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REPORT AND RECOMMENDATIONS MADE BY THE PANEL OF COMMISSIONERS CONCERNING THE FIRST INSTALMENT OF "E3" CLAIMS

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Introduction

1. The Governing Council of the United Nations Compensation Commission (the "Commission") appointed the present Panel of Commissioners (the "Panel"), composed of Messrs. Werner Melis (Chairman), David Mace and Sompong Sucharitkul, at its twenty-second session in October 1996, to review claims filed with the Commission on behalf of corporations and other legal entities in accordance with the relevant Security Council resolutions, Governing Council decisions and the Provisional Rules for Claims Procedure (the "Rules") (S/AC.26/1992/10). This report contains the recommendations to the Governing Council by the Panel, pursuant to article 38(e) of the Rules, concerning claims of ten corporations or other legal entities (the "Claimants") described below, each of which seeks compensation for loss, damage or injury arising out of Iraq's 2 August 1990 invasion and subsequent occupation of Kuwait.

2. The claims addressed in this report were included in the first instalment because each of the claims relates to a single large construction and engineering project to build a hydroelectric and water control dam on the Zab River in the Bekhme Canyon of Northern Iraq (the "Bekhme Dam Project" or the "Project"), which was under construction in Iraq on 2 August 1990. The claims relate to the Claimants' involvement with the Project on 2 August 1990 and for a short period after that date.

3. With one exception, the claims submitted to the Panel in this instalment and addressed in this report were selected from among the construction and engineering claims on the basis of criteria established under the Rules. These include the date of filing with the Commission and compliance by claimants with the requirements established for claims submitted by corporations and other legal entities (hereinafter "category 'E' claims") in the Rules. The one exception, a claim by the Central Bank of the Republic of Turkey, submitted as a claim by a Government (category "F" claim) was included because the subject matter of that claim was the financing of part of the Bekhme Dam Project and because the facts and issues presented in that claim were closely related to those of the claims selected for consideration by the Panel in this instalment of claims.

I. PROCEDURAL HISTORY

A. The nature and purposes of the proceedings

4. The status and functions of the Panel of Commissioners operating within the Commission's framework are set forth in the report of the Secretary-General pursuant to paragraph 19 of Security Council resolution 687 (1991) dated 2 May 1991 (S/22559). In his report, the Secretary-General described the function of the Commission as follows:

> "... The Commission is not a court or an arbitral tribunal before which the parties appear; it is a political organ that performs an essentially fact-finding function of examining claims, verifying their validity, evaluating losses, assessing payments and resolving disputed claims. It is only in this last respect that a quasi-

judicial function may be involved. Given the nature of the Commission, it is all the more important that some element of due process be built into the procedure. It will be the function of the commissioners to provide this element." (Paragraph 20)

"The processing of claims will entail the verification of claims and evaluation of losses and the resolution of any disputed claims. The major part of this task is not of a judicial nature; the resolution of disputed claims would, however, be quasi-judicial. It is envisaged that the processing of claims would be carried out principally by the commissioners. Before proceeding to the verification of claims and evaluation of losses, however, a determination will have to be made as to whether the losses for which claims are presented fall within the meaning of paragraph 16 of resolution 687 (1991), that is to say, whether the loss, damage or injury is direct and as a result of Iraq's unlawful invasion and occupation of Kuwait." (Paragraph 25)

5. The Panel has been entrusted with three tasks in the present proceedings. First, the Panel is required to determine whether the various types of losses alleged by the Claimants are within the jurisdiction of the Commission. Second, the Panel has to verify whether the alleged losses that are in principle compensable had in fact been incurred by a given Claimant. Third, the Panel is required to determine whether these compensable losses were incurred in the amounts claimed.

6. In fulfilling these tasks, the Panel considered that the vast number of claims before the Commission, and the time limits adopted by the Rules, necessitated the employment of legal standards and valuation methods that were administrable and which carefully balanced the twin objectives of speed and accuracy. This exercise was required to permit the efficient resolution of the thousands of claims by corporations that have been filed with the Commission.

B. The procedural history of the Bekhme Dam claims

7. In its review of the claims, the Panel has employed the full range of investigative procedures available to it under the Rules. The Panel has conducted a thorough and detailed factual and legal analysis of the claims. In addition, the Panel has used expert consultants to assist in determining the appropriate valuation of those claim elements that it found to be compensable. The Panel addressed questions to the Claimants and Iraq and has considered their replies. Finally, the Panel received a detailed factual and legal analysis of each Claim from the secretariat. In accomplishing its mission, the Panel has assumed an investigative role that goes beyond reliance merely on the information and documents supplied with the claims as presented. The conduct of the Panel's investigations is discussed in the paragraphs that follow.

8. Article 36(b) of the Rules provides that a panel of Commissioners may "request additional information from any other source, including expert advice, as necessary". Because of the complex nature of the claims and the

complex verification issues presented by large construction claims, the Panel engaged consultants with expertise in the planning, budgeting and execution of construction and engineering projects and in the adjusting and valuation of losses incurred in such projects. Two firms of expert consultants were retained. These expert consultants similarly reviewed each Claimant's submissions and the analyses produced by the secretariat.

9. The initial work of the secretariat and the expert consultants yielded specific legal recommendations and questions and identified areas of the claims in which further factual development was required. To address this need, the Panel, assisted by the secretariat and the expert consultants, prepared questions for the Claimants and formal requests for additional evidence. Such questions and requests (collectively referred to herein as "interrogatories") typically sought additional documentation concerning the claimed losses. The Panel issued these interrogatories by procedural orders dated 18 July 1997.

10. The Panel instructed the secretariat to transmit to Iraq the documents filed by the Claimants in the claims. The Panel also invited the Claimants to reply by 20 October 1997 to the interrogatories annexed to the procedural orders. The Panel invited Iraq to submit by 19 January 1998 its responses to the claims, together with supporting documentation. Iraq was also requested to submit by the same date its comments on the replies to the interrogatories to be received from the Claimants.

11. In October 1997, the Claimants submitted their replies to the interrogatories. Pursuant to paragraph 8 of the procedural order of 18 July 1997, the Claimants' replies were transmitted to Iraq upon their receipt. Iraq submitted its responses to the statements of claim at various times between 17 March and 25 April 1998.

12. On 3 March 1998, the Panel issued a further procedural order inviting the claimants Enka, Overseas Bechtel, Incorporated, and Civil Engineering and Production of Building Materials, d.d. Split, to reply to additional interrogatories by 4 April 1998. These three Claimants each filed replies on the appointed date.

13. The Panel then made initial determinations as to the compensability of the claim elements. The Panel directed the expert consultants to prepare comprehensive reports on each of the claims stating their opinions on the appropriate valuation of each of the compensable claim elements and identifying the evidence supporting these opinions. To perform this task, the expert consultants spent several months reviewing each claim file, including the evidence and interrogatory replies, and consulting with the Panel and the secretariat.

14. The expert consultants provided two reports to the Panel: one on the proposed valuation of the claim items and one on the loss of profits claims of certain claimants. The Panel reviewed these reports and, over the course of several Panel meetings, questioned the expert consultants on the data assembled and on their opinions. In several instances, the Panel

decided that further research was required and, where necessary, the valuation opinions were amended.

15. In drafting this report the Panel has not included specific citations to restricted or non-public documents that were produced or made available to it for the completion of its work. Although the Panel has not set forth in detail its valuation of each particular claim element, it has ensured that this report clearly indicates those parts of the claims that were found to be outside the jurisdiction of the Commission.

II. LEGAL FRAMEWORK

A. Applicable law and criteria

16. In paragraph 16 of resolution 687 (1991), the Security Council

> "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. Thus, paragraph 16 serves not only to reaffirm the liability of Iraq but also to define the jurisdiction of the Commission The law to be applied by the Panel is set out in article 31 of the Rules, which provides as follows:

> "In considering the claims, Commissioners will apply Security Council resolution 687 (1991) and other relevant Security Council resolutions, the criteria established by the Governing Council for particular categories of claims, and any pertinent decisions of the Governing Council. In addition, where necessary, Commissioners shall apply other relevant rules of international law."

18. Security Council resolution 687 (1991) provides that Iraq is liable "for any direct loss, damage ... or injury ... as a result of Iraq's unlawful invasion and occupation of Kuwait". Without further guidance, the concept of what constitutes a "direct loss" would be difficult to define or apply with precision. In this instance, however, the Panel can refer to specific instructions in Governing Council decisions on the issue, in particular, decisions 7 (S/AC.26/1991/7/Rev. 1), 9 (S/AC.26/1992/9) and 15 (S/AC.26/1992/15) which together set and define a standard that losses must be the direct result of the invasion and occupation to be compensable.

19. Paragraph 21 of Governing Council decision 7 is the seminal rule on "directness" for category "D", "E" and "F" claims. It provides in relevant part that compensation is available:

> "... with respect to any direct loss, damage, or injury to corporations and other entities as a result of Iraq's unlawful

invasion and occupation of Kuwait. This will include any loss suffered as a result of:

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

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

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

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

(e) Hostage-taking or other illegal detention."

20. The text of paragraph 21 is not exhaustive and leaves open the possibility that there may be causes of "direct loss" other than those enumerated therein. In paragraph 6 of decision 15 the Governing Council confirms that there "will be other situations where evidence can be produced showing claims are for direct loss, damage or injury as a result of Iraq's unlawful invasion and occupation of Kuwait". Should that be the case, the claimants will have the burden of proof to show that a loss that was not suffered as a result of one of the five categories of events in paragraph 21 is nevertheless "direct". Further, paragraph 3 of decision 15 emphasizes that for an alleged loss or damage to be compensable, "the causal link must be direct" (see also paragraph 9 of decision 9). Thus, decision 7 makes clear that a "direct loss" must be a loss directly caused by Iraq's invasion and occupation of Kuwait.

21. While the phrase "as a result of" contained in paragraph 21 of decision 7 is not further clarified in that decision, Governing Council decision 9 provides guidance as to what may be considered "losses suffered as a result of" Iraq's invasion and occupation of Kuwait. Decision 9 discusses the three main general categories of loss types that prevail among the category "E" claims: losses in connection with contracts, losses relating to tangible assets and losses relating to income-producing properties.

22. Thus, decisions 7 and 9 provide specific instructions to the Panel as to how the "direct loss" requirement must be interpreted. It is against this background that the Panel examined the loss types presented in the claims before it to determine whether, with respect to each claim, the requisite causal link - a "direct loss" - is present.

B. Liability of Iraq

23. According to paragraph 16 of Security Council resolution 687 (1991), "Iraq ... is liable under international law for any direct loss, damage... or injury to foreign Governments, nationals and corporations, as a result

of Iraq's unlawful invasion and occupation of Kuwait." The Panel notes that, in adopting resolution 687 (1991), the Security Council was acting under Chapter VII of the United Nations Charter, which permits the Council to exercise its powers under that Chapter to maintain or restore international peace and security. The Security Council also acted under Chapter VII when adopting resolution 692 (1991), in which it decided to establish the Commission and the Compensation Fund referred to in paragraph 18 of resolution 687 (1991). Given these provisions, the issue of Iraq's liability for losses falling within the Commission's jurisdiction has been resolved by the Security Council.

C. Evidentiary requirements

24. Pursuant to article 35(3) of the Rules, corporate claims must be supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and amount of the claimed loss. The Governing Council has made it clear in paragraph 5 of decision 15 that, with respect to business losses, there "will be a need for detailed factual descriptions of the circumstances of the claimed loss, damage or injury" in order for compensation to be recommended.

25. The category "E" claim form requires all corporations and other legal entities that have filed claims to submit with their claim forms "a separate statement explaining its claim ('Statement of Claim'), supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and the amount of the claimed loss". Claimants were instructed to include in the statement of claim the following particulars:

> "(a) The date, type and basis of the Commission's jurisdiction for each element of loss ...;
>
> (b) The facts supporting the claim;
>
> (c) The legal basis for each element of the claim;
>
> (d) The amount of compensation sought, and an explanation of how this amount was arrived at."

III. THE BEKHME DAM PROJECT

A. Factual background

26. In October 1986, as the result of a competitive tendering process, the contract for the construction of the Project was awarded to a consortium composed of the claimants Enka Insaat ve Sanyani A.S. ("Enka") and GIK "Hidrogradnja" Civil Engineering and General Contracting Company ("Hidrogradnja")(together, the "Consortium").

27. The main feature of the Project was to be a rockfill dam 230 metres high and 570 metres long. The dam was to be located in Iraq on the Great Zab River, a tributary flowing south and east into the Tigris River, in the Bekhme Canyon 200 kilometres west of the city of Mosul, Iraq. The dam was

intended principally to create a reservoir to feed six underground hydro-electric generators with a combined maximum capacity of 1,536 megawatts, and secondarily for irrigation and flood control.

28. Work on the Project commenced in January 1988. Construction work was to be completed in January 1995 and was to be followed by a two year maintenance and training period, during which time the Consortium was to ensure that the Project was functioning properly and carry out the training of Iraqi staff.

29. As the Project site was close to the Iranian border, the 1980-1988 war between Iran and Iraq was a major obstacle to the construction of the Project. Until the United Nations cease-fire resolution was accepted by the two countries on 20 August 1988, several areas around the Project site had not been secured by the Iraqi army and were in a state of political unrest. After the cease-fire, the area around the Project site was gradually brought under the control of the Iraqi military and opened up to the work of the Consortium.

30. In addition to war-related obstacles, the Project site presented significant geographic challenges. The Project site was remote, rugged and wholly undeveloped, making communication and transportation extremely difficult. For an extended period of time the Consortium had access to only one telephone line at the Project site. During another period the Consortium could mount only one truck convoy per day for the movement of goods and personnel to the Project site.

31. Because of the remoteness of the Project site it was necessary for the Consortium to construct certain collateral facilities to service the workforce and machines employed by the Consortium and, ultimately, the Project's permanent staff and their dependants. These included roads and accommodation, as well as electricity, water, sanitation and recreation, post, medical and religious facilities.

32. In addition to the delay caused by the war between Iran and Iraq, local political unrest and geographic challenges, the Consortium experienced a number of other delays in the construction of the Project prior to August 1990. According to the Claimants, these delays were mainly occasioned by the following circumstances:

a. the Employer's late payment of the lump sum portion of the Contract price, which was to be paid by October 1988 but which was not paid until the autumn of 1989;

b. a shortage of Iraqi-sourced concrete and explosives, which the Consortium was contractually bound to use and which the Employer was contractually bound to provide on a priority basis;

c. a lack of design drawings and the generally "unengineered" state of the Project at the time the Consortium commenced work;

d. a shortage of telecommunication services; and

e. the allegedly arbitrary manner in which the Employer exercised its contractual rights and performed its contractual obligations.

33. According to the Claimants, as a result of these factors, construction of the Project was behind schedule at the time of the invasion and occupation of Kuwait. Most importantly, the Consortium was one year late in completing the river diversion. This important step was only accomplished on 15 June 1990.

34. As is discussed more completely in paragraphs 56-62, infra, of this report, Enka alleges that the Project collapsed a short time after 2 August 1990 and that this collapse was a direct result of Iraq's invasion of Kuwait. Each of the other Claimants make similar allegations. The Claimants further allege that they have incurred losses as a result of this collapse, and it is for these alleged losses that they request compensation.

B. The Claimants

35. The Claimant Enka, a Turkish corporation, acting in consortium with Hidrogradnja, currently a corporation organized under the laws of Bosnia and Herzegovina, entered jointly into a contract dated October 1986 ("Contract") with the Iraqi Ministry of Agriculture and Irrigation, State Organization for Dams (the "Employer") under which Enka and Hidrogradnja agreed to construct the Bekhme Dam Project over a number of years. Enka is a leading construction enterprise in Turkey. During the twenty years prior to the invasion, Enka had been involved in a number of large civil engineering projects in the Middle East and elsewhere. Hidrogradnjais a leading civil engineering contractor in the former Yugoslavia and also had construction experience in the Middle East.

36. The Consortium was the contractor on the Project and had overall responsibility for the construction of the dam and the management, supervision and control of the Project and of the subcontractors and suppliers.

37. Of the remaining eight Claimants, the following seven were involved either directly or indirectly in the construction, supply, management or financing of the Consortium in its work on the Project:

- Overseas Bechtel, Incorporated ("Bechtel")

- Konsolidacija I Gradjevinarstvo (Geoinþenjering Company) ("Geoinþenjering")

- Geosonda Holding Limited ("Geosonda")

- Civil Engineering Institute of Croatia ("Civil Engineering")

- "Konstruktor-Inþenjering" Civil Engineering and Construction of Building Materials ("Konstruktor")

- Central Bank of the Republic of Turkey ("Bank of Turkey")

- Isola Bauchemie GmbH ("Isola")

38. The eighth Claimant, Energoprojekt-Hidroinþenjering Consulting Engineering Company ("Energoprojekt"), acted as advisor to the Employer.

39. The Claimant Bechtel, a corporation organized under the laws of the State of Nevada, United States of America, has an international business in, inter alia, the management of large and complex construction and civil engineering projects. Bechtel entered into a contract with the Consortium under which it agreed to act as the Consortium's technical and project management consultant, providing the Consortium with general support and technical advice and services related to the Consortium's areas of common interest.

40. The Claimants Geoinþenjering a corporation organized under the laws of Bosnia and Herzegovina, and Geosonda, a corporation organized under the laws of the Federal Republic of Yugoslavia, entered jointly into a contract with Hidrogradnja to perform, as sub-contractors, drilling and grouting work on the Project.

41. The Claimant Civil Engineering, a corporation organized under the laws of Croatia, entered into a contract with Geosonda under which Civil Engineering agreed to perform certain civil engineering services related to the Project.

42. The Claimant Konstruktor, a corporation organized under the laws of Croatia, was a labour subcontractor for Hidrogradnja.

43. The Claimant Bank of Turkey, an organ of the Government of Turkey, was involved in financing Enka's work on the Project.

44. The Claimant Isola, a corporation organized under the laws of Germany, was a supplier of chemical additives to Hidrogradnja.

45. The Claimant Energoprojekt, a corporation organized under the laws of the Federal Republic of Yugoslavia, entered into a contract with the Employer to provide detailed design and other services related to the Project over a number of years.

IV. CLAIM OF ENKA INSAAT VE SANAYI A. S.

A. Facts and contentions

1. Enka's role in the Project

46. Under the Contract the Consortium members were jointly and severally liable to the Employer. Under a separate contract dated 20 May 1987, however, Enka and Hidrogradnja agreed that Enka would be the lead member of the Consortium. Enka therefore assumed principal responsibility within the Consortium for the management of the Project. For its management services Enka earned a fixed percentage management fee from Hidrogradnja's share of revenue.

47. Despite the delays and difficulties encountered by the Consortium prior to the invasion, as previously described in paragraphs 29-34, supra, Enka claims that at the time of the invasion most problems had been resolved and that it was prepared to enter into the most profitable portion of the Project. Enka's confidence is based on its success in marshalling the equipment, spare parts and workers required to continue its work efficiently. Enka estimates that at the time of Iraq's invasion of Kuwait it had on site 12 additional months' worth of the construction supplies that it was required to provide and, therefore, that it would have avoided further supply-related delays. In contrast, however, Enka alleges that the Employer was not current in its obligations to furnish certain critical supplies, such as concrete and explosives (see paragraph 71, infra).

2. Contractual relationships

48. Under the Contract the Consortium was to charge a fixed price of Iraqi dinars ("ID") 460,350,000. This price amounted to US$1,477,212,051 at both the Contract and official Iraqi exchange rates as of the date of the Contract of ID 1.000 to US$3.208889. This price is after a reduction of 10 per cent that the Employer negotiated with the Consortium after it accepted the Consortium's tender. The Contract price was broken down in a Bill of Quantities annexed to the Contract, which detailed the agreed prices for the various subcomponents of the work to be completed.

49. Thirty per cent of the Contract price was to be paid in Iraqi dinars and 70 per cent in United States dollars. Of the dollar portion of the Contract price, 20 per cent was to be paid in cash and 50 per cent by promissory notes ("PNs") with various fixed maturity dates. The PN payments were due between seven and twelve years after the commencement of the Project. Five per cent of the Contract price, approximately US$70,000,000, was paid as a lump sum advance before the Consortium commenced work on the Project, and was intended to allow the Consortium to purchase equipment and materials and to hire the staff necessary to commence the construction of the Project.

50. Once work on the Project commenced the Consortium was to submit monthly payment certificates, referred to in the Contract as Interim

Certificates ("ICs"). The ICs reflected the quantities of the work performed to the date of the particular IC in question.

51. The Bank of Turkey agreed to finance Enka's work on the Project under a separate arrangement by which Enka sold its PNs to the Bank of Turkey at a discount.

52. Enka and Hidrogradnja otherwise agreed to split the work on the Project so that the revenue generated by the Consortium under the Contract would be earned in approximately equal shares. In turn, each was responsible for its own profit and loss. Enka was responsible for the above-ground portion of the Project, mainly the dam and the spillway structure. Hidrogradnja was responsible for the underground portion of the Project, mainly the underground powerhouse and the diversion tunnels, as well as for its own camps and shops.

53. The Consortium alleges that, as a result of a number of factors, it was required to undertake additional work. According to the Consortium, it encountered difficulties in obtaining approval for the amounts claimed for additional work until a committee was established, with the Employer's participation, to deal with these claims. This committee met for the first time on 24 March 1990 and on six subsequent occasions prior to the invasion. At the time of the invasion there were a number of unresolved claims outstanding before the committee.

3. Iraq's role in the Project

54. The Employer is defined in the Contract as the Republic of Iraq, Ministry of Agriculture and Irrigation, State Organization for Dams. This entity subsequently became the State Commission on Dams, and, still later, the State Commission for Irrigation and Reclamation Projects. The term "Employer" as used herein refers to these organizations collectively. The Employer is an agency of the State of Iraq.

55. Iraq does not contest that it may, in principle, be contractually responsible to the members of the Consortium. Iraq does, however, dispute many of the claim items asserted by the Consortium. Iraq's acceptance of this potential liability is evident in its arguments, which make extensive references to Iraq's rights and the Consortium's obligations owed to Iraq under the Contract. Iraq also makes what it terms to be counterclaims under the Contract, although these counterclaims may be more accurately described as set-offs against the amounts claimed by the Consortium.

4. The collapse of the Project

(a) Enka's contentions

56. Shortly after Iraq's invasion of Kuwait, the majority of the work on the Project ceased. While the Project site was not near a combat area, Enka maintains that the invasion was closely related to the collapse of the Project.

