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

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Introduction

1. The Governing Council of the United Nations Compensation Commission (the "Commission") appointed the present Panel of Commissioners (the "Panel"), composed of Messrs. 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 seventeenth 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. One of the claims, that of Marubeni Corporation, filed with the Commission by the Government of Japan, was withdrawn during the proceedings. (See paragraph 128, infra).

3. 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 recommendations, 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.

4. Each of the claimants included in the seventeenth 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 seventeenth instalment

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

6. On 20 June 2000, the Panel issued a procedural order relating to the claims included in the seventeenth 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.

7. 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.

8. 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

9. 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) Bureau Veritas, Registre International de Classification de Navires et d’Aéronefs, a joint-stock company organised under the laws of France, which seeks compensation in the total amount of 1,406,944 United States dollars (USD);

(b) Thyssen Rheinstahl Technik GmbH, a corporation organised under the laws of Germany, which seeks compensation in the total amount of USD 4,648,563;

(c) AK India International Private Limited, a corporation organised under the laws of India, which seeks compensation in the total amount of USD 3,158,789;

(d) Dodsal Limited, a corporation organised under the laws of India, which seeks compensation in the total amount of USD 3,234,298;

(e) Water and Power Consultancy Services (India) Limited, a corporation organised under the laws of India, which seeks compensation in the total amount of USD 3,308,748;

(f) Japanese Consortium of Consulting Firms, a consortium organised under the laws of Japan, which seeks compensation in the total amount of USD 7,079,065;

(g) Elektrim Trade Company S.A., a corporation organised under the laws of Poland, which seeks compensation in the total amount of USD 2,672,886;

(h) Stock Company in Mixed Property “Iskra” Inzenering, a corporation organised under the laws of the Republic of Macedonia, which seeks compensation in the total amount of USD 4,132,643;

(i) Enka Teknik, a corporation organised under the laws of Turkey, which seeks compensation in the total amount of USD 5,885,376;

(j) HSG Engineer Contractor Haydar Soner Görker, a corporation organised under the laws of Turkey, which seeks compensation in the total amount of USD 1,496,273;

(k) GPT Middle East Limited, a corporation organised under the laws of the United Kingdom, which seeks compensation in the total amount of USD 1,432,112;

(l) Rozbank Engineering Ltd, a corporation organised under the laws of the United Kingdom, which seeks compensation in the total amount of USD 361,217;

(m) Medical Consultants International, Inc. (trading as Medcon Enterprises), a corporation organised under the laws of the United States of America, which seeks compensation in the total amount of USD 444,074;

(n) NA Penta Inc., a corporation organised under the laws of the United States of America, which seeks compensation in the total amount of USD 482,440; and

(o) XYZ Options, Inc., a corporation organised under the laws of the United States of America, which seeks compensation in the total amount of USD 1,788,963.

10. 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. BUREAU VERITAS, REGISTRE INTERNATIONAL DE CLASSIFICATION DE NAVIRES ET D'AÉRONEFS

11. Bureau Veritas, Registre International de Classification de Navires et d'Aéronefs ("Bureau Veritas") is a joint-stock company existing under French law. It carried out inspection services in factories and on sites in Iraq on behalf of Iraqi Government bodies for the purpose of issuing "Safety Operational Permits". It alleges that the performance of its contracts was interrupted by Iraq's invasion and occupation of Kuwait.

12. Bureau Veritas seeks compensation in the amount of USD 1,406,944 (stated by Bureau Veritas in the "E" claim form as 7,461,510 French francs (FRF)) for contract losses, loss of tangible property, payment or relief to others, and financial losses.

Table 1. Bureau Veritas's claim

Claim element	Claim amount (USD)
Contract losses	681,054
Loss of tangible property	208,944
Payment or relief to others	45,100
Financial losses	471,846
Total	1,406,944

A. Contract losses

1. Facts and contentions

13. Bureau Veritas seeks compensation in the amount of USD 681,054 (USD 431,983; 75,129 Iraqi dinars (IQD) and 730,000 Pesetas (ESP)) for contract losses. The losses were allegedly incurred in respect of 15 safety inspection contracts which Bureau Veritas was performing for various Iraqi Government bodies including the State Company for Oil Projects, the Technical Corps for Special Projects ("Techcorp") and the Iraqi State Cement Enterprise. The contracts were signed between 1987 and 1990. The prices of the contracts ranged from approximately USD 2,000 to approximately USD 1,300,000.

14. Bureau Veritas asserts that, as of 2 August 1990, the contracts were between 12 per cent and 100 per cent completed. It asserts that Iraq's invasion and occupation of Kuwait prevented payment for work performed.

2. Analysis and valuation

15. In support of its claim for contract losses, in respect of 12 of the safety inspection contracts, Bureau Veritas only provided copies of invoices for the amounts claimed. These 12 contracts related to the

following projects: Baiji Fertiliser, STTP, IPSA II Shop Inspection, Saddam Field Development, Central Refinery and PC II, North Rumailah, SCOP South LPG Project, Deep Sea Terminal, UM Qsar Port, IPSA II (Daemen Shipyard) Lube Oil Plant in Basrah, and West Qurna Oilfield. In respect of these contracts, Bureau Veritas provided no evidence that the invoices were approved by the Iraqi employer or that the work was actually performed. Accordingly, the Panel is unable to recommend compensation in respect of these contracts.

16. In support of its claim in respect of the thirteenth contract, in relation to the Central Refinery project, Bureau Veritas provided the inspection contract dated 19 November 1989, an invoice dated 6 March 1990 for the amount claimed (USD 46,489), and inspection certificates indicating that the work was carried out between October and December 1989. The Panel finds that Bureau Veritas performed the work in relation to the Central Refinery project prior to 2 May 1990. The claim is therefore outside the jurisdiction of the Commission and is not compensable under Security Council resolution 687 (1991). Applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 41 to 43 of the Summary, the Panel is unable to recommend compensation for any loss arising out of this contract.

17. In support of its claim in respect of the fourteenth contract, in relation to the Petrochemical Complex, Bureau Veritas provided an invoice dated 9 August 1990 issued to Techcorp. In addition, it provided a telex dated 7 June 1990 from Banque Française du Commerce Extérieur to Rafidain Bank, Iraq requesting the issue of a performance guarantee in favour of Bureau Veritas. The Panel finds that the evidence provided does not prove that the invoice was approved by Techcorp or that the work was actually performed. Accordingly, the Panel is unable to recommend compensation in respect of this contract.

18. In support of its claim in respect of the fifteenth contract, for Inspection of Spare Parts and Castables in Spain, Bureau Veritas provided an invoice dated 25 July 1990 issued to the Iraqi Cement State Enterprise and five inspection certificates (although six were referred to in the claim documentation) dated between December 1989 and May 1990. The Panel finds that work leading to five inspection certificates was performed prior to 2 May 1990, and work leading to one inspection certificate was performed after 2 May 1990. The Panel values the work performed after 2 May 1990 at ESP 121,667. Applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 41 to 43 of the Summary, the Panel recommends compensation in the amount of USD 1,250 (ESP 121,667) for the work performed on one inspection certificate.

3. Recommendation

19. The Panel recommends compensation in the amount of USD 1,250 for contract losses.

B. Loss of tangible property

20. Bureau Veritas seeks compensation in the amount of USD 208,944 (FRF 1,095,283) for loss of tangible property. Bureau Veritas did not explain the circumstances of the loss of the tangible property, but stated that the property, which comprised installations, transport equipment, office and computer equipment, and furnishings, was located in Baghdad.

21. In support of its claim for loss of tangible property, Bureau Veritas provided inventories, fixed asset entry and withdrawal forms, individual account sheets and an internal memorandum dated 18 February 1991 requesting that property lost during Iraq's invasion and occupation of Kuwait be settled as "exceptional losses". Bureau Veritas provided no independent evidence, such as invoices and certificates of importation, to establish that it owned the property claimed, that the property was in Iraq as at 2 August 1990 and that it was lost directly due to Iraq's invasion and occupation of Kuwait. The Panel finds that the evidence provided by Bureau Veritas is insufficient to substantiate its claim.

Recommendation

22. The Panel recommends no compensation for loss of tangible property.

C. Payment or relief to others

1. Facts and contentions

23. Bureau Veritas seeks compensation in the amount of USD 45,100 (FRF 165,726 and 7,093 Pounds sterling (GBP)) for payment or relief to others. Bureau Veritas asserts that two of its employees were held hostage from 2 August to 16 December 1990 and that during this time, it bore the cost of salaries (FRF 122,959 and GBP 4,036); social-insurance contributions (FRF 42,767) and "other costs" (GBP 3,057).

24. Bureau Veritas did not explain what "other costs" comprised. The claim documentation refers to a "bonus allowance", accident insurance, and an air-fare, but these do not add up to the full amount claimed.

2. Analysis and valuation

25. In support of its claim for payment or relief to others, Bureau Veritas provided internal debit notifications dated October 1990 to March 1991 showing the salary and other amounts paid to one of the employees, a copy of one of the employees' passports, and an affidavit of Bureau Veritas's human resources manager stating the salary paid to the two employees.

26. Bureau Veritas also provided an untranslated affidavit from one employee, and an untranslated copy of a letter from the French Foreign Ministry. However, in view of article 6 of the Rules, the Panel did not consider these documents.

27. The Panel finds that the salaries allegedly paid by Bureau Veritas to its two employees are prima facie compensable as salary paid for unproductive labour. However, the Panel finds that Bureau Veritas only provided sufficient evidence to substantiate its loss in relation to one of the employees. Only in respect of one employee did Bureau Veritas provide evidence proving that he was detained in Iraq until 27 October 1990. Accordingly, the Panel recommends compensation for salaries and social-insurance contributions for the period 2 August 1990 to 27 October 1990, in the amount of USD 6,323 (FRF 33,145).

28. The Panel finds that Bureau Veritas did not provide sufficient evidence in relation to the claim for "other costs" to enable the Panel to determine whether the costs were directly caused by Iraq's invasion and occupation of Kuwait. Accordingly, the Panel is unable to recommend compensation for "other costs".

3. Recommendation

29. The Panel recommends compensation in the amount of USD 6,323 for payment or relief to others.

D. Financial losses

1. Facts and contentions

30. Bureau Veritas seeks compensation in the total amount of USD 471,846 for financial losses, including (a) bank guarantees (IQD 51,616 and USD 63,300); (b) balance in bank account no. 0327, Rafidain Bank, Baghdad (IQD 54,886); and (c) "cash in hand" (IQD 20,556).

31. Bureau Veritas did not clearly explain its claim. In respect of item (a), bank guarantees, the annex to the "E" claim form dated 26 September 1995 refers to the amounts of IQD 51,616 and USD 63,300 for bank guarantees with no further explanation. Bureau Veritas's response to the article 34 notification refers to three "bank guarantees given by Head office" in the total amount of USD 440,000, and three "local bank guarantees" in the total amount of IQD 41,516.

32. In its response to the article 34 notification, Bureau Veritas provided copies of three performance bonds totalling USD 440,000. However, it did not provide copies of the three "local bank guarantees", and did not explain how the performance bonds provided related to its alleged losses of IQD 51,616 and USD 63,300. In its response to the article 34 notification, Bureau Veritas also sought to rely on the trade embargo and contended that "due to the embargo put in force against Iraq, we cannot obtain the release

of the Bank Guarantee. These bank guarantees are still considered as financial exposure in our financial balance sheets".

33. Bureau Veritas provided no further information in relation to item (b), balance in bank account, or item (c), "cash in hand".

2. Analysis and valuation

34. In relation to item (a), bank guarantees, the Panel finds that Bureau Veritas failed to provide sufficient evidence of its alleged losses. In any event, applying the approach taken with respect to guarantees as set out in paragraphs 85 to 94 of the Summary, the Panel recommends no compensation.

35. In relation to item (b), balance in bank account, and item (c), cash in hand, the Panel finds that Bureau Veritas failed to provide sufficient evidence of its alleged losses. In any event, applying the approach taken with respect to loss of funds in bank accounts and loss of petty cash in Iraq, set out in paragraphs 135 to 140 of the Summary, the Panel finds that the amounts claimed are not compensable.

3. Recommendation

36. The Panel recommends no compensation for financial losses.

E. Summary of recommended compensation for Bureau Veritas

Table 2. Recommended compensation for Bureau Veritas

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	681,054	1,250
Loss of tangible property	208,944	nil
Payment or relief to others	45,100	6,323
Financial losses	471,846	nil
Total	1,406,944	7,573

37. Based on its findings regarding Bureau Veritas's claim, the Panel recommends compensation in the amount of USD 7,573. The Panel finds the date of loss to be 2 August 1990.

III. THYSSEN RHEINSTAHL TECHNIK GMBH

38. Thyssen Rheinstahl Technik GmbH ("Thyssen") is a corporation existing under the laws of Germany. On 8 February 1989, it entered into a contract with the Nassr Enterprise for Mechanical Industries, Iraq ("NEMI") for the supply of a rotary forging line for billets and bars production (the "contract"). Thyssen asserts that the contract was interrupted due to Iraq's invasion and occupation of Kuwait.

39. Thyssen seeks compensation in the amount of USD 4,648,563 (7,261,056 Deutsche Mark (DEM)) for contract losses.

40. Thyssen also seeks compensation for interest on the principal amount of any award in an amount to be determined by the Commission. For the reasons stated in paragraph 58 of the Summary, the Panel makes no recommendation with respect to Thyssen's claim for interest.

