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

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## Introduction

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

### I. PROCEDURAL HISTORY

#### A. The nature and purpose of the proceedings

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

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

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

4. On 13 November 2001, the Panel issued a procedural order relating to the claims. None of the claims presented complex issues, voluminous documentation or extraordinary losses that would require the Panel to classify them as “unusually large or complex” within the meaning of article 38(d) of the Rules. The Panel was thus required in accordance with article 38(c) of the Rules to complete its review of the claims within 180 days of the date of its procedural order of 13 November 2001.

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

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

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

#### C. Amending claims after filing

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

#### D. The claims

9. This report contains the Panel's findings for losses allegedly caused by Iraq's invasion and occupation of Kuwait with respect to the following 12 claims:

(a) Bangladesh Consortium Limited, a corporation organised according to the laws of Bangladesh, which seeks compensation in the amount of 19,341,338 United States dollars (USD);

(b) Bengal Development Corporation Limited, a corporation organised according to the laws of Bangladesh, which seeks compensation in the amount of USD 4,692,842;

(c) Duro Dakovic-Proizvodnja Industrijske Opreme, d.o.o., a corporation organised according to the laws of Croatia, which seeks compensation in the amount of USD 2,370,140;

(d) Duro Dakovic Montaza d.d., a corporation organised according to the laws of Croatia, which seeks compensation in the amount of USD 7,062,368;

(e) International Contractors Group-Egypt, a corporation organised according to the laws of Egypt, which seeks compensation in the amount of USD 4,050,146;

(f) Krupp Industrietechnik GmbH, a corporation organised according to the laws of Germany, which seeks compensation in the amount of USD 2,800,503;



- (g) UB Engineering Limited, a corporation organised according to the laws of India, which seeks compensation in the amount of USD 535,121;
- (h) Acqua S.p.A., a corporation organised according to the laws of Italy, which seeks compensation in the amount of USD 304,909;
- (i) F.lli Girat S.p.A., a corporation organised according to the laws of Italy, which seeks compensation in the amount of USD 1,570,606;
- (j) National Engineering Services Pakistan (Pvt) Limited, a corporation organised according to the laws of Pakistan, which seeks compensation in the amount of USD 1,238,966;
- (k) WS Atkins Limited, a corporation organised according to the laws of the United Kingdom of Great Britain and Northern Ireland, which seeks compensation in the amount of USD 1,847,437; and
- (l) Engineering-Science, Inc., a corporation organised according to the laws of the United States of America, which seeks compensation in the amount of USD 108,401.

## II. LEGAL FRAMEWORK

### A. Applicable law

10. As set forth in paragraphs 16-18 and 23 of the “Report and recommendations made by the Panel of Commissioners concerning the first instalment of ‘E3’ claims” (S/AC.26/1998/13) (the “First ‘E3’ Report”), paragraph 16 of Security Council resolution 687 (1991) reaffirmed the liability of Iraq and defined the jurisdiction of the Commission. The Panel applied to the claims under review Security Council resolution 687 (1991), other relevant Security Council resolutions, decisions of the Governing Council, and, where necessary, other relevant rules of international law.

### B. Liability of Iraq

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

### C. The “arising prior to” clause

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

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

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

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

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

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

#### D. Application of the “direct loss” requirement

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

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

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

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

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

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

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

#### E. Loss of profits

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

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

#### F. Date of loss

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

#### G. Interest

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

20. The Panel finds that interest shall run from the date of loss, which, unless otherwise specified, is determined as 2 August 1990.

#### H. Currency exchange rate

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

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

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

#### I. Evacuation losses

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

#### J. Valuation

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

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

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

#### K. Formal requirements

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

#### L. Evidentiary requirements

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

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

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

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

### III. BANGLADESH CONSORTIUM LIMITED

33. Bangladesh Consortium Limited (“Bangladesh Consortium”) is a civil engineering construction company organised according to the laws of Bangladesh. Bangladesh Consortium seeks compensation in the amount of USD 19,341,338 for contract losses, loss of profits, loss of tangible property, payment or relief to others, and financial losses.

34. Bangladesh Consortium has identified The Engineers Limited, a Bangladesh Corporation, as its parent corporation. The Engineers Limited has not filed a category “E” claim. Therefore, it is appropriate for Bangladesh Consortium to file its own claim.

35. In the original “E” claim form, Bangladesh Consortium sought compensation in the total amount of USD 21,398,010 for contract losses and loss of tangible property.

36. The claim for contract losses, however, included claims for loss of profits, payment or relief to others, and financial losses, in addition to a claim for contract losses. The Panel has reclassified the claim for contract losses to the appropriate elements for the purposes of this report.

37. In its reply to the article 15 notification submitted in January 2001, Bangladesh Consortium withdrew part of the claim that was reclassified as financial losses, which related to an alleged loss of

cash on hand and in bank accounts. In the same reply, Bangladesh Consortium attempted to increase its claims for contract losses, and its claims for losses that were reclassified as loss of profits and financial losses. Bangladesh Consortium also revised the amount of its claim for payment or relief to others to correct an arithmetical error, the correction of which resulted in an increase in the amount of the claim.

38. The Panel has only considered those losses and amounts contained in the original claim (except for correction of arithmetical errors or where such losses have been withdrawn or reduced by Bangladesh Consortium), and refers in this respect to paragraph 8, supra.

39. The Panel therefore considered the amount of USD 19,341,338 for contract losses, loss of profits, loss of tangible property, payment or relief to others, and financial losses as follows:

Table 1. Bangladesh Consortium's claim

<u>Claim element</u>	<u>Claim amount (USD)</u>
Contract losses	7,134,628
Loss of profits	8,747,376
Loss of tangible property	472,000
Payment or relief to others	1,133,493
Financial losses	1,853,841
<u>Total</u>	<u>19,341,338</u>

#### A. Contract losses

##### 1. Facts and contentions

40. Bangladesh Consortium seeks compensation in the amount of USD 7,134,628 for contract losses allegedly incurred in connection with approximately 20 contracts in Iraq. Bangladesh Consortium was involved, as the contractor or subcontractor, in the construction of projects such as bridges, railway stations, and housing projects.

41. Bangladesh Consortium's claim for contract losses is divided among five different employers. According to its Statement of Claim, the employers on all of the contracts were Iraqi state entities, except for Al-Belhan International Trading & Contracting Company, which was a Kuwaiti entity.

42. Bangladesh Consortium presented its claim for contract losses in the categories set out in table 2, infra.

Table 2. Bangladesh Consortium's claim for contract losses

<u>Name of employer</u>	<u>Amount claimed (USD)</u>
Al Fao State Establishment	4,842,909
State Company for Building Contracts	1,267,999
Al-Mu'tasim Contracting Company	109,978
State Contracting Company for Industrial Projects	234,266
Promissory note issued by State Company for Building Contracts	411,720
Al-Belhan International Trading & Contracting Company	267,756
<u>Total</u>	<u>7,134,628</u>

(a) Contract losses relating to Al-Fao State Establishment

43. Bangladesh Consortium seeks compensation in the amount of USD 4,842,909 for contract losses on projects for Al Fao State Establishment. Under these contracts, Bangladesh Consortium provided the workforce for various military industrial projects in Iraq. The workers were located throughout the country at the time of Iraq's invasion of Kuwait. Information relating to the contracts with the Al Fao State Establishment is set out in table 3, infra.

Table 3. Contracts with Al Fao State Establishment

<u>Date of contract</u>	<u>Name of employer</u>	<u>Description of contract</u>	<u>Intended completion date</u>
7 July 1987	Al Fao State Establishment (Technical Corps for Special Projects)	Provide approximately 500 workers for projects in Iraq	Nine months from date of contract
7 July 1987	Al Fao State Establishment (Technical Corps for Special Projects)	Provide an additional 550 workers for projects in Iraq	7 July 1988

44. The intended completion dates of the contracts were amended and/or extended.

45. The amounts receivable from the Al Fao State Establishment have been further broken down by Bangladesh Consortium as set out in table 4, infra.

Table 4. Confirmations relating to Al Fao State Establishment

<u>Receivable</u>	<u>Amount (USD)</u>
First confirmation	2,941,803
Second confirmation	1,696,281
Third confirmation	173,548
Fourth confirmation	31,277
<u>Total</u>	<u>4,842,909</u>

(b) Contract losses relating to State Company for Building Contracts of Iraq

46. The contracts relating to the State Company for Building Contracts of Iraq are set out in table 5, infra, with a brief description of each.

Table 5. Contracts relating to State Company for Building Contracts

<u>Date of contract</u>	<u>Description of contract</u>	<u>Intended completion date</u>
19 November 1980	Construction of dwelling town foundation at Al-Qaim	Unknown
Unspecified date in 1981	Project for fixing marble steps for houses at Alkaim and Akashat, dwelling towns project	18 months after date of contract
Unspecified date in 1981	Construction of pump house and twin box culvert at Al-Qaim	90 days after date of contract
Unspecified date in May 1981	Roofing works of Alkaim and Akashat dwelling project	12 months after date of contract
Unspecified date in 1981	Construction of Steiger manufacturing	Unknown
18 February 1982	Construction of external sanitary network at Al-Qaim and Akashat	18 February 1983
18 February 1982	Construction of internal sanitary plumbing work at Al-Qaim and Akashat	18 February 1983
18 February 1982	Roofing work for remaining houses at Al-Qaim project	18 February 1983
9 March 1982	Construction of primary school, nursery and kindergarten, health centre, shopkeeper apartment and skirting in house at Al-Qaim and Akashat	9 March 1983
9 March 1982	Pavement of interior walkways for houses in (RU-1) zone at Al-Qaim	9 December 1982
23 November 1983	External painting work of Al-Qaim and Akashat project	31 January 1985
1 November 1984	Electrical works at biological research centre at Baghdad	1 August 1985

(c) Contract losses relating to State Company for Building Contracts of Iraq (promissory notes)

47. This loss arises from the construction of a centre for disabled war veterans in Kirkuk. Part of the payment for work on the project was in the form of four promissory notes, two of which were dated 1 January 1988 and two others which were dated 30 June 1988 and 30 June 1989. The notes had maturity dates in 1993 and 1994.

48. Information relating to the claim relating to promissory notes issued by the State Company for Building Contracts is set out in table 6, infra.



Table 6. Contract relating to State Company for Building Contracts of Iraq (promissory notes)

<u>Date of contract</u>	<u>Name of employer</u>	<u>Description of contract</u>	<u>Intended completion date</u>
11 March 1986	State Company for Building Contracts	Construction of war disabled centre in Kirkuk city	20 months after date of contract

(d) Contract losses relating to Al-Mu'Tasim Contracting Company of Iraq

49. Bangladesh Consortium was involved in two projects for the Al-Mu'Tasim Contracting Company. According to Bangladesh Consortium, the State Company for Building Contracts changed its name to Al-Mu'Tasim Contracting Company. One project was the construction of a centre for disabled war veterans and the other was the construction of a multi-storey building in Baghdad.

50. Information relating to the contracts with Al-Mu'Tasim Contracting Company of Iraq is set out in table 7, infra.

Table 7. Contracts relating to Al-Mu'Tasim Contracting Company

<u>Date of contract</u>	<u>Name of employer</u>	<u>Description of contract</u>	<u>Intended completion date</u>
28 February 1985	Al-Mu'Tasim Company (State Company for Building Contracts)	Construction of superstructure installation and brickwork structure/typical block/block D	285 days after date of contract
11 March 1986	Al-Mu'Tasim Contracting Company (State Company for Building Contracts)	Construction of centre for disabled war veterans in Kirkuk city	20 months after date of contract

(e) Contract losses relating to State Contracting Company for Industrial Projects of Iraq

51. Bangladesh Consortium worked on several projects for the State Contracting Company for Industrial Projects, including projects for the construction of a railway station building, the construction of a bridge, the construction of nine elevated water tanks, and the construction of houses.

52. Information relating to the contracts with the State Contracting Company for Industrial Projects of Iraq is set out in table 8, infra.

Table 8. Contracts relating to State Contracting Company for Industrial Projects of Iraq

<u>Date of contract</u>	<u>Name of employer</u>	<u>Description of contract</u>	<u>Intended completion date</u>
Unspecified date in 1981	State Company for Industrial Contracts	Construction of Steiger manufacturing	Unknown
10 May 1981	State Company for Industrial Contracts	Construction of overhead bridge at KM 149 and 380 at Akashat	20 June 1981
Unspecified date in 1982	State Contracting Company for Industrial Projects	Construction of station building at KM 46	30 October 1982
3 June 1982	State Contracting Company for Industrial Projects	Construction of concrete flooring in platform of railway station at Akashat railway station and K46	Three months from letter of intent
Illegible date in 1983	State Contracting Company for Industrial Projects	Construction of balance work at houses at KM 8 and Akashat	29 February 1984
Unspecified date in 1983	State Contracting Company for Industrial Projects	Construction of nine elevated water tanks	Three months within date of contract

(f) Contract losses relating to Kuwaiti party

53. This portion of the claim concerns a housing construction project at Hilla, Iraq, where Al-Belhan International Trading & Contracting Company (“Al-Belhan”), a Kuwaiti company, was the contractor. Al-Belhan was unable to complete the project, and the Iraqi employer asked Bangladesh Consortium to complete it. The employer and Al-Belhan arranged for Bangladesh Consortium to become Al-Belhan’s subcontractor on the project. Bangladesh Consortium entered into two subcontracts with Al-Belhan in 1985, and completed the work. Al-Belhan did not pay amounts owed to Bangladesh Consortium under the subcontracts, and Bangladesh Consortium obtained a court judgment in Iraq against the contractor on 24 November 1991.

54. Information relating to the subcontracts with Al-Belhan International Trading & Contracting Company is set out in table 9, infra.

Table 9. Contracts relating to Al-Belhan International Trading & Contracting

<u>Date of contract</u>	<u>Name of contractor</u>	<u>Description of contract</u>	<u>Intended completion date</u>
31 May 1985	Al-Belhan International Trading & Contracting Co.	Unspecified	20 October 1985
15 December 1985	Al-Belhan International Trading & Contracting Co.	Unspecified	30 April 1986

## 2. Analysis and valuation

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

56. The Panel finds that for the purposes of the “arising prior to” clause in paragraph 16 of Security Council resolution 687 (1991), Bangladesh Consortium had in each case, with the exception of the contracts with Al-Belhan, a contract with Iraq.

### (a) Contract losses relating to Al-Fao State Establishment

57. Bangladesh Consortium provided the following evidence relating to Al-Fao State Establishment:

- (a) A breakdown of the sum receivable from the employer split into the four confirmations;
- (b) Confirmations of the amounts from the employer;
- (c) A copy of the contracts between Bangladesh Consortium and the employer;
- (d) Invoices signed by the employer dated May, June and July 1990 for the sub-projects supported by listings of employees, their position, hours worked and rate;
- (e) Minutes of a meeting between Bangladesh Consortium and the employer signed by both parties on 26 July 1990; and
- (f) Letters from the employer to the Central Bank of Iraq requesting that payments be made to Bangladesh Consortium.

58. The claim is also supported by evidence to show that Bangladesh Consortium evacuated over 1,500 of its employees after Iraq’s invasion of Kuwait. Since under the contracts, Bangladesh Consortium provided manpower for the projects, the presence of Bangladesh Consortium’s employees in Iraq is an indication that it was performing on its contracts at the time of the invasion.

### (i) First confirmation

59. The first confirmation certificate from the employer refers to seven letters sent to the Central Bank of Iraq from April to October 1990, which refer to a payment of USD 2,941,803 related to payments due for September 1989 to March 1990. Bangladesh Consortium submitted minutes of a meeting on 26 July 1990 in which Al-Fao State Establishment agreed to remit USD 2,186,637 to Bangladesh Consortium within 10 days.

60. With respect to the first confirmation, the Panel finds that the contract losses alleged by Bangladesh Consortium relate entirely to work that was performed prior to 2 May 1990.

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

(ii) Second confirmation

62. The second confirmation, in the amount of USD 1,696,281, is dated 30 December 1990 and is for payments due for the period from April to September 1990. This confirmation is supported by invoices for May, June and July 1990 and signed by a representative of Bangladesh Consortium, the Project Accountant, the Project Manager, the Site Manager and the Office Manager.

63. With respect to the second confirmation, the Panel finds that Bangladesh Consortium provided sufficient information and evidence to establish that it is entitled to compensation in the amount of USD 1,382,827 for work that was performed after 2 May 1990.

(iii) Third confirmation

64. The third confirmation, in the amount of USD 173,548, is dated 8 January 1991 and relates to payments due in April and May 1990, and an unpaid balance in September 1990.

65. With respect to the third confirmation, the Panel finds that the contract losses alleged by Bangladesh Consortium relate in part to work that was performed after 2 May 1990.

66. With respect to the third confirmation, the Panel finds that Bangladesh Consortium provided sufficient information and evidence to establish that it is entitled to compensation in the amount of USD 24,189 for work that was performed after 2 May 1990.

(iv) Fourth confirmation

67. The fourth confirmation, in the amount of USD 31,277, is dated 2 January 1992 and relates to work performed between June and August 1990. This confirmation is supported by invoices for June, July, and August 1990 and signed by a representative of Bangladesh Consortium, the Project Accountant and the Project Manager.

68. With respect to the fourth confirmation, the Panel finds that Bangladesh Consortium provided sufficient information and evidence to establish that it is entitled to compensation in the amount of USD 31,277 for work that was performed between June and August 1990. The Panel finds that the date of loss is 2 August 1990.

(b) Contract losses relating to State Company for Building Contracts of Iraq

69. In support of its claim, Bangladesh Consortium provided a copy of the contract, extension of work, and provisional and final acceptance certificates for each of the projects.

70. The final acceptance certificates were issued in 1984, 1985, 1986, 1987 or 1988. Thus, all of the work on the contracts was completed in 1988 or before.

71. The Panel finds that the contract losses alleged by Bangladesh Consortium for this employer relate entirely to work that was performed prior to 2 May 1990.

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

(c) Contract losses relating to State Company for Building Contracts of Iraq (promissory notes)

73. In support of this claim, Bangladesh Consortium provided a copy of the contract, the extension of works, and the final acceptance certificate dated 29 May 1988.

74. The Panel finds that the contract losses alleged by Bangladesh Consortium for this employer relate entirely to work that was performed prior to 2 May 1990.

