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REPORT AND RECOMMENDATIONS MADE BY THE PANEL OF COMMISSIONERS
CONCERNING THE THIRTEENTH INSTALMENT OF "E3" CLAIMS

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Introduction

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

2. One of the claims, that of Daewoo Corporation, filed with the Commission by the Government of the Republic of Korea was withdrawn during the proceedings. (See paragraph 233, infra).

I. PROCEDURAL HISTORY

A. The nature and purpose of the proceedings

3. 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 689 (1991) dated 2 May 1991 (S/22559). Pursuant to that report, the Commission is a fact-finding body that examines claims, verifies their validity, evaluates losses, recommends compensation, and makes payment of awards.

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

B. The procedural history of the claims in the thirteenth instalment

5. On 7 February 2000, the Panel issued a procedural order relating to the claims. In view of the complexity of the issues raised, the volume of the documentation underlying the claims and the compensation sought by the claimants, the Panel decided to classify each of the claims as "unusually large or complex" within the meaning of article 38(d) of the Rules. The

Panel thus decided to complete its review of the claims within 12 months of the date of its procedural order of 7 February 2000.

6. The Panel performed a thorough and detailed factual and legal review of the claims. The Panel considered the evidence submitted by the claimants in reply to requests for information and documents. It also considered Iraq's responses to the factual and legal issues raised in the twenty-ninth report of the Executive Secretary issued on 11 November 1999 in accordance with article 16 of the Rules.

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

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

C. Amending claims after filing

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

D. The claims

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

(a) Walter Bau-Aktiengesellschaft, a corporation organised according to the laws of Germany, which seeks compensation in the amount of 26,058,924 United States dollars (USD);

(b) Wayss & Freytag AG, a corporation organised according to the laws of Germany, which seeks compensation in the amount of USD 71,242,946;

- (c) Westinghouse-Controlmatic GmbH, a corporation organised according to the laws of Germany, which seeks compensation in the amount of USD 2,812,312;
- (d) Wolff & Müller GmbH & Co KG, an incorporated limited partnership organised according to the laws of Germany, which seeks compensation in the amount of USD 22,824,761;
- (e) Ansal Properties and Industries Ltd., a corporation organised according to the laws of India, which seeks compensation in the amount of USD 27,926,187;
- (f) M/s. Bhandari Builders (Private) Limited, a corporation organised according to the laws of India, which seeks compensation in the amount of USD 24,041,647;
- (g) M/s. Bhandari Builders (Private) Limited, a corporation organised according to the laws of India, which seeks compensation in the amount of USD 105,251,227;
- (h) Byucksan Development Co Ltd., a corporation organised according to the laws of the Republic of Korea, which seeks compensation in the amount of USD 36,626,418;
- (i) Nam Kwang Engineering & Construction Co. Ltd., a corporation organised according to the laws of the Republic of Korea, which seeks compensation in the amount of USD 17,450,954;
- (j) Internationale Funderingsgroep bv, a corporation organised according to the laws of the Netherlands, which seeks compensation in the amount of USD 2,166,705;
- (k) National Construction Company (Pakistan) Limited, a corporation organised according to the laws of Pakistan, which seeks compensation in the amount of USD 45,801,828;
- (l) Mercator - Mednarodna Trgovina, d.d. (Mercator - International Trade, Ltd.), a corporation organised according to the laws of Slovenia, which seeks compensation in the amount of USD 1,681,620;
- (m) NCC International AB, a corporation organised according to the laws of Sweden, which seeks compensation in the amount of USD 26,589,473;
- (n) Fusas Fuat Soylu Construction and Industry Inc. Co., a corporation organised according to the laws of Turkey, which seeks compensation in the amount of USD 4,403,320;
- (o) Hasan Canpoyraz Insaat Müteahhitligi, a corporation organised according to the laws of Turkey, which seeks compensation in the amount of USD 2,475,273;

(p) Kiska Insaat Taahhüdü Isleri A.S. (Kiska Construction Corporation), a corporation organised according to the laws of Turkey, which seeks compensation in the amount of USD 2,920,161; and

(q) ZDH Enternasyonal Insaat Taahhüt Ortakligi (ZDH International Construction Group), a corporation organised according to the laws of Turkey, which seeks compensation in the amount of USD 2,348,317.

II. LEGAL FRAMEWORK

A. Applicable law

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

B. Liability of Iraq

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

C. The "arising prior to" clause

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

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

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

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

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

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

D. Application of the "direct loss" requirement

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

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

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

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

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

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

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

and that this exchange and transfer was prevented by Iraq's invasion and occupation of Kuwait.

E. Loss of profits

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

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

F. Date of loss

19. The Panel must determine "the date the loss occurred" within the meaning of Governing Council decision 16 (S/AC.26/1992/16) for the purpose of recommending compensation for interest and for the purpose of determining the appropriate exchange rate to be applied to losses stated in currencies other than in United States dollars. Where applicable, the Panel has determined the date of loss for each claim.

G. Interest

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

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

H. Currency exchange rate

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

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

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

I. Evacuation losses

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

J. Valuation

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

27. After receipt of all claim information and evidence, the Panel's expert consultants applied the verification program. Each loss element was analysed individually according to a set of instructions. The expert consultants' analysis resulted in a recommendation of compensation in the amount claimed, an adjustment to the amount claimed, or a recommendation of no compensation for each loss element. In those instances where the Panel's expert consultants were unable to respond decisively, the issue was brought to the attention of the Panel for further discussion and development.

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

K. Formal requirements

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

L. Evidentiary requirements

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

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

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

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

III. WALTER BAU-AKTIENGESELLSCHAFT

34. Walter Bau-Aktiengesellschaft ("Walter Bau") is a corporation organised according to the laws of Germany operating in the construction industry. Walter Bau seeks compensation in the amount of 1,622,280 Deutsche Mark (DEM) (USD 1,038,592) for contract losses and interest. Walter Bau also seeks compensation in the amount of DEM 39,081,758 (USD 25,020,332) for what it describes in the Statement of Claim as a "Subsidiary Motion". This amount includes a claim for interest.

35. Walter Bau stated that it received partial compensation in the amount of DEM 1,708,469 for its contract losses from Hermes - Kreditversicherungs AG ("Hermes"), the German export credit agency. Walter Bau has taken this payment into account in the calculation of the total amount of its claim before the Commission.

Table 1. Walter Bau's claim

<u>Claim element</u>	<u>Claim amount</u> <u>(USD)</u>
Contract losses	547,958
"Subsidiary Motion"	25,020,332
Interest	490,634
<u>Total</u>	<u>26,058,924</u>

A. Contract losses and "Subsidiary Motion"1. Facts and contentions(a) Contract losses

36. Walter Bau seeks compensation in the amount of DEM 855,910 (USD 547,958) for contract losses. The losses were allegedly incurred in connection with two contracts it entered into on 21 October 1981 with the Ministry of Housing and Construction, State Organization for Buildings, of Iraq (the "Ministry").

37. The contracts provided for the construction of the Baghdad University Athletic College (the "University Project") and a guesthouse in Baghdad ("Project No. 305"). The amounts claimed for the University Project and for Project No. 305 are DEM 120,671 (USD 77,254) and DEM 735,239 (USD 470,704), respectively.

(i) University Project

38. The contract price was 18,795,300 Iraqi dinars (IQD). On 9 November 1983, the payment terms under the contract were amended and a financing agreement was put into place. Under the financing agreement, Walter Bau

was to receive payments under the contract in both United States dollars and Deutsche Mark. Ten per cent of the contract value was to be paid in cash (the "cash portion"). The remaining 90 per cent was to be paid in Deutsche Mark out of a buyer's credit made available by Ausfuhrkreditgesellschaft mbH ("AKA"), the German export finance corporation.

39. The contract provided for a maintenance period of 18 months from the initial taking over of the project. The amended terms of the contract provided for the release of retention monies in two equal portions. However, the contract did not state when the retention monies were to be released.

40. Walter Bau seeks to recover the second-half cash portion of the retention monies payable in Deutsche Mark. Walter Bau also seeks to recover the cash portion of the amount stated in the final measurement certificate. The final measurement certificate indicates that the amount due to Walter Bau was calculated after deductions were made in accordance with the terms of the contract. Walter Bau seeks compensation in the amount of DEM 120,671 (USD 77,254), net of compensation received from Hermes.

(ii) Project No. 305

41. The contract price was IQD 14,154,518. The contract provided for a maintenance period of 18 months from the date of the issue of the preliminary completion certificate. The retention monies were to be released in two equal parts, firstly, on the issue of the preliminary completion certificate, and secondly, after the expiry of the maintenance period and subject to the issue of the final maintenance certificate.

42. On 17 January 1989, the State Commission for Supervision and Pursuance of Iraq ("SCSP") issued the final acceptance certificate ("FAC"). It is unclear from the evidence provided whether the FAC fulfilled the same purpose as the final maintenance certificate referred to in the contract. The FAC indicates that the project works were completed on 15 October 1983 and that the maintenance period expired on 16 July 1985.

43. The Ministry issued a "Final Statement" on 19 September 1989. The "Final Statement" stipulated that the second half cash portion of the retention monies would be released after a document called the "acquittance certificate" was obtained from the "Government offices".

44. On 10 June 1990, the Ministry of Finance of Iraq issued the "acquittance certificate". This certificate indicates that Walter Bau did not owe any money and that no amounts were outstanding against Walter Bau for the period from 12 October 1981 to 16 July 1985.

45. Walter Bau seeks compensation in the amount of DEM 735,239 (USD 470,704) for the second half of the retention monies, net of

compensation received from Hermes. Walter Bau alleged that it never received the retention monies because of Iraq's invasion and occupation of Kuwait.

(b) "Subsidiary Motion"

46. Walter Bau seeks compensation for a "Subsidiary Motion", which is a contingent claim for compensation for the amount paid by Walter Bau to AKA. AKA submitted a claim for its losses even though Walter Bau has compensated it.

47. Walter Bau is aware that AKA has filed a claim with the Commission for the same losses. Walter Bau stated that it seeks compensation in the amount of DEM 39,081,758 (USD 25,020,332) by way of a "Subsidiary Motion" as a protective measure to ensure that its claim is before the Commission if AKA's claim is rejected.

2. Analysis and valuation

(a) Contract losses

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

49. The Panel finds that for the purpose of the "arising prior to" clause of paragraph 16 of Security Council resolution 687 (1991), Walter Bau had a contract with Iraq.

(i) University Project

50. As evidence of its contract losses, Walter Bau provided a copy of the original contract and subsequent amendments and supplements to the contract. Walter Bau also provided copies of the certificates in respect of the second-half cash portion of the retention monies and the final measurement. Both these certificates are dated 29 June 1989 and have been signed by the SCSP. It also provided a copy of a letter dated 1 November 1991 from Hermes, which indicates the payment of compensation in the amount of DEM 163,377.

51. Walter Bau asserted that the outstanding amounts were due on 29 June 1989. The terms of the certificates confirm this. The Panel therefore finds that the work to which the claim for contract losses relates was performed prior to 2 May 1990.

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

(ii) Project No. 305

53. As evidence of its contract losses, Walter Bau provided a copy of the contract, the FAC dated 17 January 1989, the "acquittance certificate" dated 10 June 1990, the "Final Statement" dated 19 September 1989, and a letter dated 13 December 1991 from Hermes indicating the payment of compensation in the amount of DEM 1,545,092.

54. The second-half cash portion of the retention monies was to be released after the expiry of the maintenance period and subject to the issue of the final maintenance certificate.

55. The maintenance period expired on 16 July 1985. However, it is not clear from the evidence provided whether the final maintenance certificate was issued. Walter Bau did not provide a copy of the final maintenance certificate, and as stated at paragraph 42, supra, the Panel has been unable to determine whether the FAC fulfilled the same purpose as the final maintenance certificate. The "Final Statement" also required the issue of the "acquittance certificate" from the customs department of Iraq prior to the release of the retention monies.

56. The Panel notes that the "Final Statement" was issued more than four years after the expiry of the maintenance period. Walter Bau stated that "SCSP did not issue the final statement according to the contract conditions. After numerous approaches over years SCSP issued the final statement 4 years later."

57. In the article 34 notification, Walter Bau was requested to explain why the retention monies remained outstanding at 2 August 1990 when the maintenance period expired on 16 July 1985. In its reply, Walter Bau simply stated that "the retention money remained outstanding since 16 July 1985 because the Client [Ministry] did not pay the retention money."

58. The Panel finds that Walter Bau failed to prove that the delay in the issue of the "Final Statement" and the subsequent failure of the Ministry to release the retention monies were a direct result of Iraq's invasion and occupation of Kuwait. The Panel therefore recommends no compensation.

(b) "Subsidiary Motion"

59. The Panel has found in its previous reports that it does not have jurisdiction over contingent claims. The Panel therefore recommends no compensation for the "Subsidiary Motion".

3. Recommendation

60. The Panel recommends no compensation for contract losses and the "Subsidiary Motion".

B. Interest

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

C. Recommendation for Walter Bau

Table 2. Recommended compensation for Walter Bau

<u>Claim element</u>	<u>Claim amount</u> <u>(USD)</u>	<u>Recommended</u> <u>compensation</u> <u>(USD)</u>
Contract losses	547,958	nil
"Subsidiary Motion"	25,020,332	nil
Interest	490,634	nil
<u>Total</u>	<u>26,058,924</u>	<u>nil</u>

62. Based on its findings regarding Walter Bau's claim, the Panel recommends no compensation.

IV. WAYSS & FREYTAG AG

63. Wayss & Freytag AG ("Wayss & Freytag") is a corporation organised according to the laws of Germany operating in the construction industry. In its original submission, Wayss & Freytag sought compensation in the amount of USD 258,661 for contract losses, and USD 132,452 for interest from 1 October 1989 to 31 December 1993. Wayss & Freytag also sought compensation in the amount of DEM 110,781,062 (USD 70,922,575) for what it describes in the Statement of Claim as a "Subsidiary Motion". This amount includes a claim for interest.

64. In its reply to the article 15 notification, Wayss & Freytag claimed additional interest and increased the claimed amounts for both the contract losses and the "Subsidiary Motion". The Panel has only considered those losses contained in the original claim except where such losses have been withdrawn or reduced by Wayss & Freytag. The Panel notes that, in its reply to the article 15 notification, Wayss & Freytag claimed interest on contract losses from 2 August 1990 to 30 June 1999. For the reasons stated in paragraph 9, *supra*, the Panel has considered the claim for interest from 2 August 1990 to 31 December 1993 in the reduced amount of USD 61,710.

65. The Panel therefore considered the amount of USD 320,371 for contract losses and interest and DEM 110,781,062 (USD 70,922,575) for the "Subsidiary Motion".

66. Wayss & Freytag stated that it received partial compensation in the amount of DEM 330,181 for its contract losses from Hermes - Kreditversicherungs AG ("Hermes"), the German export credit agency. Wayss & Freytag has not taken this payment into account in the calculation of the total amount of its claim before the Commission.

