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

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Introduction

1. The Governing Council of the United Nations Compensation Commission (the "Commission") appointed the present Panel of Commissioners (the "Panel"), composed of Messrs. John Tackaberry (Chairman), Pierre Genton and Vinayak Pradhan, at its twenty-eighth session in June 1998, to review construction and engineering claims filed with the Commission on behalf of corporations and other legal entities in accordance with relevant Security Council resolutions, the Provisional Rules for Claims Procedure (S/AC.26/1992/10) (the "Rules") and other Governing Council decisions. This report contains the recommendations to the Governing Council by the Panel, pursuant to article 38(e) of the Rules, concerning the 11 claims with an asserted value of approximately 277,399,031 United States dollars (USD) included in the twenty-eighth instalment.[1] Each of the claimants seeks compensation for loss, damage or injury allegedly arising out of Iraq's 2 August 1990 invasion and subsequent occupation of Kuwait. This report is the last report of the Panel and represents the conclusion of its work programme.

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

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

I. PROCEDURAL HISTORY

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

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

5. In July 2002, the Panel issued a procedural order relating to the claims included in the twenty-eighth instalment. In view of: (a) the apparent complexity of the issues raised; (b) the volume of the documentation underlying the claims; and/or (c) the amount of compensation sought by the claimants,

the Panel decided to classify the claims as "unusually large or complex" within the meaning of article 38(d) of the Rules. In accordance with that article, the Panel completed its review of the claims within 12 months of its procedural order.

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

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

B. The claimants

8. This report contains the Panel's findings with respect to the following 11 claims for losses allegedly caused by Iraq's invasion and occupation of Kuwait:

(a) Mannesmann Demag Krauss Maffei GmbH (formerly Mannesmann Anlagenbau AG), a corporation organised according to the laws of Germany, which seeks compensation in the total amount of USD 69,687,357;

(b) Ansaldo Industria S.p.A., a corporation organised according to the laws of Italy, which seeks compensation in the total amount of USD 17,739,489;

(c) Grassetto Costruzioni S.p.A. (formerly Incisa S.p.A.), a corporation organised according to the laws of Italy, which seeks compensation in the total amount of USD 2,415,585;

(d) Pascucci e Vannucci S.p.A., a corporation organised according to the laws of Italy, which seeks compensation in the total amount of USD 9,031,435;

(e) Chiyoda Corporation, a corporation organised according to the laws of Japan, which seeks compensation in the total amount of USD 3,319,260;

(f) Niigata Engineering Company Limited, a corporation organised according to the laws of Japan, which seeks compensation in the total amount of USD 8,595,140;

(g) Özgü-Baytur Consortium, a consortium organised according to the laws of Turkey, which seeks compensation in the total amount of USD 30,726,182;

(h) Alstom Power Conversion Limited (formerly Cegelec Projects Limited), a corporation organised according to the laws of the United Kingdom of Great Britain and Northern Ireland, which seeks compensation in the total amount of USD 35,041,474;

(i) Glantre Engineering Limited (in receivership), a corporation organised according to the laws of the United Kingdom of Great Britain and Northern Ireland, which seeks compensation in the total amount of USD 37,224,680;

(j) IE Contractors Limited, a corporation organised according to the laws of the United Kingdom of Great Britain and Northern Ireland, which seeks compensation in the total amount of USD 25,384,356; and

(k) Towell Construction Company Limited, a corporation organised according to the laws of Hong Kong, which, at the time of Iraq's invasion and occupation of Kuwait, was under the administration of the United Kingdom of Great Britain and Northern Ireland, which seeks compensation in the total amount of USD 38,234,073.

II. MANNESMANN DEMAG KRAUSS-MAFFEI GMBH (FORMERLY MANNESMANN ANLAGENBAU AG)

9. Mannesmann Demag Krauss-Maffei GmbH (formerly Mannesmann Anlagenbau AG) ("Mannesmann") is a corporation organised according to the laws of Germany. Subsequent to filing its claim with the Commission, Mannesmann Anlagenbau AG merged with another entity, Mannesmann Demag AG. Thereafter, Mannesmann Demag AG changed its name to Mannesmann Demag Krauss-Maffei AG. In August 2002, following a shareholders resolution, the company became known as Mannesmann Demag Krauss-Maffei GmbH.

10. Prior to Iraq's invasion and occupation of Kuwait, Mannesmann was performing construction work in Iraq. Mannesmann was the main contractor on the Saddam Oil Field Development Project (the "Project"). The Project, which was located approximately 80 kilometres from Kirkuk, involved gas and water separation, oil treatment and storage, gas compression and transfer of oil and gas to assigned destinations. Mannesmann alleges that, as a result of Iraq's invasion and occupation of Kuwait, it had to stop work on the Project, abandon the work site and evacuate its employees from Iraq.

11. In the "E" claim form, Mannesmann sought compensation in the total amount of USD 69,724,763 (108,910,080 Deutsche Mark (DEM)) for contract losses. Several of the alleged losses were incurred in currencies other than Deutsche Mark. Mannesmann converted all of the claim amounts for these losses into Deutsche Mark in the "E" claim form. For losses incurred in Iraqi dinars (IQD), Mannesmann used an exchange rate of IQD 1 = DEM 5.78 to convert the amounts into Deutsche Mark.

12. The Panel has considered the losses in the original currency in which they were incurred. The Panel has also reclassified elements of Mannesmann's claim for the purposes of this report. The Panel therefore considered the amount of USD 69,687,357 (DEM 108,257,894, 168,718 Swiss francs (CHF) and IQD 77,607) for contract losses, loss of profits, payment or relief to others and interest, as follows:

Table 1. Mannesmann's claim

Claim element	Claim amount (USD)
Contract losses	46,081,712
Loss of profits	9,535,177
Payment or relief to others	134,754
Interest	13,935,714
Total	69,687,357

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

14. By way of introduction, the Panel makes the following general comments on the claim as a whole. The Panel notes that this is, in financial terms, a very substantial claim. It also notes that Mannesmann provided a considerable amount of relevant and well prepared documentation in support of its claim. In formulating its recommendations, the Panel has taken into account the generally credible approach of Mannesmann to its claim.

A. Contract losses

1. Facts and contentions

15. Mannesmann seeks compensation in the amount of USD 46,081,712 (DEM 71,589,853 and IQD 77,607, which Mannesmann converted to a total of DEM 72,038,173) for contract losses. The claim is for unpaid invoices, retention monies withheld and other costs allegedly incurred as a result of the abandonment of the Project after Iraq's invasion and occupation of Kuwait.

16. The items included in Mannesmann's claim for contract losses are summarised in table 2, infra.

Table 2. Mannesmann's claim for contract losses

Loss item	Claim amount (as per the "E" claim form) (DEM)
Unpaid invoices and retention monies withheld	36,517,889
Cost of storage, conservation and insurance	1,372,905
Materials not delivered	15,966,695
Other items	10,607,372
Dodsal Pte. Ltd. invoices	4,071,825
Personnel detained in Iraq	3,501,487
Total	72,038,173

17. On 14 November 1988, Mannesmann entered into a contract with the North Oil Company of Iraq (the "Employer"). The contract covered the engineering, procurement, construction, commissioning and testing of the Project. The contract provided for a lump sum price of DEM 338,000,000 and IQD 8,129,000 (which Mannesmann converted to a total of DEM 384,985,620). These amounts were divided into the cost of materials (DEM 292,000,000), construction (DEM 40,000,000 and IQD 8,129,000) and provisional sums (DEM 6,000,000).

18. The completion date contemplated by the contract was 14 August 1990. Due to delays in the performance of the works, the completion date was later revised to 7 December 1990 and the contract price was increased to DEM 378,843,878 and IQD 10,535,857 (which Mannesmann converted to a total of DEM 439,741,131).

19. By July 1990, Mannesmann anticipated that the completion date of the Project would be no earlier than 15 March 1991. It states that, at the time of Iraq's invasion and occupation of Kuwait, 71 per cent of the construction works and 92 per cent of the supply of materials were complete.

20. The contract provided for the following terms of payment:

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

(b) Retention monies - up to a maximum amount of 5 per cent of the contract price for the material supply portion and the construction portion of the contract was to be withheld as retention monies.

(c) Material supply portion - 65 per cent of each invoice for the supply of material and equipment was payable against presentation and approval of the shipping documents. The amount of 20 per cent of each invoice was to be paid on delivery of the materials and equipment to the site against presentation of the arrival certificate issued by the Employer;

(d) Construction portion - 85 per cent of each invoice for construction, start up, commissioning, overheads and materials purchased locally was payable by way of monthly progress payments; and

(e) Provisional sum portion - the provisional sums for the supply of spare parts and chemicals were payable in accordance with the procedures outlined for the supply of material and equipment, and the provisional sums for third party inspection services were payable against monthly progress payments.

21. To support the payment of the works denominated in Deutsche Mark, Mannesmann and the Employer entered into an oil barter arrangement together with the State Oil Marketing Organisation of Iraq ("SOMO") and Exxon Trading Company International, a United States corporation ("Exxon"). All proceeds from the sale of crude oil by SOMO to Exxon were directed towards satisfaction of the Employer's payment obligations to Mannesmann arising under the contract.

22. The terms of this arrangement were set out in a memorandum of understanding dated 14 November 1988 signed by Mannesmann, the Employer, SOMO and Exxon and two other agreements

entered into by SOMO and Exxon (concerning the terms of the oil liftings) and Mannesmann and Exxon (concerning the lifting procedure). Pursuant to the memorandum of understanding, Exxon was to establish a letter of credit in favour of SOMO for each cargo of crude oil purchased from SOMO. For the purposes of the letter of credit, Banque Paribas (Deutschland) OHG ("Paribas") was to be the issuing bank and the Central Bank of Iraq was to be the confirming (advising) bank.

23. Due to Iraq's invasion and occupation of Kuwait, Exxon, in a telex dated 7 August 1990, cancelled the arrangements set out in the memorandum of understanding. In a telex dated 13 August 1990, Paribas informed Exxon and Mannesmann that, after obtaining SOMO's approval, the Central Bank of Iraq agreed to the cancellation of the letter of credit that was in place at the time. Mannesmann stated that no further letters of credit were issued by Exxon after this date. After the cancellation of the oil barter arrangement, the Employer did not pay for any works denominated in Deutsche Mark.

(a) Unpaid invoices and retention monies withheld

24. Mannesmann seeks compensation in the amount of USD 23,341,454 (DEM 36,069,569 and IQD 77,607, which Mannesmann converted to a total of DEM 36,517,889) for unpaid invoices and retention monies withheld. Mannesmann alleges that due to Iraq's invasion and occupation of Kuwait, it was not paid for works performed on the Project. The claim for unpaid invoices relates to the portions of work denominated in Deutsche Mark only. Mannesmann alleges that the Employer's failure to pay for the works denominated in Deutsche Mark was principally due to its inability to obtain Deutsche Mark and that this failure came about as a result of the cancellation on 7 August 1990 of the oil barter arrangement. The claim for retention monies withheld includes amounts denominated in both Deutsche Mark and Iraqi dinars.

25. The claim for retention monies comprises the total amount of retention monies withheld from invoices relating to claims in respect of the supply of material and construction works.

26. The claim for unpaid invoices and retention monies withheld is summarised in table 3, infra.

Table 3. Mannesmann's claim for contract losses (unpaid invoices and retention monies withheld)

Loss item	Claim amount (as per Statement of Claim) (DEM)
Material supply – 65 per cent payment	9,955,723
Material supply – 20 per cent payment (certified)	10,681,706
Material supply – 20 per cent payment (uncertified)	4,910,800
Material supply – provisional sum	16,551
Construction DEM portion (85 per cent)	4,684,258
Inspection DEM portion (100 per cent)	95,423
Subtotal unpaid supply, construction and provisional sum invoices	30,344,461
Retention monies withheld	16,506,978
Subtotal unpaid invoices and retention monies withheld	46,851,439
Advance payment credit	(5,223,650)
Dodsal invoices	(4,071,825)
Sale of materials kept in transit	(1,038,075)
Subtotal credits	(10,333,550)
Total	36,517,889

(b) Cost of storage, conservation and insurance

27. Mannesmann seeks compensation in the amount of DEM 1,372,905 for the storage, conservation and insurance of material for the Project that could not be delivered to the site in Iraq.

28. Mannesmann states that it incurred the costs for storage, conservation and insurance as a result of the trade embargo imposed on Iraq pursuant to Security Council resolution 661 (1990) which prevented the delivery of materials for use on the Project. The claim for storage of materials in the amount of DEM 993,688 is for the storage of construction parts, heavy lifts, and other installation material at locations in Germany and the Netherlands. The claim for insurance in the amount of DEM 262,367 relates to transport insurance for the material. The claim for conservation in the amount of DEM 116,850 relates to the work that was performed to prevent the deterioration of the material. Mannesmann states that it was successful in selling part of the stored material only, as the material had been specifically designed for the Project and could not be readily used for other purposes. All the material has now been either sold or scrapped.

(c) Materials not delivered

29. Mannesmann seeks compensation in the amount of DEM 15,966,695 for the cost of materials that could not be delivered to the Project site due to the imposition of the trade embargo.

30. Mannesmann alleges that materials with a value of DEM 21,225,635 delivered by its suppliers for use on the Project were re-routed and stored at various locations in Germany, the Netherlands, Canada, the United Kingdom and the United States.

31. Mannesmann deducted the amount of DEM 5,258,940 from the total value of the re-routed materials to account for the proceeds received from the subsequent sale of some of the items. The net amount claimed is, therefore, DEM 15,966,695.

(d) Other items

32. Mannesmann states that it suffered losses in the amount of DEM 10,607,372 for "other items (not yet identified by categories in detail)". Mannesmann states that the claim is mainly for overrun in material and engineering costs. Mannesmann provided no other information in support of this claim.

(e) Dodsal invoices

33. Mannesmann seeks compensation in the amount of DEM 4,071,825 for the cost of works performed by its subcontractor, Dodsal Pte. Ltd. ("Dodsal"), a Singaporean corporation with a branch office in the United Arab Emirates. In November 1988, Mannesmann entered into a subcontract with Dodsal for construction works on the Project.

34. Due to Iraq's invasion and occupation of Kuwait, Mannesmann did not pay Dodsal for certain work performed by it on the Project. The work was invoiced by Dodsal in invoice Nos. 13/DM to 16/DM, as shown in table 4, infra.

Table 4. Mannesmann's claim for contract losses (Dodsal invoices)

Invoice	Date of invoice	Claim amount (DEM)
13/DM	12 July 1990	1,059,945
14/DM	13 August 1990	1,288,389
15/DM	18 October 1990	1,703,697
16/DM	20 November 1990	19,794
Total		4,071,825

35. Mannesmann alleges that it did not receive any payment from the Employer in respect of these invoices and therefore did not make any payment to Dodsal.

(f) Personnel detained in Iraq

36. Mannesmann seeks compensation in the amount of DEM 3,501,487 for the cost of personnel detained in Iraq. The claim appears to be for unproductive salaries paid to 47 of its workers detained in Iraq for various periods between 8 August and 16 December 1990.

37. As a result of Iraq's invasion and occupation of Kuwait, Mannesmann's workers were forced to abandon the Project, but were unable to leave Iraq. While awaiting their evacuation from Iraq, they

sought refuge at various locations in Iraq. Two of the workers are alleged to have been jailed in Mosul. Mannesmann alleges that notwithstanding that the workers were unproductive during their period of detention, it continued to pay their normal salary and an additional amount, which included a 30-day redeployment benefit.

2. Analysis and valuation

(a) Unpaid invoices and retention monies withheld

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

(i) Unpaid invoices

a. Material supply – 65 per cent payment

39. Mannesmann seeks compensation in the amount of DEM 9,955,723 for the 65 per cent payment that was payable under the contract for material supply. Under the terms of the contract, 65 per cent of the amounts due for the supply of material was payable against presentation and approval of the shipping documents upon shipment from various destinations outside Iraq. The claim relates to a total of 31 invoices numbered from 263 to 293.

40. Mannesmann asserts that it presented all the invoices, save invoice Nos. 292 and 293, to Paribas. However, it did not receive payment from Paribas under the letter of credit.

41. In support of its claim, Mannesmann provided copies of the invoices comprising its claim. For some of the shipments of materials, Mannesmann also provided the arrival certificates confirming delivery of the materials to the Project site.

42. Where Mannesmann provided copies of the invoices together with the relevant arrival certificates, the Panel recommends compensation in the full amount claimed. The Panel is satisfied on the evidence that the failure of Paribas to approve these invoices was due to the frustration of the certification process as a result of Iraq's invasion and occupation of Kuwait.

43. In respect of invoice Nos. 274 to 275 and 282 to 293, Mannesmann provided copies of the invoices as well as proof of shipment, but did not provide the relevant arrival certificates. The Panel is of the opinion that, for these invoices, the shipment date was sufficiently proximate to Iraq's invasion and occupation of Kuwait to deprive Mannesmann of the possibility of obtaining certification from the Employer and recommends compensation in the full amount claimed.

44. In respect of invoice No. 267 dated 22 June 1990, Mannesmann provided a copy of the invoice, but did not provide the relevant arrival certificate. The Panel sent Mannesmann a request for further information and evidence in which it requested Mannesmann to provide the reason for the failure to provide the arrival certificate. Mannesmann responded that the arrival certificate was never issued. It cited the following reasons for this:

(a) The inspection certificate for the shipment was issued by the employer's agent on 9 July 1990. Accordingly, the shipment (shipment No. 487) was not included in the lifting under the oil barter arrangement which took place three days earlier on 6 July 1990.

(b) The next monthly lifting under the oil barter arrangement was scheduled for early August 1990. This lifting never took place.

45. The Panel is satisfied on the basis of Mannesmann's explanation that the relevant shipment arrived in Iraq and that administrative delays after the arrival of the shipment were the principal cause of the failure of the arrival certificate to be issued prior to 2 August 1990. Accordingly, the Panel recommends compensation in the full amount claimed for invoice No. 267.

46. The Panel recommends compensation in the amount of DEM 9,955,723.

b. Material supply – 20 per cent payment (certified)

47. Mannesmann seeks compensation in the amount of DEM 10,681,706 for the 20 per cent payment that was payable under the contract for material supply. Under the terms of the contract, 20 per cent of the amounts due for the supply of material was payable against presentation of the arrival certificates by the Employer confirming delivery to the site. The claim relates to a total of 55 invoices from the sequence of invoices numbered from 158 to 281.

48. Mannesmann states that invoices in the amount of DEM 10,681,706 were certified by the Employer's representative and that the certified invoices were submitted to Paribas for payment under the terms of the oil barter agreement. Mannesmann alleges that the outstanding amounts were never paid.

49. In support of its claim, Mannesmann provided copies of the invoices comprising its claim as well as the arrival certificates indicating delivery to site and certification by the Employer's representative.

50. Based on the evidence, the Panel is satisfied that the loss was incurred as a direct result of Iraq's invasion and occupation of Kuwait and recommends compensation in the amount of DEM 10,681,706.

c. Material supply – 20 per cent payment (uncertified)

51. Mannesmann seeks compensation in the amount of DEM 4,910,800 for the 20 per cent payment that was payable under the contract for material supply. The invoices were not certified by the Employer's representative. The claim relates to a total of 21 invoices from the sequence of invoices numbered from 172 to 293.

52. In respect of invoice Nos. 172, 229 and 230, Mannesmann provided copies of the invoices, but did not provide the relevant arrival certificates which were required for payment under the terms of the contract (see paragraph 20, supra). The Panel recommends no compensation for these invoices, as Mannesmann provided no adequate explanation for the lack of the arrival certificates. Moreover, in

respect of invoice No. 172 dated 22 March 1990, the invoice prima facie falls outside the jurisdiction of Commission, which is limited by the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991) to exclude debts of the Government of Iraq if the performance relating to that obligation took place prior to 2 May 1990. (See paragraphs 43 to 45 of the Summary.)

53. In respect of invoice No. 251, Mannesmann did not provide a copy of the invoice or the relevant arrival certificate. The Panel recommends no compensation.

54. In respect of invoice Nos. 274 to 275 and 282 to 293, Mannesmann provided copies of the invoices as well as proof of shipment, but did not provide the relevant arrival certificates. The Panel is of the opinion that, for these invoices, the shipment date was sufficiently proximate to Iraq's invasion and occupation of Kuwait to deprive Mannesmann of the possibility of obtaining certification from the Employer and recommends compensation in the full amount claimed.

55. In respect of invoice Nos. 257 (dated 7 June 1990), 262 (dated 22 June 1990), and 267 (dated 22 June 1990), Mannesmann provided copies of the invoices, but did not provide the relevant arrival certificates. With respect to invoice No. 267, the Panel refers to its analysis in paragraph 54, supra. The Panel recommends compensation in the full amount claimed for invoice No. 267 for the reasons set out in that paragraph.

56. With respect to invoice Nos. 257 and 262, the Panel is satisfied on the basis of Mannesmann's explanation in its response to the request for further information and evidence that the relevant shipments (shipment Nos. 455 and 465) did, indeed, arrive in Iraq within the jurisdictional period, but that some of the materials included in the shipments did not reach the project site. The Panel accepts Mannesmann's explanation that the circumstances prevailing in Iraq after Iraq's invasion and occupation of Kuwait were the cause of Mannesmann's inability to obtain the arrival certificates. The Panel recommends compensation in the full amount claimed for invoice Nos. 257 and 262.

57. The Panel recommends compensation in the amount of DEM 2,404,304.

d. Material supply – provisional sum

58. Mannesmann seeks compensation in the amount of DEM 16,551 as part of the provisional sum that was payable under the contract for material supply. The claim relates to invoice No. IPS/1 dated 7 March 1990 (in the amount of DEM 14,536) and invoice No. IPS/2 dated 16 May 1990 (in the amount of DEM 2,015). The Employer issued arrival certificates to Mannesmann on 15 April 1990 for invoice No. IPS/1 and on 20 June 1990 for invoice No. IPS/2. The arrival certificates and other documents were submitted to Paribas for payment, however the amounts were not paid.

59. In respect of the claim for invoice No. IPS/1, the supporting documentation provided by Mannesmann indicates that the performance that created the debts in question occurred prior to 2 May 1990. The claim for this unpaid invoice is therefore outside the jurisdiction of the Commission and is not compensable under Security Council resolution 687 (1991). Applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as

set out in paragraphs 43 to 45 of the Summary, the Panel recommends no compensation for invoice No. IPS/1.

60. Based on the evidence provided, the Panel finds that the non-payment of invoice No. IPS/2 in the amount of DEM 2,015 arose as a direct result of Iraq's invasion and occupation of Kuwait and recommends compensation in that amount.

e. Construction DEM portion (85 per cent)

61. Mannesmann seeks compensation in the amount of DEM 4,684,258 for the 85 per cent payment that was payable under the contract for construction. Under the terms of the contract, 85 per cent of each invoice for construction, start up, commissioning, overheads and materials purchased locally was payable by monthly progress payments. The claim relates to four invoices - invoice Nos. 13/DM dated 9 July 1990 (in the amount of DEM 1,238,405), 14/DM dated 13 August 1990 (in the amount of DEM 1,484,223), 15/DM dated 17 October 1990 (in the amount of DEM 1,943,176) and 16/DM dated 20 November 1990 (in the amount of DEM 18,454).

62. Invoice Nos. 13/DM, 14/DM and 15/DM were certified by the Employer's representative and submitted to Paribas for payment. Based on the evidence provided, the Panel finds that the claims for these invoices are compensable in principle due to the frustration of the payment process as a result of Iraq's invasion and occupation of Kuwait.

63. Invoice No. 16/DM was not submitted either to the Employer or to Paribas. In addition, there was no independent evidence that the work was done. Accordingly, the Panel finds that this invoice is not compensable.

64. In summary, the Panel finds that the failure to pay for construction works in the amount of DEM 4,665,804 arose as a result of Iraq's invasion and occupation of Kuwait.

65. The Panel notes that Mannesmann's subcontractor, Dodsal, has been compensated by the Commission for the works performed in relation to these same unpaid invoices. Invoice Nos. 13/DM to 16/DM issued by Dodsal totalled DEM 4,071,825. So far as compensable, these invoices have been addressed in the "Report and recommendations made by the Panel of Commissioners concerning the fourth instalment of 'E3' claims" (S/AC.26/1999/14) (the "Fourth Report") and in the "Report and recommendations made by the Panel of Commissioners concerning the tenth instalment of 'E3' claims" (S/AC.26/2000/18). The same invoices issued by Mannesmann to the Employer totalled DEM 4,684,258. The difference is DEM 612,433. This appears to be Mannesmann's mark-up on the invoices received from Dodsal. This conclusion is supported by a document entitled "Summary Contract Loss" which contains a reference to Mannesmann's mark-up on the invoices issued by Dodsal in the amount of approximately DEM 612,000. This amount did not form part of the claim by Dodsal.

66. The Panel recommends compensation in the amount of DEM 612,433.

f. Inspection DEM portion (100 per cent)

67. Mannesmann seeks compensation in the amount of DEM 95,671 for payments relating to the inspection portion of the contract. The claim relates to invoice Nos. BV/04 dated 19 June 1990 (in the amount of DEM 62,775), BV/10 dated 1 July 1990 (in the amount of DEM 6,509), BV/11 dated 13 August 1990 (in the amount of DEM 7,823), BV/12 dated 2 October 1990 (in the amount of DEM 16,071) and BV/13 dated 30 October 1990 (in the amount of DEM 2,493). In the Statement of Claim (as defined in paragraph 13 of the Summary), Mannesmann sought compensation in the amount of DEM 95,423 for this loss item. However, the Panel notes that Mannesmann made an error in calculating the claim amount. The total of the invoices is DEM 95,671 and not DEM 95,423.

68. All the invoices, save invoice No. BV/13, were certified by the Employer and submitted to Paribas for payment. Invoice Nos. BV/04, BV/10, BV/11 and BV/12 are therefore compensable as direct losses arising out of Iraq's invasion and occupation of Kuwait. With respect to invoice No. BV/13, the Panel is satisfied that the work to which this invoice relates was performed and that the lack of certification is due to the frustration of the payment process as a result of Iraq's invasion and occupation of Kuwait.

69. Based on the evidence provided, the Panel finds that the non-payment of the invoices in the amount of DEM 95,671 arose as a direct result of Iraq's invasion and occupation of Kuwait and recommends compensation in that amount.

(ii) Retention monies

70. Mannesmann seeks compensation in the amount of DEM 14,791,268 and IQD 296,836 (which Mannesmann converted to a total of DEM 16,506,978) for retention monies. The claim is for the withheld retention monies for the following portions of work: (a) material supply (DEM 13,397,544); (b) material supply – provisional sum (DEM 4,137); (c) construction - DEM portion (DEM 1,389,587); and (d) construction – IQD portion (IQD 296,835,617, which Mannesmann converted to a total of DEM 1,715,710).

71. The retention monies were to be released in three parts, as follows: (a) 20 per cent upon the issue of the ready for commissioning certificate; (b) 30 per cent upon the issue of the taking over certificate; and (c) 50 per cent upon the issue of the final acceptance certificate. The final acceptance certificate was to be issued upon the expiry of the maintenance period of 12 months commencing from the date of issue of the taking over certificate. Mannesmann states that the final acceptance certificate was not issued. It provided no information concerning the status of the ready for commissioning certificate and the taking over certificate.

72. In support of its claim for retention monies, Mannesmann provided copies of the invoices from which the retention monies were deducted. It also provided various cost reports for the Project, internal memoranda and a submission to the Employer prepared in November 1988 requesting an extension of time for completion of the Project and an increase in the amounts to be paid. The supporting evidence indicates that there were considerable delays and cost increases to the Project.

The November 1988 submission to the Employer states that completion of the Project had been impacted to such an extent that the revised completion date for the Project was extended until 7 July 1991.

73. In the cost report for the Project dated 31 July 1990, Mannesmann concluded that the delays to the Project would result in the handover of the works no earlier than 15 March 1991. The cost of the Project is stated to have increased by DEM 22.4 million thereby causing the Project to exceed its budget by DEM 42.8 million.

74. An internal Mannesmann memorandum dated 5 March 1990 reported substantial losses to Mannesmann on the Project. It refers to delays and problems with the original planning and pricing of the Project.

75. After reviewing the evidence, the Panel finds as follows:

(a) On the material, particularly in the light of the cost report for the Project dated 31 July 1990, it is difficult to find that Mannesmann would have been able to maintain a successful claim to recover the retention monies. The cost report makes reference to substantial delays in each of the engineering, procurement and construction activities of the project. Any claim to retention monies would have been successfully resisted (even if there were no defects in the work) by the Employer by reference to its entitlement to compensation for those delays.

(b) The Panel notes that, as might have been expected, Mannesmann was seeking to achieve a commercial resolution of the situation with the chairman of the Employer. The Panel accepts that that might have been possible to do, but future hypothetical resolutions of such a nature contain too many uncertainties to provide a sound basis for a recommendation to the Governing Council.

(c) In particular, the Panel notes that Mannesmann did not attempt to hold the Employer responsible for the delays that occurred prior to Iraq's invasion and occupation of Kuwait.

(d) It follows from the above that the claim for retention monies falls within the scope of paragraph 88(a) of the Summary; on the evidence, Mannesmann failed to establish any responsibility on the part of the Employer for the delays which had occurred. Therefore, there is no direct causative link between the loss and Iraq's invasion and occupation of Kuwait.

76. The Panel recommends no compensation for retention monies.

(b) Cost of storage, conservation and insurance

77. In support of its claim for storage costs, Mannesmann provided copies of invoices issued by the storage companies. The invoices relate to storage costs for the period from September 1990 to April 1993.

78. In support of its claim for insurance costs, Mannesmann provided copies of invoices issued by Allianz Versicherungs AG. The invoices were issued on various dates during the period from 1991 to

1993. The invoices make reference to the name of the Project, however they have not been translated into English. They appear to relate to the transport insurance for the stored materials.

79. In support of its claim for conservation costs, Mannesmann provided two invoices dated 4 March and 8 April 1991 issued by Bachmann Verpackungsbetriebe GmbH. The invoices make reference to the name of the Project, however they have not been translated into English. Mannesmann also provided a summary of the cost of conservation work carried out for certain items being stored at the different locations. However, Mannesmann did not provide a description of the type of conservation activity carried out in relation to the materials.

80. The Panel notes that in respect of all three loss items, Mannesmann provided no evidence of payment of the invoices. Indeed, in response to an additional enquiry, Mannesmann stated that the relevant documents had either been misplaced during the restructuring of the company or destroyed after the minimum document retention period required by German law had expired. Applying the evidentiary principles set out in paragraphs 30 to 34 of the Summary, the Panel finds that Mannesmann failed to establish that it incurred the alleged losses.

81. The Panel recommends no compensation for the cost of storage, conservation and insurance.

(c) Materials not delivered

82. In support of its claim, Mannesmann provided a list of the undelivered material together with details of the supplier, value, quantity, purchase order numbers, name of the storage companies and places of storage. The list of materials supplied to the Project is extensive, and includes diesel engines, pumps, couplings, fittings, installation material elbows, bolts, valves and ducts.

83. Mannesmann states that it was subsequently able to sell materials with a value of DEM 5,258,940 and it reduced the amount of its claim accordingly. However, it asserts that, despite its attempts, the remaining materials could not be sold as the goods were specifically designed for the Project and had partially deteriorated while in storage.

84. Despite these assertions, the Panel finds that Mannesmann failed to offer sufficient explanation and evidence as to why the materials could not be resold or used elsewhere. In particular, Mannesmann failed to establish the specific design, failed sufficiently to evidence the deterioration and failed to provide evidence of its efforts to sell the materials or other attempts to mitigate its losses. The Panel therefore recommends no compensation for materials which could not be delivered to the Project site.

(d) Other items

85. Mannesmann provided no evidence in support of its claim for other items. Accordingly, the Panel recommends no compensation.

(e) Dodsal invoices

86. In support of its claim, Mannesmann submitted copies of invoice Nos. 13/DM to 16/DM together with a copy of the subcontract with Dodsal.

87. The Panel refers to the discussion at paragraph 65, supra, of the compensation received by Dodsal in respect of the same invoices.

88. The Panel finds that no loss has been suffered by Mannesmann in respect of the outstanding amounts owed to Dodsal, as Mannesmann has not made any payment to Dodsal for the invoiced amounts. Moreover, as a result of the compensation awarded by the Commission, Dodsal is not owed any further amounts in respect of these invoices. Accordingly, the Panel recommends no compensation.

(f) Personnel detained in Iraq

89. In respect of recovery of unproductive salary payments, in the "Report and recommendations made by the Panel of Commissioners concerning the seventeenth instalment of 'E3' claims" (S/AC.26/2001/2) (the "Seventeenth Report"), the Panel stated at paragraph 27 that salaries paid to employees detained in Iraq are "prima facie compensable as salary paid for unproductive labour". However, the Panel noted that compensation will be awarded only when the claimant provides sufficient evidence to establish detention and actual payment.

90. In support of its claim, Mannesmann only provided two lists containing a description of the personnel allegedly present in Iraq as at 8 October and 17 December 1990. The lists, which appear to have been contemporaneously prepared in October and December 1990, respectively, include the names of the employees, their nationalities, job descriptions, dates of birth, number of days of alleged detention, dates of departure from Iraq, the applicable hourly or daily rate, as appropriate, and the amount of salary paid to each employee.

91. The Panel finds that Mannesmann failed to provide sufficient evidence of the detention of the employees and of its actual payment of the amounts stated. Accordingly, the Panel recommends no compensation.

(g) Advance payment

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

93. Any part of the advance payment still in hand must be deducted from the contract losses claimed by Mannesmann. The supporting documents show that Mannesmann received the amount of DEM 33,577,198 and IQD 812,900 (which Mannesmann converted to a total of DEM 38,275,760) by way of advance payment. Mannesmann set off the advance payment against invoices issued to the Employer in the amount of DEM 29,620,690 and IQD 593,671 (which Mannesmann converted to a

total of DEM 33,052,110). This leaves Mannesmann with a balance of DEM 3,956,508 and IQD 219,229 (which Mannesmann converted to a total of DEM 5,223,650) of the advance payment. The sum of DEM 3,956,508 and IQD 219,229 therefore falls to be deducted from the recommended compensation for contract losses. This calculation produces the amount of DEM 18,757,269 less IQD 219,229.

3. Recommendation

94. The Panel recommends compensation in the amount of USD 11,303,578 for contract losses. The Panel's recommendations for the individual loss items comprising Mannesmann's claim for contract losses are set out in table 5, infra.