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

(d) Contract losses relating to Al-Mu'tasim Contracting Company of Iraq

76. In support of this claim, Bangladesh Consortium provided copies of the contracts for the projects, the extensions of work, and a confirmation of the amounts owed by the employer. Bangladesh Consortium also provided copies of the final acceptance certificates dated 29 May 1988 for the centre for disabled war veterans project, and another dated 15 August 1988 for the superstructure project.

77. The Panel finds that the contract losses alleged by Bangladesh Consortium for this employer relate entirely to work that was performed prior to 2 May 1990.

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

(e) Contract losses relating to State Contracting Company for Industrial Projects of Iraq

79. In support of this claim, Bangladesh Consortium provided for each of the projects a copy of the contract, the extension of works, and confirmation of the amounts owed by the employer. Bangladesh Consortium also provided the provisional and final acceptance certificates for the projects (with the exception of the Steiger project).

80. The final acceptance certificates were issued in 1984, 1985, 1986, 1987 or 1988.

81. Bangladesh Consortium did not provide any evidence to show that any of the work on the Steiger project was performed after 2 May 1990.

82. The Panel finds that the contract losses alleged by Bangladesh Consortium for this employer relate entirely to work that was performed prior to 2 May 1990.

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

(f) Contract losses (with Kuwaiti party)

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

85. In support of the claim relating to Al-Belhan, Bangladesh Consortium provided copies of the contracts with the contractor, a copy of the experts' report in the related lawsuit, and a copy of the court judgment.

86. The Panel finds that this claim is not compensable for two reasons. First, the contracts were dated 1985, and the evidence indicates that the work was completed several years before Iraq's invasion and occupation of Kuwait. Bangladesh Consortium did not provide sufficient information or evidence to establish that Al-Belhan's failure to pay it was the direct result of Iraq's invasion and occupation of Kuwait. To the contrary, the evidence indicates that Al-Belhan experienced difficulties in performing in 1985. The Panel also finds that Bangladesh Consortium did not provide sufficient information and evidence to establish that the contractor was rendered insolvent or liquidated as a direct result of Iraq's invasion and occupation of Kuwait, or otherwise entitled to refuse to pay Bangladesh Consortium.

87. At the same time, the claim is not compensable because the court judgment was issued after the liberation of Kuwait. Thus, to the extent that the judgment could be considered to be the underlying obligation, the Panel finds that it was issued (and the obligation arose) outside the compensable period as determined by the Governing Council.

88. The Panel recommends no compensation for contract losses relating to this employer.

3. Recommendation

89. The Panel recommends compensation in the amount of USD 1,438,293 for contract losses. The Panel finds that the date of loss is 2 August 1990.

## B. Loss of profits

### 1. Facts and contentions

90. Bangladesh Consortium seeks compensation in the amount of USD 8,747,376 for loss of profits.

91. Bangladesh Consortium originally classified the claim for loss of profits as contract losses, but it is more appropriately classified as a claim for loss of profits.

92. Bangladesh Consortium seeks compensation for loss of profits from 1990 to 1994. The claim is based on its turnover from August 1989 to July 1990, and assumes that the turnover would have remained constant for four years with a profit margin of 15 per cent.

### 2. Analysis and valuation

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

94. In support of its claim, Bangladesh Consortium provided a breakdown of the invoices issued in the 12 months from August 1989 to July 1990, a breakdown of each monthly invoice by project, financial statements for the year ending 31 December 1991, and a summary of contracts in progress as of 31 December 1992.

95. However, Bangladesh Consortium did not provide sufficient information or evidence as to which, if any, of the contracts would have been in effect for the four-year period for which lost profits are claimed. It also did not provide sufficient information or evidence to support its assumed turnover for the four-year period (such as the timing of its contracts or status of projects). Furthermore, there was insufficient information and evidence to support the assertion that the profit margin would have been 15 per cent.

96. The Panel finds that Bangladesh Consortium failed to provide sufficient information and evidence to substantiate its loss of profits claim.

### 3. Recommendation

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

## C. Loss of tangible property

### 1. Facts and contentions

98. Bangladesh Consortium seeks compensation in the amount of USD 472,000 for loss of tangible property. The claim is for the alleged loss of equipment and machinery from its project sites in Iraq.

99. The property falls into the following categories as set out in table 10, infra.

Table 10. Bangladesh Consortium's claim for loss of tangible property

<u>Loss items</u>	<u>Amount claimed (USD)</u>
Vehicles	138,000
Construction equipment	95,000
Office equipment	27,500
Camp equipment	141,500
Guarantee money	70,000
<u>Total</u>	<u>472,000</u>

100. Bangladesh Consortium states that the Iraqi authorities confiscated some of the property (including all of the vehicles), and that other property was stolen during Iraq's invasion and occupation of Kuwait (including two photocopy machines, two typewriters, and survey equipment).

## 2. Analysis and valuation

101. In support of its claim, Bangladesh Consortium provided copies of import certificates from Iraqi customs officials relating to 15 vehicles, two photocopy machines, two typewriters, and survey equipment. It also provided a document relating to a transfer of two vehicles from Bangladesh Consortium to one of the employers in September and October 1991.

102. Bangladesh Consortium did not provide any documents to support its claims relating to construction equipment, camp equipment, or guarantee money. The Panel finds that Bangladesh Consortium did not provide sufficient information and evidence to support its claim relating to these loss items.

103. In respect of the 15 vehicles, two photocopy machines, two typewriters, and survey equipment, the Panel finds that there is sufficient evidence to demonstrate Bangladesh Consortium's title to or right to use the assets, and their presence in Iraq.

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

105. The Panel finds that Bangladesh Consortium did not provide sufficient information and evidence to support its assertion that all of the vehicles were confiscated during the compensable period as determined by the Governing Council. In fact, the evidence indicates that Bangladesh Consortium was still in possession of some of the vehicles in September and October 1991.



106. In respect of the two photocopy machines, two typewriters, and survey equipment, the Panel finds that Bangladesh Consortium provided sufficient evidence of the historical cost of the assets. The Panel applied depreciation rates appropriate for such items. The Panel finds that these items had a value of USD 6,038 on 2 August 1990, which the Panel finds is the date of loss.

### 3. Recommendation

107. The Panel recommends compensation in the amount of USD 6,038 for loss of tangible property.

#### D. Payment or relief to others

##### 1. Facts and contentions

108. Bangladesh Consortium seeks compensation in the amount of USD 1,133,493 for payment or relief to others. The claim is for the costs of evacuating and repatriating 1,587 of Bangladesh Consortium's employees from Iraq to Bangladesh, by way of Jordan.

109. Bangladesh Consortium originally classified this portion of the claim as contract losses, but it is more appropriately classified as a claim for payment or relief to others. Bangladesh Consortium also revised the original amount of its claim for payment or relief to others in respect of its claim for bus fares to correct an arithmetical error, which correction resulted in an increase in the amount of the claim.

110. Bangladesh Consortium states that its employees were evacuated in groups by bus to a refugee camp in Jordan, then moved to Amman for the flight to Bangladesh. Each group of employees was headed by a group leader. Bangladesh Consortium states that it provided money to the group leaders to pay for visas, food, and medicine for the employees.

111. The breakdown of costs is set out in table 11, infra.

Table 11. Bangladesh Consortium's claim for payment or relief to others

<u>Loss items</u>	<u>Amount claimed (USD)</u>
Bus fare from Baghdad to Amman	518,557
Jordan visa fees	25,463
Food and "tiffin" on journey from Baghdad to Jordan	509,251
Medicine	80,222
<u>Total</u>	<u>1,133,493</u>

##### 2. Analysis and valuation

112. In support of its claim, Bangladesh Consortium provided:

- (a) A list of 1,587 employees with their passport number and job title;

(b) Copies of 14 payment receipts from the transport companies for transportation costs to Amman. The receipts carry different dates in September 1990;

(c) Payment vouchers for Jordanian visas, food and medicine; and

(d) Copies of contracts and payroll records for most of the evacuated employees.

113. The Panel finds that Bangladesh Consortium provided sufficient information and evidence to support its claim for bus fares. It proved payment of the bus fares with receipts from the transport companies. The Panel also finds that the expense was extraordinary because the expenses are limited to bus fares from Iraq to Jordan, and it is unlikely that any repatriation obligation owed to the employees would have resulted in the payment of bus fares to Jordan. The Panel finds that the evidence demonstrates that Bangladesh Consortium incurred USD 502,512 on bus fares for its evacuated employees. The Panel finds that the date of loss for bus fares is 28 September 1990, which is the date of the last receipt for payment of transportation expenses.

114. In respect of the claim for visa fees, food, and medicine, the Panel finds that Bangladesh Consortium provided sufficient information and evidence to show that it gave money to the group leaders for these items. The evidence shows that Bangladesh Consortium gave the group leaders the amounts of IQD 7,935 for visa fees, IQD 158,700 for food, and IQD 25,000 for medicine. The Panel finds that the evidence demonstrates that Bangladesh Consortium incurred IQD 191,635 for visas, food, and medicine for its employees. Bangladesh Consortium converted this amount to USD 614,936. The Panel finds that the date of loss for visa fees, food, and medicine is 26 November 1990, which is the date of the last receipt regarding these expenses.

### 3. Recommendation

115. The Panel recommends compensation in the amount of USD 1,117,448 for payment or relief to others.

#### E. Financial losses

##### 1. Facts and contentions

116. Bangladesh Consortium seeks compensation in the amount of USD 1,853,841 for financial losses.

117. Bangladesh Consortium originally classified this portion of the claim as one for contract losses, but it is more appropriately classified as a claim for financial losses.

118. Bangladesh Consortium originally sought compensation in the amount of USD 4,005,497 for this portion of the claim. The claim originally consisted of three elements, (a) cash on hand and in bank accounts, (b) retention monies, payments on performance bonds, and earnest money deposits, and (c) interest paid on money borrowed by Bangladesh Consortium to cover payroll. Bangladesh Consortium withdrew its claim for cash on hand and in bank accounts following the article 15

notification. Bangladesh Consortium now seeks USD 1,853,841 in connection with the second and third category of losses.

119. Bangladesh Consortium has alleged that it made payments on performance bonds, made earnest money deposits and was owed retention monies on various contracts. Bangladesh Consortium seeks compensation in the amount of USD 457,976 for this portion of its claim.

120. With regard to the interest paid on the money borrowed to cover payroll, Bangladesh Consortium seeks compensation in the amount of USD 1,395,865. It alleges that it was unable to meet payroll for its employees located in Iraq after Iraq's invasion and occupation of Kuwait. To meet payroll, Bangladesh Consortium alleges that its parent corporation, The Engineers Limited, borrowed money from several banks, which money was used to meet Bangladesh Consortium's payroll. This portion of the claim is for the amount of interest incurred on the borrowings.

## 2. Analysis and valuation

### (a) Performance bonds, earnest money deposits, and retention monies

121. Bangladesh Consortium provided the following evidence in support of its claim with respect to payments on performance bonds, earnest money deposits, and retention monies: (a) its financial statements for the year ending 31 December 1991, and (b) its contracts on the various projects.

122. Bangladesh Consortium did not provide copies of any of the bonds, or any evidence of payment of the charges claimed.

123. With regard to retention monies, Bangladesh Consortium did not provide confirmation from the employers in respect to the retention monies, and the evidence provided does not substantiate the claimed amounts.

124. The Panel finds that Bangladesh Consortium did not provide sufficient information and evidence to support its claim for financial losses relating to performance bonds, earnest money deposits, and retention monies.

### (b) Interest on borrowings

125. To support its claim for interest incurred on the borrowings, Bangladesh Consortium provided: (a) a letter dated 15 October 1993 from The Engineers Limited to Bangladesh Consortium requesting it to seek compensation from the Commission for the interest incurred, (b) a letter from a bank to The Engineers Limited dated 4 August 1993 regarding amounts owed on a loan, and (c) an internally prepared document showing amounts borrowed and interest incurred.

126. Bangladesh Consortium did not provide evidence to show any payment of interest by it or The Engineers Limited. It also did not provide sufficient information or evidence to show that the incurring of interest charges was a direct result of Iraq's invasion and occupation of Kuwait.

127. The Panel finds that Bangladesh Consortium did not provide sufficient information and evidence to support its claim for financial losses relating to interest on money borrowed to meet payroll.

### 3. Recommendation

128. The Panel recommends no compensation for financial losses.

#### F. Recommendation for Bangladesh Consortium

Table 12. Recommended compensation for Bangladesh Consortium

<u>Claim element</u>	<u>Claim amount (USD)</u>	<u>Recommended compensation (USD)</u>
Contract losses	7,134,628	1,438,293
Loss of profits	8,747,376	nil
Loss of tangible property	472,000	6,038
Payment or relief to others	1,133,493	1,117,448
Financial losses	1,853,841	nil
<u>Total</u>	<u>19,341,338</u>	<u>2,561,779</u>

129. Based on its findings regarding Bangladesh Consortium's claim, the Panel recommends compensation in the amount of USD 2,561,779. The Panel finds the date of loss to be 2 August 1990 for contract losses and loss of tangible property. For payment or relief to others, the Panel finds the date of loss to be 28 September 1990 for bus fares and 26 November 1990 for visas, food, and medicine.

#### IV. BENGAL DEVELOPMENT CORPORATION LIMITED

130. Bengal Development Corporation Limited ("Bengal") is a corporation organised according to the laws of Bangladesh operating in the construction industry. Bengal seeks compensation in the amount of USD 4,692,842 for contract losses, loss of tangible property, and payment or relief to others.

131. In its reply to the article 15 notification submitted in February 2001, Bengal introduced a claim for loss of profits and attempted to increase the amount of its claim for contract losses. The Panel has only considered those losses and amounts contained in the original claim, and refers in this respect to paragraph 8, supra.

132. The Panel therefore considered the amount of USD 4,692,842 for contract losses, loss of tangible property, and payment or relief to others as follows:

Table 13. Bengal's claim

<u>Claim element</u>	<u>Claim amount (USD)</u>
Contract losses	2,097,472
Loss of tangible property	2,306,570
Payment or relief to others	288,800
<u>Total</u>	<u>4,692,842</u>

A. Contract losses1. Facts and contentions

133. Bengal seeks compensation in the amount of USD 2,097,472 for contract losses allegedly incurred in connection with ten projects in Iraq. Bengal was engaged as a contractor to perform work on the projects for five different employers.

134. The projects, amount claimed for each project, and the employer are set out in table 14, infra.

Table 14. Bengal's claim for contract losses

<u>Project</u>	<u>Amount claimed (IOD)</u>	<u>Conversion to United States dollars</u>	<u>Employer</u>
1. Kut brick factory	243,647.03	781,836	Al-Mutasim Construction Co.
2. Veterans hospital	147,028.91	471,799	Al-Mutasim Construction Co.
3. Al-Kaim city centre project	56,406.35	181,002	Al-Mutasim Construction Co.
4. Hartha Stores	40,509.00	129,989	State Company for Building Contracts
5. Rafidain bank	1,800.00	5,776	State Company for Building Contracts
6. Restoration of historical housing project	65,227.46	209,308	Amanat al Asima (Municipality of Baghdad)
7. Dewan Al-Qaderi	12,929.38	41,489	Amanat al Asima (Municipality of Baghdad)
8. Haifa street development	14,634.82	46,962	Amanat al Asima (Municipality of Baghdad)
9. Insurance building	68,330.95	219,266	Ministry of Finance, Government of Iraq
10. Renovation of British Embassy	3,130.43	10,045	British Embassy
<u>Total</u>	<u>653,644.33</u>	<u>2,097,472</u>	

135. With the exception of the British Embassy, all of the employers are Iraqi governmental entities.

136. The following is a brief description of each of the 10 projects at issue:

(a) Kut brick factory – Bengal was responsible for constructing an automatic brick factory. The work under the contract included the installation and commissioning of the factory, the operation and maintenance of the factory, and the production of bricks for six months after completion of construction;

(b) Veterans hospital (referred to as the “war retarder centre” by Bengal) – Bengal was responsible for constructing a hospital building for war veterans including the construction of the electricity, water and sewerage networks;

(c) Al-Kaim city centre project – Bengal was responsible for constructing community buildings in the city centre, such as a hospital, cinema, library, fire station, shopping centre, and schools;

(d) Hartha Stores project – Bengal was responsible for constructing Hartha Stores at Basrah. This included 220,000 square metres of floor pavement works and 100,000 square metres of road construction works;

(e) Rafidain bank building – Bengal was responsible for reconstructing the Rafidain bank building in Baghdad;

(f) Historical housing project – Bengal was responsible for restoring 19 historically important heritage houses at two sites. This included ensuring the buildings were structurally safe, restoring architectural features and incorporating modern service facilities into the sites;

(g) Dewan Al-Qaderi project – Bengal was responsible for constructing an office and library building for the holy shrine of Hajrat Abdul Qader Gaylani in Baghdad;

(h) Haifa street project – Bengal did not explain the nature of this work;

(i) Insurance building – Bengal was responsible for constructing a four-storey commercial complex; and

(j) British Embassy – Bengal was responsible for renovating the embassy in Baghdad.

137. Bengal did not provide copies of its contracts for any of the 10 projects that are the subject of its claim. Therefore, it is not possible to determine the payment terms or due dates for payments under each contract. For each project, however, Bengal claims that it completed the work and is owed money for the completed work plus retention monies in some instances.

138. Bengal provided a schedule regarding the commencement date and intended completion date for its projects. For some of the projects, Bengal stated that the dates are “not known”. The schedule is reproduced in part in table 15, infra.

Table 15. Bengal's claim for contract losses (commencement date and intended completion date)

<u>Project</u>	<u>Commencement date</u>	<u>Intended completion date</u>
1. Kut brick factory	11 March 1986	Not known
2. Veterans hospital	16 March 1986	30 April 1988
3. Al-Kaim city centre project	27 February 1982	31 December 1987
4. Hartha Stores project	October 1982	31 October 1983
5. Rafidain bank building	August 1985	February 1986
6. Restoration of historical housing project	19 November 1981	27 February 1983
7. Dewan Al-Qaderi	April 1984	January 1985
8. Haifa street development	Not known	Not known
9. Insurance building	February 1984	January 1986
10. British Embassy	Not known	Not known

139. In its reply to the article 34 notification, Bengal stated: “We did not require any extension of time [for any contract] and thus no extension was sought or granted.” It appears from this statement that the known intended completion dates were not extended. Bengal also provided completion certificates for some of the projects, which show that work was completed before 2 May 1990. To the extent that intended completion dates are not known, Bengal failed to provide any evidence to show that work was performed after 2 May 1990.

