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

GE.00-63580

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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. John Tackaberry (Chairman), Pierre Genton and Vinayak Pradhan, at its twenty-eighth session in June 1998, to review construction and engineering claims filed with the Commission on behalf of corporations and other legal entities in accordance with the relevant Security Council resolutions, the Provisional Rules for Claims Procedure (S/AC.26/1992/10) (the "Rules") and other Governing Council decisions. This report contains the recommendations to the Governing Council by the Panel, pursuant to article 38(e) of the Rules, concerning sixteen claims included in the fifteenth instalment. Each of the claimants seeks compensation for loss, damage or injury allegedly arising out of Iraq's 2 August 1990 invasion and subsequent occupation of Kuwait.

2. Based on its review of the claims presented to it to date and the findings of other panels of commissioners contained in their reports and recommmendations, this Panel has set out some general propositions concerning construction and engineering claims filed on behalf of corporations (the "'E3' Claims"). The general propositions are contained in Annex I entitled "Summary of General Propositions" (the "Summary"). The Summary forms part of, and is intended to be read together with, this report.

3. Each of the claimants included in the fifteenth instalment had the opportunity to provide the Panel with information and documentation concerning the claims. The Panel has considered evidence from the claimants and the responses of Governments to the reports of the Executive Secretary issued pursuant to article 16 of the Rules. The Panel has retained consultants with expertise in valuation and in construction and engineering. The Panel has taken note of certain findings by other Panels of Commissioners, approved by the Governing Council, regarding the interpretation of relevant Security Council resolutions and Governing Council decisions. The Panel was mindful of its function to provide an element of due process in the review of claims filed with the Commission. Finally, the Panel has further amplified both procedural and substantive aspects of the process of formulating recommendations in the Summary to its consideration of the individual claims.

I. PROCEDURAL HISTORY

A. The procedural history of the claims in the fifteenth instalment

4. A summary of the procedural history of the 'E3' Claims is set down in paragraphs 10 to 18 of the Summary.

5. On 16 February 2000, the Panel issued a procedural order relating to the claims included in the fifteenth instalment. None of the claims presented complex issues, voluminous documentation or extraordinary losses

that would require the Panel to classify any of them as “unusually large or complex” within the meaning of article 38(d) of the Rules. The Panel thus had an obligation to complete its review of the claims within 180 days of the date of the procedural order, pursuant to article 38(c) of the Rules.

6. In view of the review period and the available information and documentation, the Panel determined that it was able to evaluate the claims without additional information or documents from the Government of Iraq. Nonetheless, due process, the provision of which is the responsibility of the Panel, has been achieved by the insistence of the Panel on the observance by claimants of the article 35(3) requirement for sufficient documentary and other appropriate evidence.

7. In drafting this report, the Panel has not included specific citations from restricted or non-public documents that were produced or made available to it for the completion of its work.

B. The claimants

8. This report contains the Panel’s findings with respect to the following claims for losses allegedly caused by Iraq's invasion and occupation of Kuwait:

(a) Lenzing Aktiengesellschaft, a corporation existing under the laws of the Republic of Austria, which seeks compensation in the total amount of USD 6,522,682;

(b) Koncar Elektroindustrija d.d., a corporation organised under the laws of the Republic of Croatia, which seeks compensation in the total amount of USD 8,440,131;

(c) Stadler & Schaaf OHG, a corporation organised under the laws of the Federal Republic of Germany, which seeks compensation in the total amount of USD 20,055;

(d) Krupp Industrietechnik GmbH, a corporation organised under the laws of the Federal Republic of Germany, which seeks compensation in the total amount of USD 92,771;

(e) Unitech Limited, a corporation organised under the laws of the Republic of India, which seeks compensation in the total amount of USD 25,000;

(f) Icomsa Engineering Costruzioni e Impianti S.p.A., a corporation organised under the laws of the Italian Republic, which seeks compensation in the total amount of USD 6,592,022;

(g) Pacific Consultants International, a corporation organised under the laws of Japan, which seeks compensation in the total amount of USD 15,306;

(h) Kajima Corporation, a corporation organised under the laws of Japan, which seeks compensation in the total amount of USD 46,742;

(i) Taisei Corporation, a corporation organised under the laws of Japan, which seeks compensation in the total amount of USD 107,362;

(j) Sumitomo Construction Co. Limited, a corporation organised under the laws of Japan, which seeks compensation in the total amount of USD 41,684;

(k) ABB HV Switchgear AB, a corporation organised under the laws of the Kingdom of Sweden, which seeks compensation in the total amount of USD 169,150;

(l) Health and Scientific Construction Limited, a corporation organised under the laws of the United Kingdom of Great Britain and Northern Ireland, which seeks compensation in the total amount of USD 255,985;

(m) Bechtel Group, Inc., a corporation organised under the laws of the United States of America, which seeks compensation in the total amount of USD 1,280,184;

(n) Howe-Baker Engineers Inc., a corporation organised under the laws of the United States of America, which seeks compensation in the total amount of USD 215,699;

(o) Itek Optical Systems Division, a division of Litton Systems, Inc., a corporation organised under the laws of the United States of America, which seeks compensation in the total amount of USD 98,972; and

(p) Energoprojekt Building and General Contracting Company Limited, a corporation organised under the laws of the Federal Republic of Yugoslavia, which seeks compensation in the total amount of USD 3,137,264.

9. These amounts claimed in United States dollars represent the alleged loss amounts after correction for applicable exchange rates as described in paragraphs 55 to 57 of the Summary.

II. LENZING AKTIENGESELLSCHAFT

10. Lenzing Aktiengesellschaft ("Lenzing") is a company existing under Austrian law, which at the time of Iraq's invasion of Kuwait, was undertaking two contracts in Iraq with the State Establishment for the Rayon Industries. Lenzing seeks compensation in the total amount of 71,736,459 Austrian schillings ("ATS") (USD 6,522,682) for contract losses, loss of profits and interest.

11. The interest element is in the amount of ATS 2,924,350 (USD 265,898). For reasons stated in paragraph 58 of the Summary, the Panel makes no recommendation with respect to Lenzing's claim for interest.

A. Contract losses

1. Facts and contentions

12. Lenzing seeks compensation in the amount of USD 1,251,328 (ATS 13,762,109) for contract losses arising out of two contracts in Iraq. Lenzing entered into a contract with the State Establishment for Rayon Industries, Hilla, Iraq, ("contract no. 1063") on 23 June 1989 for the production of a complete plant for "raschel bags including training and installations, C&F Baghdad". The contract value was ATS 190,000,000. Lenzing was to deliver machines, apparatus and materials.

13. Under the terms of contract no. 1063, Lenzing was also responsible for the supervision of the installation of the plant. The cost of the services relating to the installation was included in the total contract price.

14. According to the contract agreement, the contract came into force upon receipt by the seller of a down payment of 10 per cent of the contract price. The down payment was to be paid by 30 October 1990. An irrevocable and confirmed letter of credit for the balance of 90 per cent of the purchase price was also required before the contract came into force. Lenzing stated that it had to "issue and negotiate into the letter of credit a down payment-repayment guarantee for 10% of each invoice value". Lenzing indicated that it had performed aspects of the contract notwithstanding the fact that the down payment had not been made.

15. Lenzing entered into a second contract dated 23 June 1989 with the State Establishment for Rayon Industries Saddat Al-Hindiya, Iraq ("contract no. 1064"). The value of the contract was ATS 168,000,000. It was for the supply of a "complete plant for the production of circular woven bags including training and installation, C&F Baghdad".

16. The subject of the contract and terms for contract number 1064 were identical to contract number 1063.

17. Lenzing stated that a letter of credit for both contracts was opened on 20 December 1989. It thereafter commenced the planning and construction

work for both contracts including the placing of orders with suppliers. Lenzing asserted that it had to pay down payments to its suppliers. It commenced delivery of the items, which were the subject of the contracts in June 1990. Lenzing asserted that the invasion and occupation of Kuwait on 2 August 1990 by Iraq prevented further deliveries. Lenzing summarised its contract losses as follows:

(a) Costs for cancellation

18. The total asserted loss is ATS 1,825,779, which Lenzing stated arose out of cancellation fees that it incurred relating to the down payments that it had to forfeit for partially, or completely, manufactured goods. These down payments were amounts that Lenzing asserted that it paid to its suppliers for the manufacture of the goods. This was its suppliers' compensation for the cancellation of the order.

(b) 10 per cent down payment for already delivered goods

19. Lenzing asserted a loss of ATS 1,602,613 arising out of the refusal "due to the trade embargo" by the Austrian banks to issue a letter of guarantee in favour of the Iraqi employer. The result, asserted Lenzing, was that the 10 per cent deposits to be paid for goods delivered to the Iraqi employer were not in fact paid.

(c) Parts supplied that could not be resold

20. Lenzing seeks compensation for ATS 9,649,285 for parts purchased from suppliers which could not be delivered "due to the trade embargo" and which could not be sold elsewhere.

(d) Storage, insurance, transport costs for undelivered goods

21. Lenzing stated that it had undertaken eight partial deliveries to Iraq, and six of these deliveries had to be returned to Austria because "entry into Iraq was not possible at this time". It asserted that it incurred costs of ATS 684,432 relating to offloading, transport, storage and insurance.

2. Analysis and valuation

22. The Panel finds that the State Establishment for Rayon Industries is an Iraqi state agency. Certain elements of the work relating to both contracts were performed after 2 May 1990 and are, therefore, within the jurisdiction of the Commission.

23. Lenzing, in support of its claim, submitted copies of the contract nos. 1063 and 1064. It also submitted a number of untranslated documents. Lenzing did not, however, submit a response that specifically answered the some 70 questions raised in the article 34 notification.

(a) Costs for cancellation

24. Lenzing did not explain why its order of machinery, equipment and electro-installation material was cancelled, the date the order was cancelled, and for which contract the machinery, equipment and electro-installation material was intended to be used.

25. Lenzing did not provide evidence, in English, that it had made the down payments to each of its suppliers in respect of the cancelled orders.

(b) 10 per cent down payment for already delivered goods

26. Lenzing did not state the dates on which the eight partial deliveries of goods took place under Contract numbers 1063 and 1064.

27. Lenzing did not explain how, as contract numbers 1063 and 1064 were dated 23 June 1989, the trade embargo (which came into effect on 6 August 1990) affected the issue of a letter of guarantee by the Austrian bank. It submitted no evidence (in the form of correspondence or other relevant documents) that the Austrian bank was unwilling to issue the letter of guarantee.

(c) Parts supplied that could not be resold

28. Lenzing did not submit a schedule, in English, setting out a precise description of the parts, aggregates and machinery purchased, the unit price, the quantity purchased and the total value purchased from the suppliers. It provided no explanation as to the intended purpose of the parts, aggregates and machinery.

29. Lenzing did not explain why the parts, aggregates and machinery were unable to be sold to other customers nor did it provide evidence of its attempts to sell them. There was also no explanation as to where the parts, aggregates and machinery are located or for what purpose they are currently being used.

(d) Storage, insurance, transport costs for undelivered

30. Lenzing did not indicate the dates on which the eight partial deliveries of goods took place under Contract numbers 1063 and 1064 and the dates on which the six deliveries were returned to Austria. Nor did it submit copies of the export documents relating to storage in a warehouse of the forwarding agent.

31. Lenzing failed to submit a full description relating to costs for off-loading (August and September 1990), storage costs and transport costs (March 1992), insurance costs from April 1992 to January 1993, storage costs of goods for warehouse and energy, or documentary evidence that the costs and charges were invoiced to Lenzing and that Lenzing paid the relevant amounts.

32. Lenzing was requested to submit detailed explanations and responses to specific questions in an article 34 notification sent to it. This information was not submitted. The Panel finds that Lenzing did not provide sufficient evidence of its stated losses. Accordingly, the Panel recommends no compensation.

3. Recommendation

33. The Panel recommends no compensation for contract losses.

B. Loss of profits

34. Lenzing describes this claim as a claim for "additional costs". It would appear that these losses are more appropriately classified as a loss of profits claim as the claimed items enumerated relate specifically to items that would normally be incorporated in a loss of profits calculation. Lenzing seeks compensation in the total amount of USD 5,005,456 (ATS 55,050,000) for loss of profits. The claim includes the following:

Table 1. Lenzing's claim for loss of profits

Item	Amount ATS
Technical planning costs	11,000,000
Loss of profit contract no. 1063	19,000,000
Loss of profit contract no. 1064	16,800,000
Loss of profits (spare parts)	8,250,000
Total	55,050,000

35. Lenzing did not submit evidence to support its allegation that a profit would have been made. It did not submit information directly linked to the project which would include: audited financial statements, budgets, management accounts, turnover, original bids, profit/loss statements, finance costs and head office costs prepared by or on behalf of the Claimant for each accounting period commencing in year one of the Project and continuing through March 1993.

36. The loss of profits for the spare parts aspect is claimed for 10 years. There is no indication of the period claimed for relating to the other claimed amounts. Lenzing did not submit evidence that demonstrated that the Project proceeded as planned.

37. The Panel finds that Lenzing failed to fulfil the evidentiary standard for loss of profits claims as set out in paragraphs 125 to 131 of the Summary. Accordingly, the Panel recommends no compensation.

C. Summary of recommended compensation for Lenzing

38. Based on its findings regarding Lenzing's claim, the Panel recommends no compensation.

III. KONČAR ELEKTROINDUSTRIJA D.D

39. KONČAR Elektroindustrija d.d. ("Koncar") is a Croatian registered limited liability company. It supplies transformer stations and builds machinery and electrical appliances. Koncar had a presence in the Iraqi market from the beginning of the 1980s. It seeks compensation relating to nine contracts in Iraq, loss of tangible property, loss of profits and interest in the total amount of USD 8,440,131.

40. For reasons stated in paragraph 58 of the Summary, the Panel makes no recommendation with respect to Koncar's claim for interest.

A. Contract losses

41. Koncar seeks compensation in the amount of USD 6,831,000 for contract losses. The claim arises out of nine contracts that the companies "belonging to Koncar Elektroindustrija d.d Zagreb" had entered into with Iraq.

42. The payment terms for the agreements, with the exception of the contract for the North Jazira Irrigation Project, were by letter of credit. Koncar stated that all the contracts "by their method of payment were connected to the interstate agreement between the governments of the former Yugoslavia and Iraq from October 1983, which comprised a part of payment by Iraq as a deferred payment for 2 years at 6 per cent interest, and later 5.5 per cent interest and 5 per cent interest p.a. The Iraqi side only partly fulfilled such payment obligations, so that a part of Iraqi debt was every year, by annexes to the interstate agreement, postponed for further 2 years".

43. The Panel finds that all the contracts were concluded with Iraq.

44. The asserted contract losses by Koncar are as follows:

1. Scientific Research Project Agreement

45. A contract was entered into on 10 October 1988 with the Solar Energy Research Centre for the supply and testing of the solar photovoltaic power system used for the vertical drainage application in the Fudhailiya area in Baghdad. The contract documentation submitted by Koncar indicated that the agreement was entered into by "Rade Koncar Electrotechnical Institute of the S.F.R. of Yugoslavia". Delivery of the system to be used was to occur within one year of the signing of the agreement. The equipment was delivered between February and March 1990. Koncar asserted a loss of USD 242,088 including interest calculated as follows:

Table 2. Koncar's claim for contract losses on Scientific Research Project Agreement

Item	Amount USD
Value of delivered equipment	205,000
5 per cent interest p.a. on USD 165,400	30,323
5 per cent interest for USD 39,600	6,765
Total	242,088

46. According to the letter of credit dated 8 November 1988, the amount of USD 165,400 was to be paid upon shipment of goods for the value of USD 205,000 and the remaining USD 39,600 was payable after the erection, testing, and functioning of the project. A copy of a "Protocol" reflecting a meeting held in Baghdad on 7 July 1990, suggests that the amount relating to the local currency amount was payable immediately (the actual amount is not clear from a copy of the Protocol). The amount of USD 39,600 was payable after completion of testing but "not later than end of October 1990".

47. The documents submitted by Koncar reflect that three shipments took place on 15 February 1990 (value of shipment USD 20,000), 26 February 1990 (value of shipment USD 165,000) and 28 March 1990 (value of shipment USD 20,000). These three shipments totalled USD 205,000.

48. With respect to the payment for the amount of USD 165,400, the Panel finds that the claim relates to work that was performed prior to 2 May 1990 and that the amounts due under the letter of credit arrangement were deferred payments. For the reasons set forth in the Panel's analysis of contractual arrangements to defer payments in paragraphs 68 to 77 of the Summary, the claim for unpaid deferred payments is outside the jurisdiction of the Commission and is not compensable under Security Council resolution 687(1991). Accordingly, the Panel does not recommend compensation.

49. With respect to the claim for the amount of USD 39,600, the Panel is satisfied that the testing of the installation which was to occur in October 1990 was prevented as a direct result of the invasion and occupation of Kuwait by Iraq on 2 August 1990. However, for the reasons stated at paragraphs 114-118, infra, (relating to the advance payment) the Panel does not recommend compensation.

2. Ministry of Industry and Minerals contract

50. In August 1988, a contract was concluded for the supply of 11 kV earthing assembly equipment to the Ministry of Industry and Minerals, State Organization on Electricity. The equipment was delivered between July and November 1989. Koncar asserted a loss, including interest, of USD 547,682.

51. The payment was in terms of letter of credit number 46/20195. It is dated in 1988 (but the exact date is unclear from the copy supplied). The payment terms are not legible from the copy supplied. In terms of the letter confirming the order, dated 16 August 1988, the payment is described as "according to prevailing agreement between Yugoslavia and Iraq with interest rate for deferred payment being 5 per cent per annum."

52. The Panel finds that the claim relates to work that was performed prior to 2 May 1990 and the amounts due under the letter of credit arrangement were deferred payments. For the reasons set forth in the Panel's analysis of contractual arrangements to defer payments in paragraphs 68 to 77 of the Summary, the claim for unpaid deferred payments is outside the jurisdiction of the Commission and is not compensable under Security Council resolution 687 (1991). Accordingly, the Panel is unable to recommend compensation.

3. The State Enterprise for Dairy Product contract

53. A contract was concluded on 20 February 1989 with the State Enterprise for Dairy Product, Baghdad, for the supply of "H.T. equipment and cables". The equipment was delivered in May 1989. Koncar seeks compensation in the amount of USD 317,540, including interest.

54. The price for the goods was USD 256,598. In terms of the Order Confirmation that Koncar sent to the employer dated 20 February 1989, payment was to be deferred for two years from the date of shipping documents with an interest rate of 5 per cent "in accordance to Yugoslav-Iraq agreement". The letter of credit also used terminology that reflected that payment was to be in terms of the agreement between Iraq and Yugoslavia. The invoice reflecting the goods shipped is dated 24 May 1989.

55. The Panel finds that the claim relates to work that was performed prior to 2 May 1990 and the amounts due under the letter of credit arrangement were deferred payments. For the reasons set forth in the Panel's analysis of contractual arrangements to defer payments in paragraphs 68 to 77 of the Summary, the claim for unpaid deferred payments is outside the jurisdiction of the Commission and is not compensable under Security Council resolution 687 (1991). Accordingly, the Panel is unable to recommend compensation.

4. Contract 11B Kirkuk

56. A contract was concluded with the Ministry of Irrigation, Baghdad, as the investor, and a consortium comprising Koncar, Ivan Milutinovic ("PIM") and Titovi Zavodi Litostroj. The contract is dated 4 June 1981 and was for the construction of three pumping stations. The equipment was delivered in the period December 1982 to May 1989. Koncar asserted a loss of USD 1,233,365, which included interest.

57. From Koncar's replies to the article 34 notification, it would appear that the main contractor (or general contractor as described by Koncar) on the project was PIM while Koncar was a sub-contractor. Koncar stated that it only seeks compensation for the balance of the unpaid part of the total supplies that it had made.

58. It appears that the claim also includes a claim for unpaid retention monies. Koncar acknowledged that it received an advance payment but did not state the amount or when it was paid. However, it indicated that it deducted the advance payment from its claim.

