UNITED NATIONS **S**

Security Council

Distr.
RESTRICTED

S/AC.26/2003/11
26 June 2003

Original: ENGLISH

UNITED NATIONS
COMPENSATION COMMISSION
GOVERNING COUNCIL

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

CONTENTS

List of tables

Introduction

1. The Governing Council of the United Nations Compensation Commission (the "Commission") appointed the present Panel of Commissioners (the "Panel"), composed of Messrs. Werner Melis (Chairman), David Mace and Sompong Sucharitkul, at its twenty-second session in October 1996 to review construction and engineering claims filed with the Commission on behalf of corporations and other legal entities in accordance with the relevant Security Council resolutions, the Provisional Rules for Claims Procedure (S/AC.26/1992/10) (the "Rules") and other Governing Council decisions. This report contains the recommendations to the Governing Council by the Panel, pursuant to article 38(e) of the Rules, concerning 15 claims with an asserted value of approximately 690,289,874 United States dollars (USD) included in the twenty-fifth instalment. Each of the claimants seeks compensation for loss, damage or injury allegedly arising out of Iraq's 2 August 1990 invasion and subsequent occupation of Kuwait. The claims submitted to the Panel in this instalment and addressed in this report were selected by the secretariat of the Commission from among the construction and engineering claims (the "E3 Claims") on the basis of criteria established under the Rules.

I. PROCEDURAL HISTORY

A. The nature and purpose of the proceedings

2. The status and functions of the Commission are set forth in the report of the Secretary-General pursuant to paragraph 19 of Security Council resolution 687 (1991) dated 2 May 1991 (S/22559). Pursuant to that report, the Commission is a fact-finding body that examines claims, verifies their validity, evaluates losses, recommends compensation, and makes payment of awards.

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

B. The procedural history of the claims in the twenty-fifth instalment

4. In a procedural order dated 20 March 2001, the Panel instructed the secretariat to transmit to the Government of Iraq ("Iraq") Jaiprakash Industries Limited's documents in relation to its claim filed through the Government of India. Iraq was invited to submit its comments on the documentation by 24 September 2001. Iraq did so on 5 February 2002. The comments and responses of Iraq were nonetheless considered by the Panel in its review of the claim, since such consideration did not delay the Panel's completion of its review and evaluation of the claim within the time period prescribed by the Rules.

5. On 12 February 2002, the Panel issued a procedural order relating to the claims. In view of the complexity of the issues raised, the volume of the documentation underlying the claims and the compensation sought by the claimants, the Panel decided to classify them as "unusually large or

complex" within the meaning of article 38(d) of the Rules. The Panel was thus required to complete its review of the claims within 12 months of its procedural order of 12 February 2002.

6. The Panel performed a thorough and detailed factual and legal review of the claims. The Panel considered the evidence submitted by the claimants in reply to requests for information and documents. It also considered the responses of Governments, including the Government of Iraq, to the reports of the Executive Secretary issued in accordance with article 16 of the Rules.

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

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

C. Amending claims after filing

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

D. The claims

10. This report contains the Panel's findings for losses allegedly caused by Iraq's invasion and occupation of Kuwait with respect to the following 15 claims:

(a) GRO "Vranica" Sarajevo, a corporation organised according to the laws of Bosnia and Herzegovina, which seeks compensation in the amount of USD 18,307,500;

(b) Unioninvest, holding d.d., a corporation organised according to the laws of Bosnia and Herzegovina, which seeks compensation in the amount of USD 33,221,228;

(c) Dumez-GTM, a corporation organised according to the laws of France, which seeks compensation in the amount of USD 28,718,764;

(d) Jaiprakash Industries Limited, a corporation organised according to the laws of India, which seeks compensation in the amount of USD 155,140,000;

(e) Reggiane Officine Meccaniche Italiane S.p.A., a corporation organised according to the laws of Italy, which seeks compensation in the amount of USD 8,030,675;

(f) Landustrie Sneek b.v., a corporation organised according to the laws of the Netherlands, which seeks compensation in the amount of USD 583,206;

(g) Mechanised Construction of Pakistan (Pvt) Limited, a corporation organised according to the laws of Pakistan, which seeks compensation in the amount of USD 309,487,029;

(h) Saudi Arabian Dumez Company Limited, a corporation organised according to the laws of Saudi Arabia, which seeks compensation in the amount of USD 7,930,044;

(i) Guris Makina ve Montaj Sanayii A.S., a corporation organised according to the laws of Turkey, which seeks compensation in the amount of USD 4,708,497;

(j) Biwater Europe Limited, a corporation organised according to the laws of the United Kingdom of Great Britain and Northern Ireland (the "United Kingdom"), which seeks compensation in the amount of USD 29,784,774;

(k) Biwater International Limited, a corporation organised according to the laws of the United Kingdom, which seeks compensation in the amount of USD 25,531,975;

(l) Biwater Process Plant Limited, a corporation organised according to the laws of the United Kingdom, which seeks compensation in the amount of USD 10,065,587;

(m) PWT Projects Limited, a corporation organised according to the laws of the United Kingdom, which seeks compensation in the amount of USD 8,553,996;

(n) Aquasep, Inc., a corporation organised according to the laws of the United States of America (the "United States"), which seeks compensation in the amount of USD 3,172,453; and

(o) NRM Corporation, a corporation organised according to the laws of the United States, which seeks compensation in the amount of USD 47,054,146.

II. LEGAL FRAMEWORK

A. Applicable law

11. As set forth in paragraphs 16-18 and 23 of the "Report and recommendations made by the Panel of Commissioners concerning the first instalment of 'E3' Claims" (S/AC.26/1998/13) (the "First 'E3' Report"), the Panel noted that paragraph 16 of Security Council resolution 687 (1991) reaffirmed the liability of Iraq and defined the jurisdiction of the Commission. The Panel applied Security Council resolution 687 (1991), other relevant Security Council resolutions, decisions of the Governing Council, and, where necessary, other relevant rules of international law.

B. Liability of Iraq

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

C. The "arising prior to" clause

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

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

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

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

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

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

D. Application of the "direct loss" requirement

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

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

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

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

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

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

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

E. Loss of profits

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

18. Calculations of a loss of profits claim should take into account the inherent risks of the particular project and the ability of a claimant to realise a profit in the past. The speculative nature of some projects requires the Panel to view the evidence submitted with a critical eye. In order to establish with "reasonable certainty" a loss of profits claim, the Panel requires that a claimant submit not only the contracts and invoices related to the various projects, but also detailed financial statements, including audited statements where available, management reports, budgets, accounts, time schedules, progress reports, and a breakdown of revenues and costs, actual and projected, for the project.

F. Date of loss

19. The Panel must determine "the date the loss occurred" within the meaning of Governing Council decision 16 (S/AC.26/1992/16) for the purpose of recommending compensation for interest

and for the purpose of determining the appropriate exchange rate to be applied to losses stated in currencies other than in United States dollars. Where applicable, the Panel has determined the date of loss for each claim.

G. Interest

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

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

H. Currency exchange rate

22. 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.

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

24. For non-contractual losses, the Panel finds the appropriate exchange rate to be the prevailing commercial rate, as evidenced by the United Nations Monthly Bulletin of Statistics on the date of loss, or, unless otherwise established, as of 2 August 1990.

I. Evacuation losses

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

J. Valuation

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

27. After receipt of all claim information and evidence, the Panel applied the verification program to each loss element. This analysis resulted in a recommendation of compensation in the amount

claimed, an adjustment to the amount claimed, or a recommendation of no compensation for each loss element.

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

K. Formal requirements

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

L. Evidentiary requirements

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

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

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

33. The Panel is required to determine whether these claims are supported by sufficient evidence and, for those that are so supported, must recommend the appropriate amount of compensation for each compensable claim element. This requires the application of relevant principles of the Commission's rules on evidence and an assessment of the loss elements according to these principles. The recommendations of the Panel are set forth below.

III. GRO "VRANICA" SARAJEVO

34. GRO "Vranica" Sarajevo ("Vranica") is a corporation organised according to the laws of Bosnia and Herzegovina operating in the construction industry.

35. In the "E" claim form, Vranica sought compensation in the amount of USD 37,051,345 for contract losses and other losses. In its combined reply to the article 15 and article 34 notifications dated 31 October 1999, Vranica reduced the total amount of compensation sought to USD 30,619,180 (the "revised claim"). Vranica reduced the total of the components of its claim for contract losses called "outstandings" and "deferred outstandings" from USD 30,200,000 to USD 11,456,155. The reduction was as a result of the sale of some receivables and receipt of some monies from the contractor.

36. In addition, Vranica increased the component of its claim for contract losses called "interests for outstandings" from USD 6,000,000 to USD 9,177,483 (now called "uncollected interest" for the period from 1 January 1986 to 31 December 1990). It also added a claim for interest in the amount of USD 9,113,190 (for the period from 1 January 1991 to 31 October 1999), with interest accruing at the rate of 5 per cent per annum after that date. Finally, Vranica added a claim for "costs of workers' return from Iraq" in the amount of USD 21,000.

37. The Panel has only considered those losses contained in the original claim, except where such losses have been withdrawn or reduced by Vranica. Where Vranica reduced the amount of losses contained in the revised claim, the Panel has considered the reduced amount. Accordingly, the Panel has not considered the claims for "costs of workers' return from Iraq" or for interest for the period from 1 January 1991 to 31 October 1999 in their entirety. The Panel has also considered the claim for "interests for outstandings" in the amount of USD 6,000,000 only.

38. The Panel has also corrected an arithmetical error in Vranica's calculation of its revised claim for "raw materials" in the amount of USD 7 (see paragraph 71, infra).

39. The Panel has reclassified elements of Vranica's claim for the purposes of this report. The Panel therefore considered the amount of USD 18,307,500 for contract losses, loss of tangible property and financial losses, as follows:

Table 1. Vranica's claim

Claim element	Claim amount (USD)
Contract losses	11,456,155
Loss of tangible property	851,345
Financial losses	6,000,000
Total	18,307,500

A. Contract losses

1. Facts and contentions

40. Vranica seeks compensation in the amount of USD 11,456,155 for contract losses. This claim relates to unpaid invoices for work which it carried out as a sub-contractor on Project 202-B in Iraq.

Vranica states that Iraq's invasion and occupation of Kuwait prevented the payment of Vranica's invoices.

41. In the "E" claim form, Vranica sought compensation in the amount of USD 36,200,000 for contract losses ("outstandings", "deferred outstandings" and "interests for outstandings"). In the revised claim, Vranica reduced the total amount of its claim to USD 20,633,638 (USD 11,456,155 for "uncollected receivables" and USD 9,177,483 for "uncollected interest" for the period from 1 January 1986 to 31 December 1990). The Panel considers that the claim for "uncollected interest" in the amount of USD 9,177,483 is an untimely amendment (see paragraph 9, supra). The Panel finds that the original basis for this loss element, "interests for outstandings" in the amount of USD 6,000,000, has not been withdrawn or extinguished. However, the claim for "interests for outstandings" is more appropriately classified as financial losses (see section C, infra).

42. On 19 December 1980, the Federal Directorate for Supply and Procurement (the "FDSP"), part of the Federal Secretariat for National Defence of the Federal Republic of Yugoslavia, and the Directorate of Airforce and Airdefence Works, Ministry of Defence, Iraq (the "Airforce Directorate"), entered into a contract for the construction of an airbase in Al Baghdadi, Iraq (the "Al Baghdadi contract").

43. The value of the Al Baghdadi contract, following an amendment in December 1981, was USD 855,155,111. Vranica did not advise the Commission of the duration of the Al Baghdadi contract, but the Panel is aware from previous claims regarding the same contract that the duration contemplated in the original contract was 1,461 calendar days. The 1981 amendment, which resulted in the addition of further works, led to a 36-month extension of the period of the Al Baghdadi contract.

44. On 2 February 1981, Vranica and other entities from the Federal Republic of Yugoslavia (including another claimant from this instalment, Unioninvest, whose claim is considered by the Panel at paragraphs 82 to 167, infra) entered into a sub-contract with the FDSP to carry out works on Project 202-B. Each sub-contractor had defined responsibilities for its works under the Al Baghdadi contract.

45. Vranica asserts that the involvement of the FDSP was mandatory under the law of the Federal Republic of Yugoslavia, but all contracts which the FDSP entered into were done so on behalf of the sub-contractors. The FDSP advised the Commission in 1993 that it would not submit any claims to the Commission.

46. In relation to the terms of the sub-contract, Vranica asserts that all of the FDSP's rights and liabilities under the Al Baghdadi contract with the Airforce Directorate were transferred to the sub-contractor. Each of the sub-contractors authorised the FDSP to enter into an agreement on their behalf with the Airforce Directorate.

47. The value of Vranica's works under the sub-contract was USD 280,267,359. Vranica asserts that there were two phases for the provision of services and that different terms of payment applied to each phase. The Panel has focused on the second phase of the payment arrangements.

48. In mid-1983, the Government of the Federal Republic of Yugoslavia and the Government of Iraq entered into a deferred payment agreement (the "deferred payment agreement"), which covered completed works under the Al Baghdadi contract. Vranica was to receive 20 per cent of the amounts due to it immediately in United States dollars and 12 per cent immediately in Iraqi dinars. The balance of 68 per cent (which was payable in United States dollars) was to be deferred for two years and earned interest at an annual rate of 6 per cent. During the operation of the deferred payment agreement, the deferred payments were subsequently repeatedly deferred.

49. Vranica contended that it did not expect to receive 60 per cent of the outstanding deferred amounts until dates from 1992 to 1995. The remaining 40 per cent was payable in exchange for oil.

50. The deferred payment agreement was still in force as at 2 August 1990 pursuant to a renewal dated 16 May 1990.

51. According to Vranica, under the deferred payment agreement it was supposed to be paid "in accordance with the schedule for payment prepared by the FDSP ..."

52. Vranica alleges that by 2 August 1990, it had completed contractual works in the amount of USD 263,758,589. Vranica received payments under the sub-contract in the amount of USD 252,302,434 for its works and USD 4,331,461 for interest calculated and paid until 31 December 1985. Vranica states that it had completed all of the contract works, including the works required during the maintenance period, to the satisfaction of the requirements of the Iraqi authorities, prior to Iraq's invasion and occupation of Kuwait.

53. Vranica seeks compensation in the amount of USD 11,456,155 for unpaid executed works. This amount represents the difference between the figures of work completed as at 29 October 1999 (USD 263,758,589) and work for which it was paid (USD 252,302,434).

54. In relation to the issue of when the work under the sub-contract giving rise to the claimed amount was carried out, Vranica provided a document entitled "final maintenance certificate", which the Airforce Directorate issued to the FDSP on 1 June 1992 for Project 202-B. This confirmed that the FDSP had "fulfilled all his contractual obligations from maintenance period within agreed time". The "agreed time" was not stated. However, on the basis of other documents dated 1988 and 1989, Vranica advised that it completed most of the works in 1988. At this time, the work completed by it was valued at USD 259,672,521. In 1989, this value was USD 261,161,070. The Panel notes that Vranica provided a statement of account dated 29 October 1999. This document, prepared by Jugoimport, the successor to the FDSP, indicates that the value of the works executed by Vranica "as per the final account" was USD 263,758,589.

2. Analysis and valuation

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

56. In relation to the issue of what party Vranica contracted with, the Panel notes that Vranica did not have a direct contractual relationship with the Airforce Directorate (which was an Iraqi State agency). Nor did Vranica assert that it was a nominated sub-contractor with a direct payment demand against the Airforce Directorate. Vranica was a sub-contractor to the FDSP in relation to Project 202-B.

57. The FDSP has not submitted any claims to the Commission. The Panel notes that the FDSP's active role in all of the contractual arrangements was very limited, and apart from the FDSP, there were no other parties in the contractual chain above Vranica. The Panel considers that Vranica should be regarded as having entered into a direct contract with Iraq in relation to Project 202-B for the purposes of the Commission's jurisdiction.

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

59. In relation to the issues of what work Vranica performed, and when, Vranica provided copies of the following documents:

(a) Extracts from the Al Baghdadi contract;

(b) Extracts from the sub-contract between Vranica and the FDSP;

(c) The Final Account – Recapitulation dated 31 May 1992;

(d) The Final Maintenance Certificate dated 1 June 1992 issued by Airforce Directorate to the FDSP;

(e) A facsimile dated 29 October 1999 from Jugoimport (formerly the FDSP) to Vranica containing the data on which Vranica relies in respect of the value of the work which it performed and the payments which it has received (i.e. the statement of account); and

(f) Financial statements from the FDSP to Vranica dated 29 August 1989 and 15 October 1990 showing the value of the work which Vranica had performed and the payments which it had received as at 31 December 1988 and 31 December 1989 respectively (the "statements of account").

60. In the article 34 notification, and in supplementary questions sent to Vranica in December 2001, Vranica was asked to provide evidence of the dates of performance of the work, whether there were any time extensions, and copies of correspondence with the employer. Vranica states that it was unable to provide any of the requested information and evidence for a number of reasons. It asserts that relevant documents were left in Iraq when its employees departed or were held by the FDSP. It also asserts, for reasons that were not fully explained, that some documents were taken from employees at a border crossing with Italy in 1992.

61. None of the evidence provided establishes the nature of the work which Vranica performed or the dates of performance of the work. In any event, the three statements of account indicate that Vranica carried out the majority of the invoiced work in respect of which it seeks compensation prior

to 2 May 1990. The Panel observes that the difference between the statement of account of 31 December 1988 (total works completed valued at USD 259,672,521) and that of 31 December 1989 (total works completed valued at USD 261,161,070) is approximately USD 1.5 million, or less than 1 per cent of the total works which Vranica executed in respect of Project 202-B. This fact suggests that work was nearing completion as at 31 December 1989. The documents provided in support of the claim by Unioninvest, holding d.d. indicate that Project 202-B was in the maintenance period as at 2 August 1990 (See paragraph 121, infra). Moreover, the statement of account dated 29 October 1999 indicates that the value of the works executed by Vranica at that date was USD 263,758,589. At 31 December 1989, the value of works executed was USD 261,161,070.

62. Therefore, only works with a maximum value of USD 2,597,519 could have been undertaken from 1 January 1990 to the date on which Vranica ceased work, some time towards the end of 1990 when its employees left. The Panel finds that there is no way of establishing whether the work carried out after 1 January 1990 was performed after 2 May 1990 and, if it was, the value of that work. Finally, Vranica was asked in the supplementary questions to provide evidence of any retention monies. In its reply it referred to the 1999 facsimile from Jugoimport. This document makes no reference to retention monies in the English translation.

63. The Panel finds that Vranica failed to establish that any of its alleged contract losses related to work that was performed after 2 May 1990.

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

65. The Panel finds that for the purposes of Security Council resolution 687 (1991) the deferred payment agreement did not have the effect of novating the debts.

3. Recommendation

66. The Panel recommends no compensation for contract losses.

B. Loss of tangible property

1. Facts and contentions

67. Vranica seeks compensation in the amount of USD 851,345 for loss of tangible property. The claim is for the alleged loss of raw materials in the amount of USD 29,523 and small construction inventory in the amount of USD 821,822. Vranica presented three categories of small construction inventory, making four subcategories in total. Vranica alleges that as at 2 August 1990, the 14 remaining employees on site were using these items to fulfil Vranica's obligation to correct defects identified in the maintenance certificate, prior to the issue of the final maintenance certificate.

68. Vranica further alleges that it was its intention to sell the items in Iraq at the conclusion of the maintenance period, but that it was denied access to the items and the site after 2 August 1990 "and in particular after 2 March 1991".

69. Vranica states that the documents establishing its ownership of the items were taken from certain employees who were at a border crossing with Italy in 1992.

70. In the "E" claim form, Vranica classified both components of the claim as other losses, but the Panel finds that the claim is more appropriately classified as loss of tangible property.

71. The Panel notes that the claim for loss of tangible property (loss of raw materials) contained an arithmetical error in the revised claim. In the "E" claim form, Vranica sought compensation in the amount of USD 29,523. In the revised claim, Vranica erroneously increased the amount sought to USD 29,530.

2. Analysis and valuation

72. Vranica asserts that all relevant documents showing its ownership of the items claimed, such as purchase invoices and certificates of ownership and title, were lost in 1992, as described in paragraph 69, supra. It did provide an internal record of an inventory taken at the Project 202-B site on 30 June 1990, which recorded in the four subcategories, the property which was subsequently lost and the global value of the items by subcategory.

73. The Panel accepts that the inventory document indicates the likely presence of some items of tangible property in Iraq on 2 August 1990. However, the document contains no detail beyond the basic global descriptions. Moreover, Vranica did not advise the Commission of the nature of the items which it alleges were lost, presumably because it has no evidence apart from the inventory document. The inventory document alone, in the absence of any invoices or customs documents, does not establish title or value.

74. The Panel finds that Vranica failed to provide sufficient information and evidence which demonstrates its title to or right to use the tangible property, or the value of the tangible property, located in Iraq.

3. Recommendation

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

C. Financial losses

1. Fact and contentions

76. Vranica seeks compensation in the amount of USD 6,000,000 for financial losses. The claim appears to be for interest on unpaid amounts (contract losses) incurred throughout the 1980s to 31 December 1990. Under the deferred payment agreement, interest accrued at the rate of 6 per cent per annum on amounts which the Airforce Directorate owed the FDSP and consequently Vranica.

77. In the "E" claim form, these losses were classified as a claim for interest. The Panel considers that the asserted losses are more appropriately classified as financial losses.

2. Analysis and valuation

78. In support of its claim, Vranica provided the deferred payment agreement and the statement of account from the FDSP and the FDSP's successor, Jugoimport, dated 29 October 1999. This was insufficient to establish the precise details of the claim, such as on what dates the Airforce Directorate's obligation to pay interest commenced, and on what amount(s) interest was payable.

79. In any event, the claim relates to interest on underlying losses (contract losses) which the Panel has found are not compensable. Vranica failed to establish that the alleged loss is the direct result of Iraq's invasion and occupation of Kuwait. The Panel accordingly recommends no compensation for financial losses.

3. Recommendation

80. The Panel recommends no compensation for financial losses.

D. Recommendation for Vranica

Table 2. Recommended compensation for Vranica

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	11,456,155	nil
Loss of tangible property	851,345	nil
Financial losses	6,000,000	nil
Total	18,307,500	nil

81. Based on its findings regarding Vranica's claim, the Panel recommends no compensation.

IV. UNIONINVEST, HOLDING D.D.

82. Unioninvest, holding d.d ("Unioninvest") is a corporation organised according to the laws of Bosnia and Herzegovina operating as a consulting engineer.

83. Unioninvest seeks compensation in relation to two projects in Iraq, Project 202-C-3 and Project 202-B-5. It submitted a separate "E" claim form for each of the two projects. In the "E" claim form for Project 202-C-3, Unioninvest sought compensation in the amount of USD 15,329,043 for contract losses, losses related to a business transaction or course of dealing, loss of real property and loss of income-producing property. In the "E" claim form for Project 202-B-5, Unioninvest sought compensation in the amount of USD 17,892,185 for contract losses, losses related to a business transaction or course of dealing, loss of tangible property and payment or relief to others.

84. Where similar losses were alleged in relation to the two projects, the Panel has grouped them together. The Panel has also reclassified elements of Unioninvest's claim for the purposes of this report. The Panel therefore considered the amount of USD 33,221,228 for contract losses, loss of tangible property, payment or relief to others, financial losses and other losses, as follows:

Table 3. Unioninvest's claim

Claim element	Claim amount (USD)
Contract losses	16,584,514
Loss of tangible property	2,352,466
Payment or relief to others	99,638
Financial losses	10,818,855
Other losses	3,365,755
Total	33,221,228

A. Contract losses

1. Facts and contentions

85. Unioninvest seeks compensation in the amount of USD 16,584,514 for contract losses allegedly incurred in connection with Project 202-C-3 (in the amount of USD 10,785,930) and Project 202-B-5 (in the amount of USD 5,798,584).

86. In both "E" claim forms, Unioninvest claimed contract losses in respect of interest on unpaid amounts for both projects in the total amount of USD 10,438,079. The Panel considers that the asserted losses are more appropriately classified as financial losses (see section D, infra).

(a) Project 202-C-3

87. Unioninvest seeks compensation in the amount of USD 10,785,930 for unpaid executed works. Unioninvest advised that it was a sub-contractor on the project. It states that Iraq's invasion and occupation of Kuwait prevented the payment of its invoices.

88. On 20 December 1979, the Federal Directorate for Supply and Procurement (the "FDSP"), part of the Federal Secretariat for National Defence of the Federal Republic of Yugoslavia, and the Directorate of Airforce and Airdefence Works, Ministry of Defence, Iraq (the "Airforce Directorate"), entered into a contract for Project 202-C concerning the construction of an airbase in Balad, Iraq (the "Balad contract"). The value of the Balad contract was USD 680,537,170. The duration of the work contemplated by the Balad contract was 1,095 days (i.e. three years) with a maintenance period of 12 months. The contract came into effect on 17 July 1980.

89. In 1983, the parties added further works to the Balad contract. Under annex No. 1, the FDSP agreed to construct a transformer sub-station and long distance power line. The value of the work contemplated by annex No. 1 was USD 43,914,262. Its duration was 12 months.

90. On an unknown date, Unioninvest and other entities from the Federal Republic of Yugoslavia entered into a sub-contract with the FDSP to carry out works in respect of the Balad contract. For the purposes of the FDSP and the sub-contractors, the project was called Project 202-C. Each sub-contractor had defined responsibilities for its works under Project 202-C. Unioninvest states that the works it performed under the Project 202-C sub-contract were the "designing and execution of all installations, energetic and radio navigation works". The value of Unioninvest's works under the sub-contract was USD 157,562,532.

91. In relation to annex No. 1, the same process applied. Unioninvest and one other sub-contractor agreed to carry out the works. The value of Unioninvest's works was USD 20,795,343. For the purposes of this report, all references to the Balad contract and the sub-contract include annex No. 1. The total contract value for Unioninvest's works was, therefore, USD 178,357,875. Unioninvest describes all work which it carried out as "Project 202-C-3".

92. Unioninvest asserts that the involvement of the FDSP was mandatory under the law of the Federal Republic of Yugoslavia, but all contracts which the FDSP entered into were done so on behalf of the sub-contractors. The FDSP advised the Commission in 1993 that it would not submit any claims to the Commission.

93. In relation to the terms of the sub-contract, Unioninvest asserts that all of the FDSP's rights and liabilities under the Balad contract with the Airforce Directorate were transferred to the sub-contractor. Each of the sub-contractors authorised the FDSP to enter into an agreement on their behalf with the Airforce Directorate in the name of the FDSP.

94. Unioninvest asserts that there were two phases for the provision of services and that different terms of payment applied to each phase. The Panel has focused on the second phase of the payment arrangements.

95. In mid-1983, the Government of the Federal Republic of Yugoslavia and the Government of Iraq entered into a deferred payment agreement (the "deferred payment agreement"), which covered completed works. Unioninvest was to receive 20 per cent of the amounts due to it immediately in United States dollars and 12 per cent immediately in Iraqi dinars. The balance of 68 per cent (which was payable in United States dollars) was to be deferred for two years and earned interest at an annual rate of 6 per cent. During the operation of the deferred payment agreement, the deferred payments were subsequently repeatedly deferred.

96. Unioninvest contended that it did not expect to receive 60 per cent of the outstanding deferred amounts until dates between 1992 and 1995. The remaining 40 per cent was payable in exchange for oil.

97. Unioninvest alleges that by 2 August 1990 it had completed contractual works in the amount of USD 188,009,898 (i.e. more than the total contemplated value of Project 202-C-3, a discrepancy which has not been explained). Unioninvest received payments under the sub-contract until 15 July 1991 in the amount of USD 177,223,968 for its works. Unioninvest alleges that it had completed all

of the contract works, including the works required during the maintenance period, to the satisfaction of the requirements of the Iraqi authorities, prior to Iraq's invasion and occupation of Kuwait.

98. Unioninvest seeks compensation in the amount of USD 10,785,930 for unpaid executed works. This is the difference between the figures of work completed (USD 188,009,898) and work for which it was paid (USD 177,223,968). Unioninvest asserts that Iraq failed to make any payments after 2 August 1990. The amount claimed can be broken down as follows:

Table 4. Unioninvest's claim for contract losses (Project 202-C-3)

Loss item	Claim amount (USD)
Delayed demands	2,665,216
Maintenance and handling services	6,300,000
Summary No. 66, XII/87	1,579,497
Final summary No. 67, XII/88	331,217
Total	10,875,930

99. Unioninvest provided no additional detail about the four individual loss items. The Panel also notes that the total of the individual loss items was USD 10,875,930, as opposed to the claim amount of USD 10,785,930. The Panel was unable to identify any further information from the evidence about the delayed demands. On the basis of the limited evidence which Unioninvest provided in relation to the other three loss items, it appears that:

(a) The claim for maintenance and handling services relates to work completed either by December 1987 or December 1988;

(b) The claim for Summary No. 66, XII/87 relates to work completed by 31 December 1987; and

(c) The claim for Final summary No. 67, XII/88 relates to work completed by 31 December 1988.

100. The FDSP obtained the final maintenance certificate for the whole of Project 202-C on an unstated date. The certificate states that the FDSP "has fulfilled all his contractual obligations from the maintenance period within agreed time".

101. It appears that Project 202-C was considerably delayed as a result of the effects of the war between Iran and Iraq and shortages of a number of important construction supplies in Iraq during the construction period.

102. Prior to Iraq's invasion and occupation of Kuwait, Unioninvest and the FDSP held negotiations about the amounts which were owed to Unioninvest. The FDSP agreed that Unioninvest should be paid the amount of USD 8,300,000 (the same amount as is claimed for maintenance and handling services), on the condition that Unioninvest refund to the FDSP the amount of USD 2,000,000 which Unioninvest had borrowed. Unioninvest agreed. It is not clear whether this

arrangement represented a settlement of Unioninvest's claims. In 1993, a court in Sarajevo entered judgment in the amount of USD 8,300,000 in Unioninvest's favour against the FDSP.

(b) Project 202-B-5

103. Unioninvest seeks compensation in the amount of USD 5,798,584 for unpaid executed works. Unioninvest advised that it was a sub-contractor on the project. It states that Iraq's invasion and occupation of Kuwait prevented the payment of Unioninvest's invoices.

104. On 19 December 1980, the FDSP and the Airforce Directorate entered into a contract for the construction of an airbase in Al Baghdadi, Iraq (the "Al Baghdadi contract"). This was Project 202-B. The value of the Al Baghdadi contract is stated by Unioninvest to have been USD 699,491,360, but the Panel is aware from other claims which it has considered in relation to this project that, following an amendment in December 1981 (resulting in extra works), the contract value was increased to USD 855,155,111. The duration contemplated in the original Al Baghdadi contract was 1,461 calendar days (i.e. four years) with a 12-month maintenance period. The 1981 amendment, which resulted in the addition of further works, led to a 36-month extension of the period of the Al Baghdadi contract.

105. On 2 February 1981, Unioninvest and other entities from the Federal Republic of Yugoslavia (including another claimant from this instalment, Vranica, whose claim is considered by the Panel at paragraphs 34 to 81, supra) entered into a sub-contract with the FDSP to carry out works in respect of Project 202-B. Each sub-contractor had defined responsibilities for its works under the Al Baghdadi contract. Unioninvest states that the works it performed under the Al Baghdadi contract sub-contract were the "designing and execution of all installations, energetic and radio navigation works".

106. The value of Unioninvest's works under the sub-contract was USD 224,909,939. The duration of work under the sub-contract was not stated. Unionvest describes all work which it carried out as "Project 202-B-5". Unioninvest asserts that there were two phases for the provision of services and that different terms of payment applied to each phase. The Panel has focused on the second phase of the payment arrangements. The deferred payment agreement referred to at paragraph 95, supra, also applied to Project 202-B-5.

107. Unioninvest alleges that by 2 August 1990, it had completed contractual works in the amount of USD 226,159,783 (i.e. more than the total contemplated value of Project 202-B-5, a discrepancy which has not been explained). Unioninvest received payments under the sub-contract until 7 July 1991 in the amount of USD 220,361,199 for its works. Unioninvest alleges that it had completed all of the contract works, including the works required during the maintenance period, to the satisfaction of the requirements of the Iraqi authorities, prior to Iraq's invasion and occupation of Kuwait.

108. Unioninvest seeks compensation in the amount of USD 5,798,584 for unpaid executed works. This is the difference between the figures of work completed (USD 226,159,783) and work for which it was paid (USD 220,361,199). Unioninvest alleges that Iraq failed to make any payments after 2 August 1990. The amount claimed can be broken down as follows:

Table 5. Unioninvest's claim for contract losses (Project 202-B-5)

Loss item	Claim amount (USD)
Delayed demands	3,528,829
Final summary No. 74 – main contract	716,349
Final summary No. 63 – annex No. 1	1,553,406
Total	5,798,584

109. Unioninvest provided no additional detail about the three individual loss items. The Panel was unable to identify any further information from the evidence about the delayed demands. On the basis of the limited amount of evidence which Unioninvest provided in relation to the other two loss items, it appears that both claims relate to work completed by 29 February 1988.

110. In relation to the issue of when the work under the sub-contract giving rise to the claimed amount was carried out, Unioninvest provided a document entitled "final maintenance certificate", which the Airforce Directorate issued to the FDSP on 1 June 1992 for Project 202-B as a whole. This confirmed that the FDSP had "fulfilled all his contractual obligations from maintenance period within agreed time". The "agreed time" was not stated.

111. As with Project 202-C-3, it appears that the project was considerably delayed as a result of the effects of the war between Iran and Iraq and shortages of a number of important construction supplies in Iraq during the construction period.