Table 3. Wayss & Freytag's claim

<u>Claim element</u>	<u>Claim amount</u> <u>(USD)</u>
Contract losses	258,661
"Subsidiary Motion"	70,922,575
Interest	61,710
<u>Total</u>	<u>71,242,946</u>

A. Contract losses and "Subsidiary Motion"

1. Facts and contentions

(a) Contract losses

67. Wayss & Freytag seeks compensation in the amount of USD 258,661 for contract losses. The losses were allegedly incurred in connection with a

contract it entered into on 5 September 1981 with Amanat Al Assima, the local city government authority of Baghdad ("Amanat"), for the construction of the Salah Al-Deen Al-Ayubi Expressway in Iraq (the "Project"). The contract price was IQD 68,519,528, subject to variation orders and final measurement.

68. The Project works were substantially completed by 11 October 1984, whereupon the maintenance period of 12 months commenced. On 11 January 1986, an entity described as the "Final Receiving Committee" recommended the final taking over of the Project works. On 18 February 1986, the "Financial Affairs Department of the City of Baghdad" issued the "Quittance Certificate to disburse the final measurement and to settle the account" of Wayss & Freytag. At this time, the contract price had increased to IQD 80,642,845.

69. Wayss & Freytag asserted that by 5 September 1989 it had received nearly all outstanding payments in local or foreign currency, except for the amount of IQD 50,000, which was payable in local currency, and the amount of IQD 76,579, which was payable in United States dollars. On 3 October 1989, Wayss & Freytag received a cheque from Amanat in the amount of IQD 50,000. On 30 October 1989, the State Board of Taxes of Iraq issued a "non objection certificate" for the transfer of IQD 76,579. Wayss & Freytag alleged that it never received the amount of IQD 76,579 because of Iraq's invasion and occupation of Kuwait.

70. Wayss & Freytag asserted that during 1990, negotiations were ongoing to settle the outstanding payment. Wayss & Freytag alleged that in June 1990 the relevant authorities advised it that it would soon receive the payment. Wayss & Freytag stated that the negotiations were terminated because of Iraq's invasion and occupation of Kuwait.

(b) "Subsidiary Motion"

71. Wayss & Freytag seeks compensation for a "Subsidiary Motion", which it describes as a contingent claim for compensation for the amount paid by Wayss & Freytag to Ausfuhrkreditgesellschaft mbH ("AKA"), the German export finance corporation. AKA submitted a claim for its losses even though it has been compensated by Wayss & Freytag as well as by Hermes.

72. Wayss & Freytag is aware that AKA has filed a claim with the Commission for the same losses. Wayss & Freytag stated that it seeks compensation in the amount of DEM 110,781,062 (USD 70,922,575) by way of a "Subsidiary Motion" as a protective measure to ensure that its claim is before the Commission if AKA's claim is rejected.

2. Analysis and valuation

(a) Contract losses

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

74. The Panel finds that for the purpose of the "arising prior to" clause of paragraph 16 of Security Council resolution 687 (1991), Wayss & Freytag had a contract with Iraq.

75. As evidence of its contract losses, Wayss & Freytag provided a copy of the contract along with the general terms and conditions, and various clearance certificates issued by the Iraqi authorities between October 1987 and October 1989.

76. Wayss & Freytag completed the Project works in 1984. The maintenance period expired some time in 1985. The "quittance certificate" was issued on 18 February 1986. On 30 October 1989, the State Board of Taxes of Iraq issued a "non objection certificate" for the transfer of IQD 76,579. The Panel therefore finds that the work to which the claim for contract losses relates was performed prior to 2 May 1990.

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

(b) "Subsidiary Motion"

78. The Panel has found in its previous reports that it does not have jurisdiction over contingent claims. The Panel therefore recommends no compensation for the "Subsidiary Motion".

3. Recommendation

79. The Panel recommends no compensation for contract losses and the "Subsidiary Motion".

B. Interest

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

C. Recommendation for Wayss & Freytag

Table 4. Recommended compensation for Wayss & Freytag

<u>Claim element</u>	<u>Claim amount</u> <u>(USD)</u>	<u>Recommended</u> <u>compensation</u> <u>(USD)</u>
Contract losses	258,661	nil
"Subsidiary Motion"	70,922,575	nil
Interest	61,710	nil
<u>Total</u>	<u>71,242,946</u>	<u>nil</u>

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

V. WESTINGHOUSE-CONTROLMATIC GMBH

82. Westinghouse-Controlmatic GmbH ("Westinghouse") is a corporation organised according to the laws of Germany operating in the electrical, instrumentation and automation industries. Westinghouse seeks compensation in the amount of DEM 4,392,831 (USD 2,812,312).

83. In the "E" claim form, Westinghouse sought compensation for contract losses. The Panel has reclassified elements of the claim for the purposes of this report. The Panel has therefore considered the amount of USD 2,812,312 for financial losses and interest, as follows:

Table 5. Westinghouse's claim

<u>Claim element</u>	<u>Claim amount</u> (USD)
Financial losses	2,248,872
Interest	563,440
<u>Total</u>	<u>2,812,312</u>

A. Financial losses

1. Facts and contentions

84. Westinghouse seeks compensation in the amount of DEM 3,512,738 (USD 2,248,872) for financial losses. Westinghouse's claim arises in connection with the financing of the Haifa Street Development, Part 7, Project No. 818/173 (the "Project") in Iraq.

85. On 16 June 1982, the main contractor, Wolff & Müller GmbH & Co KG ("Wolff & Müller"), awarded Westinghouse a sub-contract relating to all of the electrical works on the Project. Amanat Al Assima, the local city government authority of Baghdad ("Amanat"), was the employer for the main contract. The total value of the sub-contract including variation orders was IQD 2,528,263.

86. In August 1982, Westinghouse commenced work on the Project. In January 1983, Project works were suspended because of "lack of cash by Iraqi Government". On 29 November 1983, the suspension ended and the Project works recommenced on 29 January 1984. Amanat issued the certificate of completion with effect from 28 June 1985. The final maintenance certificate was issued on 15 December 1988.

87. Prior to the recommencement of the Project works, the terms of payment under the contract were altered from cash payment to a financing loan to be provided by Ausfuhrkreditgesellschaft mbH ("AKA"), the German export finance corporation. AKA and Amanat entered into a loan agreement on 27 October 1983.

88. Under the new arrangement, AKA financed 90 per cent of the contractual amount payable in Deutsche Mark. AKA obtained a full guarantee from the Rafidain Bank in Iraq. AKA also obtained insurance coverage from Hermes Kreditversicherungs-AG ("Hermes"), the German export credit agency. The export credit insurance provided by Hermes covered 75 per cent of the risk. Risk on the remaining 25 per cent was borne by AKA as a self-insured risk. However, AKA's risk was borne by Wolff & Müller by means of an exporter's guarantee signed in favour of AKA. Wolff & Müller in turn, obtained guarantees from Westinghouse "pro rata its share in the entire job", which were issued by Deutsche Bank.

89. Amanat continually failed to meet its obligations under the loan agreement and, in 1989, the Governments of Germany and Iraq agreed that repayments would be made through oil shipments. Following Iraq's invasion and occupation of Kuwait, oil shipments, and consequently the loan repayments, stopped. Westinghouse asserted that the Rafidain Bank breached its obligation to guarantee Amanat's repayment of the loans to AKA.

90. AKA claimed under its insurance with Hermes, and enforced the exporter's guarantee given by Wolff & Müller. Wolff & Müller in turn sought DEM 3,391,088 from Westinghouse, representing its pro rata liability.

91. On 24 June 1992, Westinghouse and Wolff & Müller entered into a settlement agreement pursuant to which they agreed to waive and settle all outstanding claims. In the settlement agreement, the parties agreed that Wolff & Müller held the rights to bring the claims in relation to the Project. The parties also agreed that Wolff & Müller was required to "make all reasonable efforts to assert the rights and [shall] pass on to [Westinghouse] 25.322 per cent of all payments and or other financial benefits which it receives in future."

92. The claim for financial losses includes the amounts of DEM 3,391,088 paid under the guarantees, and DEM 121,650 paid to Deutsche Bank for fees in relation to the guarantees.

2. Analysis and valuation

93. As evidence of its claim for financial losses, Westinghouse provided a copy of the sub-contract with Wolff & Müller, and a subsequent addendum to the sub-contract, dated 18 November 1983, detailing the financial restructuring of the sub-contract. Westinghouse also provided a copy of the certificate of completion, the final maintenance certificate, the settlement agreement, the loan agreement entered into between AKA and Amanat, and the bank guarantees.

94. The Panel finds that the terms of the settlement agreement dated 24 June 1992 clearly demonstrate that Westinghouse relinquished its rights to assert any claims arising out of the Project in favour of Wolff & Müller. Wolff & Müller has filed a claim with the Commission for the same

losses. The Panel's findings with respect to the claim by Wolff & Müller are reported at paragraphs 98 to 122, infra. The Panel finds that, under the terms of the settlement agreement dated 24 June 1992, as between Westinghouse and Wolff & Müller, Wolff & Müller is the appropriate claimant before the Commission and Westinghouse has no entitlement to claim for financial losses.

3. Recommendation

95. The Panel recommends no compensation for financial losses.

B. Interest

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

C. Recommendation for Westinghouse

Table 6. Recommended compensation for Westinghouse

<u>Claim element</u>	<u>Claim amount</u> <u>(USD)</u>	<u>Recommended</u> <u>compensation</u> <u>(USD)</u>
Financial losses	2,248,872	nil
Interest	563,440	nil
<u>Total</u>	<u>2,812,312</u>	<u>nil</u>

97. Based on its findings regarding Westinghouse's claim, the Panel recommends no compensation.

VI. WOLFF & MÜLLER GMBH & CO KG

98. Wolff & Müller GmbH & Co KG ("Wolff & Müller") is an incorporated limited partnership organised according to the laws of Germany. Wolff & Müller seeks compensation in the amount of DEM 1,979,975 (USD 1,267,589) for contract losses, payment or relief to others and interest. Wolff & Müller also seeks compensation in the amount of DEM 33,672,303 (USD 21,557,172) for what it describes in the Statement of Claim as a "Subsidiary Motion". This amount includes a claim for interest.

99. Wolff & Müller stated that it received partial compensation in the amount of DEM 885,077 for its contract losses from Hermes - Kreditversicherungs AG ("Hermes"), the German export credit agency. Wolff & Müller has not taken this payment into account in the calculation of the total amount of its claim before the Commission.

Table 7. Wolff & Müller's claim

<u>Claim element</u>	<u>Claim amount</u> <u>(USD)</u>
Contract losses	966,814
"Subsidiary Motion"	21,557,172
Payment or relief to others	19,206
Interest	281,569
<u>Total</u>	<u>22,824,761</u>

A. Contract losses and "Subsidiary Motion"

1. Facts and contentions

(a) Contract losses

100. Wolff & Müller seeks compensation in the amount of DEM 1,510,164 (USD 966,814) for contract losses. The losses were allegedly incurred in connection with a contract it entered into on 5 August 1981 with Amanat Al Assima, the local city government authority of Baghdad ("Amanat"), for the Haifa Street Development, Part 7, Project No. 818/173 in Iraq. The contract price was IQD 25,678,080.

101. The certificate of completion was issued on 8 September 1985 with effect from 28 June 1985. The final maintenance certificate was issued on 15 December 1988. On 20 August 1989, Wolff & Müller sent its final account to Amanat.

102. The contract provided for the release of the final portion of the retention monies, representing 1 per cent of the contract price, after the expiry of the 24-month maintenance period and upon the issue of the final

maintenance certificate. Release of this portion was also subject to the conditions that Wolff & Müller (a) provided a bank guarantee for the remaining guarantee period for motors and equipment (60 months from the certificate of completion), and (b) obtained the required clearance certificates from the Iraqi authorities.

103. The 60-month guarantee period was to expire in June 1990. Wolff & Müller asserted that, by then, it had received most of the required clearance certificates, except for the clearance certificates from the central bank and the customs department of Iraq. In the Statement of Claim, Wolff & Müller alleged that in normal circumstances, it would have received the remaining clearance certificates by September 1990, but that it was unable to do so because of Iraq's invasion and occupation of Kuwait. Wolff & Müller seeks to recover the final portion of the retention monies in the amount of DEM 1,510,164.

(b) "Subsidiary Motion"

104. Wolff & Müller seeks compensation for a "Subsidiary Motion", which it describes as a contingent claim for compensation for the amount paid by Wolff & Müller to Ausfuhrkreditgesellschaft mbH ("AKA"), the German export finance corporation. AKA has filed a claim with the Commission even though it has been compensated by Wolff & Müller as well as Hermes.

105. Wolff & Müller is aware that AKA has filed a claim with the Commission for the same losses. Wolff & Müller stated that it seeks compensation in the amount of DEM 33,672,303 (USD 21,557,172) by way of a "Subsidiary Motion" as a protective measure to ensure that its claim is before the Commission if AKA's claim is rejected.

2. Analysis and valuation

(a) Contract losses

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

107. The Panel finds that for the purpose of the "arising prior to" clause of paragraph 16 of Security Council resolution 687 (1991), Wolff & Müller had a contract with Iraq.

108. As evidence of its contract losses, Wolff & Müller provided extracts from the contract with Amanat along with the general terms and conditions. It also provided copies of the certificate of completion, the final maintenance certificate, the final account, and correspondence from Hermes dated 2 June 1992 showing the payment of compensation in the amount of DEM 885,077.

109. Pursuant to the terms of the contract, the final portion of the retention monies was to be released upon the issue of the final maintenance certificate, provided the conditions referred to in paragraph 102, supra, were fulfilled.

110. In the article 34 notification, Wolff & Müller was requested to explain whether it provided the bank guarantee for the motors and equipment and, if so, to provide evidence in support. In its reply, Wolff & Müller stated that "we did not provide a guarantee for motor and equipment on top of the outstanding money. This was planned in exchange for that money." As Wolff & Müller did not provide the bank guarantee for the motors and equipment, the Panel notes that the unpaid retention monies should have been released when the final maintenance certificate was issued on 15 December 1988 and after Wolff & Müller had obtained the necessary clearance certificates.

111. In the article 34 notification, Wolff & Müller was also requested to explain why the required clearance certificates could not be obtained prior to Iraq's invasion and occupation of Kuwait. In its reply, Wolff & Müller stated "the issue of [these] release letters took us a very long time (87-90). [These] last 3 release letters we expected to get until end of August 1990."