59. Koncar submitted a "Protocol" dated 11 June 1990 which it asserts it entered into with PIM. The Protocol appears to be an attempt by the two parties to reconcile differences between themselves. It is difficult to reconcile the amounts without the supporting documents relating to the interim certificates. It is apparent, however, that according to Koncar, the last monthly statement that it received was in May 1989. Koncar stated that it received the Final Maintenance Certificate, sent to PIM dated 4 October 1989. The Protocol referred to an expected payment of the second half of the retention money in August 1990.

60. In the article 34 notification, Koncar was requested to submit a copy of the main contract. It stated that it was unable to do so, as PIM was the main contractor. Koncar submitted a copy of the contract between itself and PIM dated 4 June 1981. The contract did not deal with retention amounts or the advance payments. Clause 1.3 refers to the main contract in terms of indicating that the technical aspects of the delivery and installation of the equipment should be in accordance with the main contract.

61. In the article 34 notification, Koncar was requested to submit detailed documentation. It did not submit a detailed statement of the arrangements for payment, including details of the time allowed for honouring invoices or payment certificates. Koncar did not submit evidence relating to bills of freight or lading and of the actual delivery of the equipment to Iraq. Copies of all applications for payment, approved payment certificates, interim certificates, monthly or other periodic progress reports, account invoices and actual payments received were requested. Koncar stated that it was unable to provide this information as

it indicated that it was a sub-contractor and did not possess the information.

62. The Panel finds that the claim relates to work that was performed prior to 2 May 1990 and is therefore outside the jurisdiction of the Commission and is not compensable under Security Council resolution 687 (1991). With respect to the claim for the retention money, Koncar did not submit sufficient evidence to demonstrate its entitlement thereto. Accordingly, the Panel is unable to recommend compensation.

5. Mr. Altai Contract

63. The contract was between "Radar Concar Export" and "Mr. Altai", acting as agent in respect of several Iraq entities, in terms of which Koncar would supply "break switches, circuit breakers, and relays". The contract is dated 29 September 1989, although Koncar stated that the equipment was delivered in the period from December 1989 to July 1990. Koncar asserted a loss of USD 1,093,956 relating to the unpaid value of the items delivered plus interest.

64. The basis upon which the contracts were entered into and financed in terms of the letters of credit is summarised at paragraph 42, supra. The evidence submitted by Koncar to establish its performance of its contractual obligation consists of invoices. The invoices do not specify when delivery occurred. The dates on the invoices range from 28 December 1989 to 18 July 1990. These dates are likely to reflect the period within which delivery occurred. Koncar stated that it no longer had the bills of freight or lading as, due to the lapse of time, these had been lost.

65. The dates on the letters of credit that correspond with the various invoices submitted reflect a range from 1988 to 25 June 1990. The payment terms for these letters of credit reflect a payment period in terms of the protocol signed by the Central Bank of Iraq and Jugobanka. Where the payment terms are specified, this reflects a payment period of two years from delivery.

66. The Panel finds that part of the claim relates to work that was performed prior to 2 May 1990 and the amounts due under the letter of credit arrangement were deferred payments. For the reasons set forth in the Panel's analysis of contractual arrangements to defer payments in paragraphs 68 to 77 of the Summary, the claim for unpaid deferred payments is outside the jurisdiction of the Commission and is not compensable under Security Council resolution 687 (1991). Accordingly, the Panel is unable to recommend compensation.

67. With respect to the Mr. Altai contract, the further issue for the Panel's determination relates to those deliveries occurring after 2 May 1990 with payment to be made two years after the date of delivery. The issue is whether the asserted failure of Iraq to pay for such deliveries can be said to have arisen directly out of its invasion and occupation of

Kuwait. Koncar's agreements indicated that the final batch of equipment to be supplied was to be on 30 June 1990. Under the payment terms negotiated by Koncar, such delivery of equipment on 30 June 1990 would have triggered a payment date of 1 July 1992.

68. Kuwait was liberated on 2 March 1991 and the Panel is aware that the losses resulting from Iraq's invasion and occupation of Kuwait continued for a period of time after the liberation of Kuwait. The Panel concludes, however, that the asserted failure by Iraq in July 1992 to pay for such deliveries cannot be said to have arisen as a direct result of Iraq's invasion and occupation of Kuwait. Accordingly, the Panel recommends no compensation.

6. Al Kadesiah State Establishment

69. A contract for the supply of circuit breakers and switches and contactors was concluded on 26 April 1988 with Alkadesiah State Establishment, Baghdad. The equipment was delivered in April 1988. Koncar stated that in May 1991 it was paid 50 per cent of the value of the delivered equipment. The claim to the Commission is based on the 50 per cent of the outstanding value of the delivered equipment. It asserted a total loss, including interest, of USD 39,736.

70. According to the letter of confirmation dated 26 April 1988, payment was to be "deferred payment according to Iraq-Yugoslavia agreement with interest of 5.5 per cent by opening an irrevocable L/C through Central Bank of Iraq at National Bank of Yugoslavia". The copy of the letter of credit submitted is of poor quality and it is impossible to ascertain the details.

71. The Panel finds that the claim relates to work that was performed prior to 2 May 1990 and the amounts due under the letter of credit arrangement were deferred payments. For the reasons set forth in the Panel's analysis of contractual arrangements to defer payments in paragraphs 68 to 77 of the Summary, the claim for unpaid deferred payments is outside the jurisdiction of the Commission and is not compensable under Security Council resolution 687 (1991). Accordingly, the Panel is unable to recommend compensation.

7. Al Qaqaa State Establishment

72. The contract was concluded on 26 April 1988 with Al Qaqaa State Establishment, Baghdad, for the supply of spare parts and circuit breakers. The equipment was delivered in August 1988. Koncar stated that in May 1991 it was paid 50 per cent of the value of the delivered equipment. Its claim to the Commission is based on the 50 per cent portion of the outstanding value of the delivered equipment. It asserted a total loss, including interest, of USD 106,153.

73. According to the letter of confirmation dated 26 April 1988, payment was to be "deferred payment according to Iraq-Yugoslavia agreement with

interest of 5.5 per cent by opening an irrevocable divisable L/C through Central Bank of Iraq at National Bank of Yugoslavia". The copy of the letter of credit submitted confirms that payment will be effected according to the agreement between Iraq and Yugoslavia signed on 14 July 1987.

74. The Panel finds that the claim relates to work that was performed prior to 2 May 1990 and the amounts due under the letter of credit arrangement were deferred payments. For the reasons set forth in the Panel's analysis of contractual arrangements to defer payments in paragraphs 68 to 77 of the Summary, the claim for unpaid deferred payments is outside the jurisdiction of the Commission and is not compensable under Security Council resolution 687 (1991). Accordingly, the Panel is unable to recommend compensation.

8. Electro Distribution Factory

75. Koncar stated that an order was confirmed on 20 October 1988 to supply the Electro Distribution Factory with isolators, contactors and switches. The equipment was supplied in the period from December 1988 to March 1989. Koncar asserted that the letters of credit were divided into two groups. It received a 50 per cent payment for the one group of letters of credit and no payment for the other. Koncar asserted a total loss, including interest, of USD 392,924.

76. According to the confirmation of order dated 20 October 1988, the payment terms were to be "two years deferred payment according to Yugoslav-Iraq agreed minutes date 3.9.88. point 4. – the banking arrangements signed between the Central Bank of Iraq and Jugobanka Beograd on January 20, 1984 shall be applicable for trade in 1988/89." The various letters of credit submitted in support of this loss element confirm this arrangement.

77. The Panel finds that the claim relates to work that was performed prior to 2 May 1990 and the amounts due under the letter of credit arrangement were deferred payments. For the reasons set forth in the Panel's analysis of contractual arrangements to defer payments in paragraphs 68 to 77 of the Summary, the claim for unpaid deferred payments is outside the jurisdiction of the Commission and is not compensable under Security Council 687 (1991). Accordingly, the Panel is unable to recommend compensation.

9. North Jazira Irrigation Project

78. A contract was concluded on 14 November 1988 with the Ministry of Agriculture and Irrigation, State Commission for Irrigation and Reclamation Projects, Baghdad. It was for the supply of equipment and erection of pumping stations for the North Jazira Irrigation project. The value of the contract was stated as 7,672,814 Iraqi dinars ("IQD"). The first deliveries were carried out from October 1989 to May 1990. Koncar stated that it was not submitting a contract claim relating to this project as they received an advance payment relating to it.

79. The contract provided for the payment of an advance payment in the amount of 5 per cent of the value of the contract. Koncar did not indicate what amount it was paid. Under Article 6 of the contract, the advance payment received was to be deducted in equal proportions from the amounts of the monthly statements commencing with the second monthly statement.

80. Koncar also asserted certain losses as being tangible property which related to the North Jazira Irrigation Project. A number of these asserted losses are more appropriately classified as contract losses. The Panel accordingly reclassifies the following as contract losses:

(a) Setting up and arranging the camp site

81. Koncar seeks compensation in the amount of USD 76,849 relating to alleged payments made for setting up the North Jazira site. It asserted that it paid China State Construction Engineering Company, with whom it had contracted the setting up of the site, an advance payment of USD 5,079. Koncar asserted that it also paid China State Construction Engineering Company a part payment amounting to USD 17,219 for work performed according to an invoice dated 8 July 1990.

82. Koncar asserted that it took over a warehouse from an entity it describes as “Slovenijacesta” and paid IQD 15,000 (USD 48,133). It apparently had to transport the warehouse and alleged that it paid an Iraqi company, Ashirafa Hakim, the amounts of, IQD 5,990 and IQD 2,550 to do this. Further, there is a reference to “storage fees” and this is with respect to an alleged payment of IQD 2,000 (USD 6,417) to Alrawi and Khateeb Contr. Co. These costs appear to relate to transport charges.

83. The advance payment of the foreign currency in the contract is stated at 5 per cent of the foreign currency value of the contract and therefore amounts to USD 5,079. Koncar submitted a copy of a remittance advice in the sum of USD 5,079 dated 23 April 1990. The Panel finds that Koncar submitted sufficient evidence to demonstrate its loss. However, for the reasons stated at paragraphs 114-118, infra, the Panel recommends no compensation for the advance payment for setting up and arranging the campsite.

84. Koncar submitted an invoice dated 8 July 1990 for the asserted completed work for the foreign currency portion of the contract with China State Construction Engineering Company in the sum of USD 17,219. It did not, however, submit proof of payment of this amount. In the absence of proof of payment, the Panel recommends no compensation for this amount.

85. With respect to the “cash payments” in February and March 1990 for the purchase of the storehouse, Koncar submitted translated cashiers receipts and copies of cheques for ID 15,000. Koncar submitted a receipt as proof of its payment to Alrawi and Khateeb Contr. Co. for transport charges. The Panel finds that Koncar submitted sufficient evidence to demonstrate its loss relating to the purchase of the storehouse and transport. However,

for the reasons stated at paragraphs 114-118, infra, the Panel recommends no compensation for the purchase of the store house and transport charges.

86. The charges stated to be for transport of the storehouse and containers are allegedly supported by invoices for "transporting materials". However, Koncar did not submit any evidence of actual payment to Ashirafa Hakim. Koncar did not adequately explain the "storage fees". Accordingly the Panel does not recommend an award for storage fees.

(b) Lloyd's Register of shipping

87. Koncar seeks compensation in the amount of USD 21,400 relating to inspection costs. Koncar asserted payment made to Lloyds for the inspection of the equipment apparently at the request of the purchaser. It is not entirely clear which equipment was being referred to. Koncar stated that it paid an amount of USD 21,400 relating to this inspection. In its reply to the article 34 notification, Koncar stated that in terms of the contract signed for the North Jazira Irrigation project, in the specifications to the contract, the costs of inspection were included. It is the contention of Koncar that had the invasion and occupation of Kuwait not occurred, then it "would have been paid by the purchaser within the total contract price."

88. The invoices submitted reflect an inspection that appears to have occurred between September 1989 and May 1990, although the invoices are dated later. Koncar did not submit sufficient evidence to establish what portion of the work, if any, was performed after 2 May 1990. Alternatively, even if Koncar had established that a portion of the work was performed after 2 May 1990, for the reasons outlined at paragraphs 114-118, infra, the Panel finds that the losses asserted for Lloyd's Register of Shipping are not compensable.

(c) Insurance premium

89. Koncar seeks compensation in the amount of USD 18,758 relating to insurance cover that it states it was obliged to effect. It appears that this insurance cover was effected relating to equipment which was to be delivered to the North Jazira Project. Koncar stated that the insurance payment was made on 21 November 1989. It is Koncar's contention that had there been no invasion and occupation of Kuwait it would have been paid by the employer as part of the contract price.

90. Koncar submitted a photocopy of an insurance policy in Arabic issued on 24 December 1989. It also submitted a copy of a telex to the bank requesting payment and a copy of a payment advice dated 21 November 1989. For the reasons stated at paragraphs 114-118, infra, the Panel recommends no compensation for insurance premiums. Further, the Panel finds that Koncar did not demonstrate how these asserted losses arose directly out of Iraq's invasion and occupation of Kuwait.

(d) Equipment in warehouse

91. Koncar asserted losses relating to equipment that apparently was manufactured for the North Jazira project but was not delivered due to Iraq's invasion and occupation of Kuwait. This equipment was stored in Koncar's warehouse. It asserted losses relating to the cost of purchase of the equipment, loss of interest on the "tied up" equipment and storage charges totalling USD 2,740,549.

92. The value of the equipment was allegedly USD 2,265,760. Koncar asserted that as the equipment was of a specific nature it could not be sold elsewhere.

93. Koncar alleged that the cost of storage was for the period from 2 August 1990 to 31 March 1994. The cost of storage, it is alleged, amounted to USD 1,449 per month. It seeks compensation in the amount of USD 59,400.

94. Koncar asserted an interest claim on the tied up funds in the manufactured equipment amounting to five per cent per annum from 2 August 1990 to 31 March 1994. The asserted loss totals USD 2,265,760 (plus interest of USD 415,389). Koncar's losses are based on a 5 per cent interest rate applied to the "total value of the equipment in the warehouse, consisting of the cost of used materials and cost of labour". The basis of the claim is not clearly explained.

95. With respect to the claim for equipment in the warehouse, Koncar did not submit evidence to establish its attempts to re-sell the equipment. In addition, in its reply to the article 34 notification, it stated that it was unable to provide "proofs of paid storage". Furthermore, Koncar sought to support this claim with a number of untranslated documents. Koncar submitted internally generated documents, through which it sought to establish the existence of the equipment in its warehouse. The Panel finds that Koncar did not submit sufficient evidence explaining the basis of its claim nor did it submit sufficient documentary evidence of the asserted losses. The Panel recommends no compensation for the asserted loss of tangible property in the warehouse.

B. Loss of profits

96. Koncar seeks compensation for loss of profit in the amount of USD 1,340,000. The claim for loss of profits is based on the contract entered into for the North Jazira Irrigation Project. The contract was concluded on 14 November 1988 with the Ministry of Agriculture and Irrigation, State Commission for Irrigation and Reclamation Projects, Baghdad. It was for the supply of equipment and erection of pumping stations for the North Jazira Irrigation project. This contract was undertaken in conjunction with Litostroj, Ljubljana (of Slovenia) and Uljanik, Pula (of Croatia).

97. Koncar, who was the main contractor, supplied the electrical equipment, while the manufacturing equipment was supplied by Uljanik

(Pula). Vodoterma (of Yugoslavia) replaced Uljanik (Pula), who withdrew from the contract. Part of the equipment that was due to be supplied by Uljanik (Pula) was to be supplied by Vodoterma and Koncar. The first deliveries were carried out from October 1989 to May 1990.

98. The overall total contract price was "ID 7,672,814 without contingencies (ID 8,209,911 with contingencies)". Koncar calculated its loss of profits claim based on its share in the contract in terms of deliveries and work it was to undertake. It asserted that the total contracted value of deliveries being IQD 4,377,340 (USD 14,046,400) less an advance payment received and partial letter of credit receipts of USD 613,622 results, according to Koncar, in a value of equipment to be delivered of USD 13,432,778. Koncar then asserted a loss of future profits based on a return of 10 per cent of the USD 13,432,778 equals "the total lost future profits of USD 1,340,000".

99. Koncar submitted copies of guarantee numbers 89/9/1388 and 89/9/1389 issued by the Central Bank of Iraq. Koncar submitted a calculation, relating to the purchase of motors for the project, which had a 10 per cent mark up. It also submitted a copy of part of the contract and the cost of equipment delivered.

100. Koncar did not submit the following types of evidence: audited financial statements, budgets, management accounts, turnover, original bids, profit/loss statements, finance costs and head office costs prepared by or on behalf of Koncar for each accounting period commencing in year one of the project and continuing through March 1993.

101. The Panel finds that Koncar failed to fulfil the evidentiary standard for loss of profits claims as set out in paragraphs 125 to 131 of the Summary. Accordingly, the Panel recommends no compensation.

C. Loss of tangible property

102. Koncar seeks compensation in the amount of USD 269,131 for loss of tangible property. A number of the asserted losses have been reclassified by the Panel as they are more appropriately considered under contract losses.

(a) Motor vehicles

103. Koncar asserted losses relating to the purchase of five motor vehicles valued at KWD 30,860 (USD 103,631) which remained at the project site and could not be shipped out due to Iraq's invasion and occupation of Kuwait. Koncar contends that under the terms of the bill of quantities that it signed with the employer, it was required to procure four motor vehicles at its own expense. These motor vehicles were to be used by the resident engineer's office on the project site. The total asserted losses, including the insurance premium on the motor vehicles, is USD 104,631.

104. With respect to the claim for the five motor vehicles, Koncar submitted evidence of the requirements to supply four of the vehicles under the contract, through extracts of the contract. Koncar also submitted documentary evidence which demonstrated that the five vehicles were in Iraq prior to 2 August 1990 and that it paid for the motor vehicles. The Panel finds that Koncar submitted sufficient evidence to demonstrate its loss relating to the five motor vehicles. However, for the reasons stated at paragraphs 114-118, supra, the Panel recommends no compensation.

105. The Panel recommends no compensation for the claim for the losses relating to the insurance on the motor vehicles as Koncar did not demonstrate how these asserted losses arose directly out of Iraq's invasion and occupation of Kuwait.

(b) Camp for North Jazira site

106. Koncar stated that it had the responsibility to organise the North Jazira camp in Iraq, which included furnishing it for the temporary stay of workers at the site. Koncar asserted that it temporarily supplied equipment to the North Jazira site which it valued at USD 91,353. It stated that the equipment, which consisted of 36 caravans plus roofing structures and three generators, was shipped to the site in Iraq in June and July 1990. Koncar asserted that this equipment "after the war it [this equipment] could not be withdrawn from Iraq".

107. In its reply to the article 34 notification, Koncar indicated that:

> "The site camp had to be organised and furnished by the main contractor. There was no provision that the purchaser should pay the camp equipment directly, but the cost of camp was included in the contract price of equipment and erection for Rade Koncar. If all the equipment had been supplied and paid, the claimant would have, within the frame of total payment by the purchaser, collected payment also for the camp equipment."

108. Koncar put forward evidence of the contract, parts of the bills of quantities, and copies of invoices for the equipment delivered in May 1990 and June 1990. It also submitted supporting documentation which indicated that equipment to the value of USD 70,748 was delivered to Iraq. The Panel finds that Koncar submitted sufficient evidence to demonstrate its loss relating to the equipment. However, for the reasons stated at paragraphs 114-118, supra, the Panel recommends no compensation for camp equipment.

(c) Insurance and transport

109. Koncar asserts a loss in the amount of USD 3,940 relating to the insurance it allegedly paid on the transportation of equipment relating to the camp to Iraq.

110. Koncar also seeks compensation in the amount of USD 69,207 for the cost of transporting the camp equipment to Iraq. In its reply to the article 34 notification, Koncar indicated that there was no special provision "that the purchaser should pay directly the costs of transport of camp equipment, but the total value of camp furnishing (including delivery of equipment for the camp and transport of the equipment) was included in the contract price of equipment and works with the Iraqi purchaser."

