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**International Conflict Related Environmental Claims -
A Critical Analysis of the UN Compensation
Commission**

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ABSTRACT

The Gulf War of 1990–91, precipitated by Iraq’s invasion and occupation of Kuwait, resulted in massive environmental damage to neighbouring countries through major oil spills, deliberate arson to over 700 Kuwaiti oil wells and the effects of military operations. In the aftermath of the Gulf War, the UN Security Council established the United Nations Compensation Commission (UNCC) to consider, process and pay claims for war reparations, including claims for environmental damage and the depletion of natural resources. The UNCC received US\$84 billion worth of environmental claims, mostly from the six regional states neighbouring Iraq. It awarded US\$5.2 billion against these claims for monitoring and assessment studies, restoration work and as compensation for the depletion of natural resources. All the awards have been paid and some of the restoration work is underway.

The environmental claims of the UNCC were unprecedented in the annals of international war reparations tribunals. A considerable volume of literature has examined the jurisprudence and juridical nature of the UNCC and the environmental claims. While this thesis builds on that literature, it explores three research questions that are novel. These questions are, (a) whether key actors influenced the rule and environmental claims outcomes of the UNCC, and if so, what means they used to achieve their goals, (b) how key actors at the UNCC used these means to influence the rule and environmental claims outcomes and (c) the extent to which the environmental rule and claims outcomes might have been different if the UNCC had adopted more transparent, inclusive and accountable processes?

The research behind the thesis is intended to throw light on the dynamics that influenced the UNCC rule and environmental claims outcomes. It is also intended to inform future design of international conflict-related environmental claims processing, by indicating how and why particular processes and dynamics could be avoided or changed. In addition, an understanding of how such dynamics brought about specific outcomes in the rules and environmental claims will help contextualise the precedential value of the UNCC’s environmental awards. In the thesis, I argue that understanding these dynamics is just as important as understanding principles of law that form the basis of these outcomes. It is important because claims and rule outcomes are as much the product of human interactions as they are of the application of legal principles. Understanding those human interactions helps improve the structure, processes and outcomes of conflict-related justice delivery systems.

Using the analytical framework developed by Braithwaite and Drahos in their book *Global Business Regulation* and the work of David Kennedy and others analysing the role of experts in decision making, the thesis examines the key actors in the UNCC and how they advanced their goals. Through this theoretical framework, I examine in detail the evolution of Iraq's participatory space, the innovations made to assist claimants in filing, developing and pursuing their claims and the role of experts in the evaluation of the environmental claims.

The thesis records that key actors, including states and UNCC management, influenced the UNCC rule and environmental claims outcomes by advocating for or against four principles. They shaped their advocacy based on changing goals and weighted conflicting principles accordingly. The principles they advocated or opposed were effective and expeditious justice for the victims of war, due process for Iraq, secrecy and transparency. They did so through mechanisms or tools which they deployed mostly through webs of dialogue and on occasion through webs of coercion. The predominant mechanism used was modelling. The thesis finds that key actors sometimes displaced political conflict on to procedural terrain, thereby embedding their policy goals in rules of procedure. I assert that the UNCC was a transitional institution somewhere in the spectrum between a tribunal administering victor's justice and an independent and impartial international judicial body adjudicating war reparations claims on a permanent basis. In my conclusions, I draw eight lessons from the UNCC experience that would inform the development of future international war reparations institutions and procedures. These lessons are about the importance of environmental monitoring and assessment studies, due process, the need for adequate claim processing time, the role of experts and precedent in the claims process, useful features of decision making forums and the need for transparency and accountability.

TABLE OF CONTENTS

Abstract.....	ii
Acknowledgements.....	ix
List of Tables	x
List of Figures.....	x
Abbreviations.....	xi
Chapter 1 Introduction and Overview.....	1
A Introduction.....	1
B Desert Apocalypse.....	3
C Research Questions, Method and Concepts	10
1 Research Questions.....	10
2 Analytical Framework	14
3 Primary Research Method.....	27
4 Data Gathering and Investigation	28
5 Concepts.....	34
D Conclusions.....	39
E Reader's Road Map	44
Chapter 2 Forums, Actors and Webs of Influence.....	47
A Introduction.....	47
B The Establishment and Structure of the UNCC	47
1 Ceasefire Negotiations	47
2 The UN Compensation Fund and UNCC	49
3 Iraqi Reactions	52
C Forums.....	55
1 The UN Security Council.....	57
2 The UNCC Governing Council	59
3 The Panel	66

D Actors	73
1 States	76
2 The Three Commissioners of the F4 Panel	80
3 UNCC Management.....	83
4 F4 Team	87
5 Panel’s Expert Consultants	89
6 Valuation and Verification Services Branch.....	92
7 Claimants	92
8 Iraq	93
E Webs of Influence.....	95
1 Dialogic Webs and Webs of Reward and Coercion.....	95
2 The UNCC Legal Epistemic Community	105
F Conclusion	108
Chapter 3 Iraq’s Participatory Space	109
A Introduction.....	109
B Due Process and Transparency: Evolution of Iraq’s Participatory Space.....	110
C A Culture of Secrecy: Limiting Iraq’s Participatory Space (Phase 1)	118
1 Controversy in the Security Council over Due Process for Iraq.....	118
2 Controversy in the Governing Council over Due Process for Iraq.....	122
3 Extremely Limited Due Process for Iraq	130
D Opening Doors: Paving the Way for Greater Iraqi Participation in the Environmental Claims (Phase 2)	133
1 Iraq Successfully Agitates for Rule Reforms.....	133
2 Funds for Iraq to Defend the Environmental Claims.....	139
3 Rule Revisions: Actors and Webs.....	141
E A Seat at the Table and a Voice in the Room: Broadening Iraqi Participation (Phase 3)	145
1 Abandonment of Redaction Procedure	147

2 Interrogatory Responses Sent to Iraq	148
3 Iraqi Experts Meet the Panel’s Expert Consultants	150
F Conclusion and Broader Claim: Political Goals Embedded in Procedural Rules	151
Chapter 4 Procedural Outcomes Favouring Claimants.....	155
A Introduction.....	155
B Early Efforts to Assist Claimants	156
C M&A Claims Procedures	161
1 Priority Processing and Payment of M&A Claims	161
2 Communication between the Panel’s Expert Consultants and Claimants	168
3 M&A Studies, Progress and Award Expenditure Tracking.....	172
D Restoration and Compensation Claim Procedures.....	177
1 Timing of Claim Review and Awards — Implications for Pending Claims	177
2 Amendment of Claims Based on M&A Results	181
3 Tracking Awards for Cleaning, Restoration and Natural Resource Depletion.....	185
E Conclusions	195
Chapter 5 Experts, Claims Outcomes and Accountability	198
A Introduction.....	198
B Expert Epistemic Communities.....	205
C Experts as Key Actors	208
1 Roles of Experts in the Claims Process	208
2 Scientific Expertise for the Panel.....	210
D Interactions with Experts	215
1 Interaction between the Panel’s Experts and Iraq’s Experts.....	215
2 Interaction between the Panel’s Experts and Claimants	216
E Experts and their Influence.....	218
1 Influence of Consultants on Interrogatories.....	224
2 Influence of Experts on Claim Evaluation.....	226

3 Influence of Experts on Claimants and Iraq	233
4 Influence of Experts on Panel Reports and Awards (Remedies)	235
5 Influence of Experts on Award Tracking.....	237
F Insulation of the Panel’s Experts from Scrutiny by Claimants or Iraq.....	240
G Conclusions.....	245
Chapter 6 Conclusions and Lessons	249
A Introduction.....	249
1 Research Questions and Method.....	249
2 Significance of the UNCC	252
B The Institutional Context.....	255
1 UNCC within an Ongoing Conflict	255
2 Demands of Credibility.....	257
3 Traditional War Reparations and Victor’s Justice	260
C Actors in Action	261
1 Powerful Actors	261
2 Weaker Actors	264
D Webs of Influence	273
E Forums as a Stage.....	274
F Four Principles in Conflict.....	275
G Modelling as a Dominant Mechanism	282
H Political Conflict on Procedural Terrain	285
I Lessons	288
1 M&A Studies, Awards and Tracking.....	289
2 Due Process.....	290
3 Adequate Processing Time	292
4 Role of Experts	293
5 Role of Precedent.....	295

6 Decision-Making Forums	297
7 Transparency and Accountability	299
J Last Words	301
Bibliography	306
Appendix.....	326

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LIST OF TABLES

- Table 1. Environmental Impacts, Sources and Agents
- Table 2. Thesis Chapters and Summary of Contents
- Table 3. Participation at Panel Meetings and Activities
- Table 4. Key Actors at the UNCC, their Mandates and Activities
- Table 5. Actor Participation in Deciding Environmental Claims and Rule Outcomes
- Table 6. The Most Influential Actors in the Production of M&A Environmental Rule and Claims Outcomes in the First Instalment of Claims
- Table 7. Phases in Iraq's Participatory Space in the Environmental Claims
- Table 8. Environmental Claim Instalment Processing Schedules
- Table 9. Advantages and Disadvantages of Award Tracking Mechanisms
- Table 10. Issues and Strategy Options for Assessment of Substantive Claims
- Table 11. Status of Principles in the Environmental Claims Process

LIST OF FIGURES

- Figure 1. Map of Gulf War Area with Troop Movements
- Figure 2. Rule and Claims Outcomes.
- Figure 3. Communication Lines between Key Actors and Forums at the UNCC
- Figure 4. UNCC Dialogic Webs
- Figure 5. Epistemic Communities in the UNCC Environmental Claims
- Figure 6. UNCC Environmental Awards as a Percentage of Amounts Claimed

ABBREVIATIONS

Abbreviation	-Full Text
ECT	-Environmental Courts and Tribunals
HTTD	-High Temperature Thermal Desorption
IEc	-Industrial Economics Inc.
IMO	-International Maritime Organization
IoJ	-Index of Jurisprudence
IUCN	-International Union for the Conservation of Nature
M&A	-Monitoring and Assessment
Mo	-Month
Mtg	-Meeting
NGO	-Non-Governmental Organisation
OPEC	-Organisation of the Oil Exporting Countries
P-5, P5	-Five permanent members of the United Nations Security Council
PAAC	-Public Authority for Assessment of Compensation for Damages Resulting from Iraqi Aggression (Kuwait)
PJR	-Professional Judgement Report
SC	-United Nations Security Council
sess	-Session
UK	-United Kingdom of Great Britain and Northern Ireland
UN	-United Nations Organisation
UNCC	-United Nations Compensation Commission
UNCITRAL	-United Nations Commission on International Trade Law
UNEP	-United Nations Environment Programme
US	-United States of America
USSR	-United Soviet Socialist Republics
VVSB	-Valuation and Verification Services Branch of the UNCC
WTO	-World Trade Organisation

CHAPTER 1

INTRODUCTION AND OVERVIEW

A Introduction

In August 1990, Iraq invaded and occupied Kuwait, initiating the Gulf War. Six months later, an international military force of 600 000 soldiers led by the US evicted Iraqi forces and liberated Kuwait. The United Nations Security Council sanctioned their actions. As part of a ceasefire agreement negotiated by the Security Council, Iraq was required to compensate all damage from the war, including damage to the environment and natural resources. For this purpose, the Security Council established the United Nations Compensation Commission (UNCC) and resourced it through compulsory contributions by Iraq from its oil sales. Thousands of compensation claims were received, processed and paid by the UNCC to individuals, corporations, states and international organisations. The operation was a colossal exercise and a landmark in the history of war reparations and the United Nations. In particular, the conflict-related environmental claims were unprecedented. In this thesis, I seek to generate and set out insights into the UNCC rules and environmental claims outcomes. Who was behind them? How and why did they come about? What did they do to produce the rules and claims outcomes? The analysis in this thesis offers a deeper understanding of this institution, its rules and environmental claims outcomes. The thesis asserts that the UNCC should be characterised as a transitional institution between an independent and impartial international tribunal and a tribunal constituted as part of victor's justice, and has the potential to pave the way for improved conflict-related reparations tribunals or a permanent war reparations tribunal.

To this end, this chapter briefly sets out the historical canvass of the 1990–91 Gulf War by reference to key dates, actors and events and in particular, Operations Desert Storm and Desert Shield and their environmental impacts. The chapter then recounts the events that led to the establishment of the UNCC and provides an overview of the environmental claims. This introduction is followed by an exposition of the goals of the research and the questions it seeks to address, the selection of the research methods and its justification, key concepts and definitions, an outline of the thesis arguments and a statement of the findings and conclusions.

The UN Secretary-General characterised the UNCC as a fact-finding political organ that was entrusted with resolving war reparations claims.¹ He was at pains to explain that the UNCC was not a court or arbitral tribunal before which the parties appear.² Nevertheless, he also recognised that resolving disputed claims was a quasi-judicial function and that the UNCC ought to build due process into the procedure.³

A survey of the literature on the UNCC shows that some jurists treat the UNCC as if it were a judicial or arbitral body attributing precedential value to its decisions.⁴ Others attribute to it varying levels of independence and impartiality even though it operated under a cloak of secrecy. Historically, war reparations have been a measure of victor's justice. Some argue that the UNCC was a significant exception, while others criticise its lack of due process for Iraq.⁵

Much of this debate is based on material that the UNCC has chosen to expose to the world through its website. How the UNCC functioned – in particular, how and why its claims outcomes came about and how and why it framed the rules that governed the claims process would therefore be a significant contribution to our understanding of this institution, especially if it includes facts that are currently inaccessible to the general public. I was employed at the UNCC as a Legal Officer in the environmental claims unit from 2002 to 2005 and as an insider can speak to or draw from some of these inaccessible facts. While I cannot provide a holistic view of the UNCC, I can provide explanations of how and why the environmental claims and rule outcomes came about. It provides one peephole into the UNCC which otherwise remains a black box.

Using socio-legal methods, the thesis (a) delves into the interactions of key actors, (b) analyses the principles they advocated or opposed to further their goals and (c) examines the

¹ United Nations Security Council, *Report of the Secretary-General regarding creation of a United Nations Compensation Fund and United Nations Compensation Commission as envisaged in Security Council Resolution 687 (1991)*, UN Doc S/22559, (2 May 1991) [20].

² *Ibid.*

³ *Ibid.*

⁴ For example Frederick L Kirgis Jr, 'Claims Settlement and the United Nations Legal Structure' in Richard B Lillich (ed), *The United Nations Compensation Commission [Thirteenth Sokol Colloquium]* (Transnational Publishers, 1995) 103; David J Bederman, 'Historic Analogues of the UN Compensation Commission' at 257–309. The results of the literature survey are found in the bibliography.

⁵ See above n 4. For historic analysis of war reparations tribunals and institutions see Alexander Gillespie, *A History of the Laws of War* (Hart Publishing, 2011) vol 2, 211-277; C P R Romano, 'Woe to the Vanquished? A Comparison of the Reparations Process after World War I (1914-18) and the Gulf War (1990-91)' (1997) 2(3) *Austrian Review of International and European Law* 361.

mechanisms or tools they employed to ensure these principles were adopted. The thesis provides a hitherto largely unavailable factual context to the environmental claims (claims outcomes) and procedural rules (rule outcomes) of the UNCC. The thesis questions whether it was entirely necessary for the UNCC to operate under a blanket of secrecy. The basic standard of good environmental decision-making since the Rio Declaration (1992) set an expectation that such decision-making will be transparent, participatory and accountable.⁶ The thesis argues that a transparent and participatory claims-processing regime would have ensured more accurate and equitable outcomes, although the process might have taken longer to complete. The thesis concludes that the rule and environmental claims outcomes were the product of actors advocating or opposing principles using mechanisms deployed through webs of influence to achieve their goals.

B Desert Apocalypse

Iraq invaded Kuwait on 2 August 1990 and purported to annex it as its ninth province.⁷ Within hours, the Security Council met and adopted a resolution condemning the invasion and demanding that Iraq withdraw its forces from Kuwait immediately.⁸ The invasion was clearly contrary to international law. The global outcry was also strong. Several regional organisations, including those of the Gulf region, condemned the invasion.⁹ Iraq refused to withdraw its troops from Kuwait, claiming that Kuwait was historically a part of Iraqi

⁶ United Nations Environment Programme, *Rio Declaration on Environment and Development* <<http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163>>. Principle 10 of this Declaration, signed by 178 governments, states that environmental issues are best handled with (a) the participation of all stakeholders at the relevant level, (b) access to information and (c) access to redress and remedies.

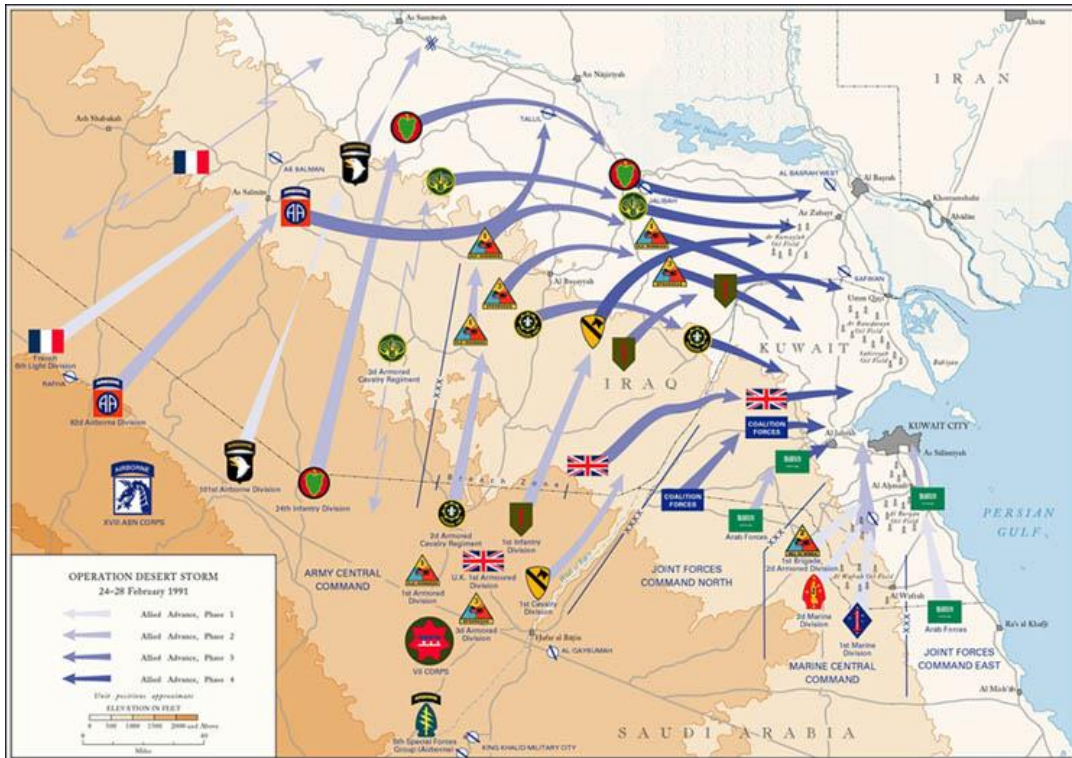
⁷ United Nations Department of Public Information, *The United Nations and the Iraq-Kuwait Conflict, 1990–1996* (United Nations Department of Public Information, 1996) 14.

⁸ SC Res 660, UN SCOR, 2932nd mtg, UN Doc S/RES/660 (2 August 1990).

⁹ United Nations Department of Public Information, above n 7, 15. These included the Gulf Cooperation Council, which characterised the invasion as the ‘brutal Iraqi aggression against the fraternal State of Kuwait’, the League of Arab States, the Organisation of the Islamic Conference and the European Community.

territory.¹⁰ The Emir of Kuwait, together with other high government officials, escaped to neighbouring Saudi Arabia and established a government in exile.¹¹

Figure 1. Map of Gulf War Area with Troop Movements



Map from the US Army Center of Military History, *Operation Desert Storm*, <http://www.history.army.mil/reference/DS.jpg>

Iraq's army had grown because of its brutal eight-year war (1980–88) with Iran. Iraq had incurred considerable debts to fund that war.¹² Saudi Arabia feared that Saddam Hussein,

¹⁰ United Nations Department of Public Information, above n 7, 16. The origins of the territorial dispute between Iraq and Kuwait go back to 1535 and the Ottoman Empire. The subsequent politics of this dispute involved the UK. The UK administered Iraq as a mandate territory from 25 October 1920 to 3 October 1932, when it became independent. Kuwait was a sheikhdom that received UK protection from 1899 under various treaties and arrangements. Iraq agreed to the Iraq-Kuwait border demarcation of 1923 when it became independent. In the throes of Kuwait's admission to the UN in 1961, Iraq re-asserted territorial rights to Kuwait and the intervention of the Arab League in 1963 eventually averted military conflict. After a military coup in Iraq, and an exchange of letters, both countries agreed to the boundaries and established diplomatic relations. Except for a brief temporary occupation of the Samtah area of Kuwait by Iraqi forces in March 1973, the integrity of the Iraq-Kuwait border was maintained and calm prevailed till 1990. In UN debates on this issue, the UK, the US and France stood with Kuwait while the USSR sided with Iraq: at 8–13.

¹¹ Ibid 16.

¹² Ibid 14. On 22 September 1980, Iraq invaded Iran, starting one of the most brutal and deadly wars of the twentieth century. Although Saddam Hussein's intention was to take advantage of the young Islamic government in Iran, the war had a unifying effect and Iran successfully defended its territory through eight years of fighting, during which Iraqi forces committed many unimaginable atrocities. The UN Security Council and the General Assembly faulted Iraq for starting the war and demanded the withdrawal of troops and a ceasefire. Hostilities ended on 20 August 1988 and the UN passed a resolution asking Iraq to pay compensation to Iran.

then President of Iraq, had further expansionist intentions and would invade its territory to gain control of key oil fields situated near the Saudi-Iraqi border. As a preventive measure, Saudi Arabia requested military assistance from the US, its long-standing strategic ally.¹³ On 7 August 1990, the US began sending troops to Saudi Arabia, deploying them along the Saudi-Iraqi and Saudi-Kuwaiti borders, in what it called Operation Desert Shield.¹⁴ Over the following six months, troops from over 30 nations joined Operation Desert Shield, swelling troop numbers to approximately 600 000.¹⁵ For months these troops remained deployed and in readiness for combat, occupying hundreds of square kilometres of the Saudi Arabian desert.¹⁶

After intense but unsuccessful diplomatic efforts, the Security Council set 15 January 1991 as the deadline for the withdrawal of Iraqi troops from Kuwait.¹⁷ Failing compliance with that deadline, the Security Council warned Iraq that any of its member States cooperating with Kuwait would have authority to ‘use all necessary means’ (understood to include military force) to liberate Kuwait, implement and uphold Security Council resolutions and restore international peace and security in the area.¹⁸

Final diplomatic efforts to persuade Iraq to withdraw from Kuwait failed and on 16 January 1991 under the authority of Security Council resolutions, the US-led Allied Coalition forces launched Operation Desert Storm to liberate Kuwait from Iraqi occupation.¹⁹ Following intense bombardment of key military installations and infrastructure in Iraq, including military command and communications centres, on 24 February 1991 Allied Coalition forces crossed the Kuwaiti border from Saudi Arabia.²⁰ Within three days, Iraqi troops had been

The Secretary-General of the UN was mandated to assess the compensation, but that never came to pass. See also SC Res 598, UN SCOR, 2750th mtg, UN Doc S/RES/698 (20 July 1987) paras 6–7; United Nations Security Council, *Further Report of the Secretary-General on the Implementation of United Nations Security Council, Resolution 598 (1987)*, UN Doc S/23273 (9 December 1991) [7].

¹³ United Nations Department of Public Information, above n 7, 16.

¹⁴ *Ibid.*

¹⁵ *Ibid.* 16, 24.

¹⁶ United Nations Compensation Commission, *Report and Recommendations made by the Panel of Commissioners concerning Part One of the Fourth Instalment of “F4” Claims*, UN Doc S/AC.26/2004/16 (9 December 2004) [266].

¹⁷ SC Res 678, UN SCOR, 2963rd mtg, UN Doc S/RES/678 (29 November 1990).

¹⁸ *Ibid.* See also United Nations Department of Public Information, above n 7, 22.

¹⁹ United Nations Department of Public Information, above n 7, 25–8.

²⁰ *Ibid.*

defeated and Kuwait was liberated. Allied Coalition forces pursued Iraqi troops into Iraqi territory, and hostilities ended at midnight on 27 February 1991.²¹

As Iraqi troops withdrew from Kuwait, pursued by the Allied Coalition forces, they set fire to hundreds of Kuwaiti oil wells and discharged millions of barrels of oil into the Persian Gulf.²² The oil well fires burned uncontrollably for months.²³ The smoke plumes from these fires extended several hundred kilometres in width, blocking out the sun and covering large areas with soot.²⁴ The damaged and burning oil well heads spilled thousands of barrels of oil, creating large oil lakes.²⁵ The oil discharged into the Persian Gulf affected the beaches, coastal reefs and marine life of Saudi Arabia, Kuwait and Iran.²⁶ In addition, the military operations of the US-led Allied Coalition and Iraqi forces affected the fragile desert ecosystems of Kuwait, Saudi Arabia and Iraq, and left long-lasting damage on the surface of the desert.²⁷ Large numbers of refugees fled across the Jordanian, Iranian and Turkish borders and settled in border areas.²⁸ They felled forests and polluted watercourses as they struggled to survive the war.²⁹ The overall environmental damage resulting from the Gulf War was devastating and its scale unprecedented in the annals of international armed conflict.³⁰ The main environmental damage caused during the Gulf crisis is set out in table 1.

²¹ Ibid.

²² United Nations Security Council, *Report to the Secretary-General by a United Nations Mission Assessing the Scope and Nature of Damage Inflicted on Kuwait's Infrastructure During the Iraq Occupation of the Country*, UN Doc S/22535 (29 April 1991) [136]–[211].

²³ United Nations Environment Programme, *Desk Study on the Environment in Iraq* (United Nations Environment Programme, 2003) 65–8.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid. See also United Nations Security Council, *Report to the Secretary-General by a United Nations Mission Assessing the Scope and Nature of Damage Inflicted on Kuwait's Infrastructure During the Iraq Occupation of the Country*, above n 22, [222]–[223].

²⁷ United Nations Security Council, *Report to the Secretary-General by a United Nations Mission Assessing the Scope and Nature of Damage Inflicted on Kuwait's Infrastructure During the Iraq Occupation of the Country*, above n 22, [155]–[166].

²⁸ United Nations Department of Public Information, above n 7, 18–19. See also United Nations Compensation Commission, *Report and Recommendations made by the Panel of Commissioners concerning Part One of the Fourth Instalment of "F4" Claims*, above n 16, [45].

²⁹ United Nations Compensation Commission, *Report and Recommendations made by the Panel of Commissioners concerning Part One of the Fourth Instalment of "F4" Claims*, above n 16, [45]–[48] [67]–[71] [104] [351]–[355].

³⁰ Peter H Sand, 'Compensation for Environmental Damage from the 1991 Gulf War' (2005) 35(6) *Environmental Policy and Law* 244; Cymie R Payne, 'Environmental Claims in Context: Overview of the Institution' in Cymie R Payne and Peter H Sand (eds), *Gulf War Reparations and the UN Compensation Commission* (Oxford University Press, 2011) 4–7.

Table 1. Environmental Impacts, Sources and Agents

Source	Environmental Impacts	Environmental Costs	Agent
Kuwaiti oil well fires	Air pollution Soot Tar Oil lakes Water pollution	Health care costs Clean-up costs Restoration costs Interim losses Loss of livestock Loss of crops	Iraqi forces
Oil discharge to Gulf	Beach pollution Damage to marine ecosystem and fisheries Aesthetics	Clean-up costs Restoration costs Interim losses Losses from fisheries Losses from tourism	Iraqi forces
Military operations	Damage to desert ecosystem Loss of pasture lands Land pollution from ordnance and Depleted Uranium Aesthetics	Clean-up costs Restoration costs Interim losses Loss of livestock Loss of pasture Loss of crops	Iraqi forces and Allied Coalition forces
Refugee settlements	Land degradation Loss of forests Water pollution	Clean-up costs Restoration costs Interim losses	Refugees

Following the Gulf War in 1991, the Security Council, by Resolutions 687³¹ and 692,³² established the UNCC to comprehensively deal with war reparations, including compensation for environmental damage. As recommended by the UN Secretary-General, the UNCC was composed of three bodies, namely, the governing council, the panels of commissioners and

³¹ SC Res 687, UN SCOR, 2981st mtg, UN Doc S/RES/687 (3 April 1991).

³² SC Res 692, UN SCOR, 2987th mtg, UN Doc S/RES/692 (20 May 1991).

the secretariat.³³ The membership of the governing council mirrored that of the Security Council, with one significant difference: permanent members of the Security Council did not have a veto power in the UNCC governing council.³⁴ The governing council was responsible for establishing criteria for the compensability of the claims, guidelines for administration of the secretariat and managing the compensation fund. It was also responsible for establishing the procedure for processing the claims (together with rules made by the secretariat and the commissioners, collectively called rule outcomes in this thesis) and granting final approval for awards recommended by the panels of commissioners (referred to as claims outcomes in this thesis).³⁵ Compensation awards made by the UNCC were paid through a UN compensation fund fed by a percentage of the proceeds from Iraqi oil sales under a UN sanctions regime.³⁶

Claims filed before the UNCC covered numerous heads of loss, ranging from personal injury, business losses and refugee claims to environmental damage claims.³⁷ Nearly 100 countries filed claims.³⁸ For example, Bangladesh, Egypt, India, Sri Lanka, and Jordan filed thousands of claims on behalf of their citizens who had been employed in Kuwait, Iraq and other neighbouring Gulf states, and who were forced to flee the Gulf War, thereby suffering economic loss.³⁹ Kuwait, the US, and European countries filed hundreds of claims on behalf of businesses for losses ranging from the frustration or delay of construction or other contracts and losses from the non-payment for goods or services to losses relating to the destruction or seizure of business assets, loss of profits, and oil sector losses.⁴⁰

Several panels of commissioners drawn from around the world heard and evaluated the claims.⁴¹ Commissioners were appointed by the UNCC governing council on the

³³ United Nations Security Council, *Report of the Secretary-General regarding creation of a United Nations Compensation Fund and United Nations Compensation Commission as envisaged in Security Council Resolution 687 (1991)*, above n 1, [5]–[6].

³⁴ *Ibid* [10].

³⁵ United Nations Security Council, *Report of the Secretary-General regarding creation of a United Nations Compensation Fund and United Nations Compensation Commission as envisaged in Security Council Resolution 687 (1991)*, above n 1.

³⁶ *Ibid*.

³⁷ SC Res 687, above n 31.

³⁸ United Nations Compensation Commission, *Claimant Countries* <<http://www.uncc.ch/claims/governm.htm>>.

³⁹ United Nations Compensation Commission, *Category “A” Claims* <http://www.uncc.ch/claims/a_claims.htm>.

⁴⁰ United Nations Compensation Commission, *Category “E” Claims* <http://www.uncc.ch/claims/e_claims.htm>.

⁴¹ United Nations Security Council, *Report of the Secretary-General regarding creation of a United Nations Compensation Fund and United Nations Compensation Commission as envisaged in Security Council*

recommendation of the secretariat.⁴² The UNCC selected them from lists of experts nominated by UN member states. The secretariat's recommendations were based on the qualifications, experience and previous record of accomplishments of those experts.

Resolution 687 specifically referred to environmental damage and the depletion of natural resources resulting from Iraq's invasion and occupation of Kuwait.⁴³ Resolution 687 reaffirmed, *inter alia*, that 'Iraq ... is liable under international law for any direct loss, damage, including environmental damage, and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait'.⁴⁴

To process the environmental claims, the UNCC established a separate three-member panel of commissioners (the panel) chaired by Thomas A Mensah.⁴⁵ The other two members were José R Allen and Professor Peter H Sand.⁴⁶ The UNCC also recruited a team of lawyers to constitute the legal team (F4 team) that exclusively handled the environmental claims.⁴⁷ Several of the lawyers recruited to the F4 team had environmental law or public health qualifications or experience.

The UNCC categorised the environmental claims (called the F4 claims) into five instalments, in harmony with the categorisation adopted by the UNCC governing council.⁴⁸ The instalments began with environmental monitoring and assessment claims.⁴⁹ The other

Resolution 687 (1991), above n 1, [5]. See also United Nations Compensation Commission, *The Commissioners* <<http://www.uncc.ch/commiss.htm>>.

⁴² Ibid.

⁴³ SC Res 687, above n 31.

⁴⁴ Ibid.

⁴⁵ United Nations Compensation Commission, *Report and Recommendations made by the Panel of Commissioners concerning the First Instalment of "F4" Claims*, UN Doc S/AC.26/2001/16 (22 June 2001) [1]. Thomas A Mensah was the first President of the International Tribunal for the Law of the Sea. See International Tribunal for the Law of the Sea, 'Election of the President and Vice President of the International Tribunal for the Law of the Sea' (Press Release, ITLOS/Press 1, 5 October 1996) <http://www.itlos.org/fileadmin/itlos/documents/press_releases_english/press_release_en_1.pdf>.

⁴⁶ José Allen is a litigating Attorney in the United States. See Skadden, Arps, Slate, Meagher, & Flom LLP & Associates, *Biography* <<http://www.skadden.com/index.cfm?contentID=45&bioID=975>>. Peter Sand is a leading academic in environmental law. See Ludwig Maximilians University, Munich, *Curriculum Vitae* <http://www.jura.uni-muenchen.de/personen/sand_peter_h/lebenslauf/index.html>.

⁴⁷ Peter H Sand, 'Compensation for Environmental Damage from the 1991 Gulf War' (2005) 35(6) *Environmental Policy and Law* 244 n5.

⁴⁸ United Nations Compensation Commission, *Governing Council, Decision 7*, 3rd sess, 18th mtg, as revised at 5th sess, 24th mtg, UN Doc S/AC.26/1991/7/Rev.1 (17 March 1992) para 35.

⁴⁹ United Nations Compensation Commission, *Report and Recommendations made by the Panel of Commissioners concerning the First Instalment of "F4" Claims*, UN Doc S/AC.26/2001/16 (22 June 2001) [1].

instalments included incurred expenditure claims, restoration claims, claims for damage and claims for depletion of natural resources.⁵⁰ The Provisional Rules for Claims Procedure (the Rules) established by the UNCC for the processing of all claims applied to the environmental claims as well.⁵¹ However, given the special nature of the environmental claims, the UNCC also established special rules for these claims.⁵² The panel processed all the environmental claims by June 2005.⁵³ The UNCC had paid out all of the environmental awards as at April 2012⁵⁴ and some major restoration work had begun.⁵⁵ Restoration work includes restoring the damaged desert by removing military structures, unexploded ordnance, oil and other contaminants and restoring the landscape and top soil and cleaning the beaches by removing oil, and establishing compensatory projects such as protected areas.⁵⁶

C Research Questions, Method and Concepts

With this brief account of the Gulf War and the establishment of the UNCC, I turn to the research questions posed, methods used and concepts employed in this thesis.

1 Research Questions

The environmental claims of the UNCC are the only example of a UN-supported effort to comprehensively deal with the restoration of and compensation for environmental damage arising from international armed conflict and therefore unprecedented. One approach to understanding the environmental claims and rule outcomes is to analyse the legal principles that the UNCC applied and to inquire if they are novel or rooted in established principles of international law. The available literature on the UNCC provides several good examples of analysis of the legal principles that were applied to the environmental claims.⁵⁷ However, my interest is not in the legal principles themselves but rather in the role played by key actors in producing the rule and claims outcomes and of this, I could find little analysis in the

⁵⁰ United Nations Compensation Commission, *Governing Council, Decision 7*, above n 48.

⁵¹ United Nations Compensation Commission, *Governing Council, Decision 10*, 6th sess, 27th mtg, UN Doc S/AC.26/1992/10 (26 June 1992). See also Sand, above n 47.

⁵² Sand, above n 47.

⁵³ *Ibid.*

⁵⁴ United Nations Compensation Commission, *Status of Processing and Payment of Claims* (26 April 2012) <<http://www.uncc.ch/status.htm>>.

⁵⁵ As at January 2010 work had begun in some countries. For example see Badia restoration project in Jordan, Jordan Environment Watch, 'Badia Restoration Projects to be launched in April' on *Qwaider Planet* (18 February 2009) <<http://www.arabenvironment.net/archive/2009/2/807436.html>>. Of the US\$5 261 746 450 awarded for environmental claims US\$4 836 737 454 had been paid out as at 29 July 2010, United Nations Compensation Commission, *Status of Processing and Payment of Claims* <<http://www.uncc.ch/status.htm>>.

⁵⁶ United Nations Compensation Commission, *Report and Recommendations made by the Panel of Commissioners concerning the Fifth Instalment of "F4" Claims*, UN Doc S/AC.26/2005/10 (30 June 2005).

⁵⁷ José R Allen, 'Points of Law' in Cymie R Payne and Peter H Sand (eds), *Gulf War Reparations and the UN Compensation Commission* (Oxford University Press, 2011) 141–69.

literature.⁵⁸ In this context I only make comparative assessments of UNCC and other institutional practices when they illuminate my arguments in the context of the chosen research framework. For the interested reader, where appropriate, I provide information on comparative studies through footnotes.

Through the research questions raised below, this thesis seeks to provide an explanation about how and why the outcomes of the environmental claims of the UNCC and the procedural rules governing them came about. Having provided this explanation, the thesis raises the issue of the transparency, inclusiveness and accountability of key actors and processes and asks whether, given current expectations and standards in this area, the UNCC claims process was an acceptable one.⁵⁹

Transparency refers to the accessibility of information relating to activities of an individual or organisation. In the context of the UNCC transparency refers, in some contexts, to the accessibility of information to parties to claims, including Iraq, but in others to the accessibility of information to the public. The terms ‘inclusiveness’ and ‘participatory space’ are used interchangeably to refer to the participatory opportunities and formal access to decision-making forums that a claimant or Iraq had under the procedural rules of the UNCC. For the purpose of this thesis the phrase ‘participatory space for Iraq’ includes aspects of transparency relating to the UNCC adjudicatory process. Accountability refers to the relationship between the decision-maker, office holder or institution and those who supervise or are subject to that individual’s or institution’s decisions or actions. A decision-maker, office-holder or institution that has an accountability relationship to another is obliged to inform and justify such actions and decisions to that other and to suffer punishment or sanctions where those actions and decisions are erroneous or result from misconduct. A decision-maker or institution might be accountable for the same action or decision to multiple individuals or institutions for the same or different aspects of that action or decision.

The thesis will primarily examine three questions. First, did key actors influence the rule and environmental claims outcomes and if so what means did these actors use to achieve their goals? Second, how did these key actors use these means to influence the rule and

⁵⁸ The literature referred to here is in the bibliography.

⁵⁹ In chapters 3 and 5 I refer to the specific standards and criteria against which the UNCC’s transparency, inclusiveness and accountability are assessed. They are derived from international declarations by states as well as practices derived from a growing body of international administrative law.

environmental claims outcomes? Third, to what extent might these outcomes have been different had the UNCC adopted more transparent, inclusive and accountable processes? These questions help us to gain a better understanding of how and why the environmental claims and rule outcomes came about. That understanding will improve the way we respond in the future to environmental damage caused by international armed conflict. To address these questions, I have selected an analytical research method developed and applied by Braithwaite and Drahos in their study of the globalisation of business regulation.⁶⁰ Their method examined the role played by key actors, principles and mechanisms in the processes of globalising business regulations.⁶¹ In this context, an underlying and implied fourth research question is to what extent this method is applicable, and if so, of assistance in understanding the processes that led to the rule and environmental claims outcomes in a somewhat different setting to the one in which Braithwaite and Drahos developed and applied it.⁶² To facilitate this evaluation, I examined a range of other research methods and frameworks which I canvass below, indicating which ones I adopted or discarded and why.

To gain an understanding of the dynamics behind the rule and environmental claims outcomes of the UNCC, several related questions are also posed. What goals did key actors seek to achieve through their influence? Identifiable principles stand behind the complex rules and environmental claims outcomes of the UNCC. What principles did key actors advance or oppose as they exerted their influence to produce the rule and environmental claims outcomes? Together, these questions provide insights into the different tools used and principles advocated or opposed by key actors. They elicit the information necessary for characterising and analysing the conflict of actors and principles that played out during the development and adoption of rules and processing of the environmental claims.

Through this information and analysis, explanations are offered of how and why the rules and environmental claims outcomes of the UNCC came about. For example, the thesis shows that the rule and environmental claims outcomes were not influenced by one dominant actor using a single tool but rather were the result of a number of actors (strong and weak) advocating or

⁶⁰ John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge University Press, 2001).

⁶¹ *Ibid.*

⁶² This issue is discussed in detail later in this chapter.

opposing a few important principles through what Braithwaite and Drahos have characterised as ‘webs of influence’.⁶³

By way of illustration, the UNCC governing council decided that Iraq was liable to compensate affected claimant countries for the costs of undertaking environmental monitoring and assessment of alleged damage. The US, the UK, France and Russia supported this outcome, which helped countries like Saudi Arabia, Turkey, Jordan and Kuwait, who were their allies, to receive funds to undertake monitoring and assessment studies in order to gather evidence in support of their substantive environmental claims. The focus of this thesis is on the interplay of these actors (webs of influence), tools and principles (in this case the principle of effective and expeditious justice for war victims) that led to this particular rule and claims outcomes. Some would argue that a claimant’s right to seek compensation for the conduct of monitoring and assessment studies hinges on the legality and validity of the claimant’s substantive claims for compensation for environmental damage. The panel decided otherwise, and gave its reasons for that decision.⁶⁴ However, it is beyond the scope of the thesis to examine the legal correctness, validity or propriety of the panel’s decision to provide funds to claimants for the conduct of the monitoring and assessment studies.

The research behind the thesis is intended to throw light on the dynamics that influenced the UNCC rule and environmental claims outcomes. It is also intended to inform future design of international conflict-related environmental claims processing, by indicating how and why particular processes and dynamics could be avoided or changed. In addition, an understanding of how such dynamics brought about specific outcomes in the rules and environmental claims will help contextualise the precedential value of the UNCC’s environmental awards. Precedential value refers to the degree to which principles applied in the award might guide other international, regional and domestic tribunals, commissions and courts in determining similar environmental claims in the future. In the thesis, I argue that understanding these dynamics is just as important as understanding principles of law that form the basis of these outcomes. This understanding is important because claims and rule outcomes are as much the product of human interactions as they are of the application of

⁶³ Braithwaite and Drahos, above n 60, 550–563.

⁶⁴ United Nations Compensation Commission, *Report and Recommendations made by the Panel of Commissioners concerning the First Instalment of ‘F4’ Claims*, above n 49.

legal principles and thus helps to improve the structure, processes and outcomes of conflict-related justice delivery systems.

2 Analytical Framework

(a) The Chosen Analytical Framework

The questions posed in the thesis and the search for responses require an appropriate analytical framework and research method. First, the chosen analytical framework should lead to an identification of the key actors, their goals, the tools employed and the principles advanced or defeated by them in producing the rule and environmental claims outcomes. Second, the chosen framework should support an analysis of the various interactions and relationships between the key players, the tools and principles and their impact on the rule and claims outcomes.

The analytical framework used by Braithwaite and Drahos in their study of global business regulation provides a well-grounded and tested method in the search for responses to the questions posed in this thesis.⁶⁵ Braithwaite and Drahos applied this method in the context of events that unfolded over a long time span (several centuries, in some instances) and involved multiple arenas or forums and business regulations spanning everything from environment to intellectual property. In contrast, the UNCC can be viewed as one arena or a collection of three smaller forums with an entire lifetime barely spanning one and a half decades. The UNCC performed some quasi-judicial functions and operated in a politically dynamic post-conflict setting. Braithwaite and Drahos applied their method across multiple areas of business regulation while this thesis attempts to apply it to a single area – that of Gulf War environmental reparations. As such, this thesis applies Braithwaite and Drahos’s method to a rather different and novel set of circumstances. Since the UNCC is unique in the way described above, one limitation of this thesis is that it does not have the advantage that Braithwaite and Drahos had to test their hypothesis – that of developing and using several comparative case studies in different areas of business regulation. Notwithstanding the different context in which Braithwaite and Drahos developed their research method, their approach provides a rigorous analytical tool for understanding the dynamics of the UNCC’s processes.

⁶⁵ Braithwaite and Drahos, above n 60.

Braithwaite and Drahos constructed a micro-macro approach that used three foundational concepts – actors, mechanisms and principles.⁶⁶ They defined actors as individuals, groups of individuals, mass publics, organisations or groups of organisations, states or groups of states. Sometimes a collection of actors (such as a network or epistemic community) can take the form of an actor as well when they act in consort and with a common purpose.⁶⁷ Mechanisms are ‘tools that actors use to achieve their goals’.⁶⁸ Coercion, rewards, modelling, reciprocal adjustment, non-reciprocal coordination and capacity building are examples of such mechanisms.⁶⁹ For example, modelling is ‘achieved by observational learning with a symbolic content; learning based on conceptions of action portrayed in words and images’.⁷⁰ Non-reciprocal coordination takes place when one actor wins on an issue while losing on another one and another actor loses on the first issue but wins on the second issue.⁷¹

Braithwaite and Drahos characterise principles as abstract prescriptions that guide conduct,⁷² and which influence the creation and application of rules and the determination of outcomes. Principles are less specific than rules, and can conflict with each other.⁷³ Rules are specific and are less likely to conflict with each other.⁷⁴ Braithwaite and Drahos postulated that the globalisation of business regulation ‘was a process in which different types of actors use various mechanisms to push for or against principles’.⁷⁵ When principles conflict, they are ‘settled by decision-makers assigning “weights” to the relevant principles in order to reach a decision’.⁷⁶

In the context of the UNCC, principles can be characterised as abstract prescriptions that guided rule and environmental claims outcomes. For example, the principle of due process for Iraq and the principle of transparency were actively advocated or opposed by key actors

⁶⁶ Ibid 9.

⁶⁷ Ibid 24.

⁶⁸ Ibid 9.

⁶⁹ Ibid 25–6. These terms are further explained below.

⁷⁰ Ibid 25.

⁷¹ Ibid.

⁷² Ibid 9.

⁷³ Ibid 18.

⁷⁴ Ibid.

⁷⁵ Ibid 9.

⁷⁶ Ibid 18.

in the UNCC. Key actors⁷⁷ advanced or defeated principles as they went about the business of producing rules and deciding environmental claims. When conflicts of actors or principles occurred, the thesis finds that actors used various mechanisms to push for or against principles, seeking to influence the rule and claims outcomes. The thesis traces the paths of influence through which the various claims were decided in particular ways. To do so, it examines decisions, behaviours and processes at the UNCC and identifies principles, mechanisms and actors in play.

Key actors were found to have exerted influence through mechanisms such as modelling, coercion and reward. The thesis also concentrates on lower-order mechanisms rather than higher-order mechanisms, following the approach of Braithwaite and Drahos. As such, the principles that emerge can be expected to be proximate to the actors. This necessitates care in attempts to aggregate principles and mechanisms. Mechanisms operated at two broad levels within the UNCC. At the level of state actors within the UNCC's governing council (the highest decision-making body) and with Iraq and claimant states, mechanisms took the forms that Braithwaite and Drahos unveil in their study of global business regulation – military and economic sanctions, rewards, modelling, non-reciprocal coordination and capacity building. At the level of UNCC management,⁷⁸ the F4 team and the panel, mechanisms also incorporated more personalised manifestations. For example, coercion manifested itself as shaming, threats of loss of potential future employment or contracts and the perceived or manifest displeasure of superiors or supervisors. I explore this further in chapters 2 and 3.

In their study on the globalisation of business regulation, Braithwaite and Drahos concluded 'no one actor appears to be master of the world' and 'there is no master mechanism of globalization'.⁷⁹ What they did find were 'webs of influence' that they categorised as 'webs of coercion, and dialogic webs.' They argued that coercion takes the form of military force as well as economic sanctions. It also includes the threat of both. It is available to the strong against the weak. It allows the strong to exercise hegemony or domination without even hinting at coercion. Dialogue, on the other hand, is available to both the strong and the weak

⁷⁷ Key actors include powerful member states of the governing council of the UNCC, the claimant states, Iraq, the panel of commissioners dealing with the environmental claims, officials of UNCC management, the panel's expert consultants and UNCC legal officers and other employees such as paralegals, accountants and valuers.

⁷⁸ I explain the use of the term 'UNCC management' in chapter 2. The term refers to officials at the top of the UNCC including the executive secretary, the deputy executive secretary, the Secretary to the UNCC governing council and the head of the environmental claims unit in the legal services branch.

⁷⁹ Braithwaite and Drahos, above n 60, 7.

and is more widely used and more effective than coercion. Generally, actors prefer to use webs of dialogue because coercion tends to be disruptive to relationships in regulatory diplomacy.⁸⁰ Dialogic webs, they claim, have the potential to bring about macro change through individual micro action.⁸¹

Dialogic webs are more fundamentally webs of persuasion than webs of control.⁸² Dialogic webs include a variety of dialogues that take place across and within epistemic communities, ranging from international and regional bodies to professional associations and non-governmental organisations. Braithwaite and Drahos describe epistemic communities as ‘loose collections of knowledge-based experts who share certain attitudes and values and substantive knowledge, as well as ways of thinking about how to use that knowledge’.⁸³ ‘In dialogic webs actors convene with each other officially and unofficially, formally and informally’.⁸⁴ Such dialogues help actors to define their interests and to negotiate through mechanisms such as reciprocal adjustment and non-reciprocal coordination.⁸⁵ In this thesis, I also demonstrate that such dialogic webs give actors the opportunity to persuade other actors to buy into or oppose models. Mechanisms therefore, form part of dialogic webs and they include not only the lower-order mechanisms but also ‘[h]igher-order mechanisms ... with lower-order mechanisms, all connecting to form an intricate reality of persuasion and engagement’.⁸⁶

This analytical framework commends itself primarily because it allows an identification of actors, mechanisms and the principles at play. It is also a good fit because it is a micro-macro method (as opposed to a macro-macro method). Micro-macro theory attempts to comprehend ‘micro processes that constitute structural change, just as those micro processes are constituted and constrained by the structural’.⁸⁷ Macro-macro theory, on the other hand, seeks to explain macro level structural change by studying the behaviour of macro level actors (eg

⁸⁰ Ibid 32.

⁸¹ Ibid 7.

⁸² Ibid 553. Dialogic webs include dialogue in professional associations, self-regulatory dialogue in industry associations, auditors from one subsidiary of a transnational corporation auditing the compliance with regulatory standards of auditors from another subsidiary, naming and shaming of irresponsible corporate practices by non-governmental organisations, discussions in intergovernmental organisations at the regional and international levels, plus any number of idiosyncratic strands of deliberation that occur within and across epistemic communities.

⁸³ Braithwaite and Drahos, above n 60, 501.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Ibid 14.

states) who are, more often than not, aggregates of many micro units.⁸⁸ The problem with macro-macro theory is that it ‘turns out to be wrong when its implicit micro foundations are false in a specific context’.⁸⁹

For example, in chapter 3, I trace the evolution of Iraq’s participatory space in the environmental claims. In 1991, key state actors such as the US and the UK advocated the principle of effective and expeditious justice for the victims of war and opposed the principle of due process for Iraq. As a result, the Rules of 1991 severely limited Iraq’s participatory space in the claims process. Revisions to the Rules expanded that space with regard to the environmental claims in 2000, against the backdrop of weakening US-UK-France relations in the Security Council after France opposed the US and the UK in their effort to obtain UN authorisation for Operation Desert Fox.⁹⁰ After the 2003 US-led invasion of Iraq, these same key actors became occupying powers and trustees of Iraq and switched sides, adopting positive positions on the principle of due process for Iraq. Significant expansion of Iraq’s participatory space took place after the success of the US-led invasion of Iraq largely due to weaker actors such as the panel and the F4 team who developed new procedural rules aided by the changed goals of the US and the UK.

In chapter 5, I discuss the high degree of influence exerted by the panel’s expert consultants on the environmental claims outcomes. Because the 1991 Rules did not provide Iraq adequate participatory space in UNCC claims generally, Iraq was not able to challenge expert testimony presented by claimants nor was it able to present its own expert testimony in non-environmental claims categories. The UNCC also adopted mass claims-processing techniques to process individual and corporate claims. These techniques looked to experts to provide methods and analysis for determining claims outcomes. In the result, the UNCC was pushed to depend on technical experts of its own to help determine claims outcomes. Rules favouring the principle of secrecy⁹¹ inappropriately insulated UNCC experts from scrutiny by Iraq and

⁸⁸ In contrast micro-micro theory (eg in psychological theory) attempts to understand the individual in macro contexts that are experimentally held constant. As such, it does not help to explain macro level structural change that impacts human lives.

⁸⁹ Braithwaite and Drahos, above n 60, 14.

⁹⁰ Operation Desert Fox was a military operation proposed by the US to enforce the no-fly zones imposed by the Security Council as part of the sanctions against Iraq. There was evidence to suggest that Saddam Hussein was deploying the Iraqi air force to target Kurdish rebels in the north of Iraq. The goal of Operation Desert Fox was to thwart these Iraqi efforts.

⁹¹ I discuss the source and implications of the principle of secrecy in chapter 2.

the claimants.⁹² Despite expansion of Iraq's participatory space in the environmental claims after 2000, the panel's expert consultants also remained insulated from scrutiny by both Iraq and the claimants. As a result, the panel's expert consultants were able to assert a high degree of influence on environmental claims outcomes. In chapter 5, I discuss how this situation came about and the role played by key actors.

The above two examples illuminate micro processes that help unravel the contest of key actors and principles. The thesis focuses on understanding the rule and claims outcomes with reference to who did what to produce those outcomes and how they did it.

Braithwaite and Drahos have their fans and critics. William Scheuerman describes their work as a 'superb study of globalization and regulatory law'.⁹³ Scheuerman states that their work 'grapples seriously with the many dilemmas raised for legal scholarship by globalization but also manages to offer a constructive vision for how we might successfully update regulatory law'.⁹⁴ For Scheuerman, Braithwaite and Drahos represents a further step in the republican renaissance. Scheuerman sees the framing of globalisation of business regulation as a rule of principles rather than a rule of law.⁹⁵

In contrast, Shubha Ghosh suggests that Braithwaite and Drahos have redefined the 'human agent in the modern world' but that the framework presents multiple nonlinear causal pathways.⁹⁶ Nevertheless, Ghosh readily acknowledges their achievement.⁹⁷ Ghosh's main criticism is that 'a compelling narrative of the driving forces that inform the political and economic processes that contemporary globalization has unleashed' is lost in Braithwaite and Drahos's 'highly analytic approach'.⁹⁸ Ghosh's main concern is not with the analytical framework adopted by Braithwaite and Drahos or with their mission 'to demonstrate the possibilities that are open to consumers and reformers', but that they 'leave us with many disparate pictures of regulation and one set of blueprints for activism'.⁹⁹ Having briefly

⁹² I discuss this issue extensively in chapter 5.

⁹³ William E Scheuerman, 'Is Republican Regulatory Law the Answer to Globalization' (2001) 52 *University of Toronto Law Journal* 301–11.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ Shubha Ghosh, 'Modeling Globalization from the Bottom up: A Review Essay of John Braithwaite and Peter Drahos, "Global Business Regulation"' (2005) 39(4) *Law and Society Review* 965–79.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

examined three other approaches, Gosh suggests that Braithwaite and Drahos's perspective 'overlaps largely with the economic approach, and their goal is to make apparent the array of interests that are in conflict in the modern world and to explain the manner in which these conflicts are resolved through the construction of global business regulation'.¹⁰⁰ Gosh laments the lack of coherence and the absence of a broader narrative in their work.

These views are generally supported by Walter Mattli and Ngaire Woods who acknowledge that Braithwaite and Drahos's work 'is remarkable not only for its many detailed and informative case studies, but also for its rich and wide-ranging conceptual discussions'.¹⁰¹ They conclude that '[a]lthough the eclecticism of their approach is highly suggestive, Braithwaite and Drahos present in the end a rather unwieldy framework for analysis'.¹⁰² According to Mattli and Woods, the framework 'accommodates all possible influences on global regulation and excludes none'.¹⁰³ They recommend their own methods rooted in political economy theories which they recommend as more parsimonious in explaining global regulation. Unfortunately, Mattli and Woods don't provide a detailed critique beyond this general comment.

Peter van Bergeijk describes Braithwaite and Drahos's work as 'a useful starting point for research in this intriguing field, but it is not more'.¹⁰⁴ Van Bergeijk addresses his concerns to the lack of a consideration of the costs of regulation by Braithwaite and Drahos and their assumption that regulation is always good.¹⁰⁵ The second complaint is that the work is too qualitative and makes large leaps rather than focusing on a single case study and processes through small steps. He also faults the work for failing to reveal the raw data consisting of 500 interviews. Finally, he contends that the sample of 500 interviewees was poorly constructed with a bias for certain countries.¹⁰⁶

These criticisms are helpful in evaluating the research framework presented by Braithwaite and Drahos. With these in mind, I have made appropriate adjustments to the research

¹⁰⁰ Ibid.

¹⁰¹ Walter Mattli and Ngaire Woods, 'Whose Benefit? Explaining Regulatory Change in Global Politics' in Walter Mattli and Ngaire Woods, *The Politics of Global Regulation* (Princeton University Press, 2009) 1, 5.

¹⁰² Ibid 6.

¹⁰³ Ibid.

¹⁰⁴ Peter A G van Bergeijk, 'Global Business Regulation (Book Review)' (200) 53(4) *Kykos Internationale Zeitschrift für Sozialwissenschaften* 595–6.

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

framework and its application in this thesis. First, I am applying the framework to a narrow field (case study) – the environmental claims of the UNCC. I am not seeking to do comparative analysis across several claim types or even across several institutions. Secondly, my sample consists of practically all the key actors involved in the UNCC decision-making minimising potential biases. Thirdly, I acknowledge that there might well be more causal explanations as to how a decision might have been made and where appropriate highlight these other possibilities. I have kept in perspective an overall narrative for how the environmental claims and rule outcomes of the UNCC came about. It is submitted that these safeguards, address the criticisms of Braithwaite and Drahos’s research framing as used in this thesis.

It is important to recognise that a single method may not adequately provide an analytical framework or research method to address the questions posed in this thesis. In this context, the thesis resorts to some of the other analytical frameworks and methods discussed below to supplement the chosen framework and method.

(b) Other Analytical Frameworks Considered

The choice of the analytical framework and research method adopted in this thesis followed an examination of several other analytical research methods. The methods considered were those used by Michael Tigar and Madeleine Levy in *Law & the Rise of Capitalism*,¹⁰⁷ Mary Anne Glendon in *Abortion and Divorce in Western Law*,¹⁰⁸ Bryant Garth and Yves Dezalay in *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*,¹⁰⁹ Pierre Bourdieu, in *Outline of a Theory of Practice*¹¹⁰ and David Kennedy’s work, reflected in *Challenging Expert Rule: The Politics of Global Governance*¹¹¹ and *The Politics of the Invisible College: International Governance and the Politics of Expertise*.¹¹² In this chapter, I have not described all the methods examined and have excluded some that I found to be less of a fit.¹¹³

¹⁰⁷ Michael E Tigar, and Madeleine R Levy, *Law & the Rise of Capitalism* (Monthly Review Press, 1977).

¹⁰⁸ Mary Anne Glendon, *Abortion and Divorce in Western Law* (Harvard University Press, 1987).

¹⁰⁹ Bryant Garth and Yves Dezalay, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press, 1996).

¹¹⁰ Pierre Bourdieu, *Outline of a Theory of Practice* (Cambridge University Press, English Translation, 1977).

¹¹¹ David Kennedy, ‘Challenging Expert Rule: The Politics of Global Governance’ (2005) 27 (1) *Sydney Law review* 5

¹¹² David Kennedy, ‘The Politics of the Invisible College: International Governance and the Politics of Expertise’ [2001] *European Human Rights Law Review* 463.

¹¹³ For example, Alexander Wendt, *Social Theory of International Politics* (Cambridge University Press, 2000), Wendt used the macro-macro structural method.

Tigar and Levy focussed their attention on the manner in which legal institutions reflect the interests of the dominant class and how they change as a new social class gradually replaces its predecessor.¹¹⁴ They argued, '[l]egal change is the product of conflict between social classes seeking to turn the institutions of social control to their purposes, and to impose and maintain a specific system of social relations'.¹¹⁵ Their analytical framework facilitates a study of evolving legal institutions and rules within an historical social context. It also facilitates an understanding of the content of competing legal ideologies and the interests from which they spring.

Two concerns militate against the use of this method for the thesis. First, the method is most useful when the investigation focuses on legal change initiated by an aspiring new social class within an established order. Second, the thesis is not examining legal change alone or the interests of an international social class. Rather, it analyses outcomes of environmental claims apparently resulting from influence asserted by key actors who may or may not form a class or group. Tigar and Levy's analytical framework is best suited to examining multiple institutions and the way they are controlled by classes within a society. While the method might have some usefulness in understanding competing legal ideologies and the interests from which they spring, given its limited applicability, the thesis does not use this method.

The second method examined was that used by Mary Anne Glendon in her study on abortion and divorce in the US and European law.¹¹⁶ Glendon was seeking to demonstrate that the law (as found in statutes, decisions and executive actions) had interpretive aspects and that this in turn influences the way society uses ordinary language and perceives reality. Glendon says that the law is interpretive 'when it is engaged in converting social facts into legal data and systematically summarizing them in legal language'.¹¹⁷ 'The law is constitutive', says Glendon, 'when legal language and legal concepts begin to affect ordinary language and to influence the manner in which we perceive reality'.¹¹⁸

¹¹⁴ Tigar and Levy, above n 107.

¹¹⁵ Ibid xiii.

¹¹⁶ Glendon, above n 108.

¹¹⁷ Ibid 9.

¹¹⁸ Ibid.

This method would help to analyse the extent to which international law was interpretive or constitutive in creating the UNCC. The method also allows an examination of whether legal concepts and language used by the panel (in the awards and decisions) influenced the way in which states perceived environmental realities and presented or amended their claims. On the one hand, the method would have to focus on how an institution (here the UNCC) assessed environmental facts and data and interpreted the applicable law and the impact this had on the way claimant states and Iraq perceived reality with respect to the environmental claims. On the other hand, the method is not particularly suitable for examining relations and interactions between key players and the tools they used to influence the functioning of the UNCC and rule and environmental claims outcomes.

A common feature of the methods of both Tigar and Levy and of Glendon is that these scholars have applied them primarily to analyse domestic law and legal institutions, while this thesis involves international law and institutions. Both methods however do have a place in comparative international law, but for the reasons stated, I only make very limited use of Glendon's method in this thesis.¹¹⁹

I evaluated two other methods but did not utilise them for the purposes of this thesis. The first was the method developed by Pierre Bourdieu.¹²⁰ Bourdieu distinguished himself in France through the collaborative work *The Weight of the World*, a definitive book of the 1990s. It was a work bringing together essays and dozens of interviews with those living at one end of society – the homeless, those in run-down housing, those on social support, part-time workers etc. Bourdieu attacked neo-liberalism and moulded his philosophy through his long-term field research in Algeria. He was dissatisfied with the emphasis on individual consciousness and preoccupation with social structures.¹²¹ He argued that each individual's material conditions of existence and social status defined that individual's outlook on the future. He theorised that the concept of *habitus* mediated the internalisation of objective possibility as subjective expectation. *Habitus* is the means by which the social game is inscribed in individuals, so that eventually their feel for the game becomes second nature.¹²² According to Bourdieu, 'in practice, it is the habitus, history turned into nature, i.e. denied as such, which accomplishes'

¹¹⁹ In particular, in chapters 2 and 3 I discuss the constitutive effect that the Iran-US Claims Tribunal had on the UNCC.

¹²⁰ Bourdieu, above n 110.

¹²¹ Jim Wolfreys, 'In perspective: Pierre Bourdieu' (2000) 87 *International Socialism Journal*.

¹²² Ibid 5.

the connection ‘of these two systems of relations, in and through the production of practice’.¹²³

He further explains that:

in each of us, in varying proportions, there is part of yesterday’s man; it is yesterday’s man who inevitably predominates in us, since the present amounts to little compared with the long past in the course of which we were formed and from which we result. Yet we do not sense this of the past, because he is inveterate in us; he makes up the unconscious part of ourselves. Consequently, we are led to take no account of him, any more than we take account of his legitimate demands. Conversely, we are very much aware of the most recent attainments of civilisation, because, being recent, they have not yet had time to settle into our unconscious.¹²⁴

Bourdieu’s theory permits an understanding of the apparent spontaneous beliefs, which he called *doxa*,¹²⁵ that shape an individual’s view of the world based on a reciprocal relationship between the ideas and attitudes of individuals and the structures within which they operate.¹²⁶ For example, in chapter 6 I use the concept of *doxa* to explore the extent to which the norms and practices of the UNCC had become a subconscious part of long standing senior staff members of the UNCC.

Had legal principles such as due process, fairness and precedent transcended the conscious to become part of the unconscious attitudes of the F4 legal team? To what extent did the consciousness of being reputed environmental lawyers influence the panel members decision-making? Though strictly not *doxa*, these considerations, in my view, are inseparable from a fuller understanding of the rule and environmental claims outcomes of the UNCC.

Yves Dezalay and Bryant Garth used Bourdieu’s method to investigate ‘the internationalization of the rule of law by studying institutions that have been developed for the resolution of transnational business disputes’.¹²⁷ In their study, they also used concepts

¹²³ Bourdieu, above n 110, 78.

¹²⁴ Ibid 79.

¹²⁵ The term *doxa* is a Greek word meaning common belief or popular opinion.

¹²⁶ Wolfreys, above n 121, 5.

¹²⁷ Garth and Dezalay, above n 109, 3.

such as international ‘epistemic communities’¹²⁸ and transnational ‘issue networks’.¹²⁹ Dezalay and Garth developed an interview method that allowed them to identify the key actors and the fields in which they operated.

The institution (the UNCC) being studied in this thesis was a short-lived one created for a specific purpose. Unlike previous war reparations tribunals, the UNCC was unique in that it was multilateral in nature. It is arguable whether there was sufficient time and a stable and significant group of individuals for the formation of a *habitus* or for the growth of a professional field of international compensation practitioners. At the height of the UNCC it employed close to 200 lawyers but they were recruited internationally and came from diverse backgrounds and jurisdictions. Only a very small number of individuals had any previous post-conflict experience working in an international tribunal. Besides, there was a regular movement of these lawyers in and out of UNCC employment making it difficult if not impossible in the absence of longer tenure, for them to form a *habitus* or *doxa*.

Arguably, lawyers whether trained in civil or common law jurisdictions are educated in certain basic legal concepts and learn to apply them consciously. Repeated conscious applications of these concepts and principles over time have the potential to make them second nature. To the extent that this education shares common elements, the body of lawyers employed at the UNCC could have had an identifiable *habitus*. Chapter 2 of the thesis argues that they formed an ‘epistemic community’ with its own webs of influence. On the other hand, did the UNCC exist long enough (15 years) for its rules, structures, norms etc to settle into the unconscious of individual employees and other actors associated with it, and if so, to what extent did that happen?¹³⁰

Within the UNCC and the environmental claims unit there were actors (such as expert legal and valuation staff) from widely differing cultures and jurisdictions and as stated above, considerable movement of these actors in and out of the UNCC. Only a small number of

¹²⁸ Peter M Haas, ‘Introduction: Epistemic Communities and International Policy Coordination’ (1992) 46(1) *International Organization* 1. An epistemic community is a network of knowledge-based experts or groups with an authoritative claim to policy-relevant knowledge within the domain of their expertise. Members hold a common set of causal beliefs and share notions of validity based on internally defined criteria for evaluation, common policy projects, and shared normative commitments.

¹²⁹ Margaret Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Cornell University Press, 1998).

¹³⁰ See chapter 6 for a discussion of this issue.

UNCC employees carried long-term institutional memories. If one of the objectives of this research was to discover the extent to which the UNCC norms etc had become internalised in the unconscious (*habitus*), this method would have been well suited to that purpose. That is not the case here. However, Bourdieu's concepts are useful in understanding how much of the influence on environmental claims outcomes and claims processing came from the *habitus* (defined in broader terms of legal education and legal professional identity or more narrowly in terms of UNCC norms and practices). His theory of practice has informed and alerted me to some of the pitfalls to avoid in preparing the thesis. Having been employed at the UNCC in the environmental claims unit, I have been conscious of the fact that I might myself have been subject to the UNCC *habitus* if indeed that existed.

Braithwaite and Drahos have also used concepts such as 'epistemic communities'¹³¹ and the interview method used by Yves Dezalay and Bryant Garth. I use these concepts and methods, with some variations, as part of the analytical approach of this thesis.

In chapter 5 I utilise methods and concepts developed by David Kennedy to supplement the concepts and methods discussed earlier. In that chapter, I analyse the role of expert consultants and the extent to which they influenced the environmental claims outcomes. Braithwaite and Drahos's method continued to be useful at that point, albeit to a lesser extent, in analysing this set of actors and the webs of influence they used. Experts hired by claimant states and Iraq deployed their influence through the same webs of influence as their principals. However, experts hired by the UNCC to advise the panel processing the environmental claims and the F4 team, were unique. By virtue of the special position, these experts had within the environmental claims process, they were a group of key actors whose views went largely unchallenged and whose scientific and environmental valuation opinions were highly influential in producing claims outcomes.

To analyse how this unique group of actors influenced the claims outcomes, I called to aid the work of David Kennedy and translated the opinions and advice of this group into politically contestable terms, identifying their distributional impacts on claims outcomes. David Kennedy suggests that 'perceptions and language developed by the professions

¹³¹ Haas, above n 128; Keck and Sikkink, above n 129.

involved in international policy ... influence its outcomes'¹³² and that we should examine the vocabulary these experts use to expose their biases, deformations and policy goals.¹³³ If we do not, the basis for their advice and opinions recede into their vernacular, forming the *background* of decision-making and eventually becomes invisible.¹³⁴ Often all we see is the *foreground* and the *context* of the decision but miss the all-important *background* that more often than not determines the outcome.¹³⁵ By applying these concepts, I analyse the role of the experts at the UNCC and draw out the manner in which they influenced claims outcomes.

3 Primary Research Method

For the purposes of this thesis, I use the analytical framework developed by Braithwaite and Drahos as my primary research framework. They coupled their analytical framework with two research methods. Their most important sources of data were 500 people whom they interviewed as they 'followed the webs of influence around the globe'.¹³⁶ They supplemented this data with what they learnt as they 'hung around the corridors of organisations' such as the World Trade Organisation.¹³⁷ They had no difficulty in seeing their method as being 'just as anthropological as the method of fieldworkers who sip tea around a campfire'.¹³⁸ The 500 interviewees were not randomly sampled.¹³⁹ Instead, they started with what they found out from Australian insiders and existing literature based on a previous study they had done.¹⁴⁰ They followed these leads and 'deduced that there were webs of influence whose strands [they] should follow until [they] found who was controlling them'.¹⁴¹ Braithwaite and Drahos argued that 'the sampling was not atheoretical snowballing, but based on fieldwork at strategic sites followed by a theoretically grounded strategy of tracing the strands of webs of control'.¹⁴² Their method is one that combines the qualitative methods of anthropologists and historians.

Braithwaite and Drahos supplemented their interviews with another information-gathering technique, by obtaining comments of key actors on drafts of their writings. They state that

¹³² Kennedy, above n 112.

¹³³ Ibid.

¹³⁴ Kennedy, above n 111.

¹³⁵ Ibid.

¹³⁶ Braithwaite and Drahos, above n 60, 12.

¹³⁷ Ibid 12.

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Ibid.

‘[p]art of [their] method was to send [their] text, for comment, to key informants and to others who [they] did not manage to interview’.¹⁴³ These comments served a useful purpose in that they either confirmed or denied statements of fact in the draft and served to elicit insights on the writings from key actors. They collected documentation along the way and made notes of their own observations. Together, all the information they gathered formed their database. From this information, they developed thirteen case studies on the globalisation of business regulation in different sectors, including the environment. In each study, they raised questions about the key actors, the principles they advocated or opposed and the mechanisms they deployed. In the section on concepts below, I discuss what I derived from Braithwaite and Drahos’s approach for my thesis research.

In the UNCC process, there were four categories of environmental claims, namely those for (a) monitoring and assessment, (b) incurred expenditure, (c) environmental restoration and (d) environmental damage and depletion of natural resources. As part of my research, I examined all of these claims and used the evidence gathered to develop the thesis. The same panel also dealt with public health claims arising from the Gulf War. The thesis does not examine the public health claims as these may present an additional set of principles and actors and go beyond the research goals of the thesis.

4 Data Gathering and Investigation

As indicated above, I served the UNCC as a Legal Officer from September 2002 to May 2005. As part of the UNCC environmental claims team (the F4 team), I processed four environmental claims of Saudi Arabia and the cultural heritage claim of Iran. During my tenure, the UNCC processed the last three (of five) environmental claim instalments. The knowledge and experience I gained at the UNCC enabled me to undertake this investigation and data collection and apply Braithwaite and Drahos’s micro-macro method. In terms of the purposes of this thesis, my work experience with the UNCC has been essential in identifying actors, mechanisms and principles and in tracing webs of influence that affected the functioning of the UNCC and the rule and environmental claims outcomes. My focus was on micro processes that led to structural change as well as the constraints placed by structure on those micro processes. Rather than assess the work of the environmental claims of the UNCC from the outside at a macro level, I was able to examine them from the inside, beginning at the micro level. The key idea behind the micro-macro method used ‘is gathering data on the

¹⁴³ Ibid 12.

most macro phenomenon possible from the most micro sources possible'.¹⁴⁴ This applies to principles as well as mechanisms.

Throughout its existence, from 1991 to date (2012),¹⁴⁵ the UNCC has operated under a blanket of secrecy and confidentiality. Staff recruited by the UNCC had to sign a confidentiality pledge that was incorporated into their employment contracts. The contracts referenced the confidentiality required of UN staff under its general rules applicable to employees.¹⁴⁶ Procedural rules and standing operating procedures of the UNCC reinforced a culture of secrecy by providing for strict guidelines as to who, when and what could be made public or provided to claimants and Iraq. For example, the rules prohibited UNCC staff from sending anything other than specified documents to Iraq, without express UNCC management permission. Violations or apparent violations of the rules by employees were dealt with severely by UNCC management.¹⁴⁷ Additionally, UNCC management stressed this aspect at staff meetings and one-on-one sessions with staff. The effect of these actions was to ensure that an organisational culture – based on the principle of secrecy – was disseminated and sustained, primarily by UNCC management.

The governing council of the UNCC established confidentiality as the rule (with publicity as an exception) for its own proceedings, for all the records received and developed by it and for proceedings of the panels of commissioners.¹⁴⁸ Despite explanations offered by the UNCC (which I discuss in chapters 2, 3 and 6), this rule did not accord with the general tenor of the UN charter, and to the transparency¹⁴⁹ rules applicable to the Security Council itself.¹⁵⁰ UNCC secrecy is a major issue I address in this thesis. These steps paved the way for the

¹⁴⁴ Braithwaite and Drahos, above n 60, 21.

¹⁴⁵ United Nations Compensation Commission, *The UNCC at a Glance* <<http://www.uncc.ch/ataglance.htm>> states '[W]ith the claims processing stage now concluded, the Commission will focus its work, with a small secretariat, on payments of awards to claimants and a number of residual tasks'.

¹⁴⁶ United Nations Secretary-General's Bulletin, *Staff Rules, Staff Regulations of the United Nations and Staff Rules 100.1 to 112.8*, UN Doc ST/SGB/2002/1 (1 January 2002) reg 1.2(i).

¹⁴⁷ During initial trainings of new staff, UNCC management emphasised the confidential nature of work at the UNCC warning that violations could result in disciplinary action.

¹⁴⁸ United Nations Security Council, *Letter from President of the Governing Council of the United Nations Compensation Commission to President of the Security Council*, UN Doc S/22885 (2 August 1991) annex I ('*Guidelines for the Conduct of the Work of the Governing Council of the United Nations Compensation Commission*'), [2], [6]. See Also United Nations Compensation Commission, *Governing Council, Decision 10*, above n 51, art 30.

¹⁴⁹ See above for a discussion of the term 'transparency'.

¹⁵⁰ The governing council kept its proceedings confidential. The public was given access to formal decisions of the governing council and the panels through the UNCC website. However, notes of proceedings of the governing council were not made public (unlike the Security Council), the public being informed of deliberations through a formal press release that contained the summary of selected major decisions.

culture of secrecy that was maintained by UNCC management through numerous means. However, a significant amount of documentation was made public through the UNCC website and significant amounts of otherwise confidential information have become available through publications authored by serving and ex-UNCC staff.¹⁵¹ Documents made publicly available through the UNCC website included (a) governing council decisions, (b) panel reports, (c) Article 41 reports,¹⁵² (d) selections of Security Council resolutions and (e) press releases.

Additionally, the UNCC website contained descriptions of the different claim categories,¹⁵³ their status¹⁵⁴ and a searchable index of jurisprudence.¹⁵⁵ The index gave public access only to the documents listed above.

In April 2004, the then UN Secretary-General General Kofi Annan appointed an independent, high-level inquiry to investigate the administration and management of the Oil-for-Food Programme in Iraq. The UNCC was also investigated as part of that committee's work. Paul Volker, former Chairman of the US Federal Reserve, headed the committee. The Volker Committee website also contained some documents, especially the commission's investigation reports pertaining to the UNCC.¹⁵⁶

For a short period in 2005–06, the UNCC website contained a link to a page that gave access to correspondence between UNCC management and the Volker Commission,¹⁵⁷ the UN Office of Legal Affairs and the UN Office of Internal Oversight. The page also contained copies of internal UN audit reports, including audit reports and responses pertaining to several environmental claims, copies of legal advice and responses from UNCC management

¹⁵¹ United Nations Compensation Commission, <<http://www.uncc.ch/>>. For example see also chapters contributed by ex-UNCC staff C. R. Payne and J. Klee and ex-UNCC Commissioners J.R. Allen and P.H Sand in Cymie R Payne and Peter H Sand (eds), *Gulf War Reparations and the UN Compensation Commission* (Oxford University Press, 2011).

¹⁵² United Nations Compensation Commission, *Governing Council, Decision 10*, above n 51, art 41.

¹⁵³ The United Nations Compensation Commission, *Claims Processing* <<http://www.uncc.ch/clmsproc.htm>>.

¹⁵⁴ The United Nations Compensation Commission, *Status of Processing and Payment of Claims* <<http://www.uncc.ch/status.htm>>.

¹⁵⁵ The United Nations Compensation Commission, *Index of Jurisprudence* <<http://ioj.uncc.ch/>>.

¹⁵⁶ Independent Inquiry Committee, *About the Committee* <<http://www.iic-offp.org/about.htm>>.

¹⁵⁷ The appointment of the Volker Committee resulted in a number of otherwise unavailable UNCC internal documents becoming publicly available on the UNCC website for a brief period.

to audit queries. These documents are therefore public documents though they were all subsequently removed from the UNCC website and are no longer available to the public.¹⁵⁸

Many other documents, such as those listed below, were not publicly available:

- a) Claim filings by claimant countries;
- b) Claim responses from Iraq;
- c) Submission notes of UNCC legal officers;
- d) Verification documents from the UNCC's valuation and verification services branch (VVS);
- e) Monitoring and assessment information provided by claimants;
- f) Other evidence in support of claims;
- g) Legal submissions by counsel for parties to the claims;
- h) Procedural orders made by the panel;
- i) Panel meeting minutes;
- j) Internal memoranda and correspondence pertaining to claims;
- k) Notes from UNCC management meetings;
- l) Notes and minutes of UNCC governing council proceedings including summary notes of working groups of the Council;
- m) Guidelines, rules and clarifications issued by the panel and UNCC management;
- n) Professional Judgement Reports by UNCC expert consultants and claims related correspondence with them;
- o) Article 34 questions (interrogatories) to claimants and responses to such questions; and
- p) Minutes of meetings with UNCC staff, consultants, claimants and Iraq.

In the thesis, I cite factual statements based on my personal knowledge of the content of these documents as 'personal knowledge' in the corresponding footnote. At the request of the PhD Award Committee, such footnotes and related text have been deleted from the thesis and placed in an appendix that is not available for public inspection for five years. The author apologizes to the reader for the resulting lack of continuity especially in some sections of chapters 4 and 5 of the thesis. Deductions or inferences made by me as a result of my personal experiences and not based on confidential UNCC documents have been cited as "personal observation".

¹⁵⁸ These documents were made public after the author had left the UNCC.

The items on this list are numerous but in many cases the format, key actors involved and the function of each category of documents were consistent and similar. For example, the function of a professional judgement report by an expert consultant was to inform the panel of its findings of scientific and economic facts and express an opinion on a particular claim. The key actors involved in generating the report were the expert consultants, the legal officer handling the claim, the F4 team leader and UNCC management. It followed a format generally established by a template and accompanying guidelines. The document was seen and used in decision-making by the panel, UNCC management and the F4 team. The content of each report varied based on the facts of each claim, as did the scientific and economic principles applied. Such a report would also have revealed the scientific and economic principles applied in that particular claim, but not principles applied in other claims. Principles in other claims might however be revealed in the panel reports. In this sense, knowledge of a few examples of such reports gives the researcher enough information to identify key actors and mechanisms that were operating in the formulation and use of such a report. A number of key UNCC ex-employees provided comments on drafts of sections of the thesis.

Given the blanket of confidentiality under which the UNCC operated, adopting the interview method used by Braithwaite and Drahos proved to be a challenge. Attempts to pave the way to use the method proved unsuccessful. My requests to the UNCC for access to documents were not responded to. Requests to a few colleagues who worked with me at the UNCC to share documents or permit named citation of statements were either unanswered or politely declined. I therefore did not conduct any interviews or adopt other data gathering methods involving the participation of or access to information from serving or ex-UNCC staff and colleagues.

Nevertheless, I draw a distinction between the data-collecting method used by Braithwaite and Drahos on the one hand, and their analytical framework on the other. The framework provides their reference points for analysing the data and theorising about it. The information-gathering method provided them with the data to apply the analytical framework. I concluded that it should therefore be possible to use the analytical framework in combination with other information-gathering techniques, if they yielded the quantity and quality of information that is required for its successful application.

For the reasons explained above, I did not follow the interview approach but obtained comments on drafts from key actors. I obtained documentation, wherever possible, from other sources including the internet. To the maximum extent possible, I used publicly available sources and materials in the thesis to support arguments and conclusions supplemented by my own experience and knowledge of processes, actors, and practices gained from working at the UNCC. Where the thesis approach demanded reference to confidential material to maintain the integrity of facts, illustrate particular arguments or substantiate conclusions, I have kept the sources confidential.

As stated earlier, many other UNCC colleagues and ex-UNCC staff have published articles and books about the UNCC which have revealed otherwise confidential information. The UNCC and the UN have not faulted any of them for violations of confidentiality. These include senior UNCC management staff as well as colleagues who served with me in the environmental claims unit. Over eight years have lapsed since my leaving the UNCC and the institutions work has been completed leaving behind a skeletal staff to wind up its mandate.

Braithwaite and Drahos investigated global business regulation in a number of settings – some more transparent than others, illustrating for example that transparency in the sphere of nuclear safety and air transport was restricted or weak while environment and trade were stronger.¹⁵⁹ This thesis is concerned with an organisation that functioned under a blanket of confidentiality. The UNCC was a claims resolution facility and in that role did develop detailed and particular rules. It was not a regulatory body nor did it perform any regulatory functions. The UNCC's quasi-judicial function contrasts with the regulatory function that Braithwaite and Drahos were investigating. While many judicial bodies around the world operate with a high degree of transparency, in many cases judges conduct the final decision-making and decision-rationalisation process in secret.¹⁶⁰

When researchers investigate organisations that function under a blanket of confidentiality, they have had to resort to non-traditional information-gathering methods out of necessity. In such cases, the researcher must collect as much information as possible from all possible

¹⁵⁹ Braithwaite and Drahos, above n 60, 508–9.

¹⁶⁰ An interesting exception is the Brazilian High Court (Superior Tribunal de Justifier) where judges debate their opinions publicly before the decision.

sources and before using it, evaluate the information against criteria for accuracy, veracity, credibility and considerations of confidentiality. In applying an analytical framework to such data, the researcher must present the conclusions with the necessary caveats that draw the reader's attention to possible data gaps, and infirmities, and whether these lacunae are a result of the need to respect confidentiality. In such situations, a researcher might be constrained to withhold or fail to discover all the data. In such situations, conclusions must remain at best, tentative, until an opportunity for fuller factual evaluation is available. This thesis adopts that course of action. The information collected for the purposes of the thesis is, by force of circumstances, not comprehensive. The UNCC archive contains currently inaccessible material that may well challenge the conclusions reached in the thesis. With this in mind, I have been cautious in arriving at the conclusions in the thesis, prefacing them, where appropriate, with identifiable data limitations.

5 Concepts

The purpose of this thesis is to provide an explanation as to how and why the UNCC's procedural rules governing the environmental claims and their outcomes came about. Braithwaite and Drahos's method helped me to analyse the interactions of key actors, and the principles advocated by them to further their goals and mechanisms they employed to ensure those principles were adopted. The thesis argues that rule and environmental claims outcomes of the UNCC were the product of interactions between actors, mechanisms and principles. This argument is not intended to displace or exclude other theories or explanations of rule and claims outcomes of the UNCC. Wherever possible, the thesis notes other explanations that support or challenge this argument. As will be seen, the thesis pitches mechanisms and principles at a defined level and it may be possible to find other explanations to the rule and claims outcomes by aggregating or disaggregating mechanisms and principles.