57. Until 15 August 1990, work on the Project continued, but according to the evidence presented by Enka, the morale of the Turkish workers was continuously eroded and the number of employees actually working decreased each day. This decline started when the borders were closed by Iraq. The situation with Enka's Turkish workers was exacerbated on 6 August 1990, when the Security Council imposed the embargo on Iraq. Shortly thereafter Turkey joined the embargo and closed the petrol pipeline between itself and Iraq. This action was accompanied by a firm declaration by the Turkish authorities against Iraq and its Government.

58. Enka contends that the worker unrest and desertion, the increased Iraqi secret police activity at the Project site and the Iraqi suspension of exit visas and travel permits combined to render further work on the Project impossible. The workers, believing that they were trapped inside a hostile state on the verge of conflict with their home state, turned their thoughts and energies to self-preservation and escape from Iraq. Enka therefore argues that it did not leave the Project, but rather that the workers left Enka as a direct result of the situation created by Iraq's invasion of Kuwait. The accounts provided by other Project contractors are consistent with Enka's description of the above situation.

59. Enka alleges a number of reasons for the behaviour of its workers:

a. Enka's workers, aware of Iraq's use of chemical weapons against its Kurdish population at the end of the war between Iran and Iraq, and having received communications from their families expressing concern about their safety generally, and about Iraq's alleged nuclear and chemical warfare capability particularly, became fearful that they would be the targets of attacks, taken as hostages, or exposed to chemical or biological weapons;

b. Iraq progressively increased its secret police presence at the Project site, which tended to heighten the fear and tension among Enka's workers;

c. at various times after the invasion Iraq closed and reopened its border with Turkey and refused to issue exit visas to Enka's workers;

d. Iraq prohibited the stockpiling of food and threatened punishments for anyone disobeying this edict;

e. members of the Consortium's workforce who ventured off the Project site were attacked and taunted by Iraqi civilians and detained and threatened by Iraqi authorities;

f. Bechtel employees, who were United States nationals, were removed from the Project site by Iraqi authorities and used as "human shields" at key Iraqi installations; and

g. international communications from the Project site were interrupted.

60. Enka also cites other causes, which were in its view secondary, including shortages of fuel and concrete experienced in the weeks following the invasion.

61. Enka offers extensive evidence describing the breakdown of discipline among its workers. The evidence produced on this issue by Enka consists of statements made under oath by its senior staff who worked on the Project and of press reports. Witness statements submitted by Enka describe the collapse of the Project in detail. Several witnesses state that problems began when Enka's workers learned of the invasion and that the situation among the workers deteriorated steadily thereafter. This evidence suggests that shortly after the invasion, Iraqi authorities stopped issuing exit visas. Enka managers at the job site tried to calm workers but were not successful. The workers refused to stay at the Enka job site.

62. Enka maintains that "Kurdish nationalists" took control of the Project site after the Iraqi military's withdrawalfrom the Project area after 2 March 1991. Despite the efforts taken to secure the Project site, Enka alleges that after the evacuation of the Consortium's workers, the whole of the Project site was looted and the Project substantially destroyed by "Kurdish nationalists" living in the area of the Project site.

(b) Iraq's contentions

63. Iraq responded to Enka's allegations in some detail. Iraq's principal arguments are (a) that the Project site was not exposed to any military attacks until 2 March 1991, when, according to Iraq, the Project site was seized by what Iraq describes as "armed bands", which Iraq alleges were not under its control, and (b) that the evacuation of the workers from the Project site was not required. Both of these facts, Iraq asserts, made the abandonment of the Project both unnecessary and a violation of the Contract.

64. In its response to the Enka claim, Iraq also argues that there was no "direct relation between the Gulf events and the damages [at] the site of the Dam". In Iraq's view, the Claimants and their workers were under no threat in the remote construction area and it was the Claimants' decision to abandon the Project. For that reason, Iraq argues, it should bear no liability for the looting and destruction at the Project site.

(c) Other relevant facts

65. Iraq does not, however, address the primary fact underlying Enka's causation arguments: that the workers left the Project site as a result of their fear of being confined in a belligerent state with which their home states could soon be engaged in armed conflict.

66. The Consortium met with the Employer on several occasions immediately following Iraq's invasion of Kuwait to discuss the status of the Project

and to request that the Employer issue a formal order for the suspension of construction. The Employer refused these requests and insisted that the Consortium continue to perform its obligations under the Contract. Only later did the Employer offer to allow the Consortium to abandon the Project in exchange for the Consortium's agreement not to advance any future claims against the Employer. The Consortium refused this offer. These communications are detailed at paragraphs 69-75, infra.

67. During August and September 1990, Enka arranged for the evacuation of over 2,000 workers from Iraq. This operation was largely completed by February 1991. As a condition for allowing the evacuation of Enka's workers, the Employer required Enka to maintain a skeleton staff of 50 at the Project site. This skeleton staff was originally composed of Turkish nationals. When Enka's Turkish workers were evacuated by the end of January 1991, they were replaced by Jordanians and Palestinians, who were themselves evacuated after March 1991 when the Iraqi military withdrew from the area.

5. Status of the Contract after 2 August 1990

68. The Contract contained the following force majeure provision:

> "The Contractor shall be under no liability whatsoever in respect of destruction or damage to the [Project]... which is the consequence whether direct or indirect of war hostilities (whether war be declared or not) invasion, act of foreign enemies, rebellion, revolution, insurrection or usurped power, civil war or (otherwise than among the Contractor's own employees) riot, commotion or disorder."

69. After the invasion, and after certain informal discussions with the Employer, Enka informed the Employer in a letter dated 12 August 1990 of the Consortium's intention to look to the Employer for any increased costs to the Consortium resulting from Iraq's invasion of Kuwait.

70. Receiving no reply to the first letter, the Consortium made a similar, more formal request to the Employer in a letter dated 18 August 1990, which emphasized the deteriorating conditions at the Project site. The Consortium again emphasized that any increased costs to the Consortium were on the Employer's account.

71. The second letter was the subject of a meeting between the Consortium's management and the Employer's Director-General. At this meeting Enka stressed the serious situation among its workers and the critical shortage of materials that the Employer was bound to provide under the Contract (see paragraph 47, supra.). Enka requested a suspension of the Project and permission to evacuate its employees remaining in Iraq. The Employer responded that Enka would have to hire replacement workers as a condition of its employees being permitted to leave Iraq, and insisted that the Consortium continue work on the Project. The Employer's Director-General later remarked that he did not have the authority to suspend the Project, but suggested that the Consortium again request a suspension in

writing and offer not to seek any compensation for expenses due to the interruption of the Project. The Employer confirmed the position it articulated in this meeting in a letter dated 25 August 1990.

72. A further meeting was held just over a week later among the same individuals. The parties reiterated their positions, and the Employer inquired into the Consortium's plans to safeguard the Project if its workers were allowed to leave the site.

73. As no agreement was reached with the Employer, construction of the Project was unilaterally stopped by the Consortium on 20 August 1990. Enka took steps to secure the Project site, which included reinforcing structures, securing equipment and preserving documents.

74. A further letter was sent by the Consortium to the Employer on 27 August 1990, which again reaffirmed the Consortium's position that the Project should be officially suspended by the Employer according to the Contract. The Consortium advised the Employer in this letter that it was the Consortium's position that the Project work was already suspended, notwithstanding that the Employer had refused to issue a formal suspension order. This letter concludes: "It is our greatest wish to be able in the shortest possible period to resume the works without any claim and we can assure you that we shall put our best efforts to complete this job to the mutual satisfaction."

75. After the evacuation of its employees, Enka pursued the issue of the Project's suspension with the Employer for the last time by a telex dated 13 October 1990. Enka asked that a suspension order be issued from 15 August 1990. The Employer, replying on 18 October 1990 by telex, refused.

76. As noted above, Iraq argues that the Consortium had no basis for its decision to suspend construction and evacuate the workers. Iraq does not comment directly on the exchange between the Employer and the Consortium immediately following the invasion.

6. Enka's claim

77. In January 1993, Enka filed a claim requesting US$264,301,350 in compensation for alleged losses, each of which it claims was caused by the collapse of the Project. These losses are listed below as they were described and in the order in which they were presented by Enka:

a. loss of evacuation costs and related expenses, including labour costs, letters of guarantee, items in transit, detention costs and project costs (US$3,275,120);

b. loss of project assets: capital equipment, spare parts and materials, and customs deposits (US$71,721,433);

c. loss of profits (US$122,375,000);

d. loss of prepaid expenses (US$5,247,784);

e. loss of project preparatory works (US$5,803,780);

f. loss of "liquidated entitlements to payment under the Contract, i.e., monies owing to Enka for ICs that were already approved by the Employer for payment (including retentions)" (US$38,537,019); and

g. loss of entitlements to payments under the Contract that were the subject of disputes with the Employer on the date of the invasion (US$17,341,214).

B. Jurisdictional Issues

78. Enka's claim raises two significant jurisdictional issues. First, the Panel must determine the scope of the clause "without prejudice to the debts and obligations of Iraq arising prior to 2 August 1990" in paragraph 16 of Security Council resolution 687(1991) (hereinafter referred to as the "arising prior to" clause). Second, the Panel is required to determine whether the loss, damage or injury is directly related to Iraq's invasion and occupation of Kuwait.

1. Application of the "arising prior to" clause

79. The Panel recognizes that it is difficult to establish a fixed date for the exclusion of its jurisdiction that does not contain an arbitrary element. With respect to the interpretation of the "arising prior to" clause, the Panel of Commissioners that reviewed the first instalment of "E2" claims concluded that the "arising prior to" clause was intended to exclude from the jurisdiction of the Commission the foreign debt of Iraq existing at the time of the invasion. Therefore, because most foreign contracting parties could expect to be paid, if at all, within three months of submission of the proof of completion of the work, the "E2" Panel held that a period of three months represented the outer limits of normal or standard commercial practice in the context of the claims before the Commission. As a result, the "E2" Panel found that:

> "In the case of contracts with Iraq, where the performance giving rise to the original debt had been rendered by a claimant more than three months prior to 2 August 1990, that is, prior to 2 May 1990, claims based on payments owed, in kind or in cash, for such performance are outside of the jurisdiction of the Commission as claims for debts or obligations arising prior to 2 August 1990." (S/AC.26/1998/7, paragraph 90).

80. Persuaded by practical considerations that a three month delay period adequately reflects the business practices prevailing in Iraq at the time, and does not depart from ordinary commercial practices, the Panel adopts these conclusions for this claim. For the purposes of this report, the Panel interprets the "arising prior to" phrase in the following manner:

a. the phrase "without prejudice to the debts and obligations of Iraq arising prior to 2 August 1990, which will be addressed

through the normal mechanisms" was intended to have an exclusionary effect on the Commission's jurisdiction, i.e., that such debts and obligations could not be brought before the Commission;

b. the period described by "arising prior to 2 August 1990" should be interpreted with due consideration to the purpose of the phrase, which was to exclude existing bad debts of Iraq from the Commission's jurisdiction; and

c. the terms "debts" and "obligations" should be given the customary and usual meanings applied to them in ordinary discourse.

81. Thus, for this claim, the use of the term "debt or obligation arising prior to 2 August 1990" means a debt or obligation that is based on work performed or services rendered prior to 2 May 1990.

2. Application of the "direct loss" requirement

82. The Panel interprets the Governing Council's guidance on the "direct loss" requirement, addressed at paragraphs 18-22, supra, as follows:

a. with respect to physical assets in Iraq on 2 August 1990, a Claimant can prove a direct loss by demonstrating that the breakdown in civil order in Iraq, which resulted from the invasion and occupation, caused the claimant to evacuate its employees and that the evacuation resulted in the abandonment of the claimant's equipment, supplies and other assets in Iraq;

b. Iraq is liable for all such losses and may not rely on force majeure or similar legal principles as a defence to its obligations under the contract;

c. with respect to losses relating to contracts to which Iraq was not a party, a claimant may nonetheless prove a direct loss if it can establish by appropriate evidence that the invasion and occupation of Kuwait or the breakdown in civil order in Iraq following the invasion caused the claimant to evacuate the personnel needed to perform the contract;

d. costs incurred in taking reasonable steps to mitigate the losses incurred by the claimant are direct losses, bearing in mind that the claimant was under a duty to mitigate any losses that could be reasonably avoided after the evacuation of its personnel from Iraq; and

e. the loss of use of funds on deposit in Iraqi banks is not a direct loss, unless the claimant can demonstrate that Iraq was under a contractual or other specific duty to exchange those funds for convertible currencies and to permit the transfer of the converted funds out of Iraq and that this exchange and

transfer was prevented by the invasion and occupation of Kuwait.

C. Analysis and valuation of Enka's claim

83. The above-mentioned elements of Enka's claim present a range of claimed losses related to its work on the Bekhme Dam Project. The claim elements comprising Enka's claim are set forth in the following table but are grouped therein by categories based on the substantive nature of the claimed loss. For example, all of the claim elements involving assets located in Iraq on 2 August 1990 are grouped and discussed together. The Panel's analysis of the individual claim elements follows the regrouping of the claim elements as set forth in the following table. The headings under which each claim element is discussed have been numbered to correspond to the table.

Table 1. ENKA'S CLAIM

	Claim element	Claim amount (US$)
1	Project assets in Iraq on 2 August 1990	
1.a	Capital equipment	57,337,198
1.b	Spare parts and materials	10,264,053
1.c	Items in transit	2,515,737
	Subtotal	70,116,988
2	Contract with Iraq	
2.a	Work performed or services provided	
2.a.i	Labour costs after 2 August 1990	746,184
2.a.ii	Pre-contract expenses	5,247,784
2.a.iii	Preparatory work	5,803,780
2.a.iv	Unpaid work	38,537,019
2.b	Loss of profits	122,375,000
2.c	Costs related to goods in transit	102,686
2.d	Costs of letters of guarantee	1,798,368
2.e	Project termination costs	186,808
2.f	Customs deposits	1,604,445
	Subtotal	176,402,074
3	Other claims	
3.a	Evacuation and repatriation	122,551
3.b	Detention of project personnel	318,523
3.c	Unresolved disputes with the Employer	17,341,214
	Subtotal	17,782,288
	TOTAL	264,301,350

1. Project assets in Iraq on 2 August 1990

84. The first category of claims presented by Enka are those for the loss of assets located in Iraq on 2 August 1990. These assets are identified in Enka's statement of claim and in the table reproduced above as "Project Assets," and include capital equipment, spare parts and materials and items in transit. Enka also claims for the loss of certain items in Iraq and in transit to the Project on 2 August 1990, which it alleges it never received.

85. Enka alleges that its employees were evacuated from Iraq during the relevant period and that it lost assets that were abandoned in Iraq as a result of this departure. The circumstances that caused Enka to evacuate their employees are carefully documented and the evidence submitted is generally corroborated by the submissions of the other claimants. In each instance, Enka alleges that the loss of tangible property it experienced was the direct result of the fact that it was forced to evacuate its employees from Iraq, thereby leaving its tangible assets unattended.

86. In its responses to the Panel's interrogatories, Iraq advances several arguments against providing compensation for this loss element. First, Iraq argues that all the materials left at the site were the responsibility of Enka, which had appointed its own watchmen, and that, consequently, Iraq had no responsibility for safeguarding the materials and equipment.

87. The Panel finds, however, that this argument ignores the fact that decisions 7 and 9 of the Governing Council do not require Iraq to have undertaken specific responsibility with respect to property located in Iraq in order for it to be held liable for the resulting loss of that property, as long as that loss can be attributed to one of the acts or consequences of its invasion and occupation of Kuwait. In this Claim, that requirement would be satisfied by the departure of Enka's employees from Iraq during the relevant period, if proven.

88. Based on these decisions, the Panel finds that in the case of physical assets located in Iraq on 2 August 1990, if a claimant can demonstrate that its employees were evacuated from Iraq during the relevant period, and that this resulted in abandonment of the assets, the Claimant will have established the requisite causal link between Iraq's invasion and occupation of Kuwait and the loss of the assets the claimant can prove were in Iraq on 2 August 1990.

89. Second, Iraq argues that Enka has failed to specify how the individual losses occurred.

90. In this connection, the Panel finds that Enka has sufficiently established that the property losses resulted from the departure of its employees from Iraq during the relevant period and, therefore, has met the requirement. The compensability of the property losses alleged depends only on whether Enka can demonstrate a causal nexus between the losses and

Iraq's invasion and occupation of Kuwait and not on the claimant proving that a specific act, such as theft or vandalism, caused each loss.

91. Third, Iraq argues that the property in question is neither damaged nor lost, but still available to Enka in Iraq. Iraq further argues that Enka failed to take any steps from 2 March 1991 onwards to contact Iraq to seek the return of the property.

92. The Panel finds, however, that once forced to evacuate, Enka was under no general obligation to return to Iraq to retrieve its property. In addition, there is no indication that the materials left behind are still at the Project site.

93. Iraq argues that it should not be held responsible for any property losses resulting from Enka's departure from Iraq because Enka did not adhere to Contract provisions relating to early termination prior to departing, such as, for example, providing notice to the other party.

94. The Panel finds that, by implication, paragraph 21 of Governing Council decision 7 and paragraph 13 of Governing Council decision 9 relieve Enka from its obligations to adhere to the terms of the underlying Contract with Iraq prior to departure. Enka was, therefore, entitled to stop the work without prior authorization by the Employer.

95. The Panel further finds that Enka has adequately proven by the evidence submitted with the claim that it was engaged in work on the Project on 2 August 1990 and that this work required the continuing presence of many workers and substantial quantities of equipment, machinery and materials. The Panel is satisfied that Enka has furnished sufficient evidence that its employees departed from Iraq during the relevant period, leaving behind a significant amount of that equipment, machinery and material. The Panel concludes, therefore, that Enka has established the requisite causal link between Iraq's invasion and occupation of Kuwait and the loss of the equipment, machinery and assets that Enka can prove were in Iraq at that time.

96. Another issue relating to claims for the loss of physical assets in Iraq concerns mitigation of damage. The evidence submitted by Enka indicates that Enka took steps to mitigate the effects of the Project's collapse by attempting to protect the equipment and Project site prior to departure. The Panel finds that these actions were reasonable, as these were appropriate measures to be taken to try to assure the continued safety and protection of the relevant equipment. Because Enka had a duty to mitigate any losses, the reasonable costs incurred by Enka in taking such actions are compensable.

(a) Capital equipment

97. Enka claims a total of US$57,337,198 as compensation for the loss of capital equipment that was purchased for the Project and located in Iraq on 2 August 1990. This equipment was allegedly abandoned at the Project site during the hostilities and never recovered by Enka. Enka has provided, in

considerable detail, supporting evidence regarding its abandoned assets. Using a variety of appraisal methods, Enka calculated the August 1990 replacement value for the abandoned equipment as US$57,337,198, which it claimed for this item. The Panel has addressed both the supporting evidence and the valuation methods employed by Enka.

98. Under Iraqi law, Enka was required to keep an equipment inventory at the site. This statutory inventory, known as the "Certified List," was audited annually by the Iraqi State Accountant and was last updated by the Statutory Auditor on 8 September 1990. Enka took the 8 September 1990 Certified List from Iraq and submitted it with the claim. The Capital Equipment List is a computer-generated printout reflecting the information detailed in the Certified List. The total historical invoice cost on the Capital Equipment List was US$51,562,229. The Capital Equipment List itemizes 1,024 items of equipment, of which 221 items were transferred to the Project from other projects within Iraq. The Panel finds that the supporting documents are genuine and that this evidence establishes the existence of this equipment, its invoice cost, and its presence in Iraq on 2 August 1990.

99. Enka has entered the items sourced within Iraq in its claim at a depreciated figure. No invoice data is available for these items. Because of the Panel's decision regarding depreciation for these items, the lack of cost data has no effect on the compensation recommended in paragraph 112, infra.

100. As noted, Enka argues that it should receive the adjusted replacement cost on 2 August 1990 for the abandoned equipment. The Panel finds, however, that valuation of capital equipment in use in the Project should be based on the same assumptions and cost considerations as those adopted by Enka at the time that the initial bids for the Contract were being prepared. The Panel reaches this conclusion for two reasons. First, the Project has been permanently abandoned, and the reality is that Enka will never have to replace this equipment. Second, the Bekhme Dam Project site presented a host of difficulties: a remote location, difficult terrain, harsh environmental conditions, and a hostile local population. These conditions were disclosed to the potential contractors during the bidding process and were known to Enka at the time of the bid. As a result, the Panel is of the opinion that Enka would have taken these conditions into consideration in calculating its bid price.

101. The Panel therefore finds that Enka would have provided for the capital equipment items to be fully depreciated to zero recoverable value over the life of the Project. This conclusion is supported by documents submitted by Enka that show that it intended to depreciate fully the purchase value of the equipment over the projected 84 month contract period. Further, Enka made no allowance for the cost of transporting the capital equipment from the Project site at the conclusion of the Project.

102. For the foregoing reasons, the Panel finds that the appropriate measure of compensation for this item of the claim is the depreciated acquisition cost of the equipment. As noted, Enka has submitted original

invoices for the majority of the items of equipment. For those items for which no acquisition date could be determined, the item was deemed to be fully depreciated as of 2 August 1990. This concerns a sum of US$22,683,026. The Panel has applied a depreciation rate that would result in complete depreciation over the life of the Project of any item purchased and placed in use as of the start of the Project, except in those instances where the evidence indicates that Enka itself applied a higher depreciation rate. Accordingly, the Panel recommends compensation in the amount of US$28,879,203 for capital equipment.

(b) Spare parts and materials

103. Enka claims for spare parts and materials that had been purchased, transported to the project site and stored in Enka's warehouses. Enka claims that these spare parts and materials were abandoned when Enka evacuated the site and subsequently confiscated by Iraq.

104. Enka originally claimed US$3,258,466 for spare parts and US$7,253,974 for construction materials. Following a review of the documentation by Enka, it reduced the overall claim amounts, amending the figures for this claim item to US$3,612,026 and US$6,652,027, respectively,for a total restated amount for this claim item of US$10,264,053.