112. Wolff & Müller commenced the process of obtaining the necessary clearance certificates in 1987. Wolff & Müller provided copies of a number of clearance certificates, which it received in 1988 and 1989. The Panel notes that Wolff & Müller did not receive any clearance certificates in 1990. It did not submit any evidence that would support its assertion that in normal circumstances it would have received the remaining clearance certificates by the end of August 1990. The Panel finds that the failure to obtain the required clearance certificates was caused by administrative and other delays on the part of the authorities in Iraq, and not by Iraq's invasion and occupation of Kuwait. The Panel therefore recommends no compensation for contract losses.

(b) "Subsidiary Motion"

113. The Panel has found in its previous reports that it does not have jurisdiction over contingent claims. The Panel therefore recommends no compensation for the "Subsidiary Motion".

3. Recommendation

114. The Panel recommends no compensation for contract losses and the "Subsidiary Motion".

B. Payment or relief to others

1. Facts and contentions

115. Wolff & Müller seeks compensation in the amount of DEM 30,000 (USD 19,206) for payment or relief to others. The claim is for salary payments allegedly paid to one of Wolff & Müller's employees during his period of detention in Iraq.

116. Wolff & Müller stated that the employee travelled to Iraq in 1988 in order to obtain the necessary clearance certificates for the release of the final portion of the retention monies. The employee was due to depart Iraq on 25 August 1990. However, he did not do so, and after Iraq's invasion and occupation of Kuwait was not permitted to leave Iraq until 9 November 1990. Wolff & Müller seeks to recover salary paid to the employee for a period of two months while he was detained in Iraq.

2. Analysis and valuation

117. As evidence of its claim for payment or relief to others, Wolff & Müller provided copies of two affidavits from the employee, both dated 22 February 1994. In the affidavits, the employee stated that he was not permitted to leave Iraq until 9 November 1990 and that he continued to receive his salary during his period of detention. The affidavits do not state the amount of salary paid.

118. In its reply to the article 34 notification, Wolff & Müller provided copies of relevant pages from the employee's passport and an untranslated schedule of the salary costs.

119. The evidence provided by Wolff & Müller indicates that the employee departed Iraq on 9 November 1990. However, the Panel finds that Wolff & Müller failed to provide sufficient evidence to substantiate the amount of salary paid to the employee, and, therefore, how it suffered any loss.

3. Recommendation

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

C. Interest

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

D. Recommendation for Wolff & Müller

Table 8. Recommended compensation for Wolff & Müller

<u>Claim element</u>	<u>Claim amount</u> <u>(USD)</u>	<u>Recommended</u> <u>compensation</u> <u>(USD)</u>
Contract losses	966,814	nil
"Subsidiary Motion"	21,557,172	nil
Payment or relief to others	19,206	nil
Interest	281,569	nil
<u>Total</u>	<u>22,824,761</u>	<u>nil</u>

122. Based on its findings regarding Wolff & Müller's claim, the Panel recommends no compensation.

VII. ANSAL PROPERTIES AND INDUSTRIES LTD.

123. Ansal Properties and Industries Ltd. ("Ansal") is a corporation organised according to the laws of India operating in the construction industry.

124. In the "E" claim form, Ansal sought compensation in the amount of USD 27,926,187 for contract losses, losses related to business transaction or course of dealing, loss of real property, loss of income producing property and payment or relief to others.

125. Ansal stated that it received partial compensation in the amount of USD 5,913,126 for its contract losses from the Government of India. Ansal has not taken the payment into account in the calculation of the total amount of its claim before the Commission.

126. The Panel reclassified some elements of Ansal's losses for the purposes of this report. The Panel therefore considered the amount of USD 27,926,187 for contract losses, loss of profits, loss of tangible property, interest and claim preparation costs, as follows:

Table 9. Ansal's claim

<u>Claim element</u>	<u>Claim amount</u> <u>(USD)</u>
Contract losses	14,603,597
Loss of profits	5,000,000
Loss of tangible property	1,089,524
Interest	7,133,066
Claim preparation costs	100,000
<u>Total</u>	<u>27,926,187</u>

A. Contract losses

1. Facts and contentions

127. Ansal seeks compensation in the amount of USD 14,603,597 for contract losses. The losses were allegedly incurred in connection with a contract it entered into on 3 January 1981 with Amanat Al Assima, the local city government authority of Baghdad ("Amanat"), for the construction of office buildings at Sadoon Street and Tahrir Square in Baghdad (the "Project"). The contract price was IQD 7,896,331. Payment was to be made in Iraqi dinars.

128. Under the contract with Amanat, the Project works were to be completed by 31 January 1983. Ansal stated that the building at Tahrir Square was not in fact completed until 30 November 1984 and the building at Sadoon

Street not until 1 August 1984. However, an acceptance letter issued by Amanat's construction department indicates that one of the buildings was not finally accepted until 21 January 1987.

129. Ansal asserted that the completion of the Project works was delayed due to the war between Iran and Iraq and that it had to incur extra expenses to complete the Project works. Ansal filed claims with Amanat in 1984 to recover the extra expenses, which it had incurred to complete the Project works. Amanat counter-claimed, seeking payment by Ansal of penalty charges because of the delay in the completion of the Project works. The dispute between Ansal and Amanat continued for several years. In June 1990, the parties agreed to resolve their dispute and in August 1990, Amanat confirmed that it would pay to Ansal the amount of USD 7,959,230.

130. With regard to payments under the contract, there was a delay in making foreign currency payments under the contract from August 1983 onwards. After discussions between the Governments of Iraq and India, a deferred payment arrangement (the "deferred payment arrangement") was agreed on 3 August 1983. As timely payments were not made under the deferred payment arrangement, the terms of the arrangement were renegotiated several times. The last negotiation was agreed and signed in July 1990. Pursuant to that agreement, Ansal was to receive payment in the form of oil. Ansal asserted that it has been unable to receive oil because of the trade embargo imposed against Iraq after Iraq's invasion and occupation of Kuwait.

131. Ansal seeks compensation for four kinds of contract losses. First, it seeks compensation in the amount of USD 4,365,268 for outstanding invoices. Ansal asserted that the amounts due under outstanding invoices were eventually covered by the deferred payment arrangement.

132. Second, it seeks compensation in the amount of USD 2,146,812 for "certified amounts due against bills". Ansal stated that this amount remained unpaid because it was required to obtain the necessary clearances from the authorities in Iraq.

133. Third, it seeks compensation in the amount of USD 7,959,230 for additional expenses incurred in completing the Project works. This represents the amount due under the settlement agreement entered into in June 1990.

134. Finally, it seeks compensation in the amount of USD 132,287 for materials which it had sold and delivered in 1989 relating to the Project. In a letter dated 24 June 1989, Amanat requested its Administration and Financial Affairs Department to pay Ansal for the materials, which had been received by the "Department of Construction, and the Department of Machinery and Production".

2. Analysis and valuation

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

136. The Panel finds that for the purpose of the "arising prior to" clause of paragraph 16 of Security Council resolution 687 (1991), Ansal had a contract with Iraq.

137. As evidence of its contract losses, Ansal provided copies of correspondence exchanged with the authorities in Iraq, and extracts from the deferred payment arrangement. Ansal did not provide a complete signed copy of the contract.

138. The Panel finds that all work under the contract, including the delivery of materials, was completed prior to 2 May 1990.

139. The Panel recommends no compensation for contract losses in respect of work performed/materials delivered prior to 2 May 1990, as they relate to debts and obligations of Iraq arising prior to 2 August 1990 and, therefore, are outside the jurisdiction of the Commission.

140. The Panel finds that the deferred payment arrangement - in so far as it related to the contract losses - does not constitute a new agreement for the purposes of the Commission's jurisdiction, but is an arrangement for deferred payment of the existing obligations of Iraq arising well before 2 August 1990.

3. Recommendation

141. The Panel recommends no compensation for contract losses.

B. Loss of profits

1. Facts and contentions

142. Ansal seeks compensation in the amount of USD 5,000,000 for loss of profits expected to be earned from January 1985 to February 1993. Ansal asserted that it was not allowed to re-export its equipment out of Iraq since 1984 and after it departed from Iraq in July 1990, its equipment was confiscated by the "Government of Iraq, believably FAW Establishment and others". Ansal further asserted that if it had been permitted to re-export its equipment out of Iraq, it could have used the equipment on other projects and earned a profit.

2. Analysis and valuation

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

144. Ansal stated that the Project works were completed in 1984. The Panel therefore finds that the failure to obtain the permission of the Iraqi authorities to re-export the equipment from Iraq was not the direct result of Iraq's invasion and occupation of Kuwait. Ansal also failed to provide evidence of an existing contractual relationship at the time of Iraq's invasion and occupation of Kuwait. In its reply to the article 34 notification, Ansal stated that "no contract was secured by Ansal in Iraq or outside Iraq due to the policy of the Iraqi Government in not allowing re-export of the assets". The Panel therefore finds that Ansal's claim for loss of profits is speculative and unsupported. The Panel further finds that Ansal failed to demonstrate that the alleged loss was suffered due to Iraq's invasion and occupation of Kuwait.

3. Recommendation

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

C. Loss of tangible property

1. Facts and contentions

146. Ansal seeks compensation in the amount of USD 1,089,524 for loss of tangible property. It asserted that because it was not allowed to re-export its equipment from Iraq after 1984, it had stored the equipment at the "Sayeed Hamdalla" from where the equipment was confiscated by "FAW Establishment" of Iraq.

147. In the article 34 notification, Ansal was requested to confirm whether the equipment was confiscated prior to Iraq's invasion and occupation of Kuwait. In its reply, Ansal stated that as its employees departed from Iraq in July 1990, it could not state the exact date when the equipment was confiscated.

2. Analysis and valuation

148. As evidence of its claim for tangible property losses, Ansal provided copies of letters addressed to the authorities in Iraq, a list comprising five typed pages containing the description of the assets, the quantity, the value and the declaration numbers. The last page of this list had the following handwritten remark "copy of documents given to AAA on 4.7.90".

149. The Panel notes that a document entitled "Appendix II Pictographic presentation of Events" indicates that Ansal's equipment and assets were confiscated on 4 July 1990. The Panel also notes that, in the Statement of Claim, Ansal stated that "in July 1990 [Ansal] submitted the consolidated list of equipment's including valuation thereof, illegally, unlawfully withheld and taken over by Iraqi Authorities". The Panel therefore finds that the alleged loss was suffered prior to 2 August 1990.

150. Ansal was requested to provide invoices in relation to the property. In its reply, Ansal asserted that it gave the invoices and other relevant documents to the authorities in Iraq. Ansal did not provide evidence in support of its assertion.

151. The Panel finds that Ansal failed to demonstrate that the alleged loss was a direct loss arising from Iraq's invasion and occupation of Kuwait.

3. Recommendation

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

D. Interest

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

E. Claim preparation costs

154. Ansal seeks compensation in the amount of USD 100,000 for asserted claim preparation costs. In a letter dated 6 May 1998, the Panel was notified by the Executive Secretary of the Commission that the Governing Council intends to resolve the issue of claim preparation costs at a future date. Accordingly, the Panel takes no action with respect to the claim by Ansal for such costs.

F. Recommendation for Ansal

Table 10. Recommended compensation for Ansal

<u>Claim element</u>	<u>Claim amount</u> <u>(USD)</u>	<u>Recommended</u> <u>compensation</u> <u>(USD)</u>
Contract losses	14,603,597	nil
Loss of profits	5,000,000	nil
Loss of tangible property	1,089,524	nil
Interest	7,133,066	nil
Claim preparation costs	100,000	(--)
<u>Total</u>	<u>27,926,187</u>	<u>nil</u>

155. Based on its findings regarding Ansal's claim, the Panel recommends no compensation.

VIII. M/S. BHANDARI BUILDERS (PRIVATE) LIMITED

156. M/s. Bhandari Builders (Private) Limited ("Bhandari") is a corporation organised according to the laws of India operating in the construction industry. The Panel notes that, on 1 July 1996, Bhandari's name was changed to Bhandari Builders Limited.

157. In the "E" claim form, Bhandari sought compensation in the amount of USD 16,800,000 for income producing property. This loss has been reclassified for the purpose of this report as loss of profits.

158. In its reply to the article 34 notification, Bhandari included an additional claim for financial losses relating to the sale of bonds at a discounted value. The Panel has only considered those losses contained in the original claim except where such losses have been withdrawn or reduced by Bhandari.

159. The Panel therefore considered the amount of USD 24,041,647 for contract losses, loss of profits and interest.

160. Bhandari stated that it received partial compensation in the amounts of USD 7,124,840 and USD 505,092 for its contract losses from both the Government of India and the Export Credit Guarantee Corporation of India, respectively. These amounts relate to losses suffered by Bhandari both for this claim and another claim. The findings of the Panel with respect to Bhandari's other claim are reported infra, at paragraphs 182 to 216 of this report. Bhandari has not stated how the amounts received as compensation should be allocated between the two claims. Bhandari has not taken the payments into account in the calculation of the total amount of its claims before the Commission.

Table 11. Bhandari's claim

<u>Claim element</u>	<u>Claim amount</u> <u>(USD)</u>
Contract losses	4,403,308
Loss of profits	16,800,000
Interest	2,838,339
<u>Total</u>	<u>24,041,647</u>

A. Contract losses1. Facts and contentions

161. Bhandari seeks compensation in the amount of USD 4,403,308 for contract losses. The losses were allegedly incurred in connection with a contract it entered into on 19 April 1980 with the Life Insurance Company,

Ministry of Finance of Iraq (the "Ministry") for the construction of an office building.

162. The contract price was IQD 2,114,702. Bhandari stated that the project works were due to be completed by 1 November 1982, however, "due to acts of omission and commission on the part of the [Ministry]", they were not completed until 6 May 1986. A copy of the completion certificate, dated 26 July 1986, indicates that the project works were completed on 6 May 1986.

163. Bhandari seeks compensation for three types of contract losses.

164. First, Bhandari seeks compensation for unpaid retention monies in the amount of USD 119,717. The contract provided for a 12-month maintenance period from the date of the issue of the completion certificate. Retention monies were to be released upon the issue of the maintenance certificate. A letter dated 6 October 1990 from the Ministry indicates that the retention monies were to be paid to Bhandari after it had obtained the required clearances.

165. Second, Bhandari seeks compensation for "payment of war claims" in the amount of USD 2,821,287. Bhandari stated that the war between Iraq and Iran considerably delayed the completion of the project works. Bhandari asserted that, as a result of that war, it had to incur extra expenses to complete the project works. It described those expenses as "payment of war claims". Bhandari further asserted that it informed the Ministry "for claim of compensation for continuing the work under adverse conditions". Bhandari alleged that the Ministry acknowledged the claims and agreed "with the estimate of damages". However, Bhandari did not provide evidence in support of its assertions.

