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REPORT AND RECOMMENDATIONS MADE BY THE PANEL OF COMMISSIONERS CONCERNING THE TWENTY-THIRD 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 the 15 claims included in the twenty-third 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 One of the claims, that of Neuero Technology GmbH, filed with the Commission by the Government of Germany, was withdrawn during the proceedings. (See paragraph 110, infra). Another of the claims, that of Turner International Industries, Inc., filed with the Commission by the Government of the United States of America, was transferred to the "E4" Panel during the proceedings. (See paragraphs 376 to 379, 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, as approved by the Governing Council, 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 twenty-third 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, including the Government of Iraq, 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, in the Summary, the Panel has further amplified both procedural and substantive aspects of the process of formulating recommendations.

I. PROCEDURAL HISTORY

A. The procedural history of the claims in the twenty-third 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 19 June 2001, the Panel issued a procedural order relating to the claims included in the twenty-third 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, among other things, 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 13 claims for losses allegedly caused by Iraq's invasion and occupation of Kuwait:

(a) Extraktionstechnik Gesellschaft für Anlagenbau m.b.H., a corporation organised according to the laws of Germany, which seeks compensation in the total amount of 407,170 United States dollars (USD);

(b) Felten & Guilleaume Kabelwerke GmbH, a corporation organised according to the laws of Germany, which seeks compensation in the total amount of USD 1,207,765;

(c) Minimax GmbH, a corporation organised according to the laws of Germany, which seeks compensation in the total amount of USD 328,630;

(d) Neue Jadewerft GmbH, a corporation organised according to the laws of Germany, which seeks compensation in the total amount of USD 1,257,152;

(e) The Furukawa Electric Co., Ltd., a corporation organised according to the laws of Japan, which seeks compensation in the total amount of USD 533,322;

(f) Hitachi Cable, Ltd., a corporation organised according to the laws of Japan, which seeks compensation in the total amount of USD 4,478,244;

(g) De Jong's Timmerfabriek Bergambacht B.V., a corporation organised according to the laws of the Netherlands, which seeks compensation in the total amount of USD 433,308;

(h) Koninklijke Schelde Groep B.V., a corporation organised according to the laws of the Netherlands, which seeks compensation in the total amount of USD 424,976;

(i) Alumina - Industry for Aluminium Semi-Finished Products, Metal Constructions, Interiors and Engineering, a corporation organised according to the laws of the former Yugoslav Republic of Macedonia, which seeks compensation in the total amount of USD 904,272;

(j) Amber Industrial Doors Limited, a corporation organised according to the laws of the United Kingdom of Great Britain and Northern Ireland, which seeks compensation in the total amount of USD 56,274;

(k) Fugro-McClelland Limited, a corporation organised according to the laws of the United Kingdom of Great Britain and Northern Ireland, which seeks compensation in the total amount of USD 36,952;

(l) John Spracklen (International) Limited, a corporation organised according to the laws of the United Kingdom of Great Britain and Northern Ireland, which seeks compensation in the total amount of USD 12,825; and

(m) Operations Management International, Inc., a corporation organised according to the laws of the United States of America, which seeks compensation in the total amount of USD 1,244,869.

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. EXTRAKTIONSTECHNICK GESELLSCHAFT FÜR ANLAGENBAU M.B.H

11. Extraktionstechnik Gesellschaft für Anlagenbau m.b.H. ("Extraktionstechnik") is a company organised according to the laws of Germany. It supplies and erects mechanical and electrical equipment. At the time of Iraq's invasion and occupation of Kuwait, Extraktionstechnik had a contract with Kuwait Flour Mills & Bakeries Co. S.A.K. ("Kuwait Flour") to carry out electrical and engineering work at a refinery plant in Kuwait.

12. Extraktionstechnik seeks compensation in the total amount of USD 407,170 (636,000 Deutsche Mark (DEM)) for contract losses.

Table 1. Extraktionstechnik's claim

Claim element	Claim amount (USD)
Contract losses	407,170
Total	407,170

A. Contract losses

1. Facts and contentions

13. Extraktionstechnik seeks compensation in the amount of USD 407,170 (DEM 636,000) for contract losses allegedly incurred in relation to a contract to perform electrical and engineering work on a refinery plant in Kuwait.

14. On 22 January 1989, Extraktionstechnik entered into a contract with Kuwait Flour for the supply of parts, erection of all mechanical and electrical equipment and engineering work for an acid degumming, bleaching and physical refinery plant in Kuwait (the "Contract"). The value of the Contract was DEM 2,120,000.

15. Under the terms of the Contract, Kuwait Flour agreed to arrange for a letter of credit to be issued by the Gulf Bank, Kuwait (the "Kuwaiti Bank") in favour of Extraktionstechnik for 80 per cent of the value of the Contract, that is DEM 1,696,000. The remaining 20 per cent of the value of the Contract, that is DEM 424,000, was to be paid to Extraktionstechnik as a down payment against a bank guarantee for an equal amount in case of non-shipment.

16. Payment under the letter of credit issued by the Kuwaiti Bank was to be made in three instalments as follows:

(a) Fifty per cent of the value of the letter of credit (equivalent to DEM 1,060,000) would be released upon Kuwait Flour's receipt of the parts which Extraktionstechnik had contracted to supply.

(b) Twenty per cent of the value of the letter of credit (equivalent to DEM 424,000) would be released upon the presentation of a provisional taking-over certificate by Kuwait Flour to the Kuwaiti Bank.

(c) Ten per cent of the value of the letter of credit (equivalent to DEM 212,000) would be released upon the issue by Kuwait Flour of the final taking-over certificate.

17. Extraktionstechnik produced deposit confirmations from its bank, Commerzbank AG, totalling DEM 1,059,790. This sum is equivalent to approximately 50 per cent of the value of the letter of credit (DEM 1,060,000) which Kuwait Flour agreed to pay for the initial shipment of goods. It therefore appears from this evidence that Extraktionstechnik was paid the first instalment under the letter of credit. It follows that the claim relates to the two remaining instalments of 20 per cent (DEM 424,000) and 10 per cent (DEM 212,000), respectively.

18. According to the terms of the Contract, the provisional taking-over certificate was to be presented to the Kuwaiti Bank no later than 15 June 1990. However, due to problems with the performance of the refinery, Kuwait Flour did not issue the provisional taking-over certificate on this date.

19. On 19 June 1990, the parties met in Hamburg, Germany, to discuss the refinery's performance. The minutes of the 19 June 1990 meeting show that the parties agreed to extend Extraktionstechnik's deadline for completing work on the refinery. Extraktionstechnik suggested that it replace the refinery's membrane-type dosing pumps with piston-type pumps at no extra cost to Kuwait Flour. Kuwait Flour accepted this proposal and the parties agreed that delivery of the new parts could take place within six weeks. The parties also agreed that after arrival of the new parts, Extraktionstechnik would have up to 14 working days to achieve successful operation of the refinery. Upon successful operation of the refinery, Kuwait Flour agreed to issue "a provisional taking- over protocol" and to extend the letter of credit until 20 August 1990.

20. Extraktionstechnik alleges that, as a result of Iraq's invasion and occupation of Kuwait, it could not complete its performance under the Contract and that, therefore, the provisional and final taking-over certificates were never issued. It therefore seeks compensation for the amounts that it was to receive upon the issue of the provisional taking-over certificate (DEM 424,000) and the final taking-over certificate (DEM 212,000).

2. Analysis and valuation

21. The Panel is satisfied on the evidence provided that, had Iraq's invasion and occupation of Kuwait not occurred, Extraktionstechnik would have been able to replace the pumps on the refinery. The Panel also finds that the evidence indicates that, had the invasion of Kuwait not occurred, Extraktionstechnik would have been able to complete its obligations and ensure successful performance of the refinery. Kuwait Flour would therefore have been contractually obliged to issue the provisional taking-over certificate and, eventually, the final taking-over certificate. The Panel therefore finds that Extraktionstechnik has demonstrated that its losses were the direct result of Iraq's invasion and occupation of Kuwait.

22. The Panel recommends compensation in the amount of DEM 424,000 which represents the 20 per cent instalment that would have been released upon presentation of the provisional taking-over certificate. The Panel also recommends compensation in the amount of DEM 106,000 which represents half of the 10 per cent instalment that would have been released upon presentation of the

final taking-over certificate. A deduction from the full amount is appropriate to recognise the extra work that Extraktionstechnik would have undertaken and the added expense that it would have incurred in order to achieve successful operation of the refinery.

3. Recommendation

23. The Panel recommends compensation in the amount of USD 339,309 for contract losses.

B. Summary of recommended compensation for Extraktionstechnik

Table 2. Recommended compensation for Extraktionstechnik

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	407,170	339,309
Total	407,170	339,309

24. Based on its findings regarding Extraktionstechnik's claim, the Panel recommends compensation in the amount of USD 339,309. The Panel finds the date of loss to be 2 August 1990.

III. FELTEN & GUILLEAUME KABELWERKE GMBH

25. Felten & Guilleaume Kabelwerke GmbH is a company organised according to the laws of Germany. It builds and acquires factories and commercial plants in the wire and cable industry and purchases and sells cables for use in factories and commercial plants.

26. The name of the claimant as stated on the original "E" claim form was Felten & Guilleaume Energietechnik AG. At the time of Iraq's invasion and occupation of Kuwait, Felten & Guilleaume Energietechnik AG had two contracts with the Ministry of Electricity and Water of Kuwait ("MEW") for the supply of cables. On 9 December 1993, Felten & Guilleaume Energietechnik AG merged with Felten & Guilleaume Kabelwerke (Cable Works) GmbH. It appears that the new company was called Felten & Guilleaume AG. On 21 April 1998, the new company, Felten & Guilleaume AG, transferred all activities relating to its cable business to Felten & Guilleaume Kabelwerke GmbH. Felten & Guilleaume Kabelwerke GmbH ("Felten") is the legal successor to Felten & Guilleaume Energietechnik AG in respect of the two contracts with MEW and in respect of the claim.

27. Felten seeks compensation for loss of tangible property in the amount of USD 1,207,765 (349,044 Kuwaiti dinars (KWD)).

28. The original "E" claim form filed by Felten contained a claim for contract losses in the amount of USD 7,297,705 (KWD 2,102,766 and DEM 33,894) and "other losses" in the amount of USD 99,240 (KWD 23,000 and USD 19,655) in addition to a claim for loss of tangible property. However, in its response to the article 15 notification, Felten withdrew its claim for contract losses and "other losses".

Table 3. Felten's claim

Claim element	Claim amount (USD)
Loss of tangible property	1,207,765
Total	1,207,765

A. Loss of tangible property

1. Facts and contentions

29. Felten seeks compensation in the amount of USD 1,207,765 (KWD 349,044) for loss of tangible property. The claim is for the alleged loss of vehicles, tools, and reserve materials which were stored at a Kuwaiti public warehouse outside Kuwait City in "Suleybiyah" (the "Kuwaiti Storage Facility") on or about 1 July 1990.

30. On 30 June 1982, Felten contracted with MEW to supply and install 132 kV power cables, pilot cables, and accessories (Contract 1218). On 28 May 1984, Felten entered into another contract with MEW for the supply and installation of 132 kilovolt ("kV") power cables, pilot cables, and accessories

(Contract 1362). Felten did not state the name(s) of the project(s) for which the goods were being supplied.

31. Felten did not state the date on which it abandoned its operations in Kuwait. However, in its original claim filed with the Commission, Felten stated that it stored its property at the Kuwaiti Storage Facility on or about 1 July 1990 in an agreement with the Public Warehousing Co. K.S.C. In its response to the article 15 notification, Felten stated that it stored its property at the Public Warehousing Co. K.S.C., P.O. Box 25418 Safat, P.C. Telex 30183 MAKHZAN, 13115 Kuwait, lot number 69. As the address for the Public Warehousing Co. is a post office box address, it may be that the actual storage facility was in Suleybiyah. However, Felten did not elaborate on this point.

32. Felten claims that it returned to Kuwait for the first time on 6-10 September 1991 at which time it discovered that the majority of its goods had disappeared.

33. Felten states that valuations of lost property were done on the basis of "acquisition value respectively replacement value" and that these values were based on the price index of the Federal Statistical Office of Germany.

2. Analysis and valuation

34. In support of its claim, Felten provided copies of both Contract 1218 and Contract 1362. It also submitted a list of items which were allegedly lost (the "Lost Item List"), and an undated receipt for a rental deposit from the Kuwaiti Storage Facility for KWD 525. In addition, Felten submitted what appears to be a cashier's cheque dated 14 June 1990 from the Gulf Bank to the Kuwaiti Storage Facility in the amount of KWD 525.

35. Felten also provided "Erection All Risks" Insurance Policies ("Insurance Policies") for contracts 1049 (illegible date), 1362 (covering 4 January 1985 to 3 July 1986), and 1385 (undated). These policies cover the risk of loss of equipment used for the contracts. Of the three contracts, only Contract 1362 was referred to by Felten in its Statement of Claim. Felten did not submit an insurance policy in respect of Contract 1218. The policies were issued by a Kuwaiti insurance company, Al Ahleia Insurance Co. S.A.K.

36. Some of the items on lists attached to Felten's Insurance Policies overlap with the items included in the Lost Item List submitted by Felten. However, as mentioned in paragraphs 34 to 35, supra, only Contract 1362 is mentioned in both the Lost Item List and one of the Insurance Policies.

37. Felten also submitted several "taking-over and acceptance certificates" ("TOAC") for Contract 1362. The latest TOAC for Contract 1362 is dated 28 January 1988. The maintenance period on Contract 1362 was to begin on 28 January 1988 and to continue for two years, that is, until 28 January 1990.

38. Felten also provided photographs of equipment, some labelled "before the war" and bearing the electronically-generated date of 21 May 1990, and some labelled "after the war" and bearing the electronically-generated date of "8 9 91" (either 9 August 1991 or 8 September 1991). Some of the equipment in the photographs bears the name "Felten & Guilleaume". The "after the war"

photographs demonstrate a substantial amount of damage and highlight the removal of valuable components of the equipment.

39. Felten also submitted a letter, dated 11 November 1992, from Al-Jehmah Trading Company, ("Al-Jehmah"), a Kuwaiti company, to whom it supplied circuit breakers. In its explanation accompanying the letter, Felten states that Al-Jehmah reported pilferage damage to its goods which were deposited in Al-Jehmah's store. However, the letter itself does not state that Felten's goods were pilfered.

40. Felten also states in the explanation accompanying Al-Jehmah's letter that at the time of Iraq's invasion and occupation of Kuwait, Al-Jehmah owed Felten USD 65,000.

41. The letter from Al-Jehmah referred to in paragraph 39 supra, shows a request for a 30 per cent discount on Al-Jehmah's outstanding receivables "due to the extraordinary circumstances prevailing in Kuwait". Felten submitted a letter which it sent to Al-Jehmah, dated 26 November 1992, which states that Felten would not deposit Al-Jehmah's cheques in the amount of USD 19,655 (approximately equivalent to the requested 30 per cent discount) and that the remainder of Al-Jehmah's debts would be considered paid in full. The letter was accompanied by predated cheques from Al-Jehmah to Felten. The relationship between Felten's cancellation of Al-Jehmah's debts and its alleged loss of tangible property stored at Al-Jehmah's premises is unclear.

42. The Panel finds that the Insurance Policies demonstrate Felten's ownership of some of the property on the Lost Item List, and the fact that the property was shipped to Kuwait. The Panel finds that the evidence demonstrates that Felten still had some equipment in Kuwait at the time of Iraq's invasion and occupation of Kuwait. The Panel finds that the property was lost as a direct result of Iraq's invasion and occupation of Kuwait.

43. As to quantum, the Panel notes two relevant matters. First, the equipment was wholly written off in Felten's books of account as at 31 December 1990. Second, despite that write-off, the equipment will still have value on the ground. That value can be described as an actual value (in contradistinction to "residual value", when the latter is used as a conventional accounting term, as to which see below). That actual value, whether it arises through the potential to refurbish and/or reuse the equipment, by way of sacrificial provision of spares or otherwise, is a real value (as is clear from the fact that if the equipment were to be sold, a price could be obtained, which would be characterised as income in the accounts).

44. The zero value in the company accounts is a conventional accounting value. However, in the same way as a snapshot seeks to record the situation at a particular moment, so company accounts are intended to depict the position of a company at a particular moment – notionally at the end of that company's accounting year. But company accounts have to encompass artificial influences, which modify what might otherwise be recorded. One such influence is taxation. In order to give formal recognition to these influences, company accounts use artificial conventions. This produces what is called the "book value". It is often different from actual or market value.

45. Where there is sufficient evidence of that market value, it is open to the Panel to recommend that market value, even if the book value is less than the market value - even if indeed the book value is zero.

46. After taking into account all of the above, including depreciation, the Panel recommends compensation for the tangible property for which evidence of ownership and presence in Kuwait was established. The Panel values the property at USD 120,777.

3. Recommendation

47. The Panel recommends compensation in the amount of USD 120,777 for loss of tangible property.

B. Summary of recommended compensation for Felten

Table 4. Recommended compensation for Felten

Claim element	Claim amount (USD)	Recommended compensation (USD)
Loss of tangible property	1,207,765	120,777
Total	1,207,765	120,777

48. Based on its findings regarding Felten's claim, the Panel recommends compensation in the amount of USD 120,777. The Panel finds the date of loss to be 2 August 1990.

IV. MINIMAX GMBH

49. Minimax GmbH ("Minimax") is a company organised according to the laws of Germany. It supplies fire protection and fire safety products. Minimax seeks compensation in the total amount of USD 328,630 (DEM 513,320) for contract losses, losses related to business transaction or course of dealing, loss of tangible property, and other losses (re-establishment and reorganisation costs).