105. The Panel finds that the evidence provided by Enka establishes that it had purchased the spare parts and materials identified in this claim item. The Claimant describes the detailed system by which consumables such as spare parts and construction materials were ordered, documented, received on the site, and distributed out of stores. The system data were maintained on computers in Enka's accounting department in Istanbul and at the Project site. Around 15 August 1990, Enka decided to bring materials back to its warehouses from the project site. On 27-28 August 1990, the computer records were updated to re-input these items into an inventory, and back up diskettes were made. Similarly, an updated spare parts computer inventory was prepared at the site by Enka's machinery department. These diskettes were taken out of Iraq and returned to the Istanbul head office. Finally, Enka took a physical inventory of balances at its Project site warehouse.

106. Enka also obtained written confirmations from its principal suppliers that all invoices in respect of these items had been paid and has submitted these confirmations together with other evidence that establishes to the Panel's satisfaction that Enka had paid for and owned these items.

107. Enka could not produce invoices for each of the huge numbers of items included in this claim item. Enka explains that it bought consumables for distribution to more than one project and, therefore, while the computer records will reflect the cost of a particular item that was shipped to the Project site, the invoice will also include items sent to other projects. Because these invoices were not specific to the Bekhme Dam Project, they were not always maintained by Enka and thus were not available for submission in reply to the Panel's request. As a result, although the Panel has not received original invoices for each of the items in this

claim item, it is satisfied that the computer inventory has been compiled from actual invoices and that the cost data contained therein is reasonable.

108. Based on these facts, the Panel finds that the value of the spare parts and materials has been properly quantified and that the costs reported by Enka have been substantiated. The Panel finds, however, that there has been a duplication involving a portion of the items in this claim item. The duplication occurs with the materials intended to be incorporated into the Project ("ICP materials") and IC33. With each IC, Enka received an advance equivalent to 75 per cent of the value of the ICP materials on site on the date of the IC. Thus, US$4,276,000 - 75 per cent of the approximately US$5,702,000 worth of ICP materials on site on the date of IC33 - was included in IC33, which was approved by the Employer. The Iraqi dinar portion of IC33 was paid, and the United States dollar elements are contained in the claim for unpaid work and unissued PNs. As a result, Enka is claiming twice for the ICP materials: once in this claim item and once as a part of the unpaid portion of IC33. Thus, the claim for ICP materials should be reduced by US$4,276,000. Accordingly, the Panel recommends compensation in the amount of US$5,988,053 for spare parts and materials.

(c) Items in transit

109. According to Enka, several pieces of equipment that had been manufactured to Bekhme Dam Project specifications and a shipment of specially-manufactured consumable supplies were in transit to Iraq on 2 August 1990. Enka alleges that the equipment and supplies could not be delivered to the Project site because of the breakdown of order and cessation of work at the site. Enka seeks US$2,515,737 for these items, which it asserts represents a total loss. The Panel finds that Enka has provided invoices for the custom-made equipment and supplies that adequately establish their cost.

110. In reply to the Panel's questions, Enka also stated that the equipment and supplies were so designed that they were of little use to any other contractor. Enka provided documents evidencing a few unsuccessful attempts to dispose of this property. The Panel finds that the value US$261,929 of specially-manufactured consumable supplies represents a total loss.

111. Enka does not, however, explain why all the equipment was unable to be sold, rather than just the customized portions. Further, it appears that Enka did not offer the items for sale to the original manufacturer, which would have been a more likely market. Based on the evidence before it, the Panel concludes that Enka did not adequately attempt to mitigate its losses for the custom equipment portion of this claim element. The Panel's expert consultants have estimated that, even stripped of its customized parts, the equipment would have had a minimum realizable value on the secondary market of approximately 40 per cent of its original costs, which were US$2,253,808. The Panel finds this estimate reasonable and therefore recommends reducing the claim amount by US$901,523, the

reasonable market value of the equipment. The Panel recommends compensation in the amount of US$1,614,214 for items in transit.

112. The Panel recommends compensation in the amount of US$36,481,470 for project assets in Iraq on 2 August 1990.

2. Contract with Iraq

(a) Work performed or services provided

113. Enka requests compensation in the amount of US$50,334,767 for money owed for work performed under the Contract. The elements comprising this portion of the claim include the costs of labour at the Project site in the period after the invasion and before the cessation of operations, the unamortized pre-contract expenses, and preparatory work and the unpaid balances on the unissued PN account and on ICs issued by the Employer.

114. The Panel finds that Iraq is a party to the Contract. As noted above at paragraph 55, Iraq seeks to assert certain claims against Enka under the Contract, which it terms "counterclaims." The necessary implication of this reliance by Iraq on the terms of the Contract is that Iraq considers itself as bound thereunder, at least as regards the Consortium.

115. The Panel finds that the failure of the Employer to pay for the work performed and services provided is the direct result of the invasion and occupation of Kuwait. Some of Enka's contract-related claims, however, raise additional issues that must be addressed.

116. First, the Project commenced in 1987. In many areas, performance was partially completed by the Claimants prior to 2 August 1990. For example, several of the PNs issued to Enka and Hidrogradnja by the Employer were issued for work completed in 1987.

117. Enka contends that the amounts owed by the Employer should be compensable regardless of the date of performance. In essence, Enka's argument is that to the extent that the issuance of the PNs deferred Iraq's existing payment obligations, they created new obligations on the part of Iraq and that these new obligations do not constitute debts of Iraq arising prior to 2 August 1990.

118. In response to some of the claims, Iraq argues that certain items for overdue payments are not compensable because of the limitation on compensation for debts arising prior to 2 August 1990. Iraq takes the position that any debt or obligation that matured prior to that date is not compensable. Thus, pursuant to Iraq's argument, a payment that became due on 1 August 1990 would not be compensable.

119. For the reasons expressed in paragraphs 79-81, supra, the Panel finds that these deferred payment arrangements and agreements do not serve to render compensable a debt that in fact arose prior to 2 May 1990. Therefore, notwithstanding the existence of these new agreements, for purposes of determining whether a debt is within this Commission's

jurisdiction, the Panel will consider only the date when performance was completed by the Claimant and disregard the effect of deferred payment arrangements.

120. Further, the Panel finds that some of the work at issue in its claim was performed by Enka after 6 August 1990, the date of the Security Council's embargo on Iraq. The work performed after 6 August 1990 was related to the construction activities on the Project and did not involve the transfer or transport of goods, services or finances to or from Iraq. Thus, the Panel finds that the work performed by Enka after 6 August 1990 did not violate the trade embargo.

(i) Labour costs after 2 August 1990

121. In the first item of this claim element, Enka seeks compensation in the amount of US$746,184 for wages paid to its 2,324 Project site employees after 2 August 1990. Enka claims that the invasion created such unrest and disorder on the Project site that no productive work was performed by these employees after 2 August 1990. The Panel is satisfied that Enka has produced credible, graphic witness reports of the terror and chaos among the workers caused by the news of the invasion. In the Panel's opinion, it is reasonable to conclude that the decline in productivity was a direct result of the invasion. Further, the evidence submitted adequately quantifies and supports the claimed difference between expected and actual labour billings to the Employer. Therefore, the Panel recommends compensation in the amount of US$746,184 for labour costs.

(ii) Pre-contract expenses

122. Enka claims for a significant amount of what it terms "pre-contract expenses". These are presented in the claim as follows:

Table 2. PRE-CONTRACT EXPENSES

Claim item	Claim amount (US$)
Bid bond commissions	335,080
Pre-award expenses/Istanbul	167,754
Pre-award expenses/Baghdad	1,318,251
Bechtel services	1,549,586
Insurance premium	1,877,113
TOTAL	5,247,784

123. Enka claims that its practice was to amortize such costs on contracts actually awarded over the life of the project. This claim element is well supported. The Panel finds, however, that with the exception of the insurance premium, these costs were all incurred either pre-bid or pre-contract award. The Panel further finds that the more

accepted commercial practice is to consider all pre-bid and pre-award expenses as part of the overheads of the business, which are then built into the contractor's rates. The Panel therefore recommends no compensation for the first four items included in pre-contract expenses.

124. In contrast, the Panel finds that the insurance premium is a prepaid item but not a pre-contract expense. The insurance was obtained by the Employer and paid in five instalments which were charged to the Consortium by deduction from ICs. The Enka claim is calculated by amortizing the total premium and deducting the amount amortized from the instalments paid. The Panel considers this approach and the amount claimed to be reasonable. The Panel therefore recommends compensation in the amount of US$1,877,113 for insurance premiums.

(iii) Preparatory work

125. Enka makes the following claims for preparatory work undertaken on the Project site:

Table 3. PREPARATORY WORK

Claim item	Claim amount (US$)
Rock quarry	2,895,666
Upstream coffer dam	390,503
Material stockpile	2,078,683
Borrow areas	438,928
TOTAL	5,803,780

126. The Panel finds that Enka provided no documentary evidence of quantities for many of the preparatory work claim items. Nevertheless, the claim did include reasonable and convincing evidence in the form of witness statements from Enka's own personnel. Rates and prices quoted, some of which are based upon Bill of Quantity rates less adjustment for contract discount overheads and profit, are reasonable. As work progressed, the costs were recovered under Bill of Quantity rates, but until then, amounts were not included in ICs.

127. The Panel accepts that the rock quarry losses are correctly stated as Enka has supplied satisfactory proof of the value of its work. The Panel recommends compensation in the amount of US$2,895,666 for the rock quarry.

128. Enka requests compensation in the amount of US$390,503 for the unamortized cost of the upstream coffer dam built to facilitate the work on the Project. At the time of the invasion, 41.5 per cent of the total cost of the coffer dam had been amortized and claimed on ICs accepted by the Employer. The claimed amount represents the unamortized balance. The Panel finds that Enka's evidence adequately supports this claim item and that Enka had accurately calculated the unamortized balance on the coffer

dam. Therefore, the Panel recommends compensation in the amount of US$390,503 for the coffer dam.

129. The material stockpile, however, was for use in the upstream coffer dam, which was 41.5 per cent completed. The Panel received no explanation as to why this amount had not been amortized. The Panel concludes that the same 41.5 per cent figure should be used, thus reducing the claimed amount for the material stockpile by US$862,653 to US$1,216,030. Therefore, the Panel recommends compensation in the amount of US$1,216,030 for the material stockpile.

130. Similarly, no use had been made of the clay and filter material from the borrow areas. Enka submitted satisfactory proof of the value and amount of materials in the borrow areas and, therefore, the Panel recommends compensation in the amount of US$438,928 for the borrow areas.

131. The Panel recommends compensation in the amount of US$4,941,127 for preparatory work.

(iv) Unpaid work

132. Enka makes the following claims for unpaid work on the Project.

Table 4. UNPAID WORK

Claim item	Claim amount (US$)
United States dollar portion of unpaid ICs	10,319,728
Unissued balance in PN account	4,413,732
Retention money	23,803,559
Total	38,537,019

133. Enka requests compensation in the amount of US$10,319,728 for the United States dollar portions of ICs 26 to 33, which were due to be paid in cash, but were never paid. The Iraqi dinar portions of all ICs were paid up to and including IC33. The Panel finds that ICs 26 to 33 had all been approved by the Employer and that the dollar portions were not paid. Much of the work for which these ICs were issued was performed prior to 2 May 1990. For the reasons expressed in paragraphs 79-81, supra, the Panel finds that US$5,198,680 of the amounts stated in these ICs are not compensable. The Panel therefore recommends compensation in the amount of US$5,121,048 for the unpaid ICs.

134. Enka also claims compensation for the unissued balance in the PN account, which was US$4,413,732 on 2 August 1990. The Panel finds that Enka has proved that the PNs included in this claim item are based on work performed after 2 May 1990. The evidence establishes that the PNs were issued, due and not paid. Therefore, the Panel recommends compensation in the amount of US$4,413,732 for the unissued balance in the PN account.

135. Enka requests compensation in the amount of US$23,803,559 for retention money held by the Employer and never paid to it following the collapse of the Project. This retention money was withheld from the payments and PNs issued pursuant to the ICs submitted by the Consortium to the Employer.

136. The Panel finds that retention money is a form of security held by an employer to ensure fulfillment by a contractor of its obligations to complete the project and to remedy defects after take over of the completed project by the employer.

137. According to the Contract, upon issue of a “take-over certificate”, 50 per cent of the retention money was to be certified by the Employer’s engineer for payment to Enka. The remaining 50 per cent was to be certified for payment to Enka by the Employer’s engineer upon expiration of the maintenance (or defects liability) period. In the event that some works were to be rectified, the Employer was entitled to withhold the remaining retention amount until completion of the remedial work. Because the results of performance may not be known until well after completion of the project, the Panel characterizes the loss of retention money as a contract loss to which a claimant has a “contingent entitlement” for payment that is already earned, but not yet owed.

138. With respect to the Project, the Panel finds that the amounts withheld as retention money were to be repaid by the Employer in two stages following completion of the Project. Because the work on the Project was ongoing on 2 August 1990 and approximately 40 per cent completed, the conditions precedent to certification of payment by the Employer’s engineer, namely completion of the Project and expiration of the maintenance or defects liability period, could not have been satisfied. The effect of the invasion was to render it impossible for Enka to satisfy those conditions. Thus, the Panel finds that the request for compensation for retention money is properly within the Commission’s jurisdiction.

139. Iraq does not challenge the assertion that it retained funds from the payments due to the Consortium. However, it does assert that some of the amounts should be denominated in Iraqi dinars rather than in United States dollars.

140. Applying equitable principles inherent in international contract practice, the Panel allocates the risks of non-completion of the Project equally between the Employer and Enka. The Consortium was behind schedule in its construction of the Project. The Project might not have been finalized according to specifications, and the eventual operation of the Project might require further rectification and adjustment to remedy possible defects. However, the Panel finds that the Employer has accepted and approved the ICs for work already done. Therefore, refusal to compensate Enka for the retention money withheld in the ICs would unjustly enrich the Employer.

141. The Panel finds that the evidence establishes: the amounts retained; the currency in which these amounts were due; and that no payment of

withheld retention money was made to Enka. Pursuant to the terms of the Contract, the Employer would have paid Enka 50 per cent of the amount withheld as retention money on the date of acceptance of the completed Project. In view of the fact that Enka was prevented from terminating the project without fault, and because the parties should share the risk of non-completion, the Panel finds that Enka is entitled to 25 per cent of the total retention money withheld by the Employer. Therefore, the Panel recommends compensation in the amount of US$5,950,889 for retention money.

142. The Panel recommends compensation in the amount of US$15,485,669 for unpaid work.

(b) Loss of profits

143. Enka requests compensation in the amount of US$122,375,000 for loss of profits under the Contract, which it asserts it would have earned had the Project been completed as scheduled.

144. In its reply to interrogatories from the Panel, Enka sought to increase this claim element to US$136,131,239. In the interrogatories, the Panel requested clarification and evidence in support of the claim presented. This request was not intended to provide a further opportunity for Enka to revise its claim or to increase the quantum of the claim elements previously submitted. Furthermore, to permit such an increase or addition would entail discriminatory practice in the treatment of claims. This increase was not accepted by the Panel as the Panel reviews only the claim as initially presented.

145. Governing Council decision 9, paragraph 9, provides that where "continuation of the contract became impossible for the other party as a result of Iraq's invasion and occupation of Kuwait, Iraq is liable for any direct loss the other party suffered as a result, including lost profits".

146. The effects of the language of decision 9 on the claimants seeking compensation for loss of profits are threefold. First, the phrase "continuation of the contract" imposes a requirement that the claimant prove that it had an existing contractual relationship at the time of the invasion. Second, the text requires the claimant to prove that the continuation of the relationship was rendered impossible by Iraq's invasion of Kuwait. Finally, this text indicates a further requirement that profits should be measured over the life of the contract. The import of this requirement is that the claimant must demonstrate that the contract would have been profitable as a whole. It is not sufficient to prove a profit at any stage before the completion of the Project. Thus, Enka must demonstrate that it would have been profitable to complete the contract.

147. Paragraph 5 of Governing Council decision 15 expressly states that the claimant seeking compensation for business losses such as loss of profits must provide "detailed factual descriptions of the circumstances of the claimed loss, damage or injury" in order for compensation to be awarded. Accordingly, the Panel requires clear and convincing evidence of ongoing and expected future profitability.

148. For a major construction project such as that presented in this claim, Enka's evidentiary burden is magnified by the nature of the Project At the time Enka signed the Contract, the Project already faced additional obstacles to profitability imposed by the harsh geographic and climatic conditions, the unreliable delivery of construction supplies, and the volatile demographics of the region where the Project was situated. In addition, the Panel takes into consideration that the Consortium accepted a price reduction of approximately 10 per cent after its bidhad been selected, which could not have been taken into consideration in the original profit projections.

149. As a threshold matter, the Panel finds that the Project Contract was ongoing on 2 August 1990 and that the Contract became impossible to perform as a direct result of Iraq's invasion and occupation of Kuwait. Based on Governing Council decision 9, therefore, Enka is entitled to the profits on the Contract that it would reasonably have earned had they been able to complete performance.

150. While Enka provided a compendium of documentation in support of its loss of profits claim and engaged expert assistance in preparing the claim, very little of the documentation provided was specific to the claimed loss of profits. A review of the loss of profits claim by the Panel and by its expert consultants indicates that Enka's estimates of direct costs, such as labour, equipment and materials costs, were of a limited nature and did not properly take into consideration the full range ofcosts associated with completing such a large, complex and difficult project.

151. In particular, Enka has underestimated the labour required to complete the Project. Historical data from the Project permitted the Panel's expert consultants to estimate the average number of work hours that had been required to complete particular jobs on the Project. Further, the Project progress reports permit the estimation of the number and size of the tasks remaining to complete the dam. The progress reports indicate that a substantially greater quantity of work remained than Enka had used in its labour calculations. Thus, Enka's labour calculations are understated. Using Enka's own data, the Panel's expert consultants estimated the number of hours and the cost that would have been required to complete the full range of remaining tasks on the Project. Enka estimated that it would have required an additional 79,574 man-months of labour to complete the Project. The Panel's expert consultants estimated that Enka would have incurred 89,592 man-months in labour costs to complete the Project and, therefore, has understated its total labour and related costs by approximately 40 per cent. The Panel finds that the estimates made by the expert consultants are more comprehensive in their scope and, therefore, are more reliable.

152. Similarly, the assumptions made by Enka regarding indirect and general costs were in some instances unwarranted or, in the opinion of the Panel, inaccurately stated. Many cost elements commonly encountered in such projects were ignored altogether or were stated in unsupported or supported lump sums. For example, the cost to Enka of the grouting and drilling subcontract was inaccurately rendered, as it ignored services that

Enka was required to provide to the subcontractor. Further, Enka's loss of profits claim appears to assume that all outstanding disputes with the Employer would have been resolved in its favour, an assumption that Iraq contests. The Panel finds that this assumption is not realistic. The Panel therefore finds that Enka has omitted from its calculations a number of indirect and general costs that it would have incurred in the completion of the Project.

153. Further, the record shows that Enka had already encountered serious time delays in the Project and would probably have experienced further, significant delays. Enka does not adequately support the assumption in its claim that all of the problems and delays it had been experiencing prior to the invasion would have been completely ameliorated soon thereafter. At the time of the invasion, Enka faced rising costs and increasing delays. The Project was already almost a year behind schedule and was falling further behind. Enka's loss of profits calculation does not, however, account for the additional costs Enka would have incurred in maintaining its construction operations in this remote geographic region for one or more years beyond the completion date on which the bid was based.

154. The evidence also shows that, in addition to the work delays, Enka faced numerous other obstacles to further payments on the Contract and, thus, to profits. Payments on accepted work had already fallen behind schedule. Moreover, several disputes involving significant sums had arisen with the Employer over claims for additional work.

155. In addition to these direct and indirect costs, the Panel finds that Enka's loss of profits calculations do not account for certain additional general operating costs that would have been borne by Enka and which are reasonably chargeable to the Project. These charges include items such as insurance, the costs of guarantees, home office facilities devoted to the Project, and advisors and local agents. Although Enka made provisions for some of these items in its claim, the Panel finds that the majority of these items were ignored or inadequately quantified. The Panel's expert consultants have estimated that these operating costs would have amounted to eight per cent of the total revenue of the Contract.

156. Further, although Enka is correct in its assertion that it had addressed the problem of financing costs through its arrangement with the Bank of Turkey, this solution was not without costs. The bank charged Enka a fee to purchase the PNs Enka received from the Employer. Because a significant portion of Enka's total revenue was received in the form of PNs, the total fees that Enka would have paid to the Bank of Turkey over the life of the Contract for this service equalled approximately six per cent of the total revenue of the Project.

157. It is important to note that the calculations regarding Enka's claim are projected loss of profits. Thus, the Panel concludes that any calculation of lost profits should take into account the risk inherent in the Project. The Panel's review shows that Enka's calculations do not make a specific allowance for this risk. On this point, Enka's statements are contradictory. On the one hand, Enka asserts that the delays and

difficulties that had been encountered throughout the Project would have been completely resolved at the time of the invasion. On the other hand, Enka's own documentation and statement of claim detail the considerable problems, disruptions and delays experienced from the start of the Project up to 2 August 1990. Further, Enka's evidence suggests that these problems were the results of the Employer's acts and omissions and would have continued in the future.

158. For example, Enka alleges that the Consortium often encountered unreasonable interference by the Employer's personnel, particularly from those located at the Project site. Indeed, Enka itself notes in its claim the "dire circumstances" caused by the Employer's delays in providing materials and services. The Project had already been delayed by one year, and a large number of disputed claims remained outstanding. As a result, Enka had not realized any profit on work completed up to the date of the invasion. The evidence submitted by Enka does not indicate that the problems which had occurred up to the date of the invasion would not have continued after that date.

159. While precise quantification of risk is a difficult task,the Panel has relied on its experience and has sought the advice of its expert consultants to make allowance for a risk factor appropriate for a project of this magnitude and complexity. The Panel finds that in a project operating under these conditions, the risk is not calculable by normal means. Nonetheless, the Panel concludes that a specific allowance for risk should have been included by Enka in its loss of profits calculations.

160. In written interrogatories, the Panel requested Enka to provide further explanation and information regarding the loss of profits claim components. In Enka's replies, some questions remained unsatisfactorily answered or the replies thereto did not directly address the issues presented. In reply to other questions, Enka provided no information.

161. In summary, the Panel makes the following findings regarding Enka's claim for loss of profits. First, Enka has understated its likely direct labour and materials costs, the largest cost component of the Project. Second, any gross profit amount should be reduced by the probable general operating costs associated with the Project, which were not adequately addressed in Enka's estimates. Third, Enka makes no provision for the financing costs it would have incurred as a result of its arrangement with the Bank of Turkey. The Panel finds that the costs itemized above would, by themselves, have consumed any profit Enka could have generated.