## 2. Analysis and valuation

### (a) Claims for contracts with Iraq

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

141. The Panel finds that for the purposes of the “arising prior to” clause in paragraph 16 of Security Council resolution 687 (1991), Bengal had, in each case (except for the project with the British Embassy), a contract with Iraq.

142. The Panel finds that the contract losses alleged by Bengal on its contracts with Iraq relate entirely to work that was performed prior to 2 May 1990.

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

(b) Claim for contract with non-Iraqi party

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

145. Bengal seeks losses in the amount of approximately USD 10,045 arising from its contract to renovate the British Embassy in Baghdad. Bengal did not provide a copy of its contract with the British Embassy. Furthermore, Bengal did not specify the commencement date or completion date of the project. Bengal did, however, submit a copy of a document from the British Embassy dated 31 December 1990 confirming the amounts owed to Bengal.

146. The Panel finds that Bengal did not establish that the failure to pay in question was the direct result of Iraq's invasion and occupation of Kuwait. Accordingly, the Panel recommends no compensation with respect to the contract losses related to the contract with the British Embassy.

3. Recommendation

147. The Panel recommends no compensation for contract losses.

B. Loss of tangible property

1. Facts and contentions

148. Bengal seeks compensation in the amount of USD 2,306,570 for the alleged loss of its tangible property in Iraq. The lost items include 85 pieces of heavy equipment and machinery (such as tractors, a crane, and concrete mixers), 11 motor vehicles, and assorted furniture and appliances, all of which were allegedly confiscated by Iraq.

149. Bengal provided a copy of a letter dated 27 August 1992 from it to the Bangladesh Embassy in Baghdad stating that Iraq had taken over its plant, machinery and vehicles from a camp site. Attached to the letter was a document dated 22 July 1992 prepared by Iraq, which appointed four persons to take an inventory of Bengal's property. Also attached was a document dated 1 August 1992 prepared by Iraq, which contained an inventory of Bengal's property.

2. Analysis and valuation

150. The Panel finds that Bengal's property was confiscated by Iraq in August 1992. Thus, the loss of tangible property occurred outside the compensable period (2 August 1990 to 2 March 1991). Accordingly, the Panel finds that Bengal failed to demonstrate that its loss of tangible property was a direct result of Iraq's invasion and occupation of Kuwait.



### 3. Recommendation

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

#### C. Payment or relief to others

##### 1. Facts and contentions

152. Bengal seeks compensation in the amount of USD 288,800 for payment or relief to others. Bengal alleges that it evacuated 45 of its employees from Iraq to Bangladesh, and paid each of them 2,000 Iraqi dinars (IQD) (USD 6,418) for travel expenses.

153. Bengal's 45 employees were located at the Kut brick factory, the veterans hospital at Nassiriya, and Bengal's regional office at Baghdad. Bengal states that the employees were evacuated by land in journeys taking 12 to 15 days.

##### 2. Analysis and valuation

154. In support of its claim, Bengal provided affidavits from three employees, each of whom states he was evacuated from Iraq and given IQD 2,000. Bengal also stated that its employee records, including proof of payment of IQD 2,000 to each employee, were located in Iraq and destroyed.

155. Bengal also provided a sample form of the employment contract used by it with its employees. Section 28 of the sample contract states that Bengal "will bear the return journey expense of the employee to Bangladesh on expiry of his contractual service period".

156. In the light of the terms of section 28 of the sample employment contract, the Panel finds that Bengal failed to demonstrate that it would not have incurred the expenses in any event, regardless of Iraq's invasion and occupation of Kuwait. The Panel also finds that Bengal failed to provide sufficient evidence to establish that it incurred the claimed costs for 45 of its employees or that it actually paid IQD 2,000 to each employee.

### 3. Recommendation

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

#### D. Recommendation for Bengal

Table 16. Recommended compensation for Bengal

<u>Claim element</u>	<u>Claim amount (USD)</u>	<u>Recommended compensation (USD)</u>
Contract losses	2,097,472	nil
Loss of tangible property	2,306,570	nil
Payment or relief to others	288,800	nil
<u>Total</u>	<u>4,692,842</u>	<u>nil</u>

158. Based on its findings regarding Bengal's claim, the Panel recommends no compensation.

#### V. DURO DAKOVIC-PROIZVODNJA INDUSTRIJSKE OPREME, D.O.O.

159. Duro Dakovic-Proizvodnja Industrijske Opreme, d.o.o. ("DDPI") is a corporation organised according to the laws of Croatia. DDPI seeks compensation in the amount of USD 2,370,140 for contract losses and interest.

Table 17. DDPI's claim

<u>Claim element</u>	<u>Claim amount (USD)</u>
Contract losses	2,154,673
Interest	215,467
<u>Total</u>	<u>2,370,140</u>

#### A. Contract losses

##### 1. Facts and contentions

160. DDPI seeks compensation in the amount of USD 2,154,673 for contract losses allegedly incurred in connection with a contract in Iraq. DDPI states that it is the legal successor to a subcontractor that performed work on the contract and that has since gone into bankruptcy.

161. The contract at issue was entered into on 31 March 1988 between RO Marsonia Commerce-Duro Dakovic ("RO Marsonia") and the Gas Distribution Company, Baghdad, Iraq (the "Employer"). The contract is referred to as "Contract No. 1/88" and concerned the design, supply, fabrication and erection of liquid petroleum gas spherical tanks for the Employer. The total value of Contract No. 1/88 was IQD 242,196 and USD 4,600,000.

162. At the time it entered into Contract No. 1/88, RO Marsonia was a joint member of a group of companies known as SOUR Duro Dakovic ("SOUR"), and was the only company within SOUR that was authorised to enter into contracts with foreign entities. RO Marsonia entered into Contract No. 1/88 for itself and on behalf of other companies within SOUR, including a company known as RO Proizvodnja Industrijskih Postrojenja I Nuklearne Opreme ("RO PIPNO"). For its role as the party executing Contract No. 1/88, RO Marsonia was entitled to 2 per cent of the contract value.

163. On 18 May 1988, RO Marsonia entered into a subcontract with three other companies within SOUR, which companies were to perform the actual work under Contract No. 1/88. One of the three subcontractors was RO PIPNO. Under the subcontract, RO PIPNO was responsible for the design, fabrication and delivery of the spherical tanks. In return, RO PIPNO was entitled to payment in the amount of USD 2,154,673.

164. The Panel notes that the successor to one of the other subcontractors, Duro Dakovic Montaza d.d., filed a claim with the Commission, which is addressed in this report. The Panel has determined that there is no overlap in the claimed losses.

165. RO Marsonia, the contractor, subsequently became bankrupt. RO PIPNO, the subcontractor, became bankrupt in November 1990. RO PIPNO was succeeded by a company known as DD Proizvodnja Industrijska opreme d.o.o. ("DD Proizvodnja"), which became bankrupt in 1995 and was in turn succeeded by DDPI.

166. DDPI filed this claim as the successor to RO PIPNO and DD Proizvodnja. Neither predecessor of DDPI has filed a claim with the Commission. DDPI alleges that its predecessors completed the work required under Contract No. 1/88, and seeks USD 2,154,673 for the work performed.

167. In support of its claim, DDPI submitted and referred to 20 invoices prepared by its predecessors for work performed under Contract No. 1/88. Of these 20 invoices, all but four were issued in 1989 during the months of June, August, September and November. The invoices from 1989 relate to work performed prior to 2 May 1990.

168. The four other invoices were issued on 30 June 1990. However, the invoices do not establish when the related work was performed. In addition, payment on these invoices was due on 30 June 1992 under the agreed deferred payment terms.

## 2. Analysis and valuation

### (a) Invoices dated June, August, September and November 1989

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

170. The Panel finds that for the purposes of the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) DDPI's claim is based on a contract with Iraq.

171. The Panel finds that the invoices issued in 1989 establish that the related work was performed prior to 2 May 1990.

172. Accordingly, the Panel recommends no compensation for the invoices dated June, August, September and November 1989 as they relate to debts and obligations of Iraq arising prior to 2 August 1990 and, therefore, are outside the jurisdiction of the Commission.

### (b) Invoices dated 30 June 1990

173. With respect to the remaining four invoices issued on 30 June 1990, the Panel finds that they do not establish that any of the related work was performed after 2 May 1990. Even if the invoices issued on 30 June 1990 related to work performed after 2 May 1990, the Panel finds that the claim would not

be compensable. Under the agreed deferred payment terms, payment of these invoices was due two years later on 30 June 1992.

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

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

176. Applying this principle to DDPI's claim for contract losses related to the invoices issued on 30 June 1990, the Panel finds that any work performed between 2 May and 2 August 1990 did not crystallise as a loss until the due date of payment on 30 June 1992 passed without satisfaction of the debt. The Panel finds that the Employer's failure to pay DDPI or its predecessors was not a direct result of Iraq's invasion and occupation of Kuwait, but rather was due to a subsequent and deliberate decision not to honour its obligations.

### 3. Recommendation

177. The Panel recommends no compensation for contract losses.

#### B. Interest

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

#### C. Recommendation for DDPI

Table 18. Recommended compensation for DDPI

<u>Claim element</u>	<u>Claim amount (USD)</u>	<u>Recommended compensation (USD)</u>
Contract losses	2,154,673	nil
Interest	215,467	nil
<u>Total</u>	<u>2,370,140</u>	<u>nil</u>

179. Based on its findings regarding DDPI's claim, the Panel recommends no compensation.

## VI. DURO DAKOVIC MONTAZA D.D.

180. Duro Dakovic Montaza d.d. (“Montaza”) is a corporation organised according to the laws of Croatia. Montaza seeks compensation in the amount of USD 7,062,368 for contract losses, loss of tangible property, and interest.

181. In its reply to the article 34 notification submitted in July 2001, Montaza reduced the amount of its claim for contract losses by USD 199,472 from USD 5,199,829 to USD 5,000,357. Montaza explained that this reduction was made because the original claim for contract losses included a claim for interest in the amount of USD 199,472, which was already reflected in the claim for interest.

182. In the same reply, Montaza attempted to increase the amount of its claim for loss of tangible property from USD 1,862,539 to USD 2,049,925. The Panel has only considered those losses and amounts contained in the original claim (except where such losses have been withdrawn or reduced by Montaza), and refers in this respect to paragraph 8, supra.

183. The Panel therefore considered the amount of USD 7,062,368 for contract losses, loss of tangible property, and interest as follows:

Table 19. Montaza’s claim

<u>Claim element</u>	<u>Claim amount (USD)</u>
Contract losses	5,000,357
Loss of tangible property	1,862,539
Interest	199,472
<u>Total</u>	<u>7,062,368</u>

A. Contract losses

1. Facts and contentions

184. Montaza seeks compensation in the amount of USD 5,000,357 for contract losses allegedly incurred in connection with seven projects in Iraq.

185. The projects and amount claimed for each project are set out in table 20, infra.

Table 20. Montaza's claim for contract losses

<u>Project</u>	<u>Claim amount (USD)</u>
Contract No. 1/88	1,994,721
Contract No. 1987/55/595, KOL-1/DWPS	838,828
P500/6	1,654,000
3994 – Annex	171,000
KOL-1/PIP	31,808
KOL-1/PIB	30,000
TAJI	280,000
<u>Total</u>	<u>5,000,357</u>

(a) Contract No. 1/88

186. Montaza seeks compensation in the amount of USD 1,994,721 in respect of work performed under Contract No. 1/88.

187. Contract No. 1/88 concerned the design, supply, fabrication, and erection of five liquid petroleum gas spherical tanks. The contract was entered into on 31 March 1988 between RO Marsonia Commerce-Duro Dakovic (“RO Marsonia”), as the contractor, and the Gas Distribution Company, Baghdad, Iraq (the “Employer”). The total value of the contract was IQD 242,196 and USD 4,600,000.

188. At the time it entered into Contract No. 1/88, RO Marsonia was a joint member of a group of companies known as SOUR Duro Dakovic (“SOUR”), and was the only company within SOUR that was authorised to enter into contracts with foreign entities. RO Marsonia entered into Contract No. 1/88 for itself and on behalf of other companies with SOUR, including Montaza. For its role as the party executing Contract No. 1/88, RO Marsonia was entitled to 2 per cent of the contract value.

189. On 18 May 1988, RO Marsonia entered into a subcontract with three other companies within the SOUR group, which companies were to perform the actual work under Contract No. 1/88. One of the three subcontractors was a company known as RO Montaza. Montaza is the successor to RO Montaza.

190. The Panel notes that the successor to one of the other subcontractors, Duro Dakovic-Proizvodnja Industrijske Opreme d.o.o., filed a claim with the Commission, which is addressed in this report at paragraphs 159 to 179, infra. The Panel has determined that there is no overlap in the claimed losses.

191. Montaza claims that the value of the subcontract with RO Marsonia was USD 2,214,927 and IQD 242,196.

192. The Statement of Claim provided by Montaza contains little detail concerning the contractual arrangements. However, it appears that Montaza asserts that it assumed RO Marsonia's obligations under Contract No. 1/88 with respect to the work covered by the subcontract entered into between RO Marsonia and Montaza's predecessor.

193. Montaza commenced work under the subcontract in January 1989. It asserts that the work was in progress on 2 August 1990 and continued until November 1990. The work was not completed. Montaza's claim is for unpaid work it performed under the subcontract concerning Contract No. 1/88.

194. In support of its claim, Montaza submitted 12 invoices for work performed and monthly progress reports signed by the Employer. The invoices are set out in table 21, infra, by invoice number, date of approval, invoice amount, and payment due date.

Table 21. Montaza's claim for contract losses (invoices for Contract No. 1/88)

<u>Invoice No.</u>	<u>Date of issue</u>	<u>Invoice amount (USD)</u>	<u>Payment due date</u>
1. 3/89	26 February 1989	135,000	27 February 1991
2. 7/89	26 August 1989	202,915	26 August 1991
3. 11/89	7 November 1989	166,500	7 November 1991
4. 427/89-N	18 November 1989	104,029	18 November 1991
5. 14/89	10 December 1989	188,193	10 December 1991
6. 18/90	18 February 1990	112,916	18 February 1992
7. 24/90	10 April 1990	319,928	10 April 1992
8. 26/90	28 July 1990	308,879	28 July 1992
9. 32/90	27 August 1990	112,915	27 August 1992
10. 31/90	27 August 1990	136,440	27 August 1992
11. 33/90	27 August 1990	94,090	27 August 1992
12. 34/90	8 December 1990	112,916	8 December 1992
<u>Total</u>		<u>1,994,721</u>	

195. Seven of the invoices relate to work performed before 2 May 1990. The remaining five invoices and their corresponding monthly progress reports are dated after 2 May 1990 and relate to work performed after that date.

196. The invoices state that payment is to be made according to the following terms: "Credit according to the Contract No. 1/88 Article No. 4, point No. 2."

197. Article No. 4 of Contract No. 1/88 is entitled "Terms of Payment." Point No. 2 of article 4 provides: "Payment for erection for the portion of US\$. – 95% of the erection cost will be paid within

24 months from the date as per monthly progress Report interim certificate appendix 3a and 3c and 5% of interest per annum will be applied. – 5% after provisional acceptance which may be released against Bank Guarantee till final acceptance.”

(b) Contract No. 1987/55/595, KOL-1/DWPS B

198. Montaza seeks compensation in the amount of USD 838,828 in respect of work performed under Contract No. 1987/55/595, KOL-1/DWPS B.

199. This contract was entered into between the Federal Directorate of Supply and Procurement (the “FDSP”), part of the Federal Secretariat for National Defence of the Federal Republic of Yugoslavia, and the Iraqi employer. The contract was made on behalf of Montaza, and concerned an unspecified military project. The involvement of the FDSP was alleged to have been mandatory under the laws of the former Yugoslavia with regard to military project contracts between participants from the former Yugoslavia and other countries.

200. Montaza states that work on this project was completed before Iraq’s invasion and occupation of Kuwait. However, it did not provide any material information describing the project or identifying the Iraqi employer.

201. According to Montaza, the project was classified as secret, and all original documents relating to the project were retained by the FDSP. It only had copies of documents. However, Montaza states that its records and documents relating to the project were destroyed during the armed conflict in Yugoslavia.

202. The only evidence that Montaza was able to provide consisted of copies of two invoices from the FDSP dated 31 December 1988 and 31 January 1989.

(c) Contracts P500/6, 3994-Annex, KOL-1/PIP, KOL-1PIB, TAJI

203. All of these contracts were entered into between the FDSP and the Iraqi employer. The contracts were made on behalf of Montaza, and concerned unspecified military projects.

204. Montaza states that the works on these projects were completed before Iraq’s invasion and occupation of Kuwait. However, it did not provide sufficient information describing the projects or identifying the Iraqi employer.

205. According to Montaza, these projects were classified as secret, and all original documents relating to these projects were retained by the FDSP. It only had copies of documents. However, Montaza states that its records and documents relating to these projects were destroyed during the armed conflict in the former Yugoslavia.

206. As a result, Montaza states that it was unable to provide any evidence to support its claim for compensation under these contracts.



## 2. Analysis and valuation

### (a) Contract No. 1/88

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

208. The Panel finds that for the purposes of the “arising prior to” clause in paragraph 16 of Security Council resolution 687 (1991) Montaza had a contract with Iraq with regard to Contract No. 1/88.

209. With regard to the seven invoices issued prior to 2 May 1990, the Panel finds that the contract losses alleged by Montaza relate entirely to work that was performed prior to 2 May 1990.

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

211. With regard to the five invoices issued after 2 May 1990, the Panel finds that under the agreed deferred payment terms, payment on these invoices was not due until July 1992 at the earliest.

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

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

214. Applying this principle to Montaza’s claim, the Panel finds that the claims relating to the five invoices issued after 2 May 1990, did not crystallise as a loss until July 1992 at the earliest. The Panel finds that the employer’s failure to pay Montaza was not as a direct result of Iraq’s invasion and occupation of Kuwait, but rather was due to a subsequent and deliberate decision not to honour its obligations.

215. The Panel recommends no compensation for contract losses relating to the five invoices issued after 2 May 1990 as Montaza failed to demonstrate that the loss was the direct result of Iraq’s invasion and occupation of Kuwait.

(b) Contract No. 1987/55/595, KOL-1/DWPS B

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

217. In relation to the issue of what party Montaza contracted with, the Panel notes that Montaza did not have a direct contractual relationship with the Iraqi employer. Montaza was apparently a subcontractor to the FDSP.

218. The Panel notes that the FDSP has not submitted any claims to the Commission. Further, the FDSP’s active role in the contractual arrangement was apparently limited, and apart from the FDSP, there were no other parties in the contractual chain above Montaza. The Panel considers that Montaza should be regarded as having entered into a direct contract with Iraq for the purposes of the Commission’s jurisdiction.