50. In its "E" claim form dated 29 March 1993, Minimax sought compensation in the amount of DEM 310,000 for contract losses. In its revised "E" claim form submitted in 1994, Minimax increased its claim from DEM 310,000 to DEM 513,320.[1]

Table 5. Minimax's claim

Claim element	Claim amount (USD)
Contract losses	70,423
Losses related to business transaction or course of dealing	6,402
Loss of tangible property	187,785
Other losses (re-establishment and reorganisation costs)	64,020
Total	328,630

A. Contract losses

1. Facts and contentions

51. Minimax seeks compensation in the amount of USD 70,423 (DEM 110,000) for contract losses. The claim is for losses allegedly incurred in connection with a subcontract to provide firefighting equipment in Kuwait.

52. On 24 June 1988, Minimax (under its former name of Preussag AG Feuerschutz) entered into a subcontract with Techno Import Export of Sofia, Bulgaria ("Techno") to provide equipment, firefighting and alarm systems for the Ahmadi Oil Storage Depot Project in Kuwait (the "Project"). The employer on the Project was Kuwaiti National Petroleum Company. The total value of the subcontract was DEM 420,000.

53. Under the subcontract, Minimax was to ship goods described in Purchase Order TK 9022 (the "Purchase Order") to Kuwait on 3 August 1990. However, due to Iraq's invasion and occupation of Kuwait, the goods were unable to be shipped. Furthermore, on 24 August 1990, Techno notified Minimax that it was cancelling the subcontract pursuant to the force majeure clause. Minimax seeks compensation for the value of the goods in the Purchase Order which were not shipped to Kuwait.

2. Analysis and valuation

54. In support of its claim, Minimax submitted the subcontract and a copy of the Purchase Order, dated 22 April 1990, which stated that the value of the manufactured goods was equivalent to DEM 110,000.

55. Minimax also submitted an unsworn statement from its engineer on the Project dated 21 June 2001. Minimax describes the statement as a "sworn statement", but the Panel finds that it is not. In the statement, the engineer states that materials for the Purchase Order were specially manufactured for the Project, could not be used for any other project, and were subsequently disposed of after many years of storage on Minimax's company premises.

56. In addition, Minimax submitted three telexes. In the first telex, dated 3 August 1990, Minimax advised Alphamain Ltd., Laindon, England, ("Alphamain") (Techno's shipping agent) that the items in the Purchase Order were ready for shipment to Techno in Kuwait.

57. In the second telex, also dated 3 August 1990, Alphamain informed Minimax that "due to the current situation in Kuwait" it would not attempt to move any cargo until receiving further instruction from Techno.

58. In the third telex, dated 24 August 1990, Techno notified Minimax that it was refusing shipment of the goods in the Purchase Order and cancelling the subcontract pursuant to the force majeure clause.

59. The Panel finds that because Minimax did not actually ship its goods to Kuwait, it did not actually suffer a loss. Minimax failed to provide evidence that the goods were specially manufactured for the Project and were unable to be resold or used for other purposes.[2] Nor indeed did Minimax clarify how it disposed of the goods. The Panel finds that the unsworn statement by itself (see paragraph 55, supra,) was not sufficient to demonstrate that the goods were specially manufactured for the Project.

3. Recommendation

60. The Panel recommends no compensation for contract losses.

B. Business transaction or course of dealing

1. Facts and contentions

61. Minimax seeks compensation in the amount of USD 6,402 (DEM 10,000) for losses related to business transaction or course of dealing. The claim is for the cost of releasing halon gas from fire extinguishers which it manufactured for Techno.

62. Under the terms of the subcontract, Minimax was to provide halon gas extinguishers to Techno. On 6 May 1991, the Government of Germany issued a decree (the "German decree") prohibiting the sale and transport of halon gas.

63. Techno's telex cancelling the subcontract is dated 24 August 1990. The prohibition of trade in halon gas which took place on 6 May 1991 occurred more than eight months after cancellation of the subcontract.

2. Analysis and valuation

64. In support of its claim, Minimax provided a translated copy of the German decree. However, while the decree stated that halon gas was not to be sold or transported, it did not explicitly mandate the release of halon gas.

65. Minimax did not submit any further evidence (such as evidence of the cost it incurred in releasing the gas). Minimax states that the cost of releasing the gas "could not be evidenced but is guessed".

66. The Panel finds that neither Minimax's decision to release the halon gas nor the issue of the German decree by the German authorities was caused by Iraq's invasion and occupation of Kuwait. It appears to the Panel that the alleged losses stem from wholly independent events and accordingly are outside the jurisdiction of the Commission.

3. Recommendation

67. The Panel recommends no compensation for losses related to business transaction or course of dealing.

C. Loss of tangible property

1. Facts and contentions

68. Minimax seeks compensation in the amount of USD 187,785 (DEM 293,320) for loss of tangible property. The claim is for the alleged loss of supplies from a storage facility at the premises of its agent, Kuwait Fire Fighting Co. W.L.L. ("Kuwait Fire Fighting").

69. A manager of Kuwait Fire Fighting, Mr Ali. A.R. Al-Saleh, supervised the storage of Minimax's property and corresponded with Minimax regarding the alleged loss.

2. Analysis and valuation

70. In support of its claim, Minimax provided two letters from Mr Al-Saleh on Kuwait Fire Fighting stationery.

71. The first letter to Minimax was dated 19 May 1993 and stated that "Iraqi forces have broken in our store in Ardiya and have been taking all our cars and Preussag tools, spare parts of your equipment, scaffolding and office furniture from your stores in the basement of our building in Ardiya".

72. The second letter to Minimax was dated 17 January 2001 and stated that items belonging to Minimax and to Kuwait Fire Fighting (including vehicles and electrical appliances) were first noted

missing during the first week of January 1991. The letter also stated that the loss date was an estimation as the employees of Kuwait Fire Fighting were unable to make regular visits to the storage site due to Iraq's invasion and occupation of Kuwait.

73. In addition to the letters from Mr Al-Saleh, Minimax also provided a list of mechanical tools (value DEM 120,410) (date of list illegible), a store inventory (value DEM 98,842) (circa November 1989) and a material list (value DEM 53,874) (dated 28 August 1989). However, the total value of the three inventories does not equal the amount claimed for tangible property loss (DEM 293,320). Minimax stated that no further evidence could be provided since all documents kept in Kuwait were lost during Iraq's invasion and occupation of Kuwait.

74. Minimax also stated that the person who made the list of tools and the store inventory, Engineer Mohammed Mallah of Preussag, Kuwait, (Minimax's legal predecessor) was "not available" after Iraq's invasion and occupation of Kuwait.

75. Minimax also stated that no schedule relating the items of lost property to specific contracts could be provided, because the material on the inventory list was not sent to Kuwait for specific projects, but to service multiple existing projects, warranty services, and future products. Minimax did not provide further evidence in addition to the list of mechanical tools, inventory and the two letters from Mr Al-Saleh.

76. Minimax stated that it valued the lost items of property according to purchase prices, and that its general practice is to value inventory at acquisition cost, production cost or lower adjusted value.

77. The Panel finds that Minimax did not provide sufficient evidence of its ownership of the lost items (such as purchase invoices, certificates of title or insurance policies).

3. Recommendation

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

D. Other losses (re-establishment and reorganisation costs)

1. Facts and contentions

79. Minimax seeks compensation in the amount of USD 64,020 (DEM 100,000) for the cost of re-establishing and reorganising its operations in Kuwait.

80. In its response to the article 34 notification, Minimax states that Iraq's invasion and occupation of Kuwait resulted in the departure of all of its employees from Kuwait and the cessation of business during the period of the invasion and occupation. Minimax states that in order to re-establish itself in Kuwait it incurred many start-up costs, including business trips, telephone calls and correspondence.

2. Analysis and valuation

81. In support of its claim for re-establishment and reorganisation costs, Minimax provided a list of contracts which were renewed after Iraq's invasion and occupation of Kuwait. Minimax also provided

a list of expenses related to re-establishing its operations after the liberation of Kuwait, including, but not limited to, telephone calls, faxes, telexes, and costs for visiting clients and organisations in England, Sweden, Hungary, Germany, France, Kuwait, Bulgaria, and Japan. However, Minimax did not provide any actual receipts or bills for its expenses or evidence proving payment of the amounts claimed.

82. The Panel finds that Minimax did not provide sufficient evidence to demonstrate that it incurred a loss or that its loss was a direct result of Iraq's invasion and occupation of Kuwait.

3. Recommendation

83. The Panel recommends no compensation for other losses (re-establishment and reorganisation costs).

E. Summary of recommended compensation for Minimax

Table 6. Recommended compensation for Minimax

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	70,423	nil
Losses related to business transaction or course of dealing	6,402	nil
Loss of tangible property	187,785	nil
Other losses (re-establishment and reorganisation costs)	64,020	nil
Total	328,630	nil

84. Based on its findings regarding Minimax's claim, the Panel recommends no compensation.

V. NEUE JADEWERFT GMBH

85. Neue Jadewerft GmbH ("Jadewerft") is a company organised according to the laws of Germany. At the time of Iraq's invasion and occupation of Kuwait, it was carrying out the building, renovation and maintenance of ships in Kuwait.

86. Jadewerft seeks compensation in the total amount of USD 1,257,152 (DEM 1,963,671) for contract losses, loss of profits and interest.

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

Table 7. Jadewerft's claim

Claim element	Claim amount (USD)
Contract losses	57,536
Loss of profits	790,064
Interest	409,552
Total	1,257,152

A. Contract losses

1. Facts and contentions

88. Jadewerft seeks compensation in the amount of USD 57,536 (DEM 89,872) for contract losses. On 16 June 1990, Jadewerft entered into a contract (the "Contract") with a Kuwaiti corporation, the Kuwait Fire Department ("Kuwait Fire"), for the construction and delivery of the fire fighting and rescue tug, the "Montaser". The total value of the Contract was KWD 3,120,000. The period of the contract with Kuwait Fire was 17 months, from 16 June 1990 until 16 November 1991.

89. To hedge against the fluctuations in the exchange rate between the Deutsche Mark and the Kuwaiti dinar during the course of the Contract, Jadewerft entered into two foreign exchange forward contracts with its bank, Commerzbank AG ("Commerzbank"). Jadewerft asserts that solely as a result of Kuwait Fire's failure to transfer Kuwaiti funds to Commerzbank, it suffered losses on the foreign exchange forward contracts.

90. Construction of the "Montaser" commenced in June 1990 and continued until 15 September 1990. Jadewerft ceased construction on 15 September 1990 due to Kuwait Fire's failure to issue a letter of credit. However, the Contract was never cancelled.

91. After the cessation of hostilities, on 24 July 1991, Jadewerft and Kuwait Fire agreed to restart construction of the "Montaser" under essentially the same terms, conditions and price of the original contract. Jadewerft eventually completed construction of the "Montaser" and a protocol of delivery and acceptance was signed on 19 November 1992.

92. Jadewerft states that it attempted to contact Kuwait Fire during the period of Iraq's occupation of Kuwait, as follows:

> "During the unlawful occupation of Kuwait by Iraq, we kept contact with the concerned authorities in exile. Since we completed our contract starting over again after our letter of 24 July 1991 this means of course that Kuwait Fire has been put in a position of no functioning and factual insolvability [sic] during the occupation. It was simply impossible to establish any communication during that period".

93. Jadewerft stated that it decided not to seek recovery from Kuwait Fire for costs relating to the foreign exchange forward contracts with Commerzbank because the contracts "refereed [sic] to political contents and could not be related in any way to the shipbuilding contract".

2. Analysis and valuation

94. In support of its claim, Jadewerft provided a copy of the Contract and invoices which it issued to Kuwait Fire.

95. Jadewerft also submitted two statements from Commerzbank, dated 31 October 1990 and 31 October 1991, respectively. The first statement described the due dates for payment under the first foreign exchange forward contract. The first due date for payment was 31 January 1991 and the last was 4 November 1991. The second statement described the due dates for payment under the second foreign exchange forward contract. The first due date for payment was 31 December 1991 and the last was 2 November 1992.

96. It also provided a letter from Commerzbank, dated 24 August 1993, stating that the amount which it received in Deutsche Mark on its foreign exchange forward contracts was reduced from DEM 16,060,668 to DEM 15,970,796 due to the delayed receipt of "KWD from Kuwait" which necessitated an extension of the foreign exchange forward contracts.

97. Commerzbank's letter also stated that the sole reason for the reduction in the Deutsche Mark amount paid to Jadewerft was the extension on the foreign exchange forward contracts.

98. A second letter from Commerzbank, dated 19 August 1993, stated the official discount rates from 15 September 1990 (the date when Jadewerft stopped work on Montaser) until 19 August 1993.

99. Jadewerft also provided a letter that it sent to the Kuwaiti Ambassador in Bonn on 13 August 1990 requesting that the Kuwaiti Embassy establish contact with Kuwait Fire. The letter stated that "for 10 days we have tried to get in contact with our customer … for clarification of contractual matters and we cannot succeed to communicate".

100. The Panel finds that Jadewerft submitted sufficient evidence to demonstrate that it incurred the claimed losses relating to the foreign exchange forward contracts and that these losses were the direct result of Iraq's invasion and occupation of Kuwait.

3. Recommendation

101. The Panel recommends compensation in the amount USD 57,536 for contract losses.

B. Loss of profits

1. Facts and contentions

102. Jadewerft seeks compensation in the amount of USD 790,064 (DEM 1,234,080) for loss of profits. The claim relates to under-utilised shipbuilding capacity. Jadewerft claims that because Iraq's invasion and occupation of Kuwait interrupted its contract with Kuwait Fire, shipbuilding capacity was not utilised as profitably as it could have been.

103. In its "E" claim form, Jadewerft characterised this loss element as "contract losses due to under-utilised shipbuilding capacity", but the Panel finds that it is more accurately described as loss of profits.

104. Jadewerft stated that it lost up to 15,426 hours of production between December 1990 and April 1991.

105. In its response to the article 34 notification, Jadewerft states, "[w]hen accepting an order (in our case: June 1990) it takes a few months before the real production starts (because of materials to prepare, drawings to be made [and so forth]), since we scheduled the actual building of the ship starting November, December 1990, we were not able to take on other orders. The management started all efforts to mitigate this way the loss and damage due to the under-utilisation of our building capacity".

2. Analysis and valuation

106. In respect of the lost shipbuilding capacity, Jadewerft provided a graph which illustrates the gap between normal capacity and actual utilisation of its shipbuilding facilities between September 1990 and June 1991. It did not provide any additional evidence.

107. The Panel finds that Jadewerft 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

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

C. Summary of recommended compensation for Jadewerft

Table 8. Recommended compensation for Jadewerft

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	57,536	57,536
Loss of profits	790,064	nil
Interest	409,552	--
Total	1,257,152	57,536

109. Based on its findings regarding Jadewerft's claim, the Panel recommends compensation in the amount of USD 57,536. The Panel finds the date of loss to be 2 August 1990.

VI. NEUERO TECHNOLOGY GMBH

110. On 27 June 2001, the Commission received a notice of withdrawal of the claim by Neuero Technology GmbH from the Permanent Mission of the Federal Republic of Germany. In the light of this communication, the Panel issued a procedural order on 14 September 2001 acknowledging the withdrawal and terminating the Panel's proceedings with respect to the claim by Neuero Technology GmbH.

VII. THE FURUKAWA ELECTRIC CO., LTD

111. The Furukawa Electric Co., Ltd. ("Furukawa") is a company organised according to the laws of Japan, which designs, manufactures and installs electrical products. At the time of Iraq's invasion and occupation of Kuwait, it had two contracts with the Ministry of Electricity and Water of Kuwait ("MEW") for the supply and installation of power cables and accessories in Kuwait.

112. Furukawa seeks compensation in the amount of USD 533,322 (KWD 154,130) for loss of tangible property.

Table 9. Furukawa's claim

Claim element	Claim amount (USD)
Loss of tangible property	533,322
Total	533,322

A. Loss of tangible property

1. Facts and contentions

113. Furukawa seeks compensation in the amount of USD 533,322 (KWD 154,130) for loss of tangible property consisting of (a) tools and equipment to be supplied under its contracts with MEW (USD 495,784), and (b) various items of office equipment (USD 37,538).

114. In the "E" claim form, Furukawa characterised the loss of tools and equipment to be supplied pursuant to its two contracts with MEW as contract losses. However, the Panel finds that the alleged loss of the tools and equipment is more accurately described as a claim for loss of tangible property.

115. At the time of Iraq's invasion and occupation of Kuwait, Furukawa had two contracts with MEW to supply and install power cables and accessories in government premises in Kuwait. Furukawa did not provide any details in relation to the project sites, but the schedule of work under one of the contracts indicates that part of the installation was to take place at the Kuwait Research Institute.

116. The first contract (Contract No. T/1166) dated 28 February 1982 was for the supply and installation of 132 and 33 kV oil-filled cables, pilot cables and accessories, for a contract price of KWD 6,947,065. Furukawa states that takeover and acceptance occurred on 26 March 1988. Presumably, this is a reference to the preliminary takeover and acceptance, as Furukawa states the completion date of the project (the date of issue of the final certificate) as 15 June 1992. Furukawa states the final contract price as KWD 6,392,709. Furukawa did not explain the difference between the original contract price and the final contract price.

117. The second contract (Contract No. T/1249) dated 6 February 1983 was for the supply and installation of 300 kV oil-filled cables, pilot cables and accessories. Furukawa did not provide a copy

of this contract, but other evidence submitted with the claim refers to this contract. Furukawa states that takeover and acceptance occurred on 8 February 1986. Presumably, this is also a reference to the preliminary takeover and acceptance, as Furukawa states the completion date of the project (the date of issue of the final certificate) as 15 June 1992. Furukawa states the final contract price as KWD 15,167,761.

