UNITED
NATIONS

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Security Council

Distr.
GENERAL
S/AC.26/2002/32
12 December 2002
Original: ENGLISH

UNITED NATIONS
COMPENSATION COMMISSION
GOVERNING COUNCIL

REPORT AND RECOMMENDATIONS MADE BY THE PANEL OF COMMISSIONERS CONCERNING THE TWENTY-SECOND INSTALMENT OF "E3" CLAIMS

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Introduction

1. The Governing Council of the United Nations Compensation Commission (the "Commission") appointed the present Panel of Commissioners (the "Panel"), composed of Messrs. John Tackaberry (Chairman), Pierre Genton and Vinayak Pradhan, at its twenty-eighth session in June 1998, to review construction and engineering claims filed with the Commission on behalf of corporations and other legal entities in accordance with relevant Security Council resolutions, the Provisional Rules for Claims Procedure (S/AC.26/1992/10) (the "Rules") and other Governing Council decisions. This report contains the recommendations to the Governing Council by the Panel, pursuant to article 38(e) of the Rules, concerning the 13 claims included in the twenty-second instalment. Each of the claimants seeks compensation for loss, damage or injury allegedly arising out of Iraq's 2 August 1990 invasion and subsequent occupation of Kuwait.

2. Based on its review of the claims presented to it to date and the findings of other panels of Commissioners contained in their reports and recommendations, as approved by the Governing Council, this Panel has set out some general propositions concerning construction and engineering claims filed on behalf of corporations (the "'E3' Claims"). The general propositions are contained in the annex entitled "Summary of general propositions" (the "Summary"). The Summary forms part of, and is intended to be read together with, this report.

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

I. PROCEDURAL HISTORY

A. The procedural history of the claims in the twenty-second instalment

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

5. In a procedural order dated 1 March 2001, the Panel instructed the secretariat to transmit to Iraq the claimant's documents in relation to the claim by Energoinvest Co. filed through the Government of Bosnia and Herzegovina. Iraq was invited to submit its comments on the documentation by 3 September 2001. Iraq did so on 28 September 2001. The comments and responses of Iraq were nonetheless considered by the Panel in its review of the claims, since such consideration did not delay the Panel's completion of its review and evaluation of the claims within the time period prescribed by the Rules.

6. On 19 June 2001, the Panel issued a procedural order relating to the claims included in the twenty-second instalment (the "second procedural order"). In view of: (a) the apparent complexity of the issues raised; (b) the volume of the documentation underlying the claims; and/or (c) the amount of compensation sought by the claimants, the Panel decided to classify the claims as "unusually large or complex" within the meaning of article 38(d) of the Rules. In accordance with that article, the Panel completed its review of the claims within 12 months of the date of the second procedural order.

7. In view of the review period and the available information and documentation, the Panel determined that, with the exception of the claim by Energoinvest Co. (as to which see paragraph 5, supra), it was able to evaluate the claims without additional information or documents from the Government of Iraq. Nonetheless, due process, the provision of which is the responsibility of the Panel, has been achieved by, among other things, the insistence of the Panel on the observance by claimants of article 35(3) of the Rules, which requires sufficient documentary and other appropriate evidence.

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

B. The claimants

9. This report contains the Panel's findings with respect to the following 13 claims for losses allegedly caused by Iraq's invasion and occupation of Kuwait:

(a) Bitas Co., a corporation organised according to the laws of Bosnia and Herzegovina, which seeks compensation in the total amount of 169,920 United States dollars (USD);

(b) Energoinvest Co., a corporation organised according to the laws of Bosnia and Herzegovina, which seeks compensation in the total amount of USD 211,386,950;

(c) CMI Entreprise, a corporation organised according to the laws of France, which seeks compensation in the total amount of USD 119,370;

(d) ABB SAE S.p.A. (formerly ABB SAE Sadelmi S.p.A.), a corporation organised according to the laws of Italy, which seeks compensation in the total amount of USD 4,891,255;

(e) Fochi Buini e Grandi S.r.l. (formerly Fochi Montaggi Elettrici (FME) S.r.l.), a corporation organised according to the laws of Italy, which seeks compensation in the total amount of USD 25,499;

(f) Delft Hydraulics, an entity organised according to the laws of the Netherlands, which seeks compensation in the total amount of USD 575,328;

(g) NKF Kabel B.V., a corporation organised according to the laws of the Netherlands, which seeks compensation in the total amount of USD 2,023,662;

(h) Polservice Ltd. (formerly Polservice Foreign Trade Enterprise), a corporation organised according to the laws of Poland, which seeks compensation in the total amount of USD 20,649,115;

(i) Prokon Engineering Construction and Trade Ltd., a limited partnership organised according to the laws of Turkey, which seeks compensation in the total amount of USD 440,620;

(j) Mitsui Babcock Energy Ltd. (formerly Babcock Energy Ltd.), a corporation organised according to the laws of the United Kingdom of Great Britain and Northern Ireland, which seeks compensation in the total amount of USD 19,767,251;

(k) Tileman (SE) Ltd., a corporation organised according to the laws of the United Kingdom of Great Britain and Northern Ireland, which seeks compensation in the total amount of USD 3,881,167;

(l) Techmation Inc., a corporation organised according to the laws of the United States of America, which seeks compensation in the total amount of USD 339,814; and

(m) Energoprojekt Inzenjering Engineering and Contracting Company Ltd., a corporation organised according to the laws of the Federal Republic of Yugoslavia, which seeks compensation in the total amount of USD 13,104,704.

10. These amounts claimed in United States dollars represent the alleged loss amounts after correction for applicable exchange rates as described in paragraphs 57 to 59 of the Summary.

II. BITAS CO.

11. Bitas Co. ("Bitas") is a corporation organised according to the laws of Bosnia and Herzegovina. Bitas is in the engineering business.

12. Prior to Iraq's invasion and occupation of Kuwait, Bitas was undertaking hydroinsulation, thermal insulation and mechanical protection of roof insulation services in Iraq as a subcontractor to "Energoprojekt-Izgradnja" ("Energoprojekt") pursuant to a contract dated 8 February 1990. Energoprojekt was the main contractor engaged by the Ministry of Industry and Military and Manufacturing of Iraq (the "Ministry"), on the construction of the Al-Shemal Thermal Power Station in Iraq (the "Project").

13. In the "E" claim form, Bitas sought compensation for contract losses in the total amount of USD 169,920. However, the Panel finds that certain portions of its claim for contract losses are more appropriately classified as claims for loss of profits, loss of tangible property, payment or relief to others and interest as shown in table 1, infra.

Table 1. Bitas' claim

Claim element	Claim amount (USD)
Contract losses	55,530
Loss of profits	40,200
Loss of tangible property	49,684
Payment or relief to others	24,506
Interest (no amount specified)	--
Total	169,920

14. For the reasons stated in paragraph 60 of the Summary, the Panel makes no recommendation with respect to Bitas' claim for interest.

A. Contract losses

1. Facts and contentions

15. Bitas seeks compensation in the amount of USD 55,530 for contract losses. Bitas' claim for contract losses is summarised in table 2, infra.

Table 2. Bitas' claim for contract losses

Loss item	Claim amount (USD)
(a) Delay and disruption due to unprepared surfaces	1,640
(b) Expenses of interruption in work due to lack of project documentation	3,498
(c) Engagement of project manager for work on other sites due to loss item (a)	1,890
(d) Performance guarantee expenses	16,310
(e) Insurance expenses	8,910
(f) Loss of interest	15,762
(g) Head office expenses	7,520
Total	55,530

16. Bitas asserts that at the time of Iraq's invasion and occupation of Kuwait, it was performing hydro and thermal insulation work for the Project. The total value of Bitas' work under the subcontract was USD 858,027.

17. The Panel considers each element of the claim for contract losses.

(a) Delay and disruption due to unprepared surfaces (USD 1,640)

(b) Expenses caused by interruption to the work due to lack of project documentation (USD 3,498)

(c) Engagement of project manager for work on other sites due to loss item (a) (USD 1,890)

18. The Panel reviewed loss items (a), (b) and (c) together as they stem from the same source of events.

19. In relation to loss items (a) and (b), Bitas alleges that due to Iraq's invasion and occupation of Kuwait the work at the Project was delayed. The works were delayed because Energoprojekt was not able to provide adequate preparation of the base for waterproofing works and there was a lack of project documentation at the site. Bitas had assigned 10 workers to the Project and as a result of the stoppage of the works, the workers became idle. The idle workers were either sent to work on another project and/or evacuated to Bosnia and Herzegovina. Bitas' claim for contract losses relates to the cost of redeploying the workers in Iraq and/or, where applicable, the costs of returning the workers to Bosnia and Herzegovina.

20. In relation to loss item (c), Bitas further asserts that, commencing 25 May 1990, it had to appoint a site manager for the new works to which the redeployed workers were being sent.

(d) Performance guarantee expenses (USD 16,310)

21. It was a term of the subcontract that Bitas provide:

(i) A performance bond in the amount of USD 85,802. The amount of the performance bond was equal to 10 per cent of the value of the subcontract. The required expiry date of the bond was 1 June 1993. Bitas did not confirm whether the bond was issued;

(ii) An advance payment bond in the amount of USD 64,352. The amount of the advance payment bond was equal to 7.5 per cent of the value of the subcontract. The required expiry date of the guarantee was 15 January 1991. Bitas states that it provided the required bond on 15 July 1990. The bond was issued by "Privredna Bank, Sarajevo".

22. Bitas alleges that it paid performance guarantee expenses in the amount of USD 16,310 in order to secure the issue of the bonds. Bitas states that in view of the fact that the subcontract was stopped due to Iraq's invasion and occupation of Kuwait, the bonds served no further purpose.

(e) Insurance expenses (USD 8,910)

23. Bitas seeks compensation in the amount of USD 8,910 for expenses incurred in obtaining insurance for the subcontract. Article 5 of the subcontract required that Bitas obtain insurance for the works, property and persons involved in the Project. It was a term of the subcontract that Bitas bear the cost of the insurance premia.

(f) Loss of interest (USD 15,762)

24. Bitas seeks compensation in the amount of USD 15,762 for the loss of interest on funds invested for materials purchased for the Project. It was a term of the subcontract that Bitas provide credit to Energoprojekt for the purchase of materials for the subcontract. Paragraph 2 of enclosure No. 2 to the contract stipulated that Energoprojekt was to be granted a credit amounting to 45 per cent of the materials purchased.

(g) Head office expenses (USD 7,520)

25. Bitas seeks compensation in the amount of USD 7,520 for payment of rent for its branch office in Baghdad. Bitas is alleged to have paid the rental in the amount of 9,000 Iraqi dinars (IQD) for the period commencing 17 June 1990 and ending 17 June 1991. Bitas provided a statement to the effect that the rent was paid on 19 May 1990. The statement does not, however, identify the recipient or the payee of the monies. Bitas did not identify the premises or the terms and conditions upon which the premises were rented.

2. Analysis and valuation

26. The Panel notes that the claim for contract losses arose from the subcontract being performed in Iraq. Although Bitas does not expressly state that Energoprojekt was not paid, the Panel finds, based on the evidence presented and on a cross check with the claim submitted by Energoprojekt, that the

non-payment for Bitas' work was the result of non-payment to Energoprojekt by the Ministry due to the stoppage of works on the Project as a result of Iraq's invasion and occupation of Kuwait.

27. In the Summary, the Panel reviews the jurisdictional limitations in respect of claims filed by subcontractors. The Panel acknowledges the political and historical realities in Iraq and concludes that, "... claims may properly be filed with the Commission by any party anywhere in the contractual chain ..." (see the Summary, paragraphs 117 and 118).

28. As the contract between Bitas and Energoprojekt concerned a project situated in Iraq, the Panel concludes that the claim for contract losses is within the Commission's jurisdiction.

(a) Delay and disruption due to unprepared surfaces (USD 1,640)

(b) Expenses caused by interruption to the work due to lack of project documentation (USD 3,498)

(c) Engagement of project manager for work on other sites due to loss item (a) (USD 1,890)

29. In support of its claim, Bitas provided copies of the subcontract and amendments, invoices, documents entitled "record sheets" and "attendance cards" setting out the number of hours worked by each Bitas employee and fees charged to the relevant employer for undertaking the assignment. In addition, Bitas provided copies of Energoprojekt's instructions to the Central Bank of Iraq to make payment to Bitas for services performed.

30. After reviewing the evidence provided, the Panel finds that the losses cannot be attributed directly to Iraq's invasion and occupation of Kuwait.

31. The Panel arrived at this conclusion because the underlying cause of the alleged loss items (a) to (c) arose from the lack of prepared positions for the works and the lack of project documentation at the site. The Panel was unable to determine with certainty from the evidence made available that the delay in the work did not manifest itself prior to Iraq's invasion and occupation of Kuwait. Bitas did not establish the causal link between Iraq's invasion and occupation of Kuwait and its alleged losses. Accordingly, the Panel recommends no compensation for loss items (a) to (c).

(d) Performance guarantee expenses (USD 16,310)

32. Applying the approach taken in paragraphs 89 to 98 of the Summary, the Panel finds that claims for expenses incurred in securing performance guarantees of this nature will only be sustainable in very unusual circumstances. After reviewing the evidence, the Panel finds that such circumstances do not exist in this claim. Accordingly, the Panel recommends no compensation for performance guarantee expenses.

(e) Insurance expenses (USD 8,910)

33. Bitas did not provide any evidence to establish payment of the expenses or other information to explain how this alleged loss was caused by Iraq's invasion and occupation of Kuwait. Bitas was requested to provide this evidence and information in the article 34 notification (as defined in paragraph 15 of the Summary), but failed to do so.

34. The Panel finds that Bitas failed to substantiate its claim. The Panel recommends no compensation for insurance expenses.

(f) Loss of interest (USD 15,762)

35. Bitas did not provide any evidence to establish payment of the expenses or other information to explain how this alleged loss was caused by Iraq's invasion and occupation of Kuwait. Bitas was requested to provide this evidence and information in the article 34 notification, but failed to do so.

36. The Panel finds that Bitas failed to substantiate its claim. The Panel recommends no compensation for loss of interest.

(g) Head office expenses (USD 7,520)

37. Applying the approach taken in paragraphs 139 to 143 of the Summary, claims for head office expenses are generally regarded as part of the overhead. Accordingly, they will, in most cases, be recoverable during the course of the contract. Based on the evidence submitted by Bitas, the Panel has been unable to determine with any certainty whether Bitas recovered the head office expenses during the execution of the contract. Bitas did not provide any evidence to establish payment of the expenses or to explain the terms and conditions upon which the premises were rented or occupied. Bitas was requested to provide this evidence and information in the article 34 notification, but failed to do so.

38. The Panel finds that Bitas failed to substantiate its claim. The Panel recommends no compensation for head office expenses.

3. Recommendation

39. The Panel recommends no compensation for contract losses.

B. Loss of profits

1. Facts and contentions

40. Bitas seeks compensation in the amount of USD 40,200 for loss of profits.

41. The claim relates to losses allegedly incurred as a result of works for the Project that were not realised in the period from July to December 1990. The claim for loss of profits is calculated as 15 per cent of the amount of the unrealised works. Based on Bitas' calculations, the value of the unrealised works was USD 269,050. Fifteen per cent of USD 269,050 equals USD 40,358, not USD 40,200.

2. Analysis and valuation

42. Bitas provided no other documents to support the figure for the unrealised works or the profit margin of 15 per cent. Bitas stated that it was unable to provide any management reports on actual and budgeted financial performance.

43. The Panel finds that Bitas failed to fulfil the evidentiary standard for loss of profits claims set out in paragraphs 144 to 150 of the Summary. Accordingly, the Panel recommends no compensation.

3. Recommendation

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

C. Loss of tangible property

1. Facts and contentions

45. Bitas seeks compensation in the amount of USD 49,684 for loss of tangible property. The details of the lost property are summarised in table 3, infra.

Table 3. Bitas' claim for loss of tangible property

Loss item	Claim amount (USD)
Boilers for bitumen	562
Boilers for bitumen compound melting	7,281
Verbit 40 (insulation tape)	22,016
Abit 10 (insulation tape)	7,182
Polyurethane al/n	6,970
Bitumen 80/25	2,700
Gas with bottles	981
Handling charges	1,992
Total	49,684

46. Bitas asserts that the tangible property was purchased for the Project and was stored at the site. Bitas asserts that since Iraq's invasion and occupation of Kuwait it has not been paid for any of the property or recovered any of the tangible property.

2. Analysis and valuation

47. In support of its claim, Bitas provided inventory lists of the tangible property. The lists set out in detail the respective units of equipment and materials kept in storage at the beginning of August 1990. The inventory lists also record the consumption of the equipment and materials that had taken place by the end of the month of August 1990. The Panel finds Bitas has established that its equipment and materials existed in Iraq at the date of Iraq's invasion and occupation of Kuwait and were lost as a result thereof. The Panel accepts Bitas' valuation of the tangible property. Accordingly, Bitas suffered a loss resulting directly from Iraq's invasion and occupation of Kuwait in the amount claimed.

3. Recommendation

48. The Panel recommends compensation in the amount of USD 49,684 for loss of tangible property.

D. Payment or relief to others

1. Facts and contentions

49. Bitas seeks compensation in the amount of USD 24,506 for payment or relief to others.

50. Bitas states that due to Iraq's invasion and occupation of Kuwait it was forced to stop works on the subcontract. The stoppage led to Bitas' workers in Iraq becoming idle and therefore losing

productive man-hours. The other consequence of the stoppage of works was the suspension of the proposed transfer from Bosnia and Herzegovina of additional workers to Iraq to complete the outstanding works. Bitas seeks compensation for the evacuation costs involved in demobilising its staff and the costs of preparing its workers to perform works under the Project in Iraq.

51. The alleged losses are summarised in table 4, infra. While some of the losses may appear to be contract-type losses, after reviewing the evidence provided, the Panel finds that they are more appropriately classified as claims for payment or relief to others.

Table 4. Bitas' claim for payment or relief to others

Loss item	Claim amount (USD)
"Interruption of work due to lack of work signed by Project manager" for the period 27 to 31 August 1990	1,050
Site manager's expenses due to interruption in work for the period 27 August to 30 September 1990	3,188
Accommodation for 3 workers for the period 8 August to 30 September 1990	675
Return airfares and expenses to Yugoslavia for 3 workers	1,557
Airfares and expenses for return to Iraq for 3 workers	1,165
Salaries in Yugoslavia for 3 workers	10,252
Salaries for workers preparing to work in Iraq in August 1990	6,619
Total	24,506

2. Analysis and valuation

52. In support of its claim, Bitas provided the same evidence as was submitted in support of its claim for contract losses. Bitas provided no other evidence to enable the Panel to verify any of the alleged losses for payment or relief to others. In particular, Bitas failed to provide evidence that it incurred the claimed expenses. Bitas failed to provide any details of the dates, numbers or passengers on the flights that evacuated its employees from Iraq. Bitas also failed to provide alternative evidence in the form of affidavits from the alleged evacuated employees. In failing to provide the required evidence for determination by the Panel, Bitas did not establish that these losses were caused as a direct result of Iraq's invasion and occupation of Kuwait.

3. Recommendation

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

E. Summary of recommended compensation for Bitas

Table 5. Recommended compensation for Bitas

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	55,530	nil
Loss of profits	40,200	nil
Loss of tangible property	49,684	49,684
Payment or relief to others	24,506	nil
Interest (no amount specified)	--	--
Total	169,920	49,684

54. Based on its findings regarding Bitas' claim, the Panel recommends compensation in the amount of USD 49,684. The Panel determines the date of loss to be 2 August 1990.

III. ENERGOINVEST CO.

55. Energoinvest Co. ("Energoinvest") is a corporation organised according to the laws of Bosnia and Herzegovina. Energoinvest is in the consulting engineering business. Prior to Iraq's invasion and occupation of Kuwait, it was performing services on 26 contracts in Iraq.

56. Energoinvest submitted 27 separate "E" claim forms containing 26 claims for contract losses allegedly suffered in respect of each of the 26 contracts and one claim for loss of tangible property and other losses. The total claimed amount in the "E" claim forms was USD 226,389,502.

57. In its reply to the article 34 notification, Energoinvest reduced the amount of its claim to USD 211,386,950. The reduction (in the amount of USD 15,002,552) was as the result of its receipt of payments for certain components of the claims for contract losses.

58. The Panel has reclassified some elements of Energoinvest's claim for the purposes of this report. The Panel considers that the claim for contract losses in the amount of USD 34,570,015 and the claim for other losses in the amount of USD 1,678,488 are more appropriately classified as claims for interest and payment or relief to others, respectively.

59. The Panel therefore considered the amount of USD 211,386,950 for contract losses, loss of tangible property, payment or relief to others, other losses and interest, as shown in table 6, infra.

Table 6. Energoinvest's claim

Claim element	Claim amount (USD)
Contract losses	169,185,671
Loss of tangible property	5,534,776
Payment or relief to others	1,678,488
Other losses	418,000
Interest	34,570,015
Total	211,386,950

60. For the reasons stated in paragraph 60 of the Summary, the Panel makes no recommendation with respect to Energoinvest's claim for interest.

61. Pursuant to a procedural order dated 1 March 2001, the Government of Iraq was invited to respond to the claim for compensation by Energoinvest. The Government of Iraq submitted a response to the Commission on 28 September 2001. The Panel has considered this response in reaching its recommendations and, where relevant, the Panel has set out its assessments of the Government of Iraq's response in the appropriate sections of this analysis.

A. Contract losses

1. Facts and contentions

62. Energoinvest seeks compensation in the amount of USD 169,185,671 for contract losses. The claim is for losses allegedly incurred in connection with works performed or services provided but not paid for in respect of the 26 contracts in Iraq. All of the contracts were carried out for Iraqi employers and involved the provision of materials and services in connection with the generation and transmission of electricity. Energoinvest alleges that its 120 employees in Iraq performed work on the 26 contracts commencing in the early 1980s. After 2 August 1990, the employees had to stop work on the contracts. The employees were ultimately repatriated from Iraq between 2 August and 31 December 1990.

63. The Panel finds that the alleged losses in relation to the 26 contracts can be divided into the following three types of losses:

(a) Value of work performed but not paid for;

(b) Costs of completed equipment to be shipped but not paid for; and

(c) Interest for delayed and/or deferred payment of the contract price.

64. Energoinvest organised its claim in 27 separate volumes labelled Volume 1 to Volume 27. For ease of reference, the Panel refers to Energoinvest's volume numbers in this analysis. The claim for contract losses is represented in table 7, infra.

Table 7. Energoinvest's claim for contract losses

Volume No.	Contract No.	Employer	Date of contract	Subject	Claim amount (USD)
Vol. 1	HT-12/80	State Organisation of Electricity	30/3/81 Addendum No. 1 - 29/3/81 Addendum No. 2 - 22/12/84	Supply of material, civil works, erection and commissioning of eight substations	3,448,526
Vol. 2	HT-15/80	State Organisation of Electricity	24/5/81 Addendum No. 1- 25/4/81	Supply of material, civil works and commissioning of two substations	834,544
Vol. 3	HT-11/79	State Organisation of Electricity	3/8/80 Addendum No. 1- 3/8/80	Supply of material, civil works and commissioning of four substations	1,523,218
Vol. 4	HT-4/79	State Organisation of Electricity	30/03/80 Addendum No. 2- 30/3/80 Addendum No. 3 - No date	Supply of material, construction, commissioning and one-year guarantee for transmission lines Dernendikhan-Taameem	4,198,384
Vol. 5	HT-84/84	State Organisation of Electricity	23/11/86 Addendum No. 1 - October 1986	Supply of material, civil works and commissioning of three substations	19,833,544
Vol. 6	SS-3	General Establishment for Generation and Transmission of Electricity	12/11/87 Addendum No. 1 - November 1987	Delivery of material, equipment and technical assistance for 14 substations	44,522,784
Vol. 7	5/3/825	General Establishment for Electrical Distribution for Governorates	19/3/88 Addendum No. 1 - 19/3/88	Electromechanical design, manufacture and supply of material, equipment and spare parts for one substation	503,375
Vol. 8	5/3/821	General Establishment for Electrical Distribution for Governorates	18/8/88 Addendum No. 1 - 18/8/88	Electromechanical design, manufacture and supply of material, equipment and spare parts for 14 switchgears	1,457,131
Vol. 9	5/3/828	General Establishment for Electrical Distribution for Governorates	21/5/88 Addendum No. 1 - 21/5/88	Electromechanical design, manufacture and supply of material, equipment and spare parts for three substations	1,216,394
Vol. 10	5/3/848	General Establishment for Electrical Distribution for Governorates	11/3/88 Addendum No. 1 - 19/3/88	Electromechanical design, manufacture and supply of material, equipment and spare parts for 20 substations	5,887,978
Vol. 11	HT-72/84	State Organisation of Electricity	22/12/84 Addendum No. 1 - 22/12/84	Supply of material, civil works and commissioning of four GIS substations	28,754,002

Volume No.	Contract No.	Employer	Date of contract	Subject	Claim amount (USD)
Vol. 12	L-2/87	General Establishment for Generation and Transmission of Electricity	No date Addendum No. 1 - 21/11/88	Manufacture and delivery of material for Twin Teal conductors	16,228,078
Vol. 14	5/5/15/R2/81	State Organisation of Electricity	3/6/81 Addendum No. 2 - 1/6/81	Design, survey, supply of material, civil works, erection and commissioning of transmission lines	2,515,829
Vol. 15	SG-TL-3.1/3	State Organisation of Electricity	1/11/81 Addendum No. 1 - No date	Supply of material, civil works, erection and commissioning of transmission lines	3,320,056
Vol. 16	57 Towers	Iraq Atomic Energy Commission	10/7/83	Design, supply of material and erection	388,734
Vol. 17	SG-TL-4.4	State Organisation of Electricity	24/8/85 Addendum No. 1 - 24/8/85 Addendum No. 2 - 28/10/86 Addendum No. 3 - 28/10/86 Addendum No. 4 - 20/7/87	Supply of material, civil works, erection and commissioning of 400 kV transmission lines	9,102,388
Vol. 18	HT-29/81	State Organisation of Electricity	22/5/82 Addendum No. 3 - No date	Supply of material, civil works, erection and commissioning of 132 kV transmission lines	3,232,337
Vol. 19	SG-TL-4.5	State Organisation of Electricity	24/8/86 Addendum No. 1 - 24/8/86 Addendum No. 2 - 30/1/90	Supply of material, civil works, erection and commissioning of 132 kV transmission lines	5,408,454
Vol. 20	HT-80/84	State Organisation of Electricity	26/12/85 Addendum No. 1 - 26/12/85	Manufacture, testing, supply and delivery, construction of foundations, erection and commissioning of 132 kV transmission lines	1,682,884
Vol. 21	HT-82A/84	State Organisation of Electricity	24/8/86 Addendum No. 1 - 24/8/86 and 17/10/88	Manufacture, testing, supply and delivery, construction of foundations, erection and commissioning of 132 kV transmission lines	3,560,139
Vol. 22	Purchase order 5/3/694/227	State Organisation of Electricity	24/12/86	Manufacture and delivery of 10 metre and 15 metre high street lighting poles with single arm and two mini brackets	1,690,774

Volume No.	Contract No.	Employer	Date of contract	Subject	Claim amount (USD)
Vol. 23	Purchase order 5/6/351/45	State Organisation for Baghdad Electricity	30/6/87	Manufacture and delivery of 12 metre and 15 metre high galvanised lighting poles	1,516,570
Vol. 24	Purchase order 5/3/772	State Organisation of Electricity	21/12/86	Manufacture and delivery of high masts and flood lights	767,043
Vol. 25	5/6/410/4	State Establishment of Baghdad Electricity Distribution	17/1/88	Manufacture and delivery of 10 metre high street lighting poles	678,216
Vol. 26	Purchase order 5/6/415/71	State Establishment of Baghdad Electricity Distribution	13/9/88	Manufacture and delivery of 15 metre high street lighting poles	767,624
Vol. 27	5/3/820R	General Establishment for Electrical Distribution for Governorates	14/5/88 Addendum No. 1 - 14/5/88 Addendum No. 2 - 26/6/88 Addendum No. 3 - 14/2/89	Delivery of towers for 33 kV transmission lines	6,146,665
Total					169,185,671

65. The losses are alleged to have been suffered in relation to contracts signed in the early 1980s. Notwithstanding that work commenced shortly thereafter, completion of the work was often delayed or suspended for many years after the original completion dates. Energoinvest alleges that the delay in progress on the works was caused by the hostile environment and the financial difficulties experienced by Iraq due to its war with Iran.