Table 3. Thyssen's claim

Claim element	Claim amount (USD)
Contract losses	4,648,563
Interest (no amount specified)	(--)
Total	4,648,563

A. Contract losses

1. Facts and contentions

41. Thyssen seeks compensation in the amount of USD 4,648,563 (DEM 7,261,056) for contract losses, including (a) equipment delivered and services performed (DEM 6,961,056), and (b) claims made against Thyssen by sub-contractors (DEM 300,000).

42. The total value of the contract was DEM 63,500,000. Thyssen states that it intended to complete the contract within 21 months of its coming into force.

43. In relation to item (a), equipment delivered and services performed, Thyssen asserts that, prior to Iraq's invasion and occupation of Kuwait, it shipped equipment and provided engineering and supervision services to the value of DEM 53,793,056. It was paid DEM 46,832,000 but asserts that it was unable to obtain payment of the outstanding amount of DEM 6,961,056 because Iraq's invasion and occupation of Kuwait made it impossible for Thyssen to obtain the documents, such as the certificate of completion, which were required under the terms of the letter of credit in order to obtain payment.

44. In relation to item (b), claims made against Thyssen by sub-contractors, Thyssen asserts that the interruption of its contract with NEMI meant that it could not meet its payment obligations under certain of its sub-contracts. It asserts that the sub-contractors filed claims against Thyssen to the value of DEM 300,000.

2. Analysis and valuation

45. The Panel finds that NEMI is an agency of the State of Iraq.

46. In support of its claim for contract losses, Thyssen provided a copy of the contract with NEMI, a copy of an irrevocable letter of credit from the Central Bank of Iraq in favour of Thyssen, seven invoices approved by NEMI dated September 1989 to July 1990 for equipment delivered, six invoices approved by NEMI dated April 1990 to June 1990 for supervision services, and two invoices for supervision services not yet dated or approved.

47. In relation to item (a), equipment delivered and services performed, based on the evidence provided by Thyssen, the Panel finds that the total value of the invoices issued by Thyssen to NEMI was DEM 53,771,836 (DEM 21,220 less than the amount claimed). Of this, the Panel finds that a total of DEM 46,832,000 was paid by NEMI. The Panel finds that Thyssen was unable to collect the remaining amount of DEM 6,939,836 as a direct result of Iraq's invasion and occupation of Kuwait. The Panel finds that Thyssen provided sufficient evidence in support of these alleged losses. The Panel recommends compensation in the amount of USD 4,442,917 (DEM 6,939,836).

48. In relation to item (b), claims made against Thyssen by sub-contractors, the Panel finds that, despite a request for evidence in support of this portion of its claim, Thyssen provided no evidence. Accordingly, the Panel is unable to recommend compensation.

3. Recommendation

49. The Panel recommends compensation in the amount of USD 4,442,917 for contract losses.

B. Summary of recommended compensation for Thyssen

Table 4. Recommended compensation for Thyssen

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	4,648,563	4,442,917
Interest (no amount specified)	(--)	(--)
Total	4,648,563	4,442,917

50. Based on its findings regarding Thyssen's claim, the Panel recommends compensation in the amount of USD 4,442,917. The Panel finds the date of loss to be 2 August 1990.

IV. AK INDIA INTERNATIONAL PRIVATE LIMITED

51. AK India International Private Limited ("AK India") is a corporation existing under the laws of India. On 30 October 1989, it entered into a contract with the State Company for Oil Projects, Iraq ("SCOP"), for the supply of engineering services for oil-based projects being executed by SCOP (the "contract"). It was in the process of establishing its branch office in Baghdad and stationing its engineers in Iraq when Iraq invaded Kuwait, thereby allegedly disrupting the performance of the contract.

52. AK India seeks compensation in the amount of USD 3,158,789 (IQD 7,963 and USD 3,133,184, converted by the claimant to USD 3,158,664) for contract losses, loss of profits, loss of tangible property, payment or relief to others, financial losses and interest.

53. The interest element is in the amount of USD 1,518,153. For the reasons stated in paragraph 58 of the Summary, the Panel makes no recommendation with respect to AK India's claim for interest.

Table 5. AK India's claim

Claim element	Claim amount (USD)
Contract losses	106,087
Loss of profits	906,415
Loss of tangible property	29,900
Payment or relief to others	290,642
Financial losses	307,592
Interest	1,518,153
Total	3,158,789

A. Contract losses

1. Facts and contentions

54. AK India seeks compensation in the amount of USD 106,087 (IQD 7,963 and USD 80,482, converted by the claimant to USD 105,963) for contract losses. It states that at the time of Iraq's invasion of Kuwait it had received confirmation from SCOP that it could mobilise 20 of its engineers to Iraq with a view to commencing work on the projects. As at 2 August 1990, it had stationed 14 of its engineers in Iraq and six more were ready to join. However, when Iraq invaded Kuwait, the six engineers did not depart from India, and the 14 already in Iraq were evacuated.

55. The work under the contract was suspended on 31 October 1990. AK India alleges that it was subsequently unable to obtain clearance of its bills by SCOP. The total unpaid invoices amount to USD 106,087.

2. Analysis and valuation

56. The Panel finds that SCOP is an agency of the State of Iraq.

57. In support of its claim for contract losses, AK India provided a copy of the contract, letters from SCOP requesting AK India to mobilise its engineers in Iraq, a copy of the engineers' standard appointment letter, the invoices relating to the work performed, and AK India's 1991 and 1992 accounts, in which the amount claimed appears as owing.

58. Based on the evidence provided by AK India, the Panel finds that AK India performed work to the value of USD 11,550 prior to 2 May 1990. The claim for unpaid invoices in relation to this work is outside the jurisdiction of the Commission and is not compensable under Security Council resolution 687 (1991). Applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 41 to 43 of the Summary, the Panel is unable to recommend compensation for this amount.

59. The Panel finds that AK India performed work to the value of USD 94,537 (USD 68,932 and IQD 7,963) after 2 May 1990 for which it was not paid by SCOP. The Panel finds that AK India provided sufficient evidence in support of these alleged losses. The Panel recommends compensation for this amount.

3. Recommendation

60. The Panel recommends compensation in the amount of USD 94,537 for contract losses.

B. Loss of profits

1. Facts and contentions

61. AK India seeks compensation in the amount of USD 906,415 for "anticipated loss in contract profits". It states that in respect of each engineer deployed on the project it would have earned USD 35,407 in the first year of the contract, with a yearly 10 per cent increase thereafter.

62. It asserts that the total contract income for 20 engineers over the three years of the contract, including overtime, would be USD 2,266,036. It arrives at the figure of USD 906,415 as loss of profits on the basis that, as company policy, it was spending 60 per cent of contract value, and saving 40 per cent.

2. Analysis and valuation

63. The Panel finds that AK India did not substantiate its assertions in relation to the amounts that would have been earned for each engineer. The Panel further finds that AK India failed to prove that the contract would have continued for the three years claimed but for Iraq's invasion and occupation of Kuwait. The Panel notes that under the terms of the contract, the contract could have been terminated by either party by giving two months' notice. Accordingly, the Panel finds that AK India failed to fulfil the evidentiary standard for loss of profits claims set out in paragraphs 125 to 131 of the Summary, and thus the Panel is unable to recommend compensation.

3. Recommendation

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

C. Loss of tangible property

65. AK India seeks compensation in the amount of USD 29,900 for loss of tangible property. AK India provided no explanation of its claim. It merely states that the claim is for "loss on account of furniture, office equipment and household goods damaged or lost on account of the war".

66. The Panel finds that AK India provided no evidence in support of its claim. It stated in its response to the article 34 notification that all documentation was destroyed in its Baghdad office. However, it failed to explain why it did not have at least some evidence at some other location of (a) ownership of the assets, (b) value of the assets, and (c) the presence of assets in Iraq on 2 August 1990.

67. The Panel recommends no compensation for loss of tangible property.

D. Payment or relief to others

1. Facts and contentions

68. AK India seeks compensation in the amount of USD 290,642 for payment or relief to others. The claim is for (a) "agony caused by war" (USD 90,642), (b) "notice period salary" (USD 75,000), (c) "break-in-contract compensation" (USD 75,000), and (d) "evacuation air-fares" (USD 50,000).

69. In relation to item (a), "agony caused by war", AK India asserts that the company "suffered psychological and mental agony, which needs to be compensated". It calculated its claim as 10 per cent of the total profits that it expected to earn under the contract.

70. Item (b), "notice period salary", is described as "loss on account of notice period salary payable to employees due to stoppage of work resulting in termination of services".

71. Item (c), “break-in-contract compensation”, is a claim in respect of four months’ salary in lieu of notice which AK India asserts it was liable to pay under the terms of the employment contract.

72. In relation to item (d), evacuation airfares, AK India asserts that it had to pay travel expenses to 16 employees and their families from Baghdad to Delhi under the termination provisions of the employment contract.

2. Analysis and valuation

73. In relation to item (a), “agony caused by war”, the Panel finds that psychological and mental agony cannot be suffered by a company. The Governing Council decided in decision 3 (S/AC.26/1991/3) and decision 8 (S/AC.26/1992/8) that claims to the Commission for mental pain and anguish could only be made by individuals. Claims of this nature could have been made by the particular individuals (if any) who suffered any such injury.

74. In relation to items (b), “notice period salary”, (c) “break-in-contract compensation”, and (d) “evacuation air-fares”, the Panel finds that AK India provided no evidence in support of the claims.

75. The Panel is therefore unable to recommend compensation for payment or relief to others.

3. Recommendation

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

E. Financial losses

1. Facts and contentions

77. AK India seeks compensation in the amount of USD 307,592 for financial losses. The claim is for (a) maintenance of the Baghdad branch (USD 135,000), (b) advance rent (USD 33,600), (c) contract development and establishment expenses (USD 113,302), and (d) the balance of Iraqi bank accounts (USD 25,690).

78. In respect of item (a), maintenance of the Baghdad branch, AK India states that as the contract with SCOP was for a period of three years, its registration for its Baghdad branch was valid up until October 1992. It asserts that it was bound by local Iraqi laws to maintain a minimum local staff. Accordingly, it retained the services of its legal adviser, local accountant and public relations officer until October 1992. It claims USD 5,000 per month for the salaries of these employees from August 1990 to October 1992.

79. In respect of item (b), advance rent, AK India seeks compensation in the amount of USD 33,600 for advance rent paid for office accommodation for the employees. AK India asserts that the advance rent was “unutilised” as a direct result of Iraq’s invasion and occupation of Kuwait.

80. In respect of item (c), contract development and establishment expenses, AK India asserts that the expenses spent on establishing its office, for example, “branch registration, travelling, hotel bills, documentation, recruitment, training, etc.” are a direct loss, because it was unable to recover these amounts from the profits expected to be earned on the projects. It calculates its claim as 0.05 per cent of the contract value (USD 2,266,036), namely, USD 113,302.

81. In respect of item (d), the balance of Iraqi bank accounts, AK India asserts that “on account of the war, the funds credited to our accounts in Iraq have remained unusable since August 90”.

2. Analysis and valuation

82. The Panel finds that AK India provided no evidence in support of its claim for financial losses. The Panel is therefore unable to recommend compensation.

3. Recommendation

83. The Panel recommends no compensation for financial losses.

F. Summary of recommended compensation for AK India

Table 6. Recommended compensation for AK India

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	106,087	94,537
Loss of profits	906,415	nil
Loss of tangible property	29,900	nil
Payment or relief to others	290,642	nil
Financial losses	307,592	nil
Interest	1,518,153	(--)
Total	3,158,789	94,537

84. Based on its findings regarding AK India’s claim, the Panel recommends compensation in the amount of USD 94,537. The Panel finds the date of loss to be 2 August 1990.

V. DODSAL LIMITED

85. Dodsal Limited ("Dodsal") is a corporation existing under the laws of India. It is engaged in the construction of oil, gas and water pipelines, industrial plants, civil and building works, and turnkey infrastructure projects. It asserts that when Iraq invaded and occupied Kuwait, it was forced to abandon construction machinery at a project site in Iraq.

86. Dodsal seeks compensation in the amount of USD 3,234,298 for loss of tangible property.

87. Dodsal also seeks compensation for interest on the principal amount of any award in an amount to be determined by the Commission. For the reasons stated in paragraph 58 of the Summary, the Panel makes no recommendation with respect to Dodsal's claim for interest.

88. The Panel notes that in the "E" claim form dated 30 September 1993 Dodsal sought compensation in the total amount of USD 5,750,533 for unpaid receivables, loss of rentals on construction machinery, and loss of tangible property. However, in its response to the article 15 notification dated 21 January 2000, Dodsal withdrew all of its claims but for the claim for loss of tangible property.

Table 7. Dodsal's claim

Claim element	Claim amount (USD)
Loss of tangible property	3,234,298
Interest (no amount specified)	(--)
Total	3,234,298

A. Loss of tangible property

1. Facts and contentions

89. Dodsal seeks compensation in the amount of USD 3,234,298 for loss of tangible property. On 10 May 1989, Dodsal entered into a contract with Dodsal Pte. Ltd of Singapore ("Dodsal Singapore") for the supply of construction machinery for the Saddam Oil Field Development Project in Iraq. Under the contract, Dodsal Singapore agreed to hire the equipment in return for a monthly rental fee. Dodsal Singapore undertook responsibility for the machinery while it was outside India. However, and apparently as a result of an arrangement between Dodsal, Dodsal Singapore, and the main contractor for the Saddam Oil Field Development Project, the claim in respect of this equipment has been filed by Dodsal.

