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GOVERNING COUNCIL

REPORT AND RECOMMENDATIONS MADE BY THE PANEL OF COMMISSIONERS CONCERNING THE TENTH INSTALMENT OF "E1" CLAIMS

GE.03-65550

CONTENTS

List of claimants

Name	Defined
Independent Petroleum Group	IPG
Kuwait Aviation Fuelling Company	KAFCO
Kuwait Drilling Company	KDC
Kuwait Foreign Petroleum Exploration Company	KUFPEC
Kuwait Oilfield Supply Company	KOSC
Kuwait Oil Tanker Company	KOTC
Kuwait Santa Fe for Engineering and Petroleum Projects Company	Santa Fe

List of currencies

Name	Defined
Kuwaiti dinar(s)	KWD
Pound(s) sterling	GBP
United Arab Emirates dirham(s)	AED
United States dollar(s)	USD

Introduction

1. At its sixteenth and thirty-sixth sessions, the Governing Council of the United Nations Compensation Commission (the “Commission”), pursuant to article 18 of the Provisional Rules for Claims Procedure (the “Rules”) (S/AC.26/1992/10), appointed a panel of Commissioners (the “Panel”) composed of Messrs Allan Philip (Chairman), Antoine Antoun and Michael Hwang to review energy sector claims submitted by corporations, other private legal entities and public-sector enterprises (“‘E1’ claims”).

2. This report contains the determinations and recommendations of the Panel with respect to the tenth instalment of “E1” claims, consisting of seven of the eight claims submitted to the Panel by the Executive Secretary of the Commission pursuant to article 32 of the Rules (the “tenth instalment” claims). The Panel makes no recommendation in respect of the claim submitted by the Government of the State of Kuwait (“Kuwait”) on behalf of Kuwait Petroleum Corporation because it exclusively concerns claim preparation costs (see paragraph 340 below). All of the claimants are state-owned or private Kuwaiti companies.

3. The claimants in the tenth instalment advance claim elements arising from the disruption of their businesses, property damage and the cost of related mitigation efforts, all allegedly caused directly by Iraq’s invasion and occupation of Kuwait.

4. The claims included in this report are listed in table 1 below. The claim amounts shown in this table are the aggregate of all amounts claimed in category “E” claim forms filed by the claimants less any amounts for severed or transferred claims. In this report, the Panel has rounded figures to the nearest whole United States dollar (USD) amount.

Table 1. Tenth instalment of "E1" claims
(United States dollars)

Claimant	UNCC claim number	Original amount claimed[a]	Amended amount claimed[b]
Kuwait Foreign Petroleum Exploration Company	4003086	14,899,000	14,442,161
Kuwait Oil Tanker Company	4003068	34,116,280	34,084,754
Kuwait Aviation Fuelling Company	4003067	26,119,536	25,908,633
Kuwait Santa Fe for Engineering & Petroleum Projects Company	4004159	90,107	90,608
Kuwait Drilling Company	4003178	108,486,246	107,690,958
Kuwait Oilfield Supply Company	4003091	1,547,903	1,547,903
Independent Petroleum Group	4004900	19,934,159	19,934,159
Total	--	205,193,231	203,699,176

[a] The original amount claimed is the amount of compensation requested by the claimant on the original claim form filed with the Commission. If this amount was not expressed in United States dollars then, for the sole purpose of comparison, it is expressed in this table in United States dollars using the August 1990 mid-point rate of exchange as indicated in the United Nations Monthly Bulletin of Statistics, Vol. XLV, No. 4 (April 1991).

[b] The amended amount claimed is the original amount claimed as amended in a timeous manner by the claimant. It includes any reductions to claimed amounts or partial withdrawal of claims made by the claimant before the Panel finalized this report.

I. PROCEDURAL HISTORY OF THE CLAIMS

5. The role and functions of panels of Commissioners operating within the framework of the Commission and the nature and purpose of the proceedings conducted by the panels are discussed by the Panel in its report concerning the second instalment of “E1” claims.[1]

6. Pursuant to article 16 of the Rules, the Executive Secretary of the Commission reported to the Governing Council the claims information and new significant factual and legal issues raised by the tenth instalment claims in his thirty-seventh and thirty-eighth reports issued on 18 October 2001 and 11 January 2002 respectively . These reports were circulated to all governments and international organizations that filed claims before the Commission, and to the Government of the Republic of Iraq (“Iraq”). Pursuant to article 16(3) of the Rules, a number of governments, including Iraq, submitted additional information and views concerning the reports of the Executive Secretary. The Panel has taken these responses into consideration during its review of the claims.

7. By its first procedural order issued in respect of the tenth instalment claims on 20 March 2002, the Panel directed the transmittal to Iraq of a copy of the original claim file consisting of the claim form, the statement of claim and all supporting documents filed by each of the claimants. The Panel invited Iraq to submit its comments on the claims together with any documentation on which Iraq might wish to rely in support of its comments. Iraq’s comments were received on 22 January 2003.

8. By its second procedural order issued on 1 August 2002 the Panel gave notice of its intention to complete its review of the tenth instalment claims and submit its report and recommendations to the Governing Council within 12 months. This procedural order was transmitted to each of the claimants through the Government of Kuwait and to Iraq.

9. In its review of the claims, the Panel has employed the full range of investigative procedures available to it under the Rules. Pursuant to article 34 of the Rules, notifications (“article 34 notifications”) were transmitted to each of the claimants through the Government of Kuwait requesting additional information in order to assist the Panel in its review of the claims. Due to the complexity of the claims, the Panel engaged consultants with expertise in asset valuation to assist it in its review and evaluation of certain claims.

10. The initial work of reviewing the claims raised specific legal issues and identified areas of the claims in respect of which further factual investigation or evidence was required. To address this need, the Panel prepared questions and formal requests for additional evidence from the claimants. Such questions and requests (collectively referred to as “interrogatories”) typically sought clarification of statements in the claim or additional documentation regarding the claimed losses. The claimants responded to the Panel’s interrogatories with additional information. Additionally, interviews were held with representatives of four claimants whose claims were particularly large and raised complex issues.

11. After reviewing the claims, the evidence submitted with the claims, the claimants' responses to the article 34 notifications ("article 34 responses") and interrogatories, and Iraq's written responses to the claims, the Panel now makes the recommendations outlined in this report.

II. LEGAL FRAMEWORK

A. Applicable law and criteria

12. The law to be applied by the Panel is set out in article 31 of the Rules, which provides as follows:

> "In considering the claims, Commissioners will apply Security Council resolution 687 (1991) and other relevant Security Council resolutions, the criteria established by the Governing Council for particular categories of claims, and any pertinent decisions of the Governing Council. In addition, where necessary, Commissioners shall apply other relevant rules of international law."

B. Liability of Iraq

13. According to paragraph 16 of Security Council resolution 687 (1991):

> "Iraq, without prejudice to the debts and obligations of Iraq arising prior to 2 August 1990, which will be addressed through the normal mechanisms, is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait."

14. The Panel notes that the issue of Iraq's liability for losses falling within the Commission's jurisdiction has been resolved by the Security Council and is not subject to review by the Panel. Further discussion of the liability of Iraq as it relates to resolution of the claims and the Governing Council's guidance on what constitutes a direct loss may be found in the Second "E1" Report at paragraphs 18 to 29.

C. Evidentiary requirements

15. Article 35(1) of the Rules provides general guidance on the submission of evidence by a claimant:

> "Each claimant is responsible for submitting documents and other evidence which demonstrate satisfactorily that a particular claim or group of claims is eligible for compensation pursuant to Security Council resolution 687 (1991)."

16. Further discussion of the Panel's application of this standard to the evidence submitted with the claims may be found in the Second "E1" Report at paragraphs 30 to 32.

D. Exclusions

17. The Governing Council has made a number of determinations concerning the non-compensability of certain types of losses. In this respect, the Panel has also found guidance in the reports of other panels that have already been approved by the Governing Council.

1. Supplements or amended claims

18. The Governing Council has determined that, after 1 January 1997, the Commission will not accept any category "E" claims for filing[2] and that, after 11 May 1998, the Commission will not admit any unsolicited supplements to previously filed claims in category "E", with the exception of environmental claims. Accordingly, the Panel finds that new claims submitted after 1 January 1997, either for new types of loss or additional claim elements, are not admissible as they are time-barred. The Panel also finds that information or documentation submitted in response to article 34 notifications or procedural orders, or unsolicited supplements delivered after 11 May 1998, may amend, clarify or correct calculations regarding existing claim elements, as long as they do not introduce new loss elements or increase the total amount claimed.

2. The trade embargo and related measures

19. The Governing Council has decided, in paragraph 6 of decision 9 (S/AC.26/1992/9), that losses caused solely by the trade embargo and related measures are not compensable. However, where the full extent of a loss has arisen as a direct result of Iraq's invasion and occupation of Kuwait, it is compensable notwithstanding the fact that it may also be attributable to the trade embargo and related measures.

III. CLAIM OF KUWAIT FOREIGN PETROLEUM EXPLORATION COMPANY

A. Introduction

20. Kuwait Foreign Petroleum Exploration Company (K.S.C.) ("KUFPEC") is a company organized under the laws of Kuwait. KUFPEC is a wholly-owned subsidiary of Kuwait Petroleum Corporation ("KPC"). The State of Kuwait owns KPC.

21. KUFPEC states that its business is the exploration for, and production of, hydrocarbons located outside Kuwait, with the exception of the geographical regions of the North Sea and the Americas.

22. KUFPEC maintains a centralized administrative office in Kuwait ("Head Office"). KUFPEC also conducts business in a number of other countries through wholly- owned subsidiary companies. KUFPEC makes its claim for itself and on behalf of one of those subsidiary companies, Kufpec (Tunisia) Limited ("KUFPEC TUNISIA").

23. KUFPEC originally sought compensation in the amount of USD 14,899,000 for additional costs, delayed income and damage to physical assets. In October 2002, KUFPEC reduced the total amount claimed to USD 14,442,161. KUFPEC also claims an unspecified amount for interest and claim preparation costs.

24. KUFPEC's claim is summarized in table 2 below.

Table 2. KUFPEC's claim
(United States dollars)

Claim element	Original amount claimed	Amended amount claimed
Payment or relief to others	1,199,000	1,199,000
- Salary payments	929,000	929,000
- Hostage and standby allowances	270,000	270,000
Other tangible property	209,000	206,431
Other (miscellaneous Head Office expenses)	2,791,000	2,784,730
- Head office relocation and other expenses	2,485,000	2,478,730
- "Wasted" Head Office rental	306,000	306,000
Contract	3,970,000	3,522,000
- Increase in drilling rig costs	1,912,000	1,912,000
- Costs of engineering services	448,000	Nil
- Increases in drilling services costs	299,000	299,000
- Costs of re-entry of SLK-2 and related costs	140,000	140,000
- KUFPEC TUNISIA office costs	1,171,000	1,171,000
Business transaction or course of dealing	6,730,000	6,730,000
Total	14,899,000	14,442,161

25. The Panel's review of KUFPEC's amended claim in the amount of USD 14,442,161 is divided into two parts: USD 4,190,161 pertains to losses and additional expenses of KUFPEC's Head Office operations; and USD 10,252,000 pertains to losses and additional expenses resulting from a delay in the development of an oilfield discovery in Tunisia, known as the Sidi El Kilani oil field ("Sidi El Kilani"), which is operated by KUFPEC TUNISIA.

B. KUFPEC's claim for Head Office operations – USD 4,190,161

1. Facts and contentions

26. KUFPEC states that Head Office incurred additional expenses and losses of USD 4,190,161 as a direct result of Iraq's invasion and occupation of Kuwait. Its claim for this sum is comprised of the following loss types as presented on the category "E" claim form: USD 1,199,000 claimed under the loss type for "payment or relief to others" with respect to payments made to Head Office employees for whom no work was available, to the families of Head Office employees who were taken hostage and to certain essential employees who were paid standby allowances; USD 206,431 claimed under the loss type of "other tangible property" with respect to Head Office physical assets that KUFPEC contends were damaged, destroyed or looted; and USD 2,784,730 claimed with respect to a variety of other expenses that KUFPEC contends were incurred as a result of the temporary shutdown of Head Office in Kuwait.

27. The portion of KUFPEC's claim that pertains to Head Office operations is summarized in table 3 below.

Table 3. KUFPEC's claim for Head Office operations
(United States dollars)

Claim element	Original amount claimed	Amended amount claimed
Payment or relief to others	1,199,000	1,199,000
- Salary payments	929,000	929,000
- Hostage and standby allowances	270,000	270,000
Other tangible property	209,000	206,431[a]
Other (miscellaneous Head Office expenses)	2,791,000	2,784,730
- Head office relocation	1,312,000	1,305,730 [b]
- Additional staff cost	1,015,000	1,015,000
- Staff replacement	135,000	135,000
- "Wasted" Head Office rental	306,000	306,000
- Head office personnel in Tunis	23,000	23,000
Total	4,199,000	4,190,161

[a] In its article 34 responses, KUFPEC advised that it wished to reduce its claim for other tangible property by USD 2,569 to reflect a recovery on the sale of damaged furniture.

[b] In its article 34 responses, KUFPEC advised that it wished to reduce a subcategory of Head Office relocation costs (for expenses relating to shipment of personal effects) by USD 6,270.

(a) Payment or relief to others – USD 1,199,000

28. KUFPEC states that, as a result of Iraq's invasion and occupation of Kuwait on 2 August 1990, it was unable to continue Head Office operations in Kuwait and was forced to relocate those operations outside the country. In August and September 1990, Head Office was first moved to London, where it remained until after the liberation of Kuwait on 2 March 1991. In April 1991 KUFPEC again moved Head Office from London to Dubai, and it remained there until July 1992, when Head Office was once again reopened in Kuwait. KUFPEC contends that it could not have reasonably resumed Head Office activities in that country before the date of its final move due to intolerable living conditions, the breakdown of municipal services and the lack of commercial air transportation in Kuwait.

29. KUFPEC states that only 19 Head Office employees relocated to London. It contends that it was unable to bring its entire staff to London following Iraq's invasion and occupation of Kuwait for a number of reasons. Many of the job functions that were normally carried out by Head Office staff were temporarily discontinued during the period of Head Office's removal from Kuwait, as a matter of business necessity. The high cost of temporarily relocating staff and a shortage of office space also contributed to its decision to limit the number of staff moved. Additionally, six Head Office employees were taken hostage by Iraqi forces, and others were physically prevented from relocating due to the difficulty of travel after Iraq's invasion and occupation of Kuwait.

30. KUFPEC states that its Head Office employees who did not relocate to London were not paid their salaries during the period of Head Office's operations in that city. However, upon the relocation of Head Office operations to Dubai, KUFPEC paid each of the 25 employees who rejoined Head Office staff the full amount of their accrued salaries for the period of Head Office's stay in London of approximately nine months. KUFPEC claims USD 929,000 for the late payment of accrued salaries. KUFPEC allegedly received no services from those employees with respect to these payments, and thus the payments were "wasted". It does not contend that it had a legal obligation to make these payments of accrued salaries, but it says that its failure to make the payments would have been "entirely unreasonable" under the circumstances. It further contends that the recipient employees would have been entitled to compensation awards by the Commission for their loss of salaries had KUFPEC not made these voluntary payments.

31. KUFPEC states that, during the period of Head Office's relocation to London, it made additional payments (other than for salaries) totalling USD 270,000 to a limited number of Head Office employees who did not move to London. It claims that it made these payments as a direct result of Iraq's invasion and occupation of Kuwait. The payments were of two types, as described below.

32. KUFPEC states that it paid USD 190,000 to the families of six Head Office employees who were held hostage by Iraqi forces during the period of hostilities. This amount was approximately equivalent to the salaries that these six employees would have earned during the period of their captivity. These costs were of a type for which these same six employees could, but did not, make individual claims before the Commission. Five of the six later rejoined the company, but none received accrued salary payments.

33. In addition, KUFPEC claims USD 80,000 for monthly stipends that it paid, at the rate of USD 2,000 per month, to another six Head Office employees. It contends that, prior to Iraq's invasion and occupation of Kuwait, these six employees held Head Office positions in business areas that were critical to the future of the company (primarily in the area of hydrocarbon exploration and project development). It states that Head Office could not continue to operate in these business areas while located outside Kuwait for a number of reasons, including its loss of access to geophysical, financial and other data that it had been forced to leave behind when it moved. KUFPEC points out that it made these payments only to those it considered essential employees who at that time were not receiving their normal salaries. This was intended to induce these employees to rejoin the company at some future date, when KUFPEC would be able to resume its normal operations in the business areas in which they formerly worked. None of the six later rejoined the company or received accrued salary payments.

(b) <u>Other tangible property – USD 206,431</u>

34. KUFPEC claims USD 206,431 for physical damage or loss of its tangible property in Kuwait that was located in either Head Office business facilities or in furnished flats that it provided as personal accommodation for certain Head Office staff members. Items that it contends were looted or damaged included office computers, other office equipment, office furniture and household

furnishings. KUFPEC's valuation of its loss is based upon the depreciated or net book value ("net book value") of these physical assets. KUFPEC claims that these losses were either directly caused by occupying Iraqi forces or were the result of a breakdown in civil order following the withdrawal of those forces from Kuwait. In both cases, it contends that these losses occurred as a direct result of Iraq's invasion and occupation of Kuwait.

(c) <u>Other (miscellaneous Head Office expenses) – USD 2,784,730</u>

35. KUFPEC claims USD 2,784,730 for other additional expenses that it contends it incurred as a result of being forced temporarily to relocate Head Office operations outside Kuwait. Included in this category are: USD 1,305,730 for relocation expenses arising from the physical movement of personnel to the new office sites; USD 1,015,000 for additional direct and indirect payroll expenses incurred while Head Office was located outside Kuwait; USD 135,000 for hiring workers who replaced those Head Office employees who resigned during the period of the relocation; USD 306,000 in "wasted" rental payments; and USD 23,000 in "wasted" salary payments to one Head Office worker who was stranded in Tunisia during a portion of the period of Head Office's relocation. These five subcategories of additional expenses are described in more detail in the following paragraphs.

36. KUFPEC claims USD 1,305,730 for the relocation expenses that it contends it incurred as a result of having to relocate Head Office operations from Kuwait to London, from there to Dubai, and finally back to Kuwait. KUFPEC states that these expenses are in the nature of moving costs and that they were in addition to the normal expenses that it would have incurred had its office remained in Kuwait. Thus, it contends that these additional expenses were incurred as a direct result of Iraq's invasion and occupation of Kuwait. When considered chronologically, KUFPEC states that USD 380,000 in relocation expenses were incurred as a result of the move of Head Office from Kuwait to London in 1990, USD 557,000 as a result of the move of Head Office from London to Dubai in the following year, and USD 368,730 during the move from Dubai back to Kuwait in 1992.

37. KUFPEC has further subdivided this part of its claim into 17 components, the largest of which are: USD 205,000 for the cost of transportation of those Head Office personnel and their families who were relocated; USD 300,000 for the cost of temporary hotel accommodation for relocated Head Office staff and families in London, Dubai and Kuwait; USD 230,000 for allowances paid to Head Office personnel for their personal "settling in" expenses in each of the three cities; USD 216,000 for office rental charges in Dubai and for utilities and other miscellaneous costs in London and Dubai; USD 128,000 that was paid directly by KUFPEC to the tax authorities of the United Kingdom of Great Britain and Northern Ireland on behalf of certain Head Office employees for income taxes assessed on their individual salaries during the time of their residence in London; and USD 41,000 for trade licences and municipal taxes charged by authorities in Dubai upon the relocation of Head Office to that emirate.

38. KUFPEC contends that its office relocation resulted in higher direct and indirect payroll expenses of USD 1,015,000 for Head Office personnel while they were located in London and Dubai and that these additional expenses were in excess of those expenses that it would have normally incurred had it been able to maintain uninterrupted operations in Kuwait. Thus, it contends that these

additional expenses were a direct result of Iraq's invasion and occupation of Kuwait. These expenses comprise amounts paid by KUFPEC to its employees and consist of four components, as follows: USD 49,000 in education assistance for the dependants of transferred Head Office employees; USD 678,000 in monthly housing allowance paid because of the increase in housing costs faced by Head Office employees in London and Dubai; USD 105,000 in monthly living allowances paid to three senior-level Head Office employees because of the increase in their personal living expenses in London and Dubai; and USD 183,000 in salaries paid to temporary staff in London and Dubai.

39. KUFPEC asserts that, prior to its resumption of operations in Kuwait, a number of expatriate staff (who had not been amongst the staff who were temporarily relocated to London and Dubai) resigned from their employment with Head Office. KUFPEC states that the resignations would not have occurred but for the uncertainty in the minds of these employees concerning the future business viability of KUFPEC and their professional positions within that organization following the removal of Head Office operations from Kuwait. Thus, KUFPEC contends that the resignations were a direct result of Iraq's invasion and occupation of Kuwait. KUFPEC states that, upon its resumption of normal Head Office operations in Kuwait and, as a result of these resignations, it incurred USD 135,000 in additional expenses in the identification and engagement of replacements for the employees who resigned. Included in this category of expense were items such as airfares and other travel related expenses and temporary accommodation expenses for the new employees and their families when relocating to Kuwait. KUFPEC claims that it incurred these expenses as a direct result of Iraq's invasion and occupation of Kuwait.

40. KUFPEC claims USD 306,000 in rental payments made on the two office buildings that were being used by Head Office facilities in Kuwait prior to Iraq's invasion and occupation of Kuwait. The claimed rental payments cover the period from August 1991 to July 1992.[3] KUFPEC states that these rental payments were "wasted" due to the fact that it was absent from the country and could not reasonably have resumed Head Office operations in Kuwait before the end of July 1992. KUFPEC emphasizes that it makes no claim for its rental costs in Dubai for the period corresponding to its claim for rental costs in Kuwait.

41. Finally, KUFPEC claims USD 23,000 for the business expense reimbursements paid to a Head Office employee who was allegedly forced to remain in Tunisia (where he had been working on temporary assignment) during the period of Iraq's occupation of Kuwait. That employee was not sent to London during the period of Head Office's first move, and he later rejoined KUFPEC when it relocated its office to Dubai, at which time he received his accrued salary payment. On 2 August 1990, this employee was working on temporary assignment in the Tunis office of its subsidiary company, KUFPEC TUNISIA, on matters relating to the development of Sidi El Kilani. For the reasons discussed in paragraphs 56-60 below, all work on the development of that oilfield was temporarily suspended due to the loss of Head Office support services. KUFPEC contends that this employee was non-productive after 2 August 1990, and that his travel expenses for the period during which he thereafter remained in Tunis were thus "wasted". KUFPEC takes the position that the "waste" of this employee's services was a direct result of Iraq's invasion and occupation of Kuwait.

2. Iraq's response

42. With respect to KUFPEC's claim for Head Office operations, Iraq states the following.

(a) KUFPEC should have terminated the services of those employees whom it chose not to move to London from Kuwait and, by doing so, it would have avoided "wasting" the salaries that were ultimately paid to those employees.

(b) Payments made to the families of the employees who were detained by Iraqi forces were "donations" that are not compensable.

(c) Office moving costs are indirect losses.

(d) KUFPEC could have resumed its Head Office operations in Kuwait at an earlier date, and it failed to mitigate its losses by not doing so.

(e) The second move of Head Office operations from London to Dubai was unnecessary and led to an avoidable duplication of moving expenses.

(f) Certain of the additional expenses incurred by KUFPEC's Head Office while operations were in London and Dubai were excessive and thus avoidable.

(g) KUFPEC failed to properly document its tangible property losses.

3. Analysis and valuation

(a) Payment or relief to others – USD 1,199,000

43. The Panel has reviewed KUFPEC's explanation for its decision to relocate only a part of its staff to London. The Panel has also reviewed evidence provided by KUFPEC that establishes that the claimed costs were actually incurred. The Panel accepts that, had KUFPEC relocated its entire Head Office staff to London after that date, including all clerical and non-managerial level employees, the additional moving costs would probably have exceeded the total of the accrued salaries that were ultimately paid to the non-transferred employees. The Panel also accepts that, due to the emergency circumstances under which KUFPEC relocated Head Office operations, the full range of its normal business activities could not have been carried out in London, and therefore the non-transferred employees would not have been productive in that location. Additionally, the Panel accepts that a number of Head Office employees were prevented from moving to London because of Iraq's invasion of Kuwait. Finally, the Panel notes that accrued salaries were paid for less than half of the period of Head Office's absence from Kuwait, and the payments were made only to the 25 employees who rejoined Head Office when the Dubai office was opened in April 1991.

44. The Panel considers that KUFPEC's decision not to terminate those of its employees who did not join the company in its temporary office relocation to London (as Iraq argues should have been done) served KUFPEC's legitimate, longer-range business purposes. KUFPEC could not have known

how long the hostilities would last when it relocated its office to London. The Panel accepts that KUFPEC always intended to resume the full range of its business activities in Kuwait when circumstances returned to normal, and that it believed that it would require the services of its normal complement of staff when it was allowed to return to Kuwait. To dismiss permanent staff, and then later attempt to rehire them, would have complicated those business purposes. Further, if, at the time of its move to London, KUFPEC had taken the decision to terminate the employment of its non-transferred employees, then those same employees would have been entitled to bring a claim against Iraq in their own right for the value of their lost wages.

45. The Panel finds that the non-transferred employees were unable to perform their jobs for KUFPEC during the relevant period as a direct result of Iraq's invasion and occupation of Kuwait. The Panel has previously held that, when an employer continues to make salary payments to non-productive employees, the employer's payments are compensable because of the employees' inability to provide services to the employer. The Panel has also previously found that the employer is entitled to compensation to the extent that the amounts paid do not exceed the amounts that could have been claimed by the employees in their own right.[4] However, following a cross check of individual claims, the Panel discovered that seven of the employees to whom KUFPEC paid accrued salaries also filed individual claims with the Commission with respect to their losses of salary, for which they were paid a cumulative amount of USD 112,118. Additionally, KUFPEC failed to provide sufficient documentation supporting its actual payment of the amounts claimed. Accordingly, the Panel recommends no award of compensation for this element of the claim.

46. Similarly, the Panel has previously found that voluntary payments made by Kuwaiti employers to the families of their employees that were taken hostage by Iraqi forces are compensable. The Panel finds that Iraqi forces in fact detained the six employees whose families received payments from KUFPEC. However, during a cross check of individual claims, the Panel discovered that two of these employees, to whose families KUFPEC had made monthly payments during the period of their captivity, filed similar claims with the Commission, for which they were paid a total of USD 22,150 in compensation for their illegal detention by Iraqi forces. With respect to the remaining claims, KUFPEC failed to provide sufficient documentation supporting its actual payment of the amounts claimed for hostage payments. Accordingly, the Panel recommends no award of compensation for this element of the claim.

47. The six employees who were paid standby allowances by KUFPEC did not receive salary payments after 2 August 1990. The Panel notes that KUFPEC has categorized the USD 2,000 per employee per month payments as being in the nature of "incentive compensation" (and not wages), which were meant to entice a limited number of its key employees to rejoin the company's service once normal operations were resumed. The Panel has confirmed that the payments of USD 2,000 per employee per month were significantly below the levels of normal salaries paid to these six employees, and none of the six employees filed personal claims with the Commission with respect to the loss of their normal wages from KUFPEC. The Panel finds that, in the circumstances, these payments should be considered as being the equivalent of lost wages, since the employees received no other payments from their employer during the period of the payments, and they were unable to

provide any services in return for these payments, all as a direct result of Iraq's invasion and occupation of Kuwait. However, KUFPEC failed to provide sufficient documentation supporting its actual payment of the amounts claimed for standby allowances. Accordingly, the Panel recommends no award of compensation for KUFPEC's claim for payment or relief to others.