162. Further, based on its experience, the Panel finds that profit margins obtainable in construction projects such as the Bekhme Dam Project are quite small. Thus, the 10 per cent reduction in the Contract price agreed to by Enka after the tender had been accepted by the Employer would have seriously eroded any profit margin included in the original bid. The fact that Enka went forward with the Project despite such obstacles to profitability is understandable, given the need of construction enterprises such as Enka to retain skilled labour and to generate cash flow to service capital equipment debt.

163. Finally, any profit calculation would have to have been adjusted to reflect the risk inherent in the Project. The combination of this risk allowance with the understated costs and the reduction in the Contract price lead the Panel to the firm conclusion that Enka could not have realized a profit on the Project. The Panel therefore recommends no compensation for loss of profits.

(c) Goods in transit

164. Enka requests compensation in the amount of US$102,686 for the costs associated with certain equipment and goods that were ordered and intended for the Project, which were in transit to Iraq at the time of the invasion. In reply to interrogatories from the Panel, Enka stated that it has continued to incur these costs up to 31 August 1997, the date of its replies, in the additional amount of US$90,364. As previously noted, the Panel requested clarification and evidence in support of the claim as it was originally presented. The Panel's request was not intended to provide a further opportunity for Enka to revise the claim or to increase the amount of any claim element previously submitted. To permit such an increase could entail discriminatory practice in the treatment of claims.

165. Enka claims that it incurred unloading, storage and handling fees and insurance costs on these goods. The evidence submitted demonstrates that Enka did incur these costs and that they have been paid, and, therefore, the Panel recommends compensation in the amount of US$102,686 for costs related to goods in transit.

(d) Costs of letters of guarantee

166. Enka requests compensation in the amount of US$1,798,368 for costs paid between 2 August 1990 and 31 October 1992 on letters of guarantee that it was required to provide to the Employer under the terms of the Contract.

167. In its claim, Enka also requests compensation in an unspecified amount for these costs incurred for the maintenance of the letters of guarantee after 31 October 1992. Apparently, Enka has maintained these letters of guarantee since the abandonment of the Project, allegedly because of a refusal by the Employer formally to suspend any indemnity obligations Enka might owe to it. Enka thus claims that it should receive the costs of maintaining these letters of guarantee up to the present day.

168. The Contract required the Consortium to maintain these letters of guarantee in favour of the Employer until the completion of the Project. The Panel has determined that the collapse of the Project was the direct result of Iraq's invasion of Kuwait. Thus, the fact that the Project remained uncompleted and that the Consortium partners were required to maintain their guarantees are likewise the direct result of Iraq's actions and are therefore compensable.

169. Notwithstanding the foregoing, the responsibility for such continuing losses is not indefinite. The Panel has determined that Enka could not reasonably expect that the Commission would provide a remedy for costs

incurred after the filing date of its claim. Moreover, Enka had an obligation to mitigate its losses. At the time Enka prepared its claim, it was clear that the Project would not be continued. Therefore, the Panel finds that Enka should have tried to find alternative means to prevent any further costs from being incurred after that date. To the extent that it has not done so, Enka must now look to other fora for compensation for such continuing costs. The Panel expresses no opinion on whether such costs are or should be compensable in other proceedings before other fora.

170. For these reasons, the Panel finds that the costs paid by Enka to maintain the letters of guarantee are compensable to the extent that they relate to the maintenance of guarantees in the period from 2 August 1990 to 31 October 1992.

171. The Panel therefore recommends compensation in the amount of US$1,798,368 for costs of letters of guarantee.

(e) Project termination costs

172. Enka requests compensation in the amount of US$186,808 for certain costs related to the termination of the Project. These costs consist primarily of wages paid to redundant workers following their repatriation and to head office personnel responsible for coordinating the withdrawal from the site and the repatriation of the workers, and the expenses of preparing and securing the Project site. Enka continued to pay their employees in Iraq after productive work had ceased on the Project and until these employees were repatriated.

173. Iraq makes no specific comment regarding this claim item although it generally claims that cessation of the Project was unnecessary and improper.

174. The Panel finds that such costs were contract-related losses that resulted directly from Iraq's invasion and occupation of Kuwait. As such, these costs are compensable to the extent proven by Enka. The Panel finds that Enka has provided acceptable evidence of the full amount claimed. The Panel therefore recommends compensation in the amount of US$186,808 for project termination costs.

(f) Customs deposits

175. Enka requests compensation in the amount of US$1,604,445 for customs deposits that it paid to Iraq upon the importation of equipment for use in the Project. Enka alleges that it has not received a refund of these deposits. Enka does not explain, however, how the loss of these deposits is the direct result of Iraq's invasion of Kuwait. Enka argues that the loss of the equipment covered by the deposits made their re-export impossible and, therefore, precluded the refund of the deposits. In one sense, this is true; however, the Panel finds that Enka is entitled to compensation for the full, proven value of the lost equipment. If the equipment had no value, it is highly unlikely that Enka would have re-exported it and received a refund of the deposits. Thus, recommending

compensation for the full value of the equipment effectively places Enka in the position of having no remaining value in that equipment. To recommend compensation for deposits in such circumstances would amount to double recovery.

176. Further, the Panel finds that the commercial reality in the region is that customs deposits are, in effect, an import duty that most contractors never expect to recover because the value of the equipment is substantially written off over the duration of the project. In addition, as the Panel notes elsewhere in this report, the extreme climatic and geographic conditions in Iraq, and particularly at the Project site, meant that much of the equipment would probably have had little, if any, residual value at the end of the Project. Thus, Enka would most likely not have incurred the costs of re-exporting the equipment, even if it had been able to do so. For these reasons, the Panel finds that the lost customs deposits are not compensable. The Panel therefore recommends no compensation for customs deposits.

3. Other claims

(a) Evacuation and repatriation

177. Enka requests US$122,551 as compensation for the costs of evacuating its workers from the Project site. In accordance with paragraph 21(b) of Governing Council decision 7, the Panel finds that the costs associated with evacuating and repatriating employees from Iraq between 2 August 1990 and 2 March 1991 are compensable to the extent that the costs are proven by the claimant. Compensable costs consist of “temporary and extraordinary expenses” related to the repatriation, including items such as transportation costs, lodging and food while in transit.

178. Enka ultimately evacuated all of its employees from the Project site. Although the majority left the site in September 1990, a skeleton staff remained in Iraq until March 1991. Enka’s records of the extraordinary expenses that it incurred include costs that were, in the Panel’s opinion, reasonably necessary for the safe and orderly evacuation of the workers and their families. These costs include airfares or road transport, accommodation, food and incidental charges. In reply to interrogatories from the Panel, Enka acknowledged that it would have incurred repatriation costs for its workers if the contract had continued to its scheduled completion. Enka calculates that it would have spent US$37,500 in regular repatriation costs, and the Panel has satisfied itself that this is a reasonable assessment of these avoided costs. Thus, the costs of regular repatriation will be deducted from the amount claimed for this item The Panel therefore recommends compensation in the amount of US$85,051 for evacuation and repatriation.

(b) Detention of project personnel

179. As discussed in paragraphs 297-299, infra, several Bechtel staff were detained by Iraqi authorities and used as human shields. Enka alleges that, under the terms of the Technical Services Agreement, it was required to compensate Bechtel for certain costs incurred by Bechtel relating to the detention of its personnel. The Panel finds that costs relating to the detention of Bechtel personnel are a direct result of Iraq's invasion of Kuwait and, therefore, are compensable to the extent that the costs are reasonable and supported by the evidence.

180. Enka seeks compensation in the amount of US$318,523, equivalent to 50 per cent of the costs associated with the detention of Bechtel's personnel in Iraq following the invasion. The Panel finds that such costs are compensable if the claimant was under a legal obligation to bear them. In this instance, the Panel is satisfied that Enka was contractually responsible for a 50 per cent share of the costs incurred by Bechtel as a result of its employees' detention. Bechtel initially included in its claim the full amount of the detention costs, although it stated its belief that the Consortium was responsible for these costs. In response to questions from the Panel, however, Bechtel acknowledged that Enka had paid its share of these costs and reduced its claim accordingly. The Panel finds that these costs are compensable and that the amounts claimed are reasonable and adequately supported by the documentation provided by Enka and Bechtel. The Panel recommends compensation in the amount of US$318,523 for detention of project personnel.

(c) Unresolved disputes with the Employer

181. Enka requests compensation in the amount of US$17,341,214 for several items that are currently the subject of other proceedings between the Consortium and the Employer.

182. Iraq argues that all but one of the additional work claims should be rejected as unauthorized. In addition, Iraq argues that there are a number of jobs that either were not performed or were not performed to Contract specifications and, therefore, that these amounts should be set-off against any amounts that might be owed to the Consortium.

183. The claims are based on the unproven assumption that the Employer was liable and that the pending disputes would have been resolved in favour of Enka. For this reason, the Panel recommends no compensation for unresolved disputes with the Employer.

D. Recommendation

Table 5. RECOMMENDED COMPENSATION FOR ENKA'S CLAIM

	Claim element/item	Claim amount (US$)	Recommended compensation (US$)
1	Project assets in Iraq on 2 August 1990		
1.a	Capital equipment	57,337,198	28,879,203
1.b	Spare parts and materials	10,264,053	5,988,053
1.c	Items in transit	2,515,737	1,614,214
	Subtotal	70,116,988	36,481,470
2	Contract with Iraq		
2.a	Work performed or services provided		
2.a.i	Labour costs after 2 August 1990	746,184	746,184
2.a.ii	Pre-contract expenses	5,247,784	1,877,113
2.a.iii	Preparatory work	5,803,780	4,941,127
2.a.iv	Unpaid work	38,537,019	15,485,669
2.b	Loss of profits	122,375,000	-
2.c	Goods in transit	102,686	102,686
2.d	Costs of letters of guarantee	1,798,368	1,798,368
2.e	Project termination costs	186,808	186,808
2.f	Customs deposits	1,604,445	-
	Subtotal	176,402,074	25,137,955
3	Other claims		
3.a	Evacuation and repatriation	122,551	85,051
3.b	Detention of project personnel	318,523	318,523
3.c	Unresolved disputes with the Employer	17,341,214	-
	Subtotal	17,782,288	403,574
	TOTAL	264,301,350	62,022,999

184. Based on its findings regarding Enka's claim, the Panel recommends total compensation in the amount of US$62,022,999. For determinations of currency exchange rate, interest and date of loss, see paragraphs 436 to 442, infra.

V. CLAIM OF HIDROGRADNJA

A. Facts and contentions

185. Except as stated below, the facts related to the Project, the Contract and the collapse of the Project are the same as those described in chapter IV.A.

1. Hidrogradnja's role in the Project

186. According to its statement of claim, Hidrogradnja was one of the leading construction enterprises in the former Yugoslavia. Hidrogradnja has been involved in construction projects since 1957, including a number of large civil engineering projects in the Middle East.

187. Hidrogradnja, as a partner in the Consortium, shared with Enka the overall responsibility for the construction of the dam and the management, supervision and control of the Project and of the subcontractors and suppliers working for the Consortium on the Project.

2. Contractual relationships

188. The Contract is described in detail at paragraphs 48-53, supra. Hidrogradnja, as part of the Consortium, was a party to the Contract and worked under a contractual regime identical to that of Enka, except that Hidrogradnja had no arrangement in place under which it could sell PNs received from the Employer to a third party.

3. The collapse of the Project

189. Hidrogradnja's account of the collapse of the Project is substantially the same as Enka's. Hidrogradnja submitted eyewitness statements by its staff and other evidence that generally corroborate the statements and other evidence submitted by Enka.

190. When construction of the Project was suspended by the Consortium on 20 August 1990, Hidrogradnja took steps to secure the Project and its assets located at the Project site. These steps included reinforcing structures, securing equipment and preserving documents. Hidrogradnja alleges that the Employer did not permit it to remove equipment and supplies from the Project site after the suspension of work.

191. During August and September 1990, Hidrogradnja arranged for the evacuation from Iraq of over 2,000 mainly Bosnian workers employed by it and its subcontractors. As a condition for allowing the evacuation of Hidrogradnja's workers and that of its subcontractors, the Employer required Hidrogradnja to contribute 49 workers to the skeleton staff maintained at the Project site.

192. Hidrogradnja alleges that this skeleton staff was insufficient to guard the Project site. Despite the efforts taken to secure the Project site, Hidrogradnja alleges that the Project site was looted and

substantially destroyed after the evacuation of Hidrogradnja's workers. Hidrogradnja asserts that the looting and destruction of the Project site were perpetrated by "Kurdish nationalists" living in the area. Iraq's responses corroborate Hidrogradnja's assertion that the local population took over the Project site but assert that this did not occur until after the liberation of Kuwait.

4. Hidrogradnja's claim

193. In March 1994, Hidrogradnja filed a claim seeking US$436,609,005 in compensation for alleged losses, each of which it asserts was caused by the collapse of the Project. These alleged losses are listed below as they were described and presented by Hidrogradnja:

a. certain extraordinary expenses, such as evacuation of workers, which allegedly would not have been incurred but for the interruption of Hidrogradnja's work on the Project (US$10,682,087);

b. value of Project assets including capital equipment at the Project site, spare parts and construction materials at the site, and inventories in transit to the site (US$87,164,948);

c. profit Hidrogradnja claims it lost when continuation and completion of the Project became impossible after the invasion (US$100,358,365);

d. recovery of unamortized pre-paid expenses Hidrogradnja claims to have incurred prior to the award of the Contract, which Hidrogradnja asserts were to be amortized over the life of the Project. Hidrogradnja also seeks recovery of the unamortized cost of certain preparatory work which it performed and which would have been amortized over the course of the Project (US$6,457,188);

e. amounts owed for work performed under the Contract (US$190,997,303); and

f. the amount which Hidrogradnja maintains it would have received in the settlement of disputes outstanding on 2 August 1990 (US$40,949,114).

B. Analysis and valuation of Hidrogradnja's claim

194. The claim elements comprising Hidrogradnja's claim are set forth in the following table, but are grouped therein by categories based on the substantive nature of the claimed loss. For example, all of the claim items involving assets located in Iraq on 2 August 1990 are grouped into one element and discussed together. In addition, the amounts given in the following table reflect any permissible adjustments by the Claimant to the original claim amount. The Panel's analysis of the individual claim elements follows the claim regrouping as set forth in the following table.

The headings under which each claim element is discussed have been numbered to correspond to the table.

Table 6. HIDROGRADNJA'S CLAIM

	Claim element	Claim amount (US$)
1	Project assets in Iraq on 2 August 1990	
1.a	Capital equipment	70,675,815
1.b	Spare parts and materials	16,398,815
1.c	Deposits in Iraqi banks	5,740,460
1.d	Loss of safe and contents	114,398
	Subtotal	92,929,488
2	Contract with Iraq	
2.a	Work performed or services provided	
2.a.i	Labour costs after 2 August 1990	3,590,358
2.a.ii	Unamortized prepaid expenses	6,457,258
2.a.iii	Unpaid work	185,318,866
2.b	Loss of profits	100,358,365
2.c	Costs of letters of guarantee	470,794
2.d	Project termination costs	4,902,650
	Subtotal	301,098,291
3	Other claims	
3.a	Evacuation and repatriation	1,603,887
3.b	Unresolved disputes with the Employer	40,949,114
	Subtotal	42,553,001
	TOTAL	436,580,780

1. Project assets in Iraq on 2 August 1990

195. The first category of claims presented by Hidrogradnjaare those for the loss of assets located in Iraq as of 2 August 1990. These assets are identified in Hidrogradnja's statement of claim and in the table reproduced above as "Project Assets," and include capital equipment, spare parts and materials, deposits in Iraqi banks and a safe allegedly maintained at the Project site.

(a) Capital equipment

196. Hidrogradnja originally requested compensation in the amount of US$70,766,135 for capital equipment that was purchased for the Project. In reply to interrogatories from the Panel, Hidrogradnja corrected the claim

amount slightly, reducing it by US$90,320 to US$70,675,815. This equipment was allegedly present in Iraq on 2 August 1990, was abandoned during the hostilities when Hidrogradnja evacuated its workers and was never recovered by Hidrogradnja.

197. Iraq alleges that many of the items on Hidrogradnja's list did not exist or had been re-exported and were not at the Project site. Iraq provided a list of the items it claims were not present.

198. Under the applicable law, Hidrogradnja was required to maintain a certified "Internal List of Capital Equipment". The internal list itemizes 1,531 items of equipment, of which 221 items were transferred from other Iraqi projects. Hidrogradnja kept copies of this document both at the Project site and in its head office. The internal list records that the historical invoice cost for the capital equipment was US$56,790,071, and the net book value was US$40,410,574.

199. The Panel finds that the evidence in the internal list, together with other documentation such as invoices and Iraqi customs records, establishes the existence of the equipment mentioned in the internal list at the Project site, that the equipment had been purchased and paid for by Hidrogradnja for use in the Project and that it was present in Iraq on 2 August 1990.

200. Hidrogradnja requests that the adjusted replacement cost of the capital equipment be used to value this loss. Hidrogradnja's advisors devised this method to value the claim amount. For some equipment, Hidrogradnja refers to published sources of data and manufacturers' reports concerning equipment values. For other items, however, Hidrogradnja provides no authoritative data as to the August 1990 replacement value. In these instances, Hidrogradnja relies on the original purchase invoices, the majority of which were submitted as evidence with the claim. To the alleged replacement value, Hidrogradnja adds an eight per cent "uplift" for costs of transportation, insurance and document costs. Hidrogradnja then multiplies the "uplift" cost by a "purchase value factor" of 1.1725, which is intended to represent the "price extension" from the August 1990 date on which the replacement cost is based to the date of replacement, here assigned as the date of the claim.

201. Iraq contests Hidrogradnja's valuation method and argues that depreciation must be considered when valuing this equipment. Iraq provides specific suggestions regarding depreciation and residual value. Iraq also contests the addition of transportation and insurance charges to the claim, asserting that these charges were included in the original invoice cost for the capital equipment.

202. A separate inquiry into the manufacture dates and purchase values of the equipment itemized in the internal list, conducted by the Panel's expert consultants, confirms to the Panel's satisfaction that Hidrogradnja has presented accurate data regarding the acquisition date and costs of its inventory of capital equipment.

203. The Panel does not, however, agree with the valuation methods employed by Hidrogradnja. First, the "uplift" sought represents a duplication. The invoices submitted in support of this claim element show that Hidrogradnja's purchases were made CIF, that is, transportation and insurance costs were included in the original purchase price. As a result, these costs were included in the depreciated value of the equipment and no further "uplift" for these costs is justified.

204. Second, the Panel concludes that valuation of capital equipment in use in the Project must be based on the same assumptions and cost considerations adopted by Hidrogradnja at the time the initial bids for the Contract were being prepared. Thus, the Panel agrees with Iraq's arguments that depreciation must be considered in valuing this claim item. The Panel reaches this conclusion for the same reasons that were detailed in paragraphs 100-102, supra.

205. The Panel finds that Hidrogradnja would have taken such conditions into consideration in calculating its bid price. Specifically, Hidrogradnja would have provided for the capital equipment items to be fully depreciated to zero recoverable value over the life of the Project. Documents submitted by Hidrogradnja show that it intended to depreciate fully the purchase value of the equipment over the projected 84 month Contract period.

206. For the foregoing reasons, the Panel concludes that the appropriate measure of compensation for this item of the claim is the depreciated original acquisition cost of the equipment at issue. The original acquisition cost was US$60,091,001. For those items for which no acquisition date could be determined, the item was deemed to be fully depreciated as of 2 August 1990. This represents about 40 per cent of the value claimed for this item. For each of the remaining items, the Panel has applied a depreciation rate that would have resulted in the complete depreciation of the item over the life of the Project had it been purchased and placed in use as of the start of the Project, except in those instances where the evidence indicates that Hidrogradnja itself applied a higher depreciation rate. Thus, items placed in service shortly before 2 August 1990 were depreciated by a minor amount while items in use since the start of the Project have significant accumulated depreciation. The Panel's expert consultants calculated that the amount of accumulated depreciation totalled US$30,532,214.

207. The Panel finds that this amount should be deducted from the acquisition cost of US$60,091,001 and therefore recommends compensation in the amount of US$29,558,787 for capital equipment.

(b) Spare parts and materials

208. Hidrogradnja alleges that at the Project site it had large quantities of construction materials, spare parts and other materials that were to be incorporated into the Project works, which it originally valued at US$16,544,973. Hidrogradnja claims that it also held quantities of various goods for the normal functioning of the site. Hidrogradnja claims for the

spare parts and materials that had been purchased, transported to the project site and stored in Hidrogradnja's warehouses. Hidrogradnja claims that these spare parts and materials were abandoned at the site when it was evacuated. Hidrogradnja has therefore valued this item of the claim as follows:

Table 7. SPARE PARTS AND MATERIALS

Claim item	Claim amount (ID)	Claim amount (US$)
Construction materials	1,049,122	3,366,516
Other materials and spare parts	3,134,860	10,059,417
Stock piled at screening plant	972,000	3,119,040
TOTAL	5,155,982	16,544,973

(Converted at ID 1.000=US$3.208889)

209. After a reconciliation of the 2 August 1990 inventory and the records of the supplies used in the work completed between 2 August and 25 September 1990, which was conducted after the claim was filed, Hidrogradnja produced a revised claim amount for this item of ID 5,110,434, i.e., US$16,398,815. Hidrogradnja, however, did not indicate to which of the above-mentioned claim items the reduction refers.

210. Following Iraq's invasion of Kuwait, the storage and accounting departments at the Project site were instructed to perform a physical inspection and count of all such materials and to prepare an inventory of each type of material. Following the physical count, the items were listed and values ascertained. Finally, the data were computer recorded and the inventory listings were prepared. These now form the basis of Hidrogradnja's spare parts and materials claim.

211. According to Hidrogradnja, the physical inventory of the items was completed in August 1990. Hidrogradnja carried out some preservation work on the Project site between 2 August and 25 September 1990, during which it made a record of the supplies used.

212. Iraq made no comment on this claim item. Nonetheless, the evidence indicates a discrepancy in the quantities of supplies that the claim does not take into account in the reduction of the claimed amount. The Panel has adjusted this claim item to remove the discrepancy. The expert consultants have also calculated a reduction in the order of US$424,776, which they estimate would ordinarily be experienced in projects of this nature. The Panel finds that it is appropriate to make this reduction and therefore recommends compensation in the amount of US$15,974,039 for spare parts and materials.