118. No explanation is provided for the seemingly long maintenance period under both contracts. Furukawa did not provide the annex to the contracts detailing the timetable for the projects and the projected duration of the maintenance periods.

119. Under the terms of Contract No. T/1166, Furukawa was obliged to supply to MEW two complete sets of tools and equipment required for the maintenance and repair of the installation during the maintenance period. At the time of Iraq's invasion and occupation of Kuwait, Furukawa and MEW had not yet reached agreement as to the specific tools and equipment to be supplied. It appears that a similar agreement was reached in relation to Contract No. T/1249, however, in the absence of the contract, the Panel was unable to verify this. On 17 and 24 December 1989, Furukawa sent a list of tools and equipment required for each contract to MEW. MEW replied on 5 May 1990, stating that the proposed lists were incomplete and attaching its own lists of required tools and equipment.

120. Furukawa states that it had imported the tools and equipment, which it considered necessary for completion of the project, from Japan and stored them in its yard in Kuwait, pending agreement with MEW on the nature of equipment to be supplied. Furukawa claims that these tools and equipment, as well as other office equipment located at its office in Kuwait, were "expropriated and looted" during Iraq's invasion and occupation of Kuwait. Furukawa claims that none of the claimed property has been recovered, nor any value received. However, it did not state whether it has made any effort to locate the property.

(a) Tools and equipment – Contract No. T/1166 and Contract No. T/1249

121. Furukawa seeks compensation in the amount of USD 495,784 for loss of tools and equipment to be supplied under the above contracts.

122. The obligation to supply the tools and equipment needed to maintain the cables is found in "Contract Documents" which supplement and form part of the above contracts. In its response to the article 34 notification, Furukawa submitted a two-page extract of contractual terms intended to supplement Contract No. T/1166. It appears that similar contractual terms were agreed in relation to Contract No. T/1249, however, in the absence of the contract, the Panel was unable to verify this. The first page of the extract is entitled "Extract from Contract Document" which contains conditions on "special risks". These conditions required the owner, MEW, to pay Furukawa for works, temporary works or materials destroyed or damaged at the installation site. These conditions do not therefore apply to the claimed tools and equipment, which were allegedly stored on Furukawa's premises.

123. The second page is an extract from the contract specification. It contains terms relating to the supply of installation and maintenance equipment. It is clear from these additional terms that Furukawa was required to provide MEW with an itemised list of the maintenance equipment to be

supplied and the price of each item. The tools and equipment were to be the property of MEW and were not to be used for installation of the contractual works.

124. Furukawa provided the itemised lists as attachments to its letters to MEW of 17 and 24 December 1989. Those lists of equipment are extensive, but can be summarised as follows:

Table 10. Furukawa's claim for loss of tangible property (tools and equipment)

Contract No. T/1166	Amount claimed original currency (KWD)	Amount claimed (USD)
(a) Tools and equipment for maintenance and repair	49,344	170,740
(b) Tool box for pilot cable	187	647
Subtotal	49,531	171,387
Contract No. T/1249		
(a) Tools and equipment for maintenance and repair	93,324	322,920
(b) Tool box for oil-filled cable	240	830
(c) Tool box for pilot cable	187	647
Subtotal	93,751	324,397
Total	143,282	495,784

125. Furukawa and MEW were still negotiating the list of required tools and equipment when Iraq invaded Kuwait. Furukawa states in its revised Statement of Claim dated 12 February 2001 that it was forced to leave Kuwait at the time of Iraq's invasion because "nobody could stay there". As an example of this, Furukawa states, without providing any evidence, that its former General Manager was taken hostage by the Iraqi forces between August and November 1990.

126. Furukawa states that, in March 1992, it returned to its Kuwait office "to resume negotiations [with MEW] on outstanding matters, including the supply of maintenance tools and equipment". Furukawa does not state what happened to the contracts on its return to Kuwait. Presumably, the contracts were resumed in March 1992 and completed in June 1992.

127. In its response to the article 34 notification, Furukawa states that the retention monies were released on 13 April 1993 for Contract No. T/1166 and on 5 July 1992 for Contract No. T/1249. It is not clear whether MEW ever accepted the original list of tools and equipment forwarded by Furukawa, or whether Furukawa ultimately agreed to supply the additional tools and equipment required by MEW. In its revised Statement of Claim, Furukawa states that MEW accepted "our losses of maintenance tools and equipment resulting from Iraq's invasion and occupation of Kuwait". However, Furukawa states later in the revised Statement of Claim that MEW agreed to pay the retention monies "in consideration of deduction" of the amounts of the tools and equipment required to maintain the cables.

(b) Office equipment

128. Furukawa seeks compensation in the amount of USD 37,538 for loss of equipment stored at its office in Kuwait. Each item of claimed property and its value is listed in a schedule provided by Furukawa. The list of claimed property is extensive and includes standard office equipment such as furniture, lights, telephones, computers, copy and facsimile machines, television and video equipment, safes and a car. Furukawa has also provided a record of assets which indicates matters such as the type of asset, the date of purchase and the book value of each claimed item of office equipment.

129. Furukawa did not provide any further evidence to support its claim. Furukawa claims that when it returned to inspect its yard and office, it found that all its property in Kuwait had been "expropriated and looted". Accordingly, packing lists and other evidence of importation of materials required for the cable installation were allegedly destroyed. Furukawa claims that all other evidence pertaining to its losses was destroyed owing to a company policy requiring destruction of documents five years after their date of issue.

2. Analysis and valuation

(a) Tools and equipment – Contract No. T/1166 and Contract No. T/1249

130. In relation to claims for loss of tangible property in Kuwait, the Panel requires sufficient evidence that the claimed property was (a) owned by the claimant and (b) situated in Kuwait as at 2 August 1990. For example, the Panel is prepared to infer the presence of the tangible property in Kuwait as at 2 August 1990 where the claimant can prove that (a) the project was ongoing in Kuwait as at 2 August 1990 and (b) the property in question was not consumable and therefore could reasonably be expected to have been on the project site as at 2 August 1990.

131. In support of its claim, Furukawa provided the letters which it sent to MEW on 17 and 24 December 1989. In these letters, Furukawa states its readiness to supply the attached list of tools and equipment to MEW. However, the Panel finds that these letters and attached lists do not amount to sufficient proof that Furukawa owned the tools and equipment. A mere statement of readiness to supply goods is not enough to show that Furukawa owned the goods that it intended to supply to MEW. Furukawa did not provide any evidence of its title to the tools and equipment to be supplied pursuant to the above contracts. Furthermore, the Panel finds that Furukawa did not provide sufficient evidence that the claimed tools and equipment were present in Kuwait as at 2 August 1990.

(b) Office equipment

132. As noted in paragraph 128, supra, Furukawa supplied lists of the claimed office equipment on its company letterhead, as well as a record of assets. These appear to be self-generated documents and are not supported by any independent evidence of ownership of the goods. The Panel therefore finds that Furukawa did not provide sufficient evidence of its ownership of the claimed items of office equipment.

3. Recommendation

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

B. Summary of recommended compensation for Furukawa

Table 11. Recommended compensation for Furukawa

Claim element	Claim amount (USD)	Recommended compensation (USD)
Loss of tangible property	533,322	nil
Total	533,322	nil

134. Based on its findings regarding Furukawa's claim, the Panel recommends no compensation.

VIII. HITACHI CABLE, LTD.

135. Hitachi Cable, Ltd. ("Hitachi") is a company organised according to the laws of Japan, which manufactures and installs electrical products. At the time of Iraq's invasion and occupation of Kuwait, it had two contracts with the Ministry of Electricity and Water of Kuwait ("MEW") for the supply and installation of power cables and accessories at various sites in Kuwait.

136. Hitachi seeks compensation in the amount of USD 4,478,244 (KWD 1,288,027 and 3,087,200 Yen (JPY)) for contract losses, loss of tangible property and loss of real property.

Table 12. Hitachi's claim

Claim element	Claim amount (USD)
Contract losses	3,833,941
Loss of tangible property	642,746
Loss of real property	1,557
Total	4,478,244

A. Contract losses

1. Facts and contentions

137. Hitachi seeks compensation in the amount of USD 3,833,941 (KWD 1,108,009) for contract losses. The claim is for losses allegedly incurred in connection with surplus and scrap pilot cable supplied to MEW under (a) Contract No. T/1165 (KWD 87,038), and (b) Contract No. T/1550 (KWD 1,020,971).

138. At the time of Iraq's invasion and occupation of Kuwait, Hitachi had two contracts (Contract Nos. T/1165 and T/1550) with MEW to supply and install power cables and accessories in Kuwait. Hitachi did not provide any details in relation to the project sites, but the schedule of work under each of the contracts indicates that the installation was to take place at various power substations in Kuwait, as well as other government premises.

139. Hitachi was requested in the article 34 notification to provide a detailed statement of the circumstances surrounding its claim for contract losses, but it did not respond to the article 34 notification. Accordingly, the Panel has been limited in its investigation to the material originally filed with the Commission.

(a) Contract No. T/1165

140. The first contract (Contract No. T/1165) dated 24 February 1982 was for the supply and installation of 33 and132 kV oil-filled cables, pilot cables and accessories, for a contract price of KWD 5,713,323. The contract price was increased during the term of the agreement to KWD 7,067,765. It is not clear whether work under this contract was ever completed. Hitachi claims

that it has not received payment of KWD 87,038 under this contract for surplus and scrap pilot cable that was stored in its storage yard, pending delivery to MEW's stores.

141. Hitachi states in a letter dated 15 November 1991 informing MEW of the status of this contract, that the total amount owing under the contract is KWD 574,943. Hitachi has presumably recovered most of this amount from MEW, as the present claim only relates to KWD 87,038 of the total amount owing in 1991.

142. In its letter to MEW of 15 November 1991, Hitachi stated that the "theoretical value" of the surplus and scrap pilot cable is KWD 87,038, but sought payment of KWD 76,103 from MEW for the surplus and scrap pilot cable. It is not clear why Hitachi sought payment from MEW of a lower amount than was actually due.

143. The final contract value (KWD 7,067,765), consisted of KWD 4,509,516 for all supplied materials (including pilot cable) and KWD 2,558,249 for installation work. Hitachi did not provide all of the variation orders, which presumably increased the contract price from that originally stated in the contract. Hitachi does not state the date of commencement of supply and installation under the contract.

144. There were 12 separate items of installation work to be performed under the contract. Hitachi provided preliminary takeover and acceptance certificates which were issued by MEW for most of these items. However, Hitachi does not state whether the entire contract was ever completed at the end of the maintenance period for each of the installation works. Hitachi did not submit a "final acceptance certificate" issued by MEW.

Terms of payment

145. Under article 8 of the contract, Hitachi was required to provide an unconditional bank guarantee in favour of MEW in an amount equal to 10 per cent of the contract price. The guarantee was to remain valid in its full value until Hitachi completed all its obligations under the contract.

146. The invoices provided by Hitachi indicate that an advance payment of 20 per cent was made to Hitachi at the commencement of the contract, and was deducted from subsequent invoiced amounts for materials and for installation work. The contract itself did not specify the amount of the advance payment, although it may have been provided for in the supplementary "Contract Documents" which are listed in article 3 of the contract, but were not submitted by Hitachi. It is not clear whether the advance payment was repaid in full by Hitachi. The invoices dated after 1 March 1986 indicate that the advance payment had been fully repaid for certain items of installation work under the contract. In addition, Hitachi did not make any adjustment to its claim for surplus and scrap pilot cable to take the advance payment into account, which may indicate that it had repaid the advance payment in full. As noted in paragraph 150, infra, Hitachi made such an adjustment in the amount claimed from MEW under Contract No. T/1550.

147. Furthermore, the invoices provided by Hitachi indicate that MEW made a partial advance or interim payment for the cables and other materials shipped by Hitachi. In each invoice sent by Hitachi to MEW, 55 per cent was deducted from the invoiced amount for materials supplied. Hitachi states in

its Statement of Claim that the 55 per cent partial payment it received from MEW in respect of shipped materials has to be returned to MEW "at the time of Final Acceptance".

(b) Contract No. T/1550

148. The second contract (Contract No. T/1550) dated 30 June 1985 was also for the supply and installation of 33 and132 kV oil-filled cables, pilot cables and accessories. The contract price is stated in the contract as KWD 4,783,299. However, in a letter to MEW dated 15 November 1991, Hitachi stated the final value of the contract as KWD 4,058,581. It is not clear whether work under this contract was ever completed. Hitachi claims that it has not received payment of KWD 1,020,971 under this contract for surplus and scrap pilot cable that was stored in its storage yard, pending delivery to MEW's stores.

149. The total contract value of KWD 4,058,581 consisted of the total amount of shipped materials, including pilot cable (KWD 2,489,596) and the total amount of installation work performed (KWD 1,568,985). The Panel would have expected the final contract value to be higher than the original contract price, given that there was at least one variation order made by MEW under the contract which resulted in a revised contract price of KWD 4,827,567. However, the difference between the original contract price and the final contract value may be explained by other evidence submitted with the claim, which indicates that three of the items of work under the contract were not performed.

150. In its letter to MEW of 15 November 1991, Hitachi stated that the "theoretical value" of the surplus and scrap pilot cable is KWD 1,020,951, but claims payment of KWD 673,767 from MEW for the surplus and scrap pilot cable. Hitachi states that the amount payable by MEW for the scrap cable was adjusted to take into account the advance payment, an interim payment for cancellation of a route, and non-installation of one of the routes required under the contract.

151. Hitachi does not state the date of commencement of supply and installation under this contract. There were eight separate items of installation work to be performed under the contract. Hitachi provided preliminary takeover and acceptance certificates which were issued by MEW for most of these items. However, Hitachi does not state whether the entire contract was ever completed at the end of the maintenance period for each of the installation works. There is an undated "final certificate" from MEW in the materials submitted by Hitachi, but it appears to relate to only one item of work performed under the contract.

Terms of payment

152. Under article 8 of the contract, Hitachi was required to provide an unconditional bank guarantee in favour of MEW in an amount equal to 10 per cent of the contract price. The guarantee was to remain valid in its full value until Hitachi completed all its obligations under the contract.

153. The invoices provided by Hitachi indicate that an advance payment of 20 per cent was made to Hitachi at the commencement of the contract, and was deducted from invoiced amounts for materials and for installation work. The contract itself did not specify the amount of the advance payment, although it may have been provided for in the "Contract Documents" listed in the contract, which were

not provided by Hitachi. It is not clear whether the advance payment was repaid in full by Hitachi. It appears that the advance was not repaid as at 15 November 1991, given that Hitachi adjusted the amount claimed for scrap pilot cable to take into account the advance payment. However, Hitachi may have subsequently repaid the advance payment, explaining why it reverted to the actual value of the scrap pilot cable in its claim before the Commission.

154. In addition, the invoices indicate that MEW made an interim payment for the supply and installation work to be performed by Hitachi. In each of the invoices sent by Hitachi to MEW, 55 per cent was deducted from the invoiced total amount of materials and installation work. Hitachi states in its Statement of Claim that part of the payment it received from MEW in respect of shipped materials has to be returned to MEW "at the time of Final Acceptance".

2. Analysis and valuation

155. Hitachi provided extensive evidence in support of its claim for contract losses, including copies of each contract, progress reports, invoices for materials supplied and work performed and payment certificates.

156. The Panel has found that a claimant must provide 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.

157. The Panel is satisfied that Hitachi had two contracts with MEW for the supply of various power cables, including pilot cable, to MEW. However, the Panel finds that Hitachi has failed to explain the circumstances surrounding its claim. In particular, Hitachi failed to explain MEW's refusal to pay the outstanding amounts despite Hitachi's attempts to recover these amounts, which continued until at least the end of 1991. Accordingly, Hitachi did not demonstrate that the claimed contract losses were the direct result of Iraq's invasion and occupation of Kuwait. Furthermore, on the evidence provided, the Panel is unable to quantify the claimed loss.

3. Recommendation

158. The Panel recommends no compensation for contract losses.

B. Loss of tangible property

1. Facts and contentions

159. Hitachi seeks compensation in the amount of USD 642,746 (KWD 179,568 and JPY 3,087,200) for loss of tangible property. The claim is for the alleged loss of property such as power cables, oil and spare parts, which Hitachi used for installation work on various projects in Kuwait. MEW was the employer on all of these projects. Hitachi claims that this property was located in its storage yard and was destroyed or stolen during Iraq's invasion and occupation of Kuwait.

160. In the "E" claim form, Hitachi characterised this portion of the claim as loss related to real property, but the Panel finds that it is more accurately described as loss of tangible property.

161. The list of property claimed is extensive and is listed in invoices provided pursuant to the following contracts:

Table 13. Hitachi's claim for loss of tangible property

Contract Number	Amount claimed original currency (KWD)	Amount claimed original currency (JPY)	Amount claimed (USD)
Contract No. T/1251-82/83	2,327	2,167,200	23,076
Contract No. T/1378-85/86	44,736	--	154,796
Contract No. T/1550-84/85	49,459	920,000	177,516
Contract No. T/1165-81/82	40,731	--	140,937
Contract No. T/1056-80/81	37,189	--	128,681
Contract No. C/P-969-79/80	5,127	--	17,740
Total	179,569	3,087,200	642,746

162. The Panel notes that some of the items claimed were supplied under Contract No. T/1165 and Contract No. T/1550. These are the contracts discussed above in relation to Hitachi's claim for contract losses. However, there does not appear to be any overlap between Hitachi's claim for contract losses and its claim for loss of tangible property. The tangible property claim relates to equipment shipped from Japan under invoices different from those referred to in the claim for contract losses.