2. Analysis and valuation

(a) Analysis of contractual relationships

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

113. In relation to the issue of what party Unioninvest contracted with, it is possible to undertake a common analysis because the employer, the Airforce Directorate (which was an Iraqi State agency), was the same in relation to both projects. The Panel notes that Unioninvest did not have a direct contractual relationship with the Airforce Directorate. Nor did Unioninvest assert that it was a nominated sub-contractor with a direct payment demand against the Airforce Directorate. Unioninvest was a sub-contractor to the FDSP in relation to both projects.

114. The FDSP has not submitted any claims to the Commission. Although Unioninvest looked to the FDSP for payment in respect of both projects, and continued to do so after Iraq's invasion and occupation of Kuwait, the Panel notes that the FDSP's active role in all of the contractual arrangements prior to this time was very limited. Further, apart from the FDSP, there were no other parties in the contractual chain above Unioninvest. The Panel considers that Unioninvest should be

regarded as having entered into a direct contract with Iraq in relation to Project 202-C-3 and Project 202-B-5 for the purposes of the Commission's jurisdiction.

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

(b) Dates of performance

(i) Evidence

116. Unioninvest provided a number of documents. However, they were incomplete and did not present a comprehensible narrative. They shed very little light on the issues of what work Unioninvest performed, and on what dates. Unioninvest provided copies of the following documents:

(a) Extracts from the Balad contract (Project 202-C-3);

(b) A complete copy of the Al Baghdadi contract (Project 202-B-5);

(c) Extracts from the sub-contract between the FDSP and Unioninvest (Project 202-B);

(d) Final maintenance certificates for both projects;

(e) Extracts from the deferred payment agreement;

(f) Certificate dated 10 December 1988 stating that the amount of USD 8,300,000 for maintenance and handling services was due to Unioninvest as of December 1987 (Project 202-C-3);

(g) Summary No. 66, XII/87 (Project 202-C-3). This document appears to show a total for executed works as at 31 December 1987 in the amount of USD 178,162,008;

(h) Final summary No. 67, XII/88 (Project 202-C-3). This document appears to show a total for executed works as at 31 December 1988 in the amount of USD 177,369,938;

(i) Final summary No. 74 (Project 202-B-5). This document appears to show a total for executed works as at 29 February 1988 in the amount of USD 181,132,958;

(j) Final summary No. 63 – annex No. 1 (Project 202-B-5). This document appears to show a total for executed works as at 29 February 1988 in the amount of USD 41,982,788;

(k) Letter dated 2 June 1992 from the FDSP to the Airforce Directorate. The letter states that the Airforce Directorate had approved the "last interim certificates No. 74 and 63" (Project 202-B-5);

(l) Correspondence with the FDSP between 1987 and 1993 regarding Unioninvest's claims for its contract losses (both projects); and

(m) A 1993 judgment in Unioninvest's favour against the FDSP in the amount of USD 8,300,000 (Project 202-C-3).

117. In the article 34 notification, and in supplementary questions sent to Unioninvest in December 2001, Unioninvest was asked to provide a copy of the complete contract for Project 202-C-3, evidence of when the work was carried out, whether there were any time extensions, and copies of correspondence with the employer. On 19 April 2002, the Commission received a one-page reply to the supplementary questions from the Ministry of Foreign Trade and Economic Relations of Bosnia and Herzegovina. The Commission was advised that all of Unioninvest's documents had already been sent to the Commission. Unioninvest advised that it could not provide any of the further requested information and evidence for a number of reasons. It asserted that its offices and documentation in Bosnia and Herzegovina were destroyed in 1993 during the armed conflict in Bosnia and Herzegovina. It stated that there might be documents in Iraq, but was unable to go there at this stage. Finally, Unioninvest asserted that it had sought copies of documentation from the FDSP, but had received no reply.

118. While the Panel accepts Unioninvest's explanations as to the lack of documentation, it requires claimants to provide substantial contemporaneous documentary evidence of their claims. In the absence of such evidence, the Panel cannot accept unsubstantiated allegations.

(ii) Conclusions – dates of performance

119. In relation to the issue of when the work was carried out in relation to both projects, the lack of information and evidence, as well as a detailed, comprehensible, narrative, has made it difficult for the Panel to assess the claims.

120. In respect of Project 202-C-3, the Panel has considered the four loss items and the evidence provided, particularly the documents entitled "Certificate (maintenance and handling services)", "Summary No. 66, XII/87" and "Final summary No. 67, XII/88". All three documents appear to show totals for works completed well before 2 May 1990. The Panel concludes that, in so far as it is possible to establish when the work was carried out, it was done so before 2 May 1990.

121. In respect of Project 202-B-5, as at 2 August 1990, the Project was in the maintenance period. Unioninvest may have a claim in respect of retention monies, but it has not identified what proportion of its claim relates to work which it carried out after 2 May 1990. Unioninvest was asked to explain what work it carried out after 2 May 1990 in the supplementary questions. Unioninvest states that, because of the lack of documentation, it was unable to answer these questions. The Panel has considered the three loss items and the evidence provided, particularly the documents entitled "Final Summary No. 74" and "Final Summary No. 63 – Annex No. 1". Both documents appear to show totals for works completed well before 2 May 1990. The Panel concludes that, in so far as it is possible to establish when the work was carried out, it was done so before 2 May 1990.

122. The Panel finds that Unioninvest failed to establish that any of its alleged contract losses related to work that was performed after 2 May 1990.

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

124. The Panel finds that for the purposes of Security Council resolution 687 (1991) the deferred payment agreement did not have the effect of novating the debts.

3. Recommendation

125. The Panel recommends no compensation for contract losses.

B. Loss of tangible property

1. Facts and contentions

126. Unioninvest seeks compensation in the amount of USD 2,352,466 for loss of tangible property. The claim is for the alleged loss of materials, spare parts, tools, furniture, barracks, a computer, and a vehicle. The claim relates to both projects.

(a) Project 202-C-3

127. Unioninvest's claim can be represented as follows:

Table 6. Unioninvest's claim for loss of tangible property (Project 202-C-3)

Loss item	Claim amount (USD)
Materials and equipment	1,891
Spare parts	4,743
Tools	2,828
Furniture	30,474
Workshops	194,000
"Material sold to Teco"	313,000
Total	546,936

128. In the "E" claim form for Project 202-C-3, all components of the claim were classified as components of the claim for losses related to a business transaction or course of dealing. The Panel considers that the alleged losses in the total amount of USD 546,936 are more appropriately classified as loss of tangible property.

129. The Panel further notes that in the "E" claim form for Project 202-C-3, Unioninvest sought compensation for loss of real property in the total amount of USD 318,694. On the basis of the descriptions in the accompanying Statement of Claim, the Panel considers that the asserted losses relating to the loss of cash (total of USD 249,803) are more appropriately classified as financial losses. The claim for "sold and non-paid material" (USD 68,891) is more appropriately classified as other losses.

(b) Project 202-B-5

130. Unioninvest's claim can be represented as follows:

Table 7. Unioninvest's claim for loss of tangible property (Project 202-B-5)

Loss item	Claim amount (USD)
Mechanical materials	31,557
Electrical materials	59,114
Maintenance materials	5,007
Hydrotechnical materials	450,805
Tools	10,818
Equipment	226,558
Workshops	1,021,671
Total	1,805,530

131. In the "E" claim form for Project 202-B-5, all components of the claim were classified as losses related to a business transaction or course of dealing.

132. In the "E" claim form for Project 202-B-5, Unioninvest claimed loss of tangible property in the amount of USD 3,308,777. On the basis of the descriptions in the accompanying Statement of Claim, the Panel considers that the asserted loss relating to the loss of cash (USD 130,973) is more appropriately classified as financial losses. The claim for "material sold to Teco" (USD 3,177,804) is more appropriately classified as other losses.

133. Unioninvest was unable to provide much information about its claims. It asserts in relation to both projects that as at 2 August 1990, it had employees on the sites working to rectify the deficiencies identified in the maintenance certificates so as to obtain the Final Maintenance Certificates. The items of tangible property were being used for the work or were being used by the employees personally. Unioninvest states that it could not return to the sites to claim the items after the liberation of Kuwait.

134. In respect of the claim for "material sold to Teco" (Project 202-C-3), Unioninvest explained that the FDSP agreed to sell on its behalf some of Unioninvest's tangible property to an Iraqi State enterprise called Teco Co., based in Baghdad. The sale price was 97,057 Iraqi dinars (IQD). Unioninvest alleges that the sale was never completed because of Iraq's invasion and occupation of Kuwait. The items were left on site and Unioninvest advised that it did not know whether Teco Co. took the material later or whether it was lost. Unioninvest seeks compensation for the United States dollar equivalent of USD 313,000.

2. Analysis and valuation

135. Unioninvest provided detailed lists of the property in respect of which it seeks compensation. It states that the lists reflected the situation as at 15 January 1991. However, Unioninvest explained that it did not have any evidence of ownership as all such evidence was destroyed by a fire in 1993 during the war in Bosnia and Herzegovina. The absence of documents is surprising given the existence of the detailed lists of items which Unioninvest provided, but this may be because the lists were prepared when Unioninvest had the documents available for the purpose of submitting a claim to the FDSP. Unioninvest advised that the absence of documents cannot be remedied.

136. Governing Council decision 7 requires corporate claimants to provide documentary and other appropriate evidence sufficient to demonstrate the circumstances and the amount of the claimed loss. In the absence of such evidence, the Panel cannot accept unsubstantiated allegations.

137. The Panel finds that Unioninvest failed to provide sufficient information and evidence which demonstrated its title to or right to use the tangible property, and the value of the tangible property, located in Iraq.

3. Recommendation

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

C. Payment or relief to others

1. Facts and contentions

139. Unioninvest seeks compensation in the amount of USD 99,638 for payment or relief to others. The claim has three components.

140. First, Unioninvest seeks compensation in the amount of USD 19,234 for the alleged costs of the airfares (from Baghdad to Belgrade) for 21 employees on the two sites. Secondly, it seeks compensation in the amount of USD 49,140 for the wages and expenses of its employees in Iraq between 2 August 1990 and their dates of departure (the employees left between 11 August and 11 September 1990) at the contractual rate of USD 22.50 an hour. Finally, Unioninvest seeks compensation in the amount of USD 31,264 for their salary costs for the two months after their repatriation as they could not be immediately reassigned to other projects.

141. In the “E” claim form for Project 202-C-3, Unioninvest sought compensation for loss of income-producing property in the amount of USD 61,681. On the basis of the descriptions in the accompanying Statement of Claim, the Panel considers that the asserted losses are more appropriately classified as payment or relief to others.

142. Unioninvest provided the names, passport numbers and job positions of the employees, but no other details.

2. Analysis and valuation

143. Unioninvest provided no evidence in support of its claim, such as airline tickets, contracts of employment, and wage and salary records. Nor did it provide evidence of its obligation to pay the employees upon their return to Belgrade. It was requested to provide this evidence in the supplementary questions of December 2001.

144. Unioninvest states that it was unable to provide this further information and evidence. In the absence of such relevant evidence, the Panel finds that Unioninvest failed to provide sufficient information and evidence to establish its claim.

3. Recommendation

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

D. Financial losses

1. Fact and contentions

146. Unioninvest seeks compensation in the amount of USD 10,818,855 for financial losses. There are two categories of claims – interest and loss of cash.

147. First, Unioninvest seeks compensation for interest in the amount of USD 10,438,079 on the unpaid contract losses prior to 2 August 1990 in respect of both projects. The claim arises because, under the deferred payment agreement, interest accrued at the rate of 6 per cent per annum on amounts which Airforce Directorate owed the FDSP, and consequently Unioninvest.

148. The claim for loss of cash has several components. Unioninvest seeks compensation in the amount of USD 39,713 for loss of cash held on the Project 202-C-3 site. It also seeks compensation for the United States dollar equivalent of Iraqi dinar amounts held in two accounts (one for each project) with the Rafidain Bank (total amount of USD 341,063). Unioninvest provided no further detail about its claim for loss of cash, such as the circumstances in which the cash was allegedly lost.

149. All of the alleged financial losses have been reclassified for the purposes of this report. In the original claims submitted by Unioninvest, the claims for interest were classified as contract losses and the claims for loss of cash were classified as loss of tangible property or loss of real/tangible property. The Panel considers that all of the alleged losses are more appropriately classified as financial losses.

2. Analysis and valuation

(a) Interest

150. Unioninvest relies on the evidence provided in support of its claim for contract losses, in particular the correspondence between Unioninvest and the FDSP regarding the amounts Unioninvest was allegedly owed. This evidence is insufficient to establish the precise details of the claim, such as

on what dates the Airforce Directorate's obligation to pay interest commenced, and on what amount(s) interest was payable.

151. In any event, the claim relates to interest on underlying losses (contract losses) which the Panel has found are not compensable. Unioninvest failed to establish that the alleged loss is the direct result of Iraq's invasion and occupation of Kuwait. The Panel accordingly recommends no compensation for financial losses (interest).

(b) Loss of cash

152. In support of its claim for cash held at the Project 202-C-3 site, Unioninvest provided one document. This was a "cashier's report" dated 13 January 1991. It showed a balance of IQD 12,315 (i.e. USD 39,713). The document does not state on its face that it relates to Project 202-C-3 or, indeed, Unioninvest. Unioninvest failed to provide any evidence of the actual existence of the cash or that the cash belonged to it.

153. In respect of the claims for loss of cash in the bank accounts, Unioninvest provided poor photocopies of some bank statements which purport to show the amounts held by the Rafidain Bank. The bank statement for Project 202-B-5 is scarcely legible. It shows two balances which may represent the balance of the account as at 26 June 1990 in Iraqi dinars (IQD 43,449 and IQD 44,245 respectively). Neither of these amounts is the figure forming the basis of Unioninvest's claim: IQD 40,613 (i.e. USD 130,973). Nor is there any indication on the face of this document showing that the account was controlled by Unioninvest.

154. The bank statement for Project 202-C-3 is illegible. Unioninvest also provided a statement from the Rafidain Bank dated 25 October 1999, which listed the deposits into the bank account for this Project. Unioninvest failed to explain the relevance of this document.

155. In relation to all components of the claim for loss of cash, Unioninvest states that it was unable to provide any further information and evidence. In the absence of relevant evidence such as evidence of Unioninvest's ownership of the accounts or cash on site, the Panel considers that Unioninvest failed to provide sufficient information and evidence to establish its claim. The Panel accordingly recommends no compensation for financial losses (loss of cash).

3. Recommendation

156. The Panel recommends no compensation for financial losses.

E. Other losses

1. Facts and contentions

157. Unioninvest seeks compensation in the amount of USD 3,365,755 for other losses in respect of a variety of losses.

158. In respect of Project 202-C-3, Unioninvest seeks compensation in the amount of USD 25,000 for payments it made to Iraqi citizens for five months to clean its premises and to guard its property. It also seeks compensation in the amount of USD 94,059 for advance rental payments for five months (the precise dates were not stated).

159. The final component of the claim for other losses relates to amounts realised from the sale of some of its items of tangible property by the FDSP on behalf of Unioninvest to Teco. The claim relates to both projects.

160. All of the alleged losses have been reclassified for the purposes of this report. In the "E" claim form for Project 202-C-3, Unioninvest sought compensation for loss of income-producing property in the amount of USD 86,681. On the basis of the descriptions in the Statement of Claim, the Panel considers that the asserted losses in the amount of USD 25,000 are more appropriately classified as other losses. In the same "E" claim form, Unioninvest sought compensation for losses related to a business transaction or course of dealing in the amount of USD 640,995. On the basis of the description in the Statement of Claim, the Panel considers that the claim for advance rental in the amount of USD 94,059 is more appropriately classified as other losses. Unioninvest also sought compensation for loss of tangible/real property in the amount of USD 318,694. On the basis of the descriptions in the accompanying Statement of Claim, the Panel considers that the claim for "sold and non-paid material" (USD 68,892) is more appropriately classified as other losses.

161. Finally, in the "E" claim form for Project 202-B-5, Unioninvest claimed loss of tangible property in the amount of USD 3,308,777. On the basis of the descriptions in the accompanying Statement of Claim, the Panel considers that the claim for "material sold to Teco" in the amount of USD 3,177,804 is more appropriately classified as other losses.

2. Analysis and valuation

162. Unioninvest provided no evidence in support of its claims. In the article 34 notification and supplementary questions, it was requested to provide evidence such as invoices and receipts, contracts of employment with the Iraqi employees, the lease agreement, the contracts of sale for the items sold to Teco, and correspondence with the FDSP relating to the sale of the items.

163. Unioninvest stated that it was unable to provide this further information and evidence. In the absence of such relevant documentation, the Panel considers that Unioninvest failed to provide sufficient information and evidence to establish its claim.

164. Moreover, in relation to the claims for the advance rental payments and the proceeds of materials sold to Teco, the Panel finds that Unioninvest failed to demonstrate that the alleged losses arose as a direct result of Iraq's invasion and occupation of Kuwait. As regards the claim for the advance rental payments, in the majority of similar claims which the Panel has previously reviewed, the Panel has found that such claims are overheads which were not directly chargeable to the employer. Unioninvest did not submit any evidence that the advance rental payments were directly chargeable to the employer.

165. In respect of the claim for the proceeds of the materials sold to Teco, Unioninvest states that the claim is really against the FDSP, on the basis that the FDSP received the proceeds of the sale from Teco. On that basis, any claim that Unioninvest may have is against the FDSP, not Teco or Iraq.

3. Recommendation

166. The Panel recommends no compensation for other losses.

F. Recommendation for Unioninvest

Table 8. Recommended compensation for Unioninvest

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	16,584,514	nil
Loss of tangible property	2,352,466	nil
Payment or relief to others	99,638	nil
Financial losses	10,818,855	nil
Other losses	3,365,755	nil
Total	33,221,228	nil

167. Based on its findings regarding Unioninvest's claim, the Panel recommends no compensation.

V. DUMEZ-GTM

168. Dumez-GTM is a corporation organised according to the laws of France operating in the construction industry. It was formed in 1991 and is the successor to a company called Dumez S.A. References to "Dumez" in this report are references to "Dumez-GTM" or "Dumez S.A."

169. Dumez is a related company of Saudi Arabian Dumez Company Limited, which filed a separate E3 claim. The Panel considers the claim by Saudi Arabian Dumez Company Limited at paragraphs 429 to 487, infra, of this report. The two claims are unrelated and they involve different projects.

170. In the original "E" claim form, Dumez sought compensation in the total amount of USD 43,517,901, and classified all of the alleged losses as contract losses. In the Statement of Claim, Dumez stated that the alleged losses were related to three projects and referred to them as the King Fahd International Airport project (the "Airport project"), the Kasr Al Hokm project (the "KAH project"), and the Makkah Road project (the "Road project"). All of the projects were located in Saudi Arabia.

171. The Airport project concerned the construction of a terminal at King Fahd International Airport in Dammam. The KAH project involved construction and development work in Arriyadh.

The Road project concerned the development of the Makkah Road, also known as the King Fahd Road.

172. In the Statement of Claim, Dumez alleged losses in the amount of USD 30,324,851 related to the Airport project, USD 9,653,615 related to the KAH project, and USD 3,539,435 related to the Road project.

173. A large portion of the claimed losses is based on Dumez's assertion that it incurred a variety of unanticipated costs when work on the projects was suspended and delayed due to safety concerns and threats created by Iraq's invasion and occupation of Kuwait.

174. The secretariat sent an article 34 notification to Dumez. In its reply, Dumez stated that it had no documents to support its claim relating to the KAH and the Road projects because all such documents were destroyed in a fire at its offices in 1993.

175. In the same reply, Dumez reduced the total amount of its claim to USD 28,718,764. With respect to the Airport project, it reduced the amount of its claim to USD 20,012,276. With respect to the KAH project, it reduced the amount of its claim to USD 6,370,709. With respect to the Road project, it reduced the amount of its claim to USD 2,335,779.

176. With reference to the reduced amounts in the claim, the Panel has reclassified elements of Dumez's claim for the purposes of this report. Of the reduced claim amount of USD 28,718,764, the amount of USD 11,370,297 remains classified as contract losses. The Panel finds that the remaining losses are more appropriately classified as follows: USD 6,398 as loss of tangible property; USD 569,240 as payment or relief to others; USD 852,013 as financial losses; USD 12,739,879 as other losses; and USD 3,180,937 as interest. The Panel therefore considered the amount of USD 28,718,764 for contract losses, loss of tangible property, payment or relief to others, financial losses, other losses, and interest as follows:

Table 9. Dumez's claim

Claim element	Claim amount (USD)
Contract losses	11,370,297
Loss of tangible property	6,398
Payment or relief to others	569,240
Financial losses	852,013
Other losses	12,739,879
Interest	3,180,937
Total	28,718,764

A. Contract losses

1. Facts and contentions

177. Dumez seeks compensation in the amount of USD 11,370,297 for contract losses allegedly incurred in connection with the three projects in Saudi Arabia.

(a) Airport project

178. Dumez entered into a contract on 10 July 1988 with the Government of the Kingdom of Saudi Arabia represented by the Ministry of Defence and Aviation and Inspectorate General, International Airport Projects (the employer). The contract was for the construction of the Royal Terminal at the King Fahd International Airport. The value of the contract, as revised, was USD 88,520,389. The completion date was scheduled for February 1992.

179. On 13 August 1990, Allied Coalition Forces started arriving at the project site and began building up their presence. The site experienced intensive military activity because it was used as a base for the Allied Coalition Forces. Dumez states that its access to the project site was blocked by the military personnel on 3 October 1990. On 10 January 1991, as the military response by the Allied Coalition Forces approached, Dumez evacuated most of its workforce from the project site to Riyadh, Saudi Arabia.

180. On 11 February 1991, the employer extended the contract period by 696 days (to December 1993). However, there was no increase in the budget.

181. Dumez resumed work on the project on 1 May 1991.

182. On 19 May 1991, Dumez signed a change notice stating that it accepted the 696-day extension of the contract period. In the change notice, Dumez indicated that the extension of time was made necessary as a result of a delay caused by the inability to obtain marble from Italy. The change notice did not alter the contract value.

183. In the cover letter relating to the change notice, Dumez wrote to the project manager: "We wish however to point out that our signing of the Change Notice as prepared by your goodselves should not be considered as a waiver of our rights nor as an acceptance of the Contract Duration – especially regarding the additional year for 'Maintenance'. Our position in this respect remains the same ..."

184. The certificate of completion for the project was issued on 16 December 1993.

185. Dumez asserts that it suffered an overall delay on the contract equivalent to 330 days.

186. Dumez seeks compensation for losses resulting from this delay and suspension of work, including the labour costs for the period when productivity was diminished or non-existent, additional

labour costs that were incurred when work resumed, and the cost of maintaining the site while work was suspended.

187. Dumez does not seek compensation for the alleged losses from the employer or any other party involved with the project.

(b) KAH project

188. Dumez entered into a contract on 5 March 1988 with the High Commission for the Development of Arriyadh to construct a court complex called the Kasr Al Hokm Justice Palace District in Riyadh. The project was divided into three phases, and the combined value of the contract for all three phases (as revised) was 361,140,882 Saudi Arabian riyals (SAR). The contract duration was intended to be 1,825 days (five years) with a 730-day (two-year) maintenance period.

189. Work on the project was suspended, and Dumez evacuated most of its workforce to Riyadh on 16 January 1991. The workforce was remobilised on 29 January 1991.

190. Dumez asserts that it suffered an overall delay on the contract equivalent to 59 days.

191. Dumez seeks compensation for losses resulting from this delay and suspension of work, including the labour costs for the period when productivity was diminished or non-existent, additional labour costs that were incurred when work resumed, and the cost of maintaining the site while work was suspended.

(c) Road project

192. On 17 May 1987, Dumez entered into a contract with the Arriyadh Development Authority of Saudi Arabia to construct a road called the Makkah Road Highway. The value of the contract (as revised) was SAR 384,694,878. The contract duration was intended to be 48 months ending on 24 May 1991, with a 730-day (two-year) maintenance period.

193. Work on the project was suspended, and Dumez evacuated most of its workforce to Riyadh on 16 January 1991. The workforce was remobilised on 29 January 1991, and the completion certificates were issued on 21 December 1992 and 10 May 1993.

194. Dumez asserts that it suffered an overall delay on the contract equivalent to 42 days.

195. Dumez seeks compensation for losses resulting from this delay and suspension of work, including the labour costs for the period when productivity was diminished or non-existent, additional labour costs that were incurred when work resumed, and the cost of maintaining the site while work was suspended.

2. Analysis and valuation

(a) Airport project

196. Dumez's claim is based on alleged losses resulting from delays in the project. The Panel finds that Dumez did not provide sufficient information or evidence to show that these delays (which were allegedly caused by the inability to obtain marble from Italy) were a direct result of Iraq's invasion and occupation of Kuwait.

197. The change notice also did not modify the value of the contract to take account of any increased costs, and Dumez did not seek compensation from the employer for such alleged costs. Thus, the Panel finds that Dumez did not provide sufficient information or evidence to establish that it incurred a contract loss.

198. In any event, the Panel finds that Dumez did not provide sufficient information or evidence to support the amounts alleged for various loss types.

(b) KAH project

199. Dumez states that it has no documents to support this claim. Accordingly, the Panel finds that Dumez did not provide sufficient information or evidence to support this claim.

(c) Road project

200. Dumez states that it has no documents to support this claim. Accordingly, the Panel finds that Dumez did not provide sufficient information or evidence to support this claim.

3. Recommendation

201. The Panel recommends no compensation for contract losses.

B. Loss of tangible property

1. Facts and contentions

202. Dumez seeks compensation in the amount of USD 6,398 for loss of tangible property. The claim is based on alleged damage to a crane and the alleged theft of property related to the Airport project.

203. Dumez originally classified the claim for loss of its tangible property as a claim for contract losses, but the Panel finds that it is more appropriately classified as loss of tangible property.

204. With respect to the crane, Dumez asserts that on 16 August 1990, military personnel ordered one of its cranes to be moved off a road at the Airport project site. The crane was unable to be moved back on to the road, and Dumez allegedly incurred costs to return it to the road.

205. Dumez alleges that in January and February 1991, personnel from the Allied Coalition Forces stole a vehicle, a car battery, a camera, and office equipment belonging to Dumez.

2. Analysis and valuation

206. The Panel finds that Dumez did not provide sufficient information or evidence to support the costs related to the crane.

207. The Panel finds that Dumez did not provide sufficient information or evidence to establish ownership of the allegedly stolen items.

3. Recommendation

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

C. Payment or relief to others

1. Facts and contentions

209. Dumez seeks compensation in the amount of USD 569,240 for payment or relief to others. Dumez originally classified the alleged losses as contract losses, but the Panel finds that they are more appropriately classified as payment or relief to others.

210. The claim is for a variety of costs related to all three projects. The alleged costs include wages paid and leave payments made to employees who left Saudi Arabia, "risk payments" made to employees who remained, and the costs of demobilising and remobilising the work force. These alleged costs were in the nature of evacuation costs, as they arose out of Dumez's stated concerns for the workers' safety.

211. Dumez states that it was unable to support its claim relating to the KAH and Road projects due to the loss of its documents.

212. Dumez originally sought compensation in the amount of SAR 4,146,602 for the loss items relating solely to the Airport project. However, in its reply to the article 34 notification, it withdrew some of the original claimed loss items, and reduced the amount sought for other loss items.

213. Dumez's revised claim is in the amount of SAR 617,107 (USD 164,518) for losses relating to the Airport project. In the revised claim, Dumez seeks compensation for the costs of evacuating the workforce from Dammam to Riyadh by bus. It also seeks compensation for the travel costs of workers who resigned, visa costs, irrecoverable recruitment costs, demobilisation of staff dependants, and unspecified costs.

2. Analysis and valuation

(a) Airport project

214. In relation to the Airport project, Dumez states that it had buses already in use at the project site and that the same buses were used to evacuate the workers. Therefore, it did not need to hire buses. However, it seeks compensation for the amount it would have had to pay if it had paid for scheduled bus service for the evacuated workers.

215. The Panel finds that Dumez did not provide evidence to show the amount of the actual cost incurred in evacuating its workers by bus or to show that any such cost was actually paid.

216. With respect to the claim for travel costs of workers who resigned, visa costs, and irrecoverable recruitment costs, the Panel finds that Dumez did not provide sufficient information or evidence to support the manner in which it calculated its costs. For example, Dumez seeks (per worker) 30 per cent of SAR 1,990 for travel costs, 30 per cent of SAR 500 for visa costs, and 30 per cent of SAR 5,702 for recruitment costs. However, the Panel finds that Dumez did not provide sufficient information or evidence to support the basis of these calculations.

217. With respect to the costs of demobilisation of staff dependants, Dumez provided evidence showing that airline tickets had been purchased. However, the Panel finds that Dumez did not provide sufficient information or evidence to show that the purchases of airline tickets were in fact related to the individuals who were demobilised.

218. With respect to the unspecified costs, the Panel finds that Dumez did not provide sufficient information or evidence to explain the nature of the costs.

(b) KAH project

219. The Panel finds that Dumez did not provide sufficient information or evidence to support its claim relating to the KAH project.

(c) Road project

220. The Panel finds that Dumez did not provide sufficient information or evidence to support its claim relating to the Road project.

3. Recommendation

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

D. Financial losses

1. Facts and contentions

222. Dumez seeks compensation in the amount of USD 852,013 for financial losses. Dumez originally classified the losses as contract losses, but the Panel finds that they are more appropriately classified as financial losses.

223. Dumez seeks compensation for the cost of extending insurance policies and bonds, and for the loss of supplier and sub-contractor warranties.

224. Dumez states that it was required to extend its insurance policies and bonds on each of the three projects, and for the period of the contract extension on the Airport project.

225. Dumez also states that its supplier and sub-contractor warranties expired due to the delays in the projects, and that it had to assume liability for the warranties until the contract completion dates. Dumez calculated its alleged losses as 0.5 per cent of the contract fee, adjusted for the level of completion of the project, and pro-rated for the duration of the period.

2. Analysis and valuation

226. Dumez did not provide evidence of its alleged financial losses with respect to the KAH and Road projects.

227. With respect to the Airport project, the Panel finds that Dumez did not provide sufficient information or evidence to show that any costs resulting from any delays were a direct result of Iraq's invasion and occupation of Kuwait. As previously noted, Dumez stated in the change notice that the delay in the project was due to the inability to obtain marble from Italy.

228. In addition, and with respect to the warranties, the Panel finds that Dumez did not provide sufficient information or evidence to show the basis of its calculation of the alleged losses.

3. Recommendation

229. The Panel recommends no compensation for financial losses.

E. Other losses

1. Facts and contentions

230. Dumez seeks compensation in the amount of USD 12,739,879 for other losses. Dumez originally classified the losses as contract losses, but the Panel finds that they are more appropriately classified as other losses.

231. The claim is for a variety of costs related to the three projects, including general administrative expenses during the periods of interruption and delay, additional costs due to security measures, depreciation charges, and increases in costs due to inflation caused by the war.

232. Dumez did not present evidence to support its claim for other losses relating to the KAH and Road projects.

233. With respect to the Airport project, the specific loss types claimed by Dumez include:

(a) Depreciation and maintenance charges incurred during the delay and extension of the project;

(b) Costs of preventative maintenance while the project was delayed;

(c) Cost of consumables (such as office supplies) while the project was delayed;

(d) Cost of security measures, such as construction of shelters, purchase of gas masks and security badges;

(e) Increase in material prices due to inflation;

(f) Increase in transportation costs due to diversion of ordinary supply routes and need for increased reliance on air freight;

(g) Increase in sub-contractors' prices due to the fact that orders were placed later than anticipated because of the delay;

(h) Costs due to use of facilities (such as water tanks and tennis courts) by military personnel;

(i) Costs due to hindrance of work by military personnel; and

(j) Administrative costs incurred while the project was delayed, including management salaries and utilities.

2. Analysis and valuation

234. The Panel finds that, as a general matter, Dumez did not provide sufficient information or evidence to support its claim because it relied on estimates of costs without showing the amount of actual costs incurred.

235. With regard to depreciation and maintenance charges, the Panel finds that Dumez did not provide sufficient information or evidence to support the claimed write-down in values due to depreciation or to support the claim depreciation and maintenance rates.

236. With regard to increase in material prices, the Panel finds that Dumez did not provide sufficient information or evidence to show the actual costs incurred. In the Statement of Claim, Dumez stated that such alleged costs "cannot be accurately measured ..."

237. With regard to the remaining loss items, the Panel finds that Dumez did not provide sufficient information or evidence to show the actual costs incurred.

3. Recommendation

238. The Panel recommends no compensation for other losses.

F. Interest

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

G. Recommendation for Dumez

Table 10. Recommended compensation for Dumez

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	11,370,297	nil
Loss of tangible property	6,398	nil
Payment or relief to others	569,240	nil
Financial losses	852,013	nil
Other losses	12,739,879	nil
Interest	3,180,937	nil
Total	28,718,764	nil

240. Based on its findings regarding Dumez's claim, the Panel recommends no compensation.

VI. JAIPRAKASH INDUSTRIES LIMITED

241. Jaiprakash Industries Limited ("Jaiprakash") is a corporation organised according to the laws of India operating in the construction industry.

242. In the "E" claim form, Jaiprakash sought compensation in the total amount of USD 155,140,000 for contract losses, and divided the total amount of the claim for contract losses among five subcategories. However, the Panel notes that the total of the five subcategories is USD 205,270,000. The difference between the two amounts is USD 50,130,000.

