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

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Introduction

1. The Governing Council of the United Nations Compensation Commission (the "Commission") appointed the present Panel of Commissioners (the "Panel"), composed of Messrs. Werner Melis (Chairman), David Mace and Sompong Sucharitkul, at its twenty-second session in October 1996 to review 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 19 claims included in the nineteenth 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. The claims submitted to the Panel in this instalment and addressed in this report were selected by the secretariat of the Commission from among the construction and engineering claims (the "E3 Claims") on the basis of criteria established under the Rules.

I. PROCEDURAL HISTORY

A. The nature and purpose of the proceedings

2. 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). Pursuant to that report, the Commission is a fact-finding body that examines claims, verifies their validity, evaluates losses, recommends compensation, and makes payment of awards.

3. The Panel has been entrusted with three tasks in its proceedings. First, the Panel determines whether the various types of losses alleged by the claimants are within the jurisdiction of the Commission. Second, the Panel verifies whether the alleged losses are in principle compensable and had in fact directly resulted from Iraq's invasion and occupation of Kuwait. Third, the Panel determines whether these compensable losses were incurred in the amounts claimed.

B. The procedural history of the claims in the nineteenth instalment

4. On 5 February 2001, the Panel issued a procedural order relating to the claims. In view of the complexity of the issues raised, the volume of the documentation underlying the claims and the compensation sought by the claimants, the Panel decided to classify them as "unusually large or complex" within the meaning of article 38(d) of the Rules. The Panel was thus required to complete its review of the claims within 12 months of the date of its procedural order of 5 February 2001.

5. The Panel performed a thorough and detailed factual and legal review of the claims. The Panel considered the evidence submitted by the claimants in reply to requests for information and documents. It also considered the responses of a number of Governments that have submitted claims and the response of the Government of Iraq to the factual and legal issues raised in the thirtieth and thirty-first reports of the Executive Secretary issued, in accordance with article 16 of the Rules, on 17 February and 28 April 2000 respectively.

6. After a review of the relevant information and documentation, the Panel made initial determinations as to the compensability of the loss elements of each claim. Pursuant to article 36 of the Rules, the Panel retained as its expert consultants accounting and loss adjusting firms, both with international and Persian Gulf experience, to assist the Panel in the quantification of losses incurred in large construction projects. The Panel then directed its expert consultants to prepare comprehensive valuation reports on each of the claims.

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

C. Amending claims after filing

8. The Panel notes that the period for filing category "E" claims expired on 1 January 1996. The Governing Council permitted claimants up to and including 11 May 1998 to file unsolicited supplements to claims already filed (S/AC.26/SER.A/1, page 185). A number of the claimants included in the nineteenth instalment had submitted several supplements to their claimed amount up to 11 May 1998. In this report, the Panel has taken into consideration such supplements up to 11 May 1998. The Panel has only considered those losses contained in the original claim, as supplemented by the claimants, up to 11 May 1998, except where such losses have been withdrawn or reduced by the claimants. Where the claimants reduced the amount of their losses the Panel has considered the reduced amount. This, however, does not preclude corrections relating to arithmetical and typographical errors.

D. The claims

9. This report contains the Panel's findings for losses allegedly caused by Iraq's invasion and occupation of Kuwait with respect to the following 19 claims:

(a) China National Overseas Engineering Corporation, a corporation organised according to the laws of China, which seeks compensation in the amount of 19,084,895 United States dollars (USD);

(b) China State Construction Engineering Corporation, a corporation organised according to the laws of China, which seeks compensation in the amount of USD 106,987,175;

(c) "BOJOPLAST" Construction, Trade and Business Services Enterprise Export-Import, JSC - Pula, a corporation organised according to the laws of Croatia, which seeks compensation in the amount of USD 1,799,011;

(d) Deutz Service International GmbH, a corporation organised according to the laws of Germany, which seeks compensation in the amount of USD 5,203,158;

(e) DIWI Consult GmbH, a corporation organised according to the laws of Germany, which seeks compensation in the amount of USD 2,144,630;

(f) KHD Humboldt Wedag AG, a corporation organised according to the laws of Germany, which seeks compensation in the amount of USD 17,802,263;

(g) Siemens AG, a corporation organised according to the laws of Germany, which seeks compensation in the amount of USD 42,564,668;

(h) Strabag AG, a corporation organised according to the laws of Germany, which seeks compensation in the amount of USD 333,945,287;

(i) Antia Electricals Pvt. Ltd., a corporation organised according to the laws of India, which seeks compensation in the amount of USD 1,180,855;

(j) Arvind Construction Company Limited, a corporation organised according to the laws of India, which seeks compensation in the amount of USD 296,097;

(k) Bhagheeratha Engineering Limited, a corporation organised according to the laws of India, which seeks compensation in the amount of USD 7,586,350;

(l) Engineering Projects (India) Limited, a corporation organised according to the laws of India, which seeks compensation in the amount of USD 111,272,419;

(m) National Buildings Construction Corporation Limited, a corporation organised according to the laws of India, which seeks compensation in the amount of USD 103,529,819;

(n) Punjab Chemi-Plants Limited, a corporation organised according to the laws of India, which seeks compensation in the amount of USD 22,530,000;

(o) Shah Construction Company Limited, a corporation organised according to the laws of India, which seeks compensation in the amount of USD 48,195,072;

(p) Landoil Resources Corporation, a corporation organised according to the laws of the Philippines, which seeks compensation in the amount of USD 75,616,660;

(q) Construction Company “Granit”, a corporation organised according to the laws of The former Yugoslav Republic of Macedonia, which seeks compensation in the amount of USD 44,315,501;

(r) The M.W. Kellogg Company, a corporation organised according to the laws of the United States of America, which seeks compensation in the amount of USD 38,448,599; and

(s) SerVaas Incorporated, a corporation organised according to the laws of the United States of America, which seeks compensation in the amount of USD 14,152,800.

II. LEGAL FRAMEWORK

A. Applicable law

10. As set forth in paragraphs 16-18 and 23 of the "Report and recommendations made by the Panel of Commissioners concerning the first instalment of 'E3' Claims" (S/AC.26/1998/13) (the "First 'E3' Report"), the Panel determined that paragraph 16 of Security Council resolution 687 (1991) reaffirmed the liability of Iraq and defined the jurisdiction of the Commission. The Panel applied 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

11. As set forth in paragraph 16 of the "Report and recommendations made by the Panel of Commissioners concerning the third instalment of 'E3' Claims (S/AC.26/1999/1) (the "Third 'E3' Report"), the Panel determined that "Iraq" as used in Governing Council decision 9 (S/AC.26/1992/9) means the Government of Iraq, its political subdivisions, or any agency, ministry, instrumentality or entity (notably public sector enterprises) controlled by the Government of Iraq. At the time of Iraq's invasion and occupation of Kuwait, the Government of Iraq regulated all aspects of economic life other than some peripheral agriculture, services and trade.

C. The "arising prior to" clause

12. In paragraphs 79-81 of the First "E3" Report, the Panel adopted the following interpretation of the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) with respect to contracts to which Iraq was a party:

(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. that such debts and obligations could not be brought before the Commission;

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

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

(d) The use of a three month payment delay period to define the jurisdictional period is reasonable and consistent both with the economic reality in Iraq prior to the invasion and with ordinary commercial practices.

13. The Panel finds that a claim relating to a "debt or obligation arising prior to 2 August 1990" means a debt for payment that is based on work performed or services rendered prior to 2 May 1990.

D. Application of the "direct loss" requirement

14. The Governing Council's decision 7 (S/AC.26/1991/7/Rev.1), decision 9 and decision 15 (S/AC.26/1992/15) provide specific instructions to the Panel regarding the interpretation of the "direct loss" requirement. Applying these decisions, the Panel examined the loss types presented in the claims to determine whether, with respect to each loss element, the requisite causal link - a "direct loss" - was present.

15. The Panel made the following findings regarding the meaning of "direct loss":

(a) With respect to physical assets in Iraq and in Kuwait on 2 August 1990, a claimant can prove a direct loss by demonstrating that the breakdown in civil order in those countries, which resulted from Iraq's invasion and occupation of Kuwait, caused the claimant to evacuate its employees and that the evacuation resulted in the abandonment of the claimant's physical assets;

(b) With respect to losses relating to contracts to which Iraq was a party, Iraq may not rely on force majeure or similar legal principles as a defence to its obligations under the contract;

(c) With respect to losses relating to contracts to which Iraq was not a party, a claimant may 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 the invasion caused the claimant to evacuate the personnel needed to perform the contract;

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

(e) The loss of use of funds on deposit in Iraqi banks is not a direct loss unless the claimant can demonstrate that Iraq was under a contractual or other specific duty to exchange those funds for convertible currencies and to authorise the transfer of the converted funds out of Iraq and that this exchange and transfer was prevented by Iraq's invasion and occupation of Kuwait.

E. Loss of profits

16. In order to substantiate a claim for loss of profits, a claimant must prove that it had an existing contractual relationship at the time of the invasion. Second, a claimant must prove that the continuation of the relationship was rendered impossible by Iraq's invasion and occupation of Kuwait. Finally, profits should be measured over the life of the contract. A claimant must demonstrate that the contract would have been profitable as a whole. Thus, a claimant must demonstrate that it would have been profitable to complete the contract, not just that the contract was profitable at a single moment in time.

17. Calculations of a loss of profits claim should take into account the inherent risks of the particular project and the ability of a claimant to realise a profit in the past. The speculative nature of some projects requires the Panel to view the evidence submitted with a critical eye. In order to

establish with "reasonable certainty" a loss of profits claim, the Panel requires that a claimant submit not only the contracts and invoices related to the various projects, but also detailed financial statements, including audited statements where available, management reports, budgets, accounts, time schedules, progress reports, and a breakdown of revenues and costs, actual and projected, for the project.

F. Date of loss

18. The Panel must determine "the date the loss occurred" within the meaning of Governing Council decision 16 (S/AC.26/1992/16) for the purpose of recommending compensation for interest and for the purpose of determining the appropriate exchange rate to be applied to losses stated in currencies other than in United States dollars. Where applicable, the Panel has determined the date of loss for each claim.

G. Interest

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

20. The Panel finds that interest shall run from the date of loss, or, unless otherwise established, 2 August 1990.

H. Currency exchange rate

21. 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.

22. The Panel finds that the exchange rate set forth in the contract is the appropriate rate for losses under the relevant contracts because this was specifically bargained for and agreed to by the parties.

23. 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 on the date of loss, or, unless otherwise established, as of 2 August 1990.

I. Evacuation losses

24. In accordance with paragraph 21(b) of decision 7 of the Governing Council, the Panel finds that the costs associated with evacuating and repatriating employees from Iraq between 2 August 1990 and 2 March 1991 are compensable to the extent that such costs are proven by the claimant. Compensable costs consist of temporary and extraordinary expenses relating to evacuation and repatriation, including transportation, food and accommodation.

J. Valuation

25. The Panel developed, with the assistance of the secretariat and the Panel's expert consultants, a verification program that addresses each loss item. The Panel's valuation analysis ensures clarity and consistency in the application of certain valuation principles to the construction and engineering claims.

26. After receipt of all claim information and evidence, the Panel applied the verification program to each loss element. This analysis resulted in a recommendation of compensation in the amount claimed, an adjustment to the amount claimed, or a recommendation of no compensation for each loss element.

27. For tangible property losses, the Panel adopted historical cost minus depreciation as its primary valuation method.

K. Formal requirements

28. Claims submitted to the Commission must meet certain formal requirements established by the Governing Council. Article 14 of the Rules sets forth the formal requirements for claims submitted by corporations and other legal entities. If it is determined that a claim does not meet the formal requirements as set forth in article 14 of the Rules, the claimant is sent a notification under article 15 of the Rules (the "article 15 notification") requesting the claimant to remedy the deficiencies.

L. Evidentiary requirements

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

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

31. In those cases where the original submission of the claim inadequately supported the alleged loss, the secretariat prepared and issued a written communication to the claimant requesting specific information and documentation regarding the loss (the "article 34 notification"). In reviewing the subsequent submissions, the Panel noted that in many cases the claimant still did not provide sufficient evidence to support its alleged losses.

32. The Panel is required to determine whether these claims are supported by sufficient evidence and, for those that are so supported, must recommend the appropriate amount of compensation for each compensable claim element. This requires the application of relevant principles of the

Commission's rules on evidence and an assessment of the loss elements according to these principles. The recommendations of the Panel are set forth below.

III. CHINA NATIONAL OVERSEAS ENGINEERING CORPORATION

33. China National Overseas Engineering Corporation ("China National") is a state-owned enterprise organised according to the laws of China.

34. In the "E" claim form, China National sought compensation in the amount of USD 256,083,501 for contract losses, loss of profits, loss of tangible property, payment or relief to others, financial losses, other losses and interest.

35. In its reply to the article 34 notification, China National reduced the amount of its claim to USD 19,084,895. The reduction (by the amount of USD 236,998,606) was due to China National's withdrawal of the component of the original claim relating to contract losses arising prior to 2 May 1990. China National advised the Commission that it considered that these losses were outside the jurisdiction of the Commission.

36. The Panel also notes that in its reply to the article 34 notification, China National calculated its claim for payment or relief to others as being USD 7,616,071. However, this figure contained an arithmetical error. The correct amount is stated in table 1, infra. China State also increased and reduced certain components of its claim for payment or relief to others. The Panel has only considered the losses contained in the original claim except where such losses have been withdrawn or reduced by China National. Where China National reduced the amount of its alleged losses in its reply to the article 34 notification, the Panel has considered the reduced amount. The Panel therefore considered the amount of USD 19,084,895 for contract losses, loss of profits, loss of tangible property, payment or relief to others, financial losses, other losses and interest, as follows:

Table 1. China National's claim

Claim element	Claim amount (USD)
Contract losses	4,364,771
Loss of profits	4,524,485
Loss of tangible property	868,941
Payment or relief to others	7,616,366
Financial losses	786,691
Other losses	485,633
Interest	438,008
Total	19,084,895

A. Contract losses

1. Facts and contentions

37. China National seeks compensation in the amount of USD 4,364,771 for contract losses allegedly incurred in connection with 27 projects in Iraq. China National alleged that its employees in Iraq performed work on the 27 projects on dates between May and September 1990. After 2 August 1990, the employees effectively worked under duress as they were not allowed to leave for some time by the Iraqi authorities. The employees were ultimately repatriated between 6 September and 2 October 1990.

38. China National alleged that it has not been paid for the component of the work payable in United States dollars, which was equal to 60 per cent of the work carried out each month.

39. China National alleged that all of its contracts were, in essence, labour only contracts, and that 24 of the 27 projects were still in progress as at 2 August 1990. The 27 projects involved work for six employers: the General Directorate of the Mixed Sector Enterprises ("General Directorate"); Lasede Contracting Company ("Lasede"); the State Organisation for Construction Engineering Industry ("SOCEI"); the State Organisation for Construction Materials Industry ("SOCMI"); the State Organisation for Minerals Industry ("SOMI"); and the State Organisation for Textile Industry ("SOTI"). Although China National originally entered into the contracts on dates throughout the 1980's, it and the employers constantly revised and supplemented the contracts to take account of new work.

40. The works do not appear to have been construction works, but rather work in factories representing a number of different skills and disciplines (particularly textiles) as can be seen in the references in table 2, infra.

41. The claim for contract losses can be represented as follows:

Table 2. China National's claim for contract losses

Project	Employer	Date of original contract	Date of supplementary contract	Number of employees	Date of latest performance	Claim amount (USD)
Baghdad Ready Made Clothes	General Directorate	December 1981	February 1990	51	July 1990	55,190
School Building Project	Lasede	December 1985	March 1990	41	September 1990	41,872
Dilaiya Industrial Factory	SOCEI	July 1981	June 1990	3	July 1990	1,900
Yiskendiya Mechanical Industrial Co.	SOCEI	July 1981	September 1988	224	September 1990	234,156
Hila Flannelette Factory	SOCMI	November 1983	March 1990	110	August 1990	167,457
Kufa Cement Plant	SOCMI	July 1981	November 1989	59	September 1990	104,188

Kerbala Cement Plant	SOCMI	October 1984	November 1989	435	June 1990	324,009
Muthanna Cement Plant	SOCMI	January 1987	October 1989	416	September 1990	713,434
New Badoosh Cement Plant	SOCMI	March 1987	May 1990	207	September 1990	479,450
Sulaimaniya Cement Plant	SOCMI	July 1981	March 1989	22	August 1990	47,425
Kerbala Lime Plant	SOCMI	July 1981	October 1988	50	June 1990	125,828
Kerbala Limestone Mine	SOCMI	July 1981	May 1990	143	June 1990	68,413
Kirkuk Floor Tile Factory	SOCMI	July 1981	May 1990	10	September 1990	20,117
Fallujah Floor Tile Factory	SOCMI	July 1981	January 1990	104	August 1990	129,844
Lamadi Glass and Industrial Porcelain Co.	SOCMI	July 1981	December 1988	77	August 1990	99,672
Brick Industrial Co.	SOCMI	July 1981	April 1990	355	June 1990	405,524
State Enterprise for Phosphate	SOMI	March 1982	March 1990	83	August 1990	124,412
Kut Cotton Spinning Mill	SOTI	November 1983	July 1990	208	September 1990	296,743
Kut Knitting Factory	SOTI	November 1983	July 1990	19	September 1990	17,610
State Establishment for Textiles, Mosul	SOTI	November 1983	May 1990	58	August 1990	92,874
Diwaniya Cotton Textile State Co.	SOTI	November 1983	July 1990	186	August 1990	256,683
Iraq Cotton Spinning Mill	SOTI	November 1983	July 1990	68	September 1990	109,352
Nasiriya Woollen Spinning Mill	SOTI	November 1983	July 1990	95	August 1990	110,664
Iraqi Machine-made Carpet Factory	SOTI	November 1983	May 1990	128	May 1990	56,311
Mosul Sewing Project	SOTI	June 1981	January 1990	151	September 1990	256,547
Sulaimaniya Womens' Clothing Factory	SOTI	November 1983	January 1988	0	June 1990	25,096
Total						4,364,771

42. China National asserted that the terms of payment for all of the projects were governed by a deferred payment agreement between the Governments of Iraq and China (the "Sino-Iraqi Bilateral Treaty"). China National alleged that the earliest date upon which it could receive payment for the work which it carried out after May 1990 was July 1992.

2. Analysis and valuation

43. China National provided a substantial amount of evidence in support of its claim for contract losses, including the contracts, relevant invoices (called "monthly confirmation letters") and the Sino-Iraqi Bilateral Treaty. The monthly confirmation letters are important documents because they recorded the amount of work which China National carried out on a particular project each month. They were signed on behalf of China National and the employers. China National also provided a number of affidavits from its former employees explaining that following Iraq's invasion and occupation of Kuwait, they were required to work by the Iraqi employers as a condition of their ultimate repatriation, and that their work was not voluntary during this period.

44. The Panel has defined the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) to limit the jurisdiction of the Commission to exclude debts of the Government of Iraq if the performance relating to that obligation took place prior to 2 May 1990.

45. The Panel finds that for the purposes of the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) China National had, in each case, a contract with Iraq.

46. The Panel has reviewed the monthly confirmation letters and finds that components of the claims in relation to the New Badoosh Cement Plant and the Sulaimaniya Cement Plant projects included losses that were incurred during April 1990 in the total amount of USD 115,627. The Panel accordingly finds that these contract losses alleged by China National relate entirely to work performed prior to 2 May 1990. The Panel recommends no compensation for these contract losses as they relate to debts and obligations of Iraq arising prior to 2 August 1990 and are, therefore, outside the jurisdiction of the Commission.

47. The Panel finds that for the purposes of Security Council resolution 687 (1991) the Sino-Iraqi Bilateral Treaty did not have the effect of novating the debts in relation to the New Badoosh Cement Plant and the Sulaimaniya Cement Plant projects (work carried out in April 1990).

48. The Panel further finds that in relation to the claim for USD 296,743 in respect of the Kut Cotton Spinning Mill project, China National failed to provide sufficient evidence that it had carried out the alleged work or that the employer had accepted the alleged work. The Panel recommends no compensation for the alleged unpaid work for the Kut Cotton Spinning Mill project as China National failed to provide sufficient evidence to support its claim.

49. In respect of the balance of its alleged contract losses in the amount of USD 3,952,401, China National provided sufficient evidence that it carried out the alleged work on the projects between May 1990 and, in the case of some projects, September 1990. This includes the balance of the claim in respect of the New Badoosh Cement Plant and the Sulaimaniya Cement Plant projects in the amount of USD 411,248.

50. The Panel observes that the terms of the Sino-Iraqi Bilateral Treaty are relevant as they provided that China National was not entitled to be paid for its work until at least two years after the

work was performed (i.e. July 1992). The Panel considers that not every loss which arose as a result of work performed after 2 May 1990 can be regarded as direct. It is necessary to consider the ongoing effects of Iraq's invasion and occupation of Kuwait.

51. Consistent with the views of other Panels, the Panel considers that notwithstanding the fact that Iraq's invasion and occupation of Kuwait ended on 2 March 1991, the economic consequences of the invasion and occupation did not end immediately after the cessation of the hostilities. The Panel therefore considers that losses which occurred after 2 March 1991 may be compensable as they can still constitute a direct consequence of Iraq's invasion and occupation of Kuwait. However, the Panel finds that the period during which the consequences continued to be felt was a maximum of five months, i.e. until 2 August 1991. After this date (at the latest), Iraq was in a position to meet its debts and responsibilities.

52. In respect of claims for contract losses, the Panel therefore concludes that where a claimant carried out work between 2 May and 2 August 1990 for which payment was agreed, but could not contractually expect payment until after 2 August 1991, and the employer did not in fact pay the claimant for this work, then the loss (when it crystallises as at the due date for payment) is not attributable to Iraq's invasion and occupation of Kuwait.

53. Applying this statement of principle to China National's claim for contract losses, the Panel finds that work which China National carried out between 2 May and 2 August 1990 did not crystallise as a loss until the date of payment in July 1992 passed without satisfaction of the debt. The Panel accepts that the employers have not paid these monies, but the Panel finds that the employers' failure to pay China National was not a direct result of Iraq's invasion and occupation of Kuwait, but rather was due to a subsequent and deliberate decision not to honour their obligations.

54. However, in respect of the work which China National carried out after 2 August 1990 (i.e. after Iraq's invasion and occupation of Kuwait), the Panel finds that Iraq's invasion and occupation of Kuwait terminated the payment provisions of the contracts and the Sino-Iraqi Bilateral Treaty. China National and its employees had no choice but to work as directed during this period as a condition of the employees' departure. The Panel has carried out a valuation of the work performed after 2 August 1990 and finds that China National performed work on 15 projects in the amount of USD 756,480. The Panel recommends compensation in this amount for contract losses, as can be seen in the following table:

Table 3. China National's claim for contract losses – Panel's recommendation

Project	Employer	Date of latest performance	Claim amount (USD)	Recommended compensation (USD)
Baghdad Ready Made Clothes	General Directorate	July 1990	55,190	nil
School Building Project	Lasede	September 1990	41,872	11,470
Dilaiya Industrial Factory	SOCEI	July 1990	1,900	nil
Yiskendiya Mechanical Industrial Co.	SOCEI	August 1990	234,156	22,332
Hila Flannelette Factory	SOCMI	September 1990	167,457	33,697
Kufa Cement Plant	SOCMI	September 1990	104,188	38,649
Kerbala Cement Plant	SOCMI	June 1990	324,009	nil
Muthanna Cement Plant	SOCMI	September 1990	713,434	219,516
New Badoosh Cement Plant	SOCMI	September 1990	479,450	96,528
Sulaimaniya Cement Plant	SOCMI	August 1990	47,425	nil
Kerbala Lime Plant	SOCMI	June 1990	125,828	nil
Kerbala Limestone Mine	SOCMI	June 1990	68,413	nil
Kirkuk Floor Tile Factory	SOCMI	September 1990	20,117	6,539
Fallujah Floor Tile Factory	SOCMI	August 1990	129,844	32,340
Lamadi Glass and Industrial Porcelain Co.	SOCMI	August 1990	99,672	25,363
Brick Industrial Co.	SOCMI	June 1990	405,524	nil
State Enterprise for Phosphate	SOMI	August 1990	124,412	31,160
Kut Cotton Spinning Mill	SOTI	September 1990	296,743	nil
Kut Knitting Factory	SOTI	September 1990	17,610	nil
State Establishment for Textiles, Mosul	SOTI	August 1990	92,874	21,595
Diwaniya Cotton Textile State Co.	SOTI	August 1990	256,683	48,042
Iraq Cotton Spinning Mill	SOTI	September 1990	109,352	37,771
Nasiriya Woollen Spinning Mill	SOTI	August 1990	110,664	27,444
Iraqi Machine-made Carpet Factory	SOTI	May 1990	56,311	nil
Mosul Sewing Project	SOTI	September 1990	256,547	104,034
Sulaimaniya Womens' Clothing Factory	SOTI	June 1990	25,096	nil
Total			4,364,771	756,480

55. In respect of the date(s) of loss, the Panel considers that because it has recommended compensation only in relation to work carried out between 2 August 1990 and the date of departure of the last employees (30 September 1990), the appropriate date of loss is the mid-point of this period, 1 September 1990.

3. Recommendation

56. The Panel recommends compensation in the amount of USD 756,480 for contract losses.

B. Loss of profits

1. Facts and contentions

57. China National seeks compensation in the amount of USD 4,524,485 for loss of profits. The claim relates to the alleged loss of profits in respect of 15 labour-only projects which were still in progress as at 2 August 1990. Table 2, supra, summarises the essential details of these contracts. The Panel notes that the Brick Industrial Co. Project, for which the employer was SOCMI, consisted of nine sub-contracts.

58. China National asserted that the total value of these 15 projects was USD 35,050,991. It asserted that it had performed work in the value of USD 16,953,049 as at the date upon which its employees stopped working on these contracts. It calculated that the value of the unperformed work was, therefore, USD 18,097,942 (USD 35,050,991 less USD 16,953,049).

59. China National alleged that it would have earned profit at the rate of 25 per cent on the unperformed value of the contract works. It calculated this figure by stating that in fact the gross profit level would have been 41 per cent. This level was based on standard figures for its projects, not actual figures for the projects under review. China National then assessed its financial costs (as a result of the delay in receiving payment under the Sino-Iraqi Bilateral Treaty) as representing a deduction of 15-16 per cent. On the basis of the resulting profit level of 25 per cent, China National calculated its loss as being USD 4,524,485 (25 per cent of USD 18,097,942).

2. Analysis and valuation

60. The requirements to substantiate a loss of profits claim have been stated by the Panel at paragraphs 16 and 17, supra.

61. In support of its claim, China National provided the following evidence: the interrupted contracts; a schedule which provided a project by project analysis indicating the monthly receipts and expenses and deriving a profit margin; the Sino-Iraqi Bilateral Treaty; a list of the standard costs for China National's overseas projects; and some summary financial statements for China National's worldwide operations for the period 1986-1991.

62. The Panel finds that the 15 projects were interrupted by Iraq's invasion and occupation of Kuwait and that China National was unable to resume its performance of the projects for the same reason.

63. In respect of the financial data which China National provided regarding its performance under the contracts, the Panel has found that, in general, China National was performing at the contractual rates. The Panel considers that China National has demonstrated that it would have earned a profit on all of the 15 projects.

64. At this point, the Panel makes three observations about China National's claim for loss of profits.

65. Firstly, the Panel has reached a different base figure in its calculation of the amount of unperformed work under the contracts as compared to that of China National. The difference is based on several factors, including the timing of the period when the contract works can be said to have started and to have ended. In respect of the start date, in the absence of evidence to the contrary, the Panel used the date of signature of the contract or a specific date stated in the contract. In relation to the end date, the Panel has utilised either (a) the last date of the month where a claim for contract losses has been made, or (b) 15 September 1990, which is the mid-point of the month during which all employees were repatriated and therefore all remaining projects stopped. Using these guidelines, the Panel has calculated the amount of unperformed work to be USD 15,831,246, not USD 18,097,942.

66. Second, in respect of certain projects or sub-projects, China National failed to provide evidence of the monthly rates which it charged to the employer under the contract. In the absence of this key evidence, the Panel has been unable to verify China National's assertions as to the profitability of these projects or sub-contracts. This has resulted in a lower than asserted, or even a nil, recommendation for the following projects: Iraqi Machine-made Carpet Factory; Kufa Cement Plant; and sub-contracts associated with the Brick Industrial Co. project. The absence of contractual monthly rates has also led the Panel to conclude that an asserted value of unperformed work for the particular project or sub-contract is not valid. This too has reduced the global amount of the value of unperformed work under the contracts (see paragraph 65, supra).

67. Third, China National's assertions as to the level of profitability of 25 per cent are not supported by the documentation which it provided. China National could not establish this asserted level in the absence of the specific and detailed financial records which have been "lost". The Panel has had to consider the indications of profitability contained in the summary financial statements for China National's worldwide operations for the period 1986-1991. China National stated that its contracts in Iraq represented approximately 70 per cent of its worldwide operations. The Panel is confident that these financial records are an accurate representation of the profitability of the 15 projects.

68. The summary financial statements show that for technical and labour service contracts (i.e. the 15 projects under review), China National achieved a level of profit of between 7 and 9 per cent for each year between 1986 and 1991. The Panel considers that the summary financial statements are a reliable guide to China National's level of profitability in respect of the 15 projects. The Panel has selected the figure of 8 per cent as being the most representative level of profit, also taking into account its knowledge of other labour-only contracts being undertaken by other claimants in Iraq at this time.

69. The Panel has applied this profit level of 8 per cent to the value of the unperformed work under the contracts (USD 15,831,246) and concluded that China National has established a loss of profits in the amount of USD 1,266,500 (8 per cent of USD 15,831,246). The Panel recommends compensation in this amount. The Panel's specific findings can be summarised as follows:

Table 4. China National's claim for loss of profits – Panel's recommendation

Project	Assumed end date of contract	Balance of contract term (months)	Monthly rate (USD)	Value of unperformed contract (USD)	Recommended compensation (USD)
Technical Wood Doors	15 September 1990	5	18,291	91,453	7,316
Mosul Sewing Project	15 September 1990	4	84,620	338,480	27,079
Hila Flannelette Factory	31 August 1990	7	57,100	399,700	31,976
Nasiriya Woollen Spinning Mill	31 August 1990	6.5-9	66,300	547,550	43,804
Iraqi Machine-made Carpet Factory	30 May 1990	4.5-11.5	49,800	502,700	40,216
Kut Knitting Factory	15 September 1990	4.5	9,230	41,535	3,323
Diwaniya Cotton Textile State Co.	31 August 1990	5	98,630	493,150	39,452
State Establishment for Textiles, Mosul	31 August 1990	9	27,860	250,740	20,059
Iraq Cotton Spinning Mill	15 September 1990	4.5	39,320	176,940	14,155
Kut Cotton Spinning Mill	15 September 1990	4.5	103,770	466,965	37,357
Baghdad Ready Made Clothes	31 July 1990	7	31,147	218,029	17,442
Dilaiya Industrial Factory	31 July 1990	10	12,825	128,250	10,260
Hengary Maintenance Centre	15 September 1990	0.5	33,000	16,500	1,320
School Building Project	15 September 1990	6.5	7,490	48,685	3,895
Sulaimaniya Cement Plant	31 August 1990	7	15,400	107,800	8,624
Muthanna Cement Plant	15 September 1990	8-13	323,174	3,058,299	244,664
New Badoosh Cement Plant	15 September 1990	8	162,500	1,300,000	104,000
Fallujah Floor	31 August 1990	4	79,510	318,040	25,443

Tile Factory					
Mosul Floor Tile Factory	15 September 1990	3.5	22,000	77,000	6,160
Kufa Cement Plant	15 September 1990	0	5,100	nil	nil
Kerbala Limestone Mine	30 June 1990	10.5	108,850	1,142,925	91,434
Kerbala Cement Plant	30 June 1990	16	306,150	4,898,400	391,872
Lamadi Glass and Industrial Porcelain Co.	15 September 1990	3	53,190	159,570	12,766
Brick Industrial Co.	30 June 1990	4-16	133,550	1,048,535	83,883
Total				15,831,246	1,266,500

70. The Panel finds the date of loss to be 15 September 1990.

3. Recommendation

71. The Panel recommends compensation in the amount of USD 1,266,500 for loss of profits.

C. Loss of tangible property

1. Facts and contentions

72. China National seeks compensation in the amount of USD 868,941 for loss of tangible property. The claim is for the alleged loss of domestic items and office equipment in the amount of USD 61,275, and of 114 vehicles in the amount of USD 807,666. All items were allegedly lost from its sites and offices in Iraq during Iraq's invasion and occupation of Kuwait.

73. China National stated that when its representatives returned to Iraq in 1992 in an attempt to find the items, they could not locate the tangible property.

74. China National advised the Commission that it had valued the domestic items and office equipment by depreciating the items at the annual rate of 9 per cent for five years on the full value of the purchase cost, and then adding 5 per cent of the residual value.

75. In respect of the vehicles, China National advised the Commission that it had valued them by depreciating the vehicles at the annual rate of 9 per cent for 10 years on half of the purchase cost, and then adding 10 per cent of the residual value.

76. The Panel notes that, in fact, China National valued its claim on a somewhat different basis that that asserted.

2. Analysis and valuation

77. In respect of the claim for loss of domestic items and office equipment, China National provided the following evidence: customs documents, signed by the Iraqi customs authorities, relating to the importation into Iraq of 58 video recorders purchased in Kuwait; a statement by two of the representatives who returned to Iraq in 1992 as to the nature and scope of the unsuccessful search; a statement from its internal accountant that the asserted items were in Iraq as at 2 August 1990; and a 'lost property certificate' from the Chinese Embassy in Iraq to the same effect as the accountant's statement. China National could not provide any specific evidence in relation to the other items for which it sought compensation, such as purchase invoices. China National stated that the specific evidence had been "lost".

78. In respect of the claim for loss of the vehicles, China National provided: invoices which evidenced the purchase of all of the vehicles in Kuwait; and the other general evidence upon which it relied for its claim in respect of loss of domestic items and office equipment.

79. The Panel considers that China National provided sufficient evidence of its title to, or right to use, the 58 video recorders and the 114 vehicles, in the form of the customs documents and purchase invoices.

80. In respect of evidence of the presence of the items in Iraq as at 2 August 1990, the Panel notes that the customs documents constitute sufficient evidence of the presence of the 58 video recorders. In relation to the 114 vehicles, the Panel finds that there was sufficient evidence of their importation into Iraq, as well as their continued presence in Iraq as at the date of Iraq's invasion and occupation of Kuwait. In this respect, the Panel has relied on the fact that the items were purchased in Kuwait, as well as on the statement by the internal accountant as to the presence of the vehicles in Iraq.

81. The Panel also finds that the 58 video recorders and the 114 vehicles were lost during Iraq's invasion and occupation of Kuwait.

82. In relation to the other items of tangible property (i.e. the balance of the claim for loss of domestic items and office equipment), the Panel finds that the other evidence is insufficiently detailed to verify China National's assertions as to the existence and value of that property.

83. In respect of the valuation of the claim for the 58 video recorders and the 114 vehicles, the Panel considers that China National's asserted values did not take appropriate account of standard depreciation rates for such items. The Panel applied depreciation rates appropriate for such items.

84. The Panel finds that some of the video recorders and vehicles had no compensable value because of their age. The Panel has concluded that the remaining items had a value of USD 348,723 on 30 September 1990, the date on which the last of China National's employees left Iraq.

3. Recommendation

85. The Panel recommends compensation in the amount of USD 348,723 for loss of tangible property.

D. Payment or relief to others

1. Facts and contentions

86. China National seeks compensation in the amount of USD 7,616,366 for payment or relief to others. The claim is for the alleged costs of evacuating China National's 3,867 employees from Iraq on various dates after 2 August 1990; their salaries and wages between 2 August 1990 and their date of departure; and payments made to the employees when they returned to China to compensate for the loss of their jobs.

87. China National alleged that all 3,867 employees were working on projects in Iraq. As a result of Iraq's invasion and occupation of Kuwait, it was forced to commence a substantial logistical exercise which involved the evacuation and repatriation of 1,803 employees to China via Jordan and 2,064 employees to China via Turkey.

88. The alleged losses may be represented as follows:

Table 5. China National's claim for payment or relief to others

Loss item	Claim amount (USD)
Costs prior to arrival of employees in China	
Transport in Iraq and Jordan/Turkey	535,018
Hotel expenses	901,395
Food	154,680
Other expenses	58,001
Airfares	3,998,572
Insurance premiums (airfares)	330,800
Food/hotels during flight	248,100
Sub-total of costs prior to arrival of employees in China	6,226,566
'In-China' costs	
Transportation in China	163,497
Wages/salaries in China	1,226,303
Sub-total for 'in-China' costs	1,389,800
Total	7,616,366

89. China National alleged that under the terms of its contracts with the Iraqi employers, those employers were required to meet all transport, accommodation and food costs for China National's employees in the ordinary course of mobilisation to, and demobilisation from, the projects. China National therefore alleged that all of its costs were temporary and extraordinary expenses which arose as a direct result of Iraq's invasion and occupation of Kuwait.

2. Analysis and valuation

90. China National's claim can be most easily considered in two components: (a) costs prior to arrival of the employees in China; and (b) the 'in-China' costs.

(a) Costs prior to arrival of employees in China

91. China National provided as evidence of its alleged losses a considerable amount of evidence, including: an affidavit explaining the routes taken by the groups of employees and the dates of repatriation of the various groups of employees; the contracts between China National and the Iraqi employers; and numerous receipts and invoices from hotels, restaurants, taxi companies and bus companies.

92. In respect of the evacuation costs for the 1,803 employees who were evacuated from Iraq via Jordan, China National also provided a certificate from the Chinese Embassy in Jordan. This certificate stated that the Embassy incurred costs in the amount of USD 708,651 for the 1,803 employees for all aspects of their evacuation and that China National subsequently reimbursed the Embassy for these costs. The Panel notes that this figure relates to the in-Jordan components of the following loss items: transport, hotel expenses, food and other expenses.

93. In respect of the airfares, China National provided a certificate from China International Airline Company ("Air China"). This certificate stated that Air China carried the 3,867 employees from Jordan and Turkey to China. It also stated that the cost of the flights was USD 4,577,472 (including associated food and accommodation costs, and the insurance premiums) and that China National had paid Air China for the airfares in this amount. The Panel notes that, in fact, China National only sought compensation in the amount of USD 4,577,472.

94. The Panel refers to the contracts between China National and the Iraqi employers. The Panel accepts China National's assertion that under these contracts, the Iraqi employers were required to meet all of the repatriation costs of China National's employees. The Panel therefore finds that all components of China National's claim for costs prior to arrival of its employees in China are compensable in principle.

95. In respect of the insurance premiums, the Panel notes that it has considered claims for such costs in its previous reports. The Panel confirms that in respect of the present claim, China National has demonstrated that these costs were a temporary and extraordinary expense in the amount of USD 330,800.

96. The Panel finds that the evidence provided by China National supports the majority of the costs claimed. In respect of some of the costs claimed for food and accommodation for the employees who were evacuated from Turkey, China National failed to provide translated invoices and receipts. The Panel therefore recommends no compensation for costs for which China National has provided no translated evidence.

97. In respect of the costs prior to the arrival of the employees in China for which China National provided sufficient evidence, the Panel recommends compensation in the amount of USD 6,121,005. The Panel's recommendations can be summarised as follows:

Table 6. China National's claim for payment or relief to others (costs prior to arrival of employees in China) – Panel's recommendation

Loss item	Claim amount (USD)	Recommended compensation (USD)
Transport in Iraq and Jordan/Turkey	535,018	528,417
Hotel, food and other expenses (total)	1,114,076	1,015,116
Airfares	3,998,572	3,998,572
Insurance premiums (airfares)	330,800	330,800
Food/hotels during flight	248,100	248,100
Total	6,226,566	6,121,005

(b) 'In-China' costs

98. China National provided as evidence of its alleged losses a list of the 3,867 employees along with the payments made to them. Each employee received 200 Renminbi (CNY) (USD 42) for his or her transportation costs in China and CNY 1,500 (USD 317) for "wages and subsidies" in China. The list of employees records each employee's signature acknowledging receipt of the amounts claimed.

(i) 'In-China' transportation costs

99. In respect of the claim for 'in-China' transportation costs, the Panel refers to the contracts between China National and the Iraqi employers. The Panel accepts China National's assertion that under these contracts, the Iraqi employers were required to meet all of the repatriation costs of China National's employees. The Panel therefore finds that China National's claim for 'in-China' transportation costs is compensable in principle. In respect of the calculation of the amount of CNY 200 per employee, China National did not provide evidence that this figure reflected the actual costs which China National incurred. Rather, the figure appears to be a flat rate.

100. The Panel takes into account its knowledge of similar claims brought by claimants who had to repatriate large numbers of employees unexpectedly in a short period of time, as well as the fact that

China National's employees came from various regions and cities in China. In the light of these factors, the Panel considers that the figure of CNY 200 is a reasonable and fair one which is likely to reflect what China National's actual costs would have been had it been required to pay the amount of each employee's specific travel costs. The Panel recommends compensation in the amount of USD 163,497 for the 'in-China' transportation costs.

(ii) "Wages and subsidies"

101. China National has established that it paid the amount of CNY 1,500 (USD 317) to each employee. The principal issue is whether China National was required to make these payments to the 3,867 employees.

102. China National did not provide a complete breakdown of its calculations in arriving at the figure of CNY 1,500, although it advised the Commission that had work on the projects in Iraq continued, each employee would have received amounts by way of monthly salaries between CNY 480 and CNY 950 for August, September and October 1990. It is, therefore, clear that China National carried out the same process as it did for the 'in-China' transportation costs, estimating what its actual costs would have been for each employee and then averaging those costs. The Panel considers China National's actions to have been reasonable in the unprecedented circumstances caused by the sudden nature of Iraq's invasion and occupation of Kuwait, which impacted dramatically on China National's large presence in Iraq.

103. It is clear that one component of the claim related to wages and salaries for the period between 2 August 1990 and the employees' respective dates of repatriation, and the other component of the claim related to a termination type benefit paid to the employees on their return to China which reflected the loss of their employment.

104. The Panel refers to its findings in respect of the claim for contract losses at paragraphs 54 and 56, supra. The Panel has recommended compensation in the amount of USD 756,480 for work carried out between 2 August 1990 and the date upon which the projects ended (in August or September 1990). The Panel notes that if it were to recommend compensation for the component of the claim relating to wages and salaries for the period between 2 August 1990 and the employees' respective dates of repatriation, this would result in over-compensation.

105. In respect of the claim for wages and subsidies paid to the employees for the period after their return to China, the Panel considers that this alleged loss is compensable in principle. Although Chinese law at that time did not require service agreements between Chinese employers (such as China National) and its employees which set out the employment benefits which an employee could expect, China National provided evidence of its own internal practice that such payments were made in extraordinary circumstances such as those which it faced in August-October 1990. Its own evidence was confirmed by an affidavit provided by an expert in Chinese labour law, who stated that at that time, Chinese employers were legally responsible for providing employment (and the consequent security) to their employees for the whole of their working lives. The Panel finds that in the circumstances, China National expected to complete the projects in Iraq and either re-deploy its

employees within Iraq at the end of those projects, or demobilise them to China in an orderly manner for work elsewhere. Iraq's invasion and occupation of Kuwait prevented this orderly process from being carried out, such that in the circumstances, China National had to pay its employees a type of termination benefit in order to meet its legal obligations. The Panel therefore finds that the alleged loss arose as a direct result of Iraq's invasion and occupation of Kuwait.

106. Valuation of the claim for wages and subsidies is not straightforward because of the flat amount of CNY 1,500 paid to each employee (which in many cases did not reflect his or her actual salary rate), as well as the different dates of repatriation for each employee. The Panel considers that the most appropriate method of valuation is to take the mid-point of the first and last dates of evacuation, being 2 September and 30 September 1990 respectively. The mid-point is 16 September 1990. That is also the mid-point of the period 2 August to 31 October 1990 (the period for which the employees might have expected to be paid their salaries).

107. On this basis, 50 per cent of the amount of CNY 1,500 relates to wages and salaries for the period between 2 August and 16 September 1990 (i.e. CNY 750), and the remaining 50 per cent to the period between 17 September and 31 October 1990 (i.e. CNY 750).

108. The Panel considers that the component of the claim relating to wages and salaries between 2 August and 16 September 1990 represents an overlap with the claim for contract losses for which the Panel has recommended compensation at paragraphs 54 and 56, supra. The Panel therefore recommends no compensation for the part of the claim for "wages and subsidies" relating to wages and salaries between 2 August and 16 September 1990.

109. The Panel recommends compensation in the amount of CNY 2,900,250 (i.e. 3,867 multiplied by CNY 750) (USD 613,152) for the component of the claim for "wages and subsidies" relating to the 'in-China' salaries and wages between 17 September and 31 October 1990.

3. Recommendation

110. The Panel recommends compensation in the amount of USD 6,897,654 for payment or relief to others.

E. Financial losses

1. Facts and contentions

111. China National seeks compensation in the amount of USD 786,691 for financial losses. The claim relates to the theft of cash in Iraqi dinars (IQD 245,160) left in a number of offices in Iraq when its employees were repatriated. China National stated that when it returned to Iraq in 1992 to check these sites, it found that the cash was missing.

2. Analysis and valuation

112. Although China National provided a schedule of the 38 sites where the cash was allegedly left, and the exact amounts left at each site, it failed to provide any evidence that it left cash as alleged. Accordingly, the Panel finds that China National failed to provide sufficient information and evidence, particularly of loss, to establish its claim.

3. Recommendation

113. The Panel recommends no compensation for financial losses.

F. Other losses

1. Facts and contentions

114. China National seeks compensation in the amount of USD 485,633 for other losses. The claim relates to the payment of advance rental for two properties in Iraq in the Jaderiya and Babylon districts.

115. On 6 July 1988, China National entered into a lease of the Jadiyera district property. It agreed to pay the lessor the amount of IQD 220,000 for the period between 11 August 1988 and 10 August 1991.

116. On 15 February 1990, China National entered into a lease of the Babylon district property. It agreed to pay the lessor the amount of IQD 89,000 for the period between 1 March 1990 and 28 February 1993.

117. China National paid the lessors the full amount of the rent on the date that it signed the leases.

118. China National seeks compensation for the portion of the leases which it was unable to use, i.e. between 2 August 1990 and 10 August 1991 for the Jadiyera district property, and between 2 August 1990 and 28 February 1993 for the Babylon district property. It calculated the amount in Iraqi dinars as IQD 151,340 (USD 485,633).

2. Analysis and valuation

119. As evidence of its claim, China National provided copies of the leases and of the receipts of payment by the lessors in the amount claimed.

120. In the majority of similar claims which the Panel has previously reviewed (as well as claims submitted by other claimants in the present instalment), the Panel has found that such claims are claims for overheads which were not directly chargeable to the employer. The Panel has not recommended compensation for such claims. It is significant in these cases that the claimants have either not presented claims for loss of profits, or if they have presented claims for loss of profits, the claimants have failed to provide sufficient information and evidence to establish their claims. A loss

of profits claim is obviously important in this context because of the nature of claims for unutilised advance rentals as being overheads.

121. In the present claim, the Panel has found that China National has demonstrated that it would have made a profit of 8 per cent on the unperformed value of the contracts in progress as at 2 August 1990 (see paragraphs 68-69, supra). China National has, therefore, demonstrated that its contractual revenues did, and would have continued to, cover rental payments over the life of the contracts which it carried out.

122. The Panel consequently finds that the claim for other losses arose as a direct result of Iraq's invasion and occupation of Kuwait. The claim is compensable in principle.

123. In relation to the valuation of the claim, the Panel notes that there are four important dates: 30 September 1990 (the date of the last evacuation); 10 August 1991 (the expiry date of the lease for the Jadiyera district property); 28 February 1993 (the expiry date of the lease for the Babylon district property); and 1 November 1991 (the latest expiry date of the 15 projects in progress as at 2 August 1990; the project in question is the Kerbala Cement Plant project).

124. The Panel considers that the appropriate method of valuation of the claims in respect of the two properties is to assume that China National was able to use the properties until 30 September 1990. In terms of the date when the losses can be said to cease to be direct, it is not necessarily appropriate to adopt the date of expiry of the lease. Rather, the Panel has proceeded on the basis of using the earlier of the lease expiry date or the expiry date of the Kerbala Cement Plant project. This is because China National failed to provide any evidence that it had entered, or anticipated entering, into contracts with Iraqi employers which would have continued after 1 November 1991. Such evidence would have included contracts or tender letters.

125. Applying this approach to the claim in respect of the Jadiyera district property, the Panel considers that the claim for the period between 30 September 1990 and 10 August 1991 is compensable. The amount of unutilised advance rental for this period is IQD 62,741 (USD 201,328).

126. In respect of the Babylon district property, the Panel considers that the claim for the period between 30 September 1990 and 1 November 1991 is compensable. The amount of unutilised advance rental for this period is IQD 32,139 (USD 103,130).

127. The Panel recommends compensation in the total amount of USD 304,458 for the unutilised advance rental payments.

3. Recommendation

128. The Panel recommends compensation in the amount of USD 304,458 for other losses.

G. Interest

129. With reference to the issue of interest, the Panel refers to paragraphs 18 and 19, supra.

H. Recommendation for China National

Table 7. Recommended compensation for China National

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	4,364,771	756,480
Loss of profits	4,524,485	1,266,500
Loss of tangible property	868,941	348,723
Payment or relief to others	7,616,366	6,897,654
Financial losses	786,691	nil
Other losses	485,633	304,458
Interest	438,008	-
Total	19,084,895	9,573,815

130. Based on its findings regarding China National's claim, the Panel recommends compensation in the amount of USD 9,573,815. The Panel finds the dates of loss to be as follows: in respect of the claim for contract losses, 1 September 1990; in respect of the claim for loss of profits, 15 September 1990; in respect of the claim for loss of tangible property, 30 September 1990; in respect of the claim for payment or relief to others, 15 September 1990; and in respect of the claim for other losses, 30 September 1990.

IV. CHINA STATE CONSTRUCTION ENGINEERING CORPORATION

131. China State Construction Engineering Corporation ("China State") is a state-owned enterprise organised according to the laws of China.

132. In the "E" claim form, China State sought compensation in the amount of USD 415,039,520 for contract losses, loss of tangible property, payment or relief to others and other losses.

133. In its reply to the article 34 notification, China State reduced the amount of its claim to USD 106,987,175. The reduction (by the amount of USD 308,052,345) was due to China State's withdrawal of the component of the original claim relating to contract losses arising prior to 2 May 1990. China State advised the Commission that it considered that these losses were outside the jurisdiction of the Commission.

134. In its revised claim, China State seeks compensation in the amount of USD 106,987,175 for contract losses, loss of tangible property, payment or relief to others, other losses and interest, as follows:

Table 8. China State's claim

Claim element	Claim amount (USD)
Contract losses	46,133,433
Loss of tangible property	53,646,802
Payment or relief to others	6,022,873
Other losses	1,181,059
Interest	3,008
Total	106,987,175

A. Contract losses

1. Facts and contentions

135. China State seeks compensation in the amount of USD 46,133,433 for contract losses allegedly incurred in connection with 11 projects which it had carried out or was in the process of carrying out in Iraq as a contractor to five Iraqi state entities. China State asserted that Iraq's invasion and occupation of Kuwait caused the projects to be suspended and payments due for its work to be stopped.

136. All of the projects involved a variety of construction works, including work on drainage and irrigation projects. China State's involvement was substantial: it had 732 employees working in Iraq as at 2 August 1990.