(b) Other tangible property – USD 206,431

48. KUFPEC provided statements by its personnel that identified the particular items that it claims were damaged or destroyed. Further, the Panel was able to trace those items to KUFPEC's fixed asset register. The Panel finds that this loss occurred as a direct result of Iraq's invasion and occupation of Kuwait. KUFPEC values its tangible property loss at the net book value of those assets. The Panel notes that the residual values of the damaged assets were so low that the cost of repairs was not justified and that, in the case of losses of furnishings in staff accommodation, the damaged or destroyed assets were not replaced. The Panel further notes that KUFPEC has deducted from its claim the proceeds received from the sale of the damaged assets. The values shown in the fixed asset register for these items, as at 2 August 1990, correspond with the amounts claimed. The Panel also notes that the dollar equivalent of the KWD 77,856 amount that KUFPEC wrote off from its fixed asset register for this loss actually exceeds the amount that is claimed. Accordingly the Panel recommends an award of the full USD 206,431 claimed for other tangible property, subject to the set-off for extraordinary income discussed below in section D of this claim.

(c) Other (miscellaneous Head Office expenses) – USD 2,784,730

49. The Panel accepts KUFPEC's argument that it would have been impossible for it to continue Head Office operations in Kuwait after 2 August 1990, and it finds that KUFPEC's attempt to temporarily operate its business from a foreign location was a reasonable response to Iraq's invasion and occupation of Kuwait. The Panel further accepts KUFPEC's rationale for selecting London, due to the fact that London is one of the centres for the petroleum industry and because KPC and other affiliate companies of KUFPEC had existing offices there. Thus, the Panel finds that the expenses incurred by KUFPEC to relocate its office to London are compensable in principle, subject to the Panel's examination of the reasonableness of the expenses that have been claimed.

50. Iraq argues that the second move of Head Office from London to Dubai was unnecessary and led to an avoidable duplication of expenses and, further, that KUFPEC should have returned its operations to Kuwait before July 1992. While KUFPEC's claim includes USD 557,000 of relocation expenses that were incurred in 1991 in relation to the second move, the Panel notes that a portion of these expenses would have been incurred had the office remained in London for the full period of the relocation. The Panel further finds that Head Office could not reasonably have resumed its operations in Kuwait before July 1992 for the reasons asserted by KUFPEC in paragraph 28 above.

51. KUFPEC's claimed relocation costs of USD 1,305,730 relate to its relocation to three different countries and were incurred in different currencies. Based on the documentary evidence that was presented, the Panel has verified payments by KUFPEC in the amounts of USD 27,649; 1,736,044 United Arab Emirates dirhams (AED); 248,093 Pounds sterling (GBP); and 89,572 Kuwaiti dinars

(KWD); for a total equivalent amount of USD 1,282,154. The Panel recommends an award of compensation in that amount, subject to the set-off for extraordinary income from oil sales discussed in section D below. The USD 23,576 in recommended adjustments pertain to KUFPEC's failure to prove that the amounts charged for office rental, utilities and related costs in London and Dubai fully exceeded the amount of its normal cost, and are also due to KUFPEC's failure to provide sufficient documentary support for certain claimed expenditures.

52. KUFPEC also seeks USD 1,015,000 for the additional direct and indirect personnel costs that it claims that it incurred as a result of the Head Office relocation. The Panel finds that KUFPEC paid its employees in Kuwait a total of USD 53,523 in education subsidies in 1989, which exceeds the USD 49,000 claimed for education subsidies paid to employees while in the United Kingdom. The Panel therefore finds that KUFPEC has failed to establish that the amount claimed exceeded the level of its normal expenses, and it recommends no award for this claim element. The Panel finds that KUFPEC paid housing subsidies on behalf of its Kuwait employees totalling USD 710,558 in 1989, which exceeds the USD 678,000 claimed for housing subsidies paid to employees while in London and Dubai. The Panel therefore finds that KUFPEC has failed to establish that this category of expense increased as a result of the office relocation, and it recommends no award for this element of the claim. Further, the Panel recommends that no award be made with respect to KUFPEC's claim for USD 183,000 in payments made to temporary workers in Dubai because the cost of the temporary workers should have been offset by the cost savings in respect of the workers whom they were replacing. Finally, the Panel recommends no compensation in respect of the whole of the USD 105,000 claimed for "living allowances" paid to three senior executives because KUFPEC has failed to establish that these payments were necessary to induce these executives to make the transfers to London and Dubai, and thus the Panel considers that these expenses are indirect. Taking into account those adjustments, the Panel recommends no award of compensation for the USD 1,015,000 claimed for additional expenses in respect of Head Office workers while in foreign locations.

53. The Panel recommends that the whole of KUFPEC's claim for USD 135,000 for staff replacement be disallowed because no supporting documentation was provided for these claimed amounts. Also, KUFPEC normally incurred these kinds of expenses in hiring its expatriate staff, and it has failed to establish that the cost of hiring staff after its return to Kuwait was above the normal expenses that it would have incurred but for Iraq's invasion and occupation of Kuwait.[5]

54. KUFPEC provided the Panel with copies of its rental agreements for two separate offices in Kuwait. It also provided supporting documentation that verified its payment of KWD 88,847 in rental costs on those two buildings during the period September 1991 to June 1992, at a time when KUFPEC was conducting its business from foreign offices (out of necessity, for the reasons discussed above), and thus incurring additional rental charges at those foreign locations. The Panel therefore finds that the payments KUFPEC made in respect of its rental of office space in Kuwait were a direct result of Iraq's invasion and occupation of Kuwait, and recommends an award of USD 306,000, subject to the set-off for extraordinary income discussed in section D below.

55. Finally, the Panel recommends no compensation in respect of KUFPEC's claim for USD 23,000 for the business expenses of its stranded worker in Tunis because it failed to satisfactorily explain why it could not have avoided these expenses by relocating this worker to London, where he could have resumed his productive services for the company.

C. KUFPEC's claim for delayed development of Sidi El Kilani – USD 10,252,000

1. Facts and contentions

56. On 2 August 1990, KUFPEC TUNISIA held a 45 per cent interest in, and was the operator of, a joint venture concerning an oil and gas exploration concession that had been granted by the Government of Tunisia, known as the North Kairouan Permit (the "permit"). The Tunisian State-owned oil company, L'Entreprise Tunisienne d'Activités Petrolières ("ETAP"), was a co-venturer with KUFPEC TUNISIA and held the remaining 55 per cent interest in the permit.

57. Prior to 2 August 1990, KUFPEC TUNISIA made a significant discovery at Sidi El Kilani during the drilling of its third exploration well on the permit. KUFPEC states that, on that date, the status of the Sidi El Kilani discovery was as follows. KUFPEC TUNISIA and ETAP had informally agreed to jointly pursue the development of Sidi El Kilani for commercial production. Preliminary development activities were ongoing, and the drilling of the first appraisal well for the discovery (which was the fourth well to be drilled under the permit), designated as the SLK-2 well ("SLK-2"), was nearing completion. A formal plan of development had been agreed upon and drawn up by the two companies, and the filing of an application with the Government of Tunisia (including the plan of development) to convert a portion of the permit into a mining concession for Sidi El Kilani was imminent.

58. KUFPEC states that, prior to 2 August 1990, it had formed a project development team (the "project team") in Head Office with respect to Sidi El Kilani comprising 16 of its employees who were skilled in petroleum reservoir, production and drilling engineering, geological sciences, contract administration and law. The project team was charged with the responsibility for making all major decisions with respect to the development of Sidi El Kilani. KUFPEC explains that the project team became non-operational on 2 August 1990 when Head Office operations were discontinued in Kuwait, and that the project team could not be reassembled and its functions could not be resumed before Head Office relocated to Dubai. Furthermore, KUFPEC states that half of the project team members ultimately resigned from the company and never resumed their work on the development.

59. On 2 August 1990, KUFPEC TUNISIA had a staff of 28 employees, all of whom were assigned to its Tunis Office. KUFPEC states that the work of KUFPEC TUNISIA "was concerned solely with the appraisal and development of Sidi El Kilani". Despite the work emphasis that KUFPEC TUNISIA placed on Sidi El Kilani, KUFPEC contends that KUFPEC TUNISIA lacked the technical expertise to proceed with the development without the assistance of the project team. KUFPEC further contends that KUFPEC TUNISIA lacked the financial resources with which to pay for the cost of the development, and it states that KUFPEC TUNISIA relied on KUFPEC to provide all capital needed to pay for these costs. KUFPEC states that, upon the issuance of regulations implementing the trade

embargo pursuant to Security Council resolution 661 (1990), it (as a Kuwaiti company) was temporarily unable to provide continued funding through normal banking channels to KUFPEC TUNISIA for the development of Sidi El Kilani.

60. KUFPEC states that, due to the disbanding of the project team and its temporary inability to provide funding, KUFPEC TUNISIA was forced to suspend development of Sidi El Kilani in August 1990, following the closure of Head Office's operations in Kuwait. KUFPEC takes the position that the development could not be resumed until September 1991, a period of approximately one year, when appraisal drilling was resumed. It further contends that the delay forced KUFPEC TUNISIA to revise the content of the plan of development, and this in turn delayed its submission of the application to the Government of Tunisia to convert the permit into a mining concession. It states that, had there been no delay in development, it would have submitted the concession application in August 1990, and the Government's approval of the development would have been issued before the end of that year. KUFPEC states that, due to its delay in the submission of the concession application, the Government's approval was not given until December 1992. Thus, it states that the delay in development resulted in a delay of approximately two years in the conversion of the permit into a mining concession.

61. KUFPEC states that, as a result of the delay in development, it and KUFPEC TUNISIA incurred additional expenses and losses of three types in a total amount of USD 10,252,000. KUFPEC claims for additional development expenses in an amount of USD 2,351,000 and for additional office operating expenses of KUFPEC TUNISIA in an amount of USD 1,171,000. Finally, KUFPEC claims for losses pertaining to a one-year delay in cash flow from Sidi El Kilani in an amount of USD 6,730,000.

62. The portion of KUFPEC's claim that pertains to KUFPEC TUNISIA's delayed development of Sidi El Kilani is summarized in table 4 below.

Table 4. KUFPEC's claim for delayed development of Sidi El Kilani
(United States dollars)

Claim element	Original amount claimed	Amended amount claimed
Contract	2,799,000	2,351,000
- Increase in drilling rig costs	1,912,000	1,912,000
- Costs of engineering services	448,000	Nil [a]
- Increases in drilling services costs	299,000	299,000
- Costs of re-entry of SLK-2 and related costs	140,000	140,000
KUFPEC TUNISIA office costs	1,171,000	1,171,000
Business transaction or course of dealing	6,730,000	6,730,000
Total	10,700,000	10,252,000

[a] In its article 34 responses, KUFPEC advised that it wished to withdraw this component of its claim.

(a) Contract - USD 2,351,000

63. KUFPEC states that KUFPEC TUNISIA incurred additional contractual expenses totalling USD 2,351,000 that it would not have incurred had it not been forced to delay the development of Sidi El Kilani. These additional expenses represent higher charges by contractors for three types of services: additional drilling expenses of USD 1,912,000 for the drilling of SLK-2 and other appraisal wells; additional expenses of USD 299,000 for other well services; and "wasted" expenses of USD 140,000 for the re-entry of SLK-2.

(i) Increase in drilling costs for SLK-2 - USD 1,912,000

64. On 2 August 1990, KUFPEC TUNISIA's drilling contractor, Challenger International Services Limited ("Challenger"), was in the process of drilling SLK-2 with its drilling rig. Under its contract with Challenger, KUFPEC TUNISIA had committed itself to drill four wells (including SLK-2), but the contract contained an option whereby KUFPEC TUNISIA could elect to use the rig to drill up to three additional wells (making a total of seven potential wells). KUFPEC states that KUFPEC TUNISIA intended to exercise that option for the drilling of two more appraisal wells plus an additional exploration well on a different exploration concession.

65. On 4 August 1990, KUFPEC TUNISIA's resident manager notified all of its development contractors, including Challenger, to suspend their work due to force majeure. Upon receipt of this notice, Challenger discontinued its drilling operations on SLK-2 and the well was later temporarily plugged for possible re-entry. At the time when drilling was discontinued, SLK-2 was approaching its target depth ("TD")[6] without encountering the productive strata that had been encountered by the earlier Sidi El Kilani discovery.

66. KUFPEC states that KUFPEC TUNISIA was obligated to pay certain charges relating to the Challenger rig that accrued between the date of suspension on 4 August 1990 and the date of termination of the drilling contract in September 1990. KUFPEC TUNISIA paid Challenger USD 235,000 for services performed after the suspension date, even though all work on SLK-2 was discontinued and no further progress was made on the well thereafter. Amongst other expenses, KUFPEC TUNISIA paid Challenger "force majeure rate" charges and "standby rate" charges. KUFPEC states that KUFPEC TUNISIA received no services for these charges, in terms of well progress, and thus it contends that these expenses were "wasted". It further contends that KUFPEC TUNISIA would not have incurred these additional expenses had it not been forced to suspend (and ultimately terminate) the drilling contract, and it therefore claims that these expenses were directly caused by Iraq's invasion and occupation of Kuwait.[7]

67. KUFPEC states that KUFPEC TUNISIA was unable to resume activities with respect to the development of Sidi El Kilani before the end of March 1991 and that the Challenger rig was no longer available for hire at that time. As a consequence, KUFPEC TUNISIA entered into a replacement drilling contract in September 1991 with Intairdrill Limited ("Intairdrill") to complete its appraisal drilling program. As called for in the original plan of development, the Intairdrill rig was thereafter used to drill three additional appraisal wells and to complete the drilling of SLK-2. KUFPEC states

that, had KUFPEC TUNISIA not been forced to terminate its contract with Challenger, the Challenger rig would have been used to complete this same drilling programme. The total of the rates and fees that KUFPEC TUNISIA was charged under the Intairdrill contract for completion of SLK-2 and other appraisal wells exceeded the rates that it would have been charged under the Challenger drilling contract by USD 1,677,000.

68. KUFPEC states that the additional drilling expenses that KUFPEC TUNISIA incurred under the Intairdrill contract are comprised of three components. USD 750,000 was paid to Intairdrill as a fee for mobilizing its rig from Pakistan to Tunisia. KUFPEC emphasizes that this payment was in addition to a mobilization fee that had previously been paid to Challenger. KUFPEC states that KUFPEC TUNISIA would not have been required to pay this additional mobilization fee, but for its forced termination of the Challenger contract, and thus it argues that this additional expense was directly caused by Iraq’s invasion and occupation of Kuwait.

69. USD 195,000 was paid to Intairdrill as a demobilization fee following the completion of drilling with its rig. KUFPEC claims this amount as an extra expense that would not have been incurred by KUFPEC TUNISIA under the Challenger drilling contract had KUFPEC TUNISIA been able to complete SLK-2 and other development wells with the Challenger rig. KUFPEC acknowledges that the Challenger contract also contained a provision calling for the possible payment of a demobilization fee, but it states that KUFPEC TUNISIA was not required to pay this fee after its early termination of the contract, due to a waiver by Challenger.[8] It further contends that KUFPEC TUNISIA would not have been required to pay this fee had the Challenger contract not been terminated early, because KUFPEC TUNISIA intended to exercise the option to extend the contract for the drilling of the additional appraisal wells that were listed in its original plan of development.[9]

70. The final component of KUFPEC’s claim for higher drilling costs pertains to a disparity in drilling rates charged by Intairdrill and Challenger for their respective rigs. KUFPEC claims that KUFPEC TUNISIA was charged USD 732,000 more by Intairdrill for its services in completing the SLK-2 and other development wells than Challenger would have charged for the same task. KUFPEC states that this was an additional expense that would not have arisen had KUFPEC TUNISIA not been forced to terminate the Challenger contract, and thus it was a direct result of Iraq’s invasion and occupation of Kuwait.

(ii) Increases in drilling service costs – USD 299,000

71. In addition to the termination of the Challenger contract for SLK-2, KUFPEC TUNISIA was also required to terminate other drilling service contracts such as “mud services” contracts and “well casing cementing” contracts. KUFPEC states that, before it could resume its appraisal-drilling programme in September 1991, KUFPEC TUNISIA had to renegotiate the terms of these other drilling service contracts, with the result that the charges that were ultimately paid under the replacement contracts exceeded the charges that would have been incurred under the original contracts by a total of USD 299,000. KUFPEC claims that these increases in charges were additional expenses that were incurred as a direct result of Iraq’s invasion and occupation of Kuwait.

(iii) Costs of re-entry of SLK-2 and related costs – USD 140,000

72. SLK-2 had not been completed by the time KUFPEC TUNISIA terminated the drilling contract with Challenger, and SLK-2 was temporarily plugged for possible later re-entry. KUFPEC states that, when development drilling was resumed in September 1991, the Intairdrill rig first drilled two additional development wells before returning to SLK-2. In order to complete the drilling of SLK-2, certain preparatory work had to be conducted by Intairdrill for well re-entry. KUFPEC characterizes this preparatory work as being a duplication of the effort of the prior drilling contractor. It states that only after the completion of this duplicated effort was Intairdrill ready to recommence the drilling of the SLK-2 at the point of progress where Challenger had ceased its efforts. The total of the charges paid by KUFPEC TUNISIA to Intairdrill for these duplicate services was USD 60,000, and KUFPEC claims these were additional expenses for the drilling of SLK-2 that KUFPEC TUNISIA would not have incurred but for Iraq's invasion and occupation of Kuwait.

73. Additionally, KUFPEC states that KUFPEC TUNISIA incurred a total of USD 80,000 in additional costs with respect to negotiated settlements arising from KUFPEC TUNISIA's cancellation of two other drilling service contracts.

(b) KUFPEC TUNISIA office costs – USD 1,171,000

74. At the time of Iraq's invasion and occupation of Kuwait, KUFPEC TUNISIA's Tunis office had a staff of 28 employees, comprised of both Tunisian nationals and expatriate workers. In the supporting affidavits attached to its statement of claim, KUFPEC states: "the work of the Tunis office staff at the time of the invasion was concentrated solely on the appraisal of the Sidi El Kilani discovery …". KUFPEC contends that KUFPEC TUNISIA's Tunis office was rendered non-productive for a portion of the period of approximately one year when the development was deferred. It states that the USD 1,171,000 in expenses that were incurred by KUFPEC TUNISIA in the operation of the Tunis office during the non-productive period were thus wasted as a direct result of Iraq's invasion and occupation of Kuwait

75. KUFPEC states that the non-productive period for the Tunis office began on 2 August 1990 and continued until 31 March 1991.[10] Included in this component of the claim are USD 925,000 for salaries and related payroll expenses for KUFPEC TUNISIA that were paid to, or on behalf of, KUFPEC TUNISIA's staff during the eight-month period. Also included were wasted expenses of USD 99,000 for rental of the Tunis office, yard facilities and staff accommodation, USD 49,000 for office postage and telephone expenses, and USD 98,000 for miscellaneous expenses.

(c) Business transaction or course of dealing - USD 6,730,000

76. KUFPEC claims USD 6,730,000 for the loss arising from delayed cash flow pertaining to the ultimate production and sale of hydrocarbons produced from Sidi El Kilani. KUFPEC contends that the delay of approximately one year in appraisal drilling for the Sidi El Kilani discovery caused an equal delay in the commencement of permanent production from that oilfield. It states that, as a

consequence of the delay in first production from Sidi El Kilani, the annual cash flow from the oilfield was delayed, and it suffered a financial loss as a result of this deferral of cash flow.

77. KUFPEC explains that it uses the phrase “cash flow” to mean the net operating income or loss pertaining to its operation of Sidi El Kilani, beginning in the year of first production from the field and ending in the year of completion of production. KUFPEC defines the cash flow in each year of the field’s life as the difference between the net revenue (after royalties and taxes) received from sale of production from the field and the operating costs incurred in production (including capital expenditure for the cost of development).

78. KUFPEC contends that Iraq’s invasion and occupation of Kuwait delayed the completion of development by almost two years, partly due to delayed appraisal drilling, but also due to changes that it made to the development plan after 2 August 1990. Nevertheless, its delayed cash flow analysis is based on a 12-month delay in the commencement of production from Sidi El Kilani.

79. KUFPEC’s claim is based on the difference in the net present value of two estimated cash flow scenarios. Under the first scenario, which is the “no-invasion” scenario,[11] KUFPEC has calculated the annual net cash flow from Sidi El Kilani that it claims would have been realized, had there been no delay in development and had first production from the field commenced in July 1991. Under the second scenario, which is the “invasion”, or actual scenario, KUFPEC has also estimated the annual cash flow that it contends would have been realized from the field commencing in July 1992, the date when permanent field production actually commenced. KUFPEC estimates that Sidi El Kilani production would have ended in 1999 in the no-invasion scenario, one year earlier than it estimated that it would occur in the invasion scenario.[12] It uses essentially the same nine-year production profile and makes other common factual assumptions in both scenarios.[13]

80. KUFPEC states that its cash flow calculations pertain only to its 45 per cent interest in Sidi El Kilani and do not pertain to ETAP’s entitlement to 55 per cent of the cash flow from the field. The 1992 net present value[14] of the future cash flow from Sidi El Kilani that would have occurred had there been no invasion and occupation of Kuwait (and had the development not been delayed), would have been USD 12,410,000. The 1992 net present value of the cash flow after a one-year delay in first production from Sidi El Kilani due to the invasion and occupation of Kuwait was estimated by KUFPEC to be USD 5,680,000. The difference between the two figures is USD 6,730,000, the amount claimed under this category of loss.[15]

2. Iraq’s response

81. With respect to KUFPEC’s claim for additional expenses and losses incurred as a result of the KUFPEC TUNISIA’s delayed development of Sidi El Kilani, Iraq states the following.

(a) The additional costs and expenses claimed by KUFPEC arose as a result of operations outside the region of the hostilities and, because they were incurred in such a geographically remote place, these costs and expenses were not direct losses.

(b) The original plan of development for Sidi El Kilani was completed before 2 August 1990; therefore, the events of that date should not have caused KUFPEC TUNISIA to delay its presentation of that original plan of development to the Government of Tunisia as part of its application for a mining concession, in which case there would have been no delay in development.

(c) KUFPEC TUNISIA made a decision to terminate the drilling contract with Challenger that was independent from, and not directly related to, the events that occurred on 2 August 1990. Therefore, any higher drilling expenses that were incurred under the replacement contract with Intairdrill were not direct losses.

(d) By delaying its appraisal drilling, KUFPEC TUNISIA deferred incurring the major portion of the expenses of development, which should be considered a cost saving. Further, the total of KUFPEC TUNISIA’s expenses may have been reduced by the delay in development, as a result of cost savings arising from the changes that KUFPEC made to the plan of development after 2 August 1990.

(e) The original plan of development was based on the assumption that SLK-2 would have been a successful appraisal well, as drilled by Challenger. That proved not to be the case, as the target formation was never found, even after the well was re-entered and deepened by Intairdrill. Therefore, even if the Challenger contract had not been terminated, the development would have been delayed as a result of changes that would have been made to the drilling programme following the completion of the Challenger’s drilling of SLK-2 to TD without encountering the productive strata that was being sought.

(f) The productive strata that KUFPEC TUNISIA sought in the SLK-2 well was below the original TD. The decision to deepen SLK-2 below the original TD was made only after the productive strata was found in the later appraisal well SLK-3, which was drilled with the Intairdrill rig. That being the case, even if the Challenger contract had not been terminated and SLK-2 had been drilled to TD with the Challenger rig, the decision would still have been made to suspend the drilling of SLK-2 when the TD was reached without encountering the productive strata. Thereafter, the Challenger rig would have moved on to drill other appraisal wells, such as SLK-3. Only after the productive strata had been found in one of the subsequently drilled appraisal wells would the Challenger rig have re-entered the SLK-2 well for deepening beyond the original TD (as was ultimately done with the Intairdrill rig). Accordingly, the additional costs of re-entering SLK-2 would have been incurred even if the contract with Challenger had not been terminated, and therefore such costs were not direct losses.

(g) As a result of ETAP’s election to participate in the mining concession for Sidi El Kilani, KUFPEC TUNISIA has been reimbursed by ETAP for a portion of the additional development expenses that it claims.

(h) The total of the drilling expenses that would have been incurred by KUFPEC TUNISIA under the Challenger contract, had that contract not been terminated early, cannot be determined with any degree of accuracy. Thus, the estimated costs of uninterrupted use of the Challenger rig are not a reasonable basis for comparison to the costs that were actually incurred by KUFPEC TUNISIA under the Intairdrill contract.

(i) It is probable that the expenses incurred by KUFPEC TUNISIA under the service contracts would have escalated over time, even if those contracts had not been terminated. Accordingly, there is no reasonable basis for KUFPEC's claim for additional costs under the replacement contracts following the termination of the initial contracts.

(j) The costs claimed by KUFPEC with respect to the operating expenses of KUFPEC TUNISIA's Tunis office for an eight-month period were not "wasted" as a direct result of the events on 2 August 1990. The Tunis office staff could have conducted other work unrelated to the Sidi El Kilani project.

(k) The assumptions and forecasts used in KUFPEC's cash flow analysis are unreliable and, by using other reasonable assumptions concerning the future production from the field, an argument can be made that KUFPEC's profits from the field increased as a result of the one-year deferral in production. Further, because production from Sidi El Kilani had not commenced on 2 August 1990, there was no past production history upon which to rely in making future cash flow projections.

(l) Finally, Iraq argues that KUFPEC enjoyed a rise in profits on its worldwide production in areas outside Tunisia, as a result of the increase in world oil prices following the events of 2 August 1990. It states that these additional profits arose as a direct result of those events and thus should be set off against the total amount claimed by KUFPEC.

3. Analysis and valuation

(a) Contract - USD 2,351,000

82. The Panel finds that KUFPEC has proven that the development of Sidi El Kilani could not proceed for a period following Iraq's invasion of Kuwait due to KUFPEC's temporary inability to provide development funding to KUFPEC TUNISIA through normal banking channels. As discussed in paragraph 92 below, KUFPEC's ability to transfer funds to KUFPEC TUNISIA was restored within approximately six weeks of 2 August 1990 but, notably, the first resumption of cash transfers came several days after KUFPEC TUNISIA had terminated the Challenger drilling contract.

(i) Increase in drilling costs for SLK-2 – USD 1,912,000

83. The Panel finds that, due to the dependence of KUFPEC TUNISIA on its parent company, KUFPEC, for operational support, the uncertainty as to whether KUFPEC would be able to continue to provide funds for the development of Sidi El Kilani following the shutdown of Head Office in Kuwait and the substantial "upfront" costs entailed in entering into a replacement drilling contract, KUFPEC TUNISIA's operational manager acted reasonably when he directed its drilling contractor, Challenger, to place drilling operations for SLK-2 on standby for the period of approximately six weeks immediately following Iraq's invasion and occupation of Kuwait. The Panel further finds that the standby and force majeure rate charges that KUFPEC TUNISIA incurred during this period were

wasted, as a direct result of Iraq's invasion and occupation of Kuwait. However, the Panel recommends a slight adjustment of USD 140 to the USD 235,000 claimed for these charges, due to insufficient evidence of the claimed costs.