111. It is Koncar's contention that had Iraq's invasion and occupation of Kuwait not occurred it would have delivered all the equipment and would have received payment of "all expenses".

112. Koncar submitted calculations on the basis of the insurance premium stated in the copies of the insurance policies that were submitted as proof of its losses relating to insurance premiums. Koncar did not submit copies of the payment of the claimed amount of USD 3,940. The Panel finds that Koncar did not submit sufficient evidence of its loss.

113. With respect to the transport claim, Koncar submitted forwarding agent's invoices but they are not summarised or totalled. Translations of the typical forms/invoices are provided but the currency details, in some translations, are not adequately explained. The charges appear to be in differing currencies and are not cross-referenced to the deliveries of specific goods for the camp. The Panel finds that Koncar did not submit sufficient evidence and explanations to demonstrate its loss.

(d) Advance payment for North Jazira Project

114. It was clear that the advance payment relating to the North Jazira Project was in a substantial amount. Indeed, it may have been as much as USD 1,058,596 relating to the foreign currency portion and IQD 73,745.700 relating to the local currency portion of the contract. Clarification was sought in an article 34 notification and Koncar did not give a precise answer.

115. It is the contention of Koncar that had Iraq's invasion and occupation of Kuwait not occurred, then it "would have been paid by the purchaser within the total contract price". On the assumption that the claims relating to the Scientific Research Project, the cost of the advance payment it paid to China State Construction Engineering Company, the purchase of storehouse, the transport of storehouse, the motorvehicles and the camp for North Jazira are valid and recoverable in the full amounts, Koncar is still left with a net surplus. This is the result of the substantial advance payments paid to it in respect of the North Jazira Project.

116. In terms of the contract, Koncar was to repay Iraq these advance payments. It is the case either that Koncar has not repaid these monies or has not submitted proof that it has. It therefore follows that, even after

taking into account the amounts owed by Iraq to Koncar referred to in paragraph 115, supra, Koncar retained a net surplus.

117. The Panel finds that the advance payments would, for the main part, have been used by Koncar to purchase tangible assets to be used on the project. In the circumstances, and applying the approach taken with respect to advance payments set out in paragraphs 64 to 67 of the Summary, there is no loss to Koncar for which the Panel can recommend compensation.

118. Further, it is the case that Koncar alleges that it did not submit a claim for other contract losses relating to this claim on the grounds that the advance payment adequately covered its losses. However, Koncar did not spell out what these losses were so as to enable the Panel to establish their validity and the extent to which they exhausted the advance payment. Accordingly, in the absence of detail relating to such asserted contract losses and the advance payment, the Panel is unable to recommend any compensation relating to contract losses for the project.

D. Summary of recommended compensation for Koncar

119. Based on its findings regarding Koncar’s claim, the Panel recommends no compensation.

IV. STADLER & SCHAAF OHG

120. Stadler & Schaaf OHG ("Stadler") is a German company which was undertaking work in Iraq at the time of Iraq's invasion and occupation of Kuwait. It seeks compensation in the amount of 31,326 Deutsche Marks ("DEM") (USD 20,055) arising out of its employee's alleged detention in Iraq. The amount claimed appears to cover the period from 6 July 1990 to 25 November 1990.

121. On 24 March 1999, Stadler was sent an article 15 notification requesting it to comply with the formal requirements for filing a claim. Stadler was requested to reply on or before 24 September 1999. Stadler did not submit a reply. On 4 October 1999, Stadler was sent a formal article 15 notification. The deadline for Stadler to reply was 6 December 1999. Stadler did not reply to the article 15 notification.

122. On 29 September 1999, Stadler was sent an article 34 notification requesting it to furnish further evidence to develop its claim. Stadler was requested to reply on or before 29 December 1999. Stadler did not submit a reply. On 17 January 2000, Stadler was sent a reminder to the article 34 notification. The deadline for Stadler to reply was 31 January 2000. Stadler did not reply to the article 34 notification.

123. The Panel finds that Stadler did not submit sufficient information or documentation to support its losses.

124. The Panel recommends no compensation.

V. KRUPP INDUSTRIETECHNIK GMBH

125. Krupp Industrietechnik GmbH ("Krupp") is a company incorporated according to German law. Krupp seeks compensation in the amount of DEM 144,908 (USD 92,771) for payment or relief to others.

A. Payment or relief to others

1. Facts and contentions

126. Krupp seeks compensation in the amount of DEM 144,908 (USD 92,771) for payment or relief to others. In 1981 it had entered into a contract with the Government of Iraq to construct a National Astronomical Observatory on Mount Korek. Krupp stated that at the time of Iraq's invasion of Kuwait, it was still negotiating with the Iraqi authorities relating to additional costs for the contract. It continued to maintain an office in Baghdad. On 5 July 1990, it asserted that it sent an employee, who was based in Germany, to prepare the final negotiation and liquidation of the office in Iraq.

127. Krupp stated that after the invasion and occupation of Kuwait, its employee was unable to continue to perform the services for which he was assigned nor was he able to leave the country as it appears he had been refused permission to depart. Eventually, on 22 November 1990, its employee returned from Baghdad via Basel, Switzerland, to Düsseldorf.

128. Krupp indicated that its employee, upon his return, went on "recreation leave" until 31 December 1990.

129. Krupp calculated its loss as follows:

(a) Payments for "compulsory stay" in Baghdad from 2 August to 22 November 1990

Salary, daily allowance and site allowance	DEM 74,144
Supplementary costs on salaries	DEM 20,944
Overhead due to maintenance of general services	DEM 9,632
Total	DEM 104,720

(b) "Recreation leave" from 23 November 1990 to 31 December 1990

Salary, daily allowance plus site allowance	DEM 25,156
Supplementary costs on salaries	DEM 6,764
Overhead due to maintenance of general services	DEM 3,268
Premium to organise leave	DEM 5,000
Total	DEM 40,188

130. Krupp asserted that with respect to the salary payments from 2 August to 22 November 1990, it was obliged to make such payments under its contract with the employee. It quoted an alleged clause of the contract

providing that "the salary shall in case of an internment be continued to be paid." Krupp asserted that this was also an obligation under German labour law.

131. With respect to the payments, including the "premium" of DEM 5,000 for the "recreation leave" from 23 November to 31 December 1990, Krupp asserted that this follows from its "obligations as an employer to care for the welfare" of its employees. Krupp also cited German labour law, but did not submit English copies of the asserted legal provisions.

132. The "supplementary costs" relate to the payment of workman's compensation, pension, and unemployment insurance. Krupp stated that these payments were obligatory under the terms of the contract that it had with the employee and under German law.

133. Krupp asserted that the "general services" were amounts it had to expend on management of the company and administration. These appear to be head office type expenses.

2. Analysis and valuation

134. Krupp submitted a partially translated copy of the contract signed by its employee on 4 July 1990. It also submitted copies of airline tickets relating to its employee's travel to and from Iraq. Krupp submitted a partially translated "monthly certificate on salary for the months of August 1990 to December 1990." It did not submit a copy of its employee's Iraqi residency permit number and passport number with issuing country.

135. Krupp submitted untranslated or partially translated documents. Invoices and receipts of the expenses incurred by the Krupp were not submitted.

136. With respect to the claim for "Payments for compulsory stay in Baghdad from 2 August 1990 to 22 November 1990" the Panel finds that the salary, daily allowance and site allowance are compensable in principle. The Panel finds that the partially translated contract and monthly certificate on salary for the months of August to December 1990 demonstrated Krupp's entitlement to compensation in the amount of DEM 43,605 (USD 27,916).

137. With respect to the claim relating to "supplementary costs on salaries", "overhead due to maintenance of general services", and "recreation leave" the Panel recommends no compensation on the basis that Krupp did not submit sufficient evidence as to loss and causation.

3. Recommendation

138. The Panel recommends compensation in the amount of USD 27,916 for payment or relief to others.

B. Summary of recommended compensation for Krupp

139. Based on its findings regarding Krupp's claim, the Panel recommends compensation in the amount of USD 27,916. The Panel finds the date of loss to be 2 August 1990.

VI. UNITECH LIMITED

140. Unitech Limited, ("Unitech") is an Indian registered company, which was awarded the contract for the construction of "Head Quarter Building for Arab Town", Kuwait. The contract was for a fixed price of KWD 1,159,318. Unitech stated that the site was established on 20 April 1990 and that it "mobilised" three engineers from 1 May 1990 and had to "demobilise" them on 31 July 1990. It seeks compensation for the total amount of 451,000 Indian Rupees (INR)(USD 25,000) for travel costs, bank guarantee charges, and salaries.

141. On 24 March 1999, Unitech was sent an article 15 notification requesting it to comply with the formal requirements for filing a claim. Unitech was requested to reply on or before 24 September 1999. Unitech did not submit a reply. On 4 October 1999, Unitech was sent a formal article 15 notification. The deadline for Unitech to reply was 6 December 1999. Unitech did not reply to the formal article 15 notification.

142. On 29 September 1999, Unitech was sent an article 34 notification requesting it to furnish further evidence to develop its claim. Unitech was requested to reply on or before 29 December 1999. Unitech did not submit a reply. On 17 January 2000, Unitech was sent a reminder article 34 notification. The deadline for Unitech to reply was 31 January 2000. Unitech did not reply to the article 34 notification.

143. The Panel finds that Unitech did not submit sufficient information or documentation to support its losses.

144. The Panel recommends no compensation.

VII. ICOMSA ENGINEERING COSTRUZIONI E IMPIANTI S.P.A.

145. Icomsa Engineering Costruzioni e Impianti S.p.A. ("Icomsa") is an Italian registered, limited liability company. It had operated in Iraq since 1981 on a number of "turnkey" projects in the fields of steel carpentry, polyurethanic panels for civil prefabrication and steel frames. At the time of Iraq's invasion of Kuwait, Icomsa was engaged in a number of projects in Iraq. It seeks compensation in the total amount of 9,228,833,000 Italian lira ("ITL") (USD 6,592,022) for contract losses, loss of profits, payment or relief to others and financial losses.

A. Contract Losses

(a) NASSR contract (contract with an Iraqi party)

146. Icomsa did not submit a copy of the contract or adequate translations of documents relating to this alleged loss. Icomsa did not respond at all to the article 34 notification. It appears, from the documentation submitted, that Icomsa seeks compensation for ITL 25,814,000 (USD 18,438) relating to payments due under a contract for "supplies and works" with NASSR Enterprise for Mechanical Industries, Baghdad. The contract related to the "restoration of the polyurethanic panels production line". Icomsa asserted that after it completed the works on the contract, it sought to test the connected items, but was unable to do so. The reasons for this are not clear.

147. The Panel finds that the contract was with Iraq.

148. With respect to the NASSR contract, Icomsa submitted copies of correspondence with the Central Bank of Iraq. It did not submit the contracts together with any approved variations or the contract conditions (both general and particular), nor applications for payment, approved payment certificates, interim certificates, progress reports, account invoices, actual payments received or dates of performance.

149. The Panel finds that Icomsa did not submit sufficient evidence of its asserted losses. Accordingly, the Panel recommends no compensation for contract losses allegedly incurred under the NASSR contract.

(b) Danieli S.p.A. (contract with non-Iraqi party)

150. Icomsa seeks compensation for "commercial co-operation" and for "engineering" totalling ITL 5,961,043,000 (USD 4,257,888). On the category "E" claim form Icomsa described its claim as "fee", however, the Panel has reclassified it as a contract loss.

151. Icomsa stated that it had entered into an agreement to supply design work and it also had a commercial co-operation arrangement with an Italian company, Danieli S.p.A. ("Danieli"). Using its local Iraqi knowledge, Icomsa facilitated the acquisition by Danieli of two orders in Iraq.

Danieli acquired the orders in 1988. They related to a rolling mill in Baghdad and a steel plant in Basrah. Icomsa asserted that it did the designs relating to these two orders and that these amounts remain unpaid by Danieli. On 27 December 1991, Icomsa served a writ on Danieli in an Italian court in which it sought to recover the amounts in question.

152. With respect to the Danieli contract, Icomsa submitted a copy of the court writ. It did not submit the contracts together with approved variations or the contract conditions (both general and particular), applications for payment, approved payment certificates, interim certificates, progress reports, account invoices, actual payments received or dates of performance.

153. Furthermore, the Panel finds that Icomsa did not demonstrate how the asserted losses arose directly out of Iraq's invasion and occupation of Kuwait.

154. The Panel recommends no compensation for contract losses allegedly incurred under the contract with Danieli.

B. Loss of profits

1. Facts and contentions

155. Icomsa submitted what appear to be three loss of profits claims identified as follows:

(a) "Contracts acquired but not realised";

(b) "Failure of acquisition of contracts in negotiation"; and

(c) "Damages for Iraqi Market closing".

(a) "Contracts acquired but not realised"

156. On the category "E" claim form, Icomsa describes its claim as a loss arising in the course of "business transaction or course of dealing". The Panel has reclassified this as a claim for loss of profits. Icomsa seeks compensation for loss of profits totalling ITL 16,950,000 (USD 12,107) arising out of contracts that it asserted were accepted by NASSR but could not be carried out. It has taken the total value of the contracts, which it asserted as amounting to ITL 169,504,000, and calculated the loss of profits based upon 10 per cent of that amount. The asserted loss of profit is stated at ITL 16,950,000.

(b) "Failure of acquisition of contracts in negotiation"

157. This claim is based on the contracts that Icomsa was allegedly negotiating with various Iraqi parties. It based its calculation of its loss of profits on the total value of the contracts it was negotiating, which it asserted as ITL 115,099,419,000. Icomsa, asserted that it would have had an "acquisition probability of 20 per cent". To the resulting amount it applies a contractual discount of five per cent which amounts to ITL 21,868,990,000. Icomsa then calculated a loss of profits of 10 per cent based on ITL 21,868,990,000 which totalled an asserted loss of profits of ITL 2,186,899,000 (USD 1,562,070).

(c) "Damages for Iraqi Market closing ('loss of goodwill')"

158. Icomsa seeks compensation in the amount of ITL 1 billion (USD 714,285) relating to "loss of goodwill" arising out of the closure of the Iraqi market from August 1992 up to "all 1993". The claim is based on what Icomsa asserted was its inability to realise its turnover of ITL 10 billion and a loss of profits based on 10 per cent of that turnover.

2. Analysis and valuation

159. With respect to its claim for "Contracts acquired but not realised", Icomsa submitted copies of letters of credits, copies of correspondence and other untranslated documents. There is no evidence either initially submitted or in response to the article 34 notification that any of the contracts were accepted by NASSR.

160. In addition, there is no evidence that demonstrates that the projects proceeded. Such evidence could have included monthly/periodic reports, planned/actual time schedules, interim certificates or account invoices, details of work completed but not invoiced, by Icomsa, details of payments made by the employer and evidence of retention amounts that were recovered by Icomsa. Icomsa did not provide such evidence.

161. As evidence of its loss of profits relating to the "Failure of acquisition of contracts in negotiation", Icomsa submitted copies of various bids made. As evidence for losses relating to "Damages for Iraqi Market closing", Icomsa submitted a copy of its turnover for 1981 to 1990.

162. The costs incurred by a contractor in making unsuccessful bids will nearly always be to the contractor's account. In addition, there is no evidence relating to audited financial statements, budgets, management accounts, turnover, original bids, profit/loss statements, finance costs and head office costs prepared by or on behalf of Icomsa for each accounting period commencing in year one of the Projects and continuing through March 1993.

163. The Panel finds that Icomsa failed to fulfil the evidentiary standard for loss of profits claims as set out in paragraphs 125 to 134 of the Summary. Accordingly, the Panel recommends no compensation.

3. Recommendation

164. The Panel recommends no compensation for loss of profits.

C. Payment or relief to others

165. Icomsa seeks compensation in the amount of ITL 36,288,000 (USD 25,920). It asserted that this was the cost of supporting its member of staff allegedly detained in Iraq from 2 August to 10 November 1990. The compensation sought relates to “salaries and other contributions.” Icomsa did not submit detailed supporting evidence relating to this claim.

166. The following information about its employee was not submitted: family name, first name, employee identification number, Iraqi residency permit number, and passport number with issuing country. Copies of Icomsa’s payroll records for the employee for the period relevant to the Claim were also not provided.

167. Invoices and receipts of the expenses allegedly incurred by Icomsa were not submitted.

168. The Panel finds that Icomsa did not submit sufficient evidence of its alleged losses. Accordingly, the Panel recommends no compensation.

D. Financial losses bank guarantees

169. Icomsa seeks compensation for ITL 1,839,000 (USD 1,314) for bank guarantees for what Icomsa describes as “costs supported unnecessarily”. These costs related to “contracts in negotiation and supported”.

170. Icomsa does not submit any argument as to why this loss is causally connected to Iraq’s invasion and occupation of Kuwait. Icomsa submitted untranslated documentation in support of its claim.

171. The Panel recommends no compensation for financial losses as Icomsa did not submit sufficient evidence to establish a loss.

E. Summary of recommended compensation for Icomsa

172. Based on its findings regarding Icomsa’s claim, the Panel recommends no compensation.

VIII. PACIFIC CONSULTANTS INTERNATIONAL

173. Pacific Consultants International ("Pacific") is a Japanese registered legal entity specialising in consulting services relating to civil construction works. Pursuant to an agreement dated 18 January 1990, it was engaged as an independent engineer for the dredging of the Um-Qusr Area in Iraq by both the General Establishment of Iraqi Port (Basrah) and the joint venture formed by Boskalis International BV and Volker Stevin Dredging.

174. It seeks compensation in the amount of Yen ("JPY") 2,207,861 (USD 15,306) for payment or relief to others.

175. On 24 March 1999, Pacific was sent an article 15 notification requesting it to comply with the formal requirements for filing a claim. Pacific was requested to reply on or before 24 September 1999. Pacific did not submit a reply. On 4 October 1999, Pacific was sent a formal article 15 notification. The deadline for Pacific to reply was 6 December 1999. Pacific did not reply to the formal article 15 notification.

176. On 29 September 1999, Pacific was sent an article 34 notification requesting it to furnish further evidence to develop its claim. Pacific was requested to reply on or before 29 December 1999. Pacific did not submit a reply. On 17 January 2000, Pacific was sent a reminder article 34 notification. The deadline for Pacific to reply was 31 January 2000. Pacific did not reply to the article 34 notification.

177. The Panel finds that Pacific did not submit sufficient information or documentation to support its losses.

178. The Panel recommends no compensation.

IX. KAJIMA CORPORATION

179. Kajima Corporation ("Kajima") is a Japanese limited liability company. According to Kajima's registration documents, it provides "contracting and undertaking of civil engineering, architecture, machinery and equipment and other construction works in general". Kajima seeks compensation in the amount of JPY 6,742,602 (USD 46,742) for payment or relief to others and pre-paid rent relating to its office in Baghdad.

A. Payment or relief to others

1. Facts and contentions

180. Kajima seeks compensation in the amount of JPY 4,942,602 (USD 34,264) for payment or relief to others. It asserts that it evacuated three employees, two Filipino citizens and one Japanese citizen from Iraq. Kajima stated that the two Filipino citizens returned to the Philippines by air on 30 August 1990 from Baghdad via Amman and Bangkok to Manila. The Japanese national was allegedly evacuated on 6 November 1990 on a plane chartered by the Government of Japan. Kajima seeks compensation for expenses, relating to its Japanese employee, including salary, social insurance, bonus, retirement allowances, accommodation on arrival and a medical check up. With respect to its Filipino employees, Kajima claims for expenses relating to war risk insurance and air tickets.

2. Analysis and valuation.

181. Kajima was only able to provide the name of one of its employees. The following information about each employee was not submitted: family name, first name, employee identification number, Iraqi residency permit number, and passport number with issuing country. Kajima did not provide copies of its payroll records for the employees for the period relevant to the claim. Kajima did not explain why it was unable to submit the documentation. In its reply to the article 34 notification, it merely indicated that the information was "not available".

