THE WORSHIPFUL COMPANY OF ARBITRATORS

23 January 2009

Dispute Resolution in the Construction Industry

1. A construction project, of whatever sort, is far more of a slice of life than most if not all other commercial contracts. There are a number of reasons for this. First of all, it takes time - a few months to many years. Second, it involves a number of people coming from very different backgrounds and with disparate and often conflicting aims and desires. Third, the ramifications of the project, legal, economic, social will often (and always with a major infrastructure project) reverberate out from the site to impact a wide area both physical and metaphysical - from the impact of the construction traffic, to the work generated by the project and the stimulating effect of the monies expended, to the short and long term inspirational effect such a project may have[1], to the social benefits it can deliver.

2. In consequence, the management of a construction site involves all the mechanisms that we use in society; of which the resolution of disputes is a particularly important and particularly difficult one.

3. Throughout the ordinary day in any social community, there are events which surprise, disappoint, even annoy people. The responses will vary

[1] And it is important that the media is kept on side. When the British Government built the Millenium Dome it failed to ensure that the representatives of the fourth estate had an untroubled path to their seats on the night the Queen attended the Gala opening. Many of them found themselves standing in the rain for 20 or 30 or more minutes after the show had started - security of course, a "dry" run for Heathrow. Consequently they panned the Dome and all that went on there. In its new role as the 02 Arena it is doing brilliantly, as a concert hall albeit of a popular rather than a classical inclination. No doubt because it actually has excellent acoustics, really good public transport links with the rest of London, and seats some 22,000.

greatly, but most of the time people do not immediately rush to court. They surmount the problems in a variety of ways, which include ignoring them, on the great principle that most problems, if ignored for long enough, go away of their own accord.

4. If the surprise, disappointment, annoyance is repeated often enough, however, their initial reactions may mutate into something different or ramp up from the original low key response.

5. This will be particularly the case where the social unit is closed or tight knit. In such an environment, repeated upsets are at risk of a pressure cooker effect - they have the potential to generate even stronger responses than would be the case in an open grouping. Pressure cooker effects are harder to control[2].

6. Disputes will always occur on building sites as they do in society. It is for those in charge on site to manage them. It follows therefore that those with responsibility for managing the site of a major project face heavy tasks in ensuring that the disputes do not get a head of steam, or that passions do not take over.

7. The traditional manager, a hundred years ago, was the engineer. As well as being responsible to the owner to achieve the desired end, and to oversee the project as it went forward, he (it was always a "he") had the task of independently holding the balance between the competing interests of owner and contractor when it came to disputes.

8. In those days matters were relatively simple and straightforward; and if they

[2] A monk was once asked if from time to time he found the early mornings and the highly structured day frustrating and infuriating. No said he. What is really infuriating and may one day drive me to violent action is when the person I have been sitting next to in the refectory for ten years still offers, at every meal, to pass me the salt when, for ten years, three times a day, I have said "No thank you, I don't take salt."

did go beyond the Engineer under the contract then, at least in the common law world they went to arbitration, which itself would be presided over by an engineer, and be fairly rough and ready[3].Such engineer arbitrators were disinclined to motivate their awards, and indeed often discouraged from doing so by the courts[4], which found the factual detail of a construction dispute very boring. The result was a speedy arbitration with an award which often had only one line of substance[5] and was especially difficult to challenge in court. Thus both at site level and when the matter was in arbitration, the process had a high potential to be quick.

9. And I offer a somewhat controversial proposition - the speed and manner of the delivery of an answer is very important to disputants in the construction field and may over ride their desire for precision in the answer.

10. To see how one gets to this proposition - assuming that one is interested, of course! - it is convenient to look at the development of common law arbitration in the last hundred and fifty years in England, a jurisdiction with a long tradition of non lawyer arbitrators in specialist commercial disputes.

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[3] And rough and ready it was. A 19th Century case - possibly the one about Blackfriars bridge in London, which developed a caisson problem - which made it all the way to the law reports records the contractor as asking about payment for the very considerable extra work he had just been instructed to carry out to deal with unforeseen underground conditions. In a memorable response but one which of course did nothing to improve relations, the Engineer responded "Just get on with the work - the inquest comes later." The choice of "inquest" was unfortunate to describe an investigation to establish entitlement. And on another site, the resident engineer only left his office once in the latter part of the job and that was to enforce an instruciton not to do some slab laying. Standing in front of the machine, he said "you will have to lay me in concrete to lay slabs today". "Well," said the contractor's site manager "that sure as hell will improve the administration of the contract" and told the machine operative to start the machine. These are not good examples of dispute management.

[4] In 1922, the Appellate Division of the High Court of India, having set aside an award by arbitrators was reviewing a further award by the same arbitrators and noted that they had put no details of the dispute in it "having learnt better".

[5] And about two pages of pro forma material - the arbitration clause, the appointment, etc.

11. The first step on that road was the introduction to the arbitration process of techniques more apposite to criminal trials than to commercial dispute resolution. Thus there was an insistence on proper detailed evidence; the importation of court rules as to the admissibility of evidence; the growing appearance of counsel in the hearing room combined with decisions in the courts that enforced upon lay arbitrators the obligation to listen to counsel[6]; and the use of techniques such as requiring arbitrators to formulate their awards by reference to differing answers to issues of law, so that the matter could in any event be taken further.

12. There was a belief in the legal profession that the industry would like detailed and precise answers; and the industry must to some extent have thought that it agreed with this approach. The bodies that drafted the standard forms of contract for the industry ensured that the arbitration clauses were couched in terms that maximised the opportunity to take matters on to court.

13. At about the same time, the contractors began to jib at the role of the engineer. More and more he was seen as the employer's agent and was therefore suspect; and interestingly, the attacks actually achieved the position that was under attack. Owners became more aware that the engineer was indeed their agent in respect of a considerable part of his job; and they began to be readier to sue him for problems that they could not load onto the contractor. This in turn made the engineer less willing to embrace the role of independence.

14. And so people started to look for different dispute resolution mechanisms. One of the more successful ones has been the dispute board. This comes in various guises but typically the substance is to have a single person or a

[6] The heartless arbitrator, who, dealing with a purely technical dispute, allowed the lawyers to be in the room but prohibited them from speaking, had his award duly set aside and himself removed.

group of two or three (often of different disciplines - the Hong Kong airport had a lawyer, an engineer and a quantity surveyor) who visit the site regularly and conduct discussions with the parties to identify and either to resolve on a temporary basis or to offer a recommendation as to any disputes that might have surfaced since the last visit. The temporary basis for a resolution parrots the old engineer's decision - it is binding unless appealed or otherwise challenged, usually at the end of the job. The philosophy was the excellent one that one has to get on with the job without delay and the final conclusion on the impact is postponed.

15. Another mechanism is adjudication. In this mechanism, obligatorily imposed in England on all construction contracts, a quantity surveyor (it usually is - although some adjudications are determined by lawyers) has 28 days (which can be increased but, at the moment, at least, only by agreement of the parties) to give an answer to the dispute that is put before him, regardless of the size of the dispute. This too is a temporary decision, binding unless challenged in arbitration or litigation. It is a mechanism that was intended to provide a speedy resolution to a dispute about an interim certificate or some other dispute that occurs during the course of the contract. In this sense it also mimicked the old Engineer's role and also that of the dispute board and in being determined, usually at least, by someone from the industry whose primary qualification is a construction industry one, reflected in another way the traditional role of the Engineer.

16. The intention as to the limited nature of the dispute to be temporarily resolved explains the tight timetable - it was to be a nearly instant decision on some issue which could be comprehended in the four weeks allowed.

17. The construction industry in England and in certain other common law jurisdictions has embraced this mechanism wholeheartedly. But it is not only used for the dispute that arises during the course of the contract , the sort of relatively limited dispute for which the mechanism was intended, but also

for much more complicated disputes including even the final account. Thus a quantity surveyor[7] who undertakes adjudication, can find himself (it still nearly always is a he) landed with many lever arch files and an unwillingness on the part of the claimant to agree to any extension of the 28 days.

18. Where the dispute is complicated it is effectively an ambush so far as the recipient of the claim is concerned unless the complaint was not only anticipated but also prepared for in some detail. What is interesting is that despite the fact that inevitably the answer is extremely rough and ready and indeed often demonstrably wrong, the industry rarely takes the matter further[8].

19. And the industry has also become enthusiastic about mediation and conciliation - methods of disposing of disputes that have the potential to find resolutions outside the limited types of relief that courts, arbitrators and adjudicators can offer.

20. Interestingly, in very recent years, some parties in the Far East have taken the concept of the dispute board and have modified it. They have gone for a one person "board" who is independent of the parties and is on site continuously, rather than visiting on a regular basis. It is a nice example of the wheel turning full circle. It takes the project back to the traditional concept of the role of the engineer a hundred and fifty years ago[9].

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[7] It is not always a quantity surveyor. Other disciplines get in on the act. But the great majority of adjudicators are surveyors.

[8] The decisions of adjudicators are immediately enforceable in court by summary proceedings. The court will always uphold the decision unless it can be clearly demonstrated that the adjudicator has exceeded his jurisdiction or asked the wrong question. Asking the right question but getting a completely wrong answer is not a ground for refusing enforcement.

[9] Human nature likes the traditional approach. Chairman Mao's books had yellow covers. Yellow was the colour traditionally reserved for the Chinese emperors; and some would suggest that there is much in common between the Kremlin today and the Court of Peter the Great! Is it a case that the familiar becomes empty through familiarity - the familiarity breeds contempt syndrome? But when we rouse ourselves to change we seem quickly to slip back into the old forms even if with new people or new names for our systems.

21. Other thoughts. The UK government put into its arbitration clauses a six month period for the whole of the dispute from notice of dispute to award. When the mechanical and electrical contract on the British Library went pear shaped, the contractors complained about the time limit, which was very tight indeed for the entire resolution of such a dispute. But it would have been possible. The arbitrator would have had to appoint experts of different disciplines to review, on a very short timescale, the various elements of claim and defence; publish a provisional conclusion and invite very speedy responses. It would have been demanding but possible; but was not put to the test, as the parties settled (which, no doubt, was one of the aims of putting the six month time limit in the first place!).

22. And the UNCC - dealing with claims from the first Iraq invasion - effectively adopted a paper only approach to resolving construction disputes - hearings were possible but were almost unheard of. It was necessary to establish a detailed procedural protocol so as to ensure that the parties' claims could be evaluated in a manner that respected the requirements of natural justice, and as part of that requirement, were transparent.

23. What lessons can we draw from these observations? First if one is about to enter a construction contract, it is important to review the dispute resolution clause in some detail. The contract is likely to be a standard form contract and in that case, it is important to understand precisely the mechanism or mechanisms that have been built into the contract. Once understood, then it should be possible to ensure that the project manager and his colleagues fully appreciate the path to be followed if, unfortunately, some dispute of substance occurs.

24. The temptation to amend a standard form clause, especially a dispute resolution clause, should be generally resisted, although there are some changes which should not cause too much trouble. Altering a clause in a

standard form is difficult. The contract will wholly or largely have been drafted as a whole and altering any clause may have consequences for or impacts upon other clauses that are not immediately obvious. If amended it is essential that the whole contract is reviewed to make sure that the amendment fits in or that any consequential amendments are carried through.

25. That said, there is still the opportunity to consider adding stages to the process - e.g. by way of a meeting between executives or a formal mediation with a neutral before embarking on arbitration or litigation. Of course each stage that is put in potentially adds to the time taken to resolve matters - but if there is a will to settle on both sides then these less formal processes can be very successful.

26. If the contract is not a domestic UK construction contract - where the process is obligatory anyway, the opportunity should not be lost to consider whether to have an adjudication clause - I personally am doubtful about the advisability of this, but it should be considered; and also a Dispute Board should be considered - and if desired - what sort.

27. Speed, cost, time of resolution are the factors to keep in mind when carrying out the review.

28. If the final fall back method of dispute resolution is arbitration then it is important to consider whether the clause imports any rules - it should do - and that the rules are understood. It is also possible to consider which rules are best - some have time limits within which the individual steps are to be taken and others have an overall time limit. One set of rules promulgated in England calls for the whole arbitration to be concluded in 100 days - a very fast schedule and intended to provide a more satisfactory method of final resolution than adjudication but one which almost matches the speed. One would obviously only opt for such rules if one was confident one could keep

up with them.

29. If the contract is being drafted from scratch then there is the opportunity to consider what method or methods one wishes to have - there is both more opportunity to tailor the dispute resolution clauses to the project and the preferences of the parties but of course it is a more difficult task than simply adopting ready made clauses. However the points made above highlight the issues to address - how fast do you wish it to be - what are the different stages that might usefully be introduced, and what is the likely cost of the process.

30. I hope that the above very brief review of dispute resolution in the construction industry is helpful.

John Tackaberry

100 DAY ARBITRATION PROCEDURE

(for use in England and Wales and other jurisdictions)

THE SOCIETY OF CONSTRUCTION ARBITRATORS
1ST JULY 2004

100 DAY ARBITRATION PROCEDURE

1 Where the parties and the appointed arbitrator agree to adopt this procedure the arbitrator shall have an overriding duty to make his Award deciding all matters submitted (excluding liability for costs) within 100 days from either;

(a) the date on which the statement of defence (or defence to counterclaim, if there is one) is delivered to him or to the other party (whichever is later); or

(b) if the statement of defence (or defence to counterclaim) has already been delivered); from the date on which the arbitrator gives his directions.

2 Reference to days are calendar days unless otherwise noted. Any period set by this procedure that would end on a Saturday, Sunday or any public holiday at the seat of the arbitration will be deemed to end on the following working day.

3 The arbitrator shall, as soon as he is appointed or on the adoption of this procedure if later, contact the parties' representatives by the most rapid and practical means (such as email or fax) to give them the opportunity to comment on the periods and dates to be ordered for the procedural steps in Rule 4.

4 Within 7 days of his appointment or of the adoption of this procedure if later, the arbitrator shall by directions establish a procedural timetable to include an overall

period of no longer than 100 days to run from the service of the statement of defence (or defence to counterclaim, if there is one) or from the date that the arbitrator gives his directions (whichever is later) that shall provide for:

(1) service of any outstanding pleadings (including replies if considered necessary) and statements of witnesses and experts' reports, if not already served with the pleadings, within 7 days;

(2) service of all further documents relied on by a party, replies to statements of witnesses and experts' reports and service of any requests for disclosure of specific documents by the other party, within 14 days thereafter;

(3) subject to any ruling by the arbitrator on any issue as to disclosure of documents, service of copies of documents specifically so requested within 7 days of the request;

(4) no further documents or other evidence to be served by either party unless requested or permitted by the arbitrator;

(5) a date for an oral hearing or hearings not exceeding 10 working days, to commence not more than 28 days after conclusion of the foregoing steps;

(6) final written submissions (if ordered by the arbitrator) to be served simultaneously within 7 days from the end of the hearing;

(7) the arbitrator to make his Award within 30 days of the end of the oral hearing.

The arbitrator may, if so agreed by the parties, direct shorter periods for any of the foregoing steps (and the period in Rule 8) and the period of 100 days may be reduced accordingly.

5 For the purpose of achieving the foregoing maximum time periods, the parties agree to cooperate and to take every opportunity to save time where possible.

6 The arbitrator, for the purpose of achieving the foregoing time limits, may do any of the following at any time:

(1) order any submission or other material to be delivered in writing or electronically;

(2) take the initiative in ascertaining the facts and the law;

(3) direct the manner in which the time at the hearing is to be used;

(4) limit or specify the number of witnesses and/or experts to be heard orally;

(5) order questions to witnesses or experts to be put and answered in writing;

(6) conduct the questioning of witnesses or experts himself;

(7) require two or more witnesses and/or experts to give their evidence together.

7 The parties may agree to extend the period of 100 days. The arbitrator has no such power save that the arbitrator or any party may apply to the Court under Section 50 of the Arbitration Act 1996 (Extension of time for making award) or under other powers available at the seat of the arbitration.

8 Not later than 14 days before the Award is due, the arbitrator shall send to the parties his reasonable estimate of the total fees and expenses incurred and likely to be incurred up to the making of the Award (including VAT if applicable). Provided the parties have paid this sum to a stakeholder acceptable to the arbitrator with the monies held to the arbitrator's account (or to the arbitrator himself) the arbitrator shall have no lien over the Award.

9 Unless they agree otherwise the parties shall make simultaneous submissions on costs to the arbitrator within 14 days of the date that the Award is published and the arbitrator shall make his Award on costs within 14 days of receipt by the arbitrator of the submissions.

100 DAY ARBITRATION PROCEDURE

Standard Adoption Clause

Arbitration between **Claimant**

and **Respondent**

(1) The parties hereby agree to adopt the Society of Construction Arbitrators' 100 Day Arbitration Procedure for the following: †

* (i) any dispute which may arise out of or in connection with the Contract between the parties dated
* (ii) the dispute referred to in correspondence dated
* (iii) any cross-claim arising out of the dispute referred to in (ii)
* (iv) the dispute referred to in Notice of Adjudication dated
* (v) any cross-claim arising out of the dispute referred to in (iv)

(2) The parties by entering into this Agreement further agree not to refer or continue to refer to adjudication any dispute falling within the matters to be referred to arbitration above until the arbitrator has delivered his Award on the matters referred to him.

(3) Where there is no other mechanism for appointment and the parties are unable to agree, the arbitrator shall be appointed on the application of either party by the President of the Society of Construction Arbitrators.

*Signed by:*_____ *Claimant* *Date*_____

_____ *Respondent* *Date*_____

† The Arbitrator must also agree to adopt the 100 Day Arbitration Procedure

* Delete where inapplicable

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GOVERNING COUNCIL

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

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Introduction

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

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

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

I. PROCEDURAL HISTORY

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

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

5. On 19 February 2002, the Panel issued a procedural order relating to the claims included in the twenty-seventh instalment. None of the claims presented complex issues, voluminous documentation or extraordinary losses that would require the Panel to classify any of them as "unusually large or complex" within the meaning of article 38(d) of the Rules. The Panel thus had an obligation to complete its review of the claims within 180 days of the date of the procedural order, pursuant to article 38(c) of the Rules.

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

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

B. The claimants

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

(a) Ast-Holzmann Baugesellschaft mbH (formerly Ed. Ast & Co. Baugesellschaft mbH), a corporation organised according to the laws of Austria, which seeks compensation in the total amount of 9,614,918 United States dollars (USD);

(b) Imp Metall-Chemie Produktions- und Handelsgesellschaft mbH, a corporation organised according to the laws of Austria, which seeks compensation in the total amount of USD 9,482,682;

(c) Universale International Realitäten GmbH (formerly Universale Bau AG), a corporation organised according to the laws of Austria, which seeks compensation in the total amount of USD 324,567;

(d) Polytechna Co. Limited, a corporation organised according to the laws of the Czech Republic, which seeks compensation in the total amount of USD 1,448,812;

(e) El-Nasr Company for Civil Works, a corporation organised according to the laws of Egypt, which seeks compensation in the total amount of USD 726,816;

(f) CLE S.A., a corporation organised according to the laws of France, which seeks compensation in the total amount of USD 3,001,060;

(g) Technique et Regulation S.à.r.l., a corporation organised according to the laws of France, which seeks compensation in the total amount of USD 191,619;

(h) National Projects Construction Corporation Limited, a corporation organised according to the laws of India, which seeks compensation in the total amount of USD 3,824,437;

(i) Elettra Progetti S.p.A., a corporation organised according to the laws of Italy, which seeks compensation in the total amount of USD 180,297;

(j) Bertrams AG, a corporation organised according to the laws of Switzerland, which seeks compensation in the total amount of USD 89,178;

(k) Modern Constructors and Planners International (Pvt) Limited, a corporation organised according to the laws of the United Kingdom of Great Britain and Northern Ireland, which seeks compensation in the total amount of USD 961,357;

(l) Shankland Cox Limited, a corporation organised according to the laws of the United Kingdom of Great Britain and Northern Ireland, which seeks compensation in the total amount of USD 297,578; and

(m) Skilled & Technical Services Limited, a corporation organised according to the laws of the United Kingdom of Great Britain and Northern Ireland, which seeks compensation in the total amount of USD 73,445.

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

II. AST-HOLZMANN BAUGESELLSCHAFT MBH (FORMERLY ED. AST & CO. BAUGESELLSCHAFT MBH)

10. Ast-Holzmann Baugesellschaft mbH (formerly Ed. Ast & Co. Baugesellschaft mbH) ("Ast-Holzmann") is a corporation organised according to the laws of Austria. In the "E" claim form, Ast-Holzmann described itself as being in the construction business. It appears from evidence submitted by Ast-Holzmann that it was formerly known as Ed. Ast & Co. Baugesellschaft mbH, but changed to its current company name since submitting its claim in 1994.

11. Ast-Holzmann seeks compensation in the total amount of USD 9,614,918 (105,744,865 Austrian schillings (ATS)) for financial losses.

12. In its response to the article 15 notification, Ast-Holzmann submitted an amendment to its Statement of Claim (as defined in paragraph 13 of the Summary) in which it purported to increase its alleged loss from the original claimed amount of ATS 105,744,865 to ATS 130,494,471 by adding a claim for loss of a cash deposit and by increasing the amounts claimed for "default interest" and interest on the "dedication deposits". 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 has not been 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.

Table 1. Ast-Holzmann's claim

Claim element	Claim amount (USD)
Financial losses	9,614,918
Total	9,614,918

A. Financial losses

1. Facts and contentions

13. Ast-Holzmann seeks compensation in the amount of USD 9,614,918 (ATS 105,744,865) for financial losses. The claim is for losses arising out of financial arrangements entered into in its capacity as a subcontractor to a German contractor on a project in Iraq.