66. Energoinvest asserts that the terms of payment for all of the contracts were governed by deferred payment agreements between the Governments of Yugoslavia and Iraq. The first such arrangement was entered into between the Yugoslav Bank for International Economic Cooperation and the Central Bank of Iraq on 13 September 1984 (the "1984 Banking Arrangement"). The 1984 Banking Arrangement provided Iraq with a credit facility of up to USD 500 million that it could utilise for payment of 85 per cent of goods and services of Yugoslav origin supplied by Energoinvest. The earliest date upon which Energoinvest could receive payment for the work which it carried out was six months after the issue of the provisional acceptance certificate for the relevant contract.

2. Analysis and valuation

67. The Panel finds that all of the Iraqi employers on the contracts were agencies of the Government of Iraq.

68. In support of its claim for contract losses, Energoinvest provided, variously, copies of contracts and amendments, invoices, taking over certificates, final acceptance certificates and correspondence

with the respective employer. The Panel notes that the evidence provided by Energoinvest is incomplete and inconsistent for all 26 contracts. Energoinvest did not provide the Panel with a comprehensive picture of the sequence of events leading up to the alleged losses.

69. Energoinvest informed the Commission that it could not provide better evidence due to the war in Bosnia and Herzegovina, which caused a fire in its head office building on 29 September 1992. Energoinvest stated that as a result of the fire, much of the documentation related to its projects abroad was destroyed. The Panel notes Energoinvest's explanation but reasserts its finding set forth in paragraph 34 of the Summary. There, the Panel made clear that where there is a lack of documentation, and an absence of alternative evidence to make good any part of that lack, the Panel has no opportunity or basis upon which to make a recommendation.

70. The Panel finds that Energoinvest's claim for contract losses can be broken down into three components: (a) work performed prior to 2 May 1990; (b) work performed after 2 May 1990; and (c) lack of evidence.

(a) Work performed prior to 2 May 1990

71. The Panel finds that the work on a majority of the contracts was completed prior to 2 May 1990.

72. Applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 43 to 45 of the Summary, only contract losses related to work performed subsequent to 2 May 1990 are compensable. The invoices found by the Panel to relate to work performed prior to 2 May 1990 are designated as "arising prior to 2 May 1990".

73. Applying the approach taken with respect to "contractual arrangements to defer payments", as set out in paragraphs 72 to 81 of the Summary, the Panel further finds that the deferred payment agreements between State parties providing for payment for some of the work after 2 May 1990 takes it out of the jurisdiction of the Commission.

74. Accordingly, the Panel is unable to recommend compensation.

(b) Work performed after 2 May 1990

75. The Panel finds that with respect to the alleged losses in respect of Volume No. 4 in the amount of USD 4,198,384 and Volume No. 11 in the amount of USD 28,754,002, Energoinvest provided sufficient evidence that certain of its claims in respect of these contracts related to obligations which initially required payment to be made for elements of the outstanding contract prices and which arose post 2 May 1990.

76. In respect of Volume No. 4, Energoinvest alleges that the terms of payment included in Addendum No. 3 required that a sum equal to 10 per cent of the contract price in the amount of IQD 287,387 should have been paid upon issue of the final acceptance certificate. The final acceptance certificate was issued on 21 May 1990. As the obligation to make payment for the completed works arose after 2 May 1990, the claim for the amount of IQD 287,387 would, in principle, come within the jurisdiction of the Commission. However, payment for this work was deferred by agreement. The effect of the agreement is that any entitlement arising out of the final

acceptance certificate would only mature in 1995. In relation to claims for contractual amounts that became due after 2 March 1991, the Panel has previously found that a point in time will come when it is no longer appropriate to regard events on the ground as directly caused by Iraq's invasion and occupation of Kuwait. In the present case, the Panel concludes that that point in time is reached three months after the ending of Iraq's occupation of Kuwait, namely at 2 June 1991. (See the Fourth Report at paragraph 799). Accordingly, the claim is outside the jurisdiction of the Panel. (See the Summary, paragraphs 80 to 81).

77. In respect of Volume No. 11, Energoinvest alleges that a sum equal to 20 per cent of the contract price for the "Ramadi East" works in the amount of USD 196,134 should have been paid upon issue of the taking over certificate. The taking over certificate was issued on 26 May 1990. As the obligation to make payment for the completed works arose after 2 May 1990, the claim for the amount of USD 196,134 would, in principle, come within the jurisdiction of the Commission. However, payment for this work was deferred by agreement. The effect of the agreement is that any entitlement arising out of the taking over certificate would only mature in 1995. Accordingly, the claim is outside the jurisdiction of the Panel. (See the Summary, paragraphs 80 to 81).

(c) Lack of evidence

78. The Panel finds that in respect of the remaining claims for contract losses (other than the claims designated as "arising prior to 2 May 1990 " and those contained in Volumes Nos. 4 and 11) Energoinvest failed to provide sufficient evidence that it had carried out the alleged work on the contracts. So far as the Commission is concerned, it is necessary for a claimant to provide evidence of approval of work by the employer (which may be by certificate or other means) or other proof that the claimed work had been done or services carried out. Failing such evidence it is not open to the Panel to recommend compensation. In the situations where there is a lack of approval from the employer, the Panel acknowledges that the approval process may have been frustrated by Iraq's invasion and occupation of Kuwait notwithstanding that the work had been performed. As such, the Panel reviewed the evidence to determine if there is other proof that the claimed work had been done or services carried out.

79. The Panel finds that for a majority of the alleged losses, Energoinvest failed to provide any proof that the employer acknowledged the performance of works and the obligation to pay the invoiced amounts. As a result, Energoinvest failed to establish its entitlement to be paid. In the absence of such evidence, the Panel recommends no compensation.

80. The Panel has, in reaching its recommendations, considered Iraq's various objections to this portion of the claim. In particular, the Panel has noted Iraq's objection to the payment of compensation for contract losses in the amount of USD 18,349,074.38, which represents the outstanding contract price payable upon issue of the taking over certificate and the final acceptance certificate on the grounds that the debt for the payment of such portion of the contract price had arisen before 2 August 1990 and therefore, is outside the mandate of the Commission. The Panel finds that this contention is not accurate as the Panel has accepted that, in general, a claim relating to a "debt or obligation arising prior to 2 August 1990" means a debt or obligation that is based on work performed or services rendered prior to 2 May 1990 (see the Summary, paragraphs 43 to 45).

81. After a review of the evidence, the Panel is satisfied that Energoinvest is entitled to payment for the unpaid invoices for Volumes Nos. 4 and 11.

82. The Panel's recommendation for contract losses is summarised in table 8, infra.

Table 8. Energoinvest's claim for contract losses – Panel's recommendation

Volume No.	Contract No.	Claim amount (USD)	Reason	Panel's recommendation
Vol. 1	HT-12/80	3,448,526	Arising prior to 2 May 1990	nil
Vol. 2	HT-15/80	834,544	Arising prior to 2 May 1990	nil
Vol. 3	HT-11/79	1,523,218	Arising prior to 2 May 1990	nil
Vol. 4	HT-4/79	4,198,384	Arising prior to 2 May 1990 save for a sum equal to 10% of the contract price in the amount of IQD 287,387 which would have been payable upon issue of the final acceptance certificate on 21 May 1990 save for an agreement to defer the same to 1995	nil
Vol. 5	HT-84/84	19,833,544	Arising prior to 2 May 1990	nil
Vol. 6	SS-3	44,522,785	Lack of evidence	nil
Vol. 7	5/3/825	503,375	Lack of evidence	nil
Vol. 8	5/3/821	1,457,131	Lack of evidence	nil
Vol. 9	5/3/828	1,216,394	Lack of evidence	nil
Vol. 10	5/3/848	5,887.978	Lack of evidence	nil
Vol. 11	HT-72/84	28,754,002	Lack of evidence and arising prior to 2 May 1990, save for a sum equal to 20% of the contract price in the amount of USD 196,134 in respect of the "Ramadi East" works which would have been payable upon issue of the taking over certificate on 26 May 1990 save for an agreement to defer the same to 1995	nil
Vol. 12	L-2/87	16,228,078	Lack of evidence	nil
Vol. 14	5/5/15/R2/81	2,515,829	Arising prior to 2 May 1990	nil
Vol. 15	SG-TL-3.1/3	3,320,056	Lack of evidence	nil
Vol. 16	57 Towers	388,734	Arising prior to 2 May 1990	nil
Vol. 17	SG-TL-4.4	9,102,388	Arising prior to 2 May 1990	nil
Vol. 18	HT-29/81	3,232,337	USD 3,006,869.08 – arising prior to 2 May 1990 and USD 225,468.17 – lack of evidence	nil
Vol. 19	SG-TL-4.5	5,408,454	USD 5,147,958.89 – arising prior to 2 May 1990 and USD 260,494.67 – lack of evidence	nil
Vol. 20	HT-80/84	1,682,884	Arising prior to 2 May 1990	nil
Vol. 21	HT-82A/84	3,560,139	USD 3,357,055 and USD 99,534 (interest) – arising prior to 2 May 1990 USD 103,550 – lack of evidence	nil

Volume No.	Contract No.	Claim amount (USD)	Reason	Panel's recommendation
Vol. 22	Purchase order 5/3/694/227	1,690,774	Arising prior to 2 May 1990	nil
Vol. 23	Purchase order 5/6/351/45	1,516,570	Arising prior to 2 May 1990	nil
Vol. 24	Purchase order 5/3/772	767,043	Arising prior to 2 May 1990	nil
Vol. 25	5/6/410/4	678,216	Arising prior to 2 May 1990	nil
Vol. 26	Purchase order 5/6/415/71	767,624	Arising prior to 2 May 1990	nil
Vol. 27	5/3/820R	6,146,665	Arising prior to 2 May 1990	nil
Total				nil

3. Recommendation

83. The Panel recommends no compensation for contract losses.

B. Loss of tangible property

1. Facts and contentions

84. Energoinvest seeks compensation in the amount of USD 5,534,776 for loss of tangible property. The claim is for the alleged loss of various items of equipment, tools, accessories, electrical appliances, furniture and motor vehicles in Iraq. All items were allegedly lost from Energoinvest's stores at Abu Graib and Rashidiya in Iraq as a result of Iraq's invasion and occupation of Kuwait.

85. Energoinvest asserts that the items of tangible property were confiscated by various agencies of the Government of Iraq in 1992 following an order from the office of the President of Iraq to the Council of Ministers that the Military Manufacturing Commission had the authority to "receive the equipment, machinery and material belonging to Foreign Companies". Based on the evidence provided, it appears that representatives of Energoinvest were present when the Iraqi authorities took its tangible property between August and November 1992.

2. Analysis and valuation

86. The Panel finds that the documentation provided in support of the claim indicates that the property used on the contracts was confiscated by the Iraqi authorities after the liberation of Kuwait, in the main part, in 1992.

87. The Panel notes Iraq's contention that the claim for loss of tangible property is not compensable because Energoinvest had left Iraq "at its will" and in doing so had abandoned its work in violation of its contractual obligations. Furthermore, due to the usage of the property over the period from 1980 to 1990, the property had "corroded" by between 80 and 100 per cent. The Panel finds that under the circumstances, Energoinvest did not voluntarily depart from Iraq and furthermore, no evidence has been presented to show "corrosion" of the property.

88. Nonetheless, because of the lack of supporting documentation, and applying the approach taken with respect to the confiscation of tangible property by the Iraqi authorities after the liberation of Kuwait, as set out in paragraph 165 of the Summary, the Panel recommends no compensation.

3. Recommendation

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

C. Payment or relief to others

1. Facts and contentions

90. Energoinvest seeks compensation in the amount of USD 1,678,488 for payment or relief to others. The claim is for (a) salaries paid to its staff and workers in the amount of USD 1,303,488, and (b) advance payment of expenses in the amount of USD 375,000.

91. In the "E" claim form, Energoinvest characterised this loss element as "other losses", but the Panel finds that it is more accurately classified as a claim for payment or relief to others.

92. With respect to the claim for salaries paid to its staff and workers in the amount of USD 1,303,488, Energoinvest alleges that at the time of Iraq's invasion and occupation of Kuwait, it had 120 employees working on projects in Iraq. As a result of Iraq's invasion and occupation of Kuwait, it was forced to evacuate the 120 employees from Iraq on various dates between 2 August and 31 December 1990. Prior to the employees' evacuation from Iraq, Energoinvest alleged that it paid one month's salary to workers who were idle in Iraq while their exit formalities were prepared. Further, Energoinvest alleges that upon their arrival in Saravejo, it paid a further month's salary to the employees as there were no other projects to which the employees could be immediately redeployed.

93. With respect to the claim for the alleged losses related to the advance payment of expenses in the amount of USD 375,000, Energoinvest alleges that it (a) paid advance payments to subcontractors and made payments for rent, office, houses and stores, and (b) reimbursed social security contributions for the employees for the period from 2 August 1990 to 30 June 1993.

2. Analysis and valuation

94. In support of its claim for payment of salaries, Energoinvest provided an explanation of its calculation of the claimed amount of USD 1,303,488. Energoinvest did not provide any evidence of payment of the claimed salaries.

95. Energoinvest failed to provide any evidence to support its claim for advance payment of expenses.

96. The Panel notes Iraq's various objections to this portion of Energoinvest's claim. In any event, the Panel finds that Energoinvest failed to provide sufficient information and evidence to establish its claim.

3. Recommendation

97. The Panel recommends no compensation for payment of relief to others.

D. Other losses (protection and storage costs)

1. Facts and contentions

98. Energoinvest seeks compensation in the amount of USD 418,000 for costs allegedly incurred in protecting and storing its property prior to its departure from Iraq. The claim is for costs incurred in respect of (a) "sorting up of heavy machinery, trucks, cars, caravans, tools etc, using cranes and forklifts and lots of unskilled workers", (b) "cleaning, greasing packing and or conservation of all heavy machinery, trucks, cars, caravans, etc. using all necessary facilities and means for conservation", and (c) "organized watchman service on 9 stores at different sites in Iraq".

99. Energoinvest failed to provide any further details of the work performed or how it incurred the costs.

2. Analysis and valuation

100. In support of its claim, Energoinvest was only able to provide a statement of expenses signed by persons identified as financial managers of Transmission Line Division & S/S Division – Energoinzenjering. Energoinvest failed to provide any evidence of its actual expenditures, in the form of invoices or receipts and/or evidence of the payment of the costs incurred together with a place or time for the performance of such works.

101. The Panel notes Iraq's various objections to this portion of Energoinvest's claim. In any event, the Panel finds that Energoinvest failed to provide sufficient information and evidence to establish its claim.

3. Recommendation

102. The Panel recommends no compensation for other losses.

E. Summary of recommended compensation for Energoinvest

Table 9. Recommended compensation for Energoinvest

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	169,185,671	nil
Loss of tangible property	5,534,776	nil
Payment or relief to others	1,678,488	nil
Other losses	418,000	nil
Interest	34,570,015	--
Total	211,386,950	nil

103. Based on its findings regarding Energoinvest's claim, the Panel recommends no compensation.

IV. CMI ENTREPRISE

104. CMI Entreprise ("CMI") is a corporation organised according to the laws of France. CMI is in the metalworks supply business.

105. In the "E" claim form, CMI sought compensation for losses in the amount of USD 122,327 (641,240 French francs (FRF)) comprising contract losses, other losses and interest.

106. CMI, in its response to the article 34 notification, reduced the claim amount for "other losses" by decreasing the amount claimed for equipment storage from FRF 78,000 to FRF 62,500. No explanation was provided by CMI for this amendment.

107. The Panel finds that the claim with respect to "administrative fees" in the amount of USD 1,430 (FRF 7,500), is more accurately classified as a claim for claim preparation costs.

108. The claim amounts as considered by the Panel are set out in table 10, infra.

Table 10. CMI's claim

Claim element	Claim amount (USD)
Contract losses	68,199
Other losses	15,357
Claim preparation costs	1,430
Interest	34,384
Total	119,370

109. Applying the approach taken with respect to claims preparation costs set out in paragraph 62 of the Summary, the Panel makes no recommendation for claim preparation costs.

110. For the reasons stated in paragraph 60 of the Summary, the Panel makes no recommendation with respect to CMI 's claim for interest.

A. Contract losses

1. Facts and contentions

111. CMI seeks compensation in the amount of USD 68,199 (FRF 357,500) for contract losses.

112. CMI asserts that at the time of Iraq's invasion and occupation of Kuwait, it was performing a contract of supply for BUTEC, a company incorporated in France (the "Employer"). The contract required CMI to supply four skids of pipings and valves (the "Equipment") to be used at a gas compressor plant in Iraq. The Equipment was to be supplied on the terms of an order dated 5 April 1990 issued by the Employer's office in Beirut, Lebanon, for a price of FRF 550,000.

113. At the time of Iraq's invasion and occupation of Kuwait, CMI asserts that it had received 30 per cent of the contract price in the amount of FRF 165,000 by way of advance payment and had

completed the manufacture of up to 95 per cent of the Equipment valued at FRF 522,500. The proposed date of delivery of the Equipment was 7 August 1990.

114. CMI asserts that because of Iraq's invasion and occupation of Kuwait it was unable to deliver the Equipment. As a result of the non-delivery it was not paid the balance of the contract price of FRF 385,000. CMI provided correspondence between CMI and the Employer dated 13 August 1990 in which CMI confirmed that it had stopped works and sought payment guarantees for the balance of the contract price.

2. Analysis and valuation

115. In support of its claim, CMI provided copies of its cost accounting documents to substantiate the work done and costs incurred as at the time it stopped work. CMI provided cost accounting documents for the years 1990 to 1992. After a review of the cost accounting documents, the Panel finds that there are insufficient details to determine with certainty the relationship between the figures set out in these documents and the contract terms. There is no explanation as to how the figures in the cost accounting documents can be reconciled with the losses claimed by CMI. CMI did not provide any other documentation to establish that the balance of the contract price was due and payable or to establish the progress of any further discussions with the Employer concerning the non-payment of the balance of the contract price. In its response to the article 34 notification, CMI simply repeated its assertion that neither BUTEC nor the Employer had paid the claimed amounts and that it had not received any compensation for the claimed amounts from any other source.

116. The Panel considers that CMI failed to substantiate a loss or that any such loss resulted directly from Iraq's invasion and occupation of Kuwait.

3. Recommendation

117. The Panel recommends no compensation for contract losses due to a lack of evidence.

B. Other losses

1. Facts and contentions

118. CMI sought compensation in the amount of USD 15,357 (FRF 80,500) for other losses allegedly incurred in respect of the stoppage of works.

119. The losses allegedly suffered by CMI are summarised in table 11, infra.

Table 11. CMI's claim for other losses

Loss item	Claim amount (USD)
Equipment storage at its "workshop" from September 1990 to June 2001	11,923
Equipment demobilisation (i.e. removing the material of the Equipment and preparing it for storage by cleaning and protecting the material)	3,434
Total	15,357

2. Analysis and valuation

120. In support of its claim for Equipment storage, CMI provided the figures on which it calculated the costs. The Panel finds that CMI did not, however, provide any supporting evidence to substantiate the location of the "workshop". CMI was requested in the article 34 notification to provide such information but failed to do so.

121. In support of its claim for Equipment demobilisation, the Panel finds that CMI did not provide any supporting evidence to substantiate the basis for, and the source of, these calculations. In addition, the Panel finds that CMI failed to explain the source of the figures quoted or to provide any detailed information as to the work or the persons involved in the demobilisation or the method and manner of “cleaning and protecting” the material. CMI was requested to provide such evidence in its response to the article 34 notification but failed to do so.

122. The Panel finds that CMI provided insufficient evidence to substantiate its claim for other losses.

3. Recommendation

123. The Panel recommends no compensation for other losses.

C. Summary of recommended compensation for CMI

Table 12. Recommended compensation for CMI

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	68,199	nil
Other losses	15,357	nil
Claim preparation costs	1,430	--
Interest	34,384	--
Total	119,370	nil

124. Based on its findings regarding CMI’s claim, the Panel recommends no compensation.

V. ABB SAE S.P.A. (FORMERLY ABB SAE SADELMI S.P.A.)

125. ABB SAE S.p.A. (formerly ABB SAE Sadelmi S.p.A.) (“ABB”) is a corporation organised according to the laws of Italy. ABB is in the engineering business. Prior to Iraq’s invasion and occupation of Kuwait, ABB was involved in five engineering projects in Iraq.

126. In the “E” claim form, ABB seeks compensation in the amount of USD 4,891,255 (2,682,003,635 Italian lire (ITL), IQD 253,284 and USD 1,763,369) for contract losses and income-producing property.

127. The Panel has reclassified some elements of ABB’s claim for the purposes of this report. The Panel considers that certain portions of the claim for contract losses in the amount of ITL 219,630,515 and IQD 80,484 are more appropriately classified as claims for loss of profits and payment or relief to

others, and the claim for income-producing property in the amount of ITL 2,165,984,943 and IQD 4,510 is more appropriately classified as a claim for loss of tangible property.

128. In the Statement of Claim (as defined in paragraph 13 of the Summary), ABB makes a reference to an additional claim for "risk on guarantees". The guarantees were issued for certain of ABB's works in Iraq. ABB alleged that the guarantees had an outstanding value of USD 3,721,267 (IQD 1,157,314). The Panel notes that this alleged loss was not contained in the calculation of the claimed amount contained in the "E" claim form. In its response to the article 34 notification, ABB withdrew its claim for this loss item, stating that the risk of the guarantees being called by the recipient no longer existed. The Panel acknowledges the withdrawal of this portion of the claim.

129. The Panel therefore considered the amount of USD 4,891,255 for contract losses, loss of profits, loss of tangible property and payment or relief to others, as shown in table 13, infra.

Table 13. ABB's claim

Claim element	Claim amount (USD)
Contract losses	2,560,155
Loss of profits	122,431
Loss of tangible property	1,882,858
Payment or relief to others	325,811
Total	4,891,255

A. Contract losses

1. Facts and contentions

130. ABB seeks compensation in the amount of USD 2,560,155 (IQD 168,290, ITL 296,388,177 and USD 1,763,369) for contract losses. The claim is for costs allegedly incurred in connection with works performed or services provided but not paid for in respect of four out of the five projects.

131. All of the contracts were carried out for Iraqi employers and involved the provision of materials and services in connection with projects relating to the generation and transmission of electricity. ABB alleges that 92 of its employees were in Iraq performing work on ABB's projects at the time of Iraq's invasion and occupation of Kuwait. After Iraq's invasion and occupation of Kuwait, the employees had to stop work on the contracts. The employees were ultimately repatriated from Iraq between 2 August and 31 December 1990.

132. The Panel finds that the alleged contract losses can be divided into the following two types of losses:

(a) Work performed but not paid for in respect of contracts Nos. 5/5/52/R2 80, SG-TL-4-1, HT 87/84 and L-4/88-E (USD 2,221,340); and

(b) Unproductive salary, welfare and social contributions (USD 338,815).

133. ABB's claim for contract losses is represented in table 14, infra.

Table 14. ABB's claim for contract losses

Loss item	Claim amount (original currency)	Claim amount (USD)
Contract No. 5/5/52/R2 80	USD 1,485,267 IQD 6,426	1,505,929
Contract No. SG-TL-4-1	USD 240,226	240,226
Contract No. HT 87/84	USD 37,876	37,876
Contract No. L-4/88-E	IQD 136,003	437,309
Unproductive salary, welfare and social contributions	ITL 296,388,177 IQD 25,861	338,815
Total	USD 1,763,369 IQD 168,290 ITL 296,388,177	2,560,155

(a) Work performed but not paid for

134. The losses are alleged to have been suffered in relation to contracts Nos. 5/5/52/R2 80, SG-TL-4-1, HT 87/84 and L-4/88-E signed in the 1980s. Save for contract L-4/88-E, all projects were completed prior to 2 May 1990. Notwithstanding the completion of the works, the employer allegedly failed to pay or delayed payment of the outstanding amounts of the respective contract price for many years after the original completion dates. ABB failed to explain the reason for the delay in the payment of the works. ABB asserts that the terms of payment for each of the contracts were subsequently amended by deferred payment agreements between ABB and the employer with the first such arrangement entered into in 1983. The Panel notes that under the deferred payment agreements ABB and the employers agreed to reschedule the payment of outstanding contract sums in exchange for the release of promissory notes supported by the issue of a bank guarantee on behalf of the respective employer. ABB alleges that the deferred payment agreements have not been honoured and that there remains outstanding an amount of USD 2,221,340 for work performed on the five projects.

135. In respect of contract No. L-4/88-E, ABB asserts that the final invoice was issued on 13 September 1990 and the taking over certificate was issued on 31 October 1990. ABB alleges that, notwithstanding the completion of the works, the release of the retention monies in the amount of IQD 136,003 (USD 437,309) remains outstanding.

136. The details of the four contracts are summarised in table 15, infra.

Table 15. ABB's claim for contract losses (work performed but not paid for)

Contract No.	Employer	Date of contract	Subject	Contract price	Claim amount (USD)
5/5/52/R2 80	General Establishment for the Generation and Transmission of Electricity of Iraq	15/6/81	Supply and erection of 1,130 km (plus or minus 20 per cent) of 33 kV transmission lines, Nord, Iraq	USD 21,620,776.660 and IQD 1,125,672.879	1,505,929
SG-TL-4-1	General Establishment for the Generation and Transmission of Electricity of Iraq	21/4/85	Supply and erection of 400 kV transmission lines, Mosul-Saddam Dam	IQD 4,170,131.679	240,226
HT 87/84	Major Electrical Projects Implementation Commission, Baghdad	14/9/85	Supply and erection of New Sulaimanya-Old Sulaimanya 132 kV transmission lines	USD 2,879,447.12	37,876
L-4/88-E	Major Electrical Projects Implementation Commission, Baghdad	19/8/88	Supply and erection of 400 kV transmission line No. 20, Haditha-Al Qaim – changing of conductors	IQD 1,360,028.02	437,309
	Total				2,221,340

(b) Unproductive salary, welfare and social contributions

137. ABB seeks compensation in the amount of USD 388,815 (ITL 296,388,177 and IQD 25,861) for unproductive salary, welfare and social contributions. The claim is for costs allegedly incurred for its 92 employees detained in Iraq for the period 2 August to December 1990.

138. The claim for unproductive salary, welfare and social contributions is represented in table 16, infra.

Table 16. ABB's claim for contract losses (unproductive salary, welfare and social contributions)

	Loss item	Claim amount (original currency)	Claim amount (USD)
(a)	Local personnel	IQD 25,861	83,154
(b)	Italian personnel		
	(i) Salary	ITL 208,854,281	180,155
	(ii) Social contributions to INAIL	ITL 7,361,395	6,350
	(iii) Welfare contribution to INPS	ITL 18,871,207	16,278
	Subtotal (Italian personnel)	ITL 235,086,883	202,783
(c)	Thai personnel	ITL 59,070,058	50,953
(d)	Filipino personnel	ITL 2,231,236	1,925
	Total	IQD 25,861 ITL 296,388,177	388,815

2. Analysis and valuation

139. The Panel finds that all of the Iraqi employers on the contracts were agencies of the Government of Iraq.

(a) Work performed but not paid for

140. The Panel finds that the work on contracts Nos. 5/5/52/R2 80, SG-TL-4-1 and HT 87/84 was completed prior to 2 May 1990. The claim for work performed on these contracts is outside the jurisdiction of the Commission and not compensable under Security Council resolution 687 (1991). Applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 43 to 45 of the Summary, the Panel recommends no compensation for losses on contracts Nos. 5/5/52/R2 80, SG-IL-4-1 and HT 87/84.

141. With respect to the alleged losses for contract No. L-4/88-E, ABB alleges that clause 3 of the contract requires that a sum equal to 10 per cent of the contract price in the amount of IQD 136,003 be paid on the date of the final acceptance certificate. Clause 3 of the contract goes on to state that the monies are to be released upon issue of a clearance certificate and fulfilment of contractual obligations. ABB fulfilled its contractual obligations on or before 13 September 1990, save in respect of some missing shield wire, as noted on ABB's letter of 13 September 1990. The Panel is satisfied that, subject to the issue of the shield wire, ABB is entitled to claim for its retention monies. The amount of the retention monies is IQD 136,003. The outstanding shield wire is valued in the annotation to the letter at IQD 600 per kilometre. The project was for 130 kilometres. It therefore follows that 130 kilometres multiplied by IQD 600 (IQD 78,000) falls to be deducted. This leaves a balance of IQD 58,003. ABB's entitlement to the retention monies arose after 2 May 1990.