182. Kajima submitted copies of untranslated documents. Kajima did not submit evidence detailing who would be responsible for the costs of airfares upon natural completion of the contract.

183. The Panel finds that Kajima did not submit sufficient evidence of its asserted losses relating to payment or relief to others.

3. Recommendation

184. The Panel recommends no compensation for payment or relief to others.

B. Financial losses (prepaid rent)

185. Kajima seeks compensation for rent paid in respect of its Baghdad office for the period from 2 August 1990 to 6 November 1990 totalling JPY 1,800,000 (USD 12,478). It did not provide sufficient detail relating to the claim. Kajima did not establish how the asserted loss was causally connected to Iraq's invasion and occupation of Kuwait. Kajima stated that it was unable to provide a copy of the lease agreement as this was left in Baghdad. For the same reason, it was unable to submit rental receipts.

186. The Panel finds that Kajima did not submit any evidence of its loss and how the asserted losses arose directly out of Iraq's invasion and occupation of Kuwait. Accordingly, the Panel recommends no compensation for financial losses.

C. Summary of recommended compensation for Kajima

187. Based on its findings regarding Kajima's claim, the Panel recommends no compensation.

X. TAISEI CORPORATION

188. Taisei Corporation ("Taisei") is a Japanese registered corporation, which engages in planning, surveying, designing, supervising, construction, engineering and consulting relating to building, civil engineering, plant installation and other construction works. It was engaged in projects in Kuwait and Iraq at the time of Iraq's invasion and occupation of Kuwait. Taisei seeks compensation in the total amount of USD 107,362 for tangible property losses, payment or relief to others and loss of cash.

A. Loss of tangible property

189. Taisei seeks compensation in the amount of JPY 601,064 (USD 4,167) for loss of tangible property kept at its office in Kuwait. Taisei asserted that the invasion and "robbery" by the Iraqi military forces resulted in its office supplies being stolen. In support of its claim, Taisei submitted an extract from an "office supplies record" dated February 1991, and a certificate from its landlord that the office was "well furnished". Taisei also submitted photographs of the office in Kuwait.

190. Taisei did not provide evidence such as certificates of title, receipts, purchase invoices, bills of lading, insurance documents, customs records, inventory lists, asset registers, hire purchase or lease agreements, transportation documents and other relevant documents generated prior to 2 August 1990.

191. The Panel finds that Taisei did not submit sufficient evidence that it owned the tangible property and that such property was in Kuwait on 2 August 1990. Accordingly, the Panel recommends no compensation for loss of tangible property.

B. Payment or relief to others

1. Facts and contentions

192. Taisei seeks compensation in the amount of USD 47,306 for payment or relief to others arising out of the evacuation of one staff member from Kuwait and 24 staff members from Iraq.

(a) Evacuation from Kuwait

193. Taisei had one member of staff in Kuwait at the time of Iraq's invasion and occupation of Kuwait on 2 August 1990. The staff member managed to escape from Kuwait to his hometown, Cochin, India. The employee departed Kuwait for Baghdad on 2 September 1990, then travelled via Amman, Jordan, en route to Bombay, India. The employee arrived in India on 12 September 1990. Taisei asserted that it incurred costs relating to airfares, hotel costs in Amman and salary payments made to its employee from 2 August to 12 September 1990.

(b) Evacuation from Iraq

194. Taisei seeks compensation for the evacuation of its seven Japanese and 17 Filipino employees from Baghdad, Iraq. It also seeks compensation for the cost of two of its employees who were involved in organising the repatriation of its staff.

195. The Filipino employees were flown from Baghdad to Amman on 18 August 1990. They stayed in Amman from 18 August 1990 to 20 August 1990. On 2O August 1990 they were flown to Bahrain and then flew to Manila on 21 August 1990.

196. Taisei stated that a member of its head office staff left Japan for Amman on 17 August 1990 to arrange the hotel reservations for, and hand over airline tickets, to the Filipino employees. He stayed in Amman from 18 to 22 August 1990, when he then left Amman for London to discuss, with staff of the Taisei London office, the fate of the seven Japanese employees who were still in Baghdad. He stayed in London from 22 to 24 August 1990 whereupon he returned to Japan. Taisei seeks compensation for the costs of this employee's journey.

197. Another head office employee of Taisei left Japan for Amman on 11 October 1990 to "receive" the seven Japanese employees. He was in Amman from 12 to 15 October 1990, but the employees were not released so he departed Amman on 15 October 1990. Taisei seeks compensation for these costs.

198. On 7 November 1990, two of the Japanese employees departed Iraq for Japan on a flight arranged by the Government of Japan. The remainder of the employees departed Iraq for Bangkok on a flight arranged by the Government of Iraq, and from Bangkok to Japan on a flight arranged by the Government of Japan.

2. Analysis and valuation

199. Taisei submitted various documents and receipts relating to the costs of evacuating its employees.

200. In the article 34 notification, Taisei was asked to explain how the evacuation costs exceeded the costs that it would normally have incurred upon natural completion of its work in Iraq or Kuwait. In its response, Taisei stated that with respect to its employee in Kuwait, upon natural completion of the work, he would have taken a direct flight to India. It adds, "yet according to emergency situations there was no choice but to take a flight via Amman. Making the hotel fee and travel expense to Amman totally additional." The same explanation was given relating to the Filipino employees. According to Taisei, they would not have had to go via Amman, but would have been transported directly to Manila.

201. Taisei was requested in an article 34 notification to provide evidence of who was responsible for the costs of repatriating employees upon natural completion of the contract in Iraq or Kuwait. In its reply, Taisei indicated that the documentation was destroyed when the offices were ransacked. Accordingly, there were no contracts submitted to demonstrate who would have borne this responsibility.

202. The Panel finds that the evidence submitted by Taisei, relating to its evacuation of its employees from Kuwait and Iraq, demonstrated that the cost of travel of its staff members to Amman, Jordan, was a temporary and extraordinary expense and is therefore compensable. Taisei submitted evidence to establish its entitlement to the amount of USD 323. With respect to the cost of travel to India (including to Cochin) and to Manila, this has not been demonstrated by Taisei to be temporary and extraordinary expenses. Accordingly, the Panel recommends no compensation.

203. With respect to the asserted salary payments made to its employee in Kuwait, Taisei did not submit proof of payment of the salary. Accordingly, the Panel recommends no compensation.

204. With respect to the claim by Taisei relating to travel costs for head quarters staff in travelling to render assistance to employees in Kuwait and Iraq, the Panel finds that the costs were temporary and extraordinary and are therefore compensable in principle. Taisei submitted evidence which demonstrated its entitlement to USD 15,619.

3. Recommendation

205. The Panel recommends compensation in the amount of USD 15,942.

C. Financial losses

206. Taisei seeks compensation in the amount of 16,152 Kuwaiti dinars (“KWD”) (USD 55,889) for loss of cash in a safe in Kuwait. Taisei asserts that Iraq’s invasion and occupation of Kuwait and “robbery” caused by the Iraqi military forces resulted in its cash being stolen.

207. Taisei submitted photographs of a cash box and an extract from its cashbook as evidence to support its claim.

208. The Panel finds that Taisei did not produce sufficient evidence of the existence of the cash in the safe. The Panel also notes that Taisei’s employee, who was based in Kuwait at the time of the invasion, did not make mention of the cash in the safe in his statement. Accordingly, the Panel recommends no compensation.

D. Summary of recommended compensation for Taisei

209. Based on its findings regarding Taisei’s claim, the Panel recommends compensation in the amount of USD 15,942. The Panel finds the date of loss to be 2 August 1990.

XI. SUMITOMO CONSTRUCTION CO. LTD

210. Sumitomo Construction Co. Ltd. ("Sumitomo") is a limited liability company specialising in "design and execution for general civil engineering, construction works and prestressed concrete products". At the time of Iraq's invasion and occupation of Kuwait, Sumitomo was involved in building maintenance work for the ArabSat Satellite project, located about 30 kilometres from Baghdad. Sumitomo seeks compensation in the total amount of JPY 6,013,026 (USD 41,684) for loss of tangible property and payment or relief to others.

A. Loss of tangible property

211. Sumitomo seeks compensation in the amount of JPY 3,905,495 (USD 27,074) for loss of tangible property.

212. Sumitomo did not clearly state whether the assets in question were lost as a result of it evacuating its employees from Iraq or confiscation by the Iraqi authorities. It submitted a copy of a letter from the Iraqi General Establishment for Communications and Posts dated 23 December 1992, which lists a "monitor and printer" and a photocopying machine as having being "handed over". Sumitomo also submitted copies of letters relating to the "handing over" of a vehicle Toyota Number 8774 to the "FAO General Establishment Committee". The exact date of "hand over" is not clear. Two other vehicles, Toyota Number 8772 and Toyota Number 8771 were "handed over" on 7 December 1992 and 29 September 1992 respectively.

213. The Panel finds that the evidence submitted by Sumitomo establishes that the items in question were confiscated by Iraq. Applying the approach, that this Panel has developed, with respect to the confiscation of tangible property by the Iraqi authorities after the liberation of Kuwait set out in paragraph 146 of the Summary, the Panel recommends no compensation.

B. Payment or relief to others

1. Facts and contentions

214. Sumitomo seeks compensation in the amount of JPY 2,107,531 (USD 14,610) relating to the costs of evacuating its employees and, in certain cases, their families from Iraq. From the evidence submitted, it would appear that Sumitomo evacuated six employees plus the spouse and child of one of its employees, which resulted in a total number of eight evacuees. The claimed amount relates to air tickets, hotel charges, meals and airport taxes and the cost of bus transport from Baghdad to Amman.

215. The exact evacuation dates are unclear, but the submitted invoices and an affidavit from the General Manager of Sumitomo reflect that this is likely to have occurred between 16 and 23 August 1990. The affidavit of the General Manager also indicated that the Indian employees and two family

members were evacuated from Amman to India, while the Filipino employees travelled from Amman to the Philippines via Bangkok.

2. Analysis and valuation

216. Sumitomo provided copies of invoices for airline tickets, hotel invoices, invoices for taxes and visas.

217. In the article 34 notification, Sumitomo was asked to explain how the evacuation costs exceeded the costs that it would normally have incurred upon natural completion of work in Iraq. It stated that "[w]e find this item impossible to calculate".

218. Sumitomo was further requested in the article 34 notification to provide evidence of who was responsible for the costs of repatriating employees upon natural completion of the contract in Iraq. In its reply, Sumitomo indicated that the question was "[n]ot applicable to this claim". Sumitomo submitted no documents to demonstrate who would have borne this responsibility.

219. The Panel finds that it is only the costs relating to the travel to Amman, Jordan, which Sumitomo established as being temporary and extraordinary. Accordingly, the Panel recommends compensation of USD 1,634 for expenses proven by Sumitomo that it incurred relating to the cost of the Amman journey.

3. Recommendation

220. The Panel recommends USD 1,634 for payment or relief to others.

C. Summary of recommended compensation for Sumitomo

221. Based on its findings regarding Sumitomo's claim, the Panel recommends compensation in the amount of USD 1,634. The Panel finds the date of loss to be 2 August 1990.

XII. ABB HV SWITCHGEAR AB

222. ABB HV Switchgear AB ("ABB Switchgear") is a Swedish registered company which describes itself as a wholly owned subsidiary of Asea Brown Boveri AB, Sweden. ABB Switchgear seeks compensation for the total amount of 973,800 Swedish krona ("SEK") (USD 169,150) for payment or relief to others. It asserts that three of its employees were detained in Iraq for the period 2 August to 10 December 1990.

223. On 24 March 1999, ABB Switchgear was sent an article 15 notification requesting it to comply with the formal requirements for filing a claim. ABB Switchgear was requested to reply on or before 24 September 1999. ABB Switchgear did not submit a reply. On 4 October 1999, ABB was sent a formal article 15 notification. The deadline for ABB Switchgear to reply was 6 December 1999. ABB Switchgear did not reply to the formal article 15 notification.

224. On 29 September 1999, ABB Switchgear was sent an article 34 notification requesting it to furnish further evidence to develop its claim. ABB Switchgear was requested to reply on or before 29 December 1999. ABB Switchgear did not submit a reply. On 17 January 2000, ABB Switchgear was sent a reminder article 34 notification. The deadline for ABB Switchgear to reply was 31 January 2000. ABB Switchgear did not reply to the reminder article 34 notification.

225. The Panel finds that ABB Switchgear did not submit sufficient information or documentation to support its losses.

226. The Panel recommends no compensation.

XIII. HEALTH AND SCIENTIFIC CONSTRUCTION LIMITED

227. Health and Scientific Construction Limited ("HSC") is a United Kingdom registered limited liability entity. It was engaged in a building contract in Iraq at the Kadhimiya Teaching Hospital (Saddam College) in Baghdad at the time of Iraq's invasion of Kuwait.

228. HSC seeks compensation in the total amount of 134,648 Pounds sterling ("GBP")(USD 255,985) for loss of tangible property and payment or relief to others.

A. Loss of tangible property

1. Facts and contentions

229. HSC seeks compensation in the amount of GBP 8,730 (USD 16,597) for loss of tangible property. It was engaged in a building contract in Iraq at the Kadhimiya Teaching Hospital (Saddam College) in Baghdad. Under the contract, HSC was to supply modular operating theatres. The agreed price was GBP 730,678.

230. The contract was almost completed at the time of Iraq's invasion and occupation of Kuwait. HSC asserted its tangible property losses as "tools and equipment that could not be exported".

2. Analysis and valuation

231. In support of its claim, HSC submitted various faxes from HSC detailing items for temporary import, a shipping note for "Temporary Lifting Gear", a copy Order dated 31 May 1990 from Shanning International Limited, which was the main contractor, and a copy of a Lloyd's documentary extension of credit note.

232. Further details and evidence relating to the claimed loss were sought from HSC in an article 34 notification. This included evidence that each of the items claimed was located in Iraq as at 2 August 1990 and that the HSC continued to own each item at that time.

233. The only item where a link has been established with a confirming shipping note relates to the "temporary lifting gear". The Panel accordingly recommends compensation, taking into account depreciation, in the amount of GBP 2,380 (USD 4,525) relating to the "temporary lifting gear".

234. With respect to the balance of the claim relating to tangible property losses, HSC provided inadequate explanations linking its asserted property losses to the evidence submitted. It is therefore impossible to conclude, which, if any, of the items imported on a temporary basis relate to the loss of property claimed.

3. Recommendation

235. The Panel recommends compensation in the amount of USD 4,525 for tangible property losses.

B. Payment or relief to others

1. Facts and contentions

236. HSC seeks compensation in the amount of GBP 125,918 (USD 239,388) for payment or relief to others. HSC stated that four of its personnel were in Iraq and were due to return to the United Kingdom on 9 August 1990, but they were prevented from doing so by the Iraqi authorities.

237. The four personnel, according to HSC, stayed in the "Al Sadeer NOVOTEL Hotel" in Baghdad. The hotel bills were allegedly paid by Shanning International Limited, who was the main contractor. On 28 March 1991, Shanning International Limited invoiced HSC for the costs. HSC seeks compensation relating to its personnel as follows:

(a)	Personnel costs	
	Payments to 3 personnel on labour supply sub-contracts	GBP 19,563
	Remuneration for managing director	GPB 9,620
	Subsistence payments for hostages	GBP 2,116
	Expenses for employee seeking release of hostages (head office)	GBP 2,356
(b)	Loss of service of managing director	
	5 months at GBP 10,000 per month	GBP 50,000
(c)	Accommodation costs	
	Hotel costs in Baghdad	GBP 39,920
(d)	Cost of journey Iraq to UK for 3 personnel(via Rome)	GBP 1,391
	Cost of journey Iraq to UK for 1 personnel member (via Amman)	GBP 538
(e)	Telephone calls to hostages	GBP 414
	Total	GBP 125,918

2. Analysis and valuation

238. HSC submitted some invoices and receipts of the expenses incurred. It also submitted copies of bank documents, credit card receipts and correspondence with British Telecom. The Panel finds as follows relating to each item of HSC's claim:

(a) Personnel costs

239. The Panel finds that the claim relating to the payments made to the three personnel on labour supply sub-contracts is compensable in so far as it relates to the period of detention as HSC submitted sufficient evidence to demonstrate its loss. The Panel, however, recommends compensation in the amount of GBP 16,687 (USD 31,724), which excludes the amount claimed for the week ending 10 August 1990, as that portion of the claim is more appropriately considered to be a contract loss. There was insufficient evidence submitted relating to the period for the week ending 10 August 1990 for the Panel to recommend compensation.

240. With respect to the claim for the amount of GBP 9,620 relating to its Managing Director, HSC submitted a schedule of payments but this was not supported by any invoices or actual proof of payment. The Panel finds that the claims for subsistence payments for the four hostages and the cost of the head office employee were not supported by sufficient explanations and evidence as to the asserted losses. Accordingly, the Panel recommends no compensation for the managing director, subsistence payments and the head office employee's costs.

(b) Loss of service of managing director

241. HSC did not submit any evidence to substantiate the claim for loss of the services of the Managing Director. Accordingly, the Panel recommends no compensation.

(c) Accommodation costs in Baghdad

242. The Panel finds that the claim for the accommodation costs in Baghdad of GBP 39,920 is compensable in principle. HSC, however, did not submit proof of payment to Shanning International Limited. The Panel recommends no compensation.

(d) Airfares/evacuation costs

243. HSC did not submit an explanation as to how these costs were temporary and extraordinary costs. Accordingly, the Panel recommends no compensation for airfares/evacuation costs.

(e) Telephone costs

244. HSC submitted evidence of correspondence between itself and British Telecom which established that the calls were made to Iraq. The Panel recommends compensation in the amount of GBP 414 (USD 787).

3. Recommendation

245. The Panel recommends compensation in the amount of USD 32,511.

C. Summary of recommended compensation for HSC

246. Based on its findings regarding HSC's claim, the Panel recommends compensation in the amount of USD 37,036. The Panel finds the date of loss to be 2 August 1990.

XIV. BECHTEL GROUP INC.

247. Bechtel Group Inc. ("Bechtel") is a corporation incorporated under the laws of the United States of America. Bechtel stated that at the time of Iraq's invasion and occupation of Kuwait, its wholly owned subsidiaries were engaged in projects in Iraq and Saudi Arabia. Bechtel seeks compensation in the total amount of USD 1,280,184 for accident insurance premiums and insurance costs related to the evacuation of its employees. It also makes a claim for interest.

248. For the reasons stated in paragraph 58 of the Summary, the Panel makes no recommendation with respect to Bechtel's claim for interest.

A. Financial losses

1. Facts and contentions

(a) Personal accident insurance (Iraq)

249. Bechtel seeks compensation in the amount of USD 223,952 for personal accident insurance premiums relating to its employees in Iraq.

250. Bechtel stated that in March 1987, July 1988 and October 1989, Overseas Bechtel, Inc. and Bechtel Limited, both wholly owned subsidiaries of Bechtel, entered into agreements with the Ministry of Irrigation and the Ministry of Industry of the Government of Iraq for engineering, technical assistance and related services in connection with the Bekhme Dam Project and the PC-2 Project (Petrochemical Complex No. 2) respectively.

251. On 1 August 1990, Bechtel asserted that it had three male employees and the spouse of one of its employees located at the Bekhme Dam Project. Another employee and his wife and daughter had just arrived in Baghdad en route to the project site.

252. With respect to the PC-2 Project, Bechtel asserted that, on 1 August 1990, the staff based in Iraq totalled 101 individuals and were situated at three locations in Baghdad. No staff member had moved to the site as the campsite was incomplete. Bechtel stated that as a direct result of Iraq's invasion and occupation of Kuwait, work on both projects was stopped. Bechtel asserted that 101 of its employees in Iraq were denied exit visas and detained in Iraq.