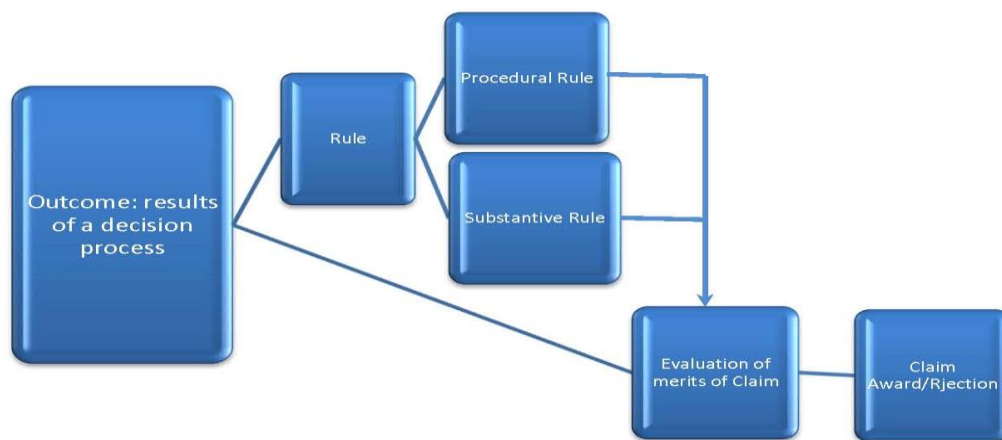
(a) Outcomes

For the purpose of this thesis, outcomes are the result of a decision-making process and are of two kinds: environmental claims outcomes and rule outcomes. An environmental claim outcome is a decision attributable to the UNCC that determined the results of a claim – usually a decision that either rejected the claim (or claim element) or accepted it and made an award. Claims outcomes include incidental decisions applying existing procedural rules to the claim. For example, decisions whether to allow an amendment to the claim, or whether to allow additional evidence to be submitted in a claim are treated as incidental procedural

decisions and therefore part of claims outcomes. These are decisions explicitly adopted pursuant to existing rules that are quite definite in their application to the claim in question and hence don't entail any interpretative variation of rules nor do they involve the promulgation of new rules (see figure 2 below).

A rule outcome is defined as a decision attributable to the UNCC that establishes a specific rule governing the claims. Such rules were either procedural or substantive. For example, the thesis treats rules about (a) filing, supporting, defending, evaluating, amending and disposing of a claim and (b) requesting, tracking, and monitoring payments made in satisfaction of that claim, as procedural rule outcomes. The thesis also treats guidelines issued to amplify or explain rules as rule outcomes. UNCC rules specifying criteria that panels had to consider in evaluating claims are substantive rules. In the above example, while I treat the decision whether or not to allow an amendment to a claim as a claim outcome, I treat the rules governing the making of that decision as a rule outcome.

Figure 2. Rule and Claims Outcomes



To ensure clarity of the arguments in this thesis, three basic concepts need to be defined, namely actors, mechanisms and principles. The thesis borrows these concepts from the analytical framework used by Braithwaite and Drahos.¹⁶¹

(b) Actors

Actors are identifiable states, organisations, groups of individuals and individuals who play a role in producing rule and environmental claims outcomes. Many of the actors such as states

¹⁶¹ Braithwaite and Drahos, above n 60, 18–20.

or organisations or the F4 team consisted of a collection of individual actors. Most of the time, these groups of collective actors spoke with one voice and the individual actors forming the collective shared the expressed view. However, there were also occasions when the individual actors within the collective did not agree; what emerged was a majority view or more importantly, the view of the most powerful actors within the collective. For example if there was no agreement on an issue on the F4 team, the team leader's view prevailed and became the F4 team's view. In this sense, for the purpose of the thesis I attribute the view of a legal officer dealing with a particular claim to the F4 team. So also with UNCC management or the view of Iraq or a claimant government.

In this context, the thesis assumes that the expression of collectives is attributable to all the individuals within the collective and that unless contradicted by the collective, the expression of an authorised individual within the collective is the view of the collective. This idealisation of the objects of the thesis is a necessary limitation on the conclusions reached. It necessarily entails a degree of abstraction that is necessary when examining actor relations at the same level of abstraction as principles and mechanisms. An actor may or may not be able to influence a rule or claim outcome alone. As the thesis will show, actors associated with the UNCC had to co-opt other actors to their side to ensure that they succeeded in advancing or opposing the principles that best served their goals. For example, the F4 team had to co-opt UNCC management to ensure that a rule or claim outcome they proposed would succeed. UNCC management had to co-opt the panel to support rule outcomes they proposed to the governing council. Chapter 2 contains a more detailed discussion of actors.

In the context of actors, a note about the notion of power as used in this thesis is important. I follow Braithwaite and Drahos in seeing power as a process of enlisting the cooperation of chains of actors who translate power from one locale to another.¹⁶² They draw on the work of Rose and Miller who expanded on Foucault's conception of power as translation or enrolment through networks and alliances of actors.¹⁶³ Braithwaite and Drahos adopt this notion stating that '[w]e exercise power by enrolling the capacities of others to our purposes' and 'by the action of chains of agents, each of whom "translates" it according to their own

¹⁶² Braithwaite and Drahos, above n 60, 482.

¹⁶³ Nikolas Rose and Peter Miller, 'Political Power Beyond the State: Problematics of Government' (1992) 43 *British Journal of Sociology* 173–203; Nikolas Rose, 'Governing "Advanced" Liberal Democracies' in A Barry, T Osborne and N Rose (eds), *Foucault and Political Reason* (University of Chicago Press, 1996) 37–64; Peter Miller and Nikolas Rose, 'Governing Economic Life' (1990) 19 *Economy and Society* 1–31.

projects'.¹⁶⁴ Braithwaite and Drahos note that the 'the fact that power is translated means that in some senses power is out of the control of the powerful' and that '[n]o translation is ever perfect'.¹⁶⁵ However, they do not stretch the notion of power as far as Latour did in claiming that power could not be possessed or accumulated.¹⁶⁶

(c) Principles

Principles are 'abstract prescriptions that precede rule complexity'.¹⁶⁷ They guide conduct. They stand behind rules informing their application, or are used to create new rules. They are found in the literature that deals with the theories of decision-making and interpretation. Principles have less specificity and can conflict with each other. Rules are less likely to be in direct conflict with each other because they are more specific. When principles conflict, decision-makers assign weights to them to determine their priority. Rules cover specific acts while principles cover highly unspecific actions.¹⁶⁸

In the context of the UNCC, principles (as distinguished from rules or regulatory schemes), includes legal liability of the aggressor (Iraq) for war-related damage, expeditious and effective justice for war victims, due process for Iraq, transparency and secrecy. Demonstrable contests of principles occurred in different decision-making forums of the UNCC. For example, the principle of due process for Iraq was often in conflict with the principle of expeditious and effective justice for war victims and sometimes with the principle of secrecy. However, more often than not, there was agreement or consensus on both the principle and its application to rule-making. From time to time, principles were in conflict, as were actors. This thesis examines these conflicts because they provide insights into rule and environmental claims outcomes and helps illuminate how and why they were shaped.

¹⁶⁴ Braithwaite and Drahos, above n 60, 482.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid; Bruno Latour, 'The Powers of Association' in John Law (ed), *Power, Action and Belief: A New Sociology of Knowledge?* (Sociological Review Monograph 32, Routledge and Paul Kegan, 1986) 264–80; Bruno Latour, *Science in Action* (Harvard University Press, 1987).

¹⁶⁷ Braithwaite and Drahos, above n 60, 18–20. Braithwaite and Drahos draw on R Dworkin, 'The Model of Rules' (1967) 35 *University of Chicago Law Review* 14, 25.

¹⁶⁸ Joseph Raz, 'Legal Principles and the Limits of Law' (1972) 81 *Yale Law Journal* 823.

A note about transparency and secrecy is appropriate here. Generally, transparency and secrecy are seen as opposites. For the reasons below, I treat the principles of transparency and secrecy as two separate principles rather than as the opposites of one principle. Besides, there are varying degrees of transparency and secrecy to consider. Transparency and secrecy connote active and passive aspects of information provision or retention. Transparency connotes the ability of a requester (for example Iraq) to access information from the information holder and the additional obligation of the information holder to push information out to the public or a concerned party. Secrecy, on the other hand, connotes situations in which the information holder does not allow any access to information in its possession to a requester and decides which information to make public or provide to a party (such as Iraq), in its sole discretion. While there is an overlap between these two notions, they create very different rights and obligations on information holders and requesters. Transparency operates on the basis that information is open and public unless there is good reason to make it confidential. Secrecy operates on the basis that information is closed and confidential unless there is good reason to make it public or available to a requester.

(d) Mechanisms

Mechanisms are tools that actors use to achieve their goals. As with Braithwaite and Drahos, this thesis limits itself to examining the mechanisms that are closely linked to the goals of actors – ‘the devices that bring about their desires’.¹⁶⁹ Mechanisms are ‘relatively simple or lower-order mechanisms to support those principles that best serve [the actors] interests and goals’.¹⁷⁰ Coercion and the giving of rewards are two examples of mechanisms that the thesis borrows from Braithwaite and Drahos. The thesis does not use more abstract mechanisms, such as evolution or rationality.¹⁷¹ Braithwaite and Drahos focus on lower order mechanisms, as does this thesis.¹⁷² They are designed by the actors and used by them either unilaterally or in cooperation with others.

Lower order mechanisms such as coercion, incentives (rewards), non-reciprocal coordination¹⁷³ and modelling¹⁷⁴ were used by key actors and their agents within the UNCC.

¹⁶⁹ Braithwaite and Drahos, above n 60, 15.

¹⁷⁰ Ibid.

¹⁷¹ Ibid 9.

¹⁷² Ibid 16.

¹⁷³ Braithwaite and Drahos, above n 60, 25. Non-reciprocal coordination takes place when one actor wins on an issue while losing on another and another actor loses on the first issue but wins on the second issue.

¹⁷⁴ Ibid. Braithwaite and Drahos suggest that modelling is ‘achieved by observational learning with a symbolic content; learning based on conceptions of action portrayed in words and images’.

However, at the level of UNCC management, the panel and F4 team, these mechanisms were applied in the context of career advancement and personnel relations. For example, coercion might include threats to discontinue a legal officer's job and incentives might include promotions and career benefits.¹⁷⁵

The use of modelling as a mechanism predominated at the UNCC. Braithwaite and Drahos suggest that modelling is 'achieved by observational learning with a symbolic content; learning based on conceptions of action portrayed in words and images'.¹⁷⁶ Models based on previous experiences or learning can be very persuasive mechanisms in the hands of weaker actors. For example, the F4 team mostly used modelling as a mechanism to advocate principles to achieve their policy goals. Despite being weak actors at the UNCC, they captured a significant share of rule outcomes related to the environmental claims. To explain how actors diffuse models, Braithwaite and Drahos classified them into five types. These are:

- a) Model missionaries who promote models, motivated by belief in the model sourced in their part of the world and travel abroad to spread the word about their model;
- b) Model mercenaries are also promoters who commercially exploit the models;
- c) Model mongers are agents who pursue their political agenda by experimental floats of large numbers of (mostly foreign) models;
- d) Model misers are adopters of models who prefer copying to innovating to economise on the costs of model debugging and raising political support; and
- e) Model modernisers are those who adopt models from the powerful for legitimacy and to be perceived as modern, civilised or progressive.¹⁷⁷

Most actors at the UNCC could be characterised as model missionaries or mongers. Arguably, scientific and economic experts contracted by the claimants, Iraq and the UNCC could be characterised as model mercenaries.

D Conclusions

In response to the thesis questions above, the thesis will argue that a significant number of environmental claims and rule outcomes of the UNCC were influenced by key actors (states, groups of individuals and individuals) using mechanisms (such as modelling and coercion) to

¹⁷⁵ For example see the discussion in chapters 2 and 3 on this issue.

¹⁷⁶ Braithwaite and Drahos, above n 60, 580.

¹⁷⁷ Ibid 585–593.

advance or defeat principles (such as due process for Iraq, secrecy and expeditious and effective justice for war victims) that achieved their goals. Powerful state actors such as the US, its western allies and Middle Eastern allies such as Kuwait and Saudi Arabia, influenced these outcomes. The predominant mechanism used by key actors was modelling. However, outcomes were also influenced by relatively weak actors such as UNCC legal officers and expert consultants handling the claims. I characterise them as weak because they had comparatively less influence in terms of their formal institutional positioning, capacity and decision-making power.

Key actors influenced the outcomes of the environmental claims by using opportunities available to them in different forums (institutional structures for producing rule and claims outcomes) through the establishment and operation of rule outcomes and claims outcomes. They did so primarily through webs of influence. Webs of influence are either coercive webs or dialogic webs; the thesis argues that the latter dominated the UNCC. Webs of influence float ‘in time and space’ and with respect to the UNCC rule and environmental claims outcomes was ‘a matter of managing a network rather than managing a hierarchy’.¹⁷⁸ Although the UNCC had a hierarchy of forums and officials, it was the webs of influence that produced outcomes. Without the notion of a web of influence at work, I would find it hard to explain some of the contested and controversial rule and environmental claims outcomes that the UNCC produced.

Within this general argument, I assert that key actors achieved their goals by (a) limiting and later expanding Iraq’s participatory space in the environmental claims and (b) adopting rule outcomes that favoured claimants. I also assert that in their endeavour to achieve their goals, key actors were compelled to rely on scientific and economic experts. Such a high degree of reliance coupled with the lack of adequate scrutiny and oversight of the experts resulted in empowering them with claim outcome decision-making beyond the original intent of the key actors. I will also argue that the secrecy in the UNCC provided considerable space for key actors to influence claims and rule outcomes. I will demonstrate that the legal epistemic community within the UNCC modulated the influence of key actors. They did so by deploying the specialised legal knowledge they had of UNCC procedures and decisions

¹⁷⁸ Ibid 550.

stored in an Index of Jurisprudence. I contend that in some cases, the use of precedent by legal officers at the UNCC was a form of modelling.

I conclude that the UNCC's rule and environmental claims outcomes cannot be fully explained by reference to rationalisations given by the panel or governing council alone. Nor can they be explained based on a single actor (or group of actors) using a master mechanism to advance their goals. Based on the material examined in the thesis, I argue that actors advocating for or against principles that served their goals produced the rule outcomes and environmental claims outcomes by using mechanisms deployed mostly through dialogic webs of influence. Key actor goals changed according to events, circumstances and interests. Changing actor goals influenced rule and environmental claims outcomes and changes to these outcomes. The broader argument of the thesis is that the UNCC rule and environmental claims outcomes must be viewed in the context of actor goals and ongoing actor relations and conflicts in the Gulf and to do otherwise is to distort their legal and precedential value. I argue that the culture of secrecy at the UNCC was the product of actor goals and that greater transparency and due process for Iraq might have resulted in more accurate environmental awards and a better overall sense of fairness of the process.

Member states of the Security Council and UNCC governing council directly influenced the rules adopted by both Councils concerning the governance structure and management of the UNCC. They also governed the procedure for processing the claims. Governing council rules also provided substantive criteria for evaluating claims. Member states of the governing council were therefore able to indirectly influence the claims outcomes of the UNCC, including the environmental claims outcomes. Rules were also made by UNCC management and the panel. These rules mostly governed procedural matters such as amendment of claims, and the categorisation of claims. Nevertheless, such rules also influenced claims outcomes. In the thesis, I have disaggregated the political conflict at the UNCC into conflicts of actors and principles and seek to demonstrate that rule and environmental claims outcomes were influenced by these conflicts. Key actors displaced such conflicts onto procedural terrain and procedural rules and claims outcomes often reflected the resolution of those conflicts.

The thesis further shows that environmental claims outcomes were directly influenced by the panel, UNCC management, the legal officers in the F4 team and the panel's expert consultants. The most influential among these actors were the panel's expert consultants. As

a result, relatively weaker actors, such as legal officers and the panel's expert consultants, were also able to influence claims outcomes. To the extent that UNCC management and the panel made rules, weaker actors such as legal officers were able to influence rule outcomes as well. The thesis identifies critical rule outcomes that were the result of ongoing conflicts of principles and actors.

One such rule governed the extent of Iraq's participation in the environmental claims process. Another rule governed the extent of environmental claims material made available to Iraq for defending the claims. A third rule governed financial assistance to Iraq to employ lawyers and experts in defending the environmental claims. In several of these rules, weak actors were able to influence the rule outcomes by using mechanisms such as modelling and by advancing the principle of due process that had support in the legal epistemic community (referred to in the thesis as an epistemic community)¹⁷⁹ within the UNCC. For key actors at the UNCC, the principle of due process for Iraq conflicted with the principle of effective and expeditious justice for war victims as well as the principle of secrecy advanced by powerful state actors. Nevertheless, weak actors were incrementally able to influence those rule outcomes to reflect the principles of due process that they advanced.

The UNCC at its height employed over 200 lawyers. These lawyers belonged to a number of epistemic communities such as the domestic legal community of their country and international law communities including the community of lawyers employed by the UN and other international organisations. For the purposes of this thesis, I characterise the UNCC legal officers as forming a specialised in-house epistemic community. Within the UNCC they created the trappings of the common law system of adjudication complete with precedent and reporting systems. This internal system of law created and implemented by the internal UNCC legal epistemic community sometimes conflicted with the goals of key actors in the UNCC governing council and UNCC management. The internal UNCC legal epistemic community increased the complexity of decision-making for the stronger actors within the UNCC.

Opportunities for influencing outcomes are dependent on the manner in which those outcomes are produced (process), the substantive rules governing the outcomes and the

¹⁷⁹ I discuss the term 'epistemic community' in chapter 2 with reference to professional legal practitioners in the UNCC and in chapter 5 with reference to scientific experts working at or for the UNCC.

institutional structure (forum) for producing outcomes. The lack of civil society and NGO involvement in the UNCC and the lack of transparency paved the way for strong actors to take greater risks in skewing the process, structure, and rules to ensure that claims outcomes harmonised with their goals. The presence of NGOs and civil society would have enabled them to hold decision-makers and other actors at the UNCC more accountable. Since the Earth Summit and the resultant Rio Declaration on Environment and Development (1992), it has become less acceptable in international environmental forums, including other UN forums, to exclude NGOs and civil society, at the very least as observers. NGO and civil society have established expectations for participation in the conduct of such business, and international public officers have responded with appropriate behavioural changes that make the secretive nature of the UNCC's work an aberration in the sphere of international environmental decision-making. For F4 team members and the panel, many of who had been associated with domestic and international environmental law and policy, the culture of secrecy at the UNCC was a constant challenge and a source of discomfort. In chapters 2, 3, 5 and 6 I discuss how this tension played out as the UNCC's decision-making on environmental claims evolved.

In processing the environmental claims and producing rule outcomes, modelling was the dominant mechanism used by key actors to promote or oppose principles. Modelling was important in the way the panel examined and adapted methods used by other panels of the UNCC. It also served a useful purpose in the analysis of scientific and economic data (eg habitat-equivalency models or evidentiary-discounting models). In the context of relations within the UNCC, webs of influence, mechanisms such as coercion, reward and reciprocal adjustment were rarely used by key actors, including states. When they *were* used, they tended to operate at UNCC organisational and individual level rather than at the state level. At the personal level, they took the form of job or relationship-related sanctions or incentives.

I will develop the hypothesis that key state actors in the UNCC manipulated rule outcomes (procedures) to increase the probability of claimant successes and initially disadvantaged Iraq in the UNCC claims determination process. These same state actors reduced the probability of claim success and increased Iraq's influence in the claim determination process when their goals with respect to Iraq diverged from the time leading up to the 2003 US-led invasion of Iraq to after the invasion. I also argue that, in political processes, powerful actors manipulate rule outcomes (procedures) to increase or decrease the probability of substantive outcomes

that favour their goals, particularly if different actors (such as the commissioners constituting each panel), more remote from the influence of the powerful actors, are vested with the power to determine substantive outcomes. A broader investigation into other international judicial and quasi-judicial processes would be required to demonstrate that the hypothesis holds good for a variety of situations. While that is beyond the scope of this thesis, I draw some broader lessons in the concluding chapter.

I conclude that the UNCC was not dissimilar to previous war reparations tribunals established through ‘victor’s justice’,¹⁸⁰ but that it also manifests features that distinguishes it from them. I characterise the UNCC as a transitional institution which has laid the groundwork for a permanent international tribunal to process claims (including environmental claims) for international conflict. I also conclude that while lessons from the UNCC environmental claim experience can serve to inform us on how to develop more independent and impartial war reparations institutions in the future, such institutions cannot be divorced from the political context of the conflict that precedes or follows it. Understanding the UNCC’s rule and environmental claims outcomes in the context of the political dynamics that shaped them will enable their value as international precedents to be better assessed. Iraq’s petroleum resources were a ready source of funding for compensation payments by the UNCC, and the economic and political goals of the US and its allies were unusually well aligned with the goals of other key actors during the Gulf War. I therefore additionally conclude that the establishment of the UNCC was unique and unlikely to be replicated unless conditions very similar to the conditions associated with the Gulf War were present in future situations of armed conflict where vital natural resources are part of the equation.

E Reader’s Road Map

Chapter 1 provides an introduction to the thesis, a brief contextual overview of the Gulf War, sets out the thesis research questions, assesses potential research methods and analytical frameworks, explains the chosen research method and analytical framework for the thesis,

¹⁸⁰ ‘Victor’s justice’ is a term used to describe war reparations institutions (commissions, tribunals, courts, etc) established by the victorious state to compensate victims of the war (usually its own citizens) at the cost of the vanquished or occupied state. Generally, such tribunals were established with procedures that disfavoured the vanquished state and its citizens and favoured the victorious state and its citizens. For other comparisons of the UNCC to nineteenth and twentieth century war reparations tribunals see David J Bederman, *Historic Analogues of the UN Compensation Commission*, in Richard B Lillich (ed), *The United Nations Compensation Commission [Thirteenth Sokol Colloquium]* (Transnational Publishers, 1995) 257–309; Citations in Cymie R Payne, ‘Environmental Claims in Context: Overview of the Institution’ in Cymie R Payne and Peter H Sand (eds), *Gulf War Reparations and the UN Compensation Commission* (Oxford University Press 2011) 4–7.

explains basic concepts used, summarises the main thesis conclusions and ends with this reader’s road map.

Chapter 2 discusses actors, forums and webs of influence setting the context for an examination of the contest of actors and principles at the UNCC and revealing the manner in which actors used webs to exert their influence within the UNCC.

Chapters 3 to 5 each delve into specific ways in which actors influenced the rule (procedure) and claims outcomes at the UNCC. Each of these three chapters respectively examine the way in which actors (a) manipulated Iraq’s participatory space, (b) assisted claimants to make and prosecute claims and (c) used and relied on external experts and consultants to determine claims outcomes.

The sixth and final chapter reflects on the previous chapters, and in particular, makes recommendations for future design of war reparations tribunals dealing with environmental damage. Table 2 provides more detail on what the reader can expect in each of the thesis chapters.

Table 2. Thesis Chapters and Summary of Contents

Chapter	Summary of Contents
1	Introduction and Overview: The Gulf War and its environmental consequences, the research questions, research method, data gathering issues, concepts, conclusions and reader’s road map.
2	Forums, Actors and Webs of Influence: This chapter examines the configuration of actors, decision-making settings (forums) and the make-up of the webs of influence (with illustrative material). It includes a discussion on the ways in which influence was exerted and information conveyed across these webs, particularly as far as this was expressed in decision-making and procedural and substantive rule/claims outcomes (again, with illustrative material).
3	Iraq’s Participatory Space: This chapter focuses on the particular significance of procedure as terrain across which influences and actor’s contestation of principles were played out (again, with illustrative material). The chapter focuses on procedural outcomes that governed Iraq’s participatory space in the environmental claims – evolving from a very limited space to a larger space after the US-led invasion of Iraq in 2003. The material and discussion in this chapter provides a strong sense of the mechanisms used by key actors and the principle of due process for Iraq being contested, contestable and worthy of contestation.
4	Procedural Outcomes Favouring Claimants: This chapter focuses on procedural outcomes that were favourable to claimants, thereby increasing the probability of success in their environmental

	claims. The materials and analysis in this chapter also provide a strong sense of the mechanisms used and principles (such as expeditious and effective justice for victims and secrecy) that were advocated, implemented or translated into rule outcomes.
5	Experts, Claims Outcomes and Accountability: This chapter focuses on the role and significance of external consultants in the substantive evaluation of environmental claims. This chapter examines the influence of external experts in determining claims outcomes and the interplay between them and the procedural outcomes discussed in the previous two chapters.
6	Conclusions and Lessons: This chapter reflects on the contest of actors and principles leading to claims and rule outcomes and how actors used mechanisms and webs of influence to achieve their goals. In it, I draw on the preceding analysis and materials and seek to respond to the questions raised in the thesis. The chapter draws lessons from the analysis and proposes improvements to the UNCC model for future international conflict related environmental claims processing.

CHAPTER 2

FORUMS, ACTORS AND WEBS OF INFLUENCE

A Introduction

This chapter examines and analyses the constellation of key actors at the UNCC and the configuration of decision-making bodies (forums) in which they went about their day-to-day work. It further explores and analyses how these actors interacted and communicated with each other. It develops the notion of the webs of influence that key actors wove through their interactions. I analyse the make-up of these webs of influence and discuss the ways in which influence was exerted and information conveyed across them, particularly as far as this was expressed in decision-making on procedural rules and substantive claims outcomes. It is argued that through these webs of influence key actors advocated or opposed principles that shaped the rule and environmental claims outcomes at the UNCC. The webs of influence served as the vehicle through which key actors deployed mechanisms (tools) to achieve their goals. I also analyse the legal epistemic community at the UNCC and argue that it was a key actor in its own right. This chapter provides the underlying basis for addressing the thesis questions.

B The Establishment and Structure of the UNCC

1 Ceasefire Negotiations

UN Security Council members, especially the permanent five, carried out intensive negotiations on post-war measures after the cessation of hostilities. Resolution 686 of the Security Council adopted on 2 March 1991¹ captured the results of those early negotiations and paved the way for Resolution 687,² a landmark resolution in the history of international armed conflict. The text of these two resolutions is in the appendix to the thesis. The origins of the UNCC are found in those resolutions.³

When the war ended, the Security Council expected assurances from Iraq that it would comply with all the resolutions already adopted.⁴ The issue of liability for war damage also loomed large. Resolution 686 covered all of these issues and demanded, inter alia, that Iraq accept its liability for loss, damage and injury arising from its invasion and occupation of

¹ SC Res 686, UN SCOR, 2978th mtg, UN Doc S/Res/686 (2 March 1991).

² SC Res 687, UN SCOR, 2981st mtg, UN Doc S/Res/687 (3 April 1991).

³ Ibid paras 16–19.

⁴ SC Res 686, above n 1, paras 2, 4.

Kuwait.⁵ Most importantly, the Security Council insisted that until Iraq complied with the demands of the resolutions, the provisions of Resolution 678 adopted earlier, authorising member states to use ‘all necessary means’, would remain effective.⁶ The resolution was proposed by the US, the UK, the USSR, France and three other countries.⁷ Resolution 686 was adopted with 11 votes in favour, one against (Cuba) and three abstentions (China, India and Yemen).⁸

The next day, 3 March 1991, Iraq agreed to fulfil its obligations under Resolution 686.⁹ It followed this up with a number of other written affirmations of its intention to comply with the resolution.¹⁰ With these steps, the door was open for further negotiations to take place on postwar reparations and a permanent ceasefire.

Postwar negotiations on key issues culminated with the Security Council adopting Resolution 687 on 3 April 1991.¹¹ The US, the UK, France, Belgium, Romania and Zaire sponsored the resolution.¹² The resolution received 12 votes in favour, one against (Cuba) and two abstentions (Ecuador and Yemen).¹³ Cuba and Yemen maintained that the issue of compensation fell within the jurisdiction of the International Court of Justice under the provisions of Article 36 of its statute and that it was not within the Security Council’s competence to include provisions in the resolution about war reparations and compensation claims.¹⁴ On the other hand, the US, the UK, China and France reiterated the importance of providing a mechanism for war reparations and expressed the view that doing so was essential for the restoration of peace in the region.¹⁵ The UK stated that the mechanism of the UNCC was one which balanced the need for compensating losses with Iraq’s ability to pay compensation while recovering from its own losses.¹⁶ Several delegates noted the extensive

⁵ Ibid para 2.

⁶ Ibid para 4.

⁷ M Weller (ed), *Iraq and Kuwait: The Hostilities and the Aftermath* (Grotius Publications, 1993), 88–90.

⁸ Ibid 93.

⁹ United Nations Department of Public Information, *The United Nations and the Iraq-Kuwait Conflict, 1990–1996* (United Nations Department of Public Information, 1996), 30. This was done through identical letters dated 3 March 1991 written by Iraq to the President of the United Nations Security Council and the Secretary-General.

¹⁰ Ibid.

¹¹ SC Res 687, above n 2.

¹² Weller, above n 7, 103.

¹³ Ibid 113.

¹⁴ Ibid 108, 112.

¹⁵ Ibid 113–23.

¹⁶ Ibid 119.

environmental damage caused by the withdrawing Iraqi forces.¹⁷ In a statement Kuwait, affirmed that the environmental damage was extreme and, in some instances, affected other states as well.¹⁸

Resolution 687 was a landmark in the history of the UN for several reasons. It traversed uncharted territory. The resolution dealt with a number of key issues including war reparations, the establishment of a compensation fund and an onerous sanctions regime.¹⁹ The resolution reaffirmed, amongst other things, that ‘Iraq ... is liable under international law for any direct loss, damage, *including environmental damage and the depletion of natural resources*, or injury to foreign Governments, nationals and corporations, as a result of Iraq’s unlawful invasion and occupation of Kuwait’.²⁰

On 6 April 1991, Iraq protested the ‘unjust’ nature of the resolution, complaining that its measures were ‘iniquitous and vengeful’ and that it was an ‘unprecedented assault’ on the sovereignty of Iraq.²¹ In particular, Iraq drew the Security Council’s attention to the fact that no such measures had been adopted against other countries in like situations and accused the UN of applying double standards to Iraq. Despite these objections, Iraq accepted the terms of the resolution on 6 April 1991 after the Iraqi National Assembly approved it.²² The president of the Security Council declared the acceptance as ‘irrevocable’, ‘without qualifying conditions’ in terms of paragraph 33 of the resolution.²³ Kuwait had accepted the terms of the resolution on 4 April 1991. The formal ceasefire became effective from 11 April 1991.

2 The UN Compensation Fund and UNCC

Resolution 687 established a compensation fund to pay Gulf War reparations claims and set up a commission to administer the fund.²⁴ This commission was the embryo for the UNCC. The resolution requested the Secretary-General to make recommendations within thirty days on a number of matters relating to the fund and the implementation of Iraq’s liability for war

¹⁷ Ibid 104, 113-123.

¹⁸ Ibid 122. These states included Saudi Arabia and Iran.

¹⁹ Ibid 31-33.

²⁰ SC Res 687, above n 2, para 16, (emphasis added).

²¹ United Nations Department of Public Information, above n 9, 35.

²² United Nations Security Council, *Identical Letters from the Deputy Prime Minister and Minister of Foreign Affairs of Iraq to the President of the Security Council and to the Secretary-General*, UN Doc S/22456 (6 April 1991).

²³ United Nations Security Council, *Letter from President of the Security Council to the Permanent Representative of Iraq*, UN Doc S/22485 (11 April 1991).

²⁴ SC Res 687, above n 2, para 18.

reparations.²⁵ In particular the resolution requested the Secretary-General to make recommendations on:

- a) mechanisms for deciding on Iraq's appropriate level of contributions to the fund;
- b) the process by which funds will be allocated and claims paid;
- c) appropriate procedures for evaluating losses, listing claims and verifying their validity, and resolving disputed claims in respect of Iraq's liability as set out in the resolution; and
- d) the composition of the commission designated in the resolution.²⁶

The contribution to the fund would be a percentage of the value of Iraq's export of petroleum and petroleum products, not to exceed a figure to be suggested to the Security Council by the Secretary-General. The resolution required the Secretary-General to take a number of factors into account when recommending an appropriate level of Iraqi contributions to the fund. These included (a) the requirements of the people of Iraq, which was understood to include food, medicines and other essentials, (b) Iraq's capacity to pay as assessed in conjunction with international financial institutions and taking into consideration the servicing of its international debt and (c) the needs of Iraq's economy.²⁷

On 2 May 1991, the Secretary-General submitted the report called for by the Security Council in Resolution 687.²⁸ The report was in two parts. The Security Council dealt with the contents of the Secretary-General's report by adopting Resolution 692 on 20 May 1991 with a near-unanimous vote in favour (Cuba abstained).²⁹ Recommendations contained in section I of the report relating to the fund, the commission, its structure, status, privileges and immunities, expenses, headquarters, functions, the commissioners and the secretariat³⁰ were accepted without reservations.³¹ Other recommendations in section II of the report concerning claims procedure, Iraq's right to participate in proceedings and the payment of claims³² were

²⁵ Ibid para 19.

²⁶ Ibid.

²⁷ Ibid.

²⁸ United Nations Security Council, *Report of the Secretary-General regarding creation of a United Nations Compensation Fund and United Nations Compensation Commission as envisaged in Security Council Resolution 687 (1991)*, UN Doc S/22559 (2 May 1991).

²⁹ SC Res 692, UN SCOR, 2987th mtg, UN Doc S/Res/692 (20 May 1991).

³⁰ Ibid paras 3–12.

³¹ Ibid para 3.

³² Ibid paras 13–29.

not expressly adopted, largely because of objections by the US and its allies.³³ Instead, the Security Council directed the UNCC governing council to set up the institution and its rules ‘taking into account the recommendations in section II of the Secretary-General’s report’.³⁴ The Security Council did not decide the issue of Iraq’s participatory space in the claims processes and instead delegated it to be decided by the UNCC governing council.³⁵ The evolving extent of Iraq’s participatory space is one aspect in which there were vigorous contests at the UNCC between actors and principles. It is therefore an important phenomenon analysed in chapters 3 and 6 of this thesis.

The UNCC and the compensation fund were established by this resolution. It specified that the location of the commission’s headquarters was to be at the UN head office in Geneva.³⁶ The fund and the UNCC became subsidiary bodies under the Security Council. The report recommended that the UNCC be composed of three bodies, namely the governing council, the secretariat and the commissioners.³⁷ The resolution specifically stated that Iraqi oil exports from 3 April 1991 onwards would be subject to Iraq’s contribution to the fund, and that oil exports prior to that date that had not yet been paid for and that were covered by the sanctions imposed under Resolution 661 of 6 August 1990³⁸ would be caught up within this requirement.³⁹ The Security Council made it clear that if Iraq did not comply with this resolution, it would retain or reimpose a total ban on oil exports from Iraq.⁴⁰

The last link in this chain of Security Council actions setting the stage for the UNCC’s work was the fixing of Iraq’s contribution to the compensation fund. As required by paragraph 19 of Security Council Resolution 687, the Secretary-General submitted a note dated 31 May 1991 to the Council recommending that Iraq contribute no more than 30 per cent of the

³³ Ronald J Bettauer, ‘Establishment of the United Nations Compensation Commission: The U.S. Government Perspective’ in Richard B Lillich (ed), *The United Nations Compensation Commission [Thirteenth Sokol Colloquium]*, (Transnational Publishers, 1995), 33. Bettauer was an assistant legal advisor for international claims and investment disputes in the US State Department and later became its deputy legal advisor.

³⁴ SC Res 692, above n 29, para 5.

³⁵ This issue is discussed further in chapter 3 of this thesis.

³⁶ SC Res 692, above n 29, para 3.

³⁷ United Nations Security Council, *Report of the Secretary-General regarding creation of a United Nations Compensation Fund and United Nations Compensation Commission as envisaged in Security Council Resolution 687 (1991)*, above n 26, [5]–[6].

³⁸ SC res 661, UN SCOR, 2933rd mtg, UN Doc S/Res/661 (6 August 1990).

³⁹ SC Res 692, above n 29, para 6.

⁴⁰ *Ibid* para 9.

annual value of petroleum and petroleum product exports to the compensation fund.⁴¹ The note made this recommendation after citing Iraq's past oil production data, OPEC quotas and past history of Iraq's foreign exchange expenditures for civilian purposes, consumption, investment, gross domestic product, external debt and hypothetical rescheduling of Iraqi debt on standard Paris Club terms.⁴² The Security Council approved the Secretary-General's recommendation of a 30 per cent Iraqi contribution by adopting Resolution 705 on 15 August 1991 and stated that it would review this figure from time to time.⁴³ Later, the Security Council revised this rate to 25 per cent,⁴⁴ and after the invasion of Iraq by US-led forces in 2003 and the fall of Saddam Hussein's regime, further revised it downward to 5 per cent when pressed by the US.⁴⁵

3 Iraqi Reactions

The Iraqi Minister of Foreign Affairs, Tariq Aziz⁴⁶ was quick to protest the resolution in the strongest terms. In a letter dated 27 May 1991 addressed to the president of the Security Council, Iraq characterised Resolution 692 establishing the UNCC and the compensation fund as a 'further dangerous precedent'.⁴⁷ First, Iraq complained about the lack of openness in the procedure followed by the Security Council in adopting the resolution, because the Council had not allowed Iraq or other member states of the UN to express their views on the resolution.⁴⁸ The lack of transparency later became a hallmark of the UNCC. It alluded to the rise of the power of the US in a post-Cold War era and alleged that the US had become the 'dominant element' in the Security Council.⁴⁹ It accused the US of using the Security Council

⁴¹ United Nations Security Council, *Note from the Secretary-General to the President of the Security Council Concerning Iraq's Contribution to the United Nations Compensation Fund*, UN Doc S/22661 (31 May 1991) [7].

⁴² Ibid [4]–[6]; Paris Club, *Welcome to the Paris Club Website*, <<http://www.clubdeparis.org/en/>>. 'The Paris Club is an informal group of official creditors whose role is to find coordinated and sustainable solutions to the payment difficulties experienced by debtor countries'.

⁴³ SC Res 705, UN SCOR, 3004th mtg, UN Doc S/Res/705 (15 August 1991). The US was not happy with 30 per cent and called for a 50 per cent contribution. See 'U.S. challenges UN on Iraq reparations', *Chicago Tribune* (Chicago), 4 June 1991, 4. The US is reported to have asked for a 50 per cent charge on Iraqi oil sales to pay for reparations and for economic sanctions to be maintained until Saddam Hussein left office.

⁴⁴ SC Res 1330, UN SCOR, 4241st mtg, UN Doc S/Res/1330 (5 December 2000).

⁴⁵ SC Res 1483, UN SCOR, 4761st mtg, UN Doc S/Res/1483 (22 May 2003).

⁴⁶ After the fall of Saddam Hussein's regime, Tariq Aziz was arrested, tried in Iraq for crimes against humanity and sentenced to death in October 2010. However, his execution was stayed by the President of Iraq. BBC News Middle East, *Talabani Refuses to Sign Tariq Aziz Execution Order* <<http://www.bbc.co.uk/news/world-middle-east-11772765>>.

⁴⁷ United Nations Security Council, *Letter from the Minister of Foreign Affairs of Iraq Addressed to the President of the Security Council*, UN Doc S/22643 (28 May 1991).

⁴⁸ Ibid.

⁴⁹ Ibid.

to bestow ‘international legitimacy’ on what Iraq saw as a war of aggression implemented in the name of, but without the supervision or control of, the Security Council.⁵⁰

Iraq also asserted several legal positions in opposition to the resolution. It consistently maintained these objections throughout the life of the UNCC. First, it argued that the Security Council had no legal authority as part of its peace-keeping mandate under the UN Charter to establish a judicial body such as the UNCC.⁵¹ The power of determining reparations, Iraq argued, was vested in the International Court of Justice, a comment that echoed those of Yemen and Cuba. It went further and alleged that, in exceeding its jurisdiction to establish the UNCC, the Security Council was acting ‘under great pressure from the United States of America, Britain and France’.⁵² Having asserted that the International Court of Justice was an ‘independent authority’, Iraq asserted that the compensation fund and the governing council of the UNCC reflected ‘the political composition of the Security Council’.⁵³ Iraq questioned the validity of the Security Council converting from ‘a principal organ for the maintenance of international peace and security into an organ which establishes judicial organs subsidiary to itself’.⁵⁴

Iraq then made a further assertion in its letter of objection, which is directly relevant to this thesis. It stated that ‘[t]he political composition of this [Governing] Council will make the criterion for consideration of compensation based on the interests and policies of States members of the Council, not on the principles of international law, without according Iraq the right to defend itself or consult its current and future economic interests’.⁵⁵ One of the conclusions of this thesis is that key actors, including the US, did indeed influence UNCC procedural rules and thus claims outcomes by using mechanisms to advance or oppose principles that served their goals. To this extent, Iraq has been proved right with regard to its critique of the UNCC claims processes.⁵⁶ Chapter 3 shows that Iraq did not have an adequate opportunity to defend the claims during the first two instalments of the environmental claims — a situation that was also true for the vast majority of claims in other categories. The thesis

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ See chapter 3 for a discussion of Iraq’s space to defend the claims.

also shows that Iraq's right and ability to defend the environmental claims significantly improved during the third, fourth and fifth instalments of environmental claims.

Iraq also drew the Security Council's attention to several matters, including the inequity of imposing compensation payments on Iraq at a time when it needed to recover from its own destruction and damage caused by the Allied Coalition forces.⁵⁷ Iraq alleged in its letter to the Security Council that Resolution 692 had 'opened the door wide to all greedy and crafty parties to submit various false or exaggerated claims without Iraq having any right to establish their lack of legitimacy'.⁵⁸ Subsequent events showed that there were some fictitious and false claims but, for the most part, claims filed against Iraq in the UNCC, particularly those on behalf of individuals and families affected were neither false nor exaggerated.⁵⁹ With respect to the environmental claims, claimants did exaggerate the quantum claimed but no claim was found to be completely false.⁶⁰ The panel rejected several environmental claims simply because there was insufficient evidence to support them.⁶¹

Iraq protested the initial 30 per cent contribution required by the Security Council in 1991, requesting that it be lowered or deferred because of the 'sufferings endured by the Iraqi population of all social classes' and 'the economic difficulties faced by Iraq as a society and State'.⁶² For a considerable period, Iraq refused to export any oil, stifling the implementation of Security Council resolutions requiring contributions to the compensation fund from Iraq.⁶³

⁵⁷ Ibid.

⁵⁸ Ibid

⁵⁹ There were some claims that were found to be false or duplicates in later investigations. Many of these were investigated and rectified. For all claims that were corrected see United Nations Compensation Commission, *Reports of the Executive Secretary Pursuant to Article 41 of the Provisional Rules for Claims Procedure* <<http://www.uncc.ch/execsecr.htm>>. Owing to my personal connections with Sri Lanka, I am aware of personal loss claims from Sri Lanka which came from men and women who were employed in Kuwait and Saudi Arabia. They had to flee, abandoning their personal property as a result of the war.

⁶⁰ Based on the published panel reports, the panel's awards on the environmental claims amounted to about 6.2 per cent of the total amount claimed by all claimants. In many cases, claim amounts were reduced because the panel's expert consultants and UNCC staff found costs for restoration and monitoring and assessment studies had been over-estimated. United Nations Compensation Commission, *Status of Processing and Payment of Claims* <<http://www.uncc.ch/status.htm>>.

⁶¹ United Nations Compensation Commission, *Status of Processing and Payment of Claims* <<http://www.uncc.ch/status.htm>>. Based on the published panel reports, the panel rejected 59 out of 168 claims mostly for lack of evidence.

⁶² United Nations Security Council, *Letter from the Permanent Representative of Iraq to the President of the Security Council*, UN Doc S/22957 (16 August 1991).

⁶³ For example see the statement by the president of the Security Council on 23 November 1992 setting out Iraq's refusal to cooperate in implementing SC Res 706 and SC Res 712 resulting in the Security Council adopting SC Res 778; United Nations Security Council, *Note by the President of the Security Council*, UN Doc S/24836 (23 November 1992), [19]–[21]. See also United Nations Security Council, *Report of the Secretary-General Pursuant to Security Council Resolution 778 (1992), Concerning the Whereabouts and Amounts of*

Iraq regularly and consistently requested the Security Council to lift the trade embargo, arguing that it was not appropriate or lawful to keep the embargo alive after the cessation of hostilities and Iraq's acceptance of Resolution 687.⁶⁴ Iraq was militarily weak after its defeat in the Gulf War. The sanctions regime imposed by the Council had crippled much of its economic activities and the groundwork had thereby been laid for the humanitarian crisis that followed.

The US had provided military leadership for Operation Desert Storm. It also provided leadership in the Security Council and the five permanent members of the Council acted with 'impressive cooperation' at that time.⁶⁵ The US-UK-France axis was extremely strong while the USSR (Russia from 25 December 1991 onwards) was struggling under its own internal political upheavals and economic challenges and therefore 'had little option but to yield to Washington's sole superpower status'.⁶⁶ The 'relative harmony' between the five permanent members of the Security Council 'ushered in at the end of the Cold War and marked by genuine P-5 cooperation in addressing challenges to international peace and security' ended in 1998 when the US-UK-France axis was shaken, after France (together with Russia and China) opposed a bombing campaign (Operation Desert Fox) proposed by the US to enforce the sanctions regime against Iraq.⁶⁷ Much of that split was orchestrated as a consequence of internal French politics and the rise to power of a more nationalistic government.⁶⁸ Despite its location in Geneva, away from the Security Council in New York, the changing political configurations were also reflected in the UNCC governing council (albeit with less intensity) and, as discussed in chapters 3 and 4, impacted upon the rule outcomes that established claim categories, procedural rules for processing claims and award payment priorities.

C Forums

There were three decision-making bodies associated with the UNCC. They were the UN Security Council, the UNCC governing council, and the panels. I have chosen to treat them as

Iraqi Petroleum and Petroleum Products and the Proceeds of Sale, UN Doc S/25863 (27 May 1993); United Nations Security Council, *Letter from the Secretary-General to the President of the Security Council*, UN Doc S/1994/907 (30 July 1994).

⁶⁴ For example see United Nations Security Council, *Letter from the Permanent Representative of Iraq to the President of the Security Council*, above n 62; United Nations Security Council, *Letter from the Minister of Foreign Affairs of Iraq Addressed to the President of the Security Council*, UN Doc S/26811 (26 November 1993).

⁶⁵ David Malone, *The International Struggle Over Iraq* (Oxford University Press, 2006) 15.

⁶⁶ *Ibid* 272.

⁶⁷ *Ibid* 11–12.

⁶⁸ *Ibid* 269–72.

forums in this thesis because they were the main organs of the UNCC that produced environmental rule and claims outcomes. Some rules were also produced by the F4 team leader and UNCC management.⁶⁹ However, I have treated these last two as actors rather than forums because in producing rules they acted alone — rather than serving as a participatory space in which other actors could interact. They did consult with other actors, but did so as a matter of discretion or good judgement rather than by virtue of any rules of procedure.

All three forums had rules of procedure for meeting, transacting business and making decisions. Those rules of procedure allowed for the participation of actors who were members of the forum as well as non-member actors. For example, the governing council procedure provided for the participation of non-member states and the UNCC secretariat.⁷⁰ The Provisional Rules for Claims Procedure (the Rules) provided for the participation of claimant states, Iraq, the F4 team and expert consultants in the panel proceedings.⁷¹ The three forums also maintained records of their meetings and decisions, though the records of the governing council and the panel were not public.⁷² Forums are those places where actors formally engaged in discussion and formulated rules and claims outcomes.

Key actors such as states (including claimant states and Iraq), commissioners, UNCC management staff, the F4 team and the panel's expert consultants interacted in these three forums. Some of these actors interacted in one forum only and others in several.⁷³ UNCC management staff enjoyed a unique position among all the actors in that they participated in all three forums. Actors also interacted within and outside these forums.⁷⁴

⁶⁹ For example the standard operating procedures of the F4 team were produced by UNCC management and the F4 team leader.

⁷⁰ United Nations Security Council, *Letter from President of the Governing Council of the United Nations Compensation Commission to President of the Security Council*, UN Doc S/22885 (2 August 1991) annex I ('*Guidelines for the Conduct of the Work of the Governing Council of the United Nations Compensation Commission*') [5].

⁷¹ United Nations Compensation Commission, *Governing Council, Decision 10*, of the, 6th sess, 27th mtg, UN Doc S/AC.26/1992/10 (26 June 1992) arts 34, 36.

⁷² *Ibid* art 30; United Nations Security Council, *Letter from President of the Governing Council of the United Nations Compensation Commission to President of the Security Council*, above n 70, [2], [6]–[7].

⁷³ Each of these actors is discussed below in detail. The discussion covers the manner in which they interacted in the forums, personnel management and meeting rules and procedures.

⁷⁴ For example, diplomats heading state delegations in the UNCC governing council were staff from the Geneva-based permanent missions of those states. They dealt with numerous UN-related issues and subjects and agencies. They also met socially at diplomatic functions and celebrations. UNCC management staff also interacted informally with F4 team members and with each other.

However, each of the three forums can also be characterised as actors in their own right. For example, the UNCC governing council might be treated as an actor interacting with the Security Council or the panel or with Iraq. However, these interactions were few and far between and were always formal.

1 *The UN Security Council*

The oldest of the forums was of course the UN Security Council, which had well-established rules of procedure and practices. The Security Council has 15 members, five of whom are permanent members.⁷⁵ The five permanent members are the US, the UK, France, Russia and China. The 10 non-permanent members rotate every two years and are drawn from the UN membership.⁷⁶ Unless otherwise decided, the Security Council meets in public.⁷⁷ Proceedings of the Security Council are recorded in provisional verbatim records, which are made available to the public on the first working day following the meeting.⁷⁸ This is an important difference between the Security Council and the UNCC governing council, in that the latter's proceedings were never made public. As argued in chapters 3 to 5, the closed nature of the governing council's proceedings affected the rule and environmental claims outcomes it produced.

The Security Council can decide on procedural matters 'by an affirmative vote of nine members' and all other matters 'by an affirmative vote of nine members, including the concurring votes of the permanent members'.⁷⁹ Each permanent member of the UN Security Council has a veto, allowing them to prevent any particular outcome. The Council has interpreted the requirement of concurrence of the permanent members as not preventing a decision even if a permanent member abstains, refuses to vote or is absent.⁸⁰ As such, to prevent a decision, a permanent member has to exercise the veto and cast a negative vote.⁸¹

⁷⁵ *Charter of the United Nations* art 23.

⁷⁶ *Ibid.*

⁷⁷ United Nations Security Council, *Provisional Rules of Procedure of the Security Council*, UN Doc. S/96/Rev.7 (1983) r 48 <<http://www.un.org/Docs/sc/scrules.htm>>.

⁷⁸ *Ibid* r 49. United Nations Dag Hammarskjöld Library, *Meetings conducted / Actions taken by the Security Council* <<http://www.un.org/Depts/dhl/resguide/scact.htm>>. These records are available to the public and on the internet.

⁷⁹ *Charter of the United Nations* art 27.

⁸⁰ Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (Oxford University Press, 2nd Edition, 2002), 476 et seq.

⁸¹ *Ibid.*

As a matter of practice though, diplomatic efforts are made to reach consensus on draft decisions.⁸²

The veto power is a significant source of influence in the Security Council. Each of the permanent members has used it from time to time. For example, the US invasion of Iraq and overthrow of Saddam Hussein's regime in 2003, without a supporting Security Council resolution was prompted by the opposition of France and Russia to the use of force and the real possibility that a resolution would be blocked by the use of their vetoes.⁸³ This situation is in contrast to the 1991 UN Security Council-supported liberation of Kuwait in the Gulf War.⁸⁴ Before the Council takes a vote, it is customary for member states to declare their positions on a proposed decision. Negotiations take place before a decision is proposed (usually in the form of a resolution) or when it is before the Council. The practices of the Council also afford member states an opportunity to make statements following a vote on a resolution. Together, these statements provide valuable evidence of the goals of member states and principles advocated or opposed by them. Sometimes they also provide evidence of mechanisms employed by member states to influence an outcome.

The functions of the UN Security Council in respect of the UNCC were:

- Establishing and overseeing the UNCC;⁸⁵
- Defining the UNCC mandate and its basic structure and funding mechanisms;⁸⁶
- Deciding Iraq's contribution to the compensation fund if the UNCC governing council could not agree;⁸⁷ and
- Receiving and considering regular reports from the UNCC.⁸⁸

⁸² Michael J Matheson, *Council Unbound* (United States Institute of Peace Press, 2006) 23–4.

⁸³ Malone, above n 65, 14–15.

⁸⁴ *Ibid.*

⁸⁵ SC Res 687, above n 2, paras 19, 34.

⁸⁶ *Ibid.* See also SC Res 692, above n 29, paras 3, 5, 10; United Nations Security Council, *Report of the Secretary-General regarding creation of a United Nations Compensation Fund and United Nations Compensation Commission as envisaged in Security Council Resolution 687 (1991)*, above n 28.

⁸⁷ SC Res 692, above n 29, paras 6–7. See also SC Res 687, above n 2, para 19; United Nations Security Council, *Report of the Secretary-General regarding creation of a United Nations Compensation Fund and United Nations Compensation Commission as envisaged in Security Council Resolution 687 (1991)*, above n 28, [13].

⁸⁸ SC Res 692, above n 29, para 8; United Nations Security Council, *Letter from President of the Governing Council of the United Nations Compensation Commission to President of the Security Council*, above n 70.

Most of these foundational tasks were accomplished in 1991. The involvement of the Security Council in the UNCC thereafter was marginal.⁸⁹ The president of the UNCC governing council sent regular reports to the Security Council, many of which are publicly available on the internet.⁹⁰ The membership of UNCC governing council mirrored that of the Security Council⁹¹ (with some important procedural differences noted below) and in this sense it was the Security Council's alter ego.

2 The UNCC Governing Council

The UNCC governing council was responsible for establishing criteria for the compensability of the claims, guidelines for the administration of the secretariat, the compensation fund, the procedure for processing the claims and the final approval of recommendations for awards by the panels of commissioners.⁹² The veto power exercised by permanent members of the Security Council did not apply in the UNCC governing council, and decisions could be made by majority vote.⁹³ In determining Iraq's contributions to the fund, the UNCC governing council decisions were to be made by consensus and, if consensus failed, the matter was required to be referred to the Security Council.⁹⁴ As a matter of practice though, the UNCC governing council established a tradition of deciding on all matters by consensus, generally achieved through a working group established by the Council to deal with contentious issues.⁹⁵ All decisions made hitherto had been by consensus.⁹⁶ Despite the practice of consensus and the absence of veto powers, some permanent members of the Security Council exerted considerable influence within the UNCC governing council.⁹⁷ Part of the influence

⁸⁹ There were two situations thereafter when the Security Council decided on issues concerning the UNCC. First it received regular reports from the president of the governing council about the ongoing progress at the UNCC. Second, it considered a request by Iraq for revisions to the procedural rules and referred it back to the governing council for decision.

⁹⁰ SC Res 692, above n 29, para 8. For example see United Nations Security Council, *Letter dated 23 October 2008 from the President of the United Nations Compensation Commission addressed to the President of the Security Council*, <<http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Iraq%20Kuwait%20S2008658.pdf>>.

⁹¹ United Nations Security Council, *Report of the Secretary-General regarding creation of a United Nations Compensation Fund and United Nations Compensation Commission as envisaged in Security Council Resolution 687 (1991)*, above n 28, [5]–[6].

⁹² *Ibid* [10].

⁹³ *Ibid*.

⁹⁴ *Ibid* [10], [13].

⁹⁵ United Nations Compensation Commission, *The Governing Council* <<http://www.uncc.ch/governin.htm>>.

See also Carlos Alzamora, 'The UN Compensation Commission: An Overview' in Richard B Lillich (ed), *The United Nations Compensation Commission [Thirteenth Sokol Colloquium]*, (Transnational Publishers, 1995) 5, 14.

⁹⁶ *Ibid*.

⁹⁷ The US, the UK and France exerted considerable influence on the governing council. There were also senior UNCC management staff who were US nationals who worked closely with the US, UK and French Delegations. See also Bettauer, above n 33. Bettauer gives a clear sense of this close collaboration and influence.

came from their close association with the creation of the UNCC by the Security Council and their own historic influence within that Council. For example, the US, the UK and France played a pivotal role in shaping Iraq's participatory space in the claims process.⁹⁸ Furthermore, after the 2003 US-led invasion of Iraq, the US (supported by the UK) played an important role in the Security Council and the UNCC governing council in reducing Iraq's contribution to the compensation fund from 25 per cent to 5 per cent of annual oil sales.⁹⁹

The functions of the UNCC governing council were:

- Reporting regularly to the Security Council on its progress;
- Further defining its own structure and procedures;
- Establishing rules for the compensation fund;
- Approving UNCC budgets;
- Receiving audit reports;
- Establishing categories of claims, procedural rules and guidelines for determining claims outcomes;
- Appointing commissioners and constituting panels;
- Considering and approving awards and panel recommendations;
- Overseeing UNCC management; and
- Receiving and considering representations from claimants, Iraq and other UN members.¹⁰⁰

The working group of the governing council that dealt with controversial issues produced consensual decisions through iterative negotiations.¹⁰¹ They involved negotiations in working groups or the corridors of the UN in Geneva.¹⁰² For example, the working group on claims procedure took over six months to develop the rules for the operation of the UNCC.¹⁰³ Some

⁹⁸ See chapter 3 for discussion of their role.

⁹⁹ See discussion of the post-2003 role of the US in chapter 3.

¹⁰⁰ SC Res 687, above n 2, paras 16, 19; United Nations Department of Public Information, above n 9, 240, 280, 459; SC Res 692, above n 29.

¹⁰¹ Bettauer, above n 33; Raboin, Michael, F., 'The Provisional Rules for Claims Procedure of the United Nations Compensation Commission: A Practical Approach to Mass Claims Processing' in Richard B Lillich (ed), *The United Nations Compensation Commission [Thirteenth Sokol Colloquium]*, (Transnational Publishers, 1995), 119, 123; United Nations Compensation Commission, *The Governing Council* <<http://www.uncc.ch/governin.htm>>.

¹⁰² Ibid.

¹⁰³ Michael F Raboin, 'The Provisional Rules for Claims Procedure of the United Nations Compensation Commission: A Practical Approach to Mass Claims Processing' in Richard B Lillich (ed), *The United Nations Compensation Commission [Thirteenth Sokol Colloquium]*, (Transnational Publishers, 1995), 119–31.

aspects of the rules were contentious, especially with regard to the amount of participatory space for Iraq.¹⁰⁴ Multiple negotiations took place with varying constellations of state and UNCC management actors, each advocating principles to suit their goals.¹⁰⁵ The rules went through many drafts before completion.¹⁰⁶

The governing council had discretion to allow members of the UN to attend and participate in its proceedings without the right to vote.¹⁰⁷ The general procedure adopted by the governing council provided for claimant states, Iraq and other interested states to make statements (on invitation) at the commencement of council meetings and to withdraw soon thereafter.¹⁰⁸ The governing council conducted its proceedings in camera, thus excluding claimant states, Iraq, other UN member states, international organisations, non-governmental organisations and the public from its deliberations and decision-making processes.¹⁰⁹ Although the rules stated that the governing council could open the meetings to the public when necessary for enhancing the effectiveness of the council, the meetings were in fact never opened to the public.¹¹⁰ The principle of secrecy embedded by the governing council in its basic rules percolated throughout the UNCC bureaucracy and panels.¹¹¹ In the next three chapters, I discuss how the principle of secrecy significantly impacted upon other procedural rules and environmental claims outcomes at the UNCC and how it came into conflict with the norms and expectations engendered by the transparency, inclusiveness and accountability principles prevalent in the environmental sector. On transparency and the openness of proceedings to the public, the UNCC governing council differed from its parent, the Security Council. I submit that secrecy and the absence of a right of veto were two of the most important reasons why the Security Council preferred to shunt contentious issues such as Iraq's participatory space to the

¹⁰⁴ Ibid.

¹⁰⁵ Ibid. More detailed discussions of this are found in chapter 3 of this thesis.

¹⁰⁶ Ibid.

¹⁰⁷ United Nations Security Council, *Letter from President of the Governing Council of the United Nations Compensation Commission to President of the Security Council*, UN Doc S/22885 (2 August 1991) annex I ('*Guidelines for the Conduct of the Work of the Governing Council of the United Nations Compensation Commission*'), above n 70, [5].

¹⁰⁸ United Nations Compensation Commission, *Press Releases* <<http://www.uncc.ch/pressrel.htm>>.

¹⁰⁹ United Nations Security Council, *Letter from President of the Governing Council of the United Nations Compensation Commission to President of the Security Council*, UN Doc S/22885 (2 August 1991) annex I ('*Guidelines for the Conduct of the Work of the Governing Council of the United Nations Compensation Commission*'), above n 70, [2].

¹¹⁰ Ibid.

¹¹¹ United Nations Compensation Commission, *Governing Council, Decision 10*, above n 71, art 30. Staff recruited to the UNCC signed confidentiality pledges that referenced to the United Nations Secretary-General's Bulletin, *Staff Rules, Staff Regulations of the United Nations and Staff Rules 100.1 to 112.8*, UN Doc ST/SGB/2002/1 (1 January 2002) reg 1.2(i).

governing council. By doing so, contentious issues could be dealt with away from the public eye and solutions reached through compromise without the threat or fear of veto. Additionally, the governing council being located in Geneva, away from the Security Council in New York, also had its advantages. Controversial issues could be decided in relatively calmer waters.

The chair and secretary of the governing council and the secretariat determined the agenda of governing council meetings.¹¹² The chair of the Council was elected for a two-year term. The position was always held by a non-permanent member of the Security Council.¹¹³ Formal meetings of the governing council took place four times a year.¹¹⁴ Between these meetings, the working group of the governing council would meet in less formal settings.¹¹⁵ The individuals who served on the governing council were generally staff from the permanent missions of member states in Geneva.¹¹⁶ Sometimes, a representative of a state might also join the delegation, particularly if there was some issue concerning that state or one which required more in-depth knowledge.¹¹⁷ As noted above, unlike the Security Council, which holds its meetings in New York, the UNCC governing council met in Geneva.¹¹⁸ To some extent, geographic distance allowed the governing council to develop its own culture and practices away from the direct influence of the Security Council. The practice of deciding by consensus was one example. Even when there were serious disputes between the permanent members of the Security Council over Iraq between 1998 and 2003, they were still able to reach compromises in the governing council. The governing council usually met for five days at a time. Both bodies shared a feature well known in UN diplomatic circles — during these meetings, members of the Security Council and governing council discussed, negotiated and sometimes even decided significant issues in informal venues such as the many coffee bars in the UN building in New York or Geneva.¹¹⁹

¹¹² SC Res 687, above n 2, para 12.

¹¹³ United Nations Compensation Commission, *The Governing Council* <<http://www.uncc.ch/governin.htm>>.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ Bettauer, above n 33, 36.

¹¹⁷ Ibid.

¹¹⁸ Ibid. SC Res 692, above n 29, para 3. By United Nations Security Council, *Report of the Secretary-General regarding creation of a United Nations Compensation Fund and United Nations Compensation Commission as envisaged in Security Council Resolution 687 (1991)*, above n 28, [9], the UN Secretary-General had suggested that the UNCC be located in New York but the Security Council decided otherwise.

¹¹⁹ Coffee bar diplomacy at the UN is a well-known facet of that institution and its many organs, agencies and programs. As a delegate, I have participated in such negotiations and experienced coffee bar diplomacy first hand. For another description by a UK diplomat Amelia Bate, see Foreign and Commonwealth Office, *Nuclear Negotiations in NYC* <<http://blogs.fco.gov.uk/ameliabate/2010/05/17/nuclear-negotiations-in-nyc/>>.

The staff of permanent missions attending the formal meetings of the UNCC governing council were usually senior diplomats (so-called Geneva ambassadors) representing member states.¹²⁰ Except for Kuwait, and later Iraq, none of the missions had staff exclusively assigned to UNCC work.¹²¹ All relied on regular permanent mission staff to service the governing council. Except for the permanent members of the Security Council, other governing council members were generally content to rely on the judgements of their missions in Geneva for UNCC-related issues and rarely, if ever, sought advice from their home offices or sent representatives from the capital for governing council meetings. The permanent members, on the other hand (especially the US, France, the UK and Russia), did seek home office advice and guidance on UNCC issues from time to time.¹²² Personnel in the State Department in Washington DC advised the US delegation.¹²³ Staff in the Foreign and Commonwealth Office in Whitehall advised the UK delegation in Geneva and were seen as accountable for the UK actions in the governing council.¹²⁴ Because it was the most seriously impacted nation, Kuwait was the only country to established a specialised agency to deal with UNCC-related matters — the Public Authority for Assessment of Compensation for Damages Resulting from Iraqi Aggression (PAAC).¹²⁵ The PAAC had offices in Kuwait and an office within the Kuwaiti permanent mission in Geneva and liaised with the UNCC on Gulf War reparations claims.¹²⁶

¹²⁰ Bettauer, above n 33, 36.

¹²¹ The Compensation Office, Kuwait Mission in Geneva <<http://www.kuwaitmission.ch/>>. The website states “The United Nations Liaison Office was established in December 1991 as a branch office of PAAC in Geneva with the main objective to liaise between PAAC in Kuwait and the UNCC in Geneva on all aspects of the UNCC claims process.” Referring to PAAC, the website further states “The Public Authority for Assessment of Compensation for Damages Resulting from Iraq Aggression was established in May of 1991, by Kuwaiti government Decree Law number 6...”

¹²² Bettauer, above n 33, 29–44.

¹²³ Ibid.

¹²⁴ For example see 2007 questions and answers in parliament on compensation for the Iraq-Kuwait conflict, The UK Parliament, *Parliamentary Debates*, House of Commons, 10 May 2007, Column 393W—395W, (Ben Chapman and Dr Kim Howells, Minister for the Middle East)

<<http://www.publications.parliament.uk/pa/cm200607/cmhansrd/cm070510/text/70510w0011.htm>>.

¹²⁵ Adel Omar Asem, *Establishment of the UN Compensation Commission: The Kuwait Government Perspective* in Richard B Lillich (ed), *The United Nations Compensation Commission [Thirteenth Sokol Colloquium]*, (Transnational Publishers, 1995) 55–65.

¹²⁶ Ibid.

The UNCC governing council was supported by a secretariat.¹²⁷ The secretariat also serviced the panels.¹²⁸ It was headed by an executive secretary appointed by the Secretary-General in consultation with the governing council¹²⁹ and staff were appointed by the Secretary-General of the UN in accordance with UN staff regulations and rules.¹³⁰ The report of the Secretary-General (in response to Resolution 687 of the Security Council) which formed the basis of the structure, power and functions of the UNCC also contained recommendations with regard to the claims procedure.¹³¹ In particular, the Secretary-General stated that the UNCC was ‘not a court or arbitral tribunal before which the parties appear’ but that it was ‘a political organ that performs an essentially fact-finding function of examining claims, verifying their validity, evaluating losses, assessing payments and resolving disputed claims’.¹³² The report went on to state that it was ‘only in this last respect that a quasi-judicial function may be involved’ and that, given the nature of the UNCC, it was ‘all the more important that some element of due process be built into the procedure’.¹³³ The implications of this characterisation and its implicit mobilisation of a law–politics distinction in favour of the quasi-judicial nature of the UNCC is an important one. I discuss the extent to which it was or was not borne out in UNCC operations in chapter 6 of this thesis.

The Secretary-General envisaged that it would be the function of the commissioners to provide this element of due process and that, as the policymaking organ of the UNCC, the governing council should establish guidelines respecting claims procedures.¹³⁴ The commissioners were expected to implement the guidelines in resolving the claims that came before them and make recommendations to the governing council, which would make the final determination.¹³⁵ The recommendations also proposed that the UNCC should process small claims from individuals on a priority basis and that larger claims from states should be considered later.¹³⁶

¹²⁷ United Nations Security Council, *Report of the Secretary-General regarding creation of a United Nations Compensation Fund and United Nations Compensation Commission as envisaged in Security Council Resolution 687 (1991)*, above n 28, [6], [12].

¹²⁸ Ibid.

¹²⁹ Ibid [6].

¹³⁰ Ibid.

¹³¹ Ibid [20]–[28]. These recommendations were contained in Part II of his report.

¹³² Ibid [20].

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Ibid. This is an example of the influence of the experience with the US-Iran Claims Tribunal where individual small claims remained unresolved for a long period of time whereas corporate claims were resolved much earlier.

Principally, panels of commissioners processed the claims.¹³⁷ Threshold issues for all claims would be whether the claimed loss, damage or injury was ‘a *direct result* of Iraq’s invasion and occupation of Kuwait’ as envisaged in paragraph 16 of Resolution 687.¹³⁸ The UNCC governing council was expected to provide detailed guidelines to claimants and commissioners as to what constituted such direct loss, damage or injury.¹³⁹ The panels of commissioners made recommendations to the governing council on their verification and evaluation of claims.¹⁴⁰ The governing council would then make final decisions on the claims based on the recommendations.¹⁴¹

The report envisaged that, at any given time, the resources available to the compensation fund might not be adequate to pay awarded claims.¹⁴² The report therefore gave claims by Kuwait special consideration and sought to authorise the UNCC governing council to determine both the procedure and allocation of fund resources to the payment of claims.¹⁴³ It was thought that some claims might be paid in instalments, the unpaid portion remaining as an outstanding obligation.¹⁴⁴ The fund was to bear the costs of the governing council, the secretariat, the processing of the claims and the commissioners.¹⁴⁵ However, the report drew the Security Council’s attention to the reality that it would be some time before the compensation fund would be resourced through Iraqi oil exports, and therefore recommended the Security Council address itself to finding the means by which the expenses of the UNCC would be met.¹⁴⁶

¹³⁷ Ibid [26]; Julia Klee, ‘The Process’ in Cymie R Payne and Peter H Sand (eds), *Gulf War Reparations and the UN Compensation Commission* (Oxford University Press, 2011) 29, 30.

¹³⁸ United Nations Security Council, *Report of the Secretary-General regarding creation of a United Nations Compensation Fund and United Nations Compensation Commission as envisaged in Security Council Resolution 687 (1991)*, above n 28, [25] (emphasis added). SC Res 687, above n 2, para 16 reaffirms that Iraq ‘is liable under international law for any *direct* loss, damage — including environmental damage and the depletion of natural resources — or injury to foreign Governments, nationals and corporations *as a result* of its unlawful invasion and occupation of Kuwait’ (emphasis added).

¹³⁹ United Nations Security Council, *Report of the Secretary-General regarding creation of a United Nations Compensation Fund and United Nations Compensation Commission as envisaged in Security Council Resolution 687 (1991)*, above n 28, [25] –[27].

¹⁴⁰ Ibid [26].

¹⁴¹ Ibid.

¹⁴² Ibid [28].

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid [29].

¹⁴⁶ Ibid.

3 The Panel

The Secretary-General's report in response to Resolution 687 stated that the commissioners would be experts in various fields, including law and environmental damage assessment, and would be nominated by the Secretary-General and appointed by the governing council for specific terms and tasks.¹⁴⁷ The report stated that the Secretary General would take into consideration geographical representation, experience, professional qualifications and integrity in nominating commissioners.¹⁴⁸

Commissioners were assembled into panels consisting of three members each.¹⁴⁹ One of them was designated chairperson.¹⁵⁰ Each panel was assigned a set of claims in a particular claim category.¹⁵¹ Commissioners served the UNCC in a personal capacity and were expected not to have any financial interest in the claims submitted to them.¹⁵² They were also expected not to represent or advise any claimant or party concerning the preparation or presentation of claims to the UNCC during their service with the UNCC.¹⁵³ They were expected to file statements with the UNCC disclosing their relationships to corporations, governments or individuals that might raise justifiable doubts about their impartiality or independence.¹⁵⁴ This was a continuing obligation.¹⁵⁵ They enjoyed the privileges and immunities conferred on UN experts when on mission.¹⁵⁶ Commissioners made a declaration to perform their duties 'honourably, faithfully, independently, impartially and conscientiously'.¹⁵⁷ These safeguards were meant to ensure that commissioners were impartial and independent. But were they adequate? In chapters 3 to 6, I examine how different actors influenced the panel. I contend that these influences were all brought to bear on the panel through legitimate channels — channels established and recognised under the Rules. Nevertheless, did these influences erode the impartiality and independence that the Rules were supposed to protect and foster? These are issues I address in chapters 3 to 6 of the thesis.

¹⁴⁷ Ibid [5].

¹⁴⁸ Ibid.

¹⁴⁹ United Nations Compensation Commission, *Governing Council, Decision 10*, above n 71, arts 20, 28. The term 'panel' first appears in the Provisional Rules for Claims Procedure.

¹⁵⁰ Ibid.

¹⁵¹ Ibid art 20.

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ Ibid art 22(1).

¹⁵⁵ Ibid art 22(2).

¹⁵⁶ Ibid art 26.

¹⁵⁷ Ibid art 27.

Panels of commissioners were obligated to maintain confidentiality with respect to records received or developed by them and to conduct their proceedings ‘in private’.¹⁵⁸ The obligation of confidentiality continued even after they ceased to be commissioners.¹⁵⁹ The requirements of privacy and secrecy were implicitly justified by the UNCC on the basis that commissioners were like judges and that the requirements were in keeping with the general culture of secrecy at the UNCC.¹⁶⁰ But that justification stood in contrast to the Secretary-General’s characterisation of the UNCC as a ‘political institution’ that evaluated and adjusted claims.¹⁶¹ Panels met at the UNCC head office in Geneva and were serviced by UNCC staff. The secretariat maintained very detailed records, including electronic databases and records.¹⁶² Staff of the secretariat attended panel meetings, assisted the commissioners and provided them with required information.¹⁶³ Claimants could submit evidence to panels processing their claims and the panels determined their ‘admissibility, relevance, materiality and weight’.¹⁶⁴ In ‘unusually large and complex cases’ panels could request written submissions and invite individuals, corporations, governments or international organisations to present their views at oral proceedings¹⁶⁵ or request additional information from experts or other sources.¹⁶⁶ In such cases they could also allow parties to present their claims at oral proceedings represented by an attorney or other representative.¹⁶⁷ In chapter 5, I provide more details about how claims were filed and supported by evidence.

The UNCC constituted dozens of panels to evaluate and recommend awards for six categories of claims ranging from individual loss claims and corporate claims to government claims.¹⁶⁸ The environmental claims formed part of the sixth category — category F — namely ‘claims filed by governments and international organisations for losses incurred in

¹⁵⁸ Ibid arts 30(1), 30(2).

¹⁵⁹ Ibid art 30(3).

¹⁶⁰ Ibid, ch III. Chapter III of the Rules of the UNCC dealt with the appointment, terms, conditions etc of commissioners. Many of the provisions dealt with the impartiality, integrity, disclosure of interests of commissioners, their privileges and immunities. Provisions of this nature are generally associated with officers performing judicial or quasi-judicial functions. Article 30 made it obligatory for commissioners to do their work in private and to hold information confidential even after they ceased to be commissioners.

¹⁶¹ United Nations Security Council, *Report of the Secretary-General regarding creation of a United Nations Compensation Fund and United Nations Compensation Commission as envisaged in Security Council Resolution 687 (1991)*, above n 28, [20].

¹⁶² United Nations Compensation Commission, *Governing Council, Decision 10*, above n 71, art 34.

¹⁶³ Ibid art 34(3).

¹⁶⁴ Ibid art 35(1).

¹⁶⁵ Ibid art 36(a).

¹⁶⁶ Ibid art 36(b).

¹⁶⁷ Ibid art 38(d).

¹⁶⁸ Ibid. For an explanation of the six claim categories see United Nations Compensation Commission, *The Claims*, <<http://www.uncc.ch/theclaims.htm>>.

evacuating citizens; providing relief to citizens; damage to diplomatic premises and loss of, and damage to, other government property; and damage to the environment'.¹⁶⁹

A three-member panel was constituted to process the environmental claims.¹⁷⁰ The panel conducted its proceedings in camera, except for oral proceedings which it opened to claimants and Iraq. Oral proceedings were therefore exceptional in that the parties to the claim could participate in the panel meeting during the hearing. Staff from the secretariat attended the panel meetings. Additionally, the panel had the services of expert consultants contracted by the UNCC. These consultants participated in selected parts of panel meetings on invitation only. Claimants and Iraq did not have access to the panel at these meetings except through the claim filings, written submissions and oral hearings.

The rules established by the UNCC governing council provided for panels to make decisions and recommendations by a majority of the commissioners.¹⁷¹ Although there was room for dissenting opinions, all the reports and recommendations issued by the environmental panel were unanimous. This does not mean that there were no differences of opinion on legal or factual issues between the three commissioners. Such differences were generally resolved by open discussion at the panel meetings, by commissioners addressing clarifying questions to legal officers, UNCC management, the panel's expert consultants, claimants or Iraq, or by informal private discussions among the commissioners.¹⁷² Sometimes clarifying questions from a commissioner were answered immediately while others required further work by UNCC staff or the panel's expert consultants. Such questions sometimes resulted in a *note verbale* or a procedural order to a claimant or Iraq seeking further information or submissions.¹⁷³ But in the end, the commissioners always agreed and spoke with one voice. To what extent this phenomenon was the result of the consensus-oriented culture of the UNCC is difficult to say. Doubtless, this culture had its role to play. The fact that they were able to reach agreed conclusions on controversial issues is evidence that their disagreements were not significant enough to trigger the need for a dissent and small enough to be compromised.

¹⁶⁹ United Nations Compensation Commission, *Category "F" Claims*, <http://www.uncc.ch/claims/f_claims.htm>.

¹⁷⁰ See below for details of the commissioners constituting the panel.

¹⁷¹ United Nations Compensation Commission, *Governing Council, Decision 10*, above n 71, art 33(3).

¹⁷² All panels at the UNCC followed similar procedures.

¹⁷³ United Nations Compensation Commission, *Governing Council, Decision 10*, above n 71, art 33(3).

The panel was an important forum for the production of procedural rules and environmental claims outcomes. Panel meetings held in private were the main forum but oral proceedings also provided a more limited, open and formal forum.¹⁷⁴ The panel had a special procedure known as an executive session.¹⁷⁵ This was a panel meeting held behind closed doors in which only the panel members, UNCC management and special invitees participated. Often it was only the panel and UNCC management. The rationale for these meetings was to create a space for the panel to engage in matters that were confidential or of a private nature. In chapters 3 and 5 I discuss the manner in which executive sessions were used by UNCC management to influence panel decisions.

Other panel meetings were also closed to the public, the claimants and Iraq. However, UNCC management, the valuation and verification services branch (VVSB), the F4 team and the panel's expert consultants all participated in these proceedings. In this sense, these meetings were more open than executive sessions. Oral proceedings were open to all of the aforementioned as well as the claimants and Iraq, but not to the public. Oral proceedings took place in the main buildings of the UN headquarters in Geneva while panel meetings and executive sessions were held in the conference room of the UNCC main office at the Villa La Pelouse,¹⁷⁶ located in the UN compound in Geneva, away from the main UN buildings. Meetings held in the main UN buildings were more visible, whereas holding meetings at the Villa La Pelouse reinforced their confidential nature. Each of these forms of the forum provided by the panel had its own dynamics and differed from the others considerably. Table 3 shows the actors that participated in the various forms of panel meeting referred to above.

¹⁷⁴ Ibid art 36(a).

¹⁷⁵ Executive sessions of panel meetings are not referred to in the UNCC Rules. It was a special session of the panel where only UNCC management staff participated. For a discussion of this see below.

¹⁷⁶ The Villa La Pelouse is a mansion which was originally used as the residence of the Secretary-General of the League of Nations. It was built in 1853 as a private residence. See, The United Nations Office at Geneva, *The Palais des Nations*

<[http://www.unog.ch/80256EE600581D0E/\(httpPages\)/1DE2F2883D9C5E8680256EF700594A46?OpenDocument](http://www.unog.ch/80256EE600581D0E/(httpPages)/1DE2F2883D9C5E8680256EF700594A46?OpenDocument)>. Prior to the F4 team moving to the Villa La Pelouse, they were housed in the International Center Cointrin (ICC) building in Geneva where the panel met. This location was even more remote from the main UN buildings and away from the public eye.

Table 3. Participation at Panel Meetings and Activities

Forum	Participants											
	Commissioners	UNCC Management	F4 Team	Panel's Expert Consultants	Claimants	Iraq	Public, Media or Observers					
Executive Session	X	X	C	L	O	S	E	D				
Panel Meeting	X	X	X	X	C	L	O	S	E	D		
Country visits	X	X	X	C	L	O	S	E	D			
Site Inspections	-	X	X	X	X	C	L	O	S	E	D	
Oral proceedings	X	X	X	X	X	X	C	L	O	S	E	D

Table 3 shows that the key actors who had greatest access to the panel were staff from UNCC management. Non-claimant states, civil society and the media had no access at all. The panel's proceedings were not open to public scrutiny. The only documents authored by the panel that were available to the public were the panel reports containing recommendations on claims. These reports were available through the UNCC website.¹⁷⁷ Iraq had the least access to the panel. In chapter 3, I discuss how, despite this barrier, Iraq was able to assert influence over the panel's decisions, especially in the third, fourth and fifth instalments of environmental claims, largely because of the efforts of the commissioners and the F4 team to enlarge Iraq's participatory space in the decision-making process.

The panel generally held its main meetings over two to five days. The panel convened day to day and conducted its business in terms of a pre-agreed agenda. The agenda was developed by the chair of the panel together with UNCC management and the F4 team. Each meeting usually began with a 60 to 90-minute executive session. Occasionally, an executive session would be interposed during a meeting either at the behest of the panel or UNCC management. Again, the rationale for the executive sessions was to provide a protected space for the panel to deliberate on matters that the panel or UNCC management saw as sensitive or confidential.

¹⁷⁷ United Nations Compensation Commission, *United Nations Compensation Commission*, <<http://www.uncc.ch/>>.

The uses — and the potential for misuse — of an interposed executive session merit special attention. Even in the most transparent systems, courts and tribunals generally¹⁷⁸ do not consider and debate their final decisions in public. Proceedings are transparent but judges generally retire into secrecy to consider their rulings. Arguably, an executive session in which only the three commissioners participated for the purpose of considering their decisions would therefore fall into the category of widespread judicial practice. But this was not the case.

In the case of the environmental panel (as with many other UNCC panels), the executive session included UNCC management staff. Being a supposedly non-judicial body, there might be justification for an executive session involving UNCC management and the commissioners to discuss administrative issues and other issues involving logistics and personnel matters. However, an executive session convened in the middle of a panel meeting generally signalled an unusual course of action. These interposed executive sessions were convened when there were matters of political sensitivity or issues on which there was disagreement between the panel and UNCC management. As such they were always significant events. To my knowledge, there were no records kept of what transpired during executive sessions since they were held behind closed doors and were secret.¹⁷⁹

One such occasion was when the panel had to make a ruling on whether Saudi Arabia's terrestrial claim was barred by Decision 19 of the governing council.¹⁸⁰ Another occasion was when UNCC management met with the panel in an executive session to discuss an agricultural claim by Iran where the panel had expressed the view that the evidence adduced was insufficient to support causation or quantification and UNCC management felt otherwise.¹⁸¹

The executive sessions of panel meetings and the dynamics that operated within them are an important aspect of the webs of influence that existed between the panel and UNCC management, as discussed in section E of this chapter. First, executive sessions that took

¹⁷⁸ One exception is Brazil where as a matter of course, judges deliberate in detail on their decision in public.

¹⁷⁹ The only hint that an executive session was held would be in the agenda or minutes of panel meetings. The minutes circulated to UNCC staff recorded that an executive session was held but did not contain any record of the substantive matters discussed or decided. If a record of executive sessions was kept, it was a closely held secret document.

¹⁸⁰ Also discussed in chapter 6 of this thesis.

¹⁸¹ Discussed in chapter 5 of this thesis.

place at the commencement of each panel meeting allowed UNCC management and the panel to discuss issues in confidence. There was apparently greater openness between UNCC management staff and the panel during these sessions.¹⁸² In turn, this seems to have engendered a high degree of trust between these individuals. Second, interposed executive sessions always signalled that the issue to be discussed was important, contentious or sensitive. Interposed executive sessions allowed UNCC management and the panel to take into account (but not necessarily reveal on the record) facts and circumstances that were political or extraneous to the issue or that did not arise directly from the claim material. For example, when the panel held an executive session to consider the implication of governing council Decision 19 on the Saudi Arabian terrestrial claim, it would have been possible for the panel and UNCC management to discuss the political implications of the decision — implications that would have been inappropriate to discuss at the formal panel meeting or oral proceedings. Governing council Decision 19 ruled that military costs were not recoverable. The issue was whether damage done to the Saudi desert by the Allied Coalition were ‘military costs’ and therefore not recoverable. For example, how would the US or the UK react to a decision that held the Allied Coalition forces were also responsible for the environmental damage to the Saudi desert or that they failed to take mitigatory measures during the conduct of the Gulf War?

It is important to bear in mind that the executive sessions provided the space for openness and the opportunity to discuss politically sensitive issues, but this does not mean that such discussions in fact took place or that the panel or UNCC management actually indulged in such discussions. On the other hand, it is hard to imagine why a closed-door executive session was necessary as part of a decision-making mechanism, if such facts, concerns and circumstances were not being discussed or did not underlie the discussion. This example and another I recount in chapter 5 show that opinions held by the commissioners or UNCC management before the executive session changed or concretised after the sessions. For these reasons it is safe to conclude that the executive sessions formed an important formal component of the web of influence that connected the F4 commissioners and UNCC management — a web through which the commissioners and UNCC management exerted influence on each other. This observation does not imply that the assertion of influence

¹⁸² An argument often made to justify confidentiality is that it fosters greater openness.

through these channels was improper but does raise the question of whether such channels were appropriate to the functions of the panel.

D Actors

Several key actors were engaged in producing procedural rules and environmental claims outcomes at the UNCC. The formal interactions took place within the three forums mentioned above: the UN Security Council, the UNCC governing council and the panel. But equally important (and sometimes even more so) were the informal consultations that actors had with each other. These are discussed below where I examine UNCC actors and webs of influence.

Some actors, such as the F4 team or UNCC management were constituted by a number of individuals, but are collectively referred to as singular actors for the purpose of this thesis. UNCC management consisted of at least three key individuals. As stated in chapter 1, I treat them as one actor, although the reality was that they were a group of three individuals among whom there may have been disagreements. This aggregation of intent and outcome necessarily involves a degree of loss of accuracy and specificity that must be kept in mind.

Each key actor had a legal mandate and a set of activities that were required by that mandate. Summarised in table 4, these mandates and activities set the stage for the production of rule and claims outcomes, including those for the environmental claims.