90. Dodsal duly supplied the machinery, consisting of a pipe-bending machine, a pipelayer side boom, an air compressor, and an internal pneumatic line up clamp.

91. Dodsal states that when Iraq invaded Kuwait, its employees were evacuated and the machinery was abandoned at the project site in Iraq. It states that from August 1990 it made repeated efforts to retrieve the machinery from Iraq, and on 21 May 1992, the Security Council granted permission to Dodsal to remove the machinery from Iraq. However, the permission of the Security Council could not be implemented because in April 1992 an Iraqi presidential order had been issued to the Ministry of Military Industry of the Republic of Iraq and the North Oil Company of Iraq to impound the equipment.

2. Analysis and valuation

92. The Panel finds that the equipment was confiscated by the Iraqi authorities in April 1992. Accordingly, the approach with respect to the confiscation of tangible property by the Iraqi authorities after the liberation of Kuwait, as set out in paragraph 146 of the Summary, is applicable to this case. There are no special circumstances which would justify a departure from the principle set out in that paragraph and the Panel is unable to recommend compensation.

3. Recommendation

93. The Panel recommends no compensation for loss of tangible property.

B. Summary of recommended compensation for Dodsal

Table 8. Recommended compensation for Dodsal

Claim element	Claim amount (USD)	Recommended compensation (USD)
Loss of tangible property	3,234,298	nil
Interest (no amount specified)	(--)	(--)
Total	3,234,298	nil

94. Based on its findings regarding Dodsal’s claim, the Panel recommends no compensation.

VI. WATER AND POWER CONSULTANCY SERVICES (INDIA) LIMITED

95. Water and Power Consultancy Services (India) Limited ("Water & Power") is a government-owned corporation existing under the laws of India. Its principal business is the provision of consultancy services in the water and power sector. As at August 1990 Water & Power was executing five projects in Iraq. It asserts that by September 1990 it had evacuated all of its personnel from Iraq and had closed down its Iraqi operations.

96. Water & Power seeks compensation in the amount of USD 3,308,748 for contract losses and loss of tangible property.

Table 9. Water & Power's claim

Claim element	Claim amount (USD)
Contract losses	3,045,548
Loss of tangible property	263,200
Total	3,308,748

A. Contract losses

1. Facts and contentions

97. Water & Power seeks compensation in the total amount of USD 3,045,548 for contract losses. As at August 1990, it was engaged as a contractor to perform works on five projects in Iraq. The projects were: Bekhme Dam Model Studies, Kifil Shinafiya Project Phase I, Kifil Shinafiya Project Phase II, Amarah Irrigation Project, and the Bakruman and Khalikan Project.

98. The contracts were signed between 1977 and 1989. The total prices of the contracts ranged from approximately IQD 110,000 to IQD 1,270,000. The Iraqi contracting parties included the State Commission for Irrigation and Land Reclamation, and the State Organisation of Dams.

99. Water & Power asserts that the Iraqi employers have not paid Water & Power a total of USD 3,045,548 for work performed on the five projects.

2. Analysis and valuation

100. In support of its claim for contract losses, Water & Power provided copies of the contracts and copies of the invoices issued to the Iraqi employers.

101. The supporting documentation provided by Water & Power indicates that the work the subject of all of the invoices was performed prior to 2 May 1990. Accordingly, the claim for these unpaid amounts is outside the jurisdiction of the Commission and is not compensable under Security Council resolution 687 (1991). Applying the approach taken with respect to

the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 41 to 43 of the Summary, the Panel is unable to recommend compensation.

3. Recommendation

102. The Panel recommends no compensation for contract losses.

B. Loss of tangible property

1. Facts and contentions

103. Water & Power seeks compensation in the amount of USD 263,200 for loss of tangible property. It asserts that assets and properties with a value of USD 263,200 were left behind in Iraq in Water & Power's office and at the Bekhme Dam project site. The property comprises equipment, tools and office equipment.

2. Analysis and valuation

104. The only evidence provided by Water & Power in support of its claim is an undated packing list addressed to the Ministry of Agriculture and Irrigation, Iraq which lists various items of property. The Panel finds that this list is not sufficient to substantiate the claim. Water & Power failed to prove that it owned these assets or that they were located in Iraq as at 2 August 1990. The Panel notes that work on the Bekhme Dam project, on which the equipment was allegedly being used, was completed in September 1989.

3. Recommendation

105. The Panel recommends no compensation for loss of tangible property.

C. Summary of recommended compensation for Water & Power

Table 10. Recommended compensation for Water & Power

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	3,045,548	nil
Loss of tangible property	263,200	nil
Total	3,308,748	nil

106. Based on its findings regarding Water & Power's claim, the Panel recommends no compensation.

VII. JAPANESE CONSORTIUM OF CONSULTING FIRMS

107. Japanese Consortium of Consulting Firms ("JCCF") was established in 1985 for the purpose of undertaking "the study works of the Integrated Capital Development Plan for Baghdad". The study had been commissioned by Amanat Al Assima, the local city government authority of Baghdad. At 2 August 1990, JCCF was carrying out the Minimum Operational Level ("MOL") Study. JCCF asserts that Iraq's invasion and occupation of Kuwait interrupted the study.

108. JCCF seeks compensation in the amount of USD 7,079,065 for contract losses, payment or relief to others and financial losses.

Table 11. JCCF's claim

Claim element	Claim amount (USD)
Contract losses	2,899,597
Payment or relief to others	308,569
Financial losses	3,870,899
Total	7,079,065

A. Contract losses

1. Facts and contentions

109. JCCF seeks compensation in the amount of USD 2,899,597 for contract losses. The amount claimed is described as follows:

	USD
Phase 1	822,578
MOL Study USD portion	1,716,810
MOL Study IQD portion	360,209
Total	2,899,597

110. JCCF performed the work the subject of the claim between April 1989 and October 1990.

2. Analysis and valuation

111. In support of its claim for contract losses, JCCF provided a copy of the contract and a schedule of the invoices issued to the Iraqi employer. It did not provide the invoices themselves, nor any of the other supporting material requested in the article 34 notification.

112. The Panel finds that JCCF failed to provide sufficient evidence in support of its claim. The Panel is therefore unable to recommend compensation.

3. Recommendation

113. The Panel recommends no compensation for contract losses.

B. Payment or relief to others

1. Facts and contentions

114. JCCF seeks compensation in the amount of USD 308,569 for payment or relief to others.

115. In the "E" claim form, JCCF characterised this loss element as "loss of earnings", but the Panel finds that it is more accurately described as payment or relief to others.

116. The claim is for salaries paid in respect of unproductive labour. JCCF asserts that seven of its engineers were forced to remain in Baghdad and continue working on the study between 2 August 1990 and 2 March 1991. It states that in ordinary circumstances the study would have been finished by mid-October 1990. It therefore claims compensation for the salaries paid to the engineers between 2 August 1990 and 2 March 1991.

2. Analysis and valuation

117. In support of its claim for payment or relief to others, JCCF only provided a schedule setting out such information as the names of the engineers, the engineering grade unit rate, and the invoice period. It did not provide evidence in support of the schedule.

118. The Panel finds that JCCF failed to provide sufficient evidence in support of its claim.

3. Recommendation

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

C. Financial losses

1. Facts and contentions

120. JCCF seeks compensation in the amount of USD 3,870,899 for financial losses, including (a) balance of Iraqi bank account (IQD 11,855, converted by the claimant to USD 36,851); and (b) bank interest and currency exchange losses (USD 3,834,048).

121. In the "E" claim form, JCCF characterised item (a) as a loss related to a business transaction, and item (b) as contract losses, but the Panel finds that they are more accurately described as financial losses.

122. In respect of item (a), balance of Iraqi bank account, JCCF asserts that it had an Iraqi dinar bank deposit with the Rafidain Bank, Iraq which was frozen in Baghdad due to an order of the Government of Iraq. JCCF asserts that the balance of this account, as at 31 October 1990, was IQD 11,855.

123. In respect of item (b), bank interest and currency exchange losses, JCCF asserts that the study project commenced in 1982, and was due to be completed within 14 months. However, for reasons attributable to the Iraqi employer, the project was delayed throughout the 1980s. JCCF asserts that the delays caused it to suffer losses. The losses were due to, first, the drop in the value of the Yen against the United States dollar during this period, and, second, the bank interest which it had to pay during this period.

2. Analysis and valuation

124. In respect of item (a), balance of Iraqi bank account, applying the approach taken with respect to loss of funds in bank accounts, set out in paragraphs 135 to 140 of the Summary, the Panel recommends no compensation for loss of funds in JCCF's bank account in Iraq.

125. In respect of item (b), bank interest and currency exchange losses, the Panel finds that the bank interest and currency exchange losses were incurred prior to Iraq's invasion and occupation of Kuwait, and were due to the delays allegedly caused by the Iraqi employer at this time. The losses were not directly caused by Iraq's invasion and occupation of Kuwait. The Panel is therefore unable to recommend compensation.

3. Recommendation

126. The Panel recommends no compensation for financial losses.

D. Summary of recommended compensation for JCCF

Table 12. Recommended compensation for JCCF

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	2,899,597	nil
Payment or relief to others	308,569	nil
Financial losses	3,870,899	nil
Total	7,079,065	nil

127. Based on its findings regarding JCCF's claim, the Panel recommends no compensation.

VIII. MARUBENI CORPORATION

128. On 9 November 2000, the Commission received a notice of withdrawal of the claim by Marubeni Corporation from the Permanent Mission of Japan. In the light of this communication, the Panel issued a procedural order on 4 December 2000, pursuant to article 42 of the Rules, acknowledging the withdrawal and terminating the Panel's proceedings with respect to the claim by Marubeni Corporation.

IX. ELEKTRIM TRADE COMPANY S.A.

129. Elektrim Trade Company S.A. ("Elektrim") is a corporation existing under the laws of Poland. It has supplied electrical equipment and services in Iraq and Kuwait since the 1970s. In the "E" claim form dated 11 October 1993, Elektrim sought compensation in the total amount of USD 3,856,672 for contract losses, loss of profits, loss of tangible property, and claim preparation costs. In its response to the article 34 notification dated 16 May 2000, it reduced the total claim amount to USD 2,672,886 (KWD 289,639 and USD 1,670,675, converted by the claimant to USD 2,669,928). The reduction reflected amounts received from the Kuwaiti Ministry of Communications in respect of one of the contracts (see paragraph 141, infra).

130. Elektrim also seeks compensation for interest on the principal amount of any award in an amount to be determined by the Commission. For the reasons stated in paragraph 58 of the Summary, the Panel makes no recommendation with respect to Elektrim's claim for interest.

131. The claim preparation cost element is in the amount of USD 174,668. Applying the approach taken with respect to claim preparation costs set out in paragraph 60 of the Summary, the Panel makes no recommendation for claim preparation costs.

Table 13. Elektrim's claim

Claim element	Claim amount (USD)
Contract losses	2,102,387
Loss of profits	363,990
Loss of tangible property	31,841
Claim preparation costs	174,668
Interest (no amount specified)	(--)
Total	2,672,886

A. Contract losses

132. Elektrim seeks compensation in the total amount of USD 2,102,387 (KWD 280,437 and USD 1,132,017, converted by the claimant to USD 2,099,524) for contract losses in Iraq and Kuwait. The claim is in respect of three different contracts. The Panel considers each in turn.

(a) Contract HT – 7/79 (State Organisation of Electricity, Iraq)

133. Elektrim seeks compensation in the amount of USD 836,239 for contract losses on Contract HT – 7/79. On 30 June 1980, Elektrim entered into a contract with the State Organisation of Electricity, Iraq ("SOE") for the

installation of electricity cables within a period of 15 to 19 months. The value of the contract was USD 27,520,977. The contract was delayed because of the war between Iran and Iraq and the works were completed in 1986. The SOE confirmed all invoices presented by Elektrim but paid only part of the amount due.

134. On 29 May 1989, Elektrim and SOE entered into an agreement by which Elektrim agreed to forego a portion of the amounts due to it in exchange for the remission of certain sums frozen since 1984 as a delay penalty. In July 1990, SOE informed Elektrim that a payment order had been sent to the Central Bank of Iraq for the amounts due to be remitted. Elektrim asserts that Iraq's invasion and occupation of Kuwait prevented the execution of the payment order.

135. The Panel finds that the documentation and explanations provided by Elektrim indicate that the debt in question arose in or before 1986. Accordingly, the claim is outside the jurisdiction of the Commission and is not compensable under Security Council resolution 687 (1991). Applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 41 to 43 of the Summary, the Panel is unable to recommend compensation.

136. The Panel recommends no compensation for (a) Contract HT – 7/79 (State Organisation of Electricity, Iraq).

(b) Contract No. 50 (Kirkuk Irrigation Project Administration, Iraq)

137. Elektrim seeks compensation in the amount of USD 295,778 for contract losses on Contract No. 50. On 14 September 1982 Elektrim entered into a contract with the Kirkuk Irrigation Project Administration ("KIPA") for the installation of an electrical network within a period of 14 months. The value of the contract was USD 7,537,660. The contract was delayed because of the war between Iran and Iraq and works were completed in mid-1986.

138. Elektrim asserts that the guarantee period expired in 1987, but Elektrim replaced part of the installation in November 1989 and KIPA "took delivery of the works" on 5 May 1990. Elektrim sent a final bill to KIPA on 30 June 1990. Elektrim asserts that it was informed by phone that a payment order had been sent by KIPA to its bank on 15 July 1990. However, it asserts that it was not paid due to Iraq's invasion and occupation of Kuwait.