2. Analysis and valuation

163. In support of its claim, Hitachi provided invoices which list all items shipped from its head office in Japan for installation work in Kuwait under each of the above contracts. The invoices indicate the value of each shipped item, including the items claimed by Hitachi before the Commission. Hitachi also provided bills of lading and airway bills indicating that most of the claimed equipment was shipped to Kuwait throughout the 1980s. These bills of lading and airway bills name several different consignees in Kuwait, but there is no evidence that any of these consignees were acting as agents for Hitachi in Kuwait.

164. In relation to claims for loss of tangible property in Kuwait, the Panel requires sufficient evidence that the claimed property was (a) owned by the claimant and (b) situated in Kuwait as at 2 August 1990. For example, the Panel is prepared to infer the presence of the tangible property in Kuwait as at 2 August 1990 where the claimant can prove that (a) the project was ongoing in Kuwait as at 2 August 1990 and (b) the property in question was not consumable and therefore could reasonably be expected to have been on the project site as at 2 August 1990.

165. The Panel finds that Hitachi did not provide sufficient evidence of its ownership of the claimed items and their presence in Kuwait as at 2 August 1990. Hitachi was requested in the article 34 notification to provide further information and evidence to demonstrate ownership and presence of the claimed property in Kuwait as at 2 August 1990, but it did not respond to the article 34 notification.

3. Recommendation

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

C. Loss of real property

1. Facts and contentions

167. Hitachi seeks compensation in the amount of USD 1,557 (KWD 450) for the cost of repairing its store in Kuwait, which was allegedly damaged during Iraq's invasion and occupation of Kuwait. Materials and equipment required for installation work under Hitachi's contracts with MEW were kept in this store.

168. In the "E" claim form, Hitachi characterised this alleged loss as a claim for payment or relief to others. Hitachi does not give any details of the nature of the store which required repair. However, the store was large enough to house equipment and materials required pursuant to Hitachi's two contracts with MEW, and was presumably a permanent fixture in Hitachi's storage yard. The Panel therefore finds that this loss element is more accurately described as loss of real property.

2. Analysis and valuation

169. Hitachi was requested in the article 34 notification to provide evidence in relation to the alleged repair cost. In particular, Hitachi was asked to provide evidence that it incurred the repair cost and to explain how the repair cost was directly caused by Iraq's invasion and occupation of Kuwait. However, as noted above, Hitachi did not respond to the article 34 notification, and provided no evidence demonstrating that it incurred the repair cost.

3. Recommendation

170. The Panel recommends no compensation for loss of real property.

D. Summary of recommended compensation for Hitachi

Table 14. Recommended compensation for Hitachi

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	3,833,941	nil
Loss of tangible property	642,746	nil
Loss of real property	1,557	nil
Total	4,478,244	nil

171. Based on its findings regarding Hitachi's claim, the Panel recommends no compensation.

IX. DE JONG'S TIMMERFABRIEK BERGAMBACHT B.V.

172. De Jong's Timmerfabriek Bergambacht B.V. ("De Jong") is a company organised according to the laws of the Netherlands. At the time of Iraq's invasion and occupation of Kuwait, it had a "sole sale" agency contract (the "Agency Contract") with a Kuwaiti entity, Duay Al-Salman General Trading and Construction Company ("Al-Salman") for the manufacture, sale and delivery of hardwood window frames and cupboards.

173. De Jong seeks compensation in the total amount of USD 433,308 (763,056 Guilders (NLG)) for loss of profits and other losses (business development expenses).

Table 15. De Jong's claim

Claim element	Claim amount (USD)
Loss of profits	369,108
Other losses (business development expenses)	64,200
Total	433,308

A. Loss of profits

1. Facts and contentions/analysis and valuation

174. De Jong seeks compensation in the amount of USD 369,108 (NLG 650,000) for loss of profits. The claim is for (a) loss of profits expected to be earned under the Agency Contract during the five-month period between 2 August 1990 and 1 January 1991 (USD 283,929), and (b) loss of profits due to production standstill (USD 85,179)

(a) Loss of profits (Agency Contract)

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

176. De Jong states that the alleged loss was calculated on the basis of an historical annual profit margin of 10 per cent a year between the years 1992-1998.

177. In support of its claim, De Jong provided a copy of the Agency Contract, dated 26 May 1990. It also submitted accounting records evidencing its 10 per cent annual profit margin. These records were audited by the accounting firm of Ernst and Young. De Jong did not provide any further evidence of the profitability of its relationship with Al-Salman. It produced no evidence of prior or existing orders or of a specific sales target which it agreed upon with Al-Salman.

178. The Panel finds that De Jong 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.

(b) Loss of profits (due to production standstill)

179. De Jong asserts that it reserved domestic production facilities for the manufacture of window frames and cupboards for export to Kuwait. De Jong asserts that as a result of Iraq's invasion and occupation of Kuwait, it lost the Kuwaiti market for its products. Therefore, it claims that it had under-utilised production capacity which was a direct result of the invasion.

180. De Jong did not submit any evidence of either domestic demand in the Netherlands or of future demand in Kuwait. It also did not submit any evidence of internal plans to reserve specific production capacity for orders from Al-Salman. The Panel finds that De Jong 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.

2. Recommendation

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

B. Other losses (business development expenses)

1. Facts and contentions

182. De Jong seeks compensation in the amount of USD 64,200 (NLG 113,056) for other losses (business development expenses). The claim is for travel expenses, marketing costs, and legal fees incurred in developing De Jong's business in Kuwait prior to Iraq's invasion and occupation of Kuwait.

183. In its "E" claim form, De Jong characterised this loss element as payment or relief to others, but the Panel finds that it is more accurately described as other losses.

184. De Jong asserts that because of Iraq's invasion and occupation of Kuwait, it was unable to continue its business relation with Al-Salman and the amounts spent on business development were lost.

2. Analysis and valuation

185. In support of its claim for business development expenses, De Jong provided an invoice dated 31 July 1990 from a typesetter, an invoice dated 22 May 1990 from a marketing firm, an invoice dated 5 June 1990 from a solicitor's office, and a credit card receipt dated 26 April 1990 for a stay at the Kuwait International Hotel.

186. De Jong failed to provide evidence of actual expenditure of the amounts claimed. Moreover, it did not explain how its alleged loss was directly caused by Iraq's invasion and occupation of Kuwait.

187. The Panel finds that De Jong did not provide sufficient evidence of the alleged loss or of a direct causal link with Iraq's invasion and occupation of Kuwait. Therefore, the Panel recommends no compensation.

3. Recommendation

188. The Panel recommends no compensation for other losses (business development expenses).

C. Summary of recommended compensation for De Jong

Table 16. Recommended compensation for De Jong

Claim element	Claim amount (USD)	Recommended compensation (USD)
Loss of profits	369,108	nil
Other losses (business development expenses)	64,200	nil
Total	433,308	nil

189. Based on its findings regarding De Jong's claim, the Panel recommends no compensation.

X. KONINKLIJKE SCHELDE GROEP B.V.

190. Koninklijke Schelde Groep B.V. ("Koninklijke") is a company organised according to the laws of the Netherlands. Shortly before Iraq's invasion and occupation of Kuwait, it received three purchase orders from the Ministry of Electricity and Water of Kuwait ("MEW") for the manufacture and supply of spare coils and tubes for the boilers of the Shuwaikh Power and Water Production Plant (the "Shuwaikh Project") in Kuwait City, Kuwait.

191. Koninklijke seeks compensation in the total amount of USD 424,976 (NLG 748,383) for contract losses, other losses (storage and handling) and interest.

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

Table 17. Koninklijke's claim

Claim element	Claim amount (USD)
Contract losses	293,357
Other losses (storage and handling costs)	22,002
Interest	118,703
Less scrap value of goods	(9,086)
Total	424,976

A. Contract losses

1. Facts and contentions

193. Koninklijke seeks compensation in the amount of USD 293,357 (NLG 516,603) for contract losses. The claim is for the value of the three purchase orders for spare coils and tubes, which were not shipped to the Shuwaikh Project. The purchase orders were dated 3 September 1989 (the "First Purchase Order"), 17 February 1990 (the "Second Purchase Order") and 25 March 1990 (the "Third Purchase Order"). The amounts claimed for each of the Purchase Orders are KWD 12,200 for the First Purchase Order, KWD 55,980 for the Second Purchase Order and KWD 14,500 for the Third Purchase Order.

194. Koninklijke asserts that Iraq's invasion and occupation of Kuwait prevented shipment of the First Purchase Order which was en route to Kuwait at the time of the invasion. The First Purchase Order was subsequently diverted to Dubai and then returned to Rotterdam.

195. Koninklijke also asserts that because of Iraq's invasion and occupation of Kuwait, it was forced to stop production of the goods included in the Second and Third Purchase Orders, which were being prepared in Rotterdam for shipment to Kuwait.

196. Koninklijke states that it mitigated its loss by recycling the goods which were manufactured for, but not shipped to, MEW. It states that the scrap value of the goods was NLG 16,000 and it subtracted this amount from the total amount of its claim.

2. Analysis and valuation

(a) First Purchase Order (Purchase Order No. 18277)

197. In support of its claim, Koninklijke submitted a copy of the First Purchase Order, dated 3 September 1989. Koninklijke also submitted a letter of credit issued in its favour by MEW via the Central Bank of Kuwait (the "Kuwait Bank") in the amount of KWD 12,843. The date on the letter of credit is illegible. The expiration date on the letter of credit was 30 June 1990 and the letter of credit stated that the shipment was to be made on or before 15 June 1990.

198. According to the bill of lading issued by United Arab Shipping Company (the "Kuwaiti Shipping Agent"), the goods included in the First Purchase Order left Rotterdam on 7 July 1990 for delivery to MEW in Kuwait.

199. A telefax dated 3 August 1990 from Koninklijke's Dutch shipping intermediaries, Vertom Expeditie & Projection B.V., states that the Kuwaiti Shipping Agent decided not to call at Kuwait Harbour and instead discharged Koninklijke's goods in Dubai, "owing to the present developments in Kuwait".

200. A telefax from another Dutch shipping agent, D. Burger & Zoon B.V. dated 8 August 1990, states that Koninklijke's shipment was to be recalled to Rotterdam at Koninklijke's cost.

201. Koninklijke also submitted a letter which it sent to MEW on 17 October 1991 requesting advice as to the status of the First Purchase Order.

202. The Panel notes that the "E2A" Panel has considered the requirement of "directness" in the context of non-payment for goods shipped to Kuwaiti parties. The relevant extract from paragraph 147 of the "Report and recommendations made by the Panel of Commissioners concerning the fourth instalment of 'E2' claims" (S/AC.26/2000/2) is as follows:

> "Based on the above factual circumstances, the Panel formulates the following rules with reference to the claims under review involving goods lost in transit:
>
> (a) The Panel finds that a claim based on goods lost in transit must be substantiated by evidence of shipment to Kuwait (such as a bill of lading, airway bill, or freight receipt), from which an arrival date may be estimated, and by evidence of the value of the goods (demonstrated by, for example, an invoice, contract or purchase order);
>
> (b) The Panel is of the opinion that the further away the arrival date is from the date of Iraq's invasion of Kuwait, the greater the possibility that the goods were collected by the buyer. Thus, in the absence of evidence to the contrary and in the light of the circumstances discussed above, it is reasonable to expect that non-perishable goods, arriving in Kuwait within two to four weeks before the invasion, had not yet been collected by the buyer. Accordingly, the Panel

determines that, where goods arrived at a Kuwaiti sea port on or after 2 July 1990 or at the Kuwait airport on or after 17 July 1990 and could not thereafter be located by the claimant, an inference can be made that the goods were lost or destroyed as a direct result of Iraq's invasion and occupation of Kuwait and the ensuing breakdown in civil order … " .

203. The Panel adopts the above reasoning of the "E2A" Panel in relation to goods which have been shipped to Kuwait but subsequently lost in transit.

204. On the evidence provided, the Panel finds that the shipment was diverted and the goods never reached Kuwait. The Panel further finds that, by reason of their nature, it is highly improbable that the goods included in the First Purchase Order could have been employed for another project. Therefore, the Panel finds that the loss of payment on the First Purchase Order was directly caused by Iraq's invasion and occupation of Kuwait and recommends compensation in the full amount of KWD 12,200.

(b) Second Purchase Order (Purchase Order No. 18396)

205. Koninklijke stated that work on the Second Purchase Order commenced in January 1990 and was suspended in August 1990.

206. In support of its claim, Koninklijke submitted the Second Purchase Order, dated 17 February 1990. Koninklijke also submitted a letter of credit, dated 11 March 1990, in its favour issued by MEW via the Central Bank of Kuwait in the amount of KWD 55,980. The expiration date on the letter of credit was 30 June 1990 and shipment was to be made on or before 15 June 1990.

207. Koninklijke also submitted a letter which it sent to the Embassy of Kuwait in the Netherlands on 21 December 1990 requesting assistance in obtaining payment for the Second Purchase Order.

208. In the letter dated 17 October 1991 from Koninklijke to MEW (referred to in paragraph 201, supra), Koninklijke also requested advice as to the status of the Second Purchase Order.

209. On the evidence provided, the Panel finds that, as a direct result of Iraq's invasion and occupation of Kuwait, Koninklijke was required to cease manufacture of the goods included in the Second Purchase Order. The Panel further finds that, by reason of their nature, the goods in the Second Purchase Order were to a substantial extent impossible to employ for another project. Therefore, it finds that the loss of payment on the Second Purchase Order was directly caused by Iraq's invasion and occupation of Kuwait. The Panel recommends compensation in the amount of KWD 43,833.

(c) Third Purchase Order (Purchase Order No. 18424)

210. Koninklijke stated that work on the Third Purchase Order commenced in March 1990 and was suspended in August 1990.

211. Koninklijke did not submit a copy of the Third Purchase Order. However, Koninklijke provided the letter of credit (date illegible) issued in its favour by MEW via the Central Bank of Kuwait in the alleged amount of the Third Purchase Order, KWD 14,500. The date of expiration was 30 June 1990 and shipment was to be made on or before 15 June 1990.

212. Koninklijke's letter to the Embassy of Kuwait in the Netherlands (referred to in paragraph 207, supra) also requested assistance in obtaining payment for the Third Purchase Order in the amount of KWD 14,500.

213. In the letter dated 17 October 1991 from Koninklijke to MEW (referred to in paragraph 201, supra), Koninklijke also requested advice as to the status of the Third Purchase Order.

214. On the evidence provided, the Panel finds that, as a direct result of Iraq's invasion and occupation of Kuwait, Koninklijke was required to cease manufacture of the goods included in the Third Purchase Order. The Panel further finds that, by reason of their nature, the goods in the Third Purchase Order were also to a substantial extent impossible to employ for another project. Therefore, it finds that the loss of payment on the Third Purchase Order was directly caused by Iraq's invasion and occupation of Kuwait. The Panel recommends compensation in the amount of KWD 13,050.

3. Recommendation

215. The Panel recommends compensation in the amount of USD 239,042 for contract losses.

B. Other losses (storage and handling costs)

1. Facts and contentions

216. Koninklijke seeks compensation in the amount of USD 22,002 (NLG 38,745) for other losses (storage and handling costs). The claim is for the cost of storing and handling the goods in the three shipments which were not delivered to Kuwait. Based on the evidence submitted, Koninklijke appears to assert that due to its inability to deliver the first shipment to Kuwait, it incurred storage costs in Dubai and transport expenses back to Rotterdam. In respect of the second and third purchase orders, Koninklijke stated that it stored the unfinished goods in its own storage facilities.

2. Analysis and valuation

217. Koninklijke stated that it calculated storage costs at the rate of 7.5 per cent of NLG 516,603 (the total value of the Purchase Orders).

218. In support of its claim Koninklijke also provided an internal memorandum, dated 10 August 1990, which stated that work on the Second and Third Purchase Orders would be suspended and the materials put in storage. The memorandum also states that the first shipment was to be shipped back to Rotterdam.

219. Koninklijke also provided a telefax from its shipping agents, D. Berger & Zoon, dated 8 August 1990, stating that the first shipment was to be shipped back to Rotterdam at Koninklijke's cost.

220. The Panel finds that Koninklijke did not provide evidence that it incurred expenditure in storing and handling the goods included in the three purchase orders.

3. Recommendation

221. The Panel recommends no compensation for other losses (storage and handling costs).

C. Koninklijke's recovery of scrap value of the goods

222. Koninklijke states that it recycled the goods which were manufactured for, but not shipped to, MEW. It states that it retained the amount of NLG 16,000, which was the scrap value of the goods.

223. Koninklijke calculated the net amount of its claim by deducting the amount of NLG 16,000 (USD 9,086) from the gross amount of its asserted losses. This is the correct approach and the Panel has followed it in reaching its conclusion.

D. Summary of recommended compensation for Koninklijke

224. Based on the Panel's findings regarding Koninklijke's claim, the following is the calculation:

Table 18. Recommended compensation for Koninklijke

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	293,357	239,042
Other losses (storage and handling costs)	22,002	nil
Interest	118,703	--
Less scrap value of goods	(9,086)	(9,086)
Total	424,976	229,956

225. Based on its findings regarding Koninklijke's claim, the Panel recommends compensation in the amount of USD 229,956. The Panel finds the date of loss to be 2 August 1990.

XI. ALUMINA - INDUSTRY FOR ALUMINIUM SEMI-FINISHED PRODUCTS, METAL CONSTRUCTIONS, INTERIORS AND ENGINEERING

226. Alumina - Industry for Aluminium Semi-Finished Products, Metal Constructions, Interiors and Engineering ("Alumina") is a company organised according to the laws of the former Yugoslav Republic of Macedonia. It manufactures aluminium semi-finished products, metal constructions and interiors and performs engineering for building projects. At the time of Iraq's invasion and occupation of Kuwait it was a subcontractor on four projects in Kuwait and one project in Iraq.