243. The amount of USD 50,130,000 is also the same amount claimed by Jaiprakash under a subcategory described as the foreign currency portion of a claim in respect of the Basrah sewerage project. It is clear from additional documentation, which Jaiprakash provided in support of its claim, that it double-counted the amount of USD 50,130,000 relating to this subcategory.

244. The Panel therefore finds that the claim review amount is USD 155,140,000, which is the total claimed amount stated in the "E" claim form.

245. The Panel observes that the claim as submitted to the Commission contained a number of defects, including formal and evidential defects. In accordance with the Rules, the secretariat sent a

number of communications to Jaiprakash in 2000 and 2001 requesting it to correct the deficiencies in its claim documentation and to provide further necessary information and evidence. Jaiprakash failed to reply to the communications. Further, on 20 March 2001, the Panel issued Procedural Order No. 19 in respect of Jaiprakash's claim in which it instructed the secretariat to transfer a copy of Jaiprakash's claim to Iraq, and requested Iraq's comments on the claim. The Commission received a reply from Iraq to Procedural Order No. 19 on 5 February 2002 ("Iraq's reply"). The secretariat sent Iraq's reply to Jaiprakash on 25 April 2002. Jaiprakash was requested to comment on Iraq's reply by 27 May 2002. It failed to respond.

246. Since the date of submission of the "E" claim form and limited additional information to the relevant Indian governmental authorities in 1992, Jaiprakash did not communicate with the Commission at any stage. The lack of information and evidence contained in the claim documentation has made it difficult for the Panel to assess the nature of Jaiprakash's claims.

247. The Panel has, where relevant, referred to Iraq's reply in considering Jaiprakash's claim.

Table 11. Jaiprakash's claim

Claim element	Claim amount (USD)
Contract losses	155,140,000
Total	155,140,000

A. Contract losses

1. Facts and contentions

248. Jaiprakash seeks compensation in the amount of USD 155,140,000 for contract losses allegedly incurred in connection with four projects in Iraq.

249. The following details are based on the limited information which Jaiprakash provided, and the limited information and evidence which Iraq provided in its reply.

250. The four projects were:

(a) The East of Army Canal project, Baghdad, Iraq (Contract No. 124/123) (the "Canal Project"). The employer was the Amanat of Baghdad (i.e. the municipal authority) (the "Amanat");

(b) The West Bank Trunk Sewer Baghdad project, Baghdad, Iraq (Contract No. 222) (the "West Bank Project"). The employer was the Amanat;

(c) The Basrah Sewerage project, Basrah, Iraq (Contract No. 57/85) (the "Basrah Project"). The contract was dated 3 October 1987. The employer was the State Establishment of Water and Sanitation, Baghdad ("SEWS"); and

(d) The Training Centre project, Baghdad, Iraq (the "Training Centre Project"). The contract was dated 31 December 1988. The employer was SEWS.

251. The alleged losses by project can be represented as follows:

Table 12. Jaiprakash's claim for contract losses (by project)

Project	Claim amount (USD)
Canal Project	33,480,000
West Bank Project	1,100,000
Basrah Project	117,270,000
Training Centre Project	3,290,000
Total	155,140,000

252. There appear to be four types of contract losses. Jaiprakash provided explanations for none of them:

(a) Certified bills due under a deferred payment agreement in the amount of USD 86,940,000 (all projects);

(b) Certified dues under a cash contract (the Training Centre Project only) in the amount of USD 60,000;

(c) "Interest" in the amount of USD 18,010,000 (all projects); and

(d) "Damages"/"payment in foreign currency"/ "other claims" in the amount of USD 50,130,000 (the Basrah Project only).

253. Jaiprakash failed to provide copies of the contracts, despite the secretariat's request in the article 34 notification that it do so. Nor did it provide any details of the terms of payment for any of the projects. Iraq alleged in its reply that all of the contracts were subject to intergovernmental deferred payment agreements between the Governments of India and Iraq and between the EXIM Bank of India and the Central Bank of Iraq.

254. According to Iraq, Jaiprakash's claims in relation to all four projects relate to debts or obligations arising prior to 2 May 1990. As such, Iraq contended in its reply that Jaiprakash's claims are outside the jurisdiction of the Commission.

255. Iraq also asserted that Jaiprakash's claim in respect of the Basrah Project had been settled. Iraq alleged that Jaiprakash, the employer (SEWS) and Jaiprakash's "partner" (an Iraqi company called Abdul-Karim Al-Khirbit Company) entered into "a conciliatory settlement agreement" on 12 May 1998 (the "conciliatory settlement agreement"). In its reply, Iraq stated that:

> "The agreement provided for the settlement of all the outstanding financial matters between the two parties. Paragraph (2) of Article (4) of the agreement provided for the payment of the dues of Contract No. 57/85 [i.e. the contract for the Basrah Project], relating to the deferred payment agreement of 3 October 1987, would be settled after the lifting of the embargo on Iraq. Accordingly, [Jaiprakash] has submitted a request to [SEWS] in which it expressed its intention to withdraw its claim."

256. Iraq provided a copy of the alleged conciliatory settlement agreement in Arabic only, along with a letter dated 5 June 2001 from Jaiprakash to SEWS in which Jaiprakash appeared to confirm that it wished to withdraw its claim as the parties had reached a settlement under which SEWS (now called the General Establishment for Water and Sewerage) would pay Jaiprakash the amount of USD 69,804,595 upon the lifting of trade embargo imposed on Iraq pursuant to Security Council resolution 661 (1990). However, the letter also indicates that Jaiprakash sought further assurances from SEWS that the amount due under the purported settlement would be paid. It also expressed its intention to withdraw its claim before the Commission once the assurances were given.

2. Analysis and valuation

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

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

259. Jaiprakash provided limited information, and no evidence, in support of its claim for contract losses. The Panel is unable to determine, on the basis of the claim documentation, a number of significant facts, such as the nature of the contract works, the value of the original contract works, the date(s) on which Jaiprakash carried out its works, and the date(s) on which it could expect to be paid for its works.

260. The Panel is consequently unable to determine whether the claims relate to work carried out after 2 May 1990. As such, Jaiprakash failed to provide sufficient information and evidence to establish that its claim is within the Commission's jurisdiction. The Panel recommends no compensation for contract losses as they relate to debts and obligations of Iraq arising prior to 2 August 1990 and are, therefore, outside the jurisdiction of the Commission.

261. In respect of the limited information and evidence contained in Iraq's reply, the Panel observes that Iraq appeared to accept the existence of the alleged contracts and that it originally owed Jaiprakash substantial amounts for work carried out under these contracts. Iraq also appeared to accept that, in respect of the Basrah Project, Jaiprakash was entitled to receive the amount of USD 69,804,595.

262. In view of the Panel's conclusion with regard to its lack of jurisdiction over this claim, it is unnecessary for the Panel to reach a conclusion on the effect of the documentation provided by Iraq.

In any event, the conciliatory settlement agreement is not fully translated. Further, the attached letter of 5 June 2001 from Jaiprakash to SEWS does not explain the scope or the effect of the conciliatory settlement agreement in sufficient detail so as to operate as an admission by Jaiprakash that a settlement occurred.

3. Recommendation

263. The Panel recommends no compensation for contract losses.

B. Recommendation for Jaiprakash

Table 13. Recommended compensation for Jaiprakash

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	155,140,000	nil
Total	155,140,000	nil

264. Based on its findings regarding Jaiprakash's claim, the Panel recommends no compensation.

VII. REGGIANE OFFICINE MECCANICHE ITALIANE S.P.A

265. Reggiane Officine Meccaniche Italiane S.p.A. ("Reggiane") is a corporation organised according to the laws of Italy. It operates as a designer and builder of desalination plants.

266. In the "E" claim form, Reggiane sought compensation in the amount of 3,320,865 Kuwaiti dinars (KWD) (USD 11,490,882) for contract losses.

267. On 7 February 1996, the Permanent Mission of Italy advised the Commission that Reggiane had "received partial compensation for the losses claimed" in the amount of KWD 1,000,000 (USD 3,460,207). It enclosed Reggiane's letter to the Commission of 2 January 1996 informing the Commission of a "transaction" whereby the Kuwaiti employer for the project in respect of which Reggiane seeks compensation had paid Reggiane the amount of KWD 1,000,000 and released a bank guarantee. This advice was in accordance with Reggiane's ongoing obligation of disclosure under Governing Council decision 13 (S/AC.26/1992/13). Reggiane consequently reduced its claim by the amount of KWD 1,000,000 to KWD 2,320,865. It did not assign this "partial compensation" to any of its claim elements.

268. The Panel has reclassified elements of Reggiane's claim for the purposes of this report. In the "E" claim form, Reggiane sought compensation in the total amount of KWD 3,320,865 for contract losses. The Panel considers that losses in the amount of KWD 1,096,419 (USD 3,793,837) are more appropriately classified as payment or relief to others, financial losses and other losses.

269. The Panel therefore considered the amount of KWD 2,320,865 (USD 8,030,675) for contract losses, payment or relief to others, financial losses and other losses, as follows:

Table 14. Reggiane's claim

Claim element	Claim amount (USD)
Contract losses	7,697,045
Payment or relief to others	1,574,394
Financial losses	508,024
Other losses	1,711,419
Less proceeds received	(3,460,207)
Total	8,030,675

A. Contract losses

1. Facts and contentions

270. Reggiane seeks compensation in the amount of KWD 2,224,446 (USD 7,697,045) for contract losses allegedly incurred in connection with a contract in Kuwait.

271. In April 1989, Reggiane entered into an agency agreement with a Kuwaiti company, called Al Sagar and Brothers ("Al Sagar"). Under the agreement, Al Sagar agreed to provide consultancy services and assistance in Reggiane's projects in Kuwait.

272. On 24 October 1989, Reggiane and Al Sagar entered into a contract with the Ministry of Electricity and Water of Kuwait ("MEW") to construct a desalination system in Doha West, Kuwait (the "desalination contract"). Under the desalination contract, Reggiane and Al Sagar were required to design, supply equipment for, and build, a desalination plant and to operate it for one year after its construction. Reggiane advised that the desalination plant, when completed, would have satisfied the needs of about half the population of Kuwait City.

273. The value of the desalination contract was KWD 20,448,893. The intended date of completion of the works (and therefore the start of the operation of the works) was 34 months from the date of signing the contract, or approximately July 1992.

274. MEW made an advance payment to Reggiane in the amount of KWD 1,950,703.

275. As at the date of Iraq's invasion and occupation of Kuwait, Reggiane was in the process of carrying out preliminary works, such as geological and technical and design analysis, basic design and execution, market research in Kuwait and Italy, the sub-contracting of aspects of the works, establishment of a project office in Kuwait, commencement of site preparations, and fabrication of equipment in Italy. According to Reggiane, it carried out all of these tasks to MEW's satisfaction.

276. Reggiane asserts that Iraq's invasion and occupation of Kuwait interrupted the contract works. Reggiane states that on 7 August 1990, it wrote to MEW advising that the contract was consequently

suspended. Certain of Reggiane's employees working in Kuwait were detained until November 1990. Reggiane's office equipment was also allegedly destroyed by Iraqi soldiers.

277. Some time after the liberation of Kuwait, MEW requested Reggiane to resume the works, but effectively at the pre-invasion price. Reggiane objected, and after several months of negotiations, MEW cancelled the desalination contract on 1 September 1992. MEW advised Reggiane of its intention to call for new tenders for the project. MEW also demanded the restitution of advance payments to Reggiane, even though Reggiane had exhausted these funds to pay for its work to date.

278. By December 1992 MEW had awarded the project to another company. Reggiane protested. In a letter dated 16 December 1992, Reggiane sought damages in the amount of KWD 5,758,574 from MEW for unpaid executed works, tender preparation costs, miscellaneous expenses, amounts paid to employees, and loss of expected profits.

279. Reggiane did not explain the history of its dispute with MEW. However, it is clear that on 24 September 1995, Reggiane and MEW entered into a "Settlement and Finalisation Deed" (the "Deed") in respect of the project. The Deed recorded the fact that the value of the desalination contract was KWD 20,448,893. It also referred to Reggiane's letter to MEW of 26 July 1995 and recorded the following agreement:

(a) MEW agreed to pay Reggiane the amount of KWD 1,000,000 toward the total cost and expenses incurred by Reggiane due to termination of the desalination contract (clause 1);

(b) Both parties waived all claims and demands in respect of the desalination contract (clause 2); and

(c) MEW agreed to release all of the bank guarantees (clause 3).

280. The Deed was subject to the approval of two Ministers of the Government of Kuwait. Reggiane did not provide copies of their approvals, but presumably they gave their approval because Reggiane subsequently advised the Commission that it had received the amount of KWD 1,000,000 in accordance with the Deed. Reggiane reduced its claim accordingly.

281. Reggiane's letter to MEW of 26 July 1995 would have been useful in interpreting the ambit of the Deed. A copy of the 26 July 1995 letter was requested in the article 34 notification. In its reply, Reggiane failed to provide a copy of the letter and offered no explanation for this.

282. In the article 34 notification, Reggiane was asked to explain the effect of the Deed. It described the arrangement as a "partial and unfair reimbursement received from M.E.W." In response to detailed questions regarding the nature of the arrangement and what heads of alleged loss it related to, Reggiane answered:

> "The modest reimbursement made by M.E.W. refers mainly to partial compensation for assistance and costs sustained by Reggiane OMI as a result of the cancellation of the order, decided unilaterally by the Kuwaiti Minister of Electricity and Water."

283. The claim for contract losses has three components. First, Reggiane seeks compensation in the amount of KWD 704,749 for engineering development costs.

284. It also seeks compensation in the amount of KWD 869,697 for costs incurred in relation to sub-contracts. Reggiane had entered into a number of sub-contracts in respect of most aspects of the project. Reggiane was required to make advance payments to these suppliers in the amount of 10 per cent of the value of each sub-contract. Iraq's invasion and occupation of Kuwait suspended the sub-contract works. According to Reggiane, the sub-contractors retained the advance payments "in partial compensation for [their] costs".

285. Finally, Reggiane asserts that it incurred costs in the amount of KWD 650,000 for materials that were ready to be used in the performance of the desalination plant contract. It appears that some materials were already in Kuwait and were destroyed or taken during Iraq's invasion and occupation of Kuwait. The balance of the items never left Italy. Reggiane alleges it was unable to resell these custom-built items.

2. Analysis and valuation

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

287. The Panel is required to consider the effect of the Deed on the claim for contract losses, despite the absence of the letter of 26 July 1995. The Panel notes that, in the absence of the letter of 26 July 1995, and in the absence of an explanation from Reggiane as to what the letter referred to, it is not clear what sub-claims Reggiane and MEW intended to settle in the Deed. The Deed's reference to the letter of 26 July 1995 appears to have been a shorthand reference to the scope of the settlement arrangements. Reggiane provided a large amount of correspondence between itself and MEW dating from 1990 to November 1992. This correspondence relates to the parties' unsuccessful attempts to renegotiate the contract. However, the correspondence stops well before 26 July 1995.

288. The absence of the letter of 26 July 1995 has made it difficult for the Panel to reach a conclusion on the scope and effect of the Deed, and, therefore, on the claim for contract losses. The Panel considers that Reggiane, having submitted the Deed and amended its claim to reflect the compensation received, was under an obligation to provide the letter and to explain the effect of the Deed.

289. The Panel finds that it is likely that all three components of the claim for contract losses were the subject of the settlement evidenced by the Deed.

290. On the assumption that the letter of 26 July 1995 refers to the same losses as those which Reggiane now seeks as contract losses before the Commission, the Panel finds that the effect of the Deed is as follows. Under the Deed, Reggiane waived all claims against MEW in consideration of a

payment of KWD 1,000,000. Reggiane contended that the payment by MEW was a "modest reimbursement", or "partial compensation for assistance and costs". However, the Panel finds that there is no indication in the Deed that the parties objectively agreed anything else other than a full settlement of the claims for contract losses and indeed of all other claims. More importantly for the Panel's determinations with respect to the claim, the Panel finds that Reggiane failed to demonstrate that its claimed losses were not covered by the terms of the Deed.

291. Accordingly, the Panel finds that Reggiane failed to demonstrate that the alleged contract losses arose as a direct result of Iraq's invasion and occupation of Kuwait.

292. The Panel also wishes to record that while Reggiane supplied the Commission with a large number of documents in support of its claim for contract losses, much of **it** was not translated. Further, Reggiane did not explain the relevance of many of the documents.

3. Recommendation

293. The Panel recommends no compensation for contract losses.

B. Payment or relief to others

1. Facts and contentions

294. Reggiane seeks compensation in the amount of KWD 455,000 (USD 1,574,394) for payment or relief to others. The claim appears to relate to payments made or expenses incurred in relation to Reggiane's own employees and those of its sub-contractors and suppliers, some of whom were in Kuwait on 2 August 1990.

295. The claim is for personnel costs incurred both in Italy and in Kuwait. Reggiane alleges that as at the date of Iraq's invasion and occupation of Kuwait, it had 45 employees working on the project in Italy. They all had to be demobilised within 60 days after 2 August 1990. It is not clear whether these employees were reassigned to other projects or made redundant, but Reggiane asserts that it had to pay their salaries during this period in the total amount of KWD 270,000.

296. The balance of the claim, in the amount of KWD 185,000, is for the amount Reggiane paid to its 40 employees in Kuwait between 2 August 1990 and the end of November 1990. Reggiane asserts that nine of the employees were Italian, and the remainder of various nationalities. Reggiane states that some of its Italian employees were taken hostage by Iraqi soldiers. During this time it paid salaries to families of the hostages. It also incurred unspecified "unforeseen and unplanned costs" and managed to route funds to the employees in Kuwait for them to purchase necessary items.

297. In the "E" claim form, the losses were classified as contract losses, but the Panel finds that they are more appropriately classified as payment or relief to others.

2. Analysis and valuation

298. The Panel notes that Reggiane failed to provide sufficient evidence in support of the loss items. In support of its claim for amounts paid to the employees in Italy, it provided a list of the employees who were employed at its head office as at July 1990. The list contains the names of the employees only. It does not reference the salaries of the employees, and there is no supporting evidence of the amounts paid to the employees during the period following Iraq's invasion and occupation of Kuwait. In respect of the claim for amounts paid to the Italian employees in Kuwait, Reggiane provided insufficient translated evidence to support the claim. Finally, in respect of the claim for amounts paid to the local employees in Kuwait, all of the evidence which Reggiane provided related to the period prior to 2 August 1990. Reggiane provided no evidence as to the costs incurred after this date.

299. The Panel also refers to its findings in relation to Reggiane's claim for contract losses, supra, and in particular, the Panel's view of the scope and effect of the Deed.

300. The parties appear to have executed the Deed following a disagreement between them as to Reggiane's entitlement for payment for losses incurred in relation to the desalination contract. Given the nature and timing of the Deed, and the parties' agreement to waive all claims and demands, it was incumbent on Reggiane to demonstrate that the Deed did not cover the alleged losses (payment or relief to others). It failed to do so.

301. Reggiane failed to demonstrate that the Deed did not cover the alleged losses related to payment or relief to others. The Panel therefore recommends no compensation because Reggiane failed to demonstrate that the alleged losses arose as a direct result of Iraq's invasion and occupation of Kuwait.

3. Recommendation

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

C. Financial losses

1. Facts and contentions

303. Reggiane seeks compensation in the amount of KWD 146,819 (USD 508,024) for financial losses. It appears that Reggiane seeks compensation in the amount of KWD 135,937 for the cost of a public risks insurance policy with the Italian insurer, Istituto per i Servizi Assicurativi per il Commercio Estero (SACE), which was previously known as Sezione Speciale per l'Assicurazione del Credito all'Esportazione. The policy is dated 4 October 1991 and Reggiane paid the premium on 26 November 1991.

304. Reggiane also seeks the amount of KWD 10,882 for the costs incurred in maintaining bank guarantees and performance bonds from 1989 to 1992.

305. Reggiane did not explain how the alleged losses arose as a direct result of Iraq's invasion and occupation of Kuwait. The Panel notes that Reggiane sought compensation from MEW for these amounts in its letter of demand of 16 December 1992.

306. In the "E" claim form, the losses were classified as contract losses, but the Panel finds that they are more appropriately classified as financial losses.

2. Analysis and valuation

307. For the same reasons as have been summarised at paragraphs 287 to 290, supra, in relation to the claim for contract losses, the Panel finds that Reggiane failed to demonstrate that the Deed did not cover the alleged financial losses. The Panel therefore recommends no compensation because Reggiane failed to demonstrate that the alleged losses arose as a direct result of Iraq's invasion and occupation of Kuwait.

308. Moreover, in respect of the claim for the costs of the public risks insurance policy, the Panel notes that Reggiane entered into the policy well after the conclusion of Iraq's invasion and occupation of Kuwait. As such, the Panel considers that Reggiane failed to establish that this was a loss arising as a direct result of Iraq's invasion and occupation of Kuwait.

309. Finally, in respect of the claim for the costs of maintaining the bank guarantees, Reggiane did not explain how costs incurred in 1989 and prior to 2 August 1990 could be direct losses. In relation to the costs incurred after this date, Reggiane failed to explain why it was required to continue paying them.

3. Recommendation

310. The Panel recommends no compensation for financial losses.

D. Other losses

1. Facts and contentions

311. Reggiane seeks compensation in the amount of KWD 494,600 (USD 1,711,419) for other losses. The claim is for the costs incurred in setting up an on-site office and presence in Kuwait in the amount of KWD 231,590 (USD 801,350), and payments to maintain local insurance coverage and agency fees in the amount of KWD 263,010 (USD 910,069).

312. In the "E" claim form, the losses were classified as contract losses, but the Panel finds that they are more appropriately classified as other losses.

(a) Office establishment costs

313. In respect of the claim for the costs incurred in setting up an on-site office and presence in Kuwait, Reggiane explained that it was necessary for it to have a strong local presence in Kuwait for technical and logistical reasons. It set up this office after it secured the desalination contract in

October 1989 and as at the date of Iraq's invasion and occupation of Kuwait, 40 employees were working there. Reggiane seeks compensation for a variety of costs, which are summarised in table 15, infra.

Table 15. Reggiane's claim for other losses (office establishment costs)

Loss item	Claim amount (USD)
Marketing and advertising monthly fees (October 1989 to July 1990)	431,621
Auditor's fees (1989 to 1991)	46,713
Rent of flats used by employees in Kuwait	9,343
Miscellaneous overheads and operating expenses (January to July 1990)	279,652
Employee travel and accommodation expenses (November 1989 to July 1990)	34,021
Total	801,350

314. The majority of these costs were incurred before 2 August 1990. Reggiane did not explain how the alleged losses arose as a direct result of Iraq's invasion and occupation of Kuwait.

(b) Payment to agent

315. The claim for payments to maintain local insurance coverage and agency fees appears to relate to one payment (in the amount claimed) to Reggiane's agent, Al Sagar.

316. In the tender preparation documents, Reggiane provided an agency agreement between it and Al Sagar signed in March and April 1989. Under this agreement, Al Sagar agreed to provide assistance to Reggiane in tendering for the project and other projects, and thereafter in a liaison and support role. Al Sagar was to receive 3 per cent of the contract value by way of commission.

317. Al Sagar and Reggiane are both named as the "Contractor" in the desalination contract. On 12 August 1989, Reggiane wrote to Al Sagar stating that "in consideration of the extra efforts you have exerted and the instrumental role you have played in respect" of the desalination contract, Reggiane agreed to pay Al Sagar an "additional bonus" of 1 per cent of the contract value.

318. Reggiane did not explain how it calculated the amount in respect of which it seeks compensation based on the amounts which it agreed to pay Al Sagar in 1989, which were based on the contract value.

319. Reggiane did not explain how the alleged losses arose as a direct result of Iraq's invasion and occupation of Kuwait. The Panel notes that Reggiane sought compensation from MEW for these amounts in its letter of demand of 16 December 1992.

2. Analysis and valuation

320. While Reggiane provided extensive evidence in support of the various alleged losses, it failed to explain how the alleged losses arose as a direct result of Iraq's invasion and occupation of Kuwait. It answered this question by referring to the documents. The documents themselves, in the absence of adequate explanations, are insufficient to prove Reggiane's alleged losses.

321. In any event, for the same reasons as have been given, supra, in relation to the claim for contract losses, the Panel finds that Reggiane failed to demonstrate that the Deed did not cover the alleged other losses. The Panel therefore finds that Reggiane failed to demonstrate that the alleged losses arose as a direct result of Iraq's invasion and occupation of Kuwait.

3. Recommendation

322. The Panel recommends no compensation for other losses.

E. Recommendation for Reggiane

Table 16. Recommended compensation for Reggiane

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	7,697,045	nil
Payment or relief to others	1,574,394	nil
Financial losses	508,024	nil
Other losses	1,711,419	nil
Less proceeds received	(3,460,207)	-
Total	8,030,675	nil

323. Based on its findings regarding Reggiane's claim, the Panel recommends no compensation.

VIII. LANDUSTRIE SNEEK B.V.

324. Landustrie Sneek b.v. ("Landustrie") is a corporation organised according to the laws of the Netherlands operating as a manufacturer and supplier of goods.

325. In the "E" claim form, Landustrie sought compensation in the amount of 2,250,000 Guilders (NLG) (USD 1,277,683) for losses related to a business transaction or course of dealing.

326. In its reply to the article 34 notification, Landustrie submitted a revised claim in which it reduced the claim amount. In the revised claim, it sought compensation for losses related to a business transaction or course of dealing in the alternative amounts of NLG 1,241,956 or NLG 1,027,026. The claim in the amount of NLG 1,241,956 represented Landustrie's alleged losses as at 8 August 1990, the date upon which it suspended contract works. The claim in the amount of NLG 1,027,026

represented Landustrie's alleged losses as at 29 September 1992, the date upon which it finally terminated its involvement in the project in respect of which it seeks compensation. The Panel considers that the amount of NLG 1,027,026 is the correct claim figure, as that represents Landustrie's alleged actual losses assessed at a later date. The amount of its alleged liabilities as at 8 August 1990 was higher, since at that time, Landustrie had not yet taken steps to mitigate its losses.

327. The Panel has reclassified Landustrie's claim for losses related to a business transaction or course of dealing as contract losses for the purposes of this report. The Panel therefore considered the amount of NLG 1,027,026 (USD 583,206) for contract losses.

Table 17. Landustrie's claim

Claim element	Claim amount (USD)
Contract losses	583,206
Total	583,206

A. Contract losses

1. Facts and contentions

328. Landustrie seeks compensation in the amount of NLG 1,027,026 (USD 583,206) for contract losses allegedly incurred in connection with a contract to manufacture and supply goods to an Iraqi company. Landustrie states that it carried out its obligations but was unable to deliver the goods to Iraq as a direct result of Iraq's invasion and occupation of Kuwait.

329. On 15 August 1989, Landustrie (which was then called Machinefabriek Landustrie b.v.) entered into an agreement with the New Tyres Project Commission of the Ministry of Industry, Iraq (the "employer"), to manufacture and supply mechanical and electrical equipment and "process works" for a sewerage works in Najaf, Iraq. Payment was to be made pursuant to a letter of credit dated 22 October 1989 between the employer and Landustrie. The value of the letter of credit was NLG 2,500,000.

330. The payment terms of the letter of credit were subsequently amended. Under the amended payment terms applicable to the manufacture and supply of goods Landustrie was to receive an advance payment in the amount of 10 per cent of the contract value and the remaining 90 per cent against shipping documents. The 90 per cent payment was triggered when the goods were delivered F.O.B. (free on board) a Dutch port or F.O.T. (free on truck) Landustrie's premises. The delivery of the goods F.O.B. and F.O.T. was governed by the International Commercial Terms (Incoterms), 1980 version.

331. Landustrie provided the following information regarding its works under the contract. However, Landustrie failed to explain how the works described relate to the claimed amounts.

332. On 1 March 1990, Landustrie submitted some of the civil design drawings for the works to the employer. It sought payment under the letter of credit agreement in the amount of NLG 232,290.

This figure represented 90 per cent of the value of the drawings (NLG 258,100). Landustrie does not appear to have ever received payment of this amount. The employer allegedly approved the civil design component of the drawings on 13 September 1990.

333. On 2 March 1990, Landustrie received an advance payment in the amount of NLG 250,000 (10 per cent of the contract value).

334. Landustrie alleges that it commenced purchasing and manufacturing materials and components in the Netherlands at the beginning of April 1990.

335. On 14 May 1990, Landustrie sent further drawings (mechanical and electrical design) to the employer. No payment was sought from the employer at this time because, according to Landustrie, the drawings' "value … [was] included in equipment prices". Landustrie asserts that the employer approved these drawings in November 1990.

336. On 15 June 1990, Landustrie submitted additional civil design drawings for the works to the employer. The employer allegedly approved the civil design component of the drawings on 13 September 1990. On 13 August 1990, Landustrie sought payment in the amount of NLG 232,290 for these drawings. This is the same amount as was sought for the March civil design drawings.

337. On 16 August 1990, Landustrie informed the employer that the equipment was ready to be transported within one month. It therefore alleges that it had fulfilled all of its obligations. The employer did not make a ship available. The terms of the letter of credit could not be fulfilled and Landustrie has not received payment for the items.

338. On 26 October 1990, Landustrie either handed over in person or sent the final batch of mechanical/electrical design drawings to the employer in Iraq. The precise details of the exchange were not explained. Landustrie sought payment in the amount of NLG 262,320. The enclosures may have included the drawings of 1 March and 14 May 1990. It is unclear why Landustrie provided the drawings to the employer at this time. A representative of the employer signed the covering letter dated 26 October 1990. Landustrie states that the employer approved these drawings in November 1990. Assuming that Landustrie's reference is to this signature, this suggests that the employer in effect approved the invoice of 26 October 1990.

339. In late 1991, there was correspondence between the parties regarding the extension of the letter of credit to allow the goods to be shipped, but no agreement was reached. Landustrie ended its involvement in the project on 29 September 1992.

340. Landustrie alleges that it could not use or sell the items it had manufactured or prepared for the employer because they were custom-made. Landustrie advised the Commission that it had scrapped the goods in 1994 and 1995.

341. In the article 34 notification, Landustrie advised that it had paid its sub-contractors all amounts which they invoiced Landustrie and that it stopped any further work by them when it was possible to do so. It provided no evidence in support of this statement. It did not advise the

Commission what works the sub-contractors had carried out, when the work was carried out, or what its value was.

342. Landustrie originally sought compensation for the unpaid balance of the contract price in the amount of NLG 2,250,000 (i.e. the contract value less the advance payment), was originally sought as compensation. Landustrie stated in it original claim submission that all goods had been manufactured so that its loss was total. However, in its reply to the article 34 notification, Landustrie stated that the amount of its loss was in fact only NLG 1,027,026. It formulated its revised claim as shown in table 18, infra.

Table 18. Landustrie's claim for contract losses

Loss item	Claim amount (NLG)	Claim amount (USD)
Sales cover	170,000	96,536
Wages/salaries	315,908	179,391
Materials purchased and paid	530,932	301,495
Loss of profit (as per project budget)	260,186	147,749
Subtotal	1,277,026	725,171
Advance payment	(250,000)	(141,965)
Total	1,027,026	583,206

343. Landustrie did not provide any futher detail about the loss items referred to in table 18, supra, or how they were linked to the evidence.

2. Analysis and valuation

344. In support of its claim, Landustrie provided extracts from the contract dated 15 August 1989, the letter of credit, correspondence between Landustrie, the employer and the relevant bank in 1989 and 1990 regarding amendments to the letter of credit, correspondence from Landustrie to the employer in 1990 regarding drawings, correspondence between Landustrie and the employer in 1991 regarding the extension of the letter of credit, correspondence between Landustrie and its shipping agent regarding the impossibility of shipping the goods, audited accounts for the years 1988 to 1990, and detailed specifications for the goods.

345. In the article 34 notification, Landustrie was requested to provide evidence relating to its attempts to mitigate its losses and the amounts that it had to pay its suppliers and sub-contractors. It did not provide this evidence. Landustrie was also requested to provide evidence that it actually incurred the costs alleged and evidence of the costs incurred in manufacture. It failed to do so.

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

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

348. The Panel finds that the composition of Landustrie's claim is unclear. The Panel has assumed that Landustrie's reference to a loss in the amount of NLG 1,027,026 as at 29 September 1992 signifies that Landustrie did not complete the construction and assembly of the component parts. The difficulty which Landustrie's specific allegations pose to the Panel is that the allegations relate only to the provision of the drawings and the intended provision of the goods. When these amounts are added together, they do not equate to the amount claimed. Rather than analysing the claim using the loss items put forward by Landustrie as set out in table 18, supra, the Panel has focused on the provision of the drawings and the intended provision of the goods in analysing the claim as these are the only material events described in any detail.

(a) Drawings of 1 March 1990

349. In respect of the claim for the drawings provided on 1 March 1990 and invoiced on that date, Landustrie did not provide a copy of the relevant contractual provision relating to the supply of the drawings to the employer and the mechanism for their approval by the employer. In the absence of these provisions, the Panel cannot assign any weight to the allegation that these drawings were not approved until 13 September 1990. Landustrie did not explain whether approval was a pre-condition to payment, and if so, what period of time the employer had under the contract to approve or reject the drawings. The Panel also observes that Landustrie may not have received payment for this invoice because it received the advance payment on the day after the date of its invoice.

350. In any event, the Panel finds that the claim relates to performance prior to 2 May 1990.

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

(b) Drawings of May and June 1990/work carried out between 2 May and 2 August 1990

352. Landustrie asserts that it had manufactured or was about to complete the manufacture of goods for the employer after 2 May 1990, which it was unable to supply as a result of Iraq's invasion and occupation of Kuwait.