142. After a review of the evidence, the Panel finds that Iraq's invasion and occupation of Kuwait prevented ABB from recovering the retention monies in the amount of IQD 58,003. The Panel therefore recommends compensation in the amount of IQD 58,003 (USD 186,505) for contract No. L-4/88-E.

(b) Unproductive salary, welfare and social contributions

143. ABB's claim for unproductive salary, welfare and social contributions can be considered in the following components: local personnel; Italian personnel (salary, social contributions to Istituto Nazionale Anti Infortuni sul Lavoro of Italy (INAIL) and welfare contribution to Istituto Nazionale Previdenza Sociale of Italy (INPS); Thai personnel; and Filipino personnel.

(i) Local personnel

144. ABB seeks compensation in the amount of USD 83,154 (IQD 25,861) for salaries allegedly paid to its local personnel after 2 August 1990. ABB submitted insufficient evidence in support of its claim.

145. The Panel recommends no compensation for the alleged payment of salary to local personnel.

(ii) Italian personnel

146. ABB seeks compensation in the amount of USD 202,783 (ITL 235,086,883) for salaries, welfare and social contributions allegedly paid to its Italian personnel after 2 August 1990.

147. In support of its claim, ABB provided the names of the eight employees together with details of their respective job titles, identification numbers, passport numbers, Iraqi residence permits, arrival date in Iraq and job location. ABB also provided salary slips for the employees and a breakdown of the respective contributions paid to INAIL and INPS from September to December 1990 together with payment slips evidencing such payment to INAIL and INPS.

148. ABB acknowledges that it is the employer of the eight Italian workers. The Panel finds that it met its obligation to continue paying the salaries and social and welfare contributions during the period of detention of the employees in Iraq.

149. On the evidence provided, the Panel is satisfied that ABB suffered a loss as a direct result of Iraq's invasion and occupation of Kuwait, and is entitled to payment in the amount of ITL 235,086,883 (USD 202,783).

(iii) Thai personnel

150. ABB seeks compensation in the amount of USD 50,953 (ITL 59,070,058; converted by ABB from 1,277,707 Baht (THB)) for salaries allegedly paid to its Thai personnel for the period from 2 August 1990 to the dates of their respective departures from Iraq.

151. In support of its claim, ABB provided evidence of the names of the workers, salary and bonus entitlements, overtime worked, holidays and the amounts of salaries payable to the workers. In addition, it provided copies of its payment instructions to "Banca Commerciale Italiana" requesting the bank to transfer the payments of salary for the months of September, October, November and December 1990.

152. The Panel finds that the salaries were paid to a supplier of manpower, Pacific Skilled Manpower Co. Ltd. of Thailand, and not directly to the respective workers. The Panel determines, that ABB was obliged to continue paying the salaries of the Thai workers during their detention in Iraq.

153. The Panel is satisfied that ABB is entitled to payment in the amount of THB 1,277,707 (USD 50,145).

(iv) Filipino personnel

154. ABB seeks compensation in the amount of USD 1,925 (ITL 2,231,236; converted by ABB from 48,130 Philippine pesos (PHP)) for salaries allegedly paid to its personnel from the Philippines for the period from 2 August 1990 to the dates of their respective departures from Iraq.

155. ABB provided evidence of the names of the workers, salary entitlements, details of time worked and amounts of the salaries payable to the workers. In addition, it provided copies of its instructions to "Banca Commerciale Italiana" requesting the bank to transfer the payments of salary for the months of September and October 1990.

156. The Panel notes that the salaries were paid to the supplier of manpower, Multiplan International Technical Services Ltd. of the United Kingdom, and not directly to the respective workers, in the form of a fee for each worker provided to ABB. The Panel determines from the correspondence provided that ABB and Multiplan International Technical Services Ltd. expressly agreed that a certain portion of the fee represented the salary payable to the respective workers. The Panel determines from the evidence that ABB was obliged to continue paying the salaries of the workers from the Philippines during their detention in Iraq.

157. The Panel is satisfied that ABB is entitled to compensation in the amount of PHP 48,130 (USD 1,925).

3. Recommendation

158. The Panel's recommendation for contract losses is summarised in table 17, infra.

Table 17. ABB's claim for contract losses – Panel's recommendation

Loss item	Panel's recommendation (original currency)	Panel's recommendation (USD)
Contract No. 5/5/52/R2 80	nil	nil
Contract No. SG-TL-4-1	nil	nil
Contract No. HT 87/84	nil	nil
Contract No. L-4/88-E	IQD 58,003	186,505
Unproductive salary, welfare and social contributions	ITL 235,086,883 THB 1,277,707 PHP 48,130	254,853
Total	IQD 58,003 ITL 235,086,883 THB 1,277,707 PHP 48,130	441,358

159. The Panel recommends compensation in the amount of USD 441,358 for contract losses.

B. Loss of profits

1. Facts and contentions

160. ABB seeks compensation in the amount of USD 122,431 (IQD 38,076) for loss of profits. The claim is for the loss of profits allegedly suffered in relation to the termination of contract No. 5/2/20 S/938.

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

162. ABB alleges that due to the cancellation of the contract as a result of Iraq's invasion and occupation of Kuwait, it suffered a "missed economic profit" equal to 10 per cent of the contract price. At the time of Iraq's invasion and occupation of Kuwait, ABB had not commenced any works on this contract.

2. Analysis and valuation

163. In support of its claim ABB provided a document entitled "Statement of gross added value at cost of production factors for the year ended 31st December/1990". The Panel finds that the document does not explain or substantiate the amount of the alleged loss of profits. ABB failed to provide any other document to support its claim for loss of profits.

164. The Panel finds that ABB failed to fulfil the evidentiary standard for loss of profits claims set out in paragraphs 144 to 150 of the Summary.

3. Recommendation

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

C. Loss of tangible property

1. Facts and contentions

166. ABB seeks compensation in the amount of USD 1,882,858 (ITL 2,165,984,943 and IQD 4,510) for loss of tangible property. The claim is for the alleged loss of equipment and machinery from its project sites in Iraq following Iraq's invasion and occupation of Kuwait.

167. In the "E" claim form, ABB characterised this loss element as a claim for "income-producing property", but the Panel finds that it is more accurately classified as a claim for loss of tangible property.

168. The Panel finds that the claim can be considered in three components: (a) equipment delivered or "rented" to the employer for contract No. 5/2/20 S/938; (b) equipment confiscated by Iraq; and (c) loss of spare parts.

(a) Equipment delivered or "rented" to the employer for contract No. 5/2/20 S/938

169. ABB seeks compensation in the amount of USD 345,036 (ITL 400,000,000) for the alleged loss of equipment imported into Iraq for use in the performance of contract No. 5/2/20 S/938.

170. ABB states that contract No. 5/2/20 S/938 was cancelled due to Iraq's invasion and occupation of Kuwait. ABB asserts that subsequent to the cancellation of the contract, it entered into an

agreement dated 25 October 1990 with the General Establishment for Generation and Transmission of Electricity to "rent" the equipment for a period of six months without charge. ABB alleges that upon the expiry of the six-month period, the employer did not return the equipment. ABB asserts that the equipment was subsequently confiscated by the employer pursuant to a confiscation order issued by the Ministry of Industry of Iraq. ABB was unable to provide any details of the confiscation order, including the date of the confiscation order.

(b) Equipment confiscated by Iraq

171. ABB seeks compensation in the amount of USD 1,222,127 (ITL 1,400,000,000 and IQD 4,510) for the loss of various items of equipment, tools, accessories, electrical appliances and vehicles left at its project sites in Iraq. All items were allegedly lost from the project sites as a result of Iraq's invasion and occupation of Kuwait.

172. ABB asserts that the property was confiscated by agencies of the Government of Iraq in 1992 following an order from the office of the President of Iraq to the Ministry of Industry.

(c) Loss of spare parts

173. ABB seeks compensation in the amount of USD 315,695 (ITL 365,984,943) for the loss of spare parts left at a project site in Iraq. All items were allegedly lost from ABB's Al Jazair store in Iraq as a result of Iraq's invasion and occupation of Kuwait.

174. ABB asserts that the spare parts were lost after ABB's employees departed from Iraq following Iraq's invasion and occupation of Kuwait.

2. Analysis and valuation

(a) Equipment delivered or "rented" to the employer for contract No. 5/2/20 S/938

175. In support of its claim, ABB provided a copy of the agreement dated 25 October 1990 and entitled "Appendix No. 2" governing the "rental" of the equipment to the employer. ABB also provided a list setting out a description and value of the equipment together with 12 delivery notes evidencing the delivery of the equipment to the employer and acknowledgement of receipt of the delivery notes by the employer's representative on each delivery note.

176. The Panel finds that ABB failed to provide any evidence that it requested the return of the equipment from the employer or that the equipment was returned by the employer.

177. In the absence of any information as to the date of confiscation, the Panel is unable to determine that the claim is within its jurisdiction. Accordingly, the Panel recommends no compensation.

(b) Equipment confiscated by Iraq

178. In support of its claim, ABB provided copies of the orders from the office of the President of Iraq to the Ministry of Industry. The Panel finds that the documentation provided in support of the claim indicates that the property was confiscated by the Iraqi authorities after the liberation of Kuwait in 1992.

179. Applying the approach taken with respect to the confiscation of tangible property by the Iraqi authorities after the liberation of Kuwait, as set out in paragraph 165 of the Summary, the Panel recommends no compensation.

(c) Loss of spare parts

180. In support of its claim, ABB provided a list setting out a description, purchase date, initial cost and commercial value of the spare parts. The Panel finds that ABB did not provide sufficient evidence of its ownership of the lost items and their presence in Iraq in August 1990. The Panel finds that ABB did not provide sufficient evidence to substantiate its claim.

181. The Panel recommends no compensation for loss of spare parts.

3. Recommendation

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

D. Payment or relief to others

1. Facts and contentions

183. ABB seeks compensation in the amount of USD 325,811 (ITL 219,630,515 and IQD 42,408) for payment or relief to others. The claim is for costs allegedly incurred in evacuating ABB's employees from Iraq on various dates after 2 August 1990, including the provision of transportation, food and accommodation to the workers prior to their departure from Iraq.

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

185. ABB alleges that 92 of its employees were working on projects in Iraq. As a result of Iraq's invasion and occupation of Kuwait, it was forced to demobilise the workers and repatriate them via Jordan to their respective countries of origin including Italy, Thailand and the Philippines. In addition, ABB alleges that prior to the employees' evacuation from Iraq, it continued to pay for the provision of food, accommodation and other related expenses for its employees.

186. The individual items forming part of the claim for payment or relief to others together with the amounts claimed are set out in table 18, infra.

Table 18. ABB's claim for payment or relief to others

	Loss item	Claim amount (original currency)	Claim amount (USD)
(a)	Food		
	(i) Local personnel	IQD 11,734	37,730
	(ii) Non-local personnel	ITL 76,889,400	66,324
	Subtotal (food)	IQD 11,734 ITL 76,889,400	104,054
(b)	Accommodation	IQD 11,666	37,511
(c)	Travelling expenses		
	(i) Local personnel	IQD 8,009	25,752
	(ii) Thai/Filipino personnel	ITL 136,941,000	118,124
	(iii) Italian personnel	ITL 3,592,115	3,099
	Subtotal (travelling expenses)	IQD 8,009 ITL 140,533,115	146,975
(d)	Other personnel expenses – local branch	IQD 10,999	35,367
(e)	Postal (courier) expenses	ITL 2,208,000	1,905
	Total	ITL 219,630,515 IQD 42,408	325,811

2. Analysis and valuation

(a) Food expenses

187. ABB seeks compensation for the provision of food to its employees remaining in Iraq after 2 August 1990. The claim can be divided between costs allegedly incurred for the provision of food to its local and non-local employees.

188. In respect of the alleged costs incurred for local employees, ABB provided no evidence to support its claim and the Panel recommends no compensation.

189. In respect of the alleged costs incurred for non-local employees in the amount of USD 66,324 (ITL 76,889,400), ABB provided invoices and debit notes related to the payment of the costs from a catering services company, Alma S.p.A. The Panel notes that the invoices set out the costs for providing canteen management services for the months September to December 1990 and the number of personnel in attendance at meal times. ABB also provided an invoice dated 6 November 1990 for food delivery.

190. On the evidence provided, the Panel is satisfied that ABB is entitled to compensation in the amount of USD 66,324 (ITL 76,889,400) for food expenses paid in respect of non-local personnel.

191. In summary, the Panel recommends compensation in the amount of USD 66,324 (ITL 76,889,400) for food expenses.

(b) Accommodation

192. ABB seeks compensation for accommodation costs allegedly incurred for its employees remaining in Iraq after 2 August 1990. ABB failed to provide any evidence to support its claim.

193. The Panel recommends no compensation for accommodation costs.

(c) Travelling expenses

194. ABB seeks compensation for costs allegedly incurred in connection with the evacuation of its workers from Iraq to Italy, Thailand and the Philippines.

195. ABB asserts that the expenses were allegedly incurred for accommodation, bus transportation, airline tickets, telephone calls, visa charges, airport and exit charges and other related transportation for the repatriation of its employees out of Iraq via Jordan to Italy, Thailand and the Philippines.

196. In support of its claim, ABB provided an affidavit dated 11 May 2001 sworn by ABB's former branch manager in Iraq confirming that there were eight Italian, four Filipino and 80 Thai employees present in Iraq on 2 August 1990. Further, ABB provided invoices and debit notes which provided a general description of how the expenses were incurred by its employees. Applying the principles set out in paragraph 170 of the Summary, the Panel finds that ABB did not provide a documentary trail to establish how the costs were incurred nor evidence that ABB had paid the expenses.

197. The Panel recommends no compensation for travelling expenses.

(d) Other personnel expenses – local branch

198. ABB seeks compensation for other personnel expenses incurred by its local branch. ABB provided no evidence to support its claim.

199. The Panel recommends no compensation for other personnel expenses – local branch.

(e) Postal (courier) expenses

200. ABB seeks compensation for the use of courier services. The claim is for costs allegedly incurred by ABB for sending a courier on 24 September 1990 from Milan, Italy, to Baghdad.

201. In support of its claim, ABB provided an airway bill from World Courier dated 24 September 1990 describing the shipper of the courier and identifying the consignee with an address in Baghdad, Iraq. The Panel notes that on the airway bill the nature of the goods is described as "URGENT DOCS". ABB failed to provide any other evidence to clarify the reason or purpose for incurring the alleged expense. The Panel finds that ABB failed to provide sufficient evidence to support its claim.

202. The Panel recommends no compensation for postal (courier) expenses.

3. Recommendation

203. The Panel recommends compensation in the amount of USD 66,324 for payment or relief to others.

E. Summary of recommended compensation for ABB

Table 19. Recommended compensation for ABB

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	2,560,155	441,358
Loss of profits	122,431	nil
Loss of tangible property	1,882,858	nil
Payment or relief to others	325,811	66,324
Total	4,891,255	507,682

204. Based on its findings regarding ABB’s claim, the Panel recommends compensation in the amount of USD 507,682. The Panel determines the date of loss to be 2 August 1990.

VI. FOCHI BUINI E GRANDI S.R.L. (FORMERLY FOCHI MONTAGGI ELETTRICI (FME) S.R.L.)

205. Fochi Buini e Grandi S.r.l. (“Fochi”) is a corporation organised according to the laws of Italy. It operates and maintains power generation plants. It was formerly known as Fochi Montaggi Elettrici (FME) S.r.l. Fochi states that at the time of Iraq’s invasion and occupation of Kuwait it had a subcontract for work on a thermal power station in Iraq.

206. Fochi seeks compensation in the total amount of USD 25,499 (ITL 29,560,714) for loss of tangible property and for payment or relief to others.

Table 20. Fochi’s claim

Claim element	Claim amount (USD)
Loss of tangible property	16,873
Payment or relief to others	8,626
Total	25,499

A. Loss of tangible property

1. Facts and contentions

207. Fochi seeks compensation in the amount of USD 16,873 (ITL 19,560,714) for loss of tangible property. The claim is for the alleged loss of two pre-fabricated hangars with accessories (the “Equipment”) from a project site in Iraq.

208. Fochi states that it was the subcontractor on the Al Shemal Thermal Power Station (the “Project”). The contractor on the Project was Filippo Fochi S.p.A., a related company incorporated in Italy (“Filippo Fochi”), and the Iraqi owner was the Ministry of Industry and Military Manufacturing-Al Shemal TPS Committee (the “Owner”).

2. Analysis and valuation

209. In support of its claim, Fochi provided an invoice, dated 15 June 1990, for the Equipment issued by a Belgian company, Frisomat N.V. Fochi also submitted a certificate of origin from the European Community for the Equipment, dated 15 June 1990, which states that the country of origin was Belgium and the consignee was the Owner. Fochi did not provide evidence that it had paid for the Equipment.

210. Fochi also provided a bill of lading, dated 22 June 1990, which states that the Equipment's intended destination was Mersin, Iraq. The consignee was the Owner.

211. Fochi did not provide the subcontract. Fochi also did not provide any documentation in respect of the Equipment's arrival or storage in Iraq.

212. Fochi states that, upon its departure from Iraq at the end of December 1990, the Equipment "remained definitively out of our control and guardianship" and this led to its loss.

213. The Panel finds that Fochi did not provide sufficient evidence of ownership of the Equipment or that it had paid for the Equipment. Accordingly, the Panel recommends no compensation.

3. Recommendation

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

B. Payment or relief to others

1. Facts and contentions

215. Fochi seeks compensation in the amount of USD 8,626 (ITL 10,000,000) for payment or relief to others. The claim relates to the repatriation of one of Fochi's employees from Iraq. The claim is for payments identified as (a) bonus, and (b) "forfeit reimbursement".

2. Analysis and valuation

216. In support of its claim, Fochi provided (a) a contract dated 10 April 1990 appointing an Italian employee to perform work in Iraq, and (b) a payroll form concerning the December 1990 salary for the Italian employee.

217. The Panel finds that Fochi did not submit sufficient evidence that it incurred the expense of paying its employee. Fochi could have submitted evidence such as acknowledgements of receipt of payment from the concerned employee and confirmations from its bank of payment transfers. However, Fochi did not provide such evidence. Fochi also failed to provide evidence that the payments were made as a direct result of Iraq's invasion or occupation of Kuwait. For the claim to be compensable, Fochi would need to substantiate, among other things, that its employee was working to fulfil Fochi's contractual obligations and that he became redundant because Fochi's contract was terminated as a result of Iraq's invasion and occupation of Kuwait.

218. Fochi failed to describe the nature of the bonus payment and of the term "forfeit reimbursement".

219. The Panel finds that Fochi did not provide sufficient evidence of its alleged loss or of the direct causal link between its alleged loss and Iraq's invasion and occupation of Kuwait.

3. Recommendation

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

C. Summary of recommended compensation for Fochi

Table 21. Recommended compensation for Fochi

Claim element	Claim amount (USD)	Recommended compensation (USD)
Loss of tangible property	16,873	nil
Payment or relief to others	8,626	nil
Total	25,499	nil

221. Based on its findings regarding Fochi's claim, the Panel recommends no compensation.

VII. DELFT HYDRAULICS

222. Delft Hydraulics ("Delft") is an entity organised according to the laws of the Netherlands. It is involved in providing hydraulic services such as physical scale modelling, mathematical modelling and engineering consulting. It commenced its operations in Iraq in 1988. At the time of Iraq's invasion and occupation of Kuwait it was engaged in work on three contracts and was seeking contracts on 12 other projects.

223. Delft seeks compensation in the total amount of USD 575,328 (1,013,152 Guilders (NLG)) for contract losses and other losses (business development expenses).

Table 22. Delft's claim

Claim element	Claim amount (USD)
Contract losses	421,319
Other losses (business development expenses)	154,009
Total	575,328

A. Contract losses

1. Facts and contentions

224. Delft seeks compensation in the amount of USD 421,319 (NLG 741,942) for contract losses. The claim is for (a) unpaid work performed (USD 250,961) and (b) underutilised personnel capacity (USD 170,358).

225. In the "E" claim form, Delft characterised its claim for underutilised personnel capacity as a claim for "discontinuity of staff deployment" (NLG 300,000), but the Panel finds that it is more accurately classified as a claim for contract losses.

(a) Unpaid work performed

(i) Al-Mussaib Thermal Power Station

226. Delft seeks compensation in the amount of NLG 170,494 for unpaid work which it states it performed on the Al-Mussaib Thermal Power Station.

227. On 24 June 1989, Delft contracted with the Ministry of Industry and Military Manufacturing of Iraq (the "Al-Mussaib Employer") to provide hydraulic studies related to the cooling water intake and pump performance of the extension of the Al-Mussaib Thermal Power Station (the "Al-Mussaib Contract").

228. According to the terms of the Al-Mussaib Contract, Delft was to begin performing services upon receiving the downpayment which was to be made within one week of the 24 June 1989 date on which the contract was signed. The Al-Mussaib Contract did not state a completion date. The evidence submitted by Delft did not demonstrate which aspects of its performance, if any, were required or performed after 2 May 1990.

229. Delft states that in mid-1991 it cancelled the contract under the force majeure clause of the contract. Under the terms of the force majeure clause, Delft was to submit an invoice for unpaid work within 30 days of terminating the contract. Upon receiving the invoice, the Al-Mussaib Employer was to pay the outstanding amount within 30 days.

230. Delft states that as of 2 August 1990, all model tests on the Al-Mussaib Contract were nearly complete and reporting was well on its way.

(ii) Tigris River Training Study

231. Delft seeks compensation in the amount of NLG 118,844 for unpaid work which it states that it performed on the Tigris River Training Study.

232. On 10 May 1990, Delft signed a contract with the Ministry of Agriculture and Irrigation of Iraq (the "Tigris River Employer") to perform surveys and data collection for the Tigris River Training Study in Baghdad (the "Tigris River Contract"). According to the terms of the Tigris River Contract, the services were scheduled to be carried out in 1990 and 1991.

233. On 19 June 1991, Delft cancelled the contract under the force majeure clause of the contract. Under the terms of the force majeure clause, Delft was to submit an invoice within 30 days of terminating the contract for unpaid work. Upon receiving the invoice, the Tigris River Employer was to pay the outstanding amount within 30 days.

(iii) Al-Anbar Thermal Power Station

234. Delft seeks compensation in the amount of NLG 152,604 for unpaid work which it states it performed on the Al-Anbar Thermal Power Station.

235. On 9 June 1990, Delft entered into a contract with the Ministry of Industry and Industrialisation of Iraq (the "Al-Anbar Employer") to provide consultancy services for water level regulation measures at Al-Anbar Thermal Power Station (the "Al-Anbar Contract"). According to the terms of the Al-Anbar Contract, services were to begin within two weeks after receipt of the downpayment which was to be made within one week of signing the contract.

236. Delft states that in mid-1991 it cancelled the contract under the force majeure clause of the contract. Under the terms of the force majeure clause, Delft was to submit an invoice within 30 days of terminating the contract for unpaid work. Upon receiving the invoice, the Al-Anbar Employer was to pay the outstanding amount within 30 days.

(b) Underutilised personnel capacity

237. Delft seeks compensation in the amount of USD 170,358 for the underutilised capacity of five of its expert staff whom it states were employed on various projects in Iraq and were made idle for three months due to Iraq's invasion and occupation of Kuwait.

2. Analysis and valuation

238. The Panel finds that the Al-Mussaib Employer, Tigris River Employer, and the Al-Anbar Employer are agencies of the Government of Iraq.

(a) Unpaid work performed

239. In support of its claim, Delft submitted the Al-Mussaib Contract, the Tigris River Contract, and the Al-Anbar Contract.

240. In the article 34 notification, the secretariat of the Commission (the "secretariat") requested that Delft provide evidence of actual costs incurred in the performance of work (e.g. invoices, payment certificates, time allocations, job-cost information, audited accounts and other documentation). Delft did not submit any such evidence. Delft was also requested to provide copies of the applications for payment for each contract as well as approved payment certificates, interim certificates, periodic progress reports, account invoices, and evidence of actual payments received. However, Delft did not submit any such evidence.

241. The Panel recommends no compensation for contract losses in respect of unpaid invoices on the grounds that Delft did not provide sufficient evidence of its performance of the work.

(b) Underutilised personnel capacity

242. In the article 34 notification, the secretariat requested that Delft provide documentary evidence, including schedules, and payroll details. However, Delft responded that such evidence was no longer available. Delft did not submit any documents which identified the experts or which described the work that they allegedly performed in Iraq.

243. Delft states that the Iraqi projects required expert staffing (e.g. for physical model construction, operation of physical and mathematical models). Delft states that during discussion with the Ministry of Industry regarding scheduling of the projects, the availability of experts was taken into account.

244. The Panel recommends no compensation for contract losses in respect of underutilised personnel on the grounds that Delft did not provide evidence of the employment of its experts or of any work which they allegedly performed.

3. Recommendation

245. The Panel recommends no compensation for contract losses.

B. Other losses (business development expenses)

1. Facts and contentions

246. Delft seeks compensation in the amount of USD 154,009 (NLG 271,210) for other losses (business development expenses). The claim is for project preparation costs allegedly incurred by Delft in the process of seeking to be engaged as a contractor on 12 projects in Iraq.

2. Analysis and valuation

247. In support of its claim, Delft submitted a draft proposal for employment on the hydraulic investigations of the Samarra New Escape Regulator (the "Samarra Contract"), dated July 1990. The draft proposal was for the provision of experts and tools to provide details for design, boundary conditions and assistance during construction and operation of the physical scale models in the hydraulic laboratory. This was not a contract, but a proposal for a contract and was not signed by the prospective employer, the Ministry of Agriculture and Irrigation Al-Furat Centre for Studies and Designs of Irrigation Projects Hydraulic Laboratory.

248. In the article 34 notification, the secretariat requested that Delft provide correspondence in respect of the Samarra Contract which demonstrated a willingness on the Iraqi side to sign the draft proposal. In its response, Delft stated that correspondence from the prospective Iraqi employer was no longer available.

249. In the article 34 notification, the secretariat also requested that Delft indicate "project by project" work that had been carried out to win the projects and to specify when the work had been performed. The notification also requested that evidence such as time sheets, payrolls, or receipts be provided. In its response Delft described its expectations for employment on the various contracts and its plans to discuss its proposals with the prospective Iraqi employers, but did not provide any documentation.

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

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

3. Recommendation

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

C. Summary of recommended compensation for Delft

Table 23. Recommended compensation for Delft

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	421,319	nil
Other losses (business development expenses)	154,009	nil
Total	575,328	nil

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

VIII. NKF KABEL B.V.

254. NKF Kabel B.V. ("NKF") is a corporation organised according to the laws of the Netherlands. It manufactures and trades in electric wiring for energy telecommunications and data transmission applications. At the time of Iraq's invasion and occupation of Kuwait, it was engaged on four projects in Baghdad and three in Kuwait City for the manufacture, testing, transfer to site, excavation, laying, and installation of cable circuits and accessories.

255. NKF seeks compensation in the total amount of USD 2,023,662 (NLG 3,563,668) for contract losses, loss of tangible property, and payment or relief to others.

Table 24. NKF's claim

Claim element	Claim amount (USD)
Contract losses	142,846
Loss of tangible property	1,377,256
Payment or relief to others	503,560
Total	2,023,662

A. Contract losses

1. Facts and contentions

256. NKF seeks compensation in the amount of USD 142,846 (NLG 251,551) for contract losses. The claim is for unproductive salary payments which it allegedly made to six of its employees while they were detained in Baghdad. NKF states that it had employees at its branch offices in Baghdad and in Kuwait and that upon Iraq's invasion of Kuwait, it immediately terminated the projects upon which it was engaged. NKF states that upon the advice of the Dutch Ambassador to Kuwait, its employees in Kuwait City were evacuated to Baghdad where they joined other NKF employees already stationed there.