Table 4. Key Actors at the UNCC, Their Mandates and Activities

Key actor at the UNCC	Mandate/Activity
States ¹⁸³	<ul style="list-style-type: none"> • Participated in the UN Security Council, the UNCC governing council and, where appropriate, appeared before the panel • Filed and pursued claims on behalf of themselves, their citizens and corporations • Distributed compensation received to citizens and corporations
The panel of commissioners ¹⁸⁴	<ul style="list-style-type: none"> • Reported to UNCC Governing Council • Worked with UNCC management • Worked with the F4 team • Communicated with claimants and Iraq • Made procedural and substantive decisions on environmental claims • Tracked the use of M&A awards by claimants
UNCC management ¹⁸⁵	<ul style="list-style-type: none"> • Reported to the UNCC governing council • Participated in UNCC governing council meetings • Appointed and managed staff and branches • Appointed the F4 team • Selected and contracted the panel's expert consultants • Managed the compensation fund • Paid out and tracked awards • Liaised with the UN Environment Programme • Liaised with panels of commissioners • Further defined the organisation of teams • Managed budget and audit • Implemented and supplemented claim processing rules • Provided oversight of claim processing • Liaised with claimants and Iraq • Interacted with the media
F4 team ¹⁸⁶	<ul style="list-style-type: none"> • Reported to UNCC management • Processed environmental claims • Communicated with claimants and Iraq • Worked with the panel's expert consultants • Worked with the panel • Worked with other UNCC branches including VVSB • Worked with UNEP • Observed and provided input to UNCC governing council meetings

¹⁸³ *Charter of the United Nations*; SC Res 687, above n 2; United Nations Compensation Commission, *Governing Council, Decision 10*, above n 71.

¹⁸⁴ United Nations Compensation Commission, *Governing Council, Decision 10*, above n 71.

¹⁸⁵ *Ibid*; SC Res 687, above n 2; United Nations, *Staff Regulations of the United Nations and Provisional Staff Rules*, UN Doc ST/SGB/2009/7 (21 October 2009)

<<http://www.un.org/esa/cdo/hr/RULES%20AND%20REGULATIONS/Staff%20Rules%20JY9.pdf>>; United Nations, *United Nations Procurement Manual* (1 November 2011)

<<http://www.un.org/Depts/ptd/pdf/pmrev6.pdf>>; Memorandum of Understanding dated 8 May 2002 between the United Nations Compensation Commission and the United Nations Environment Programme, notified by governing council of the United Nations Environment Program, *Memorandums of Understanding Concerning Cooperation between the United Nations Environment Program and other Organizations in the United Nations System*, UN Doc UNEP/GC.22/INF/6 (13 November 2002)

<<http://www.unep.org/gc/gc22/Document/k0263254.pdf>>; United Nations Environment Programme, *Governing Council, Implementation of Governing Council Decision 22/1 IV on Post-Conflict Environmental Assessment*, UN Doc UNEP/GC.23/INF/20, (14 December 2004) <<http://www.unep.org/GC/GC23/documents/GC23-INF20.pdf>>.

¹⁸⁶ United Nations, *Staff Regulations of the United Nations and Provisional Staff Rules* UN Doc ST/SGB/2009/7 (21 October 2009)

<<http://www.un.org/esa/cdo/hr/RULES%20AND%20REGULATIONS/Staff%20Rules%20JY9.pdf>>; United Nations, *United Nations Procurement Manual* (1 November 2011)

<<http://www.un.org/Depts/ptd/pdf/pmrev6.pdf>>; United Nations Compensation Commission, *Governing Council, Decision 10*, above n 71.

Key actor at the UNCC	Mandate/Activity
Panel's expert consultants ¹⁸⁷	<ul style="list-style-type: none"> • On contract to the UNCC • Worked with the F4 team • Interacted with claimants' and Iraq's experts through channels established by the UNCC • Analysed and provided advice/opinions to panel, UNCC management and the F4 team
Claimants ¹⁸⁸	<ul style="list-style-type: none"> • Filed claims • Made submissions to and communicated with all the above actors • Informally liaised with the UN Security Council, the UNCC governing council and UNCC management • Applied awards to environmental M&A studies, restoration and compensatory projects
Iraq ¹⁸⁹	<ul style="list-style-type: none"> • Made submissions to and communicated with all of the above actors (except claimants) • Received funding from the UNCC for defence of environmental claims in third, fourth and fifth instalments • Filed responses to Article 16 reports • Filed responses to claims when notified by the UNCC • Contributed to the compensation fund from oil sales

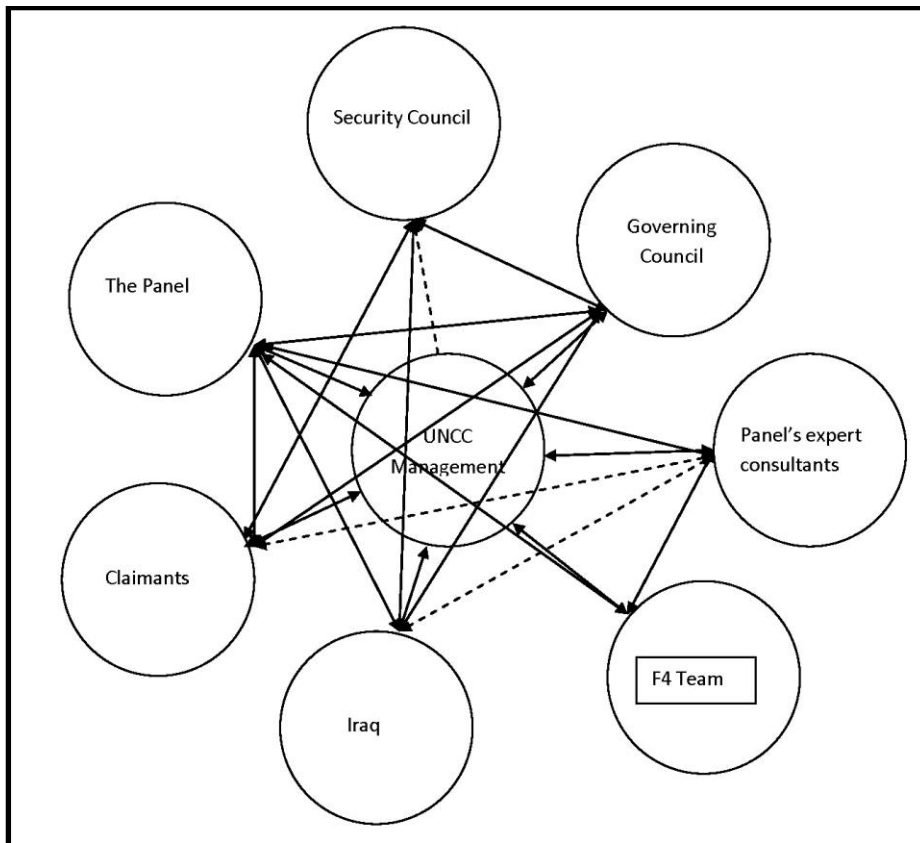
I examine in some detail each of these actors, their roles and webs of influence in the UNCC. I look at each actor's position within the UNCC, the Gulf War and post-conflict relations. I also examine their powers and functions, the role they played in producing rule and environmental claims outcomes, the relationship they had with other key actors and the means they adopted to communicate with each other. The purpose of this examination is to situate each actor within the webs of influence that operated at the UNCC. The formal communication channels between key actors and forums at the UNCC were complex and figure 3 below attempts to capture them. All lines represent formal communication channels while dotted lines represent restricted or controlled channels.

¹⁸⁷ United Nations Compensation Commission, *Governing Council, Decision 10*, above n 71; United Nations Compensation Commission, 'Request for Consulting Services' reproduced in, Cymie R Payne and Peter H Sand, (eds), *Gulf War Reparations and the UN Compensation Commission* (Oxford University Press, 2011) 359.

¹⁸⁸ United Nations Compensation Commission, *Governing Council, Decision 10*, above n 71; United Nations Compensation Commission, *Decisions of the Governing Council* <<http://www.uncc.ch/decision.htm>>.

¹⁸⁹ United Nations Compensation Commission, *Governing Council, Decision 10*, above n 71; United Nations Compensation Commission, *Decisions of the Governing Council* <<http://www.uncc.ch/decision.htm>>; SC Res 687, above n 2.

Figure 3. Communication Lines between Key Actors and Forums at the UNCC



1 States

Particular state actors such as the US and the UK were involved in the UN Security Council to establish the UNCC and to lay the foundation for procedural rules. After the initial decisions establishing the UNCC, the Security Council was not an important forum in terms of producing further procedural rules and claims outcomes. The action shifted to the UNCC governing council and the panel. Nevertheless, the Security Council did play a role in shaping some of the earliest rule outcomes, especially with respect to Iraq's participation in UNCC claim procedures.¹⁹⁰

The US played a key role in shaping the rule outcomes in the Security Council and the governing council. Lawyers from the US State Department were involved in crafting the rules embedded in the Security Council resolutions.¹⁹¹ The US's primary goals between 1991 and 2003 were to ensure that Iraq paid for the costs of invading Kuwait and the damage caused to

¹⁹⁰ See the detailed discussion in chapter 3.

¹⁹¹ Bettauer, above n 33, 29–44; Matheson, above n 82, 178.

allied nations and to severely limit Iraq's military capabilities.¹⁹² By doing so, the US was ensuring that its allies were placated and economic losses in Kuwait, Saudi Arabia, Jordan and Turkey were compensated.¹⁹³ By liberating Kuwait, supporting Saudi Arabia militarily to protect its border against potential Iraqi attacks and helping establish a war reparations mechanism to pay for the war damage suffered by these nations, the US was siding with its Middle Eastern allies. These goals were shared by the UK as well as other nations in the North Atlantic Treaty Organization (NATO).¹⁹⁴ The Soviet Union had close ties with Saddam Hussein's regime and Iraq.¹⁹⁵ However, the Soviet Union was in the throes of collapse leading to the emergence of the new Russian state.¹⁹⁶ It was a transitional period for Russia and its government was in no mood to assert any authority at the international level.¹⁹⁷ As a result, Russia provided diplomatic support to the US but did not participate in Operation Desert Storm.¹⁹⁸ It also attempted to mediate in the crisis.¹⁹⁹ As a result, the US-UK-France alliance prevailed in Security Council decision-making at this time.²⁰⁰ Eventually, this led to unprecedented cooperation between the five permanent members of the Security Council until 1998 when France-US relations became strained over Operation Desert Fox.²⁰¹ France-US relations reached a historic low when the US sought a UN resolution in 2003 supporting its proposal to invade Iraq and bring about regime change.²⁰² France led Germany and other states against the resolution.

After the so-called coalition of the willing, led by the US and the UK, succeeded in invading and effecting regime change in Iraq in 2003, their goals with respect to Iraq changed and so

¹⁹² H.C Graf von Sponeck, 'Iraq and the United Nations, Post-War and Pre-Peace — The Dilemma of the Future' (2005) 2(6) *Essex Human Rights Review*, 87 <<http://projects.essex.ac.uk/ehrr/V2N1/Sponeck.pdf>>. Sponeck was a senior UN official and confirms that the UNCC was established because of US pressure and that previously the Security Council had adopted resolutions asking one nation to pay war reparations to another but never put in place a mechanism to enforce it.

¹⁹³ SC Res 687, above n 2; Speeches by Mr Abulhasan, Kuwait's Permanent Ambassador to the UN and Mr Pickering, the US's Permanent Ambassador to the UN in United Nations Security Council, *Provisional Verbatim Record*, UN Doc S/PV. 2981 (3 April 1991).

¹⁹⁴ Speech by Mr Rochereau de la Sabliere, France's Permanent Ambassador to the UN in United Nations Security Council, *Provisional Verbatim Record*, UN Doc S/PV. 2981 (3 April 1991).

¹⁹⁵ The USSR was providing military support and training to the Iraqi army under Saddam Hussein. Jay Kosminsky, *The Future of Iraq A Heritage Foundation Forum* <<http://www.heritage.org/Research/Lecture/The-Future-of-Iraq-A-Heritage-Foundation-Forum>>; James Phillips, *Saddam Hussein and the Crisis in the Persian Gulf*, (1990) <<http://www.heritage.org/Research/Reports/1990/11/Saddam-Hussein-and-the-Crisis-in-the-Persian-Gulf>>.

¹⁹⁶ The USSR was dissolved in 1991.

¹⁹⁷ Malone, above n 65, 70.

¹⁹⁸ *Ibid* 69.

¹⁹⁹ *Ibid* 70.

²⁰⁰ *Ibid*.

²⁰¹ *Ibid* 15, 100, 158–9, 160–5.

²⁰² *Ibid*.

too did their role in the Security Council and the UNCC governing council. The US and the UK went from being sworn enemies of Iraq to trustees, protectors and promoters.²⁰³ As stated earlier in this chapter, one repercussion of this changed US and UK role was their increased vigilance in regard to Iraq's Gulf War liabilities and their opposition to any increase in those liabilities. For example, the US and the UK's new role led to the governing council's concern over amendments to claims that substantially increased the claim amount.²⁰⁴ New monitoring and assessment (M&A) material generated by the studies funded in the first instalment of environmental claims precipitated these amendments. The panel had allowed such amendments before and expressed this as a rule outcome.²⁰⁵ The governing council adopted this rule outcome when it approved the panel reports on the first and third instalment of environmental claims.²⁰⁶ However, the changed political landscape seemed to trigger concern, resulting in a strong signal to UNCC management and the F4 team against amendments that increased claim amounts.²⁰⁷

In this context, the gradual expansion of Iraq's participatory space in the environmental claims also reflected the changing goals and roles of the US and the UK.²⁰⁸ Another example of the US and the UK's changed role vis-a-vis Iraq is the reduction of the contribution to the UNCC fund required from Iraq (based on a percentage of oil sales). The 25 per cent contribution fixed by Resolution 1360 in 2001 was reduced to 5 per cent by Resolution 1483 of the Security Council in 2003.²⁰⁹ This measure was put in place to alleviate the humanitarian crisis in Iraq and the need to allow it to reconstruct after the fall of Saddam Hussein's regime. As occupying powers, the US and the UK expected that post-invasion

²⁰³ SC Res 1483, UN SCOR, 4761st mtg, UN Doc S/Res/1483 (22 May 2003) para 4. This resolution enjoined the US and the UK, 'consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future.'

²⁰⁴ Personal observation.

²⁰⁵ Ibid. I discuss this rule outcome in chapter 4.

²⁰⁶ United Nations Compensation Commission, *Report and Recommendations made by the Panel of Commissioners concerning the First Instalment of "F4" Claims*, UN Doc S/AC.26/2001/16 (22 June 2001) [1]; United Nations Compensation Commission, *Report and Recommendations made by the Panel of Commissioners concerning the Third Instalment of "F4" Claims*, UN Doc S/AC.26/2003/31 (18 December 2003) [174].

²⁰⁷ Increases in claim amounts could lead to larger awards, prolonging subsequent payment schedules, increasing Iraq's liability and delaying the completion of the UNCC's mandate.

²⁰⁸ See chapter 3 for a detailed discussion of this expansion. The expansion was the result of a combination of several factors including the changed role of the US and the UK, continued persistence in that regard by the Panel and the F4 team and Iraq's own role in pushing for more participatory space.

²⁰⁹ SC Res 1483, above n 203, para 21; SC Res 1360, UN SCOR, 4344th mtg, UN Doc S/Res/1360 (3 July 2001).

democracy in Iraq would stabilise the country and increase oil production and sales.²¹⁰ Neither of these expectations immediately materialised, with Iraq plunging into a post-invasion sectarian and religious insurgency.²¹¹ To date, the 5 per cent contribution levels have been maintained, resulting in slower payments and lower award instalments for claimants who won UNCC awards. This has particularly affected oil industry claims (category E1), miscellaneous non-Kuwaiti corporate claims (category E2) and Kuwaiti government claims (category F3).²¹² At the same time as the UNCC commenced payments on the awards of the third, fourth and fifth instalments of environmental claims in December 2005,²¹³ it also approved the UNCC-supervised tracking mechanism for the third, fourth and fifth instalments of environmental claims,²¹⁴ raising the interesting question as to how and why these awards received priority of payment over other awards.²¹⁵ I deal with this issue in chapter 4.

Key state actors such as the US and the UK had direct formal access to the Security Council and the UNCC governing council, but not to the panel. They also did not have formal access to the F4 team or the panel's expert consultants. For four of the five instalments, Industrial Economics Inc. (IEC),²¹⁶ a firm based in Boston, functioned as the panel's expert consultants. In the second instalment of claims, Mazars & Guerard²¹⁷ and IEc acted as the panel's expert consultants. My research does not suggest that the US or the UK influenced or attempted to influence the panel's expert consultants.²¹⁸ José Allen, a member of the panel, was a US citizen. Again, there is no evidence that the US influenced or attempted to influence him. The panel and the panel's expert consultants were, to this extent, not influenced by powerful state actors such as the US and the UK, both major actors in the Allied Coalition that liberated Kuwait in 1991 and subsequently invaded and changed the Iraqi regime in 2003. The US, the

²¹⁰ United Nations Security Council, *Provisional Verbatim Record*, UN Doc S/PV. 4761 (22 May 2003). See the statements made by the US, the UK and other state members after resolution 1483 was adopted by the Council.

²¹¹ Malone, above n 65, 290–1.

²¹² United Nations Compensation Commission, *Status of Processing and Payment of Claims* <<http://www.uncc.ch/status.htm>> .

²¹³ United Nations Compensation Commission, *Governing Council, Decision 256*, UN Doc S/AC.26/Dec. 256 (8 December 2005).

²¹⁴ United Nations Compensation Commission, *Governing Council, Decision 258*, UN Doc S/AC.26/Dec. 258 (8 December 2005).

²¹⁵ As at January 2012 all of the payments on environmental claim awards have been completed. See United Nations Compensation Commission, *Status of Processing and Payment of Claims* <<http://www.uncc.ch/status.htm>> .

²¹⁶ Industrial Economics Inc, *IEc* <<http://www.indecon.com/>> .

²¹⁷ Mazars, *Global Website* <<http://www.mazars.com/Home/About-us/Mazars-worldwide>> .

²¹⁸ Some might argue that IEc, being a US consultancy firm engaged in other consulting with the US government might have been influenced by its relationship and potential future contracts from the US government.

UK, France and Russia had significant economic and strategic interests in the region, including access to Iraq's vast oil reserves.²¹⁹ The US and the UK both had well-staffed missions in Geneva and UNCC management staff were in regular dialogue with them during and between governing council meetings.²²⁰

2 The Three Commissioners of the F4 Panel

The panel dealing with environmental claims consisted of three commissioners appointed by the governing council on the recommendation of the executive secretary. Thomas A Mensah chaired the panel of commissioners.²²¹ The other two members were José R Allen and Professor Peter H Sand.²²² All three members had considerable experience as lawyers. Thomas A Mensah was the first president of the International Tribunal for the Law of the Sea.²²³ José Allen was and continues to be a litigating attorney in the US with considerable experience, specialising in environmental law, in particular the disposal of toxic substances and materials.²²⁴ Peter Sand was and continues to be a leading internationally recognised academic in environmental law in Munich.²²⁵ Together, they brought a great deal of stature and credibility to the panel.

Both Chairman Mensah and Professor Sand had previous affiliations with the UN system. Born in Ghana, Mensah had a distinguished two-decade career at the International Maritime Organization (IMO).²²⁶ He was an active participant in the negotiations to develop the Law of the Sea Convention. He served as Ghana's high commissioner to the Republic of South Africa from 1995–96. He was appointed as a judge of the International Tribunal for the Law of the Sea in Hamburg in 1996 and subsequently became the president of the tribunal, continuing in this role until 2005. During his tenure as a UNCC commissioner, Thomas

²¹⁹ Lee Carole Owens, 'Between Iraq and a Hard Place: The UN Compensation Commission and its Treatment of the Gulf War Claims' (1998) 31(2) *Vanderbilt Journal of Transnational Law* 499, 533–5.

²²⁰ The US and UK missions had considerably more staff than other permanent missions in Geneva.

²²¹ United Nations Compensation Commission, *Report and Recommendations made by the Panel of Commissioners concerning the First Instalment of "F4" Claims*, UN Doc S/AC.26/2001/16 (22 June 2001) [1].

²²² *Ibid.*

²²³ International Tribunal for the Law of the Sea, 'Election of the President and Vice President of the International Tribunal for the Law of the Sea' (Press Release, ITLOS/Press 1, 5 October 1996) <http://www.itlos.org/fileadmin/itlos/documents/press_releases_english/press_release_en_1.pdf>.

²²⁴ See Skadden, Arps, Slate, Meagher, & Flom LLP & Affiliates, *Biography* <<http://www.skadden.com/index.cfm?contentID=45&bioID=975>>.

²²⁵ See Ludwig Maximilian University, Munich, *Dr Peter H. Sand, LL.M., Adjunct Professor of Law (Duke University)* <http://www.jura.uni-muenchen.de/personen/sand_peter_h/index.html>.

²²⁶ International Foundation for the Law of the Sea, *Professor Thomas A. Mensah*, <<http://www.iflos.org/en/summer-academy/faculty/bio-mensah.aspx>>; Reconnect Africa, *H.E. Judge Thomas A. Mensah – International Maritime and Environmental Law Advisor* <<http://www.reconnectafrica.com/5-minute-interview/h.e.-judge-thomas-a.-mensah-international-maritime-and-environmental-law-advisor.html>>.

Mensah had many engagements as an arbitrator and academic and continued his work as the president of the International Tribunal for the Law of the Sea.

Professor Sand is a German national, who writes and speaks excellent French, German and English. He started his academic career as the assistant to the director of the Institute of European Studies at the University of Saarbrücken.²²⁷ He thereafter held a number of academic positions at McGill University in Montreal and the University of Addis Ababa. He then worked for the Food and Agriculture Organization of the United Nations (FAO) in Rome, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) in Switzerland, the International Union for Conservation of Nature (IUCN/World Conservation Union), the United Nations Environment Programme (UNEP) in Nairobi, the United Nations Economic Commission for Europe (UNECE) in Geneva and the World Bank in Washington DC. He played a leading role at the first Earth Summit in Rio de Janeiro. He held several concurrent academic and international positions at the time of his appointment as a commissioner by the UNCC. In particular, he was a supporter of access to information, public participation and access to justice in environmental decision-making. In an article he wrote on the right to know and environmental disclosure by government and industry in 2002, Sand traced the progress made in access to information regimes in the US and Europe and warned that hard-won rights might be in jeopardy after the September 11 terrorist attacks in the US.²²⁸ In my view, Sand was particularly conscious of the importance of ensuring greater transparency and participation for Iraq.

José R Allen, a US citizen, holds a Juris Doctor degree from the Boston College of Law (1976) and a BA from Yale University (1973). At the time of his appointment, he was a partner in the law firm Skadden, Arps, Slate, Meagher and Flom LLP & Affiliates, working out of their San Francisco office. Allen had considerable experience litigating in federal and state courts in the US. His legal practice focussed on ‘environmental matters, toxic torts, securities issues, and unfair business practices under California Proposition 65 and California

²²⁷ Ludwig Maximilians University, Munich, *Curriculum Vitae* <http://www.jura.uni-muenchen.de/personen/sand_peter_h/lebenslauf/index.html>.

²²⁸ Peter H Sand, ‘The Right to Know: Environmental Information Disclosure by Government and Industry’ (Revised paper presented at the 2nd Transatlantic Dialogue on “The Reality of Precaution: Comparing Approaches to Risk and Regulation”, Warrenton, Virginia, 15 June 2002 and the Conference on the Human Dimensions of Global Environmental Change: Knowledge for the Sustainability Transition, Berlin, 7 December 2002) <http://www.inece.org/forumspublicaccess_sand.pdf>.

Business and Professions Code, section 17200'.²²⁹ He 'represented numerous major public corporations in enforcement actions brought by federal and state agencies alleging violations of environmental laws' and 'also defended major companies against suits under the Superfund law to recover cleanup costs and natural resource damages resulting from contaminated sites'.²³⁰ Most importantly, he had experience representing 'clients in lawsuits and mediation proceedings among private parties to allocate the costs of cleaning up contaminated sites'.²³¹

Prior to his career as a private practitioner, Allen served as an attorney with the Land and Natural Resources Division of the US Department of Justice in Washington DC.²³², ²³³, ²³⁴ My own observation was that José R Allen often brought a perspective different to that of the other two commissioners on the panel. His perspectives often triggered inquiry and posed questions that the panel's expert consultants had to investigate and respond to.²³⁵, ²³⁶ On these occasions he would confer with the panel by telephone, but was not privy to some of the important exchanges that took place during panel meetings — exchanges between the panel, UNCC management, the F4 team and the panel's expert consultants. Had Allen been at these meetings in person, it is arguable that, with his unique perspective, his manner of posing probing questions to the experts and his practical understanding of pollution-related issues, he might have had an even greater impact on claims outcomes.

The most authoritative and forceful of the three commissioners was the chairman, Thomas Mensah. However, as key actors, there was no significant conflict between the three commissioners. They tended to act as one body, and in this sense conflicts could generally be characterised as the panel against other actors. For example, there was a conflict between the panel and UNCC management in an Iranian agricultural damage claim in the fifth instalment which was eventually resolved through an executive session requested by UNCC

²²⁹ Skadden, Arps, Slate, Meagher, & Flom LLP & Affiliates, *Biography*, above n 224.

²³⁰ *Ibid.*

²³¹ *Ibid.*

²³² Skadden, Arps, Slate, Meagher, & Flom LLP & Affiliates, *Biography*

<<http://www.skadden.com/PrintToPDF.cfm?print=1&contentID=45&bioID=975>>.

²³³ [The content of this footnote has been deleted and placed in an appendix which has been embargoed to the public by the University of Sydney for five years.].

²³⁴ *Ibid.*

²³⁵ Personal observation.

²³⁶ See above n 233.

management.²³⁷ On a few occasions, there were disagreements between a commissioner and the panel's expert consultants.²³⁸ These disagreements generally led to further discussions or investigations by the panel's expert consultants or the F4 team. Whenever I attribute statements, opinions or decisions to the panel in this thesis, it is because the three commissioners were unanimous on the issues.

Many administrative decisions involving the panel were made by the chair in consultation with UNCC management or the F4 team leader.²³⁹ These administrative decisions involved the organisation of the panel's work, timing of documentation sent to the panel or the steps to be followed in handling a procedural decision or issue. The primary objective of the panel was similar to that of the F4 team — to process claims fairly. The three commissioners were strong advocates of the principle of due process for Iraq, transparency, and effective and expeditious justice for the victims, as might be expected given their professional and academic backgrounds.

3 UNCC Management

UNCC management consisted of the executive secretary, the deputy executive secretary, the secretary to the governing council and the chief of the F4 claims section²⁴⁰ of the legal services branch. There was also the registrar of the UNCC, referred to as the chief of the registry branch. As far as environmental claims were concerned, the involvement of the executive secretary and the chief of the registry branch was marginal. In addition, there was also the chief of the valuation and verification services branch (VVS) who was particularly involved with claims during the second instalment and with tracking M&A claims. The term UNCC management as used in this thesis applies to the deputy executive secretary, the secretary to the governing council and the chief of the F4 section of the legal services branch. These three officers remained unchanged for the duration of the processing of all the environmental claims. These three UNCC management staff members tended to act as a

²³⁷ Personal observation. For more details on this claim see, United Nations Compensation Commission, *Report and Recommendations made by the Panel of Commissioners concerning the Fifth Instalment of "F4" Claims*, UN Doc S/AC.26/2005/10 (22 June 2001) [113]–[118]. In the fifth instalment of claims, claimants used statistical analysis as evidence of causation as well as quantification of damages. Statistical analysis was used mostly in the public health claims, which this thesis does not cover. The only example of statistical analysis used for environmental claims was by Iran in the cited claim. This is also the only case in which the Panel accepted statistical evidence as sufficient to establish causation and quantification of damages, though it did make revisions to the quantification through re-runs of the statistical analysis with added parameters.

²³⁸ For example disagreements arose about the interpretation of data or assumptions made in drawing conclusions.

²³⁹ United Nations Compensation Commission, *Governing Council, Decision 10*, above n 71, art 29.

²⁴⁰ Division dealing with the environmental claims.

collective. They had their offices at the UNCC's headquarters. The F4 team, on the other hand, was located in a separate area, originally in the International Center Cointrin building in Geneva²⁴¹ and later in the Villa le Bocage.²⁴² The long service at the UNCC of the three officers I refer to as UNCC management and the location of their offices at the UNCC headquarters fostered a closer working relationship between them, strengthening the webs of influence connecting them.

Michael Raboin²⁴³ served as the UNCC's deputy executive secretary from its inception until 2005. He was a US citizen and had worked for the US State Department before taking up senior office as deputy agent of the US at the Iran-US Claims Tribunal in The Hague. He was an experienced diplomat and had many connections within the UN system. He was responsible for much of the initial work establishing and building the UNCC and putting in place its rules of procedure. He retired from the UNCC at the end of 2005 after the environmental claims had been processed. Then in 2007, he became a consultant to Kuwait, advising them on the implementation of the restoration and compensatory programs funded through the environmental claims awards.

Raboin's transition from being a top UNCC management staff member to becoming a consultant to Kuwait on its environmental restoration and compensation award implementation is evidence of what a UNCC employee's legitimate expectations might have been. Since the UN's employment benefits and salaries are very competitive with the US public sector, UNCC employees routinely looked for post-UNCC employment within the UN system or in other capacities related to UNCC work — such as UNCC post-award implementation and tracking.²⁴⁴ This is not to imply any impropriety in such expectations or

²⁴¹ International Center Cointrin, *Welcome to the International Center Cointrin* <<http://www.icc-geneve.ch/index.asp?lang=en>>.

²⁴² The Villa le Bocage (1823) originally formed the stables of the mansion built by Napoleon for his wife (now occupied by the Italian Embassy in Geneva). The Bocage is located about 50 meters away from La Pelouse and sometimes also called Dependence La Pelouse. United Nations Office at Geneva, *The Palais des Nations* <<http://www.unog.ch/80256EE600581D0E/%28httpPages%29/1DE2F2883D9C5E8680256EF700594A46?OpenDocument>>. For a map of the UN complex in Geneva see United Nations Office at Geneva <[http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/88FFDD768F055AECC1256F2A0052A3CC/\\$file/Palais%20des%20Nations%20map.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/88FFDD768F055AECC1256F2A0052A3CC/$file/Palais%20des%20Nations%20map.pdf)>. Individuals located in the same venue tend to develop closer working and personal relationships with each other. The F4 Team located in the Bocage and UNCC management located in the Villa La Pelouse were *inter se* closely connected by their own webs of influence while their connections to each other as two groups represented separate webs of influence.

²⁴³ Mike Raboin died tragically on 9 April 2008 in Kuwait City, Kuwait because of an automobile accident. Peshitgo Times, *Michael F. Raboin* <<http://www.peshitgotimes.net/?id=9045>>.

²⁴⁴ These expectations were so strong that in 2005 UNCC staff made representations to UNCC management and through it to the UN Headquarters in New York and obtained a special dispensation to be treated on a priority

personal career goals, but rather to suggest that such expectations and goals probably influenced UNCC employees' opinions and decisions. In reality, only Mike Raboin obtained consulting work related to the environmental claims. Some continued to serve the UNCC or had their contracts extended; others were assured job security through post-environmental award tracking; and still others ceased to work at the UNCC. A conclusive answer as to whether the post-environmental award tracking program established by the UNCC was influenced by such expectations would require an examination of documentation that is not available to me. For the purposes of this thesis, it is sufficient to acknowledge that such a probability existed and may have been a contributing factor to the post-award environmental restoration and compensatory tracking rule outcome.

Mojtaba Kazazi served as the secretary to the UNCC governing council for much of its life and was later made acting executive secretary following the completion of the environmental claims. He had served as a judge in Iran before joining the Iran-US Claims Tribunal in The Hague. As the secretary of the governing council, he was able to cultivate close working relationships with state delegates serving on the council. Both he and Mike Raboin brought with them their experiences from the Iran-US Claims Tribunal. Several lessons and viewpoints they brought with them from their experience in that tribunal shaped their advocacy positions at the UNCC. In particular, they were very supportive of mass claims-processing techniques and lower evidentiary standards, particularly for individual claimants. They were also generally averse to procedures that might open doors to dilatory tactics by Iraq.²⁴⁵ These two individuals, who served the UNCC almost from its inception, played an influential role in crafting the Rules of the UNCC and in advising the panel. They were also influential in shaping the internal culture and attitudes within the UNCC. As such, examining their background and previous work experience provides helpful context for understanding their roles within the UNCC and the processing of the environmental claims. Since they both came to the UNCC from the Iran-US Claims Tribunal, I examine below some of the experiences of that tribunal.

The Iran-US Claims Tribunal 'came into existence as one of the measures taken to resolve the crisis in relations between the Islamic Republic of Iran and the US arising out of the

basis for recruitment to other vacancies within the UN and its agencies. As the UNCC began winding down in 2005, several UNCC staff members, based on this dispensation, were absorbed into other UN agencies.

²⁴⁵ Bettauer, above n 33, 30, 38–9.

detention of 52 US nationals at the US Embassy in Tehran which commenced in November 1979, and the subsequent freeze of Iranian assets by the US'.²⁴⁶ The Tribunal was established following the Algiers Declarations of 1981²⁴⁷ as the mechanism for adjudicating 'commercial claims by United States nationals against Iran and its state enterprises'.²⁴⁸ From the outset, Iranian lawyers and judges serving on the Tribunal were alleged to have used dilatory tactics to delay and obstruct proceedings.²⁴⁹ Mojtaba Kazazi and Michael Raboin would therefore have been aware of this experience. Additionally, claims were processed on a case-by-case basis resulting in long delays.²⁵⁰ These experiences shaped the US position with regard to the UNCC.²⁵¹ The US and former employees of the Iran-US Claims Tribunal who came over to the UNCC preferred mass claims-processing techniques to case-by-case evaluations, especially for processing individual claims, and were opposed to giving Iraq full participatory space, fearing the use of dilatory and delaying tactics by Iraq.²⁵² The experience of the Iran-US Claims Tribunal had a powerful constitutive effect²⁵³ on the structure and functioning of the UNCC. The actions of the Iranian judges at the Iran-US Claims Tribunal were interpreted as dilatory tactics, even though they may have been justifiable in the eyes of the Iranians. This interpretation generated a strong message that the UNCC ought to adopt measures to avoid a similar situation.

Julia Klee served as the chief of the F4 legal services branch and had an undergraduate degree from the University of Illinois, majoring in chemistry.²⁵⁴ She served in the US Peace

²⁴⁶ Iran — United States Claims Tribunal, About the Tribunal, <<http://www.iusct.net/Pages/Public/A-About.aspx>>.

²⁴⁷ The US agreed, 'to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration'.

²⁴⁸ Ibid.

²⁴⁹ Bettauer, above n 33, 39.

²⁵⁰ Ibid.

²⁵¹ Ibid. For comparative studies on the Iran-US Claims tribunal and the UNCC see Howard Holtzmann and Edda Kristjansdottir (eds), *International Mass Claims Processes: Legal and Practical Perspectives* (Oxford University Press, 2007); John R Crook, 'Mass Claims Processes: Lessons Learned Over Twenty-Five Years' in The International Bureau of the Permanent Court of Arbitration (ed), *Redressing Injustices Through Mass Claims Processes: Innovative Responses to Unique Challenges* (Oxford University Press, 2006) 42; Charles N Brower, 'The Lessons of the Iran-United States Claims Tribunal: How May They be Applied in the Case of Iraq?' (1992) 32(2) *Virginia Journal of International Law*, 421.

²⁵² Ibid.

²⁵³ Mary Anne Glendon, *Abortion and Divorce in Western Law* (Harvard University Press, 1987). 'The law is constitutive,' says Glendon, 'when legal language and legal concepts begin to affect ordinary language and to influence the manner in which we perceive reality.' The experiences of the Iran-US Claims Tribunal brought by officers who migrated to the UNCC, influenced the manner in which the UNCC realities were perceived.

²⁵⁴ 'Symposium: The International Response to the Environmental Impacts of War, Georgetown International Environmental Law Review,' (2005), 17 *Georgetown International Environmental Law Review* 636.

Corps in Kenya.²⁵⁵ She obtained her Juris Doctor degree at the University of California, Berkeley, Law School (Boalt Hall).²⁵⁶ She was also an environmental officer for the Joyce Foundation in Chicago.²⁵⁷ She focused much of her legal practice on servicing the corporate sector's environmental law needs. For her part, she was particularly supportive of mediation and conciliatory procedures and viewed litigation as a less helpful dispute resolution mechanism.²⁵⁸

UNCC management's primary goals were to process the environmental claims expeditiously, collect funds from Iraq and pay the claim awards. From my observation, each member of UNCC management also had legitimate personal goals in advancing their careers and obtaining UN or related employment after the UNCC wound up. UNCC management had access to all three forums (the Security Council, the UNCC governing council and the panel) and could influence them all — see figure 3. They were also influenced by the political dynamics of all of these forums. At the beginning of the environmental claims, they were strong advocates for the principles of expeditious and effective justice for the victims and generally opposed the principles of due process for Iraq and transparency. As circumstances changed in the Security Council and the UNCC governing council, their advocacy against due process and transparency waned. In chapters 3 to 5, I examine how UNCC management modified their advocacy to achieve or allow others to achieve their changing goals and how they used webs of influence to achieve their goals.

4 F4 Team

The legal officers of the F4 team mandated to process the environmental claims had access to the panel and played a major role in that forum. They formally interacted with the commissioners serving on the panel during meetings (usually lasting three to five consecutive days) and informally during coffee and lunch breaks. Their access to the governing council was limited to observing the proceedings (except on rare occasions when the leader of the team made a formal presentation) and they had no access to the Security Council (see figure 3). At its peak, thirteen legal officers formed the F4 team.²⁵⁹ As in other legal teams at the UNCC, there was a turnover of F4 legal officers, but it was not high.²⁶⁰, ²⁶¹ As claims were

²⁵⁵ Ibid.

²⁵⁶ Ibid.

²⁵⁷ Ibid.

²⁵⁸ Personal impressions.

²⁵⁹ Personal observation.

²⁶⁰ See above n 233.

processed and completed, the UNCC wound down units dealing with claims in categories A through F3. Legal officers rendered redundant in those teams competed for F4 team vacancies. The UNCC recruited at least three such officers to the team.²⁶² During the second and third instalments, the UNCC made a special effort to recruit experts in environmental law and public health law.²⁶³, ²⁶⁴, ²⁶⁵, ²⁶⁶, ²⁶⁷, ²⁶⁸, ²⁶⁹, ²⁷⁰, ²⁷¹

The F4 team legal officers came from different countries and legal traditions — Australia (two), Brazil (one), Canada (two), Cyprus (one), Greece (one), Malaysia (one), Norway (one), Sri Lanka (one) and the US (three). There were five paralegals who served in the F4 team.²⁷² There was also a legal officer from Taiwan who was part of the F4 team during the early instalments.²⁷³ The legal officer from Cyprus specialised in public health law, but resigned his office in 2004.²⁷⁴ At the conclusion of the F4 team’s work, six of the team’s 13 officers were absorbed by UN agencies, while six others obtained employment outside the UN and one left to pursue further education. All three US legal officers returned to the US. The significant number of legal officers absorbed by UN agencies is evidence of the high expectation of UN employment engendered in UNCC staff — a legitimate expectation that influenced the advocacy positions and career goals of F4 team members and also the reason why UNCC management was able to exert significant control over legal officers.²⁷⁵

The F4 team members had both official and personal goals. Their personal goal was to advance their careers within the UNCC and the UN system or to enhance their marketability in the job market. To this end, they had to endear themselves, to the extent possible, to their

²⁶¹ Ibid.

²⁶² Personal observation.

²⁶³ For example my recruitment was as a result for the search for an experienced environmental lawyer from a developing country. The recruitment of Demtri Vryonides (Cyprus) was the result of a search for a public health lawyer.

²⁶⁴ See above n 233.

²⁶⁵ Ibid.

²⁶⁶ Ibid.

²⁶⁷ Ibid.

²⁶⁸ Ibid.

²⁶⁹ Ibid.

²⁷⁰ Ibid.

²⁷¹ Ibid.

²⁷² Personal observations.

²⁷³ Ibid.

²⁷⁴ Ibid.

²⁷⁵ The fact that F4 team members entertained such expectations and the fact that they shaped their advocacy so as not to jeopardise their chances of UN employment is based on anecdotal evidence from my own conversations with them and my own observations.

superiors — the team leaders and UNCC management. Their official goal was to do effective justice in the cases they were handling. None of them came from the regional claimant countries and as such had no national loyalties to the claimants. Many of them came from common law jurisdictions and had been trained as lawyers in law schools in their countries. Initially, they were all strong advocates for the principle of due process for Iraq, as they were for transparency and expeditious and effective justice for the victims of war. In chapters 3 to 5, I examine how the F4 team members shaped this advocacy to advance their legitimate goals. For example, advocating for due process for Iraq or for transparency carried risks of displeasing superiors, including UNCC management. Sometimes, these risks manifested themselves and team members were sanctioned through UNCC management reprimands. In chapter 3, I seek to demonstrate that, in the end, the F4 team and the panel were successful in incrementally expanding Iraq's participatory space in the environmental claims.

5 Panel's Expert Consultants

The panel's expert consultants had access to the panel and played a major role in environmental claims outcomes (see figure 3). The consultants produced analytical reports for the panel on the scientific evidence supporting claims. They gave evidence before the panel and interacted informally with panel members during breaks at panel meetings. They also had access to UNCC management and the F4 team. Interactions with UNCC management and the F4 team took place via correspondence (emails and letters), telephone and in person during panel meetings in Geneva. They also happened during site visits to inspect alleged damage. The panel's expert consultants interacted with claimant states and Iraq, but these interactions were in controlled environments supervised by UNCC management and the F4 team. For example, interactions with claimants happened through F4 team-controlled teleconferences or meetings or site visits. Interactions with Iraq's experts happened through meetings supervised by UNCC management. The panel's expert consultants did not have formal access to state delegations in the UNCC governing council or the Security Council.

The UNCC contracted IEC for the first, third, fourth and fifth instalments.²⁷⁶ In the second instalment, the UNCC experimented with two consulting firms, IEC being one of them. The other firm was Mazars & Guerard of France. The UNCC was subject to the UN's

²⁷⁶ M T Huguenin, M C Donlan, A E van Geel, and R W Paterson, 'Assessment and Valuation of Damage to the Environment' in Cymie R Payne and Peter H Sand (eds), *Gulf War Reparations and the UN Compensation Commission* (Oxford University Press, 2011) 67.

procurement rules and had to advertise and select consultants through a competitive bidding process.²⁷⁷ IEc was selected by these means for the first, second and third instalments. However, given the telescoping of the fourth and fifth instalments, it became necessary to hire consultants quickly. Besides, there was little time for consultants to have the benefit of a long learning curve. In these circumstances, with the panel's blessing, the F4 team leader and UNCC management recommended that IEc's contract for the third instalment be extended to cover the fourth instalment and the environmental and cultural heritage claims in the fifth instalment.²⁷⁸ This was done. An open procurement process was launched by the UNCC for the public health claims in the fifth instalment. At the pre-bidding conference there were several firms and universities interested in bidding for these claims.²⁷⁹, ²⁸⁰

IEc's previous experience working with the panel contributed to its success in the bidding process. The continuation of one consulting firm throughout the environmental claims allowed the panel's expert consultants to build personal relations with the F4 team, the panel and UNCC management. Most importantly, IEc acquired the knowledge of what was expected of them by the panel, UNCC management and the F4 team and was able to deliver satisfactory products at the various stages of claim processing. These products were primarily professional judgement reports (PJR) consisting of an evaluation of evidence of causation and directness of alleged damage and evidence supporting quantification of damage. IEc was also able to bring together a number of key experts in varied areas of science, ranging from entomology, soil sciences and agriculture to ballistics (including techniques for the safe disposal of remnant ordnance) and resource economics.²⁸¹

²⁷⁷ United Nations Office at Geneva, *About UNOG* <[http://www.unog.ch/80256EDD006AC19C/\(httpPages\)/AC05C88A1449ED7280256EED004E71AA?OpenDocument](http://www.unog.ch/80256EDD006AC19C/(httpPages)/AC05C88A1449ED7280256EED004E71AA?OpenDocument)>; United Nations Office at Geneva, *About UNOG* <[http://www.unog.ch/80256EDD006AC19C/\(httpPages\)/356F1E712A33AF9E80256EED0050429D?OpenDocument](http://www.unog.ch/80256EDD006AC19C/(httpPages)/356F1E712A33AF9E80256EED0050429D?OpenDocument)>.

²⁷⁸ Julia Klee, 'The Process' in Cymie R Payne and Peter H Sand (eds), *Gulf War Reparations and the UN Compensation Commission* (Oxford University Press, 2011) 29, 43–5; M T Huguenin, M C Donlan, A E Van Geel and R W Paterson, 'Assessment and Valuation of Damage to the Environment' in Cymie R Payne and Peter H Sand (eds) 67.

²⁷⁹ See above n 233.

²⁸⁰ Ibid.

²⁸¹ The range of expertise is listed in the panel reports for each instalment. For example see United Nations Compensation Commission, *Report and Recommendations made by the Panel of Commissioners concerning the First Instalment of "F4" Claims*, UN Doc S/AC.26/2001/16 (22 June 2001) [42].

The expert consultants' primary function was to provide technical assistance to the panel in reviewing and evaluating the claims.²⁸² To perform their function, the consultants were provided with all the claim material including the claim form, supporting evidence, Article 34 questions and responses (ie interrogatories and responses to them) and all the M&A material that claimants submitted.²⁸³ The consultants were also privy to scientific and other materials provided by Iraq in support of its responses and submissions.²⁸⁴, ²⁸⁵, ²⁸⁶ On such missions, the consultants brought with them key experts relevant to evaluating the evidence for claims filed by that country.

The panel, UNCC management and the F4 team were very dependent on the panel's expert consultants in making factual findings on the claims. In the absence of independent verification or testing of the consultants' views, fortified by confidentiality, there was little choice for the panel and the F4 team but to defer to their opinions. In the absence of greater checks and balances, exclusive reliance on expert consultants by the panel resulted in what might be characterised as technocratic decision-making practices. In chapter 5, I discuss the nature and extent of this expertise and the role it played in the institutional design of the UNCC and the decision-making practices that developed around consultants and experts and issues associated with them.

In my view, the primary goal of the panel's expert consultants was to discharge their contractual obligations to the UNCC in a commercially profitable manner.²⁸⁷ They would have been mindful of potential legitimate future UN consulting work and their own business reputation as consultants. It is not suggested that staff employed by the panel's expert

²⁸² UNCC Request for Consulting Services reproduced in Cymie R Payne and Peter H Sand (eds), *Gulf War Reparations and the UN Compensation Commission* (Oxford University Press, 2011) 359. The UNCC issued public Requests for Proposals (RFPs) for each of the five environmental claim instalments. These were RFP No. 9/PTS — 69 EMD (first instalment); RFP No. 0/PTS — EMD (second instalment); RFP No. /PTS — EMD (third instalment); RFP No. 02/PTS — 119/HE (fourth instalment) and RFP No. 03/PTS — 310/HPG (fifth instalment). These RFPs set out the terms of reference for the tasks required of the consultants. Generally, they all included, 'initial factual and technical' evaluation of claims, valuation and verification of claim amounts, assistance with methodological issues, site visits, interactions with the claimants and Iraq's experts, literature surveys and restoration and compensation analysis.

²⁸³ Ibid.

²⁸⁴ Ibid.

²⁸⁵ See above n 233.

²⁸⁶ Ibid.

²⁸⁷ I draw this conclusion from the facts (a) that IEc, was a commercial consulting company based in Boston competing in the open market for consulting jobs, (b) that the UNCC recruited the Panel's consultants through an open competitive bidding process and (c) that IEc was engaged by the UNCC on a contract setting out the services that were to be performed in return for a consulting fee.

consultants necessarily had expectations of employment at the UNCC although it is in fact the case a senior partner of IEc was appointed to the senior scientist position at the UNCC to manage the post-award tracking program.²⁸⁸ The panel's expert consultants were not involved in the creation of that program and did not have an opportunity to exert influence over decision-making relating to it.

6 Valuation and Verification Services Branch

The valuation and verification services branch (VVSb) consisted of valuation experts employed by the UNCC. Their task was to support the evaluation of claims by providing expertise in valuation techniques and by verifying the quantification of compensation. VVSb played a significant role in the application of mass claims processing techniques to individual and commercial loss claims. However, their role in the environmental claims was more limited, partly because the panel was generally averse to mass claims processing techniques in the evaluation of the environmental claims, and partly because valuation of natural resource and eco-system service losses required specialized expertise which was acquired by the UNCC through external consultants. Nevertheless, VVSb did play a more significant role in the environmental expenditure claims processed in the second instalment of claims by the panel. These claims were for expenses incurred by claimant states in preventing or mitigating environmental damage during and immediately after the Gulf war. To a limited extent, the panel did adopt discounting techniques used in mass claims processing, and as such VVSb's services became significant for that instalment of claims.

7 Claimants

Environmental claims filed by states fall into two broad categories: regional and non-regional.²⁸⁹ Regional claims were those filed by Middle Eastern states neighbouring Iraq. Iran, Jordan, Kuwait, Syria, Saudi Arabia and Turkey were regional claimants and together had claims in all the instalments. Australia, Canada, Germany, the Netherlands, the UK and the US filed the non-regional claims. They only had incurred-expenditure claims which the panel dealt with in the second instalment. These claims were for assistance rendered to regional states to abate or mitigate environmental damage during and after the Gulf War.

²⁸⁸ The Senior Scientist was employed by the UNCC after the conclusion of the environmental claims.

²⁸⁹ It is worth noting that this thesis only examines the environmental claims. The UNCC had many other categories of claims ranging from individual and corporate claims to government claims which were filed by numerous states.

Regional claimants tended to act together. On several occasions they exhibited a high degree of coordination in their approach to UNCC-related issues. For example, they jointly proposed the establishment of an escrow account to process M&A claims.²⁹⁰ They also acted jointly in responding to the call to establish a post-award tracking mechanism for the environmental restoration and compensatory claims.²⁹¹ In many of these situations when regional claimants acted together, leadership was provided by Kuwait and Saudi Arabia. This is probably because Kuwait and Saudi Arabia had the biggest stakes in the environmental claims. Kuwait and Saudi Arabia were environmentally the most affected by the Gulf War. Providing leadership for the other regional claimants was therefore well within their goals. Both Kuwait and Saudi Arabia were close economic and military allies of the US. As a result, this leadership played a dual role. First, it acted as a pressure point on the US to shape positions and behaviour in the governing council and the Security Council (see figure 3). Second, these two regional states acted as proxies for the US in these two bodies. Syria and Iran both had strained relations with the US.²⁹² Yet they were able to form a broad coalition with Kuwait and Saudi Arabia in matters concerning the environmental claims.²⁹³

Naturally, the primary goal of the regional claimants was to obtain the maximum possible compensation from Iraq for damages suffered in consequence of the Gulf War. They looked to the UNCC as well as to the Allied Coalition for this recompense. Considerable amounts of aid and military assistance was given by the US and the UK to Saudi Arabia.²⁹⁴ The regional claimants were vocal advocates of the principles of secrecy and effective and expeditious justice for the victims of war. They were also opposed to the principle of due process for Iraq.

8 Iraq

Iraq was a key actor in the UNCC, yet it was a relatively weak one. State actors in the UNCC maintained their view of Iraq as an aggressor right up until 2003 when the US invaded the

²⁹⁰ Julia Klee, 'The Process' in Cymie R Payne and Peter H Sand (eds), *Gulf War Reparations and the UN Compensation Commission* (Oxford University Press, 2011) 29, 35–6.

²⁹¹ United Nations Compensation Commission, *Governing Council, Decision 258*, 58th sess, UN Doc S/AC.26/Dec.258 (8 December 2005) Preamble. For a further discussion of the follow-up program see chapter 4.

²⁹² Syria cooperated with the US during the Gulf War but relations declined after the 2003 US-led invasion of Iraq. See U.S. Department of State, *Background Note: Syria* <<http://www.state.gov/r/pa/ei/bgn/3580.htm>>. Since then relations warmed but again took a plunge after the April-May 2011 attacks on peaceful pro-democracy protesters by the Assad regime. US-Iran relations have remained cold since the seizure of the US Embassy in Teheran in 1979 and the closing of the US Embassy in April 1980. See U.S. Department of State, *Background Note: Iran* <<http://www.state.gov/r/pa/ei/bgn/5314.htm>>. These relations have further deteriorated recently with Iran's alleged ambitions to build a nuclear weapon.

²⁹³ Klee, above n 290.

²⁹⁴ Malone, above n 65, 62–3.

country and overthrew Saddam Hussein. From this point onwards, most state actors, including some of the claimant states, softened in their attitudes.

Iraq received financial assistance from the UNCC in 2001 and appointed legal counsel from Geneva. Prior to this, Iraq had been advised by its own national legal counsel and experts.²⁹⁵,²⁹⁶ There was also the legal issue of whether the US, the invading power, had succeeded to Iraq's rights. These issues remained in abeyance until the Security Council adopted the post-invasion Resolution 1483 in May 2003.²⁹⁷,²⁹⁸,²⁹⁹,³⁰⁰

Iraq was in conflict with most of the other key actors at the UNCC, the only real exception being Russia. It was in conflict with the US (until after the 2003 invasion and overthrow of Saddam Hussein), with other key states in the governing council, with claimant states, and with UNCC management. Iraq acknowledged that some UNCC panels had courageously attempted to alleviate the hardship it suffered due to a lack of participatory space.³⁰¹ Based on the positive reaction it received from the panel, Iraq would also have understood that the panel and the F4 team were supportive of its desire for increased participatory space. Its allegations about the lack of due process and the procedural handicaps it had to face were generally directed at UNCC management and the governing council.³⁰² However, as the environmental claims progressed, the UNCC afforded Iraq greater participatory space through changes to the procedural rules and other forms of assistance such as funds to hire legal and scientific experts. Iraq's ability to hire legal counsel and scientific experts significantly increased the quality of its responses and its submissions on the environmental claims.³⁰³ For example, lawyers hired in Geneva with international law experience drafted Iraq's legal submissions, which became much more professional as a result. Iraq also began to support its factual submissions on the environmental claims with scientific literature surveys and expert testimony from scientists hired internationally.³⁰⁴

²⁹⁵ See above n 233.

²⁹⁶ Ibid.

²⁹⁷ SC Res 1483, UN SCOR, 4761st mtg, UN Doc S/Res/1483 (22 May 2003).

²⁹⁸ See above n 233.

²⁹⁹ Ibid.

³⁰⁰ Ibid.

³⁰¹ Michael E Schneider, 'How Fair and Efficient is the UNCC System ? A Model to Emulate?' (1998) 15 *Journal of International Arbitration* 1. For a further discussion of this issue see chapter 3.

³⁰² Ibid.

³⁰³ For further discussion of this issue see chapter 3.

³⁰⁴ Personal observation.

As a key actor at the UNCC, Iraq had several goals.³⁰⁵ First, it wanted to reduce the awards made by the UNCC to a minimum. Second, it wanted to enlarge its participatory space and increase the transparency of the process by which claims were decided. Third, it wanted to delay the proceedings for as long as possible. Delays ensured that awards and consequent payments would be postponed and Iraq would gain more time to study the claims and prepare its responses. If it could achieve these goals, Iraq stood to increase its influence on the procedural rules and claims outcomes and reduce the burden it would have to bear. These goals did not change after the US-led invasion of 2003. On the contrary, they became even more pronounced and bold, given the new US sympathy. With the change in the US's role vis-a-vis Iraq after the 2003 invasion, Iraq was able to achieve more of its goals than before. Iraq was a most vocal advocate of the principles of due process and transparency. Iraq maintained that the determination of its war liabilities was a matter for the International Court of Justice in The Hague. Despite accepting Security Council Resolution 687 including liability for war damage, Iraq consistently resisted acknowledging the right of affected citizens and governments to claim compensation for such damage. In this context, Iraq was also generally opposed to the principle of expeditious and effective justice for the victims of war.

E Webs of Influence

1 Dialogic Webs and Webs of Reward and Coercion

One of the three research questions this thesis seeks to answer is *how* various actors at the UNCC used mechanisms to influence rule and claims outcomes. So far, this chapter has discussed who the key actors were, and their roles, functions, powers and interests. These actors communicated with each other both formally and informally. Their formal interactions took place in three forums, namely the Security Council, the governing council and the panel. But they also interacted and communicated informally in working groups, UN coffee bars, and outside the workplace. Analysing *how* these actors communicated and interacted with each other is critical to unravelling how they advocated or opposed principles and how they deployed mechanisms to achieve their goals. In the discussion below, I approach this issue using the notion of webs of influence. I argue that actors at the UNCC communicated and interacted with each other through such webs. Sometimes these webs overlapped and were

³⁰⁵ My conclusions are based on official statements made by Iraq in its submissions to the Security Council, UNCC governing council, the Panel and other publicly available written documentation which I cite in the thesis.

interconnected; sometimes they were exclusive of one another. Occasionally there is documentary evidence of how the webs operated. Most of the time though, there is only anecdotal evidence. Until the UNCC's records become public and more evidence is revealed, my conclusions on webs of influence will therefore have to remain tentative.

Braithwaite and Drahos describe dialogic webs as follows:

Dialogic webs are more fundamentally webs of persuasion than webs of control. They include dialogue in professional associations, self-regulatory dialogue in industry associations, auditors from one subsidiary of a TNC [trans-national corporation] auditing the compliance with regulatory standards of auditors from another subsidiary, naming and shaming of irresponsible corporate practices by NGOs [non-governmental organisations], discussions in intergovernmental organizations at the regional and international levels, plus any number of idiosyncratic strands of deliberation that occur within and across epistemic communities. In dialogic webs actors convene with each other officially and unofficially, formally and informally. Dialogue helps actors to define their interests, thereby giving scope for the operation of mechanisms... Mechanisms form part of dialogic webs.³⁰⁶

Braithwaite and Drahos observed that '[s]ometimes practice remains solidly globalised without any formal rules'.³⁰⁷ They illustrate this point with traveller behaviour at check-in counters at airports around the world. Travellers form two lines — business class and economy class — and wait for their turn to check in without any formal rules. Even the inexperienced traveller falls into line by emulating more experienced ones. A considerable number of practices constituting the cumulative culture at the UNCC developed without any formal rules or decisions being made. Some practices started off as views expressed by senior UNCC management, became entrenched or fortified in certain rules or decisions and were then almost invariably followed by UNCC staff. New recruits were quickly made aware of these practices and were inducted into them through training or day-to-day advice by superiors and peers. Those who violated them were corrected formally or informally by peers or supervisors.

For example, the practice of resorting to mass claims-processing techniques to dispose of claims started off as a view held by UNCC management. As noted earlier, several senior UNCC staff members came from the Iran-US Claims Tribunal in The Hague. Their

³⁰⁶ Braithwaite and Drahos, *Global Business Regulation* (Cambridge University Press, 2001) 551.

³⁰⁷ *Ibid*, 553.

experience in that tribunal had taught them that large claims had been resolved on a priority basis while many small individual claims had not. They had also had first-hand experience of the dilatory tactics adopted by Iran and its arbitrators because of full participation rights for both parties and court-like procedures for processing each and every claim. What started as a UNCC management staff view became a general propensity to adopt mass claims-processing techniques. This practice pervaded the staff culture at the UNCC without any further need for rules or decisions. Arguably, these cultural aspects might have formed the habitus of UNCC staff.³⁰⁸ Had the UNCC lived longer, there is little doubt that these practices would have become second nature to staff. They can also be seen as part of the bureaucratic cultural background forming a consciousness and a resulting vocabulary of arguments as described in David Kennedy's work, where individual causal beliefs prove to be more important determinants of outcomes than the channels through which they operate.³⁰⁹

On the other hand, limitations on Iraq's participatory space originated as a goal of key state actors in the Security Council and the UNCC governing council. It was an agenda fortified by the views of senior UNCC management staff who came over from the US-Iraq Claims Tribunal. Limitations on Iraq's participatory space became entrenched in rules and decisions made by the UNCC's governing council and its panels and passed into the UNCC culture through informal means as well. This is also true of the culture of secrecy and the lack of transparency.

Braithwaite and Drahos, while conceding that dialogic webs and webs of reward and coercion are 'very often intertwined', draw an important distinction between them.³¹⁰ They assert that all webs of reward and coercion are connected to dialogic webs but that dialogic webs can often exist without any connection to webs of reward or coercion.³¹¹ In the case of the UNCC, US coercion or the threat of coercion always pervaded UNCC dialogic webs and although the coercion or its threat was not always obvious, it was nevertheless there. This point is illustrated by the decisions of the governing council and the panel on the extent of

³⁰⁸ Pierre Bourdieu, *Outline of a Theory of Practice* (Cambridge University Press, English Translation, 1977).

³⁰⁹ Kennedy, David, 'Challenging Expert Rule: The Politics of Global Governance' (2005) 27(1) *Sydney Law Review* 5. See also Kennedy, David, 'The Politics of the Invisible College: International Governance and the Politics of Expertise' [2001] *European Human Rights Law Review* 463. In chapter 5, I engage in a broader discussion of Kennedy's work and its implications for this thesis.

³¹⁰ Braithwaite and Drahos, above n 306, 552.

³¹¹ *Ibid.*

participatory space for Iraq in the environmental claims.³¹² There was evidence that the US was advocating and negotiating for limited participatory space for Iraq through formal and informal dialogic webs.³¹³ Other actors participating in the dialogic web, aware of the US position and its position as the only global superpower, would likely have been extremely slow to oppose the US.

The webs of influence that operated in the UNCC cannot be divorced from the context of the Gulf War. The US had emerged as the only superpower and had flexed its military muscle. The UK came a close second with France following. China and Russia had played a less prominent role in the lead-up to the Gulf War, though Russia had attempted to negotiate a settlement with Iraq before the outbreak of war. When it came to the 2003 invasion of Iraq by the US-led coalition of the willing, France and Russia opposed the use of force at the UN Security Council, forcing the US, together with the UK, to embark on the invasion without a UN resolution authorising the use of force.³¹⁴ After the invasion, both the US and the UK changed their roles, becoming trustees, protectors and promoters of Iraq.³¹⁵

In the context of the UNCC, the use of coercive force by the US (with or without UN authorisation) always loomed large. On four occasions in the space of 15 years, the US and the UK had used military force to coerce Iraq to submit to UN sanctions and resolutions. Between these events, the US had taken it upon itself to enforce the UN-sanctioned no-fly zones over areas of Iraq to protect the Kurds from Iraqi attack. These coercive acts are evidence that a web of coercion existed within the UN with regard to some nations. Whenever the US asserted a position within the Security Council or the UNCC governing council, its capacity as a military superpower loomed large in the unspoken background. Although the US may not in reality have intended to use or threaten force or economic sanctions as a means of achieving a given goal within the UNCC, other actors were aware of its potential power and ability to use coercion. Even when the US engaged in dialogic webs, actors could hardly forget its ability to use coercion. Though this was also true for other international forums where the US participated, the impact was much more real and immediate in the Gulf War-related work of the UNCC. US military capacity was therefore an unspoken force in all webs of influence in the UNCC where the US was involved,

³¹² For a detailed discussion of this issue, see chapter 3.

³¹³ Bettauer, above n 33, 29–44; Matheson above n 82, 178.

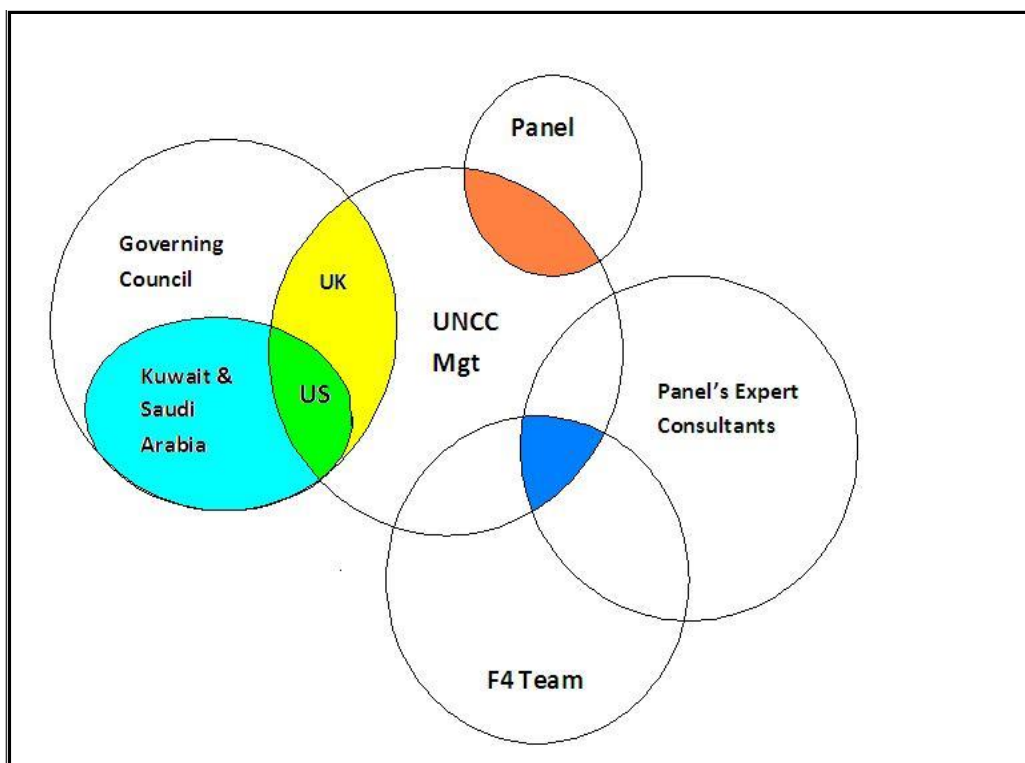
³¹⁴ Malone, above n 65, 192–201.

³¹⁵ *Ibid.*, 205–08.

particularly when it related to decisions concerning Iraq or its allies such as Kuwait and Saudi Arabia.

As stated by Braithwaite and Drahos, dialogic webs are more often ‘webs of persuasion than webs of control’ and actors convene ‘officially and unofficially, formally and informally’.³¹⁶ The dialogue helps actors define their interests and gives scope for the operation of mechanisms which form part of those webs.³¹⁷ In the UNCC, dialogic webs were constituted at different hierarchical levels and some of these webs intersected with each other. Figure 4 below attempts to illustrate these webs of influence. The first dialogic web included some members of the UNCC governing council, including the US and UK delegations and sometimes UNCC management. The second dialogic web included the US and UNCC management and some claimants such as Kuwait and Saudi Arabia. A third dialogic web included UNCC management, the F4 team and the panel’s expert consultants. The fourth dialogic web included the three commissioners and UNCC management staff. The first and second dialogic webs intersected from time to time. The third and fourth dialogic webs also intersected from time to time.

Figure 4. UNCC Dialogic Webs



³¹⁶ Braithwaite and Drahos, above n 306, 551.

³¹⁷ Ibid.

Figure 4 does not include Iraq, as it was not part of the dialogic webs referred to in this thesis, although Iraqi representatives did have formal conversations with UNCC management staff, the F4 team and the panel's expert consultants. They hardly ever had a dialogue with claimants on UNCC issues, except at the rare oral hearings. Iraq and claimant states began improving their relations after the overthrow of Saddam Hussein and the conclusion of the environmental claims. After the 2003 US-led invasion of Iraq, Iraqi officials had direct access to the first and second dialogic webs with US support. They also participated in meetings organised by the UNCC where claimants were also present to discuss post-award tracking mechanisms. Non-governmental organisations (NGOs) and other international organisations did not play a part in any of these webs or in the UNCC. The absence of NGOs in the UNCC arena removed a significant actor and a potentially dynamic force from the equation. NGOs play a very important part in other intergovernmental bodies such as the United Nations Environment Programme, the World Trade Organization, the World Intellectual Property Organization and International Labour Organization. The media and academia were perhaps the only outside group which had any influence on the UNCC, mostly through analysis, reporting, and naming and shaming.³¹⁸ The main argument against the inclusion of NGOs in the UNCC process was that it was a quasi-judicial body where, if any parties were to have a voice at all, it ought only be those who were party to the dispute. As shown earlier, the descriptor 'quasi-judicial' was not used consistently by UNCC actors and the commission was sometimes also described as a political organ, creating an ambiguity. As argued in chapter 1 of this thesis, there has been a growing expectation over the past three decades of NGO involvement in intergovernmental organisations, especially those dealing with environmental issues. NGOs could have been admitted as observers to oral proceedings and panel meetings, allowed to file amicus briefs or recruited as consultants for claim evaluations. In this context, the complete exclusion of NGOs from UNCC processes (especially the environmental claims) fell well short of this expectation.

³¹⁸ For examples of academic criticisms see Frederick L Kirgis, Jr, 'Claims Settlement and the United Nations Legal Structure' in Richard B Lillich (ed), *The United Nations Compensation Commission [Thirteenth Sokol Colloquium]*, (Transnational Publishers, 1995) 103; David J Bederman, 'Historic Analogues of the UN Compensation Commission' at 257–309. For media criticisms see for example, British Broadcasting Corporation, 'UN Pays out Iraqi Compensation', (2003) <<http://news.bbc.co.uk/2/hi/business/2930703.stm>>; T R Stauffer., 'Critical Review of UNCC Award for Lost Production And Lost Reserves ('Fluid loss' and 'PSL' Claims)', *Mid East News* (2001) <<http://www.mideastnews.com/gulf004.html>>.

The first and second webs operated in the context of two forums, the UNCC governing council and the UN Security Council. The third and fourth dialogic web operated in the context of the panel. Within each of these dialogic webs, each actor conveyed information and engaged others in formal, official ways and in informal, unofficial ways. Formal or official communications and dialogue occurred in the context of meetings of the three forums mentioned above. As noted previously, informal communication took place in the working group of the governing council as well as in coffee bars within the UN headquarters building in Geneva or among actors directly. UNCC management had access to and participated in all four webs. By virtue of this access, UNCC management had the most opportunities and channels to influence decisions made in the three forums. There is no evidence that the US accessed the panel except through UNCC management and formal responses to Article 16 reports³¹⁹ — a special procedural rule invented by the US and adopted by the UNCC governing council.³²⁰ The F4 team and the panel's expert consultants did not have direct access to the governing council except when the leader of the F4 team, on rare occasions, made formal presentations of panel reports to the governing council.

With these explanations, I turn to the environmental claims and the webs of influence that operated to produce rule and environmental claims outcomes. Table 5 shows which of the above actors directly participated in producing the environmental rule and claims outcomes in each instalment of environmental claims.

³¹⁹United Nations Compensation Commission, *Governing Council, Decision 10*, above n 71. Article 16 of the Rules stated that the Executive Secretary of the UNCC would make periodic reports to the governing council concerning the claims received. The reports would include basic details of the claims and legal and factual issues raised by the claims. All claimant governments, international organisations and Iraq would also receive the reports. Claimants and Iraq as well as member states on the governing council could submit, within stipulated time limits, 'additional information and views' on the claims to the secretariat for transmission to the panels dealing with the claims. This was the main mechanism available to Iraq to defend the claims.

³²⁰ For a further discussion see chapter 3.

Table 5. Actor Participation in Deciding Environmental Claims and Rule Outcomes

Outcomes Key Actor	M&A Claims (1 st Instalment)		Expenditure Claims (2 nd Instalment)		Restoration Claims (3 rd & 4 th Instalments)		Damage Claims (5 th Instalment)	
	Rule	Claim	Rule	Claim	Rule	Claim	Rule	Claim
<i>State actors (in the UNCC governing council)</i>	X				X		X	
<i>UNCC management</i>	X	X	X	X	X	X	X	X
<i>Commissioners</i>	X	X	X	X	X	X	X	X
<i>F4 team</i>	X	X	X	X	X	X	X	X
<i>Valuation & Verification Services Branch (VVS)</i>		X	X	X		X		X
<i>Panel's Expert Consultants</i>		X		X		X		X
<i>Claimants (state actors)</i>	X	X		X		X	X	X
<i>Iraq (state actor)</i>					X	X	X	X

Table 5 shows that the three commissioners, UNCC management and the F4 team were the most involved in producing these outcomes, whereas state actors in the governing council influenced important rule outcomes that affected the first, third, fourth and fifth instalments of claims. They were also involved in approving the claims outcomes for all instalments, but there was no controversy in the governing council about these decisions. As such, I conclude that the states participating in the governing council were not key actors in claims outcomes. Neither did state actors in the governing council and Security Council directly access the panel to influence claims outcomes. They were, however, able to assert an *indirect* influence through procedural rules.³²¹ The panel's expert consultants influenced the claims outcomes through their uncontested scientific, economic and valuation opinions and advice but had no influence over the rule outcomes. Their influence was concentrated on the claims outcomes, which I discuss in chapter 5 of this thesis. The claimants had some influence over the rule outcomes that affected the M&A claims and the post-award restoration and compensation claims but, in other instalments, their influence was mainly confined to claims outcomes. Iraq

³²¹ In chapters 3, 4, 5 and 6, I analyse the relationship between claims outcomes and procedure.

influenced the rule and claims outcomes in the third, fourth and fifth instalments, but had little say in the rule and claims outcomes of the first two instalments.

Apart from UNCC management, the claimant states and Iraq were the only other state actors that had access to all three forums. Access to the Security Council and the UNCC governing council was available to claimant states and Iraq as members of the United Nations, subject always to the discretion of those forums to hold sessions behind closed doors. On the other hand, access to the panel through written communications was available to claimant states and Iraq as parties to the environmental claims.

It is also possible to drill down into each instalment of environmental claims and identify key actors who influenced the rule and claims outcomes of that instalment. For example, table 6 below identifies the most influential actors in producing rule and claims outcomes in the first instalment of M&A claims. The outcomes referred to in this table are discussed in more detail in the next three chapters of the thesis.

Table 6. The Most Influential Actors in the Production of M&A Environmental Rule and Claims Outcomes in the First Instalment of Claims

Outcomes Key Actors	<i>Priority for M&A claims</i>	<i>Panel guidelines for expert consultants</i>	<i>Iraq's participation in the claim process</i>	<i>M&A award tracking</i>	<i>M&A claim awards</i>
<i>Non-Claimant States</i>	X		X		X
<i>UNCC management Staff</i>	X	X	X	X	X
<i>Panel</i>		X	X	X	X
<i>F4 team members</i>	X	X	X	X	X
<i>Valuation and verification Services Branch (VVSb)</i>					X
<i>Panel's Expert Consultants</i>					X
<i>Claimants</i>	X				X
<i>Iraq</i>			X		

Table 6 shows that non-claimant states (like the US and the UK) were involved in some of the major rule outcomes while they were not involved (except formally through Article 16 responses) in the claims outcomes.³²² The involvement of non-claimant states in rule outcomes was confined to major interventions.³²³ Claims outcomes were almost exclusively forged by UNCC management, the panel, the F4 team, the panel's expert consultants, Iraq and the claimants.³²⁴ Iraq was hardly involved in the M&A claims outcomes, its interventions being confined to a response provided to an Article 16 report and a last-minute formal response to the claims.³²⁵ On the other hand, neither the valuation and verification services

³²² For further discussion see chapters 3 to 4.

³²³ For example in determining Iraq's participatory space or payment priority for the monitoring and assessment claims. For a fuller discussion see chapters 3 and 4.

³²⁴ For a fuller discussion see chapter 5.

³²⁵ For further discussion see chapter 3.

branch (VVS) nor the panel's expert consultants were involved in any of the rule outcomes of the first instalment.³²⁶

As discussed in this and later chapters, UNCC management played an important role in the governing council and the panel, and with the F4 team. In many ways, UNCC management had to interact in several arenas at the same time. The relationships that UNCC management developed with key actors in the three forums, together with the considerable opportunities it had to influence several key actors, made UNCC management one of the two most influential actors within the UNCC. The other influential actor was the US. On the other hand, less influential actors used rule outcomes to influence claims outcomes. They did so by framing rule outcomes in ways that afforded the best chance for claims outcomes favourable to their goals to emerge. I examine this phenomenon in the next three chapters.

2 The UNCC Legal Epistemic Community

Another important issue concerning the webs of influence operating at the UNCC was whether there were epistemic communities formed at or around the UNCC and how they exerted influence on claims and rule outcomes. Haas describes epistemic communities as loose collections of knowledge-based experts who share certain attitudes and values and substantive knowledge as well as ways of thinking about how to use that knowledge.³²⁷ As Braithwaite and Drahos point out '[m]ost epistemic communities start with professions'.³²⁸

In my view there was a legal epistemic community at the UNCC — or possibly one such community with sub-epistemic communities within it. I discuss these below. In chapter 5, I consider whether the scientific experts and other experts who interacted with the UNCC also formed an epistemic community. I conclude that they may have formed smaller, isolated epistemic communities. The legal epistemic community at the UNCC consisted of UNCC legal officers and UNCC management staff.

As mentioned earlier, at its height, the UNCC employed around 200 lawyers from around the world. They were legal professionals drawn from the public, private, academic and non-profit

³²⁶ For further discussion see chapters 3 and 4.

³²⁷ Peter M Haas, 'Introduction: Epistemic Communities and International Policy Coordination' (1992) 46(1) *International Organization* 1. An 'epistemic community' is a network of knowledge-based experts or groups with an authoritative claim to policy-relevant knowledge within the domain of their expertise. Members hold a common set of causal beliefs and share notions of validity based on internally defined criteria for evaluation, common policy projects, and shared normative commitments.

³²⁸ Braithwaite and Drahos, above n 306, 501.

sectors. They comprised the UN's single largest gathering of legal professionals. These legal professionals formed a community, bound together by a common employer and a common employment objective — that of processing the Gulf War reparations claims. Some came from civil law traditions and others from common law jurisdictions. Yet they shared knowledge of basic legal principles and were interested in achieving a common understanding of the legal principles and methods applicable to processing Gulf War reparations claims. From my observations, they had a common policy project to process the UNCC claims so as to ensure compensation to the victims of war. Within this community, I conclude that the F4 team formed a sub-epistemic community. The F4 team shared all of these policy goals, including processing the UNCC claims and ensuring compensation to the victims of war. But they did not espouse the prevailing view on the method of achieving these goals. In particular, they did not believe in excluding Iraq or engaging in secrecy. On the contrary, their policy project included methods that were exactly the opposite — enlarging Iraq's participatory space and bringing more transparency to the process. I argue that one reason for this difference was the culture of openness and participation fostered within the environmental movement with which the F4 team and the three F4 commissioners found affinity.

To facilitate consistency in decision-making, the UNCC established an electronic Index of Jurisprudence (IoJ).³²⁹ The IoJ had a public and a private face. Documents ranging from governing council and Security Council proceedings and decisions to panel decisions and key legal and policy memoranda written by UNCC staff were made available in electronic form through the IoJ.^{330, 331} A search engine allowed legal staff to search the IoJ using keywords, dates, authors and other data.^{332, 333}

The IoJ functioned as a reference and database for UNCC precedents. Although the legal professionals employed at the UNCC came from both common and civil law jurisdictions, senior staff (especially those belonging to UNCC management) and the majority of the legal officers came from common law systems.³³⁴ Legal staff often used the IoJ when drafting

³²⁹ United Nations Compensation Commission, *Index of Jurisprudence* <<http://ioj.uncc.ch/>>. This website is no longer accessible to the public.

³³⁰ Ibid.

³³¹ See above n 233.

³³² Ibid.

³³³ Ibid.

³³⁴ The exact geographic spread of legal officers is not publicly available.

internal memoranda and legal submissions.³³⁵ Previous decisions or rulings by the governing council, UNCC management or the panels of commissioners often functioned like judicial precedents in the common law systems. Legal staff and panels cited these decisions and followed or distinguished them. Panel reports provide evidence of this practice as do legal submissions and internal memoranda.³³⁶

The IoJ served four key functions. First, it was a database and an archive for important UNCC documents and decisions. Second, it provided precedents and therefore guidance to UNCC staff and panels. Third, it became the glue for the formation of a legal epistemic community consisting of the legal and paralegal staff. Finally, it served the less obvious function of modulating the influences of key actors, a phenomenon discussed further in chapters 3 to 5 of this thesis.³³⁷

The dialogues between UNCC legal officers were both formal and informal. Formal dialogue took place through official correspondence and discussions. Informal dialogue took place during work, breaks and outside working hours. Many friendships were formed among the legal officers and UNCC legal issues were often discussed on social occasions.³³⁸

The legal epistemic community was able to influence both rule and claims outcomes in all categories of claims, including the environmental claims. Influence was exerted through the legal officer handling the claims and his or her supervisors. An individual legal officer could resort to the IoJ and to the advice of other members of the epistemic community to ward off influence from another actor by reference to the IoJ and to UNCC precedent. The epistemic community and its common pool of knowledge was used by legal officers to positively influence claims and rule outcomes as well as to oppose other actors and principles when they conflicted with values and attitudes held by the community. In the next three chapters, I

³³⁵ The IoJ provided a database for legal officers writing legal opinions or submissions. For example, a legal officer drafting a submission to a panel might have to address the issue of costs of claim preparation or whether a particular governing council decision applied to the claim or not. In such cases, the IoJ provided a search function that allowed legal officers to locate and cite previous panel decisions, legal memoranda and submissions as well as governing council decisions.

³³⁶ For example see United Nations Compensation Commission, *Report and Recommendations made by the Panel of Commissioners concerning Part One of the Fourth Instalment of 'F4' Claims*, UN Doc S/AC.26/2004/16 (9 December 2004) [255]–[256] [259]–[263] [267]–[271]. Here the panel was deciding whether Decision 19 of the UNCC governing council applied to the terrestrial damage claim of Saudi Arabia

³³⁷ See the discussion in chapter 3 and 6.

³³⁸ Most legal teams at the UNCC were a closely knit group who often carried their friendships beyond work.

examine how the legal epistemic community modulated the influence of more powerful actors by using community knowledge and values.

F Conclusion

In this chapter, I have discussed the establishment and structure of the UNCC, the role, powers, functions and goals of key actors involved in producing rule and claims outcomes, the webs of influence connecting these actors and the legal epistemic community (and the sub-epistemic community of F4 legal officers) that was active at the UNCC. In the next three chapters I seek to demonstrate that key actors interacted with each other through webs of influence that enabled them to advocate or oppose principles to further their goals. I analyse evidence to show how they achieved their goals by deploying mechanisms — mostly modelling — through the webs of influence at their disposal. The US, the UK and France played key roles in the Security Council and the governing council. These powerful actors worked together from 1990 to 1998 when France's goals in Iraq changed and it parted company with the US and the UK at the Security Council with regard to policies on the Gulf War and Iraq. Weaker actors such as the F4 team and the panel also played a role in producing rule and claims outcomes. The IoJ served an important function in how the F4 team and the legal epistemic community deployed mechanisms (modelling) to achieve their goals.

In the next two chapters, I analyse how these key actors shaped Iraq's participatory space in regard to the environmental claims and enabled claimants to file, develop and pursue their environmental claims. These chapters will provide evidence and analysis as to which principles were advocated or opposed, the mechanisms that were deployed and how this was done, and the rule and claims outcomes that resulted. In chapter 5, I analyse the role played by scientific experts in influencing the environmental claims outcomes and how they used the webs of influence. While this chapter has served to analyse actors, forums and the webs of influence they wove, the next three chapters will serve to analyse how they used their webs of influence to produce rule and claims outcomes.

CHAPTER 3 IRAQ'S PARTICIPATORY SPACE

A Introduction

Transparency, participation and access to justice occupy a special place in environmental law, having been recognised by Principle 10 of the Rio Declaration (1992) as essential elements of good governance and environmental decision-making.¹ The legal notion of due process includes aspects of access to information, participation and accountability as applicable to adjudicatory processes.² In the assessment of environmental claims, the principle of secrecy that prevailed at the UNCC came into direct conflict with notions of transparency and participation and therefore also with aspects of the notion of due process. This chapter examines Iraq's participatory space in the UNCC environmental claims – evolving from a very limited space in 1991 to a larger space after the US-led invasion of Iraq in 2003. I discuss this evolution below. Participatory space refers to the participatory opportunities and formal access to decision-making forums that a claimant or Iraq had under the procedural rules of the UNCC.³

One important aspect of fairness is the right and ability of all parties to a dispute to participate fully in its resolution, including the determination of compensation for conflict-related damage. Another aspect is the transparency of the dispute resolution process to the parties and the broader public. For the purpose of this thesis, the notion of fairness encompasses transparency, participatory space and due process. In the UNCC context, Iraq consistently complained about the lack of fairness. Its primary complaint was insufficient due process in the determination of the compensation claims. The lack of transparency in the claims resolution process was another complaint. In this chapter, I examine both these complaints.

I also examine both powerful and weak actors at the UNCC who were responsible for producing the rules governing Iraq's rights to information and participation in the environmental claims and ask what their goals were and how they deployed various mechanisms through webs of influence to achieve those goals. To these actors, due process

¹ United Nations Environment Programme, *Rio Declaration on Environment and Development* <<http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&ArticleID=1163&l=en>.

² It also includes other aspects such as impartiality and rules against self-incrimination.

³ For the purpose of this thesis the term participatory space for Iraq includes due process and aspects of transparency and participation relating to the UNCC adjudicatory process.

for Iraq and transparency were issues worthy of contestation. Through the rule outcomes they produced from 1991 to 2005, I track the manner in which key actors wrote procedural rules to serve their goals, how they manipulated webs of influence and how these rules affected claims outcomes. The chapter provides evidence of the particular significance of procedure as terrain across which actor's contestation of principles and their influence played out. It also examines strategies adopted by key actors, such as displacing or transcending conflict by shifting forum or scale, to avoid decision-making on controversial issues. In this and the next chapter, the thesis lays the ground for the assertion that international peace processes, whether initiated and implemented during or after a conflict, are more likely to succeed when fairness to all parties (as understood in its broadest sense) is an essential ingredient in that process.⁴

B Due Process and Transparency: Evolution of Iraq's Participatory Space

Due process and transparency are essential elements of fairness and lend credibility to judicial and quasi-judicial proceedings.⁵ Due process is a legal notion and consists of those aspects of fairness (including transparency and participation) that constitute the foundations of many legal systems. The rights of parties to (a) have adequate notice of the allegations (including all the evidence) against them in a judicial or quasi-judicial forum (transparency), (b) respond to such allegations and challenge the evidence against that party, (c) be heard by and participate in proceedings before an impartial decision-maker (inclusiveness), (d) legal counsel, (e) have reasons for the decision (accountability) and (f) have the decision reviewed by an independent agency (accountability) are all part of the notion of due process. Due process can be evaluated against the quality and quantity of these rights available to parties in any decision-making process – the more such rights are available, the greater the due process. Transparency refers to the availability of information relating to activities of an individual or organisation. In the context of the UNCC, transparency refers in some contexts to the availability of information to the public but in others to the availability of information to parties to claims, including Iraq.