353. There is some evidence to support Landustrie's allegations that it performed some work after 2 May 1990. However, Landustrie did not establish or support the amount or value of any such work. The Panel finds that Landustrie failed to provide sufficient information and evidence to support its claim.

354. In relation to the drawings of 14 May and 15 June 1990, Landustrie provided no evidence that it completed these drawings or that the employer received them. The Panel finds that Landustrie failed to provide sufficient information and evidence to support its claim.

(c) Drawings of 26 October 1990

355. In relation to the drawings of 26 October 1990, Landustrie did not establish the portion of work (if any) that was carried out after 2 May 1990. The Panel finds that Landustrie failed to provide sufficient information and evidence to support its claim.

(d) Balance of claim

356. Landustrie provided no comprehensible narrative or linked allegations in respect of its claim. Landustrie provided no evidence that as at 2 August 1990, it had manufactured or partially manufactured the items it had contracted to provide to the employer. It was requested to provide this evidence in the article 34 notification but failed to do so. The Panel finds that Landustrie failed to provide sufficient information and evidence to support its claim.

3. Recommendation

357. The Panel recommends no compensation for contract losses.

B. Recommendation for Landustrie

Table 19. Recommended compensation for Landustrie

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	583,206	nil
Total	583,206	nil

358. Based on its findings regarding Landustrie's claim, the Panel recommends no compensation.

IX. MECHANISED CONSTRUCTION OF PAKISTAN (PVT) LIMITED

359. Mechanised Construction of Pakistan (Pvt) Limited (under members' voluntary liquidation) ("Mechanised") is a corporation organised according to the laws of Pakistan. Mechanised, which was fully owned by the Government of Pakistan, was placed into liquidation on 8 June 1987.

360. The claim has undergone a number of changes since it was filed with the Commission in 1993.

361. In the original "E" claim form dated 8 December 1993, Mechanised sought compensation in the amount of IQD 12,590,000 (which it converted to USD 40,390,000) for loss of tangible property (stolen or expropriated assets). In the Statement of Claim that accompanied this form, Mechanised sought compensation in the more precise amount of IQD 12,585,575. Mechanised reserved the right to bring further claims.

362. In a revised "E" claim form dated 27 November 1996, Mechanised increased its claim for loss of tangible property (stolen or expropriated assets) to the amount of IQD 20,680,000 (which it converted to USD 66,359,000). Mechanised reserved the right to bring further claims, including an additional claim for "proceeds of sold assets" in the amount of IQD 75,596,000.

363. In its reply to the article 34 notification dated 18 April 2002, Mechanised corrected certain arithmetical and other errors in respect of its claim for loss of tangible property (stolen or expropriated assets). It did not quantify its revised claim, but applying the formulae it had developed in its revised claim of November 1996, it appeared to seek compensation for this loss element in the amount of IQD 20,654,466. It quantified its claim for loss of tangible property (proceeds of sold assets) as IQD 75,596,000. It therefore sought compensation in the total amount of IQD 96,250,466.

364. The Panel has reclassified elements of Mechanised's claim for the purposes of this report. For consistency, the Panel has also converted the amounts sought in Iraqi dinars into United States dollars at the applicable United Nations exchange rate (see paragraph 24, supra), rather than using Mechanised's conversion rate. The Panel therefore considered the amount of IQD 96,250,466 (USD 309,487,029) for loss of tangible property and other losses, as follows:

Table 20. Mechanised's claim

Claim element	Claim amount (USD)
Loss of tangible property	66,413,074
Other losses	243,073,955
Total	309,487,029

A. Loss of tangible property

1. Facts and contentions

365. Mechanised seeks compensation in the amount of IQD 20,654,466 (USD 66,413,074) for loss of tangible property. The claim is for the value of a large number of items owned by Mechanised in Iraq which were allegedly stolen or confiscated.

366. Mechanised also seeks compensation in the amount of IQD 75,596,000 (USD 243,073,955) for the balance of the proceeds of items belonging to Mechanised that were sold by the Iraqi authorities and which balance has not been remitted to Mechanised. The Panel has classified this loss as other losses. For present purposes, the factual background to both claims is set out and analysed together, infra, in this section. The legal analysis of the claim for other losses is at section B, infra.

367. The history of Mechanised's claim stretches over many years and a number of discrete events. The following description of its claim, while necessarily lengthy, is nevertheless abbreviated. In essence, Mechanised alleges that it was the victim of a conspiracy between a number of Iraqi people and entities (governmental and private) to defraud it of its tangible property or its value, and that Iraq is, therefore, responsible for Mechanised's losses.

(a) History of Mechanised's work in Iraq

368. Between 1977 and 1979, Mechanised entered into three contracts with Iraqi entities for the construction of irrigation projects in Iraq. The contracts were:

(a) Contract K2/Lower Khalis Project (the "Khalis Project"). On 28 April 1977, Mechanised entered into a contract with the Khalis Agricultural Administration, Ministry of Agriculture and Agrarian Reforms, Iraq. The location of the project was Khan Bani Saad. The amended contract value was IQD 29,007,000. Mechanised handed over the project to the employer on 31 July 1985 and the maintenance period finished on 31 July 1986. The employer issued the final maintenance certificate on 14 August 1986;

(b) Contract No. 21/South Ruz Land Reclamation Project (the "South Ruz Project"). On 24 March 1979, Mechanised entered into a contract with the State Organisation for Soil and Land Reclamation, Iraq. The location of the project was Baled Ruz. The amended contract value was IQD 7,149,000. Mechanised handed over the project to the employer on 6 April 1985 and the maintenance period finished on 1 November 1987. The employer issued the final maintenance certificate on 28 November 1987; and

(c) Contract No. 20/Dalmaj Land Reclamation Project (the "Dalmaj Project"). On 10 April 1979, Mechanised entered into a contract with the State Organisation for Soil and Land Reclamation, Iraq. The location of the project was Al-Hussania, Kut. The amended contract value was IQD 10,051,000. Mechanised handed over the project to the employer on 24 July 1984 and the maintenance period finished on 24 October 1988. The employer issued the final maintenance certificate on 13 November 1988.

369. Mechanised states that it imported into Iraq and purchased in Iraq a substantial amount of equipment in order to carry out its obligations under these contracts, including large items of construction machinery like graders and bulldozers. Mechanised alleges that it successfully completed the projects in 1984-1985, despite difficulties caused by the war between Iran and Iraq. The maintenance periods were completed between 1986 and 1988.

370. According to Mechanised, it submitted claims for its works under the contracts to the employers between 1983 and 1985 in the total amount of IQD 51,870,000. It asserts that it had never received payment for these works, although the employers allegedly "agreed to payment" in the amount of IQD 1,900,000. Mechanised did not submit a claim to the Commission for its unpaid contract works.

371. It was Mechanised's contention that the employers ordered Mechanised not to export or re-export its tangible property from the work sites as the employers alleged that Mechanised owed a significant amount. The date of this order was not stated.

(b) Appointment of liquidator

372. On or around 26 December 1988, a liquidator was appointed to Mechanised's Iraqi branch (the "liquidator"). The appointment of the liquidator followed the voluntary liquidation of Mechanised in Pakistan in May 1987.

(c) Events between 2 August 1990 and 10 January 1991

373. As at 2 August 1990, Mechanised had 10 employees in Iraq. Several of these employees were employed specifically to look after the large number of items of tangible property which Mechanised had in Iraq. Prior to their departure from Iraq between 29 December 1990 and 10 January 1991, the liquidator gave a written undertaking to the employers on 24 December 1990 to care for Mechanised's assets at all three project sites in the absence of its employees until their return. Prior to the employees' departure, the liquidator gave a similar undertaking to Mechanised. Mechanised arranged for several Iraqis to guard the project sites in their absence under the supervision of the liquidator. The liquidator agreed to pay the estimated monthly expenses of IQD 2,000, and Mechanised agreed to reimburse him when its employees were able to return to Iraq.

374. Mechanised states that in 1990, the total "residual" value of its assets on the three project sites was IQD 4,690,362, comprised of IQD 3,632,624 for "fixed assets at book value" and IQD 1,057,738 for "inventories at cost".

375. In relation to the claim for loss of items at the residential site, Mechanised asserts that when its employees left Iraq, they paid the lessor an advance, which was the rent until the end of April 1991. They assured the lessor that if they could not return to Iraq until after the end of April 1991, the additional rent would be paid upon their return.

(d) Alleged theft or unlawful disposal of Mechanised's tangible property

376. On 18 October 1991, a senior employee of Mechanised returned to Iraq to assess the status of its assets which had been entrusted to the liquidator. At first, he was not allowed access to the sites because the sites and the assets on the three sites had been taken over by the Iraqi customs authorities. Between that date and December 1991, he allegedly found that the most expensive items of Mechanised's tangible property at its three project sites and its residential quarters had been stolen and that its records had been destroyed. He also found that the residential quarters had been rented out to a third party. In addition, all three project sites were now controlled by the employers.

377. Mechanised subsequently learned that the liquidator had himself sold some of the assets. According to Mechanised, his actions were dishonest and unlawful and were for his personal gain. In support of its contentions, Mechanised referred to a decision of the Iraqi Customs Court of 27 May 1991. In this decision, the liquidator and the purchaser of the assets were fined the amount of IQD 31,060 in respect of the unlawful disposal of assets.

378. The decision of the Customs Court which Mechanised provided to the Commission does not refer to the site(s) at which the alleged unlawful disposal took place. According to Mechanised, the

assets referred to in the Customs Court's decision came from the Khalis Project site. Because of Mechanised's reliance on the decision, the Panel considers that it is helpful to summarise the key allegations made before, and the findings of, the Customs Court.

(a) The value of the assets in question was IQD 7,000;

(b) The liquidator's defence appears to have been that he signed the undertaking of 24 December 1990 because the Iraqi authorities would not allow Mechanised's 10 employees to leave without the undertaking. In respect of the attempted sale of the assets, he said that the funds which Mechanised had left him had run out and that he needed further funds to meet the necessary disbursements for the guards' fees and other expenses. The liquidator stated that he only tried to dispose of old equipment to obtain funds to meet these expenses. In terms of customs fees for the items, if there were any (according to the liquidator, Mechanised was exempt from such fees), they were to be paid by the purchaser;

(c) The Customs Court appears to have accepted the liquidator's explanation that he sold the assets to realise some funds to pay Mechanised's ongoing expenses;

(d) The Customs Court nevertheless found that on 25 January 1991, the liquidator and the purchaser breached the relevant customs laws by contracting to dispose of, and indeed disposing of, the assets. The Customs Court convicted the liquidator and the purchaser, fined them the total value of the assets disposed of and also fined them three times the total value of the items. Finally, the Customs Court ordered the return of the assets to the project site.

379. Mechanised pointed also to a complaint of theft which the liquidator himself made on 5 February 1991 to the police in Bani Saad. In that complaint, he stated that he had visited the Khalis site on 3 February 1991 and items had been stolen at that time.

380. Mechanised referred to other actions of the liquidator in respect of the items of tangible property which were alleged to be illegal and dishonest. For the purposes of the Panel's analysis, these are not relevant.

381. Mechanised contended that the liquidator's complaint to the police was "just a smoke screen to cover his own wrong doings." Mechanised's senior employee lodged complaints of theft with the Iraqi police on dates between 27 October 1991 and 18 March 1992 in relation to property stolen from the residential quarters and the three project sites. Mechanised alleges that the liquidator and the purchaser were responsible for the alleged thefts from the three project sites. In its reply to the article 34 notification, in which it was asked to explain the dates of the alleged loss(es)/theft(s), Mechanised admitted that it could not be precise about the date(s), because it had no employees in Iraq at the time when the assets were disposed of. Nevertheless, based on the decision of the Customs Court and the liquidator's own complaint of 5 February 1991, Mechanised asserts that the liquidator started his alleged course of thefts on 25 January 1991 at the Khalis project site.

382. It appears from the documents provided that the liquidator's actions not only resulted in his conviction, but also resulted in raising the interest of the Iraqi customs authorities in the great number of items which had been taken from the project site(s), as well as those which were left.

383. There is clear evidence in the documentation submitted by Mechanised that on or around 6 April 1991, the Iraqi customs authorities were taking steps to take the items which the liquidator tried to sell (presumably from the Khalis site) into their custody.

384. On 12 March 1992, Mechanised dismissed the liquidator from his position.

385. In March and April 1992, the Iraqi customs authorities imposed substantial customs fines on Mechanised in respect of the property at all three project sites. Mechanised took subsequent, unsuccessful steps to have the relevant decisions reversed.

(e) Mechanised's efforts to dispose of remaining assets

386. On 20 May 1992, Mechanised and two Iraqis signed a letter of intent regarding the sale of all assets which had been on the three project sites prior to Iraq's invasion and occupation of Kuwait. The prospective purchasers agreed to pay Mechanised the amount of IQD 7,765,444 and any further customs fines (which at that stage had not been fixed).

(f) Confiscation of remaining assets by Iraqi authorities

387. In June 1992, while the agreement for sale and purchase of the assets was being finalised, the Government of Iraq (through the Military Industrial Commission), pursuant to an April 1992 Iraqi law, confiscated the assets which were the subject of the agreement. Mechanised unsuccessfully challenged the Government's actions on the basis that the law, which applied to companies which had "deserted" its projects in Iraq, did not apply to Mechanised. Mechanised advised the Government of Iraq that the law did not apply to it because it had completed the projects in 1984-1985. It also asserts that the value of the assets taken far exceeded the alleged level of Mechanised's liabilities to the other Iraqi authorities, and in fact prevented Mechanised from meeting those alleged obligations because it had no other means to pay in the absence of either the assets or payment for the contract works (which still remained unpaid).

388. Mechanised provided a letter dated 22 July 1992 to the Military Industrial Commission from the person in charge of the three sites after the confiscation order was issued. The letter acknowledges that Mechanised's assets which the Military Industrial Commission had taken over were in good working condition, and that the items had in fact been extensively used. The letter also lists the items which the Military Industrial Commission took into its custody. Mechanised asserts that the Government of Iraq managed to retrieve some of the items which were allegedly stolen and used them, although there is no evidence of this allegation. It was Mechanised's belief that this evidence of Iraq's use of its assets demonstrated that the Iraqi authorities assisted the liquidator in the theft of these assets.

(g) Sale of assets by Iraqi authorities

389. In 1992-1993, the Military Industrial Commission returned assets belonging to Mechanised, with a book value of IQD 2,577,578, to the Iraqi customs authorities. The Military Industrial Commission retained items with a book value of IQD 533,220. Between 24 December 1993 and 12 May 1994, the Iraqi customs authorities then sold the items of tangible property in the open market for the total amount of IQD 100,871,500. Mechanised had requested that it be able to sell the assets itself but was not allowed to do so.

390. The Iraqi customs authorities then fixed the amount owing by Mechanised to the employer and the Iraqi authorities in the total amount of IQD 25,275,500, as follows:

Table 21. Amounts allegedly owed by Mechanised relating to sale of assets

Description of amount allegedly owed	Amount (IQD)
Customs, fines and charges for guarding assets	20,559,587
Recovery of overdrawn amount	4,195,444
Payment to court in civil case	206,529
Payment to Iraqi tax authorities	313,940
Total	25,275,500

(h) Claims by Mechanised relating to assets

391. The Iraqi customs authorities advised Mechanised that they would retain the balance of the sale proceeds, IQD 75,596,000 (i.e. IQD 100,871,500 less IQD 25,275,500) until a law called the "Special Instructions for Foreign Companies" was issued. According to Mechanised, this law has never been issued.

392. In October 1994, the Military Industrial Commission advised Mechanised that it would retain the balance of the items that were not transferred to the Iraqi customs authorities, which had a book value of IQD 533,220, until at least the trade embargo against Iraq was lifted.

393. Mechanised asserts that its theft cases had still not been heard as at April 2002 (the date of its last communication with the Commission) and that these cases related to assets with a value in the amount of IQD 1,573,089.

(i) Summary of Mechanised's case

394. Mechanised's claim focuses on the assets which were originally on the three project sites. It is on the basis of the liquidator's alleged thefts, the decision of the Iraqi customs authorities to take over the sites in 1991, the 1992 fines, and the subsequent confiscations, that Mechanised alleges that it was the victim of a conspiracy between all of these parties to defraud it and that Iraq is, therefore, responsible for Mechanised's losses.

395. Mechanised alleges that there were 1,218 items of tangible property at the three project sites when it left Iraq. It believed that 403 items were stolen by the liquidator, with the balance of 815 items being taken over by the Iraqi customs authorities.

396. In relation to the claim for loss of items at the residential site, the theft or loss was only discovered in October 1991 when the senior employee who had returned to Iraq to investigate the status of Mechanised's residential site laid complaints with the Iraqi police about thefts. In an affidavit, the employee states that he returned to the residential site and found not only that it had been rented out to another party but that a number of items such as a television and some cars had disappeared.

(i) Mechanised's original claim

397. In the original "E" claim form dated 8 December 1993 (as amended by the Statement of Claim), Mechanised sought compensation in the amount of IQD 12,585,575 for loss of tangible property. This amount was alleged, in a draft agreement for their sale to an Iraqi entity, to be the value of its stolen or expropriated assets.

(ii) Mechanised's reply to the article 34 notification

398. In its reply to the article 34 notification in February 2002, Mechanised amended the value of its claim for loss of tangible property (stolen or expropriated assets). Mechanised calculated its claim as the book value of the assets (IQD 2,106,309) multiplied by a factor of 9.806. The revised claim amount is, therefore, IQD 20,654,466 (USD 66,413,074).

2. Analysis and valuation

399. The Panel's analysis of Mechanised's claim falls into two categories: (a) the claim regarding the items which were originally on the project sites and entrusted to the liquidator, and (b) the claim regarding the items at the residential site.

(a) Project sites

(i) The issue

400. This claim presents an unusual issue. In the vast majority of claims for loss of tangible property which the Panel has considered, the party which stole, destroyed or damaged the property has either been shown to be an agent of the Government of Iraq or its controlled entities (for example, the army), or the Panel has been able to assume this to be the cause of the loss in the absence of evidence to the contrary. However, in the present case, the person or entity initially responsible for Mechanised's alleged losses was its own agent, the liquidator.

401. Because the issue was a novel one for the Commission, it was raised by the Executive Secretary of the Commission in his report to the Governing Council in accordance with article 16 of the Rules (report No. 34) dated 10 January 2001. The report invited countries to comment on the

issue. There were two responses to the relevant section of the Executive Secretary's report: from Iraq and Kuwait. The Panel considered these responses in analysing Mechanised's claim.

(ii) Evidence

402. Mechanised provided a considerable volume of evidence in support of its claim, such as:

(a) Correspondence between it and the Iraqi authorities between 1991 and 2000 regarding the status of the tangible property;

(b) Statements made by Mechanised's representative to the Iraqi police in 1991-1992 regarding the thefts of property from the three project sites and the residential property;

(c) Correspondence between the Iraqi authorities regarding the actions of the liquidator, including the decision of the Iraqi Customs Court;

(d) Several volumes of inventories of items at the three project sites; and

(e) Audited accounts for the Iraqi branch for several years.

403. The evidence showed that Mechanised had a large number of items on the three project sites in Iraq on 2 August 1990. The evidence also shows that the items were taken from its custody and control by a number of Iraqi citizens and governmental entities over the course of the following five years. The net result is that Mechanised effectively lost ownership of the items and of the proceeds of the sold items.

(iii) Mechanised's arguments and relevant decisions of the Governing Council

404. It is helpful to recall that Mechanised's primary contention is that the disappearance of the items of tangible property from the three project sites was due to the liquidator's dishonesty. The alleged date of his actions was 25 January 1991.

405. Mechanised drew a connection between the actions of the liquidator and those of the Iraqi authorities by arguing that the sequence of events which led to the alleged losses was initiated by the actions of the liquidator, and that his actions caused the Iraqi authorities to step in and confiscate the tangible property which had been recovered or which had not been stolen.

406. Nonetheless, relying on Governing Council decision 9, paragraphs 12 and 13, Mechanised contended that its property was lost because it was left unguarded by its own employees who had to leave Iraq. It states that the alleged losses, were, therefore, a direct result of Iraq's invasion and occupation of Kuwait.

407. With respect to the issue of causation, paragraph 21 of Governing Council decision 7 provides that compensation is available with respect to any direct loss, damage, or injury to corporations and other entities as a result of Iraq's unlawful invasion and occupation of Kuwait. This will include any loss suffered as a result of, inter alia, "[a]ctions by officials, employees or agents of the Government of

Iraq … during that period [i.e. 2 August 1990 to 2 March 1991] in connection with the invasion or occupation" or "[t]he breakdown of civil order in … Iraq during that period".

(iv) Analysis of liquidator's actions - facts

408. The evidence provided by Mechanised was somewhat contradictory as to when the liquidator disposed or attempted to dispose of the assets. However, it seems reasonably clear that at least some of the assets were taken on or around 25 January 1991, as the Customs Court found.

409. By way of comparison, the evidence as to what site or sites from which the property was taken is inconclusive, at least on the basis of the evidence which Mechanised provided. It seems likely that some property was taken from the Khalis site on or around that date. That probably formed the basis of the decision which led to the conviction of the liquidator and the purchaser by the Customs Court on 27 May 1991.

410. The Panel considers that the documentation relating to this decision does not establish Mechanised's central contention that the Customs Court convicted the liquidator of theft of the assets as such. Rather, according to the translation of the decision, the liquidator's error was to have breached the Iraqi customs laws by disposing of assets without the permission of the Iraqi customs authorities, and without the payment of customs duties. The Customs Court appears to have accepted his explanation that he needed the funds to pay for Mechanised's ongoing expenses. If that finding is correct, then he was not necessarily acting dishonestly vis-à-vis Mechanised. On the other hand, the Panel considers that Mechanised had strong grounds to accuse him of theft, since he himself laid a complaint of theft of items from the Khalis site on 5 February 1991. Before the Customs Court, he accepted that he had disposed of assets from an unnamed site on 25 January 1991. The liquidator's actions appear inconsistent and indicative of dishonesty vis-à-vis Mechanised.

(v) Analysis of liquidator's actions – legal consequences

411. Although there are a number of legal difficulties with Mechanised's claim, the Panel has focused on one in particular. This is the issue of whether the liquidator's actions can ultimately be attributed to Iraq's invasion and occupation of Kuwait.

412. The Panel considers that it is irrelevant as to whether or not the liquidator acted dishonestly in respect of the disposal of Mechanised's assets. He was appointed as the Iraqi liquidator in December 1988. As such, he had the legal responsibility for the company from that time until the termination of his appointment in March 1992. On 24 December 1990, he reiterated his responsibility for the company's assets to the employer. In early January 1991, he made the same promises (verbally) to Mechanised's departing employees.

413. The Panel notes that the alleged initial losses were inflicted by Mechanised**'s** agent/representative in its absence. He had been the liquidator for more than two years when Mechanised's employees left Iraq. The Panel finds that the actions of the liquidator, and not the breakdown of civil order in Iraq between 2 August 1990 and 2 March 1991, caused the initial alleged losses.

414. Mechanised made general allegations of collusion between the liquidator and the Iraqi authorities. It properly acknowledged the speculative nature of this allegation, and the Panel finds no basis for it in the evidence.

(vi) Subsequent events

415. According to Mechanised, it incurred the bulk of its alleged losses (stolen or expropriated assets) after it returned to Iraq. The actions included the confiscation and subsequent sale of its assets, the retention of the proceeds by the Iraqi authorities, and the customs fines.

416. Mechanised did not specify the precise line between its claim for loss of tangible property (stolen or expropriated assets) and its claim for other losses (proceeds of sold assets). On the basis that the claim for loss of tangible property (stolen or expropriated assets) covers all events up to (but not including) the advice from the Iraqi authorities regarding the proceeds of the sale of the assets (see paragraph 391, supra), the Panel notes that all of these actions took place after 2 March 1991.

417. With respect to the issue of causation, Governing Council decision 7 provides that compensation is available with respect to any direct loss, damage, or injury to corporations and other entities as a result of Iraq's unlawful invasion and occupation of Kuwait. This will include any loss suffered as a result of, inter alia, "the breakdown of civil order in … Iraq during that period" (i.e. 2 August 1990 to 2 March 1991). However, in respect of the losses which Mechanised incurred after 2 March 1991, the Panel finds that the costs relate to the time after the relevant compensable period as determined by the Governing Council. The Panel therefore concludes, on the basis of the evidence provided by Mechanised, that the balance of the alleged losses of tangible property (stolen or expropriated assets at the three project sites) was incurred after 2 March 1991. As such, they were not suffered as a direct result of Iraq's invasion and occupation of Kuwait.

(vii) Conclusion – project sites

418. The Panel therefore considers that the claim for loss of tangible property (stolen or expropriated assets at the project sites) is not compensable before the Commission because Mechanised failed to demonstrate that the alleged losses arose as a direct result of Iraq's invasion and occupation of Kuwait.

(b) Residential site

419. Despite a request in the article 34 notification for evidence of Mechanised's title to the alleged items of tangible property, and their presence in Iraq as at 2 August 1990, Mechanised provided no such evidence. The only evidence it provided in relation to its claim for theft of property from its residential site were some witness and police statements. These mentioned some of the items which were allegedly stolen. No document indicated a value or provided detail about these items.

420. The Panel accordingly considers that the claim for loss of tangible property at the residential site is not compensable because Mechanised failed to provide sufficient information and evidence to establish its claim.

3. Recommendation

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

B. Other losses

1. Facts and contentions

422. Mechanised seeks compensation in the amount of IQD 75,596,000 (USD 243,073,955) for other losses. The claim and the relevant factual background have been extensively summarised at section A, supra. By way of summary, the claim is for the proceeds of the sale by the Iraqi authorities of Mechanised's assets which had been confiscated. Although the Iraqi authorities have not made any claims against the proceeds of the sale, according to Mechanised, they have made no moves to repay Mechanised in the seven years that they have held the proceeds. Mechanised therefore submitted that it was entitled to bring a claim in respect of the proceeds.

423. Mechanised never formally classified the claim in respect of the unpaid proceeds of the sale of its confiscated assets. The Panel considers that although the claim arises out of the loss of tangible property, it is more appropriately classified as a claim for other losses because it is a claim for unpaid proceeds following the sale of the items of tangible property.

2. Analysis and valuation

424. The claim for other losses arises out of the same set of facts as the claim for loss of tangible property at the three project sites. The Panel confirms its earlier finding that the sequence of events which led to the alleged loss was initiated by the actions of the liquidator and not the Iraqi authorities, although the Iraqi authorities clearly played a significant role at a later time.

425. In addition, in so far as the claim for other losses rests on the actions of the Iraqi authorities in imposing customs fines, and then confiscating the assets which were ultimately sold and the proceeds retained, all of these actions took place after 2 March 1991. In respect of the losses which Mechanised incurred after 2 March 1991, the Panel finds that the costs relate to the time after the relevant compensable period as determined by the Governing Council. The Panel therefore concludes, on the basis of the evidence provided by Mechanised, that these losses were incurred after 2 March 1991. As such, they were not suffered as a direct result of Iraq's invasion and occupation of Kuwait.

426. The Panel therefore considers that the claim for other losses is not compensable because Mechanised failed to demonstrate that the alleged losses arose as a direct result of Iraq's invasion and occupation of Kuwait.

3. Recommendation

427. The Panel recommends no compensation for other losses.

C. Recommendation for Mechanised

Table 22. Recommended compensation for Mechanised

Claim element	Claim amount (USD)	Recommended compensation (USD)
Loss of tangible property	66,413,074	nil
Other losses	243,073,955	nil
Total	309,487,029	nil

428. Based on its findings regarding Mechanised's claim, the Panel recommends no compensation.

X. SAUDI ARABIAN DUMEZ COMPANY LIMITED

429. Saudi Arabian Dumez Company Limited ("Saudi Arabian Dumez") is a corporation organised according to the laws of Saudi Arabia operating in the construction industry.

430. Saudi Arabian Dumez is a related company of Dumez-GTM, which filed its own separate E3 claim. The Panel considers the claim by Dumez-GTM at paragraphs 168 to 240, supra. The two claims are unrelated because they involve different projects.

431. In the original "E" claim form, Saudi Arabian Dumez sought compensation in the total amount of SAR 50,591,860 (USD 13,509,175), and classified all of the alleged losses as contract losses. In its Statement of Claim, Saudi Arabian Dumez stated that the alleged losses were related to four projects and referred to them as (a) the King Abdelaziz City for Science and Technology project (the "KACST project"), (b) the Chamber of Commerce project, (c) the Saudi Arabian Dumez headquarters project (the "Headquarters project"), and (d) the Kuwait Embassy Housing project. All of the projects were located in Saudi Arabia.

432. The KACST project concerned construction of a science laboratory and research institute for the King Abdelaziz City for Science and Technology. The Chamber of Commerce project involved the construction of a headquarters building for the Chamber of Commerce and Industry in the Eastern Province. The Headquarters project concerned repair of damage to Saudi Arabian Dumez's head office, which was caused by a scud missile attack. The Kuwait Embassy Housing project was for construction of the Kuwaiti diplomatic staff residence in Riyadh.

433. In the Statement of Claim, Saudi Arabian Dumez alleged losses in the amount of SAR 28,357,881 related to the KACST project, SAR 21,383,654 related to the Chamber of Commerce project, SAR 393,335 related to the Headquarters project, and SAR 456,990 related to the Kuwait Embassy project.

434. A large portion of the claimed losses is based on Saudi Arabian Dumez's assertion that it incurred a variety of unanticipated costs when work on the projects was suspended and delayed due to safety concerns and threats created by Iraq's invasion and occupation of Kuwait.

435. Saudi Arabian Dumez submitted a revised "E" claim form dated 25 May 1998, which added a claim in the amount of SAR 35,000 for claim preparation costs and a claim for interest. These loss items were in addition to the original claimed amount of SAR 50,591,860 for contract losses. The Panel has only considered those losses and amounts contained in the original claim (except for correction of arithmetical errors or where such losses have been withdrawn or reduced by Saudi Arabian Dumez, as discussed infra), and refers in this respect to paragraph 9, supra.

436. The secretariat sent an article 34 notification to Saudi Arabian Dumez. Saudi Arabian Dumez's reply included a few documents. However, it stated that it did not have most of its documents due to a fire at its offices in 1993. It stated that it was attempting to obtain relevant documents from other sources, and expressed its hope that additional documents would be submitted at a later time.

437. The secretariat subsequently sent a notice to Saudi Arabian Dumez to remind it that the Commission had not received a substantive reply to many of its questions. Saudi Arabian Dumez replied by providing some additional substantive information, but the information in the reply was limited to the Chamber of Commerce project.

438. Saudi Arabian Dumez sent a further communication to the Commission dated 4 July 2002 in which it clarified that it had reduced the amount of its claimed losses relating to the Chamber of Commerce project from SAR 21,383,654 to SAR 15,561,244. It went on to state that it was reducing the amount of its alleged losses relating to the KACST, Headquarters, and Kuwait Embassy Housing projects, and claiming only 48.4 per cent of the original amounts. Thus, Saudi Arabian Dumez reduced the total amount of its claim from SAR 50,591,860 (USD 13,509,175) to SAR 29,698,015 (USD 7,930,044).

439. In the same communication, Saudi Arabian Dumez stated that it had not withdrawn its claim relating to the KACST, Headquarters, and Kuwait Embassy Housing projects. However, it stated that with respect to these projects, "we are no longer able to provide supporting documents ..." due to the fire at its offices.

440. With reference to these modifications in the claimed amounts, the Panel has reclassified elements of Saudi Arabian Dumez's claim for the purposes of this report. Of the reduced claim amount of SAR 29,698,015 (USD 7,930,044), the amount of SAR 15,280,891 (USD 4,080,345) remains classified as contract losses. The Panel has reclassified SAR 21,780 (USD 5,816) as loss of tangible property, SAR 434,329 (USD 115,976) as payment or relief to others, SAR 356,602 (USD 95,221) as financial losses, SAR 5,680,454 (USD 1,516,810) as other losses, SAR 7,681,622 (USD 2,051,167) as interest, and SAR 242,337 (USD 64,709) as claim preparation costs.

441. The Panel therefore considered the amount of SAR 29,698,015 (USD 7,930,044) for contract losses, loss of tangible property, payment or relief to others, financial losses, other losses, interest and claim preparation costs as follows:

Table 23. Saudi Arabian Dumez's claim

Claim element	Claim amount (USD)
Contract losses	4,080,345
Loss of tangible property	5,816
Payment or relief to others	115,976
Financial losses	95,221
Other losses	1,516,810
Interest	2,051,167
Claim preparation costs	64,709
Total	7,930,044

A. Contract losses

1. Facts and contentions

442. Saudi Arabian Dumez seeks compensation in the amount of SAR 15,280,891 (USD 4,080,345) for contract losses allegedly incurred in connection with the KACST and the Chamber of Commerce projects.

(a) KACST Project

443. On 25 July 1990, Saudi Arabian Dumez entered into a contract with the King Abdelaziz City for Science and Technology for the construction of a science laboratory and research institute. The value of the contract was SAR 199,967,000, and the duration of the contract was intended to be 941 days from the date of the notice to commence works.

444. Saudia Arabian Dumez states that during the period from September 1990 to October 1991, it suffered a loss of production equivalent to 233 days of interruption of the contract as a result of Iraq's invasion and occupation of Kuwait. It states that, at times, work either ceased or was delayed because of concerns for the safety of the workforce.

445. According to Saudi Arabian Dumez, the project completion date was delayed by a total of 183 days due to lost production. It states that the period of delay was reduced from 233 days to 183 days by the implementation of an "acceleration program" involving the recruitment of additional workers.