137. The five employers were: the Ministry of Irrigation, Iraq ("MOI"); the General Co-operative Union of Iraq ("GCU"); the Ministry of Industry and Materials, Iraq ("MOIM"); the Rafidain State Organisation for Irrigation Projects ("Rafidain"); and the State Enterprise for Vegetable Oils ("SEVO").

138. The claim for contract losses comprises two components: (a) "confirmed/completed but unconfirmed amounts", and (b) retention monies.

(a) "Confirmed/completed but unconfirmed amounts"

139. China State seeks compensation in the amount of USD 27,167,878 for "confirmed/completed but unconfirmed amounts". This claim relates to work which China State performed in relation to four projects. The work was allegedly either approved by both the Iraqi employer and the Iraqi banking authorities ("confirmed"), or by the Iraqi employer only ("completed but unconfirmed"). However, the following components of the claim do not accurately reflect this description by China State and therefore require a brief explanation.

(i) North Jazira No. 2 project (advance rental payment)

140. China State alleged that in April 1989, it leased certain road construction equipment from an Iraqi company called Qadisyah for two years in order to carry out roading works in relation to the North Jazira No. 2 project. There was also provision for the lease agreement to be extended. The agreed rental value was IQD 2,300,000 which was to be paid in instalments between April 1989 and February 1990.

141. China State maintained that it paid this amount to Qadisyah but that as a result of Iraq's invasion and occupation of Kuwait, its use of the equipment was interrupted such that it received only part of the value for which it had already paid. China State seeks compensation in the amount of IQD 996,667 (USD 3,198,193) for the unutilised value of the equipment.

(ii) North Jazira No. 2 project (payments under sub-contract)

142. This claim is related to that described at paragraphs 140-141, supra. China State alleged that on 14 September 1990, it sub-contracted the roading works to Qadisyah. Under the terms of the sub-contract, China State was required to allow Qadisyah to use the equipment leased from it.

143. China State agreed to pay Qadisyah for its work in two tranches: it paid the amount of IQD 250,000 on 15 September 1990 and was required to pay the balance of the sub-contract works on completion.

144. China State asserted that it was coerced into entering the sub-contract and that, as a condition of the departure of its employees, it was required to make the advance payment of IQD 250,000 to Qadisyah. China State seeks compensation in the amount of IQD 250,000 (USD 802,222) for recovery of the payment which it made to Qadisyah.

(iii) New Hindiya project (price differential on cement)

145. Under the contract, MOI was required to supply cement for China State's use at a set rate. MOI was entitled to deduct the value of the cement supplied from China State's monthly invoices. China State alleged that between December 1986 and February 1989, MOI deducted the value of the cement at a rate higher than that agreed in the contract. China State asserted that the amount of the effective over-payment was IQD 105,943, which it rounded down to IQD 100,000.

146. China State relied on correspondence between it and MOI's project manager in support of its claim.

147. China State seeks compensation in the amount of IQD 100,000 (USD 320,889) for recovery of the alleged unauthorised deductions.

(b) Retention monies

148. China State seeks compensation in the amount of USD 18,965,555 for retention monies which it would have allegedly earned in respect of 10 projects had Iraq's invasion and occupation of Kuwait not prevented completion of the relevant maintenance periods.

149. China State asserted that Iraq's invasion and occupation of Kuwait interrupted maintenance periods which were in progress for the North Jazira Nos. 1 and 2 projects, and for the New Hindiya project.

150. In respect of the seven other projects for which it seeks compensation for unpaid retention monies, China State alleged that although the maintenance periods had been completed between dates in 1986 and January 1990, the employers refused to pay the outstanding retention monies because China State had failed to obtain all 'clearance' or 'no objection' certificates from the relevant Iraqi authorities. China State maintained that although it was not under an express contractual obligation to obtain these certificates as a condition of the release of the outstanding retention monies, it was an implied term of the contracts that it would do so.

151. The claim for contract losses can be represented as follows:

Table 9. China State's claim for contract losses

Project	Employer	Claim amount - "Confirmed/completed but unconfirmed" (USD)	Claim amount - Retention money (USD)	Claim amount – total (USD)
North Jazira No. 2	MOI	21,117,441	5,031,134	26,148,575
New Hindiya	MOI	3,723,499	5,955,539	9,679,038
North Jazira No. 1	MOI	2,296,855	1,879,327	4,176,182
Vegetable Oil	SEVO	30,083	-	30,083
4 Regulators	MOI	-	4,656,545	4,656,545
3 Buildings	GCU	-	247,820	247,820
Amara	MOIM	-	158,208	158,208
Nassiria	MOIM	-	354,485	354,485
Kubaisa	MOIM	-	155,151	155,151
5 Structures	MOI	-	106,741	106,741
Settling Basin	Rafidain	-	420,605	420,605
Total		27,167,878	18,965,555	46,133,433

152. China State asserted that the terms of payment for all of the projects were governed by a deferred payment agreement between the Governments of Iraq and China (the "Sino-Iraqi Bilateral Treaty"). China State alleged that all payments for work in respect of the Vegetable Oil project were deferred for two years after the date of performance. China State alleged that payments for work in respect of the other 10 projects were deferred for periods of between six months and three years after the date of performance.

2. Analysis and valuation

153. China State provided a substantial amount of evidence in support of its claim for contract losses, including the contracts and sub-contracts; relevant invoices (called "interim payment certificates"); confirmation letters in respect of amounts approved both by the employers and the banks; provisional and final acceptance certificates; and the Sino-Iraqi Bilateral Treaty. The interim payment certificates and the confirmation letters are important documents because they record the amount of work which China State carried out on a particular project each month. China State also provided a number of affidavits from China State's former employees explaining that following Iraq's invasion and occupation of Kuwait, they were required to work by the Iraqi employers as a condition of their ultimate repatriation, and that their work was not voluntary during this period.

154. China State also provided correspondence between it and various employers regarding components of its claim, and evidence of payment of a number of the miscellaneous loss elements which China State classified as "confirmed/completed but unconfirmed amounts".

155. The Panel has defined the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) to limit the jurisdiction of the Commission to exclude debts of the Government of Iraq if the performance relating to that obligation took place prior to 2 May 1990.

156. The Panel finds that for the purposes of the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) China State had, in each case, a contract with Iraq.

(a) "Confirmed/completed but unconfirmed amounts"

157. The Panel finds that it is most convenient to analyse this loss item by project:

(i) North Jazira No. 2

158. The Panel has considered the interim payment certificates and confirmation letters. The Panel finds that components of the claim in relation to the North Jazira No. 2 project included losses which were incurred prior to May 1990, even though these components (invoices 35 and 36) are dated after 2 May 1990. The Panel accordingly finds that these contract losses alleged by China State relate entirely to work that was performed prior to 2 May 1990. The Panel recommends no compensation for these contract losses as they relate to debts and obligations of Iraq arising prior to 2 August 1990 and, therefore, are outside the jurisdiction of the Commission.

159. The Panel finds that for the purposes of Security Council resolution 687 (1991), the Sino-Iraqi Bilateral Treaty did not have the effect of novating the debts.

160. Consistent with the views of other Panels, the Panel considers that notwithstanding the fact that Iraq's invasion and occupation of Kuwait ended on 2 March 1991, the economic consequences of the invasion and occupation did not end immediately after the cessation of the hostilities. The Panel therefore considers that losses which occurred after 2 March 1991 may be compensable as they can still constitute a direct consequence of Iraq's invasion and occupation of Kuwait. However, the Panel finds that the period during which the consequences continued to be felt was a maximum of five months, i.e. until 2 August 1991. After this date (at the latest), Iraq was in a position to meet its debts and responsibilities.

161. In respect of claims for contract losses, the Panel therefore concludes that where a claimant carried out work between 2 May and 2 August 1990 for which payment was agreed, but could not contractually expect payment until after 2 August 1991, and the employer did not in fact pay the claimant for this work, then the loss (when it crystallises as at the due date for payment) is not attributable to Iraq's invasion and occupation of Kuwait.

162. Applying this statement of principle to China State's claim for contract losses (North Jazira No. 2 project), the Panel finds that components of the work which China State carried out between 2 May and 2 August 1990 did not crystallise as a loss until the due date of payment in late 1991 through to 1992 passed without satisfaction of the debt. The Panel accepts that the employer has not paid these monies, but the Panel finds that the employer's failure to pay China State was not as a direct result of Iraq's invasion and occupation of Kuwait, but rather was due to a subsequent and deliberate decision

not to honour its obligations. This finding affects significant components of the claim in relation to this project.

163. The Panel finds that, subject to its specific comments at paragraph 162, supra, and at paragraph 165, infra, China State has provided sufficient information and evidence to establish that the balance of its claim for "confirmed/completed but unconfirmed amounts" in respect of the North Jazira No. 2 project, is compensable. The Panel recommends compensation in respect of the North Jazira No. 2 project in the total amount of USD 5,844,317.

164. In relation to the three 'miscellaneous claims' which were described at paragraphs 140-147, supra, the Panel has reached the following conclusions.

a. North Jazira No. 2 project (advance rental payment)

165. China State provided promissory notes which it gave in favour of Qadisyah in the amount of IQD 900,000 and two receipts signed by Qadisyah in the amount of IQD 550,000. The Panel notes that China State failed to provide sufficient evidence linking these documents to the lease agreement. The Panel recommends no compensation as China State failed to provide sufficient information and evidence to establish its claim.

b. North Jazira No. 2 project (payments under sub-contract)

166. China State provided evidence that it paid Qadisyah the amount of IQD 250,000 on 15 September 1990. China State also established that it made this payment under coercion and that the payment effectively operated as a condition of the release of its employees.

167. The Panel recommends compensation in the amount of IQD 250,000 (USD 802,222).

(ii) New Hindiya project

168. The Panel has considered the interim payment certificates and confirmation letters. The Panel finds that all components of the claim in relation to the New Hindiya project represent losses which were incurred prior to May 1990. The Panel accordingly finds that these contract losses alleged by China State relate entirely to work that was performed prior to 2 May 1990. The Panel recommends no compensation for these contract losses as they relate to debts and obligations of Iraq arising prior to 2 August 1990 and, therefore, are outside the jurisdiction of the Commission.

169. The Panel finds that for the purposes of Security Council resolution 687 (1991), the Sino-Iraqi Bilateral Treaty did not have the effect of novating the debts.

170. In respect of the claim for the price differential on cement, China State provided evidence that MOI's project manager appeared to agree with China State's complaints about the unauthorised deduction of amounts relating to cement. However, the Panel notes that this correspondence is dated 16 December 1989. Any repayment was subject to MOI's approval which was not forthcoming prior to Iraq's invasion and occupation of Kuwait.

171. China State failed to explain why there was no action in respect of this claim for a period of seven and a half months or why, in these circumstances, the alleged loss should be considered as having arisen as a direct result of Iraq's invasion and occupation of Kuwait.

172. The Panel accordingly recommends no compensation.

(iii) Vegetable Oil project

173. China State provided invoices which were approved by SEVO in the amount of IQD 9,375. The invoices related to work which China State carried out in May and June 1990.

174. The Panel observes that the terms of the Sino-Iraqi Bilateral Treaty, insofar as they applied to the Vegetable Oil project, are relevant as they provided that China State was not entitled to be paid for its work until at least two years after the work was performed (i.e., May-June 1992). The Panel considers that not every loss which arose as a result of work performed after 2 May 1990 can be regarded as direct. It is necessary to consider the ongoing effects of Iraq's invasion and occupation of Kuwait. The Panel refers to its discussion of this issue in relation to components of the claim in respect of the North Jazira No. 2 project at paragraphs 160-162, supra. Payment for the work performed in respect of the Vegetable Oil project was not due until May-June 1992. China State has, therefore, failed to demonstrate that the loss was the direct result of Iraq's invasion and occupation of Kuwait.

(iv) North Jazira No. 1 project

175. In support of its claim, China State provided invoices and a final acceptance certificate dated 4 June 1990 in the amount of IQD 715,779 (i.e. the equivalent of the amount claimed in United States dollars). MOI never approved the certificate. It is not clear on the face of the certificate when the work for which China State seeks compensation was carried out. China State also advised the Commission that the maintenance period commenced on 31 August 1989 and that the completion certificate was issued on 23 January 1990. At this time, the first half of the retention monies was paid to China State.

176. On the basis of the evidence and China State's admissions, the Panel concludes that China State seeks compensation in relation to work performed prior to 2 May 1990.

177. The Panel recommends no compensation for contract losses in relation to the North Jazira No. 1 project ("confirmed/completed but unconfirmed") as they relate to debts and obligations of Iraq arising prior to 2 August 1990 and, therefore, are outside the jurisdiction of the Commission.

178. The Panel finds that for the purposes of Security Council resolution 687 (1991), the Sino-Iraqi Bilateral Treaty did not have the effect of novating the debts.

(b) Retention monies

179. In respect of the North Jazira Nos. 1 and 2 projects, and the New Hindiya project, the Panel finds that Iraq's invasion and occupation of Kuwait interrupted maintenance periods which China

State was likely to have completed successfully. The Panel therefore finds that these claims are compensable in principle.

180. In terms of the valuation of the claims in respect of these three projects, the Panel finds that it must take account of the uncertainties inherent in predicting the completion of the maintenance periods on time. In making its recommendations for compensation for unpaid retention monies, the Panel considers that the evidence supports some modest reductions to the amounts claimed. The Panel's recommendations are summarised in table 10, infra.

181. In respect of the claims for retention monies for the remaining projects, the Panel finds that China State failed to establish that there was a contractual or legal obligation on the part of China State to obtain the 'clearance' or 'no objection' certificates as a condition of release of the outstanding retention monies. The Panel finds that the outstanding retention monies relate to work which was completed between 1986 and January 1990.

182. The Panel concludes that all of the work for which China State seeks compensation related to work that was performed prior to 2 May 1990.

183. The Panel recommends no compensation for contract losses in relation to the 4 Regulators, 3 Buildings, Amara, Nassiria, Kubaisa, 5 Structures and Settling Basin projects as they relate to debts and obligations of Iraq arising prior to 2 August 1990 and, therefore, are outside the jurisdiction of the Commission.

184. The Panel finds that for the purposes of Security Council resolution 687 (1991), the Sino-Iraqi Bilateral Treaty did not have the effect of novating the debts.

185. The Panel's recommendations can be summarised as follows:

Table 10. China State's claim for contract losses – Panel's recommendation

Project	Recommended compensation - "Confirmed/completed but unconfirmed" (USD)	Recommended compensation - Retention money (USD)	Recommended compensation – total (USD)
North Jazira No. 2	5,844,317	4,402,243	10,246,560
New Hindiya	nil	5,062,209	5,062,209
North Jazira No. 1	nil	1,597,430	1,597,430
Vegetable Oil	nil	-	nil
4 Regulators	-	nil	nil
3 Buildings	-	nil	nil
Amara	-	nil	nil
Nassiria	-	nil	nil
Kubaisa	-	nil	nil
5 Structures	-	nil	nil
Settling Basin	-	nil	nil
Total	5,844,317	11,061,882	16,906,199

3. Recommendation

186. The Panel recommends compensation in the amount of USD 16,906,199 for contract losses.

B. Loss of tangible property

1. Facts and contentions

187. China State seeks compensation in the amount of USD 53,646,802 for loss of tangible property. The claim is for the alleged loss of equipment, vehicles and machinery from the North Jazira No. 2 and New Hindiya project sites in Iraq, the Baghdad branch office, as well as four project sites in Kuwait.

188. In total, China State alleged that it had lost approximately 3,000 items of tangible property, ranging from small domestic appliances which were used by its employees, to large items of construction machinery. Over 99 per cent of the claim by value (i.e. USD 53,321,075) related to property in use on the North Jazira No. 2 and the New Hindiya projects. The balance of the claim (i.e., USD 325,727) related to property in use in Iraq at the Baghdad Branch office, and in Kuwait for the following projects: the Kuwait Branch office; the 405 Houses project; the Kuwait Conservatory of Music project; and the Kuwait Red Crescent Society project.

189. China State divided its claim into seven categories, as follows:

Table 11. China State's claim for loss of tangible property

Loss element	Claim amount (USD)
Transportation equipment	10,880,854
Construction equipment	26,075,320
Production equipment	9,410,828
Domestic and office equipment	2,912,306
Household appliances	598,311
Imported pre-fabricated houses	303,368
Locally purchased pre-fabricated houses	3,465,815
Total	53,646,802

190. China State alleged that some of the property was destroyed or damaged beyond repair prior to the evacuation of the last of its employees. In late August 1990, China State took steps to safeguard its substantial financial investment in the tangible property by entrusting the property in Iraq to two Iraqi nationals (the "trustees"). China State paid these individuals for their services and seeks compensation for these payments under its claim for other losses in section D, infra. China State maintained that, despite the efforts of the trustees, its property was destroyed during and as a result of Iraq's invasion and occupation of Kuwait. China State asserted that the majority of the losses occurred after the last of its employees left Iraq on 15 January 1991. China State alleged that on its return to Iraq and Kuwait after the liberation of Kuwait, it found that all of the property had been destroyed.

191. China State advised the Commission that it seeks compensation for the replacement cost of all of the lost items.

2. Analysis and valuation

(a) Information and evidence submitted by China State

192. As evidence of its alleged losses, China State provided: affidavits from its employees regarding the status of property as at the date of their departure from Iraq and Kuwait; and similar statements from Kuwaitis who worked with China State. In these documents, the deponents also explained that they witnessed considerable damage to and loss of the property in Iraq and Kuwait during Iraq's invasion and occupation of Kuwait at the hands of the Iraqi military.

193. China State also provided voluminous evidence relating to its ownership of the items for which it seeks compensation, such as purchase invoices and receipts, customs documents, insurance policies

and financial statements. It helpfully summarised this information in schedules relating to each of the seven categories of tangible property.

194. As stated at paragraph 190, supra, China State entrusted the majority of the property in Iraq to two trustees. The property which it entrusted to the trustees was recorded in schedules to the trust agreements. China State provided copies of the trust agreements and the schedules to the Commission.

195. Finally, China State provided a copy of a valuation of its claim for loss of tangible property carried out by its accountants as at August 1990. China State's accountants carried out their valuation based on information provided by China State, but in the acknowledged absence of any of the property in question. The accountants' report carefully stated all of the assumptions which they had made, including the fact that they had carried out a representative sample of 363 items of the property at the North Jazira No. 2 and the New Hindiya project sites, rather than a valuation of each and every item of tangible property which China State alleged had been lost or destroyed. China State's accountants concluded that China State had lost tangible property with a value of USD 53,646,802. China State then relied on this document to formulate its claim to the Commission.

(b) The Panel's development of an appropriate verification methodology

196. When the Panel commenced its review of the claim for loss of tangible property, it noted both the number of items for which China State seeks compensation and the large volume of supporting documentation.

197. The Panel concluded that, in recognition of these factors, it should adopt the appropriate and accepted procedure of sampling certain of the larger categories of the claim for loss of tangible property. Where the population of items was limited in number, the Panel has verified and valued the claim in the ordinary manner.

(c) Assessment of China State's title to or right to use the assets and assessment of presence of property in Iraq or Kuwait

198. The Panel found that China State failed to provide any or sufficient evidence in support of the following categories and sub-categories of its claim for loss of tangible property:

- Transportation equipment (New Hindiya project);
- Production equipment (New Hindiya project);
- Domestic and office equipment (New Hindiya project); and
- Household appliances (all components of claim).

199. In summary, the Panel found that significant components of the claim in respect of the New Hindiya project were not proven through the submission of sufficient evidence. The Panel reached the same conclusion in respect of all of the property alleged to have been lost in Kuwait.

200. The Panel therefore finds that China State demonstrated its title to or right to use the following assets in Iraq only:

- Transportation equipment (North Jazira No. 2 project);
- Construction equipment;
- Production equipment (North Jazira No. 2 project);
- Domestic and office equipment (North Jazira No. 2 project and Baghdad Branch office);
- Imported pre-fabricated houses; and
- Locally purchased pre-fabricated houses.

201. In respect of the issue of whether these items were in Iraq as at the date of Iraq's invasion and occupation of Kuwait, the Panel notes that China State provided considerable evidence of the presence in Iraq of the property, such as purchase invoices for property purchased in Iraq and customs documents for items imported into Iraq. The Panel reviewed these documents in the course of carrying out its verification exercise. The Panel finds that China State provided sufficient evidence of the presence in Iraq of the items summarised at paragraph 200, supra.

(d) Assessment of fact of loss

202. In respect of the issue of whether China State demonstrated that the items of tangible property were lost during and as a direct result of Iraq's invasion and occupation of Kuwait, the Panel finds that the affidavit evidence which China State provided in addition to the underlying facts and circumstances of the claim establish China State's allegations. It is clear that there was widespread looting of its property in Iraq even before the departure of its employees from Iraq. China State took steps to safeguard its assets in Iraq by entrusting them to the trustees, who, it appears, hired other people to guard the assets. However, the fact that these efforts proved unsuccessful does not invalidate China State's claim. The Panel finds that the items of tangible property were lost during and as a direct result of Iraq's invasion and occupation of Kuwait.

(e) Assessment of the value of the tangible property in Iraq

203. China State formulated its claim on the basis of the claimed replacement cost of the items of tangible property. In doing so it relied on the valuation exercise carried out by China State's accountants.

204. As is explained at paragraph 27, supra, the Panel has adopted historical cost minus depreciation as its primary valuation methodology. China State failed to provide any information or evidence which has persuaded the Panel to depart from its primary valuation methodology.

205. It has therefore been necessary for the Panel to apply depreciation rates appropriate for such items. China State did provide, in the majority of cases, sufficient information and evidence to allow the age and condition of the items to be determined.

206. The Panel finds that some items had no compensable value because of their age.

207. The Panel has concluded that the remaining items had a value in the amount of USD 9,305,727 on 15 January 1991, the date on which the last of China State's employees left Iraq. The Panel's recommendations can be summarised as follows:

Table 12. China State's claim for loss of tangible property – Panel's recommendation

Loss element	Recommended compensation – North Jazira No. 2 Project (USD)	Recommended compensation – New Hindiya Project (USD)	Recommended compensation – Baghdad Branch office (USD)	Recommended compensation – total (USD)
Transportation equipment	1,954,676	nil	-	1,954,676
Construction equipment	3,954,816	667,395	-	4,622,211
Production equipment	943,857	nil	-	943,857
Domestic and office equipment	537,511	nil	13,356	550,867
Imported pre-fabricated houses	61,884	61,111	-	122,995
Locally purchased pre-fabricated houses	946,208	164,913	-	1,111,121
Total	8,398,952	893,419	13,356	9,305,727

3. Recommendation

208. The Panel recommends compensation in the amount of USD 9,305,727 for loss of tangible property.

C. Payment or relief to others

1. Facts and contentions

209. China State seeks compensation in the amount of USD 6,022,873 for payment or relief to others. The claim relates to evacuation expenses for 1,962 employees up to September 1990, and a few employees in January 1991 (airfares, other transport costs, food and accommodation expenses and visas), their salaries/wages during the period between 2 August 1990 and the date of their evacuation, payments made to the employees when they returned to China, and payments made to the employees in China who coordinated the repatriation effort ("head office reception costs").

210. China State seeks compensation in the amount of USD 4,718,536 made to or on behalf of the 1,230 employees based in Kuwait and USD 1,304,337 in relation to payments made to or on behalf of

the 732 employees based in Iraq. The Panel notes that China State had a considerable presence in Kuwait as at Iraq's invasion and occupation of Kuwait, although it has not sought compensation for any contract losses incurred in Kuwait.

211. The basic components of the claim can be represented as follows:

Table 13. China State's claim for payment or relief to others

Loss element	Claim amount (USD)
(a) Kuwait - based employees	
(i) Salary payments (August-October 1990)	2,046,717
(ii) Airfares Jordan to China	1,198,020
(iii) War risk insurance	307,500
(iv) Food, accommodation and vehicle hire in Iraq	542,110
(v) Miscellaneous travel and food and accommodation expenses; termination payments in China	574,171
(vi) Head office costs (costs of employees at China State's head office in China who co-coordinated repatriation effort)	50,018
Sub-total for Kuwait - based employees	4,718,536
(b) Iraq - based employees	
(i) Salary payments August 1990 until departure	393,323
(ii) Termination payments in China	262,022
(iii) Evacuation costs (airfares, food and accommodation)	648,992
Sub-total for Iraq - based employees	1,304,337
Total	6,022,873

212. The employees based in Kuwait were evacuated from Kuwait as follows. They were taken from Kuwait to the New Hindiya site in Iraq. From there they went to Jordan and were then flown back to China. All of these employees were evacuated between 22 and 24 August 1990. The Panel notes that these employees were paid three months' salary even though they were repatriated in August 1990.

213. The employees based in Iraq were evacuated from Iraq as follows. Approximately 60 employees appear to have returned to China via Jordan on two different dates. The rest of the employees were repatriated via Turkey. The dates varied but the majority of these employees were evacuated between 18 August and 17 September 1990. The Panel notes that these employees were paid five months' salary even though they were repatriated in August-September 1990.

2. Analysis and valuation

214. China State provided voluminous evidence in support of its claim, including affidavits from employees, receipts for a large number of the alleged expenses, and the contracts between the Iraqi employers and China State.

215. China State also provided an affidavit from an expert in Chinese labour law in respect of the claim for salary payments as the claim includes a component which relates to the loss of employment. The expert stated that at that time, Chinese employers were legally responsible for providing employment (and the consequent security) to their employees for the whole of their working lives.

216. Because of the detailed nature of the claim for payment or relief to others, the Panel has summarised its findings in respect of the claim in table 14, infra. However, the Panel makes the following specific observations about its findings.

217. The Panel finds that under its contracts with the Iraqi employers, China State was required to meet the costs of repatriation of its employees. The Panel nevertheless accepts that China State incurred costs substantially greater than it would have expected to incur had it been able to demobilise its 1,962 employees from the projects in Iraq and in Kuwait in the manner which it had originally anticipated. The Panel finds that China State has established in principle that a large component of its claims therefore represents losses arising as a direct result of Iraq's invasion and occupation of Kuwait.

218. In respect of the claim for salaries and wages paid to China State's employees upon their return to China, the Panel notes that a significant component of these costs does not relate to wages and salaries per se, but rather to compensation to those employees for the loss of either their jobs or employment opportunities. The Panel finds that in the circumstances, China State expected to complete the projects in Iraq and either re-deploy its employees within Iraq at the end of those projects, or demobilise them to China in an orderly manner for work elsewhere. Iraq's invasion and occupation of Kuwait prevented this orderly process from being carried out, such that in the circumstances, China State had to pay its employees a type of termination benefit in order to meet its legal obligations.

219. The Panel also notes that in respect of the claim for wages and salaries for the employees based in Iraq, and which relates to the period of their detention only, the Panel has ensured that there is no overlap between its recommendations in respect of the claim for contract losses and the claim for payment or relief to others.

220. Finally, the Panel notes that in respect of some components of the claims for food, accommodation and vehicle hire (employees based in Kuwait) and for evacuation costs (employees based in Iraq), China State was unable to provide evidence that it incurred the asserted costs, such as invoices and receipts. In these cases, the Panel has recommended no compensation.

221. The Panel recommends compensation for payment or relief to others in the total amount of USD 4,390,298.

222. The Panel's recommendations can be summarised as follows:

Table 14. China State's claim for payment or relief to others – Panel's recommendation

Loss element	Claim amount (USD)	Recommended compensation (USD)
(a) Kuwait - based employees		
(i) Salary payments (August-October 1990)	2,046,717	2,046,717
(ii) Airfares Jordan to China	1,198,020	539,970
(iii) War risk insurance	307,500	307,500
(iv) Food, accommodation and vehicle hire in Iraq	542,110	430,986
(v) Miscellaneous travel and food and accommodation expenses; termination payments in China	574,171	574,171
(vi) Head office costs	50,018	14,587
Sub-total for Kuwait - based employees	4,718,536	3,913,931
(b) Iraq - based employees		
(i) Salary payments August 1990 until departure	393,323	186,761
(ii) Termination payments in China	262,022	256,659
(iii) Evacuation costs (airfares, food and accommodation)	648,992	32,947
Sub-total for Iraq - based employees	1,304,337	476,367
Total	6,022,873	4,390,298

3. Recommendation

223. The Panel recommends compensation in the amount of USD 4,390,298 for payment or relief to others.

D. Other losses

1. Facts and contentions

224. China State seeks compensation in the amount of USD 1,181,059 for other losses. The claim is for the alleged costs of two trustees whom China State retained to look after its interest and property in Iraq in August 1990. China State called its claim "property trust for evacuation".

225. Following Iraq's invasion and occupation of Kuwait, China State repatriated all of its Iraq – based employees over a period of time until 17 September 1990. This meant that its employees could not guard its work sites, offices and property after this date.

(a) New Hindiya Project trust agreement

226. On 28 August 1990, China State entrusted the property at, and oversight of, the New Hindiya project to one of its Iraqi agents. The duration of the agreement was originally six months, but was in force at the instigation of the trustee until May 1992.

227. The trustee's duties included the hiring of guards for the New Hindiya project site and payment of related expenses. The trustee was entitled to receive the amount of IQD 7,000 per month, which was to cover all expenses.

228. China State alleged that despite the trustee's efforts, China State sustained substantial loss of tangible property during Iraq's invasion and occupation of Kuwait, as has been explained supra. China State advised the Commission that the trustee did not report the losses to it during this period or afterwards because of the breakdown in communications between China and Iraq, and probable danger to the trustee had he tried to report the losses to the appropriate Iraqi authorities.

229. China State only regained contact with the trustee when some of its employees returned to Iraq in July 1992 to ascertain the extent of its property losses. China State informed the Commission that "though all properties were found lost by [China State], [China State] paid [the trustee] the costs incurred for trust period till mid-1992".

230. China State seeks compensation both for the amounts which it paid the trustee pursuant to the agreement for his services (at the rate of IQD 7,000 per month), and for the amounts which the trustee paid on China State's behalf between 17 September 1990 (when the majority of China State's employees left Iraq) and July 1992, for which China State reimbursed him. Although the original contract term was for the six month period between August 1990 and February 1991, the trustee signed extensions to the trust agreement on behalf of China State without China State's authorisation. China State alleged that it had to pay the accrued costs when its representatives returned briefly to Iraq in July 1992.

231. China State alleged that it made payments to the trustee in the amount of IQD 145,000 at the monthly rate of IQD 7,000 (20 months) and for the cost of utilities in the last month in the amount of IQD 5,000. The balance comprised of payments to him for his related services, and notarial expenses in the amount of IQD 2,976. The total compensation sought is IQD 147,976 (USD 474,837).

(b) Baghdad Branch office/North Jazira No. 2 project trust agreement

232. On 27 August 1990, China State entrusted the property at, and oversight of, the Baghdad Branch office site and the North Jazira No. 2 project site to another of its Iraqi agents. The duration of the agreement was originally six months (i.e. until February 1991), but was in force at the instigation of the trustee until October 1992.

233. The trustee's duties included the hiring of guards for the sites and payment of related expenses. The trustee was entitled to receive the amount of IQD 2,500 per month, which was to cover all expenses. China State advised the Commission that on the date of signature, it paid the trustee the amount of IQD 15,000 for the period between that date and February 1991.

234. China State made the same general allegations in respect of this trust agreement as it did in relation to that for the New Hindiya project site trust agreement.

235. China State alleged that upon the return of some of its employees to Iraq in 1992, it was required to pay costs which the trustee had allegedly incurred in respect of wages paid to employees and their employees' social security premiums, in the total amount of IQD 104,873. It was also required to meet rent and utilities payments for the office and domestic properties during this period, in the total amount of IQD 100,210. The total compensation sought is IQD 220,083 (USD 706,222).

2. Analysis and valuation

236. China State provided as evidence of its alleged losses affidavits by the employees who returned to Iraq in 1992; the two trust agreements; the trustees' acknowledgement of receipt of payments made to them in 1990 and in 1992; detailed registers of property entrusted to the two trustees; lease agreements; and invoices for the other expenses incurred by the trustees, allegedly on behalf of China State. The Panel finds that the evidence provided by China State established that it incurred the trustees' costs, or that it reimbursed the trustees for the additional costs which they incurred.

237. The Panel refers to the terms of the two trust agreements. They are very similar in their wording and it is clear that both agreements provided that the amount which China State agreed to pay the trustees respectively covered all of their costs as well as all expected costs or disbursements which third parties might seek against China State. In other words, in respect of the New Hindiya trust agreement, the trustee was only entitled to receive the amount of IQD 7,000 per month. In respect of the Baghdad Branch office/North Jazira No. 2 trust agreement, the trustee was only entitled to receive the amount of IQD 2,500 per month.

238. The Panel acknowledges that China State was in a difficult position when it returned to Iraq in July 1992 and was confronted by its trustees who demanded payment for the entire period between late August 1990 and May or October 1992. The trustees had also unilaterally extended the duration of the trust agreements.

239. With respect to the issue of causation, Governing Council decision 7 provides that compensation is available with respect to any direct loss, damage, or injury to corporations and other entities as a result of Iraq's unlawful invasion and occupation of Kuwait. This will include any loss suffered as a result of, inter alia, "the breakdown of civil order in … Iraq during that period" (i.e. 2 August 1990 to 2 March 1991).

240. The Panel notes that China State took appropriate steps in late August 1990 to attempt to mitigate losses which were already occurring and which it anticipated would continue to occur in its absence. The Panel finds that the costs of its trustees during the period between late August 1990 and

2 March 1991 represent losses arising as a direct result of Iraq's invasion and occupation of Kuwait. However, in respect of the costs which China State incurred after 2 March 1991, the Panel finds that the costs relate to the time after the relevant compensable period as determined by the Governing Council. The Panel is unable to conclude, on the evidence provided by China State, that the losses incurred after 2 March 1991, or relating to the period after 2 March 1991, were suffered as a direct result of Iraq's invasion and occupation of Kuwait.

241. In respect of the valuation of the costs incurred between 27-28 August 1990 and 2 March 1991, the Panel notes that the terms of the trust agreements originally expired on 27 and 28 February 1991 respectively. This is sufficiently proximate to 2 March 1991 to value the claim in respect of amounts paid until 27-28 February 1991.

242. The Panel refers to its finding at paragraph 237, supra, that the monthly rate in the trust agreements covered all expenses.

243. In respect of the New Hindiya trust agreement, the Panel therefore recommends compensation for the monthly rate under the trust agreement (IQD 7,000) for six months (i.e. IQD 42,000).

244. In respect of the Baghdad Branch office/North Jazira No. 2 trust agreement, the Panel therefore recommends compensation for the monthly rate under the trust agreement (IQD 2,500) for six months (i.e. IQD 15,000).

245. The Panel recommends compensation in the amount of IQD 57,000 (USD 182,906) for other losses. The Panel considers that the date of loss should be 28 November 1990, as that is the mid-point of the period between 27-28 August 1990 and 27-28 February 1991.

3. Recommendation

246. The Panel recommends compensation in the amount of USD 182,906 for other losses.

E. Interest

247. The Panel notes that the claim for interest relates to the claim for contract losses in respect of the Vegetable Oil project only. As the Panel recommends no compensation for that component of the claim for contract losses (see paragraph 174, supra), there is no need for the Panel to determine the date of loss from which interest would accrue.

F. Recommendation for China State

Table 15. Recommended compensation for China State

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	46,133,433	16,906,199
Loss of tangible property	53,646,802	9,305,727
Payment or relief to others	6,022,873	4,390,298
Other losses	1,181,059	182,906
Interest	3,008	nil
Total	106,987,175	30,785,130

248. Based on its findings regarding China State's claim, the Panel recommends compensation in the amount of USD 30,785,130. The Panel finds the dates of loss to be as follows: in respect of the claim for contract losses, 2 August 1990; in respect of the claim for loss of tangible property, 15 January 1991; in respect of the claim for payment or relief to others, 15 September 1990; and in respect of the claim for other losses, 28 November 1990.

V. "BOJOPLAST" CONSTRUCTION, TRADE AND BUSINESS SERVICES ENTERPRISE EXPORT-IMPORT, JSC - PULA

249. "BOJOPLAST" Construction, Trade and Business Services Enterprise Export-Import, JSC - Pula ("Bojoplast") is a corporation organised according to the laws of Croatia operating in the construction industry.

250. In the "E" claim form, Bojoplast sought compensation in the amount of USD 1,799,011 for contract losses, loss of tangible property and other losses.

251. In its reply to the article 15 notification submitted in November 2000, Bojoplast introduced a claim for interest. The Panel has only considered those losses contained in the original claim and refers in this respect to paragraph 8, supra.

252. The Panel has reclassified elements of Bojoplast's claim for the purposes of this report. The Panel therefore considered the amount of USD 1,799,011 for contract losses, loss of profits, loss of tangible property, payment or relief to others, financial losses and other losses, as follows:

Table 16. Bojoplast's claim

Claim element	Claim amount (USD)
Contract losses	810,648
Loss of profits	415,017
Loss of tangible property	79,148
Payment or relief to others	3,157
Financial losses	433,425
Other losses	57,616
Total	1,799,011

A. Contract losses

1. Facts and contentions

253. Bojoplast seeks compensation in the amount of USD 810,648 for contract losses. Bojoplast alleged that it suffered these losses in relation to 17 sub-contracts for painting works which it carried out in Iraq. It alleged that it was a sub-contractor to six other sub-contractors from the Federal Republic of Yugoslavia. These six sub-contractors (called "investors" by Bojoplast) contracted with the Federal Directorate for Supply and Procurement (the "FDSP"), part of the Federal Secretariat for National Defence of the Federal Republic of Yugoslavia. It was the FDSP which secured and entered into the main contracts with the relevant Iraqi state agency, the Directorate of Military Works, Ministry of Defence (the "employer"). The FDSP received a fee for its involvement. There were therefore three tiers of contracts. The involvement of the FDSP was alleged to have been mandatory

under the laws of the Federal Republic of Yugoslavia, but all contracts which the FDSP entered into were done so on behalf of the investors and Bojoplast. The FDSP has not brought any claims before the Commission. Indeed, the FDSP advised the Commission in 1993 that it would not submit any claims to the Commission.

254. The alleged contract losses may be represented as follows:

Table 17. Bojoplast's claim for contract losses

Project title	"Investor"	Claim amount (USD)
P-2000/1	FDSP-2000 Baghdad VP Belgrade	73,898
P-2000/2	FDSP-2000 Baghdad VP Belgrade	7,500
Sub-total for FDSP-2000 Belgrade		81,398
P-500/2	"SCT" Ljubljana	9,171
P-201	"SCT" Ljubljana	35,180
P-14 Saad	"SCT" Ljubljana	17,909
P-A Ruthba	"SCT" Ljubljana	6,879
P-B SCT	"SCT" Ljubljana	25,085
P-202 D-II	"SCT" Ljubljana	120,190
P-700	"SCT" Ljubljana	93,791 2,959
PL-L195 SCT	"SCT" Ljubljana	5,549
Sub-total for "SCT Ljubljana"		316,713
P-195 Annex IV	"Industrogradnja" Zagreb	52,926
P-500/3	"Industrogradnja" Zagreb	27,265
P-14 Quajara	"Industrogradnja" Zagreb	17,358
P-196	"Industrogradnja" Zagreb	62,736
Sub-total for "Industrogradnja" Zagreb		160,285
P-1101/4	GRO "Primorje" Rijeka	248,904
P-195	"Jelovica" Skofja Loka	1,382
P-202 B-3	GRO "Vranica" Sarajevo	1,966
Total		810,648

255. The Panel describes, infra, Bojoplast's contentions in relation to each of the sub-sub-contracts. For ease of reference, the Panel has called these sub-sub-contracts "sub-contracts".

256. It is important to record at this stage that Bojoplast asserted that there were two phases for its services and that different terms of payment were used for each phase. Until 1983, Bojoplast provided the employer with a statement of costs. When the employer certified (i.e. approved) the statement of costs, Bojoplast presented the statement of costs to the FDSP. Bojoplast's bank also issued a guarantee in favour of the FDSP, and vice versa. The FDSP then forwarded money received for a particular instalment to the investors, which then forwarded to Bojoplast the amounts it had earned.

257. On 18 October 1983, the Government of the Federal Republic of Yugoslavia and the Government of Iraq entered into a deferred payment agreement (the "deferred payment agreement"). This covered completed works. In essence, the FDSP (and consequently, ultimately, Bojoplast) received some payment immediately in United States dollars (which was usually receivable in oil), a smaller payment immediately in Iraqi dinars, and the balance in United States dollars deferred for two years and at a rate of five per cent interest. Despite the deferred payment agreement, payments were received late and the deferred payments were subsequently further deferred. Bojoplast asserted that all of the monies for which it seeks compensation as contract losses were subject to the deferred payment agreement. It stated that under the deferred payment agreement, all deferred payments became due on or after 7 October 1990. Bojoplast did not explain the status of payment of the amounts which the Governments agreed should be paid immediately.

258. Bojoplast alleged that if the FDSP had received monies from the Iraqi employers since the liberation of Kuwait, the FDSP would not forward to Bojoplast (via the investors) any monies received from the Iraqi employers, because of the breakdown of the relationship between Croatia and the Federal Republic of Yugoslavia.

(a) Sub-contracts with FDSP Belgrade

259. Bojoplast seeks compensation in the amount of USD 81,398 for work carried out under two sub-contracts with FDSP Belgrade, a division of the FDSP.

260. On 14 November 1986, Bojoplast entered into a sub-contract with FDSP Belgrade. Under the sub-contract, Bojoplast agreed to carry out painting services for Project P-2000/1. The value of the sub-contract after amendments was either USD 397,027 or USD 425,588 (the information which Bojoplast provided was unclear). One of the amendments to the sub-contract appears to have been signed in May 1990. Bojoplast seeks compensation in the amount of USD 73,898 for unpaid executed works. Based on an invoice dated 28 December 1989, it appears likely that payment for the work for which Bojoplast seeks compensation was outstanding as at 30 September 1989.

261. On an unknown date (possibly 5 October 1989), Bojoplast entered into a sub-contract with FDSP Belgrade in relation to Project P-2000/2. The value of the sub-contract after an amendment was USD 41,724. Bojoplast seeks compensation in the amount of USD 7,500 for unpaid executed works.

Bojoplast provided no other information about this claim, and the evidence provided is largely untranslated.

(b) Sub-contracts with "SCT" Ljubljana

262. Bojoplast seeks compensation in the amount of USD 316,713 for unpaid executed works carried out under eight sub-contracts with "SCT" Ljubljana ("SCT"). In support of its claim, Bojoplast only provided one sub-contract dated 15 March 1982. Under this sub-contract, Bojoplast agreed to carry out painting works for Project P-202-D. The value of the sub-contract was USD 3,027,027.

263. Based on documents called "statements of outstanding items" issued by SCT to Bojoplast, it appears likely that much of the work for which Bojoplast seeks compensation was carried out between 1987 and 1989.

(c) Sub-contracts with "Industrogradnja" Zagreb

264. Bojoplast seeks compensation in the amount of USD 160,285 for unpaid executed works carried out under four sub-contracts with "Industrogradnja" Zagreb ("Industrogradnja"). In support of its claim, Bojoplast only provided two sub-contracts.

265. The first sub-contract is dated 3 June 1986. Bojoplast agreed to carry out unspecified works on Project P-196. The value of the sub-contract (which appears to be an amendment to a sub-contract dated 13 August 1984) was USD 513,927.

266. The second sub-contract is dated 20 March 1987. Bojoplast agreed to carry out unspecified works on Project P-195. The value of the sub-contract (which appears to be an amendment to a sub-contract dated 28 February 1986) was USD 225,991.

267. Based on documents called "statements of outstanding items" issued by Industrogradnja to Bojoplast, and other evidence provided, it appears likely that much of the work for which Bojoplast seeks compensation was carried out between 1986 and 1989.

(d) Sub-contract with GRO "Primorje" Rijeka

268. On 16 February 1988, Bojoplast entered into a sub-contract with GRO "Primorje" Rijeka ("Primorje"). Under the sub-contract, Bojoplast agreed to carry out painting services for Project P-1101/4. The value of the sub-contract was USD 1,034,589. An undated annex increased the contract value to USD 1,360,528.

269. Bojoplast did not provide any further information about this project, although it appears that the project was interrupted by Iraq's invasion and occupation of Kuwait. However, the Panel is aware from material provided by Primorje, which also submitted a claim to the Commission, that Project P-1101/4 involved the construction of a tank base in Al-Kassek, Iraq.

270. Bojoplast alleged that by 2 August 1990, it had completed contractual works in the amount of USD 619,573. Bojoplast received payments under the sub-contract (advance payment) and pursuant

to the deferred payment agreement in the amount of USD 370,669. It therefore seeks compensation in the amount of USD 248,904 for unpaid executed works. Its claim in relation to the unperformed part of the sub-contract is considered in paragraphs 293-300, infra, as a claim for loss of profits.

(e) Sub-contract with "Jelovica" Skofja Loka

271. Bojoplast seeks compensation in the amount of USD 1,382 for work carried out under a sub-contract with "Jelovica" Skofja Loka ("Jelovica"). Bojoplast provided no contractual documentation in relation to this sub-contract. It appears that Bojoplast carried out work in relation to Project P-195. Based on the small amount of evidence provided, it appears likely that all of the work for which Bojoplast seeks compensation was carried out in 1982 and 1983.

(f) Sub-contract with GRO "Vranica" Sarajevo

272. Bojoplast seeks compensation in the amount of USD 1,966 for work carried out under a sub-contract with GRO "Vranica" Sarajevo ("Vranica"). Bojoplast provided no contractual documentation in support of its claim. It appears that Bojoplast carried out work in relation to Project P-202 B-3. Based on the small amount of evidence provided, it appears likely that all of the work for which Bojoplast seeks compensation was carried out in 1986.

2. Analysis and valuation

273. The Panel considers that Bojoplast contracted as a sub-sub-contractor in relation to all of the projects referred to, supra. It did not have a direct right of payment against the employer or against the FDSP. It relied on payment from the parties directly above it in the contractual chain (i.e. the investors), some of which have also submitted cla ims to the Commission for contract losses.

274. In support of its claim for contract losses, Bojoplast provided a limited amount of evidence, such as copies of some of the sub-contracts. However, the sub-contracts were not in English and Bojoplast translated only limited extracts from the sub-contracts. Bojoplast also provided invoice type documents from the investors. Most of these documents were called "statements of outstanding amounts". Although many of these are dated in 1990 and 1991, they relate to work performed well before these dates. According to Bojoplast, they were an acknowledgement of debt for legal purposes. They operated as a final acceptance certificate. Finally, Bojoplast supplied some limited correspondence and the deferred payment agreement.

275. In the article 34 notification, Bojoplast was asked to provide extensive further evidence and translations of existing evidence, such as all of the sub-contracts. It was also asked to explain how the alleged losses arose as a direct result of Iraq's invasion and occupation of Kuwait. Bojoplast did not reply.

(a) Sub-contracts with FDSP Belgrade

276. None of the limited information or evidence which Bojoplast submitted establishes when Bojoplast carried out its work and why Bojoplast did not receive payment for that work.

277. The Panel recommends no compensation for contract losses arising from Bojoplast's sub-contracts with FDSP Belgrade as Bojoplast failed to provide sufficient information and evidence to establish its claim.

(b) Sub-contracts with SCT

278. None of the limited information or evidence which Bojoplast submitted establishes when Bojoplast carried out its work and why Bojoplast did not receive payment for that work.

279. The Panel recommends no compensation for contract losses arising from Bojoplast's sub-contracts with SCT as Bojoplast failed to provide sufficient information and evidence to establish its claim.

(c) Sub-contracts with Industrogradnja

280. None of the limited information or evidence which Bojoplast submitted establishes when Bojoplast carried out its work and why Bojoplast did not receive payment for that work.

281. The Panel notes that Industrogradnja submitted a claim to the Commission which was considered by the Panel in its "Report and recommendations made by the Panel of Commissioners concerning the second instalment of 'E3' Claims" (S/AC.26/1999/5). Three of the projects mentioned by Bojoplast were the subject of contract loss claims by Industrogradnja: P-195, P-500 and P-196. At paragraph 154, the Panel stated:

> "The dates of the last certified payments for each Project were March 1987 (contract P-196), March 1988 (contract P-195) and December 1988 (contract P-500)."

282. Industrogradnja relied on the same deferred payment agreement to which Bojoplast referred (see paragraph 257, supra) to argue that the loss was direct. The Panel rejected this argument and stated that the losses represented debts and obligations of Iraq arising prior to 2 May 1990, and were, therefore, outside the Commission's jurisdiction (paragraph 156). The Panel concludes that none of its findings or information recorded in the report on Industrogradnja's claim supports Bojoplast's claim for contract losses.

283. The Panel recommends no compensation for contract losses arising from Bojoplast's sub-contracts with Industrogradnja as Bojoplast failed to provide sufficient information and evidence to establish its claim.

(d) Sub-contract with Primorje

284. Bojoplast provided no certificates signed either by the employer or by Primorje acknowledging Bojoplast's work done or when Bojoplast carried out the work. Bojoplast did provide a document called a "Recapitulation" dated 30 July 1990. This document purported to show that work with a value of USD 18,104 was carried out in June-July 1990. The Panel finds that this document alone does not confirm that work in the amount of USD 18,104 (or for the amount claimed of

USD 248,904) was performed. Bojoplast provided no timesheets and it failed to provide all earlier invoices to allow the Panel to establish what work was done at what time.

285. The Panel notes that Primorje has submitted a claim to the Commission. The Panel considered the material which Primorje submitted but has concluded that there is no evidence or information of relevance to Bojoplast's claim.

286. The Panel recommends no compensation for contract losses arising from Bojoplast's sub-contract with Primorje as Bojoplast failed to provide sufficient information and evidence to establish its claim.

(e) Sub-contract with Jelovica

287. None of the limited information or evidence which Bojoplast submitted establishes when Bojoplast carried out its work and why Bojoplast did not receive payment for that work.

288. The Panel recommends no compensation for contract losses arising from Bojoplast's sub-contract with Jelovica as Bojoplast failed to provide sufficient information and evidence to establish its claim.

(f) Sub-contract with Vranica

289. None of the limited information or evidence which Bojoplast submitted establishes when Bojoplast carried out its work and why Bojoplast did not receive payment for that work.

290. Vranica has submitted a claim to the Commission which relates, in part, to Project P-202 B. The Panel has considered the material which Vranica submitted but concludes that there is no evidence or information of relevance to Bojoplast's claim.

291. The Panel recommends no compensation for contract losses arising from Bojoplast's sub-contract with Vranica as Bojoplast failed to provide sufficient information and evidence to establish its claim.

3. Recommendation

292. The Panel recommends no compensation for contract losses.

B. Loss of profits

1. Facts and contentions

293. Bojoplast seeks compensation in the amount of USD 415,017 for loss of profits in relation to the sub-contract with Primorje (P-1101/4). Bojoplast asserted that had the sub-contract works not been interrupted by Iraq's invasion and occupation of Kuwait, Bojoplast would have realised a profit of 5 per cent on the value of the contracted but unperformed works.

294. The Panel notes that the basis of the claim for loss of profits is unclear, because the amount of USD 415,017 is the value of the unperformed part of the sub-contract, not the 5 per cent figure (which would be USD 20,751).

295. Bojoplast originally classified the claim for loss of profits as "other losses (indirect loss)", but the losses are more appropriately classified as loss of profits.

2. Analysis and valuation

296. The requirements to substantiate a loss of profits claim have been stated by the Panel at paragraphs 16 and 17, supra.

297. In support of its claim, Bojoplast provided a limited amount of evidence, such as an incomplete translation of the sub-contract with Primorje, a copy of the deferred payment agreement to which the sub-contract was subject, and "statements of outstanding costs". In the article 34 notification, Bojoplast was requested to provide evidence such as invoices, profit and loss calculations and its accounts. It failed to reply.