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

258. NKF's claim for contract losses is summarised in table 25, infra.

Table 25. NKF's claim for contract losses

Name of employee	Dates of employment	Claim amount (NLG)
Mr. S.	12/12/89 - 15/8/90	3,426
Mr. F.H.P.	28/12/84 - 2/1/91	66,730
Mr. R.R.	1/9/89 - 2/1/91	42,130
Mr. A.T.B.	15/2/80 - 5/1/91	45,384
Mr. J.P.H.V.	1/1/86 - 1/12/90	92,298
Mr. J.J.B.	28/10/88 - 10/8/90	1,583
Total		251,551

2. Analysis and valuation

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

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

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

260. The Panel recently applied these principles in the "Report and recommendations made by the Panel of Commissioners concerning the twenty-third instalment of 'E3' claims" (S/AC.26/2002/3) at paragraph 315.

261. In support of its claim, NKF provided evidence of the detention of all six of the employees, including correspondence with the Dutch Ministry of Foreign Affairs detailing events during the evacuation process, correspondence with its parent company, NKF Holding N.V., describing attempts to make contact with the detained employees and contemporaneous internal records of detention payments made to employees.

262. NKF submitted evidence of salary payments in respect of four of the six employees, including an undated record of salary expenses, a record of annual salary data dated 27 April 1990, and an internal memorandum from its "controller," dated "23 maart 1993", naming the employees to whom salary payments had been made.

263. NKF's submission for reimbursement of payments made to six employees includes the items referred to in paragraph 262, supra, naming the employees to whom salary payments had been made.

The Panel finds that the six employees were detained in Iraq. However, assertions of entitlement which are unsupported by evidence cannot support a recommendation for compensation (see the Summary, paragraphs 30 to 34). In the present case, there is evidence of such payment in respect of four of the six employees, but not in respect of the other two, and accordingly, the Panel recommends compensation in respect of the four employees only.

264. The Panel recommends compensation in the amount of NLG 113,869.

3. Recommendation

265. The Panel recommends compensation in the amount of USD 64,662 for contract losses.

B. Loss of tangible property

1. Facts and contentions

266. NKF seeks compensation in the amount of USD 1,377,256 (NLG 2,425,347) for loss of tangible property. The claim is for the alleged loss of equipment and furniture from its branch office in Iraq and for costs related to transportation of equipment.

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

268. NKF states that due to Iraq's invasion and occupation of Kuwait, its representatives left in haste leaving behind property and equipment. NKF states that none of the property was recovered afterwards.

2. Analysis and valuation

269. In support of its claim, NKF provided a self-generated list of the property which it allegedly lost. In response to the secretariat's article 34 notification, NKF states that the list was created in 1993. NKF also submitted an internal memorandum dated 15 February 1993 describing its property losses.

270. In the article 34 notification, the secretariat requested that NKF provide evidence of ownership of each of the items of its property, evidence of each item's presence in Iraq as at 2 August 1990 and evidence of the loss or damage to each item of its property. In its response to the article 34 notification, NKF states that all documentary evidence was lost or destroyed. With respect to the absence of supporting documentation, the Panel refers to paragraphs 30 to 34 of the Summary.

271. The Panel finds that NKF did not provide sufficient evidence to substantiate its claim. NKF failed to provide evidence of importation into Iraq or other evidence of the presence of the items in Iraq in August 1990 evidence of its ownership of the property and evidence of its loss or damage.

3. Recommendation

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

C. Payment or relief to others

1. Facts and contentions

273. NKF seeks compensation in the amount of USD 503,560 (NLG 886,770) for payment or relief to others. First, NKF claims compensation in the amount of USD 102,214 (NLG 180,000) for "one-off" ex-gratia hardship payments allegedly made to five of its employees as a result of their detention in Iraq. Second, NKF seeks compensation in the amount of USD 401,346 (NLG 706,770) for payments allegedly made to six of its employees who lost personal possessions due to Iraq's invasion and occupation of Kuwait.

274. NKF's claim for payment or relief to others is summarised in table 26, infra.

Table 26. NKF's claim for payment or relief to others

Name of employee	Claim amount (hardship payment) (NLG)	Claim amount (personal property payment) (NLG)
Mr. S.	5,000	2,677
Mr. F.H.P.	50,000	54,775
Mr. R.R.	40,000	--
Mr. A.T.B.	45,000	71,700
Mr. A.W.S.G.	--	154,510
Mr. J.P.H.V.	40,000	270,108
Mr. J.A.v.T.	--	153,000
Total	180,000	706,770

2. Analysis and valuation

(a) Hardship payments

275. The Panel has found that the costs associated with evacuating and repatriating employees from 2 August 1990 to 2 March 1991 are compensable to the extent that such costs are proven by the claimant and are reasonable in the circumstances (see the Summary, paragraph 169).

276. In support of its claim, NKF provided evidence of detention as described in paragraph 261, supra. It also provided contemporaneous internal memoranda describing hardship payments to be made to its employees. NKF also submitted letters which it sent to its employees stating that it would make payments to them to compensate them for their forced stays in Baghdad or Kuwait. However, none of these letters were countersigned by the employees.

277. The Panel finds that NKF's hardship payments are compensable in principle. However, NKF did not provide sufficient evidence of actual payment to the employees. Sufficient evidence would have included countersigned letters or other evidence that the employees had received the amounts claimed.

278. The Panel recommends no compensation for hardship payments due to lack of evidence.

(b) Personal property payments

279. In support of its claim, NKF provided letters to five of the six employees describing payments made by way of compensation for the lost or damaged possessions. The Panel finds that NKF did not submit evidence of payment to Mr. S. However, in its calculation of personal property payments it stated that it paid NLG 2,677 to Mr. S. The letters submitted by NKF were signed by NKF's head of social affairs and countersigned by the five individual employees. NKF also submitted three personal property packing lists which were compiled by the employees who allegedly lost their possessions.

280. The Panel finds that NKF provided sufficient evidence of personal property payments to five of the six employees in respect of whom it claims compensation (Mr. F.H.P., Mr. A.T.B., Mr. A.W.S.G., Mr. J.P.H.V., Mr. J.A.v.T.).

281. NKF's claim in respect of Mr. A.W.S.G. comprises two elements: (a) payment for lost personal property (NLG 148,270); and (b) payment for lost funds in a bank account in Kuwait (NLG 6,240).

282. In respect of the claim for the payment for lost personal property, the Panel finds that there is some duplication between NKF's claim for the payment to Mr. A.W.S.G. and the individual category "C" award made to Mr. A.W.S.G. NKF did not explain or calculate the extent of the duplication between its claim and the category "C" claim of Mr. A.W.S.G. The Panel has reviewed the evidence submitted by Mr. A.W.S.G. in support of his claim included in the Fifth "C" Instalment and the evidence submitted by NKF to this Panel in respect of Mr. A.W.S.G. The Panel finds that the evidence submitted in support of both claims, in particular, the "packing lists" containing an inventory of the lost personal property, is similar and there appears to be an overlap between the two claims. In such circumstances, the Panel is unable to recommend compensation for NKF's lost personal property payment allegedly made to Mr. A.W.S.G. The Panel finds that making a recommendation for compensation in such circumstances would amount to double recovery.

283. In respect of the claim for lost funds in a bank account in Kuwait, the Panel finds that NKF submitted insufficient evidence to prove that it compensated Mr. A.W.S.G. for this amount. Indeed, in a letter dated 25 April 1991, NKF states that it had not yet compensated Mr. A.W.S.G. for the loss of funds in his bank account, as it anticipated that this amount would become available to him in "coming months". NKF did not submit any evidence that demonstrated that it subsequently compensated Mr. A.W.S.G. for the lost funds.

284. The Panel also notes that although NKF submitted evidence that it made a payment (NLG 168,530) in respect of Mr. F.H.P. which is greater than the amount claimed (NLG 54,775), the Panel cannot compensate a claimant for an amount greater than the amount shown by the claimant's "E" claim form.

285. The actual amounts of the payments shown by the payment letters and the Panel's recommendations are summarised in table 27, infra.

Table 27. NKF's claim for payment or relief to others (personal property payments)

Employee	Claim amount (personal property payment) (NLG)	Amount shown by personal property payment letter (NLG)	Panel's recommendation (NLG)
Mr. S.	2,677	nil	nil
Mr. F.H.P.	54,775	168,530	54,775
Mr. A.T.B.	71,700	71,700	71,700
Mr. A.W.S.G.	154,510	148,270	nil
Mr. J.P.H.V.	270,108	270,108	270,108
Mr. J.A.v.T.	153,000	153,000	153,000
Total	706,770	811,608	549,583

286. The Panel recommends compensation in the amount of NLG 549,583 in respect of the personal property payments made to Mr. F.H.P., Mr. A.T.B., Mr. J.P.H.V. and Mr. J.A.v.T.

3. Recommendation

287. The Panel recommends compensation in the amount of USD 312,086 for payment or relief to others.

D. Summary of recommended compensation for NKF

Table 28. Recommended compensation for NKF

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	142,846	64,662
Loss of tangible property	1,377,256	nil
Payment or relief to others	503,560	312,086
Total	2,023,662	376,748

288. Based on its findings regarding NKF's claim, the Panel recommends compensation in the amount of USD 376,748. The Panel determines the date of loss to be 2 August 1990.

IX. POLSERVICE LTD. (FORMERLY POLSERVICE FOREIGN TRADE ENTERPRISE)

289. Polservice Ltd. (formerly Polservice Foreign Trade Enterprise) ("Polservice") is a corporation organised according to the laws of Poland. Polservice is in the consulting engineering business. Prior to Iraq's invasion and occupation of Kuwait, it had been conducting business in Iraq since the early 1970s. Its business in Iraq was focused on providing services related to technical work, industrial construction and assembly, consultancy, geological services and works management.

290. In the "E" claim form, Polservice sought compensation for losses in the amount of USD 22,177,635 comprising contract losses, loss of real property, payment or relief to others, claim preparation costs and interest.

291. Following the submission of its claim, Polservice, in its response to the article 34 notification, reduced the claimed amount for contract losses and claim preparation costs. The reduction in the claim amount for contract losses is to take account of the outstanding amounts that Polservice received from the respective employers since it filed its claim with the Commission.

292. In addition, the Panel finds that the claim with respect to the loss of real property involves a breach of contract for the purchase of three vehicles in the amount of USD 40,309 and as such the Panel determined that this loss is more accurately classified as a claim for contract losses.

293. The Panel therefore considered the amount of USD 20,649,115 for contract losses, loss of real property, payment or relief to others, claim preparation costs and interest, as shown in table 29, infra.

Table 29. Polservice's claim

Claim element	Original claim amount (USD)	Revised claim amount (USD)
Contract losses	20,689,792	19,324,142
Loss of real property	40,309	nil
Payment or relief to others	391,456	391,456
Claim preparation costs	1,056,078	933,517
Interest (no amount specified)	--	--
Total	22,177,635	20,649,115

294. Applying the approach taken with respect to claims preparation costs set out in paragraph 62 of the Summary, the Panel makes no recommendation for claim preparation costs.

295. For the reasons stated in paragraph 60 of the Summary, the Panel makes no recommendation with respect to Polservice's claim for interest.

296. Polservice organised its claim in 33 separate volumes labelled Volume 2 to Volume 34. For ease of reference, the Panel refers to Polservice's volume numbers in this analysis.

A. Contract losses

1. Facts and contentions

297. Polservice seeks compensation in the amount of USD 19,324,142 for contract losses in respect of 32 contracts with several Iraqi State agencies.

298. Polservice asserts that at the time of Iraq's invasion and occupation of Kuwait, it was performing services in Iraq on 32 different contracts for various Iraqi State entities, and that these contracts were disrupted due to Iraq's invasion and occupation of Kuwait. A summary of the contracts is set out in table 30, infra.

Table 30. Polservice's claim for contract losses (contracts in Iraq)

Volume No. - contract No.	Employer	Date of contract/ amendments	Number of employees	Type of work	Contract period - completion date
Vol. 2 – 460/7-0505	NASSR Establishment for Mechanical Industries	10 June 1987 (amended 2 April 1987 – annex No. 2)	22	Consultancy for foundry works	June 1992
Vol. 3 – 460/8-0531	NASSR Establishment for Mechanical Industries	28 May 1989 (amended 14 August 1990, 26 July 1990)	14	Consultancy for welding works	31 July 1991
Vol. 4 – 460/9-0477	Bader General Establishment	9 April 1989 (amended 26 June 1990)	9	Consultancy for tool room plant	June 1992
Vol. 5 – 460/9-0476	Bader General Establishment	30 May 1990	8	Foundry construction services	May 1991
Vol. 6 – 460/9-0629	NASSR Establishment for Mechanical Industries	31 May 1990 (amended 7 June 1990)	51	Machinery erection	May 1991
Vol. 7 - 460/8-0570, 460/8-0737	NASSR Establishment for Mechanical Industries	9 July 1990	21	Consultancy for welding works	July 1991
Vol. 8 - 460/0-9679	Al Shaheed Falluja	5 June 1990	None	Development and supply of know-how and technology for the production of hard metals in the factory.	June 1992
Vol. 9 - 460/0-9427	NASSR Establishment for Mechanical Industries	2 March 1990	None	Delivery of a turning and boring lathe	August 1990
Vol. 10 - n/a	Sehee Plant	31 July 1990	120	Supply of vessels, storage tanks, heat exchangers and technical services	July 1991
Vol. 11 – 460/0-9429	NASSR Establishment for Mechanical Industries	2 February 1990	8	Supply of engineers to design the Al Mutakawe factory	February 1991
Vol. 12 – 460/7-0398	Central Tool Room Plant	3 March 1987 (amended 19 March 1989)	30	Moulds and dies casting etc.	March 1991

Volume No. - contract No.	Employer	Date of contract/ amendments	Number of employees	Type of work	Contract period - completion date
Vol. 13 – 460/8-0611	Ministry of Health General Establishment for Projects and Maintenance of Medical Appliances	6 July 1988 (amended 11 March 1990, 25 July 1990)	16	Hospital maintenance	31 December 1990
Vol. 14 – 460/9-0776	Project 144/4 Baghdad	3 September 1989	12	Consultancy for moulds and dies casting etc.	September 1991
Vol. 15 – 460/9-0868	Lamp Factory	17 October 1989	7	Consultancy for lamp manufacturing	October 1991
Vol. 16 – 460/9-0423	State Establishment for Mechanical Industries	23 November 1988	4	Operation and maintenance of precise casting equipment	November 1990
Vol. 17 – 460/7-0460	Rayon State Establishment	undated (amended 1 July 1989)	14	Welding, pipe fitting etc.	30 June 1990
Vol. 18 – 460/7-0727	Al Shaheed Factory - Fallujah	27 December 1987	43	Maintenance, melting, casting, rolling etc.	5 December 1990
Vol. 19 – 460/0-9453	Hutten General Establishment Iskandariyah	14 January 1990	1	Operations and maintenance of hydraulic press and hummers	January 1991
Vol. 20 – 460/0-9454	Al Qadissiyah State Enterprise for Electrical Industries	14 January 1990	2	Maintenance of equipment	January 1991
Vol. 21 - 310/9-0671, 310/9-0672	FAO State Establishment Project 112, 1157 and 924	15 June 1989	14	Quality control and civil construction works at Badush dam, Baghdad	June 1991
Vol. 22 – 320/9-0409	Ministry of Planning Project 25	23 February 1989	15	Design of Project 25	May 1991
Vol. 23 – 322/0-9623	Ministry of Planning Project 14	28 May 1990	22	Design work for Project 14	May 1991
Vol. 24 – 310/9-0808	State Company for Oil Projects	10 October 1989	88	Maintenance of gas plant, Basrah	October 1990

Volume No. - contract No.	Employer	Date of contract/ amendments	Number of employees	Type of work	Contract period - completion date
Vol. 25 - 310/9-0740, 310/0-9795	State Company for Oil Projects	30 July 1989	26	Operation and maintenance for oil lubrication plant, Basrah	January 1991
Vol. 26 – 310/1-0253	Amanat Al Assima	25 February 1981	not specified	Map elaboration and mapping works for underground service facilities for downtown Baghdad and training	February 1986
Vol. 27 – 310/9-0914	State Enterprise for Glass and Ceramics	30 November 1989	47	Maintenance and operation of glass production machines, Ramadi	November 1990
Vol. 28 - 310/8-0698, 310/9-0441, 310/9-0752	Technical Corps for Special Projects Badush Dam Project	22 September 1988	not specified	Quality control and civil works for Badush dam, Basrah	October 1992
Vol. 29 - 310/9-0741, 310/9-0 760	FAO State Establishment Project 555	10 August 1989	14	Piping, electrical, mechanical works - Badush dam, Baghdad	April 1990
Vol. 30 – 520/0-9374	State Enterprise for Phosphate	13 December 1989	192	Operation and maintenance of Al Kaim project	31 December 1991
Vol. 31 - 520/7-0728, 520/0-9375	Mishraq Sulphur State Enterprise	21 December 1987	24	Operation and maintenance of the Mishraq Sulphur Project	June 1991
Vol. 32 – 520/9-0764	Mishraq Sulphur State Enterprise	3 September 1989	not specified	Feasibility study for Mishraq sulphur deposits	October 1991
Vol. 33 – 520/9-0513	General Establishment for Geological Survey and Mineral Investigations – Mishraq Sulphur State Enterprise	19 April 1989	not specified	Drilling services and supply of related material and equipment for Mishraq Sulphur Project	December 1991

299. Polservice’s claim for contract losses comprises claims for the following items:

(a) Unpaid invoices (USD 5,834,704);

(b) Lost revenues (USD 13,449,129); and

(c) "Breach of contract" for the purchase of three motor vehicles (USD 40,309).

300. In the following section of the report the Panel considers whether Polservice has suffered a loss resulting directly from Iraq's invasion and occupation of Kuwait in respect of each of the 32 contracts. The Panel makes a final recommendation in respect of contract losses after considering the question of advance payments. The Panel considers the question of advance payments at paragraphs 316 to 319, infra. The Panel's final recommendation for contract losses appears at paragraph 320, infra.

2. Analysis and valuation

(a) Unpaid invoices

301. Polservice seeks compensation in the amount of USD 5,834,703 for unpaid invoices. The invoices were issued by Polservice in connection with services performed pursuant to the contracts with Iraqi State entities. The claimed amounts are set out in table 31, infra.

Table 31. Polservice's claim for contract losses (unpaid invoices)

Volume No. - contract No.	Contract value (USD)	Claim amount (USD)
Vol. 2 - 460/7-0505	1,249,134.52	133,989
Vol. 3 - 460/8-0531	392,690.00	50,062
Vol. 4 - 460/9-0477	"rates contract"	110,840
Vol. 5 - 460/9-0476	"rates contract"	69,787
Vol. 6 - 460/9-0629	"rates contract"	414,059
Vol. 7 - 460/8-0570, 460/8-0737	"rates contract"	84,128
Vol. 9 - 460/0-9427	75,000.00	2,870
Vol. 11 - 460/0-9429	"rates contract"	26,285
Vol. 12 - 460/7-0398	"rates contract"	266,668
Vol. 13 - 460/8-0611	"rates contract"	159,520
Vol. 14 - 460/9-0776	"rates contract"	61,696
Vol. 15 - 460/9-0868	"rates contract"	20,912
Vol. 16 - 460/9-0423	40,083.74	33,863
Vol. 17 - 460/7-0460	8,221.14	8,221
Vol. 18 - 460/7-0727	22,526.58	2,210
Vol. 19 - 460/0-9453	25,583.03	10,708
Vol. 20 - 460/0-9454	38,796.20	7,300
Vol. 21 - 310/9-0671, 310/9-0672	148,368.18	145,870
Vol. 22 - 320/9-0409	118,218.74	99,706
Vol. 23 - 322/0-9623	701,463.02	56,362
Vol. 24 - 310/9-0808	702,932.80	689,730
Vol. 25 - 310/9-0740, 310/0-9795	191,744.51	191,745
Vol. 26 - 310/1-0253	538,111.01	185,442
Vol. 27 - 310/9-0914	122,655.41	118,455
Vol. 28 - 310/8-0698, 310/9-0441, 310/9-0752	1,639,915.98	993,203
Vol. 29 - 310/9-0741, 310/9-0 760	29,987.98	29,988
Vol. 30 - 520/0-9374	5,709,771.68	1,197,611
Vol. 31 - 520/7-0728, 520/0-9375	404,248.18	352,154
Vol. 32 - 520/9-0764	886,592.00	33,333
Vol. 33 – 520/9-0513	310,955.00	277,986
Total		5,834,703

302. In support of its claim, Polservice provided copies of contracts and amendments, invoices, documents entitled "record sheets" and "attendance cards" setting out the number of hours worked by each Polservice employee and fees charged to the relevant employer for undertaking the assignment. In addition, for certain projects, Polservice provided copies of payment instructions issued by the relevant employer to the Central Bank of Iraq to make payment to Polservice for services performed.

303. The evidence shows that the asserted losses occurred during the period from January 1990 to January 1991. Certain of the asserted losses relate to work performed before 2 May 1990.

304. Applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 43 to 45 of the Summary, only contract losses related to work performed subsequent to 2 May 1990 are compensable. The invoices found by the Panel to relate to work performed prior to 2 May 1990 are identified in table 32, infra, and are designated "arising prior to 2 May 1990".

305. From the documentation provided by Polservice, the Panel was able to identify the work performed and services rendered that took place subsequent to 2 May 1990. In respect of that work and those services, under the respective contracts, the employer's approval was required prior to any payment being made. The evidence provided by Polservice did not include such approvals in respect of all such services claimed by Polservice. So far as the Commission is concerned, it is necessary for a claimant to provide evidence of approval of work by the employer (which may be by certificate or other means) or other proof that the claimed work had been done or services carried out. Failing such evidence it is not open to the Panel to recommend compensation. In the situations where there is a lack of approval from the employer, the Panel acknowledges that the approval process may have been frustrated by Iraq's invasion and occupation of Kuwait notwithstanding that the work had been performed. As such, the Panel has reviewed the evidence to determine if there is other proof that the claimed work had been done or services carried out. The Panel found that for certain of the unpaid invoices which did not have the approval of the employer certified on the individual invoice, there is other proof that the employer acknowledged the performance of works and the obligation to pay the invoiced amounts. The proof has come in various forms and, in particular, the Panel found that it could conclude an obligation on the part of the employer to pay for invoiced works from copies of returned cheques, correspondence issued between the employer and Polservice and payment instructions issued by the employer requesting payments to be made to Polservice. In all these cases, there is a clear relationship between the evidence of the debt and the details of the respective invoice including the time for performance of the works and the value of works for the Panel to make a recommendation for compensation.

306. On the evidence provided, the Panel is satisfied that Polservice is entitled to payment for the unpaid invoices as set out in table 32, infra.

Table 32. Polservice's claim for contract losses (unpaid invoices) – Panel's recommendation

Volume No. - contract No.	Claim amount (USD)	Invoice No.	Invoice reference and month in which services were rendered	Reason	Panel's recommendation (USD)
Vol. 2 – 460/7-0505	133,989	1	53/90/195 – April 1990	Arising prior to 2 May 1990	nil
		2	52/90/196 – April 1990		
		3	54/90/253 – May 1990	Certification by employer	101,675
		4	55/90/254 – May 1990		
		5	57/90/272 – June 1990		
		6	56/90/273 – June 1990		
		7	58/90/328 – July 1990		
		8	59/90/329 – July 1990		
		9	61/90/376 – August 1990		
		10	60/90/377 – August 1990		
		11	62/90/399 – September 1990		
		12	63/90/437 – October 1990		
		13	64/90/471 – November 1990		
		14	65/90/496 – December 1990		
Vol. 3 – 460/8-0531	50,062	1	23/90/247 – June 1990	Certification by employer	50,062
		2	24/90/327 – July 1990		
		3	25/90/397 – August 1990		
		4	26/90/426 – September 1990		
		5	27/90/469 – October 1990		
		6	28/90/468 – November 1990		
Vol. 4 - 460/9-477	110,840	1	12/90/198 – April 1990	Arising prior to 2 May 1990	nil
		2	13/90/252 – May 1990	Certification by employer	92,021
		3	14/90/270 – June 1990		
		4	15/90/333 – July 1990		
		5	16/90/378 – August 1990		
		6	17/90/398 – September 1990		
		7	18/90/438 – October 1990		
		8	19/90/490 – November 1990		
		9	20/90/491 – December 1990		
Vol. 5 - 460/9-0476	69,787	1	12/90/254 – May 1990	Certification by employer	69,787
		2	13/90/271 – June 1990		
		3	14/90/330 – July 1990		
		4	15/90/382 – August 1990		

Volume No. - contract No.	Claim amount (USD)	Invoice No.	Invoice reference and month in which services were rendered	Reason	Panel's recommendation (USD)
Vol. 6 - 460/9-0629	414,059	1	21/90/216 claim for leave of employees terminating employment before 30 April 1990 - under article 9.1 of the contract	Arising prior to 2 May 1990	nil
		2	22/90/221 – April 1990		
		3	23/90/220 – April 1990		
		6	26/90/305 – June 1990	Payment instructions issued	92,349
		7	27/90/276 – June 1990		
		12	32/90/427 – September 1990		
		13	33/90/428 – September 1990		
		4	24/90/259 – May 1990	Insufficient evidence	nil
		5	25/90/260 – May 1990		
		9	29/90/366 – July 1990		
		10	30/90/400 – August 1990		
		11	31/90/401 – August 1990		
		14	34/90/446 – October 1990		
		15	35/90/445 – October 1990		
		16	36/90/492 – November 1990		
		17	37/90/493 – November 1990		
		18	38/90/498 – December 1990		
		19	39/90/499 – December 1990		
Vol. 7 - 460/9 – 0570 and 460/8-037	84,128	1	40/90/208 – April 1990	Arising prior to 2 May 1990	nil
		2	41/90/209 – April 1990		
		3	42/90/237 – May 1990	Payment instructions issued	71,825
		4	42/90/238 – May 1990		
		5	44/90/278 – June 1990		
		6	45/90/279 – June 1990		
		7	46/90/323 – July 1990		
		8	47/90/324 – July 1990		
		9	48/90/383 – August 1990		
		10	49/90/384 – August 1990		
		11	50/90/417 – September 1990		
		12	51/90/418 – September 1990		

Volume No. - contract No.	Claim amount (USD)	Invoice No.	Invoice reference and month in which services were rendered	Reason	Panel's recommendation (USD)
Vol. 9 - 460/0-427	2,870		Letter from Polish Ocean Lines confirming return of ship "B/L" is a charge incurred due to ship's return (see SQ 50)	No loss	nil
Vol. 11 - 460/0-9429	26,285	1	1/90/331 – June 1990	Certification by employer	26,285
		2	2/9/0332 – July 1990		
		3	3B/90/373 – August 1990		
		4	4/435 – September 1990		
		5	5/90/470 – October 1990		
Vol. 12 – 460/7-0398	266,668	1	65/9/0211- April 1990	Arising prior to 2 May 1990	nil
		2	66/90/212 – April 1990		
		14	65/90/496 – December 1990	Insufficient evidence	nil
		3	67/90/240 – May 1990	Certification by employer and/or payment instructions issued	202,758
		4	68/90/239 – May 1990		
		5	69/90/275 – June 1990		
		6	70/90/274 – June 1990		
		7	71/90/325 – July 1990		
		8	72/90/326 – July 1990		
		9	73/90/385 – August 1990		
		10	74/90/386 – August 1990		
		11	75/90/416 – September 1990		
		12	76/90/442 – October 1990		
		13	77/90/443 – November 1990		
		15	79/91/01 – January 1991		
Vol. 13 – 460/9-0776	159,521	1	21/90/341 – July 1990	Payment instructions issued	98,650
		2	22/90/346 – August 1990		
		3	3/90/457 – September 1990		
Vol. 14 – 460/9-0776	61,696	1	1/90/459 – July 1990	Certification by employer	59,644
		2	2/90/458 – August 1990		
		3	3/90/457 – September 1990		
		4	4/90/456 – October 1990		
		5	5/90/463 – November 1990		