166. Third, Bhandari seeks compensation for payments alleged to be outstanding under a deferred payment arrangement in the amount of USD 1,462,304. From 1983 onwards, the Ministry was unable to make timely payments relating to the foreign currency payments under the contract. After discussions between the Governments of Iraq and India, a deferred payment arrangement was agreed on 3 August 1983. As the Ministry failed to make timely payments under the deferred payment arrangement, the terms of the arrangement were renegotiated several times. The last of such arrangements was signed on 14 March 1990. Bhandari asserted that since February 1990, it has not received any payments and it attributes the fact of non-payment to Iraq's invasion and occupation of Kuwait.

2. Analysis and valuation

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

168. The Panel finds that for the purpose of the "arising prior to" clause of paragraph 16 of Security Council resolution 687 (1991), Bhandari had a contract with Iraq.

169. As evidence of its claim for contract losses, Bhandari provided a copy of the contract along with the general and specific conditions, the completion certificate dated 26 July 1986 and a letter dated 6 October 1990 confirming the amount of the outstanding retention monies. It also provided correspondence from the Export Credit Guarantee Corporation of India.

170. In this case, the project works were completed on 6 May 1986. The contract provided for the release of the retention monies after the 12 month maintenance period. The maintenance period was to commence from the date of the issue of the completion certificate. The completion certificate was issued on 26 July 1986. The Panel notes that the maintenance period should have expired in July 1987 and the retention monies should have been released at that time.

171. The Panel finds that the retention monies became due to Bhandari in 1987, and therefore constitute a debt and obligation of Iraq arising prior to 2 August 1990.

172. With respect to the "payment of war claims" and the amounts outstanding under the deferred payment arrangement, the Panel finds that all work under the contract was completed prior to 2 May 1990.

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

174. The Panel finds that the deferred payment arrangement - in so far as it related to the contract losses - does not constitute a new agreement for the purposes of the Commission's jurisdiction, but is an arrangement for deferred payment of the existing obligations of Iraq arising prior to 2 August 1990.

3. Recommendation

175. The Panel recommends no compensation for contract losses.

B. Loss of profits

1. Facts and contentions

176. Bhandari seeks compensation in the amount of USD 16,800,000 for loss of profits for a period of three years, but it did not specify which years. It asserted that had it received the amounts owed to it by the Ministry, it could have "managed" a project of approximately USD 70,000,000 each year, and would have achieved a turnover of 80 per cent, which amounts to

USD 56,000,000. Bhandari stated that it would have made a profit of 10 per cent per annum, which amounts to USD 5,600,000 per year.

2. Analysis and valuation

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

178. Bhandari did not provide any evidence to substantiate its loss of profits claim or that it had an existing contractual relationship at the time of Iraq's invasion and occupation of Kuwait. The Panel therefore finds that Bhandari's claim for loss of profits is unsupported and speculative. In any event, the Panel notes that the claim for loss of profits is based on the assertion of non-payment of amounts allegedly owed to Bhandari, which the Panel has found to be outside the jurisdiction of the Commission. As such, the claim must fail.

3. Recommendation

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

C. Interest

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

D. Recommendation for Bhandari

Table 12. Recommended compensation for Bhandari

<u>Claim element</u>	<u>Claim amount</u> <u>(USD)</u>	<u>Recommended</u> <u>compensation</u> <u>(USD)</u>
Contract losses	4,403,308	nil
Loss of profits	16,800,000	nil
Interest	2,838,339	nil
<u>Total</u>	<u>24,041,647</u>	<u>nil</u>

181. Based on its findings regarding Bhandari's claim, the Panel recommends no compensation.

IX. M/S. BHANDARI BUILDERS (PRIVATE) LIMITED

182. M/s. Bhandari Builders (Private) Limited ("Bhandari") is a corporation organised according to the laws of India operating in the construction industry. The Panel notes that, on 1 July 1996, Bhandari's name was changed to Bhandari Builders Limited.

183. In the "E" claim form, Bhandari sought compensation in the amount of USD 48,000,000 for income producing property. This loss has been reclassified for the purpose of this report as loss of profits.

184. In its reply to the article 34 notification, Bhandari confirmed that its claim for "loss of camp" in the amount of USD 1,847,056 is a claim for loss of real property, which was originally included in its claim for loss of tangible property in the amount of USD 7,007,373. Accordingly, the Panel has considered the amounts of USD 1,847,056 for loss of real property and USD 5,160,317 for loss of tangible property.

185. In its reply to the article 34 notification, Bhandari included an additional claim for financial losses relating to the sale of bonds at a discounted value. For the reasons stated in paragraph 9, supra, the Panel has only considered those losses contained in the original claim except where such losses have been withdrawn or reduced by Bhandari.

186. The Panel therefore considered the amount of USD 105,251,227 for contract losses, loss of profits, loss of real property, loss of tangible property and interest, as follows:

Table 13. Bhandari's claim

<u>Claim element</u>	<u>Claim amount</u> <u>(USD)</u>
Contract losses	30,637,890
Loss of profits	48,000,000
Loss of real property	1,847,056
Loss of tangible property	5,160,317
Interest	19,605,964
<u>Total</u>	<u>105,251,227</u>

A. Contract losses

1. Facts and contentions

187. Bhandari seeks compensation in the amount of USD 30,637,890 for contract losses. The losses were allegedly incurred in connection with a contract it entered into on 12 July 1980 with the State Organisation of Housing, Ministry of Housing and Construction of Iraq (the "Ministry") for

the construction of 800 houses and public buildings in the Najaf Governorate in Iraq (the "Project").

188. The contract price was IQD 14,308,405. Bhandari asserted that the Project works were to be completed in 28 months, however, due to the delays caused by the war between Iran and Iraq, the works were not completed until 30 December 1985. The contract provided for a 12-month maintenance period from the date of the issue of the preliminary completion certificate. The preliminary completion certificate was issued on 30 December 1985 and the final completion certificate on 18 January 1988.

189. Bhandari seeks compensation for four types of contract losses, as set out in the following table:

Table 14. Bhandari's claim for contract losses

<u>Loss element</u>	<u>Claim amount</u> <u>(USD)</u>
Unpaid retention monies	1,071,451
Outstanding bills	275,559
"Payment of war claims"	21,638,052
Outstanding deferred payments	7,652,828
<u>Total</u>	<u>30,637,890</u>

(a) Unpaid retention monies

190. Bhandari seeks compensation for unpaid retention monies in the amount of USD 1,071,451. In its reply to the article 34 notification, Bhandari indicated that the retention monies were to be released after it had obtained the required clearance certificates. Bhandari stated that the clearance certificates were obtained in 1997. Bhandari also provided a letter dated 16 September 1993 addressed to the Ministry of Foreign Affairs of Iraq. In this letter, Bhandari indicated that the amount of retention monies has been outstanding and payable since 1987, but that, "payment has not been made on one pretext or the other".

(b) Outstanding bills

191. Bhandari asserted that the Ministry failed to pay the amounts due under the "final and the pre-final bills" in the amount of USD 275,559. In its reply to the article 34 notification, Bhandari provided a letter dated 16 September 1993 addressed to the Ministry of Foreign Affairs of Iraq. In this letter, Bhandari indicated that the amounts outstanding under the bills have been payable since 1987, but that, "payment has not been made on one pretext or the other". Bhandari seeks compensation in the amount of USD 275,559 with respect to the outstanding bills.

(c) "Payment of war claims"

192. Bhandari stated that the war between Iraq and Iran considerably delayed the completion of the Project works. Bhandari asserted that, as a result of that war, it had to incur extra expenses to complete the Project works. It described those expenses as "payment of war claims". Bhandari further asserted that it informed the Ministry "for claim of compensation for continuing the work under adverse conditions". Bhandari alleged that the Ministry acknowledged the claims and agreed "with the estimate of damages". However, Bhandari did not provide evidence in support of its assertions. Bhandari seeks compensation for "payment of war claims" in the amount of USD 21,638,052.

(d) Outstanding deferred payments

193. From 1983 onwards, the Ministry was unable to make timely payments relating to the foreign currency payments under the contract. After discussions between the Governments of Iraq and India, a deferred payment arrangement was agreed on 3 August 1983. As the Ministry failed to make timely payments under the deferred payment arrangement, the terms of the arrangement were renegotiated several times. The last of such arrangements was signed on 14 March 1990. Bhandari asserted that since February 1990, it has not received any payments and it attributes the fact of non-payment to Iraq's invasion and occupation of Kuwait. Bhandari seeks compensation for payments alleged to be outstanding under the deferred payment arrangement in the amount of USD 7,652,828.

2. Analysis and valuation

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

195. The Panel finds that for the purpose of the "arising prior to" clause of paragraph 16 of Security Council resolution 687 (1991), Bhandari had a contract with Iraq.

196. As evidence of its contract losses, Bhandari provided a copy of the contract, the preliminary completion certificate, the final completion certificate and the final bill. It also provided copies of correspondence with the Ministry and the Export Credit Guarantee Corporation of India, and the minutes of the meetings that took place at which the deferred payment arrangement was agreed.

(a) Unpaid retention monies

197. With respect to the claim for retention monies, Bhandari stated that the retention monies became due and payable in 1987. It further stated that the retention monies were to be released after it had obtained the

required clearance certificates. Given that the retention monies became due and payable in 1987, the Panel finds that it is extremely unlikely that the failure to obtain the required clearance certificates was due to Iraq's invasion and occupation of Kuwait. The Panel therefore recommends no compensation for retention monies.

- (b) Outstanding bills;
- (c) "Payment of war claims"; and
- (d) Outstanding deferred payments

198. With respect to the claims for outstanding bills, "payment of war claims" and the amounts outstanding under the deferred payment arrangement, the Panel finds that all work under the contract was completed prior to 2 May 1990. Accordingly, the claim relates entirely to work that was completed prior to 2 May 1990 and is not within the jurisdiction of the Commission.

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

200. The Panel finds that the deferred payment arrangement - in so far as it related to the contract losses - does not constitute a new agreement for the purposes of the Commission's jurisdiction, but is an arrangement for deferred payment of the existing obligations of Iraq arising prior to 2 August 1990.

3. Recommendation

201. The Panel recommends no compensation for contract losses.

B. Loss of profits

1. Facts and contentions

202. Bhandari seeks compensation in the amount of USD 48,000,000 for loss of profits for a period of three years, but it did not specify which years. It asserted that had it received the amounts owed to it by the Ministry, it could have "managed" a project of approximately USD 200,000,000 each year, and would have achieved a turnover of 80 per cent, which amounts to USD 160,000,000. Bhandari stated that it would have made a profit of 10 per cent per annum, which amounts to USD 16,000,000 per year.

2. Analysis and valuation

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

204. Bhandari did not provide any evidence of an existing contractual relationship at the time of Iraq's invasion and occupation of Kuwait. The Panel therefore finds that Bhandari's claim for loss of profits is speculative. In any event, the Panel notes that the claim for loss of profits is based on the assertion of non-payment of amounts allegedly owed to Bhandari, which the Panel has found to be outside the jurisdiction of the Commission. As such, the claim must fail.

3. Recommendation

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

C. Loss of real property

1. Facts and contentions

206. Bhandari seeks compensation in the amounts of USD 1,847,056 for loss of real property. The claim relates to the loss of its camp at the project site in Iraq. Documents submitted by Bhandari indicate that there were many trailer units located at the camp. Accommodation buildings, factories and offices were constructed on site. Bhandari depreciated the value of the camp by 30 per cent to provide a residual value and increased the depreciated value by 5 per cent per annum for inflation, resulting in the claimed amount of USD 1,847,056.

207. Bhandari asserted that its campsite was "fully protected by boundary and looked after by [Bhandari's] staff". Hence, the project site was not abandoned. Bhandari stated that on 4 March 1991, "rebels" (who were allegedly acting against the Government of Iraq) forced themselves on to the camp site, looted and burnt all of its property and records. Bhandari further asserted that the looting and destruction of its camp site by the "rebels" on 4 March 1991 was due to the complete breakdown of civil law and order in Iraq, which was caused by the withdrawal of Iraqi forces from Kuwait.

2. Analysis and valuation

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

209. The Panel notes that Bhandari's staff was present at the camp site on 4 March 1991. The Panel further notes that the actions resulting in the loss of the camp allegedly took place as a result of the breakdown of civil order in Iraq, which Bhandari stated was caused by the withdrawal of Iraqi forces from Kuwait. These actions took place outside the compensable period as determined by the Governing Council. The Panel has been unable

to conclude, on the evidence provided by Bhandari, that the loss was suffered as a direct result of Iraq's invasion and occupation of Kuwait.

3. Recommendation

210. The Panel recommends no compensation for real property losses.

D. Loss of tangible property

1. Facts and contention

211. Bhandari seeks compensation in the amount of USD 5,160,317 for loss of tangible property. The claim includes the amounts of USD 635,716 for loss of spare parts, USD 1,039,584 for loss of construction materials and USD 3,485,017 for loss of equipment.

212. Bhandari asserted that after the expiry of the maintenance period in December 1986, it applied for permission from the Iraqi authorities to re-export its machinery, equipment and materials out of Iraq. The permission to re-export was not granted, and Bhandari asserted that all its property was stolen, destroyed and looted by the "rebels" on 4 March 1991.

2. Analysis and valuation

213. For the reasons referred to in paragraphs 208 and 209, *supra*, the Panel finds that Bhandari failed to establish that the loss was suffered as a direct result of Iraq's invasion and occupation of Kuwait.

3. Recommendation

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

E. Interest

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

F. Recommendation for Bhandari

Table 15. Recommended compensation for Bhandari

<u>Claim element</u>	<u>Claim amount</u> <u>(USD)</u>	<u>Recommended</u> <u>compensation</u> <u>(USD)</u>
Contract losses	30,637,890	nil
Loss of profits	48,000,000	nil
Loss of real property	1,847,056	nil
Loss of tangible property	5,160,317	nil
Interest	19,605,964	nil
<u>Total</u>	<u>105,251,227</u>	<u>nil</u>

216. Based on its findings regarding Bhandari's claim, the Panel recommends no compensation.

X. BYUCKSAN DEVELOPMENT CO., LTD.

217. Byucksan Development Co., Ltd. ("Byucksan") is a corporation organised according to the laws of the Republic of Korea. At the time of Iraq's invasion and occupation of Kuwait, Byucksan operated in the construction industry. Byucksan seeks compensation in the amount of USD 36,626,418 for contract losses.

Table 16. Byucksan's claim

<u>Claim element</u>	<u>Claim amount</u> <u>(USD)</u>
Contract losses	36,626,418
<u>Total</u>	<u>36,626,418</u>

A. Contract losses

1. Facts and contentions

218. Byucksan seeks compensation in the amount of USD 36,626,418 for contract losses arising out of a contract awarded to a consortium described as the "KOCC - Namkwang - Hyundai" consortium (the "consortium"). KOCC sub-contracted its portion of the project works to Byucksan. On 18 July 1982, the consortium was awarded a contract by the New Railways Implementation Authority of Iraq for the execution of the Kirkuk-Baiji-Haditha Railway Authority project in Iraq. Byucksan stated that the project works were completed on 30 September 1987.