253. The last of the employees to be evacuated from Iraq departed on 12 December 1990.

254. Bechtel claimed that it effected personal accident insurance cover relating to its personnel in Iraq. On 2 October 1990, Bechtel accepted a quotation for USD 250,000 for personal accident insurance for each of its, then, 93 employees in Iraq. On 5 October 1990, Bechtel increased the personal accident insurance by an additional USD 300,000 for each of the 91 employees then still in Iraq. The total personal accident cover effected

for each of its employees in Iraq was USD 550,000. On 29 November 1990, Bechtel reduced the insured amount to USD 300,000 per person.

(b) Personal accident insurance (Saudi Arabia)

255. Bechtel seeks compensation in the amount of USD 983,732 relating to its management decision on 5 October 1990 to provide personal accident insurance cover of USD 300,000 per person for its 272 employees based in Saudi Arabia. The decision, according to Bechtel, was based on the employees being "in a more hazardous situation than ever envisioned by the company". On 29 November 1990, Bechtel reduced the insured amount to USD 250,000 per person. The personal insurance cover in Saudi Arabia was extended on several occasions up to 26 March 1991.

(c) Evacuation insurance

256. Bechtel also seeks compensation in the amount of USD 72,500 for "contingent liability" relating to the costs for insurance cover for its personnel on five flights during the period 8 August to 5 September 1990. Bechtel stated that these flights were to "evacuate the company's employees and dependants who were not detained by Iraq and the company's dependants in Saudi Arabia".

2. Analysis and valuation

257. Bechtel asserted that the losses it claims were "suffered as a result of military operations during the period 2 August 1990 to 2 March 1991 or, alternatively, resulted from the 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".

(a) and (b) Personal accident insurance (Iraq and Saudi Arabia)

258. In its response to the article 34 notification, Bechtel stated, that it ". . . was morally obligated to provide additional personal accident coverage to employees that had been placed in a situation far more hazardous than ever expected. Bechtel is not aware of any US law or condition of its employment contracts which otherwise required Bechtel to obtain the additional personal accident insurance."

259. In a reply to an article 34 notification question, Bechtel indicated that prior to Iraq's invasion and occupation of Kuwait its employees elected on an individual basis whether to be covered or not in terms of personal accident insurance.

260. Bechtel submitted a listing of the projects in Saudi Arabia, the job numbers, and the number of workers employed. There is no explanation as to how the conditions relating to each project site in Saudi Arabia resulted in a credible and serious threat that was intimately connected to Iraq's invasion and occupation of Kuwait.

261. The Panel finds that, with respect to the cost of accident insurance premiums relating to Bechtel's employees in Iraq and Saudi Arabia, Bechtel did not demonstrate that such asserted expenses were direct losses arising out of Iraq's invasion and occupation of Kuwait. Accordingly, the Panel recommends no compensation for accident insurance premiums.

(c) Evacuation insurance

262. Bechtel was requested in the article 34 notification to state whether the cost of the flight insurance was "mandatory" in order to charter the flights. Bechtel, in its response, indicated that it "has not been able to locate information regarding whether it was mandatory to obtain the flight insurance in order to charter the flights."

263. Bechtel did not provide an accurate indication of what proportion of the passengers on the flights were not Bechtel's employees. It simply stated that "one or more of the flights chartered by Bechtel may have carried several employees of other companies performing work in Iraq or their dependants." There is an indication of the number of passengers on all except one of the flights. Bechtel, however, did not provide lists of passengers aboard the flights.

264. Bechtel did not provide an explanation or evidence explaining how each premium for the individual flights was calculated or the extent of the coverage for each of the flights.

265. The Panel finds that Bechtel did not submit sufficient evidence as to its asserted loss relating to evacuation insurance. Accordingly, the Panel recommends no compensation.

3. Recommendation

266. The Panel recommends no compensation for financial loss.

B. Summary of recommended compensation for Bechtel

267. Based on the Panel's findings regarding Bechtel's claim, the Panel recommends no compensation.

XV. HOWE-BAKER ENGINEERS, INC.

268. Howe-Baker Engineers, Inc. ("Howe-Baker") is a corporation organised and existing under the laws of the United States of America. It is involved in the business of consulting and contracting engineers.

269. Howe-Baker seeks compensation in the total amount of USD 215,699 for contract losses, loss of earnings and payment or relief to others. The Panel is of the view that elements of the claimed amount appear to relate to claims that are more appropriately classified as contract losses and loss of earnings. Where appropriate, the Panel has re-classified the relevant portions of the claim as such.

A. Contract losses

1. Facts and contentions

270. Howe-Baker seeks compensation for contract losses in the amount of USD 9,529.

271. A contract was entered into between State Engineering Company for Industrial Design and Construction ("SEIDACC") and Superior Air Products Division, Howe-Baker Engineers, Inc. ("the contract") to be located at Diala Governorate, Iraq. The contract is dated 4 June 1988 and had a lump sum price of USD 3,355,951. SEIDACC wanted to obtain a modularized Air Separation Unit, having the capacity to produce liquid argon. The process involves the separation of air into high purity oxygen and argon by low temperature distillation. Howe-Baker was to design, supply and provide technical advice during construction and commissioning of the plant.

272. Howe-Baker stated that its four employees were assigned to work on the portion of the contract related to "start up work for an Air Separation Plant". This work, according to Howe-Baker, began on 26 February 1990. Howe-Baker asserted that the amount outstanding related to losses incurred from 2 August 1990 to 2 March 1991 totalling USD 215,699.

273. Howe-Baker contended that its losses arose as a result of "non-payment of contractual obligations and illegal detention of US citizens". It submitted invoices relating to its claim, namely invoice numbers 29834, 29835 and 29836. The invoices appear to reflect a combination of claims for work performed, loss of earnings and payment or relief to others.

274. With respect to what appears to be the contract losses, Howe-Baker's assertion is that it had four technical service employees supervising job sites for the State Organisation for Industrial Design and Construction. This appears to be the same organisation referred to as SEIDACC. Howe-Baker asserted that from 6 August to 10 December 1990 these employees were supervising job sites. It also adds that three of them were held as "human shields" by the Iraqi authorities. In the affidavit submitted by one of the employees, there is no mention of "supervisory activities" after the

invasion and occupation of Kuwait. It is apparent from the affidavit that it was impossible for them to depart Iraq due to the activities of the Iraqi officials.

275. The unpaid invoices would, therefore, appear to relate to supervisory activity that occurred up to, at the latest, 6 August 1990. In a summary of its claim attached to the statement of claim, the asserted contract losses are stated for a period from 2 to 6 August 1990 and can be summarised as follows:

Table 3. Howe-Baker's claim for supervision for period 2 to 6 August 1990

Invoice no. 29834	5 days at USD 500 per day	USD 2,500
Invoice no. 29835	5 days at USD 500 per day	USD 2,500
Invoice no. 29836	5 days at USD 500 per day	USD 2,500
Total		7,500

Table 4. Howe-Baker's claim for expenses: Hotel, food, laundry and taxi for period 2 to August 1990

Invoice no. 29834	-
Invoice no. 29835	USD 472
Invoice no. 29836	USD 1,557
Total	2,029

276. Howe-Baker stated that the amounts claimed are in terms of a section of the contract that was "cost reimbursable for expenses and $500 a day for time." Section 6 of the contract stated that Howe-Baker shall:

> "...provide technical assistance during erection, commissioning and start up and test run at a per diem rate of 500 U.S. $ per day. The charges will commence on the day SUPAIRCO personnel leave SUPAIRCO's office in TYLER TEXAS with the maximum travel time two days each way. Travel cost, hotel, local subsistence for such service are to be paid by SEIDACC."

2. Analysis and valuation

277. The Panel finds that the contract was with Iraq and the work performed by Howe-Baker under the contract included in Howe-Baker's claim was performed after 2 May 1990. The claim is therefore within the jurisdiction of the Commission.

278. Howe-Baker submitted a copy of the contract. The Panel finds that the provisions of the contract relating to the daily rate for the services to be provided at USD 500 per day are evident from the relevant clause in the contract. Howe-Baker also submitted three invoices. The Panel finds that Howe-Baker submitted sufficient evidence as to its entitlement in the amount of USD 7,500 relating to services rendered for the period from 2 to 6 August 1990. With respect to the asserted losses relating to hotel, food, laundry and taxi for the period 2 to 6 August 1990, Howe-Baker did not submit the vouchers supporting these costs. Nor did it submit proof of payment of the alleged expenses. The Panel recommends no compensation for the asserted losses relating to hotel, food, laundry and taxi for the period 2 to 6 August 1990.

3. Recommendation

279. The Panel recommends compensation in the amount of USD 7,500.

B. Loss of earnings

1. Facts and contentions

280. Howe-Baker seeks compensation in the amount of USD 189,000 for loss of earnings. The claim for loss of earnings appears to be based on the inability of Howe-Baker's three employees to leave Iraq after Iraq's invasion and occupation of Kuwait. For each of its three employees who were detained in Iraq, Howe-Baker has sought payment relating to the period from 7 August to 10 December 1990 during which its employees were detained in Iraq.

281. Howe-Baker has based the claimed amount on section 6 of the contract with SEIDACC which stipulates a per diem of USD 500 per day. This amount, however, relates specifically to technical services that were to be provided by Howe-Baker. There do not appear to have been any technical services provided during the period from 7 August to 10 December 1990.

282. The claim is not based on the entirety of its contract with SEIDACC, but appears limited to that portion of the contract being undertaken by its three employees.

283. It is not clear when the employees were due to complete the technical services in terms of the contract. Howe-Baker states only that "[t]he job was nearing completion and these employees would have come home before

December 12, 1990. We are trying to recoup for the extra time they had to spend in Iraq due to the invasion."

284. The amounts claimed are calculated for a period of 126 days for each of the three employees and the total asserted loss of earnings amounts to USD 189,000.

2. Analysis and valuation

285. The Panel finds that Howe-Baker did have a contract in existence, which was disrupted by Iraq's invasion and occupation of Kuwait on 2 August 1990. It did not, however, indicate when the supervisory services were to cease apart from the assertion that the employees would return before 12 December 1990.

286. Howe-Baker provided no evidence of any other costs which it may have incurred in performing the contract, for example, the overhead costs of its head office, which may have affected the profitability of the contract as a whole.

287. Howe-Baker submitted Consolidated Financial Statements for Process Systems International for the years ending 31 December 1989, 1990 and 1991 to support its assertion relating to loss of earnings. It did not submit information directly linked to the project which would include: audited financial statements, budgets, management accounts, turnover, original bids, profit/loss statements, finance costs and head office costs prepared by or on behalf of Howe-Baker for each accounting period commencing in year 1 of the Project and continuing through March 1993.

288. The Panel recommends no compensation for loss of earnings as Howe-Baker did not submit sufficient evidence of its loss.

3. Recommendation

289. The Panel recommends no compensation for loss of earnings.

C. Payment or relief to others

1. Facts and contentions

290. Howe-Baker seeks compensation in the amount of USD 17,170 relating to the asserted illegal detention of three of its employees in Iraq by the Iraqi authorities. The three employees were engaged as technical supervisors with respect to the contract with SEIDACC. Two of the employees were American nationals and one was British. On 7 August 1990 the employees were advised by the United States embassy that American nationals should attempt to leave Iraq. The three employees, according to an affidavit of one of the employees, were denied permission to leave Iraq as the authorities refused to grant them exit visas. It appears as though sanctuary was offered at the United States Embassy from about 19 August 1990 and the American nationals appear to have moved into the Embassy.

This was in order to avoid being “picked up” by the Iraqi authorities. The British national chose to remain in his hotel.

291. According to the affidavit of one of the employees, “the local bank accounts were frozen. The balance in the bank was approximately 13,000ID. We had approximately 2500ID in cash. The cost of living in the Residency was approximately 1000ID per month.” The two American nationals were released on 10 December 1990 and flew to Frankfurt. On 11 December 1990, they flew to the United States from Frankfurt. The British national flew to London from Iraq on 11 December 1990.

2. Analysis and valuation

292. The following information about each employee was submitted by Howe-Baker: family name, first name, and passport number with issuing country for only one employee. Copies of Howe-Baker’s payroll records for the employees for the period relevant to the claim (both before and after 2 August 1990) were not provided nor were the Iraqi residency permit numbers for the employees submitted.

293. The evidence of the loss submitted consists of an attachment, an affidavit from one of Howe-Baker’s employees and three invoice numbers, 29834, 29835 and 29836. These invoices list the expenses relating to airfares, hotel, food, taxi and miscellaneous items for the period 7 August 1990 to 10 December 1990. There are no supporting vouchers detailing the expenses listed on the invoices. Further, Howe-Baker did not submit proof of having incurred these costs by way of receipts for payment, for example.

294. The Panel recommends no compensation for payment or relief to others as Howe-Baker did not submit sufficient evidence that it paid for these costs.

3. Recommendation

295. The Panel recommends no compensation for payment or relief to others.

D. Summary of recommended compensation for Howe-Baker

296. Based on its findings regarding Howe-Baker’s claim, the panel recommends compensation in the amount of USD 7,500. The Panel finds the date of loss to be 2 August 1990.

XVI. ITEK OPTICAL SYSTEMS DIVISIONS

297. Itek Optical Systems Divisions ("Itek"), a division of Litton Systems, Inc., is a corporation organised and existing under the laws of the United States of America. Itek undertakes the research, development, design and manufacture of electric equipment. Itek seeks compensation in the total amount of USD 98,972 for payment or relief to others.

A. Payment or relief to others

1. Facts and contentions

298. Itek seeks compensation in the gross amount of USD 173,089 for payment or relief to others in relation to the detention of three of its employees by the Iraqi authorities. It has offset against this, the amount of compensation that it received relating to an insurance policy recovery totalling USD 74,116. This results in a net claim to the Commission of USD 98,972.

299. Itek stated that its three employees were in Kuwait at the invitation of the Kuwait Airforce. The trip was a business development visit. The employees arrived in Kuwait on 31 July 1990. On 1 August 1990 they had a meeting with the Kuwait Airforce. They were scheduled to meet with the commander of the Kuwait Airforce on 2 August 1990.

300. Iraqi military authorities detained the employees on 4 August 1990. The employees were transported to Iraq and held at various institutions as "human shields". One of the employees was released on 10 September 1990, the second was released on 10 December 1990 and the third employee was released on 11 December 1990. Two of the employees were unable to resume work until 2 January 1991 due to the "ill effects of their detention and mistreatment by the Government of Iraq".

301. Itek's claim consists of three items as follows:

(a) Compensation to detained employees during detention and recovery

302. Itek seeks compensation for USD 88,851 relating to asserted compensation paid to its three employees. The amounts paid were salary payments during the period of detention of the employees, and during the period when they were "recovering" and unable to work upon their release from detention.

(b) Reimbursement to detained employees for loss of personal possessions

303. Itek stated that upon the detention of its employees by the Iraqi authorities they had to abandon their personal possessions in Kuwait. It asserted that it compensated its employees for the loss of their personal possessions. Itek seeks compensation in the amount of USD 7,042.

(c) Hardship allowance

304. Itek seeks compensation in the amount of USD 77,196 which it asserted it paid to its three employees. This amount was paid, Itek asserted, in order to "compensate them for the stress, hardship and separation from their families which they incurred while travelling on Claimant's business."

(d) Insurance compensation received

305. Itek stated that it filed a claim with its insurer, the National Union Fire Insurance Company Unit of American International Underwriters ("AIU"), in connection with the losses, which are the subject of this claim. Itek acknowledged receiving a payment from AIU on its claim in the amount of USD 74,117. The amount has been deducted from the total claim that Itek submitted to the Commission. Itek claimed for compensation from AIU in terms of a Corporate Kidnap and Ransom/Extortion Insurance Policy number 80-160278 issued by AIU. The Release form signed by Itek (in about July 1991 as the exact date is not clear from the copy attached) comprised the following amounts:

Payroll expenses	USD 77,196.08
Less deductible	USD (3,079.44)
Total received	USD 74,116.64

2. Analysis and valuation

306. The compensation by AIU appears to be confined to the payroll expenses for the period that the employees were held hostage. It does not include the asserted losses to the employees' possessions, payments made during the "recovery" or the "hardship allowance". Itek did not submit an explanation for the amounts deducted from the release. It merely refers to them as "deductibles under the policy".

307. Itek deducted the amount paid in compensation by AIU from the entire claimed amount submitted. It is the view of the Panel that the amount from AIU should be deducted from the cost of the salaries paid to the employees only. The net result would be that, in the absence of an explanation relating to the amount of USD 3,079 deducted from the policy, Itek has been fully compensated for that particular loss element.

(a) Compensation to detained employees during detention and recovery

308. The Panel recommends that, in line with its previous decisions, only salary costs up to the final date of departure of Itek employees should be compensable. Given that the salary costs have been compensated already by insurance payouts, the Panel recommends no compensation for losses relating to salary. In the absence of an explanation relating to the nature of the amount of USD 3,079 deducted from the insurance payout, the Panel recommends no compensation for that amount.

(b) Reimbursement to detained employees for loss of personal possessions

309. Itek submitted copies of its internal requests for cheque disbursements in favour of its three employees along with receipts relating to items purchased. The Panel finds that Itek submitted evidence entitling it to compensation in the amount of USD 7,042.

(c) Hardship allowance

310. Itek provided the following information about each employee: family name, first name, employee identification number and passport number with issuing country. Itek submitted two copies of payroll records relating to January 1991 only and relating to two of its employees. It did not submit proof of payment, apart from an Internal Memorandum of Itek dated 2 June 1991 summarising expenses incurred on employees.

311. Itek did not establish how the losses arose directly as a result of Iraq's invasion and occupation of Kuwait. The Panel accordingly recommends no compensation for the hardship allowance paid to the employees.

3. Recommendation

312. The Panel recommends compensation of USD 7,042 for payment or relief to others.

B. Summary of recommended compensation for Itek

313. Based on its findings regarding Itek's claim, the panel recommends compensation in the amount of USD 7,042. The Panel finds the date of loss to be 2 August 1990.

XVII. ENERGOPROJEKT BUILDING AND GENERAL CONTRACTING COMPANY LIMITED

314. Energoprojekt Building and General Contracting Company Limited ("Energoprojekt") is a joint stock company incorporated according to the laws of the Republic of Yugoslavia. Energoprojekt is a provider of construction and engineering services and was involved in various projects in Iraq. Energoprojekt seeks compensation for asserted losses relating to contract, tangible property and interest totalling USD 3,137,264.

315. The interest element is in the amount of USD 748,264. For the reasons stated in paragraph 58 of the Summary, the Panel makes no recommendation with respect to Energoprojekt's claim for interest.

A. Contract losses

1. Facts and contentions

316. Energoprojekt seeks compensation in the amount of USD 1,157,556 for contract losses. The claim is for outstanding interim payment certificates and unpaid retention monies in respect of the restoration and maintenance of the Old Head Office Building of the Central Bank of Iraq in Baghdad. On 22 October 1988, Energoprojekt entered into a lump sum contract with the Central Bank of Iraq ("the employer") for civil engineering works relating to the restoration and maintenance of the Old Head Office Building of the Central Bank of Iraq in Baghdad. The contract price was a lump sum amount of IQD 1,809,000 "plus ID 91,000 contingencies". Under the contract, Energoprojekt had 365 days to "complete and hand over the works."

317. Energoprojekt commenced the maintenance and restoration work on 31 December 1988. The initial stage involved dismantling work with respect to the ceiling, doors, partitioning, flooring, electrical works and plumbing. This aspect of the work took about 2.5 months to complete.

318. The next stage of the project involved the works on the building structure itself. This included work on the plumbing, electrical, ceilings, partitioning, doors, windows, and flooring. The works were completed on 16 June 1990 and the maintenance period commenced on 1 July 1990. In terms of the contract, the maintenance period was to last one year and therefore was due to expire on 30 June 1991. Energoprojekt asserted that the employer required it to rectify the works in accordance with the "snag list" supplied by the Resident Engineer.

319. Energoprojekt stated that, notwithstanding Iraq's invasion and occupation of Kuwait on 2 August 1990, it continued to maintain a presence on the site and to remedy the defects on the "snag list". Energoprojekt indicated that it was unable to complete the "snag list" in full as it was unable to import materials. In a letter to the employer dated 17 August 1990, Energoprojekt outlined the difficulty with sourcing material and manpower. It also indicated that, due to the circumstances prevailing in Iraq, it was also sending a number of its workers "for a short holiday".