84. The Panel has examined the drilling contract for the Challenger rig, and it is satisfied that the drilling contractor would not have been entitled to an increase in the day rates upon KUFPEC TUNISIA's drilling of additional development wells on Sidi El Kilani following the completion of SLK-2. The Panel has further examined the original plan of development for the field and has confirmed that additional appraisal and development wells had been included in KUFPEC TUNISIA's original drilling plan. Ultimately, more than four wells were drilled during the appraisal and development of Sidi El Kilani. Given that the rig rates for the Challenger rig were lower than those of the Intairdrill rig, and given the additional costs that would have been entailed in mobilizing a new rig, the Panel accepts KUFPEC TUNISIA's argument that, in the normal course of business, it would have exercised its option to extend the Challenger rig contract for additional appraisal wells and, by doing so, would have avoided the obligation to pay a demobilization fee to Challenger. Accordingly, the Panel finds that the USD 195,000 that KUFPEC TUNISIA paid to Intairdrill for the demobilization of its rig was an additional expense that it would not have incurred had it not been forced to terminate its drilling contract with Challenger. Similarly, because KUFPEC TUNISIA had already paid a mobilization fee to Challenger, the Panel finds that the second mobilization fee of USD 750,000 that KUFPEC TUNISIA paid to Intairdrill was clearly an additional expense that KUFPEC TUNISIA incurred as a result of its termination of the Challenger contract.

85. The Panel has further verified the disparity in day rates between the two rigs and, for the reasons stated above, it is persuaded that, had the Challenger rig not been terminated, KUFPEC TUNISIA would have used it to drill the same four wells that were ultimately drilled with the Intairdrill rig. The Panel therefore finds that KUFPEC TUNISIA incurred additional drilling costs totalling USD 732,000.

86. The Panel finds that, in total, KUFPEC TUNISIA incurred USD 1,911,860 in additional drilling costs and extra mobilization and demobilization fees for the joint account.[16] However, subsequent to the filing of its claim, KUFPEC TUNISIA received partial reimbursement from ETAP for KUFPEC's claimed extra drilling expenses of USD 1,912,000. The amount of KUFPEC's award should therefore be reduced by the amount of this reimbursement.[17] As KUFPEC did not provide a breakdown of this ETAP payment (despite the Panel's request that it do so), the Panel recommends that the amount claimed for this element be reduced by 55 per cent, or USD 1,051,523. The Panel considers that this would be the maximum amount of reimbursement that would have been owed to KUFPEC TUNISIA by ETAP as a result of its undivided joint interest in the mining concession. The Panel therefore recommends an award of compensation in the amount of USD 860,337 for KUFPEC's claim in respect of increased drilling expenses, subject to the set-off for extraordinary income, as discussed below in section D.

(ii) Increases in drilling services costs – USD 299,000

87. The Panel has examined the original drilling service contracts that were also cancelled by KUFPEC TUNISIA, contemporaneously with the termination of the Challenger rig contract, and it has confirmed that the contract rates were firm and that the contractors would not have been entitled to rate increases during the drilling of the three development wells following SLK-2. KUFPEC TUNISIA's termination of those contracts, and its later renegotiation of replacement contracts with the same service contractors, resulted in an increase in service rates. For the reasons stated in the preceding paragraphs, the Panel finds that KUFPEC TUNISIA terminated those contracts as a direct result of the events of 2 August 1990. However, the Panel finds that KUFPEC presented evidence that supported only USD 185,568 of the USD 299,000 claimed for these extra expenses. Further, as was the case in its claim for extra drilling costs, KUFPEC TUNISIA incurred these additional service contractor costs for the joint account. Subsequent to the filing of this claim, ETAP paid KUFPEC TUNISIA partial reimbursement for the joint account expenses pertaining to drilling services contracts. KUFPEC has not advised the Panel of the precise amount of reimbursement received from ETAP with respect to this element of its claim. The Panel therefore recommends that the verified amount of USD 185,568 be reduced by USD 102,062 (based on ETAP's undivided 55 per cent joint interest in the mining concession) and recommends an award of compensation in the amount of USD 83,506 for this claim element, subject to the set-off for extraordinary income, as discussed below in section D.

(iii) Costs of re-entry of SLK-2 and related costs – USD 140,000

88. The Panel accepts Iraq's argument with respect to the probable decisions that would have been taken by KUFPEC TUNISIA with respect to SLK-2 had the Challenger contract not been terminated. The sought after productive strata had not been encountered when the Intairdrill rig reached the original TD in SLK-2; but it continued deeper, based on geological information obtained through the second appraisal well. That information would not have been available to KUFPEC TUNISIA had the Challenger rig continued drilling to TD. Therefore, it seems probable that the Challenger rig would have moved off SLK-2 after it reached TD without finding its target, and it then would have proceeded to drill the second appraisal well (as was later done with the Intairdrill rig). It further seems likely that, once the productive strata had been found in that second appraisal well at an unexpected depth, KUFPEC TUNISIA would have ordered the Challenger rig back to the suspended SLK-2 for purposes of deepening SLK-2. In other words, the Panel finds that KUFPEC TUNISIA would have in any case incurred the USD 60,000 in SLK-2 well re-entry costs, even if the Challenger rig had not been terminated. Therefore, the Panel recommends no award of compensation for this claim element.

89. With respect to the claim for settlements with two of KUFPEC TUNISIA's service contractors, the Panel considers that KUFPEC TUNISIA's settlement costs were not directly caused by Iraq's invasion and occupation of Kuwait, and recommends an additional adjustment of USD 80,000 for this claim element of its claim. Taking into account this adjustment and the adjustment recommended in the preceding paragraph, the Panel recommends no award of compensation for KUFPEC's claim for the costs of re-entry of SLK-2 and related costs.

(b) KUFPEC TUNISIA office costs – USD 1,171,000

90. The Panel notes that this portion of KUFPEC's claim relates to an oilfield development, thousands of miles removed from the area of hostilities, that was being developed by a subsidiary company with a substantial number of staff in Tunisia. KUFPEC contends that the development was necessarily delayed because of the break up of the project team in Kuwait, but the Panel considers that KUFPEC has not satisfactorily justified why it could not have thereafter re-formed the project team in London (where it moved a large portion of Head Office staff) or Tunisia and continued its work on the project.

91. KUFPEC TUNISIA held two exploration licences in Tunisia on 2 August 1990, and KUFPEC has stated that it planned to drill at least one exploration well with the Challenger rig that was unrelated to the Sidi El Kilani development. Accordingly, the Tunis office did have business responsibilities other than those relating to the Sidi El Kilani development. If, as KUFPEC alleges, all of the staff of the Tunis office were dedicated to the Sidi El Kilani development on 2 August 1990, then the Panel considers that it would have been reasonable for KUFPEC TUNISIA to reassign staff, after the project team was temporarily disbanded, to other matters such as exploration. Also if, as KUFPEC asserts, the development could not have proceeded without the assistance of the project team, then it was incumbent upon KUFPEC to attempt to re-form a project team as soon as possible in either London or Tunisia, and to replace members who resigned with personnel from its other offices, or to hire new staff or use service contractors to perform the work of missing project team members. KUFPEC states that half of the members on the project team resigned subsequent to 2 August 1990; yet it made no effort to replace them before early 1991. In the circumstances, KUFPEC has not explained to the satisfaction of the Panel why it could not have taken the mitigating steps of attempting to hire or contract for replacement staff in an effort to reduce the period of the delay of development and, by so doing, allow the staff in Tunisia to more quickly return to their work on the project.

92. The Panel notes that the blockage of fund transfers from KUFPEC to KUFPEC TUNISIA was only temporary, as KUFPEC had resumed cash transfers to KUFPEC TUNISIA by mid-September 1990. Further, the Panel notes that KUFPEC TUNISIA was able to meet at least some of its financial obligations as they fell due during the six-week suspension of normal banking cash-transfer services, as the payment of salaries of KUFPEC TUNISIA's staff never ceased. The Panel notes that KUFPEC had subsidiary offices in at least two other foreign locations[18] and the events of 2 August 1990 did not cause KUFPEC to curtail the activities of those two offices.

93. The Panel therefore finds that the services of KUFPEC TUNISIA's office were not wasted as a direct result of Iraq's invasion and occupation of Kuwait, and it recommends no award of compensation for KUFPEC's claim for KUFPEC TUNISIA office costs.

(c) Business transaction or course of dealing - USD 6,730,000

94. KUFPEC seeks compensation for the loss arising from the delayed cash flow of an oil field in Tunisia that had not commenced production on 2 August 1990. The Panel considers that a claim for

the net present value of a delay in receipt of net sales revenue would have to be based on the sales revenue it would have received in a no-invasion scenario. However, in the Panel's view, KUFPEC has not provided sufficient evidence in support of its claim.

95. The figures that KUFPEC uses for production rates and oil prices are, at least in part, based on estimates in both its invasion and no-invasion scenarios, even though actual production rates, operating expenditures and sales revenues are now available with respect to the nine-year period of the claim. The Panel finds that the computations presented by KUFPEC with respect to its claim for delayed cash flow are based on assumptions and projections that cannot be predicted with the required level of certainty, and therefore that these computations cannot be relied upon as a measure for calculation of compensation. Accordingly, the Panel recommends no award of compensation for KUFPEC's claim for losses in respect of "business transaction or course of dealing".

D. Extraordinary income from production of oil in 1990

96. While production had not commenced at Sidi El Kilani on 2 August 1990, KUFPEC did have production from other concessions in Australia and Egypt in which it held a joint interest on that date, and production from a new field in Indonesia was added during November 1990. KUFPEC provided the Panel with the monthly production details for its oil production for the year 1990, which includes the balance of the approximately five-month period remaining in that year following Iraq's invasion of Kuwait. During that five-month period, KUFPEC produced approximately 950,000 barrels of oil. It also provided the Panel with the prices at which that production was sold.

97. The Panel has earlier found that crude oil prices increased following 2 August 1990 as a direct result of Iraq's invasion and occupation of Kuwait. The Panel has previously determined the average price at which crude oil would have sold in the world market after 2 August 1990, had Iraq not invaded Kuwait,[19] which has been referred to as the "no-invasion" price. The Panel has also consistently held that any extraordinary profit that a claimant enjoyed as a result of these price increases must be set off against the claimant's compensable losses, as the causation for both can be traced to the same causal event.[20] The Panel notes that KUFPEC has publicly recognized that the market value of its worldwide production increased in the aftermath of Iraq's invasion of Kuwait.[21]

98. The Panel finds that the extraordinary income from oil sales earned by KUFPEC on its worldwide production during the months of August to December 1990[22] exceeded the level of the compensable losses recommended by the Panel above. The magnitude of KUFPEC's extraordinary income would no doubt have only increased if its production in the year 1991 had been included in the Panel's calculations.[23] Consistent with the approach used in the Panel's review of previous claims,[24] the Panel recommends that this extraordinary income be set off against what otherwise would have been the cumulative amount of the Panel's recommended award of USD 2,738,428.

E. Recommendations

99. The total of the Panel's recommended award, without adjustment for extraordinary income, is USD 2,738,428. However, taking into account the recommended set-off for extraordinary income, the Panel recommends no award of compensation. The Panel's recommendations with respect to KUFPEC are summarized in table 5 below.

Table 5. KUFPEC's claim – recommended compensation
(United States dollars)

Claim element	Original amount claimed	Amended amount claimed	Amount of compensation recommended before adjustment	Amount of compensation recommended after adjustment for extraordinary income
Payment or relief to others	1,199,000	1,199,000	Nil	Nil
- Salary payments	929,000	929,000	Nil	Nil
- Hostage and standby allowances	270,000	270,000	Nil	Nil
Other tangible property	209,000	206,431	206,431	Nil
Other (miscellaneous Head Office costs)	2,791,000	2,784,730	1,588,154	Nil
- Head office relocation and other expenses	2,485,000	2,478,730	1,282,154	Nil
- "Wasted" Head Office rental	306,000	306,000	306,000	Nil
Contract	3,970,000	3,522,000	943,843	Nil
- Increase in drilling rig costs	1,912,000	1,912,000	860,337	Nil
- Costs of engineering services	448,000	Nil	Nil	Nil
- Increases in drilling services costs	299,000	299,000	83,506	Nil
- Costs of re-entry of SLK-2 and related costs	140,000	140,000	Nil	Nil
- KUFPEC TUNISIA office costs	1,171,000	1,171,000	Nil	Nil
Business transaction or course of dealing	6,730,000	6,730,000	Nil	Nil
Total	14,899,000	14,442,161	2,738,428	Nil

IV. CLAIM OF KUWAIT OIL TANKER COMPANY

A. Facts and contentions

1. Introduction

100. Kuwait Oil Tanker Company (S.A.K.) (“KOTC”) is a company organized under the laws of Kuwait. KOTC is a wholly-owned subsidiary of Kuwait Petroleum Company (“KPC”), which is owned by the Government of Kuwait.

101. KOTC claims KWD 9,850,494 for damages and losses that were allegedly sustained by four of its business units as a direct result of Iraq’s invasion and occupation of Kuwait.

102. KOTC states that it or its subsidiaries own and operate a fleet of ocean-going crude oil tankers, refined product carriers and refrigerated liquid petroleum gas (“LPG”) tankers. It also owns and operates a fleet of local service vessels in Kuwait. KOTC’s fleet operations business unit (“Fleet Operations”) is responsible for all business functions relating to the operation of KOTC’s vessels.

103. Additionally, KOTC was, at the material time, the sole provider of port services for all tankers calling at Kuwait, including tankers that KOTC did not own. It explains that its port services include transportation for crew and pilots from ship to shore and vice versa, arranging for hotel accommodation and other personal services for crews once ashore, delivery of stores and bunkers to ships, docking assistance and customs clearance. KOTC provides these services through its agency branch unit (the “Agency Branch”).

104. KOTC is also the sole bottler and distributor of LPG in Kuwait, which is normally used as a fuel for domestic purposes. It engages in this business activity through a business unit known as the gas branch unit (the “Gas Branch”).

105. KOTC states that Fleet Operations and Agency Branch suffered loss of profits of KWD 3,998,771 as a direct result of Iraq’s invasion and occupation of Kuwait. Further, Fleet Operations, Agency Branch and Gas Branch, as well as its administrative unit (“Head Office”), sustained damage or losses to tangible property of KWD 5,851,723 due to the same cause.

106. KOTC's claim is summarized in table 6 below.

Table 6. KOTC's claim
(Kuwaiti dinars)

Claim element	Original amount claimed	Amended amount claimed
Business transaction or course of dealing	3,998,771	3,998,771
- Fleet Operations	171,771	171,771
- Agency Branch	3,827,000	3,827,000
Other tangible property	5,860,834	5,851,723
- Fleet Operations	3,125,445	3,116,334 [a]
- Agency Branch	39,188	39,188
- Gas Branch	1,824,057	1,824,057
- Head Office	872,144	872,144
Total	9,859,605	9,850,494

[a] KOTC reduced the amount claimed for repair of two vessels by a total of KWD 9,111.

2. Business transaction or course of dealing – KWD 3,998,771

(a) Fleet Operations – KWD 171,771

107. KOTC states that Fleet Operations is its largest business unit measured by assets, annual revenue and number of employees. Fleet Operations engages in two types of work. It operates a fleet of large, ocean-going tankers that transport crude oil, petroleum products and LPG produced or manufactured in Kuwait. Fleet Operations also operates a fleet of smaller service vessels from the Mina Al Ahmadi small boat harbour. KOTC's tankers trade worldwide. KOTC's service vessels work only in Kuwaiti waters. KOTC's loss of profits claim for Fleet Operations pertains only to its operation of the service vessels and not to the tanker fleet.

108. KOTC states that, following Iraq's invasion of Kuwait, it set up temporary operations in Sharjah, United Arab Emirates, from which it continued to operate its tanker fleet. It explains that it was forced to discontinue the remainder of its business operations during Iraq's occupation of Kuwait. In the normal course of business, KOTC's tankers were all time-chartered to KPC, and this was the situation on 2 August 1990. Prior to 2 August 1990, KOTC and KPC signed one-year time charters for all of its tankers at world market rates. Because all of KOTC's tankers were at sea on that date, their operations were not affected by Iraq's invasion and occupation of Kuwait. KPC never ceased making charter payments during the period of Iraq's occupation of Kuwait.

109. KOTC states that a number of its service vessels were damaged, stolen or destroyed as a direct result of Iraq's invasion and occupation of Kuwait. KOTC's service vessels were mainly crew, pilot or supply boats that were used by Fleet Operations or KOTC's other operating units, including Agency Branch, in the performance of their work. However, as with the case of its tanker fleet, KOTC sometimes chartered its service vessels to affiliated companies. KOTC claims loss of profits on

charters of two such service vessels that it states were damaged by Iraqi forces. It contends that those two vessels, NAKILAT 1 and STRIKER, lost charter hire during the period from 2 August 1990 to the date when repairs were completed.

110. KOTC claims KWD 86,881 for loss of profits with respect to NAKILAT 1. The claim period for this vessel is the 568 days from 2 August 1990 to the date of completion of repairs on 20 February 1992, which KOTC contends is the earliest reasonable date by which the repair work could have been finished. KOTC states that NAKILAT 1 was under a one-year time charter to Kuwait Oil Company ("KOC") on the invasion date at a daily rate of KWD 175 per day. While the term of the time charter for NAKILAT 1 expired before the end of the claim period, KOTC contends that, had the vessel not been damaged, KOC would have renewed the time charter for an additional one-year period, in which event the renewed charter would have continued beyond the date of completion of repairs. As evidence of the likely renewal of the charter, KOTC presented a letter from KOC, written after KOTC had filed its claim, stating its earlier intent to extend the charter for another one-year period. KOTC estimates that, if NAKILAT 1 had been able to operate under the KOC charter during the claim period, then it would have been "off-hire" for no more than a total of five days. Thus, KOTC estimates that, but for Iraq's invasion and occupation of Kuwait, KOC would have paid the daily rate of KWD 175 provided for in the charter agreement for 563 days, yielding a total in normal operating revenue of KWD 98,525. KOTC estimates that the normal operating expenses for NAKILAT 1 for the claim period would have been KWD 61,464. By subtracting one from the other, KOTC estimates that the normal profit that it would have earned from NAKILAT 1 during the claim period would have been KWD 37,061. To this estimate of normal profits KOTC adds KWD 49,820 in actual operating losses[25] that it states it incurred in operating the vessel during the claim period to reach the total of its claim for KWD 86,881 in loss of profits on charter hire.

111. KOTC claims KWD 84,890 in loss of profits on charter hire with respect to STRIKER, a larger offshore service vessel.[26] The claim period for this vessel is the 543 days from 2 August 1990 to the date of completion of repairs on 26 January 1992, which KOTC contends is the earliest reasonable date by which the repair work could have been finished. On 2 August 1990 STRIKER was in a shipyard in Kuwait nearing the completion of repairs to a gearbox and was scheduled for delivery from the shipyard within the following several days. KOTC states that, but for Iraq's invasion and occupation of Kuwait, it would have entered into a long-term time charter with KOC for STRIKER as soon as the ship was released from the shipyard, although a charter party had not been signed on 2 August 1990. It states that STRIKER had never been chartered for work in the offshore oil industry before the invasion date because the ship was relatively new and the only third-party work in which it had engaged was for military purposes.[27] Because there was no prior charter history for commercial use of STRIKER, KOTC estimated what would have been normal charter rates for STRIKER during the claim period, based on the rates that were charged by a sister vessel approximately one year after the invasion date. While that sister vessel charged a daily charter rate of KWD 1,416, KOTC bases its claim for STRIKER on a lower estimated daily charter rate of KWD 1,032.5. It states that it uses a lower charter rate in its calculation to take into account the later date of the charter for the sister vessel and also to allow for the possibility that it might not have been able to charter STRIKER for the full claim period. It estimates that STRIKER would have been "off-hire" for repairs during six days of the

claim period, and it subtracts the number of estimated repair days from the 543-day period of the claim. Thus it claims that, but for Iraq's invasion and occupation of Kuwait, during the claim period it would have been able to charter STRIKER to KOC for 537 days at a daily rate of KWD 1,032.5, which would have produced normal operating revenue totalling KWD 554,453. KOTC estimates that it would have incurred normal expenses of KWD 482,909 in its operation of the vessel during the claim period. By subtracting one from the other, KOTC estimates that the normal profits it would have earned from operation of STRIKER during the claim period would have been KWD 71,544. To this KOTC adds actual operating losses[28] of KWD 13,346 that it states it incurred with respect to STRIKER during the claim period to reach the total of its claim for KWD 84,890 in loss of profits on charter hire.

(b) Agency Branch – KWD 3,827,000

112. KOTC claims KWD 3,827,000 for loss of profits by Agency Branch during the period 2 August 1990 to 30 June 1994. KOTC states that the activities of Agency Branch were severely curtailed during the claim period because of the reduced number of tankers that called at Kuwait. From 2 August 1990 to 17 March 1991, no tankers could call at Kuwait due to the occupation of the country by Iraq and the trade embargo on exports from Kuwait. After the liberation of Kuwait, tanker traffic was slow to return to normal because of the damage caused to Kuwait's oil fields, its refineries and chemical plants and to its crude oil, petroleum product and LPG loading facilities. At the time when it filed its claim, KOTC estimated that monthly tanker traffic would not return to normal until the last half of 1994, by which time it expected that the petroleum marine loading facilities and related infrastructure of Kuwait that had been damaged by the Iraqis would have been fully repaired.[29] KOTC states that, because Agency Branch was the only entity that was authorized to provide tanker agency services in Kuwait, the absolute reduction in tanker traffic in the country during the claim period is an accurate measure for judging the decrease in Agency Branch's volume of business.

113. KOTC states that, during the one-year period ended 30 June 1990, Agency Branch provided services for 1,366 tankers that called in Kuwait, and the average revenue that it received in that year from each tanker was KWD 2,192. By applying an assumed 6.34 per cent compounded annual growth rate in tanker traffic to the 1990 total,[30] KOTC estimates that, had there been no invasion and occupation of Kuwait, Agency Branch would have serviced a total of 6,258 tankers during the claim period. By multiplying the total of estimated tanker visits by the average revenue received from each tanker in 1990, KOTC estimates that its no-invasion revenue during the claim period would have been KWD 13,717,000. It estimates that its normal expenses during the period would have been KWD 8,675,000, based on the average expenses that it incurred on each tanker that it serviced in the months preceding 2 August 1990. The difference of KWD 5,042,000 is KOTC's estimate of the normal profits that Agency Branch would have earned during the claim period.

114. When KOTC filed its claim in July 1993 it estimated that, during the claim period, Agency Branch would have received KWD 5,554,000 in actual revenues and would have incurred KWD 4,339,000 in actual expenses, for an estimated actual profit during the claim period of KWD 1,215,000.[31] The KWD 3,827,000 claimed by KOTC for loss of profits is derived by subtracting its

estimated actual profits of KWD 1,215,000 from its estimate of no-invasion profits of KWD 5,042,000.

3. Other tangible property – KWD 5,851,723

(a) Fleet Operations – KWD 3,116,334

115. KOTC states that Fleet Operations suffered tangible property losses totalling KWD 3,116,334 as a direct result of Iraq's invasion and occupation of Kuwait. Its claim relates to damage to property of the following types. It claims KWD 1,774,190 for the damage to, or loss of, 10 service vessels and a mobile crane. It claims an additional KWD 1,342,144 for losses of materials and supplies, equipment and petty cash.

116. KOTC's claim with respect to Fleet Operations' tangible property is summarized in table 7 below.

Table 7. Claim for damage to Fleet Operations' tangible property
(Kuwaiti dinars)

Identity and status of asset	Amount claimed	Basis for claimant's valuation
Vessels and crane	1,774,190	
- NAKILAT 72 – sunk/total loss	90,640	Estimated replacement cost
- NAKILAT 73 – sunk/total loss	90,640	Estimated replacement cost
- NAKILAT 75 – sunk/repaired	65,680	Actual repair cost
- NAKILAT 1 – repaired	7,779	Actual repair cost
- NAKILAT 2 – repaired	6,508	Actual repair cost
- NAKILAT 71 – repaired	45,154	Actual repair cost
- STRIKER – repaired	90,830	Actual towage cost
- NAKILAT 3 –stolen/repaired	115,209	Actual repair cost
- NAKILAT 4 – stolen/not recovered	618,000	Estimated replacement cost
- NAKILAT 6 – stolen/not recovered	618,000	Estimated replacement cost
- 18-ton mobile crane – total loss	25,750	Estimated market value
Materials, supplies, equipment and cash	1,342,144	
- Material and supplies - stolen	1,130,864	Estimated replacement cost
- Equipment - stolen	211,080	Estimated replacement cost
- Cash – stolen	200	Replacement cost
Total	3,116,334	

117. As stated above, none of KOTC's tankers was damaged because they were all outside Kuwaiti waters on 2 August 1990. Its service vessels, on the other hand, were all in Kuwait on that date, and KOTC states that it was unable to remove them before Iraqi forces commandeered them. KOTC

contends that Iraqi troops thereafter vandalized, sank or stole nearly all of its service vessel fleet. In support of its claim, amongst other documents, KOTC submitted salvage reports, together with extracts from Lloyd's Register, covering all 10 boats, together with repair invoices.

118. KOTC states that Iraqi forces sank three of the 10 vessels. The three were all crew boats, named NAKILAT 72, NAKILAT 73 and NAKILAT 75. One of those three, NAKILAT 75, was raised and repaired. The other two were declared total losses and were not repaired. KOTC claims KWD 90,640 for each of the two vessels that were not repaired, based on its consultant's estimates of actual replacement value, without allowance for depreciation or salvage. KOTC's consultant increased the historical purchase costs for the vessels by an assumed 3 per cent annual rate of inflation to the assumed date of replacement. In the case of NAKILAT 75, KOTC submitted documentation showing that the actual cost of repairs to the vessel was KWD 65,680.

119. KOTC states that Iraqi forces damaged four of the 10 vessels, NAKILAT 1, NAKILAT 2, NAKILAT 71 and STRIKER, and that all were subsequently repaired. KOTC claims its actual cost of repairs of the first three of these vessels in the amounts of KWD 7,779, KWD 6,508, and KWD 45,154 respectively. All three vessels were repaired in Kuwaiti repair yards, and KOTC submitted invoices substantiating the cost of those repairs. KOTC does not claim the cost of repairs of STRIKER because it received indemnity payments from its insurer for this loss.[32] However, KOTC states that its settlement with its insurer for damage to STRIKER did not include reimbursement for towage charges for the vessel,[33] and claims KWD 90,830 for the actual cost of towage of STRIKER from Kuwait to the repair yard in Sharjah. KOTC states that it was necessary to tow STRIKER to a foreign repair yard because none of the domestic repair yards that were operating following the liberation of Kuwait were of sufficient size to repair the vessel. It submitted invoices that substantiated the amount paid for towage.