14. In the "E" claim form, Ast-Holzmann characterised this loss element as "other losses", but the Panel finds that it is more accurately classified as a claim for financial losses.

15. On 14 November 1984, a German company, Gildemeister Projekta GmbH, entered into a contract with SAAD General Establishment of Iraq for the construction of the Research and Development Centre in Mosul, Iraq. Ast-Holzmann gives no details about the project, except that it was known as "Project SAAD 16". Furthermore, Ast-Holzmann did not provide any of the contracts pertaining to the project and the financing of the project. Ast-Holzmann states that the total contract value for the project was 206,045,969 Deutsche Mark, ATS 1,661,853,747 and 3,322,396 Iraqi dinars (IQD).

16. Ast-Holzmann's claim for financial losses is summarised in table 2, infra.

Table 2. Ast-Holzmann's claim for financial losses

Loss item	Claim amount (ATS)	Claim amount (USD)
Bank balance	5,214,958	474,173
"Default interest"	26,087,655	2,372,036
"Dedication deposits"	51,787,152	4,708,779
Interest on "dedication deposits"	22,655,100	2,059,930
Total	105,744,865	9,614,918

17. The Panel considers each item of the claim for financial losses in turn, as follows:

(a) Bank balance

18. Ast-Holzmann seeks compensation in the amount of USD 474,173 (ATS 5,214,958) for loss of the balance of an account at a bank in Iraq. Ast-Holzmann does not explain what this amount represents and whether it relates to the financial transactions it entered into for the financing of the project.

(b) "Default interest"

19. Ast-Holzmann seeks compensation in the amount of USD 2,372,036 (ATS 26,087,655) for "default interest". Ast-Holzmann does not clearly explain the nature of its claim for "default interest", despite being specifically requested to do so in the article 34 notification (as defined in paragraph 15 of the Summary).

(c) "Dedication deposits" and interest

20. Ast-Holzmann seeks compensation in the amount of USD 4,708,780 (ATS 51,787,152) for seized "dedication deposits", and USD 2,059,929 (ATS 22,655,100) for interest on those deposits. Ast-Holzmann does not clearly explain the nature of its claim for the "dedication deposits" and interest, despite being specifically requested to do so in the article 34 notification.

2. Analysis and valuation

(a) Bank balance

21. In support of its claim for loss of the bank balance, Ast-Holzmann provided what appears to be an account statement which shows that the claimed amount is held in its bank account in Iraq. However, the account statement was not translated into English and the Panel is therefore unable to verify the nature of this document. Ast-Holzmann also provided evidence that on 2 January 1993, the Central Bank of Iraq authorised the transfer of the amount claimed from an account in Iraq to Ast-Holzmann.

22. Applying the approach taken with respect to loss of funds in bank accounts in Iraq set out in paragraphs 154 to 158 of the Summary, the Panel recommends no compensation. Ast-Holzmann did not establish that a loss actually occurred. Moreover, Ast-Holzmann did not provide any evidence to prove that it could not gain access to the bank balance after the cessation of hostilities.

(b) "Default interest"

23. In support of its claim for "default interest", Ast-Holzmann provided a letter dated 3 April 2001 from Bank der Österreichischen Sparkassen AG confirming the balances of Ast-Holzmann's seized "dedication deposits" in relation to Project SAAD 16, as well as interest owing on those accounts. The letter states that the amount of ATS 21,150,744 is owing as "interest on arrears" which is charged to the borrower "on a quarterly basis at a rate of 9.5% as per agreement". It is not clear how this amount relates to the original claim amount of ATS 26,087,655 for "default interest". Finally, Ast-Holzmann provided handwritten statements (and an affidavit confirming the accuracy of the statements), which indicate that "default interest" is due from 1989 to 1993 in the total amount of ATS 28,738,418.

24. The Panel finds that Ast-Holzmann failed to prove that the claimed loss of "default interest" was incurred as a direct result of Iraq's invasion and occupation of Kuwait. The evidence provided by Ast-Holzmann shows that the claim relates to debts which were incurred by SAAD General Establishment of Iraq in 1988 and which continued to be outstanding thereafter. It is not clear that Ast-Holzmann would have succeeded in renegotiating these debts even if Iraq's invasion and occupation of Kuwait had not occurred.

(c) "Dedication deposits" and interest

25. In support of its claim for the "dedication deposits" and interest thereon, Ast-Holzmann submitted a letter dated 3 April 2001 from Bank der Österreichischen Sparkassen AG which confirms

the balances of Ast-Holzmann's two seized "dedication deposits" in relation to Project SAAD 16 as being ATS 41,888,246 and ATS 9,898,906 respectively. The total amount in the seized "dedication deposits" is therefore shown in the letter as the claimed amount of ATS 51,787,152. The letter states that overdue interest on the dedication account is owing in the amount of ATS 21,475,281 and that the "dedication deposits" and interest "can only be released as and when the foreign borrower makes the corresponding payments". It is not clear how the amounts allegedly owing in the "dedication deposits" were calculated. Ast-Holzmann states that it calculated the claim by adding the debit notes from the banks. However, these debit notes were among documents submitted by the claimant which were not translated into English.

26. The Panel finds that Ast-Holzmann failed to prove that the claimed loss of the "dedication deposits" and interest thereon was incurred as a direct result of Iraq's invasion and occupation of Kuwait. The claim relates to debts which were incurred by SAAD General Establishment of Iraq in 1988. It is not clear that Ast-Holzmann would have succeeded in renegotiating these debts even if Iraq's invasion and occupation of Kuwait had not occurred.

3. Recommendation

27. The Panel recommends no compensation for financial losses.

B. Summary of recommended compensation for Ast-Holzmann

Table 3. Recommended compensation for Ast-Holzmann

Claim element	Claim amount (USD)	Recommended compensation (USD)
Financial losses	9,614,918	nil
Total	9,614,918	nil

28. Based on its findings regarding Ast-Holzmann's claim, the Panel recommends no compensation.

III. IMP METALL-CHEMIE PRODUKTIONS- UND HANDELSGESELLSCHAFT MBH

29. IMP Metall-Chemie Produktions- und Handelsgesellschaft mbH ("IMP Metall") is a corporation organised according to the laws of Austria. IMP Metall stated in the "E" claim form that it was involved in construction, trade in goods and the provision of services. At the time of Iraq's invasion and occupation of Kuwait, IMP Metall was involved in four projects in Iraq. Subsequent to filing its claim, IMP Metall went into liquidation and was removed from the Austrian register of companies. Pursuant to an assignment agreement dated 18 December 1992, IMP Metall assigned all of its rights and liabilities (including its rights and liabilities arising out of its claim before the Commission) to its parent company incorporated in Slovenia, IMP inženiring, montaža, proizvodnja d.d. ("IMP inženiring"). Thereafter, IMP inženiring filed documents and information in support of the claim.

30. In the "E" claim form, IMP Metall sought compensation in the total amount of USD 12,163,613 for contract losses, loss of tangible property and payment or relief to others.

31. In its response to the article 34 notification, IMP inženiring reduced the amount of the claim to USD 10,970,388. The reduction in the claim amount was to take account, inter alia, of a portion of the advance payments made under two of IMP Metall's contracts which were retained by IMP Metall, and the withdrawal of part of IMP Metall's claim for payment or relief to others.

32. In its response to the article 34 notification, IMP inženiring attempted to increase the amount of IMP Metall's alleged loss by adding claims for contract losses (comprising materials delivered to the Baghdad Tower Clock Project) in the amount of USD 1,046,717 and payment or relief to others (comprising "consequential damage" on the Al-Sijood Palace Project) in the amount of USD 63,000. IMP inženiring also attempted to increase the amount claimed for "materials which could not be delivered to the Al-Sijood Palace Project" from USD 1,635,113 to USD 1,645,948. 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 or to bring additional claims. Accordingly, the Panel has only considered those losses contained in the original claim, except where such losses have been reduced by IMP inženiring. Increases made to the claim by IMP inženiring have not been 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.

33. After taking into account reductions made by IMP inženiring to the amount claimed, the Panel finds that the claimed amount is USD 9,482,682, as shown in table 4, infra.

34. The Panel has reclassified certain elements of IMP Metall's claim for the purposes of this report. The Panel's reclassifications are indicated in the Panel's analysis for each relevant loss item.

Table 4. IMP Metall's claim

Claim element	Claim amount (USD)
Contract losses	8,040,489
Loss of tangible property	213,211
Financial losses	41,942
Interest	1,187,040
Total	9,482,682

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

A. Contract losses

1. Facts and contentions

36. IMP Metall seeks compensation in the total amount of USD 8,040,489 for contract losses.

37. At the time of Iraq's invasion and occupation of Kuwait, IMP Metall was engaged as a nominated subcontractor on two construction projects in Iraq. The first project involved the manufacture, supply of materials and the "mounting of site works", fountains and electrical works for the Baghdad Tower Clock (the "Baghdad Tower Clock Project"). The second project involved the supply, erection, operation and design of mechanical, sanitary and electrical installations at the Al-Sijood Palace (the "Al-Sijood Palace Project"). IMP Metall alleges that amounts are outstanding under both contracts for unpaid monthly certificates and materials which could not be delivered to the project sites.

38. IMP Metall also alleges that it incurred contract losses on a project in which it was engaged as a subcontractor to install electrical, heating, air-conditioning, ventilation and water supply systems in the Um Al Idham Al Quadisijah housing complex in Baghdad (the "Um Al Idham Project"). IMP Metall alleges that it had completed work on the project, but that it was unable to recover the self-financed portion of the contract price.

39. Finally, IMP Metall alleges that it incurred start-up costs prior to starting work on a contract for the supply of steel structures, cladding, windows and doors for paint shop facilities and other buildings at a car factory in Iraq (the "Car Factory Project").

40. The claim for contract losses consists of losses allegedly incurred on (a) the Baghdad Tower Clock Project in the amount of USD 3,367,412, (b) the Al-Sijood Palace Project in the amount of USD 1,934,486, (c) the Um Al Idham Project in the amount of USD 1,600,531, and (d) the Car Factory Project in the amount of USD 1,138,060. The items forming part of the claim for each project are set out in table 5, infra.

Table 5. IMP Metall's claim for contract losses

Loss item	Claim amount (USD)
(a) Baghdad Tower Clock Project	
(i) unpaid monthly statements	2,638,710
(ii) materials which could not be delivered	1,890,390
(iii) storage costs	282,270
Less advance payment retained	(1,443,958)
Subtotal (Baghdad Tower Clock Project)	3,367,412
(b) Al-Sijood Palace Project	
(i) unpaid monthly statements	506,636
(ii) retention monies	343,633
(iii) materials which could not be delivered	1,635,113
(iv) storage costs	200,655
Less advance payment retained	(751,551)
Subtotal (Al-Sijood Palace Project)	1,934,486
(c) Um Al Idham Project	1,600,531
(d) Car Factory Project	1,138,060
Total	8,040,489

41. The Panel considers each project in turn, as follows:

(a) Baghdad Tower Clock Project (Project 115)

42. IMP Metall seeks compensation in the amount of USD 3,367,412 for contract losses allegedly incurred on the Baghdad Tower Clock Project. This amount consists of (i) USD 2,638,710 for unpaid monthly statements, (ii) USD 1,890,390 for materials which could not be delivered to the project site, and (iii) USD 282,270 for storage costs. IMP inženiring deducted the United States dollar portion of the advance payment retained by it (USD 1,443,958) from the amount of the claim.

(i) Unpaid monthly statements

43. IMP Metall was employed by Al-Fao General Establishment of Iraq ("Al-Fao") as nominated subcontractor to manufacture, supply materials and mount site works, fountains and electrical works for the Baghdad Tower Clock Project. Al-Fao and IMP Metall entered into a contract on 14 March 1989. Al-Fao was awarded the main contract for the project. The project is also referred to in the claim submission as Project 115.

44. According to the contract, work on the project was to commence when Al-Fao had fulfilled the last of its preliminary obligations, including making the advance payment to IMP Metall. IMP inženiring states that the advance payment was paid in two instalments on 1 June and 10 July 1989. The completion date was 21 months from the date of commencement of the contractual works. IMP

inženiring states that the works commenced in July 1989. The maintenance period was to commence upon signing of the taking-over certificate and continue for a period of 18 months. IMP inženiring states that less than 50 per cent of the work on this project was completed prior to August 1990.

45. IMP inženiring states that it was the main subcontractor on the project and that it performed the majority of the installation works.

a. Terms of payment

46. The contract price was IQD 5,203,297. According to the contract, 77 per cent of the contract price was payable in United States dollars at a rate of exchange of IQD 1 = USD 3.224933. The amount payable in United States dollars was therefore USD 12,920,819. The remaining 23 per cent was payable in Iraqi dinars, that is IQD 1,196,758. Although neither IMP Metall nor IMP inženiring expressly states so in documents filed with the claim, it appears that the claim for unpaid work performed is for the United States dollar portion of the work only.

47. IMP Metall was required to issue letters of guarantee to guarantee the advance payment and a "good performance guarantee".

48. The advance payment was equal to 20 per cent of the contract price (i.e. IQD 1,040,659). The advance payment was paid to IMP Metall as follows:

(a) the United States dollar portion was paid on 1 June 1989 in the amount of USD 2,584,164 (20 per cent of the portion of the contract price payable in United States dollars, i.e. USD 12,920,819); and

(b) the Iraqi dinar portion was paid on 10 July 1989 in the amount of IQD 239,352 (20 per cent of the portion of the contract price payable in Iraqi dinars, i.e. IQD 1,196,758).

49. The remaining 80 per cent of the contract price was to be paid to IMP Metall upon submission of monthly accounts for executed work and materials delivered to the site. Al-Fao was required to issue an irrevocable letter of credit in favour of IMP Metall for the payment of USD 10,336,655. The remaining IQD 957,407 was to be paid to IMP Metall within seven days of presentation of a certificate of the monthly account of the executed works.

b. Invoices rendered

50. IMP inženiring states that work on the Baghdad Tower Clock Project could not continue after 2 August 1990 because it was impossible to import goods to the project site due to the imposition of the trade embargo pursuant to Security Council resolution 661 (1990) (the "trade embargo"). Correspondence between Al-Fao and IMP Metall indicates that the former decided that the works would be "frozen" until one month after normal work conditions resumed and the embargo was lifted. Moreover, payment for deliveries previously made to the site and for work executed was not made because the letter of credit opened for payment of IMP Metall's monthly invoices was blocked. Indeed, according to IMP inženiring, payments under the letter of credit were delayed before August

1990, as the owner of the project had not always provided timely "covering of the letter of credit" with its bank.

51. IMP inženiring states that the value of the unsettled claims for the project is USD 2,729,881. This was the amount originally claimed by IMP Metall in the "E" claim form for "unpaid monthly statements" in respect of the Baghdad Tower Clock Project.

52. The evidence submitted by IMP inženiring shows that the total of outstanding monthly invoiced amounts was USD 3,005,864 and that the unutilised portion of the advance payment was USD 1,443,958. IMP inženiring reduced the amount of its claim for contract losses by deducting the United States dollar portion of the advance payment retained by it. IMP inženiring did not, however, make any deduction for the Iraqi dinar portion of the advance payment retained by IMP Metall.

53. IMP inženiring states in its response to the article 34 notification that it seeks compensation for the unpaid monthly statements for the period after April 1990. It states that the last payment was received in respect of the interim monthly statement of March 1990.

(ii) Materials which could not be delivered to the project site

54. According to the terms of the contract for the Baghdad Tower Clock Project, IMP Metall was obliged to supply certain materials for the installation works at the project site. In the "E" claim form, IMP Metall claimed that material and equipment purchased by it in the amount of USD 1,986,141 could not be delivered to the project site. However, in its response to the article 34 notification, IMP inženiring reduced the amount claimed to USD 1,890,390. IMP inženiring gives no explanation as to why the reduction in the amount claimed was made.

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

56. IMP inženiring alleges that the materials were either held at the borders of Iraq or were held ready for shipment and stored with the suppliers in Austria, Italy and elsewhere. The list of materials which were to be supplied to the Baghdad Tower Clock Project is extensive, and includes marble and granite, aluminium facade elements and glass. In its response to the article 34 notification, IMP inženiring states that it was not possible for IMP Metall to mitigate its losses because most of the non-delivered materials were manufactured specifically for the project. In addition, IMP inženiring states that the electrical equipment was manufactured to British standards and was not marketable in Central Europe.

(iii) Storage costs

57. IMP inženiring states that IMP Metall incurred storage and freight costs in the amount of USD 282,270 in relation to the storage of materials that it was unable to import into Iraq for use on the Baghdad Tower Clock Project. The claim appears to relate to storage costs incurred from shortly after

Iraq's invasion and occupation of Kuwait to September 1992, as well as to "costs for unloading and conservation" and freight costs.

58. In the "E" claim form, IMP Metall characterised this loss element as part of its claim for "payment or relief to others". However, the Panel finds that this loss is more accurately classified as part of the claim for contract losses.

59. IMP inženiring states that the equipment and material purchased by IMP Metall for this project were ordered for the purposes of the project and were designed according to specific design requirements. For this reason, IMP inženiring states that the suppliers refused to take the materials back and traders to whom the goods were offered for repurchase refused to purchase the materials, even at a greatly reduced price. IMP inženiring also states that some of the materials, such as paints and adhesives, had a limited shelf life and were harmful to the environment, and therefore had to be stored carefully at increased expense to IMP Metall.

(b) Al-Sijood Palace Project (Project 304X)

60. IMP Metall seeks compensation in the amount of USD 1,934,486 for contract losses allegedly incurred on the Al-Sijood Palace Project. This amount consists of (i) USD 506,636 for unpaid monthly statements, (ii) USD 343,633 for retention monies, (iii) USD 1,635,113 for materials which could not be delivered to the project site, and (iv) USD 200,655 for storage costs. IMP inženiring deducted the United States dollar portion of the advance payment retained by it (USD 751,551) from the amount of its claim.

(i) Unpaid monthly statements

61. IMP Metall was employed by Al-Rashid Contracting Company of the Ministry of Housing and Construction of Iraq (the "Ministry") as nominated subcontractor for the supply, erection, operation and design of mechanical, sanitary and electrical installations at the Al-Sijood Palace. Al-Rashid Contracting Company and IMP Metall entered into a contract on 25 April 1990. Al-Rashid Contracting Company was awarded the main contract for the project. The project is also referred to in the claim submission as Project 304X.

62. According to the contract, work on the project was to commence on receipt of a letter of intent (which was to occur by 8 April 1990), presumably sent by the Ministry to IMP Metall, and upon handing over of the site by the Ministry by 20 May 1990. It is not clear when the contractual works actually started. The completion date stated in the contract is 25 August 1990. The maintenance period was to commence upon signing of the taking-over certificate and continue for a period of 12 months. IMP inženiring states that less than 50 per cent of the work on this project was completed prior to August 1990.

63. IMP inženiring states that it was the main subcontractor on the project for execution of the installation works.

a. Terms of payment

64. The contract price was USD 7,143,055, which was stated in the contract to be equivalent to IQD 2,226,021. According to the contract, 97 per cent of the contract price was payable in United States dollars. The contract does not expressly state an exchange rate, but the conversion performed in the contract uses a rate of exchange of IQD 1 = USD 3.2088893. Using this rate, the amount payable in United States dollars was USD 6,928,764. Although neither IMP Metall nor IMP inženiring expressly states so in documents filed with the claim, it appears that the claim for unpaid work performed is for the United States dollar portion of the work only. The remaining 3 per cent, that is IQD 66,780, was payable in Iraqi dinars. The contract specifically stated that the material to be supplied represented 86 per cent of the contract value, while the work executed was valued at 14 per cent of the contract value.

65. IMP Metall was required to issue a letter of guarantee to guarantee the advance payment and a "good performance guarantee". The advance payment was to be equal to 20 per cent of the contract price (i.e. USD 1,428,611). The advance payment was paid to IMP Metall as follows:

(a) the United States dollar portion was paid on May 1990 in the amount of USD 1,385,753 (20 per cent of the portion of the contract price payable in United States dollars, i.e. USD 6,928,764); and

(b) the Iraqi dinar portion was paid on an unspecified date in the amount of IQD 13,356 (20 per cent of the portion of the contract price payable in Iraqi dinars, i.e. IQD 66,780).

66. The remaining 80 per cent of the contract price was to be paid to IMP Metall upon submission of monthly accounts for executed work and materials delivered to the site. The Ministry was required to issue an irrevocable letter of credit in favour of IMP Metall for the payment of USD 5,543,011.

b. Invoices rendered

67. IMP inženiring states that work on the Al-Sijood Palace Project could not continue because of the trade embargo on importing goods to the project site. Indeed, correspondence between the Ministry and IMP Metall indicates that the parties agreed that the continuation of works was subject to the lifting of the trade embargo. Moreover, IMP Metall could not receive further payments under the contract as the Ministry's letter of credit expired in October 1990.

68. In its response to the article 34 notification, IMP inženiring states that USD 506,636 is outstanding under invoices rendered for work completed on the Al-Sijood Palace Project.

69. In addition, IMP inženiring states that IMP Metall had only repaid USD 634,201 of the advance payment of USD 1,385,753, leaving the amount of USD 751,551 which was not repaid to the Ministry. These calculations are supported by the evidence. IMP inženiring therefore deducted this amount from the amount of its claim for contract losses. IMP inženiring did not, however, make any deduction for the Iraqi dinar portion of the advance payment retained by IMP Metall.

70. IMP inženiring states in its response to the article 34 notification that it seeks compensation for the unpaid monthly statements for the period after April 1990.