⁴ See chapter 6 for a discussion of this argument.

⁵ Christopher Hood and David Heald (eds), *Transparency: The Key to Better Governance? Proceedings of the British Academy* (Oxford University Press, 2006). On due process and expeditious justice, see Dennis Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Oxford University Press, 1996). On fairness, legitimacy and equity in international law and institutions see Thomas M Franck, *Fairness in International Law and Institutions* (Oxford University Press, 1995, reprint 1998).

Due process and transparency have been recognised and applied in varied contexts within the international institutional framework. There is an important and growing body of global administrative law that has been researched and documented by the Global Administrative Law Research Project at New York University School of Law.⁶ The project seeks to systematise studies in diverse national, transnational, and international settings that relate to the administrative law of global governance.⁷ The project has assessed the normative case for and against promotion of a unified field of global administrative law, and for and against some specific positions within it.⁸ For the purposes of this chapter what is relevant is the growing recognition that ‘[u]nderlying the emergence of global administrative law is the vast increase in the reach and forms of transgovernmental (*sic*) regulation and administration designed to address the consequences of globalized interdependence’ in many fields including security, environmental protection and law enforcement.⁹ An increasing number of international bodies and informal groups perform administrative functions and make consequential decisions implementable directly against states and third parties by the global regime or more commonly through implementing mechanisms at the national level.¹⁰ These trends have sparked an extension of domestic administrative law principles to intergovernmental bodies that impact nation states as well as the development of new administrative law mechanisms and principles applicable to the decision-making of such bodies.¹¹

The growing field of global administrative law comprises ‘mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring that they meet adequate standards of transparency, participation, reasoned decision, and legality’ and it provides ‘effective review of the rules and decisions they make’.¹² The UNCC was one of these bodies that possessed

⁶ Research Project on Global Administrative Law, NYU School of Law, Institute for International Law and Justice in conjunction with the Center on Environmental and Land Use Law. Working papers, a bibliography, and project documents appear on the project website at <http://www.iilj.org/global_adlaw>.

⁷ Benedict Kingsbury, Nico Krisch and Richard B Stewart, ‘The Emergence of Global Administrative Law’ (2005) 68 *Law and Contemporary Problems* 15; Javier Robalino-Orellana and Jaime Rodríguez-Arana Muñoz (eds), *Global Administrative Law Towards a Lex Administrativa* (CMP Publishing, 2012).

⁸ Benedict Kingsbury, Nico Krisch and Richard B Stewart, ‘The Emergence of Global Administrative Law’ (2005) 68 *Law and Contemporary Problems* 15.

⁹ *Ibid* 16.

¹⁰ *Ibid*.

¹¹ *Ibid*.

¹² *Ibid* 17.

powers and functions to determine claims made by states against Iraq including rulemaking powers that are typical of domestic administrative bodies.¹³

Procedural participation and transparency (key aspects of due process and as notions embedded in Principle 10 of the Rio Declaration) are identified as key principles for which there is growing support within the sphere of global administrative law.¹⁴ There are several examples that support the recognition of participation and transparency as key global administrative law principles. They include the decisions of the Appellate Body of the World Trade Organization, Financial Action Task Force and the International Olympic Committee.¹⁵ There are also other examples where these principles are not reflected or are undermined. For example, there are no participatory mechanisms in place to hear affected individuals and domestic institutions when the Security Council takes decisions on imposing sanctions on a member state.¹⁶ Despite these instances, there are a considerable number of examples where non-governmental organisations and other actors such as labour unions have been allowed to participate in the decision-making of international bodies. In this context, an analysis of the participatory space afforded to Iraq within the context of the UNCC provides useful insights into the evolution of participatory space and transparency. The principles identified by the Global Administrative Law Project also offers a useful set of standards against which to evaluate the UNCC administrative practices. I address this in chapter 6.

Iraq's participatory space in the environmental claims evolved in three seamless phases over the life of the UNCC. The first phase roughly covered the period from 1991 to 1997. In this phase, Iraq's participation in the UNCC claims was severely limited, especially with regard to the individual loss claims. The second phase commenced in 1998 and ended with the revision of the rules of procedure in 2001 and their application till 2003. Iraq's participatory space and access to environmental claim documentation was enlarged during this period. In the third phase, which began around 2003 and continued to the end of the environmental claims in 2005, Iraq was provided the maximum participatory space provided during any claims process at the UNCC. These three phases were not coincidental. Rather they closely corresponded to changing key actor goals regarding Iraq – powerful actors such as the US,

¹³ Ibid 19. The Security Council and its committees are also identified as one of the types of these intergovernmental bodies.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid 38.

the UK, France and Russia. However, changes to procedural rules in the third phase also came about as a result of the actions of weaker actors such as the F4 team and the panel. This chapter analyses how and why this happened. Table 7 below summarises the three phases, the procedural changes and the key actors involved and their goals.

Table 7. Phases in Iraq’s Participatory Space in the Environmental Claims

Period/Phase	Iraq’s Participatory Space	Key Actors Involved	Key Actor Goals	Comments
Phase 1 1991–97	Extremely restricted by the Rules.	Permanent members (P5) of Security Council (SC) led by US.	<ul style="list-style-type: none"> • Punish and restrict Iraq • Compensate US-UK-France allies • Russia focussed on domestic issues 	Unprecedented cooperation among P5 in the SC on goals.
Phase 2 1998–2003	More participatory space for government & environmental claims through revised Rules.	France splits from the US-UK-France axis in P5. France, Russia and China Oppose Operation Desert Fox proposed by the US.	<ul style="list-style-type: none"> • The US/UK: punish and restrict Iraq • France/Russia: re-establish trade and other links with Iraq • SC: help Iraq with humanitarian crisis • SC: compensate the US allies • F4 team and panel push for more Iraqi participation in the environmental claims 	Split between the US-UK and France leading to weakening of US-UK-France axis. Considerable international concern with humanitarian crisis in Iraq. P5 disputes over alleged Iraqi weapons of mass destruction ending with France and Russian opposition to US-led invasion of Iraq. F4 team and the panel push for more participatory space for Iraq.
Phase 3 2003–05	Further expanded participatory space for environmental claims.	2003 US-led invasion of Iraq. The US and the UK become trustees, protectors and promoters of Iraq.	<ul style="list-style-type: none"> • The US/UK: establish stable democratic Government in Iraq and rebuild it • SC: help Iraq with humanitarian crisis • Panel and F4 team further expand Iraq’s participatory space 	The US and the UK recognised as trustees, protectors and promoters of Iraq. France and Russia desire to resume trade and other relations with Iraq. SC desires to help Iraq with humanitarian crisis. The changed key actor goals allow F4 team and the panel to enlarge Iraq’s participatory space even further.

In the first phase, general rules of procedure made by the governing council also applied to the environmental claims. Under these early rules, panels of commissioners were given *discretion* to provide Iraq with an opportunity to participate by holding oral proceedings and filing claim responses with regard to the larger corporate and government claims. Very few panels processing government and corporate claims exercised this discretion. It was a period in which a culture of secrecy and Iraqi exclusion pervaded the entire UNCC, a culture that was engendered by the Security Council and the UNCC governing council and maintained by UNCC management.¹⁷ One visible exception was the panel processing the environmental claims that swam against the current of this culture of secrecy and decided (through rule outcomes that it produced) to allow Iraq to participate to the maximum extent possible. In a culture where secrecy and Iraqi exclusion from proceedings was the norm, panels exercising this discretion were making bold decisions that went counter to that culture.

This phase is also characterised by the US and the UK (with unusual agreement from the other three permanent members of the Security Council) viewing Iraq as an aggressor state deserving of punishment for its invasion of Kuwait and a minimal role for Iraq in UNCC proceedings.¹⁸ In this phase, key actors involved in producing these rule outcomes were UNCC management and state actors in the governing council.

During this phase, key state actors (the five permanent members of the Security Council led by the US) used dialogic webs to influence rule outcomes that limited Iraq's participatory space. These rule outcomes handicapped Iraq in the defence of UNCC claims and increased the chances of success for claimants. The US and the UK advocated the principle of expeditious and effective justice for war victims and downplayed the principle of due process for Iraq. In crafting the rules of procedure, the US was holding up the Iran-US Claims Tribunal¹⁹ as a model with elements that should not be followed and drawing on models of mass claims-processing techniques used by other domestic tribunals.

In the second phase, Iraq was provided enhanced participatory space, particularly in the environmental claims by way of access to claim materials, right to file claim responses together with an extended time for doing so and funds for hiring legal and scientific experts.

¹⁷ For a discussion of the culture of secrecy, see chapter 2.

¹⁸ See chapter 2 for a detailed discussion of the US and the UK goals regarding Iraq at this time.

¹⁹ See chapter 2 for a discussion of the Iran-US Claims Tribunal experience and its constitutive effect on the UNCC.

This phase took place before the US-led invasion of Iraq in 2003 and much of it was inspired by Iraqi persistence in urging reforms, changing goals of key state actors with respect to Iraq and the Middle East – especially the permanent members of the UN Security Council – and the growing humanitarian crisis in Iraq. During this phase, key actors such as France and Russia wanted to re-engage Iraq²⁰ through trade and commerce while other key actors such as the US and the UK were forced to put Iraq on the back-burner following changes in administration in those countries or domestic political crises.²¹ The panel and the F4 team also played a role in addition to UNCC management and the governing council in this phase by clearly expressing its goal of increasing Iraq’s participatory space in the environmental claims.

During phase two, key state actors continued to use dialogic webs to influence rule outcomes as they considered revisions to the rules of procedure. While the US and the UK were reluctant to change the rules, Russian and French positions were more accommodating of Iraq.²² France in particular opposed the US in its efforts to obtain UN approval of Operation Desert Fox – a military operation to enforce the Security Council’s sanctions including the no-fly zones over Iraq. Additionally, France and Russia wanted to re-establish trade links with Iraq – a once lucrative market and a reliable trading partner for both these nations.²³ Unlike in 1991, given the lack of consensus, the US and the UK were prepared to compromise and allow greater participatory space for Iraq. The US, the UK, France and Russia were all using coercive webs to achieve their goals.²⁴ Interestingly, Iraq though a

²⁰ David Malone, *The International Struggle Over Iraq* (Oxford University Press, 2006). As Malone explains, in 1998 France parted company with the US and the UK over Operation Desert Fox to enforce sanctions on Iraq. Jacques Chirac had been elected Prime Minister of France and Dominique de Villepin (who later became a Prime Minister) had become the Foreign Minister. Russia under Vladimir Putin had begun to re-assert itself in international affairs and was interested in resuming commerce with Iraq, where it had considerable stakes.

²¹ For example, President Bill Clinton in the US faced impeachment proceedings in Congress from 1998–99.

²² Malone, above n 20.

²³ Lee Carol Owen, ‘Between Iraq and a Hard Place: The U.N. Compensation Commission and Its Treatment of Gulf War Claims’ (1998) 31(2) *Vanderbilt Journal of transnational Law* 499, 533. See also ‘Russia Suggest Easing Iraqi Burden’, *China Daily* (New York), 25 August 2000, 12; Frances Williams, ‘UN Unable to Agree Gulf War Reparations’, *Financial Times*, (Geneva), 1 July 2000, 6. The *China Daily* news report suggests that Russian UN envoy Sergei Lavrov had asked the Security Council to lower the percentage of Iraqi contributions to the UNCC fund from 30 to 20 per cent. The news report also suggest that he had asked for an investigation of the UNCC and that France and Russia were holding up the approval of a US\$15.9 billion award by a UNCC panel to Kuwait for lost oil revenue. The *Financial times* report corroborates this and states that France and Russia blocked the Kuwaiti award for the second time. Apparently Iraq had threatened to cancel contracts if the award was approved but the US had counter threatened to call for an unprecedented vote in the UNCC governing council which had decided issues by consensus till then.

²⁴ ‘Russia Suggest Easing Iraqi Burden’, *China Daily* (New York), 25 August 2000, 12; Frances Williams, ‘UN Unable to Agree Gulf War Reparations’, *Financial Times*, (Geneva), 1 July 2000, 6

weak actor, was also threatening economic repercussions if its demands were not met.²⁵ The revisions to the Rules resulted in expanding Iraq's participatory space with two significant changes – funds for internationally hiring scientific and legal experts to defend the environmental claims and extended time and greater access to claim materials and the panel for the environmental claims.

The changed actor goals (particularly of Russia and France) noted above prompted them to give greater weight to the principle of due process for Iraq. One mechanism used for changing Iraq's role in impacting the claims outcomes was to build its capacity²⁶ to defend the environmental claims. State actors in the Security Council and governing council shifted forums and vocabulary to try to circumvent obstacles to the achievement of particular rule outcomes that they were pursuing. For example, key state actors shifted from explicitly political vocabularies – of the sort that tend to prevail in the Security Council – to more particularised, procedural vocabularies in the governing council, albeit still with quite explicit political dimensions.

In the third phase, which began around 2003 and continued to the end of the environmental claims in 2005, Iraq was provided the maximum participatory space during any claims process at the UNCC, which included access to most claim materials, claimant responses to interrogatories, M&A materials submitted by claimants, oral proceedings and meetings with the panel's expert consultants. Much of this phase was helped by the 2003 invasion and regime change in Iraq, in that Iraq no longer tended to be regarded as an aggressor state worthy of sanctions. Despite this expanded participation, Iraq was denied other potential participatory rights such as a right of inspection of the sites of alleged damage located in claimant countries and access to communications between the panel's experts and the panel on the one hand, and the panel and claimants on the other.

Iraq used its expanded participatory space in the environmental claims to hire international legal and scientific expertise, demand documents, gain access to information and develop legal and factual defences to the claims. The net impact of the expanded participatory space is that Iraq was able to influence the claims outcomes by mounting substantive challenges to the environmental restoration and damage claims in the third to fifth instalments. Arguably, had

²⁵ Ibid.

²⁶ Capacity building is another mechanism that actors use to pursue their goals.

Iraq been provided with more participatory space earlier in the first two claim instalments, including more time to prepare its defence to the claims, it might have increased this influence even further and might even have influenced the claims outcomes in its favour in these early instalments.

In the final third phase, key state actor goals changed significantly in favour of Iraq after the US-led invasion and regime change in 2003. The US and the UK that were once opposed to Iraq became its protectors, promoters and trustees after the invasion.²⁷ Although the weakening of the US-UK-France axis in the Security Council leading up to the 2003 US-led invasion of Iraq²⁸ did not allow for major revisions to the UNCC rules of procedure, it set the stage for weaker actors to take advantage of Iraq's new favoured status in the UN. As such, the governing council did not play a direct role in these rule outcomes. The only significant rule change wrought by the US in the Security Council was the drastic reduction in Iraq's contribution to the UNCC fund.²⁹ Though state actors did not go beyond this rule change, it set the stage for the panel and the F4 team – both weaker actors – to take advantage of changed state actor goals and push for further participatory space for Iraq through its own actions and rules. UNCC management did not stand in the way of these changes because of changed state actor goals in the UNCC governing council and arguably even tacitly helped expand Iraq's participatory space.

The panel and F4 team used dialogic webs and modelling to promote the principle of due process for Iraq and, it is argued, co-opted UNCC management to its own agenda. The F4 team's and panel's efforts to enlarge Iraq's participatory space were in part an expression of identities and norms displayed by the sub-epistemic legal community of which the team's and panel's members felt a part.

In all three phases, contestation among relevant actors often took the form (in part) of a dispute about principles – in particular, the principles of due process, expeditious justice and

²⁷ SC Res 1483, UN SCOR, 4761st mtg, UN Doc S/RES/1483 (22 May 2003) para 4. This resolution enjoined the US and the UK 'consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future'.

²⁸ Malone, above n 20.

²⁹ See chapter 2 for a discussion of the reduction of Iraq's contribution to the UNCC fund following the US-led invasion of Iraq.

transparency, each of which was given content, weight and meaning specific to the UNCC institutional context, yet was also shaped by broader legal and political norms. In this sense, principles served an important mediating and depersonalising function. This function sometimes resulted in focussing contestation around notions of fairness, but also served to mask the political goals of state actors. I examine each of these three phases in detail below.

C A Culture of Secrecy: Limiting Iraq's Participatory Space (Phase 1)

From 1991 to 1998 the UNCC operated within a culture of secrecy³⁰ where Iraq was afforded very little participatory space, particularly in the individual loss claims. During this period, the UNCC disposed of thousands of individual and corporate claims using the Rules of Procedure (the Rules) established by the governing council in 1992.³¹ Processing of the environmental claims had not yet commenced in earnest during this time, but when they did, the Rules also applied to them.

Three aspects of the Rules shed light on the research questions of this thesis. First, the Security Council, having decided to develop the Rules, changed its mind and shunted them to the governing council because of member conflicts around Iraq's participatory space. Second, as a result, these conflicts migrated to the governing council, which negotiated the Rules for almost one year. Third, Iraq's participatory space was eventually limited to responses to Article 16 reports³² and limited access to claim materials and oral proceedings at the discretion of panels. Examining these three aspects and identifying who the key actors and their goals were, the principles they advocated and any mechanisms they deployed, through their webs of influence, will help respond to the thesis questions.

1 Controversy in the Security Council over Due Process for Iraq

The first reference to Iraq's right to participate in the claims process is found in the Secretary General's report to the Security Council pursuant to Resolution 687.³³ Resolution 687 had requested the Secretary General to include 'appropriate procedures for evaluating losses, listing claims and verifying their validity and resolving disputed claims in respect of Iraq's

³⁰ See chapter 1 and 2 for a discussion of the culture of secrecy at the UNCC.

³¹ United Nations Compensation Commission, *Governing Council, Decision 10*, of the, 6th sess, 27th mtg, UN Doc S/AC.26/1992/10 (26 June 1992).

³² *Ibid* art 16. The content and implications of Article 16 are discussed below.

³³ United Nations Security Council, *Report of the Secretary-General regarding creation of a United Nations Compensation Fund and United Nations Compensation Commission as envisaged in Security Council Resolution 687 (1991)*, UN Doc S/22559 (2 May 1991).

liability'.³⁴ In his report dated 2 May 1991, the UN Secretary General advocated the principle of due process for Iraq and stated that '*Iraq will be informed of all claims and will have the right to present its comments to the commissioners within time limits fixed by the governing council or panels of commissioners dealing with claims*'.³⁵

Members of the Security Council had mixed reactions to the Secretary General's proposals. The Council accepted part of the recommendations of the Secretary General by adopting Resolution 692 on 20 May 1991.³⁶ The Council *did not* adopt the claims procedures advocated by the Secretary General, including the recommendation giving Iraq full participatory rights (recognising due process for Iraq) in the claims process. Instead, it mandated the UNCC governing council to implement the compensation provisions of Resolution 687 expeditiously 'taking into account the recommendations' on claims procedure made by the Secretary General in his report.³⁷

The negotiations of Resolutions 687 and 692 were led by the US and the UK.³⁸ These two key states were responsible for crafting the resolutions which also had the support of the other three permanent members of the Council, given the unusual cooperation between the permanent members of the Security Council at this time.³⁹

³⁴ SC Res 687, UN SCOR, 2981st mtg, UN Doc S/RES/687 (3 April 1991) para 19.

³⁵ United Nations Security Council, *Report of the Secretary-General regarding creation of a United Nations Compensation Fund and United Nations Compensation Commission as envisaged in Security Council Resolution 687 (1991)*, above n 33, (emphasis added).

³⁶ SC Res 692, UN SCOR, 2987th mtg, UN Doc S/RES/692 (20 May 1991) para 3. Also see United Nations Department of Public Information, above n 33, 255. By para 3, the Security Council established the UNCC 'in accordance with Section I of the Secretary General's report' dealing with the establishment, organs and structure of the UNCC'.

³⁷ *Ibid* para 5. Para 5 delegated the rule making to the UNCC governing council, requesting it to 'take into account' the recommendations of the Secretary General in part II of his report. Part II of the report dealt with claims procedures including Iraq's participatory space and recommended full participation for Iraq. See also Michael F Raboin, 'The Provisional Rules for Claims Procedure of the United Nations Compensation Commission: A Practical Approach to Mass Claims Processing' in Lillich Richard (ed), *The United Nations Compensation Commission [Thirteenth Sokol Colloquium]* (Transnational Publishers, 1995) 119, 124. The Security Council adopted the recommendations of the Secretary General in section I of the report dealing with the establishment, organs and structure of the UNCC.

³⁸ Ronald J Bettauer, 'Establishment of the United Nations Compensation Commission: The U.S. Government Perspective' in Lillich Richard (ed), *The United Nations Compensation Commission [Thirteenth Sokol Colloquium]* (Transnational Publishers, 1995) 33.

³⁹ Malone, above n 20.

The formal record of the Security Council is silent on the discussions that took place regarding this particular issue.⁴⁰ All of the negotiations on the text of the resolution took place in private, as was the practice of the Security Council.⁴¹ Although, the verbatim records of Security Council proceedings are made public, much of the real decision-making was not transparent. What can be inferred from the decision is that the Security Council was not ready to adopt the claims procedure proposed by the Secretary General (including full participatory rights for Iraq). It was also not prepared to decide on the procedure itself, although the Secretary General had proposed a fairly comprehensive set of procedures. In the result, the development of claims procedure was devolved to the UNCC governing council. Arguably, the delegation might have been the result of an over-worked Security Council with little appetite for negotiating detailed claims procedure. This argument has some merit when considered in the light of the cooperative relations among the permanent members of the Security Council.

While the over-worked Council argument might have merit, in my view, the action was, at least partly, the displacement of contested procedural provisions to another forum (the governing council). If it was not the intention of the Security Council to spend time on procedural details, presumably it would not have requested a draft procedure from the Secretary General in Resolution 687 in the first place.⁴² Subsequent events outlined below demonstrate that the delegation of procedural issues to the governing council was probably a deliberate act of the Security Council, likely precipitated, among others, by contestation of and conflict over Iraq's participatory space. In my view, the displacement of the decision-making to the governing council was likely caused by the intensity of contestation over due process for Iraq, an issue on which the US, the UK and France probably did not want to risk a vote, which would have brought into play the possible exercise of the veto power of the other two permanent members.

⁴⁰ United Nations Security Council, *Provisional Verbatim Record*, UN Doc S/PV. 2981, (3 April 1991); United Nations Security Council, *Provisional Verbatim Record*, UN Doc S/PV. 2987 (20 May 1991). The proceedings show that there were discussions on the floor of the Security Council before and after Resolution 687 was adopted – but there was no discussion prior to or after the adoption of Resolution 692 which was proposed by several states including the US, the UK, France and Russia and supported by 14 states including China.

⁴¹ Susan C Hulton, 'Council Working Methods and Procedure' in David M Malone (ed), *The UN Security Council from the Cold War to the 21st Century* (Lynne Rienner Publishers, 2004) 237, 245–247.

⁴² SC Res 687, UN SCOR, 2981st mtg, UN Doc S/Res/687 (3 April 1991) para 19.

By shunting the procedural decisions to the governing council, the Security Council sent a signal that there was contention over some procedural issues, including full Iraqi participation in the claims process and identified the governing council as a better forum in which to tackle these. An advantage in having the procedural rules framed by the governing council was the absence of the veto and the ability to make decisions by majority vote. The goal of the US, the UK and France at this time was to make an example of Iraq by punishing it for invading Kuwait and ensure that their allies – Kuwait, Saudi Arabia, Jordan and Turkey – were compensated for the massive losses suffered in consequence of the Gulf War. The US in particular was acutely aware of its experience in the Iraq-US Claims Tribunal in The Hague, where, as mentioned earlier, perceived dilatory tactics adopted by Iranian judges and lawyers had delayed individual loss claims for years. Providing for robust due process rights for Iraq risked a repeat performance of that tribunal’s experience. On the other hand, Iraq and the UN Secretary General were advocating due process rights for Iraq. Several countries, including Yemen and Cuba, had argued that the Security Council was not competent to establish the UNCC and that the issue of Iraq’s liability for war damage must rest with the International Court of Justice.⁴³ If allowed, Iraq was more than likely to raise issues about the UNCC’s legality and the Security Council’s competence to establish the UNCC in compensation proceedings.⁴⁴ The US, the UK and France are also nations with strong due process jurisprudence in their domestic judicial systems. Striking the right balance with regard to Iraq’s participatory space was therefore important for these three states – too much space risked delays in compensating victims and allies alike and too little space risked creating a UNCC which had little credibility and would be a bad precedent in international law.

Substantive and procedural rules are stamped with the policy goals of and compromises made by the most influential among the rule-writing actors. But, distilling the goal of actors from procedural rules they write may be more challenging than with substantive rules. Unlike with substantive rules, the formulation of procedural rules invites generalisation rather than particularisation. Procedural rules can also be read or written in a more open or outwardly-directed mode. Fortunately, several factors help overcome this challenge in interpreting actor behaviour at the UNCC with regard to procedural aspects of due process for Iraq. First, the UNCC and the related post-Gulf War infrastructure established by the Security Council was

⁴³ See the discussion of this issue in chapter 2.

⁴⁴ In fact, Iraq raised this objection in every response it submitted to notifications under Article 16 of the UNCC Rules. Iraq also made the objection in formal claim responses it filed.

specifically related to Iraq.⁴⁵ Second, UNCC procedures were concerned with how to determine compensation against Iraq. In this context, a more direct link is possible between actor goals and the positions they took with regard to procedural issues.

When actors are unable to resolve substantive issues because of controversy, one option is to displace them to procedural terrain. If there is disagreement on whether to apportion a liability between A, B and C, the dispute can be moved to procedural terrain by suggesting that the decision be made elsewhere subject to a set of procedures that the actors would put in place. The actors would then negotiate the rules of procedure rather than the substantive decision. In doing so, they would write the procedures in ways that laid the foundation for their policy goal to emerge from the ultimate decision-making. In this sense, procedures are stamped with the policy goals of the most influential actors in the rule-writing project.⁴⁶ The Rules at the UNCC were written by UNCC management and negotiated by the state members of the governing council. The decisions on claims were made by panels – third parties not directly controlled by the governing council. The Rules therefore became the medium through which the most influential state actors laid the groundwork for their policy goals to emerge through panels making claim-related decisions. The Rules dealing with due process for Iraq were at the heart of that conflict.

2 Controversy in the Governing Council over Due Process for Iraq

The UNCC governing council, led by the US, entrenched rules that disadvantaged Iraq in its participation and defence of the claims.⁴⁷ For example, Iraq was not given access to claim documentation relating to individual loss claims⁴⁸ nor was it given an automatic right to oral hearings.⁴⁹ State delegates in both the Security Council and the governing council were keen to ensure that the claims were processed expeditiously and that Iraq should be made to pay the costs of war.⁵⁰ At the same time, they could not be seen to establish direct control over the

⁴⁵ Had the institution more wide ranging powers over conflict related damage relating to several wars, the conclusions would have been more difficult to make.

⁴⁶ Alex Mills and Tim Stephens, 'Challenging the Role of Judges in Slaughter's Liberal Theory of International Law' (2005) 18 *Leiden Journal of International Law* 1.

⁴⁷ See chapter 2 for a discussion of the role played by the US and the UK in establishing and guiding the early years of the UNCC.

⁴⁸ Raboin, above n 37, 119, 125.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*; United Nations Security Council, *Provisional Verbatim Record*, UN Doc S/PV. 2981, (3 April 1991). For example, see the statement by Mr Rochereau de la Sabliere representing France that '[i]t is only fair that such losses should be properly compensated for by reparations.' See also the statement by Sir David Hannay representing the UK stating that there is no reason why Iraq 'blessed as it was with the second –largest unused

claims outcomes, since this would undermine the goals of impartiality and credibility.⁵¹ State's delegates with policy goals to influence the claims set up the procedural rules in ways that handicapped Iraq and placed claimants at an advantage. Key actors in the governing council achieved this goal through the Rules.⁵² These rules were not revised in Iraq's favour until 2001 when the processing of the environmental claims had commenced.⁵³

On 26 June 1992, The UNCC governing council adopted Decision 10 establishing 'Provisional Rules for Claims Procedure',⁵⁴ one year after it commenced work. The Rules dealt with a number of matters including the submission of claims, *locus standi* for submitting claims, claim forms and language, representation of claimants, the establishment of the UNCC registry, late claims, preliminary assessment of claims, categorisation of claims, appointment and tenure of commissioners, confidentiality, the work of the panels of commissioners, evidentiary rules and decision-making.⁵⁵ Claims filed with the UNCC covered numerous heads of loss, ranging from personal injury, business losses and refugee claims to environmental restoration and damage claims. Claims were filed by numerous countries on behalf of themselves and their affected citizens and corporations.

The secretariat decided to use its own staff to develop the Rules. As noted earlier, several senior management staff members at the secretariat had come over from the Iran-US Claims Tribunal in The Hague⁵⁶ and many of them also had international arbitration experience. In chapter 2, I discussed how the experiences of that tribunal had a constitutive effect on the UNCC.⁵⁷ The Iran-US Claims Tribunal had drawn loud criticism from academics and lawyers.⁵⁸ Together with the US, they held up the procedures adopted by the Iran-US Claims

oil reserves in the world should not be able to assure a reasonable measure of economic development and prosperity to its people and to meet claims for compensation'.

⁵¹ United Nations Security Council, *Provisional Verbatim Record*, UN Doc S/PV. 2981, (3 April 1991). For example, see the statement by Mr Lukabu K N'Zaji, representative for Zaire made after the Security Council adopted Resolution 687 – '...it is only fair,...that Iraq, the aggressor, bear responsibility for its acts and pay for them. This is why we believe that the machinery set up will ensure that the system functions harmoniously and impartially,...'.

⁵² United Nations Compensation Commission, *Governing Council, Decision 10*, above n 31.

⁵³ United Nations Compensation Commission, *Governing Council, Decision 114*, 101st mtg, S/AC.26/Dec.114 (2000) (7 December 2000).

⁵⁴ United Nations Compensation Commission, *Governing Council, Decision 10*, above n 31.

⁵⁵ *Ibid.*

⁵⁶ Iran-United States Claims Tribunal, *Iran-United States Claims Tribunal* <<http://www.iusct.org/>>.

⁵⁷ Mary Anne Glendon, *Abortion and Divorce in Western Law* (Harvard University Press, 1987). See the discussion of Glendon's work in chapter 1. Glendon suggests that the law has both a 'constitutive' and 'interpretive' role in society.

⁵⁸ Howard Holtzmann and Edda Kristjansdottir (eds), *International Mass Claims Processes: Legal and Practical Perspectives* (Oxford University Press, 2007). See also John R Crook, 'Mass Claims Processes:

Tribunal as a model that the UNCC *should not* follow. Instead, the US and UNCC management advocated mass claims-procedures that had been used by other claims tribunals.⁵⁹ As the negotiations of the Rules continued, these models were discussed by state's delegates and UNCC senior staff. Advocacy for and against the principle of due process for Iraq was largely done through comparative modelling of other tribunals and institutions as part of the Rule negotiation process at the UNCC.

The secretariat's initial drafts proceeded on the basis that each category of claims would have its own special set of processing rules. However, the governing council dropped this option because it thought the draft rules 'too cumbersome'.⁶⁰ Instead, the secretariat developed 'an all-inclusive set of draft Rules'.⁶¹ Interestingly, the evolution of the Rules shows that the secretariat was responding to the US's concerns about Iraq's participatory space. While some of these concerns were expressed in the governing council, the secretariat drafts presented to the council showed revisions that would require closer consultations.⁶²

For example, the secretariat's early consultations with members of the governing council appear to have highlighted several concerns and expectations,⁶³ including the extent of Iraq's

Lessons Learned Over Twenty-Five Years' in *The International Bureau of the Permanent Court of Arbitration* (ed), *Redressing Injustices Through Mass Claims Processes: Innovative Responses to Unique Challenges* (Oxford University Press, 2006) 42. Crook refers to the 'delay frequently associated with past international claims commissions as a key factor leading to policymakers' disaffection with their use'. Crook served as a US agent to the Iran-US Claims Tribunal for four years and later was involved in the creation of the UNCC. Interestingly he refers to the transfer of expertise with regard to 'a body of experienced lawyers schooled at the Tribunal' (at 44) who went on to establish the UNCC. Referring to the fact that the Iran-US Claims Tribunal had not given priority to the 2800 small claims, Crook states that the Tribunal 'taught harsh lessons in fairness' (at 46), and that in contrast, the UNCC's mass claims processes were 'designed to avoid the shortcomings in the [Tribunal's] handling of its small claims'. Crook claims that 'except for the largest of the 2.6 million claims, the UNCC's processes 'consciously abandoned the model of individualized case-by-case adjudication' (at 47).

⁵⁹ For example the United States-German Mixed Claims Commission 1922-1939. For a discussion of the historical antecedents of the UNCC see David J Bederman, 'Historic Analogues of the UN Compensation Commission', in Richard Lillich above n 38, 257. For another perspective of the design of the UNCC see Francis E McGovern, 'Dispute System Design: The United Nations Compensation Commission' (2009) 14 *Harvard Negotiation Law Review* 171. While I agree with McGovern's analysis of the structure of the UNCC, I disagree with his characterisation of the UNCC as being transparent.

⁶⁰ Raboin, above n 37, 123.

⁶¹ *Ibid.*

⁶² *Ibid* 126.

⁶³ These concerns included (a) a strong desire to avoid oral hearings for the first three claim categories, which were claims involving individual claimants (A, B and C category claims), (b) a desire to ensure that commissioners resolved category D, E and F claims (including environmental claims), which were claims involving corporate and government claimants, on the documents alone within a six month period and (c) a desire to confine oral hearings to unusually large and complex claims where additional written submissions and an extended 12 month period might be necessary.

participation in the claims process.⁶⁴ All these concerns were addressed in the first working paper tabled by the secretariat before the governing council.⁶⁵ In these fleeting glimpses, we begin to have a sense of the webs of dialogue between UNCC management, the US and the UK. Contention among governing council members on these issues provides an important clue as to why the Security Council might have shunted the procedural rule-making to the governing council. The US in particular wanted to ensure that the claims of individuals were dealt with on a priority basis and with minimal burden to them. This was one of the lessons the US had learnt from the Iran-US Claims Tribunal. It was a concomitant view also held by UNCC management. The capacity of individuals in conflict situations to muster evidence in support of loss claims is extremely limited.⁶⁶ Developing rules that simplified claim filing and processing was therefore imperative for the US and its allies. Government claims did not present these same problems and the US and its allies seemed more willing to accommodate greater due process for Iraq and higher evidentiary standards for these claims. The contestation on due process for Iraq in claims filed by governments was therefore a question of quality and quantity – what level of due process was appropriate? The secretariat addressed many of these concerns and expectations in the first draft of the Rules circulated to the governing council on 4 March 1992.⁶⁷ The extent of Iraq's participation in the claims process was central to the governing council's discussion of the draft Rules.⁶⁸

There was divided opinion within the governing council on the extent of Iraq's participation in the claims process. At one end were those members who held the view that Iraq should have no role in the processing of the A, B and C category claims – claims of individuals. They pointed to the absence of any reference to Iraq in the first decision made by the governing council setting out the criteria for such claims.⁶⁹ On the other hand, there were governments that felt Iraq should have access to general claim information such as the identity of claimants, the number of claims in each category, the claim elements within those claims and the amounts claimed.⁷⁰ Opinions about Iraq's participation in the D, E and F

⁶⁴ Raboin, above n 37, 123. Raboin does not specify who these members were, but it is more than likely that it included the dominant actors in the UNCC governing council including the US, the UK and possibly France.

⁶⁵ Raboin, above n 37, 123, 124.

⁶⁶ In most cases individuals making these claims were refugees who fled with no time to gather their personal belongings and documents while others lost their homes, and documents during the war.

⁶⁷ Raboin, above n 37, 123, 125.

⁶⁸ Ibid 124.

⁶⁹ United Nations Compensation Commission, *Governing Council, Decision I*, 1st sess, S/AC.26/1991/1 (1991) (2 August 1991).

⁷⁰ Raboin, above n 37, 123, 125.

categories of claims (corporate and government claims) were less divided and the concerns were:

- 1) whether Iraq should receive copies of claim materials and supporting legal documentation;
- 2) how much time Iraq should have to submit comments on the claims (periods from 60–180 days were considered);
- 3) whether Iraq’s comments should be made available to the governing council before being sent to the commissioners;
- 4) whether Iraq’s comments should be restricted to the claims or whether Iraq should also be able to challenge the procedure and work of the UNCC; and
- 5) how to balance Iraq’s participation in the claims process against the need to provide effective and expeditious justice to the victims of the war.⁷¹

This last issue appears to have been the one around which the other issues were resolved. Here we encounter the two principles that actors advocated or opposed. The first was the principle of due process for Iraq. This principle impacted the rules of procedure dealing with the scope, nature and extent of Iraq’s participatory space in the claims process. The second was the principle of effective and expeditious justice for the victims of the war. There are two elements to this principle – expedition and effectiveness. Expeditious justice requires the speedy processing of the claim. Effective justice refers to the provision of a satisfactory remedy – in the UNCC, an adequate monetary award. Actors at the UNCC constantly engaged in contestation over these two principles. As the discussion below shows, the principle of due process for Iraq was weak at the time the UNCC was established in 1991, but gradually gained ascendancy in the environmental claims after 1998.

The secretariat’s first draft of the Rules of 4 March 1992 ‘reflected a compromise effort to allow Iraq to participate in the claims process but to avoid unnecessary delay in that process’.⁷² The draft made a distinction between the role Iraq was allowed to play in the processing of category A, B and C (individual) claims on the one hand and category D, E, and F (corporate and government) claims on the other. With respect to individual claims, the draft rules adopted mass claims-processing techniques that included sampling and

⁷¹ Crook, above n 58.

⁷² Raboin, above n 37, 123, 125.

consolidation of similar types of claims.⁷³ With respect to corporate and government claims, the draft adopted a less restrictive approach and stated that ‘Iraq should be informed of the names of each claimant, the elements of loss in each separate claim, the amount of compensation sought in each separate claim, and the legal briefs and supporting documentation submitted by claimants, *where appropriate*’ and ‘Iraq was to be given 180 days to provide its comments on such information’.⁷⁴

Comments on the first draft from governing council members demonstrated a division of opinion, with some favouring the exclusion of Iraq from the claims process altogether and others giving Iraq an active role in the claims process in the light of the Secretary General’s suggestions contained in his report.⁷⁵

The US held the view that the draft rules gave Iraq an unnecessarily prominent role.⁷⁶ It made an alternative proposal in response.⁷⁷ The proposal was that the Executive Secretary of the UNCC would present reports to the governing council from time to time, setting out the number of claims received and significant factual and legal issues that arose in the claims. Claimant governments and international organisations would have 180 days to submit their views on the report. The UNCC would provide these views to the panels of commissioners for consideration when evaluating the claims. This proposal was the embryo of what eventually became Article 16 of the Rules.⁷⁸

The secretariat incorporated the US proposal into a revised working paper that it distributed to the governing council at its March 1992 meeting.⁷⁹ This draft preserved a role for Iraq to comment on basic claim documentation in the environmental claims. Because the governing council continued to be divided on this issue, Ambassador Carlos Alzamora,⁸⁰ the first

⁷³ Ibid. The draft stated that ‘Iraq would be provided with a summary of the claims received indicating the governments that submitted consolidated claims, the category of such claims, the number of claimants, the total amount of compensation claimed, and the sampling made for each category of claims’ and ‘Iraq would be given sixty days to provide its comments on the information received’.

⁷⁴ Ibid (emphasis added).

⁷⁵ Ibid. For the Secretary General report see United Nations Department of Public Information, above n 33.

⁷⁶ Bettauer, above n 38, 33; Raboin, above n 37, 119.

⁷⁷ Raboin, above n 37, 119.

⁷⁸ United Nations Compensation Commission, *Governing Council, Decision 10*, above n 31, art 16.

⁷⁹ Without consultations between the US delegation and UNCC management, this revision would not have been possible. It affords further evidence of a web of dialogue between the US and UNCC management.

⁸⁰ Carlos Alzamora was the Peruvian Ambassador to the UN in Geneva and was appointed as the first Executive Secretary of the UNCC. He had a distinguished career as an international civil servant and ambassador. See

Executive Secretary of the UNCC, made a personal intervention at the March 1992 meeting of the governing council. He appealed to council members that Iraq ‘not be excluded from the UNCC’s procedures’ in the interests of transparency.⁸¹ Here we see the fourth identifiable principle advocated or opposed in the UNCC – that of transparency. Later, the US proposed an amended version of its earlier proposal, which enabled Iraq to comment on the proposed Executive Secretary’s report on claim amounts and significant factual and legal issues.

Governing council members reacted in three ways to this new proposal by the US. Some members felt that the proposal did not provide Iraq adequate participation in the claims process.⁸² Some took the position that it went too far and that Iraq did not have a basic right of defence before the UNCC because (a) the proceedings were not adversarial in nature, (b) Iraq’s liability had already been determined by Resolution 687 of the Security Council and (c) Iraq’s participation would lead to delays in claim disposal. Some members felt that Iraq would not be able to provide relevant and meaningful comments for at least the individual category A and B claims arising from displacement, injury or death.⁸³ It was argued that individual claims were so varied that Iraq as a state could not reasonably be expected to know those circumstances on a case by case basis – and as such make meaningful comments on such claims.⁸⁴

It is worth pausing here to consider the vocabulary used to articulate state positions. On the one hand, the use of legal terminology focussed attention on due process for Iraq. On the other hand, it also hid the political agenda of each state. Unlike the discussions in the Security Council which were couched in political language with references to Iraq’s aggression and the need to re-establish peace in the region, the arguments in the governing council were couched in vocabulary akin to a discussion in a legal forum. The vocabulary also drew on principles rather than political agendas as the main basis of discussion. The argument that Iraq should have no due process because the Security Council had already determined Iraq’s

Embassy of Peru, *Ambassador – Carlos Alzamora* <<http://www.embassyofperu.org/ambassador-carlos-alzamora/>>.

⁸¹ Raboin, above n 37, 119, 126. Ambassador Alzamora was part of UNCC management and did not share the experience of the Iran-US Claims Tribunal with other UNCC management staff. At this time, UNCC management itself may not have been united in its support for limited due process.

⁸² Ibid 125–6. Raboin captures the intensity of the debate over due process for Iraq stating that some UNCC governing council members were opposed to any role for Iraq while others felt that in deference to the Secretary General’s proposal for full participatory rights for Iraq, more due process should be afforded.

⁸³ Ibid.

⁸⁴ Ibid 127.

liability by Resolution 687 is a good example of a legalistic argument seeking to derive strength from a pre-determination by a higher body. I comment further on this aspect of state behaviour in the conclusion of this chapter and in chapter 6.

The secretariat and the president of the governing council took several steps to develop a consensus on Article 16. The secretariat, the president and key members of the governing council met at the Villa la Pelouse, the headquarters of the UNCC in Geneva⁸⁵ during the March 1992 meeting.⁸⁶ The president offered to prepare a draft text incorporating the views of members.⁸⁷ Such a draft was presented to the March 1992 meeting of the governing council but in the absence of agreement, Article 16 together with chapter IV of the draft rules dealing with D, E and F claims (including environmental claims) was postponed for the next meeting scheduled for June 1992.⁸⁸ This enabled the council to adopt the first three chapters of the rules dealing with the A, B and C individual displacement, injury and death claims.⁸⁹

It is important to note here that the adoption of the first three chapters of the Rules dealing with individual claims was a victory for key actors such as the US who advocated the principle of effective and expeditious justice for the victims of the war over the principle of due process for Iraq. It was also a defeat for key actors such as Iraq (and its supporters) who advocated the principle of transparency. The first three chapters of the Rules dealt with general procedure applicable to all claims and in particular the processing of the individual loss claims. In the Rules, Iraq's participatory space was limited to receiving summaries of the claims together with a sampling of claims and an opportunity to make a response within 60 days. The UNCC decided not to reveal the details of each claim to Iraq or to provide it with an opportunity to respond to each and every claim. Key state actors in the governing council, including the US and the UK opposed broader participatory rights and transparency for Iraq. These actors used the formal and informal opportunities described in chapter 2 to influence the rule outcomes. By separating the procedure for individual claims (with extremely limited participatory space for Iraq) from the corporate and government claims, the governing council was able to postpone the more contentious issues for later on and reach agreement on providing relief for individuals who suffered loss in the Gulf War. Here we have another

⁸⁵ Here again is evidence of an 'inner group' of key actors at the UNCC with whom UNCC management had a continuous dialogue – manifesting a web of influence at work.

⁸⁶ Raboin, above n 37, 127–131.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

example of the state actor strategy of segmenting and postponing contentious issues to enable agreement and passage of agreed measures.

3 Extremely Limited Due Process for Iraq

Diplomatic negotiations continued between the March and June 1992 sessions of the council on the wording of Article 16 as well as provisions in the draft chapter IV.⁹⁰ Issues discussed included whether Iraq's comments on Article 16 reports should be circulated to governing council members, whether claimant governments should have a right to file rebuttals, and whether Iraq should have time to file rejoinders.⁹¹ A consensus emerged against these procedures because members felt it was 'unworkable in the UNCC's closed procedural atmosphere'.⁹² A consensus also emerged against Iraq receiving 'claim forms, legal briefs, and supporting documents filed by claimants'.⁹³ Council members also agreed that Article 16 reports should protect the identity of all claimants, including corporations and governments. At this early stage of the UNCC's life, as noted above, the principle of expeditious and effective justice for victims and the principle of secrecy had greater weight and more support among key actors, including the US, the UK and France than the principle of due process for Iraq or transparency. The consensus on Article 16 reflects these weightings because it limited Iraq's participatory space and transparency to the minimum in favour of expeditious disposal of claims and secrecy. By embedding these provisions in the Rules, the US and its allies paved the way for processing the corporate and government claims on the basis that Iraq would have as little information and opportunity as possible to mount a defence. Placing Iraq in this position laid the foundation for claims outcomes that were more likely to favour claimants than Iraq. In chapter 4, I demonstrate how procedural rules and arrangements that favoured claimants further helped them to establish their environmental claims. The Rules therefore skewed the claims evaluation process against Iraq and in favour of claimants, thereby increasing the likelihood that the US and its allies would achieve their substantive goal of compensating war victims and their allies and punishing Iraq for its invasion of Kuwait. Interestingly though, there were state beneficiaries such as Syria and Iran – whom the US-UK-France axis viewed as antagonists – who also successfully filed claims and won awards under this scheme. This was a logical outcome of the process however ironical it might seem to some. I discuss this aspect of the UNCC further in chapter 6.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Ibid 129.

⁹³ Ibid.

In early June 1992, the secretariat prepared a revised draft of chapter IV of the rules based on written and oral comments it had received.⁹⁴ Because Article 16 had been negotiated between the March and June 1992 meetings, it was adopted in its final form without much discussion at its opening plenary session on 22 June 1992.⁹⁵ The council made minor wording changes to the article at the meeting, reflecting the strong sentiments against Iraq's fuller participation in UNCC proceedings. For example the word 'comments' in the title of the draft article was replaced by 'reports'.⁹⁶ The Executive Secretary's obligation to report factual and legal issues became optional to accommodate situations where no such issues were found. Claimant governments, international organisations and Iraq could submit 'additional information and views' not 'comments'.⁹⁷ The term 'comment' engendered a vision of rights and due process⁹⁸ that the majority of key state actors of the governing council, including the US, were not prepared to concede to Iraq.⁹⁹

The discussion at the meeting on the revised chapter IV draft resulted in an agreement that governments would not be afforded an opportunity to review panel recommendations before the governing council issued its decision on them because this was felt to be potentially disruptive and prone to cause delay.¹⁰⁰ With these agreements, the governing council adopted chapter IV and the entire set of procedural rules on 26 June 1992.¹⁰¹ These rules were called the 'Provisional Rules for Claims Procedure' (the 'Rules').¹⁰²

The UNCC commenced claims processing based on the Rules in 1992. Under the Rules, the first opportunity that Iraq had to respond to claims filed before the UNCC was when the Executive Secretary filed a report with the governing council under Article 16 of the Rules.¹⁰³ Iraq and claimant governments then had an opportunity to respond to the basic claim

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ Ibid 130.

⁹⁸ In the US the term 'comment' is used in the context of public hearings and public comments during statutory hearing processes. Failure to seek and consider 'comments' have led the US courts to strike down resultant decisions.

⁹⁹ Raboin, above n 37, 119, 130.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² United Nations Compensation Commission, *Governing Council, Decision 10*, above n 31.

¹⁰³ Ibid. Article 16 of the Rules contained in the annex to the decision of the UNCC governing council. Also see the discussion on the formulation of Article 16 in this chapter. These reports and government responses were not publicly available on the UNCC website.

information provided in the report, including significant factual and legal issues. These issues that were generally included in the report were those identified by legal officers handling the claims. The environmental claims were at a relatively early stage of development when the Article 16 reports were made to the governing council and there was a possibility that some significant issues in the claims had either not been identified or had not surfaced at that point in time. These reports did not disclose the claimant. For example, an Article 16 report simply stated in general terms that a government had made a claim for damage to its desert ecosystem, etc.¹⁰⁴

The problem with such statements was that the affected desert could have been in Iran, Kuwait, Saudi Arabia or some other regional country. The desert ecosystem was different from area to area and there were other relevant facts that were important to know before responding to such information. The lack of identity of claimant and location of damage as well as the possibility that the issues identified may or may not include all the significant issues, created difficulties for Iraq in formulating its response or offering a defence for the claims. The anonymity of Article 16 reports was an extraordinary procedure that reflected the high degree of opposition within the governing council to the principle of due process for Iraq. Article 16 afforded only a very limited opportunity for Iraq to respond to the claims or mount a defence. Despite these serious drawbacks, Iraq did respond to many Article 16 reports.¹⁰⁵ Kuwait and the US were two other states that responded regularly to such reports.¹⁰⁶ Apart from these, other states that had claims referred to in an Article 16 report occasionally responded to that particular report.¹⁰⁷

The vagueness associated with information contained in Article 16 reports would clearly not have satisfied due process standard applied in other international or domestic judicial or quasi-judicial forums. However, some have nevertheless argued that in combination with other steps taken by particular panels (such as the F4 panel), Iraq was provided with adequate due process.¹⁰⁸

¹⁰⁴ R C O'Brien, 'The Challenge of Verifying Corporate and Government Claims at the United Nations Compensation Commission' (1998) 31 *Cornell International Law Journal* 1, 12. As stated by O'Brien, Article 16 reports were circulated quite widely, even though they were not considered public documents.

¹⁰⁵ Ibid. See also Howard Holtzmann and Edda Kristjansdottir (eds), *International Mass Claims Processes: Legal and Practical Perspectives* (Oxford University Press, 2007) 266–267.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ For example, Andrea Gattini, 'The UN Compensation Commission: Old Rules, New Procedures on War Reparations' (2002) 13 *European Journal of International Law* 161.

D Opening Doors: Paving the Way for Greater Iraqi Participation in the Environmental Claims (Phase 2)

Four aspects are worthy of note during the second phase (1998 to 2003) of the evolution of Iraq's participatory space in the environmental claims. First, Iraq made significant efforts to win more participatory space from the governing council. Second, the changing goals of France and Russia and the weakening of the US-UK-France axis in the UN formed the background for the governing council to revise the Rules and expand Iraq's participatory space, especially for the large corporate, government and environmental claims. Third, the governing council provided Iraq with funds from the UNCC to engage international legal and scientific experts to mount its defence to the environmental claims. Fourth, the panel, aided by the F4 team, continued to use its discretion and expand Iraq's participatory space within the restrictive rules. Rule and claims outcomes during this period were impacted by Iraq's increased participation and altered the dynamics between key actors before the panel. Several rule outcomes during this phase significantly improved Iraq's participatory space and its influence on the environmental claims outcomes.

1 Iraq Successfully Agitates for Rule Reforms

By 1996, Iraq had begun to make stronger pleas to the governing council about the importance of its participation in UNCC proceedings. By this time, panels were considering larger and more complex claims in categories E (corporate) and F (government). Awards on these claims could potentially condemn Iraq to large compensation payments that could linger for years. These were claims by governments (some rich developed nations), wealthy private corporations and international organisations - and not by individuals. Considerations that applied to the individual claims in categories A, B and C did not apply to these claims.

Iraq's participation was limited to interactions in the two main UNCC forums. In the governing council, Iraq participated (a) through a delegation addressing the governing council, (b) meetings of Iraqi delegations with council members and the secretariat and (c) a liaison officer at the Permanent Mission of Iraq to the UN in Geneva who was in contact with the secretariat.¹⁰⁹ In panel proceedings assessing claims, Iraq participated (a) through responses to Article 16 reports submitted by the Executive Secretary of the UNCC

¹⁰⁹ United Nations Compensation Commission, *Governing Council, Decision 10*, above n 31, art 9.

identifying significant factual and legal issues in claims, (b) through written responses to claims where panels in their discretion decided to send claim materials to Iraq in ‘unusually large and complex’ claims because they felt it was useful to have Iraq’s views;¹¹⁰ and (c) in oral proceedings where three panels had invited Iraq to participate while in others the panel reports stated that oral proceedings were either not required, necessary or useful.¹¹¹

The panel dealing with oil sector claims (E1) in their reports to the governing council from 1996 to 2003 often decided to hold oral proceedings and welcomed Iraqi participation, particularly since these were extremely large claims.¹¹² Despite this exception, most other panels nonetheless managed to conclude their work with the existing level of participation, confining Iraq to responses to Article 16 reports.¹¹³ Of the 15 panels that recommended awards up to February 2000, 13 had either not sent any claim materials to Iraq or sent claim materials only in selected large and complex claims.¹¹⁴ In effect, panels had sent two claims out of every ten claims to Iraq, while the balance eight claims had been decided without Iraqi participation.¹¹⁵ In every case where Iraq received claim materials, it filed a written response and submitted a defence.¹¹⁶ An analysis of the documentation available on the UNCC website shows that the practice of the UNCC at that time was to exclude Iraq from participation in claim proceedings except in unusually large and complex claims.

When the governing council adopted the Rules, it had acknowledged the need for broader participatory space for Iraq in the corporate and government claims (as opposed to the individual claims) largely because these claimants had access to more resources to pursue their claims than individuals. Almost ten years had elapsed since the Gulf War and the

¹¹⁰ United Nations Compensation Commission, *Governing Council, Decision 35*, 57th mtg, UN Doc S/AC.26/Dec .35 (13 December 1995). Where claim materials were sent to Iraq it was usually given six months to respond to the claims.

¹¹¹ United Nations Compensation Commission, *Reports and Recommendations of the Panels of Commissioners* <<http://www.uncc.ch/reports.htm>>. An analysis of the various panel reports numbering 182 on the UNCC website shows that apart from the environmental panel (F4), panel’s dealing with (a) Kuwaiti claims (F3), (b) export credit claims (E/F) claims, and (c) oil sector claims (E1) claims held oral proceedings and Iraq either participated in them or opted to be an observer under protest, sometimes withdrawing from proceedings midway through the proceedings. However, the vast majority of panels did not hold oral proceedings or even send Iraq claim materials for response, deciding that such proceedings were not necessary, required or useful.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

humanitarian tragedy in Iraq had unravelled.¹¹⁷ The Clinton Administration in the US had been distracted from the Iraq issue due to domestic politics, including President Bill Clinton's impeachment proceedings in Congress.¹¹⁸ There was more sympathy for the suffering of Iraqi people as such (as opposed to Saddam Hussein's regime) within the governing council than there had been before. Most importantly, as mentioned earlier, the US-UK-France axis had begun to come apart from 1998 when France (together with Russia) opposed Operation Desert Fox — proposed by the US — and the unity among the five permanent members of the Security Council, demonstrated just before and after the Gulf War, had also begun to splinter.¹¹⁹

It took around four years of agitation by Iraq to win some concessions in the form of revisions to the Rules. Not much progress was made by Iraq from 1996 to 1998 and as will be seen, its agitation succeeded only after 1998 when the US-UK-France axis began to break up. Iraq's attempts to obtain greater participatory space commenced in earnest on 26 July 1996 when it submitted a request to the governing council in the context of the claim by Kuwait for compensation for damages arising from the oil well fires (blowouts).¹²⁰ In its submissions, Iraq requested the governing council to decide, among others, that:

- 1) the council recognised Iraq's right to mount a proper defence to the claims (particularly the large and complex claims) through legal counsel and experts of its choice;
- 2) Iraq had a right to have legal counsel and experts employed by it, financed through its own funds 'administered or used' by the UNCC; and
- 3) the governing council should revise the Rules to ensure that Iraq had a right to full participation on all levels in UNCC claims procedures.¹²¹

¹¹⁷ Hans C Von Sponeck, *A Different Kind of War The UN Sanctions Regime in Iraq* (Berghahn Books, 2006) 3–172. Von Sponeck describes in detail the severe deprivation that the Iraqi people were undergoing in many spheres including water, sanitation, electricity, food, education, security and health on account of the UN sanctions and a relentless dictatorship.

¹¹⁸ Malone, above n 20, 159, 277. Malone citing contemporaneous newspaper reports suggests that Operation Desert Fox in 1998 was launched by the Clinton administration partially to distract domestic attention from the Monica Lewinsky affair and the pending impeachment proceedings in the US Congress against President Clinton.

¹¹⁹ Ibid 100, 160–161.

¹²⁰ Michael E Schneider, 'How Fair and Efficient is the UNCC System? A Model to Emulate?' (1998) 15 *Journal of International Arbitration* 1. See also references to the Iraqi request in the United Nations Compensation Commission, *Report and Recommendations made by the Panel of Commissioners Appointed to Review the Well Blowout Control Claim*, UN Doc S/AC.26/1996/5/Annex, [18] et seq.

¹²¹ Ibid.

While welcoming effective Iraqi participation in UNCC claims within existing structures and rules, the council decided to bring the issues raised by Iraq to the attention of the Security Council and postponed further consideration of the matter.¹²² By September 2000, the issue had been brought to the attention of the Security Council which agreed that ‘the current UNCC procedures be reviewed before the end of the year, taking into account the recommendations made by the Executive Secretary’.¹²³ In turn, the Security Council did not resolve the issue but requested the governing council to do so. In my view this attempt by the governing council to shunt the issue to the Security Council and *vice-versa*, is another example of forum shifting when controversial issues arise.¹²⁴

Forum shifting served the interests of key actors. In this instance, when controversy over expanded due process for Iraq arose in the governing council, shunting it to the Security Council gave the US-UK-France axis more time to consult with home offices and negotiate with each other. It also pushed decision-making to more senior officials serving in the Security Council in New York. Much of the debate around enforcing sanctions against Iraq was taking place in the Security Council. It therefore was in the interests of officials serving in the governing council in Geneva to shunt the issue to the Security Council where it could be considered by senior officials in the context of the broader sanctions debate. Transcending or displacing conflict by shifting forum or scale is a strategy or tactic that key actors in the Security Council and governing council adopted. This behaviour cannot be described as a mechanism or principle because it does not seek to achieve an actor goal (except to maintain the status quo) but merely postpones or shunts it to another forum or scale. These tactics and strategies form an important part of how key actors manipulated webs of dialogue to frustrate or achieve goals.¹²⁵

During this period, Iraq submitted successive requests for greater participatory space at subsequent governing council sessions. The issue came to a head during the 34th to 37th sessions. The Committee on Administrative Matters had recommended that the council address the matter because the panel examining the environmental claims was to begin

¹²² United Nations Compensation Commission, *Governing Council, Decision 114*, above n 53, para 1.

¹²³ *Ibid.*

¹²⁴ The first example was discussed in chapter 2 where the Security Council shunted the controversial issue of Iraq’s participatory space in the UNCC to the governing council.

¹²⁵ For a further discussion of this issue see chapter 6.

evaluating the first instalment of monitoring and assessment claims in March 2000.¹²⁶ Iraq also made oral presentations to the council at the 34th session. Following the presentations, council members favourable to due process for Iraq took the view that (a) the council should entertain Iraq's request and be open minded, (b) legal assistance should be provided to Iraq and (c) the UNCC should examine the manner in which panels decided large and complex claims and ensure that decisions conformed to minimum requirements.¹²⁷ Other members of the council opposed to greater due process for Iraq disagreed and their views, in summary, were (a) that it was too late to reconsider qualitative or quantitative changes to the UNCC's procedures, (b) Iraq had qualified lawyers to represent it in proceedings and had the funds to pay for such services, obviating the need for financial assistance for its defence and (c) UNCC funds could not be used to assist Iraq.¹²⁸

The governing council at the 37th session made a recommendation that the working group of the council should carry out a review of UNCC procedures, taking into account submissions made by country delegations. The council thereafter adopted the recommendations made in the report of the working group.¹²⁹

The working group, having listed the many proposals made to it, including those by Iraq, made several recommendations to revise the procedure for submitting panel reports to the council.¹³⁰ On the issue of providing Iraq with adequate claim materials, the working group recommended the following:

- 1) The commissioners should continue to have a discretion as to whether claim files should be sent to Iraq;
- 2) However, panels should be encouraged to act consistently in applying the criteria that had been developed;
- 3) Based on criteria developed by the secretariat, claim files were to be sent to Iraq (a) when it was a party to a contract forming part of the subject matter of the claim; (b) if the alleged loss occurred in Iraq; (c) if the panel determined that the transmission of the claim files will otherwise facilitate the panel's verification and valuation of the claim; or (d) if the amount claimed was more than US\$100 million;

¹²⁶ United Nations Compensation Commission, *Governing Council, Decision 114*, above n 53, para 1.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

- 4) Iraq would be given an additional six month period to respond to claims over US\$1 billion; and
- 5) claim materials ought to be sent to Iraq before the commencement of proceedings on such claims.¹³¹

The working group also considered the issue of Iraq's participation in oral proceedings. It recommended:

- a) that panels should continue to have discretion in convening oral proceedings;
- b) that such proceedings should be held where the claims have an asserted value of US\$1 billion or more; and
- c) that such proceedings were encouraged where the panels decided it would be useful to hear the views of the claimants and Iraq, or the claims contained significant technical, legal and factual issues or *were substantive environmental claims*.¹³²

These revisions represent a significant departure from the original Rules, especially with regard to the procedure applicable to the environmental claims. The key actors pushing for greater Iraqi participation were the F4 team, the panel and Iraq. Given the weakening of the US-UK-France axis and Russia and France's positive attitude to engaging Iraq on trade, the US and the UK had little choice than to compromise its hitherto hardline stance to Iraqi participation.¹³³ Changed actor goals led to greater weight being allocated to the principle of due process for Iraq, especially in the environmental claims. Because a consensus emerged through the working group, it is clear that dialogic webs were at work and there is no evidence to suggest that coercion or rewards were used as mechanisms.¹³⁴ Whether there were reciprocal adjustments or non-reciprocal coordination is difficult to determine through the limited material available, but parallel relaxations in the sanctions regime¹³⁵ suggest that

¹³¹ Ibid [14]–[18].

¹³² Ibid.

¹³³ 'Russia Suggest Easing Iraqi Burden', *China Daily* (New York), 25 August 2000, 12; Frances Williams, 'UN Unable to Agree Gulf War Reparations', *Financial Times*, (Geneva), 1 July 2000, 6. France and Russia blocked the approval of several instalments of E1 claims (oil well blowout claims) of Kuwait seeking reductions in Iraq's contribution to the UNCC fund in late 1999 and 2000. The Rule revisions were made by the UNCC governing council in December 2000 and even as at September 2000, these two states and the US and the UK were divided on Iraq related issues and the Kuwaiti oil blowout claims.

¹³⁴ Although arguably Russian and French threats to seek a reduction from 30 to 20 per cent in the contribution of Iraqi oil revenue to the UNCC fund can be assessed as coercion and therefore the use of coercive webs.

¹³⁵ From 2000 to 2001 France and Russia, in pursuit of their desire to improve trade and relations with Iraq, jockeyed for concession regarding Iraq. These included the Rule revisions of 2000 (discussed in this chapter), the reduction of contributions by Iraq to the UNCC fund from 30 to 25 per cent in 2001 (discussed in chapter 2), the provision of technical assistance to Iraq for the defence of the environmental claims in June 2001 (discussed

these mechanisms might have been employed. Iraq, in its submissions to the governing council, had offered a model for its participation and the outcome suggests that this was part of the broader negotiations.

2 Funds for Iraq to Defend the Environmental Claims

Finally, the working group examined the issue of technical and financial assistance for Iraq to conduct its defence.¹³⁶ There was no consensus in the group on this issue, although all the members, including the US, appeared ready to provide some assistance at a future date for Iraq to conduct its defence in the environmental claims.¹³⁷ Perhaps this outcome was influenced by the fact that the environmental claims were the largest claims before the UNCC and influenced also by the worsening humanitarian situation in Iraq. Additionally, the post-Gulf War cooperation among the permanent five members of the Security Council had ended with France leaving the US-UK-France alliance in 1998¹³⁸ and actor goals in Iraq had changed.¹³⁹ In this context the working group report recommended that the panel should ‘use its experts to ensure the full development of the facts and relevant technical issues, as well as to obtain the full range of views including those of the claimants and Iraq.’¹⁴⁰

Six months later in June 2001, accepting a recommendation by the working group, the governing council decided to provide Iraq with financial assistance for its defence of the environmental claims.¹⁴¹ This is the only instance where the UNCC provided funds to Iraq to strengthen its capacity to defend claims. Since this was a consensus that emerged from the governing council and the working group that examined and negotiated the issue, it can be safely assumed that all key actors such as the permanent five members of the Security Council and UNCC management concurred in the decision. This is a significant decision in

below in this chapter) and the temporary blocking of the Kuwaiti oil well blowout claim awards in which the US and the UK had an interest in 2000 (discussed in this chapter).

¹³⁶ United Nations Compensation Commission, *Governing Council, Decision 114*, above n 53, para 22.

¹³⁷ *Ibid.*

¹³⁸ Malone, above n 20, 160–1.

¹³⁹ *Ibid.* See also Lee Carol Owen, ‘Between Iraq and a Hard Place: The U.N. Compensation Commission and Its Treatment of Gulf War Claims’ (1998) 31(2) *Vanderbilt Journal of transnational Law* 499, 533. In this well researched article, Owen demonstrates how France and Russia began taking decisive steps, such as opening an interest section in Baghdad to improve relations with Iraq. She documents increasing trade contacts between European and Iraqi business people and growing private sector pressure on France and Russia to improve trade relations with Iraq. She shows how the push by France, Russia and China to lift sanctions on Iraq coincides with increasing business pressure.

¹⁴⁰ United Nations Compensation Commission, *Governing Council, Decision 114*, above n 53, para 22.

¹⁴¹ United Nations Compensation Commission, *Governing Council Decision 124*, 107th mtg, S/AC. 26/Dec. 124 (19 June 2001).

the context of the sanctions regime that was in place against Iraq.¹⁴² Examining that sanctions regime is, however, outside the scope of this thesis.¹⁴³

I have not been able to obtain material that indicates which of the positions identified above were taken by key state actors in the governing council and the working group. Nevertheless, it is clear that the decision to improve Iraq's capacity for defending the environmental claims is consistent with the governing council's original pronouncements that Iraq should have greater participatory space in the government and large corporate claims. However, a question remains as to why financial assistance was confined to the environmental claims and not extended to other large government or corporate claims. There is also no material to show the precise mechanisms used by the key actors to advocate for or against this decision. The evidence only supports the conclusion that the key state actors provided financial assistance to Iraq for the environmental claims and that this increased Iraq's voice and influence in claim and rule outcomes. Whether this was an unanticipated consequence or a goal of key actors at this time, must remain to be answered another day when more material becomes available.

The decision to provide funds came too late to make a real difference to Iraq's participation in the first and second instalment of environmental claims dealing with monitoring and assessments studies.¹⁴⁴ However, it made a demonstrable difference to Iraq's participation in the third to fifth instalment of environmental claims. The council decision allowed Iraq to select and hire qualified experts to assist in its defence of the environmental claims. These experts assisted Iraq in the preparation of responses to Article 16 reports, written submissions and oral proceedings before the panel and communications with the UNCC on the environmental claims. The cost of the expenses was estimated at three to five million US dollars but was not to exceed five million US dollars.¹⁴⁵

Iraq did not enjoy this financial facility in any of the other categories of claims. The council justified this decision on the basis that the environmental claims involved questions of

¹⁴² Von Sponeck, above n 117. Sponeck describes and analyses the sanctions regime in great depth.

¹⁴³ There was an administrative delay in the hiring of Iraq's legal counsel and experts despite Iraq being allocated funds under Governing Council Decision 124. However, they were in place by the summer of 2002.

¹⁴⁴ The first instalment claim report was approved by the governing council two days later on 21 June 2001.

¹⁴⁵ United Nations Compensation Commission, *Governing Council, Decision 124*, above n 141, annex [7]. Note the avoidance of language referring to the charge being on the compensation fund. In practice this did not make a difference because the UNCC's administrative budget came out of the compensation fund.

‘complexity’ and because there was a ‘limited amount of relevant international practice’.¹⁴⁶ The council also stated that the decision was aimed at providing the panel with a full range of views, including those of Iraq, to develop a robust set of facts and technical issues for each claim. As stated earlier, the panel had already indicated its views on the importance of Iraq’s full participation in the environmental claims. It had also expressed the view that it wanted to send as much claim material to Iraq as possible. The council’s decision was therefore responsive to the demands of the F4 team, the panel and Iraq, indicating that these weaker actors had also contributed to the rule outcome.

In my view, the governing council’s reasons for making an exception and granting financial assistance to Iraq for the environmental claims do not quite add up. For example, there were other categories of claims before UNCC panels that were equally (if not more) complex or involved subjects on which there was limited international practice.¹⁴⁷ However no such accommodation was made to Iraq in those claims. It is therefore difficult to explain the decisions of the governing council granting Iraq greater participatory space and financial assistance in the environmental claims only by reference to the explicit reasons it gave. It is my contention that an important factor in this decision was the role played by the F4 team and the panel in pushing for greater participation and transparency for Iraq. During this phase the panel and the F4 team played a significant and compelling role pushing for more participatory space for Iraq, as indicated further in the next section. In contrast, the F3 panel did not.¹⁴⁸

3 Rule Revisions: Actors and Webs

Strong and weak actors came together to produce the Rule revisions of December 2000. First, the panel and the F4 team advocated transparency and due process for Iraq from the very first meeting.¹⁴⁹ Second, Iraq itself was seeking more transparency and due process. Third, the UNCC management was mediating between these weaker actors and stronger actors like the US, the UK, France and Russia, who by now had varied goals in Iraq and were no longer

¹⁴⁶ Ibid annex [2]. The text of the decision gives no indication of what was being referred to as ‘relevant international practice’.

¹⁴⁷ Complex issues were involved in the E1 claims for damage to oil wells from the oil well fires as well as in the F3 non-environmental government claims.

¹⁴⁸ The F3 panel dealt with claims filed by Kuwait (other than environmental claims) such as claims for damage caused to its oil industry through oil well blowouts, United Nations Compensation Commission, *Category “F” Claims* <http://www.uncc.ch/claims/f_claims.htm>. Despite requests for oral hearings, the panel denied that request in three of the five instalments that it processed but it did send claim materials for response to Iraq.

¹⁴⁹ José R Allen, ‘Points of Law’ in Cymie R Payne and Peter H Sand (eds), *Gulf War Reparations and the UN Compensation Commission* (Oxford University Press, 2011) 141, 147–152.

cooperating as they did in 1991. Each of these actors had their own goals and motivations for or against due process for Iraq. I analyse each of them below.

In keeping with the notion referred to by the Secretary General when the UNCC was formed that due process had to be supplied by the panels of commissioners,¹⁵⁰ UNCC management maintained it was entirely up to the panel to assess whether or not input from Iraq would assist them in their decision-making and that the method by which input was received was also entirely a panel decision.¹⁵¹ The position of UNCC management was made clear to the panel at one of its earliest meetings in 1999¹⁵² and also seemed to respond to statements made by Iraq's representatives to the governing council at a meeting immediately preceding the panel meeting and to the secretariat, expressing a desire to assist the panel with its experts and comments.¹⁵³ These statements suggest that UNCC management's attitudes to Iraqi participation in the environmental claims was softening and perhaps more positive than before in both the governing council and the panel. As early as January 2000, the panel made it clear that the environmental claims review process should be carried out in as transparent and fair manner as possible and requested the secretariat to work out expeditious procedures to send claim files to Iraq.¹⁵⁴ The panel set a much higher expectation with regard to Iraq's participation in the environmental claims than other UNCC panels had done.¹⁵⁵ The panel was encouraging UNCC management to provide Iraq with all of the monitoring and assessment studies before the UNCC and be given the necessary six-month time frame to respond. The panel was also encouraging Iraq to address M&A issues that the panel was about to consider in the first instalment of claims.¹⁵⁶ This was a significant departure from the general UNCC practice up to that point.¹⁵⁷

The legal epistemic community at the UNCC had strong beliefs in its ability to deliver expeditious and effective justice to the victims of war.¹⁵⁸ Due process norms had been compromised by this community to enable it to deliver this justice. There had been round

¹⁵⁰ United Nations Department of Public Information, above n 33.

¹⁵¹ Julia Klee, 'The Process' in Payne and Sand, above n 149, 53–6.

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ Julia Klee, 'The Process' in Payne and Sand, above n 149, 39–40; Allen, above n 149, 147–52.

¹⁵⁵ See earlier in this chapter for a discussion of the frequency of oral proceedings and dispatch of claim material to Iraq by other panels at the UNCC.

¹⁵⁶ Payne and Sand, above n 149, 150–52.

¹⁵⁷ Ibid.

¹⁵⁸ See the discussion of the legal epistemic community in chapter 2.

criticism in some quarters of the lack of due process for Iraq. With transparency and participation having a much stronger force as values among environmental professionals, the prevailing attitudes of the legal epistemic community were challenged by the F4 team.¹⁵⁹ To be credible in the eyes of the environmental community, the public and academia, Iraq would need to have more transparency and participation than had been the case till then. The claims were unprecedented and there was a sense that this alone would attract the attention of academics and other international jurists.

The commissioners themselves had reputations to protect. Several members of the F4 team had a background in environmental law. As discussed in chapter 2, all of them came from predominantly common law jurisdictions that have strong traditions of due process. The F4 team formed a sub-epistemic community within the larger UNCC legal community – one which shared common values and policy projects with the rest but who also had significantly different policy goals to the rest. Additionally, the claims were complex and unprecedented and any help they could get from the parties was valuable. My contention is that these were some of the factors that led the panel and F4 team to push for due process and transparency goals that favoured Iraq.

UNCC management had heard and seen the desire of the panel and the F4 team to have greater and more meaningful participation from Iraq. The panel and the F4 team felt strongly that such participation would assist the panel in arriving at a more fair and credible decision on the claims. These sentiments had been expressed by the panel. UNCC management was also well aware of the previous negotiations involving the procedural rules where key governing council actors made a distinction between A to C claims on the one hand and D to F claims on the other. Additionally, the environmental claims were the largest claims before

¹⁵⁹ Although there are no surveys of environmental values held by environmental professionals, several historic documents and international agreements provide a trail of evidence for the universality of some values in the environmental community. For example, The United Nations, *Rio Declaration on Environment and Development* (1992), above n 1; UN Department of Economic and Social Affairs Division for Sustainable Development, *Johannesburg Plan of Implementation* <http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIToc.htm>; *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, (The Aarhus Convention, 1998) <<http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>>; and several other international treaties contain strong language on the importance of transparency, accountability and participation in environmental decision-making. More recently, the governing council of the United Nations Environment Program adopted *Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters* (2010) <<http://www.unep.org/DEC/PDF/GuidelinesAccesstoJustice2010.pdf>>. These landmark documents embody underlying values including those of transparency and participation.

the UNCC, and excluding or limiting Iraq in the decision-making process carried with it reputational risks for UNCC management which could have further undermined the already questionable credibility of the UNCC. UNCC management was also well aware of the splintered US-UK-France axis which had weakened the US and the UK in UNCC and Security Council negotiations.

In this context, UNCC management had two options: either it could oppose the F4 team and the panel's advocacy and let Iraqi inclusion appear to be a special situation created by the panel or it could co-opt the governing council and regularise what the panel was doing, thus making these innovations appear mandated by stronger state actors. Clearly the latter course was chosen and the revision of the Rules in 2001 regularised the oral proceedings and claim documentation being sent to Iraq. It is difficult to classify the mechanism used by the panel but it best fits into Braithwaite and Drahos's descriptions of non-reciprocal coordination. Here the panel's actions precipitated a non-reciprocal adjustment of the Rules by the governing council facilitated by UNCC management. The adjustment also entailed providing Iraq with funds for defending the environmental claims. Here the governing council and the panel were acting as two separate actors in making this reciprocal adjustment, although they are treated as forums in this thesis. Additionally, although there is no evidence to support this hypothesis, it is more than likely that the US and the UK compromised with Russia and France to enlarge Iraq's participatory space in exchange for keeping most of the sanction regime in place.

UNCC management of course had access to the panel, the F4 team, the governing council and the council's working group. It is my contention that UNCC management was a prime mover in incorporating revisions to the Rules that enlarged Iraq's participatory space in the environmental claims. In this sense UNCC management played a key role in shaping governing council decisions and was perhaps, the most influential of all key actors. The revisions to the Rules therefore represents a good example of how UNCC management was able to use webs of influence to find common ground between the panel and F4 team on the one hand and the governing council on the other. Transferring and transliterating information from the panel to the governing council and *vice versa*, assessing the position of actors and the relative strength or weakness of their bargaining positions and defining and combining issues, UNCC management used the many webs of dialogue that it had access to in bringing about this rule outcome. In the light of known contention in the governing council, it is

unlikely that this rule outcome would have come about without the mediatory role of UNCC management.

E A Seat at the Table and a Voice in the Room: Broadening Iraqi Participation (Phase 3)

During this phase starting in 2003, relations between the permanent five members of the Security Council continued to be strained but their goals in Iraq were more aligned. With the US-led invasion of Iraq, the US goals in Iraq changed radically. The US and the UK adopted a more supportive and conciliatory position toward Iraq. The change in the US and the UK position implied a considerable diminution of coercion as a mechanism within the UNCC, opening up a larger space for dialogic webs. This change allowed weaker actors such as the panel and the F4 team to enlarge Iraq's participatory space and provide for more transparency in the environmental claims process. The third phase dovetailed with the second and resulted in the highest level of transparency and participatory space afforded to Iraq in the UNCC.

The Rule revisions took place in June 2001. Little did anybody know at the time that three months later, 11 September 2001 would change international relations and the world forever. After the *Al Qaeda* attacks of that day, the US focused on Afghanistan as a target of retaliation. Later, the US focused on regime change in Iraq, although this had been on its agenda for some time.¹⁶⁰ The US invasion of Iraq from March to May 2003 was supported by the UK in the Security Council but opposed by France, Germany and Russia.¹⁶¹ Unlike in the 1991 Gulf War, there was no express Security Council authorisation for the invasion.¹⁶² This event significantly weakened the US-UK-France axis that had held sway in the Security Council for years.¹⁶³ It was not until several years later that the alliance was repaired.¹⁶⁴ The 2003 US-led invasion of Iraq commenced a few days before the panel conducted oral proceedings on the third instalment of environmental claims.¹⁶⁵

¹⁶⁰ Malone, above n 20.

¹⁶¹ Ibid.

¹⁶² The US, the UK and Australia argued that Security Council Resolution 678 was revived, authorising the use of force some 12 years later. Cf transcript of the evidence of Sir Michael Wood to The Iraq Inquiry launched by the Prime Minister of the UK <<http://www.iraqinquiry.org.uk/media/44205/20100126am-wood-final.pdf>>, where he expressed the contrary view that the Iraq invasion in 2003 was unlawful.

¹⁶³ Malone, above n 20.

¹⁶⁴ Ibid.

¹⁶⁵ I recall being present at the oral hearing and Michael Schneider, legal counsel for Iraq commented that Iraq was under attack even as he spoke on its behalf and that international rule of law was at an end.

Following the 2003 invasion and regime change, the US became a friend and protector of Iraq on the international stage. Powerful and key actors such as the US and the UK made significant efforts to reduce the Gulf War burden on Iraq. These actions included the reduction of Iraq's contribution to the UNCC fund,¹⁶⁶ lifting of the sanctions regime,¹⁶⁷ dismantling of the UN Oil for Food Programme¹⁶⁸ and investigation of corruption in the Programme. France and Russia were also keen to re-engage Iraq and as such did not stand in the way of concessions to the new regime in Iraq.¹⁶⁹ In this changed context, weaker actors such as the F4 team and the panel sailed with the new currents set off by stronger actors in pushing for further expansion of Iraq's participatory space.

Iraq's participatory space was further improved, largely through the exercise of discretion by the panel under the revised Rules and through new rules of procedure innovated by the panel at the request of the F4 team. UNCC management did not resist this expansion of participatory space. In some cases, innovations by the panel and F4 team to expand Iraq's participatory space went well beyond those contemplated by the governing council and in one instance at least, even contradicted the UNCC's established procedure.¹⁷⁰ I discuss these developments below.

Three rule outcomes during this period illustrate how the panel and F4 team enlarged Iraq's participatory space. They are:

- 1) The establishment of a new rule putting claimant states on notice that material submitted by them in support of restoration and compensation claims would be sent to Iraq without any further notifications to redact information;
- 2) A decision to send responses by claimant states to UNCC Article 34 questions (interrogatories) to Iraq; and
- 3) New procedures that allowed for Iraq's counsel and experts to meet with the panel's expert consultants to clarify claim material.

¹⁶⁶ SC Res 1483, above n 27. See chapter 2 for a discussion of this reduction.

¹⁶⁷ Ibid.

¹⁶⁸ Ibid.

¹⁶⁹ Owen, above n 23, 533.

¹⁷⁰ This reference is specifically to Article 34 responses by claimants which were sent to Iraq. Under the established procedure and practice of the UNCC, these responses were previously treated as confidential material.

1 Abandonment of Redaction Procedure

As noted earlier, the restoration claims spanned the third and fourth instalments. Voluminous M&A material was coming into the UNCC from six claimant countries. M&A material submitted at this time related both to the fourth and fifth instalments, since the panel was evaluating both sets of claims in parallel. Difficult as it was for the F4 team and the panel's expert consultants to study and monitor these submissions at the speed they were coming in, there was also the need to send them to Iraq for study and response. Each time M&A material had to be sent to Iraq, the F4 team was required to issue a redaction notice to claimants giving them adequate time before sending out the material to Iraq. This procedure, prescribed by UNCC management was tedious. However, this practice continued for part of the fourth instalment, but was radically changed after March 2003. In the fourth (latter part) and fifth instalment, the panel decided to notify all claimants that all material submitted by them might be sent to Iraq and therefore requested claimants to redact material before submissions were sent to the UNCC.¹⁷¹ The change considerably sped up the process of sending claim materials including M&A data to Iraq.

This is another example of a procedural change that was initiated by the F4 team and approved by the panel. Given the heavy inflow of M&A material and the delay and practical redundancy of sending redaction notices, the F4 team suggested that claimants be sent an omnibus redaction notice informing them that all material submitted by them would be sent to Iraq and should they wish to redact information, they should do so prior to submitting the materials.¹⁷² The draft language submitted by the F4 team leader clearly stated that all material submitted by claimants was likely to be sent to Iraq.¹⁷³ It also clarified that claimant materials included claim amendments, legal arguments, monitoring and assessment data and reports, Article 34 questions and answers, documents provided during UNCC missions, documents provided during oral proceedings, and any other legal, scientific or technical information.¹⁷⁴ Many of these classes of documents had not been given to Iraq earlier. The final notice to claimants from the secretariat took the form of a *note verbale* which stated that

¹⁷¹ Payne and Sand, above n 149, 54–5. With regard to the fourth instalment of claims, UNCC management adopted a more targeted approach. By the time the panel reached the omnibus redaction decision, Iraq had prepared its response to the fourth instalment claims and was awaiting approval of the submission by Baghdad. In these circumstances, the panel decided to send only those materials which in the opinion of the panel's expert consultants would be useful to have comments from Iraq. Applying this standard, M&A submissions sent by Iran and Saudi Arabia in support of fourth instalment claims were transmitted to Iraq without redaction notices being sent to claimants.

¹⁷² Ibid.

¹⁷³ Ibid.

¹⁷⁴ Ibid.

effective immediately, any material submitted by the claimants in support of a claim may be transmitted to Iraq and that the UNCC will no longer send specific notifications concerning redaction for F4 claim-related materials.¹⁷⁵ UNCC management did not oppose this rule change and actively recruited members of the governing council to support them.¹⁷⁶ The main mechanism used by the F4 team was modelling where different models for notifying claimants were proposed to and discussed before the panel.¹⁷⁷

2 Interrogatory Responses Sent to Iraq

Another example of a procedural rule change initiated and implemented by the F4 team and panel is the decision to transmit the claimant's interrogatory responses to Iraq. This is an example of a procedural change that was in the teeth of a contrary provision in the Rules adopted by the governing council. Article 34 questions and answers had been embargoed as strictly confidential material by the governing council and UNCC management.¹⁷⁸ The panel's expert consultants and the F4 team generated and framed Article 34 questions. Claimants received these questions for response within stipulated time limits. Questions and answers were treated as confidential communications between the UNCC, the panel and the claimants. This was true for all claim types and panels.

The question of how to handle this interrogatory-responsive material was first raised during the first and second instalment claims when material which was embargoed was sent by some F4 team legal officers to Iraq. The officers were severely admonished by UNCC management and told not to repeat the mistake.¹⁷⁹ This is one example of the way in which UNCC management asserted its influence over the F4 team. Human resources-related decisions such as promotions, transfers from one team to another, and reprimands were used as a means of influence. Such actions functioned as coercion or rewards as the case may be within the web of influence that existed between UNCC management and the F4 team. This was not unique to the F4 team but formed part of tools (mechanisms) available to and used by UNCC management.¹⁸⁰

¹⁷⁵ Ibid.

¹⁷⁶ Payne and Sand, above n 149, 54.

¹⁷⁷ Using previously tested and tried models is a typical use of modelling.

¹⁷⁸ Payne and Sand, above n 149, 54–5.

¹⁷⁹ Personal communication by one such officer with me.