219. Byucksan seeks compensation for four types of contract losses. First, it seeks compensation in the amount of USD 25,754,025 relating to unpaid promissory notes issued in respect of works performed on the project. The promissory notes were issued from 1 September 1986 by the Ministry of Housing and Construction of Iraq (the "Ministry"). Payments under the promissory notes fell due after their respective dates of issue. As the Ministry failed to make timely payments, the Ministry and Byucksan entered into a deferred payment agreement on 1 October 1989 for the reissue of promissory notes with new dates of payment between 1992 and 1995.

220. Second, Byucksan seeks compensation in the amount of USD 7,987,798 for the "Balance of 52nd and 54th progress payments and the first half of the retention money".

221. Third, it seeks compensation in the amount of USD 656,819 for the "55th (final) progress payment".

222. Fourth, it seeks compensation in the amount of USD 2,227,776 for the second half of the retention monies.

2. Analysis and valuation

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

224. Byucksan provided copies of the promissory notes which make reference to the Ministry of Housing and Construction, Republic of Iraq". Byucksan entered into the deferred payment agreement on 1 October 1989 with the Ministry. Pursuant to the terms and conditions of this agreement, the Ministry was to make all payments referred to in the agreement directly to Byucksan. As such, Byucksan had a direct payment demand against the Ministry. This indicates that Byucksan had contracted with an Iraqi state agency.

225. The Panel finds that for the purpose of the "arising prior to" clause of paragraph 16 of Security Council resolution 687 (1991), Byucksan had a contract with Iraq.

226. As evidence of its claim for contract losses, Byucksan provided copies of promissory notes due for payment between 1990 and 1995, and a copy of the deferred payment agreement.

227. With respect to the claim for unpaid promissory notes, the Panel finds that the promissory notes were issued for work, which was performed prior to 2 May 1990, and is therefore a debt and obligation of Iraq arising prior to 2 August 1990.

228. With respect to the claims for outstanding progress payments and the unpaid retention monies, Byucksan did not provide any evidence to substantiate its claim. The Panel notes that in response to the article 34 notification, the Permanent Mission of the Republic of Korea informed the Commission that Byucksan had no further information or evidence to present to the Panel. In the absence of any evidence to the contrary, the Panel finds that the work to which the claim for outstanding progress payments and unpaid retention monies relates was performed prior to 2 May 1990. The Panel further finds that Byucksan failed to provide sufficient evidence to demonstrate that the alleged losses were suffered due to Iraq's invasion and occupation of Kuwait.

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

230. The Panel finds that for the purposes of the Security Council resolution 687 (1991) the deferred payments agreement did not have the effect of novating the debt.

3. Recommendation

231. The Panel recommends no compensation for contract losses.

B. Recommendation for Byucksan

Table 17. Recommended compensation for Byucksan

<u>Claim element</u>	<u>Claim amount</u> <u>(USD)</u>	<u>Recommended</u> <u>compensation</u> <u>(USD)</u>
Contract losses	36,626,418	nil
<u>Total</u>	<u>36,626,418</u>	<u>nil</u>

232. Based on its findings regarding Byucksan's claim, the Panel recommends no compensation.

XI. DAEWOO CORPORATION

233. On 19 April 2000, the Commission received a notice of withdrawal of the claim by Daewoo Corporation from the Permanent Mission of the Republic of Korea. In the light of this communication, the Panel issued a procedural order on 22 May 2000, pursuant to article 42 of the Rules, acknowledging the withdrawal and terminating the Panel's proceedings with respect to the claim by Daewoo Corporation.

XII. NAM KWANG ENGINEERING & CONSTRUCTION CO., LTD.

234. Nam Kwang Engineering & Construction Co., Ltd., ("Nam Kwang") is a corporation organised according to the laws of the Republic of Korea operating in the construction industry. Nam Kwang seeks compensation in the amount of USD 17,450,954 for contract losses and interest.

Table 18. Nam Kwang's claim

<u>Claim element</u>	<u>Claim amount</u> (USD)
Contract losses	13,400,674
Interest	4,050,280
<u>Total</u>	<u>17,450,954</u>

A. Contract losses

1. Facts and contentions

235. Nam Kwang seeks compensation in the amount of USD 13,400,674 for contract losses. Nam Kwang did not provide a Statement of Claim or any information relating to its claim for contract losses. Nam Kwang was one of the members of the consortium described as the "KOCC Consortium", which was executing the "KBH Railway Project" in Iraq. Nam Kwang's claim for contract losses is set out in the following table:

Table 19. Nam Kwang's claim for contract losses

<u>Loss element</u>	<u>Claim amount</u> (USD)
Unpaid promissory notes	11,405,431
"MPP 53 rd and retention money released"	54,147
"Retention money released"	167,758
"MPP 54 th "	28,092
"MPP 55 th and additional works"	134,690
Second half of the retention monies	1,610,556
<u>Total</u>	<u>13,400,674</u>

2. Analysis and valuation

236. The Panel has defined the "arising prior to" clause of paragraph 16 of Security Council resolution 687 (1991) to limit the jurisdiction of the

Commission to exclude debts of Iraq if the performance relating to that obligation took place prior to 2 May 1990.

237. As evidence of its contract losses, Nam Kwang provided copies of the promissory notes, which were issued by the Ministry of Housing and Construction of Iraq. Nam Kwang also provided copies of correspondence from the Ministry of Transport and Communications of Iraq indicating that it was one of the members of the "KOCC Consortium".

238. The Panel finds that for the purpose of the "arising prior to" clause of paragraph 16 of Security Council resolution 687 (1991), Nam Kwang had a contract with Iraq.

(a) Unpaid promissory notes

239. Nam Kwang provided copies of two promissory notes, which it describes as "old promissory notes". Both of these promissory notes were issued on 16 July 1987 and were due for payment on 20 January 1990 and 20 July 1990, respectively. Nam Kwang also provided copies of 10 other promissory notes, which it describes as "re-scheduled promissory notes". These 10 promissory notes were issued on 5 July 1989 and were due for payment between 1992 and 1994.

240. In the absence of any evidence to the contrary, the Panel finds that the work to which the claim for unpaid promissory notes relates was performed prior to 2 May 1990. The Panel also finds that Nam Kwang failed to demonstrate that the alleged loss was suffered due to Iraq's invasion and occupation of Kuwait.

(b) "MPP 53rd and retention money released"

241. In support of its claim for this loss item, Nam Kwang provided a copy of a letter dated 24 January 1989 from the Ministry of Transport and Communications of Iraq, which indicates that the work to which the claim for "MPP 53rd and retention money released" relates was performed prior to 2 May 1990.

(c) "Retention money released"

242. In support of its claim for this loss item, Nam Kwang provided a copy of a letter dated 10 May 1989 from the Ministry of Transport and Communications of Iraq, which indicates that the Ministry had approved and authorised the Central Bank of Iraq to transfer the retention money in the account of "KOCC Consortium". The Panel therefore finds that the retention monies became due and payable to Nam Kwang on 10 May 1989.

(d) "MPP 54th"

243. In support of its claim for this loss item, Nam Kwang provided a copy of a letter dated 19 December 1989 from the Ministry of Transport and

Communications of Iraq, which indicates that the work to which the claim for "MPP 54th" relates was performed prior to 2 May 1990.

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

(e) "MPP 55th and additional works"; and

(f) Second half of the retention monies

245. Nam Kwang did not state when it performed the works relating to "MPP 55th and additional works" or when the second half of the retention monies became due and payable. The Panel notes that, in response to the article 34 notification, the Permanent Mission of the Republic of Korea informed the Commission that Nam Kwang had no further information or evidence to present to the Panel.

246. The Panel finds that Nam Kwang failed to provide sufficient evidence to substantiate its claim, and, therefore, how it suffered the alleged losses. The Panel further finds that Nam Kwang failed to provide sufficient evidence to demonstrate that the alleged losses were suffered due to Iraq's invasion and occupation of Kuwait.

3. Recommendation

247. The Panel recommends no compensation for contract losses.

B. Interest

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

C. Recommendation for Nam Kwang

Table 20. Recommended compensation for Nam Kwang

<u>Claim element</u>	<u>Claim amount</u> <u>(USD)</u>	<u>Recommended</u> <u>compensation</u> <u>(USD)</u>
Contract losses	13,400,674	nil
Interest	4,050,280	nil
<u>Total</u>	<u>17,450,954</u>	<u>nil</u>

249. Based on its findings regarding Nam Kwang's claim, the Panel recommends no compensation.

XIII. INTERNATIONALE FUNDERINGSGROEP BV

250. Internationale Funderingsgroep bv ("Internationale") is a corporation organised according to the laws of the Netherlands operating in the construction industry. Internationale seeks compensation in the amount of USD 2,166,705 for losses related to business transaction or course of dealing and interest.

251. In its reply to the article 15 notification, Internationale claimed additional interest and increased the claimed amount. The Panel has only considered those losses contained in the original claim except where such losses have been withdrawn or reduced by Internationale, as follows:

Table 21. Internationale's claim

<u>Claim element</u>	<u>Claim amount</u> <u>(USD)</u>
Business transaction or course of dealing	1,720,000
Interest	446,705
<u>Total</u>	<u>2,166,705</u>

A. Business transaction or course of dealing

1. Facts and contentions

252. Internationale seeks compensation in the amount of USD 1,720,000 for losses related to business transaction or course of dealing. Between 1970 and 1985, Internationale carried out a number of large and small "deep foundation works" in Iraq. This included work on bridges, power plants, hotels, office buildings and other projects. Internationale asserted that in 1984, the Iraqi customs authorities confiscated its equipment and levied a fine in the amount of IQD 1,336,441 for violating the customs regulations of Iraq.

253. In order to pay this fine, on 18 July 1985, Internationale transferred 12,600,000 Guilders from the Netherlands to the Rafidain Bank in Baghdad. The fine was paid on 24 July 1985.

254. After having paid the fine, Internationale appealed against the decision of the customs authorities to levy the fine and started a protracted legal process, which lasted from 1985 to 1989. In January 1989, the Iraqi Customs Court ordered a partial refund of the fine in the amount of IQD 670,435. On 15 March 1989, Internationale received the amount of IQD 670,435, and deposited the refunded amount into its bank account with the Rafidain Bank the following day.

255. Thereafter, Internationale commenced the procedure to obtain the permission of the Iraqi authorities to transfer the refunded amount to the

Netherlands. After the intervention of the Embassy of the Netherlands in Iraq, on 26 June 1990, the Iraqi authorities approved the transfer of the amount of USD 1,720,000 out of Iraq in four monthly instalments in the amount of USD 430,000 each, commencing in July 1990 and ending in October 1990.

256. On 11 July 1990, the Rafidain Bank requested the Central Bank of Iraq to transfer the first instalment in the amount of USD 430,000.

257. Internationale stated that this transfer and the subsequent transfers never took place as a result of Iraq's invasion and occupation of Kuwait. The amount claimed by Internationale is still on deposit in its bank account with the Rafidain Bank.

2. Analysis and valuation

258. As evidence of its claim for losses related to business transaction or course of dealing, Internationale provided details of the dispute with the customs authorities, a transcript of the appeal to the Customs Court and a chronology of the legal proceeding which took place between 1985 and 1989. The documents submitted also show that funds were transferred from the Netherlands to the Rafidain Bank.

259. Further, Internationale provided the approval of the Ministry of Finance of Iraq relating to the refund of the amount of IQD 670,435, and the approval of the Ministry of Foreign Affairs of Iraq relating to the transfer of the amount of USD 1,720,000 in four equal instalments of USD 430,000. It also provided the Rafidain Bank's request to the Central Bank of Iraq to transfer the first instalment of USD 430,000, and a certificate dated 22 March 2000 from the Rafidain Bank showing a balance of IQD 535,001 in its account at that date.

260. This Panel has found in its previous reports that the loss of use of funds on deposit in Iraqi banks is not a direct loss unless the claimant can demonstrate that Iraq was under a contractual or other specific duty to exchange those funds for convertible currencies and to authorise the transfer of the converted funds out of Iraq and that this exchange and transfer was prevented by Iraq's invasion and occupation of Kuwait.

261. In this case, the authorities in Iraq had granted their permission to transfer the amount of USD 1,720,000. Internationale stated that the first instalment was due to be transferred out of Iraq on 26 July 1990. Having reviewed the evidence submitted, the Panel accepts this assertion. The Panel therefore finds that under normal circumstances, the proposed transfer of the amount of USD 1,720,000 in four equal monthly instalments would have taken place had it not been for Iraq's invasion and occupation of Kuwait.

262. The Panel notes that the Iraqi dinars deposited by Internationale in its bank account with the Rafidain Bank are still available to it. The

Panel finds that, while the funds may still be available in Iraqi dinars, the inability to exchange the funds for convertible currencies and to transfer the converted funds out of Iraq constitutes the loss. This fact is not changed by the fact that the funds might be withdrawn in Iraqi dinars. The Panel therefore recommends compensation in the amount of USD 1,720,000.

3. Recommendation

263. The Panel recommends compensation in the amount of USD 1,720,000 for business transaction or course of dealing.

B. Interest

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

C. Recommendation for Internationale

Table 22. Recommended compensation for Internationale

<u>Claim element</u>	<u>Claim amount</u> <u>(USD)</u>	<u>Recommended</u> <u>compensation</u> <u>(USD)</u>
Business transaction or course of dealing	1,720,000	1,720,000
Interest	446,705	(--)
<u>Total</u>	<u>2,166,705</u>	<u>1,720,000</u>

265. Based on its findings regarding Internationale's claim, the Panel recommends compensation in the amount of USD 1,720,000. In relation to Internationale's claim for business transaction losses, the Panel finds the date of loss to be 11 September 1990, which is the mid-point of the four monthly instalments.

XIV. NATIONAL CONSTRUCTION COMPANY (PAKISTAN) LIMITED

266. National Construction Company (Pakistan) Limited ("National") is a corporation organised according to the laws of Pakistan. At the time of Iraq's invasion and occupation of Kuwait, National operated in the construction industry.

267. On 17 August 1990, National went into voluntary liquidation. National's claim has been submitted by the liquidator.

268. In the "E" claim form National sought compensation in the amount of USD 45,801,828 for contract losses, loss of profits, loss of tangible property, payment or relief to others and other losses.

269. The Panel has reclassified elements of National's claim for the purposes of this report. The Panel therefore considered the amount of USD 45,801,828 for contract losses, loss of profits, loss of tangible property, payment or relief to others, financial losses, other losses and interest, as follows:

Table 23. National's claim

<u>Claim element</u>	<u>Claim amount</u> (USD)
Contract losses	29,367,553
Loss of profits	3,323,020
Loss of tangible property	3,729,284
Payment or relief to others	215,469
Financial losses	5,725,668
Other losses	999,387
Interest	2,441,447
<u>Total</u>	<u>45,801,828</u>

A. Contract losses

1. Facts and contentions

270. National seeks compensation in the amount of USD 29,367,553 for contract losses. The losses were allegedly incurred in connection with two contracts awarded on 5 January 1980 by the State Organization of Soil and Land Reclamation of Iraq (the "State Organization") to a joint venture comprising National and Civelecmecc (Pakistan) Limited ("Civelecmecc").