446. Saudia Arabian Dumez seeks compensation for losses resulting from this delay, including the additional costs incurred due to the 183-day extension of the project. The increased costs include the hiring of additional workers to accelerate the work to make up for the lost days.

(b) Chamber of Commerce project

447. Saudi Arabian Dumez entered into a contract on 20 July 1990 with the Chamber of Commerce and Industry in the Eastern Province for the construction and one year's maintenance of a headquarters building. The value of the contract was originally SAR 54,235,980, but was increased to SAR 64,887,476.

448. The intended completion date of the works was 31 January 1992, but the works were actually completed on 30 April 1992.

449. According to Saudi Arabian Dumez, it suffered 72 days of lost production and delay as a result of Iraq's invasion and occupation of Kuwait. It states that work on the project ceased completely for 48 days in January and February 1991 because of concerns for the safety of the workforce, and that work was delayed by the need for additional security measures and the time needed to restart the work when it resumed in February 1991.

450. Saudia Arabian Dumez seeks compensation for losses resulting from this delay, including the additional costs incurred due to the extension of the project. The increased costs include the hiring of additional workers to accelerate the work to make up for the lost days.

2. Analysis and valuation

(a) KACST Project

451. Saudi Arabian Dumez did not provide any documents that support the claimed loss. The contract with the employer is among the documents that were not provided. Thus, the Panel has no evidence of the terms of the contract. There is also no evidence to show that additional costs were actually incurred.

452. The Panel finds that Saudi Arabian Dumez did not provide sufficient information or evidence to support its claim.

(b) Chamber of Commerce project

453. Although Saudi Arabian Dumez provided some documents in support of its claim, it did not provide important documents, such as the contract with the employer. Thus, the Panel has no evidence of the terms of the contract.

454. There is also insufficient evidence to show that additional costs were actually incurred. While there are some documents relating to the payment of salaries and other expenses, these documents do not show that such payments were the result of any delay or were an additional cost.

455. The Panel finds that Saudi Arabian Dumez did not provide sufficient information or evidence to support its claim.

3. Recommendation

456. The Panel recommends no compensation for contract losses.

B. Loss of tangible property

1. Facts and contentions

457. Saudi Arabian Dumez seeks compensation in the amount of SAR 21,780 (USD 5,816) for loss of tangible property. The claim arises out of a scud missile attack on the headquarters of Saudi Arabian Dumez. Saudi Arabian Dumez seeks compensation for alleged losses incurred in repairing the damage to the building from the attack.

458. Saudi Arabian Dumez originally classified this claim as contract losses, but the Panel finds that it is more appropriately classified as loss of tangible property.

2. Analysis and valuation

459. Saudi Arabian Dumez did not provide any evidence to show that it owned the building or property that was allegedly attacked and damaged. It also did not provide any evidence to show that any damage actually occurred. For example, it did not provide any photographs, witness statements, or repair invoices.

460. The Panel finds that Saudi Arabian Dumez did not provide sufficient information or evidence to support its claim.

3. Recommendation

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

C. Payment or relief to others

1. Facts and contentions

462. Saudi Arabian Dumez seeks compensation in the amount of SAR 434,329 (USD 115,976) for payment or relief to others. It originally classified the losses as contract losses, but the Panel finds that they are more appropriately classified as payment or relief to others.

463. Saudi Arabian Dumez seeks compensation for the alleged costs of demobilising and remobilising its workforce in connection with the suspension of work on the KACST and Chamber of Commerce projects. These alleged costs were in the nature of evacuation costs for the workforce, resulting from Dumez's stated concerns for its safety.

464. In relation to the Chamber of Commerce project, Saudi Arabian Dumez asserts that it purchased airline tickets and hired seven buses to transport its workforce, and that it paid the wages of its workers while they were in transit.

465. Saudi Arabian Dumez also seeks compensation for salaries paid to certain staff members who were in France and unable to travel to Saudi Arabia to work on the KACST Project, and for salaries paid to members of its headquarters staff during a 12-day period when they were unable to work due to the closure of the office.

2. Analysis and valuation

466. Saudi Arabian Dumez did not provide evidence to support its claims regarding the demobilisation and remobilisation of its workforce on the KACST project.

467. With regard to demobilisation and remobilisation costs related to the Chamber of Commerce project, Saudi Arabian Dumez presented invoices from December 1990 and January 1991 relating to airline tickets. However, the Panel finds that Saudi Arabian Dumez did not provide evidence to show actual payment for the airline tickets. The Panel also finds that Saudi Arabian Dumez did not provide sufficient evidence to show that such airline tickets were in fact related to the demobilisation and remobilisation of the workforce. The Panel also finds that Saudi Arabian Dumez did not provide evidence to show that payments were actually made for the hiring of buses and payment of wages.

468. Saudi Arabian Dumez did not present evidence regarding salary payments to personnel in France or at its headquarters.

469. The Panel finds that Saudi Arabian Dumez did not provide sufficient information or evidence to support its claim.

3. Recommendation

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

D. Financial losses

1. Facts and contentions

471. Saudi Arabian Dumez seeks compensation in the amount of SAR 356,602 (USD 95,221) for financial losses. It originally classified the losses as contract losses, but the Panel finds that they are more appropriately classified as financial losses.

472. The claim is comprised of three types of losses.

473. First, Saudi Arabian Dumez seeks compensation in the amount of SAR 107,465 (USD 28,696) for the insurance costs incurred to cover the periods of lost productivity and delay in relation to the KACST and Chamber of Commerce projects.

474. Second, Saudi Arabian Dumez seeks compensation in the amount of SAR 27,954 (USD 7,464) for payments allegedly required pursuant to bank guarantees in relation to the KACST and Chamber of Commerce projects. It asserts that this amount represents additional costs of advance payment guarantees and performance bonds to cover the delay periods on the projects.

475. Third, Saudi Arabian Dumez seeks compensation in the amount of SAR 221,183 (USD 59,061) for the cost of obtaining alternative financing arrangements. It asserts that one or more of its projects were financed by Kuwaiti sources. The financing was interrupted when Iraq invaded Kuwait, and Saudi Arabian Dumez maintains that it was required to obtain alternative financing from other sources.

2. Analysis and valuation

476. With regard to the insurance costs, the Panel finds that Saudi Arabian Dumez did not provide evidence to show the amount of insurance costs allegedly incurred as a result of lost productivity or delays.

477. With regard to the advance payment guarantees and performance bonds, Saudi Arabian Dumez provided evidence to show that they were extended due to the delay periods. However, the Panel finds that it did not provide evidence to show the amount of any bank charges.

478. With regard to the cost of obtaining alternative financing, the Panel finds that Saudi Arabian Dumez did not present evidence regarding the interruption of financing, such as when transfers were due from the financing sources and in what amounts. The Panel also finds that it did not present evidence regarding the alternative financing, such as the alleged costs incurred.

479. The Panel finds that Saudi Arabian Dumez did not provide sufficient information or evidence to support its claim.

3. Recommendation

480. The Panel recommends no compensation for financial losses.

E. Other losses

1. Facts and contentions

481. Saudi Arabian Dumez seeks compensation in the amount of SAR 5,680,454 (USD 1,516,810) for other losses. It originally classified the losses as contract losses, but the Panel finds that they are more appropriately classified as other losses.

482. The claim is comprised of seven types of losses, as follows:

(a) The increased cost of material purchases resulting from inflation in Saudi Arabia during the periods of delay on the projects;

(b) The increased cost of wages resulting from inflation in Saudi Arabia during the periods of delay;

(c) The cost of consumables (such as office supplies) incurred as a result of the delays in the projects;

(d) The cost of office rent incurred as a result of the delays in the projects;

(e) The cost of general office administrative costs (such as utilities and maintenance costs) incurred as a result of the delays in the projects;

(f) The cost of gas masks purchased for the workforce; and

(g) The costs of depreciation on equipment and fixtures during the periods of delay.

2. Analysis and valuation

483. With regard to the claim for other losses, the Panel finds that Saudi Arabian Dumez did not provide sufficient information or evidence to support the claim.

3. Recommendation

484. The Panel recommends no compensation for other losses.

F. Interest

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

G. Claim preparation costs

486. Saudi Arabian Dumez seeks compensation in the amount of SAR 242,337 (USD 64,709) for asserted claim preparation costs. In a letter dated 6 May 1998, the Panel was notified by the Executive Secretary of the Commission that the Governing Council intends to resolve the issue of claims preparation costs at a future date. Accordingly, the Panel takes no action with respect to the claim by Saudi Arabian Dumez for such costs.

H. Recommendation for Saudi Arabian Dumez

Table 24. Recommended compensation for Saudi Arabian Dumez

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	4,080,345	nil
Loss of tangible property	5,816	nil
Payment or relief to others	115,976	nil
Financial losses	95,221	nil
Other losses	1,516,810	nil
Interest	2,051,167	nil
Claim preparation costs	64,709	-
Total	7,930,044	nil

487. Based on its findings regarding Saudi Arabian Dumez's claim, the Panel recommends no compensation.

XI. GURIS MAKINA VE MONTAJ SANAYII A.S.

488. Guris Makina ve Montaj Sanayii A.S. ("Guris") is a corporation organised according to the laws of Turkey operating in the construction industry. At the time of Iraq's invasion and occupation of Kuwait, Guris was involved in three projects in Iraq. It was a contractor on two projects and a sub-contractor on one project.

489. In the "E" claim form, Guris sought compensation in the total amount of USD 4,640,881, 840,000 Deutsche Mark (DEM), KWD 32,000 and IQD 45,200 in the total amount of USD 5,434,718 for contract losses, loss of tangible property, payment or relief to others and other losses.

490. In its reply to the article 34 notification, Guris subsequently made a number of changes to its claim, including the withdrawal of a number of loss items. Guris also increased the claim amount for several components of its claim. As the Panel has previously held, a response to an inquiry for additional evidence is not an opportunity for a claimant to increase the quantum of a claim previously submitted. The increases were not accepted by the Panel, as the Panel will only consider those losses contained in the original claim, as supplemented by claimants up to 11 May 1998.

491. The Panel has reclassified elements of Guris' claim for the purposes of this report. In the "E" claim form, Guris sought compensation in the amount of USD 2,649,206 and IQD 45,200 for contract losses. The Panel has reclassified several components of the original claim for contract losses as claims for financial losses and other losses. The reclassifications are referred to in the Panel's review of each loss element, infra. In addition, the Panel reclassified the portion of Guris' claim for contract losses in the amount of USD 276,174 as a claim for interest.

492. The Panel therefore considered the amount of amount of USD 4,708,497 for contract losses, loss of tangible property, financial losses, other losses and interest, as follows:

Table 25. Guris' claim

Claim element	Claim amount (USD)
Contract losses (contracts with Iraqi parties)	1,300,546
Contract losses (contract with non-Iraqi party)	356,000
Loss of tangible property	400,000
Financial losses	203,878
Other losses	2,171,899
Interest	276,174
Total	4,708,497

A. Contract losses (contracts with Iraqi parties)

1. Facts and contentions

493. Guris seeks compensation in the total amount of USD 811,800 and IQD 152,000 in the total amount of USD 1,300,546 for contract losses in respect of contracts with Iraqi parties. The claim is for losses allegedly arising out of two projects which Guris was carrying out in Iraq as a contractor.

494. Guris designated its claims as "Claim No. 1" and "Claim No. 2". Claim No. 1 relates to work performed on the Baiji project site and Claim No. 2 relates to work performed on the Taji and Tarmiyah project sites.

(a) Claim No. 1

495. Guris seeks compensation in the amount of USD 245,000 for work performed on the Baiji project site.

496. The claim relates to amounts owed under two promissory notes issued in accordance with a banking arrangement dated 4 November 1983 between the Central Banks of Iraq and Turkey. This was an inter-governmental deferred payment agreement (the "deferred payment agreement").

497. On 13 April 1989, Guris and the State Engineering Company for Industrial Design and Construction, Ministry of Industry of Iraq ("SECIDAC"), entered into a contract in relation to works at the Baiji site. Guris agreed to carry out works relating to the contract for "Rail Wagon Bulk Loading Facilities of Fertilizer No. 4 at Baiji". The works consisted of design, supply of materials, and construction. The contract value was USD 245,000 and IQD 75,000. Guris seeks compensation in respect of the amount denominated in United States dollars only.

498. In respect of the amount payable in United States dollars, the amount of USD 145,000 related to the shipment of materials. The balance of USD 100,000 related to the delivery of materials to the project site. According to the terms of the deferred payment agreement, payment of the amounts denominated in United States dollars was deferred for 24 months.

499. Guris states that, because of Iraq's invasion and occupation of Kuwait, it was unable to complete the works because of the risks to its employees and it evacuated the employees on dates between 12 and 30 August 1990. Guris asserts that, as at 2 August 1990, the project was very near completion. All that remained were the tests for the issue of the taking-over certificate.

500. On 3 December 1989, the Central Bank of Turkey issued a promissory note in the amount of USD 145,000. The promissory note was to be repaid by SECIDAC to Guris on 3 December 1991.

501. On 18 December 1989, the Central Bank of Turkey issued a promissory note in the amount of USD 100,000. The promissory note was to be repaid by SECIDAC to Guris on 18 December 1991.

502. SECIDAC failed to repay Guris the amounts of the promissory notes on the due dates. Guris accordingly seeks compensation in the amount of USD 245,000. It also seeks compensation for

accrued and default interest in the amount of USD 71,709, which the Panel has reclassified as a claim for interest.

503. Guris states that it received the equivalent of USD 245,000 in Turkish lira from the Turkish authorities by way of credit, and is required to forward any compensation received from the Commission to those authorities as reimbursement.

(b) Claim No. 2

504. Guris seeks compensation in the amount of USD 566,800 and IQD 152,000 for work performed on the Taji and Tarmiyah project sites. The claim is summarized in table 26, infra.

Table 26. Guris' claim for contract losses (Claim No. 2)

Item	Amount (IQD)	Amount (USD)
Contract price	304,000	840,000
Less:		
Advance payment received	(152,000)	(126,000)
Payment received for goods shipped		(147,200)
Total	152,000	566,800

505. On 3 May 1989, Guris and the Nassr Establishment for Mechanical Industries, Ministry of Industry of Iraq ("Nassr"), entered into a contract in relation to works at the Taji and Tarmiyah sites. The works consisted of design, supply of materials, and construction. The contract value was USD 840,000 and IQD 304,000.

506. Guris states that the commencement date of the contract was 27 November 1989, the date upon which it received advance payments in the amounts of USD 126,000 and IQD 152,000. The intended completion date was 31 December 1991. Payment was to be by way of letter of credit.

507. Guris states that as at the date of Iraq's invasion and occupation of Kuwait, it was working on the Taji project site. Guris asserts that as at 2 August 1990, the engineering and design work had been completed and approved and the civil works had been "mostly completed". Guris had shipped goods with a value of USD 184,000 to Iraq on 3 May, 28 June and 1 August 1990. It received payment under the letter of credit in the amount of USD 147,200 for these three shipments. Guris was unable to complete the works because of the risks to its employees and it evacuated the employees on dates between 12 and 30 August 1990.

508. Guris had started to manufacture four cranes in Turkey. It was unable to ship the cranes because of the trade embargo. Guris alleges that it was unable to resell the cranes as they were manufactured to the employer's specifications.

509. Guris appears to be seeking compensation not only for unpaid work performed, but also for work which it was unable to carry out because of Iraq's invasion and occupation of Kuwait. This would include the assembly and erection of the cranes in Iraq, as well as other amounts payable upon the satisfactory testing of the cranes. The latter part is a claim for loss of profits, but Guris did not explain what proportion of the claim this represents. The Panel has treated the entire claim as a claim for contract losses.

2. Analysis and valuation

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

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

(a) Claim No. 1

512. In support of Claim No. 1, Guris provided copies of the promissory notes and the deferred payment agreement.

513. The two promissory notes were issued in December 1989. Based on the terms of the contract, this means that the work payable in United States dollars was carried out prior to this date. This is in accordance with Guris' statements as to the status of the contract works as at 2 August 1990. It states that all works had been completed except for the issue of the taking-over certificate and the completion of the maintenance period.

514. Accordingly, the Panel finds that the contract losses alleged by Guris in Claim No. 1 relate entirely to work that was performed prior to 2 May 1990.

515. The Panel recommends no compensation for contract losses (Claim No. 1) as they relate to debts and obligations of Iraq arising prior to 2 August 1990 and, therefore, are outside the jurisdiction of the Commission.

516. The Panel finds that for the purposes of Security Council resolution 687 (1991) the deferred payment agreement did not have the effect of novating the debts.

(b) Claim No. 2

517. In respect of Claim No. 2, Guris asserts that the work was interrupted by Iraq's invasion and occupation of Kuwait.

518. Guris provided some evidence to show the status of the contract as at 2 August 1990. The evidence is in the form of an "expertise report" prepared by the Chamber of Industry of Ankara on 16 August 1990. It states that the four cranes had been inspected and were ready for shipment to Iraq. The report also noted that certain components had already been shipped to Iraq.

519. In addition, Guris provided correspondence between the relevant banks regarding the letter of credit and extensions thereto, a copy of the letter of credit, invoices of the goods that were shipped to Iraq, and copies of bank statements showing receipt of monies for the goods shipped prior to 2 August 1990.

520. The Panel finds that Guris provided sufficient evidence to establish that its construction works in Turkey, the shipment of the goods from Turkey, and its erection works in Iraq, were interrupted by Iraq's invasion and occupation of Kuwait.

(i) United States dollar component

521. The Panel finds that the "expertise report" of 16 August 1990 constitutes sufficient evidence that the cranes were complete and ready for shipment as at 2 August 1990. The Panel further finds that Iraq's invasion and occupation of Kuwait prevented the shipment of the cranes to Iraq. The Panel considers that, had Guris not been so prevented, the evidence presented indicates a sufficient likelihood that the cranes would have been erected and that a successful test run would have been completed within 12 months. Under the terms of payment of the contract, Guris would then have been entitled to receive 80 per cent of the United States dollar component of the contract upon delivery of the cranes to the project sites and a further 2.5 per cent upon the issue of the taking- over certificate.

522. The Panel finds that Guris is entitled to 82.5 per cent of the United States dollar component of the contract (i.e. a total of USD 693,000). However, the payment received by Guris for the goods shipped in the amount of USD 147,200 falls to be deducted from this amount, thereby producing the sum of USD 545,800. Moreover, Guris, by not shipping the remaining cranes to Iraq, made a saving of the costs that it would have incurred had the shipment taken place. In its response to a request for further information and evidence, Guris indicated that it would have incurred costs in the amount of USD 23,586 in shipping the remaining cranes to Iraq. It provided documentary evidence in support of this. The Panel finds that these saved costs should be deducted from the amount of recommended compensation. This calculation produces the sum of USD 522,214 (USD 545,800 less USD 23,586).

(ii) Iraqi dinar component

523. The evidence shows that Guris received the advance payment in the amount of IQD 152,000. The advance payment was equal to 50 per cent of the Iraqi dinar component of the contract. Guris carried out approximately 25 per cent of the work with a value of IQD 76,000. The Panel considers that the amount of the advance payment retained by Guris should be deducted from the award in respect of the United States dollar component of the contract. This calculation produces a final recommendation for contract losses in respect of contracts with Iraqi parties in the amount of USD 277,841 (USD 522,214 less IQD 76,000 (USD 244,373)).

3. Recommendation

524. The Panel recommends compensation in the amount of USD 277,841 for contract losses in respect of contracts with Iraqi parties.

B. Contract losses (contract with non-Iraqi party)

1. Facts and contentions

525. Guris seeks compensation in the amount of USD 356,000 for contract losses in respect of a contract with a non-Iraqi party.

526. Guris entered into a sub-contract with Aqua Engineering GmbH of Austria ("Aqua") to carry out work for the State Organisation for Water and Sewerage of Iraq. Guris states that it constructed and erected 61 prefabricated water supply units in Basrah and Maysan.

527. Guris provided no details of the sub-contract value or duration. In its reply to the article 34 notification, it stated that almost all of its documents were left in Iraq when it departed in August 1990. The claim is for unpaid retention monies. Guris alleges that it would have received these monies once it had obtained taxation clearance certificates from the Iraqi authorities. It was unable to obtain these certificates because of Iraq's invasion and occupation of Kuwait.

528. It appears that Guris may have completed its works under the sub-contract by July 1987. In September 1992, Aqua wrote to Guris requesting it to forward a taxation clearance certificate issued by the Iraqi authorities valid until 30 September 1992. This seems to have been a pre-requisite for the release of the outstanding monies. Guris was unable to comply with this request because it had ceased its presence in Iraq in August 1990.

2. Analysis and valuation

529. Guris provided almost no evidence in support of its claim. The documents that it did provide evidence the fact that it constructed 61 prefabricated water supply units for Aqua, that Aqua was satisfied with its work, and that the reason Guris has not been paid is because it was unable to secure a taxation clearance certificate from the Iraqi authorities.

530. However, Guris did not provide a copy of the sub-contract or any evidence that demonstrates that it is owed the amount of USD 356,000 for unpaid retention monies. Nor did Guris provide any evidence which demonstrates that Aqua was entitled to refuse to pay it the amounts outstanding pending receipt of the taxation clearance certificate. It was requested to provide this information in the article 34 notification.

531. The Panel finds that Guris failed to provide sufficient information and evidence to establish its claim.

3. Recommendation

532. The Panel recommends no compensation for contract losses in respect of the contract with a non-Iraqi party.

C. Loss of tangible property

1. Facts and contentions

533. Guris seeks compensation in the amount of USD 400,000 for loss of tangible property. The claim is for the loss of fixed assets, machinery and equipment which were left in Iraq "due to the threat of military action by either side".

534. In the "E" claim form, Guris sought compensation in the amount of USD 503,275 for loss of tangible property. However, the Panel considers that the component of the claim relating to interest on the letter of guarantee in the amount of USD 103,275 is more appropriately classified as financial losses.

535. Guris asserts that all of the equipment was being used on the projects which it was still carrying out in Iraq and that most of the items were imported into Iraq from Turkey. A few items were purchased locally or imported into Iraq from other countries.

536. Guris provided a list of the property which includes office buildings, a computer and vehicles. Many items were purchased in currencies other than United States dollars. Guris converted these amounts to a total amount of USD 400,000.

537. In 1991, Guris pledged the assets to a Turkish bank by way of collateral for a loan. At the same time, the tangible property was registered with the Government of Turkey as being lost. Guris received the amount of USD 400,000 from the Turkish authorities by way of a letter of guarantee, and is required to forward any compensation received from the Commission to those authorities as reimbursement.

538. Guris does not know what happened to the items as it has not returned to Iraq.

2. Analysis and valuation

539. Guris provided some evidence of its ownership of the items claimed. The evidence includes purchase invoices for some items and inventories of the assets. According to the inventories, almost all of the items were purchased in 1988 and 1989. A few items were purchased in 1986 and one item (a car) was purchased in 1985. Guris also provided some untranslated customs declarations.

540. The Panel performed a reconciliation of the items appearing in the inventories for which purchase invoices were also provided. Based on this reconciliation and applying the appropriate rates of depreciation to the assets in question, the Panel valued the tangible property at USD 17,979.

3. Recommendation

541. The Panel recommends compensation in the amount of USD 17,979 for loss of tangible property.

D. Financial losses

1. Facts and contentions

542. Guris seeks compensation in the amount of USD 203,878 for financial losses. The claim is for alleged losses arising out of Guris' involvement in the projects at the Baiji, Taji and Tarmiyah sites. The claimed losses include expenses allegedly incurred in relation to a performance bond, cash penalties and other miscellaneous expenses.

543. Guris originally classified the claims for performance bond expenses and cash penalties as contract losses and the claim for miscellaneous expenses as loss of tangible property, but the Panel finds that the losses are more appropriately classified as financial losses.

(a) Performance bond expenses

544. Guris seeks compensation for "performance bond and related expenses". The claim is for the performance bonds provided by Guris in relation to the Baiji site in the amount USD 26,452 and the Taji and Tarmiyah sites in the amount USD 9,934.

(i) Baiji site

545. The claim relates to the performance bond provided by Guris in relation to its work on the Baiji site. The amount of the performance bond was USD 24,500. Guris states that the performance bond was not released and that it was required to pay "additional commissions and related expenses" in the amount of USD 1,952. The claim is for the principal amount of the performance bond as well as the charges.

546. Guris provided a letter dated 14 October 1992 from a Turkish bank (the correspondent bank) which advises that the charges for the performance bond as at 30 September 1990 were USD 1,309 and 4,497,641 Turkish liras (TRL).

547. Guris asserts that the loss arose as a direct result of Iraq's invasion and occupation of Kuwait because as at 2 August 1990 it was very close to fulfilling its obligations under the contract. Iraq's invasion and occupation of Kuwait prevented this from taking place with the consequence that Guris was unable to secure the release of the performance bond, and was required to continue paying charges.

(ii) Taji and Tarmiyah sites

548. The claim relates to a performance bond provided by Guris in relation to its work on the Taji and Tarmiyah sites. The amount of the performance bond was USD 126,000. Guris states that the performance bond was not released and that it was required to pay "additional commissions and related expenses" in the amount of USD 9,934. The claim is for the charges on the performance bond only.

549. The performance bond was originally valid until 30 December 1989. However, based on the evidence provided, it seems to have been extended until 8 September 1993.

550. Guris provided a letter dated 14 October 1992 from a Turkish bank (the correspondent bank) which advises that the charges for the performance bond as at 30 September 1990 were USD 7,105 and TRL 33,459,914.

(b) Cash penalties

551. Guris seeks compensation in the amount of USD 64,217 for cash penalties. In order to finance its involvement in the work on the Taji and Tarmiyah sites, Guris obtained a loan from a Turkish bank in the amount of USD 614,000. The date of the loan agreement is unclear from the documentation provided, however there is evidence that the interest payments under the loan date back to December 1989.

552. Guris states that as a result of Iraq's invasion and occupation of Kuwait, it was unable to repay the outstanding balance under the loan agreement. It alleges that under the Turkish foreign exchange regulations, it was obliged to pay back the amount of the loan together with a penalty relating to taxation and other duties, exchange rate and interest rate differences.

553. Guris asserts that it paid the penalties to the Turkish authorities on 24 November 1993.

(c) Miscellaneous expenses

554. Guris seeks compensation in the amount of USD 103,275 for miscellaneous expenses. The claim is related to the claim for loss of tangible property. Guris alleges that it lost tangible property with a value of USD 400,000. On 11 October 1991, it borrowed the amount of USD 400,000 from a Turkish bank. It pledged its title to the tangible property by way of collateral for the loan. Guris states that it paid "expenses, commissions and interest" in the amount of USD 103,275 on this loan.

2. Analysis and valuation

(a) Performance bond expenses

(i) Baiji site

555. In respect of the claim for the principal amount of the performance bond, Guris did not provide any evidence which shows that the bond is still in the hands of the Iraqi employer, or that it has been, or could be, called by the Iraqi employer.

556. In respect of the charges on the performance bond, Guris provided evidence that it paid the charges. However, it did not explain why the amount claimed exceeds the amount actually paid. There is correspondence dated 14 October 1992 and 8 February 2002 stating the amounts of the charges relating to the performance bond at those dates. The letters do not refer to the period during which the charges were incurred.

557. Guris failed to explain during what period the expenses and charges were incurred, and how they resulted from Iraq's invasion and occupation of Kuwait. The Panel finds that Guris failed to demonstrate that the alleged loss arose as a direct result of Iraq's invasion and occupation of Kuwait.

(ii) Taji and Tarmiyah sites

558. The Panel finds that Guris appears to have, following 2 August 1990, allowed the letter of credit and the performance bond to be renewed until September 1993. In these circumstances, it appears that the alleged loss is not a direct result of Iraq's invasion and occupation of Kuwait. Guris did not provide additional evidence and explanations to enable the Panel to make a contrary finding.

559. The Panel recommends no compensation because Guris failed to provide sufficient information and evidence to establish its claim.

(b) Cash penalties

560. The claim for cash penalties is supported by some evidence that Guris paid the charges. However, Guris failed to demonstrate that the alleged loss is a direct result of Iraq's invasion and occupation of Kuwait, since the basis for the charges arose out of its own financing arrangements. The Panel finds that Guris' decision to enter into a financing agreement with a Turkish bank in October 1991 was an independent commercial decision.

561. The Panel recommends no compensation because Guris failed to demonstrate that the alleged loss arose as the direct result of Iraq's invasion and occupation of Kuwait.

(c) Miscellaneous expenses

562. Guris provided no evidence that it incurred the expenses.

563. The Panel recommends no compensation because Guris failed to provide sufficient information and evidence to demonstrate that the alleged loss arose as the direct result of Iraq's invasion and occupation of Kuwait.

3. Recommendation

564. The Panel recommends no compensation for financial losses.

E. Other losses

1. Facts and contentions/analysis and valuation

565. Guris seeks compensation in the total amount of USD 1,523,400, DEM 840,000 and KWD 32,000 in the total amount of USD 2,171,899 for other losses.

566. Guris originally classified the claim for social security reimbursement as contract losses and the claim for potential penalties as payment or relief to others, but the Panel finds that the losses are more appropriately classified as other losses.

(a) Potential penalties

567. Guris seeks compensation in the amount of USD 1,428,400 for penalties which it expects to be required to pay by the Iraqi authorities. Guris alleges that it is liable to pay these penalties because it abandoned its Baghdad office prior to fulfilling its legal obligations vis-à-vis these authorities. The penalties result from Guris' failure to submit to the relevant Iraqi authorities audited financial accounts for its Iraqi branch and its head office for the years 1989 to 1992, a yearly activity report for the Iraqi branch and customs declarations for the items of tangible property which Guris had imported into Iraq.

568. Guris provided no evidence in support of its claim for other losses (potential penalties). The Panel finds that Guris failed to provide sufficient information and evidence to establish its claim.

(b) Social security reimbursement

569. Guris seeks compensation in the amount of USD 35,000 for social security payments which it expected would be reimbursed according to Iraqi law.

570. In support of its claim, Guris provided a copy of the Iraqi law which allegedly relieves it from the duty to make social security payments and which requires reimbursement of any social security payments which it made. Guris did not explain the application of the law to the projects on which Guris was working. Nor did Guris provide any evidence of its entitlement to receive payments in the amount of USD 35,000.

571. The Panel finds that Guris failed to provide sufficient information and evidence to establish its claim for social security reimbursement.

(c) Tender preparation costs

572. Guris seeks compensation in the amount of USD 60,000, DEM 840,000 and KWD 32,000 for the costs and expenses it allegedly incurred in preparing tenders for six contracts in Iraq and two projects in Kuwait. Guris alleges that it was close to securing these contracts when Iraq's invasion and occupation of Kuwait intervened.

573. In support of its claim, Guris provided copies of its correspondence with the Iraqi employer and with the contractor for the two projects in Kuwait. This correspondence indicates that Guris was in the process of tendering for these contracts as at 2 August 1990. However, Guris provided no evidence that it incurred the alleged costs or that it would have been awarded the contracts in question.

574. The Panel has found in its previous reports that tender preparation costs are not compensable unless there is clear evidence that a claimant could have recovered such costs even in the absence of an executed contract. Guris submitted no such evidence.

575. The Panel recommends no compensation because Guris failed to demonstrate that it suffered a loss and, if there was a loss, that the loss arose as the direct result of Iraq's invasion and occupation of Kuwait.

2. Recommendation

576. The Panel recommends no compensation for other losses.

F. Interest

577. With reference to the issue of interest, the Panel refers to paragraphs 20 and 21, supra, of this report.

G. Recommendation for Guris

Table 27. Recommended compensation for Guris

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses (contracts with Iraqi parties)	1,300,546	277,841
Contract losses (contract with non-Iraqi party)	356,000	nil
Loss of tangible property	400,000	17,979
Financial losses	203,878	nil
Other losses	2,171,899	nil
Interest	276,174	-
	4,708,497	295,820

578. Based on its findings regarding Guris' claim, the Panel recommends compensation in the amount of USD 295,820. The Panel determines the date of loss to be 2 August 1990.

XII. BIWATER EUROPE LIMITED

579. Biwater Europe Limited ("Biwater Europe") is a corporation organised according to the laws of the United Kingdom. Its operates in the construction industry and specialises in water and effluent treatment plants.

580. This claim is based upon six projects in Iraq.

581. In the original "E" claim form, Biwater Europe sought compensation in the total amount of 17,539,018 Pounds sterling (GBP) (USD 33,344,140), and classified all of the alleged losses as contract losses.

582. In a revised claim received by the Commission prior to 11 May 1998, Biwater Europe withdrew its claim for two loss items and reduced the total amount of its claim to GBP 15,666,791 (USD 29,784,774).

583. In May 2002, the Commission received Biwater Europe's reply to the article 34 notification. In this reply, Biwater Europe reintroduced one of the loss items it had previously withdrawn and

increased the total amount of the revised claim by GBP 160,596. The Panel has not considered those losses that were claimed after 11 May 1998, and refers in this respect to paragraph 9, supra.

584. The Panel has reclassified elements of Biwater Europe's claim for the purposes of this report. Of the reduced claim amount of GBP 15,666,791 (USD 29,784,774), the amount of GBP 6,600,213 (USD 12,547,933) remains classified as contract losses. The Panel has reclassified GBP 3,492,174 (USD 6,639,114) as loss of profits, GBP 230,745 (USD 438,679) as other losses, and GBP 5,343,659 (USD 10,159,048) as interest. Biwater Europe also seeks an unspecified amount for claim preparation costs.