139. The supporting documentation provided by Elektrim indicates that the performance that created the debt in question occurred prior to 2 May 1990. Accordingly, the claim is outside the jurisdiction of the Commission and is not compensable under Security Council resolution 687 (1991). Applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 41 to 43 of the Summary, the Panel is unable to recommend compensation.

140. The Panel recommends no compensation for (b) Contract No. 50 (Kirkuk Irrigation Project Administration, Iraq).

(c) Contract No. 05-330/96526 (Ministry of Communications, Kuwait)

141. In the "E" claim form dated 11 October 1993, Elektrim sought compensation in the amount of USD 1,230,934 (KWD 355,740, converted by the claimant to USD 1,227,302) for contract losses on Contract No. 05-330/96526. In its response to the article 34 notification dated 16 May 2000, Elektrim reduced the claim amount to USD 970,370 (KWD 280,437, converted by the claimant to USD 967,507), stating that it had received the amount of USD 260,564 (KWD 75,303, converted by the claimant to USD 259,795) from the Ministry of Communications, Kuwait (the "Ministry").

142. On 7 December 1989, Elektrim entered into a contract with the Ministry for the installation and maintenance of a telephone network in the region of Mushrif and South Sabahiya. The value of the contract was KWD 783,432 (converted by the claimant to USD 2,702,839). The contract was to be completed within 12 months.

143. Elektrim asserts that it carried out orders to the value of KWD 431,750 prior to Iraq's invasion and occupation of Kuwait. The Ministry paid KWD 76,010, but Elektrim asserts that the invasion and occupation prevented the payment of KWD 355,740. It received KWD 75,303 "soon after" the submission of its Statement of Claim on 11 October 1993, leaving an outstanding amount of KWD 280,437.

144. Applying the approach taken with respect to claims for contract losses with non-Iraqi parties, as set out in paragraphs 61 to 63 of the Summary, the Panel finds that Elektrim did not demonstrate that the failure of the Ministry to pay the outstanding amount was directly caused by Iraq's invasion and occupation of Kuwait. There is no evidence that the Ministry became insolvent or otherwise ceased to exist as a direct result of Iraq's invasion and occupation of Kuwait. The payment of the amount of KWD 75,303 indicates that the failure to pay the remainder was not directly due to Iraq's invasion and occupation of Kuwait, but to the decision of the Ministry, whose reasons for failing to make the payment are not known.

145. The Panel recommends no compensation for (c) Contract No. 05-330/96526 (Ministry of Communications, Kuwait).

Recommendation for contract losses

146. The Panel recommends no compensation for contract losses.

B. Loss of profits

1. Facts and contentions

147. In the "E" claim form Elektrim sought compensation in the amount of USD 1,216,889 (KWD 351,681, converted by the claimant to USD 1,213,302) for lost earnings on Contract No. 05-330/96526 (see paragraphs 141 - 145, supra). In its response to the article 34 notification, Elektrim reduced the claim amount to USD 363,990, after having received a further payment from the Ministry. Elektrim asserts that Iraq's invasion and occupation of Kuwait prevented continuation of the contract, thereby depriving it of expected income in the claimed amount.

2. Analysis and valuation

148. The Panel finds that Elektrim did not provide sufficient evidence that Iraq's invasion and occupation of Kuwait was the cause of the non-resumption of Contract No. 05-330/96526. According to the documentation provided by Elektrim in support of its claim, the Ministry was still in existence in 1993. It appears to the Panel that the contract was not continued because of a commercial decision of one or both of the parties.

3. Recommendation

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

C. Loss of tangible property

1. Facts and contentions

150. Elektrim seeks compensation in the amount of USD 31,841 (KWD 9,202, converted by the claimant to USD 31,746) for loss of tangible property. On 8 August 1988, Elektrim entered into a contract with the Ministry for the installation and maintenance of a telephone network. Elektrim completed the installation of the network within 12 months and was continuing to service the network as and when requested by the Ministry when Iraq invaded Kuwait.

151. Elektrim asserts that its personnel were evacuated from Kuwait on 16 August 1990, abandoning property being used on the contract. The property comprised residential and office furniture and special technical equipment. In September 1991, Elektrim visited Kuwait but was unable to recover the lost property, or to determine the circumstances in which it had been lost.

2. Analysis and valuation

152. The Panel finds that Elektrim provided sufficient evidence to substantiate its claim for loss of tangible property. The documentation provided by Elektrim shows that the items were shipped to Kuwait in August 1988 and May 1989, and that Elektrim was still performing the contract at

the time of Iraq's invasion of Kuwait. A joint statement by three managers of Elektrim states that they visited the project office of Elektrim on 5 September 1991 and that all the furniture and equipment had disappeared. The Panel finds that the residual value of the property as at 2 August 1990 was KWD 7,614 (USD 26,346).

3. Recommendation

153. The Panel recommends compensation in the amount of USD 26,346 for loss of tangible property.

D. Summary of recommended compensation for Elektrim

Table 14. Recommended compensation for Elektrim

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	2,102,387	nil
Loss of profits	363,990	nil
Loss of tangible property	31,841	26,346
Claim preparation costs	174,668	(--)
Interest (no amount specified)	(--)	(--)
Total	2,672,886	26,346

154. Based on its findings regarding Elektrim's claim, the Panel recommends compensation in the amount of USD 26,346. The Panel finds the date of loss to be 2 August 1990.

X. STOCK COMPANY IN MIXED PROPERTY “ISKRA” INZENERING

155. Stock Company in Mixed Property “Iskra” Inzenering (“Iskra”) is a stock company existing under the laws of the Republic of Macedonia. Its principal business is the manufacture and assembly of “metal constructions”. It claims that Iraq’s invasion and occupation of Kuwait interrupted a number of projects which it was undertaking in Iraq. It seeks compensation in the total amount of USD 4,132,643 for contract losses.

Table 15. Iskra’s claim

Claim element	Claim amount (USD)
Contract losses	4,132,643
Total	4,132,643

A. Contract losses

156. Iskra seeks compensation in the total amount of USD 4,132,643 for contract losses.

157. In the “E” claim form, Iskra characterised USD 1,668,268 of this loss element as “loss related to a business transaction”, but the Panel finds that it is more accurately described as contract losses.

158. The claim is divided into four groups of projects on which Iskra was engaged as a sub-contractor by the following contractor companies: (a) GP Pelagonija, Macedonia; (b) SGP Slovenia Ceste Tehnika Obnova, Ljubljana, Slovenia; (c) Metalna Maribor, Slovenia; and (d) IMP Metall Chemie, Austria and IMP Engineering, Slovenia. The name of the projects, the principal amount claimed and the amount of interest claimed is set out in table 16, infra.

Table 16. Iskra's claim for contract losses

Project	Principal amount (USD)	Interest amount (USD)	Total (USD)
1. GP Pelagonija			
P-85794	260,708	157,652	418,360
P-85742	15,425	9,328	24,753
P-B2	52,948	33,924	86,872
P-85770	26,825	16,222	43,047
P-85772	6,267	3,789	10,056
P-500/4	3,943	2,526	6,469
P-85481	619,222	374,448	993,670
Sub-total	985,338	597,889	1,583,227
2. SGP Slovenia	150,135	67,703	217,838
3. Metalna			
Bekhme Dam	243,538	64,968	308,506
Badush Dam	288,488	66,316	354,804
Sub-total	532,026	131,284	663,310
4. IMP			
Salaries	100,505	nil	100,505
Material	150,610	34,601	185,211
Lost business	1,382,552	nil	1,382,552
Sub-total	1,633,667	34,601	1,668,268
Total	3,301,166	831,477	4,132,643

159. The Panel deals with each of the four project groups in turn. The Panel notes at the outset that much of the documentation provided by Iskra was untranslated, despite a specific request from the secretariat for English translations. In view of article 6 of the Rules, the Panel did not consider the untranslated documentation.

(a) Contracts with GP Pelagonija, Macedonia

160. Iskra seeks compensation in the amount of USD 1,583,227 for contract losses on seven projects on which Iskra was engaged as a sub-contractor by GP Pelangonija. The claim includes interest in the amount of USD 597,889.

161. The only information provided by Iskra was the name of the project, the principal amount claimed, the amount of interest claimed, and the period for which interest is claimed.

162. In support of its claim Iskra provided an untranslated contract and a number of untranslated handwritten documents which appear to be applications for payment.

163. The Panel finds that the work in relation to the contracts was performed prior to 2 May 1990. Indeed, most of the work was performed prior to 1 January 1986 and, in one case, prior to 1 January 1984. Accordingly, the claim is outside the jurisdiction of the Commission and is not compensable under Security Council resolution 687 (1991). Applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 41 to 43 of the Summary, the Panel is unable to recommend compensation.

164. The Panel recommends no compensation for contract losses in respect of (a) GP Pelagonija, Macedonia.

(b) Contracts with SGP Slovenia Ceste Tehnika Obnova, Ljubljana, Slovenia

165. Iskra seeks compensation in the amount of USD 217,838 (USD 150,135 plus USD 67,703 for 6 per cent per annum interest calculated from 1 October 1987 to 31 December 1993) for contract losses on "construction project P-700 Baghdad-Iraq" with SGP Slovenia Ceste Tehnika Obnova – Ljubljana.

166. Iskra asserts that it performed construction work with a value of USD 282,125. Iskra was paid USD 131,990 and states that it was due to receive the remaining USD 150,135 in ten half year annuities. However, Iskra asserts that because of Iraq's invasion and occupation of Kuwait it has not yet received the amount due.

167. In support of its claim Iskra provided an untranslated contract, a translation of a final account document for work executed to October 1988, and a translated minute dated 23 May 1989 indicating a balance due in the amount claimed.

168. The Panel concludes from the documentation provided by Iskra that the construction work giving rise to the debt in question was completed prior to 2 May 1990. Iskra's assertion that payment on the contract was due in ten half year annuities would mean that some of the annuities fell due on dates subsequent to 2 May 1990. However, Iskra has not provided sufficient evidence to enable the Panel to determine whether it has jurisdiction in respect of the contract, as set out in paragraphs 68 to 77 of the Summary.

169. In these circumstances, the Panel must find that the claim is not compensable under Security Council resolution 687 (1991). Applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 41 to 43 of the Summary, the Panel is unable to recommend compensation.

170. The Panel recommends no compensation for contract losses in respect of (b) SGP Slovenia Ceste Tehnika Obnova, Ljubljana, Slovenia.

(c) Contracts with Metalna Maribor, Slovenia

171. Iskra seeks compensation in the amount of USD 663,310 for contract losses on projects on which Iskra was engaged as a sub-contractor by Metalna Maribor, Slovenia. The claim is comprised of (i) the amount of USD 308,506 (USD 243,538 plus USD 64,968 for 6 per cent per annum interest calculated from 1 January 1990 to 31 December 1993) in respect of a contract for the manufacture of equipment for the Bekhme Dam project, and (ii) the amount of USD 354,804 (USD 288,488 plus USD 66,316 for 6 per cent per annum interest calculated from 30 June 1990 to 31 December 1993) in respect of a contract for the manufacture of equipment for the Badush Dam.

172. The only explanation provided by Iskra in relation to the claim is that the equipment was “manufactured but not delivered”.

173. In support of its claim Iskra provided a translated contract dated 30 September 1989, two sets of minutes documenting the completion of the manufacture of the equipment dated 10 August and 16 September 1990, and a summary dated 17 February 1994 indicating a balance due to Iskra in the amount claimed.

174. Although little information was provided in relation to the claim, the Panel notes that the claimant seeks interest on amount (i) from 1 January 1990 and interest on amount (ii) from 30 June 1990. This indicates to the Panel that the equipment could not be delivered from these dates. As these dates are prior to Iraq’s invasion and occupation of Kuwait, the Panel concludes that the failure to deliver the equipment was not directly caused by Iraq’s invasion and occupation of Kuwait.

175. The Panel recommends no compensation for contract losses in respect of (c) Metalna Maribor, Slovenia.

(d) Contracts with IMP Metall Chemie, Austria, and IMP Engineering, Slovenia

176. Iskra seeks compensation in the amount of USD 1,668,268 for contract losses on a contract for the manufacture and export of equipment to Iraq for the contractors IMP Metall Chemie, Austria, and IMP Engineering, Slovenia.

177. Iskra states that it entered into a contract with IMP Metall Chemie for the manufacture of “metal construction” for the “construction project P-824” in Iraq. IMP Engineering, Slovenia was to export the equipment to Iraq.

178. Iskra asserts that 15 employees worked for three months on the project to complete the necessary documentation, and that it acquired 273,478 kilograms of material from Zelezara – Skopje to start the project. It also asserts that it refused orders from other customers.

179. When Iraq invaded Kuwait, work on the project stopped. Iskra seeks compensation for the salaries paid to its employees (USD 100,505), the material purchased (USD 150,610 and USD 34,601 for 6 per cent yearly interest calculated from 30 June 1990 to 31 December 1993), and lost business (USD 1,382,552).

180. In support of its claim, Iskra provided a translated contract dated 6 July 1990, the untranslated invoices from Zelezara-Skopje, and a facsimile dated 24 July 1990 from IMP Metall Chemie instructing Iskra to stop production on the contract.

181. The Panel finds that Iskra did not provide sufficient evidence in support of its claim. Whether or not the contract was terminated directly due to Iraq's invasion and occupation of Kuwait, as asserted by Iskra, Iskra provided no evidence of salary payments, nor that it paid for the materials supplied by Zelezara-Skopje, nor of the existence or value of the lost business.