Volume No. - contract No.	Claim amount (USD)	Invoice No.	Invoice reference and month in which services were rendered	Reason	Panel's recommendation (USD)
Vol. 14 – 460/9-0776		6	6/90/464 – paid holidays for July to November 1990		
		7	7/91/03 – December 1990		
		8	8/91/04 – January 1991		
Vol. 15 - 460/9-0868	20,912	1	5/90/472 – June 1990	Payment instructions issued	20,912
		2	6/90/473 – July 1990		
		3	7/90/474 – August 1990		
		4	8/90/475 – September 1990		
		5	9/90/476 – October 1990		
		6	10/90/477 – November 1990		
		7	12/91/06 – December 1990		
		8	11/90/478 – paid holidays		
		9	13/91/07 – January 1991		
		10	14/91/08 – paid holidays		
Vol. 16 - 460/9-0423	33,863	1	14/90/187 – April 1990	Arising prior to 2 May 1990	nil
		2	15/90/243 – May 1990	Insufficient evidence	nil
		3	16/90/282 – June 1990		
		4	17/90/484 – July 1990		
		5	18/90/485 – July 1990		
		6	19/90/486 – September 1990		
		7	20/90/487 – October 1990		
		8	21/90/488 – November 1990		
		9	22/90/489 – paid leave		
Vol. 17 - 460/7-0460	8,221	1	26/90/180 – April 1990	Arising prior to 2 May 1990	nil
		2	27/90/285 – May 1990	Payment instructions issued	2,762
		3	28/90/286 – June 1990	Insufficient evidence	nil
Vol. 18 - 460/7-0727	2,210	1	26/90/336 – July 1990	Insufficient evidence	nil
		2	27/90/345 – August 1990		
		3	28/90/375 – September 1990		
Vol. 19 - 460/0-9453	10,708	1	1/90/185 – April 1990	Arising prior to 2 May 1990	nil
		2	2/90/283 – May 1990	Insufficient evidence	nil
		3	3/90/284 – June 1990		
		4	4/90/479 – July 1990		

Volume No. - contract No.	Claim amount (USD)	Invoice No.	Invoice reference and month in which services were rendered	Reason	Panel's recommendation (USD)
Vol. 19 - 460/0-9453		5	5/90/480 – August 1990		
		6	6/90/481 – September 1990		
		7	7/90/482 – paid leave		
Vol. 20 - 460/0-9454	7,300	1	1/90/184 – April 1990	Arising prior to 2 May 1990	nil
		2	2/90/226 – May 1990	Payment instruction issued	5,214
		3	3/90/287 – June 1990		
		4	4/90/296 – July 1990		
		5	5/90/317 – leave		
Vol. 21 - 310/9-0671 and 0672	145,870		Invoices for Project 112, 1157 and 924	Certification by employer	125,937
Vol. 22 - 322/0-9623	99,706	1	13/90/227 – May 1990	Insufficient evidence	nil
		2	14/90/269 – June 1990		
		3	15/90/318 – July 1990		
		4	16/90/347 – August 1990		
Vol. 23 - 322/0-9623	56,362	1	21/90/348 – July and August 1990	Award recommended based on returned cheque	56,362
		2	1A/90/348A – July and August 1990		
		3	2A/90/375 – September 1990		
		4	2B/90/409 – September 1990		
		5	3/90/467 – October 1990		
		6	3a/90/467a – October 1990		
Vol. 24 - 310/9-0808	689,730	1	Debit note 1/90/420 – invoice Nos. 4 and 5 (no month given)	Arising prior to 2 May 1990	nil
		2	5/90/153 – March 1990		
		3	6/90/215 – April 1990		
		4	6A/90/248 – April 1990		
		5	7/90/257 – May 1990	Compensation recommended based on Ministry of Oil's letter Ref. No. 2876	385,740
		6	8/90/295 – June 1990		
		7	9/90/340 – July 1990		
		8	10/90/370 – August 1990		
		9	11/90/395 – September 1990		

Volume No. - contract No.	Claim amount (USD)	Invoice No.	Invoice reference and month in which services were rendered	Reason	Panel's recommendation (USD)
Vol. 24 - 310/9-0808		10	12/90/454 – October 1990		
		11	13/90/502 – November 1990		
Vol. 25 - 310/9-0740 and 310/0-9795	191,745	1	9/90/258 – May 1990	Compensation recommended based on letter No. 2869 confirming balance outstanding	56,425
		2	10/90/297 – June 1990		
		3	11/90/342 – July 1990	Compensation recommended based on letter No. 2871 confirming balance outstanding	135,320
		4	12/90/369 – August 1990		
		5	13/90/396 – September 1990		
		6	14/90/455 – October 1990		
		7	15/90/501 – November 1990		
		8	16/91/503 – December 1990		
		9	17/91/504 – January 1991		
Vol. 26 - 310/1-0253	185,442	1	37//85 – January 1985	Arising prior to 2 May 1990	nil
		2	38/82/85 – February 1985		
		3	39/127/85 – March 1985		
Vol. 27 - 310/9-0914	118,455	1	17/T/90/394 – September 1990	Insufficient evidence	nil
		2	1/T/90/429 – October 1990		
		3	20/OVERTIME/T/90/431 - October 1990		
		4	21/T/incl.OVT/90/465 - November 1990		
		5	22/T/incl.OVT/91 – December 1990		
		6	DN 1/T to invoice 22/T of 1991.01.09 (no month given)		
		7	DN I/T to invoice 22/T of 1991.01.09 (no month given)		
		8	23/T – January 1991		
		9	23/NT – January 1991		
Vol. 28 - 310/8-0698, 16-310/9-0441, 16-310/9-0752	993,203	1	18/199-201 – April 1990	Arising prior to 2 May 1990	nil

Volume No. - contract No.	Claim amount (USD)	Invoice No.	Invoice reference and month in which services were rendered	Reason	Panel's recommendation (USD)
Vol. 28 - 310/8-0698, 16-310/9-0441, 16-310/9-0752		8	(IQD portion)	Insufficient evidence	nil
		2	19/244-246 – May 1990	Letter of insurance for payment of USD portions confirms amount due and owing	889,546
		3	20 June 1990		
		4	21 July 1990		
		5	22 August 1990		
		6	23 September 1990		
		7	24 October 1990		
		8	25 November 1990		
		9	26 December 1990 and January 1991		
Vol. 29 - 310/9-041 16-310/9-0760	29,988	1	8/P.555 – April 1990	Arising prior to 2 May 1990	nil
Vol. 30 - 520/0-9374	1,197,611	1	103/225 – April 1990	Arising prior to 2 May 1990	nil
		2	104 – May 1990	Minutes of meeting agreed the outstanding amounts which cover the aggregate amounts of these invoices	970,378
		3	105 – June 1990		
		4	106/371 – July 1990		
		5	107/406 – August 1990		
		6	108/434 – September 1990		
		7	109/450 – October 1990		
		8	110/9 – November 1990		
		9	111/452 – December 1990		
Vol. 31 – 520/7-0728 and 16-520/0-9375	352,154	1	5/247/90 – May 1990	Insufficient evidence	nil
		2	6/313/90 – June 1990		
		3	7/314/90 – June 1990		
		4	8/343/90 – July 1990		

Volume No. - contract No.	Claim amount (USD)	Invoice No.	Invoice reference and month in which services were rendered	Reason	Panel's recommendation (USD)
Vol. 31 – 520/7-0728 and 16-520/0-9375		5	9/344/90 – July 1990		
		6	10/389/90 – August 1990		
		7	11/390/90 – August 1990		
		8	12/403/90 – September 1990		
		9	13/404/90 – September 1990		
Vol. 32 - 520/9-0764	33,333	1	1/11/90 (no month given)	Arising prior to 2 May 1990	nil
		2	2/232/90 – progress report (no month given)	Insufficient evidence	nil
Vol. 33 - 520/9-0513	277,986	2	15/267/90 – transportation costs (no month given)	Payment instruction issued	277,986
		3	16/288/90 – June 1990		
		4	18/335/90 – July 1990		
		5	19/356/90 – August 1990		
		6	19/356/90 – debit note 3/379/90 (no month given)		
		7	20/368/90 – September 1990		
		8	4/380/90 – debit note 4/380/90 (no month given)		
		9	21/381/90 – cost of demobilisation (no month given)		
Total	5,834,704				3,791,638

307. The Panel considers that Polservice has suffered contract losses resulting directly from Iraq's invasion and occupation of Kuwait in the amount of USD 3,791,638.

(b) Lost revenues

308. Polservice seeks compensation in the amount of USD 13,449,129 for lost revenues. In the Statement of Claim, Polservice asserted that due to Iraq's invasion and occupation of Kuwait, it had to evacuate its workers from Iraq. At the time the workers were evacuated from Iraq, there was still work to be performed on the contracts. As a consequence of the evacuation, Polservice was deprived of the expected revenue to be derived from the unperformed work under the respective contracts. The loss was described by Polservice in relation to one of its contracts, as follows: "The value of Polservice's claim in this part is for the contractual value of the jobs that Polservice was supposed to perform on account of the impossibility of the continuing contract, which deprived Polservice of expected revenues …"

309. Polservice alleges that it is entitled to be paid the full amount that it would have recovered had each of the contracts run for the original designated period. Polservice does not give any credit for any expense on site it might have incurred. Furthermore, Polservice does not spell out in any way its

overhead costs or its calculation, if it made any, of the risks inherent in the projects. Finally, Polservice does not seek to demonstrate that, in respect of the individuals whom it utilised on these projects, it was legally obliged to pay any sum by way of determination of that employment when the contracts unexpectedly came to a conclusion.

310. Based on the evidence submitted by Polservice, the Panel recommends no compensation for lost revenues.

(c) "Breach of contract"

311. Polservice seeks compensation in the amount of USD 40,309 for the breach of a contract entered into on 8 July 1990 with a Mr. Abdul A. Al Swadi (the "Seller") in Kuwait. Under the contract, Polservice agreed to purchase three motor vehicles which were to be used for one of its projects in Iraq. The motor vehicles comprised one Toyota Corolla valued at KWD 2,980 and two Mitsubishi micro-buses valued at 7,800 Kuwaiti dinars (KWD) (KWD 3,900 each).

312. In the "E" claim form, Polservice characterised this loss element as "loss of real property", but the Panel finds that it is more accurately classified as a claim for contract losses.

313. It was a term of the contract that the vehicles were to be delivered to Baghdad within 10 days of the date of the contract. Polservice paid the purchase price for the vehicles on the date of signing the contract. In turn, the Seller provided to Polservice a cheque issued by the National Bank of Kuwait for a similar amount. This cheque was to be retained by Polservice as security for the delivery of the vehicles. The vehicles were never delivered to Polservice. Polservice attempted to bank the Seller's cheque after Iraq's invasion and occupation of Kuwait but the National Bank of Kuwait refused to honour the cheque.

314. In support of its claim, Polservice provided a copy of the Seller's cheque and a copy of the contract of 8 July 1990.

315. The Panel finds that the evidence provided is sufficient to substantiate Polservice's claim. The Panel finds that Polservice has suffered a loss resulting directly from Iraq's invasion and occupation of Kuwait in the amount of USD 40,309.

(d) Advance payments

316. In the article 34 notification, Polservice was requested, in respect of each of the 32 contracts for which it seeks compensation for contract losses, to provide evidence of (a) any advance payments received by Polservice, and (b) whether Polservice retains any such advance payments or has repaid them to the Iraqi employer.

317. Polservice responded that it had received advance payments for a number of the contracts. After examining all the evidence, the Panel finds that the position as to advance payments is as set out in table 33, infra.

Table 33. Polservice's claim for contract losses (advance payments)

Volume No. – contract No.	Advance payments received (original currency)	Advance payments still in hand (USD)
Vol. 2 - 460/7-0505	USD 112,420	nil
Vol. 3 - 460/8-0531	USD 35,338	nil
Vol. 4 - 460/9-0477	nil	nil
Vol. 5 - 460/9-0476	nil	nil
Vol. 6 - 460/9-0629	USD 83,408	nil
Vol. 7 - 460/8-0570, 460/8-0737	USD 67,673	nil
Vol. 8 - 460/0-9679	nil	nil
Vol. 9 - 460/0-9427	nil	nil
Vol. 10 - n/a	nil	nil
Vol. 11 – 460/0-9429	nil	nil
Vol. 12 – 460/7-0398	USD 162,173	nil
Vol. 13 – 460/8-0611	USD 72,084	nil
Vol. 14 - 460/9-0776	nil	nil
Vol. 15 - 460/9-0868	nil	nil
Vol. 16 - 460/9-0423	USD 14,897	nil
Vol. 17 - 460/7-0460	nil	nil
Vol. 18 - 460/7-0727	USD 176,136	nil
Vol. 19 - 460/0-9453	nil	nil
Vol. 20 - 460/0-9454	nil	nil
Vol. 21 - 310/9-0671, 310/9-0672	USD 38,507 and IQD 12,000	nil
Vol. 22 - 320/9-0409	USD 22,462	nil
Vol. 23 - 322/0-9623	USD 32,089	nil
Vol. 24 - 310/9-0808	USD 23,623	336
Vol. 25 - 310/9-0740, 310/0-9795	USD 28,380	nil
Vol. 26 - 310/1-0253	nil	nil
Vol. 27 - 310/9-0914	nil	nil
Vol. 28 - 310/8-0698, 310/9-0441, 310/9-0752	IQD 87,637	nil
Vol. 29 - 310/9-0741, 310/9-0 760	USD 34,092	15,001
Vol. 30 - 520/0-9374	nil	nil
Vol. 31 - 520/7-0728, 520/0-9375	nil	nil
Vol. 32 - 520/9-0764	USD 55,092	50,000
Vol. 33 - 520/9-0513	USD 404,320 and IQD 25,552	51,684
Total		117,021

318. Applying the approach with respect to advance payments set out in paragraphs 68 to 71 of the Summary, the Panel finds that Polservice must account for the advance payments in reduction of its claim.

319. Any part of any advance payment still in hand must be deducted from the direct losses incurred by Polservice in the amount of USD 3,831,947 (USD 3,791,638 for unpaid invoices and USD 40,309

for "breach of contract"). The amount still in hand (USD 117,021) must be deducted from the direct losses amounting to USD 3,831,947. This calculation produces an amount of USD 3,714,926.

3. Recommendation

320. The Panel recommends compensation in the amount of USD 3,714,926 for contract losses.

B. Payment or relief to others

1. Facts and contentions

321. Polservice seeks compensation in the amount of USD 391,456 for payment or relief to others. The claim is for the alleged costs of evacuating Polservice's employees from Iraq after Iraq's invasion and occupation of Kuwait. Polservice states that due to Iraq's invasion and occupation of Kuwait it was forced to demobilise 487 of its staff engaged in Iraq and repatriate them to Poland by air transport or, where not available, through Amman, Jordan. The evacuation of its staff commenced in August 1990 and continued until December 1990 and was organised with the assistance of the Ministry of Foreign Economic Relations of Poland ("MOFR"), the Polish airline, PLL Lot ("Lot") and Elektromontaz Export. Polservice asserts that it made payments to MOFR, Lot and Elektromontaz Export for providing assistance for the evacuation of its staff. Polservice seeks compensation for the evacuation costs involved in demobilising its staff. The claim is for (a) airfares, (b) accommodation costs, and (c) "evacuation" of an individual from Iraq.

2. Analysis and valuation

(a) Airfares

322. Polservice seeks compensation in the amount of USD 377,986 for 487 airline tickets purchased for the evacuation of its workers from Iraq to Poland. All tickets were purchased from Lot.

323. Security Council resolution 687 (1991) states that Iraq is liable for any "direct loss ... as a result of Iraq's unlawful invasion and occupation of Kuwait". The Panel in its "Report and recommendations made by the Panel of Commissioners concerning the ninth instalment of 'E3' claims" (S/AC.26/1999/16) (the "Ninth 'E3' Report") found that claimants are entitled to compensation so long as the cost of evacuation airfares exceeds the cost which they would have incurred in repatriating their employees in any event after natural completion of their contracts in Iraq.

324. It was a term of the majority of the contracts that Polservice entered into that the employer would provide return airline tickets for employees returning to Poland after the completion of their assignments. Polservice states that, at the time of evacuation, the respective employers provided return airline tickets for 130 workers only. As a result, Polservice had to incur costs to establish alternative transportation and evacuation arrangements for its remaining employees. Accordingly, airfares constitute an additional cost that Polservice would not have incurred upon natural completion of the contract.

325. The Panel took note of the cross check of the claims filed with the Commission by the Ministry of Foreign Affairs of Poland and MOFR (for the costs of evacuating its employees from Iraq and Kuwait in August 1990) and by Lot (for loss of revenues incurred due to the suspension of its flights in the airspace of Iraq, Kuwait and adjacent countries from November 1990 to June 1991). The Panel

finds that the material filed by the Ministry of Foreign Affairs of Poland, MOFR and Lot shows that there is no overlap with the claim filed by Polservice.

326. Applying the principles set out in paragraph 170 of the Summary, the Panel notes that Polservice did not provide a documentary trail, in particular, concerning the role of Elektromontaz Export, as a creditor of certain invoices, in the evacuation.

327. The Panel considers that the evidence in this claim is sufficient to support a recommendation that compensation be paid for all invoices submitted (save for invoices issued to Elektromontaz Export) for airfares in the amount of USD 354,747.

(b) Accommodation costs

328. Polservice seeks compensation in the amount of USD 13,422 for accommodation costs incurred in Jordan for 260 of its workers who were not repatriated directly out of Baghdad.

329. In support of its claim, Polservice provided 11 invoices issued by MOFR and related payment orders issued by Polservice for payment of certain of the invoices.

330. The Panel considers that costs associated with evacuating and repatriating employees between 2 August 1990 and 2 March 1991 are compensable to the extent that such costs are proved by the claimant and are reasonable in the circumstances. Urgent temporary liabilities and extraordinary expenses relating to evacuation and repatriation, including transportation, food and accommodation are, in principle, compensable (see the Summary, paragraph 169).

331. The Panel finds that there is sufficient evidence to recommend compensation in the amount of USD 13,422 for accommodation costs.

(c) Evacuation costs

332. Polservice seeks compensation in the amount of USD 49 for losses described as “evacuation costs” for an individual from Iraq. Polservice does not state the relationship of the person to Polservice, i.e. whether or not he was an employee or how Polservice’s obligation to pay the cost arose.

333. In support of its claim, Polservice provided a debit note and payment order issuing instructions for the payment of these costs to MOFR. Polservice did not provide any other clarification or details of the cost.

334. Polservice did not describe the nature of the payment or establish that the payment was related to Iraq’s invasion and occupation of Kuwait. The Panel recommends no compensation for evacuation costs.

3. Recommendation

335. The Panel recommends compensation in the amount of USD 368,169 for payment or relief to others.

C. Summary of recommended compensation for Polservice

Table 34. Recommended compensation for Polservice

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	19,324,142	3,714,926
Payment or relief to others	391,456	368,169
Claim preparation costs	933,517	--
Interest (no amount specified)	--	--
Total	20,649,115	4,083,095

336. Based on its findings regarding Polservice's claim, the Panel recommends compensation in the amount of USD 4,083,095. The Panel determines the date of loss to be 2 August 1990.

X. PROKON ENGINEERING CONSTRUCTION AND TRADE LTD.

337. Prokon Engineering Construction and Trade Ltd. ("Prokon") is a limited partnership organised according to the laws of Turkey. It provides services to various industries, including the power, iron, steel, and cement industries. Prokon was a subcontractor on the Sabia Thermal Power Plant in Kuwait (the "Project"). The contractor on the Project was Turkish Joint Venture ("TJV"). The employer was the Ministry of Electricity and Water of Kuwait ("MEW"). Prokon was engaged on a contract with TJV to prepare general projects, application details and 3,000 to 4,000 drawings for the Project (the "Contract").

338. Prokon seeks compensation in the total amount of USD 440,620 for contract losses, loss of profits, and payment or relief to others.

Table 35. Prokon's claim

Claim element	Claim amount (USD)
Contract losses	105,920
Loss of profits	300,000
Payment or relief to others	34,700
Total	440,620

A. Contract losses

1. Facts and contentions

339. Prokon seeks compensation in the amount of USD 105,920 for contract losses.

340. The Contract, which was not dated, stated that Prokon was to provide 4,000 architectural, civil, mechanical, and electrical detail working drawings for the Project. The total price of the work was

estimated to be USD 1,200,000. Prokon was to prepare detailed working drawings within the framework of the preliminary design and design drawings prepared by MEW's designer.

341. Under the terms of the Contract, an advance payment in an amount equivalent to 10 per cent of USD 600,000 was to be made to Prokon - 50 per cent before the performance bond was provided and 50 per cent afterwards. TJV was to pay the salaries of Prokon's employees and to deduct these salary payments from Prokon's progress payments.

342. Monthly progress payments were to be made to Prokon[1] in the amount of 60 per cent of the price of the drawings submitted in the respective month plus 30 per cent of the price of the drawings approved by "MEW/DESIGNER" in the respective month plus 10 per cent of the price of the drawings approved by "MEW/DESIGNER" two months prior to the respective month. Amounts paid directly to Prokon's personnel and the 10 per cent "advance cut"[2] against the advance payment made and any penalties were to be deducted from, and man-month pays (if any) were to be added to, the progress payments.

343. Prokon's claim for contract losses is summarised in table 36, infra.

Table 36. Prokon's claim for contract losses

Loss item	Claim amount (USD)
(a) Unpaid work - 11 July to 2 August 1990	44,000
(b) Business development expenses - works in Ankara before going to Kuwait	14,000
(c) Travel expenses to Kuwait for 11 people	12,000
(d) Expenses for office facilities in Kuwait	15,000
(e) Expenses for bank guarantee letter in amount of USD 60,000	3,100
(f) Duplicate salaries for 11 July to 2 August 1990 not paid by TJV	17,820
Total	105,920

2. Analysis and valuation

(a) Unpaid work (11 July to 2 August 1990)

344. Prokon seeks compensation in the amount of USD 44,000 for 110 sheets of drawings at a price of USD 400 per drawing which it states it produced for the Project between 11 July and 2 August 1990.

345. In support of its claim, Prokon provided a copy of the Contract. In the article 34 notification, the secretariat requested that Prokon provide evidence of the number of drawings completed and submitted to TJV for approval as well as evidence of approval. In response to this query, Prokon stated that everything was left behind in Kuwait.

346. This Panel has stated that a subcontractor in Kuwait must establish its locus standi by explaining why it is not able or entitled to seek compensation from the next party up the line in the causal chain (see the Summary, paragraph 122).

347. TJV's claim was reviewed by the Panel in the "Report and recommendations made by the Panel of Commissioners concerning the sixteenth instalment of 'E3' claims" (S/AC.26/2001/28). In its claim, TJV stated that it made advance payments to Prokon in the amount of KWD 8,985 and that it advised Prokon to submit its outstanding claims to the Commission. Prokon itself did not provide any explanation or evidence as to why it is not able or entitled to seek recovery from TJV. Prokon did not submit evidence of TJV's insolvency or inability to pay or of a contractual bar against such a claim. Prokon also did not submit any evidence of an assignment or arrangement with TJV to submit a joint claim. In the absence of any such evidence, Prokon has not established a basis for seeking compensation from the Commission rather than from TJV. Furthermore, Prokon did not submit evidence of its performance or of attempts to obtain payment. The Panel has stated that a claimant's explanation for its lack of evidence is relevant to the analysis of the claim (see paragraphs 30 to 33 of the Summary). However, in the absence of alternative evidence, the Panel cannot recommend compensation (see the Summary, paragraph 34).

(b) Business development expenses - works in Ankara before going to Kuwait

348. Prokon seeks compensation in the amount of USD 14,000 for works which it states were performed by four of its engineers in Ankara before their deployment to Kuwait. Prokon states that the work began after signing a "Preagreement" with TJV on May 1990 (the "Preagreement") and that it continued until the middle of July 1990 when Prokon's team went to Kuwait.

349. In the article 34 notification, the secretariat requested that Prokon provide full details of the work which was done in Ankara before leaving for Kuwait. The notification also requested that Prokon provide payroll details for the persons concerned together with receipts for expenses incurred.

350. In support of its claim, Prokon submitted the Preagreement which references drawings which were to be done in Turkey. It also states that these drawings were to be accepted after approval by TJV and MEW. The Preagreement did not state the price which the parties agreed on for the work which was to be performed in Turkey.

351. Prokon submitted a payroll and payroll summary for June to September 1990 in Turkish. The untranslated payroll information appears to identify up to 11 members of the staff who were working on the Project during the time period of the claim.

352. Prokon did not provide evidence of the work performed by the engineers, an explanation of how the value of the work was calculated or evidence of having sought payment for the work from TJV.

353. The Panel finds that Prokon failed to submit sufficient evidence of its loss.

(c) Travel expenses to Kuwait for 11 people

354. Prokon seeks compensation in the amount of USD 12,000 for the cost of air travel for 11 of its employees from Ankara to Kuwait on 11 July 1990.

355. In support of its claim, Prokon submitted invoices for 11 airline tickets from Ankara to Kuwait, dated July 1990. The invoices state that Prokon spent 21,208,000 Turkish lira (TRL). Prokon also submitted passport details for 10 of the 11 staff members who were sent to Kuwait.

356. The Panel finds that, in principle, these costs are compensable. However, in accordance with the Panel's previous findings (see paragraph 71 of the Summary), it finds that the cost of the airfares (USD 12,000) must be offset against any advance payment received by Prokon as part of its contractual arrangements with TJV. According to article 5.7 of the Contract, Prokon was to receive USD 17,120. Prokon provided no evidence that it did not receive this amount or that the amount was recouped in whole or in part by TJV. Therefore, the net amount of recommended compensation to Prokon will be nil.

(d) Expenses for office facilities in Kuwait

357. Prokon seeks compensation in the amount of USD 15,000 for office facilities in Kuwait consisting of a telephone, facsimile machine, two rental cars and insurance.

358. Prokon did not submit any evidence in support of its loss.

359. The Panel finds that according to article 5.6 of the Contract with TJV, TJV was to pay all the costs of running the office.

360. The Panel finds that these costs are not compensable because (a) TJV was to bear the costs of maintaining the office, and (b) Prokon did not submit evidence which demonstrated that it incurred the costs.

(e) Expenses for bank guarantee letter in amount of USD 60,000

361. Prokon seeks compensation in the amount of USD 3,100 for the cost of obtaining a bank guarantee in favour of TJV.

362. In support of its claim, Prokon submitted a copy of the advance payment guarantee in favour of TJV, and a copy of a letter from Prokon's bank (Interbank) to TJV confirming issue of the guarantee. Prokon also submitted untranslated receipts which appear to be from Interbank ("Uluslararasi Endustri ve Ticaret Bankasi A.S." in Turkish). However, as these documents were not translated, the Panel was unable to consider them.

363. The Panel finds that Prokon did not submit sufficient evidence in support of its claim.

(f) Duplicate salaries for 11 July to 2 August 1990 not paid by TJV

364. Prokon seeks compensation in the amount of USD 17,820 for duplicate salaries paid to its employees for work done on the Project between 11 July and 2 August 1990. Under the terms of the Contract, TJV was to pay the salaries of Prokon's employees on the Project. Prokon states that TJV paid its employees KWD 4,950 on 1 August 1990. Prokon states that due to Iraq's invasion and occupation of Kuwait, the salaries paid by TJV lost all value on the day of the invasion and, thus, Prokon was obliged to pay duplicate salaries to its employees.

365. Prokon's claim consisted simply of the figure of KWD 4,950 and the exchange rate of KWD 1 = USD 3.6.

366. The Panel finds that Prokon did not submit sufficient evidence in support of its claim.

3. Recommendation

367. The Panel recommends no compensation for contract losses.

B. Loss of profits

1. Facts and contentions

368. Prokon seeks compensation in the amount of USD 300,000 for loss of profits on the Contract. Prokon stated that it expected to earn a 25 per cent profit on the total value of the contract, which was USD 1,200,000.

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

2. Analysis and valuation

370. In support of its claim, Prokon provided a copy of the Contract and untranslated copies of its profit and loss accounts from 1 January to 31 December 1990 and balance sheets from 1 January to 31 December 2000. The Panel did not consider the profit and loss accounts and balance sheets since they were not translated.

371. The Panel finds that Prokon failed to fulfil the evidentiary standard for loss of profits claims set out in paragraphs 144 to 150 of the Summary. Accordingly, the Panel recommends no compensation.

3. Recommendation

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

C. Payment or relief to others

1. Facts and contentions

373. Prokon seeks compensation in the amount of USD 34,700 for payment or relief to others. The claim is for the alleged costs of evacuating Prokon's employees and their dependants from Iraq. The claim is for (a) communication expenses (USD 10,000), (b) the cost of a hired bus (USD 1,700), and (c) hardship payments (USD 23,000).

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

(a) Communication expenses

375. Prokon seeks compensation in the amount of USD 10,000 for the costs of communicating with its employees in Kuwait, supporting the families of the employees and for the decline in office productivity caused by the communication efforts.