585. The Panel therefore considered the amount of GBP 15,666,791 (USD 29,784,774) for contract losses, loss of profits, other losses, interest and claim preparation costs, as follows:

Table 28. Biwater Europe's claim

Claim element	Claim amount (USD)
Contract losses	12,547,933
Loss of profits	6,639,114
Other losses	438,679
Interest	10,159,048
Claim preparation costs (no amount specified)	-
Total	29,784,774

A. Contract losses

1. Facts and contentions

586. Biwater Europe seeks compensation in the amount of GBP 6,600,213 (USD 12,547,933) for contract losses allegedly incurred in connection with three projects in Iraq. The three projects are referred to as the Haditha project, the Najaf Kufa project, and the Rashidiya project.

(a) Haditha project

587. Biwater Europe and an Iraqi company, as co-contractors, entered into a contract with the State Organisation for Water and Sewerage of Iraq on 22 February 1986. Under the contract, Biwater Europe agreed to supply equipment and supervise its installation in connection with the Haditha-Haklania Water Treatment Scheme. The value of the contract was GBP 4,600,000. The effective date of the contract was 22 February 1986. Payment was to be made by drawing on a letter of credit.

588. Biwater Europe states that by 2 August 1990, it had completed almost all of the work required of it under the contract and had received 96.95 per cent of the amounts owed to it. The provisional acceptance certificate was issued in October 1990, and the final acceptance certificate was issued in January 1992. Biwater Europe was given copies only, not the originals, of the certificates.

589. Biwater Europe alleges that because it received copies of the certificates, it could not obtain payment on the letter of credit because the signed originals were required.

590. The contract with the employer did not provide for retention monies. However, in practice, the employer did in fact retain the payment that would have been triggered by the final monthly progress payment in order to protect itself financially until the project was handed over.

591. Biwater Europe seeks compensation in the amount of GBP 121,289 (USD 230,587) for the amounts payable on the provisional and final acceptance certificates.

(b) Najaf Kufa project

592. On 5 March 1987, Biwater Europe's legal predecessor entered into a contract with the Iraqi State Contracting Company for Water and Sewerage to design, construct, and commission a water treatment plant in Najaf Kufa, Iraq. The value of the contract, as revised, was GBP 19,699,016. The effective date of the contract was 8 March 1988, and the estimated completion date was 7 March 1991.

593. Biwater Europe states that on-site work on the project was ongoing as of 2 August 1990. It estimates that 90 per cent of the required equipment had been dispatched to the site, and that 20 per cent of the equipment had been installed.

594. Biwater Europe also states that during the course of the project, it was requested to, and did perform, work that was not covered by the contract. It asserts that as of 2 August 1990, it was in negotiations with the employer for payment for the additional work, but the negotiations were not concluded due to Iraq's invasion and occupation of Kuwait.

595. Biwater Europe seeks compensation in the amount of GBP 5,344,650 (USD 10,160,932) for amounts owed under the contract and for the amount of additional work that was performed outside of the contract.

(c) Rashidiya project

596. On 5 March 1987, Biwater Europe's legal predecessor entered into a contract with the Iraqi State Contracting Company for Water and Sewerage for the supply and erection of the mechanical and electrical equipment for the Rafshidiya Unified Water Supply Scheme. The value of the contract, as revised, was GBP 5,788,334. The effective date of the contract was 8 March 1988, and the estimated completion date was 7 September 1990.

597. Biwater Europe states that on-site work on the project was ongoing as of 2 August 1990. It estimates that 95 per cent of the required equipment had been dispatched to the site, and that 55 per cent of the equipment had been installed.

598. Biwater Europe also states that during the course of the project, it was requested to perform, and did perform, work that was not covered by the contract. It asserts that as of 2 August 1990, it was in negotiations with the employer for payment of the additional work, but the negotiations were not concluded due to Iraq's invasion and occupation of Kuwait.

599. Biwater Europe seeks compensation in the amount of GBP 1,134,274 (USD 2,156,414) for amounts owed under the contract and for the amount of additional work that was performed outside of the contract.

2. Analysis and valuation

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

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

(a) Haditha project

602. The claim relating to this project is in the nature of a claim for retention monies, and the alleged losses relate to amounts payable after 2 August 1990.

603. Based upon the course of conduct and actual practice established between Biwater Europe and the employer, the Panel finds that the employer did withhold payment in the same manner as retention monies, and that Biwater Europe accepted that it would not receive the withheld payment until satisfaction of some de facto obligation.

604. The Panel finds that Biwater Europe did not provide sufficient information or evidence to establish that its failure to satisfy the condition or conditions to release of the withheld payment was the direct result of Iraq's invasion and occupation of Kuwait. For example, Biwater Europe did not explain why it received copies instead of originals of the certificates that were required to trigger payment. The Panel thus finds that Biwater Europe did not present sufficient information or evidence to establish that its alleged losses were a direct result of Iraq's invasion and occupation of Kuwait.

(b) Najaf Kufa project

605. Biwater Europe states that it is unable to determine the value of work performed before or after 2 May 1990. Even assuming that some work was performed after that date, the Panel finds that Biwater Europe did not present sufficient information or evidence to establish the value of any work after 2 May 1990 or to show which related payments remained outstanding.

606. Accordingly, the Panel finds that Biwater Europe did not provide sufficient information or evidence to establish that the alleged contract losses relate to debts and obligations of Iraq within the jurisdiction of the Commission.

(c) Rashidiya project

607. Biwater Europe states that it is unable to determine the value of work performed before or after 2 May 1990. Even assuming that some work was performed after that date, the Panel finds that

Biwater Europe did not present sufficient information or evidence to establish the value of any work after 2 May 1990 or to show which related payments remained outstanding.

608. Accordingly, the Panel finds that Biwater Europe did not provide sufficient information or evidence to establish that the alleged contract losses relate to debts and obligations of Iraq within the jurisdiction of the Commission.

3. Recommendation

609. The Panel recommends no compensation for contract losses.

B. Loss of profits

1. Facts and contentions

610. Biwater Europe seeks compensation in the amount of GBP 3,492,174 (USD 6,639,114) for loss of profits. It originally classified the losses as contract losses, but the Panel finds that they are more appropriately classified as loss of profits.

611. This claim is based upon four of its projects in Iraq. In addition to the Rashidiya project (described above), Biwater Europe seeks compensation for loss of profits on the Al Khanooka, Nahrawan, and Nassiriyah projects.

612. With respect to the Al Khanooka project, Biwater Europe entered into a contract with the General Establishment for Water and Sewerage of Iraq on 24 October 1989. Under the contract, Biwater Europe agreed to supply equipment for use in the construction of the Al Khanooka Water Scheme. The value of the contract was GBP 1,262,746. In May 1990, Biwater Europe entered into a sub-contract with another company, which agreed to supply a water treatment tank. The value of the sub-contract was GBP 192,562.

613. Biwater Europe states that it was forced to cancel the sub-contract in September 1990 because of Iraq's invasion and occupation of Kuwait. In doing so, it allegedly incurred cancellation charges and costs. Biwater Europe seeks compensation for loss of profits in the form of the amounts allegedly incurred in connection with the cancellation of the sub-contract.

614. With respect to the Nahrawan project, Biwater Europe and the Iraqi General Establishment for Water and Sewerage signed a contract on 24 October 1989 concerning a water supply scheme at Nahrawan. The value of the contract was GBP 653,300. The contract was to enter into effect upon the issue of financial approval by the Export Credits Guarantee Department of the United Kingdom. The approval was not issued. As of 2 August 1990, Biwater Europe had incurred no costs on the project.

615. With respect to the Nassiriyah project, the Al Farouq Contracting Company invited Biwater Europe in 1988 to tender for a contract for the supply, erection, and maintenance of a water project in Nassiriyah. Biwater Europe asserts that it was granted a preliminary award of the contract in

November 1988 based on its tender in the amount of GBP 20,230,311. As of 2 August 1990, there was still no contract regarding the project.

616. Biwater Europe seeks compensation for the four projects on the basis that it suffered loss of profits because work was interrupted as a result of Iraq's invasion and occupation of Kuwait.

617. The following table sets forth the amount of loss of profits alleged by Biwater Europe for each project, and the alleged profit margin for each project. Biwater Europe states that the profit margin is based on the profit divided by the contract price.

Table 29. Biwater Europe's claim for loss of profits

Project	Claim amount (USD)	Profit margin (percentage)
Al Khanooka	298,013	7.94
Rashidiya	328,481	3.24
Nahrawan	207,249	8.00
Nassiriyah	5,805,371	10.00
Total	6,639,114	

2. Analysis and valuation

618. The requirements to substantiate a loss of profits claim have been stated by the Panel at paragraphs 17 and 18, supra.

619. With respect to the Nahrawan and Nassiriyah projects, the Panel finds that Biwater Europe did not establish a loss because there was no contract in effect for either project.

620. With regard to the Al Khanooka and Rashidiya projects, the Panel finds that Biwater Europe did not provide sufficient information or evidence to support its claim. Much of the claim is unsupported by contemporaneous source documents, and is instead based on summaries.

621. The Panel finds that Biwater Europe did not satisfy the requirements set forth in paragraphs 17 and 18, supra. The Panel recommends no compensation as Biwater Europe failed to provide information and evidence that establishes with reasonable certainty ongoing and expected profitability or sufficient evidence to substantiate its loss of profits claim.

3. Recommendation

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

C. Other losses

1. Facts and contentions

623. Biwater Europe seeks compensation in the amount of GBP 230,745 (USD 438,679) for other losses. It originally classified the losses as contract losses, but the Panel finds that they are more appropriately classified as other losses.

624. Biwater Europe seeks compensation for other losses relating to the Al Khanooka, Haditha, Najaf Kufa, and Rashidiya projects.

625. With respect to the Al Khanooka project, Biwater Europe seeks compensation in the amount of GBP 7,215 (USD 13,717) for legal fees arising out of the cancellation of the contract with the sub-contractor.

626. With respect to the Haditha project, Biwater Europe seeks compensation in the amount of GBP 2,772 (USD 5,270) for staff costs incurred in pursuing payment from a trade finance company, and bond costs.

627. With respect to the Najaf Kufa project, Biwater Europe seeks compensation in the amount of GBP 147,605 (USD 280,618) for (a) costs of marshalling of equipment, (b) site expenses related to local staff, (c) staff costs for preparation of a claim to the Export Credits Guarantee Department of the United Kingdom (the "ECGD"), legal defences, and disposal of equipment, (d) legal fees, and (e) overhead.

628. With respect to the Rashidiya project, Biwater Europe seeks compensation in the amount of GBP 73,153 (USD 139,074) for (a) costs of marshalling of equipment, (b) site expenses related to local staff, (c) staff costs for preparation of the ECGD claim, legal defences, and disposal of equipment, (d) legal fees, and (e) overhead.

2. Analysis and valuation

629. The Panel finds that Biwater Europe did not present evidence to show that the alleged losses were incurred or to establish the amount of the alleged losses. The Panel also finds that Biwater Europe did not present evidence to show that it actually paid the alleged costs.

630. The Panel finds that Biwater Europe did not provide sufficient information or evidence to support its claim.

3. Recommendation

631. The Panel recommends no compensation for other losses.

D. Interest

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

E. Claim preparation costs

633. Biwater Europe seeks compensation in an unspecified amount for asserted claim preparation costs. In a letter dated 6 May 1998, the Panel was notified by the Executive Secretary of the Commission that the Governing Council intends to resolve the issue of claims preparation costs at a future date. Accordingly, the Panel takes no action with respect to the claim by Biwater Europe for such costs.

F. Recommendation for Biwater Europe

Table 30. Recommended compensation for Biwater Europe

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	12,547,933	nil
Loss of profits	6,639,114	nil
Other losses	438,679	nil
Interest	10,159,048	nil
Claim preparation costs (no amount specified)		-
Total	29,784,774	nil

634. Based on its findings regarding Biwater Europe's claim, the Panel recommends no compensation.

XIII. BIWATER INTERNATIONAL LIMITED

635. Biwater International Limited ("Biwater International") is a corporation organised according to the laws of the United Kingdom operating in the construction industry and specialising in water management projects.

636. In the "E" claim form, Biwater International sought compensation in the total amount of GBP 13,699,688 (USD 26,045,035) for contract losses, claim preparation costs, and interest.

637. The Panel has reduced the original total amount of the claim to take account of duplicate loss elements in the claim. In its reply to the article 34 notification, Biwater International acknowledged that a claim described as "payments outstanding from Techcorp" in the amount of GBP 261,176 duplicated a claim for "goods delivered to employer but not reimbursed", and that a claim described as

"miscellaneous 1991 and 1992 costs" in the amount of GBP 8,693 duplicated portions of its claim for claim preparation costs.

638. The Panel has thus reduced the total amount of the claim by the amount of GBP 269,869 to GBP 13,429,819 (USD 25,531,975) to account for the duplicate loss elements.

639. The Panel has reclassified elements of Biwater International's claim for the purposes of this report.

640. After taking into account the reduced claim amount, Biwater sought compensation in the amount of GBP 11,382,138 (USD 21,639,045) for contract losses. Of this amount, the Panel has reclassified GBP 1,038,475 (USD 1,974,287) as loss of tangible property, GBP 137,062 (USD 260,573) as payment or relief to others, GBP 1,072,040 (USD 2,038,100) as financial losses, and GBP 621,155 (USD 1,180,902) as other losses.

641. The Panel therefore considered the amount of GBP 13,429,819 (USD 25,531,975) for contract losses, loss of tangible property, payment or relief to others, financial losses, other losses, interest and claim preparation costs, as follows:

Table 31. Biwater International's claim

Claim element	Claim amount (USD)
Contract losses	16,185,183
Loss of tangible property	1,974,287
Payment or relief to others	260,573
Financial losses	2,038,100
Other losses	1,180,902
Interest	3,785,798
Claim preparation costs	107,132
Total	25,531,975

A. Contract losses

1. Facts and contentions

642. Biwater International seeks compensation in the amount of GBP 8,513,406 (USD 16,185,183) for contract losses allegedly incurred in connection with three contracts in Iraq. The contracts are referred to as the Mahmoudiyah contract, the Rustamiya contract, and the Akashat Railway contract.

(a) Mahmoudiyah contract

643. On 23 May 1982, Biwater International entered into a contract with the State Contracting Company for Water and Sewerage Projects, Ministry of Housing and Construction of Iraq. The

contract concerned the construction of civil works on the Mahmoudiyah Sewerage Treatment Plant Project. The value of the contract, as amended, was GBP 3,795,964 and IQD 1,136,047.

644. Biwater International states that it completed its work on the contract in July 1984. It also states that the completion of the work and final account figures were confirmed by the employer in a letter dated 15 March 1986.

645. Biwater International claims that it is owed unpaid amounts relating to the final payment and retention monies under the contract, and seeks compensation in the amount of GBP 266,733 and IQD 28,289 for such amounts.

646. Biwater International asserts that it was not paid these amounts because payment was conditional upon the issue by the Government of Iraq of clearance certificates, and that it was unable to obtain such certificates due to Iraq's invasion and occupation of Kuwait.

(b) Rustamiya contract

647. On 30 January 1985, Biwater International entered into a contract with the State Contracting Company for Water and Sewerage Projects, Ministry of Housing and Construction of Iraq for the construction of civil works on the Rustamiya Sewerage Treatment Plant Project. The value of the contract, as amended, was GBP 2,244,025 and IQD 1,117,747.

648. Biwater International states that it completed its work on the contract in July 1987, and that the final account figures were confirmed by the employer in a letter dated 27 January 1990.

649. Biwater International asserts that it is owed unpaid amounts relating to the final payment of retention monies, and seeks compensation in the amount of GBP 51,678 and IQD 26,024 for such amounts.

650. Biwater International asserts that it was not paid these amounts because payment was conditional upon the issue by the Government of Iraq of clearance certificates, and that it was unable to obtain such certificates due to Iraq's invasion and occupation of Kuwait.

(c) Akashat Railway contract

651. On 16 March 1987, Biwater International entered into a contract with the Baghdad Al Qaim Akashat Railway Project Organisation, Ministry of Transport and Communications of Iraq, for the design and construction of a water supply scheme to the Baghdad Al Qaim Akashat railway. The value of the contract, as amended, was GBP 13,418,975 and IQD 2,382,300. The intended completion date was 10 August 1990.

652. Work on the contract was divided into six schemes, plus survey and design work.

653. The contract called for a 12 month maintenance period for each scheme to commence upon issue of a taking-over certificate ("TOC").

654. Upon the conclusion of the maintenance period for each scheme, Biwater International was to request the project engineer to issue the final acceptance certificate ("FAC"). If the project engineer was satisfied with the work, he was to issue the FAC within 30 days of the request.

655. Payments under the contract were as follows:

(a) Advance payment of 10 per cent of the value of the contract;

(b) Monthly progress payments (75 per cent of the value of the contract);

(c) Payment of 10 per cent of the value of the contract upon issue of complete and ready for commissioning certificate;

(d) Payment of 2.5 per cent of the value of the contract upon issue of the TOCs; and

(e) Payment of 2.5 per cent of the value of the contract upon issue of the FACs.

656. Biwater International commenced work on the contract on 17 December 1987. It completed work on the schemes as follows:

(a) Scheme 1 was completed on 7 August 1990, and confirmed by the employer in a letter dated 3 November 1990.

(b) Scheme 2 was completed on 1 August 1990, and confirmed by the employer in a letter dated 8 September 1990.

(c) Scheme 3 was completed on 25 June 1990, and confirmed by the employer in a letter dated 30 June 1990.

(d) Scheme 4 was completed on 25 June 1990, and confirmed by the employer in a letter dated 30 June 1990.

(e) Scheme 5 was completed on 11 October 1989, and confirmed by the employer in a letter dated 8 January 1990.

(f) Scheme 6 was completed on 28 November 1989, and confirmed by the employer in a letter dated 8 January 1990.

657. In addition, Biwater International asserts that it performed "significant additional works not covered by the original scope of the Akashat contract" in 1989 and 1990. It states that such works were performed prior to Iraq's invasion and occupation of Kuwait as a result of modifications required by the employer and events that were not foreseeable at the time of the tender.

658. Prior to Iraq's invasion and occupation of Kuwait, Biwater International hired a claims consultant to review the issue of the additional work and attempted to resolve the issue with the employer. The claims consultant prepared a report, which supported Biwater International's claim for payment of the additional work. Biwater International asserts that in July 1990, the employer

"conceded that the additional costs dispute would have to be resolved, but insisted that this was not to be done until completion of the contract".

659. As at 2 August 1990, the employer had not approved the additional work. Biwater International asserts that Iraq's invasion and occupation of Kuwait prevented it from pursuing its discussions with the employer for payment of the work.

660. It appears that Biwater International is relying upon clauses 43 and 44 of the contract, which govern "Outbreak of War", and "Frustration & Force Majeure", as it asserts that it is entitled to compensation for the additional costs notwithstanding the fact that such costs were not included in the contract price.

661. Biwater International seeks compensation in the amount of GBP 1,290,166 (USD 2,452,787) for the balance of the unpaid amounts owing on the Akashat Railway contract (retention monies), and GBP 6,784,330 (USD 12,897,966) for its additional unreimbursed work not covered by the contract.

2. Analysis and valuation

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

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

(a) Mahmoudiyah contract

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

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

666. With regard to Biwater International's assertion that it was unable to obtain clearance certificates due to Iraq's invasion and occupation of Kuwait, the Panel finds that Biwater International did not provide sufficient explanation as to why it was unable to obtain the certificates in the period from the completion of the work in July 1984 to Iraq's invasion and occupation of Kuwait.

667. Biwater International offered the brief and unsupported assertion that "[b]y 2 August 1990, [it] had not received all Iraqi clearance certificates in connection with this Contract because the concerned Iraqi authorities were not co-operating with expatriate companies on instruction from higher Iraqi Authorities". Even if this statement is accepted on its face, the Panel finds that it indicates that the inability to obtain the certificates was due to reasons pre-dating 2 August 1990, and therefore not a direct result of Iraq's invasion and occupation of Kuwait.

(b) Rustamiya contract

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

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

670. With regard to Biwater International's assertion that it was unable to obtain clearance certificates due to Iraq's invasion and occupation of Kuwait, the Panel finds that Biwater International did not provide sufficient explanation as to why it was unable to obtain the certificates in the period from the completion of the work in July 1987 to Iraq's invasion and occupation of Kuwait.

671. Biwater International offered the brief and unsupported assertion that "[b]y 2 August 1990, [it] had not received all Iraqi clearance certificates in connection with this Contract because the concerned Iraqi authorities were not co-operating with expatriate companies on instruction from higher Iraqi Authorities". Even if this statement is accepted on its face, the Panel finds that it indicates that the inability to obtain the certificates was due to reasons pre-dating 2 August 1990, and therefore not a direct result of Iraq's invasion and occupation of Kuwait.

(c) Akashat Railway contract

672. The Panel has determined through its review of the payment certificates that by the end of May 1990, all amounts due for work previously performed by Biwater International had been paid. Thus, the claim does not include any amounts owed for work performed prior to 2 May 1990. The Panel finds that the claim presented by Biwater International is solely based upon unpaid amounts for work that was performed after 2 May 1990.

(i) Balance of unpaid amounts (retention monies)

673. The Panel has determined that the unpaid balance relates to retention monies that should have been released upon the issue of certain TOCs and FACs regarding the six schemes.

674. Biwater International showed that it was not paid retention monies with respect to the TOCs for Schemes 1 and 2, as well as the survey and design work. It was paid retention monies with respect to the TOCs for Schemes 3 to 6. Biwater International also showed that it was not paid retention monies that would have been released had the FACs been issued.

675. The Panel finds that Biwater International is owed USD 1,388,204 for withheld retention monies that should have been released in connection with the TOCs and FACs.

676. The Panel finds that Biwater International provided evidence in the form of Payment Certificates 33 and 35 that it completed the work entitling it to release of the retention monies. Payment Certificate 33 was certified by the employer. As for Payment Certificate 35, while it was not

formally certified by the employer, the evidence shows that the employer paid the Iraqi dinar portion of the amount owed, which indicates that the work was performed and accepted.

677. The Panel further finds that Biwater International's inability to obtain the FACs was a direct result of Iraq's invasion and occupation of Kuwait, which occurred during the maintenance periods for the six schemes.

(ii) Additional unreimbursed work

678. With regard to the claim for additional unreimbursed work not covered by the contract, the Panel finds that Biwater International did not provide sufficient evidence to show when the additional work was performed. It states that such "additional works were executed concurrently with the original contract works for each scheme …" Given that the work on the project commenced in 1987 and that two of the schemes were completed in 1989, the Panel finds that Biwater International did not submit sufficient evidence to show that the works were performed after 2 May 1990.

679. The Panel also finds that Biwater International did not provide sufficient evidence relating to the cost of the additional works. Although it submitted information from its cla ims consultant and its auditor relating to the amounts, it did not provide underlying, contemporaneous supporting evidence. It states it was unable to do so because it did not electronically transfer its records relating to the Akashat Railway contract when it updated its computerized record-keeping system in 1991.

3. Recommendation

680. The Panel recommends compensation in the amount of USD 1,388,204 for contract losses.

B. Loss of tangible property

1. Facts and contentions

681. Biwater International seeks compensation in the amount of GBP 1,038,475 (USD 1,974,287) for loss of tangible property. The claim is for the alleged loss of property related to the Akashat Railway contract.

682. Biwater International originally classified these losses as contract losses, but the Panel finds that they are more appropriately classified as loss of tangible property.

683. After completion of the work on the six schemes under the Akashat Railway contract, Biwater International entered into a contract dated 22 March 1992 to sell its remaining tangib le property from the project to Iraq Republic Railways. The contractual purchase price was IQD 500,000.

684. The property that was sold under the contract included pipes and fittings, plant and equipment, and spare parts.

685. According to Biwater International, "on 16 April 1992 the Government of Iraq issued an edict empowering the Iraqi Board of Military Industries to take control of the equipment, machinery,

vehicles and materials 'relative to foreign companies who discontinued working' in Iraq". As a result of this edict, the property that was the subject of the sale to Iraq Republic Railways was seized by Iraq, and Biwater International was unable to complete the sale. Biwater International seeks compensation in the amount of the contract price of IQD 500,000.

2. Analysis and valuation

686. The Panel finds that the alleged loss of tangible property occurred (at the earliest) on 16 April 1992, when Iraq issued its edict regarding the confiscation of property. The Panel thus finds that the alleged loss was not a direct result of Iraq's invasion and occupation of Kuwait.

3. Recommendation

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

C. Payment or relief to others

1. Facts and contentions

688. Biwater International seeks compensation in the amount of GBP 137,062 (USD 260,573) for payment or relief to others. The claim is based on costs allegedly incurred in connection with its expatriate employees who were assigned to work on the Akashat Railway project.

689. Biwater International originally classified the losses as contract losses, but the Panel finds that they are more appropriately classified as payment or relief to others.

690. Biwater International divided its claim into the following loss items:

Table 32. Biwater International's claim for payment or relief to others

Loss item	Claim amount (GBP)	Claim amount (USD)
1990: Expatriate local allowance	5,486	10,429
1990: Expatriate messing costs	30,393	57,781
1990: Miscellaneous Sterling costs	8,529	16,216
1990: Expatriate salaries	86,406	164,269
1991: Miscellaneous Sterling costs	6,248	11,878
Total	137,062	260,573

691. Biwater International had approximately 14 employees in Iraq whose departure from Iraq was delayed until November or December 1990 as a result of Iraq's invasion and occupation of Kuwait. The employees were detained by Iraq (many as hostages) and prevented from leaving Iraq. As identified in the table above, the claim is for the employees' salaries and local allowances, the cost of food provided to some employees, and miscellaneous costs denominated in Pounds sterling, which

includes items such as airline tickets, reimbursement of telephone charges, and compensation for employees' personal property.

2. Analysis and valuation

692. With regard to the claim for "messing costs", Biwater International states that "it is not possible to ascertain the actual messing costs for each man". It also did not provide sufficient evidence to show that it actually incurred such costs, such as invoices or other third-party documents. The Panel therefore finds that Biwater International did not provide sufficient information or evidence to support this portion of its claim.

693. With regard to 1990 and 1991 "miscellaneous Sterling costs", Biwater International did not provide third-party evidence to show that the alleged costs were actually paid. The Panel therefore finds that Biwater International did not provide sufficient information or evidence to support this portion of its claim.

694. With regard to the claim for expatriate salaries and local allowance, it appears that Biwater International is seeking compensation for payments made to 11 of its employees. The Panel has determined that at least two of them filed category "C" (individual) claims with the Commission and received compensation for lost income. Thus, there is some duplication between Biwater International's claim for payment or relief to others and the individual category "C" awards made to its employees. Biwater International did not explain or calculate the extent of duplication between its claim and the category "C" claims of its employees.

695. The Panel finds that Biwater International did not provide sufficient information or evidence to establish the degree of the overlap between its claim and the category "C" awards to its employees. Without such information or evidence, the Panel is unable to determine whether Biwater International is entitled to any compensation as claimed. In such circumstances, the Panel is unable to recommend compensation for the claim for payments allegedly made to the expatriate employees. The Panel finds that a recommendation for compensation in such circumstances would amount to double recovery.

696. The Panel further finds that, with respect to the expatriate employees who did not file individual category "C" claims, Biwater International did not submit sufficient evidence to show that the employees actually received the amounts claimed. The absence of sufficient evidence was demonstrated by the fact that, in its reply to the article 34 notification, Biwater International stated that it was unable to provide the employees' payroll records because it no longer possessed such records. The Panel finds that Biwater International did not provide sufficient information and evidence to support its claim.

3. Recommendation

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

D. Financial losses

1. Facts and contentions

698. Biwater International seeks compensation in the amount of GBP 1,072,040 (USD 2,038,100) for financial losses. It originally classified the losses as contract losses, but the Panel finds that they are more appropriately classified as financial losses.

699. The claim is based upon a performance bond issued by the Rafidain Bank in connection with the Akashat Railway project. The bond was issued on 2 December 1987, and had an expiry date of 31 July 1990. The bond was not returned to Biwater International.

700. The claim is also based on interest payments on an overdraft provided by the Rafidain Bank in Baghdad, Iraq. Biwater International states that it had an overdraft at the bank as at 2 August 1990, and that it was unable to clear the overdraft due to Iraq's invasion and occupation of Kuwait. It seeks compensation for the interest that has allegedly accrued since that time.

2. Analysis and valuation

701. With regard to the performance bond, Biwater International provided evidence of the existence of the bond, and of its value. However, the Panel finds that it did not provide sufficient evidence to show that the bond was ever called by the employer.

702. In the Statement of Claim, Biwater International stated it had been obliged to take provisions with respect to the bond because the employer "may still call the bond at any time". Subsequently, the article 34 notification specifically requested Biwater International to provide evidence to show that the bond was called, but it did not provide any such evidence. The Panel thus finds that Biwater International did not provide sufficient information or evidence to show that it suffered a loss on the bond.

703. With regard to the interest on the overdraft, Biwater International stated in its reply to the article 34 notification that "it is impossible to provide documentary evidence of the interest on the overdraft". The Panel finds that Biwater International did not provide sufficient information or evidence to support its claim.

3. Recommendation

704. The Panel recommends no compensation for financial losses.

E. Other losses

1. Facts and contentions

705. Biwater International seeks compensation in the amount of GBP 621,155 (USD 1,180,902) for other losses. It originally classified the losses as contract losses, but the Panel finds that they are more appropriately classified as other losses.

706. The claim is based upon three separate types of alleged losses.

(a) Unpaid balances from sales of tangible property

707. Biwater International seeks compensation in the amount of GBP 259,618 (USD 493,570) for assets which it sold to two Iraqi State entities. The assets had been used in connection with the Akashat Railway project. One of the purchase and sale contracts was dated 30 June 1990, and the other was dated 28 July 1990. The purchasers made some, but not all, payments under the contracts, and Biwater International seeks compensation for the unpaid balances.

(b) Claim against Iraqi sub-contractor

708. Biwater International seeks compensation in the amount of GBP 101,770 (USD 193,479), which is the amount awarded to it by an Iraqi court against an Iraqi sub-contractor.

709. The sub-contract was entered into on 28 April 1988 in connection with the Akashat Railway project. Biwater International made an advance payment to the sub-contractor, but later terminated the sub-contract on the basis of the sub-contractor's poor performance. An Iraqi court issued a ruling on 22 April 1989 that the termination was valid. Biwater International's alleged loss includes the amount of the advance payment that was unearned, and not returned by the sub-contractor.

(c) Miscellaneous and restart costs

710. Biwater International seeks compensation in the amount of GBP 259,767 (USD 493,853) for alleged miscellaneous and other costs incurred from August 1990 to June 1992.

711. The alleged costs are itemised as follows:

Table 33. Biwater International's claim for other losses (miscellaneous and restart costs)

Loss item	Claim amount (GBP)	Claim amount (USD)
1990 accommodation costs	7,669	14,579
1990 overhead contribution	21,399	40,682
1990 miscellaneous Sterling costs	15,758	29,958
1990 transport costs	8,664	16,471
1990 head office personnel costs	16,452	31,278
1991 miscellaneous IQD costs	71,407	135,755
1991 miscellaneous Sterling costs	17,455	33,185
1991 head office personnel costs	5,529	10,511
1991 UK salaries	35,182	66,886
1992 miscellaneous IQD costs	48,676	92,541
1992 miscellaneous Sterling costs	418	795
1992 UK salaries	11,158	21,212
Total	259,767	493,853

712. Biwater International alleges that these alleged costs were incurred both in Iraq and outside of Iraq, and included items such as transportation costs, re-export costs, personnel costs, costs of accommodations, and extraordinary management time.

713. The loss items listed in table 33, supra, include the following types of alleged costs:

(a) "1990 accommodation costs" – includes the cost of rental housing for its employees after 2 August 1990;

(b) "1990 overhead contribution" – includes overhead costs incurred by the head office that were allocable to work in Iraq. These costs were based upon an allocation percentage of 49 per cent to reflect the head office's portion of the costs;

(c) "1990 miscellaneous Sterling costs" – includes costs of certification related to the Akashat Railway project and consultancy fees incurred in preparing a claim for compensation from the ECGD;

(d) "1990 transport costs" – includes payment of increased transport rates to re-export plant, which rates increased after Iraq's invasion of Kuwait;

(e) "1990 head office personnel costs" – based upon an estimate of the amount of personnel time and cost incurred at the head office that was devoted to dealing with the matters in Iraq. Biwater International estimates that 40 per cent of its staff's time was devoted to such matters in 1990;

(f) "1991 miscellaneous IQD costs" – includes general overhead expenses in Iraq such as local salaries, utility costs, and office maintenance costs;

(g) "1991 miscellaneous Sterling costs" – includes payment of legal fees to an English law firm, and payment of consultancy fees;

(h) "1991 head office personnel costs" – based upon an estimate of the amount of personnel time and cost incurred at the head office that was devoted to dealing with the matters in Iraq. Biwater International estimates that 5 per cent of its staff's time was devoted to such matters in 1991;

(i) "1991 UK salaries" – based upon an allocation of salary costs attributable to work on matters relating to Iraq, such as the ECGD claim and the winding-up of matters in Iraq;

(j) "1992 miscellaneous IQD costs" – includes lease payments for a villa, houses, and office space in Iraq;

(k) "1992 miscellaneous Sterling costs" – includes payment of legal fees to an English law firm; and

(l) "1992 UK salaries" – based upon an allocation of salary costs attributable to work on matters relating to Iraq, such as the ECGD claim and the winding-up of matters in Iraq.

2. Analysis and valuation

(a) Unpaid balances from sales of tangible property

714. Biwater International did not provide evidence establishing the amounts paid on the contracts or delivery of all the property the subject of the contracts. The Panel finds that Biwater International did not provide sufficient information or evidence to support its claim.