227. Alumina seeks compensation in the total amount of USD 904,272 for contract losses.

Table 19. Alumina's claim

Claim element	Claim amount (USD)
Contract losses	904,272
Total	904,272

A. Contract losses

1. Facts and contentions/analysis and valuation

228. Alumina seeks compensation in the amount of USD 904,272 for contract losses.

229. The claim is for losses allegedly incurred in connection with the following projects:

(a) Waterfront Phase I Project, Kuwait (USD 99,030);

(b) Shuwaikh Port Complex, Kuwait (USD 179,207);

(c) Project AIC-New Commercial Complex, Dhajeej, Kuwait (USD 27,805);

(d) Military Hospital Project, Kuwait (USD 100,297); and

(e) Central Bank of Iraq Project, Baghdad, Iraq (USD 497,933).

230. In the article 34 notification, the secretariat asked Alumina to provide a detailed statement of the circumstances surrounding its claim for contract losses and to provide copies of the relevant contracts, including the general and specific conditions. However, Alumina did not respond to the article 34 notification. Therefore, the Panel has been limited in its investigation to the material originally filed with the Commission.

(a) Contracts in Kuwait

(i) Waterfront Phase I Project, Kuwait

231. Alumina entered into a subcontracting agreement (the "Waterfront Subcontract") with the main contractor, International Contractors Groups, Kuwait ("ICG") concerning the Waterfront Phase I Project. The main investor in the project was the Municipality of Kuwait. As a subcontractor, Alumina was to provide aluminium locksmith works, glassing, and installation. The work was to be completed by April 1986. Alumina states that the price agreed upon by the parties was USD 667,993.

232. Alumina states that it fully completed its performance under the terms of the Waterfront Subcontract and therefore was entitled to receive USD 667,993. However, it states that at the time of Iraq's invasion and occupation of Kuwait, it had only received USD 568,963. Therefore, it seeks compensation for the unpaid balance of the contract, that is, USD 99,030.

233. In support of its claim, Alumina provided a signed, but undated copy of the Waterfront Subcontract. Alumina also submitted a copy of an 11 January 1983 tender offer which it made to ICG.

234. The Panel finds that under the terms of the Waterfront Subcontract, Alumina was to have completed its work on the Waterfront Phase 1 Project by April 1986, more than four years prior to Iraq's invasion and occupation of Kuwait. Alumina did not submit any evidence of attempts to collect payment for its work during the four-year period before the invasion.

235. Alumina did not submit evidence of approval of the work by the main contractor or the employer on the project (such as an engineer's certificate of completion).

236. The Panel has found that a claimant must provide 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.

237. The Panel finds that Alumina did not submit evidence of ICG's (the main contractor) or the Municipality of Kuwait's (the main investor) insolvency or inability to pay.

238. Accordingly, Alumina failed to fulfil the evidentiary standard for establishing claims for contracts in Kuwait. The Panel finds that Alumina failed to demonstrate that its losses were the direct result of Iraq's invasion and occupation of Kuwait. The Panel recommends no compensation.

(ii) Shuwaikh Port Complex, Kuwait

239. On 17 February 1988, Alumina entered into a subcontracting agreement (the "Port Subcontract") with the main contractor Mohamed Abdulmohsin Kharafi, Kuwait ("Abdulmohsin") concerning the Shuwaikh Port Complex. The employer on the project was Ports Public Authority Shuwaikh Port-Kuwait (the "Port Authority"). The engineer on the project was the director general of the Port Authority or any other person appointed by the Port Authority.

240. As the subcontractor, Alumina was to carry out the aluminium locksmith works, glassing and installation on the main building and connected building of the Shuwaikh Port Complex project. The Port Subcontract was to be completed within 1,030 days.

241. Alumina states that the parties agreed it would be paid USD 1,987,300. Alumina states that it completed work equivalent to the value of USD 1,624,802. Alumina states that it had been paid USD 1,445,595 prior to Iraq's invasion and occupation of Kuwait. Thus, Alumina seeks to recover the difference of USD 179,207.

242. In addition to the Port Subcontract, Alumina submitted a "payment sheet" (the "Payment Sheet"), dated 17 May 1990, which states that the value of the Port Subcontract was KWD 595,000. According to the Payment Sheet, Alumina completed work equivalent to KWD 342,780 by 31 March 1990. The Payment Sheet also states that Alumina was due to receive KWD 22,655 as the tenth payment under the Port Subcontract.

243. Alumina also submitted a table summarising nine of the building certificates for which it had received payment prior to 31 March 1990 (the "Building Certificate Table"). The Building Certificate Table states that after receipt of payment for work approved in the "Ninth Building Certificate," Alumina had received a total of USD 1,291,717.

244. The Panel finds that Alumina did not submit sufficient evidence of its loss. Although Alumina submitted both the Building Certificate Table and the Payment Sheet, the sum total of payments claimed from Abdulmohsin (either KWD 365,435[3] or USD 1,291,717 + KWD 22,655[4]) does not appear to add up to the value of work which it asserts it had completed prior to Iraq's invasion and occupation of Kuwait (USD 1,624,802) in its Statement of Claim. Alumina did not submit an explanation that would account for this discrepancy.

245. According to article 29 of the Port Subcontract, Alumina was obliged to submit to Abdulmohsin for each item of its works a breakdown of its unit rates to show the percentage of labour, materials, plant and equipment, overheads and profit included therein. No payment was to have been made to Alumina until this requirement was fulfilled. However, Alumina did not submit copies of this documentation.

246. Alumina also submitted no evidence of the insolvency or inability to pay of Abdulmohsin (the main contractor) or of the Port Authority (the employer).

247. Accordingly, Alumina failed to fulfil the evidentiary standard for establishing claims for contracts in Kuwait (see, paragraph 236, supra). Furthermore, the Panel finds that Alumina failed to demonstrate that its losses were the direct result of Iraq's invasion and occupation of Kuwait. The Panel recommends no compensation.

(iii) Project AIC-New Commercial Complex, Dhajeej, Kuwait

248. On 20 January 1986, Alumina entered into a subcontracting agreement (the "AIC Subcontract") with Al-Hamra Kuwait Co. W.L.L. ("Al-Hamra"), the main contractor on Project AIC-New Commercial Complex in Dhajeej, (the "Project AIC"). Al Ahleia Insurance Co. Kuwait was the

owner of Project AIC. As the subcontractor, Alumina was to carry out the aluminium locksmith works, glassing, and installation on Project AIC. Alumina states that the parties agreed it was to be paid USD 728,751.

249. Alumina asserts that prior to Iraq's invasion and occupation of Kuwait, it had completed performance on the AIC Subcontract and was due to receive full payment in the amount of USD 728,751. However, it states that it had only been paid USD 700,946 as at 2 August 1990. Therefore, Alumina seeks compensation for the balance of the contract, that is, USD 27,806.

250. Alumina submitted a copy of the AIC Subcontract. Alumina also submitted an 8 December 1987 settlement agreement which it reached with Al-Hamra. The settlement agreement states that the final subcontract sum was KWD 218,189 and that Alumina had already received KWD 209,864. Thus, as of 8 December 1987, Alumina was to receive KWD 8,325.

251. Alumina did not submit any evidence of attempts to collect the unpaid amounts on the subcontract between the date of the settlement agreement in December 1987 and Iraq's invasion and occupation of Kuwait.

252. Alumina also did not submit any evidence of the insolvency or inability to pay the outstanding amounts of Al-Hamra (the main contractor) or of Al-Ahleia (the owner).

253. Accordingly, Alumina failed to fulfil this Panel's evidentiary standard for establishing claims for contracts in Kuwait (see, paragraph 236, supra). Furthermore, the Panel finds that Alumina failed to demonstrate that its losses were the direct result of Iraq's invasion and occupation of Kuwait. The Panel recommends no compensation.

(iv) Military Hospital Project, Kuwait

254. On 19 February 1984, Alumina states that it entered into a subcontracting agreement (the "Hospital Subcontract") with Energoprojekt Construction, Belgrade ("Energoprojekt") concerning the Military Hospital Project in Kuwait. As the subcontractor, Alumina was to carry out the aluminium locksmith works, glassing and installation on the Military Hospital Project. The employer on the Project was the Ministry of Public Works of Kuwait ("MPW").

255. Alumina states that the parties agreed that it was to be paid USD 1,888,980. Alumina states that prior to Iraq's invasion and occupation of Kuwait it had completed work in the amount of USD 1,828,479, but had only been paid USD 1,728,182. It therefore claims compensation in the amount of the balance of the contract, USD 100,297.

256. Alumina submitted a payment certificate signed by itself and Energoprojekt, (the "Payment Certificate"), dated 8 July 1987, which states that the value of the Hospital Subcontract was KWD 523,879. The Payment Certificate also states that on 25 June 1987, the total value of executed works was KWD 515,892. Thus, according to the Payment Certificate, the net total due to Alumina (having subtracted retention payments, repayment, and advance payments) was KWD 8,127.

257. Alumina also submitted a balance sheet in respect of the Hospital Subcontract. However, the significance of the figures on the balance sheet was unclear. Alumina did not submit a copy of the Hospital Subcontract. However, it submitted a copy of the main contract between Energoprojekt and MPW.

258. The Panel finds that Alumina did not demonstrate that it suffered a direct loss as a result of Iraq's invasion of Kuwait. Between the time of the Payment Certificate dated 8 July 1987 and Iraq's invasion and occupation of Kuwait, more than three years elapsed. Alumina did not submit any evidence of attempts to collect the balance due to it during those three years.

259. Furthermore, the Panel finds that Alumina did not submit any evidence of Energoprojekt's (the main contractor) or MPW's (the employer) insolvency or inability to pay outstanding amounts.

260. Accordingly, Alumina failed to fulfil this Panel's evidentiary standard for establishing claims for contracts in Kuwait (see, paragraph 236, supra). Furthermore, the Panel finds that Alumina failed to demonstrate that its losses were the direct result of Iraq's invasion and occupation of Kuwait. The Panel recommends no compensation.

(b) Central Bank of Iraq Project

261. In its Statement of Claim, Alumina asserts that on 10 March 1989, it entered into a subcontracting agreement (the "Bank Subcontract") with Energoprojekt, the main contractor on the Central Bank of Iraq Project in Baghdad (the "Bank of Iraq Project"). However, the Bank Subcontract submitted by Alumina states that the commencement date for the subcontracting works was 18 December 1988, four months prior to 10 March 1989.

262. As the subcontractor, Alumina was to carry out work on aluminium doors and windows, glazing and erection. The Bank Subcontract states that the completion date for subcontracting work on the Bank of Iraq Project was 25 October 1989. The owner of the Bank of Iraq Project was the Ministry for Public Works of the Republic of Iraq.

263. The Bank Subcontract states that the parties agreed that Alumina was to be paid USD 1,115,000 for its work. Alumina claims that prior to the invasion of Kuwait, it performed work equivalent to the value of USD 1,091,759, but had only been paid USD 593,826. Thus, it seeks compensation in the amount of the balance of its unpaid accounts, that is USD 497,933.

264. In addition to the Bank Subcontract, Alumina submitted the Ninth Temporary Building Certificate ("Ninth Building Certificate") which was issued on 10 October 1990. Like the Statement of Claim, the Ninth Building Certificate also describes executed works in the total amount of USD 1,091,759. After deduction of amounts paid in prior building certificates (USD 969,388) and for 10 per cent retention monies (USD 12,227) the remaining payment due on the Ninth Building Certificate was USD 110,044.

265. In its Statement of Claim, Alumina states that it had only been paid USD 593,826 at the time of Iraq's invasion and occupation of Kuwait, but according to the Ninth Building Certificate, it had

received USD 969,388 by 10 October 1990. Thus, according to its own evidence, it received payment of at least USD 375,562 after the invasion that it did not report in its Statement of Claim.

266. Alumina submitted an undated self-generated recapitulation statement (the "Recapitulation Statement") which states (as does the Statement of Claim) that it received only USD 593,826 of the USD 1,091,759 which was due to it for completed works. According to the Recapitulation Statement, Alumina is owed a balance of USD 497,933 consisting of realisation of the works described in the Ninth Building Certificate and retention monies withheld from the First to the Ninth Building Certificates.

267. In addition, Alumina submitted an undated self-generated table of claims which reiterates the assertion in the Statement of Claim and the Recapitulation Statement that Alumina performed work in the amount of USD 1,091,759.

268. In its Statement of Claim, Alumina stated that "[b]y consultation with 'Energoproject' [sic] it was agreed: 'Alumina' as 'sub-contractor' to send the Comission [sic] claim for this project separately". No document was supplied to support this assertion.

269. Energoprojekt filed a claim with the Commission in respect of the Bank of Iraq Project which was addressed by this Panel at paragraphs 314 to 331 of its "Report and recommendations made by the Panel of Commissioners concerning the fifteenth instalment of 'E3' claims" (S/AC.26/2000/20). The Panel recommended compensation the amount of USD 229,904 for Energoprojekt's claim for contract losses relating to unpaid retention monies.

270. In its response to the article 34 notification, Energoprojekt stated "no claim arises on the part of our subcontractors/suppliers. Services rendered have been duly paid and terms of engagement strictly observed". Energoprojekt then listed four subcontractors/suppliers, one of which was Alumina. Energoprojekt stated that it had paid Alumina USD 724,750 and/or 121,615 Iraqi dinars (IQD).

271. In the article 34 notification the secretariat asked Alumina to report the receipt of any compensation which it had received from other sources. Alumina did not respond to the article 34 notification. In light of the information from Energoprojekt, it would appear that Alumina has already received compensation for its alleged losses from Energoprojekt. The Panel recommends no compensation.

2. Recommendation

272. The Panel recommends no compensation for contract losses.

B. Summary of recommended compensation for Alumina

Table 20. Recommended compensation for Alumina

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	904,272	nil
Total	904,272	nil

273. Based on its findings regarding Alumina's claim, the Panel recommends no compensation.

XII. AMBER INDUSTRIAL DOORS LIMITED

274. Amber Industrial Doors Limited is a company organised according to the laws of the United Kingdom which manufactures and supplies industrial doors. Since filing its claim before the Commission, it has changed its name and is now known as Amber Doors Limited ("Amber Doors"). At the time of Iraq's invasion and occupation of Kuwait, it had two contracts to supply industrial doors to clients in Kuwait.

275. Amber Doors seeks compensation in the total amount of USD 56,274 (29,600 Pounds sterling (GBP)) for contract losses.

Table 21. Amber Doors' claim

Claim element	Claim amount (USD)
Contract losses	56,274
Total	56,274

A. Contract losses

1. Facts and contentions

276. Amber Doors seeks compensation in the amount of USD 56,274 (GBP 29,600) for contract losses allegedly incurred in connection with the manufacture and supply of industrial doors for two Kuwaiti clients, both of them Kuwaiti companies. In each case, a letter of credit had been issued by a bank based in Kuwait for the contract price of the doors. Amber Doors did not receive payment under either letter of credit.

277. The first contract was with Kirby Building Systems Kuwait Co. ("Kirby Building Systems") for the supply of four rubber/PVC crash doors at a contract price of GBP 10,600. The second contract was with Door Service Centre for the supply of 13 fire-rated shutter doors at a contract price of GBP 19,000. In both cases, the doors were purpose made in accordance with specifications provided by the respective Kuwaiti clients, and could not be used by Amber Doors for any other purpose.

(a) Contract with Kirby Building Systems

278. According to documents submitted by Amber Doors, Kirby Building Systems placed an order with Amber Doors on 5 May 1990 to purchase four double-leaf rubber/PVC crash doors at a contract price of GBP 10,600. On 21 May 1990, the Gulf Bank of Kuwait issued a letter of credit in favour of Amber Doors for the contract price. A bill of lading provided by Amber Doors indicates that Amber Doors shipped the doors to the order of the Gulf Bank of Kuwait on 28 June 1990 aboard a vessel known as the "Norasia Pearl". The port of loading was Felixstowe and the port of discharge was Kuwait.

279. In a facsimile transmission dated 22 April 1991, Amber Doors' freight company advised Amber Doors that consignment of one of the industrial doors shipped to Kirby Building Systems aboard the Norasia Pearl had been located in Dubai.

280. In a revised Statement of Claim submitted in April 2001 in response to the article 15 notification, Amber Doors stated that the doors arrived in Kuwait, but were subsequently destroyed or stolen. It further stated that the business of Kirby Building Systems was severely damaged by Iraq's invasion and occupation of Kuwait.

Terms of payment

281. The letter of credit issued by the Gulf Bank of Kuwait on 21 May 1990 was expressed to be irrevocable. The expiry date was 30 June 1990. Barclays Bank in the United Kingdom was the correspondent (advising) bank. The letter of credit stated that shipment of the crash doors was to take place no later than 15 June 1990 and that partial shipments were prohibited.

282. Fifty per cent of the amount of the letter of credit (i.e. GBP 5,300) was payable to Amber Doors "at sight" upon presentation of all documentation required under the letter of credit, namely commercial invoices, the packing list, certificate of origin, shipping marks, freight payment, shipping company certificate and bill of lading. The other 50 per cent was payable 120 days after the date of the bill of lading, that is on 26 October 1990. There were other terms annexed to the letter of credit in relation to the content of the documentation required for presentation to Kirby Building Systems.