298. On the basis of the limited information and evidence which Bojoplast provided, it appears likely that Bojoplast's performance of the sub-contract with Primorje was interrupted by Iraq's invasion and occupation of Kuwait. However, there is insufficient evidence to verify Bojoplast's assertions, not least because it has provided no explanation of its calculations.

299. The Panel recommends no compensation for loss of profits as Bojoplast failed to provide sufficient information and evidence to substantiate its claim.

3. Recommendation

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

C. Loss of tangible property

1. Facts and contentions

301. Bojoplast seeks compensation in the amount of USD 79,148 for loss of tangible property. The claim is for the alleged loss of property in Iraq at the time of Iraq's invasion and occupation of Kuwait. The property was being used on three projects underway at that time. The tangible property includes "capital material" ("materials") with an asserted value of USD 28,444 and "machinery and other temporary imported equipment" ("equipment") with an asserted value of USD 50,704. The property primarily consists of vehicles, painting equipment and household appliances.

302. Bojoplast alleged that it was not able to re-export the property due to "Iraq's attitude" after 2 August 1990. On 19 and 23 September 1990, Bojoplast left the property in the care of the relevant contractors: Primorje for Project P-1101/4 and FDSP-Belgrade for Projects P-2000/1 and P-2000/2.

303. Bojoplast did not explain the basis for its valuation of the tangible property.

2. Analysis and valuation

304. In support of its alleged losses, Bojoplast provided, inter alia, some invoices for items purchased in the Federal Republic of Yugoslavia or in Kuwait. These invoices referred to bills of lading which were not provided. Bojoplast also provided some invoices for items purchased in Iraq, and lists of property entrusted to Primorje and FDSP-Belgrade, in which those investors acknowledged that the listed property was entrusted to them in September 1990. However, the lists are very general in nature and refer to annexes, only some of which were provided.

305. In the article 34 notification, Bojoplast was asked to provide further documentary evidence and reconciliation of the existing evidence, such as the bills of lading. Bojoplast did not reply.

(a) Materials

306. The annexes that were provided are general and do not refer to the quantity of the materials. Bojoplast provided the original purchase invoices from Croatia. However, Bojoplast was unable to demonstrate a link between the two sets of documents. The Panel finds that Bojoplast failed to provide sufficient evidence of the presence of the materials in Iraq as at the date of Iraq's invasion and occupation of Kuwait.

(b) Equipment

307. Bojoplast provided evidence which demonstrated that it had several items of domestic equipment in Iraq as at 2 August 1990. However, the Panel observes that all of these items were purchased in 1983 and would have reached the end of their working lives by 2 August 1990. The Panel, therefore, recommends no compensation for the items of domestic equipment as Bojoplast failed to demonstrate that it had suffered a loss.

308. The claim for equipment includes a claim for three vehicles in the amount of USD 39,700. Bojoplast provided evidence which demonstrated that it purchased these vehicles in Kuwait and that they were imported into Iraq. The signed acknowledgement from FDSP-Belgrade of 23 September 1990 specifically indicates that the three vehicles were present in Iraq as at that date. The Panel finds that Bojoplast provided sufficient evidence of its title to or right to use, and the presence in Iraq of, the three vehicles. The Panel further finds that Bojoplast suffered the loss of the three vehicles as a direct result of Iraq's invasion and occupation of Kuwait.

309. In valuing the loss, the Panel notes that it does not accept Bojoplast's valuation of these vehicles. The Panel applied depreciation rates appropriate for such items and concluded that the three vehicles had a value of USD 11,071 as at 23 September 1990, the date upon which FDSP Belgrade took the three vehicles into its safekeeping.

3. Recommendation

310. The Panel recommends compensation in the amount of USD 11,071 for loss of tangible property.

D. Payment or relief to others

1. Facts and contentions

311. Bojoplast seeks compensation in the amount of USD 3,157 for payment or relief to others. The claim is for the alleged costs of evacuating four of Bojoplast's employees from Iraq via Jordan to the Federal Republic of Yugoslavia on 19 September 1990 (airfares and other transport costs), and their salaries and daily allowances.

312. Bojoplast originally classified the claim for payment or relief to others as part of its claim for "other losses (expenses caused by evacuation)", but the alleged losses in the amount of USD 3,157 are more appropriately classified as payment or relief to others.

2. Analysis and valuation

313. In support of its claim, Bojoplast provided an invoice for the airfares dated 19 September 1990, issued by Yugoslav Airlines, and some internal acknowledgements of payment for travel expenses dated September 1990.

314. In the article 34 notification, Bojoplast was asked to provide further supporting evidence such as contracts of employment and evidence of payment of the invoice for the airfares. It failed to reply. Bojoplast provided no evidence in relation to the claim for salaries and wages. Finally, Bojoplast failed to demonstrate that the costs were temporary and extraordinary in nature.

315. The Panel recommends no compensation for payment or relief to others as Bojoplast failed to provide sufficient information and evidence to establish its claim.

3. Recommendation

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

E. Financial losses

1. Facts and contentions

317. Bojoplast seeks compensation in the amount of USD 433,425 for financial losses. Bojoplast stated that this amount represented the amount of interest on monies owed to it by the investor SCT, payable under the deferred payment agreement and due in 1990. Interest was payable at an annual rate of 5 per cent. Bojoplast provided no other information about this claim, but the claim appears to relate to Bojoplast's claim for contract losses in relation to SCT (see paragraphs 262-263, supra).

318. Bojoplast originally classified the claim for financial losses as "other losses (balance of interests)", but the losses are more appropriately classified as financial losses.

2. Analysis and valuation

319. The claim relates to interest on underlying contract losses which the Panel has found are not compensable (see paragraph 279, supra). Bojoplast failed to establish that the alleged loss is the direct result of Iraq's invasion and occupation of Kuwait. The Panel recommends no compensation for the claim for financial losses.

3. Recommendation

320. The Panel recommends no compensation for financial losses.

F. Other losses

1. Facts and contentions

321. Bojoplast seeks compensation in the amount of USD 57,616 for other losses. The claim consists of expenses arising out of evacuation and repair to vehicles (USD 14,018), rent for a house (USD 25,460) and a loss item called "general common company's expenses" (USD 18,138).

322. The expenses in the amount of USD 14,018 are alleged to relate to the costs of evacuation and repair to vehicles and were incurred between 1988 and 22 September 1990. Prior to 2 August 1990, they included purchase of such items as water pumps. The expenses incurred after 2 August 1990 included food, water, petrol, mechanical repairs, and purchase of some items for the ongoing projects. Bojoplast stated that it incurred all of these expenses (except those for ongoing work) in anticipation of a potential evacuation from Iraq.

323. The rental payment was made in June 1990 for one year's rental in advance for a house in Baghdad.

324. Bojoplast calculated the "general common company's expenses" by totalling some components of its claim for other losses and some components of its claim for tangible property losses in the amount of USD 90,690. It then sought compensation for 20 per cent of those costs. Bojoplast did not provide any further information about the basis of this claim.

325. Bojoplast originally sought compensation in the amount of USD 60,773 for other losses, but the Panel has reclassified a component of the claim in the amount of USD 3,157 as a claim for payment or relief to others (see paragraph 312, supra).

2. Analysis and valuation

(a) Evacuation and repair expenses

326. In support of its claim, Bojoplast provided a large number of invoices for the items purchased and the services performed, and statements by some of the employees who remained in Iraq after 2 August 1990 of expenses which were incurred.

327. Many of the expenses were incurred before 2 August 1990. Such costs by their very nature cannot be said to have been incurred as a direct result of Iraq's invasion and occupation of Kuwait.

328. The balance of the expenses were incurred after 2 August 1990. In relation to the majority of these expenses (a large proportion of which related to vehicle maintenance), Bojoplast failed to demonstrate that it would not have had to incur these costs had Iraq's invasion and occupation of Kuwait not taken place. The costs appear to be items of normal maintenance. The Panel recommends no compensation for these expenses because Bojoplast failed to establish that the costs were incurred as a direct result of Iraq's invasion and occupation of Kuwait.

329. Bojoplast allegedly incurred expenses after 2 August 1990 for food and water in the amount of IQD 240 (USD 815). Bojoplast submitted evidence which demonstrated that some of its employees purchased these items for the purpose of an intended evacuation. Bojoplast's employees were not free to leave Iraq at the time at which the items were purchased. However, Bojoplast did not provide any evidence that it reimbursed the employees for these costs. The Panel recommends no compensation because Bojoplast failed to demonstrate that it suffered a loss.

(b) Advance rental

330. In support of its claim, Bojoplast provided a receipt from the Iraqi landlord relating to the rental payment in the amount claimed for the following year.

331. Bojoplast asserted that it was unable to use its premises for a portion of the term for which it had already paid. In the majority of similar claims which the Panel has previously reviewed, the Panel has found that such claims are claims for overheads which were not directly chargeable to the employer. Bojoplast did not submit any evidence, or indeed assert, that the payments were directly chargeable to any employer. The Panel recommends no compensation for the claim for rent because Bojoplast failed to demonstrate that it is a loss arising as a direct result of Iraq's invasion and occupation of Kuwait.

(c) "General common company's expenses"

332. Bojoplast failed to provide any detailed information about, or any evidence supporting, this claim. The Panel recommends no compensation because Bojoplast failed to demonstrate that it incurred a loss and that the loss arose as a direct result of Iraq's invasion and occupation of Kuwait.

3. Recommendation

333. The Panel recommends no compensation for other losses.

G. Recommendation for Bojoplast

Table 18. Recommended compensation for Bojoplast

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	810,648	nil
Loss of profits	415,017	nil
Loss of tangible property	79,148	11,071
Payment or relief to others	3,157	nil
Financial losses	433,425	nil
Other losses	57,616	nil
Total	1,799,011	11,071

334. Based on its findings regarding Bojoplast's claim, the Panel recommends compensation in the amount of USD 11,071. The Panel finds the date of loss to be 23 September 1990.

VI. DEUTZ SERVICE INTERNATIONAL GMBH

335. Deutz Service International GmbH ("Deutz Service") is a corporation organised according to the laws of Germany operating in the manufacturing industry. It brings the claim on behalf of itself and its parent company, Deutz AG (formerly called Klöckner Humboldt Deutz AG).

336. In the "E" claim form, Deutz Service sought compensation in the amount of 8,127,332 Deutsche Mark (DEM) (USD 5,203,158) for contract losses and interest. The Panel has reclassified some elements of Deutz Service's claim for the purposes of this report. The Panel therefore considered the amount of DEM 8,127,332 (USD 5,203,158) for contract losses, a "subsidiary motion", financial losses and interest, as follows:

Table 19. Deutz Service's claim

Claim element	Claim amount (USD)
Contract losses	352,113
"Subsidiary motion"	3,169,014
Financial losses	1,557,713
Interest (as at 31 December 1993)	124,318
Total	5,203,158

A. Contract losses and "subsidiary motion"

1. Facts and contentions

(a) Contract losses

337. Deutz Service seeks compensation in the amount of DEM 550,000 (USD 352,113) for contract losses. The claim arises out of Deutz Service's presence in Iraq, where it carried out works under a Technical Management and Operating Contract dated 19 April 1984 (the "technical contract") in relation to the Muthanna-Samawa Cement Project in Iraq (the "Cement Project"). The employer was the Iraqi Cement State Enterprise ("Iraqi Cement"). At the date upon which it entered into the contract, Deutz Service was called KHD Engineering GmbH, and Iraqi Cement was called the Southern Cement State Enterprise.

338. Deutz Service stated that it entered into the technical contract on behalf of its parent company, Deutz AG. In 1991, Deutz AG assigned its interest in the technical contract to Deutz Service.

339. Deutz Service seeks compensation for contract losses alleged to have arisen under the technical contract with Iraqi Cement and subsequent refinancing arrangements. It also seeks compensation for related losses alleged to have arisen under a "subsidiary motion". The claim for the "subsidiary motion" is discussed, at paragraphs 355-356, infra.

340. Under the technical contract, Iraqi Cement engaged Deutz Service to provide technical and management services in relation to the Southern Cement Plant in Muthanna (Samawa) in Iraq (the "Plant"). The Plant was in the process of construction by a related company of Deutz Service, KHD Humboldt Wedag AG ("KHD Humboldt"), under a contract with Iraqi Cement entered into in 1981 (the "construction contract"). The Panel considers the related claim by KHD Humboldt at paragraphs 403-436, infra.

341. Under the construction contract, KHD Humboldt agreed to build the Plant. The specifications of the construction contract provided that the Plant would produce a daily output of 6,400 metric tons of clinker, for 300 days a year. Deutz Service's principal obligation was to ensure that the Plant achieved the performance which KHD Humboldt had contracted to provide.

342. The value of the technical contract was not fixed but the upper limit or maximum value was DEM 80,550,000. Thirty-five per cent of the contract value was payable in Iraqi dinars. The duration of the contract works was to be 32 months. The contract works consisted of two phases. In the first phase of eight months, the maximum value of the contract was DEM 22,500,000. This phase involved the commissioning of the Plant and managing the quarries connected to the Plant. The phase was meant to end shortly after the issue of the Provisional Acceptance Certificate under the construction contract. In the second phase of 24 months, the maximum value of the contract was DEM 58,050,000. This phase consisted of managing the Plant and the quarries, and training Iraqi Cement's employees. This phase appears to have tracked the commissioning and maintenance periods under the construction contract. In any event, the parties agreed that the contract should end by 31 December 1986.

343. Deutz Service stated that it carried out work under the technical contract between 1 February and 7 July 1986. It did not provide any information as to the total value of the work it carried out. On 13 July 1986, Iraqi Cement issued the Final Acceptance Certificate under the construction contract, effective from 10 July 1986.

344. Under the technical contract, payment was essentially to be made on a monthly basis. However, this payment arrangement was superseded by a deferred payment agreement between Iraqi Cement and other parties related to Deutz Service. The background to the negotiation of the new payment terms was as follows.

345. On 23 November 1983, Iraqi Cement and Société Générale-Elsässische Bank, Frankfurt ("Société Générale") entered into a loan agreement (the "loan agreement"). Société Générale is a limited partnership organised according to the laws of Germany. Under the loan agreement, 90 per cent of Iraqi Cement's payments to be made in Deutsche Mark to KHD Humboldt under the construction contract, which fell due in 1983 or 1984, were to be financed by Société Générale (the "foreign currency payments"). Iraqi Cement was required to repay Société Générale in 1985 and 1986. Iraqi Cement agreed to pay KHD Humboldt the balance of 10 per cent of the payments due in Deutsche Mark, as well as all payments due in Iraqi dinars, as and when they fell due under the construction contract. Iraqi Cement was also required to pay interest. The loan was guaranteed by the Central Bank of Iraq (the "Central Bank") and by KHD Humboldt. Société Générale duly advanced the funds to Iraqi Cement.

346. There were subsequent amendments and extensions to the loan agreement, reflecting late or partial repayments. The amendments and extensions affected the repayment terms of the loan agreement.

347. Deutz Service asserted that in 1986, the Governments of Germany and Iraq agreed that amounts owing to certain German contractors (including the amounts owing under the construction contract) would be covered by an agreement under which German banks such as Société Générale would receive the proceeds of the sale of Iraqi oil. This payment mechanism continued until the date of Iraq's invasion and occupation of Kuwait. Under the mechanism, payments under the loan agreement were made on behalf of Iraqi Cement to Société Générale.

348. It seems likely that Iraqi Cement fell behind in its payments of the monies payable to Deutz Service under the technical contract. On 9 October 1989, Deutz Service and Iraqi Cement entered into an agreement to resolve payment of outstanding monies (the "Final Document Agreement"). Under the Final Document Agreement, Iraqi Cement agreed that it owed Deutz Service the amounts of DEM 5,500,000 and IQD 18,000. Iraqi Cement agreed to pay the outstanding amounts as follows:

(a) The amount of DEM 550,000 to be paid to Deutz Service in 10 equal monthly instalments (the "cash portion");

(b) The amount of DEM 4,950,000, to be financed by a loan by Société Générale, and to be paid to Deutz Service in one lump sum by 31 December 1989 at the latest. The loan was to be made under the provisions of the loan agreement (the "financed amount"); and

(c) The amount of IQD 18,000, to be paid immediately.

349. The financing aspect of the repayment envisaged by the Final Document Agreement duly led, on 12 October 1989, to the extension of the loan agreement between Société Générale and Iraqi Cement. The parties called this extension "Supplement No. 4". Société Générale agreed to loan to Iraqi Cement the amount of DEM 4,950,000 (i.e., the financed amount) under Supplement No. 4. The financed amount fell due and payable to Société Générale between 1992 and 1994. Deutz Service guaranteed Iraqi Cement's obligations under Supplement No. 4 in respect of the financed amount.

350. Deutz Service alleged that although Société Générale loaned Iraqi Cement the monies in accordance with Supplement No. 4, Iraqi Cement paid Deutz Service neither the cash portion nor the financed amount. Nor did it repay Société Générale.

351. Deutz Service alleged that Iraqi Cement's failure to honour its obligations at this time appears to have been due to the collapse of the Plant's clinker transport system. Iraqi Cement notified Deutz Service of this collapse on 29 November 1989. Although any responsibility for the collapse as between Deutz Service and KHD Humdoldt would presumably have been KHD Humboldt's, Iraqi Cement seems to have taken the view that it could and would suspend payment to Deutz Service because the two companies were related.

352. On 7 February 1990, KHD Humboldt and Iraqi Cement entered into an agreement under which KHD Humboldt agreed to provide components and engineering supervisory services for the reconstruction of the clinker transport system (the "reconstruction agreement"). Iraqi Cement agreed to make its best endeavours to arrange payment of the amounts owing to KHD Humboldt. Deutz Service asserted that on the same date, Iraqi Cement instructed the Central Bank to transfer the overdue cash portion instalments to Deutz Service. Deutz Service alleged that KHD Humboldt's entry into the reconstruction agreement was agreed to lead to payment of the amounts outstanding under the Final Document Agreement to Deutz Service as well as payment of the amounts owed to KHD Humboldt. Deutz Service was not a party to the reconstruction agreement.

353. Work on-site under the reconstruction agreement was due to start before October 1990. In the meantime, KHD Humboldt had acquired the necessary components and made arrangements for its employees to go to Iraq "by late spring 1990". KHD Humboldt also sent drawings to Iraqi Cement for its approval in March 1990. In June 1990, Iraqi Cement transferred the amount of DEM 140,000 to KHD Humboldt in payment of its contribution towards the manufacture of parts for the repair of the clinker transport system. Manufacture of these items was in progress as at the date of Iraq's invasion and occupation of Kuwait. The invasion prevented further performance of the reconstruction agreement. Deutz Service contended that this prevented payment of the cash portion.

354. The transfers authorised by Iraqi Cement on 7 February 1990 never took place. Deutz Service therefore seeks compensation for the amount of the cash portion due under the technical contract, i.e. DEM 550,000. However, it does not rely on the technical contract, but rather on Supplement No. 4 and the Final Document Agreement. Deutz Service makes no claim in relation to the reconstruction agreement.

(b) "Subsidiary motion"

355. Deutz Service seeks compensation in the amount of DEM 4,950,000 (USD 3,169,014) for a "subsidiary motion". It stated that pursuant to its guarantee of Iraqi Cement's obligations in favour of Société Générale, Deutz Service was required to pay the financed amount under Supplement No. 4 to Société Générale after 2 August 1990 when it became clear that Iraqi Cement would not meet its obligations under the loan agreement. It advised the Commission that Société Générale had submitted a claim to the Commission for the same loss even though Société Générale had already been compensated by Deutz Service. Deutz Service stated that the claim for the "subsidiary motion" was only to be considered if Société Générale's claim before the Commission was rejected.

356. The Panel notes that Société Générale's claim was considered in the "Report and recommendations made by the Panel of Commissioners concerning the fifth instalment of 'E2' Claims" (S/AC.26/2000/17) (the "Fifth 'E2' Report"). The "E2" Panel rejected Société Générale's claim as being outside the jurisdiction of the Commission on the basis of the "'arising prior to' exclusion".

2. Analysis and valuation

(a) Contract losses

357. The Panel has defined the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) to limit the jurisdiction of the Commission to exclude debts of the Government of Iraq if the performance relating to that obligation took place prior to 2 May 1990.

358. The Panel finds that for the purposes of the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) Deutz Service had a contract with Iraq.

359. Deutz Service stated in its reply to the article 34 notification that it completed its work under the technical contract by 7 July 1986. In any event, in the Final Document Agreement (dated 9 October 1989), Iraqi Cement acknowledged that the amounts for which Deutz Service seeks compensation for contract losses, for the "subsidiary motion" and for financial losses (see paragraphs 365–368, infra), were due and owing to Deutz Service at that date.

360. The Panel finds that the contract losses alleged by Deutz Service relate entirely to work that was performed prior to 2 May 1990. Accordingly, the Panel recommends no compensation for contract losses as they relate to debts and obligations of Iraq arising prior to 2 August 1990 and, therefore, are outside the jurisdiction of the Commission.

361. The Panel finds that for the purposes of Security Council resolution 687 (1991), the deferred payment agreement (in the form of the loan agreement, Supplement No. 4 and the Final Document Agreement) did not have the effect of novating the debts.

(b) "Subsidiary motion"

362. Deutz Service made the payments to Société Générale for which it seeks compensation after 2 August 1990. Its obligations to make these payments arose under its 1989 guarantee of Iraqi Cement's repayment obligations under the loan agreement. However, as the "E2" Panel decided in the Fifth "E2" Report in relation to the claim submitted by Société Générale, this Panel finds that the performance which created the debt underlying the "subsidiary motion" was carried out prior to 2 May 1990.

363. The Panel recommends no compensation for the "subsidiary motion" as it relates to debts and obligations of Iraq arising prior to 2 August 1990 and, therefore, is outside the jurisdiction of the Commission.

3. Recommendation

364. The Panel recommends no compensation for contract losses and for the "subsidiary motion".

B. Financial losses

1. Facts and contentions

365. Deutz Service seeks compensation in the amount of DEM 2,433,148 (USD 1,557,713) for financial losses. The claim represents the amount of interest on the "subsidiary motion" which Société Générale "has charged, and [Deutz Service] is required to pay", from 2 August 1990 until 31 December 1993.

366. Deutz Service originally classified the claim for financial losses as a claim for interest, but it is more properly classified as a claim for financial losses.

2. Analysis and valuation

367. The claim relates to interest on underlying losses which the Panel has found are not compensable. Deutz Service has failed to establish that the alleged loss is the direct result of Iraq's invasion and occupation of Kuwait. The Panel recommends no compensation for financial losses.

3. Recommendation

368. The Panel recommends no compensation for financial losses.

C. Interest

369. As the Panel recommends no compensation for contract losses, there is no need for the Panel to determine the date of loss from which interest would accrue.

D. Recommendation for Deutz Service

Table 20. Recommended compensation for Deutz Service

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	352,113	nil
"Subsidiary motion"	3,169,014	nil
Financial losses	1,557,713	nil
Interest (as at 31 December 1993)	124,318	nil
Total	5,203,158	nil

370. Based on its findings regarding Deutz Service's claim, the Panel recommends no compensation.

VII. DIWI CONSULT GMBH

371. DIWI Consult GmbH ("DIWI") is a corporation organised according to the laws of Germany operating in the construction industry.

372. In the "E" claim form, DIWI sought compensation in the amount of DEM 4,129,916 (USD 2,643,993) for contract losses and interest. However, in the correspondence attached to the "E" claim form, DIWI advised the Commission that it sought compensation in the lesser amount of DEM 3,349,912. DIWI calculated this figure on the basis that it had received compensation in the amount of DEM 742,543 from Hermes Kreditversicherungs AG ("Hermes"), the German export credit agency. This compensation related to the claim for contract losses.

373. DIWI also stated that as a result of the receipt of compensation from Hermes, it had initially calculated the claim for interest in a higher amount than that stated in table 21, infra. DIWI requested the Commission to reduce its claim for interest by the amount of DEM 37,461. DIWI consequently reduced its claim in the amount of DEM 4,129,916 by the amount of DEM 780,004 (USD 499,363) to reach the amount of DEM 3,349,912 (USD 2,144,630).

374. The Panel therefore considered DIWI's claim for contract losses and interest in the amount of DEM 3,349,912 (USD 2,144,630), as follows:

Table 21. DIWI's claim

Claim element	Claim amount (USD)
Contract losses	1,476,436
Interest	668,194
Total	2,144,630

A. Contract losses

1. Facts and contentions

375. DIWI seeks compensation in the amount of DEM 2,306,193 (USD 1,476,436) for contract losses allegedly incurred in connection with a contract for the supervision of the construction of an airport in Basrah, Iraq. The claim relates to unpaid invoices (DEM 1,413,920) and unpaid retention monies (DEM 892,273).

376. In the "E" claim form, DIWI submitted a claim for contract losses in the amount of DEM 3,048,736. However, it reduced its claim by the amount of DEM 742,543 to take account of compensation from Hermes. The Panel therefore deducted this compensation from the claim for contract losses (DEM 3,048,736 less DEM 742,543 equals DEM 2,306,193).

377. DIWI alleged that it suffered losses arising out of the Basrah International Airport Project (the "Airport Project"), which it carried out in Iraq. Under a contract with the State Corporation of Roads and Bridges, Iraq (the "State Corporation") dated 11 December 1980 (the "supervision contract"), DIWI provided design review and construction management services for the Airport Project. It did not provide any more detail than this in relation to the services which it provided. However, in the related claim submitted by Strabag AG ("Strabag"), which concerns the construction of the airport, Strabag advised the Commission that DIWI was a consultant to the State Corporation. Strabag and its joint venture partners (the "joint venture") constructed the airport pursuant to a contract dated 12 November 1980 (the "construction contract"). The Panel considers Strabag's claim at paragraphs 505-558, infra.

378. The initial value of the supervision contract was IQD 3,432,157. This amount covered the work to be performed during the first three years of the contract. The State Corporation agreed to reimburse DIWI on a "man-month rate" basis. Seventy per cent of the payments were to be made in Deutsche Mark and 30 per cent were to be made in Iraqi dinars.

379. The duration of the supervision and the construction contracts was expected to be five years - three years for the design review and construction management and two years for the maintenance period. Due to the war between Iran and Iraq, the construction contract had to be extended. Consequently, the supervision contract was formally extended in December 1985. Under the extension, an upper limit of IQD 2,500,000 was agreed for DIWI's services. There appears to have been an increase in the agreed "ceiling" by the amount of IQD 353,467 in November 1988.

380. Under article 15.8 of the supervision contract, the State Corporation was entitled to deduct 10 per cent from each monthly payment up to a total of 5 per cent of the value of the supervision contract as retention monies. The State Corporation was to release 2.5 per cent of the value of the supervision contract to DIWI at the time that the initial completion certificates were issued for the construction contract. The remaining 2.5 per cent of the value of the supervision contract was to be released upon issue of the final completion certificates at the end of the maintenance period.

381. According to DIWI, it carried out work between 1981 and 1989 under the supervision contract. It asserted that the construction contract was "deemed to have been completed" on 18 August 1987. At that time, a completion certificate was issued to the joint venture led by Strabag and the maintenance period commenced. DIWI stated that this meant that the end of the maintenance period of the construction contract was stipulated to be one year after the issue of the completion certificate for the civil works (i.e. 18 August 1988) and two years after the issue of the completion certificate for all mechanical and electrical works (i.e. 18 August 1989), unless specific defects in the work had been identified. The same period of maintenance consequently applied to the supervision contract.

382. In relation to the issue of payment for its services, DIWI stated that although the State Corporation at times delayed paying DIWI's invoices, the payments were made on a regular basis until early 1988. The first part of DIWI's claim relates to invoices dated from early 1988. DIWI alleged that the Deutsche Mark component of its invoices for February 1988, and from May 1988 to December 1988, were not paid. DIWI also stated that the Iraqi dinar and the Deutsche Mark

components of all invoices for services rendered from December 1988 until December 1989 were not paid.

383. DIWI maintained that the fact that the Iraqi dinar component of its invoices up to November 1988 was paid proves that the State Corporation did not dispute the services rendered by DIWI. It asserted that the fact that the Deutsche Mark component of its monthly invoices was not paid was "apparently due to financial problems experienced by Iraq at that time and can be construed under no circumstances as being related to the ... Airport Project or to DIWI's performance under the contract".

384. DIWI alleged that in 1989, the State Corporation assured DIWI that the payments were being processed. According to DIWI, despite these assurances, it received no payments from the State Corporation.

385. During 1989, it was discovered that damage had occurred to the foundations of some of the Airport Project buildings due to the presence of chloride in the ground. DIWI stated that the joint venture and itself made independent extensive examinations in order to identify the cause and the extent of such damage and submitted proposals to the State Corporation for remedial and rectification works.

386. At a meeting held on 17 December 1989, the State Corporation held DIWI and the joint venture responsible for the damage and advised that payment of invoices would not be made and no formal extension of the supervision contract would be granted until the matter was fully resolved. DIWI alleged that despite this finding, it was expected to continue providing its services without payment. DIWI rejected the allegations and advised the State Corporation that no personnel would work in Iraq until the outstanding payments were made and the contractual basis for continuation of the supervision contract was confirmed.

387. In December 1989, when no further payments were received, DIWI withdrew almost all of its personnel from the project site. DIWI submitted its final account for the construction works to the State Corporation at this time.

388. On 20 February 1990, the State Corporation telexed DIWI advising that the supervision contract would be extended until 31 March 1990 and that appropriate measures would be taken to secure further extensions if they became necessary. DIWI alleged that at the same time, DIWI's representatives in its Baghdad office were verbally assured (presumably by the State Corporation) that DIWI would receive payment of all outstanding invoices.

389. On 7 May 1990, the State Corporation wrote to DIWI advising that the State Corporation had received approval to pay DIWI a "major" (but unspecified) portion of its invoices.

390. On 31 July 1990, DIWI decided to send a small team to Iraq to continue work on the Airport Project. However, the team was never sent due to Iraq's invasion and occupation of Kuwait. DIWI did not receive any further payments from the State Corporation.

391. DIWI stated that the total of its unpaid invoices was DEM 2,156,463. It deducted the amount of DEM 742,543 from its claim in relation to the unpaid invoices for the compensation it received from Hermes. It therefore seeks compensation in the amount of DEM 1,413,920 in relation to the unpaid invoices.

392. It also seeks compensation for DEM 892,273 for unpaid retention monies. DIWI alleged that the State Corporation deducted retention monies at irregular intervals throughout the contract period. As a result, at the time of the issue of the initial completion certificates in August 1987, an amount of less than 5 per cent of all the invoices submitted had accrued. It was allegedly agreed between DIWI and the State Corporation that 2.5 per cent of the contract sum would continue to be withheld until the issue of the final completion certificate, and the amount in excess of the figure of 2.5 per cent would be paid to DIWI. The State Corporation paid this latter amount to DIWI in August 1988. DIWI stated that part of the condition of release of the remaining 2.5 per cent of the retention monies was that DIWI complete its obligations under the supervision contract, which was deemed to be when DIWI issued its "final account certificate".

393. DIWI issued the "Final Account" for the Airport Project (presumably the final completion certificate) in December 1989. The "Final Account" allegedly evidenced the completion of DIWI's obligations. DIWI asserted that it has not received the remaining 2.5 per cent in retention monies from the State Corporation in the amount of DEM 892,273.

2. Analysis and valuation

394. In support of its claim for contract losses, DIWI provided, inter alia, the supervision contract, the unpaid invoices (including retention payment components), correspondence with the State Corporation and evidence of the State Corporation's payment of some components of the invoices.

395. The Panel has defined the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) to limit the jurisdiction of the Commission to exclude debts of the Government of Iraq if the performance relating to that obligation took place prior to 2 May 1990.

396. The Panel finds that for the purposes of the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) DIWI had a contract with Iraq.

397. In relation to the claim for unpaid invoices, DIWI asserted that all of the invoices related to work carried out between February 1988 (invoice No. 85A) and November 1989 (invoice No. 106A). The Panel finds that the claim for the unpaid invoices relates entirely to work that was performed prior to 2 May 1990.

398. The Panel reaches the same conclusion in relation to the claim for the retention monies. According to DIWI, these were payable in December 1989 when it issued the Final Account. Although DIWI continued to be involved with the Airport Project after this time as a result of the allegations concerning the chloride damage, and in February 1990 the State Corporation unilaterally extended the supervision contract until 31 March 1990, DIWI appeared to formulate its claim on the basis that the retention monies were due at the end of 1989. In the article 34 notification, DIWI was

requested to provide more information about its claim for retention monies. It did not respond to the article 34 notification. The Panel accordingly finds that the retention monies were payable in December 1989 at the time when DIWI issued the Final Account.

399. The Panel recommends no compensation for contract losses as they relate to debts and obligations of Iraq arising prior to 2 August 1990 and, therefore, are outside the jurisdiction of the Commission.

3. Recommendation

400. The Panel recommends no compensation for contract losses.

B. Interest

401. As the Panel recommends no compensation for contract losses, there is no need for the Panel to determine the date of loss from which interest would accrue.

C. Recommendation for DIWI

Table 22. Recommended compensation for DIWI

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	1,476,436	nil
Interest	668,194	nil
Total	2,144,630	nil

402. Based on its findings regarding DIWI's claim, the Panel recommends no compensation.

VIII. KHD HUMBOLDT WEDAG AG

403. KHD Humboldt Wedag AG ("KHD Humboldt") is a corporation organised according to the laws of Germany operating in the construction industry. It brings the claim on behalf of itself and its parent company, Deutz AG (formerly called Klöckner Humboldt Deutz AG).

404. In the "E" claim form, KHD Humboldt sought compensation in the amount of DEM 27,936,066 (USD 17,884,805) for contract losses and interest. In its reply to the article 34 notification, KHD Humboldt advised the Commission that it had received a payment in the amount of DEM 128,931 from Société Générale-Elsässische Bank, Frankfurt ("Société Générale"), a limited partnership organised according to the laws of Germany. Société Générale's role in the claim is explained at paragraph 413, infra. By way of this payment, KHD Humboldt effectively received a refund of monies which it had already paid to Société Générale. The refund relates to the claim for a "subsidiary motion", which KHD Humboldt originally classified as a component of its claim for contract losses. The amount of the total claim therefore decreased from DEM 27,936,066 to DEM 27,807,135.

405. The Panel has reclassified some elements of KHD Humboldt's claim for the purposes of this report. The Panel therefore considered the amount of DEM 27,807,135 (USD 17,802,263) for contract losses, a "subsidiary motion", financial losses and interest, as follows:

Table 23. KHD Humboldt's claim

Claim element	Claim amount (USD)
Contract losses	336,487
"Subsidiary motion"	10,050,765
Financial losses	7,267,158
Interest (as at 31 December 1993)	147,853
Total	17,802,263

A. Contract losses and "subsidiary motion"

1. Facts and contentions

(a) Contract losses

406. KHD Humboldt seeks compensation in the amount of DEM 525,592 (USD 336,487) for contract losses. The claim arises out of KHD Humboldt's presence in Iraq, where it constructed a cement factory pursuant to a construction contract dated 30 March 1981 (the "construction contract"). KHD Humboldt seeks compensation for contract losses alleged to have arisen under the construction contract and subsequent refinancing arrangements. At the date upon which it entered into the construction contract, the employer on the project was the State Organization for Industrial Design and

Construction. The employer became the State Organization of Industrial Projects in 1983 and the Iraqi Cement State Enterprise in 1988. The collective employers are referred to as "Iraqi Cement" in this report.

407. KHD Humboldt stated that it entered into the construction contract on behalf of its parent company, Deutz AG. In 1991, Deutz AG assigned its interest in the contract to KHD Humboldt.

408. KHD Humboldt also seeks compensation for losses alleged to arise under a "subsidiary motion". The claim for the "subsidiary motion" is discussed at paragraphs 419-420, infra.

409. Under the construction contract, Iraqi Cement engaged KHD Humboldt to construct the Southern Cement Plant in Muthanna (Samawa) in Iraq (the "Plant"). KHD Humboldt was required to construct a factory with the ability to produce two million tons of cement a year. The value of the contract was DEM 525,000,000. The duration of the contract works was to be 36 months.

410. KHD Humboldt did not provide much information about the developments in the contract works after the construction contract was signed. It sub-contracted some works. KHD Humboldt stated that until the end of 1982, Iraqi Cement met its payment obligations under the construction contract. However, in 1983, Iraqi Cement experienced problems in the timely repayment of its obligations to KHD Humboldt.

411. Consequently, in November 1983, the parties agreed on certain refinancing arrangements in respect of Iraqi Cement's obligation to pay KHD Humboldt. These refinancing arrangements are described in the claim of Deutz Service at paragraphs 344-347, supra.

412. On 13 July 1986, Iraqi Cement issued the Final Acceptance Certificate under the construction contract, effective from 10 July 1986. Despite the issue of the Final Acceptance Certificate, KHD Humboldt appears to have provided some technical assistance after this date in the form of training employees of Iraqi Cement to operate the plant. KHD Humboldt stated that this work was completed in 1986.

413. Iraqi Cement fell behind in its payment of monies which it owed KHD Humboldt. The deferred payments were themselves deferred. On 8 March 1989, Société Générale and Iraqi Cement extended the scope of the loan agreement referred to at paragraph 345, supra, to cover the payment of the amount of DEM 2,730,832. The parties called this extension "Supplement No. 3". KHD Humboldt alleged that Iraqi Cement agreed to pay the amount of DEM 2,730,832 to KHD Humboldt immediately upon receipt of monies from Société Générale. In any event, according to the terms of Supplement No. 3, the amount of DEM 2,730,832 was due on 8 March 1989. KHD Humboldt guaranteed Iraqi Cement's obligations under the loan agreement and Supplement No. 3 in respect of the extensions to, and further deferrals under, the loan agreement, including the cash portion.

414. Iraqi Cement did not repay the amount of DEM 2,730,832. The parties' relationship deteriorated in late November 1989 when the clinker transport and storage system at the Plant collapsed. Iraqi Cement accused KHD Humboldt of poor design and construction. Iraqi Cement

refused to pay KHD Humboldt until KHD Humboldt agreed to restore the plant. KHD Humboldt denied responsibility for the collapse.

415. On 7 February 1990, KHD Humboldt and Iraqi Cement entered into an agreement under which KHD Humboldt agreed to provide components and engineering supervisory services for the reconstruction of the clinker transport system (the "reconstruction agreement"). Each party effectively bore its own costs, but Iraqi Cement agreed to make its best endeavours to arrange payment of the amount of DEM 2,730,832 (the "cash portion"). ICSE consequently requested the Central Bank to release the cash portion to KHD Humboldt on the same date. It also requested the Central Bank to release the amount of DEM 550,000 to a related company of KHD Humboldt, Deutz Service International GmbH ("Deutz Service"). The Panel considers the related claim by Deutz Service in this report at paragraphs 335-370, supra.

416. KHD Humboldt had acquired the necessary components and made arrangements for its employees to go to Iraq "by late spring 1990". KHD Humboldt also sent drawings to Iraqi Cement for its approval in March 1990. In June 1990, Iraqi Cement transferred the amount of DEM 140,000 to KHD Humboldt in payment of its contribution towards the manufacture of parts for the repair of the clinker transport system. Manufacture of these items was in progress as at the date of Iraq's invasion and occupation of Kuwait, and the invasion prevented further performance of the February 1990 agreement.

417. In the article 34 notification, KHD Humboldt was asked to explain the relevance of the reconstruction agreement to the claim by Deutz Service. That was because in the claim by Deutz Service, a link was suggested between KHD Humboldt's entry into the agreement of 7 February 1990 and resumption of outstanding payments to Deutz Service under its contract with Iraqi Cement. KHD Humboldt did not provide a satisfactory explanation, but KHD Humboldt provided evidence that Iraqi Cement used the collapse of the clinker transport system as a reason to not pay both KHD Humboldt and Deutz Service the amounts which it owed them.

418. The transfers authorised by Iraqi Cement on 7 February 1990 never took place. KHD Humboldt, therefore, seeks compensation for the amount of DEM 2,730,832 due under the construction contract and Supplement No. 3, less amounts which it has received as compensation from other parties involved in the transaction, including sub-contractors and Hermes (DEM 2,205,240). The balance, in the amount of DEM 525,592 (USD 336,487), is effectively the self-insured component of the cash portion.

(b) "Subsidiary motion"

419. KHD Humboldt seeks compensation in the amount of DEM 15,699,295 (USD 10,050,765) for a "subsidiary motion". It stated that pursuant to its guarantee of Iraqi Cement's obligations in favour of Société Générale, KHD Humboldt was required to pay to Société Générale the foreign currency payments when it became clear that Iraqi Cement would not meet its obligations under the loan agreement. It advised the Commission that Société Générale had submitted a claim to the Commission for the same loss even though Société Générale had already been compensated by KHD

Humboldt. KHD Humboldt stated that the claim for the "subsidiary motion" was only to be considered if Société Générale's claim before the Commission was rejected.

420. Société Générale's claim was considered in the Fifth "E2" Report. The "E2" Panel rejected Société Générale's claim as being outside the jurisdiction of the Commission on the basis of the "'arising prior to' exclusion".

421. The Panel refers to paragraph 404, supra, and notes that KHD Humboldt reduced the amount sought in respect of its claim for the "subsidiary motion" from DEM 15,828,226, a reduction in the amount of DEM 128,931.

2. Analysis and valuation

(a) Contract losses

422. The Panel has defined the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) to limit the jurisdiction of the Commission to exclude debts of the Government of Iraq if the performance relating to that obligation took place prior to 2 May 1990.

423. The Panel finds that for the purposes of the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) KHD Humboldt had a contract with Iraq.

424. The Final Acceptance Certificate is dated 13 July 1986 and evidences satisfactory completion of the maintenance period as at 10 July 1986. There is evidence that KHD Humboldt also provided assistance to Iraqi Cement for a short period after 10 July 1986 only. The Panel, therefore, finds that the contract losses alleged by KHD Humboldt relate entirely to work that was performed prior to 2 May 1990.

425. The Panel recommends no compensation for contract losses as they relate to debts and obligations of Iraq arising prior to 2 August 1990 and, therefore, are outside the jurisdiction of the Commission.

426. The Panel finds that for the purposes of Security Council resolution 687 (1991), the deferred payment agreement (in the form of the loan agreement and Supplement No. 3) did not have the effect of novating the debts.

427. The Panel reaches the same conclusion in relation to the reconstruction agreement. The agreement is premised on Iraqi Cement's historical failure to pay the cash portion due under the construction contract. The reconstruction agreement did not revive this obligation. Rather, it committed KHD Humboldt to carry out new obligations for which it essentially bore its own costs. It does not seek compensation for any such costs which it may have incurred under this agreement.

(b) "Subsidiary motion"

428. KHD Humboldt made the payments to Société Générale for which it seeks compensation after 2 August 1990. KHD Humboldt's obligations to make these payments arose under its 1989 guarantee

of Iraqi Cement's repayment obligations under the loan agreement. However, as the "E2" Panel decided in the Fifth "E2" Report in relation to the claim submitted by Société Générale, this Panel finds that the performance which created the debt which is the subject of the "subsidiary motion" was carried out prior to 2 May 1990.

429. The Panel recommends no compensation for the "subsidiary motion" as it relates to debts and obligations of Iraq arising prior to 2 August 1990 and, therefore, is outside the jurisdiction of the Commission.

3. Recommendation

430. The Panel recommends no compensation for contract losses and for the "subsidiary motion".

B. Financial losses

1. Facts and contentions

431. KHD Humboldt seeks compensation in the amount of DEM 11,351,300 (USD 7,267,158) for financial losses. The claim represents the amount of interest on the "subsidiary motion" which Société Générale "has charged, and [KHD Humboldt] is required to pay", from 2 August 1990 until 31 December 1993.

432. KHD Humboldt originally classified the claim for financial losses as a claim for interest, but it is more properly classified as a claim for financial losses.

2. Analysis and valuation

433. The claim relates to interest on underlying losses which the Panel has found are not compensable. KHD Humboldt has failed to establish that the alleged loss is the direct result of Iraq's invasion and occupation of Kuwait. The Panel recommends no compensation for financial losses.

3. Recommendation

434. The Panel recommends no compensation for financial losses.

C. Interest

435. As the Panel recommends no compensation for contract losses, there is no need for the Panel to determine the date of loss from which interest would accrue.

D. Recommendation for KHD Humboldt

Table 24. Recommended compensation for KHD Humboldt

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	336,487	nil
"Subsidiary motion"	10,050,765	nil
Financial losses	7,267,158	nil
Interest (as at 31 December 1993)	147,853	nil
Total	17,802,263	nil

436. Based on its findings regarding KHD Humboldt's claim, the Panel recommends no compensation.

IX. SIEMENS AG

437. Siemens AG ("Siemens") is a corporation organised according to the laws of Germany operating, inter alia, in the construction industry.

438. When Siemens originally submitted its claim to the Commission in 1993, it sought compensation in the total amount of DEM 107,685,946 (USD 68,941,067) for contract losses. The total claim consisted of 24 sub-claims. Siemens submitted a separate "E" claim form for each sub-claim. The secretariat, having reviewed all of the "E" claim forms and supporting documentation, concluded that some of the alleged losses related to construction and engineering projects in Iraq, Kuwait and the United Arab Emirates. These alleged losses (representing 11 sub-claims), in the total amount of DEM 68,425,432 (USD 43,806,294), were consequently classified as "E3" losses. The remaining 13 sub-claims are under consideration by the "E2" Panel of Commissioners.

439. In its reply to the article 34 notification, Siemens withdrew a component of its claim for contract losses under consideration by the Panel in the amount of DEM 1,939,421 because it had received compensation for these alleged losses since the date of submission of its claim.

440. The Panel has reclassified some elements of Siemens' claim for the purposes of this report. The Panel therefore considered the amount of DEM 66,486,011 (USD 42,564,668) for contract losses, payment or relief to others and interest, as follows:

Table 25. Siemens' claim

Claim element	Claim amount (USD)
Contract losses (contracts with Iraqi parties)	31,480,684
Contract losses (contracts with non-Iraqi party)	35,481
Payment or relief to others	56,613
Interest	10,991,890
Total	42,564,668

A. Contract losses (contracts with Iraqi parties)

1. Facts and contentions

441. Siemens seeks compensation in the amount of DEM 49,172,828 (USD 31,480,684) for contract losses allegedly incurred in connection with seven contracts in Iraq. The majority of the alleged losses relate to contracts for the supply of goods to Iraqi parties.

442. The alleged losses can be represented as follows:

Table 26. Siemens' claim for contract losses (contracts with Iraqi parties)

Loss item	Claim amount (DEM)	Claim amount (USD)
Claim regarding local cable and wire (sub-claim 1)	10,403	6,660
Claim regarding telecommunication equipment (sub-claim 2)	10,936	7,001
Claim regarding special telecommunication cable (sub-claim 3)	16,565	10,605
Claim regarding Daura Power Station Unit 5 and 6 (sub-claim 4)	42,888,726	27,457,572
Claim regarding 240 teleprinters plus spares (sub-claim 6)	3,512,123	2,248,478
Claim regarding turnkey supply of Central Workshop BO1 (sub-claim 7)	2,519,275	1,612,852
Claim regarding turnkey supply of Photovoltaic Plant (sub-claim 8)	214,800	137,516
Total contract losses (Iraqi parties)	49,172,828	31,480,684

(a) Sub-claim 1

443. On 8 July 1989, Siemens agreed to supply cable and wire to the North Oil Company, Kirkuk, Iraq, in the amount of DEM 10,403. Although the parties appear initially to have agreed in February 1990 that shipment would proceed in the near future, the goods were not shipped. Siemens did not explain the reason why the goods were not shipped.

444. Siemens alleged that it "confirmed … the order" on 9 and 10 May 1990. Siemens also alleged that at this time, it advised the employer that some of the items ordered were not available and suggested alternatives. Siemens stated that it informed the employer at that time that shipment would take place within three months, i.e. by 10 August 1990. However, the Panel notes that the documents which Siemens relied on (telexes) were actually dated 9 and 10 May 1989, not 1990.

445. Siemens asserted that it was prevented from sending the goods to Iraq by Iraq's invasion and occupation of Kuwait. It was unable to resell the goods. Siemens seeks compensation in the amount of DEM 10,403 (USD 6,660) for undelivered goods.

(b) Sub-claim 2

446. On 3 March 1990, Siemens agreed to supply telecommunication equipment (eight telephone boxes) to the Ministry of Industry, Baghdad, Iraq, in the amount of DEM 10,936. The employer confirmed the order on 5 July 1990. Shipment from Germany was due to take place on 31 August

1990. Siemens sub-contracted the work to an unnamed French company, which allegedly manufactured the equipment and delivered it to Siemens at the end of July 1990.

447. Siemens asserted that it was prevented from sending the goods to Iraq by Iraq's invasion and occupation of Kuwait. It was unable to resell the goods and scrapped them in 1992. It has not recovered any of its costs. Siemens seeks compensation in the amount of DEM 10,936 (USD 7,001) for undelivered goods.

(c) Sub-claim 3

448. On 11 October 1989, Siemens agreed to supply special telecommunications cables to the North Oil Company, Kirkuk, Iraq, in the amount of DEM 16,892. Some time elapsed before the goods were duly shipped from Hamburg to the port of Aqaba (Iraqi sector) on 26 July 1990.

449. Siemens asserted that the goods were stopped in Aqaba and were consequently not delivered to the employer as a direct result of Iraq's invasion and occupation of Kuwait. Siemens had already handed over the shipping documents and was unable to recover the goods. Siemens seeks compensation in the amount of DEM 16,565 (USD 10,605) for the cost of delivered (but not received) goods for which it has not been paid.

(d) Sub-claim 4

450. On 12 July 1981, Siemens entered into a contract with the Ministry of Heavy Industry, Iraq, for the construction of part of the Daura Power Station in Iraq. The contract value was DEM 431,000,000 and IQD 6,500,000.

451. Siemens handed over the contract works to the employer in November 1983 and February 1984, at which time Siemens received the preliminary acceptance certificates. All work was completed by this time.

452. Siemens did not provide the contract, so it has not been possible to establish when Siemens was entitled to payment for its works under the contract. In any event, in 1983 and again in 1987, Siemens and the employer entered into a deferred payment agreement. The effect of the deferred payment agreement was that amounts due to Siemens under the contract were deferred for considerable periods of time. Siemens seeks compensation in the amount of DEM 42,888,726 (USD 27,457,572). This figure represents amounts which were not payable to Siemens until between 1 January 1991 and 4 February 1993. As stated at paragraph 451, supra, all of the underlying work was carried out by 1984.

453. Siemens seeks compensation in the amount of DEM 42,888,726 (USD 27,457,572) for amounts which remain unpaid under the deferred payment agreement.

(e) Sub-claim 6

454. On 20 September 1988, Siemens agreed to supply 240 teleprinters and spares to the State Company for Imports and Exports, Baghdad, Iraq, in the amount of DEM 3,898,028. The date of shipment was scheduled for December 1989.

455. Siemens received an advance payment in the amount of 15 per cent of the contract value. It shipped the goods to Iraq on 25 December 1989. Under the terms of the contract, payment of the remaining 85 per cent of the contract value was not due until 28 December 1990. The amount owed has not been paid. Siemens did obtain monies under an insurance policy in the amount of DEM 2,206,434 in 1992. However, the terms of that policy require repayment of the insurance monies if the Commission recommends compensation to Siemens. Siemens therefore maintains a claim for the unpaid balance of the contract value in the full unpaid amount of DEM 3,512,123 (USD 2,248,478).

(f) Sub-claim 7

456. On 28 September 1989, Siemens entered into a contract with the Al-Fao General Establishment, Iraq, to supply, install and commission equipment at the "Central Workshop BO1". The contract value was DEM 24,500,000 and IQD 364,000.