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

220. By its own statement, Montaza concedes that it is able to provide little in the way of evidence to support its claim because its records and documents were destroyed, and the Panel finds that there is insufficient information and evidence to support the claim.

221. The Panel recommends no compensation for the alleged loss as Montaza did not provide sufficient information and evidence to support its claim.

(c) Contracts P500/6, 3994-Annex, KOL-1/PIP, KOL-1PIB, TAJI

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

223. In relation to the issue of what party Montaza contracted with, the Panel’s findings at paragraph 218, supra, apply equally to these contracts.

224. The Panel finds that for the purposes of the “arising prior to” clause in paragraph 16 of Security Council resolution 687 (1991) Montaza had a contract with Iraq with respect to these contracts.

225. By its own statement, Montaza concedes that it is able to provide little in the way of evidence to support its claim because its records and documents were destroyed. The Panel therefore finds that there is insufficient information and evidence to support the claim.

226. The Panel recommends no compensation for the alleged loss as Montaza did not provide sufficient information and evidence to support its claim.

### 3. Recommendation

227. The Panel recommends no compensation for contract losses.

#### B. Loss of tangible property

##### 1. Facts and contentions

228. Montaza seeks compensation in the amount of USD 1,862,539 for loss of tangible property. The claim is for the alleged loss of equipment and machinery from its project sites in Iraq.

229. Montaza states that it was forced to abandon its property on the project sites when its employees were evacuated from Iraq. Montaza states that the last of its employees were evacuated on 16 January 1991. The property consisted of tools and machinery, including five cranes and a laboratory van. Montaza states that it was later informed that all of the property had been destroyed.

230. According to Montaza, Iraqi soldiers escorted its workers from the sites and did not allow the workers to remove any items, except for personal luggage. As a result, documents located at the sites relating to the tangible property were abandoned as well.

231. The items of claimed property are set out in table 22, infra, by invoice number, customs clearance date, amount claimed, and description.

Table 22. Montaza's claim for loss of tangible property

<u>Number</u>	<u>Invoice No.</u>	<u>Customs clearance date</u>	<u>Amount claimed (USD)</u>	<u>Description</u>
1	31/88	14/11/88	1,689	Tools and gas cylinders
2	8/89	01/08/89	20,000	Assembly tools
3	9/89	01/08/89	9,600	Assembly tools
4	16/89	28/07/89	71,760	DEMAG TC-600 crane accessories
5	7/89	28/07/89	16,400	Erection tools
6	6/89	28/07/89	75,225	Machines
7	15/89	25/07/89	62,560	DEMAG TC-600 crane accessories
8	16/89	25/07/89	84,640	DEMAG TC-600 crane accessories
9	07/89	10/07/89	680,855	DEMAG TC 600 crane
10	12/90	09/07/90	5,000	KOWOMAT – equipment
11	05/89	09/06/89	699,344	DEMAG TC 400 crane
12	82210	04/03/89	123,725	Laboratory van
13			11,741	Pickup truck
<u>Total</u>			<u>1,862,539</u>	

## 2. Analysis and valuation

232. In support of its claim, Montaza provided documents, including customs and shipping documents, to establish title to or right to use, and the presence in Iraq of, all of the claimed property at the time of Iraq's invasion and occupation of Kuwait.

233. Montaza did not provide purchase invoices for the claimed property, except with respect to the Demag HC 400 crane, the Demag TC 600 crane and the laboratory van.

234. As is explained at paragraph 27, supra, the Panel has adopted historical cost minus depreciation as its primary valuation methodology.

235. The Panel finds that with respect to the property for which purchase invoices were not provided, Montaza did not provide sufficient information and evidence to support its claims.

236. With regard to the property for which purchase invoices were provided, the Panel finds as follows.

(a) The purchase invoice for the Demag HC 400 crane (and another crane which was not included in Montaza's claim) shows that they were purchased in December 1981 at a cost of 3,290,624 Deutsche Mark (DEM). Given the age of the Demag HC 400 crane, the Panel finds that this crane had a nominal scrap value of USD 35,000 at the date of loss;

(b) The purchase invoice for the Demag TC 600 crane shows that it was purchased in December 1976 at a cost of DEM 1,290,960. The delivery address for the crane was a site in Neka, Iran. Given its age and indications of prior use, the Panel finds that this crane had no compensable value at the time of loss; and

(c) The purchase invoice for the laboratory van shows that it was purchased in December 1988 at a cost of DEM 204,132. The Panel applied the depreciation rate appropriate for this type of item and finds that it had a value of USD 70,027 at the time of loss.

237. The Panel finds that the claimed property had a value of USD 105,027 on 16 January 1991, the date on which the last of Montaza's employees were evacuated from Iraq.

## 3. Recommendation

238. The Panel recommends compensation in the amount of USD 105,027 for loss of tangible property.

### C. Interest

239. Montaza's claim for interest is for interest on the unpaid amounts for contract losses. As the Panel recommends no compensation for contract losses, there is no need for the Panel to determine the date of loss from which interest would accrue.

D. Recommendation for MontazaTable 23. Recommended compensation for Montaza

<u>Claim element</u>	<u>Claim amount (USD)</u>	<u>Recommended compensation (USD)</u>
Contract losses	5,000,357	nil
Loss of tangible property	1,862,539	105,027
Interest	199,472	nil
<u>Total</u>	<u>7,062,368</u>	<u>105,027</u>

240. Based on its findings regarding Montaza's claim, the Panel recommends compensation in the amount of USD 105,027. The Panel finds that the date of loss is 16 January 1991.

## VII. INTERNATIONAL CONTRACTORS GROUP-EGYPT

241. International Contractors Group-Egypt ("International Contractors-Egypt") is an "Egyptian partnership company" which is a form of limited liability company organised according to the laws of Egypt. International Contractors-Egypt seeks compensation in the amount of USD 4,050,146 for contract losses, loss of profits, loss of tangible property, and interest. The claim arises out of a project to construct deep sewerage works in Iraq.

242. The Panel has reclassified elements of International Contractor-Egypt's claim for the purposes of this report. In the "E" claim form, International Contractors-Egypt sought compensation in the total amount of USD 4,050,146 for income-producing property, payment or relief to others, loss of profits, and interest.

243. International Contractors-Egypt's claim for payment or relief to others is for maintenance of equipment, preparation of site, transport and living expenses for employees in Iraq, removal of waste products, and monthly wages. These costs are more appropriately categorised as contract losses, and the Panel has reclassified them as such.

244. The original claim for income-producing property also included a claim for transportation of equipment to Iraq in the amount of USD 15,000. This cost is more appropriately categorised as a contract loss, and the Panel has reclassified it as such.

245. The Panel has also reclassified the claim for income-producing property to loss of tangible property because International Contractors-Egypt does not seek compensation for loss of future income from such property.

246. The Panel therefore considered the amount of USD 4,050,146 for contract losses, loss of profits, loss of tangible property, and interest as follows:

Table 24. International Contractors-Egypt's claim

<u>Claim element</u>	<u>Claim amount (USD)</u>
Contract losses	889,000
Loss of profits	754,360
Loss of tangible property	1,075,306
Interest	1,331,480
<u>Total</u>	<u>4,050,146</u>

#### A. Contract losses

##### 1. Facts and contentions

247. International Contractors-Egypt seeks compensation in the amount of USD 889,000 for contract losses allegedly incurred in connection with a subcontract entered into by it and a company called International Contractors Group-Kuwait, a company organised according to the laws of Kuwait ("International Contractors-Kuwait"). International Contractors-Kuwait had a main contract with the Government of Iraq to construct deep sewerage works in Iraq. It is unclear what relationship, if any (apart from the contractual relationship), exists between International Contractors-Egypt and International Contractors-Kuwait.

248. International Contractors-Egypt entered into the subcontract with International Contractors-Kuwait on 16 May 1990. Under the subcontract, International Contractors-Egypt was to "provide the equipment, technical know-how required to execute [the deep sewerage project]". The value of the subcontract was IQD 750,000 (USD 2,412,675). The payment terms under the subcontract were: "Monthly batches are to be payed [sic] from the executed works to the second party against monthly extracts approved from the first party and payment is to be in Iraqi Dinar." International Contractors-Egypt was responsible for bringing the necessary equipment from Egypt and returning it on completion of the contract "on his own account". The period of execution under the subcontract was six months from 10 May 1990.

249. International Contractors-Egypt commenced its preparations for the construction of the sewerage works after it executed the subcontract with International Contractors-Kuwait. International Contractors-Egypt states that pursuant to the subcontract, it shipped equipment to Iraq, prepared the work site, and transported workers to the work site. Work on the project was interrupted by Iraq's invasion and occupation of Kuwait, and International Contractors-Egypt seeks compensation for the costs it incurred under the subcontract.

250. International Contractors-Egypt originally classified all components of the claim for contract losses as a claim for payment or relief to others (maintenance of equipment, preparation of site, transport and living expenses for employees in Iraq, removal of waste products, and monthly wages). It also originally classified a claim for transportation of equipment to Iraq as a claim for income-

producing property. The Panel finds that all of these costs are more appropriately categorised as contract losses.

251. The specific items claimed as part of International Contractors-Egypt's contract losses are set out in table 25, infra.

Table 25. International Contractors-Egypt's claim for contract losses

<u>Description</u>	<u>Amount claimed (USD)</u>
Maintenance of equipment	210,000
Preparation of site	145,000
Transport and living expenses for employees in Iraq	219,000
Removal of waste products	250,000
Monthly wages	50,000
Transportation of equipment	15,000
<u>Total</u>	<u>889,000</u>

## 2. Analysis and valuation

252. The Panel finds that there is insufficient information and evidence to substantiate the costs allegedly incurred by International Contractors-Egypt or to establish that any of the incurred costs were necessarily incurred under International Contractors-Egypt's subcontract with International Contractors-Kuwait.

253. The Panel recommends no compensation for the alleged costs incurred as International Contractors-Egypt did not establish that its alleged costs were the direct result of Iraq's invasion and occupation of Kuwait. Furthermore, it did not provide sufficient information and evidence to support its claims for such alleged costs.

## 3. Recommendation

254. The Panel recommends no compensation for contract losses.

### B. Loss of profits

#### 1. Facts and contentions

255. International Contractors-Egypt seeks compensation in the amount of USD 754,360 for loss of profits. International Contractors-Egypt alleges that it was expecting a profit of 45 per cent of the estimated cost of the subcontract with International Contractors-Kuwait, which cost was USD 1,676,356.

## 2. Analysis and valuation

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

257. In support of its claim, International Contractors-Egypt provided a copy of its subcontract with International Contractors-Kuwait and an internally generated budgeted contract costing schedule. International Contractors-Egypt failed to provide any third party documentation regarding the status of the project or substantiating the actual costs incurred. International Contractors-Egypt failed to explain its calculation of the alleged lost profits, and failed to provide evidence to explain the way in which it calculated the claim. In fact, International Contractors-Egypt's claimed amount does not equal 45 per cent of the value of the subcontract, and there is no explanation for the discrepancy. The only evidence was International Contractors-Egypt's own budgeted contract costing schedule, which refers to a 45 per cent profit margin with no explanation or support.

258. The Panel recommends no compensation as International Contractors-Egypt failed to provide sufficient information and evidence to substantiate its loss of profits claim.

## 3. Recommendation

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

### C. Loss of tangible property

#### 1. Facts and contentions

260. International Contractors-Egypt seeks compensation in the amount of USD 1,075,306 for loss of tangible property. The claim is for the alleged loss of equipment and machinery from its project site in Iraq.

261. International Contractors-Egypt originally classified the claim for loss of its tangible property as loss of income-producing property, but it is more appropriately classified as a claim for loss of tangible property. The original claim for loss of income-producing property was in the amount of USD 1,090,306, and included a claim for transportation of equipment to Iraq in the amount of USD 15,000. This cost is more appropriately classified as a contract loss, and the Panel has reclassified it as such. The Panel thus reclassified the amount of USD 1,075,306 to loss of tangible property.

262. The tangible property included a tunnel digging machine and related equipment, which were abandoned at the project site after Iraq's invasion of Kuwait.

#### 2. Analysis and valuation

263. International Contractors-Egypt provided copies of bills of lading dated 20 June 1990 showing shipment of equipment to Iraq. It also provided a copy of a marine insurance certificate concerning



the tunnel digging machine, and a copy of a letter of guarantee to Egyptian customs authorities regarding the tunnel digging machine. With respect to International Contractors-Egypt's other equipment and machinery, only a vague description of the property was provided, and there was no evidence of their purchase cost and age.

264. The Panel finds that there is sufficient evidence of International Contractors-Egypt's title to or right to use the tunnel digging machine, its historical cost, and its presence in Iraq. The Panel applied a depreciation rate appropriate for this item, and finds that it had a value of USD 25,000. With respect to International Contractors-Egypt's other equipment and machinery, the Panel finds that there is insufficient information and evidence concerning their description, purchase cost, and age.

### 3. Recommendation

265. The Panel recommends compensation in the amount of USD 25,000 for loss of tangible property.

#### D. Interest

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

#### E. Recommendation for International Contractors-Egypt

Table 26. Recommended compensation for International Contractors-Egypt

<u>Claim element</u>	<u>Claim amount (USD)</u>	<u>Recommended compensation (USD)</u>
Contract losses	889,000	nil
Loss of profits	754,360	nil
Loss of tangible property	1,075,306	25,000
Interest	1,331,480	nil
<u>Total</u>	<u>4,050,146</u>	<u>25,000</u>

267. Based on its findings regarding International Contractors-Egypt's claim, the Panel recommends compensation in the amount of USD 25,000. The Panel finds the date of loss to be 2 August 1990.

## VIII. KRUPP INDUSTRIE-TECHNIK GMBH

268. Krupp Industrietechnik GmbH ("Krupp") is a corporation organised according to the laws of Germany operating in the construction industry. Krupp seeks compensation in the amount of DEM 4,374,387 (USD 2,800,503) for contract losses, a "subsidiary motion", and interest. The claim arises out of two contracts for the installation of a water supply system in Iraq, which Krupp entered into with the General Establishment for Implementing Water and Sewerage Projects of Iraq (the "Employer").

269. Krupp's claim for contract losses is for amounts allegedly owed to it for work performed on the completed projects. Krupp's claim for a "subsidiary motion" arises from a loan guarantee executed by Krupp in favour of a lender that financed the Employer's obligations under the contracts.

270. Krupp replied to the article 15 notification in May 2001, but did not reply to the article 34 notification.

271. The Panel considered the amount of DEM 4,374,387 (USD 2,800,503) for contract losses, a "subsidiary motion", and interest as follows:

Table 27. Krupp's claim

<u>Claim element</u>	<u>Claim amount (USD)</u>
Contract losses	752,084
"Subsidiary motion"	940,351
Interest	1,108,068
<u>Total</u>	<u>2,800,503</u>

#### A. Contract losses

##### 1. Facts and contentions

272. Krupp seeks compensation in the amount of DEM 1,174,755 (USD 752,084) for contract losses allegedly incurred in connection with two contracts in Iraq.

273. On 16 December 1980, Krupp entered into a contract with the Employer for the installation of a water supply system in Shamia, Iraq (the "Shamia Project"). The value of the contract was IQD 4,255,351 (payable as IQD 1,698,839 and DEM 15,393,500).

274. Krupp completed the work on the Shamia Project in early 1987, and a final acceptance certificate was issued on 26 January 1987.

275. On 20 January 1981, Krupp entered into a contract with the Employer for the installation of a water supply system in Zakho, Iraq (the "Zakho Project"). The value of the contract was IQD 3,494,227 (payable as IQD 1,130,000 and DEM 13,944,686).

276. Krupp completed the work on the Zakho Project in August 1985, and a final acceptance certificate was issued on 18 August 1985.

277. Krupp alleges that it was paid for only part of its work on the two projects, and that it was owed DEM 2,772,289 (USD 1,774,833) by the Employer for work performed. Krupp received DEM 1,597,533 from the German export credit agency as partial compensation for the amount owed to it (discussed further at paragraphs 285-287, *infra*). Krupp deducted the amount of this payment in calculating its claim to be the amount of DEM 1,174,755 (USD 752,084).

## 2. Analysis and valuation

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

279. The Panel finds that for the purposes of the “arising prior to” clause in paragraph 16 of Security Council resolution 687 (1991), Krupp had a contract with Iraq for both projects.

280. The Panel finds that the contract losses alleged by Krupp relate entirely to work that was performed prior to 2 May 1990. The final acceptance certificates for the projects were issued in August 1985 and January 1987.

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

## 3. Recommendation

282. The Panel recommends no compensation for contract losses.

### B. Subsidiary motion

#### 1. Facts and contentions

283. Krupp seeks compensation in the amount of DEM 1,468,829 (USD 940,351) for a “subsidiary motion”.

284. In 1983, the Employer requested a loan arrangement to finance the Deutsche Mark component of the payments due on the Shamia and Zakho Projects. In December 1983 and February 1984, the Employer entered into loan agreements with AKA Ausfuhrkreditgesellschaft mbH, the German export finance corporation (“AKA”). Under these loan agreements, AKA advanced in favour of the Employer the amounts of DEM 11,066,359 in relation to the Shamia Project and DEM 6,519,145 in relation to the Zakho Project. The Employer continued to pay Krupp the Iraqi dinar component of the contracts directly, and the Deutsche Mark component of the contracts was paid to Krupp through AKA.

285. As part of this financing arrangement, AKA obtained security for its loans in the form of credit insurance from Hermes Kreditversicherungs AG, the German export credit agency (“Hermes”), and a guarantee from Krupp of part of the loan amounts.

286. In 1988, after the projects were completed, a further loan agreement was executed by AKA and the Employer to settle the outstanding amounts owed on both projects. The Employer confirmed that the amounts of IQD 82,919 and DEM 758,011 were unpaid and outstanding on the Shamia Project,

and the amounts of IQD 72,153 and DEM 1,089,429 were unpaid and outstanding on the Zakho Project.

287. The Employer ceased making payments to Krupp for the outstanding amounts, and Krupp asserted a claim against Hermes for amounts owed to Krupp by the Employer. In February and March 1992, Hermes made two payments to Krupp in the amounts of DEM 736,471 and DEM 861,062 in respect of amounts outstanding on the projects. These payments from Hermes were deducted by Krupp from the amounts owed to it by the Employer, and the amount on the “E” claim form for contract losses is net of the payments from Hermes.