182. The Panel recommends no compensation for contract losses in respect of (d) IMP Metall Chemie, Austria, and IMP Engineering, Slovenia.

Recommendation for contract losses

183. The Panel recommends no compensation for contract losses.

B. Summary of recommended compensation for Iskra

Table 17. Recommended compensation for Iskra

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	4,132,643	nil
Total	4,132,643	nil

184. Based on its findings regarding Iskra's claim, the Panel recommends no compensation.

XI. ENKA TEKNIK

185. Enka Teknik ("Enka") is a corporation existing under the laws of Turkey. The company carried on construction and engineering projects in Iraq from 1982. Its activities in Iraq were allegedly disrupted when Iraq invaded Kuwait. It seeks compensation in the total amount of USD 5,885,376 (1,240,486,060 Turkish liras (TRL), IQD 160,921, DEM 209,800 and USD 4,772,877, converted by the claimant to USD 5,800,738) for contract losses, loss of profits, loss of tangible property, financial losses and interest.

186. The interest element is in the amount of USD 199,410. For the reasons stated in paragraph 58 of the Summary, the Panel makes no recommendation with respect to Enka's claim for interest.

Table 18. Enka's claim

Claim element	Claim amount (USD)
Contract losses	3,939,578
Loss of profits	937,861
Loss of tangible property	221,412
Financial losses	587,115
Interest	199,410
Total	5,885,376

A. Contract losses

187. Enka seeks compensation in the amount of USD 3,939,578 (TRL 125,031,658, IQD 49,292, DEM 209,800 and USD 3,600,328, converted by the claimant to USD 3,938,927) for contract losses. The claim includes six loss items as set out in table 19, infra. The Panel deals with each loss item in turn. The Panel's recommendations for each loss item are set out in table 20, infra.

Table 19. Enka's claim for contract losses

Loss item	Claim amount (USD)
Promissory notes	3,340,978
Progress payment (Um Qasr)	180,785
Progress payment (Failuja Cement)	112,559
Progress payment (Hamamalil)	45,936
"Advances and expenses of purchase orders with respect to Um Qasr contract"	137,288
Materials (Kufa Cement Factory)	122,032
Total	3,939,578

(a) Promissory notes

188. Enka seeks compensation in the amount of USD 3,340,978 for losses incurred on promissory notes issued by the State Organisation of Industrial Projects of Iraq ("SOIP"). The claim is comprised of three amounts: (i) the principal amount of eleven promissory notes (USD 2,688,785); (ii) interest on another note dated 1 January 1987 (USD 89,049); and (iii) interest on the eleven notes (USD 563,144).

189. Enka entered into a contract with SOIP on 18 December 1985 for various works related to railway construction at the Kubaisa Cement Plant. The total contract value was USD 16,872,307.

190. In respect of item (i), the principal amount of eleven promissory notes, Enka asserts that a total of 11 promissory notes with a value of USD 2,688,785 remain unpaid. The notes are dated between 21 October 1987 and 1 March 1990. The maturity dates are two years later, i.e., between 21 October 1989 and 1 March 1992.

191. In respect of item (ii), interest on another note dated 1 January 1987, Enka asserts that the principal amount of the promissory note issued on 1 January 1987 was paid by SOIP, but interest in the amount of USD 89,049 was not.

192. In respect of item (iii), interest on the eleven notes, Enka asserts that SOIP has not paid interest in the amount of USD 563,144 on the 11 promissory notes referred to at paragraph 190, supra.

193. The Panel finds that the work in relation to the 11 promissory notes was performed prior to 2 May 1990. Under clause 4.6.2(1) of the contract, payment for the work was deferred for a period of two years after its completion. In the case of some of the invoices, this meant that payment

fell due on dates subsequent to 2 May 1990. However, applying the approach taken with respect to "old debt", as set out in paragraphs 68 to 77 of the Summary, the claim is outside the jurisdiction of the Commission and is not compensable under Security Council resolution 687 (1991).

194. Therefore, applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 41 to 43 of the Summary, the Panel is unable to recommend compensation.

(b) Progress payment (Um Qasr)

195. Enka seeks compensation in the amount of USD 180,785 for an unpaid progress payment on the Um Qasr project. On 11 November 1989, Enka entered into a contract with the Iraqi Cement State Enterprise ("ICSE") for the construction of a rail tanker off-loading and cement silos feeding system. The total contract price was USD 1,943,000. Under the contract, ICSE was obliged to make an advance payment of USD 382,400. The contract was to be completed within 11 months of the date of receipt of the advance payment.

196. Enka asserts that it shipped materials to Iraq on 21 July 1990 and delivered the shipping documents to "PTT administration" on 2 August 1990 for despatch to the Rafidain Bank, Iraq. However, the documents could not be delivered to Iraq allegedly due to Iraq's invasion and occupation of Kuwait, and they were returned to Enka on 16 November 1990.

197. The Panel finds that the loss incurred in relation to the unpaid progress payment was directly due to Iraq's invasion and occupation of Kuwait. However, the contract provided for an advance payment of USD 382,400. Enka was asked in the article 34 notification, among other things, whether it had received any advance payments, and, if so, whether there were any amounts outstanding. The response received by the Commission did not answer this question in relation to this contract.

198. The Panel must assume that Enka received, and still retains, the advance payment. The amount of the advance payment (USD 382,400) is greater than the amount claimed (USD 180,785). Applying the approach taken with respect to advance payments, as set out in paragraph 67 of the Summary, the Panel is unable to recommend compensation.

(c) Progress payment (Failuja Cement)

199. Enka seeks compensation in the amount of USD 112,559 (IQD 35,006, converted by the claimant to USD 112,822) for an unpaid progress payment on the Failuja Cement project. On 9 January 1985, Enka entered into a contract with ICSE for various works, including preparation of a protective maintenance system, manufacturing of spare parts and supervision. There is no evidence of the total contract price. There is no evidence that there was any advance payment. Enka asserts that "the date of expiry of contract of phase-out term was April 1987".

200. Enka asserts that as at 31 December 1989, the amount receivable on the Failuja project was IQD 35,006. It asserts that a letter dated 30 October 1990 from ICSE instructed it to apply to the accounting department for payment. However, it states that "due [to] UN embargo decision we couldn't apply to the client".

201. The Panel finds that the work in relation to the unpaid progress payment was performed prior to 2 May 1990. Accordingly, the claim is outside the jurisdiction of the Commission and is not compensable under Security Council resolution 687 (1991). Applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 41 to 43 of the Summary, the Panel is unable to recommend compensation.

(d) Progress payment (Hamamalil)

202. Enka seeks compensation in the amount of USD 45,936 (IQD 14,286, converted by the claimant to USD 46,070) for an unpaid progress payment on the Hamamalil project. Enka asserts that it entered into an arrangement with the Northern Cement State Enterprise, Iraq ("NCSE") by which the NCSE agreed to pay Enka IQD 2,500 per week per technician for advice on the furnace adjusting operations in the Hamamalil Cement Factory. There is no evidence that there was any advance payment. Advice was provided by Enka's technicians between 11 and 30 July 1990 to the value of IQD 14,286.

203. The Panel finds that the work that created the debt in question was performed after 2 May 1990 and that the debt is therefore within the jurisdiction of the Commission. The Panel further finds that the loss incurred in relation to the unpaid progress payment was directly due to Iraq's invasion and occupation of Kuwait.

204. However, the Panel must assume that Enka retains an advance payment of USD 382,400 in relation to the Um Qasr Contract (loss item (b)) (see paragraph 198, supra). Applying the approach taken with respect to advance payments, as set out in paragraphs 64 to 67 of the Summary, the Panel must take this advance payment into account with respect to Enka's entire claim for contract losses. This calculation appears at table 20, infra.

(e) "Advances and expenses of purchase orders with respect to Um Qasr contract"

205. Enka seeks compensation in the amount of USD 137,288 (TRL 116,071,812, DEM 110,294 and USD 23,565, converted by the claimant to USD 136,931) for "advances and expenses of purchase orders with respect to the Um Qasr contract". The claim includes three separate amounts allegedly payable to suppliers upon the cancellation of orders.

206. The amount of USD 23,565 was an advance payment made to Fuller International Inc., a United States corporation, for two compressors and

two pumps, which Enka states it lost when the Um Qasr contract was interrupted by Iraq's invasion and occupation of Kuwait.

207. The amount of TRL 116,071,812 was claimed by AEG Eti A.S., a Turkish corporation ("AEG Turkey"), against Enka, as damages for the cancellation of Enka's purchase order allegedly due to Iraq's invasion and occupation of Kuwait.

208. The amount of DEM 110,294 was claimed by AEG Lloyd Dynamowerke, a German corporation, against Enka, as damages for the cancellation of Enka's purchase order upon Iraq's invasion and occupation of Kuwait.

209. In relation to the advance payment made to Fuller Pumps, the Panel considers that the loss of an advance payment on a contract cancelled because of Iraq's invasion and occupation of Kuwait is a direct loss. The Panel finds that Enka provided sufficient evidence to substantiate its claim. It provided a copy of the contract with Fuller Pumps and evidence that it paid the advance payment. The contract provided that in the event of termination, the purchaser would be liable for 10 per cent of the contract price, costs and cancellation charges. Having considered the material presented to it, the Panel finds that Enka has suffered a loss directly resulting from Iraq's invasion and occupation of Kuwait in the amount of USD 23,565.

210. However, the Panel must assume that Enka retains an advance payment of USD 382,400 in relation to loss item (b) (see paragraph 198, supra). Applying the approach taken with respect to advance payments, as set out in paragraphs 64 to 67 of the Summary, the Panel must take this into account with respect to the claimant's entire claim for contract losses. This calculation appears at table 20, infra.

211. In respect of the amount of TRL 116,071,812 allegedly claimed by AEG Turkey, and the amount of DEM 110,294 allegedly claimed by AEG Lloyd Dynamowerke, Enka's response to a request for further information and evidence issued by the Commission makes it clear that Enka has not paid either of these amounts to the companies concerned. In the absence of such payment, Enka has not suffered a loss, and the Panel is unable to recommend compensation for these amounts.

(f) Materials (Kufa Cement Factory)

212. Enka seeks compensation in the amount of USD 122,032 (TRL 8,959,846, DEM 99,506 and USD 55,000, converted by the claimant to USD 121,341) for the cost of materials purchased but not shipped for the Kufa Cement Factory.

213. Enka asserts that on 7 December 1989 it entered into a contract with the Iraqi State Enterprise for the supply of three kiln shells for the Kufa Cement Factory. One kiln shell was supplied and paid for on 19 April 1990. On 7 June 1990, Enka imported materials from Daval, France for the

remaining two kiln shells and delivered these to the manufacturers in Turkey. However, it was forced to suspend the manufacture due to the interruption of the contract for the Kufa Cement Factory.

214. The claim includes the amount claimed by the manufacturer for manufacturing and other services (USD 55,000), the cost of the material for the kiln shells (DEM 99,506), and the expenses of importing the material (TRL 8,959,846).

215. The Panel finds that the manufacture and intended export to Iraq of the second and third kilns was interrupted due to the disruption of shipping services caused by Iraq's invasion and occupation of Kuwait. The Panel finds that the costs thereby incurred were directly caused by Iraq's invasion and occupation of Kuwait.

216. However, the Panel finds that Enka substantiated its claim only in relation to the cost of the material for the kiln shells (DEM 99,506), and the expenses of importing the material (TRL 8,959,846). In relation to the amount claimed by the manufacturer, Enka provided no evidence that it paid the manufacturer the amount claimed.

217. Accordingly, the Panel finds that Enka has suffered a loss directly resulting from Iraq's invasion and occupation of Kuwait in the amount of USD 67,032 (DEM 99,506 and TRL 8,959,846).

218. However, the Panel must assume that Enka retains an advance payment of USD 382,400 in relation to loss item (b) (see paragraph 198, supra). Applying the approach taken with respect to advance payments, as set out in paragraphs 64 to 67 of the Summary, the Panel must take this into account with respect to the claimant's entire claim for contract losses. This calculation appears at table 20, infra.

Recommendation for contract losses

219. Based on the Panel's findings regarding Enka's claim for contract losses, the calculation of the Panel's recommendation concerning contract losses is as follows:

Table 20. Enka's claim for contract losses (Panel's recommendation)

Claim item	Claim amount (USD)	Recommended compensation (USD)
Promissory notes	3,340,978	nil
Progress payment (Um Qasr)	180,785	180,785
Progress payment (Failuja Cement)	112,559	nil
Progress payment (Hamamalil)	45,936	45,936
"Advances and expenses of purchases orders with respect to Um Qasr contract"	137,288	23,565
Materials (Kufa Cement Factory)	122,032	67,032
Less advance payment	(--)	(382,400)
Total	3,939,578	nil

220. In view of the calculation in table 20, supra, the Panel recommends no compensation for contract losses.

B. Loss of profits

1. Facts and contentions

221. Enka seeks compensation in the amount of USD 937,861 (TRL 500,394,295 and USD 752,000, converted by the claimant to USD 939,789) for loss of profits. The claim includes (a) overhead expenses (TRL 500,394,295, converted by the claimant to USD 187,789); (b) loss of profits on the Um Qasr project (USD 613,000); and (c) loss of profits on the Kufa Cement project (USD 139,000).

222. In relation to item (a), overhead expenses, Enka asserts that the overhead expenses include items such as salaries, premiums, housing remittance, etc. Enka provides no further information in relation to the claim. Enka does not explain how the costs were directly caused by Iraq's invasion and occupation of Kuwait.