¹⁸⁰ In employer-employee relations in the workplace, rewards and sanctions are commonplace. Rewards come in the form of salary increases, promotions, bonuses and awards. Sanctions come in the form of reprimands, pay cuts, demotions and termination. These rewards and sanctions form part of the formal relationship between employer and employee. However, there are many informal rewards and sanctions that are also commonplace. These include assignment of tasks that are considered challenging and therefore reflect on the high competence

The issue again arose in the third instalment, when responses supplied by claimants to Article 34 questions sent by the secretariat contained material supporting the claims.¹⁸¹ Some of the responses also contained M&A data. It was clear to the legal officers handling the claims that Iraq ought to have the material if it was to submit a meaningful defence. The material also included documents requested by Iraq in a document inspection request.¹⁸² The issue was then placed before the panel at its January 2003 meeting. The panel decided to authorise the secretariat to send all the material requested except Article 34 responses in question/answer format.¹⁸³ The panel also requested the secretariat to send the usual redaction notices to the claimants before the material was sent to Iraq. The panel did not decline to send Article 34 responses and questions – but desired that the ‘format’ be changed – largely in response to UNCC management cautions and in an attempt not to be seen as contradicting governing council rules. The legal officer had to redact or rephrase the questions and create a new document with the answers only and transmit them to Iraq.¹⁸⁴ Additionally, the panel authorised the F4 team to send 50 research studies submitted in support of a claim by Kuwait. Kuwait submitted these studies in response to Article 34 questions.¹⁸⁵ In doing so, the panel was relying on previous decisions it had made to send Iraq M&A studies submitted in response to Article 34 questions. Here it was expanding that decision to include non-M&A material submitted in response to Article 34 questions. This is another example of the UNCC legal epistemic community resorting to precedent and the Index of Jurisprudence (IoJ) to expand the effect of a rule through interpretation. The basing of decisions on precedent made it harder for stronger actors like UNCC management to reverse them or interfere in their realisation.

It must be noted though that these incremental changes by interpretation took place in January 2003 a few months before the US-led invasion of Iraq. The rule change being discussed here – to send all interrogatory material to Iraq – occurred after the invasion. Apart

of the employee, removal or provision of facilities such as office space, computers etc and transfer to workplace locations that are remote and entail hardship.

¹⁸¹ The two claims were Nos. 5000256 and 5000450. See United Nations Compensation Commission, *Report and Recommendations made by the Panel of Commissioners concerning the Third Instalment of “F4” Claims*, UN Doc S/AC.26/2003/31 (18 December 2003) [30]–[32].

¹⁸² Payne and Sand, above n 149, 55.

¹⁸³ Ibid.

¹⁸⁴ Ibid, 54-56.

¹⁸⁵ Ibid. See also United Nations Compensation Commission, *Report and Recommendations made by the Panel of Commissioners concerning the Fifth Instalment of “F4” Claims*, UN Doc S/AC.26/2005/10 (30 June 2005) [533] et seq.

from the cumbersome task of developing a fresh document from claimant responses to interrogatories, the only other circumstance of significance was the success of the US-led invasion of Iraq. It is my contention that the new rule to send interrogatory material to Iraq initiated by the F4 team and adopted by the panel became possible because the US and the UK had a supportive attitude to Iraq and UNCC management no longer expressed concern about sharing otherwise confidential claim material with Iraq. Here again the F4 team, citing examples of common law domestic courts to argue for sharing interrogatory material with Iraq used modelling as a mechanism to advocate for more transparency and due process for Iraq.

3 Iraqi Experts Meet the Panel's Expert Consultants

During the evaluation of the fourth instalment, internal discussions between the panel, UNCC management and F4 team led to arrangements for Iraq's legal counsel and its experts to meet with the panel's expert consultants and UNCC management. The goals of the discussions were for Iraq's experts to seek information and clarifications they needed for preparing Iraq's defence and for the panel's consultants to provide input and answers to those questions. The panel felt that by having its consultants engage in such interactions, it would obtain a deeper understanding of Iraq's position in the fourth and fifth instalment claims. In the panel's portfolio, these were the largest claims in terms of the amount of damages claimed. This raised the issue of the scope and limits of the discretion the panel's expert consultants in disclosing information to Iraq.

On 19 November 2003 in response to these issues, the panel issued guidelines for interactions between its expert consultants and representatives of Iraq.¹⁸⁶ The first three instalments of environmental claims did not benefit from these guidelines. They were only adopted before the fourth and fifth instalments of claims. I discuss the impact of these guidelines and the expert to expert interactions that followed in chapter 5 as part of an assessment of the role of experts in producing claims outcomes. Suffice it to note here that these new guidelines provided Iraq with further participatory space during the fourth and fifth instalment of claims.

Here too I contend that this rule outcome was enabled by the changed circumstances of the US-led invasion of Iraq. During the first instalment, the panel had adopted guidelines for the

¹⁸⁶ Payne and Sand, above n 149, 55.

panel's expert consultants to interact with claimants.¹⁸⁷ Based on these guidelines, the panel's experts interacted with claimants during the first to third instalments. A similar opportunity was not provided to Iraq during the first and second instalments. During the third instalment of restoration claims, Iraq's legal counsel made specific requests to gain opportunities for its experts to interact with the panel's expert consultants and the F4 team particularly since Iraq did not have the advantage of site visits.¹⁸⁸ The UNCC did not afford Iraq either of these opportunities during the third instalment either. Much of the third instalment proceedings took place before or during the US led-invasion of Iraq (March–May 2003). As noted earlier, the oral proceedings for the third instalment claims were held during the invasion.¹⁸⁹ The changed goals of the US and the UK in Iraq enabled the panel and F4 team to adopt this new arrangement and UNCC management did not oppose it. The mechanism used was modelling – modelling in the form of the guidelines the panel had previously adopted for its experts to meet claimant's experts. As discussed in chapter 2, precedent served as models within the context of the legal epistemic community at the UNCC.

F Conclusion and Broader Claim: Political Goals Embedded in Procedural Rules

Many of the innovations that expanded participatory space for Iraq came in close proximity to changing goals of the US, the UK, France and Russia and the US-led invasion of Iraq in 2003. It is contended that this is not a coincidence. Rather, it is evidence that the change in the inter-state dynamics in the Security Council (and therefore the governing council which mirrored the membership of the Security Council) centred on the split in the US-UK-France axis in 1998 followed by the US-led invasion of Iraq in 2003. The 1998 split was over the US proposed Operation Desert Fox to enforce the UN authorised no-fly zones over Iraq. France and Russia did not approve of this proposal. Despite the UK's efforts to repair relations, the US and French actions leading up to the 2003 invasion of Iraq only worsened the relationship between these two permanent members. These events forced key actors in the UNCC to either alter their advocacy with respect to key principles or change the weights they assigned to principles. In particular, UNCC management began increasing the weight they gave to the principle of due process. This conclusion is possible because UNCC management was

¹⁸⁷ Ibid 48. See chapter 4 for a discussion of the guidelines relating to interactions between the claimants and the panel's expert consultants.

¹⁸⁸ Ibid 55.

¹⁸⁹ I participated in the oral proceedings as a legal officer of the F4 team and vividly recall the remarks by Iraq's counsel about the ongoing US-led invasion of Iraq.

originally opposed to full due process for Iraq but later became silent in the face of proposals for more due process.

The US and the UK had to soften their advocacy on expeditious and effective justice for the victims of war and compromise to a greater extent in response to calls by other states for more due process for Iraq. After the US-led invasion in 2003, the US and the UK themselves became advocates for lightening Iraq's war burdens because of their need to establish a friendly and functioning democratic state. The new inter-state dynamic also allowed weaker actors such as the F4 team and Iraq to advocate for the principle of due process and to co-opt other key actors (such as UNCC management) to their side. There is little doubt that the success of the US-led invasion of Iraq signalled a positive change for the principle of due process for Iraq. But it did not signal such a change for other principles, such as the principle of the aggressor's liability for all war damage. The principle of due process for Iraq was contested throughout the UNCC's life and was incrementally embedded into procedural rules. In turn, evolving procedural rules concerning Iraq's participatory space in the environmental claims impacted claims outcomes.

The discussion in this chapter supports a broader conclusion as well. Because the claims outcomes would be determined by actors and forums somewhat removed from the direct influence of the Security Council and the governing council, one way in which member states could retain some influence over claims outcomes was through the rules they produced. It is my contention that rule outcomes were crafted in ways that had indirect influence over claims outcomes. Key actors in the Security Council and the governing council weighted principles and embedded them in the rule outcomes in favour of their goals and allies. By disadvantaging Iraq in participating in the claims process, these key actors ensured that claims outcomes would favour claimants to the maximum extent possible, including Kuwait and Saudi Arabia and other allied states that participated in the liberation of Kuwait and were adversely impacted by Iraq's actions. Both the US and the UK have domestic legal systems in which due process and the right to defend criminal and civil suits are protected as a basic right. Due process rights are a foundational aspect of the domestic laws of both states. Yet, in crafting rule outcomes in the Security Council and the governing council, these states took a different view.

Key actors opposed to weighting the principle of due process against Iraq were some senior UN management staff such as the Secretary General and the first Executive Secretary of the UNCC.¹⁹⁰ In the UNCC environmental claims, such opposition came mostly from the panel and the F4 team. UNCC management had the difficult task of engaging in dialogue with key actors in the governing council and the panel. Obtaining win-win results in both forums was one of its goals. Smaller states, especially Yemen and other Middle Eastern and Islamic States, also spoke up for Iraq from time to time.¹⁹¹ All this changed after the US-UK-France alliance splintered in 1998 and again changed after the US invaded Iraq in 2003 and effected a regime change. The goal was then to support Iraq in its recovery and to create a new ally in the Middle East.¹⁹²

What paved the way for the governing council to revise the rules, and to resolve the difference via a working group? By the time these revisions were put in place, a host of claims involving individuals and companies had already been dealt with and disposed of. The environmental claims and the F3 claims (other Kuwaiti Government claims) represented the biggest UNCC claims and constituted a massive share of the compensation claimed.¹⁹³ At the time, the principle of due process was weighted against Iraq. This was reflected in the procedural rules that limited Iraq's participation in the claims process. An argument made by the governing council was that excluding Iraq in the individual and small company claims was justified on humanitarian grounds (suffering of victims of war) but that Iraq should have a bigger role to play in the larger claims, including environmental claims.¹⁹⁴ However, Iraq itself was facing a major humanitarian disaster and there had been round criticism of this situation by some members of the UN.¹⁹⁵ All of these factors contributed to the revision of the procedural rules. The revised rules created expanded participatory space for Iraq. The continued weighting of the rules against Iraq influenced a rule outcome that favoured the goals of key actors in the UNCC governing council, in particular the US and the UK.

¹⁹⁰ Discussed earlier in this chapter.

¹⁹¹ For example see the discussion of state position with regard to Security Council Resolution 687 in chapter 2.

¹⁹² This aspect of changed US and UK goals with regard to Iraq are discussed earlier in this chapter and in chapter 2.

¹⁹³ The United Nations Compensation Commission, *Status of Processing and Payment of Claims*, <<http://www.uncc.ch/status.htm>>.

¹⁹⁴ See chapter 2 and earlier in this chapter.

¹⁹⁵ Ibid.

Another important finding to emerge from the discussion in this chapter is the manner in which state actors used more politically-charged vocabulary in the Security Council and used more legally-oriented vocabulary in the governing council to present arguments. The vocabulary before the panel was always couched in legal and scientific terms. The use of legal and scientific vocabulary created a sense within the UNCC that rule decisions about transparency, due process and claims outcome decisions were based on legal and scientific principles. The use of such vocabulary pushed actor goals into the background – sometimes so far into the background that they either seemed irrelevant or marginal.

In concluding this chapter, a final point is that Iraq's participatory space in the UNCC environmental claims was dynamic and evolved from very little to a considerably more expanded state. These rule outcomes happened not because of the work of one actor but rather the collective effects of the work of several actors, both strong and weak. This evolution took place in a continuum of webs of influence which formed the medium through which actors communicated. There is only circumstantial evidence to indicate that these webs were being used, particularly in the atmosphere of confidentiality that enveloped the UNCC. There may well be other potential explanations of this evolution, but until more material is available from the UNCC, these explanations will, at best, have only as much evidence as that which I have proposed here. For example, it may well be argued that the evolution of Iraq's participatory space was actually the doing of UNCC management, rather than the F4 team or the panel. It can also be argued that it was always the intention of the governing council, including the US and the UK delegations to provide Iraq with considerably more participatory space in the government claims, including the environmental claims. These explanations will only shift emphasis from one actor to another. But they will not contradict the basic conclusions that Iraq's participatory space evolved, that this evolution is strongly aligned to powerful actor dynamics, relations and goals and that weaker actors also played a part in that evolution. In the next chapter I go on to analyse the rule outcomes that supported the claimants in filing and pursuing their environmental claims and how these outcomes came to be produced by key actors.

CHAPTER 4 PROCEDURAL OUTCOMES FAVOURING CLAIMANTS

A Introduction

This chapter focuses on rule outcomes that were favourable to claimants and increased the probability of their environmental claims succeeding. The material and discussion in this chapter provide a strong sense of the dialogic webs used, the employment of modelling as the dominant mechanism, and the principles advocated (such as expeditious and effective justice for victims and secrecy) by key actors to produce rule outcomes that positively aided claimants in pursuing their environmental claims. The goal of powerful actors such as the US, the UK and France was to ensure that their allies (including Kuwait, Saudi Arabia, Jordan, and Turkey) were adequately compensated for environmental damage caused by the Gulf War.¹ Russia, too, had an interest in ensuring that nations like Syria and Iran were compensated.

UNCC management was therefore quite supportive of developing procedural rules that helped claimants marshal evidence to support their claims. The panel and the F4 team also supported the general goal of ensuring that damaged ecosystems were restored. There was a strong sense of agreed goals and purposes when it came to restoring damaged ecosystems and compensating nations that had suffered environmental damage. In this sense, there was no contestation of principles in the rule outcomes discussed in this chapter. If anything was contested at all, it was the precise nature, scope and effect of these rules, rather than whether the rules were needed or it was the weighting given to the principles advocated.

In contrast to the gradual evolution which saw Iraq's participatory space go from being extremely limited to a level where Iraq had significant opportunities to participate (discussed in chapter 3), rule outcomes favouring claimants were mostly developed and established in

¹ See the discussion in chapter 2 of statements made by the US, the UK and France following the adoption of Resolution 687 by the UN Security Council affirming the need for compensation and a means to ensure payments. A strong sense of the US's leadership in creating and advocating the UNCC and influencing its procedures and decisions can be gained from the following article: Ronald J Bettauer, 'Establishment of the United Nations Compensation Commission: The U.S. Government Perspective', in Richard Lillich (ed), *The United Nations Compensation Commission [Thirteenth Sokol Colloquium]*, (Oxford University Press, 1995) 29. Bettauer was an assistant legal advisor for international claims and investment disputes in the US State Department and later became its deputy legal advisor. He was recently appointed by the UN Secretary-General to the Board of the United Nations Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory <<http://unispal.un.org/UNISPAL.NSF/0/FE095025A5DC24F38525747800458015>> at 9 Oct 2010. My observation is based on these facts combined with the close military and economic alliances that the US, the UK and France had (and continue to have) with Saudi Arabia and Kuwait.

the earlier stages of processing the environmental claims. For the most part, Iraq had no say in these outcomes and the general impact of the rules was to aid and empower claimants in pursuing their claims. In this sense, the rule outcomes were not produced in a transparent or participatory manner (with the exception of the restoration and compensation award tracking mechanism). As noted earlier and in the conclusion of this chapter, modelling was the dominant mechanism used by actors to contest proposed rule outcomes. It is argued in this chapter that actors used dialogic webs to advocate or oppose proposed rule outcomes that were precipitated by claimants, Iraq or the secretariat.

Gulf War claimant states filing environmental restoration and compensation claims faced a challenging task. In many cases, there was no baseline data to assess the nature and extent of the war-related damage. In other cases, the environmental changes had to be monitored and assessed to gain a good understanding of the ecological changes and the processes involved. Parallel causes of damage compounded this challenge. Such causes included the possibilities that the desert surface had been damaged by Bedouin pastoralists before the war as well as by military operations, or that beaches had been contaminated by oil spills from ships before and after the war in addition to the deliberate spilling of oil by Iraqi troops. Restoration presented yet another set of challenges. What were the best and most cost-effective methods to restore a damaged ecosystem? To what standard must the ecosystem be restored? If the ecosystem had already been damaged before the war, would that standard have to be lowered and, if so, to what extent?

In order for claimants to succeed in their claims, evidence on damage and restoration had to be gathered in a timely fashion and presented to the UNCC in a coherent way. The UNCC produced a number of rule outcomes that helped claimants through these challenges. The principle of expeditious and effective justice had strong support among actors at the UNCC.² But even with this help, there were many environmental claims that failed, mostly for lack of sufficient evidence.

B Early Efforts to Assist Claimants

In chapter 1, I briefly described the extensive environmental damage suffered by Iraq's neighbours as a result of the Gulf War. I visited Saudi Arabia in 2004 as part of the UNCC mission to evaluate the terrestrial environmental damage. The fragile desert ecosystem was

² This principle, along with others, has already been discussed in chapters 1, 2 and 3.

scarred with war damage. The northern desert of Saudi Arabia was dotted with encampments and embankments, some stretching for kilometres. There were massive roads and tracks all over the desert. The documented damage to Kuwait and Saudi Arabia — the two countries whose environments were most affected — included damage to the desert and marine and coastal ecosystems.

A few months after the Gulf War, the UN Environment Programme evaluated the environmental damage in Kuwait, Saudi Arabia and Iraq.³ The reports indicated that the damage was extensive and restoration and compensation would require international support. Although most of the environmental damage in Kuwait had been done by the Iraqi army, there was also a significant amount of damage done by the Allied Coalition forces, especially to the Saudi desert. The Iraqi army deliberately set fire to 700 oil wells while withdrawing from Kuwait — a shocking act unprecedented in the annals of war. Spilling millions of barrels of oil into the Gulf was another act of such vandalism. Deliberations among UN Security Council members show the outrage that these acts generated.⁴ They affected not only Kuwait but Iraq's other immediate neighbours as well.⁵

It is therefore not surprising to see the Security Council and the UNCC governing council making efforts to help claimant countries to present and support their claims for environmental damage. Besides, as discussed earlier, this was the first time post-conflict environmental claims had become the subject of international settlement.

The Security Council had included 'direct environmental damage and the depletion of natural resources' in Resolution 687 as part of Iraq's war damage liabilities.⁶ The earliest evidence of efforts by the UNCC governing council to help claimants with environmental claims is found in Decision 7, where it clarified 'environmental damage and depletion of natural resources' as including losses or expenses resulting from:

³ United Nations Environment Programme, *Rapid Assessment of the Impact of the Iraq-Kuwait Conflict on Terrestrial Ecosystems* (United Nations Environment Programme, 1991) Parts 1, 2 and 3, <<http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=307&ArticleID=3907&l=en>>.

⁴ United Nations Security Council, *Provisional Verbatim Record*, UN Doc S/PV. 2981, 3 April 1991. Speeches in the Security Council by several permanent ambassadors to the United Nations.

⁵ United Nations Compensation Commission, *Report and Recommendations made by the Panel of Commissioners concerning the First Instalment of "F4" Claims*, UN Doc S/AC.26/2001/16 (22 June 2001) [61], [120], [473], [593], [627], [713].

⁶ SC Res 687, UN SCOR, 2981st mtg, UN Doc S/Res/687 (3 April 1991).

- (a) abatement and prevention of environmental damage, including expenses directly relating to fighting oil fires and stemming the flow of oil in coastal and international waters;
- (b) reasonable measures already taken to clean and restore the environment or future measures which can be documented as reasonably necessary to clean and restore the environment;
- (c) reasonable monitoring and assessment of the environmental damage for the purposes of evaluating and abating the harm and restoring the environment;
- (d) reasonable monitoring of public health and performing medical screenings for the purposes of investigation and combating increased health risks as a result of the environmental damage; and
- (e) depletion of or damage to natural resources.⁷

One key element of the criteria spelled out here is the inclusion of claims for monitoring and assessment (M&A) of environmental and public health damage. Abatement, restoration and compensation of environmental damage are easily seen to fall within the overall ambit of the terms of Security Council Resolution 687, which made Iraq liable for ‘direct environmental damage and the depletion of natural resources’.⁸ Monitoring and assessment of that damage with a view to abatement, restoration or compensation was an interpretative addition made by the UNCC governing council. There is, however, little doubt that M&A was well within the contemplation of the Security Council at the time it passed Resolution 687. A report filed by the Under-Secretary-General of the UN, Martti Ahtisaari, in March 1991 described the horrible environmental damage Ahtisaari had witnessed in Kuwait immediately after the Gulf War and stated that it ‘seems clear that monitoring, on a regional basis, is urgently required of the environmental, including health, aspects of the oil well fires’.⁹ This report was repeatedly referred to by Security Council members in discussions before and after the adoption of Resolution 678.¹⁰ The inclusion of M&A claims by the governing council is one of the earliest interventions in favour of claimants. Within a year of the UNCC being established, its governing council decided to allow claimants more time to file environmental claims than

⁷ United Nations Compensation Commission, *Governing Council, Decision 7*, 5th Sess, UN Doc S/AC.26/1991/7/Rev.1 (17 March 1992) para 35.

⁸ SC Res 687, above n 6.

⁹ United Nations Security Council, *Report of the Secretary-General regarding creation of a United Nations Compensation Fund and United Nations Compensation Commission as envisaged in Security Council Resolution 687 (1991)*, UN Doc S/22559 (2 May 1991).

¹⁰ United Nations Security Council, *Provisional Verbatim Record*, UN Doc S/PV 2981 (3 April 1991).

other claims, extending the deadline to February 1997.¹¹ In 1998, soon after the environmental claims had been filed, in response to a request made by Kuwait and Saudi Arabia, the governing council decided to expedite the M&A claims¹² and later decided to prioritise the payment of awards to facilitate the completion of the M&A studies.¹³

Most of the decisions concerning rules to assist claimants were not covered by the governing council's Provisional Rules for Claims Procedure (the Rules).¹⁴ In this sense, they were specific to environmental claims and more claimant-friendly. When taken together with other innovations of procedure that were put in place by UNCC management, the panel and the F4 team, they form a weighty set of interventions in favour of environmental claimants. Some of these innovations included:

- procedures for the panel's expert consultants to communicate with claimants;
- the development of an interactive claim assessment process that involved conversations between the F4 team, the panel's expert consultants and the claimants;
- F4 team reviews of claims which allowed claimants an opportunity to revise imperfectly filed claims (Article 15 of the Rules);
- Interrogatories sent by the secretariat which helped claimants identify gaps in claims and prepare supporting materials (Article 38 of the Rules); and
- an iterative claim development process and procedure that allowed claimants to file M&A study data and revise their claims based on such data.

Underlying these early decisions was the principle of *expeditious* and *effective* justice for the victims, a principle that was advocated by the vast majority of the governing council members.¹⁵ I noted in chapter 3 that this principle has two aspects. Expedition refers to the need for speedy processing of claims. Effectiveness refers to the provision of a satisfactory compensatory award to the victim. Much of the background learning for this principle came from the Iraq-US Claims Tribunal which I discussed in chapters 2 and 3. The lessons learned by the US and key senior staff in UNCC management, who had come over to the UNCC from

¹¹ United Nations Compensation Commission, *Governing Council, Decision 12*, 7th sess, 29th mtg, UN Doc S/AC.26/1992/12 (25 September 1992) para 1(c).

¹² United Nations Compensation Commission, 'Press Release for the Closing of the 29th Session of the Governing Council' (Press Release, 30 September 1998) <http://www.uncc.ch/pressrel/pr_29c.pdf>.

¹³ United Nations Compensation Commission, *Governing Council, Decision 100*, 36th sess, 96th mtg, as revised at the 43rd sess, 115th mtg, UN Doc S/AC.26/Dec.100 (2000)/Rev.1 (15 March 2002) para 1(e).

¹⁴ United Nations Compensation Commission, *Governing Council, Decision 10*, 6th sess, 27th mtg, UN Doc S/AC.26/1992/10 (26 June 1992).

¹⁵ In chapter 3, I commenced a brief discussion of this principle. I now expand on it.

that tribunal, were that individual claims must be processed quickly and that room for dilatory tactics must be minimised. Another lesson was that due process for Iraq must be minimised in favour of speedy rough justice, at least for the individual claims.¹⁶ If an example was to be made of Iraq to the rest of the world, relief had to be given quickly, particularly for the thousands of individual claimants. A considerable degree of the Security Council's and the UNCCs credibility rested on the speed and effectiveness of this relief. For these reasons, all of the key actors in the UNCC strongly supported the principle of expeditious and effective justice for the victims of war. Even in the latter stages of the UNCC's substantive work, the weighting given to this principle had not waned much, particularly with regard to individual claimants. The application of the principle to environmental claims often translated into the need to provide claimants with assistance to develop and support their claims and determine a fair assessment and payment of compensation or restoration costs (effectiveness) and the conclusion of the processing as speedily as possible (expedition).

This collection of procedural interventions could be characterised as deliberate and purposeful assistance to claimants to enable them to present, revise, support and win their claims. In short, the interventions promoted an uneven playing field that favoured the claimants. This inequality was exacerbated by the reduced participatory space provided to Iraq — an issue I discussed in the previous chapter.

The key actors involved in these rule outcomes in the governing council were the US and the UK. UNCC management, being generally supportive of the dominant powers in the governing council, also supported these rule outcomes. As noted in earlier chapters,¹⁷ senior UNCC management staff favoured mass claims-processing techniques. The F4 team and the panel were also generally supportive of these outcomes because it helped develop the claims and allowed evidence to be gathered for evaluating the claims. In a broader sense, these rule outcomes assisted in the more expeditious restoration of the damaged environment. Given the broad support for these rule outcomes, the only resistance or contest on principles came from Iraq. Dialogic webs allowed for conversations around the details of the rules and, apart from modelling as a learning tool and capacity building for claimants, there is no evidence of the

¹⁶ Francis E McGovern, 'Dispute System Design: The United Nations Compensation Commission' (2009) 14 *Harvard Negotiation Law Review* 171.

¹⁷ See discussion in chapter 2.

use of any other mechanism to produce these outcomes. The main principle advocated was expeditious and effective justice for the victims. Key state actors and UNCC management, who supported this principle, also downplayed the principles of transparency and due process for Iraq.

C M&A Claims Procedures

The governing council, the panel and UNCC management established several rules either specific to or triggered by the first instalment of M&A claims. As noted at the beginning of this chapter, most of the rules assisting claimants were developed and established during the processing of the first instalment of M&A claims. The first rule outcome discussed below had to do with priority processing and payment of M&A claims. The second rule outcome deals with the interaction of the panel's expert consultants with claimants in the process of assessing the M&A claims. The third rule outcome was related to post-M&A claim award tracking. Tracking became necessary to ensure financial integrity, M&A study quality and the relevance of M&A study results to substantive claims.

There were other rule outcomes that predate the environmental claims, such as Article 34 interrogatories and Article 15 evaluations, which are not discussed here. These were rule outcomes that were developed as part of the rules of procedure which helped claimants identify gaps in their claims and rectify them in a timely fashion. They were part of a general post-conflict attempt by the UNCC to assist claimants of all claims categories.

1 Priority Processing and Payment of M&A Claims

By the time the panel convened informally for the first time in July 1999, the governing council had expressed its willingness to consider the special circumstances surrounding M&A claims and to consider priority payments being made in respect of these claims.¹⁸ Saudi Arabia and Kuwait had addressed the governing council on more than one occasion appealing for priority of payment for M&A claims.¹⁹ These two states had more to lose than any other if their substantive environmental claims were to fail. They became key actors in promoting priority of processing and payment of M&A claims. Fact finding through M&A

¹⁸ United Nations Compensation Commission, *Governing Council, Decision 73*, 32nd sess, 88th mtg, UN Doc S/AC.26/Dec. 73 (25 June 1999); United Nations Security Council, *Letter from President of the Governing Council of the UNCC to President of Security Council*, UN Doc A/1999/856 (25 June 1999).

¹⁹ United Nations Compensation Commission, 'Press Release for 28th Session of the Governing Council on 1 July 1998' (Press Release, 1 July 1998) <http://www.uncc.ch/pressrel/pr_28c.pdf>. The Governments of Iran, Saudi Arabia, Jordan, Kuwait and Syria addressed the governing council at the opening session.

studies was crucial to gathering and presenting evidence in support of their substantive claims. Their concerns about receiving funds from the UNCC for M&A studies arose mostly because the UNCC had until then given priority to the payment of individual claims. Given the limited funding available to the UNCC through Iraqi oil sales, the chances that M&A awards would be paid in a timely manner looked remote. The concern of claimants was that, if funds for M&A studies were not made available in a timely manner, they would be denied an opportunity to produce the necessary evidence to support their substantive claims for environmental restoration and damage.

It was in this context that several claimant countries in the region — Iran, Jordan, Kuwait, Saudi Arabia and Syria — took the initiative of proposing the establishment of an escrow account for environmental claims.²⁰ These claimant governments made the proposal to the governing council in mid-1998.²¹ The purpose of the environmental escrow account was to fund the costs of (a) reasonable measures to monitor and assess environmental damage, (b) experts commissioned by the UNCC at the request of a panel of commissioners, (c) interim measures requested by the claimants with respect to claims for environmental damage and (d) urgent measures requested to abate and prevent further environmental damage.²²

As a general proposition, providing funds to a claimant to gather the evidence needed to support a claim at the expense of the respondent is a highly unusual and exceptional procedure (although, as noted below, it was not without precedent). In most domestic jurisdictions, claimants must first bear the costs of litigation, including the costs of marshalling the evidence to support their claims. In the US, each party bears their own costs of litigation unless the court varies this for special reasons.²³ In the UK and most Commonwealth countries, the winner can recover costs from the loser.²⁴ There are at least two reasons for this. First, the burden of proof for the claim is on the claimant. Second, the respondent's liability for the claim is determined on evidence produced by the claimant. If the claim fails, the respondent would ordinarily be free of liability, including the costs of

²⁰ Julia Klee, 'The Process' in Cymie R Payne and Peter H Sand (eds), *Gulf War Reparations and the UN Compensation Commission* (Oxford University Press, 2011) 35–6.

²¹ The US-UK-France axis began to splinter in 1998 culminating in a total breakdown in 2003. Contentious decisions made by the governing council during this period generally evolved out of long winded negotiations in working groups.

²² Ibid. Also Klee, above n 20.

²³ John E Bonine, 'Best Practices—Access to Justice (Agenda for Public Interest Law Reform)', (2009) <<http://www.accessinitiative.org/resource/best-practices%E2%80%9494access-justice%E2%80%94>>.

²⁴ Ibid.

gathering the claimant's evidence. The accommodation made by the UNCC governing council for claimants to seek M&A awards ran counter to this general proposition. One justification for doing so was that Iraq's liability for environmental damage had already been determined by the Security Council in Resolution 687. Yet claimants were still required to produce evidence of causation and quantum of damage in order to recover against Iraq.²⁵, ²⁶, ²⁷ As a precedent, the claimants cited a similar escrow account that had been established as part of a settlement in the Exxon Valdez oil spill in Alaska.²⁸

By doing so, the claimants expected the US, the most powerful actor in the UNCC, to support them. In particular Saudi Arabia and Kuwait were affirming and advocating two principles through this proposal. First, they were affirming that Iraq was responsible for all the Gulf War damage (principle of state responsibility), including monitoring and assessing environmental damage.²⁹ Second, they were advocating the principle of expeditious and effective justice for the victims of the war, discussed in chapter 3. They were advocating expedition through priority for M&A claims and effectiveness through the immediate availability of funds to hire experts and gather evidence.

The proposal was discussed by a working group of the governing council but several members of this group had concerns about the feasibility of an escrow account.³⁰ In view of the working group's concerns, the claimants made an alternative proposal to the governing council.³¹, ³²

The claimant's alternative proposal (which abandoned the model based on the Exxon Valdez spill escrow account) suggested that the panel should prioritise the processing of environmental M&A claims and the UNCC should make early awards on these claims.³³ The claimants also suggested that the alternative proposal would allow the panel to provide

²⁵ In chapter 5, I discuss the quantum of proof required to establish claims.

²⁶ [The content of this footnote has been deleted and placed in an appendix which has been embargoed to the public by the University of Sydney for five years.].

²⁷ See above n 26.

²⁸ The escrow account in the Exxon Valdez Oil spill was set up under a consent decree in October 1991 and may be accessed at <http://www.evostc.state.ak.us/Universal/Documents/History/Agree_CD.pdf>.

²⁹ The principles of state responsibility for damage caused to another state have been well established in international law. See *Trail Smelter Case* (1939) 33 *Arbitration Journal of International Law*, 182 and are codified by the International Law Commission, *State Responsibility* <http://untreaty.un.org/ilc/guide/9_6.htm>.

³⁰ Klee, above n 20.

³¹ *Ibid.*

³² See above n 26.

³³ *Ibid.*

feedback and guidance on the scope of, and methodology to be applied in, the M&A studies.³⁴ This would help claimants ensure that the M&A studies were both justified and well defined.³⁵ The proposal suggested that, for this scheme to work, the governing council would have to give priority to the payment of M&A awards.³⁶ The alternative proposal was also studied by the council's working group.

At the working group's request, the secretariat³⁷ prepared the required documentation on the subject.³⁸ Requests for preparation of background documentation of draft proposals or notes and working papers are routine manifestations of the operation of dialogic webs. These kinds of documentation allow for discussion and revisions as one would expect in the case of an operational dialogic web. Dialogic webs therefore constituted a vital part of the way decisions were forged in the context of the environmental claims at the UNCC. The secretariat was not opposed to the alternative proposal but highlighted procedural issues that the governing council would need to address, should it accept the proposal.³⁹ The secretariat's efforts were directed at revising the proposed model on the basis of priority of processing and payment. Claimants had bundled all their environmental claims together, including claims for M&A studies, expenses already incurred, environmental restoration and environmental damages. If M&A studies were to be dealt with separately on a priority basis, claimants would need to identify, clarify and supplement these claims.⁴⁰ It might even be necessary for M&A claims to be refiled. Additionally, the secretariat felt that it was essential that claimants indicate how long the proposed M&A studies would take and that they should satisfy procedural and evidentiary requirements under the Rules.⁴¹ The time required for the completion of the M&A studies later influenced the extension of the work period of the panel. The longer the studies took, the longer the need to process the substantive claims. In my view, legal officers on the F4 team and UNCC management favoured this outcome partly because it fulfilled

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid; United Nations Compensation Commission, *Governing Council, Decision 17*, 41st mtg, UN Doc S/AC.26/Dec. 17 (24 March 1994) para 8. In this decision the governing council had stated that it would make revisions to the payment system whenever needed to respond to circumstances. This statement was cited as justification for the proposal.

³⁷ Whenever the governing council mandated the secretariat to produce a document or act with regard to environmental claims, the task was generally carried out by the F4 team and UNCC management.

³⁸ Julia Klee, above n 20.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid.

legitimate expectations of longer job tenure for them. This is another example of a key set of actors supporting or opposing an outcome that favoured their (legitimate) personal goals.

The working group was influenced by the secretariat's note and by the claimants' alternative proposal, as is reflected in its recommendation to the council.⁴², ⁴³ The working group recommended that the governing council request the executive secretary to advise the claimants 'to identify and file separately, within the time period to be specified ... those portions of their claims already filed with the UNCC that pertain to the monitoring and assessment of environmental damage'.⁴⁴ The working group also recommended that 'appropriate priority should be given to the processing of such claims, so that the claims can be resolved quickly and separately from the resolution of the related claims for environmental damage'.⁴⁵ The working group further recommended that the issue of priority of payment for M&A claims be considered by the governing council at a later stage in the broader context of a discussion about payments to be made to successful claimants in all claim categories before the UNCC.⁴⁶

These recommendations were adopted by the UNCC governing council.⁴⁷ Claimants were asked to identify and file separately those portions of their claims already filed with the UNCC that pertained to the monitoring and assessment of environmental damage. These procedural outcomes were consistent with the principles advocated by the regional claimants and there was no opposition to them, largely because Iraq's participation in the governing council was confined to attempts to influence its members through oral and written statements.

It then fell to the secretariat, and more particularly the F4 team, to implement the governing council decision to give priority to processing M&A claims. At the request of the regional claimants, UNCC management organised a meeting in November 1998 in Amman, Jordan, to

⁴² United Nations Compensation Commission, *Provisional Summary Record of the Eighty-First Meeting (Closed) of the Governing Council*, UN Doc S/AC.26/SR.81 (30 September 1998) [20] in United Nations, *Documents of the United Nations Compensation Commission: Basic Documents* (United Nations, 2001).

⁴³ See above n 26.

⁴⁴ United Nations Compensation Commission, *Provisional Summary Record of the Eighty-First Meeting (Closed) of the Governing Council*, above n 42.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ United Nations Compensation Commission, 'Press Release for the closing of the 29th session of the Governing Council' (Press Release, 30 September 1998) <http://www.uncc.ch/pressrel/pr_29c.pdf>.

brief the claimants on the governing council's decision regarding environmental monitoring and assessment claims and to give them guidance on the identification and separate filing of those claims.⁴⁸ This is also evidence of efforts by the UNCC to assist claimants. In terms of the governing council decision, 1 February 1999 and 15 May 1999 were initially set as deadlines for identifying and submitting M&A claims in the first instalment.⁴⁹ This was later extended to 14 October 1999.⁵⁰ The panel and UNCC management decided to process all M&A claims in the first instalment.⁵¹

The more controversial issue of priority of payment of M&A claims was resolved by the governing council in favour of the claimants two years later. The governing council adopted a decision on 15 June 2000 (revised on 13 March 2002) during the third phase of payments to give exceptional priority of payment to environmental monitoring and assessment claims in paying out category D, E and F claims.⁵² Essentially, this resulted in full payment of all M&A claims after June 2001.⁵³ The decision to postpone the consideration of this issue allowed UNCC management and the council to wait until the costs of the M&A studies had been determined by the panel in the first instalment of claims and to weigh these claim payments against other claim payments due in other categories and the income from Iraqi oil sales. Once the figures were known and placed in the larger context of UNCC income and claim payments, it turned out to be less objectionable and less worrying for the key actors than before.

The events surrounding the claimants' proposal for an escrow account, and the presentation of an alternative proposal so quickly in response to the reaction of the governing council's working group, are suggestive of ongoing dialogue between these parties. Obviously dialogic webs were being used by the claimants and members of the working group (which included the US) to develop an outcome that was consistent with their goals. The working group's concerns did not signify opposition to the key principles advocated; rather, they were directed

⁴⁸ Mojtaba Kazazi, 'Environmental Damage in the Practice of the UNCC' in M Bowman and A Boyle (eds), *Environmental Damage in International and Comparative Law - Problems of Definition and Valuation* (Oxford University Press, 2002) 111, 126.

⁴⁹ Klee, above n 20.

⁵⁰ Ibid.

⁵¹ Ibid 37–8.

⁵² United Nations Compensation Commission, *Governing Council, Decision 100*, 36th sess, 96th mtg as revised at its 39th sess, 115th mtg, UN Doc S/AC.26/Dec.100 (2000)/Rev. 1 (15 March 2002).

⁵³ United Nations Security Council, *Letter dated 22 June 2001 from President Governing Council of the UNCC to President Security Council*, UN Doc S/2001/763 (6 August 2001).

at the precise nature of the procedural outcomes that were proposed — ie the proposed model of an escrow account.⁵⁴ Here then is an example of key actors in the governing council and claimants being in agreement on principles and the weighting given to them, but diverging in their views on the content of the rules that would implement that principle. It is significant that this difference of opinion among key actors in the governing council happened at a time when the US-UK-France axis was beginning to weaken. US-supported proposals were no longer uncontested and, as in this example, even when there was no contest on principles, contests on the rules or models were emerging. But dialogic webs allowed these actors to negotiate outcomes and define, pack and repack issues and solutions to achieve their goals.

The claimants advocated the model of an escrow account, drawing on the example of the Exxon Valdez oil spill. The working group, on the other hand, sought ways to implement the principles within the existing arrangements of the UNCC, without the need for further innovation. This example suggests that there is greater room for convergence and consensus in principle-mediated conflict than in rule-mediated conflict. In principle-mediated conflict, actors have a wider range of rule models or options to choose from to satisfy the weighting they may allot to conflicting principles. On the other hand, in rule-mediated conflict, actors may be locked into a single rule model or option constrained by implied principle weightings. In such situations, conflicts over principles may translate into actors adopting stubborn positions, ostensibly over the rules.

With regard to payment priority for M&A claims, the secretariat recommended that the council consider this issue later when it considered priority of payment generally.⁵⁵ Priority of payment of M&A awards was a much more controversial issue. Segregating priority of processing from priority of payment allowed the secretariat and the council to evaluate the payment burden after it had been determined by the panel, rather than commit to it beforehand. Priority of payment for M&A claims would result in delayed payment of other categories of claims. Giving priority of payment to environmental M&A claims had to be dealt with in the context of previous governing council decisions to give priority to the payment of individual claim awards. Besides this, priority for these claims would have to be considered in the context of other government and corporate claims and the income from Iraqi oil sales.

⁵⁴ Klee, above n 20.

⁵⁵ Ibid.

There was no conflict with regard to the applicable principles. Nevertheless, the issue of prioritising payments of M&A awards over other awards was postponed to another day. In my experience, key actors at the UNCC tended to postpone decision-making or shift the forum when issues were likely to attract conflict. I therefore contend that forum shifting and postponement of decision-making were ancillary tools that actors used in combination with mechanisms to achieve their goals.

Although decision-making involving dialogic webs may be more time consuming, this example illustrates how such webs allow for issues to be unpacked and repacked. In this case, the dialogic webs used by the key actors in the governing council allowed for the evolution of a solution where the problem was reduced to two smaller components and each component was dealt with separately. The evolution of solutions to smaller components of a problem becomes possible because dialogic webs are informal and create space for actors to explore alternatives.

2 Communication between the Panel's Expert Consultants and Claimants

The panel and the UNCC established a set of procedures that allowed the panel's expert consultants to interact and consult with the claimants' experts and government officials during the claim evaluation process. These interactions and consultations were later applied to the other claim instalments as well. I discuss this rule outcome to illustrate yet another procedure that assisted claimants to clarify, develop and further define their M&A claims. This procedure excluded Iraq from the interactions and consultations and therefore lined up with the UNCC trend discussed in chapter 3 to generally exclude Iraq from claims processing. It was also extraordinary because it was these interactions that led the panel's expert consultants and the panel to develop the terms of reference for the M&A studies — in the same sense that a consultant would interact with a client to shape a deliverable in the form of a report.

These rules were extremely important for M&A claims, since the panel had decided to adopt an interactive approach to claims processing⁵⁶ that relied on meetings between the panel's expert consultants and the claimants. The F4 panel had the dual task of assessing whether there was a sufficient nexus between the alleged damage and the proposed studies and, if so,

⁵⁶ For a detailed discussion of this approach see chapter 5 of this thesis.

whether these studies were reasonable.⁵⁷ The interactive approach adopted by the panel precipitated this rule outcome in that it was a prerequisite for the panel discharging its function of evaluating and shaping the M&A claims.

In May 2000, the F4 panel approved teleconferencing procedures for technical expert review of monitoring and assessment claims.⁵⁸ The procedures were issued pursuant to Article 38(b) of the Rules.⁵⁹ In accordance with the procedures, the panel directed the secretariat to arrange teleconferences to allow the panel's expert consultants to discuss the proposed monitoring and assessment claims with the claimants' technical experts.⁶⁰ Such interaction was needed to enable the panel's consultants to obtain the necessary clarifications and information from claimants, especially in light of the expedited status of M&A claims. The teleconferences were used in lieu of site visits to carry out information-gathering activities.⁶¹ The F4 panel designed the procedures to ensure fairness in communications with claimants and to provide the claimants' permanent missions (in Geneva) with appropriate notice of the telephone calls.⁶² Implicit in these procedures was an acknowledgement of the due process principle for claimants, a principle which was contentious at that time when applied to Iraq. The overriding principle, though, seems to be that of effective and expeditious justice for the victims. The due process principle when applied to the claimants generally accorded with this principle in the context of UNCC actors.

The procedure was silent on the possibility of Iraq participating in the teleconferences and on Iraq's access to the information exchanged and documents elicited in the course of the teleconferences. Perhaps not surprisingly, Iraq did not participate in any of these conferences. Iraqi authorities did not know about them and therefore had no opportunity to insist on participating. These guidelines did not reflect due process for Iraq though they did recognise the need for expeditious and effective justice for the victims. The principle of secrecy was also entrenched in the guidelines. Recordings of conferences could not be made except with

⁵⁷ United Nations Compensation Commission, *Report and Recommendations made by the Panel of Commissioners concerning the First Instalment of "F4" Claims*, above n 5, [29]–[35].

⁵⁸ Klee, above n 20, 48.

⁵⁹ United Nations Compensation Commission, *Governing Council, Decision 10*, above n 14, art 38(b). Article 38(b) states: 'With respect to claims received under the Criteria for Processing of ... Claims of Governments and International Organizations (S/AC.26/1991/7/Rev.1), the following procedures will be used: ... (b) Panels may adopt special procedures appropriate to the character, amount and subject-matter of the particular types of claims under consideration.'

⁶⁰ Klee, above n 20, 48.

⁶¹ *Ibid.*

⁶² *Ibid.*

the consent of all parties. There is no mention of Iraq's right of access to material elicited in teleconferences or its right to participate in them, despite these interactions leading to a substantive shaping of the scope, methods, duration and costs of the M&A studies that Iraq was paying for.

The key actors involved in this rule outcome were the panel, UNCC management and the F4 team. The panel's consultants had been hired at the time the procedures were issued, but the accessible material did not disclose that they had been consulted or had played a role in shaping the rules. There were three issues that figured in the drafting of the procedures. The first of these had to do with the degree to which the panel's expert consultants might disclose claim information to claimants. The second had to do with the possible disclosure of panel recommendations or conclusions by the panel's expert consultants during interactions with claimants. The third had to do with the extent to which the panel's expert consultants would help claimants shape their M&A studies through these interactions.

On this last issue, there was concern as to the degree to which the panel's experts should proactively help claimants reformulate their M&A claims. At the same time, there was a need to ensure that M&A studies funded by the UNCC made scientific sense, were useful to the assessment of the substantive claims and were costed reasonably.⁶³ The documentation does not show where this initiative came from, but the UNCC management was supportive of the approach. The UNCC had an interest in ensuring that M&A studies were designed and implemented properly because the evidence produced would help it decide the substantive claims one way or the other. But proactively shaping the studies went beyond the mandate of entertaining, evaluating and processing claims. It is doubtful whether these rule outcomes would have emerged had Iraq been an active participant at this stage. Given Iraq's insistence on more transparency and participation, it would have resisted rule outcomes that excluded it from the decision-making process. While key actors involved in this rule outcome advocated the principle of expeditious and effective justice for the victims, there were no actors to advocate the principle of due process for Iraq. In situations where there is no conflict, actors do not have to deploy a mechanism to win support for their goals.

⁶³ See above n 26.

Despite the enthusiasm of the panel and the F4 team for promoting greater participatory space for Iraq, they never raised the issue of a potential role for Iraq in the interactions between the panel's expert consultants and claimants. This rule outcome was produced before the 2003 US-led invasion, when the US and the UK saw Iraq as their enemy. The US-UK-France axis had begun to weaken but priority processing for M&A claims had been agreed to by the governing council and the original Rules for Claims Procedure had not yet been revised by the governing council. Unfortunately, these rules remained in operation throughout all the instalments of environmental claims and were not revised to include Iraq, even after the US-led invasion of Iraq in 2003,⁶⁴ although other procedures were evolved to give Iraq access to the panel's expert consultants. The elements of secrecy and lack of Iraqi participation in these consultant–claimant interactions clearly fell short of the standards of Principle 10 of the Rio Declaration and the evolving standards of international administrative law.⁶⁵

The F4 panel commissioner, José Allen, discusses the context of limited due process for Iraq at the UNCC and states 'that the environmental claims presented special considerations that warranted even greater procedural protections'.⁶⁶ Allen gives several reasons that impelled the panel to provide Iraq with greater due process. These were (a) the novelty of an international regime requiring compensation for environmental losses resulting from armed conflict, (b) the undermining of the potential precedential value of the panel's findings and decisions if the process was judged to be unfair to Iraq, (c) the panel's belief that transparency was essential to the integrity of its own decision-making, (d) the sheer magnitude of claims asserted against Iraq requiring greater scrutiny, (e) 'fundamental fairness' that Iraq should have full opportunity to see material relating to the claims against it and provide a defence and (f) benefits accruing to the panel from diverse views expressed on the environmental claims which were complex and often involved cross-cutting scientific issues.⁶⁷ Allen concludes that 'providing due process for the participants did not impede the

⁶⁴ In lieu of site visits, Iraq was provided with a separate opportunity to consult with the panel's experts during the fourth and fifth instalment of claims but not in the presence of the claimant's experts. For a discussion of this, see chapter 3.

⁶⁵ In chapter 1, I formulated the proposition that since 1992 the global standard for environmental dispute resolution was Principle 10 of the Rio Declaration which recognises that environmental issues are best solved with the participation of all stakeholders and with access to information and justice. The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) had been adopted by states in the United Nations Economic Commission for Europe in 1998.

⁶⁶ José R Allen, 'Points of Law' in Cymie R Payne and Peter H Sand, above n 20, 150.

⁶⁷ *Ibid.*

panel's work and, in the end, resulted in better decisions'.⁶⁸ This is a strong testament to the efficacy of due process and Principle 10 of the Rio Declaration and supports the view that the principle of due process should be applied even in the context of post-conflict environmental claims processing. However, for the reasons stated above, the teleconferencing procedures for consultant-claimant interactions put in place by the panel failed to meet this standard.⁶⁹

The issue of possible disclosure of environmental information from an M&A claim to another claimant was somewhat thornier. Such a disclosure might become necessary for two reasons. First, the panel's expert consultants might need to discuss M&A studies in neighbouring countries that followed a given method or model in order to ensure that they produced comparable information. These and other such reasons were justified on the basis of good science. Then there was also the possibility that M&A studies might be duplicative of one another. The need to share information with claimants about such claims with a view to avoiding duplication was inevitable in the UNCC. It was meant to avoid possible double awards. In both cases, the strict rules of confidentiality would necessarily be breached.⁷⁰ Here the principle of secrecy was relaxed in favour of claimants, by implication affirming Principle 10 of the Rio Declaration — something the UNCC neglected to do when it came to providing information or participatory space to Iraq.⁷¹

3 M&A Studies, Progress and Award Expenditure Tracking

With respect to individual claims in categories A, B and C, the governing council had put in place an elaborate set of rules that required recipient governments to take steps to distribute the awards to the individuals concerned.⁷² The rules established a tracking and reporting system to ensure that disbursed funds would reach the hands of the awardees and, where payment could not be effected, funds would be returned to the UNCC.

The environmental claims were filed by governments and international organisations. If M&A awards were not tracked, there was a possibility that they might end up in the coffers

⁶⁸ Ibid. All these measures are discussed in chapter 3.

⁶⁹ See above n 26.

⁷⁰ Ibid.

⁷¹ In making the claims process more transparent and increasing the participatory space for claimants, the UNCC was generally complying with Principle 10. The concern though is that similar treatment was not afforded to Iraq till much later in the environmental claims process.

⁷² United Nations Compensation Commission, *Governing Council, Decision 17*, 41st mtg, UN Doc S/AC.26/Dec.17 (24 March 1994); United Nations Compensation Commission, *Governing Council, Decision 18*, 41st mtg, UN Doc S/AC.26/Dec.18 (24 March 1994); United Nations Compensation Commission, *Governing Council, Decision 73*, 88th mtg, UN Doc S/AC.26/Dec.73 (25 June 1999).

of governments and not be applied to the studies for which they were made. There was also the possibility that funds might be applied to studies different from those evaluated and approved by the panel. These considerations led the UNCC to develop a financial expenditure and substantive tracking mechanism for M&A awards. Furthermore, environmental claims represented high value claims at the UNCC and the awards made were also likely to be large. On another level, the overall purpose of M&A awards was to enable claimant governments to undertake fact finding and to use the data gathered to support substantive claims or to restore and protect the environment. In my view, ensuring that the funds disbursed would achieve those purposes enhanced the credibility of the UNCC.

The initiative for developing a mechanism for ensuring that M&A awards were used for their intended purpose came from the panel, UNCC management and the F4 team.⁷³ The panel was convinced that such a linkage was appropriate and needed. The panel was concerned that, if awards were not used for carrying out the studies recommended, the related substantive claims could suffer.⁷⁴ A decision was reached that the UNCC secretariat should provide the governing council with a note linking M&A awards to their use. Such a note was drafted by the F4 team and submitted to UNCC management for transmission to the governing council.⁷⁵

Under paragraph 35, subsections (c) and (d), of Decision 7 of the governing council, M&A claims could be filed to gather facts to support substantive claims or to mitigate and restore environmental damage.^{76, 77}

Three options were developed, linked to each of the above three issues. The first and last options focused on ways and means to ensure that M&A awards would be applied by the recipient government for accomplishing the designated studies. The first option linked non-use of funds to adverse impacts on the related substantive claim, creating a sanction against non-use or misuse of funds. The third option linked the M&A awards to reporting procedures where funds would be disbursed in instalments or disbursed in full on the basis of progress

⁷³ See above n 26.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ United Nations Compensation Commission, *Governing Council, Decision 7*, 3rd sess, 18th mtg, UN Doc S/AC.26/1991/7/ Rev. 1 (17 March 1992).

⁷⁷ See above n 26.

reports.⁷⁸ Someone would need to track, monitor and analyse the reports and recommend steps to be taken to enforce the rules.⁷⁹ Where progress was linked to award payments, payments could be suspended or halted.

The second option sought to strengthen the inherent incentive for governments to complete M&A studies. Recipient governments would know that substantive claims needed to be supported by data and would have an inherent interest in having the studies completed. To strengthen this incentive, the second option suggested fixing a time period for the completion of studies. The time period would match the panel's work program for evaluating the related substantive claim. Funds would be estimated for a study that could be completed in time for the review of the substantive claim, further incentivising its accomplishment. This option involved reshaping the scope and nature of M&A studies to match the panel's work program. Such reshaping required greater involvement of the panel's expert consultants, who would need to suggest new terms of reference for the M&A studies.⁸⁰

The issue of tracking M&A awards was highlighted and the governing council 'requested the secretariat to prepare an information note on the tracking of the expenditure of funds to be awarded to the environmental monitoring and assessment studies, and to regularly update the Council on the work of the Panel of Commissioners'.⁸¹ The issue was considered by the governing council at its meeting in December 2000. The secretariat proposed the tracking of funds awarded to successful environmental monitoring and assessment studies.⁸² The governing council did not make a decision on the proposal. Instead, it mandated the executive secretary to request information from the six regional claimant governments who had filed M&A claims 'on the specific measures that have been put in place to ensure the efficient and expeditious transfer of funds to be awarded to successful claims'.⁸³ These actions are evidence of dialogic webs, the operation of which was essential to the way decisions were made. Again, the request for notes, working papers or consultations is a manifestation of the ongoing dialogue between actors.

⁷⁸ Ibid.

⁷⁹ For example, if the finding was that funds were not being used appropriately, this factor would be weighed against the substantive claim, or the panel might refuse to consider the substantive claim.

⁸⁰ See above n 26.

⁸¹ United Nations Security Council, *Letter dated 5 October 2000 from the President of the Governing Council to the President of the Security Council*, UN Doc S/2000/1057 (7 November 2000).

⁸² United Nations Security Council, *Letter dated 8 December 2000 from the President of the Governing Council to the President of the Security Council*, UN Doc S/2000/1249 (29 December 2000).

⁸³ Ibid.

At the same December meeting, the governing council also considered revisions to the Rules. The revisions included issues such as the content and transmission of claim files to Iraq and other aspects of Iraq's participation in claim proceedings.⁸⁴ Most of these rule revisions relate to Iraq's participatory space, which I discussed in chapter 3. They are mentioned here because they also affected M&A claims. On account of these revisions, the broad message from the governing council was that Iraq ought to have more space to participate in the processing of environmental claims.

In June 2001, two days after the governing council decided to provide financial assistance to Iraq,⁸⁵ the council considered the panel's first report on awards for M&A claims and approved the recommended awards.⁸⁶ At the last minute, Iraq had participated in oral proceedings on the M&A claims before the panel and had also provided responses to the claims. The panel had decided to send claim files to Iraq in accordance with the terms of the revised Rules of December 2000. But the financial assistance came too late for Iraq to utilise it for its participation in the M&A claims. Nevertheless, the council was fully aware that Iraq would beef up its participation on account of the financial assistance that the council had approved two days earlier in June 2001. This awareness fortified the need to track M&A awards paid to claimants and ensure that they were utilised for the studies that they were intended for. Iraq's increased capacity to defend the claims and space to participate in proceedings had begun to influence rule and claims outcomes. But the tracking mechanism was also justifiable on the basis that it fell into the same class of rules monitoring award distribution in claim categories A, B and C. Indeed, as will be seen later in this chapter, during the third instalment's oral proceedings, Iraq brought up the need to track the restoration and compensatory projects undertaken by claimants with funds disbursed through the third, fourth and fifth instalment awards. By anticipating its concerns on this account, the UNCC had taken a step to assure Iraq that its funds would be used in an accountable (as opposed to transparent) manner for M&A studies only.

⁸⁴ United Nations Compensation Commission, *Governing Council, Decision 114*, 101st mtg, UN Doc 2000 A/AC.26/Dec. 114 (7 December 2000).

⁸⁵ See chapter 3 for a discussion of financial assistance to Iraq.

⁸⁶ United Nations Compensation Commission, *Governing Council, Decision 132*, 109th mtg, UN Doc S/AC.26/Dec.132 (21 June 2001).

The decision approving the M&A awards contained several special provisions aimed at ensuring the awards were applied by claimant governments to the designated studies. The special provisions forced claimants to be accountable for the way M&A awards were spent although, in a strict sense, there was no transparency in that the tracking information would not be made available to the public or to Iraq. The special provisions therefore represented a miniscule movement towards the standards embodied in Principle 10 of the Rio Declaration (1992) as set out in chapter 1. These provisions were:

1. a requirement that claimant governments ‘expeditiously distribute amounts received for successful claims to the entity responsible for conducting the environmental monitoring and assessment activities, pursuant to the agreed upon procedures’ and that governments should ‘provide information on such distribution as soon as possible’;
2. a tracking mechanism to ‘ensure that funds are spent on conducting the environmental monitoring and assessment activities in a *transparent* and appropriate manner and that the funded projects remain reasonable monitoring and assessment activities’;
3. a request to the panel ‘to issue procedural orders directing claimant Governments to submit periodic reports concerning the environmental monitoring and assessment projects to the Panel’; and
4. a request to the panel to keep the governing council informed (through the executive secretary) of such progress reports and any action that may be required.⁸⁷

The term ‘transparency’ had been used previously by the governing council to describe tracking mechanisms for the individual claims in categories A, B and C.⁸⁸ The use of the word ‘transparent’ in the governing council decision is at once curious and important. It was curious because it signified not a radical departure from the prevailing policy of secrecy, but rather an assurance to Iraq and to internal and external auditors that funds given for M&A studies would be used by governments for the purposes for which they were awarded. It was important because the term contrasted with the UNCC’s long-standing policy of secrecy and confidentiality.⁸⁹ This rule outcome therefore did not signal a departure from the principle of secrecy. Rather, it was a rule partially rooted in the principle of expeditious and effective justice for victims. Nonetheless, the vocabulary of transparency played a legitimising role

⁸⁷ Ibid. (emphasis added)

⁸⁸ United Nations Compensation Commission, *Governing Council, Decision 18*, 41st mtg, UN Doc S/AC.26/Dec.18 (24 March 1994).

⁸⁹ Ibid.

even though the prevailing culture of secrecy was largely undisturbed. While the vocabulary used by the legal epistemic community at the UNCC did not include notions of transparency and inclusiveness with regard to Iraq, other UN member states or the public, it did include notions of accountability as applicable to some actor relations within the UNCC. In the final analysis, these special provisions may not have advanced transparency, but they did improve the accountability of claimants as to how M&A awards were utilised.

D Restoration and Compensation Claim Procedures

There were three rule outcomes applicable to the restoration and compensation claims that demand discussion and analysis. The first of these had to do with the timing of the restoration and compensation claims. This rule outcome was not favourable to claimants and was precipitated by the limited time frame established by the governing council for processing environmental claims. This rule outcome is an exception to the other rule outcomes discussed in this chapter in that it did not assist claimants. Arguably, though, it did help Iraq. I discuss it here because it falls into the category of rule outcomes relating to claimants and also because it furnishes an important lesson for future institutions resembling the UNCC. The second rule outcome relates to the amendment of claims based on new information from M&A studies funded through UNCC awards. The last of the rule outcomes established a tracking system for restoration and compensation awards. I discuss each of these three rule outcomes below.

1 Timing of Claim Review and Awards — Implications for Pending Claims

The panel, assisted by UNCC management and the F4 team, regularly reviewed and revised its schedule of work. Given the pioneering nature of the panel's work, there were circumstances it could not always predict. Obtaining data from M&A studies in a timely manner was a challenge to both the claimants and the panel. However, there were also factors beyond the panel's control. One of these was the US-led invasion of Iraq in 2003,⁹⁰ which caused massive disruption to the government of Iraq. For a short period following the end of the invasion and the overthrow of Saddam Hussein, the legal succession of the Iraqi government was in doubt.

⁹⁰ The invasion commenced on 20 March 2003, spearheaded by troops from the US and the UK.

Table 8. Environmental Claim Instalment Processing Schedules

Instalment	Subject matter	Start Date	End date	Duration	Comment
First	M&A	Mar 2000	Jun 2001	16 months	<u>22 months</u> for studies to generate data to support substantive claims (instalment three onwards and assuming awards were paid immediately)
Second	Cost claims	Apr 2001	Oct 2002	19 months	
Third	Restoration	Mar 2002	Dec 2003	22 months	Fourth instalment claims formally commenced in parallel with third instalment claims but were not seriously progressed before the panel until the conclusion of the third instalment.
Fourth	Restoration	Mar 2003	Dec 2004	22 months	Processed in parallel with fifth instalment claims.
Fifth	Compensation and public health	Nov 2003	Jun 2005	20 months	<u>18 months</u> to amend claims in response to third instalment awards. <u>6 months</u> to amend claims in response to fourth instalment awards.

While there was a reasonable lapse of time between the third and fifth instalment of claims, this was not the case for the fourth and fifth instalments (see table 8). In particular, this led to a practical problem in the last two instalments. The third and fourth instalments dealt with claims for remediation of environmental damage, whereas the fifth instalment dealt mostly with compensatory measures for interim loss — loss sustained from the time the environment was degraded to the time it would be restored. The quantum of compensation for interim loss

depends on restoration methods and amounts awarded. A smaller award or an award for a restoration method that took longer to restore the environment would entail higher interim losses. In order to make an appropriate adjustments to claims, a reasonable period would need to intervene between the awards for restoration (fourth instalment) and the consideration of interim loss claims (fifth instalment). That time would allow claimants to assess the restoration awards and adjust their interim loss claims accordingly.

Ultimately, the UNCC processed the fourth and fifth instalments in parallel.⁹¹ By the time the governing council had reviewed the panel's fourth instalment report and accepted the recommended awards, the panel had already made significant progress in processing the fifth instalment of claims.⁹² A more reasonable interval between the last two instalments would have helped to alleviate the practical difficulty of revising claim amounts in the fifth instalment based on awards made in the third and fourth instalments.⁹³

The panel dealt with scheduling the fifth instalment of claims in July 2003. The fifth instalment claims were closely related to the restoration claims. Many of the fifth instalment claims arose out of the same factual circumstances relating to the third and fourth instalment claims. For example, in the fourth instalment, Saudi Arabia had claimed the costs of repairing and restoring the military damage to its desert.⁹⁴ In the fifth instalment, it proffered a claim for compensation for ecosystem service losses sustained from the time of the Gulf War to the time the desert was restored (interim loss).⁹⁵ It therefore made sense to consider the scheduling of the fifth instalment claims after the awards on the fourth instalment claims had been announced.^{96 97 98 99 100 101 102 103 104}

⁹¹ As table 8 shows, the processing of each instalment commenced before the preceding one had ended. However, while an instalment might have formally commenced by presentation of the claims to the panel, the panel did not consider the claims in earnest until after the decision-making on the previous instalment had been substantively concluded — usually by drafting the panel report.

⁹² The third instalment awards were known to claimants in December 2003. The fourth instalment was referred to the panel in March 2003 and awards made in December 2004. The fifth instalment was referred to the panel for processing in November 2003 and awards made in June 2005. This left less than six months for claimants in the fourth instalment to adjust claims in the fifth instalment whereas claimants in the third instalment had nearly 18 months to do so.

⁹³ Awards were based on the restoration methods the panel decided were most appropriate.

⁹⁴ United Nations Compensation Commission, *Report and Recommendations made by the Panel of Commissioners concerning Part One of the Fourth Instalment of "F4" Claims*, UN Doc S/AC.26/2004/16 (9 December 2004) [242].

⁹⁵ United Nations Compensation Commission, *Report and Recommendations made by the Panel of Commissioners concerning the Fifth Instalment of "F4" Claims*, UN Doc S/AC.26/2005/10 (30 June 2005) [585] et seq.

⁹⁶ See above n 26.

⁹⁷ Ibid.

This panel decision had the significant consequence that internal UN procurement proceedings were commenced to dispense with open bidding for the expert consultancy contract for the fifth instalment natural resource claims and extend the contract of the fourth instalment consultants to cover fifth instalment work.¹⁰⁵ This rule outcome was the result of dialogue between the panel, the F4 team and UNCC management. The F4 team provided two models for the panel to choose from and, in this sense, modelling was used as a mechanism. The panel revised its work schedule to accommodate its decision to evaluate the fifth instalment natural resource claims in parallel with the fourth instalment cleaning and restoration claims.

The parallel processing of fourth and fifth instalment claims did not accord with the principle of effective justice for the victims, although it did accord with the principle of expeditious disposal of claims.¹⁰⁶ Parallel processing of the fourth and fifth instalments meant that claimants were denied the opportunity to amend their fifth instalment claims in response to awards in the fourth instalment. From Iraq's standpoint, it did not make much difference to the principle of due process. In either scenario, Iraq did not have the time it had requested to consider the material in the two instalments and provide comments. Arguably, though, the back-loaded option would have been slightly more favourable to Iraq. Two factors drove this outcome. First, there was the convenience of having the same expert consultants for both instalments and, second, the convenience of completing both instalments together. One factor that pushed the panel, the F4 team and UNCC management to make this decision was the timetable fixed by the governing council and its manifest reluctance to extend the time for completing the environmental claims. Key actors involved were the panel, the F4 team and UNCC management. Apart from modelling (in the form of the two options mentioned) no

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ The United Nations Office of Internal Oversight later criticised this move in the course of an internal audit on the basis that it contravened UN procurement procedures. United Nations Office of Internal Oversight Services, *OIOS audit of F-4 Claims-5th Instalment*, UN Doc AF2005/830/01 (8 June 2005). This document is confidential but was briefly made available on the UNCC website during the Volker Commission when the Office of Internal Oversight stated that they would make the documents public on their website. They were later withdrawn from the UNCC website. The UNCC provided a response to this criticism in a formal letter.

¹⁰⁶ In chapter 3, I discussed the principle of expeditious and effective justice for the victims of war and noted that it has two aspects referring to speed of claim processing and adequacy of awards.

other mechanism was used to produce this rule outcome. UNCC management was keen to hold the panel to the timetable fixed by the governing council and this meant that it did not favour the back-loaded option.

There were also timing issues concerning the M&A awards in the first instalment. The panel received the bulk of the data produced by claimants in time for consideration in the substantive claims. However, a few studies remained incomplete at the time the panel concluded its work.¹⁰⁷ Ideally, the panel should have considered substantive claims after the M&A studies had been completed and all the data gathered and analysed. This was not feasible given the timetable imposed on the panel by the UNCC governing council. Besides, a few of the M&A claims were recognised by the panel as longer-term studies. Thus, the time afforded institutions for the completion of particular tasks is an important factor in planning and designing institutions and processes for future conflict-related reparations mechanisms addressing environmental damage. I discuss this lesson in chapter 6.

2 Amendment of Claims Based on M&A Results

The Gulf War had caused major environmental damage to numerous ecosystems from a number of sources. There were few, if any, natural baselines from which to measure the impacts. Claimants had to undertake M&A studies after the war to assess the nature, extent and causation of the damage. As indicated in the introduction, some damage, such as desert impacts, had multiple causes, some of which were unrelated to the conflict.¹⁰⁸ For example, military activity had caused damage to the desert surface but so had overgrazing by Bedouin livestock.¹⁰⁹ The Iraqi army spilled millions of barrels of oil into the Persian Gulf on Saddam Hussein's orders, damaging long stretches of the Gulf coast.¹¹⁰ However, there had also been

¹⁰⁷ United Nations Compensation Commission, *Report and Recommendations made by the Panel of Commissioners concerning the Fifth Instalment of "F4" Claims*, above n 95, [782]. Fifty-three of the 69 projects were completed. With regard to the 16 ongoing monitoring and assessment projects, the panel stated that 12 of them continued to be reasonable monitoring and assessment activities and the governments concerned were permitted to use funds from the first instalment awards to continue their monitoring and assessment activities. In relation to the four remaining projects, the panel concluded that further work was no longer necessary and the governments were requested to return the remaining funds in respect of these projects.

¹⁰⁸ Parallel or contributory causation is not unique to environmental claims. It can arise in non-environmental claims, too.

¹⁰⁹ United Nations Compensation Commission, *Report and Recommendations made by the Panel of Commissioners concerning Part One of the Fourth Instalment of "F4" Claims*, above n 94, [279].

¹¹⁰ United Nations Compensation Commission, *Report and Recommendations made by the Panel of Commissioners concerning the Third Instalment of "F4" Claims*, S/AC.26/2003/31 (18 December 2003) [174].

previous and subsequent oil spills from oil tankers that had also damaged the Gulf coast, as well as natural oil seeps.¹¹¹

Knowledge about remediation and quantification of damage in the Middle Eastern desert was spotty. In this context, data gathering and the selection and application of restoration and assessment methods posed considerable challenges. At best, there were significant scientific data gaps and uncertainties that had to be taken into account in the decision-making. One consequence of this was the need to have the flexibility to amend claims to take into account new information coming to light through the M&A studies about causation, quantification and remediation of environmental damage.

In the first instalment of claims, the panel made awards for M&A studies. The results of these studies would bring new data applicable to substantive claims. For example, M&A study awards were provided to (a) Iran to use satellite imagery to track the spread of oil in the Persian Gulf from Kuwait to Iran, (b) Iran to study the impact of airborne pollutants from the Kuwaiti oil well fires on cultural heritage, including stone relics at Persepolis and tile work and paintings in Esfahan and other sites, (c) Jordan to study the impact of refugees on groundwater reserves and the port of Aqaba, (d) Kuwait to determine the damage to public health from the plumes of the oil well fires and (e) Saudi Arabia to assess the damage to its desert and coastal shoreline.¹¹² New M&A data often meant that claims had to be amended. But the obvious need for amendment had to be balanced against the need to be fair to Iraq as well as the need for the UNCC to process the claims in an expeditious manner. This was an area for potential conflict between the principles of due process and expeditious and effective justice for the victims.

1 February 1997 was set as the deadline for filing environmental claims.¹¹³ The F4 panel reviewed all proposed amendments to ensure they did not amount to new claims being filed after the relevant deadlines. The rule was that UNCC claims, with the exception of environmental claims, could be amended up until 11 May 1998, the date the UNCC governing council had fixed as the deadline for the submission of unsolicited supplements

¹¹¹ Ibid.

¹¹² United Nations Compensation Commission, *Report and Recommendations made by the Panel of Commissioners concerning the First Instalment of "F4" Claims*, above n 5.

¹¹³ United Nations Compensation Commission, *Governing Council, Decision 12*, UN Doc S/AC.26/1992/12 (25 September 1992).

and amendments by claimants.¹¹⁴ Prior to this date, claimants could submit new information and amend their claims (including revising claim amounts) provided they did not introduce a new claim. After the deadline for unsolicited information, the UNCC did not allow amendments, except in cases where amendment became necessary as a result of some UNCC action such as the severing of one claim from another or the amalgamation of claims.¹¹⁵

Deadlines for claimants to submit unsolicited supplements and amendments to claims had been fixed by the UNCC governing council for all claims except environmental claims. The governing council encouraged the secretariat to set deadlines for environmental claims and, in response, the panel adopted a staggered set of deadlines for unsolicited information.¹¹⁶

The F4 panel established another exception to the general rule against amendments after the deadline for unsolicited information. In its report on the first instalment of F4 claims, it ruled that it was ‘appropriate to receive and consider amendments to the amounts claimed, provided that such amendments were based on information and data obtained from monitoring and assessment activities’.¹¹⁷ The panel justified this exception on the basis that the governing council itself had expedited the M&A claims in the first instalment to enable claimants to use funds to carry out studies and that these study results would supplement the material required to establish the substantive claims.¹¹⁸ This exception allowed claimants to rely on new information and data generated by M&A claims and use that material to support their substantive claims and amend them accordingly. UNCC management sometimes explained this decision by suggesting that M&A generated information was solicited information in that such information had been funded through UNCC awards and claimants were expected to submit information generated from M&A studies.¹¹⁹

¹¹⁴ United Nations Compensation Commission, ‘Press Release for the Closing of the 27th session of the Governing Council’ (Press Release, 11 March 1998). This deadline was called the ‘unsolicited information deadline’.

¹¹⁵ Ibid. See also United Nations Compensation Commission, *Report and Recommendations made by the Panel of Commissioners concerning the Fourth Instalment of “F1” Claims*, UN Doc S/AC.26/2000/13 (15 June 2000) [18].

¹¹⁶ Klee, above n 20, 47. The deadlines were: second instalment – 1 August 2000; third instalment – 15 January 2001; fourth instalment – 15 May 2001; and fifth instalment – 15 January 2002.

¹¹⁷ United Nations Compensation Commission, *Report and Recommendations made by the Panel of Commissioners concerning the Third Instalment of “F4” Claims*, above n 110 [30]–[32].

¹¹⁸ Ibid.

¹¹⁹ Klee, above n 20, 47.

Iraq did not favour this exception as it had to contend with ever-increasing claim amounts as well as new material furnished late in the claim assessment process. The panel sought to balance the need for making a reasonable award that would allow for the restoration of the environment against the need to be fair to Iraq as the defending party. In an evolving procedure,¹²⁰ it made the M&A data and results available to Iraq and allowed it to supplement its submissions even after oral proceedings were concluded. This is a rule outcome that balanced two competing principles: due process for Iraq and expeditious and effective justice for the victims.¹²¹ The only key actor opposed to amendments based on M&A data was Iraq. But, as shown in chapter 3, Iraq was not able to be involved in webs of coercion or dialogue or use mechanisms to influence this rule outcome because it was excluded from participating in most UNCC processes at that time. Iraq's involvement in webs of dialogue at that time was marginal or remote. For example, it might have used allies such as Russia to influence decisions or it might have threatened commercial repercussions against companies engaged in trade and other commerce with Iraq. But, at most, these were webs that had relatively little impact. As a result, amendments based on M&A study information passed muster without reference to Iraq in the early part of the third instalment. But as the panel began to send M&A material to Iraq in the latter part of the third instalment and the fourth and fifth instalment of claims, this imbalance was corrected to a great extent.

This experience is relevant to the future design of environmental claims procedures and institutions.¹²² Ideally, claimants should be able to use M&A data to formulate and eventually support their substantive claims. M&A data would then inform both the legal and factual basis of claims as well as their quantification. Such a scheme would require the filing and processing of M&A claims very early in the proceedings. The amendment (updating) and processing of substantive claims would have to wait for a reasonable period to allow claimants to generate sufficient M&A data to inform the formulation and filing of such claims. In turn, that would allow defending parties to evaluate all the data available in developing their defence.

¹²⁰ Ibid, 57–58. Also discussed in chapter 3 of this thesis.

¹²¹ José R Allen, 'Points of Law' in Cymie R Payne and Peter H Sand, above n 20, 141, 148–52. Commissioner Allen discusses the need for due process and transparency and how the panel balanced this need with other considerations. Reflecting on the past, he says that due process and transparency neither delayed nor created obstructions to claims processing. He also discounts the earlier fears expressed by Iraq about the independence of UNCC panels generally with regard to the environmental panel.

¹²² For a fuller discussion see chapter 6.

3 Tracking Awards for Cleaning, Restoration and Natural Resource Depletion

The UNCC tracked the use of M&A awards made in the first instalment. An analogous situation also arose with regard to the third to fifth instalment awards. These were awards for cleaning up and restoring the environment and compensating for depleted natural resources and damaged cultural heritage. The UNCC expected claimants to use the awards for remediation and to make good the identified ecological losses through equivalent improvements to ecosystems. There was a need to ensure that these expectations were realised through an accountability mechanism, even if it were only to satisfy internal UN financial accountability rules.

Iraq raised this issue at the third instalment oral proceedings held in March 2003¹²³ and, in response, the panel informed the governing council that it was ready and willing, if so invited by the governing council, to formulate proposals for the establishment and operation of a mechanism to monitor and track the use of compensation awards for future remediation measures if the governing council decided that it was necessary or desirable to establish such a mechanism.¹²⁴ In Iraq's submission at the oral proceedings on the third instalment of claims, it proposed the establishment of a mechanism to ensure that any compensation awarded by the governing council for remediation measures to be undertaken in the future would be used by the successful claimant for the purpose for which the award was made. Iraq repeated its concerns and proposal at the opening session of the 53rd and 54th governing council meetings in 2003.¹²⁵

At the panel's oral proceedings, Iraq spelled out its concerns in this area with reference to two possibilities:

1. a claimant might not undertake such remedial measures as could be held to be reasonable;
or
2. a claimant might undertake remedial measures that cost less than indicated in the award.¹²⁶

Obviously, Iraq wanted to ensure that its funds were used for the purpose for which they were awarded and, if not, prevent such funds from benefiting claimants. Iraq recognised that the

¹²³ Cymie R Payne, 'Oversight of Environmental Awards and Regional Environmental Cooperation' in Cymie R Payne and Peter H Sand (eds), above n 20, 123–4.

¹²⁴ Ibid.

¹²⁵ United Nations Compensation Commission, *Governing Council, Decision 258*, 150th mtg, UN Doc S/AC.26/Dec. (2005) (8 December 2005).

¹²⁶ Payne, above n 123.

panel had no mandate to establish such a mechanism, but it urged the panel to make a recommendation to the governing council.¹²⁷ The panel stressed that in making recommendations for awards for cleaning up and restoring the environment, it assumed that compensation awarded to claimants for future remediation measures would only be used to achieve the environmental remediation objectives which the panel found to be necessary and reasonable for each claim.¹²⁸ The governing council also considered the panel's report on the third instalment of claims at its December 2003 meeting.¹²⁹ In its decision approving the awards recommended by the panel for the third instalment cleaning and restoration claims, the governing council adopted language that (a) signalled its willingness to consider a monitoring mechanism for remediation and compensation claims and (b) imposed an obligation on claimants to report regularly on the use of awarded funds.

The governing council's decision on the third instalment of claims in December 2003, included the following:

[T]o ensure that funds are spent on conducting the environmental remediation activities in a transparent and appropriate manner and that the funded projects remain reasonable remediation activities, claimant Governments are directed to submit to the secretariat every six months progress reports concerning the status of the funds received and the environmental remediation projects. The secretariat will keep the Governing Council informed of such progress reports for any appropriate action that may be required. The Governing Council shall consider what further measures may be necessary to ensure that the funds will only be used for reasonable remediation projects, and shall specify any mechanism that may be necessary

...¹³⁰

At the governing council meeting in December 2003, the F4 team and UNCC management gave a presentation on aspects of the third instalment panel report. Partly because of this presentation and partly because of issues raised by council members, the council sought the advice and views of the panel on (a) the extent to which the modifications set out in the technical annexes to its report on the third instalment claims needed to be followed to ensure that the remediation projects undertaken by the claimant governments with UNCC awarded

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ United Nations Compensation Commission, *Governing Council, Decision 212*, 133rd mtg, UN Doc S/AC.26/Dec. 212 (2003) (18 December 2003).

¹³⁰ Ibid.

funds remained ‘reasonable remediation projects’ and (b) proposals to track the remediation and compensation awards.¹³¹

In seeking advice about the technical annexes, the council was probing the extent to which the panel viewed the proposed modifications to the claimant’s remediation programs as cast in stone. The panel’s view was that the modifications should be implemented by the claimants, since the purpose of the modifications were to improve the net environmental benefit and reduce the cost of remediation measures.¹³² Nevertheless, the panel drew a distinction between aspects of technical annexes that related to remediation objectives and suggestions made by the panel that pertained only to the particular remediation technologies and procedures that might be adopted to achieve those objectives.¹³³ The panel took the view that the remediation *objectives* set out in the technical annexes were mandatory, except to the extent that there were compelling reasons for deviation or modification.¹³⁴ At the same time, it also took the view that remediation *methods and procedures* set out in the annexes were not mandatory and that claimants should have the ‘flexibility’ to change or refine the methods and procedures in the context of changed environmental conditions, developments in science and technology and new information in the future.¹³⁵

In response to proposals for award-tracking options, the panel suggested three possibilities. These were to entrust the tracking function to:

1. A UN agency or body or regional institution if such a body was established in the region;
2. A specially established independent national body in each award recipient country; or
3. An ad hoc body consisting of a small number of qualified persons appointed and established by the UNCC governing council.¹³⁶

The panel suggested that such a body could have a mandate to:

1. Track the use of awarded funds to ensure that they were applied to the purpose for which they were granted and that remediation activities were undertaken according to the terms and conditions of the award;

¹³¹ Cymie R Payne, ‘Oversight of Environmental Awards and Regional Environmental Cooperation’ in Cymie R Payne and Peter H Sand (eds), above n 20, 105, 123, 129–33.

¹³² Ibid 131.

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Ibid 123.

2. Examine proposals and decide if proposed modifications of the remediation methods set out in the technical annexes¹³⁷ were permissible in the circumstances;
3. Determine how funds from compensation awards should be used in cases where it was not possible to use the funds for the purposes originally intended or where the compensation was not awarded for a specific purpose (eg compensation for damage to or depletion of natural resources that could not be restored or replaced);
4. Report regularly to the UN through the Secretary-General.¹³⁸

The panel identified important advantages and disadvantages of each mechanism.¹³⁹ Table 9 shows these and other advantages and disadvantages of each tracking mechanism.

Table 9. Advantages and Disadvantages of Award Tracking Mechanisms

Possible Tracking Mechanism/Body	Advantages	Disadvantages
UN agency or body or regional institution	<ol style="list-style-type: none"> 1. Established institution, infrastructure and procedures 2. Minimum delay in operationalising mechanism 	Not easy for UN/regional institutions to pass judgement on governments/agencies
Independent national body	<ol style="list-style-type: none"> 1. Decentralised tracking mechanism 2. Lower overheads than international body 	<ol style="list-style-type: none"> 1. May lack genuine independence 2. May not have sufficient authority 3. Mandates may vary from country to country 4. Would take time to operationalise
Ad hoc UNCC body of qualified persons	<ol style="list-style-type: none"> 1. Established institution, infrastructure and procedures 2. Minimum delay in operationalising mechanism 	<ol style="list-style-type: none"> 1. Excessive reliance on consultants who may lack independence. 2. Requires a funding mechanism which is outside the UNCC Iraqi oil mechanism.

As a result of these responses and discussions between UNCC management and key members of the governing council, UNCC management began to explore the possibility of establishing a regional mechanism with or without UNCC participation. As part of that effort, the UNCC sought the views of all six regional claimant governments about such a tracking

¹³⁷ Attached to panel reports were technical annexes. The annexes established terms of reference for the environmental M&A studies, restoration and compensatory awards.

¹³⁸ Payne, above n 131.

¹³⁹ Ibid.

mechanism.¹⁴⁰ The outcome of these consultations was a decision by the UNCC governing council in December 2005 to establish a tracking mechanism with the involvement of Iraq and claimant governments.¹⁴¹

The tracking mechanism did not become a rule outcome until the fifth instalment. Historically, however, it originated in the third instalment. Key actors involved at this stage were Iraq, the panel, the F4 team and UNCC management. As the outcome developed, claimant governments and the governing council also became involved.

The F4 team and UNCC management supported the proposal not only because it helped establish accountability for the use of UNCC funds, but also because it had the potential of legitimately creating a program of work beyond the life of the panel. Such work always carried with it the implication of continued job security through employment creation. The panel had no direct interest in the proposal other than its concern for ensuring that awards were used for the purposes for which they were given.

In proposing the measure, Iraq (now in the post-2003-US-invasion era) was driven by self-interest. It advocated due process but, curiously, it also placed emphasis on effective justice for the victims. The proposed measures also undermined the principle of secrecy and promoted transparency. The F4 team and UNCC management had common goals and both advocated the principles of transparency (which often included accountability) and effective justice for victims. By proposing a number of options each actor was presenting models that were workable and in harmony with the weighting each actor gave to the conflicting principles at stake. None of the actors pushed for a particular model but what I am arguing here is that (as detailed above) each actor ensured that models that favoured their personal goals were included among those put forward.

Between December 2003 and December 2005, UNCC management took a number of steps towards defining a tracking mechanism that was acceptable to Iraq, the claimant governments and the governing council. As will be seen, funding for such a mechanism was one issue that

¹⁴⁰ Ibid.