(b) Hired bus to Ankara

376. Prokon seeks compensation in the amount of USD 1,700 for the cost of a bus which allegedly transported its workers from the Turkish-Iraqi border to Ankara.

(c) Hardship payments

377. Prokon seeks compensation in the amount of USD 23,000 for “one-off” ex-gratia hardship payments allegedly made to its employees after they returned from Kuwait.

2. Analysis and valuation

(a) Communication expenses

378. Prokon did not submit any evidence in support of its claim and the Panel finds that it did not prove a loss.

(b) Hired bus to Ankara

379. In support of its claim, Prokon submitted an untranslated document which it states was a receipt for the cost of the bus rental. The Panel could not consider the untranslated document.

380. The Panel finds that Prokon submitted insufficient evidence to prove its loss.

(c) Hardship payments

381. This Panel has found that the costs associated with evacuating and repatriating employees between 2 August 1990 and 2 March 1991 are compensable to the extent that such costs are proven by the claimant and are reasonable in the circumstances (see the Summary, paragraph 169).

382. In support of its claim, Prokon submitted an untranslated payroll document, passport details and untranslated documents from the Kuwaiti Department of Immigration.

383. The Panel finds that Prokon’s hardship payments are compensable in principle. However, Prokon did not provide sufficient evidence of payment to the employees. Therefore, the Panel recommends no compensation.

3. Recommendation

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

D. Summary of recommended compensation for Prokon

Table 37. Recommended compensation for Prokon

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	105,920	nil
Loss of profits	300,000	nil
Payment or relief to others	34,700	nil
Total	440,620	nil

385. Based on its findings regarding Prokon’s claim, the Panel recommends no compensation.

XI. MITSUI BABCOCK ENERGY LTD. (FORMERLY BABCOCK ENERGY LTD.)

386. Mitsui Babcock Energy Ltd. (formerly Babcock Energy Ltd.) ("Babcock") is a corporation organised according to the laws of the United Kingdom. Babcock is in the construction and engineering business. At the time of Iraq's invasion and occupation of Kuwait it was the main contractor engaged to construct the Al Anbar Thermal Power Station in Iraq.

387. Babcock seeks compensation for losses in the total amount of USD 19,767,251 (10,397,574 Pounds sterling (GBP)) for contract losses.

Table 38. Babcock's claim

Claim element	Claim amount (USD)
Contract losses	19,767,251
Total	19,767,251

A. Contract losses

1. Facts and contentions

388. Babcock seeks compensation in the amount of USD 19,767,251 (GBP 10,397,574) for contract losses. A summary of Babcock's claims is set out in table 39, infra.

Table 39. Babcock's claim for contract losses

Claim element	Claim amount (USD)
"Direct losses (close down costs)"	13,718,631
"Losses of running expenses"	4,083,650
"Disruption costs at the Renfrew factory"	258,555
"Disruption costs at the Dumbarton factory"	549,430
"Redundancy payments"	1,156,985
Total	19,767,251

389. Babcock asserts that at the time of Iraq's invasion and occupation of Kuwait, it was performing work on a contract dated 11 March 1989 with the Ministry of Industry and Military Industrialisation of Iraq (the "Ministry") to supply and supervise the erection of six 300-megawatt boilers and associated equipment for the Al Anbar Thermal Power Station for a lump sum contract price of IQD 82,500,000 (the "Contract"). Babcock alleges that the works were stopped due to Iraq's invasion and occupation of Kuwait.

2. Analysis and valuation

(a) "Direct losses (close down costs)"

390. Babcock seeks compensation in the amount of USD 13,718,631 (GBP 7,216,000) for losses described by Babcock as "close down costs". The costs were allegedly incurred between the end of

July 1990 and the date of the claim. It is unclear from the supporting evidence how these "close down costs" were valued or why the close down process began in late July, prior to Iraq's invasion and occupation of Kuwait.

391. In support of its claim, Babcock submitted figures from its general ledger. The amounts in the ledger are different from the amount claimed as "close down costs" in the Statement of Claim. The Panel was not able to reconcile the figures or determine how the alleged losses were calculated in relation to the value of works performed under the Contract. The documentary evidence provided by Babcock is not sufficient to provide the clarifications required.

392. The Panel does not consider that Babcock has suffered a loss resulting directly from Iraq's invasion and occupation of Kuwait. The Panel finds that Babcock failed to substantiate its claim for "direct losses (close down costs)". The Panel recommends no compensation for "direct losses (close down costs)" due to a lack of evidence.

(b) "Losses of running expenses"

393. Babcock seeks compensation in the amount of USD 4,083,650 (GBP 2,148,000) for losses described as "running expenses".

394. Babcock states that the compensation sought is derived by calculating "40% on added value and timesheet bookings". It stated also that the "costs to complete for this element for the period September 1990 to March 1991 were GBP 5,371,000. This results in a loss of recovery of GBP 2,148,000 i.e.: 40% of GBP 5,371,000." Babcock also provided a table headed "Al Anbar TPS, Contracts 5930-7, Cash Flow" which makes reference to the figure of "5371". The claim appears to have been calculated on the basis that "running expenses" comprise overheads for the Contract while the "40%" figure constitutes "cost chargeable" for Babcock continuing to commit resources to the Contract from July 1990 until the date of termination. Babcock did not provide any other evidence to substantiate its calculations.

395. The Panel finds that Babcock failed to substantiate its claim for "losses of running expenses". The Panel recommends no compensation.

(c) "Disruption costs (Renfrew factory)"

396. Babcock seeks compensation in the amount of USD 258,555 (GBP 136,000) for losses due to disruption at the Renfrew factory.

397. Babcock did not provide any supporting evidence to explain the details of the loss and how this loss was caused by Iraq's invasion and occupation of Kuwait. Babcock was requested to provide this information and evidence in the article 34 notification. However, Babcock did not reply to the article 34 notification.

398. The Panel finds that Babcock failed to substantiate its claim for "disruption costs (Renfrew factory)". The Panel recommends no compensation.

(d) "Disruption costs (Dumbarton factory)"

399. Babcock seeks compensation in the amount of USD 549,430 (GBP 289,000) for losses due to disruption at the Dumbarton factory.

400. Babcock did not provide any supporting evidence to explain the details of the loss and how this loss was caused by Iraq's invasion and occupation of Kuwait. Babcock was requested to provide this information and evidence in the article 34 notification. However, Babcock did not reply to the article 34 notification.

401. The Panel finds that Babcock failed to substantiate its claim for "disruption costs (Dumbarton factory)". The Panel recommends no compensation.

(e) "Redundancy payments"

402. Babcock seeks compensation in the amount of USD 1,156,985 (GBP 608,574) for redundancy payments allegedly made to its employees as a result of the stoppage of the Contract in July 1990. Babcock states that the redundancies took place between November 1990 and March 1991.

403. Babcock provided details of the redundancy programme in the form of a table. The table enumerates the different types of payments made for the redundancy programme but is unclear as to the number of persons made redundant.

404. The Panel finds that Babcock did not provide evidence that it paid the amounts claimed and, if paid, that the amounts were paid as a result of Iraq's invasion and occupation of Kuwait. Babcock could have proved that such payments were made by providing, for example, copies of its employees' salary ledgers, acknowledgements of receipt of payment from the concerned employees and, if paid out from a bank, confirmation of payment transfers. However, Babcock did not provide any such evidence.

405. The Panel considers that the evidence provided by Babcock is insufficient to support a recommendation for payment of any compensation.

406. The Panel recommends no compensation for "redundancy payments".

3. Recommendation

407. The Panel recommends no compensation for contract losses.

B. Summary of recommended compensation for Babcock

408. Based on its findings regarding Babcock's claim, the Panel recommends no compensation for contract losses.

Table 40. Recommended compensation for Babcock

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	19,767,251	nil
Total	19,767,251	nil

XII. TILEMAN (SE) LTD.

409. Tileman (SE) Ltd. ("Tileman") is a corporation organised according to the laws of the United Kingdom. It is in the construction and engineering business. It states that at the time of Iraq's invasion and occupation of Kuwait it was a contractor engaged on the construction of the Al Anbar Thermal Power Station in Iraq "Project 922" (the "Project"). Tileman states that it entered into a contract (the "Contract") with Al Fao General Establishment (the "Employer") to construct six single flue chimneys for the Project.

410. Tileman seeks compensation in the total amount of USD 3,881,167 (GBP 2,041,494) for contract losses, loss of tangible property, payment or relief to others, and interest.

411. For the reasons stated in paragraph 60 of the Summary, the Panel makes no recommendation with respect to Tileman's claim for interest.

Table 41. Tileman's claim

Claim element	Claim amount (USD)
Contract losses	2,845,469
Loss of tangible property	968,213
Payment or relief to others	16,154
Interest	51,331
Total	3,881,167

A. Contract losses

1. Facts and contentions

412. Tileman seeks compensation in the amount of USD 2,845,469 (GBP 1,496,717) for contract losses comprising:

(a) Unpaid invoices in the amount of USD 657,479 (GBP 345,834);

(b) "Loss of contract gross margin" in the amount of USD 1,295,087 (GBP 681,216);

(c) Demands under bank guarantees in the amount of USD 866,384 (GBP 455,718);

(d) Letter of credit charges in the amount of USD 18,726 (GBP 9,850); and

(e) Bank guarantee charges in the amount of USD 7,793 (GBP 4,099).

413. The Panel considers each of the claimed losses below.

2. Analysis and valuation

414. The Panel finds that Al Fao General Establishment (the Employer) is an agency of the Government of Iraq.

(a) Unpaid invoices

415. Tileman seeks compensation in the amount of USD 657,479 (GBP 345,834) for outstanding amounts owed to it in respect of the supply of equipment and skilled specialists to the Employer.

416. In support of its claim, Tileman provided copies of invoices relating to the services provided. Tileman also provided way bills from its shipper and customs documents bearing the insignia of the Republic of Iraq, which appear to relate to some of the invoices.

417. Tileman did not provide evidence of the Employer's certification of the work it allegedly performed or a copy of the contract with the Employer. Tileman was requested to provide this and other information and evidence in the article 34 notification, but Tileman did not reply.

418. The Panel finds that several of the invoices relate to work that was performed prior to 2 May 1990. Claims for unpaid amounts in respect of work performed prior to 2 May 1990 are outside the jurisdiction of the Commission and are not compensable under Security Council resolution 687 (1991). Applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 43 to 45 of the Summary, the Panel recommends no compensation for this amount.

419. In respect of all of the invoices submitted by Tileman, the Panel finds that no evidence was submitted to support these invoices. In consequence, the invoices amounted to no more than a self-generated collection of documents which is insufficient to support a recommendation by this Panel.

(b) "Loss of contract gross margin"

420. Tileman seeks compensation in the amount of USD 1,295,087 (GBP 681,216) for "loss of contract gross margin."

421. In support of its claim, Tileman provided an internal calculation of its loss. In its calculation, Tileman stated that the value of its initial contract tender for two chimneys was GBP 2,093,368. It subtracted costs of GBP 1,517,526 and claimed "gross profit" of GBP 575,842. Based on these figures, Tileman stated that its "gross profit percentage" was 27.5 per cent. Tileman stated that it later submitted a revised contract tender for six chimneys with a value of GBP 2,477,151. Based on the revised contract tender and the "gross profit percentage", Tileman submitted its claim for "loss of contract gross margin", 27.5 per cent of GBP 2,477,151, i.e. GBP 681,216.

422. Tileman also submitted an undated internal memorandum which listed the costs for goods and services. Tileman further submitted a fax to the Employer, dated 27 July 1989, confirming prices of services at GBP 2,477,151. However, Tileman did not submit a copy of the Contract.

423. In the absence of the Contract and any evidence that the Employer agreed to the prices proposed by Tileman, the Panel finds that Tileman failed to submit sufficient evidence of its loss. Therefore, the Panel recommends no compensation.

(c) Demands under bank guarantees

424. Tileman seeks compensation in the amount of USD 866,384 (GBP 455,718) for two bank guarantees issued in favour of its Employer via the correspondent bank, Rafidain Bank, Baghdad.

425. Tileman submitted copies of the guarantees, a request for extension of the bank guarantees and a letter from the Department of Trade and Industry denying the request for extension of the guarantees.

426. Tileman did not provide any proof of payment on the bank guarantees or evidence that the bank guarantees had been called. Therefore, in respect of the bank guarantees, the Panel recommends no compensation on the grounds of lack of evidence.

(d) Letter of credit charges

427. Tileman seeks compensation in the amount of USD 18,726 (GBP 9,850) for charges allegedly levied by the Central Bank of Iraq in respect of the letters of credit. However, Tileman also states that it rejected the bank charges and it did not submit any evidence of payment of the charges.

428. Tileman submitted a certificate from Rafidain Bank on account of the Employer stating Central Bank of Iraq charges in the amount of USD 17,742. It is not clear whether this charge for USD 17,742 is also the basis for the claim for compensation for GBP 9,850.

429. In respect of the bank charges, the Panel recommends no compensation on the grounds of lack of evidence.

(e) Bank guarantee charges

430. Tileman seeks compensation in the amount of USD 7,793 (GBP 4,099) for agent charges allegedly levied by Rafidain Bank in respect of one of the bank guarantees. However, Tileman also states that it rejected these charges.

431. Tileman submitted a receipt from Lloyds Bank, dated 9 November 1989, stating that Tileman's account was debited GBP 4,099 for agent charges.

432. Tileman also submitted a copy of guarantee No. F. 107736 to its Employer, dated 26 September 1989, from Rafidain Bank in the amount of GBP 247,715 and a charge slip for the guarantee with a charge of GBP 4,099.

433. According to the evidence submitted by Tileman, it paid the agent charges on the guarantee nine months prior to Iraq's invasion and occupation of Kuwait. Tileman did not provide any explanation of a direct causal relationship between the charges which it paid in November 1989 and Iraq's invasion and occupation of Kuwait, which took place nine months later in August 1990. Therefore, the Panel recommends no compensation.

3. Recommendation

434. The Panel recommends no compensation for contract losses.

B. Loss of tangible property

1. Facts and contentions

435. Tileman seeks compensation in the amount of USD 968,213 (GBP 509,280) for loss of tangible property. The claim is for the alleged loss of vehicles, plant and equipment.

(a) Loss of vehicles

436. Tileman seeks compensation in the amount of USD 65,186 (GBP 34,288) for the loss of four vehicles. Tileman states that three of the vehicles which were supplied were "excluded from the contract as submitted". It states that the one additional vehicle was shipped by accident but should have been "recoverable" from insurances held by the Employer for the site.

(b) Loss of plant and equipment

437. Tileman seeks compensation in the amount of USD 903,027 (GBP 474,992) for the loss of plant and equipment.

2. Analysis and valuation

(a) Loss of vehicles

438. In support of its claim, Tileman submitted an inter-office memorandum dated 22 December 1989 requesting transfer of funds to the supplier to pay for the vehicles, a letter from Tileman to the Employer dated 2 February 1990 confirming that one of its vehicles was to be made available for use by the Employer's personnel on the Project, a memorandum from the car dealer dated 11 January 1990 to Tileman with instructions regarding pickup of the vehicles, a notice from Lloyds Bank dated 20 June 1990 which states that KWD 3,285 had been transferred to the account of the car dealer, and an untranslated invoice. The Panel did not consider the untranslated invoice.

439. The Panel finds that Tileman failed to demonstrate that the vehicles were in Iraq on 2 August 1990. This could have been demonstrated by showing that Tileman was performing work as at 2 August 1990. However, Tileman did not submit any evidence (e.g. a contract) that it was performing work when Iraq's invasion and occupation of Kuwait occurred.

440. The Panel recommends no compensation for loss of vehicles.

(b) Loss of plant and equipment

441. In support of its claim, Tileman submitted an undated list of its plant and equipment in respect of Contract C.3910/8. However, it was not clear if this contract referred to Tileman's contract with the Employer for work on the Project. Tileman states that calculations were made at current replacement values.

442. The article 34 notification requested that Tileman provide shipping lists, dates of shipping and original invoices as well as evidence of the property's presence in Iraq as at 2 August 1990. The article 34 notification further requested information about the fact, cause and date of the loss of plant and equipment. Tileman did not respond to the article 34 notification.

443. The Panel finds that Tileman did not provide sufficient evidence to substantiate its claim. Therefore, it recommends no compensation for loss of plant and equipment.

3. Recommendation

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

C. Payment or relief to others

1. Facts and contentions

445. Tileman seeks compensation in the amount of USD 16,154 (GBP 8,497) for payment or relief to others. The claim is for the accommodation costs of evacuated employees and eight airplane tickets from Iraq to the United Kingdom at a cost of GBP 500 per ticket.

2. Analysis and valuation

446. Tileman did not provide copies of the airplane tickets. Tileman provided a copy of a receipt for a hotel stay in Damascus with an illegible date attached to an expense report dated 3 October 1990. However, Tileman did not explain the circumstances surrounding its alleged loss nor did it explain how the alleged loss was directly caused by Iraq's invasion of Kuwait.

447. The article 34 notification requested that Tileman provide documentation of its expenditures, including, but not limited to: lists of affected employees, payroll records, travel receipts, evidence of reimbursement, flight numbers, dates, and an explanation of the costs that exceeded the expected travel expenditures. Tileman did not respond to the article 34 notification.

448. For a claim for repatriating employees to be compensable, a claimant must provide evidence that (a) the claimant incurred expenses; (b) the expenses were directly incurred as a direct result of Iraq's invasion of Kuwait; and (c) that expenses exceeded the normal costs that would have been incurred upon natural completion of the contract.

449. The Panel finds that Tileman did not provide sufficient evidence of its alleged loss.

3. Recommendation

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

D. Summary of recommended compensation for Tileman

Table 42. Recommended compensation for Tileman

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	2,845,469	nil
Loss of tangible property	968,213	nil
Payment or relief to others	16,154	nil
Interest	51,331	--
Total	3,881,167	nil

451. Based on its findings regarding Tileman's claim, the Panel recommends no compensation.

XIII. TECHMATION INC.

452. Techmation Inc. ("Techmation") is a corporation organised according to the laws of the State of Virginia, United States of America. Techmation is in the petroleum engineering business.

453. In the “E” claim form, Techmation sought compensation for losses in the total amount of USD 506,369 for contract losses, claim preparation costs and interest.

454. In its response to the article 34 notification, Techmation reduced its claim amount to USD 339,814. The reduction was due to the withdrawal of its claim for debts owing to its subcontractors, Industrial International Ltd. and Pelton Company Inc. Techmation states that, after reviewing the claim, it found that the employer was not responsible for the amounts owing to Industrial International Ltd. and Pelton Company Inc., and that, as the direct contracting party, it is not liable for these payments.

455. The Panel therefore considered the amended claim amount of USD 339,814, as shown in table 43, infra.

Table 43. Techmation’s claim

Claim element	Claim amount (USD)
Contract losses	334,814
Claim preparation costs	5,000
Interest (no amount specified)	--
Total	339,814

456. Applying the approach taken with respect to claims preparation costs set out in paragraph 62 of the Summary, the Panel makes no recommendation for claim preparation costs.

457. For the reasons stated in paragraph 60 of the Summary, the Panel makes no recommendation with respect to Techmation’s claim for interest.

A. Contract losses

1. Facts and contentions

458. Techmation seeks compensation in the amount of USD 334,814 for contract losses.

459. Techmation asserts that at the time of Iraq's invasion and occupation of Kuwait, it was performing a supply contract for the Iraqi National Oil Company (the "Employer"). The contract required Techmation to supply geophysical equipment (the "Equipment") to the Employer. The Equipment was to be supplied on the terms of a purchase order No. X40-89-1035-01 dated 19 September 1989 for the sum of USD 1,627,881 (the “contract price”). Techmation states that the contract price was subsequently increased to USD 1,674,067.

460. At the time of Iraq’s invasion and occupation of Kuwait, Techmation states that it had received 80 per cent of the contract price in the amount of USD 1,302,305 against presentation of shipping documents. This amount was paid pursuant to the letter of credit. The issuing bank, Arab American Bank, confirmed that an amount of USD 1,339,254 (before deduction of charges) was paid on 12 April 1990. The Panel notes that this amount of USD 1,339,254 equals 80 per cent of USD 1,674,067 (the “increased contract price”). Techmation seeks compensation for the remaining 20 per cent of the increased contract price.

461. The outstanding amount of the contract price was payable in two equal instalments of USD 167,408. The first instalment was payable upon receipt of the Equipment on site, installation and start up in Baghdad and the second instalment was payable upon completion of a one-year warranty of quality commencing from the issue of the bill of lading.

462. Techmation asserts that because of Iraq's invasion and occupation of Kuwait it was unable to deliver the Equipment to Iraq and to require payment of the outstanding instalments of the contract price in the amount of USD 334,814.

2. Analysis and valuation

463. In support of its claim, Techmation provided copies of its correspondence with the Employer outlining a schedule for the installation at site and performance of the start-up tests. Techmation also provided evidence that it had assigned an engineer to be present on site for the tests. The engineer arrived on site on 17 June 1990 to conduct the tests but could not do so due to the non-delivery of a part of the Equipment. Further arrangements were made for the engineer to return to Iraq and the missing Equipment arrived on 6 August 1990. By such date, Iraq's invasion and occupation of Kuwait had commenced. Techmation stated that it did not request its engineer to return to Iraq because the Government of Iraq was, during the hostilities, taking non-Iraqis present in Iraq as hostages. Techmation did not want to expose its personnel to such a risk and therefore the designated engineer did not travel to Baghdad. Techmation clarifies in the Statement of Claim that but for the actions of hostage-taking by the Government of Iraq, it would have allowed its personnel to return to Baghdad to perform the acceptance tests.

464. After a review of the evidence, the Panel finds that Iraq's invasion and occupation of Kuwait prevented Techmation from completing the start-up test and recovering the balance of the contract price.

465. The Panel is of the opinion that Techmation has suffered a loss resulting directly from Iraq's invasion and occupation of Kuwait. After taking into account the evidence submitted by Techmation, the Panel recommends compensation in the amount of USD 301,333.

3. Recommendation

466. The Panel recommends compensation in the amount of USD 301,333 for contract losses.

B. Summary of recommended compensation for Techmation

Table 44. Recommended compensation for Techmation

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	334,814	301,333
Claim preparation costs	5,000	--
Interest (no amount specified)	--	--
Total	339,814	301,333

467. Based on its findings regarding Techmation's claim, the Panel recommends compensation in the amount of USD 301,333. The Panel determines the date of loss to be 2 August 1990.

XIV. ENERGOPROJEKT INZENJERING - ENGINEERING AND CONTRACTING COMPANY LTD.

468. Energoprojekt Inzenjering - Engineering Contracting Company Ltd. ("Energoprojekt") is a corporation organised according to the laws of the Federal Republic of Yugoslavia. Energoprojekt states that at the time of Iraq's invasion and occupation of Kuwait, it was the main contractor engaged on the construction and refurbishment of two villas in Iraq. Energoprojekt states that it entered into a contract dated 23 May 1990 (the "Contract") with the Ministry of Planning, Iraq (the "Employer"), to install marble and wood and to complete metalworks and related works for "Villa No. 2" and to complete certain works for the swimming pool of "Villa No. 75" in Basrah, Iraq.

469. In the "E" claim form, Energoprojekt sought compensation in the amount of USD 13,457,800 for contract losses and interest.

470. The Panel finds that the classification of losses in Energoprojekt's claim for "contract losses" is erroneous and contains arithmetic errors. Accordingly, the Panel has reclassified parts of Energoprojekt's claim and corrected arithmetic errors as appropriate. The result is as set out in table 45, infra.

471. For the reasons set out in paragraph 480, infra, the Panel further finds that the claimed amount for contract losses is more accurately stated as USD 10,070,265.

472. The Panel therefore considered the amount of USD 13,104,704 for contract losses, loss of tangible property, payment or relief to others, financial losses and interest, as shown in table 45, infra.

Table 45. Energoprojekt's claim

Claim element	Claim amount (USD)
Contract losses	10,070,265
Loss of tangible property	21,746
Payment or relief to others	117,686
Financial losses	545,199
Interest	2,349,808
Total	13,104,704

473. For the reasons stated in paragraph 60 of the Summary, the Panel makes no recommendation with respect to Energoprojekt's claim for interest.

A. Contract losses

1. Facts and contentions

474. Energoprojekt seeks compensation in the amount of USD 10,070,265 for contract losses. The claim is for costs allegedly incurred in connection with performing the Contract. Energoprojekt

alleges that 321 of its employees were in Iraq performing work on the Contract shortly after the signing of the Contract on 23 May 1990. The work was scheduled to be completed by 10 September 1990. After Iraq's invasion and occupation of Kuwait, the employees had to stop work on the Contract. The employees were ultimately repatriated from Iraq on various dates after 2 August 1990.

475. Energoprojekt's claim for contract losses is summarised in table 46, infra.

Table 46. Energoprojekt's claim for contract losses

1	2	3	4	5	6
	Loss item	Claim amount (as set out in the Statement of Claim)	Amount paid (ascertained from documents lodged)	Value of claim in original currency (column No. 4 less column No. 3)	Value of claim (USD)
A.1	Costs chargeable without fee	IQD 7,791	IQD 5,032	IQD 2,759	8,871
A.2	Costs chargeable with fee	IQD 274,473 USD 2,796,917	IQD 246,399 USD 1,828,074	IQD 28,074 USD 968,843	1,059,113
A.3	Total costs not included in interim certificates				
	(a) Crane hire charges	IQD 9,844	nil	IQD 9,844	31,653
	(b) Compressor hire charges	IQD 2,470	nil	IQD 2,470	7,942
	(c) "SIDA test"	IQD 100	nil	IQD 100	322
	(d) Taxi and hotel bills	IQD 295	nil	IQD 295	949
	(e) Marble supply	USD 3,550,250	nil	USD 3,550,250	3,550,250
	(f) Containers for marble storage	USD 43,000	nil	USD 43,000	43,000
	(g) Storage charges for marble	JOD[a] 194,912	nil	JOD 194,912	296,219
	(h) Woodwork supply	USD 4,730,500	nil	USD 4,730,500	4,730,500
	(i) Aluminium supply	USD 220,724	nil	USD 220,724	220,724
	(j) Cost of labour	IQD 35,838 USD 2,185,000	IQD 26,878 USD 1,092,500	IQD 8,960 USD 1,092,500	1,121,310
	(k) Contractor's fee	IQD 50,257 USD 1,488,732	IQD 43,483 USD 511,101	IQD 6,774 USD 977,631	999,412
	Subtotal (total costs not included in interim certificates)	IQD 98,804 JOD 194,912 USD 12,218,206	IQD 70,361 USD 1,603,601	IQD 28,443 JOD 194,912 USD 10,614,605	11,002,281
	Total (prior to deduction of advance payments)	IQD 381,068 JOD 194,912 USD 15,015,123	IQD 321,792 USD 3,431,675	IQD 59,276 JOD 194,912 USD 11,583,448	12,070,265
	Deduct: advance payment retained	(IQD 268,117) (USD 5,260,091)	(IQD 268,117) (USD 3,260,091)	(USD 2,000,000)	(2,000,000)
	Total (after deduction of advance payment retained)	IQD 112,951 JOD 194,912 USD 9,755,032	IQD 53,675 USD 171,584	IQD 59,276 JOD 194,912 USD 9,583,448	10,070,265

[a] Jordanian dinars (JOD)

476. Energoprojekt alleges that prior to the stoppage of works following Iraq's invasion and occupation of Kuwait, it had submitted seven Interim Payment Certificates (Interim Payment Certificates Nos. 1 to 7) to the Employer for certification and payment. The alleged losses in respect of the Interim Payment Certificates Nos. 1 to 7 are claimed as "costs chargeable without fee" and

"total costs chargeable with fee". In addition, Energoprojekt alleged that due to Iraq's invasion and occupation of Kuwait, it did not include certain costs incurred in respect of performing the Contract and these alleged losses are claimed as "total costs not included in interim certificates".

2. Analysis and valuation

477. The Panel finds that the Employer is an agency of the Government of Iraq.

478. The Panel finds that the works were payable based on a "cost plus fee" contract. The Employer agreed to reimburse Energoprojekt for all actual costs, charges and expenses incurred for the Contract. In addition to the reimbursement of costs, the Employer agreed to pay Energoprojekt a fixed sum payable by instalments in the amount of USD 2,300,000 for "cost of labour" and a fee of up to USD 10,000,000 as "contractor's fee", to be calculated based on the value of work performed. The payment of the "cost of labour" was not dependent on the value of work performed.