457. Siemens sub-contracted the manufacture of some items to various sub-contractors. It alleged that it carried out works under the contract between December 1989 (when the letter of credit was opened) and 2 August 1990.

458. Siemens stated that as at 2 August 1990, it had executed work in the amount of DEM 733,035 for which it had not been paid. This work is recorded in invoices dated 31 July and 1 August 1990. The paying bank refused to pay this amount because the invoices were alleged not to conform to the terms of the letter of credit. The invoices refer to progress reports for these months, suggesting that work was carried out at this time. However, Siemens failed to provide these reports.

459. Siemens further stated that as at 2 August 1990, it had received and paid for deliveries of goods which it had ordered from sub-contractors in the amount of DEM 1,786,240. Siemens stated that it was able to resell some items in the amount of DEM 33,446, which it took into account in formulating its claim.

460. Siemens therefore seeks compensation in the total amount of DEM 2,519,275 (DEM 733,035 and DEM 1,786,240) (total amount in United States dollars, USD 1,612,852) for services for which it has not been paid and goods which were ordered but which could not be delivered.

(g) Sub-claim 8

461. On 29 January 1985, Siemens entered into a contract with the State Organisation for Technical Industries, Baghdad, Iraq, to supply, install and commission equipment at a photovoltaic production plant in Iraq. The contract was divided into two sections. The claim for contract losses relates to the second section. Pursuant to an undated amendment to the contract, the value of the second section was DEM 7,406,000.

462. Siemens alleged that it had carried out all of its duties under the second section by 30 October 1990, when it invoiced the employer for the final two shipments. The reference to 30 October 1990 is incorrect because the invoices themselves referred to a date of 30 October 1989.

463. The amount of the final two invoices was DEM 214,800. The due date for payment was 30 November 1989, but the employer had not paid these amounts prior to 2 August 1990. Siemens contended that Iraqi debtors took on average 10 months to pay their debts. Siemens therefore alleged that it did not expect to receive payment until around the date of Iraq's invasion and occupation of Kuwait, and that the employer's non-payment was as a direct result of Iraq's invasion and occupation of Kuwait.

464. Siemens seeks compensation in the amount of DEM 214,800 (USD 137,516) for the cost of delivered goods for which it has not been paid.

2. Analysis and valuation

465. The Panel has defined the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) to limit the jurisdiction of the Commission to exclude debts of the Government of Iraq if the performance relating to that obligation took place prior to 2 May 1990.

466. The Panel finds that for the purposes of the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) Siemens had, in each case, a contract with Iraq.

(a) Sub-claims 1, 2 and 7

467. In respect of sub-claim 1, the Panel notes that the last communication between Siemens and the employer which Siemens provided was dated February 1990, not 10 May 1990 as Siemens asserted. The Panel notes that Siemens failed to explain such important issues such as why the goods were not shipped at this time. Siemens also failed to provide a complete copy of the contract despite being asked to do so in the article 34 notification. Finally, it failed to provide sufficient evidence of the circumstances of the scrapping of the goods.

468. In respect of sub-claim 2, the Panel notes that Siemens provided no translated evidence to support Siemens' allegation that the goods were manufactured by a French sub-contractor and then delivered to Siemens at the end of July 1990. It also failed to provide any translated evidence of the circumstances of the scrapping of the goods.

469. In respect of sub-claim 7 (the claim for goods supplied to the employer but not paid for), the Panel notes that almost all of the documents which Siemens provided were in German and were not translated. It was not possible to establish from the translated documents when the goods were supplied.

470. In respect of sub-claim 7 (the claim for services), the Panel finds that although Siemens provided invoices dated July and August 1990, the invoices constitute insufficient evidence that Siemens carried out the asserted work in these months. As the Panel has noted in paragraph 458, supra, the invoices referred to progress reports for these months which Siemens did not provide. The Panel has noted that under the contract, invoices were deemed to be accepted by the employer if not challenged within 10 days of receipt. However, the Commission only has jurisdiction to recommend

compensation for contract losses for work which was carried out after 2 May 1990. Siemens failed to provide evidence confirming when it carried out the work.

471. The Panel recommends no compensation for the alleged contract losses in respect of sub-claims 1, 2 and 7 as Siemens failed to provide sufficient information and evidence to support its claims for the alleged losses.

(b) Sub-claim 3

472. Siemens provided a bill of lading which confirmed its assertion that the special telecommunications cables were shipped on 26 July 1990 from Hamburg to Aqaba (Iraqi sector). Siemens was unable to provide evidence that the goods reached Aqaba on or around the date of Iraq's invasion and occupation of Kuwait, or that the goods could not be recovered due to that event. However, the Panel accepts that it is difficult if not impossible for a claimant in Siemens' situation to establish exactly what happened to goods shipped to Iraq in such circumstances existing at this time. The Panel finds that Siemens shipped goods to Iraq for which it has not been paid, and that the reason for the non-payment was Iraq's invasion and occupation of Kuwait.

473. The Panel finds that Siemens established that it has suffered a loss of the value of the delivered but unpaid goods in the amount claimed, DEM 16,565 (USD 10,605).

(c) Sub-claims 4, 6 and 8

474. Siemens provided evidence, and indeed admitted, that the services or supplies for which it has not been paid represent losses which were incurred well before 2 May 1990. In respect of these three sub-claims, the Panel finds that the contract losses alleged by Siemens relate entirely to work that was performed prior to 2 May 1990.

475. The Panel recommends no compensation for these contract losses as they relate to debts and obligations of Iraq arising prior to 2 August 1990 and, therefore, are outside the jurisdiction of the Commission.

476. In respect of sub-claim 4, the Panel finds that for the purposes of Security Council resolution 687 (1991) the deferred payment agreement did not have the effect of novating the debts.

3. Recommendation

477. The Panel recommends compensation in the amount of USD 10,605 for contract losses (contracts with Iraqi parties).

B. Contract losses (contracts with non-Iraqi parties)

1. Facts and contentions

478. Siemens seeks compensation in the amount of DEM 55,422 (USD 35,481) for contract losses allegedly incurred in connection with three contracts to supply goods to a Kuwaiti company, National

and German Electrical and Electronic Services Company ("NGEECO"). NGEECO was 49 per cent owned by Siemens. The two companies (Siemens and NGEECO) had entered into a joint venture, although the scope of the arrangement was not stated.

(a) Contract for electrical motor plus spares

479. On 12 December 1989, Siemens agreed to supply NGEECO with an electrical motor plus spares. The contract value was DEM 17,270. Payment was due three months after the date of shipment.

480. The goods were shipped from Hamburg on 1 July 1990. Siemens stated that after the liberation of Kuwait, Siemens' shipping agent tried to locate the goods shipped. The shipping agent advised that it was likely that the goods reached Kuwait before Iraq's invasion and occupation, but that NGEECO never received the goods. In any event, NGEECO refused to pay for the goods.

481. Siemens seeks compensation for the full amount of the goods shipped but not received, DEM 17,270 (USD 11,056).

(b) Contracts for fire alarm systems

482. On 31 March 1990, Siemens agreed to supply NGEECO with various electrical components for fire alarm systems under Contract No. 201417. The contract value was DEM 1,271. The goods were couriered by air from Germany to NGEECO's warehouse in Sulaibiya, Kuwait, on 14 May 1990.

483. On 20 June 1990, Siemens agreed to supply NGEECO with various electrical components for fire alarm systems under Contract No. E 4/13-4004/13-4017. The contract value was DEM 36,881, including air freight charges. The goods were couriered by air from Germany to NGEECO's warehouse in Sulaibiya on 12 and 18 July 1990.

484. Under the terms of the contracts between Siemens and NGEECO, the goods were held at Siemens' risk until they were transferred to work sites elsewhere in Kuwait. Prior to the anticipated transfer, NGEECO's warehouse in Sulaibiya was allegedly destroyed as a result of Iraq's invasion and occupation of Kuwait. Siemens stated that it could not claim payment from NGEECO. Siemens seeks compensation for the value of the goods supplied under the two contracts (and associated freight costs) in the total amount of DEM 38,152 (USD 24,425).

2. Analysis and valuation

485. This Panel has found that a claimant must provide specific proof that the failure of a non-Iraqi debtor to pay was a direct result of Iraq's invasion and occupation of Kuwait. A claimant must demonstrate, for example, that such a business debtor was rendered unable to pay due to insolvency or bankruptcy caused by the destruction of its business during Iraq's invasion and occupation of Kuwait, or was otherwise entitled to refuse to pay the claimant.

(a) Contract for electrical motor plus spares

486. Siemens provided copies of the purchase order, an invoice dated June 1990, the bill of lading dated 1 July 1990, and correspondence evidencing enquiries made by its shipping agents after the conclusion of Iraq's invasion and occupation of Kuwait.

487. The Panel finds that Siemens shipped the goods from Germany on 1 July 1990 and that it is likely that they arrived in Kuwait before 2 August 1990. Payment was not due until 1 October 1990. The Panel therefore considers that NGEECO was not required to pay for the goods prior to Iraq's invasion and occupation of Kuwait. The Panel further finds that the goods were destroyed during, and as a direct result of, Iraq's invasion and occupation of Kuwait.

488. The Panel recommends compensation in the amount of DEM 17,270 (USD 11,056) in respect of the contract losses arising out of the contract for electrical motor plus spares.

(b) Contracts for fire alarm systems

489. Siemens provided copies of the purchase orders (which constituted the contracts), air waybills and invoices for the goods. The air waybills show that the goods were despatched from Germany on the dates alleged.

490. The Panel finds that Siemens air-freighted the goods from Germany on 14 May, and on 12 and 18 July 1990. The Panel considers that the goods arrived in Kuwait on or shortly after those dates. The Panel also finds that the goods were destroyed during Iraq's invasion and occupation of Kuwait.

491. The Panel notes the consideration given to similar factual circumstances in 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") at paragraphs 140-147. In the prevailing circumstances, the Panel reaches the same conclusions, in this case, as were reached in the Fourth "E2" Report.

492. In respect of the goods which were despatched from Germany on 14 May and 12 July 1990, the Panel finds that Siemens failed to establish that NGEECO should not have picked up the goods and paid Siemens for them prior to Iraq's invasion and occupation of Kuwait. The Panel therefore finds that Siemens failed to demonstrate that the alleged losses arose as a direct result of Iraq's invasion and occupation of Kuwait.

493. In respect of the goods which were despatched from Germany on 18 July 1990, the Panel considers it reasonable that NGEECO had not yet picked up and paid for the goods prior to Iraq's invasion and occupation of Kuwait. The Panel therefore finds that Siemens established that the losses (in the total amount of DEM 4,586 including the associated freight costs) arising out of the shipment of 18 July 1990 were the direct result of Iraq's invasion and occupation of Kuwait.

494. The Panel recommends compensation in the amount of DEM 4,586 (USD 2,935) in respect of the contract losses arising out of the contracts for fire alarm systems.

3. Recommendation

495. The Panel recommends compensation in the amount of USD 13,991 for contract losses (contracts with non-Iraqi party).

C. Payment or relief to others

1. Facts and contentions

496. Siemens seeks compensation in the amount of DEM 88,430 (USD 56,613) for payment or relief to others. The claim is for the alleged labour costs of three employees who were working in the United Arab Emirates at the time of Iraq's invasion and occupation of Kuwait. Siemens alleged that Iraq's invasion and occupation of Kuwait potentially threatened the employees' safety.
On 17 December 1990, Siemens received a warning from the German embassy in the United Arab Emirates recommending that all German nationals leave the United Arab Emirates and not return until 15 January 1991.

497. Siemens stated that it followed this advice and the three employees left the United Arab Emirates in December 1990 and January 1991. All three employees returned to the United Arab Emirates in March 1991.

498. Siemens seeks compensation for the "costs per working hour" of the three employees for the whole period when they were absent from the United Arab Emirates.

499. The Panel notes that Siemens classified the claim as a claim for contract losses, but it is more properly classified as a claim for payment or relief to others.

2. Analysis and valuation

500. In support of its claim, Siemens provided copies of the warning from the German embassy in the United Arab Emirates and an internal circular to a similar effect. In the article 34 notification, Siemens was requested to provide evidence such as the contracts of employment and evidence of payment of the employees' salaries. Siemens failed to provide this evidence.

501. The Panel recommends no compensation for payment or relief to others as Siemens failed to provide sufficient information and evidence to establish its claim.

3. Recommendation

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

D. Interest

503. With reference to the issue of interest, the Panel refers to paragraphs 18 and 19, supra.

E. Recommendation for Siemens

Table 27. Recommended compensation for Siemens

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses (contracts with Iraqi parties)	31,480,684	10,605
Contract losses (contracts with non-Iraqi party)	35,481	13,991
Payment or relief to others	56,613	nil
Interest	10,991,890	-
Total	42,564,668	24,596

504. Based on its findings regarding Siemens' claim, the Panel recommends compensation in the amount of USD 24,596. The Panel finds the date of loss to be 2 August 1990 for all losses.

X. STRABAG AG

505. Strabag AG ("Strabag") is a corporation organised according to the laws of Germany operating in the construction industry.

506. In the "E" claim form, Strabag sought compensation in the amount of DEM 473,732,082 (USD 303,285,584) for contract losses, interest on the contract losses, a "subsidiary motion" and interest on the "subsidiary motion". The claim for contract losses and interest thereon was in the total amount of DEM 179,394,326. However, in the correspondence accompanying the "E" claim form, Strabag advised the Commission that it had received compensation which reduced the amount of its claim for contract losses and interest thereon to DEM 123,710,854 (DEM 80,678,858 for contract losses and DEM 43,031,996 for interest). The Commission accordingly treated Strabag's original claim amount as being for DEM 418,048,610 (USD 267,636,754).

507. Between the date of its original claim and 11 May 1998, Strabag received further compensation which reduced certain loss elements of its claim. Strabag advised the Commission of the receipt of this compensation and reduced its claim further. On 4 May 1998, Strabag increased the amount of its claim for interest to DEM 62,066,289.

508. In its reply to the article 34 notification, Strabag advised the Commission that it had received compensation in the amount of DEM 71,804,831 between 2 August 1990 and 25 October 1997 in respect of its claim for contract losses. It stated that it had deducted these amounts from the amount sought in the "E" claim form. The Panel confirms that Strabag has reduced the amount of its original claim in accordance with evidence from the compensating party.

509. Strabag further stated in its reply to the article 34 notification that it had received compensation from Ausfuhrkreditgesellschaft ("AKA"), the German export finance corporation, in the amount of DEM 935,373. It reduced its claim for the "subsidiary motion" by this amount.

510. Strabag also noted an arithmetical error which is considered at paragraph 531, infra. This resulted in a reduction of its claim for contract losses.

511. The Panel has reclassified some elements of Strabag's claim for the purposes of this report. The Panel therefore considered the amount of DEM 521,622,539 (USD 333,945,287) for contract losses, a "subsidiary motion", financial losses and interest, as follows:

Table 28. Strabag's claim

Claim element	Claim amount (USD)
Contract losses	38,910,404
"Subsidiary motion"	136,123,734
Financial losses	119,176,009
Interest (as at 11 May 1998)	39,735,140
Total	333,945,287

A. Contract losses and "subsidiary motion"

1. Facts and contentions

(a) Contract losses

512. Strabag seeks compensation in the amount of DEM 60,778,051 (USD 38,910,404) for contract losses allegedly incurred in connection with a contract in Iraq for the construction of the Basrah International Airport (the "Airport Project").

513. Strabag was the sponsor of a joint venture between itself, the German company, Bilfinger & Berger Bauaktiengesellschaft ("Bilfinger & Berger") and the Austrian company, Universale-Bau AG (the "Joint Venture"). The Joint Venture was formed for the construction of the Airport Project works. On 18 April 1982, Bilfinger & Berger was internally released from its Joint Venture obligations. Strabag assumed Bilfinger & Berger's responsibilities, including any losses incurred. In order to maintain the Joint Venture structure, Bilfinger & Berger remained a Joint Venture partner with a formal share of 1 per cent with no beneficial interest. Strabag stated that it seeks compensation for the losses incurred on behalf of the Joint Venture as a whole.

514. On 12 November 1980, the Joint Venture and the State Corporation of Roads and Bridges, Iraq (the "State Corporation") entered into a contract for the construction of the airport (the "construction contract").

515. Another German company, DIWI Consult GmbH, ("DIWI") was appointed as a consultant to the State Corporation. DIWI has also submitted a claim to the Commission which the Panel considers at paragraphs 371-402, supra.

516. The value of the construction contract was IQD 172,579,155. Eighty per cent of the contract value was payable in United States dollars and 20 per cent was payable in Iraqi dinars. Under the terms of the construction contract, payment was initially to be in cash. However, this was changed into a financed contract through a "buyer's credit scheme" dated 13 December 1983. Under this arrangement, 90 per cent of the foreign currency portion (in Deutsche Mark) was financed by AKA, and the remaining 10 per cent was payable in cash by the State Corporation.

517. The contract works were to be completed within 36 months of 12 November 1980 (i.e. November 1983). The Joint Venture was to receive a certificate of completion after it had substantially completed the works. The maintenance period following the certificate of completion covered a period of 12 months for architectural and civil works and a period of 24 months for mechanical and electrical works. Strabag maintained that, in accordance with Iraqi law, the maintenance certificate was deemed to be the only evidence that the Joint Venture had fulfilled its contractual obligations. Strabag further stated that the State Corporation was entitled to a warranty period covered by particular conditions of the construction contract.

518. In addition, a special 10-year warranty period applied to the Airport Project covering defects which were not visible at the time of the issue of the maintenance certificate and which endangered the

solidity and security of the works. Strabag stated that this warranty period was to commence only if a maintenance certificate was issued.

519. Strabag alleged that the Airport Project was affected to a "significant extent" by the war between Iran and Iraq, particularly in terms of the construction period and financial matters. As a result of the war between Iran and Iraq, work on the Airport Project did not commence until 5 January 1981 and was not completed until August 1987, when the certificate of completion was issued. Both maintenance periods commenced on 19 August 1987.

520. Strabag asserted that several defects were under discussion between the Joint Venture and the State Corporation throughout the subsequent maintenance periods, including chloride contamination of the sub-structures. Strabag did not state when the issue of the chloride contamination first came to the attention of the Joint Venture. The Joint Venture and the State Corporation agreed (it is not clear when) that there were defects caused by the contamination and that the defects needed rectification. The Joint Venture maintained the position that the chloride defects were caused by the defective outline design, which was the State Corporation's responsibility. The Joint Venture insisted that the start of the "rectification works" was conditional upon an agreement between the Joint Venture and the State Corporation as to the responsibility for the defects and the compensation for the "rectification works". In any event, Strabag alleged that maintenance work and investigation of the chloride defects was ongoing during 1990.

521. On 30 June 1990, the Joint Venture notified the State Corporation by letter that, except for the rectification works for the chloride defects (which were a separate topic), the maintenance work was effectively complete in so far as that was possible. There were some minor defects but the State Corporation had previously stated that it did not want Strabag to correct these defects. Rather, it wanted Strabag to accept that the cost of remedying these deficiencies should be reflected in Strabag's final invoice to the State Corporation. In the letter, the Joint Venture advised the State Corporation that the only issue which the parties still had to discuss was the possibility of reducing the amounts which the State Corporation owed to Strabag on account of the alleged minor deficiencies.

522. Strabag contended that prior to Iraq's invasion and occupation of Kuwait, the Joint Venture continued to perform work under the construction contract. This work included investigative work related to the chloride contamination. At this time, the final account for the work performed by the Joint Venture on the Airport Project was under discussion. However, a final agreement had not been reached.

523. Strabag alleged that after Iraq's invasion and occupation of Kuwait, the Joint Venture prepared a statement to the State Corporation detailing the amounts that were due to it under the construction contract.

524. On 6 December 1990, the Joint Venture agreed to a "temporary cessation of works". Strabag stated that from that point on, further performance of the contract was "physically and legally impossible". The Joint Venture notified the State Corporation accordingly.

525. In June 1991, DIWI prepared a report on the project. This document, and a document entitled "List of Work Executed", provide a detailed statement of the work performed and the services rendered under the construction contract by the Joint Venture.

526. Strabag alleged that following Iraq's invasion and occupation of Kuwait and the "temporary cessation" of works agreed in December 1990, the Joint Venture attempted to reach a settlement with Iraq as it was clear that the payment for the contract work would not materialise due to the invasion.

527. Strabag stated that the total amount due by the State Corporation to the Joint Venture was "reduced and liquidated" in an agreement signed in Geneva on 12 August 1993 (the "Agreement"). According to Strabag, Iraq recognised that the Joint Venture was entitled to compensation in the amount of IQD 160,000,000 and that the Joint Venture should be released from any further performance or liability under the construction contract.

528. The following summarises the key terms of the Agreement:

(a) The State Corporation accepted that the Joint Venture had fulfilled its contractual obligations under the construction contract;

(b) The State Corporation recognised that the Joint Venture was entitled to compensation in the total amount of IQD 160,000,000 in accordance with the terms of the Agreement (article 1 of the Agreement);

(c) By signing the Agreement, the State Corporation and the Joint Venture consented that there were to be no further contractual rights between the parties arising out of the construction contract except in relation to article 1;

(d) The Joint Venture was released from all of its obligations concerning the Airport Project; and

(e) The State Corporation agreed to indemnify the Joint Venture sponsor (Strabag) against any and all claims of the Rafidain Bank resulting out of the credit facilities granted to the benefit of the Joint Venture, including but not limited to the relevant bank guarantees.

529. Strabag alleged that it received payment in the amount of IQD 135,521,573 from the State Corporation. The remaining outstanding amount was, therefore, IQD 24,478,427 (i.e. IQD 160,000,000 less IQD 135,521,573).

530. The way in which Strabag formulated its claim for contract losses is understandably somewhat complex. Strabag converted the Iraqi dinar figure of IQD 24,478,427 into Deutsche Mark. This Deutsche Mark equivalent was DEM 132,583,917. Strabag then reduced the amount of its claim to take account of payments which it received as compensation under its export credit insurance in the amount of DEM 51,905,059. As at the date upon which Strabag originally submitted its claim to the Commission (24 February 1994), the balance of the claim for contract losses was, therefore, DEM 80,678,858 (i.e. DEM 132,583,917 less DEM 51,905,059).

531. After 24 February 1994, Strabag received further compensation in the amount of DEM 19,899,772, which reduced the amount of its claim for contract losses to a claim in the amount of DEM 60,779,086. Strabag also reduced the amount of its claim for contract losses by the amount of DEM 1,035 due to an arithmetical error. This resulted in a revised claim amount of DEM 60,778,051.

532. Strabag maintained that it has not received full payment from Iraq of the balance of the amount agreed to be owed in the Agreement.

533. On 4 November 2000, the Commission received a letter from the Deputy Prime Minister of Iraq detailing Iraq's position in connection with the Agreement. Iraq maintained that the Agreement was approved subject to the condition that Strabag would, inter alia, submit a letter undertaking to waive all of its rights in connection with its claim which it had filed with the Commission. Iraq contended that, despite having waived its rights, Strabag continued to pursue its claim before the Commission in breach of the Agreement and relevant additional documents. Iraq provided these additional documents to the Commission.

534. The additional documents comprised a side letter dated 3 August 1993 signed by the Joint Venture and the State Corporation (the "Side Letter"), and a memorandum dated 10 August 1993 signed by the Joint Venture and the State Corporation (the "Memorandum").

535. The Side Letter states that in consideration of the final settlement relating to the Airport Project, Strabag waives its rights to pursue any claims [defined as Claim No. 53, SO 219 dated 14 December 1992 ("Claim No. 53")] through the Commission, inclusive of any additional costs mentioned in paragraph 2 of the cover letter of that claim.

536. The Memorandum states that in consideration of the final settlement concerning the Airport Project, especially with regard to the Side Letter, Strabag confirms that the waiver of its rights in the Side Letter "as to our Claims contained in the submission of Claim No. 53 comprises the loss of our properties remaining in Iraq. These properties consist of our offices and other buildings, plant and equipment, stores and materials."

537. The secretariat forwarded Iraq's communication and the attached documents to Strabag and asked Strabag to comment upon Iraq's assertions as well as the effect of the additional documents.

538. In reply to the secretariat's communication, Strabag reiterated that the effect of the Agreement, the related Side Letter and the Memorandum was to "fix and liquidate the remaining contractual entitlement, including all issues related to chloride corrosion, on which the UNCC Claim amount is based, and which is clearly due, and but for the Gulf War should have been paid by Iraq." Strabag asserted that the Side Letter and the Memorandum were not originally submitted to the Commission because they were "considered confidential vis-à-vis the Iraqi contract client and because they were essentially duplicative, and confirmed the results of the ... Agreement. Neither the Side Letter nor the Memorandum affects the claim or its quantum." Strabag further stated that the Agreement represents a significant mitigation of damages by Strabag. Strabag asserted that the Side Letter confirmed to the State Corporation that it would not submit any claims to the Commission which are above "the agreed

entitlements" of IQD 160,000,000, as stipulated in the Agreement. As such, Strabag maintained that it withdrew Claim No. 53 dated 14 December 1992 upon signing the Agreement dated 12 August 1993.

539. Strabag provided a copy of Claim No. 53. The claim includes a claim for loss of tangible property, comprising construction equipment, office and workshop tools as well as spare parts which Strabag effectively "lost" due to Iraq's invasion and occupation of Kuwait. Many other items are also included. Strabag maintained that there is no overlap between Claim No. 53 and its claim before the Commission.

(b) "Subsidiary motion"

540. Strabag seeks compensation in the amount of DEM 212,625,272 (USD 136,123,734) for a "subsidiary motion", which Strabag described as a contingent claim for compensation for the amount which it paid to AKA. AKA has filed a claim with the Commission even though it has been compensated by Strabag under its guarantees of a buyer's credit scheme dated 13 August 1983. Pursuant to an exporter's guarantee, which was required by this financing, the Joint Venture was committed, in relation to AKA, to bear AKA's self-insured and non-covered risks under the loan agreement between the Iraqi Government and AKA.

541. Strabag originally sought compensation in the amount of DEM 294,337,756 for the "subsidiary motion", but a component of the claim is more appropriately classified as a claim for financial losses (see paragraphs 553-556, infra).

542. Strabag alleged that due to Iraq's invasion and occupation of Kuwait, Iraq defaulted on its obligations to pay the amounts borrowed. AKA called for compensation under the guarantees from the Joint Venture. Accordingly, on 31 December 1993, the Joint Venture compensated AKA in the total amount of DEM 213,560,645. Strabag seeks compensation for this payment.

543. As explained at paragraph 508, supra, in 1998 Strabag received compensation in the amount of DEM 935,373 in respect of this loss element. This correspondingly reduced the amount of Strabag's claim to DEM 212,625,272 (i.e. DEM 213,560,645 less DEM 935,373).

544. Strabag stated that although AKA submitted a claim to the Commission itself, Strabag was submitting an alternative and subsidiary claim for the same amounts, in the event that AKA was not deemed a proper claimant on behalf of the Joint Venture.

2. Analysis and valuation

(a) Contract losses

545. The Agreement was entered into with Iraq because it was clear to Strabag that the payment for the contract work would not materialise. The Panel finds that the Agreement establishes the fact that the State Corporation accepted that Strabag had fulfilled its contractual obligations on the contract for the Airport Project. The State Corporation also recognised, through the Agreement, that Strabag was

entitled to compensation in the amount of IQD 160,000,000 for the work carried out under the construction contract.

546. The Panel agrees with Strabag's assertion that Claim No. 53 does not overlap with the current claim for contract losses.

547. However, although the Agreement does not describe itself as a "settlement agreement" and does not use the language of "settlement" or "compromise" or synonyms for these words, the Panel considers that the terms of the Agreement and the related documents clearly demonstrate that Strabag, on behalf of the Joint Venture, and the State Corporation, entered into a settlement agreement. There are a number of factors which led the Panel to reach this conclusion. The two most important factors are as follows.

548. First, in the Agreement itself, the parties agreed that they had "no further contractual rights, obligations and claims between the Parties arising out of the [construction contract]" (article 3). In effect the parties agreed to mutually waive any rights to bring claims for contract losses except in accordance with the Agreement.

549. Second, the related contemporaneous documents refer to the overall transaction as a "settlement". Strabag and the State Corporation believed in 1993 that they were entering into a settlement of disputes arising under the construction contract.

550. The Panel accordingly finds that Strabag failed to demonstrate that its claimed losses were not covered by the terms of the Agreement and the related documents. In essence, Strabag has asked the Commission to enforce a settlement agreement entered into in 1993 which the State Corporation has not honoured. The Panel finds that it is not the purpose of the Commission to afford claimants a source of funds to satisfy amounts due under such settlement agreements; the failure of the State Corporation to honour its obligations under this agreement is not a direct result of Iraq's invasion and occupation of Kuwait.

(b) "Subsidiary motion"

551. The Panel has found in its previous reports that it does not have jurisdiction over contingent claims. The Panel therefore recommends no compensation for the "subsidiary motion".

3. Recommendation

552. The Panel recommends no compensation for contract losses and for the "subsidiary motion".

B. Financial losses

1. Facts and contentions

553. Strabag seeks compensation in the amount of DEM 186,152,927 (USD 119,176,009) for financial losses. This represents the amount of interest on the "subsidiary motion" which AKA has charged to Strabag from 2 August 1990 until 31 December 1993.

554. Strabag originally classified the claim for financial losses as a claim for interest on the "subsidiary motion", but it is more properly classified as a claim for financial losses.

2. Analysis and valuation

555. The claim relates to interest on underlying losses which the Panel has found are not compensable. Strabag has failed to establish that the alleged loss is the direct result of Iraq's invasion and occupation of Kuwait. The Panel, therefore, recommends no compensation for financial losses.

3. Recommendation

556. The Panel recommends no compensation for financial losses.

C. Interest

557. As the Panel recommends no compensation for contract losses, there is no need for the Panel to determine the date of loss from which interest would accrue.

D. Recommendation for Strabag

Table 29. Recommended compensation for Strabag

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	38,910,404	nil
"Subsidiary motion"	136,123,734	nil
Financial losses	119,176,009	nil
Interest	39,735,140	nil
Total	333,945,287	nil

558. Based on its findings regarding Strabag's claim, the Panel recommends no compensation.

XI. ANTIA ELECTRICALS PVT. LTD.

559. Antia Electricals Pvt. Ltd. ("Antia") is a corporation organised according to the laws of India operating in the construction industry. Antia advised the Commission that it was placed into liquidation "under Iraqi law" in 1992 because of the destruction which its office in Iraq allegedly suffered during Iraq's invasion and occupation of Kuwait.

560. Antia seeks compensation in the amount of USD 1,180,855 for contract losses, loss of tangible property and interest, as follows:

Table 30. Antia's claim

Claim element	Claim amount (USD)
Contract losses	1,165,007
Loss of tangible property	15,848
Interest (no amount specified)	-
Total	1,180,855

A. Contract losses

1. Facts and contentions

561. Antia seeks compensation in the amount of USD 1,165,007 for contract losses allegedly incurred in connection with three projects in Iraq: the Alquaim-Akashat railway project, the Kubaisa railway project and the Al Muthanna cement factory branch line project. Antia described its claim as a claim for "outstanding payable Contract amounts till November 1992". Apart from a breakdown of the amounts allegedly owed in respect of each project, it provided no other information or evidence in its original claim submission.

562. The secretariat sent Antia article 15 and article 34 notifications requesting, inter alia, a detailed Statement of Claim, information regarding the alleged dates of performance, and supporting evidence such as the contracts for the three projects. Antia did not reply to the notifications.

2. Analysis and valuation

563. The Panel recommends no compensation for the alleged contract losses as Antia failed to provide sufficient information and evidence to establish its claim.

3. Recommendation

564. The Panel recommends no compensation for contract losses.

B. Loss of tangible property

1. Facts and contentions

565. Antia seeks compensation in the amount of USD 15,848 for loss of tangible property. The claim is for the alleged loss of a typewriter and two vehicles from its office in Baghdad.

566. Antia alleged that its office was closed for the entire duration of Iraq's invasion and occupation of Kuwait. When two of its employees visited Iraq in March 1992, they found the typewriter and the two vehicles, and some other items, missing. The office had been burgled and ransacked. Antia stated that it filed a police report. On a subsequent visit, its employees traced all items of equipment apart from those for which it seeks compensation.

2. Analysis and valuation

567. Antia failed to provide any evidence of its ownership of the items of tangible property, such as purchase invoices. Further, it failed to provide any evidence of the presence of the tangible property in Iraq, such as inventories and customs documentation. Antia stated that it had left the police report in Iraq and had requested that the police report be sent to it. However, Antia did not provide this document to the Commission.

568. The Panel recommends no compensation for the alleged tangible property losses as Antia failed to provide sufficient information and evidence to establish its claim.

3. Recommendation

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

C. Interest

570. As the Panel recommends no compensation, there is no need for the Panel to determine the date of loss from which interest would accrue.

D. Recommendation for Antia

Table 31. Recommended compensation for Antia

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	1,165,007	nil
Loss of tangible property	15,848	nil
Interest (no amount specified)	-	nil
Total	1,180,855	nil

571. Based on its findings regarding Antia's claim, the Panel recommends no compensation.

XII. ARVIND CONSTRUCTION COMPANY LIMITED

572. Arvind Construction Company Limited ("Arvind") is a corporation organised according to the laws of India operating in the engineering and construction industries.

573. In the "E" claim form, Arvind sought compensation in the amount of USD 296,097 for loss of income-producing property and other losses. The Panel reclassified the claim for loss of income-producing property as loss of tangible property for the purposes of this report, and the claim for other losses as payment or relief to others. The Panel therefore considered the amount of USD 296,097 for loss of tangible property and payment or relief to others, as follows:

Table 32. Arvind's claim

Claim element	Claim amount (USD)
Loss of tangible property	277,519
Payment or relief to others	18,578
Total	296,097

A. Loss of tangible property

1. Facts and contentions

574. Arvind seeks compensation in the amount of USD 277,519 for loss of tangible property. The claim is for the alleged loss of 43 items of equipment, machinery and vehicles from its project site in Iraq.

575. Arvind alleged that it had carried out work in Iraq since 1980 as a sub-contractor on the construction of a railway in Samawa (the "Railway Project"). In 1985, it started work pursuant to another sub-contract on the Al-Muthanna Cement Factory Branch-Line project (the "Cement Project"). Arvind stated that the Cement Project was completed in 1987 and that it successfully completed the maintenance period in October 1989.

576. Arvind alleged that the items in respect of which it seeks compensation had been imported into Iraq for use on the Railway Project. It then transferred the items to the Cement Project. While Arvind had re-exported some items of equipment from the site prior to Iraq's invasion and occupation of Kuwait following the unofficial completion of the Cement Project, a number of items were still on-site. Arvind stated that these items were "confiscated by the Iraqi Government" after 2 August 1990 before it could obtain approval for their re-export.

577. Arvind provided details of the purchase dates and prices for all 43 items. All items were purchased between 1981 and 1984. It seeks compensation for the "depreciated value as on 31.3.91", which it advised was on a "straight line" basis in accordance with Indian companies legislation.

2. Analysis and valuation

578. As evidence of its alleged losses, Arvind provided the following documents: the sub-contracts for the two projects; bills of entry into Iraq for all of the items; purchase invoices for some of the items; its financial statements between 1986 and 1992; and a certificate dated 14 January 1993 from its chartered accountants confirming the purchase cost of the relevant items of tangible property.

579. The Panel finds that Arvind provided sufficient evidence of its title to or right to use, and the presence in Iraq of, 13 of the 43 items of tangible property. The 13 items comprised the majority of the vehicles and heavy construction machinery for which Arvind seeks compensation. The Panel further finds that Arvind suffered the loss of these 13 items as a direct result of Iraq's invasion and occupation of Kuwait.

580. In valuing the loss, the Panel applied depreciation rates appropriate for such items and concluded that the 13 items had a value of USD 41,892 as at 9 February 1991, the date upon which the last of Arvind's employees left Iraq.

3. Recommendation

581. The Panel recommends compensation in the amount of USD 41,892 for loss of tangible property.

B. Payment or relief to others

1. Facts and contentions

582. Arvind seeks compensation in the amount of USD 18,578 for payment or relief to others. The claim is for the alleged salary costs of 17 of Arvind's employees who were unable to leave Iraq after 1 September 1990 due to restrictions imposed by the Iraqi authorities. These employees consequently stayed in Iraq for various periods until they were repatriated. During the period in which they were unable to leave Iraq, they guarded Arvind's offices and tangible property. The first group of employees was repatriated on 15 October 1990 and the last group on 9 February 1991. Arvind seeks compensation for the salaries of these 17 employees between 1 September 1990 and their date of repatriation.

2. Analysis and valuation

583. Arvind provided as evidence of its alleged losses only two documents. The first document was a copy of account advice from its bank, the State Bank of India, Bahrain branch, dated 31 August 1992. Arvind alleged that the account advice indicated that the amount of USD 37,551 was remitted to the Oriental Bank of Commerce (the "Oriental Bank") towards payment of salary to its 17 employees on 27 August 1992. Arvind stated that this amount represented the 17 employees' salaries for the period between August 1990 and March 1992, and that the amount of USD 18,578 sought as compensation related to the relevant period of detention for the 17 employees. The salary payments were allegedly credited to the employees' non-resident external accounts with the Oriental Bank.

584. The second document which Arvind provided was a photocopy of a letter dated 8 September 1992 from the State Bank of India to the Oriental Bank wherein the State Bank of India forwarded the necessary banker's cheque to the Oriental Bank for the above transaction.

585. The only document which Arvind provided showing the amount of salary allegedly paid to each employee was an undated internally generated list prepared in reply to questions in the article 34 notification. Arvind stated that it was unable to furnish payroll records for its 17 employees because the records were left at its offices in Iraq. It provided no evidence of receipt by the employees of their salaries, such as signed acknowledgements or details of remittance into their individual accounts. The Panel considers that Arvind failed to provide sufficient evidence of the calculation and payment of the alleged salary costs.

3. Recommendation

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

C. Recommendation for Arvind

Table 33. Recommended compensation for Arvind

Claim element	Claim amount (USD)	Recommended compensation (USD)
Loss of tangible property	277,519	41,892
Payment or relief to others	18,578	nil
Total	296,097	41,892

587. Based on its findings regarding Arvind's claim, the Panel recommends compensation in the amount of USD 41,892. The Panel finds the date of loss to be 9 February 1991.

XIII. BHAGHEERATHA ENGINEERING LIMITED

588. Bhagheeratha Engineering Limited ("Bhagheeratha") is a corporation organised according to the laws of India operating in the construction industry.

589. In the "E" claim form, Bhagheeratha sought compensation in the amount of USD 10,448,328 for contract losses, loss of real property, loss of tangible property, payment or relief to others and other losses. The total was stated to include interest, although in the Statement of Claim, Bhagheeratha also sought interest on the claim for other losses for the period after 31 May 1992 in an unspecified amount.

590. In its reply to the article 15 notification, Bhagheeratha submitted a revised "E" claim form and reclassified some of its claims. It sought compensation in the amount of USD 7,603,860 for contract losses, loss of tangible property, payment or relief to others and other losses. At this time, Bhagheeratha advised the Commission that it had withdrawn its claim for loss of real property and that it had reduced components of its claims for contract losses and payment or relief to others. In the Statement of Claim accompanying the revised "E" claim form, Bhagheeratha advised the Commission that it sought compensation in the total amount of USD 7,603,860 "excluding interest". The Panel has assumed that by this statement Bhagheeratha was seeking interest in an unspecified amount.

591. The Panel has reclassified elements of Bhagheeratha's claim for the purposes of this report. The Panel also notes that Bhagheeratha's claims included several arithmetical errors. In addition to these errors, which are described in paragraphs 603, 612 and 622, infra, Bhagheeratha submitted two claims in respect of "leave salary". Both claims were identical. The Panel has therefore ignored one of the claims. The consequence of these errors and the removal of the duplicate claim has resulted in an overall reduction of the amount sought to a claim in the amount of USD 7,586,350.

592. The Panel therefore considered the amount of USD 7,586,350 for contract losses, loss of profits, loss of tangible property, payment or relief to others and interest, as follows:

Table 34. Bhagheeratha's claim

Claim element	Claim amount (USD)
Contract losses	3,825,364
Loss of profits	402,347
Loss of tangible property	3,297,215
Payment or relief to others	61,424
Interest (no amount specified)	-
Total	7,586,350

A. Contract losses

1. Facts and contentions

593. Bhagheeratha seeks compensation in the amount of USD 3,825,364 for contract losses allegedly incurred in relation to two projects in Iraq, the Cement Handling System Project (the "Cement Project") and the Baiji Fertiliser Plant No. 4 Expansion Project (the "Fertiliser Project").

594. Bhagheeratha seeks compensation in the amount of USD 3,477,476 for the Cement Project and USD 347,888 for the Fertiliser Project.

595. In the revised "E" claim form, Bhagheeratha classified elements of the claim for contract losses as other losses or payment or relief to others, but the losses are more appropriately classified as contract losses.

(a) Cement Project

596. Bhagheeratha entered into a contract with the State Organisation for Industrial Projects (the "State Organisation"), an entity of the Government of Iraq, on 9 January 1986. Under the contract, Bhagheeratha undertook a turnkey project to build a cement handling system at the Al-Muthanna Cement Factory at Samawa, Iraq (the "cement contract"). The total value of the contract was IQD 4,802,000 and was to be paid in Iraqi dinars (40 per cent) and United States dollars (60 per cent).

597. Bhagheeratha stated that it agreed to execute the contract works as "builder" and as "financier". Accordingly, the cement contract was in the nature of a build, operate and transfer contract commonly known as a "BOT contract".

598. The cement contract included a private (i.e. non-governmental) deferred payment provision. Pursuant to this provision, the payments in United States dollars were deferred for three years from the certified due date. To cover the deferred portion of the payments, the State Organisation opened three irrevocable letters of credit in Bhagheeratha's favour on 9 July 1986. Interest on the deferred payments was payable from the date of certification.

599. The original date of completion of the project was 30 June 1988. Due to reasons attributable to the State Organisation, the completion date was mutually extended for twelve months from the original completion date of 30 June 1988. The provisional acceptance certificate was issued on 13 September 1988 and the final acceptance certificate was issued on 14 August 1989.

600. Bhagheeratha maintained that although it fulfilled all of its obligations in respect of the Cement Project, the State Organisation failed to make the deferred payments, allegedly because of Iraq's invasion and occupation of Kuwait. Bhagheeratha stated that its bankers tried to cash the letters of credit. However, the State Organisation's Iraqi bankers would not honour them.

601. Bhagheeratha alleged that it did not receive the payments under the letters of credit which it is entitled to receive from the State Organisation in the amount of USD 7,927,675, due to Iraq's invasion and occupation of Kuwait.

602. In 1991-1992, Bhagheeratha received the amount of USD 4,450,199, or 85 per cent of the total payments due under the letters of credit, from the Export Credit Guarantee Corporation of India. Bhagheeratha consequently reduced its claim for contract losses in respect of the Cement Project by this amount, i.e. USD 7,927,675 less USD 4,450,199 is USD 3,477,476.

603. The Panel notes that in the revised "E" claim form, Bhagheeratha sought compensation in the amount of USD 3,447,475 for this component of the claim for contract losses. This was the result of an arithmetical error and the Statement of Claim in fact referred to the correct amount of USD 3,477,476. The Panel has accordingly corrected the error contained in the revised "E" claim form and increased the amount sought by USD 30,001.

(b) Fertiliser Project

604. On 6 July 1989, Bhagheeratha entered into a contract with the State Engineering Company for Industrial Design and Construction, Iraq (the "State Engineering Company"), to provide technical services for civil engineering work at the fertiliser plant (the "fertiliser contract"). Because the fertiliser contract was essentially one in which Bhagheeratha provided labour to the State Engineering Company, there is no total contract value. However, Bhagheeratha estimated the contract value as being IQD 1,500,000, or USD 4,813,334. Sixty per cent of the total payment for monthly work done was to be made in United States dollars, with the balance to be paid in Iraqi dinars. The duration of the fertiliser contract was 18 months with provision for an extension for another period of 18 months (three years in total).

605. The contract works commenced on 20 September 1989. Consequently, the contract works were meant to be completed by March 1991 in the event that the fertiliser contract was not extended.

606. Bhagheeratha alleged that as a result of Iraq's invasion and occupation of Kuwait, its work on the Fertiliser Project stopped on 17 September 1990. A few employees had left after 2 August 1990 but the majority had stayed on site. On 17 September 1990, the State Engineering Company requested the remaining employees to build pre-cast water tanks. This was extra-contractual work but was agreed to be subject to the payment terms of the fertiliser contract. Bhagheeratha's employees obeyed the State Engineering Company's request until their repatriation on 10 October 1990.

607. Bhagheeratha seeks compensation in the amount of USD 347,888 for four types of contract losses in relation to the Fertiliser Project.

608. The Panel notes that in the revised "E" claim form, Bhagheeratha sought compensation in the amount of USD 347,348 for the component of the claim for contract losses which concerned the Fertiliser Project. The claim included a claim for "leave salary" in the amount of USD 46,695. The loss element for "leave salary" duplicated Bhagheeratha's claim for "leave salary" which Bhagheeratha classified as part of its claim for payment or relief to others in the payment or relief to others, in the amount of USD 46,695, as having been submitted in error. The Panel does not consider that it forms part of Bhagheeratha's claim and has accordingly reduced the total amount of compensation which Bhagheeratha seeks before the Commission.

609. The Panel also notes that the original amount sought of USD 347,348 as compensation for contract losses (Fertiliser Project) contained some arithmetical errors which are described in paragraphs 612 and 622, infra. The Panel's correction of these errors has resulted in the claim amount of USD 347,888.

(i) Compensation for "non-payment of one month extra rate"

610. Bhagheeratha stated that in accordance with clause 3(g) of the fertiliser contract, the State Engineering Company was under a contractual obligation to pay it "one month extra rate" for each employee (i.e. one month's notice pay for each employee). Clause 3(g) states:

> "... In case any personnel has to be repatriated before completing his service period due to reasons not attributable to him or [Bhagheeratha], [Bhagheeratha] should be compensated by [the State Engineering Company] by giving one month extra rate and airfare."

611. Bhagheeratha alleged that this clause applied because Bhagheeratha had to repatriate all of its employees prematurely as a direct result of Iraq's invasion and occupation of Kuwait. Bhagheeratha had a similar obligation to its employees in their service agreements with Bhagheeratha.

612. In order to calculate the "one month extra rate", Bhagheeratha added up each of the 163 employees' monthly salaries as they were charged to the State Engineering Company. The amount was considerably higher than that paid by Bhagheeratha to its employees to allow for the contractual margin. The total amount of compensation claimed under this loss element is USD 81,176. Bhagheeratha alleged that the State Engineering Company has not paid this amount to it. Bhagheeratha sought compensation in the amount of USD 80,996, but the Panel notes that this amount contained an arithmetical error which increased the claim to USD 81,176.

(ii) Compensation for loss due to "non-payment of R.A. bills"

613. Bhagheeratha maintained that it executed work between September 1989 and October 1990. It submitted the "R.A. [Running Account] bills" for June to October 1990 (certified by the representatives of the State Engineering Company) amounting to IQD 86,320, to the State Engineering Company. Bhagheeratha stated that it has only received the Iraqi dinar component amounting to IQD 34,528. The component amounting to USD 166,194 (i.e. IQD 51,792) has not been paid by the State Engineering Company. Bhagheeratha seeks compensation in the amount of USD 166,194.

614. Bhagheeratha provided copies of letters, dated 27 October 1990 and 4 January 1991, which it sent to the State Engineering Company regarding the non-payment of the "R.A. bills". Bhagheeratha maintained that it has not received payment because of Iraq's invasion and occupation of Kuwait.

(iii) Loss of retention money

615. Clause 9 of the Fertiliser Project contract provides that the State Engineering Company was entitled to:

> "withhold first month's of rate of every personnel of [Bhagheeratha] as guarantee for good performance subject to a maximum of 5% of the total contract value which is initially estimated as ID: 75,000/- which will be released in three equal instalment when the work reaches 50 %, 75 % and 100 % completion."

616. Bhagheeratha alleged that it had completed 25 per cent of the contract work at the time of Iraq's invasion and occupation of Kuwait. It stated that the State Engineering Company had deducted the total amount of IQD 27,769 from Bhagheeratha's "R.A. bill" between September 1989 and October 1990. The State Engineering Company allegedly released IQD 11,108. However, the United States dollar portion of the balance of the deposit, USD 53,464 (IQD 16,661), has not yet been paid to Bhagheeratha.

617. Bhagheeratha provided a statement summarising the details of the bill payments received and due from the State Engineering Company. It also provided the copies of the bills from October 1989 to July 1990. Bhagheeratha stated that the majority of these bills were accepted and certified by the State Engineering Company.

618. Bhagheeratha asserted that since the State Engineering Company terminated the fertiliser contract, the State Corporation cannot continue to retain the retention monies owed to Bhagheeratha. Iraq's invasion and occupation of Kuwait allegedly prevented Bhagheeratha from achieving the 50, 75 and 100 per cent milestones. Bhagheeratha stated that had it completed the Fertiliser Project, it would have received the monies retained by the State Engineering Corporation as security for Bhagheeratha's performance. Bhagheeratha seeks compensation in the amount of USD 53,464 (the equivalent of IQD 16,661) for retention monies owed to it by the State Engineering Company.

(iv) "Leave salary"

619. Bhagheeratha seeks compensation in the amount of USD 47,054 for "leave salary". The claim is for accrued holiday pay which Bhagheeratha paid to all of its employees, at the contractual rate as between Bhagheeratha and the State Engineering Company.

620. Bhagheeratha relied on clause 3(c) of the Fertiliser Project contract, which provides that Bhagheeratha's employees:

> "shall be given one month paid leave per year of service, and for part thereof in the same proportion. In case any personnel does not avail his full eligible leave during his service such unavailed portion of leave shall be paid for at the end of his service/termination."

621. Bhagheeratha asserted that clause 3(c) imposed an obligation on the State Engineering Company to pay "leave salary". Bhagheeratha had a similar obligation to its employees in the service agreements. Bhagheeratha stated that it paid "leave salary" to all of its employees pursuant to the service agreements. To calculate each employee's entitlement, Bhagheeratha calculated each employee's period of employment and multiplied that pro rata by the salary to arrive at the leave salary amount. Bhagheeratha used the same data to formulate its claim against the State Engineering Company, but applied the rate contained in the fertiliser contract.

622. Bhagheeratha stated that it has received the Iraqi dinar component of the claim, IQD 4,877. However, the State Engineering Company has not paid any of the United States dollar component, which is equivalent to USD 47,054 after correction of an arithmetical error of USD 359, which increased the claim from USD 46,695 to USD 47,054.

623. Bhagheeratha alleged that the non-payment of the United States dollar portion of the leave salary is attributable to Iraq's invasion and occupation of Kuwait.

2. Analysis and valuation

(a) Cement Project

624. The Panel has defined the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) to limit the jurisdiction of the Commission to exclude debts of the Government of Iraq if the performance relating to that obligation took place prior to 2 May 1990.

625. The Panel finds that for the purposes of the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) Bhagheeratha had a contract with Iraq.

626. Bhagheeratha contended that it successfully completed its work on the Cement Project on 13 September 1988 and that the State Organisation issued the final acceptance certificate on 14 August 1989. In accordance with the payment terms of the cement contract, the last instalment of the deferred portion was to be paid on 30 June 1991. Bhagheeratha therefore alleged that all work and all of its obligations were completed by 14 August 1989, but that the State Organisation's obligation did not arise until June 1991.

627. The Panel finds that the contract losses alleged by Bhagheeratha relate entirely to work that was performed prior to 2 May 1990.