¹⁴¹ United Nations Compensation Commission, *Governing Council, Decision 258*, above n 125. See also Mojtaba Kazazi, 'The UNCC Follow-up Programme for Environmental Awards' in Tafsir M Ndiaye & R Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes, Liber Amicorum Judge Thomas A. Mensah* (Martinus Nijhoff Publishers, 2007) 1109–30.

had to be addressed. A sustainable external funding source was needed if the tracking mechanism was to continue and be effective, especially beyond the life of the UNCC. The council expressed this concern at its October 2004 meeting, having had an opportunity to consider the panel's responses to questions it had tabled in August 2004. The council 'requested the secretariat to provide further information concerning the modalities of the three options proposed by the Panel, as well as information as to the scope of the authority of the Council to create such a mechanism, with particular reference to the period after the UNCC, for the Council's further consideration, and decided that this issue should remain on the Council's agenda'.¹⁴²

The issue remained alive at the December 2004 meeting of the governing council when it decided 'that UNEP's possible involvement in monitoring the environmental remediation programmes of successful claimant Governments [would] continue to be explored, and that this issue [would] be referred to a future informal meeting of the Working Group'.¹⁴³ It would seem that the Council was showing a preference for an existing UN agency taking over the tracking function as opposed to a new ad hoc UNCC body or a national body.

However, as might be expected in such a dialogue, actors visit and revisit issues, changing conclusions based on new information or changing goals until an outcome becomes necessary or inevitable. Here, several dialogic webs were in operation. Iraq was using its new allies and trustees, the US and the UK, to win as much participation and transparency as possible. At the same time, Saudi Arabia and Kuwait (the claimants who received the most funds in terms of UNCC environmental awards) were also using dialogic webs that gave them access to the US and the UK.¹⁴⁴ These dialogic webs included UNCC management and the permanent mission staff of Kuwait, Saudi Arabia, the US and the UK in Geneva as well as key officials

¹⁴² United Nations Security Council, *Letter from the President of the Governing Council of the United Nations Compensation Commission addressed to the President of the Security Council*, UN Doc S/2004/773 (24 September 2004).

¹⁴³ United Nations Security Council, *Letter from the President of the Governing Council of the United Nations Compensation Commission addressed to the President of the Security Council*, UN Doc S/2004/977 (10 December 2004).

¹⁴⁴ Mojtaba Kazazi, 'The UNCC Follow-up Programme for Environmental Awards' in Tafsir M Ndiaye and R Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes, Liber Amicorum Judge Thomas A. Mensah* (2007) 1109–30. Kazazi describes a series of meetings held under the auspices of the UNCC between the regional claimant governments and Iraq. Although the original request by Iraq for tracking was made in 2003, there was little movement on that proposal until 2005 when Iraq, Saudi Arabia and Kuwait had the US and the UK as allies. The flurry of meetings convened by the UNCC of claimants and Iraq on the one hand and informal meetings of governing council members on the other demonstrates that UNCC management was using dialogic webs involving key council actors as well as the claimants and Iraq.

in each country dealing with UNCC issues. Kuwait and Saudi Arabia submitted a joint letter to the governing council in January 2005 supporting Iraq's call for a follow-up program for the environmental restoration and compensation awards and requested that the UNCC call for a meeting of all parties in March 2005.¹⁴⁵ UNCC management was using webs available to it to ensure that the outcome favoured claimants' accountability for UNCC funds and a continuation of UNCC work, fulfilling legitimate expectations of continued work for senior staff. It is therefore not surprising that, in the final arrangements that emerged, the UNCC retained a significant proportion of the award funds to cover UNCC staff salaries and costs for administering the tracking program. Information and options went back and forth between actors and ebbed and flowed through these dialogic webs, shaping the outcome. The visible evidence of this phenomenon was the various formal meetings attended by key actors and the documents they produced throughout the evolution of the outcome.¹⁴⁶

Subsequently, the UNCC convened two meetings between claimant governments, Iraq and UNEP.¹⁴⁷ The first of these meetings took place in Kuwait in September 2005, the second in Geneva in November 2005.¹⁴⁸ At the first meeting, participants 'agreed to a follow-up programme and the development of detailed guidelines by the Governing Council' and, at the second, they 'reviewed and considered the draft guidelines prepared by the secretariat and recommended that they be presented to the governing council'.¹⁴⁹ At the second meeting the participants also decided that the 'costs of a possible follow-up programme would be borne by the claimant Governments'.¹⁵⁰

The final form of the tracking mechanism that the governing council adopted in December 2005 was a variation of the third option proposed by the panel — that of an ad hoc body of experts established by the UNCC governing council. The mechanism had the support of the regional claimant governments and Iraq.¹⁵¹ It embodied a high level of dependence on expert consultants, a UNCC hallmark when it came to environmental and other claims.¹⁵²

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ United Nations Compensation Commission, *Governing Council, Decision 258*, above n 125.

¹⁴⁸ Ibid. Also see Kazazi, above n 144, 1120.

¹⁴⁹ United Nations Compensation Commission, *Governing Council, Decision 258*, above n 125, Preamble.

¹⁵⁰ Ibid.

¹⁵¹ Ibid para 4.

¹⁵² For a fuller discussion of this issue, see chapter 5.

The governing council established a monitoring and tracking mechanism that it described as a ‘cooperative process’.¹⁵³ The mechanism involved five parties:

1. Four of the six regional claimant governments (Iran, Jordan, Kuwait and Saudi Arabia — Syria and Turkey did not receive any awards on their claims in the third, fourth or fifth instalment);
2. Iraq;
3. The UNCC governing council;
4. The UNCC secretariat; and
5. Independent reviewers — international or local experts who were to be independent with respect to the projects, proposed by claimant governments and approved by the UNCC.¹⁵⁴

The innovation and the danger in this mechanism was the reliance on the independent reviewers to guide the decisions of the other four parties. Growing concerns for transparency as well as the lack of expertise of the other four parties probably motivated these arrangements.¹⁵⁵ The governing council decision set up three criteria for evaluating the suitability of independent reviewers. These were:

1. a high level of professional expertise and experience;
2. integrity, supported by declarations that would attest to the person not benefiting financially or otherwise from the projects funded by awards or from the governments or firms involved; and
3. that the proposed person, in combination with the other reviewers appointed, would cover the range of expertise needed to adequately monitor and track the projects.¹⁵⁶

Under this mechanism, the UNCC would hire a small staff to enable the secretariat to perform its functions.¹⁵⁷ Additionally, the UNCC’s costs would be funded through contributions made by claimant governments.¹⁵⁸ The UNCC would retain 15 per cent of all award payments to defray operational costs.¹⁵⁹ The precise contributions would be dealt with through separate agreements between the UNCC and the claimant governments.¹⁶⁰ Each

¹⁵³ United Nations Compensation Commission, *Governing Council, Decision 258*, above n 125.

¹⁵⁴ *Ibid.*

¹⁵⁵ I discuss this further in chapter 5 of the thesis.

¹⁵⁶ United Nations Compensation Commission, *Governing Council, Decision 258*, above n 125, para 53.

¹⁵⁷ *Ibid* para 25.

¹⁵⁸ *Ibid* para 55.

¹⁵⁹ *Ibid* para 31.

¹⁶⁰ *Ibid* para 55.

claimant government would make a proportionate contribution to the costs, based on the extent of the monitoring and tracking involved.¹⁶¹ The governing council decision briefly described the mechanism as follows:

The UNCC will monitor the Programme. Claimant countries will provide regular technical and financial reports for each project to the Independent Reviewers, according to the criteria and guidelines set out below. The Independent Reviewers will report their evaluation of the projects to the secretariat. The secretariat will, in turn report to the Governing Council.¹⁶²

There is limited documentation available or accessible to determine the key actors, mechanisms and principles involved in this rule outcome. The governing council made the final decision concerning the outcome. Key actors who were involved in previous rule outcomes are likely to have been involved in this claim outcome as well. The US and the UK are likely to have played a key role. Other state actors involved were Iraq and the four claimant governments that received restoration and compensation awards in the third, fourth and fifth instalments. The outcome is in accordance with the principle of effective justice for the victims. It also involves Iraq in the tracking system, satisfying the principles of due process and transparency. The mechanism put in place to track awards and restoration work ensured that the funds would be effectively utilised for the benefit of the environment. However, the fact that claimant governments agreed to a percentage of awards financing the tracking mechanism leaves room to question this conclusion. Taking 15 per cent of the award for tracking essentially means that there is only 85 per cent of the award available to fund the restoration and compensation interventions, unless the claimant state supplements the balance with its own funds. The awards were meant for restoration work, not for tracking the work itself. That said, the tracking mechanism does provide greater accountability and (to some extent) transparency with respect to the use of awards — an outcome that was contrary to the general principle of secrecy that prevailed at the UNCC, but nevertheless desirable.

In chapter 1, I noted the importance of Principle 10 of the Rio Declaration (1992) as setting a new standard for transparency, participation and accountability requirements in environmental decision-making. The restoration and compensation award tracking rule outcome can be characterised as a significant step by the UNCC towards fulfilling Principle

¹⁶¹ Ibid.

¹⁶² Ibid para 5.

10 expectations. The rule outcomes relating to environmental claims at the UNCC discussed in this thesis show an evolutionary path that begins with poor compliance with Principle 10 standards and gradual incremental improvements towards greater transparency, participation of the claimants and Iraq, and accountability. Significantly, this evolutionary pattern was clearly seen in the environmental claims at the UNCC while there was little evidence of it in other claim categories. It is therefore submitted that Principle 10 and the attendant standards and culture of openness that it fostered, nationally and internationally, had a direct bearing on the rule outcomes associated with the environmental claims at the UNCC.

Iraq advocated greater transparency as did the F4 team and the panel. Arguably, the US and the UK might have also supported greater transparency at this time. Although the principle applied primarily to pre-award decisions, post-award adjustments of restoration were contemplated in the panel reports. What mechanisms were used to produce this outcome is hard to determine. There is certainly no evidence to suggest that coercion was used. Different models were suggested by the panel and discussed by the claimants, Iraq and the governing council. The claimants had conceded part of their awards to fund the tracking mechanism and it is therefore possible that reciprocal adjustments were made by claimant governments and Iraq or UNCC management. UNCC management was interested in creating legitimate post-award jobs and consultancy work for some of its staff.¹⁶³

Negotiations appear to have veered away from the governing council's early preference for UNEP or another UN agency to take on the tracking functions and were substituted with a UNCC-run ad hoc mechanism. The tracking mechanism is now administered by the Head of the UNCC overseeing a small number of remaining staff at the UNCC.¹⁶⁴ Undoubtedly, some senior staff at UNCC management benefited from the post-award tracking mechanism as it created new work which legitimately required their services and secured their jobs. The senior scientist recruited by the UNCC to manage the tracking mechanism was a senior partner of the firm that functioned as the panel's expert consultants for the environmental

¹⁶³ Soon after the tracking mechanism was put in place, Mike Raboin the deputy executive secretary of the UNCC resigned his position and after one year was appointed by Kuwait as a consultant to assist it in implementing and tracking the environmental awards. His untimely death due to a motor accident in Kuwait in 2008 was a surprise. Mojtaba Kazazi, the secretary of the governing council later assumed duties as acting executive secretary of the UNCC and now oversees the program. Both of these transitions confirm the legitimate staff expectations of continued work through this program. My own observation as a staff member of the environmental claims unit at the UNCC is that these instances were a manifestation of widely held expectations that some staff members would receive some form of employment through the UNCC environment program.

¹⁶⁴ Kazazi, above n 144, 1120.

claims.¹⁶⁵ There is no evidence to suggest that this firm or the individual was in any way involved in negotiations concerning the tracking mechanism.

Since then, restoration work has commenced in Kuwait and Jordan.¹⁶⁶ By January 2010, all the environmental awards had been paid out to claimants by the UNCC, subject to the follow-up program described here.¹⁶⁷

E Conclusions

Based on the discussion in this chapter, I highlight key conclusions relating to the research framework of this thesis, namely actors, principles and mechanisms as seen in relation to rule outcomes concerning environmental claimants. I then highlight some lessons identified in this chapter which are further discussed in chapter 6.

Of the six rule outcomes discussed in this chapter, three were decided by the governing council and three by the panel. The rule outcome on the priority of claims was initiated by claimants, whereas the rule outcomes on tracking mechanisms were initiated by Iraq and the secretariat. The secretariat also initiated the rule outcomes on interactions with claimants and amendments as well as the one on timing. There was no conflict over principles in any of these outcomes, although actors contested rules and rule models and reached compromises on them through dialogic webs. Two rule outcomes worked to the benefit of Iraq. These were the rule outcomes concerning the timing of the fourth and fifth instalment of claims and the post-award tracking mechanism for the environmental restoration and compensation claims. Both came about after the US-led invasion of Iraq in 2003. Arguably, they conform to (although are not necessarily attributable to) the general pattern of pro-Iraqi actions at the UNCC following the overthrow of Saddam Hussein.

The role played by UNCC management in the rule outcomes decided by the governing council was a very substantial one. With respect to at least one of these outcomes, it is argued

¹⁶⁵ This individual has since left the UNCC.

¹⁶⁶ Hana Namrouqa, 'Desert dams to shore up rehabilitation of damaged badia ecosystems — Jordan Times', *Environment and Climate in the Middle East*, (2011) <<http://mideastenvironment.apps01.yorku.ca/?p=3260>>; Jordan National Focal Point, Program Management Unit of the Badia Restoration Program, *Community Action Plan of Badia Restoration Programme*, (2010) <http://www.badiarp.gov.jo/sites/default/files/draft_cap_perepared_by_pmu_of_brp_december_2010_4.pdf>.

¹⁶⁷ United Nations Compensation Commission, 'United Nations Compensation Commission Pays Out US\$ 674.2 Million' (Press Release, UN Doc PR/2010/1, 28 January 2010) <<http://www.uncc.ch/pressrel/Press%20release%20-%2028%20January%202010.pdf>>.

that legitimate self-interest in promoting post-award job security played a role. In another, financial accountability played a role. In many of the rule outcomes, the dominant principle was effective and expeditious justice for the victims. In the rule outcome concerning amendments to claims, due process for Iraq played a role, and in the tracking mechanisms for restoration and compensation claims, Iraq became an active participant in the cooperative mechanism. In the cases of both of the award tracking systems, it was not due process for Iraq or transparency that drove the rule; rather, it is submitted that it was *internal* financial accountability demands and the self-interest of UNCC staff. Despite this, it is possible to discern a greater emphasis on due process for Iraq in the later rule outcomes — eg restoration and compensation award tracking and amendments, and timing — consistent with the emergence of a more accommodating attitude towards Iraq from 1998 onwards in phases two and three of the expansion of Iraq’s participatory space (see previous chapter for a discussion of these phases).

Apart from modelling, the mechanism of reciprocal adjustment may have been at work in the decision to grant priority to M&A claims. After all, this was initiated by Saudi Arabia and Kuwait, and the US and the UK might have felt the need to be responsive to their military allies. But, in all other cases, the dominant mechanism was modelling. There is no evidence of webs of coercion at work, although the military might of the US was never far from UNCC operations. Key actors used modelling as the mechanism of choice and deployed it via dialogic webs that defined issues and allowed for packing and repacking issues and solutions to win outcomes that favoured the actors’ goals. Modelling gave actors the flexibility to opt for rules that satisfied the principles they were advocating. In all cases, key actors used dialogic webs to lobby for the rule models or aspects of models they advocated.

There is no doubt that when contention arose in the decision-making forum, it was often displaced. This was reflected in postponed decision-making and forum shifting. The rule outcome concerning priority of processing and payment of M&A claims is an example of this in that there was agreement on priority of processing but the decision on payment priority was postponed. Again, with restoration and compensation award tracking, the governing council’s preference was for a UN body to handle it, but the final rule outcome was to establish a UNCC-led ad hoc system, reflecting UNCC management’s goals, which included job preservation. Postponements of the final decision also helped here.

The overall impact of these rule outcomes was to enlarge the favourable rule environment for claimants and to ensure that they had the best opportunity to file, perfect, develop and present their environmental claims. The rule outcomes also ensured that awards were applied towards the environmental goals they were intended for. If a claim failed, it was because there was a lack of evidence to support the claim, even using the claimant-friendly evidentiary standards applied at the UNCC. These rule outcomes laid the foundation for military allies of key actors in the governing council, including the US and the UK, to be compensated for their losses. But it also paved the way for claimants such as Iran (who were not allies) to pursue their claims. The rule outcomes also had the effect of excluding and disadvantaging Iraq in the claims process, which was another goal of key actors in the UNCC governing council. The reality is that key actors' political goals influenced the principles that were advocated or opposed and therefore the rule outcomes relating to environmental claims before the UNCC.

In chapter 6, I discuss key lessons relevant to the future design of adjudicatory bodies. Among these lessons is the need to ensure adequate time for the performance of tasks critical to a successful claims process. These critical tasks include monitoring and assessment, revision of claims based on new evidence and adequate transparency and participatory space for the aggressor state to defend the claims. Greater balance and fairness would need to be considered in future adjudicatory processes for environmental claims where the rights of the parties to participate in the claims process and the claimants' needs to gather evidence and support claims for environmental restoration and damages are both facilitated in equal measure.

CHAPTER 5

EXPERTS, CLAIMS OUTCOMES AND ACCOUNTABILITY

A Introduction

Having focused on rule outcomes in the last two chapters, I now turn to claims outcomes. Claims outcomes amounted to either the rejection of a claim or the making of an award in respect of a claim or claim element. Claimants, Iraq, UNCC management, the F4 team, and the panel's expert consultants played key roles in shaping claims outcomes. But as will become evident in this chapter, legal, scientific, economic and valuation experts influenced claims outcomes more than anyone else.

At the outset, it is useful to reflect again on the research questions posed in this thesis. The three questions are (1) did key actors influence the rule and environmental claims outcomes and, if so, what means did these actors use to achieve their goals, (2) how did these key actors use these means to influence the rule and environmental claims outcomes and (3) to what extent might these outcomes have been different had the UNCC adopted more transparent, inclusive and accountable processes? In chapters 3 and 4, I discussed how key actors at the UNCC influenced rule outcomes that disadvantaged Iraq and assisted environmental claimants in the claims process. By contrast, claims outcomes were largely shaped by experts hired by the UNCC, the claimants and Iraq. For the reasons analysed in this chapter, these experts exerted considerable influence over claims outcomes.

Advice given by the panel's expert consultants in particular was highly influential in determining claims outcomes. Information generated by these consultants was treated confidentially and was never shared with either Iraq or the claimants. Their opinions went largely unchallenged within the UNCC. The dominance of the principle of secrecy at the UNCC thrust the consultants into a position of significant influence not of their choosing. The panel's expert consultants formed an exclusive epistemic community, a phenomenon discussed further in this chapter. The panel's experts had access to the panel, UNCC management, the F4 team, Iraq's experts and the claimants' experts. They also had access to all the claim materials, M&A studies and information gathered from site visits. They could propose questions for interrogatories sent to the claimants. They proposed and applied scientific and economic methods for evaluating the claims, rendered opinions on causation of damage, quantified damages, drafted terms of reference for M&A studies, restoration and

compensatory projects and helped draft the panel reports. Their influence on the environmental claims outcomes was very significant and I discuss their role and the role of other experts in more detail in this chapter. In this chapter, I also raise the issue of their accountability — to whom they were accountable and in what way.

To understand the nature and extent of their influence, I turn to the work of David Kennedy. I also look to the work of Sheila Jasanoff in critiquing and suggesting improvements to the use of experts in international conflict and environmental damage assessment. Coming from a sociological tradition, Kennedy's point of departure is to focus on the background of institutions rather than their foreground or context.¹ Adopting this perspective, I seek to unravel the mystery of the UNCC's experts as a group of actors who clothed their choices in terms such as 'expert advice', 'professional judgement' and a raft of scientific and economic vocabulary that allowed little opportunity for their views to be contested. Though there is no evidence of experts' abuse or misuse of their authority, I contend that this degree of insulation from scrutiny raised the risk of such abuse or misuse, removed the expert consultants from scrutiny by peers and parties to claims, and deprived the decision-makers of potential alternative distributive choices, methods, theories, doctrines and policies that might have been applied and resulted in different claims outcomes.

Claims outcomes were formally decided by two forums — the governing council and the panel. In the case of environmental claims, the panel's recommendations were consistently accepted by the governing council. It is therefore safe to conclude that governing council members were not key actors in determining environmental claims outcomes, although, as discussed in the previous two chapters, the rule outcomes they produced skewed the claim evaluation process against Iraq and in favour of the claimants.

The experts involved in the UNCC environmental claims were:

1. The panel's expert consultants (contracted and paid by the UNCC)
2. UNEP's experts acting under a memorandum of understanding with the UNCC (recruited and paid by UNEP)
3. The claimants' experts (contracted and paid by claimant governments)
4. Iraq's technical experts (contracted by Iraq and paid out of UNCC funds)

¹ I discuss these concepts and methods in chapter 1 as well as later in this chapter.

5. Experts assisting the panel (contracted by the UNCC on an ad hoc basis)

In this chapter, I examine how the opinions of UNCC experts who interacted with the environmental claims process were ‘determined either by the structure’ within which they worked or ‘by external ideas which captured’ their allegiance.² Academic research on the UNCC and the environmental claims has sometimes focused on the constitution and procedures,³ assuming that experts were somehow apolitical participants in the process. Some researchers have tended to overestimate ‘the political importance of constitutional structures’.⁴ Others have overlooked ‘the biases of expertise’, thereby reinforcing ‘policy-makers’ own claims to be structurally exceptional and technically apolitical’.⁵

The term ‘bias’ has a variety of meanings in socio-legal literature. For example Duncan Kennedy uses the term ‘half-conscious orientation’ bound up with the Sartrean notion of bad faith.⁶ In this sense ‘bias’ is neither linked to subjective malevolence, nor false consciousness, nor structural determinism, but rather to an open-weave and flexible background–foreground or core–periphery structure that establishes or reinforces certain orientations or tendencies even though these are not always borne out in particular instances.⁷ In this thesis, the term ‘bias’ is used in a narrower sense with reference to scientific, economic and other technical experts. In the context of inadequate understanding or insufficient data, uncertainty plays an important role in scientific and technical judgments. In the context of uncertainty, there may well be several competing assumptions, theories and methods available to experts to rationalise judgments and decisions. Experts might develop preferences for one or another of these theories, methods or assumptions and might even belong to schools that adopt them as their own. Even where there is greater certainty, scientists may still chose between interpretations that combine different contexts or theories to arrive at conclusions. It is these kinds of biases that need to be exposed so that decision-makers, parties to claims and peers

² David Kennedy, ‘The Politics of the Invisible College: International Governance and the Politics of Expertise’ [2001] *European Human Rights Law Review*, 463. As Kennedy theorises, experts use a ‘vernacular’ that he equates to ‘policy prose’ which masks biases and assumptions that are made by experts.

³ For example, Julia Klee, ‘The Process’ in Cymie R Payne and Peter H Sand (eds), *Gulf War Reparations and the UN Compensation Commission* (Oxford University Press, 2011) 29; M T Huguenin, M C Donlan, A E van Geel, and R W Paterson, ‘Assessment and Valuation of Damage to the Environment’ at 67; L Wilde, ‘Scientific and Technical Advice : The Perspective of Iraq’s Experts’ at 95.

⁴ David Kennedy, above n 2, 466.

⁵ Ibid.

⁶ Duncan Kennedy, *A Critique of Adjudication (Fin de Siècle)* (Harvard University Press, 1997) ch 8. Duncan Kennedy’s preoccupation in this book is with the political nature of legal, and especially judicial, decision-making.

⁷ See Duncan Kennedy, *The Rise and Fall of Classical Legal Thought* (Beard Books, 1975) introduction.

who depend on the expert might be made aware of other methods, assumptions and theories that might be applicable to the subject matter on which decisions are being made. Such awareness can have profound impacts on decision-making. At the same time, experts need to be able to protect their rightful sphere of operation without influence from decision-makers who may be obliged by rules, institutional structure or their own goals to interpret and apply scientific advice to suit their purposes.

While the information generated by claimants and Iraq and their respective experts was increasingly shared among the parties, information generated by UNCC staff and their experts was never shared with Iraq or the claimants. UNCC-generated information was critical in the claims decision-making process and outcomes. Not even the efforts of the commissioners and the F4 team went so far as to open this category of information to the parties. The strict rules of secrecy established by the UNCC governing council, the Security Council and UNCC management prevented such information from being shared with anyone not employed by the UNCC.

Protected by secrecy, legal officers and experts employed by the UNCC went about their respective tasks of generating legal submissions and professional judgment reports (PJR). These documents were not scrutinised by any of the parties to the claims. Since UNCC management staff and the panel members were lawyers, legal submissions made by the F4 team were subject to some degree of internal scrutiny. Economic valuation opinions rendered by the panel's expert consultants were looked over by the UNCC's valuation and verification services branch (VVS) and, at least to the extent of checking arithmetic, were scrutinised by UNCC staff. But scientific and technical opinions generated by the panel's expert consultants did not have even that degree of scrutiny. The panel's expert consultants operated in a relatively unchallenged arena. They exerted considerable influence over the claims outcomes. In the absence of any scientific expertise within the UNCC, the panel and the F4 team were dependent on these consultants. Over time, through their interactions with each other, the panel, the F4 team, the consultants and UNCC management developed relationships that socialised the entire operation. Individuals came to know each other and developed personal relationships. They shared perspectives on claims and other environmental and political issues during breaks in proceedings or in private conversations. Through these informal interactions, participants positioned themselves in a socialised relationship and expressed views in ways that tended to endear them to one another. Individuals assessed what ought to

be said and what ought to remain unsaid to ensure the smooth processing of claims and the growth of relationships. For example, prior to the 2003 US-led invasion of Iraq, the norm of secrecy was strong and both F4 team members and the panel's consultants would either develop strong arguments for creating exceptions or would fall in line behind the panel when proposing to send more information to Iraq. Running counter to the norms and expectations entrenched through socialisation was risky and required considerable energy, commitment or provocation. The less influential of these actors, such as the members of the F4 team or the panel's expert consultants, would incur the displeasure of UNCC management or the panel or individual members of these groups if they stepped outside the bounds of socialised norms.

This degree of influence in the hands of experts and the consequent dependence upon them was probably not foreseen by the governing council or the Security Council. What was the nature and extent of their influence? What were their vocabularies, sensibilities and expertise? What were the motivations behind their opinions? Did experts have discretion and, if so, how did they exercise it? At first blush, the panel's expert consultants do not appear to have had a goal beyond providing their best objective professional advice on the science related to causation and quantum of damage. They do not appear to have advocated principles such as transparency or due process, or used mechanisms to promote these concepts. *Prima facie*, it would seem as though the panel's expert consultants were key actors whose actions defy analysis by Braithwaite and Drahos's goal-oriented method.

However, closer examination reveals that the experts did make choices between methods, theories, doctrines and policies and, by doing so, they made distributive choices that affected claims outcomes. The choices they made were couched in scientific vocabulary and recognised that alternative views were possible. Phrases such as 'in our best professional judgement' often prefaced choices made by the panel's expert consultants, followed by their justification for the conclusion. Can broader policy goals be deduced or interpreted from these choices? Were these policy choices motivated by the experts' desire to accord with the mainstream views prevailing at the UNCC or to please their paymaster or secure future work from the UNCC? Were they motivated by bias or by a combination of these factors?

Once again, I draw on the work of David Kennedy to help answer these questions.⁸ Kennedy suggests that it is

the expert who stands between the foreground *prince* and the lay *context*, advising and informing the prince, implementing and interpreting his decisions for laymen. It is the scientist ... who interprets facts for the politician, and it is the lawyer ... who translates political decisions back into facts on the ground.⁹

Focusing on the background, rather than the foreground or context of the UNCC environmental claims outcomes, opens a pathway to unravelling the role of experts in that decision-making process.

Kennedy describes how experts influence the prince not merely by giving advice but also by imagining the prince as the prince; or, in the context of this thesis, imagining the panel as a more or less autonomous decision-maker and site of concentrated power.¹⁰ They develop a vocabulary of arguments to agree or disagree about the issues they care about.¹¹ Following a study of international legal professionals, Kennedy concludes that

professionals make arguments about choices which produce *outcomes*. The outcomes might be material or distributional (favour plaintiff vs defendant, agriculture vs industry, slow the economy vs speed up the economy) or normative (strengthen respect for equality or justice, community solidarity or individualism, and so forth).¹²

Experts will dispute ‘alternate [sic] policies and doctrines which they think will lead to different outcomes’.¹³ Kennedy suggests three approaches for unravelling the decisions that experts make:

1. Assessing, however crudely, the consequences of the expert’s actions — who wins and loses? By identifying the stakes of the expert action, we can understand its politics;
2. Focusing on the underlying shared assumptions — the blind spots and biases which skew the choices, or place some alternatives altogether out of the discussion;

⁸ David Kennedy, Manley Hudson Professor of Law, Harvard Law School.

⁹ David Kennedy, ‘Challenging Expert Rule: The Politics of Global Governance’ (2005) 27(1) *Sydney Law Review* 5. Kennedy uses the term ‘prince’ to denote the ruler, decision-maker or those who govern and the terms ‘laymen’ and ‘lay context’ to denote the ruled or governed.

¹⁰ *Ibid* 13.

¹¹ *Ibid*.

¹² *Ibid* 15.

¹³ *Ibid* 19.

3. Looking at the experience of the expert rather than the theory or ideology espoused and seeing the expert as a free person able to exercise discretion — discretion experienced as responsible choices.¹⁴

I adopt these approaches for the analysis of experts in this chapter. Within the limits of publicly available information, I examine, however generally, who wins and loses from the experts' advice in the claims outcomes and what obvious assumptions and biases skewed their choices. I examine illustrative examples of expert advice and the claims outcomes that resulted to come to conclusions about the distributional choices experts made. By examining those choices, I seek to identify the experts' goals. I also examine expert experience and envision experts as vehicles of critical or decisive agency or as exercising discretion in the production of claims outcomes.

I conclude that the panel's experts, the claimants' experts and Iraq's experts each belonged to separate communities of practice and that each of them had policy goals that they advocated through the advice they gave. Compared to other key actors, the panel's expert consultants were relatively weak, but they occupied a unique position of influence because they were insulated from being scrutinised by the claimants or Iraq (or their respective experts). Additionally, their influence was magnified because the panel and the F4 team were dependent on them for scientific and economic advice. This situation was brought about by the rule outcomes produced by the governing council and the Security Council and implemented by UNCC management, creating a set of power relations which was perhaps not within the contemplation of the rule-makers.

In the previous three chapters, I traced the influence exerted by a number of actors on rule outcomes. The UNCC legal epistemic community generally and the F4 team in particular (a subcommunity in itself) exerted considerable influence over rule outcomes. Despite being weak actors at the UNCC, they asserted a disproportionately large influence on rule outcomes, mostly because rule outcomes are the bread and butter policy enterprise of lawyers.

In contrast, the claims outcomes were shaped by three separate epistemic communities: expert advisors to the claimants, expert advisors to Iraq and the panel's expert consultants.

¹⁴ Ibid 17–24.

Each of these communities shared the characteristics of the epistemic communities described in chapters 1 and 2. They were constituted by experts recruited and paid by the UNCC, the claimants or Iraq and they had a policy goal of furthering the interests of their paymasters. The first two of these epistemic communities had policy projects with opposing goals. The claimants' experts wanted claims outcomes that increased compensation, while Iraq's experts wanted it decreased or eliminated. I discuss below the nature and extent of the influence exerted by these two epistemic communities. The panel's expert consultants, on the other hand, did not have such an obviously partisan policy goal. Their project was to assist the panel in coming to decisions on the opposing cases presented by the claimants and Iraq. However, case decisions involved choices that went beyond mere scientific or methodological alternatives. They involved patent or latent legal policy and distributional considerations.¹⁵ The panel's expert consultants had to shape their advice around such considerations as they came to be articulated in an iterative fashion by panel members, UNCC management and the F4 team. As I will go on to show in more detail, it is my contention that, had the experts' advice been open to Iraqi and claimant scrutiny, some claims outcomes might have been different.

In the rest of this chapter, I discuss (1) expert epistemic communities, (2) experts as key actors within the UNCC, (3) claimant and Iraqi interactions with experts, (4) the influence exerted by experts on various aspects of the claims process and claims outcomes and (5) the insulation of the panel's expert consultants from scrutiny. I end the chapter with a summary of the main conclusions of my analysis. Through this analysis I conclude that the scientific and economic experts who served the panel might have formed an epistemic community isolated from the claimants' and Iraq's experts and that the panel's experts significantly influenced the outcomes of the environmental claims.

B Expert Epistemic Communities

I begin with a discussion of whether the many scientific and other non-legal experts involved in the environmental claims process constituted one or more communities of practice. The answer to this question helps to contextualise the influence that was exerted by experts on the

¹⁵ Peter M Haas, 'Epistemic Communities and International Policy Coordination' (1992) 46(1) *International Organization* 1, 11. Haas points out that even when the issue is 'technical', policy making decisions 'generally involve weighing a number of complex and nontechnical issues centered [sic] around who is to get what in society and at what cost.' Haas emphasises that despite the 'vener of objectivity and value neutrality achieved by pointing to the input of scientists, policy choices remain highly political in their allocative [sic] consequences.'

claims outcomes and to understand the flow of information within such a community. To the extent that a community or communities of practice existed, this analysis will help to elucidate the webs of influence that might have been at work in the UNCC.

Haas defines an epistemic community as ‘a network of professionals with recognised expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue area’.¹⁶ Haas identifies four characteristics of an epistemic community:

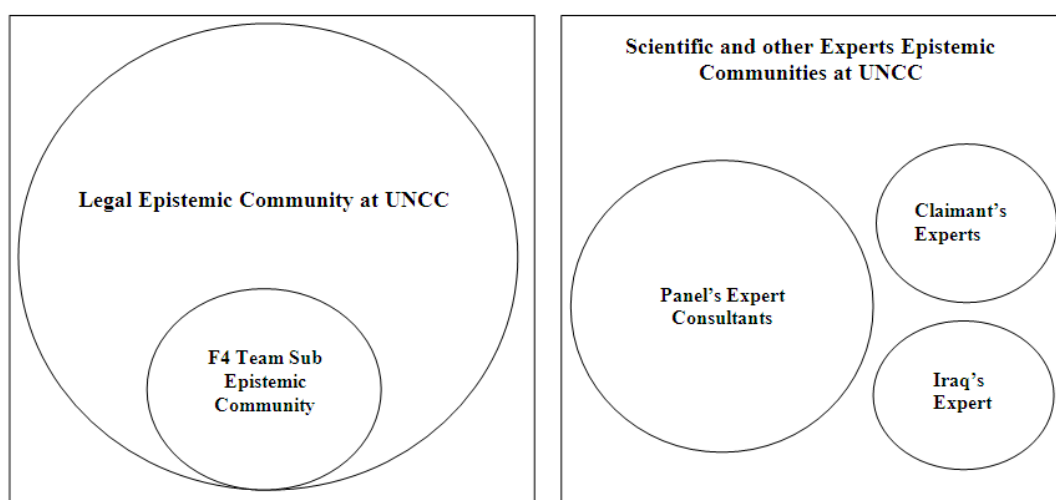
1. A shared set of normative and principled beliefs, which provide a value-based rationale for the social action of community members;
2. Shared causal beliefs, which are derived from their analysis of practices leading or contributing to a central set of problems in their domain and which then serve as the basis for elucidating the multiple linkages between possible policy actions and desired outcomes;
3. Shared notions of validity — that is, inter-subjective, internally defined criteria for weighing and validating knowledge in the domain of their expertise; and
4. A common policy enterprise — that is, a set of common practices associated with a set of problems to which their professional competence is directed, presumably out of the conviction that human welfare will be enhanced as a consequence.¹⁷

Most of these non-legal experts were scientists, economists, valuers, engineers or accountants. Some of these experts were widely recognised in their own field and had published research in recognised journals. As such they were cited in material developed by other experts. However, the circumstances in which these experts came to be engaged in the UNCC environmental claims did not, in my view, permit the formation or maintenance of an epistemic community encompassing all the experts associated with claims outcomes. Arguably though, they may well have formed a number of separate epistemic communities — each community with a different and at times opposing policy enterprise. The epistemic communities at the UNCC are depicted in figure 5.

¹⁶ Ibid, 1–35.

¹⁷ Ibid, 3.

Figure 5. Epistemic Communities Involved in the UNCC Environmental Claims



The F4 team formed an epistemic subcommunity within the larger legal epistemic community at the UNCC. They differentiated themselves from the larger UNCC legal epistemic community by their commitment to due process, transparency and expanding Iraq's participatory space. The scientific and other experts involved in UNCC-related work formed three separate and unconnected epistemic communities, each with its own policy goal.

While all of these experts shared the desire to influence the environmental claims outcomes and contribute to an understanding of the environmental impacts of the Gulf War, their interests in the claims were derived from the key actors they served. Iraq and the claimants had opposing policy goals and were therefore in conflict with one another. It is therefore reasonable to assume that the experts working for the claimants and Iraq did not talk to each other openly about the claims because they were on opposing sides.¹⁸ Had they done so, they would run the risk of being seen by their clients as betraying their policy goals. The panel's expert consultants could not talk to either Iraq's or the claimants' experts about claims except through the procedure established by the UNCC.^{19, 20}

In essence, firewalls, confidentiality obligations, opposing interests or a combination of all of these kept the experts from communicating directly with one another about the environmental claims. Smaller dialogic webs developed between the experts within the Iraqi, claimant and

¹⁸ I do not have documentary evidence of the terms under which these experts were employed by the claimants or Iraq.

¹⁹ I discussed these procedures in chapters 3 and 4.

²⁰ [The content of this footnote has been deleted and placed in an appendix which has been embargoed to the public by the University of Sydney for five years.].

UNCC camps. As a result, an epistemic community covering the entire UNCC environmental claims arena did not develop and pockets of experts remained isolated from one another. There is no evidence to conclude that an epistemic community developed among the experts on the Iraqi and claimant sides, though this is a distinct possibility. The panel's expert consultants formed a separate epistemic community with a policy enterprise connected to their services to the panel.²¹ UNEP's experts formed a loose part of this epistemic community, sharing a common policy goal. The power of their influence was thrust upon them by the UNCC rules and their influence came from the knowledge and skills they brought to the table. They were, moreover, the only ones at the table with that knowledge and those skills.

C Experts as Key Actors

1 Roles of Experts in the Claims Process

Scientific experts were involved in the environmental claims process to collect and provide evidence to support or defend claims, and to evaluate that evidence. Those employed by the UNCC were mandated to evaluate scientific evidence and make economic valuations with respect to the environmental claims and to advise the panel and the F4 team. The role of these experts is best understood in the legal context of the rules on the burden and standard of proof applicable to these claims.

The Security Council had determined Iraq's liability by Resolution 687.²² In order to succeed in a claim before the UNCC, a claimant was expected to produce evidence showing that there was environmental damage and that the damage was the direct result of Iraq's invasion and occupation of Kuwait. Additionally, a claimant was expected to establish the quantum of damage. The presence of parallel causes of damage and the paucity of prewar data often complicated the assessment of directness and quantification of damages. In the case of the environmental restoration claims, once a claimant had overcome these thresholds, there was still the issue of the reasonableness of the proposed remediation.

²¹ During my time at the UNCC, I witnessed experts serving as consultants to the panel engage in salient discussions on claim issues through email, and personal conversations during site visits, panel meetings and oral hearings. These discussions were often about selecting the appropriate method or developing a conclusion through the application of methods derived from different scientific disciplines. Such dialogue is typical of a living epistemic community.

²² SC Res 687, UN SCOR, 2981st mtg, UN Doc S/Res/687 (3 April 1991). I discussed the content and implications of Resolution 687 in chapter 2.

The standard of proof required of claimants was specified in Article 35 of the Provisional Rules for Claims Procedure (the Rules), which required each claimant to submit evidence to prove that their claim was eligible for compensation.²³ The same Article also gave authority to the panels to ‘determine the admissibility, relevance, materiality and weight of any documents and other evidence submitted’. Article 35(3) of the Rules provided that category F claims (including environmental claims) ‘must be supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and amount of the claimed loss’. The governing council emphasised the mandatory nature of this requirement in paragraph 37 of Decision 7: ‘Since these [category F] claims will be for substantial amounts, they must be supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and the amount of the claimed loss’.²⁴ Apart from referencing the Rules, the panel did not articulate a specific standard of proof for the environmental claims. The question it posed in every claim was whether, in all the circumstances, the evidence was satisfactory to establish the alleged facts or damage or the reasonableness of the proposed remediation.

UNCC panels adopted variable standards based on the type of claim being evaluated and the circumstances applicable to them. Commenting on this variable standard, Kazazi, then secretary of the governing council, observed that the ‘[r]ules provide guidance on the level of evidence required to prove a claim by making distinctions among various categories of small and large claims’.²⁵ He further observed that ‘[I]nient standards were set with respect to small individual claims, due to the humanitarian nature of these claims, and the fact that such claims are for small amounts and have been filed to a significant degree by migrant workers who were victims of the Gulf War’.²⁶

Many of the facts involved in the environmental claims were of a scientific nature. Much of the damage quantification in the claims in the third, fourth and fifth instalments required the application of novel valuation techniques such as habitat equivalency analysis or contingent valuation drawn from the field of resource economics. Given the paucity of baseline data in

²³ United Nations Compensation Commission, *Governing Council, Decision 10*, 6th sess, 27th mtg, UN Doc S/AC.26/1992/10 (26 June 1992) art 35.

²⁴ United Nations Compensation Commission, *Governing Council, Decision 7*, 3rd sess, 18th mtg as revised at 5th sess, 24th mtg, UN Doc S/AC.26/1991/7/Rev.1 (17 March 1992) para 35.

²⁵ Mojtaba Kazazi, ‘An Overview of Evidence before the United Nations Compensation Commission’ (1999) 1 *International Law FORUM du droit international* 219.

²⁶ *Ibid.*

the affected region, it was near impossible to evaluate the environmental claims without the help of experts, ranging from natural and social scientists to ballistic experts and economists. These experts were essential to the claimants to identify the damage, formulate their claims and marshal evidence. They were essential to Iraq to analyse the claims and the evidence presented, and to mount a defence. They were essential to the panel and the F4 team to help sift through the evidence presented and the defences advanced on causation, damage quantification and remediation options, and to formulate awards. Because of the technical nature of the material before the decision-makers, experts had to be made part of the formal environmental claims evaluation process.

2 Scientific Expertise for the Panel

UNCC management recognised that the panel would be faced with technical evidence and scientific uncertainty (due to a paucity of information and potential alternative explanations) and would need expertise to process that information.²⁷ In situations of scientific uncertainty, decision-makers tend to turn to experts for advice.²⁸ Even when scientific data is available, it needs to be interpreted and made sense of in the light of the claims being made — a process by which the data and the conclusions are institutionalised.²⁹ Uncertainty, interpretation and institutionalisation are what create the context and dynamics for the genesis and growth of an epistemic community and policy intervention.³⁰

For example, satellite imagery before and after the Gulf War might show vegetation changes coupled with the appearance of new tracks. By itself, this data only suggests a physical change. Coupled with other information such as seasonal changes, the width and pattern of tracks and air pollution data at the time of the later image, scientists could begin interpreting the data and developing hypotheses about causation. Haas described the information involved in similar situations as consisting of ‘depictions of social or physical processes, their interrelation with other processes, and the likely consequences of actions that require application of considerable scientific or technical expertise’.³¹ The information is therefore

²⁷ Klee, above n 3.

²⁸ Haas above n 15, 12.

²⁹ Ibid, 3. Institutionalisation in this context refers to experts shaping their conclusions or advice to the mandate, process or requirements of an institution to which the advice is rendered. For example in the context of the UNCC, an expert would have to advise which restoration method makes sense in the context of UNCC rules and policies even if that method is not the most ideal. Experts might be asked to choose the lowest cost restoration method as opposed to the most ecologically robust.

³⁰ Ibid.

³¹ Ibid, 4.

‘neither guesses nor “raw” data; it is the product of human interpretations of social and physical phenomena’.³²

It is not unusual for judicial and quasi-judicial institutions dealing with environmental cases to turn to experts when attempting to unravel issues involving complex physical and social processes. Countries that have established specialised environmental courts or tribunals (ECTs) have usually chosen one of several approaches to address the need for scientific expertise in their decision-making. These approaches either ensure internal expertise or manage external expertise.³³ Approaches for ensuring internal expertise include (1) the use of expert judges, ie appointing scientific-technical experts as decision-makers on the ECT (examples of jurisdictions in which this is done are Sweden, Kenya, India, Ireland and Japan), (2) expert panels, where the ECT has a standing panel of experts (sometimes called commissioners), selected on a case-by-case basis to sit with judges or sit by themselves to make decisions (examples: New Zealand and the State of Tasmania in Australia), (3) special commissions of experts that the ECT appoints on a case-by-case basis to investigate, take testimony, and make recommendations to the ECT (examples: India and the Philippines) and (4) court consultant-inspectors hired by the ECT to provide advice to the court and assist in the evaluation of the evidence presented by the parties (examples: Ireland and the State of Vermont in the US).³⁴

Approaches that manage external expertise include (1) focused meetings where the ECT requires the parties’ experts to meet in advance of the hearing, discuss and focus their areas of agreement and disagreement, and write a report (example: the State of Queensland in Australia), (2) amicus curiae instructions where experts are advised that they are accountable to the ECT ethically and are not advocates for the parties (examples: the Province of Ontario in Canada, the State of Queensland), (3) concurrent testimony or ‘hot tubbing’ where, at a hearing, all the parties’ experts on each topic are brought together (often seated side-by-side in the jury box as though in a hot tub) and instructed to discuss the issues before the ECT, with the judge or decision-makers managing the discussion (example: the State of New South Wales in Australia), (4) issue sequencing where experts are called one after the other on each of the issues in dispute, rather than as an integrated part of a party’s case (example: New

³² Ibid.

³³ George Pring and Catherine Pring, *Greening Justice: Creating and Improving Environmental Courts and Tribunals* (World Resources Institute, 2009) 55 et seq.

³⁴ Ibid.

Zealand), (5) pre-filed testimony where the experts to be called as witnesses by the parties are required to submit their testimony in writing to the ECT and all parties prior to the hearing (example: the State of Vermont in the US), and (6) miscellaneous experts not affiliated with the ECT or the parties who are permitted to testify.³⁵

In all of these examples, transparency and accountability to the ECT and to the parties are essential elements of the arrangements for managing the experts' testimony and input.³⁶ Transparency is ensured by making the expert advice available in a timely fashion to the ECT and the parties before it is acted upon by the ECT. Accountability is ensured by allowing the parties and the ECT to test the expert advice by (a) directly questioning the expert and (b) having the advice peer reviewed through different means and presenting those opinions to the ECT and the parties in a manner that is relevant to the decision at hand.

UNCC management examined several options to assist the panel in evaluating the complex scientific and economic information in the environmental claims. One option was to have a scientist on the panel. But the multi-disciplinary nature of environmental claim evaluation meant that a single scientist on the panel would not solve the problem of expertise.³⁷ Another option was to hire scientists to work as employees of the UNCC. Again, hiring a few scientists would not answer the need for multi-disciplinary analysis across a variety of environmental claims.³⁸ Hiring a firm of consultants capable of summoning a broad spectrum of scientists and economists was assessed to be the best option.³⁹

Consultants were contracted by UNCC management in line with UN procurement processes. The UNCC followed this procedure from the first to the fourth instalments. However, because of time limitations, it did away with the procedure for the environmental claims of the fifth instalment,⁴⁰ the contract of the consultants in the fourth instalment simply being extended to cover the fifth as well. With the panel's agreement, UNCC management hired

³⁵ Ibid.

³⁶ These were critical features that were missing with regard to the panel's expert consultants. I discuss this below.

³⁷ Pring and Pring, above n 33.

³⁸ The panel reports list dozens of experts who assisted the panel in the claim evaluation process. Among them were experts in forestry, plant pathology, terrestrial and marine remediation techniques, engineers, hydrologists, chemists, geomorphologists and many more.

³⁹ Klee, above n 3.

⁴⁰ See brief discussion of reasons in chapter 4.

expert consultants for all of the instalments.⁴¹ The Boston based firm, Industrial Economics Inc (IEc), was hired as the consultants for the first instalment, while Mazars & Guerard and IEc were hired as consultants for the second instalment. IEc won the consultancies for the third, fourth and fifth instalments as well.⁴²

Because IEc continued as the panel's expert consultants throughout all the claim instalments, it was able to develop a relationship of trust with the panel. As the panel developed new rules of procedure and made new demands on the consultants, they were able to adjust to these demands and provide the panel and the F4 team with the required analysis and opinions. It was largely as a result of its growing confidence in IEc that the panel resorted to developing technical annexes specifying terms of reference for M&A studies, remediation and compensatory projects. The annexes to the first instalment report contain terms of reference for over a dozen M&A claims.⁴³ The panel also developed terms of reference for the remediation claims in the third and fourth instalments and for the compensatory projects in the fifth instalment.⁴⁴ It is unlikely that the panel would have resorted to tailoring the remedy in each claim through terms of references for studies and projects for restoration and compensation had it not had the scientific expertise that the panel's expert consultants provided. The panel's decisions, embodied in the published panel reports, are covered with the fingerprints of the panel's expert consultants, a fact that is not apparent to the public. The technical detail contained in these annexes was only possible because the panel had the benefit of experts in the form of IEc. The language in the panel reports discussing the scientific evidence for the claims was supplied by the panel's expert consultants and only slightly modified, if at all, by the panel or the F4 team. The very vocabulary in which the panel expressed itself publicly was informed by the expert consultants.⁴⁵

The panel was heavily dependent on its expert consultants to guide it on the scientific evidence and economic valuations in the cases. None of the members of the panel or the F4

⁴¹ For an example of the request for expressions of interest issued by the UNCC for hiring consultants see the advertisement reproduced in Cymie R Payne and Peter H Sand, above n 3, 359.

⁴² For a more detailed discussion of the consultants and their selection see chapter 2. See also Klee, above n 3.

⁴³ United Nations Compensation Commission, *Report and Recommendations made by the Panel of Commissioners concerning the First Instalment of "F4" Claims*, UN Doc S/AC.26/2001/16 (22 June 2001), annex 1–16.

⁴⁴ In chapters 3 and 4, I discuss how the panel shaped the remedy in each claim through the terms of reference for the monitoring and assessment studies, restoration projects and compensatory schemes found in the annexes to the panel reports.

⁴⁵ David Kennedy, above n 2; David Kennedy above n 9.

team were scientists. Except for one, the UNCC management staff were also not scientists. They all looked to the experts to provide advice and guidance on scientific and economic issues. The panel's expert consultants were therefore able to directly influence the claims outcomes.

In this regard, there were several dilemmas that the UNCC had to grapple with. The governing council was seen as a political body where international relations, however clothed, influenced the outcomes. UN officials and members of the governing council described the UNCC as a 'political institution' undertaking claim verification and payment.⁴⁶ UNCC management made a point of distinguishing it from a judicial body.⁴⁷ But at the same time it was important to ensure that claims outcomes were credible and that there was a degree of due process in claims processing. Complicating this dilemma was the UNCC's policy of secrecy and generally excluding Iraq from the claims process. In this context, employing experts became an extremely attractive solution. Experts brought credibility to claims outcomes and provided respectability to the claims processes. What was not so apparent was that experts could also influence distributive justice and that the choices they recommended (albeit honestly) may have been buried in professional vocabulary. Driven by the desire to make claims outcomes objective, the UNCC entrusted the claims process to legal and scientific specialists — so-called experts.⁴⁸

But with its policies of confidentiality and secrecy the UNCC protected these same experts from being scrutinised by the parties to the dispute or the public.⁴⁹ The expert's competence, methods employed and analysis could have been the subject of scrutiny. Did the actors in the governing council and UNCC management make a deliberate choice in favour of experts and sacrifice accountability through confidentiality? In my view, key actors in the governing council, UNCC management and the panel made a choice in favour of contracting experts but

⁴⁶ United Nations Security Council, *Report of the Secretary-General regarding creation of a United Nations Compensation Fund and United Nations Compensation Commission as envisaged in Security Council Resolution 687 (1991)*, UN Doc S/22559 (2 May 1991) [20].

⁴⁷ See chapter 2 for a discussion of this distinction made by UN officials.

⁴⁸ The requests for proposals for potential consultants issued by the UNCC for each instalment of environmental claims contained a strict confidentiality clause as well as clauses obligating the potential consultant to disclose conflicts of interest. Additionally, a teleconference was held in September 2000 between UNCC staff and IEc, the panel's expert consultants, seeking assurances that IEc's subcontractor experts would not later serve as consultants to claimants. Many of the guidelines developed by the panel for interactions between the panel's expert consultants and claimants or Iraq were couched in terms that sought to ensure impartiality and objectivity on the part of the expert consultants.

⁴⁹ See the discussion below.

did not foresee the sacrifice of accountability. What is clear is that when they made a choice in favour of the principle of expeditious and effective justice for the victims and in favour of secrecy, they also paved the way for sacrificing accountability and due process. In the context of Braithwaite and Drahos's framework employed in this thesis, actors advocating positions based on principles may not always be in control of how the dominant principles are converted into rules and institutions. Even when they do have control, not all the consequences can be foreseen. I conclude that actors faced with this situation often seek to influence the formulation of the rules and institutions through procedures they establish or substantive criteria they might specify.

D Interactions with Experts

I now discuss the nature and scope of interactions that the panel's expert consultants had with Iraq's experts and with the claimants and their experts. These interactions placed the panel's expert consultants in a position of influence similar to that of the panel, the F4 team and UNCC management, giving them the ability to delve into the substance of claims and shape outcomes through interactions with Iraq and the claimants. Unlike the other actors, the consultants were scientists and economists familiar with the subject matter. Their knowledge and their ability to shape the claims outcomes placed them in a significant position of influence with regard to Iraq and the claimants — though, perhaps, the claimants and Iraq might not have known or realised the extent of that influence.

1 Interaction between the Panel's Experts and Iraq's Experts

As discussed in chapter 3, Iraq's participatory space was enlarged in the pre- and post-2003 period. Iraq was given funds from the compensation fund to hire legal and scientific experts to defend claims. With the hiring of experts, Iraq began to request opportunities for its experts to interact with the panel's expert consultants. Claimants presented a large amount of material generated by M&A studies and there was only a short period of time to analyse this data. Iraq's request was largely prompted by a desire on the part of its scientific experts to minimise and focus the research they would need to do as part of advising Iraq.

During the third instalment of restoration claims, Iraq's legal counsel made specific requests for its experts to have the opportunity to inspect sites in Kuwait and Saudi Arabia that had allegedly sustained damage⁵⁰ and interact with the panel's expert consultants and the F4

⁵⁰ Klee, above n 3, 55..

team.⁵¹ The UNCC did not afford Iraq either of these opportunities during the third instalment.⁵² Claimant countries had expressly opposed its request for site visits and they denied permission for Iraq's experts to enter those countries.⁵³

As noted briefly in chapter 3, in response to these issues, the panel issued guidelines for interactions between its expert consultants and representatives of Iraq in November 2003.⁵⁴ The first three instalments of environmental claims did not benefit from these guidelines as they were not issued until the fourth and fifth instalments of claims commenced.

The interactions between the panel's expert consultants and Iraq's representatives resulted in a more thorough analysis of the issues, which ultimately helped the process.⁵⁵ Some important legal and factual submissions made by Iraq in the third, fourth and fifth instalment were accepted by the panel, although on most of these occasions the submissions were also in accord with views expressed by the panel's expert consultants or the F4 team. Even so, Iraq's ability to influence claims outcomes did increase in the third, fourth and fifth instalments as discussed in chapter 3.

As already argued in chapter 3, UNCC management was less hostile to the principle of due process for Iraq after the 2003 US-led invasion of Iraq. This rule outcome is an example of that change. On the other hand, the rule outcomes that allowed the panel's expert consultants to interact with claimants and Iraq placed the experts in a unique situation as investigators. In this capacity, the panel's expert consultants had the ability to raise scientific questions and receive responses on technical issues from claimants and Iraq. This is an ability that neither the panel nor the F4 team had. It is my contention that, for all practical purposes, these rule outcomes made the panel's expert consultants the predominant arbiters of scientific, economic and technical issues.

2 Interaction between the Panel's Experts and Claimants

Pursuant to the decision on the choice of method (interactive method) for processing M&A claims, the panel issued guidelines on providing professional judgement reports to its expert

⁵¹ Ibid.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Ibid. Note that the guidelines were issued after the 2003 US-led invasion of Iraq.

⁵⁵ Ibid. See also José R Allen, 'Points of Law' in Cymie R Payne and Peter H Sand, above n 3, 141.

consultants in June 2000.⁵⁶ ⁵⁷, ⁵⁸, ⁵⁹, These provisions enabled the consultants to provide claimants with data and information they might otherwise not have had or been aware of. Such information in all probability enabled claimants to consider alternative scientific criteria, methods or literature when it came to supporting their claims with evidence. None of these exchanges were open to Iraq.⁶⁰

The panel also expected the consultants to express an opinion on the viability of the studies as originally proposed and, where they were not viable, to suggest any modifications that might make them useful and viable. The panel allowed the experts to consult with claimants about possible modifications. These consultations were to be conducted through the UNCC secretariat. The guidelines also allowed the consultants to discuss specific parts of their analysis with claimants and required them to develop cost estimates for the studies. This part of the guidelines envisaged the consultants modifying M&A studies in consultation with claimants, again with no participation from Iraq.

The interactive method allowed the panel's expert consultants to change the methods, design, scope and goals of M&A studies to ensure that the data produced and analysed would assist the panel in determining the substantive claims. The flexibility and interactive nature of the process also allowed the panel's expert consultants to evaluate the M&A studies and use comparative information from similar studies in other claimant countries as well as information from similar studies in other parts of the world.

As noted earlier, as a consequence of the interactive process, the panel's expert consultants constantly revised the terms of reference for the M&A studies proposed by claimants. During the processing of the M&A claims, the panel's expert consultants became quasi-consultants to the claimants as well, advising them of scientific criteria, methods and literature and modifying M&A studies to make them conform to the panel's and the UNCC's requirements. This dual role as consultants to the UNCC and the claimants placed the experts in a unique position as a key actor with the ability to directly influence the outcomes of the M&A claims. It also established a hidden policy goal for the consultants — not merely to advise the panel

⁵⁶ Klee, above n 3, 43-4, 48. The guidelines are not available to the public.

⁵⁷ See above n 20.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Ibid.

on the claims, but to proactively shape the M&A claims outcomes in ways that satisfied the policy goals of the panel and the UNCC.

Couched in scientific jargon and vocabulary, the many choices made by the consultants through their role as claim outcome mediators are embedded in the annexes of the first instalment panel report. Each time the consultants shortened the period of an M&A study, they also reduced the claim in favour of Iraq and against the claimant. Each time the consultants recommended a more costly method over a less costly one for the study, they effectively enlarged the claim award in favour of a claimant. But these distributive choices were couched in the scientific and legal vocabulary of the report and justified on the basis of legal and scientific reasons. To be clear, I am not suggesting that there was an active effort to conceal these choices or deceive readers of the report. Rather, the choices were embedded in other considerations. The choices were made apparent only to the panel, the F4 team and UNCC management. Iraq and its experts, other actors in the governing council, including states, and the public were not privy to these transactions. These rules were later applied to the annexes of the third, fourth and fifth instalment as well. The panel's expert consultants did not play as active a mediator role as they did in the M&A claims, but they did visit claimant countries on site visits, interacted similarly with claimants' experts and officials, and shaped the nature, scope and duration of restoration and compensatory projects for which awards were made in those instalments.

E Experts and their Influence

I now turn to a discussion of the conflict between the F4 team and the commissioners on the one hand and UNCC management on the other over the role and influence of the panel's expert consultants — a struggle that ended in a hollow victory for the F4 team and the commissioners.

As the environmental claim instalments unfolded, the extent to which the panel's expert consultants could influence claim decision-making became a contested issue before the panel. The F4 team and the commissioners wanted to retain as much control over the claims process as they could, while UNCC management favoured a technocratic approach where experts

played a greater role. This contest became apparent during the planning stages of the restoration and compensation claims of the third, fourth and fifth instalments.⁶¹

Directness of damage, the standard of restoration and the reasonableness of restoration measures presented challenging evidentiary and scientific issues in these claims. In my observation, UNCC management resorted to an external consultant because there was opposition from the F4 team and even the commissioners to enlarging the role of the panel's expert consultants.⁶² UNCC management probably hoped that a neutral external consultant could convince the commissioners and the F4 team of the merits of its proposal for a greater role for expert consultants in the claim evaluation process.

UNCC management asked their external legal consultant (not to be confused with the panel's expert consultants) to advise on evaluation procedures and valuation methods. Table 10 summarises the issues identified and the recommendations made by the external consultant.⁶³

Table 10. Issues and Strategy Options for Assessment of Substantive Claims

Identified Issues	Options	Recommendation by external consultant
1. Deficient or incomplete supporting documentation for claims	<ol style="list-style-type: none"> 1. Provide guidance to claimants on key issues as soon as possible soliciting further documentation as required. 2. Request supplemental information after the unsolicited information deadline. 3. Judge claims only on the basis of the data submitted by the claimants. 	Option 1.
2. Paucity of baseline data to assess the claims	<ol style="list-style-type: none"> 1. Request baseline data from claimants. 2. Develop discount factors and information. 	Option 1 or, where baseline information is unavailable, option 2.
3. Developing methods for assessing the cleaning and restoration claims	<ol style="list-style-type: none"> 1. Immediately develop and distribute guidelines specifying the factors and requirements to be considered in evaluating and deciding upon the cleaning and restoration claims. 2. Postpone development of evaluation criteria until the panel's consultants for the cleaning and 	Option 1. If time does not permit option 1, continue implementing it later.

⁶¹ See above n 20.

⁶² My conclusion is based on the events that unfolded — see below.

⁶³ Klee, above n 3, 40–2.

Identified Issues	Options	Recommendation by external consultant
	restoration claims have been retained and the unsolicited documentation has been retrieved. 3. Do not develop evaluation factors; instead, decide each claim independently on its own merits.	
4. Developing methods for assessing the natural resource depletion claims	1. Retain individual experts immediately to assist the F4 team in the development of assessment methods. Retain consultants to implement the chosen method. 2. Contract the development and implementation of the method to a consultant.	Option 1.
5. The panel's capacity to assess cleaning, restoration and depletion claims	1. Divide the claims between two panels. 2. Add scientific/technical expertise to the panel	Discuss options with the panel and solicit their views.

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Following the panel meeting, UNCC management, the F4 team and the external consultant engaged in an attempt to develop the required documents pursuant to the panel decision. However, there were divergent views between two sets of key actors. The external consultant (a legal expert) and UNCC management formed one set of actors while the F4 team formed the other. The contest focused on a set of recommendations prepared by the external consultant that sought to streamline the claim decision-making process into five steps and establish a scoring system for each step to enable the panel to be consistent across all decisions and awards.⁶⁸

69 70 71 72 73 74
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⁶⁴ See above n 20.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Ibid..

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵, ⁷⁶, ⁷⁷ These counter-proposals from the F4 team were largely prompted by their experience from the first instalment M&A claims, where expert consultants had interacted with claimants and determined the content, methods and outcomes of those claims.

An important area of concern identified by the F4 team was the need to clearly define the roles of the team and the panel's expert consultants vis-a-vis the panel.⁷⁸ These comments, based on the previous experience of the F4 team, reflect concerns with entrusting the claim evaluation process to expert consultants and a general dissatisfaction with the outcome of previous instalments where expert consultants had played a greater role in the decision-making.⁷⁹ The F4 team took the view that legal standards relating to issues such as directness of damage, restoration levels, damage assessment methods, and the reasonableness of remediation ought to be determined within the factual context presented in the claims.⁸⁰, ⁸¹ The claims presented novel legal and factual challenges with many unknown aspects that led the panel to believe that establishing standards and legal principles beforehand might prove to be inadequate and ineffective. The team went on to set out a claim assessment approach that was iterative and assigned a proactive role to the F4 team, with consultants playing a supportive role.

The team's comments reflect not just a divergence of views on claim processing methods but also a struggle for control and influence in the claim decision-making process. For the purposes of the analytical framework of this thesis, each of the competing methods can be characterised as a model. The UNCC relied heavily on external consultants to advise panels and process claims.⁸² From the team's point of view, UNCC management appeared to be taking steps to empower external consultants to influence and guide the decision-making process. But the team wanted to retain influence and control and perhaps also saw itself as the protector of the panel's expressed preferences against mass claims-processing techniques. The team, made up mostly of lawyers with common law training, much preferred a case-by-case, precedent-by-precedent approach to developing principles. The approach preferred by

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Klee, above n 3, 40; Cymie R Payne, 'Environmental Claims in Context' in Cymie R Payne and Peter H Sand, above n 3, 1, 12.

UNCC management was one where principles were articulated beforehand and the panel and team merely applied them — a model more characteristic of the civil law tradition.⁸³ Both approaches have their advantages and disadvantages.

The approach preferred by UNCC management arguably had greater objectivity in that legal standards would have been established beforehand and applied to the facts of each claim. Its disadvantage was that the scoring method left much of the decision-making in the hands of expert consultants. The approach preferred by the panel and F4 team commenced with a factual assessment of each claim, the defences advanced and remedial options leading to the identification and application of relevant legal principles as would be most helpful in achieving a fair outcome.

The F4 team used modelling to advocate their position in that they presented an alternative decision-making process to that presented by the legal consultant. The F4 team's preference for a deliberative model of claims processing can be contrasted with the legal consultant's proposed model, which was more akin to mass claims-processing models.⁸⁴ Arguably, advocacy for mass claims-processing techniques could be characterised as a principle being promoted by key actors as a counterpoint to the principles of deliberative claims-processing techniques. However, I see mass claims-processing as a choice of model within the wider context of the principle of expeditious and effective justice for the victims of war.

Given the magnitude and complexity of the environmental claims, the panel saw deliberative processes as yielding more defensible outcomes than mass claims-processing techniques which were, more often than not, based on formulae, approximations and evidentiary discounting. Mass claims-processing techniques were, however, seen by UNCC management as necessary and, in many cases, sufficient to deliver expeditious and effective justice to the victims of war — victims who were approaching the UNCC in their thousands. Deliberative justice processes, although consistent with the notion of due process, were seen as inimical to the principle of expeditious and effective justice for victims. The contest here can therefore be characterised as a conflict between the principles of due process on the one hand and expeditious and effective justice on the other.

⁸³ Tony Honoré, *About Law: An Introduction* (Clarendon Press, 1995). The civil law, being codified is rich in principle whereas the common law is rich in precedent.

⁸⁴ Howard Holtzmann and Edda Kristjansdottir (eds), *International Mass Claims Processes: Legal and Practical Perspectives* (Oxford University Press, 2007) 243–54, 248.

It is submitted that part of the difference in views within the UNCC can be attributed to differences in career experience between the F4 team members on the one hand, several of whom had backgrounds as litigating attorneys, and UNCC management on the other, which consisted of former officials from the Iran-US Claims Tribunal and the US State Department⁸⁵ and included one lawyer who had experience advising private sector corporations. In my view, the members of the latter of these two groups much preferred to run a program in terms of established standards, formulae and procedures while the members of the former were more comfortable with developing principles on a case-by-case basis.⁸⁶,
⁸⁷ ⁸⁸

The F4 team framed these issues as presenting a choice between content (substantive justice based on factual findings) and process, but in reality it was a contest between consultant-controlled claims-processing and processing controlled by the panel and the F4 team. In terms of Braithwaite and Drahos's analytical framework, UNCC management's emphasis on content would have resulted in greater expert consultant influence over the claims outcomes, whereas the F4 team perceived that their emphasis on process may have minimised that influence. In the final analysis, though, the panel's expert consultants (scientists and economists) exerted considerable influence over the claims outcomes, simply because there was nobody within the UNCC capable of overseeing their work or holding them accountable. The F4 team, it is submitted, won a hollow victory.

The contest that took place with respect to this rule outcome can also be viewed primarily as a contest between actors, namely the F4 team and UNCC management. On another level, it was a contest of principles. The principle that appears to have been the foundation for the expert legal consultant's recommendation was expeditious and effective justice for the victims. The external consultant's recommendations were modelled on mass claims-processing techniques, which were a mainstay at the UNCC. It would appear that, in the legal consultant's view, providing guidance to claimants ahead of time about key issues that would be addressed in the claims was a very important element.

⁸⁵ See chapter 2 for more details of staff members and their backgrounds.

⁸⁶ See above n 20.

⁸⁷ Ibid.

⁸⁸ Ibid.

However, to the F4 team, concern for the same principle – that of effective and expeditious justice – translated into a more flexible approach that allowed the panel and the F4 team to assess a claim via a process rather than according to pre-determined evidentiary discounting methods and claim element rankings typical of mass claims-processing techniques. To them, such flexibility was essential to deliver justice to the victims, even though it might be slower. In this sense, timeliness was certainly a point of contention.

Perhaps another principle (due process) was also at play, though not obvious. Insistence on a flexible process left greater room to afford Iraq an opportunity to participate, promoting due process for Iraq. In chapter 3, I discussed how the mass claims-processing methods adopted by the UNCC for other claim types had become notorious for disregarding the principle of due process, even though it was not inevitable that such techniques should exclude adequate due process altogether.

Finally, the mechanism at work here was modelling — two competing models for processing the restoration claims were vying for entronement. Dialogic webs were at work, as can be seen in the numerous consultations that took place between the panel, UNCC management, the F4 team, and the expert legal consultant. It is noteworthy that the panel's expert consultants (as distinct from the UNCC's external legal consultant), who eventually inherited the outcome of this contest, were not part of this struggle.

In the following sections, I examine how experts associated with the UNCC environmental claims process influenced claims outcomes.

1 Influence of Consultants on Interrogatories

This section examines how the panel's expert consultants significantly influenced the nature, scope, quality, quantity and emphasis of evidence elicited from claimants through the use of interrogatories. As part of preparing claims for evaluation, F4 team legal officers routinely sent out interrogatories to claimants seeking further information on their claims. These interrogatories were sent in accordance with the terms of Article 34 of the Rules.⁸⁹ The purpose of these questions was to elicit more information that would enable the panel to make a determination on the claims. This was a practice adopted by previous panels at the

⁸⁹ United Nations Compensation Commission, *Governing Council, Decision 10*, above n 23, art 34.

UNCC. Article 34 questions often prompted claimants to close evidentiary gaps by producing information in support of claims even after the unsolicited information deadlines.

Generally, the first encounter that a legal officer in the F4 team handling a claim would have with the panel's experts was when they had to formulate interrogatories to be sent to claimants. Legal officers generally examined the evidence of causation and quantum adduced by claimants to determine if there were any gaps in the material or if there were issues that required further clarification. In this sense, legal officers took on the role of investigators consistent with the inquisitorial nature of UNCC claims-processing. As claim investigators, the F4 team was dependent on the panel's expert consultants. Once they had been contracted, the consultants were supplied with all the claim materials. Based on an analysis of this material, the experts supplied a draft list of Article 34 questions that they felt would help illuminate causation and quantum of damage, remediation issues and compensatory projects.

While the final decision of what questions to include in the Article 34 request was in the hands of the legal officers in the F4 team, they were largely led by the professional guidance supplied by the panel's experts on scientific and costing issues. The scientific questions in interrogatories were informed by the vocabularies and goals of the expert consultants, even though they were nominally under the legal officer's hand.

The interrogatory was one vehicle by which the panel's expert consultants influenced the claims outcomes. The very formulation of the Article 34 questions allowed the experts to probe particular aspects of a claim or to emphasise particular remedies or causes over others. For example, the terrestrial claims made by Kuwait and Saudi Arabia quantified damages on the basis of high temperature thermal desorption (HTTD) as the remediation method for removing oil contamination from sandy beaches.⁹⁰ The panel's expert consultant believed that manually breaking the oil-caked sand (tarcrete)⁹¹ and natural bio-remediation was a better combined method.⁹² The interrogatories that were proposed by the panel's experts were therefore designed to elicit more information related to this method, with the expectation that

⁹⁰ United Nations Compensation Commission, *Report and Recommendations made by the Panel of Commissioners concerning the Third Instalment of "F4" Claims*, UN Doc S/AC.26/2003/31 (18 December 2003) [174]. For a more detailed discussion of HTTD see below.

⁹¹ Tarcrete is a concrete like substance that forms naturally when beaches are contaminated with crude oil deposits.

⁹² *Ibid.*

it would allow them to evaluate that option.⁹³ The choice of emphasis and the line of questioning deliberately probed one remediation method. While the panel's expert consultant could probe the claimant (and therefore its experts) in this fashion, neither Iraq nor its technical experts could do so.⁹⁴ Nor were these Article 34 questions and answers made available to Iraq until the fourth and fifth instalment of claims. The panel's expert consultants therefore had in effect an opportunity to cross-examine claimants, an opportunity which no other scientific expert in the UNCC claims process had. Another aspect worth noting is that the panel's expert consultant's partiality to particular remediation or damage estimation methods or data interpretations influenced the Article 34 questions. To the extent that such influences or biases existed, Iraq did not have the opportunity to challenge them until the fourth and fifth claim instalments, when it was finally allowed access to Article 34 questions and responses. Even then, Article 34 questions were only made available post-facto.

2 Influence of Experts on Claim Evaluation

In this section, I examine how the panel's expert consultants influenced claims outcomes through their involvement in evaluating material presented by the claimants and Iraq. Early in the life of the panel, UNCC management proposed a scheme whereby the panel's expert consultants would be given the claim documentation for evaluation and their views would be submitted to the panel through professional judgement reports (PJR). During the first and second instalments, PJRs were divided into two parts. The first focused on causation and directness of damage, while the second focused on quantification of damage. During the third, fourth and fifth instalments, these two reports were merged into a single report which was developed in an iterative manner taking into account the panel's feedback and decisions made on issues such as causation, remediation methods or quantum of compensation. This feedback loop allowed the consultants to iteratively revise their findings and advice to ensure (1) new material presented by claimants in the form of M&A study data and Iraq's defences were taken into account and (2) they were responsive to the requirements of the panel, the F4 team and UNCC management. Shielded from scrutiny by claimants, Iraq and the public by secrecy, this iterative interaction, feedback and responsive advice allowed the consultants to influence the other key actors and to be influenced by them.

⁹³ Ibid.

⁹⁴ Ibid. The panel report also posed a question on this issue to Iraq, Saudi Arabia and Kuwait. To the extent that the issue was raised at an oral hearing, it was open to Iraq to challenge HTTD as an appropriate remediation method.

PJRs would first be submitted in draft form by the panel's expert consultants to the legal officer handling the claim. Occasionally, a legal officer, in consultation with a staff member from the VVSB, might raise questions about the quantification of damage in the PJR. Though it was rare for a legal officer to challenge the scientific reasoning in a PJR, the dialogue with the panel's expert consultants and the VVSB led to choices being made between potential theories of causation, including parallel causes, and remediation methods. For example, in the case of the Saudi Arabia's terrestrial restoration claim, tracks in the desert could have been caused by military vehicles or by water transport vehicles supplying Bedouin camps set up for herding livestock, or by both. The PJR might have suggested that there was a greater likelihood that most of the tracks were caused by military vehicles and allocate 90 per cent of the damage to that cause. The VVSB might seek clarifications as to how the figure of 90 per cent was determined and through dialogue and questions arrive at a different percentage allocation of damage. These choices impacted upon the quantification of compensation and had distributive effects on the parties to the claims.⁹⁵

Once the PJRs had been finalised, the legal officer presented them to the panel together with a legal submission. At a subsequent panel meeting, the panel's expert consultants would have experts available to clarify the PJR and engage in discussion with the panel about the claim. The PJR was therefore a vehicle of influence through which the panel's expert consultants expressed their views on a claim. Since the panel and UNCC staff were particularly dependent on the consultants for scientific analysis, the PJR generally formed the basis of the panel's substantive decision on the claims. If the consultants offered two or more possibilities, discussions at panel meetings would likely result in the panel indicating a preference for one or the other. Generally, the choice was based on recommendations made by the consultants, reflecting their own distributional preference.⁹⁶ The consultants would

⁹⁵ United Nations Compensation Commission, *Report and Recommendations made by the Panel of Commissioners concerning Part One of the Fourth Instalment of "F4" Claims*, UN Doc S/AC.26/2004/16 (9 December 2004) [243]–[300]. One such example I am personally aware of was in Saudi Arabia's terrestrial remediation claim in the fourth instalment. Saudi Arabia had requested funds (mostly for safety and aesthetic reasons) to cover the cost of removing *all* berms — sand/soil embankments built in the desert by the Allied Coalition forces. Often, berms were built to form the four sides of a rectangular fortification — sometime stretching for miles. In the PJR, the consultants recommended removing three sides of the rectangle and quantified costs accordingly. As the legal officer handling the claim, I recommended removing all four sides as requested by Saudi Arabia and the panel agreed. The consultants then revised the PJR to reflect this revision.

⁹⁶ For example, in its terrestrial claim in the fourth instalment (evaluated and processed after the US invasion of Iraq in 2003), Saudi Arabia had requested funds to vegetate areas disturbed by military activity. The panel's consultants recommended establishing vegetation islands allowing seeds to spread to other areas from those islands. This remediation method cost less but would take longer to achieve results. This recommendation favoured Iraq and reduced Saudi Arabia's award.

then revise the PJRs to incorporate the options chosen. They would also incorporate into the PJR their views on Iraq's submissions on the claim and on additional material that claimants sent as a result of M&A data. The consultants, in agreement with the legal officer, would compile a final PJR. The final panel decisions on claims were based on these PJRs.

There are only two examples of challenges to the panel's factual findings within the UNCC process. Saudi Arabia and Kuwait filed Article 41 requests to revise the third instalment award amounts on the basis that the remediation method proposed by these claimant states was better than those proposed by the panel.⁹⁷ The claimants had proposed high temperature thermal desorption (HTTD) as the remediation method for cleaning the tarcrete deposits from the oil spills on the beaches. The HTTD process involved removing contaminated sand from beaches and incinerating it at high temperatures to burn off the oil and tarcrete. This process destroyed all living organisms in the sand. The sand that would be returned to the beaches would therefore be sterile. On the basis of opinions expressed by the panel's expert consultants in their PJR, the panel opted for a far less expensive technique of remediation which involved natural recovery aided by ploughing and other techniques. The view of the panel's expert consultants was fortified by Iraq's responses to the claim which also challenged the appropriateness of HTTD as a remediation method, arguing that it was expensive and entailed adverse environmental impacts.

The Article 41 request was unsuccessful because, under that article, the governing council could only correct obvious mistakes such as arithmetical errors and could not entertain challenges on the merits of awards.⁹⁸ The paucity of challenges against the panel's scientific findings may therefore not be significant, considering that there was no appeal procedure to challenge scientific or factual findings. But it did contribute to a positive relationship between the panel and the consultants. The choice between HTTD and ploughing techniques had distributional consequences. The effect was to decrease the award for Saudi Arabia and considerably lengthen the period needed for environmental recovery. Ideally, this choice should also have resulted in an appropriate compensatory award in the fifth instalment to cover the higher interim losses (ie ecosystem service losses from the oil-polluted beaches from the time of the spill to the time of recovery) occasioned by the decision in favour of

⁹⁷ United Nations Compensation Commission, *Twenty-Seventh Report of the Executive Secretary Pursuant to Article 41 of the Provisional Rules for Claims Procedure*, UN Doc S/AC.26/2004/15 (23 September 2004).

⁹⁸ *Ibid.*

ploughing. This did not happen because the fifth instalment was processed on the heels of the third, with little time for claimants to adjust claims between the two.

Another example of influence exerted by the panel's expert consultants is to be found in a claim made by Iran seeking compensation for agricultural losses.⁹⁹ On this occasion, UNCC management asserted its influence on the claim outcome and relied on the panel's expert consultants to provide the scientific basis to do so. This is also one of two claims where, as discussed in chapter 2, an executive session of the panel was used by UNCC management to successfully advance its agenda. Examining this claim helps to understand the kinds of policy choices that the panel's expert consultants made or facilitated.

Iran claimed that there had been a drop in crop yields in the east of the country and consequently a loss of income to farmers as a result of the smoke plume from the Kuwaiti oil well fires.¹⁰⁰ The claimant produced statistical evidence which indicated a drop in production in a variety of crops in the period immediately following the Gulf War.¹⁰¹ The claimant then sought to quantify the losses by reference to samplings of prevailing crop prices and differences between postwar and prewar production levels. The panel's expert consultants took the initial view that the drop in production levels may well have been caused by the plume from the oil well fires, but that it might equally have been caused by other factors such as rainfall, soil conditions etc. On the basis of this opinion, the legal officer on the F4 team prepared a legal submission recommending that the claim be rejected for lack of evidence.

At the panel meeting, the expert brought in by IEC submitted to the panel an opinion somewhat different to that expressed in the PJR, suggesting that there might be room to make a directness finding in favour of the claimant on the basis of the statistical evidence, but that the finding should recognise that there might also have been other causes for the drop in crop production — essentially a finding that the oil fire plume may have been a contributory cause of the crop losses. Based on the PJR and the legal officer's submission, the panel's initial reaction was to reject this view on the basis that the evidence was insufficient to support an award.

⁹⁹ United Nations Compensation Commission, *Report and Recommendations made by the Panel of Commissioners concerning the Fifth Instalment of "F4" Claims*, UN Doc S/AC.26/2005/10 (30 June 2005) [102]–[130].

¹⁰⁰ *Ibid.*

¹⁰¹ The following account is based on personal notes and confirmed by one of the legal officers who handled the claim.

This reaction was based on the expert's findings that, while it was possible that the smoke plume impacted upon crop production levels, there was insufficient scientific data to conclude that this was probable. UNCC management took the view that the evidence presented was sufficient to establish contributory causation on the basis of prevailing UNCC rulings on standards of evidence.¹⁰² At this point, UNCC management requested that the panel hold an executive session.

UNCC management and the panel met in executive session, excluding all other parties from the meeting.¹⁰³ When the panel reconvened, it had changed its mind. It was now inclined to accept the claimant's statistical evidence and requested its own expert consultant to revise the PJR and assess the probability of the plume causing the crop losses. The PJR was revised and eventually the panel made an award on the claim based on the statistical evidence, price samples and discounting.¹⁰⁴ This is the only environmental claim in which an award was made on the basis of statistical evidence. This was an exception to the panel's consistent practice of rejecting statistical evidence as a sole basis for causation findings — a method that had been associated with mass claims-processing techniques.¹⁰⁵

What led the panel's expert consultant to make a presentation to the panel that suggested statistical modelling was possible after having written off that possibility in the draft PJR? Was the change of heart triggered by a desire to present the science as honestly as possible or because the expert saw the distributional effect of his evidence? Was there pressure, however subtle, exerted by another UNCC actor? If the draft PJR had been adopted, Iran's claim would have been rejected and farmers who had lost crops would not have been compensated. On the other hand, presenting the possibility of statistical modelling opened the door to an award being made. There is little doubt that the prevailing practice of other UNCC panels was to accept and adopt statistical modelling. As Kennedy might ask, was the expert politically captured?¹⁰⁶ If so, was this due to the influence of an interest group or was it

¹⁰² See above n 20.

¹⁰³ For an explanation of executive sessions, see chapter 2.

¹⁰⁴ United Nations Compensation Commission, *Report and Recommendations made by the Panel of Commissioners concerning the Fifth Instalment of "F4" Claims*, above n 99.

¹⁰⁵ Holtzmann and Kristjansdottir, above n 84, 244–5; United Nations Compensation Commission, *Report and Recommendations made by the Panel of Commissioners concerning the Fourth Instalment of Claims for – Departure from Iraq or Kuwait (Category "A" Claims)*, U.N. Doc. S/AC.26/1995/4 (12 October 1995) [9]–[10].

¹⁰⁶ David Kennedy, above n 2, 473–8. Kennedy associates the term "capture" with three different notions. The first is where an institution comes under the influence of a group or economic interest. The second is where

because the expert was captured by a mass claims-processing method or doctrine?¹⁰⁷ I am unable to provide a definitive answer to these questions based on the material available to me. However, it is plausible to conclude that the panel's expert consultant's testimony resulted in a panel decision that had different distributional consequences and that, to achieve that end, UNCC management used mechanisms that might have had coercive¹⁰⁸ overtones. This case also shows the extent of the consultant's discretion to recommend a level of discounting — would the claim amount be discounted by 30 or 40 per cent? Ideally, that is a conclusion that ought to have been based on the statistical probability of the physical impact of the Gulf War being the cause of the crop losses as opposed to other causes. Given the paucity of data, a discount level for this claim could at best only have been an educated guess.

Following the panel meeting, UNCC management summoned the entire F4 team for a refresher course in the rules of evidence at the UNCC.¹⁰⁹ The general message conveyed to the team was that standards of evidence for claims at the UNCC were much lower than normally required before judicial bodies and that mass claims-processing techniques permitted the use of statistical and sampling methods.¹¹⁰ This example illustrates how UNCC management might have changed the views of the panel through the use of an executive session. Since there is no publicly available record of the session, it is impossible to know what transpired at the meeting. But it is clear that UNCC management advocated a different claim outcome, one which the panel accepted, changing its initial view on the merits of the claim. It is likely that UNCC management referred to other precedents and practices of panels at the UNCC concerning the standard of proof. What other mechanisms, apart from precedent-based modelling, might have been used, is unknown. But if it was simply modelling that was used, it is hard to comprehend the need for a secretive executive session. It is my tentative conclusion that the closed and special nature of executive sessions, coupled with advocacy by UNCC management based on UNCC practice, had a strong influence on the panel and resulted in it changing its mind.

participants in decision-making are themselves ideologically or politically committed partisans of one faction or another rather than objective assessors. The third is where structural dimensions of an institution or decision-making process over-represent some interests as against an imaginary or ideal just order. I use the term capture here in the first and second sense.

¹⁰⁷ Ibid.

¹⁰⁸ See the discussion in chapter 2 as to why executive sessions had a coercive character to them.

¹⁰⁹ M Kazazi and M Raboin conducted a half-day course.

¹¹⁰ Personal recollections

Policymakers and experts, including UNCC management, the panel's expert consultants, the panel and the F4 team, were not 'themselves innocent of political commitment or identity'.¹¹¹ Nor can I say that rule or claims outcomes presented themselves 'as best practices detached from knowledge of, or responsibility for, distributional choices'.¹¹² The manner in which the consultants changed their opinions in the Iranian agriculture case or chose ploughing over HTTD in the Kuwaiti and Saudi Arabian cases are examples of wider practices, many of which remain obscure in the absence of access to UNCC documentation. Secrecy protected the panel's consultants from being scrutinised by Iraq, the claimants, the governing council or the public.¹¹³ Unknown to these actors, the expert consultants revised their PJRs in response to new M&A materials from claimants or feedback from the panel, the F4 team and UNCC management. In doing so, they were making choices that either supported or undermined particular claims outcomes with significant distributional impacts.