By 22 August 1990, Energoprojekt indicated that it had only 25 per cent of its personnel on site. The remainder of its expatriate staff were evacuated by 14 January 1991. Further work to complete the project became impossible. Energoprojekt asserted that it had completed 50 per cent of the items on the "snag list".

320. Energoprojekt stated that it seeks compensation in terms of its "draft final account". It appears that the claim is for unpaid contractual amounts that were included in Energoprojekt's draft final account.

2. Analysis and valuation

321. The Panel finds that the Central Bank of Iraq is an Iraqi state agency.

322. The first element of the loss is with respect to outstanding interim payment certificates. Energoprojekt submitted the following interim payment certificates:

(a) Interim Certificate number 15, dated 26 April 1990 and relating to work performed during the period ending March 1990;

(b) Interim Certificate number 16 dated 24 May 1990 and relating to work performed during the period ending April 1990;

(c) Interim Certificate number 17, dated 20 June 1990 and relating to work performed during the period ending May 1990; and

(d) Interim Certificate number 18, dated 9 July 1990 and relating to work performed during the period ending June 1990.

323. The Panel finds that the work, with respect to Interim Payment Certificates Numbers 15 and 16, relate to work performed during the periods ending March 1990 and April 1990 respectively and accordingly relate to performances which are outside the jurisdiction of the Commission.

324. Interim Payment Certificates Numbers 17 and 18 refer to work performed during the period ending May 1990 and June 1990 respectively. As the performance took place after 2 May 1990, the amounts claimed are within the jurisdiction of the Commission. The Panel finds that Energoprojekt submitted evidence which demonstrates that it is entitled to payment of USD 170,000.

325. Energoprojekt asserted losses relating to the non-release of the retention monies in the amount of IQD 95,000 (USD 304,844). According to the contract, it would have been entitled to 50 per cent of the retention payments made under the interim certificates upon the commencement of the maintenance period. The balance of 50 per cent would have been released upon the issue of the final maintenance certificate.

326. This Panel discusses the issue of unpaid retention amounts in paragraphs 78 to 84 of the Summary. The Panel finds that the evidence submitted by Energoprojekt demonstrated that the project would have reached a conclusion, but there were a number of "snags" to complete prior to completion. This would have necessitated Energoprojekt incurring some costs in order to complete the project. In accordance with the approach previously taken by the Panel, the Panel determines that Energoprojekt would have been entitled to payment of a retention amount of IQD 71,500 (USD 229,904) and recommends compensation in this amount.

3. Recommendation

327. The Panel recommends compensation of USD 399,904 for contract loss.

B. Loss of tangible property

328. Energoprojekt seeks compensation in the amount of USD 1,231,444 for loss of tangible property. It stated that it had set up a temporary camp at Al Shaab to accommodate its personnel working on the project with the Central Bank of Iraq. Energoprojekt asserted that, on 11 May 1992, the Al Fao State Organisation requested Energoprojekt to produce an inventory of the moveable items on site. Energoprojekt stated that it produced an inventory, which was signed by three of its representatives and one of the representatives of the Government of Iraq.

329. Energoprojekt stated that the "camp was confiscated by the Al Fao State Organisation by an administrative Order promulgated in or about May 1992".

330. Applying the approach taken with respect to the confiscation of tangible property by the Iraqi authorities after the liberation of Kuwait set out in paragraph 146 of the Summary, the Panel recommends no compensation.

C. Summary of recommended compensation for Energoprojekt

331. Based on its findings regarding Energoprojekt's claim, the Panel recommends compensation in the amount of USD 399,904. The Panel finds the date of loss to be 2 August 1990.

XVIII. SUMMARY OF RECOMMENDED COMPENSATION BY CLAIMANT

Table 5. Recommended compensation for the fifteenth instalment

Claimant	Claim amount (USD)	Recommended Compensation (USD)
Lenzing Aktiengesellschaft	6,522,682	nil
Koncar Elektroindustrija d.d.	8,440,131	nil
Stadler & Schaaf OHG	20,055	nil
Krupp Industrietechnik GmbH	92,771	27,916
Unitech Limited	25,000	nil
Icomsa Engineering Costruzioni e Impianti S.p.A.	6,592,022	nil
Pacific Consultants International	15,306	nil
Kajima Corporation	46,742	nil
Taisei Corporation	107,362	15,942
Sumitomo Construction Co. Ltd	41,684	1,634
ABB HV Switchgear AB	169,150	nil
Health and Scientific Construction Limited	255,985	37,036
Bechtel Group, Inc.	1,280,184	nil
Howe-Baker Engineers Inc	215,699	7,500
Itek Optical Systems Division	98,972	7,042
Energoprojekt Building and General Contracting Company Limited	3,137,264	399,904

Geneva, 21 June 2000

(Signed) Pierre Genton
Commissioner

(Signed) Vinayak Pradhan
Commissioner

(Signed) John Tackaberry
Chairman

Annex I

SUMMARY OF GENERAL PROPOSITIONS

CONTENTS

Introduction

1. In the Report and Recommendations Made by the Panel of Commissioners Concerning the Fourth Instalment of "E3" Claims (S/AC.26/1999/14) (the "Fourth Report"), this Panel set out some general propositions based on those claims which had come before it and the findings of other panels of Commissioners contained in their reports and recommendations. Those propositions, as well as some observations specific to the claims in the fourth instalment of "E3" claims, are to be found in the introduction to the Fourth Report (the "Preamble").

2. The Fourth Report was approved by the Governing Council in its decision 74 (S/AC.26/Dec.74 (1999)); and the claims that this Panel has subsequently encountered continue to manifest the same or similar issues. Accordingly, the Panel has revised the Preamble, so as to delete the specific comments, and thus present this Summary of General Propositions (the "Summary"). The Summary is intended to be annexed to, and to form part of, the reports and recommendations made by this Panel. The Summary should facilitate the drafting, and reduce the size, of this Panel's future reports, since it will not be necessary to set matters out in extenso in the body of each report.

3. As further issues are resolved, they may be added at the end of future editions of this Summary.

4. In this Summary, the Panel wishes to record:

(a) the procedure involved in evaluating the claims put before it and in formulating recommendations for the consideration of the Governing Council; and

(b) its analyses of the recurrent substantive issues that arise in claims before the Commission relating to construction and engineering contracts.

5. In deciding to draft this Summary in a format which was separated out from the actual recommendations in the report itself, and in a way that was re-usable, the Panel was motivated by a number of matters. One was the desire to keep the substantive element of its reports to a manageable length. As the number of reports generated by the various panels increases, there seems to be a good deal to be said for what might be called economies of scale. Another matter was the awareness of the Panel of the high costs involved in translating official documents from their original language into each official language of the United Nations. The Panel is concerned to avoid the heavy costs of re-translation of recurrent texts, where the Panel is applying established principles to fresh claims. That re-translation would occur if the reasoning set out in this Summary had been incorporated into the principal text of each report at each relevant point. And, of course, that very repetition of principles seems

unnecessary in itself, and this Summary avoids it. In sum, it is the intention of the Panel to shorten those reports and recommendations, wherever possible, and thereby to reduce the cost of translating them.

I. THE PROCEDURE

A. Summary of the process

6. Each of the claimants whose claims are presented to this Panel is given the opportunity to provide the Panel with information and documentation concerning the claims. In its review of the claims, the Panel considers evidence from the claimants and the responses of Governments to the reports of the Executive Secretary issued pursuant to article 16 of the Provisional Rules for Claims Procedure (S/AC.26/1992/10) (the "Rules"). The Panel has retained consultants with expertise in valuation and in construction and engineering. The Panel has taken note of certain findings by other panels, approved by the Governing Council, regarding the interpretation of relevant Security Council resolutions and Governing Council decisions. The Panel is mindful of its function to provide an element of due process in the review of claims filed with the Commission. Finally, the Panel expounds in this Summary both procedural and substantive aspects of the process of formulating recommendations in its consideration of the individual claims.

B. The nature and purpose of the proceedings

7. The status and functions of the Commission 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).

8. The Panel is entrusted with three tasks in its 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, i.e., whether the losses were caused directly by Iraq's invasion and occupation of Kuwait. Second, the Panel has to verify whether the alleged losses that are in principle compensable have 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, and if not, the appropriate quantum for the loss based on the evidence before the Panel.

9. In fulfilling these tasks, the Panel considers that the vast number of claims before the Commission and the time limits in the Rules necessitate the use of an approach which is itself unique, but the principal characteristics of which are rooted in generally accepted procedures for claim determination, both domestic and international. It involves the employment of well established general legal standards of proof and valuation methods that have much experience behind them. The resultant process is essentially documentary rather than oral, and inquisitorial rather than adversarial. This method both realises and balances the twin

objectives of speed and accuracy. It also permits the efficient resolution of the thousands of claims filed by corporations with the Commission.

C. The procedural history of the "E3" Claims

10. The claims submitted to the Panel are selected by the secretariat of the Commission from among the construction and engineering claims (the ""E3" Claims") on the basis of established criteria. These include the date of filing and compliance by claimants with the requirements established for claims submitted by corporations and other legal entities (the "category "E" claims").

11. Prior to presenting each instalment of claims to the Panel, the secretariat performs a preliminary assessment of each claim included in a particular instalment in order to determine whether the claim meets the formal requirements established by the Governing Council in article 14 of the Rules.

12. Article 14 of the Rules sets forth the formal requirements for claims submitted by corporations and other legal entities. These claimants must submit:

(a) an "E" claim form with four copies in English or with an English translation;

(b) evidence of the amount, type and causes of losses;

(c) an affirmation by the Government that, to the best of its knowledge, the claimant is incorporated in or organized under the law of the Government submitting the claim;

(d) documents evidencing the name, address and place of incorporation or organization of the claimant;

(e) evidence that the claimant was, on the date on which the claim arose, incorporated or organized under the law of the Government which has submitted the claim;

(f) a general description of the legal structure of the claimant; and

(g) an affirmation by the authorized official for the claimant that the information contained in the claim is correct.

13. Additionally, the "E" claim form requires that a claimant submit with its claim a separate statement in English explaining its claim ("Statement of Claim"), supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and the amount of the claimed losses. The following particulars are requested in the "INSTRUCTIONS FOR CLAIMANTS":

(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; and

(d) the amount of compensation sought and an explanation of how the amount was calculated.

14. If it is determined that a claim does not provide these particulars or does not include a Statement of Claim, the claimant is notified of the deficiencies and invited to provide the necessary information pursuant to article 15 of the Rules (the "article 15 notification"). If a claimant fails to respond to that notification, the claimant is sent a formal article 15 notification.

15. Further, a review of the legal and evidentiary basis of each claim identifies specific questions as to the evidentiary support for the alleged losses. It also highlights areas of the claim in which further information or documentation is required. Consequently, questions and requests for additional documentation are transmitted to the claimants pursuant to article 34 of the Rules (the "article 34 notification"). If a claimant fails to respond to the article 34 notification, a reminder notification is sent to the claimant. Upon receipt of the responses and additional documentation, a detailed factual and legal analysis of each claim is conducted. Communications with claimants are made through their respective governments.

16. It is the experience of the Panel in the claims reviewed by it to date that this analysis usually brings to light the fact that many claimants lodge little material of a genuinely probative nature when they initially file their claims. It also appears that many claimants do not retain clearly relevant documentation and are unable to provide it when asked for it. Indeed, some claimants destroy documents in the course of a normal administrative process without distinguishing between documents with no long term purpose and documents necessary to support the claims that they have put forward. Some claimants carry this to the extreme of having to ask the Commission, when responding to an article 15 or an article 34 notification, for a copy of their own claim. Finally, some claimants do not respond to requests for further information and evidence. The consequence is inevitably that for a large number of loss elements and a smaller number of claimants the Panel is unable to recommend any compensation.

17. The Panel performs a thorough and detailed factual and legal review of the claims. The Panel assumes an investigative role that goes beyond reliance merely on information and argument supplied with the claims as presented. After a review of the relevant information and documentation, the Panel makes initial determinations as to the compensability of the loss

elements of each claim. Next, reports on each of the claims are prepared focusing on the appropriate valuation of each of the compensable losses, and on the question of whether the evidence produced by the claimant is sufficient in accordance with article 35(3) of the Rules.

18. The cumulative effect is one of the following recommendations: (a) compensation for the loss in the full amount claimed; (b) compensation for the loss in a lower amount than that claimed; or (c) no compensation.

II. PROCEDURAL ISSUES

A. Panel recommendations

19. Once a motivated recommendation of a panel is adopted by a decision of the Governing Council, it is something to which this Panel gives great weight.

20. All panel recommendations are supported by a full analysis. When a new claim is presented to this Panel it may happen that the new claim will manifest the same characteristics as the previous claim which has been presented to a prior panel. In that event, this Panel will follow the principle developed by the prior panel. Of course, there may still be differences inherent in the two claims at the level of proof of causation or quantum. Nonetheless the principle will be the same.

21. Alternatively, that second claim will manifest different characteristics to the first claim. In that event, those different characteristics may give rise to a different issue of principle and thus warrant a different conclusion by this Panel to that of the previous panel.

B. Evidence of loss

22. 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 stated 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 to justify a recommendation for compensation (S/AC.26/1992/15).

23. The Panel takes this opportunity to emphasise that what is required of a claimant by article 35(3) of the Rules is the presentation to the Commission of evidence that must go to both causation and quantum. The Panel’s interpretation of what is appropriate and sufficient evidence will vary according to the nature of the claim. In implementing this approach, the Panel applies the relevant principles extracted from those within the corpus of principles referred to in article 31 of the Rules.

1. Sufficiency of evidence

24. In the final outcome, claims that are not supported by sufficient and appropriate evidence fail. In the context of the construction and engineering claims that are before this Panel, the most important evidence is documentary. It is in this context that the Panel records a syndrome which it found striking when it addressed the first claims presented to it and which has continued to manifest itself in the claims subsequently encountered. This was the reluctance of claimants to make critical documentation available to the Panel.

25. Imperatively, the express wording of decision 46 of the Governing Council requires that "... claims received in categories 'D', 'E', and 'F' must be supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and amount of the claimed loss ..." In this same decision, the Governing Council confirmed that "... no loss shall be compensated by the Commission solely on the basis of an explanatory statement provided by the claimant,..." (S/AC.26/Dec.46(1998)).

26. It is also the case that the Panel has power under the Rules to request additional information and, in unusually large or complex cases, further written submissions. Such requests usually take the form of procedural orders. Where such orders are issued, considerable emphasis is placed on this need for sufficient documentary and other appropriate evidence.

27. Thus there is an obligation to provide the relevant documentary evidence both on the first filing of a claim and on any subsequent steps.

28. What is more, the absence of any relevant contemporary record to support a particular claim means that the claimant is inviting the Panel to make an award, often of millions of dollars, on no foundation other than the assertion of the claimant. This would not satisfy the "sufficient evidence" rule in article 35(3) of the Rules and would go against the instruction of the Governing Council contained in decision 46. It is something that the Panel is unable to do.

2. Sufficiency under article 35(3): The obligation of disclosure

29. Next in the context of documentary evidence, this Panel wishes to highlight an important aspect of the rule that claims must be supported by sufficient documentary and other appropriate evidence. This involves bringing to the attention of the Commission all material aspects of the claim, whether such aspects are seen by the claimant as beneficial to, or reductive of, its claims. The obligation is not dissimilar to good faith requirements under domestic jurisdictions.

3. Missing documents: The nature and adequacy of the paper trail

30. The Panel now turns to the question of what is required in order to establish an adequate paper trail.

31. Where documents cannot be supplied, their absence must be explained in a credible manner. The explanation must itself be supported by the appropriate evidence. Claimants may also supply substitute documentation for or information about the missing documents. Claimants must remember that the mere fact that they suffered a loss at the same time as the hostilities in the Persian Gulf were starting or were in process does not mean that the loss was directly caused by Iraq's invasion and occupation of Kuwait. A causative link must be established. It should also be borne in mind that it was not the intention of the Security Council in its resolutions to provide a "new for old" basis of reimbursement of the losses suffered in respect of tangible property. Capital goods depreciate. That depreciation must be taken into account and demonstrated in the evidence filed with the Commission. In sum, in order for evidence to be considered appropriate and sufficient to demonstrate a loss, the Panel expects claimants to present to the Commission a coherent, logical and sufficiently evidenced file leading to the financial claims that they are making.

32. Of course, the Panel recognises that in time of civil disturbances, the quality of proof may fall below that which would be submitted in a peace time situation. Persons who are fleeing for their lives do not stop to collect the audit records. Allowances have to be made for such vicissitudes.

33. Thus the Panel is not surprised that some of the claimants in the instalments presented to it to date seek to explain the lack of documentation by asserting that it is, or was, located in areas of civil disorder or has been lost or destroyed, or, at least, cannot be accessed. But the fact that offices on the ground in the region have been looted or destroyed would not explain why claimants have not produced any of the documentary records that would reasonably be expected to be found at claimants' head offices situated in other countries.

34. The Panel approaches the claims presented to it in the light of the general and specific requirements to produce documents noted above. Where there is a lack of documentation, combined with no or no adequate explanation for that lack, and an absence of alternative evidence to make good any part of that lack, the Panel has no opportunity or basis upon which to make a recommendation.

C. Amending claims after filing

35. In the course of processing the claims after they have been filed with the Commission, further information is sought from the claimants pursuant to the Rules. When the claimants respond they sometimes seek to use the opportunity to amend their claims. For example, they add new loss

elements. They increase the amount originally sought in respect of a particular loss element. They transfer monies between or otherwise adjust the calculation of two or more loss elements. In some cases, they do all of these.

36. The Panel notes that the period for filing category "E" claims expired on 1 January 1996. The Governing Council approved a mechanism for these claimants to file unsolicited supplements until 11 May 1998. After that date a response to an inquiry for additional evidence is not an opportunity for a claimant to increase the quantum of a loss element or elements or to seek to recover in respect of new loss elements. In these circumstances, the Panel is unable to take into account such increases or such new loss elements when it is formulating its recommendations to the Governing Council. It does, however, take into account additional documentation where that is relevant to the original claim, either in principle or in detail. It also exercises its inherent powers to re-characterise a loss, which is properly submitted as to time, but is inappropriately allocated.

37. Some claimants also file unsolicited submissions. These too sometimes seek to increase the original claim in the ways indicated in the previous paragraph. Such submissions when received after 11 May 1998 are to be treated in the same way as amendments put forward in solicited supplements. Accordingly the Panel is unable to, and does not, take into account such amendments when it is formulating its recommendations to the Governing Council.

III. SUBSTANTIVE ISSUES

A. Applicable law

38. As set forth in paragraphs 17 and 18 of the Fourth Report, paragraph 16 of Security Council resolution 687 (1991) reaffirmed the liability of Iraq and defined the jurisdiction of the Commission. Pursuant to article 31 of the Rules, the Panel applies Security Council resolution 687 (1991), other relevant Security Council resolutions, decisions of the Governing Council, and, where necessary, other relevant rules of international law.

B. Liability of Iraq

39. When adopting resolution 687 (1991), the Security Council acted under chapter VII of the Charter of the United Nations which provides for maintenance or restoration of 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). Specifically, under resolution 687 (1991), the issue of Iraq's liability for losses falling within the Commission's jurisdiction is resolved and is not subject to review by the Panel.

40. In this context, it is necessary to address the meaning of the term "Iraq". In Governing Council decision 9 (S/AC.26/1992/9) and other Governing Council decisions, the word "Iraq" was used to mean the Government of Iraq, its political subdivisions, or any agency, ministry, instrumentality or entity (notably public sector enterprises) controlled by the Government of Iraq. In the Report and Recommendations Made by the Panel of Commissioners Concerning the Fifth Instalment of "E3" Claims (the "Fifth Report", S/AC.26/1999/2), this Panel adopted the presumption that for contracts performed in Iraq, the other contracting party was an Iraqi Government entity.