479. The Panel finds that all costs incurred for the performance of the work, including the contractor's fee and cost of labour, was to be invoiced by an "Interim Payment Certificate". Every two weeks Energoprojekt was required to submit an Interim Payment Certificate to the Employer for its approval. All Interim Payment Certificates were to be accompanied by invoices from subcontractors evidencing the actual costs incurred.

480. The Panel explains that its figure for contract losses is different from that calculated by Energoprojekt due to Energoprojekt's method of calculation. The method of calculation used by Energoprojekt in determining the alleged contract loss is inappropriate for the following reasons:

(a) In respect of invoices that had been certified and paid by the Employer, the Panel finds that Energoprojekt has included in its calculation of the claimed amount, the difference in the values between the invoiced amounts and the amounts ultimately approved for payment. This approach in calculating the claimed amount does not reflect the fact that, pursuant to the terms of the Contract, the invoiced costs were to be certified by the Employer and the Employer had the right to approve or disapprove the invoiced amount. Article 9.6.2 of the Contract provides clear provision for the rejection of invoiced amounts and a procedure for the resolution of such disputed amounts. Therefore, as is reflected in the evidence submitted, there are differences between the invoiced costs and the amount ultimately approved for payment. Energoprojekt addresses this by asserting in the Statement of Claim that the Employer was "wrong" in making deductions to the invoiced amounts and "unilaterally and without any explanation in writing" deducting the whole or the parts of the already "paid invoices". However, Energoprojekt did not provide any evidence to support its contentions.

(b) In relation to certain loss items (e.g. contractor's fee and cost of labour), Energoprojekt claims the difference between (i) 100 per cent of the fee payable, and (ii) the fees paid prior to the stoppage of the works. This is not accurate as the contractor's fees and costs of labour were meant to be paid over the entire duration of the Contract. As the Contract was never completed and these costs were never incurred, Energoprojekt cannot properly claim the entire amount of such fees and costs.

(c) Energoprojekt does not, in calculating the amounts paid by the Employer, take into consideration the amount of advance payment still in its hand and retention monies that had been deducted by the Employer as required by the terms of the Contract.

481. Accordingly, the Panel has recalculated the appropriate quantum of Energoprojekt's claim for contract losses after taking into consideration the foregoing observations to arrive at an amount of USD 10,070,265.

(a) Costs chargeable without fee

482. Energoprojekt seeks compensation in the amount of IQD 2,759 for "costs chargeable without fee". This loss item is the first line item in each Interim Payment Certificate and comprises a claim for costs to be reimbursed which are not subject to the payment of the contractor's fee (stipulated in article 8 of the terms of the Contract)

483. The Panel finds that the cumulative amount invoiced for all seven Interim Payment Certificates in respect of "cost chargeable without fee" is IQD 7,791. Energoprojekt confirmed that the amounts invoiced for "total costs chargeable without fee" in Interim Payment Certificates Nos. 1 to 6 in the amount of IQD 5,032 have been paid by the Employer. Accordingly, the only unpaid amount for "total cost chargeable without fee" is contained in Interim Payment Certificate No. 7 in the amount of IQD 2,759.

484. In support of its claim, Energoprojekt provided a copy of Interim Payment Certificate No. 7 showing the cumulative and non-cumulative value of the works performed. The Interim Payment Certificates confirm that the invoiced amounts are calculated for works performed between 28 August and 20 September 1990. Although there is no indication of the Employer's approval of the amount invoiced on the Interim Payment Certificates or invoices from subsuppliers or subcontractors accompanying the Interim Payment Certificates, the Panel concludes after a review of other evidence submitted that the works had continued after the date of the sixth Interim Payment Certificate, i.e. 28 August 1990. Furthermore, the Panel is of the opinion that the lack of approval for Interim Payment Certificate No. 7 on the part of the Employer is due to the certification process having been frustrated by the events occurring after 2 August 1990.

485. On the evidence provided, the Panel finds that the unpaid amount in Interim Payment Certificate No. 7 in the amount of IQD 2,759 is compensable in principle. The Panel however finds that the Employer had, in certifying the amounts invoiced in Interim Payment Certificates Nos. 1 to 6, deducted an average of 13 per cent from the invoiced amounts prior to making payment to Energoprojekt. The Panel considers that it is appropriate to make a like deduction in calculating the compensation payable in connection with Interim Payment Certificate No. 7.

486. This calculation produces an amount of IQD 2,400, and the Panel recommends compensation in this amount.

(b) Costs chargeable with fee

487. Energoprojekt seeks compensation in the amount of IQD 28,074 and USD 968,843 for "costs chargeable with fee". This loss item is the second line item in each Interim Payment Certificate and relates to the reimbursement of costs which are subject to the payment of the contractor's fee.

488. The alleged losses comprise the following components:

(i) Iraqi dinar portion

489. Energoprojekt alleges that the claim for the outstanding amount of work denominated in Iraqi dinars is derived from the unpaid amount contained in Interim Payment Certificate No. 7 in the amount of IQD 28,074.

490. In support of its claim for the unpaid amount contained in Interim Payment Certificate No. 7, Energoprojekt provided a copy of Interim Payment Certificate No. 7 showing the cumulative and non-cumulative value of the works performed. The Panel finds that although there is no indication of the Employer's approval of the amount invoiced on the Interim Payment Certificate or invoices from subsuppliers or subcontractors accompanying the certificate, other evidence submitted by Energoprojekt supports the contention that the works continued after the date of the sixth Interim Payment Certificate, i.e. 28 August 1990. Furthermore, the Panel is of the opinion that the lack of approval for Interim Payment Certificate No. 7 on the part of the Employer is due to the certification process having been frustrated by the events occurring after 2 August 1990.

491. On the evidence provided, the Panel finds that the unpaid amount in Interim Payment Certificate No. 7 in the amount of IQD 28,074 is compensable in principle. The Panel however finds that the Employer had, in certifying the amounts invoiced in Interim Payment Certificates Nos. 1 to 6, deducted an average of 13 per cent from the invoiced amounts prior to making payment to Energoprojekt. The Panel considers that it is appropriate to make a like deduction in calculating the compensation payable in connection with Interim Payment Certificate No. 7.

492. This calculation produces an amount of IQD 24,424, and the Panel recommends compensation in this amount.

(ii) United States dollar portion

493. Energoprojekt alleges that the claim for the outstanding amount of work denominated in United States dollars is USD 968,843. The claimed amount represents the allegedly unpaid amounts included in Interim Payment Certificate No. 5 (USD 963,166) and No. 6 (USD 5,677).

494. The Panel finds that Interim Payment Certificate No. 5 was certified by the Employer but has not been paid and, therefore, Energoprojekt is entitled to payment of the claimed amount. With respect to Interim Payment Certificate No. 6, the Panel finds that since the Iraqi dinar portion was approved for payment, there is no plausible explanation as to why the United States dollar portion of works should not have been payable.

495. The Panel is satisfied that Energoprojekt is entitled to compensation for the claimed amounts in respect of Interim Payment Certificates Nos. 5 and 6 in the amount of USD 968,843.

496. In summary, the Panel recommends compensation in the amount of IQD 24,424 and USD 968,843 for "costs chargeable with fee".

(c) Total costs not included in Interim Payment Certificates

497. Energoprojekt seeks compensation in the amount of USD 11,002,281 (IQD 28,443, JOD 194,912 and USD 10,614,605) for costs allegedly incurred in respect of the Contract that were not invoiced in any Interim Payment Certificate prior to the stoppage of the works.

(i) Crane hire charges

498. Energoprojekt alleges that it paid a sum of IQD 9,844 for the hire of a crane and its driver for the performance of the works commencing on 6 August 1990 and ending on 22 August 1990.

499. In support of its claim, Energoprojekt provided an invoice and receipt of payment in the amount of IQD 9,843.750 signed by the crane driver.

500. The Panel finds that Energoprojekt is entitled to compensation in the amount of IQD 9,844.

(ii) Compressor hire charges

501. Energoprojekt alleges that it paid a sum of IQD 2,470 for the hire of a compressor for the performance of the works commencing on 1 August 1990 and ending on 23 August 1990.

502. In support of its claim, Energoprojekt provided an invoice and receipt of payment in the claimed amount signed by the operator of the compressor.

503. The Panel finds that Energoprojekt is entitled to compensation in the amount of IQD 2,470.

(iii) "SIDA test"

504. Energoprojekt alleges that it paid a sum of IQD 100 for the performance of a "SIDA test" (Aids test).

505. In support of its claim, Energoprojekt provided a document dated 7 June 1990 which resembles a receipt. However, aside from the words "SIDA test" and the amount of "IQD 100", its contents are not translated. There is no other evidence explaining the purpose of the payment of this amount or evidence that Energoprojekt paid the claimed amount. Moreover, Energoprojekt does not explain how its alleged loss arose as a direct result of Iraq's invasion and occupation of Kuwait.

506. The Panel finds that Energoprojekt failed to submit sufficient evidence to substantiate its loss. The Panel recommends no compensation.

(iv) Taxi and hotel bills

507. Energoprojekt seeks compensation in the amount of IQD 295 for taxi and hotel bills. Energoprojekt submitted no evidence in support of its claim.

508. The Panel recommends no compensation.

(v) Marble supply

509. Energoprojekt seeks three elements of compensation in connection with the marble supply for the Contract. The three elements comprise a claim in the amount of USD 3,550,250 for outstanding payments in respect of the supply of the marble and two claims in connection with the storage of the marble in the amounts of USD 43,000 and JOD 194,912 respectively.

510. In support of its claim for the outstanding payments in respect of the supply of the marble, Energoprojekt submitted invoices Nos. 733, 799, 809, 813, 872, 884, 899, 900, 901, 902 and 903 issued by the subcontractor, Marmi Formigari Marbles and Granites S.p.A. of Italy, to Energoprojekt.

511. In support of its claim for payments allegedly made to CMB Transport NV of Belgium in the amount of USD 43,000 for the purchase of 16 containers for the storage of marble, Energoprojekt provided written confirmation dated 12 February 1992 from CMB Transport NV confirming the sale of the containers and invoice No. D31227 dated 23 December 1991 in the amount of USD 43,000.

512. In support of its claim for payments allegedly made to Amin Kawar & Sons Co. of Jordan in the amount of JOD 194,912 for services related to the payment of storage fees and port charges to the relevant port authorities, Energoprojekt provided confirmation of the amounts owed to Amin Kawar & Sons Co. in the form of correspondence setting out the outstanding fees and charges.

513. The Panel after reviewing the claim finds that four of the invoices for the marble itself (invoices Nos. 733, 799, 809 and 813) were included in the Contract application for payment and, accordingly, do not qualify for separate consideration.

514. The remaining invoices (invoices Nos. 872, 884, 899, 900, 901, 902 and 903) were CIF Basra and were met by a combination of advance payment and letter of credit. As a result of Iraq's invasion and occupation of Kuwait it was impossible to deliver the shipped marble to Basra and it was diverted to Aqaba Port, Jordan.

515. In Aqaba Port, Energoprojekt purchased a number of containers to store the marble and, in due course, transferred the marble for storage to the Free Zone of Aqaba pursuant to instructions from the customs authority in December 1992. Energoprojekt provided invoices for the storage costs.

516. Energoprojekt alleged that the storage charges were incurred due to the fact that the works were never resumed, and the materials remained in storage at Aqaba Port, Jordan. Energoprojekt further explained that the continued storage of the marble was necessitated by the fact that the materials could not be resold or reutilised for any other customer due to its unique design. In support of its assertion, Energoprojekt provided correspondence from the vendor of the materials documenting its failed attempts to resell the marble together with a fax dated 26 August 1994 sent by an associate company "VIVAND" (through the agent, Amin Kawar & Sons Co.) to the Jordanian port authorities negotiating a reduction of the storage costs. The uniqueness of the design was also confirmed by an affidavit dated 7 June 2001 sworn by the architects employed by "Energoprojekt Arhitektura – Architecture and Town Planning Co. Ltd." who were engaged to provide design services for the Contract.

517. A cross check reveals that no claim has been filed with the Commission by the marble supplier, Marmi Formigari Marbles and Granites S.p.A.

518. Based on the evidence provided, the Panel is satisfied that the marble no longer has any commercial value and that Energoprojekt established its entitlement to the amounts of USD 3,420,000 for the supply of marble, USD 43,000 for the purchase of storage containers and JOD 194,912 for the storage charges. The Panel recommends compensation in these amounts.

(vi) Woodwork supply

519. Energoprojekt seeks compensation in the amount of USD 4,730,500 in respect of outstanding payments for the purchase of woodwork for the Contract. The claim is for the alleged costs payable

for woodwork purchased for the Contract from Al-Wagan General Contracting Establishment pursuant to a subcontract dated 14 June 1990 at a price of USD 5,720,000.

520. Energoprojekt states that the supply of woodwork had commenced at the time of Iraq's invasion and occupation of Kuwait. After Iraq's invasion and occupation of Kuwait, the subcontractor was not able to deliver further shipments of woodwork to Iraq due to the trade embargo. Energoprojekt alleges that it dealt with the undelivered woodwork as follows:

(a) Woodwork with a value of USD 1,617,978 was rerouted to the customs-free zone in Az-Zarqa, Jordan, and remains in storage in Jordan under a warehouse warrant issued in the name of Energoprojekt's representative in Amman; and

(b) Woodwork with a value of USD 3,112,522, which was ready for shipment, remained at factories in the United Arab Emirates.

521. In support of its claim, Energoprojekt provided written confirmation that woodwork with a value of USD 5,720,000 was purchased from the subcontractor together with a breakdown of the work performed. The subcontractor further confirmed in a letter dated 9 June 2001 that woodwork with a value of USD 3,112,522 remains in storage at factories in the United Arab Emirates.

522. Energoprojekt submits that the resale of the woodwork was practically "impossible" due to its unique design.

523. Based on the evidence provided, the Panel finds that Energoprojekt suffered a loss as a direct result of Iraq's invasion and occupation of Kuwait in the amount of USD 4,730,500 and recommends compensation in this amount.

(vii) Aluminium supply

524. Energoprojekt seeks compensation in the amount of USD 220,724 in respect of outstanding payments for the supply of aluminium for the Contract. The claim is for the alleged costs of aluminium purchased for the Contract from Alumina Industry of Yugoslavia pursuant to a subcontract dated 29 June 1990 at a price of USD 315,320.

525. Energoprojekt states that the aluminium was complete and ready for shipment prior to Iraq's invasion and occupation of Kuwait. However, due to the trade embargo, the aluminium was not delivered and was stored at the subcontractor's premises at Skopje, Macedonia.

526. The loss allegedly suffered by Energoprojekt is derived from an amount of USD 63,640 paid to the subcontractor pursuant to an agreement dated 5 October 1990 between the parties. The other portion of the claimed loss is made up of an amount of USD 157,084 which is said to be payable, but which has not been paid by Energoprojekt, under the terms of the subcontract for the manufacture of the aluminium.

527. In support of its claim, Energoprojekt provided written confirmation from the subcontractor that it had sold to Energoprojekt aluminium with a value of USD 220,724. It goes on to state that the materials had been manufactured and were kept in storage in Skopje.

528. Energoprojekt stated that it was unable to resell the aluminium due to the unique design requirements of the Contract. The uniqueness of the design was confirmed by an affidavit dated 7 June 2001 sworn by the architects employed by "Energoprojekt Arhitektura – Architecture and Town Planning Co. Ltd." that were engaged to provide design services for the Contract.

529. Based on the evidence provided, the Panel finds that Energoprojekt suffered a loss as a direct result of Iraq's invasion and occupation of Kuwait in the amount of USD 63,640 and recommends compensation in this amount.

(c) Cost of labour

530. Energoprojekt seeks compensation in the amount of IQD 8,960 and USD 1,092,500 for the cost of labour.

531. Article 8.1.1 of the Contract entitles Energoprojekt to claim from the Employer an amount of up to USD 2,300,000 as the cost of labour. The amount of USD 2,300,000 was payable in eight equal instalments in the proportion of 95 per cent in United States dollars and five per cent in Iraqi dinars. The claimed amount of USD 2,185,000 is equal to 95 per cent of USD 2,300,000 and the claimed amount of IQD 35,838 is equal to 5 per cent of USD 2,300,000 (post conversion at the rate specified in the Contract).

532. Energoprojekt claims the full agreed costs notwithstanding that it only substantially completed the works. Energoprojekt asserts its full entitlement to the costs on the basis that it was delayed by the Employer in the performance of the works prior to 2 August 1990 and also had to incur additional labour costs to accelerate the works prior to their stoppage. Energoprojekt asserts that, had there been no delay of the works, it could have complied with the schedule of works and completed the project by the original scheduled date for completion of 10 September 1990.

533. In support of its claim, Energoprojekt referred to the amounts of labour costs invoiced in Interim Payment Certificates Nos. 1 to 7 and an internally-generated table setting out the cost of labour as invoiced in the Interim Payment Certificates Nos. 1 to 7. The Panel finds that there is a clear discrepancy between the values included in the table and the claimed amount. The Panel finds that the table evidences payment made to Energoprojekt for the cost of labour in the amount of IQD 26,878 and USD 1,092,500. Accordingly, Energoprojekt is not entitled to compensation for these amounts as they have been paid by the Employer.

534. The Panel finds that Energoprojekt has not received payment for the cost of labour in the amount of USD 273,125 (Interim Payment Certificate No. 5) and IQD 4,480 (Interim Payment Certificate No. 7).

535. Energoprojekt further asserts that it lost the opportunity to earn a bonus for early completion of the works as permitted under article 14.1 of the Contract. The basis of the payment was the completion of the contract prior to the completion date determined in accordance with the contract. In view of the numerous delays to the Contract, the time for completion was revised. However, the Panel finds that there is insufficient evidence to determine if there was a new completion date or if Energoprojekt would have been able to complete the works prior to the revised completion time (assuming a new date could have been agreed).

536. After reviewing the evidence, the Panel determines that Energoprojekt is entitled to compensation in the amount of USD 273,125 and IQD 4,480 for cost of labour.

(d) Contractor's fee

537. Energoprojekt seeks compensation in the amount of IQD 6,774 and USD 977,631 for contractor's fee.

538. Under the Contract, Energoprojekt is permitted to claim from the Employer a fee in United States dollars for the value of work performed in the proportions of 17.5 per cent of the first USD 6,000,000 (i.e. a maximum of USD 1,050,000) and 15 per cent of the next USD 4,000,000 (i.e. a maximum of USD 600,000). The fee is payable on the costs incurred in Iraqi dinars and United States dollars. No fee is payable for work invoiced above USD 10,000,000. As a result, the maximum contractor's fee that Energoprojekt can recover under the Contract is USD 1,650,000.

539. In support of its claim, Energoprojekt referred to the amounts of contractor's fees invoiced in Interim Payment Certificates Nos. 1 to 7 and an internally-generated table setting out the contractor's fee as invoiced in the Interim Payment Certificates Nos. 1 to 7. There is a clear discrepancy between the values included in the table and the claimed amount. The Panel finds that the table evidences payment made to Energoprojekt for the contractor's fee invoiced in Interim Payment Certificates Nos. 1 to 4 (United States dollar and Iraqi dinar portion) and Nos. 5 and 6 (Iraqi dinar portion only). Accordingly, Energoprojekt is not entitled to compensation for these amounts as they have been paid by the Employer.

540. Based on the evidence provided, the Panel finds that Energoprojekt has not received payment for Contractor's fee in the amount of USD 216,531 (Interim Payment Certificate No. 5) and IQD 5,697 (Interim Payment Certificate No. 7).

541. After reviewing the evidence, the Panel determines that Energoprojekt is entitled to compensation in the amount of USD 216,351 and IQD 5,697 for contractor's fee.

(e) Retention monies

542. Energoprojekt asserted losses relating to the non-release of retention monies equal to five per cent of the value of each Interim Payment Certificate submitted to the Employer. Under article 9.9 of the Contract the retention monies were to be withheld initially until five days after the issue of the taking over certificate. At that point, half of the total retention monies was to be paid to Energoprojekt. The balance of the retention monies was to be paid to Energoprojekt within seven days of the issue of the final acceptance certificate.

543. Having considered all the documentation, the Panel finds that the Employer retained, under article 9.9 of the Contract, an amount of USD 171,584 (contained in Interim Payment Certificates Nos. 1 to 4) and an amount of IQD 14,849 (contained in Interim Payment Certificates Nos. 1 to 6). However, the Panel finds that the evidence submitted by Energoprojekt demonstrated that the project would have reached a conclusion, but in executing the completion of the Contract, Energoprojekt would have itself incurred costs equal to 10 per cent of the retention monies. Such costs would amount to USD 17,158 and IQD 1,485. After allowing for such costs, applying the principles set out

in paragraph 88 of the Summary, the Panel determines that Energoprojekt is entitled to the payment of retention monies in the amount of USD 197,397 (USD 154,426 and IQD 13,364).

3. Summary of Panel's findings

544. In summary, the Panel finds that Energoprojekt suffered a loss resulting directly from Iraq's invasion and occupation of Kuwait in respect of the following items included in Energoprojekt's claim for contract losses. The Panel's findings in respect of Energoprojekt's claim for contract losses is summarised in table 47, infra.

Table 47. Energoprojekt's claim for contract losses – Panel's findings

	Loss item	Panel's findings (original currency)	Panel's findings (USD)
A.1	Costs chargeable without fee	IQD 2,400	7,717
A.2	Costs chargeable with fee	IQD 24,424 USD 968,843	1,047,377
A.3	Total costs not included in interim certificates		
	(a) Crane hire charges	IQD 9,844	31,653
	(b) Compressor hire charges	IQD 2,470	7,942
	(c) "SIDA test"	nil	nil
	(d) Taxi and hotel bills	nil	nil
	(e) Marble supply	USD 3,420,000	3,420,000
	(f) Containers for marble storage	USD 43,000	43,000
	(g) Storage charges for marble	JOD 194,912	296,219
	(h) Woodwork supply	USD 4,730,500	4,730,500
	(i) Aluminium supply	USD 63,640	63,640
	(j) Cost of labour	IQD 4,480 USD 273,125	287,530
	(k) Contractor's fee	IQD 5,697 USD 216,351	234,669
	Subtotal (total costs not included in interim certificates)	IQD 22,491 JOD 194,912 USD 8,746,616	9,115,153
	Retention monies	IQD 13,364 USD 154,426	197,397
	Total	IQD 62,679 JOD 194,912 USD 9,869,885	10,367,644

4. Advance payment retained by Energoprojekt

545. Energoprojekt confirmed that it received from the Employer an advance payment in the amount of USD 3,000,000. The Panel finds that only USD 1,000,000 of the advance payment has been repaid to the Employer via Interim Payment Certificates Nos. 1 to 4 and Energoprojekt has to give credit for USD 2,000,000 of the advance payment.

546. Accordingly, applying the approach with respect to advance payments set out in paragraphs 68 to 71 of the Summary, the Panel finds that the amount of USD 2,000,000 must be deducted from the direct losses incurred by Energoprojekt in the amount of USD 10,367,644. This calculation produces an amount of USD 8,367,644.

5. Recommendation

547. The Panel recommends compensation in the amount of USD 8,367,644 for contract losses.

B. Loss of tangible property

1. Facts and contentions

548. Energoprojekt seeks compensation in the amount of USD 21,746 for loss of tangible property. The claim is for the alleged loss of food stocks from its project site in Iraq following Iraq's invasion and occupation of Kuwait.

549. In the "E" claim form, Energoprojekt characterised this loss element as "contract losses", but the Panel finds that it is more accurately classified as a claim for loss of tangible property.

550. Energoprojekt failed to provide any explanation of how the food stocks were lost or destroyed as a result of Iraq's invasion and occupation of Kuwait.

2. Analysis and valuation

551. In support of its claim, Energoprojekt submitted a list of the food stocks allegedly left at the site. The list was dated 23 September 1990 and was signed by three persons whose names are not spelt out. The list sets out 21 food items, including meat products, canned vegetables and bottled water. Energoprojekt did not provide any evidence to substantiate the value of the food stocks or to describe the time and place of purchase, consignment or storage of the food.

552. The Panel finds that Energoprojekt did not provide sufficient evidence to substantiate its claim.

3. Recommendation

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

C. Payment or relief to others

1. Facts and contentions

554. Energoprojekt seeks compensation in the amount of USD 117,686 (JOD 20,237 and USD 86,931) for payment or relief to others. The claim is for costs allegedly incurred in evacuating Energoprojekt's 321 employees from Iraq on various dates after 2 August 1990.

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

556. Energoprojekt alleges that all 321 of its employees were working on the Contract in Iraq. As a result of Iraq's invasion and occupation of Kuwait, it was forced to demobilise the workers and repatriate them via Jordan and Turkey to their respective countries of origin including Thailand and Yugoslavia.

557. Energoprojekt's alleged losses comprise the cost of airfares for transportation out of Baghdad in the amounts of JOD 19,880 and USD 85,609 (USD 115,825) and cost of accommodation in Jordan in the amounts of JOD 357 and USD 1,322 (USD 1,861).

2. Analysis and valuation

(a) Airfares

558. Energoprojekt seeks compensation in the amount of USD 115,825 (JOD 19,880 and USD 85,609) for airline tickets purchased for the evacuation of its workers from Iraq to Thailand and Yugoslavia. All tickets were purchased from the Yugoslav national airline.

559. Energoprojekt provided as evidence of its alleged losses copies of invoices setting out the cost of airfares, flight details of certain flights, names of passengers, ticket numbers and the payroll of the workers.

560. In respect of the cost of airfares, in the Ninth "E3" Report this Panel held that claimants are only entitled to compensation for the cost of evacuation airfares if this cost exceeded the cost which they would have incurred in repatriating their employees in any event after natural completion of their contracts in Iraq.

561. The Panel finds that it was a term of the Contract that the Employer provide return airline tickets and excess baggage allowance of 10 kilograms for employees returning to their home countries after the completion of their assignments. However, Energoprojekt states that the tickets provided by the Employer for travel on Iraq Airways could not be used. Energoprojekt did not provide the reason for this. As a result Energoprojekt had to purchase alternative tickets from the Yugoslav national airline. As a result, Energoprojekt had to incur costs to establish alternative transportation and evacuation arrangements for its employees. Accordingly, the airfares constitute an additional cost that Energoprojekt would not have incurred upon natural completion of the contract.

562. Applying the principles set out in paragraph 170 of the Summary, the Panel notes that Energoprojekt did not provide, for the majority of the alleged losses, a documentary trail detailing the expenses incurred in evacuating its employees. In particular, Energoprojekt did not provide copies of airline tickets or proof that payment was made for the airfares. It provided the names of 10 passengers only (and where names are provided, there are no details identifying the passports or other proof to confirm employment on the Contract). Although certain ticket numbers were submitted with invoice Nos. 1, 2, 3, 5 and 7, there are no names attached and the ticket numbers do not have any similarity with the list of ticket numbers and names provided by Energoprojekt.

563. The Panel finds that Energoprojekt only provided sufficient evidence to support the claim for invoice Nos. 4, 6, 9 and 10 in the amount of USD 6,278. In support of its claim for invoice Nos. 4, 6, 9 and 10, Energoprojekt provided copies of the invoices issued by counterparties that had paid the costs of evacuation for the employees, including the costs of airfares. The invoices set out the number of passengers and the names of the passengers. The Panel finds that there is a clear relationship between the names of the passengers and Energoprojekt's employees working in Iraq. The Panel considers that the evidence provided in respect of invoices Nos. 4, 6, 9 and 10 supports a finding that the losses were caused as a direct result of Iraq's invasion and occupation of Kuwait.

564. The Panel finds that Energoprojekt is entitled to compensation for airfares in the amount of USD 6,278.

(b) Accommodation costs

565. Energoprojekt seeks compensation in the amount of US 1,861 (JOD 357 and USD 1,322) for accommodation costs incurred in Jordan for its workers who were not repatriated directly out of Baghdad.

566. In support of its claim, Energoprojekt provided invoices and debit notes related to the payment of the costs. The invoices and debit notes provided do not describe the nature of the payment or how the payment was related to Iraq's invasion and occupation of Kuwait. Energoprojekt did not provide any other clarification or details of how the costs were incurred.