(c) Deposits in Iraqi banks

213. Hidrogradnja requests compensation in the amount of US$5,740,460 for the loss of the use of Iraqi dinar funds deposited with Iraqi banks for use in the Project.

214. Hidrogradnja alleges that in February 1992 the Registrar of Companies of Iraq issued an instruction that made the funds liable to sequestration. Hidrogradnja states that it has no information as to whether the instruction was ever used to sequester its accounts.

215. Iraq makes little comment on this claim element, other than to state that it is willing to "facilitate" Hidrogradnja's attempts to withdraw these funds from the Iraqi banks in question.

216. The Panel finds that, because Hidrogradnja does not contend that the bank deposits were actually confiscated, the claim for bank deposits is in effect a claim for the use of the funds in these accounts. With the collapse of the Project, there was no longer any use for these funds. It is clear, however, from the documents submitted by Hidrogradnja, that it was well aware at the time the contract was signed that the Iraqi dinar was not convertible. This limitation existed prior to 2 August 1990 and persists to this day. Thus, in the absence of any guarantees by the Employer as to the convertibility or transferability of these funds, any losses incurred as a result of the non-convertibility of these Iraqi dinar deposits cannot be attributed to Iraq's invasion and occupation of Kuwait and cannot provide a basis for compensation by this Commission.The Panel therefore recommends no compensation for deposits in Iraqi banks.

(d) Loss of safe and contents

217. Hidrogradnja requests compensation in the amount of US$114,398 for the loss of a safe located at the Project site and its contents, alleging that the safe was lost when the local populace took control of the Project site in March 1991. The Panel agrees with Iraq that there is no clear proof of the existence of the safe, its contents or that the safe was still in place at the time when the site was overrun. The Panel therefore recommends no compensation for the loss of safe and contents.

2. Contract with Iraq

(a) Work performed or services provided

(i) Labour costs after 2 August 1990

218. Under the first item of this claim element, Hidrogradnja requests compensation in the amount of US$3,590,358 for wages and other labour costs, such as consumable supplies, that it incurred from August 1990 to February 1991, less the value of any productive work it received in return for these wages. This claim item includes amounts for non-productive labour costs (US$3,206,299), the board and expenses attributable to the

non-productive workers (US$360,955) and charges for Project site guards that Hidrogradnja was required to hire (US$23,104).

219. Hidrogradnja claims that the invasion created unrest and disorder at the Project site such that little productive work was performed by its workers during the period from 2 August 1990 to February 1991. Iraq again argues that the invasion was not the cause of any difficulties experienced at the Project site. The Panel finds that the weight of the evidence supports Hidrogradnja's contention and therefore concludes that the productivity losses measured by Hidrogradnja are the direct result of the invasion.

220. The Panel further finds that the wages and other costs incurred are reasonably supported by payroll information supplied by Hidrogradnja. However, Hidrogradnja's calculations are inaccurate. The Panel notes that the deduction taken by Hidrogradnja for productive work is calculated by comparing the actual work performed in August and September 1990 with the monthly average of work performed from January to July 1990 and subtracting the cost of materials. Hidrogradnja's calculation does not recognize that the size of the labour force was declining during August and September 1990, and, therefore, that the proportion of productive work during those months was actually higher than is stated in the claim. The Panel finds that the amount of this claim item must be adjusted to correct the overstatement of non-productive work.

221. For non-productive labour costs, Hidrogradnja requests compensation in the amount of US$3,206,299. In order to verify this claim item, the Panel's expert consultants first determined the proportion of work charged to the Employer that was normally attributable to wage costs, as reflected in Hidrogradnja's records. This normal proportion was applied to the actual work charged following the invasion to calculate the wage costs that would ordinarily have been incurred for that level of work. Because the actual wage costs for this period were higher than the expected wage costs, the expected costs were subtracted from the actual wage costs to give the amount of non-productive wage costs. In this manner, the expert consultants calculated that Hidrogradnja's claim for non-productive work costs was overstated by US$650,952. Therefore, the Panel recommends compensation in the amount of US$2,555,347 for non-productive labour costs.

222. Hidrogradnja also requests compensation in the amount of US$360,955 for food and accommodation. In this claim item, no allowance is made for productive work and similar arithmetical errors occur. The Panel finds that this claim item must be adjusted to account for the portion attributable to productive work. Using the proportion of non-productive work calculated in the preceding paragraphs, the expert consultants determined that US$184,420 for food and accommodation costs was incurred in respect of productive work. For these reasons, the Panel finds that the claim for non-productive food and accommodation costs should be reduced by the amount attributable to productive work as calculated by the expert consultants. The Panel therefore recommends compensation in the amount of US$176,535 for food and accommodation.

223. Hidrogradnja claims that following the invasion it was required to appoint Iraqi personnel to act as watchmen. It requests compensation in the amount of US$23,104 for their wages. Iraq contends that it should not be required to pay for a benefit that Hidrogradnja had received. The Panel finds, however, that these wages are properly classified as non-productive labour costs directly caused by the invasion and occupation of Kuwait. The Panel finds that the documentation supplied in support of the claim confirms that these wages were paid and, further, that the amount claimed is reasonable. The Panel therefore recommends compensation in the amount of US$23,104, for watchmen's wages.

224. The Panel recommends compensation in the amount of US$2,754,986 for labour costs.

(ii) Unamortized prepaid expenses

225. Hidrogradnja requests compensation in the amount of US$6,457,258 for what it terms "Prepaid Expenses." The amount was stated in the statement of claim as US$6,457,188, although this appears to be an arithmetical error, as the component items total US$6,457,258. The items in this claim are presented as follows:

Table 8. UNAMORTIZED PREPAID EXPENSES

Claim item	Claim amount (US$)
Bid bond commissions	353,776
Head office expenses	200,691
Bechtel and Enka services	2,203,315
Insurance premiums	1,905,937
Housing expenses	902,281
Preparatory work	891,258
TOTAL	6,457,258

226. The bid bond commissions in the amount of US$353,776 included in this claim item were incurred by Hidrogradnja either in the pre-bidding or pre-contract award process. Hidrogradnja claims that its practice was to amortize such costs on contracts actually awarded over the life of the project and to treat costs on unsuccessful bids as general overheads. The Panel finds, however, that the more common commercial practice is to consider all pre-bid and pre-award expenses as part of the overheads of the business, which are then built into the contractor's rates. The Panel therefore recommends no compensation for bid bond commissions.

227. Hidrogradnja also requests compensation in the amount of US$200,691 for head office expenses that it asserts would have been recovered over the life of the Contract and, therefore, are compensable. The Panel finds, however, that these expenses are also more appropriately considered as

business overheads. The Panel therefore recommends no compensation for head office expenses.

228. Hidrogradnja requests compensation in the amount of US$2,203,315 for payments to Bechtel and Enka. The payments to Bechtel were related to the reimbursable costs charged by Bechtel for its normal labour and costs. The payments to Enka represent a fee payable to Enka as leader of the Consortium on the amount of worked performed and invoiced. However, neither of these costs are prepaid expenses, but rather are similar to Hidrogradnja's own labour costs. The Panel recommends no compensation for Bechtel and Enka services.

229. Hidrogradnja requests compensation in the amount of US$1,905,937 for insurance premiums charged to Hidrogradnja by the Employer. The Panel finds that the insurance premiums are a prepaid, recoverable item and not a pre-contract expense. The insurance was obtained by the Employer and paid in five instalments. Instalments were then charged to the Consortium by deduction from ICs. The Hidrogradnja claim is calculated by amortizing the total premium and deducting the amount amortized from the instalments paid to give the net claim. The Panel finds this approach and the amount claimed to be reasonable and therefore recommends compensation in the amount of US$1,905,937 for insurance premiums.

230. Hidrogradnja requests compensation in the amount of US$902,281 for housing expenses. The Panel finds that these costs would have been properly amortized over the life of the Project and would have been recovered. The Panel finds that the claim is supported by appropriate evidence and therefore recommends compensation in the amount of US$902,281 for housing expenses.

231. Hidrogradnja requests compensation in the amount of US$891,258 for preparatory work. The Panel finds that these costs would have been properly amortized over the life of the Project and would have been recovered. The Panel finds that the claim is supported by appropriate evidence and, therefore, recommends compensation in the amount of US$891,258 for preparatory work.

232. The Panel recommends compensation in the amount of US$3,699,476 for unamortized prepaid expenses.

(iii) Unpaid work

233. Hidrogradnja requests compensation in the amount of US$185,318,866 for lost "entitlement to payments under contract". Hidrogradnja makes several claims under this heading, which the Panel classifies as "unpaid work." These claim items are stated in the following table and are analyzed in the succeeding paragraphs. The Panel notes, however, that no recommendation for compensation for interest on losses will be made at this time, as directed by Governing Council decision 16, which states that the "methods of calculation and of payment of interest will be considered by the Governing Council at the appropriate time." (S/AC.26/1992/16).

Accordingly, no discussion of the claims for interest on losses appears herein.

Table 9. UNPAID WORK

Claim item	Claim amount (US$)
United States dollar portion owed on approved but unpaid ICs.	11,904,998
Interest on United States dollar portion owed on approved ICs	2,120,339
PN account	5,235,938
Interest on PN account	513,645
Unpaid PNs	136,372,241
Retention money	25,927,335
IC34	3,244,370
TOTAL	185,318,866

a. United States dollar portion owed on approved but unpaid ICs

234. Hidrogradnja requests compensation of US$11,904,998 for the United States dollar amount due on approved ICs that were never paid. The Panel finds that the evidence establishes that these ICs had all been approved by the Employer, that the amounts stated in the claim are correct and that the United States dollar portions claimed were not paid. Iraq does not contest that it accepted the ICs in question, although it disputes that the amounts are recoverable. The Panel's expert consultants calculate that of the claimed amount, US$6,071,082 was owed on ICs issued for work performed prior to 2 May 1990. For the reasons expressed in paragraphs 79-81, supra, the Panel finds that this portion of the claim is not compensable and recommends compensation in the amount of US$5,833,916 for the United States dollar portion owed on approved but unpaid ICs.

235. The claim for interest on the United States dollar portion owed on approved ICs in the amount of US$2,120,339 is not dealt with for the reasons set forth in paragraph 233, supra.

b. PN account

236. In addition, Hidrogradnja requests compensation of US$5,235,938 for amounts in the PN account on 2 August 1990 but for which no PNs were ever issued. The Panel finds that the evidence establishes that the balance in the PN account has been correctly stated, that the amounts in the account were based on ICs which had been approved by the Employer, and that no PNs had been issued or paid in respect of this balance. Iraq does not contest that it accepted the ICs in question, although it disputes that the amounts are recoverable. The Panel further finds that the entire claimed amount

owed was based on ICs issued for work performed after 2 May 1990. The Panel finds, therefore, that this claim item is compensable in its entirety and recommends compensation in the amount of US$5,235,938 for the PN account.

237. The claim for interest on the PN account in the amount of US$513,645 is not dealt with for the reasons set forth in paragraph 233, supra.

c. Unpaid PNs

238. Hidrogradnja further claims US$136,372,241 for PNs that were issued but which remained unpaid. Included in this claim amount is interest to maturity on each of the PN obligations. Hidrogradnja calculates the amount of this claim item as follows: first, Hidrogradnja claimed for the value of the PNs at the date of the claim (US$116,802,613) plus the interest to maturity on the PNs from the date of the claim to the maturity dates of the individual notes (US$15,646,754). In addition, Hidrogradnja added to the stated amount of this claim item what it terms “delay interest”, or interest from the maturity dates of the PNs that had matured as of the date of the claim to the date of its replies to the Panel’s interrogatories (US$3,922,874).

239. Although Iraq asserts that losses claimed in respect of these PNs are not compensable, it does not dispute the amount of interest to maturity on the individual notes calculated by the claimant and verified by the Panel’s expert consultants. Iraq does, however, argue that there is no contractual basis for delay interest.

240. The Panel finds that the claim amount of US$116,802,613 for the value of the PNs at the time of the claim is correctly stated. The Panel also finds that this claim item is supported by the documentary and other evidence supplied. The Panel further finds, however, that of the claimed amount, US$106,879,542 was based on PNs issued for work performed prior to 2 May 1990. For the reasons expressed in paragraphs 79-81 supra, the Panel therefore recommends compensation in the amount of US$9,923,071 for unpaid PNs.

241. In its replies to the Panel’s interrogatories, Hidrogradnja recalculated the interest to maturity on the PNs to take into account the fact that some of the PNs had matured after the claim was filed. The new calculation of interest to maturity on the individual notes increased the total amount of this item from US$15,646,754 to US$18,818,426. The Panel accepts this revision as it does not consider this to be a new claim or an increase in the claimed amount, as the additional amounts were not due at the time of the claim.

242. The Panel’s expert consultants calculated that Hidrogradnja made certain arithmetical errors in the calculation of interest to maturity, primarily by overstating the number of days of interest payable on the individual notes. The expert consultants calculate that the correct figure for interest to maturity on the individual notes is US$18,800,740. The

Panel accepts this adjusted figure. The Panel finds that this claim item is otherwise correct and supported by the evidence supplied. The Panel therefore finds that the claim amount for interest to maturity should be reduced to account for the overstatement of payable interest.

243. In addition, the interest to maturity was largely owed on PNs issued in respect of work performed prior to 2 May 1990. Of the amount of this claim item, US$17,263,989 was owed on non-compensable PN balances. For the reasons expressed in paragraphs 79-81, supra, the Panel therefore finds that the corrected figure for interest to maturity of US$18,800,740 should be reduced by this non-compensable portion. The Panel recommends compensation in the amount of US$1,536,751 for interest to maturity on unpaid PNs.

244. The Panel finds the claim for interest to maturity on the PNs to be a contractual claim, which is not covered by Governing Council decision 16. This decision addresses claims for interest on "the principal amount of the award". The Panel finds that interest to maturity on an unpaid PN constitutes part of "the principal amount of the award" as that term is used in decision 16.

245. As noted in paragraph 233, supra, the Panel does not address the claim for delay interest on the PNs. The Panel therefore recommends no compensation for delay interest.

246. The Panel therefore recommends compensation in the amount of US$11,459,822 for unpaid PNs, before taking into account the Geosonda reduction (see Table.10, infra).

d. Retention money

247. Hidrogradnja also requests compensation in the amount of US$25,927,335 for retention money withheld by the Employer under the terms of the Contract but never paid to Hidrogradnja after the abandonment of the Project. The Panel finds that the evidence establishes both the amounts retained and the fact that no payment of withheld retention was made to Hidrogradnja. Iraq does not contest that it has retained the funds, but it argues that any award should be denominated partly in Iraqi dinars, as a portion of the retained funds was denominated in this currency.

248. The Panel finds that the evidence establishes: the amount retained; the currency in which these amounts were due; and that no payment of the withheld retention money was made to Hidrogradnja. For the reasons expressed in paragraphs 135-141, the Panel determines that Hidrogradnja is entitled to 25 per cent of the total amount of the retention money withheld by the Employer. Therefore, the Panel recommends compensation in the amount of US$6,481,834 for retention money.

249. The determination that these amounts are compensable is not, however, the conclusion of the Panel's inquiry. Included within Hidrogradnja's claim for these items are portions actually due to and claimed by Geosonda,

a subcontractor, (see paragraph 334, infra) and by Isola, a supplier (see paragraph 433, infra). In paragraph 10 of decision 9, the Governing Council determined that claimants with claims for contract losses need not establish contractual privity with Iraq in order to recover for such losses. The Panel finds that if Geosonda and Isola are thus eligible to recover directly for their contract losses, the necessary implication of this finding is that, unlike normal contractual practice, Hidrogradnja may not claim for an amount due to its subcontractor or supplier if that amount is also claimed by the subcontractor or supplier.

250. As a result, the Panel finds that the compensable portion of the Hidrogradnja unpaid work claim item must be further reduced by those amounts included in the Geosonda claim.

251. The Claimant Isola supplied materials to Hidrogradnja during July 1990 for which payment was not received (see paragraphs 433-435, infra). From the evidence submitted by Hidrogradnja and Isola, the Panel concludes that Hidrogradnja most probably included the cost of the materials supplied by Isola in the IC filed with the Employer immediately prior to the invasion. Thus, the amount claimed by Isola is most probably also claimed by Hidrogradnja in the claim item for the United States dollar portion owed on approved but unpaid ICs. The Panel therefore also recommends reducing the amount of that claim item by US$186,616, the amount to be included in the recommended compensation for Isola.

Table 10. GEOSONDA AND ISOLA DEDUCTIONS

Claim item	Amount compensable (US$)	Geosonda claim amount (US$)	Isola claim amount (US$)	Recommended compensation (US$)
United States dollar portion owed on approved but unpaid ICs	5,833,916	250,194	186,616	5,397,106
PN account	5,235,938	315,718	-	4,920,220
Unpaid PNs	11,459,822	75,648	-	11,384,174
Retention money	6,481,834	192,542	-	6,289,292
TOTAL	29,011,510	834,102	186,616	27,990,792

252. After taking into account the above deductions, the Panel recommends compensation in the amounts of US$5,397,106 for the United States dollar portion owed on approved but unpaid ICs, US$4,920,220 for the PN account, US$11,384,174 for unpaid PNs and US$6,289,292 for retention money.

e. IC34

253. Hidrogradnja claims that it has not been paid US$3,244,370 due for IC34, which had been presented to the Employer for acceptance. The Panel finds that this IC was properly presented under the Contract and that the amount claimed therein is supported by the documentation submitted with the claim. The Panel therefore recommends compensation in the amount of US$3,244,370 for IC34.

Table 11. RECOMMENDED COMPENSATION FOR UNPAID WORK

Claim item	Recommended compensation (US$)
United States dollar portion owed on approved but unpaid ICs	5,397,106
Interest on United States dollar portion owed on approved but unpaid ICs	-
PN account	4,920,220
Interest on PN account	-
Unpaid PNs	11,384,174
Retention money	6,289,292
IC34	3,244,370
TOTAL	31,235,162

254. The Panel recommends compensation in the amount of US$31,235,162 for unpaid work.

(b) Loss of profits

255. Hidrogradnja requests compensation in the amount of US$100,358,365 for loss of profits under the Contract, which it asserts it would have earned had the Project been completed as scheduled.

256. Hidrogradnja's claim suffers from a lack of credible evidence regarding expected profits or their calculation. Although Hidrogradnja provided several volumes of documents in support of its claim, the documentation provided was not specific as to the asserted loss of profits.

257. In written interrogatories, the Panel requested Hidrogradnja to provide further explanation and information regarding the loss of profits component. Although Hidrogradnja replied, and in some instances provided requested information, its replies did not lend additional support to the claim amount as stated.

258. A complete discussion of the compensability of the claim for loss of profits and the evidentiary standards applied by the Panel to such claims appears at paragraphs 145-155 and 157-163, supra.

259. As noted, the Panel finds that the Project Contract was ongoing on 2 August 1990 and that the Contract became impossible to perform as a direct result of Iraq's invasion and occupation of Kuwait. Based on Governing Council decision 9, Hidrogradnja is entitled to the profits on the Contract that it would reasonably have earned had the Consortium actually completed performance of the Contract.

260. The Panel and its expert consultants have engaged in a detailed review of the relevant information, including the Project work schedule and history, the status of the works and the work performed up to 2 August 1990. The Panel and its expert consultants have also analysed the contract specifications for the work, the resources mobilized by Hidrogradnja and available to it in Iraq, and the work plans and methods described by Hidrogradnja.

261. A review of the loss of profits claim by the Panel and by its expert consultants indicates that Hidrogradnja's estimates of direct costs, such as labour, equipment and materials costs, suffered from the same deficiencies as the claim of its Consortium partner, Enka. These estimates were of a limited nature and did not properly take into consideration the full range of costs associated with completing such a large, complex and difficult project.

262. The Panel finds that Hidrogradnja has underestimated the labour required to complete the Project. The Panel's expert consultants performed an analysis similar to that performed for Enka's claim, using historical data from the Project to estimate the average number of work hours that had been required to complete particular jobs on the Project. The progress reports indicate that a substantially larger quantity of work remained to be performed than Hidrogradnja had used in its labour calculations. Similarly, the Panel finds that Hidrogradnja had omitted from its calculations or inaccurately stated a number of indirect and general costs that it would have incurred in the completion of the Project.

263. The Panel also finds that Hidrogradnja's loss of profit calculations do not take into account a number of additional general operating costs, including charges that the claimant would have incurred for insurance, the cost of guarantees, home office facilities, and advisors and local agents. Although Hidrogradnja made provisions for some of these items in its claim, the Panel finds that the majority were ignored or inadequately qualified.

264. Further, the record shows that Hidrogradnja had already encountered serious time delays in the Project. Hidrogradnja does not adequately support the assumption in its claim that all the problems and delays it had been experiencing prior to the invasion would have been completely ameliorated soon thereafter. At the time of the invasion, Hidrogradnja faced rising costs and increasing delays. The Project was already almost a

year behind schedule and was falling further behind. Further, Hidrogradnja's loss of profits calculation does not account for the additional costs it would have incurred in maintaining its construction operations in this remote geographic region for one or more years after the completion date on which the bid was based.

265. The evidence also shows that, in addition to the work delays, Hidrogradnja faced numerous other obstacles to further payments on the Contract and, thus, to profits. Payments on accepted work had already fallen behind schedule. Moreover, several disputes involving significant sums had arisen with the Employer over claims for additional work.

266. Unlike Enka, Hidrogradnja had not addressed the problem of financing costs, having made no arrangement to sell the PNs issued by the Employer. The Panel's expert consultants have calculated that, over the life of the project, Hidrogradnja would have incurred financing costs equal to approximately 30 per cent of the total revenue on the Contract.

267. It is also important to recall that the calculations regarding Hidrogradnja's claim are projected loss of profits. Thus, the Panel concludes that any calculation of the loss of profits should take into account the risk inherent in the Project. The Project had already been delayed by one year, and a large number of disputed claims remained outstanding. As a result, Hidrogradnja had not realized any profit on work completed up to the date of the invasion. The evidence submitted by Hidrogradnja does not indicate that the problems that had occurred up to the date of the invasion would not have continued after that date. The Panel finds that in a project operating under such conditions, the risk is not calculable by normal means. The Panel also finds that a specific allowance for risk should have been included in Hidrogradnja's loss of profits calculation.