283. Amber Doors states in its revised Statement of Claim that it was unable to obtain clearance from Kirby Building Systems because of "discrepancies" in the letter of credit to "enable funds to be released prior to the invasion". Amber Doors was requested in the article 34 notification to provide evidence of its assertions that it was unable to obtain payment because of "discrepancies" in the letter of credit. It did not provide any such evidence in relation to the letter of credit issued by the Gulf Bank of Kuwait. However, Amber Doors did provide a letter dated 18 June 1991 from the Gulf Bank of Kuwait to Barclays Bank stating that it was unable to obtain payment of "two bills for GBP 5,300 each" under its letter of credit.

(b) Contract with Door Service Centre

284. Door Service Centre sent a facsimile transmission to Amber Doors on 4 December 1989 ordering 13 fire-rated shutter doors and motors to operate the doors. The total contract price was GBP 19,000. On 26 May 1990, National Bank of Kuwait issued a letter of credit in favour of Amber Doors for the contract price. A bill of lading provided by Amber Doors indicates that Amber Doors shipped the doors to the order of National Bank of Kuwait on 31 July 1990. The port of loading was Felixstowe and the port of discharge was Kuwait.

285. Amber Doors states in its revised Statement of Claim that the doors did not arrive in Kuwait prior to Iraq's invasion and occupation of Kuwait and that the ship was directed to another port because "it was impossible to deliver the goods due to the invasion". This is supported by other evidence, namely the reply from Door Service Centre to a letter from Amber Doors dated 14 May 1993 requesting it to release payment under the letter of credit. In its handwritten response at the

bottom of Amber Doors' letter of 14 May 1993, Door Service Centre noted that the shipment was not received and could not be claimed by Door Service Centre, and that it understood that the doors were returned to England.

Terms of payment

286. The letter of credit issued by National Bank of Kuwait on 26 May 1990 was expressed to be irrevocable and the expiry date was 15 August 1990. The London office of National Bank of Kuwait was the correspondent (advising) bank. The letter of credit stated that shipment was to take place no later than 31 July 1990.

287. The total amount of GBP 19,000 was payable under the letter of credit upon presentation and acceptance of documents similar to those outlined in paragraph 282, supra, and presentation of Amber Doors' draft drawn on Door Service Centre 90 days from the date of the bill of lading, that is on 29 October 1990.

288. Amber Doors states in its revised Statement of Claim that it was "unable to obtain release of monies from National Bank of Kuwait" due to "discrepancies". As noted above, Amber Doors was asked in the article 34 notification to provide evidence of these "discrepancies". Amber Doors provided a copy of the letter of credit issued by National Bank of Kuwait, highlighted to show the "discrepancies". An examination of the letter of credit shows that what are described as discrepancies are problems with the formulation of the letter of credit, for example, the spelling of Door Service Centre's name and the address of Amber Doors. Other aspects of the formulation of the letter of credit also appeared to constitute problems. These problems would have justified the bank in refusing to honour the letter of credit, but it is not clear to the Panel that these problems reflected deficiencies with the doors as shipped.

2. Analysis and valuation

289. Applying the principles set forth in paragraph 202, supra, to the present facts, the Panel considers that Amber Doors has proved that it shipped the doors to Kuwait pursuant to its contracts with Kirby Building Systems and Door Service Centre, respectively, and that the doors were either not received by the buyers, or were destroyed as a direct result of Iraq's invasion and occupation of Kuwait.[5] Furthermore, the Panel is satisfied that Amber Doors did not receive payment under either contract as a direct result of Iraq's invasion and occupation of Kuwait.

(a) Contract with Kirby Building Systems

290. In relation to the contract with Kirby Building Systems, it is clear that there was a pre-existing commercial dispute between the parties as to certain discrepancies in the letter of credit issued by the Gulf Bank of Kuwait. As noted above, this letter of credit was due to expire on 30 June 1990. On the evidence provided by Amber Doors, there is nothing to indicate the extent of the discrepancies in the letter of credit, nor whether Amber Doors, in the ordinary course of events, would have been able to remedy those discrepancies by 30 June 1990.

291. However, the existence of a terminological dispute alone does not affect the Panel's conclusion that non-payment for the goods by Kirby Building Systems was due to Iraq's invasion and occupation of Kuwait. The Panel considers that where goods have been shipped to Kuwait and secured by a letter of credit, the claimant has a potential claim under both the letter of credit and the contract. In this case, although the claim under the letter of credit fails because Amber Doors did not demonstrate that the failure of the Gulf Bank of Kuwait to pay was the direct result of Iraq's invasion and occupation of Kuwait, the Panel considers that Amber Doors has made a successful claim pursuant to its contract to manufacture and supply industrial doors to Kirby Building Systems. By shipping the doors to Kirby Building Systems aboard the Norasia Pearl, Amber Doors fulfilled its obligations under the contract.

292. The Panel therefore recommends compensation in the amount of GBP 10,600 for the doors shipped to Kirby Building Systems.

(b) Contract with Door Service Centre

293. Amber Doors provided evidence showing that the fire-rated shutter doors were shipped to Door Service Centre on 31 July 1990. Given that Iraq invaded Kuwait two days later on 2 August 1990, it is reasonable to assume the Panel concludes that the goods were never delivered as a direct result of the Iraq's invasion and occupation of Kuwait.[6]

294. In this case, the doors were shipped immediately prior to Iraq's invasion and occupation of Kuwait and the letter of credit was to expire on 15 August 1990, after Iraq's invasion of Kuwait. The discrepancies in the letter of credit were not the sole determinative cause of Amber Doors' loss. The contractual obligations of Amber Doors to deliver the doors were impossible to fulfil, notwithstanding any discrepancies in the letter of credit. The Panel considers that Amber Doors has proved its case under both the letter of credit and the contract.

295. The Panel therefore recommends compensation in the amount of GBP 19,000 for the doors shipped to Door Service Centre.

3. Recommendation

296. The Panel recommends compensation in the amount of USD 56,274 for contract losses.

B. Summary of recommended compensation for Amber Doors

Table 22. Recommended compensation for Amber Doors

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	56,274	56,274
Total	56,274	56,274

297. Based on its findings regarding Amber Doors' claim, the Panel recommends compensation in the amount of USD 56,274. The Panel finds the date of loss to be 2 August 1990.

XIII. FUGRO-MCCLELLAND LIMITED

298. Fugro-McClelland Limited ("Fugro-McClelland") is a company organised according to the laws of the United Kingdom. It describes itself as a geotechnical consultant, carrying on the business of consultancy and designing in the fields of geotechnical and civil engineering, mining, land surveying and oceanography. At the time of Iraq's invasion and occupation of Kuwait, it had an agency agreement with a Kuwaiti company, Kuwait Commercial Agency Limited. Under the Agency Agreement, Kuwait Commercial Agency Limited acted as the agent of Fugro-McClelland in Kuwait. The materials filed with the claim do not indicate the nature of the work which Fugro-McClelland was performing in Kuwait in August 1990.

299. Fugro-McClelland seeks compensation in the total amount of USD 36,952 (GBP 19,437) for loss of tangible property.

Table 23. Fugro-McClelland's claim

Claim element	Claim amount (USD)
Loss of tangible property	36,952
Total	36,952

A. Loss of tangible property

1. Facts and contentions

300. Fugro-McClelland seeks compensation in the amount of USD 36,952 (GBP 19,437) for loss of tangible property. The claim is for the alleged loss of (a) a six-metre steel storage container and (b) various items of soil laboratory testing equipment, drilling rods and sampling equipment. All of the claimed property was allegedly stored at the premises of Fugro-McClelland's agent, Kuwait Commercial Agency Limited.

301. Fugro-McClelland asserts that these items were removed from its agent's compound in Ahmadi, Kuwait by "persons unknown" during Iraq's invasion and occupation of Kuwait. It claims that, although extensive enquiries were made, neither the storage container nor any items of the claimed equipment has been located.

2. Analysis and valuation

302. In support of its claim for the storage container, Fugro-McClelland provided photocopies of photographs showing the storage container. In support of its claim for the equipment, Fugro-McClelland provided invoices which were rendered by either the manufacturers of the equipment or Fugro-McClelland itself to its Kuwaiti agent in March 1984. It also provided certificates of origin dated April 1984 in relation to all of the claimed equipment.

303. Fugro-McClelland was requested in the article 34 notification to provide further information and evidence in relation to its claim. In a letter to the Commission dated 1 August 2001, Fugro-McClelland stated that it is unable to provide any additional information relating to its claim as it is company policy not to retain project files beyond seven years of completion of a project. Fugro-McClelland also stated that it understands that, in the absence of the additional information requested, its claim will proceed as originally submitted.

304. In relation to claims for loss of tangible property in Kuwait, the Panel requires sufficient evidence that the claimed property was (a) owned by the claimant and (b) situated in Kuwait as at 2 August 1990. For example, the Panel is prepared to infer the presence of the tangible property in Kuwait as at 2 August 1990 where the claimant can prove that (a) the project was ongoing in Kuwait as at 2 August 1990 and (b) the property in question was not consumable and therefore could reasonably be expected to have been on the project site as at 2 August 1990.

305. Applying these principles, in respect of the storage container, the Panel finds that Fugro-McClelland did not provide sufficient evidence of its ownership of the storage container and its presence in Kuwait as at 2 August 1990. In respect of the equipment, the Panel finds that Fugro-McClelland failed to provide evidence that its operations in Kuwait were ongoing as at 2 August 1990 and that the claimed testing and sampling equipment, which was imported into Kuwait in 1984, remained in Kuwait as at 2 August 1990.

3. Recommendation

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

B. Summary of recommended compensation for Fugro-McClelland

Table 24. Recommended compensation for Fugro-McClelland

Claim element	Claim amount (USD)	Recommended compensation (USD)
Loss of tangible property	36,952	nil
Total	36,952	nil

307. Based on its findings regarding Fugro-McClelland's claim, the Panel recommends no compensation.

XIV. JOHN SPRACKLEN (INTERNATIONAL) LIMITED

308. John Spracklen (International) Limited ("Spracklen") is a company organised according to the laws of the United Kingdom. Prior to Iraq's invasion and occupation of Kuwait, it contracted with the Overseas Estate Department of the British Foreign and Commonwealth Office to perform construction works at the British Embassy in Kuwait. Two of Spracklen's employees were taken hostage by the Iraqi forces during the invasion and occupation of Kuwait.

309. Spracklen seeks compensation in the amount of USD 12,825 (GBP 6,746) for contract losses. The claim is for unproductive salary payments made to its two employees during the period that they were detained by the Iraqi forces.

Table 25. Spracklen's claim

Claim element	Claim amount (USD)
Contract losses	12,825
Total	12,825

A. Contract losses

1. Facts and contentions

310. Spracklen seeks compensation in the amount of USD 12,825 (GBP 6,746) for contract losses. The claim is for the alleged payment of (a) unproductive salaries to two company employees (the "first and second employees"), and (b) a bonus payment made to the first employee's family during his detention.

311. According to documents submitted by Spracklen, the construction works which it had contracted to perform at the British Embassy in Kuwait were substantially complete in July 1990. All unwanted plant, vehicles, labour and materials were transported back to Spracklen's base in Riyadh, Saudi Arabia, on 21 July 1990. Its two employees remained in Kuwait to oversee completion of the remaining works. They were captured at the Messila Beach Hotel by the Iraqi forces shortly after Spracklen withdrew its equipment from the project site. Spracklen does not state the date that the two employees were captured by the Iraqi forces, nor the exact dates of detention of each employee.

312. However, Spracklen submitted a record of payments made to the first employee, which indicates that he was paid a weekly salary of GBP 414 for 14 weeks from the week ending 11 August 1990 until the week ending 10 November 1990. The total amount allegedly paid to the first employee is therefore GBP 6,335, consisting of his salary for 14 weeks (GBP 5,790), plus a bonus payment of GBP 545 made to the first employee's family on 30 September 1990 during his detention. Spracklen does not state how it calculated the amount of the bonus payment paid to the first employee's family.

313. The second employee escaped from the Iraqi authorities en route to Baghdad and made his way to Pakistan, returning to the company's base in Riyadh in the first week of October 1990. The record

of payments made to the second employee indicates that he was paid a weekly salary of 720 Saudi Arabian riyals (equivalent to GBP 102) for four weeks from the week ending 11 August 1990 until the week ending 1 September 1990. The total amount allegedly paid to the second employee was therefore GBP 411.

2. Analysis and valuation

(a) Unproductive salary payments

314. In support of its claim, Spracklen provided correspondence with the Overseas Estate Department of the British Foreign and Commonwealth Office. The correspondence indicates that Spracklen attempted to recover compensation from the British Foreign and Commonwealth Office for payment of the salaries of its two employees during their detention. Spracklen also provided a letter from the first employee to an unnamed recipient, giving details of his salary and bonus payments as an employee of Spracklen. The Panel notes that this letter is also contained in a separate category "C" claim filed with the Commission for loss of income. The first employee filed the claim after he was released and repatriated to the United Kingdom. Finally, Spracklen provided records of payments made to its two employees during their detention, which appear to have been prepared for the purposes of making a claim to the Commission rather than as contemporaneous payrolls.

315. In respect of recovery of unproductive salary payments, in the "Report and recommendations made by the Panel of Commissioners concerning the seventeenth instalment of 'E3' claims" (S/AC.26/2001/2), this Panel stated at paragraph 27 that salaries paid to employees are "prima facie compensable as salary paid for unproductive labour". The Panel noted that compensation will be awarded only when the claimant provides sufficient evidence to establish its loss in relation to the payment of unproductive salaries. In considering whether a claimant has provided sufficient evidence of its loss, this Panel requires:

(a) Evidence that each employee has been detained for the period during which unproductive salary has been paid; and

(b) Evidence of a legal obligation, whether by contract or under law applicable to the claimant, requiring the payments to be made.

316. Applying these principles, sufficient evidence has only been provided to the Panel to substantiate the loss in relation to one of the two employees. Spracklen has proved that only the first employee was detained by the Iraqi authorities. As noted in paragraph 314, supra, Spracklen submitted a letter indicating that the first employee was detained. Neither this letter, nor any other documents submitted by Spracklen, prove the exact dates of detention of the first employee, but there is further evidence on this point in a category "C" claim filed by the first employee. In a letter submitted with his category "C" claim, the first employee states that he was detained on 2 August 1990 for a period of 133 days, and returned to the United Kingdom on 11 December 1990.

317. Spracklen provided no evidence relating to the second employee's detention, nor is there any claim filed by the second employee before the Commission which might have contained such evidence. In the article 34 notification, Spracklen was requested to provide further information and

evidence concerning the circumstances of the detention of both employees. However, Spracklen did not respond to the article 34 notification, despite the fact that Spracklen stated in its Statement of Claim that its files for the project were "fully intact".

318. The Panel recommends compensation in the amount of GBP 5,790 for the salary paid to the first employee during his period of detention.

(b) Bonus payment

319. The bonus of GBP 545 paid by Spracklen to the first employee's family appears to be in the nature of a "one-off" ex gratia payment intended to comfort the first employee's family during his detention. In the view of this Panel, it is not a loss directly resulting from Iraq's invasion and occupation of Kuwait. The Panel finds that in order for it to be able to recommend an award of compensation for the bonus payment, Spracklen must provide evidence that it was under a legal obligation to make the payment. There is no evidence to this effect.

320. Accordingly, the Panel recommends no compensation for the bonus payment.

3. Recommendation

321. The Panel recommends compensation in the amount of USD 11,008 for contract losses.

B. Summary of recommended compensation for Spracklen

Table 26. Recommended compensation for Spracklen

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	12,825	11,008
Total	12,825	11,008

322. Based on its findings regarding Spracklen's claim, the Panel recommends compensation in the amount of USD 11,008. The Panel finds the date of loss to be 2 August 1990.

XV. OPERATIONS MANAGEMENT INTERNATIONAL, INC.

323. Operations Management International, Inc. ("OMI") is a company organised according to the laws of the State of California in the United States of America. OMI is an operations and maintenance firm, which provides sewage treatment, odour management and other utility services to private and public-sector clients. It is a wholly-owned subsidiary of a company known as CH2M Hill Limited.

324. At the time of Iraq's invasion of Kuwait, OMI had a contract with the Sanitary Engineering Department of the Ministry of Public Works of Kuwait ("MPW") to manage, operate and maintain the Rekka Wastewater Treatment Plant in Kuwait. The scope of services provided by OMI included management of the effluent utilisation scheme in Kuwait through a Data Monitoring Centre. Under the same contract, OMI also operated and maintained odour control facilities at seven main pumping stations in Kuwait. The contractual works were expected to end in February 1991.

325. OMI seeks compensation in the total amount of USD 1,244,869 for contract losses, loss of profits, loss of tangible property and financial losses. [7]

Table 27. OMI's claim

Claim element	Claim amount (USD)
Contract losses	39,683
Loss of profits	963,844
Loss of tangible property	218,813
Financial losses	22,529
Total	1,244,869

A. Contract losses

1. Facts and contentions

326. OMI seeks compensation in the amount of USD 39,683 for contract losses. The claim relates to (a) reimbursement of an amount paid by OMI's insurers in respect of the salaries of two OMI employees taken hostage by the Iraqi forces (USD 32,138), and (b) severance and other payments made to four expatriate employees who were forced to flee Kuwait (USD 7,545).

327. In the "E" claim form, OMI characterised this loss element as a claim for payment or relief to others, but the Panel finds that it is more accurately described as contract losses.

(a) Salary payments

328. OMI states that it has already received payment under an insurance policy in respect of salaries paid to its two employees (the "first and second employees") while they were taken hostage by the Iraqi forces from August to December 1990. According to documents submitted by OMI, the first

employee's total salary over this period was USD 13,384 and the second employee's salary was USD 18,754.