120. KOTC states that three of the 10 vessels, NAKILAT 3, NAKILAT 4 and NAKILAT 6 were stolen. KOTC ultimately recovered NAKILAT 3 in July 1992, when the Iraqi authorities delivered the vessel to the United Nations Return of Property Agency in a damaged state. KOTC presented documentation showing actual repair costs for NAKILAT 3 of KWD 115,209. KOTC claims damages of KWD 618,000 for each of the two vessels that were never returned. As with NAKILAT 72 and NAKILAT 73, KOTC claims the estimated replacement cost of NAKILAT 4 and NAKILAT 6. Again, it has based its estimate of replacement cost on an assumed 3 per cent annual rate of inflation applied to the date of replacement of both vessels, without deduction for depreciation. However, it was unable to supply the Panel with documentation substantiating its original payment of these amounts.

121. KOTC further states that an 18-ton mobile crane was so heavily damaged during the period of Iraqi occupation that it was beyond economic repair. KOTC further states that an affiliate, Kuwait National Petroleum Company ("KNPC"), gave KOTC the crane for no consideration because the equipment was in excess of its needs, and therefore the crane was not listed on KOTC's asset register. The crane was approximately 13 years old as at 2 August 1990. KOTC claims KWD 25,750 as the market value of the crane as at that date.

122. KOTC claims that Fleet Operations also suffered other tangible property losses totalling KWD 1,342,144 as a result of looting by Iraqi forces. It divides this component of its claim into three categories – loss of materials and supplies valued at KWD 1,130,864, loss of equipment valued at KWD 211,080 and loss of KWD 200 in cash.

123. KOTC states that Fleet Operations' inventory and supplies consisted, in the main, of spare parts for its fleet of tankers and service vessels. The highest value items in its inventory were a set of five duplicate marine radio sets for its marine tankers, which KOTC values at KWD 156,600. KOTC conducted a physical count of Fleet Operations' inventory and supplies in March 1991, and it identified missing items by comparison of this count with its register of pre-invasion inventory. It values lost items at the estimated replacement cost and claims KWD 1,130,864. It derived its estimate of the replacement cost by increasing the moving average acquisition cost of the missing items by 20 per cent. KOTC contends that depreciation should not be applied to the acquisition cost for the items because spare parts that are held in reserve do not deteriorate over time.

124. KOTC states that, in June 1990, KNPC gave Fleet Operations for no consideration the equipment that it claims was stolen by Iraqi forces; thus, the equipment was never recorded on KOTC's asset register. It offers the written statements of a Fleet Operations employee as evidence that the equipment existed prior to the invasion. The equipment had earlier been purchased by KNPC for use in the expansion of its Mina Abdullah refinery, and the equipment was given to Fleet Operations by KNPC after that project was completed, when KNPC determined that the equipment was in excess of its needs. KOTC states that the equipment included a welding machine, air compressors and a generator. It claims KWD 211,080 for its loss based on an independent consultant's estimate of replacement cost, without adjustment for depreciation. KOTC states that KNPC had removed this equipment from its books before the date of the invasion, and thus KNPC did not claim this equipment in its claim to the Commission for tangible property loss.[34]

125. KOTC states that Iraqi forces stole the contents of Fleet Operations' "petty cash" reserves that were kept in the Agency Branch's offices. KOTC submitted a copy of its trial balance as at 30 June 1990 in support of this component of its claim. It also submitted a copy of a "journal voucher" through which it later wrote off the amount of KWD 200 as an invasion loss, together with the affidavit of an employee confirming the loss.

(b) <u>Agency Branch – KWD 39,188</u>

126. KOTC claims that Agency Branch suffered tangible property losses totalling KWD 39,188 as a result of looting by Iraqi forces. It states that these losses were comprised of KWD 38,024 in cash that was looted from a safe in the Agency Branch's offices and KWD 1,164 in postage that was looted from a postage machine at that same location. KOTC states it kept a large amount of cash in its safe because of "the various currency requirements of the captains of Kuwait ships while out of port and also to handle the service requirements of ships in the Port of Kuwait". In support of its claim for stolen cash, KOTC submitted a copy of its trial balance as at 30 June 1990, which recorded cash on hand in the amount claimed. KOTC also submitted copies of its cash book for Kuwait dinars and foreign currencies. In support of its claim for loss of postage, KOTC submitted copies of its trial

balance dated 30 June 1990, which shows a stamp inventory of the value claimed, together with original receipts for purchase of the stamps.

(c) Gas Branch – KWD 1,824,057

127. The Gas Branch was in the business of bottling and distributing LPG in Kuwait. It had no competitors in this business. The Gas Branch had two gas bottling plants in Kuwait, the Mina Abdullah gas bottling plant (the "Mina Abdullah plant") and the Shuwaikh gas bottling plant (the "Shuwaikh plant").

128. KOTC claims that the Gas Branch suffered tangible property losses totalling KWD 1,824,057 as a result of looting and damage of the two plants by Iraqi forces. It states that Iraqi troops forced the continued operation of the Mina Abdullah plant but not the Shuwaikh plant during the period of their occupation of Kuwait. It contends that, before the Iraqi forces withdrew from Kuwait, they stole gas cylinders[35] from the Mina Abdullah plant valued at KWD 923,077, machinery from the Shuwaikh plant valued at KWD 618,000, and other materials and supplies from both plants valued at KWD 282,980.

129. KOTC states that the Gas Branch was forced to temporarily curtail its operations at the two plants following the liberation of Kuwait, but makes no claim for business interruption. It explains that the Gas Branch did not suffer any loss as a result of the interruption in its normal business operation because those operations are a "not for profit" endeavour and because all revenue from sales of bottled LPG is received by KNPC and not KOTC.[36]

130. The two plants were located on the premises of KNPC's refineries of the same names. KOTC explains that, while KNPC owned the land on which the two plants were located, KOTC nevertheless owned the two plants and carried the plants as assets on its books. It further states that KNPC did not, in its claim to the Commission, include tangible property damage to the two gas bottling plants.[37]

131. The Shuwaikh plant was built in 1962, and was operated until 1987 when the construction of the Mina Abdullah plant was completed. The Shuwaikh plant was subsequently maintained as a reserve plant for use only in the event of an emergency shutdown of the Mina Abdullah plant, or for possible expansion of manufacturing capacity as domestic demand for LPG increased. KOTC states that there were no other facilities in Kuwait for the bottling of LPG and, because of this, it was necessary for it to own a reserve plant. Thus, the operating status of the Gas Branch on 2 August 1990 was that the Mina Abdullah plant was in production and the Shuwaikh plant was held in an unmanned, but fully maintained, standby role.

132. The Gas Branch conducted a survey of the two plants following the liberation of Kuwait and determined that its manufacturing facilities had been damaged in the following respects. It found that the manufacturing equipment in the Shuwaikh plant had been physically dismantled and removed from the premises. KOTC estimates that the replacement value of the manufacturing equipment that was stolen from the Shuwaikh plant is KWD 618,000. No depreciation was applied to this estimate. The net book value of the Shuwaikh plant, including the manufacturing equipment, on 2 August 1990

was KWD 500. KOTC states that the equipment at the Shuwaikh plant was not replaced by a similar facility, but instead it purchased a different type of mobile plant[38] for future use in the event of an emergency shutdown of the Mina Abdullah plant.

133. KOTC states that, while the Iraqi forces did not cause damage to the manufacturing equipment at the Mina Abdullah plant, they looted 72,476 gas cylinders from that facility, and it states that another 15,000 of its cylinders were taken from the Shuaiba port, where the cylinders were being held in a customs area awaiting cargo clearance and delivery to KOTC. While the cylinders were of different sizes, the vast majority appear to have been of the 12 kilograms variety. In its claim, KOTC estimated that the replacement value of the stolen cylinders was KWD 923,077. KOTC determined the number of cylinders lost from the Mina Abdullah plant by comparing a physical count made after the liberation of Kuwait with the number of cylinders shown on its pre-invasion inventory list. In support of its valuation of the replacement cost of all the stolen cylinders, KOTC submitted vendor's stock cards showing the unit cost for each category of container. No depreciation was applied to this estimate. In support of its claim for the loss of cylinders in the port area, KOTC submitted, amongst other documents, copies of the invoice for the 15,000 cylinders, plus a copy of the original bill of lading[39] for this cargo.

134. In addition to its claim for stolen equipment and cylinders, KOTC claims an additional KWD 282,980 for other materials and supplies that it states Iraqi forces stole from its store of inventory at both plants. Amongst the other types of materials in inventory, KOTC states that the Iraqi forces took spare parts and accessories. KOTC has accounted for the missing items by comparing the results of a physical stock count that was made in March 1991 to its perpetual inventory list, which showed the balances of inventory on hand as at 2 August 1990. KOTC values its loss on the basis of what it contends is the replacement cost of the stolen items as at 2 August 1990, but without adjustment for depreciation or obsolescence. KOTC states that the lost materials and supplies were replaced over time, but that it is not feasible to provide documentation of actual replacement cost. Instead, it bases its estimate of replacement cost on the moving average cost of acquisition of the lost items plus 20 per cent.

(d) Head Office – KWD 872,144

135. KOTC claims that Head Office suffered several types of tangible property losses totalling KWD 872,144 as a result of looting and damage by Iraqi forces. The Head Office facilities were located on a single floor of an office building in Kuwait. KOTC states that petty cash and postage valued at KWD 20,825, and gold medallions[40] valued at KWD 9,887, were stolen after a safe at that facility was burgled. In addition, KOTC states that Iraqi forces stole commercial vehicles valued at KWD 391,400. It states that, while those vehicles had been assigned to its operating units, they nevertheless were registered in its accounts as Head Office assets.[41] Finally, KOTC claims that Iraqi forces damaged or stole office furniture and computers from Head Office facilities and personal furnishings from company-provided apartments[42] of a total value of KWD 450,032.

136. The lost items in this component were also identified by a physical count done after the liberation of Kuwait. KOTC has provided copies of its pre-invasion asset register to which the items

that have been claimed can be traced. The gold medallions had been purchased in April 1990, and KOTC values the medallions at their acquisition cost as shown on the copy of the original invoice, which it submitted in support of its claim along with extracts from the general ledger account in which those purchases were recorded. In support of its claim for loss of petty cash, KOTC submitted copies of the relevant entries in its trial balance of 30 June 1990, which establishes cash on hand as at that date. It also submitted a ledger copy of an account that shows a postage balance of KWD 400 as at 2 August 1990. KOTC values the stolen commercial vehicles, office equipment and furnishing at estimated replacement cost increased at an assumed 3 per cent annual rate of inflation from the date of loss.

B. Iraq's response

137. With respect to KOTC's claim, Iraq states the following.

(a) The period of KOTC's claim for business transaction losses, both with respect to loss of profits on charter hire by Fleet Operations and loss of profits by Agency Branch, should be limited to the period before 17 January 1991, when Iraqi forces were still in Kuwait. All losses of profits after Iraq's exit from Kuwait should be viewed as indirect damage.

(b) KOTC conducted work on NAKILAT 71 for other purposes in addition to damage caused by the hostilities, and thus an adjustment for "betterment" should be made to the amount claimed for repair cost.

(c) Because KOTC purchased war risk insurance for STRIKER, it most probably had similar coverage for the other nine vessels.

(d) KOTC failed to submit adequate documentation that proves that the items claimed as tangible property loss by Fleet Operations existed before 2 August 1990. In addition, KOTC values its loss on the basis of replacement value, but it calculates the replacement value by increasing the original acquisition cost of the lost items; the latter is an inappropriate methodology for valuation.

(e) KOTC failed to provide adequate supporting documentation for its claim for Head Office loss or damage to tangible property.

C. Analysis and valuation

1. Business transaction or course of dealing – KWD 3,998,771

(a) Fleet Operations – KWD 171,771

138. The Panel finds that the evidence produced by KOTC only supports a loss of profits on charter hire for one of the two service vessels and, with respect to that one vessel, for a shorter contractual period than is claimed by KOTC.

139. As at 2 August 1990, there were 183 days remaining on the existing NAKILAT I charter. KOTC claims that a renewal charter would have been agreed with KOC that would have extended the charter to 20 February 1992, this being the last day of the 568-day claim period that it proposed be used for the calculation of its damages. However, the only documentary evidence that KOTC submitted to the Panel in support of its contention regarding the charter renewal was a letter from a KOC official, written a number of years after the force majeure termination of the first charter. The Panel considers this evidence to be insufficient, and it finds that the period of KOTC's loss of charter hire for NAKILAT 1 should be limited to the normal expiration date of the charter that was in effect on 2 August 1990, less two days for normal maintenance work. By applying this shorter period of 181 days to the day rate charge of USD 175 specified in the charter party, the Panel finds that KOTC experienced a gross loss of charter revenue totalling KWD 31,675. In reviewing the information provided by KOTC with respect to the "estimated" and "actual" operating costs for the vessel, the Panel has concluded that the normal costs for depreciation and insurance, which were avoided while NAKILAT 1 was in the repair yard, were not fully taken into account. After adjustments in this regard, the Panel recommends that KOTC be awarded KWD 11,915 for lost net income on charter of this vessel.

140. The Panel notes that STRIKER was an atypical service vessel for the owner's normal business and that, being an offshore supply vessel, STRIKER does not appear to have been the type of boat that would have satisfied the work needs of Fleet Operations' sister unit, Agency Branch, which employed the bulk of the service fleet. KOTC states that KOC, the only charterer of its service vessels, did have offshore oil production, and the Panel thus accepts that KOC may have been the target market[43] for which STRIKER was built. As at 2 August 1990, STRIKER had yet to be engaged for service in the offshore oil industry by KOC or by any other charterer. KOTC offers no explanation as to why it could not find other work for the vessel during the pre-invasion period. In fact, the only proof presented in support of KOTC's claim for lost charter hire is KOC's letter, written after the fact, stating that it would likely have chartered STRIKER in August 1990 had Iraq's invasion and occupation of Kuwait not occurred. It is notable that, despite the fact that STRIKER was scheduled for release from a Kuwaiti repair yard within a few days after the invasion date, a charter party had not been agreed before then between KOTC and KOC. As STRIKER had never engaged in work in the offshore oil industry prior to 2 August 1990, and because insufficient evidence was offered with respect to the state of the relevant charter market after that date, the Panel recommends no award for KOTC's claim for loss of profits from charter hire of this vessel.

(b) Agency Branch – KWD 3,827,000

141. The Panel notes that the income of the Agency Branch was dependent on the absolute number of tankers calling at Kuwait during the claim period, and that those numbers decreased from what they otherwise would have been the case in the no-invasion scenario, as a direct result of Iraq's invasion and occupation of Kuwait. The Panel accepts KOTC's argument that it was impossible for any tankers to load at Kuwait during the period of Iraq's occupation of that country. It further accepts KOTC's position that, in the aftermath of Iraq's invasion and occupation of Kuwait, its business continued to suffer while refineries, production facilities and marine loading docks in that country

were being repaired. Based on these findings, the Panel accepts the overall methodology used by KOTC in estimating its loss of profits, subject to the adjustments recommended below.

142. In its original statement of claim KOTC deducted from an approximation of its no-invasion income its estimate of the level of (reduced) profits that it expected to earn during the claim period. However, KOTC later provided the Panel with information that showed that its actual profits had been greater than expected in those years. This information, by itself, would justify an adjustment to the amount claimed.

143. KOTC based its calculation of average income per tanker on its financial results in the year prior to the invasion. In reviewing those prior-year results, the Panel has concluded that KOTC significantly overstated its revenue, and consequent adjustments of this magnitude are therefore also in order.

144. KOTC based its estimate of the number of tankers that would have called in Kuwait during the claim period in the no invasion scenario on a projected annual growth rate in the volume of tanker traffic of 6.34 per cent. The Panel finds that this was an overly optimistic prediction of the rate of growth in KOTC's business, and it has recalculated the loss based on a lower 1.3 per cent annual increase in revenue.

145. Based on its calculation of the no-invasion profits, the Panel finds that KOTC returned to normal levels of profitability during the year ended 30 June 1993. The Panel therefore finds that KOTC's loss should be limited to the period from 2 August 1990 to 30 June 1992.

146. Based on the findings immediately above, the Panel recommends that adjustments totalling KWD 2,095,487 be made to the Agency Branch's claim for KWD 3,827,000 and that KOTC be awarded KWD 1,731,513 for this element of its claim.

2. Other tangible property – KWD 5,851,723

(a) Fleet Operations – KWD 3,116,334

147. KOTC provided the Panel with copies of registration certificates, extracts from Lloyd's Register listings and other documentation that established that it owned the 10 service vessels and the mobile crane as at 2 August 1990. It produced additional evidence, including survey reports and repair invoices, that proved that the vessels and equipment were damaged, stolen or destroyed after that date, while in Kuwaiti waters, sometime during the period of Iraq's occupation of that country. The Panel therefore finds that KOTC either lost, or sustained damage to, the assets included in this component of its claim as a direct result of Iraq's invasion and occupation of Kuwait.

148. The Panel has reviewed the insurance policies that were in place as at 2 August 1990, and it is satisfied that, with the exception of STRIKER, those policies excluded war risk coverage. KOTC has satisfactorily explained why it maintained war risk coverage on only this single vessel.[44] The Panel finds that KOTC has not received an indemnity payment with respect to any of the losses that it has included in its claim.

149. The basis for the Panel's findings for each of Fleet Operations' vessels and for the mobile crane are shown below.

(a) NAKILAT 72. This vessel was sunk and was declared a total loss. KOTC's values its loss at KWD 90,640, this being what it states is the current replacement cost for the vessel, without deduction for depreciation for age or condition. The Panel considers that a replacement cost valuation of the loss should take into account the depreciation factor. Without the data to make this adjustment for depreciation, the Panel finds that the insured value of the vessel as at 2 August 1990 is the best available evidence of the market value of the property on that date. The insured value of the vessel as at that date was USD 160,000.

(b) NAKILAT 73. This vessel was also sunk and was not raised for repair. Again, KOTC's claim for KWD 90,640 is based on its estimate of the non-depreciated replacement cost of the asset. Again, the Panel finds that the insured value of the vessel as at 2 August 1990 better represents its market worth. The insured value as at that date was USD 160,000.

(c) NAKILAT 75. KOTC claims KWD 65,680 as the repair cost for this vessel. Notably, the amount claimed for repair cost exceeds the USD 160,000 insured value of the vessel as at 2 August 1990. As KOTC was unable to provide documentary evidence of its proof of payment of repairs in the amount claimed, the Panel considers that the recommended compensation should be limited to the insured value.

(d) NAKILAT 1. KOTC provided the Panel with copies of its cancelled cheque and the repair yard's receipt voucher, together with other documentary evidence, which adequately established its payment of KWD 7,779 for the repair of this vessel. The Panel considers that the amount paid for repairs was reasonable.

(e) NAKILAT 2. KOTC provided the Panel with copies of the repair yard's invoice, extracts from its general ledger, debit notes and other documentary evidence, which adequately established its payment of AED 79,153[45] for the repair of damage to this vessel.

(f) NAKILAT 71. KOTC provided the Panel with copies of invoices, a cancelled cheque, extracts from its general ledger and other documentary evidence that adequately establishes its payment of KWD 44,826 for the repair of this vessel, this being KWD 328 less than the amount claimed. Contrary to Iraq's assertion, the Panel found no evidence that the vessel was improved or bettered as a result of the repairs.

(g) STRIKER. KOTC provided the Panel with copies of invoices and other documentary evidence that adequately established its payment of KWD 91,058 in charges for towage of the vessel from Kuwait to the United Arab Emirates, where it was ultimately repaired, this amount being slightly in excess of the amount claimed. KOTC provided the Panel with copies of its marine insurance policies (including the war risk endorsement), and the Panel could find no evidence that towage expenses were excluded from the insured's coverage under those policies. However, having reviewed other documents submitted by KOTC regarding the settlement of its casualty claim with its underwriter, the Panel is satisfied that KOTC did not receive an indemnity payment with respect to these towage charges. The Panel notes that the Commission does not require a claimant to exhaust all other remedies before pursuing its claim. Thus, even though KOTC did not pursue a claim for towage charges against its insurer, the Panel considers that it may present a claim to the Commission. The Panel also notes that an indemnity payment for towage costs would likewise have been recoverable against Iraq if pursued by the insurer.[46] The Panel therefore recommends an award of compensation in the full amount of KWD 90,830 for towage charges.

(h) NAKILAT 3. KOTC provided the Panel with copies of debit advice notes, remittance advice notes, a cancelled cheque, journal vouchers, payment instructions and other documentary evidence, which adequately establish its payments of KWD 108,709 and GBP 6,500 to a single repair yard (under multiple invoices) for repairs to this vessel.

(i) NAKILAT 4 and NAKILAT 6. Both of these vessels were stolen and were not subsequently recovered by KOTC, which claims KWD 618,000 for each of these vessels based on its estimate of their net book value. KOTC did not provide an explanation of the basis for its valuation, and the Panel was unable to independently verify the vessels' worth as at 2 August 1990. As KOTC provided evidence of the insured value of each vessel on this date, the Panel finds that this is a reasonable basis for an alternative valuation of KOTC's loss. The Panel notes, in particular, that the insured values were less than the amounts claimed.

(j) Eighteen-ton mobile crane. The mobile crane was damaged beyond repair; thus, the claim is for depreciated replacement value. KOTC paid no consideration to its affiliate for this item of machinery and thus did not list it on its fixed asset register. Accordingly, the crane had a nil book value in KOTC's accounting records. Nevertheless, KOTC proved that this asset existed on 2 August 1990, and it further established that the crane was being used at that time, indicating that it did have some residual value to KOTC, despite being fully depreciated from an accounting standpoint. KOTC claims KWD 25,750 for its loss. Given the age of the crane, the Panel finds that the crane's reasonable market value was no more than KWD 4,000, and accordingly recommends an award of compensation in that amount.

In summary, the Panel finds that it is necessary to make adjustments totalling KWD 191,100 to KOTC's claim for KWD 1,774,190 for losses to Fleet Operation's service vessels and mobile crane.

150. The Panel's findings on Fleet Operations' claim for stores and equipment are as follows.

(a) The Panel does not accept the 20 per cent uplift factor that was applied to arrive at KOTC's KWD 974,264 valuation of its missing base stock inventory, and it therefore recommends an adjustment of KWD 162,377 with respect to this component of the claim.

(b) The five radio sets were old models and had been fully depreciated in KOTC's books even before they were removed from the KOTC's vessels and placed in storage. As it has not been shown that the radios had any residual value, the Panel recommends no award of compensation for the KWD 156,600 claimed for the value of the lost radios.

(c) The Panel recommends no award of compensation for the KWD 211,080 claimed by KOTC for the equipment that was donated to it by KNPC because this equipment was assigned a zero value in KOTC’s books, and KOTC failed to provide other evidence establishing that the equipment had any residual value.

(d) KOTC provided the Panel with a copy of a trial balance as at 30 June 1990, establishing the existence of KWD 200 in its petty cash account. It explained that the trial balance for 31 July 1990 is not available. Further, KOTC submitted a copy of a journal entry, dated 30 June 1991, whereby it recorded that this amount had been written off as a result of theft. The Panel finds that the combination of evidence is sufficient to establish the existence and amount of the cash loss.

151. The Panel recommends that adjustments totalling KWD 530,057 be made to KOTC’s claim for KWD 1,342,144 for losses to Fleet Operations’ stores and equipment.

152. In summary, based on its assessment of the value of KOTC’s Fleet Operations’ assets, the Panel recommends that adjustments totalling KWD 721,157 be made to this element of the KOTC claim, and that it be awarded a total amount of KWD 2,395,177.

(b) Agency Branch – KWD 39,188

153. KOTC provided the Panel with a copy of its trial balance as at 30 June 1990 showing balances of cash totalling KWD 42,218. It also provided copies of its cash books as at 31 July showing cash balances of KWD 6,797, USD 96,777 and GBP 1,533. Finally, KOTC submitted copies of its 30 June 1991 financial statements, which record a write-off of KWD 59,913 in cash. Based on this evidence, the Panel finds that KOTC has proved its cash loss and, after applying the currency exchange rate set out in paragraphs 333-335 below, it recommends an award of KWD 36,420, which reflects an adjustment of KWD 1,604 from the amount claimed for cash loss. As KOTC did not submit evidence that the KWD 1,164 claimed for lost postage stamps had been written off from its books, the Panel recommends no award for this loss.

(c) Gas Branch – KWD 1,824,057

154. KOTC claims KWD 618,000 for the loss of manufacturing facilities at its Shuwaikh gas bottling plant. While it replaced those facilities with a new mobile plant, the design of the new facility is unlike that of the old plant, and therefore its cost cannot serve as a basis for comparison of relative values. The Panel has taken particular note of the significant age of the Shuwaikh plant, the fact that it was maintained as a reserve or “emergency” plant and had not been operated for a number of years before 2 August 1990, and that it was an almost fully depreciated asset with a net book value on that date of only KWD 500. However, the Panel also recognizes that the plant must have had some residual value beyond that carried on KOTC’s asset register, as it was the only back-up facility in the country for the main Mina Abdullah gas bottling plant. In view of this, the Panel recommends an award of KWD 38,229 in compensation for KOTC’s loss of its manufacturing facilities at the Shuwaikh plant, this being 5 per cent of the KWD 764,570 historical cost of the plant.

155. KOTC also claims KWD 923,077 for the approximately 75,000 gas cylinders that were looted from its Mina Abdullah gas plant and the approximately 15,000 gas cylinders that were stolen from the customs depot at the Shuaiba port. KOTC provided inventory records that established the loss of the cylinders from the plant, and the invoices and bill of lading that KOTC provided with respect to the theft from the customs areas substantiate its ownership of the remaining cylinders. The Panel finds that these losses were a direct result of Iraq's invasion and occupation of Kuwait. The Panel finds that the net book value of these materials is the best evidence of their worth. The Panel therefore recommends an award of compensation in the amount of KWD 127,302 for the loss of gas cylinders.

156. The final component of this claim element is the KWD 282,980 in losses that KOTC claims for theft of equipment and spare parts from both its Shuwaikh and Mina Abdullah plants. KOTC's valuation of loss is based on the net book value of these materials, plus a 20 per cent escalation factor. The Panel finds that KOTC has proved the loss of the items claimed, based on records which compared the results of KOTC's post-liberation inventory count with the materials listed in its pre-invasion asset register. However, the Panel considers that KOTC's award should be limited to KWD 235,817 as insufficient justification was provided with respect to the 20 per cent escalation factor, and it therefore recommends an award of compensation of KWD 235,817 for this claim element.

(d) Head Office – KWD 872,144

157. The final category of KOTC's claim for tangible property loss pertains to cash and materials taken from its Head Office facilities. The Panel finds that KOTC has established its loss of the items claimed, subject to the qualifications set out below. It recommends an award of KWD 106,142 for this claim element based upon the following analysis.

(a) The amount of KWD 9,887 claimed with respect to the medallions is awarded in full.

(b) The cash claim for KWD 20,425 and the postage claim for KWD 400 are both disallowed for reason of insufficient evidence.

(c) The motor vehicles for which KOTC claims KWD 391,400 had been fully written-off shortly before Iraq's invasion and occupation of Kuwait. In view of the fact that these assets had a zero net book value on the invasion date, the Panel recommends that the award for this component of KOTC's claim be limited to 5 per cent of their historical cost, this being KWD 4,375.