268. Further, based on its experience, the Panel finds that profit margins obtainable in construction projects such as the Bekhme Dam Project are quite small. Thus, the 10 per cent reduction in the Contract price agreed to by Hidrogradnja after the tender had been accepted by the Employer would have seriously eroded any profit margin included in the original bid. The fact that Hidrogradnja went forward with the Project despite such obstacles to profitability is understandable given the need construction enterprises such as Hidrogradnja have to retain skilled labour and to generate cash flow to service capital equipment debt.

269. Finally, the combination of this risk allowance with the understated costs and the reduction in the Contract price lead the Panel to the firm conclusion that Hidrogradnja would not have realized a profit on the Project.

270. As with Enka's claim for loss of profits, the Panel recommends no compensation for Hidrogradnja's loss of profits claim.

(c) Costs of letters of guarantee

271. Hidrogradnja has requested compensation in the amount of US$470,794 for the cost of maintaining letters of guarantee in favour of the Employer. Hidrogradnja made payments totalling US$470,794 up to the end of 1992 and claims that it should receive the costs of maintaining these letters of guarantee up to that date. Iraq argues that the costs of the letters of guarantee are costs that Hidrogradnja was contractually obliged to bear and that these costs would have been incurred up to the end of the Project, which would probably have continued up to the end of 1992. Thus, in Iraq's view, the entire quantum of this claim item would have been incurred by Hidrogradnja regardless of the invasion.

272. The issue for the Panel to determine is whether Hidrogradnja should have continued to incur these costs. The Panel notes that once the Project collapsed as a result of Iraq's actions, there should no longer have been a need to maintain the letters of guarantee in favour of the Employer. The Panel finds that because performance of the Contract was precluded by Iraq's invasion of Kuwait, Hidrogradnja should have been freed from its obligation to secure its performance through letters of guarantee. The Panel further finds that these letters of guarantee were maintained because the Employer refused to release Hidrogradnja from its obligations under the Contract.

273. Further, it is the Panel's opinion that it would be inequitable for Iraq to avoid compensating Hidrogradnja for costs that were necessitated by Iraq's intransigence. As discussed more fully at paragraphs 169-170, supra, the Panel believes that the Commission's jurisdiction to recommend compensation for continuing costs such as these should end on the date of the filing of the claim. The losses claimed in respect of this item extend, however, only up to 1992. The claim was filed in 1993. The Panel therefore recommends compensation in the amount of US$470,794 for the costs of letters of guarantee.

(d) Project termination costs

274. Hidrogradnja requests compensation in the amount of US$4,902,650 for project termination costs, comprising wages paid to redundant personnel (US$4,677,013) and certain head office expenses (US$225,637).

275. Hidrogradnja requests compensation in the amount of US$4,677,013 for wages paid to redundant personnel after their evacuation from Iraq and return to the former Yugoslavia. The Panel notes that under the then existing applicable law, the returning workers could not be dismissed unless they found another job. At the time of the collapse of the Project, Hidrogradnja had no other major contracts that required additional staff. The evidence submitted with the claim shows that the redundancy payments were made from 1 September 1990 to 1 March 1992 and that the average number of redundant employees receiving payments during this period was 909 workers, or approximately 43 per cent of the total number of employees at the Project site at the time work on the project ceased.

276. Iraq contends that the situation in the former Yugoslavia is responsible for the inability of Hidrogradnja to find work for its redundant employees. The evidence before the Panel indicates, however, that most of Hidrogradnja's work took place outside the former Yugoslavia.

277. The Panel is of the opinion that the costs claimed by Hidrogradnja are in fact a consequence of the then existing labour legislation. Hidrogradnja made efforts to mitigate this loss by attempting to find employment for these redundant workers, as a result of which approximately 50 per cent found jobs. The Panel finds, therefore, that the redundancy payments were directly caused by the invasion. The Panel is further satisfied that the remaining redundant employees who received the redundancy payments made no productive contribution to Hidrogradnja. The Panel therefore recommends compensation in the amount of US$4,677,013 for payments made to redundant employees.

278. In addition, Hidrogradnja seeks compensation in the amount of US$225,637 for the wages paid to headquarters personnel involved in terminating Hidrogradnja's work on the Project on the ground that the work of these workers was non-productive and was necessitated solely by the collapse of the Project.

279. During the period from 2 August 1990 to the end of July 1991, a number of employees at Hidrogradnja's headquarters were assigned to the Project to organize and coordinate the evacuation of the Project site and to perform other tasks related to the collapse of the Project. The total number of employees so assigned was initially 18, which number was subsequently reduced to 9 by July 1991.

280. In its interrogatories, the Panel requested Hidrogradnja to provide particulars of the work performed by the headquarters staff involved in this claim item and to describe how this work was related to the collapse of the Project. In reply, Hidrogradnja submitted documentation that supported this claim.

281. In the Panel's opinion, it is reasonable to expect that the sudden and unplanned collapse of such a major contract would entail repercussions for the contractor. The Panel considers that additional personnel expenses were reasonable and necessary. The Panel therefore recommends compensation in the amount of US$225,637 for wages paid to headquarters personnel.

282. The Panel recommends total compensation in the amount of US$4,902,650 for project termination costs.

3. Other claims

(a) Evacuation and repatriation

283. Hidrogradnja requests compensation in the amount of US$1,603,887 for the evacuation of almost all its staff and their dependants, with the exception of a skeleton staff required by the Employer. The evacuation of

2,116 employees took place between August and October 1990. In addition to the cost of transport, the employees were paid a per diem allowance, being the legally mandated minimum per diem payments then required of Hidrogradnja by the applicable law.

284. In its interrogatories, the Panel asked Hidrogradnja to explain how the costs claimed exceeded the costs that would have been incurred by it in the normal repatriation of its employees, assuming the completion of work on the Project would have proceeded as planned. Hidrogradnja provided no answer to this question, stating instead that the evacuation was regarded as a humanitarian necessity and that employee safety was the only consideration. Hidrogradnja also provided no information as to what costs would have been incurred for the normal repatriation of their employees.

285. Iraq argues in its responses that Hidrogradnja would ultimately have been required to repatriate its workers regardless of the invasion and that therefore repatriation costs should not be compensable.

286. The Panel agrees to some extent with Iraq's argument. In the Panel's view, Hidrogradnja would undoubtedly have incurred some costs for the normal repatriation of its employees. The Panel's expert consultants calculated normal repatriation costs of US$211,600, which the Panel finds to be reasonable. The Panel therefore recommends compensation in the amount of US$1,392,287 for evacuation and repatriation.

(b) Unresolved disputes with the Employer

287. Hidrogradnja requests compensation in the amount of US$40,949,114 for several items that are currently the subject of other proceedings between the Consortium and the Employer.

288. Iraq argues that all but one of the additional work claims should be rejected as unauthorized. In addition, Iraq argues that there are a number of jobs that either were not performed or were not performed to Contract specifications and, therefore, that these amounts should be set-off against any amounts that might be owing to the Consortium.

289. These claims are based on the unproven assumption that the Employer was liable and that the pending disputes would have been resolved in favour of Hidrogradnja. For this reason, the Panel recommends no compensation for unresolved disputes with the Employer.

C. Recommendation

Table 12. RECOMMENDED COMPENSATION FOR HIDROGRADNJA'S CLAIM

	Claim element	Claim amount (US$)	Recommended compensation (US$)
1	Project assets in Iraq on 2 August 1990		
1.a	Capital equipment	70,675,815	29,558,787
1.b	Spare parts and materials	16,398,815	15,974,039
1.c	Deposits in Iraqi banks	5,740,460	-
1.d	Loss of safe and contents	114,398	-
	Subtotal	92,929,488	45,532,826
2	Contract with Iraq		
2.a	Work performed or services provided		
2.a.i	Labour costs after 2 August 90	3,590,358	2,754,986
2.a.ii	Unamortized prepaid expenses	6,457,258	3,699,476
2.a.iii	Unpaid work	185,318,866	31,235,162
2.b	Loss of profits	100,358,365	-
2.c	Costs of letters of guarantee	470,794	470,794
2.d	Project termination costs	4,902,650	4,902,650
	Subtotal	301,098,291	43,063,068
3	Other claims		
3.a	Evacuation and repatriation	1,603,887	1,392,287
3.b	Unresolved disputes with the Employer	40,949,114	-
	Subtotal	42,553,001	1,392,287
	TOTAL	436,580,780	89,988,181

290. Based on the Panel's findings regarding Hidrogradnja's claim, the Panel recommends total compensation in the amount of US$89,988,181. For determinations of currency exchange rate, interest and date of loss, see paragraphs 436 to 442, infra.

VI. CLAIM OF OVERSEAS BECHTEL INCORPORATED

A. Facts and contentions

291. Except as stated below, the facts related to the Project, the Contract and the collapse of the Project are the same as those described in chapter IV.A.

1. Bechtel's role in the Project

292. At the time of the invasion, Bechtel Corporation and its various subsidiaries, including Claimant Bechtel, had over 100 employees and dependants involved in a number of construction projects in Iraq, including the Bekhme Dam Project.

293. Bechtel was retained by the Consortium under a Technical Assistance Services Agreement ("Bechtel Services Agreement") entered into between Bechtel and the Consortium on 29 January 1987 and subsequently modified by amendment. Bechtel's role as technical and project management consultant to the Consortium was specifically mentioned in the negotiations between the Employer and the Consortium.

294. As the technical and project management consultant to the Project, Bechtel provided general support and technical advice and service in areas of common interest to the Consortium. This advice and service included monitoring the progress of the Consortium's work, preparing invoices and contract claims, establishing operating procedures, and rendering technical assistance with respect to construction methods, as well as coordinating relations between the Consortium and the Employer generally.

2. Contractual relationships

295. As noted above, Bechtel's relationship to the Project was as a consultant to the Consortium under the Bechtel Services Agreement. Although Bechtel was mentioned in negotiations between the Consortium and the Employer, no contractual relationship existed between the Employer and Bechtel, and no such relationship is alleged by Bechtel.

3. The collapse of the Project

296. On 2 August 1990, Bechtel had four employees in Iraq. These employees were accompanied by three dependants (these seven persons are collectively referred to as the Bechtel staff). On the day of Iraq's invasion of Kuwait, Bechtel chartered an aircraft to evacuate its staff from Iraq. Bechtel instructed its staff to proceed to Baghdad to meet the aircraft. Bechtel asserts, however, that its staff were refused exit visas by the Iraqi authorities. On several occasions after 2 August 1990, Enka attempted to intercede and obtain exit visas for the Bechtel staff, but Enka's requests were refused each time.

297. Three members of the Bechtel staff, a male employee and his wife and daughter, took refuge in the Canadian Embassy on 7 August 1990. Each of these persons ultimately obtained exit visas and left Iraq. On 27 August 1990, the four remaining Bechtel staff were moved by the Iraqi authorities on short notice from the Project site to a Baghdad hotel. Shortly after this move, the three male employees in this group were moved again to various strategic sites in Iraq and used as "human shields." The female dependant in this group received an exit visa and left Iraq shortly after 27 August 1990.

298. The above mentioned three individuals were held by the Iraqi authorities without contact with the outside world until they were returned to Baghdad on 8 December 1990. They received exit visas and left Iraq on 11 December 1990.

299. Based on advice from its counsel, Bechtel paid salaries and benefits to its staff during their detention in Iraq. Bechtel continued to pay its staff after their repatriation until other work within the Bechtel organization became available to them.

300. One of the Bechtel staff held as a "human shield" was unable to work following his departure from Iraq as a result of an illness arising from his detention. Once he had recovered, this employee still could not readily be employed, allegedly as a result of the disruption to Bechtel's work schedule caused by the aftermath of the invasion.

301. Bechtel alleges that the suspension of the Project on 20 August 1990 prevented the resumption and completion of its Services Agreement.

4. Bechtel's claim

302. Bechtel filed a claim seeking compensation in the amount of US$6,352,576, which it later reduced to US$6,192,639, for the losses itemized in the following table:

Table 13. BECHTEL'S CLAIM

Claim element	Claim amount (US$)
Wage costs	328,381
Loss of profits	5,864,258
TOTAL	6,192,639

B. Analysis and valuation of Bechtel's claim

303. Bechtel originally requested compensation in the amount of US$488,318 for wages and reimbursable costs it alleges were owed to it by the Consortium. The reimbursable costs include those relating to the salaries of Bechtel staff held as "human shields" by Iraq, which Bechtel asserts the

Consortium was required to pay. In the original claim, Bechtel asserted that Enka had paid a portion of the amounts due and that Hidrogradnja had paid nothing. In its replies to questions from the Panel, however, Bechtel confirmed that Enka has paid the balance of the amounts due. Bechtel has thereby reduced this claim element from US$488,318 to US$328,381, which is the amount that Bechtel asserts remains due from Hidrogradnja. The Panel finds that the documentation submitted with the claim supports the revised claim amount and demonstrates that the work was actually performed and accepted by the Consortium. The Panel therefore recommends compensation in the amount of US$328,381 for wage costs.

304. Bechtel requests compensation for loss of profits in the amount of US$6,088,258, which it calculates by adding the contractual earned fee and the amended performance fee on the contract work still to be charged. The fees are an "earned fee" of US$4,943,098 and a "performance fee" of US$1,145,160, thereby totalling US$6,088,258. Bechtel has proposed a deduction of US$224,000 from the earned fee to allow for non-reimbursable overhead costs that would have been incurred in completing the work, resulting in an amended amount of US$5,864,258.

305. The earned fee in the amount of US$4,943,098 was stated as a fixed percentage of the Consortium's billings to the Employer. The amount projected for the earned fee is supported by the evidence and accords with the amount of contract work yet to be performed. The Panel finds that this claim element does not properly account for the non-reimbursable costs Bechtel would have incurred in completing the work necessary to realize the earned fee. Using Bechtel's records, the Panel's expert consultants estimate that Bechtel would have incurred additional, non-reimbursable costs in the amount of US$988,620, not the US$224,000 as stated by the claimant.

306. While Bechtel's position was more secure than that of the Consortium, the majority of its fees was based on the Consortium's billings. However, Bechtel's work was not without risk. Bechtel's earned fee depended on the ability of the Consortium to continue its work. Thus, the Panel finds that an allowance of 7.5 per cent of the earned fee for risk, as proposed by its expert consultants, should be made and that an assessed reduction of US$370,732 is appropriate.

307. As discussed in the Enka and Hidrogradnja claims, the Panel finds that the Consortium would not have earned a profit on the Contract. Because the amount of Bechtel's performance fee was contractually dependent on the Consortium earning a profit of at least 10 per cent, the Panel finds that Bechtel would not have earned a performance fee under the Contract.

308. Taking into account these deductions of US$988,620 and US$370,732, the Panel recommends compensation in the amount of US$3,583,746 for the earned fee portion of loss of profits.

C. Recommendation

Table 14. RECOMMENDED COMPENSATION FOR BECHTEL'S CLAIM

Claim element	Claim amount (US$)	Recommended compensation (US$)
Wage costs	328,381	328,381
Loss of profits	5,864,258	3,583,746
TOTAL	6,192,639	3,912,127

309. Based on its findings regarding Bechtel's claim, the Panel recommends total compensation in the amount of US$3,912,127. For determinations of currency exchange rate, interest and date of loss, see paragraphs 436 to 442, infra.

VII. CLAIM OF ENERGOPROJEKT

A. Facts and contentions

310. Except as stated below, the facts related to the Project, the Contract and the collapse of the Project are the same as those described in chapter IV.A.

1. Energoprojekt's role in the Project

311. In October 1988, Energoprojekt, acting in concert with Dijla Contracting, its Iraqi joint venture partner, entered into a contract entitled "Agreement for Consulting Engineering Services (Detail Design and General Supervision)" (the "Engineering Contract") with the Employer. The Engineering Contract required Energoprojekt to provide the Employer with detailed design, general supervision, training and other services relating to the Project. Energoprojekt's work on the Project was divided under the Engineering Contract into three main tasks.

312. Work on the Project commenced in January 1988. Construction was scheduled to last 84 months and to be completed in January 1995. Construction of the Project was to be followed by a two-year maintenance and training period, during which time the Consortium and Energoprojekt were to ensure that the Project was functioning properly. Under the Engineering Contract, Energoprojekt's work on the Project was to continue for a further two years following the maintenance period, during which time Energoprojekt would complete the training of the Employer's staff and perform a safety evaluation of the Project. Energoprojekt's obligations under the Engineering Contract were to continue for 11 years from October 1988.

2. Contractual relationships

313. Under the Engineering Contract, the Employer was required to pay Energoprojekt a fixed price of ID 9,383,241. This price amounted to US$30,109,778.83 at the Engineering Contract and official Iraqi exchange rates of ID 1.000 to US$3.208889. The prices for the various elements of the work to be performed under the Engineering Contract were listed in an appendix to the Engineering Contract, which was termed the "Bill of Quantities".

314. The Engineering Contract required the Employer to pay approximately 57 per cent, or ID 5,346,769, of the contract price in United States dollars at the official and contractual exchange rate, which amounted to approximately US$17,157,188. Of this amount, the Employer was required to pay 10 per cent (US$1,715,719) in cash as an advance payment and 40 per cent (US$6,862,875) in cash as the work progressed.

315. The remaining 50 per cent (US$8,578,594) of the United States dollar portion of the contract price was the subject of a "loan" arrangement between Energoprojekt and the Employer, in which Energoprojekt agreed to

"loan" back to the Employer the US$8,578,594 that was supposed to be paid to it on a credit basis as the work progressed. Under the Engineering Contract, this credit granted by Energoprojekt to the Employer was then to be repaid over five years, starting 18 months after the execution of the Engineering Agreement. The Employer was required to make no payment in the first year, then to make eight equal, semi-annual payments over the remaining four years. The Employer agreed to pay 5 per cent interest on the credit. The Engineering Contract provides that the Employer's credit obligations were fully guaranteed by the Central Bank of Iraq, although no guarantee document issued by the Central Bank is included in the claim.

316. The United States dollar advance payment was to be repaid in 60 equal instalments by deduction from Energoprojekt's invoices to the Employer.

317. The Employer was required to pay the remaining approximately 43 per cent of the contract price, or ID 4,036,472, in Iraqi dinars. Ten per cent of the Iraqi dinar portion of the price (ID 403,647) was paid to Energoprojekt as an advance payment, and the remaining 90 per cent (ID 3,632,825) was to be paid in cash as the work progressed.

318. Once work on the Project commenced, Energoprojekt was required to submit ICs in the Engineering Contract. The ICs reflected the amount of work on each component of the Bill of Quantities performed during the period covered by the particular IC in question. The value of the work described as completed in each IC is not equal to the monthly amount that the Employer was required to pay as the parties had agreed in the Engineering Contract that the Employer would make equal monthly payments to Energoprojekt. Energoprojekt alleges that the parties agreed to a payment schedule setting out the monthly payments, although no such document appears in the claim. The ICs were approved by the Employer's Resident Engineer at the Project Site before being paid, although there was no requirement for such approval in the Engineering Contract.

3. The collapse of the Project

319. Energoprojekt's statement of claim accords with the account of the Project's collapse provided by Enka. Like Enka's workers, shortly after the invasion Energoprojekt's workers demanded to be repatriated to their countries of origin. The bulk of Energoprojekt's staff was evacuated from Iraq by the end of October 1990. The remaining staff departed by January 1991.

4. Energoprojekt's claim

320. In its original statement of claim, Energoprojekt requested compensation in the amount of US$13,803,870. In reply to interrogatories from the Panel, Energoprojekt revised and resubmitted its claim, thereby reducing its total claim amount to US$12,421,241.

Table 15. ENERGOPROJEKT'S CLAIM

Claim element	Claim amount (US$)
Loss of profits	1,971,565
Loss of Project assets	551,186
Overheads	936,783
Unpaid work	5,716,207
Interest	3,245,500
TOTAL	12,421,241

B. Analysis and valuation of Energoprojekt's claim

1. Loss of profits

321. In its resubmitted claim, Energoprojekt requested US$1,971,565, for the profits it asserts it would have earned upon the completion of the Engineering Contract. The Panel finds that the loss of profits claim provides adequate evidence of the revenues Energoprojekt expected to earn under the Engineering Contract and the costs it expected to incur. Energoprojekt's own evidence, however, shows that it had already completed most of the profitable elements of the Engineering Contract and that it was likely to experience substantial losses over the remaining life of the contract. The Panel finds that, at the time of the invasion, Energoprojekt had completed only a small portion of the work it was required to perform. However, Energoprojekt had already billed the Employer for over 50 per cent of the total contract price.

322. Energoprojekt's evidence shows that its revenues exceeded costs by a significant margin for the work completed prior to the invasion. Energoprojekt could not, however, have maintained this gross margin over the life of the Engineering Contract. Energoprojekt's own evidence shows that costs would have exceeded revenues for the remaining work on the first task and for the second and third tasks. Further, Energoprojekt's claim fails to account for the delays that it had already experienced. Finally, the claim fails to make any allowance for further delays or other risks that are inherent in a project such as the Bekhme Dam Project. Energoprojekt's own figures indicate that it would likely have made a net loss over the life of the Engineering Contract. Based on that fact, and on the likely effect of further delays and risks, the Panel finds that Energoprojekt has not demonstrated that there was any reasonable probability of earning a profit on the Engineering Contract. The Panel therefore recommends no compensation for loss of profits.

2. Loss of Project assets

323. Energoprojekt requested US$551,186 as compensation for assets it maintained at the Project site that were lost after it evacuated the Project. The Panel finds that the claim for Project assets is adequately documented to the extent of the corrected claim amount. Energoprojekt's calculations do account for accumulated depreciation. However, the depreciation rate employed was not based on complete depreciation of the assets over the life of the Project. The Panel finds that the appropriate method of depreciation to employ in calculating the claim amount is one that would result in the complete depreciation of the assets over the term of the Project. Using the figures contained in the evidence submitted by Energoprojekt, therefore, the Panel's expert consultants determined that Energoprojekt's depreciation calculations had the effect of overstating this claim element by US$11,158. After correcting this error, the Panel recommends compensation in the amount of US$540,028 for loss of project assets.

3. Overheads

324. Energoprojekt requested US$936,783 in compensation for overhead costs. Energoprojekt failed to submit appropriate evidence in support of this claim element or to establish that the cost of the Project overheads were a separate, recoverable cost under the Engineering Contract. Energoprojekt did not demonstrate that there was any affirmative allocation of costs to Project overheads as part of its cost structure. The Panel finds therefore that Energoprojekt had no expectation of recovering these costs from the fees paid to it by the Employer. Energoprojekt has declined to submit appropriate supporting evidence, despite specific requests to do so. The Panel therefore recommends no compensation for overheads.