(b) Claim against Iraqi sub-contractor

715. This claim is based on a judgment issued in April 1989. The Panel finds that Biwater International did not provide sufficient information or evidence to establish that the loss was a direct result of Iraq's invasion and occupation of Kuwait.

(c) Miscellaneous and restart costs

716. In analysing this claim regarding miscellaneous and restart costs, the Panel finds that certain statements by Biwater International should be noted in particular because they apply to all the loss types. First, in its reply to the article 34 notification, Biwater International stated that the last maintenance period on the Akashat Railway project did not expire until 7 August 1991. It also stated that it continued remedial work on the project after 2 August 1990, and that the work on the project "was not interrupted or suspended". Biwater International's reply also made clear that it had expatriate and local staff working on the project after 2 August 1990.

717. Based on these statements, the Panel finds that, as a general matter, Biwater International did not provide evidence to show that its alleged losses were extraordinary. Given that Biwater International was contractually obligated to continue work on the project until August 1991, the Panel finds that Biwater International did not provide sufficient evidence to show that such alleged losses were a direct result of Iraq's invasion and occupation of Kuwait.

718. The Panel addresses each specific loss type as follows:

(a) "1990 accommodation costs" – Biwater International did not provide any records to show that it paid the claimed accommodation costs in Iraq, and states that it is unable to provide such records because they remained in Iraq after the departure of its employees. The Panel finds that Biwater International did not provide sufficient information or evidence to support this claim;

(b) "1990 overhead contribution" – The Panel finds that Biwater International did not provide sufficient explanation as to how costs were allocated between the head office and the local office. The Panel also finds that Biwater International did not provide sufficient information or evidence to support the claimed allocation of 49 per cent to reflect the head office's portion of the costs. The Panel finds that Biwater International did not provide sufficient information or evidence to support this claim;

(c) "1990 miscellaneous Sterling costs" – The Panel finds that Biwater International did not provide sufficient evidence to show that the costs were actually paid. With regard to the costs of certification related to the Akashat Railway project, the Panel finds that they were not an extraordinary expense;

(d) "1990 transport costs" – The Panel finds that Biwater International did not provide sufficient evidence to: (a) prove the amount of increase in transport rates, (b) show that any increase was the direct result of Iraq's invasion and occupation of Kuwait, and (c) show that it actually paid transport costs;

(e) "1990 head office personnel costs" – Biwater International states that it is only able to provide an estimate that 40 per cent of its staff's time was devoted to Iraq-related matters in 1990, and that it has no documents to support its assertion that 40 per cent is a correct estimate. The Panel finds that Biwater International did not provide sufficient information or evidence to support this claim. The Panel also finds that Biwater International did provide sufficient evidence to show that such costs were extraordinary;

(f) "1991 miscellaneous IQD costs" – The Panel finds that Biwater International did not provide sufficient evidence to show that such costs were extraordinary or that such costs were actually paid;

(g) "1991 miscellaneous Sterling costs" – The Panel finds that Biwater International did not provide sufficient evidence to show that such costs were actually paid. The Panel also finds that a portion of this claimed loss is duplicative of the amount claimed for claim preparation costs;

(h) "1991 head office personnel costs" – Biwater International states that it is only able to provide an estimate that 5 per cent of its staff's time was devoted to Iraq-related matters in 1990, and that it has no documents to support its assertion that 5 per cent is a correct estimate. The Panel finds that Biwater International did not provide sufficient information or evidence to support this claim. The Panel also finds that Biwater International did provide sufficient evidence to show that such costs were extraordinary;

(i) "1991 UK salaries" – The Panel finds that Biwater International did not provide sufficient evidence to show that such salaries would not have been incurred in the absence of Iraq's invasion and occupation of Kuwait. It did not show that additional staff had been hired, or that overtime costs were incurred. There is no evidence to show that such salary costs were anything other than ordinary administrative expenses that would have been incurred in any event. The Panel finds that Biwater International did not submit sufficient information or evidence to show that such costs were extraordinary;

(j) "1992 miscellaneous IQD costs" – The Panel finds that Biwater International did not provide sufficient evidence to show that such costs were extraordinary or to show that such costs were actually paid;

(k) "1992 miscellaneous Sterling costs" – The Panel finds that Biwater International did not provide sufficient evidence to show that such costs were actually paid. The Panel also finds that a portion of this claimed loss is duplicative of the amount claimed for claim preparation costs;

(l) "1992 UK salaries" – The Panel finds that Biwater International did not provide sufficient evidence to show that such salaries would not have been incurred in the absence of Iraq's invasion and occupation of Kuwait. It did not show that additional staff had been hired, or that overtime costs were incurred. There is no evidence to show that such salary costs were anything other than ordinary administrative expenses that would have been incurred in any event. The Panel finds that Biwater International did not submit sufficient evidence to show that such costs were extraordinary.

3. Recommendation

719. The Panel recommend no compensation for other losses.

F. Interest

720. With reference to the issue of interest, the Panel refers to paragraphs 20 and 21, supra, of this report.

G. Claim preparation costs

721. Biwater International seeks compensation in the amount of GBP 56,351 (USD 107,132) for asserted claim preparation costs. In a letter dated 6 May 1998, the Panel was notified by the Executive Secretary of the Commission that the Governing Council intends to resolve the issue of claims preparation costs at a future date. Accordingly, the Panel takes no action with respect to the claim by Biwater International for such costs.

H. Recommendation for Biwater International

Table 34. Recommended compensation for Biwater International

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	16,185,183	1,388,204
Loss of tangible property	1,974,287	nil
Payment or relief to others	260,573	nil
Financial losses	2,038,100	nil
Other losses	1,180,902	nil
Interest	3,785,798	-
Claim preparation costs	107,132	-
Total	25,531,975	1,388,204

722. Based on its findings regarding Biwater International's claim, the Panel recommends compensation in the amount of USD 1,388,204. The Panel determines the date of loss to be 7 August 1991.

XIV. BIWATER PROCESS PLANT LIMITED

723. Biwater Process Plant Limited ("Biwater Process Plant") is a corporation organised according to the laws of the United Kingdom operating in the construction industry. At the time of Iraq's invasion and occupation of Kuwait, it was called Chemical and Thermal Engineering Limited. On 1 January 1993, another claimant in this instalment, Biwater Europe Limited (see paragraphs 579 to 634, supra), purchased the business of Biwater Process Plant and the right to bring any claim arising out of Biwater Process Plant's alleged losses suffered in Iraq. The claims of Biwater Process Plant and Biwater Europe Limited have not been formally consolidated. For the purposes of the report, the Panel has considered the claim as that of Biwater Process Plant.

724. In the "E" claim form, Biwater Process Plant sought compensation in the amount of GBP 4,771,905 (USD 9,072,063) for contract losses in relation to two projects, Resin Project 1937 and Epoxy Resin Plant 8888 Project.

725. In a revised claim received by the Commission prior to 11 May 1998, Biwater Process Plant increased the total amount of its claim in respect of these two projects to GBP 5,329,786 (USD 10,132,673). In the revised claim, it sought compounding interest as at 28 February 1998. It also sought an unquantified amount for future interest and for claim preparation costs.

726. On 30 May 2002, the Commission received Biwater Process Plant's reply to the article 34 notification. In its reply, Biwater Process Plant reduced the total amount of its claim in respect of the two projects to GBP 5,294,499 (USD 10,065,587). The reduction in the amount of GBP 35,287 relates to Resin Project 1937.

727. The Panel has reclassified elements of Biwater Process Plant's claim for the purposes of this report. The Panel therefore considered the amount of GBP 5,294,499 (USD 10,065,587) for contract losses, loss of profits, interest and claim preparation costs, as follows:

Table 35. Biwater Process Plant's claim

Claim element	Claim amount (USD)
Contract losses	1,802,281
Loss of profits	4,838,268
Interest	3,425,038
Claim preparation costs (no amount specified)	-
Total	10,065,587

A. Contract losses

1. Facts and contentions

728. Biwater Process Plant seeks compensation in the amount of GBP 948,000 (USD 1,802,281) for contract losses (retention monies) allegedly incurred in connection with a project in Iraq called Resin Project 1937.

729. On 1 December 1988, Biwater Process Plant entered into a contract with the State Organisation for Heavy Engineering Equipment of Iraq (which subsequently changed its name to the Ministry of Industry Technical Corp. for Special Projects, or "Techcorp"). Biwater Process Plant agreed to design and provide engineering and supervision services in respect of an epoxy resin plant in Taji, North Baghdad.

730. The contract value was GBP 11,494,000. The duration of the contract was intended to be 65 weeks between the effective date of the contract and the last ready for commissioning certificate.

731. The project appears to have been on a relatively small scale, as Biwater Process Plant only had three people working on the project as at 2 August 1990.

732. The Pounds sterling portion of the contract value had two components: GBP 10,325,000 for the "main plant total" and GBP 875,000 for "stainless steel and fittings". As Biwater Process Plant's claim only relates to the "main plant total", the Panel sets out the relevant terms of payment:

(a) Ten per cent advance payment;

(b) Five per cent for basic engineering design;

(c) Ten per cent for detailed engineering design;

(d) Forty-five per cent upon shipment of equipment (partial shipment was permissible);

(e) Twenty per cent upon arrival of equipment;

(f) Two and one-half per cent upon issue of final ready for commissioning certificate;

(g) Two and one-half per cent upon issue of provisional acceptance certificate; and

(h) Five per cent upon issue of final acceptance certificate (after one-year maintenance period).

733. Biwater Process Plant states that by 2 August 1990, the plant had been built and was "fully operational". Its works under the contract were 90 per cent complete. It had already received payment in the amount of GBP 10,132,213 for the total Pounds sterling portion. However, Biwater Process Plant had not yet completed the site management and commissioning work under the contract, so that the final ready for commissioning certificate, and the provisional acceptance and final

acceptance certificates, had not yet been issued. Accordingly, "satisfactory operation" of the plant had not yet been achieved.

734. The employees working in Iraq as at the date of Iraq's invasion and occupation of Kuwait were not free to leave Iraq for a considerable period. During this period of effective detention, they worked on the project between 2 August and December 1990, when they were repatriated. Their ability to complete the certification process was substantially impeded during this time.

735. Biwater Process Plant asserts that had Iraq's invasion and occupation of Kuwait not occurred, it would have started the ready for commissioning process (and obtained the attendant certificate and the provisional acceptance certificate) "shortly after 2 August 1990". It maintained that it would have obtained the final acceptance certificate after the one-year maintenance period.

736. In its final revised claim received on 30 May 2002, Biwater Process Plant explained that its claim for losses in relation to the Resin Project 1937 in fact only related to 10 per cent of the "main plant price", which was GBP 10,325,000 (i.e. GBP 1,032,500). It then deducted the amount of GBP 84,500. The resulting figure is the amount claimed being considered by the Panel of GBP 948,000.

737. The Panel has treated the claim as being analogous to a claim for retention monies, despite the fact that the contract does not refer to the monies payable following certification as being retention monies.

2. Analysis and valuation

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

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

740. The claim for retention monies is a claim for monies payable for work which was about to commence when Iraq's invasion and occupation of Kuwait interrupted the works. Biwater Process Plant's successful completion of the work would have led to the release of three amounts of retention monies with a combined value of GBP 1,032,500.

741. Biwater Process Plant provided the following documents in support of its claim for contract losses (retention monies): a complete copy of the contract (but not the appendices); an internal ledger document showing the amount owing and the financing charges; an internal document dated 12 December 1989 which breaks down the contract value to show Biwater Process Plant's profit margin; some financial statements for the relevant period; and some affidavits. The affidavits generally focused on the difficulties which Biwater Process Plant had experienced with information and document retention.

742. In the article 34 notification, Biwater Process Plant was requested to provide further information and evidence, such as correspondence with the employer regarding the status of the works as at 2 August 1990, and evidence that Biwater Process Plant had received payment for its works to date. The only additional evidence it provided were copies of typed notes of conversations between staff detained in Iraq after 2 August 1990 and Biwater Process Plant's head office in the United Kingdom, and some affidavits. The notes do refer to the status of ongoing work in respect of other projects which employees in the Biwater Group were working on, but not Resin Project 1937. There is no documentary acknowledgement from the employer as to the status of the works or of payment for the works.

743. In its reply to the article 34 notification, Biwater Process Plant explained that the majority of the key documents were left in Iraq and that the project files in the United Kingdom were almost entirely disposed of in good faith prior to the secretariat's request for further documentation. It stated that it had provided all relevant documents which it still possessed and requested the Panel to take its position into consideration. These assertions were supported by affidavits from some employees who were involved in the project.

744. The Panel accepts Biwater Process Plant's explanation as to the absence of relevant documentary evidence. However, as it has stated on a number of occasions, it is expected that such claimants would have duplicated and retained their documents in their home countries. Indeed, it is clear that Biwater Process Plant did possess such documents for a period after Iraq's invasion and occupation of Kuwait in the United Kingdom, but chose to dispose of them notwithstanding the existence of a pending claim before the Commission.

745. In summary, Biwater Process Plant failed to establish important facts, such as the allegation that the project was 90 per cent complete as at 2 August 1990. It also failed to provide any evidence establishing that it would have completed each of the three outstanding stages, and when it could have realistically expected to complete these stages. The only evidence it provided were general statements in its affidavit. Some work would clearly have been required as Biwater Process Plant admitted that its costs in completing all three stages would have been GBP 84,500.

746. In the absence of this relevant information and evidence, the Panel considers that Biwater Process Plant failed to provide sufficient information and evidence to establish its claim.

747. The Panel recommends no compensation for the alleged unpaid retention monies as Biwater Process Plant did not provide sufficient evidence to support its claims for such alleged costs.

3. Recommendation

748. The Panel recommends no compensation for contract losses.

B. Loss of profits

1. Facts and contentions

749. Biwater Process Plant seeks compensation in the amount of GBP 2,544,929 (USD 4,838,268) for loss of profits. The claim is for losses arising out of its involvement in Epoxy Resin Plant 8888 Project, which was also to be built in Taji, North Baghdad.

750. In the "E" claim form and in the revised claims, Biwater Process Plant classified the claim in relation to Epoxy Resin Plant 8888 Project as contract losses. However, the Panel finds that the losses are more appropriately classified as loss of profits.

751. The employer on the project was again Techcorp. The contract was dated 8 March 1990. Biwater Process Plant agreed to carry out the same type of works as under the contract for Resin Project 1937. The contract value was GBP 11,100,000. The duration of the contract was intended to be 21 months.

752. The Pounds sterling portion of the contract value had the following five components: (a) know-how and basic engineering; (b) detailed engineering; (c) equipment; (d) supervision; and (e) supply of stainless steel plates and two years worth of spare parts.

753. The terms of payment for the Pounds sterling portion of the contract value differed according to each of the five components. The advance payments ranged from 10 to 35 per cent of the value of the particular component. The components relating to detailed engineering and equipment had retention monies provisions, whereby 2.5 per cent of the contract value was payable upon the issue of both the provisional and final acceptance certificates.

754. The Iraqi dinar portion of the contract value was payable as a 15 per cent advance payment (or IQD 30,000), with the remaining 85 per cent payable in 12, equal, monthly instalments of IQD 14,167.

755. On 8 August 1990, Biwater Process Plant received notice that the advance payment in the amount of GBP 1,540,000 had been deposited in Techcorp's bank account with the London branch of the Rafidain Bank. This sum was never paid to Biwater Process Plant. At this time, Biwater Process Plant had started its works under the contract in the form of substantial off-site design work, i.e. drawings and schedules. However, as a result of Iraq's invasion and occupation of Kuwait, it never started the on-site work. In fact, the contract never became "effective" as that term was defined in the contract, because the project had not yet been formally included in a loan protocol.

756. Because Biwater Process Plant had not started its on-site contract works, it formulated its claim for loss of profits based on its tender analysis.

757. Biwater Process Plant seeks compensation in the amount of GBP 800,000 for the loss of overhead (primarily labour costs) and the amount of GBP 1,744,929 for loss of profits, at the rate of 17 per cent of the selling price.

2. Analysis and valuation

758. The requirements to substantiate a loss of profits claim have been stated by the Panel at paragraphs 17 and 18, supra.

759. In support of its claim, Biwater Process Plant provided a copy of the contract, an internal ledger document showing the amount owing and the financing charges, and a one-page tender analysis dated 2 July 1990 (with two pages of attached handwritten workings dated 16 February 1990) which breaks down the contract value to show Biwater Process Plant's asserted profit margin. Biwater Process Plant also provided some basic affidavits from employees with knowledge of the project explaining its contract pricing structure.

760. Biwater Process Plant's claim was based exclusively on the tender analysis (which shows basic calculations leading to the amounts for which Biwater Process Plant seeks compensation) and the two pages of handwritten notes (which further explain the calculations).

761. In the article 34 notification, Biwater Process Plant was requested to provide further information and evidence, such as correspondence with the employer, evidence of receipt of the advance payment, and a detailed breakdown of its analysis regarding its likely profits. It was also requested to provide evidence that it had in fact achieved similar profits in its past projects. It replied that none of this information and evidence was available because, as at the date of Iraq's invasion and occupation of Kuwait, the contract was "in its infancy". The consequence was that the relevant documents had not yet been prepared.

762. The Panel finds that Biwater Process Plant failed to provide sufficient information and evidence to substantiate its loss of profits claim. In particular, it provided no evidence that the asserted level of profit was obtainable.

763. Accordingly, the Panel recommends no compensation because Biwater Process Plant failed to provide sufficient information and evidence to support its claim.

3. Recommendation

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

C. Interest

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

D. Claim preparation costs

766. Biwater Process Plant seeks compensation in an unquantified amount for asserted claim preparation costs. In a letter dated 6 May 1998, the Panel was notified by the Executive Secretary of the Commission that the Governing Council intends to resolve the issue of claims preparation costs at

a future date. Accordingly, the Panel takes no action with respect to the claim by Biwater Process Plant for such costs.

E. Recommendation for Biwater Process Plant

Table 36. Recommended compensation for Biwater Process Plant

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	1,802,281	nil
Loss of profits	4,838,268	nil
Interest	3,425,038	nil
Claim preparation costs (no amount specified)	-	-
Total	10,065,587	nil

767. Based on its findings regarding Biwater Process Plant's claim, the Panel recommends no compensation.

XV. PWT PROJECTS LIMITED

768. PWT Projects Limited ("PWT") is a corporation organised according to the laws of the United Kingdom operating in the construction industry.

769. In the "E" claim form, PWT sought compensation in the amount of GBP 4,499,402 (USD 8,553,996) for contract losses and loss of real property.

770. The Panel has reclassified elements of PWT's claim for the purposes of this report. The Panel therefore considered the amount of GBP 4,499,402 (USD 8,553,996) for contract losses, loss of profits and financial losses, as follows:

Table 37. PWT's claim

Claim element	Claim amount (USD)
Contract losses	4,523,158
Loss of profits	3,851,070
Financial losses	179,768
Total	8,553,996

A. Contract losses

1. Facts and contentions

771. PWT seeks compensation in the amount of GBP 2,379,181 (USD 4,523,158) for contract losses allegedly incurred in connection with three projects in Iraq: the Al Auja Unified Water project, Baghdad (the "Al Auja Project"); the Karkh Telemetry project, Baghdad (the "Karkh Project"); and the Al-Shemal Thermal Power Station, Mosul (the "Al-Shemal Project").

772. PWT states that all three projects were underway as at 2 August 1990 and that they were interrupted and ultimately terminated by Iraq's invasion and occupation of Kuwait.

773. In the "E" claim form, PWT sought compensation for contract losses in the amount of GBP 4,404,844. However, the Panel finds that the alleged losses in the amount of GBP 2,025,663 (USD 3,851,070) for "forecasted profit" in relation to the Al Auja and the Al-Shemal Projects are more appropriately classified as loss of profits.

(a) Al Auja Project

774. On 10 January 1989, PWT entered into an agreement with the Al-Farouq Contracting Co. Ltd. of Baghdad ("Al-Farouq") to supply mechanical and electrical equipment to, and to supervise the erection, operation and maintenance of this equipment, on the project site near Baghdad.

775. The contract value was GBP 3,995,607. Approximately 97 per cent of the contract value, or GBP 3,864,107, was payable in Pounds sterling. The amount of GBP 3,751,560 related to the cost of the mechanical and electrical materials and the supervision costs. The amount of GBP 112,547 related to the cost of construction materials.

776. The balance of the contract value, GBP 131,500, was payable in Iraqi dinars (IQD 74,560). PWT did not provide an explanation as to what the Iraqi dinar component related. Apart from the fact that 5 per cent of the contract value was payable as an advance payment, PWT was unable to provide any details as to the terms of payment.

777. Al-Farouq made an advance payment to PWT in November 1989 in the amount of GBP 193,205. This was the only payment which PWT received from Al-Farouq.

778. PWT alleges that the contract was approved by the ECGD on 2 March 1990, at which time the contract became effective. The duration of the contract was 24 months from that date. PWT commenced design, procurement and logistics work on 2 March 1990. This activity continued until August 1990, when it stopped as a result of Iraq's invasion and occupation of Kuwait.

779. PWT asserts that it incurred costs in the amount of GBP 921,952 in relation to this project. These costs included the costs of equipment and services which it commissioned, work carried out internally, and the costs of subsequently settling claims by some sub-contractors. It took into account the advance payment, monies received from the ECGD as a refund on the ECGD insurance premium,

and monies realised from the sale of equipment in the amount of GBP 456,271. The balance, in the amount of GBP 465,681 (USD 885,325), is the amount sought as compensation for contract losses.

(b) Karkh Project

780. On or around 29 January 1985, PWT entered into an agreement with Al-Farouq to supervise the monitoring and control system for the project. The project site was Baghdad. The contract was an amendment to a contract dated 8 January 1981 between the same parties.

781. PWT did not provide a copy of the contract. PWT did not explain what the contract value was. However, pursuant to an "administration order" from Al-Farouq dated 29 January 1985, it appears that the value of the amended contract was to be GBP 4,201,997 and IQD 214,107.

782. PWT alleges that as at the date of Iraq's invasion and occupation of Kuwait, the installation of equipment was complete, as was the maintenance period, which appears to have ended on 31 January 1989. PWT did not provide any further detail as to the services which it had performed prior to 2 August 1990. Its claim relates to work performed after this date. PWT states that it was providing training to Iraqi personnel as at 2 August 1990. It continued to provide this training after this date as PWT's employees were detained in Iraq and were not allowed to leave until November 1990.

783. PWT seeks compensation for the costs of the training which it provided from August to October 1990 in the amount of GBP 51,608 (USD 98,114). PWT invoiced Al-Farouq for these costs, but the three invoices (August, September and October 1990) have not been paid.

(c) Al-Shemal Project

784. On 4 January 1989, PWT entered into an agreement with the Ministry of Industry and Military Manufacturing of Iraq ("MIMM"), under which it agreed to design, supply components to, and supervise the erection and commissioning of, a water and waste-water treatment plant in Mosul, Iraq.

785. The contract value was GBP 10,735,940 and IQD 164,000. PWT alleges that the contract came into force on 21 December 1989. The duration of the contract was agreed to be 850 days. PWT states that it commenced design and procurement activities at this point and that it continued work under the contract until 8 August 1990.

786. MIMM made an advance payment to PWT in the amount of GBP 536,797 in October 1989. This represented 5 per cent of the contract value. PWT alleges that it received other payments from MIMM over the course of its work prior to 2 August 1990 in the amount of GBP 975,220. It therefore received payments from MIMM in the total amount of GBP 1,512,017.

787. PWT asserts that as at the date upon which the contract works were interrupted (8 August 1990), it had incurred costs in the amount of GBP 3,373,909. These costs included the costs of equipment and services which it commissioned, work carried out internally, the costs of subsequently settling claims by some sub-contractors, and storage costs. It took into account the payments which it received from MIMM in the amount of GBP 1,512,017. The balance of GBP 1,861,892

(USD 3,539,719) is the amount sought as compensation for contract losses in relation to the Al-Shemal Project.

2. Analysis and valuation

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

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

(d) Al Auja Project

790. In support of its claim, PWT provided the following: the first two pages of the contract with Al-Farouq; a "Contract Status Report" dated 12 September 1993 (this document contains some of the figures referred to in the Statement of Claim); an invoice dated November 1989 seeking payment of the advance payment from Al-Farouq; invoices for the scrap value of equipment manufactured for the project but which could not be used elsewhere; and three invoices/receipts from sub-contractors relating to settlements which PWT reached with them after 2 August 1990 in respect of services which they had performed prior to Iraq's invasion and occupation of Kuwait.

791. In the article 34 notification, PWT was requested to provide copies of the complete contract, the sub-contracts, the documentation underlying the Contract Status Report, and correspondence with Al-Farouq. In view of PWT's statement that it had carried out a substantial amount of work under the contract prior to 2 August 1990, it was also requested to provide information about the dates of performance.

792. In its reply to the article 34 notification, PWT stated that it was unable to provide any of the requested additional evidence. PWT explained that it had carried out an extensive search of its records. Apart from two documents, it was unable to locate any further evidence or provide any further information in addition to that which it originally submitted in support of its claim. It states that in its haste to leave Iraq in 1990, it left almost all of its documentation behind.

793. In the absence of the requested information and evidence, PWT provided insufficient information and evidence to allow the Panel to form a view as to when the work was carried out. Further, PWT provided very little evidence that it incurred the alleged costs. Where it did provide such evidence, it failed to provide sufficient evidence linking it to the project or to establish that the loss arose as a direct result of Iraq's invasion and occupation of Kuwait. The Panel finds that PWT failed to provide sufficient information and evidence to establish its claim in relation to the Al Auja Project.

(e) Karkh Project

794. All of the work for which PWT seeks compensation was allegedly carried out from August to October 1990 under duress. Prima facie, the claim is within the Commission's jurisdiction. The alleged dates of the work are substantiated by the three invoices provided.

795. PWT provided some limited evidence and information in support of its claim:

(a) A translation of an administration order dated 29 January 1985, apparently issued by Al-Farouq. This document refers to the contract and the terms of payment under the contract;

(b) Copies of the three invoices for August, September and October 1990 for training services which PWT performed. These invoices were sent by PWT to Al-Farouq. All of the invoices have a page attached which is signed on behalf of a company called Kent Process Control Limited and on behalf of an entity called "BWSA". There is no reference in any other documentation provided to "BWSA". Kent Process Control Limited is referred to in the administration order as being a sub-contractor to PWT; and

(c) A letter dated 3 December 1990 on the letterhead of the Ministry of Housing and Construction of Iraq and of Al-Farouq confirming that invoices Nos. 30 and 31 issued by PWT had been "stamped and signed" (the "Al-Farouq letter").

796. The Panel finds that there is sufficient evidence to establish that there was a contractual relationship between PWT and Al-Farouq and that PWT carried out the invoiced work for Al-Farouq after 2 August 1990 in the amounts claimed.

797. The Panel further finds that the claim relates to work carried out from August to October 1990 while PWT's employees were detained. As such, the alleged loss arose as a direct result of Iraq's invasion and occupation of Kuwait.

798. The Panel finds that the Al-Farouq letter is useful supporting evidence. The letter represents evidence emanating from Al-Farouq in December 1990 that it had reviewed PWT's September and October 1990 invoices and had considered PWT's request for payment for the work which it carried out in those two months. A copy of the Al-Farouq letter was sent to PWT. The Panel considers that there is nothing in the letter to suggest that Al-Farouq did not consider the September and October 1990 invoices to be fair and reasonable. The Panel considers that this letter, together with the terms of the invoices for August, September and October 1990, constitute sufficient evidence that PWT carried out the work in the total amount claimed, GBP 51,608. The Panel therefore recommends compensation in the amount of GBP 51,608 (USD 98,114). The Panel finds the date of loss to be 15 September 1990, the mid-point of the date range for the three compensable invoices.

(f) Al-Shemal Project

799. In support of its claim, PWT provided the following: the first two pages of the contract with MIMM; an undated "Contract Status Report"; an invoice dated February 1989 seeking payment of the advance payment from MIMM; an invoice dated 1 August 1990 for the amount of GBP 975,220; and

an internally-generated document dated 27 March 1993 entitled "actual costs by date range" relating to storage costs in the amount of GBP 242,595.

800. In the article 34 notification, PWT was requested to provide copies of the complete contract, the sub-contracts, all invoices and receipts underlying the Contract Status Report and the document entitled "Actual Costs by Date Range", and correspondence with MIMM. PWT was also requested to provide information about the dates of performance.

801. The Panel notes that the payment in the amount of GBP 975,220 which PWT received from MIMM appears in an invoice dated 1 August 1990. However, the dates upon which this work was carried out were not provided and it was not stated when PWT received this payment.

802. PWT was unable to provide any of the requested additional evidence and anything more than a minimal amount of additional information about the project.

803. In the absence of the requested information and evidence, there was insufficient information and evidence to allow the Panel to form a view as to when the work was carried out, or that PWT had incurred the alleged costs. Where it did provide such evidence, it failed to link the evidence to the project or to establish that the loss arose as a direct result of Iraq's invasion and occupation of Kuwait. The Panel finds that PWT failed to provide sufficient information and evidence to establish its claim.

3. Recommendation

804. The Panel recommends compensation in the amount of USD 98,114 for contract losses.

B. Loss of profits

1. Facts and contentions

805. PWT seeks compensation in the amount of GBP 2,025,663 (USD 3,851,070) for loss of profits. The claim is for the alleged loss of profits in respect of the Al Auja and the Al-Shemal Projects.

806. In the "E" claim form, PWT classified the alleged losses as contract losses. On the basis of the description in the Statement of Claim, the Panel finds that the losses are more appropriately classified as loss of profits.

807. In respect of both projects, PWT states that it expected to receive profits in the amounts alleged, based on its forecasts, over the balance of the relevant contracts. In respect of the Al Auja Project, PWT seeks compensation in the amount of GBP 76,962. PWT seeks compensation in the amount of GBP 1,948,701 in respect of the Al-Shemal Project.

2. Analysis and valuation

808. The requirements to substantiate a loss of profits claim have been stated by the Panel at paragraphs 17 and 18, supra.

809. In support of its claim, PWT relied on the evidence provided in support of its claim for contract losses. It referred in particular to the "Contract Status Reports", which allegedly show that PWT would have realised the profits in the amounts claimed. However, it was unable to provide the underlying documents, or any documents establishing the claim with sufficient certainty.

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

3. Recommendation

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

C. Financial losses

1. Facts and contentions

812. PWT seeks compensation in the amount of GBP 94,558 (USD 179,768) for financial losses. The claim is for the alleged loss of funds in the equivalent Iraqi dinar amount held in the local branch of the Rafidain Bank. PWT alleges that it had to abandon these monies when its employees left Iraq in November 1990.

813. In the "E" claim form, PWT classified the alleged loss as loss of real property. On the basis of the description in the Statement of Claim, the Panel finds that the loss is more appropriately classified as financial losses.

2. Analysis and valuation

814. PWT provided no evidence in support of its claim for financial losses. In the article 34 notification, it was asked to provide evidence such as bank statements (which would prove the existence of the account and the amount claimed) and correspondence with the Rafidain Bank. PWT did not provide the requested evidence. In the absence of this evidence, the Panel considers that PWT failed to provide sufficient information and evidence to establish its claim.

3. Recommendation

815. The Panel recommends no compensation for financial losses.

D. Recommendation for PWT

Table 38. Recommended compensation for PWT

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	4,523,158	98,114
Loss of profits	3,851,070	nil
Financial losses	179,768	nil
Total	8,553,996	98,114

816. Based on its findings regarding PWT's claim, the Panel recommends compensation in the amount of USD 98,114. The Panel finds the date of loss to be 15 September 1990.

XVI. AQUASEP, INC.

817. Aquasep, Inc. ("Aquasep") is a corporation organised according to the laws of the United States. During the relevant period, Aquasep operated as a manufacturer and provider of reverse osmosis desalination systems for the production of potable water. It has now ceased operations.

818. In the "E" claim form dated 29 July 1992, Aquasep sought compensation in the amount of USD 2,630,953 for contract losses and USD 600,000 for interest (total amount USD 3,230,953).

819. In an amended "E" claim form which Aquasep first submitted to the Commission in May 2001 in its reply to the article 15 notification, Aquasep increased the total amount of its claim to USD 3,650,953 for contract losses, losses related to a business transaction or course of dealing and interest. In the accompanying Statement of Claim, Aquasep sought compensation in the total amount of USD 8,606,454 for contract losses, losses related to a business transaction or course of dealing, and interest. The Panel makes the following observations about the revised claim of May 2001:

(a) The amount sought for contract losses, USD 2,572,453, represented a reduction of USD 58,500 from the amount originally sought. The reduction reflected the proceeds received from Aquasep's ongoing and protracted efforts to mitigate its alleged losses;

(b) In respect of the claim for losses related to a business transaction or course of dealing, Aquasep appears to have incorporated this loss element in an "E" claim form which it sent to the relevant United States authorities prior to sending the Commission the original "E" claim form dated 29 July 1992. However, by the time that the Commission received the original "E" claim form, Aquasep had withdrawn its claim for this loss element, so that the original "E" claim form made no reference to a claim for losses related to a business transaction or course of dealing. Aquasep sought to reintroduce the loss element in May 2001. In its reply to the article 34 notification, Aquasep advised the Commission that it "erroneously withdrew" the claim for losses related to a business transaction or course of dealing; and

(c) Aquasep increased its claim for interest from USD 600,000 to USD 5,589,944.