Table 5. Mannesmann's claim for contract losses – Panel's recommendations

Loss item	Claim amount (as per Statement of Claim) (DEM)	Panel's recommendation (original currency)	Panel's recommendation (USD)
Unpaid invoices and retention monies withheld			
Material supply – 65 per cent payment	9,955,723	DEM 9,955,723	
Material supply – 20 per cent payment (certified)	10,681,706	DEM 10,681,706	
Material supply – 20 per cent payment (uncertified)	4,910,800	DEM 2,404,304	
Material supply – provisional sum	16,551	DEM 2,015	
Construction DEM portion (85 per cent)	4,684,258	DEM 612,433	
Inspection DEM portion (100 per cent)	95,423	DEM 95,671	
Retention monies withheld	16,506,978	nil	
Subtotal unpaid invoices and retention monies withheld	46,851,439	DEM 23,751,852	15,206,051
Deductions made by Mannesmann			
Advance payment credit	(5,223,650)	(DEM 3,956,508 & IQD 219,229)	
Dodsal invoices	(4,071,825)	nil	
Sale of materials kept in transit	(1,038,075)	(DEM 1,038,075)	
Subtotal deductions	(10,333,550)	(DEM 4,994,583 & IQD 219,229)	(3,902,473)
Subtotal (unpaid invoices and retention monies withheld)	36,517,889	DEM 18,757,269 minus IQD 219,229	11,303,578
Cost of storage, conservation and insurance	1,372,905	nil	
Materials not delivered	15,966,695	nil	
Other items	10,607,372	nil	
Dodsal invoices	4,071,825	nil	
Personnel detained in Iraq	3,501,487	nil	
Total (contract losses)	72,038,173	DEM 18,757,269 minus IQD 219,229	11,303,578

B. Loss of profits

1. Facts and contentions

95. Mannesmann seeks compensation in the amount of USD 9,535,177 (DEM 14,893,947) for loss of profits. The claim is for loss of anticipated profits resulting from the early termination of the contract.

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

97. Mannesmann asserts that it would have been entitled to the full contract price after adjustment of contract changes in the sum of DEM 439,741,131. It calculated its claim upon the assumption that it would have incurred total costs in the aggregate amount of DEM 424,847,184 for the completion of the Project as foreseen in the cost report dated 31 July 1990. Mannesmann therefore anticipated its profits for the Project as DEM 14,893,947, which is equal to 3.5 per cent of the contract price.

2. Analysis and valuation

98. In support of its claim for loss of profits, Mannesmann provided extensive calculations of the costs of the Project in the form of cost reports, internal memoranda and auditors' reports for the financial years ending 1987 to 1992. As noted at paragraph 75, supra, in the Panel's analysis of Mannesmann's claim for retention monies, the supporting documents indicate that, prior to Iraq's invasion and occupation of Kuwait, the cost of the Project had been steadily increasing. There is no evidence that the Employer had agreed to, or was liable for, such additional costs.

99. The cost reports do not make specific reference to the profit element of the Project or provide information as to the type of profit margins that were normally applied to Mannesmann's projects. The information does, however, confirm that, prior to Iraq's invasion and occupation of Kuwait, there were considerable delays and cost increases on the Project and that the financial situation of the Project continued to worsen after Iraq's invasion and occupation of Kuwait.

100. The evidence submitted by Mannesmann demonstrates that the Project may have reached a conclusion, but that there would have been problems to resolve after completion of the works. It is likely that considerable time and costs would have been required to be expended to resolve the problems.

101. The Panel finds that Mannesmann failed to fulfil the evidentiary standard for loss of profits claims set out in paragraphs 144 to 150 of the Summary. In particular, it failed to provide sufficient and appropriate evidence that the contract would have been profitable as a whole. Accordingly, the Panel recommends no compensation.

3. Recommendation

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

C. Payment or relief to others

1. Facts and contentions

103. Mannesmann seeks compensation in the amount of USD 134,754 (DEM 6,509 and CHF 168,718) for payment or relief to others. The claim is for costs allegedly incurred for providing food to its workers detained in Iraq after Iraq's invasion and occupation of Kuwait. The total sum of the costs comprising this claim as evidenced by the invoices provided is DEM 6,509 and CHF 168,718. Mannesmann converted these amounts to DEM 210,375 in the "E" claim form.

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

105. Mannesmann states that, due to Iraq's invasion and occupation of Kuwait, it was forced to stop work on the Project on 8 August 1990 and its workers thereafter became idle. After the cessation of the works, Mannesmann's workers were detained in Iraq while awaiting evacuation from Iraq. It was during this period of detention that Mannesmann incurred costs for the food provided to its workers.

2. Analysis and valuation

106. In support of its claim for payment or relief to others, Mannesmann provided invoices issued by various food supply companies in Germany, Jordan and Switzerland. The invoices, which are dated from 3 August to 6 November 1990, list the items of foodstuff together with related transportation expenses. They are accompanied by some evidence that Mannesmann paid the expenses.

107. In respect of evacuation and relief costs, the Panel considers that the costs associated with evacuating and repatriating employees from Iraq between 2 August 1990 and 2 March 1991 are compensable to the extent that such costs are proved by the claimant and are reasonable in the circumstances. Urgent temporary liabilities and extraordinary expenses relating to evacuation and repatriation, including food and accommodation are, in principle, compensable. (See the Summary, paragraph 172.)

108. The Panel finds that Mannesmann's claim is compensable in principle and is satisfied, based on the evidence provided, that Mannesmann incurred the expenses. The Panel recommends compensation in the full amount claimed.

3. Recommendation

109. The Panel recommends compensation in the amount of USD 134,754 for payment or relief to others.

D. Summary of recommended compensation for Mannesmann

Table 6. Recommended compensation for Mannesmann

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	46,081,712	11,303,578
Loss of profits	9,535,177	nil
Payment or relief to others	134,754	134,754
Interest	13,935,714	-
Total	69,687,357	11,438,332

110. Based on its findings regarding Mannesmann's claim, the Panel recommends compensation in the amount of USD 11,438,332. The Panel determines the date of loss to be 2 August 1990.

III. ANSALDO INDUSTRIA S.P.A.

111. Ansaldo Industria S.p.A. ("Ansaldo") is a corporation organised according to the laws of Italy. It was involved in construction projects in Iraq at the time of Iraq's invasion and occupation of Kuwait. For several of the projects, it was performing work as a subcontractor to Danieli & Co. S.p.A. Italy. Ansaldo states that it submitted claims for unpaid work to Istituto per i Servizi Assicurativi per il Commercio Estero (SACE), the Italian export credit agency, prior to submitting its claim to the Commission. SACE was previously known as Sezione Speciale per l'Assicurazione del Credito all'Esportazione.

112. In the original claim submission, Ansaldo sought compensation in the total amount of USD 21,425,664 (24,838,772,000 Italian lire (ITL)) for contract losses in the "E" claim form.

113. On 18 September 2001, in its response to the article 15 notification (as defined in paragraph 14 of the Summary) Ansaldo reduced the "practically completed contracts" section of the contract loss element of its claim from ITL 1,356,943,000 to ITL 756,672,000. It also withdrew the United States dollar portion of this loss item (in the amount of USD 2,410,643). This reduction in the claim amount was made in the light of a settlement which Ansaldo entered into in respect of the Kirkuk pumping plant.

114. In its response to the article 15 notification, Ansaldo also increased its claim for "contracts under performance" from ITL 10,864,700,000 to ITL 13,052,488,000. For the reasons stated in paragraph 36 of the Summary, this increase was not taken into account by the Panel.

115. In the original claim submission, Ansaldo characterised the following losses as a claim for contract losses, but the Panel finds that they are more accurately classified as a claim for loss of overhead/profits:

(a) "Contracts under performance" ("non-effected contribution to general expenses");

(b) "Contracts under performance" ("non-attained profits");

(c) "Acquired contracts not entered into force" ("non-effected contribution to general expenses"); and

(d) "Acquired contracts not entered into force" ("non-attained profits").

116. Ansaldo also characterised the following losses as a claim for contract losses, but the Panel finds that they are more accurately classified as a claim for losses related to business transaction or course of dealing:

(a) "Contracts under performance" ("non-effected recovery of offer preparation cost"); and

(b) "Acquired contracts not entered into force" ("non-effected recovery of offer preparation cost").

117. As a result of this reclassification, the Panel treated the claim for contract losses, losses related to business transaction or course of dealing and loss of overhead/profits as amounting to USD 17,739,489, as made up as follows:

Table 7. Ansaldo's claim

Claim element	Claim amount (USD)
Contract losses	3,679,570
Losses related to business transaction or course of dealing	328,647
Loss of overhead/profits	13,731,272
Total	17,739,489

A. Contract losses

1. Facts and contentions

118. Ansaldo seeks compensation in the amount of USD 3,679,570 (ITL 4,147,672,000 and DEM 159,061) for contract losses. The claim is for losses allegedly incurred in connection with contracts in Iraq.

119. Ansaldo submitted claims in respect of "contracts under performance," "practically completed contracts" and "contracts recycled on other foreign plants".

(a) "Contracts under performance"

120. Ansaldo seeks compensation the amount of USD 2,522,258 (ITL 2,806,000,000 and DEM 159,061) for contract losses ("contracts under performance"). The claim relates to three contracts, as follows:

(a) A contract relating to the supply of equipment, engineering and services for a "hot belt rolling plant" at the Az-Zubair site signed on 6 December 1989;

(b) A contract relating to a "rolling process software development with mathematical mode" at the Az-Zubair site signed on 6 December 1989; and

(c) A contract relating to the Ashtar substation at the Az-Zubair site signed on 20 March 1990.

121. Ansaldo seeks compensation in the amount of ITL 1,507,000,000 for "share of work in progress that cannot be refunded by SACE insurance". It stated that the non-refundable share was equal to 20 per cent of the total amount of work in progress on the projects.

122. Ansaldo seeks compensation in the amount of ITL 500,000,000 for "stocking and preservation costs" in respect of the "contracts under performance". It stated that these costs were related to the stocking of its plants in Milan and Monfalcone as well as those of its subcontractors. Ansaldo states that the costs also related to handling and preservation for the suspension period. However, it did not identify the dates of the suspension period.

123. Ansaldo seeks compensation in the amount of ITL 512,000,000 for unproductive salary payments in respect of the "contracts under performance". It states that the suspension of works brought about a period of inactivity for some of the technicians directly employed on the contracts. Ansaldo stated that the problem could not be solved by shifting personnel to other projects since it would have resulted in higher costs to Ansaldo than allowing the technicians to remain unproductive on the projects on which they were already employed.

124. Ansaldo seeks compensation in the amount of ITL 287,000,000 for "suspension and extinction extraordinary administration". Ansaldo states that "this item includes all the costs that have cropped up for the administration of an 'extraordinary' event going beyond the customary procedures for the actioning of an order", including bookkeeping expenses in respect of subcontractors, file keeping in respect of claims to SACE and expenses in respect of filing its claim to the Commission.

125. Ansaldo seeks compensation in the amount of DEM 159,061 for "costs for third parties". Ansaldo did not submit any explanation concerning the nature of its losses. Ansaldo provided two invoices which may be related to this alleged loss. However, they were not translated into English.

(b) <u>"Practically completed contracts (other minor orders)"</u>

126. Ansaldo seeks compensation in the total amount of USD 652,697 (ITL 756,672,000) for three motor orders which it states that it manufactured but for which it did not receive payment:

(a) "No. 4 Motors" for Ionics Italba (ITL 256,327,000);

(b) "No. 1 Motor" for Nuovo Pignone (ITL 216,125,000; and

(c) "No. 6 Motors" for Danieli & Co. S.p.A (ITL 284,220,000).

(c) "Contracts recycled on other foreign plants"

127. Ansaldo seeks compensation in the amount of USD 504,615 (ITL 585,000,000) for "losses on reutilization." Ansaldo submitted this claim in respect of a contract (the "Rod Belt Contract") signed on 10 October 1989 in relation to work to be performed at the TAJI site, located approximately 70 kilometres from Baghdad. Ansaldo states that SACE insurance had not been provided for the contract and therefore it was difficult for Ansaldo to "redeem the risks" which occurred due to interruption of the works. Ansaldo states that it was compelled to opt for reutilization of the equipment "by applying an extra commercial discount on another similar foreign plant."

2. Analysis and valuation

128. In support of its claim for "contracts under performance", Ansaldo provided the cover pages of its contracts only. Although requested to do so, it did not provide copies of the contracts themselves.

129. In support of its claim for "practically completed contracts", Ansaldo submitted a calculation of its claim (including amounts for legal expenses) in respect of the motor order for Ionics Italba and states that Ansaldo was carrying out legal action against the client for the unsettled amount.

130. Ansaldo submitted a calculation of its claim (including amounts for "stocking and preservation") in respect of the motor order for Nuovo Pignone and states that although the motor was completed it had not been sent to the client.

131. Ansaldo submitted a calculation of its claim (including amounts for "suspension action, stocking") in respect of the motor order for Danieli & Co. S.p.A. which states that about 65 per cent of the work had been completed with "the possibility of a reutilization equal to ITL 136 millions [sic]". Ansaldo did not provide further explanation.

132. Ansaldo did not submit any evidence in support of its claim for "contracts recycled on other foreign plants".

133. In relation to the claim for all three categories of contract losses, Ansaldo did not provide sufficient evidence to demonstrate that it incurred a loss or that its losses were directly caused by Iraq's invasion and occupation of Kuwait.

3. Recommendation

134. The Panel recommends no compensation for contract losses.

B. Business transaction or course of dealing

1. Facts and contentions

135. Ansaldo seeks compensation in the amount of USD 328,647 (ITL 381,000,000) for losses related to business transaction or course of dealing. The claim is for expenses allegedly incurred in

preparing offers for "contracts under performance" in the amount of ITL 184,000,000 and "acquired contracts not entered into force" in the amount of ITL 197,000,000. In the "E" claim form, Ansaldo characterised this loss element as a claim for contract losses, but the Panel finds that it is more accurately classified as a claim for losses related to business transaction or course of dealing.

136. Ansaldo states that the cost of preparing the offers for the contracts under performance could have been "absorbed by the contracts themselves instead of becoming a charge for the Company". Because the contracts were never completed, Ansaldo states that the costs of preparing the offers were only partially recovered.

2. Analysis and valuation

137. In support of its claim, Ansaldo provided an explanation of its loss, however it did not provide any evidence in support of its loss, such as the offers for the contracts or the contracts themselves.

138. In the Fourth Report, the Panel stated at paragraph 436 that bid costs (like operating costs and overheads) are to be recovered through the payments under the contract for work done. Furthermore, where there is no indication of how much of the costs are recoverable through payment for work done, which is the case in Ansaldo's claim, the item is not recoverable. In any event, Ansaldo did not provide sufficient evidence to enable the Panel to make any accurate evaluation of quantum.

3. Recommendation

139. The Panel recommends no compensation for losses related to business transaction or course of dealing.

C. Loss of overhead/profits

1. Facts and contentions

140. Ansaldo seeks compensation in the amount of USD 13,731,272 (ITL 7,572,000,000 and DEM 11,246,000) for loss of overhead/profits. In the "E" claim form, Ansaldo characterised this loss element as a claim for contract losses but the Panel finds that it is more accurately classified as a claim for loss of overhead/profits.

141. Ansaldo described the losses as follows:

(a) "Contracts under performance" ("non-effected contribution to general expenses")

142. Ansaldo stated that the "non-effected contribution to general expenses refers to the period of time from the interruption of works to their foreseen completion time, the annual values of the non-effected invoicing which were recalculated by applying ISTAT (Italian National Institute of Statistics) indexes and then re-evaluated until 31 December 1991 on the basis of 'ABI indexes'" [a term not defined by Ansaldo].

(b) "Contracts under performance" ("non-attained profits")

143. Ansaldo stated that the percentage used to calculate "non-attained profits" was 10 per cent. Ansaldo also stated that the same procedure which was used to calculate "non-effected contribution to general expenses" was also used to calculate "non-attained profits". Ansaldo did not provide further details.

(c) "Acquired contracts not entered into force" ("non-effected contribution to general expenses")

144. Ansaldo stated that it had entered into two contracts on which it had not yet begun work. The first contract was entered into between a consortium formed by Ansaldo and Sulzer-Escher-Wyss GmbH, Germany ("Sulzer") and the State Enterprise for Paper Industry, Basrah ("SEPI"), dated 3 February 1990 to supply machinery and equipment for a "kraftliner" paper plant at Misan (the "Misan Paper Contract"). The second contract was entered into between the same consortium and SEPI to supply machinery and equipment for a tissue plant in Iraq (the "Tissue Paper Contract"). The Tissue Paper Contract was signed on 6 September 1989. Ansaldo provided copies of the signature pages of the contracts. Ansaldo seeks compensation for non-effected contribution to general expenses in respect of the Misan Paper Contract and the Tissue Paper Contract. It did not provide further details.

(d) "Acquired contracts not entered into force" ("non-attained profits")

145. Ansaldo stated that it used the same procedure to calculate "non-attained profits" in respect of the Misan Paper Contract and the Tissue Paper Contract as it did to determine "non-attained profits" in respect of the "contracts under performance". It provided no further explanation.

2. Analysis and valuation

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

3. Recommendation

147. The Panel recommends no compensation for loss of overhead/profits.

D. Summary of recommended compensation for Ansaldo

Table 8. Recommended compensation for Ansaldo

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	3,679,570	nil
Losses related to business transaction or course of dealing	328,647	nil
Loss of overhead/profits	13,731,272	nil
Total	17,739,489	nil

148. Based on its findings regarding Ansaldo's claim, the Panel recommends no compensation.

IV. GRASSETTO COSTRUZIONI S.P.A. (FORMERLY INCISA S.P.A.)

149. Grassetto Costruzioni S.p.A. (formerly Incisa S.p.A.) ("Grassetto") is a corporation organised according to the laws of Italy. The claim was originally submitted by Incisa S.p.A., ("Incisa"), which was also known as Impresa Nazionale Condotte Industriali Strade ed Affini. However, in June 1993, four months after filing the claim, Incisa merged with four other Italian companies. The new entity is known as Grassetto Costruzioni S.p.A.

150. At the time of Iraq's invasion and occupation of Kuwait, Incisa was engaged as a subcontractor to carry out the second phase of the civil works on a pumping station in Zubair, Iraq. The project was known as the Iraq Crude Oil Pipeline Trans Saudi Arabia Project (the "IPSA project"). The main contractor on the project was a French company, Spie-Capag S.A. ("Spie-Capag"), which subcontracted all of the earth, civil and road works to Incisa pursuant to a subcontract dated 10 February 1988. The owner of the project was the State Organisation for Oil Projects of Iraq.

151. Grassetto claims that Incisa incurred losses of equipment, plant, materials and spare parts, as well as costs and expenses in supporting its employees who were forced to remain in Iraq after August 1990. In addition, Grassetto claims that Incisa incurred losses in extending its insurance coverage for the IPSA project, as well as losses on a bank guarantee provided in relation to the project.

152. Grassetto seeks compensation in the total amount of USD 2,415,585 for loss of tangible property, payment or relief to others, financial losses and other losses.

153. In its original claim submission, Incisa also sought compensation in the amount of USD 1,922,233 for contract losses. In its response to the article 34 notification (as defined in paragraph 15 of the Summary), Grassetto withdrew its claim for contract losses, stating that it had received payment for this amount from Spie-Capag as a result of arbitration proceedings.

Table 9. Grassetto's claim

Claim element	Claim amount (USD)
Loss of tangible property	2,033,790
Payment or relief to others	303,071
Financial losses	35,956
Other losses	42,768
Total	2,415,585

A. Loss of tangible property

1. Facts and contentions

154. Grassetto seeks compensation in the amount of USD 2,033,790 (ITL 2,357,772,702) for loss of tangible property.

155. At the time of Iraq's invasion and occupation of Kuwait, Incisa was engaged as a subcontractor to carry out civil works at a pumping station, which Incisa refers to as the "PSA2" pumping station, on the IPSA project. The project site was located approximately 30 kilometres from the border with Kuwait. Incisa does not state when it commenced work on the IPSA project.

156. The scope of the work to be performed by Incisa included earth moving, concrete paving, provision of drainage systems and the supply of materials and technical assistance for the construction of various buildings at the project site. It appears from charts annexed to the subcontract with Spie-Capag that the work was originally scheduled to end in February 1989. Given that Incisa states in the Statement of Claim that it was finalising the civil works at the time of Iraq's invasion and occupation of Kuwait, there were presumably delays or variations in the works performed.

157. Grassetto's claim for loss of tangible property consists of (a) USD 1,834,532 (ITL 2,126,772,702) for equipment and plant, and (b) USD 199,258 (ITL 231,000,000) for materials and spare parts. The Panel considers each of these claims in turn.

(a) Equipment and plant

158. In the Statement of Claim, Incisa states that it temporarily imported equipment and plant into Iraq in order to execute the works on the IPSA project. The equipment and plant included earthmoving equipment, trucks, cars, cranes and generators. As work on the IPSA project was almost finished at the time of Iraq's invasion and occupation of Kuwait, Incisa had prepared the documentation required for re-exportation of the majority of items claimed.

159. However, upon the commencement of hostilities in Kuwait, Incisa states that it transferred part of the equipment and plant to an enclosed and guarded area in Zubair which belonged to Spie-Capag and from which Incisa intended to re-export the equipment and plant when the circumstances

allowed. Incisa further states that its site personnel who remained in Baghdad went periodically to Zubair to check on the equipment and plant, but were only able to verify the progressive withdrawal of the equipment and plant from the area by the Iraqi authorities.

160. Incisa alleges that the nature of the equipment and plant, and the fact that it had been recently overhauled with a view to re-exportation for use on other projects, as well as the fact that it was held close to the Kuwaiti border, resulted in it being taken by the Iraqi authorities for use in Iraq's military operations in Kuwait.

161. Incisa values its equipment and plant present in Iraq as of August 1990 in the total amount of ITL 6,336,005,714. However, part of the claimed equipment and plant was insured against risk of war damage, destruction, catastrophic events and confiscation pursuant to an insurance policy which Incisa held with SACE. Incisa did not provide a copy of the insurance policy, but states that the insurance coverage was for a total amount of ITL 4,193,951,495. Incisa states that it made a claim under the insurance policy in April 1991. SACE valued the loss in the amount of ITL 2,992,085,051 and indemnified Incisa in the amount of ITL 2,393,668,041, after deducting ITL 598,417,010, which represented 20 per cent of the loss which was not covered by the insurance policy.

162. Incisa states that it retained an expert to value its loss of equipment and plant for the purpose of seeking indemnification under the insurance policy, and provided a sworn statement as to the methods of valuation used by this expert. Incisa states in the Statement of Claim that it calculated its claim for equipment and plant in the total amount of ITL 2,126,772,702. Incisa states that the depreciation rate applied by SACE to the equipment and machinery was 28.65 per cent of the "purchase value" of the insurance policy.

163. Applying the same depreciation rate, Incisa calculates its claim for equipment and plant (that was not covered under the insurance policy with SACE) as follows:

Table 10. Grassetto's claim for loss of tangible property (equipment and plant)

Calculation of loss	Claim amount (ITL)
Total value of equipment in Iraq	6,336,005,714
Less equipment covered by SACE policy	(4,193,951,485)
Equipment lost but not insured	2,142,054,229
Less applied depreciation rate (28.65%)	(613,698,537)
Value of loss of equipment and plant	1,528,355,692
Plus 20 per cent of insured losses not covered by SACE policy	598,417,010
Total amount of claim for equipment and plant	2,126,772,702

(b) Materials and spare parts

164. In the Statement of Claim, Incisa states that it incurred losses of materials and spare parts which it held at its site in Iraq as of August 1990 because these goods were stolen by the Iraqi authorities or destroyed during the hostilities in Kuwait. Invoices provided by Incisa indicate that the materials included doors, lamps, adhesive tape, tiles and pipes and that the spare parts included gaskets, bolts, valves, pumps, spare parts for engines and bearings.

165. Incisa states that as of August 1990, no inventory had been made in relation to the materials and spare parts. It was therefore necessary to estimate the value of the materials and spare parts. Incisa estimates that the total value of the materials was ITL 148,000,000 and the total value of the spare parts was ITL 83,000,000. Accordingly, the total amount claimed for the materials and spare parts is ITL 231,000,000.

2. Analysis and valuation

(a) Equipment and plant

166. In support of its claim for loss of equipment and plant, Incisa provided a letter dated 17 April 1991 from Incisa to SACE outlining its claim for indemnification under the insurance policy held with SACE. Incisa also submitted a letter dated 9 April 1992 from SACE indicating that it would indemnify Incisa pursuant to the insurance policy in the amount of ITL 2,393,668,041. Finally, Incisa submitted an internally-generated spreadsheet dated 10 April 1991 which appears to value the equipment and plant in the total amount of ITL 2,992,085,051, but which has not been translated into English.

167. Incisa did not provide any independent evidence translated into English to demonstrate that the equipment and plant for which it did not receive indemnification from SACE was present in Iraq as at August 1990. In the article 34 notification, the secretariat of the Commission (the "secretariat") requested Grassetto to provide evidence such as certificates of title, receipts, purchase invoices, bills of lading, customs records and asset registers generated prior to August 1990. Grassetto responded to the article 34 notification, but most of the evidence provided with its response was not translated into English, and the evidence that was in English did not demonstrate that the equipment and plant was present in Iraq as at August 1990.

168. Moreover, neither Incisa nor Grassetto provided any verification, such as affidavits, from its personnel who had allegedly witnessed the withdrawal of the equipment and plant from the store in Zubair, and did not provide any specific or estimated timeframes as to the date or period in which the loss was discovered. Accordingly, the Panel recommends no compensation.

(b) Materials and spare parts

169. In relation to its claim for loss of materials and spare parts, Incisa provided internally-generated inventory sheets dated 31 December 1989 listing the value of materials held in Iraq in relation to the IPSA project as ITL 143,682,243 and the value of the spare parts as ITL 82,535,414.

These documents have not been translated into English. Incisa also provided a series of invoices and shipping documents dated between January and June 1990 (some of which have been translated into English), which list materials and spare parts allegedly brought into Iraq. The value of the goods listed in these documents does not correspond with the amount claimed.

170. The Panel finds that Incisa failed to provide sufficient evidence in support of its claim for loss of materials and spare parts. Incisa did not provide any evidence in support of its estimated valuation of the materials and spare parts. In the article 34 notification, the secretariat requested Grassetto to provide such evidence. Although Grassetto responded to the article 34 notification, most of the evidence submitted was not translated into English. The evidence that was in English did not support this claim. Accordingly, the Panel recommends no compensation.

3. Recommendation

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

B. Payment or relief to others

1. Facts and contentions

172. Grassetto seeks compensation in the amount of USD 303,071 (ITL 351,349,969) for payment or relief to others. The claim for payment or relief to others is as follows:

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

Loss element	Claim amount (ITL)	Claim amount (USD)
Wages paid to Italian personnel	149,024,643	128,547
Wages paid to local personnel	76,703,626	66,164
Wages paid to Thai and Bangladeshi personnel	33,225,348	28,660
Catering charges	49,623,608	42,805
Food and medical charges	42,772,744	36,895
Total	351,349,969	303,071

(a) Wages paid to Italian personnel

173. Grassetto seeks compensation in the amount of USD 128,547 (ITL 149,024,643) for wages and other contributions made by Incisa in respect of its Italian personnel.

174. Incisa states in the Statement of Claim that 32 of its employees were in Iraq working on the IPSA project at the time of Iraq's invasion and occupation of Kuwait. Incisa alleges that the entire site activity in Zubair was suspended and that all of its employees, other than two mechanics who travelled to Zubair to check on the state of its property, were subject to conditions of "forced inactivity". That

is the employees were obliged to leave the IPSA project site and to shelter in Baghdad for four months due to the refusal of the Iraqi authorities to issue exit visas.

175. Incisa states that five of its employees, all Italian nationals, were forced to remain in Iraq until 31 December 1990. Incisa claims that it incurred costs and expenses in Italian lire and in Iraqi dinars in supporting these employees, as follows:

Table 12. Grassetto's claim for payment or relief to others (wages paid to Italian personnel)

Loss element	Claim amount (ITL)	Claim amount (USD)
Wages for employees and workers	68,130,000	58,768
Contributions to INPS (Istituto Nazionale Previdenza Sociale)	17,482,000	15,080
Contributions to INAIL (Istituto Nazionale Anti Infortuni sul Lavoro)	239,834	207
Contributions to INAIL up to 28 September 1990	1,260,186	1,087
War risk insurance	2,996,875	2,585
Dismissal wage	2,899,528	2,501
Wages and contributions for manager	39,903,000	34,420
Wages integration in local currency	8,576,622	7,398
Trip expenses refund	7,536,598	6,501
Total	149,024,643	128,547

(b) Wages paid to local personnel

176. Grassetto seeks compensation in the amount of USD 66,164 (ITL 76,703,626) for wages and other contributions made by Incisa in respect of its local personnel. Incisa alleges that it paid wages and other contributions to its seven local personnel from August to December 1990, as follows:

Table 13. Grassetto's claim for payment or relief to others (wages paid to local personnel)

Loss element	Claim amount (ITL)	Claim amount (USD)
Wages for local personnel	58,632,172	50,576
Contributions	3,598,665	3,104
Trip expenses	14,472,789	12,484
Total	76,703,626	66,164

(c) Wages paid to Thai and Bangladeshi personnel

177. Grassetto seeks compensation in the amount of USD 28,660 (ITL 33,225,348) for wages and other contributions made by Incisa in respect of its 20 Thai and Bangladeshi personnel. Incisa alleges

that it paid wages to these employees in the amount of ITL 33,225,348 from August to December 1990. Incisa states in the Statement of Claim that most of these employees left Iraq in September 1990, with three remaining in November 1990, and two in December 1990.

(d) Catering

178. Grassetto seeks compensation in the amount of USD 42,805 (ITL 49,623,608) for catering charges incurred between 2 August and 31 December 1990. Incisa provided very little detail in relation to this aspect of its claim for payment or relief to others. Incisa states in the Statement of Claim that two employees from an Italian catering service known as AL.MA. S.p.A. of Genoa, Italy, provided services in its guesthouse up to the date of departure of its personnel from Iraq.

(e) Food and medical charges

179. Grassetto seeks compensation in the amount of USD 36,895 (ITL 42,772,744) for food and medical charges incurred by Incisa between 2 August and 31 December 1990 in maintaining its personnel in Baghdad. Incisa calculated the cost of purchasing food as IQD 11,299 and converted this amount to ITL 40,042,614. Incisa states in the Statement of Claim that the food costs were high, as commodities were difficult to locate after closure of the borders and were therefore sold at "exorbitant prices". Incisa also claims that it incurred costs of IQD 766 (ITL 2,730,130) in purchasing medicines and medical services for its personnel.

2. Analysis and valuation

180. In respect of recovery of unproductive salary payments, in the Seventeenth Report, the Panel stated at paragraph 27 that salaries paid to employees detained in Iraq are "prima facie compensable as salary paid for unproductive labour". However, the Panel noted that compensation will be awarded only when the claimant provides sufficient evidence to establish detention and actual payment.

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

(a) Wages paid to Italian personnel

182. The evidence provided by Incisa included documents which appear to be payroll records pertaining to the Italian personnel for the months of August 1990 to January 1991. Incisa also provided forms which appear to record contributions made by Incisa to the INPS and to INAIL, as well as an insurance policy which appears to relate to the war risk insurance element of Incisa's claim for payments to its Italian personnel. Most of the evidence provided by Incisa was not translated into English. Moreover, the Panel was unable to reconcile many of the amounts listed in the evidence with the amounts claimed by Incisa. In the article 34 notification, the secretariat requested English

translations of all supporting documents, together with a detailed explanation substantiating the alleged losses. However, in its response to the article 34 notification, Grassetto did not submit any further evidence in support of this claim. Accordingly, the Panel recommends no compensation.

(b) Wages paid to local personnel

183. In support of its claim, Incisa provided seven pages of what appear to be payroll records pertaining to Incisa's local personnel. This document (which Incisa refers to as a "local accounts ledger") was not translated into English and the Panel was unable to reconcile the amounts listed with the claimed amount of ITL 76,703,626. Incisa also submitted pay statements showing wages paid to local personnel. However, the Panel was unable to reconcile the amounts listed in the pay statements with the amount claimed by Incisa for wages paid to local personnel. Moreover, the above evidence does not support Incisa's claims as to amounts claimed for contributions and trip expenses of local personnel. In its response to the article 34 notification, Grassetto did not submit any further evidence in support of this claim. Accordingly, the Panel recommends no compensation.

(c) Wages paid to Thai and Bangladeshi personnel

184. In support of its claim, Incisa provided pay statements showing payments to Thai and Bangladeshi personnel in the amount of USD 27,583. However, Incisa did not provide any evidence of the detention of its Thai and Bangladeshi personnel in Iraq. In its response to the article 34 notification, Grassetto did not submit any further evidence in support of this claim. Accordingly, the Panel recommends no compensation.

(d) Catering

185. In support of its claim, Incisa provided a series of invoices from AL.MA. S.p.A. dated between September and December 1990. None of these invoices was translated into English and the Panel was therefore unable to verify the nature of the invoices. In its response to the article 34 notification, Grassetto did not submit any further evidence in support of this claim. Accordingly, the Panel recommends no compensation.

(e) Food and medical charges

186. In support of its claim, Incisa provided several pages from its "local accounts ledger". This document was not translated into English and there is no other evidence in support of the claim. In its response to the article 34 notification, Grassetto did not submit any further evidence in support of this claim. Accordingly, the Panel recommends no compensation.

3. Recommendation

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

C. Financial losses

1. Facts and contentions

188. Grassetto seeks compensation in the amount of USD 35,956 (ITL 41,684,075) for financial losses. The amount claimed consists of (a) costs incurred in extending insurance coverage for works on the IPSA project in the amount of USD 26,000 (ITL 30,141,575), and (b) a bank guarantee in the amount of USD 9,956 (ITL 11,542,500).

189. In the "E" claim form, Incisa characterised this loss element as a claim for other losses, but the Panel finds that it is more accurately classified as a claim for financial losses. The Panel considers each claim in turn.

(a) Insurance costs

190. Grassetto seeks compensation in the amount of USD 26,000 (ITL 30,141,575) for costs incurred in extending insurance coverage.

191. In the Statement of Claim, Incisa states that it held two insurance policies in relation to the work it was performing on the IPSA project. The first of these was an "all risks work policy" held with SAI Società Assicuratrice Industriale S.p.A. Incisa states that this policy was due to expire on 31 August 1990. Incisa alleges that due to Iraq's invasion and occupation of Kuwait and the subsequent stoppage of work on the IPSA project, it was unable to complete the works under the agreed terms and had to extend its insurance coverage from 31 August to 31 December 1990. Incisa states that the premium on this policy was ITL 12,180,000.

192. The second insurance policy was an "all risk equipment policy" held with Assicurazioni Generali of Venice. Incisa alleges that it maintained this policy up to 31 December 1990 when it became clear that it would not recover its equipment. Incisa states that the premium paid on this policy from 3 August to 31 December 1990 was ITL 17,961,575.

(b) Bank guarantee costs

193. Grassetto seeks compensation in the amount of USD 9,956 (ITL 11,542,500) for the costs allegedly incurred by Incisa in providing a bank guarantee to the Iraqi customs authorities. Incisa states that from 17 August 1990 to 18 February 1992, it paid commissions to its bank under the guarantee in the amount of ITL 11,542,000.