271. Pursuant to the terms of the joint venture agreement dated 22 December 1981 between National and Civelecmecc, National was responsible for the execution of a contract for Project Ishaqi-11 ("Contract 29") and

consequently entitled to all of the profits (or losses) arising from that contract. Civelecmecc had similar responsibilities and benefits under the other contract for Project Ishaqi-10 ("Contract 28"). National provided the bank guarantees in respect of both contracts.

272. The contract price for Contract 29 was IQD 6,990,000. The contract price for Contract 28 was IQD 8,082,034.

273. National stated that it completed the project works for Contract 29 on 12 January 1987, with considerable losses and delays. The delays were stated to have been caused by the war between Iran and Iraq. The State Organization consequently withheld certain financial claims of National and also levied delay penalties.

274. The progress of Contract 28 was even more troubled. On 9 February 1982, National informed the State Organization that Civelecmecc had neither the means nor the ability to execute the contract and requested the transfer of the project works to National. At this stage, although Civelecmecc had received approximately 60 per cent of the contract price, it had only carried out 20 per cent of the project works.

275. On 16 August 1984, the State Organization removed Civelecmecc from the management of Contract 28 and confiscated its assets. At this point, there was a substantial time overrun on the contract. The State Organization advised National that unless it agreed to complete the project, it would employ another contractor to complete the project at National's cost, as National was the only joint venture partner remaining in Iraq.

276. On 9 March 1985, National and the State Organization entered into a contract under which National agreed to complete Contract 28 (the "replacement contract"). According to its terms, the replacement contract represented an assignment of Contract 28 to National. The replacement contract was based on the original 1980 prices, which allegedly resulted in a loss of approximately USD 4,000,000 to National. The replacement contract specifically held National liable for amounts due from or paid to Civelecmecc.

277. National stated that towards the end of the replacement contract, it learned that Civelecmecc had been overpaid an amount of IQD 3,353,557 in respect of fees which could be deducted from the approved payments due to National. National also learned that the customs authorities of Iraq had levied a penalty on Civelecmecc in the amount of IQD 971,408, which could also be deducted from the approved payments due to National.

278. National eventually handed over the works carried out under the replacement contract to the State Organization on 24 September 1990, following the expiry of the maintenance period. The final acceptance certificate was issued on 9 October 1990.

279. National seeks compensation for five types of contract losses. The losses relate to various elements in dispute in relation to Contract 29 and the replacement contract.

(a) Losses due to non-payment of principal amounts and retention monies

280. National seeks compensation in the amount of IQD 993,158 (USD 3,186,934) relating to unpaid principal amounts for various "running bills" and retention monies for the works carried out under the replacement contract. National asserts that: (i) work relating to bills numbered 10, 19, 20, 21, 23, 25-31, 33, 34 and 36-46a was performed prior to 29 August 1989; and (ii) work relating to bills numbered 47, 48 and 49 was performed in April, May and June 1990, respectively. National also asserted that the unpaid retention monies were due and payable by 20 December 1989.

(b) Losses due to non-payment of approved payments

281. National seeks compensation in the amount of IQD 2,102,137 (USD 6,745,524) relating to various amounts which were approved for payment by the State Organization, but allegedly never paid. National stated that the State Organisation withheld approved amounts to set-off the alleged overpayments to Civelecmecc.

(c) Losses due to non-settlement of contractual claims of Contract 29

282. National seeks compensation in the amount of USD 4,566,958 for necessary additional expenses incurred on the project. National asserted that it initially submitted a larger claim to the State Organization. It further asserted that in January 1987, after receiving verbal assurances of payment from the State Organization, it reduced its claim to IQD 1,423,221 (USD 4,566,958). The State Organization allegedly failed to make the payment.

(d) Refund of delay penalty

283. National seeks compensation in the amount of IQD 366,938 (USD 1,177,463) relating to delay penalties imposed by the State Organization. National asserted that the completion of Contract 29 was delayed for a number of reasons: (i) the war between Iran and Iraq; (ii) the actions of the State Organization which were in breach of contract; and (iii) the actions of third parties.

(e) Losses due to non-settlement of contractual claims of replacement contract

284. National seeks compensation in the amount of IQD 4,266,484 (USD 13,690,674) for expenses incurred "through circumstances beyond [its] control". National asserted that it submitted its claim consisting of 11 items to the State Organization. The State Organization considered the first seven items on 24 April 1990. The notes of that meeting indicate

that the work relating to the first seven items was performed between 1985 and 1989. In its reply to the article 34 notification, National confirmed that the work relating to the remaining four items was also performed between 1985 and 1989.

2. Analysis and valuation

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

286. The Panel finds that for the purpose of the "arising prior to" clause of paragraph 16 of Security Council resolution 687 (1991), National had a contract with Iraq.

(a) Losses due to non-payment of principal amounts and retention monies

287. In support of its claim, National provided a schedule of bills. This schedule shows the outstanding principal amount, the date of approval of the bills and the date of payment according to the contract. The Panel finds that the work to which the claim for bills numbered 10, 19, 20, 21, 23, 25-31, 33, 34, 36-46a and 47 relates was performed prior to 2 May 1990.

288. With respect to retention monies, the Panel finds that the retention monies became due and payable to National on 20 December 1989, and therefore constitute a debt and obligation of Iraq arising prior to 2 August 1990.

289. With respect to the claim for bills numbered 48 and 49, National asserted that the work relating to these two bills was performed in May and June 1990. A copy of bill number 49 indicates that the work relating to this bill was performed in June 1990. The work relating to bill number 47 was performed in April 1990. Considering the dates of these other bills, the Panel finds that the work relating to bill number 48 was performed in May 1990. Because the work relating to bills 48 and 49 was performed in May and June 1990, the amounts outstanding under these two bills are within the jurisdiction of the Commission.

290. However, as the amounts owed to the State Organization and the customs department of Iraq exceed the amounts outstanding under bills 48 and 49, the Panel finds that National failed to demonstrate a compensable loss. The Panel also notes that the overpayments to Civelecmecc were made prior to or in the year 1984. The Panel further finds that National failed to demonstrate that the loss was due to Iraq's invasion and occupation of Kuwait.

291. The Panel recommends no compensation for amounts outstanding under bills 48 and 49.

(b) Losses due to non-payment of approved payments

292. As the amounts owed to the State Organization and the customs department of Iraq exceeds the amount claimed for non-payment of approved payments, the Panel finds that National failed to demonstrate a compensable loss. For the reason referred to in paragraph 290, supra, the Panel further finds that National failed to demonstrate that the loss was due to Iraq's invasion and occupation of Kuwait. The Panel recommends no compensation for losses due to non-payment of approved payments.

(c) Losses due to non-settlement of contractual claims of Contract 29

293. As evidence of its claim for contract losses, National provided copies of correspondence with the State Organization. The first letter containing National's claim was sent to the State Organization on 16 March 1985. As the claims for extra expenses incurred were made in 1985, the Panel finds that the work to which the claim relates was performed prior to 2 May 1990.

(d) Refund of delay penalty

294. As evidence of its claim for contract losses, National provided a copy of a final completion certificate dated 12 January 1987. The Panel consequently finds that all work under the contract was completed prior to 2 May 1990.

(e) Losses due to non-settlement of contractual claims of replacement contract

295. As evidence of its claim for contract losses, National provided a copy of the minutes of the meeting held on 24 April 1990. The Panel finds that the work relating to the claim for losses due to non-settlement of contractual claims of the replacement contract was performed prior to 2 May 1990.

(f) Summary of Panel's findings with respect to contract losses

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

3. Recommendation

297. The Panel recommends no compensation for contract losses.

B. Loss of profits

1. Facts and contentions

298. National seeks compensation in the amount of USD 3,323,020 for loss of profits. It asserted that it made an average annual operating profit of IQD 230,126 under the replacement contract. National further asserted that

its operating profit would have been 50 per cent higher (i.e. IQD 345,189), if payment for works under the replacement contract had been awarded at 1985 rates as opposed to "1979" rates.

299. National seeks compensation for loss of profits for three years up to April 1993.

2. Analysis and valuation

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

301. In the article 34 notification, National was requested to provide copies of the contracts on which it expected to make a profit of IQD 345,189 per year, for the three years ending 30 April 1993. In its reply, National stated that it anticipated winning new contracts like the Saddam Hussain Irrigation Project Contract-23 and other land reclamation projects from the Ministry of Irrigation on which it would have made profits. As National's claim for loss of profits is not based on any specific project or contract, it is impossible for the Panel to verify National's assertions. The Panel therefore finds that National's claim for loss of profits is speculative.

302. The Panel recommends no compensation as National failed to provide evidence that establishes with reasonable certainty ongoing and expected profitability.

3. Recommendation

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

C. Loss of tangible property

1. Facts and contention

304. National seeks compensation in the amount of USD 3,729,284 for loss of tangible property. As part of this claim, National originally classified an amount of USD 341,724 as other losses, but the alleged loss relating to this amount is more appropriately classified as a loss of tangible property.

305. After the expiry of the maintenance period in September 1990, National was not permitted to re-export its equipment and assets out of Iraq. Nor was it allowed to sell them on the "open market", by which the Panel understands National to refer to the market in Iraq. Certain "government companies" subsequently approached National to buy its equipment and assets in Iraqi dinars. National asserted that although the Iraqi dinars had no value on the international market, it authorised the State Organization to sell its equipment and collect the sale proceeds to prevent theft of the equipment. It further asserted that the State Organization sold its equipment and assets worth IQD 1,055,680 and collected the sale proceeds.

A copy of a letter dated 1 February 1995 from the State Organization indicates that it collected IQD 1,064,555 as sale proceeds.

306. National alleged that the State Organization then unlawfully confiscated the sale proceeds. National seeks compensation in the amount of IQD 1,055,680 (USD 3,387,560), representing the amount of the sale proceeds collected by the State Organization.

307. National also seeks compensation in the amount of USD 341,724 relating to furniture, televisions, videocassette recorders and a car, which were all allegedly stolen. National stated that the car, along with the televisions, videocassette recorders and the furniture, had been given to local people for safekeeping.

2. Analysis and valuation

(a) Sale proceeds

308. In the article 34 notification, National was requested to provide proof that the sale proceeds had been confiscated by the State Organization. In its reply, National provided a copy of a letter dated 6 December 1992 from the State Organization, which states as follows:

"Sub:- Remaining works of Ishaqi-10 Contract-28

The amount held up from Monthly Certificates for the above contract to cover the Civelecmecc Company's debts as per para (2-B) of the Contract is not enough for settlement of above debts mentioned in our letter No. 10373 of 18-11-1992. As the debts are your [National's] responsibility because you are a partner, therefore we can not pay the sale amount of equipment & machine purchases, until finalisation of the Final Account of the above Contract and to understand the Company situation".

309. The Panel finds that this letter indicates that the funds have not been confiscated and that their payment has been deferred only until finalisation of the final account because of the overpayments made to Civelecmecc. In any event, even if the funds have been confiscated, the Panel finds that National failed to demonstrate that the funds were confiscated as a direct result of Iraq's invasion and occupation of Kuwait.

(b) Tangible assets

310. With respect to its claim for furniture, spare parts, televisions and video cassette recorders, the Panel finds that National failed to submit sufficient evidence to demonstrate its title to and the value of the property alleged to have been lost.

311. With respect to its claim for the car, National provided a copy of a letter to the "Criminal Police", dated 8 December 1992, which indicates that the car was stolen on 7 July 1991. For the reason referred to in

paragraph 208, supra, the Panel finds that National failed to establish that the loss was a direct loss arising from Iraq's invasion and occupation of Kuwait.

3. Recommendation

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

D. Payment or relief to others

1. Facts and contentions

313. National seeks compensation in the amount of USD 215,469 for payment or relief to others. National originally classified this amount as other losses ("Impossibility, frustration and force majeure"), but it is more appropriately classified as payment or relief to others.

314. National seeks compensation for losses due to non-productivity of workers and losses due to unplanned repatriation of personnel.

(a) Losses due to non-productivity of workers

315. National seeks compensation in the amount of USD 173,198 for salaries paid to its employees while they were forced to stay in Iraq until 8 January 1991. National asserted that after Iraq's invasion and occupation of Kuwait, it applied for exit visas for its employees, which were not issued. After the intervention of the Embassy of Pakistan in Baghdad, the authorities in Iraq started issuing exit visas. National's employees carried out no productive work during the period of their detention.

(b) Losses due to unplanned repatriation of personnel

316. National seeks compensation in the amount of USD 42,271 for expenses incurred in repatriating its employees from Iraq.

317. National asserted that because of the deteriorating situation in Iraq, it purchased 53 air tickets valid for a period of one year for an amount of IQD 7,863 (USD 25,232) from Pakistan International Airlines in Baghdad, in June 1990. However, as exit visas were not issued on time, the tickets could not be used. It further asserted that all its employees ultimately travelled by taxis to Amman and took "UN Sponsored" flights from Amman to Karachi. National alleged that it spent IQD 5,310 (USD 17,039) in transporting its employees to Amman by taxis, but it was not required to pay for the flights.

2. Analysis and valuation

(a) Losses due to non-productivity of workers

318. As evidence of its claim for losses due to non-productivity of workers, National provided a list containing the names of its employees, their job titles, gross salaries and dates of departure from Iraq. It also

provided internally generated payroll records for July, September, November and December 1990. These records contain the names of the employees, their addresses in Pakistan along with the addresses of their banks and their bank account numbers. A sample contract of employment was also provided.

319. The Panel notes that the payroll records have not been counter-signed by the employees. National provided the details of the banks and the bank account numbers of the employees. However, it failed to provide evidence demonstrating the actual transfer of salaries into the bank accounts of the employees. The Panel therefore finds that National failed to provide sufficient evidence to substantiate its claim, and, therefore, how it suffered any loss.

(b) Losses due to unplanned repatriation of personnel

320. As evidence of its claim for repatriation costs, National provided copies of correspondence with Pakistan International Airlines. The documents provided indicate that National received a refund from Pakistan International Airlines in the amount of IQD 5,683.

321. In the article 34 notification, National was requested to explain how the costs claimed exceeded the costs that would, in any event, have been incurred by National in repatriating its employees. In its reply, National stated that "...if the situation would have remained normal the employees would have reached in normal ways and much earlier to the date they actually reached". The Panel finds that National did not incur any extraordinary expenses in repatriating its employees.

322. With respect to its claim for expenses incurred while transporting its employees to Amman, National failed to provide any evidence establishing that it incurred the expenses. The Panel therefore finds that National failed to provide sufficient evidence to substantiate its claim, and, therefore, how it suffered any loss.