(ii) Retention monies

71. IMP Metall alleges that retention monies in the amount of USD 343,633 are outstanding in relation to the Al-Sijood Palace Project. IMP inženiring states that there was a provision in the contract that required the retention of 10 per cent of each monthly invoice. In the original "E" claim form, IMP Metall sought compensation in the amount of USD 343,633 for the retention monies. IMP inženiring states in its response to the article 34 notification that this amount was offset against the part of the advance payment which was not repaid to the Ministry.

(iii) Materials which could not be delivered to the project site

72. According to the terms of the contract for this project, IMP Metall was obliged to supply certain materials for the installation works at the project site. In the "E" claim form, IMP Metall claimed that material and equipment purchased by it in the amount of USD 1,635,113 could not be delivered to the project site.

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

74. IMP inženiring alleges that the materials were either held at the borders of Iraq or were held ready for shipment and stored with the suppliers in Austria, Italy and elsewhere. The list of materials which were to be supplied to the Al-Sijood Palace Project was extensive and included cables, pipes, fittings and tiles. In its response to the article 34 notification, IMP inženiring states that it was not possible for IMP Metall to mitigate its losses because most of the non-delivered materials were manufactured specifically for the project. IMP inženiring states that IMP Metall was unable to sell these materials to either the suppliers or the wholesalers.

(iv) Storage costs

75. IMP inženiring states that IMP Metall incurred storage costs in the amount of USD 200,655 in storing materials that it was unable to import into Iraq for use on the Al-Sijood Palace Project. The claim is similar to that made in respect of the Baghdad Tower Clock Project referred to at paragraphs 57 to 59, supra, and appears to relate to storage costs from August 1990 to May 1994.

76. In the "E" claim form, IMP Metall characterised this loss element as part of its claim for "payment or relief to others". However, the Panel finds that this loss is more accurately classified as part of the claim for contract losses.

(c) Um Al Idham Project

77. IMP inženiring states that USD 1,600,531 is outstanding in relation to the Um Al Idham Project.

78. According to a contract dated 15 November 1985, Arbeitsgemeinschaft Ilbau Irak 2 ("Ilbau"), an Austrian company, entered into a contract with IMP Metall to install electrical, heating, air-conditioning, ventilation, water supply and sewerage systems, and shelter equipment in the Um Al Idham Al Quadisijah housing complex in Baghdad. The State Organisation of Housing of Iraq (the "State Organisation") was the owner of the project which involved the construction of 170 flats in the housing complex.

79. The contract did not state when work on the project was to commence, nor did it state the completion date for the project. Moreover, IMP inženiring does not give any details as to the commencement and completion dates of the contractual works, but does state that it had obtained the final acceptance certificate prior to August 1990.

80. Accordingly, IMP inženiring alleges that IMP Metall had completed work on the project at the time of Iraq's invasion and occupation of Kuwait, but that "paying off of the credit for the works on the project … was in progress at the time" and did not continue as a direct result of Iraq's invasion and occupation of Kuwait. That is, according to the contract, and to other financial agreements between the parties, IMP Metall agreed to finance all purchases of materials which did not come from Iraq or Austria in the amount of ATS 20,000,000. The contract states that the amount financed by IMP Metall was to be repaid in 10 semi-annual payment instalments 30 days after the receipt of payment from the State Organisation. IMP inženiring states that USD 1,600,531 is owing in repayment of the financing provided by IMP Metall.

81. The contract price was a fixed lump sum of ATS 114,900,000 (which is stated by IMP inženiring as being equal to USD 6,270,497), 70 per cent of which was payable in Austrian schillings and 30 per cent in Iraqi dinars. The price for deliveries and works from Austria was ATS 80,430,000 (i.e. 70 per cent of the contract price), less deliveries and works which came from countries other than Iraq or Austria (i.e. ATS 60,430,000). As noted above, all additional purchases coming from countries other than Iraq or Austria were to be financed by IMP Metall in the amount of ATS 20,000,000.

82. IMP Metall was required to submit a performance guarantee to the value of 10 per cent of the contract price.

(d) Car Factory Project (Project 924)

83. IMP Metall seeks compensation in the amount of USD 1,138,060 for losses related to the Car Factory Project.

84. In the "E" claim form, IMP Metall characterised this loss element as part of its claim for "payment or relief to others". However, the Panel finds that it is more accurately classified as part of the claim for contract losses.

85. According to a contract dated 28 June 1990 between Al-Fao, as purchaser, and IMP Metall, as supplier, IMP Metall was to supply steel structures, cladding, windows and doors for the paint shop and other buildings at the Car Factory Project. The project is also referred to in the evidence as Project 924.

86. The contract price was USD 16,628,465. There was detailed provision in the contract regarding the time frame for delivery of various supplies to the project. However, the overall completion time for the project was eight months. The advance payment was to have been 10 per cent of the contract value, but IMP inženiring states that no advance payment was received by IMP Metall. There were also provisions in the contract regarding the terms of payment.

87. In its response to the article 34 notification, IMP inženiring states that IMP Metall was carrying out preparatory works for the Car Factory Project at the time of Iraq's invasion and occupation of Kuwait. IMP inženiring alleges that as the contractual works never commenced, IMP Metall was unable to recover certain start-up costs that it incurred in preparation for work on the project. The start-up costs allegedly include expenses incurred in preparation of the bid for the project, recruitment of employees and organisation of their departures to the project site, selection of subcontractors and suppliers of equipment and material, and preparation of technical documents required for the project.

88. In a letter dated 3 September 1990 to Al-Fao, IMP Metall stated that it commenced "implementation of works on the Project 924 immediately upon the receipt of your Letter of Intent, i.e. prior to the signing of the Contract on June 28, 1990". In this letter to Al-Fao, IMP Metall also states that the preparatory works were discontinued on 9 August 1990, and that it incurred the expenditures set out in table 6, infra, prior to discontinuation of the project.

Table 6. IMP Metall's alleged losses on the Car Factory Project

Type of expenditure	Amount of expenditure (USD)
(a) Initial expenditure up to 9 August 1990	
Cost of prepared and approved workshop documents for 6,000 tons of steel structure	200,000
Costs of purchase of material for welded structures	400,000
Costs of already-commenced production of structures	112,000
Costs of opening of the Letter of Credit for Europrofile by Thyssen, West Germany	25,000
Costs of storage of purchased goods by the manufacturer	8,500
Total expenditure (up to 9 August 1990)	745,000
(b) Additional costs from discontinuation of the works	
Repeated anticorrosion protection	80,000
Expected annual increase of prices on the world market	182,000
Total estimated additional costs	262,000
Total	1,007,000

2. Analysis and valuation

(a) Baghdad Tower Clock Project

(i) Unpaid monthly statements

89. In support of the claim for unpaid monthly statements in respect of the Baghdad Tower Clock Project, IMP inženiring provided extensive evidence, including a copy of the contract dated 14 March 1989 with Al-Fao, letters from various suppliers stating that equipment could no longer be delivered to the project site and monthly invoices for work performed from May to September 1990. The 20 per cent advance payment was deducted from the amount invoiced on each of the monthly invoices. In accordance with paragraphs 43 to 45 of the Summary, the Panel has not considered invoices provided by IMP Metall for work performed prior to 2 May 1990.

90. The Panel finds that Al-Fao is an agency of the Government of Iraq.

91. The Panel finds that the evidence provided by IMP inženiring indicates that invoices to the value of USD 2,368,671 and IQD 219,392 were rendered to, and approved by, Al-Fao for work performed between May and September 1990. Accordingly, applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 43 to 45 of the Summary, the contract losses are compensable in their entirety. This is so notwithstanding the statements made by IMP inženiring in respect of the trade embargo. The trade embargo was, at best, a parallel cause of the loss. As the claim is for the United States dollar portion of the certificates only, the Panel recommends compensation in the amount of USD 2,368,671. This recommendation is subject to a deduction to take into account the advance payment retained by IMP Metall. (See paragraphs 106 to 110, infra.)

(ii) Materials which could not be delivered to the project site

92. In support of the claim for materials purchased by IMP Metall but held outside Iraq, IMP inženiring supplied invoices from two of its suppliers, Voest-Alpine Eisenwaren Handels GmbH, Austria, and Intertech International Corporation, United States, to the value of ATS 19,845,784 and USD 106,360. IMP inženiring also provided a list of its own inventory showing the materials which were to be delivered, correspondence with one of the suppliers and bank transaction records showing transfer of various amounts to one of the suppliers, Intertech International Corporation.

93. The Panel finds that IMP inženiring failed to offer sufficient explanation and evidence as to why the materials could not be resold or used elsewhere. In particular, IMP inženiring failed to provide evidence of its efforts to sell the materials or other attempts to mitigate its losses. The Panel therefore recommends no compensation for materials which could not be delivered to the project site.

(iii) Storage costs

94. In support of the claim for storage costs in respect of the Baghdad Tower Clock Project, IMP inženiring provided invoices showing the costs it incurred to its suppliers and other agents, as well as payment instructions to its bank. The evidence includes storage lists dated 7 October 1990 and 13

March 1992 listing the quality and description of items stored. The Panel finds that IMP Metall incurred storage and other costs in the amounts claimed. However, only those storage costs incurred during a reasonable period of time after Iraq's invasion and occupation of Kuwait can be considered a direct result of the invasion. Accordingly, the Panel finds that IMP Metall is entitled to compensation for storage costs incurred until three months after the liberation of Kuwait, i.e. up to 2 June 1991. The Panel recommends compensation in the amount of USD 135,197. This recommendation is subject to a deduction to take into account the advance payment retained by IMP Metall. (See paragraphs 106 to 110, infra.)

(b) Al-Sijood Palace Project

(i) Unpaid monthly statements

95. In support of the claim for unpaid monthly statements in respect of the Al-Sijood Palace Project, IMP inženiring provided extensive evidence, including a copy of the contract dated 25 April 1990 with the Ministry, and monthly statements and certificates for work performed "up to 15 August 1990". The 10 per cent retention monies and the 20 per cent advance payment were deducted from the amount invoiced on each of the above certificates.

96. The Panel finds that the Ministry is an agency of the Government of Iraq.

97. The Panel finds that IMP inženiring provided sufficient evidence that the work was performed by IMP Metall and that the invoices were approved by the Ministry. The sum of the amounts denominated in United States dollars in the monthly statements and certificates is equal to the amount claimed of USD 506,636 and relates to work performed after May 1990. Accordingly, applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 43 to 45 of the Summary, the contract losses are compensable in their entirety. The Panel recommends compensation in the amount of USD 506,636 for unpaid monthly statements in relation to the Al-Sijood Palace Project. This recommendation is subject to a deduction to take into account the advance payment retained by IMP Metall. (See paragraphs 106 to 108 and 111 to 112, infra.)

(ii) Retention monies

98. The monthly statements provided by IMP inženiring show that the amount of USD 343,633 was withheld by the Ministry. Furthermore, on the evidence provided, there is no indication that the contract would not have been completed satisfactorily. Applying the approach taken with respect to retention monies as set out in paragraph 88 of the Summary, the Panel recommends compensation in the amount of USD 343,633. This recommendation is subject to a deduction to take into account the advance payment retained by IMP Metall. (See paragraphs 106 to 108 and 111 to 112, infra.)

(iii) Materials which could not be delivered to the project site

99. In support of the claim for materials purchased by IMP Metall but held outside Iraq, IMP inženiring supplied invoices from eight of its suppliers as follows: Voest-Alpine Eisenwaren Handels

GmbH, Austria; Dawcul Limited, United Kingdom; Trilux-Leuchten GmbH, Austria; Wank Warenhandels GmbH, Austria; Merlin Gerin, France; Intertech International Corporation, United States; BSH, Austria; and IMP Trade d.o.o., Slovenia, to the value of USD 1,645,948. IMP inženiring calculated this amount by applying its own exchange rates to the amounts originally invoiced in Austrian schillings, Pounds sterling and French francs, and adding this amount to the amounts invoiced in United States dollars. Using the exchange rates set out in the United Nations Monthly Bulletin of Statistics, the Panel calculates that these amounts convert into United States dollars in the amount of USD 1,611,471 and not the claimed amount of USD 1,635,113. IMP inženiring also provided a list of its own inventory showing the materials which were to be delivered, correspondence with the suppliers, packing lists (attached to some of the invoices) and bank transaction records showing transfer of various amounts to the suppliers.

100. The Panel finds that IMP inženiring failed to provide sufficient evidence in support of its claim. In particular, IMP inženiring failed to provide evidence of its efforts to sell the materials or other attempts to mitigate its losses. The Panel therefore recommends no compensation for materials which could not be delivered to the project site.

(iv) Storage costs

101. In support of the claim for storage costs in respect of the Al-Sijood Palace Project, IMP inženiring provided a large number of invoices from its suppliers, as well as payment instructions to its bank. All of the amounts originally invoiced to IMP Metall were in Austrian schillings and these amounts have been converted by IMP inženiring into United States dollars. The Panel finds that IMP Metall incurred storage and other costs in the amounts claimed. However, only those storage costs incurred during a reasonable period of time after Iraq's invasion and occupation of Kuwait can be considered a direct result of the invasion. Accordingly, the Panel finds that IMP Metall is entitled to compensation for storage costs incurred until three months after the liberation of Kuwait, i.e. up to 2 June 1991. The Panel recommends compensation in the amount of USD 56,307. This recommendation is subject to a deduction to take into account the advance payment retained by IMP Metall. (See paragraphs 106 to 108 and 111 to 112, infra.)

(c) Um Al Idham Project

102. In support of the claim for amounts outstanding for works on the Um Al Idham Project, IMP inženiring provided extensive evidence, including a copy of the contract dated 15 November 1985 between Ilbau and IMP Metall for the Um Al Idham Project, and a copy of the loan agreement between the State Organisation and Girozentrale. IMP inženiring also provided copies of correspondence between the contracting parties and the banks involved in the financing as to monies owing pursuant to the project. This evidence includes a letter dated 7 July 1997 from Ilbau to IMP Metall notifying that remittances of the overdue semi-annual payments by the State Organisation did not occur after 1991, and that if any repayments occurred, the amounts owing to IMP Metall would be forwarded by Ilbau. It also includes a letter dated 7 June 1990 from Ilbau to the Bank für Kärnten und Steiermark confirming Ilbau's liability to IMP Metall in the amount of ATS 17,650,001 which was to be remitted to IMP Metall in five semi-annual payments of ATS 3,530,000 each. Finally, IMP

inženiring provided notices of default issued by the Austrian Girozentrale to the Oesterreichische Kontrollbank export guarantee department dated from 2 April 1991 to 30 June 1992.

103. It is not clear from the above evidence how IMP Metall calculated the amount of the claim, and there is nothing in the evidence to indicate that the amount claimed of USD 1,600,531 is in fact owing to IMP Metall. The only explanation given in relation to the amount claimed is that it does not include interest owing. The contract for the project was signed in November 1985 and the performance of the works to which the claimed financial losses relate occurred before May 1990 and are therefore outside the jurisdiction of the Commission. Accordingly, the Panel recommends no compensation in respect of the Um Al Idham Project.

(d) Car Factory Project

104. In support of the claim for the start-up costs in relation to the Car Factory Project, IMP inženiring provided a copy of the contract dated 28 June 1990 with Al-Fao, a letter dated 9 August 1990 from IMP Metall to Al-Fao notifying the latter of the occurrence of force majeure, and the letter referred to in paragraph 88, supra, dated 3 September 1990 from IMP Metall to Al-Fao.

105. The Panel finds that neither IMP Metall nor IMP inženiring provided sufficient evidence in support of its claim for start-up costs in relation to the Car Factory Project. There is no evidence such as tender and other documents prepared in making the bid for the project, invoices, or correspondence with subcontractors and suppliers selected for the project, to demonstrate that the claimed costs were actually incurred. Furthermore, IMP inženiring explains the difference between the expenses listed in its letter of 3 September 1990 (i.e. USD 1,007,000) and the claim amount (i.e. USD 1,138,060) by stating that the sum of USD 131,060 represents anticipated profit under the project. However, IMP inženiring did not provide any evidence in support of lost profits on this project. Accordingly, the Panel recommends no compensation in relation to start-up costs allegedly incurred on the Car Factory Project.

3. Advance payments retained by IMP Metall

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

107. IMP inženiring responded that IMP Metall had received advance payments for two of the projects – the Baghdad Tower Clock Project and the Al-Sijood Palace Project.

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

(a) Baghdad Tower Clock Project

109. The evidence submitted by IMP inženiring shows that IMP Metall retained the advance payment in the amounts of USD 1,443,958 (United States dollar portion) and IQD 133,743 (Iraqi dinar portion, converted to USD 431,312 at the exchange rate specified in the contract). IMP inženiring reduced the amount of the claim for contract losses on the Baghdad Tower Clock Project by deducting the United States dollar portion only of the advance payment retained by IMP Metall. IMP inženiring did not make any deduction for the Iraqi dinar portion of the advance payment retained by IMP Metall.

110. Any part of any advance payment still in hand must be deducted from the direct losses incurred by IMP Metall in the amount of USD 2,503,868 (USD 2,368,671 for unpaid monthly statements and USD 135,197 for storage costs). The Panel finds that the amount of USD 1,875,270 must be deducted from the direct losses incurred by IMP Metall in the amount of USD 2,503,868. This calculation produces an amount of USD 628,598 in respect of the Baghdad Tower Clock Project.

(b) Al-Sijood Palace Project

111. The evidence submitted by IMP inženiring shows that IMP Metall retained the advance payment in the amounts of USD 751,551 (United States dollar portion) and IQD 7,244 (Iraqi dinar portion, converted to USD 23,244 at the exchange rate specified in the contract). IMP inženiring reduced the amount of the claim for contract losses on the Al-Sijood Palace Project by deducting the United States dollar portion only of the advance payment retained by IMP Metall. IMP inženiring did not make any deduction for the Iraqi dinar portion of the advance payment retained by IMP Metall.

112. Any part of any advance payment still in hand must be deducted from the direct losses incurred by IMP Metall in the amount of USD 906,576 (consisting of USD 506,636 for unpaid monthly statements, USD 343,633 for retention monies and USD 56,307 for storage costs). The Panel finds that the amount of USD 774,796 must be deducted from the direct losses incurred by IMP Metall in the amount of USD 906,576. This calculation produces an amount of USD 131,780 in respect of the Al-Sijood Palace Project.

4. Recommendation

113. The Panel recommends compensation in the amount of USD 760,378 for contract losses.

B. Loss of tangible property

1. Facts and contentions

114. IMP Metall seeks compensation in the amount of USD 213,211 for loss of tangible property. The claim is for loss of fixed assets that were allegedly “forcefully taken over” by the Iraqi authorities.

115. In the “E” claim form, IMP Metall characterised this loss element as part of its claim for “payment or relief to others”, but the Panel finds that it is more accurately described as a claim for loss of tangible property.

2. Analysis and valuation

116. IMP Metall claims that it lost certain fixed assets, namely vehicles, which were kept on site at the Baghdad Tower Clock Project. IMP inženiring submitted letters sent by IMP Metall to Al-Fao in July and August 1992, claiming the value of the vehicles at their "unwritten off value" of USD 188,683, plus monthly financing costs of USD 1,888 and "consequential damage" of USD 22,641. IMP inženiring also submitted letters sent by IMP Metall to Al-Fao in September and October 1992 requesting information as to the procedure for cancelling custom guarantees over its assets.

117. In the letters sent to Al-Fao in July and August 1992, IMP Metall refers to the "forceful taking over of our assets" but does not specify the date on which the alleged taking over of the assets occurred. Given the dates of these letters, the Panel considers that it is likely that the assets were confiscated by the Iraqi authorities in 1992. Applying the approach taken with respect to the confiscation of tangible property by the Iraqi authorities after the liberation of Kuwait, as set out in paragraph 165 of the Summary, the Panel recommends no compensation.

3. Recommendation

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

C. Financial losses

1. Facts and contentions / analysis and valuation

119. IMP Metall seeks compensation in the total amount of USD 41,942 for financial losses. The claim is for bank commission charges allegedly incurred on (a) the Baghdad Tower Clock Project in the amount of USD 14,137, and (b) the Al-Sijood Palace Project in the amount of USD 27,805.

120. In the "E" claim form, IMP Metall characterised this loss element as part of its claim for "payment or relief to others", but the Panel finds that it is more accurately described as a claim for financial losses.

121. The Panel considers each of the projects, in turn, as follows:

(a) Baghdad Tower Clock Project

122. IMP inženiring states that IMP Metall incurred bank commission charges in the amount of USD 14,137. IMP inženiring provided bank debit advices dated from 27 September 1990 to 7 February 1992 issued by the Bank für Kärnten und Steiermark. These debit advices show debits from the account of IMP Metall in the amount of USD 14,137. IMP inženiring gives no explanation of the nature of this claim. However, the debit advices appear to relate to guarantee numbers 33635, 33636 and 33637 issued by IMP Metall to Al-Fao. The debit advices indicate that guarantee number 33635 was the performance bond, but it is not clear what the other two guarantees were, and how they related to the Baghdad Tower Clock Project. Accordingly, the Panel recommends no compensation for bank commission charges allegedly incurred on the Baghdad Tower Clock Project.

(b) Al-Sijood Palace Project

123. IMP inženiring states that IMP Metall incurred bank commission charges in the amount of amount of USD 27,805. IMP inženiring provided bank debit advices dated from 21 September 1990 to 5 September 1991 issued by the Bank für Kärnten und Steiermark. The debit advices show debits from the account of IMP Metall in the amount of USD 28,513, and appear to relate to guarantee numbers 34940, 34941 and 35196 issued by IMP Metall to Al-Fao. The guarantees are referred to as "performance bonds" in the debit advices. IMP inženiring gives no explanation of the nature of this claim and how the guarantees related to the Al-Sijood Palace Project. Accordingly, the Panel recommends no compensation for bank commission charges allegedly incurred on the Al-Sijood Palace Project.