194. In the Statement of Claim, Incisa states that in order to temporarily import equipment and plant into Iraq for the execution of works on the IPSA project, it was required to issue a guarantee in the amount of USD 2,400,000 through Banca Commerciale Italiana, Parma. Incisa states that the guarantee was in favour of the Iraqi customs authorities through its bank, the Rafidain Bank of Baghdad.

195. Incisa alleges that the guarantee was issued on 17 February 1988 but was extended to 17 October 1990 because most of the equipment was still in Baghdad and release of the guarantee was

not possible until the equipment was re-exported. As re-exportation of the equipment never occurred, Incisa requested Banca Commerciale Italiana to release the guarantee, but it did not do so as the possibility of the guarantee being called remained a possibility once the trade embargo was lifted.

2. Analysis and valuation

(a) Insurance costs

196. In support of its claim for the costs incurred in relation to the insurance policies, Incisa appears to have provided copies of both insurance policies, as well as a series of letters to its insurance broker, Paros S.r.l., enclosing lists of property insured under the second insurance policy. However, none of these documents has been translated into English. In its response to the article 34 notification, Grassetto did not submit any further evidence in support of this claim. Accordingly, the Panel recommends no compensation.

(b) Bank guarantee costs

197. In support of its claim for commission paid on the bank guarantee, Incisa provided a copy of the customs guarantee, as well as a series of debit advices from Banca Commerciale Italiana (which were not translated into English) showing debits in the amount claimed of ITL 11,542,000 and correspondence with the bank about the commissions paid and owing in the future. The Panel finds that Incisa failed to explain the nature of its claim and failed to provide evidence in English of the amount of its losses. In its response to the article 34 notification, Grassetto did not submit any further evidence in support of this claim. Applying the approach taken with respect to guarantees as set out in paragraphs 89 to 98 of the Summary, the Panel recommends no compensation.

3. Recommendation

198. The Panel recommends no compensation for financial losses.

D. Other losses

1. Facts and contentions

199. Grassetto seeks compensation in the amount of USD 42,768 (ITL 49,580,773) for other losses. This amount consists of (a) USD 5,118 (ITL 5,933,824) for office costs, (b) USD 10,328 (ITL 11,973,737) for maintenance of equipment, (c) USD 11,757 (ITL 13,629,252) for customs charges, and (d) USD 15,565 (ITL 18,043,960) for caution deposits.

200. In the “E” claim form, Incisa characterised these loss items as part of its claim for payment or relief to others, but the Panel finds that these items are more accurately classified as other losses. The Panel considers each claim in turn.

(a) Office costs

201. Grassetto seeks compensation in the amount of USD 5,118 (ITL 5,933,824) for office costs allegedly incurred by Incisa.

202. In the Statement of Claim, Incisa states that the activity of its Baghdad office continued after Iraq's invasion and occupation of Kuwait, albeit in a "reduced manner". Incisa alleges that its branch office continued to carry out services including ordinary administration, support to personnel present in Iraq, relations with public bodies, contact with the "Embassy" (presumably the Italian Embassy in Baghdad), and contact with other Italian companies in Baghdad. The costs of providing such services allegedly include photocopying and administrative charges, repair of office equipment, purchase of consumables, as well as water, lighting and office cleaning charges. Incisa states that the total amount incurred was IQD 1,664 and converted this amount to ITL 5,933,824.

(b) Maintenance of equipment

203. Grassetto seeks compensation in the amount of USD 10,328 (ITL 11,973,737) for the costs allegedly incurred by Incisa in maintaining its equipment and plant. Incisa alleges that it incurred costs in the amount of IQD 3,358 and converted this amount to ITL 11,973,737.

204. As noted above, Incisa alleges that two of its mechanics travelled periodically from Baghdad to Zubair to check the condition of, and to conduct maintenance operations on, Incisa's equipment and plant. Incisa states that it incurred costs in purchasing materials such as spare parts, consumables and fuel required for the maintenance of its equipment and plant, as well as third-party automobile insurance costs for the cars used for the transportation of its mechanics.

(c) Customs charges

205. Grassetto seeks compensation in the amount of USD 11,757 (ITL 13,629,252) for customs charges allegedly incurred by Incisa. Incisa alleges that it incurred customs charges and fees of forwarding agents in the amount of IQD 3,822 and converted this amount to ITL 13,629,252.

206. As noted above, Incisa alleges that at the time of Iraq's invasion and occupation of Kuwait, it had already commenced preparing the documentation required for re-export of its equipment and plant. Incisa states in the Statement of Claim that, notwithstanding the fact that it was impossible to re-export the equipment after August 1990, it had to maintain its customs declaration in order to avoid fines being imposed by the customs authorities, and so that it could have the documents prepared for re-exportation of the equipment as soon as that became possible.

(d) "Caution deposits"

207. Grassetto seeks compensation in the amount of USD 15,565 (ITL 18,043,960) for costs of "caution deposits". Incisa alleges that it incurred costs in the amount of IQD 5,060 and converted this amount to ITL 18,043,960. In the Statement of Claim, Incisa states that it was required to maintain

"uncleared deposits due to the impossibility to return the relative materials (cylinders)". Incisa offers no further explanation of this part of the claim.

2. Analysis and valuation

208. In support of its claim for other losses, Incisa provided what appear to be internally-generated spreadsheets referred to as "local accounts ledgers" listing expenses for each of the items forming part of the claim for other losses. However, none of these documents is translated into English and there is no further evidence in support of any element of the claim. In its response to the article 34 notification, Grassetto did not submit any further evidence in support of this claim. Accordingly, the Panel recommends no compensation.

3. Recommendation

209. The Panel recommends no compensation for other losses.

E. Summary of recommended compensation for Grassetto

Table 14. Recommended compensation for Grassetto

Claim element	Claim amount (USD)	Recommended compensation (USD)
Loss of tangible property	2,033,790	nil
Payment or relief to others	303,071	nil
Financial losses	35,956	nil
Other losses	42,768	nil
Total	2,415,585	nil

210. Based on its findings regarding Grassetto's claim, the Panel recommends no compensation.

V. PASCUCCI E VANNUCCI S.P.A.

211. Pascucci e Vannucci S.p.A. ("Pascucci") is a corporation organised according to the laws of Italy. Pascucci is involved in the provision of civil and industrial engineering services. Prior to Iraq's invasion and occupation of Kuwait, Pascucci was performing civil works as a subcontractor on three projects in Iraq.

212. Pascucci seeks compensation in the total amount of USD 9,031,435 (USD 631,392, ITL 8,806,255,648 and IQD 250,000) for contract losses, loss of tangible property and other losses.

213. In the "E" claim form, Pascucci sought compensation in the amount of ITL 10,529,926,084 for loss of tangible property and other losses. The claim for other losses includes claims for personnel expenses, branch office expenses, deposit guarantee customs and "services rendered by third party".

214. Some of Pascucci's alleged losses were incurred in currencies other than Italian lire, notably in United States dollars and Iraqi dinars. Pascucci converted these losses to Italian lire at the rate of USD 1 to ITL 1,200 and IQD 1 to USD 3.22. The Panel has reviewed the losses in the original currency and has converted them to United States dollars in accordance with paragraphs 57 to 59 of the Summary.

215. The Panel has reclassified an element of Pascucci's claim for the purposes of this report. The Panel considers that the claim for other losses (personnel expenses) in the amount of USD 641,067 is more accurately classified as a claim for contract losses.

Table 15. Pascucci's claim

Claim element	Claim amount (USD)
Contract losses	641,067
Loss of tangible property	7,240,749
Other losses	1,149,619
Total	9,031,435

A. Contract losses

1. Facts and contentions

216. Pascucci seeks compensation in the amount of USD 641,067 (ITL 259,305,848 and USD 417,392, which Pascucci converted to a total of ITL 760,176,284) for contract losses. The claim is for the cost of unproductive salary and benefits allegedly paid to its employees and foreign workers in Iraq from August 1990 to January 1993.

217. In the "E" claim form, Pascucci characterised this loss element as other losses (personnel expenses) but the Panel finds that it is more accurately classified as a claim for contract losses.

218. At the time of Iraq's invasion and occupation of Kuwait, Pascucci was engaged as a subcontractor on three construction projects in Iraq. The projects are summarised below.

219. The first project (the "North Rumaila project") involved the performance of civil works for a compressor station in North Rumaila pursuant to a contract entered into on 13 October 1987 with a contractor incorporated in the former Union of Soviet Socialist Republics. The employer on the North Rumaila project was the State Organisation for Oil Projects of Iraq ("SCOP").

220. The second project (the "Youssifiyah project") involved the performance of excavation and other works for the "Youssifiyah" Thermal Power Station pursuant to a contract entered into on 26 November 1988 with another contractor incorporated in the former Union of Soviet Socialist Republics. The employer on the Youssifiyah project was the General Establishment for Generation and Transmission of Electricity of the Ministry of Industry and Military Industries of Iraq.

221. The third project (the "Shipping Terminal project") involved the performance of works on a shipping terminal at Khor Al Zubair pursuant to a contract entered into on 3 August 1989 with Saipem S.p.A., Italy. The employer on the Shipping Terminal project was SCOP.

222. At the time of Iraq's invasion and occupation of Kuwait, Pascucci's workers had completed the works on the Youssifiyah project and were preparing to depart from the site. At the North Rumaila and Shipping Terminal projects, Pascucci was performing maintenance obligations and outstanding works at the sites. After Iraq's invasion and occupation of Kuwait, Pascucci's workers abandoned the works and left the project sites. The workers returned to Pascucci's office in Baghdad where arrangements were made to evacuate them from Iraq. However, the workers were unable to leave Baghdad immediately due to their inability to obtain exit visas. By 10 December 1990, Pascucci had evacuated its Italian and Indian workers and a majority of its Filipino workers.

223. Pascucci alleges that from the date of Iraq's invasion and occupation of Kuwait to the date of the evacuation of its workers from Iraq it continued to pay the workers' salary and benefits notwithstanding that they were unproductive during this period. Pascucci seeks compensation for the amounts of salary and benefits paid to its workers during this period. Additionally, Pascucci requested 11 of its foreign workers to remain in Iraq after 10 December 1990 to safeguard its assets and to represent its interests in Iraq. Pascucci also seeks compensation for the amount of salaries allegedly paid to these workers from 10 December until their departure from Iraq.

224. The claim for contract losses (unproductive salary and benefits) is summarised in table 16, infra.

Table 16. Pascucci's claim for contract losses (unproductive salary and benefits)

Loss item	Number of workers	Claim amount (original currency)	Claim amount (USD)
Italian personnel			
(from 6 August to 9 December 1990)	4	ITL 259,305,848	223,675
Filipino personnel			
(from 6 August to 9 December 1990)	5	USD 22,216	
(from 10 December 1990 to 30 April 1992)	1	USD 35,800	
Subtotal (Filipino personnel)	6	USD 58,016	58,016
Indian personnel			
(from 6 August to 25 September 1990)	4	USD 14,062	14,062
Iraqi personnel			
(from 6 August 1990 to 16 January 1991)	4	USD 36,523	
(from 17 January 1991 to 31 December 1992)	4	USD 140,940	
Subtotal (Iraqi personnel)	8	USD 177,463	177,463
Other nationalities			
(from 6 August to 9 December 1990)	8	USD 61,261	
(from 10 December 1990 to 31 May 1992)	6	USD 106,590	
Subtotal (other nationalities)	14	USD 167,851	167,851
Total	36	ITL 259,305,848 & USD 417,392	641,067

225. Pascucci converted the total amount claimed of ITL 259,305,848 and USD 417,392 to Italian lire using an exchange rate ITL 1,200 to USD 1, producing a total of ITL 760,176,284. This was the amount claimed in the "E" claim form.

2. Analysis and valuation

226. In respect of recovery of unproductive salary payments, in the Seventeenth Report, the Panel stated at paragraph 27 that salaries paid to employees detained in Iraq are "prima facie compensable as salary paid for unproductive labour". However, the Panel noted that compensation will be awarded only when the claimant provides sufficient evidence to establish detention and actual payment.

(a) Italian personnel

227. Pascucci seeks compensation in the amount of USD 223,675 (ITL 259,305,848) for salaries and benefits allegedly paid to its four Italian employees from 6 August to 9 December 1990.

228. In support of its claim, Pascucci provided the names of the employees together with details of their respective job titles, passport numbers, internal time sheets, schedule of hours worked and salary slips. The Panel finds that the evidence provided in support of the claim identifies a gross amount of salaries and benefits paid equal to ITL 82,966,060. It is not clear how Pascucci arrived at a claim amount of ITL 259,305,848 for this loss item. According to a schedule of hours worked for each of the four employees for the months August to December 1990, the number of hours worked multiplied by the hourly rate for each worker produces a total of ITL 259,305,848. However, this figure is not reflected in the salary statements.

229. As evidence of the detention of the Italian employees in Iraq, Pascucci provided copies of declarations issued by the Italian authorities. In respect of one employee, Pascucci provided declarations dated 8 and 9 May 1991 from the Italian Ministry of Foreign Affairs confirming that the individual was "withheld in Iraq in consequence of the famous events of August 2, 1990" and was repatriated on 9 December 1990. In respect of three employees, Pascucci provided consular declarations dated 8 December 1990 from the Italian Embassy in Baghdad confirming the presence of the employees in Iraq from the date of Iraq's invasion and occupation of Kuwait to the date of the declarations. The consular declarations confirm that the three individuals were unable to leave Iraq during this period due to Iraq's invasion and occupation of Kuwait.

230. The Panel finds that Pascucci provided sufficient evidence of the detention of the Italian employees during the period for which the unproductive salary was paid. The salary statements demonstrate that Pascucci was the employer of the four individuals and that it had a legal obligation to make the payments in the amount of ITL 82,966,060. The Panel further finds that a deduction in the amount of ITL 2,766,561 must be made to take account of the thirteenth-month salary payment made to the four employees in December 1990. As this payment is akin to a bonus payment made in December each year, but relating to the entire year, it must be apportioned pro-rata over the five-month period from August to December 1990. This calculation produces the amount of ITL 80,199,499.

231. The Panel is satisfied that Pascucci suffered a loss in the amount of ITL 80,199,499 as a direct result of Iraq's invasion and occupation of Kuwait.

(b) Filipino personnel

232. Pascucci seeks compensation in the amount of USD 58,016 for salaries and benefits allegedly paid to its Filipino personnel for the respective periods from 6 August to 9 December 1990 (five workers) and 10 December 1990 to 30 April 1992 (one worker).

233. In support of its claim for the salary paid for the period 6 August to 9 December 1990, Pascucci provided internal salary records and a copy of a bank transfer form dated 21 August 1991. The bank transfer form was made out in favour of Sangarlo International Inc., a Philippine corporation, for an amount of USD 46,865. It does not, however, specify the purpose of the payment. Pascucci stated that Sangarlo International Inc. recruited workers from the Philippines and supplied manpower to Pascucci.

234. In support of its claim for the salary paid for the period 10 December 1990 to 30 April 1992, Pascucci provided a copy of internal salary records setting out the number of hours worked and amounts of salary paid. In addition Pascucci provided copies of bank transfer forms dated 8 October 1991, 16 January 1992 and 18 May 1992 showing payments made totalling an amount of USD 8,500. Two of the three bank transfer forms stipulated that the purpose of the transfer was payment for works performed by the worker.

235. However, the Panel finds that Pascucci provided no evidence of the workers' detention in Iraq during the alleged period of unproductivity.

236. Accordingly, the Panel finds that Pascucci did not provide sufficient evidence to establish that the alleged losses were caused as a direct result of Iraq's invasion and occupation of Kuwait.

(c) Indian personnel

237. Pascucci seeks compensation in the amount of USD 14,062 for salaries and benefits allegedly paid to its four Indian employees from 6 August to 25 September 1990.

238. In support of its claim, Pascucci provided copies of internal salary records and bank transfer forms evidencing the payment of salaries for the period 6 August to 25 September 1990 in the amount of USD 53,866. The internal time sheets assist in the identification of the workers alleged to have been present in Iraq during the period of unproductivity but provide no evidence of their detention. The workers were recruited by Technical Consultants, an Indian corporation, pursuant to the terms of a contract dated 14 March 1988.

239. The Panel finds that Pascucci provided no evidence of the workers' detention in Iraq during the alleged period of unproductivity. Accordingly, the Panel finds that Pascucci failed to establish that the loss was suffered as a direct result of Iraq's invasion and occupation of Kuwait.

(d) Iraqi personnel

240. Pascucci seeks compensation in the amount of USD 177,463 for salaries and benefits allegedly paid to four Iraqi workers for the period 6 August 1990 to 31 December 1992.

241. In support of its claim, Pascucci provided internal time sheets and schedules of hours worked. However, Pascucci provided no contract or other evidence of its legal obligation to pay the salaries.

242. The Panel recommends no compensation for the payment of salary and benefits to its Iraqi personnel.

(e) Other nationalities

243. Pascucci seeks compensation in the amount of USD 167,851 for salaries and benefits allegedly paid for eight workers of various nationalities for the period 6 August 1990 to 31 May 1992.

244. In support of its claim, Pascucci submitted internal time sheets, schedule of hours worked and numerous bank transfer forms evidencing payment in an amount of USD 73,231. Pascucci provided no evidence of the detention of the workers in Iraq.

245. The Panel recommends no compensation for the payment of salary and benefits to the workers of various nationalities.

3. Recommendation

246. The Panel recommends compensation in the amount of USD 69,179 for contract losses.

B. Loss of tangible property

1. Facts and contentions

247. Pascucci seeks compensation in the amount of USD 7,240,749 (ITL 8,394,200,000) for loss of tangible property. The claim is for the alleged loss of property from the North Rumaila, Youssifiyah and Shipping Terminal project sites following Iraq's invasion and occupation of Kuwait.

(a) North Rumaila project

248. Pascucci seeks compensation in the amount of ITL 4,242,700,000 for the loss of camp housing facilities, machinery and plant, motor vehicles and equipment situated at the North Rumaila project site, located at the Kuwaiti border.

249. Pascucci states that at the time of Iraq's invasion and occupation of Kuwait, Pascucci's workers were present on site to perform maintenance obligations on the project. The workers subsequently abandoned the site due to the hostilities arising out of Iraq's invasion and occupation of Kuwait. Pascucci states that the Government of Iraq took possession of the site on 8 December 1990 and confiscated its property which was found on the site. Pascucci alleges that the property was never returned by the Iraqi authorities.

250. According to Pascucci, the handover of the property did not take place pursuant to contract or pursuant to a directive issued by the Government of Iraq. Instead, Pascucci was "forced and influenced" to deliver its property to the Iraqi authorities.

(b) Youssifiyah project

251. Pascucci seeks compensation in the amount of ITL 1,664,500,000 for the loss of camp housing facilities, machinery and plant, motor vehicles and equipment situated at the Youssifiyah project site.

252. Pascucci states that at the time of Iraq's invasion and occupation of Iraq, Pascucci was preparing to depart from the site as the project had been completed. Pascucci asserts that as a result of the hostilities arising out of Iraq's invasion and occupation of Kuwait it was forced to abandon its

property on the site. Pascucci asserts that the abandoned property was confiscated in 1992 pursuant to orders dated 12 and 17 May 1992 issued by the Government of Iraq.

(c) Shipping Terminal project

253. Pascucci seeks compensation in the amount of ITL 2,487,000,000 for the loss of camp housing facilities, machinery and plant, motor vehicles and equipment situated at the Shipping Terminal project site.

254. After Iraq's invasion and occupation of Kuwait, Pascucci states that its employees attempted to continue with the outstanding works. Pascucci's employees were subsequently forced to abandon the works and its property on site due to the hostilities resulting out of Iraq's invasion and occupation of Kuwait. Pascucci asserts that the abandoned property was confiscated in 1992 pursuant to an order dated 24 May 1992 issued by the Government of Iraq.

2. Analysis and valuation

(a) North Rumaila project

255. In support of its claim, Pascucci provided an inventory of the assets that were handed over to the Iraqi authorities. The inventory, which is dated 8 December 1990, was signed by representatives of Pascucci and the Iraqi authorities. Attached to the inventory is a list of the assets that were handed over to the Iraqi authorities. Pascucci also provided various invoices and shipping documents showing importation into Iraq of the equipment.

256. Further, Pascucci provided invoices showing purchase of some items from a joint venture in 1980.

257. Pascucci provided sufficient evidence to enable the Panel to reach an assessment of an appropriate amount of compensation for the losses suffered. That assessment is in the amount of ITL 1,272,810,000.

(b) Youssifiyah project

258. In support of the claim, Pascucci provided inventories dated 12 and 17 May 1992 containing a description of the assets handed over to the Iraqi authorities. The inventories were acknowledged by representatives of Pascucci and the Iraqi authorities.

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

(c) Shipping Terminal project

260. In support of the claim, Pascucci provided an inventory dated 24 May 1992 setting out a description of the assets handed over to the Iraqi authorities. The inventory was acknowledged by representatives of Pascucci and the Iraqi authorities.

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

3. Recommendation

262. The Panel recommends compensation in the amount of USD 1,097,913 for loss of tangible property.

C. Other losses

1. Facts and contentions

263. Pascucci seeks compensation in the amount of USD 1,149,619 (IQD 250,000, USD 214,000 and ITL 152,749,800) for other losses. The claim is for (a) the loss of a cash deposit in the amount of IQD 250,000 (USD 803,859) provided to the Customs and Excise Office, Safwan, Iraq, (b) the payment of branch office expenses in the amount of ITL 152,749,800 (USD 131,760), and (c) "services rendered by third party" in the amount of USD 214,000.

(a) Customs deposit

264. Pascucci alleges that it provided a cash deposit in the amount of IQD 250,000 to the Customs and Excise Office, Safwan, Iraq. The cash deposit was paid to guarantee the payment of customs duties on equipment imported into Iraq on a temporary basis. Pascucci claims that it is unable to recover the cash deposit from the Iraqi authorities, as the equipment secured by the deposit has been lost and cannot be re-exported as a result of Iraq's invasion and occupation of Kuwait.

(b) Branch office expenses

265. Pascucci seeks compensation in the amount of ITL 152,749,800 for branch office expenses. The claim is for (a) expenses allegedly incurred for the period 6 August to 9 December 1990 for rental payments for its Baghdad office and guest houses together with related telephone and telefax charges (USD 61,134), and (b) office rental payments for the period 10 December 1990 to 31 December 1992 (USD 66,158).

266. Pascucci asserts that it maintained an office in Baghdad after Iraq's invasion and occupation of Kuwait in order to seek reports of the expropriation of its equipment from the Iraqi authorities.

(c) "Services rendered by third party"

267. The claim for "services rendered by third party" is for fees allegedly paid for services rendered by (a) Sangarlo International Inc., a Philippine corporation, in the amount of USD 190,000, and (b) an Iraqi individual in the amount of USD 24,000.

(i) Sangarlo International Inc.

268. Pascucci engaged Sangarlo International Inc. pursuant to a contract dated 15 December 1990 to represent and safeguard Pascucci's interests in Iraq, including watching over its Baghdad branch office and the three project sites, and to maintain and repair its equipment, plant and machinery located in Iraq. Pascucci alleges that it paid Sangarlo International Inc. the amount of USD 20,000 per month for the period 15 December 1990 to 30 September 1991.

(ii) Iraqi individual

269. Pascucci appointed an Iraqi individual pursuant to a power of attorney dated 3 September 1991 to act as Pascucci's legal representative in Iraq. The individual was appointed to manage the affairs of Pascucci's branch office in Baghdad and to sign and approve its accounts. Pascucci alleges that it paid the individual the amount of USD 1,500 per month for the period 1 September 1991 to 31 December 1992.

2. Analysis and valuation

(a) Customs deposit

270. In support of its claim, Pascucci provided a copy of its internal accounting records setting out the payment of the cash deposit and a copy of the receipt dated 1 December 1987 from the Customs and Excise Office in Safwan in the amount of IQD 250,000. Applying the approach taken with respect to customs deposits set out in paragraphs 160 to 163 of the Summary, the Panel recommends no compensation.

(b) Branch office expenses

271. As stated in paragraphs 139 to 143 of the Summary, claims for branch office expenses are generally regarded as part of the overhead. Accordingly, they will, in most cases, be recoverable during the course of the contract. Pascucci did not provide any evidence to establish the payment of the expenses. Pascucci stated that all documentation relating to the payment of the branch office expenses was kept in the Baghdad office which has since been abandoned.

272. The Panel finds that Pascucci failed to provide sufficient evidence in support of its claim. The Panel recommends no compensation.

(c) "Services rendered by third party"

(i) Sangarlo International Inc.

273. In support of its claim, Pascucci provided a copy of the contract between Pascucci and Sangarlo International Inc. dated 15 December 1990, invoice No. 1/91 dated 31 May 1991 in the amount of USD 90,000 for services provided by Sangarlo International Inc. for the period 15 December 1990 to 30 April 1991 and invoice No. 1/92 dated 1 September 1991 in the amount of USD 100,000 for services performed for the period 1 May 1991 to 30 September 1991. Pascucci also provided two bank transfer forms dated 29 August and 12 September 1991 showing payments to Sangarlo International Inc. in the amounts of USD 90,000 and USD 100,000, respectively.

274. The Panel finds that Pascucci made payments to Sangarlo International Inc. in the amount of USD 20,000 per month for the period 15 December 1990 to 30 September 1991. However, only those costs incurred during a reasonable period of time after Iraq's invasion and occupation of Kuwait can be considered a direct result of the invasion. In this case, the Panel finds that Pascucci is entitled to compensation for costs incurred until three months after the liberation of Kuwait, i.e. up to 2 June 1991. This totals USD 110,000.

275. The Panel recommends compensation in the amount of USD 110,000 for losses incurred in respect of payments made to Sangarlo International Inc.

(ii) Iraqi individual

276. In support of its claim for payments made to the Iraqi individual, Pascucci provided a copy of the power of attorney dated 3 September 1991. However, Pascucci failed to provide evidence of payments made to the individual or an explanation as to how the loss was a direct result of Iraq's invasion and occupation of Kuwait. The Panel therefore recommends no compensation.

3. Recommendation

277. The Panel recommends compensation in the amount of USD 110,000 for other losses.

D. Summary of recommended compensation for Pascucci

Table 17. Recommended compensation for Pascucci

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	641,067	69,179
Loss of tangible property	7,240,749	1,097,913
Other losses	1,149,619	110,000
Total	9,031,435	1,277,092

278. Based on its findings regarding Pascucci's claim, the Panel recommends compensation in the amount of USD 1,277,092. The Panel determines the date of loss to be 2 August 1990.

VI. CHIYODA CORPORATION

279. Chiyoda Corporation ("Chiyoda") is a corporation organised according to the laws of Japan. An extract from the Commercial Registry of Japan indicates that Chiyoda was established to engage in a wide variety of construction projects, including the provision of engineering and consultancy services, design and other related work on process units and equipment, and operation, maintenance and repair services relating to various chemical plants and facilities.

280. At the time of Iraq's invasion and occupation of Kuwait, Chiyoda was engaged as a contractor on four construction projects in Iraq, which are described in further detail below. Chiyoda seeks compensation for amounts allegedly outstanding on three of these projects. In addition, Chiyoda alleges that it incurred expenses in supporting one of its employees who was not able to leave Iraq after the commencement of hostilities in Kuwait. Finally, Chiyoda alleges that it incurred financial losses relating to performance bonds provided in relation to the fourth project.

281. Chiyoda seeks compensation in the total amount of USD 3,319,260 for contract losses, payment or relief to others and financial losses, as follows:

Table 18. Chiyoda's claim

Claim element	Claim amount (USD)
Contract losses	3,167,882
Payment or relief to others	7,532
Financial losses	143,846
Total	3,319,260

A. Contract losses

1. Facts and contentions/analysis and valuation

282. Chiyoda seeks compensation in the amount of USD 3,167,882 (IQD 284,667 and 324,930,860 Yen (JPY)) for contract losses on three of the four construction projects in which it was engaged in Iraq. The projects were as follows:

(a) The first project involved the supply of engineering and procurement services and the supply of equipment and materials to the Central Refinery at Jurf Al-Sakhar, near Baghdad (the "Central Refinery project"). The employer on this project was Technical Corps for Special Projects ("Techcorp"), part of the Ministry of Industry of Iraq;

(b) The second project involved the design, supply, erection, commissioning, testing and maintenance of works at the North Refinery, Baghdad (the "North Refinery project"). The employer on this project was the State Organisation for Oil Projects of Iraq ("SCOP"); and

(c) The third project involved procurement work at the Basrah Refinery (the "Basrah Refinery project"). The employer on this project was the State Enterprise for Oil Refining and Gas Industry in the Southern Area of Iraq ("SEOG").

283. Chiyoda seeks compensation for amounts allegedly outstanding for work performed on the projects prior to Iraq's invasion and occupation of Kuwait.

284. Chiyoda's claim for contract losses consists of eight separate claims in relation to the above projects. Several of these claims are made by Chiyoda on behalf of Mitsubishi Corporation ("Mitsubishi"). Mitsubishi is a Japanese corporation which was joint signatory with Chiyoda to the contracts for the Central Refinery and North Refinery projects. Chiyoda submitted a power of attorney from Mitsubishi which indicates the claims which Chiyoda is authorised to make before the Commission on behalf of Mitsubishi. The Panel considers each of the claims in turn.

(a) Techcorp contracts for the Central Refinery project

(i) Utility Facilities ("Claim No. 1")

285. Chiyoda seeks compensation in the amount of USD 800,797 (JPY 115,515,000) for contract losses allegedly incurred in relation to work performed with Mitsubishi on the utility facilities at the Central Refinery project. According to the power of attorney submitted by Chiyoda, Chiyoda is specifically authorised to bring this claim on Mitsubishi's behalf.

286. In the Statement of Claim, Chiyoda states that on 31 August 1989, Techcorp issued a Letter of Intent in favour of Chiyoda for work to be performed on utility facilities at the Central Refinery. According to the Letter of Intent, the scope of the work to be performed by Chiyoda included the supply of engineering and procurement services and the supply of equipment and materials for the utility facilities at the refinery.

287. Chiyoda was required to commence work from the date of the Letter of Intent, that is from 31 August 1989. Chiyoda states in the Statement of Claim that it commenced work on this date, but that it was to be paid only upon entering into a formal contract for the work.

288. Chiyoda subsequently entered into a contract with Techcorp dated 18 October 1989. The contract was to become effective when a number of conditions were satisfied. These conditions included approval of the contractual terms by the Iraqi and Japanese governments, issue by Chiyoda of an advance payment bank guarantee and performance bond in favour of Techcorp, and receipt by Chiyoda of a "down payment".

289. Chiyoda states that the contract became effective on 15 June 1990 when the advance payment was made. While Chiyoda does not explain the eight-month delay between signature of the contract and the date on which it became effective, it appears from correspondence between Chiyoda and

Techcorp that the delay was on the part of Techcorp. Chiyoda provided extensive correspondence between the parties as to price adjustments and other variations that were required because of the delay.

290. The contract states that the work was to be completed within 22 months from the date of the Letter of Intent, or 20 months from the effective date, whichever was later, or within any extended period granted by Techcorp. The guarantee period was one year from the date of mechanical completion of the project, or 24 months from the date of the respective F.O.B. (free on board) deliveries, whichever occurred first.

291. The contract price was payable in a lump sum of JPY 13,910,000,000, consisting of JPY 2,250,000,000 for engineering and procurement services and JPY 11,660,000,000 for materials supplied and freight charges. Amounts due under the contract were payable as follows:

(a) Ten per cent "down payment" was to be paid within 30 days of signing the contract, subject to receipt of a bank guarantee and performance bond from Chiyoda, as well as Chiyoda's invoice for the down payment;

(b) Eighty-five per cent was to be paid from a loan facility to be obtained by Techcorp, within 15 days after presentation of each monthly invoice and shipping documents;

(c) Two and a half per cent was to be retained by Techcorp and paid within 30 days after the date of the "Last Major Shipment" of materials (that is, as defined in the contract, when 95 per cent of the value of materials had been delivered); and

(d) Two and a half per cent was to be retained by Techcorp and paid upon the expiry of the guarantee period.

292. Chiyoda states that it received the first payment under the contract in June 1990, representing progress payments for work performed from 31 August 1989 to 31 May 1990. However, Chiyoda alleges that payment for the work performed by it in June and July 1990 remains outstanding in the total amount of JPY 115,515,000. This amount allegedly consists of JPY 41,118,750 for work performed in June 1990 and JPY 74,396,250 for work performed in July 1990. Chiyoda alleges that it continued to work on the project until 31 July 1990, when it was forced to evacuate its employees and close its project office in Iraq.

293. The evidence provided by Chiyoda included a copy of the Letter of Intent dated 31 August 1989, and a copy of the contract dated 18 October 1989. In addition, Chiyoda submitted a copy of an invoice signed by Techcorp and dated 4 July 1990 for work performed in June 1990 in the amount of JPY 41,118,750. Chiyoda also submitted a copy of an invoice dated 3 August 1990 for work performed in July 1990 in the amount of JPY 74,396,250. This invoice was not signed by Techcorp. Chiyoda states that it was unable to submit this invoice to Techcorp owing to the departure of its employees and closure of its office in Iraq. However, Chiyoda stated in its response to the article 34 notification that it obtained verbal approval of the invoice from Techcorp.

294. The Panel finds that Chiyoda provided sufficient evidence in support of its claim for work performed in June 1990 in the amount of JPY 41,118,750. However, the Panel finds that Chiyoda did not submit sufficient evidence in support of the amount claimed for work performed in July 1990 in the amount of JPY 74,396,250. As noted above, the invoice provided by Chiyoda for July 1990 was not signed by Techcorp nor was there any other evidence demonstrating that the work allegedly performed in July 1990 was in fact performed. Accordingly, the Panel recommends compensation in the amount of USD 285,052 (JPY 41,118,750) in respect of the June 1990 work.

295. The Panel notes that in calculating the amount of its claim, Chiyoda did not take into account the amount of USD 9,183,310 (JPY 1,324,692,500), which represents the portion of the advance payment retained by Chiyoda. Accordingly, the amount of USD 9,183,310 falls to be deducted from the recommended amount of compensation for contract losses. (See paragraphs 343 to 344, infra.)

(ii) Process Units ("Claim No. 2")

296. Chiyoda seeks compensation in the amount of USD 1,250,469 (JPY 180,380,200) for contract losses allegedly incurred in relation to work performed with Mitsubishi on process units at the Central Refinery project. According to the power of attorney submitted by Chiyoda, Chiyoda is specifically authorised to bring this claim on Mitsubishi's behalf.

297. On 28 December 1989, Techcorp issued a Letter of Intent in favour of Chiyoda for engineering and procurement work to be performed on the process units at the Central Refinery. According to the Letter of Intent, Chiyoda was required to complete the work within 24 months of the date of the Letter of Intent, or within 22 months of the effective date (presumably of the formal contract to be entered into by the parties).

298. Chiyoda states that it commenced work on 28 December 1989, the date of the Letter of Intent. Chiyoda alleges that Techcorp was aware that Chiyoda had commenced work pursuant to the Letter of Intent and that there was an agreement that Chiyoda would be paid for such work upon the conclusion and coming into effect of a formal contract between the parties.