820. The Panel has only considered those losses contained in the original claim, except where such losses have been withdrawn or reduced by Aquasep. Where Aquasep reduced the amount of losses contained in the revised claim, the Panel has considered the reduced amount. Accordingly, the Panel has not considered the entire claim for losses related to a business transaction or course of dealing as it was not submitted to the Commission until after 11 May 1998 (see paragraph 9, supra). The Panel has also considered the claim for interest in the original amount claimed of USD 600,000 only.

821. The Panel has reclassified elements of Aquasep's claim for the purposes of this report. The Panel therefore considered the amount of USD 3,172,453 for contract losses and interest, as follows:

Table 39. Aquasep's claim

Claim element	Claim amount (USD)
Contract losses	2,572,453
Interest	600,000
Total	3,172,453

A. Contract losses

1. Facts and contentions

822. Aquasep seeks compensation in the amount of USD 2,572,453 for contract losses allegedly incurred in connection with a contract in Iraq.

823. The claim arises out of an agreement with the Nassr Establishment for Mechanical Industries of Iraq, part of the Ministry of Industry of Iraq ("Nassr"), dated 10 September 1989 (the "contract"). Aquasep agreed to manufacture, supply and install a reverse osmosis desalination plant for the production of drinking water from salt water. The plant was to be located in Baghdad. This contract appears to have been the only contract on which Aquasep was engaged in Iraq.

824. The value of the contract was USD 3,438,100. The duration of the contract was intended to be 54 weeks from the date that a letter of credit was opened. The letter of credit, in the amount of USD 3,352,148, was duly opened on 6 December 1989. The contract works were therefore intended to be substantially completed by 20 December 1990.

825. The terms of payment provided for in the contract were:

(a) Ten per cent advance payment;

(b) Sixty per cent against presentation of shipping documents (divisible payment was possible);

(c) Ten per cent upon issue of ready for commissioning certificate ("RFC");

(d) Fifteen per cent upon issue of provisional acceptance certificate ("PAC"); and

(e) Five per cent upon issue of final acceptance certificate ("FAC").

826. The RFC was to be issued when "the works … [were] finally completed in accordance with the construction drawings successfully tested and inspected … to the [employer's] full satisfaction …". This was meant to be 54 weeks after the date upon which the letter of credit was opened, 6 December 1989. In other words, the RFC was to be issued on or about 20 December 1990.

827. After the RFC was issued, a period of commissioning was to commence. According to the contract, this was the responsibility of Nassr, which had one month to carry it out. If, due to Nassr's delays, the commissioning was not been completed within six months, Aquasep would be deemed to have met its obligations in respect of commissioning. The PAC was, therefore, to be issued either when Nassr had satisfactorily tested the plant or within six months of the RFC, whichever was the earlier. In its reply to the article 34 notification, Aquasep asserts that the date of the issue of the PAC would have been 1 January 1991 at the earliest.

828. The FAC was to be issued one year after the issue of the PAC or 30 months after the effective date of the contract, whichever was the earlier, unless Aquasep was responsible for any delays. Thirty months from the effective date of the contract would have been approximately June 1992. In its reply to the article 34 notification, Aquasep asserts that the date of the issue of the FAC would have been 8 January 1991 at the earliest.

829. In March 1990, Aquasep provided a bank guarantee to the value of USD 335,215, or 10 per cent of the value of the letter of credit. At that time, it received an advance payment in the same amount.

830. On 5 April 1990, Aquasep shipped to Iraq some of the equipment destined for the plant and received payment in the full amount of the invoice (USD 105,000) under the letter of credit.

831. On 23 May 1990, Aquasep shipped some further equipment to Iraq. It sent Nassr an invoice in the amount of USD 538,300. However, the paying bank, the Bank of New York (the "bank"), advised Aquasep that under the terms of the letter of credit, the bank was only required to pay Aquasep 60 per cent of the value of the shipping documents shipped in April and May 1990. A dispute ensued, with Aquasep asserting that the amount of USD 538,300 already represented 60 per cent of the value of the goods shipped in May 1990. However, because Aquasep needed funds for the project, on 13 June 1990 it advised the bank that it accepted the bank's position. The bank therefore only paid Aquasep the amount of USD 280,980, which was 60 per cent of the invoice for the items shipped in May 1990, less 40 per cent of the value of the April 1990 invoice.

832. Aquasep contends that the bank deducted the value of the invoices twice. Aquasep states that "it had no alternative but to" accept the bank's actions. Before the Commission, Aquasep categorised the bank's actions as a misinterpretation of the letter of credit. In 1992, it sought payment from the bank in the amount of USD 257,320 (40 per cent of the total of USD 538,300 and USD 105,000). It has never received these monies from either the bank or Nassr.

833. In total, Aquasep received the amount of USD 721,195 from the bank under the letter of credit.

834. According to Aquasep, the balance of the equipment had been prepared and was intended to be shipped to Iraq in late August or early September 1990. The parties intended that Nassr's engineers come to the United States for training and inspection prior to shipment. Due to Iraq's invasion and occupation of Kuwait, this did not take place. Aquasep retained the equipment and could not be paid under the letter of credit because the goods could not be shipped.

835. Aquasep relied on two items of correspondence between itself and Nassr:

(a) On 17 July 1990, Aquasep sent a telex to Nassr enquiring as to the arrival date of Nassr's employees for training and advising Nassr that Aquasep would be ready to train them from 5 August 1990; and

(b) On 26 July 1990, in response to a telex from Nassr dated 21 July 1990, a copy of which was not provided, Aquasep alleges that it advised Nassr that the plant had been installed at a special training facility for the training of Nassr's employees and that Aquasep was awaiting Nassr's response.

836. Aquasep alleges that had the goods been shipped and the plant operated successfully, it would have received payment of the balance of the monies owing under the letter of credit. It would have received at the time of shipment (approximately 19 August 1990, in accordance with the timing under the contract schedule) the balance of the amount payable upon shipping (i.e. USD 1,625,309). In addition, it would have received the amounts payable upon start up of the plant after a commissioning period and a maintenance period (30 per cent of the contract value), probably in December 1990 or January 1991, in the amount of USD 1,005,644. The payment represented by the FAC is included in this latter total but in fact would not have been received until 12 months later. Aquasep states that these events could not take place because of Iraq's invasion and occupation of Kuwait and because of the trade embargo.

837. Aquasep therefore originally sought compensation for the difference between the value of the letter of credit and the amount which it actually received from Nassr, i.e. USD 2,630,953. In January 1998, Aquasep was able to sell the equipment for USD 58,500. Aquasep asserts that it tried without success to arrange a sale for eight years because the plant was custom designed. In its reply to the article 34 notification, Aquasep accordingly reduced its claim for contract losses by this amount.

2. Analysis and valuation

838. In support of its claim, Aquasep provided copies of the following documents: extracts from the contract; the letter of credit; correspondence with the Bank of New York regarding the deductions from the April and May 1990 shipments; the April and May 1990 invoices; the contract for the sale of the plant in 1998; correspondence from Aquasep to Nassr on 17 and 26 July 1990 advising of Aquasep's readiness to train Nassr's employees on the equipment; income tax returns for the 1990 to 1992 tax years; and financial statements for the year ending 31 December 1990.

839. In its reply to the article 34 notification dated February 2002, Aquasep explained that, since the date of the preparation of its claim it had moved its office several times and had not retained documents. It states that it "has submitted the best evidence available to substantiate its claims".

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

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

842. Ignoring for present purposes the effect of the receipt of the amount of USD 58,500 in January 1998, the Panel considers that the claim for contract losses can be broken down into three components:

(a) The claim for the balance of the payment of the April 1990 invoice (USD 42,000);

(b) The claim for the balance of the payment of the May 1990 invoice (USD 215,320); and

(c) The balance of the claim (payment for unshipped goods and amounts due upon the issue of the RFC, PAC and FAC) (USD 2,373,633).

843. The Panel now considers each component separately.

(a) The balance of the payment of the April 1990 invoice

844. The work to which this invoice relates was carried out prior to 2 May 1990. Aquasep appears to be suggesting in its claim submission that if the shipment of the remaining items had gone ahead in August or September 1990, Aquasep would have received the unpaid balance of the payment of the April 1990 invoice at that time.

845. However, this contention ignores the fact that the April 1990 invoice was initially paid in full by the bank under the letter of credit, and later, on 13 June 1990, the bank decided to deduct from the May 1990 invoice 40 per cent of the amount paid under the April 1990 invoice. That Aquasep regarded the bank's actions as a misinterpretation of the letter of credit only supports the conclusion that the bank's action, and not Iraq's invasion and occupation of Kuwait, was the direct cause of Aquasep's loss.

846. In addition, the Panel consequently considers that there is nothing in the facts relating to the claim for the balance of the payment of the April 1990 invoice to suggest that further performance was required after 2 May 1990. In respect of the claim for the balance of the payment of the April 1990 invoice, therefore, the Panel finds that the contract losses alleged by Aquasep relate entirely to work that was performed prior to 2 May 1990.

847. The Panel accordingly recommends no compensation for contract losses in respect of the balance of the payment of the April 1990 invoice as these losses have not been established to be the direct result of Iraq's invasion and occupation of Kuwait, and because they relate to debts and

obligations of Iraq arising prior to 2 August 1990 and, therefore, are outside the jurisdiction of the Commission.

(b) The balance of the payment of the May 1990 invoice

848. The facts relating to the claim in respect of the unpaid balance of the May 1990 invoice are the same as those relating to the claim in respect of the unpaid balance of the April 1990 invoice.

849. The Panel considers that on 13 June 1990, Aquasep made an independent decision to accept the bank's interpretation of the letter of credit. Accordingly, Aquasep failed to demonstrate that the alleged loss arose as a direct result of Iraq's invasion and occupation of Kuwait.

850. The Panel recommends no compensation for contract losses in respect of the balance of the payment of the May 1990 invoice because Aquasep failed to demonstrate that the alleged loss arose as a direct result of Iraq's invasion and occupation of Kuwait.

(c) Balance of the claim (payment for unshipped goods and amounts due upon the issue of the RFC, PAC and FAC)

851. In the article 34 notification, Aquasep was requested to provide evidence of its assertion that the unshipped equipment was ready as at 19 August 1990.

852. Aquasep states that the contract works had been performed in a timely fashion as at 2 August 1990. Aquasep's telex of 26 July 1990 suggests that Aquasep regarded itself as being very close to readiness as at that date, and supports Aquasep's assertion that shipment could have been effected on or around 19 August 1990. The Panel observes that the timing of the intended training of Nassr's employees matched the intended timing under the contract schedule. Shipment was subject to the inspection of the goods by Nassr's employees.

853. However, Aquasep provided no direct evidence that, as at 26 July 1990, it was close to shipping the remaining items. Nor did it provide any evidence that Nassr accepted that this was the position. Moreover, Aquasep failed to provide any independent evidence verifying the alleged status of the unshipped goods, such as a survey of the equipment in August or September 1990.

854. In terms of the evidence which could be categorised as less direct evidence of the alleged status of the unshipped goods, the Panel makes the following observation. Aquasep relied on the financial statements and the tax returns to show the amount of its actual costs incurred and payments made, mainly prior to 19 August 1990 when it ceased most of its work on the project. It relied on a line item in the financial statements called "inventory" in the amount of USD 992,086. Aquasep asserts that this: "represents amounts incurred on the Iraqi project. Such amounts included payments to suppliers for the purchase of equipment and materials and also other expenditures identified with the project such as wages and salaries, and other direct overheads."

855. The Panel accepts that as the contract in question was the only one which Aquasep was performing in Iraq, the line item refers to this contract and not to any others. However, because the line item is global in nature, it provides no assistance in establishing the precise breakdown of

Aquasep's actual costs, which is necessary when considering a claim for an interrupted contract where a large portion of work remained to be carried out. The information and evidence provided by Aquasep included the following:

(a) Aquasep provided a list of its sub-contractors and suppliers. It also provided basic details of the work that these entities allegedly carried out. However, it did not explain what the value of their work was. Nor did it provide evidence of its assertion that it actually paid them;

(b) In relation to the issue of the costs Aquasep saved by not having to carry out the shipment of the remaining goods and the commissioning, Aquasep advised in its reply to the article 34 notification that it had not incurred any costs for the unperformed value of the contract as at 19 August 1990. It asserts that it had saved costs in the total amount of USD 55,783 because it was not required to undertake any of the planned actions. These alleged costs were training costs (USD 13,000), shipping costs (USD 17,783) and installation and start-up costs in Iraq (USD 25,000). Aquasep provided no evidence in support of these assertions, although it is possible, on the basis of the shipping invoices for April and May 1990, to calculate what the likely shipping costs may have been; and

(c) Aquasep established that it was able to sell some equipment in 1998. However, the nature of that evidence (correspondence between Aquasep and the purchaser, including a list of the items) does not establish that seven and a half years earlier, these items were ready to be shipped. The link between the value of the goods which were finally sold in 1998 (USD 58,500) and their alleged value and readiness in August or September 1990 (when Aquasep was prevented from shipping them) is insufficient.

856. Having considered the limited evidence which Aquasep provided, the Panel concludes that Aquasep failed to establish to the satisfaction of the Panel that it had prepared the final shipment of goods for dispatch in August 1990.

857. In the light of its finding that Aquasep failed to provide sufficient information and evidence that it would have shipped the balance of the goods to Iraq in August 1990, the Panel considers that the claim in respect of the 30 per cent of the contract value due upon the issue of the RFC, PAC and FAC must also fail. Aquasep could not have achieved these milestones until the balance of the goods was installed on site. Furthermore, the Panel also wishes to record that Aquasep provided no evidence that it would have satisfactorily completed the certification and testing process.

858. The Panel recommends no compensation for the alleged unpaid value of the goods that could not be shipped, and the 30 per cent of the contract value due upon the issue of the RFC, PAC and FAC, because Aquasep failed to provide sufficient information and evidence to establish its claim.

3. Recommendation

859. The Panel recommends no compensation for contract losses.

B. Interest

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

C. Recommendation for Aquasep

Table 40. Recommended compensation for Aquasep

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	2,572,453	nil
Interest	600,000	nil
Total	3,172,453	nil

861. Based on its findings regarding Aquasep's claim, the Panel recommends no compensation.

XVII. NRM CORPORATION

862. NRM Corporation is a corporation organised according to the laws of the United States. In January 1990, NRM Corporation merged with another United States company, Steelastic Company. The new entity became known as NRM Steelastic, Inc. NRM Corporation and NRM Steelastic, Inc. are now under administration in bankruptcy. The "E" claim form was signed by the attorney for the creditors committees of NRM Corporation and NRM Steelastic, Inc.

863. References in this report to "NRM" are references to NRM Corporation and, as it later became known, NRM Steelastic, Inc. References in this report to "the NRM group of companies" are references to NRM Corporation, NRM Steelastic, Inc. and other related companies.

864. In the "E" claim form, NRM sought compensation in the total amount of USD 51,713,000. The claim was for contract losses in the amount of USD 20,411,544 and other losses ("loss of equity interest") in the amount of USD 31,301,456.

865. In its reply to the article 34 notification, NRM reduced the amount of its claim for contract losses to USD 15,752,710 and increased its claim for other losses ("loss of equity interest") to USD 35,960,290. As the Panel has previously held, a response to an inquiry for additional evidence is not an opportunity for a claimant to increase the quantum of a claim previously submitted. This increase was not accepted by the Panel, as the Panel will only consider those losses contained in the original claim, as supplemented by claimants up to 11 May 1998.

866. The Panel has reclassified elements of NRM's claim for the purposes of this report. NRM originally classified the losses in respect of "non-completed orders" as contract losses, but the Panel finds that they are more appropriately classified as loss of profits. NRM originally classified the

losses in respect of production variances, sale of items and additional storage costs as contract losses, but the Panel finds that they are more appropriately classified as other losses.

867. The Panel therefore considered the amount of USD 47,054,146 for contract losses, loss of profits, other losses and interest, as follows:

Table 41. NRM's claim

Claim element	Claim amount (USD)
Contract losses	6,659,978
Loss of profits	2,065,551
Other losses	34,305,093
Interest	4,023,524
Total	47,054,146

A. Contract losses

1. Facts and contentions

868. NRM seeks compensation in the amount of USD 6,659,978 for contract losses. The claim relates to the balance of the goods that NRM was unable to ship to Iraq after Iraq's invasion and occupation of Kuwait and that NRM was unable to sell to third parties in mitigation of its losses. NRM describes its claim as a claim for "completed orders".

(a) The contracts

869. NRM states that it entered into "various contracts" with the New Tyre Project Committee of the Ministry of Industry and Minerals of Iraq (the "employer") "commencing November 16, 1988 with various amendments to supply various pieces of capital equipment to be used in the production of tires".

870. Based on the evidence provided, it appears that, on 7 July 1988, NRM entered into an agreement (the "contract") with the employer to supply items of equipment and spare parts to be used in the production of tyres.

871. The contract was amended on a number of occasions, including on 12 October 1988, 4 November 1988, 16 November 1988, 22 January 1989, 16 May 1989 and 10 August 1989.

872. The value of the initial contract was USD 28,000,000 (USD 26,872,950 for equipment and USD 1,127,050 for spare parts). However, this was subsequently amended by the parties. Payment under the contract was to be by letter of credit.

873. NRM states that the equipment was scheduled for shipment between 2 August and 5 December 1990. Under the terms of the contract, in addition to the supply of equipment, NRM's other

obligations included the supervision of the installation and dry commissioning of the equipment and the training of the employer's employees.

874. NRM provided a number of other contracts. It is not clear whether they represent amendments to the original contract or whether they are contracts for the supply of additional items of equipment. A number of the amendments and related correspondence show that the employer cancelled its orders for some of the items, but ordered further items.

875. In addition, there are references in the documentation submitted in support of the claim to "contracts nos. 2, 3 and 4". However, NRM does not use this same terminology in the Statement of Claim or in its reply to the article 34 notification. It does not relate its explanations back to these contract numbers. Accordingly, the Panel was unable to determine whether it was operating under one or more contracts with the employer.

(b) Events after 2 August 1990

876. NRM states that it had manufactured a large proportion of the items prior to Iraq's invasion and occupation of Kuwait. It states that a water purification plant which was adjacent to the tyre production factory in Iraq and which was necessary to the tyre factory's operation was destroyed during bombing, and, because of this damage, it was unable to complete the balance of the contract.

877. NRM states that the employer cancelled the letters of credit after Iraq's invasion and occupation of Kuwait. The employer refused to pay for the equipment that NRM had manufactured or purchased, or for the items that NRM had ordered but not yet paid for.

(c) NRM's attempts to mitigate losses

878. After Iraq's invasion and occupation of Kuwait, NRM attempted to sell to third parties the equipment which it had contracted to supply to the employer. It was able to sell some of the equipment to third parties (usually at a discount) and consequently seeks compensation for the balance of the unsold goods in the amount of USD 6,659,978. NRM states that it has been unable to sell the majority of the items, allegedly due to their unique nature.

2. Analysis and valuation

879. In support of its claim, NRM provided a copy of the contract and amendments thereto, correspondence between the parties, and internal documents setting out projected shipping dates for a large number of items of equipment.

880. NRM also provided invoices and receipts relating to the orders in respect of which it seeks compensation as well as a copy of a telex dated 13 May 1989 from the Central Bank of Iraq to UBAF Bank, New York. The telex appears to contain the terms of a letter of credit in favour of NRM. It refers to a contract value of USD 25,775,000. The letter of credit was expressed to be valid until 1 May 1990.

881. NRM states that its performance of the work to which its claim relates (the completion and preparation for shipment of the equipment, spare parts and tools) occurred after 2 May 1990. It further states that, "the vast majority of the equipment was completed and ready for shipment at the time Iraq invaded Kuwait. The items were on the dock in New Jersey for shipment and for payment by letter of credit."

882. There is some evidence that the completed orders were due to be shipped in August, September and December 1990. However, the pages in the contractual documentation dealing with delivery dates are missing. Therefore, the Panel cannot be sure that these were the intended dates.

883. The evidence provided by NRM shows that the contract was running behind schedule. There was no evidence that such overruns were acceptable to the employer, and there is therefore some uncertainty as to whether the goods would have been accepted and paid for in full several months after the employer expected to receive them.

884. Clause 19 of the contract states that delayed deliveries would be subject to a penalty fee amounting to 0.5 per cent of the value of the shipment for each week of delay, not exceeding 5 per cent of the delayed shipment value. It is therefore possible that NRM would have been required to pay penalty fees in respect of the completed and non-completed orders, or that it would have received reduced payments from the employer in lieu of such fees.

885. NRM did not provide any evidence to show that the letter of credit was extended to cover the delayed shipments of equipment. Accordingly, in respect of the completed orders it is unclear whether there was a valid letter of credit in place sufficient to cover the shipments scheduled for August, September and December 1990.

886. NRM provided no evidence that it incurred the cost of manufacturing the equipment for which it is claiming contract losses, or that the goods were on a dock in New Jersey awaiting shipment at the time of Iraq's invasion and occupation of Kuwait. NRM also failed to provide details of any shipments made to the employer or of payments it received in respect of equipment shipped.

887. The Panel finds that NRM failed to provide a sufficiently linked narrative which explains when the goods were due to be shipped and which establishes that they were not shipped because of Iraq's invasion and occupation of Kuwait.

888. The Panel recommends no compensation for contract losses as NRM did not provide sufficient information and evidence to support its claim.

3. Recommendation

889. The Panel recommends no compensation for contract losses.

B. Loss of profits

1. Facts and contentions

890. NRM seeks compensation in the amount of USD 2,065,551 for loss of profits. The claim is for the loss of earnings in relation to "non-completed orders". NRM calculated the claim amount on the basis of the "excess of the contract price over the anticipated cost of sales as determined on a historical basis".

891. The claim appears to relate to equipment not yet purchased or manufactured by NRM. However, NRM provided very few details about this alleged loss. It did not explain the meaning of "anticipated cost of sales". It did not provide the payment conditions to which the orders were subject or the financial information which the Panel requires in support of claims for loss of profits. This information and evidence was requested in the article 34 notification. In its reply, NRM provided some evidence of its costs between the date of signature of the contract and 2 August 1990.

2. Analysis and valuation

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

893. NRM asserts that military action and civil disorder during Iraq's invasion and occupation of Kuwait interrupted work on the project and ultimately led the employer to cancel the letter of credit.

894. NRM provided no evidence in support of the "anticipated cost of sales" figures used to calculate the claim for loss of profits, although it states that the costs were obtained from historical records. It is unclear whether the costs represent only material costs or whether they include labour, customs duties and shipping costs. The loss of profit calculations imply that a 32 per cent gross profit margin would have been achieved from selling the outstanding items to the employer at the contract prices. However, the Panel finds that NRM provided insufficient evidence to support this profit margin.

895. NRM did not explain whether it manufactured the equipment ordered by the employer or whether it acted as a supplier (i.e. by assembling equipment ordered from a third party). Therefore, it is unclear whether the claim being made for loss of profits relates to items which would have been produced from raw materials at NRM's premises or to items which were ordered from a third party supplier.

896. The Panel finds that NRM failed to demonstrate that the alleged losses arose as the direct result of Iraq's invasion and occupation of Kuwait. The Panel recommends no compensation as NRM failed to provide sufficient evidence to substantiate its claim.

3. Recommendation

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

C. Other losses

1. Facts and contentions

898. NRM seeks compensation in the amount of USD 34,305,093 for other losses. The claim is for four types of alleged losses, as shown in table 42, infra.

Table 42. NRM's claim for other losses

Loss item	Claim amount
"Loss of equity interest"	31,301,456
Production variances	2,468,171
Sale of items	417,939
Additional storage costs	117,527
Total	34,305,093

899. NRM originally classified the losses in respect of production variances, sale of items and additional storage costs as contract losses, but the Panel finds that they are more appropriately classified as other losses.

(a) "Loss of equity interest"

900. NRM seeks compensation in the amount of USD 31,301,456 for "loss of equity interest". It alleges that as at the date of Iraq's invasion and occupation of Kuwait, NRM Steelastic, Inc. was in the final stages of an initial public offering ("IPO") of its common stock. NRM alleges that the IPO would have realised at least USD 30 million in equity revenues.

901. NRM states that the loss of the contracts in Iraq caused the failure of the IPO and led to the subsequent bankruptcy of NRM, NRM Steelastic, Inc. and another related company in December 1991. NRM is still under administration in bankruptcy.

902. NRM calculated its claim for "loss of equity interest" by subtracting its total claim for contract losses, other losses and interest from the alleged total value of the NRM group of companies as at 31 March 1990.

(b) Production variances

903. NRM seeks compensation in the amount of USD 2,468,171 for production variances. NRM alleges that it incurred costs caused by inefficiencies in the manufacturing process following Iraq's invasion and occupation of Kuwait and the uncertainty which it caused. The claim comprises costs in relation to "labor efficiency variance" in the amount of USD 501,845 and "overhead variance" in the amount of USD 1,966,326.

904. NRM did not explain the difference between the two types of variance or whether they relate to completed orders or non-completed orders.

(c) Sale of items

905. NRM seeks compensation in the amount of USD 417,939 for losses related to the sales of items to two tyre manufacturers, Cooper Tire Company ("Cooper") and Pirelli Armstrong Tire Co. ("Pirelli"), both United States companies. It appears that NRM was able to mitigate its contract losses by selling to these two companies some items which it had contracted to supply to the employer.

906. NRM states that it was required to convert some of the items so that they would be suited to the use of these companies. This caused it to incur labour costs in the total amount of USD 341,015 (the "conversion costs").

907. NRM also offered an "accelerated payment discount" to Cooper in the amount of USD 76,924. This helped reduce interest costs and assisted NRM's cash flow.

908. NRM provided no other information or evidence concerning this alleged loss, such as the original cost of the items that were converted.

(d) Additional storage costs

909. NRM seeks compensation in the amount of USD 117,527 for "additional storage and handling costs associated with units that were completed". The claim relates to the storage of goods from 28 August 1990 to 30 October 1991 with two of NRM's suppliers, Jan-Pak, Inc. ("Jan-Pak") and Kreiz Motor Express, Inc. ("KMX"), both United States companies. NRM seeks compensation in the amount of USD 57,674 for storage with Jan-Pak and in the amount of USD 59,853 for storage with KMX.

910. NRM states that it had to store the equipment to mitigate its losses, as it might have been able to resell preserved equipment.

2. Analysis and valuation

(a) "Loss of equity interest"

911. In support of its claim for loss of equity interest, NRM provided copies of accountants' valuations of, and audited consolidated statements for, the NRM group of companies for the period **from** 1988 to 1990. It also provided a newspaper article dated 6 August 1990. The article discusses the proposed IPO and cites analysts who said that because of the uncertainty caused by Iraq's invasion and occupation of Kuwait, investors were not willing to invest.

912. NRM provided no other evidence of the effect of Iraq's invasion and occupation of Kuwait on its IPO.

913. The Panel does not consider the alleged losses to be compensable for the following reasons:

(a) The valuation of the claim is based on a valuation of the NRM group of companies in the amount of USD 51,713,000. The valuation was carried out by the accountants of the NRM group of

companies. There is no way to confirm whether NRM would have floated, or, if it had, at what price the shares would have been sold. This would depend on the market conditions at the date of flotation. The Panel cannot assume that the share price at 31 March 1990 is representative of the price which the shares could be expected to achieve on flotation some five to six months later.

(b) The share price which has been quoted is for the NRM group of companies, of which the NRM is a wholly-owned subsidiary. The total value quoted is therefore unrepresentative of the value of NRM on 31 March 1990.

(c) The actual loss to NRM is from future profits which could have been generated by the company if funds from the IPO had been received. Such a loss cannot be said to be a direct result of Iraq's invasion and occupation of Kuwait.

(d) The newspaper article does not constitute sufficient proof of NRM's allegations.

914. The Panel recommends no compensation for "loss of equity interest" because NRM failed to demonstrate that it suffered a loss and, if it did suffer a loss, that the loss arose as the direct result of Iraq's invasion and occupation of Kuwait.

(b) Production variances

915. In support of its claim, NRM provided an undated hand-written schedule entitled "Labor efficiency & overhead variance due to Iraq". This was prepared by an in-house cost accountant. The schedule contains a breakdown of the monthly alleged losses from August to December 1990. However, the schedule does not explain the nature of the variances or the underlying data used in the calculations of the alleged losses. Accordingly, the Panel finds that the schedule is insufficiently detailed to establish the claim.

916. NRM failed to provide summary time records or further explanations of how the figures were generated.

917. The Panel recommends no compensation for production variances because NRM failed to provide sufficient information and evidence to establish its claim.

(c) Sale of items

918. In support of its claim for conversion costs, NRM provided a hand-written note dated 15 February 1991 (which is barely legible) setting out the conversion costs. The details are said to have been "gathered by the former cost accountant of NRM". It also provided an invoice dated 18 October 1990 addressed to Pirelli. The invoice, in the amount of USD 135,000, relates to equipment.

919. The Panel considers that there is insufficient information and evidence to establish that NRM incurred the conversion costs. NRM provided no evidence of how it calculated the conversion costs, such as time records of the work necessary to convert the items to the use of either Cooper or Pirelli.

920. In support of its claim for payment time discount, NRM provided an invoice dated 27 November 1990 addressed to Cooper. The invoice, in the amount of USD 2,804,996, lists a number of items of equipment, and shows that a discount for early payment in the amount of USD 76,924 was offered for early settlement. However, NRM provided no evidence to support its assertion that Cooper accepted the discount, such as a copy of a bank statement or remittance advice confirming the amount received, and that it did, in fact, pay early. In addition, it is unclear whether all the items listed on the invoice were manufactured for the contracts with the employer.

921. NRM also provided some other invoices with dates in 1992 for some of the items included in the November 1990 invoice. However, the relevance of these invoices is unclear.

922. The Panel therefore finds that NRM failed to provide sufficient information and evidence to establish its claim for sale of items.

(d) Additional storage costs

923. In support of its claim, NRM provided a hand-written schedule of costs as at 19 February 1991 (which shows the specific items stored with both suppliers as at that date) and a computer-generated schedule of storage costs from September 1990 to April 1992. This document contains the figures on which NRM relies.

(i) Jan-Pak costs

924. In support of its claim for the cost of storage with Jan-Pak, NRM provided evidence in the form of bank debit advices to show that it paid Jan-Pak, Inc. the total amount of USD 373,935 for storage costs. However, NRM's claim is in the amount of USD 57,674. There is no invoice for this specific amount. Nor are there several invoices which, when added together, constitute this amount.

925. There are no documents from Jan-Pak indicating the items of equipment it was storing for NRM.

926. The Panel was unable to reconcile NRM's list of stored goods with the invoices submitted in support of the claim for contract losses ("completed orders"). There is no evidence that the amounts claimed were in excess of the storage costs which NRM would have incurred had the goods been shipped to Iraq as planned.

927. The Panel finds that NRM failed to demonstrate that the alleged loss arose as the direct result of Iraq's invasion and occupation of Kuwait.

(ii) KMX costs

928. In support of the claim for the cost of storage with KMX, NRM provided an agreement dated 14 January 1993 between a company called McNeil & NRM, Inc. ("McNeil") and KMX. Under this agreement, KMX agreed to transfer to McNeil its right to receive payment of storage costs in return for payment by McNeil of the amount of USD 27,844 (which relates to storage costs from

19 November 1991 to 13 December 1992). The equipment referred to in the agreement was that which was due to be sold to Iraq (i.e. the "completed orders").

929. The agreement annexes a document of the same date which acknowledges receipt by Kreitz Motor Express of payment from McNeil & NRM, Inc. in the amount of USD 27,844.

930. The Panel notes that there is evidence of payment of the storage costs in the total amount of USD 27,844 only (referred to in the agreement of 14 January 1993). According to the agreement, these costs relate to the period from 19 November 1991 to 13 December 1992. NRM's claim is in the amount of USD 59,853 for the storage costs incurred in the period from 28 August 1990 to 17 October 1991. The Panel was unable to reconcile the evidence provided with NRM's claim.

931. The Panel finds that NRM failed to provide sufficient information and evidence to establish its claim.

3. Recommendation

932. The Panel recommends no compensation for other losses.

D. Interest

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

E. Recommendation for NRM

Table 43. Recommended compensation for NRM

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	6,659,978	nil
Loss of profits	2,065,551	nil
Other losses	34,305,093	nil
Interest	4,023,524	nil
Total	47,054,146	nil

934. Based on its findings regarding NRM's claim, the Panel recommends no compensation.

XVIII. RECOMMENDATIONS

935. Based on the foregoing, the Panel recommends the following amounts of compensation for direct losses suffered by the claimants as a result of Iraq's invasion and occupation of Kuwait:

(a) GRO "Vranica" Sarajevo: Nil;

(b) Unioninvest, holding d.d.: Nil;

(c) Dumez-GTM: Nil;

(d) Jaiprakash Industries Limited: Nil;

(e) Reggiane Officine Meccaniche Italiane S.p.A.: Nil;

(f) Landustrie Sneek b.v.: Nil;

(g) Mechanised Construction of Pakistan (Pvt) Limited: Nil;

(h) Saudi Arabian Dumez Company Limited: Nil;

(i) Guris Makina ve Montaj Sanayii A.S.: USD 295,820;

(j) Biwater Europe Limited: Nil;

(k) Biwater International Limited: USD 1,388,204;

(l) Biwater Process Plant Limited: Nil;

(m) PWT Projects Limited: USD 98,114;

(n) Aquasep, Inc.: Nil; and

(o) NRM Corporation: Nil.

Geneva, 10 February 2003

(Signed) Mr. Werner Melis
Chairman

(Signed) Mr. David Mace
Commissioner

(Signed) Mr. Sompong Sucharitkul
Commissioner