3. Recommendation

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

E. Financial losses

1. Facts and contentions

324. National seeks compensation in the amount of USD 5,725,668 for financial losses. National originally classified two loss items in the amounts of USD 720,279 and USD 512,537 as "Other foreign exchange controls" and an amount of USD 4,492,852 as "Other Bank guarantee and performance bond", but they are more appropriately classified as financial losses.

(a) Loss of funds in Iraqi bank account

325. National seeks compensation in the amount of USD 720,279 relating to funds which it left behind in its account with the Rafidain Bank in Iraq.

(b) Losses due to non-cancellation of advance payment guarantee and performance bonds

326. National seeks compensation in the amount of USD 4,492,852 relating to the performance bonds and the advance payment guarantee, which have not been released by the State Organization. National seeks compensation for the value of the performance bonds and the advance payment guarantee, which were issued through the Rafidain Bank.

(c) Interest on unpaid amounts

327. National seeks compensation in the amount of USD 512,537 for interest on unpaid amounts. The amount claimed relates to interest calculated at 14 per cent per annum for the period between the payment due date according to the contract and the date of release of the payment in respect of Contract 28. National asserted that all payments relating to "Running Bills" and the retention monies were approved by 30 April 1989. It further asserted that all payments were due by 15 May 1989 and were actually received by 18 January 1990.

2. Analysis and valuation

(a) Loss of funds in Iraqi bank account

328. As evidence of its claim, National provided untranslated copies of bank statements and copies of various letters from the Rafidain Bank showing the balance of its account as of those dates.

329. The Panel finds that National did not submit sufficient information or documentation to support its asserted losses. National failed to demonstrate that the account is no longer in existence or that National has been denied access to the funds. Further, National did not demonstrate that Iraq was under a contractual or other specific duty to exchange those funds for convertible currencies and to authorise the transfer of the converted funds out of Iraq. Finally, National did not demonstrate that Iraq's invasion and occupation of Kuwait prevented this exchange and transfer.

(b) Losses due to non-cancellation of advance payment guarantee and performance bonds

330. As evidence of its claim for financial losses, National provided a copy of the final acceptance certificate dated 9 October 1990, copies of correspondence relating to guarantees issued by the Government of Pakistan, and a letter from the Finance Division of the Government of Pakistan to the Pakistan Banking Council.

331. In the article 34 notification, National was requested to explain the nature of the security given for the issue of the guarantee and the performance bonds, and how their non-release caused an actual loss. In its reply, National stated that the "Security/Guarantee" was provided by the Ministry of Finance of the Government of Pakistan, and that the losses suffered by National were in the form of commission and interest. The Panel notes that National did not make a claim for bank commission or interest.

332. The Panel further notes that both guarantees, dated 21 June 1982 and 10 December 1985, were payable on demand. In the Statement of Claim, National stated that "it appears that no sooner freezing of Iraq's finances are lifted the Bank guarantees furnished by [National] would be encashed". As the guarantee and the performance bonds, which were issued by the Government of Pakistan have not been encashed, the Panel finds that National failed to demonstrate that the contingent loss materialised. The Panel therefore finds that National failed to demonstrate that it suffered a loss.

(c) Interest on unpaid amounts

333. As evidence of its claim, National provided copies of correspondence exchanged with the Director General, State Commission for Irrigation and Reclamation Projects, and a schedule containing the "Running Bill" numbers, the date of approval, the payment due date as per the contract and the actual date of release of the amounts. The Panel finds that the work to which the claim relates was performed prior to 2 May 1990.

334. The Panel therefore recommends no compensation for interest on unpaid amounts, as the underlying claim relates to work performed prior to 2 May 1990, and is, therefore, outside the jurisdiction of the Commission.

3. Recommendation

335. The Panel recommends no compensation for financial losses.

F. Other losses

1. Facts and contentions

336. National seeks compensation in the amount of USD 999,387 for other losses. National originally classified the amounts of USD 75,191 and USD 578,571 as payment or relief to others and an amount of USD 345,625 as "other impossibility frustration and force majeure" but they are more appropriately classified as other losses.

(a) Losses due to unforeseen expenses on watch and ward

337. National seeks compensation in the amount of USD 75,191 for expenses incurred in hiring guards and a "caretaker" to safeguard its assets and machinery at its project sites in Iraq.

338. National asserted that in order to safeguard its assets and machinery, it hired eight additional guards between 10 August and 21 December 1990. National seeks compensation in the amount of USD 22,523 for wages paid to the eight guards.

339. National asserted that it also hired a "caretaker" between 24 December 1990 and 31 October 1991 to look after its plant and machinery. National seeks compensation in the amount of USD 52,668 for the salary paid to the "caretaker".

(b) Losses due to expenses incurred for office establishment after Iraq's invasion and occupation of Kuwait

340. National seeks compensation in the amount of USD 345,625 relating to expenses incurred in operating its office in Iraq after 1991.

341. National asserted that six of its personnel went to Iraq in October 1991 to take care of administrative matters. It stated that it did not derive any monetary benefits by sending its personnel to Iraq. However, it avoided "unnecessary custom cases or other court cases". National seeks compensation for salaries paid to its personnel, rent for the office, utilities charges, expenses incurred on maintenance of two vehicles and fees paid to the auditors.

(c) Losses due to final settlement to permanent employees

342. National seeks compensation in the amount of USD 578,571 in relation to redundancy costs paid to its employees as a result of its liquidation. National asserted that the main reasons for liquidating the company were the non-payment of approved payments by Iraq, the non-acceptance of its claims by Iraq, the withholding of the performance bonds and the advance payment guarantee by Iraq, the recovery of 15 million United States dollars against liabilities of Civelecmecc and the disposal of its assets by Iraq.

2. Analysis and valuation

(a) Losses due to unforeseen expenses on watch and ward

343. In the article 34 notification, National was requested to provide evidence of payment. In its reply, National stated that no records were available as payments were made in cash. The Panel finds that National failed to provide evidence to substantiate its claim, and, therefore, how it suffered any compensable loss.

(b) Losses due to expenses incurred for office establishment after Iraq's invasion and occupation of Iraq

344. As evidence of its claim for other losses, National provided copies of the lease agreements for the years 1991, 1992 and 1993. It also provided a schedule showing the salaries paid to its staff in Iraq from 18 October 1991 to 30 June 1993. The documentation provided by National does not

establish that it incurred the alleged expenses. The Panel therefore finds that National failed to provide sufficient evidence to substantiate its claim, and, therefore, how it suffered any compensable loss.

(c) Losses due to final settlement to permanent employees

345. As evidence of its claim for other losses, National provided schedules of amounts paid to its employees who were made redundant, along with statements showing how the amounts were calculated and bank disbursement vouchers signed by the payees.

346. In this case, the Panel finds that National went into voluntary liquidation because of the State Organization's non-payment of the amounts owed to National. The State Organization withheld the amounts due to the overpayments made to Civelecmecc. The overpayments were made prior to Iraq's invasion and occupation of Kuwait. The Panel therefore finds that National failed to demonstrate that the alleged loss was suffered as a direct result of Iraq's invasion and occupation of Kuwait.

3. Recommendation

347. The Panel recommends no compensation for other losses.

G. Interest

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

H. Recommendation for National

Table 24. Recommended compensation for National

<u>Claim element</u>	<u>Claim amount</u> (USD)	<u>Recommended compensation</u> (USD)
Contract losses	29,367,553	nil
Loss of profits	3,323,020	nil
Loss of tangible property	3,729,284	nil
Payment or relief to others	215,469	nil
Financial losses	5,725,668	nil
Other losses	999,387	nil
Interest	2,441,447	nil
<u>Total</u>	<u>45,801,828</u>	<u>nil</u>

349. Based on its findings regarding National's claim, the Panel recommends no compensation.

XV. MERCATOR - MEDNARODNA TRGOVINA, D.D.
(MERCATOR - INTERNATIONAL TRADE, LTD)

350. Mercator-Mednarodna Trogovina, d.d ("Mercator") is a corporation organised according to the laws of Slovenia. The Panel notes that on 7 November 1996, Mercator merged with Poslivni Sistem Mercator d.d., which is Mercator's legal successor.

351. In the "E" claim form, Mercator sought compensation in the amount of USD 780,773 for losses related to business transaction or course of dealing. This loss has been reclassified for the purpose of this report as a financial loss.

352. The Panel therefore considered the amount of USD 1,681,620 for loss of real property, loss of tangible property and financial losses, as follows:

Table 25. Mercator's claim

<u>Claim element</u>	<u>Claim amount</u> (USD)
Loss of real property	713,329
Loss of tangible property	187,518
Financial losses	780,773
<u>Total</u>	<u>1,681,620</u>

A. Loss of real property

1. Facts and contentions

353. On 11 May 1981, Mercator entered into a sub-contract with SGP Slovenija Cest Tehnika, a company incorporated in Slovenia, to provide various support services at a building site in Iraq. The services were for the supply of food products and other articles from Yugoslavia. Following this initial project, Mercator acted as a sub-contractor on a number of separate projects in Iraq for various foreign contractors.

354. Due to an increase in the volume of its business, Mercator asserted that it built its own warehouse with cold storage facilities and also made investments in the Yugoslav club in Baghdad, where it built a restaurant.

355. Mercator asserted that the investment in both facilities comprised "building, installation, assembly, and ceramic works performed by companies from Yugoslavia". It stated that the payments for the work done by the Yugoslav companies were made both in Iraq and in Yugoslavia.

356. Mercator seeks compensation in the amount of USD 713,329 relating to the investments which it made in the warehouse and the Yugoslav club.

2. Analysis and valuation

357. As evidence of its claim for real property losses, Mercator provided invoices in the amount of USD 161,908 relating to the erection expenses incurred on the warehouse and USD 174,370 relating to the refurbishment costs incurred on the Yugoslav club. Mercator stated that it was unable to provide invoices for the full amount of USD 713,329 as they were destroyed during Iraq's invasion and occupation of Kuwait. The Panel notes that these invoices were issued in 1982.

358. In its reply to the article 34 notification, Mercator stated that it was not the owner of the Yugoslav club and that the building in which the club was located was not damaged. Mercator did not provide any evidence to show that the warehouse was damaged during the invasion. The Panel therefore finds that Mercator failed to provide sufficient evidence to demonstrate that it suffered the alleged loss or that the alleged loss was suffered due to Iraq's invasion and occupation of Kuwait. The Panel also finds that Mercator failed to show that it incurred the costs of repairing the alleged damage and, therefore, failed to demonstrate any compensable loss.

3. Recommendation

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

B. Loss of tangible property

1. Facts and contentions

360. Mercator seeks compensation in the amount of USD 187,518 for loss of tangible property. It stated that it was unable to take its assets and consumables with it when it departed from Iraq. The assets and consumables were deployed on different projects in Iraq.

2. Analysis and valuation

361. In support of its claim for loss of tangible property, Mercator provided internally generated inventory lists for the year ending 31 December 1990. These lists contain a brief description of the lost items and their value. However, the lists lack detail and Mercator provided no explanation of the context in which they were prepared.

362. The Panel finds that Mercator failed to provide sufficient evidence of its title to or right to use the assets and consumables alleged to have been lost or destroyed, or that the assets and consumables were in Iraq at the time of Iraq's invasion and occupation of Kuwait.

3. Recommendation

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

C. Financial losses

1. Facts and contentions

364. Mercator seeks compensation in the amount of USD 780,773 for financial losses. The amount claimed was allegedly held in its bank account with the Rafidain Bank in Iraq.

2. Analysis and valuation

365. In its reply to the article 34 notification, Mercator stated that the funds were still available in its bank account. It further advised that it was unable to prove that the funds were transferable or convertible.

366. This Panel has found in its previous reports that the loss of use of funds on deposit in Iraqi banks is not a direct loss unless the claimant can demonstrate that Iraq was under a contractual or other specific duty to exchange those funds for convertible currencies and to authorise the transfer of the converted funds out of Iraq, and that this exchange and transfer was prevented by Iraq's invasion and occupation of Kuwait.

367. The Panel notes that the funds have not been appropriated, removed, stolen or destroyed. The Panel further notes that the funds were not transferable or convertible. The Panel therefore finds that Mercator failed to demonstrate that it suffered a loss or that the alleged loss was suffered due to Iraq's invasion and occupation of Kuwait.

3. Recommendation

368. The Panel recommends no compensation for financial losses.

D. Recommendation for Mercator

Table 26. Recommended compensation for Mercator

<u>Claim element</u>	<u>Claim amount</u> <u>(USD)</u>	<u>Recommended</u> <u>compensation</u> <u>(USD)</u>
Loss of real property	713,329	nil
Loss of tangible property	187,518	nil
Financial losses	780,773	nil
<u>Total</u>	<u>1,681,620</u>	<u>nil</u>

369. Based on its findings regarding Mercator's claim, the Panel recommends no compensation.

XVI. NCC INTERNATIONAL AB

370. NCC International AB ("NCC") is a corporation organised according to the laws of Sweden. NCC seeks compensation in the amount of IQD 5,080,831 (USD 16,337,077) and USD 10,252,396 (total amount claimed USD 26,589,473) for contract losses and financial losses.

371. The Panel notes that NCC's claim for contract losses relating to unrefunded deposits contains an arithmetic error. The nature of the error is described at paragraph 379, *infra*. In the Statement of Claim, NCC's claim for contract losses includes a claim for unrefunded deposits in the amount of USD 1,511,112. The Panel has corrected the error and has considered the figure of USD 1,351,111 for unrefunded deposits and the amount of USD 16,943,171 for contract losses.

372. NCC is a wholly-owned subsidiary of Nordic Construction Company AB. Nordic Construction Company AB was formed by a merger between Johnson Construction Company AB and Armerad Betong Vagforbattringar AB ("ABV") in 1989. The contract losses for which NCC seeks compensation arise out of a contract entered into by ABV.

Table 27. NCC's claim

<u>Claim element</u>	<u>Claim amount</u> <u>(USD)</u>
Contract losses	16,943,171
Financial losses	9,646,302
<u>Total</u>	<u>26,589,473</u>

A. Contract losses

1. Facts and contentions

373. NCC seeks compensation in the amounts of IQD 2,080,831 and USD 10,252,396 (total USD 16,943,171) for contract losses allegedly incurred in connection with a contract entered into between ABV and the Ministry of Housing and Construction of Iraq (the "Ministry") on 27 June 1981.

374. The contract was for the construction of 25 shelters, including the central operation hall and building of the Civil Defence Directorate. The contract was to be executed within 1,278 days (approximately 42 months) from the date of the signing of the contract. The maintenance period of 18 months was to commence after the issue of the preliminary certificate of handing over of the project works.