299. Chiyoda subsequently entered into a contract with Techcorp dated 11 February 1990. The contract was to become effective when a number of conditions were satisfied. These conditions included approval of the contractual terms by the Iraqi and Japanese governments, issue by Chiyoda of an advance payment bank guarantee and performance bond in favour of Techcorp, and receipt by Chiyoda of a "down payment". Chiyoda states that the contract never actually became effective because, although Chiyoda fulfilled all of its obligations necessary for the contract to come into effect, Techcorp did not make the advance payment. The advance payment was therefore still outstanding at the time of Iraq's invasion and occupation of Kuwait.

300. Chiyoda alleges that payment for work performed by it from 28 December 1989 until 2 August 1990 remains outstanding in the total amount of JPY 180,380,200. This amount consists of JPY 151,760,700 for work performed in May and June 1990 (which was invoiced), and JPY 28,619,500 for work performed in July 1990, which Chiyoda was unable to invoice after the commencement of hostilities in Kuwait.

301. The contract price was payable in a lump sum of JPY 12,500,000,000, consisting of JPY 1,547,000,000 for engineering and procurement services and JPY 10,953,000,000 for materials supplied and freight charges. Amounts due under the contract were payable under the same terms as outlined in paragraph 291, supra.

302. The evidence provided by Chiyoda included a copy of the Letter of Intent dated 28 December 1989 and the contract dated 11 February 1990. Chiyoda also submitted copies of an invoice dated 10 June 1990 for work performed in May 1990 in the amount of JPY 94,150,420, an invoice dated 4 July 1990 for work performed in June 1990 in the amount of JPY 34,846,175, and an invoice dated 3 August 1990 for work performed in July 1990 in the amount of JPY 24,326,575.

303. However, none of the invoices submitted by Chiyoda was signed by Techcorp, nor was there any other evidence demonstrating that the work was in fact performed. The Panel finds that Chiyoda did not submit sufficient evidence in support of its claim. Accordingly, the Panel recommends no compensation.

(b) SCOP contracts for the North Refinery project

(i) Materials supplied ("Claim No. 4")

304. Chiyoda seeks compensation in the amount of USD 133,883 (JPY 19,312,560) for contract losses allegedly incurred in relation to materials supplied to the North Refinery project. According to the power of attorney submitted by Chiyoda, Chiyoda is specifically authorised to bring this claim on Mitsubishi's behalf. In the contractual documents for this project, Mitsubishi and Chiyoda are referred to as being in joint venture. As shown in the following paragraphs, the contractual history of this project is complex.

305. In the Statement of Claim, Chiyoda states that the joint venture concluded a Memorandum of Agreement with SCOP on 25 October 1979 for the design, supply, erection, commissioning, testing and maintenance work on the North Refinery project. The parties subsequently entered into a supplementary agreement (which Chiyoda refers to as "Supplementary Agreement No. 1") dated 18 April 1983 to adjust the previous contractual conditions which had been affected by the war between Iran and Iraq.

306. A further supplementary agreement ("Supplementary Agreement No. 2") was concluded between Chiyoda, SCOP and the North Refineries Establishment on 20 March 1990 in respect of remaining works on the project. Mitsubishi does not appear to have been party to this agreement. Finally, on 31 May 1990, Chiyoda entered into a "Technical Assistance Service Agreement" with the North Refinery Company to provide technical assistance in order to maintain the refinery constructed by Chiyoda pursuant to the original agreement with SCOP of 25 October 1979.

307. Under the Technical Assistance Service Agreement, Chiyoda contracted to provide experts to witness the test run of one of the units at the refinery in September 1990, and to provide solutions to various technical problems relating to the refinery. Chiyoda also contracted to supply spare parts related to units at the refinery which were constructed by Chiyoda under the original agreement with

SCOP. The North Refinery Company was obliged to pay amounts owing to Chiyoda within 15 days of receipt of each of Chiyoda's invoices.

308. Chiyoda states that it supplied spare parts to the North Refinery Company pursuant to the Technical Assistance Service Agreement. The spare parts were allegedly shipped in three consignments in the total amount of JPY 19,312,560, as follows:

(a) Invoice No. 01048-A-001-T dated 12 July 1990 in the amount of JPY 5,455,500;

(b) Invoice No. 01048-A-002-T dated 25 July 1990 in the amount of JPY 8,865,060; and

(c) Invoice No. 80251S-A-007-NRT dated 27 July 1990 in the amount of JPY 4,992,000.

Chiyoda submitted copies of the above invoices, which indicate that the shipped spare parts included calibration cylinders, batteries, sensor cables and gaskets.

309. Chiyoda alleges that the first consignment of spare parts was shipped to Iraq by air on 18 July 1990. Chiyoda states that it did not receive payment for the first consignment.

310. Chiyoda states that the second and third consignments were ready for shipment in July 1990 and that the shipping invoices were authenticated by the Embassy of Iraq in Tokyo on 19 and 30 July 1990, respectively. However, Chiyoda alleges that upon the commencement of hostilities in Kuwait, it was unable to ship these consignments to Iraq. In its original claim submission filed in 1993, Chiyoda stated that the unshipped goods were still lying in a storage yard in Yokohama, Japan, because Chiyoda was unable to dispose of the goods, even at reduced prices. In the article 34 notification, the secretariat requested Chiyoda to confirm the present status and location of the unshipped materials and to provide evidence of the attempts to dispose of them and the value set on the sale. In its response to the article 34 notification, Chiyoda was unable to confirm the location of the materials, stating that some of them may have been lost or destroyed.

311. The evidence provided by Chiyoda included a copy of its contract with SCOP dated 25 October 1979, copies of Supplementary Agreements No. 1 and No. 2 with SCOP, and a copy of the Technical Assistance Service Agreement dated 31 May 1990 with the North Refinery Company. In addition, Chiyoda submitted copies of an invoice dated 12 July 1990 relating to spare parts shipped to the value of JPY 5,455,500 and an accompanying air waybill dated 17 July 1990; an invoice dated 25 July 1990 relating to spare parts shipped to the value of JPY 8,865,060, and an invoice dated 27 July 1990 relating to spare parts shipped to the value of JPY 4,992,000.

312. The Panel finds that Chiyoda provided sufficient evidence in support of its claim for the first consignment in the amount of JPY 5,455,500. The air waybill and invoice provided in relation to the first consignment indicate that spare parts to the value of JPY 5,455,500 were shipped in late July, only weeks prior to Iraq's invasion and occupation of Kuwait. However, the Panel finds that Chiyoda did not provide sufficient evidence in relation to the non-shipped spare parts in the second and third consignments. Chiyoda failed to provide any information or evidence as to the current location of the spare parts contained in the second and third consignments, and as to its attempts to mitigate its losses

by selling or otherwise disposing of these goods. Accordingly, the Panel recommends compensation in the amount of USD 37,820 (JPY 5,455,500).

(ii) Retention monies ("Claim No. 5")

313. Chiyoda seeks compensation in the amount of USD 111,469 (IQD 34,667) for loss of retention monies retained by SCOP in relation to the North Refinery project. According to the power of attorney submitted by Chiyoda, Chiyoda is specifically authorised to bring this claim on Mitsubishi's behalf.

314. As noted above, Chiyoda entered into a contract dated 25 October 1979 with SCOP. Chiyoda states that, although it completed its obligations under the contract, SCOP did not repay all of the retention monies withheld pursuant to the contract. The invoices issued under the contract (in relation to which the retention monies were not released) were as follows:

(a) Invoice No. NR-IV-V01/01-08 dated 7 February 1983 in the amount of IQD 28;

(b) Invoice No. NR-IV-V01/13-ST dated 17 August 1983 in the amount of IQD 5,939; and

(c) Invoice No. NR0-80251-36 dated 21 February 1983 in the amount of IQD 1,875.

315. Chiyoda alleges that the payment of these invoices was delayed by the war between Iran and Iraq. However, according to Chiyoda, SCOP should have subsequently released the retention monies because it was obliged to do so under Supplementary Agreement No. 2. Chiyoda states that it wrote to SCOP requesting release of the retention monies on 30 July 1986. Chiyoda further states that SCOP, by a letter dated 3 August 1986, acknowledged that it had retained the claimed amounts and requested Chiyoda to submit no objection certificates from the relevant government authorities prior to release of the claimed amounts.

316. In addition, Chiyoda alleges that it executed a Memorandum of Agreement dated 29 June 1981 with SCOP for work relating to the Baiji Dispatching Station. This agreement was a variation of the original contract for works on the North Refinery project. Chiyoda alleges that it completed the work under this agreement, but that SCOP retained retention monies owing to Chiyoda which was invoiced by invoice No. DS-IV-RT dated 7 February 1983 in the amount of IQD 26,825.

317. Chiyoda states that SCOP advised it to submit no objection certificates prior to release of the amount withheld. Chiyoda states that it was able to submit no objection certificates from seven governmental departments prior to 2 August 1990. However, Chiyoda did not submit copies of these with its claim, despite being requested to do so in the article 34 notification. Chiyoda states that it was unable to obtain a no objection certificate from the customs authorities, because, although application for such a certificate was made jointly by Chiyoda and SCOP, SCOP subsequently delayed submission of the required documents. Chiyoda sent one of its employees to Iraq on 26 July 1990 to coordinate the submission of such documentation. However, Chiyoda states that the retention monies were never released owing to the commencement of hostilities in Kuwait.

318. Chiyoda states that as of August 1990 it had completed 95 per cent of its obligations on the North Refinery project pursuant to the original contract and subsequent supplementary agreements.

319. In support of its claim, Chiyoda submitted a letter dated 3 August 1986 from SCOP acknowledging that retention monies were owing to Chiyoda in the amounts of IQD 5,939, IQD 28 and IQD 1,875, respectively. Chiyoda also submitted a letter dated 1 March 1989 from Chiyoda to SCOP purporting to enclose seven no objection certificates and requesting the release of IQD 26,825 held as retention monies under the Memorandum of Agreement dated 29 June 1981. Chiyoda did not submit the no objection certificates which were enclosed with this letter. Finally, Chiyoda submitted a progress certificate dated 29 August 1990 indicating that 95 per cent of the work on the North Refinery project was complete. This certificate is signed by SCOP and attaches various inspection reports that Chiyoda was required to submit.

320. The Panel finds that the evidence submitted by Chiyoda did not demonstrate how the retention monies related to the original contract which Chiyoda entered into with SCOP on 25 October 1979 and to the subsequent supplemental agreements entered into in relation to the project. Accordingly, the Panel recommends no compensation.

(iii) Amounts outstanding ("Claim No. 6")

321. Chiyoda seeks compensation in the amount of USD 803,859 (IQD 250,000) for contract losses consisting of amounts allegedly outstanding for work performed at the North Refinery project. According to the power of attorney submitted by Chiyoda, Chiyoda is specifically authorised to bring this claim on Mitsubishi's behalf. The facts and the contractual history in relation to this project have already been outlined with reference to Claim Nos. 4 and 5 above.

322. According to Supplementary Agreement No. 2 dated 20 March 1990 which Chiyoda entered into in relation to the North Refinery project, Chiyoda was entitled to receive IQD 300,000 upon completion of certain tasks allocated to it under Attachment I of the agreement. Chiyoda was also required to submit a recommendation report in respect of the items listed in Attachment II of the agreement (which consisted of various technical problems in relation to the project). In the Statement of Claim, Chiyoda states that it had completed 95 per cent of the tasks listed in Attachment I before the work was interrupted and discontinued as a result of Iraq's invasion and occupation of Kuwait. Chiyoda states that it had also prepared the recommendation report but was unable to send it to SCOP due to the commencement of hostilities in Kuwait.

323. Chiyoda argues that given that SCOP was an undertaking of the Government of Iraq, and since completion of the items listed in Attachment I was rendered impossible by Iraq, Chiyoda should be deemed to have completed 100 per cent of its work. Accordingly, Chiyoda seeks compensation in the amount of IQD 250,000. This amount takes into account compensation in the amount of IQD 50,000 which Chiyoda states that it received from the North Refinery Company. Chiyoda also makes a claim in the alternative for IQD 235,000, which is equal to 95 per cent of IQD 300,000, less the amount of compensation (IQD 50,000) already received.

324. In support of its claim, Chiyoda relies on all of the contractual documentation already detailed above in relation to Claim Nos. 4 and 5, including the progress certificate dated 29 August 1990. In addition, in its response to the article 34 notification Chiyoda provided an original copy of a cash bank journal and other accounting records (some of which were not translated into English) which indicate that a payment of IQD 50,000 was made to Chiyoda on 12 May 1990.

325. The Panel finds that Chiyoda provided sufficient evidence in support of its claim for IQD 235,000, representing 95 per cent of the work which Chiyoda had contracted to perform, less the amount of IQD 50,000 already paid to Chiyoda. However, as the progress certificate submitted by Chiyoda only indicates that 95 per cent of the work was performed, the Panel cannot recommend compensation for the remaining 5 per cent of the work. Accordingly, the Panel recommends compensation in the amount of USD 755,627 (IQD 235,000).

(c) SEOG contracts for the Basrah Refinery project

(i) Materials supplied ("Claim No. 9")

326. Chiyoda seeks compensation in the amount of USD 8,610 (JPY 1,242,000) for contract losses allegedly incurred in relation to materials supplied to the Basrah Refinery project. Chiyoda submitted this claim on its own behalf.

327. Chiyoda states in the Statement of Claim that SEOG issued a purchase order on 7 March 1990 requesting Chiyoda to undertake procurement work at the Basrah Refinery. Chiyoda was to supply the items listed in the purchase order, that is spare parts including washers, belts and gaskets. Payment for the spare parts was to be made by irrevocable letter of credit to be opened by SEOG in favour of Chiyoda within four months from the date of the purchase order. Chiyoda states that on 22 April 1990, at the request of SEOG, the Rafidain Bank established an irrevocable letter of credit. The letter of credit was to be valid until 22 August 1990.

328. Chiyoda alleges that it completed its obligations under the purchase order and that the items were shipped by air on 25 July 1990. Chiyoda states that upon making the shipment, it presented a complete set of the documents which were required to be submitted under the letter of credit. Chiyoda states that the documents were presented through the Mitsubishi Bank to the Bank of Tokyo, which was acting on behalf of the Rafidain Bank. Chiyoda alleges that it was subsequently informed by the Mitsubishi Bank that the Bank of Tokyo had refused to accept the documents due to the military operations in Iraq. Accordingly, Chiyoda claims that the amount of JPY 1,242,000 is outstanding.

329. The evidence provided by Chiyoda included a copy of the purchase order from SEOG to Chiyoda in the amount of JPY 1,242,000, as well as a copy of the irrevocable letter of credit dated 22 April 1990 and the bill of exchange dated 31 July 1990 established by SEOG in favour of Chiyoda in the amount of JPY 1,242,000. Chiyoda also submitted a copy of an invoice dated 16 July 1990 in the amount of JPY 1,242,000 and air waybill dated 24 July 1990.

330. The Panel finds that Chiyoda submitted sufficient evidence in support of its claim. The evidence demonstrates that the goods were shipped at the end of July 1990, and non-payment was

therefore the direct result of Iraq's invasion and occupation of Kuwait. Accordingly, the Panel recommends compensation in the amount of USD 8,610 (JPY 1,242,000).

(ii) Materials supplied ("Claim No. 10")

331. Chiyoda seeks compensation in the amount of USD 44,939 (JPY 6,482,400) for contract losses allegedly incurred in relation to materials supplied to the Basrah Refinery project. Chiyoda submitted this claim on its own behalf.

332. Chiyoda states in the Statement of Claim that SEOG issued several purchase orders requesting Chiyoda to undertake procurement work at the Basrah Refinery. Chiyoda was to supply the items listed in each purchase order, that is spare parts including valves, gaskets, filter cartridges, ball bearings and rings. The purchase orders were as follows:

Table 19. Chiyoda's claim for contract losses (purchase orders provided in relation to Claim No. 10)

Purchase order	Amount (JPY)	Date of shipment	Letter of credit	Issuing bank	Advising bank	Reimbursing bank
3876/RM	362,600	10 February 1990 (by sea)	2/36404 valid for four months	Rafidain Bank	Mitsubishi Bank	Bank of Tokyo
3888/RM	163,900	10 February 1990 (by sea)	2/36419 valid for four months	Rafidain Bank	Fuji Bank	Bank of Tokyo
3886/RM	119,900	10 February 1990 (by sea)	2/36417 valid for four months	Rafidain Bank	Tokai Bank	Bank of Tokyo
3900/RM	223,900	10 February 1990 (by sea)	2/36431 valid for three months	Rafidain Bank	Mitsubishi Bank	Bank of Tokyo
3883/RM	2,016,900	10 February 1990 (by sea)	2/36430 valid for four months	Rafidain Bank	Sumitomo Bank	Bank of Tokyo
3871/RM	2,753,900	10 February 1990 (by sea)	2/36395 valid for four months	Rafidain Bank	Tokai Bank	Bank of Tokyo
3897/RM	841,300	10 February 1990 (by sea)	2/36425 valid for six months	Rafidain Bank	Sumitomo Bank	Bank of Tokyo
Total	6,482,400					

333. Payment for the spare parts was to be made in each case by irrevocable letter of credit to be opened by SEOG in favour of Chiyoda. Chiyoda alleges that it completed its obligations under the purchase orders and that the items were all shipped by sea on 10 February 1990. Chiyoda believes that the items reached SEOG by the end of March 1990.

334. Chiyoda states that upon making the shipments, it presented a complete set of the documents which were required to be submitted under the letters of credit. Chiyoda alleges that it was subsequently informed by each advising bank that the Bank of Tokyo had refused to release payment because the Rafidain Bank did not have sufficient credit with the Bank of Tokyo. Chiyoda states that the Rafidain Bank promised to take steps to release the payments, but failed to transfer sufficient funds

to its account with the Bank of Tokyo prior to Iraq's invasion and occupation of Kuwait. Accordingly, Chiyoda claims that the amount of JPY 6,482,400 is outstanding.

335. In support of its claim, Chiyoda provided extensive evidence, including copies of the purchase orders and irrevocable letters of credit in relation to each shipment. Chiyoda also provided confirmation from each of the advising banks named above that payment under the respective letters of credit could not be made.

336. The Panel finds that Chiyoda did not demonstrate that its claimed loss was the direct result of Iraq's invasion and occupation of Kuwait. As noted above, the goods were shipped by sea and Chiyoda believes that they arrived at the end of March 1990. The confirmations of non-payment issued by each of the advising banks were all issued in June 1990, which indicates that payment was outstanding prior to June 1990. The non-payment of the amounts owing to Chiyoda was therefore not related to Iraq's invasion and occupation of Kuwait, but rather resulted from SEOG's failure several months prior to August 1990 to honour its obligations under the purchase orders and letters of credit. Therefore, in accordance with the reasoning set out in paragraphs 43 to 45 of the Summary, the Panel recommends no compensation.

(iii) Materials supplied ("Claim No. 11")

337. Chiyoda seeks compensation in the amount of USD 13,856 (JPY 1,998,700) for contract losses allegedly incurred in relation to materials supplied to the Basrah Refinery project. Chiyoda submitted this claim on its own behalf.

338. Chiyoda states in the Statement of Claim that SEOG issued a purchase order in September 1989 requesting Chiyoda to undertake procurement work at the Basrah Refinery. Chiyoda was to supply the items listed in the purchase order, that is spare parts including repair kits, seal rings and gaskets. Payment for the spare parts was to be made by irrevocable letter of credit opened by SEOG in favour of Chiyoda within five months from the date of the purchase order. Chiyoda states that at the request of SEOG, the Central Bank of Iraq established an irrevocable letter of credit which was to be valid until 10 March 1990.

339. Chiyoda alleges that it completed its obligations under the purchase order and that the items were shipped by air on 7 February 1990. Chiyoda believes that the items reached SEOG by the end of February 1990. Chiyoda alleges that upon making the shipment, it presented a complete set of the documents which were required to be submitted under the letter of credit prior to payment being made.

340. Chiyoda states that the documents were presented through the Sumitomo Bank, which was engaged by Chiyoda as the advising bank, to the Bank of Tokyo, which was appointed to act on behalf of the Central Bank of Iraq. Chiyoda alleges that it was subsequently informed by the Sumitomo Bank that the Bank of Tokyo had refused to accept the documents as the head office of the Central Bank of Iraq did not recognise the letter of credit. Chiyoda states that the Central Bank of Iraq had not instructed the Bank of Tokyo to release payment at the time of Iraq's invasion and occupation of Kuwait. Accordingly, Chiyoda claims that the amount of JPY 1,998,700 is outstanding.

341. In support of its claim, Chiyoda provided a copy of the purchase order from SEOG to Chiyoda in the amount of JPY 1,998,700 and a copy of the irrevocable letter of credit dated 7 October 1989 and the bill of exchange dated 14 February 1990, established by SEOG in favour of Chiyoda in the amount of JPY 1,998,700. Finally, Chiyoda submitted a copy of the invoice dated 29 January 1990 in the amount of JPY 1,998,700 and an air waybill dated 6 February 1990.

342. The Panel finds that Chiyoda did not demonstrate that its claimed loss was the direct result of Iraq's invasion and occupation of Kuwait. As noted above, the goods were shipped by air in early February 1990. The non-payment for the goods was therefore not related to Iraq's invasion and occupation of Kuwait, but rather resulted from SEOG's failure several months prior to August 1990 to honour its obligations under the purchase order and letter of credit. Therefore, in accordance with the reasoning set out in paragraphs 43 to 45 of the Summary, the Panel recommends no compensation.

2. Advance payments retained by Chiyoda

343. As noted at paragraph 295, supra, the Panel finds that Chiyoda did not take into account the amount of USD 9,183,310 (JPY 1,324,692,500), which represents the portion of the advance payment retained by Chiyoda in respect of Claim No. 1 for work performed on the utility facilities at the Central Refinery project. Applying the approach with respect to advance payments set out in paragraphs 68 to 71 of the Summary, the Panel finds that Chiyoda must account for the advance payment in reduction of its claim for contract losses.

344. The Panel concludes that Chiyoda has suffered losses resulting directly from Iraq's invasion and occupation of Kuwait in the total amount of USD 1,087,109 in respect of its claim for contract losses. This sum consists of USD 285,052 for Claim No. 1, USD 37,820 for Claim No. 4, USD 755,627 for Claim No. 6, and USD 8,610 for Claim No. 9. However, the Panel finds that the advance payment of USD 9,183,310 must be deducted from the direct losses incurred by Chiyoda in the amount of USD 1,087,109. As this calculation produces a negative figure, the Panel recommends no compensation for contract losses.

3. Recommendation

345. The Panel recommends no compensation for contract losses.

B. Payment or relief to others

1. Facts and contentions

346. Chiyoda seeks compensation in the amount of USD 7,532 (JPY 793,578 and USD 2,031) for payment or relief to others.

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

348. Chiyoda alleges that it incurred losses in the amount of USD 7,532 in relation to one of its employees who was forced to remain in Iraq for 25 days from 2 to 26 August 1990. This amount

consists of (a) salary payments and other official entitlements paid to the employee in the amount of JPY 743,578, (b) daily allowances in the amount of JPY 50,000 and USD 615, and (c) lodging charges in the amount of USD 1,416. Chiyoda refers to this claim as "Claim No. 7".

349. Chiyoda states that prior to Iraq's invasion and occupation of Kuwait, it sent one of its employees to Iraq in connection with the construction projects described above. According to the Statement of Claim, the employee arrived in Iraq on 26 July 1990 and was scheduled to stay for one week. He completed his duties on 1 August 1990 and intended to return to Japan, but was prevented from leaving Iraq due to the closure of Baghdad airport on 2 August 1990.

350. Chiyoda states that the employee attempted to leave Iraq via Jordan by road transport on 14 August 1990, but was prevented from crossing the Iraqi border. He was then forced to return to Baghdad until 26 August 1990, when he received a permit permitting him to leave Iraq.

2. Analysis and valuation

351. In respect of recovery of unproductive salary payments, in the Seventeenth Report, the Panel stated at paragraph 27 that salaries paid to employees detained in Iraq are "prima facie compensable as salary paid for unproductive labour". However, the Panel noted that compensation will be awarded only when the claimant provides sufficient evidence to establish detention and actual payment.

352. Moreover, in respect of evacuation and relief costs, the Panel considers that the costs associated with evacuating and repatriating employees from Iraq between 2 August 1990 and 2 March 1991 are compensable to the extent that such costs are proved by the claimant and are reasonable in the circumstances. Urgent temporary liabilities and extraordinary expenses relating to evacuation and repatriation, including transportation, food and accommodation are, in principle, compensable. (See the Summary, paragraph 172.)

353. In support of its claim for payment or relief to others, Chiyoda provided extensive evidence, including an affidavit from the employee dated 5 August 1993 confirming that he was an employee of Chiyoda and was in Iraq during the time stated by Chiyoda. Chiyoda also provided two certificates dated 5 August 1993 certifying that the employee was employed by Chiyoda from 26 July to 27 August 1990, and that the claimed expenses were paid to the employee. Finally, Chiyoda submitted a copy of sections of the employee's passport which support Chiyoda's account of the period which he spent in Iraq.

354. Applying the principles outlined in paragraphs 351 to 352, supra, the Panel finds that Chiyoda provided sufficient evidence in support of its claim. Accordingly, the Panel recommends compensation in the full amount claimed of USD 7,532.

3. Recommendation

355. The Panel recommends compensation in the amount of USD 7,532.

C. Financial losses

1. Facts and contentions/analysis and valuation

356. Chiyoda seeks compensation in the amount of USD 143,846 (JPY 20,749,770) for financial losses.

357. As noted above, at the time of Iraq's invasion and occupation of Kuwait, Chiyoda was engaged as a contractor on four projects in Iraq. Three of those projects are discussed above in relation to Chiyoda's claim for contract losses. The fourth project involved commissioning, testing and maintenance work on the North Rumaila NGL Plant (the "North Rumaila project"), which was part of a wider project known as the South LPG Project. The employer on this project was SCOP. Two of Chiyoda's three claims for financial losses relate to this project, and the other claim relates to the North Refinery project.

358. In the "E" claim form, Chiyoda characterised these loss elements as part of its claim for contract losses, but the Panel finds that these loss elements are more accurately classified as a claim for financial losses.

359. In its response to the article 34 notification, Chiyoda appears to have increased its claim for financial losses for bond charges which Chiyoda claims it continues to incur, and provided internally-generated records indicating the accruing charges. The Panel did not consider the increased amount of the claim for financial losses because Chiyoda did not provide any independent evidence in support of the continuing bond charges.

360. The Panel considers each of the claims in turn.

(a) SCOP contracts for the North Rumaila project

(i) Performance bond charges ("Claim No. 3")

361. Chiyoda seeks compensation in the amount of USD 10,800 (JPY 1,557,849) for financial losses consisting of charges allegedly incurred on a performance bond provided in relation to the North Rumaila project. Chiyoda and Mitsubishi are referred to in the contractual documents as being in joint venture on this project. According to the power of attorney submitted by Chiyoda, Chiyoda is specifically authorised to bring this claim on Mitsubishi's behalf.

362. Chiyoda entered into a contract dated 15 December 1979 with SCOP for the design, supply, erection, commissioning, testing and maintenance of the North Rumaila NGL Plant. According to the contract, the lump sum contract price was JPY 21,761,006,000, USD 40,298,160 and IQD 3,832,242. The works were to be completed 29.5 months from the effective date of the contract, that is from 4 December 1979.

363. According to the contract, Chiyoda was required to submit a performance bond to SCOP. Chiyoda states in the Statement of Claim that it provided the performance bond to SCOP in accordance with the contract. Chiyoda further states that the war between Iran and Iraq prevented it

from fulfilling its obligations under the contract. Chiyoda was therefore required to maintain the bond for a longer period than that originally envisaged under the contract.

364. Accordingly, the parties executed an addendum to the contract on 31 October 1988 for the start up and commissioning of the plant. Under this contract, Chiyoda was entitled to the original contract price stated above, and an additional lump sum compensation of JPY 750,000,000 and IQD 350,000.

365. According to the addendum, charges on the performance bond incurred up to 30 September 1989 were to be borne by Chiyoda, but any charges incurred after that date were to be borne by SCOP. A new performance bond was to be issued in the amounts of JPY 544,025,150, USD 1,007,454 and IQD 95,806, to be valid until issue of the final acceptance certificate. Chiyoda provided a copy of the performance bond dated 15 December 1988, which was issued by Chiyoda in these amounts and was stated to be valid up to 30 September 1989. The bond was payable on demand.

366. Chiyoda states that due to delays caused by SCOP, the performance bond was not released until 13 June 1990. Chiyoda alleges that on 20 July 1990, it invoiced SCOP for charges which Chiyoda paid on the performance bond in the amount of JPY 1,557,849. These charges were allegedly incurred from 1 October 1989 to 13 June 1990. According to the invoice, the charges were to be settled by SCOP within 30 days of receipt of the invoice, that is, according to Chiyoda, by 26 August 1990. Chiyoda alleges that SCOP did not pay these charges and that the amount of JPY 1,557,849 therefore remains outstanding.

367. In support of its claim, Chiyoda provided a copy of its contract with SCOP dated 15 December 1979 and an addendum dated 31 October 1988. In addition, Chiyoda provided a copy of the performance bond dated 15 December 1988, which was issued by the Rafidain Bank, and an invoice dated 20 July 1990 for bond charges in the amount of JPY 1,557,849.

368. The Panel finds that Chiyoda failed to provide sufficient evidence in support of its claim. Although Chiyoda provided a copy of its invoice dated 20 July 1990 to SCOP, Chiyoda did not provide any independent evidence of the amount of the charges allegedly incurred despite being requested to do so in the article 34 notification. Accordingly, the Panel recommends no compensation.

(ii) Retention bond charges ("Claim No. 8")

369. Chiyoda seeks compensation in the amount of USD 41,780 (JPY 6,026,790) for financial losses consisting of charges allegedly incurred on a retention bond provided in relation to the North Rumaila project. According to the power of attorney submitted by Chiyoda, Chiyoda is specifically authorised to bring this claim on Mitsubishi's behalf. The facts and the contractual history in relation to this project have already been outlined with reference to Claim No. 3 above. (See paragraphs 361 to 368, supra).

370. Chiyoda states in the Statement of Claim that it was required under its contract with SCOP dated 15 December 1979 to provide a "retention bond". Chiyoda states that it submitted a retention bond dated 7 August 1982 and a "counter guarantee" dated 13 July 1982 to SCOP. The retention

bond, which was an on demand bond, was stated to be valid until 30 June 1984 or until issue of the final acceptance certificate or settlement of all outstanding financial matters, whichever occurred later. It was issued by the Rafidain Bank in favour of SCOP. The counter guarantee was issued by a consortium of banks in Japan which was led by the Mitsubishi Bank, in favour of the Rafidain Bank.

371. Chiyoda states that it completed the work under the contract and that the final acceptance certificate was issued by SCOP on 4 February 1990. Chiyoda did not provide a copy of the final acceptance certificate. Chiyoda states that a performance bond (presumably that to which Claim No. 3 relates, above) was released by SCOP to reflect completion of the work. However, Chiyoda alleges that the retention bond was not released. Instead, SCOP allegedly asked Chiyoda to obtain no objection certificates from various government agencies in Iraq as a condition precedent to release of the retention bond. Chiyoda states that it obtained all of the certificates, other than a no objection certificate from the customs authorities, and submitted these to SCOP prior to August 1990. Chiyoda did not provide a copy of the no objection certificates, despite being requested to do so in the article 34 notification.

372. Chiyoda states that application for the certificate from the customs authorities was made jointly by Chiyoda and SCOP, but that SCOP delayed submission of the required documents. Chiyoda therefore sent one of its employees to Iraq on 26 July 1990 to coordinate the submission of such documentation. However, Chiyoda states that the retention bond was never released owing to the commencement of hostilities in Kuwait. Accordingly, Chiyoda alleges that it paid charges on the retention bond from 2 August 1990 to 31 May 1993 in the amount of JPY 6,026,790.

373. In support of its claim, Chiyoda provided a copy of its contract with SCOP dated 15 December 1979 and an addendum dated 31 October 1988. Chiyoda also provided a copy of the retention bond and the counter guarantee. Finally, Chiyoda provided what appears to be an internally-generated statement dated 6 August 1993 detailing the amounts owing as bank charges to each member of the consortium of banks which provided the counter guarantee, and indicating the total charges owing in the amount of JPY 6,026,790.

374. The Panel finds that Chiyoda failed to provide sufficient evidence in support of its claim. Chiyoda did not provide any independent evidence of the amount of the charges allegedly incurred, such as correspondence with the lead bank (the Mitsubishi Bank), despite being requested to do so in the article 34 notification. Accordingly, the Panel recommends no compensation.

(b) SCOP contract for the North Refinery project: retention bond charges ("Claim No. 5")

375. Chiyoda seeks compensation in the amount of USD 91,266 (JPY 13,165,131) for financial losses consisting of charges allegedly incurred on a retention bond provided in relation to the North Refinery project. According to the power of attorney submitted by Chiyoda, Chiyoda is specifically authorised to bring this claim on Mitsubishi's behalf. The facts and the contractual history in relation to this project have already been outlined at paragraphs 304 to 312, supra.

376. Chiyoda states that it submitted a retention bond dated 8 August 1982 and a "counter guarantee" dated 13 July 1982 to SCOP. The retention bond, which was an on demand bond, was

stated to be valid until 30 June 1984 or until issue of the final acceptance certificate or settlement of all outstanding financial matters, whichever occurred later. It was issued by the Rafidain Bank in favour of SCOP. The counter guarantee was issued by a syndicate of banks in Japan which was led by the Mitsubishi Bank, in favour of the Rafidain Bank.

377. Chiyoda repeats its assertions about applying for no objection certificates, as outlined above. Accordingly, Chiyoda alleges that it paid charges on the retention bond from 2 August 1990 until 31 May 1993 in the amount of JPY 13,165,131.

378. In support of its claim, Chiyoda provided a copy of its contract with SCOP dated 25 October 1979 and subsequent amendments. In addition, Chiyoda provided copies of the retention bond and the counter guarantee. Finally, Chiyoda provided what appears to be an internally-generated statement dated 6 August 1993 detailing the amounts owing as bank charges to each member of the consortium of banks which provided the counter guarantee, and indicating the total charges owing in the amount of JPY 13,165,131.

379. In the article 34 notification, the secretariat requested Chiyoda to provide independent evidence of the amount of the charges allegedly incurred, such as correspondence with the lead bank (the Mitsubishi Bank). Chiyoda did not provide such evidence. The Panel finds that Chiyoda failed to provide sufficient evidence in support of its claim. Therefore, in accordance with the reasoning set out in paragraphs 89 to 98 of the Summary, the Panel recommends no compensation.