4. Unpaid work

325. Energoprojekt also requests compensation in the amount of US$5,716,207 for work that had been completed and invoiced to the Employer but which remained unpaid on 2 August 1990. The Panel finds that this claim element is supported by invoices in the amount stated. Of these unpaid invoices, however, invoices with a stated value of US$2,923,422 are based on work performed prior to 2 May 1990. For the reasons expressed in paragraphs 79-81, supra, the Panel recommends compensation in the amount of US$2,792,785 for unpaid work.

5. Interest

326. Energoprojekt claimed US$3,245,500 as interest on amounts owed to it by the Employer. As noted at paragraph 233, supra, the Panel will not consider claims for interest on the principal amount of awards at this time. The Panel therefore recommends no compensation for interest.

C. Recommendation

Table 16. RECOMMENDED COMPENSATION FOR ENERGOPROJEKT'S CLAIM

Claim element	Claim amount (US$)	Recommended compensation (US$)
Loss of profits	1,971,565	-
Loss of Project assets	551,186	540,028
Overheads	936,783	-
Unpaid work	5,716,207	2,792,785
Interest	3,245,500	-
TOTAL	12,421,241	3,332,813

327. Based on its findings regarding Energoprojekt's claim, the Panel recommends total compensation in the amount of US$3,332,813. For determinations of currency exchange rate, interest and date of loss, see paragraphs 436 to 442, infra.

VIII. CLAIM OF GEOSONDA

A. Facts and contentions

328. Except as stated below, the facts related to the Project, the Contract and the collapse of the Project are the same as those described in chapter IV.A.

1. Geosonda's role in the Project

329. In March 1988, Geosonda and its partner, Geoinþenjering, entered into an Agreement on Execution of Grouting Works (the "Grouting Contract") with Hidrogradnja. The Grouting Contract required Geosonda and Geoinþenjering to complete drilling, grouting and related work on the Project. Geosonda's specific responsibilities included geological exploration work, which had not been completed by the date of the invasion. In March 1988, Geosonda and Geoinþenjering also entered into another agreement which governed the relations between them. In this contract, the parties agreed to divide the work under the Grouting Contract between them. Geosonda alleges that it would have earned ID 12,281,444.500 under these contracts.

330. Geosonda agreed to payment terms similar to those of its contractor, Hidrogradnja, according to which it was entitled to a share of Hidrogradnja's payments from the Employer. Geosonda submitted ICs to Hidrogradnja, which in turn submitted its own ICs to the Employer that covered, among other costs, the work performed by Geosonda. Geosonda was then paid after receipt of payment by Hidrogradnja. The payments were divided: Geosonda received 50 per cent in cash (20 per cent in United States dollars and 30 per cent in Iraqi dinars) and 50 per cent in the form of PNs. This payment arrangement had the effect of delaying Geosonda's payments until Hidrogradnja received payment for the work done by Geosonda and invoiced by Hidrogradnja.

2. The collapse of the Project

331. Geosonda's statement of claim accords with the account of the Project's collapse provided by Enka. Like Enka's workers, shortly after the invasion Geosonda's workers demanded to be repatriated to their countries of origin. All of Geosonda's staff, except for one worker, were evacuated from Iraq by the end of September 1990.

332. Geosonda attributes its losses to the activities of insurgents at the Project site after the Iraqi military ceased to control the area. Geosonda's evidence is similar to the evidence produced by Enka regarding the efforts taken to secure the Project site and the looting and destruction that followed the evacuation by the Consortium and its subcontractors. Geosonda notes, however, that it was unable to verify the state of the Project because the area of the Project site was closed to civilians.

3. Geosonda's claim

333. In July 1994, Geosonda filed a claim seeking compensation in the amount of US$11,787,441 for the losses listed below:

a. lost profits Geosonda alleges it would have earned had it not been prevented from carrying out its work (US$5,511,928);

b. an amount retained by the Employer, which would have been released upon the completion of Geosonda's work (US$220,711);

c. overhead expenses, which Geosonda alleges it would have amortized over the life of the Project, but which it claims it was unable to amortize as a result of the interruption of its work (US$556,316);

d. the cost of repatriating Geosonda's staff, excluding those costs that were paid by Geosonda's prime contractor (US$26,067);

e. the residual value of certain plant, temporary facilities and materials, which Geosonda alleges it was unable to remove from the Project site after the invasion (US$1,371,129);

f. the amount owed for work performed by Geosonda that was unpaid as of the date of the invasion (US$692,359);

g. certain miscellaneous costs (totalling US$1,050,699) including the value of goods in transit for the Project site as of the date of the invasion (US$155,259), cost of additional protection for the Project site (US$125,410), salaries paid to staff pending their reemployment (US$750,030), and the costs of claim preparation (US$20,000); and

h. interest on the principal amount of the claim (US$2,358,232).

B. Analysis and valuation of Geosonda's claim

334. For purposes of its analysis, the Panel grouped the claim elements by the substantive nature of the loss. The Panel's analysis of each of these claim elements is contained in the following paragraphs. The Panel does not address claims for interest (see paragraph 233) or claim preparation costs (see paragraph 358).

Table 17. GEOSONDA'S CLAIM

Claim element	Claim amount (US$)
Loss of Project assets	1,371,129
Goods in transit	155,259
Loss of profits	5,511,928
Project termination costs	901,507
Unamortized expenses	556,316
Unpaid work	913,070
Interest	2,358,232
Claim preparation costs	20,000
TOTAL	11,787,441

1. Loss of Project assets

335. Geosonda requests compensation in the amount of US$1,371,129 for the loss of certain Project assets, which it claims to be the residual value of certain plant, temporary facilities and materials. Geosonda alleges it was unable to remove these Project assets from the Project site after the invasion. For the capital equipment, Geosonda calculated the claim amount by subtracting the amount of accumulated depreciation from the acquisition cost of the equipment at issue. Geosonda calculated the claim amount for the spare parts and materials by subtracting the cost of those materials already consumed in the work up to 2 August 1990.

336. The Panel finds that this claim element is adequately documented. The evidence submitted by Geosonda establishes that the assets were located in Iraq on the date of the invasion. The invoices provided lend support to Geosonda's cost figures. The Panel further finds that Geosonda has accurately calculated the cost of the spare parts and materials consumed up to the date of the invasion.

337. The Panel finds, however, that the depreciation rate employed by Geosonda has overestimated the residual value of the equipment. The Panel has determined that the appropriate depreciation rate is one that would result in the complete depreciation of the equipment over the life of the Project. As a result, the Panel finds that a further reduction of US$12,978 should be made for depreciation as suggested by its expert consultants. The Panel therefore recommends compensation in the amount of US$1,358,151 for loss of project assets.

2. Goods in transit

338. Geosonda requests compensation in the amount of US$155,259 for the value of goods in transit to the Project site on the date of the invasion.

Geosonda alleges that these goods were never delivered to the Project and that their loss is the result of the invasion. The Panel finds that Geosonda's claim for goods in transit is not adequately documented. No proof is offered as to the ownership of most of the goods listed in the statement of claim, nor is any explanation offered as to why the goods were never delivered or recovered. The Panel therefore recommends no compensation for goods in transit.

3. Loss of profits

339. Geosonda requests compensation in the amount of US$5,511,928 for loss of profits it alleges it would have earned on the Grouting Contract had it not been prevented from completing its work. Geosonda alleges that, according to its projections made after the Grouting Contract was signed but before commencement of the work, it expected to achieve a profit margin on the Grouting Contract of approximately 25 per cent of revenues. The amount Geosonda actually claims, however, is a net profit of 15 per cent on the value of the Grouting Contract work that remained. Geosonda does not directly explain the reason for the apparent decrease, although it does suggest that the 15 per cent rate provides for unspecified "contingencies."

340. The Panel finds that Geosonda's profit calculations make no specific allowance for risk. At the time of the invasion, the Project was already delayed by almost one year. The Employer was late in supplying critical materials and services to the Consortium. There is no evidence that these delays would have been ameliorated. Further, the harsh climate and geography, the remote location, the limited infrastructure and the hostile local population all combined to create a highly risky environment for construction work. The Panel finds that any calculation of expected profit on a contract related to the Project must make an allowance for such risk.

341. The Panel finds that Geosonda's revenue and cost projections are generally supported by the Grouting Contract, the agreement with Geoinþenjering and the supporting documentation. Geosonda's profit projections, however, do not account for Geosonda's probable financing costs. Because of the payment terms of the Grouting Contract, Geosonda was essentially required to finance a substantial portion of the work itself. Nowhere in the Geosonda documentation are these financing costs identified or addressed. The Panel's expert consultants estimate that Geosonda would have incurred US$1,367,287 in additional financing costs up to the completion of the Grouting Contract as a result of borrowings against the PNs issued by Hidrogradnja. The Panel finds that the claim for loss of profits should be reduced by this amount.

342. As noted above, the Panel finds that any claim for loss of profits must take into consideration the project risk inherent in projects such as the one at issue (see paragraph 159, supra). Although the Claimant did not make a specific deduction for project risk, the Panel finds that the reduction from 25 to 15 per cent in anticipated profit margin made by Geosonda for "unspecified contingencies" is adequate to account for Geosonda's risk on the Project.

343. The Panel finds that the claim amount of US$5,511,928 should be reduced by the amount of the omitted financing costs of US$1,367,287 and therefore recommends compensation in the amount of US$4,144,641 for loss of profits.

4. Project termination costs

344. Geosonda requests compensation in the amount of US$901,507 for Project termination costs, consisting of salaries paid to repatriated workers, costs relating to site protection and costs of evacuating its workers from Iraq.

(a) Salaries

345. Geosonda requests compensation in the amount of US$750,030 for salaries paid to its repatriated workers from the time of the collapse of the Project until the workers found new employment. Geosonda alleges that it was required to make these payments under the applicable law. Geosonda provided evidence of the staff involved and the wages paid to them during their redundancy periods. In reply to questions from the Panel, Geosonda submitted further evidence of its legal obligation to make these payments. The Panel finds that redundancy payments such as those that were made by Geosonda are compensable. The Panel also finds that this claim item is supported by adequate evidence and therefore recommends compensation in the amount of US$750,030 for salaries paid to repatriated workers.

(b) Site protection costs

346. Geosonda requests compensation in the amount of US$125,410 for the labour costs involved in protecting the assets that were left behind at the Project site. The Panel finds that Geosonda provided documentation which adequately supported this claim element, although it used an inappropriate rate of exchange when calculating the United States dollar value of the claim. After adjusting the exchange rate, the Panel recommends compensation in the amount of US$106,910 for site protection costs.

(c) Evacuation costs

347. Geosonda requests compensation in the amount of US$26,067 for the costs of evacuating its workers following the invasion. Geosonda did not, however, provide requested documentation on its evacuation costs. The Panel finds that the evidence which was submitted indicates that part of Geosonda’s evacuation costs was paid by others and that it would have been required ultimately to bear the costs of repatriation in any event. The Panel therefore recommends no compensation for evacuation costs.

348. The Panel recommends compensation in the amount of US$856,940 for Project termination costs.

5. Unamortized expenses

349. Geosonda requests compensation in the amount of US$556,316 for overhead expenses that it alleges it would have amortized over the life of the Project. The evidence submitted in support of the unamortized work claim shows that the costs involved were post-contract costs. However, the documents do not fully support the amounts claimed. In reply to interrogatories from the Panel, Geosonda revised some of the figures and submitted additional evidence. This evidence was in large part untranslated and does not support all the costs included. The Panel finds that components of this claim element with a claimed value of US$245,352 are not adequately supported by the evidence submitted. Therefore, the Panel recommends compensation in the amount of US$310,964 for unamortized expenses.

6. Unpaid work

350. Geosonda requests compensation in the amount of US$913,070 for unpaid work. This element of the claim is composed of US$692,359 for unpaid ICs and PNs and US$220,711 for money retained by the Employer and not released to Hidrogradnja for payment to Geosonda.

(a) Unpaid ICs and PNs

351. The unpaid ICs and PNs portion of the unpaid work claim element consists of ICs issued in respect of work performed prior to the invasion, for which Geosonda alleges that it has not been paid, and PNs for which Geosonda alleges it has never received payment.

352. The evidence in support of the unpaid ICs and PNs claim item, which was submitted together, is neither clear nor conclusive. Although there is adequate support for most of the amounts included, the Panel finds that components of the unpaid ICs and PNs claim item with a value of US$67,645 are not adequately supported by evidence.

353. In addition, US$58,802 was incurred in respect of work performed prior to 2 May 1990. For the reasons expressed in paragraphs 79-81, supra, the Panel recommends compensation in the amount of US$565,912 for the unpaid ICs and PNs.

(b) Retention money

354. Geosonda also requests US$220,711 in compensation for unpaid retention money withheld by the Employer from Hidrogradnja and, therefore, from Geosonda.

355. The Panel finds that the evidence establishes: the amount retained; the currency in which these amounts were due; and that no payment of the withheld retention money was made to Geosonda. For the reasons expressed in paragraphs 135-141, the Panel determines that Geosonda is entitled to 25 per cent of the total amount of the retention money withheld by the

Employer. The Panel therefore recommends compensation in the amount of US$55,178 for retention money.

356. The Panel recommends compensation in the amount of US$621,090 for unpaid work.

7. Interest

357. Geosonda requests US$2,358,232 as compensation for interest on the principal amounts that it claims are owed to it. As noted in paragraph 233, supra, the Panel will not address claims for interest.

8. Claim preparation costs

358. Geosonda requests compensation in the amount of US$20,000 for the costs of preparing the claim. The Governing Council has directed the panels of Commissioners not to consider claim preparation costs at this time. Therefore, the Panel makes no recommendation for claim preparation costs.

C. Recommendation

Table 18. RECOMMENDED COMPENSATION FOR GEOSONDA'S CLAIM

Claim element	Claim amount (US$)	Recommended compensation (US$)
Loss of Project assets	1,371,129	1,358,151
Goods in transit	155,259	-
Loss of profits	5,511,928	4,144,641
Project termination costs	901,507	856,940
Unamortized expenses	556,316	310,964
Unpaid work	913,070	621,090
Interest	2,358,232	-
Claim preparation costs	20,000	-
TOTAL	11,787,441	7,291,786

359. Based on its findings regarding Geosonda's claim, the Panel recommends total compensation in the amount of US$7,291,786.For determinations of currency exchange rate, interest and date of loss, see paragraphs 436 to 442, infra.

IX. CLAIM OF GEOINÞENJERING

A. Facts and contentions

360. Except as stated below, the facts related to the Project, the Contract and the collapse of the Project are the same as those described in chapter IV.A.

1. Geoinþenjering's role in the Project

361. In March 1988 Geoinþenjering and its partner, Geosonda, entered into the Grouting Contract with Hidrogradnja (see paragraphs 329-330, supra).

2. The collapse of the Project

362. At the time of the invasion, the Project was reaching the stage where Geoinþenjering and Geosonda were actively involved, and Geoinþenjering was increasing its commitment of workers and materials to the Project.

363. Geoinþenjering's statement of claim, while not particularly detailed, accords with the account of the Project's collapse provided by Enka and Geosonda. Like Enka's workers, shortly after the invasion Geoinþenjering's workers demanded to be repatriated to their countries of origin. Geoinþenjering's staff was evacuated from Iraq by the end of September 1990. Geoinþenjering asserts that this evacuation was caused by the mutiny of the workers. The Panel finds that the evidence submitted by other Claimants is generally consistent with this assertion.

364. Geoinþenjering's losses allegedly flow from the disruption of the Grouting Contract, and the departure of Geoinþenjering's staff from Iraq following the invasion. Geoinþenjering alleges it was put to certain expenses, lost certain assets and could not continue performing its contractual obligations because of this disruption and departure. Unlike its partner in the Grouting Contract, Geosonda, Geoinþenjering does not claim for unpaid ICs, PNs and retention money.

3. Geoinþenjering's claim

365. In March 1994, Geoinþenjering filed a claim seeking compensation in the amount of US$2,592,314 for the losses listed below.

a. labour expenses incurred after 2 August 1990 (US$185,372);

b. evacuation expenses, being the cost of repatriating workers from Iraq to Bosnia and Herzegovina after 2 August 1990 (US$43,900);

c. wages paid to redundant workers upon their return to Bosnia and Herzegovina for which Geoinþenjering did not receive productive work (US$255,519);

d. the balance as at the date of the invasion of certain Iraqi dinar accounts in Iraqi banks (US$116,964);

e. the unamortized cost of certain rental housing acquired by Geoinþenjering in Mosul, Iraq, the nearest major Iraqi settlement to the Project site (US$33,112);

f. the value of certain equipment left at the Project site after Geoinþenjering's evacuation from Iraq (US$1,484,722); and

g. the value of certain spare parts, construction and other materials left at the Project site after Geoinþenjering's evacuation from Iraq (US$472,725).

B. Analysis and valuation of Geoinþenjering's claim

366. For the purposes of its analysis, the Panel grouped the claim elements by the substantive nature of the loss. The Panel's analysis of each of these claim elements is contained in the paragraphs that follow.

Table 19. GEOINÞENJERING'S CLAIM

Claim element	Claim amount (US$)
Loss of Project assets	2,074,411
Project termination costs	299,419
Unpaid labour costs	185,372
Unamortized expenses	33,112
TOTAL	2,592,314

1. Loss of Project assets

367. Geoinþenjering requests compensation in the amount of US$2,074,411 for Project assets lost after the evacuation of its workers from the Project site. This claim consists of equipment (US$1,484,722), spare parts and materials (US$472,725) and bank deposits (US$116,964).

(a) Equipment

368. Geoinþenjering requests compensation in the amount of US$1,484,722 for the value of equipment left at the Project site after the evacuation, alleging that all of the equipment in question was destroyed or otherwise lost. In support of this claim item, Geoinþenjering submitted a limited number of copies of invoices and storehouse receipts, along with a ledger setting out for each piece of equipment, inter alia, its description, date in service, acquisition cost in Iraqi dinars, annual amortization rate, total amortization, and amortized value as of 31 July 1990.

369. In reply to questions from the Panel, Geoinþenjering provided additional supporting documentation regarding the existence of the equipment and its presence in Iraq, as well as data regarding service dates. The Panel finds that the evidence submitted with the claim adequately supports the numbers, acquisition costs and service dates of the equipment in this claim item.

370. The Panel finds, however, that the depreciation rate employed by Geoinþenjering has overestimated the individual value of the equipment. The Panel has determined that the appropriate depreciation rate is one that would result in the complete depreciation of the equipment over the life of the Project. As a result, the Panel finds that a further reduction of US$438,609 should be made from the claim amount for depreciation and therefore recommends compensation in the amount of US$1,046,113 for equipment.

(b) Spare parts and materials

371. Geoinþenjering also requests compensation in the amount of US$472,725 for quantities of construction materials, spare parts and related items that were abandoned at the Project site. The Panel finds that the evidence supports this claim item. Geoinþenjering maintained a detailed system of accounting for these materials, which tracked the materials' import into Iraq, storage at the site and use on the Project. However, the productive work following the invasion probably required the use of some of these supplies in that work. In reply to questions from the Panel, Geoinþenjering acknowledged that some productive work was performed. For this reason, the Panel recommends reducing this claim item by US$91,579 to account for the proportion of supplies that would have been used in this further work. The Panel therefore recommends compensation in the amount of US$381,146 for spare parts and materials.

(c) Bank deposits

372. Geoinþenjering requests compensation in the amount of US$116,964 for Iraqi dinar deposits at an Iraqi bank. Although Geoinþenjering supports this claim with documents demonstrating the deposits, it does not actually allege the loss of these funds. The inadequacy of such bank deposit claims is discussed more fully at paragraphs 214-216, supra. The Panel finds that claims for Iraqi dinar bank deposits are not compensable in the absence of a specific contractual obligation on the part of the Employer or Iraq both to permit the conversion of the dinar deposits into a convertible currency and to allow the export of such converted funds. The Panel finds that Geoinþenjering's claim does not allege such facts. Therefore, the Panel recommends no compensation for bank deposits.

373. The Panel recommends compensation in the amount of US$1,427,259 for loss of Project assets.

2. Project termination costs

374. Geoinþenjering requests compensation in the amount of US$299,419 for costs related to the termination of the Project, which include wages paid to redundant workers (US$255,519) and the costs of evacuating those workers (US$43,900).

(a) Wages paid to redundant workers

375. Geoinþenjering seeks compensation in the amount of US$255,519 for wages paid to workers left idle by the collapse of the Project, alleging that the applicable law made it illegal to dismiss these workers. Geoinþenjering alleges that it was required to pay these workers, legally classified as workers "waiting to be assigned", a monthly allowance and their social and health insurance premiums.

376. Geoinþenjering submitted copies of the payrolls for these workers, from which it is possible to identify the workers and the amounts paid to them. The Panel finds that the evidence shows that Geoinþenjering paid these workers between September 1990 and March 1992. Further, the Panel finds that there is sufficient evidence that Geoinþenjering attempted to find alternative employment for these workers. The Panel finds that this cost is compensable and therefore recommends compensation in the amount of US$255,519 for wages paid to redundant workers.

(b) Evacuation costs

377. Geoinþenjering also seeks compensation in the amount of US$43,900 for the cost of evacuating its Project site workers. It appears that Geoinþenjering is alleging that it still owes the balance to its evacuated workers. However, the Panel finds that the record suggests that Hidrogradnja paid the costs of evacuating Geoinþenjering's workers, including the per diem payments mandated by the applicable law. Having found that this claim item is not supported by evidence, the Panel recommends no compensation for evacuation costs.

378. The Panel recommends compensation in the amount of US$255,519 for Project termination costs.

3. Unpaid labour costs

379. Geoinþenjering requests compensation in the amount of US$185,372 for wages paid to its Project site workers after the invasion and for the cost of feeding these workers. All of these expenses were incurred in August and September 1990.

380. In support of its claim for wages, Geoinþenjering submitted copies of its pay register for the relevant months. In support of its claim for food costs, Geoinþenjering offers a detailed estimation of its food costs.

381. Geoinþenjering originally alleged that its workers did not perform any productive work in exchange for the wages and food. The statement of claim of Geoinþenjering's partner, Geosonda, however, suggests, that Geoinþenjering continued to perform some work on the Project after 2 August 1990. In reply to interrogatories from the Panel, Geoinþenjering acknowledges that some productive work was performed during the period following the invasion. The Panel's expert consultants, using information supplied by Geoinþenjering in its replies, calculated that US$58,569 of its claim element relates to productive work performed in August 1990. The Panel therefore recommends compensation in the amount of US$126,803 for unpaid labour costs.