628. The Panel recommends no compensation for contract losses as they relate to debts and obligations of Iraq arising prior to 2 August 1990 and, therefore, are outside the jurisdiction of the Commission.

629. The Panel finds that for the purposes of Security Council resolution 687 (1991) the deferred payment provision contained in the cement contract did not have the effect of novating the debts.

(b) Fertiliser Project

630. The Panel has defined the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) to limit the jurisdiction of the Commission to exclude debts of the Government of Iraq if the performance relating to that obligation took place prior to 2 May 1990.

631. The Panel finds that for the purposes of the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) Bhagheeratha had a contract with Iraq.

632. In support of its claim for contract losses in respect of the Fertiliser Project, Bhagheeratha provided, inter alia, copies of the following documents: the fertiliser contract; summary details of bill payments made to Bhagheeratha and due from the State Engineering Company in relation to the Fertiliser Project; the claim which it submitted to the State Engineering Company in relation to the Fertiliser Project; correspondence (various dates) from the State Engineering Company to Bhagheeratha in relation to the Fertiliser Project; Bhagheeratha's productivity analyses; and comprehensive documentation recording the employees' salary arrangements, including service agreements, and amounts paid to employees in respect of their employment claims against Bhagheeratha.

(i) Compensation for "non-payment of one month extra rate"

633. The State Engineering Company had an obligation to pay Bhagheeratha one month's notice pay for each of the 163 employees repatriated at the rate specified in the fertiliser contract. The Panel accepts Bhagheeratha's assertion that this obligation was triggered by Iraq's invasion and occupation of Kuwait and the subsequent repatriation of Bhagheeratha's employees. The Panel finds that the obligation mirrored Bhagheeratha's obligation to its employees in their service agreements to pay them one month's salary by way of notice.

634. The Panel further finds that Bhagheeratha substantiated the salary rate which it charged the State Engineering Company for 162 of the 163 employees. Although Bhagheeratha did not substantiate the rate in relation to the remaining employee, Bhagheeratha provided evidence that it paid this employee one month's salary by way of notice in accordance with his service agreement.

635. Accordingly, the Panel finds that Bhagheeratha demonstrated that it has suffered a loss and that the loss arose as a direct result of Iraq's invasion and occupation of Kuwait. The Panel recommends compensation for 162 employees at the rate which Bhagheeratha was entitled to charge the State Engineering Company under the fertiliser contract. The resulting figure is USD 80,566. The Panel also recommends compensation for the remaining employee in the amount which Bhagheeratha paid him. This figure is USD 350.

636. The Panel recommends compensation in the amount of USD 80,916 for contract losses (compensation for "non-payment of one month extra rate"). The Panel finds the date of loss to be 10 October 1990, the date on which the last of Bhagheeratha's employees left Iraq.

(ii) Compensation for loss due to "non-payment of R.A. bills"

637. Bhagheeratha provided substantial evidence that it carried out work between June and October 1990 for which it has not been paid. The evidence includes correspondence between Bhagheeratha and the State Engineering Company and substantial documentation showing the amount of work carried out on a monthly basis between June and October 1990. Bhagheeratha helpfully provided detailed evidence of its work on the Fertiliser Project prior to 2 May 1990. The Panel found this evidence useful because it allowed the Panel to track the development of Bhagheeratha's work and confirmed the asserted rates for each employee as charged to the State Engineering Company.

638. Bhagheeratha continued to work on the Fertiliser Project until 17 September 1990. Between 17 September and 10 October 1990, the State Engineering Company transferred the employees to an extra-contractual task, building pre-cast water tanks. Bhagheeratha wrote to the State Engineering Company in October 1990 and in January 1991 attaching invoices for the work which it carried out between June and October 1990. Bhagheeratha provided these letters, but not the invoices stated to be attached.

639. As is recorded in paragraph 613, supra, Bhagheeratha advised the Commission that it had received the monies owed in Iraqi dinars for the period between June and October 1990. Had Bhagheeratha provided evidence of receipt of these local currency payments, its entitlement to compensation in the full amount claimed would have been very clear. However, it was unable to verify this assertion.

640. Nevertheless, the Panel considers that there is substantial internal evidence of work carried out between June and October 1990. The Panel refers to the salaries/wages records. The Panel also refers to the State Engineering Company's correspondence. On 5 January 1991, in an apparent follow up to a letter which was sent on behalf of the State Engineering Company on 1 December 1990, the State Engineering Company wrote to Bhagheeratha stating that the suspension of the Fertiliser Project was due to Iraq's invasion and occupation of Kuwait. It also stated:

> "... the [Fertiliser Project C]ommission shall liquidate all your dues in local currency, whereas dues in foreign currency, shall be settled whenever the present situation is improved".

641. The State Engineering Company's letter of 5 January 1991 may not have been sent in direct response to Bhagheeratha's letter of 4 January 1991 (or the letter of 27 October 1990), and it is likely that the January letters crossed. However, the letter of 5 January 1991 shows that the State Engineering Company was satisfied with Bhagheeratha's work and intended to pay its claims. Combined with Bhagheeratha's extensive internal evidence of its work during the period between June and October 1990, the Panel considers that Bhagheeratha provided sufficient evidence that it was entitled to invoice the State Engineering Company in the amount of USD 166,194 for that period and that Bhagheeratha has not been paid.

642. The Panel recommends compensation in the amount of USD 166,194 for contract losses (compensation for loss due to "non-payment of R.A. bills"). The Panel finds the date of loss to be 15 August 1990, the mid-point of the period June – October 1990.

(iii) Loss of retention money

643. The Panel accepts Bhagheeratha's argument that clause 9 of the fertiliser contract created a type of retention fund which was designed to secure Bhagheeratha's ongoing good performance. The first payment was not due to be made according to a specific time, but rather according to a particular stage of completion (50 per cent for the first payment). This stage had not occurred by the date of Iraq's invasion and occupation of Kuwait or by 17 September 1990, the date work stopped on the Fertiliser Project.

644. The Panel finds that the State Engineering Company did deduct monies in the amount of IQD 27,769 from invoices by way of a security deposit arrangement between September 1989 and October 1990. The Panel further finds that a total amount of IQD 16,661 has not been repaid.

645. Bhagheeratha did not state when it would have achieved the 50, 75 and 100 per cent milestones. On the basis of the information and evidence provided, the Panel has found it difficult to establish when Bhagheeratha would have completed the first milestone of 50 per cent of the contract works. As at the date of the execution of the contract in July 1989, the parties envisaged work being completed in March 1991. This would suggest that the milestones of 50 per cent and 75 per cent of work performed (which would have triggered the first two retention payments) would have been reached well before March 1991. However, Bhagheeratha asserted that as at September 1990, it had carried out 25 per cent of the contract works since late September 1989. On this basis, Bhagheeratha had only carried out a quarter of the contract works in 12-13 months. Bhagheeratha's time frame suggests that it would have had some difficulty at its current rate as at September 1990 to finish 50 per cent of the contract works by August 1991.

646. Moreover, the Panel has analysed the documentation which Bhagheeratha provided. Based on invoiced work as a proportion of the alleged contract value, the Panel finds that Bhagheeratha had only carried out 16.4 per cent of the contract works as at September/October 1990.

647. On the basis of Bhagheeratha's evidence of the work which it carried out and its projections as to its future progress, the Panel considers that Bhagheeratha demonstrated that it would have completed 50 per cent of the contract works sometime in late 1991.

648. In relation to the 75 and 100 per cent milestones, although Bhagheeratha provided a large number of productivity analyses which it prepared both for internal use and for review by the State Engineering Company, these show problems with the rate of work prior to 2 August 1990 for a number of reasons, mainly associated with the State Engineering Company rather than Bhagheeratha. However, these difficulties prior to Iraq's invasion and occupation of Kuwait show that there were reasons other than Iraq's invasion which had caused the Project to fall behind schedule. Considering the Fertiliser Project's status and rate of progress as at 2 August 1990 and the evidence which Bhagheeratha provided, the Panel finds that Bhagheeratha failed to demonstrate that it would have reached the 75 and 100 per cent milestones.

649. The Panel therefore only recommends compensation for the payment which Bhagheeratha would have earned when it reached the 50 per cent milestone. That payment would have been one third of the amount of IQD 16,661, i.e. IQD 5,554. The United States dollar equivalent of IQD 5,554 is USD 17,821. The Panel recommends compensation in the amount of USD 17,821 for the payment which Bhagheeratha would have earned when it reached the 50 per cent milestone.

650. The Panel recommends no compensation for the payments which Bhagheeratha would have earned when it reached the 75 and 100 per cent milestones.

651. The Panel finds the date of loss to be 1 December 1991, being the date upon which Bhagheeratha would have earned the 50 per cent milestone payment.

(iv) "Leave salary"

652. The Panel accepts Bhagheeratha's contention that clause 3(c) of the fertiliser contract required the State Engineering Company to meet the "leave salary" expenses incurred by Bhagheeratha at the contractual rate. The Panel therefore finds that the alleged loss arose as a direct result of Iraq's invasion and occupation of Kuwait.

653. Bhagheeratha provided substantial evidence which established that it made "leave salary" payments to 162 of the 163 employees in accordance with their service agreements. The Panel has already found that Bhagheeratha established the rate for payment under the fertiliser contract vis-à-vis the State Engineering Company for all of those employees (see paragraph 634, supra).

654. The Panel finds that Bhagheeratha established its claim for "leave salary" at the rate in the fertiliser contract in relation to the 162 employees to whom it proved that it paid leave salary.

655. The Panel recommends compensation in the amount of USD 46,904 for the claim for "leave salary". The Panel finds the date of loss to be 10 October 1990, the date upon which the last employees were repatriated from Iraq.

3. Recommendation

656. The Panel recommends compensation in the amount of USD 311,835 for contract losses.

B. Loss of profits

1. Facts and contentions

657. Bhagheeratha seeks compensation in the amount of USD 402,347 for loss of profits in relation to the Fertiliser Project.

658. Bhagheeratha stated that the estimated value of the fertiliser contract was IQD 1,500,000 or USD 4,813,334. It alleged that but for Iraq's invasion and occupation of Kuwait, it would have earned a minimum of 10 per cent profit under the fertiliser contract. Bhagheeratha stated that the Fertiliser Project was not resumed after the cessation of hostilities in Kuwait because the contract was terminated by the State Engineering Company on 27 March 1992.

659. Bhagheeratha asserted that the total invoiced value of the work which was completed prior to Bhagheeratha's departure as a result of Iraq's invasion and occupation of Kuwait was IQD 246,150 (USD 789,868). As explained in paragraph 646, supra, the Panel has calculated this figure to represent 16.4 per cent of the contract value, rather than the 25 per cent which Bhagheeratha asserted.

660. Bhagheeratha alleged that the evidence supported an actual profit margin of 11.29 per cent. However, Bhagheeratha limited its claim for loss of profit to 10 per cent. Bhagheeratha stated that the

estimated contract value which was not invoiced was IQD 1,253,850 (USD 4,023,465). Ten per cent of the uninvoiced estimated contract value is USD 402,347.

661. In the revised "E" claim form, Bhagheeratha classified the claim for loss of profits as a claim for contract losses, but the claim is more appropriately classified as a claim for loss of profits.

2. Analysis and valuation

662. The requirements to substantiate a loss of profits claim have been stated by the Panel at paragraphs 16 and 17, supra.

663. In support of its claim, Bhagheeratha provided a copy of the fertiliser contract; a letter dated 25 September 1989 from Bhagheeratha to the State Engineering Company regarding manpower planning; correspondence between the parties regarding the termination of the Fertiliser Project; certified extracts of the profit and loss accounts and balance sheets for the Fertiliser Project for the period of the three years prior to 31 December 1990; an internally generated summary of profitability statements based on actual expenses during the course of the project, dated 28 February 1990; a letter dated 10 July 1989 from Bhagheeratha to the Joint Controller, Reserve Bank of India which contains profitability estimates and cash flow projection up to the end of the project; and monthly production reports.

664. Bhagheeratha's performance on the Fertiliser Project was interrupted by Iraq's invasion and occupation of Kuwait. However, the Panel considers the following points to be significant. First, the contract was for an initial period of 18 months with a possible extension for another period of 18 months. Bhagheeratha advised the Commission that the fertiliser contract would not have been extended. Secondly, as has been explained in paragraphs 648, supra, the Fertiliser Project appears to have been well behind schedule. In October 1990, it was only 16.4 per cent complete.

665. While Bhagheeratha provided evidence which indicated that it may have been earning a profit on the Fertiliser Project above 10 per cent as at 2 August 1990, the Panel considers that the facts and evidence summarised in paragraph 664, supra, cast substantial doubt both on Bhagheeratha's assertions that it would complete the Fertiliser Project and on its calculations and assertions as to continued profitability. The Panel finds that Bhagheeratha failed to provide evidence which established with reasonable certainty ongoing and expected profitability. Accordingly, the Panel recommends no compensation for loss of profits.

3. Recommendation

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

C. Loss of tangible property

1. Facts and contentions

667. Bhagheeratha seeks compensation in the amount of USD 3,297,215 for loss of tangible property. The claim relates to the alleged loss of Bhagheeratha's machinery and equipment which was being used for the Fertiliser Project at the time of Iraq's invasion and occupation of Kuwait.

668. Bhagheeratha alleges that it purchased a large fleet of plant and machinery and other "articles of furniture" in connection with the Cement Project. Bhagheeratha transferred some of the items of tangible property to the Fertiliser Project. This was done in accordance with certain provisions in the fertiliser contract which required Bhagheeratha to mobilise its equipment and use it on the Fertiliser Project. There were also some items left at the Cement Project site, and some items which were located at Bhagheeratha's Baghdad office.

669. Under the fertiliser contract, Bhagheeratha was allowed to re-export all of the items when the Fertiliser Project finished. In accordance with these provisions, Bhagheeratha was not obligated to pay any tax or duties on the equipment.

670. As a result of Iraq's invasion and occupation of Kuwait, the Fertiliser Project stopped. Consequently, Bhagheeratha left Iraq after repatriating 163 of its employees. Bhagheeratha alleged that at this time (October 1990), the State Engineering Company suggested that Bhagheeratha hand over its equipment to it until the end of Iraq's invasion and occupation of Kuwait.

671. On 18 October 1990, Bhagheeratha handed over all of the equipment from the Fertiliser Project to the State Engineering Company. The State Engineering Company provided Bhagheeratha with a signed receipt for all of the equipment in its possession. Bhagheeratha stated that it also gave the State Engineering Company the equipment which was left over from the Cement Project, but which had not been transferred to the Fertiliser Project, and items at the Baghdad office.

672. Bhagheeratha alleged that after the conclusion of Iraq's invasion and occupation of Kuwait, the State Engineering Company did not invite Bhagheeratha back to Iraq to continue its performance on the Fertiliser Project. The State Engineering Company terminated the contract. The termination letter did not refer to the return of Bhagheeratha's equipment.

2. Analysis and valuation

673. In support of its claim, Bhagheeratha provided, inter alia, lists of the items of tangible property handed over to the State Engineering Company dated 18 October 1990 signed by the State Engineering Company. All of the statements indicate the value of the equipment handed over and accepted by the State Engineering Company. Bhagheeratha also provided the fertiliser contract, which includes a list of Bhagheeratha's equipment which it was required to mobilise from other projects to the Fertiliser Project. The contract specifically states that Bhagheeratha is the owner of this equipment. Finally, Bhagheeratha provided invoices and letters of credit for a large number of the items for which it seeks compensation.

674. The Panel finds that the invoices and letters of credit, as well as the detailed October 1990 lists signed by representatives of the State Engineering Company, constitute evidence that Bhagheeratha not only had the title to or right to use all of the items on the lists, but that those items were present in Iraq on 18 October 1990.

675. Bhagheeratha was unable to find out what happened to its tangible property after it left Iraq in October 1990. In the absence of information or evidence to the contrary, the Panel concludes that the tangible property was lost during, and as a direct result of, Iraq's invasion and occupation of Kuwait.

676. In relation to the valuation of the items, the Panel considers Bhagheeratha's valuation of all of the items for which it seeks compensation (in most cases at the rate of 50 per cent of the purchase price) to be inflated. Much of the property was several years old and Bhagheeratha advised the Commission that a number of items had not been maintained due to shortages of money and people. The Panel also noted that Bhagheeratha's asserted exchange rate in respect of some items purchased in currencies other than United States dollars was not in accordance with the official United Nations exchange rates adopted by the Panel in its reports. The Panel has adjusted the figures asserted by Bhagheeratha in order to take into account the different exchange rates used.

677. The Panel applied depreciation rates appropriate for such items. It also applied the appropriate exchange rates. The Panel concluded that certain types of items, such as furniture, instruments and caravans at the Fertiliser Project site, had no value because of their age. The Panel has concluded that the remaining items had a value of USD 427,191 on 18 October 1990, the date on which the State Engineering Company took the items into its custody.

3. Recommendation

678. The Panel recommends compensation in the amount of USD 427,191 for loss of tangible property.

D. Payment or relief to others

1. Facts and contentions

679. Bhagheeratha seeks compensation in the amount of USD 61,424 for payment or relief to others. The claim is made for the cost of airfares for some of its employees.

680. The Panel notes that the claim for payment or relief to others contained an arithmetical error. In the revised "E" claim form, Bhagheeratha sought compensation in the amount of USD 62,780 in respect of the claim for airfares. However, the Panel has noted that this loss element contained an arithmetical error which reduced the amount of the claim by the amount of USD 1,356 to USD 61,424.

681. The Panel refers to paragraphs 591 and 608, supra, and notes that it has not considered the duplicate claim for "leave salary" as part of the claim for payment or relief to others.

682. Bhagheeratha had 163 employees working on the Fertiliser Project. From the beginning of Iraq's invasion and occupation of Kuwait, Bhagheeratha was "compelled" to repatriate its employees on an emergency basis until October 1990. Bhagheeratha alleged that it paid for the airfares of all 163 employees between Iraq and Jordan, and for 95 out of its 163 employees between Jordan and India. The remaining employees on the latter leg were repatriated through rescue missions paid for by other parties.

683. Bhagheeratha stated that it incurred costs between IQD 48 and IQD 60 per employee for airfares from Baghdad to Amman and USD 530 per employee for airfares from Amman to Bombay. Bhagheeratha alleged that it incurred a total amount of USD 61,424 for airfare expenses for the 163 employees.

684. Bhagheeratha relied on clause 3(g) of the Fertiliser Project contract, which provides:

> "in case any personnel has to be repatriated before completing his service period due to reasons not attributable to him or [Bhagheeratha], [Bhagheeratha] should be compensated by [the State Engineering Company] by giving ... airfare".

685. Bhagheeratha wrote to the State Engineering Company seeking reimbursement for the repatriation expenses of its employees. Bhagheeratha stated that the State Engineering Company did not respond to its request.

2. Analysis and valuation

686. In support of its claim for payment or relief to others, the only evidence which Bhagheeratha provided was the fertiliser contract and some affidavits from employees which described the circumstances of their departure from Iraq. In the article 34 notification, Bhagheeratha was asked to provide evidence that it actually incurred the costs for which it seeks compensation. It failed to provide evidence to establish that it did in fact make the payments to its employees for the airfares, or to airlines on behalf of its employees, for any part of the claim. The Panel therefore finds that Bhagheeratha failed to provided sufficient evidence to establish its claim.

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

3. Recommendation

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

E. Interest

689. With reference to the issue of interest, the Panel refers to paragraphs 18 and 19, supra.

F. Recommendation for Bhagheeratha

Table 35. Recommended compensation for Bhagheeratha

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	3,825,364	311,835
Loss of profits	402,347	nil
Loss of tangible property	3,297,215	427,191
Payment or relief to others	61,424	nil
Interest (no amount specified)	-	-
Total	7,586,350	739,026

690. Based on its findings regarding Bhagheeratha's claim, the Panel recommends compensation in the amount of USD 739,026. In respect of the contract losses, the Panel finds the dates of loss to be 10 October 1990 ("one month extra rate" and "leave salary"), 15 August 1990 (the "R.A. bills") and 1 December 1991 (loss of retention monies). In respect of the tangible property losses, the Panel finds the date of loss to be 18 October 1990.

XIV. ENGINEERING PROJECTS (INDIA) LIMITED

691. Engineering Projects (India) Ltd. ("Engineering Projects") is a corporation organised according to the laws of India operating in the construction industry.

692. In the "E" claim form, Engineering Projects sought compensation in the amount of USD 113,133,341 for contract losses. In its reply to the article 15 notification dated 25 August 2000, Engineering Projects increased the total amount of compensation to USD 129,708,751. At this time, Engineering Projects reduced its claim for contract losses (funds held in Iraqi bank account) from USD 1,545,160 to USD 954,419. It also reduced its claim in respect of retention monies (a component of its claim for contract losses) from USD 2,765,730 to USD 2,304,160, a reduction of USD 461,570. The increase in the total amount of compensation sought was due to Engineering Projects' inclusion of amounts claimed for compounding interest.

693. The Panel has only considered those losses contained in the original claim, except where such losses have been withdrawn or reduced by Engineering Projects. Where Engineering Projects reduced the amount of losses contained in its reply to the article 15 notification, the Panel has considered the reduced amount.

694. The Panel has also corrected an arithmetical error in Engineering Projects' calculations of its claim for contract losses (funds held in Iraqi bank account). The correct amount is stated in table 36, infra.

695. The Panel has reclassified elements of Engineering Projects' claim for the purposes of this report. The Panel therefore considered the amount of USD 111,272,419 for contract losses, payment or relief to others, financial losses, other losses and interest, as follows:

Table 36. Engineering Projects' claim

Claim element	Claim amount (USD)
Contract losses (contracts with Iraqi parties)	92,990,581
Contract losses (contract with non-Iraqi party)	482,565
Payment or relief to others	105,148
Financial losses	1,099,165
Other losses	309,681
Interest	16,285,279
Total	111,272,419

A. Contract losses (contracts with Iraqi parties)

1. Facts and contentions

696. Engineering Projects seeks compensation in the amount of USD 92,990,581 for contract losses (contracts with Iraqi parties) allegedly arising out of five projects in Iraq. The claims relate to several types of losses.

697. The five projects are as follows:

(a) Water Research Centre Project, Baghdad, Iraq (the "Research Project");

(b) Saad 3 Project, Iraq (the "Saad Project");

(c) Northern Grain Silos – Lot 3(A), Iraq (the "Northern Project");

(d) Grain Silos – Lot 4 (the "Grain Project"); and

(e) Council of Ministers Building Project, Iraq (the "Council Project").

698. Engineering Projects provided only basic details of the five projects.

699. The Research Project contract is dated 3 February 1979. The employer was the Ministry of Irrigation of Iraq. The value of the contract was IQD 5,532,236 and the project was to be completed within a period of 28 months after the date of commencement of the works.

700. The Saad Project contract is dated 12 October 1978. The employer was the State Organisation for Technical Industries, Iraq. The value of the contract was IQD 7,000,000 and Pounds Sterling 12,093,625. The project was to be completed within two years of the date of commencement of the works.

701. The Northern Project contract is dated 6 April 1978. The employer was the State Organisation of Grain, Iraq. The value of the contract was IQD 26,231,901 and the project was to be completed within 32 months from the date of commencement of the works.

702. The Grain Project contract is dated 12 July 1980. The employer was the Ministry of Trade, Iraq. The value of the contract was IQD 26,620,729 and the project was to be completed within 20 months.

703. The Council Project contract is dated 14 May 1979. The employer was the Minister of Housing and Construction of Iraq. The value of the contract was IQD 30,047,269 and the project was to be completed by 14 May 1981. Modifications to this contract will be discussed at paragraph 722, infra.

704. Engineering Projects alleged that it had completed four of the five projects prior to Iraq's invasion and occupation of Kuwait. The last project, the Council Project, was in its maintenance period at the time of Iraq's invasion and occupation of Kuwait. The maintenance period was due to be

completed in November-December 1990. Engineering Projects stated that the project building was damaged and that the employer eventually "foreclosed on the contract" in 1992.

705. Engineering Projects alleged that although all of the other projects were completed, there were still amounts due under final bills, retention monies and other receivables due to it. Engineering Projects maintained that it was unable to obtain the necessary clearance certificates, which would have entitled it to payment, as a result of Iraq's invasion and occupation of Kuwait.

706. There are three main categories of alleged losses: (a) losses relating to amounts due under a deferred payment agreement; (b) amounts due under the "final bill, retention money, penalty refund and other dues"; and (c) "war claims and other claims pending".

(a) Amounts owed under a deferred payment agreement

707. Engineering Projects seeks compensation in the amount of USD 41,895,433 for contract losses in relation to amounts owed under a deferred payment agreement. The claim relates to work carried out on three projects: the Grain Project, the Research Project and the Council Project.

708. In reply to the article 15 notification, Engineering Projects increased the amount of compensation it sought in respect of this loss element to USD 62,508,772. However, this included a significant component of interest as well as an increased claim for interest. The Panel has reclassified the original amount of interest sought when Engineering Projects first submitted its claim, i.e. USD 7,665,183, as a claim for interest.

709. Engineering Projects stated that in 1983, the Governments of India and Iraq entered into a deferred payment agreement in connection with the foreign currency portion of "bills certified by Iraqi clients for projects undertaken by Indian contractors in Iraq" (the "deferred payment agreement"). According to Engineering Projects, the deferred payment agreement was substantially extended from 1983 onwards.

710. The entity responsible in India for the payment of monies owed to Indian contractors like Engineering Projects was the Export-Import Bank of India (the "EXIM Bank").

711. There are three sub-categories of amounts owed under a deferred payment agreement: (a) certified and credited amounts; (b) amounts certified but not credited; and (c) amounts due under "double recovery".

(i) Certified and credited amounts

712. Engineering Projects alleged that as a result of Iraq's invasion and occupation of Kuwait, it did not receive the payments due to it under the deferred payment agreement in relation to the Grain Project and the Council Project. Engineering Projects stated that it was entitled to receive USD 40,796,450 against bills certified and credited to the EXIM Bank.

713. Engineering Projects asserted that the performance relating to the certified bills was carried out prior to 2 May 1990. The amounts were allegedly due for payment from 1 March 1991 onwards.

Engineering Projects maintained that the payments were not received due to Iraq's invasion and occupation of Kuwait.

(ii) Amounts certified but not credited

714. Engineering Projects alleged that as a result of Iraq's invasion and occupation of Kuwait, the deferred payment agreement for the amounts payable from 1991 onwards in respect of the Research and Council Building Projects could not be renewed. Consequently, although "bills" amounting to USD 776,456 have been certified by the employers, the amounts have not been credited by the Central Bank of Iraq to the EXIM Bank.

715. Engineering Projects maintained that it did not receive the payments due to Iraq's invasion and occupation of Kuwait.

(iii) Amounts due under "double recovery"

716. Engineering Projects stated that it is entitled to compensation in the amount of USD 322,527 in respect of errors arising out of payment for its work on the Grain Project. The nature of the claim is not clear, but Engineering Projects appeared to assert that the Central Bank of Iraq (the "Central Bank") used different exchange rates in calculating monies earned and owed in respect of this project. The Central Bank may have erroneously offset monies in the amount of USD 322,527.

717. Engineering Projects therefore asserted that the amount of USD 322,527 represented a double recovery by the Central Bank for Engineering Projects' certified payments in respect of the Grain Project. Engineering Projects stated that it could not receive repayment of this amount due to Iraq's invasion and occupation of Kuwait.

718. The work in respect of which Engineering Projects seeks compensation was carried out in 1983.

(b) "Amounts due under final bill, retention money, penalty refund and other claims"

719. Engineering Projects seeks compensation in the amount of USD 8,585,148 for "amounts due under final bill, retention money, penalty refund and other claims" in relation to the following projects: the Council Project, the Northern Project, the Grain Project, the Research Project and the Saad Project.

720. Engineering Projects originally sought compensation in the amount of USD 28,248,400 for this loss element. The Panel has reclassified a component of the claim as a claim for interest. In its replies to the article 15 and article 34 notifications, Engineering Projects also amended and reclassified aspects of this loss element to other components of the claim for contract losses.

721. Engineering Projects alleged that due to Iraq's invasion and occupation of Kuwait, it had to demobilise its staff from Iraq and, as a result, it could not obtain various clearance certificates from the Iraqi authorities. It states that it would have received due payments in the amount of USD 6,280,988 had it obtained the clearance certificates.

722. The sole claim for retention monies relates to the Council Project. Engineering Projects alleged that the Council Project was in its maintenance period at the time of Iraq's invasion and occupation of Kuwait. It is unclear from the documents provided by Engineering Projects whether the Council Project was subject to the deferred payment agreement. Engineering Projects alleged that following the issue of the provisional acceptance certificate on or effective as at 18 August 1988, Engineering Projects was required to remedy some defects during the maintenance period. Engineering Projects stated that as at 2 August 1990, only minor defects remained to be remedied, such that it would have completed the maintenance period in November-December 1990. Engineering Projects would have been entitled to payment of the retention monies in the amount of USD 2,304,160 at that time. This is the only claim for monies arising out of performance after 2 May 1990.

(c) "War claims and other claims"

723. Engineering Projects seeks compensation in the amount of USD 42,510,000 for outstanding claims with the employers. Engineering Projects did not specify what the difference was between this loss element and the loss element relating to "amounts due under final bill, retention money, penalty refund and other dues".

724. Engineering Projects alleged that during the execution of the Research, Northern and Grain Projects, it lodged claims with the employers relating to "extra works, variation items, war claims, etc."

725. Engineering Projects stated that these claims were "vigorously" followed up after the completion of the projects. However, due to Iraq's invasion and occupation of Kuwait, it had to close its office in Baghdad and demobilise its staff from Iraq. As a result, the outstanding claims remain unsettled. The only other information which Engineering Projects provided was that it completed all work in respect of the three projects many years before 2 May 1990.

2. Analysis and valuation

726. In support of its claim for contract losses, Engineering Projects provided a considerable amount of evidence, including the contracts for all of the projects, details of commencement dates and contract values. It also provided largely illegible copies of final acceptance certificates and 'no objection' certificates.

727. The Panel has defined the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) to limit the jurisdiction of the Commission to exclude debts of the Government of Iraq if the performance relating to that obligation took place prior to 2 May 1990.

728. The Panel finds that for the purposes of the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) Engineering Projects had, in each case, a contract with Iraq.

729. In relation to all of the projects, with the exception of the Council Project, Engineering Projects clearly stated that it completed the contract works, including the maintenance periods, well before 2 May 1990. The Panel finds that these contract losses relate entirely to work performed prior to

2 May 1990. The Panel also notes that Engineering Projects failed to provide sufficient evidence that a contractual or legal condition of payment was that it receive the 'no objection' certificates.

730. The Panel recommends no compensation for these contract losses as they relate to debts and obligations of Iraq arising prior to 2 August 1990 and, therefore, are outside the jurisdiction of the Commission.

731. The Panel finds that for the purposes of Security Council resolution 687 (1991) the deferred payments agreement did not have the effect of novating the debts.

732. In respect of the claim for retention monies (Council Project), the maintenance period commenced 18 months from the date of completion. It is not clear from the contract documents provided by Engineering Projects when the Council Project contract was actually completed. Nevertheless, in its reply to the article 34 notification, Engineering Projects stated that an extension to the Council Project was granted by the employer up to 18 August 1988. Engineering Projects alleged that the employer issued the provisional acceptance certificate at this time.

733. In terms of events after that date, the only information which Engineering Projects provided was that the employer issued the final acceptance certificate on 27 May 1992, effective 18 August 1988. The document which Engineering Projects provided in support of this assertion (dated October 1992) was not completely legible, but it did confirm the assertion.

734. However, if the Council Project was in fact effectively completed on 18 August 1988 and the 18 month maintenance period commenced on that date, Engineering Projects should have completed its performance on 18 February 1990. Engineering Projects did not provide an explanation as to why the maintenance period was allegedly extended after 18 February 1990 and indeed was still in progress as at 2 August 1990, with an asserted likely completion period of November-December 1990. The Panel finds that although the maintenance period was still in progress as at 2 August 1990, Engineering Projects failed to explain the basis for the extension after 18 February 1990. In the absence of evidence to the contrary, and taking into account the period of over five months between that date and 2 August 1990, the Panel assumes that the reasons for the delay were not due to Iraq's invasion and occupation of Kuwait. Consequently, Engineering Projects has failed to establish that the alleged loss in respect of the Council Project (retention monies) arose as a direct result of Iraq's invasion and occupation of Kuwait.

735. The Panel recommends no compensation for the Council Project (retention monies).

3. Recommendation

736. The Panel recommends no compensation for contract losses (contracts with Iraqi parties).

B. Contract losses (contract with non-Iraqi party)

1. Facts and contentions

737. Engineering Projects seeks compensation in the amount of USD 482,565 for work that it completed as a sub-contractor on the Um Qasar Project in Basrah, Iraq (the "Um Qasar Project").

738. Engineering Projects stated that it was a sub-contractor to a Kuwaiti company, the Al Amiry Trading and Contracting Co. ("Al Amiry"). Al Amiry was the main contractor to the employer, the State Organisation of Iraqi Ports, Iraq (the "State Organisation").

739. The main Um Qasar Project contract between the State Organisation and Al Amiry is dated 15 February 1976. The value of the contract was IQD 5,913,688 and the project was to be completed within 18 months after the date of commencement of the works.

740. In February 1976, Al Amiry sub-contracted works in the amount of IQD 3,405,595 to Engineering Projects. The sub-contract incorporated the terms and conditions included in the main contract, including the provisions relating to payment and completion.

741. Engineering Projects did not explain the history of the Project or when it was completed. However, according to a Settlement Agreement dated 12 September 1989 between Al Amiry and Engineering Projects (the "settlement agreement"), Engineering Projects had completed all of its obligations under the sub-contract by August 1978. The State Organisation issued the final acceptance certificate on 7 July 1982.

742. In the settlement agreement, Al Amiry acknowledged that it owed Engineering Projects monies in Iraqi dinars. Engineering Projects asserted that the amount recorded in the settlement agreement was IQD 150,384 (USD 482,565), but it has not been possible to establish this assertion.

743. Engineering Projects alleged that Al Amiry received payment from the State Organisation in July 1990 and that Al Amiry advised Engineering projects that it would pay the monies outstanding as soon as possible. Al Amiry did not remit payment to Engineering Projects prior to 2 August 1990 and allegedly could not do so subsequently due to Iraq's invasion and occupation of Kuwait.

2. Analysis and valuation

744. In support of its claim, Engineering Projects provided a copy of the contract for the Um Qasar Project, the Settlement Agreement, the final acceptance certificate and correspondence between Engineering Projects and Al Amiry regarding likely payment of the monies owed in July 1990.

745. This Panel has found that a claimant must provide specific proof that the failure of a non-Iraqi debtor to pay was a direct result of Iraq's invasion and occupation of Kuwait. A claimant must demonstrate, for example, that such a business debtor was rendered unable to pay due to insolvency or bankruptcy caused by the destruction of its business during Iraq's invasion and occupation of Kuwait, or was otherwise entitled to refuse to pay the claimant.

746. Engineering Projects established that under the terms of the Settlement Agreement, it had the right to payment of monies by Al Amiry for Engineering Projects' work on the Um Qasar Project. However, Engineering Projects failed to demonstrate why Al Amiry had not paid it the monies after the conclusion of Iraq's invasion and occupation of Kuwait. Nor was the amount allegedly owed clearly identified. The Panel, therefore, finds that Engineering Projects failed to demonstrate that the alleged loss arose as a direct result of Iraq's invasion and occupation of Kuwait.

3. Recommendation

747. The Panel recommends no compensation for contract losses (contract with non-Iraqi party).

C. Payment or relief to others

1. Facts and contentions

748. Engineering Projects seeks compensation in the amount of USD 105,148 for payment or relief to others. The claim is for the alleged costs of evacuating Engineering Projects' employees and their dependants from Iraq and Kuwait, as well as for certain salary payments.

749. Engineering Projects originally classified all components of the claim for payment or relief to others as claims for contract losses, but the losses are more appropriately classified as payment or relief to others.

(a) Repatriation expenses

750. Engineering Projects seeks compensation in the amount of USD 37,202 for the repatriation expenses of 31 employees and their families (48 people in total).

751. Engineering Projects stated that it had to evacuate its entire staff and their families from Iraq as a result of Iraq's invasion and occupation of Kuwait. The people affected were evacuated in two groups. The first group left Iraq on 7 October 1990 and the second group left on 27 October 1990. Both groups were repatriated to India via Jordan.

752. Engineering Projects seeks compensation for the cost of their airfares, excess baggage charges and departure taxes.

(b) Salary payments since August 1990 (repatriated employees)

753. Engineering Projects seeks compensation in the amount of USD 61,855 for salary payments that it paid to 31 of its employees between 2 August 1990 and their dates of departure in October 1990. During this period, the employees were unable to leave Iraq due to delays in obtaining the necessary exit documents. Their work during this time was unproductive.

754. Engineering Projects stated that its payroll records for its employees were kept in Iraq and, as such, were destroyed. Engineering Projects did, however, provide some documentation in support of its claims.

(c) Salary payments to Indian employee remaining in Iraq

755. Engineering Projects seeks compensation in the amount of USD 6,091 for salary payments to an Indian employee who stayed in Baghdad to oversee its assets and records after the departure of the other employees, until 31 December 1991. His specific function was that of cook/caretaker. The employee was assisted in the general task by two other employees who were Iraqi nationals. The claim in respect of the salaries to the two Iraqi employees has been reclassified as a claim for other losses.

2. Analysis and valuation

(a) Repatriation expenses

756. As evidence of its alleged losses, Engineering Projects provided an affidavit from its general manager verifying the alleged costs; a letter from Air India dated 6 October 1990 stating that 48 tickets were enclosed and listing the people to be repatriated; copies of over half of the tickets for the leg between Jordan and India; and receipts for the excess baggage charges. Engineering Projects provided no evidence in support of the alleged departure taxes.

757. Engineering Projects must demonstrate that the alleged repatriation expenses were in excess of the costs which it would otherwise have had to incur.

758. Engineering Projects stated that it, not the employer, was responsible for the costs of repatriating its employees. It asserted that had Iraq's invasion and occupation of Kuwait not taken place, the cost of repatriating the employees "would have been covered against the contract sum, receivable for the project from the Employer". Engineering Projects further states that since the works were not completed, the repatriation expenses were an additional expense which was borne by Engineering Projects.

759. In respect of the claims for excess baggage charges and departure taxes, Engineering Projects failed to provide any information or evidence which demonstrated that Engineering Projects incurred costs in addition to those which it would have expected to incur upon the orderly completion of its work in Iraq.

760. In respect of the claim for airfares, the Panel finds that on the basis of Engineering Projects' assertions, the only costs which clearly represent temporary and extraordinary expenses in principle were those incurred for the leg between Iraq and Jordan. However, Engineering Projects provided documentary evidence that these costs were incurred, in the form of tickets, for only a few employees and their dependants. Engineering Projects also failed to provide any documentary evidence that it, and not the employees, incurred the alleged costs. The Panel therefore finds that Engineering Projects failed to demonstrate to the satisfaction of the Panel that it incurred any losses or that the alleged losses arose as a direct result of Iraq's invasion and occupation of Kuwait.

(b) Salary payments since August 1990 (repatriated employees)

761. In support of its claim, Engineering Projects provided a copy of an undated internally generated statement of salaries between January and October 1990. Engineering Projects also provided a banker's cheque from the State Bank of India dated 22 November 1990 representing the global amount of salaries paid to Engineering Projects' detained employees between January and December 1990. This provided some certainty to its claim for salary payments for some employees.

762. The Panel finds that the claims for salary payments made since August 1990 are compensable in principle as having arisen as a direct result of Iraq's invasion and occupation of Kuwait. However, Engineering Projects provided sufficient detail for 11 employees only in the amount of USD 12,995. The Panel recommends compensation in the amount of USD 12,995 for the salary payments to these 11 employees only between 2 August 1990 and their date of departure (7 or 27 October 1990).

(c) Salary payments to Indian employee remaining in Iraq

763. The Panel notes that the employee remained in Iraq under the employment of Engineering Projects to oversee Engineering Projects' assets until 31 December 1991. Engineering Projects did not assert that the employee was detained or otherwise unable to leave Iraq between 2 August 1990 and 2 March 1991.

764. The Panel considers that the fact that the employee stayed in Iraq for almost 10 months after the conclusion of Iraq's invasion and occupation of Kuwait indicates that his presence for the entire period in Iraq (from 2 August 1990) was the result of Engineering Projects' conscious choice to attempt to secure payment of the monies allegedly owed to it by the employer. The qualifications of the employee to carry out this task were not stated. Nor did Engineering Projects explain what work he in fact carried out. The Panel accordingly finds that Engineering Projects has failed to demonstrate that the claim for salary payments arose as a direct result of Iraq's invasion and occupation of Kuwait.

3. Recommendation

765. The Panel recommends compensation in the amount of USD 12,995 for payment or relief to others.

D. Financial losses

1. Facts and contentions

766. Engineering Projects seeks compensation in the amount of USD 1,099,165 for financial losses. The claim includes a claim for funds in an Iraqi bank account in the amount of IQD 297,427 (USD 954,409) and losses related to the extension of bank guarantees in the amount of USD 144,756.

767. The Panel notes that in its reply to the article 15 notification, Engineering Projects reduced the amount claimed in respect of the claim for funds in an Iraqi bank account from USD 1,545,160 to USD 954,419. It did not provide an explanation for the reduction. The Panel notes that the asserted

amount in United States dollars contained an error when converted from the amount in Iraqi dinars using Engineering Projects' exchange rate. The Panel corrected this error, so that the amount claimed in United States dollars is USD 954,409.

768. Engineering Projects originally classified both components of the claim for financial losses as claims for contract losses, but they are more appropriately classified as financial losses.

(a) Funds in Iraqi bank account

769. Engineering Projects alleged that as at 3 August 1995, it had a bank balance of IQD 297,427 with the Al-Rasheed Bank in Baghdad ("Al-Rasheed"). Engineering Projects alleged that it earned these Iraqi dinar monies during its work on the Council Project.

770. Engineering Projects stated that it was unable to utilise or repatriate these funds as a result of Iraq's invasion and occupation of Kuwait. It alleged that it was entitled to repatriate the funds under clause 6 of the Council Project contract. Engineering Projects asserted that the amount in the bank account was supposed to be transferred upon completion of the Council Project. However, because the maintenance period on the Council Project was allegedly not completed, the transfer was prevented and did not subsequently occur due to Iraq's invasion and occupation of Kuwait. Engineering Projects seeks compensation in the amount of IQD 297,427 (USD 954,409) for loss of funds in the bank account.

771. The Panel notes that Engineering Projects continued to use the bank account for a considerable period after Iraq's invasion and occupation of Kuwait, making some deposits and many withdrawals between March 1992 and August 1994.

(b) Expenses relating to extension of bank guarantees

772. Engineering Projects seeks compensation in the amount of USD 144,756 for expenses relating to the extension of three bank guarantees. Engineering Projects asserted that the three guarantees were valid until 31 December 1990. Engineering Projects maintained that its contractual obligations would have been completed by this date but for Iraq's invasion and occupation of Kuwait. Engineering Projects did not state to which projects the bank guarantees related. The Panel has assumed that they were some of the projects in respect of which Engineering Projects seeks compensation for contract losses.

773. Engineering Projects alleged that its work could not be completed at any time after Iraq's invasion and occupation of Kuwait. The guarantees were consequently not released until 10 October 1992. Engineering Projects seeks compensation for the expenses incurred towards the extension of the guarantees from 31 December to 10 October 1992.

2. Analysis and valuation

(a) Funds in Iraqi bank account

774. In support of its claim, Engineering Projects provided, inter alia, the following evidence: a translated certificate issued by Al-Rasheed which indicates the balance in Iraqi dinars as at 31 March 1993 (IQD 364,025); photocopies of partially translated bank statements from Al-Rasheed for the period 29 March 1992 to 17 August 1994; a certificate in Arabic (untranslated) which was asserted to show the amount claimed as at 3 August 1995; and the contract for the Council Project.

775. The Panel has found in its previous reports that, inter alia, a claimant must establish that the funds in the bank account have been appropriated, removed, stolen or destroyed.

776. The Panel finds that the evidence showed that as at 17 August 1994, Engineering Projects had funds in the bank account in an amount close to the amount asserted as at 3 August 1995. There is insufficient translated evidence to establish the amount as at 3 August 1995. The evidence also showed that Engineering Projects had access to this account during and after the conclusion of Iraq's invasion and occupation of Kuwait and used some of the funds, presumably within Iraq, prior to 17 August 1994. The balance fluctuated considerably during this period.

777. Engineering Projects used the account for a number of years after 2 August 1990 and the account was still in existence as at 3 August 1995, the date on which it valued its alleged loss. The Panel finds that Engineering Projects failed to establish that the funds had been appropriated, removed, stolen or destroyed. Engineering Projects therefore failed to establish that it has suffered any loss.

778. The Panel recommends no compensation for the claim for the funds held in the Iraqi bank account.

(b) Expenses relating to extension of bank guarantees

779. The Panel finds that the claim for expenses relating to the extension of bank guarantees is not compensable because the Panel has determined in paragraphs 729-735, supra, that Engineering Projects' underlying claims for contract losses were not compensable.

3. Recommendation

780. The Panel recommends no compensation for financial losses.

E. Other losses

1. Facts and contentions

781. Engineering Projects seeks compensation in the amount of USD 309,681 for a wide variety of miscellaneous losses incurred after 2 August 1990, including: rents paid for office space, storage, plant and equipment; utilities expenses paid; the cost of extensions for temporary import guarantees and

project insurance; and salary payments to two Iraqi employees who remained in Iraq to oversee Engineering Projects' assets during Iraq's invasion and occupation of Kuwait.

782. The alleged losses can be represented as follows:

Table 37. Engineering Projects' claim for other losses

Loss item	Amount claimed (USD)
Rent expenses:	
(a) guest house/office	101,616
(b) 22 flats	34,495
(c) store shed	46,529
Sub-total for rent expenses	182,640
Miscellaneous expenses	
Utility expenses	19,735
Temporary import guarantee expenses	20,216
Project insurance expenses	36,902
Salaries paid to Iraqi employees	50,188
Sub-total for miscellaneous expenses	127,041
Total	309,681

783. Engineering Projects did not provide much detail or information about any of the components of the claim for other losses.

(a) Rent

784. Engineering Projects seeks compensation in the amount of USD 101,616 for the rental expenses that it incurred on its guest house/office building in Baghdad between August 1990 and December 1992.

785. Engineering Projects also seeks compensation in the amount of USD 34,495 for the rental expenses that it incurred on 22 flats in one building in Baghdad between August 1990 and 25 September 1991.

786. Engineering Projects seeks compensation in the amount of USD 46,529 for the rental expenses which it allegedly incurred in respect of a store shed at Baquba, Iraq, between August 1990 and December 1992.

(b) Utility expenses

787. Engineering Projects seeks compensation in the amount of USD 19,735 for expenses which it allegedly incurred on water, electricity and telephone charges for maintaining its guest house/office building in Baghdad and for storage costs at the Baquba site.

(c) Temporary import guarantees expenses

788. Engineering Projects seeks compensation in the amount of USD 20,216 for charges allegedly incurred in extending 42 temporary import guarantees from January 1991 to November 1992.

789. Engineering Projects stated that the temporary import guarantees related to the construction plant and equipment which was required for its projects in Iraq, particularly the Council Project. Engineering Projects asserted that under normal circumstances, it would have completed the Council Project by December 1990 and cancelled the temporary import guarantees. However, due to Iraq's invasion and occupation of Kuwait, the work was not completed and the construction plant and equipment were surrendered to the Iraqi authorities in 1992.

790. Engineering Projects stated that the temporary import guarantees were not cancelled until after November 1992.

(d) Project insurance expenses

791. Engineering Projects seeks compensation in the amount of USD 36,902 for project insurance expenses between August 1990 and June 1992. Engineering Projects stated that it was required to take out insurance "against all risks" in accordance with the contract conditions of the Council Project from the commencement of work until the issuance of the final acceptance certificate. The insurance policy with the National Insurance Company of Iraq covered all of its employees, work, material and equipment relating to the Council Project.

(e) Salaries paid to Iraqi employees

792. Engineering Projects seeks compensation in the amount of USD 50,188 for salary payments to two Iraqi employees. These employees, along with the Indian employee referred to at paragraphs 755 and 763-764, supra, oversaw its assets in Baghdad after the departure of the majority of Engineering Projects' employees until 31 December 1991.

2. Analysis and valuation

793. In support of all components of its claim for other losses, Engineering Projects provided an affidavit of its general manager. The affidavit provides no detail in addition to that already provided.

(a) Rent

794. In support of its claim for rent, Engineering Projects provided a rent receipt dated 31 July 1995 for the rent in respect of the guest house/office, and a rent receipt dated 25 September 1991 for the rent

in respect of the 22 flats. It provided no evidence in respect of the store shed. The Panel notes that the rent receipt for the guest house/office related to a rental period between 1 April 1994 and 31 August 1995, which was not the period for which Engineering Projects seeks compensation.

795. Engineering Projects asserted that it was unable to use the three premises for a portion of the terms for which it had already paid. In the majority of similar claims which the Panel has previously reviewed, the Panel has found that such claims are claims for overheads which were not directly chargeable to the employer. Engineering Projects did not submit any evidence, or indeed make any claim, that the payments were directly chargeable to any employer. The Panel recommends no compensation for all components of the claim for rent because Engineering Projects failed to demonstrate that they are losses arising as a direct result of Iraq's invasion and occupation of Kuwait.

(b) Utility expenses

796. In support of its claim for utility expenses, Engineering Projects provided an undated internally generated list detailing the alleged expenses. However, it failed to provide more specific evidence such as invoices and receipts, or evidence which established that the alleged losses arose as a direct result of Iraq's invasion and occupation of Kuwait.

797. The Panel recommends no compensation for the claim for the utility expenses because Engineering Projects failed to establish that the alleged losses arose as a direct result of Iraq's invasion and occupation of Kuwait.

(c) Temporary import guarantees expenses

798. In support of its claim, Engineering Projects provided a customs clearance certificate dated 2 July 1995. Engineering Projects stated that evidence of payment of the temporary import guarantee expenses had been left in Iraq and subsequently lost.

799. The Panel normally requires a claimant to supply clear documentary evidence of such claims, such as evidence of payment and evidence of the requirement to pay. The Panel considers that Engineering Projects should have kept duplicates of such documents outside of Iraq. In the absence of any primary documentary evidence, the Panel finds that Engineering Projects failed to provide sufficient information and evidence to establish its claim.

800. The Panel recommends no compensation for the claim for expenses relating to the extension of temporary import guarantees.

(d) Project insurance expenses

801. Engineering Projects stated that evidence of payment of the project insurance expenses, as well as a copy of the insurance policy, had been left in Iraq and subsequently lost. However, it did provide a clearance certificate from the National Insurance Company of Iraq and some correspondence which confirmed that the insurance policy had been extended for at least part of the period after 2 August 1990.

802. This evidence did not establish either that Engineering Projects had paid the premiums or that the alleged loss arose as a direct result of Iraq's invasion and occupation of Kuwait.

803. The Panel recommends no compensation for the claim for project insurance expenses because Engineering Projects failed to establish that the alleged loss arose as a direct result of Iraq's invasion and occupation of Kuwait.

(e) Salaries paid to Iraqi employees

804. Engineering Projects provided some evidence in support of its claim relating to payment of some of the alleged components of the salary of one of the employees. However, Engineering Projects did not provide more comprehensive evidence such as the full payroll records and the service agreements as these were allegedly lost in Iraq. In the absence of these documents, there is insufficient evidence to support the alleged losses. The Panel refers to its observations at paragraph 799, supra, regarding the reasons for the absence of the documents.