2. Recommendation

380. The Panel recommends no compensation for financial losses.

D. Summary of recommended compensation for Chiyoda

Table 20. Recommended compensation for Chiyoda

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	3,167,882	nil
Payment or relief to others	7,532	7,532
Financial losses	143,846	nil
Total	3,319,260	7,532

381. Based on its findings regarding Chiyoda's claim, the Panel recommends compensation in the amount of USD 7,532. The Panel determines the date of loss to be 2 August 1990.

VII. NIIGATA ENGINEERING COMPANY LIMITED

382. Niigata Engineering Company Limited ("Niigata") is a corporation organised according to the laws of Japan. An extract from the Register of Incorporation of Japan indicates that Niigata was

established to engage in a wide variety of construction projects, including engineering works relating to petroleum and petrochemical plants, and manufacture of machines, engines and equipment used in mining and energy projects.

383. Niigata seeks compensation in the total amount of USD 8,595,140 (consisting of DEM 24,538, IQD 185,606, JPY 636,726,132 and USD 3,568,581) for contract losses, payment or relief to others, financial losses and other losses, as follows:

Table 21. Niigata's claim

Claim element	Claim amount (USD)
Contract losses	5,306,774
Payment or relief to others	757,909
Financial losses	2,455,056
Other losses	75,401
Total	8,595,140

A. Contract losses

1. Facts and contentions

384. Niigata seeks compensation in the amount of USD 5,306,774 (IQD 22,533, JPY 409,690,586 and USD 2,394,178) for contract losses.

385. At the time of Iraq's invasion and occupation of Kuwait, Niigata was involved in three projects in Iraq. Niigata claims that amounts are outstanding in relation to each of these three projects. On the first project, Niigata was engaged as the main contractor by the State Enterprise for Oil Refining and Gas Industry in the Southern Area of Iraq ("SEOG") for the completion of remaining works on a refining complex at the Basrah Refinery in Basrah, Iraq (the "Basrah Refinery Complex project"). Niigata was awarded the original contract for this project in 1980, but work on the project was suspended due to the war between Iran and Iraq.

386. The second project involved two contracts for work on the second and third phases of a project which Niigata refers to as the "Inoc Missan Oil Field Development". Niigata has not provided any details in relation to the nature of this project, other than stating that the owner of the project was the South Oil Company of Basrah, Iraq. The third project involved the manufacture and supply of spare parts to various Iraqi State entities.

387. The claim for contract losses consists of losses allegedly incurred on (a) the Basrah Refinery Complex project in the amount of USD 3,758,066, (b) the Inoc Missan Oil Field Development in the amount of USD 347,778, and (c) the manufacture and supply of spare parts in the amount of USD 1,200,930.

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

(a) Basrah Refinery Complex Project (BRC-project): Contract No. 9015-2132

389. Niigata seeks compensation in the amount of USD 3,758,066 (IQD 22,533, JPY 236,456,406 and USD 2,046,400) for contract losses allegedly incurred in relation to the Basrah Refinery Complex project. This amount consists of (a) USD 2,300,392 for work performed and for materials allegedly supplied to the project site, and (b) USD 1,457,674 for retention monies allegedly retained by SEOG.

(i) Work performed and materials supplied

390. According to the Statement of Claim and other documents submitted with the claim, Niigata originally entered into a contract dated 5 January 1980 with SEOG for work at the Basrah Refinery Complex. The contract was subsequently suspended in May 1982 due to the war between Iran and Iraq. Niigata did not provide a copy of this contract. Niigata states that no amount is outstanding in relation to the original contract.

391. On 11 July 1989, SEOG entered into a further contract with Niigata for completion of the remaining work at the Basrah Refinery Complex. Niigata refers to this contract as the "amended contract". The contract itself is entitled "Memorandum of Amended Contract Conditions for Completion of Remaining Works". Niigata does not describe the nature of the remaining work, and has not supplied a copy of an attachment referred to in the amended contract, which defined the remaining works to be performed. The invoices submitted with the claim refer to the remaining construction work performed by Niigata on civil and steel structures, equipment installation, furnace and tank erection, and piping, electrical and insulation fittings.

392. The completion date for the remaining works under the amended contract was 12 months from the date of signature of the contract "to the date of the last ready for commissioning certificate". Niigata states that the completion date was to have been 10 November 1990.

393. The contract price for the remaining works under the amended contract was payable in Iraqi dinars (IQD 901,280), Yen (JPY 692,395,000), and United States dollars (USD 6,743,550). These amounts were payable as follows:

(a) Ten per cent within 30 days of signing the contract and against the submission of a bank guarantee and performance bond;

(b) Three per cent within 30 days of Niigata's resumption on site of the remaining works;

(c) Seventy-five per cent within 30 days of receipt of each monthly construction invoice;

(d) Seven per cent within 30 days of the date of the last ready for commissioning certificate;

(e) Two and a half per cent (retention monies) within 30 days of the date of the provisional acceptance certificate of the plant; and

(f) Two and a half per cent (retention monies) within 30 days of the date of the final acceptance certificate.

394. Niigata states that it mobilised and commenced activity at the project site upon signing of the amended contract. Niigata further states that it submitted and received payment of some of its monthly invoices prior to August 1990, but that further payments were not received thereafter. Niigata also alleges that there were a further eight change orders, six of which have not been fully paid. An internally-generated table provided by Niigata entitled "BRC-PJ Payment Breakdown Sheet", and dated 31 December 1992, indicates the payments which are allegedly owing for work and for additional change order services from May to August 1990.

395. The amounts allegedly outstanding are set out in table 22, infra.

Table 22. Niigata's claim for contract losses on the Basrah Refinery Complex project

Contract	Contract price	Amount received	Amount outstanding	Amount outstanding (USD)
Amended contract dated 11 July 1989				
(a) Iraqi dinars	901,280	878,747	22,533	72,453
(b) Yen	692,395,000	513,580,529	178,814,471	1,239,615
(c) US dollars	6,743,550	5,001,997	1,741,553	1,741,553
Subtotal (amended contract)				3,053,621
Change orders under the amended contract				
(a) Iraqi dinars	74,000	74,000	-	-
(b) Yen	132,508,500	74,866,565	57,641,935	399,598
(c) US dollars	350,182	45,335	304,847	304,847
Subtotal (change orders)				704,445
Total				3,758,066

(ii) Retention monies

396. Niigata seeks compensation in the total amount of USD 1,457,674 for retention monies allegedly withheld by SEOG. The amounts claimed are as follows:

(a) USD 808,047 (JPY 48,467,650 and USD 472,049), which represents 7 per cent of the contract price payable on issue of the last ready for commissioning certificate. Niigata alleges that it invoiced this amount to SEOG in July 1990, but it did not provide a copy of the relevant invoice;

(b) USD 288,587 (JPY 17,309,875 and USD 168,588), which represents 2.5 per cent of the retention monies payable on issue of the provisional acceptance certificate. Niigata alleges that it invoiced this amount to SEOG in September 1990, but it did not provide a copy of the relevant invoice; and

(c) USD 361,041 (IQD 22,533, JPY 17,309,875 and USD 168,588), which represents 2.5 per cent of the retention monies payable on issue of the final acceptance certificate. Niigata states that it has not invoiced this amount to SEOG.

(b) Inoc Missan Oil Field Development

397. Niigata seeks compensation in the amount of USD 347,778 for contract losses allegedly incurred on the Inoc Missan Oil Field Development. Niigata states that it had two "old" contracts in relation to this project for which amounts remain outstanding. The owner of the project was the South Oil Company, Basrah, Iraq.

398. Niigata refers to the first contract as the "Contract for Inoc Missan Oil Field Development Phase II PJ (INOC P-2), Nov/1978". Niigata did not provide a copy of this contract, but states that the contract value was USD 22,900,000 and IQD 490,000. Niigata alleges that the amount of USD 7,978 is outstanding under this contract. Niigata states that this amount represents retention monies of 5 per cent of the United States dollar portion (i.e. USD 243,206) for additional work performed on re-routing of pipelines. Niigata states in a letter dated 25 July 1990 to the South Oil Company that this amount takes into account a discount which Niigata had agreed with the South Oil Company.

399. Niigata refers to the second contract as the "Contract for Inoc Missan Oil Field Development Phase III PJ (INOC P-3), May/1980". Niigata did not provide a copy of this contract, but states that the contract value was USD 6,796,000 and IQD 260,000. Niigata alleges that the amount of USD 339,800 is outstanding under this contract. Niigata states that this amount represents retention monies of 5 per cent of the United States dollar contract value. The Iraqi dinar portion of the retention monies (IQD 13,000) was paid to Niigata in August 1990.

400. Niigata seems to indicate that, at least initially, it did not receive payment as it had not fulfilled all its obligations under the contracts. However, Niigata states that it later completed all its obligations under these contracts. Niigata states that on 25 July 1990 it requested the South Oil Company to release retention monies withheld under the contracts. The South Oil Company allegedly agreed to pay the retention monies within one month, but, according to Niigata, did not do so as a result of Iraq's invasion and occupation of Kuwait.

(c) Spare parts

401. Niigata seeks compensation in the amount of USD 1,200,930 for contract losses allegedly incurred in relation to the manufacture and supply of spare parts.

402. Niigata alleges that at the time of Iraq's invasion and occupation of Kuwait, it had either supplied, or was in the process of manufacturing, spare parts ordered by Iraqi clients. Accordingly, Niigata seeks compensation in the amount of USD 1,127,843 (JPY 162,691,313) for "unpaid amounts" which represent cargo shipped to Iraq according to letters of credit which remain unpaid. It also seeks compensation in the amount of USD 73,087 (JPY 10,542,867) for manufacturing which it commenced according to orders received from Iraqi clients, but which it was obliged to discontinue due to Iraq's invasion and occupation of Kuwait. Niigata refers to this latter claim as a claim for

"value under process". It is not clear whether, and if so how, the manufacture and supply of spare parts related to Niigata's other projects in Iraq.

403. The amounts allegedly outstanding are set out in table 23, infra.

Table 23. Niigata's claim for contract losses (manufacture and supply of spare parts)

Client	Job number	Amount of order (JPY)	Letter of credit (number and date)	Unpaid amount (JPY)	Value under process (JPY)	Amount outstanding (USD)
State Enterprise for Oil and Gas Processing (Southern Area), Basrah	E201650	2,320,000	2/36596 of 27/3/90	-	711,375	4,932
State Enterprise for Oil Refining (Central Area), Daura	E299250	10,495,525	89/2/90 of 27/2/89	10,495,525	-	72,759
State Enterprise for Oil Refining (Central Area), Daura	E299870	74,026,984	89/2/245 of 24/5/89	74,026,984	-	513,185
State Enterprise for Oil Refining (Central Area), Daura	E201300	2,148,566	34000 of 10/2/90	-	1,018,213	7,059
State Enterprise for Oil Refining (Central Area), Daura	E201760	2,217,142	35334 of 1/4/90	-	161,515	1,120
State Establishment of Pipelines, Daura	E275470	34,542,000	24039 of 28/10/87	34,542,000	-	239,459
State Establishment of Pipelines, Daura	E290700	9,289,320	32968 of 7/11/89	9,289,320	-	64,397
State Establishment of Pipelines, Daura	E299810	29,190,911	30924 of 11/5/89	29,190,911	-	202,363
State Establishment of Pipelines, Daura	E201770	2,721,573	35312 of 29/3/90	2,721,573	-	18,867
State Establishment of Pipelines, Daura	E201740	6,437,500	35170 of 25/3/90	-	4,024,519	27,900
State Establishment of Pipelines, Daura	E201690	10,894,684	35041 of 10/3/90	-	2,061,515	14,291
State Establishment of Pipelines, Daura	E201680	7,019,755	35037 of 11/3/90	-	2,565,730	17,787
North Oil Company, Kirkuk	E201190	2,425,000	76/557 of 25/1/90	2,425,000	-	16,811
Total		193,728,960		162,691,313	10,542,867	1,200,930

2. Analysis and valuation

(a) Basrah Refinery Complex project (BRC-project): Contract No. 9015-2132

(i) Work performed and materials supplied

404. The Panel finds that SEOG is an agency of the Government of Iraq.

405. In support of its claim, Niigata provided monthly invoices for January to August 1990 with supporting documents and quotations for the work performed and the change orders in the total amount of JPY 153,369,006 and USD 1,237,175. Niigata also provided copies of the construction progress certificates for each month, which were signed by a representative of SEOG.

406. The Panel finds that the evidence provided by Niigata indicates that the performance that created the debts in question occurred between May and August 1990. Accordingly, applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 43 to 45 of the Summary, the contract losses relate to work performed subsequent to 2 May 1990 and are, therefore, compensable in their entirety. From the documentation provided by Niigata, the Panel was able to identify the value of the work performed and materials supplied, and recommends compensation in the amount of JPY 153,369,006 and USD 1,237,175.

(ii) Retention monies

407. In respect of retention monies allegedly outstanding, the Panel finds that, although Niigata did not provide copies of any of the completion certificates pertaining to the project, the monthly invoices submitted by Niigata demonstrate that the project was almost 100 per cent complete at the time of Iraq's invasion and occupation of Kuwait. Accordingly, the evidence indicates that the debt was due and owing after 2 May 1990 and is therefore within the jurisdiction of the Commission.

408. The Panel recommends compensation in the total amount of JPY 74,432,462, USD 724,931 and IQD 11,266 in respect of the retention monies, as follows:

(a) The full amount claimed of JPY 48,467,650 and USD 472,049 for the 7 per cent of the contract price payable on issue of the last ready for commissioning certificate;

(b) The full amount claimed of JPY 17,309,875 and USD 168,588 for the 2.5 per cent of the retention monies payable on issue of the provisional acceptance certificate; and

(c) JPY 8,654,937, USD 84,294 and IQD 11,266, which represents half of the amount allegedly owing as 2.5 per cent of the retention monies payable on issue of the final acceptance certificate.

409. The Panel considers that a deduction in any recommendation for retention monies payable to Niigata on issue of the final acceptable certificate is appropriate given that Niigata failed to provide

the final acceptance certificate and did not provide any details as to the length of the maintenance period and the works required to be completed during the maintenance period.

(b) Inoc Missan Oil Field Development

410. Niigata provided a letter dated 25 July 1990 requesting the South Oil Company to pay outstanding amounts owing on the project. However, Niigata did not provide any further evidence. In the article 34 notification, the secretariat requested Niigata to provide independent evidence, including invoices, final acceptance certificates and correspondence indicating the South Oil Company's approval of the claimed amounts, and to explain the delay in applying to the South Oil Company for release of the amounts claimed. As noted above, Niigata indicated to the Commission that it was unable to submit any further information in response to the article 34 notification. Finally, Niigata's brief references to both contracts for this project indicate that they were signed, or that the second and third phases of the project commenced, in November 1978 and May 1980, respectively.

411. Accordingly, the Panel has no evidence before it that would allow it to make the evaluation referred to in paragraphs 82 to 88 of the Summary, namely assessing how the projects were proceeding and whether any deductions would have been required from the retention monies withheld by the owner. The Panel therefore finds that Niigata did not provide sufficient evidence in support of its claim for the retention monies allegedly owing under this project.

(c) Spare parts

412. In support of its claim for "unpaid amounts" in relation to the manufacture and supply of spare parts, Niigata provided extensive documentation, including various shipping documents, as well as letters of credit and bills of exchange. The spare parts which Niigata allegedly shipped to Iraq included spare parts for gate valves and electrical equipment, switches, lamps, fuses, transformers and thermostats. The Panel finds that Niigata failed to provide any evidence as to the current location of the shipped goods and whether Niigata was able to mitigate its losses by selling or otherwise disposing of the goods. Finally, there is no evidence as to whether any of the bills of exchange submitted by Niigata were ever presented for payment.

413. In support of its claim for "value under process", Niigata provided several internally-generated tables showing amounts allegedly outstanding. The Panel finds that Niigata provided no independent evidence to support this part of its claim.

414. In the article 34 notification, the secretariat requested Niigata to provide evidence of any attempt to mitigate its contract losses. Moreover, Niigata was requested to supply independent evidence of its manufacturing process for the part of the claim described as "value under process". The secretariat also asked Niigata to indicate the present location of the spare parts and, if they were sold elsewhere, to supply evidence of receipt of payment. As noted above, Niigata indicated to the Commission that it was unable to submit any further information in response to the article 34 notification.

3. Recommendation

415. The Panel recommends compensation in the amount of USD 3,577,544 for contract losses, consisting of USD 2,300,392 (i.e. JPY 153,369,006 and USD 1,237,175) for work performed and materials supplied on the Basrah Refinery Complex project, and USD 1,277,152 (i.e. JPY 74,432,462, USD 724,931 and IQD 11,266) for retention monies withheld on the Basrah Refinery Complex project.

B. Payment or relief to others

1. Facts and contentions

416. Niigata seeks compensation in the amount of USD 757,909 (JPY 109,328,396) for payment or relief to others. The claim is for costs and expenses incurred from 2 August to 17 December 1990, as are set out in table 24, infra.

Table 24. Niigata's claim for payment or relief to others

Expense	Amount claimed (JPY)	Amount claimed (USD)
Item 1. Additional manpower costs	73,660,000	510,641
Item 2. Site expenses	6,356,962	44,069
Item 3. Overseas travellers insurance	895,100	6,205
Item 4. International telephone charges	1,695,461	11,754
Item 5. Living expenses in Iraq	14,325,160	99,308
Item 6. Food, medicine and books	661,062	4,582
Item 7. Transportation expenses	4,385,730	30,404
Item 8. Travelling expenses	4,044,186	28,036
Item 9. Expenses for relief to families	3,304,725	22,910
Total	109,328,396	757,909

(a) Item 1: "Additional Manpower Costs"

417. Niigata seeks compensation in the amount of USD 510,641 (JPY 73,660,000) for expenses which it refers to as "Additional Manpower Costs".

418. Niigata states that at the time of Iraq's invasion and occupation of Kuwait, it was conducting commissioning work on the Basrah Refinery Complex project. Niigata states that 17 of its employees were initially required for this work, but that as the commissioning work progressed, employees completed their duties and were ready to return to Japan. However, Niigata states that the Government of Iraq would not allow its employees to leave and they were therefore forced to remain in Iraq. Niigata claims that it paid their salaries during this time, but does not state whether the employees were being detained and/or whether they were working during this period.

419. Niigata's claim for "Additional Manpower Costs" in respect of 17 of its employees is set out in table 25, infra.

Table 25. Niigata's claim for "Additional Manpower Costs"

Employee title	Scheduled date of departure	Actual date of departure	Additional days in Iraq	Salary per day (JPY)	Amount claimed (JPY)	Amount claimed (USD)
Project manager	31 October 1990	17 December 1990	47	104,000	4,888,000	33,886
Field manager	31 August 1990	8 November 1990	69	104,000	7,176,000	49,747
Commissioning manager	10 September 1990	17 December 1990	98	98,000	9,604,000	66,579
Commissioning manager	10 September 1990	17 December 1990	98	98,000	9,604,000	66,579
Commissioning operator	21 August 1990	29 August 1990	8	85,000	680,000	4,714
Commissioning operator	21 August 1990	29 August 1990	8	85,000	680,000	4,714
Pipe engineer	21 August 1990	29 August 1990	8	91,000	728,000	5,047
Furnace engineer	15 August 1990	29 August 1990	14	91,000	1,274,000	8,832
Mechanical engineer	15 August 1990	29 August 1990	14	85,000	1,190,000	8,249
Mechanical supervisor	31 August 1990	8 November 1990	69	85,000	5,865,000	40,659
Electrical engineer	31 August 1990	17 December 1990	108	91,000	9,828,000	68,132
Electrical assistant	2 August 1990	16 August 1990	14	78,000	1,092,000	7,570
Instrument engineer	10 September 1990	8 November 1990	59	91,000	5,369,000	37,220
Instrument supervisor	2 August 1990	16 August 1990	14	85,000	1,190,000	8,249
Cook	10 September 1990	17 December 1990	98	85,000	8,330,000	57,747
Mechanical engineer	2 August 1990	16 August 1990	14	91,000	1,274,000	8,832
Baghdad manager	31 October 1990	17 December 1990	47	104,000	4,888,000	33,885
Total					73,660,000	510,641

(b) Items 2-9: Site expenses and other costs

420. Niigata provided a very brief description of these eight items of expense, without explaining each of the expenses separately. Niigata states that all of these expenses resulted from the enforced stay of its 17 employees in Iraq and were necessarily incurred in supporting the employees until they

were able to depart from Iraq. In support of each of these claimed expenses, Niigata provided internally-generated tables which itemise the claimed expenses. None of the tables are dated, and there is no further evidence in support of the claim.

2. Analysis and valuation

(a) Item 1: "Additional Manpower Costs"

421. In support of its claim for "Additional Manpower Costs", Niigata provided an internally-generated table detailing the evacuation records of the above 17 employees. This table, which is not dated, indicates that each employee actually left Baghdad several days before his respective departure dates listed in the table above. It therefore appears that Niigata is alleging that it continued to pay the employees until their arrival at their respective destinations outside of Iraq, rather than until the date of departure from Iraq. In addition, Niigata provided copies of the individual category "A" claims for departure losses filed with the Commission by each of the above employees. The departure dates listed in those claims are consistent with the details given by Niigata in table 25, supra.

422. In respect of recovery of unproductive salary payments, in the Seventeenth Report, the Panel stated at paragraph 27 that salaries paid to employees detained in Iraq are "prima facie compensable as salary paid for unproductive labour". However, the Panel noted that compensation will be awarded only when the claimant provides sufficient evidence to establish detention and actual payment.

423. Applying the principles set out in the preceding paragraph, the Panel finds that Niigata did not provide sufficient evidence in support of its claim for "Additional Manpower Costs". Apart from providing copies of category "A" claims filed by its employees with the Commission, Niigata provided no independent evidence in support of its claim.

424. Niigata stated that it had difficulty in locating receipts, vouchers and other documents pertaining to its claim for payment or relief to others. It stated that the difficulty was caused by the large amount of documents, translation difficulties, and the fact that some of the documents were kept at its Baghdad office.

425. In the article 34 notification, the secretariat specifically requested Niigata to provide evidence of detention (such as newspaper reports or reports from international organisations and Governments), payroll records, invoices and receipts, airline and bus tickets, affidavits by company employees, etc. As noted above, Niigata indicated to the Commission that it was unable to submit any further information in response to the article 34 notification. Accordingly, the Panel recommends no compensation in respect of the claim for "Additional Manpower Costs".

(b) Items 2-9: Site expenses and other costs

426. In respect of evacuation and relief costs, the Panel considers that the costs associated with evacuating and repatriating employees from Iraq between 2 August 1990 and 2 March 1991 are compensable to the extent that such costs are proved by the claimant and are reasonable in the circumstances. Urgent temporary liabilities and extraordinary expenses relating to evacuation and

repatriation, including transportation, food and accommodation are, in principle, compensable. (See the Summary, paragraph 172.)

427. In respect of the cost of airfares, in the "Report and recommendations made by the Panel of Commissioners concerning the ninth instalment of 'E3' claims" (S/AC.26/1999/16) (the "Ninth Report"), the Panel held that claimants were only entitled to compensation for the cost of evacuation airfares if this cost exceeded the cost which they would have incurred in repatriating their employees in any event after natural completion of their contracts in Iraq.

428. As noted above, Niigata provided no independent evidence in support of this part of its claim. Accordingly, applying the above principles, the Panel recommends no compensation for site expenses and other costs.

3. Recommendation

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

C. Financial losses

1. Facts and contentions

430. Niigata seeks compensation in the amount of USD 2,455,056 (IQD 153,217, JPY 117,707,150 and USD 1,146,403) for financial losses. The amount claimed consists of (a) a performance bond in the amount of USD 1,010,904 (IQD 63,089, JPY 48,467,650 and USD 472,048), and (b) a "refund bond" in the amount of USD 1,444,152 (IQD 90,128, JPY 69,239,500 and USD 674,355).

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

432. Niigata alleges that it provided both of the above bonds to SEOG in accordance with its contract "at the initial stage of Basrah Refinery New Refining Complex". This statement presumably refers to the amended contract of 11 July 1989, rather than the original contract because the bonds specifically refer to the amended contract. Niigata states that the performance bond and the "refund bond" expired "by fulfilment of its purpose" and the expiry of the date of validity specified in each bond. Niigata alleges that the originals have not been returned to it by SEOG through its bank, the Rafidain Bank in Baghdad. Niigata appears to be alleging that it will possibly suffer a future loss if SEOG or its bank, or the local issuing bank in Japan, attempts to call the unreturned bonds.

2. Analysis and valuation

433. In support of its claim for financial losses, Niigata provided a cable dated 28 August 1989 from the Rafidain Bank to SEOG evidencing a guarantee in favour of SEOG for up to IQD 90,128, JPY 69,239,500 and USD 674,355 and outlining the terms of the guarantee. The bond is stated to be valid up to 10 July 1990 and secured the first payment of 10 per cent of the contract price under the amended contract. Niigata also provided a cable dated 29 August 1989 from the Rafidain Bank to SEOG evidencing a guarantee in favour of SEOG for up to IQD 63,090, JPY 48,467,650 and

USD 472,049 and outlining the terms of the guarantee. The bond is stated to be valid up to 10 November 1990 and secured the "good performance" of Niigata's obligations under the amended contract.

434. The Panel finds that Niigata failed to provide sufficient evidence in support of its claim for financial losses. There is no evidence, such as correspondence with SEOG, the Rafidain Bank or the local issuing bank, that Niigata ever attempted and was unable to recover the bonds. Moreover, Niigata's claim appears to be a claim for future losses and, as such, is impossible to quantify. The bonds, on their face, have clearly expired and it is difficult to see how any future loss could be caused to Niigata through calling of the bonds.

435. In the article 34 notification, the secretariat specifically requested Niigata to explain whether it had incurred an actual loss, and how the alleged loss was directly caused by Iraq's invasion and occupation of Kuwait. As noted above, Niigata indicated to the Commission that it was unable to submit any further information in response to the article 34 notification.

3. Recommendation

436. The Panel recommends no compensation for financial losses.

D. Other losses

1. Facts and contentions

437. Niigata seeks compensation in the amount of USD 75,401 (DEM 24,538, IQD 9,856 and USD 28,000) for other losses. This amount consists of (a) USD 43,710 (DEM 24,538 and USD 28,000) for compensation allegedly paid by Niigata to its subcontractors for equipment and tools, and (b) USD 31,691 (IQD 9,856) for refund of a penalty allegedly overpaid by Niigata. The Panel considers each claim in turn.

(a) Compensation for equipment and tools

438. Niigata states that it engaged subcontractors for work on the Basrah Refinery Complex project. The three subcontractors were:

(a) Dodsal P.T.E., a company based in Dubai, United Arab Emirates (for civil, building, piping, electrical, instrumental and painting works);

(b) Dowell Schlumberger Corporation, a company based in Dubai, United Arab Emirates (for flashing and nitrogen purging work to be conducted prior to commissioning work); and

(c) Siemens AG, a company based in Germany (for checking work for switch gear (panel) and motors).

439. According to Niigata, each of the above subcontractors brought equipment, tools and consumables to the project site for implementation of the subcontracted or assigned work under

licences of temporary admission. Niigata states that the equipment was to be re-exported out of Iraq, or "donated to the client" on or after completion of its usage. Niigata states that Iraqi customs law therefore effectively required it to act as an importer of goods because of its position as main contractor on the project. Niigata states that all necessary equipment, tools and consumables were imported in its name.

440. After the subcontractors had completed their work, they allegedly requested Niigata to proceed with the re-export formalities. Niigata states that, despite the fact that this occurred after Iraq's invasion and occupation of Kuwait, it still tried to get permission from the customs authorities, but failed to do so. Niigata alleges that it was then required to "donate" the goods to SEOG because it was unable to export them, and was also obliged to pay compensation to its subcontractors for the value of the goods. Niigata claims that it paid compensation of USD 5,000 to Dodsal P.T.E. for empty argon gas cylinders; USD 23,000 to Dowell Schlumberger Corporation for equipment; and DEM 24,538 to Siemens AG for tools for electrical work.

(b) Refund of overpaid penalty

441. Niigata states that it made an overpayment of a penalty for missing car parts in the amount of USD 31,691 (IQD 9,856). The overpayment was allegedly made to the Southern Customs, Basrah. Niigata states that it appealed the decision to levy a penalty and a decision was given by the Baghdad Customs Court requiring refund of the excess payment. However, Niigata states that the refund has not been made. Niigata has offered no evidence in support of this claim.

2. Analysis and valuation

(a) Compensation for equipment and tools

442. In relation to its claim for the compensation for tools, Niigata provided a letter dated 7 November 1990 from Dodsal P.T.E to Niigata enclosing an invoice for USD 5,000 for "Settlement finalised with Niigata, Basrah, in connection with Argon Gas Cylinders". Niigata also provided an invoice dated 30 April 1990 from Dowell Schlumberger Corporation to Niigata for USD 23,000 for "Equipment lost in Iraq". Finally, Niigata provided an invoice dated 28 March 1990 from Siemens AG to Niigata for DEM 24,538 for equipment. This invoice states that no payment was required, presumably because at the time of import, Siemens AG could not have anticipated that the equipment would not be able to be re-exported.

443. The Panel finds that Niigata has failed to provide sufficient evidence in support of its claim for compensation paid for the tools and equipment. Niigata has not provided any evidence, such as bank statements or correspondence with the subcontractors, to demonstrate that it paid compensation to its subcontractors. In the article 34 notification, the secretariat requested Niigata to provide evidence in support of this alleged loss, including copies of all contracts and subcontracts, as well as a description of the work performed by each contractor, and the goods delivered by each subcontractor. As noted above, Niigata indicated to the Commission that it was unable to submit any further information in response to the article 34 notification. Accordingly, the Panel recommends no compensation in respect of the claim for compensation for equipment and tools.

(b) Refund of overpaid penalty

444. As noted above, Niigata offered no evidence in support of its claim for refund of the overpaid penalty. Accordingly, the Panel recommends no compensation in respect of this part of the claim for other losses.

3. Recommendation

445. The Panel recommends no compensation for other losses.

E. Summary of recommended compensation for Niigata

Table 26. Recommended compensation for Niigata

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	5,306,774	3,577,544
Payment or relief to others	757,909	nil
Financial losses	2,455,056	nil
Other losses	75,401	nil
Total	8,595,140	3,577,544

446. Based on its findings regarding Niigata's claim, the Panel recommends compensation in the amount of USD 3,577,544. The Panel determines the date of loss to be 2 August 1990.

VIII. ÖZGÜ-BAYTUR CONSORTIUM

447. Özgü-Baytur Consortium is a consortium organised according to the laws of Turkey. The claim is brought by the Özgü-Baytur Consortium and by its two constituent entities, Öz-Gü Inşaat ve Ticaret A.Ş. and Baytur Inşaat Taahhüt A.Ş. For ease of reference, the claimant is referred to herein as "the Consortium". According to the Statement of Claim, the Consortium was created for the specific purpose of carrying out land and soil reclamation projects in Iraq.

448. Prior to Iraq's invasion and occupation of Kuwait, the Consortium was engaged as the main contractor on eight projects in Iraq. The Consortium alleges that amounts are outstanding in relation to five of these projects, which are described in greater detail below. In addition, the Consortium seeks compensation for unproductive salaries paid to its employees who remained in Iraq after 2 August 1990. Finally, the Consortium alleges that it incurred losses of tangible property which it was forced to leave behind in Iraq.

449. The Consortium seeks compensation in the total amount of USD 30,726,182 for contract losses, loss of tangible property, other losses, claim preparation costs and interest.

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

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

Table 27. The Consortium's claim

Claim element	Claim amount (USD)
Contract losses	9,398,397
Loss of tangible property	20,453,637
Other losses	320,889
Claim preparation costs	553,259
Interest (no amount specified)	-
Total	30,726,182

A. Contract losses

1. Facts and contentions/analysis and valuation

452. The Consortium seeks compensation in the amount of USD 9,398,397 for contract losses. The claim consists of (a) amounts outstanding on the Consortium's five remaining projects in the amount of USD 9,353,407, and (b) wages and salaries paid to personnel in the amount of USD 44,990.

453. In the "E" claim form, the Consortium characterised its claim for wages and salaries paid to its personnel as a claim for payment or relief to others, but the Panel finds that it is more accurately classified as a claim for contract losses.

(a) Project summaries

454. At the time of Iraq's invasion and occupation of Kuwait, the Consortium was performing work on five projects in Iraq in relation to which amounts are allegedly outstanding. The projects are as follows:

(i) Jute Farm Debuni project

455. The first project was known as the Jute Farm Debuni project and involved land reclamation as well as the construction of main, secondary and tertiary irrigation and drainage systems, asphalt roads, houses and administrative buildings. The project covered an area of 18,750 hectares and was located 110 kilometres south of Baghdad. The employer on this project was the State Organisation for Land Reclamation ("SOLR").

456. The contract for the Jute Farm Debuni project was awarded to the Consortium in December 1979. The contract specified that work was to be completed "within a period of 990 days". The Consortium began work on the project on 28 February 1980 and substantially completed its work by October 1985.

457. The contract price was IQD 22,520,700, which the Consortium states was equivalent to USD 72,266,427 according to the official exchange rate set by the Government of Iraq at the time. Sixty per cent of the contract price was payable in United States dollars. The balance was payable in Iraqi dinars. Ten per cent of each monthly invoice was to be withheld as retention monies, until the total amount withheld was equal to 5 per cent of the contract price. The Consortium states that when a portion of any of its projects was completed, that portion was inspected and handed over to SOLR. One half of the retention monies that had been withheld was then released to the Consortium so that when the last handover for a project had been made, the Consortium had received half of the total retention monies, or 2.5 per cent of the contract price. The remaining half was released upon issue of the final acceptance certificate. It appears from the Consortium's description of its projects, that the contractual provisions and payment procedures were the same on all of the projects.

458. The maintenance period for the Jute Farm Debuni project was 12 months. The final acceptance certificate was issued on 12 November 1988.

(ii) Ishaqi project

459. The second project was known as the Ishaqi project and involved the construction of secondary and tertiary irrigation and drainage systems. The project covered an area of approximately 30,000 hectares and was located 85 kilometres north of Baghdad. The employer on this project was SOLR.

460. The contract for the Ishaqi project was awarded to the Consortium in December 1979. The contract specified that work was to be completed "within a period of 960 days". The Consortium began work on the project on 10 March 1980.

461. The contract price was IQD 14,266,480, which the Consortium states was equivalent to USD 45,779,551 according to the official exchange rate set by the Government of Iraq at the time. Sixty per cent of the contract price was payable in United States dollars. The balance was payable in Iraqi dinars.

462. The Ishaqi project was substantially completed in February 1985. SOLR issued a completion certificate dated 25 February 1985 stating that it had taken over 95 per cent of the project.

(iii) Abu Ghraib project

463. The third project was known as the Abu Ghraib project (or the Abu Ghraib Precast Flume project) because it involved the construction of a tertiary irrigation system using flumes. The Consortium specialised in the construction of flumes, which are artificial channels mounted above the ground to convey water in an irrigation system. The project covered an area of 60,000 hectares and was located 30 to 60 kilometres west of Baghdad. The employer on this project was SOLR.