C. The "arising prior to" clause

41. The Panel recognises 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 in paragraph 16 of Security Council resolution 687 (1991), the Panel of Commissioners that reviewed the first instalment of "E2" claims concluded that the "arising prior to" clause was intended to exclude the foreign debt of Iraq which existed at the time of Iraq's invasion of Kuwait from the jurisdiction of 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." (Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of "E2" Claims, S/AC.26/1998/7, paragraph 90)).

42. That report was approved by the Governing Council. Accordingly, this Panel adopts the "E2" Panel's interpretation which is to the following effect:

(a) the phrase "without prejudice to the debts and obligations of Iraq arising prior to 2 August 1990, which will be addressed through normal mechanisms" was intended to have an exclusionary effect on the Commission's jurisdiction, i.e., such debts and obligations are not compensable by the Commission;

(b) the limitation contained in the clause "arising prior to 2 August 1990" was intended to leave unaffected the debts and obligations of Iraq which existed prior to Iraq's invasion and occupation of Kuwait; and

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

43. Thus, this Panel accepts that, in general, a claim relating to a "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.

D. Application of the "direct loss" requirement

44. Paragraph 21 of Governing Council decision 7 (S/AC.26/1991/7/Rev.1) is the seminal rule on "directness" for category "E" claims. It provides in relevant part that compensation is available for:

> "... 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."

45. The text of paragraph 21 of decision 7 is not exhaustive and leaves open the possibility that there may be causes of "direct loss" other than those enumerated. Paragraph 6 of decision 15 of the Governing Council (S/AC.26/1992/15) 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 to prove specifically that a loss that was not suffered as a result of one of the five categories of events set out in paragraph 21 of decision 7 is nevertheless "direct". Paragraph 3 of decision 15 emphasises that for any alleged loss or damage to be compensable, the "causal link must be direct". (See also paragraph 9 of decision 9).

46. While the phrase "as a result of" contained in paragraph 21 of decision 7 is not further clarified, Governing Council decision 9 provides guidance as to what may be considered business "losses suffered as a result of" Iraq's invasion and occupation of Kuwait. It identifies the three main categories of loss types in the "E" claims: losses in connection with contracts, losses relating to tangible assets and losses relating to income-producing properties. Thus, decisions 7 and 9 provide specific

guidance to the Panel as to how the "direct loss" requirement must be interpreted.

47. In the light of the decisions of the Governing Council identified above, the Panel has reached certain conclusions as to the meaning of "direct loss". These conclusions are set out in the following paragraphs.

48. With respect to physical assets in Iraq or in Kuwait as at 2 August 1990, a claimant can prove a direct loss by demonstrating two matters. First, that the breakdown in civil order in these countries, which resulted from Iraq's invasion and occupation of Kuwait, caused the claimant to evacuate its employees. Second, as set forth in paragraph 13 of decision 9, that the claimant left physical assets in Iraq or in Kuwait.

49. With respect to losses relating to contracts to which Iraq was a party, force majeure or similar legal principles are not available as a defence to the obligations of Iraq.

50. With respect to losses relating to contracts to which Iraq was not a party, a claimant may prove a direct loss if it can establish that Iraq's invasion and occupation of Kuwait or the breakdown in civil order in Iraq or Kuwait following Iraq's invasion caused the claimant to evacuate the personnel needed to perform the contract.

51. In the context of the losses set out above, reasonable costs which have been incurred to mitigate those losses are direct losses. The Panel bears in mind that the claimant was under a duty to mitigate any losses that could have been reasonably avoided after the evacuation of its personnel from Iraq or Kuwait.

52. These findings regarding the meaning of "direct loss" are not intended to resolve every issue that may arise with respect to this Panel's interpretation of Governing Council decisions 7 and 9. Rather, these findings are intended as initial parameters for the review and evaluation of the claims.

53. Finally, there is the question of the geographical extent of the impact of events in Iraq and Kuwait outside these two countries. Following on the findings of the "E2" Panel in its first report, this Panel finds that damage or loss suffered as a result of (a) military operations in the region by either the Iraqi or the Allied Coalition Forces or (b) a credible and serious threat of military action that was connected to Iraq's invasion and occupation of Kuwait is compensable in principle. Of course, the further the project in question was from the area where military operations were taking place, the more the claimant may have to do to establish causality. On the other hand, the potential that an event such as the invasion and occupation of Kuwait has for causing an extensive ripple effect cannot be ignored. Each case must depend on its facts.

E. Date of loss

54. There is no general principle with respect to the date of loss. It needs to be addressed on an individual basis. In addition, the specific loss elements of each claim may give rise to different dates if analysed strictly. However, applying a different date to each loss element within a particular claim is impracticable as a matter of administration. Accordingly, the Panel has decided to determine a single date of loss for each claimant, which, in most cases, coincides with the date of the collapse of the project.

F. Currency exchange rate

55. 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.

56. The Panel finds that, as a general rule, where an exchange rate is set forth in the contract then that is the appropriate rate for losses under the relevant contracts because this was specifically agreed by the parties.

57. For losses that are not contract based, however, the contract rate is not usually an appropriate rate of exchange. For non-contractual losses, the Panel finds the appropriate exchange rate to be the prevailing commercial rate, as evidenced by the United Nations Monthly Bulletin of Statistics, at the date of loss.

G. Interest

58. On the issue of the appropriate interest rate to be applied, the relevant Governing Council decision is decision 16 (S/AC.26/1992/16). 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 any decision on the methods of calculation and payment.

59. Accordingly, the Panel recommends that interest shall run from the date of loss.

H. Claim preparation costs

60. Some claimants seek to recover compensation for the cost of preparing their claims. The compensability of claim preparation costs has not hitherto been ruled on and will be the subject, in due course, of a specific decision by the Governing Council. Therefore, this Panel has made

and will make no recommendations with respect to claim preparation costs in any of the claims where they have been raised.

I. Contract losses

1. Claims for contract losses with non-Iraqi party

61. Some of the claims relate to losses suffered as a result of non-payment by a non-Iraqi party. The fact of such a loss, simpliciter, does not establish it as a direct loss within the meaning of Security Council resolution 687 (1991). In order to obtain compensation, a claimant must lodge sufficient evidence that the entity with which it carried on business on 2 August 1990 was unable to make payment as a direct result of Iraq's invasion and occupation of Kuwait.

62. A good example of this would be that the party was insolvent and that the insolvency was a direct result of Iraq's invasion and occupation of Kuwait. At the very least a claimant should demonstrate that the other party had not renewed operations after the end of the occupation. In the event that there are multiple factors which have resulted in the failure to resume operations, apart from the proved insolvency of the other party, the Panel will have to be satisfied that the effective reason or causa causans was Iraq's invasion and occupation of Kuwait.

63. Any failure to pay because the other party was excused from performance by the operation of law which came into force after Iraq's invasion and occupation of Kuwait is in the opinion of this Panel the result of a novus actus interveniens and is not a direct loss arising out of Iraq's invasion and occupation of Kuwait.

2. Advance payments

64. Many construction contracts provide for an advance payment to be made by the employer to the contractor. These advance payments are often calculated as a percentage of the initial price (initial, because many such contracts provide for automatic and other adjustments of the price during the execution of the works). The purpose of the advance payment is to facilitate certain activities which the contractor will need to carry out in the early stages.

65. Mobilisation is often one such activity. Plant and equipment may need to be purchased. A workforce will have to be assembled and transported to the work site, where facilities will be needed to accommodate it. Another such activity is the ordering of substantial or important materials which are in short supply and may, therefore, be available only at a premium or at a long lead time.

66. Advance payments are usually secured by a bond provided by the contractor, and are usually paid upon the provision of the bond. They are frequently repaid over a period of time by way of deduction by the employer

from the sums which are payable at regular intervals (often monthly) to the contractor for work done. See, in the context of payments which are recovered over a period of time, the observations about amortisation at paragraph 120, infra. Those observations apply mutatis mutandis to the repayment of advance payments.

67. The Panel notes that some claimants presenting claims have not clearly accounted for the amounts of money already paid to them by the employer. This Panel regularly sees evidence of advance payments amounting to tens of millions of United States dollars. Where advance payments have been part of the contractual arrangements between the claimant and the employer, the claimant must account for these payments in reduction of its claims, unless these payments can be shown to have been recouped in whole or in part by the employer. Where no explanation or proof of repayment is forthcoming, the Panel has no option but to conclude that these amounts paid in advance are due, on a final accounting, to the employer, and must be deducted from the claimant's claim.

3. Contractual arrangements to defer payments

(a) The analysis of "old debt"

68. Where payments are deferred under the contracts upon which the claims are based, an issue arises as to whether the claimed losses are "debts and obligations arising prior to 2 August 1990" and therefore outside the jurisdiction of the Commission.

69. In its first report, the "E2" Panel interpreted Security Council resolution 687 (1991) as intending to eliminate what may be conveniently called "old debt". In applying this interpretation to the claim before it the "E2" Panel identified, as "old debt", cases 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. In those cases, claims based on payments owed, in kind or in cash, for such performance are outside the jurisdiction of the Commission as claims for debts or obligations arising prior to 2 August 1990. "Performance" as understood by the "E2" Panel for the purposes of this rule meant complete performance under a contract, or partial performance, so long as an amount was agreed to be paid for that portion of completed partial performance. In the claim the "E2" Panel was considering, the work under the contract was clearly performed prior to 2 May 1990. However, the debts were covered by a form of deferred payments agreement dated 29 July 1984. This agreement was concluded between the parties to the original contracts and postdated the latter.

70. In its analysis, the "E2" Panel found that deferred payments arrangements go to the very heart of what the Security Council described in paragraph 16 of resolution 687 as a debt of Iraq arising prior to 2 August 1990. It was this very kind of obligation which the Security Council had

in mind when, in paragraph 17 of resolution 687 (1991), it directed Iraq to "adhere scrupulously" to satisfying "all of its obligations concerning servicing and repayment". Therefore, irrespective of whether such deferred payment arrangements may have created new obligations on the part of Iraq under a particular applicable municipal law, they did not do so for the purposes of resolution 687 (1991) and are therefore outside the jurisdiction of this Commission.

71. The arrangements that the "E2" Panel was considering were not arrangements that arose out of genuine arms' length commercial transactions, entered into by construction companies as part and parcel of their normal businesses. Instead the situation which the "E2" Panel was addressing was described as follows:

> "The negotiation of these deferred payment arrangements was typically conducted with Iraq not by the contractor or supplier itself, but rather by its Government. Typically, the Government negotiated on behalf of all of the contracting parties from the country concerned who were in a similar situation. The deferred payment arrangements with Iraq were commonly entered into under a variety of forms, including complicated crude oil barter arrangements under which Iraq would deliver certain amounts of crude oil to a foreign State to satisfy consolidated debts; the foreign State then would sell the oil and, through its central bank, credit particular contractors' accounts." (S/AC.26/1998/7, paragraph 93).
>
> "Iraq's debts were typically deferred by contractors who could not afford to "cut their losses" and leave, and thus these contractors continued to work in the hope of eventual satisfaction and continued to amass large credits with Iraq. In addition, the payment terms were deferred for such long periods that the debt servicing costs alone had a significant impact on the continued growth of Iraq's foreign debt." (S/AC.26/1998/7, paragraph 94).

72. This Panel agrees.

(b) Application of the "old debt" analysis

73. In the application of this analysis to claims other than those considered by the "E2" Panel, there are two aspects which are worth mentioning.

74. The first is that the problem does not arise where the actual work has been performed after 2 May 1990. The arrangement deferring payment is irrelevant to the issue. The issue typically resolves itself in these cases into one of proof of the execution of the work, the quantum, the non payment and causation.

75. The second concerns the ambit of the above analysis. As noted above, the claims which led to the above analysis arose out of "non-commercial"

arrangements. They were situations where the original terms of payment entered into between the parties had been renegotiated during the currency of the contract or the negotiations or renegotiations were driven by inter-governmental exchanges. Such arrangements were clearly the result of the impact of Iraq's increasing international debt.

76. Thus one can see underlying the "E2" Panel's analysis two important factors. The first was the subsequent renegotiation of the payment terms of an existing contract to the detriment of the claimant (contractor). The second was the influence on contracts of the transactions between the respective governments. In both cases, a key element underlying the arrangements must be the impact of Iraq's mountain of old debt.

77. In the view of this Panel, where either of these factors is wholly or partially the explanation of the "loss" suffered by the claimant, then that loss or the relevant part of it is outside the jurisdiction of the Commission and cannot form the basis of recommendation by a panel. It is not necessary that both factors be present. A contract that contained deferment provisions as originally executed would still be caught by the "arising prior to" rule if the contract was the result of an inter-governmental agreement driven by the exigencies of Iraq's financial problems. It would not be a commercial transaction so much as a political agreement, and the "loss" would not be a loss falling within the jurisdiction of the Commission.

4. Losses arising as a result of unpaid retention monies

78. The claims before this Panel include requests for compensation for what could be described as another form of deferred payment, namely unpaid retention monies.

79. Under many if not most construction contracts, provision is made for the regular payment to the contractor of sums of money during the performance of the work under the contract. The payments are often monthly, and often calculated by reference to the amount of work that the contractor has done since the last regular payment was calculated.

80. Where the payment is directly related to the work done, it is almost invariably the case that the amount of the actual (net) payment is less than the contractual value of the work done. This is because the employer retains in his own hands a percentage (usually 5 per cent or 10 per cent and with or without an upper limit) of that contractual value. (The same approach usually obtains as between the contractor and his subcontractors.) The retained amount is often called the "retention" or the "retention fund". It builds up over time. The less work the contractor carries out before the project comes to an early halt, the smaller the fund.

81. The retention is usually payable in two stages, one at the commencement of the maintenance period, as it is often called, and the other at the end. The maintenance period usually begins when the employer

first takes over the project, and commences to operate or use it. Thus the work to which any particular sum which is part of the retention fund relates may have been executed a very long time before the retention fund is payable.

82. Retention fund provisions are very common in the construction world. The retention fund serves two roles. It is an encouragement to the contractor to remedy defects appearing before or during the maintenance period. It also provides a fund out of which the employer can reimburse itself for defects that appear before or during the maintenance period which the contractor has, for whatever reason, failed or refused to make good.

83. In the claims before this Panel, events - in the shape of Iraq's invasion and occupation of Kuwait - have intervened. The contract has effectively come to an end. There is no further scope for the operation of the retention provisions. It follows that the contractor, through the actions of Iraq, has been deprived of the opportunity to recover the money. In consequence the claims for retention fall within the jurisdiction of the Commission.

84. In the light of the above considerations it seems to this Panel that the situation in the case of claims for retention is as follows:

(a) The evidence before the Commission may show that the project was in such trouble that it would never have reached a satisfactory conclusion. In such circumstances, there can be no positive recommendation, principally because there is no direct causative link between the loss and the invasion and occupation of Kuwait.

(b) Equally the evidence may show that the project would have reached a conclusion, but that there would have been problems to resolve. Accordingly the contractor would have had to expend money resolving those problems. That potential cost would have to be deducted from the claim for retention; and accordingly the most convenient course would be to recommend an award to the contractor of a suitable percentage of the unpaid retention.

(c) Finally, on the evidence it may be the case that there is no reason to believe or conclude that the project would have gone other than satisfactorily. In those circumstances, it seems that the retention claim should succeed in full.

5. Guarantees, bonds, and like securities

85. Financial recourse agreements are part and parcel of a major construction contract. Instances are (a) guarantees - for example given by parent companies or through banks; (b) what are called "on demand" or "first demand" bonds (hereinafter "on demand bonds") which support such matters as bidding and performance; and (c) guarantees to support advance

payments. (Arrangements with government sponsored bodies that provide what might be called “fall-back” insurance are in a different category. As to these, see paragraphs 95 to 102, infra).

86. Financial recourse arrangements give rise to particular problems when it comes to determining the claims filed in the population of construction and engineering claims. A convenient and stark example is that of the on demand bond.

87. The purpose of an on demand bond is to permit the beneficiary to obtain monies under the bond without having to prove default on the part of the other party - namely, in the situations under discussion here, the contractor executing the work. Such a bond is often set up by way of a guarantee given by the contractor or its parent to its own bank in its home State. That bank gives an identical bond to a bank (the second bank) in the State of the employer under the construction contract. In its turn, the second bank gives an identical bond to the employer. This leaves the employer, at least theoretically, in the very strong position of being able, without having to prove any default on the part of the contractor, to call down a large sum of money which will be debited to the contractor.

88. Of course, the contractor’s bank will have two arrangements in place. First, an arrangement whereby it is secured as to the principal sum, the subject of the bond, in case the bond is called. Second, it will have arranged to exact a service charge, typically raised quarterly, half-yearly or annually.

89. Many claimants have raised claims in respect of the service charges; and also in respect of the principal sums. The former are often raised in respect of periods of years measured from the date of Iraq’s invasion and occupation of Kuwait. The latter have, hitherto at least, been cautionary claims, in case the bonds are called in the future.

90. This Panel approaches this issue by observing that the strength of the position given to the employer by the on demand bond is sometimes more apparent than real. This derives from the fact that the courts of some countries are reluctant to enforce payment of such bonds if they feel that there is serious abuse by the employer of its position. For example, where there is a persuasive allegation of fraud, some courts will be prepared to injunct the beneficiary from making a call on the bond, or one or other of the banks from meeting the demand. It is also the case that there may be remedies for the contractor in some jurisdictions when the bonds are called in circumstances that are clearly outside the original contemplation of the parties.

91. The Panel notes that most if not all contracts for the execution of major construction works by a contractor from one country in the territory of another country will have clauses to deal with war, insurrection or civil disorder. Depending on the approach of the relevant governing law to

such matters, these provisions, if triggered, may have a direct or indirect effect on the validity of the bond. Direct, if under the relevant legal regime, the effects of the clause in the construction contract apply also to the bond; indirect if the termination or modification of the underlying obligation (the construction contract) gives rise to the opportunity to seek a forum-driven modification or termination of the liabilities under the bond.

92. In addition, the simple passage of time is likely to give rise to the right to treat the bond obligation as expired or unenforceable, or to seek a forum-driven resolution to the same effect.

93. In sum, and in the context of Iraq's invasion and occupation of Kuwait and the time which has passed since then, it seems to this Panel that it is highly unlikely that on demand bond obligations of the sort this Panel has seen in the instalments it has addressed are alive and effective.

94. If that analysis is correct, then it seems to this Panel that claims for service charges on these bonds will only be sustainable in very unusual circumstances. Equally, claims for the principal will only be sustainable where the principal has in fact been irrevocably paid out and where the beneficiary of the bond had no factual basis to make a call upon the bond.

6. Export credit guarantees

95. Arrangements with government sponsored bodies that provide what might be called "fall-back" insurance are in a different case to guarantees generally. These forms of financial recourse have names such as "credit risk guarantees". They are in effect a form of insurance, often underwritten by the government of the territory in which the contractor is based. They exist as part of the economic policy of the government in question, in order to encourage trade and commerce by its nationals abroad.

96. Such guarantees often have a requirement that the contractor must exhaust all local remedies before calling on the guarantee; or must exhaust all possible remedies before making a call.

97. Claims have been made by parties for:

(a) reimbursement of the premia paid to obtain such guarantees; and also for

(b) shortfalls between the amounts recovered under such guarantees and the losses said to have been incurred.

In the view of this Panel, one of these types of claim is misconceived; and the other is mis-characterised.

98. A claim for the premia is misconceived. A premium paid for any form of insurance is not recoverable unless the policy is avoided. Once the policy is in place, either the event that the policy is intended to embrace

occurs, or it does not. If it does, then there is a claim under the policy. If it does not then there is no such claim. In neither case does it seem to the Panel that the arrangements - prudent and sensible as they are - give rise to a claim for compensation for the premia. There is no "loss" properly so called or any causative link with Iraq's invasion and occupation of Kuwait.

99. Further, where a contractor has in fact been indemnified in whole or in part by such a body in respect of losses incurred as a result of Iraq's invasion and occupation of Kuwait, there is, to that extent, no longer any loss for which that contractor can claim to the Commission. Its loss has been made whole.