805. The Panel finds that Engineering Projects failed to provide sufficient information and evidence to establish its claim. The Panel recommends no compensation for salaries paid to the two Iraqi employees.

3. Recommendation

806. The Panel recommends no compensation for other losses.

F. Interest

807. As the Panel recommends no compensation for contract losses, there is no need for the Panel to determine the date of loss from which interest would accrue.

G. Recommendation for Engineering Projects

Table 38. Recommended compensation for Engineering Projects

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses (contracts with Iraqi parties)	92,990,581	nil
Contract losses (contracts with non-Iraqi party)	482,565	nil
Payment or relief to others	105,148	12,995
Financial losses	1,099,165	nil
Other losses	309,681	nil
Interest	16,285,279	nil
Total	111,272,419	12,995

808. Based on its findings regarding Engineering Projects' claim, the Panel recommends compensation in the amount of USD 12,995. The Panel finds the date of loss to be 15 September 1990.

XV. NATIONAL BUILDINGS CONSTRUCTION CORPORATION LIMITED

809. National Buildings Construction Corporation Limited ("National") is a corporation organised according to the laws of India operating in the construction industry.

810. In the "E" claim form, National sought compensation in the amount of USD 103,553,848 for contract losses. The Panel has reclassified elements of National's claim for the purposes of this report. The Panel also notes that National made an arithmetical error in the calculation of a component of its reclassified claim for payment or relief to others. The nature of the error is described in paragraph 878, infra. This increased the original claim amount by USD 38 to USD 103,553,886.

811. In its reply to the article 34 notification, National reduced a component of its reclassified claim for other losses by the amount of USD 24,067. The nature of this reduction is explained in paragraph 919, infra.

812. The Panel therefore considered the amount of USD 103,529,819 for contract losses, payment or relief to others, financial losses, other losses and interest, as follows:

Table 39. National's claim

Claim element	Claim amount (USD)
Contract losses	60,734,106
Payment or relief to others	63,744
Financial losses	650,885
Other losses	1,117,228
Interest	40,963,856
Total	103,529,819

A. Contract losses

1. Facts and contentions

813. National seeks compensation in the amount of USD 60,734,106 for contract losses allegedly incurred in connection with nine projects in Iraq.

814. There are two categories of alleged losses: losses relating to amounts due under a deferred payment agreement and amounts due under "cash contracts". National asserted that all of the alleged losses represent amounts which the employers had approved, but which due to inter-governmental or banking arrangements, had not yet been finally certified or paid to National. National seeks compensation in the amount of USD 58,338,537 for amounts due under the deferred payment agreement. National seeks compensation in the amount of USD 2,395,569 for amounts due under the "cash contracts".

815. The alleged losses can be represented as follows:

Table 40. National's claim for contract losses

Loss element (project)	Claim amount (USD)
Deferred payment agreement	
(a) Mosul hotel	10,288,886
(b) Dokan hotel	2,628,613
(c) Kirkuk storage tank	949,820
(d) Kirkuk/Debis water treatment plant	1,116,541
(e) Baghdad Al-Qaim Akashat railway	43,354,677
Sub-total for deferred payment agreement	58,338,537
Cash contracts	
(a) Baghdad University I & II	411,049
(b) Kubaisa railway	1,854,401
(c) Kirkuk control building	36,977
(d) Basrah	93,142
Sub-total for cash contracts	2,395,569
Total for all contract losses	60,734,106

816. In the "E" claim form and accompanying Statement of Claim, National sought compensation in the amount of USD 40,893,000 for additional contract losses. The Panel reclassified this loss element as a claim for interest.

(a) Amounts owed under deferred payment agreement

817. National stated that it carried out five projects in Iraq which were subject to inter-governmental deferred payment arrangements. It stated that "due to foreign currency crunch faced by Iraq" (by which the Panel understands National to mean the inability of Iraq to make payments due in currencies other than the Iraqi dinar), a number of contracts under which National was carrying out work became subject to deferred payment arrangements between the Governments of India and Iraq. These arrangements commenced in 1983 and were in effect as at 2 August 1990 (the "deferred payment agreement"). The nature of the individual work carried out under these contracts is described, infra. The deferred payment agreement essentially superseded the payment terms contained in these contracts.

818. The process of payment for work done in respect of these five projects covered by the deferred payment agreement for amounts owing in United States dollars was as follows:

- National submitted an invoice to the employer;

- If the employer approved the invoice, it advised the Central Bank of Iraq (the "Central Bank") (the paying bank) accordingly;

- If the Central Bank agreed, it notified the Export Import Bank of India ("EXIM") accordingly;

- The Central Bank was required to actually pay EXIM the deferred components several years later. Deferred components were themselves deferred; and

- Interest on the deferred components was to be satisfied by supply of oil to India. National asserted that it had a lien over the oil.

819. National seeks compensation in the amount of USD 58,338,537 for amounts due under the deferred payment agreement. This represents amounts which had been confirmed by the Central Bank as due under the payment mechanism established pursuant to the deferred payment agreement (USD 52,816,951), and amounts which had been certified by the Iraqi employers but not yet confirmed for payment under the deferred payment agreement (USD 5,521,586).

(i) Mosul hotel project

820. On 9 August 1980, National entered into a contract with the State Organisation for Tourism, Government of Iraq, under which it agreed to undertake the design and construction of a four-star hotel in Mosul together with another Indian company, India Tourism Development Corporation Limited ("ITDC").

821. The contract value was IQD 8,750,000, which was to be divided between National and ITDC. National did not explain what proportion each party was to receive. The employer was required to pay 70 per cent of the contract value in United States dollars, with the balance payable in Iraqi dinars. The contract value was subsequently increased to IQD 10,220,000 to account for extra items.

822. The contract works commenced on 15 February 1981. The contract period was 20 months and there was a 12 month maintenance period. National stated that it completed the contract works on 20 March 1986. On 3 March 1990, the employer issued the final acceptance certificate. This stated that the maintenance period ended on 20 March 1987.

823. National asserted that the Government of Iraq had confirmed the amount of USD 8,713,638 as due for payment and that the employer had certified the amount of USD 1,575,248 (total amount USD 10,288,886).

(ii) Dokan hotel project

824. On 11 August 1980, National entered into a contract with the State Organisation for Tourism, Government of Iraq, under which it agreed to undertake the design and construction of a three-star hotel in Dokan. National was again required to carry out the work with ITDC.

825. The contract value was IQD 2,650,000, which was again to be divided between National and ITDC. National did not explain what proportion each party was to receive. National provided no information about the currency of the contractual payments. The contract value was subsequently increased to IQD 3,077,000 to account for extra items.

826. The contract works commenced on 3 June 1981. The contract period was 18 months and there was a 12 month maintenance period. National stated that it completed the contract works on 18 April 1986. On 24 February 1990, the employer issued the final acceptance certificate. This stated that the maintenance period ended on 18 April 1987.

827. National asserted that the Government of Iraq had confirmed the amount of USD 1,705,866 as due for payment and that the employer had certified the amount of USD 922,747 (total amount USD 2,628,613).

(iii) Kirkuk storage tank project

828. On 4 May 1982, National entered into a contract with the Northern Petroleum Organisation, Kirkuk, Iraq, under which it agreed to undertake the construction of four brine storage reservoirs and associated works in Kirkuk.

829. The contract value was USD 4,136,360 (IQD 1,224,580)and IQD 306,145 (total of IQD 1,530,725). The contract value was subsequently increased to IQD 2,314,000 to account for extra items.

830. The contract works commenced on 1 June 1982. The contract period was 54 weeks and there was a 12 month maintenance period. National stated that it completed the contract works on 31 May 1985. This is confirmed by the final acceptance certificate.

831. National asserted that the Government of Iraq had confirmed the amount of USD 722,321 as due for payment and that the employer had certified the amount of USD 227,499 (total amount USD 949,820).

(iv) Kirkuk/Debis water treatment plant project

832. On 24 May 1982, National entered into a contract with the Northern Petroleum Organisation, Kirkuk, Iraq, under which it agreed to undertake the construction of a water treatment plant and associated works in Kirkuk.

833. The contract value was USD 4,129,190 and IQD 524,223. The contract works commenced on 21 June 1982. The contract period was 365 calendar days and there was a 12 month maintenance period. National stated that it completed the contract works on 30 April 1984.

834. National asserted that the Government of Iraq had confirmed the amount of USD 1,116,541 as due for payment.

(v) Baghdad Al-Qaim Akashat railway project

835. In September 1982, National entered into a contract with the State Company for Contracts of Industrial Projects, Iraq, under which it agreed to construct the industrial buildings and main stations for the Baghdad-Al-Qaim Akashat railway.

836. The contract value was IQD 20,861,528. The employer was required to pay 75 per cent of the contract value in United States dollars, with the balance payable in Iraqi dinars. The contract value was subsequently increased to IQD 26,905,000 to account for extra items.

837. The contract works commenced on 28 September 1982. The contract period was 19 months and there was a one year maintenance period. National stated that it completed the contract works on 1 October 1987. On 7 April 1992, the employer issued the final acceptance certificate. The date of acceptance was stated to be 20 May 1991.

838. National asserted that the Government of Iraq had confirmed the amount of USD 40,558,585 as due for payment and that the employer had certified the amount of USD 2,796,092 (total amount USD 43,354,677).

(b) Amounts due under "cash contracts"

839. National carried out smaller projects in Iraq. These were not subject to the deferred payment agreement.

840. National seeks compensation in the amount of USD 2,395,569 for monies due under these "cash contracts". For three of the projects, National's claim represents amounts due from the Central Bank following approval by the client of the invoice and the issue of 'no objection certificates' by the relevant Iraqi authorities. National had already received payment of the local currency payments under the contracts. National therefore only seeks compensation for amounts payable in United States dollars.

841. Payment for the fourth project was to be pursuant to a letter of credit. On the basis of the information and evidence provided by National, the fourth project was the only project interrupted by Iraq's invasion and occupation of Kuwait. However, it is unlikely that any work was actually in progress as at 2 August 1990 as the project had come to a standstill over a disagreement regarding the payment mechanism.

(i) Baghdad University projects

842. In 1978, National entered into a sub-contract with the State Constructional Contracting Co. for Public Constructional Work, Baghdad, Iraq, under which it agreed to provide services relating to structural concrete work for the Baghdad University building (known as "Baghdad University I").

843. The sub-contract value was IQD 2,672,701. The sub-contract value was subsequently reduced to IQD 2,405,000. Work commenced on 30 November 1978 and was due for completion on

30 November 1980. Payment was due within 30 days of the site engineer's approval. There was a maintenance period of 12 months.

844. National stated that it completed the sub-contract works on 31 May 1982. It asserted that the employer had certified the amount of USD 405,982 as due for payment.

845. On 17 June 1982, National entered into a sub-contract with the same contractor, under which it agreed to provide finishing work at the Baghdad University (known as "Baghdad University II").

846. The sub-contract value was IQD 292,684. Sixty-five per cent of the contract value was payable in "foreign currency" (presumably United States dollars) and 35 per cent in Iraqi dinars. The sub-contract value was subsequently increased to IQD 909,000. Work commenced on 17 June 1982. There were three phases for the sub-contract works. The last phase was due for completion on 28 February 1983. Payment was due on a monthly basis. There was a maintenance period of six months. On 16 March 1988, the employer wrote to National stating that it would not issue the final acceptance certificate until certain matters were attended to.

847. National stated that it completed the sub-contract works on 31 December 1985. It asserted that the employer had certified the amount of USD 5,067 as due for payment.

848. National seeks compensation in the total amount of USD 411,049 (USD 405,982 and USD 5,067) in respect of the Baghdad University projects.

(ii) Kubaisa railway project

849. On 17 December 1984, National entered into a contract with the Ministry of Transport and Communication, Iraq, under which it agreed to construct several buildings comprising the Kubaisa railway station.

850. The contract value was IQD 1,227,751. National was also required to provide a performance guarantee in the amount of 5 per cent of the contract value. The employer was required to pay 60 per cent of the contract value in United States dollars, with the balance payable in Iraqi dinars. The contract value was subsequently increased to IQD 1,424,000 to account for extra items. Three per cent of the contract value was retained as security for the maintenance period.

851. The contract works commenced on 31 January 1985. The contract period was 365 consecutive days and there was a maintenance period of the same duration. National submitted monthly invoices to the employer. National stated that it completed the contract works on 31 October 1987.

852. National asserted that the employer had certified the amount of USD 1,854,401 as due for payment.

(iii) Kirkuk control building project

853. On 24 May 1982, National entered into a contract with the Northern Petroleum Organization, Kirkuk, Iraq, under which it agreed to undertake the construction of a control building and pump shelter in Kirkuk.

854. The contract value was IQD 66,345 and USD 672,296. The contract value was alleged to have been subsequently increased to IQD 269,000. The contract works commenced on 21 June 1982. The contract works were required to be completed by 31 December 1982 and there was a 12 month maintenance period. Payment for monthly invoices was due within 15 days of the engineer's approval. National stated that it completed the contract works on 30 September 1983.

855. National asserted that the employer had certified the amount of USD 36,977 as due for payment.

(iv) Basrah project

856. On 28 September 1989, National entered into a contract with the State Enterprise for Iron and Steel, Basrah, Iraq, under which it agreed to design and construct steel shelters, roof and wall cladding in Basrah.

857. The contract value was USD 650,000 and IQD 30,000. The employer made advance payments of IQD 3,000 and USD 65,000. Payment of the balance of the contract value was to be by letter of credit. The employer retained 2.5 per cent of the contract value as security for the maintenance period. Payment for monthly invoices was due within 10 days of submission.

858. National subcontracted certain of the contract works to a Kuwaiti entity, Khalid Al Kharafi ("Khalid").

859. The contract works were deemed to have commenced on 10 November 1989. The contract works were required to be completed by 10 June 1990 and there was a one year maintenance period. However, National stated that although the employer opened the letter of credit, Khalid insisted on a "confirmed" letter of credit from National for payment for its works. This required the assistance of the employer and it appears that discussions were ongoing as at 2 August 1990. There is some internal evidence to suggest that in the light of the funding difficulties, the parties were considering agreeing to a revised completion schedule. This would have resulted in completion of the project by December 1990. In any event, Khalid completed some or all of its works under the sub-contract prior to that date, as "a goodwill gesture".

860. National asserted that following Iraq's invasion and occupation of Kuwait, Khalid went out of business and National had to abandon work under the contract. In 1992, National invoiced the employer for Khalid's work and costs stated to be associated with the contract in the amount of USD 93,142. National stated that it handed over construction materials and drawings to the employer prior to 2 August 1990. It stated that it had not received payment. In relation to the issue of whether Khalid or its shareholders have sought payment for Khalid's works under the sub-contract, National provided undated documents, in which National advised the employer that Khalid had approached it

for payment. National advised the Commission that it paid Khalid the amount of USD 5,000 prior to 2 August 1990. Details of the specific works to which this related were not provided.

861. National stated that it has not repaid the advance payment of IQD 3,000. National also advised the Commission that it had repaid USD 27,000 of the advance payment of USD 65,000. National provided a letter from the employer to National dated 19 August 1993. The letter relates to the advance of USD 65,000. In the letter, the employer acknowledged that National had incurred costs in the amount of USD 27,000. The employer requested the return of the balance of USD 38,000. National's comment on the letter appears to indicate its acceptance of its debt to the employer in the amounts of USD 38,000 and IQD 3,000. However, National does not appear to have reduced the amount of its claim in relation to the Basrah project accordingly. It seeks compensation in the amount of USD 93,142.

862. The Panel notes that National originally sought a further amount of USD 70,856 as alleged contract losses in respect of the Basrah project. The Panel reclassified this amount as a claim for interest.

2. Analysis and valuation

863. The Panel has defined the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) to limit the jurisdiction of the Commission to exclude debts of the Government of Iraq if the performance relating to that obligation took place prior to 2 May 1990.

864. The Panel finds that for the purposes of the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) National had, in each case, a contract with Iraq.

865. The Panel finds that it is able to reach a common conclusion in relation to all of the projects except the Basrah project (i.e. eight projects). The Panel considers the claim in relation to the Basrah project in paragraphs 871-873, infra.

866. In relation to these eight projects (i.e. Mosul hotel, Dokan hotel, Kirkuk storage tank, Kirkuk/Debis water treatment plant, Baghdad Al-Qaim Akashat railway, Baghdad University I & II, Kubaisa railway and Kirkuk control building), National informed the Commission that National completed the contract works, including the maintenance periods, well before 2 May 1990. The dates of performance of the work range from 1982 to 1987. All of the evidence which National provided supported National's assertions. For example, the final acceptance certificates which National was able to provide, although dated in some cases in 1990 or later, indicated that the work was completed by the dates/times which National asserted.

867. In relation to the eight projects, it is important to note National's assertion that "clients release the payment of final bill only after the maintenance period is successfully completed and ['no objection certificates' or clearance certificates] are obtained from various local departments as per the Laws of the Country". National consequently appeared to argue that the Iraqi employers were legally entitled to withhold payment to National of the final contract payments until National had obtained

clearance certificates from the relevant Iraqi authorities. In some cases, National had not obtained the clearance certificates by 2 August 1990.

868. National only provided a few final acceptance certificates. It stated that the remaining certificates were in Iraq. The state of the evidence in relation to the issue of when it completed physical works in relation to the eight projects is therefore unsatisfactory. So too is the evidence in relation to the reasons why National had failed to obtain the necessary clearance certificates given its assertion that it completed the contract works between 1982 and 1987. National failed to explain why it had not yet received all of the necessary clearance certificates prior to 2 August 1990, despite the fact that in some cases it had been waiting for the certificates for eight years. National also failed to explain why it had not been paid for the projects for which it had received the necessary clearance certificates.

869. National asserted that the contract losses arose as a direct result of Iraq's invasion and occupation of Kuwait because, due to the sanctions against Iraq, the employers could not pay National the amounts for which it seeks compensation. The Panel finds that the dates of completion of contract works for the eight projects make it unlikely that the failure of Iraq to pay any of the amounts alleged to be compensable can be said to have arisen as a direct result of Iraq's invasion and occupation of Kuwait.

870. The Panel considers that the period of time that elapsed between 1982-1987 (the alleged dates between which the eight projects were completed) and 2 August 1990 indicates that Iraq's invasion and occupation of Kuwait was not the cause of National's alleged losses. The Panel finds that the claim in relation to these eight projects is not compensable because National has failed to demonstrate that the losses arose as a direct result of Iraq's invasion and occupation of Kuwait.

871. In relation to the Basrah project, National asserted that its performance was interrupted as a direct result of Iraq's invasion and occupation of Kuwait. On the basis of the evidence provided, this might be correct.

872. However, the Panel finds that the evidence which National provided in relation to the Basrah project does not establish that the employer owes it the amount claimed. All that National provided in this respect is an affidavit in which the deponent states that all payments which National made in respect of the project were made before 2 August 1990. The evidence which National submitted suggests that no contract was ever finalised, as an acceptable letter of credit was not agreed. National had some type of claim against the employer for work performed even in the absence of a binding contract, but the employer accepted the value of this claim to be USD 27,000 only. All of the work for which National seeks compensation appears to have been carried out before 2 May 1990. Further, National appeared to accept that it owes the employer a much more substantial sum as a result of advance payments which it has not repaid.

873. In relation to the Basrah project, the Panel recommends no compensation for contract losses both because the claim relates to work performed prior to 2 May 1990 (which means that the claim is

outside the jurisdiction of the Commission) and because National failed to demonstrate that it has suffered a loss.

3. Recommendation

874. The Panel recommends no compensation for contract losses.

B. Payment or relief to others

1. Facts and contentions

875. National seeks compensation in the amount of USD 63,744 for payment or relief to others.

876. National alleged that it was required to pay wages to 18 of its employees who remained in Iraq between 2 August 1990 and various dates until 20 January 1991. The employees were unable to carry out productive work during this period due to the suspension of projects and general unrest. National seeks compensation for their salaries/wages for this period.

877. 10 of the 18 employees tried to leave Iraq for India on 12 January 1991. When they reached Jordan, the Jordanian authorities refused them entry. The consequence was that they were forced to return to Iraq for another week. When they tried again, they were admitted to Jordan, but were forced to stay in a refugee camp in Jordan for the 12 days prior to their repatriation to India. National seeks compensation for the wages/salaries of the 10 employees during this 12 day period.

878. National also alleged that it incurred costs for the evacuation of its employees and their families from Iraq to India via Jordan between December 1990 and February 1991. Included in these costs are airfares and taxi fares, including the costs incurred by the 10 employees in travelling from Jordan back to Iraq on 13 January 1991, when the Jordanian authorities did not allow them to enter Jordan.

879. The loss elements may be represented as follows:

Table 41. National's claim for payment or relief to others

Loss element	Claim amount (USD)
(a) Salaries/wages	
Salaries/wages paid to 18 employees in Iraq for unproductive labour between 2 August 1990 and 20 January 1991	44,749
Salaries/wages paid to 10 employees during period in refugee camp in Jordan and until arrival in India (between 20 January and 1 February 1991)	2,305
Sub-total for salaries/wages	47,054
(b) Transport costs	
Airfares Jordan to India for 19 people in December 1990 and January 1991	6,648
Airfares Iraq to Jordan for 10 employees on 12 January 1991	2,021
Airfares Jordan to Iraq for 10 employees on 13 January 1991	2,181
Taxi fares Iraq to Jordan for 10 employees on 19 January 1991	5,840
Sub-total for transport costs	16,690
Total	63,744

880. National originally classified the claims for the alleged losses set out in table 41, supra, as contract losses, but the claims are more appropriately classified as payment or relief to others.

881. In the "E" claim form and accompanying Statement of Claim, National sought compensation in the amount of USD 44,711 for salaries/wages paid to 18 employees in Iraq between 2 August 1990 and 20 January 1991. However, review of the supporting evidence shows that National's claim in this respect actually totalled USD 44,749. The Panel has corrected this error, which consequently increased National's reclassified claim for payment or relief to others by the amount of USD 38.

2. Analysis and valuation

(a) Salaries/wages

882. In support of its alleged losses, National provided the following evidence: monthly payrolls for the period August 1990 to February 1991 for the 18 employees, signed by the employees; some employment contracts; and internal payment certificates.

883. The evidence provided includes signed acknowledgements of receipt of wages/salaries (in Iraqi dinars) by the 18 employees and a document recording the name and number of the payee's account.

There is sufficient evidence of payment and of proof of payment in the amount of USD 37,663 (IQD 11,737) for the costs claimed as wages/salaries for the period between 2 August 1990 and 20 January 1991. There is also sufficient evidence of payment and of proof of payment in the amount of USD 1,149 (IQD 358) for the costs claimed as wages/salaries for the period between 21 January and 1 February 1991. The total is USD 38,812.

884. The employees were detained and were not able to carry out any work for National, which may have wanted to reassign them at any time. National lost the benefit of their services for almost half a year, paying them while receiving no benefit. Further, National also asserted that it was negotiating for new work as at 2 August 1990, which, presumably, would have resulted in its employees remaining in Iraq. The Panel, therefore, considers that the loss is compensable and recommends compensation in the amount of USD 38,812 for salaries/wages.

885. In relation to the date of loss for the salaries/wages, the Panel finds that it is appropriate to choose the mid-point of the period between 2 August 1990 and 1 February 1991. The date of loss is, therefore, 2 November 1990.

(b) Transport costs

886. In support of its alleged losses, National provided the following evidence: correspondence with the Indian authorities regarding repatriation of employees; correspondence from employees to National requesting reimbursement for costs of airfares etc; and an invoice and correspondence from Iraqi Airways acknowledging receipt of National's payment for the airfares between Jordan and Iraq on 13 January 1991 in the amount of USD 2,181.

887. In the article 34 notification, National was requested to provide further evidence such as evidence of payment for the transport costs. National was unable to provide most of these documents as they were said to be in Iraq. National provided no evidence in support of its claim for the airfares between Jordan and India in December 1990 and January 1991.

888. In relation to the claim for the cost of the airfares between Iraq and Jordan on 12 January 1991, National provided no documentary evidence that it incurred these costs. National did provide a document from an employee stating that he had personally incurred these costs, but National failed to provide evidence from him acknowledging receipt of payment for these costs.

889. In relation to the claim for the taxi fares between Iraq and Jordan on 19 January 1991, National again failed to provide documentary evidence that it had incurred these costs. It did provide evidence of a request for payment by the employee who incurred the costs. However, the only evidence of actual reimbursement comes from recent affidavits stating that the employee had been paid. The Panel requires documentary evidence to recommend compensation for such claims.

890. The Panel, therefore, recommends no compensation for the claims for the airfares between Iraq and Jordan on 12 January 1991, the taxi fares between Iraq and Jordan on 19 January 1991, and the airfares between Jordan and India, because National failed to provide sufficient information and evidence to establish its claim.

891. In relation to the final claim, for the airfares between Iraq and Jordan on 13 January 1991, National provided evidence that it had incurred the alleged costs. However, the Panel considers that the reason that National incurred these costs was as a result of the actions of the Jordanian authorities which refused to allow National's employees to continue their journey and sent them back to Iraq. The Panel finds that National failed to demonstrate that this alleged loss arose as a direct result of Iraq's invasion and occupation of Kuwait. The Panel recommends no compensation for the airfares between Iraq and Jordan on 13 January 1991.

3. Recommendation

892. The Panel recommends compensation in the amount of USD 38,812 for payment or relief to others.

C. Financial losses

1. Facts and contentions

893. National seeks compensation in the amount of USD 650,885 for financial losses. The claim includes losses stated by National to be commission on guarantees and loss of profit/interest on a bank account in Iraq. National originally classified the claim for financial losses as "contract losses", but the losses are more appropriately classified as financial losses.

(a) Commission on guarantees

894. National seeks compensation in the amount of USD 515,000 for payments which it alleged it will be required to make to service a number of guarantees. National asserted that it was required to provide mobilisation/advance payment and performance guarantees in favour of the Iraqi employers, as well as guarantees to banks to support loans which it took to finance the projects. The compensation sought relates to the period between 2 August 1990 and 31 December 1993.

895. In respect of the guarantees in favour of the employers, National stated that it was required to provide such guarantees in respect of six projects. It also stated that it should have been released from the guarantees when the project works were handed over to the employers. National stated that the guarantees could not be released until it obtained final acceptance certificates and clearance certificates from the Iraqi authorities. National stated that this process was interrupted by Iraq's invasion and occupation of Kuwait and that National could not recommence the process until August 1991. The guarantees have still not been released, because the sanctions against Iraq prevent payment of the amounts which National owes under them. National therefore continues to be liable to pay commission on the guarantees. National calculated the amount of these commissions as at 31 December 1993 as USD 187,000.

896. In respect of the bank guarantees, National stated that it was required to provide guarantees in respect of five projects. It also appeared to allege that Iraq's invasion and occupation of Kuwait prevented Iraq from paying its invoices, on the same basis as for the performance guarantees. National alleged that it was consequently unable to repay the loans and will be required to pay

commission on these guarantees in the amount of USD 328,000 for the period to 31 December 1998 (although it only seeks compensation for the period until 31 December 1993).

897. Although the original claim submission and National's reply to the article 15 notification suggested that National had been required to pay the commissions, the status of its payments was unclear. In the article 34 notification, National was asked to clarify the status of the payments. National replied that the commissions had not yet been paid "due to the UN Embargo". However, in relation to the Mosul and Dokan hotel projects, National asserted that the State Bank of India (the "State Bank"), the Rafidain Bank's correspondent bank, "kept a lien" over the guarantees.

(b) Loss of profit on funds held in bank account

898. National seeks compensation in the amount of USD 135,885 for the loss of use of funds in an Iraqi bank account with the Rafidain Bank/Al-Rasheed Bank. National asserted that it was unable to use the funds in the amount of IQD 725,937 for the period between the date of closure of its office in Iraq (21 January 1991) and the date it reopened (23 August 1991).

899. National stated that it had "local currency work ... in the pipe line" during this period. However, Iraq's invasion and occupation of Kuwait led to the suspension of construction activities, which meant that it could not utilise the funds. National asserted that it expected to realise a level of profit of 10 per cent on the funds. It calculated the amount of USD 135,885 as follows:

- IQD 725,937 multiplied by seven months multiplied by 10 per cent equals IQD 42,346

- National then converted the amount of IQD 42,346 to United States dollars at rate of IQD 1 = USD 3.208889. This resulted in the amount claimed of USD 135,885.

900. National asserted that the figure of 10 per cent was based on "budgetary estimates" (unspecified) and was similar to that adopted by the Indian Central Public Works Department.

2. Analysis and valuation

(a) Commission on guarantees

901. In support of its claim, National provided a large amount of evidence including correspondence with the relevant banks and governmental authorities and correspondence between the Indian banks and the Iraqi banks regarding release of the guarantees.

902. However, the Panel finds that this evidence only indicated that all of the monies in respect of which National seeks compensation represent payments which National is alleged to be liable to make but which it has not yet paid. This includes the guarantees for the Mosul and Dokan projects. After review of the evidence provided for this part of the claim, the Panel observes that the State Bank only requested National to pay the amount owing under the guarantee, so that the State Bank could effect payment once sanctions were lifted. However, there is no evidence to show that National actually

made any of the requested payments to the State Bank, despite its assertions that "the banks in India are holding the amounts due to Iraqi banks with them".

903. The Panel finds that all components of the claim for commission on guarantees are not compensable because the Panel has determined in paragraph 870, supra, that National failed to establish that the underlying contract losses which gave rise to the financial losses were the direct result of Iraq's invasion and occupation of Kuwait.

(b) Loss of profit on funds held in bank account

904. In support of its claim, National provided, inter alia, several bank statements for the account and a recent communication from the Al-Rasheed Bank in Iraq confirming the balance of the account.

905. The Panel observes that the claim faces a number of difficulties. These difficulties lead the Panel to conclude that it cannot recommend compensation for the claim for loss of profit on funds held in the bank account.

906. Firstly, most of the alleged loss was incurred after 2 March 1991. It is therefore outside the period for compensation for events which occurred within Iraq. Secondly, National did not establish that there were projects for which it could have utilised the funds in Iraq (the funds were not convertible or transferable). The only project which was possibly interrupted as at 2 August 1990 was the Basrah project, which was a small project compared to the other projects which National had carried out in the past.

907. Finally, National failed to demonstrate that the alleged loss was a loss which would ever have been recoverable directly from an Iraqi employer. National therefore failed to demonstrate that the loss arose as a direct result of Iraq's invasion and occupation of Kuwait. The funds in Iraq were meant to finance National's own costs, and while no doubt it would have sought to recover those costs from any employer, it would have done so through the pricing mechanisms in its contracts.

3. Recommendation

908. The Panel recommends no compensation for financial losses.

D. Other losses

1. Facts and contentions

909. National seeks compensation in the amount of USD 1,117,228 for other losses. This claim comprises a number of loss items, which can be broadly grouped as follows.

(a) Transport and associated costs

910. Four of National's employees returned to Iraq in August 1991 in order to wind up National's Baghdad office and to realise outstanding receivables by obtaining clearance certificates. National

seeks compensation for their airfares from India to Iraq, and for other costs incurred in Iraq in 1991-1992.

(b) Costs to maintain business

911. National asserted that it incurred considerable expenses in maintaining its office in Baghdad both during and after Iraq's invasion and occupation of Kuwait. For a lengthy period, the office was in fact closed. However, National asserted that it remained liable for a number of expenses during this period. The expenses include rent for the office premises; salary paid to a secretary/Arabic translator; salaries paid to two Iraqis who guarded one of National's sites where property was stored; a fee paid to its accountant in Iraq for preparing the accounts for submission to the Iraqi authorities; a fee paid to its lawyer in Iraq; a fee paid to the Iraqi authorities for carrying out scheduled audits in 1991 and 1992; petrol expenses; and telephone and telex expenses.

(c) Losses associated with sale of tangible property

912. National seeks compensation for four types of loss associated with tangible property transactions. It asserted that it imported equipment into Iraq for the purpose of carrying out its contract works. It was not economical to re-export the equipment, so National agreed on 11 October 1990 to sell the equipment for USD 27,000 to three purchasers. National only provided information and evidence in relation to one purchaser. This purchaser paid a deposit of USD 16,000 to National. It appears that National was responsible for obtaining permission from the Iraqi customs authorities for the sale of this equipment since the purchasers may not have been Iraqis. The property was required by Iraqi law to be in good working order to be re-exported and the purchasers had to spend a considerable amount of money upgrading the equipment. However, National was not ultimately allowed to export the equipment, but rather was allegedly forced to hand it over to an Iraqi company called Al-Fao Establishment ("Al-Fao"), free of charge. This surrender occurred in March 1994, three years after the conclusion of Iraq's invasion and occupation of Kuwait. The purchasers have allegedly sought reimbursement from National for the payments they made to upgrade the equipment in the amount of USD 767,868. National stated that it is required to reimburse the purchasers for these costs but has not yet done so. The claim is therefore a contingent claim.

913. National also seeks compensation in the amount of USD 16,000, which it calls "the sale value" of the equipment. The nature of this loss element is not clear unless National had to return the amount of USD 16,000 to the purchasers when National finally was unable to deliver the equipment to the purchasers.

914. National stated that it renewed its customs clearances and accordingly seeks compensation for charges levied by the customs authorities for these clearances, in the amount of IQD 9,875 (USD 31,688), for the period between 10 January and 23 August 1991.

915. Finally, National asserted that it was unable to renew customs clearances for the tangible property while its office was closed between 10 January and 23 August 1991. The Iraqi customs

authorities imposed a penalty which National alleges it paid in the amount of IQD 8,090 (USD 25,960).

(d) Penalty for failure to submit balance sheet

916. National seeks compensation for a penalty to which it was subject for failure to lodge a duly certified balance sheet for its Iraqi operations with the Iraqi authorities in 1991.

917. National's claim for other losses may be represented as follows:

Table 42. National's claim for other losses

Loss item	Claim amount (USD)
Airfares India to Iraq in 1991 and associated expenses	1,888
Rent for one year	64,178
Salary for secretary @ IQD 500 per month for 12.5 months (2 August 1990-23 August 1991)	20,055
Salaries for two guards @ IQD 300 each per month for 12.5 months (2 August 1990-23 August 1991)	24,067
Accountant's fee	25,671
Lawyer's fee @ IQD 400 per month for 12.5 months (2 August 1990-23 August 1991)	16,044
Audit fees @ IQD 12,000 per year for two years (year to 31 March 1991 and to 31 March 1992)	77,013
Petrol expenses for 5.5 months	8,824
Telephone/telex expenses for 5.5 months	5,883
Losses associated with sale of tangible property	841,516
Penalty for failure to submit balance sheet	32,089
Total	1,117,228

918. National originally classified the claims for the alleged losses set out in table 42, supra, as contract losses, but the claims are more appropriately classified as other losses.

919. In the "E" claim form and accompanying Statement of Claim, National sought compensation in the amount of USD 48,134 for salaries for the two guards between 2 August 1990 and 23 August 1991. In its reply to the article 34 notification, National reduced the amount of its claim in respect of this loss element to USD 24,067.

2. Analysis and valuation

920. National provided some evidence in support of the majority of the loss elements. It provided, inter alia, letters of employment or retainer with its secretary/translator, accountant and lawyer; correspondence regarding the submission of its accounts to the Iraqi authorities; the contract with the guards; the agreement dated 11 October 1990 with the purchasers for sale of National's tangible property; evidence of payment of deposit for purchase by a purchaser; letters from National to the purchaser purporting to enclose renewed re-export declarations, signed by the purchaser; undated internal list of customs charges and penalties; internal authorisations for payment of customs charges and penalties; internal correspondence in 1992; correspondence in 1994 regarding transfer of tangible property to Al-Fao, including acknowledgement of receipt by Al-Fao; bank statements between November 1991 and March 1992; and affidavits stating that documentation supporting the asserted payments could not be retrieved from Iraq, but that the asserted payments had indeed been made.

921. As the description of the affidavits indicates, National was only able to provide a small amount of documentary evidence that it in fact made the alleged payments, such as receipts. It was asked to provide explanations in the article 34 notification as to the basis for its assertions that the alleged losses were a direct result of Iraq's invasion and occupation of Kuwait. In some instances, National did attempt to justify its assertions with evidence, but in general, its claims in this respect were not supported by the evidence.

(a) Transport and associated costs

922. The Panel addresses National's two asserted reasons for the return of the four employees.

923. National's first assertion was that the costs related to the need to wind up its office. The Panel explained the elements necessary to establish such a claim in its consideration of the similar claim by Parsons, De Leuw, Inc, in the "Report and recommendations made by the Panel of Commissioners concerning the eighteenth instalment of 'E3' Claims" (S/AC.26/2001/3) at paragraph 513:

> "... Parsons failed to provide any evidence which demonstrated that the alleged losses were suffered as a direct result of Iraq's invasion and occupation of Kuwait. In order for costs of the kind alleged to be compensable, a claimant must show that the costs exceeded what it would ordinarily have had to pay to conclude its presence in Kuwait".

924. National failed to meet this test. It failed to establish that the alleged loss arose as a direct result of Iraq's invasion and occupation of Kuwait, and that it would not have closed the office in any event at some stage. National also failed to establish that the costs it incurred exceeded the costs it would ordinarily have had to pay to conclude its business in Iraq. National asserted that the costs were much greater than normal because of the devalued Iraqi dinars. However, all of the costs for which it seeks compensation were incurred in Indian rupees or United States dollars.

925. National's second assertion was that it incurred costs in its attempt to mitigate its contract losses by seeking to collect receivables. Such costs are only compensable insofar as the claim relates to contract losses within the Commission's jurisdiction. Because the visit related to contract losses

which the Panel has determined are not compensable (see paragraphs 867 and 870, supra), the mitigation costs associated with the visit are also not compensable. The Panel refers to its decision in respect of the claim by Bhandari Builders (Private) Limited for loss of profits in the "Report and recommendations made by the Panel of Commissioners concerning the thirteenth instalment of 'E3' Claims" (S/AC.26/2001/12) at paragraph 204:

> "In any event, the Panel notes that the claim for loss of profits is based on the assertion of non-payment of amounts allegedly owed to Bhandari, which the Panel has found to be outside the jurisdiction of the Commission. As such, the claim must fail."

926. All of the alleged contract losses are either outside the Commission's jurisdiction or are not direct losses. The Panel, therefore, considers that the alleged loss does not arise as a direct result of Iraq's invasion and occupation of Kuwait.

(b) Costs to maintain business

(i) Rent

927. National asserted that it was unable to use its premises for a portion of the term for which it had already paid. In the majority of similar claims which the Panel has previously reviewed, the Panel has found that such claims are claims for overheads which were not directly chargeable to the employer. National did not submit any evidence, or indeed assert, that the payments were directly chargeable to any employer. The Panel recommends no compensation for the claim for rent because National failed to demonstrate that it is a loss arising as a direct result of Iraq's invasion and occupation of Kuwait.

(ii) Secretary's wages

928. National asserted that the secretary looked after National's interests during the partial closure and eventually total closure of its Baghdad office. The secretary allegedly liaised with the Iraqi employers regarding outstanding amounts, and co-ordinated between them and National until the office reopened in August 1991. Although her contract was terminable on notice, National did not terminate it, presumably because she acted as one of its representatives in National's absence.

929. Although there are several reasons why the alleged loss cannot be regarded as arising as a direct result of Iraq's invasion and occupation of Kuwait, the Panel's primary conclusion is that prior to Iraq's invasion and occupation of Kuwait, the secretary's wages would have been part of National's overheads. National did not suggest, and there is no evidence to indicate, that her costs were directly recoverable from any Iraqi entity at any later stage. The claim for the secretary's wages is not compensable because National failed to demonstrate that the loss arose as a direct result of Iraq's invasion and occupation of Kuwait.

(iii) Accountant's fees

930. National was required under Iraqi law to submit accounts to the Iraqi authorities, and required the accountant's assistance to do so. National advised the Commission that the accountant had been

retained since 1984-1985. National would therefore have incurred the accountant's preparation costs even if Iraq's invasion and occupation of Kuwait had not occurred. This is confirmed by the fact that National did ultimately submit the accounts to the authorities.

931. National's principal argument was that these costs were "wasted", because National did not maintain its business in Iraq and therefore did not reap the benefit of complying with Iraqi laws. The Panel considers that the existence of the Iraqi laws is the true cause of National's costs in this respect. In any event, National made an independent choice to submit the accounts and ultimately to terminate its presence in Iraq. The claim for the accountant's fees is not compensable because National failed to demonstrate that the loss arose as a direct result of Iraq's invasion and occupation of Kuwait.

(iv) Lawyer's fees

932. National's Iraqi lawyer had been retained to assist National in Iraq since 1986. He appears to have liaised with relevant Iraqi authorities during the period of partial and ultimately total closure of National's Baghdad office. In the article 34 notification, National was asked to explain how the work which he carried out arose as a direct result of Iraq's invasion and occupation of Kuwait. National failed to do so, for example by submitting evidence that the lawyer carried out work that the lawyer would not have had to carry out had Iraq's invasion and occupation of Kuwait not occurred. The Panel cannot assume that the lawyer's fees would not have been incurred in any event, since he had been retained by National since 1986. The claim for the lawyer's fees is not compensable because National failed to demonstrate that the loss arose as a direct result of Iraq's invasion and occupation of Kuwait.

(v) Audit fees

933. National was required under Iraqi law to submit accounts to the Iraqi authorities. National would therefore have incurred the audit fee even if Iraq's invasion and occupation of Kuwait had not occurred. The claim for the audit fees is not compensable because National failed to demonstrate that the loss arose as a direct result of Iraq's invasion and occupation of Kuwait.

(vi) Guards' salaries

934. While it is clear that the guards' employment was initiated by Iraq's invasion and occupation of Kuwait, the evidence provided in support of this element was insufficient. In particular, in the article 34 notification, the secretariat requested National to provide evidence that it paid the guards the monies for which National sought compensation. National failed to provide any documentary evidence of payment and relied on a general affidavit that it had incurred and paid these costs.

935. As it has already stated in this report in paragraph 889, supra, the Panel requires documentary evidence of payment reasonably contemporaneous with the payment in order to recommend compensation for such claims. The Panel, therefore, recommends no compensation because National failed to provide sufficient evidence to establish its claim.

(vii) Petrol and telephone expenses

936. Although National allegedly incurred the costs after 2 August 1990, that fact does not in itself mean that they arose as a direct result of Iraq's invasion and occupation of Kuwait. In the article 34 notification, National was required to explain, but did not do so, the specific purpose(s) for which these costs were allegedly incurred. National provided no contemporaneous documentary evidence which answered this question. It only provided a general affidavit. National therefore failed to establish that the loss arose as a direct result of Iraq's invasion and occupation of Kuwait.

(viii) Tangible property losses

a. Costs of improving equipment

937. The entire amount for which National seeks compensation is a contingent loss as National says that it has not repaid the purchasers. The Panel has found in its previous reports that it does not have jurisdiction over contingent claims. The Panel recommends no compensation for the claim for the costs of improving the equipment.

b. Sale value

938. National did not present this claim clearly. Consequently, the Panel discusses, infra, several alternative ways of considering the claim. It is important to note that National did not seek compensation for the full amount of the value of the equipment under the contract, USD 27,000.

939. If National repaid the purchasers the amount of USD 16,000 which it received as a deposit, then National suffered a loss. However, it is not clear when the deposit was repaid and therefore when the loss was incurred (one exhibit suggested late 1991). In the absence of clear evidence, the Panel considers that the surrender of the equipment to Al-Fao in 1994 was the act causing this alleged loss. Therefore, the loss did not arise as a direct result of Iraq's invasion and occupation of Kuwait.

940. However, it seems more likely that National did not repay the purchasers the amount of USD 16,000. The Panel reaches this conclusion because National was asked the following question in the article 34 notification: "It appears that National received money in respect of the sold plant and machinery. If this is the case, please explain how a loss (of sales value) has been suffered." National replied that: "The said money is payable to the buyers" (emphasis added).

941. The Panel finds that the alleged loss is contingent. The Panel has found in its previous reports that it does not have jurisdiction over contingent claims. The Panel recommends no compensation for the claim for the sale value of the equipment.

c. Customs charges

942. National did not provide sufficient evidence to establish that the transfer of the equipment to the purchasers would, or was meant to, have taken place prior to 10 January 1991. Given that the contract was signed in October 1990, the Panel cannot assume that the transfer would have occurred before

2 March 1991, or indeed before 23 August 1991. National may therefore have been required to pay these charges in any event.

943. Further, it has not provided sufficient evidence to establish that it was required to pay the alleged charges, such as correspondence with the Iraqi customs authorities. There is some evidence of payment to the authorities, but it is unclear to what this relates.

944. National therefore failed to establish that the alleged loss arose as a direct result of Iraq's invasion and occupation of Kuwait.

d. Customs penalty

945. National did not provide sufficient evidence to establish that it was required to pay the alleged penalty, such as correspondence with the Iraqi customs authorities. It did provide some evidence of payment to the authorities, but it is unclear to what this payment relates. National, therefore, failed to establish that the alleged loss arose as a direct result of Iraq's invasion and occupation of Kuwait.

(ix) Penalty for failure to submit balance sheet

946. National was required to submit the 1990 accounts in Arabic to the Iraqi authorities by 15 September 1991. It failed to do so because it only re-established its Baghdad office in August 1991, leaving it insufficient time to submit its translated accounts. It submitted that it was required to make this penalty payment in December 1991 and provided some evidence of payment.

947. The need to pay the penalty arose out of the fact that National did not return to Iraq until 23 August 1991, more than seven months after the conclusion of Iraq's invasion and occupation of Kuwait. The period of time which elapsed between 2 August 1990 and 23 August 1991 meant that National made an independent decision to pay the penalty. National, therefore, failed to establish that the alleged loss arose as a direct result of Iraq's invasion and occupation of Kuwait.

3. Recommendation

948. The Panel recommends no compensation for other losses.

E. Interest

949. As the Panel recommends no compensation for contract losses, there is no need for the Panel to determine the date of loss from which interest would accrue.

F. Recommendation for National

Table 43. Recommended compensation for National

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	60,734,106	nil
Payment or relief to others	63,744	38,812
Financial losses	650,885	nil
Other losses	1,117,228	nil
Interest	40,963,856	nil
Total	103,529,819	38,812

950. Based on its findings regarding National's claim, the Panel recommends compensation in the amount of USD 38,812. The Panel finds the date of loss to be 2 November 1990.

XVI. PUNJAB CHEMI-PLANTS LIMITED

951. Punjab Chemi-Plants Limited ("Punjab Chemi-Plants") is a corporation organised according to the laws of India operating in the construction industry.

952. In the Statement of Claim attached to the "E" claim form, Punjab Chemi-Plants sought compensation in the amount of USD 22,530,000 for contract losses, loss of tangible property and "loss of opportunity" to use its equipment for other projects. For the purposes of this report, the Panel has reclassified this latter element of the claim as a claim for loss of profits. The Panel therefore considered the amount of USD 22,530,000 for contract losses, loss of profits and loss of tangible property, as follows:

Table 44. Punjab Chemi-Plants' claim

Claim element	Claim amount (USD)
Contract losses	3,400,000
Loss of profits	1,500,000
Loss of tangible property	17,630,000
Total	22,530,000

A. Contract losses

1. Facts and contentions

953. Punjab Chemi-Plants seeks compensation in the amount of USD 3,400,000 for contract losses allegedly incurred in connection with three projects which it worked on in Iraq. The projects were the Diwania Housing Project, the 4 Sub Stations Project and the 401 Houses Project. Punjab Chemi-Plants failed to provide any of the contracts or sub-contracts, or any detailed information regarding the timing of the commencement of the Projects or the nature of the Projects. In the article 34 notification, the secretariat requested Punjab Chemi-Plants to provide this information and evidence. However, Punjab Chemi-Plants did not reply to the article 34 notification.

(a) Diwania Housing Project

954. Punjab Chemi-Plants alleged that it entered into a contract with the State Enterprises of Direct Industrial Construction, Baghdad, Iraq (the "State Enterprises"). The value of the contract was USD 37,070,000. Punjab Chemi-Plants stated that it completed its contractual works in 1989. Punjab Chemi-Plants seeks compensation in the amount of USD 2,545,000 in relation to the Diwania Housing Project, as follows: USD 800,000 for unpaid invoices; USD 600,000 for retention monies; USD 215,000 for "cement and steel escalation dues"; and USD 930,000 for "deferred payment dues". Punjab Chemi-Plants alleged that the State Enterprises was considering its final invoice as at the date of Iraq's invasion and occupation of Kuwait.

(b) 4 Sub Stations Project

955. Punjab Chemi-Plants asserted that it completed the contractual works in 1989. It seeks compensation in the amount of USD 105,000 for unpaid retention monies. Punjab Chemi-Plants' Statement of Claim implied that it was a sub-contractor for this project to Toyo Engineering India Ltd, which contracted with the State Organisation of Electricity. Punjab Chemi-Plants provided no other information about, or evidence relating to, this claim.

(c) 401 Houses Project

956. Punjab Chemi-Plants asserted that it completed its contractual works in 1988-1989. It seeks compensation in the amount of USD 750,000 for unpaid retention monies. Punjab Chemi-Plants provided no other information about, or evidence relating to, this claim, including the identity of the employer.

2. Analysis and valuation

957. In its original claim submission, Punjab Chemi-Plants failed to provide any information in addition to that set out, supra. It also failed to provide any supporting evidence. In the article 34 notification, it was requested to provide detailed information and evidence, such as the contracts/sub-contracts, invoices, certificates of completion, requests for payment, and an explanation of how the alleged losses were a direct result of Iraq's invasion and occupation of Kuwait. Punjab Chemi-Plants failed to reply to the article 34 notification.

958. The Panel recommends no compensation as Punjab Chemi-Plants failed to provide sufficient information and evidence to establish its claim for contract losses.

3. Recommendation

959. The Panel recommends no compensation for contract losses.

B. Loss of profits

1. Facts and contentions

960. Punjab Chemi-Plants seeks compensation in the amount of USD 1,500,000 for loss of profits. It described the claim as the loss of the opportunity to use the equipment, which it had utilised for the Diwania Housing Project, the 4 Sub Stations Project and the 401 Houses Project, on future projects in Iraq. It provided no other information about, or explanation of, its claim. The Panel notes that Punjab Chemi-Plants also seeks compensation for the alleged total loss of these items in its claim for loss of tangible property, which the Panel considers at paragraphs 966-972, infra.

961. Punjab Chemi-Plants originally classified the claim for loss of profits as a claim for "loss of opportunity", but the loss is more properly classified as loss of profits.

2. Analysis and valuation

962. The requirements to substantiate a loss of profits claim have been stated by the Panel at paragraphs 16 and 17.

963. Punjab Chemi-Plants provided no detailed information, and no evidence, in support of its claim. In the article 34 notification, it was requested to provide detailed information and evidence, such as the contracts/sub-contracts or tender proposals, and the calculations underlying its claim. It failed to reply to the article 34 notification.

964. The Panel recommends no compensation as Punjab Chemi-Plants failed to provide sufficient information and evidence to substantiate its claim for loss of profits.

3. Recommendation

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

C. Loss of tangible property

1. Facts and contentions

966. Punjab Chemi-Plants seeks compensation in the amount of USD 17,630,000 for loss of tangible property. The claim is for the alleged loss of a wide variety of domestic property, office equipment, vehicles and machinery from its project sites in Iraq and Kuwait. The Panel notes that Punjab Chemi-Plants rounded up the claim amount from the total of the individual loss elements, which was USD 17,625,377.

967. Punjab Chemi-Plants stated that the items of tangible property were destroyed, damaged or stolen following Iraq's invasion and occupation of Kuwait. It referred to the losses being suffered during an "air raid" in early 1991 and a "rebellion" some time after February 1991.