464. The contract price was originally IQD 10,140,000, which the Consortium states was equivalent to USD 32,538,134 according to the official exchange rate set by the Government of Iraq at the time. The contractor which was originally responsible for levelling the land and constructing the

main and secondary irrigation and drainage systems was unable to complete the work. As a result of the change in responsibilities for the project, the scope of the Consortium's work for the tertiary system was reduced by agreement with SOLR. The revised contract price was IQD 6,984,450, which the Consortium states was equivalent to USD 22,412,325. Seventy per cent of the contract price was payable in United States dollars. The balance was payable in Iraqi dinars.

465. The Consortium began work on the Abu Ghraib project in October 1984. The project was approximately 81 per cent complete in April 1989, when the Consortium was forced to suspend work because promissory notes issued by SOLR had not been paid. The Consortium had agreed to accept payment of the foreign currency portions of various interim payments when Iraq experienced difficulties in meeting its foreign currency payments under each of the projects. After a period of negotiation with SOLR, the Consortium resumed work in January 1990 in accordance with a revised work programme. It was estimated at that time that the project would be completed by March or April 1991.

(iv) Saqlawia project

466. The fourth project was known as the Saqlawia project and involved land reclamation and the construction of main and secondary irrigation and drainage systems, as well as asphalt roads. The project lay within the larger Abu Ghraib project, covered an area of 10,000 hectares and was located 30 kilometres northwest of Baghdad. The employer on this project was SOLR.

467. The contract for the Saqlawia project was originally awarded to a Greek contractor, Odon & Odostromaton, S.A. ("Odon") in 1981. The contract price was IQD 15,139,701, which the Consortium states was equivalent to USD 51,138,549 according to the official exchange rate set by the Government of Iraq at the time. Odon completed work on the project to the value of approximately IQD 4,181,940, but then ceased work because SOLR discontinued payment of the foreign currency portion of the contract price. The contract for the remaining work, with a value of IQD 10,957,761, was assigned to the Consortium in February 1984. Sixty-five per cent of the contract price was payable in United States dollars. The balance was payable in Iraqi dinars.

468. The Saqlawia project was 95 per cent complete in April 1989, when the Consortium was forced to suspend work because promissory notes issued by SOLR had not been paid. After a period of negotiation with SOLR, the Consortium resumed work on this project in January 1990. It was estimated that the project would be completed by December 1990.

(v) Tharthar Bridges project

469. The fifth project was known as the Tharthar Bridges project and involved the construction of one railway bridge and five highway bridges across the Tharthar Canal which linked Lake Tharthar to the Tigris River. The employer on this project was the State Organisation for Dams and Reservoirs ("SODR").

470. As in the case of the Saqlawia project, the contract for this project was originally awarded to Odon in 1981. The contract price was IQD 4,036,054, which the Consortium states was equivalent to

USD 13,632,894 according to the official exchange rate set by the Government of Iraq at the time. The contract was assigned to the Consortium in June 1985. Seventy per cent of the contract price was payable in United States dollars. The balance was payable in Iraqi dinars.

471. The final acceptance certificate for the Tharthar Bridges project was issued in December 1988.

(b) Amounts outstanding on the Consortium's projects

472. The Consortium seeks compensation in the amount of USD 9,353,407 for amounts outstanding on the above five projects in Iraq. There are six separate claims for amounts allegedly outstanding. The Panel considers each of the claims in turn.

(i) Unpaid interim certificates and released but unpaid retention monies

473. The Consortium seeks compensation in the amount of USD 697,055 for unpaid interim certificates and released but unpaid retention monies. This claim consists of (a) unpaid foreign currency portions of the last interim certificates issued in relation to the Abu Ghraib and Saqlawia projects in the amount of USD 46,462 and USD 618,682, respectively, and (b) released but unpaid retention monies withheld on the Saqlawia project in the amount of USD 31,911.

a. Unpaid foreign currency portions

474. The Consortium seeks compensation in the amount of USD 665,144 for unpaid foreign currency portions of the last interim certificates issued in relation to the Abu Ghraib and Saqlawia projects.

475. The Consortium states that during the month of August 1990, its management in Baghdad made concerted efforts to address outstanding payment issues with SOLR. In particular, the Consortium's site managers for the Abu Ghraib and Saqlawia projects devoted a substantial amount of time preparing and obtaining approval from SOLR's resident engineer of the last interim certificates in relation to both projects (Interim Certificates 47 and 61, respectively "IC 47" and "IC 61"). Both of these certificates were approved by SOLR on 4 September 1990.

476. The Consortium subsequently received payment of the Iraqi dinar portion of the interim certificates. SOLR informed the Consortium that the foreign currency portions of the certificates had been credited to the Consortium's account with the Rafidain Bank until promissory notes incorporating those amounts (and other foreign currency receivables accruing in the account) were issued. The Consortium alleges that, although it received payment of the Iraqi dinar portions of both interim certificates, it never received payment in the amount of USD 665,144, which represents the United States dollar portions for the Abu Ghraib and Saqlawia projects in the respective amounts of USD 46,462 and USD 618,682.

477. The evidence provided by the Consortium included two payment instruction letters, each dated 4 September 1990, from SOLR to the Consortium for IC 47 (Abu Ghraib project) and IC 61 (Saqlawia project). This evidence indicates that IC 47 related to work performed from 1 to 26 August

1990, and IC 61 related to work performed from 1 May to 31 August 1990. This evidence also indicates that the amounts claimed on both projects were credited to the Consortium's account pending issue of the respective promissory notes. Finally, the Consortium provided a report dated 10 January 1994 from KPMG (the "KPMG report", which consists of a series of reports prepared by the Consortium's external accountants) confirming that the contract receivables for IC 47 and 61 are supported by the Consortium's accounts and that the exchange rates used are correct and were correctly applied to arrive at the amounts claimed as owing under both interim certificates. The Panel finds that the KPMG report, which KPMG authorised the Consortium to submit in support of its claims, confirms the other evidence submitted by the Consortium. The Panel considers that the KPMG report is credible and has relied on the report in considering the Consortium's claims.

478. The Panel finds that SOLR is an agency of the Government of Iraq. Moreover, the Panel finds that the evidence demonstrates that the work to which the last interim certificates IC 47 and 61 relate was performed after 2 May 1990. Furthermore, the Panel finds that although the Consortium did not provide copies of the contracts for either the Abu Ghraib project or the Saqlawia project, there is ample evidence to support the existence of such a contract, including statements from the Consortium's personnel. The Panel therefore recommends compensation in the full amount claimed of USD 665,144.

b. Released but unpaid retention monies

479. The Consortium seeks compensation in the amount of USD 31,911 for released but unpaid retention monies withheld on the Saqlawia project.

480. The Consortium states that on 11 July 1990, SOLR released the amount of IQD 14,534 in retention monies previously withheld in relation to the Saqlawia project. The Consortium subsequently received the Iraqi dinar portion of this amount. The United States dollar portion of the released retention monies, IQD 9,447 (USD 31,911), was credited to the Consortium's foreign currency receivable account where it was to remain until its inclusion in the next promissory note. No such promissory note was issued due to Iraq's invasion and occupation of Kuwait.

481. In support of the claim, the Consortium provided a letter dated 11 June 1990 from SOLR to the Consortium stating that the Consortium's account had been credited with the amount of IQD 9,447 which represented 65 per cent (i.e. the United States dollar portion) of the released retention monies, pending issue of a promissory note. The KPMG report confirms that the released but unpaid retention monies for the Saqlawia project in the amount of IQD 9,447 (USD 31,911) is supported by the Consortium's accounts and that the exchange rates used are correct and were correctly applied to arrive at the amount claimed.

482. The Panel finds that the Consortium provided sufficient evidence to support the claim and recommends compensation in the full amount claimed of USD 31,911.

(ii) Issued but not guaranteed promissory notes

483. The Consortium seeks compensation in the amount of USD 1,115,827 for promissory notes which were issued by SOLR but not guaranteed by the Central Bank of Iraq.

484. The Consortium states that, pursuant to an agreement reached with SOLR in November 1989, the amount of IQD 579,550 (which represented the second half of the retention monies withheld on the Jute Farm Debuni project) was released by SOLR. The Iraqi dinar portion of this amount was released without incident. On 4 February 1990, two promissory notes in the total amount of IQD 347,730 (USD 1,115,827), representing the United States dollar portion of the remaining withheld retention monies on the Jute Farm Debuni project, were issued by SOLR and sent to the Central Bank of Iraq for its signature in its capacity as guarantor. The Consortium alleges that the Central Bank of Iraq delayed in signing these two promissory notes, despite an express request by SOLR that the promissory notes be returned to it once endorsed by the Central Bank of Iraq.

485. The Consortium states that it sent one of its employees to Iraq in May 1990 to address outstanding payment issues. By July 1990, the Consortium had made both oral and written inquiries of the Central Bank of Iraq to attempt to resolve this issue. The Central Bank of Iraq cited various bureaucratic obstacles, such as procurement of clearance certificates from Iraqi governmental entities, for its failure to sign the promissory notes. The Consortium states that, acting in good faith, it fulfilled these bureaucratic requirements by mid-July 1990. However, the promissory notes did not receive endorsement prior to Iraq's invasion and occupation of Kuwait.

486. In support of the claim, the Consortium provided extensive evidence, including a letter dated 27 February 1990 from SOLR to the Central Bank of Iraq. Attached to this letter are two promissory notes, each dated 4 February 1990, in the total amount of IQD 347,730 (USD 1,115,827) issued for the "final measurement" of the Jute Farm Debuni project. The Consortium also provided a statement dated 22 January 1994 from its Baghdad office manager stating that two promissory notes in the amount of USD 1,115,827 were outstanding. Finally, the KPMG report confirms that the amount claimed for the issued but not guaranteed promissory notes is supported by the Consortium's accounts and that the exchange rates used are correct and were correctly applied to arrive at the amounts claimed as owing under both interim certificates.

487. The final acceptance certificate for the Jute Farm Debuni project was issued on 12 November 1988. The evidence indicates that the performance that created the debts in question occurred prior to 2 May 1990. The claim is therefore outside the jurisdiction of the Commission and is not compensable under Security Council resolution 687 (1991). Applying the approach taken with respect to "contractual arrangements to defer payments" as set out in paragraphs 72 to 81 of the Summary, the Panel further finds that the deferred payment arrangements evidenced by the promissory notes issued by SOLR do not have the effect of bringing the claim within the jurisdiction of the Commission. Accordingly, applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 43 to 45 of the Summary, the Panel recommends no compensation.

(iii) Amounts due in relation to promissory notes

488. The Consortium seeks compensation in the amount of USD 2,665,034 for amounts due under promissory notes issued by SOLR and SODR. This claim consists of (a) unpaid principal amounts on the promissory notes in the amount of USD 1,824,128, (b) loss of periodic interest payments on the notes in the amount of USD 196,964, and (c) loss of delay interest in the amount of USD 643,942. The Panel considers each of these claims in turn.

a. Unpaid principal amounts

489. The Consortium seeks compensation in the amount of USD 1,824,128 for promissory notes issued by SOLR and SODR.

490. The Consortium states that from 1986 until it left Iraq in 1990, SOLR and SODR issued 44 promissory notes in the total amount of USD 12,683,245 for the portions of the Consortium's projects which were payable in United States dollars. These promissory notes each had a maturity period of two years and bore interest of the London Interbank Offered Rate (LIBOR) minus 1 per cent to be paid every six months, with the fourth and final interest payment to be made on the maturity date of the relevant promissory note.

491. By August 1990, SOLR, SODR and the Central Bank of Iraq had fallen behind in honouring matured promissory notes previously issued and guaranteed. The Consortium seeks compensation for the lost principal on five of these promissory notes: three promissory notes issued in respect of the Tharthar Bridges project in the principal amounts of USD 411,262, USD 638,064 and USD 408,309, respectively, ("PN 6, 7 and 8") and two promissory notes comprising the United States dollar portion of interim payments and other receivables on the Abu Ghraib ("PN 18") and Saqlawia projects ("PN 12") in the principal amounts of USD 228,616 and USD 137,877, respectively.

492. The evidence provided by the Consortium included a letter dated 13 July 1993 from the Consortium to the Central Bank of Turkey requesting confirmation of attached lists of promissory notes issued between November 1986 and August 1990, showing those which had been paid and those which had not been paid. The evidence also includes the response from the Central Bank of Turkey dated 21 July 1993, indicating that the lists corresponded with bank records. The Consortium also provided a statement dated 28 January 1994 from its finance manager confirming the amounts claimed in relation to unpaid principal on the five promissory notes, as well as copies of each of the five promissory notes to which the claim relates. Finally, the KPMG report confirms that the principal amounts claimed in relation to the five promissory notes are correct and are supported by the Consortium's accounts.

493. The Panel finds that SOLR and SODR are agencies of the Government of Iraq.

494. Each of the five promissory notes were issued two years prior to their maturity dates. The date of issue of each of the five promissory notes was 13 July 1987 (PN 6), 16 August 1987 (PN 7), 21 November 1987 (PN 8), 20 November 1988 (PN 12) and 14 August 1990 (PN 18). The Panel finds that the work to which the three promissory notes issued in respect of the Tharthar Bridges project (PN

6, 7 and 8) and the promissory note issued in respect of the Saqlawia project (PN 12) relates, was performed prior to 2 May 1990 and is therefore outside the jurisdiction of the Commission. In relation to the promissory note issued in respect of the Abu Ghraib project (PN 18), the Panel is unable to confirm, despite the extensive evidence provided by the Consortium, that the work to which the promissory note relates was performed entirely after 2 May 1990. Accordingly, applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as out in paragraphs 43 to 45 of the Summary, the Panel recommends no compensation.

b. Periodic interest payments

495. The Consortium seeks compensation in the amount of USD 196,964 for loss of periodic interest payments on promissory notes issued by SOLR.

496. The Consortium states that, prior to Iraq's invasion and occupation of Kuwait, periodic interest payments on promissory notes issued to the Consortium had, with one exception, been made on schedule. These interest payments stopped abruptly after 2 August 1990. The claim relates to the following periodic interest payments on six promissory notes:

(a) The fourth and final periodic interest payment on the Saqlawia project promissory note (PN 12), which was to be made on 20 November 1990. The Consortium alleges that interest in the amount of USD 4,804 is due on this promissory note;

(b) All four of the periodic interest payments in relation to the Abu Ghraib project promissory note (PN18). The Consortium alleges that interest in the amount of USD 20,933 is due on this promissory note;

(c) All four of the periodic interest payments on the two promissory notes issued by SOLR on 4 February 1990 for the Jute Farm Debuni project. The Consortium alleges that interest in the amount of USD 117,859 is due on these promissory notes; and

(d) All four of the periodic interest payments on the two promissory notes that would have been issued (in the amounts of USD 46,462 and USD 618,682, respectively) for the United States dollar portions of IC 47 and IC 61 on the Abu Ghraib and Saqlawia projects, and the Saqlawia retention monies released on 11 July 1990. The Consortium estimates that interest is due in the amount of USD 3,557 for the Abu Ghraib project promissory note and in the amount of USD 49,811 for the Saqlawia project promissory note. However, the Consortium acknowledges that interest on these promissory notes cannot be calculated with certainty because the exact date on which the promissory notes would have been issued, but for Iraq's invasion and occupation of Kuwait, is not known.

497. In support of the claim, the Consortium provided a chart showing the LIBOR rates applied by Barclays Bank and Natwest and the resulting interest amounts on the above promissory notes for the period from September 1990 to October 1992. The Consortium also provided a list of unpaid promissory notes and outstanding periodic interest which is attached to a letter dated 13 July 1993 from the Consortium to the Central Bank of Turkey. The evidence includes a response from the

Central Bank of Turkey stating that the amounts referenced in the list are correct. Finally, the Consortium provided a statement dated 28 January 1994 from its finance manager confirming that the amounts of periodic interest claimed on the above six promissory notes are correct.

498. The Panel finds that the evidence demonstrates that the periodic interest owing on the promissory notes referred to in items (a) to (c), above, relates to work performed prior to 2 May 1990 and is therefore outside the jurisdiction of the Commission. This includes the promissory note issued for work performed in relation to the Abu Ghraib project, as the Panel was unable to confirm that the work to which this promissory note relates was performed entirely after 2 May 1990. Finally, the Panel was unable to determine a date from which periodic interest would have accrued in relation to the promissory notes referred to in item (d), above, which were to be issued after 2 August 1990 in relation to the last interim certificates on the Abu Ghraib and Saqlawia projects. Accordingly, applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 43 to 45 of the Summary, the Panel recommends no compensation.

c. Delay interest

499. The Consortium seeks compensation in the amount of USD 643,942 for delay interest on promissory notes that were not honoured by SOLR and SODR upon their maturity, and which were either never honoured subsequently or were honoured very late.

500. The Consortium alleges that it is owed delay payments on 22 of the 23 promissory notes that were ultimately honoured prior to August 1990, and on the three Tharthar Bridges project promissory notes that are still outstanding. The Consortium calculated the amount of the claim based on a delay interest rate of 11 per cent. The Consortium states that it was obliged to borrow funds at a rate of 11 per cent in order to pay its employees and continue its operations in Iraq, and provided a letter from a Turkish commercial bank stating that the rate of interest on its loans to the Consortium was 11 per cent.

501. Applying this delay interest rate, the Consortium alleges that it is owed delay interest in the amount of USD 643,942, consisting of USD 495,440 on the 22 promissory notes honoured by the Central Bank of Iraq after their maturity dates and USD 148,502 on the three promissory notes issued to the Consortium in relation to the Tharthar Bridges project.

502. The evidence provided by the Consortium included a statement dated 28 January 1994 from its finance manager explaining the calculation of the claim and the use of a delay interest rate of 11 per cent, as well as a chart setting out delay interest on the paid promissory notes and the length of delays in payment.

503. The Panel finds that all of the 22 promissory notes relate to work performed prior to 2 May 1990. The claim is therefore outside the jurisdiction of the Commission. Moreover, delay interest on the three Tharthar Bridges project promissory notes relates to delays in payment between the maturity of the promissory notes in 1989 and 2 August 1990 and therefore the performance that created the

debts in question occurred prior to 2 May 1990 and is outside the jurisdiction of the Commission. Accordingly, the Panel recommends no compensation.

(iv) Receivables relating to unreleased retention monies

504. The Consortium seeks compensation in the amount of USD 4,194,635 for receivables relating to unreleased retention monies on the Ishaqi, Abu Ghraib and Saqlawia projects.

505. The Ishaqi project was substantially completed in February 1985. SOLR issued a completion certificate dated 25 February 1985 stating that it had taken over 95 per cent of the project and that the Consortium had completed work to the value of IQD 13,562,004 (USD 43,518,965). Half of the retention monies were then released. The remaining retention monies, in the amount of IQD 382,624 (USD 1,227,797) were to be released upon issue of the final acceptance certificate. However, the Consortium alleges that this never took place owing to a dispute with SOLR as to who was responsible for clearing weeds that had grown in the drainage channels after the works were handed over to SOLR. An ad hoc committee, consisting of representatives of the two parties, examined the matter and decided that clearance of the weeds was part of SOLR's maintenance responsibilities. The Consortium states that SOLR accepted the decision and that its resident engineer prepared the final acceptance certificate but did not issue it. The Consortium also states that the second half of the retention monies was therefore not released due to Iraq's invasion and occupation of Kuwait.

506. The Abu Ghraib project was approximately 81 per cent complete in April 1989, when the Consortium suspended work due to its dispute with SOLR about outstanding promissory notes. Work resumed in January 1990 and it was estimated that the project would be completed by March or April 1991, at which time the maintenance period would have commenced. Between January 1990 and the end of August 1990, the Consortium executed work on the project in the amount of IQD 508,030. The last interim certificate (No. 47), which was issued and approved by SOLR, covered the period from 1 to 26 August 1990. When work stopped in August 1990, the remaining work consisted of the construction of 63,450 metres of flume lines, of the total 760,000 metres required in the revised contract. The Consortium states that portions of the first half of the retention monies were released when portions of the flume lines were handed over to SOLR. However, the Consortium alleges that, as of 2 August 1990, SOLR still held the balance of the first half of the retention monies (IQD 115,045), and the entire amount of the second half of the retention monies (IQD 216,996) which was payable upon issue of the final acceptance certificate. The Consortium therefore alleges that the unreleased retention monies amount to IQD 332,041 (USD 1,065,482).

507. The Saqlawia project was 95 per cent complete in April 1989 when the Consortium suspended work. Work resumed in January 1990 and it was estimated that the project would be completed by December 1990 or January 1991, at which time the maintenance period would have commenced. Between January 1990 and the end of August 1990, the Consortium executed work in the amount of IQD 505,546. The last interim certificate (No. 61), which was issued and approved by SOLR, covered the period from 1 May to 31 August 1990. When work stopped in August 1990, the remaining work consisted of the construction of an asphalt road (to be performed by a subcontractor) and the remedying of minor deficiencies in works previously handed over to SOLR. The Consortium alleges

that the unreleased retention monies, consisting of the balance of the first half of the retention monies, plus the entire amount of the second half payable upon issue of the final acceptance certificate, amount to IQD 562,901 (USD 1,901,356).

508. In support of the claim, the Consortium provided a list of interim certificates for the Ishaqi project, as well as the Consortium's ledger balance dated 10 September 1990, which indicates that retention monies on the project are owing in the amount of IQD 382,624 (USD 1,227,797). The Consortium also submitted ledger balances dated 31 December 1989 and 10 September 1990 for the Abu Ghraib and the Saqlawia projects, respectively, which indicate that retention monies are owing on both projects in the amounts claimed. Finally, the KPMG report confirms that the amounts claimed as unreleased retention monies on each of the above projects are correctly stated and are supported by the Consortium's accounts.

509. The Panel finds that the evidence demonstrates that, although the Ishaqi project was substantially complete in February 1985, a dispute between the Consortium and SOLR resulted in the final acceptance certificate not being issued prior to August 1990. Furthermore, the evidence demonstrates that, following a decision in favour of the Consortium by the ad hoc committee formed to resolve the dispute, a final acceptance certificate was prepared by SOLR in June 1990, although not issued. The Panel therefore finds that the claim is within the jurisdiction of the Commission and recommends compensation in the full amount claimed of USD 1,227,797.

510. In relation to the Abu Ghraib and the Saqlawia projects, the Panel finds that both projects had reached a substantially completed stage. However, work on both projects was not complete as of August 1990, and, even if it had been, only 50 per cent of the retention monies would have been released upon completion of the work. The remaining 50 per cent would have been released at the end of the respective maintenance period for each project. In making its recommendation, the Panel has taken into account that it is unable to determine how much work, if any, the Consortium would have had to perform during the maintenance period for each project. The Panel therefore recommends compensation in the amount of USD 1,483,419, which represents half of the amount claimed for both projects.

511. The Panel recommends compensation in the total amount of USD 2,711,216 for receivables relating to unreleased retention monies.

(v) Repayment of delay penalties

512. The Consortium seeks compensation in the amount of USD 245,252 for delay penalties levied by SOLR. This amount consists of IQD 13,012 (USD 41,755) levied in relation to the Abu Ghraib project and IQD 60,246 (USD 203,497) levied in relation to the Saqlawia project.

513. According to the general conditions applicable to each of the contracts for the Consortium's projects, once the completion date had passed, SOLR and SODR were entitled to deduct delay penalties from any monies held by them or which became due to the Consortium. The Consortium states that the amount to be deducted was specified in the contract as a daily rate for each day that completion of the project was delayed. The Consortium states that, in the case of the Abu Ghraib

project, the delay penalty was initially IQD 200 per day, but this amount was subsequently reduced by agreement to IQD 162 per day. In the case of the Saqlawia project, the Consortium states that the delay penalty was IQD 600 per day. The general conditions of contract also made provision for determining increases in the delay penalty based on the length of the delay beyond the contractual completion date.

514. The Consortium states that, in practice, delay penalties were automatically deducted from the Consortium's interim payments regardless of whether the Consortium or SOLR was responsible for the delay. When SOLR was responsible for the delay, the Consortium applied to SOLR for a time extension and SOLR, after granting the extension, reimbursed the Consortium for the delay penalties it assessed in relation to the period to be covered by the time extension.

515. The Consortium states that, as part of an agreement reached with SOLR in November 1989, SOLR agreed to extend the time for completion of the Abu Ghraib and Saqlawia projects equal to the number of days between the date of maturity of overdue promissory notes for those projects and the date of their payment. The Consortium states that delays in honouring promissory notes occurred again in February 1990 and alleges that further extensions of time, and the related repayment of delay penalties, would have occurred but for Iraq's invasion and occupation of Kuwait.

516. The evidence provided by the Consortium included a statement dated 31 January 1994 from its executive director confirming that the total amount of IQD 73,258 (USD 245,252) was levied by SOLR as delay penalties on the above projects. The Consortium also submitted a letter dated 25 September 1989 from the Turkish Embassy in Baghdad to the Iraqi Minister of Oil requesting certain actions, including extensions of time and return of delay penalties on the Abu Ghraib and Saqlawia projects. Finally, the KPMG report confirms that the amounts claimed for delay penalties levied pursuant to the Abu Ghraib and Saqlawia contracts are correct and are supported by the Consortium's accounts.

517. Despite the extensive evidence submitted by the Consortium as to extensions of time and refunds of delay penalties retrospectively granted by SOLR, the Panel is unable to identify a clear course of conduct on the part of SOLR such as to justify the Panel in concluding that further delay penalties on both projects would have been repaid and corresponding extensions of time granted, but for Iraq's invasion and occupation of Kuwait. Accordingly, the Panel recommends no compensation.

(vi) Receivables relating to handover payments

518. The Consortium seeks compensation in the amount of USD 435,604 for receivables relating to handover payments for portions of work performed by the Consortium.

519. The claim relates to the Abu Ghraib project. The Consortium alleges that during July and August 1990, it completed work on 160,650 metres of flume lines for the Abu Ghraib project. Normally, these flume lines would have been inspected by SOLR and then handed over. The Consortium alleges that the handover payments would have amounted to IQD 135,749 (USD 435,604). However, the Consortium was unable to carry out the handover procedure of the

flume lines because of Iraq's invasion and occupation of Kuwait (and the subsequent departure of its employees) and, consequentially, left those flume lines behind in Iraq.

520. In support of the claim, the Consortium provided a statement dated 25 January 1994 from its site manager for the Abu Ghraib project, confirming the above facts and the amount claimed, and a letter dated 29 July 1990 from SOLR to the Consortium indicating that certain portions of the Abu Ghraib project were handed over on 11 July 1990.

521. In the article 34 notification, the Consortium was requested to provide evidence of the agreement by SOLR to the amount claimed. The Consortium states that it lost most of the documentary evidence that would have supported this claim when it was forced to leave Iraq. However, in its response to the article 34 notification, the Consortium alleged that the completion of certain flume lines was raised by SOLR as a pre-requisite to the issue of exit visas for the Consortium's personnel. It alleged that the fact that SOLR agreed to issue exit visas is evidence of its acceptance of the work performed.

522. Applying the approach taken in paragraph 28 of the Summary, the Panel finds that the Consortium did not provide sufficient evidence of SOLR's approval of the work which was to be handed over. Accordingly, the Panel recommends no compensation.

(c) Wages and salaries paid to personnel

523. The Consortium seeks compensation in the amount of USD 44,990 for wages and salaries paid to personnel. This amount consists of (a) wages and salaries of personnel for the month of August 1990 in the amount of USD 27,650, and (b) wages and salaries of personnel who remained in Iraq after 31 August 1990 in the amount of USD 17,340. The Panel considers each of these claims in turn.

(i) Wages and salaries of personnel for the month of August 1990

524. The Consortium states that in August 1990 it employed 210 people in connection with its activities in Iraq. Of these 210 employees, 198 were Turkish nationals.

525. The Consortium asserts that during the first few days after 2 August 1990, its work proceeded relatively undisturbed. However, as the tension in the region heightened and as the workers gained a better appreciation of the gravity of the situation, the pace of work slowed. The Consortium states that it was impossible to persuade most of its personnel to continue working on its projects and that it began the process of seeking exit visas for them on 18 August 1990.

526. The Consortium states that SOLR threatened to withhold exit visas as a means of asserting pressure on the Consortium to complete certain work on the Abu Ghraib and Saqlawia projects. The Consortium itself wished to continue working and had the materials available to do so. Some workers were willing to continue to work in order to facilitate the issue of exit visas, and some work was accomplished during this period.

527. The Consortium's Turkish employees received a portion of their wages and salaries in Iraqi dinars and a larger portion in Turkish lira. The Consortium alleges that during the month of August 1990, it paid wages and salaries to its 198 Turkish employees in the total amount of 162,029,450 Turkish lira (TRL) (USD 55,300). The Consortium seeks compensation for half of this amount (USD 27,650), due to the fact that the efficiency of its workers was allegedly halved during the month of August 1990 following Iraq's invasion and occupation of Kuwait. According to the Consortium, only one half of the August wages and salaries can be attributed to work actually completed in August 1990 and the remaining half represents unproductive wage and salary payments.

528. After 20 August 1990, the Iraqi authorities began issuing exit visas and the Consortium began immediately to evacuate its employees to Turkey. The Consortium makes no claim for the evacuation costs. Within 10 days, approximately 75 per cent of the Consortium's personnel left Iraq. The majority left on 28 August 1990. The remaining personnel, other than nine employees who volunteered to remain in Iraq, left on or before 11 September 1990. The remaining nine employees eventually left in December 1990 and January 1991, and had all departed as of 14 January 1991.

(ii) Wages and salaries of personnel who remained in Iraq after 31 August 1990

529. The Consortium states that most of its personnel left Iraq on or before 11 September 1990. However, nine employees remained after this date. The Consortium alleges that it paid wages and salaries to its management and other personnel who remained in Iraq in the amount of USD 17,340. These payments cover the period from August 1990 to the time of each employee's departure in December 1990 and January 1991. The Consortium states that its payroll records reveal that it paid USD 9,055 (TRL 26,531,150) to the nine employees up to September 1990, and that it paid USD 8,285 (TRL 24,274,575) for the remaining months thereafter until every employee was evacuated.

530. In respect of recovery of unproductive salary payments, in the Seventeenth Report, the Panel stated at paragraph 27 that salaries paid to employees detained in Iraq are "prima facie compensable as salary paid for unproductive labour". However, the Panel noted that compensation will be awarded only when the claimant provides sufficient evidence to establish detention and actual payment.

531. The evidence provided by the Consortium included news reports from the Turkish press in August 1990 relating to the situation in Iraq after 2 August 1990, and a list of its 198 Turkish employees who remained in Iraq after 2 August 1990, including their positions in the Consortium and departure dates from Iraq. The Consortium also provided a statement dated 31 January 1994 from its executive director in support of the facts and the amounts claimed. Finally, the Consortium submitted a list of wages and salaries paid to the Turkish employees in August and September 1990.

532. With respect to both items claimed, the Panel finds that the Consortium provided sufficient evidence of the detention of its personnel and of the payment of their wages and salaries. In making its recommendation, the Panel notes that the Consortium reduced its claim for wages and salaries paid in August 1990 by 50 per cent to take into account productive work performed by its employees while they were being detained. However, the Panel considers that the work performed in August 1990 related to the flumes to be handed over to SOLR on the Abu Ghraib project. Given that the Panel did not recommend any compensation for this work, the Panel finds that there should be no reduction in

the amount claimed for wages and salaries. The Panel therefore recommends compensation in the amount of USD 72,640, representing USD 55,300 for wages and salaries of personnel for the month of August 1990 and USD 17,340 for wages and salaries of personnel who remained in Iraq after 31 August 1990.

2. Recommendation

533. The Panel recommends compensation in the total amount of USD 3,480,911 for contract losses. This amount consists of USD 697,055 for "Unpaid interim certificates and released but unpaid retention monies", USD 2,711,216 in relation to "Receivables relating to unreleased retention monies" and USD 72,640 in relation to "Wages and salaries paid to personnel".

B. Loss of tangible property

1. Facts and contentions

534. The Consortium seeks compensation in the amount of USD 20,453,637 for loss of tangible property. The Consortium's claim consists of (a) loss of plant, machinery and equipment in the amount of USD 19,249,247, and (b) loss of warehouse inventory in the amount of USD 1,204,390.

535. The Consortium's claim is for the replacement value of lost plant, machinery, equipment, spare parts, construction materials and consumables. After Iraq's invasion and occupation of Kuwait, most of the Consortium's employees ceased work and left Iraq. Only nine employees stayed behind to guard the project assets. Ultimately however, the Consortium was forced to leave its project assets behind when these employees were evacuated in December 1990 and January 1991. The Consortium presumes that its assets were, prior to the liberation of Kuwait, either seized or plundered by the Iraqi authorities.

536. The Panel considers each of the Consortium's claims in turn.

(a) Plant, machinery and equipment

537. The Consortium states that, as at 2 August 1990, it had an extensive collection of plant, machinery and equipment which had been brought into Iraq for use on its eight construction projects. Although six of these eight projects were completed prior to August 1990, the Consortium required equipment to complete its two remaining projects, the Abu Ghraib and Saqlawia projects.

538. The equipment which the Consortium was using at the time of Iraq's invasion and occupation of Kuwait included an operational flume factory, a fleet of vehicles and machines sufficient for another three months of work on the two remaining projects. In addition, the Consortium states that the plant, machinery and equipment used on the six completed projects remained in Iraq until it could be deployed for use on future projects in Iraq or exported to Turkey.

539. The Consortium provided a very detailed explanation regarding the presence of its plant, machinery and equipment in Iraq as of 2 August 1990, and the value of those assets. According to the Statement of Claim, the majority of the Consortium's plant, machinery and equipment was imported

temporarily into Iraq, pending use on other projects in Iraq or re-exportation to Turkey. Requests for equipment or other items needed at the project sites and the subsequent supply of such materials was coordinated by the Consortium's Baghdad office, which also handled all customs formalities in Iraq.

540. When importing equipment, the Baghdad office usually received multiple copies of the invoice from the seller of the equipment. The Consortium then sent two copies of the invoice to the Iraqi resident engineer at the relevant project site, who approved the import of the item by stamping the invoices. The approved invoices were then sent back to the Baghdad office and were presented with the necessary freight documents to the Iraqi customs office, which issued a customs declaration. The Consortium states that the invoices and customs declarations were regularly submitted to the Turkish Embassy in Baghdad from 1985 to 1987 for eventual re-exportation to Turkey.

541. The Consortium states that the presence in Iraq and value of all of its project assets is evidenced by invoices, customs declarations and other contemporaneous records maintained by the Consortium in the ordinary course of its business up to September 1990, when the last member of the Consortium's management left Iraq. The Consortium also states that it prepared a list of fixed assets shortly after Iraq's invasion and occupation of Kuwait, in an early attempt to assess the extent of its losses.