2. Recommendation

124. The Panel recommends no compensation for financial losses.

D. Summary of recommended compensation for IMP Metall

Table 7. Recommended compensation for IMP Metall

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	8,040,489	760,378
Loss of tangible property	213,211	nil
Financial losses	41,942	nil
Interest	1,187,040	--
Total	9,482,682	760,378

125. Based on its findings regarding IMP Metall's claim, the Panel recommends compensation in the amount of USD 760,378. The Panel finds the date of loss to be 2 August 1990.

IV. UNIVERSALE INTERNATIONAL REALITÄTEN GMBH (FORMERLY UNIVERSALE BAU AG)

126. Universale International Realitäten GmbH (formerly Universale Bau AG) ("Universale") is a corporation organised according to the laws of Austria. Universale was formerly known as Universale Bau AG, but changed to its current name after filing its claim before the Commission, as a result of restructuring of the company.

127. At the time of Iraq's invasion and occupation of Kuwait, Universale was a partner in two joint ventures which were established to carry out two projects in Iraq. The two projects involved the construction of Expressway No. 1, Lot 11, and of Basrah International Airport.

128. Universale seeks compensation in the amount of USD 324,567 (ATS 3,569,583) for claim preparation costs for the costs of assisting its joint venture partners on each of the above projects to

prepare two separate claims before the Commission for losses allegedly incurred during Iraq's invasion and occupation of Kuwait.

Table 8. Universale's claim

Claim element	Claim amount (USD)
Claim preparation costs	324,567
Total	324,567

A. Claim preparation costs

1. Facts and contentions

129. Universale seeks compensation in the total amount of USD 324,567 (ATS 3,569,583) for claim preparation costs. In the "E" claim form, Universale characterised this loss element as "other losses", but the Panel finds that it is more accurately classified as a claim for claim preparation costs.

130. As noted above, at the time of Iraq's invasion and occupation of Kuwait, Universale was a partner in two joint ventures in Iraq. The first of these was a joint venture with two German companies, Strabag AG ("Strabag") and Polensky & Zöllner. On 2 March 1981, the joint venture was awarded a contract to construct Expressway No. 1, Lot 11, in Iraq (the "Expressway Project"). On 12 March 1981, the contract was signed between the joint venture and the Government of Iraq, Ministry of Housing and Construction, State Corporation of Roads and Bridges.

131. The second joint venture was also with Strabag and another German company, Bilfinger & Berger Bauaktiengesellschaft. On 12 November 1980, the joint venture was awarded a contract for the construction of Basrah International Airport (the "Airport Project"). The contract was signed on the same day between the joint venture and the Government of Iraq, Ministry of Housing and Construction, State Corporation of Roads and Bridges.

132. Payments under both contracts were allegedly outstanding at the time of Iraq's invasion and occupation of Kuwait. Strabag brought a claim before the Commission on behalf of each joint venture for its respective losses. The claim brought by Strabag in relation to the Expressway Project was considered by the "E3" Panel in its "Report and recommendations made by the Panel of Commissioners concerning the seventh instalment of 'E3' claims" (S/AC.26/2000/3). The claim brought by Strabag in relation to the Airport Project was considered by the "E3" Panel in its "Report and recommendations made by the Panel of Commissioners concerning the nineteenth instalment of 'E3' claims" (S/AC.26/2002/15).

133. Universale alleges that it incurred costs in connection with the preparation of these claims, including the costs of preparing documentation, legal fees and overheads of staff involved in the preparation of both claims.

2. Analysis and valuation

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

3. Recommendation

135. The Panel makes no recommendation in respect of this claim.

B. Summary of recommended compensation for Universale

Table 9. Recommended compensation for Universale

Claim element	Claim amount (USD)	Recommended compensation (USD)
Claim preparation costs	324,567	--
Total	324,567	--

136. Based on its findings regarding Universale's claim, the Panel makes no recommendation in respect of the claim.

V. POLYTECHNA CO. LIMITED

137. Polytechna Co. Limited ("Polytechna") is a corporation organised according to the laws of the Czech Republic. In the "E" claim form, Polytechna describes its business as one of "technical cooperation". An excerpt from the Commercial Registry in Prague which was submitted with the claim indicates that Polytechna provides consultancy services and expertise in relation to geological research, engineering, mining and other fields.

138. At the time of Iraq's invasion and occupation of Kuwait, Polytechna had five separate contracts with the State Organisation for Roads and Bridges of Iraq (the "State Organisation") to provide the services of Czech experts to supervise the construction of various roads, airports, tunnels and bridges in Iraq. Polytechna claims that amounts are outstanding under each of these contracts. Polytechna also alleges that it incurred financial expenses as a result of the accumulation of debt owed to it by the State Organisation and the inability to recover that debt after August 1990.

139. Polytechna seeks compensation in the total amount of USD 1,448,812 for contract losses and financial losses.

Table 10. Polytechna's claim

Claim element	Claim amount (USD)
Contract losses	1,252,673
Financial losses	196,139
Total	1,448,812

A. Contract losses

1. Facts and contentions

140. Polytechna seeks compensation in the amount of USD 1,252,673 for contract losses. The claim relates to five contracts which Polytechna entered into with the State Organisation between 1979 and 1988.

141. According to the terms of the contracts, Polytechna agreed to provide engineers and other technically qualified personnel and experts to the State Organisation. The expert personnel received monthly payments in Iraqi dinars directly from the State Organisation, based on proof of their presence in Polytechna's office in Baghdad. During the term of the contractual works, Polytechna's experts received their salaries each month without delay and each expert received all monies due up to the time of their departure from Iraq in August 1990.

142. The State Organisation also paid "overhead charges" to Polytechna for provision of the experts' services and for "backstopping" services in its home office. The "overhead charges" were paid in Swiss francs according to monthly invoices issued by Polytechna and presented to the State Organisation for approval. The State Organisation issued a payment order for each invoice and requested the Al Rafidain Bank in Baghdad to obtain approval from the Central Bank of Iraq for the transfer of foreign currency to Polytechna's account in Prague. Initially, as soon as approval was obtained, the Al Rafidain Bank transferred payment to Polytechna. The State Organisation considered its obligations fulfilled upon issuing payment orders, and Polytechna had to secure the transfer of outstanding sums with the Al Rafidain Bank.

143. In 1986 and 1987, transfers to Polytechna's account were increasingly subject to delay. Polytechna states that this was due to the Central Bank of Iraq adopting a different practice of approving transfers abroad on a lump sum basis, sometimes once or twice a year only, and at random intervals. The last transfer relating to the five contracts was received by Polytechna in 1989 for invoices issued in 1986 and 1987. Polytechna continued to seek payment for outstanding amounts up to August 1990.

144. Polytechna states that the operations of its branch office in Baghdad could not be renewed in the years following Iraq's invasion and occupation of Kuwait. Polytechna claims that, "due to the embargo", it was unable to send its specialists to Iraq in March 1991 to negotiate outstanding payments with the Iraqi authorities. Polytechna was also unable to prepare its audit statements for

1990, which were, according to Polytechna, required under Iraqi law as a condition of further operation of its office in Baghdad and of transfer of all outstanding amounts to Prague.

145. Polytechna alleges that the invoiced amounts set out in table 11, infra, remain outstanding.

Table 11. Polytechna's claim for contract losses

Contract	Date of contract	Amount outstanding (USD)
(a) Contract for consulting and engineering services for the construction of airports and other structures	25 June 1979	101,060
(b) Contract for consulting and engineering services for the construction of bridges	13 March 1980	462,552
(c) Contract for consulting and engineering services for the construction of bridges and tunnels	6 May 1981	62,644
(d) Contract for consulting and engineering services for the construction of roads, bridges and establishment of the computer centre	25 November 1981	555,232
(e) Contract of employment of Czechoslovak experts by the State Organisation upon consulting and engineering services for design and construction of roads, bridges and tunnels	15 December 1988	71,185
Total		1,252,673

2. Analysis and valuation

146. In support of its claim for contract losses, Polytechna provided extensive evidence, including copies of the five contracts, as well as all of the outstanding invoices rendered pursuant to those contracts. This evidence indicates that the performance that created the debts in question occurred prior to May 1990. The claim for these unpaid invoices is outside the jurisdiction of the Commission and is not compensable under Security Council resolution 687 (1991). Applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 43 to 45 of the Summary, the Panel recommends no compensation.

3. Recommendation

147. The Panel recommends no compensation for contract losses.

B. Financial losses

1. Facts and contentions

148. Polytechna seeks compensation in the amount of USD 196,139 for financial losses. The claim relates to financial expenses which Polytechna alleges it incurred as a result of the accumulation of debt owed to it by the State Organisation and the inability to recover that debt after August 1990. Polytechna states that it had to "draw credits" to pay its outstanding debts in Iraq and had to pay

interest in the amount of USD 179,695 on those credits. Moreover, Polytechna states that the credits were not sufficient and that it incurred late charges in the amount of USD 16,444 on debts owed to its local clients. In the "E" claim form, Polytechna characterised these losses as "other losses", but the Panel finds that they are more accurately classified as a claim for financial losses.

149. Polytechna did not provide any further details about the nature of its claim for financial losses. The amounts claimed for financial losses are summarised in table 12, infra.

Table 12. Polytechna's claim for financial losses

Loss item	Claim amount (USD)
Interest on bank credits	
1990-1991:	14,893
1992:	42,433
1993:	122,369
Subtotal (interest on bank credits):	179,695
Late charges	16,444
Total	196,139

150. In support of its claim for interest on the bank credits, Polytechna provided evidence including bank statements and letters from the Federal Ministry of the Czechoslovak Republic (which was subsequently known as the Ministry of Finance of the Czech Republic), showing that compensation for the payments of interest claimed in the years 1990-1991, 1992 and 1993 was received from the Ministry of Finance. Polytechna also provided a letter of confirmation dated 11 December 1992 from its bank, Société Générale Komercni Banka, which states the debit interest owing by Polytechna. The amount stated is well below the amount claimed by Polytechna. No explanation was provided for the difference between the two amounts.

151. In support of its claim for the late charges, Polytechna submitted a self-generated four-page document listing the names of local clients in respect of whom Polytechna incurred late charges on debts in the amount of USD 16,444.

2. Analysis and valuation

152. Evidence submitted by Polytechna indicates that it received compensation from the Government of the Czech Republic for its financial losses, although there is conflicting evidence as to the amount of compensation received.

153. Polytechna submitted correspondence from the Ministry of Finance of the Czech Republic as evidence of receipt of such compensation. However, this correspondence does not impose a requirement upon Polytechna to repay the amounts received as compensation. In addition, Polytechna states, in its response to the article 34 notification, that it has no authorisation from the Ministry of Finance of the Czech Republic to bring the claim on its behalf. Given that Polytechna received

compensation for its alleged financial losses, the Panel finds that Polytechna failed to demonstrate that it has suffered a financial loss.

154. Moreover, the Panel finds that Polytechna failed to explain how non-payment of outstanding invoices by the State Organisation was directly related to Polytechna's financial difficulties. In particular, Polytechna did not demonstrate that it had no other option but to draw credits and to incur late charges on debts to local clients because of the debt accumulated by the State Organisation. Most of the debt owing by the State Organisation was incurred well before Iraq's invasion and occupation of Kuwait, and Polytechna may have experienced financial difficulties regardless of the events of August 1990. Accordingly, the Panel finds that Polytechna failed to provide sufficient evidence that the alleged expenses were incurred as a direct result of Iraq's invasion and occupation of Kuwait.

3. Recommendation

155. The Panel recommends no compensation for financial losses.

C. Summary of recommended compensation for Polytechna

Table 13. Recommended compensation for Polytechna

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	1,252,673	nil
Financial losses	196,139	nil
Total	1,448,812	nil

156. Based on its findings regarding Polytechna's claim, the Panel recommends no compensation.

VI. EL-NASR COMPANY FOR CIVIL WORKS

157. El-Nasr Company for Civil Works ("El-Nasr") is a corporation organised according to the laws of Egypt. El-Nasr did not provide any details regarding the nature of its business, or its involvement in Iraq at the time of Iraq's invasion and occupation of Kuwait. However, in the materials filed with the claim, El-Nasr refers to its contract with the Government of Iraq, and states in the "E" claim form that it is a "public sector" company.

158. El-Nasr seeks compensation in the total amount of USD 726,816 for financial losses and interest.

159. In its response to the article 15 notification (as defined in paragraph 14 of the Summary), El-Nasr purported to increase the amount of interest claimed in the "E" claim form from USD 128,862 to USD 894,335. 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 has not been 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.

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

Table 14. El-Nasr's claim

Claim element	Claim amount (USD)
Financial losses	597,954
Interest	128,862
Total	726,816

A. Financial losses

1. Facts and contentions

161. El-Nasr seeks compensation in the amount of USD 597,954 for financial losses.

162. At the time of Iraq's invasion and occupation of Kuwait, El-Nasr had a bank account into which money owing to it for contractual work performed in Iraq was paid. El-Nasr states that it obtained approval from the Central Bank of Iraq to transfer IQD 126,867 from this account to an account with its bank in Cairo, Egypt. El-Nasr alleges that this transfer was never carried out due to Iraq's invasion and occupation of Kuwait, and seeks to recover the amount of IQD 126,867 that was debited from its account, but never transferred, as well as the remaining balance in its account of IQD 50,159.

163. In the "E" claim form, El-Nasr characterised this loss element as "other losses", but the Panel finds that it is more accurately classified as a claim for financial losses.

164. The Panel considers each item of the claim for financial losses in turn, as follows:

(a) Amount to be transferred to Cairo

165. According to materials submitted with the "E" claim form, El-Nasr obtained approval from the Central Bank of Iraq to transfer two sums of IQD 20,861 and IQD 126,867 to its current account at the Arab African International Bank in Cairo, Egypt. El-Nasr does not state when it obtained approval to make the transfers, but it must have been at some stage prior to 25 March 1989, the date on which the transfer of IQD 126,867 was to have taken place.

166. El-Nasr states that, according to its contract with the Government of Iraq, each of these amounts was to be transferred in instalments, rather than as lump sums. The amount of IQD 20,861 was transferred in instalments to El-Nasr's account in Egypt, with the last transfer taking place on 25 January 1990. This aspect of the claim for financial losses therefore relates only to the amount of IQD 126,867, which El-Nasr claims was never transferred.

167. El-Nasr states that on 25 March 1989, IQD 126,867 was withdrawn and debited from its account with the Al Rafidain Bank in Iraq. El-Nasr submitted a copy of the transfer order (which El-Nasr refers to as a "letter of deduction") indicating that the transfer of IQD 126,867 was to take place

on 25 March 1989 to an account in Cairo belonging to "Co. Gemi Al Nasr". It did not, however, submit any account statements from the Al Rafidain Bank or any other evidence showing that IQD 126,867 was in fact withdrawn from its account.

(b) Balance of Iraqi bank account

168. El-Nasr also seeks to recover the amount of IQD 50,159 which it claims was the balance remaining in its account at the Al Rafidain Bank prior to Iraq's invasion and occupation of Kuwait. El-Nasr states that this amount is the final balance of the account, as it had completed all contractual work and the owner had taken over the site. El-Nasr did not transfer this amount to its bank in Cairo because it did not have the approval of the Central Bank of Iraq to do so. El-Nasr did not submit any evidence confirming the balance in its account in Iraq, claiming that all records of its account are "registered in the bank files in Iraq" and that all company files were left behind due to the outbreak of hostilities in Kuwait.

2. Analysis and valuation

169. In support of its claim, El-Nasr provided a copy of the transfer advice dated 25 March 1989 from the Al Rafidain Bank, concerning the transfer of IQD 126,867 and other minor amounts for postage and telegraph commission. In addition, it provided transfer advice notifications from the Arab African International Bank in Cairo crediting various amounts to El-Nasr's account. It is not clear to the Panel how the latter transfer advice notifications relate to El-Nasr's claim before the Commission.

(a) Amount to be transferred to Cairo

170. El-Nasr did not explain how the alleged non-transfer of IQD 126,867 was directly caused by Iraq's invasion and occupation of Kuwait. That is, El-Nasr failed to demonstrate that the transfer, which was due to be made in March 1989, was delayed by Iraq's invasion and occupation of Kuwait some 16 months later in August 1990. This is particularly so given that El-Nasr acknowledged that the last instalment of the other amount transferred to its account in Cairo (IQD 20,861) was successfully completed in January 1990.

(b) Balance of Iraqi bank account

171. The Panel finds that El-Nasr provided no evidence of the existence of the amount of IQD 50,159, which El-Nasr alleged was the balance of its account in Iraq. In the article 34 notification, El-Nasr was specifically requested to provide evidence of ownership of the funds in the bank account, and in particular, the latest available bank statement relating to the account. El-Nasr responded to the article 34 notification, but it did not provide the requested documentation.

3. Recommendation

172. The Panel recommends no compensation for financial losses.

B. Summary of recommended compensation for El-Nasr

Table 15. Recommended compensation for El-Nasr

Claim element	Claim amount (USD)	Recommended compensation (USD)
Financial losses	597,954	nil
Interest	128,862	--
Total	726,816	nil

173. Based on its findings regarding El-Nasr's claim, the Panel recommends no compensation.

VII. CLE S.A.

174. CLE S.A. ("CLE") is a corporation organised according to the laws of France. CLE stated in the "E" claim form that it undertakes construction and engineering projects. CLE also stated in the "E" claim form that it had ceased operating in its own right at the time of filing the claim in 1995 because it merged with another French company, Technip S.A.

175. CLE did not explain the nature of its involvement in Iraq at the time of Iraq's invasion and occupation of Kuwait. There are, however, brief details on file which indicate that CLE was involved in the supply of natural gas units in Iraq. CLE also states that the services involved placing "two Zubair units under preservation".

176. CLE seeks compensation in the total amount of USD 3,001,060 (15,731,559 French francs (FRF)) for payment or relief to others and financial losses.

Table 16. CLE's claim

Claim element	Claim amount (USD)
Payment or relief to others	81,991
Financial losses	2,919,069
Total	3,001,060

A. Payment or relief to others

1. Facts and contentions

177. CLE seeks compensation in the amount of USD 81,991 (FRF 429,801) for payment or relief to others. The claim is for losses allegedly incurred through the payment of salaries and welfare costs of two of its employees who were detained by the Iraqi authorities between 2 August and 29 October 1990. The amount claimed, which was calculated on the basis that the two employees were taken hostage for 89 days, is summarised in table 17, infra.

Table 17. CLE's claim for payment or relief to others
(French francs)

Name	Gross salary and employer's contribution toward welfare costs			Paid vacation 2.5 days / month	Home leave 2 days / month	Taxes on salaries (payroll duties)	Total
	August 1990	September 1990	October 1990				
First employee	57,379	57,379	57,366	19,873	15,811	5,715	213,523
Second employee	58,122	58,122	58,108	20,121	16,016	5,789	216,278
Total	115,501	115,501	115,474	39,994	31,827	11,504	429,801

2. Analysis and valuation

178. In the "Report and recommendations made by the Panel of Commissioners concerning the seventeenth instalment of 'E3' claims" (S/AC.26/2001/2), the Panel stated at paragraph 27 that in a situation where employees were held hostage, salaries paid to employees are "prima facie compensable as salary paid for unproductive labour". However, the Panel noted that compensation would be awarded only when the claimant provides sufficient evidence to establish its loss in relation to the payment of unproductive salaries.

179. Applying these principles, the Panel finds that CLE did not provide any evidence in support of its claim for payment or relief to others. In particular, CLE did not provide any evidence that the amount claimed was actually paid to its two employees. In the article 34 notification, CLE was requested to provide evidence of payment of the claimed salaries and welfare costs, as well as evidence of employment and detention of both employees. However, CLE did not reply to the article 34 notification.

3. Recommendation

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

B. Financial losses

1. Facts and contentions

181. CLE seeks compensation in the amount of USD 2,919,069 (FRF 15,301,758) for financial losses. The claim is for (a) loss of funds in a bank account in Iraq, (b) loss of petty cash, and (c) charges for calls made on a guarantee given in respect of a project known as the "Steel Sponge contract".

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

183. The Panel considers each item of the claim for financial losses in turn, as follows:

(a) Balance of Iraqi bank account

184. CLE seeks compensation in the amount of USD 472,929 (FRF 2,479,092) for loss of the balance of an account at a bank in Iraq. CLE alleges that the amount of IQD 149,253 was the balance of its account with the Al Rafidain Bank in Baghdad. It converted this amount to FRF 2,479,092 without providing any details or evidence of the exchange rate it used in performing the conversion.

185. CLE states that it was forced to abandon its residual monetary assets in Iraq (including the funds in its bank account) due to Iraq's invasion and occupation of Kuwait.

(b) Petty cash

186. CLE seeks compensation in the amount of USD 120,408 (FRF 631,180) for the loss of petty cash left behind in Iraq. CLE alleges that it was forced to abandon petty cash in Iraq in the amount of IQD 38,000. It converted this amount to FRF 631,180 without providing any details or evidence of the exchange rate it used in performing the conversion.

(c) Calls on guarantee

187. CLE seeks compensation in the amount of USD 2,325,732 (FRF 12,191,486) for charges for calls made on a counter-guarantee given by CLE in respect of a project known as the "Steel Sponge contract".

188. CLE provided two "Zubair units" to the Ministry of Industry State Organisation of Industrial Design and Construction of Iraq (the "Buyer"). Evidence submitted with the claim indicates that the units were supplied for the direct reduction of iron ore by natural gas. According to documents submitted with the claim, the Central Bank of Iraq provided a bank guarantee in the name of the Buyer for the benefit of CLE with respect to the sale of the Zubair units.