4. Unamortized expenses

382. Geoinþenjering requests compensation in the amount of US$33,112 for unamortized expenses relating to prepaid housing costs Geoinþenjering incurred for its workers. The Panel finds that this claim element is adequately documented, and therefore recommends compensation in the amount of US$33,112 for unamortized expenses.

D. Recommendation

Table 20. RECOMMENDED COMPENSATION FOR GEOINÞENJERING'S CLAIM

Claim element	Claim amount (US$)	Recommended compensation (US$)
Loss of Project assets	2,074,411	1,427,259
Project termination costs	299,419	255,519
Unpaid labour costs	185,372	126,803
Unamortized expenses	33,112	33,112
TOTAL	2,592,314	1,842,693

383. Based on its findings regarding Geoinþenjering's claim, the Panel recommends total compensation in the amount of US$1,842,693. For determinations of currency exchange rate, interest and date of loss, see paragraphs 436 to 442, infra.

X. CLAIM OF CIVIL ENGINEERING INSTITUTE OF CROATIA

A. Facts and contentions

384. Except as stated below, the facts related to the Project, the Contract and the collapse of the Project are the same as those described in chapter IV.A.

1. Civil Engineering's role in the Project

385. In March 1988 Geosonda and its partner, Geoinþenjering, entered into the Grouting Contract with Hidrogradnja discussed at paragraphs 329-330, supra. Geosonda then engaged Civil Engineering under an agreement entitled Contract for the Geological Investigation Works on the Bekhme Dam Project (the "Civil Engineering Contract") under which Civil Engineering was required to perform certain technical services for Geosonda, primarily civil engineering tasks related to the grouting work to be performed by Geosonda.

386. Civil Engineering has produced translated excerpts from the Civil Engineering Contract. These excerpts do not indicate the date that the Civil Engineering Contract was executed or became effective. However, the Panel does not consider this to be a material deficiency because Civil Engineering does not seek compensation for loss of profits or other losses that would require the Panel to discount future payments.

387. Under the Civil Engineering Contract, the Claimant was to be paid a fixed price of ID 238,208.992. This price amounted to US$764,386.21 at the official Iraqi exchange rate of ID 1.000 to US$3.208889, which was also the rate agreed on in the Consortium's Contract with the Employer, the terms of which were incorporated into the Civil Engineering Contract.

2. The collapse of the Project

388. At the time of the invasion, the Project was reaching the stage where Geosonda and Geoinþenjering were becoming actively involved. It appears, based on the translation of the single invoice rendered by Civil Engineering to Geosonda, that at the time of the invasion, the Claimant was still to perform the bulk of its work under the Civil Engineering Contract. Civil Engineering had billed Geosonda for a total amount of ID 23,241.740.

3. Civil Engineering's claim

389. In December 1993, Civil Engineering filed a claim seeking compensation in the amount of US$269,771 for the losses included in the table below:

Table 21. CIVIL ENGINEERING'S CLAIM

Claim element	Claim amount (US$)
Unpaid work	74,580
Loss of Project assets	9,277
Goods in transit	119,814
Unamortized expenses	47,100
Project termination costs	19,000
TOTAL	269,771

B. Analysis and valuation of Civil Engineering's claim

1. Unpaid work

390. Civil Engineering requests compensation in the amount of US$74,580 for work performed for, and billed to, Geosonda, for which it alleges it was never paid.

391. In support of its claim, Civil Engineering submitted only a certified translation of an invoice to Geosonda in the amount of the claim. The actual invoice was not submitted. The Panel finds that Civil Engineering has offered no proof of whether the work referred to in the translated invoice was accepted by Geosonda.

392. Geosonda's own records, however, confirm the invoice on which Civil Engineering bases the unpaid invoice claim in the amount of US$61,942. Taking into account the state of the evidence and Civil Engineering's minimal replies to the interrogatories posed, the Panel finds that compensation for the unpaid work claim should be limited to the amount that is supported by the evidence submitted by Civil Engineering's employer, Geosonda. The Panel therefore recommends compensation in the amount of US$61,942 for unpaid work.

2. Loss of Project assets

393. Civil Engineering requests compensation in the amount of US$9,277 for assets that were manufactured by it in Croatia and transported to the Project site. It alleges that these assets were lost when the site was abandoned.

394. The Project assets loss is sufficiently documented. The assets were newly-delivered to the Project site as of 2 August 1990. For that reason, the Panel does not assess any reduction for depreciation and recommends compensation in the amount of US$9,277 for loss of Project assets.

3. Goods in transit

395. Civil Engineering requests compensation in the amount of US$119,814 for certain equipment that it alleges was specifically manufactured for the Project. The goods in transit identified in the claim were actually still in Croatia at the time of the invasion. Civil Engineering has submitted evidence of the costs of manufacturing these items. In addition, Civil Engineering has calculated the claim amount by suggesting a reduction in the cost of manufacture to account for the portion of the equipment that could be used elsewhere. However, the Panel finds that Civil Engineering has not explained why much of the equipment could not be used in other applications, despite a request from the Panel for such explanation.

396. In the absence of any appropriate evidence in support of Civil Engineering's assertion that this equipment had no other uses and could not be sold, the Panel finds that this claim element is not compensable. The Panel therefore recommends no compensation for goods in transit.

4. Unamortized expenses

397. Civil Engineering requests compensation in the amount of US$47,100 for certain preliminary costs incurred in Zagreb, which it alleges would have been amortized over the life of the Project. The unamortized expenses claim element has almost no supporting documentation, although the Panel specifically requested Civil Engineering to augment the documentary record. The Panel agrees that Civil Engineering incurred some costs which could be amortized in relation to the Project. However, it is impossible to determine from the evidence submitted the portion of the claim amount that is compensable. Further, the Panel finds that none of these costs were amortized against the work actually performed prior to the collapse of the Project. Finally, the Panel finds that some of the unsupported claim amounts are greater than similar costs in other claims. The Panel therefore recommends no compensation for unamortized expenses.

5. Project termination costs

398. Civil Engineering requests compensation in the amount of US$19,000 for lost wages and evacuation costs allegedly caused by the collapse of the Project. This claim element consists of a claim for wages due from Geosonda for non-productive work necessitated by the termination of the Project and for the costs of evacuating Civil Engineering's personnel.

399. The Panel finds that the evidence adequately supports the claim for loss of wages due from Geosonda, which Civil Engineering valued at US$15,000. The Panel therefore recommends compensation in the amount of US$15,000 for loss of wages.

400. In contrast, the Panel finds that the costs of repatriation of Civil Engineering's workers are not fully documented, although the assertion that they were evacuated is credible. Because of the minimal amount claimed and the fact that Civil Engineering did evacuate its workers, the Panel recommends compensation in the amount of US$4,000 for repatriation.

401. The Panel therefore recommends compensation in the amount of US$19,000 for Project termination costs.

C. Recommendation

Table 22. RECOMMENDED COMPENSATION FOR CIVIL ENGINEERING'S CLAIM

Claim element	Claim amount (US$)	Recommended amount (US$)
Unpaid work	74,580	61,942
Loss of Project assets	9,277	9,277
Goods in transit	119,814	-
Unamortized expenses	47,100	-
Project termination costs	19,000	19,000
TOTAL	269,771	90,219

402. Based on its findings regarding Civil Engineering's claim, the Panel recommends total compensation in the amount of US$90,219. For determinations of currency exchange rate, interest and date of loss, see paragraphs 436 to 442, infra.

XI. CLAIM OF KONSTRUKTOR

A. Facts and contentions

403. Except as stated below, the facts related to the Project, the Contract and the collapse of the Project are the same as those described in chapter IV.A.

1. Konstruktor's role in the Project

404. Konstruktor was a labour subcontractor to Hidrogradnja and was engaged in the preparation of underground concrete works. Pursuant to an agreement between Konstruktor and Hidrogradnja dated 9 March 1988, Hidrogradnja was responsible for the wages, food, accommodation, travel and benefits of Konstruktor's workers. Under the agreement, Konstruktor was entitled to receive an 11 per cent profit margin on the actual labour costs.

2. The collapse of the Project

405. Konstruktor provides little detail about the effects of the invasion on the Project. Nonetheless, Konstruktor does allege that its workers left the Project site after the suspension of construction operations. Konstruktor further alleges that after the repatriation of its workers, it was unable to find productive work for them. As a result, Konstruktor alleges that it was required under the applicable law to continue wage payments to the repatriated workers for six months.

3. Konstruktor's claim

406. In December 1993, Konstruktor filed a claim seeking compensation in the amount of US$506,197 for the losses included in the table below:

Table 23. KONSTRUKTOR'S CLAIM

Claim element	Claim amount (US$)
Loss of wages	186,857
Project termination costs	201,420
Loss of profits	117,920
TOTAL	506,197

B. Analysis and valuation of Konstruktor's claim

407. The Panel analysed Konstruktor's claim as it was presented in the statement of claim. This analysis appears in the paragraphs that follow.

1. Loss of wages

408. Konstruktor requests compensation in the amount of US$186,857 for wages and related costs incurred on the Project and billed to Hidrogradnja, but never paid. The Panel finds that the wage claim element is supported by adequate evidence, including invoices to Konstruktor's employer, Hidrogradnja. Further, in reply to interrogatories from the Panel, Konstruktor has submitted minutes of a meeting in which Hidrogradnja appears to acknowledge the validity of the accounts. The Panel finds that this evidence adequately establishes the amount of this claim element and the fact that the amount has not been paid. The Panel recommends compensation in the amount of US$186,857 for loss of wages.

2. Project termination costs

409. Konstruktor requests compensation in the amount of US$201,420 for wages paid after the collapse of the Project. Konstruktor alleges that under the applicable law it was required to make these wage payments to the repatriated workers.

410. The Panel finds that the evidence submitted adequately supports the amount of this claim element and Konstruktor's contention that it was required to make these payments.

411. The Panel further finds that additional documents submitted confirm that the two wage claims do not duplicate each other or claim elements in the Hidrogradnja claim. The Panel therefore recommends compensation in the amount of US$201,420 for Project termination costs.

3. Loss of profits

412. Konstruktor also requests compensation in the amount of US$117,920 for profits it alleges it would have earned had it been able to complete its work on the Project. The Panel finds that this claim element is adequately supported by documentary evidence. The calculation of this claim is relatively straightforward, as the contract provided a defined profit element. Further, only a short time remained in which to complete its work under the contract, suggesting that the inherent risk was lower than in other claims. The Panel finds, therefore, that one per cent of the value of the Konstruktor subcontract is an appropriate risk allowance. As a result, the Panel recommends making an adjustment of US$7,800 to the claim to account for the remaining project risk. The Panel therefore recommends compensation in the amount of US$110,120 for loss of profits.

D. Recommendation

Table 24. RECOMMENDED COMPENSATION FOR KONSTRUKTOR'S CLAIM

Claim element	Claim amount (US$)	Recommended amount (US$)
Loss of wages	186,857	186,857
Project termination costs	201,420	201,420
Loss of profit	117,920	110,120
TOTAL	506,197	498,397

413. Based on its findings regarding Konstruktor's claim, the Panel recommends total compensation in the amount of US$498,397. For determinations of currency exchange rate, interest and date of loss, see paragraphs 436 to 442, infra.

XII. CLAIM OF CENTRAL BANK OF THE REPUBLIC OF TURKEY

A. Facts and contentions

414. Except as stated below, the facts related to the Project, the Contract and the collapse of the Project are the same as those described in chapter IV.A.

1. The Bank of Turkey's role in the Project

415. The Bank of Turkey was involved indirectly in financing the Project through an arrangement to purchase the PNs periodically issued to Enka by the Employer and guaranteed by the Rafidain Bank of Iraq. The use of PNs as payment to the Consortium is described in paragraphs 49-51, supra.

416. The PNs carried interest on the principal amount to the maturity of the notes. Interest was payable semi-annually at the mean of the LIBOR (London Inter-Bank Offering Rate) quoted at three London banks two days prior to the payment date, less two per cent.

417. No contractual relationship existed between the Employer and the Bank of Turkey, and no such contractual relationship is alleged by the Bank of Turkey. The Bank of Turkey's role in financing Enka was, however, allegedly known to Iraq at the time the Contract was executed.

2. The collapse of the Project

418. Nine PNs were issued to Enka and purchased by the Bank of Turkey. The first eight of these were issued between 29 December 1987 and 18 March 1990, while the ninth was issued on 5 August 1990. The total principal amount of the notes was US$104,779,190. The total unpaid interest originally claimed was US$16,661,219. At the time it filed its reply to interrogatories from the Panel, the Bank of Turkey also sought to amend its stated claim amount to correct certain interest calculations and to add interest from the claim date to maturity on the notes.

419. The notes fell due at various times between January 1994 and July 1995. Although they were never paid, some of the scheduled interest payments were made.

420. The Bank of Turkey provides minimal factual detail in its claim, other than to suggest that Iraq's failure to pay the notes was the result of the suspension of relations between Turkey and Iraq following Iraq's 2 August 1990 invasion of Kuwait.

3. The Bank of Turkey's claim

421. In May 1994, the Bank of Turkey filed a category "F" claim seeking US$121,440,409 in compensation for the losses listed below, which the Bank of Turkey alleges were the result of the collapse of the Project:

a. unpaid principal amounts of PNs issued by the Employer to Enka that the Bank of Turkey claims were due it as the purchaser of the notes from Enka (US$104,779,190); and

b. unpaid interest to maturity on the PNs (US$16,661,219).

422. The Commission transferred this claim to the “E3" Panel, where it was included with the other claims in this instalment because of its close factual relationship to the Project and to the claim of Enka.

B. Analysis and valuation of the Bank of Turkey’s claim

423. In its statement of claim, the Bank of Turkey requests compensation in the amount of US$121,440,409 for losses it alleges it sustained when Iraq’s Rafidain Bank failed to make payment on certain PNs issued in favour of Enka and purchased by the Bank of Turkey. The Bank of Turkey indirectly financed the Project through an agreement under which it purchased PNs issued by the Employer in favor of Enka. In its replies to interrogatories from the Panel, the Bank of Turkey alleged that the interest calculations were incorrectly stated in the statement of claim as a result of using an incorrect interest rate in its calculations.

424. The Bank of Turkey also stated in its replies that the interest component of its claim should be updated to add interest to maturity on the PNs. The Bank of Turkey requested that the amount of accrued interest be increased by US$323,800. Although the Panel has elsewhere ruled that unsolicited attempts to change claim amounts will be disregarded, it finds that the situation presented by the Bank of Turkey is distinguishable. In this instance, the Panel finds that the Bank of Turkey could not have made the claim for interest to maturity at the time the claim was filed, as the PNs had not reached their maturity date. Because the Bank of Turkey’s request is in the nature of an amendment or an update to a claim element already before the Panel, and not an additional claim element not previously presented, the Panel finds that it is appropriate and consistent to permit the correction requested by the Bank of Turkey.

425. Thus, the Panel finds that the PN and accrued interest losses are compensable to the extent that they are proven by appropriate evidence. In support of this claim, the Bank of Turkey has submitted copies of the notes and detailed interest calculations, and the Panel finds that these documents adequately support the amounts stated for this claim element.

426. These notes were issued, however, as early as 1989 and are based, at least in part, on work that was performed prior to 2 May 1990. Thus, the Bank of Turkey’s claim is not compensable to the extent that it is based on PNs issued in respect of work performed prior to 2 May 1990. The majority of the work on which the claim is based was performed prior to 2 May 1990 and the value of the PNs issued in respect of this work, together with compensable interest to maturity, is US$109,009,391. For the reasons expressed in paragraphs 79-81, supra, the Panel finds that this non-compensable amount should be deducted from the claim amount.

C. Recommendation

427. Based on its findings regarding the Bank of Turkey's claim, the Panel recommends compensation in the amount of US$12,431,018 for the Bank of Turkey. For determinations of currency exchange rate, interest and date of loss, see paragraphs 436 to 442, infra.

XIII. CLAIM OF ISOLA

A. Facts and contentions

428. Except as stated below, the facts related to the Project, the Contract and the collapse of the Project are the same as those described in chapter IV.A.

1. Isola's role in the Project

429. Pursuant to a purchase order dated 9 May 1990, Isola sold concrete additives to Hidrogradnja for use in the Project. These chemicals were shipped to the Project site, where they were received in July 1990.

2. The collapse of the Project

430. Isola alleges that Hidrogradnja has failed to pay for the materials delivered under the purchase order. Although Isola's claim contains few facts, it appears that the materials were shipped for Hidrogradnja's use, for which no payment was received.

431. Isola states that an agreement was reached with Hidrogradnja during a meeting on 21 June 1991, pursuant to which Isola was to receive partial payments in July and September 1991. Isola claims that these payments were not made.

3. Isola's claim

432. In March 1994, Isola filed a claim requesting compensation in the amount of 246,333 Deutsche Mark, equivalent to US$186,616 at the then prevailing rate of exchange, in compensation for the materials delivered to Hidrogradnja. Isola alleges it was not paid for these materials.

B. Analysis and valuation of Isola's claim

433. The Panel finds that Isola has submitted sufficient evidence of the sale and delivery of chemicals to Hidrogradnja. The invoice indicates that the sale took place on 25 May 1990 and that the goods were delivered in June and July 1990. Based on the evidence, the Panel finds that Isola provided the goods identified in the claim at the amount claimed and that the goods were received by Hidrogradnja. The Panel further finds that Hidrogradnja's inability to pay the amounts due to Isola is the result of the invasion.

434. Although Hidrogradnja does not specifically account for the Isola costs, the evidence suggests that the goods furnished by Isola to Hidrogradnja were either on site on the date of the invasion or had been used in the works. Therefore, there is the possibility that Hidrogradnja would have claimed for the same goods as Isola has, either in the claim for spare parts and materials or in the claim for unpaid work. To prevent double recovery, and because the Panel finds that in the context of these

claims a contractor may not claim for amounts claimed by its subcontractor (see paragraph 251, supra), the Panel has reduced Hidrogradnja's recommended compensation by US$186,616.

C. Recommendation

435. Based on its findings regarding Isola's claim, the Panel recommends compensation in the amount of US$186,616 for Isola. For determinations of currency exchange rate, interest and date of loss, see paragraphs 436 to 442, infra.

XIV. OTHER ISSUES

A. Currency exchange rate

436. While many of the costs incurred by the Claimants were denominated in currencies other than United States dollars, the Commission issues its awards in that currency. Therefore the Panel is required to determine the appropriate rate of exchange to apply to losses expressed in other currencies.

437. Several of the Claimants have argued that their contracts contain agreed-upon currency exchange rates and, therefore, that these contractually-agreed exchange rates should apply to all of their losses. The contract rate was usually higher than the prevailing commercial rate on 2 August 1990 or the date the alleged losses occurred. The Panel agrees that the contract rate is the appropriate rate for losses under the relevant contracts, because this was specifically bargained for and agreed to by the parties.

438. For losses that are not contract based, however, a contractual rate is not an appropriate rate of exchange. In the claims before the Panel, valuation of lost assets was not contemplated by the parties when agreeing to an exchange rate in the underlying contracts. In addition, these types of items are readily traded on the international markets. The United Nations Monthly Bulletin of Statistics is the source of commercial exchange rates for all preceding Commission awards and reports and recommendations. Therefore, for non-contractual losses, the Panel determines the appropriate exchange rate to be the prevailing commercial rate, as evidenced by the United Nations Monthly Bulletin of Statistics, at the time the Panel determines is appropriate to apply the exchange rate.

B. Interest

439. On the issue of the appropriate interest rate to be applied, the relevant Governing Council decision is decision 16. According to that decision, “[i]nterest will be awarded from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful claimants for the loss of use of the principal amount of the award.” In decision 16 the Governing Council further specified that “[i]nterest will be paid after the principal amount of awards,” while postponing a decision on the methods of calculation and payment of interest.

C. Date of loss

440. The Panel must determine “the date the loss occurred" within the meaning of Governing Council decision 16 for the purpose of awarding interest, and, as stated above, for the purpose of determining the appropriate exchange rate to be applied to losses stated in currencies other than United States dollars. In a situation such as that which existed at the Project site after 2 August 1990, it is difficult for the Panel to determine a precise date on which actual work ceased.

Nevertheless, the Panel must determine the date based on the facts before it.

441. The invasion of Kuwait by Iraq created a serious disturbance for all concerned in the Project and made the orderly continuation of the Project work impossible. The Consortium tried to reach an accommodation with the Employer to suspend the Project. No agreement was reached because the Employer refused to release the Consortium unless it agreed not to seek compensation (see paragraphs 69-75, supra).

442. As stated in paragraph 73, supra, the Consortium stopped construction and all related work on the Project on 20 August 1990. Although the claimants took steps to thereafter secure the Project site, the main focus of the Consortium after that date was the evacuation and repatriation of its workers as well as other demobilization activities. The Panel finds that the Consortium's cessation of work on 20 August 1990 also ended the activities of the other Claimants involved in the Project. The Panel therefore adopts 21 August 1990, the day after the stoppage of work, as the date of loss for all Bekhme Dam Project related losses.

XV. RECOMMENDATIONS

443. Based on the foregoing, the Panel recommends the following amounts of compensation for direct losses suffered by the Claimants as a result of Iraq's unlawful invasion and occupation of Kuwait:

a. Enka Insaat ve Sanayi A.S.: US$62,022,999;

b. Gik "Hidrogradnja" Civil Engineering and General Contracting Company: US$89,988,181;

c. Overseas Bechtel, Incorporated: US$3,912,127;

d. Energoprojekt-Hidroinþenjering - Consulting Engineering Company Limited: US$3,332,813;

e. Geosonda Holding Limited: US$7,291,786;

f. Konsolidacija I Gradjevinarstvo (Geoinþenjering) Company: US$1,842,693;

g. Civil Engineering Institute of Croatia: US$90,219;

h. Konstruktor Inþenjering, Civil Engineering and Production of Building Materials, d.d. Split: US$498,397;

i. Central Bank of the Republic of Turkey: US$12,431,018; and

j. Isola Bauchemie, Gmbh: US$186,616.

Geneva, 21 October 1998

(Signed) Mr. Werner Melis
Chairman

(Signed) Mr. David Mace
Commissioner

(Signed) Mr. Sompong Sucharitkul
Commissioner