(d) An adjustment of KWD 358,152 should be made with respect to loss of equipment and furnishings in employee apartments, this limit again being placed at the level of the net book value that KOTC assigned to these lost assets. Accordingly, the Panel recommends an award of KWD 91,880 for this claim element.

3. Examination of possible extraordinary income due to higher tanker charter rates after 2 August 1990

158. KOTC's operating income (before extraordinary items) increased during the financial year of Iraq's occupation of Kuwait, over the prior financial year, and continued to increase in the subsequent

year[47] due to increases in the profitability of the tanker chartering business of Fleet Operations unit.[48] This is because, according to KOTC, its Fleet Operations' tanker business was unaffected by Iraq's invasion and occupation of Kuwait.[49]

159. The Panel has examined the documents submitted by KOTC in support of its contention with respect to the cause of the increased income from its tanker chartering business. Amongst those documents were the charter parties executed between KOTC and KPC in July 1990 and 1991. The Panel finds that KOTC reached agreement with its parent company, KPC, on one-year fixed charter rates for its entire tanker fleet prior to 2 August 1990. Likewise, KPC renewed its charters of the entire KOTC ocean-going tanker fleet several months after the liberation of Kuwait, based on world-market rates. Therefore, the Panel finds that, during the relevant period, any increase in income earned by KOTC from its tanker chartering business was not a result of Iraq's invasion and occupation of Kuwait. Accordingly, no adjustment should be made to the Panel's recommended award to KOTC for extraordinary income.

D. Recommendations

160. The Panel's recommendations with respect to the claim of KOTC are summarized in table 8 below.

Table 8. KOTC's claim – recommended compensation
(Kuwaiti dinars)

Claim element	Original amount claimed	Amended amount claimed	Amount of compensation recommended
Business transactions or course of dealing	3,998,771	3,998,771	1,743,428
- Fleet Operations	171,771	171,771	11,915
- Agency Branch	3,827,000	3,827,000	1,731,513
Other tangible property	5,860,834	5,851,723	2,939,087
- Fleet Operations	3,125,445	3,116,334	2,395,177
- Agency Branch	39,188	39,188	36,420
- Gas Branch	1,824,057	1,824,057	401,348
- Head Office	872,144	872,144	106,142
Total	9,859,605	9,850,494	4,682,515

V. CLAIM OF KUWAIT AVIATION FUELLING COMPANY

A. Facts and contentions

1. Introduction

161. Kuwait Aviation Fuelling Company ("KAFCO") is a company organized under the laws of Kuwait. All the issued shares in the capital of KAFCO are owned by Kuwait Petroleum Corporation ("KPC"), the capital of which is owned by the Government of Kuwait. KAFCO buys aviation fuels from KPC and sells them to commercial airlines and to the Kuwait Air Force. KAFCO also sells oil lubricants and other related products purchased from various suppliers and provides maintenance services to the Kuwait Air Force for its mobile refuelling equipment.

162. KAFCO's activities developed rapidly following its creation in 1963 due to the expansion of air traffic movements to Kuwait. To satisfy growing demand, KAFCO increased its storage capacity from 325,000 litres in 1963 to 30 million litres as at 2 August 1990, corresponding to about four weeks of forward supplies. Following the introduction of wide-bodied jets with larger engines in the 1970s KAFCO constructed a 37-kilometre pipeline of 8 inches in diameter to connect the company's airport fuel depot to the Shuaiba and Mina Al-Ahmadi oil refineries. The two refineries belonged to Kuwait National Petroleum Company (K.S.C.) ("KNPC") and were located south-east of the airport facilities. The pipeline was used exclusively for the supply of Jet A-1 fuel.

163. With the commissioning of the new international airport in 1979 KAFCO expanded its refuelling network, and its fuel depot was relocated next to the new airport, on the south-west outskirts of Kuwait City. There, aircraft were refuelled by means of a network of underground pipelines running from the company's fuel depot to the airstrips. Planes were refuelled by means of dispensers providing a connection between the pipeline hydrant and the aircraft. Fuel was also supplied to aircraft at the old airport, located adjacent to the new one, by way of refuellers (tanker trucks) each having a capacity of 65,000 litres. The maximum tank capacity of a large commercial airliner is approximately 150,000 litres.

164. KAFCO bought aviation fuel (mainly Jet A-1) from KPC at prevailing posted prices and sold it to its customers. At the time of the invasion, KAFCO employed approximately 90 people and achieved annual turnover of approximately KWD 22 million.

165. KAFCO filed its claim in July 1993. In its original statement of claim, KAFCO sought compensation in the total amount of KWD 7,548,546 for losses and damage it allegedly sustained as a direct result of Iraq's invasion and occupation of Kuwait. KAFCO also claimed an unspecified amount for interest on any award at a rate to be determined by the Commission.

166. In its article 34 responses, KAFCO increased the amount claimed to KWD 9,039,168. For the reasons set out above in paragraph 18, the Panel has decided not to consider the amendments to the original claim introduced by KAFCO after 11 May 1998 that purported to increase the total amount claimed. The Panel therefore considers that the total amended amount of KAFCO's claim, as shown

in table 9 below, is KWD 7,487,595. This claimed amount was divided by KAFCO into three categories: business interruption losses, damage to tangible property and a claim for debts alleged to have become uncollectible as a direct result of Iraq's invasion and occupation of Kuwait ("bad debts").

167. KAFCO seeks compensation in the total amount of KWD 7,487,595 in respect of loss of profits, tangible property and bad debts following Iraq's invasion and occupation of Kuwait. Its claim is summarized in table 9 below.

Table 9. KAFCO's claim
(Kuwaiti dinars)

Claim element	Original amount claimed	Amended amount claimed
Business interruption (loss of profits)	6,444,050	6,444,050
Other tangible property	1,083,215	1,025,437
Other (bad debts)	21,281	18,108
Total	7,548,546	7,487,595

2. Business interruption (loss of profits) – KWD 6,444,050

168. KAFCO claims KWD 6,444,050 for loss of profits due to the interruption of its normal business activities.

169. The company states that Iraqi forces took possession of KAFCO's premises on 3 August 1990. Staff and management left their offices on the same day and did not return to KAFCO before the liberation of Kuwait. KAFCO alleges that it could not resume normal levels of operation after the liberation of Kuwait due to the damage to its buildings, its refuelling equipment and the airport. KAFCO states that the "operating building" and the fuel depot (including the refuelling facilities) had been vandalized and that the refuellers had either disappeared or been damaged. KAFCO restarted limited supplies of jet fuel to commercial airlines soon after liberation, but alleges that it was unable to resume normal levels of operation for three years. KAFCO contends that some of the disruption in its business activities was also due to the reduced number of airlines servicing Kuwait International Airport because of a significant decrease in the expatriate population of Kuwait.

170. KAFCO retained the services of a firm of loss adjusters ("KAFCO's consultants"), which produced a report on the damage and losses sustained by the company allegedly as a direct result of Iraq's invasion and occupation of Kuwait. The report of KAFCO's consultants was annexed to the statement of claim and was incorporated by reference. In relation to the claim for business interruption losses, KAFCO's consultants estimated that the business of the company would return to normal operating levels by 30 June 1994. Accordingly, KAFCO makes its claim for the period 2 August 1990 to 30 June 1994, during which it alleges that operating results were adversely affected by Iraq's invasion and occupation of Kuwait.

171. With respect to the claim for business interruption losses incurred during the period 2 August 1990 to 31 March 1991, KAFCO's consultants calculated the estimated loss on the basis of actual aviation fuel sales in litres for the similar period of the prior accounting year, i.e. 1 August 1989 to 31 March 1990. To reflect the rate of growth the company would have allegedly had in the absence of Iraq's invasion and occupation of Kuwait, KAFCO's consultants applied a 15.83 per cent growth factor to the selected sales figures for the months of August 1989 to 31 January 1990 and a 5 per cent growth factor to the figures for February and March 1990. The 15.83 per cent adjustment is the increase of jet fuel sales volume from the six-month period 1 February to 31 July 1990 as compared to the six-month period 1 February to 31 July 1989. The 5 per cent growth factor used in estimating the no-invasion sales volume for February and March 1991 was based on KAFCO's average growth for financial years 1989 to 1990 (two years).

172. With respect to KAFCO's claim for the period from 1 April 1991 to 30 June 1991, KAFCO's consultants based their estimate on actual sales volume of jet fuel for the same months in 1990, increased by a 5 per cent growth rate. Similarly, KAFCO's consultants estimated sales for financial years 1992 to 1994 by applying the same 5 per cent growth rate to the estimated sales of the prior year.

173. To estimate sales value, KAFCO's consultants calculated jet fuel sales prices for the period 1 August 1990 to 30 June 1991 on the basis of the actual average price in the prior six-month period. KAFCO's consultants used the actual sales price per litre realized during the period from July 1991 to June 1994 on the basis that these prices appeared unaffected by the invasion and occupation of Kuwait. KAFCO's consultants then deducted actual sales revenue from the estimated no-invasion revenue.

174. KAFCO also made deductions for cost savings realized. KAFCO's consultants estimated no-invasion costs for each category of expense and compared them with the actual costs incurred in order to arrive at the amount of each cost saving. KAFCO calculated its claim amount for estimated loss of profits by deducting the estimated expenses for the period of reference from the estimated gross revenue.

3. Other tangible property – KWD 1,025,437

175. KAFCO claims KWD 1,025,437 for the following five types of damage or loss: damage to its fuel depot, loss of product from its storage tanks and also from the underground pipeline connecting KAFCO to the two oil refineries, loss of items stored in the maintenance stores of the company, loss of vehicles and loss of goods in transit.

(a) Fuel depot – KWD 110,631

176. In its original claim, KAFCO sought compensation in the amount of KWD 160,000 for damage to its fuel depot and refuelling facilities. In its article 34 responses, KAFCO reduced its claim to KWD 110,631. This lower figure is allegedly based upon the actual cost of the repairs and replacements rather than the estimates put forward in the original claim submission.

177. KAFCO's fuel depot and refuelling facilities include nine storage tanks, a safety and security office, vehicle sun protection canopies, an office block, an inspection bay, a maintenance workshop, a pump house, a store, a drum store, a generator house, two switch rooms, two transformer shelters, a gymnasium and training centre, a guard shack, an operations building, an equipment shelter, a sub-depot office and an open yard. KAFCO claims that many of its buildings were damaged, vandalized and looted by Iraqi forces and that the company's equipment and furniture, comprising a total of 18 items, were damaged or stolen. For the purpose of assessing the repair or replacement costs of the damaged or stolen assets KAFCO's consultants divided the claim into three broad categories. In the case of items requiring repairs, the assessment was based on full actual repair costs, which included all materials, labour, plant and equipment used in the repairs. For items either stolen, completely destroyed or damaged to the extent that repairs were impractical and/or uneconomic, the cost of full replacement at the time of the claim was used. However, for individual items of office furniture and equipment, site and other vehicles, mobile plant, cranes and laboratory equipment, KAFCO's consultants considered that the company would obtain significant benefit by replacing these items. In these instances, KAFCO's consultants adjusted the replacement cost to reflect the age and condition of the original item and, when they were unable to determine this, they applied an average depreciation factor of 20 per cent. To support its claim, KAFCO provided the Panel with copies of invoices for replacement items and the relevant pages of its fixed asset register.

(b) <u>Lost product – KWD 648,439</u>

178. KAFCO seeks compensation in the amount of KWD 648,439 for the loss of Jet A-1 fuel sustained as a result of a spillage from the underground pipeline connecting the oil refineries to the fuel depot (KWD 326,317) and the loss of both Jet A-1 fuel and Chevron Hy-Jet IV lubricant from storage tanks, allegedly stolen by Iraqi forces during the period of Iraq's invasion and occupation of Kuwait (KWD 322,122).

179. KAFCO states that it resumed the pumping of aviation fuel from KNPC's oil refineries on 4 May 1991 through the underground pipeline. KAFCO states that it subsequently noticed a drop of pressure in the pipeline. KAFCO ordered a helicopter survey and, on 8 June 1991, discovered a break in the pipeline of 50 to 75 millimetres in diameter approximately 25 kilometres from the airport's fuel depot. It immediately commissioned repairs from Bechtel Ltd ("Bechtel") and, on 12 June 1991, Bechtel put the pipeline in working order. Pipeline pressure was tested on the same day and, on 13 June 1991, KAFCO was able to resume pumping. KAFCO contends that the break did not exist before Iraq's invasion of Kuwait and that the pipeline did not show any sign of external or internal corrosion when examined on 8 June 1991. KAFCO asserts that, based on eyewitness statements made following the inspection of the leak, the damage to the pipeline was caused by Iraqi earth moving/digging equipment when Iraqi forces attempted to dig a bunker or pursued military activities in this area. In total, KAFCO asserts that it lost 8,060,476 litres of jet fuel from the ruptured pipeline over a period of five weeks. KAFCO states that the repairs to the pipeline undertaken by Bechtel were carried out as part of the Al-Awda project, and that these were paid for by Kuwait Oil Company (K.S.C.) ("KOC"). KAFCO valued the loss of Jet A-1 fuel at the actual purchase price per litre it paid to KPC.

180. Regarding the loss of Jet A-1 fuel and of Chevron Hy-Jet IV lubricant from the storage tanks, KAFCO claims that, at the time of the invasion, it had filled all its storage tanks to be in a position to face a possible shortage from the refineries in case of hostilities in the region. When employees returned to the fuel depot after the liberation of Kuwait, they found that half of the volume of Jet A-1 fuel held prior to the invasion, representing more than 8 million litres, had been taken from the tanks. In addition, they also found that 970 US Quarts of Chevron Hy-Jet IV lubricants were also missing. KAFCO valued the Jet A-1 fuel at the replacement cost as at May 1991, based on the average cost of purchases. In contrast, KAFCO valued the Chevron Hy-Jet IV on the basis of the perpetual inventory value prior to 2 August 1990 because the product was not replaced until August 1992.

(c) <u>Maintenance/stores – KWD 82,651</u>

181. KAFCO asserts losses of KWD 82,651 for this claim element, which consists mainly of the loss of spare parts.

182. KAFCO claims that its premises were subject to widespread looting and vandalism by Iraqi forces from 3 August 1990 to 2 March 1991. Based on inventories taken prior to and after Iraq's invasion and occupation of Kuwait, the company was able to compile a list of missing items. The missing parts were valued using weighted average costs at the time of the invasion, without adjustment for depreciation.

(d) <u>Vehicles – KWD 179,000</u>

183. KAFCO claims KWD 179,000 for the loss of 39 vehicles, which it alleges were either stolen, completely destroyed or damaged beyond economic repair.

184. After the liberation of Kuwait, KAFCO states that it recovered only two damaged refuellers and three damaged dispensers. KAFCO prepared a list of missing vehicles from the company's pre-invasion vehicles register. KAFCO's consultants based the valuation of the vehicles on depreciated replacement cost. KAFCO provided witness statements, post-liberation accounts recording the loss of vehicles as an extraordinary loss, copies of invoices relating to the purchase of replacement vehicles and the asset register prior to invasion, demonstrating the historical purchase cost and accumulated depreciation on each vehicle. In its article 34 responses, KAFCO explained that it could not supply deregistration certificates for these vehicles because depot vehicles were not used outside KAFCO's facilities and for that reason were not registered at the Kuwaiti Vehicle Registration Office.

(e) <u>Goods in transit – KWD 4,716</u>

185. KAFCO claims KWD 4,716 for goods paid for but never received as a result of Iraq's invasion and occupation of Kuwait.

186. Prior to 2 August 1990, KAFCO ordered goods from six overseas suppliers. KAFCO states that the goods arrived by ship in Kuwait before the invasion but were not delivered to KAFCO from the port. After the liberation of Kuwait, KAFCO states that the port authorities were unable to locate the

goods. KAFCO had paid the suppliers upon receipt of the shipping documents and values its loss at the invoiced amounts.

187. In support of its claim, KAFCO provided the Panel with purchase invoices and proof of payment for two transactions. However, trade documents establishing shipment and delivery of the goods at the Kuwait maritime port, and the certificate issued by the Kuwait port authorities acknowledging the loss of the goods, were provided for only one of the above two transactions. KAFCO did not provide documentation showing evidence of the loss of the goods for the other four transactions for which it claims compensation. Rather, it provided a copy of its ledger allegedly corresponding to telex charges incurred for transmitting purchase orders for the goods.

4. Other (bad debts) – KWD 18,108

188. KAFCO claims KWD 18,108 for irrecoverable debts owed to it, in particular by Yemeni and Sudanese airlines, in respect of jet fuel supplied prior to 2 August 1990. KAFCO contends that it made every effort to seek payment from these airlines, but without success. To support its claim, KAFCO provided copies of the relevant invoices as well as evidence that the debts had not been collected. KAFCO claims that these debts are uncollectible because legal proceedings to recover these amounts would not be economical or practical, and because the debtor airlines did not resume flights to Kuwait after the period of occupation and have refused to pay their bills.

189. In its original claim, KAFCO sought compensation in the amount of KWD 21,281. However, after the filing of its original claim, KAFCO further pursued its debtors. It reports that from 1992 to 2002 it received payments from some of these debtors, and it reduced its claim for compensation accordingly. By contrast, in its subsequent submissions, KAFCO sought compensation for an outstanding invoice from Iraqi Airways that it had not initially claimed. As indicated earlier, the Panel did not consider the debt from Iraqi Airways when reviewing KAFCO’s claim because it was not received by the filing deadline referred to at paragraph 18 above.

B. Iraq’s response

190. In relation to the alleged loss for business interruption, Iraq states that the major part of the loss is indirect since sales decreased as a result of a reduction in the number of flights to Kuwait, which is linked to the policies applied by airline companies, and by other economic and political considerations that are not directly related to Iraq’s invasion and occupation of Kuwait. Iraq contends that KAFCO’s claim should be limited to the period 2 August 1990 to 28 February 1991, and should only concern compensation for the employees’ salaries and any expenses of a continuous nature that KAFCO incurred during that period.

191. Iraq also states that there is no evidence to support KAFCO’s assumption that the company would have achieved a compounded annual growth of 5 per cent for the years 1991 and 1992 and 10 per cent for the years 1993 and 1994.

192. On the alleged damage to KAFCO's fuel depot, Iraq is critical of the fact that KAFCO's consultants carried out their inspection 15 months after the Iraqi presence in Kuwait, and that the report is based on statements from employees rather than documentary evidence.

193. Iraq contends that the assessment of the alleged loss of aviation fuel stored in the tanks is based on documents annexed to the statement of claim produced by KAFCO's consultants well after the period of occupation of Kuwait, and not enclosing "real inventories" for pre-invasion and post-invasion quantities. In Iraq's view, it is more probable that the quantities of jet fuel lost were supplied to allied coalition forces aircraft soon after the end of the Iraqi presence in Kuwait. Regarding the alleged loss of jet fuel as a result of a leak in the pipeline, Iraq contends that the statement of claim does not contain evidence that the rupture of the pipeline was caused by Iraqi forces. In addition, Iraq states that KAFCO did not mitigate the alleged loss when it was discovered and should have taken appropriate measures to stop it more quickly.

194. In relation to claimed losses to KAFCO's property and vehicles, Iraq states that KAFCO's allegations are not supported by "material evidence". Iraq asserts that the stores inventory was made more than a month after the period of occupation of Kuwait, leaving enough time for any party to steal the contents of the stores. Iraq makes the same allegation of lack of evidence regarding KAFCO's claims for loss of goods in transit.

195. In regard to bad debts, Iraq's position can be summarized as follows.

(a) The debts arose prior to 2 August 1990. They are not direct losses and do not fall within the jurisdiction of the Commission.

(b) Bad debts are contractual obligations between KAFCO and its customers, the recovery of which should be pursued through courts. Moreover, the debts are borne by "well known airline companies that abide by the rules of the International Air Transport Association (IATA)", which can be used by KAFCO to resolve the matter.

C. Analysis and valuation

1. Business interruption (loss of profits) – KWD 6,444,050

196. During the course of the claim review, the Panel requested KAFCO to supply additional information and data regarding the business loss claim, for which only estimates had been provided when the claim was originally filed. This request for additional information related in particular to KAFCO's actual sales volume and prices, as well as actual expenses for the period from 2 March 1991 to 30 June 1994. Where KAFCO supplied this information, the Panel relied on actual data rather than estimates in reviewing the claim.

197. In its original claim and in documents submitted in its article 34 responses, KAFCO alleged that it suffered business interruption losses until 30 June 1994. The Panel therefore had to consider whether KAFCO's alleged business losses are a direct result of Iraq's invasion and occupation of

Kuwait and, if so, whether the indemnity period of almost four years claimed by KAFCO is appropriate, and on what basis such losses should be calculated.

198. KAFCO bases its calculation of the no-invasion estimated profit on volumes of jet fuel the company would have sold in the absence of Iraq's invasion and occupation of Kuwait. In its submission, KAFCO asserts that the decline in sales volume of jet fuel after the period of occupation and the disruption of its business activities were due to a reduction in the number of flights servicing Kuwait. According to KAFCO, this downturn in flight movements was directly caused by Iraq's invasion and occupation of Kuwait.

199. In reviewing KAFCO's sales records, the Panel noted that a decline in business was apparent during the period immediately following the liberation of Kuwait, with sales significantly lower both in terms of volume and revenue when compared with pre-invasion levels. The Panel finds that the market conditions prevailing after liberation did not allow KAFCO to resume sales to the level prevailing before 2 August 1990. In fact, KAFCO partially resumed jet fuel supplies as soon as its facilities became operational, that is to say, when the necessary repairs to the refuelling equipment system were carried out. Limited supplies resumed, first to Kuwait Airways Corporation on 22 March 1991, and then to some foreign airlines when operations resumed at Kuwait International Airport after 22 April 1991.[50] KAFCO's documents supplied to the Panel demonstrate that the slow return to business operation of foreign airline companies reached its pre-invasion levels around July 1991. It is only from that month that KAFCO had the material capacity to rebuild its profitability with a regular increase in sales volume of its aviation fuel. The Panel therefore finds that Iraq's invasion and occupation of Kuwait disrupted KAFCO's business activities and caused the company business interruption losses.

200. The Panel finds that the compensation period should not go beyond the date at which KAFCO recovered its pre-invasion sales levels.

201. The Panel finds that, at the material time, the jet fuel market in Kuwait was seasonal with periods of high demand in the summer months (in particular, July, August and September) and that the increase in demand during these months was due to an increase in the number of commercial flights to and from Kuwait. The Panel notes that the approach advocated by KAFCO is one of estimating lost revenues based on historical sales volume, sales prices and operating costs, taking into account the fundamentals of this seasonal market. The Panel finds that KAFCO's method of estimating business losses on the basis of the historical performance of the company is consistent with the practice of the Commission,[51] to the extent that such method is properly employed using accurate historical information. Based on its calculation of the no-invasion sales volume, the Panel finds that KAFCO resumed normal sales volume during September 1992. Therefore, the Panel finds that KAFCO's period of compensable loss is from 2 August 1990 to 31 August 1992, the date upon which sales volume reached pre-invasion levels.[52]

202. Having determined the period during which jet fuel sales volume varied from pre-invasion levels, the Panel considered KAFCO's no-invasion sales volume before calculating its no-invasion profits. With respect to the choice of the adequate period of reference for business losses incurred

during the period of invasion and occupation, KAFCO's consultants based their calculation on the actual sales volume of jet fuel for the period from 1 August 1989 to 31 March 1990. The Panel finds that this is consistent with its own analysis of the market. The Panel finds, however, that KAFCO did not provide sufficient evidence in support of the growth rates used by its consultants to calculate the estimated sales volume on which it based the calculation of its claim. The Panel reviewed the performance of the company and found that KAFCO had enjoyed an average annual growth rate of 1 per cent between financial years 1985 and 1989. Accordingly, the Panel finds that KAFCO's no-invasion sales volume during the period of occupation can be calculated at 249,504,386 litres.

203. Regarding the period of reference to be used to calculate the no-invasion sales for the period April 1991 to August 1992, the Panel finds that KAFCO's choice of using the actual volume sold for the same period of the prior year was appropriate. As noted above, the Panel finds that KAFCO's application of a 5 per cent growth rate was not supported by adequate evidence, and the Panel adopts instead a 1 per cent growth rate. Moreover, the Panel finds that the decision of a small number of airlines not to resume flights to Kuwait after the period of occupation cannot be attributed directly to Iraq's invasion and occupation of Kuwait. The Panel finds that, when calculating the no-invasion sales volume, adjustments should be made for the sales to those airlines that did not resume flights to Kuwait. On this basis, the Panel finds that KAFCO's no-invasion sales volume during this period can be calculated at 579,459,287 litres.

204. In determining the no-invasion sales revenue, the Panel finds that the sales prices to be employed should represent as far as possible those that would have prevailed if Iraq's invasion of Kuwait had not occurred. The Panel considers that the aviation fuel price projection study, carried out by KPC's consultants in the fourth instalment of "E1" claims[53] and accepted by the Panel, represents an appropriate basis on which to calculate KAFCO's no-invasion purchase prices. The Panel increased these purchase prices by KAFCO's average pre-invasion gross profit margin to obtain KAFCO's no-invasion selling prices to be used to calculate KAFCO's business interruption losses. The Panel finds that the actual jet fuel prices, on average, are comparable to the no-invasion prices as calculated.

205. To quantify the no-invasion expenses for the period August 1990 to 30 June 1991, KAFCO estimated its cost of sales and other income based on its operating results for the financial year ended 30 June 1990. For financial years 1992 to 1994, KAFCO used the actual ratio of its total costs and its sales income. To be consistent with the approach pursued by the Panel in this claim to favour the use of historical data, the Panel finds that it is appropriate to deduct the pre-invasion average total cost percentage from the estimated no-invasion sales revenues.

206. After deduction of the no-invasion expenses, the Panel finds that KAFCO sustained a loss of profits in the amount of KWD 2,796,211 during the period 2 August 1990 to 31 August 1992. Accordingly, the Panel recommends an award of compensation of this amount for business interruption losses.

2. Other tangible property – KWD 1,025,437

(a) Fuel depot – KWD 110,631

207. KAFCO seeks compensation for KWD 110,631 for damage to its fuel depot buildings and their contents. The Panel notes that KAFCO reduced its claim to reflect the actual cost of the repairs and replacements rather than the estimates initially provided in the original statement of claim. The largest component of the claim relates to damage suffered to an office building and to the electronic equipment it contained, at a total asserted value of KWD 45,512.

208. The Panel reviewed KAFCO's documents and notes that none of the company's financial records were lost during the period of occupation. This enabled the company to compile a list of missing and damaged assets after a physical survey of the site carried out by KAFCO's employees in early April 1991. KAFCO's consultants attached to their report the inventory prepared by themselves after they inspected the premises during the period 30 May to 26 June 1992. The Panel finds that physical damage to KAFCO's offices and equipment occurred during the period of Iraq's invasion and occupation of Kuwait. The Panel also finds that both inventories provided by KAFCO contain the same list of missing and damaged items and that the company sufficiently demonstrated that it suffered a loss from the damage to its fuel depot.