288. The Employer also ceased making repayments on the loan from AKA. Consequently, AKA enforced its rights under the guarantee executed by Krupp. Krupp asserts that it paid DEM 1,468,829 (USD 940,351) to AKA pursuant to the guarantee.

289. AKA filed its own category “E” claim with the Commission for losses claimed in relation to its loans to the Employer.

290. According to its Statement of Claim, it is Krupp’s position that AKA should assign its claim against the Employer to Krupp or transfer to Krupp any amounts that AKA may receive from the Commission pursuant to AKA’s claim relating to the Employer. Krupp further states that it has submitted its subsidiary motion to preserve its right to compensation in the event that AKA is not compensated for its losses.

## 2. Analysis and valuation

291. The Panel finds that Krupp’s claim for the “subsidiary motion” is a contingent claim. The Panel has found in its previous reports that it does not have jurisdiction over contingent claims. The Panel therefore recommends no compensation for the “subsidiary motion”.

## 3. Recommendation

292. The Panel recommends no compensation for the “subsidiary motion”.

### C. Interest

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

D. Recommendation for KruppTable 28. Recommended compensation for Krupp

<u>Claim element</u>	<u>Claim amount (USD)</u>	<u>Recommended compensation (USD)</u>
Contract losses	752,084	nil
“Subsidiary motion”	940,351	nil
Interest	1,108,068	nil
<u>Total</u>	<u>2,800,503</u>	<u>nil</u>

294. Based on its findings regarding Krupp’s claim, the Panel recommends no compensation.

## IX. UB ENGINEERING LIMITED

295. UB Engineering Limited, formerly Western India Enterprises Limited, (“UB Engineering”) is a corporation organised according to the laws of India, which specializes in “electromechanical contracts”. UB Engineering seeks compensation in the amount of 154,650 Kuwaiti dinars (KWD) (USD 535,121) for loss of tangible property and payment or relief to others.

296. In its reply to the article 15 notification submitted in January 2001, UB Engineering introduced a claim for loss of profits and attempted to increase the amount of its claims for loss of tangible property and payment or relief to others. The Panel has only considered those losses and amounts contained in the original claim, and refers in this respect to paragraph 8, supra.

297. The Panel has reclassified elements of UB Engineering’s claim for the purposes of this report. In the “E” claim form, UB Engineering sought KWD 68,000 (USD 235,294) for loss of income-producing property. The claim for loss of income-producing property is a claim for loss of construction equipment, tools, and tackle. The Panel has reclassified the claim for loss of income-producing property to a claim for loss of tangible property.

298. The Panel therefore considered the amount of KWD 154,650 (USD 535,121) for loss of tangible property and payment or relief to others.

Table 29. UB Engineering’s claim

<u>Claim element</u>	<u>Claim amount (USD)</u>
Loss of tangible property	448,789
Payment or relief to others	86,332
<u>Total</u>	<u>535,121</u>

A. Loss of tangible property

1. Facts and contentions

299. UB Engineering seeks compensation in the amount of KWD 129,700 (USD 448,789) for loss of tangible property.

300. In the “E” claim form, UB Engineering sought the amounts of KWD 61,700 (USD 213,495) for loss of tangible property and KWD 68,000 (USD 235,294) for loss of income-producing property. The claim for loss of tangible property is related to a residential colony for UB Engineering’s employees. The claim for income-producing property is a claim for loss of construction equipment, tools and tackle. The Panel has reclassified the claim for income-producing property to a claim for loss of tangible property.

301. UB Engineering was engaged as a subcontractor to perform work on the Az-Zour power station in Kuwait by Toshiba Corporation, the contractor. The contract between UB Engineering and the contractor was dated 17 February 1984. Work under the contract was performed from 12 March 1984 to 2 August 1990, and resumed on 1 January 1992. The completion certificate was issued on 11 November 1996.

302. As stated on the “E” claim form, the claim for loss of tangible property consists of losses related to a residential colony for UB Engineering’s employees in the amount of KWD 61,700 (USD 213,495) and losses of construction equipment, tools and tackle in the amount of KWD 68,000 (USD 235,294). UB Engineering states that following the evacuation of its employees from Kuwait, it was forced to abandon all of the claimed property.

(a) Residential colony

303. UB Engineering seeks compensation for “for constructing and establishing residential colony for our staff and labour in the year 84-85 and 85-86 from getting the job from Toshiba at Az-Zour Power Station”.

304. To support its claim, UB Engineering provided a copy of a Receipt & Payment Statement dated 20 August 1997 from itself to the Reserve Bank of India, which indicates that UB Engineering expended KWD 278,690 on the residential colony between 12 March 1984 and 2 August 1990. It also provided a copy of an invoice issued by a third party to UB Engineering dated 24 August 1989 for repair work on property located at the residential colony, and copies of documents from an insurer to UB Engineering dated 22 March 1989 showing coverage for property, including property related to the residential colony. UB Engineering also provided a copy of a letter dated 5 April 2001 from its chartered accountants to UB Engineering, confirming the write-down of the labour quarters, and a copy of its twentieth Annual Report for 1990-1991, which shows a write-down of assets located in Kuwait as a result of Iraq’s invasion and occupation of Kuwait.

305. However, UB Engineering did not identify the individual items of property that comprised the residential colony. No description of the residential colony was provided, other than a statement that

“[t]hese staff quarters are used during the execution of the concerned job and then shifted to other sites where jobs from different clients are executed.” UB Engineering also did not explain how the claimed amount was calculated.

(b) Construction equipment, tools and tackle

306. UB Engineering provided an itemised list of several hundred pieces of equipment, tools and tackle for which it seeks compensation. The list contains items such as winches, chain pulley blocks, wrenches, drills, grinders and jacks. UB Engineering contends that some of the items were purchased in India or Japan, and shipped to Kuwait. Other items were purchased in Kuwait. UB Engineering stated that it had no invoices or other documents reflecting purchase of items in Kuwait because they were lost during Iraq’s invasion and occupation of Kuwait.

307. To support its claim, UB Engineering provided a list of items shipped by it to the work site. It also provided a copy of a letter dated 28 May 1997 from UB Engineering to the Reserve Bank of India concerning loss of equipment, tools and tackle, and a copy of a letter dated 23 September 1998 from the Reserve Bank of India to UB Engineering approving write-off of equipment, tools and tackle. UB Engineering also provided copies of shipping documents from 1984, 1985 and 1986 for some of the equipment, including packing lists, certificates of origin, bills of lading and air waybills, and copies of documents from an insurer to UB Engineering showing coverage for property, including equipment, tools and tackle, for the period 1 April 1990 to 31 March 1991.

2. Analysis and valuation

(a) Residential colony

308. The Panel finds that UB Engineering failed to identify or describe the property constituting the residential colony, and instead relied on showing the existence of a residential colony as a whole. Because UB Engineering failed to establish what constitutes the residential colony, it failed to establish ownership of the items constituting the residential property. For the same reason, the Panel further finds that UB Engineering also failed to establish what exactly was lost. The Panel notes that UB Engineering did not submit any photographic evidence or any evidence relating to any post-liberation attempt to repair or salvage any part of the residential colony. UB Engineering further stated that its records in Kuwait were destroyed during Iraq’s invasion and occupation of Kuwait and that its records in India were destroyed in accordance with “prevalent rules and regulations in India”. The Panel finds that UB Engineering failed to establish that it had suffered a loss.

309. Accordingly, the Panel recommends no compensation with respect to the claim for loss of tangible property in connection with the residential colony because UB Engineering failed to provide sufficient information and evidence to establish its claim.

(b) Construction equipment, tools and tackle

310. In support of its claim, UB Engineering relies on the correspondence with the Reserve Bank of India from 1997 and 1998 concerning the write-down of the assets. However, the Panel finds that there is no evidence of any loss that occurred at the time of Iraq's invasion and occupation of Kuwait.

311. The Panel recommends no compensation with respect to the claim for loss of equipment, tools and tackle because UB Engineering failed to provide sufficient information and evidence to establish its claim.

3. Recommendation

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

B. Payment or relief to others

1. Facts and contentions

313. UB Engineering seeks compensation in the amount of KWD 24,950 (USD 86,332) for payment or relief to others.

314. The claim is for the repatriation costs of 35 employees who were evacuated from Kuwait to India, via Jordan, in August 1990. UB Engineering stated that it incurred losses in the amount of KWD 14,000 (USD 48,443) for the cost of two buses which were used to transport the employees to Jordan. UB Engineering stated that the buses were confiscated by Iraqi forces. UB Engineering also claims the amount of KWD 10,950 (USD 37,889) for the cost of airfare and other related expenses from Jordan to India.

2. Analysis and valuation

315. In its reply to the article 34 notification submitted in July 2001, UB Engineering stated: "We are not able to provide any documentary evidence of the receipts of payment made to employees since all the relevant record was destroyed in Kuwait war and the record at Head Office at Pune, India, was destroyed as per the prevalent rules and regulations in India."

316. The Panel finds that UB Engineering failed to provide sufficient information and evidence to establish its claim. In particular, the Panel finds that UB Engineering failed to establish that the claimed expenses were actually paid by it.

3. Recommendation

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



C. Recommendation for UB EngineeringTable 30. Recommended compensation for UB Engineering

<u>Claim element</u>	<u>Claim amount (USD)</u>	<u>Recommended compensation (USD)</u>
Loss of tangible property	448,789	nil
Payment or relief to others	86,332	nil
<u>Total</u>	<u>535,121</u>	<u>nil</u>

318. Based on its findings regarding UB Engineering's claim, the Panel recommends no compensation.

## X. ACQUA S.P.A.

319. Acqua S.p.A. ("Acqua") is a corporation organised according to the laws of Italy operating in the construction industry. In the "E" claim form, Acqua sought compensation in the amount of USD 304,909 for contract losses, loss of tangible property, payment or relief to others, financial losses, other losses and interest. The total amount on the "E" claim form was stated as USD 304,309. However, the sum total of the loss elements is USD 304,909.

320. The Commission issued article 15 and article 34 notifications to Acqua. Acqua did not respond to the notifications.

321. The Panel has reclassified elements of Acqua's claim for the purposes of this report. The Panel has reclassified part of Acqua's claim for loss of tangible property to financial losses, and has reclassified Acqua's claim for interest to financial losses. The Panel therefore considered the amount of USD 304,909 for contract losses, loss of tangible property, payment or relief to others, financial losses, and other losses as follows:

Table 31. Acqua's claim

<u>Claim element</u>	<u>Claim amount (USD)</u>
Contract losses	102,955
Loss of tangible property	20,000
Payment or relief to others	65,405
Financial losses	99,776
Other losses	16,773
<u>Total</u>	<u>304,909</u>

A. Contract losses1. Facts and contentions

322. Acqua seeks compensation in the amount of USD 102,955 for contract losses. Acqua established a joint venture with the Al Rawi and Al Khateeb Contracting Company Ltd., a company incorporated in Iraq. The joint venture signed a contract on 10 October 1985 with the General Establishment for Water and Sewerage, Baghdad, Iraq (the “Employer”). The contract involved the construction of three ground storage tanks and pumping stations at three different locations in Iraq. The joint venture was required to design, supply and transport the electromechanical equipment and supervise the erection of the tanks, and the commissioning and start up of the pumps. The work was scheduled for completion within 36 months of the signing of the contract.

323. Acqua’s claim for contract losses is based on the following items:

Table 32. Acqua’s claim for contract losses

<u>Loss items</u>	<u>Claim amount (IQD)</u>	<u>Claim amount (USD)</u>
Sales invoices prior to 2 August 1990	7,128	22,035
Invoice dated 13 February 1991	3,453	10,672
“Accrued income”		
(a) 2.5% Preliminary acceptance certificate	11,363	35,124
(b) 2.5% Final acceptance certificate	11,363	35,124
<u>Subtotal</u>	<u>22,726</u>	<u>70,248</u>
<u>Total</u>	<u>33,307</u>	<u>102,955</u>

324. Acqua used the following rate of exchange to calculate the United States dollar amount: IQD 3.092 = USD 1. Acqua did not explain the basis for use of this exchange rate.

(a) Sales invoices

325. Acqua submitted three sales invoices that were generated prior to 2 August 1990. Two of the invoices are dated 26 January 1990. The third is dated 28 May 1990.

326. With respect to the invoices dated 26 January 1990, the first relates to erection work undertaken in the months of October and November 1989. The second relates to amounts due against presentation of shipping documents and arrival at site. Acqua did not present any evidence of when performance or delivery relating to the invoice occurred.

327. The invoice dated 28 May 1990 relates to amounts due on arrival on site and amounts due on completion of erection works. Acqua did not present any evidence of when performance or delivery relating to the invoice occurred.

(b) Invoice dated 13 February 1991

328. The invoice dated 13 February 1991 relates to erection work performed in February and March 1990 and to an amount due on arrival of goods on site. Acqua did not present any evidence of when delivery relating to the invoice occurred.

(c) “Accrued income”

329. With regard to the claim involving accrued income, Acqua presented a document dated 5 April 1987 from the Employer, which stated that 2.5 per cent of the contract value would be paid upon Preliminary Acceptance and a further 2.5 per cent upon Final Acceptance. Acqua did not present any evidence to show that a preliminary or final acceptance certificate had been issued or received, or to show that the work at issue was completed.

## 2. Analysis and valuation

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

331. The Panel finds that for the purposes of the “arising prior to” clause in paragraph 16 of Security Council resolution 687 (1991), Acqua had a contract with Iraq.

332. In respect of the sales invoices dated 26 January 1990, the Panel finds that the contract losses alleged by Acqua relate entirely to work that was performed prior to 2 May 1990.

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

334. In respect of the sales invoice dated 28 May 1990, the Panel finds that the invoice does not indicate the time period of the work covered by the invoice. However, an examination of the subsequent invoice dated 13 February 1991 indicates that the erection work covered by the 28 May 1990 invoice occurred before February and March 1990, which is the period in which the erection work covered by the 13 February 1991 invoice was performed. As for the delivery that was invoiced in the 28 May 1990 invoice, the Panel finds that there is no indication as to when the delivery occurred.

335. The Panel recommends no compensation as the erection work covered by the 28 May 1990 invoice relates to debts and obligations of Iraq arising prior to 2 August 1990 and is, therefore, outside the jurisdiction of the Commission. As for the delivery, the Panel recommends no compensation because Acqua did not provide sufficient information and evidence to support its claim for these alleged contract losses.

336. In respect of the invoice dated 13 February 1991 and the “accrued income”, the Panel recommends no compensation, as Acqua did not provide sufficient information and evidence to support its claims for these alleged contract losses.

### 3. Recommendation

337. The Panel recommends no compensation for contract losses.

#### B. Loss of tangible property

##### 1. Facts and contentions

338. Acqua seeks compensation in the amount of USD 20,000 for loss of tangible property. The claim is for the alleged loss by theft of seven motor vehicles, equipment and materials in Iraq.

339. In the “E” claim form, Acqua included a claim for loss of tangible property in the amount of USD 116,339. The Panel has concluded that only USD 20,000 of the claim is a claim for loss of tangible property. The Panel has reclassified the remaining USD 96,339 as financial losses (loss of cash).

340. To support its claim, Acqua included two Iraqi police reports, one dated 15 April 1992 and the other undated, concerning the alleged theft of the claimed tangible property.

##### 2. Analysis and valuation

341. The undated police report concerns the theft of one motor vehicle. It states that the theft occurred on 23 April 1992, which is outside the compensable period as determined by the Governing Council. Accordingly, the Panel finds that the claimed loss of the motor vehicle was not a direct result of Iraq’s invasion and occupation of Kuwait.

342. The police report dated 15 April 1992 concerns the theft of office equipment and materials. The Panel finds that Acqua did not demonstrate when the theft of the claimed items occurred. Acqua did not establish that the loss occurred within the jurisdictional period. Accordingly, the Panel finds that Acqua did not submit sufficient information or evidence to establish that the loss of the claimed items was a direct result of Iraq’s invasion and occupation of Kuwait.

343. Acqua also failed to establish its claim for the following additional reason. In order to establish a loss of tangible property claim, this Panel has found that a claimant must submit evidence such as certificates of title, receipts, purchase invoices, bills of lading, insurance documents, customs records, inventory asset registers, hire purchase or lease agreements, transportation documents, and other relevant documents generated prior to 2 August 1990. A claimant must also provide evidence which would establish that it paid for the tangible property or confirm the value of the tangible property.

344. The Panel finds that Acqua did not submit sufficient evidence to demonstrate its title to or right to use the assets and the value of those assets.

### 3. Recommendation

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

#### C. Payment or relief to others

##### 1. Facts and contentions

346. Acqua seeks compensation in the amount of USD 65,405 for payment or relief to others. The claim is for the alleged costs in the form of salaries and airfares for two Italian employees in Iraq, and food and medicine for employees detained in Iraq.

Table 33. Acqua's claim for payment or relief to others

<u>Loss items</u>	<u>Claim amount (ITL)</u>	<u>Claim amount (USD)</u>
Salaries of Italian employees	57,215,495	48,528
Air travel	2,157,065	1,820
Food and medicine	17,846,145	15,057
<u>Total</u>	<u>77,218,705</u>	<u>65,405</u>

347. Acqua used the following rate of exchange to arrive at the United States dollar amount: 1,179 Italian lire (ITL) = USD 1 (for salaries), and ITL 1,185 = USD 1 (for air travel, and food and medicine). Acqua did not explain the basis for use of these exchange rates.

348. With respect to the claim for salaries, Acqua seeks compensation for salaries paid to two Italian employees while they were detained in Iraq. One of the employees returned to Italy on 9 November 1990, and the other returned on 9 December 1990. The claim for salaries includes monthly salaries, bonuses, social security contributions and severance pay.

349. With respect to the claim for air travel, Acqua seeks compensation for air travel costs relating to the employee who returned to Italy on 9 November 1990. Acqua also seeks compensation for the cost of pre-paid return tickets, which it states were provided to all its personnel in Iraq.

350. With respect to the claim for food and medicine, Acqua seeks compensation for the cost of food and medicine provided to its Italian employees who were detained in Iraq.

##### 2. Analysis and valuation

351. With respect to the claim for salaries, Acqua did not provide any evidence to show that the amounts claimed were actually paid to the employees. Acqua also did not provide any evidence to show that its employees were detained or the amount of time during which they were detained. Accordingly, the Panel finds that there is insufficient information and evidence to support the claim for salaries.