329. OMI provided evidence that its parent company, CH2M Hill Limited, held a Special Contingency insurance policy with Professional Indemnity Agency, Inc ("PIA"). On 11 March 1991, PIA sent a cheque for USD 32,138 to Corroon and Black, Inc. The cheque was payable to CH2M Hill Limited. Although it is not stated in the claim documentation, Corroon and Black, Inc. appears to have been OMI's insurance broker. On 14 March 1991, Corroon and Black, Inc. forwarded the cheque to OMI. There does not appear to have been any excess or deductible applied in reduction of the amount paid under the insurance policy.

330. The fact that OMI has recovered the full amount of this portion of its claimed loss does not extinguish OMI's claim before the Commission. In its "Report and recommendations made by the Panel of Commissioners concerning the twenty-first instalment of 'E3' claims" (S/AC.26/2001/21), at paragraphs 273 to 274, the Panel stated:

> "...the fact that a body such as [the export credit guarantor] has paid a sum of money to a contractor does not prove that that contractor has suffered a loss in that or any amount for the purpose of maintaining a claim before the Commission. Accordingly, while noting the way in which [the claimant] has formulated its claim, and the fact that it has been paid a substantial sum by [the export credit guarantor], the Panel is obliged to analyse the claim and supporting documents filed by [the claimant] so as to establish what loss, if any, [the claimant] can support in accordance with the criteria applied by the Commission. The Panel finds that the fact of the payment is irrelevant to the question of loss. Likewise the fact that [the claimant] makes the application on behalf of [the export credit guarantor] is irrelevant.
>
> That said, the Panel must nonetheless address the question of whether the payment by [the export credit guarantor] should be taken into account in calculating this final recovery of [the claimant] in the same way as a settlement or an advance payment would be called into account. It seems to this Panel that the answer is in the negative. The payment by [the export credit guarantor] is not made on a final basis but is subject to a provision by which [the claimant] must reimburse [the export credit guarantor] if it obtains compensation from another source. Accordingly, in so far as the recommendation of this Panel overlaps with this payment made by [the export credit guarantor], then to that extent [the claimant] is bound to return that amount to [the export credit guarantor]. Payment by [the export credit guarantor] in that event did not extinguish the claim ..."

331. OMI submitted a letter dated 28 March 1994 from PIA to CH2M Hill Limited stating that the named insured, presumably CH2M Hill Limited, must reimburse PIA for any amount recovered in respect of the insured loss. Although OMI is not specifically named in this letter as the insured, the Panel is satisfied that there is an obligation on the part of its parent company to reimburse the insurance payment. In addition, a search of the Commission's records indicates that PIA has not itself brought a claim before the Commission to recover the insurance payment. The Panel therefore finds that OMI can maintain this portion of its claim before the Commission.

332. OMI claims that its two employees were taken hostage by the Iraqi forces on 20 September 1990 and subsequently transported to Baghdad to be used as human shields. As noted in paragraph 328, supra, OMI's claim relates to the unproductive salaries paid to these two employees from August to December 1990.

(b) Severance payments, travel costs and other expenses

333. This portion of OMI's claim for contract losses in the amount of USD 7,545 relates to payments made to three of OMI's Polish employees and to one Indian employee (the "third, fourth, fifth and sixth employees"). The Panel notes that there is a minor discrepancy between the amount claimed in the Statement of Claim (USD 7,545) and the alleged loss stated in the documents submitted with the claim (USD 7,546).

334. The contracts of the four employees were allegedly terminated as at 2 August 1990, when OMI's contract with MPW came to a halt. OMI claims that its payment to the third employee includes amounts owing for salary, severance of employment and travel, accommodation and communication costs. OMI did not provide a similar breakdown of the payments made to the other three employees and it is not clear whether those payments incorporate expenses other than severance payments.

335. OMI's claim can be summarised as follows:

Table 28. OMI's claim for contract losses (severance payments, travel costs and other expenses)

Employee	Amount claimed (USD)
Third employee (Polish)	
(a) Salary payments	3,077
(b) Severance payment	1,539
(c) Travel costs	640
(d) Accommodation	480
(e) Communication	358
Less payments already made	(1,000)
Subtotal	5,094
Fourth employee (Polish)	
Severance payment	855
Fifth employee (Polish)	
Severance payment	1,197
Sixth employee (Indian)	
Severance payment	400
Total	7,546

2. Analysis and valuation

(a) Salary payments

336. OMI provided extensive evidence in support of its claim for the salary payments made to its two employees. This includes evidence detailing the detention of the two employees, such as OMI's annual report for 1990, letters from one of the two employees during his detention and newspaper reports, as well as payrolls and attendance records.

337. Applying the principles referred to in paragraph 315, supra, the Panel finds that OMI has proved that it made the salary payments to the first and second employees as a direct result of Iraq's invasion and occupation of Kuwait.

338. The Panel therefore recommends compensation in the amount of USD 32,138 for the salary payments.

(b) Severance payments, travel costs and other expenses

339. OMI provided extensive evidence in support of its claim for the severance payments, travel costs and other expenses. This evidence includes payrolls for staff working at its three project sites in Kuwait from May 1989 to June 1990; a journal voucher dated 31 May 1989 showing debits for salaries paid to employees; purchase orders for one-way air travel to Poland for the third, fourth and fifth employees; letters to the third, fourth and fifth employees enclosing cheques in the amounts claimed and a money transfer order in the name of the sixth employee.

340. In respect of severance payments, this Panel has found that such payments will only be recoverable where the claimant is able to demonstrate that it was under a legal obligation to make the payment.[8]

341. In respect of evacuation and relief costs, this Panel considers that 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. (See Summary, paragraph 149).

342. In respect of the cost of airfares, in the "Report and recommendations made by the Panel of Commissioners concerning the ninth instalment of 'E3' claims" (S/AC.26/1999/16), this Panel held that claimants were only entitled to compensation for the cost of evacuation airfares if this cost exceeded the cost which they would have incurred in repatriating their employees in any event after natural completion of their contracts.

343. Applying these principles, the Panel finds that OMI has failed to explain the circumstances surrounding the claimed salary payment to the third employee. Furthermore, there is no indication of the method used by OMI to calculate the salary payment made to the third employee. The Panel

therefore recommends no compensation in respect of the claimed salary payment made to the third employee.

344. Furthermore, the Panel finds that OMI has not shown that it was legally or contractually obligated to make the claimed severance payments. OMI has not provided the employment contracts for any of the four employees. The Panel therefore recommends no compensation in respect of the claimed severance payments made to the four employees.

345. In relation to the claimed travel, accommodation and communication expenses, the Panel finds that OMI has failed to provide any evidence that it incurred the claimed expenses. OMI was requested to provide such evidence in the article 34 notification, but failed to do so. The Panel notes that the purchase orders for the one-way flights of the Polish employees do not indicate the price of the tickets. Furthermore, there is no evidence that the travel costs were extraordinary and would have exceeded the costs which OMI would have incurred in repatriating its employees upon natural completion of its contract with MPW. The Panel therefore recommends no compensation in respect of the claimed travel, accommodation and communication expenses.

3. Recommendation

346. The Panel recommends compensation in the amount of USD 32,138 for contract losses.

B. Loss of profits

1. Facts and contentions

347. OMI seeks compensation in the amount of USD 963,844 (converted by OMI from the original currency of the loss: KWD 277,102) for loss of profits. OMI claims that this amount is the balance that would have been payable under its contract with MPW from August 1990 to February 1991 if work had proceeded as planned under the contract.

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

349. OMI signed Contract No. SE/S/45 with MPW on 14 January 1989. The contract price was KWD 1,025,680. Start-up activity on the project began on 15 February 1989. On 7 March 1989, OMI commenced full contractual services under the contract. The contractual works were expected to continue for 24 months, ending in February 1991.

350. The contract involved three separate services, namely, (a) management of the Rekka Wastewater Treatment Plant, (b) management of the effluent utilisation scheme through the Data Monitoring Centre, and (c) operation of odour control facilities at various substations. OMI's claim for loss of profits is based on the amounts it claims it would have earned for each of the services had the contract proceeded to natural completion in February 1991. OMI has calculated its claim by multiplying the monthly invoiced amounts for each of the services by seven, to represent the seven months of contractual work which OMI was unable to complete from August 1990 to February 1991.

351. OMI's claim for loss of profits can be summarised as follows:

Table 29. OMI's claim for loss of profits

Service under Contract No. SE/S/45	Amount claimed (KWD)	Amount claimed (USD) [a]
(a) Rekka Wastewater Treatment Plant (KWD 19,816 x 7 months)	138,712	482,482
(b) Effluent utilisation scheme (KWD 11,855 x 7 months)	82,985	288,647
(c) Odour control facilities (KWD 7,915 x 7 months)	55,405	192,715
Total	277,102	963,844

[a] Amounts converted from Kuwaiti dinars to United States dollars using the claimant's exchange rate.

352. As noted in paragraph 349, supra, the contract price was KWD 1,025,680. OMI asserts that it had been paid KWD 390,980 under the contract prior to August 1990. The payment certificates submitted by OMI support this figure. This was not the full amount due for the work performed prior to August 1990. OMI states that it received payment as late as October 1995 for the last invoice rendered for work performed in July 1990.

353. The amount claimed by OMI is for the full amount of the operating and maintenance fees under the contract. However, the amount claimed does not include costs of labour, which explains why the sum of the amount already recovered (KWD 390,980) and the amount claimed (KWD 277,102) is substantially less than the contract price.

354. OMI states that the payments under the contract were structured so as to allow it to recover upfront costs and investment in mobilisation and project start-up over the 24-month period of the contract. In its response to the article 34 notification, OMI asserts that Iraq's invasion and occupation of Kuwait prevented it from recovering its initial and subsequent investments in the project. These included additional funds allegedly spent in removing excess sludge from the Rekka plant and performance of additional laboratory tests during the start-up period.

355. OMI claims that the contractual works came to an abrupt halt on 2 August 1990 when the project sites were vandalised, and the project facilities were rendered inoperable due to the detonation of explosives by the Iraqi forces at the project sites. Accordingly, OMI states that it did not provide any further services under the contract after 2 August 1990. However, after the liberation of Kuwait, OMI returned to assist the Government of Kuwait with environmental clean-up and repair of three wastewater plants, including Rekka, and the restoration of the Data Monitoring Centre. OMI states that these services were performed under the Emergency Relief and Recovery Plan for Kuwait, which was a separate contract and had no connection with the services previously performed under Contract No. SE/S/45. A Restoration Assessment performed by the Kuwait Emergency Recovery Office confirms that the clean-up services performed by OMI after the liberation of Kuwait were unrelated to those of the original contract.

2. Analysis and valuation

356. OMI provided extensive evidence in relation to its claim for loss of profits including a copy of the contract, invoices for work performed and for operation and maintenance fees and payment certificates. However, OMI did not prove that the project would have been profitable over the life of the contract. Furthermore, OMI did not provide any evidence in relation to its start-up costs and initial investments which it claims it would have recovered over the life of the contract.

357. The Panel finds that OMI 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

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

C. Loss of tangible property

1. Facts and contentions

359. OMI seeks compensation in the amount of USD 218,813 (converted by OMI from the original currency of the loss: KWD 62,908) for loss of tangible property. The claim is for the loss of various items of office equipment which were allegedly stolen or destroyed during Iraq's invasion and occupation of Kuwait.

360. In the "E" claim form, OMI characterised this loss element as a claim for loss of real property, but the Panel finds that it is more accurately described as loss of tangible property.

361. The tangible property claimed by OMI includes items such as vehicles, computers, office equipment, laboratory equipment and furniture which was located in the Data Monitoring Centre and in OMI's project office in Kuwait. OMI provided a list of the claimed property and the dates on which each item of property was acquired. OMI states in its response to the article 34 notification that it has not recovered any of the claimed property, or received value in respect of any of the property.

2. Analysis and valuation

362. In relation to claims for loss of tangible property in Kuwait, the Panel requires sufficient evidence that the claimed property was (a) owned by the claimant and (b) situated in Kuwait as at 2 August 1990. For example, the Panel is prepared to infer the presence of the tangible property in Kuwait as at 2 August 1990 where the claimant can prove that (a) the project was ongoing in Kuwait as at 2 August 1990 and (b) the property in question was not consumable and therefore could reasonably be expected to have been on the project site as at 2 August 1990.

363. OMI purchased the claimed items locally in Kuwait and provided invoices, receipts and quotations in OMI's name for the majority of claimed items. OMI also provided a hand-written asset schedule and its trial balance for 1990, which values the property at the claimed amount of KWD 62,908. Finally, OMI provided photographs of the project sites, which show extensive damage to property and records in the Data Monitoring Centre and in OMI's project office.

364. The invoices provided by OMI are dated from April 1989 to May 1990. However, there is no evidence to suggest that any of the claimed property was sold or otherwise disposed of by OMI prior to August 1990. Moreover, as the claimed property consists of vehicles, computers, office equipment, laboratory equipment and furniture, the Panel considers it unlikely that the property was consumed before the project came to a halt in August 1990. The Panel is therefore satisfied that the claimed property was lost as a direct result of Iraq's invasion and occupation of Kuwait.

365. OMI states that it has valued the property at original cost because most of the items were less than a year old at the time of Iraq's invasion and occupation of Kuwait. However, after taking into account OMI's depreciation of the claimed property and the items of property for which no invoices were provided, the Panel finds that a more accurate valuation of the property as at 2 August 1990 is KWD 36,000.

3. Recommendation

366. The Panel recommends compensation in the amount of USD 124,567 for loss of tangible property.

D. Financial losses

1. Facts and contentions

367. OMI seeks compensation in the amount of USD 22,529 (converted by OMI from the original currency of the loss: KWD 6,477) for financial losses. The claim is for loss of funds which OMI held on deposit with the Commercial Bank of Kuwait at the time of Iraq's invasion and occupation of Kuwait.

368. In the "E" claim form, OMI characterised this loss element as a claim for loss of tangible property, but the Panel finds that it is more accurately described as financial losses.

369. After the liberation of Kuwait, the Government of Kuwait issued a new currency. The Central Bank of Kuwait allowed the old currency to be exchanged for the new Kuwaiti currency from the Central Bank and from banks operating in Kuwait for a period of 45 days from 24 March 1991.

370. OMI states that the Commercial Bank of Kuwait was heavily damaged and did not reopen during the "short period allowed to exchange the currency". As a result, OMI alleges that it was not able to exchange the old currency.

2. Analysis and valuation

371. In support of its claim for financial losses, OMI provided an extract from its general ledger showing a ledger balance of KWD 6,477 as at 31 July 1990. It also provided its trial balance for 1990 showing the claimed amount held in its bank account with the Commercial Bank of Kuwait. Finally, OMI provided various bank statements from the Commercial Bank of Kuwait, the most recent of which was dated 28 June 1990, showing a balance of KWD 4,404.

372. The Panel considers that OMI has proved the amount claimed. The extract from OMI's general ledger, the trial balance and bank statements indicate that OMI would have had a balance of KWD 6,477 in its bank account, had the bank statements been issued in August 1990.

373. However, the Panel is not satisfied that OMI's claimed loss was the direct result of Iraq's invasion and occupation of Kuwait. OMI failed to prove that it was impossible to access its money through another branch of the Commercial Bank of Kuwait during the 45-day period after the liberation of Kuwait when currency exchange was possible.

3. Recommendation

374. The Panel recommends no compensation for financial losses.

E. Summary of recommended compensation for OMI

Table 30. Recommended compensation for OMI

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	39,683	32,138
Loss of profits	963,844	nil
Loss of tangible property	218,813	124,567
Financial losses	22,529	nil
Total	1,244,869	156,705

375. Based on its findings regarding OMI's claim, the Panel recommends compensation in the amount of USD 156,705. The Panel finds the date of loss to be 2 August 1990.

XVI. TURNER INTERNATIONAL INDUSTRIES, INC.

376. In its review of the claim filed by Turner International Industries, Inc., a company organised according to the laws of the State of Delaware in the United States of America ("Turner"), the Panel found that Turner was engaged in a joint venture (the "joint venture") with a Kuwaiti corporation known as Project Analysis and Control Systems Co., W.L.L. (the "Kuwaiti joint venture partner"). Turner seeks compensation for its share of the losses incurred by the joint venture.

377. During the Panel's review of the claim by Turner, it was brought to the Panel's attention that the Kuwaiti joint venture partner also filed a claim with the Commission for its share of the losses incurred by the joint venture. The claim by the Kuwaiti joint venture partner has been presented to the "E4" Panel of Commissioners (the "'E4' Panel") for its review. The "E4" claims population consists of claims submitted by Kuwaiti private sector corporations and entities, other than oil sector and environmental claimants.

378. After consultation with the "E4" Panel, the Panel determined that the claim by Turner should be transferred to the "E4" Panel for its review together with the claim of the Kuwaiti joint venture partner. Given that the claim by Turner and the claim by the Kuwaiti joint venture partner concern losses allegedly arising out of a joint business, both the Panel and the "E4" Panel were of the view that to ensure the efficient processing of these claims, the two claims should be considered by the same panel in the same instalment.

379. Accordingly, on 5 October 2001, the Panel issued a procedural order directing the secretariat to transfer the claim by Turner to the "E4" group of claims and to submit the claim to the "E4" Panel for its review. The Government of the United States of America and the Government of Iraq were notified accordingly.