223. In relation to item (b), loss of profits on the Um Qasr project, Enka calculated its loss of profits by subtracting the cost of materials and equipment, the cost of erection and supervision, and other expenses, from the total contract price.

224. In relation to item (c), loss of profits on the Kufa Cement project, Enka calculated its loss of profits by subtracting the cost of materials, the cost of transport, and other expenses, from the amount outstanding under the letter of credit.

2. Analysis and valuation

225. In support of item (a), overhead expenses, Enka provided a list of the items of overhead comprising the claim, and untranslated ledger accounts. In view of article 6 of the Rules, the Panel did not consider the untranslated accounts.

226. It provided no evidence in support of item (b), loss of profits on the Um Qasr project, or item (c), loss of profits on the Kufa Cement project.

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

3. Recommendation

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

C. Loss of tangible property

1. Facts and contentions

229. Enka seeks compensation in the amount of USD 221,412 (IQD 68,859, converted by the claimant to USD 222,066) for loss of tangible property. The claim includes (a) fixed assets (IQD 50,947, converted by the claimant to USD 164,301) and (b) stocks (IQD 17,912, converted by the claimant to USD 57,765).

230. The claim for item (a), fixed assets, includes vehicles, office furniture and equipment. The evidence indicates that the property was confiscated by the Iraqi authorities in December 1992.

231. The claim for item (b), stocks, includes foodstuffs, work-clothes, stationary, spare parts and sundries. Enka does not explain how the stock was lost.

2. Analysis and valuation

232. In relation to item (a), fixed assets, the Panel finds that the property was confiscated by the Iraqi authorities in December 1992. Applying the approach taken with respect to the confiscation of tangible property by the Iraqi authorities after the liberation of Kuwait, as set out in paragraph 146 of the Summary, the Panel is unable to recommend compensation.

233. In relation to item (b), stocks, Enka provided accounts for its Iraqi branch dated 12 December 1989 showing the value of its stock. It provided

no evidence that the stock was in Iraq as at 2 August 1990 or that the stock was lost due to Iraq's invasion and occupation of Kuwait. Accordingly, the Panel is unable to recommend compensation for this portion of the claim.

3. Recommendation

234. The Panel recommends no compensation for loss of tangible property.

D. Financial losses

235. Enka seeks compensation in the amount of USD 587,115 (TRL 615,060,107, IQD 42,770 and USD 221,139, converted by the claimant to USD 500,545) for financial losses. There are four items in the claim. The Panel deals with each item in turn.

(a) Expenses of letters of guarantee

236. Enka seeks compensation in the amount of USD 107,133 (TRL 288,432,841, converted by the claimant to USD 29,890) for expenses relating to letters of guarantee. Enka does not explain its claim well. It merely states that it makes no claim for letters of guarantee issued with respect to works of Enka performed prior to 7 August 1990. However, it claims the following expenses and commissions paid for letters of guarantee issued between 7 August 1990 and 30 April 1993.

	TRL
Iktisat Bankasi Mecidiyekoy Branch	265,750,956
Vakiflar Bankasi Taksim Branch	3,695,958
Is Bankasi Galata Branch	15,555,713
Esbank Mecidiyekoy Branch	3,430,214
Total	288,432,841

237. The Panel finds that fees paid on letters of guarantee after 2 August 1990 may be directly caused by Iraq's invasion and occupation of Kuwait depending on the circumstances of the claim.

238. However, in support of its claim, Enka provided only correspondence dated 1992-1993 from branches of Turkish banks setting out the amount of expenses and commissions paid. It did not state in relation to which contracts the letters of guarantee were issued, nor the reason why the expenses and commissions continued to be paid after 7 August 1990. Accordingly, the Panel is unable to determine whether the fees paid by Enka were directly caused by Iraq's invasion and occupation of Kuwait and is therefore unable to recommend compensation.

239. The Panel recommends no compensation for item (a), expenses of letters of guarantee.

(b) Cash

240. Enka seeks compensation in the amount of USD 137,524 (IQD 42,770, converted by the claimant to USD 137,930) for the following cash amounts left in Iraq.

	IQD
Enka Baghdad office (petty cash)	510
Al Rasheed Bank Mosul branch	466
Al Rasheed Bank Arasat branch	41,794
Total	42,770

241. In support of its claim, Enka provided a petty cash record for the Baghdad office dated 12 July 1990, a bank account statement of the Mosul branch dated 1 January 1990, and a bank account statement of the Arasat branch dated 5 August 1990.

242. Applying the approach taken with respect to loss of funds in bank accounts and loss of petty cash in Iraq, set out in paragraphs 135 to 140 of the Summary, the Panel recommends no compensation for loss of cash.

243. The Panel recommends no compensation for item (b), cash.

(c) Interest on Turkish bank loans

244. Enka seeks compensation in the amount of USD 221,139 for interest paid on loans from the Turkish bank, Turkiye Is Bankasi. Enka states that it took the loans against the security of promissory notes (presumably issued by Iraqi employers) with due dates of 31 October, 5 November and 19 November, 1989. The promissory notes were not paid, with the consequence that Enka paid interest on the loans from the due date of the promissory notes until 30 June 1993 in the total amount of USD 221,139.

245. In support of its claim Enka provided a translation of a letter from the Turkish bank dated 6 May 1993 stating the total amount of interest paid with respect to the “Iraqi drafts received as guarantee to foreign currency loans”.

246. The Panel finds that Enka failed to demonstrate a direct causal link between the interest paid on the loans taken from the Turkish bank and Iraq’s invasion and occupation of Kuwait. Enka did not even state the contract(s) in relation to which the promissory notes were issued.

247. The Panel recommends no compensation for item (c), interest on Turkish bank loans.

(d) Interest on exports pre-financing loan

248. Enka seeks compensation in the amount of USD 121,319 (TRL 326,627,266, converted by the claimant to USD 111,586) for interest paid on an exports prefinancing loan from "Iktisat Bankasi Mecidiyekoy Branch with respect to Kufa kiln shell exportation". Enka asserts that the loan matured on 17 December 1990, but due to the inability to export the material to Iraq, the loan was extended to 19 June 1991. Enka states that it was thereby obliged to pay interest in the amount claimed.

249. In support of its claim, Enka provided a translation of a letter from Iktisat Bankasi dated 11 May 1993 stating the total interest paid with respect to "pre shipment Exports Eximbank Loan".

250. The Panel finds that Enka did not demonstrate a direct causal link between the interest paid on the exports prefinancing loan and Iraq's invasion and occupation of Kuwait. The Panel finds that the direct cause of the loss was Enka's commercial decision to extend the loan, which ultimately was a decision as to how to structure its financial affairs.

251. The Panel recommends no compensation for item (d), interest on exports pre-financing loan.

Recommendation for financial losses

252. The Panel recommends no compensation for financial losses.

E. Summary of recommended compensation for Enka

Table 21. Recommended compensation for Enka

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	3,939,578	nil
Loss of profits	937,861	nil
Loss of tangible property	221,412	nil
Financial losses	587,115	nil
Interest (no amount specified)	199,410	(--)
Total	5,885,376	nil

253. Based on its findings regarding Enka's claim, the Panel recommends no compensation.

XII. HSG ENGINEER CONTRACTOR HAYDAR SONER GÖRKER

254. HSG Engineer Contractor Haydar Soner Görker ("HSG") is a company existing under the laws of Turkey. It seeks compensation in the amount of USD 1,496,273 for contract losses.

255. HSG also seeks compensation for interest on the principal amount of any award at the rate of 8 per cent. For the reasons stated in paragraph 58 of the Summary, the Panel makes no recommendation with respect to HSG's claim for interest.

Table 22. HSG's claim

Claim element	Claim amount (USD)
Contract losses	1,496,273
Interest (no amount specified)	(--)
Total	1,496,273

A. Contract losses

1. Facts and contentions

256. HSG seeks compensation in the total amount of USD 1,496,273 for contract losses. On 16 December 1985, it entered into a sub-contract with the Al Jazira Contracting and Investment Company, Kuwait ("Al Jazira"), for remodelling of drains and roadworks for the Abu Ghraib Project of the Ministry of Agriculture and Agrarian Reforms of Iraq (the "Ministry"). HSG started work on the sub-contract and continued to work for a 10 month period (until October 1986) despite the fact that it was not being paid.

257. The sub-contract provided that the "court of Baghdad" should have exclusive jurisdiction in respect of all actions and proceedings arising out of the sub-contract. It further provided that any dispute or difference, if not susceptible of amicable settlement, was to be referred to arbitration. An arbitration committee was to be formed by the competent court.

258. On 7 January 1987, HSG, having unsuccessfully sought to persuade the Ministry to exercise its power of making a direct payment to HSG, referred the matter of the outstanding payments to a domestic arbitration under Iraq law. An arbitral tribunal was appointed by the authorised Court of Karrada, Iraq on 7 January 1987. The arbitral tribunal delivered its decision on 14 October 1990. It ordered Al Jazira to pay HSG "in hard currency outside Iraq" the amounts of USD 1,420,683 and KWD 21,910; and HSG to pay Al Jazira "inside Iraq" the amount of IQD 78,670.

259. On 13 April 1991, the Karrada Court of First Instance, Baghdad, approved the decision of the arbitral tribunal. The Court passed the following judgment:

(a) Al Jazira was ordered to pay HSG the sum of USD 1,420,683;

(b) HSG was ordered to pay Al Jazira the sum of IQD 78,670;

(c) "the competent Executive Department shall hand the [USD 1,420,683] to [HSG] after its payment by [Al Jazira] and after obtaining the approval of the competent authority at the Central Bank of Iraq and passing the approval of the said bank".

260. The Ministry of Justice signed and sealed the judgment on 6 June 1991. There was no appeal.

261. So far as the Panel can determine, Al Jazira was represented at part and possibly all of the arbitration, but not at the subsequent court "proceedings".

2. Analysis and valuation

262. The facts as asserted raise no issue about quantum. The matter which warrants discussion by the Panel is the compensability in principle of the claim. On the one hand, the initial non-payment of HSG by Al Jazira had nothing to do with Iraq's invasion and occupation of Kuwait. On the other hand, HSG has pursued the correct contractual course; which, by the time it was complete, had been overtaken, at least in time, by the invasion and occupation of Kuwait. It had also been overtaken by the liberation of Kuwait.

263. These circumstances throw up a number of issues for the Panel, all of which would have to be resolved in favour of HSG if the Panel was to be able to recommend compensation. One such issue for the Panel is whether it would have been possible to execute the decision of the court if Iraq's invasion and occupation of Kuwait had not taken place. The Panel notes that HSG has provided no evidence as to Al Jazira's present status or previous fate.

264. The documentation provided by HSG demonstrates the following:

(a) The original non-payment of HSG is wholly unrelated to the invasion and occupation of Kuwait.

(b) After the invasion and indeed after the liberation of Kuwait, HSG obtained a judgment against a company that may or may not exist.

(c) By the time the judgment was confirmed by the Ministry, Kuwait had been liberated.

(d) The judgment expressly placed the onus on the Ministry to secure the payment from Al Jazira. There is no apparent role for HSG.

265. In these circumstances, the Panel is invited to assume that:

(a) Had the invasion and occupation of Kuwait not occurred the judgment would have been met.

(b) The reason it was not possible to execute the judgment was because of the invasion and occupation of Kuwait and despite the liberation of Kuwait.

266. The Panel respectfully declines to make such assumptions in the absence of any material which can be said to support either of them. Accordingly, this issue must be resolved against HSG's claim. It is therefore unnecessary to consider the other issues which would have had to have been addressed had this issue been resolved in favour of HSG's claim.

3. Recommendation

267. The Panel recommends no compensation for contract losses.

B. Summary of recommended compensation for HSG

Table 23. Recommended compensation for HSG

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	1,496,273	nil
Interest (no amount specified)	(--)	(--)
Total	1,496,273	nil

268. Based on the Panel's findings regarding HSG's claim, the Panel recommends no compensation.

XIII. GPT MIDDLE EAST LIMITED

269. GPT Middle East Limited ("GPT") is a corporation existing under the laws of the United Kingdom. It was formerly known as GEC Telecommunications (Overseas Services) Ltd. ("GECTOS"). On 2 November 1989 GECTOS entered into a contract with the Ministry of Transport and Communications, Iraq (the "Ministry") for the supply and installation of a digital radio link for the FAW Telecommunications Project (the "contract"). GPT asserts that the contract was interrupted by Iraq's invasion and occupation of Kuwait. GPT seeks compensation in the total amount of USD 1,432,112 (GBP 753,291) for contract losses.

Table 24. GPT's claim

Claim element	Claim amount (USD)
Contract losses	1,432,112
Total	1,432,112

A. Contract losses

270. GPT seeks compensation in the total amount of USD 1,432,112 (GBP 753,291) for contract losses. The total value of the contract was USD 5,133,080 (GBP 2,700,000).

271. GPT asserts that it manufactured equipment, ordered equipment from other suppliers, and undertook the training services required under the contract in the months leading up to Iraq's invasion and occupation of Kuwait. The contract was interrupted when the invasion occurred, and has not been resumed since.

272. GPT seeks compensation in respect of the following items:

Table 25. GPT's claim for contract losses

Claim item	Claim amount (USD)
Manufactured equipment	339,888
Equipment purchased	847,116
Services provided (training & site surveys)	96,589
Costs of bank guarantees	27,778
Costs of letter of credit confirmation	207,224
Less advance payment	(86,483)
Total	1,432,112

273. The Panel deals with each item in turn.

(a) Manufactured equipment

274. GPT seeks compensation in the amount of USD 339,888 (GBP 178,781) for manufactured equipment. GPT describes the equipment as “Radio equipment”, but does not provide any further detail.