542. Moreover, the Consortium states that the presence of its plant, machinery and equipment in Iraq as of 2 August 1990 is evidenced by a valuation of those assets commissioned and performed in December 1989. The Consortium refers to this study as the "1989 Valuation Study". The Consortium states that the valuation was performed by three mechanical engineers - one representative of each of the two constituent entities of the Consortium, and one representative of one of the Consortium's major creditors. As part of the valuation, the engineers spent one week physically inspecting the plant, machinery and equipment and examining documentation and records containing information about these assets. The primary reason for undertaking this valuation was to determine the condition of the Consortium's project assets prior to resuming work on the two remaining projects in Iraq.

543. The Consortium provided a statement from its Baghdad office manager that no plant, machinery or equipment was either imported to, or exported from, Iraq by the Consortium between the time of the 1989 Valuation Study and August 1990.

544. In addition, the Consortium commissioned a replacement value study carried out by an expert with over 20 years of experience with construction equipment. The expert was able to find specific replacement values as at 2 August 1990 for approximately 65 per cent of the plant, machinery and equipment. The Consortium then calculated the replacement values for the remaining assets. These calculations produce a total amount of USD 16,764,063 for the replacement value of all of the Consortium's project assets.

545. However, the Consortium argues that the replacement value of its project assets must also include shipping, insurance, documentation and handling costs involved in transporting project assets to the Consortium's project sites in Iraq. Accordingly, the Consortium increased the amount of its claim for the replacement value of its assets by 8 per cent of the historical value of the assets (i.e. 8 per cent of USD 31,064,796). This results in an increase of USD 2,485,184 to the amount claimed for

plant, machinery and equipment to reflect these additional charges. In calculating the amount claimed, the Consortium relied on the opinion of other professionals with expertise in valuing assets that such additional charges normally amount to between 8 and 10 per cent of the purchase price of equipment.

546. The total amount claimed for loss of plant, materials and equipment is therefore USD 19,249,247, consisting of USD 16,764,063 for the replacement value of the project assets and USD 2,485,184 for shipping, insurance, documentation and handling costs.

(b) Spare parts, construction materials and consumables

547. The Consortium alleges that when it left Iraq, it abandoned spare parts, construction materials and consumables in the amount of USD 1,204,390. The Consortium states that the items were stored at its central warehouse which was originally located at the Jute Farm Debuni project site and subsequently at the Saqlawia project site.

548. In the Statement of Claim, the Consortium states that prior to Iraq's invasion and occupation of Kuwait, it had developed a method of maintaining detailed records of the stocks and consumption of spare parts, construction materials and consumables and their respective values. That is, the Consortium employed staff at its central warehouse to record on registration cards details of materials of the incoming and outgoing assets.

549. When a shipment arrived at the warehouse, it was checked to determine its conformity with the corresponding documents and then the receipt of the item as delivered was entered onto the registration card. Each year, a warehouse summary was produced based on the information contained in the registration cards. In August 1990, two of the Consortium's senior employees carried out an inventory of the spare parts, construction materials and consumables, as reflected in the detailed records kept for previous years.

550. According to this inventory, the value in August 1990 of the spare parts, construction materials and consumables abandoned in Iraq was IQD 375,330 (USD 1,204,390), consisting of spare parts to the value of IQD 343,443, construction materials to the value of IQD 24,092, and consumables to the value of IQD 7,795.

2. Analysis and valuation

(a) Loss of plant, machinery and equipment

551. In support of the claim, the Consortium provided a large amount of evidence, including statements from several of its employees in support of the valuation of the claim and the fact that the Consortium was forced to leave its property unguarded upon its departure from Iraq. In addition, the Consortium submitted a copy of its fixed assets registration book (which the Consortium refers to as the "Blue Book") which lists its plant, machinery and equipment and other relevant details such as registration, make of vehicles, etc. The Consortium also provided invoices and import declarations relating to project assets imported into Iraq in the early 1980s, vehicle registration licences for Consortium vehicles, and a list of the Consortium's project assets reflecting historical acquisition cost

and book value as at 31 December 1986 and as at 31 December 1989 (which the Consortium refers to as the "1989 Fixed Assets List"). The Consortium submitted a copy of its "Project Assets List" which reflects information contained in customs declarations, the 1989 Fixed Assets List and the Blue Book. Finally, the Consortium provided a copy of the replacement value study which it commissioned an expert to perform to determine the value of its project assets as of 2 August 1990 and the KPMG report in support of this study.

552. The Panel finds that the Consortium provided sufficient evidence in support of its claim for loss of plant, machinery and equipment. The evidence submitted by the Consortium demonstrates that the plant, machinery and equipment was in Iraq as at August 1990. Moreover, the Consortium has offered a satisfactory explanation of the departure of its employees from Iraq, which resulted in the project assets being left unguarded.

553. The Consortium provided sufficient evidence from two sources to support the contention that the plant, machinery and equipment which it lost as a result of Iraq's invasion and occupation of Kuwait had a substantial value in the recent past of approximately USD 16,000,000. (See paragraphs 542 and 544, supra.) Following the guidance in decision 9 of the Governing Council (S/AC.26/1992/9), the Panel considers that the proper value of the Consortium's plant, machinery and equipment is USD 14,500,000 and recommends compensation in that amount.

554. The Panel finds that the Consortium did not provide sufficient evidence in support of its claim for shipping, insurance, documentation and handling costs. Accordingly, the Panel recommends no compensation for these costs.

(b) Spare parts, construction materials and consumables

555. In support of the claim, the Consortium provided a statement from one of its employees confirming the facts and the amount of the claim. The Consortium also submitted a list of spare parts, construction materials and consumables located in the Consortium's central warehouse in August 1990 in the total amount of IQD 375,330 (USD 1,204,390).

556. The Panel finds that the Consortium provided sufficient evidence in support of its claim for loss of spare parts, construction materials and consumables. The evidence submitted by the Consortium demonstrates that the spare parts, construction materials and consumables were in Iraq as at August 1990. Moreover, the Consortium has offered a satisfactory explanation of the departure of its employees from Iraq, which resulted in the project assets being left unguarded. Accordingly, the Panel recommends compensation in the full amount claimed of USD 1,204,390.

3. Recommendation

557. The Panel recommends compensation in the amount of USD 15,704,390 for loss of tangible property.

C. Other losses

1. Facts and contentions

558. The Consortium seeks compensation in the amount of USD 320,889 for other losses. The claim relates to customs penalties assessed by the Iraqi authorities and held in escrow pending resolution of a dispute between the Consortium and the authorities as to the amount of penalties payable.

559. In the "E" claim form, the Consortium characterised this loss element as part of its claim for contract losses, but the Panel finds that it is more accurately classified as a claim for other losses.

560. The Consortium states that while it was performing work pursuant to its contracts in Iraq, it was required to pay certain penalties to the Iraqi authorities. These penalties were usually refunded to the Consortium after an application for their return was made to the owner of the relevant project or another relevant Iraqi authority. One such penalty that was levied and, according to the Consortium would have been repaid but for Iraq's invasion and occupation of Kuwait, relates to the temporary import approvals given by the Iraqi customs authorities.

561. The Consortium routinely obtained temporary approvals from the Iraqi customs authorities for the duty-free importation of equipment into Iraq which would later be re-exported. These temporary approvals were renewed annually upon the submission by the Consortium of a request to the employer on the relevant project, which then approved the request and transmitted a renewal application to the appropriate customs authorities.

562. However, the Consortium states that it suspended work in late April 1989 because SOLR failed to honour promissory notes it had issued to the Consortium. The Consortium alleges that SOLR's initial response was to apply pressure upon the Consortium to resume work by creating difficulties for the Consortium with the Iraqi customs authorities by delaying application for renewal of the import approvals that were about to expire. The Consortium states that as a result of these delays, the customs authorities assessed penalties of IQD 4,000 per application for 112 applications made by the Consortium. The penalties therefore amounted to IQD 448,000.

563. The Consortium protested to the customs authorities against the imposition of the penalties, and, pending resolution of this dispute, it was agreed that the penalties would be deducted from payments of the Iraqi dinar portion of retention monies payable to the Consortium. These amounts would then be held in escrow. The Consortium alleges that one such deduction in the amount of IQD 100,000 was made from the second half of the retention monies payable for the Jute Farm Debuni project. No further deductions were made after Iraq's invasion and occupation of Kuwait, nor did the Iraqi customs authorities ever revoke the remaining portion of the penalty (IQD 348,000), which it had assessed against the Consortium. Accordingly, the Consortium seeks compensation in the amount of USD 320,899 (IQD 100,000) for the deduction made and held in escrow.

2. Analysis and valuation

564. In support of the claim, the Consortium provided a statement dated 31 January 1994 from its executive director confirming that the amount of IQD 100,000 of the retention monies released on the Jute Farm Debuni project was being held in escrow. In addition, the Consortium submitted letters dated 11 June and 25 September 1989 from the Consortium to SOLR and from the Turkish Embassy in Baghdad to the Iraqi authorities, requesting the postponement of customs penalties and release of retention monies, including those withheld on the Jute Farm Debuni project. Finally, the Consortium submitted a letter dated 5 February 1990 from SOLR to the Consortium releasing payment of the Iraqi dinar portion of the Jute Farm Debuni contract. This document indicates that IQD 100,000 was deducted and retained for the account of the Iraqi customs authorities. SOLR had stated in a prior letter dated 17 August 1989 to the Consortium that it would make such a deduction for the benefit of the customs authorities.

565. The Panel finds that, although the Consortium stated that this was not the first time such penalties were assessed and therefore likely to be refunded, there is no specific evidence and no specific examples of a course of conduct to indicate that the authorities would have refunded the penalties but for Iraq's invasion and occupation of Kuwait. Accordingly, the Panel finds that there is no causal link between the alleged loss and Iraq's invasion and occupation of Kuwait and recommends no compensation.

3. Recommendation

566. The Panel recommends no compensation for other losses.

D. Summary of recommended compensation for the Consortium

Table 28. Recommended compensation for the Consortium

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	9,398,397	3,480,911
Loss of tangible property	20,453,637	15,704,390
Other losses	320,889	nil
Claim preparation costs	553,259	-
Interest (no amount specified)	-	-
Total	30,726,182	19,185,301

567. Based on its findings regarding the Consortium's claim, the Panel recommends compensation in the amount of USD 19,185,301. The Panel determines the date of loss to be 2 August 1990.

IX. ALSTOM POWER CONVERSION LIMITED (FORMERLY CEGELEC PROJECTS LIMITED)

568. Alstom Power Conversion Limited (formerly Cegelec Projects Limited) ("Alstom") is a corporation organised according to the laws of the United Kingdom. It is involved in the provision of electrical installation, commissioning and testing services. Prior to Iraq's invasion and occupation of Kuwait, Alstom was performing work on the 10 Berth Harbour Project at Um Qasr in Iraq (the "Harbour project").

569. Alstom seeks compensation in the total amount of USD 35,041,474 (8,609,750 Pounds sterling (GBP) and IQD 5,807,343) for contract losses, loss of tangible property, financial losses, claim preparation costs and interest.

570. In the "E" claim form, Alstom sought compensation in the total amount of USD 16,117,319 (GBP 8,477,710) for contract losses and interest. On 19 July 2002, in its response to the article 34 notification, Alstom quantified its claims for interest and financial losses (bond charges and overdraft charges). These alleged losses were included in the "E" claim form but were not quantified in Alstom's original claim submission. As a result, the claim amount increased to USD 35,041,474.

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

572. Alstom calculated its claim for interest using the base rates set by the Bank of England for the relevant period. For the reasons stated in paragraph 60 of the Summary, the Panel makes no recommendation with respect to Alstom's claim for interest.

Table 29. Alstom's claim

Claim element	Claim amount (USD)
Contract losses	10,096,314
Loss of tangible property	783,401
Financial losses	4,952,295
Claim preparation costs	275,665
Interest	18,933,799
Total	35,041,474

A. Contract losses

1. Facts and contentions

573. Alstom seeks compensation in the amount of USD 10,096,314 (GBP 3,451,312 and IQD 1,099,349) for contract losses. The claim is for losses allegedly incurred in connection with the Harbour project.

574. On 30 July 1981 Alstom entered into a contract (the "Contract") with Al-Farouq Contracting Company (formerly the Iraqi State Construction Company for Industrial Projects Ltd.) ("Al-Farouq") to "carry out supply, installation, testing and commissioning of the electrical services" on the Harbour project. The initial Contract value was GBP 8,100,000 and IQD 1,200,000. The Contract provided for initial performance dates from 31 July 1981 to 31 July 1984.

575. Several delays occurred on the project and extensions were granted twice. The first extension was granted for the period from August 1984 to July 1987 and the second extension was granted for the period from August 1987 to March 1990. Alstom states that due to long delays on the part of Al-Farouq, it was not able to begin work "in any substantial fashion until January 1989". Alstom states that the work was "taken over on 2 May 1990 when the port was put into commercial use".

576. Following completion of the work, a one-year maintenance period came into effect. At the end of the maintenance period, Alstom was to receive a final certificate and final payment. During the maintenance period, Alstom retained on site a project manager, a national of the United Kingdom, together with a team of nationals from other countries. After Iraq's invasion and occupation of Kuwait, the nationals from other countries were repatriated to their own countries but the project manager was held hostage until 2 January 1991. Alstom also claims that its site suffered extensive bomb damage and that its plant, tools, vehicles, offices and accommodation suffered vandalism and theft.

577. The claim for contract losses is for unpaid amounts allegedly due under the Contract, including the variations to the Contract and additional costs resulting from delays on the part of Al-Farouq. Alstom also seeks compensation for payments due to it at the commencement of and upon completion of the maintenance period (i.e. retention monies). Under the terms of the Contract, Alstom was to receive 2.5 per cent of the Contract value upon receipt of the taking over certificate and an additional 2.5 per cent upon receipt of the final acceptance certificate. Alstom states that, as it was unable to complete its contractual obligations, the final acceptance certificate was not issued and the final payment was not made.

2. Analysis and valuation

578. In support of its claim, Alstom provided invoices, a copy of the letter of credit opened under the terms of the Contract pursuant to which payments under the Contract were made, correspondence with Al-Farouq in respect of work delays, payment delays, and payment arrangements, and the report of the project manager dated 13 January 1991 upon his departure from Iraq.

579. The Panel finds that Al-Farouq is an agency of the Government of Iraq.

580. In respect of the claim for unpaid amounts allegedly due under the Contract, the supporting evidence provided by Alstom indicates that the performance that created the debts in question occurred prior to 2 May 1990. The claim for these unpaid amounts is outside the jurisdiction of the Commission and is not compensable under Security Council resolution 687 (1991). Applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council

resolution 687 (1991), as set out in paragraphs 43 to 45 of the Summary, the Panel recommends no compensation.

581. In respect of the claim for retention monies, the evidence indicates that the debt was due and owing after 2 May 1990 and is therefore within the jurisdiction of the Commission. The Panel finds that the maintenance period was due to expire on 2 May 1991. Correspondence between Alstom and Al-Farouq shows that certain minor works were required to be carried out by Alstom during the maintenance period. Alstom provided sufficient evidence in support of its claim including the Contract, correspondence in respect of the taking over certificate, and correspondence from Al-Farouq acknowledging the amounts owed.

582. Applying the approach taken with respect to losses arising as a result of unpaid retention monies as set out in paragraphs 82 to 88 of the Summary and taking into account the remaining works to be performed during the maintenance period, the Panel recommends compensation for 100 per cent of the amount due upon the issue of the taking over certificate and 75 per cent of the amount due upon the issue of the final payment certificate.

583. The Panel recommends compensation in the amount of GBP 383,618 and IQD 38,719 for retention monies.

3. Recommendation

584. The Panel recommends compensation in the amount of USD 853,810 for contract losses.

B. Loss of tangible property

1. Facts and contentions

585. Alstom seeks compensation in the amount of USD 783,401 (GBP 412,069) for loss of tangible property. The claim is for the alleged loss of plant, camp, and vehicles from its project site in Iraq.

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

587. Alstom and Al-Farouq agreed that, upon the conclusion of the Contract, Al-Farouq would purchase the equipment from Alstom at 40 per cent of the "bill of entry value" (the value according to customs declaration forms). The report of the project manager dated 13 January 1991 states that, upon the cessation of hostilities, "local friends visited our camp and reported that it had been subject to wide scale looting, vehicles had been taken and the site office damaged presumably as a result of allied air attack".

2. Analysis and valuation

588. In support of its claim, Alstom provided purchase invoices and shipping documents.

589. Alstom provided the report of the project manager which describes several of the allegedly lost items and demonstrates that the project manager was present in Iraq until 2 January 1991.

590. In support of its claim, Alstom provided evidence of ownership of the tangible property, and of the shipment of the tangible property to Iraq. The Panel finds that Alstom was still performing the Contract at the time of Iraq's invasion and occupation of Kuwait and finds that the tangible property was lost as a direct result of Iraq's invasion and occupation of Kuwait.

591. By reason of the fact that Al-Farouq had agreed to purchase the equipment from Alstom at 40 per cent of the "bill of entry value", it is unnecessary to consider any other issue as to quantum, such as depreciation.

592. According to the evidence submitted by Alstom, the total value of its lost tangible property was USD 597,805. Therefore, the Panel recommends compensation for 40 per cent of USD 597,805, that is USD 239,122.

3. Recommendation

593. The Panel recommends compensation in the amount of USD 239,122 for loss of tangible property.

C. Financial losses

1. Facts and contentions

594. Alstom seeks compensation in the amount of USD 4,952,295 (GBP 26,824 and IQD 1,524,304) for financial losses. The claim is for bond charges, "ongoing charges" and overdraft charges.

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

(a) Bond charges

596. Alstom seeks compensation in the amount of USD 21,338 (GBP 11,224) in respect of commissions paid to Barclays Bank ("Barclays") for extending "on demand" performance bonds issued to Al-Farouq.

597. Alstom states that it received "extend or pay" demands from Al-Farouq in respect of the bonds. It claims that it subsequently applied to the Department of Trade and Industry of the United Kingdom for extensions of the bonds but that these extensions were refused.

(b) "Ongoing charges"

598. Alstom seeks compensation in the amount of GBP 15,600 for "ongoing charges" on the bonds. Alstom did not describe in further detail the nature of its claim and did not differentiate between this claim and its claim for bond charges.

(c) Overdraft charges

599. Alstom seeks compensation in the amount of IQD 1,524,304 for overdraft charges and interest. Alstom states that it made use of an overdraft facility to draw down funds in the amount of IQD 892,492 due to lack of cash flow as a result of outstanding payments from Al-Farouq. The amount claimed is comprised of the principal amount of the overdraft and interest accruing on the overdraft at a rate of 12 per cent per annum from 31 December 1997 to the filing of its response to the article 34 notification in June 2002.

2. Analysis and valuation

(a) Bond charges

600. In support of its claim for commissions on bond charges, Alstom provided the bonds themselves and correspondence with Barclays. Barclays informed Alstom that it would not release Alstom from its liability because of the risk that Al-Farouq would obtain judgment against Alstom in Iraq. Such a judgment would render Barclays liable to pay Rafidain Bank, Al-Farouq's bank, upon the lifting of the trade embargo imposed on Iraq pursuant to Security Council resolution 661 (1990). Alstom also submitted internal documents authorising payment to Barclays for "bank charges".

601. Applying the approach taken with respect to "on demand" performance bonds in favour of Iraqi parties set out in paragraphs 93 to 98 of the Summary, the Panel recommends no compensation. The Panel finds that, due to the trade embargo, the bonds could not have been legally honoured after 6 August 1990. Therefore, Barclays did not provide any benefit that would justify the charges or Alstom's payment of them.

(b) "Ongoing charges"

602. In support of its claim for "ongoing charges" on the bonds, Alstom did not provide any evidence.

603. The Panel finds that Alstom failed to provide sufficient evidence of its alleged losses and therefore recommends no compensation.

(c) Overdraft charges

604. In support of its claim for overdraft charges, Alstom provided a letter from Rafidain Bank to Barclays, dated 5 February 1998 stating that, as of 31 December 1997, Alstom had an outstanding overdraft in the amount of IQD 892,492.

605. The Panel finds that the overdraft was incurred seven years after Iraq's invasion of Kuwait and there is no direct link between the overdraft and Iraq's invasion and occupation of Kuwait. The Panel recommends no compensation for the overdraft and interest on the overdraft.

3. Recommendation

606. The Panel recommends no compensation for financial losses.

D. Summary of recommended compensation for Alstom

Table 30. Recommended compensation for Alstom

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	10,096,314	853,810
Loss of tangible property	783,401	239,122
Financial losses	4,952,295	nil
Claim preparation costs	275,665	-
Interest	18,933,799	-
Total	35,041,474	1,092,932

607. Based on its findings regarding Alstom's claim, the Panel recommends compensation in the amount of USD 1,092,932. The Panel determines the date of loss to be 2 August 1990.

X. GLANTRE ENGINEERING LIMITED (IN RECEIVERSHIP)

608. Glantre Engineering Limited (in receivership) ("Glantre") is a corporation organised according to the laws of the United Kingdom. Prior to Iraq's invasion of Kuwait, Glantre was the main contractor on a project to construct a fibre optic cable factory in Baquba, Iraq. Glantre alleges that as a result of Iraq's invasion of Kuwait it was forced to abandon the project and evacuate its employees.

609. In the "E" claim form, Glantre sought compensation in the total amount of USD 17,496,165 (GBP 9,202,983) together with an unspecified amount of interest. The Panel has reclassified elements of Glantre's claim for the purposes of this report.

610. In its response to the article 34 notification, Glantre brought its claim up to date by quantifying its claim for interest for the period from 1994 to 2000. In addition, it added a claim for claim preparation costs. For the reasons stated in paragraph 36 of the Summary, the Panel did not consider this loss element. The Panel therefore considered the amount of USD 37,224,680 (GBP 19,580,182) for contract losses, loss of overhead/profits, payment or relief to others, financial losses, other losses and interest.

611. By way of introduction, the Panel makes the following general comments on the claim as a whole. The Panel notes that this is, in financial terms, a very substantial claim. It also notes that Glantre provided a considerable amount of documentation in support of its claim. In particular, in its response to the article 34 notification Glantre provided a detailed index to the claim submission which gave the impression that the claim was very well prepared. However, a closer examination of the evidence revealed this not to be the case. Furthermore, as a general proposition, the Panel notes that the documentation provided in support of the claim was not satisfactorily related to the losses that were asserted.

612. Each of the losses claimed by Glantre and referred to below includes an interest component. For the reasons stated in paragraph 60 of the Summary, the Panel makes no recommendation with respect to Glantre's claim for interest.

Table 31. Glantre's claim

Claim element	Claim amount (USD)
Contract losses	11,876,247
Loss of overhead/profits	19,637,833
Payment or relief to others	83,068
Financial losses	300,935
Other losses	128,838
Interest	5,197,759
Total	37,224,680

A. Contract losses

1. Facts and contentions

613. Glantre seeks compensation in the amount of USD 11,876,247 (GBP 6,246,906) for contract losses. The claim is for (a) loss on the works under construction, (b) unproductive salary payments, (c) loss on cost of local purchases, and (d) loss on "labour, plant, and materials".

614. On 24 September 1989, Glantre entered into a turnkey contract (the "Contract") with the State Engineering Company for Industrial Design and Construction (the "Employer") for construction of a fibre optic cable factory. The total value of the Contract was GBP 21,110,768, payable partly in Pounds sterling and partly in Iraqi dinars. The anticipated duration of the Contract was 17 months. After Iraq's invasion and occupation of Kuwait, Glantre stated that its work was disrupted and delayed. From August 1990 to January 1991, Glantre applied for extensions of time and a suspension of the Contract. However, these requests were denied by the Employer. Glantre states that on the advice of the British Embassy it performed work to the extent that it was able to until February 1991.

615. The Contract provided for the following terms of payment:

(a) Pounds sterling component

616. Amounts due in Pounds sterling under the contract were to be paid as follows:

(a) Ten per cent down payment at signing of Contract against unconditional bank guarantee;

(b) Five per cent payment against completion of design and drawings;

(c) Sixty per cent payment against presentation of shipping documents, pro-rata to partial shipments made;

(d) Fifteen per cent payment against site installation progress against monthly certificates;

(e) Seven and a half per cent payment against provisional acceptance certificate; and

(f) Two and a half per cent payment against final acceptance certificate.

(b) Iraqi dinar component

617. The Iraqi dinar component of the Contract was to be invoiced in instalments according to the progress of work.

2. Analysis and valuation

(a) Loss on the works under construction

618. Glantre seeks compensation in the amount of USD 9,272,180 (GBP 4,877,167) for work which it allegedly performed but for which the Employer did not make payment due to Iraq's invasion of Kuwait. The principal amount of the loss claimed is GBP 1,880,407 and the interest component is in the amount of GBP 2,996,760.

619. In support of its claim, Glantre provided a copy of the Contract, an addendum to the Contract also dated 24 September 1989, invoices forming the basis of its claim and certificates of work performance indicating the Employer's approval of the work performed. Glantre also submitted several items of correspondence between itself, the Bank of England, the Employer, and the London Branch of Scandinaviska Enskilda Bank (formerly Scandinavian Bank Group PLC) ("SEB") with whom the Employer had an account. Among the documents provided is a telex dated 6 April 1993 from the Employer to SEB and Glantre stating that Glantre was due to be paid the amount of GBP 1,115,895 for works performed on the project prior to 1 August 1990. It is not clear whether the telex refers to any work which was performed before 2 May 1990.

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

621. The Panel finds that the telex of 6 April 1993 is not helpful in enabling the Panel to make a determination on the compensability of this portion of the claim. While, according to its contents, the asserted losses referenced in the telex relate to work performed prior to 1 August 1990, the Panel is unable to identify what portion of those losses relate to work performed prior to 2 May 1990, which is the relevant date for determining whether a claim for loss is within the jurisdiction of the Commission by application of the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 43 to 45 of the Summary.

622. However, the Panel finds that the asserted losses in respect of the invoices provided relate entirely to work that was performed between May and October 1990. The claim for unpaid amounts in respect of work included in these invoices is therefore within the jurisdiction of the Commission. On the evidence provided, the Panel is satisfied that Glantre is entitled to payment of these invoices in the amount of USD 1,771,226 (GBP 931,665) and recommends compensation in this amount.

(b) Unproductive salary payments

623. Glantre seeks compensation in the amount of USD 672,867 (GBP 353,928) for unproductive salary payments which it allegedly made to its employees after Iraq's invasion and occupation of Kuwait. The principal amount of the loss claimed is GBP 136,485 and the interest component is in the amount of GBP 217,443.

624. In respect of recovery of unproductive salary payments, in the Seventeenth Report, the Panel stated at paragraph 27 that salaries paid to employees detained in Iraq are "prima facie compensable as salary paid for unproductive labour". The Panel noted that compensation will be awarded only when the claimant provides sufficient evidence to establish detention and actual payment.

625. In support of its claim, Glantre provided an affidavit given by its project director, correspondence with its employees instructing them to seek compensation from the Commission, evidence of employment of its Indian employees and of some of its British employees, correspondence in respect of the repatriation of its Indian employees, and internally-generated payroll and general ledgers.

626. Glantre seeks a lump sum amount of compensation to cover payments made to its Indian employees. The Panel was unable to relate the evidence of the employment of the individual employees to the lump sum amount claimed and therefore recommends no compensation in respect of the Indian employees.

627. Glantre seeks compensation in respect of several British employees. However, it only provided evidence of employment in respect of two of the British employees. In respect of these two employees, Glantre provided evidence of their employment in Iraq, detention and departure from Iraq, and salary payments (i.e. the internally-generated payroll and general ledgers). Glantre states that the first employee, the project manager, left Iraq on 1 December 1990 and that the second employee left Iraq on 14 December 1990. The Panel recommends compensation for these two employees for the period during which they were in Iraq (i.e. from 2 August to 1 December 1990 in the case of the first employee and from 2 August to 14 December 1990 in the case of the second employee) in the amount of USD 44,962 (GBP 23,650).

(c) "Loss on cost of local purchases"

628. Glantre seeks compensation in the amount of USD 967,924 (GBP 509,128) for the increased cost of purchasing supplies locally in Iraq as a result of Iraq's invasion and occupation of Kuwait. The principal amount of the loss claimed is GBP 196,296 and the interest component is in the amount of GBP 312,832.

629. In support of its claim, Glantre submitted invoices from Omani suppliers for various supplies. However, the supplies appear to have been imported into Iraq prior to Iraq's invasion and occupation of Kuwait (i.e. in December 1989 and February 1990). Glantre stated that it purchased certain items in Iraq, however it did not provide any evidence of these purchases. The Panel recommends no

compensation for this loss item because Glantre failed to offer sufficient explanation and evidence as to the causal link between its alleged purchases and Iraq's invasion and occupation of Kuwait.

(d) Loss on "labour, plant and materials"

630. Glantre seeks compensation in the amount of USD 963,276 (GBP 506,683) for the costs of unplanned temporary labour and for the alleged loss in value of plant and materials as a result of the early termination of the Contract. The principal amount of the loss claimed is GBP 195,353 and the interest component is in the amount of GBP 311,330.

631. In support of its claim for loss on labour, Glantre did not provide any supporting evidence other than a calculation of labour costs on temporary works.

632. In support of its claim for loss on plant and materials, Glantre submitted a list of the materials, invoices issued by itself to the Employer for the materials, and invoices issued by several suppliers of materials. Glantre also submitted costing reports and a purchase order status schedule. The Panel finds that Glantre provided insufficient evidence of the presence in Iraq of the plant and materials and the extent to which they were or were not utilized.

633. The Panel recommends no compensation for loss on "labour, plant, and materials".

3. Recommendation

634. The Panel recommends compensation in the amount of USD 1,816,188 for contract losses.

B. Loss of overhead/profits

1. Facts and contentions

635. Glantre seeks compensation in the amount of USD 19,637,833 (GBP 10,329,500) for loss of overhead/profits. The claim for loss of overhead is in the amount of USD 17,112,293 (GBP 9,001,066). The principal amount of the loss claimed is GBP 3,470,389 and the interest component is in the amount of GBP 5,530,677. The claim for loss of profits is in the amount of USD 2,525,540 (GBP 1,328,434). The principal amount of the loss claimed is GBP 512,182 and the interest component is in the amount of GBP 816,252.

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

2. Analysis and valuation

637. Glantre submitted the same evidence in support of its claims for loss of overhead and loss of profits. The evidence included a cash flow projection which commenced in August 1990. The Panel finds that this cash flow projection was an inappropriate basis for the calculation of Glantre's alleged loss for the following reasons:

(a) The cash flow projection does not cover the period leading up to Iraq's invasion and occupation of Kuwait.

(b) Glantre applied this projection until June 1992. However, it carried out no work after February 1991. Its calculation of the claim makes no attempt whatsoever to explain how, or in what amount, it was incurring relevant overheads, when it was not in fact carrying out any work.

(c) What is more, even if the claim was otherwise sufficiently evidenced, jurisdictional issues would arise once Kuwait had been liberated.

In addition, Glantre submitted an audit overhead figure of 29 per cent. However, the Panel finds that the starting point should have been the actual overhead figure in the bid contract. Up until March 1991, there should have been some kind of actual overhead, but Glantre provided no evidence of this. The only evidence submitted in support of the claim was the cash flow projection and the overhead information, but these do not prove the claimed loss.

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

3. Recommendation

639. The Panel recommends no compensation for loss of overhead/profits.

C. Payment or relief to others

1. Facts and contentions

640. Glantre seeks compensation in the amount of USD 83,068 (GBP 43,694) for payment or relief to others. The claim is for the alleged costs of evacuating Glantre's employees and their dependants from Iraq, including travel expenses and communication costs. The principal amount of the loss is GBP 16,820 and the interest component is in the amount of GBP 26,874.

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

642. Glantre states that it paid the travel costs of its employees when they were evacuated from Iraq. It also states that it incurred communication costs in attempting to secure the repatriation of its employees.

2. Analysis and valuation

643. In respect of the communication costs, Glantre failed to establish that there was a link between the repatriation of its employees and the telephone calls which it allegedly made from its United Kingdom headquarters to Iraq in January, February, and March 1991. Furthermore, Glantre failed to provide evidence of payment for the phone calls.

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

645. Glantre submitted its form of employment contract in respect of its Indian employees. The form of contract states that Glantre was obliged to pay for economy class return air tickets for its Indian employees upon termination of their employment. Glantre did not provide any evidence of its expenditures on behalf of the Indian employees exceeding the normal cost of airfares which it would have incurred upon the natural termination of the contracts nor did it provide any evidence of payment of travel expenses on behalf of its employees.

646. The Panel finds that Glantre provided insufficient evidence of its loss.

3. Recommendation

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

D. Financial losses

1. Facts and contentions

648. Glantre seeks compensation in the amount of USD 300,935 (GBP 158,292) for financial losses. The claim is for bank charges incurred in respect of a performance bond guarantee and in respect of an advance payment guarantee. The principal amount of the loss is GBP 61,030 and the interest component is in the amount of GBP 97,262.

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

650. Glantre stated that it paid GBP 750 per month in bank charges for maintenance of the guarantees. Glantre also stated that the Employer formally attempted to call the outstanding bonds and that the banks never cancelled the bonds or stopped issuing charges on them until four or five years until after Glantre went into liquidation.

2. Analysis and valuation

651. In support of its claim, Glantre provided correspondence between itself, the British Department of Trade and Industry, the Employer's Bank and several other banks involved in the guarantees. Glantre also provided its bank statements and a letter from Scandinavian Bank Group Holdings Ltd. stating that one of the Employer's banks requested it to "extend or pay" one of the guarantees.

652. Applying the approach taken with respect to guarantees as set out in paragraphs 89 to 98 of the Summary, the Panel recommends no compensation.

3. Recommendation

653. The Panel recommends no compensation for financial losses.

E. Other losses

654. Glantre seeks compensation in the amount of USD 128,838 (GBP 67,769) for "additional costs" incurred from 1994 to 2000. The principal amount of the loss is GBP 27,932 and the interest component is in the amount of GBP 39,837.

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

656. In support of its claim, Glantre submitted its general ledger for the period from 1994 to 1999. Many of the items reported in the general ledger represent increases to existing elements of the claim (e.g. bank charges, legal fees, travel and accommodation costs, and employee wages). However, Glantre did not explain how the additional losses were distinct from its other claimed losses. The Panel was therefore unable to determine the extent to which the additional losses overlapped with Glantre's other alleged losses.

657. The Panel recommends no compensation for other losses.

F. Summary of recommended compensation for Glantre

Table 32. Recommended compensation for Glantre

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	11,876,247	1,816,188
Loss of overhead/profits	19,637,833	nil
Payment or relief to others	83,068	nil
Financial losses	300,935	nil
Other losses	128,838	nil
Interest	5,197,759	nil
Total	37,224,680	1,816,188

658. Based on its findings regarding Glantre's claim, the Panel recommends compensation in the amount of USD 1,816,188. The Panel determines the date of loss to be 2 August 1990.

XI. IE CONTRACTORS LIMITED

659. IE Contractors Limited ("IE Contractors") is a corporation organised according to the laws of the United Kingdom. It was engaged in the business of building poultry slaughterhouses and cold storage facilities in Iraq. IE Contractors was called GKN Contractors Limited until 1988.