XVII. SUMMARY OF RECOMMENDED COMPENSATION BY CLAIMANT

Table 31. Recommended compensation for the twenty-third instalment

Claimant	Claim amount (USD)	Recommended compensation (USD)
Extraktionstechnik Gesellschaft für Anlagenbau m.b.H	407,170	339,309
Felten & Guilleaume Kabelwerke GmbH	1,207,765	120,777
Minimax GmbH	328,630	nil
Neue Jadewerft GmbH	1,257,152	57,536
The Furukawa Electric Co., Ltd	533,322	nil
Hitachi Cable, Ltd	4,478,244	nil
De Jong's Timmerfabriek Bergambacht B.V.	433,308	nil
Koninklijke Schelde Groep B.V.	424,976	229,956
Alumina - Industry for Aluminium Semi-Finished Products, Metal Constructions, Interiors and Engineering	904,272	nil
Amber Industrial Doors Limited	56,274	56,274
Fugro-McClelland Limited	36,952	nil
John Spracklen (International) Limited	12,825	11,008
Operations Management International, Inc.	1,244,869	156,705
Total	11,325,759	971,565

Geneva, 4 December 2001

(Signed) Pierre Genton
Commissioner

(Signed) Vinayak Pradhan
Commissioner

(Signed) John Tackaberry
Chairman

Notes

[1] In the revised "E" claim form, Minimax miscalculated the sum of its losses as DEM 513,200. The actual total was DEM 513,320. (See paragraph 50).

[2] See, in this context, paragraph 163 of the "Report and recommendations made by the Panel of Commissioners concerning the fourth instalment of 'E2' claims" (S/AC.26/2000/2), (the "Fourth 'E2' Report"). (See paragraph 59).

[3] KWD 365,435 is the sum total of the 10 payments claimed by Alumina in the Payment Sheet. According to the Payment Sheet, by 31 March 1990, Alumina had completed work valued at KWD 342,780 and was due to receive KWD 22,655. The total of these two sums is KWD 365,435. (See paragraph 244).

[4] USD 1,291,717 is the sum of payments received for work done in fulfilment of the First to Ninth Building Certificates according to the Building Certificate Table. According to the Payment Sheet, Alumina was also due to receive KWD 22,655 as the tenth payment under the Port Subcontract. (See paragraph 244).

[5] See paragraph 147 of the "Fourth 'E2' Report". (See paragraph 289).

[6] See paragraph 147 of the "Fourth 'E2' Report". (See paragraph 293).

[7] There is a reference in the Statement of Claim filed by OMI to loss of petty cash kept at the project sites and to loss incurred through payment of benefits to expatriate employees. However, there is no further reference to these losses in the "E" claim form or in the claim documentation. (See paragraph 325).

[8] See, for example, paragraphs 198 to 199 of the "Report and recommendations made by the Panel of Commissioners concerning the fourth instalment of 'E3' claims" (S/AC.26/1999/14). (See paragraph 340).

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

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

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

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

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

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

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

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

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

C. Amending claims after filing

35. In the course of processing the claims after they have been filed with the Commission, further information is sought from the claimants pursuant to the Rules. When the claimants respond they

sometimes seek to use the opportunity to amend their claims. For example, they add new loss elements. They increase the amount originally sought in respect of a particular loss element. They transfer monies between or otherwise adjust the calculation of two or more loss elements. In some cases, they do all of these.

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

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

III. SUBSTANTIVE ISSUES

A. Applicable law

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

B. Liability of Iraq

39. When adopting resolution 687 (1991), the Security Council acted under chapter VII of the Charter of the United Nations which provides for maintenance or restoration of international peace and security. The Security Council also acted under chapter VII when adopting resolution 692 (1991), in which it decided to establish the Commission and the Compensation Fund referred to in paragraph 18 of resolution 687 (1991). Specifically, under resolution 687 (1991), the issue of Iraq's liability for losses falling within the Commission's jurisdiction is resolved and is not subject to review by the Panel.

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

Claims (the "Fifth Report", S/AC.26/1999/2), this Panel adopted the presumption that for contracts performed in Iraq, the other contracting party was an Iraqi Government entity.

C. The "arising prior to" clause

41. The Panel recognises that it is difficult to establish a fixed date for the exclusion of its jurisdiction that does not contain an arbitrary element. With respect to the interpretation of the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), the Panel of Commissioners that reviewed the first instalment of "E2" claims concluded that the "arising prior to" clause was intended to exclude the foreign debt of Iraq which existed at the time of Iraq's invasion of Kuwait from the jurisdiction of the Commission. As a result, the "E2" Panel found that:

> "In the case of contracts with Iraq, where the performance giving rise to the original debt had been rendered by a claimant more than three months prior to 2 August 1990, that is, prior to 2 May 1990, claims based on payments owed, in kind or in cash, for such performance are outside of the jurisdiction of the Commission as claims for debts or obligations arising prior to 2 August 1990." (Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of "E2" Claims, S/AC.26/1998/7, paragraph 90)).

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

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

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

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

43. Thus, this Panel accepts that, in general, a claim relating to a "debt or obligation arising prior to 2 August 1990" means a debt or obligation that is based on work performed or services rendered prior to 2 May 1990.

D. Application of the "direct loss" requirement

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

> "...any direct loss, damage, or injury to corporations and other entities as a result of Iraq's unlawful invasion and occupation of Kuwait. This will include any loss suffered as a result of:

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

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

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

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

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

45. The text of paragraph 21 of decision 7 is not exhaustive and leaves open the possibility that there may be causes of "direct loss" other than those enumerated. Paragraph 6 of decision 15 of the Governing Council (S/AC.26/1992/15) confirms that there "will be other situations where evidence can be produced showing claims are for direct loss, damage or injury as a result of Iraq's unlawful invasion and occupation of Kuwait". Should that be the case, the claimants will have to prove specifically that a loss that was not suffered as a result of one of the five categories of events set out in paragraph 21 of decision 7 is nevertheless "direct". Paragraph 3 of decision 15 emphasises that for any alleged loss or damage to be compensable, the "causal link must be direct". (See also paragraph 9 of decision 9).

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

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

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

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

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

order in Iraq or Kuwait following Iraq's invasion caused the claimant to evacuate the personnel needed to perform the contract.

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

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

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

E. Date of loss

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

F. Currency exchange rate

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

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

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

G. Interest

58. On the issue of the appropriate interest rate to be applied, the relevant Governing Council decision is decision 16 (S/AC.26/1992/16). According to that decision, "[i]nterest will be awarded from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful claimants for the loss of use of the principal amount of the award". In decision 16 the Governing Council further specified that "[i]nterest will be paid after the principal amount of awards", while postponing any decision on the methods of calculation and payment.

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

H. Claim preparation costs

60. Some claimants seek to recover compensation for the cost of preparing their claims. The compensability of claim preparation costs has not hitherto been ruled on and will be the subject, in due course, of a specific decision by the Governing Council. Therefore, this Panel has made and will make no recommendations with respect to claim preparation costs in any of the claims where they have been raised.

I. Contract losses

1. Claims for contract losses with non-Iraqi party

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

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

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

2. Advance payments

64. Many construction contracts provide for an advance payment to be made by the employer to the contractor. These advance payments are often calculated as a percentage of the initial price (initial, because many such contracts provide for automatic and other adjustments of the price during the

execution of the works). The purpose of the advance payment is to facilitate certain activities which the contractor will need to carry out in the early stages.

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

66. Advance payments are usually secured by a bond provided by the contractor, and are usually paid upon the provision of the bond. They are frequently repaid over a period of time by way of deduction by the employer from the sums which are payable at regular intervals (often monthly) to the contractor for work done. See, in the context of payments which are recovered over a period of time, the observations about amortisation at paragraph 120, infra. Those observations apply mutatis mutandis to the repayment of advance payments.

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

3. Contractual arrangements to defer payments

(a) The analysis of "old debt"

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

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

70. In its analysis, the "E2" Panel found that deferred payments arrangements go to the very heart of what the Security Council described in paragraph 16 of resolution 687 as a debt of Iraq arising prior to 2 August 1990. It was this very kind of obligation which the Security Council had in mind when, in paragraph 17 of resolution 687 (1991), it directed Iraq to "adhere scrupulously" to satisfying "all of its obligations concerning servicing and repayment". Therefore, irrespective of whether such deferred payment arrangements may have created new obligations on the part of Iraq under a particular applicable municipal law, they did not do so for the purposes of resolution 687 (1991) and are therefore outside the jurisdiction of this Commission.

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

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

72. This Panel agrees.

(b) Application of the "old debt" analysis

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

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

75. The second concerns the ambit of the above analysis. As noted above, the claims which led to the above analysis arose out of "non-commercial" arrangements. They were situations where the original terms of payment entered into between the parties had been renegotiated during the currency of the contract or the negotiations or renegotiations were driven by inter-governmental exchanges. Such arrangements were clearly the result of the impact of Iraq's increasing international debt.

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

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

4. Losses arising as a result of unpaid retention monies

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

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

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

81. The retention is usually payable in two stages, one at the commencement of the maintenance period, as it is often called, and the other at the end. The maintenance period usually begins when the employer first takes over the project, and commences to operate or use it. Thus the work to which any particular sum which is part of the retention fund relates may have been executed a very long time before the retention fund is payable. It follows that a loss in respect of the retention fund cannot be evaluated by reference to the time when the work which gave rise to the retention fund was executed, as for instance is described at paragraph 74, supra. Entitlement to be paid the retention fund is dependent on the actual or anticipated overall position at the end of the project.

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. In addition, it is necessary to bear in mind the existence of the trade embargo and related measures[a]. The effect of the trade embargo and related measures was that an on demand bond in favour of an Iraqi party could not legally have been honoured after 6 August 1990. In those circumstances, it is difficult to see what benefit the issuing bank was providing in return for any service charges that it was paid

[a] The expression the "trade embargo and related measures" refers to the prohibitions in Security Council resolution 661 (1990) and relevant subsequent resolutions and the measures taken by the states pursuant thereto.

once notice of the embargo had been widely disseminated. If the bank is providing no benefit, it is difficult to ascertain a juridical basis for any entitlement to receive the service charges.

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

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

6. Export credit guarantees

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

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

97. Claims have been made by parties for:

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

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

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

98. A claim for the premia is misconceived. A premium paid for any form of insurance is not recoverable unless the policy is avoided. Once the policy is in place, either the event that the policy is intended to embrace occurs, or it does not. If it does, then there is a claim under the policy. If it does not then there is no such claim. In neither case does it seem to the Panel that the arrangements - prudent and sensible as they are - give rise to a claim for compensation for the premia. There is no "loss" properly so called or any causative link with Iraq's invasion and occupation of Kuwait.

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

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

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

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

7. Frustration and force majeure clauses

103. Construction contracts, both in common law and under the civil law, frequently contain provisions to deal with events that have wholly changed the nature of the venture. Particular events which are addressed by such clauses include war, civil strife and insurrection. Given the length of time that a major construction project takes to come to fruition and the sometimes volatile circumstances, both political and otherwise, in which such contracts are carried out, this is hardly surprising. Indeed, it makes good sense. The clauses make provision as to how the financial consequences of the event are to be borne; and what the result is to be so far as the physical project is concerned.

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

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

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

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

107. The situation described above was one where the work that was the subject of the claim had been performed prior to Iraq's invasion and occupation of Kuwait, and, therefore, fell clearly foul of the "arising prior to" rule. However, the claimants, who had agreed on arrangements for delayed payment, sought to rely on the frustration clause to get over this problem. The argument was, as this Panel understands it, that the frustration clause was triggered by the events which had in fact occurred, namely Iraq's invasion and occupation of Kuwait. The frustration clause provided for the accelerated payment of sums due under the contract. Payment of the sums had originally been deferred to dates which were still in the future at the time of the invasion and occupation; but the frustrating event meant that they became due during the time of, or indeed at the beginning of, Iraq's invasion and occupation of Kuwait. Accordingly, the payments had, in the event, become due within the period covered by the jurisdiction established by Security Council resolution 687 (1991). Therefore, a claim for the reimbursement of these payments could be entertained by the "E2" Panel.

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

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

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

J. Claims for overhead and "lost profits"

1. General

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

112. Many of the construction contracts encountered in the claims submitted to this Panel contain a schedule of rates or a "bill of quantities". This document defines the amount to be paid to the contractor for the work performed. It is based on previously agreed rates or prices. The final contract price is the aggregate value of the work calculated at the quoted rates together with any variations and other contractual entitlements and deductions which increase or decrease the amount originally agreed.

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

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

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

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

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

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

will ultimately be. Indeed, the cost of dealing with the unexpected or the unplanned may equal or exceed the risk margin, leading to a nil result or a loss.

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

2. Head office and branch office expenses

120. These are generally regarded as part of the overhead. These costs can be dealt with in the price in a variety of ways. For example, they may be built into some or all of the prices against line items; they may be provided for in a lump sum; they may be dealt with in many other ways. One aspect, however, will be common to most, if not all, contracts. It will be the intention of the contractor to recover these costs through the price at some stage of the execution of the contract. Often the recovery has been spread through elements of the price, so as to result in repayment through a number of interim payments during the course of the contract. Where this has been done, it may be said that these costs have been amortised. This factor is relevant to the question of double-counting (see paragraph 123, infra).

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

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

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

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

3. Loss of profits on a particular project

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

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

127. The qualification of "margin" by "risk" is an important one in the context of construction contracts. These contracts run for a considerable period of time; they often take place in remote areas or in countries where the environment is hostile in one way or another; and of course they are subject to political problems in a variety of places - where the work is done, where materials, equipment or labour have to be procured, and along supply routes. The surrounding circumstances are thus very different and generally more risk prone than is the case in the context of, say, a contract for the sale of goods.

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

129. This approach, in the view of this Panel, is inherent in the thinking behind paragraph 5 of Governing Council decision 15. This paragraph expressly states that a claimant seeking compensation for business losses such as loss of profits, must provide "detailed factual descriptions of the circumstances of the claimed loss, damage or injury" in order for compensation to be awarded.

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

131. Instead, the claimant must lodge sufficient and appropriate evidence to show that the contract would have been profitable as a whole. Such evidence would include projected and actual financial information relating to the relevant project, such as audited financial statements, budgets, management accounts, turnover, original bids and tender sum analyses, time schedules drawn up at the commencement of the works, profit/loss statements, finance costs and head office costs prepared by or on behalf of the claimant for each accounting period from the first year of the relevant project to March 1993. The claimant should also provide: original calculations of profit relating to the project and all revisions to these calculations made during the course of the project; management reports on actual financial performance as compared to budgets that were prepared during the course of the project; evidence demonstrating that the project proceeded as planned, such as monthly/periodic reports, planned/actual time schedules, interim certificates or account invoices, details of work that was completed but not invoiced by the claimant, details of payments made by the employer and

evidence of retention amounts that were recovered by the claimant. In addition, the claimant should provide evidence of the percentage of the works completed at the time work on the project ceased.

4. Loss of profits for future projects

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

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

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

K. Loss of monies left in Iraq

1. Funds in bank accounts in Iraq

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

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

137. Second, for such a claim to succeed it would be necessary to establish that in the particular case, Iraq would have permitted the exchange of such funds into hard currency for the purposes of export. For this, appropriate evidence of an obligation to this effect on the part of Iraq is required. Furthermore, this Panel notes that the decision to deposit funds in banks located in particular countries

is a commercial decision, which a corporation engaged in international operations is required to make. In making this decision, a corporation would normally take into account the relevant country or regional risks involved.

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

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

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

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

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

2. Petty cash

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

3. Customs deposits

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

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

143. In the light of the foregoing, it seems to the Panel that claims to recover these duties need to be supported by sufficient evidentiary material, going to the issue of whether, but for Iraq's invasion and

occupation of Kuwait, such permission would, in fact or on a balance of probabilities, have been forthcoming.

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

L. Tangible property

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

146. Many of the construction and engineering claims that come before this Panel are for assets that were confiscated by the Iraqi authorities in 1992 or 1993. Here the problem is one of causation. By the time of the event, Iraq's invasion and occupation of Kuwait was over. Liberation was a year or more earlier. Numerous claimants had managed to obtain access to their sites to establish the position that obtained at that stage. In the cases the subject of this paragraph, the assets still existed. However, that initially satisfactory position was then overtaken by a general confiscation of assets by Iraqi authorities. While it sometimes seems to have been the case that this confiscation was triggered by an event which could be directly related to Iraq's invasion and occupation of Kuwait, in the vast majority of the claims that this Panel has seen, this was not the case. It was simply the result of a decision on the part of the authorities to take over these assets. This Panel has difficulty in seeing how these losses were caused by Iraq's invasion and occupation of Kuwait. On the contrary, it appears that they stem from an wholly independent event and accordingly are outside the jurisdiction of the Commission.

M. Payment or relief to others

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

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

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

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

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

N. Final awards, judgments and settlements

152. In the case of some of the projects in which claimants are seeking compensation from the Commission, there have been proceedings between the parties to the project contract leading to an award or a judgment; or there has been a settlement between the claimant and another party to the relevant contract. In all such cases, one is concerned with finality. The award, judgment or settlement must be final – not subject to appeal or revision.

153. The claim that is then raised with the Commission is either for sums said not to have been included in the award or judgment or for sums said not to have been included in the settlement.

154. It follows that it will be a prerequisite to establish that that is in fact the case, namely that, for some reason, the claim resulting in the award, judgment or settlement did not raise or resolve the subject matter of the claim being put before the Commission. Sufficient evidence of this will be needed. The absence of an identifiable element in the award, judgment or settlement relating to the claim before the Commission does not necessarily mean that that it has not been addressed. The Tribunal that issued the award or judgment or the parties that concluded the settlement may have reached a single sum to cover a number of claims, including the claim in question; or the Tribunal may have considered that the claim was not maintainable. Equally, the claim may have been abandoned in, and as part of, the settlement. In such an event it would appear that the claim has been resolved and there is no loss left to be compensated. At that stage, it will be necessary to review the file to see if there is any special circumstance or material that would displace this initial conclusion. Absent such circumstance or material, no loss has been established. Sufficient evidence of an existing loss is essential if this Panel is to recommend compensation.

155. If, on the other hand, it is clear that the particular claim has not been adjudicated or settled, then it may be entertained by the Commission.