Another important aspect of the influence of the experts on the panel and the F4 team is their involvement in all five instalments of the environmental claims process. Over the six-year period during which the expert consultants were engaged by the UNCC, the senior management at IEc did not change. Nor did the panel itself change. The F4 team did change, with new officers coming on board, but many of the senior officers continued to serve, as did UNCC management staff. Over the six years of claim processing, the individuals involved came to know each other and came to understand each other's expectations and sentiments quite well. In this context, writing PJRs containing expert consultants' opinions and legal submissions containing legal officers' views became an art. As noted earlier in this thesis,¹¹⁴ the F4 Legal team and the panel's expert consultants belonged to epistemic communities which had common understandings of concepts, assumptions and policy goals. Each of these actors also learned through the experience of producing numerous PJRs and legal submissions. They learned from the comments of superiors and peers and they also learned from the panel's reactions to their PJRs and legal submissions. PJRs and legal submissions were therefore not based purely on scientific and legal materials but were shaped by the experience gained by the experts and legal officers at the UNCC. They knew what materials were important and what was not important and they learned to craft their opinions in ways that made sense to the panel and UNCC management. What made these reports persuasive

¹¹¹ David Kennedy, above n 2.

¹¹² Ibid.

¹¹³ Discussed further below.

¹¹⁴ Chapters 2 and 5.

was, in the words of Holmes and Marcus, ‘the experience of the interlocutors, their judgement, their feel’.¹¹⁵ As discussed earlier, the biases that actors brought with them from their epistemic communities were embedded in their work and, ironically, are partly what made that work acceptable to its audience. The PJRs and legal submissions were shaped through interactions among legal officers, experts and UNCC management before they ever saw the light of day. Once they were presented to the panel, they would be revised iteratively over the period that the claim was processed — each time going through the network of individuals referred to above. The PJRs can therefore be viewed as being more than documents containing an objective legal or scientific opinion; they were documents that had been socialised and written to enable and justify claim decision-making.¹¹⁶

3 Influence of Experts on Claimants and Iraq

In this section, I examine the influence exerted by experts employed by the claimants and Iraq on the environmental claims outcomes. These were mostly scientists, economists and lawyers. Unlike the panel’s expert consultants who had a mandate to advise the panel independently, these experts had a clear policy goal — either to help the claimants establish their claims and obtain the best possible award of compensation for their losses, or to help Iraq defend the claims and reduce the awards to a minimum. These goals shaped the way claims were framed, supported and defended.

Environmental claims presented considerable challenges to claimants because of the paucity of pre-conflict environmental data. Often, baseline data was not available and, when it was, it was unreliable or had problems associated with data collection frequency or methods. Sometimes, claimants had to perform field studies supported by research data to identify the best remediation method.¹¹⁷

The panel recognised these challenges early in its deliberations on the first instalment of M&A claims.¹¹⁸ Field studies funded by the M&A awards helped claimants put together the evidence needed to support the quantification of damages as well as a determination of

¹¹⁵ Douglas R Holmes and George E Marcus, ‘Cultures of Expertise and the Management of Globalization’, in Aihwa Ong and Stephen J Collier (eds), *Global Assemblages: Technology, Politics, and Ethics as Anthropological Problems* (Wiley-Blackwell, 2005) 235, 244.

¹¹⁶ Ibid, 246.

¹¹⁷ For example, Saudi Arabia carried out field studies which involved growing different species of plants in the desert to identify the best revegetation options to restore the damaged desert. These studies were funded through an award made in respect of a first instalment M&A claim.

¹¹⁸ Klee, above n 3, 41.

causation. Many of these investigations had to be conducted by qualified and skilled scientists, economists and valuation professionals. The M&A awards helped claimants hire such experts and provided funds for the studies and the purchase of satellite imagery required to support the claims. But it is also important to note that claimants had to hire experts to develop and support their M&A claims. Claimants depended significantly on scientific, economic and valuation expertise well before filing their environmental claims as well as to implement M&A studies and support their claims with evidence.

Similarly, some time after the second instalment claims had been processed, Iraq received funding from the UNCC to hire international legal and scientific experts to defend claims. In chapter 3, I discussed the provision of funds to Iraq as a significant procedural rule outcome. I also noted that the quality of Iraq's legal and factual submissions in response to claims vastly improved after it hired experts. Experts testified on behalf of Iraq at oral proceedings on the claims in the third, fourth and fifth instalments. They interacted with the panel's experts consultants in a procedure that the panel developed for the fourth and fifth instalments. In several cases, Iraq's experts were able to highlight shortcomings in claims and the panel's expert consultant's own reasoning was fortified by the findings and recommendations of Iraq's experts.¹¹⁹

Adopting Haas's analysis, the experts assisting claimants and Iraq influenced 'state interests either by directly identifying them for decision makers or by illuminating the salient dimensions of an issue from which the decision makers [might] then deduce their interests'.¹²⁰ Helping define the self-interest of a state or factions within it is one incentive for decision-makers to consult epistemic communities under conditions of uncertainty.¹²¹ As the environmental claim instalments proceeded, these experts analysed panel decisions, learned from them and helped their clients improve their performance in subsequent instalments by articulating claims or presenting evidence in line with such decisions.¹²²

¹¹⁹ For example, the panel report in the fourth instalment of claims has many references to Iraq's position with regard to each claim. These references indicate the degree to which Iraq benefited from its experts. See United Nations Compensation Commission, *Report and Recommendations made by the Panel of Commissioners concerning the Fourth Instalment of "F4" Claims*, above n 95.

¹²⁰ Haas, above n 15, 4.

¹²¹ *Ibid*, 15.

¹²² For example, Kuwait and Saudi Arabia both abandoned HTTD as a remediation method in their fourth and fifth instalment claims, learning from the panel decision on that issue in the third instalment. For a discussion of this, see above. This phenomenon might be characterised as an interpretive effect of the law as suggested by

These experts interacted with the panel's expert consultants under procedures established by the panel.¹²³ These interactions gave the experts yet another opportunity to influence claims outcomes. Material produced by either the claimants' or Iraq's experts and presented in support or defence of a claim was generally scrutinised by the other side's experts and also by the panel's expert consultants. The panel's experts were required to examine this material and express their views to the panel. Additionally, material produced by claimants' experts under M&A awards was scrutinised by UNEP experts under a memorandum of understanding between UNEP and the UNCC.¹²⁴ In this sense, the work and influence of the claimants' experts were not insulated from scrutiny in contradistinction to the work of the panel's expert consultants. Nevertheless, their role in developing and presenting claims and defences to claims and in supporting cases with evidence placed them in the shoes of advocates able to influence claims outcomes. By contrast, the panel's expert consultants were expected to be impartial and objective. But, as discussed earlier, although experts are engaged with the goal of pursuing objectivity, they almost inevitably make distributive choices in their advice as they are influenced by preferences for methods, assumptions and interpretations.

4 Influence of Experts on Panel Reports and Awards (Remedies)

This section assesses the influence of the panel's expert consultants on panel reports. Once the panel had decided on the important legal and factual issues of a claim, the F4 team would begin drafting language to reflect the panel's conclusions. This language was then incorporated into the panel report on the claim. The F4 team relied on the panel's expert consultants to help articulate factual and scientific findings. The panel, in consultation with UNCC management, revised the language before it took its final form. Most of these revisions had to do with legal issues and how many of the factual findings needed to be stated. The panel relied heavily on the F4 team and its own expert consultants in deciding which factual and scientific statements to keep in their entirety and which ones to prune. By the time this final stage was reached, claim decisions and awards had crystallised, leaving little room for further influence. As indicated above, most of the influence exerted by the panel's expert consultants was in the earlier stages of decision-making. Yet, it was possible

Mary Anne Glendon, *Abortion and Divorce in Western Law* (Harvard University Press, 1987). For a discussion of Glendon's hypothesis, see chapter 1.

¹²³ These procedures were discussed in chapters 3 and 4.

¹²⁴ The role of UNEP experts is discussed below.

even at this stage for the F4 team and the panel's consultants to offer suggestions to the panel on report language.

These negotiations of language took place behind closed doors, with the F4 team, UNCC management and the panel's expert consultants the only participants in the meetings. Iraq, the claimants and the public had no access to these proceedings. The closed door nature of these deliberations is not in itself surprising; even in national judicial institutions such as the regular courts, there comes a point in the proceedings when judges write their decisions behind closed doors. Arguably, the report writing stage was the equivalent stage in the UNCC claim proceedings. This analogy would hold true if the commissioners had met on their own in camera to consider and write their decisions. But they did not do so. Instead, the panel had the F4 team, UNCC management and its own expert consultants participating in the report writing. This provides another piece of evidence to support the argument that the claims outcomes were decided not by the panel alone but by the panel acting in consort with the F4 team, UNCC management and its own expert consultants, with the consequence that these actors collectively produced claims outcomes.

Although the UNCC would have liked the external world to believe that the claims outcomes were the result of independent panel decisions,¹²⁵ claim processes involved collective decision-making open to influence by all the actors involved. But all of these actors worked behind closed doors and their work and respective roles were not transparent to the public or the members of the UN. Many of them were experts (technocrats) protected from being scrutinised by their peers or other stakeholders who might otherwise have exposed underlying biases or distributive choices they were making.

The influence of the consultants on panel report writing was perhaps most felt in the development of the remedies set out in the annexes to the reports. The annexes to the panel reports produced in the first, third, fourth and fifth instalments set out the terms of reference for M&A studies, restoration measures and compensatory projects. The interactive method is evident in the 36 annexes to the panel's first instalment report.¹²⁶ Each of these annexes

¹²⁵ United Nations Compensation Commission, *Claims Processing* <<http://www.uncc.ch/clmsproc.htm>>. UNCC descriptions of claims processing do not refer to the involvement of legal teams and consultants but merely state that panels evaluated and presented reports on the claims.

¹²⁶ United Nations Compensation Commission, *Report and Recommendations made by the Panel of Commissioners concerning the First Instalment of "F4" Claims*, above n 43, annexes 1–16.

contained detailed terms of reference for each M&A study. The awards recommended in the panel report were calculated on the basis of the terms of reference in the annexes. The starting point for the development of these annexes were the M&A claims submitted by claimants and the scope and nature of the studies set out in those claims. But the panel, through its expert consultants, reshaped the terms of reference for each study. The panel felt obligated to provide guidelines to its expert consultants, setting out its expectations and goals and guiding them as they assessed the M&A claims.

As with the first instalment M&A claims, key actors, including the commissioners, mooted the idea of using annexes to shape the awards for the cleaning, restoration and damage claims of the third, fourth and fifth instalments. In the first instalment, the panel used the annexes in the panel report as the vehicle for redefining the objectives, scope and methods for the M&A studies. Likewise, the annexes to the third, fourth and fifth instalment panel reports became the vehicle for redefining the goals, scope, standards and methods for the remediation and compensatory awards. The final form that the annexes took was the result of months of discussion and negotiation between the commissioners, the F4 team, UNCC management and the panel's expert consultants.

In the formulation of remedies and awards, the interactive method of claim evaluation developed by the panel played a critical role.¹²⁷ The ability of the expert consultants to interact with the claimants allowed them to better shape the remedy (eg M&A studies or compensatory projects). Unfortunately these interactions, while useful and important, were not all transparent or inclusive, raising doubts as to their legitimacy and credibility.

5 Influence of Experts on Award Tracking

In this section, I examine the role of experts in environmental award tracking. Another important outcome related to M&A tracking¹²⁸ was the involvement of UNEP in the substantive evaluation of the M&A studies, study results and data. UNCC management realised that M&A data would stream in from a large number of studies from the countries in the region. Where would this data be stored? How would it be organised to be easily accessible to the F4 team and the panel's expert consultants? Once the panel's work was done, what would happen to this valuable data? These and similar concerns gave rise to the

¹²⁷ See chapter 4 for further discussion of the interactive method.

¹²⁸ See chapter 4 for a discussion of M&A tracking.

idea that another specialised UN agency with a permanent mandate should be brought into the M&A studies to create a database for the M&A studies.¹²⁹ The United Nations Environment Programme (UNEP) was the obvious choice, with its post-conflict and disaster management branch (then called the post-conflict assessment unit) housed in Geneva.¹³⁰ The UNCC negotiated with UNEP to establish a database for the storage and organisation of the M&A data. UNEP was also brought in to assess the methods, content and data integrity of the M&A studies undertaken by claimants. A memorandum of understanding authorised by the governing council was negotiated and signed to this effect.¹³¹ The costs of the operation were paid for by the UNCC out of the compensation fund. Since Iraq was the only contributor to the compensation fund these costs were in effect paid for by Iraq.

M&A data was assessed by scientific experts at UNEP and reports were submitted to the panel. These reports were not shared with claimants or Iraq.¹³² Where UNEP raised issues concerning an M&A study, the secretariat (through a specially designated legal officer) would pose questions and seek answers from the claimants on those issues. UNEP's reports became part of the substantive tracking of the M&A studies. Whether these reports were useful in ensuring data and methodological integrity is outside the scope of this thesis. Subsequent to the conclusion of the panel's work, the UNCC facilitated negotiations between the claimants and Iraq which resulted in an agreement that each regional claimant country would maintain the database relating to itself and would in the future consider uploading to a regional website any information that could be made publicly available.¹³³ Due to issues of confidentiality, intellectual property rights and security, public access to the database was a contentious issue — indeed, it is one that has yet to be resolved to this day.¹³⁴

Through this process, the UNCC maintained oversight of the content and financial expenditures of the M&A studies. It also ensured that the M&A studies were completed in

¹²⁹ Klee, above n 3, 58.

¹³⁰ United Nations Compensation Commission, *Report and Recommendations made by the Panel of Commissioners concerning the Fifth Instalment of "F4" Claims*, above n 99, [780]–[782].

¹³¹ *Ibid.*

¹³² *Ibid.* Also Klee, above n 3, 53–6.

¹³³ Cymie R Payne, 'Oversight of Environmental Awards and Regional Environmental Cooperation' in Cymie R Payne and Peter H Sand, above n 3, 103, 134–135.

¹³⁴ *Ibid.*

accordance with the terms of reference established by the panel in its first instalment report.¹³⁵

This is another example of the involvement of experts in the UNCC's environmental claims process — on this occasion involving experts employed by UNEP. As a specialised agency, UNEP also developed the database which is now facilitating post-award collaboration between claimant countries and Iraq. Like the other groups of expert actors — the claimants' experts, Iraq's experts, the panel's experts and the F4 team — UNEP's experts were bound by the confidentiality terms included in the memorandum of understanding between the UNCC and UNEP and their own employment contracts. As a result, they were bound to refrain from communicating with any of the other groups of experts. While they may have formed a small epistemic community within UNEP — and I have no evidence that they did — they did not have an opportunity to form an epistemic community with the other expert actors largely because of the limited nature, short duration and confidentiality of their task. Their influence, if any, was mediated through the F4 team and UNCC management. Their influence on the M&A studies and their scientific content was, in my view, not significant.

Experts again played a major role in the tracking mechanism established for the restoration and compensation awards. When the panel suggested three institutional options for tracking the restoration and compensation awards, it warned that an ad hoc mechanism risked becoming overly dependent on experts.¹³⁶ The ongoing environmental award tracking mechanism uses independent consultants nominated by claimant countries to evaluate and report on progress in the implementation of restoration and compensatory projects. Reports generated by these independent experts were provided to the UNCC and the claimants. Whether they were also provided to Iraq is unclear, but they were not available to the public or the scientific community.¹³⁷ The UNCC employed its own scientist, a step it did not take when the claims were being processed. Given that the restoration work is still ongoing in 2012, the in-house scientist can, at the very least, raise critical questions about data and

¹³⁵ United Nations Compensation Commission, *Report and Recommendations made by the Panel of Commissioners concerning the Fifth Instalment of "F4" Claims*, above n 99, [780]–[782]. The panel report refers to eight reports sent by the panel to the governing council. None of these reports are available to the public.

¹³⁶ See the discussion of this issue in chapter 4. See also chapter 4, table 9.

¹³⁷ Payne, above n 133, 137–8. Payne laments the unavailability of this information to the public and the scientific community. She rightly points out that much of the restoration work is cutting-edge and the information generated could be of immense use to environmental science in future remediation work.

analysis found in the independent experts' reports. Because Iraq is participating in the tracking scheme, there is a greater degree of oversight and transparency in relation to the operations and the funds being expended by claimants. In this sense, the current operational tracking mechanism is much more respectful of the principles of transparency and due process for Iraq.

F Insulation of the Panel's Experts from Scrutiny by Claimants or Iraq

In adversarial judicial proceedings such as those found in many common law countries, a plaintiff and defendant would be permitted to lead the evidence of expert witnesses who had studied the facts relating to the case, particularly with regard to technical issues. Where causation or quantum of damage or reasonableness of remediation was at issue in an environmental case, both sides might lead the evidence of scientific experts to speak to their findings and opinions on the issues before the court. Generally, such witnesses would be subject to cross-examination by the opposing side and also to questioning by the court. Additionally, the court itself might have power to issue a commission, either of its own motion, or at the request of a party, to a scientific expert or agency to study an issue before the court and present its findings and opinions. In such situations, the commissioned expert would be available for cross-examination by the parties. Each party might produce scientists or experts who might give opposing views or challenge each other's findings and opinions. These procedures are meant to ensure: (a) transparency of the source and basis of evidence before the court, (b) credibility and veracity of the evidence, findings and opinion, (c) opportunities for the court and the parties to probe the experts' reasoning, findings and opinions and (d) an opportunity for the court to weigh the differing data, findings and opinions of the experts before acting on any one of them.¹³⁸

In the environmental claims before the UNCC, the established procedure did not involve such open processes as those described above, and thus did not provide transparency with regard to UNCC-employed experts. Expert evidence produced by claimants was made available to Iraq and vice versa, but the testimony of the panel's own expert consultants was not open to the scrutiny of either party. While the panel and the F4 team examined the findings and opinions of the panel's expert consultants, as noted earlier, neither the panel nor the F4 team had the scientific expertise to challenge or verify the experts' conclusions and opinions. The generally secretive nature of UNCC proceedings meant that the panel's expert consultants

¹³⁸ Pring and Pring, above n 33.

enjoyed a privileged position — one in which their data, findings and opinions, unless obviously erroneous, would go largely unchallenged. This placed the panel's expert consultants in a unique position of influence over the claims outcomes.

The panel's expert consultants' professional judgement reports (PJR) were never shared with either the claimants or Iraq. As a result, neither of the parties had any opportunity to challenge the views of the panel's expert consultants. Since none of the legal officers or the panel members were scientists, it can be safely concluded that the chance of any serious challenge to consultants' scientific reasoning, methods or data analysis was minimal. Lawyers who have worked with scientific evidence are familiar with scientific methods and can raise questions about data accuracy, collection techniques and analysis. But there is probably less chance that they would be familiar with the details of scientific theories, formulae, their appropriate application or the underlying assumptions of such theories and analysis.

For example, in the fifth instalment claims, the panel's consultants used habitat equivalency analysis¹³⁹ as a method for evaluating lost ecosystem services. In applying the method, the consultants would propose a compensatory replacement for lost ecosystem services per unit of land area impacted. That compensatory proposal would likely be based on comparable valuations of such ecosystem services or on data provided by claimants from M&A studies etc. While the VVSB could verify the resultant total cost by reference to the proposed cost and the affected land area, they could not verify the process, reasoning or method by which the consultants arrived at the proposed cost of lost ecosystem services. Therein lay an area of discretion that was enjoyed by the consultants. In my observation, the exercise of that discretion went unchallenged and, effectively, unsupervised.

At this point it is useful to turn to the work of Sheila Jasanoff, who has made an extensive examination of the relationship between science and policy or knowledge and politics.¹⁴⁰ She argues that with the rise of government agencies with mandates that require scientific input into decision-making, scientific advisory systems have become the fifth branch of

¹³⁹ For a good explanation of this method and the assumptions and data required, see Department of Commerce USA, National Oceanic and Atmospheric Administration, Damage Assessment and Restoration Program, *Habitat Equivalency Analysis: An Overview*, <<http://www.darrp.noaa.gov/library/pdf/heaoverv.pdf>>.

¹⁴⁰ Sheila Jasanoff, *The Fifth Branch: Science Advisers as Policymakers* (Harvard University Press, 1990). See also Sheila Jasanoff, *Science at the Bar: Law, Science and technology in America* (Harvard University Press, 1995).

government. Like David Kennedy, Jasanoff highlights policy makers' mistaken assumption that science guarantees truth and that scientific advice is value-free. She draws attention to the difficulty for scientists to remain neutral and objective in the face of challenges in the media and courts. Traditionally, there have been two approaches to dealing with this problem. The technocratic approach has expanded 'the role of the expert community in decisionmaking [sic]' by seeking advice from peers.¹⁴¹ This system tends to be captured by commercial and industrial interests. The democratic approach favours 'the need for nonscientific [sic] modes of accountability: open decisionmaking [sic] procedures, advance publication of decisionmaking [sic] guidelines, and judicial review'.¹⁴² However, public and community participation may not necessarily win the respect of the scientific community for the outcome. Jasanoff suggests a hybrid approach where negotiation and boundary work play a role.¹⁴³ She suggests a social construction of science which recognises that different scientific viewpoints can be adjusted and by drawing clear boundaries between science and policy.¹⁴⁴ In practice, this means (a) making the boundary between science and policy clear and transparent, (b) allowing the boundary to be negotiated between the policy maker and scientist, (c) developing and implementing balanced peer review systems, (d) standardising protocols and analytical methods and (e) retaining transparency and appropriate levels of participation.¹⁴⁵ I draw on these suggestions below and in chapter 6 in developing recommendations for future conflict related environmental damage assessment institutions.

Conceptually, the panel, the legal officers and the panel's expert consultants often constituted a single set of decision-makers working in tandem with each other. By being insulated from scrutiny, the panel's consultants, along with the panel itself, gained control over the claims outcomes, at the very least on issues of causation, directness, quantification of damage and choice of remediation or compensatory methods, schemes and projects. That is not to say that there were no disagreements between the panel and the consultants or that the panel members did not challenge certain aspects of PJRs. The point is that the panel's expert consultants, with no equals to play devil's advocate, dominated the internal scientific discussions.

¹⁴¹ Sheila Jasanoff, *The Fifth Branch: Science Advisers as Policymakers* (Harvard University Press, 1990) 15–16.

¹⁴² *Ibid.*, 16.

¹⁴³ *Ibid.*, 234.

¹⁴⁴ *Ibid.*, 236.

¹⁴⁵ *Ibid.*

In contrast, legal officers prepared legal submissions to the panel. The panel members were also lawyers and so were UNCC management staff. Although these submissions were also not shared with the claimants or Iraq, the fact that panel members were lawyers allowed for a higher degree of scrutiny of legal arguments than that applied to the scientific reasoning of the consultants. In my observation, contestation was more robust in the legal sphere than in the scientific sphere.

The implications of this lack of scrutiny or challenge of scientific data and decision-making are significant. Not being scientists themselves and not having any scientists among the UNCC staff, the panel had only a weak ability to contest scientific advice or opinions rendered by its own expert consultants. Claims outcomes were shaped by decisions based on both legal and scientific grounds. But actors before the panel could only contest scientific issues to a very limited extent because they generally lacked sufficient knowledge and expertise. The implication therefore is that claims outcomes might have turned out differently had actors before the panel been able to contest the scientific reasoning of the panel's expert consultants.

Another implication is that contesting a claim on legal grounds had a much greater potential impact on the award amount than contesting on scientific grounds. For example, had Iraq's legal objection to the Saudi Arabian terrestrial restoration claim, based on Decision 19 of the governing council barring military costs succeeded, the result would have been a zero award. Again, in the fifth instalment claims Iraq challenged the use of habitat equivalency as a legally acceptable damage assessment method. Had this argument succeeded, several compensation claims for interim ecosystem losses might have been rejected for lack of a reliable damage assessment method. However, when Iraq successfully contested the use of HTTD as a restoration method for polluted shorelines in Saudi Arabia and Kuwait and proposed bioremediation and manual tilling instead, the result was a lower award for the claimants. As these examples show, the stakes involved in legal or procedural contestation tended to be all or nothing, whereas, when scientific issues were contested, an award might be higher or lower based on the choice of assumptions, the restoration method or the data set used. In this sense, the stakes for scientific contestation tended to be lower.

In this peculiar situation, the consultants did not have to use specific mechanisms (such as modelling, coercion or rewards as conceived by Braithwaite and Drahos) to advocate their

positions to the panel. In internalised and insulated situations, as was the case here, key actors exert influence simply by virtue of their position of trust and authority and the monopoly over knowledge that they enjoy. So long as their positions are within ordinary reason, the high degree of dependence on their services opens the decision-maker to an equally high level of influence. That high level of influence minimises or eliminates the possibility of conflict among the key actors. In turn, the need for mechanisms fades into the background. In the UNCC context, the best argument for using a mechanism might be non-reciprocal coordination. Maintaining a relationship of trust was critical to the panel's consultants. By doing so, they ensured that their contracts with the UNCC continued and they also enhanced the possibility of being contracted for other environmental claims instalments. The panel's consultants delivered reliable opinions, quality work and a responsive approach while the UNCC (UNCC management, the commissioners and the F4 team) reciprocated by hiring and retaining the consultants. This might be best described as a symbiotic relationship in which both actors benefitted from and depended on each other.

Anne-Marie Slaughter highlights another aspect relevant to technocratic influences over claims processing at the UNCC. She argues that in this type of situation the 'affinity and even solidarity felt among central bankers, environmental regulators and judges ... socializes them to believe that the deeply political trade-offs are value-neutral choices based on "objective" expertise'.¹⁴⁶ The UNCC panels operated in Geneva, far from the countries where the Gulf War was fought and the environmental damage had occurred. The F4 team, the panel and the panel's expert consultants were all from other countries as well. They were drawn together by a common task and, through working together, they came to know and trust each other. They were also drawn together by a common objective and worked iteratively on UNCC claims, resulting in a socialisation of their tasks and the belief that they were somehow impartially dispensing fair and just decisions when in fact, it is submitted, they were, in Slaughter's terms, making various political trade-offs.¹⁴⁷ Even those who took pride in being impartial and fair (such as the F4 team or the panel) had a strong sense of the constraints imposed on them by the UNCC, its institutional culture and weighted rules that essentially favoured claimants and handicapped Iraq. Hence their efforts to provide Iraq with a greater degree of

¹⁴⁶ Anne-Marie Slaughter, 'Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks', in David Held and Mathias Koenig-Archibugi (eds), *Global Governance and Public Accountability* (Blackwell Publishing, 2005) 40, 41.

¹⁴⁷ Ibid.

due process and transparency provided them with a socialised sense that they were somehow more objective and fair than others at the UNCC.

The lack of transparency within the UNCC has led jurists to raise questions about its legitimacy and credibility.¹⁴⁸ As Slaughter puts it, ‘the idea of regulators meeting behind closed doors, without input from a wide variety of interested public groups at a time when they can still have impact on the discussions and the outcome, is deeply worrying in itself’.¹⁴⁹ That same worry holds true for judicial or quasi-judicial decision-makers sitting behind closed doors making decisions in a forum in which experts, shielded by secrecy, participate actively while the parties to the dispute have limited or no participation. This is an image that detracts from the UNCC’s legitimacy. In the final chapter, I discuss two related issues. First, what measures might have been adopted by the UNCC to be more inclusive and transparent in order to increase its own legitimacy and credibility? Second, why did the UNCC procedures involve such a low level of inclusiveness and transparency despite the UNCC’s desire for greater legitimacy and credibility?

G Conclusions

To summarise, I have argued in this chapter that the panel’s expert consultants occupied a unique position of influence over the environmental claims outcomes by virtue of the rules adopted by the UNCC. These rules enabled the panel’s expert consultants to interact with and interrogate claimants, Iraq and their experts. It allowed them to provide advice to the panel, the F4 team and UNCC management. Confidentiality insulated the panel’s expert consultants from scrutiny by claimants, Iraq and the public. Because the F4 team, UNCC management and the panel lacked scientific expertise, substantive challenges to the advice rendered by the panel’s expert consultants were limited. As a result, the panel’s expert consultants exercised a disproportionately high influence over the environmental claims outcomes. Had the reports and advice of the panel’s expert consultant been made available to claimants, Iraq and the public, the likelihood of challenges to substantive conclusions, analysis and distributive choices in the reports might have been higher. Transparency might have paved the way for the experts’ biases of methods, assumptions and analysis, if any, to be examined by claimants, Iraq and peers among the public. Such scrutiny might also have enhanced data veracity and credibility.

¹⁴⁸ For a discussion on loss of credibility and legitimacy through secrecy, see chapters 2 and 3.

¹⁴⁹ Slaughter, above n 146, 43.

Resorting to expert assistance in processing UNCC claims, including environmental claims, had far-reaching implications for the principle of due process. In chapters 3 and 4, I discussed how actors in the Security Council and the UNCC governing council were aligned against the principle of due process for Iraq. UNCC procedural rules handicapped Iraq in participating fully in the claims process and key actors characterised the UNCC as ‘a political organ that perform[ed] an essentially fact-finding function of examining claims, verifying their validity, evaluating losses, assessing payments and resolving disputed claims’.¹⁵⁰ Entrusting the claim outcome decision-making to panels of commissioners not directly controlled by the governing council and infusing that process with expert advice brought a higher degree of rationality and an appearance of impartiality.

Peter Haas points out that ‘the increasing influence of specialized groups such as epistemic communities may have serious negative implications for such deep-seated political values such as democracy and participation’.¹⁵¹ The danger in privileging the advice of specialists — especially with little or no review or scrutiny by their peers — is that, following Haas’s analysis, it ‘may result in the generation of “bad” decisions ... because it ... ignores the social ends to which decisions regarding specific issues are directed’.¹⁵² There is evidence to suggest that, in other UNCC claims, dependence on experts strengthened arguments for excluding Iraq from the claims process.¹⁵³ This might well have been Iraq’s fate in the environmental claims as well if not for the F4 team and panel advocating greater participatory space for Iraq, more control over shaping the claims outcomes and only a supporting role for expert consultants.

In contrast, as discussed in chapter 2, a legal epistemic community developed at the UNCC because the lawyers constituting it were all employed by the UNCC and had a common policy project in processing the claims. They formed an epistemic community within the UNCC, exerting considerable influence on rule and claims outcomes. On the other hand, the scientific experts employed by the UNCC, the claimants, Iraq and UNEP could not form an

¹⁵⁰ United Nations Security Council, *Report of the Secretary-General regarding creation of a United Nations Compensation Fund and United Nations Compensation Commission as envisaged in Security Council Resolution 687 (1991)*, above n 46, [20].

¹⁵¹ Haas, above n 15, 24.

¹⁵² *Ibid.*

¹⁵³ See the discussion of this issue in chapter 3.

epistemic community *together* largely because of the context of judicial proceedings and the conflict of interest firewalls that had to be established.¹⁵⁴

The influence asserted by the panel's expert consultants on the outcome of the environmental claims was very significant. There is no evidence to show that this influence was misused or abused, nor is there evidence to suggest that the influence was distorted by extraneous considerations. What the evidence does show is that the panel's expert consultants did make choices in methods, designs, data, assumptions and scientific models and that these choices had direct impacts on the claims outcomes and the distributive justice that they represented. Space for the panel's expert consultants to exert influence on claims outcomes was created through the combined effects of a conflict of actors (state actors, UNCC management and the F4 team), the insulation of the experts from scrutiny and the lack of scientific expertise within the UNCC.

The tension created by UNCC management's desire to adopt mass claims-processing techniques on the one hand and the F4 team's desire to retain control and influence over the claims outcomes on the other continued throughout the claims evaluation process. Although compromises struck between the conflicting actors might have favoured the F4 team retaining control, the lack of substantive knowledge and skill in science and economics within the UNCC resulted in a pyrrhic victory for the F4 team and the panel. The team ended up being reliant on the panel's experts for substantive scientific advice and input.

Making expert advice transparent and accountable ensures that claims processing yields accurate outcomes and makes distributive goals explicit. In chapters 1 and 3, I discussed transparency and accountability in the context of the growing body of international administrative law as well as the standards implicit in Principle 10 of the Rio Declaration and the Aarhus Convention. In chapter 6, I discuss the implications of transparency and accountability standards for the UNCC and for similar institutions that may come into being in the future. Due process for all parties, including the former aggressor, is critical to achieving this goal. The dependence on external experts to process the environmental claims

¹⁵⁴In this context, useful insights can be gained by comparing and contrasting innovations on expert testimony recently introduced to the Land and Environment Court in New South Wales, Australia. The Court can require all the experts in a case to confer and write a single report on the issues. Land and Environment Court, New South Wales, *Practice Directions - Class 1 Development Appeals - Usual Directions* <http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/LEC_usual_directions_home>.

(and also many other UNCC claims) contributed to the curtailment of Iraq's participatory space. It was only the efforts of the F4 team and the panel to enlarge that space that enabled greater Iraqi participation. This is a lesson worth noting when constructing future institutions for international armed conflict-related compensation.

As David Kennedy suggests,¹⁵⁵ an examination of the background of environmental claims processing and the manner in which experts asserted influence demonstrates that experts can have policy goals and can influence distributive justice through pursuit of those goals in ways not open to review or contestation. Transparency and due process for all parties appearing before adjudicating bodies such as the UNCC, especially with regard to experts, is one sure way to make that influence more explicit and accountable. In this chapter, I have looked at different approaches to the use of experts in decision-making tribunals. In some examples, such as the UNCC, experts advise or provide analysis and opinions to decision-makers. In other examples, such as tribunals that have scientists as members, the experts are themselves the decision-makers. I argue that, in the case of the UNCC, more needed to be done in the way of exposing the experts' advice, analysis and opinions to the parties to the claim, and perhaps even to the public. This would have provided a means by which the experts' advice, analysis and opinions could have been verified, challenged or illuminated. Even when experts are honest and competent, shielding their work from scrutiny exposes the decision-making process to risks of abuse and error.

The main lesson from the UNCC is that when claim adjudication requires the use of experts, their advice and opinions must be subject to scrutiny by the parties and peers. Such scrutiny can only take place when the experts' advice is transparent to the parties (and, where appropriate, the public) and when the experts can be held accountable for the credibility, accuracy and integrity of their advice and interactions with the parties and the decision-makers.

¹⁵⁵ See the discussion earlier in this chapter.

CHAPTER 6 CONCLUSIONS AND LESSONS

A Introduction

1 *Research Questions and Method*

The goal of this thesis was to answer three research questions set out in chapter 1. These questions were (a) whether key actors influenced the rule and environmental claims outcomes of the UNCC and if so what means they used to achieve their goals, (b) how key actors at the UNCC used these means to influence the rule and environmental claims outcomes and (c) the extent to which the environmental claims outcomes might have been different if the UNCC adopted more transparent, inclusive and accountable processes? In this final chapter, I revisit the thesis questions and theoretical underpinnings of the key arguments, synthesise the main conclusions and set out a range of lessons that might be learned for the purpose of designing future compensation mechanisms concerning war reparations for environmental damage.

To respond to the research questions of the thesis, I selected an analytical research method developed and applied by Braithwaite and Drahos in their study of the globalisation of business regulation.¹⁵⁶ Their method examined the role played by key actors, principles and mechanisms in the processes of globalising business regulations.¹⁵⁷ In this context, an underlying and implied fourth research question of this thesis was to what extent this method is applicable, and if so, of assistance in understanding the processes that led to the rule and environmental claims outcomes in a somewhat different setting to the one in which Braithwaite and Drahos had developed and applied it.¹⁵⁸

As pointed out in chapter 1, three basic concepts were fundamental to the application of Braithwaite and Drahos's research method. These were the concepts of actors, mechanisms and principles. Actors were individuals, groups of individuals, mass publics, organisations or groups of organisations and states or groups of states. Sometimes a collection of actors (such as a network or epistemic community) took the form of an actor as well when they acted in consort and with a common purpose.¹⁵⁹ Mechanisms were 'tools that actors use to achieve

¹⁵⁶ John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge University Press, 2001). See chapter 1 for a discussion of the selected research method.

¹⁵⁷ *Ibid.*

¹⁵⁸ This issue is discussed in detail in the latter part of chapter 1.

¹⁵⁹ Braithwaite and Drahos, above n 1, 24.

their goals'.¹⁶⁰ Coercion, rewards, modelling, reciprocal adjustment, non-reciprocal coordination and capacity building were given as examples of such mechanisms.¹⁶¹ They characterised principles as abstract prescriptions that guide conduct,¹⁶² and influence the creation and application of rules and the determination of outcomes. Principles were less specific than rules, and could conflict.¹⁶³ Rules were specific and less likely to conflict.¹⁶⁴ Braithwaite and Drahos postulated that the globalisation of business regulation 'was a process in which different types of actors use various mechanisms to push for or against principles'.¹⁶⁵ When principles conflict, they are 'settled by decision-makers assigning "weights" to the relevant principles in order to reach a decision'.¹⁶⁶

Chapters 2 to 5 of the thesis demonstrated that there were individuals such as UN staff and UN member state delegates in the Security Council and governing council who played important roles in shaping the rule and environmental claims outcomes. Groups of individuals such as UNCC management or F4 team or the panel also played an important role. So did groups of states such as the permanent members of the Security Council, the US-UK-France axis within the governing council and the regional claimant states led by Kuwait and Saudi Arabia. The public and civil society organisations did not play any role in the work of the UNCC. This was because of the secrecy that prevailed within the UNCC. Chapter 2 argued that the lawyers in the F4 team constituted a sub-epistemic community within the larger epistemic community formed by the UNCC legal staff and sometimes also acted as one actor to influence rule and claims outcomes. With the information in the public domain and my personal knowledge, chapter 2 of the thesis mapped webs of influence that actors used to deploy their influence.

Chapters 3 to 5 of the thesis also showed that modelling was the pre-dominant mechanism used by actors at the UNCC. As indicated in chapter 3 and 4, reciprocal adjustment and non-reciprocal coordination as well as capacity building (mostly through the monitoring and assessment (M&A) awards) was also used by actors to pursue their goals, though evidence to show the use of these mechanisms is much weaker. The influence deployed through

¹⁶⁰ Ibid 9.

¹⁶¹ Ibid 25–26. These terms are further explained below.

¹⁶² Ibid 9.

¹⁶³ Ibid 18.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid 9.

¹⁶⁶ Ibid 18.

modelling was generally done via webs of dialogue rather than webs of coercion. Whether modelling was the predominant mechanism (deployed via webs of dialogue) because the UNCC was a quasi-judicial institution is an issue that deserves investigation, but is beyond the purview of this thesis. If a later investigation reveals that this is the case, it would be possible to argue that the structure and safeguards for judicial decision-makers should be framed around encouraging modelling and discouraging or eliminating other mechanisms such as reward, coercion, reciprocal adjustment and non-reciprocal cooperation as mechanisms for deploying influence. Mechanisms such as reward, coercion, reciprocal adjustment and non-reciprocal coordination lend themselves to negotiated decision-making between the parties on the one hand and decision-makers on the other. Obviously, such behaviour carries risks of bias and partiality on the part of the decision-maker. I have deliberately left out modelling and capacity building from this list. Capacity building and modelling as mechanisms might still be useful and indeed legitimate in the context of environmental claims even in the context of judicial institutions.

Chapters 3 to 5 of the thesis demonstrated that there were key principles that actors advocated or opposed at the UNCC. These were the principles of transparency, secrecy, due process for Iraq and effective and expeditious justice for the victims. Pitching these principles at the right level — as abstract prescriptions that guide conduct — required navigation between legal and scientific principles that apply at the level of individual cases and overarching principles, such as global peace, that operate at the multi-state and multi-institutional level. Chapter 3 and 4 of the thesis showed that as actor goals in Iraq changed, they weighted these principles differently and resolved conflicts of principles through such weighting.

In chapter 5, I demonstrated that Braithwaite and Drahos's research method alone was not helpful in examining and analysing the influence of the panel's expert consultants on the claims. These experts were actors whose influence was not created or desired by them. Rather they were thrust into a position of influence by the UNCC rules and shielded from scrutiny by claimants, Iraq and the public. I therefore relied on the analytical framings developed by David Kennedy and Sheila Jasanoff to focus on the influence of advisors who stand behind the decision makers. Together, these two methods provided an analytical framing to help answer the thesis questions, even in the quasi-judicial context of the UNCC.

2 Significance of the UNCC

As observed in earlier chapters, the UNCC was unique in many ways. It was the first ever institution to be established by the UN to entertain and determine war reparations claims from individuals, governments and international organisations. It was the first such institution to process such a large number and value of claims, amounting to over two and half million claims seeking approximately US\$325 billion as compensation. Of this claimed amount, US\$52 billion was awarded by the UNCC and approximately US\$35 billion has been paid out as compensation, leaving a balance of US\$17 billion unpaid.¹⁶⁷ At its height, the UNCC employed around 200 lawyers. It contracted experts from numerous disciplines to help process the claims. It appointed commissioners drawn from countries around the world. The environmental claims processed by the UNCC were also unique in that this was the first time an international commission had entertained and assessed such claims for war-related environmental damage. The pioneering work of the UNCC was a laboratory for many war-related reparations experiments.¹⁶⁸ Some experiments succeeded and provided good models for the future.¹⁶⁹ Others did not.¹⁷⁰

The successes and failures of the UNCC will be debated for a long time. The focus of this thesis is *how* the various actors at the UNCC interacted to produce a body of rules and environmental claims outcomes and what lessons can be learned from those interactions and outcomes. In chapter 2, I examined the various actors at the UNCC and analysed their goals, webs of influence and the legal epistemic community it engendered. In chapter 3 and 4 I analysed how actors used webs of influence to achieve their goals and how they advocated or opposed principles and deployed mechanisms in that pursuit. In particular, in chapter 3 I demonstrated how, as a consequence of changing actor goals and the use of webs of influence, Iraq's participatory space evolved from one that was extremely limited to one that was broad. I also demonstrated how actors produced rules favouring claimants because doing so served their goals. In chapter 5, I analysed the role of expert consultants and the influential

¹⁶⁷ United Nations Compensation Commission, *Status of Processing and Payment of Claims* <<http://www.uncc.ch/status.htm>>.

¹⁶⁸ For example M&A claims discussed in chapter 3, 4 and 5, the use of modern valuation methods to assess environmental claims as discussed in chapter 5, and the extent of participatory space for the respondent to the claims as discussed in chapter 3.

¹⁶⁹ For example the lesson that M&A studies need to be done as soon as possible after the conclusion of hostilities and that adequate time needs to be left for the results of those studies to shape the substantive claims as discussed in chapter 4.

¹⁷⁰ As discussed in chapter 3 and 4, the exclusion of Iraq from the claims process was, in my view, a failed experiment and the expanded participatory space given to Iraq during the environmental claims was, in contrast, a success.

role they played in claims outcomes. I demonstrated how the panel's expert consultants were insulated by secrecy and the very considerable influence they wielded over the environmental claims outcomes.

As set out in chapter 2, state actors in the Security Council led by the US (and supported by the other permanent members of the Council), established the UNCC, framed its mandate and organisational structure, stamped it with a culture of secrecy and delegated the rule making to the UNCC governing council. They did so mainly because their goal in 1991 was to ensure that their allies (primarily Kuwait, Saudi Arabia, Jordan, and Turkey) were adequately compensated for war damage suffered by them and their citizens.¹⁷¹ They also had as their goal to punish Iraq for its aggression.¹⁷² Their goals were to make it difficult for Saddam Hussein and his regime to govern Iraq, remove him from power and hold Iraq accountable for its invasion of Kuwait.¹⁷³ In turn, the governing council adopted the Rules that governed the claims process. State actor goals were pursued further through the Rules by embedding secrecy even further, disadvantaging Iraq in the defence of the claims by severely restricting its participatory space and denying it transparency in the claims process.

The UNCC provisional rules for claims procedure (the Rules) also provided assistance to the claimants that enhanced their capacity to collect and marshal evidence in the environmental claims. The Rules further provided for the UNCC to hire expert consultants to help process the claims but insulated them from scrutiny and influence by Iraq or the public. On the other hand, as I have argued in chapters 4 and 5, the expert consultants were open to some influence by the claimants through an interactive process that included site visits but were protected from scrutiny by the claimants. These experts influenced the environmental claims outcomes because the panel and the F4 team were dependent on them for guidance and advice.

Between 1998 and 2003, the US-UK-France axis weakened as a result of France opposing US military actions in Iraq.¹⁷⁴ France, which supported the Gulf War, began falling out with the US and the UK in 1998 over the US decision to enforce UN sanctions on Iraq through

¹⁷¹ For a detailed discussion see chapter 2.

¹⁷² Hans C Von Sponeck, *A Different Kind of War The UN Sanctions Regime in Iraq* (Berghahn Books, 2006) 273. I discussed this aspect of the ceasefire agreement with Iraq in chapters 1 and 2.

¹⁷³ Ibid.

¹⁷⁴ David Malone, *The International Struggle Over Iraq* (Oxford University Press, 2006) 11–15, 269–72. For detailed discussions of these events see chapters 1 and 2.

military operations — Operation Desert Fox.¹⁷⁵ France and Russia's new goal was to re-establish trade relations with Iraq and newly elected regimes in both these countries wanted to re-assert themselves in the UN. The humanitarian crisis in Iraq had worsened to the point that many UN members sympathised with the Iraqi people's basic needs of food, medicines and essential items and Iraq's growing debt burden. The Rules of the UNCC were revised during this period by state actors in the governing council to provide Iraq with more participatory space in the environmental claims and to assist Iraq with financial aid to conduct its defence in the environmental claims. These rule revisions improved Iraq's capacity to defend the environmental claims and Iraq began to take advantage of this new capacity in successfully challenging the legal and factual basis of many environmental claims.

After the 2003 US-led invasion of Iraq and the overthrow of the Saddam Hussein regime, the US and the UK, unsurprisingly, changed their position to become promoters and trustees for Iraq.¹⁷⁶ With these changes, there was a fresh alignment of state actor goals in the Security Council and governing council. The new goals were very supportive of Iraq. This period saw further rule revisions favouring Iraq. As a result, Iraq's contribution to the compensation fund was drastically reduced. More importantly, weaker actors such as the panel and the F4 team were emboldened to increase transparency and participatory space for Iraq in the environmental claims. It is argued in this chapter that UNCC management, which was by far the most influential actor with the most access to other UNCC actors, was nevertheless co-opted by weaker actors to their agenda. UNCC management in turn co-opted state actors to the agenda of the weaker actors. Despite these rule changes, the one set of actors who exerted the most influence on environmental claims outcomes was the panel's expert consultants, as indicated in chapter 5. They enjoyed a special place within the organisational architecture of the UNCC. They were insulated from external scrutiny, and key UNCC actors were dependent on their expertise. Their advice and input went unchallenged and many of the environmental claims outcomes were shaped by them.

¹⁷⁵ Ibid 54–113.

¹⁷⁶ SC Res 1483, UN SCOR, 4761st meeting, UN Doc S/Res/1483 (22 May 2003) para 4.

B The Institutional Context

1 UNCC within an Ongoing Conflict

The UNCC was born, grew up and reached its senior years within the context of an ongoing conflict between Iraq and powerful states, particularly the US and the UK. The ongoing conflict and its fortunes and losses shaped state actor goals with respect to Iraq. It also shaped goals with respect to other Allied Coalition partners such as Saudi Arabia, Kuwait, Turkey and Jordan. Changing state actor goals played out in the decision-making of the three forums associated with the UNCC – the UN Security Council, the UNCC governing council and the panel. For example, US hostility to Iraq before the Gulf War continued till 2003 when it invaded and overthrew the Saddam Hussein regime. France's goals in Iraq changed from 1990 to 2005.¹⁷⁷ Together with Germany and Russia, France opposed the 2003 US-led invasion of Iraq.¹⁷⁸ The changing goals of the permanent members of the Security Council shaped their advocacy positions in the UNCC governing council. They were most visible and clear in the UN Security Council, which was more transparent than the UNCC governing council. Despite being located in Geneva, away from the direct influence of New York UN politics, the UNCC governing council was significantly affected by the broad goals of the five permanent member states of the Security Council.

It was argued in chapter 3 that the law-politics distinction was a dichotomy of convenience as opposed to a material one. The UNCC was a political institution and any regard for due process or transparency were subordinated to the political goals of state actors with regard to Iraq. For example, chapter 3 of the thesis unearthed linkages between key state actor goals and rule changes with regard to Iraq's participatory space. The expansion of Iraq's participatory space in the environmental claims became possible partly because of the weakening of the US-UK-France axis and the 2003 regime change and US invasion of Iraq. Weaker actors such as the panel and the F4 team would not have been able to win rule changes that expanded transparency and participatory space for Iraq if key state actor goals continued to be aligned against Iraq as they had been at the time of the Gulf War.

The law-politics distinction made by the Security Council, the governing council and UNCC management had important implications. The political nature of the UNCC was emphasised by UN officials when justifying a smaller participatory space for Iraq and conversely, the

¹⁷⁷ Malone, above n 19, 54–113.

¹⁷⁸ Ibid.

judicial aspects were emphasised when expanding that space and giving Iraq funding to hire experts for defending the environmental claims. The adoption of mass claims-processing methods and the principle of secrecy were justified by emphasising the political and administrative nature of the UNCC.

Saddam Hussein's intransigence and brinkmanship with regard to the UN weapons inspection process had left the international community with few options but to treat Iraq as a threat to regional and international peace. After the Gulf War, the tight and strict sanctions regime imposed on Iraq by the Security Council was partly punitive and partly to achieve regime change through economic means.¹⁷⁹ The agenda for regime change in Iraq was being set in Washington well before George Bush Jr came to office as the US President.¹⁸⁰ After the 9/11 attacks of 2001, regime change in Iraq became a primary goal for the US and the UK. The overall consequences of this agenda for the UNCC were discussed in chapter 2.

The image that was consistently conjured up in the Security Council and the UNCC was one which demonised Iraq and paved the way for decision-making that imposed secrecy and abridged due process as essential UNCC principles. These anti-Iraqi sentiments changed only after the 2003 US-led invasion of Iraq and the overthrow of the Hussein regime. Soon after the 1991 Gulf War there was remarkable comity between the permanent five members of the Security Council, leading to consensus decision-making on Iraq. However, as discussed in chapter 3, as France and Russia emerged from their domestic political changes with aspirations to re-establish their once lucrative trade with Iraq and reassert themselves in European and UN affairs, the picture changed. From 1998 there were contests over principles that had been settled, until then, in the UNCC. Due process for Iraq, secrecy and even the hallowed principle of justice for the victims of war were challenged or re-weighted by key actors. It is more probable than not that the correlation of changed actor goals and pro-Iraqi rule changes in the environmental claims were cause and effect.

The UNCC governing council established secrecy as the ruling principle, and, as argued in chapters 2 and 3, in time secrecy became part of the institutional culture. Secrecy was practiced at all levels in dealings with Iraq, the claimants, and the public and became the norm and expectation among staff within the UNCC. The absence of the veto for permanent

¹⁷⁹ Ibid. See also Von Sponeck, above n 17.

¹⁸⁰ Malone, above n 19, 185 et seq.

members of the Security Council in the UNCC governing council gave rise to the phenomenon of consensual decision-making. Webs of dialogue became an important *modus operandi* to reach consensus. Secrecy was consonant with state behaviour during war when military movement and strategy are treated as closely guarded secrets. Because of secrecy, actors could take positions, however radical, and enter into compromises far removed from earlier positions without being held to account. It also offered up an alternative for the Security Council to delegate controversial decisions to the governing council where they could be resolved away from the public eye without the threat or the consequences of the veto. Secrecy and the lack of the veto (in the formal rules) contributed to consensus building within the UNCC as a whole. Arguably, these elements contributed to easier decision-making through the 1998–2003 years when the military conflict in Iraq led to conflict among the permanent members of the Security Council. But it also had the potential to erode concepts of due process, accountability and transparency.

Another key lesson from the UNCC as an institution that functioned in the context of an ongoing international armed conflict is the impact that greater due process for Iraq had on the overall peace process in that conflict. An examination of this issue in detail is outside the purview of this thesis; suffice it to say that I have argued elsewhere that greater due process in the environmental claims contributed to improved cooperation between Iraq and its neighbours in the restoration and remediation phase of the UNCC environmental claims.¹⁸¹ Providing due process to all parties, including the vanquished state, particularly within an ongoing conflict, is essential if foundations for peace are to be laid between the warring parties.

2 Demands of Credibility

Ensuring credibility for the UNCC was an important goal for the Security Council and the governing council. To achieve this goal, the UNCC's organisational architecture was designed to insulate the commissioners from the governing council and the Security Council. In chapter 2, I discussed the safeguards adopted to ensure both impartiality and independence of the commissioners. Despite these safeguards, UNCC management, F4 team and the panel's expert consultants were able to exert influence on the commissioners. As argued in

¹⁸¹ Lalanath de Silva, 'Reflections on the United Nations Compensation Commission Experience' in Carl Bruch, Carroll Muffett and Sandra S Nichols (eds), *Governance, Natural Resources, and Post-Conflict Peacebuilding* (Earthscan, 2012 forthcoming).

chapters 2 to 4, these influences were brought to bear through webs of influence that each set of actors used to their advantage. For the most part, the panel's experts were the least accountable, being protected by secrecy from peer review of their advice. But UNCC management and the F4 team were also protected by secrecy and their advice and interactions with the panel were not open to scrutiny by the claimants or Iraq. Arguably, they can be seen as part and parcel of the decision-making apparatus of the UNCC – the panel, UNCC management, the F4 team and the panel's expert consultants together formed the decision-making unit for a range of decisions, – including quasi-judicial decisions. But, as indicated in chapter 2, only the panel was provided safeguards under the rules.

The organisational architecture as unravelled in this thesis shows that there were several issues relating to the independence and impartiality of the decision-making process that could be said to have undermined the credibility of the UNCC and its decision-making. First, safeguards to the independence and impartiality of the commissioners were inadequate to prevent unaccountable influences from UNCC management and the panel's expert consultants. As discussed in chapters 4 and 5, there were tools (such as the executive session of the panel) used by UNCC management to influence the panel. Besides, as noted above, by virtue of the lack of scientific expertise on the panel, and the secrecy practices prevalent at the UNCC, the panel's experts became the panel's predominant source of scientific and economic advice. Second, by its nature, secrecy was not conducive to inspiring credibility. The lack of openness led claimants and Iraq to question the credibility of decisions. In this context, the panel performed relatively well because there were only two complaints by claimants against its decisions under Article 41 of the Rules (see chapter 5). Thirdly, as shown in chapters 3 to 5, the UNCC's rule and claims outcomes were influenced by key actor goals – pushed by advocacy (deployed through webs of influence) for or against principles using mechanisms (as defined by Braithwaite and Drahos).

With reference to the standards of global administrative law discussed in chapter 3, the environmental claims of the UNCC, stand out as an example of how the credibility of decisions can be improved through more transparency and participatory space for stakeholders.¹⁸² But the processing of the environmental claims also reveal gaps that need to

¹⁸² Benedict Kingsbury, Nico Krisch and Richard B Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 15. See also United Nations Economic Commission for Europe, *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in*

be closed in future claims processing methods if decision-making credibility is to be improved. For example, experts' advice must be opened up to scrutiny and comment by the parties to the claims as well as the public and their peers. Records of executive sessions must be maintained and such proceedings confined to logistical and personnel issues. Claim-related discussions can take place in an open setting. These kinds of improvements will lead to increased decision credibility before the international community and the public. These points are taken up further in this chapter under the heading, 'Lessons'.

As noted in the first two chapters, the genesis of the UNCC was surrounded by legal controversy as to the competence of the Security Council to establish it. Iraq and its supporters, such as Yemen, asserted two legal positions, namely (a) that the Security Council had no legal competence under the UN Charter to establish a compensation tribunal for war reparations and (b) that the International Court of Justice had jurisdiction over claims for war reparations and that this was the right forum to deal with such claims from the Gulf War. Iraq also made the allegation that the UNCC was a political body and did not have the independence to deliver fair decisions. The Secretary General blew wind in the sails of this argument by asserting, in a report to the Security Council, that the UNCC was not a judicial body but a political body entrusted with assessing compensation.¹⁸³ This positioning was partly aimed at deflecting arguments against its own competence to create judicial bodies under the UN Charter, although it has consistently established judicial bodies to try war crimes.¹⁸⁴ Affected by this legal uncertainty, UNCC management staff were faced with two challenges. First, the UNCC's credibility would depend on delivering results early and fast. Second, appropriate methods had to be adopted to process thousands of claims to achieve the

Environmental Matters, (Aarhus, Denmark, 1998) <http://www.unece.org/env/pp/welcome.html>>; United Nations Economic Commission for Europe, *Almaty Guidelines on Promoting the Application of the Principles of the Aarhus Convention in International Forums, Decision II/4 Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, UN Doc ECE/MP.PP/2005/2/Add.5 (20 June 2005).

¹⁸³ United Nations Security Council, *Report of the Secretary-General regarding creation of a United Nations Compensation Fund and United Nations Compensation Commission as envisaged in Security Council Resolution 687 (1991)*, UN Doc S/22559 (2 May 1991) [20]. I discuss this in more detail in chapters 1 and 2.

¹⁸⁴ United Nations International Criminal Tribunal for the former Yugoslavia (ICTY), *About the ICTY* <<http://www.icty.org/sections/AbouttheICTY>>; United Nations International Criminal Tribunal for Rwanda (ICTR), *About ICTR, General Information* <<http://www.unict.org/>>; The Special Court for Sierra Leone, *About the Special Court for Sierra Leone* <<http://www.sc-sl.org/ABOUT/tabid/70/Default.aspx>>; Extraordinary Chambers in the Courts of Cambodia (ECCC), *Introduction to the ECCC* <<http://www.eccc.gov.kh/en/about-eccc/introduction>>.

first goal. ‘Rough justice’ seemed the only way forward; mass claims-processing techniques presented an attractive solution and became standard practice at the UNCC.¹⁸⁵

Processing and paying out thousands of claims of individual war victims was done relatively quickly and efficiently, to the point that the UNCC was able to claw back some of the lost credibility and legitimacy. But if rule outcomes had not evolved to more open and fair procedures in the environmental claims, the UNCC might have courted vocal criticism from the environmental movement.

3 Traditional War Reparations and Victor’s Justice

As observed in chapter 1, traditional war reparations tribunals delivered victor’s justice – justice delivered through an institution designed, established and often administered by the victorious state at the end of a war. The victorious state extracted either a lump sum payment from the defeated state to cover war reparations or established a tribunal of its choice and required it, through specific terms of reference, to determine the reparations. In that setting, no one expected impartiality and independence from the tribunal, although many relevant principles of international law were applied and expounded by such tribunals from time-to-time.¹⁸⁶ The literature cited in chapter 1 on the UNCC is divided on whether it was a species of victor’s justice or a new form of international judicial institution.¹⁸⁷ The analysis in chapters 2 to 5 shows that the UNCC was a species of victor’s justice, with promising departures that provide a basis for crafting a new international institution for war reparations in the future that is more credible, independent and satisfies modern international juridical standards and expectations.

In chapter 3, I showed how the extent of Iraq’s participatory space in the environmental claims was hinged to the changing goals of key state actors – like the US, the UK and France

¹⁸⁵ In chapter 5, I discuss how and why the panel and the F4 team did not favour mass claims-processing techniques for the environmental claims and instead adopted claim-by-claim evaluations. This issue is further discussed below.

¹⁸⁶ David J Bederman, *Historic Analogues of the UN Compensation Commission* in Richard Lillich (ed), *The United Nations Compensation Commission [Thirteenth Sokol Colloquium]*, (Transnational Publishers, 1995) 257, 284. Bederman provides several examples of such international law principles contained in precedents such as standards for attributing conduct to the agencies or instrumentalities of a state and standards of compensation for nationalised property.

¹⁸⁷ For example Frederick L Kirgis Jr, ‘Claims Settlement and the United Nations Legal Structure’ in Richard Lillich (ed), *The United Nations Compensation Commission [Thirteenth Sokol Colloquium]*, (Transnational Publishers, 1995) 103; Bederman, above n 31, 257–309. See also citations in Cymie R Payne, ‘Environmental Claims in Context: Overview of the Institution’ in Cymie R Payne and Peter H Sand (eds), *Gulf War Reparations and the UN Compensation Commission* (Oxford University Press, 2011) 8.

that had led and won the military action in the Gulf War against Iraq. In chapter 4, I demonstrated how claimants were assisted in filing and pursuing their environmental claims by UNCC rules and actions. These factors, taken alone, might be sufficient to characterise the UNCC as a species of victor's justice. But there were other features that militate against that conclusion. Panel members were drawn from experts around the world. The legal team and UNCC management were international. At least for the environmental claims, Iraq's participatory space improved significantly in the third to fifth instalments. Iraq was provided with funds to hire experts to help in its defence of the environmental claims. Considering that only 15 per cent of the claimed amounts came to be awarded, the success rate of claimants was not that high in comparison to the advantages they had through the rules. When considering the environmental claims, as set out in chapter 2, only 6.2 per cent of the claimed amounts were ultimately awarded by the panel, a significantly lower success rate in comparison to the 15 per cent average at the UNCC. Despite the lack of transparency and scrutiny, on the basis of publicly available material it is safe to conclude that, the panel's experts did not abuse or misuse their position of trust. These factors suggest that the UNCC was not the typical example of victor's justice. If it were so, one might for example expect to see much higher percentages by way of claim awards and commissioners mostly drawn from the US and the UK.

As such the UNCC, together with the improvements to due process and transparency made during the environmental claims, may be characterised as a 'transitional' institution – one which is moving the international community away from victor's justice to an institution that is more acceptable to modern standards of independence, impartiality, transparency and participation that the international community has come to expect. It is in this transitional nature of the UNCC that I see potential for lessons to be learned, and these lessons are assessed at the conclusion of this chapter.

C Actors in Action

1 Powerful Actors

Braithwaite and Drahos argued that the globalisation of business regulations took place as a result of powerful and weak actors deploying mechanisms through webs of influence to advocate or oppose principles that aligned with their goals. Applying this analytical framing to the UNCC and based on the analysis in the previous chapters, I draw conclusions below as to the achievements and failures of powerful and weak actors and their changing goals.

(a) *The US, the UK, France and Russia*

Key states were important actors in the UNCC. The US, the UK, France and Russia were powerful actors setting and changing their own goals and advocating for or against principles to achieve those goals. Other states within the Allied Coalition, such as Kuwait and Saudi Arabia, that fought against Iraq in the Gulf War were also powerful within the context of the UNCC. Their power derived mostly from military alliances they had with the US, the UK and France. They were also claimant states and benefitted from the alliance. In chapter 2, I traced how the US in particular played a major role in the design of the institutional architecture of the UNCC. In chapter 3, I traced how the changing goals of powerful state actors such as the US, the UK, France and Russia contributed to the gradual expansion of Iraq's participatory space in the environmental claims. These same powerful actors played an important role in establishing secrecy as the culture of the UNCC. They shaped the Rules of the UNCC in 1992 and also shaped the revision of the Rules in 2001.

(b) *UNCC Management*

If power is a concomitant of influence (see chapter 1), UNCC management also qualifies as a powerful actor. Indeed, it is my argument that UNCC management was the most influential actor within the UNCC. UNCC management is the only actor that had access to all three UNCC decision-making forums and the actors within them. It was also part of several webs of influence, some of which overlapped.¹⁸⁸ With this capacity, UNCC management was able to co-opt actors as appropriate to its own goals and to alter its own goals in response to those of powerful actors. However, weaker actors sometimes co-opted UNCC management to achieve their goals. For example the panel and the F4 team co-opted UNCC management to its goal of expanding Iraq's participatory space, particularly after the weakening of the US-UK-France axis and the US-led invasion of Iraq.¹⁸⁹

UNCC management staff and F4 team members also shared an individual set of goals associated with their own career advancement. These goals sometimes coincided with work-related goals. The compensation and benefits package offered to UN staff is competitive and attractive.¹⁹⁰ A significant number of UNCC staff preferred to remain employed within the

¹⁸⁸ See figure 3 in chapter 2.

¹⁸⁹ See the discussion in chapter 3.

¹⁹⁰ United Nations, *Salaries and Post Adjustment*

<http://www.un.org/depts/OHRM/salaries_allowances/salary.htm>. UN salaries are fixed on the *Noblemaire Principle* which states that the international civil service should be able to recruit staff from its member states,

UN system. As discussed in chapter 2, UNCC staff knew that employment within the UNCC was of limited duration since it had a finite mandate to process Gulf War reparations claims. As the UNCC completed various categories of claims, it shrunk in employee numbers.¹⁹¹, ¹⁹²

The incentive created by future UN employment was a strong one which, it is argued, played a role in aligning individual staff goals with work-related decisions. The expectation was legitimate but also prompted UNCC staff to promote principles that achieved those goals. In the event, a significant number of F4 team members were absorbed as staff in other UN agencies. In this thesis, I have examined several examples where personal career goals of UNCC staff aligned with claims or rule outcomes. The restoration and compensation-tracking program put in place at the conclusion of the panel's work is one such example.¹⁹³ Providing Iraq with more time for responding to claims and more participatory space in the environmental claims also aligned with longer employment at the UNCC.¹⁹⁴ To be clear, I am not suggesting that there was any impropriety in what UNCC management or F4 team did. As set out in chapter 2, my argument is that, as a sociological phenomenon, the personal goals of UNCC management and F4 team members sometimes contributed to the choice of principles they advocated or opposed and the weightings they gave those principles.

(c) Panel's Expert Consultants

The panel's expert consultants are the final category of highly influential actors in the environmental claims process. As chapters 2 and 5 showed, the consultants wielded considerable influence at every stage of the environmental claims process and significantly shaped the environmental claims outcomes. Interestingly, the consultants' influence came not because they were associated with powerful or other highly influential actors. Their influence came from the role assigned to them by the UNCC under its own rules of procedure. Additionally, as noted, the panel, F4 team and UNCC management were solely dependent on the consultants for scientific and economic advice and content for the environmental claims. But their advice was also protected from review by other experts through secrecy rules. While they formed a small epistemic community on their own, they did not have communications on related matters with other scientists and economists working on the

including the highest-paid. Over the years, the US civil service has been determined to be the highest paid and UN salaries are based on these salary scales.

¹⁹¹ See above n 20.

¹⁹² Ibid

¹⁹³ See the discussion in chapter 4.

¹⁹⁴ See the discussion in chapter 3.

UNCC environmental claims. There was a unique situation of influence thrust on them through the UNCC institutional architecture and rules. The consultants also had their own corporate and personal goals and their advice had distributive consequences on the environmental claims outcomes. Yet they were not subject to transparent scrutiny by stakeholders and to that extent lacked accountability. In chapter 5, I have attempted to unravel some of these goals, albeit in a coarse fashion, to demonstrate that the consultants acting as experts had corporate and personal goals that may have impacted distributional choices. A more robust and finessed analysis will have to wait for a time when the UNCC archives are made public.

2 Weaker Actors

(a) Claimants

Of the regional governments that made environmental claims to the UNCC, Kuwait and Saudi Arabia occupied a special place. These two claimants were the ones most affected by the Gulf War. Kuwait in particular enjoyed a special relationship with the US, the UK and France. Saudi Arabia was a close ally of the US and the UK and had strong economic ties based on oil exports. These two states belonged to a dialogic web that wielded considerable influence within the UNCC. Although I have classified claimants as a group of weaker actors, it was a collective of actors with disparate influence. Kuwait and Saudi Arabia were powerful actors while Syria and Iran were weaker actors within the claimant group.

I analysed the impact of this web in chapters 2 and 4. Rule outcomes related to limiting Iraq's participatory space at the UNCC and rules assisting claimants in the environmental claims generally favoured Kuwait and Saudi Arabia in their environmental and other UNCC claims. UNCC staff were extremely deferential to Saudi Arabian and Kuwaiti diplomats and officials.¹⁹⁵ At least one senior UNCC management staffer was subsequently employed by Kuwait (after a one year grace period of his leaving the UNCC) to help manage its post-awards environmental restoration program. Much of the relationship between the US, the UK, France, Kuwait and Saudi Arabia was of a military nature but there were also oil-related trade relationships and personal friendships between the heads of these states that provide a broader context.¹⁹⁶ No analysis of the UNCC's work would be sufficient without placing it within the context of this strong web of influence. Kuwait and Saudi Arabia's influence in the

¹⁹⁵ In the Gulf War, Saudi Arabia and Kuwait were strong partners in the US-led Allied Coalition forces.

¹⁹⁶ Bruno Tertrais, 'The Changing Nature of Military Alliances' (2004) 27(2) *The Washington Quarterly*, 135–50.

UNCC came from their association with the US, the UK and France, all of them powerful actors in the Security Council and governing council. Because of this, Kuwait and Saudi Arabia also wielded considerable influence over UNCC management, which was thus drawn into their web of influence.

The other regional claimants fell into two broad groups. The first, consisting of Turkey and Jordan, were seen favourably by the US-UK-France axis because they were military allies, and Turkey was aspiring to join the European Union. Syria and Iran were seen unfavourably by the US-UK-France axis because these countries were hostile to their interests. However, they were tolerated as claimants. One aspect of due process at the UNCC is this artefact of decision-making – that two states hostile to key state actors in the UNCC forums received benefits from the UNCC by way of compensation for claims, something that likely would not have happened had the UNCC been a clear manifestation of victor's justice.

In analysing the rule and claims outcomes, if any benefits flowed to Syria and Iran, it was merely because they were claimants and benefitted from rule outcomes that favoured Kuwait, Saudi Arabia, Jordan and Turkey, although, as set out in chapter 4 there is one instance where exceptionally, Iran received a beneficial claim outcome through the influence of UNCC management. In this case Iran received compensation for an agricultural loss claim on a standard of evidence lower than applied to other environmental claims and more in line with mass claims-processing techniques. The precise reasons for this decision will remain hidden until UNCC archives are opened to the public, but this case stands out as an exception demanding closer examination and analysis.

Chapter 4 analysed a number of rule outcomes that assisted claimants in the filing, preparation and prosecution of their environmental claims. While each of these rule outcomes, when taken separately and out of context, might be justified on the basis of expediency or effectiveness of the environmental claims processes, the details surrounding many of them show that they flew in the face of due process for Iraq and transparency. For example, the funding of monitoring and assessment (M&A) studies in the first instalment claims is justifiable on the basis that they were required to generate information needed to process the claims. However, the interactive claim evaluation method put in place by the panel, whereby its expert consultants communicated in an iterative fashion with the claimants to shape the final M&A studies in the absence of Iraq, raises significant due process and

transparency questions. Again, the tracking mechanism for compensation awarded for the M&A studies is another example of the conflict between innovations which advanced expediency and effectiveness of claim processing while at the same time falling short of due process and transparency for Iraq. The proper use and application of M&A funds by claimants was tracked and evaluated in the absence of and without Iraqi participation. A healthy exception to this is the tracking mechanism, discussed in chapter 4, that is now operative at the UNCC to track the use and application of funds for the restoration and compensation awards. This mechanism, unlike the former, has a higher degree of transparency, and included Iraqi participation.

The regional claimants were part of a web of influence and engaged in dialogue among themselves on important issues that affected them. The initiative taken by the regional claimants to propose an escrow account to handle the environmental claims is an example of what this web of influence was capable of. However, on its own, it was not very influential. The escrow account concept presented by all the regional claimants was not favoured by the governing council, but it did trigger a process by which the urgency of approving and funding M&A studies was addressed. Kuwait and Saudi Arabia, as close military allies of the US-UK-France axis, formed an inner web of influence – a web that was much less visible but nevertheless strong and active. This web of influence played an important role in ensuring the Rules of the UNCC were written in ways favourable to claimants and was also influential in obtaining priority for the M&A claims processing and payment.¹⁹⁷ Even after the 2003 US-led invasion of Iraq, this web of influence remained strong and influential, as a result of which there were no Rule revisions from the governing council or Security Council after that invasion, other than for reductions in Iraq's contribution to the UNCC fund and the lifting of sanctions against Iraq. Rule changes after the 2003 US-led invasion were made by the panel and the F4 team, not by state actors.

(b) Iraq

Iraq started out as a weak actor at the UNCC. From 1991 to 1998, Iraq was seen by the permanent five members of the Security Council as an aggressor state and as a threat to the US and Europe. This view was shared by allies of the five permanent members and also by the regional states. The international community continued to impose severe economic and other sanctions on Iraq and key actors had regime change as a political goal in Iraq. During

¹⁹⁷ These outcomes are discussed in chapter 4.

this time, the UN had an aggressive weapons inspection and dismantling program in Iraq.¹⁹⁸ As outlined in chapter 3, Iraq was provided extremely limited documentation of and participatory space in the UNCC claims during this same period.

The resulting stress and deprivation within Iraq from the sanctions and its impact on the most vulnerable including the sick, women and children gradually unravelled, with the media spotlighting the tragic circumstances and consequences coupled with Saddam Hussein's tyrannical rule.¹⁹⁹ International sympathy for the Iraqi people began to take over and soften the punitive and firm attitude that had created the UNCC and which was held in place by the Rules. By 1998, the commercial lobbies within France and Russia began to clamour to return to Iraq and re-open the once lucrative trade links.²⁰⁰ These two nations emerged from political change within their own territories with new and more confident regimes looking to re-establish their presence in the international community.²⁰¹ From 1998 onwards France (supported by Russia) began to assert a more pro-Iraqi outlook, leading to the Security Council refusing to authorise military action to enforce the no-fly zone in the predominantly Kurd-occupied north of Iraq, followed by unilateral action by the US and the UK in the form of Operation Desert Fox. As discussed in chapter 3, this signalled the beginning of the weakening US-UK-France axis which worsened and resulted in an open confrontation in 2003, when the Security Council refused to authorise the US-UK proposed resolution authorising the invasion and regime change in Iraq.

The years 1998–2003 also saw the governing council enlarging Iraq's participatory space through formal revisions to the Rules of the UNCC and rule changes by the panel. Following the 2003 US-led invasion of Iraq and regime change, the attitude to Iraq within the UNCC changed radically. After 2003, the panel and the F4 team were able to further expand Iraq's participatory space as well as transparency in claim documentation. These three stages were discussed and analysed in chapter 3. These rule outcomes and changes resonate with the proposition that the UNCC reflected some elements of victor's justice, though, as I have asserted earlier there were other elements that militated against that proposition.

¹⁹⁸ Malone, above n 19, 152 et seq.

¹⁹⁹ Von Sponeck, above n 17, 3–172. Von Sponeck gives a detailed description of the humanitarian crisis in Iraq, including the health, sanitation, food, water and energy sectors.

²⁰⁰ Lee Carol Owen, 'Between Iraq and a Hard Place: The U.N. Compensation Commission and Its Treatment of Gulf War Claims' (1998) 31 *Vanderbilt Journal of transnational Law* 499, 533.

²⁰¹ Malone, above n 19, 269–73.

The evolution of Iraq's participatory space in the environmental claims and its access to claim documentation is a significant aspect of UNCC claims processes. UNCC claims outcomes and decisions cannot be divorced from the reality of this aspect of claims processing. The fairness and accuracy of awards are closely tied to the participation of Iraq and to other aspects of the process. Subsequent comments by the commissioners serving on the panel have acknowledged that Iraq's participation in the environmental claims was an asset and assisted them in making claims decisions that were more credible and better informed.²⁰² These sentiments are equally applicable to non-environmental claims in differing degrees. They are, perhaps, least applicable to small individual claims which were made and processed in their thousands. They are most applicable to large corporate, government and individual claims in which Iraq had extremely limited access to claim documentation and participatory space. While UNCC decisions may well contain valuable and useful legal, accounting and valuation principles and techniques, to assume that these decisions somehow have the same credibility or legitimacy as decisions which are the outcome of more transparent and participatory processes, would be a grievous error.²⁰³

The evolution of Iraq's participatory space and access to environmental claims documentation was closely tied to changing key actor goals in the Security Council and governing council. The limitation of Iraq's participatory space and access to documents was the result of key actors advocating the principle of effective and expeditious justice for the victims and the principle of secrecy. These same actors took more neutral positions from 1998–2003 and after, enabling weaker actors like the F4 team and the panel to further expand Iraq's participatory space and access to documents in the environmental claims. For the most part, modelling mechanisms were employed to change the rules. Most of the rule changes were negotiated through informal processes that involved webs of influence that were analysed in chapters 2 and 3.

(c) Commissioners

As noted previously, the three commissioners were experienced and reputed lawyers steeped in environmental and maritime law. In chapter 2 I discussed the views they held with regard to transparency. All three of them were consistently supportive of more access to

²⁰² José R Allen, 'Points of Law' in Cymie R Payne and Peter H Sand (eds), *Gulf War Reparations and the UN Compensation Commission* (Oxford University Press, 2011) 141, 152.

²⁰³ For example the International Court of Justice, the Compliance Committee of the Aarhus Convention and UNCITRAL international arbitration rules all have more participatory space for parties to the claims and rules requiring parties to share documentation, evidence and pleading.

environmental claim documentation and participatory space for Iraq. They made this clear from the very first informal meeting they held in 1998. But they were also cognizant of the overall purpose of the UNCC to expeditiously and effectively compensate the victims of war. While the claims outcomes were officially attributed to decisions of the panel, UNCC management, F4 team and the panel's expert consultants played influential roles in shaping those outcomes. As I observed in chapter 5, decisions producing claims outcomes were the collective result of interactions between these actors within a bubble of secrecy. These interactions were not visible to claimants or Iraq. They were also not visible to the governing council or the public. As noted in chapter 2, these actors were part of two closely knit webs of influence, both involving UNCC management and working in tandem with one another.

I discussed in chapter 3 and 5 examples of how these webs interacted in the post-2003 period to produce rule outcomes that favoured Iraqi participation and access to documentation. One example was the decision to send claimant responses to questions (interrogatories) under Article 34 of the Rules to Iraq and another was the arrangements made for the panel's expert consultants to meet and interact with Iraq's experts. Both of these examples are from the post-2003 period and demonstrate how the panel with the F4 team was able to expand Iraq's participatory space without recourse to rule revisions by the governing council.

(d) F4 Team

The F4 team was an important but nevertheless weak actor at the UNCC. However, its weak position did not stop it from achieving rule outcomes that significantly improved transparency and participatory space for Iraq. Through the probing interrogatories that they issued, the F4 team was able to influence claims outcomes as well. The F4 team formed part of the larger legal epistemic community at the UNCC. They were provided an orientation when recruited to the UNCC and a few of them had moved over from other claims teams to the F4 team. In this sense, they brought with them the culture and policy goals of other teams and the UNCC legal epistemic community in general. The culture of secrecy and the goal of effective and expeditious compensation for the victims of the war were part of those policy goals. Additionally, they had access to and used the Index of Jurisprudence of the UNCC and through it drew on precedents to justify or oppose recommendations they felt were contrary to precedent. For the members of the F4 team who came from other UNCC teams as well as

UNCC management, these cultural norms might have become *doxa*²⁰⁴ – a subconscious part of their work at the UNCC.

However, the majority of the F4 team consisted of lawyers recruited directly to the team. The F4 team consistently pushed for greater access to documents and more participatory space for Iraq in the environmental claims. In my view, their legal training and orientation to a growing body of international and domestic environmental law contributed to these goals. There is a strong transparency and citizen engagement ethic and agenda within the environmental movement shared by professionals in the field as well as by activists and related government agency officials in many countries.²⁰⁵ Reflected in Principle 10 of the Rio Declaration (1992),²⁰⁶ procedural rights in environmental decision-making have found their way into numerous multilateral environmental agreements as well domestic law. The majority of the F4 team and the commissioners were all well aware of these principles which were in the teeth of the principles of secrecy and supported due process for Iraq.

An important question, though well beyond the purview of this thesis, is why due process and transparency were not policy goals for the larger legal epistemic community at the UNCC. Thousands of claims apart from the environmental claims had been processed and completed by lawyers working at the UNCC within restrictive rules that excluded Iraq and covered claims in a blanket of secrecy. There is little in the UNCC documentation to suggest that there were significant attempts by these legal teams to change those rules, even though due process and transparency are principles that generally form part of the legal training and ethics of lawyers. In my view, the commencement of claims processing with small individual claims was partly responsible for creating a strong institutional culture of expedition and mass-claims processing to the point where due process for Iraq and transparency were unimportant in comparison with the rough justice that individual victims of war were provided. In the early years of the UNCC, thousands of such claims were processed in large batches. Sampling techniques common to mass claims-processing were adopted and applied

²⁰⁴ Pierre Bourdieu, *Outline of a Theory of Practice* (Oxford University Press, English Translation, 1977). See also the discussion of the notion of *doxa* in chapter one.

²⁰⁵ Benjamin J Richardson and Jona Razzaque, 'Public Participation in Environmental Decision-Making' in Benjamin J Richardson and S Wood (eds), *Environmental Law for Sustainability* (Hart Publishing, 2006) 165–94. See also Aarti Gupta, 'Transparency under Scrutiny: Information Disclosure in Global Environmental Governance' (2008) 8 (2) *Global Environmental Politics* 1–7.

²⁰⁶ The Rio Declaration on Environment and Development (1992).

to non-environmental claims, setting precedent after precedent for by-passing opportunities for transparency and participation for Iraq.

These patterns of claims processing came to be concretised through training sessions and orientations given to legal officers on recruitment to the UNCC. They were strongly reinforced by UNCC management through career-related incentives and sanctions.²⁰⁷ Heavy-handed declarations of the principle of secrecy and expeditious and effective justice for the victims by powerful state actors amplified and strengthened this culture. Such declarations were contained in the Rules, and decisions adopted by the UNCC governing council. By the time the corporate claims commenced in the middle years of the UNCC, the institution was set in its ways. The commissioners on the panel dealing with environmental claims were a rare exception to this trend. Without a strong push from or co-opting panels, UNCC management or powerful state actors, it was near impossible for lawyers on UNCC claims teams to push for greater transparency and participation. As discussed in chapter 2, this was also the case in the early years of the F4 team, when two lawyers on the team were reprimanded by UNCC management for sending interrogatory responses to Iraq without prior permission from the executive secretary.²⁰⁸

The push for transparency and greater participation for Iraq first came from the environmental commissioners who from the outset manifested their desire to open up the environmental claims process. These signals were quickly picked up by the F4 team and they joined the choir. In this context, I conclude that the F4 team formed a distinct legal sub-epistemic community at the UNCC. Its policy goals differed from the larger epistemic community in that it shared transparency and due process goals with the commissioners. The F4 team shared other principles in common with the larger epistemic community within the UNCC – principles such as expeditious and effective justice for the victims. But they also brought other environmental concepts to the table – concepts such as the precautionary approach.²⁰⁹

²⁰⁷ See discussions in chapters 2 and 3.

²⁰⁸ See the discussion in chapter 3.

²⁰⁹ Council of the International Union for the Conservation of Nature and Natural Resources (IUCN), *Guidelines for applying the Precautionary Principle to Biodiversity Conservation and Natural Resource Managements* (2007) <http://cmsdata.iucn.org/downloads/ln250507_ppguidelines.pdf>. The precautionary principle or approach is explained well in this set of guidelines.

The F4 team also espoused a case-by-case approach and eschewed mass claims-processing techniques.²¹⁰ Again, this was a signal they picked up from the commissioners. It was almost as if the F4 team was waiting for a more influential actor to encourage due process and transparency. The case-by-case approach allowed more flexibility and control for the F4 team and the panel over the claims process.²¹¹ It also allowed for greater participation by Iraq. The policy goals of increasing transparency, expanding participatory space for Iraq and eschewing mass claims-processing techniques distinguishes the F4 team as a sub-epistemic community from the larger legal epistemic community of the UNCC.

In the theoretical framing by Braithwaite and Drahos,²¹² actors use mechanisms to advocate or oppose principles that accord with their goals. Mechanisms take many forms including coercion, rewards, reciprocal adjustment, non-reciprocal coordination and modelling.²¹³ Braithwaite and Drahos suggest that modelling is ‘achieved by observational learning with a symbolic content; learning based on conceptions of action portrayed in words and images’.²¹⁴ Models based on previous experiences or learning can be very persuasive mechanisms in the hands of weaker actors. The F4 team used modelling as a mechanism to advocate principles to achieve their policy goals. For example, they used a model of omnibus notifications to change a rule that had required individual notifications to claimants asking them to redact sensitive material before such material was sent to Iraq.²¹⁵ Using this model they advocated for greater transparency and due process for Iraq. Despite being weak actors at the UNCC, they captured a significant share of rule outcomes related to the environmental claims.

Another dynamic within the F4 team worth recalling in this context had to do with career goals and management goals. The expectation of future UN work or employment, legitimate as it was, acted as a strong incentive for the F4 team to promote or oppose principles to achieve that goal. In chapter 3 and 4, I discussed a number of examples where rule outcomes that precipitated extensions of employment contracts for the F4 team were supported by team members. While there were independent reasons articulated for supporting such rule outcomes, career goals provided latent and unarticulated reasons for such support.

²¹⁰ See the discussion in chapter 4.

²¹¹ The F4 team was unhappy about the panel’s expert consultants being entrusted with control over the claims process. I analyse the resulting conflict of actors in chapter 5.

²¹² Braithwaite and Drahos, above n 1.

²¹³ See chapter 1 for a description of each of these mechanisms.

²¹⁴ Braithwaite and Drahos, above n 1, 580.

²¹⁵ Discussed in detail in chapter 3.

D Webs of Influence

In producing the rule and claims outcomes discussed in chapters 3 to 5, dialogic webs dominated the UNCC. Dialogic webs that were at work in producing rule outcomes including the negotiation of the Rules, the revision of the Rules in 2001, the procedures related to consultation with Iraq's consultants, the tracking mechanisms and many more. Similarly, dialogic webs dominated the claims outcomes. An important advantage of dialogic webs is that they allowed actors to pack and unpack concepts, ideas and principles, weighting of principles and outcomes in a variety of ways even when locked in entrenched positions. There were two rare exceptions where the executive session of the panel was used to finalise the panel decision on the application of Decision 19 of the governing council concerning military expenses to the Saudi Arabian terrestrial restoration claim and as discussed in chapter 5, the decision to make an award to Iran for its agricultural claim in the fifth instalment through the use of statistical evidence. Whether coercion was present on these occasions cannot be conclusively excluded until the UNCC archives become public. Nevertheless, it is my contention that these sessions were of such a nature that all the circumstances point to persuasion that might have gone beyond mere modelling and advocacy. While coercion is a mechanism that is used by actors to achieve their goals, its use (or even a perception of its possible use) with regard to the panel either by UNCC management or by state actors in the governing council or Security Council or by claimants or Iraq raise issues about the independence and impartiality of the rule or claims outcomes affected by that coercion. It also raises questions about the adequacy of the safeguards in the Rules that aimed to protect the impartiality and independence of the commissioners.