660. In the 1970s and 1980s, IE Contractors contracted with various Iraqi State entities (the "Employers") to construct poultry slaughterhouses and cold storage facilities. Disputes arose between IE Contractors and the Employers over alleged breaches of contract and unpaid invoices. In 1984, the State Establishment for Agricultural Design and Construction ("SEADAC"), one of the Employers, called the performance bonds on one of the poultry slaughterhouse contracts. From 1984 to 1990, IE Contractors litigated the call on the performance bonds in England (the "English Litigation") with SEADAC, Rafidain Bank ("Rafidain"), and Lloyds Bank of London ("Lloyds"). IE Contractors states that it could have entered into arbitration proceedings in Iraq during this time over alleged breaches by the Employers on four separate projects, but that it did not do so because of concern that the English Litigation might have an adverse effect on arbitration in Iraq and vice versa. The English Litigation concluded in 1990 when the Judicial Committee of the House of Lords refused IE Contractors leave to appeal.

661. IE Contractors states that it then began preparing for arbitration in Iraq, but that when Iraq invaded Kuwait in August 1990 it was forced to suspend these efforts. Therefore, IE Contractors seeks compensation in respect of sums it contends it would have recovered had it been able to pursue its arbitrations in respect of the four projects. IE Contractors received compensation from the Export Credits Guarantee Department of the United Kingdom (the "ECGD") in respect of four separate claims and agreed to repay this compensation in the event of receiving compensation from the Commission.

662. IE Contractors states that its expatriate staff had a continuous presence in Iraq from 1978 to 1989. It also states that by the time Iraq's invasion of Kuwait occurred, IE Contractors' employees had already left Iraq.

663. IE Contractors seeks compensation in the total amount of USD 25,384,356 (GBP 13,352,171) for contract losses and interest.

664. IE Contractors seeks interest at the "United Kingdom base rate" plus 2 per cent on its claim for contract losses. For the reasons stated in paragraph 60 of the Summary, the Panel makes no recommendation with respect to IE Contractors' claim for interest.

Table 33. IE Contractors' claim

Claim element	Claim amount (USD)
Contract losses	25,384,356
Interest (no amount specified)	-
Total	25,384,356

A. Contract losses

1. Facts and contentions

665. IE Contractors seeks compensation in the amount of USD 25,384,356 (GBP 13,352,171) for contract losses. The claim is for losses allegedly incurred in connection with four contracts in Iraq.

(a) Claims 1 and 2 - Slaughterhouse Contracts

666. In 1978, IE Contractors entered into three contracts with SEADAC to build poultry slaughterhouses in Duhouk, Kerbala, and Qadissiya, Iraq (the "Slaughterhouse Contracts"). IE Contractors submitted two claims in respect of the Slaughterhouse Contracts ("claim 1" and "claim 2", respectively).

667. Claim 1 concerns three performance bonds which were issued by Rafidain in favour of SEADAC. Lloyds guaranteed payment of the bonds to Rafidain and IE Contractors undertook to pay Lloyds if the bonds were called. SEADAC called the bonds on 9 December 1984 on the grounds that IE Contractors did not complete performance. Rafidain refused SEADAC's call, but in turn requested payment from Lloyds. IE Contractors initiated the English Litigation to prevent Lloyds from making payment to Rafidain on the grounds that Rafidain did not follow correct procedures. The English Court of Appeal ultimately ordered Lloyds to pay Rafidain for two of the three performance bonds. IE Contractors seeks compensation for costs related to the litigation.

668. In claim 2, IE Contractors seeks compensation in respect of the Slaughterhouse Contracts for breaches of contract by SEADAC. It states that, due to Iraq's invasion and occupation of Kuwait, it was unable to return to Iraq to continue the contract or to commence arbitration proceedings under the contract.

(b) Claim 3 - Cold Store Contract

669. IE Contractors entered into a contract with the General Establishment for Engineering and Projects, Ministry of Trade of Iraq ("GEEP") on 24 December 1977 to build cold stores in Kut, Kirkuk, and Mosul in Iraq (the "Cold Store Contract'). IE Contractors seeks compensation for the final payment due on contract completion and management time and expenses ("claim 3"). IE Contractors states that GEEP refused to make the final payment of 2.5 per cent of the contract price until IE Contractors obtained clearance documents from various Iraqi State ministries. IE Contractors states that in order to obtain these documents it would have had to pay unwarranted taxes and customs duties.

(c) Claim 4 - Farm Contract

670. IE Contractors entered into a contract with SEADAC to build a farm at Samarra in Iraq (the "Farm Contract"). IE Contractors states that although it completed work on the contract, SEADAC failed to pay for spare parts and to make a final payment of 5 per cent of the contract price until IE Contractors obtained clearance documents from various Iraqi State ministries. IE Contractors asserts

that under the terms of the contract it was exempt from having to obtain clearance documents. IE Contractors states that it was preparing to seek compensation from SEADAC under the Farm Contract's arbitration clause, but that it was not able to do this while the English Litigation was proceeding. IE Contractors states that it would have sought compensation from SEADAC upon the conclusion of the English Litigation but for Iraq's invasion and occupation of Kuwait. IE Contractors seeks compensation for spare parts, final payment due on contract completion and management time and expenses ("claim 4").

(d) Claim 5 - Kut Contract

671. IE Contractors entered into a contract with GEEP on 15 November 1981 to build an extension of a cold store in Kut, Iraq (the "Kut Contract"). During the course of the contract, several disputes arose with GEEP concerning interim payments due on the contract and final payments due on contract completion. IE Contractors states that because of the English Litigation it postponed bringing legal proceedings against GEEP in Iraq and was prevented from commencing arbitration proceedings against GEEP. IE Contractors seeks compensation for payments due on the contract, final payment due on contract completion and management time and expenses ("claim 5").

2. Analysis and valuation

672. In support of its claim, IE Contractors provided a copy of an arbitration clause, which it states is relevant to all five claims. IE Contractors also submitted a letter from the ECGD dated 31 January 1994, advising IE Contractors to submit a claim to the Commission. It also submitted the following evidence.

673. In support of claim 1, IE Contractors submitted a judgment of 12 July 1990 from the Supreme Court of Judicature, Court of Appeal, a copy of the Petition for Leave to Appeal to the House of Lords, copies of the two original performance bonds, and a copy of the replacement performance bonds, a copy of the two original counter guarantees, a copy of the replacement counter guarantees, and a copy of a letter from the ECGD, dated December 1992, describing the compensation paid to IE Contractors.

674. In support of claim 2, IE Contractors submitted a report from GKN Contractors Ltd. describing the alleged breaches of contract by SEADAC. However, the report does not provide any evidence to support these assertions. The report also states that IE Contractors was "contractually secured against many of the costs incurred as a result of the delays". Copies of the Slaughterhouse Contracts themselves were not provided.

675. In support of claim 3, IE Contractors submitted only the form of contract dated 24 December 1977 listing the other documents forming the contract and the terms of payment section. It did not submit a copy of the actual Cold Store Contract.

676. In support of claim 4, IE Contractors submitted a "terms of payment" section from the Farm Contract, but did not submit a complete copy of the contract. IE Contractors also submitted several

documents relating to a specific guarantee between GKN Contractors Ltd. and the ECGD which IE Contractors states was entered into for claim 4.

677. In support of claim 5, IE Contractors submitted the form of contract dated 15 November 1981 which lists the other documents forming the Kut Contract and the terms of payment section. IE Contractors also submitted "Schedule 2" to a guarantee, dated 5 March 1982, for the Kut Contract. IE Contractors did not, however, submit a complete copy of the Kut Contract.

678. The Panel finds that SEADAC and GEEP are agencies of the Government of Iraq.

679. In the presentation of the claim, IE Contractors acknowledged that the work that is the subject of all five claims was performed prior to 2 May 1990. Accordingly, applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 43 to 45 of the Summary, at least prima facie, the work is outside the jurisdiction of the Commission. IE Contractors seeks to bring the claim within the jurisdiction of the Commission by reference to the English Litigation. In the view of the Panel, that argument fails to overcome the fact that IE Contractors made a commercial decision as to the remedy it would seek and the forum in which it would seek it. Such a decision cannot have the effect of modifying the limits of the Commission's jurisdiction. The Panel finds that the alleged losses are not compensable and recommends no compensation.

3. Recommendation

680. The Panel recommends no compensation for contract losses.

B. Summary of recommended compensation for IE Contractors

Table 34. Recommended compensation for IE Contractors

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	25,384,356	nil
Interest (no amount specified)	-	-
Total	25,384,356	nil

681. Based on its findings regarding IE Contractors' claim, the Panel recommends no compensation.

XII. TOWELL CONSTRUCTION COMPANY LIMITED

682. Towell Construction Company Limited ("Towell") is a corporation organised according to the laws of Hong Kong, which, at the time of Iraq's invasion and occupation of Kuwait, was under the administration of the United Kingdom. Its claim was submitted to the Commission on behalf of Towell by the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland.

683. Towell carries out turnkey contracts related to civil electro-mechanical works on residential and public buildings. It was employed as a contractor on two projects in Iraq in the 1980s. The first project was Contract No. 2/1980 (the "Al-Anbar Contract") to build housing and service buildings in the Ramadi and Kubesah cities of the Anbar Governorate (the "Al-Anbar project"). The employer on this contract was the State Enterprise for Industrial Housing, Ministry of Industry and Materials, Baghdad, Iraq ("SEIH"). The second project consisted of three contracts (the "Grain Silos Contracts") to build horizontal grain silos at three different sites (the "Grain Silos project"). The employer on this contract was the General Establishment for Engineering and Projects, Ministry of Trade of Iraq ("GEEP").

684. In the "E" claim form, Towell sought compensation in the amount of USD 38,699,708 for contract losses, loss of tangible property (equipment and materials) and interest. In its response to the article 34 notification, Towell reduced the amount of its claim for loss of tangible property (equipment and materials) on the Al-Anbar project and the Grain Silos project. The Panel has reclassified elements of Towell's claim for the purposes of this report.

685. The Panel therefore considered the amount of USD 38,234,073 for contract losses, loss of overhead/profits, loss of tangible property, financial losses, other losses and interest.

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

Table 35. Towell's claim

Claim element	Claim amount (USD)
Contract losses	10,915,967
Loss of overhead/profits	1,968,000
Loss of tangible property	9,471,427
Financial losses	4,410,000
Other losses	1,702,888
Interest	9,765,791
Total	38,234,073

A. Contract losses

1. Facts and contentions

687. Towell seeks compensation in the amount of USD 10,915,967 for contract losses. The claim is for losses allegedly incurred in connection with the Al-Anbar Contract and Grain Silos Contracts in Iraq.

(a) Al Anbar Contract

688. Towell seeks compensation in the amount of USD 2,755,000 for unpaid retention monies under the Al-Anbar Contract.

689. Towell states that, pursuant to the Al-Anbar Contract, it was to construct flats and individual houses in addition to service buildings, such as schools and clinics. Towell states that it had a construction base with several factories and a camp in Ramadi for 2,000 workers. Towell did not include information on the terms of payment.

(b) Grain Silos Contract

690. Towell states that it was employed on the Grain Silos project at Salmanpak, Khanbanisad, and Najaf. It seeks compensation in the amount of USD 8,160,967 for unpaid work. Towell states that it was forced to terminate its work due to the outbreak of the war between Iran and Iraq and that the unpaid amount was pending since 1985.

691. Towell's joint venture partner on the Grain Silos project was Howe International Ltd. of Canada ("Howe International"). Howe International authorised Towell to submit the claim on behalf of the Howe International-Towell Construction Joint Venture (the "Joint Venture").

692. Towell states that it signed three Grain Silos Contracts: RS-1, RS-2, and RS-3. Towell states that RS-1 was signed in 1981. It provided an extract of the RS-1 contract. Towell states that RS-2 was signed in 1981. It did not provide any part of the RS-2 contract. Towell did not state when RS-3 was signed nor did it provide the RS-3 contract. Towell states that the Joint Venture submitted "war claims" relating to unpaid work to GEEP in 1982 and continued to seek payment until 1987. GEEP rejected the claims on the grounds that the war between Iran and Iraq had already begun when the Grain Silos Contracts were signed.

693. Towell states that the Joint Venture was planning to "resort to arbitration or legal processes" against GEEP when Iraq invaded Kuwait in August 1990 and that because of Iraq's invasion and occupation of Kuwait it was prevented from obtaining payment from GEEP.

2. Analysis and valuation

(a) Al-Anbar Contract

694. In support of its claim, Towell provided a copy of the Al-Anbar Contract which was signed on 10 August 1980. The work was to have been completed before August 1983, seven years prior to Iraq's invasion and occupation of Kuwait. Towell submitted an undated letter from SEIH confirming that on 31 December 1986 the total value of completed work on the Al-Anbar project was IQD 11,509,783. Towell submitted a final acceptance certificate which was issued in November 1988. In addition, Towell submitted correspondence from Lloyds Bank ("Lloyds") dated 6 March 1984 and 11 August 1983 stating that Lloyds would make available certain credit facilities in connection with the

Al-Anbar project. Finally, Towell submitted an undated witness statement of a site engineer who claimed that some payments were pending at the end of the project.

(b) Grain Silos Contracts

695. In support of its claim, Towell submitted several items of correspondence between the Joint Venture and GEEP dated from 1982 to 1986 which provide the details of their dispute over unpaid costs that arose under the "special risks" clause of the Grain Silos Contract. According to the correspondence, the Joint Venture's requests for payment were consistently rejected by GEEP. Additional correspondence between the Joint Venture and GEEP indicates that final acceptance certificates had been issued by November and December 1986 although no dates were provided for the final acceptance certificates.

696. The Panel finds that SEIH and GEEP are agencies of the Government of Iraq.

697. In respect of the claim for retention monies on the Al-Anbar project (USD 2,755,000) and unpaid work on the Grain Silos project (USD 8,160,967), the supporting documentation provided by Towell indicates that the performance which created the debts in question occurred prior to 2 May 1990. The claims for the unpaid retention monies and unpaid work are therefore outside the jurisdiction of the Commission and are not compensable under Security Council resolution 687 (1991). Applying the approach taken with respect to the "arising prior to" clause in paragraph 16 of Security Council resolution 687 (1991), as set out in paragraphs 43 to 45 of the Summary, the Panel recommends no compensation.

3. Recommendation

698. The Panel recommends no compensation for contract losses.

B. Loss of overhead/profits

1. Facts and contentions

699. Towell seeks compensation in the amount of USD 1,968,000 for loss of overhead/profits. Towell states that its overhead expenses were incurred in the course of trying to collect the unpaid amounts on the Al-Anbar Contract and Grain Silos Contracts. Specifically, the costs were for operating offices in Baghdad and Kuwait and for its employees' salaries. The amounts were estimated at an average of IQD 10,000 per month for the five-year period preceding Iraq's invasion and occupation of Kuwait in 1990. Towell stated that the supporting information was kept in the Baghdad office and could not be retrieved for submission to the Commission.

2. Analysis and valuation

700. In support of its claim, Towell did not provide any evidence other than the description of the alleged overhead expenses.

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

3. Recommendation

702. The Panel recommends no compensation for loss of overhead/profits.

C. Loss of tangible property

1. Facts and contentions

703. Towell seeks compensation in the amount of USD 9,471,427 for loss of tangible property. The claim is for equipment and materials allegedly lost from the Al-Anbar project and Grain Silos project.

704. In the "E" claim form, Towell characterised this loss element as other losses (equipment and material), but the Panel finds that it is more accurately classified as a claim for loss of tangible property.

705. Towell states that it imported equipment into Iraq in order to perform its contracts and that some of the equipment was transferred to Kuwait in the late 1980s. Towell states that the Iraqi authorities prevented exportation of other equipment by confiscating permits and title documents so that customs' clearance was delayed for almost two years. Towell was still seeking customs clearance when Iraq invaded and occupied Kuwait. Towell states that as a result of the invasion it experienced a "total loss of the equipment, machinery, plant, stores and other fixed assets, goods, and chattels".

706. Towell states that the items were lying at the Ramadi storage yards and warehouses for the Al-Anbar project and at the Najaf storage yards and warehouses for the Grain Silos project.

2. Analysis and valuation

(a) Al-Anbar project

707. In support of its claim, Towell provided an undated schedule of property allegedly lost from the Al-Anbar site and its other office sites. The property was valued at second-hand replacement value of USD 4,689,062 as at an unspecified "date of loss". Towell provided another undated list of the materials related only to the Al-Anbar site. Those materials were valued at second-hand replacement value of USD 3,324,062 as at an unspecified "date of loss". Both submissions are internally generated and appear to have been prepared for the claim.

708. Towell submitted a letter to "The Project Manager of Towell Construction Company Limited Iraq Branch", dated 2 April 1987 in respect of the Ramadi site stating that three "National Video Recorders" were at the Ramadi site camp. Attached to this letter was a "list of permanent materials" which were "handed over" and "taken over" on 18 June 1987. Towell provided an inventory list of unvalued items dated 31 July 1989 from the Ramadi site of the Al-Anbar project.

709. Towell submitted a witness statement dated 5 May 2002 of a Kuwaiti site engineer who worked on the Al-Anbar site from 1981 to 1984. He stated that the equipment which was originally at the Al-Anbar site was subsequently moved to the Grain Silos project.

710. Towell also submitted a witness statement dated 15 May 2002 of another employee who also stated that the equipment which was originally at the Al-Anbar site was subsequently moved to the Grain Silos project.

(b) Grain Silos project

711. Towell provided an undated schedule of property valued at second-hand replacement value of USD 5,248,000 allegedly lost from the Grain Silos project. Towell also submitted an undated list of its assets valued at USD 5,248,000 (IQD 1.6 million) which were at the Najaf site of the Grain Silos project pending re-export to Kuwait. Towell provided a document entitled "fixed asset schedule for market value of assets" as at 1 August 1990.

(c) Other

712. Towell submitted three lists of items which were allegedly lost but it did not relate the lists to either the Grain Silos project or the Al-Anbar project.

713. Towell also submitted a series of sample purchase invoices dated from 1981 to 1982 for items related to Iraqi projects, however, it did not indicate the relationship between the materials and the projects.

714. In addition, Towell submitted the Iraqi Revolutionary Command Council decision 390 ("decision 390"), dated 30 April 1986, which authorised the confiscation of vehicles carrying non-Iraqi plates or temporary import plates. In addition, Towell submitted a letter dated 1 August 1987 from the Ministry of Finance of Iraq to the Customs Authority of Iraq granting permission to cancel formalities in respect of some vehicles which were apparently confiscated under decision 390.

715. The Panel finds that Towell did not provide sufficient evidence of its ownership of the lost items or of their presence in Iraq in August 1990. Therefore, the Panel finds that Towell did not provide sufficient evidence to substantiate its claim.

3. Recommendation

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

D. Financial losses

1. Facts and contentions

717. Towell seeks compensation in the amount of USD 4,410,000 for financial losses. The claim is for interest paid to banks on an original loan of USD 12.6 million. Towell states that the banks charged interest at a rate of 7 per cent per annum for the five-year period preceding Iraq's invasion of

Kuwait. Towell states that it could not repay the loans because it did not receive payment for its work from SEIH or GEEP.

2. Analysis and valuation

718. Towell provided a letter from Lloyds dated 6 March 1984 describing loan facilities made available to it in respect of the Al-Anbar Contract and the Grain Silos Contracts. The letter confirms that the cost of funding was 1.25 per cent over the cost of funds to Lloyds.

719. The Panel finds that Towell failed to demonstrate that its loss was a direct result of Iraq's invasion and occupation of Kuwait.

3. Recommendation

720. The Panel recommends no compensation for financial losses.

E. Other losses

1. Facts and contentions

721. Towell seeks compensation in the amount of USD 1,702,888 for other losses. The claim relates to an unpaid fire insurance claim and unpaid tax refunds.

(a) Unpaid fire insurance claim

722. Towell seeks compensation in the amount of USD 1,213,600 for an unpaid insurance claim which originated from a fire at the Najaf site of the Grain Silos project. Towell stated that the value of the claim with an unidentified Iraqi insurance company was IQD 250,000 payable under the Contractor's "all risk policy". Towell states that the amount has been outstanding since 1985. Towell also claims interest on the unpaid insurance claim calculated over an eight-year period at an annual rate of 6 per cent.

(b) Unpaid tax refunds

723. Towell seeks compensation for unpaid tax refunds in the amount of USD 489,288. Towell states that it made an advance deposit in the amount of IQD 100,792.80 (USD 330,600) with the income tax authorities in Iraq. The amount was deducted from payments received for completed works under the Grain Silos Contract. It states that this amount was to be returned by the Iraqi tax authorities but could not be collected because of Iraq's invasion and occupation of Kuwait. Towell also claims interest on the unpaid tax refunds calculated over an eight-year period at an annual rate of 6 per cent.

2. Analysis and valuation

(a) Unpaid fire insurance claim

724. In support of its claim, Towell submitted a letter dated 16 February 1987 from the Ministry of Commerce of Iraq to the Joint Venture which references the repair of a water tank and the removal of burnt caravans at the Najaf Horizontal Silo.

725. The Panel finds that Towell failed to demonstrate that its loss was a direct result of Iraq's invasion and occupation of Kuwait.

(b) Unpaid tax refunds

726. Towell submitted a letter dated 10 December 1985 from the Ministry of Finance of Iraq confirming the Joint Venture's payment of taxes for interest charged by foreign banks.

727. The Panel finds that Towell failed to demonstrate that its loss was a direct result of Iraq's invasion and occupation of Kuwait.

3. Recommendation

728. The Panel recommends no compensation for other losses.

F. Summary of recommended compensation for Towell

Table 36. Recommended compensation for Towell

Claim element	Claim amount (USD)	Recommended compensation (USD)
Contract losses	10,915,967	nil
Loss of overhead/profits	1,968,000	nil
Loss of tangible property	9,471,427	nil
Financial losses	4,410,000	nil
Other losses	1,702,888	nil
Interest	9,765,791	-
Total	38,234,073	nil

729. Based on its findings regarding Towell's claim, the Panel recommends no compensation.

XIII. SUMMARY OF RECOMMENDED COMPENSATION BY CLAIMANT

Table 37. Recommended compensation for the twenty-eighth instalment

Claimant	Claim amount (USD)	Recommended compensation (USD)
Mannesmann Demag Krauss Maffei GmbH (formerly Mannesmann Anlagenbau AG)	69,687,357	11,438,332
Ansaldo Industria S.p.A.	17,739,489	nil
Grassetto Costruzioni S.p.A. (formerly Incisa S.p.A.)	2,415,585	nil
Pascucci e Vannucci S.p.A.	9,031,435	1,277,092
Chiyoda Corporation	3,319,260	7,532
Niigata Engineering Company Limited	8,595,140	3,577,544
Özgü-Baytur Consortium	30,726,182	19,185,301
Alstom Power Conversion Limited (formerly Cegelec Projects Limited)	35,041,474	1,092,932
Glantre Engineering Limited (in receivership)	37,224,680	1,816,188
IE Contractors Limited	25,384,356	nil
Towell Construction Company Limited	38,234,073	nil
Total	277,399,031	38,394,921

Geneva, 18 July 2003

(Signed) John Tackaberry
Chairman

(Signed) Pierre Genton
Commissioner

(Signed) Vinayak Pradhan
Commissioner

Note

[1] Consistent with the provisions of article 22(3) of the Rules, one Commissioner has recused himself from consideration of the claim by Grassetto Costruzioni S.p.A. (formerly Incisa S.p.A.).

Annex

SUMMARY OF GENERAL PROPOSITIONS

CONTENTS

Introduction

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

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

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

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

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

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

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

I. THE PROCEDURE

A. Summary of the process

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

B. The nature and purpose of the proceedings

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

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

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

C. The procedural history of the "E3" Claims

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

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

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

(a) An "E" claim form with four copies;

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

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

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

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

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

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

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

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

(b) The facts supporting the claim;

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

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

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

15. Further, a review of the legal and evidentiary basis of each claim identifies specific questions as to the evidentiary support for the alleged losses. It also highlights areas of the claim in which

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

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

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

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

II. PROCEDURAL ISSUES

A. Panel recommendations

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

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

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

B. Evidence of loss

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

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

1. Sufficiency of evidence

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

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

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

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

28. What is more, the absence of any relevant contemporary record to support a particular claim means that the claimant is inviting the Panel to make an award, often of millions of dollars, on no foundation other than the assertion of the claimant. This would not satisfy the "sufficient evidence"

rule in article 35(3) of the Rules and would go against the instruction of the Governing Council contained in decision 46. It is something that the Panel is unable to do.

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

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

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

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

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

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

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

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

C. Amending claims after filing

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

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

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

D. Assignments of claims

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

E. Related and overlapping claims

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

III. SUBSTANTIVE ISSUES

A. Applicable law

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

B. Liability of Iraq

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

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

C. The "arising prior to" clause

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

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

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

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

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

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

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

D. Application of the "direct loss" requirement

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

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

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

decision 7 is nevertheless "direct". Paragraph 3 of decision 15 emphasises that for any alleged loss or damage to be compensable, the "causal link must be direct". (See also paragraph 9 of decision 9.)

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

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

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

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

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

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

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

55. Finally, there is the question of the geographical extent of the impact of events in Iraq and Kuwait outside these two countries. Following on the findings of the "E2" Panel in the First "E2" Report, this Panel finds that damage or loss suffered as a result of (a) military operations in the region by either the Iraqi or the Allied Coalition Forces or (b) a credible and serious threat of military action that was connected to Iraq's invasion and occupation of Kuwait is compensable in principle. Of course, the further the project in question was from the area where military operations were taking place, the more the claimant may have to do to establish causality. On the other hand, the potential

that an event such as the invasion and occupation of Kuwait has for causing an extensive ripple effect cannot be ignored. Each case must depend on its facts.

E. Date of loss

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

F. Currency exchange rate

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

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

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

G. Interest

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

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

H. Claims preparation costs

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

I. Contract losses

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

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

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

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

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

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

2. Advance payments

68. Many construction contracts provide for an advance payment to be made by the employer to the contractor. These advance payments are often calculated as a percentage of the initial price (initial, because many such contracts provide for automatic and other adjustments of the price during

the execution of the works). The purpose of the advance payment is to facilitate certain activities which the contractor will need to carry out in the early stages.

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

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

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

3. Contractual arrangements to defer payments

(a) The analysis of "old debt"

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

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

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

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

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

76. This Panel agrees.

(b) Application of the "old debt" analysis

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

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

79. The second concerns the ambit of the above analysis. As noted above, the claims which led to the above analysis arose out of "non-commercial" arrangements. They were situations where the original terms of payment entered into between the parties had been renegotiated during the currency

of the contract or the negotiations or renegotiations were driven by inter-governmental exchanges. Such arrangements were clearly the result of the impact of Iraq's increasing international debt.

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

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

4. Losses arising as a result of unpaid retention monies

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

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

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

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

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

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

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

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

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

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

5. Guarantees, bonds, and like securities

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

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

91. The purpose of an on demand bond is to permit the beneficiary to obtain monies under the bond without having to prove default on the part of the other party - namely, in the situations under

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

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

93. Many claimants have raised claims in respect of the service charges; and also in respect of the principal sums. The former are often raised in respect of periods of years measured from the date of Iraq's invasion and occupation of Kuwait. The latter have, hitherto at least, been cautionary claims, in case the bonds are called in the future.

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

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

96. In addition, the simple passage of time is likely to give rise to the right to treat the bond obligation as expired or unenforceable, or to seek a forum-driven resolution to the same effect. In addition, it is necessary to bear in mind the existence of the trade embargo and related measures.[a] The

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

effect of the trade embargo and related measures was that an on demand bond in favour of an Iraqi party could not legally have been honoured after 6 August 1990. In those circumstances, it is difficult to see what benefit the issuing bank was providing in return for any service charges that it was paid once notice of the embargo had been widely disseminated. If the bank is providing no benefit, it is difficult to ascertain a juridical basis for any entitlement to receive the service charges.

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

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

6. Export credit guarantees

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

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

101. Claims have been made by parties for:

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

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

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

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

103. Further, where a contractor has in fact been indemnified in whole or in part by such a body in respect of losses incurred as a result of Iraq's invasion and occupation of Kuwait, there is, to that

extent, no longer any loss for which that contractor can claim to the Commission. Its loss has been made whole.

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

105. Here the claim is mis-characterised. That balance may indeed be a claimable loss; but its claimability has nothing to do with the fact that the monies represent a shortfall between what has been recovered under the guarantee and what has been lost. Instead, the correct analysis should start from a review of the cause of the whole of the loss of which the balance is all that remains. The first step is to establish whether there is evidence to support that whole sum, that it is indeed a sum that the claimant has paid out or failed to recover; and that there is the necessary causation. To the extent that the sum is established, then to that extent the claim is prima facie compensable. However, so far as there has been reimbursement by the guarantor, the loss has been made good, and there is nothing left to claim for. It is only if there is still some qualifying loss, not made good, that there is room for a recommendation of this Panel.

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

7. Frustration and force majeure clauses

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

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

109. As to the first question, the position seems to this Panel to be as follows. In the population of claims before the Commission, the frustrating or force majeure event will nearly always be the act or omission of Iraq itself. However, such a clause is designed to address events which, if they occurred

at all, were anticipated to be wholly outside the control of both parties. It would be quite inappropriate for the causal wrongdoer to rely on such clause to reduce the consequences of its own wrongdoing.

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

> "Second, [the Claimants] direct the Commission's attention to the clauses relating to 'frustration' in the respective underlying contracts. The Claimants assert that in the case of frustration of contract, these clauses accelerate the payments due under the contract, in effect giving rise to a new obligation on the part of Iraq to pay all the amounts due and owing under the contract regardless of when the underlying work was performed. The Panel has concluded that claimants may not invoke such contractual agreements or clauses before the Commission to avoid the 'arising prior to' exclusion established by the Security Council in resolution 687 (1991); consequently, this argument must fail." (paragraph 188).

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

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

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

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

8. Subcontractors and suppliers

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

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

(a) Projects within Iraq

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

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

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

(b) Projects outside Iraq

120. Where the project out of which a claim arises was sited outside Iraq (as to which see also paragraphs 63 to 67, supra) and particularly where it was sited within Kuwait, the situation is more complicated. The Kuwaiti situation, being, obviously, the most common one, is a convenient one to

use as an example. In Kuwait today, ministries are back in full operation. Kuwaiti companies have in many cases resumed business. Projects have been restarted and completed. Claims arising out of Iraq's invasion and occupation of Kuwait have been lodged and resolved.

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

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

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

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

(c) "Pay when paid" clauses

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

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

to seek relief independently of what is happening or has happened between the contractor and the owner.

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

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

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

J. Claims for overhead and "lost profits"

1. General

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

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

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

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

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

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

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

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

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

2. Head office and branch office expenses

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

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

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

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

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

3. Loss of profits on a particular project

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

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

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

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

148. This approach, in the view of this Panel, is inherent in the thinking behind paragraph 5 of Governing Council decision 15. This paragraph expressly states that a claimant seeking compensation

for business losses such as loss of profits, must provide "detailed factual descriptions of the circumstances of the claimed loss, damage or injury" in order for compensation to be awarded.

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

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

4. Loss of profits for future projects

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

152. Accordingly, in the view of this Panel, for such a claim to warrant a recommendation, it is necessary to demonstrate by sufficient documentary and other appropriate evidence a history of successful (i.e. profitable) operation, and a state of affairs which warrants the conclusion that the hypothesis that there would have been future profitable contracts is well founded. Among other

matters, it will be necessary to establish a picture of the assets that were being employed so that the extent to which those assets would continue to be productive in the future can be determined. Balance sheets for previous years will have to be produced, along with relevant strategy statements or like documents which were in fact utilised in the past. The current strategy statement will also have to be provided. In all cases, this Panel will be looking for contemporaneous documents rather than ones that have been formulated for the purpose of the claim; although the latter may have a useful explanatory or demonstrational role.

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

K. Loss of monies left in Iraq

1. Funds in bank accounts in Iraq

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

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

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

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

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

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

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

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

2. Petty cash

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

3. Customs deposits

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

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

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

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

L. Tangible property

164. With reference to losses of tangible property located in Iraq, Governing Council decision 9 provides that where direct losses were suffered as a result of Iraq's invasion and occupation of Kuwait with respect to tangible assets, Iraq is liable for compensation (decision 9, paragraph 12). Typical actions of this kind would have been the expropriation, removal, theft or destruction of particular items of property by Iraqi authorities. Whether the taking of property was lawful or not is not relevant for Iraq's liability if it did not provide for compensation. Decision 9 furthermore provides that in a

case where business property had been lost because it had been left unguarded by company personnel departing due to the situation in Iraq and Kuwait, such loss may be considered as resulting directly from Iraq's invasion and occupation (decision 9, paragraph 13).

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

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

167. As to quantum, the Panel notes that there may be instances in which tangible assets are wholly written off in a claimant's books of account as at 2 August 1990. Despite that write-off, the equipment will still have value on the ground. That value can be described as an actual value (in contradistinction to "residual value", when the latter is used as a conventional accounting term, as to which see below). That actual value, whether it arises through the potential to refurbish and/or reuse the equipment, by way of sacrificial provision of spares or otherwise, is a real value (as is clear from the fact that if the equipment were to be sold, a price could be obtained, which would be characterised as income in the accounts).

168. The zero value in the claimant's accounts is a conventional accounting value. However, in the same way as a snapshot seeks to record the situation at a particular moment, so company accounts are intended to depict the position of a company at a particular moment – notionally at the end of that company's accounting year. But company accounts have to encompass artificial influences, which modify what might otherwise be recorded. One such influence is taxation. In order to give formal recognition to these influences, company accounts use artificial conventions. This produces what is called the "book value". It is often different from actual or market value.

169. Where there is sufficient evidence of that market value, it is open to the Panel to recommend that market value, even if the book value is less than the market value - even if indeed the book value is zero.

M. Payment or relief to others

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

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

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

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

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

N. Final awards, judgments and settlements

175. In the case of some of the projects in which claimants are seeking compensation from the Commission, there have been proceedings between the parties to the project contract leading to an award or a judgment; or there has been a settlement between the claimant and another party to the relevant contract. In all such cases, one is concerned with finality. The award, judgment or settlement must be final – not subject to appeal or revision.

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

177. It follows that it will be a prerequisite to establish that that is in fact the case, namely that, for some reason, the claim resulting in the award, judgment or settlement did not raise or resolve the subject matter of the claim being put before the Commission. Sufficient evidence of this will be needed. The absence of an identifiable element in the award, judgment or settlement relating to the

claim before the Commission does not necessarily mean that that it has not been addressed. The Tribunal that issued the award or judgment or the parties that concluded the settlement may have reached a single sum to cover a number of claims, including the claim in question; or the Tribunal may have considered that the claim was not maintainable. Equally, the claim may have been abandoned in, and as part of, the settlement. In such an event it would appear that the claim has been resolved and there is no loss left to be compensated. At that stage, it will be necessary to review the file to see if there is any special circumstance or material that would displace this initial conclusion. Absent such circumstance or material, no loss has been established. Sufficient evidence of an existing loss is essential if this Panel is to recommend compensation.

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