968. In relation to items of property stated to have been located in Iraq as at 2 August 1990, Punjab Chemi-Plants seeks compensation not only for the value of the individual items of lost property, but also for "clearance charges" at the rate of 10 per cent. It did not explain the nature of these clearance charges. Nor did it explain the basis for the valuation of the property. It has provided a letter from its accountant in India that the items of property "[appeared] in Books of [Punjab Chemi-Plants] as on 31/7/90".

2. Analysis and valuation

969. In support of its allegations, Punjab Chemi-Plants provided a statement by an Iraqi police officer. The police officer stated that he had witnessed substantial damage to equipment held at one of the project sites in Iraq and that the damage was as a result of bombing. Punjab Chemi-Plants also provided a copy of a lengthy letter which it sent to an Iraqi judge on 10 June 1991 detailing the list of property destroyed, damaged or stolen "consequent to the recent war ... and subsequent civil riots ...",

and sworn statements taken by the judge. Punjab Chemi-Plants provided no other evidence of its ownership of the tangible property, such as invoices.

970. While the Panel accepts that the documents provided to the Iraqi judge constitute some evidence of the existence of property in Iraq in 1991, Punjab Chemi-Plants failed to provide sufficient documentary evidence that it owned not just these items but those in Kuwait. For example, it failed to provide purchase invoices and customs documentation. It also failed to provide sufficient information regarding the circumstances of the alleged loss.

971. The Panel recommends no compensation for tangible property losses as Punjab Chemi-Plants failed to provide sufficient information and evidence to establish its claim.

3. Recommendation

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

D. Recommendation for Punjab Chemi-Plants

Table 45. Recommended compensation for Punjab Chemi-Plants

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	3,400,000	nil
Loss of profits	1,500,000	nil
Loss of tangible property	17,630,000	nil
Total	22,530,000	nil

973. Based on its findings regarding Punjab Chemi-Plants' claim, the Panel recommends no compensation.

XVII. SHAH CONSTRUCTION COMPANY LIMITED

974. Shah Construction Company Limited ("Shah") is a corporation organised according to the laws of India operating in the construction industry.

975. In the original "E" claim form, Shah sought compensation in the amount of USD 48,195,072 for contract losses. In July 2001, Shah submitted a revised "E" claim form (but which was dated 1993, shortly after the date of the original "E" claim form) in which Shah appeared to seek compensation in the amount of USD 50,655,038 for a variety of losses. The Panel has been unable to discern a clear intention in Shah's actions in 2001 to revise its claim. The Panel has accordingly relied on the original "E" claim form only.

976. The Panel has reclassified elements of Shah's claim for the purposes of this report. The Panel therefore considered the amount of USD 48,195,072 for contract losses, loss of tangible property, payment or relief to others and financial losses, as follows:

Table 46. Shah's claim

Claim element	Claim amount (USD)
Contract losses	38,584,245
Loss of tangible property	9,188,059
Payment or relief to others	272,756
Financial losses	150,012
Total	48,195,072

A. Contract losses

1. Facts and contentions

977. Shah seeks compensation in the amount of USD 38,584,245 for contract losses allegedly incurred in relation to six projects which it worked on in Iraq. Shah alleged that it commenced all of the projects in the early 1980's and that all of the projects were completed by 1987 except for one project which was allegedly interrupted by Iraq's invasion and occupation of Kuwait.

978. Shah was unable to provide much information or evidence about the six projects due to a lack of relevant documentation. In particular, it only provided extracts of the six contracts. The lack of detail and evidence has made it difficult to assess the parameters of the claim for contract losses. Shah was only able to provide the following basic details for the six projects.

979. On 26 December 1981, Shah entered into a contract with the General Establishment for Water and Sewerage, Baghdad, to provide services in relation to the Ishaki Water Supply Project (the "Ishaki Project"). The intended completion date of the contract was 28 August 1984. However, the contract works were not completed until 1987.

980. On or around 1 September 1980, Shah entered into a contract with the State Organisation of Buildings, Iraq to provide services in relation to the Basrah Bank Building Project (the "Basrah Project"). The contract value was IQD 1,697,940. The intended completion date of the contract was 12 June 1982. However, the contract works were not completed until 1987.

981. On 12 July 1978, Shah entered into a contract with the State Commission for Roads and Bridges, Baghdad to provide services in relation to the Hilla Bridge Project (the "Hilla Project"). The contract value was IQD 704,415. The intended completion date of the contract was 21 July 1980. However, the contract works were not completed until 1985.

982. On 20 April 1978, Shah entered into a contract with the General Corporation for Roads and Bridges, Iraq to provide services in relation to the Khider Bridge Project (the "Khider Project"). The contract value was IQD 1,703,412. The intended completion date of the contract was 30 April 1980. However, the contract works were not completed until 1985.

983. The fifth project was the Liquid Sulphur Terminal Project (the "Sulphur Project"). The employer was stated to have been the Iraqi Ports and Administration, Basrah. Shah asserted that the contract was completed in 1987. It provided no other details.

984. Finally, on 24 December 1980, Shah entered into a contract with the Ministry of Agriculture, Iraq, to provide services in relation to the Dujailah Housing Project (the "Dujailah Project"). The Dujailah Project involved the construction of 772 houses in the Wassit area commencing in January 1981. The initial value of the contract was IQD 8,500,000. The contract value appears to have been reduced at a later date to IQD 6,960,000. The reasons for the reduction were not explained. Shah stated that the Dujailah Project was intended to be completed on 20 June 1983. However, as a result of the war between Iran and Iraq, the project was not completed until November 1989. Shah received the preliminary acceptance report for the Dujailah Project on 27 November 1989. Shah alleged that the receipt of the preliminary acceptance report triggered a one year maintenance period and that the Dujailah Project was in the last stages of maintenance work as at 2 August 1990.

985. Shah stated that after 2 January 1982, all six projects were subject to a deferred payment agreement between India and Iraq (the "deferred payment agreement"). Under the deferred payment agreement, all payment for work done was deferred for a minimum of two years.

986. Shah seeks compensation for four types of contract losses.

(a) "War claims"

987. Shah stated that five of the six projects (the Ishaki, Basrah, Hilla, Khider and Dujailah Projects) were affected by the war between Iran and Iraq. This conflict allegedly resulted in substantial delays to the progress of the five projects and to the employers' payments to Shah for its contract works.

988. Shah seeks compensation in the total amount of USD 29,524,524 in respect of the war claims.

(b) Deferred payments

989. Shah stated that it carried out work on the five projects referred to in paragraph 984, supra, for which it has not been paid. The amount sought in respect of each project was allegedly subject to the deferred payment agreement.

990. Shah seeks compensation in the total amount of USD 2,027,454 in respect of the deferred payments.

(c) Retention monies

991. Shah stated that it was entitled to payment of retention monies which were outstanding in relation to all six projects.

992. Shah provided very few details of its claim for retention monies. For all of the projects except the Dujailah Project, Shah referred to provisional or actual completion dates well before 2 May 1990. In some cases, these dates were supported by evidence such as the provisional or final acceptance certificates. Shah was unable to explain why the monies alleged to be owing for many years were still outstanding as at 2 August 1990.

993. In relation to the Dujailah Project, Shah asserted that it obtained the preliminary acceptance certificate in November 1989. A one year maintenance period allegedly commenced at this time. At the same time, the employer identified a number of deficiencies in Shah's contract works. Shah appears to have accepted that there were some deficiencies which it set about rectifying. Shah stated that it had remedied almost all of these deficiencies by 2 August 1990. Shah alleged that Iraq's invasion and occupation of Kuwait prevented it from successfully completing the maintenance period and therefore from obtaining payment of retention monies.

994. Shah seeks compensation in the total amount of USD 3,109,548 in respect of the retention monies.

(d) Final bills

995. Shah stated that it had not received payment of what it described as its "final bills" in relation to four projects (the Ishaki, Basrah, Hilla and Dujailah Projects). In respect of the final bills for the Ishaki, Basrah, Hilla Projects, Shah submitted claims to the Iraqi employers well before 2 August 1990. Shah asserted that it did not have the opportunity to submit a final bill in relation to the Dujailah Project prior to Iraq's invasion and occupation of Kuwait because the project was still in the maintenance period. Shah has nevertheless submitted a claim in respect of the Dujailah Project for the amount which it would have claimed as a final bill.

996. Shah seeks compensation in the total amount of USD 3,922,719 in respect of the final bills.

2. Analysis and valuation

997. In support of its claim, Shah provided incomplete extracts of the contracts relating to the six projects; some statements of completed work; some approved payment certificates; a list of insurance and export credit guarantees; copies of financial statements; and some provisional and final acceptance certificates. In the article 34 notification, Shah was asked to provide evidence such as complete copies of the contracts and the deferred payment agreement. Shah replied that it was unable to do so because its documents had been destroyed during Iraq's invasion and occupation of Kuwait.

998. The Panel normally requires a claimant to supply clear documentary evidence of its contractual arrangements. The Panel considers that Shah should have kept duplicates of such documents outside of Iraq. In the absence of any primary documentary evidence, the evidence which Shah submitted was therefore incomplete, particularly in respect of the contractual payment terms. The Panel has considered all of the surrounding evidence but finds that this surrounding evidence is not sufficiently clear to indicate what the payment terms were or that the Shah had claims against the Iraqi employers. For example, in relation to the claim for retention monies in respect of the Dujailah Project, Shah's information and evidence referred to three different amounts allegedly retained.

999. The Panel also notes that a significant proportion of the evidence was in Arabic and was not translated.

1000. The Panel recommends no compensation for all components of the claim for contract losses as Shah failed to provide sufficient information and evidence to support its claim.

3. Recommendation

1001. The Panel recommends no compensation for contract losses.

B. Loss of tangible property

1. Facts and contentions

1002. Shah seeks compensation in the amount of USD 9,188,059 for loss of tangible property. The claim is for the alleged loss of its "plant and machinery" and "stock of stores" in Iraq at the time of Iraq's invasion and occupation of Kuwait.

1003. In the "E" claim form, Shah classified the losses as contract losses, but the claim is more appropriately classified as a claim for loss of tangible property.

1004. Shah originally alleged that during the last stages of its work on the Dujailah Project, Iraq invaded and occupied Kuwait. At this time, Shah was forced to repatriate its entire work force leaving behind all of its tangible property at the Dujailah Project site. The property was allegedly looted and stolen.

1005. In its reply to the article 34 notification, Shah provided a translation of a letter dated 14 March 1998 from the State Commission of Customs in Wassit, Iraq, to the State Commission of Customs, Middle Area, Lawsuits Department, Iraq. The letter concerned Shah's tangible property and was in response to a visit to Iraq by Shah's regional manager, who wanted to know the whereabouts of the tangible property. The Wassit Customs Office stated that on 11 July 1992, the State Establishment of the Military Industrialisation Commission of Iraq took a major part of Shah's machinery and equipment in the Wassit area without informing Shah or the Wassit Customs Office. The letter stated that the remaining items were sold by the State Establishment of the Military Industrialisation Commission of Iraq in February 1993.

2. Analysis and valuation

1006. Shah only seeks compensation for the loss of tangible property items being used on the Dujailah Project. The work sites were in the Wassit area. The letter of 14 March 1998 states that all of Shah's tangible property in that area was either confiscated in July 1992 or sold in February 1993.

1007. The Panel therefore considers that all of the items for which Shah seeks compensation were lost well after the end of Iraq's invasion and occupation of Kuwait.

1008. The Panel recommends no compensation for loss of tangible property because Shah failed to demonstrate that the loss arose as a direct result of Iraq's invasion and occupation of Kuwait.

3. Recommendation

1009. The Panel recommends no compensation for loss of tangible property.

C. Payment or relief to others

1. Facts and contentions

1010. Shah seeks compensation in the amount of USD 272,756 for payment or relief to others. The claim is for termination payments and repatriation expenses.

1011. Shah alleged that it had to evacuate 103 employees from the Dujailah and Basrah Project sites. Shah stated that it was required to pay its employees for the "premature termination of their services" due to Iraq's invasion and occupation of Kuwait. It allegedly paid them wages, leave salary and "other benefits" but did not provide any other details.

1012. Shah further alleged that it had to incur the cost of repatriating its employees to India via Jordan. This claim includes the cost of bus and taxi fares, accommodation, visas, some airfares and other incidental expenses.

1013. In the "E" claim form, Shah classified the losses as contract losses, but the claim is more appropriately classified as a claim for payment or relief to others.

2. Analysis and valuation

1014. In support of its claim, Shah provided a list of the repatriated employees. The list indicates the names of the employees, their passport numbers and dates of departure, and the amount which Shah allegedly paid to each employee. Shah also provided an affidavit from one of the employees and some correspondence regarding the repatriation exercise.

1015. In the article 34 notification, Shah was requested to provide evidence establishing that it incurred the costs for which it seeks compensation. Shah failed to provide any such evidence. It also failed to explain and establish whether the costs which it incurred were temporary and extraordinary.

1016. The Panel finds that Shah failed to provide sufficient information and evidence to establish its claim for payment or relief to others.

3. Recommendation

1017. The Panel recommends no compensation for payment or relief to others.

D. Financial losses

1. Facts and contentions

1018. Shah seeks compensation in the amount of USD 150,012 for financial losses. Shah asserted that it has suffered the loss of monies in three Iraqi dinar current accounts in Iraq. The monies related to three separate projects. Shah stated that it attempted to obtain the monies in the accounts in 1998 but was informed that one of the accounts had been frozen by order of the Government of Iraq. Shah also advised the Commission that the monies were not convertible into other currencies. Shah did not provide any further information about the alleged losses.

1019. In the "E" claim form, Shah classified the losses as contract losses, but the claim is more appropriately classified as a claim for financial losses.

2. Analysis and valuation

1020. In support of its claim, Shah provided a bank balance sheet stating the name and address of the banks, the account numbers and the balances in the accounts. Most of the narrative was in Arabic and was not translated into English. Shah provided no other information or evidence in support of its claim. In particular, Shah failed to explain how the alleged losses arose as a direct result of Iraq's invasion and occupation of Kuwait.

1021. The Panel recommends no compensation as Shah failed to provide sufficient information and evidence to establish its claim for financial losses.

3. Recommendation

1022. The Panel recommends no compensation for financial losses.

E. Recommendation for Shah

Table 47. Recommended compensation for Shah

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	38,584,245	nil
Loss of tangible property	9,188,059	nil
Payment or relief to others	272,756	nil
Financial losses	150,012	nil
Total	48,195,072	nil

1023. Based on its findings regarding Shah's claim, the Panel recommends no compensation.

XVIII. LANDOIL RESOURCES CORPORATION

1024. Landoil Resources Corporation ("Landoil") is a corporation organised according to the laws of the Philippines. It and the other companies in the Landoil Group provide a comprehensive range of services in many countries, including construction and transportation services. Landoil brings the claim as parent company of the Landoil Group, on behalf of all of the Landoil Group companies which allegedly suffered losses as a direct result of Iraq's invasion and occupation of Kuwait.

1025. In the "E" claim form, Landoil sought compensation in the amount of USD 75,616,660 for loss of real property, loss of tangible property and other losses. The Panel has reclassified elements of Landoil's claim for the purposes of this report. The Panel therefore considered the amount of USD 75,616,660 for contract losses and loss of tangible property, as follows:

Table 48. Landoil's claim

Claim element	Claim amount (USD)
Contract losses (contract with Iraqi party)	14,438,310
Contract losses (contract with non-Iraqi party)	23,650,015
Loss of tangible property	37,528,335
Total	75,616,660

A. Contract losses (contract with Iraqi party)

1. Facts and contentions

1026. Landoil seeks compensation in the amount of USD 14,438,310 for contract losses allegedly incurred in connection with the Military Barracks Project in Iraq (the "Barracks Project").

1027. Landoil originally classified the claim for contract losses as a claim for "other losses (value of works completed and in-progress building and housing units)", but the losses are more properly classified as contract losses.

1028. The contractual history in relation to the Barracks Project is somewhat involved. On 5 February 1981, a joint venture formed by a Kuwaiti company called FIAFI Trading and Contracting Company ("FIAFI") and n.v. Foldaway International SA (country of incorporation not provided) entered into a contract with the Directorate of Military Works, Ministry of Defence, Iraq (the "Directorate of Military Works"), for the construction of military accommodation and associated works totalling 695 buildings in various locations in Iraq.

1029. The contract value was USD 207,325,289. Seventy per cent of the contract value was payable in United States dollars (USD 145,115,279) and 30 per cent in Iraqi dinars (IQD 18,417,436) (i.e. USD 62,210,010). The contract works were due to commence within 120 days of the date of signing

the contract, i.e. around the beginning of June 1981. The contract's duration was to be 750 days. Payment was to be made by letter of credit. There was a one year maintenance period with the balance of 2.5 per cent of the contract value payable at its completion.

1030. In May 1981 and in June 1982, the joint venture sub-contracted components of the contract works to Landoil and to a company called IOCC Ltd. (country of incorporation not stated). The Directorate of Military Works then expanded the scope of the Barracks Project, resulting in an increase in the contract value.

1031. On 28 September 1982, the joint venture entered into a Plenary Sub-Contract Agreement with Landoil under which the joint venture assigned the majority of the contract works (i.e. all of the 695 buildings) as well as sub-contracted the rest of the contract works (the scope of which is unclear) to Landoil. This contractual rearrangement was allegedly put in place to ensure that Landoil received payment for completed work. The value of the Plenary Sub-Contract Agreement was USD 226,485,000 when variation orders were taken into account. Landoil provided copies of other related contracts but it is not necessary to summarise these for present purposes.

1032. On 1 October 1982, Landoil assigned all of its interest in the Plenary Sub-Contract Agreement to a related Filipino company called Greater Manila Land Corporation ("GMLC").

1033. Landoil did not expressly state when the contract works commenced. Its comments in its reply to the article 34 notification suggested that commencement was substantially postponed, due to the Directorate of Military Works' constant changes to the contract works and schedule.

1034. Landoil asserted that in 1981, it was required to provide a performance bond in the amount of USD 4,500,000 and an advance payment guarantee in the amount of USD 4,625,000. According to Landoil, these payments were "called capriciously and paid to FIAFI" on 22 April 1984. Landoil alleged that this action was not contractually authorised.

1035. Landoil asserted that by the time its work on the Barracks Project concluded in 1984-1985, it had carried out 17.5 per cent of the work under the contract, or 49 units and had commenced work on a further 167 units. It stated that the value of this work was USD 14,438,310. Landoil neither billed nor received payment for this amount because FIAFI, in alleged breach of its sub-contract with Landoil, failed to open an irrevocable transferable and revolving credit facility in the amount of USD 40,800,000 in Landoil's favour.

1036. Landoil stated that its performance under the contract was substantially disrupted. The Directorate of Military Works committed a number of contractual defaults, including a failure to make contractual payments, making payments in Iraqi dinars instead of United States dollars, and a failure to make contract sites available. Landoil asserted that these events, particularly around 1982, caused Landoil to stop its contractual performance. The Directorate of Military Works then terminated the Barracks Project. Between 1984 and 1987, Landoil consequently had to withdraw from its involvement in the Barracks Project and repatriated its employees from Iraq. It asserted that the

failure of the project and other projects disrupted in similar circumstances almost caused the Landoil Group to go into liquidation.

2. Analysis and valuation

1037. The Panel has defined the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) to limit the jurisdiction of the Commission to exclude debts of the Government of Iraq if the performance relating to that obligation took place prior to 2 May 1990.

1038. The Panel finds that for the purposes of the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) Landoil had a contract with Iraq. Although Landoil was originally a sub-contractor to the joint venture, and not to the Directorate of Military Works, under the September 1982 Plenary Sub-Contract Agreement, the joint venture assigned Landoil most of its obligations and sub-contracted to Landoil the balance of its obligations. The Panel considers that the effect of the Plenary Sub-Contract Agreement was to assign to Landoil all of the joint venture's obligations, so that Landoil, in effect, had a direct contractual relationship with the Directorate of Military Works.

1039. It is clear from all of the information and evidence provided that Landoil finished its work well before 2 May 1990. It stated that it stopped work on the projects in 1984-1985 and completed its withdrawal from Iraq in early 1987. The Panel finds that the contract losses alleged by Landoil relate entirely to work that was performed prior to 2 May 1990.

1040. The Panel recommends no compensation for contract losses as they relate to debts and obligations of Iraq arising prior to 2 August 1990 and, therefore, are outside the jurisdiction of the Commission.

3. Recommendation

1041. The Panel recommends no compensation for contract losses (contract with Iraqi party).

B. Contract losses (contract with non-Iraqi party)

1. Facts and contentions

1042. Landoil seeks compensation in the amount of USD 23,650,015 for contract losses allegedly incurred in connection with the 1,400 Housing Units Project in Basrah, Iraq (the "1,400 Units Project").

1043. Landoil originally classified the claim for contract losses as a claim for "other losses (value of works completed and in-progress building and housing units)", but the losses are more properly classified as contract losses.

1044. Landoil seeks compensation arising out of a sub-contract entered into by a related Filipino company called Construction Consortium Incorporated ("CCI"). Landoil brings the claim on behalf of CCI.

1045. On 10 July 1980, FIAFI entered into a contract with the Southern Petroleum Organisation, a division of the Iraq National Oil Company, Ministry of Oil ("Southern Petroleum"), under which FIAFI agreed to undertake the design and construction of 1,400 houses on a turn-key basis in Basrah. The original contract value was IQD 22,062,500. Seventy per cent of the contract value was payable in United States dollars (USD 52,165,558) and 30 per cent in Iraqi dinars (IQD 6,618,750). The sites were due to be handed over to FIAFI within 60 days of signing the contract. The contract period was 29 months (after an amendment) and there was a one year maintenance period. Two and a half per cent of the contract value was retained as security for the maintenance period.

1046. On the same date, FIAFI assigned this contract to Singa Malaysia Development Pte. Ltd. ("Singa"), a Singaporean company. On 14 July 1980, Singa sub-contracted the entire Project works to CCI. The value of the sub-contract was IQD 17,208,750. Landoil alleged that there was an amount of IQD 7,000,000 associated with the sub-contract for "claims due to delay in turn-over of site". This subsequently led to an increase in the total sub-contract value to IQD 24,208,750. Landoil stated that this was equivalent to USD 77,615,000.

1047. Landoil stated that hand-over of some of the project sites was delayed by more than 29 months, due to the war between Iraq and Iran. CCI did carry out some work for which it was paid until late 1982. At this time, Southern Petroleum unilaterally reversed the currency payment proportion so that 70 per cent was payable in Iraqi dinars and 30 per cent in United States dollars.

1048. CCI did not complete the sub-contract works. Landoil asserted that this was because of the difficulties associated with the project, including Southern Petroleum's unilateral reversal of the payment proportion in 1982. It also alleged that Southern Petroleum "unreasonably confiscated" advance payment and performance guarantees provided by FIAFI and CCI because of FIAFI's non-performance. Landoil stated that Southern Petroleum "terminated the Project" on 22 May 1984. Landoil stated that the project stopped in 1985 "because of serious liquidity problems brought about by the delay in the turnover of sites resulting in increased cost and expenses, scarcity of materials, slow progress of work because night work was prohibited".

1049. Landoil explained the basis of calculation for the amount of USD 23,650,015 as follows. Landoil alleged that CCI submitted a claim to Southern Petroleum for compensation for extra costs which CCI incurred arising out of the war between Iraq and Iran. In January 1982, Southern Petroleum responded stating that it agreed to compensation. Landoil contended that after further discussions, CCI and Southern Petroleum agreed that the compensation for these extra costs was IQD 7,001,649 (i.e. USD 23,650,015). This is the figure of IQD 7,000,000 referred to in paragraph 1046, supra. CCI sought considerably more compensation, but this issue was never resolved.

2. Analysis and valuation

1050. Southern Petroleum appears to have been a state organisation of Iraq. CCI, as a sub-contractor, contracted with Singa, and with FIAFI, to carry out the works on the 1,400 Units Project. Therefore, CCI had a direct contractual relationship with Singa and with FIAFI, not with Southern

Petroleum. Landoil also submitted evidence in relation to the 1,400 Units Project which indicated that CCI regarded itself as a sub-contractor. It looked to FIAFI for payment.

1051. This Panel has found that a claimant must provide specific proof that the failure of a non-Iraqi debtor to pay was a direct result of Iraq's invasion and occupation of Kuwait. A claimant must demonstrate, for example, that such a business debtor was rendered unable to pay due to insolvency or bankruptcy caused by the destruction of its business during Iraq's invasion and occupation of Kuwait, or was otherwise entitled to refuse to pay the claimant. Landoil did not supply such proof in relation to its claim. It did not prove that the failure on the part of FIAFI to pay the amounts outstanding under the sub-contract was a direct result of Iraq's invasion and occupation of Kuwait.

1052. Moreover, the information which Landoil did provide indicated that CCI's failure to receive payment was a problem that arose well before Iraq's invasion and occupation of Kuwait. CCI completed its performance in relation to the sub-contract well before 2 August 1990. It stated that it stopped work on the project in 1984-1985 and completed its withdrawal from Iraq in early 1987. Given that CCI completed work on the sub-contract by 1984-1985, and taking into account the role of CCI as a sub-contractor, the Panel finds that the failure of Iraq to pay the amounts alleged to be compensable did not arise as a direct result of Iraq's invasion and occupation of Kuwait.

1053. In relation to the 1,400 Units Project, the claim for contract losses is not compensable because Landoil failed to demonstrate that the alleged losses arose as a direct result of Iraq's invasion and occupation of Kuwait.

3. Recommendation

1054. The Panel recommends no compensation for contract losses (contract with non-Iraqi party).

C. Loss of tangible property

1. Facts and contentions

1055. Landoil seeks compensation in the amount of USD 37,528,335 for loss of tangible property. The property was alleged to have been used in relation to the projects and contracts in Iraq referred to, supra, as well as in relation to four other projects which took place principally in Iraq.

1056. Landoil stated that following its demobilisation from Iraq and Kuwait between 1984 and 1987, its tangible assets in those countries were initially guarded by employees. The employees tried to sell what assets they could in 1987 and 1988. The employees left Iraq and Kuwait in 1988 and the remaining items of tangible property were handed over to Landoil's Kuwaiti joint venture partners, FIAFI, Al Fajji Trading and Contracting Company ("Al Fajji") and Al-Roudah Trading and Contracting Company ("Al-Roudah"), presumably to be guarded and/or sold.

1057. Landoil allegedly sighted most of the property during site visits in November 1989. The assets were never re-exported.

1058. Landoil asserted that during Iraq's invasion and occupation of Kuwait, many of the assets were close to scenes of fighting and were consequently destroyed or taken.

1059. The total amount claimed for loss of tangible property is firstly comprised of the amount of USD 4,522,636 for loss of a precast fabricating plant, crushing plant and batching plant. Landoil classified these losses as loss of real property. The precast fabricating plant was in use, inter alia, for casting of components for the 1,400 Units Project. Landoil stated that the plant was delivered to Iraq in May 1981, and commenced operation in February 1982. It appears that the property was imported into Iraq, in FIAFI's name, although FIAFI acknowledged that CCI was the real owner. Landoil believed that the plant was completely destroyed as a direct result of Iraq's invasion and occupation of Kuwait, but provided no details. Landoil stated that it seeks compensation for the "mothballed value" of the plant, which it described as the historical cost of the plant less depreciation. It provided no information about the crushing and batching plants except to state that they were valued on a similar basis.

1060. The balance of the claim for loss of tangible property is made up of the alleged loss of "heavy equipment" (USD 2,884,687), "machinery and equipment" (USD 1,748,893), "rolling stocks" (USD 13,761,984), assorted tangible property (USD 122,975) and construction materials and spares (USD 14,487,160).

1061. The heavy equipment, and machinery and equipment, consist of items such as bulldozers, cranes, excavators, graders, forklifts, generators and pumps. Landoil also seeks compensation for the historical cost of these items less depreciation.

1062. The "rolling stocks" consist of 205 Volvo trucks and Nooteboom trailers, and cars, used to carry out the works under the cargo hauling sub-contract dated 16 February 1982 between Philippine-Singapore Ports Corporation ("PSPC"), a related company of Landoil, and Al Fajji. Under the sub-contract, Al Fajji sub-contracted part of a cargo hauling contract to PSPC. PSPC agreed to carry out cargo hauling services from Kuwaiti ports to Iraq. Three million tons a year were to be transported. Landoil asserted that the sub-contract failed in 1985 because the guaranteed tonnage level failed to materialise. The rolling stock was imported into Kuwait in Al Fajji's name for tax reasons, although PSPC was the true owner. Landoil asserted that these items were taken by the Iraqi forces after 2 August 1990. Landoil seeks compensation for the historical cost of the items less depreciation using a valuation methodology appropriate for vehicles.

1063. The assorted tangible property consists of items used in completed construction projects such as concrete mixers and welding machines. Most were fully depreciated and Landoil therefore seeks compensation for the scrap value of these items.

1064. The construction materials and spares consist of large numbers of unspecified items ("various construction materials") and some spare parts for the rolling stock. Landoil seeks compensation for the historical cost of these items.

1065. Landoil stated that 95 per cent of the items by value were between eight and 10 years old. However, due to the problems experienced with the projects, most items had only been used for 18 months and had then been securely stored in a good condition.

1066. Landoil alleged that all of the tangible property for which it seeks compensation was destroyed during fighting during Iraq's invasion and occupation of Kuwait, or during subsequent civil disorder, or was taken by the Iraqi forces.

2. Analysis and valuation

1067. In support of its allegations, Landoil submitted affidavit and documentary evidence.

1068. The affidavits were provided by employees and former employees. The employees stated that they returned to Kuwait in 1994 as part of a team convened by Landoil to locate and secure its tangible property if possible. They stated that upon enquiries of local Kuwaitis, they were informed that Iraqi soldiers had taken some of the rolling stock. They were unable to locate any employees of FIAFI or Al Fajji. Some of the employees had previously worked for the Landoil Group in Kuwait and in Iraq prior to Iraq's invasion and occupation of Kuwait.

1069. The former employees (who had left Landoil's employ well before 2 August 1990 but had remained in Kuwait working for other employers) stated that they were in Kuwait on 18 August 1990 attempting to leave Kuwait. They said that they had seen some of the trucks owned by PSPC (i.e. the "rolling stocks") being driven by Iraqi soldiers.

1070. Landoil attempted to obtain an affidavit from its lawyer in Iraq regarding the status of items of tangible property left in Iraq. However, it was unable to get this and has been unable to enter Iraq to verify the position itself. Landoil, however, provided a note of its meeting with the lawyer which recorded his advice that all items have been "lost, removed or destroyed", but that he "cannot say whether cause war-related off-hand".

1071. Landoil provided, inter alia, the following documentary evidence of its title to the tangible property:

(a) Purchase invoices for items of rolling stock (and spare parts) either made out to Landoil or on behalf of Landoil, all dated 1982. These show shipment of the items to Kuwait;

(b) A declaration by Al Fajji of PSPC's title over the rolling stock dated 22 March 1983, including a list of chassis and engine numbers;

(c) A similar document between FIAFI and CCI dated 12 April 1982;

(d) A declaration to a similar effect by Al-Roudah in favour of Pacific Asia Building and Developers, Inc. (a related company of Landoil) dated 2 June 1983;

(e) Inventory of construction equipment dated 31 December 1984; and

(f) Landoil's financial accounts.

1072. Apart from the invoices for the rolling stock, the evidence of ownership is thus very general in nature. The Panel notes that in the audited accounts for the year ending 31 December 1987, the balance sheet lists no assets of the type in respect of which Landoil seeks compensation.

1073. In relation to the issue of loss, although there is some affidavit evidence which may suggest that some of the rolling stock was taken by the Iraqi forces, that evidence is not specific enough to be probative. More importantly, Landoil failed to provide evidence that its joint venture partners, to which it entrusted its property after it left Iraq and Kuwait in 1988, in fact safeguarded the items until 2 August 1990. This is a lengthy period of time during which other reasons may have caused the items to be lost.

1074. In the article 34 notification, the secretariat requested further information about Landoil's verification of the status of the items of tangible property during this period, such as annual inventories of stock. Landoil provided an affidavit from an employee who visited project and assets depot sites in November 1989 in Iraq and Kuwait. The evidence in the form of the affidavit was general and the employee stated that a written report prepared at the time had been lost. In relation to the lack of documentary evidence, Landoil replied that it could not provide such evidence because the evidence was left at the project sites during the demobilisation.

1075. The Panel finds it difficult to accept that Landoil would leave behind assets with an alleged value of USD 37.5 million in the possession of third parties without retaining adequate documentation of ownership outside of Iraq and Kuwait. If Landoil had intended to return or to try and realise the value of the assets, the only documents proving the title and ownership of these assets are unlikely to have been left at the project sites in 1989.

1076. Landoil failed to provide any contemporaneous documentary evidence to establish that any of the items of tangible property for which it seeks compensation were in existence in 1989 or 1990. The affidavit evidence relating to events both before and after 2 August 1990 is too general to be relied on in the absence of documentary evidence.

1077. The Panel recommends no compensation for loss of tangible property because Landoil failed to demonstrate that the alleged losses were a direct result of Iraq's invasion and occupation of Kuwait.

1078. As a final observation, the Panel notes that in the course of reviewing Landoil's claim, it came to the Panel's attention that Al Fajji has submitted a claim to the Commission which appears to demonstrate a likely overlap with Landoil's claim in respect of some of the rolling stock. Landoil had advised the Commission that it had been unable to locate Al Fajji after the conclusion of Iraq's invasion and occupation of Kuwait. Al Fajji's claim was considered in the "Report and recommendations made by the Panel of Commissioners concerning the fifth instalment of 'E4' Claims" (S/AC.26/2000/7). Al Fajji received compensation for some of the rolling stock.

3. Recommendation

1079. The Panel recommends no compensation for loss of tangible property.

D. Recommendation for Landoil

Table 49. Recommended compensation for Landoil

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses (contract with Iraqi party)	14,438,310	nil
Contract losses (contract with non-Iraqi party)	23,650,015	nil
Loss of tangible property	37,528,335	nil
Total	75,616,660	nil

1080. Based on its findings regarding Landoil's claim, the Panel recommends no compensation.

XIX. CONSTRUCTION COMPANY "GRANIT"

1081. Construction Company "Granit" ("Granit") is a corporation organised according to the laws of Macedonia operating in the construction industry.

1082. In the "E" claim form, Granit sought compensation in the amount of USD 44,385,170 for contract losses and loss of tangible property. In its reply to the article 34 notification, it reduced the amount of its claim for loss of tangible property by the amount of USD 69,669. The Panel has reclassified the amount of USD 15,000,000, which Granit called "contract losses" in respect of a project in Iraq called Project 202 B-2, as a claim for interest. The Panel therefore considered Granit's claim for compensation in the amount of USD 44,315,501 for contract losses, loss of tangible property and interest, as follows:

Table 50. Granit's claim

Claim element	Claim amount (USD)
Contract losses (contract with Iraqi party)	19,988,421
Contract losses (contract with non-Iraqi parties)	5,930,278
Loss of tangible property	3,396,802
Interest	15,000,000
Total	44,315,501

A. Contract losses (contract with Iraqi party)

1. Facts and contentions

1083. Granit seeks compensation in the amount of USD 19,988,421 for contract losses (contract with Iraqi party). This claim relates to unpaid invoices for work which it carried out in Iraq on a project called Project 202 B-2. It stated that Iraq's invasion and occupation of Kuwait prevented the payment of Granit's invoices. Granit advised that it was a sub-contractor and that it became involved in Project 202 B-2 in the following way.

1084. On 19 December 1980, the Federal Directorate for Supply and Procurement ("the FDSP"), part of the Federal Secretariat for National Defence of the Federal Republic of Yugoslavia, and the Directorate of Airforce and Airdefence Works, Ministry of Defence, Iraq (the "Airforce Directorate"), entered into a contract for the construction of an airbase (the "airbase contract"). This was Project 202 B. The value of the airbase contract was USD 688,777,630. The duration of the airbase contract was 1,461 calendar days (approximately four years).

1085. In December 1981, the parties amended the airbase contract resulting in the addition of further works. The value of the airbase contract following the amendment was USD 850,854,310. The duration of the additional works was 36 months.

1086. On 16 September 1980 (i.e. before the date of the airbase contract), Granit and other entities from the Federal Republic of Yugoslavia entered into a sub-contract with the FDSP to carry out works to be designated as Project 202 B. Granit's component of Project 202 B was called Project 202 B-2. Under the sub-contract, Granit agreed to carry out certain civil engineering works under the airbase contract.

1087. Granit asserted that the involvement of the FDSP was mandatory under the law of the Federal Republic of Yugoslavia, but all contracts which the FDSP entered into were done so on behalf of the sub-contractors. The FDSP advised the Commission in 1993 that it would not submit any claims to the Commission.

1088. In relation to the terms of the sub-contract, Granit asserted that all rights and liabilities under the airbase contract with the Airforce Directorate were transferred to the sub-contractor. Each of the sub-contractors authorised the FDSP to enter into an agreement on their behalf with the Airforce Directorate in the name of the FDSP. Granit informed the Commission that the Airforce Directorate knew of the sub-contracting arrangement and the identity of all parties. There was frequent and direct contact between Granit and the Airforce Directorate.

1089. The value of Granit's sub-contract was USD 238,346,885. The duration of the sub-contract was not stated. Granit asserted that there were two phases for the provision of services and that different terms of payment were used for each phase. The Panel has focussed on the second phase of the payment arrangements.

1090. In mid 1983, the Government of the Federal Republic of Yugoslavia and the Government of Iraq entered into a deferred payment agreement (the "deferred payment agreement"), which covered works already completed. Granit was to receive 20 per cent immediately in United States dollars and 20 per cent immediately in Iraqi dinars. The balance of 60 per cent payable in United States dollars was to be deferred for two years and earned interest at an annual rate of 5 per cent. During the operation of the deferred payment agreement, the deferred payments were subsequently repeatedly deferred. Granit asserted that until 1989, it received payments (including interest) into its bank accounts, but that from 1989 onwards, it was required to have an account with the FDSP into which all payments were made.

1091. Granit stated that it was not paid in accordance with performance under the deferred payment agreement. It received payment "in accordance with the schedule for payment prepared by the FDSP as they considered fit for their needs for funding their new contracted projects ..."

1092. Granit alleged that it had completed contractual works in the amount of USD 249,922,996 by 2 August 1990. Granit did not explain why it carried out more work than the value of the sub-contract. Granit received payments under the sub-contract in the amount of USD 229,934,575. It seeks compensation for the difference, USD 19,988,421, for unpaid executed works. Granit stated that it repaid all advance payments which it received.

1093. In relation to the issue of when the work under the sub-contract giving rise to the claimed amount was carried out, Granit provided a document entitled "Final Maintenance Certificate", which the Airforce Directorate issued on 31 May 1992 for Project 202 B-2. This confirmed that the FDSP had "fulfilled all his contractual obligations from maintenance period within agreed time". The "agreed time" was not stated. However, Granit advised that the project was completed and the preliminary hand-over to the Airforce Directorate took place in April 1987. It further stated that the maintenance period was completed in April 1988 without any claims being made against Granit. Granit failed to provide any other information or evidence which would suggest that the work was carried out any later than April 1988.

2. Analysis and valuation

1094. The Panel has defined the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) to limit the jurisdiction of the Commission to exclude debts of the Government of Iraq if the performance relating to that obligation took place prior to 2 May 1990.

1095. In relation to the issue of what party Granit contracted with, the Panel notes that Granit did not have a direct contractual relationship with the Airforce Directorate. Nor did Granit assert that it was a nominated sub-contractor with a direct payment demand against the Airforce Directorate (which was an Iraqi state agency). Granit was a sub-contractor to the FDSP in relation to Project 202 B-2.

1096. The Panel notes that the FDSP has not submitted any claims to the Commission. Further, the FDSP's active role in all of the contractual arrangements was very limited, and apart from the FDSP, there were no other parties in the contractual chain above Granit. The Panel considers that Granit should be regarded as having entered into a direct contract with Iraq in relation to Project 202 B-2 for the purposes of the Commission's jurisdiction.

1097. The Panel finds that for the purposes of the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) Granit had a contract with Iraq.

1098. In relation to the issues of what work Granit performed, and when, Granit provided extracts from the airbase contract, extracts from the sub-contract between Granit and the FDSP, and the Final Maintenance Certificate dated 31 May 1992. In the article 34 notification, Granit was asked to provide extensive further evidence and translations of existing evidence, such as invoices and evidence of the dates of performance of the works under the sub-contract. It failed to do so and relied on its existing evidence. It stated in its explanation that its documents were in Iraq and had been destroyed or could not be retrieved. None of the evidence provided established the nature of the work which it performed or when it carried out the work. In the absence of any clear evidence, the Panel refers to Granit's admission at paragraph 1090, supra, that the maintenance period ended in April 1988. The fact that Granit seeks compensation for interest on these contract losses between 1986 and 1992 reinforces the conclusion that the work was completed well before 2 May 1990. The Panel finds that the contract losses alleged by Granit relate entirely to work that was performed prior to 2 May 1990.

1099. The Panel recommends no compensation for contract losses (contract with Iraqi party) as they relate to debts and obligations of Iraq arising prior to 2 August 1990 and, therefore, are outside the jurisdiction of the Commission.

1100. The Panel finds that for the purposes of Security Council resolution 687 (1991) the deferred payment agreement did not have the effect of novating the debts.

3. Recommendation

1101. The Panel recommends no compensation for contract losses (contract with Iraqi party).

B. Contract losses (contract with non-Iraqi parties)

1. Facts and contentions

1102. Granit seeks compensation in the amount of USD 5,930,278 for contract losses (contract with non-Iraqi parties). This claim relates to unpaid invoices for work which Granit carried out in Iraq on a project called Project 1101-3/4. It stated that Iraq's invasion and occupation of Kuwait prevented the payment of Granit's invoices. Granit advised that it was a sub-sub-contractor and that it became involved in Project 1101-3/4 in the following way.

1103. On 5 April 1981, the FDSP and the Directorate General of Military Works, Ministry of Defence, Iraq (the "Directorate of Military Works"), entered into a contract for the construction of three tank bases (the "tank contract"). This was called Project 1100. The value of the tank contract was USD 1,101,435,297. The duration of the tank contract was not stated.

1104. On an unspecified date (but probably in 1981), the FDSP entered into a sub-contract with, inter alia, two companies from the Federal Republic of Yugoslavia, I.L. Lavcevic-Split ("Lavcevic") and Primorje-Rijeka ("Primorje"), to construct one of the tank bases. These works were designated as Project 1101 and were to be carried out in Al-Kassek, Iraq.

1105. The value and duration of the works under the sub-contract were not provided. On 29 September 1981, Lavcevic and Primorje entered into an agreement regulating their division of the work (50 per cent each). The same parties revised this agreement on 24 April 1988. The 1988 document refers to Granit.

1106. On 27 August 1986, Granit entered into three sub-sub-contracts with Lavcevic and Primorje in relation to aspects of Project 1101. The works under the following sub-sub-contracts were collectively designated as Project 1101-3/4:

(a) Contract No. 308/86 with Lavcevic for the construction of roads and platforms ("Contract 308"). The value of Contract 308 was USD 1,550,529. On 22 April 1988, the parties amended Contract 308 by the addition of further roading works, including the construction of culverts. This resulted in an increase in the value of this sub-sub-contract to USD 5,903,863;

(b) Internal contract No. 309 with Lavcevic and contract No. 109 with Primorje for the construction of roads ("Contract 309"). The value of the two combined sub-sub-contracts was USD 10,125,638;

(c) Contract No. 110 with Primorje for the construction of roads and platforms ("Contract 110"). The value of Contract 110 was USD 3,765,502. On 31 August 1989, the parties amended Contract 110 by the addition of further roading works, including the construction of culverts. This resulted in an increase in the value of this sub-sub-contract to USD 4,395,161.

1107. The progress of the project works is not clear. Under an annex to the tank contract signed on 6 July 1990, the FDSP agreed to complete the contractual works by 1 December 1991. The contract value was stated to be USD 924,000,000 (a reduction in value). The value of Project 1101 was USD 254,516,095. No value was specifically assigned to Project 1101-3/4.

1108. Granit seeks compensation in the amount of USD 5,930,278 for unpaid executed works in respect of Project 1101-3/4. This was calculated as follows:

(a) Granit carried out work for Lavcevic in the amount of USD 8,034,634. It has received payment in the amount of USD 5,579,802. It seeks compensation in relation to its work for Lavcevic in the amount of USD 2,454,832;

(b) Granit carried out work for Primorje in the amount of USD 9,509,806. It has received payment in the amount of USD 6,034,360. It seeks compensation in relation to its work for Primorje in the amount of USD 3,475,446.

1109. Granit stated that it has received an advance payment which it took into account in formulating its claim.

1110. In reply to the article 34 notification, Granit informed the Panel that it carried out work on Project 1101-3/4 between 2 August and 19 October 1990 as a condition of its employees being allowed to leave Iraq. It is not clear which part, if any, of the claim in relation to Project 1101-3/4 this alleged work relates to.

1111. Lavcevic and Primorje submitted claims to the Commission which are related, inter alia, to Project 1101-3/4. These claims were considered by the "E3A" Panel in the "Report and recommendations made by the Panel of Commissioners concerning the sixteenth instalment of 'E3' Claims" (S/AC.26/2001/27) (the "Sixteenth 'E3' Report"). Granit advised the Panel that Lavcevic's claim for contract losses included a claim for the monies which Lavcevic allegedly owed Granit.

2. Analysis and valuation

1112. The Panel considers that Granit contracted as a sub-sub-contractor and did not have a direct right to payment against the Directorate of Military Works. Granit was one step further down the contractual chain than it was in relation to Project 202 B-2, and Lavcevic and Primorje both submitted claims to the Commission.

1113. In support of its claim for contract losses, Granit provided extracts from the contract between the Directorate of Military Works and the FDSP, and extracts from the sub-contract between the FDSP and Lavcevic and Primorje. However, Granit failed to provide all relevant provisions of the latter, particularly all of the payment terms. Granit also provided all of the sub-sub-contracts between Granit and Lavcevic and Primorje, and correspondence between Granit and Lavcevic and Primorje, which in most cases represents the agreed position as to amounts owed by these parties to Granit. However, as will be explained infra, the correspondence does not establish conclusively when work was carried out.

1114. In the article 34 notification, Granit was asked to provide extensive further evidence and translations of existing evidence, such as invoices and evidence of the dates of performance of the works under the sub-contracts and sub-sub-contracts. It failed to do so and relied on its existing evidence. It stated that its documents were in Iraq and had been destroyed or could not be retrieved.

1115. The Panel also reviewed the information and evidence submitted by Lavcevic and Primorje. In relation to Granit's claim for work done for Lavcevic, the two claims clearly overlap. It was not possible to reach the same conclusion in relation to an overlap between Granit's claim and that of Primorje.

1116. The "E3A" Panel considered Lavcevic's claim at paragraphs 155-211 of the Sixteenth "E3" Report. The "E3A" Panel concluded that there was insufficient evidence that Lavcevic carried out work after 2 May 1990, or the quantity and value of such work (paragraphs 169-170).

1117. The "E3A" Panel considered Primorje's claim at paragraphs 235-301 of the same Report. While the "E3A" Panel did recommend some compensation for contract losses, in relation to all of the contract loss claims which appear similar to that brought by Granit, the "E3A" Panel concluded that there was insufficient evidence that Primorje carried out work after 2 May 1990, or of the quantity and value of such work (paragraphs 245-247).

1118. Based on its review of all of the information and evidence provided by Granit, Lavcevic and Primorje, the Panel finds that payment pursuant to the sub-sub-contracts with Lavcevic and Primorje appears to have always been subject to the deferred payment agreement referred to at paragraph 1090, supra, although the asserted currency payment proportions differ slightly from the arrangement referred to in that paragraph. According to the information provided by Lavcevic and Primorje, the reality was different. All parties appear to have been subject to a de facto 'pay when paid' arrangement. That is to say, a party only received payment for its work when the party above it in the contractual chain received payment. However, Granit failed to submit evidence which confirmed Lavcevic's and Primorje's assertions.

1119. Granit failed to explain its claim properly in general or to provide evidence which created a comprehensible narrative. Granit failed to provide any evidence to establish that the alleged loss was direct. The Panel observes that there is some evidence to suggest that Granit was in the process of executing various contract works as at 2 August 1990, such as the July 1990 annex to the tank contract. This specified a work programme through to December 1991. Further, Granit asserted that

it carried out work under duress between 2 August and 19 October 1990 for which it has not been paid. This was a condition of the evacuation of its employees. However, it is not clear that Granit seeks any compensation for this work.

1120. The evidence which Granit provided did not establish that the alleged losses are direct. In relation to the claim for work done for Lavcevic, the principal document, a letter from Lavcevic to Granit dated 12 September 1990, is confusing in translation. The document appears to indicate that the amount sought by Granit from Lavcevic for work done (which is close to, but not exactly the same as, the amount sought before the Commission) relates to work carried out between 1986 and 1989. The document concludes with the statement that Lavcevic would pay Granit the outstanding amount when it received payment from the Directorate of Military Works.

1121. In the article 34 notification, Granit was asked questions regarding the nature of the claim vis-à-vis Lavcevic, and how the alleged loss was the direct result of Iraq's invasion and occupation of Kuwait. Granit's responses strongly support a conclusion that it has a claim against Lavcevic which Lavcevic has not satisfied. Lavcevic is not insolvent and Granit has failed to demonstrate any other reasons why Granit has not been paid.

1122. In relation to the claim for work done for Primorje, Granit provided a fax from it to Primorje dated 17 December 1990, in which Granit sought payment from Primorje in the amount of USD 3,475,446. Like the evidence provided in relation to Lavcevic, this fax is similarly confusing in translation. The fax suggests that the amount sought by Granit from Primorje for work done does relate, at least in part, to work carried out between 1 June and 30 September 1990, although Granit admitted that "we agree that there is a difference between our account with yours due to the lack of documents for internal invoicing ..." The fax concluded with the request that Primorje pay Granit the outstanding amount prior to the end of 1990. Granit did not provide any reply from Primorje to this fax.

1123. In the article 34 notification, Granit was asked questions regarding the nature of the claim vis-à-vis Primorje, and how the alleged loss was the direct result of Iraq's invasion and occupation of Kuwait. Granit's responses strongly support a conclusion that it has a claim against Primorje which Primorje has not satisfied. In respect of Primorje's ability to pay, Granit itself provided no evidence that Primorje is insolvent. However, from the information provided by Primorje to the Commission, it appears that Primorje is legally insolvent. However, there is insufficient information to establish that Primorje's status was as the direct result of Iraq's invasion and occupation of Kuwait. Granit also failed to demonstrate any other reasons why it has not been paid.

1124. The Panel recommends no compensation for contract losses in relation to Project 1101-3/4 as Granit failed to provide sufficient information and evidence to establish its claim.

3. Recommendation

1125. The Panel recommends no compensation for contract losses (contract with non-Iraqi parties).

C. Loss of tangible property

1. Facts and contentions

1126. Granit seeks compensation in the amount of USD 3,396,802 in respect of the loss of its property in Iraq at the time of Iraq's invasion and occupation of Kuwait. It was using the items for its work in relation to Project 1101-3/4. Some of the items had been transferred from Project 202 B-2. Granit alleged that the tangible property was seized and removed from the Project site by the Iraqi authorities.

1127. There are two major components to the claim. The first component is a claim for spare parts in the amount of USD 983,879. The second component is a claim for 28 vehicles, an asphalt plant and 41 large items of other construction equipment in the amount of USD 2,412,923. As indicated at paragraph 1082, supra, Granit reduced the amount of its claim for the vehicles and construction equipment by the amount of USD 69,669.

1128. Granit explained that the basis for the valuation of the tangible property was market value as at 2 August 1990 with account taken of depreciation.