I also noted in chapter 2 that coercive webs were never far from the UNCC during its life because of the visibility and manifestations of the US and the UK military force in Iraq. Although the military force was never directed at other members of the UN, the mere presence and use of such force against Iraq for the enforcement of sanctions and weapons inspections and ultimately regime change, made coercive webs a part of the UNCC's work.

Coercive webs are neither popular nor the most effective way of achieving actor goals.²¹⁶ As Braithwaite and Drahos have pointed out, dialogic webs have many advantages over coercive webs. Coercive webs burn political capital and endanger actor relationships. Nevertheless,

²¹⁶ Braithwaite and Drahos, above n 1, 558.

powerful actors develop and maintain coercive webs because they are used as a last resort when dialogic webs fail. Material on the Gulf War points to the existence of coercive webs used mostly by the US, the UK and France, particularly in the early years of the UNCC.²¹⁷ During this period, there was a high degree of cooperation among the five permanent members of the Security Council and the web was mostly directed at other non-cooperative state members. For example, obtaining over-flight rights, especially over predominantly Muslim states for military aircraft involved in the Gulf War was not always forthcoming.²¹⁸ Coercive webs became useful at these times. However, with the weakening of the US-UK-France alliance in the Security Council in the middle years of the UNCC, the power of coercive webs controlled by the axis also diminished. Bi-lateral coercive webs controlled by the US, the UK or France were clearly in use during the Security Council debate on UN authorisation for the second War to invade Iraq and depose Saddam Hussein. Germany sided with France but the US and the UK did use all their powers to dissuade Germany.²¹⁹ The US and the UK also used webs of coercion to recruit member states to the ‘coalition of the willing’ that eventually invaded Iraq in 2003 and deposed Saddam Hussein.²²⁰

E Forums as a Stage

The three forums of the UNCC (the Security Council, the governing council and the panel) where formal decisions on rule and claims outcomes were made, functioned as a stage on which key actors played their parts, following a script dictated by their changing goals. The only actor which participated in all three forums was UNCC management, which developed and used the art of co-opting one or the other actor or forum to its own goals or allowed itself to be co-opted when it was advantageous to itself. I analysed examples of this in chapters 3 and 4 in discussing the expansion of Iraq’s participatory space after 2003 and the development and implementation of the restoration and compensation awards tracking mechanism. In both these examples, UNCC management co-opted the governing council and successfully advocated a re-weighting of the principles of transparency and due process in favour of Iraq and an ad hoc UNCC post-award tracking mechanism for the environmental restoration and compensation claims. UNCC management also allowed itself to be co-opted by the F4 team in post-2003 efforts to expand Iraq’s participatory space and transparency.

²¹⁷ Malone, above n 19, 274–9.

²¹⁸ Ibid 63–8.

²¹⁹ Ibid 193–204

²²⁰ Ibid.

F Four Principles in Conflict

I discussed principles in chapter 1. To recapitulate, principles are abstract prescriptions that guided rule and environmental claims outcomes. Principles are less specific than rules, and can conflict. Rules are specific and are less likely to conflict. Braithwaite and Drahos postulated that the globalisation of business regulation ‘was a process in which different types of actors use various mechanisms to push for or against principles’. When principles conflict, they are ‘settled by decision-makers assigning “weights” to the relevant principles in order to reach a decision’.

As defined and outlined in chapter 1, there were four principles that were advocated or opposed at the UNCC in producing the rule outcomes and environmental claims outcomes:

- Expeditious and effective justice for victims;
- Due process for Iraq (participatory space and accountability);
- Transparency and
- Secrecy.

A fifth principle concerning Iraq’s liability for war damage featured prominently in debates in the Security Council in 1990 in the lead up to Operation Desert Storm. With the passing of Resolutions 678 and 687 Iraq’s liability for the Gulf War damage became a settled issue at the Security Council. For this reason it was not a principle that was advocated for or against in the UNCC and even Iraq came to accept this principle while protesting the UNCC as a mechanism for determining the monetary consequences of that liability. For this reason, the principle of Iraq’s liability was not part of the analysis in this thesis, as it was a principle that was not in conflict at the UNCC.

The other four principles were in conflict throughout the environmental claims process. The principle of expeditious and effective justice for the victims was generally in conflict with due process for Iraq. The principle of transparency was in conflict with the principle of secrecy. Often, the principles of transparency and due process were coupled together by advocates and the principles of expeditious and effective justice for the victims and secrecy were likewise coupled together by their opponents. This coupling may not make rational sense in that neither transparency nor due process necessarily reduces expedition or effectiveness. The coupling of principles took place mostly because due process often

involves higher degrees of transparency, while expedition often involves abridging transparency and espousing secrecy in favour of rough justice delivered through mass claims processing methods and techniques.

Chapter 3 analyses how the principles of transparency and due process gradually received higher weightings by key actors, resulting in rule outcomes that favoured greater Iraqi participation in, and more access to, documentation of the environmental claims. It is therefore possible to track the relative strengths of principles throughout the period in which environmental claims were processed at the UNCC. The relative status of principles is shown in Table 11 below.

Table 11. Status of Principles in the Environmental Claims Process²²¹

Principle	Security Council	Governing Council	Panel	Overall status
Expeditious and effective justice for the victims	Strong	Strong	Strong	Strong
Due process for Iraq	Weak but strengthening	Weak but strengthening	Strong	Weak but strengthening
Transparency	Weak but strengthening	Weak but strengthening	Strong	Weak but strengthening
Secrecy	Strong but weakening	Strong but weakening	Weak	Strong but weakening

The main champions for the principle of expeditious and effective justice for victims were the US, the UK and UNCC management. These three actors advocated this principle with high weightings throughout the life of the UNCC. Other actors such as the regional claimants led by Kuwait and Saudi Arabia advocated this principle in all the forums to which they had access. These actors used the webs of influence they were part of to advocate the principle in order to influence rule and claims outcomes. The commissioners and the F4 team were also supportive of the principle. Effective and expeditious justice for the victims translated to the provision of expeditious and effective environmental remediation and compensation.

²²¹ Braithwaite and Drahos, above n 1, 508, table 21.1. Braithwaite and Drahos produced similar tables to demonstrate the relative strength of principles.

It is worth noting that sometimes expedition resulted in sacrificing effectiveness. In the individual and small corporate claims, sampling methods typical of mass claims-processing techniques increased the speed of processing but left little time for claimants to gather evidence. The lack of evidence sometimes led to lower awards than might have been expected. For the environmental claims, expedition meant that in the fifth instalment, claimants did not have sufficient time to adjust their claims to reflect the fourth instalment awards, because these instalments were processed in parallel on account of expediency demands.²²² Arguably, the resulting fifth instalment awards might otherwise have been different.

Due process for Iraq was championed by the commissioners and the F4 team and the principle remained strong throughout the work of the panel. The importance of access to information, participation and justice was emphasised in Principle 10 of the Rio Declaration signed by 178 nations in 1992 – one year after the Gulf War. By the time the panel began processing the third instalment of environmental claims, Principle 10 was a decade old and was re-affirmed many times over at the World Summit on Sustainable Development in Johannesburg in 2002.²²³ The Johannesburg Plan of Implementation²²⁴ adopted by the UN membership was replete with references to transparency, inclusiveness and accountability in environmental decision-making. Dozens of countries had adopted the principles into domestic laws and the basic notions of transparency, participation and access to justice captured in Principle 10 had their own roots in the freedom of expression, right to political participation and right of access to justice embodied in post-World War II international human rights instruments such as the Universal Declaration of Human Rights. The Aarhus Convention based on Principle 10 of the Rio Declaration had been adopted by the member states of the UN Economic Commission for Europe in 1998 and had come into effect in 2001.²²⁵ Under the Aarhus Convention state parties (including France and other European states who were members of the UNCC governing council) were legally obliged to promote the principles of transparency, participation and access to justice in other international forums

²²² See chapter 4 for discussion of this issue.

²²³ United Nations, *Johannesburg Summit 2002* < <http://www.johannesburgsummit.org/>>.

²²⁴ United Nations, Department of Economic and Social Affairs, Division of Sustainable Development, *Johannesburg Plan of Implementation* <http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIToc.htm>.

²²⁵ United Nations Economic Commission for Europe, *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, (Aarhus, Denmark, 1998) <<http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>>.

and institutions. As set out in chapters 1 and 3 to 5, the practices of the UNCC with regard to Iraq's participatory space and transparency fell short of the Principle 10 and Aarhus Convention standards that were developing and this was a matter of some concern for the commissioners and the F4 team. Several F4 team members came to the UNCC with an environmental law background. Professor Peter Sand (a commissioner on the panel) had written about the Aarhus Convention and stressed its importance in environmental decision-making.²²⁶ The other two commissioners came from backgrounds where due process played a much bigger role than was practiced at the UNCC. These factors contributed to the commissioners and the F4 team becoming committed advocates for due process and transparency. Principles of due process and transparency had become part of the *habitus* of these actors through their training, work experience and convictions.²²⁷ Their thinking on claims processing issues were influenced on a day-to-day basis, almost sub-conscientiously by due process and transparency considerations.

In the light of this advocacy, UNCC management had no option but to do its best to co-opt the governing council and key actors within it, including the US and the UK to be supportive of due process and transparency, resulting in both the US and the UK increasing the weightings for these principles. The 2001 revision of the Rules and the subsequent expansion of Iraq's participatory space after the 2003 US-led invasion of Iraq can be characterised as victories for weaker actors at the UNCC. The more powerful actors gradually retreated because it suited their goals to do so and the weaker actors capitalised on these changing goals to improve Iraq's participatory space and access to claim documentation. The changed goals of the US and the UK also strengthened Iraq's voice and influence after 2003 which also contributed to rule outcomes that increased Iraq's participatory space and access to environmental claim documentation.

While due process for Iraq was weak, and not strengthened until later in the life of the panel, due process for the claimants was always strong. One of the reasons cited by the panel during the first instalment M&A claims for developing the interactive method, for the panel's expert

²²⁶ Peter H Sand, 'The Right to Know: Environmental Information Disclosure by Government and Industry', Institute of International Law, University of Munich (2002) <http://www.inece.org/forumspubliaccess_sand.pdf>. For a more recent article by the same author see Peter H Sand, 'The Right to Know: Freedom of Environmental Information in Comparative and International Law' (2011) 20 *Tulane Journal of International and Comparative Law* 203.

²²⁷ See the discussion of *habitus* and *doxa* in chapter 1.

consultants to consult with claimants, was due process.²²⁸ However, that same reason did not manifest itself at an earlier stage in favour of Iraq, resulting in the panel's expert consultants not consulting with Iraq until later on during the fourth instalment of claims.²²⁹ In my view, the use of due process in favour of claimants at a much earlier stage is because actors such as UNCC management were giving the principle of effective justice for the victims a high weighting. Doing so furthered their goal of supporting the claimants to obtain compensation for alleged environmental damage from the Gulf War. This principle sometimes also translated in favour of due process improvements for claimants which, as in this case, was provided to Iraq at a much later stage when the principle of due process for Iraq received higher weighting by UNCC management as well as key state actors.

Transparency and secrecy were opposing principles and, for the reasons set out in chapter 1, the thesis treats them as separate but related principles. The increased emphasis on transparency led to reduced secrecy and vice versa. Transparency within the environmental claims process was championed by the commissioners of the panel and the F4 team. UNCC management did not openly favour greater transparency for Iraq until the 2003 US-led invasion of Iraq. In chapter 3, I analysed how Iraq's access to claim documentation gradually improved from 1999 onwards first as a result of panel actions, then subsequently as a result of Rule revisions by the governing council and finally as a result of the F4 team and panel actions with UNCC management support. Although access to documentation for Iraq improved in this way, general transparency of the UNCC to the public or even to other member states of the UN never materialised. The UNCC archives continue to be inaccessible to the public, and some documents are scheduled for destruction within a few years.

Despite a culture of secrecy, from 1994 to 2005 UNCC management used the word 'transparency' in the context of describing the goals of developing tracking mechanisms for award payments, environmental M&A awards and environmental restoration and compensation awards. As discussed in chapter 4, awards made by the UNCC for individual payments were tracked and reported to the governing council.²³⁰ Awardees were required to report on the use and destination of award funds to the UNCC and these were then tallied by

²²⁸ See the discussion in chapter 4.

²²⁹ See the discussion in chapter 3. There appears to have been informal telephone conversations between the UNCC and Iraq's legal counsel on claims issued during the third instalment.

²³⁰ United Nations Compensation Commission, *Decision 18, Governing Council*, 41st mtg, UN Doc S/AC.26/Dec.18 (24 March 1994). The term 'transparency' first appears in UNCC documentation in this decision.

the secretariat and reported to the governing council. Similar tracking mechanisms developed for tracking the M&A,²³¹ restoration and compensation awards²³² were described by UNCC management as seeking to achieve transparency. From 1994 to 2005, the procedures achieved accountability of claimants to the UNCC for award funds, but they did not provide transparency of funds to the public, UN members, or for that matter, Iraq. Only in the 2005 restoration and compensation award tracking is there some transparency of funds for Iraq. In this sense, the term ‘transparency’ was applied by UNCC management to capture the idea of the accountability of governments to the UNCC for award funds to be distributed to awardees, rather than access to that information. But the use of that term also appears to have created the impression that somehow tracking provided access to information to all stakeholders. In this latter sense, it was a misuse of the term.

The development of vocabulary including terms such as ‘transparency’ had a legitimising effect on UNCC decisions, particularly for governing council members and parties to claims.²³³ Discussions leading to UNCC decisions that had distributive consequences were often couched in terms of procedural or legal issues. The 1992 decision to adopt Article 16 of the Rules, which was the main space created for Iraqi participation in the claims evaluation process, was not made on the basis that a restricted participatory space for Iraq might result in larger or unjustified awards against it. Rather, the discussion centred on Iraq’s proper role in the claims evaluation process and the extent to which it was entitled to due process as the aggressor state. The Rule revisions by the panel to dispense with redaction notices and the decision to send all material to Iraq, including claimant responses to interrogatories under Article 34 of the Rules, was justified on the basis of reducing the administrative burdens of the secretariat. The decision was also supported by resorting to an omnibus redaction notice covering all future materials sent in by claimants as being sufficient to put claimants on notice. Again, the distributive consequences of the rule change in favour of Iraq were not discussed at all. Vocabulary that evolved around the UNCC’s decision-making often masked

²³¹ United Nations Compensation Commission, *Decision 132, Governing Council*, 109th mtg, UN Doc S/AC.26/Dec.132 (21 June 2001).

²³² United Nations Compensation Commission, *Decision 258, Governing Council*, 150th mtg, UN Doc S/AC.26/Dec. 258 (8 December 2005).

²³³ See chapter 4. See also United Nations Compensation Commission, *Decision 18, Governing Council*, above n 75. The decision is entitled ‘Distribution of Payments and Transparency’. Here, the word ‘transparency’ is used in the title of the decision, but the content of the decision does not cover any aspect of openness or access to information. Rather it deals with the accountability of governments for distributing payments to awardees.

distributive consequences and couched them in terms of procedural decisions rationalised on another basis.

As discussed in chapter 3, this phenomenon might also be classified as a mediating and depersonalising function. Principles and vocabulary functioned to mediate opposing distributive results that actors were seeking to achieve. Through the weighting and re-weighting of principles, actors were able to reach compromises that achieved parts of their goals, while also allowing another actor's goals to be achieved. The 2001 Rule revision is an example in point. It is unlikely that the US or the UK wanted to change the Rules midstream to accommodate the environmental claims. However France and Russia's hostility coupled with UNCC management's message that the panel was keen to broaden Iraq's participatory space pushed the US and the UK to compromise and agree to broaden Iraq's participatory space. By changing the weighting of the principle of due process they were able to preserve the Rules intact for all claims other than the environmental claims. The mediatory and depersonalising function of principles and vocabulary sometimes resulted in focussing contestation around procedure including notions of fairness but also served to mask the political goals of state actors.

The 2001 Rule revisions were justified on the basis that the environmental claims were complex in nature and unprecedented in the annals of international law. While they were unprecedented in the sense that no UN-mandated tribunal had entertained or processed such claims, there was plenty of precedent on environmental claims at the domestic and international levels from non-UN forums. Additionally, as pointed out earlier in this thesis, the environmental claims were no more complex than some of the other large corporate or governmental claims handled by UNCC panels. Yet, the notion of complexity and novelty couched in appropriate language mediated and legitimised the improvements in due process and financial assistance for Iraq in the environmental claims. These two functions were important because they allowed actors to change earlier held positions without significant loss of face. For example the 2001 Rule revision had significant distributive consequences in favour of Iraq. But the US and the UK were able to agree to them, even as US government machinery was building the case for regime change and invasion of Iraq.

G Modelling as a Dominant Mechanism

Except for a few instances when the panel made decisions in executive session and a handful of cases when the governing council and Security Council made decisions that might be attributed to the use of other mechanisms such as non-reciprocal coordination, modelling was the predominant mechanism used by actors at the UNCC to pursue their goals. Modelling as a mechanism therefore assumes significance in the context of the UNCC. Braithwaite and Drahos's research framework suggests that actors use mechanisms to advocate or oppose principles that promote their goals.²³⁴ For example, the F4 team used modelling to promote more due process and transparency for Iraq.²³⁵ UNCC management used modelling to co-opt the UNCC governing council when it proposed tracking mechanisms for M&A awards as well as restoration and compensatory award tracking.²³⁶ Understanding modelling as a mechanism is therefore essential to this thesis. Modelling as a mechanism was explained in chapter 1. Modelling is realised by learning based on observation. It has a symbolic content and is based on conceptions of action portrayed in words and images. Models based on previous experiences or learning can be very persuasive mechanisms in the hands of weaker actors.

Modelling was used by actors to produce rule and environmental claims outcomes. For example, in the governing council and the Security Council, the US used lessons from the Iran-US Claims Tribunal to advocate that the UNCC structure and procedures (rules) should be different. Here we have an example of reactive modelling. Generally, modelling is proactive, where actors use a model to advocate replication. Reactive modelling (or model modernising) does the opposite; this is a process where actors use a model to showcase what actors see as pitfalls and mistakes and advocacy centres on developing a new model free of those errors. Several features of the Iran-US Claims Tribunal model were advocated against by the US and UNCC management in the UNCC. Firstly, that individual (not corporate) claimants need to have their claims determined first and speedily because they have fewer resources to recover from the war losses and are therefore more vulnerable. Secondly, that adopting process rules that allow the defendant full access to documentation and argumentation will likely delay claims outcomes. Third, that mass claims-processing

²³⁴ Braithwaite and Drahos, above n 1.

²³⁵ See the discussion in chapter 3.

²³⁶ See the discussions in chapters 3, 4 and 5.

techniques (as opposed to case by case evaluation) would need to be adopted for the UNCC to deal with the thousands of claims it received.

Another example of modelling in the governing council is the proposal made to the governing council by regional claimant governments led by Kuwait and Saudi Arabia for an escrow account for the environmental claims.²³⁷ The claimants used the model of an escrow account from the Exxon Valdes oil spill in Alaska. This was an example of proactive modelling – or ‘model mongering’, in terms of Braithwaite and Drahos’s classification of models.²³⁸ The governing council however was not inclined to adopt the US model and instead opted for segmentation and partial postponement of decisions on priority of processing and payment of awards on the M&A claims. Below, I discuss the procedural manoeuvres of decision postponement and segmentation.

Examples of the use of modelling before the panel by UNCC management and the F4 team included omnibus redaction notices to claimants enabling all material to be sent to Iraq (by the F4 team) and pre-determined criteria for environmental restoration and compensation claim processing using mass claims-techniques (used by UNCC management). In many of these instances where modelling was used, there was no dispute among the actors about the principles applicable or sometimes even their relative weightings. The conflict of actors was about competing models that each actor advocated as the best choice for implementing the agreed principles and weightings. For example, the conflict over the escrow account proposal from claimants, discussed in chapter 4, was one of competing models. Actors were agreed that the M&A claims needed to have priority of processing and payment, in keeping with the then dominant principle of effective and expeditious justice for the victims. The dispute was over how best to implement the principle for prioritising processing and payment for the M&A claims. The dispute was not about the principles or their weighting, but rather about the rules (model) developed to embody and implement them.

Coercion and reward were not mechanisms that are prominent or popular with actors at the UNCC. Although, as I noted in chapter 2, the possibility of coercion by the US was always in the background given the US-Iraq conflict, my investigations did not reveal examples of the US or other key actors using coercion or reward to achieve goals at the UNCC. It may well

²³⁷ See discussion in chapter 4.

²³⁸ Braithwaite and Drahos, above n 1, 588.

be that such mechanisms were being used in the Security Council on Gulf War-related issues such as weapons inspections, sanctions on Iraq and the Oil for Food Programme. But there is no evidence of their use with regard to the UNCC. Until UNCC archives are open to the public, the tentative answer seems to be that coercion and rewards were not used at the UNCC by state actors.

On the other hand, there are presumptive examples of the use of coercion and rewards as a mechanisms by UNCC management to achieve its goals before the panel and within the UNCC. UNCC management was a relatively weaker actor within the Security Council and the governing council. In these two forums, states such as the US, the UK, France and Russia dominated UNCC-related conversations. In front of the panel, UNCC management was the most powerful actor. The interposed executive session of the panel was the procedure it used when contentious issues with political implications were involved. By using the executive session, UNCC management was able to influence changes of some decisions and opinions held by the panel. My tentative conclusion, in the absence of greater access to the UNCC archives, is that there was persuasive coercion used by UNCC management in these sessions. The basis of my conclusion is set out in chapter 5. Coercion before the panel came in more subtle forms than one might expect. A vague statement from a senior UNCC management staffer that a particular action proposed by the panel ‘may not resonate well with the governing council’ or that there would be ‘questions’ asked at the governing council had an impact in proceedings before the panel.²³⁹ Asserting that a proposed action was contrary to ‘established UNCC practice’ was a way of invoking vague references to precedent as authority.²⁴⁰ Interactions of this nature invoked fear of displeasure by higher forums, and UNCC management indulged in it from time-to-time.

Within the UNCC, UNCC management had at its command the power to hire and fire employees, including legal officers and team leaders. It also had power to discipline them and impose rules of its own making. There were also other more subtle forms of coercive action, ranging from assigning an employee unpopular claims to moving an employee’s office from more comfortable and agreeable facilities to less attractive ones. In chapter 3, I cited several examples of the use of coercion by UNCC management on the F4 team to achieve its goals. For example, the strict rules about limited access to documentation for Iraq was enforced by

²³⁹ Such statements flagged potential challenges in the governing council to evolving panel views or decisions.

²⁴⁰ In chapter 3, I discuss an example of such a case where the F4 team had sent documentation to Iraq.

UNCC management by disciplinary measures against F4 team members.²⁴¹ Another example was when an Iranian cultural heritage claim was removed from one legal officer who held the view that it was maintainable and it was allotted to another legal officer who took the view that it was not.²⁴² Splitting leadership between two F4 team leaders was another example of coercion and reward used by UNCC management.²⁴³

Of course, the kind of coercion used as part of employment relations is not unique to the UNCC. Employment-related coercion and rewards are a common feature of employment relations with public and private institutions. They are generally used by employers to improve the performance of employees. In the case of the UNCC, employment-related coercion and rewards were used by UNCC management as a mechanism to achieve its goals related to rule and claims outcomes as well as the implementation of rule outcomes. To this extent, UNCC management's use of coercion and rewards went further than general employment practice. UNCC management's ability to use coercion and rewards as a mechanism was fortified by secrecy. Because these actions were not transparent, they were not open to scrutiny either by the governing council, the Security Council, Iraq, the claimants or the public. The possibility of other UNCC actors or the public holding UNCC management accountable for the use of employment-related coercion and rewards was therefore significantly reduced because of secrecy, simply because those actors did not have access to information about these actions.

H Political Conflict on Procedural Terrain

In chapter 3, I discussed the difficulty of identifying actor goals when analysing rule outcomes. Having analysed rule changes that occurred over a period of 15 years, I concluded in chapter 3 that rule changes concerning Iraq's participatory space could be reliably mapped to changing actor goals and relations in the Security Council and governing council. Major rule outcomes were produced by state actors with the active participation of UNCC management.

Environmental claims outcomes were produced by a separate set of actors – the panel, F4 team, the panel's expert consultants, claimants, Iraq and UNCC management. Other than for

²⁴¹ See the discussion in chapter 3.

²⁴² Personal communication from ex-F4 Legal Officer.

²⁴³ See discussion in chapter 2.

UNCC management, the rule makers were not necessarily the same as the claim processors. In this situation, rule makers mould the rules in ways that have the best chance of producing the claims outcomes that accord with their goals. In this sense, key actor goals get embedded in rule outcomes. Actor conflicts over opposing goals are sometimes displaced on to procedural terrain. In the governing council actor goals were less explicit than they were in the Security Council. Discussions about rules were couched in language that masked actor goals and justified actor proposals by reference to principles. In this sense, principles also had the effect of de-personalising debate and legitimising actor positions.

It is my contention that key actors at the UNCC embedded their policy goals in rule outcomes using mechanisms such as modelling, rewards or coercion and advocating particular principles such as transparency or expeditious and effective justice for the victims. At the UNCC, procedural rules often reflected the policy goals of those who wrote them. When UNCC actors were unable to resolve substantive issues because of controversy, one option open to them was to suggest that the substantive issue be decided later or elsewhere subject to an agreed procedure. For example, if there was disagreement on whether and how to apportion liability between A, B and C, the dispute was sometimes moved to procedural terrain by suggesting that the decision be made elsewhere subject to a set of procedures that the actors would put in place. The actors would then negotiate the rules of procedure and criteria that the decision-makers should use, rather than making the substantive decision themselves. Because the actor's policy goals were embedded in the procedural rules they created, in effect they were weighting the outcomes to emerge from that process in favour of their goals. In doing so, they would write the procedures in ways that provided the best chance for their policy goal to emerge from the ultimate decision-making. There is a tendency to assume that judicial or quasi-judicial procedures are somehow neutral or indifferent to the outcomes they produce. In this sense, procedures at the UNCC were not neutral but were stamped with the policy goals and preferences of key actors, reflecting the compromises they arrived at through weighting of principles.

For example, key state actors agreed to separate rules pertaining to the A, B and C claim categories, relating to individual claims, from D, E and F corporate and government claims. By doing so, they gained more time to discuss the rules relating to corporate and government claims and later arrived at a compromise limiting Iraq's participatory space in the processing

of those claims.²⁴⁴ By limiting Iraq's participatory space, key actors ensured that claimants stood the best chance of obtaining an award of compensation for war losses. For individual and small corporate claims, Iraq's participatory space was extremely limited and the burden of proof on claimants was minimised, ensuring easy awards for claimants. After the 2003 US-led invasion of Iraq, when state actor goals were aligned to support Iraqi revival, Iraq's participatory space was enlarged and provided with greater access to environmental claims documentation, largely as a result of the panel and F4 team's advocacy. By enlarging Iraq's participatory space in the environmental claims, the chances of claimants recovering against Iraq were significantly reduced. Absent access to the UNCC archives, material in the public domain does not suggest that this result was expected or predicted by UNCC management or key state actors of the governing council.

Another example of displaced political conflict is the provision of financial assistance to Iraq for the defence of the environmental claims. The 2001 Rule revisions took place at a time when France and Russia were advocating increased trade relations with Iraq and the US-UK-France axis was weakening. The Rule revisions included expanded participatory space for Iraq as well as more access to claim documentation. However, because of the US-UK opposition, financial assistance to Iraq was initially referred to the Security Council and punted back to the governing council and put off for decision at a later time. Six months later, financial assistance was provided with a ceiling on spending and included UNCC supervision of experts hired by Iraq. The conflict of the political goals of key actors manifested itself through compromises, forum shifting and postponements of the Rule revisions. Providing financial assistance to Iraq was confined to the environmental claims only and conditioned by a spending ceiling and UNCC supervision. The US-UK opposition and France and Russia's advocacy in favour of Iraq was displaced to and reflected in procedural manoeuvres and rule outcomes.

The displacement of political conflict to procedural terrain is not confined to the UNCC and has been identified as a widespread phenomenon in international environmental law.²⁴⁵ State actors would often displace conflict over substantive environmental values to procedural

²⁴⁴ See chapter 3 for a discussion of the evolution of Article 16 of the Rules.

²⁴⁵ Martti Koskenniemi, 'Peaceful Settlement of Environmental Disputes' (1991) 60 *Nordic Journal of International Law* 73.

terrain providing for the conflict to be resolved in another forum.²⁴⁶ The analysis of the UNCC in this thesis suggests that institutions created by actors to respond to ongoing conflicts are more likely than not to be embedded with procedural rules that reflect changing actor goals in relation to that conflict. This is a fact that war reparations institutions and mechanisms will have to live with until and unless a permanent reparations mechanism and institution is established by the international community.

Other aspects of procedural manipulation as an aid to dealing with political conflict are also evident. Time, scale and forum shifting and segmentation were procedural manoeuvres used in the three forums of the UNCC to help resolve political conflict. Time shifting takes place in the form of advancements or postponements of decisions as was the case with the proposals to provide Iraq with financial assistance to defend the environmental claims and provide priority payment for the M&A awards. Scale shifting occurs when a decision on one issue is made part of a decision about a larger issue as was the case with the proposal to provide priority processing and payment for the M&A claims. The governing council subsumed that proposal in a decision about the second tranche of payments from the fund allowing it to consider M&A awards in the context of the availability of funds for award payment in multiple claim categories. Forum shifting takes place when one forum or a group of actors punts the decision to another forum as was the case with the proposal to frame the Rules of the UNCC (Security Council punting to governing council) and provide Iraq with financial assistance for the environmental claims (governing council punting to Security Council). Segmentation occurs when the subject matter of the decision is fragmented into smaller parts and dealt with separately. For example, in the face of political contestation, the governing council segmented the rules dealing with individual claims from those dealing with corporate and government claims and decided on them separately. These procedural manoeuvres can sometimes help resolve political conflict. I have not treated them as mechanisms because they are not used by actors to win or defeat a proposal (as was the case with a mechanism such as modelling or coercion) but rather to manage controversy within a decision-making process.

I Lessons

Throughout the thesis I have highlighted lessons that can be useful for the future – a future in which conflict-related environmental damage becomes the subject of reparations. As I

²⁴⁶ Ibid.

observed earlier in this chapter, war reparations tribunals are likely to be one or the other species of victor's justice until and unless the international community establishes a permanent commission, court or tribunal with jurisdiction to entertain and decide war reparations claims. The credibility and effectiveness of such an institution will depend on a number of factors, including the impartiality of its judges, the transparency and fairness of the procedures and the availability of compliance mechanisms. The establishment of the International Criminal Court (ICC) has set a precedent for such an institution. The ICC was preceded by a number of ad hoc tribunals established after specific conflicts to try crimes against humanity.²⁴⁷ In my view, with the experience gained from the UNCC, the establishment of a permanent war reparations tribunal or commission is a possibility in the future. Were such a tribunal or commission to be introduced, there are valuable lessons that can be learned from the UNCC experience with the environmental claims. In these last pages, I bring these lessons together under seven headings. These are (1) M&A studies, awards and tracking, (2) due process, (3) adequate processing time, (4) the role of experts, (5) the role of precedent, (6) decision-making forums and (7) transparency and accountability. Each lesson is aligned with one or more of the principles that were in play within the UNCC, namely the principles of due process, expeditious and effective justice for the victims, secrecy and transparency.

1 M&A Studies, Awards and Tracking

Collecting and storing baseline scientific information about ecosystems and human health is critical before a conflict. Consistent with the principle of effective and expeditious justice for the victims of conflict, collecting and analysing scientific and economic information about ecosystems suspected to be damaged and adverse human health impacts soon after a conflict is also vital for prevention of further damage, remediation and compensation. In hindsight, the environmental claims at the UNCC benefitted tremendously from the data and information generated through the M&A studies funded by the first instalment awards. Even so, the M&A studies were undertaken a decade after the conflict and some evidence was either lost or adversely impacted by the delay. Irrespective of how they are funded, post-conflict M&A studies need to be done as soon as possible after the conflict.²⁴⁸ With modern

²⁴⁷ Examples of such tribunals are the International Criminal Tribunal for Rwanda, International Criminal Tribunal for the former Yugoslavia and Extraordinary Chambers in the Courts of Cambodia. Some of these courts were established by the Security Council while others like the Cambodian court are national tribunals established under agreements with the UN. See above n 29.

²⁴⁸ Part of the mandate of UNEP's post-conflict and disaster management branch is to 'understand and reduce the impacts of environmental degradation from disasters and conflicts on human health, livelihoods and

satellite technologies, it is now possible to track changes to vegetation and landscapes as well as buildings on a day-to-day basis.²⁴⁹ As such, M&A data and information can be gathered on the environmental impacts of a conflict in real time, in much the same way as human injury and death are recorded by news journalists and others in modern-day conflicts.

M&A studies were also helpful in determining appropriate preventive and restorative methods.²⁵⁰ Such studies can also be very useful in determining the location and suitability of alternative sites for compensatory projects to replace lost ecosystem services and values. Despite the availability of new technologies, there will always be a need to (a) ground-truth data and (b) focus and target M&A studies where the results are to be used for assessment of environmental damage, restoration and compensation.

How M&A studies should be funded before, during and after a conflict is a more difficult issue to settle. Often, funding mechanisms will depend on the parties to the conflict as well as on war reparations regimes that are established. The lesson to take away is that, ideally, there should be a ready-made funding mechanism to monitor environmental and human health impacts from ongoing conflicts wherever they may occur in the world. If the goal of the international community is to ensure effective and expeditious justice for the victims of conflict, establishing a permanent funding mechanism for and institutional capacity and procedures for M&A studies related to environmental damage, is an essential intervention to make.

2 Due Process

The principle of due process advocated by the panel, the F4 team and some UN staff members is fundamental for ensuring the quality of decision-making in a war reparations tribunal and is also helpful in creating the enabling conditions for reconciliation and peace between the parties to the conflict. Due process consists of procedural rules and safeguards that are directed towards ensuring a fair hearing to all parties on claims. The UNCC's

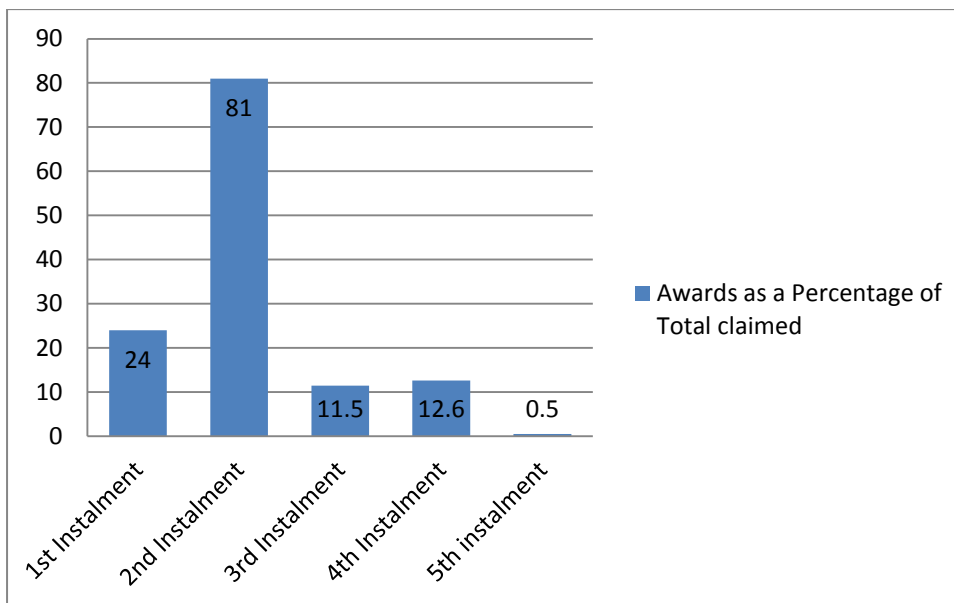
security'. See United Nations Environment Program, *Disasters and Conflicts* <<http://www.unep.org/disastersandconflicts/Introduction/tabid/51921/Default.aspx>>.

²⁴⁹ See for example D W Witmer and John O'Loughlin, 'Satellite Data Methods and Application in the Evaluation of War Outcomes: Abandoned Agricultural Land in Bosnia-Herzegovina after the 1992–1995 Conflict', (2009) 99 *Annals of the Association of American Geographers* 5. With available technology it is now possible to map conflicts as they happen, supported by crowd-sourcing technologies where citizens on the ground can upload information, pictures and video footage in real time as the damage happens. For example see Conflict Map <<http://www.conflictmap.org/map>>.

²⁵⁰ See above n 20.

procedural rules were skewed against Iraq and in favour of the claimants. Over time, Iraq’s participatory space and access to the environmental claim documentation was improved. However, in other respects, the rules continued to be skewed against Iraq. For example, Iraq could not generate interrogatories or comment on UNCC interrogatories to claimants. Iraq was not allowed access to the sites where damage was alleged and its scientists thus could not observe or examine those sites. As pointed out in chapter 3, greater participatory space for Iraq resulted in legal and factual challenges being mounted to several environmental claims. The extent to which more active Iraqi participation resulted in the reduction of awards or rejection of claims is debatable. As shown in figure 6 below, it is the fact that claim success rates significantly reduced for the third, fourth and fifth instalments in comparison to the first and second.²⁵¹ There was limited Iraqi participation in the first and second instalments. This changed dramatically, as shown in chapter 3, for the third to fifth instalments.

Figure 6. UNCC Environmental Awards as a Percentage of Amounts Claimed



²⁵¹ Awards as a percentage of the total claimed for each instalment is as follows: first instalment 24 per cent; second instalment 81 per cent, third instalment 11.5 per cent, fourth instalment 12.6 per cent and fifth instalment 0.5 per cent. These percentages are based on the claim and award summary data provided at the end of each panel report for each instalment. But these percentages might also reflect the relative ability of claimants to discharge their burden of proof for each type of claim. For example the expenditure claims in the second instalment needed proof of expenses for funds already expended whereas third to fifth instalment claims required proof of environmental damage and causal relations between the damage and the Gulf War.

Providing due process to all parties, including the aggressor state (vanquished state) is essential if foundations for peace are to be laid between the warring parties.²⁵² For example, the restoration and compensation claim award tracking mechanisms involved Iraq more closely than before. This led to unprecedented cooperation between Iraq and other claimant states. Greater participation for Iraq in the environmental claims and the restoration and compensation award tracking mechanisms was one of many factors that contributed to this collaboration.

Due process and transparency engenders a sense of fair play in the parties even when the resultant decision is against that party. This sense of fair play is fundamental to the establishment and nourishment of peace and normalcy following an international armed conflict. A war reparations tribunal which is part of the process of reconciliation and peace building will make a greater contribution to that process if its procedures are also transparent, accountable and respects due process. Such a tribunal is more likely to help build peace and create the space for cooperation and collaboration among former belligerent states.

3 Adequate Processing Time

Adequate processing time for environmental claims occupies a space in common with the principles of due process as well as effective and expeditious justice for the victims of war. Ideally, claimants should be able to use M&A data to formulate and eventually support their substantive claims. M&A data would then inform both the legal and factual basis of claims as well as the assessment of causation and quantification of damage. Such a scheme would require the filing and processing of M&A claims very early in the proceedings. The subsequent amendment (updating) and processing of substantive claims would have to wait for a reasonable period to enable claimants to generate sufficient M&A data to inform the amendment or filing of such claims. In turn, that would allow defending parties to evaluate all the data available in developing a defence.

Adequate time must be provided for M&A studies to be concluded for this material to be used for revising claims and for the defendant to have enough time to evaluate the evidence

²⁵² de Silva, above n 26. See also Howard Holtzmann and Edda Kristjansdottir (eds), *International Mass Claims Processes: Legal and Practical Perspectives* (Oxford University Press, 2007) 263-77. In discussing due process in several international mass claims processing institutions, the authors conclude that due process is a fundamental requirement incorporated in all of their procedures but also note various abridgements of due process from institution to institution.

and respond to claims.²⁵³ Of course, such a procedure creates its own institutional and practical challenges. For example, would staff be retrenched during the time claimants are doing M&A studies and would they be re-employed afterwards? If not, how would they be gainfully employed during that interim period?

One solution to that problem would be to establish an international institution with a mandate to process war reparations claims with a small institutional staff and the ability to recruit temporary staff when claim volumes expand. One can assume that a permanent institution would have several claims arising from multiple international conflicts to process and as such provide adequate gainful employment for staff throughout its life. For example while M&A awards are being employed to conduct environmental studies, it would be possible to employ legal and scientific staff to process other claims arising from a different conflict. Such staff can also be employed to process environmental claims from a different conflict that might have reached post-M&A stages. The bottom-line is that in order to entertain and process substantive environmental claims, future war reparations tribunals must provide adequate time for claimants to conduct M&A studies and generate the required data and information to enable a sound decision to be made on the claims. Where restoration and compensation awards are involved, adequate time is also required between the announcement of awards for restoration and the processing of awards for compensation to allow claimants to revise their compensation claims based on the restoration awards.

4 Role of Experts

The principle of transparency plays a major role in ensuring greater accountability of decision-makers and especially those who advise decision-makers. Experts in science, resource economics, valuation and law are essential to evaluating environmental damage, identifying causation, deciding on restoration and quantifying compensation. The UNCC experience shows that the inter-disciplinary interaction of these experts was critical to the formulation, assessment and determination of the environmental claims. Future international institutions mandated to entertain, evaluate and compensate environmental damage claims arising from conflict are likely to need experts to service claimants, defendants and the deciding institution. The question that the UNCC experience raises is how and to what extent these experts should be held accountable. While experts bring rationality to claims outcomes and provide credibility to the claims processes, what is not so apparent is their unique ability

²⁵³ See the discussion in chapter 4.

to mask distributive justice with professional vocabulary that rationalises decision-making through science, economics and law.²⁵⁴

The analysis in chapter 5 demonstrated that experts do make distributive choices and that they bring methodological and conceptual biases to the table. Accountability must therefore include mechanisms that will make these biases transparent to the parties to the dispute, the deciding institution and possibly the public. If acted upon, expert advice on a claim may result in winners and losers. As such, fairness demands that parties to the claim should be allowed to scrutinise and challenge such advice.

For example in chapter 5 I discuss how expert biases led to emphasis being placed by the panel's expert consultants on a particular remediation method as opposed to another. This emphasis translated to a similar emphasis on that remediation method in UNCC interrogatories issued to claimants or expert recommendations which favoured that method. The choice of remediation method is something over which experts can differ. But the inability of parties and the decision-maker to examine the methods with the help of all experts available in a transparent and participatory manner runs the risk of biases going unchecked or distributive choices by experts influencing the decision-maker without full awareness on the part of the decision-maker about the reasons for the distributive choice.

Kennedy suggests three approaches for unravelling the decisions that experts make. These are:

- 1) assessing, however crudely, the consequences of the expert's actions – who wins and who loses? By identifying the stakes of an expert's action, we can understand its politics;
- 2) focusing on the underlying shared assumptions – the blind spots and biases which skew the choices, or place some alternatives altogether out of the discussion and
- 3) looking at the experience of the expert rather than the theory or ideology espoused and seeing the expert as a free person able to exercise discretion – discretion experienced as responsible choices.²⁵⁵

One mechanism that achieves these goals is to make the expert's inputs and advice transparent, at all stages, to the parties to the claim and the decision-makers and perhaps even

²⁵⁴ See discussion in chapter 5.

²⁵⁵ David Kennedy, 'Challenging Expert Rule: The Politics of Global Governance' (2005) 27(1) *Sydney Law Review*, 1, 17–24.

the public. Transparency will allow the expert's peers to review the input and advice and challenge biases or distributive choices. For example, before interrogatories are sent by the institution to the claimant, they could be reviewed by the respondent, or the parties can be afforded an independent opportunity to send interrogatories to each other. Opinions given by experts can be made available to the parties and the parties afforded an opportunity to cross-examine the expert or at the very least to submit counter opinions that challenge the expert's advice or views. The only exception to transparency might be in the drafting of the final decision where the decision-maker might require confidential advice from an expert on language for the decision. Generally, in the fields of science, law and economics, peer review and challenge is not new and many experts would prefer, for their own reputations, to be transparent with their views. In subsequent literature, even the panel's expert consultants themselves have called for more transparency from the UNCC.²⁵⁶

All of these suggestions pertain to experts serving the decision-maker. But experts also serve the parties to the dispute. These experts help parties to identify and define issues and interests and gather the needed evidence to support their positions. Transparency also helps minimise the biases and distributive choices made by these experts, even though their opinions are presumed to be supportive of the party employing them. The main lesson for a future war reparations institution processing environmental claims is that the views and opinions of experts (whether in science, law or economics) that have a bearing on claims outcomes need to be tested in the crucible of peer review and transparency.

5 Role of Precedent

Legal precedent played three important roles at the UNCC. As stated in chapter 2, many senior legal officers at the UNCC came from countries with common law systems and had been trained in legal educational institutions from those countries. The creation of the Index of Jurisprudence (IoJ) early in the life of the UNCC facilitated the use of precedent. Most lawyers would be unfamiliar with mass claims-processing techniques which were advocated by UNCC management, as they are not part of their regular training. Precedents therefore played the role of mainstreaming mass claims-processing techniques into the way legal officers went about processing non-environmental claims. The IoJ served as a reference tool for lawyers when faced with mass claims-processing issues that they were unfamiliar with.

²⁵⁶ M T Huguenin, M C Donlan, A E Van Geel and R W Paterson, 'Assessment and Valuation of Damage to the Environment' in Cymie R Payne and Peter H Sand (eds), above n 47, 67, 92.

Precedent also enabled the UNCC to minimise variation in decision-making between panels and to bring in a higher degree of consistency and predictability to UNCC rule outcomes. Finally, precedent provided legal officers and panels with a means to resist influence from claimants and Iraq and other state actors or to justify decisions that might otherwise have appeared to have been biased in favour of a claimant, Iraq or a third party state.

As a means of mainstreaming mass claims-processing techniques and as a means of bringing about greater consistency and predictability, precedents operated as modelling. Modelling was a predominant mechanism used by actors at the UNCC to advocate or oppose principles. Precedents formed models that legal officers or panels adopted or used to distinguish particular situations in order to justify decisions or positions they were making or advocating. For example, the panel interpreted M&A information as solicited information, thus putting such information outside the unsolicited information deadline — a deadline set by the UNCC for the receipt of information submitted by claimants in support of their claims. This precedent was used consistently by the panel to allow M&A information to be filed by claimants almost up to the time a decision was rendered on the claim. The panel used precedents from other panels to justify its decision on the non-application of Article 19 to Saudi Arabia's terrestrial restoration claim. The F4 team cited precedents from the IoJ in their legal submissions to support a position they were advocating. In this sense, precedents served as models for rule outcomes. Claimants and Iraq also cited panel report decisions as precedent as they pursued particular rule outcomes in their favour.

Many of the precedents were available to the parties and the other state actors because panel reports in all claim categories were made public. Through the IoJ, the public as well as claimants, Iraq and other states could access the panel decisions contained in panel reports. However, there were other documents that the IoJ only made available to UNCC staff. These included legal opinions given by claims teams or by UNCC management. They included opinions and legal memoranda submitted to panels. These documents sometimes also served as precedent but they were not made available to claimants or Iraq or the public. To that extent, the IoJ served as an internal modelling mechanism that was unavailable to claimants and Iraq. Making all the contents of the IoJ public would have allowed all of its content to serve as precedent in the hands of both weak and strong actors.

In summary, the IoJ would have served a much greater precedential function had all of its content been made public and available to the claimants, Iraq and UNCC staff alike. Had this happened, Iraq and the claimants might have used IoJ precedents more widely in their legal submissions as well as in shaping and presenting their claims and evidence in support of their claims. Because parts of the IoJ were not made public and confined to use by UNCC staff, such material was used by UNCC staff and panel's in internal decision-making but could not be used by the claimants or Iraq. In line with the principle of transparency, wider use of the IoJ would have ensured greater consistency and accountability in UNCC decision-making and allowed claimants and Iraq to fashion their claims, and defences better. In a future war reparations institution, an IoJ would serve a wider precedential purpose if all of its content is made public and available to claimants and respondents alike.

6 Decision-Making Forums

The UNCC Rules had a number of provisions that were meant to ensure the independence of the commissioners. Commissioners were appointed by the Secretary General of the UN on the recommendation of the executive secretary of the UNCC, drawn from a register of experts maintained by the UN Secretary-General.²⁵⁷ Nominations were based on qualifications, experience and integrity, and commissioners were matched to the claim types that they had to process.²⁵⁸ The governing council could disapprove a nomination of a commissioner and request another nominee.²⁵⁹ Commissioners were required not to have a financial interest in any claims before the UNCC, nor were they to have any interests in the corporations that had claims before them.²⁶⁰ The commissioners were required, as on ongoing duty, to file disclosure statements about relationships or interests that might throw any doubt on their impartiality or independence.²⁶¹ If a conflict situation arose during a claim, commissioners were expected to recuse themselves.²⁶² The governing council retained a right to remove a commissioner in the event of a conflict of interest brought to its attention by a party to the claims or by any other means.²⁶³ Commissioners were given the same immunity and privileges attaching to UN experts on mission.²⁶⁴ Commissioners were expected to file a

²⁵⁷ United Nations Compensation Commission, *Decision 10, Governing Council*, 6th sess, 27th mtg, UN Doc S/AC.26/1992/10 (26 June 1992) art 18.

²⁵⁸ *Ibid* art 19.

²⁵⁹ *Ibid* art 20.

²⁶⁰ *Ibid* art 21.

²⁶¹ *Ibid* art 22.

²⁶² *Ibid*.

²⁶³ *Ibid*.

²⁶⁴ *Ibid* art 23.

declaration that stated they would perform their duties ‘honourably, faithfully, independently, impartially and conscientiously’.²⁶⁵

These safeguards were meant to ensure the impartiality and independence of the commissioners. But were they adequate? In chapters 3, 4, 5 and 6 I examined how different actors influenced the panel. These were all influences brought to bear on the panel through legitimate channels – channels established and recognised under the Rules. Nevertheless, did these influences erode the impartiality and independence that the Rules were supposed to guarantee? In my view there were further steps that the UNCC could have taken to protect the independence and impartiality of commissioners.

In chapters 2 and 5 I discussed the use of the executive session of the panel as a means used by UNCC management to influence the commissioners. In chapter 5, I also demonstrated that the commissioners were influenced by the panel’s expert consultants on scientific issues and that distributive choices made by the consultants made their way into claims outcomes. In both of these situations, checks and balances by way of greater transparency and participation of the claimants and Iraq could have minimised adverse impacts of these influences and increased the credibility of the rule and claims outcomes. Transparency would have prevented UNCC management from raising potentially political issues for consideration by the panel during executive sessions and ensured that distributive choices and methodological biases on the part of the panel’s consultants were scrutinised by both claimants and Iraq.

The secrecy practiced by the governing council enabled state actors to operate away from the public eye and avoid close scrutiny by claimants and Iraq. As demonstrated in chapter 3 webs of influence operated within the Council resulting in rule outcomes that procedurally handicapped Iraq and advantaged claimants. As a result, despite Iraq’s objections and criticisms, a wider public debate on an international institution was thwarted. Transparency in the governing council would also have enhanced its credibility and strengthened public scrutiny of its action.

The lesson to be drawn for future war reparations tribunals is that general safeguards that ensure decision-makers disclose personal and financial interests and safeguarding their

²⁶⁵ Ibid art 27.

integrity are essential measures. However, these alone are not sufficient to minimise potential influences that can find their way through legitimate channels to the decision-maker. Transparency at all levels to the maximum extent possible is an important check on such influences. All meetings by decision-makers where claims are dealt with or discussed ought to open at all times to the parties and possibly the public as well. Experts should not be shielded from scrutiny by peers or parties to the claims.

7 Transparency and Accountability

Throughout the thesis I have noted the transparency and accountability deficits at the UNCC. Despite the valiant efforts of the F4 team and the panel to improve transparency and participatory space for Iraq, the UNCC's Rules and procedures fell short of the standards set by Principle 10 of the Rio Declaration and other tribunals established by the UN. As the environmental claims proceeded, Iraq was provided more claim documentation and participatory space than had been the case with other UNCC claims. As observed by the panel and other commentators, these due process improvements resulted in Iraq's ability to defend the claims better, and were helpful to the panel in making more accurate and fair determinations of claims outcomes.²⁶⁶ As stated earlier in this chapter and in chapter 3, there were further due process improvements that could have been made, but were not.²⁶⁷ I list below some of the improvements that could have been made by the UNCC at least for the larger corporate and government claims that might have significantly improved transparency and accountability. In the broader context of mass claims processing institutions, abridged due process and limited transparency are not uncommon. For example most mass claims processing institutions "have adopted rules and procedures designed to make public their awards, decisions, or statistical information such as the number of claims, and the total amounts awarded to claimants" mostly through websites maintained by the institution.²⁶⁸ As such, some of the reforms proposed below may seem to go beyond current practices in similar institutions but they are, for the most part, rooted in the UNCC's own experience and the growing demand for greater transparency and due process in international dispute resolution mechanisms.

²⁶⁶ José R Allen, above n 47, 141, 152.

²⁶⁷ For example, Iraq was not provided with an opportunity to undertake site inspections of alleged environmental damage. Nor were legal submissions made by UNCC Legal Officers or the Professional Judgement Reports made by the panel's expert consultants shared with Iraq.

²⁶⁸ Howard Holtzmann and Edda Kristjansdottir (eds), *International Mass Claims Processes: Legal and Practical Perspectives* (Oxford University Press, 2007) 369-74.

- 1) The governing council proceedings and documents could have been made public, as is the case with its parent, the UN Security Council. To date only the final decisions and the official press releases of the governing council are available to the public via the UNCC website. Much of the other documentation including minutes and notes of governing council meetings and memoranda presented to it continue to be secret.
- 2) Claimants and Iraq could have been allowed to either participate or be observers of panel proceedings. Participation would have entailed the development of additional procedural rules, but observation would not. The presence of parties at panel proceedings might have prevented or minimised potentially biased influences that UNCC management, F4 team and the panel's expert consultants might have brought to bear on claims and rule outcomes.
- 3) Unilateral communications between the UNCC on the one hand and claimants or Iraq on the other could have been avoided by ensuring that both parties were aware of the communications.
- 4) Iraq's participatory space could have been further improved by allowing its experts to inspect alleged environmentally damaged sites, allowing Iraq to present its own interrogatories to claimants and giving Iraq access to the professional judgement reports prepared by the panel's expert consultants and legal submissions prepared by the F4 team.
- 5) Similar improvements in the claimant's participatory space could have been provided by allowing claimants to present interrogatories to Iraq where appropriate and giving access to the professional judgement reports prepared by the panel's expert consultants and legal submissions prepared by the F4 team.
- 6) Claimants and Iraq could have been provided an opportunity to comment on the professional judgment reports and legal submissions, enabling expert peers to challenge the opinions, biases, methods, conclusions and recommendations in these influential documents.
- 7) Oral proceedings before the panel could have been open to the public and the press without any attendant delays but with considerable improvement in credibility.²⁶⁹

²⁶⁹ Peter H Sand, 'Environmental Principles Applied' in Payne and Sand, above n 47, 170, 191–92. Professor Peter Sand was a commissioner on the panel and makes a strong plea for 'a high degree of openness and transparency' in future reparations processes. He argues that environmental issues have an overriding community interest and advocates that transparency should be part of a future permanent tribunal or mechanism for war reparations.

- 8) Documentation before the panel, including claims, supporting documents and M&A information could have been made public through the IoJ at least after the conclusion of the claims process.
- 9) The UNEP-created database of M&A materials (which is still closed to the public) could have been made available sooner to the regional governments and to the public because there is a wealth of environmental data that is useful to governments, scientists and civil society in those datasets.²⁷⁰

Based on these experiences, future war reparations tribunals ought to ensure that the proceedings and documentation of its governing body should be transparent and available to the public. All proceedings of decision-making panels should be open to the parties and perhaps, even the public. Bilateral communications between the decision-maker or the tribunal and one party should not, as a rule, be permitted, such communications always being conducted with the knowledge of and participation of all parties to the claim. Respondent aggressor (vanquished) states should have access to all claim documentation and evidence adduced in support of the claims and also have access (barring exceptional circumstances) to inspect the site where the alleged damage occurred, and be able to present interrogatories to the claimant. Additionally, the experts of the parties to the claims ought to be able to interact with any experts employed for the benefit of the decision-maker and have access to advice and opinions expressed by them. Proceedings of panels ought to be open to the public as well as parties and all documentation such as pleadings, evidence and the record of proceedings could also be made public or at the very least made available to the parties to the claims. These additional measures would improve credibility and minimise biases in the claims process.

J Last Words

This chapter sets out the responses to the research questions that the thesis posited. The three questions were:

- 1) did key actors influence the rule and environmental claims outcomes and if so what means did these actors use to achieve their goals?
- 2) how did these key actors use these means to influence the rule and environmental claims outcomes?

²⁷⁰ Julia Klee, 'The Process' in Payne and Sand, above n 47, 29, 65.

3) to what extent might these outcomes have been different if the UNCC adopted more transparent, inclusive and accountable processes?²⁷¹

A subsidiary thesis question was also raised, namely whether Braithwaite and Drahos's research framework was applicable to the quasi-judicial context of the UNCC.

In summary, the thesis has shown that key actors influenced the rule and environmental claims outcomes of the UNCC.²⁷² Powerful key state actors such as the US, the UK and France influenced the rule outcomes mostly by limiting Iraq's participatory space and due process in the claims evaluation.²⁷³ Despite these limitations, the panel and the F4 team, though weaker actors, were able to enlarge Iraq's participatory space in the environmental claims and provide it more due process than was envisaged in the rules.²⁷⁴ They did so by taking advantage of more positive powerful state actor goals vis-a-vis Iraq, the post-1998 weakening relationships between the US-UK-France axis and by using modelling as a mechanism to promote their agenda.²⁷⁵ In formulating the rules, powerful state actors such as the US used modelling to disseminate lessons from the Iran-US Claims Tribunal.²⁷⁶

Modelling was the predominant mechanism used by both strong and weak actors to advocate for or against rule or claims outcomes.²⁷⁷ Occasionally, coercion, reward and reciprocal coordination might have been used, though evidence for this conclusion is tentative and weak.²⁷⁸ A more accurate conclusion can only be made when public access to the UNCC archives is allowed. The panel's expert consultants occupied a unique position within the environmental claims process.²⁷⁹ They were shielded by confidentiality from scrutiny by Iraq, and the claimants and the UNCC and the panel relied heavily on their advice.²⁸⁰ As a result, they were able to greatly influence the environmental claims outcomes, more than any other actor.²⁸¹

²⁷¹ Chapter 1 sets out the research questions and the research method and framing.

²⁷² Chapter 3–5.

²⁷³ Chapter 3.

²⁷⁴ Ibid.

²⁷⁵ Chapters 3 and 4.

²⁷⁶ Chapters 2 and 3.

²⁷⁷ Chapters 3–5.

²⁷⁸ Ibid.

²⁷⁹ Chapter 5.

²⁸⁰ Ibid.

²⁸¹ Ibid.

Actors advocated or opposed principles in promoting their agendas. Five principles were identified in the thesis.²⁸² These were Iraq's liability for war damage, expeditious and effective justice for the victims of war, due process for Iraq, secrecy and transparency.²⁸³ Both weak and powerful actors used these principles, changing the weighting of each principle when they were in conflict.²⁸⁴ Weightings were based on the status of the ongoing conflict with Iraq and on what the actors perceived as the interests and goals.²⁸⁵ There were times when key actors were agreed on the principles and weightings but disagreed on the rule models that best represented them.²⁸⁶ At other times, disagreements between actors were so strong that they displaced the decision-making to another forum.²⁸⁷ For example the Security Council mandated the governing council to frame rules of procedure and the governing council mandated the panel to provide the specifics of due process for Iraq.²⁸⁸ At other times, they displaced the disagreement over principles to procedural terrain, embedding the principles and weighting in procedures for resolving the substantive dispute.²⁸⁹ For example, the governing council embedded limited participatory space and due process for Iraq in the claims processing rules, making it easier for claimants to win claims and harder for Iraq to defend them.²⁹⁰ In turn, this increased the chances of claimant states like Kuwait and Saudi Arabia, both strong allies of the US-UK-France axis, from winning compensation for war damage.²⁹¹

Had there been greater transparency and participatory space for Iraq and other actors such as civil society, UNCC management and the panel's expert consultants would have been held more accountable.²⁹² Even powerful actors such as the US or the UK might have been subject to more scrutiny and accountability by the media, the public and other states. The UNCC's cloak of secrecy limited the accountability levels within the institution and protected it, its decision-making processes and its decisions from greater scrutiny by Iraq, the claimants, other states and the public.²⁹³ Limited transparency and due process for Iraq led to its

²⁸² Chapters 2–5.

²⁸³ Ibid.

²⁸⁴ Ibid.

²⁸⁵ Ibid.

²⁸⁶ Ibid.

²⁸⁷ Ibid.

²⁸⁸ Chapter 3.

²⁸⁹ Chapters 3 and 5.

²⁹⁰ Chapter 3.

²⁹¹ Ibid.

²⁹² Chapters 3–5.

²⁹³ Ibid.

inability to defend the first two instalments of the environmental claims adequately, and increased participatory space and due process in the third to fifth instalments led to more accurate awards and improved decision-making and decision quality.²⁹⁴ Contrary to arguments by the US, the UK and UNCC management, greater due process and transparency for Iraq did not delay the environmental claims unreasonably nor did they result in dilatory tactics being used by Iraq.²⁹⁵

The fourth thesis question was about the usefulness of Braithwaite and Drahos's research framework developed and used in their treatise on global business regulation.²⁹⁶ While Braithwaite and Drahos's research method and framing was useful in gaining the insights developed in this thesis, it proved challenging to deploy for two reasons. First, the confidentiality and secrecy of UNCC documentation and archives did not allow for a more robust investigation that the thesis questions deserved.²⁹⁷ Second, the method proved to be less useful in the context of unique actors such as the panel's expert consultants.²⁹⁸ David Kennedy's method of examining the conduct of advisors proved useful in those situations.²⁹⁹ Otherwise, Braithwaite and Drahos's research framework, which was originally applied in the context of global business regulation with a long history dating back to Roman times, proved useful even in the context of a quasi-judicial institution with a relatively short lifespan.

The legacy of the UNCC in general and that of the environmental claims in particular have important lessons for similar institutions that might be established in the future. Above, I have set out seven of the most important reforms that a future war reparations tribunal dealing with environmental damage claims ought to incorporate with a view to improving the quality, credibility, fairness, impartiality and effectiveness of environmental claims decision-making. In my view the UNCC was not the typical example of an institution fashioned from the imperatives of victors justice. Nor was it an institution that can be seen as an UN-led tribunal that impartially and independently dispensed Gulf War reparations. I see the UNCC as a transitional institution – between victors justice and a permanent neutral war reparations

²⁹⁴ Ibid.

²⁹⁵ Ibid.

²⁹⁶ Chapter 1 sets out these additional questions.

²⁹⁷ Chapters 3–5 notes the lack of evidence in coming to certain conclusions flagging them as tentative for this reason.

²⁹⁸ Chapter 5.

²⁹⁹ Ibid.

tribunal. It is highly unlikely that another institution similar to the UNCC will be established soon. The UNCC's success (or failure as some would argue) was a product of many unique circumstances that are unlikely to be replicated. Iraq had the oil resources to pay for the reparations and there was unique agreement among all the permanent members of the UN Security Council on evicting Iraq from Kuwait and extracting war reparations from it. Iraq's actions in the Gulf War were particularly reprehensible and its damage to the environment unprecedented. The US-UK-France alliance was unified at the beginning against Iraq when the UNCC was set up. These unique circumstances are hard to replicate. It is more likely that the key actors involved in an international armed conflict will opt for victor's justice, though there is now a growing sentiment for the establishment for a permanent tribunal for war reparations.

The UNCC had features that were similar to institutions established previously by victorious powers as well as a neutral international body.³⁰⁰ In the thesis I have demonstrated that the ongoing Iraq conflict provided a special context for UNCC operations. In that context key actor goals at the UNCC changed over the 15 years of its life. Ideally, states should be able to step back from the immediacy of any conflict and design an international institution that draws on the UNCC's lessons.³⁰¹ In doing so, the international community has a better chance of creating rules and institutional arrangements that are less subject to changing key actor goals. Such rules and institutional arrangements have the potential to provide the international community with an agreed legal and institutional framework on war reparations that moves away from victors justice and toward a more independent and impartial international one. These rules and institutional arrangements do not necessarily have to create a new reparations institution, but can establish the framework and rules by which such an institution will be created and operated as necessitated by future conflicts.

END

³⁰⁰ See the detailed discussion of this in chapter 2.

³⁰¹ For example the International Criminal Court was the result of lessons learned from several ad hoc criminal tribunals established by the UN following conflicts in Rwanda, the former Yugoslavia and the Second World War. See above n 29.

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APPENDIX

(Text of UN Security Council Resolutions 686 and 687 referred to in chapter 2 of thesis)

United Nations

S/RES/0686 (1991)

2 March 1991

RESOLUTION 686 (1991)

Adopted by the Security Council at its 2978th meeting on 2 March 1991

The Security Council,

Recalling and reaffirming its resolutions 660 (1990), 661 (1990), 662 (1990), 664 (1990), 665 (1990), 666 (1990), 667 (1990), 669 (1990), 670 (1990), 674 (1990), 677 (1990), and 678 (1990),

Recalling the obligations of Member States under Article 25 of the Charter,

Recalling paragraph 9 of resolution 661 (1990) regarding assistance to the Government of Kuwait and paragraph 3 (c) of that resolution regarding supplies strictly for medical purposes and, in humanitarian circumstances, foodstuffs,

Taking note of the letters of the Foreign Minister of Iraq confirming Iraq's agreement to comply fully with all of the resolutions noted above (S/22275), and stating its intention to release prisoners of war immediately (S/22273),

Taking note of the suspension of offensive combat operations by the forces of Kuwait and the Member States cooperating with Kuwait pursuant to resolution 678 (1990),

Bearing in mind the need to be assured of Iraq's peaceful intentions, and the objective in resolution 678 (1990) of restoring international peace and security in the region,

Underlining the importance of Iraq taking the necessary measures which would permit a definitive end to the hostilities,

Affirming the commitment of all Member States to the independence, sovereignty and territorial integrity of Iraq and Kuwait, and noting the intention expressed by the Member States cooperating under paragraph 2 of Security Council resolution 678 (1990) to bring their military presence in Iraq to an end as soon as possible consistent with achieving the objectives of the resolution,

Acting under Chapter VII of the Charter,

1. Affirms that all twelve resolutions noted above continue to have full force and effect;
2. Demands that Iraq implement its acceptance of all twelve resolutions noted above and in particular that Iraq:
 - (a) Rescind immediately its actions purporting to annex Kuwait;
 - (b) Accept in principle its liability for any loss, damage, or injury arising in regard to Kuwait and third States, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq;
 - (c) Under international law immediately release under the auspices of the International Committee of the Red Cross, Red Cross Societies, or Red Crescent Societies, all Kuwaiti and third country nationals detained by Iraq and return the remains of any deceased Kuwaiti and third country nationals so detained; and
 - (d) Immediately begin to return all Kuwaiti property seized by Iraq, to be completed in the shortest possible period;
3. Further demands that Iraq:
 - (a) Cease hostile or provocative actions by its forces against all Member States including missile attacks and flights of combat aircraft;
 - (b) Designate military commanders to meet with counterparts from the forces of Kuwait and the Member States cooperating with Kuwait pursuant to resolution 678 (1990) to arrange for the military aspects of a cessation of hostilities at the earliest possible time;
 - (c) Arrange for immediate access to and release of all prisoners of war under the auspices of the International Committee of the Red Cross and return the remains of any deceased personnel of the forces of Kuwait and the Member States cooperating with Kuwait pursuant to resolution 678 (1990); and
 - (d) Provide all information and assistance in identifying Iraqi mines, booby traps and other explosives as well as any chemical and biological weapons and material in Kuwait, in areas of Iraq where forces of Member States cooperating with Kuwait pursuant to resolution 678 (1990) are present temporarily, and in adjacent waters;
4. Recognizes that during the period required for Iraq to comply with paragraphs 2 and 3 above, the provisions of paragraph 2 of resolution 678 (1990) remain valid;
5. Welcomes the decision of Kuwait and the Member States cooperating with Kuwait pursuant to resolution 678 (1990) to provide access and to commence immediately the release of Iraqi prisoners of war as required by the terms of the Third Geneva Convention of 1949, under the auspices of the International Committee of the Red Cross;

6. Requests all Member States, as well as the United Nations, the specialized agencies and other international organizations in the United Nations system, to take all appropriate action to cooperate with the Government and people of Kuwait in the reconstruction of their country;
7. Decides that Iraq shall notify the Secretary-General and the Security Council when it has taken the actions set out above;
8. Decides that in order to secure the rapid establishment of a definitive end to the hostilities, the Security Council remains actively seized of the matter.

United Nations

S/RES/687 (1991)

8 April 1991

RESOLUTION 687 (1991)

Adopted by the Security Council at its 2981st meeting, on 3 April 1991

The Security Council,

Recalling its resolutions 660 (1990) of 2 August 1990, 661 (1990) of 6 August 1990, 662 (1990) of 9 August 1990, 664 (1990) of 18 August 1990, 665 (1990) of 25 August 1990, 666 (1990) of 13 September 1990, 667 (1990) of 16 September 1990, 669 (1990) of 24 September 1990, 670 (1990) of 25 September 1990, 674 (1990) of 29 October 1990, 677 (1990) of 28 November 1990, 678 (1990) of 29 November 1990 and 686 (1991) of 2 March 1991,

Welcoming the restoration to Kuwait of its sovereignty, independence and territorial integrity and the return of its legitimate Government,

Affirming the commitment of all Member States to the sovereignty, territorial integrity and political independence of Kuwait and Iraq, and noting the intention expressed by the Member States cooperating with Kuwait under paragraph 2 of resolution 678 (1990) to bring their military presence in Iraq to an end as soon as possible consistent with paragraph 8 of resolution 686 (1991),

Reaffirming the need to be assured of Iraq's peaceful intentions in the light of its unlawful invasion and occupation of Kuwait,

Taking note of the letter sent by the Minister for Foreign Affairs of Iraq on 27 February 1991 and those sent pursuant to resolution 686 (1991),

Noting that Iraq and Kuwait, as independent sovereign States, signed at Baghdad on 4 October 1963 "Agreed Minutes Between the State of Kuwait and the Republic of Iraq Regarding the Restoration of Friendly Relations, Recognition and Related Matters", thereby recognizing formally the boundary between Iraq and Kuwait and the allocation of islands, which were registered with the United Nations in accordance with Article 102 of the Charter of the United Nations and in which Iraq recognized the independence and complete sovereignty of the State of Kuwait within its borders as specified and accepted in the letter of the Prime Minister of Iraq dated 21 July 1932, and as accepted by the Ruler of Kuwait in his letter dated 10 August 1932,

Conscious of the need for demarcation of the said boundary,

Conscious also of the statements by Iraq threatening to use weapons in violation of its obligations under the Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925, and of its prior use of chemical weapons and affirming that grave consequences would follow any further use by Iraq of such weapons,

Recalling that Iraq has subscribed to the Declaration adopted by all States participating in the Conference of States Parties to the 1925 Geneva Protocol and Other Interested States, held in Paris from 7 to 11 January 1989, establishing the objective of universal elimination of chemical and biological weapons,

Recalling also that Iraq has signed the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, of 10 April 1972,

Noting the importance of Iraq ratifying this Convention,

Noting moreover the importance of all States adhering to this Convention and encouraging its forthcoming Review Conference to reinforce the authority, efficiency and universal scope of the convention,

Stressing the importance of an early conclusion by the Conference on Disarmament of its work on a Convention on the Universal Prohibition of Chemical Weapons and of universal adherence thereto,

Aware of the use by Iraq of ballistic missiles in unprovoked attacks and therefore of the need to take specific measures in regard to such missiles located in Iraq,

Concerned by the reports in the hands of Member States that Iraq has attempted to acquire materials for a nuclear-weapons programme contrary to its obligations under the Treaty on the Non-Proliferation of Nuclear Weapons of 1 July 1968,

Recalling the objective of the establishment of a nuclear-weapons-free zone in the region of the Middle East,

Conscious of the threat that all weapons of mass destruction pose to peace and security in the area and of the need to work towards the establishment in the Middle East of a zone free of such weapons,

Conscious also of the objective of achieving balanced and comprehensive control of armaments in the region,

Conscious further of the importance of achieving the objectives noted above using all available means, including a dialogue among the States of the region,

Noting that resolution 686 (1991) marked the lifting of the measures imposed by resolution 661 (1990) in so far as they applied to Kuwait,

Noting that despite the progress being made in fulfilling the obligations of resolution 686 (1991), many Kuwaiti and third country nationals are still not accounted for and property remains unreturned,

Recalling the International Convention against the Taking of Hostages, opened for signature at New York on 18 December 1979, which categorizes all acts of taking hostages as manifestations of international terrorism,

Deploring threats made by Iraq during the recent conflict to make use of terrorism against targets outside Iraq and the taking of hostages by Iraq,

Taking note with grave concern of the reports of the Secretary-General of 20 March 1991 and 28 March 1991, and conscious of the necessity to meet urgently the humanitarian needs in Kuwait and Iraq,

Bearing in mind its objective of restoring international peace and security in the area as set out in recent resolutions of the Security Council,

Conscious of the need to take the following measures acting under Chapter VII of the Charter,

1. Affirms all thirteen resolutions noted above, except as expressly changed below to achieve the goals of this resolution, including a formal cease-fire;

A

2. Demands that Iraq and Kuwait respect the inviolability of the international boundary and the allocation of islands set out in the "Agreed Minutes Between the State of Kuwait and the Republic of Iraq Regarding the Restoration of Friendly Relations, Recognition and Related Matters", signed by them in the exercise of their sovereignty at Baghdad on 4 October 1963 and registered with the United Nations and published by the United Nations in document 7063, United Nations, Treaty Series, 1964;

3. Calls upon the Secretary-General to lend his assistance to make arrangements with Iraq and Kuwait to demarcate the boundary between Iraq and Kuwait, drawing on appropriate material, including the map transmitted by Security Council document S/22412 and to report back to the Security Council within one month;

4. Decides to guarantee the inviolability of the above-mentioned international boundary and to take as appropriate all necessary measures to that end in accordance with the Charter of the United Nations;

B

5. Requests the Secretary-General, after consulting with Iraq and Kuwait, to submit within three days to the Security Council for its approval a plan for the immediate deployment of a United Nations observer unit to monitor the Khor Abdullah and a demilitarized zone, which is hereby established, extending ten kilometres into Iraq and five kilometres into Kuwait from the boundary referred to in the "Agreed Minutes Between the State of Kuwait and the Republic of Iraq Regarding the Restoration of Friendly Relations, Recognition and Related Matters" of 4 October 1963; to deter violations of the boundary through its presence in and surveillance of the demilitarized zone; to observe any hostile or potentially hostile action mounted from the territory of one State to the other; and for the Secretary-General to report regularly to the Security Council on the operations of the unit, and immediately if there are serious violations of the zone or potential threats to peace;

6. Notes that as soon as the Secretary-General notifies the Security Council of the completion of the deployment of the United Nations observer unit, the conditions will be established for the Member States cooperating with Kuwait in accordance with resolution 678 (1990) to bring their military presence in Iraq to an end consistent with resolution 686 (1991);

C

7. Invites Iraq to reaffirm unconditionally its obligations under the Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925, and to ratify the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, of 10 April 1972;

8. Decides that Iraq shall unconditionally accept the destruction, removal, or rendering harmless, under international supervision, of:

(a) All chemical and biological weapons and all stocks of agents and all related subsystems and components and all research, development, support and manufacturing facilities;

(b) All ballistic missiles with a range greater than 150 kilometres and related major parts, and repair and production facilities;

9. Decides, for the implementation of paragraph 8 above, the following:

(a) Iraq shall submit to the Secretary-General, within fifteen days of the adoption of the present resolution, a declaration of the locations, amounts and types of all items specified in paragraph 8 and agree to urgent, on-site inspection as specified below;

(b) The Secretary-General, in consultation with the appropriate Governments and, where appropriate, with the Director-General of the World Health Organization, within forty-five days of the passage of the present resolution, shall develop, and submit to the Council for

approval, a plan calling for the completion of the following acts within forty-five days of such approval:

- (i) The forming of a Special Commission, which shall carry out immediate on-site inspection of Iraq's biological, chemical and missile capabilities, based on Iraq's declarations and the designation of any additional locations by the Special Commission itself;
- (ii) The yielding by Iraq of possession to the Special Commission for destruction, removal or rendering harmless, taking into account the requirements of public safety, of all items specified under paragraph 8 (a) above, including items at the additional locations designated by the Special Commission under paragraph 9 (b) (i) above and the destruction by Iraq, under the supervision of the Special Commission, of all its missile capabilities, including launchers, as specified under paragraph 8 (b) above;
- (iii) The provision by the Special Commission of the assistance and cooperation to the Director-General of the International Atomic Energy Agency required in paragraphs 12 and 13 below;

10. Decides that Iraq shall unconditionally undertake not to use, develop, construct or acquire any of the items specified in paragraphs 8 and 9 above and requests the Secretary-General, in consultation with the Special Commission, to develop a plan for the future ongoing monitoring and verification of Iraq's compliance with this paragraph, to be submitted to the Security Council for approval within one hundred and twenty days of the passage of this resolution;

11. Invites Iraq to reaffirm unconditionally its obligations under the Treaty on the Non-Proliferation of Nuclear Weapons of 1 July 1968;

12. Decides that Iraq shall unconditionally agree not to acquire or develop nuclear weapons or nuclear-weapons-usable material or any subsystems or components or any research, development, support or manufacturing facilities related to the above; to submit to the Secretary-General and the Director-General of the International Atomic Energy Agency within fifteen days of the adoption of the present resolution a declaration of the locations, amounts, and types of all items specified above; to place all of its nuclear-weapons-usable materials under the exclusive control, for custody and removal, of the International Atomic Energy Agency, with the assistance and cooperation of the Special Commission as provided for in the plan of the Secretary-General discussed in paragraph 9 (b) above; to accept, in accordance with the arrangements provided for in paragraph 13 below, urgent on-site inspection and the destruction, removal or rendering harmless as appropriate of all items

specified above; and to accept the plan discussed in paragraph 13 below for the future ongoing monitoring and verification of its compliance with these undertakings;

13. Requests the Director-General of the International Atomic Energy Agency, through the Secretary-General, with the assistance and cooperation of the Special Commission as provided for in the plan of the Secretary-General in paragraph 9 (b) above, to carry out immediate on-site inspection of Iraq's nuclear capabilities based on Iraq's declarations and the designation of any additional locations by the Special Commission; to develop a plan for submission to the Security Council within forty-five days calling for the destruction, removal, or rendering harmless as appropriate of all items listed in paragraph 12 above; to carry out the plan within forty-five days following approval by the Security Council; and to develop a plan, taking into account the rights and obligations of Iraq under the Treaty on the Non-Proliferation of Nuclear Weapons of 1 July 1968, for the future ongoing monitoring and verification of Iraq's compliance with paragraph 12 above, including an inventory of all nuclear material in Iraq subject to the Agency's verification and inspections to confirm that Agency safeguards cover all relevant nuclear activities in Iraq, to be submitted to the Security Council for approval within one hundred and twenty days of the passage of the present resolution;

14. Takes note that the actions to be taken by Iraq in paragraphs 8, 9, 10, 11, 12 and 13 of the present resolution represent steps towards the goal of establishing in the Middle East a zone free from weapons of mass destruction and all missiles for their delivery and the objective of a global ban on chemical weapons;

D

15. Requests the Secretary-General to report to the Security Council on the steps taken to facilitate the return of all Kuwaiti property seized by Iraq, including a list of any property that Kuwait claims has not been returned or which has not been returned intact;

E

16. Reaffirms that Iraq, without prejudice to the debts and obligations of Iraq arising prior to 2 August 1990, which will be addressed through the normal mechanisms, is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait;

17. Decides that all Iraqi statements made since 2 August 1990 repudiating its foreign debt are null and void, and demands that Iraq adhere scrupulously to all of its obligations concerning servicing and repayment of its foreign debt;

18. Decides also to create a fund to pay compensation for claims that fall within paragraph 16 above and to establish a Commission that will administer the fund;

19. Directs the Secretary-General to develop and present to the Security Council for decision, no later than thirty days following the adoption of the present resolution, recommendations for the fund to meet the requirement for the payment of claims established in accordance with paragraph 18 above and for a programme to implement the decisions in paragraphs 16, 17 and 18 above, including: administration of the fund; mechanisms for determining the appropriate level of Iraq's contribution to the fund based on a percentage of the value of the exports of petroleum and petroleum products from Iraq not to exceed a figure to be suggested to the Council by the Secretary-General, taking into account the requirements of the people of Iraq, Iraq's payment capacity as assessed in conjunction with the international financial institutions taking into consideration external debt service, and the needs of the Iraqi economy; arrangements for ensuring that payments are made to the fund; the process by which funds will be allocated and claims paid; appropriate procedures for evaluating losses, listing claims and verifying their validity and resolving disputed claims in respect of Iraq's liability as specified in paragraph 16 above; and the composition of the Commission designated above;

F

20. Decides, effective immediately, that the prohibitions against the sale or supply to Iraq of commodities or products, other than medicine and health supplies, and prohibitions against financial transactions related thereto contained in resolution 661 (1990) shall not apply to foodstuffs notified to the Security Council Committee established by resolution 661 (1990) concerning the situation between Iraq and Kuwait or, with the approval of that Committee, under the simplified and accelerated "no-objection" procedure, to materials and supplies for

essential civilian needs as identified in the report of the Secretary-General dated 20 March 1991, and in any further findings of humanitarian need by the Committee;

21. Decides that the Security Council shall review the provisions of paragraph 20 above every sixty days in the light of the policies and practices of the Government of Iraq, including the implementation of all relevant resolutions of the Security Council, for the purpose of determining whether to reduce or lift the prohibitions referred to therein;

22. Decides that upon the approval by the Security Council of the programme called for in paragraph 19 above and upon Council agreement that Iraq has completed all actions contemplated in paragraphs 8, 9, 10, 11, 12 and 13 above, the prohibitions against the import of commodities and products originating in Iraq and the prohibitions against financial transactions related thereto contained in resolution 661 (1990) shall have no further force or effect;

23. Decides that, pending action by the Security Council under paragraph 22 above, the Security Council Committee established by resolution 661 (1990) shall be empowered to approve, when required to assure adequate financial resources on the part of Iraq to carry out the activities under paragraph 20 above, exceptions to the prohibition against the import of commodities and products originating in Iraq;

24. Decides that, in accordance with resolution 661 (1990) and subsequent related resolutions and until a further decision is taken by the Security Council, all States shall continue to prevent the sale or supply, or the promotion or facilitation of such sale or supply, to Iraq by their nationals, or from their territories or using their flag vessels or aircraft, of:

(a) Arms and related materiel of all types, specifically including the sale or transfer through other means of all forms of conventional military equipment, including for paramilitary forces, and spare parts and components and their means of production, for such equipment;

(b) Items specified and defined in paragraphs 8 and 12 above not otherwise covered above;

(c) Technology under licensing or other transfer arrangements used in the production, utilization or stockpiling of items specified in subparagraphs (a) and (b) above;

(d) Personnel or materials for training or technical support services relating to the design, development, manufacture, use, maintenance or support of items specified in subparagraphs (a) and (b) above;

25. Calls upon all States and international organizations to act strictly in accordance with paragraph 24 above, notwithstanding the existence of any contracts, agreements, licences or any other arrangements;

26. Requests the Secretary-General, in consultation with appropriate Governments, to develop within sixty days, for the approval of the Security Council, guidelines to facilitate full international implementation of paragraphs 24 and 25 above and paragraph 27 below, and to make them available to all States and to establish a procedure for updating these guidelines periodically;

27. Calls upon all States to maintain such national controls and procedures and to take such other actions consistent with the guidelines to be established by the Security Council under paragraph 26 above as may be necessary to ensure compliance with the terms of paragraph 24 above, and calls upon international organizations to take all appropriate steps to assist in ensuring such full compliance;

28. Agrees to review its decisions in paragraphs 22, 23, 24 and 25 above, except for the items specified and defined in paragraphs 8 and 12 above, on a regular basis and in any case one hundred and twenty days following passage of the present resolution, taking into account Iraq's compliance with the resolution and general progress towards the control of armaments in the region;

29. Decides that all States, including Iraq, shall take the necessary measures to ensure that no claim shall lie at the instance of the Government of Iraq, or of any person or body in Iraq, or of any person claiming through or for the benefit of any such person or body, in connection with any contract or other transaction where its performance was affected by reason of the measures taken by the Security Council in resolution 661 (1990) and related resolutions;

G

30. Decides that, in furtherance of its commitment to facilitate the repatriation of all Kuwaiti and third country nationals, Iraq shall extend all necessary cooperation to the International Committee of the Red Cross, providing lists of such persons, facilitating the access of the International Committee of the Red Cross to all such persons wherever located or detained and facilitating the search by the International Committee of the Red Cross for those Kuwaiti and third country nationals still unaccounted for;

31. Invites the International Committee of the Red Cross to keep the Secretary-General apprised as appropriate of all activities undertaken in connection with facilitating the repatriation or return of all Kuwaiti and third country nationals or their remains present in Iraq on or after 2 August 1990;

H

32. Requires Iraq to inform the Security Council that it will not commit or support any act of international terrorism or allow any organization directed towards commission of such acts to

operate within its territory and to condemn unequivocally and renounce all acts, methods and practices of terrorism;

I

33. Declares that, upon official notification by Iraq to the Secretary-General and to the Security Council of its acceptance of the provisions above, a formal cease-fire is effective between Iraq and Kuwait and the Member States cooperating with Kuwait in accordance with resolution 678 (1990);

34. Decides to remain seized of the matter and to take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the area.