352. With respect to the claim for air travel, Acqua submitted an invoice dated 24 July 1991 to support its claim relating to the employee who returned to Italy on 9 November 1990. Acqua did not provide an explanation as to how the invoice dated 24 July 1991 relates to travel by one of its employees on 9 November 1990. With regard to the pre-paid tickets, Acqua submitted an invoice dated 28 August 1990. However, Acqua did not provide any evidence that this invoice was actually paid. Accordingly, the Panel finds that there is insufficient information and evidence to support the claim for air travel.

353. With respect to the claim for food and medicine, Acqua submitted an expense voucher dated September 1990 and four expense vouchers dated December 1990. Two of the vouchers were accompanied by untranslated receipts. Acqua did not provide any evidence to show that the vouchers were actually paid, and there is no explanation as to how the receipts support the vouchers. Accordingly, the Panel finds that there is insufficient information and evidence to support the claim for food and medicine.

### 3. Recommendation

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

#### D. Financial losses

##### 1. Facts and contentions

355. Acqua seeks compensation in the amount of USD 99,776 for financial losses. The claim is for (a) loss of funds in a safe in Iraq, and (b) interest incurred on overdraft facility during the period from August 1990 to March 1991.

356. In the “E” claim form, Acqua characterised the loss of funds in the safe as loss of tangible property and the interest on the overdraft facility as a claim for interest. The Panel finds that these losses are more accurately described as financial losses.

Table 34. Acqua’s claim for financial losses

<u>Loss items</u>	<u>Claim amount</u>	<u>Claim amount (USD)</u>
Funds in safe	IQD 28,603 USD 7,922	88,417 7,922
Interest on overdraft	IQD 1,112	3,437
<u>Total</u>		<u>99,776</u>

357. Acqua did not explain the basis for the exchange rate used by it.

358. With respect to the claimed loss of funds in the safe, Acqua alleges that the safe was located within its office in Iraq. According to Acqua, the office was broken into on 10 January 1991 and the contents of the safe, including Iraqi dinars and United States dollars, were stolen. Acqua submitted a receipt showing the amount of cash in the possession of its local representative on 9 December 1990.

However, Acqua did not provide any evidence to show what, if any, cash was in the safe at the time of the break-in.

359. With respect to the claim for interest on the overdraft facility, Acqua alleges that at the time of Iraq's invasion and occupation of Kuwait there was a bank overdraft in its favor in the amount of IQD 20,000. Acqua further alleges that because its own debtors failed to pay amounts owed to it, it was unable to repay the overdraft amount and that it incurred interest charges on the overdraft in the amount of IQD 1,112 during the period from August 1990 to March 1991. The only evidence in support of this loss is a letter on Acqua's own letterhead to a third party dated 15 July 1991, which refers to interest charges. However, the letter does not explain what, if any, relationship exists between the interest charges and Iraq's invasion and occupation of Kuwait. Moreover, there is no evidence to show that the interest charges were actually paid or that the interest charges were a direct result of Iraq's invasion and occupation of Kuwait.

## 2. Analysis and valuation

360. With respect to the claim for loss of funds in the safe, Acqua did not provide any evidence to show what, if any, cash was in the safe at the time of the break-in. Accordingly, the Panel finds that there is insufficient information and evidence to support the claim for loss of funds.

361. With respect to the claim for interest on the overdraft facility, Acqua did not explain what, if any, relationship exists between the interest charges and Iraq's invasion and occupation of Kuwait. Accordingly, the Panel finds that the alleged loss was not a direct result of Iraq's invasion and occupation of Kuwait, and also finds that there is insufficient information and evidence to support the claim for interest charges.

## 3. Recommendation

362. The Panel recommends no compensation for financial losses.

### E. Other losses

#### 1. Facts and contentions

363. Acqua seeks compensation in the amount of USD 16,773 for other losses. The claim is for additional premiums payable under a war risk insurance policy, which was extended to all staff in Iraq at the time of Iraq's invasion and occupation of Kuwait.

#### 2. Analysis and valuation

364. Acqua provided invoices showing that insurance coverage was obtained on an annual basis. The invoices indicate that the premiums increased from 1990 to 1991. However, Acqua did not provide any evidence to show that additional insurance coverage was obtained as a result of Iraq's invasion and occupation of Kuwait. Acqua also did not provide any evidence to show that any increase was the result of Iraq's invasion and occupation of Kuwait. Moreover, Acqua did not provide

any evidence to show that the premiums were actually paid or to show that the premiums were for coverage limited to Iraq or whether other areas were included in the coverage. Accordingly, the Panel finds that there is insufficient information and evidence to support the claim for other losses, and that the alleged loss was not a direct result of Iraq's invasion and occupation of Kuwait.

### 3. Recommendation

365. The Panel recommends no compensation for other losses.

#### F. Recommendation for Acqua

Table 35. Recommended compensation for Acqua

<u>Claim element</u>	<u>Claim amount (USD)</u>	<u>Recommended compensation (USD)</u>
Contract losses	102,955	nil
Loss of tangible property	20,000	nil
Payment or relief to others	65,405	nil
Financial losses	99,776	nil
Other losses	16,773	nil
<u>Total</u>	<u>304,909</u>	<u>nil</u>

366. Based on its findings regarding Acqua's claim, the Panel recommends no compensation.

#### XI. F.LLI GIRAT S.P.A.

367. F.lli Girat S.p.A. ("Girat") is a corporation organised according to the laws of Italy operating in the construction industry.

368. In the "E" claim form, the total of Girat's alleged losses was stated as ITL 920,803,869 (USD 794,276) for contract losses. However, Girat's original claim submission also referred to "non business productivity" losses in the amount of ITL 900 million (USD 776,330). Girat mentioned this amount and loss element in its Statement of Claim and its reply to the article 34 notification. The Panel accordingly treated Girat's original claim amount as being ITL 1,820,803,869 (USD 1,570,606).

369. The Panel has reclassified elements of Girat's claim for the purposes of this report. The Panel has reclassified part of Girat's claim for contract losses to loss of profits, and has reclassified Girat's claim for "non business productivity" to loss of profits. The Panel therefore considered the amount of ITL 1,820,803,869 (USD 1,570,606) for contract losses and loss of profits as follows:



Table 36. Girat's claim

<u>Claim element</u>	<u>Claim amount (USD)</u>
Contract losses	625,238
Loss of profits	945,368
<u>Total</u>	<u>1,570,606</u>

#### A. Contract losses

##### 1. Facts and contentions

370. Girat seeks compensation in the amount of USD 625,238 for contract losses. The original claim for contract losses was in the amount of ITL 920,803,869 (USD 794,276). However, the Panel has reclassified ITL 195,965,672 (USD 169,038) of that amount to loss of profits. The Panel therefore considered the amount of ITL 724,838,197 (USD 625,238) for contract losses.

371. The claim for contract losses comprises claims for planning (design), purchase of materials, costs of working, and administrative and bank charges.

372. The claim arises out of a subcontract between Girat and Filippo Fochi S.p.A. ("Fochi"), an Italian company. Girat and Fochi entered into the subcontract on 9 August 1990. The subcontract required Girat to build and supply pre-fabricated shelters for the FPC Fertiliser Plant No. 4 in Iraq (the "Project"). The value of the subcontract was ITL 1.02 billion (USD 879,841), and delivery was scheduled for the end of 1990.

373. Girat provided no material information about the main contract for the Project between Fochi and the employer.

374. Girat stated that it began work on the Project on 18 July 1990, and ceased work on 30 November 1990. Girat further stated that as at the end of March 1991, 80 per cent of its work on the Project had been completed.

375. Girat stated that it has not received any payments for any of its work on the Project. According to Girat, Fochi did not receive payments from the employer and was unable to pay Girat under the subcontract.

##### 2. Analysis and valuation

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

377. Girat provided an untranslated copy of the subcontract with Fochi, which was in Italian, and untranslated invoices, which were also in Italian, for the purchase of materials and for costs related to the planning of the work on the Project. However, Girat did not provide any evidence to show that Fochi was rendered insolvent or bankrupt as a result of Iraq's invasion and occupation of Kuwait or that Fochi was otherwise entitled to refuse to pay Girat.

378. Accordingly, the Panel finds that Girat did not demonstrate that its losses were the direct result of Iraq's invasion and occupation of Kuwait.

379. The Panel further finds that Girat did not provide sufficient information and evidence to support its claim. Girat provided little documentation in support of its claim. With regard to the submitted documentation, much of it was not translated into English.

380. Girat did not provide any evidence to show that the untranslated invoices submitted with its claim were related to work required under its subcontract with Fochi. Girat also did not explain why it entered into the subcontract with Fochi on 9 August 1990 – one week after Iraq's invasion and occupation of Kuwait.

### 3. Recommendation

381. The Panel recommends no compensation for contract losses.

#### B. Loss of profits

##### 1. Facts and contentions

382. Girat seeks compensation in the amount of USD 945,368 for loss of profits. Girat's original claimed amount for contract losses included ITL 195,965,672 (USD 169,038) for loss of profits (described by Girat as "non-profit of the order"), and the Panel has reclassified that portion of the claim to loss of profits. Girat also claimed "non business productivity" losses in the amount of ITL 900 million (USD 776,330), and the Panel has also included that amount in Girat's claim for loss of profits. The Panel therefore considered the amount of ITL 1,095,965,672 (USD 945,368) for loss of profits.

383. With regard to the claim for loss of profits in the amount of USD 169,038, Girat did not explain the factual basis for the alleged loss or how the amount was calculated. Girat also did not provide any evidence to support this loss.

384. With regard to the claim for "non business productivity," Girat provided little explanation as to the nature of its claim. It asserted, however, that the "volume" for its business in 1990 was ITL 800 billion and based its claimed loss on two months of lost "volume." Girat did not provide any evidence to support this claim.

## 2. Analysis and valuation

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

386. The Panel finds that Girat did not provide sufficient information and evidence to support its claim. Girat did not provide any evidence to prove the nature of the claimed amounts or the amount of the alleged losses.

## 3. Recommendation

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

### C. Recommendation for Girat

Table 37. Recommended compensation for Girat

<u>Claim element</u>	<u>Claim amount (USD)</u>	<u>Recommended compensation (USD)</u>
Contract losses	625,238	nil
Loss of profits	945,368	nil
<u>Total</u>	<u>1,570,606</u>	<u>nil</u>

388. Based on its findings regarding Girat's claim, the Panel recommends no compensation.

## XII. NATIONAL ENGINEERING SERVICES PAKISTAN (PVT) LIMITED

389. National Engineering Services Pakistan (Pvt) Limited ("National Engineering") is a corporation organised according to the laws of Pakistan, which provides consulting engineering services. National Engineering seeks compensation in the amount of USD 1,238,966 for contract losses, loss of tangible property, financial losses, and interest. The claim arises out of services provided by National Engineering to Iraq on four projects in Iraq.

390. The Panel considered the amount of USD 1,238,966 for contract losses, loss of tangible property, financial losses, and interest as follows:

Table 38. National Engineering's claim

<u>Claim element</u>	<u>Claim amount (USD)</u>
Contract losses	425,328
Loss of tangible property	435,076
Financial losses	319,075
Interest	59,487
<u>Total</u>	<u>1,238,966</u>

A. Contract losses1. Facts and contentions

391. National Engineering seeks compensation in the amount of IQD 129,425 (USD 425,328) for contract losses allegedly incurred in connection with four projects in Iraq on which it provided consulting engineering services to Iraq.

392. The breakdown of the amount claimed for each project is set out in table 39, infra.

Table 39. National Engineering's claim for contract losses (claim amount by project)

<u>Project</u>	<u>Amount claimed (USD)</u>
Rumaitha irrigation and drainage project	200,356
North Jazira irrigation project	80,513
Zubair irrigation project	78,802
Regulators and irrigation structures project	65,657
<u>Total</u>	<u>425,328</u>

(a) Rumaitha irrigation and drainage project

393. This project involved the implementation of a new irrigation and drainage system to improve agricultural, economic and social development in the Rumaitha area. National Engineering performed work on the project under a contract dated 3 September 1981 with the State Organisation of Land Reclamation. Under the contract, National Engineering conducted field studies, and prepared a planning report and implementation documents on this project. The intended completion date under the contract was 2 April 1983. The total value of the contract was IQD 504,795.

394. National Engineering states that its work on the project was completed in 1985, and that the employer approved the final bill in the amount of IQD 59,316. National Engineering asserts that this final payment was not made due to Iraq's invasion and occupation of Kuwait.

(b) North Jazira irrigation project

395. This project involved construction work concerning the main pumping station in the North Jazira area. National Engineering provided the general supervision for this project under a contract with the Ministry of Irrigation dated 7 April 1985. Its work included the approval of the employer's work programme, the review and modification of the work designs, the review and approval of working drawings, and preparation of the completion reports. The original term of the contract was two years from 7 April 1985. The total value of the contract was IQD 822,190.

396. National Engineering states that its work on the project was completed in 1988. It seeks compensation for retention money in the amount of IQD 25,091. The amount was invoiced to the

employer after work was completed, but remains unpaid. National Engineering asserts that this final payment was not made due to Iraq's invasion and occupation of Kuwait.

(c) Zubair irrigation project

397. National Engineering entered into a contract with the Ministry of Irrigation dated 17 June 1981. Under the contract, National Engineering prepared a draft and final planning report for this project. The total value of the contract was IQD 255,000. The original completion date was 16 April 1982.

398. National Engineering asserts that due to the changed requirements of the employer, the work remained suspended for more than two years. The work recommenced in November 1986 with a new schedule for completion. National Engineering submitted a draft planning report in July 1987, which was approved by the employer in July 1989, and again recommenced its work in November 1989. It submitted a draft final planning report in the first week of June 1990, and its work remained in progress up to December 1990.

399. National Engineering claims that it is still owed IQD 24,557 for work performed by it. Of this amount, National Engineering claims that a progress payment in the amount of IQD 14,557 is unpaid and owing. National Engineering asserts that the employer confirmed this amount was owed to it in a letter dated 5 September 1988. With respect to the balance of IQD 10,000, National Engineering asserts that the employer authorised payment of this amount in a letter dated 10 October 1990.

(d) Regulators and irrigation structures project

400. National Engineering entered into a joint venture with Dijla Centre Mosul – Iraq (“Dijla”) to inspect and evaluate regulators and irrigation structures. The joint venture performed the work under a contract with the Ministry of Agriculture and Irrigation. As part of the joint venture, National Engineering provided four engineers, a diver, and an underwater camera operator for the project, and provided technical assistance to Dijla in preparing draft and final reports.

401. The joint venture agreement was signed on 12 June 1989 by National Engineering and Dijla. National Engineering did not provide a copy of the contract between the joint venture and the Ministry of Agriculture and Irrigation. Work on the project commenced in August 1989, and was completed in August 1990.

402. National Engineering claims that it is still owed IQD 20,461 for work performed by it from April to August 1990.

## 2. Analysis and valuation

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

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

405. In respect of the Rumaita irrigation and drainage project, the Panel finds that the contract losses alleged by National Engineering relate entirely to work that was performed prior to 2 May 1990. Accordingly, the Panel recommends no compensation in respect of this project, as the alleged losses relate to debts and obligations of Iraq arising prior to 2 August 1990 and, therefore, are outside the jurisdiction of the Commission.

406. In respect of the North Jazira irrigation project, the Panel finds that the contract losses alleged by National Engineering relate entirely to work that was performed prior to 2 May 1990. Accordingly, the Panel recommends no compensation in respect of this project, as the alleged losses relate to debts and obligations of Iraq arising prior to 2 August 1990 and, therefore, are outside the jurisdiction of the Commission.

407. In respect of the Zubair irrigation project, the Panel finds that the portion of the claim for IQD 24,557 relates entirely to work that was performed prior to 2 May 1990. As for the portion of the claim for IQD 10,000, the Panel finds that National Engineering did not submit sufficient information and evidence concerning the dates of performance of the work. Such evidence is particularly important given the prolonged period of time over which this particular work appears to have been performed. The Panel therefore finds that National Engineering failed to establish that its alleged contract losses relate entirely to work that was performed after 2 May 1990. Accordingly, the Panel recommends no compensation in respect of this project, as the alleged losses relate to debts and obligations of Iraq arising prior to 2 August 1990 and, therefore, are outside the jurisdiction of the Commission.

408. In respect of the regulators and irrigation structures project, the Panel finds that National Engineering did not submit sufficient information and evidence. The Panel therefore finds that National Engineering failed to establish that its alleged contract losses relate entirely to work that was performed after 2 May 1990. Accordingly, the Panel recommends no compensation in respect of this project, as the alleged losses relate to debts and obligations of Iraq arising prior to 2 August 1990 and, therefore, are outside the jurisdiction of the Commission.

### 3. Recommendation

409. The Panel recommends no compensation for contract losses.

#### B. Loss of tangible property

##### 1. Facts and contentions

410. National Engineering seeks compensation in the amount of IQD 135,585 (USD 435,076) for loss of tangible property. The claim is for the alleged loss of tangible property in Iraq, including four motor vehicles and assorted office furniture and items.

411. National Engineering asserts that two of its motor vehicles were destroyed in a bombing raid by Allied Coalition Forces on 17 January 1991. The two motor vehicles were 1981 Nissan Patrol Jeeps.

412. National Engineering asserts that its other claimed tangible property items (including the two remaining motor vehicles and assorted office furniture and items) were expropriated by Iraq pursuant to Presidential Order No. S/1/8568 dated 16 April 1992.

## 2. Analysis and valuation

413. With regard to the two motor vehicles destroyed in the bombing raid, National Engineering provided copies of reports issued by the local Iraqi police authorities and a copy of a document issued by the State Commission for Customs, Northern Region, Iraq, to National Engineering. These documents confirmed the date, cause and extent of the damage to the vehicles.

414. With regard to these motor vehicles, the Panel finds that the documents provided by National Engineering demonstrate National Engineering's title to or right to use the vehicles, and the presence of the vehicles in Iraq, at the time of damage. The Panel finds that the two vehicles had a value of USD 3,000 at the time of loss.

415. With regard to the remaining items of tangible property, the Panel finds that the alleged losses were not a direct result of Iraq's invasion and occupation of Kuwait. Furthermore, the losses occurred outside the compensable period as determined by the Governing Council because the losses resulted from an expropriation order in April 1992.

## 3. Recommendation

416. The Panel recommends compensation in the amount of USD 3,000 for loss of tangible property.

### C. Financial losses

#### 1. Facts and contentions

417. National Engineering seeks compensation in the amount of IQD 99,435 (USD 319,075) for financial losses. National Engineering claims that as a result of Iraq's invasion and occupation of Kuwait, it had to close its office in Iraq and cease its operations there. It further claims that at the time it ceased its operations, it had an account with Al-Rasheed Bank which held IQD 99,435. National Engineering claims that it was unable to withdraw the money, and that the money was "lost".