209. The Panel finds that KAFCO provided documentary evidence establishing its ownership of only three quarters of the items for which it claims repairs and replacement expenditure for the fuel depot. Moreover, the Panel finds that the supported repairs and replacement expenditure significantly exceed the net book value of fuel depot assets written off in KAFCO's audited financial statements for 1991 in the amount of KWD 24,206. Accordingly, based on its review of the supporting evidence and KAFCO's 1991 accounts, the Panel recommends an award of compensation of KWD 24,206 for KAFCO's claim for damage to fuel depot buildings and equipment.

(b) Lost product – KWD 648,439

210. In support of its claim for compensation of KWD 648,439, KAFCO submitted evidence of its ownership of the product flowing in the pipeline, copies of the perpetual register and copies of invoices and proof of payment to KPC. Based on the evidence provided by KAFCO, the Panel is satisfied that the damage to the pipeline was directly caused by Iraq's invasion and occupation of Kuwait.

211. The Panel investigated KAFCO's assertion that quick remedial action had been taken to locate and repair the ruptured pipeline when it allegedly noticed a drop in pressure soon after pumping resumption. The Panel finds that KAFCO proceeded with pumping of jet fuel on nine separate days from 4 to 29 May 1991 before it realised the pipeline was losing product. Between those two dates, a total of 7,536,057 litres were lost from the pipeline, representing more than 40 per cent of the volume forwarded by the refineries. KAFCO's documentary evidence demonstrates that the company kept detailed records of the volume sent by Mina Al-Ahmadi and Shuaiba refineries and also of the volume received by KAFCO from the pipeline. By comparing the volume received at the tanks with those

charged in the pipeline by the two oil refineries, the Panel finds that KAFCO should have been in a position to notice that it was losing product, and to take adequate remedial measures to mitigate its loss quickly after it resumed pumping.

212. The Panel considers that a maximum of two deliveries would have been sufficient for KAFCO to become aware of a loss and to take action. Accordingly, the Panel finds that the loss of jet fuel from the first two deliveries of 4 and 7 May 1991 is compensable and recommends compensation of KWD 88,247. The Panel finds that the jet fuel lost from subsequent deliveries is not compensable because KAFCO did not take sufficiently prompt action to mitigate its loss.

213. With respect to KAFCO's claim for the loss of Jet A-1 fuel and 970 US quarts of Chevron Hy-Jet IV lubricant from its storage tanks, the Panel reviewed KAFCO's perpetual inventory register recording movements of products that the company stored before and after the period of invasion and occupation.

214. With respect to the Jet A-1 fuel, the Panel notes that KAFCO did not produce copies of the tank dipping records, nor of the annual sales records to customers. The Panel also notes that, in an affidavit in support of this claim element, KAFCO provided a witness statement indicating that Jet A-1 fuel had been provided free of charge to the United States Air Force at the time of liberation. The Panel further notes, however, that KAFCO subsequently disputed this statement. Considering all of the foregoing, the Panel finds that KAFCO has not produced sufficient evidence that the loss of Jet A-1 fuel was a direct result of Iraq's invasion and occupation of Kuwait. Accordingly, the Panel recommends no award for compensation for this claim element.

215. Regarding the loss of Chevron Hy-Jet IV lubricant, the Panel reviewed the documentary evidence submitted by KAFCO and finds that the alleged loss has been supported. The Panel therefore recommends an award of compensation of KWD 3,124 for this claim element.

216. The Panel finds that KAFCO's claim for loss of product from both the pipeline rupture and the stock at its premises is justified in the amount of KWD 91,371, and recommends compensation in this amount for lost product.

(c) Maintenance/stores – KWD 82,651

217. KAFCO claims KWD 82,651 for the loss to its maintenance stores and workshops allegedly looted and vandalized by Iraqi forces. The Panel reviewed inventories produced by KAFCO prior to and after the invasion detailing the missing items. The Panel also reviewed the invoices for the spare parts purchased for replacement and compared KAFCO's valuation of its lost stock (KWD 82,651) with the "extraordinary losses" recorded in its financial statements for the year ended 30 June 1991. The Panel finds that KAFCO provided sufficient and appropriate evidence in support of its claimed loss, and recommends an award of compensation in the amount of KWD 82,651 for this claim.

(d) Vehicles – KWD 179,000

218. KAFCO claims that 39 vehicles with a total value of KWD 179,000 belonging to the company were either stolen, completely destroyed or damaged beyond economic repair. In the case of total loss of a Kuwaiti vehicle, the Panel usually relies on the vehicle registration cancellation certificates ("deregistration certificates") issued by the Government of Kuwait to establish the existence of the vehicle before Iraq's invasion and to establish the claimant's interest in that vehicle. However, the Panel notes KAFCO's explanation for its failure to supply such deregistration certificates and, consistent with the approach taken by other panels,[54] considers that the claim can be reviewed despite the absence of such certificates.

219. After reviewing all of the documentary evidence provided by KAFCO and the asserted values of the vehicles lost, the Panel finds that the appropriate value of these vehicles to be KWD 25,245. Accordingly, the Panel recommends an award of compensation in this amount for this claim element.

(e) Goods in transit – KWD 4,716

220. The Panel reviewed the evidence provided by KAFCO in respect of the transactions, including dates of shipment, modes of transport and other shipment details in order to determine whether the goods claimed to have been lost in transit were situated in Kuwait on the day of Iraq's invasion and were subsequently lost. The Panel finds that KAFCO wrote off an amount of KWD 3,444 as part of the "extraordinary loss" for goods in transit in its financial statements for the year ended 30 June 1991. Accordingly, the Panel recommends an award of compensation in the amount of KWD 3,444 for this claim element.

3. Other (bad debts) – KWD 18,108

221. When reviewing the claim, the Panel noted that, at regular intervals from the liberation of Kuwait to September 2001, KAFCO sent reminders to its debtors requesting payment of the outstanding invoices and that it received in return payment from some of the companies. The Panel therefore considers that KAFCO's assertion that debts were uncollectible because the debtors did not resume flights to Kuwait has proved to be unfounded. The Panel finds that KAFCO could still receive further payments from its debtors either by way of normal legal proceedings or by continuing normal commercial credit recovery procedures. For these reasons, the Panel finds that KAFCO has not demonstrated that such debtors' failure to pay was directly caused by Iraq's invasion and occupation of Kuwait. The Panel therefore recommends no award of compensation for KAFCO's claim in respect of bad debts.

D. Recommendations

222. The Panel's recommendations with respect to the claim of KAFCO are summarized in table 10 below.

Table 10. KAFCO's claim – recommended compensation
(Kuwaiti dinars)

Claim element	Original amount claimed	Amended amount claimed	Recommended compensation
Business interruption (loss of profits)	6,444,050	6,444,050	2,796,211
Other tangible property	1,083,215	1,025,437	226,917
Other (bad debts)	21,281	18,108	Nil
Total	7,548,546	7,487,595	3,023,128

VI. CLAIM OF KUWAIT SANTA FE FOR ENGINEERING AND PETROLEUM PROJECTS COMPANY

A. Facts and contentions

1. Introduction

223. Kuwait Santa Fe for Engineering and Petroleum Company ("KSF") is a company organized under the laws of Kuwait. All the issued shares in the capital of KSF are owned by Santa Fe International Corporation, which itself is owned by Kuwait Petroleum Corporation ("KPC"). KPC is, in turn, owned by the Government of Kuwait.

224. At the time of its incorporation, KSF had two principal objectives: to represent Santa Fe International Corporation in its drilling and engineering activities in Kuwait, and to second or loan the personnel of the company to KPC and its subsidiaries such as Kuwait Oil Company ("KOC"), Petrochemical Industries Company ("PIC"), Kuwait National Petroleum Company ("KNPC") and Santa Fe International Corporation. The Kuwait Ministry of Public Works was also one of the major customers of KSF at the time of Iraq's invasion and occupation of Kuwait.

225. KSF filed its claim on 30 May 1994 and amended it on 15 February 1995. KSF seeks compensation in the amount of KWD 26,186 for prepaid contracts, damage to real property, other tangible property and other losses allegedly caused by Iraq's invasion and occupation of Kuwait. KSF divided its claim into four categories: contract loss, real property loss, other tangible property loss and other losses. KSF also claimed an unspecified amount for interest on any award at a rate to be determined by the Commission. Its claim is summarized in table 11 below.

Table 11. KSF's claim
(Kuwaiti dinars)

Claim element	Original amount claimed	Amended amount claimed
Prepaid contracts	14,082	13,927
Real property	1,175	1,175
Other tangible property	9,779	9,779
Other	1,005	1,305
Total	26,041	26,186 [a]

[a] KSF's amendment increasing the total amount of its claim was timeous. See paragraph 18 above.

226. While KSF's claim form and the statement of claim stated the total amount claimed in Kuwaiti dinars, a portion of the claimed loss was incurred in United States dollars. KSF converted these amounts to Kuwaiti dinars using exchange rates that it selected. Consistent with its practice in previous instalments, the Panel has assessed these amounts in the currencies in which the expenses were incurred.

2. Prepaid contracts – KWD 13,927

227. KSF claims compensation for losses in respect of two categories of prepaid contracts: prepaid rental agreements and prepaid maintenance agreements.

(a) Prepaid rent – KWD 13,270

228. KSF states that it suffered a loss of KWD 13,270 in relation to rent it had prepaid in respect of its Kuwait City offices located at Union Centre in Farwaniya and for apartments located in the Marafi complex at Abu Haifa. KSF states that payments were made according to the terms of the two agreements, which provide for payment in advance every three months. Payments were allegedly made by KSF in July 1990 for these offices and apartments for the period of July, August and September 1990. KSF states that its personnel vacated the offices and the apartments on 2 August 1990 for the entire period of the occupation of Kuwait. The first employees returned to KSF's offices shortly after liberation. In support of its claim, KSF provided copies of the two rental agreements, a copy of the trial balance as at 30 June 1990, copies of the cheques paid to the landlords, of the bank draft voucher for the office rent and of an "internal summary payment" for the apartment rent. The amount claimed by KSF allegedly represents the prepaid rentals for the months of August and September 1990.

(b) Prepaid maintenance – KWD 657

229. KSF alleges that it made pre-payments for four maintenance contracts relating to its telephone system, typewriters, computers and mobile telephone system for a total amount of KWD 657. KSF states that it had entered into annual maintenance agreements with four companies for the above services. KSF contends that the agreements were lost when its offices were looted during the occupation of Kuwait. KSF states that it attempted to contact each of the four companies in order to obtain evidence of the maintenance agreements, but that the companies had either ceased to exist or had suffered losses themselves and were therefore unable to locate the requested documents. KSF provided copies of the journal vouchers recording the amounts it paid to the four maintenance companies which it alleges correspond to the amounts due in respect of the annual maintenance agreements. KSF claims the portion of the annual charges under these agreements for the period of Iraq's occupation of Kuwait.

3. Real property – KWD 1,175

230. KSF claims KWD 1,175 for physical damage to its offices.

231. KSF alleges that, when its employees returned to the premises shortly after liberation of Kuwait, they found the offices had been damaged and, to a certain extent, looted. KSF states that it was necessary to repair the damage after liberation in order to resume the normal activities of the company. Santa Fe Drilling Company, a subsidiary of Santa Fe International Corporation which had employees available, carried out the essential repairs for a total cost of USD 4,000. In its statement of claim, KSF converted this amount to Kuwaiti dinars using an exchange rate that it selected. KSF states that it paid

Santa Fe Drilling Company in cash and therefore has no bank statement showing evidence of payment. KSF produced a copy of an invoice from Santa Fe Drilling Company and a receipt of payment from that company for the full amount.

4. Other tangible property – KWD 9,779

232. KSF claims three separate amounts under this category of loss. The amount of KWD 1,750 relates to the loss of office furniture and equipment, KWD 6,229 relates to the damage to apartment furniture and fixtures and KWD 1,800 relates to the loss of petty cash.

(a) Fixed asset losses – KWD 7,979

233. KSF states that 29 residential apartments rented by the company in the Marafi complex were discovered in a state of devastation after the liberation of Kuwait. KSF contends that Iraqi forces occupied the apartments during the period of occupation and removed most of their contents. KSF states that the furniture not taken by Iraqi forces was destroyed or damaged beyond economic repair. In support of its claim, KSF provided a list of damaged and missing items. It assessed the value of the loss of apartment furniture, which it purchased in April 1990, based upon its written-down value. KSF also provided copies of the original purchase invoices of the lost items, a specimen list of furniture for one of the apartments and an extract from the fixed asset register showing KSF’s valuation of the furniture as at 2 August 1990, adjusted to reflect depreciation.

234. With respect to KSF’s office furnishings, KSF states that it was not able to provide any original invoices in support of its claim. It states that its fixed asset register supports both the ownership of the items and their valuation.

(b) Loss of cash – KWD 1,800

235. KSF states that it held KWD 1,800 in cash at its office in Farwaniya on 2 August 1990. On their return to the office, around 15 March 1991, KSF employees found that the office doors had been opened and the offices had been ransacked. Drawers and files had been broken and the cash box was missing. KSF contends that witnesses reported to the General Manager of the company that Iraqi forces visited the offices and stole the contents. KSF produced a copy of the trial balance report for the month ended 31 July 1990 showing the claimed amount under the heading “petty cash” and a copy of the audited financial statements for the year ended 30 June 1991 showing that this amount was identified as part of the extraordinary loss recorded in financial year 1991.

5. Other – KWD 1,305

236. KSF claims KWD 1,305 for receivables due from ex-employees in respect of private telephone bills KSF allegedly paid on their behalf, and the cost of airline tickets for five employees to return to work after the liberation of Kuwait. KSF states that these expenses were directly caused by Iraq’s invasion and occupation of Kuwait.

(a) Receivables due from ex-employees

237. In the period immediately following Iraq's invasion of Kuwait, all KSF expatriate employees left Kuwait to return to their respective home countries. These employees were all expatriates on secondment from KSF to either KOC or KNPC. The telephone account was maintained under KSF's name but allegedly related to the employees' private apartment telephones provided by KSF. KSF states that, although it paid the telephone bills upon receipt, its employees were asked to verify them and either pay any personal telephone calls directly to KSF or ask KSF to deduct the relevant amount from their salary. None of the employees returned to Kuwait, and KSF states that the company, which has no means of locating its former employees and which no longer owes them salaries, cannot recover from them the amount due for the telephone charges.

238. The basis of calculation of the claimed loss is the amount of outstanding invoices paid by KSF to the supplier. KSF states that it is unable to supply copies of the invoices and has not been able to locate the company's audited employees' receivables register as at 30 June 1991.

(b) Re-mobilization expenses

239. Re-mobilization expenses claimed by KSF are the airfares for five support staff brought back to Kuwait after liberation to help set up KSF offices and resume normal operations. KSF states that four of these employees were employed by KSF on 2 August 1990. The fifth employee was part of Braun Transworld Corporation's KNPC Mina Abdullah refinery modernization project, and was called back by the KSF General Manager because of a shortage of experienced manpower in Kuwait.

240. KSF states that the airfare costs were initially paid by Santa Fe Drilling Company, which subsequently charged KSF for these airfares. The basis of calculation of the claimed loss is the cost of the five airfares paid by KSF to Santa Fe Drilling Company. KSF, however, did not provide a copy of the invoice from Santa Fe Drilling Company to KSF in respect of these claimed expenses.

B. Iraq's response

241. Iraq's written response to the claim can be summarized as follows.

(a) Iraq contends that the losses of prepaid rent and maintenance contracts are "not real losses" since the claimant did not have to pay additional sums to rent alternative office space or to obtain telephone or computer services. Iraq states that prepayment is a normal practice by all companies whether the properties or services are used throughout the contract period or for part only, since it is more economical to conclude long-term contracts than short-term contracts.

(b) Iraq is critical of the absence of any supporting evidence for the asserted damage to the claimant's offices, for the losses in relation to the furnishings of its offices and of its apartments, and for the loss of petty cash.

(c) Iraq contends that the telephone bills of the employees are personal debts owed by the employees to the telephone companies. Iraq points out that it is not clear why KSF decided to pay these outstanding invoices on behalf of its employees and states that it is necessary to ascertain that the telephone company did not submit a claim to the Commission on the same grounds.

(d) With respect to KSF's claim for re-mobilization expenses arising from airfare expenses for five support office staff brought back to Kuwait after liberation, Iraq alleges that this does not represent additional expenses. Iraq states that the period spent outside Kuwait by the five employees must have been substituted for their annual leave "for at least one time, thus saving travel cost of double trip for those employees".

C. Analysis and valuation

1. Prepaid contracts – KWD 13,927

(a) Prepaid rent – KWD 13,270

242. In reviewing the documents provided by KSF in support of its claim of KWD 13,270 for prepaid rent in respect of offices and apartments, the Panel found that KSF was paying the rent for offices and apartments that were occupied by itself and other subsidiaries of Santa Fe International Corporation. KSF states in its 34 responses that the rents were apportioned between these subsidiaries, which in return normally repaid KSF for the office space and apartments occupied by their staff. KSF further states that it seeks compensation for the total prepaid rent amount because Santa Fe International Corporation's subsidiaries were never billed for their portion of the leases. The Panel recommends an award for compensation in the amount of KWD 9,677, which corresponds to the portion of the prepaid rent KSF paid for the premises that were occupied by KSF staff.

(b) Prepaid maintenance – KWD 657

243. In the case of prepaid maintenance agreements, KSF provided copies of the journal vouchers dated 30 June 1991 that correspond to the amounts due to the four maintenance companies. The Panel also investigated KSF's statement that these companies had not been able to provide KSF with a copy of their respective contracts because the companies had either disappeared during or after the period of invasion and occupation of Kuwait or had been severely damaged. The Panel finds that, in respect of one of these companies, KSF's assertion is supported by independent evidence.[55] Moreover, the Panel notes that the amount claimed in this case corresponds to the "extraordinary losses" recorded in its financial statements for the year ended 30 June 1991. Therefore, the Panel recommends an award for compensation in the amount of KWD 657 in respect of prepaid maintenance.

2. Real property – KWD 1,175

244. Although KSF provided the Panel with a copy of an invoice from Santa Fe Drilling Company and with a receipt of payment from that company in support of its claim of KWD 1,175 for damage to its offices, the Panel considered that it was unable to determine with sufficient certainty that the invoice was issued in respect of the claimed repairs carried out by Santa Fe Drilling Company. The Panel therefore recommends no award of compensation for KSF's claim in respect of real property.

3. Other tangible property – KWD 9,779

(a) Fixed asset losses – KWD 7,979

245. The Panel finds that the documents provided by the company can be reconciled with its audited financial statements. The Panel also finds that the basis used by KSF to value its fixed asset losses was reasonable. The Panel therefore recommends an award of compensation in the amount claimed of KWD 7,979 in respect of this claim element.

(b) Loss of cash – KWD 1,800

246. The Panel reviewed the information provided by KSF in support of its claim and finds that it corroborates the statement made by KSF. The Panel therefore recommends an award of compensation in the amount of KWD 1,800 for loss of cash.

4. Other – KWD 1,305

(a) Receivables due from ex-employees

247. When reviewing the documentary evidence provided by KSF, the Panel noted that the claimed amount was already due to the company by the employees as at 30 June 1990. KSF did not provide any explanation as to why the claimed amount had not been recovered from the employees' July 1990 salaries. Nor did KSF provide historical evidence that the cost of private calls was charged by KSF to its employees. The Panel therefore recommends no award of compensation for KSF's claim in respect of receivables due from ex-employees.

(b) Re-mobilization expenses

248. With regard to this claim element, the Panel reviewed Iraq's contentions that the airfares paid for the employees to return to Kuwait were due for annual leave. It notes that, although four of the five employees were employed by KSF before 2 August 1990, KSF failed to provide a copy of their employment contracts. For the employee sent from Braun Transworld Corporation to KSF, the Panel finds that KSF provided no substantiating evidence in regard to the cost of the airfare. The Panel therefore recommends no award of compensation for KSF's claim in respect of expenses incurred for re-mobilization.

D. Recommendations

249. The Panel's recommendations with respect to the claim of KSF are summarized in table 12 below.

Table 12. KSF's claim – recommended compensation
(Kuwaiti dinars)

Claim element	Original amount claimed	Amended amount claimed	Amount of compensation recommended
Prepaid contracts	14,082	13,927	10,334
Real property	1,175	1,175	Nil
Other tangible property	9,779	9,779	9,779
Other	1,005	1,305	Nil
Total	26,041	26,186	20,113

VII. CLAIM OF KUWAIT DRILLING COMPANY

A. Facts and contentions

1. Introduction

250. Kuwait Drilling Company (K.S.C.) ("KDC") is a company organized under the laws of Kuwait. KDC carries on business as a supplier of drilling and workover services for oil and gas wells. KDC claims compensation in the amount of KWD 31,122,687.

251. KDC was formed in 1963. At all times material to this claim, Marine Services and Contracting Co ("MSC"), a company whose shares are traded on the Kuwaiti stock market, owned 51 per cent of KDC's shares. The remaining 49 per cent of its shares were owned by Kuwait Petroleum Corporation ("KPC"). Until 1997, the Government of Kuwait, represented by the Ministry of Oil, owned approximately 45 per cent of the shares of MSC.

252. On 2 August 1990, KDC owned a total of seven drilling rigs and had leased a further four rigs from Santa Fe International Corporation ("Santa Fe"), a wholly-owned subsidiary of KPC. All of the rigs save one, which had been damaged in a fire in 1987, were operational and deployed under separate contracts with Kuwait Oil Company ("KOC"). The contracts were expected to continue for differing periods of time, and those that were shortly due to expire were the subject of renewal negotiations. As at 2 August 1990, KDC enjoyed the role of predominant drilling service provider to the Kuwait oil industry, and its principal customer was KOC.

253. KDC's claim is summarized in table 13 below.

Table 13. KDC's claim
(Kuwaiti dinars)

Claim element	Original amount claimed	Amended amount claimed
Contract	1,141,416	Nil
Real property	10,000	10,000
Other tangible property	18,955,508	18,955,508
Payment or relief to others	384,874	365,759
Loss of income	8,099,341	9,030,034 [a]
Interest	2,754,336	2,754,336
Claim preparation costs	7,050	7,050
Total	31,352,525	31,122,687

[a] This amendment results in an increase of this claim element and a simultaneous decrease of the original amount claimed for contract losses as a result of the claimant's request to re-categorize loss elements.

2. Contract – Nil

254. KDC alleges that, on 2 August 1990, it was in the process of performing its obligations under a number of existing contracts with KOC of differing durations (the "existing contracts") for the supply of drilling and workover services. KDC states that all the existing contracts were cancelled with effect from 2 August 1990 as a direct result of Iraq's invasion and occupation of Kuwait. KDC states that the reason for the cancellation of the existing contracts was that their performance became impossible due to the theft or destruction of all of KDC's drilling equipment. KDC originally sought compensation for the unrealised profits in respect of the uncompleted portions of the existing contracts in the amount of KWD 1,141,416. During the course of the Panel's review of the claim, KDC re-categorized this element of the claim for reasons which are described more fully in paragraph 255 below.

255. In response to the Panel's enquiries, KDC elected to amend its claim for loss of income (described in paragraphs 260 and 261 below) and contract losses by consolidating these two claim elements. KDC alleged that, due to the loss of documentary records, it was no longer able to substantiate its claim for contract losses. KDC alleged that both its contract losses and loss of income were, in substance, species of the same theoretical loss type, namely, lost profits due to business interruption. It alleged further that the consolidation of these two loss categories should pose no procedural or substantive obstacles. As a consequence of the proposed consolidation, KDC re-categorized its claim for contract losses by increasing its claim for loss of income by KWD 930,693. The cumulative effect of this amendment, if permitted by the Panel, would be to remove the claim for contract losses, and to increase the claim for loss of income by the amount of KWD 930,693. The overall effect on the compensation claimed by KDC is a reduction in the total claimed amount of KWD 210,723 as reflected in table 13 above. As a preliminary matter, the Panel finds that KDC's proposed amendment is permissible, and reviews KDC's claim as amended by KDC (see table 13 above).

3. Real property – KWD 10,000

256. KDC alleges that Iraqi military personnel occupied its offices and warehouse located in East Ahmadi for several months following Iraq's invasion of Kuwait, causing damage to these facilities. KDC alleges that the estimated cost of restoring the warehouse and offices to their pre-invasion condition was KWD 10,000. At the time of filing its claim, KDC had not actually carried out the necessary repairs, but did so subsequently in 1999.

4. Other tangible property – KWD 18,955,508

257. KDC alleges that most of its tangible property, comprising spare parts inventory, drilling rigs, transportation equipment, furniture and fixtures were destroyed or stolen by Iraqi forces. KDC also claims that it lost the value of "work in progress", by which it means the value of capital expenditure to its drilling rigs that had not yet been returned to service. KDC regards such expenditures as being of a capital nature and recorded the expenses as fixed assets in its accounting records. KDC measured the extent of each of these losses by selecting what it considered the most appropriate valuation

method for each subcategory of loss. KDC valued its inventory of spare parts, furniture and fittings and work in progress losses at KWD 799,783, KWD 69,215 and KWD 90,775, based upon the accounting book value and original cost of these respective items. KDC valued its drilling equipment in the amount of KWD 17,893,631 based upon the depreciated replacement cost or net book value of its seven drilling rigs. Finally, KDC valued transportation equipment losses at KWD 102,104 using the depreciated historical cost.

5. Payment or relief to others – KWD 365,759

258. KDC alleges that it paid its employees their salaries from 2 August 1990 to February 1991, while the company was not operational. The aggregate of the salaries paid during this period amounted to KWD 102,711. In addition, KDC alleges that, after the liberation of Kuwait in March 1991, it laid off the majority of its staff members. KDC alleges that it became liable under Kuwaiti law to pay to each employee an indemnity as a result of the termination of his employment (the "termination indemnity"). KDC claims the full cost of the termination indemnity in relation to staff members having less than five years' service, as it would ordinarily have had no obligation to make such payments had the employee himself terminated his employment, and claims 50 per cent of the termination indemnities paid to staff of more than five years' service, as it would ordinarily only have been liable to pay these staff members 50 per cent of the indemnity actually paid had the employee himself terminated his employment.

259. In response to the Panel's enquiries, KDC reduced the amount claimed under this category of loss to KWD 365,759.

6. Loss of income – KWD 9,030,034

260. KDC alleges that its business operations ceased as a direct result of Iraq's invasion and occupation of Kuwait. All the seven drilling rigs it owned and the four additional rigs leased from Santa Fe (one of its competitors, and at the time a wholly-owned subsidiary of KPC) were stolen or destroyed, leading to the cancellation of its existing drilling contracts with KOC. KDC alleges that, as a result, it was unable to re-enter the market at the crucial moment when KOC commenced its post-invasion drilling operations. KDC states that Santa Fe was appointed on 27 February 1991 to conduct all drilling work in Kuwait under a five-year contract between KOC and Santa Fe. At the time of filing its statement of claim, KDC estimated that it would not be able to return to its pre-invasion level of profitability before the end of 1995. Notwithstanding the foregoing, KDC limits its claims for compensation to the profits which it would have earned from 2 August 1990 to 31 December 1994.