567. The Panel finds that there is insufficient evidence and recommends no compensation for accommodation costs.

3. Recommendation

568. The Panel recommends compensation in the amount of USD 6,278 for payment or relief to others.

D. Financial losses

1. Facts and contentions

569. Energoprojekt seeks compensation in the amount of USD 545,199 (189,543 New Yugoslavian dinars (YUD) and USD 527,876) for financial losses. The claim is for costs allegedly incurred for the issue of performance bonds, advance payment bonds, a letter of credit and utilisation of an overdraft facility in connection with the Contract.

570. In the "E" claim form, Energoprojekt characterised this loss element as "contract losses", but the Panel finds that it is more accurately classified as a claim for financial losses.

571. The claim for charges incurred for the issue of performance bonds, advance payment bonds and a letter of credit in connection with the performance of the Contract is in the amount of YUD 189,543 and USD 33,381.

572. The claim for interest incurred in connection with drawing on an overdraft facility is in the amount of USD 494,495. Energoprojekt states that due to the Employer's failure to address the increase in costs for the Contract, it was forced to fund the continued performance of the Contract by obtaining from Jugobanka an overdraft facility for an amount of up to USD 2,000,000. Energoprojekt asserted that the cost of the overdraft facility was to be borne by the Employer as stipulated in article 8.1.21 of the Contract and therefore, claims from the Employer the interest charged for drawing on the facility.

2. Analysis and valuation

573. Energoprojekt's claim for financial loss can be considered in two components: (a) bank guarantee costs; and (b) interest on overdraft facility.

(a) Bank guarantee costs

574. In support of its claim for bank guarantee costs in the amount of YUD 189,543 and USD 33,381, Energoprojekt provided copies of correspondence from the issuing bank confirming the issue of the bonds and the letter of credit and requesting payment of charges in the amount of USD 10,530 for the issue of the letter of credit and USD 4,810 for the issue of the performance bond. Energoprojekt provided further evidence to support its claim for bank guarantee costs, however the documents were not translated into English. Therefore, the Panel was unable to consider those documents.

575. The Panel finds that Energoprojekt provided sufficient evidence only in respect of its alleged losses for the issue of the letter of credit in the amount of USD 10,530 and for the issue of the performance bond in the amount of USD 4,810. However, applying the approach taken with respect to guarantees as set out in paragraphs 89 to 98 of the Summary, the Panel recommends no compensation.

(b) Interest on overdraft facility

576. In support of its claim for interest incurred in connection with drawing on the overdraft facility in the amount of USD 494,495, Energoprojekt provided a bank statement and correspondence from the bank stating that the facility was overdrawn and that interest in the amount of USD 494,495 had been charged to Energoprojekt. The Panel finds that Energoprojekt did not provide evidence of payment of the interest charged and, more importantly, it failed to provide information to substantiate the increase in the Contract price which necessitated the use of an overdraft facility. Further, the Panel finds that Energoprojekt failed to provide evidence that the Employer agreed with its interpretation of article 8.1.21 of the Contract upon which Energoprojekt relied to claim the interest. Energoprojekt provided no evidence of the Employer’s agreement to the increase of the Contract price or Energoprojekt’s resort to an overdraft facility to cover the shortfall required in order to fund the performance of the Contract.

577. The Panel determines that Energoprojekt failed to establish that the costs allegedly incurred for interest paid on the overdraft facility were caused as a direct result of Iraq’s invasion and occupation of Kuwait.

578. The Panel finds that Energoprojekt failed to provide sufficient evidence of its claim for interest on overdraft facility.

3. Recommendation

579. The Panel recommends no compensation for financial losses.

E. Summary of recommended compensation for Energoprojekt

Table 48. Recommended compensation for Energoprojekt

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	10,070,265	8,367,644
Loss of tangible property	21,746	nil
Payment or relief to others	117,686	6,278
Financial losses	545,199	nil
Interest	2,349,808	--
Total	13,104,704	8,373,922

580. Based on its findings regarding Energoprojekt's claim, the Panel recommends compensation in the amount of USD 8,373,922. The Panel determines the date of loss to be 2 August 1990.

XV. SUMMARY OF RECOMMENDED COMPENSATION BY CLAIMANT

Table 49. Recommended compensation for the twenty-second instalment

Claimant	Claim amount (USD)	Recommended compensation (USD)
Bitas Co.	169,920	49,684
Energoinvest Co.	211,386,950	nil
CMI Entreprise	119,370	nil
ABB SAE S.p.A. (formerly ABB SAE Sadelmi S.p.A.)	4,891,255	507,682
Fochi Buini e Grandi S.r.l. (formerly Fochi Montaggi Elettrici (FME) S.r.l.)	25,499	nil
Delft Hydraulics	575,328	nil
NKF Kabel B.V.	2,023,662	376,748
Polservice Ltd. (formerly Polservice Foreign Trade Enterprise)	20,649,115	4,083,095
Prokon Engineering Construction and Trade Ltd.	440,620	nil
Mitsui Babcock Energy Ltd. (formerly Babcock Energy Ltd.)	19,767,251	nil
Tileman (SE) Ltd.	3,881,167	nil
Techmation Inc.	339,814	301,333
Energoprojekt Inzenjering - Engineering and Contracting Company Ltd.	13,104,704	8,373,922
Total	277,374,655	13,692,464

Geneva, 17 July 2002

(Signed) John Tackaberry
Chairman

(Signed) Pierre Genton
Commissioner

(Signed) Vinayak Pradhan
Commissioner

Notes

[1] There appears to have a typographical error in the contract as the contract stated that monthly payments were to be made to TJV.

[2] The term "advance cut" appears to refer to the monthly repayment of the advance payment that was to be deducted from the monthly progress payments made to Prokon.

Annex

SUMMARY OF GENERAL PROPOSITIONS

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Introduction

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

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

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

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

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

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

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

I. THE PROCEDURE

A. Summary of the process

6. Each of the claimants whose claims are presented to this Panel is given the opportunity to provide the Panel with information and documentation concerning the claims. In its review of the claims, the Panel considers evidence from the claimants and the responses of Governments to the

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

B. The nature and purpose of the proceedings

7. The status and functions of the Commission are set forth in the report of the Secretary-General pursuant to paragraph 19 of Security Council resolution 687 (1991) dated 2 May 1991 (S/22559).

8. The Panel is entrusted with three tasks in its proceedings. First, the Panel is required to determine whether the various types of losses alleged by the claimants are within the jurisdiction of the Commission, i.e. whether the losses were caused directly by Iraq's invasion and occupation of Kuwait. Second, the Panel has to verify whether the alleged losses that are in principle compensable have in fact been incurred by a given claimant. Third, the Panel is required to determine whether these compensable losses were incurred in the amounts claimed, and if not, the appropriate quantum for the loss based on the evidence before the Panel.

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

C. The procedural history of the "E3" Claims

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

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

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

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

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

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

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

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

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

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

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

(a) The date, type and basis of the Commission's jurisdiction for each element of loss;

(b) The facts supporting the claim;

(c) The legal basis for each element of the claim; and

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

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

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

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

respond to requests for further information and evidence. The consequence is inevitably that for a large number of loss elements and a smaller number of claimants the Panel is unable to recommend any compensation.

17. The Panel performs a thorough and detailed factual and legal review of the claims. The Panel assumes an investigative role that goes beyond reliance merely on information and argument supplied with the claims as presented. After a review of the relevant information and documentation, the Panel makes initial determinations as to the compensability of the loss elements of each claim. Next, reports on each of the claims are prepared focusing on the appropriate valuation of each of the compensable losses, and on the question of whether the evidence produced by the claimant is sufficient in accordance with article 35(3) of the Rules.

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

II. PROCEDURAL ISSUES

A. Panel recommendations

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

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

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

B. Evidence of loss

22. Pursuant to article 35(3) of the Rules, corporate claims must be supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and amount of the claimed loss. The Governing Council has stated in paragraph 5 of decision 15 (S/AC.26/1992/15) that, with respect to business losses, there "will be a need for detailed factual descriptions of the circumstances of the claimed loss, damage or injury" in order to justify a recommendation for compensation.

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

1. Sufficiency of evidence

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

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

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

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

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

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

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

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

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

31. Where documents cannot be supplied, their absence must be explained in a credible manner. The explanation must itself be supported by the appropriate evidence. Claimants may also supply substitute documentation for or information about the missing documents. Claimants must remember that the mere fact that they suffered a loss at the same time as the hostilities in the Persian Gulf were starting or were in process does not mean that the loss was directly caused by Iraq's invasion and

occupation of Kuwait. A causative link must be established. It should also be borne in mind that it was not the intention of the Security Council in its resolutions to provide a "new for old" basis of reimbursement of the losses suffered in respect of tangible property. Capital goods depreciate. That depreciation must be taken into account and demonstrated in the evidence filed with the Commission. In sum, in order for evidence to be considered appropriate and sufficient to demonstrate a loss, the Panel expects claimants to present to the Commission a coherent, logical and sufficiently evidenced file leading to the financial claims that they are making.

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

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

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

C. Amending claims after filing

35. In the course of processing the claims after they have been filed with the Commission, further information is sought from the claimants pursuant to the Rules. When the claimants respond they sometimes seek to use the opportunity to amend their claims. For example, they add new loss elements. They increase the amount originally sought in respect of a particular loss element. They transfer monies between or otherwise adjust the calculation of two or more loss elements. In some cases, they do all of these.

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

37. Some claimants also file unsolicited submissions. These too sometimes seek to increase the original claim in the ways indicated in the previous paragraph. Such submissions when received after 11 May 1998 are to be treated in the same way as amendments put forward in solicited supplements.

Accordingly the Panel is unable to, and does not, take into account such amendments when it is formulating its recommendations to the Governing Council.

D. Assignments of claims

38. From time to time, it appears that claims have been assigned between the parties and it is the assignee that files the original claim. In principle, there is no objection to such assignments, provided the assignment is properly evidenced and the Commission can satisfy itself that the claim is not also being advanced by the assignor. However, the assignee is not thereby released from the necessity to prove the claim as fully as would have been required by the assignor.

E. Related and overlapping claims

39. Inevitably claimants from the same contractual chain file claims with the Commission. Often, but not always, these claims overlap. In some cases they are effectively coterminous, or one claim embodies the whole of the other. A real benefit that can flow from the receipt of related claims is that this Panel when dealing with its claims will have a greater body of information available to it than would have been the case if only one claim had been presented. Furthermore, when this Panel first addresses a claim in respect of a project where there are related claims before other panels, it will liaise with the other panels so as to address the question of how and by whom the overlap or inter-accounting is to be addressed.

III. SUBSTANTIVE ISSUES

A. Applicable law

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

B. Liability of Iraq

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

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

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

C. The "arising prior to" clause

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

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

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

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

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

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

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

D. Application of the "direct loss" requirement

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

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

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

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

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

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

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

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

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

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

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

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

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

53. In the context of the losses set out above, reasonable costs which have been incurred to mitigate those losses are direct losses. The Panel bears in mind that the claimant was under a duty to mitigate

any losses that could have been reasonably avoided after the evacuation of its personnel from Iraq or Kuwait.

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

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

E. Date of loss

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

F. Currency exchange rate

57. 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.

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

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

G. Interest

60. On the issue of the appropriate interest rate to be applied, the relevant Governing Council decision is decision 16 (S/AC.26/1992/16). According to that decision, "[i]nterest will be awarded from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful claimants for the loss of use of the principal amount of the award". In decision 16 the Governing

Council further specified that "[i]nterest will be paid after the principal amount of awards", while postponing any decision on the methods of calculation and payment.

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

H. Claims preparation costs

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

I. Contract losses

1. The issue of "directness" in claims for contract losses with a non-Iraqi party

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

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

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

66. The Panel, accepting the approach taken by the "E2A" Panel in the "Report and recommendations made by the Panel of Commissioners concerning the fourth instalment of 'E2' claims" (S/AC.26/2000/2), finds that a claim based on goods lost in transit must be substantiated by evidence of shipment to Kuwait (such as a bill of lading, airway bill or freight receipt), from which an arrival date may be estimated, and by evidence of the value of the goods (demonstrated by, for example, an invoice, contract or purchase order).

67. The Panel is also of the opinion that the further away the arrival date is from the date of Iraq's invasion of Kuwait, the greater the possibility that the goods were collected by the buyer. Thus, in the absence of evidence to the contrary and in the light of the circumstances discussed above, it is reasonable to expect that non-perishable goods, arriving in Kuwait within two to four weeks before the invasion, had not yet been collected by the buyer. Accordingly, the Panel determines that, where goods arrived at a Kuwaiti sea port on or after 2 July 1990 or at the Kuwait airport on or after 17 July

1990 and could not thereafter be located by the claimant, an inference can be made that the goods were lost or destroyed as a direct result of Iraq's invasion and occupation of Kuwait and the ensuing breakdown in civil order.

2. Advance payments

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

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

70. Advance payments are usually secured by a bond provided by the contractor, and are usually paid upon the provision of the bond. They are frequently repaid over a period of time by way of deduction by the employer from the sums which are payable at regular intervals (often monthly) to the contractor for work done. See, in the context of payments which are recovered over a period of time, the observations about amortisation at paragraph 139, infra. Those observations apply mutatis mutandis to the repayment of advance payments.

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

3. Contractual arrangements to defer payments

(a) The analysis of "old debt"

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

73. In the First "E2" Report, the "E2" Panel interpreted Security Council resolution 687 (1991) as intending to eliminate what may be conveniently called "old debt". In applying this interpretation to the claim before it the "E2" Panel identified, as "old debt", cases where the performance giving rise to the original debt had been rendered by a claimant more than three months prior to 2 August 1990, that is, prior to 2 May 1990. In those cases, claims based on payments owed, in kind or in cash, for such performance are outside the jurisdiction of the Commission as claims for debts or obligations arising

prior to 2 August 1990. "Performance" as understood by the "E2" Panel for the purposes of this rule meant complete performance under a contract, or partial performance, so long as an amount was agreed to be paid for that portion of completed partial performance. In the claim the "E2" Panel was considering, the work under the contract was clearly performed prior to 2 May 1990. However, the debts were covered by a form of deferred payments agreement dated 29 July 1984. This agreement was concluded between the parties to the original contracts and postdated the latter.

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

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

> "The negotiation of these deferred payment arrangements was typically conducted with Iraq not by the contractor or supplier itself, but rather by its Government. Typically, the Government negotiated on behalf of all of the contracting parties from the country concerned who were in a similar situation. The deferred payment arrangements with Iraq were commonly entered into under a variety of forms, including complicated crude oil barter arrangements under which Iraq would deliver certain amounts of crude oil to a foreign State to satisfy consolidated debts; the foreign State then would sell the oil and, through its central bank, credit particular contractors' accounts." (the First "E2" Report, paragraph 93).
>
> "Iraq's debts were typically deferred by contractors who could not afford to 'cut their losses' and leave, and thus these contractors continued to work in the hope of eventual satisfaction and continued to amass large credits with Iraq. In addition, the payment terms were deferred for such long periods that the debt servicing costs alone had a significant impact on the continued growth of Iraq's foreign debt." (the First "E2" Report, paragraph 94).

76. This Panel agrees.

(b) Application of the "old debt" analysis

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

78. The first is that the problem does not arise where the actual work has been performed after 2 May 1990. The arrangement deferring payment is irrelevant to the issue. The issue typically

resolves itself in these cases into one of proof of the execution of the work, the quantum, the non payment and causation.

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

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

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

4. Losses arising as a result of unpaid retention monies

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

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

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

85. The retention is usually payable in two stages, one at the commencement of the maintenance period, as it is often called, and the other at the end. The maintenance period usually begins when the employer first takes over the project, and commences to operate or use it. Thus the work to which any particular sum which is part of the retention fund relates may have been executed a very long time before the retention fund is payable. It follows that a loss in respect of the retention fund cannot be

evaluated by reference to the time when the work which gave rise to the retention fund was executed, as for instance is described at paragraph 78, supra. Entitlement to be paid the retention fund is dependent on the actual or anticipated overall position at the end of the project.

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

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

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

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

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

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

5. Guarantees, bonds, and like securities

89. Financial recourse agreements are part and parcel of a major construction contract. Instances are (a) guarantees - for example given by parent companies or through banks; (b) what are called "on demand" or "first demand" bonds (hereinafter "on demand bonds") which support such matters as bidding and performance; and (c) guarantees to support advance payments. (Arrangements with government-sponsored bodies that provide what might be called "fall-back" insurance are in a different category. As to these, see paragraphs 99 to 106, infra.)

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

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

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

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

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

95. The Panel notes that most if not all contracts for the execution of major construction works by a contractor from one country in the territory of another country will have clauses to deal with war, insurrection or civil disorder. Depending on the approach of the relevant governing law to such matters, these provisions, if triggered, may have a direct or indirect effect on the validity of the bond. Direct, if under the relevant legal regime, the effects of the clause in the construction contract apply also to the bond; indirect if the termination or modification of the underlying obligation (the construction contract) gives rise to the opportunity to seek a forum-driven modification or termination of the liabilities under the bond.

96. In addition, the simple passage of time is likely to give rise to the right to treat the bond obligation as expired or unenforceable, or to seek a forum-driven resolution to the same effect. In addition, it is necessary to bear in mind the existence of the trade embargo and related measures [a]. The

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

effect of the trade embargo and related measures was that an on demand bond in favour of an Iraqi party could not legally have been honoured after 6 August 1990. In those circumstances, it is difficult to see what benefit the issuing bank was providing in return for any service charges that it was paid once notice of the embargo had been widely disseminated. If the bank is providing no benefit, it is difficult to ascertain a juridical basis for any entitlement to receive the service charges.

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

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

6. Export credit guarantees

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

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

101. Claims have been made by parties for:

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

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

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

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

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

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

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

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

7. Frustration and force majeure clauses

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

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

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

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

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

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

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

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

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

8. Subcontractors and suppliers

115. Construction contracts involve numerous parties who operate at different levels of the contractual chain. In the simplest form there will almost always be an employer or project owner; a main contractor; subcontractors and suppliers. Usually each member of the chain will be in a contractual relationship with the party above and below it (if any) in the chain; but not with a party outside this range.

116. The claims before the Commission often include ones made by parties in different positions in the same chain and in relation to the same project. In resolving these claims, this Panel, basing itself on its own work and on that of other panels, has come to recognise certain principles which appear to be worth recording. Of course these general propositions are not absolute – there will always be exceptions in special circumstances.

(a) Projects within Iraq

117. The first principle that should be noted is the distinction between projects which were going forward within Iraq and those that were going on outside Iraq. Different considerations apply in the two situations. A notable example of this difference is the limitation on the Commission's jurisdiction which flows from the "arising prior to" principle - see paragraphs 43 to 45, supra, and the First "E2" Report, paragraph 90. In the view of this Panel, this jurisdictional limitation applies to all claims made in respect of projects in Iraq, regardless of where in the contractual chain the claimant might be.

118. This jurisdictional limitation flowed from the need to deal in an appropriate manner with political and historical realities in Iraq. Similarly current realities in that country require this Panel to acknowledge that the normal processes of payment down the contractual chain do not operate in Iraq, at least so far as projects that commenced before Iraq's invasion and occupation of Kuwait are concerned. In these circumstances, it is unnecessary to review the operation of the contractual chain – the assumption must be that it is not operating. Consequently, claims may properly be filed with the Commission by any party anywhere in the contractual chain. Naturally this approach does not detract from or modify the obligation of a claimant pursuant to Governing Council decision 13 (S/AC.26/1992/13) to inform the Commission of any payments in fact received which go to moderate or extinguish its loss. The Panel notes that this obligation has, so far as this Panel can judge (by its review of the claims filed, the follow up information provided when asked for, and extensive cross checking against the myriad other claims filed with the Commission), been almost wholly honoured by claimants.

119. Both past and present realities may lead, as more claims are investigated, to other dissimilarities between the treatment of projects within and outside Iraq.

(b) Projects outside Iraq

120. Where the project out of which a claim arises was sited outside Iraq (as to which see also paragraphs 63 to 67, supra) and particularly where it was sited within Kuwait, the situation is more complicated. The Kuwaiti situation, being, obviously, the most common one, is a convenient one to use as an example. In Kuwait today, ministries are back in full operation. Kuwaiti companies have in

many cases resumed business. Projects have been restarted and completed. Claims arising out of Iraq's invasion and occupation of Kuwait have been lodged and resolved.

121. In these circumstances, the risk of double rewards or unjustifiably enhanced reimbursement of claimants is greater; and it is necessary to proceed with caution. Doing so, the following propositions can be seen to be generally applicable.

122. A claimant that is not at the top of the contractual chain and which wishes to recover for a contract loss will usually have to establish why it is not able or entitled to look to the party next up the line. There are many possible explanations which such a claimant may be able to rely on when thus establishing its locus standi. The bankruptcy or liquidation of the debtor is one; another is that the contractual relation between claimant and debtor is subject to a contractual bar which does not apply in the context of claims to the Commission; another is that there has been an assignment or other arrangement between the two parties which has allowed the claimant to bring the claim.

123. Where such an explanation is established by sufficient evidence, this Panel sees no great difficulty in principle in entertaining the claim.

124. Where no such ground is established (either by the evidence of the particular claimant or extraneously, for example by the evidence put forward in some other claim before the Commission) this Panel is prima facie obliged to make appropriate assumptions – for example, that the next party up the chain is in existence, solvent and liable to pay. In that event, the claimant's loss would not appear to be caused directly by Iraq's invasion and occupation of Kuwait but by the failure of the debtor to pay. An example might be where a subcontractor is out of his money for work done; where the contractor would, if so minded, be entitled to recover it from the owner; but where, for whatever the reason, the contractor is not pursuing the claim against the owner and is, at the same time, refusing to reimburse the subcontractor out of his own pocket. If that is the end of the story it will be difficult if not impossible for this Panel to recommend payment of the claim.

(c) "Pay when paid" clauses

125. Many construction contracts in wide use in various parts of the world contain what are called "pay when paid" clauses. Such a clause relieves the paying party – most usually the contractor – from the obligation to pay the party down the line - the subcontractor in the usual example – until the contractor has been paid by the owner. The aim of such a clause is to assist in the planning of the cash flow down the contractual chain. The effect of such a clause is to modify the point in time at which the entitlement of the next party down the chain to be paid for its work accrues.

126. Such a clause falls to be distinguished from a "back to back" arrangement. This latter expression refers to the situation where the terms of two contracts in a chain are identical as to obligations and rights. Thus – continuing the example of the owner, main contractor and subcontractor – in a "back to back" situation, the obligations owed by the contractor to the owner and his rights against the owner will be mirrored in the rights and obligations of the subcontractor and the contractor. This type of situation does not, of itself, in any way inhibit the ability of the subcontractor to seek relief independently of what is happening or has happened between the contractor and the owner.

127. A "pay when paid" clause is superficially attractive – among other effects the main contractor and the subcontractor may both be said to be at risk of non payment by the owner. However, experience in many jurisdictions has shown that it is easy for main contractors to abuse such clauses when they are seeking to avoid fair payment for work done by their subcontractors. It also creates problems for the subcontractor when the main contractor is disinclined to pursue the subcontractor's claim against the owner, a situation that can easily come about – e.g. where pursuing such a claim may lead to a cross claim by the owner against the contractor in respect of matters that cannot be passed back down to the subcontractor.

128. Such clauses are to be found in some of the contracts utilised in projects which have given rise to the claims to the Commission. The question arises therefore as to whether such clauses are relevant for the purposes of determining the claimant's entitlement. To put it another way, does the existence of such a clause affect the causative chain between Iraq's invasion and occupation of Kuwait and the claimed loss?

129. It seems to this Panel that the answer to this question will vary according to the circumstances. However, where the sole effect of the clause would be to prevent a claim by a subcontractor to the Commission, then the clause falls to be ignored. Such a clause appears to this Panel to be comparable, in this context, to frustration and force majeure clauses. For example, in respect of contracts involving Iraq, Governing Council decision 9 made it clear that Iraq could not avoid its liability for loss by reliance upon the provisions of frustration and force majeure clauses. It would be odd, therefore, if such liability could be avoided by the operation of a provision such as a "pay when paid" clause.

J. Claims for overhead and "lost profits"

1. General

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

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

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

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

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

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

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

137. Finally, there is what is called the "risk margin" - the allowance for the unexpected. The risk margin is generally in the range of between barely above zero and 5 per cent of the total contract price. The more smoothly the project goes, the less the margin will have to be expended. The result will be enhanced profits, properly so called, recovered by the contractor at the end of the day. The more the unexpected happens and the more the risk margin has to be expended, the smaller the profit will ultimately be. Indeed, the cost of dealing with the unexpected or the unplanned may equal or exceed the risk margin, leading to a nil result or a loss.

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

2. Head office and branch office expenses

139. Head office and branch office expenses are generally regarded as part of the overhead. These costs can be dealt with in the price in a variety of ways. For example, they may be built into some or all of the prices against line items; they may be provided for in a lump sum; they may be dealt with in many other ways. One aspect, however, will be common to most, if not all, contracts. It will be the intention of the contractor to recover these costs through the price at some stage of the execution of the contract. Often the recovery has been spread through elements of the price, so as to result in repayment through a number of interim payments during the course of the contract. Where this has been done, it may be said that these costs have been amortised. This factor is relevant to the question of double-counting (see paragraph 142, infra).

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

141. If these items were the subject of an advance payment, again they may have been recovered in their entirety at an early stage of the project. Here of course there is an additional complication, since the advance payments will be credited back to the employer - see paragraph 70, supra - during the

course of the work. In this event, the Panel is thrown back onto the question of where in the contractor's prices payment for these items was intended to be.

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

143. The same applies where there are physical losses at a branch or indeed a site office or camp (which expenses are also generally regarded as part of the overhead). These losses are properly characterised, and therefore claimable, if claimable at all, as losses of tangible assets.

3. Loss of profits on a particular project

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

145. As will be seen from the observations at paragraphs 130 to 138, supra, the expression "lost profits" is an encapsulation of quite a complicated concept. In particular, it will be appreciated that achieving profits or suffering a loss is a function of the risk margin and the actual event.

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

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

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

149. In the light of the above analysis, and in conformity with the two Governing Council decisions cited above, this Panel requires the following from those construction and engineering claimants that seek to recover for lost profits. First, the phrase "continuation of the contract" imposes a requirement on the claimant to prove that it had an existing contractual relationship at the time of the invasion. Second, the provision requires the claimant to prove that the continuation of the relationship was rendered impossible by Iraq's invasion and occupation of Kuwait. This provision indicates a further

requirement that profits should be measured over the life of the contract. It is not sufficient to prove that there would have been a "profit" at some stage before the completion of the project. Such a proof would only amount to a demonstration of a temporary credit balance. This can even be achieved in the early stages of a contract, for example where the pricing has been "front-loaded" for the express purpose of financing the project.

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

4. Loss of profits for future projects

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

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

153. Such evidence is often difficult to obtain; and accordingly in construction cases such claims will only rarely be successful. And even where there is such evidence, the Panel is likely to be unwilling

to extend the projected profitability too far into the future. The political exigencies of work in a troubled part of the world are too great to justify looking many years ahead.

K. Loss of monies left in Iraq

1. Funds in bank accounts in Iraq

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

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

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

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

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

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

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

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

2. Petty cash

159. Exactly the same considerations apply to claims for petty cash left in Iraq in Iraqi dinars. These monies were left in the offices of claimants when they departed from Iraq. The circumstances in which the money was left behind vary somewhat; and the situation which thereafter obtained also varies - some claimants contending that they returned to Iraq but the monies were gone; and others being unable to return to Iraq and establish the position. In these different cases, the principle seems to this Panel to be the same. Claimants in Iraq needed to have available sums (which could be substantial) to meet liabilities which had to be discharged in cash. These sums necessarily consisted of Iraqi dinars. Accordingly, absent evidence of the same matters as are set out in paragraph 157, supra, it will be difficult to establish a "loss", and in those circumstances, this Panel is unable to recommend compensation.

3. Customs deposits

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

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

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

163. Absent such evidence and leaving aside any question of double-counting (see paragraph 142, supra), the Panel is unlikely to be able to make any positive recommendations for compensating unrecovered customs deposits made for plant, vehicles and equipment used at construction projects in Iraq.

L. Tangible property

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

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

were caused by Iraq's invasion and occupation of Kuwait. On the contrary, it appears that they stem from an wholly independent event and accordingly are outside the jurisdiction of the Commission.

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

M. Payment or relief to others

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

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

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

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

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

N. Final awards, judgments and settlements

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

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

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

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