100. The second situation is that where a contractor claims for the balance between what are said to be losses incurred as a result of Iraq's invasion and occupation of Kuwait and what has been recovered from the guarantor.

101. Here the claim is mis-characterised. That balance may indeed be a claimable loss; but its claimability has nothing to do with the fact that the monies represent a shortfall between what has been recovered under the guarantee and what has been lost. Instead, the correct analysis should start from a review of the cause of the whole of the loss of which the balance is all that remains. The first step is to establish whether there is evidence to support that whole sum, that it is indeed a sum that the claimant has paid out or failed to recover; and that there is the necessary causation. To the extent that the sum is established, then to that extent the claim is prima facie compensable. However, so far as there has been reimbursement by the guarantor, the loss has been made good, and there is nothing left to claim for. It is only if there is still some qualifying loss, not made good, that there is room for a recommendation of this Panel.

102. Finally, there are the claims by the bodies granting the credit guarantees who have paid out sums of money. They entered into an insurance arrangement with the contractor. In consideration of that arrangement, they required the payment of premia. As before, either the event covered by the insurance occurred or it did not. In the former case, the Panel would have thought that the guarantor was contractually obliged to pay out; and in the latter case, not so. Whether any payments made in these circumstances give rise to a compensable claim is not a matter for this Panel. Such claims come within the population of claims allocated to the "E/F" Panel.

7. Frustration and force majeure clauses

103. Construction contracts, both in common law and under the civil law, frequently contain provisions to deal with events that have wholly changed the nature of the venture. Particular events which are addressed by such clauses include war, civil strife and insurrection. Given the length of time that a major construction project takes to come to fruition and the

sometimes volatile circumstances, both political and otherwise, in which such contracts are carried out, this is hardly surprising. Indeed, it makes good sense. The clauses make provision as to how the financial consequences of the event are to be borne; and what the result is to be so far as the physical project is concerned.

104. Such clauses give rise to two questions when it comes to the population of claims before this Panel. The first question is whether Iraq is entitled to invoke such clauses to reduce its liability. The second is whether claimants may utilise such clauses to support or enhance their recovery from the Commission.

105. As to the first question, the position seems to this Panel to be as follows. In the population of claims before the Commission, the frustrating or force majeure event will nearly always be the act or omission of Iraq itself. However, such a clause is designed to address events which, if they occurred at all, were anticipated to be wholly outside the control of both parties. It would be quite inappropriate for the causal wrongdoer to rely on such clause to reduce the consequences of its own wrongdoing.

106. But the second question then arises as to whether claimants can rely upon such clauses. An example of such reliance would be where the clause provides for the acceleration of payments which otherwise would not have fallen due. As to this question, one example of this sort of claim has been addressed and the answer categorically spelt out in the first report of the "E2" Panel as follows:

> "Second, [the Claimants] direct the Commission's attention to the clauses relating to "frustration" in the respective underlying contracts. The Claimants assert that in the case of frustration of contract, these clauses accelerate the payments due under the contract, in effect giving rise to a new obligation on the part of Iraq to pay all the amounts due and owing under the contract regardless of when the underlying work was performed. The Panel has concluded that claimants may not invoke such contractual agreements or clauses before the Commission to avoid the "arising prior to" exclusion established by the Security Council in resolution 687 (1991); consequently, this argument must fail." (S/AC.26/1998/7, paragraph 188).

107. The situation described above was one where the work that was the subject of the claim had been performed prior to Iraq's invasion and occupation of Kuwait, and, therefore, fell clearly foul of the "arising prior to" rule. However, the claimants, who had agreed on arrangements for delayed payment, sought to rely on the frustration clause to get over this problem. The argument was, as this Panel understands it, that the frustration clause was triggered by the events which had in fact occurred, namely Iraq's invasion and occupation of Kuwait. The frustration clause

provided for the accelerated payment of sums due under the contract. Payment of the sums had originally been deferred to dates which were still in the future at the time of the invasion and occupation; but the frustrating event meant that they became due during the time of, or indeed at the beginning of, Iraq's invasion and occupation of Kuwait. Accordingly, the payments had, in the event, become due within the period covered by the jurisdiction established by Security Council resolution 687 (1991). Therefore, a claim for the reimbursement of these payments could be entertained by the "E2" Panel.

108. It was this claim that the "E2" Panel rejected. This Panel agrees.

109. There remains the situation where the frustration clause is being used by claimants to enhance a claim, other than by way of circumventing the "arising prior to" rule, for example, where the acceleration delivered by the frustration clause is put forward to seek to bring into the period within the jurisdiction of the Commission payments which would otherwise have been received, under the contract, well after the liberation of Kuwait, and therefore would not otherwise be compensable.

110. In the view of this Panel, such claims would similarly fail. In this case, as in the case addressed by the "E2" Panel, claimants are seeking to use the provisions of private contracts to enhance the jurisdiction granted by Security Council resolution 687 (1991) and defined by jurisprudence developed by the Commission. That is not an appropriate course. It is not open to individual entities by agreement or otherwise, to modify the jurisdiction of the Commission.

J. Claims for overhead and "lost profits"

1. General

111. Any construction project can be broken down into a number of components. All of these components contribute to the pricing of the works. In this Panel's view, it is helpful for the examination of these kinds of claims to begin by rehearsing in general terms the way in which many contractors in different parts of the world construct the prices that ultimately appear in the construction contracts they sign. Of course, there is no absolute rule as to this process. Indeed, it is unlikely that any two contractors will assemble their bids in exactly the same way. But the constraints of construction work and the realities of the financial world impose a general outline from which there will rarely be a substantial deviation.

112. Many of the construction contracts encountered in the claims submitted to this Panel contain a schedule of rates or a "bill of quantities". This document defines the amount to be paid to the contractor for the work performed. It is based on previously agreed rates or prices. The final contract price is the aggregate value of the work calculated at the quoted

rates together with any variations and other contractual entitlements and deductions which increase or decrease the amount originally agreed.

113. Other contracts in the claims submitted to this Panel are lump sum contracts. Here the schedule of rates or bill of quantities has a narrower role. It is limited to such matters as the calculation of the sums to be paid in interim certificates and the valuation of variations.

114. In preparing the schedule of rates, the contractor will plan to recover all of the direct and indirect costs of the project. On top of this will be an allowance for the "risk margin". In so far as there is an allowance for profit it will be part of the "risk margin". However, whether or not a profit is made and, if made, in what amount, depends obviously on the incidence of risk actually incurred.

115. An examination of actual contracts combined with its own experience of these matters has provided this Panel with guidelines as to the typical breakdown of prices that may be anticipated on construction projects of the kind relevant to the claims submitted to this Panel.

116. The key starting point is the base cost - the cost of labour, materials and plant – in French the "prix secs." In another phrase, this is the direct cost. The direct cost may vary, but usually represents 65 to 75 per cent of the total contract price.

117. To this is added the indirect cost - for example the supply of design services for such matters as working drawings and temporary works by the contractor's head office. Typically, this indirect cost represents about 25 to 30 per cent of the total contract price.

118. Finally, there is what is called the "risk margin" - the allowance for the unexpected. The risk margin is generally in the range of between barely above zero and five per cent of the total contract price. The more smoothly the project goes, the less the margin will have to be expended. The result will be enhanced profits, properly so called, recovered by the contractor at the end of the day. The more the unexpected happens and the more the risk margin has to be expended, the smaller the profit will ultimately be. Indeed, the cost of dealing with the unexpected or the unplanned may equal or exceed the risk margin, leading to a nil result or a loss.

119. In the view of the Panel, it is against this background that some of the claims for contract losses need to be seen.

2. Head office and branch office expenses

120. These are generally regarded as part of the overhead. These costs can be dealt with in the price in a variety of ways. For example, they may be built into some or all of the prices against line items; they may be provided for in a lump sum; they may be dealt with in many other ways. One

aspect, however, will be common to most, if not all, contracts. It will be the intention of the contractor to recover these costs through the price at some stage of the execution of the contract. Often the recovery has been spread through elements of the price, so as to result in repayment through a number of interim payments during the course of the contract. Where this has been done, it may be said that these costs have been amortised. This factor is relevant to the question of double-counting (see paragraph 123, infra).

121. If therefore any part of the price of the works has been paid, it is likely that some part of these expenses has been recovered. Indeed, if these costs have been built into items which are paid early, a substantial part or even all of these costs may have been recovered.

122. If these items were the subject of an advance payment, again they may have been recovered in their entirety at an early stage of the project. Here of course there is an additional complication, since the advance payments will be credited back to the employer - see paragraph 66, supra - during the course of the work. In this event, the Panel is thrown back onto the question of where in the contractor's prices payment for these items was intended to be.

123. In all of these situations, it is necessary to avoid double-counting. By this the Panel means the situation where the contractor is specifically claiming, as a separate item, elements of overhead which, in whole or in part, are already covered by the payments made or claims raised for work done.

124. The same applies where there are physical losses at a branch or indeed a site office or camp. These losses are properly characterised, and therefore claimable, if claimable at all, as losses of tangible assets.

3. Loss of profits on a particular project

125. 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".

126. As will be seen from the observations at paragraphs 111 to 119, supra, the expression "lost profits" is an encapsulation of quite a complicated concept. In particular, it will be appreciated that achieving profits or suffering a loss is a function of the risk margin and the actual event.

127. The qualification of "margin" by "risk" is an important one in the context of construction contracts. These contracts run for a considerable period of time; they often take place in remote areas or in countries where the environment is hostile in one way or another; and of course they are subject to political problems in a variety of places - where the work is done, where materials, equipment or labour have to be procured, and along

supply routes. The surrounding circumstances are thus very different and generally more risk prone than is the case in the context of, say, a contract for the sale of goods.

128. In the view of this Panel it is important to have these considerations in mind when reviewing a claim for lost profits on a major construction project. In effect one must review the particular project for what might be called its "loss possibility". The contractor will have assumed risks. He will have provided a margin to cover these risks. He will have to demonstrate a substantial likelihood that the risks would not occur or would be overcome within the risk element so as to leave a margin for actual profit.

129. This approach, in the view of this Panel, is inherent in the thinking behind paragraph 5 of Governing Council decision 15. This paragraph expressly states that a 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.

130. In the light of the above analysis, and in conformity with the two Governing Council decisions cited above, this Panel requires the following from those construction and engineering claimants that seek to recover for lost profits. First, the phrase "continuation of the contract" imposes a requirement on the claimant to prove that it had an existing contractual relationship at the time of the invasion. Second, the provision requires the claimant to prove that the continuation of the relationship was rendered impossible by Iraq's invasion and occupation of Kuwait. This provision indicates a further requirement that profits should be measured over the life of the contract. It is not sufficient to prove that there would have been a "profit" at some stage before the completion of the project. Such a proof would only amount to a demonstration of a temporary credit balance. This can even be achieved in the early stages of a contract, for example where the pricing has been "front-loaded" for the express purpose of financing the project.

131. Instead, the claimant must lodge sufficient and appropriate evidence to show that the contract would have been profitable as a whole. Such evidence would include projected and actual financial information relating to the relevant project, such as audited financial statements, budgets, management accounts, turnover, original bids and tender sum analyses, time schedules drawn up at the commencement of the works, profit/loss statements, finance costs and head office costs prepared by or on behalf of the claimant for each accounting period from the first year of the relevant project to March 1993. The claimant should also provide: original calculations of profit relating to the project and all revisions to these calculations made during the course of the project; management reports on actual financial performance as compared to budgets that were prepared during the course of the project; evidence demonstrating that the project

proceeded as planned, such as monthly/periodic reports, planned/actual time schedules, interim certificates or account invoices, details of work that was completed but not invoiced by the claimant, details of payments made by the employer and evidence of retention amounts that were recovered by the claimant. In addition, the claimant should provide evidence of the percentage of the works completed at the time work on the project ceased.

4. Loss of profits for future projects

132. Some claimants say they would have earned profits on future projects, not let at the time of Iraq's invasion and occupation of Kuwait. Such claims are of course subject to the sorts of considerations set out by this Panel in its review of claims for lost profits on individual projects. In addition, it is necessary for such a claimant to overcome the problem of remoteness. How can a claimant be certain that it would have won the opportunity to carry out the projects in question? If there was to be competitive tendering, the problem is all the harder. If there was not to be competitive tendering, what is the basis of the assertion that the contract would have come to the claimant?

133. Accordingly, in the view of this Panel, for such a claim to warrant a recommendation, it is necessary to demonstrate by sufficient documentary and other appropriate evidence a history of successful (i.e., profitable) operation, and a state of affairs which warrants the conclusion that the hypothesis that there would have been future profitable contracts is well founded. Among other matters, it will be necessary to establish a picture of the assets that were being employed so that the extent to which those assets would continue to be productive in the future can be determined. Balance sheets for previous years will have to be produced, along with relevant strategy statements or like documents which were in fact utilised in the past. The current strategy statement will also have to be provided. In all cases, this Panel will be looking for contemporaneous documents rather than ones that have been formulated for the purpose of the claim; although the latter may have a useful explanatory or demonstrational role.

134. Such evidence is often difficult to obtain; and accordingly in construction cases such claims will only rarely be successful. And even where there is such evidence, the Panel is likely to be unwilling to extend the projected profitability too far into the future. The political exigencies of work in a troubled part of the world are too great to justify looking many years ahead.

K. Loss of monies left in Iraq

1. Funds in bank accounts in Iraq

135. Numerous claimants seek to recover compensation for funds on deposit in Iraqi banks. Such funds were of course in Iraqi dinars and were subject to exchange controls.

136. The first problem with these claims is that it is often not clear that there will be no opportunity in the future for the claimant to have access to and to use such funds. Indeed, many claimants, in their responses to interrogatories or otherwise have modified their original claims to remove such elements, as a result of obtaining access to such funds after the initial filing of their claim with the Commission.

137. Second, for such a claim to succeed it would be necessary to establish that in the particular case, Iraq would have permitted the exchange of such funds into hard currency for the purposes of export. For this, appropriate evidence of an obligation to this effect on the part of Iraq is required. Furthermore, this Panel notes that the decision to deposit funds in banks located in particular countries is a commercial decision, which a corporation engaged in international operations is required to make. In making this decision, a corporation would normally take into account the relevant country or regional risks involved.

138. This Panel, in analysing the claims presented to it to date concludes that, in most cases, it will be necessary for a claimant to demonstrate (in addition to such matters as loss and quantum) that:

(a) the relevant Iraqi entity was under a contractual or other specific duty to exchange those funds for convertible currencies;

(b) Iraq would have permitted the transfer of the converted funds out of Iraq; and

(c) this exchange and transfer was prevented by Iraq's invasion and occupation of Kuwait.

139. Absent proof of these aspects of the matter, it is difficult to see how the claimant can be said to have suffered any "loss". If there is no loss, this Panel is unable to recommend compensation.

2. Petty cash

140. Exactly the same considerations apply to claims for petty cash left in Iraq in Iraqi dinars. These monies were left in the offices of claimants when they departed from Iraq. The circumstances in which the money was left behind vary somewhat; and the situation which thereafter obtained also varies - some claimants contending that they returned to Iraq but the monies were gone; and others being unable to return to Iraq and establish the position. In these different cases, the principle seems to this Panel to be the same. Claimants in Iraq needed to have available sums (which could be substantial) to meet liabilities which had to be discharged in cash. These sums necessarily consisted of Iraqi dinars. Accordingly, absent evidence of the same matters as are set out in paragraph 138, supra, it will be difficult to establish a "loss", and in those circumstances, this Panel is unable to recommend compensation.

3. Customs deposits

141. In this Panel's understanding, these sums are paid, nominally at least, as a fee for permission to effect a temporary importation of plant, vehicles or equipment. The recovery of these deposits is dependent on obtaining permission to export the relevant plant, vehicles and equipment.

142. The Panel further understands that such permission was hard to obtain in Iraq prior to Iraq's invasion and occupation of Kuwait. Accordingly, although defined as a temporary exaction, it was often permanent in fact, and no doubt contractors experienced in the subtleties of working in Iraq made suitable allowances. And no doubt they were able to, or expected to, recover these exactions through payment for work done. Once the invasion and occupation of Kuwait had occurred, obtaining such permission to export became appreciably harder. Indeed, given the trade embargo, a necessary element would have been the specific approval of the Security Council.

143. In the light of the foregoing, it seems to the Panel that claims to recover these duties need to be supported by sufficient evidentiary material, going to the issue of whether, but for Iraq's invasion and occupation of Kuwait, such permission would, in fact or on a balance of probabilities, have been forthcoming.

144. Absent such evidence and leaving aside any question of double-counting, (see paragraph 123, supra), the Panel is unlikely to be able to make any positive recommendations for compensating unrecovered customs deposits made for plant, vehicles and equipment used at construction projects in Iraq.

L. Tangible property

145. With reference to losses of tangible property located in Iraq, decision 9 provides that where direct losses were suffered as a result of Iraq's invasion and occupation of Kuwait with respect to tangible assets, Iraq is liable for compensation (decision 9, paragraph 12). Typical actions of this kind would have been the expropriation, removal, theft or destruction of particular items of property by Iraqi authorities. Whether the taking of property was lawful or not is not relevant for Iraq's liability if it did not provide for compensation. Decision 9 furthermore provides that in a case where business property had been lost because it had been left unguarded by company personnel departing due to the situation in Iraq and Kuwait, such loss may be considered as resulting directly from Iraq's invasion and occupation (decision 9, paragraph 13).

146. Many of the construction and engineering claims that come before this Panel are for assets that were confiscated by the Iraqi authorities in 1992 or 1993. Here the problem is one of causation. By the time of the event, Iraq's invasion and occupation of Kuwait was over. Liberation was a year or more earlier. Numerous claimants had managed to obtain access to their sites to establish the position that obtained at that stage. In the cases

the subject of this paragraph, the assets still existed. However, that initially satisfactory position was then overtaken by a general confiscation of assets by Iraqi authorities. While it sometimes seems to have been the case that this confiscation was triggered by an event which could be directly related to Iraq's invasion and occupation of Kuwait, in the vast majority of the claims that this Panel has seen, this was not the case. It was simply the result of a decision on the part of the authorities to take over these assets. This Panel has difficulty in seeing how these losses were caused by Iraq's invasion and occupation of Kuwait. On the contrary, it appears that they stem from an wholly independent event and accordingly are outside the jurisdiction of the Commission.

M. Payment or relief to others

147. Paragraph 21(b) of decision 7 specifically provides that losses suffered as a result of "the departure of persons from or their inability to leave Iraq or Kuwait" are to be considered the direct result of Iraq's invasion and occupation of Kuwait. Consistent with decision 7, therefore, the Panel finds that evacuation and relief costs incurred in assisting employees in departing from Iraq are compensable to the extent proven.

148. Paragraph 22 of Governing Council decision 7 provides that "payments are available to reimburse payments made or relief provided by corporations or other entities to others - for example, to employees, or to others pursuant to contractual obligations - for losses covered by any of the criteria adopted by the Council".

149. In the Fourth Report, this Panel found that the costs associated with evacuating and repatriating employees between 2 August 1990 and 2 March 1991 are compensable to the extent that such costs are proven by the claimant and are reasonable in the circumstances. Urgent temporary liabilities and extraordinary expenses relating to evacuation and repatriation, including transportation, food and accommodation, are in principle, compensable.

150. Many claimants do not provide a documentary trail detailing to perfection the expenses incurred in caring for their personnel and transporting them (and, in some instances, the employees of other companies who were stranded) out of a theatre of hostilities.

151. In these cases this Panel considers it appropriate to accept a level of documentation consistent with the practical realities of a difficult, uncertain and often hurried situation, taking into account the concerns necessarily involved. The loss sustained by claimants in these situations is the very essence of the direct loss suffered which is stipulated by Security Council resolution 687 (1991). Accordingly, the Panel uses its best judgement, after considering all relevant reports and the material at its disposal, to arrive at an appropriate recommendation for compensation.