189. CLE alleges that it entered into a contract with Compagnie Financière de CIC et de l'Union Européenne ("CIC") and Compagnie Française pour le Commerce Extérieur ("COFACE") to "share in the risk to the extent of 5% for COFACE and 5% for banks". CLE alleges that it was required to repay to CIC and COFACE, upon the default of the Buyer, a total of 10 per cent of each instalment of principal and interest which was owing, as set out in table 18, infra.

Table 18. CLE's claim for financial losses (calls on guarantee)

Loss item	Claim amount (FRF)
(a) Realised losses as at 31 October 1993	
Calls on guarantee paid to CIC	4,139,016
Calls on guarantee paid to COFACE	7,423,079
Subtotal (Realised losses as at 31 October 1993)	11,562,095
(b) Estimated future losses	
Calls on guarantee unpaid to CIC	81,103
Instalments for which CIC has not called for the guarantee	233,592
Instalments for which COFACE has not called for the guarantee	314,696
Subtotal (Estimated future losses)	629,391
Total	12,191,486

190. CLE provided no explanation of its arrangements with CIC and COFACE, nor any explanation as to why it was required to make repayments to CIC and COFACE.

2. Analysis and valuation

(a) Balance of Iraqi bank account

191. In support of its claim for the balance in its bank account in Iraq, CLE provided an internally-generated document entitled "Trial Balance as of Sept. 30, 1990". This document shows an amount of IQD 149,253 held on deposit in the Al Rafidain Bank, Baghdad. CLE also provided an internally-generated document entitled "Rafidain Bank Baghdad 1005 – Year 1990" which shows a balance of IQD 149,253 owing at the end of the financial period. Finally, CLE provided what may be a bank statement showing the amount of IQD 149,253. This document was not translated into English and the Panel was therefore not able to verify the nature or content of the document.

192. Applying the principles set out in paragraphs 154 to 158 of the Summary, the Panel finds that CLE failed to provide sufficient evidence in support of its claim for the balance of its bank account in Iraq. In particular, CLE failed to provide any independent evidence of its alleged loss, such as bank accounts, bank statements or other correspondence with the Al Rafidain Bank. Moreover, there is no evidence as to whether CLE would have obtained permission from the Iraqi authorities to transfer the funds out of Iraq, or whether CLE was able to, or even attempted to, obtain the balance of its account from the Al Rafidain Bank upon the cessation of hostilities in Kuwait. CLE was requested in the article 34 notification to provide such evidence. However, CLE did not reply to the article 34 notification.

(b) Petty cash

193. In support of its claim for loss of petty cash, CLE provided an internally-generated document entitled "Trial Balance as of Sept. 30, 1990" which shows an amount of IQD 38,000 as "cash". CLE also provided an internally-generated document entitled "Petty Cash Baghdad – Year 1990" which shows a balance of IQD 38,000 owing at the end of the financial period.

194. Applying the principles set out in paragraph 159 of the Summary, the Panel finds that CLE failed to provide sufficient evidence in support of its claim for the petty cash. In particular, CLE failed to provide sufficient evidence of the amount claimed, such as company affidavits verifying the amount claimed. CLE was requested in the article 34 notification to provide independent evidence, other than its own internally-generated records, verifying the amount of, and circumstances relating to, the loss of the petty cash. However, CLE did not reply to the article 34 notification.

(c) Calls on guarantee

195. In support of its claim for calls on the guarantee, CLE provided several internally-generated documents showing amounts owing to CIC and COFACE. It also provided a series of letters from CIC and COFACE showing amounts owing under the financial arrangements made with CLE, as well as bank vouchers indicating payment of various amounts by CLE.

196. The Panel finds that CLE failed to provide sufficient evidence in support of its claim. Firstly, CLE provided no independent evidence of the provision of the Zubair units, nor did it provide any details or contracts relating to the financial arrangements entered into with CIC and COFACE. CLE also failed to explain the circumstances surrounding the claim, despite being requested to provide further evidence in the article 34 notification. In the article 34 notification, CLE was also requested to explain how its losses were directly related to Iraq's invasion and occupation of Kuwait, to provide copies of the relevant guarantees and credit agreements and to explain how the amounts of principal and interest allegedly called under the guarantee were calculated. CLE failed to reply to the article 34 notification.

3. Recommendation

197. The Panel recommends no compensation for financial losses.

C. Summary of recommended compensation for CLE

Table 19. Recommended compensation for CLE

Claim element	Claim amount (USD)	Recommended compensation (USD)
Payment or relief to others	81,991	nil
Financial losses	2,919,069	nil
Total	3,001,060	nil

198. Based on its findings regarding CLE's claim, the Panel recommends no compensation.

VIII. TECHNIQUE ET REGULATION S.À.R.L.

199. Technique et Regulation S.à.r.l. ("Technique") is a corporation organised according to the laws of France. Technique describes its business as one of providing industrial services. Technique states that at the time of Iraq's invasion and occupation of Kuwait, it was involved in the start up of liquid petroleum gas plants for a French company, Technip S.A., in Zubair, Iraq.

200. Technique seeks compensation in the total amount of USD 191,619 (FRF 1,004,465) for contract losses, loss of tangible property and payment or relief to others.

Table 20. Technique's claim

Claim element	Claim amount (USD)
Contract losses	117,322
Loss of tangible property	2,013
Payment or relief to others	72,284
Total	191,619

201. On 21 December 2000, Technique was sent an article 15 notification requesting it to comply with the formal requirements for filing a claim. Technique was requested to reply on or before 21 June 2001. Technique did not submit a reply. On 29 June 2001, Technique was sent a reminder. The deadline for Technique to reply was 29 August 2001. Technique did not reply to the reminder notification.

202. On 27 July 2001, Technique was sent an article 34 notification requesting it to furnish further evidence in support of its claim. Technique was requested to reply on or before 27 November 2001. Technique did not submit a reply. On 18 December 2001, Technique was sent a reminder article 34 notification. The deadline for Technique to reply was 7 January 2002. Technique did not reply to the reminder article 34 notification.

203. Notwithstanding the requirements of article 15 and 34 of the Rules, the Panel considered such information and documentation as had been submitted and found it to be insufficient to demonstrate the circumstances and amount of the claimed losses.

A. Summary of recommended compensation for Technique

Table 21. Recommended compensation for Technique

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	117,322	nil
Loss of tangible property	2,013	nil
Payment or relief to others	72,284	nil
Total	191,619	nil

204. Based on its findings regarding Technique's claim, the Panel recommends no compensation.

IX. NATIONAL PROJECTS CONSTRUCTION CORPORATION LIMITED

205. National Projects Construction Corporation Limited ("National Projects") is a corporation organised according to the laws of India. National Projects' Memorandum of Association indicates that it was established to engage in a wide variety of construction projects.

206. At the time of Iraq's invasion and occupation of Kuwait, National Projects was working on two projects in Iraq pursuant to contracts with the Government of Iraq. The first of these was a project involving the laying and maintenance of collector and field drains, as well as the levelling of fields at the Maisan State Sugar Enterprises in Major Al-Kabir in Amara, Iraq (the "ARPS – 4 Works"). National Projects refers to a second project known as the "Nahar SAAD Works", but did not provide any details about the nature of this project.

207. National Projects seeks compensation in the total amount of USD 3,824,437 (IQD 989,187 and USD 643,771) for contract losses, loss of profits, loss of real property, loss of tangible property, payment or relief to others, financial losses, and other losses.

Table 22. National Projects' claim

Claim element	Claim amount (USD)
Contract losses	752,505
Loss of profits	242,328
Loss of real property	96,463
Loss of tangible property	43,508
Payment or relief to others	85,209
Financial losses	1,226,617
Other losses	1,377,807
Total	3,824,437

A. Contract losses

1. Facts and contentions

208. National Projects seeks compensation in the amount of USD 752,505 (IQD 81,910 and USD 489,129) for contract losses. The claim is for losses allegedly incurred in connection with the ARPS – 4 Works and the Nahar SAAD Works.

209. The Panel considers each of the projects in turn, as follows:

(a) ARPS – 4 Works

210. National Projects states that the value of the contract awarded in respect of drainage work to be performed at the Maisan State Sugar Enterprises in Major Al-Kabir, Iraq, was IQD 728,436. National Projects states that the contract was awarded by the Government of Iraq and was subject to a deferred payment arrangement. National Projects did not provide any details in relation to the specific terms of payment under the contract, despite having been specifically requested to do so in the article 34 notification. National Projects was also requested to provide a copy of the contract, which it failed to do.

(b) Nahar SAAD Works

211. National Projects provided no details about the nature of this project, other than stating that the owner of the project was the State Organisation for Land and Reclamation, Iraq. National Projects failed to provide a copy of the contract, despite being requested to do so in the article 34 notification.

212. National Projects' claim under both contracts can be summarised as follows:

Table 23. National Projects' claim for contract losses

Loss item	Claim amount (IQD)	Claim amount (USD)
ARPS – 4 Works		
(a) Bills submitted for work done by National Projects from May-December 1990	24,645	
(b) 10% retention money	35,989	
Subtotal (ARPS – 4 Works)	60,634	
Nahar SAAD Works		
(a) Amount due against work done in final bill	114,720	
Less advance payment	(67,774)	
Net due for work on final bill	46,946	
(b) 10% retention money	118,250	
(c) Amount receivable "as per personal account"	8,199	
Subtotal (Nahar SAAD Works)	173,395	
Total	234,029	752,505
Amount claimed (USD)	65% of total = 152,119	489,129
Amount claimed (IQD)	35% of total = 81,910	

2. Analysis and valuation

213. In support of its claim for contract losses, National Projects provided an internally-generated document showing that the amount of IQD 24,645 was due from the "project authority" as at 31 March 1995 for works performed on the ARPS – 4 Works. National Projects also provided an internally-generated document with the amount of IQD 35,989 circled, presumably to indicate the amount of retention money allegedly paid by National Projects on the ARPS – 4 Works. Finally, National Projects provided an internally-generated statement showing amounts due from the "project authority" (including IQD 114,720 and IQD 8,199 for the outstanding works and the "personal account", respectively) as at 31 March 1995 for the Nahar SAAD Works. It is not clear what is meant by the amount receivable "as per personal account".

214. The Panel finds that National Projects did not provide sufficient evidence in support of its claim for contract losses. In particular, National Projects did not provide copies of the contracts for either project, invoices for work performed, evidence of payment by National Projects of the retention money, evidence of repayment of the advance made by the owners of the projects and taking over certificates. In the article 34 notification, National Projects was requested to provide all of this information. In its response to the article 34 notification, National Projects states that important

documentation was lost during Iraq's invasion and occupation of Kuwait. However, the Panel recommends no compensation in the absence of sufficient evidence in support of the claim.

3. Recommendation

215. The Panel recommends no compensation for contract losses.

B. Loss of profits

1. Facts and contentions

216. National Projects seeks compensation in the amount of USD 242,328 (IQD 75,364) for loss of profits. The claim relates to profits allegedly lost under the ARPS – 4 Works contract.

217. In the "E" claim form, National Projects characterised this loss element as "loss of earnings", but the Panel finds that it is more accurately classified as a claim for loss of profits.

218. National Projects calculates the claim as follows:

Table 24. National Projects' claim for loss of profits

Loss item	Claim amount (IQD)
Value of contract awarded	728,436
Work executed	(426,979)
Balance of works remaining	301,457
Total (Loss of profit 25% of IQD 301,457)	75,634

219. National Projects did not explain why it used the rate of 25 per cent in calculating its claim for loss of profits.

2. Analysis and valuation

220. National Projects did not provide any evidence in support of its claim for loss of profits. The Panel finds that National Projects failed to fulfil the evidentiary standard for loss of profits claims set out in paragraphs 144 to 150 of the Summary. Accordingly, the Panel recommends no compensation.

3. Recommendation

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

C. Loss of real property

1. Facts and contentions

222. National Projects seeks compensation in the amount of USD 96,463 (IQD 30,000) for loss of real property. National Projects states that the items in respect of which the claim is made include caravans, workshop buildings, water supply, pipelines and electrical wires, store buildings, office

buildings, home appliances and office equipment. The Panel notes that some of these items are likely to have been affixed to the project site and are thus appropriately described as real property, but that other items are more appropriately described as tangible property. However, as National Projects did not provide a detailed breakdown of the value of each item, the Panel did not reclassify any part of this claim as a loss of tangible property.

2. Analysis and valuation

223. National Projects provided no evidence in support of its claim for loss of real property. Accordingly, the Panel recommends no compensation.

3. Recommendation

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

D. Loss of tangible property

1. Facts and contentions

225. National Projects seeks compensation in the amount of USD 43,508 for loss of tangible property. The claim is made in respect of the vehicles as set out in table 25, infra.

Table 25. National Projects' claim for loss of tangible property

Type of vehicle	Make and model	Registration No.	Year	Claim amount (USD)
Super saloon car	Toyota 1981	207	1981	9,887
Pickup truck	Toyota 1982	357	1982	6,614
Station wagon	Toyota 1985	441	1985	(no value stated)
Station wagon	Toyota 1985	442	1985	27,007
Total				43,508

226. National Projects states that it "handed over" these vehicles to Maisan State Sugar Enterprises, Iraq, due to the forced premature closure of the projects during Iraq's invasion and occupation of Kuwait.

2. Analysis and valuation

227. National Projects provided no evidence in support of its claim for loss of tangible property. Accordingly, the Panel recommends no compensation.

3. Recommendation

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

E. Payment or relief to others

1. Facts and contentions

229. National Projects seeks compensation in the amount of USD 85,209 (IQD 26,500) for payment or relief to others. The claim is for the alleged costs of unproductive salary payments in the amount of IQD 24,000, consisting of wages of IQD 4,000 per month, paid by National Projects during the six-month period from 2 August 1990 to 31 January 1991. In addition, National Projects alleges that it incurred "expenditure on importation and deportation of workmen before contract period" in the amount of IQD 2,500. National Projects does not explain the nature of the latter claim.

230. In the "E" claim form, National Projects classified this loss element as "wages of idle labour / importation and deportation", but the Panel finds that it is more accurately classified as a claim for payment or relief to others since there is no indication that it was part of the claim for contract losses.

231. National Projects states that the Iraqi authorities did not issue visas in time to allow its employees to depart from Iraq in August 1990. The employees were forced to remain in Iraq until their repatriation at the end of January 1991. National Projects states that the owners of the projects issued the requisite letters for obtaining a visa on 26 January 1991.

232. According to National Projects, the owners of the two projects in Iraq were contractually obliged to supply all machinery, materials and spare parts required for the projects to National Projects free of charge. That is, the projects were awarded to National Projects on a labour rate basis only, with no machinery and materials to be supplied by National Projects.

233. National Projects states that due to the imposition of the trade embargo pursuant to Security Council resolution 661 (1990), neither National Projects nor the owners of the project sites were able to import into Iraq the equipment and materials necessary for National Projects to continue with the projects. Accordingly, National Projects incurred losses of wages paid to employees who were unable to work. National Projects states that the "import documents" (presumably documents that show that an attempt was made to import the relevant equipment) are not available as they were lost when its store in Iraq was looted.

2. Analysis and valuation

234. In support of its claim for payment or relief to others, National Projects provided a document which appears to be an internally-generated list of 45 employees. National Projects also provided a letter dated 4 October 1990 from its finance office in Iraq to the General Manager of National Projects in New Delhi, India. The letter encloses a repatriation statement listing the salaries and wages of 45 company employees for the month of September 1990 at 70 per cent of the value of the wages. The total amount which is shown as being payable is IQD 2,968, which is well below the amount of IQD 4,000 which National Projects claimed it paid to its workers per month.

235. Applying the principles set out in paragraph 178, supra, the Panel finds that National Projects did not provide sufficient evidence in support of its claim. In particular, National Projects failed to

provide any evidence, such as bank statements, payroll or accounting records, to prove that the salaries were actually paid.

3. Recommendation

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

F. Financial losses

1. Facts and contentions

237. National Projects seeks compensation in the amount of USD 1,226,617 (IQD 381,478) for financial losses. National Projects states that this amount represents cash balances in bank accounts in Iraq which could not be transferred to India. National Projects alleges that this amount could have been utilised if the works had not been subject to premature closure as a result of Iraq's invasion and occupation of Kuwait. National Projects does not give any details about the claim, including the name of the bank or banks where the cash was allegedly deposited.

2. Analysis and valuation

238. In support of its claim for financial losses, National Projects provided an internally-generated balance sheet which lists IQD 381,478 as "cash in bank". National Projects did not, however, provide any other evidence, such as bank statements. Applying the approach taken with respect to loss of funds in bank accounts in Iraq set out in paragraphs 154 to 158 of the Summary, the Panel finds that National Projects failed to provide sufficient evidence in support of its claim. Accordingly, the Panel recommends no compensation.

3. Recommendation

239. The Panel recommends no compensation for financial losses.

G. Other losses

240. National Projects seeks compensation in the amount of USD 1,377,807 (IQD 393,935 and USD 111,135) for other losses. The Panel considers each item of the claim for other losses in turn, as follows:

(a) Penalty for late submission of balance sheet

241. National Projects seeks compensation in the amount of USD 128,617 (IQD 40,000) for losses incurred as a result of the late submission of its balance sheet for the financial years 1990/91 and 1991/92. National Projects alleges that it incurred a penalty of IQD 20,000 for the late submission of its balance sheet and that an unnamed "associate" of National Projects incurred a similar penalty in the amount of IQD 20,000.

242. National Projects did not explain the nature of this claim and, in particular, how it is related to Iraq's invasion and occupation of Kuwait. It also failed to provide any evidence in support of the claim, despite having been specifically requested to do so in the article 34 notification. The limited

details provided by National Projects do not indicate when, and to whom, the balance sheets were required to be submitted, or the authority which levied the penalty claimed. Accordingly, the Panel recommends no compensation.

(b) War claim

243. National Projects seeks compensation in the amount of USD 110,322 for losses allegedly sustained as a result of its inability to pursue a claim arising from the war between Iran and Iraq which took place from 1980 to 1988. National Projects states that it had lodged a claim with the State Organisation for Land and Reclamation (the owner of the Nahar SAAD Works), in relation to a loss of property which allegedly occurred in 1984-1985 during the hostilities. National Projects states that this claim could no longer be pursued after Iraq's invasion and occupation of Kuwait.

244. The Panel finds that National Projects failed to demonstrate how this claim is the direct result of Iraq's invasion and occupation of Kuwait. Moreover, National Projects submitted no evidence in support of the claim. Accordingly, the Panel recommends no compensation.

(c) Expenditure on maintenance of office

245. National Projects seeks compensation in the amount of USD 1,135,009 (IQD 352,735 and USD 813) for losses it incurred in maintaining its office and employees in Iraq after the cessation of hostilities in Kuwait, and for the premature closure of the office. This claim relates to amounts allegedly incurred by National Projects for the four years from 1991 to 1995.

246. National Projects provided no evidence in support of this claim, nor a breakdown of the expenditure incurred, despite having been requested to do so in the article 34 notification. Accordingly, the Panel recommends no compensation.

(d) Deposit for telex

247. National Projects seeks compensation in the amount of USD 3,859 (IQD 1,200) for loss of a deposit for a telex. National Projects states that this amount was paid by way of a deposit to the Director of Telephones and Telex in Baghdad, Iraq, but was not refunded when National Projects left Iraq.

248. National Projects provided the receipt number for this transaction, but did not provide the receipt itself. National Projects was requested in the article 34 notification to explain this loss and how it was directly caused by Iraq's invasion and occupation of Kuwait. However, National Projects failed to submit any evidence in support of the claim. Accordingly, the Panel recommends no compensation.

H. Summary of recommended compensation for National Projects

Table 26. Recommended compensation for National Projects

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	752,505	nil
Loss of profits	242,328	nil
Loss of real property	96,463	nil
Loss of tangible property	43,508	nil
Payment or relief to others	85,209	nil
Financial losses	1,226,617	nil
Other losses	1,377,807	nil
Total	3,824,437	nil

249. Based on its findings regarding National Projects' claim, the Panel recommends no compensation.

X. ELETTRA PROGETTI S.P.A.

250. Elettra Progetti S.p.A. ("Elettra") is a corporation organised according to the laws of Italy. In its Statement of Claim, Elettra described itself as a supplier of industrial services.

251. At the time of Iraq's invasion and occupation of Kuwait, Elettra was engaged as a subcontractor to three Italian contractors on three separate projects in Iraq. Elettra asserts that it incurred costs in maintaining and providing assistance to its employees on the three projects who were forced to remain in Iraq. Elettra claims to have invoiced each of the contractors for the amounts it incurred, but states that it has not received payment.

252. Elettra seeks compensation in the total amount of USD 180,297 (209,018,827 Italian lire (ITL)) for contract losses.

Table 27. Elettra's claim

Claim element	Claim amount (USD)
Contract losses	180,297
Total	180,297

A. Contract losses

1. Facts and contentions

253. Elettra seeks compensation in the amount of USD 180,297 (ITL 209,018,827) for contract losses. The claim is for losses allegedly incurred by Elettra in payment of "direct and indirect remunerations, insurances, repatriation costs and general expenses, extraordinary assistance etc." made to its employees during their period of forced stay in Iraq between 2 August and 9 December 1990. Elettra has invoiced each of the three Italian contractors for these costs, but states that it has not received payment as the contractors invoked force majeure clauses in their respective contracts and refused to pay the invoiced amounts.

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

255. The Panel considers each contract in turn, as follows:

(a) Contract with Nuovo Pignone S.p.A. (Contract No. ACQU/DIMP 6/61815)

256. The first contract pursuant to which Elettra was engaged as a subcontractor in Iraq, was with Nuovo Pignone S.p.A. ("Nuovo Pignone"), an Italian company. Elettra contracted with Nuovo Pignone to supervise the commissioning and start up of the compressor stations at South Rumalia, Iraq (the "South Rumalia – South LPG Project"). The owner of the project was the State Organisation for Oil Projects, Baghdad (the "State Organisation").