1129. Granit alleged that one of its employees visited the Project 1101-3/4 site in February 1993. He provided a brief statement (the "witness statement"). He found that all of the items of tangible property had been taken away except for the asphalt plant, "which due to technical reasons was left on the job site but under the custody of the state organization FAO". Apart from the asphalt plant, the employee did not refer to any specific items.

2. Analysis and valuation

1130. Granit advised in its original claim submission that it had "voluminous" evidence of ownership. It did not provide this documentation in the original claim submission, so it was asked to provide this and further documentary evidence in the article 34 notification. Granit then provided detailed schedules prepared for the purpose of the claim submission and some invoices which backed up its schedules in relation to a few items. In a later request for further information and evidence, Granit was again asked to provide the "voluminous" documentation, but it failed to reply.

(a) Spare parts

1131. Granit provided a translated inventory which was made by Granit's employees on 30 September 1990. Granit did not provide the original. The inventory lists each item, its unit price, quantity and amount in Iraqi dinars. Granit provided no other evidence. The Panel accepts that the inventory constitutes evidence of the presence of the property in Iraq. However, without any invoices or customs documents, the inventory does not establish title or value.

1132. The Panel finds that Granit failed to provide sufficient information and evidence which demonstrated its title to or right to use the spare parts, and the value of the tangible property located in Iraq.

(b) Vehicles and construction equipment

1133. Granit helpfully provided schedules of the 28 vehicles and the 42 large items of construction equipment (including the asphalt plant). These list details such as the type of equipment; invoice number; import customs declaration; total amount of invoice in United States dollars; "total write-off" in percentages and amounts until 2 August 1990 (i.e. the amount of depreciation); "market value" as at 2 August 1990; and whether Granit had provided evidence. For many items, Granit referred to specific customs documentation but nevertheless asserted that it had no supporting documents. The Panel confirmed that this was the case upon review of the file.

(i) Vehicles

1134. Granit provided translated evidence of the existence of 10 of the 28 vehicles in the form of purchase invoices from the manufacturers. It provided untranslated invoices for two other vehicles. The Panel can only consider translated evidence.

1135. The 10 purchase invoices indicated that the vehicles were destined for Iraq for the two projects. Of the 10 invoices, only four invoices were in Granit's name. The rest were in the name of the FDSP. Apart from reference to the projects, these six invoices did not refer to Granit. Granit was asked in the article 34 notification to provide evidence of its ownership given that the property was in the FDSP's name. It replied that:

> "... we executed works in Iraq under the name of FDSP. FDSP ... was the main contractor and signatory for the Works. The whole documentation including also the commercial documentation of equipment and materials procurement for the requirement of the projects were addressed to "FDSP Project 202-B-2" or Project 1101/4. The relation between Granit and FDSP and other contractors was regulated in the contract for regulation of mutual relations, rights and obligations and responsibilities of co-contractors in the realization of the Project 202-B. See [the sub-contract]".

1136. The Panel reviewed the sub-contract. There is no reference in the sub-contract to an obligation on the part of the FDSP to hold tangible property on behalf of Granit.

1137. In relation to the six vehicles which were in the name of the FDSP, the Panel recognises that as between the FDSP and the sub-contractors (including Granit), all dealings with the Airforce Directorate and the Directorate of Military Works were in the name of the FDSP. It would therefore make sense for items to be purchased in the name of the FDSP and imported into Iraq in its name, rather than that of the sub-contractor or the sub-sub-contractor. The FDSP also had no role on Project 1101/3-4 in carrying out any construction work itself. It therefore had no need for any of the vehicles. Nevertheless, the Panel finds that Granit provided insufficient evidence of title. The Panel considers it is likely that, as between the FDSP and Granit, there was an acknowledgement that Granit owned the relevant property. Granit failed to provide such evidence in relation to the six vehicles in the FDSP's name. Granit's assertions of title in relation to these six vehicles are insufficient given the absence of clear evidence (express or implied) of its title.

1138. The Panel considers that Granit provided sufficient evidence of title in relation to the four vehicles where the invoices were in its name. However, while Granit's schedule of vehicles referred to import customs declarations documentation and stated that the majority of the items were imported into Iraq in 1988 and 1989, Granit did not provide any of the customs declarations. All four invoices are dated 1981 or 1982. All four vehicles were purchased outside Iraq. The Panel finds that Granit provided insufficient evidence of presence of the four vehicles in Iraq as at 2 August 1990.

(ii) Construction equipment

1139. In relation to the asphalt plant, Granit provided no documentary evidence. The only evidence is the witness statement. This constitutes insufficient evidence of Granit's title to the asphalt plant.

1140. In relation to the other 41 large items of construction equipment, Granit provided translated evidence of the existence of seven of the 41 items in the form of five purchase invoices from the manufacturers. The five purchase invoices indicated that the items were destined for Iraq for Granit's projects. Of the five invoices, four were dated 1985 or earlier. Only one was dated 1989. All five invoices were in the name of Granit. This constitutes sufficient evidence of Granit's title in relation to the seven items.

1141. Granit failed to provide customs documentation in respect of five of the seven items which supported its assertion that the five items were imported into Iraq in 1989. The five items were purchased outside Iraq. The Panel finds that Granit provided insufficient evidence of presence of the five items in Iraq as at 2 August 1990.

1142. The Panel notes that the 1989 invoice is stamped with the stamp of the Iraqi embassy in Germany, which is where the goods were manufactured. The stamps indicate that the two items mentioned in the invoice (Bomag Vibrating Rollers) were to be exported to Iraq in May 1989. The Panel finds that the 1989 invoice is sufficient evidence of the presence of these two items in Iraq as at 2 August 1990.

1143. In respect of the valuation of the claim for the two rollers, the Panel considers that Granit's asserted value of USD 55,912 took appropriate account of standard depreciation rates for such equipment. The Panel concludes that the rollers had a value of USD 55,912. The Panel recommends compensation in the amount of USD 55,912 for the construction equipment. The Panel considers that Granit effectively lost the use of the two rollers on 2 August 1990. It finds 2 August 1990 to be the date of loss.

3. Recommendation

1144. The Panel recommends compensation in the amount of USD 55,912 for loss of tangible property.

D. Interest

1145. As the Panel recommends no compensation for contract losses (contract with Iraqi party), there is no need for the Panel to determine the date of loss from which interest would accrue.

E. Recommendation for Granit

Table 51. Recommended compensation for Granit

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses (contract with Iraqi party)	19,988,421	nil
Contract losses (contract with non-Iraqi parties)	5,930,278	nil
Loss of tangible property	3,396,802	55,912
Interest	15,000,000	nil
Total	44,315,501	55,912

1146. Based on its findings regarding Granit's claim, the Panel recommends compensation in the amount of USD 55,912. The Panel finds the date of loss to be 2 August 1990.

XX. THE M.W. KELLOGG COMPANY

1147. The M.W. Kellogg Company is a corporation organised according to the laws of the United States of America operating in the construction industry. The claim arises out of the presence in Kuwait of a subsidiary of the M.W. Kellogg Company, Kellogg Plant Services Inc. In 1994, Kellogg Plant Services Inc. assigned its rights and interests in any claims or suits arising from Iraq's invasion and occupation of Kuwait to the M.W. Kellogg Company. Both corporations are collectively referred to as "Kellogg" in this report.

1148. In the "E" claim form, Kellogg sought compensation in the amount of USD 38,460,424 for contract losses, loss of real property and payment or relief to others. In a supplement to its claim, filed in 1997, Kellogg reclassified elements of its claim or invited the Commission to do so. However, the total amount sought as compensation remained the same.

1149. In its reply to the article 34 notification, Kellogg withdrew a claim in the amount of USD 11,825 which was part of its claim for payment or relief to others. The Panel has therefore treated its claim as a claim in the amount of USD 38,448,599.

1150. The Panel has reclassified elements of Kellogg's claim for the purposes of this report. The Panel therefore considered the amount of USD 38,448,599 for contract losses, loss of profits, loss of tangible property and payment or relief to others, as follows:

Table 52. Kellogg's claim

Claim element	Claim amount (USD)
Contract losses	507,652
Loss of profits	36,219,565
Loss of tangible property	1,497,952
Payment or relief to others	223,430
Total	38,448,599

A. Contract losses

1. Facts and contentions

1151. Kellogg seeks compensation in the amount of USD 507,652 for contract losses allegedly incurred in connection with three contracts in Kuwait.

1152. Kellogg provided services on two major maintenance support contracts with the Kuwait National Petroleum Co. ("KNPC") at the Mina Al-Ahmadi and Mina Abdulla Refineries in Kuwait. In addition, Kellogg was involved in "lump sum contract" work at the Mina Al-Ahmadi north pier for the installation of metering facilities with the same employer.

1153. Kellogg entered into its first contract with KNPC on 10 February 1987 to provide long-term maintenance support for the instrumentation systems at the Mina Al-Ahmadi refinery (the "instrumentation contract"). The original term of the instrumentation contract was four years commencing on 1 December 1987. Kellogg asserted that KNPC requested Kellogg to extend the contract for an additional year (i.e. until 1 December 1992). An affidavit sworn by one of Kellogg's employees stated that the contract extension documents had not been finalised or formalised at the time of Iraq's invasion and occupation of Kuwait. The deponent of the affidavit stated that "although the specific terms had not been finalised, it was and is reasonable to assume that the contract price for the extensions would have been at least the same, on an annual basis, as the prices on the original base contracts".

1154. Kellogg entered into a second contract with KNPC in November 1987 to provide long-term maintenance support for the electrical systems at KNPC's Mina Abdulla refinery (the "electrical contract"). The original term of the contract was four years starting on 1 April 1988.

1155. Kellogg entered into a third contract with KNPC on 1 November 1989 to install metering facilities at the north pier of the Mina Al-Ahmadi refinery on a "lump sum" basis. Kellogg alleged that work on this project was over 80 per cent complete at the time of the invasion.

1156. Kellogg stated that these projects, together with other additional work orders for work beyond the scope of the original base contracts, were accounted for as a "single job".

1157. Kellogg stated that prior to Iraq's invasion and occupation of Kuwait, KNPC paid all of its "billings" prior to June 1990. However, Kellogg maintained that certain amounts were not yet "billed" at the time of Iraq's invasion and as a result have not been collected. Kellogg further stated that invoices issued immediately prior to Iraq's invasion and occupation of Kuwait were not paid. Kellogg alleged that it attempted to obtain payment of these invoices. However, the supporting documentation was lost or destroyed when its camp in Kuwait was evacuated.

1158. At the time of Iraq's invasion and occupation of Kuwait, all operations under the contracts ceased. Kellogg's camp was abandoned and its personnel fled Kuwait. Kellogg invoked the force majeure provisions in relation to all three contracts on 3 August 1990. As a result, Kellogg did not complete the three contracts. KNPC refused to pay for all the contract works which Kellogg performed up to 2 August 1990 because of Kellogg's actions of 3 August 1990.

2. Analysis and valuation

1159. As evidence of its claim for contract losses, Kellogg provided, inter alia, the contracts, a projects status report for the period ended July 1990, a record of its billings on all three projects, an affidavit and correspondence with KNPC.

1160. This Panel has found that a claimant must provide specific proof that the failure of a non-Iraqi debtor to pay was a direct result of Iraq's invasion and occupation of Kuwait. A claimant must demonstrate, for example, that such a business debtor was rendered unable to pay due to insolvency or bankruptcy caused by the destruction of its business during Iraq's invasion and occupation of Kuwait,

or was otherwise entitled to refuse to pay the claimant. Kellogg did not supply such proof in relation to its claim for contract losses. In this respect, the Panel notes that KNPC has submitted a claim to the Commission. That claim contains no indication that KNPC is insolvent. Further, on the basis of the information which Kellogg provided, Kellogg's failure to receive payment was probably due to an independent decision of KNPC to refuse to pay Kellogg for completed works. The Panel finds that Kellogg failed to provide sufficient information and evidence to establish its claim.

3. Recommendation

1161. The Panel recommends no compensation for contract losses.

B. Loss of profits

1. Facts and contentions

1162. Kellogg seeks compensation in the amount of USD 36,219,565 for loss of profits. The claim consists of four loss items. Kellogg originally classified the loss items as claims for contract losses, but the claims are more appropriately dealt with as loss of profits.

(a) Lost future billings

1163. Kellogg stated that it billed USD 14,738,000 for its work under the three contracts with KNPC and extra work orders up to the time of Iraq's invasion and occupation of Kuwait. Its accounting records reflect that if the existing projects were completed, the total billings would have totalled USD 24,484,000. Kellogg alleged that the difference in the amount of USD 9,746,000 is the additional revenue that it would have received on its existing contracts if Iraq's invasion and occupation of Kuwait had not occurred.

1164. Kellogg further stated that its "Project Operations Cost Report" for the period up to July 1990 indicated that its estimated remaining costs to complete its existing Kuwait contracts were USD 7,825,000. Accordingly, Kellogg alleged that its future billings to complete the existing contract work (i.e. USD 9,746,000) exceeded its best estimate of its costs to carry out this performance (i.e. USD 7,825,000) by the amount of USD 1,921,000. Kellogg alleged that the amount of USD 1,921,000 represented the "lost future billings in excess of estimated future costs on existing contract completion", and was the amount of profit that it would have earned in relation to the three in-progress contracts if Iraq's invasion and occupation of Kuwait had not occurred.

(b) Profit margin

1165. Kellogg alleged that KNPC informed it in July 1990 that it would like to extend both maintenance contracts for at least one year beyond the original term. Kellogg calculated that it would have earned profit on the extended contracts. It estimated its revenue from the two one-year extensions as follows:

(a) For the instrumentation contract, it would have earned KWD 4,096,000 over a four year term. This meant that it would have earned the amount of KWD 1,024,000 over the one year extension; and

(b) For the electrical contract, it would have earned KWD 2,209,000 over a four year term. This meant that it would have earned the amount of KWD 552,000 over the one year extension.

1166. Kellogg alleged that an extension of the two contracts by one year each would have given it additional revenues of KWD 1,576,000 (KWD 1,024,000 and KWD 552,000). Kellogg calculated that this amount was the equivalent of USD 5,358,000. Applying an estimated rate of profit of 18 per cent, Kellogg alleged that it would have earned profit in the amount of approximately USD 965,000.

(c) Recovery of "up-front" investment

1167. Kellogg maintained that as of the end of July 1990, it had incurred direct costs for all of its work for KNPC in the total amount of USD 28,086,000. It further claimed that billings for work, including work under extra work orders, after July 1990, totalled USD 14,738,000. Kellogg alleged that the difference between these two figures is USD 13,348,000 which represented its "net unrecovered investment" in the Kuwait projects.

1168. Kellogg stated that elements of the "net unrecovered investment" in the amount of USD 13,348,000 have been accounted for in other portions of its claim, for example, "lost future billings" and "profit margin", supra. After deduction of these elements, Kellogg submitted a claim in the amount of USD 8,124,000 for "recovery of 'up-front' investment".

1169. Kellogg did not provide any independent evidence of the total direct cost of USD 8,124,000. Nor did it provide any evidence of future loss of overheads or profit.

(d) Future profits on Kuwait projects

1170. Kellogg seeks compensation for anticipated future profits on its projects and operations in Kuwait in the amount of USD 25,209,565. Kellogg alleged that this amount was sufficient to provide a fair and reasonable return on the money which it invested and put at risk to establish its position, facilities and personnel in Kuwait.

1171. Kellogg alleged that its relationship with KNPC at the time of Iraq's invasion and occupation of Kuwait was "excellent and profitable". It further stated that it had been informed, more than a year before the expiration of the initial term of either the instrumentation or the electrical contracts, that they would be extended. Kellogg alleged that each year's extension of the base maintenance work would result in approximately USD 1,000,000 profit to Kellogg, i.e. the claim for the "profit margin" at paragraphs 1165-1166, supra.

1172. Furthermore, Kellogg maintained that the additional work orders which it had already been awarded were "high profit margin activities" which had already yielded estimated profit margins of USD 1,700,000 in the two years prior to Iraq's invasion and occupation of Kuwait.

1173. Kellogg submitted that it stood to make profits of up to USD 2,000,000 per year from its operations in Kuwait. It did not specify which further contracts or projects it expected to be awarded. Nor did it explain how it calculated the amount claimed based on these assumptions.

2. Analysis and valuation

1174. The requirements to substantiate a loss of profits claim have been stated by the Panel at paragraphs 16 and 17, supra.

1175. The Panel observes that Kellogg failed to submit detailed information and evidence in relation to all four loss items of the claim for loss of profits.

(a) Lost future billings

1176. In support of its claim for lost future billings, Kellogg provided the contracts, correspondence with KNPC, some general affidavits and monthly project reports.

1177. Kellogg also provided a list of invoices which it allegedly presented to KNPC totalling USD 14,737,620. The invoices are dated 2 November 1987 to June 1990. However, Kellogg did not provide copies of the invoices themselves, evidence of their payment or any other relevant documents to support the component of its claim for loss of profits.

1178. Kellogg provided a project status report which indicated that 72.9 per cent of its work was complete as at the fourth quarter 1990. However, this percentage does not correlate to the USD 14,738,000 amount which it is claiming for contract losses. The figure of 72.9 per cent would be USD 17,848,836. The actual percentage is 60.19 per cent. Furthermore, Kellogg did not provide any supporting documentation in connection with its estimates.

1179. The remainder of Kellogg's evidence included its own internally generated schedules of profit and loss and invoices which are not supported by independent evidence.

1180. The Panel finds that Kellogg failed to provide sufficient information and evidence to substantiate its claim for lost future billings.

(b) Profit margin

1181. As is stated at paragraph 1153, supra, the contract extension documents had not been formalised by the time of Iraq's invasion and occupation of Kuwait. The only evidence in support of this loss element is a general affidavit to the effect that it was "reasonable to assume" that the prices would have been at least the same as the original contracts and that Kellogg expected to achieve a profit of 18 per cent on the extensions.

1182. The Panel finds that Kellogg failed to provide sufficient information and evidence to substantiate its claim for the profit margin.

(c) Recovery of "up-front" investment

1183. In support of its claim, Kellogg provided the evidence summarised, supra. It relied in particular on the affidavits, but these are very general in nature. However, it did not provide any independent evidence of the total direct cost of USD 8,124,000. Nor did it provide any evidence of future loss of overheads or profit.

1184. The Panel finds that Kellogg failed to provide sufficient information and evidence to substantiate its claim for recovery of "up-front" investment.

(d) Future profits on Kuwait projects

1185. In support of its claim, Kellogg relied on general affidavits. These were to the effect that Kellogg had an excellent relationship with KNPC and that some extra work orders and extended maintenance work were expected. However, Kellogg did not provide sufficient contemporaneous documentary evidence to support the expectation of the work or the profit margins. Furthermore, Kellogg did not provide any calculations or evidence to support the claimed figure.

1186. The Panel finds that Kellogg failed to provide sufficient information and evidence to substantiate its claim for future profits on Kuwait projects.

3. Recommendation

1187. The Panel recommends no compensation for loss of profits.

C. Loss of tangible property

1. Facts and contentions

1188. Kellogg seeks compensation in the amount of USD 1,497,952 for loss of tangible property. The claim relates to the loss of a labour camp, tools, vehicles and office equipment and furniture. It originally classified the alleged losses as real property losses in the amount of USD 507,602 and as contract losses in the amount of USD 990,350, but the losses are more appropriately classified as tangible property losses.

1189. Kellogg stated that in order to fulfil its contractual obligations vis-à-vis KNPC, it built a camp to house and feed approximately 450 of its 600 employees while it performed work under the contracts. The camp consisted of numerous mobile homes, barracks, duplexes, and ancillary buildings and amenities.

1190. Kellogg's administrative offices were allegedly fully equipped with equipment and furniture. Additionally, Kellogg allegedly also invested substantial sums in recruitment, mobilisation and improvement costs including tools, test equipment and approximately 100 vehicles.

1191. Finally, Kellogg allegedly provided furnished apartments for three western expatriate employees and furnishings for approximately 25 other employees.

1192. Kellogg alleged that as a result of Iraq's invasion and occupation of Kuwait, the camp and the other apartments and furnishings were completely looted and destroyed. All equipment tools, appliances, and vehicles were destroyed, vandalised or stolen and the housing was severely damaged. Kellogg alleged that its losses amount to USD 1,497,952 after taking into account depreciation.

2. Analysis and valuation

1193. Kellogg provided no evidence to support its claim for tangible property losses except for a witness statement. This was to the effect that all of the items were in Kuwait at the time of Iraq's invasion and occupation of Kuwait.

1194. Kellogg stated that all of its records of ownership were lost or destroyed as a result of Iraq's invasion and occupation of Kuwait. Following the conclusion of Iraq's invasion and occupation of Kuwait, it commissioned its accountants to recreate certain financial information about its Kuwaiti operations for the purpose of Kuwaiti income tax. In a letter dated 12 March 1992, Kellogg's accountants stated that they were unable to undertake an audit of its Kuwaiti accounts due to the loss of accounting records. Kellogg's accountants further noted that the field trial balances from October 1989 to June 1990 did not include any fixed assets. Accordingly, the fixed assets as at 31 October 1989 were "restated" and depreciation to 2 August 1990 was calculated from that base.

1195. Kellogg did not provide any other evidence of ownership, details or descriptions of its equipment apart from some letters written after the conclusion of Iraq's invasion and occupation of Kuwait. It did not provide any information about the age, condition, purchase value or date of purchase of the equipment.

1196. The Panel normally requires a claimant to supply clear documentary evidence of title to or right to use the tangible property, such as invoices and customs declarations. Kellogg asserted that it could not provide these documents because all of its records were in Kuwait and were lost or destroyed during Iraq's invasion and occupation of Kuwait. The Panel considers that Kellogg should have kept duplicates of such documents outside of Kuwait. Consequently, the Panel cannot accept the estimates of value prepared by Kellogg's accountants. In the absence of any primary documentary evidence, the Panel finds that Kellogg failed to provide sufficient evidence of its title to or right to use, and the presence in Kuwait of, the tangible property.

3. Recommendation

1197. The Panel recommends no compensation for loss of tangible property.

D. Payment or relief to others

1. Facts and contentions

1198. Kellogg seeks compensation in the amount of USD 223,430 for payment or relief to others.

1199. This claim comprises two separate items. First, Kellogg seeks compensation in the amount of USD 166,030 for travel and search expenses for its employees. Kellogg stated that at the time of

Iraq's invasion and occupation of Kuwait, it had almost 600 personnel of various nationalities working on its site. Kellogg alleged that it spent a significant amount of money after 2 August 1990 to trace the whereabouts of its 600 workers in order to pay them compensation under their employment contracts, to pay for their airfares, and to provide all necessities to ensure their safe return to their respective homelands.

1200. Secondly, it seeks compensation in the amount of USD 57,400 for cash payments to its employees. Kellogg stated that it paid 574 of its employees the amount of USD 100 each for incidental travel expenses to travel to their home countries. Kellogg also paid its employees their salaries and airfares but has not sought compensation for those payments.

2. Analysis and valuation

(a) Travel and search expenses

1201. In support of its claim for travel and search expenses, Kellogg provided newspaper clippings evidencing the search made by Kellogg to find its employees in order to pay their salaries. Kellogg also provided copies of receipts, salary settlement and termination vouchers, hotel bills, air tickets and visa expenses. Although Kellogg's search was extensive, Kellogg did not provide sufficient evidence to enable the Panel to determine that any of the alleged costs were direct losses. Kellogg failed to provide evidence that the costs were in excess of the costs which it would normally have expected to incur in arranging payment to its employees of amounts which it owed to them, and that the excess costs were incurred as a direct result of Iraq's invasion and occupation of Kuwait. The Panel finds that Kellogg failed to demonstrate that the loss arose as a direct result of Iraq's invasion and occupation of Kuwait.

(b) Cash payments made to employees

1202. In relation to the cash payments made to the employees, Kellogg provided payroll status reports dated 20 and 26 December 1990 and a list of employees containing 573 names. The payroll information dated 26 December 1990 stated that 473 employees had been paid and 82 employees were awaiting payment. Each of the expense payment invoices was approved and signed by Kellogg's contract manager.

1203. The Panel is satisfied that the figure of USD 100 for each employee, although a global figure, was calculated by Kellogg on an appropriate basis and reflected incidental travel costs which Kellogg would not have incurred had Iraq's invasion and occupation of Kuwait not taken place.

1204. In relation to the claim for payments made to employees, Kellogg provided evidence that it paid these amounts to 473 of its employees, that the payments were received and that they were losses directly caused by Iraq's invasion and occupation of Kuwait. The Panel therefore recommends compensation for payment or relief to others in the amount of USD 47,300.

1205. In relation to the date of loss, the Panel finds the date of loss to be 2 August 1990.

3. Recommendation

1206. The Panel recommends compensation in the amount of USD 47,300 for payment or relief to others.

E. Recommendation for Kellogg

Table 53. Recommended compensation for Kellogg

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	507,652	nil
Loss of profits	36,219,565	nil
Loss of tangible property	1,497,952	nil
Payment or relief to others	223,430	47,300
Total	38,448,599	47,300

1207. Based on its findings regarding Kellogg's claim, the Panel recommends compensation in the amount of USD 47,300. The Panel finds the date of loss to be 2 August 1990.

XXI. SERVAAS INCORPORATED

1208. SerVaas Incorporated ("SerVaas") is a corporation organised according to the laws of the United States of America operating in the construction industry.

1209. In the "E" claim form, SerVaas sought compensation in the amount of USD 14,152,800 for contract losses, interest and claim preparation costs. In its reply to the article 34 notification, SerVaas reduced its claim by the amount of USD 966,515 to take account of 'compensation' received from strenuous attempts to mitigate its losses. It therefore stated that its claim was in the amount of USD 13,186,285. For reasons which will be explained at paragraph 1265, infra, the Panel considers that the amount of USD 966,515 should be deducted from any amount awarded, not from the amount claimed.

1210. The Panel therefore considered the original amount of USD 14,152,800 for contract losses, interest and claim preparation costs, as follows:

Table 54. SerVaas' claim

Claim element	Claim amount (USD)
Contract losses	14,152,800
Interest (no amount specified)	-
Claim preparation costs (no amount specified)	-
Total	14,152,800

A. Contract losses

1. Facts and contentions

1211. SerVaas seeks compensation in the amount of USD 14,152,800 for contract losses allegedly incurred in connection with a contract with the Iraqi Ministry of Industry (the "Employer") in relation to a copper scrap refinery located at Ameria-Falluja Anbar, Iraq (the "Plant").

(a) Contract details

1212. On 10 September 1988, SerVaas entered into a contract with the Employer for the supply of machinery, equipment, and numerous services relating to the Plant. The contract was revised and re-executed on 2 October 1988 and again on 8 August 1989.

1213. The purpose of the Plant was to convert more than 70,000 tons of scrap brass, predominantly shell casings, into copper and copper-based alloy, for production into commercial brass by the existing Al-Shaheed Factory, immediately adjacent to the Plant. SerVaas alleged that the Plant would use SerVaas' proprietary process whereby silicon was removed from the shell casings. The total contract

price payable by the Employer to SerVaas was USD 40,602,000. SerVaas asserted that its particular contract was significantly different from the typical construction contract considered by the Panel. It alleged that 40 per cent of the total contract price was contingent upon proof that SerVaas' proprietary process successfully removed silicon from scrap brass. Therefore, the true value of the contract did not lie in the provision of the equipment or in construction supervisory services or the design of the Plant, but rather, in SerVaas' proprietary knowledge, although the contract assigned no specific value to this. SerVaas stated that the contract was, therefore, not a standard construction contract. According to SerVaas, the contract had a "single, indivisible objective", namely the delivery of a silicon extraction process through the provision of goods and services.

1214. The Employer was responsible for construction of the Plant itself.

1215. The contract was divided into supply and service provisions. According to the contract's schedules, approximately 92 per cent of the contract value related to the supply of goods, and approximately 8 per cent related to services. However, the payment provisions did not reflect this division. In fact, the contract only allowed payment of the final 40 per cent of the contract value upon SerVaas' completion of testing leading to certificates. The claim for contract losses essentially relates to this payment of 40 per cent of the contract value.

1216. The certificates were designed to be issued following an extensive testing process of all of the Plant's constituent parts and the together. The certificates, and the payments they represented, were as follows:

- the last Certificate of Commissioning (the "C.O.C.") - 10 per cent;
- the last Taking Over Certificate (the "T.O.C.") - 20 per cent; and
- the Final Acceptance Certificate (the "F.A.C.") - 10 per cent.

1217. Payment under the contract was effected pursuant to a letter of credit dated 21 November 1988.

1218. SerVaas received its first down payment instalment under the letter of credit in March 1989. By July 1990, SerVaas had shipped virtually all plans and equipment allowing it to collect 60 per cent of the total contract price through draws on the letter of credit.

(b) Status of contract works as at 2 August 1990

1219. SerVaas alleged that prior to 2 August 1990, it had delivered supplies in the amount of USD 37,214,000. This represented 99.74 per cent of the total supplies required under the contract. The undelivered balance in the amount of USD 94,000 related to certain minor items, which were to be delivered at the time the Plant would have been ready for operation.

1220. SerVaas alleged that it had carried out services in the amount of USD 1,300,000 as at 2 August 1990. This represented approximately 40 per cent of the services required under the

contract. It had completed the design of the foundations and that it performed approximately 20 per cent of the construction and installation supervision required under the contract. SerVaas stated that due to substantial delays by the Employer, no portion of the start-up services were performed by SerVaas by 2 August 1990.

1221. SerVaas' assertion in relation to the start-up services is important because this is a reference to the C.O.C., the T.O.C. and the F.A.C. process referred to at paragraph 1216, supra. SerVaas had not yet commenced this testing and acceptance process by 2 August 1990. It was only when SerVaas obtained each certificate that it earned the right to payment for the proportion of the remaining unpaid 40 per cent of the contract value represented by each certificate.

1222. SerVaas alleged that within the 60 day period preceding Iraq's invasion and occupation of Kuwait, it delivered to the Employer the designated official "Smelting and Refining Operation Manual" and the "Factory Process Flow Chart" detailing SerVaas' proprietary know-how and process. According to SerVaas, its proprietary know-how was the "singularly most valuable asset".

1223. SerVaas also stated that as of 2 August 1990, no C.O.C.s had been issued because the Employer had "not yet put a roof on the building". Furthermore, SerVaas alleges that machinery and equipment delivered by it and paid for by 40 per cent draws under the letter of credit were sitting in crates outside the perimeter of the "unroofed", partially constructed Plant.

(c) Termination of contract

1224. On 2 August and 10 August 1990, the President of the United States of America issued Executive Orders prohibiting "the performance by any United States person of any contract in support of an industrial or other commercial or governmental project in Iraq". On 13 August 1990, SerVaas consequently terminated the contract under paragraph 23.2, which provides:

> "If [SerVaas'] performance is prevented or delayed, however, by any hostilities or labor disputes involving the [Employer] or the government of Iraq, or other items under the control of the [Employer], that would prevent completion of this Contract, [SerVaas] may terminate this Contract, and shall be entitled to payment for the portion of the Plant that has been completed, plus the cost of any Supplies that have been ordered in reliance upon this Contract prior to termination. Such compensation shall be based upon the costs to [the Employer] established in Annex B."

1225. On 27 August 1990, SerVaas telexed the Employer and demanded payment for the portion of the Plant that was completed, plus the cost of the supplies ordered in reliance upon the contract and delivered to the Employer in the amount of USD 14,152,800.

1226. The Employer responded to SerVaas' notification of termination and to its demand stating that "our opinion in this situations which is beyond your control is to slow down your steps until declearing of the matter." The Panel finds that the Employer therefore acknowledged that this was a force majeure situation, but requested SerVaas not to proceed to arbitration at this stage.

1227. SerVaas alleged that its staffing needs could not be met because of Iraq's invasion and occupation of Kuwait on 2 August 1990. The Plant could not be completed without key supervisory staff and construction workers, who either left eventually following Iraq's invasion and occupation of Kuwait, or were prevented by it and the Executive Orders from coming. Final payment to SerVaas was not due until the last C.O.C. and later, the last T.O.C. were issued. SerVaas asserts that those critical certificates could not be issued because Iraq's invasion and occupation of Kuwait prevented it from completing the contract.

(d) Calculation of SerVaas' claim

1228. As at 2 August 1990, SerVaas had provided goods and services under the contract in the amount of USD 38,514,000. It had been paid USD 24,361,200 under the letter of credit (i.e. 60 per cent of the contract value). The resulting balance is USD 14,152,800. This is the amount which SerVaas seeks as compensation in reliance on paragraph 23.2 of the contract.

1229. At the same time, SerVaas explained that the claim was based on the premise that, had Iraq's invasion and occupation of Kuwait not taken place, it would have obtained the C.O.C., the T.O.C. and the F.A.C. It asserted that the payments triggered by obtaining these certificates were analogous to retention payments.

1230. In support of this contention, SerVaas referred to the additions to paragraph 11.7 of the contract executed on 8 August 1989. These recognise that the Employer's delay had caused SerVaas to exceed the time originally anticipated. The amendments provided that if the Employer was responsible for any further delays with the consequence that SerVaas had not received the 10 per cent payment for the C.O.C. and the 20 per cent payment for the T.O.C by 2 July 1991, SerVaas was automatically entitled to those payments by that date notwithstanding the fact that the C.O.C. and the T.O.C. had not been issued.

1231. Paragraph 11.8 provided for payment of the final 10 per cent of the contract value (for the F.A.C.) by 2 July 1992 (i.e., after a 12 month maintenance period) on the same terms.

1232. On the basis of paragraphs 11.7 and 11.8, SerVaas contended that all components of the balance of 40 per cent of the contract value would have been due by 2 July 1992, and that SerVaas would have earned this amount had it not been for Iraq's invasion and occupation of Kuwait.

1233. SerVaas asserted that there was no specific contractual provision for the transfer of SerVaas' proprietary knowledge and know-how, nor was a separate value placed on this transfer. SerVaas further maintained that because of the indivisible nature of the Contract, the "process by which silicon is removed from the brass was an integral part of the entire bundle of goods and services to be provided by SerVaas". SerVaas alleged that the Employer was "buying not an assemblage of equipment and machinery, but a fully integrated process that had to achieve a clearly defined objective before SerVaas would be entitled to full payment".

1234. SerVaas asserted that the contract only entitled SerVaas to be paid for partial performance upon the occurrence of a force majeure event such as Iraq's invasion and occupation of Kuwait. In

this case, SerVaas' entitlement was accelerated. Apart from these force majeure circumstances, the contract required that the Plant be commissioned, turned over and finally accepted before SerVaas was entitled to payment of the final 40 per cent of the total contract price.

(e) SerVaas' attempts to mitigate loss

1235. Consistent with the requirement that claimants mitigate their losses, SerVaas made considerable efforts to abate its alleged loss. It explored a range of options which included arbitration and litigation proceedings against the Employer directly, as well as discussions with the Employer.

1236. SerVaas' efforts did not lead to any final settlement or satisfaction of its claim. However, as a result of its efforts, SerVaas has recovered monies to date in the amount of USD 966,515. In accordance with Governing Council decision 13 (S/AC.26/1992/13), SerVaas advised the Commission of its receipt of the monies.

2. Analysis and valuation

1237. In support of its claim for contract losses, SerVaas provided a large amount of evidence, including copies of the contract and its amendments, the Executive Orders, the correspondence between the parties concerning the termination of the contract and SerVaas' demands for payment, the letter of credit, a list of equipment shipped by date, affidavits from its personnel working in Iraq as at 2 August 1990, financial statements and a copy of the manuals containing proprietary information.

1238. The Panel has defined the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) to limit the jurisdiction of the Commission to exclude debts of the Government of Iraq if the performance relating to that obligation took place prior to 2 May 1990.

1239. The Panel finds that for the purposes of the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) SerVaas had a contract with Iraq.

1240. The Panel observes that the contract differs from the majority of the contracts which the Panel has previously considered. The single most important aspect is that the payment terms (i.e. the time for payment and the amounts of payments) did not reflect the contract value which the parties assigned to the goods and services supplied in the contract schedules. Although there is a disjunction, this reflects the importance of the C.O.C., the T.O.C. and the F.A.C..

1241. However, the Panel does not accept SerVaas' contention that the contract was "single and indivisible". Parties to a contract must be taken to have expressed their objective intentions in their contracts. Aspects of the contract resemble those of a standard Iraqi construction contract and SerVaas had already received payment for 60 per cent of the contract value.

1242. In any event, paragraph 23.2 of the contract must be interpreted in the light of the Panel's previous decisions and those of other Panels. The Panel does not accept SerVaas' argument that paragraph 23.2 of the contract accelerated SerVaas' entitlement to be paid for goods and services supplied by 2 August 1990. The Panel refers to the "Report and recommendations made by the Panel

of Commissioners concerning the seventh instalment of 'E3' Claims" (S/AC.26/2000/3). It considered there a claim for contract losses submitted by VVO Selkhozpromexport. VVO Selkhozpromexport relied on a force majeure clause which required payment of all monies owed to it within 45 days in the event of war. VVO Selkhozpromexport asserted that Iraq's invasion and occupation of Kuwait triggered the force majeure clause and that it was consequently entitled to payment for work carried out prior to 2 May 1990. At paragraphs 455-458, the Panel decided that this clause did not override the "arising prior to" exclusion in Security Council resolution 687 (1991). The Panel also notes that the "E3A" Panel reached a similar conclusion in its "Report and recommendations made by the Panel of Commissioners concerning the tenth instalment of 'E3' Claims" (S/AC.26/2000/18) when it considered the claim submitted by ABB Lummus, Inc (at paragraphs 480-482).

1243. Nevertheless, the Panel does accept SerVaas' alternative but linked argument that the payments triggered by the issue of the C.O.C.s, the T.O.C. and the F.A.C. are analogous to retention payments similar to those which the Panel has customarily been required to consider. SerVaas and the Employer agreed to a payment arrangement which established a disjunction between the value of SerVaas' services and the payment for those services. Therefore, although as at 2 August 1990 (and indeed probably as at 2 May 1990), SerVaas had supplied 99.74 per cent of the goods under the contract and approximately 40 per cent of the services, constituting approximately 95 per cent of the contract by the value assigned to the goods and services in the schedules to the contract, the real value of SerVaas' performance to the Employer came at the end of the contract when SerVaas carried out the C.O.C. and the T.O.C. processes. The T.O.C. process was particularly important as it represented the true test of the Plant's ability to process scrap brass by removing silicon. The F.A.C., payable after a 12 month maintenance period, was the Employer's security for SerVaas' promise that the Plant could work for an extended period of time using SerVaas' know-how. Without a successful 'acceptance' process, the Plant would have been worthless to the Employer and SerVaas would not have been paid. The Panel considers that the payment terms of 10 per cent for the C.O.C., 20 per cent for the T.O.C.s and 10 per cent for the F.A.C. clearly bear out SerVaas' assertion that these steps were particularly important and are analogous to the preliminary and final acceptance certificate process under a standard construction contract.

1244. SerVaas' employees were ordered to leave the project because of the Executive Orders. The Panel therefore considers that SerVaas has demonstrated, prima facie, that all of the alleged losses are losses arising as a direct result of Iraq's invasion and occupation of Kuwait.

1245. It is, nevertheless, necessary for the Panel to assess whether the alleged losses are, on the basis of the evidence provided, direct losses. This involves an evaluation of the likely progress of the Plant after 2 August 1990 had Iraq's invasion and occupation of Kuwait not occurred.

1246. Having considered all of the information and evidence which SerVaas submitted, and taking into account the Panel's knowledge of the nature of contract works in Iraq in the 1980's and in 1990, the Panel does not consider that all of the amount represented by the C.O.C., the T.O.C. and the F.A.C. represent direct losses. The Panel's starting point is that as at 2 August 1990, the C.O.C. process had not commenced. This process had to be completed before the T.O.C. process could start and then

there would be a further period of 12 months before the F.A.C. could be issued. The C.O.C. process and the T.O.C. process were designed to be extensive tests of the plant by section and in toto.

1247. The Panel has therefore been required to determine when these processes might have started and been completed, and indeed whether they would have been completed.

1248. Paragraphs 11.7 and 11.8, which deal with delays caused by the Employer, are relevant and provide:

> "11.7 In the event [the Employer's] delays prohibit [SerVaas] from completing C.O.C. and T.O.C. beyond 30 months [i.e., 2 July 1991], [SerVaas] shall be entitled to payment of 90% of Contract price less performance deficiencies by [SerVaas].
>
> 11.8 [SerVaas] shall be allowed F.A.C. payment no later than July 2, 1992, if [the Employer] delays [SerVaas'] completion of F.A.C. beyond such date."

1249. Contrary to SerVaas' assertion, the Panel does not consider that paragraphs 11.7 and 11.8 mandate a conclusion that SerVaas would have necessarily earned the payments represented by the C.O.C. and the T.O.C. by 2 July 1991 (30 months) and the F.A.C. by 2 July 1992. The clauses simply provided some security to SerVaas in the event of ongoing further delays by the Employer. The clauses do not deal with the issue of what difficulties SerVaas may have anticipated with its own performance, if any, or which were not attributable to the Employer.

1250. In relation to delays generally on the Project, and the likely time schedules for achievement of the C.O.C. and the T.O.C., SerVaas has provided some information and evidence.

1251. First, the contract contains schedules which set out flow charts showing the time which SerVaas expected each step of the contract works to take. Many steps were obviously designed to run contemporaneously, but it is difficult on the basis of the schedules to work out how long SerVaas anticipated the C.O.C. and T.O.C. processes would take. The F.A.C. was intended to be issued 12 months after the T.O.C.

1252. Secondly, SerVaas has provided affidavits from some employees working on the Project in Iraq. That of the project engineer is particularly relevant, as he comments on the state of the Project as at 2 August 1990. He deposed, and the Panel accepts, that the Employer had already caused significant delays to the Project prior to Iraq's invasion and occupation of Kuwait. Further, although SerVaas had carried out its obligations as far as it could without the input of the Employer, it had to wait for the Employer to finish construction of the Plant before SerVaas could install the equipment, let alone test it. Finally, SerVaas had carried out its duties diligently and properly.

1253. Thirdly, SerVaas provided notes of a meeting between it and the Employer in Iraq on 30 June 1990. SerVaas sent its record of the meeting to the Employer on 26 July 1990. At the meeting, the parties, inter alia:

- Discussed the schedule for completion of the contract works;

- Discussed the need to obtain personnel both from the existing related plant and from overseas. The Employer lacked the skilled personnel required and so the parties agreed that sub-contractors were likely to be required for the installation and early operation phases;

- Agreed that SerVaas had completed its obligations to supply equipment in accordance with the contract;

- Noted the "original project target completion 7/90 – now revised to 12/90-3/91";

- Noted the "original building target completion 10/89 – revised to 9/90 (1 yr. late)";

- Noted that the estimated completion time for the building was September-October 1990;

- Listed a number of items which had been ordered in June 1990, but had not yet been delivered (which presumably were the responsibility of the Employer, not SerVaas). The key undelivered item was the switch gear which was ordered on 15 June 1990 and would not be delivered for seven months, i.e. the middle of January 1991; and

- Agreed, based on the delay in obtaining the switch gear followed by installation, that "the complete plant cannot operate before March, 1991 (estimated)". However, the parties considered that they could complete the T.O.C. process before then as they had an alternative power supply.

1254. There is no record of the Employer acknowledging this correspondence and thereby accepting that these time frames were realistic. However, the Panel finds that the evidence is sufficiently credible and detailed. The Panel accepts that the parties agreed in late June 1990 that these time frames were workable.

1255. Fourthly, SerVaas provided evidence in the form of an affidavit from a senior employee that he had learned that the Plant was in operation in 1992.

1256. It is clear from the evidence which SerVaas has provided that all delays as at 2 August 1990 were the responsibility of the Employer and not SerVaas. SerVaas had not only carried out its own work, but also was proactive in trying to bring the Project to completion by assisting the Employer's planning and work.

1257. However, the evidence referred to at paragraphs 1252–1256, supra, leads to a conclusion that even assuming that the Employer diligently met its obligations (an assumption which is required by paragraphs 11.7 and 11.8), it is not possible to say with complete certainty that SerVaas would not have experienced delays in the installation and testing process leading to the issue of the certificates. The Plant was intended to be a working factory utilising a sophisticated proprietary process. The C.O.C. and the T.O.C. processes involved test runs of numerous individual items of machinery, and then together as sections. The process of acceptance involved much more than checking the status of a building as in most claims for retention payments which the Panel considers. The process of acceptance required a more lengthy analysis and testing, with the potential for difficulties to arise, as is

typical of new bespoke machines and factories. The minutes of the meeting of 30 June 1990 record that even SerVaas envisaged ordinary start-up problems when it wrote that communications from the site need to be improved so that:

> "during installation period this [i.e. communication equipment] needs to be expanded so that equipment technicians can obtain quick turnaround on questions from their head office."

1258. That the parties must have regarded these tests as very important and potentially difficult can be seen by the fact that they assigned 10 per cent of the contract value to the C.O.C. process and 20 per cent to the T.O.C. process. That is despite the fact that the value of the goods supplied represented 92 per cent of the contract value when the schedules are considered (i.e. there is a disjunction between the value of work carried out and the payment terms). The Panel notes that most construction contracts which the Panel considers involve retention payments of between 5 and 10 per cent of the contract value. It is an unusual feature of this claim and the underlying contract that SerVaas seeks compensation for retention payments of 40 per cent of the contract value.

1259. The Panel has taken into account the following factors and made the following findings of fact:

- No delays attributable to the Employer can be taken into account in assessing the likelihood of SerVaas' completion of its duties and therefore its entitlement to payment;

- SerVaas had carried out all duties under the contract until 2 August 1990 on time;

- There is some evidence to suggest that the plant was in operation in 1992. However, the evidence is general and SerVaas properly pointed out that it could not state that the plant was working using its technology;

- SerVaas was working in Iraq with the attendant difficulties experienced by all construction companies in 1990 prior to Iraq's invasion and occupation of Kuwait of obtaining timely assistance, advice and communications, including advice from overseas; and

- SerVaas had to oversee the installation and connection of approximately USD 37 million worth of equipment, comprising of many items large and small, starting from scratch (no items had been put together or installed as at 2 August 1990). The value of unperformed services was large (USD 1,994,000), which confirms how extensive SerVaas' unperformed obligations would have been.

1260. As in its previous consideration of claims for contract losses involving retention payments, the Panel has observed that it is usually very difficult to predict what would have happened and what a claimant would have achieved had Iraq's invasion and occupation of Kuwait not taken place. Paragraphs 11.7 and 11.8, although assisting SerVaas, do not remove the Panel's obligation of making an assessment of SerVaas' ability to meet its remaining obligations under the contract.

1261. The Panel finds that the progress of work up to 2 August 1990 was in full accordance with SerVaas' contractual obligations. This is a strong indication that SerVaas would have successfully

completed the C.O.C. process by 30 March 1991, thereby entitling it to payment of 10 per cent of the contract value. SerVaas has, therefore, demonstrated that the whole of this loss is a direct loss.

1262. In relation to the achievement of the T.O.C., the Panel considers on the basis of the information and evidence that SerVaas would have successfully completed the T.O.C. process by 30 July 1991. However, the Panel considers that the payment triggered by achievement of the T.O.C. must be significantly discounted to reflect the likely extensive nature of the testing process (i.e. the Plant had to work in its entirety and actually extract silicon from shell casings) and the contingencies and the difficulties which SerVaas would have been likely to encounter, summarised supra. The Panel considers that the payment represented by the T.O.C. (20 per cent of the contract value) should be reduced by 50 per cent to take into account these matters.

1263. Given the likely difficulties which SerVaas would have experienced in obtaining the T.O.C., and the fact that the F.A.C. would not have been issued until at least 12 months after the T.O.C., the Panel finds that it is not possible to conclude that SerVaas would have obtained the F.A.C.. SerVaas has failed to establish that this loss was directly caused by Iraq's invasion and occupation of Kuwait.

1264. On the basis of its findings at paragraphs 1261-1263, supra, the Panel has performed a valuation of SerVaas' direct losses as follows. The contract value was USD 40,602,000. The amounts of the undelivered goods (USD 94,000) and unperformed services (USD 1,994,000) should be subtracted from this figure because these amounts represent the cost of SerVaas' performance had it actually carried out and obtained the C.O.C., the T.O.C. and the F.A.C.. This gives a total of USD 38,514,000. The Panel then multiplied this figure by 10 per cent (for the full value the C.O.C.) and a further 10 per cent (for half of the value of the T.O.C.). This gives a figure of USD 7,702,800 (20 per cent of USD 38,514,000).

1265. In relation to the effect of SerVaas' receipt of monies from its attempts to mitigate its loss in the total amount of USD 966,515, the Panel refers again to Governing Council decision 13. The effect of this decision is that the Panel must reduce the amount of compensation which it considers to be a direct loss by the amount of USD 966,515. The total after deduction of this figure is USD 6,736,285 (USD 7,702,800 less USD 966,515).

1266. The Panel therefore recommends compensation in the amount of USD 6,736,285 for contract losses.

1267. In relation to the date of loss, the Panel finds that SerVaas would have earned the amount payable on issue of the C.O.C. by 30 March 1991 and the amount payable on issue of the T.O.C. by 30 July 1991. As the amounts which the Panel has found to be direct losses are the same for both dates, the Panel considers that the mid-point, 30 May 1991, is the date of loss.

3. Recommendation

1268. The Panel recommends compensation in the amount of USD 6,736,285 for contract losses.

B. Interest

1269. With reference to the issue of interest, the Panel refers to paragraphs 18 to 20, supra.

C. Claim preparation costs

1270. SerVaas seeks compensation in an unspecified amount for asserted claim preparation costs. In a letter dated 6 May 1998, the Panel was notified by the Executive Secretary of the Commission that the Governing Council intends to resolve the issue of claim preparation costs at a future date. Accordingly, the Panel takes no action with respect to the claim by SerVaas for such costs.

D. Recommendation for SerVaas

Table 55. Recommended compensation for SerVaas

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	14,152,800	6,736,285
Interest (no amount specified)	-	-
Claim preparation costs (no amount specified)	-	-
Total	14,152,800	6,736,285

1271. Based on its findings regarding SerVaas' claim, the Panel recommends compensation in the amount of USD 6,736,285. The Panel finds the date of loss to be 30 May 1991.

XXII. RECOMMENDATIONS

1272. Based on the foregoing, the Panel recommends the following amounts of compensation for direct losses suffered by the claimants as a result of Iraq's invasion and occupation of Kuwait:

(a) China National Overseas Engineering Corporation: USD 9,573,815;

(b) China State Construction Engineering Corporation: USD 30,785,130;

(c) "Bojoplast" Construction: USD 11,071;

(d) Deutz Service International GmbH: Nil;

(e) DIWI Consult GmbH: Nil;

(f) KHD Humboldt Wedag AG: Nil;

(g) Siemens AG: USD 24,596;

(h) Strabag AG: Nil;

(i) Antia Electricals Pvt Ltd: Nil;

(j) Arvind Construction Company Limited: USD 41,892;

(k) Bhagheeratha Engineering Limited: USD 739,026;

(l) Engineering Projects (India) Limited: USD 12,995;

(m) National Buildings Construction Corporation Limited: USD 38,812;

(n) Punjab Chemi-Plants: Nil;

(o) Shah Construction Company Limited: Nil;

(p) Landoil Resources Corporation: Nil;

(q) Construction Company "Granit": USD 55,912;

(r) The M.W. Kellogg Company: USD 47,300; and

(s) SerVaas Incorporated: USD 6,736,285.

Geneva, 11 December 2001

(Signed) Mr. Werner Melis
Chairman

(Signed) Mr. David Mace
Commissioner

(Signed) Mr. Sompong Sucharitkul
Commissioner