261. KDC calculates its claim for loss of profits by projecting its historical average net profits earned from operations from January 1985 to July 1990 over the claim period. In this way KDC calculates that, based on historical performance, it could reasonably have expected to earn net profits of KWD 1,192,646 from August 1990 to February 1991, and KWD 7,837,388 from March 1991 to 31 December 1994. From these two amounts, KDC subtracted profits of KWD 930,693, claimed under the contract losses referred to in paragraphs 254 and 255 above.[56] KDC in fact earned no trading profits during the claim period, as it was unable to conduct any drilling operations during the claim

period and was only able to recommence limited drilling operations in 1999. Its claim therefore originally comprised its expected trading profits over the claim period, but was later amended as described in paragraph 255 above.

7. Interest – KWD 2,754,336

262. KDC claims interest in the amount of KWD 2,754,336 calculated at the rate of 7 per cent per annum from different dates depending on the type of loss in question and terminating on 31 December 1993. KDC also alleges that interest should continue to accrue on the losses until the date upon which it receives compensation.

8. Claim preparation costs – KWD 7,050

263. KDC claims the actual costs incurred and paid by it in respect of legal fees, extraordinary auditors' fees and costs of translation of relevant documents associated with the presentation of its claim. These costs are alleged to amount to KWD 7,050.

B. Iraq's response

264. Iraq's written response to the claim may be summarized as follows.

(a) KDC's claim for tangible property has been exaggerated. Evidence filed by KDC itself, in the form of an annex to its claim, indicates that the true value of the tangible property was approximately KWD 10,600,000 in contrast with the claimed amount of approximately KWD 18,900,000.

(b) Compensation for loss of income should be limited to the direct results of the events of 2 August 1990. The period of interruption of KDC's business as a direct result of those events does not exceed seven months, being the period of the Iraqi presence in Kuwait. The claimant's operations in the subsequent period were governed by the decisions of its management and the policies of its owners. The failure by KDC to re-establish a trading relationship with KOC is not to be blamed on Iraq, but is governed by the internal relationship between KDC, its clients and its owners.

(c) There should be no award of interest on compensation.

(d) The Panel should subject all other claimed items to a thorough investigation, and KDC should be required to submit supporting evidence to substantiate its allegations, with an emphasis on the principle of mitigation.

C. Analysis and valuation

1. Contract - Nil

265. In response to the Panel's request for additional information, KDC elected to re-categorize this element of the claim as described in paragraph 255 above. In view of this election, items formerly

categorised as contract losses are now reviewed by the Panel as loss of income in paragraphs 283-287 below.

2. Real property – KWD 10,000

266. In support of its claim, KDC provided a copy of the original quotation for the repairs obtained in 1993, together with the relevant invoices and proof that during 1999 it had paid the contractor an aggregate amount in excess of the originally anticipated cost. The Panel finds that all these costs, save an amount in respect of work outside the scope of the original quotation, were reasonably incurred in order to restore KDC's real property to its pre-invasion condition. Consequently, the Panel recommends an award of compensation in the amount of KWD 9,441 for real property losses.

3. Other tangible property – KWD 18,955,508

267. In regard to its stock of spare parts, KDC provided copies of relevant audited financial statements together with the supporting audit working papers. These documents confirmed that KDC had written off the value of the missing spare parts as an extraordinary loss in the financial statements for the year ended 31 December 1990. Additionally, the Panel examined KDC's stock records from June 1987 to July 1990. Based upon these records, the Panel is satisfied that the quantity of stock on hand as at 2 August 1990 was reasonably stated, and that KDC had suffered the loss as alleged. For these reasons, the Panel finds that KDC has established its claim for compensation for spare parts inventory, and recommends an award of compensation in the amount of KWD 799,783 for this claim element.

268. KDC claims compensation of KWD 17,893,631 in respect of the loss of all of its drilling equipment. The claim amount was apportioned separately between six fully operational land-based drilling rigs valued on the basis of their depreciated replacement cost of KWD 17,437,460, the salvaged remains of one fire-damaged rig with a net book value of KWD 154,719 and a collection of equipment described as "general rotary"[57] with a net book value of KWD 301,452.

269. KDC also seeks compensation in the amount of KWD 102,104 for losses that it described as "transportation equipment". Upon investigation, the Panel found that the claim for transportation equipment was in substance a claim for the costs of transporting replacement drilling rigs from the point of manufacture to the point where the original stolen rigs had been located. The Panel accordingly assessed the claim for transportation equipment as part of the cost of replacing KDC's lost rigs.

270. The Panel finds that KDC established that it was the owner of all of the rigs and the general rotary by submitting the purchase and loan agreements in respect of five of the rigs and the applicable loan agreements in respect of the other two rigs. Furthermore, the Panel finds that KDC has demonstrated ownership of all of KDC's drilling equipment by reference to KDC's audited financial statements, fixed asset register and insurance policies in respect of all drilling equipment.

271. The Panel notes that all of KDC’s drilling equipment had been transferred to the Iraqi Drilling Company during Iraq’s invasion and occupation of Kuwait. This was confirmed in a Ministerial Order issued by Iraq’s Minister of Oil dated 16 September 1990 stating that: “moveable assets of Kuwaiti Drilling Company in excess of the needs, shall be transferred to Basra Governate within the custody of the Iraqi Drilling Company.” Furthermore, the Panel also notes that KDC’s audited financial statements dated 31 December 1990 confirm that KDC wrote off the entire net book value of its drilling equipment with effect from 2 August 1990.

272. In regard to the valuation of its losses, KDC relied upon estimates of the cost of replacing its lost drilling rigs obtained from a manufacturer of drilling rigs based in the United States. KDC adjusted the estimated replacement costs of each rig by deducting an amount of depreciation in order to account for the age of each lost rig. In regard to rig 9 and the general rotary, KDC relied upon the net book value appearing in its audited financial statements and fixed asset register as at 31 July 1990.

273. The Panel considered a variety of methods available to it in determining the most appropriate valuation methodology applicable to each item of equipment. The Panel examined the values apparent from the insurance policies applicable to each rig, the cost of acquisition, the cost of replacement and the likely market value of the rigs as at 2 August 1990.

274. In regard to the six operational rigs, the Panel finds that KDC’s method of valuation, while valid in approach, does not adequately take account of the depreciation applicable to assets of this nature, as ordinarily encountered in the oil well drilling industry. The claimant’s method of accounting for depreciation was to allocate depreciation on a straight-line basis for a period of between 10 and 25 years for the different components of each rig. The Panel finds that the straight line method of depreciation is unsuitable to the valuation of drilling equipment, and chose instead to apply the reducing balance method of depreciation.

275. The Panel finds that, applying this alternative depreciation method, KDC’s operational drilling rigs had a value of KWD 9,031,861 as at 2 August 1990.

276. In regard to KDC’s non-operational rig and general rotary, KDC elected to base its claim valuation on the net book value of these items. In its investigation, the Panel found that the claimed amount was less than the market value and depreciated replacement cost of these two items. The Panel accordingly finds that KDC’s claim for compensation of KWD 456,171 in respect of rig 9 and the general rotary was reasonably stated.

277. In summary, the Panel recommends the award of compensation of KWD 9,488,032 in respect of KDC’s claim for lost drilling and transportation equipment. This amount is composed of KWD 9,031,861 in respect of the six operational drilling rigs and KWD 456,171 in respect of rig 9 and the general rotary.

278. In regard to the claim for furniture and fittings, the Panel finds that the claim amount of KWD 69,215 comprises items of furniture, fittings and machinery and communication equipment. The Panel notes that KDC had written off an amount of KWD 79,476 in respect of the same items in its audited

financial statements dated 31 December 1990. The amount written off was accordingly greater than the amount for which KDC now seeks compensation. The Panel is satisfied that KDC's fixed asset register accurately recorded the cost of the items and that KDC had suffered the loss as alleged. The Panel therefore recommends an award of compensation in the amount of KWD 69,215 for furniture and fittings.

279. In regard to the amount of KWD 90,775, which KDC claims for "work in progress", the Panel investigated KDC's audited financial statements and audit working papers in respect of the financial statements for the period of 31 July 1990. The Panel found that an amount of KWD 9,400 claimed in respect of the modification of a rig yard owned by MSC (KDC's parent company) was not an expense for which KDC was liable. Additionally, KDC's audited financial statements reflected that this amount had not been taken into account in the calculation of the extraordinary loss written off in the financial statements for the year ended 31 December 1990. Save for the amount of KWD 9,400, the Panel finds that the loss of work in progress is compensable and is adequately substantiated with relevant evidence. Accordingly, the Panel recommends an award of compensation in the amount of KWD 81,375 for this claim element.

280. In summary, the Panel recommends an award of compensation in the aggregate amount of KWD 10,438,405 for KDC's tangible property losses. This amount is made up of the Panel's recommended awards as follows: spare parts for the amount of KWD 799,783; drilling rigs and equipment for the amount of KWD 9,488,032; furniture and fittings for the amount of KWD 69,215; and work in progress for the amount of KWD 81,375.

4. Payment or relief to others – KWD 365,759

281. The claimed amount is comprised of the aggregate of salaries paid to all of KDC's employees during the seven-month occupation period from 2 August 1990 to February 1991, totalling KWD 102,711, and of the amount of KWD 263,048 paid to those employees whom KDC laid off as a direct result of Iraq's invasion and occupation of Kuwait.

282. Notwithstanding requests by the Panel, KDC did not supply the requisite supporting evidence to demonstrate that it had paid these amounts to its employees. The Panel accordingly recommends no award of compensation for this claim element.

5. Loss of income – KWD 9,030,034

283. For purposes of the calculation of its claim, KDC projected that it would have earned monthly net profits of KWD 170,378 over the 53-month claim period from 2 August 1990 to 31 December 1994. The projected monthly net profits were derived by calculating the average monthly profits earned by KDC in the 72 months preceding Iraq's invasion and occupation of Kuwait.

284. The panel finds that KDC suffered loss of income as a direct result of Iraq's invasion and occupation of Kuwait. The Panel reviewed KDC's audited financial statements for the calendar years 1983 to 2001. The Panel is satisfied that KDC had accurately calculated its average monthly net

profits from January 1985 to July 1990 to be KWD 170,378 per month and that this amount was properly substantiated by the audited financial statements. The Panel also investigated KDC's historic profit trend from 1983 to 1990. The Panel established that, from 1983 to 1989, KDC's turnover steadily worsened, and its net profits were in overall decline. The trend for both turnover and net profits was reversed in the first seven months of 1990, when there was a marked improvement.

285. The Panel conducted a separate examination of the planned drilling expenditure budget by KDC's principal customer, KOC. For the purposes of this investigation the Panel examined KOC's annual work programme and budget records for financial years 1988/89 and 1990/91, as well as a draft five-year corporate plan produced in May 1990, covering the period from financial years 1990/91 to 1994/95. Based upon these records, the Panel determined that KOC's annual drilling expenditure was projected to vary during the claim period in a range of between approximately KWD 20,000,000 and KWD 50,000,000.

286. Based upon the Panel's finding that KDC's turnover and net profits were in a downward trend during most of the five years preceding Iraq's invasion and occupation of Kuwait, and the significant variations in KOC's projected drilling expenditure for the five years after 2 August 1990, the Panel finds KDC's average net profit calculation of KWD 170,378 per month to be an unreliable indication of the profits that KDC could reasonably have expected to earn during the claim period. The Panel finds that a more realistic projection of KDC's net profits could be obtained from a simple average of KDC's trading results over the three financial years prior to the invasion. Applying this method, the Panel finds that KDC would have earned monthly net profits of KWD 98,973 during the claim period.

287. In regard to the period for which KDC should be compensated for its lost profits, the Panel investigated correspondence and documents pertaining to the issue of KDC's ability to recommence its business operations. Based upon these records, although KDC did not recommence limited operations until 1999, the Panel finds that KDC should reasonably have been able to re-establish itself to its pre-invasion trading position by 31 December 1993, and that any loss of profits after that date were, in any event, not a direct result of Iraq's invasion and occupation of Kuwait. The Panel accordingly finds that KDC should be compensated for its lost profits from 2 August 1990 to 31 December 1993 at the rate of KWD 98,973 per month, an aggregate amount of KWD 4,057,893. The Panel recommends the payment of compensation of this amount in respect of KDC's claim for loss of income.

6. Interest – KWD 2,754,336

288. The Panel finds that KDC's claim for interest falls within the scope of Governing Council decision 16, as discussed in paragraph 336 below. Consequently, the Panel takes no action in respect of this claim.

7. Claim preparation costs – KWD 7,050

289. For the reasons set out in paragraph 340 below, the Panel takes no action with respect to KDC's claim for claim preparation costs.

D. Recommendations

290. The Panel's recommendations with respect to the claim of KDC are summarized in table 14 below.

Table 14. KDC's claim - recommended compensation
(Kuwaiti dinars)

Claim element	Original amount claimed	Amended amount claimed	Amount of compensation recommended
Contract	1,141,416	Nil	Nil [a]
Real property	10,000	10,000	9,441
Other tangible property	18,955,508	18,955,508	10,438,405
Payment or relief to others	384,874	365,759	Nil
Loss of income	8,099,341	9,030,034	4,057,893 [a]
Interest	2,754,336	2,754,336	See paragraph 288
Claim preparation costs	7,050	7,050	See paragraph 289
Total	31,352,525	31,122,687	14,505,739

[a] See paragraph 265.

VIII. CLAIM OF KUWAIT OILFIELD SUPPLY COMPANY

A. Facts and contentions

1. Introduction

291. Kuwait Oilfield Supply Company ("KOSC") is a company organized under the laws of Kuwait. KOSC conducts business as a supplier of equipment, services and technical assistance to oil companies and oil refineries.

292. KOSC claims compensation in the amount of KWD 447,344. Its claim is summarized in table 15 below.

Table 15. KOSC's claim
(Kuwaiti dinars)

Claim element	Original amount claimed	Amended amount claimed
Business transaction or course of dealing	160,655	160,655
Other tangible property	5,265	5,265 [a]
Loan interest	187,422	187,422
Loss of income	34,656	34,656
Claim preparation costs	2,500	2,500
Interest	56,846	56,846
Total	447,344	447,344

[a] The claimant attempted to increase the amount of its claim with respect to this claim element but the Panel determined that the amendment was not timeous.

2. Business transaction or course of dealing – KWD 160,655

293. KOSC states that it had been awarded two contracts in March 1990 by Kuwait Oil Company ("KOC") for the supply of oil field equipment and instruments with an aggregate value of KWD 3,446,066. It states that one of the contracts and the remaining unperformed portion of the other were cancelled by KOC as a direct result of Iraq's invasion and occupation of Kuwait. KOSC states that the unrealized profits from these two contracts amounted to KWD 96,403 ("contract losses"). In addition, KOSC states that it suffered a currency exchange loss of KWD 64,252 as a result of having purchased United States dollars in the amount of USD 6,175,749 from its bankers in anticipation of performing its obligations under one of the contracts with KOC. KOSC states that, after the liberation of Kuwait, it sold this amount back to its bankers, but that the currency exchange rate had moved adversely against it, and that it had therefore suffered a loss.

3. Other tangible property- KWD 5,265

294. KOSC states that it had ordered and paid for a shipment of steel material to the value of KWD 5,265 from a supplier in the United Kingdom. It states that the shipment arrived at Shuwaikh port in

Kuwait on 17 July 1990, and that it was in the process of arranging for the goods to clear customs, but was unable to do so due to closure of all governmental offices on 2 August 1990. KOSC states that it was unable to recover the goods from the port in spite of its efforts, and that the goods were later looted by the Iraqis. KOSC claims compensation based upon the cost price of the goods.

295. In response to the Panel's enquiries, KOSC sought to increase the amount claimed under this claim element to KWD 125,161 by including a claim for the value of a ship owned by it and situated in Iraq on 2 August 1990. The claimant alleges that the ship was destroyed and was reported as having been scrapped. The Panel did not consider this element in its review of KOSC's claim as it was not submitted within the authorized filing period.

4. Loan interest – KWD 187,422

296. KOSC states that, in order to fulfil its obligations under certain contracts between it and KOC for the delivery of oil field equipment, it had previously borrowed an amount of KWD 1,963,000 from its bankers. It states that, in the ordinary course of business, it would have received payments from KOC within 30 days of the presentation of its invoice after delivery of the goods and would accordingly have been able to repay the loan. KOSC states that by 2 August 1990 it had already delivered the equipment in question to KOC, presented its invoices and was awaiting payment from KOC. It states that, due to Iraq's invasion and occupation of Kuwait, it did not receive the expected payments from KOC until late 1991 and was unable to repay the loan until 31 December 1991. It states that, throughout the period from 2 August 1990 to 31 December 1991, it was charged interest by its bankers at the rate of 9.5 per cent per annum on the outstanding loan. KOSC states that the total of the interest charges paid by it during this period amounted to KWD 187,422. It states that it received no compensation for this loss from any other source, and claims compensation for this amount from the Commission.

5. Loss of income – KWD 34,656

297. KOSC alleges that its business operations ceased from 2 August 1990 to 1 August 1991 (the "claim period"). It states that, based upon the trading results recorded in its audited financial statements in the financial years 1988 and 1989 as well as the first seven months of 1990, it could reasonably have expected to earn profits of KWD 2,888 per month during the claim period. It states that it earned no profits during the claim period as a direct result of Iraq's invasion and occupation of Kuwait, and accordingly claims compensation in the amount of KWD 34,656.

6. Claim preparation costs – KWD 2,500

298. KOSC claims the costs allegedly incurred and paid by it in respect of accounting fees in the amount of KWD 2,500 for the preparation of its balance sheet as at 1 August 1990 and its claim documentation.

7. Interest- KWD 56,846

299. KOSC claims the amount of KWD 56,846 as interest on its total amount claimed calculated at the rate of 9.5 per cent from varying dates, depending on the nature of each claim element, to 31 December 1992. Additionally, KOSC claims interest from 1 January 1993 to the date of final payment of any compensation awarded to it, at a rate to be determined by the Commission. KOSC sought to increase its claim for interest by way of its responses to the Panel's enquiries. The Panel considered that the attempted amendment was not timeous, and has dealt with the interest claim as originally framed.

B. Iraq's response

300. The written comments of Iraq concerning KOSC's claim may be summarised as follows.

(a) Loss of profits does not fall within the scope of "direct loss".

(b) The claim for losses related to the purchase and sale of foreign currency arose from normal commercial transactions unrelated to the events of 2 August 1990. These transactions were the result of decisions taken by the management of KOSC and are not direct losses resulting from the events in Kuwait.

(c) KOSC has failed to produce a letter from the Kuwaiti port authority confirming the arrival of the missing goods in Kuwait. The claim is therefore unfounded and should fail.

(d) The claim for interest on the loan from KOSC's bankers was caused by KOC's delay in paying its debts. This is a matter between two Kuwaiti companies and cannot be classified as a direct loss for which compensation may be awarded.

(e) The claim for loss of profits is uncertain and cannot be based on a projection of historical profits. Additionally, Iraq's presence in Kuwait ended on 28 February 1991, while the claimant seeks compensation for loss of profits until 1 August 1991. This is in contradiction of the principle of loss mitigation.

(f) There should be no award of interest on compensation.

C. Analysis and valuation

1. Business transaction or course of dealing – KWD 160,655

301. KOSC provided copies of the two contracts in question and acceptable evidence that KOC cancelled the contracts with effect from 2 August 1990 as a direct result of Iraq's invasion and occupation of Kuwait. The Panel established that one of the contracts had been partially performed by KOSC by 2 August 1990, and that the other contract remained due to be performed. The Panel found that KOSC's expected gross profit margins of 7.4 and 4.3 per cent respectively for the two contracts were far greater than the gross average profit margin of 2.2 per cent reflected in KOSC's financial

statements from 1988 to 1990. As KOSC was not operational from August to October 1990 (and therefore incurred no fixed costs), the Panel finds that KOSC's actual loss is more appropriately measured by reference to the average net profit margin of 0.7 per cent. Applying this reasoning, the Panel finds KOSC's contract losses to be valued at KWD 11,489 and recommends the payment of compensation in this amount.

302. In regard to KOSC's claim for losses resulting from the unfavourable movement in the rate of exchange of United States dollars to Kuwaiti dinars, the Panel finds that such losses are not directly related to Iraq's invasion and occupation of Kuwait,[58] and recommends no compensation in respect of this portion of the claim for contract losses.

2. Other tangible property – KWD 5,265

303. KOSC provided copies of two invoices, the certificate of origin, bill of lading, delivery certificate and bank payment advice relating to the missing goods. Additionally, KOSC's audited financial statements confirmed that the claimed amount was written off as part of a larger extraordinary loss reflected in its 1991 financial statements.

304. As stated in paragraph 295 above, the Panel considers that KOSC's attempt to increase this claim element by the inclusion of the value of a ship was not timeous.

305. The Panel finds that KOSC has demonstrated that it suffered tangible property losses in the amount of KWD 5,265. The Panel recommends compensation in this amount.

3. Loan interest – KWD 187,422

306. KOSC provided evidence that it concluded two separate loan agreements. Funds under the first loan in the amount of KWD 243,000 were advanced on 26 February 1990 and were repayable on 26 April 1990. Funds under the second loan in the amount of KWD 1,720,000 were advanced on 7 July 1990 and were repayable on 4 September 1990.

307. The first loan was disbursed and was repayable prior to Iraq's invasion and occupation of Kuwait. The Panel finds that any delay in its repayment is therefore unrelated to Iraq's invasion and occupation of Kuwait.

308. In regard to the second loan, KOSC did not provide evidence to demonstrate that this advance was intended for use in relation to any specific contract with KOC. Furthermore, KOSC's audited financial statements do not corroborate the amounts claimed in respect of interest paid from 2 August 1990 to 31 December 1991. The audited financial statements covering this period reflect interest charges of only KWD 4,500. The Panel finds that KOSC has not demonstrated that it suffered an interest loss, and recommends no compensation for this element of the claim.

4. Loss of income – KWD 34,656

309. KOSC based its historical profit calculation on the adjusted average monthly profits reflected in its audited financial statements for 1988 and 1989, together with the first seven months of 1990. KOSC adjusted the reported net profits by excluding interest (paid and received), depreciation and certain employee related costs. KOSC did not explain the basis for the adjustments to its net profits calculation.

310. Pursuant to the Panel's enquiries, KOSC provided copies of its audited financial statements for the year ended 31 December 1987. The Panel found that KOSC's net profits from 1987 to 1989 were in a downward trend, but that the trend was reversed in the first seven months of 1990. The increased profit trend from the beginning of 1990 continued, despite an understandable loss in 1991, until 1993.

311. The Panel considers that, in order to more accurately reflect KOSC's likely results during the claim period, a simple average of KOSC's profits during the period from 1 January 1988 to 2 August 1990 should be used. Applying this methodology, the Panel finds that KOSC could reasonably have expected to earn monthly net profits of KWD 2,351 during the 12-month claim period. KOSC contended that its loss of profits claim was not duplicative of its claim for loss of income. The Panel, however, finds that KOSC duplicated its loss of contracts claim with its loss of income claim by seeking compensation for lost profits and contract losses, both to be earned in the period from August to October 1990. As a consequence, the Panel finds the claim for loss of income to be compensable only for the nine-month period from November 1990 to July 1991. The Panel recommends compensation for this claim element in the amount of KWD 21,159.

5. Claim preparation costs – KWD 2,500

312. For the reasons set out in paragraph 340 below, the Panel takes no action with respect to KOSC's claim for claim preparation costs.

6. Interest – KWD 56,846

313. The Panel finds that KOSC's claim for interest falls within the scope of Governing Council decision 16, as discussed in paragraph 336 below. Consequently, the Panel takes no action in respect of this claim.

D. Recommendations

314. The Panel's recommendations with respect to the claim of KOSC are summarized in table 16 below.

Table 16. KOSC's claim - recommended compensation (Kuwaiti dinars)

Claim element	Original amount claimed	Amended amount claimed	Amount of compensation recommended
Business transaction or course of dealing	160,655	160,655	11,489
Other tangible property	5,265	5,265	5,265
Loan interest	187,422	187,422	Nil
Loss of income	34,656	34,656	21,159
Claim preparation costs	2,500	2,500	See paragraph 312
Interest	56,846	56,846	See paragraph 313
Total	447,344	447,344	37,913

IX. CLAIM OF INDEPENDENT PETROLEUM GROUP

A. Facts and contentions

1. Introduction

315. Independent Petroleum Group K.S.C. (Closed) ("IPG") is a company organized under the laws of Kuwait. IPG's primary business activity is trading in crude oil and refined petroleum products.

316. IPG claims compensation in the amount of KWD 5,760,972. Its claim is summarized in table 17 below.

Table 17. IPG's claim
(Kuwaiti dinars)

Claim element	Original amount claimed	Amended amount claimed
Payment or relief to others	98,044	98,044
Loss of profits	5,022,512	5,022,512 [a]
Relocation costs	138,278	138,278
Claim preparation costs	3,000	3,000
Interest	499,138	499,138
Total	5,760,972	5,760,972

[a] IPG sought to increase the amount claimed under this category of loss in 2002. The Panel determined that the attempted amendment was not timeous and deals with the claim as originally framed.

2. Payment or relief to others – KWD 98,044

317. IPG alleges that, under Kuwaiti law, all existing employment contracts with its 30 employees were terminated with effect from 2 August 1990. IPG states that it was compelled under the relevant labour laws to pay such employees a termination indemnity, calculated in accordance with their salary and length of service. IPG states that under ordinary circumstances it would only have been compelled to pay 50 per cent of each indemnity in respect of employees with more than five years' service, and no indemnity in respect of employees with less than five years' service. IPG accordingly claims compensation for the additional indemnities paid or accrued in favour of the 30 employees.

3. Loss of profits – KWD 5,022,512

318. IPG asserts that its business activities were totally disrupted as a direct result of Iraq's invasion of Kuwait. IPG claims that, as a result of this interruption of its business activities, it suffered a shortfall in the profits that it expected to earn from 2 August 1990 to 31 December 1992. Based on IPG's calculations of its average monthly profits in the first seven months of 1990, IPG states that it could reasonably have expected to earn profits of KWD 3,720,538 from January 1990 to 31 December 1992. It states that it actually incurred losses of KWD 1,301,974 over this period and that the

aggregate adverse impact on its trading results amounted to KWD 5,022,512. In response to the Panel's enquiries, IPG sought to increase the amount claimed under this category of loss to KWD 5,057,297. However, the Panel finds that the attempted amendment was not timeous, and deals with the claim as originally framed.

4. Relocation costs – KWD 138,278

319. On 2 August 1990, IPG was engaged in the process of conducting its business as an oil trader from offices situated in Kuwait. It also maintained administrative offices in Singapore and London. IPG alleges that, as a direct result of Iraq's invasion and occupation of Kuwait, its shareholders decided to establish a new company domiciled in the Bahamas. This company was established under the name IPG Ltd ("IPG Bahamas") on or about 8 August 1990. IPG alleges that, during the period of Iraq's occupation of Kuwait, its senior management was relocated to London, from where IPG Bahamas temporarily conducted business operations on behalf of IPG. After the liberation of Kuwait, all of IPG's operations were again temporarily relocated to Bahrain until such time as communication and other essential utilities had returned to normal in Kuwait. IPG's operations were finally returned to Kuwait in September 1991.

320. IPG claims the costs of relocating its Kuwait office temporarily to London and Bahrain, and thereafter returning it to Kuwait, the costs of incorporation of IPG Bahamas and various associated costs in the aggregate amount of KWD 138,278.