257. The contract was dated 11 February 1987. The contractual works were to start "at the beginning of 1987", with seven days' advance notice of the starting date to be given by Nuovo Pignone to Elettra. The works were for an estimated duration of six months, which was subsequently extended by various amending agreements between the parties. The contract provided for monthly rates payable pursuant to monthly invoices rendered in Italian lire for the services of the foreman and the instrument and machinery supervisors.

258. According to the contract, Elettra was to bear certain expenses, including the payment of salaries and remuneration to its employees, insurance, and other expenses such as staff replacement costs (when replacement was made necessary through the fault of Elettra). Further, Nuovo Pignone was to bear, inter alia , the expenses of board and lodging, living and transport costs, the return journey to Italy in case of "popular riots, rising, wars and natural calamities", and the costs of providing medical treatment to Elettra's employees.

259. The force majeure clause provided for the obligations of the parties to be suspended in various circumstances, including war. Under this clause, if the circumstance of force majeure continued for a period exceeding four months, each party was able to rescind the contract in writing.

260. There were six subsequent amendments to this agreement in the period from February 1987 to February 1990, which varied matters such as the monthly rates payable in respect of the services of supervisors provided by Elettra.

(b) Contract with Saipem S.p.A. (Contract No. MONT/89/082)

261. The second contract was with Saipem S.p.A. ("Saipem"), an Italian company, to provide assistance during the assembling, reconditioning and commissioning of plants at the shipping terminal of Basrah, Iraq (the "Shipping Terminal Project"). The owner of the project is not mentioned in the materials submitted by Elettra, although a claim filed before the Commission by Saipem in relation to the Shipping Terminal Project contains invoices addressed to the State Organisation, which was presumably the owner of the project.

262. The contract refers in general terms to the services to be provided by Elettra for projects in Italy and abroad, including works involving electrical installations and petrochemical plants. Saipem subsequently requested Elettra's services on the Shipping Terminal Project. The contract was dated 17 November 1989, but took effect from 1 December 1989. It was to expire on 31 December 1990. According to the terms of the contract, each "intervention" or period of service provided by Elettra was to commence upon issue of a "services order" by Saipem. Elettra was to issue its invoice at the end of the works for each service order and was to be paid according to the rates specified in the contract. The duration of the stay abroad of Elettra's employees could not exceed two months for each service provided by Elettra, unless a longer stay was specifically requested by Saipem.

263. According to the contract, Saipem was to bear certain expenses, including the expenses of board and lodging of Elettra's employees, travel expenses, and medical expenses. Further, Elettra was to bear, inter alia, the expenses of remuneration of its employees, as well as repatriation and replacement costs of employees (when replacement was made necessary through the fault of Elettra).

264. The force majeure clause provided for the obligations of the parties to be suspended in various circumstances, including war. Under this clause, the party which was subject to a force majeure event was not responsible for the costs or damages caused to the other party by that event, if the first party gave notice of the event within 15 days of its occurrence. If the circumstance of force majeure continued for a period exceeding three consecutive months, each party was able to request cancellation of the contract.

265. Elettra provided several of the service orders issued in 1990, as well as revisions to those orders to prolong the services of various employees supplied by Elettra.

(c) Contract with Snamprogetti S.p.A. (Contract No. SEDE89/SPS/05298)

266. The third contract was with Snamprogetti S.p.A. ("Snamprogetti"), an Italian company, to provide assistance during the commissioning activities of a lube-oil plant at Basrah, Iraq (the "Lube-Oil Project"). The owner of this project is not mentioned in the materials submitted by Elettra, but a claim filed before the Commission by Snamprogetti in relation to the Lube-Oil Project refers to the State Organisation as the owner of the project.

267. The contract was dated 24 November 1989. The contractual works were to commence on 4 December 1989 and were to end on 10 February 1990. There was provision for the final date of the contract to be extended for three months if necessary. Ultimately, the parties agreed to extend the

contract to 31 July 1990. The rates to be paid for the services of Elettra's employees were stated in the contract, and payment was to be effected after receipt of a monthly invoice. The contract price was set at a maximum amount of ITL 34,000,000, which was subsequently increased to ITL 100,000,000.

268. According to the contract, Elettra was to bear certain expenses, including the payment of salaries and remuneration to its employees, insurance and various travel expenses, including extraordinary return of employees to Italy. Further, Snamprogetti was to bear, inter alia, the expenses of board and lodging, local transport costs, the return journey to Italy, and medical expenses.

269. There was no express force majeure provision in this contract. There was an amendment to the contract dated 16 May 1990 to increase the contract price and to extend the works until 31 July 1990.

(d) Invoices issued by Elettra

270. Elettra alleges that it issued invoices to each of its Italian contractors for the charges it incurred in respect of the assistance to its employees who were forced to remain in Iraq. Elettra submitted invoices dated between 20 November and 31 December 1990 which indicate that Elettra invoiced Nuovo Pignone for the amount of ITL 35,333,010 in respect of the South Rumalia – South LPG Project. In addition, Elettra submitted invoices dated between 10 September 1990 and 15 February 1991 which indicate that Elettra invoiced Saipem for the amount of ITL 487,968,086 in respect of the Shipping Terminal Project. Finally, Elettra submitted invoices dated between 21 September 1990 and 16 January 1991 which indicate that Elettra invoiced Snamprogetti for the amount of ITL 44,506,150 in respect of the Lube-Oil Project. The total amount allegedly invoiced to the three companies is therefore ITL 567,807,246.

271. Elettra states that it received the amounts of ITL 25,799,333 and ITL 332,989,086 from Nuovo Pignone and Saipem respectively, thus leaving amounts outstanding of ITL 9,533,677 and ITL 154,979,000 from these two contractors. Elettra states that it received no amount from Snamprogetti in payment of the amounts invoiced. Elettra therefore received ITL 358,788,419 of the total amount of ITL 567,807,246 allegedly invoiced to the three companies, thus leaving a balance of the claimed amount of ITL 209,018,827. The amounts paid by each contractor, and the amounts allegedly outstanding, are as follows:

Table 28. Elettra's claim for contract losses (outstanding amounts under Elettra's contracts in Iraq)

Contractor	Invoiced amount (ITL)	Amount received (ITL)	Amount outstanding (ITL)	Amount outstanding (USD)
Nuovo Pignone	35,333,010	25,799,333	9,533,677	8,224
Saipem	487,968,086	332,989,086	154,979,000	133,683
Snamprogetti	44,506,150	--	44,506,150	38,390
Total	567,807,246	358,788,419	209,018,827	180,297

272. Elettra states that after issuing invoices to each of the above Italian contractors, it held meetings with them to discuss the amounts outstanding. On the basis of these discussions, Elettra issued credit notes to Nuovo Pignone in the amount of ITL 9,533,677, to Saipem in the amount of ITL 154,979,000 and to Snamprogetti in the amount of ITL 44,506,150. The amounts of the credit notes issued by Elettra correspond to the amounts which Elettra claims is owing from each contractor.

273. Elettra also entered into agreements with Nuovo Pignone and Saipem. Elettra submitted a copy of one of these agreements, namely an agreement dated 7 January 1992 with Saipem. This was signed shortly before Elettra issued the credit note to Saipem on 9 January 1992 in the amount of ITL 154,979,000.

274. According to the terms of this agreement, an amount of ITL 487,968,086 was invoiced to Saipem. The agreement notes that Saipem paid ITL 219,989,086, thus leaving an amount of ITL 267,979,000 outstanding. Elettra agreed that this amount would be satisfied by Elettra issuing a credit note in favour of Saipem for ITL 154,979,000 and the remaining amount of ITL 113,000,000 being paid by Saipem to Elettra. Elettra provided a bank transfer dated 27 February 1992 indicating that ITL 113,000,000 was paid by Saipem. As noted above, Elettra now seeks to recover the remaining ITL 154,979,000 allegedly owed by Saipem.

275. Elettra did not provide a copy of its agreement with Nuovo Pignone. However, Elettra states that it issued credit notes to Nuovo Pignone in the amount of ITL 9,533,677 after the parties had agreed that Nuovo Pignone would pay ITL 25,799,333 of the total amount of ITL 35,333,010 invoiced by Elettra. Elettra now seeks to recover the remaining ITL 9,533,677 allegedly owed by Nuovo Pignone.

2. Analysis and valuation

276. In support of its claim for contract losses, Elettra provided extensive evidence, including copies of its three contracts, timesheets, payrolls, copies of all the relevant invoices, the credit notes, copies of the employment contracts with its employees, job-cost information, bank transfers of various amounts from the contractors to Elettra, and a copy of the agreement with Saipem.

277. The Panel finds that Elettra entered into a settlement agreement with Saipem and with Nuovo Pignone. It is clear from the evidence submitted by Elettra that it carried out a careful and detailed assessment of the amounts invoiced to both of these contractors and entered into the settlement agreements on the basis of that assessment. There was, in consequence, no outstanding amount owing to Elettra for which Elettra can recover compensation before the Commission. Accordingly, applying the approach taken with respect to final awards, judgments and settlements as set out in paragraphs 172 to 175 of the Summary, the Panel recommends no compensation for the amounts which Elettra alleged were outstanding from Saipem and Nuovo Pignone.

278. However, the Panel finds that Elettra did not enter into any agreement to resolve the amounts outstanding from Snamprogetti. Elettra provided evidence that it had a contract with Snamprogetti, that it incurred costs in relation to its employee on the Lube-Oil Project and that it invoiced Snamprogetti for these amounts. Timesheets and an affidavit provided by the legal representative of

Elettra demonstrate that its employee on the Lube-Oil Project was forced to remain in Iraq during the period from August to December 1990. Accordingly, the Panel recommends compensation in the amount of ITL 44,506,150 in respect of the amount outstanding from Snamprogetti.

3. Recommendation

279. The Panel recommends compensation in the amount of USD 38,390 for contract losses.

B. Summary of recommended compensation for Elettra

Table 29. Recommended compensation for Elettra

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	180,297	38,390
Total	180,297	38,390

280. Based on its findings regarding Elettra's claim, the Panel recommends compensation in the amount of USD 38,390. The Panel finds the date of loss to be 2 August 1990.

XI. BERTRAMS AG

281. Bertrams AG ("Bertrams") is a corporation organised according to the laws of Switzerland. At the time of Iraq's invasion and occupation of Kuwait, Bertrams had a contract with a German company, Thyssen Rheinstahl Technik GmbH ("Thyssen"), for the commissioning of a soda concentration plant at Basrah Petrochemical Complex No. 1. The plant was located approximately 35 kilometres from Basrah, Iraq.

282. Bertrams alleges that one of its engineers was taken hostage by Iraqi forces and detained in Baghdad. It seeks compensation in the total amount of USD 89,178 (115,218 Swiss francs (CHF)) for contract losses (consisting of costs incurred in connection with the detention of the employee), and interest.

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

Table 30. Bertrams' claim

Claim element	Claim amount (USD)
Contract losses	74,782
Interest	14,396
Total	89,178

A. Contract losses

1. Facts and contentions

284. Bertrams seeks compensation in the amount of USD 74,782 (CHF 96,619) for contract losses.

285. In its Statement of Claim, Bertrams seeks compensation for costs allegedly incurred in connection with the detention of its engineer in the amount of USD 74,782 (CHF 96,619), plus 7 per cent interest on amounts allegedly owed by Thyssen from 27 March 1991 to the date of payment of the claim. Bertrams submitted a copy of the invoice sent to Thyssen, which was dated 27 February 1991 and which indicates the invoiced amount of CHF 96,619. However, Bertrams does not explain how it arrived at the amount claimed in the "E" claim form of USD 89,178 (CHF 115,218), after applying an interest rate of 7 per cent to the invoiced amount. The Panel has therefore calculated the difference between the amount claimed in the "E" claim form (CHF 115,218) and the amount claimed in the Statement of Claim (CHF 96,619) and reclassified it as a separate claim for interest in the amount of CHF 18,599 (USD 14,396).

286. According to Bertrams' Statement of Claim, the contract between Bertrams and Thyssen was dated 22 May 1990. Bertrams did not provide a copy of the contract. Therefore, Bertrams' role at the Basrah plant and the nature of the works to be carried out by it are unclear. The contractual works commenced on 4 May 1990 and were carried out by Bertrams' own engineers.

287. Bertrams states that on 1 August 1990, one of its engineers intended to leave Iraq and return to Switzerland via Kuwait. However, the engineer was allegedly taken hostage in Kuwait by Iraqi forces and taken to Baghdad, where he was forced to remain until November 1990. Bertrams does not specify the date its engineer was taken hostage, but the costs claimed in its invoice to Thyssen are claimed from 11 August 1990. On 22 November 1990, the engineer was released as a result of the intervention of the Government of Switzerland and was then able to leave Baghdad.

288. Bertrams does not specify the costs which it allegedly incurred in relation to the detention of its engineer in Iraq. However, Bertrams' invoice to Thyssen dated 27 February 1991 contains an itemised list of expenses which is summarised in table 31, infra:

Table 31. Bertrams' claim for contract losses

Loss item	Claim amount (CHF)	Claim amount (USD)
From 11 August to 22 November 1990:		
"90 days stand by (Item 1A)"	66,870	51,757
"Room, board, laundry, telephone from 1 August to 21 November 1990"	31,099	24,070
Subtotal	97,969	75,827
"Less advance payment [from] Lummus Thyssen, Baghdad"	(1,350)	(1,045)
Total	96,619	74,782

2. Analysis and valuation

289. In support of its claim for contract losses, Bertrams submitted a copy of the invoice dated 27 February 1991 and addressed to Thyssen. Bertrams also provided a copy of what appears to be a response from Thyssen dated 20 March 1991, but this document was not translated into English.

290. The Panel finds that Bertrams did not provide sufficient evidence in support of its claim. Bertrams failed to provide any evidence (i.e. documents translated into English) of Thyssen's response acknowledging that the costs were incurred by Bertrams. According to Bertrams, Thyssen refused to pay Bertrams' invoice, arguing that the costs were "caused by military actions". There is no evidence, other than Bertrams' invoice to Thyssen, of the costs allegedly incurred by Bertrams and no evidence that Bertrams actually paid the amounts claimed to anyone. Furthermore, Bertrams did not provide evidence establishing the circumstances of the detention of its engineer in Iraq. In the article 34 notification, the secretariat requested Bertrams to provide further information and evidence in support of its claim. The State Secretariat for Economic Affairs of Switzerland responded to the article 34 notification, notifying the Commission, without further explanation, that Bertrams was no longer in a position to provide the requested additional information. In the absence of such information, the Panel recommends no compensation.

3. Recommendation

291. The Panel recommends no compensation for contract losses.

B. Summary of recommended compensation for Bertrams

Table 32. Recommended compensation for Bertrams

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	74,782	nil
Interest	14,396	--
Total	89,178	nil

292. Based on its findings regarding Bertrams' claim, the Panel recommends no compensation.

XII. MODERN CONSTRUCTORS AND PLANNERS INTERNATIONAL (PVT) LIMITED

293. Modern Constructors and Planners International (Pvt) Limited ("MCPI") is a corporation organised according to the laws of the United Kingdom. Prior to August 1990, MCPI operated a construction business in Iraq. However, MCPI states in the "E" claim form filed in 1993 that it has ceased operating permanently due to liabilities arising from non-settlement of the debt which is the subject of the present claim.

294. In 1982, MCPI was awarded a contract to erect prefabricated residential and industrial accommodation in Nassiriyah, Iraq, for the Ministry of Irrigation of Iraq (the "Ministry of Irrigation").

MCPI claims that amounts are outstanding under the contract, and that it has been unable to recover these amounts due to Iraq's invasion and occupation of Kuwait.

295. MCPI seeks compensation in the total amount of USD 961,357 (IQD 298,982) for contract losses.

Table 33. MCPI's claim

Claim element	Claim amount (USD)
Contract losses	961,357
Total	961,357

A. Contract losses

1. Facts and contentions

296. MCPI seeks compensation in the amount of USD 961,357 (IQD 298,982) for contract losses.

297. In February 1982, MCPI was awarded a contract to erect prefabricated residential and industrial accommodation in Nassiriyah, Iraq, for the Ministry of Irrigation. The contractual works were completed in October 1984.

298. MCPI submitted a letter dated 6 May 1986 from the Ministry of Irrigation to the Public Tax Authority of Iraq in which the Ministry of Irrigation requested settlement of monies owing under the contract with MCPI. According to this letter, the contract price was IQD 3,539,087. The date of commencement of work specified in the contract was 14 April 1982. However, the letter indicates that the actual date of commencement of contractual work was 14 July 1982. The contract was expected to continue for 14 months, ending in June 1983. Due to extensions, the contractual work was finalised on 16 October 1984. The maintenance period expired on 25 March 1986.

299. MCPI claims that there are nine amounts in the total amount of USD 961,357 (IQD 298,982) outstanding under the contract. MCPI submitted correspondence with the Ministry of Irrigation showing that it attempted to recover these amounts on 14 September 1985. MCPI states that it pursued its claim regularly thereafter, in writing and in person, for nearly five years until August 1990 when it was unable to continue doing so due to Iraq's invasion and occupation of Kuwait.

300. The amounts allegedly owing to MCPI are set out in table 34, infra:

Table 34. MCPI's claim for contract losses

Loss item	Claim amount (IQD)
Extra costs incurred due to changing of sites	146,020
External services: sewerage system and septic tanks	52,000
Reimbursement of additional expenditures due to changing of sites	13,828
Late handing over of sites and idle labour and equipment	57,820
Outer walls to be the bas is for measurement	18,900
External water supply at Shatt-Al-Basrah site	1,225
Concrete slab for one house made at Basrah and not paid	4,614
Provision of polythene nylon sheets under concrete slabs	1,575
Payment of differential of cost of cement	3,000
Total	298,982

2. Analysis and valuation

301. In support of its claim, MCPI provided an extract from its contract with the Ministry of Irrigation, as well as correspondence between MCPI and the Ministry of Irrigation in relation to the amounts that MCPI alleges are outstanding under the contract.

302. The evidence provided by MCPI indicates that the performance that created the debts in question occurred prior to 2 May 1990. On the facts presented by MCPI, all of the payments under its contract fell due, at the very latest, on 25 March 1986. Applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 43 to 45 of the Summary, the Panel recommends no compensation.

3. Recommendation

303. The Panel recommends no compensation for contract losses.

B. Summary of recommended compensation for MCPI

Table 35. Recommended compensation for MCPI

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	961,357	nil
Total	961,357	nil

304. Based on its findings regarding MCPI's claim, the Panel recommends no compensation.

XIII. SHANKLAND COX LIMITED

305. Shankland Cox Limited ("Shankland Cox") is a corporation organised according to the laws of the United Kingdom. Shankland Cox supplies planning, landscape and development consultancy services on urban planning projects.

306. At the time of Iraq's invasion and occupation of Kuwait, Shankland Cox was engaged as a subcontractor on two contracts to provide consultancy services in Kuwait. Shankland Cox alleges that amounts invoiced to the contractors on both projects remain outstanding. In addition, Shankland Cox states that it suffered a loss of profits due to the early cancellation of one of the projects by the Government of Kuwait. Finally, Shankland Cox states that one of its consultants was taken hostage by the Iraqi authorities and detained at strategic sites within Iraq between 6 August and 10 December 1990. During this period, Shankland Cox allegedly made a payment to the consultant's family.

307. Shankland Cox seeks compensation in the total amount of USD 297,578 (156,526 Pounds sterling (GBP)) for contract losses, loss of profits, and payment or relief to others.

Table 36. Shankland Cox's claim

Claim element	Claim amount (USD)
Contract losses	56,937
Loss of profits	232,215
Payment or relief to others	8,426
Total	297,578

A. Contract losses

1. Facts and contentions

308. Shankland Cox seeks compensation in the amount of USD 56,937 (GBP 29,949) for contract losses. The claim is for losses allegedly incurred in connection with two contracts to provide consultancy services in Kuwait.

309. The first of these was a contract with Bonyan Design Limited ("Bonyan Design"), a company based in Kuwait, to supply consultancy services in connection with the "Kuwait Fresh Food Souks" project. Bonyan Design is a firm of consulting architects, planners and engineers, and was the main contractor on the project.

310. The second contract was with a Kuwaiti company known as Salem Al-Marzouk & Sabah Abi-Hanna W.L.L. ("SSH") to supply consultancy services in connection with the "Kuwait Master Plan Third Review". SSH is also a firm of consulting architects, planners and engineers, and was the main contractor on the project. The owner of both projects was the Kuwait Municipality.

311. Shankland Cox claims that the amount of USD 16,806 (GBP 8,840) was invoiced to Bonyan Design, but remains outstanding for work on the Kuwait Fresh Food Souks project. It also claims that the amount of USD 40,131 (GBP 21,109) remains outstanding under invoices rendered to SSH for work on the Kuwait Master Plan Third Review.

312. The Panel considers each contract in turn, as follows:

(a) Kuwait Fresh Food Souks Project (Contract No. 149)

313. Shankland Cox did not provide any details about the nature of this project, nor did it provide a copy of the contract. It does state, however, that it was the sub-consultant in relation to planning and landscape. In addition, the documents and invoices submitted with the claim indicate that the contract was negotiated between April and September 1988, and work commenced in October 1988.

314. According to the Statement of Claim submitted by Shankland Cox, work on this project was fully complete and invoices had been rendered to Bonyan Design at the time of Iraq's invasion and occupation of Kuwait. The last invoice was rendered by Shankland Cox on 31 July 1989 for work performed on the project in June and July 1989. The total amount invoiced to Bonyan Design was GBP 34,053, of which GBP 8,840 is allegedly outstanding. Shankland Cox states that this amount was not paid because the work had not been approved, and the funds not released from Kuwait Municipality to Bonyan Design, prior to August 1990.