#### 2. Analysis and valuation

418. National Engineering did not provide evidence showing that it had a bank account in Iraq at the time of Iraq's invasion and occupation of Kuwait, and it did not provide any evidence showing the amount on deposit in any bank account in Iraq at the time of Iraq's invasion and occupation of Kuwait. Instead, National Engineering provided a document dated 22 May 1993 from Al-Rafidain Bank stating that National Engineering had a balance in its favour of IQD 99,435 as at 20 May 1993.

419. The Panel finds that National Engineering failed to establish a loss. The document from Al-Rafidain Bank indicates there was no loss as at 20 May 1993.

### 3. Recommendation

420. The Panel recommends no compensation for financial losses.

#### D. Interest

421. National Engineering seeks compensation for interest in the amount of USD 59,487. National Engineering's Statement of Claim states that this claim is for interest on the unpaid amounts comprising its claim for contract losses.

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

#### E. Recommendation for National Engineering

Table 40. Recommended compensation for National Engineering

<u>Claim element</u>	<u>Claim amount (USD)</u>	<u>Recommended compensation (USD)</u>
Contract losses	425,328	nil
Loss of tangible property	435,076	3,000
Financial losses	319,075	nil
Interest	59,487	nil
<u>Total</u>	<u>1,238,966</u>	<u>3,000</u>

423. Based on its findings regarding National Engineering's claim, the Panel recommends compensation in the amount of USD 3,000. The Panel finds the date of loss to be 17 January 1991.

### XIII. WS ATKINS LIMITED

424. WS Atkins Limited ("Atkins") is a corporation organised according to the laws of the United Kingdom. In the "E" claim form, Atkins originally sought compensation in the total amount of GBP 2,614,913. Atkins completed the "E" claim form in Pounds sterling, but a number of the loss elements were originally denominated in Kuwaiti dinars.

425. Subsequently, it reduced the amount of its claim in its reply to the article 34 notification submitted in July 2001. In its reply, Atkins reduced the amount of its claim for contract losses from KWD 976,237 to KWD 102,143 (USD 363,646), and reduced the amount of its claim for other losses (restart costs) from KWD 148,902 to KWD 145,762 (USD 554,228).



426. Atkins now seeks compensation in the amount of 971,752 Pounds sterling (GBP) (USD 1,847,437) for contract losses, loss of profits, loss of tangible property, payment or relief to others, and other losses (restart costs).

427. The Panel has reclassified elements of Atkins' claim for the purposes of this report. The Panel has reclassified the amount of KWD 54,204 (USD 192,975) from contract losses to loss of profits because that portion of the claim relates to alleged future profits on contracts rather than work already performed. The Panel therefore considered the amount of GBP 971,752 (USD 1,847,437) for contract losses, loss of profits, loss of tangible property, payment or relief to others, and other losses (restart costs) as follows:

Table 41. Atkins' claim

<u>Claim element</u>	<u>Claim amount (USD)</u>
Contract losses	170,671
Loss of profits	192,975
Loss of tangible property	192,966
Payment or relief to others	736,597
Other losses (restart costs)	554,228
<u>Total</u>	<u>1,847,437</u>

428. Atkins is the parent company of the WS Atkins Limited Group, two members of which include WS Atkins Overseas Limited ("Overseas Limited") and WS Atkins and Partners Overseas ("Partners Overseas"). Atkins owns 100 per cent of the shares of each of Overseas Limited and Partners Overseas. This claim arises out of five projects in Kuwait on which either Overseas Limited or Partners Overseas was a subcontractor.

429. Atkins has filed this claim in its capacity as the parent company of Overseas Limited and Partners Overseas, neither of which has filed its own claim with the Commission.

430. The five projects to which the claim relates are:

- (a) Project No. 53606: Maintenance of landscape irrigation and construction of minor new works;
- (b) Project No. 53603: Kuwait effluent utilisation project;
- (c) Project No. 53609: Landscape maintenance in the garden districts 2, 3 and 5b;
- (d) Project No. 53613: Integrated border stations; and
- (e) Project No. 53509: Traffic models.

431. Additional information regarding the five projects is set out in table 42, infra, by project number, description of subcontract by date and parties, expected completion date, and employer.

Table 42. Atkins' claim (projects in Kuwait)

<u>Project No.</u>	<u>Subcontract – date and parties</u>	<u>Expected completion date of work</u>	<u>Employer</u>
53606	Sub-consultancy agreement dated 27 June 1989 between Overseas Limited and Salem Al-Marzouk/Sabah Abi-Hanna	26 June 1990 – extended to 26 June 1991 (maintenance) and 7 September 1991 (supervision)	State of Kuwait Ministry of Public Works Roads Administration (under Agreement EF/R/46)
53603	Sub-consultancy agreement dated 26 October 1987 between Overseas Limited and Salem Al-Marzouk/Sabah Abi-Hanna	November 1990	State of Kuwait Ministry of Public Works Sanitary Engineering (under (Agreement EF/S/9)
53609	Sub-consultancy agreement dated 13 June 1989 between Overseas Limited and Kuwait Consult	31 July 1991	State of Kuwait Public Authority for Agriculture Affairs and Fish Resources (under Agreement 2/88-89)
53613	Sub-consultancy agreement dated 15 April 1990 between Overseas Limited and Gulf Consult	March 1991	Refrigeration Industries Co. of Kuwait
53509	Subcontract dated 11 October 1987 between Overseas Limited and the Kuwaiti Engineer's Office	Work completed as at 2 August 1990	Kuwait Municipality (under a contract with the Kuwaiti Engineer's Office, in association with Partners Overseas and Scott Wilson Kirkpatrick and Partners)

#### A. Contract losses

##### 1. Facts and contentions

432. Atkins seeks compensation in the amount of KWD 47,939 (USD 170,671) for contract losses allegedly incurred in connection with one of its projects in Kuwait.

433. The Panel has reclassified the amount of KWD 54,204 (USD 192,975) from the original claim for contract losses to loss of profits because that portion of the claim relates to alleged future profits on contracts rather than work already performed.

434. Atkins' claim for contract losses relates to Project No. 53509. Overseas Limited entered into a subcontract dated 11 October 1987 with the Kuwaiti Engineer's Office to perform work on a contract between the Kuwait Municipality and the Kuwaiti Engineer's Office regarding traffic models. Under the terms of the subcontract, Overseas Limited was to act as an "independent professional technical

consultant to the [Kuwaiti Engineer's Office] for the project". Work was due to commence on 1 August 1987. Atkins states that work had been completed at the time of Iraq's invasion and occupation of Kuwait. Atkins also asserts that the Kuwaiti Engineer's Office ceased its business in August 1990 as a result of Iraq's invasion and occupation of Kuwait.

435. Atkins seeks compensation in the amount of KWD 47,939 (USD 170,671), which it states is owed by the Kuwaiti Engineer's Office to Overseas Limited. Atkins asserts that the Kuwaiti Engineer's Office received money from the Municipality of Kuwait to pay Overseas Limited, but that the money was never paid to it.

## 2. Analysis and valuation

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

437. Atkins submitted a copy of the subcontract and a schedule of invoices, which shows that the last invoice was dated August 1989. It also provided a letter dated 28 February 1992 from it to the Kuwaiti Engineer's Office, which demands payment of amounts owed and states: "I understand you are now trading successfully and have a healthy current and forward workload." Atkins also provided a memorandum dated 15 May 1992 from it to the Kuwaiti Engineer's Office, which states Atkins' "intention to begin formal proceedings to recover outstanding monies due to us under the terms of this contract".

438. The Panel finds that Atkins did not submit any evidence to show that the Kuwaiti Engineer's Office was rendered unable to pay due to insolvency or bankruptcy caused by the destruction of its business during Iraq's invasion and occupation of Kuwait, or was otherwise entitled to refuse to pay Overseas Limited. The Panel finds that Atkins' own correspondence indicates that the Kuwaiti Engineer's Office was in business and able to meet its obligations in February 1992.

439. The Panel also finds that Atkins did not establish why it or Overseas Limited was unable to collect on the unpaid amounts between the time of the last invoice in August 1989 and 2 August 1990.

440. The Panel recommends no compensation for contract losses because Atkins did not provide sufficient evidence to establish that its alleged loss was a direct result of Iraq's invasion and occupation of Kuwait.

## 3. Recommendation

441. The Panel recommends no compensation for contract losses.

## B. Loss of profits

### 1. Facts and contentions

442. Atkins seeks compensation in the amount of KWD 54,204 (USD 192,975) for loss of profits.

443. The Panel has reclassified the amount of KWD 54,204 (USD 192,975) from contract losses to loss of profits because that portion of the claim relates to alleged future profits on contracts rather than work already performed.

444. Atkins claims that as a direct result of Iraq's invasion and occupation of Kuwait, the employers on Project Nos. 53606, 53603, 53609 and 53613 were forced to cancel the projects. Atkins states that it stopped work on the projects upon Iraq's invasion and occupation of Kuwait.

445. In respect of Project Nos. 53606, 53603, and 53609, Atkins is seeking to recover budgeted profits and unrecovered overhead costs for the remainder of the period over which the projects would have run. In respect of Project No. 53613, Atkins is seeking to recover the budgeted contribution on the project. The amount claimed by project is set out in table 43, infra.

Table 43. Atkins' claim for loss of profits

<u>Project No.</u>	<u>Amount claimed (KWD)</u>	<u>Amount claimed (USD)</u>
53606	9,603	34,188
53603	3,140	11,179
53609	16,632	59,213
53613	24,829	88,395
<u>Total</u>	<u>54,204</u>	<u>192,975</u>

446. Atkins submitted copies of the related contracts for these projects. Atkins states that much of its records relating to the projects were lost or destroyed due to the fact that its offices were looted during Iraq's invasion and occupation of Kuwait.

### 2. Analysis and valuation

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

448. In its previous reports, the Panel has held that claimants must provide evidence that establishes with reasonable certainty ongoing and expected profitability to support a claim for loss of profits. In the absence of such evidence, the Panel does not recommend compensation for loss of profits.

(a) Project No. 53606

449. Atkins states that Project No. 53606 was originally scheduled for completion on 26 June 1990. However, both the maintenance and the supervision elements were each extended for a one-year period until 26 June 1991 and 7 September 1991, respectively. Atkins states that the monthly overhead and profit contribution was KWD 873 per month. The claim has been calculated as KWD 873 per month for 11 months, which results in a total claimed amount of KWD 9,603.

450. Atkins provided a schedule (prepared for the purpose of supporting the claim) which calculates the budgeted contribution per month based on the budgeted monthly salaries for one horticulturalist and two irrigation inspectors. Budgeted monthly contributions were calculated as the sum of overheads, calculated at 35 per cent of monthly salary cost, plus profit at 10 per cent of the sum of monthly salary and overheads.

451. Atkins did not provide sufficient evidence, however, to show that the budgeted contribution was likely to have been achieved. For example, Atkins did not provide financial information to support the actual contribution achieved during the period prior to Iraq's invasion and occupation of Kuwait. Atkins also did not provide sufficient evidence to support the claim that overhead costs constituted 35 per cent of salary costs.

452. The Panel finds that Atkins did not provide sufficient information and evidence to support its claim for loss of profits with respect to Project No. 53606.

(b) Project No. 53603

453. Atkins states that Project No. 53603 was scheduled for completion in November 1990 and, as at 2 August 1990, there were four months of work outstanding. Atkins alleges that the expected monthly overhead and profit contribution during this period was KWD 785 based on a monthly billing rate of KWD 2,405. The claim has been calculated as KWD 785 per month for four months (August to November 1990), which results in a total claimed amount of KWD 3,140.

454. Atkins provided a schedule (prepared for the purpose of supporting the claim) which calculates the budgeted contribution per month based on the budgeted monthly salaries for a project engineer. Budgeted monthly contributions were calculated as the sum of overheads, calculated at 35 per cent of monthly salary cost, plus profit at 10 per cent of the sum of monthly salary and overheads.

455. Atkins did not provide sufficient evidence, however, to show that the budgeted contribution was likely to have been achieved. For example, Atkins did not provide financial information to support the actual contribution achieved during the period prior to Iraq's invasion and occupation of Kuwait. Atkins also did not provide sufficient evidence to support the claim that overhead costs constituted 35 per cent of salary costs.

456. The Panel finds that Atkins did not provide sufficient information and evidence to support its claim for loss of profits with respect to Project No. 53603.

(c) Project No. 53609

457. Atkins states that Project No. 53609 was scheduled for completion at the end of July 1991. The expected monthly contribution to overheads and profit was KWD 1,386 based on a monthly billing rate of KWD 4,246. The claim has been calculated as KWD 1,386 per month for 12 months, which results in a total claimed amount of KWD 16,632.

458. Atkins provided a schedule (prepared for the purpose of supporting the claim) which calculates the budgeted contribution per month based on the budgeted monthly salaries for two resident landscape engineers. Budgeted monthly contributions were calculated as the sum of overheads, calculated at 35 per cent of monthly salary cost, plus profit at 10 per cent of the sum of monthly salary and overheads.

459. Atkins did not provide sufficient evidence, however, to show that the budgeted contribution was likely to have been achieved. For example, Atkins did not provide financial information to support the actual contribution achieved during the period prior to Iraq's invasion and occupation of Kuwait. Atkins also did not provide sufficient evidence to support the claim that overhead costs constituted 35 per cent of salary costs. Atkins also did not provide sufficient evidence to support the monthly salary cost used in its calculations, or the rates of overhead recovery and profit accrual.

460. The Panel finds that Atkins did not provide sufficient information and evidence to support its claim for loss of profits with respect to Project No. 53609.

(d) Project No. 53613

461. Atkins states that the effective commencement date of this project was 15 April 1990 with an anticipated work schedule of 11 months. The anticipated total revenue on the project was KWD 81,428 with an overhead and profit contribution budgeted at KWD 24,603. Atkins also alleges it suffered losses on the project (for costs incurred but not reimbursed by the main contractor/employer) totalling KWD 226 as well as being unable to recover the budgeted contribution of KWD 24,603.

462. With respect to the claim regarding costs incurred but not reimbursed, Atkins did not provide evidence to support the claim.

463. With respect to the claim regarding the budgeted contribution, Atkins provided a schedule (prepared for the purpose of supporting the claim) outlining a budget for the entire project, showing budgeted revenue, direct costs, overheads at 35 per cent of direct costs and profit. The budgeted contribution was calculated as overheads at 35 per cent of budgeted base cost plus profit.

464. Atkins did not provide sufficient evidence, however, to show that the budgeted contribution was likely to have been achieved. For example, Atkins did not provide financial information to support the actual contribution achieved during the period prior to Iraq's invasion and occupation of Kuwait. Atkins also did not provide sufficient evidence to support the claim that overhead costs constituted

35 per cent of direct costs and profit. Atkins also did not provide sufficient evidence to support the budgeted overhead and profit figures.

465. The Panel finds that Atkins did not provide sufficient information and evidence to support its claim for loss of profits with respect to Project No. 53613.

### 3. Recommendation

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

#### C. Loss of tangible property

##### 1. Facts and contentions

467. Atkins seeks compensation in the amount of GBP 101,500 (USD 192,966) for loss of tangible property. Atkins claims that its offices and employees' apartments in Kuwait were entered and looted during Iraq's invasion and occupation of Kuwait. The stolen or destroyed property includes furniture, fixtures, a motor vehicle, and computer equipment.

##### 2. Analysis and valuation

468. Atkins provided as evidence of its alleged losses a copy of its summary of fixed assets, and photographs of its offices showing the looting and destruction. The photographs, however, do not show the items that were allegedly stolen. Atkins states it was unable to provide records such as invoices because all such records were destroyed during the looting. As a result, Atkins was unable to provide evidence of its title to or right to use the assets, or their historical cost.

469. Because of the nature of the photographs, the Panel was unable to conclude that the items of tangible property were stolen, damaged or destroyed. The Panel finds that Atkins did not provide sufficient information and evidence to demonstrate its title to or right to use the assets, or their historical cost.

##### 3. Recommendation

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

#### D. Payment or relief to others

##### 1. Facts and contentions

471. Atkins seeks compensation in the amount of GBP 387,450 (USD 736,597) for payment or relief to others. The claim is for employee costs, including salary, compensation and other expenses relating to Atkins' expatriate and locally recruited employees during the period August to December 1990. Atkins states that, during this period, its employees were unable to perform any work because they were either held hostage, were in hiding or had fled the country.

472. Atkins states that on 2 August 1990, it employed 95 employees on assignments in Kuwait. Of these, 20 were expatriate employees recruited in the United Kingdom and seconded to Kuwait and 75 were employees recruited locally in Kuwait. At the time of Iraq's invasion, Atkins states that five of the United Kingdom expatriate staff were on holiday outside the country, six were taken hostage (one of whom suffered a heart attack and died), seven remained in hiding until 11 December 1990, when they were repatriated to the United Kingdom, and two escaped during August and September 1990, making their own way back to the United Kingdom.

473. Atkins states that the payments made were exceptional in nature, since under the terms of the contracts, the various Kuwaiti contractors/employers were responsible for the monthly salary costs of staff working on the projects and for the normal cost of repatriating Atkins' employees. However, because the employees were unable to perform their duties under the contracts, Atkins paid their salaries.

474. Atkins presented a spreadsheet listing the expatriate employees and showing payments for salary from August to December 1990, plus payments for accrued leave, contract termination, repatriation expenses, other expenses, school fees, pension payments, and rent.

475. The "other expenses" relate mainly to the costs associated with one of Atkins' employees and his wife. The employee was taken hostage, suffered a heart attack and died. The expenses relate to the cost of repatriating his body. The employee's wife became ill during the period of her husband's detention, and Atkins is claiming for the cost of her treatment as an inpatient at a hospital in the United Kingdom.

476. In respect of local employees, Atkins presented a spreadsheet showing amounts due to each employee, and bank statements relating to such amounts.

477. Atkins states that during the period when its expatriate employees were detained in Iraq and in Kuwait, "on-account" payments were made to their dependants on a monthly basis. Atkins maintains that a complete reconciliation of amounts due and paid, excluding leave entitlement, was undertaken in December 1990 and settlement was effected thereafter.