5. Interest – KWD 499,138

321. IPG claims interest in the amount of KWD 499,138 on its claimed losses calculated at the rate of 7 per cent per annum from different dates depending on the type of loss in question and terminating on 31 December 1992. Furthermore, IPG claims additional interest from 1 January 1993 until the date of final payment of any compensation awarded to it.

6. Claim preparation costs – KWD 3,000

322. IPG claims the actual costs incurred and paid by it in respect of legal fees, extraordinary auditors' fees and costs of translation of relevant documents associated with the presentation of its claim. These costs are alleged to amount to KWD 3,000.

B. Iraq's response

323. The written comments of Iraq concerning IPG's claim may be summarized as follows.

(a) IPG has not provided any proof that the indemnity payments were in fact made to the employees, that IPG was obliged to terminate their services or that the terminations actually took place. Iraq states that the only document filed in support of this claim element is a list of the names of the employees whose employment was allegedly terminated and the amounts of money due to each of them.

(b) The claimant has duplicated the claim for two indemnities paid to the same employee, and has advanced a claim for an indemnity allegedly paid to a person who was at all relevant times the managing director of IPG, and one of its major shareholders. Iraq states that these facts are indicative of the unreliability of the claim in its entirety.

(c) Even if the indemnity payments were actually made, they are not direct losses, as the decision to terminate the employees' contracts was an internal decision taken by the company; they are therefore not compensable losses.

(d) The seven-month period from January to July 1990 upon which the claim for loss of profits is based is not reflective of the "actual commercial standing" of IPG, and was chosen deliberately to inflate the claimed amount. In this regard, Iraq states that "the claimant had incurred a net loss of KWD 424,289 in the year 1989 (the net profit of KWD 663,338 for the first seven months of 1990)."

(e) The financial statements for the financial years 1990 to 1994 demonstrate that IPG distributed an amount of USD 5,000,000 to its shareholders during 1991, in contravention of the applicable Bahamian company laws. Iraq states that this amount was more than twice the net loss allegedly incurred by the claimant during 1991. Iraq states that the inference to be drawn from this fact is that the claimant was not being operated on a purely commercial basis during 1991 and 1992, thereby resulting in the generation of lower profits at a time when IPG should have been mitigating its losses.

(f) The claim for loss of profits has no real foundation, is based on fictitious figures and is speculative. No compensation should be awarded for this claim element.

(g) The costs of relocating the claimant's office to Bahrain arose in March 1991, after Iraqi forces had left Kuwait. The amounts comprising this claim element are exorbitantly expensive and arose from an internal decision by the company's management, not directly from Iraq's presence in Kuwait.

(h) There should be no award of interest on compensation.

C. Analysis and valuation

1. Payment or relief to others – KWD 98,044

324. IPG provided payroll records for June and July 1990, employee identification numbers, payment certificates and its corporate consultant's report. The Panel finds that IPG has demonstrated that it paid the amount claimed to its employees by way of termination indemnities as alleged. The Panel further finds that IPG would not have paid the claimed amount to its employees but for Iraq's invasion and occupation of Kuwait. The Panel investigated Iraq's contention that IPG had duplicated the claim in respect of one employee, but found that no duplication had taken place. Instead, one expatriate employee had been paid his termination benefit in two parts, a local currency and a foreign currency amount. The Panel also found that the individual shareholder and managing director who had received a termination indemnity in respect of which Iraq referred, was not a controlling

shareholder. The individual concerned owned approximately 4 million of the available 50 million issued shares. The Panel accordingly recommends compensation in the amount of KWD 98,044 for this claim element.

2. Loss of profits – KWD 5,022,512

325. The claim for loss of profits is based upon an extrapolation of IPG's trading results in the first seven months of 1990. At the Panel's request, IPG provided audited financial statements for 1987, 1988 and 1989. The audited financial statements show that IPG suffered net trading losses in the two financial years 1988 and 1989. The claimant explained that it had suffered extraordinary losses during these financial years, which it contended should not be taken into account in determining IPG's historical profitability. IPG alleged that the extraordinary losses arose from three separate causes. First, it had engaged in speculative futures trading in 1988, 1989 and 1990. The futures trading activities had caused IPG substantial losses in 1989. IPG states that futures trading was not part of its ordinary business activities. Secondly, IPG states that one of its customers, the Sudanese Petroleum Company, had significantly decreased its level of trade with IPG in 1988 and 1989. IPG states that the reason for the decline in trade was a flood in Sudan in 1988, which had led to the donation of petroleum products to Sudan by various Middle Eastern countries, thereby reducing Sudan's demand for products from IPG. Thirdly, IPG states that Yemen's Petroleum Corporation had reduced its purchases from IPG in 1988 and 1989, as a result of a donation of petroleum products to Yemen by the Government of the Kingdom of Saudi Arabia.

326. The Panel investigated all of the claims by IPG in regard to its historical profitability. The Panel finds that IPG has not demonstrated that any of the factors referred to by IPG constitutes extraordinary circumstances, justifying the inference that IPG was otherwise profitable between 1988 and 1990. The Panel finds that, contrary to IPG's assertions, the seven-month period prior to the invasion is not representative of IPG's trading history, and cannot be used to extrapolate its likely profits during the 36-month period until 31 December 1992. The Panel finds that it is more appropriate to base such an extrapolation on the three-year period prior to the invasion.

327. Applying this methodology, the Panel concludes that IPG has not shown that it suffered any loss of profits. The Panel accordingly recommends no award of compensation for this claim element.

3. Relocation costs – KWD 138,278

328. The costs making up this claim element were particularized by IPG as follows: "Special staff bonus", car rental, staff accommodation for relocated staff, office rental, commission, professional services and auditors, business travel, legal fees and various other categories.

329. IPG provided a comparative history of these same categories of expense from 1987 to 1990. Based on its review of the expenses, the Panel finds that IPG has not demonstrated an increase in the level of expenditure for any of these categories. The Panel recommends no award of compensation in respect of this claim element.

4. Interest – KWD 499,138

330. The Panel finds that IPG's claim for interest falls within the scope of Governing Council decision 16, as discussed in paragraph 336 below. Consequently, the Panel takes no action in respect of this claim.

5. Claim preparation costs – KWD 3,000

331. For the reasons set out in paragraph 340 below, the Panel takes no action with respect to IPG's claim for claim preparation costs.

D. Recommendations

332. The Panel's recommendations with respect to the claim of IPG are summarized in table 18 below.

Table 18. IPG's claim – recommended compensation
(Kuwaiti dinars)

Claim element	Original amount claimed	Amended amount claimed	Amount of compensation recommended
Payment or relief to others	98,044	98,044	98,044
Loss of profit	5,022,512	5,022,512	Nil
Relocation costs	138,278	138,278	Nil
Claim preparation costs	3,000	3,000	See paragraph 331
Interest	499,138	499,138	See paragraph 330
Total	5,760,972	5,760,972	98,044

X. INCIDENTAL ISSUES

A. Currency exchange rate

333. The Panel notes that the majority of the claimants have advanced claims in currencies other than United States dollars. The Panel has assessed all such claims, and performed all claim calculations, in the original currencies claimed. However, the Commission issues its awards in United States dollars. Accordingly, the Panel is required to determine the appropriate United States dollar exchange rate to apply to losses expressed and assessed in currencies other than United States dollars.

334. The Panel also notes that most prior awards of compensation by the Commission have relied on the United Nations Monthly Bulletin of Statistics for determining commercial exchange rates into United States dollars. The Panel adopts such an approach for this report.

335. In the circumstances, the Panel finds that the appropriate currency exchange rate to be applied to the claims advanced in the tenth instalment in currencies other than the United States dollar is the rate prevailing on the date of loss, as outlined in table 19 below.

B. Interest

336. In accordance with Governing Council 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". The Governing Council further specified in decision 16 that "[i]nterest will be paid after the principal amount of awards", while postponing a decision on the methods of calculation, and the rate and the details of payment of interest.

337. The task of the Panel, therefore, is to determine from which date interest will run for the successful claimants.

338. In each instance where a precise date of loss is apparent or discernible, the Panel recommends that precise date to be the date from which interest will run. In some instances, a precise date of loss cannot be established. In those cases, the Panel has been guided by relevant principles set forth in paragraphs 276 to 288 of the "Report and recommendations made by the Panel of Commissioners concerning the first instalment of 'E2' claims" (S/AC.26/1998/7). In particular, where the claim is for a loss of profits or payment or relief to others, and that loss was incurred over a period of time, the Panel has selected the mid-point of the compensable period. Further, where the claim is for a loss of tangible assets, the Panel has selected 2 August 1990 (the date of Iraq's invasion of Kuwait) as the date of the loss, as that coincides with the claimant's date of loss of control over the assets in question.

339. In accordance with these determinations, table 19 below summarizes the dates of loss from which interest will run for those claims in respect of which the Panel has recommended an award of compensation.

Table 19. Date of loss

Claimant and loss element	Date of loss
Kuwait Foreign Petroleum Exploration Co	N/A
Kuwait Oil Tanker Company	--
- Business transaction or course of dealing	15 July 1991
- Other tangible property	2 August 1990
Kuwait Aviation Fuelling Company	--
- Business interruption	15 August 1991
- Other tangible property	2 August 1990
Kuwait Santa Fe for Engineering and Petroleum Projects Company	--
- Prepaid contracts	2 August 1990
- Other tangible property	2 August 1990
Kuwait Drilling Company	--
- Real property	2 August 1990
- Other tangible property	2 August 1990
- Loss of income	15 April 1992
Kuwait Oilfield Supply Company	--
- Business transaction or course of dealing	15 September 1990
- Other tangible property	2 August 1990
- Loss of income	15 March 1991
Independent Petroleum Group	--
- Payment or relief to others	31 July 1991

C. Claims preparation costs

340. In a letter dated 6 May 1998, the Panel was notified by the Executive Secretary of the Commission that the Governing Council intends to resolve the issue of claim preparation costs at a future date. Accordingly, the Panel takes no action with respect to claims for such costs.[59]

D. Summary of recommendations

341. Table 20 below summarizes the Panel's recommended awards of compensation.

Table 20. Recommended compensation

Claimant	Original amount claimed (original currency)	Amount of compensation recommended (original currency)	Original amount claimed (USD)	Amended amount claimed (USD)	Amount of compensation recommended (USD)
Kuwait Foreign Petroleum Exploration Company	USD 14,899,000	Nil	14,899,000	14,442,161	Nil
Kuwait Oil Tanker Company	KWD 9,859,605	KWD 4,682,515	34,116,280	34,084,754	16,140,495
Kuwait Aviation Fuelling Company	KWD 7,548,546	KWD 3,023,128	26,119,536	25,908,633	10,394,153
Kuwait Santa Fe for Engineering and Petroleum Projects Company	KWD 26,041	KWD 20,113	90,107	90,608	69,595
Kuwait Drilling Company	KWD 31,352,525	KWD 14,505,739	108,486,246	107,690,958	49,907,285
Kuwait Oilfield Supply Company	KWD 447,344	KWD 37,913	1,547,903	1,547,903	131,187
Independent Petroleum Group	KWD 5,760,972	KWD 98,044	19,934,159	19,934,159	335,767
Total (USD)	--	--	205,193,231	203,699,176	76,978,482

342. The Panel respectfully submits this report, pursuant to article 38(3) of the Rules, through the Executive Secretary to the Governing Council.

Geneva, 29 July 2003

(Signed) Mr. Allan Philip
Chairman

(Signed) Mr. Antoine Antoun
Commissioner

(Signed) Mr. Michael Hwang
Commissioner

Notes

[1] "Report and recommendations made by the Panel of Commissioners concerning the second instalment of 'E1' claims" (S/AC.26/1999/10) (the "Second 'E1' Report"), paras. 3-4.

[2] Pursuant to Governing Council decision 30 (S/AC.26/Dec.30 (1995)), the deadline for filing category "E" and "F" claims was 1 January 1996. At the Governing Council's twenty-second session, the Council decided that late claims in categories "E" and "F" would be considered for filing if submitted before 1 January 1997 and if based on strong original contemporaneous evidence of the claimant's good faith.

[3] KUFPEC states that it was relieved of its obligation to pay rental on these two office buildings in Kuwait during the period 2 August 1990 to August 1991 because of a general rental holiday declared by the Government of Kuwait.

[4] See "Report and recommendations made by the Panel of Commissioners concerning the third instalment of 'E1' claims" (S/AC.26/1999/13) (the "Third 'E1' Report"), paras. 479-481; and "Report and recommendations made by the Panel of Commissioners concerning the eighth instalment of 'E1' claims" (S/AC.26/2002/31) (the "Eighth 'E1' Report"), para. 319.

[5] For example, in its supplemental article 34 responses KUFPEC states that it incurred expenses totalling USD 72,379 in 1989 for the recruitment of new employees.

[6] The TD is the maximum vertical depth to which a well is intended to be drilled. The TD for SLK-2 was based upon the depth at which the productive, oil-bearing strata was found in the earlier discovery well.

[7] KUFPEC explains that its decision to hold the rig on standby for some six weeks was made in the hope that it could shortly resume drilling with the Challenger rig, and thus avoid the great expense of mobilizing a different rig.

[8] The Challenger drilling contract calls for Challenger's waiver of the demobilization fee if it finds additional work for the rig (of a specified duration and in the immediate vicinity) within a specified number of days following early termination by the customer. KUFPEC states that Challenger found this additional work after KUFPEC's termination of the drilling contract.

[9] Similarly, the Challenger contract relieved the customer of its obligation to pay the demobilization fee if, as a result of the customer having exercised its option for extension of the term of the drilling contract, the Challenger rig thereafter worked a specified number of days beyond the regular term of the contract.

[10] KUFPEC does not claim expenses incurred by KUFPEC TUNISIA between the end date of this claim period (31 March 1991) and the date when appraisal drilling was resumed in September 1991. It states that, during this period, the Tunis staff of KUFPEC TUNISIA once again resumed work on the development by, amongst other things, conducting preparatory work for the resumption of appraisal drilling.

[11] The Panel made use of the term "no-invasion" in its "Report and recommendations made by the Panel of Commissioners concerning the fourth instalment of 'E1' claims" (S/AC.26/2000/16) (the "Fourth 'E1' report"), para. 6, as follows: "As used by the claimants, as well as by the Panel in this report, the use of the term 'no-invasion' to describe a figure means that the figure described is an

estimate of what that figure would have been if Iraq had not invaded and occupied Kuwait in 1990/91". The same methodology is applied by the Panel in the current report.

[12] In fact, the field has continued producing beyond the year 2000. KUFPEC's calculation of cash flow in the invasion scenario is based on actual production figures only up to mid-1994, when it filed its claim. The production profile used after that point in time is based on KUFPEC's estimate made in 1994 of annual production rates, even though actual production figures are now available. KUFPEC did not provide the updated figures.

[13] KUFPEC uses the same annual operating expenses and assumes total recoverable reserves of 25 million barrels of oil in both cases. It states that, in making its cash flow calculations for both cases, it has excluded from annual operating expense the USD 4,190,161 Head Office portion of its claim (as set out in table 3 above). KUFPEC uses actual oil prices up to the date upon which the claim was filed in 1994, and uses estimated oil prices from that time up to 31 December 1994. After that date, and for the remainder of the nine-year production profile for both cases, KUFPEC assumes a common oil price in each year escalated annually at a rate of 4 per cent.

[14] Discounted to the date of first production in 1992 using an annual discount rate of 9 per cent.

[15] The USD 6,730,000 amount claimed is the difference between the net present values of the two cash flow cases. KUFPEC states that, on an "undiscounted" basis, its estimate of the cash flow in the no-invasion scenario exceeds its estimate in the invasion scenario by only USD 2,090,000. KUFPEC states that this decrease in undiscounted invasion scenario cash flow is "principally due to the fall in oil prices in the early years of the cash flow". Stated another way, the no-invasion scenario assumes that production would have commenced in 1991, when oil prices were higher than in subsequent years of the production profile.

[16] That is to say, in its capacity as operator for the Sidi El Kilani mining concession, it incurred these costs for itself and its 55 per cent co-venturer, ETAP. In answer to the Panel's article 34 enquiry, KUFPEC stated that it has brought the claim for additional development expenses for itself only, and not for the joint account.

[17] Under the provisions of the concession agreement between the two concession holders and the Government of Tunisia, ETAP was not required to pay any of the joint venture's exploration costs for the joint venture until such time as a commercial discovery was made, and then only if a portion of the area of the permit was converted into a mining concession by the Government of Tunisia and ETAP elected to participate in the mining concession. At the time of any such election, ETAP was required to reimburse KUFPEC TUNISIA for 55 per cent of all KUFPEC TUNISIA's development costs pertaining to the mining concession (which included those costs of the exploration effort that led to the discovery). Thereafter, ETAP was required to pay, on a current basis, 55 per cent of KUFPEC TUNISIA's future cost of development and operation of the mining concession. As explained later in this report, after KUFPEC filed this claim, ETAP exercised its option to participate in the mining concession for Sidi El Kilani, and ETAP later paid KUFPEC TUNISIA partial reimbursement for its 55 per cent share of exploration and development costs. These reimbursement payments by ETAP totalled USD 22,950,044 (out of a total of USD 25,880,417 sought by KUFPEC Tunisia) and were made during the period 1994 to 1998. KUFPEC Tunisia later charged the "joint account" for a portion of its office expenses and drilling costs, but it did not provide the Panel with documentation establishing what portion of ETAP's reimbursement payment, if any, was for ETAP's share of the expenses claimed by KUFPEC for delayed development of Sidi El Kilani.

[18] Australia and Indonesia.

[19] See the Fourth "E1" Report, paragraphs 164-165 and 179-190.

[20] This logic has been previously applied by the Panel. See the Fourth "E1" Report; "Report and recommendations by the Panel of Commissioners concerning the sixth instalment of 'E1' claims" (S/AC.26/2001/18) (the "Sixth 'E1' Report"); and "Report and recommendations made by the Panel of Commissioners concerning part two of the seventh instalment of 'E1' claims" (S/AC.26/2002/13) (the "Seventh 'E1' Report, Part Two").

[21] In <u>Against All Odds</u> (John Levins, <u>Against All Odds</u> (Kuwait City, Kuwait Foreign Petroleum Exploration Company, 2001)), a book published by KUFPEC and made publicly available, it is said that the value of the company's production from three foreign fields (Harriet, Amal and Anoa) went up dramatically as a result of Iraq's invasion and occupation of Kuwait, to wit: "Thus, with the price effect … the company's revenues almost doubled in 1990 over 1989, … <u>even with lower oil prices for the first seven months of the year</u>" [emphasis added].

[22] The Panel calculated KUFPEC's extraordinary income by multiplying the volume of its worldwide oil production, as measured in barrels, by the difference between the actual average price at which each barrel was sold and the no-invasion price for each barrel.

[23] KUFPEC advised the Panel that it was unable to provide its production and sales data on a monthly basis for 1991.

[24] See the Panel's discussion of extraordinary profits in the Third "E1" Report, paras. 468-472; the Fourth "E1" Report, paras. 170 – 178; the Sixth "E1" Report, paras. 215-217; the Seventh "E1" Report, Part Two, para. 148.

[25] The losses were due to depreciation and insurance expenses that continued while the NAKILAT I was being repaired.

[26] As at 2 August 1990 STRIKER was owned by Norton Bay Ltd., a Panamanian company that was a wholly-owned subsidiary of KOTC. The Panel has verified that no other claim has been filed with respect to this vessel, and it takes notice that it is common practice for ship owners to register their vessels in single-purpose subsidiaries. The Panel accepts that it is appropriate for KOTC to pursue this claim instead of its subsidiary.

[27] KOTC submitted a copy of a charter agreement between itself and its parent company, KPC, for use of STRIKER for military purposes. Under that agreement, which ran from late 1986 to 1988, KOTC was paid a daily rate of USD 1,700 for STRIKER.

[28] See note 27 above. STRIKER also had continuing depreciation and insurance expenses while it was being repaired.

[29] In its calculation of the number of tankers calling in Kuwait during the claim period, KOTC used actual arrival numbers for the period up to 30 June 1992. It estimated the number of the tankers that would call in the balance of the claim period.

[30] KOTC contends that prior year growth rates in tanker traffic during the financial years 1988/89 and 1989/90 were much higher than the 6.34 per cent growth rate used in its calculation of future tanker traffic in Kuwait.

[31] In its article 34 response, KOTC provided the actual financial results for the claim period by operating unit. Those results show that Agency Branch actually earned a higher profit during the claim period than was estimated when it filed its claim.

[32] KOTC states that the actual cost of repairs to STRIKER was KWD 311,397, for which it received full reimbursement from its insurer. KOTC states that its marine insurance policy for STRIKER included "war risk" coverage, but that the policies for the other nine vessels excluded this risk. KOTC explains that it elected to buy war risk insurance for STRIKER because it was an ocean-going, offshore supply boat; thus, it was thought that the vessel would be subject to greater operating perils than the other vessels, which were expected to operate close to shore.

[33] The war risk policy for STRIKER does not specifically exclude towage costs. KOTC was unable to produce documentation explaining why its insurance settlement did not include reimbursement for the cost of towage of STRIKER to the repair yard in Sharjah, although it surmised that the cause might have been its own oversight in failing to file a claim with the insurer for this expense.

[34] The Panel has reviewed the items earlier claimed by KNPC, and there does not appear to be any duplication of items claimed by Fleet Operations. See "Report and recommendations made by the Panel of Commissioners concerning part one the seventh instalment of 'E1' claims" (S/AC.26/2002/12) (the "Seventh 'E1' Report, Part One"), paras. 122-132.

[35] In a gas bottling plant, LPG is filled into metal cylinders and these cylinders are distributed to consumers.

[36] KOTC states that the LPG that it bottled and distributed was sold to consumers in Kuwait at subsidized prices. It also states that all revenue from the sale of bottled LPG was credited to KNPC's account.

[37] The Panel has confirmed that the earlier KNPC claim did not include claims for damage to gas bottling plants. See the Seventh "E1" Report, Part One, paras. 122-132.

[38] In its article 34 responses, KOTC states that the actual cost of the new mobile plant was KWD 637,517, but it acknowledges that the new plant is not of similar design to the Shuwaikh plant.

[39] KOTC states that it has maintained custody of the original bill of lading for the cargo because, upon its presentation of the bill to the consignee in the port authority, the consignee was unable to deliver the cargo due to theft.

[40] KOTC states that the gold medallions were held on the premises for the purpose of making service awards to employees.

[41] Included amongst the lost vehicles were forklift trucks, road tankers, mobile filling units, and various types of trailers.

[42] KOTC states that the personal furnishings were taken from apartments that it provided for certain of its employees and it (and not the employees) owned these furnishings.

[43] KOTC offered no description of the magnitude of KOC's offshore production in Kuwait. During interviews with KOTC representatives, the Panel was advised that KOC had no offshore platforms upon which offshore service vessels might call. Neither did KOTC explain what KOC's needs might have been in this respect for the number of offshore service vessels that it owned or chartered.

[44] See note 32 above.

[45] In presenting its claim, the claimant converted its costs into what it contends is an equivalent amount of KWD 6,508. The Panel has calculated the claim in the currency in which the repair costs were incurred. The Panel notes that the amount claimed by KOTC is KWD 277 in excess of the amount calculated by the Panel in accordance with paragraphs 333 to 335 of this report.

[46] See for example “Report and recommendations of the Panel of Commissioners concerning the first instalment of ‘E/F’ claims” (S/AC.26/2001/6) (the “First ‘E/F’ Report”), paras. 182 to 185.

[47] KOTC’s financial year ends on 30 June. For 1990, the year prior to Iraq’s invasion and occupation of Kuwait, KOTC earned an operating profit (before extraordinary items) of KWD 2,980,286. In 1991, which included the period of Iraq’s occupation of Kuwait, KOTC earned KWD 5,777,565 in operating profit. In the following year of 1992 it earned KWD 7,184,217 in operating profit.

[48] In addition to Fleet Operations, KOTC had two other business units that operated on a “for profit” basis, Agency Branch and another unit called “Dry Cargo” (for which no claim was filed). Both the Agency Branch and the Dry Cargo units reported losses in the two years 1991/92 and 1992/93.

[49] As stated above, KOTC claims that all of its tankers were under charter to KPC and were at sea on 2 August 1990, and charter hire payments from KPC never ceased during the period of the hostilities.

[50] The “Report and recommendations made by the Panel of Commissioners concerning the third instalment of ‘E2’ claims” (S/AC.26/1999/22) (the “Third ‘E2’ Report”), paras. 77 and 119 to 121 indicates that foreign airlines did not resume normal operations to Kuwait airport before 22 April 1991.

[51] See Governing Council decision 9 (S/AC.26/1992/9).

[52] The Panel reviewed the findings of the “Report and recommendations made by the Panel of Commissioners concerning part one of the third instalment of ‘F3’ claims” (S/AC.26/2002/8) (the “Third ‘F3’ Report, Part One”) relating to the claim made by the Kuwaiti Directorate General of Civil Aviation ("DGCA") in relation to alleged losses of revenue from its airport operations and regulatory activities over commercial aviation. In that report, the “F3” Panel found that the DGCA revenue was affected as a direct result of Iraq's invasion and occupation of Kuwait until 30 June 1992. However, the Panel finds that the DCGA claim differs from the KAFCO claim for the following reasons.

(a) DGCA limited its claim for loss of revenue to the period 2 August 1990 to 30 June 1992.

(b) The “F3” Panel in the Third ‘F3’ Report, Part One states that the DGCA returned to pre-invasion revenue levels "during the year ended 30 June 1993". No finding was made as to the specific month that the DGCA's revenue returned to pre-invasion levels during the financial year ended 30 June 1993.

(c) No compensation was awarded in respect of this claim, since saved expenses by DGCA exceeded the alleged loss of revenue.

(d) DGCA's activities are based on aircraft and passenger movements, whereas KAFCO's business is based on the number of aircraft choosing to use KAFCO to refuel and on their refueling requirements. In this respect, KAFCO successfully demonstrated that a significant number of aircraft servicing post-liberation Kuwait were small aircraft with low refueling requirements.

Therefore, the Panel finds that awarding compensation to KAFCO in respect of loss of profits over the period 2 August 1990 to 31 August 1992 is not inconsistent with the findings of the “F3” Panel in the Third “F3” Report, Part One.

[53] See KPC’s claim for “production and sales loss” at paras. 89 to 408 of the Fourth “E1” Report.

[54] See “Report and recommendations made by the Panel of Commissioners concerning the first instalment of ‘E4’ claims” (S/AC.26/1999/4), para. 144 and the Fourth “E1” Report, para. 60.

[55] One of the four companies with which KSF entered a maintenance contract filed a claim for compensation with the Commission for damage to its tangible property.

[56] KDC alleged that the amount of KWD 930,693 represents the lost profits that it would have earned from the existing contracts in the period from 2 August 1990 to 31 December 1994. The amount claimed under contract losses of KWD 1,141,416 represented unearned profits from existing contracts, which in two instances extended beyond 31 December 1994.

[57] The claimant used the term “general rotary” to describe extra standby components owned by KDC and maintained for the purpose of providing back-up to the critical components of all of KDC’s drilling rigs.

[58] See the Third “E1” Report, para. 395; the Eighth “E1” Report, para. 98.

[59] The claim of KPC is exclusively for claim preparation costs, and was therefore excluded from this report.