315. Shankland Cox submitted a facsimile transmission which it sent to Bonyan Design on 25 January 1990. This document states that GBP 8,800 was outstanding on the project.

(b) Kuwait Master Plan Third Review (Contract No. 505)

316. Shankland Cox did not provide any details about the nature of this project, nor did it provide a copy of the signed contract. Shankland Cox provided a draft copy of the sub-consultancy agreement between itself and SSH, but there is no indication as to whether all of the terms of the draft agreement were ultimately adopted by the parties.

317. However, an "inception report", or project brief, submitted with the claim contains additional information in relation to the Kuwait Master Plan Third Review. According to this report, the contract for the project was signed on 25 December 1989 between Kuwait Municipality (as owner) and SSH (as head contractor), in association with Shankland Cox, W. S. Atkins Overseas Limited, a company incorporated in the United Kingdom, and the Kuwait Institute for Scientific Research (as consultants). Financial estimates prepared in relation to the project valued the review at 684,815 Kuwaiti dinars.

318. The purpose of the project was to prepare a plan to guide development and planning in Kuwait for the following 20-year period ending in the year 2010. This included proposals on distribution of land uses, service and employment centres, and transport and infrastructure systems. The review was to extend for a period of 18 months in six separate phases, and involved the preparation of reports covering national, metropolitan, urban and local planning. Mobilisation of the project team commenced on 6 January 1990.

319. Shankland Cox states that prior to Iraq's invasion and occupation of Kuwait, it had completed work on the first phase of the project, and that some work had been performed on the second phase. However, Shankland Cox states that the Government of Kuwait subsequently cancelled the project because the planning and population projections made prior to August 1990 were no longer relevant after the population shift caused by Iraq's invasion and occupation of Kuwait.

320. Shankland Cox alleges that it invoiced SSH in the total amount of GBP 44,274, and received GBP 23,165. Thus, there is an alleged balance of GBP 21,109 outstanding. Invoices submitted with the claim indicate that GBP 44,274 was invoiced to SSH for work performed from March to July 1990.

2. Analysis and valuation

321. In support of its claim for contract losses, Shankland Cox provided correspondence between itself and Bonyan Design in relation to the fees payable for the Kuwait Fresh Food Souks project, as well as copies of invoices rendered to Bonyan Design. The Panel notes that the evidence includes a facsimile transmission dated 25 January 1990 from Shankland Cox to Bonyan Design stating that the amount claimed was outstanding. In relation to the Kuwait Master Plan Third Review, Shankland Cox provided financial estimates for the project and the "inception report" prepared in February 1990, which details the progress and objectives of the project. Shankland Cox also provided copies of invoices rendered to SSH for the amount allegedly outstanding.

322. In accordance with paragraphs 63 to 67 of the Summary, the Panel requires claimants whose claims for contract losses arise from projects in Kuwait to provide sufficient evidence that the entity with which it carried on business on 2 August 1990 was unable to make payment as a direct result of Iraq's invasion and occupation of Kuwait.

323. In the case of the Kuwait Fresh Food Souks project, the evidence submitted by Shankland Cox indicates that the amount claimed of GBP 8,800 was outstanding as at January 1990. The last invoice was rendered by Shankland Cox in July 1989, well before Iraq's invasion and occupation of Kuwait. Moreover, Shankland Cox did not explain why it could not recover this amount from Bonyan Design upon the cessation of hostilities in Kuwait by demonstrating, for example, that Bonyan Design was insolvent or otherwise unable to pay.

324. In relation to the Kuwait Master Plan Third Review, the evidence submitted by Shankland Cox indicates that SSH requested the National Bank of Kuwait to transfer monies to Shankland Cox in June 1992. It is not clear what this amount related to, but this evidence indicates that SSH was still solvent in 1992. Shankland Cox did not explain why it was unable to recover outstanding monies from SSH at that time.

325. Accordingly, Shankland Cox failed to fulfil the evidentiary standard for claims for contract losses with non-Iraqi parties as set out in paragraphs 63 to 67 of the Summary. The Panel finds that Shankland Cox also failed to demonstrate that its losses were the direct result of Iraq's invasion and occupation of Kuwait. The Panel recommends no compensation.

3. Recommendation

326. The Panel recommends no compensation for contract losses.

B. Loss of profits

1. Facts and contentions

327. Shankland Cox seeks compensation in the amount of USD 232,215 (GBP 122,145) for loss of profits. The claim relates to the Kuwait Master Plan Third Review. Shankland Cox alleges that cancellation of this project by the Government of Kuwait resulted in a loss of profit on the remaining work which Shankland Cox would otherwise have performed on the project.

328. In the "E" claim form, Shankland Cox characterised this loss element as contract losses, but the accompanying Statement of Claim states that the claim relates to anticipated profit under the contract, rather than amounts outstanding for work already performed. Accordingly, the Panel finds that the claim is more accurately classified as a claim for loss of profits.

2. Analysis and valuation

329. In support of its claim for loss of profits, Shankland Cox provided financial estimates prepared prior to commencement of work on the Kuwait Master Plan Third Review, and an internally-generated statement showing its anticipated loss of profits on the project. In the article 34 notification, Shankland Cox was requested to provide extensive evidence in support of its claim, including projected and actual financial information relating to the project, financial statements, budgets, management accounts, tender sum analyses, and profit and loss statements. Shankland Cox notified the Commission that it was unable to locate any of the information requested in the article 34 notification.

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

3. Recommendation

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

C. Payment or relief to others

1. Facts and contentions

332. Shankland Cox seeks compensation in the amount of USD 8,426 (GBP 4,432) for payment or relief to others. The claim is for a payment which Shankland Cox allegedly made to the family of one of its consultants during his detention in Iraq between 6 August and 10 December 1990.

333. According to the consultancy contract between Shankland Cox and its consultant, the latter was the Senior Architect Planner on the Kuwait Master Plan Third Review. His employment in Kuwait was to commence in June 1990, for a period of nine calendar months, ending in April 1991. He was to

receive a fee of GBP 3,500 per calendar month, as well as payments for incidental expenses. There was a provision in the contract that if the contract between Shankland Cox and the "Client" (presumably SSH) was cancelled for any reason, including force majeure, the consultant was to be given termination notice of one month, or an agreed period to the end of the assignment, whichever was the shorter period.

334. The consultant was taken hostage by the Iraqi authorities from his hotel in Kuwait on 6 August 1990 and taken to Baghdad. He was later moved to a series of strategic sites throughout Iraq. On 10 December 1990, he was taken back to Baghdad, where he departed on the first direct flight to England.

2. Analysis and valuation

335. In support of its claim for payment or relief to others, Shankland Cox provided a copy of the consultancy agreement. It also provided a letter from the consultant which describes the circumstances of his detention in Iraq, as well as two invoices rendered by the consultant to Shankland Cox for work performed in June and July 1990. It is not clear how these invoices relate to the claim for payment or relief to others.

336. The Panel finds that Shankland Cox failed to provide sufficient evidence in support of its claim. In particular, Shankland Cox did not provide any evidence such as payroll records or accounting records to demonstrate how the amount claimed was calculated, or that the amount claimed was paid to the consultant's family. Shankland Cox was requested in the article 34 notification to explain the nature of its claim for payment or relief to others and to provide evidence of payment of the amount claimed. However, Shankland Cox notified the Commission that it was unable to locate any of the information requested in the article 34 notification.

3. Recommendation

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

D. Summary of recommended compensation for Shankland Cox

Table 37. Recommended compensation for Shankland Cox

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	56,937	nil
Loss of profits	232,215	nil
Payment or relief to others	8,426	nil
Total	297,578	nil

338. Based on its findings regarding Shankland Cox's claim, the Panel recommends no compensation.

XIV. SKILLED & TECHNICAL SERVICES LIMITED

339. Skilled & Technical Services Limited ("STS") is a corporation organised according to the laws of the United Kingdom. STS supplies the services of contract engineers and technicians in all engineering disciplines for on-site engineering work within the United Kingdom and abroad.

340. At the time of Iraq's invasion and occupation of Kuwait, STS had a contract to provide the services of two engineers to Robert Cort & Son Ltd. ("Robert Cort"), another United Kingdom company, on a project at the East Baghdad Oilfield in Baghdad, Iraq. STS claims that amounts remain outstanding under invoices issued to Robert Cort pursuant to the contract, and that it made hardship payments to the families of its two engineers during their detention in Iraq.

341. STS seeks compensation in the total amount of USD 73,445 (GBP 38,632) for contract losses, payment or relief to others, and interest.

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

Table 38. STS's claim

Claim element	Claim amount (USD)
Contract losses	49,162
Payment or relief to others	4,098
Interest	20,185
Total	73,445

A. Contract losses

1. Facts and contentions

343. STS seeks compensation in the amount of USD 49,162 (GBP 25,859) for contract losses. The claim is for losses allegedly incurred through non-payment of invoices rendered by STS to Robert Cort in the amount of USD 48,483 (GBP 25,502). In addition, STS claims that it incurred costs of USD 679 (GBP 357) in seeking legal advice "in respect of our two employees".

344. In the "E" claim form, STS characterised its claim for costs incurred in seeking legal advice as "other losses". However, the Panel reviewed evidence submitted by STS in support of its claim for the costs of obtaining such legal advice. Correspondence between STS and its legal advisers indicates that STS sought legal advice as to how to recover the amounts owing from Robert Cort for services rendered by its two engineers. The Panel therefore finds that the claim for costs incurred in seeking legal advice is more accurately classified as part of the claim for contract losses.

345. The Panel considers each item of the claim for contract losses in turn, as follows:

(a) Amounts outstanding under invoices rendered to Robert Cort

346. STS claims that a total amount of GBP 25,502 (USD 48,483) remains outstanding under invoices issued from 9 August to 23 October 1990.

347. STS's two engineers were employed to install and commission well head shut-down equipment provided by Robert Cort to an Italian company, Snamprogetti S.p.A. ("Snamprogetti"). Snamprogetti was the main contractor under a contract with the Iraq National Oil Company for the installation and commissioning of well head shut-down systems at the East Baghdad Oilfield in Baghdad, Iraq.

348. Robert Cort sent purchase orders dated 5 April and 19 June 1990 respectively to STS for the services of two engineers, a commissioning engineer, and an instrument pipefitter. According to these purchase orders, the commissioning engineer was to commence work on 6 April 1990 for approximately 12 weeks and the instrument pipefitter was to commence work on 22 June 1990 for approximately four to six weeks. In its response to the article 34 notification, STS states that the commissioning engineer commenced work in April 1990 and later returned to the United Kingdom in mid-July 1990 for two weeks' leave. He then returned to Baghdad on 31 July 1990. The instrument pipefitter arrived in Baghdad on 23 June 1990 and commenced work the following day.

349. The purchase orders indicate that the contractual rate for both engineers, based on a standard 60-hour working week, was GBP 1,008. Correspondence between STS and Robert Cort indicates that Robert Cort paid all outstanding invoices owing to STS for the services of the two engineers up to and including 9 August 1990. Robert Cort notified STS in a letter dated 22 October 1990 that it had cancelled its contract with STS, effective immediately, due to the cancellation of its own contract with Snamprogetti and Snamprogetti's refusal to pay amounts owing to Robert Cort. The claim therefore relates to invoices issued by STS to Robert Cort from 9 August to 23 October 1990. STS submitted 22 invoices covering the period from the week ending 12 August 1990 to the week ending 21 October 1990, which indicate that STS invoiced Robert Cort for the claimed amount of GBP 25,502.

350. STS states that both of its engineers were unable to leave Iraq in August 1990 and continued to work at the project site with Snamprogetti's engineers up to 22 October 1990, when both engineers were placed under restrictions by the Iraqi authorities.

(b) Legal advice

351. STS seeks compensation for legal costs in the amount of USD 679 (GBP 357). STS states in its Statement of Claim that this amount represents the professional charges of its solicitors for legal services rendered in September and October 1990 in respect of its two employees who were detained in Iraq.

2. Analysis and valuation

(a) Amounts outstanding under invoices rendered to Robert Cort

352. In support of its claim, STS provided extensive evidence, including the purchase orders from Robert Cort for the services of the two engineers, correspondence between STS and Robert Cort outlining the terms of the engineers' employment in Iraq, timesheets signed by Snamprogetti for both engineers from 5 August to 9 December 1990, and the 22 invoices rendered to Robert Cort in the claimed amount of GBP 25,502.

353. The Panel finds that the Iraq National Oil Company is an agency of the Government of Iraq.

354. The Panel finds that the asserted losses in respect of the 22 invoices provided by STS relate entirely to work that was performed subsequent to 2 May 1990. The claim for these unpaid invoices is therefore within the jurisdiction of the Commission. On the evidence provided, and in accordance with paragraphs 117 to 119 of the Summary, the Panel is satisfied that STS is entitled to payment of all of the invoices in the total amount of USD 48,483 (GBP 25,502).

(b) Legal advice

355. In support of its claim, STS submitted a letter dated 22 October 1990 from STS to its legal advisers in which STS summarised its negotiations with Robert Cort and explained Snamprogetti's reasons for refusing to pay Robert Cort. STS also submitted an invoice dated 31 October 1990 from its legal advisers in the claimed amount of GBP 357. The invoice states that it relates to services "in respect of various general commercial affairs of the Company including all employment matters and advice in particular in respect of your two employees presently in Iraq – and generally in the year ended 31st October, 1990".

356. On the evidence submitted by STS, it is clear that the legal services rendered by STS's legal advisers related to general commercial matters in addition to the legal issues arising from STS's contract with Robert Cort. The Panel was unable to determine the value of the general legal advice which was not related to STS's two employees. The Panel therefore cannot determine the amount of the claimed legal fees which were directly caused by Iraq's invasion and occupation of Kuwait. Accordingly, the Panel recommends no compensation in respect of the claimed costs of seeking legal advice.

3. Recommendation

357. The Panel recommends compensation in the amount of USD 48,483 for contract losses.

B. Payment or relief to others

1. Facts and contentions

358. STS seeks compensation in the amount of USD 4,098 (GBP 2,156) for payment or relief to others. The claim relates to STS's alleged costs of making "hardship relief payments" in the amount of USD 3,935 (GBP 2,070) to the families of its two engineers during their detention in Iraq. In

addition, STS claims that it incurred costs of USD 163 (GBP 86) in making telephone calls to its engineers during their detention.

359. In the "E" claim form, STS characterised its claim for the cost of making telephone calls as "other losses". However, in its Statement of Claim, STS states that the calls were made to obtain information on the condition of the two engineers and to update them on STS's efforts to secure their release. The Panel therefore finds that the claim for costs of the telephone calls is more accurately classified as part of the claim for payment or relief to others.

360. The Panel considers each item of the claim for payment or relief to others in turn, as follows:

(a) "Hardship relief payments"

361. STS seeks compensation for the alleged costs of making "hardship relief payments" in the amount of USD 3,935 (GBP 2,070) to the families of its two engineers during their detention in Iraq.

362. In its Statement of Claim, STS states that its two engineers were unable to leave Iraq after Iraq's invasion and occupation of Kuwait, and that they continued working on the project site together with Snamprogetti's engineers. STS states that although work continued for many weeks, it eventually came to a complete halt as the hostilities intensified and the trade embargo made it impossible to deliver materials to the project site. STS further states that it does not know when this occurred, but it submitted evidence which indicates reductions in the working hours of both men after 2 August 1990.

363. STS submitted correspondence with the families of the two engineers, and with Robert Cort, which indicates that the British Foreign and Commonwealth Office had instructed British nationals in Iraq to continue working, as failure to do so could jeopardise their lives. In a letter to the Commission dated 21 September 1993, STS stated that the two engineers were informed that if they did not carry on working, they would be removed as hostages to a site considered "strategic".

364. STS states that normal payment of salaries could not be made to the two engineers after 17 September 1990 while they were still present at the project site. STS therefore decided to make a "hardship relief payment" in the amount of GBP 100 per week for 10 weeks to the families of the two engineers. STS alleges that it paid GBP 1,000 to the family of the instrument pipefitter and GBP 1,070 to the family of the commissioning engineer over these 10 weeks, resulting in payment of the amount claimed of GBP 2,070.

365. The two engineers were released on 9 December 1990 and returned to the United Kingdom at that time.

(b) Telephone calls

366. STS seeks compensation in the amount of USD 163 (GBP 86) for the costs of telephone calls to its two engineers during their detention in Iraq. STS states in its Statement of Claim that it made two telephone calls, on 21 and 28 September 1990, respectively, to ascertain the welfare of its two engineers.

2. Analysis and valuation

(a) "Hardship relief payments"

367. STS provided payroll summaries for the period from 19 September to 6 December 1990 showing the gross earnings of one of the engineers in the amount of GBP 1,070. It also submitted an affidavit sworn by its former managing director which gives details of the payments made to the families of both engineers, as well as correspondence between STS and various government agencies seeking assistance for both men during their detention in Iraq.

368. The Panel finds that the claimed "hardship relief payments" were made as a substitute for normal salary payments made to both men under their respective contracts. Further, in accordance with the principles set out in paragraphs 167 to 171 of the Summary, the Panel finds that the payments were extraordinary payments that were made as a direct result of Iraq's invasion and occupation of Kuwait, and are reasonable in amount. The Panel finds that STS provided sufficient evidence in support of its claim for the unproductive salary payments and recommends compensation in the full amount claimed of USD 3,935.

(b) Telephone calls

369. In support of its claim, STS submitted an invoice from British Telecom dated 20 November 1990 showing two calls of 12 and 16 minutes respectively. The calls were made to Iraq from a telephone number at STS's company address, at a total cost of GBP 73 plus value added tax. The telephone calls are also referred to in other evidence submitted by STS.

370. The Panel finds that the cost of making the two telephone calls is compensable as the cost was incurred as a direct result of Iraq's invasion and occupation of Kuwait, was extraordinary in nature and reasonable in amount. Further, the Panel finds that STS provided sufficient evidence in support of its claim for the costs of the telephone calls.

3. Recommendation

371. The Panel recommends compensation in the amount of USD 4,098 for payment or relief to others.

C. Summary of recommended compensation for STS

Table 39. Recommended compensation for STS

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	49,162	48,483
Payment or relief to others	4,098	4,098
Interest	20,185	--
Total	73,445	52,581

372. Based on its findings regarding STS's claim, the Panel recommends compensation in the amount of USD 52,581. The Panel finds the date of loss to be 2 August 1990.

XV. SUMMARY OF RECOMMENDED COMPENSATION BY CLAIMANT

Table 40. Recommended compensation for the twenty-seventh instalment

Claimant	Claim amount (USD)	Recommended compensation (USD)
Ast-Holzmann Baugesellschaft mbH	9,614,918	nil
Imp Metall-Chemie Produktions- und Handelsgesellschaft mbH	9,482,682	760,378
Universale International Realitäten GmbH	324,567	--
Polytechna Co. Limited	1,448,812	nil
El-Nasr Company for Civil Works	726,816	nil
CLE S.A.	3,001,060	nil
Technique et Regulation S.à.r.l.	191,619	nil
National Projects Construction Corporation Limited	3,824,437	nil
Elettra Progetti S.p.A.	180,297	38,390
Bertrams AG	89,178	nil
Modern Constructors and Planners International (Pvt) Limited	961,357	nil
Shankland Cox Limited	297,578	nil
Skilled & Technical Services Limited	73,445	52,581
Total	30,216,766	851,349

Geneva, 17 July 2002

(Signed) John Tackaberry
Chairman

(Signed) Pierre Genton
Commissioner

(Signed) Vinayak Pradhan
Commissioner

Annex

SUMMARY OF GENERAL PROPOSITIONS

CONTENTS

Introduction

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

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

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

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

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

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

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

I. THE PROCEDURE

A. Summary of the process

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

B. The nature and purpose of the proceedings

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

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

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

C. The procedural history of the "E3" Claims

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

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

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

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

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

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

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

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

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

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

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

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

(b) The facts supporting the claim;

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

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

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

15. Further, a review of the legal and evidentiary basis of each claim identifies specific questions as to the evidentiary support for the alleged losses. It also highlights areas of the claim in which further information or documentation is required. Consequently, questions and requests for additional

documentation are transmitted to the claimants pursuant to article 34 of the Rules (the "article 34 notification"). If a claimant fails to respond to the article 34 notification, a reminder notification is sent to the claimant. Upon receipt of the responses and additional documentation, a detailed factual and legal analysis of each claim is conducted. Communications with claimants are made through their respective Governments.

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

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

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

II. PROCEDURAL ISSUES

A. Panel recommendations

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

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

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

B. Evidence of loss

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

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

1. Sufficiency of evidence

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Amending claims after filing

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

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

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

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

D. Assignments of claims

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

E. Related and overlapping claims

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

III. SUBSTANTIVE ISSUES

A. Applicable law

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

relevant Security Council resolutions, decisions of the Governing Council, and, where necessary, other relevant rules of international law.

B. Liability of Iraq

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

42. In this context, it is necessary to address the meaning of the term "Iraq". In Governing Council decision 9 (S/AC.26/1992/9) and other Governing Council decisions, the word "Iraq" was used to mean the Government of Iraq, its political subdivisions, or any agency, ministry, instrumentality or entity (notably public sector enterprises) controlled by the Government of Iraq. In the "Report and recommendations made by the Panel of Commissioners concerning the fifth instalment of 'E3' claims" (S/AC.26/1999/2) (the "Fifth Report"), this Panel adopted the presumption that for contracts performed in Iraq, the other contracting party was an entity of the Government of Iraq.