478. Atkins asserts that in accordance with contractual terms, in addition to salary and leave payments made during their period of captivity/hiding, its expatriate employees were paid two months' salary by way of compensation for "loss of office". Locally-recruited employees were paid one month's salary as compensation along with annual and terminal leave payments.

## 2. Analysis and valuation

479. While Atkins provided information and evidence to support elements of its claim for payment or relief to others, the supporting documents contain inconsistencies and generally do not establish a basis for compensation of the claim. In some instances, it is difficult to determine how certain items of evidence relate to the claim, and in other instances, the amounts indicated by the supporting



evidence do not reconcile with the claim amounts for the individual loss items. In addition, the supporting evidence reflects payment by Atkins of only a fraction of the amount claimed.

480. Atkins attempted to provide evidence of payment of the various claimed items on an employee-by-employee basis. However, it was only able to provide evidence of proof and amount of payment with respect to three expatriate employees. Atkins did not provide such evidence with respect to the loss items claimed with respect to all the other employees.

481. The Panel finds that Atkins did not provide sufficient information and evidence to support its claim for the various loss items (with the exception of three expatriate employees).

482. However, there is a further deficiency affecting Atkins' claim for its expatriate employees, including the three for which it did provide evidence of proof and amount of payments. With respect to the three employees, the Panel observes that all three received awards from the Commission under category "C" for lost income. In fact, at least 10 of Atkins' employees received payments from the Commission for lost income, ranging in amounts from USD 19,737 to USD 61,895.

483. Thus, there is some duplication between Atkins' claim for payment or relief to others and the individual category "C" awards made to its employees, and Atkins did not explain or calculate the extent of the duplication between its claim and the category "C" claims of its employees. The Panel thus finds that Atkins did not provide sufficient information or evidence to establish the degree of the overlap between its claim and the category "C" awards to its employees. Without such information or evidence, the Panel is unable to determine whether Atkins is entitled to any compensation as claimed. In such circumstances, the Panel is unable to recommend compensation for Atkins' claim for salary payments allegedly made to its expatriate employees. The Panel finds that making a recommendation for compensation in such circumstances would amount to double recovery.

484. The Panel finds that Atkins is not entitled to further compensation with respect to the three expatriate employees, who have already received compensation from the Commission.

### 3. Recommendation

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

#### E. Other losses

##### 1. Facts and contentions

486. Atkins seeks compensation in the amount of KWD 145,762 (USD 554,228) for other losses. In its reply to the article 34 notification submitted in July 2001, Atkins reduced the amount of its claim for other losses (restart costs) from KWD 148,902 to KWD 145,762 (USD 554,228).

487. The other losses are comprised of amounts expended by Atkins from 1 April 1991 to 31 August 1992 in re-establishing its operations in Kuwait. Atkins states that it returned to Kuwait in April 1991, and began re-establishing its offices and renegotiating contracts with the various Kuwaiti employers.

The claim includes all costs incurred from 1 April 1991 to 31 August 1992, when Atkins was awarded a new contract with the Government of Kuwait.

488. Atkins concedes that the majority of the expenditures arose from normal operating activities, but asserts that the claim has been made because, under normal circumstances, the costs would have been covered by income generated from ongoing projects.

## 2. Analysis and valuation

489. Atkins provided numerous documents to show that it incurred costs from 1 April 1991 to 31 August 1992. However, the Panel finds that Atkins has not provided sufficient information and evidence to enable the Panel to determine which, if any, of the expenditures are restart costs and which are normal operating costs. Some, if not all, of the expenditures can be attributed to the cost of obtaining new contracts (such as the contract with the Government of Kuwait) as opposed to restart costs.

490. The Panel finds that Atkins did not provide sufficient information and evidence to support its claim for other costs, or to establish that the costs were incurred as a direct result of Iraq's invasion and occupation of Kuwait.

## 3. Recommendation

491. The Panel recommends no compensation for other losses (restart costs).

### F. Recommendation for Atkins

Table 44. Recommended compensation for Atkins

<u>Claim element</u>	<u>Claim amount (USD)</u>	<u>Recommended compensation (USD)</u>
Contract losses	170,671	nil
Loss of profits	192,975	nil
Loss of tangible property	192,966	nil
Payment or relief to others	736,597	nil
Other losses	554,228	nil
<u>Total</u>	<u>1,847,437</u>	<u>nil</u>

492. Based on its findings regarding Atkins' claim, the Panel recommends no compensation.

## XIV. ENGINEERING-SCIENCE, INC.

493. Engineering-Science, Inc. ("Engineering-Science") is a corporation organised according to the laws of the United States of America. The claim arises out of losses related to engineering work provided by Engineering-Science in connection with a wastewater treatment facility in Kuwait.

Engineering-Science seeks compensation in the amount of USD 108,401 for loss of tangible property, payment or relief to others, and financial losses.

494. In the “E” claim form, Engineering-Science sought compensation in the total amount of USD 651,387 for contract losses, loss of tangible property, “deposits – Rent, Tel., Electr.”, “Employees detained in Kwt [sic]”, “other losses”, which included losses related to the support of its employees and loss of cash, and interest lost on cash in a Kuwaiti bank account.

495. In the reply to the article 34 notification submitted in July 2001, Engineering-Science withdrew its claim for contract losses in the amount of USD 464,006, reduced the amount of its claim for loss of tangible property from USD 51,200 to USD 43,804, and reduced its claim for loss of cash from USD 904 to USD 552. Engineering-Science also attempted to increase its claim for “deposits” and its claim for interest.

496. In its reply to a request for further information and evidence submitted in December 2001, Engineering-Science reduced the amount of its claim related to its employees detained in Kuwait from USD 97,805 to USD 26,573.

497. The Panel has only considered those amounts contained in the original claim (except where such losses have been withdrawn or reduced by Engineering-Science), and refers in this respect to paragraph 8, supra.

498. The Panel has reclassified elements of Engineering-Science’s claim for the purposes of this report. In the “E” claim form, Engineering-Science included its claim for “deposits – Rent, Tel., Electr.” under “other losses.” The Panel has reclassified this claim to financial losses. Engineering-Science included its claim for “Employees detained in Kwt” under “other losses”. The Panel has reclassified this claim to payment or relief to others.

499. Under “other losses”, Engineering-Science sought compensation for losses related to the support of its employees and loss of cash. The Panel has reclassified the claim related to the support of employees to a claim for payment or relief to others, and the claim related to loss of cash to financial losses.

500. The Panel has also reclassified the claim for interest as a claim for financial losses.

501. The Panel therefore considered the amount of USD 108,401 for loss of tangible property, payment or relief to others, and financial losses as follows:

Table 45. Engineering-Science’s claim

<u>Claim element</u>	<u>Claim amount (USD)</u>
Loss of tangible property	43,804
Payment or relief to others	26,573
Financial losses	38,024
<u>Total</u>	<u>108,401</u>

A. Loss of tangible property

1. Facts and contentions

502. Engineering-Science seeks compensation in the amount of USD 43,804 for loss of tangible property. The claim is for the alleged loss of furniture and equipment located at the project site in Kuwait.

503. On 11 February 1989, Engineering-Science entered into a contract with the Shuaiba Area Authority of the State of Kuwait to study, design and supervise work on an industrial wastewater treatment facility in the Shuaiba Industrial Area of Kuwait. According to Engineering-Science, it maintained offices and employee quarters at the project site. As a result of Iraq's invasion and occupation of Kuwait, Engineering-Science states that it was forced to abandon the site and that the items of tangible property located in its offices and quarters were stolen or destroyed. The stolen or destroyed property included furniture and appliances, computer and other electronic equipment, office equipment, and test equipment.

504. In the reply to the article 34 notification submitted in July 2001, Engineering-Science reduced the amount of its claim for loss of tangible property from USD 51,200 to USD 43,804.

2. Analysis and valuation

505. Engineering-Science provided as evidence of its alleged losses a list of the lost or destroyed tangible property, an affidavit from an employee describing the circumstances of loss, and copies of purchase invoices for most of the claimed property. Many of the invoices establish purchase of the subject item in Kuwait, while others establish purchase of the subject item in the United States.

506. As is explained at paragraph 27, supra, the Panel has adopted historical cost minus depreciation as its primary valuation methodology.

507. With respect to the items of tangible property for which there is a purchase invoice establishing purchase in Kuwait or a purchase invoice plus proof of import into Kuwait, the Panel finds that there is sufficient evidence demonstrating title to or right to use the assets, the historical cost, and the presence of the tangible property in Kuwait. The Panel applied the depreciation rate appropriate for the claimed property and finds that it had a value of USD 40,160 at the time of loss.

508. With respect to the items of tangible property for which there is no purchase invoice, the Panel finds that Engineering-Science did not provide sufficient information and evidence to support its claim. For such items, the Panel recommends no compensation.

509. With respect to the items of tangible property for which there is a purchase invoice showing purchase of the subject item in the United States and no proof of import into Kuwait, the Panel finds that Engineering-Science did not provide sufficient information and evidence to prove that the subject items were located in Kuwait as at 2 August 1990. For such items, the Panel recommends no compensation.

### 3. Recommendation

510. The Panel recommends compensation in the amount of USD 40,160 for loss of tangible property.

#### B. Payment or relief to others

##### 1. Facts and contentions

511. Engineering-Science seeks compensation in the amount of USD 26,573 for payment or relief to others. Engineering-Science states that following Iraq's invasion of Kuwait, three of its employees were held as hostages or otherwise prevented from leaving Kuwait. One of the employees was able to leave Kuwait on 31 August 1990, and the remaining two employees were able to leave Kuwait in December 1990. Engineering-Science seeks compensation for salaries and overseas allowances for the employees, as well as related fringe benefits. It also seeks compensation for other expenses related to these employees, including subsistence, shipping allowances, and airline tickets.

512. In the "E" claim form, Engineering-Science included its claim for "Employees detained in Kwt" under "other losses". The Panel has reclassified this claim to payment or relief to others. Also in the "E" claim form, Engineering-Science sought compensation for other losses related to the support of its employees under "other losses". The Panel has reclassified the claim related to the support of employees as a claim for payment or relief to others.

513. In its reply to a request for further information and evidence submitted in December 2001, Engineering-Science reduced the amount of its claim related to these employees from USD 97,805 to USD 26,573. The reduction in the claim amount was to reflect the receipt of an insurance payment in the amount of USD 71,232 received by Engineering-Science applicable to the claim for salaries, fringe benefits, and expenses.

514. Engineering-Science provided a breakdown by employee of the amounts it originally claimed for salaries and expenses (before application of the insurance proceeds), and also provided a breakdown by employee of the portion of the insurance proceeds allocated to each claim. Table 46, *infra*, sets out this information:

Table 46. Engineering-Science's claim for payment or relief to others (amounts originally claimed and insurance proceeds allocated per employee)

<u>Employee</u>	<u>Amount originally claimed for salary (USD)</u>	<u>Amount originally claimed for expenses (USD)</u>	<u>Amount of insurance proceeds allocated to salary claim (USD)</u>	<u>Amount of insurance proceeds allocated to expense claim (USD)</u>
Employee 1	32,014	1,345	35,825	346
Employee 2	21,894	5,826	25,544	2,234
Employee 3	5,137	nil	7,283	nil
<u>Total</u>	<u>59,045</u>	<u>7,171</u>	<u>68,652</u>	<u>2,580</u>

515. In addition to the amounts claimed in table 46, supra, Engineering-Science's claim consists of a claim for fringe benefits in the amount of USD 31,589 for all three employees. Engineering-Science stated that fringe benefits constituted 53.5 per cent of the amount claimed for salaries.

516. Based on the information provided by Engineering-Science as set forth in table 46, supra, the following table 47, infra, sets out the total amount of salary and expenses originally claimed per employee as compared to the total amount of insurance proceeds allocated to each employee. Table 47, infra, does not reflect any amounts regarding fringe benefits.

Table 47. Engineering-Science's claim for payment or relief to others (total amounts originally claimed compared to total insurance proceeds allocated per employee)

<u>Employee</u>	<u>Total amount originally claimed for salary and expenses (USD)</u>	<u>Amount of insurance proceeds allocated to salary claim (USD)</u>
Employee 1	33,359	36,171
Employee 2	27,720	27,778
Employee 3	5,137	7,283
<u>Total</u>	<u>66,216</u>	<u>71,232</u>

## 2. Analysis and valuation

517. The Panel finds that Engineering-Science's claim for salaries and expenses related to the three employees has been reimbursed by its insurer. The Panel recommends no compensation for this portion of the claim for payment or relief to others.

518. With respect to the remaining portion of the claim relating to fringe benefits in the amount of USD 31,589, Engineering-Science did not provide any evidence to prove that fringe benefits constituted 53.5 per cent of the salaries paid to its employees, or that the amount was reasonable. It also did not provide any calculations or explanation as to how it reached the amount of 53.5 per cent. The Panel recommends no compensation for this portion of the claim for payment or relief to others.

## 3. Recommendation

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

### C. Financial losses

#### 1. Facts and contentions

520. Engineering-Science seeks compensation in the amount of USD 38,024 for financial losses. The alleged losses are comprised of (a) lost deposits related to employees' quarters and to telephone, fax and electricity services, (b) loss of cash, and (c) lost interest relating to a Kuwait bank account. The loss items and amounts are set out in table 48, infra.

Table 48. Engineering-Science's claim for financial losses

<u>Loss item</u>	<u>Amount claimed (USD)</u>
Lost deposits	7,770
Loss of cash	552
Lost interest	29,702
<u>Total</u>	<u>38,024</u>

521. In the "E" claim form, Engineering-Science included its claim for "deposits – Rent, Tel., Electr." under "other losses." The Panel has reclassified this claim to financial losses. Engineering-Science sought compensation for losses of cash under the "Other" category. The Panel has reclassified the claim related to losses of cash as a claim for financial losses. The Panel has also reclassified the original claim for interest to financial losses.

522. In the reply to the article 34 notification submitted in July 2001, Engineering-Science reduced the amount of its claim for loss of cash from USD 904 to USD 552.

523. Engineering-Science seeks compensation for deposits paid for employees' quarters, and telephone, fax, and electricity services, which deposits were related to contracts for services to extend beyond 2 August 1990. It states that because the contracts were terminated on short notice and not honoured for their full terms due to Iraq's invasion and occupation of Kuwait, the deposits were not refunded.

524. Engineering-Science seeks compensation for loss of cash it states was stolen from its employees' apartments during Iraq's invasion and occupation of Kuwait.

525. Engineering-Science also seeks compensation for loss of interest on money held in a bank account in Kuwait. It states that it held a total of KWD 89,127 (USD 308,075) in a non-interest-bearing bank account in Kuwait at the time of Iraq's invasion and occupation of Kuwait. According to Engineering-Science, it would have wired the money to an interest-bearing account in the United States, but was unable to do so because it was unable to access the account due to Iraq's invasion and occupation of Kuwait. It seeks compensation for the interest it would have earned if it had been able to effect the transfer.

## 2. Analysis and valuation

526. With reference to the deposits, Engineering-Science provided evidence that the deposits were paid in the form of documents including the petty cash ledger and bank statements. However, there is no evidence to show whether the relevant deposit holder has refused to return the deposit, and, if so, why. There is also no evidence to show that Engineering-Science would have been entitled to return of the deposits at a future date (such as a copy of the relevant contract which would set forth the circumstances, if any, under which the deposit would be returned).

527. The Panel finds that Engineering-Science has not provided sufficient information and evidence to support its claim for financial losses relating to lost deposits.

528. With reference to the loss of cash, Engineering Science provided a copy of the petty cash account and journal entries for the month ended 31 July 1990. However, there is no evidence to show that these are contemporaneous documents or that any cash was stolen. It appears that entries relating to expenses incurred after Iraq's invasion of Kuwait were actually recorded in accounts entitled "July 1990".

529. The Panel finds that Engineering-Science has not provided sufficient information and evidence to support its claim for financial losses relating to loss of cash.

530. With reference to the lost interest, Engineering-Science provided its Statement of Claim describing the loss, which states that the money was held in a non-interest-bearing account in Kuwait. It also provided a bank statement from the Kuwaiti bank holding the money, and documents showing the amount of interest being paid by banks in the United States during the period of Iraq's invasion and occupation of Kuwait. It also provided an internal memorandum dated 7 August 1990, which discussed the possibility of a transfer of the money from Kuwait to the United States.

531. The Panel observes that Engineering-Science did not earn interest on its money because it placed the money into a non-interest-bearing account. In addition, the internal memorandum provided by Engineering-Science states that the money was received in late July 1990, and that its employees "had in fact decided to transfer most of the money back to the U.S.... last week on 31 July and 1 August", i.e. prior to Iraq's invasion and occupation of Kuwait. Accordingly, the Panel finds that Engineering-Science did not establish that the loss of interest was a direct result of Iraq's invasion and occupation of Kuwait.

### 3. Recommendation

532. The Panel recommends no compensation for financial losses.

#### D. Recommendation for Engineering-Science

Table 49. Recommended compensation for Engineering-Science

<u>Claim element</u>	<u>Claim amount (USD)</u>	<u>Recommended compensation (USD)</u>
Loss of tangible property	43,804	40,160
Payment or relief to others	26,573	nil
Financial losses	38,024	nil
<u>Total</u>	<u>108,401</u>	<u>40,160</u>

533. Based on its findings regarding Engineering-Science's claim, the Panel recommends compensation in the amount of USD 40,160. The Panel finds the date of loss to be 2 August 1990.



XV. RECOMMENDATIONS

534. Based on the foregoing, the Panel recommends the following amounts of compensation for direct losses suffered by the claimants as a result of Iraq's invasion and occupation of Kuwait:

- (a) Bangladesh Consortium Limited: USD 2,561,779;
- (b) Bengal Development Corporation Limited: Nil;
- (c) Duro Dakovic-Proizvodnja Industrijske Opreme, d.o.o.: Nil;
- (d) Duro Dakovic Montaza d.d.: USD 105,027;
- (e) International Contractors Group-Egypt: USD 25,000;
- (f) Krupp Industrietechnik GmbH: Nil;
- (g) UB Engineering Limited: Nil;
- (h) Acqua S.p.A.: Nil;
- (i) F.lli Girat S.p.A.: Nil;
- (j) National Engineering Services Pakistan (Pvt.) Limited: USD 3,000;
- (k) WS Atkins Limited: Nil; and
- (l) Engineering-Science, Inc.: USD 40,160.

Geneva, 23 April 2002

(Signed) Mr. Werner Melis  
Chairman

(Signed) Mr. David Mace  
Commissioner

(Signed) Mr. Sompong Sucharitkul  
Commissioner

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