275. GPT states that after Iraq’s invasion and occupation of Kuwait, it received certain directives from the Ministry which caused it to suspend further manufacturing of the equipment. It states that it used some of the equipment on other projects, but could not re-allocate a considerable amount, which remained in the “Finished Goods Store”.

276. GPT states that it performed a stocktake in November 1993, and deleted the items which could not be found during this stocktake from a list dated 28 November 1991 of the “projects book stock value”. The items which remained on the list after the stocktake are the subject of this claim. GPT states that these items have no value except for scrap.

277. The Panel finds that GPT has not evidenced a clear link between equipment manufactured for the contract and the two stock lists – the original one in 1991 and the revised one in 1993. While it may be the case that some of the equipment still held by GPT in 1993 was equipment originally intended for the contract, there is no material which the Panel can use to identify that equipment. Furthermore there is no evidence that that equipment has no commercial value; nor is there any evidence of what the scrap value would be.

278. The Panel recommends no compensation for item (a), manufactured equipment.

(b) Equipment purchased from external suppliers

279. GPT seeks compensation in the amount of USD 847,116 (GBP 445,583) for equipment which was purchased from external suppliers in order to fulfil the contract. The equipment included such items as a frequency counter, aerials, a mobile generator and fuel tanks.

280. GPT states that following Iraq’s invasion of Kuwait it cancelled further orders for equipment for the contract, and also asked the suppliers to repurchase equipment already purchased by GPT. It conducted a full stocktake of the equipment in January 1994 and the items found on this stocktake are the content of this claim.

281. GPT asserts that the equipment the subject of the claim was specially manufactured for the contract and cannot be utilised on other projects. It states that its present value is only as the proceeds of a scrap sale.

282. In support of its claim for equipment purchased from external suppliers, GPT provided invoices for the equipment from the suppliers. It

also provided proof of payment of some of the invoices, in the form of internal memoranda.

283. The Panel finds that GPT failed to provide sufficient evidence in support of its claim. GPT did not provide evidence that it attempted to use the equipment on other projects, or that it now has only scrap value.

284. The Panel recommends no compensation for item (b), equipment purchased from external suppliers.

(c) Services provided (training of Iraqi personnel and site surveys)

285. GPT seeks compensation in the amount of USD 96,589 (GBP 50,806) for services provided, including training of Iraqi personnel (USD 20,673; GBP 10,874) and site surveys (USD 75,916; GBP 39,932).

286. In respect of the training of Iraqi personnel, GPT was responsible, under the terms of the contract, for the training of the Ministry's personnel. GPT undertook some of the training at its premises but also arranged for training to be undertaken at other companies' sites in the United Kingdom. It asserts that it paid five different companies the total amount claimed for training, and has not been reimbursed by the Ministry for this amount.

287. In respect of the site surveys, GPT states that in order to fulfil the contract, comprehensive site surveys had to be undertaken in Iraq prior to the shipment and installation of the equipment. GPT employed the consulting group Marchant, Filer and Dixon to undertake the surveys. It subsequently paid the group GBP 39,932 for work performed. It asserts that it has not been reimbursed by the Ministry for the cost of the surveys.

288. In support of its claim for services, GPT provided invoices for the services from the companies concerned.

289. The Panel finds that GPT failed to provide sufficient evidence in support of its claim. GPT did not provide evidence that it paid the companies the amount claimed.

290. The Panel recommends no compensation for item (c), services provided.

(d) Costs of bank guarantees

291. GPT seeks compensation in the amount of USD 27,778 (GBP 14,611) for commission and insurance paid on an advance payment bond (GBP 405,235 plus IQD 22,108; later amended by deleting the Pounds sterling value) and a performance bond (GBP 189,818) required to be issued by the Ministry in respect of the contract in November 1989.

292. The commission was paid to the Gulf International Bank ("GIB") in respect of its own charges and those raised by Rafidain Bank for the

provision of these two bonds. The insurance was with Lloyd's and was against unfair calling of the bonds.

293. The payments commenced in late 1989 and continued until February 1995. The basis of claim is that the sums paid out would have been recovered through the payments under the contract.

294. However, it is clear that the project was initially very slow to get off the ground - see in this context, the comments of the Panel on the claims for the "reservation" costs for the proposed irrevocable letter of credit at paragraph 300, infra.

295. Accordingly, it cannot be said that the non-recovery of the initial payments made in respect of these two bonds were the result of Iraq's invasion and occupation of Kuwait. GPT took a commercial risk and set up the bonds despite the possibility that the project might never go ahead.

296. Given the absence of a causative link between the costs of the bank guarantees and Iraq's invasion and occupation of Kuwait, the Panel is unable to recommend compensation for item (d), costs of bank guarantees.

(e) Costs of letter of credit confirmation

297. GPT seeks compensation in the amount of USD 207,224 (GBP 109,000) for costs incurred in respect of the confirmation of an irrevocable letter of credit. GPT states that it accepted the contract with the Ministry in 1989 against a confirmed irrevocable letter of credit. The initial cost of reservation was GBP 40,000 and it paid three subsequent reservation fees of GBP 23,000 each when the Ministry failed to raise the letter of credit. It paid the last reservation fee in March 1990.

298. Upon Iraq's invasion and occupation of Kuwait, GIB notified GPT that the confirmation was withdrawn. Accordingly, GPT seeks compensation for the costs associated with the letter of credit, which GPT asserts would normally be recovered as part of the contract price.

299. In support of its claim for the costs incurred, GPT provided correspondence between itself and GIB showing the confirmation and extension of the letter of credit.

300. The Panel finds that the costs incurred in respect of the irrevocable letter of credit were not directly caused by Iraq's invasion and occupation of Kuwait. The last reservation fee was paid in March 1990. This indicates to the Panel that the reason for the payment of the additional fees was not Iraq's invasion and occupation of Kuwait, but the failure of the Ministry, for an unrelated reason in early 1990, to issue the letter of credit at the time required.

301. The Panel recommends no compensation for item (e), irrevocable letter of credit confirmation costs.

Recommendation

302. The Panel recommends no compensation for contract losses.

B. Summary of recommended compensation for GPT

Table 26. Recommended compensation for GPT

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	1,432,112	nil
Total	1,432,112	nil

303. Based on its findings regarding GPT's claim, the Panel recommends no compensation.

XIV. ROZBANK ENGINEERING LTD

304. Rozbank Engineering Ltd ("Rozbank") is a corporation existing under the laws of the United Kingdom. On 10 September 1989, it entered into a contract with the State Company for Drug Industries, Iraq ("SDI") for the supply of five lifts, and spare parts over a two year period (the "contract"). Rozbank asserts that the contract was interrupted by Iraq's invasion and occupation of Kuwait. It seeks compensation in the amount of USD 361,217 (GBP 190,000) for loss of profits.

305. Rozbank also lodged a claim "in the alternative" in the amount of USD 56,610 (GBP 29,777) for actual costs incurred (USD 47,105; GBP 24,777) and administration costs (USD 9,505; GBP 5000).

Table 27. Rozbank's claim

Claim element	Claim amount (USD)
Loss of profits	361,217
Total	361,217

A. Loss of profits

1. Facts and contentions

306. Rozbank seeks compensation in the total amount of USD 361,217 (GBP 190,000) for loss of profits under the contract. The total value of the contract was GBP 680,000. The contract was financed by a credit line established between Midland Montagu Trade Finance, London, and the Rafidain Bank, Baghdad. The Export Credits Guarantee Department ("ECGD") guaranteed payment by the Rafidain Bank for a premium of GBP 69,360.

307. On 1 December 1989, Rozbank sent a letter of intent to a supplier, Express Lift Company ("Express Lifts"), a company incorporated in the United Kingdom, advising that it would order the five lifts as soon as the ECGD and Midland Bank had clarified certain outstanding matters concerning the financing. The parties agreed to ship standard items to Iraq in August 1990 and make the final shipment towards the end of 1990.

308. On 15 May 1990, the Midland Bank advised Rozbank that the ECGD had approved the financing of the lifts contract, specifying 30 September 1990 as the last date of drawings. However, before the first shipment could be made, Iraq invaded Kuwait. Midland Montagu withdrew the credit facility and Rozbank states that it had no choice but to cancel its order with Express Lifts. Express Lifts had already purchased and received special motors from Germany to be incorporated into the lifts. Rozbank states that it was forced to meet the costs of Express Lifts, which amounted to GBP 29,145.

309. The ECGD made an ex gratia payment to Rozbank in the amount of GBP 52,000, but retained GBP 17,000 of the premium paid.

310. The amount of GBP 190,000 for gross profit is calculated as follows:

	GBP
Contract price	680,000
Lift/spares purchase price	(173,000)
Difference	507,000
ECGD premium and bank charges	(71,000)
Bank interest (loan)/arrange fee	(21,000)
Estimated shipping costs	(8,000)
ECGD guarantee	(17,000)
Overseas contractors' installation fee	(200,000)
Gross profit	190,000

311. Rozbank filed an alternative claim in which it seeks compensation in the amount of USD 47,105 (GBP 24,777) for actual costs incurred and in the amount of USD 9,505 (GBP 5,000) for "administration costs".

312. The claim for actual costs incurred is calculated as follows:

	GBP
Net payments to Express Lifts and ECGD	46,485
Bank interest and charges	12,292
Total	58,777
Less advance payment from SDI	(34,000)
Total	24,777

313. Rozbank provided no explanation or evidence in relation to the claim for administration costs.

314. Rozbank states that after the trade embargo against Iraq came into force, SDI requested that Rozbank execute its order. However, on 6 March 1992, Rozbank's application for an export licence from the Department of Trade and Industry of the United Kingdom was refused.

2. Analysis and valuation

315. In support of its claim for loss of profits, Rozbank provided the purchase order from SDI, and documentation from Express Lifts, the Rafidain bank, Midland Montagu Bank, and the ECGD.

316. The Panel finds that Rozbank was prepared to ship the lifts and spare parts to Kuwait on or about August 1990 and this could not be achieved due to Iraq's invasion and occupation of Kuwait.

317. However, applying the evidentiary standard for loss of profits claims set out in paragraphs 125 to 131 of the Summary, the Panel finds that Rozbank did not provide sufficient evidence to enable the Panel to assess the net loss of profits on the contract. In particular, Rozbank did not provide sufficient evidence of the costs which would have been incurred in performance of the contract.

318. Accordingly, the Panel recommends compensation for the alternative claim in the amount of GBP 24,777 (USD 47,105) for the actual costs incurred.

319. Given the lack of information, the Panel is unable to recommend compensation for "administration costs".

3. Recommendation

320. The Panel recommends compensation in the amount of USD 47,105 for loss of profits.

B. Summary of recommended compensation for Rozbank

Table 28. Recommended compensation for Rozbank

Claim element	Claim amount (USD)	Recommended compensation (USD)
Loss of profits	361,217	47,105
Total	361,217	47,105

321. Based on the Panel's findings regarding Rozbank's claim, the Panel recommends compensation in the amount of USD 47,105. The Panel finds the date of loss to be 2 August 1990.

XV. MEDICAL CONSULTANTS INTERNATIONAL, INC. (TRADING AS MEDCON ENTERPRISES)

322. Medical Consultants International, Inc. (trading as Medcon Enterprises)(“Medcon”) is a corporation existing under the laws of the United States of America. On 4 April 1990, Medcon entered into a contract with the Al-Fao General Contracting Establishment, Iraq (“Al-Fao”) for the design and installation of a sheet metal fabricating duct shop (the “contract”). The total value of the contract was USD 865,062. Medcon asserts that it was unable to perform the contract due to Iraq’s invasion and occupation of Kuwait. It seeks compensation in the total amount of USD 444,074 for contract losses, loss of profits, and other losses (legal fees).

Table 29. Medcon’s claim

Claim element	Claim amount (USD)
Contract losses	124,710
Loss of profits	215,000
Other losses (legal fees)	104,364
Total	444,074

A. Contract losses

1. Facts and contentions

323. Medcon seeks compensation in the total amount of USD 124,710 for contract losses. The claim includes (a) loss of deposit (USD 27,210) and (b) judgment in favour of Engel Industries (USD 97,500).

324. In the “E” claim form, Medcon characterised item (a) as “other losses” and item (b) as “payment or relief to others”, but the Panel finds that they are more accurately described as contract losses.

325. In respect of item (a), loss of deposit, Medcon states that, on 27 July 1990, it paid a deposit of USD 27,210 to Engel Industries, United States, a manufacturer of sheet metal machinery, for the completion of “general assembly drawings of specially manufactured machinery”. Medcon asserts that Iraq’s invasion and occupation of Kuwait prevented it from shipping any equipment to Iraq. It therefore sought to recover the deposit from Engel Industries. However, Engel Industries refused to refund it. Medcon further states that it has not been able to collect the deposit from its Iraqi client.

326. In respect of item (b), judgment in favour of Engel Industries, Medcon states that on, 2 June 1992, a judgment was issued by the United States District Court for the District of Columbia against Medcon in favour of

Engel Industries. Engel Industries filed suit against Medcon claiming that Medcon should take possession of, and pay for, the equipment contracted for.

2. Analysis and valuation

327. In support of its claim for contract losses, Medcon provided a copy of the contract between Medcon and Al-Fao, the relevant letters of credit, a copy of the District Court judgment in favour of Engel Industries and a copy of the settlement and release agreement dated 24 November 1993 by which Medcon agreed to pay Engel the amount claimed.