C. The "arising prior to" clause

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

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

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

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

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

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

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

D. Application of the "direct loss" requirement

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

> "... any direct loss, damage, or injury to corporations and other entities as a result of Iraq's unlawful invasion and occupation of Kuwait. This will include any loss suffered as a result of:
>
> (a) Military operations or threat of military action by either side during the period 2 August 1990 to 2 March 1991;
>
> (b) Departure of persons from or their inability to leave Iraq or Kuwait (or a decision not to return) during that period;
>
> (c) Actions by officials, employees or agents of the Government of Iraq or its controlled entities during that period in connection with the invasion or occupation;
>
> (d) The breakdown of civil order in Kuwait or Iraq during that period; or
>
> (e) Hostage-taking or other illegal detention."

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

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

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

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

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

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

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

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

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

E. Date of loss

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

F. Currency exchange rate

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

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

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

G. Interest

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

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

H. Claims preparation costs

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

I. Contract losses

1. The issue of "directness" in claims for contract losses with a non-Iraqi party

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

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

the proved insolvency of the other party, the Panel will have to be satisfied that the effective reason or causa causans was Iraq's invasion and occupation of Kuwait.

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

66. The Panel, accepting the approach taken by the "E2A" Panel in the "Report and recommendations made by the Panel of Commissioners concerning the fourth instalment of 'E2' claims" (S/AC.26/2000/2), finds that a claim based on goods lost in transit must be substantiated by evidence of shipment to Kuwait (such as a bill of lading, airway bill or freight receipt), from which an arrival date may be estimated, and by evidence of the value of the goods (demonstrated by, for example, an invoice, contract or purchase order).

67. The Panel is also of the opinion that the further away the arrival date is from the date of Iraq's invasion of Kuwait, the greater the possibility that the goods were collected by the buyer. Thus, in the absence of evidence to the contrary and in the light of the circumstances discussed above, it is reasonable to expect that non-perishable goods, arriving in Kuwait within two to four weeks before the invasion, had not yet been collected by the buyer. Accordingly, the Panel determines that, where goods arrived at a Kuwaiti sea port on or after 2 July 1990 or at the Kuwait airport on or after 17 July 1990 and could not thereafter be located by the claimant, an inference can be made that the goods were lost or destroyed as a direct result of Iraq's invasion and occupation of Kuwait and the ensuing breakdown in civil order.

2. Advance payments

68. Many construction contracts provide for an advance payment to be made by the employer to the contractor. These advance payments are often calculated as a percentage of the initial price (initial, because many such contracts provide for automatic and other adjustments of the price during the execution of the works). The purpose of the advance payment is to facilitate certain activities which the contractor will need to carry out in the early stages.

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

70. Advance payments are usually secured by a bond provided by the contractor, and are usually paid upon the provision of the bond. They are frequently repaid over a period of time by way of deduction by the employer from the sums which are payable at regular intervals (often monthly) to the contractor for work done. See, in the context of payments which are recovered over a period of time, the observations about amortisation at paragraph 139, infra. Those observations apply mutatis mutandis to the repayment of advance payments.

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

3. Contractual arrangements to defer payments

(a) The analysis of "old debt"

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

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

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

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

> "The negotiation of these deferred payment arrangements was typically conducted with Iraq not by the contractor or supplier itself, but rather by its Government. Typically, the Government negotiated on behalf of all of the contracting parties from the country concerned who were in a similar situation. The deferred payment arrangements with Iraq were commonly entered into under a variety of forms, including complicated crude oil barter arrangements under which Iraq would deliver certain amounts of crude oil to a foreign State to satisfy consolidated debts; the foreign State then would sell the oil and, through its central bank, credit particular contractors' accounts." (the First "E2" Report, paragraph 93).
>
> "Iraq's debts were typically deferred by contractors who could not afford to 'cut their losses' and leave, and thus these contractors continued to work in the hope of eventual satisfaction and continued to amass large credits with Iraq. In addition, the payment terms were deferred for such long periods that the debt servicing costs alone had a significant impact on the continued growth of Iraq's foreign debt." (the First "E2" Report, paragraph 94).

76. This Panel agrees.

(b) Application of the "old debt" analysis

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

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

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

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

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

transaction so much as a political agreement, and the "loss" would not be a loss falling within the jurisdiction of the Commission.

4. Losses arising as a result of unpaid retention monies

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

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

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

85. The retention is usually payable in two stages, one at the commencement of the maintenance period, as it is often called, and the other at the end. The maintenance period usually begins when the employer first takes over the project, and commences to operate or use it. Thus the work to which any particular sum which is part of the retention fund relates may have been executed a very long time before the retention fund is payable. It follows that a loss in respect of the retention fund cannot be evaluated by reference to the time when the work which gave rise to the retention fund was executed, as for instance is described at paragraph 78, supra. Entitlement to be paid the retention fund is dependent on the actual or anticipated overall position at the end of the project.

86. Retention fund provisions are very common in the construction world. The retention fund serves two roles. It is an encouragement to the contractor to remedy defects appearing before or during the maintenance period. It also provides a fund out of which the employer can reimburse itself for defects that appear before or during the maintenance period which the contractor has, for whatever reason, failed or refused to make good.

87. In the claims before this Panel, events - in the shape of Iraq's invasion and occupation of Kuwait - have intervened. The contract has effectively come to an end. There is no further scope for the operation of the retention provisions. It follows that the contractor, through the actions of Iraq, has been deprived of the opportunity to recover the money. In consequence the claims for retention fall within the jurisdiction of the Commission.

88. In the light of the above considerations it seems to this Panel that the situation in the case of claims for retention is as follows:

(a) The evidence before the Commission may show that the project was in such trouble that it would never have reached a satisfactory conclusion. In such circumstances, there can be no positive recommendation, principally because there is no direct causative link between the loss and the invasion and occupation of Kuwait.

(b) Equally the evidence may show that the project would have reached a conclusion, but that there would have been problems to resolve. Accordingly the contractor would have had to expend money resolving those problems. That potential cost would have to be deducted from the claim for retention; and accordingly the most convenient course would be to recommend an award to the contractor of a suitable percentage of the unpaid retention.

(c) Finally, on the evidence it may be the case that there is no reason to believe or conclude that the project would have gone other than satisfactorily. In those circumstances, it seems that the retention claim should succeed in full.

5. Guarantees, bonds, and like securities

89. Financial recourse agreements are part and parcel of a major construction contract. Instances are (a) guarantees - for example given by parent companies or through banks; (b) what are called "on demand" or "first demand" bonds (hereinafter "on demand bonds") which support such matters as bidding and performance; and (c) guarantees to support advance payments. (Arrangements with government-sponsored bodies that provide what might be called "fall-back" insurance are in a different category. As to these, see paragraphs 99 to 106, infra.)

90. Financial recourse arrangements give rise to particular problems when it comes to determining the claims filed in the population of construction and engineering claims. A convenient and stark example is that of the on demand bond.

91. The purpose of an on demand bond is to permit the beneficiary to obtain monies under the bond without having to prove default on the part of the other party - namely, in the situations under discussion here, the contractor executing the work. Such a bond is often set up by way of a guarantee given by the contractor or its parent to its own bank in its home State. That bank gives an identical bond to a bank (the second bank) in the State of the employer under the construction contract. In its turn, the second bank gives an identical bond to the employer. This leaves the employer, at least theoretically, in the very strong position of being able, without having to prove any default on the part of the contractor, to call down a large sum of money which will be debited to the contractor.

92. Of course, the contractor's bank will have two arrangements in place. First, an arrangement whereby it is secured as to the principal sum, the subject of the bond, in case the bond is called. Second, it will have arranged to exact a service charge, typically raised quarterly, half-yearly or annually.

93. Many claimants have raised claims in respect of the service charges; and also in respect of the principal sums. The former are often raised in respect of periods of years measured from the date of

Iraq's invasion and occupation of Kuwait. The latter have, hitherto at least, been cautionary claims, in case the bonds are called in the future.

94. This Panel approaches this issue by observing that the strength of the position given to the employer by the on demand bond is sometimes more apparent than real. This derives from the fact that the courts of some countries are reluctant to enforce payment of such bonds if they feel that there is serious abuse by the employer of its position. For example, where there is a persuasive allegation of fraud, some courts will be prepared to injunct the beneficiary from making a call on the bond, or one or other of the banks from meeting the demand. It is also the case that there may be remedies for the contractor in some jurisdictions when the bonds are called in circumstances that are clearly outside the original contemplation of the parties.

95. The Panel notes that most if not all contracts for the execution of major construction works by a contractor from one country in the territory of another country will have clauses to deal with war, insurrection or civil disorder. Depending on the approach of the relevant governing law to such matters, these provisions, if triggered, may have a direct or indirect effect on the validity of the bond. Direct, if under the relevant legal regime, the effects of the clause in the construction contract apply also to the bond; indirect if the termination or modification of the underlying obligation (the construction contract) gives rise to the opportunity to seek a forum-driven modification or termination of the liabilities under the bond.

96. In addition, the simple passage of time is likely to give rise to the right to treat the bond obligation as expired or unenforceable, or to seek a forum-driven resolution to the same effect. In addition, it is necessary to bear in mind the existence of the trade embargo and related measures.[a] The effect of the trade embargo and related measures was that an on demand bond in favour of an Iraqi party could not legally have been honoured after 6 August 1990. In those circumstances, it is difficult to see what benefit the issuing bank was providing in return for any service charges that it was paid once notice of the embargo had been widely disseminated. If the bank is providing no benefit, it is difficult to ascertain a juridical basis for any entitlement to receive the service charges.

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

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

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

6. Export credit guarantees

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

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

101. Claims have been made by parties for:

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

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

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

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

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

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

105. Here the claim is mis-characterised. That balance may indeed be a claimable loss; but its claimability has nothing to do with the fact that the monies represent a shortfall between what has been recovered under the guarantee and what has been lost. Instead, the correct analysis should start from a review of the cause of the whole of the loss of which the balance is all that remains. The first step is to establish whether there is evidence to support that whole sum, that it is indeed a sum that the claimant has paid out or failed to recover; and that there is the necessary causation. To the extent that the sum is established, then to that extent the claim is prima facie compensable. However, so far as there has been reimbursement by the guarantor, the loss has been made good, and there is nothing left

to claim for. It is only if there is still some qualifying loss, not made good, that there is room for a recommendation of this Panel.

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

7. Frustration and force majeure clauses

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

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

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

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

> "Second, [the Claimants] direct the Commission's attention to the clauses relating to 'frustration' in the respective underlying contracts. The Claimants assert that in the case of frustration of contract, these clauses accelerate the payments due under the contract, in effect giving rise to a new obligation on the part of Iraq to pay all the amounts due and owing under the contract regardless of when the underlying work was performed. The Panel has concluded that claimants may not invoke such contractual agreements or clauses before the Commission to

avoid the 'arising prior to' exclusion established by the Security Council in resolution 687 (1991); consequently, this argument must fail." (paragraph 188).

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

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

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

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

8. Subcontractors and suppliers

115. Construction contracts involve numerous parties who operate at different levels of the contractual chain. In the simplest form there will almost always be an employer or project owner; a main contractor; subcontractors and suppliers. Usually each member of the chain will be in a contractual relationship with the party above and below it (if any) in the chain; but not with a party outside this range.

116. The claims before the Commission often include ones made by parties in different positions in the same chain and in relation to the same project. In resolving these claims, this Panel, basing itself on its own work and on that of other panels, has come to recognise certain principles which appear to be worth recording. Of course these general propositions are not absolute – there will always be exceptions in special circumstances.

(a) Projects within Iraq

117. The first principle that should be noted is the distinction between projects which were going forward within Iraq and those that were going on outside Iraq. Different considerations apply in the two situations. A notable example of this difference is the limitation on the Commission's jurisdiction which flows from the "arising prior to" principle - see paragraphs 43 to 45, supra, and the First "E2" Report, paragraph 90. In the view of this Panel, this jurisdictional limitation applies to all claims made in respect of projects in Iraq, regardless of where in the contractual chain the claimant might be.

118. This jurisdictional limitation flowed from the need to deal in an appropriate manner with political and historical realities in Iraq. Similarly current realities in that country require this Panel to acknowledge that the normal processes of payment down the contractual chain do not operate in Iraq, at least so far as projects that commenced before Iraq's invasion and occupation of Kuwait are concerned. In these circumstances, it is unnecessary to review the operation of the contractual chain – the assumption must be that it is not operating. Consequently, claims may properly be filed with the Commission by any party anywhere in the contractual chain. Naturally this approach does not detract from or modify the obligation of a claimant pursuant to Governing Council decision 13 (S/AC.26/1992/13) to inform the Commission of any payments in fact received which go to moderate or extinguish its loss. The Panel notes that this obligation has, so far as this Panel can judge (by its review of the claims filed, the follow up information provided when asked for, and extensive cross checking against the myriad other claims filed with the Commission), been almost wholly honoured by claimants.

119. Both past and present realities may lead, as more claims are investigated, to other dissimilarities between the treatment of projects within and outside Iraq.

(b) Projects outside Iraq

120. Where the project out of which a claim arises was sited outside Iraq (as to which see also paragraphs 63 to 67, supra) and particularly where it was sited within Kuwait, the situation is more complicated. The Kuwaiti situation, being, obviously, the most common one, is a convenient one to use as an example. In Kuwait today, ministries are back in full operation. Kuwaiti companies have in many cases resumed business. Projects have been restarted and completed. Claims arising out of Iraq's invasion and occupation of Kuwait have been lodged and resolved.

121. In these circumstances, the risk of double rewards or unjustifiably enhanced reimbursement of claimants is greater; and it is necessary to proceed with caution. Doing so, the following propositions can be seen to be generally applicable.

122. A claimant that is not at the top of the contractual chain and which wishes to recover for a contract loss will usually have to establish why it is not able or entitled to look to the party next up the line. There are many possible explanations which such a claimant may be able to rely on when thus establishing its locus standi. The bankruptcy or liquidation of the debtor is one; another is that the contractual relation between claimant and debtor is subject to a contractual bar which does not apply

in the context of claims to the Commission; another is that there has been an assignment or other arrangement between the two parties which has allowed the claimant to bring the claim.

123. Where such an explanation is established by sufficient evidence, this Panel sees no great difficulty in principle in entertaining the claim.

124. Where no such ground is established (either by the evidence of the particular claimant or extraneously, for example by the evidence put forward in some other claim before the Commission) this Panel is prima facie obliged to make appropriate assumptions – for example, that the next party up the chain is in existence, solvent and liable to pay. In that event, the claimant's loss would not appear to be caused directly by Iraq's invasion and occupation of Kuwait but by the failure of the debtor to pay. An example might be where a subcontractor is out of his money for work done; where the contractor would, if so minded, be entitled to recover it from the owner; but where, for whatever the reason, the contractor is not pursuing the claim against the owner and is, at the same time, refusing to reimburse the subcontractor out of his own pocket. If that is the end of the story it will be difficult if not impossible for this Panel to recommend payment of the claim.

(c) "Pay when paid" clauses

125. Many construction contracts in wide use in various parts of the world contain what are called "pay when paid" clauses. Such a clause relieves the paying party – most usually the contractor – from the obligation to pay the party down the line - the subcontractor in the usual example – until the contractor has been paid by the owner. The aim of such a clause is to assist in the planning of the cash flow down the contractual chain. The effect of such a clause is to modify the point in time at which the entitlement of the next party down the chain to be paid for its work accrues.

126. Such a clause falls to be distinguished from a "back to back" arrangement. This latter expression refers to the situation where the terms of two contracts in a chain are identical as to obligations and rights. Thus – continuing the example of the owner, main contractor and subcontractor – in a "back to back" situation, the obligations owed by the contractor to the owner and his rights against the owner will be mirrored in the rights and obligations of the subcontractor and the contractor. This type of situation does not, of itself, in any way inhibit the ability of the subcontractor to seek relief independently of what is happening or has happened between the contractor and the owner.

127. A "pay when paid" clause is superficially attractive – among other effects the main contractor and the subcontractor may both be said to be at risk of non payment by the owner. However, experience in many jurisdictions has shown that it is easy for main contractors to abuse such clauses when they are seeking to avoid fair payment for work done by their subcontractors. It also creates problems for the subcontractor when the main contractor is disinclined to pursue the subcontractor's claim against the owner, a situation that can easily come about – e.g. where pursuing such a claim may lead to a cross claim by the owner against the contractor in respect of matters that cannot be passed back down to the subcontractor.

128. Such clauses are to be found in some of the contracts utilised in projects which have given rise to the claims to the Commission. The question arises therefore as to whether such clauses are relevant for the purposes of determining the claimant's entitlement. To put it another way, does the existence of such a clause affect the causative chain between Iraq's invasion and occupation of Kuwait and the claimed loss?

129. It seems to this Panel that the answer to this question will vary according to the circumstances. However, where the sole effect of the clause would be to prevent a claim by a subcontractor to the Commission, then the clause falls to be ignored. Such a clause appears to this Panel to be comparable, in this context, to frustration and force majeure clauses. For example, in respect of contracts involving Iraq, Governing Council decision 9 made it clear that Iraq could not avoid its liability for loss by reliance upon the provisions of frustration and force majeure clauses. It would be odd, therefore, if such liability could be avoided by the operation of a provision such as a "pay when paid" clause.

J. Claims for overhead and "lost profits"

1. General

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

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

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

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

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

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

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

137. Finally, there is what is called the "risk margin" - the allowance for the unexpected. The risk margin is generally in the range of between barely above zero and 5 per cent of the total contract price. The more smoothly the project goes, the less the margin will have to be expended. The result will be enhanced profits, properly so called, recovered by the contractor at the end of the day. The more the unexpected happens and the more the risk margin has to be expended, the smaller the profit will ultimately be. Indeed, the cost of dealing with the unexpected or the unplanned may equal or exceed the risk margin, leading to a nil result or a loss.

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

2. Head office and branch office expenses

139. Head office and branch office expenses are generally regarded as part of the overhead. These costs can be dealt with in the price in a variety of ways. For example, they may be built into some or all of the prices against line items; they may be provided for in a lump sum; they may be dealt with in many other ways. One aspect, however, will be common to most, if not all, contracts. It will be the intention of the contractor to recover these costs through the price at some stage of the execution of the contract. Often the recovery has been spread through elements of the price, so as to result in repayment through a number of interim payments during the course of the contract. Where this has been done, it may be said that these costs have been amortised. This factor is relevant to the question of double-counting (see paragraph 142, infra).

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

141. If these items were the subject of an advance payment, again they may have been recovered in their entirety at an early stage of the project. Here of course there is an additional complication, since the advance payments will be credited back to the employer - see paragraph 70, supra - during the course of the work. In this event, the Panel is thrown back onto the question of where in the contractor's prices payment for these items was intended to be.

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

143. The same applies where there are physical losses at a branch or indeed a site office or camp (which expenses are also generally regarded as part of the overhead). These losses are properly characterised, and therefore claimable, if claimable at all, as losses of tangible assets.

3. Loss of profits on a particular project

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

145. As will be seen from the observations at paragraphs 130 to 138, supra, the expression "lost profits" is an encapsulation of quite a complicated concept. In particular, it will be appreciated that achieving profits or suffering a loss is a function of the risk margin and the actual event.

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

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

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

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

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

4. Loss of profits for future projects

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

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

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

K. Loss of monies left in Iraq

1. Funds in bank accounts in Iraq

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

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

156. Second, for such a claim to succeed it would be necessary to establish that in the particular case, Iraq would have permitted the exchange of such funds into hard currency for the purposes of export. For this, appropriate evidence of an obligation to this effect on the part of Iraq is required. Furthermore, this Panel notes that the decision to deposit funds in banks located in particular countries is a commercial decision, which a corporation engaged in international operations is required to make. In making this decision, a corporation would normally take into account the relevant country or regional risks involved.

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

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

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

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

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

2. Petty cash

159. Exactly the same considerations apply to claims for petty cash left in Iraq in Iraqi dinars. These monies were left in the offices of claimants when they departed from Iraq. The circumstances in which the money was left behind vary somewhat; and the situation which thereafter obtained also varies - some claimants contending that they returned to Iraq but the monies were gone; and others being unable to return to Iraq and establish the position. In these different cases, the principle seems to this Panel to be the same. Claimants in Iraq needed to have available sums (which could be substantial) to meet liabilities which had to be discharged in cash. These sums necessarily consisted of Iraqi dinars. Accordingly, absent evidence of the same matters as are set out in paragraph 157, supra, it will be difficult to establish a "loss", and in those circumstances, this Panel is unable to recommend compensation.

3. Customs deposits

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

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

162. In the light of the foregoing, it seems to the Panel that claims to recover these duties need to be supported by sufficient evidentiary material, going to the issue of whether, but for Iraq's invasion and occupation of Kuwait, such permission would, in fact or on a balance of probabilities, have been forthcoming.

163. Absent such evidence and leaving aside any question of double-counting (see paragraph 142, supra), the Panel is unlikely to be able to make any positive recommendations for compensating unrecovered customs deposits made for plant, vehicles and equipment used at construction projects in Iraq.

L. Tangible property

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

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

the part of the authorities to take over these assets. This Panel has difficulty in seeing how these losses were caused by Iraq's invasion and occupation of Kuwait. On the contrary, it appears that they stem from an wholly independent event and accordingly are outside the jurisdiction of the Commission.

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

M. Payment or relief to others

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

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

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

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

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

N. Final awards, judgments and settlements

172. In the case of some of the projects in which claimants are seeking compensation from the Commission, there have been proceedings between the parties to the project contract leading to an award or a judgment; or there has been a settlement between the claimant and another party to the

relevant contract. In all such cases, one is concerned with finality. The award, judgment or settlement must be final – not subject to appeal or revision.

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

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

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