328. It is clear from the material provided by Medcon that it commenced proceedings against Engel Industries to recover the deposit paid. Engel Industries, in its turn, cross claimed for the value of work ordered by Medcon and executed by Engel Industries but neither paid for nor collected by Medcon.

329. Other parties were joined to the proceedings, in particular the UBAF Arab American Bank (the "Bank"). The Bank had confirmed the normal letter of credit issued by an Iraqi bank on behalf of Al-Fao.

330. In the first of two judgments, the United States District Court for the District of Columbia, inter alia, found for Engel Industries against Medcon in the sum of USD 148,000. In the second of the two judgments the Court recorded that the Office of Foreign Assets Control had determined that the letter of credit (and the collateral posted with the Bank by the Iraqi bank) were both blocked property. However, the Court went on to hold that Medcon was entitled to recover against the Bank because the latter, by its confirmation of the letter of credit, undertook liability in its own right.

331. The Court accordingly, inter alia, entered judgment in favour of Medcon against the Bank. Thereafter the parties lodged appeals and entered into settlement discussions. The latter were successful and on 24 November 1993 the parties, including Medcon and the Bank, executed a settlement and release agreement.

332. Prima facie, once a claimant's claims are settled, no claim remains to be pursued. In that event, it is necessary to review the filed material to ascertain if there is any basis which displaces the prima facie view. Absent such material, Medcon has not established a loss and, therefore, the Panel is unable to recommend compensation.

3. Recommendation

333. The Panel recommends no compensation for contract losses.

B. Loss of profits

334. Medcon seeks compensation in the amount of USD 215,000 for loss of future profits under the contract.

335. In the "E" claim form, Medcon characterised this loss element as "contract losses", but the Panel finds that it is more accurately described as loss of profits.

336. Medcon states that as at 2 August 1990, freight forwarders advised that, due to Iraq's invasion and occupation of Kuwait, no goods were being shipped to the Middle East, and therefore it could not perform the contract.

337. Medcon does not explain how it calculated its loss of profits. It merely states that the calculation is based on the actual projected margin of profit built into its total contract price. The calculation took into account the actual contract sell price, less the cost of goods sold.

338. In support of its claim for loss of profits, Medcon provided a statement of its Executive Vice President stating that the calculation was based on the profit margin built into the contract price, and the evidence described at paragraph 327, supra.

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

C. Other losses

340. Medcon seeks compensation in the amount of USD 104,364 for other losses. The claim is for legal fees and includes (a) legal fees incurred in the action to recover the deposit from Engel Industries (USD 8,079), and (b) additional and current legal fees (USD 96,285) incurred in relation to the legal proceedings brought by Engel Industries. Medcon did not provide any breakdown of the legal fees.

341. In support of its claim for other losses, Medcon provided invoices from the law firms from which it sought advice.

342. The Panel finds that Medcon did not demonstrate a direct causal link between the legal fees and Iraq's invasion and occupation of Kuwait. The fees were incurred due to the commercial decision of Medcon to bring, and defend, legal proceedings in respect of the non-fulfilment of its contract.

343. The Panel recommends no compensation for other losses.

D. Summary of recommended compensation for Medcon

Table 30. Recommended compensation for Medcon

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	124,710	nil
Loss of profits	215,000	nil
Other losses (legal fees)	104,364	nil
Total	444,074	nil

344. Based on the Panel's findings regarding Medcon's claim, the Panel recommends no compensation.

XVI. NA PENTA INC.

345. NA Penta Inc. (“Penta”) is a corporation existing under the laws of the United States of America. On 11 August 1988, it entered into a contract with the Ur State Enterprise for Engineering Industries, Iraq (“Ur State Enterprise”) for the supply and delivery of an extrusion press (the “contract”). The contract also required the supply of spare parts, the provision of training, the provision of technical documentation and commissioning. The total value of the contract was USD 3,639,700.

346. Penta asserts that the contract was not completed due to Iraq’s invasion and occupation of Kuwait. It seeks compensation in the amount of USD 482,440 for contract losses.

Table 31. Penta’s claim

Claim element	Claim amount (USD)
Contract losses	482,440
Total	482,440

A. Contract losses

1. Facts and contentions

347. Penta seeks compensation in the amount of USD 482,440 for contract losses. The claim includes 5 per cent of the contract price payable on the issue of the take-over certificate (USD 181,985), 5 per cent of the contract price payable on the issue of the final acceptance certificate (USD 181,985) and USD 118,470 payable in respect of overtime performed on the contract.

348. Penta asserts that it performed the work in relation to, and was paid, 90 per cent of the contract price. Five per cent of the contract price was payable on issue of the “plant take over certificate”, and a further 5 per cent of the contract price was payable on the issue of the final acceptance certificate.

349. Pursuant to article 13 of the contract, the take-over certificate was to be issued after a successful test run of the installed machinery. Pursuant to article 14 of the contract, the final acceptance certificate was to be issued after the expiration of a 12 month warranty period and after it had been successfully demonstrated that the equipment operated as a complete system. Penta asserts that Iraq’s invasion and occupation of Kuwait rendered impossible these events.

350. In relation to the claim for overtime (USD 118,470), the contract provided for payment of overtime as follows:

(a) USD 550 per day for man/days in excess of 75 days for performance of the contract work;

(b) USD 110 per hour for additional time in excess of six working days per week from 8.00 am to 4:30 p.m.;

(c) USD 110 per hour for work performed on Friday.

2. Analysis and valuation

351. In support of its claim for contract losses, Penta provided a copy of the contract dated 11 August 1988, copies of the correspondence establishing the letter of credit, and copies of the invoices (both paid and unpaid). Penta did not respond to the article 34 notification requesting further information.

352. Based on the evidence provided by Penta, the Panel finds that the 5 per cent of the contract price due upon the issue of the take-over certificate is a debt due and owing prior to 2 May 1990. This portion of the claim is outside the jurisdiction of the Commission and is not compensable under Security Council resolution 687 (1991). Applying the approach taken with respect to the “arising prior to” clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 41 to 43 of the Summary, the Panel is unable to recommend compensation for this amount.

353. The Panel finds that Penta did not provide sufficient evidence to enable the Panel to determine whether Penta became entitled to the final acceptance certificate after 2 May 1990. The Panel notes that the equipment was due to be delivered by December 1988, and that the contract designated 75 days to cover installation and commissioning of the equipment, and training of the personnel of Ur State Enterprise. In the absence of further evidence, the Panel must assume that the amount claimed is a debt due and owing prior to 2 May 1990, and is therefore unable to recommend compensation for this amount.

354. The Panel finds that, according to the terms of the contract, Penta was entitled to payment for overtime only if the overtime was not due to the fault of Penta. As Penta provided no evidence that this was the case, the Panel is unable to recommend compensation for the overtime. In any case, the Panel notes that most of the overtime was performed prior to 2 May 1990, and is therefore outside the jurisdiction of the Commission.

3. Recommendation

355. The Panel recommends no compensation for contract losses.

B. Summary of recommended compensation for Penta

Table 32. Recommended compensation for Penta

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	482,440	nil
Total	482,440	nil

356. Based on its findings regarding Penta’s claim, the Panel recommends no compensation.

XVII. XYZ OPTIONS, INC.

357. XYZ Options, Inc. ("XYZ") is a corporation existing under the laws of the United States of America. On 20 October 1988, it entered into a contract with the Machinery Trade Company, an Iraqi company ("MTC"), for the construction of a carbide cutting tool factory in Yousifiya, Iraq (the "contract"). The contract was almost completed at the time of Iraq's invasion and occupation of Kuwait. XYZ asserts that MTC has not paid retention monies amounting to 15 per cent of all invoices issued under the contract. It also asserts that it lost a vehicle and a trailer when Iraq invaded Kuwait in August 1990.

358. In the "E" claim form dated 25 October 1994, XYZ sought compensation in the total amount of USD 1,850,732 for contract losses and loss of tangible property.

359. On 28 April 1994, creditors of XYZ filed a bankruptcy petition against XYZ. On 30 November 1999, the United States District Court for the District of Alabama entered an order for a settlement agreement which provided, inter alia, that all of XYZ's rights under the contract, including its claim before the Commission, were assigned to an individual. In this report, references to XYZ include the individual assignee.

360. On 3 March 2000, in its response to the article 15 notification, XYZ reduced its claim amount to USD 1,788,963. The reduction in the claim amount is to take account of a portion of the advance payment under the contract still retained by XYZ (see paragraph 364, infra).

Table 33. XYZ's claim

Claim element	Claim amount (USD)
Contract losses	1,767,434
Loss of tangible property	21,529
Total	1,788,963

A. Contract losses

1. Facts and contentions

361. XYZ seeks compensation in the amount of USD 1,767,434 for contract losses. The scheduled completion date of the contract was 20 October 1990. XYZ asserts that at the time of Iraq's invasion and occupation of Kuwait, 99 per cent in dollar value of all machinery, supplies, and freight had been delivered under the contract, and over 50 per cent of the service and training portion of the contract had been completed.

362. XYZ further asserts that at the time of Iraq's invasion and occupation of Kuwait it was within 60 days of receiving the preliminary acceptance certificate but, due to Iraq's invasion and occupation of Kuwait, both the preliminary acceptance certificate and the final acceptance certificate will never be issued.

363. The total amount of the invoices issued by XYZ to MTC for machinery was USD 12,194,685. Fifteen per cent (USD 1,829,203) was withheld for retention monies which would have been payable on issue of the preliminary acceptance certificate and the final acceptance certificate.

364. XYZ admits that it retains USD 63,012 of the advance payment. Accordingly, XYZ seeks compensation for the amount of retention monies withheld by MTC, less the USD 63,012 of the advance payment still held by XYZ.

2. Analysis and valuation

365. In support of its claim for contract losses, XYZ provided a copy of the contract between XYZ and MTC, a letter of credit issued by the Banca Nazionale del Lavoro and copies of the invoices paid by MTC.

366. The Panel finds that the documentation provided by XYZ shows that a substantial part of the contract had been completed at the time of Iraq's invasion and occupation of Kuwait. There is no indication that the contract would not have been successfully completed had the invasion and occupation not ensued.

367. The contract and the invoices show that 15 per cent of the amount of the invoices rendered was withheld as retention monies. The Panel finds that non-payment of the retention monies was directly caused by Iraq's invasion and occupation of Kuwait.

368. However, the Panel further finds that in executing the completion and maintenance of the contract, XYZ would itself have incurred costs. After allowing for such costs, applying the principles relating to retention monies, as set out in paragraphs 78 to 84 of the Summary, the Panel estimates that the proper value of the claim is USD 1,116,977.

3. Recommendation

369. The Panel recommends compensation in the amount of USD 1,116,977 for contract losses.

B. Loss of tangible property

1. Facts and contentions

370. XYZ seeks compensation in the amount of USD 21,529 for loss of tangible property.

371. XYZ asserts that upon Iraq's invasion and occupation of Kuwait, it was forced to abandon at the project site a "S-15, 1989 GMC vehicle" valued at USD 17,029 and an "office trailer" valued at USD 4,500.

2. Analysis and valuation

372. In support of its claim for tangible property losses XYZ provided evidence of ownership of the property, and of the fact that the property was shipped to Iraq in July 1989. The Panel finds that XYZ was still performing the contract at the time of the invasion and finds that the property was lost at this time as a direct result of Iraq's invasion and occupation of Kuwait.

373. After taking into account depreciation, the Panel values the property at USD 16,800.

3. Recommendation

374. The Panel recommends compensation in the amount of USD 16,800 for loss of tangible property.

C. Summary of recommended compensation for XYZ

Table 34. Recommended compensation for XYZ

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	1,767,434	1,116,977
Loss of tangible property	21,529	16,800
Total	1,788,963	1,133,777

375. Based on its findings regarding XYZ's claim, the Panel recommends compensation in the amount of USD 1,133,777. The Panel finds the date of loss to be 2 August 1990.

XVIII. SUMMARY OF RECOMMENDED COMPENSATION BY CLAIMANT

Table 35. Recommended compensation for the seventeenth instalment

Claimant	Claim amount (USD)	Recommended compensation (USD)
Bureau Veritas, Registre International de Classification de Navires et d'Aéronefs	1,406,944	7,573
Thyssen Rheinstahl Technik GmbH	4,648,563	4,442,917
AK India International Private Limited	3,158,789	94,537
Dodsal Limited	3,234,298	nil
Water and Power Consultancy Services (India) Limited	3,308,748	nil
Japanese Consortium of Consulting Firms	7,079,065	nil
Elektrim Trade Company S.A.	2,672,886	26,346
Stock Company in Mixed Property "Iskra" Inzenering	4,132,643	nil
Enka Teknik	5,885,376	nil
HSG Engineer Contractor Haydar Soner Görker	1,496,273	nil
GPT Middle East Limited	1,432,112	nil
Rozbank Engineering Ltd	361,217	47,105
Medical Consultants International, Inc. (trading as Medcon Enterprises)	444,074	nil
NA Penta Inc.	482,440	nil
XYZ Options, Inc.	1,788,963	1,133,777

Geneva, 5 December 2000

(Signed) Pierre Genton
Commissioner

(Signed) Vinayak Pradhan
Commissioner

(Signed) John Tackaberry
Chairman

Annex

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 <u>any</u> 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. <u>Sufficiency under article 35(3): The obligation of disclosure</u>

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. <u>Missing documents: The nature and adequacy of the paper trail</u>

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 s uch 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.