375. The claim is for additional costs incurred and for unrefunded deposits paid to the Ministry.

(a) Additional costs

376. NCC seeks compensation in the amount of IQD 1,980,831 and USD 8,901,285 for additional costs due to contract delays, delays in payment, and variation orders for which it has allegedly not been paid. NCC asserted that it filed three separate claims with the Ministry in 1985, 1986 and 1987 in an attempt to recover these amounts.

377. NCC alleged that the Ministry verbally approved the amounts claimed, with the exception of the claim for delayed payments. Agreement on the amount of this claim was left pending further discussions in the second half of 1990.

(b) Unrefunded deposits

378. NCC seeks compensation in the amounts of IQD 100,000 and USD 1,351,111 for unrefunded deposits.

379. NCC converted an amount of IQD 400,000 (payable to NCC in United States dollars) at the rate of exchange IQD 1 = USD 3.77778, which amounts to USD 1,511,112. However, the rate of exchange stated in the contract is IQD 1 = USD 3.377778, which amounts to only USD 1,351,111. The Panel has considered the lower figure.

380. NCC asserted that after the expiry of the maintenance period, inspection of the sites for the final handing over was carried out between September 1985 and November 1986. NCC also asserted that the Ministry issued the final handing over certificates and paid the retention monies after deducting a cash deposit of IQD 20,000 for each site. The deposits were to be repaid to NCC after the expiry of three years from the date of the final handing over certificates. These deposits were retained by the Ministry as a guarantee against construction related defects.

381. NCC alleged that it had to extend its guarantee obligations. The final inspection, at which time the deposits were to be returned, was scheduled to take place between 10 and 12 March 1990. At the final inspection, NCC alleged that 17 sites were approved and another seven were approved after "minor adjustments" by 15 May 1990. NCC also alleged that inspection of the last site, "Site no. 16", was scheduled for 6 June 1990, but was never performed, as a result of Iraq's invasion and occupation of Kuwait.

2. Analysis and valuation

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

383. The Panel finds that for the purpose of the "arising prior to" clause of paragraph 16 of Security Council resolution 687 (1991), NCC had a contract with Iraq.

(a) Additional costs

384. The Panel notes that the inspection of the sites for the final handing over was carried out between September 1985 and November 1986 and in an attempt to recover the additional costs incurred, NCC filed three separate claims with the Ministry in the years 1985, 1986 and 1987. NCC provided copies of the claims. The Panel finds that the work to which the claim for additional costs relates was performed prior to 2 May 1990.

385. The Panel recommends no compensation for additional costs incurred in respect of work performed prior to 2 May 1990, as these costs relate to debts and obligations of Iraq arising prior to 2 August 1990 and, therefore, are outside the jurisdiction of the Commission.

(b) Unrefunded deposits

386. As evidence of its claim for unrefunded deposits, NCC provided a copy of the contract and a sample copy of a "Final Handing over Report for Site No. 1" dated 5 August 1985. This report indicates that the deposit amount of IQD 20,000 was to be retained as a guarantee against construction related defects and was payable to NCC after the guarantee period of three years.

387. Since the inspection of the sites in connection with the final handing over was carried out between September 1985 and November 1986, the Panel finds that the guarantee period for all the sites should have expired, in the normal course of events, by November 1989. NCC submitted an internally generated list dated 15 March 1990, which indicates that the guarantee period for 24 sites expired by December 1989 and for the remaining one site on 10 February 1990.

388. NCC alleged that it had to extend its guarantee obligations, and that the deposit amounts for all the twenty five sites was to be returned after all the sites were finally approved by the Ministry. NCC did not provide evidence supporting these allegations. NCC also failed to provide evidence that the sites were finally approved on the dates it alleges and that the last site could not be approved due to Iraq's invasion and occupation of Kuwait. The Panel notes that on 16 May 2000, the Commission received a reply to the article 34 notification from the Permanent Mission of Sweden on behalf of NCC. The reply stated that NCC would not be able to submit any further information or evidence because its archives in Iraq were destroyed during Iraq's invasion and occupation of Kuwait.

389. In the absence of any evidence to the contrary, the Panel finds that the work to which the claim for unrefunded deposits (for the 24 sites, which were allegedly approved) relates was performed prior to 2 May 1990.

390. The Panel recommends no compensation for unrefunded deposits in respect of work performed prior to 2 May 1990, as they relate to debts and obligations of Iraq arising prior to 2 August 1990 and are, therefore, outside the jurisdiction of the Commission.

391. With respect to the claim for unrefunded deposit for Site no. 16, the Panel notes that the site had not been approved. Further, NCC also failed to provide sufficient evidence to demonstrate that the inspection allegedly scheduled for 6 June 1990, nearly two months before Iraq's invasion, could not be performed as a result of Iraq's invasion and occupation of Kuwait. The Panel recommends no compensation for the unrefunded deposit relating to Site no. 16.

3. Recommendation

392. The Panel recommends no compensation for contract losses.

B. Financial losses

1. Facts and contentions

393. NCC seeks compensation in the amount of IQD 3,000,000 (USD 9,646,302) for financial losses. The amount claimed was allegedly held in its bank account with the Rafidain Bank in Iraq.

394. Article 10 of the contract with the Ministry permitted ABV/NCC "to transfer the extra amount remaining in Iraq and which is in the Iraqi Currency to any other currency to be selected by him in accordance with the regulations of the Central Bank of Iraq". In December 1988, NCC requested the Ministry to approve the transfer of IQD 3,000,000 held in its bank account with the Rafidain Bank.

395. On 13 December 1988, the Ministry forwarded NCC's request to the Central Bank of Iraq to "take the necessary measures". NCC asserted that the transfer instructions given by the Ministry to the Central Bank of Iraq were never effected.

2. Analysis and valuation

396. As evidence of its financial losses, NCC provided a copy of a letter to the Ministry dated December 1988, requesting the Ministry to approve the transfer of IQD 3,000,000. NCC also provided a copy of a letter from the Ministry dated 13 December 1988, requesting the Central Bank of Iraq to take "the necessary measures". However, NCC failed to provide evidence demonstrating the link between the Central Bank of Iraq's failure to approve the transfer and Iraq's invasion and occupation of Kuwait. Further, NCC also failed to provide evidence of its ownership and the balance of its bank account with the Rafidain Bank as at 2 August 1990.

397. The Panel finds that NCC did not submit sufficient information or documentation to support its asserted losses. NCC failed to demonstrate

that the account is no longer in existence or that NCC has been denied access to the funds. Further, given the period of almost eighteen months between the correspondence regarding the proposed transfer of the funds and 2 August 1990, the Panel finds that NCC did not demonstrate that the exchange and transfer was prevented by Iraq's invasion and occupation of Kuwait.

3. Recommendation

398. The Panel recommends no compensation for financial losses.

C. Recommendation for NCC

Table 28. Recommended compensation for NCC

<u>Claim element</u>	<u>Claim amount</u> <u>(USD)</u>	<u>Recommended</u> <u>compensation</u> <u>(USD)</u>
Contract losses	16,943,171	nil
Financial losses	9,646,302	nil
<u>Total</u>	<u>26,589,473</u>	<u>nil</u>

399. Based on its findings regarding NCC's claim, the Panel recommends no compensation.

XVII. FUSAS FUAT SOYLU CONSTRUCTION AND INDUSTRY INC. CO.

400. Fusas Fuat Soylu Construction and Industry Inc. Co. ("Fusas") is a corporation organised according to the laws of Turkey. At the time of Iraq's invasion and occupation of Kuwait, Fusas operated in the construction industry. The Panel notes that in March 1998, Fusas' name was changed to Fusas Fuat Soylu Insaat Taahhut Turizm Tekstil Mermer Sanayi Ve Ticaret Anonim Sirketi.

401. In the "E" claim form, Fusas sought compensation in the amount of USD 4,403,320 for contract losses, real property losses and payment or relief to others.

402. The Panel has reclassified elements of Fusas' claim for the purposes of this report. The Panel therefore considered the amount of USD 4,403,320 for contract losses, loss of tangible property, payment or relief to others and interest, as follows:

Table 29. Fusas' claim

<u>Claim element</u>	<u>Claim amount</u> (USD)
Contract losses (contracts with Iraqi parties)	1,791,839
Contract losses (contracts with non-Iraqi parties)	539,316
Loss of tangible property	1,033,110
Payment or relief to others	322,000
Interest	717,055
<u>Total</u>	<u>4,403,320</u>

A. Contract losses (contracts with Iraqi parties)

1. Facts and contentions

403. Fusas seeks compensation in the amount of USD 1,791,839 for contract losses. The losses were allegedly incurred in connection with various contracts for projects in Iraq.

(a) Unpaid promissory notes

404. Fusas seeks compensation in the amount of USD 1,489,506 for eleven unpaid promissory notes issued between 1988 and 1990, with two-year maturities. These promissory notes relate to various contracts that were performed between 1984 and 1990.

405. Fusas asserted that prior to Iraq's invasion and occupation of Kuwait, a banking agreement was signed between the Central Banks of Turkey and

Iraq, "granting two years deferred payment terms to Iraq for contracts executed by Turkish contractors in Iraq". Fusas further asserted that, prior to 1988, regular payments were received from the Central Bank of Iraq. However, thereafter, due to the financial crisis in Iraq, the Central Bank of Iraq stopped making payments due on the promissory notes. On 2 August 1990, Fusas held nine unpaid promissory notes. Two further promissory notes were issued in September 1990, which Fusas alleged also remain unpaid.

(b) Amounts due for calcium carbide exported to Iraq

406. Fusas seeks compensation in the amount of USD 46,013 for 1,525 barrels of calcium carbide, which it exported to Iraq on 15 August 1989. The purchaser, Eastern Gases Company of Baghdad, paid the Rafidain Bank of Iraq in Iraqi dinars; however, the bank was unable to transfer the amount in United States dollars as it did not have the authorisation to do so. Fusas asserted that the amount remains unpaid due to Iraq's invasion and occupation of Kuwait.

(c) Al-Rasheed Detergent Project

407. Fusas seeks compensation in the amount of USD 86,080 in relation to the Al-Rasheed Detergent Project. The claim comprises USD 28,800 for unpaid invoices in respect of 12 per cent of the project works, which it had allegedly completed, and USD 57,280 relating to an unrecovered performance bond.

(i) Unpaid invoices

408. Fusas stated that on 25 July 1990, it entered into a contract with the State Enterprise for Vegetable Oils of Iraq (the "State Enterprise") for the erection of equipment and machinery and electrical installations. The contract, however, appears to have been signed on 15 July 1990. The contract period was 180 days. Fusas asserted that the project site was handed to it on 16 June 1990 and that it commenced work on that day. The contract value was IQD 155,000 and USD 240,000.

409. The erection of the equipment was to be carried out in accordance with the drawings and technical specifications provided by Ballestra SpA of Italy ("Ballestra"). Ballestra was also the main supplier of the plant and equipment. The terms of the contract entered into between Fusas and the State Enterprise provides that the State Enterprise would authorise Fusas to enter into a contract with Ballestra so that Ballestra would make the payment of the United States dollar portion of the contract directly to Fusas.

410. Fusas alleged that after Iraq's invasion and occupation of Kuwait, it was compelled to continue work at the project site until all the machinery was erected. Fusas asserted that, by 17 October 1990, all of its personnel had departed from Iraq.

411. At the time of its departure from Iraq, Fusas had completed 12 per cent of the project works, and consequently seeks compensation for 12 per cent of the United States dollar portion of the contract value, which amounts to USD 28,800.

(ii) Unrecovered performance bond

412. The contract between Fusas and the State Enterprise required Fusas to provide a performance bond, payable at the rate of 8 per cent of the total contract value. The performance bond was to be released upon the issue of the final acceptance certificate. However, Fusas asserted that half the value of the performance bond was to be released on the completion of the project works (the expected date was 16 December 1990) and the remaining half was to be released a year later on 16 December 1991. Fusas asserted that the performance bond in the amount of USD 57,280 could not be released because Fusas was unable to complete the project works due to Iraq's invasion and occupation of Kuwait.

(d) Rusafa-Hilla Grain Silo Projects

413. Fusas seeks compensation in the amount of USD 170,240 for an unrecovered performance bond issued in respect of the Rusafa-Hilla Grain Silo Projects.

414. On 9 December 1987, Fusas entered into a contract with Al-Mansoor Contracting Co. of Iraq for the execution of erection works of machinery and equipment. The total contract value was IQD 665,000. The project works were to be completed within a period of 12 months for the Rusafa grain silo and five months for the Hilla extension. Fusas alleged that due to certain problems, an extension of one year and 25 days was granted and the provisional acceptance certificate was issued on 4 January 1990.

415. Fusas asserted that it gave a performance bond for 8 per cent of the total contract value of USD 2,128,000 (IQD 665,000 at an exchange rate of IQD 1 = USD 3.2), which amounts to USD 170,240.

416. In the article 34 notification, Fusas was requested to provide additional information relating to its claim for the unreleased performance bond. In its reply, Fusas asserted that its claim for the unreleased performance bond should have been USD 172,355 and not USD 170,240. However, Fusas specifically stated that it was not revising its claim and is seeking compensation only for USD 170,240. In its reply, Fusas indicated that it was seeking compensation for 4 per cent of IQD 665,000 (IQD 26,600) relating to the unreleased performance bond; IQD 20,658 for unpaid retention money; and IQD 6,454 for another performance bond relating to extra works.

2. Analysis and valuation

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

(a) Unpaid promissory notes

418. Fusas provided a schedule marked as "Doc.11.1". This schedule indicates all of the promissory notes were issued for projects that were executed for various Iraqi employers. Copies of the promissory notes provided by Fusas state that the Central Bank of Iraq was the guarantor. The promissory notes also state that they were "negotiable only among Turkish commercial banks as agreed upon between C.B.I. and C.B.R.T. [Central Bank of Iraq and Central Bank of Republic of Turkey] otherwise with prior written consent of C.B.I.". The Panel therefore finds that for the purpose of the "arising prior to" clause of paragraph 16 of Security Council resolution 687 (1991), Fusas had a contract with Iraq.

419. "Doc.11.1" also indicates the contracts the promissory notes relate to and the dates when the contracts were completed. Fusas also provided copies of the contracts for promissory notes 10 and 11 issued in September 1990 along with their provisional acceptance certificates.

420. Of the 11 promissory notes, nine relate to contracts that were completed prior to 2 May 1990. Seven of these promissory notes were issued in 1988 and two in 1989. Although the tenth promissory note was not issued until September 1990, the Panel finds that Fusas' performance under the related contract was completed in February 1990.

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

422. With respect to the eleventh promissory note, Fusas asserted that it was for retention relating to a contract for the construction of building "B602 in 39B Project". This contract was signed on 13 March 1986 between Fusas and the Director of State Organisation for Industrial Projects of Iraq. Clause 5(b) of the contract provides for the release of the balance 50 per cent of the retained amount on the issue of the final acceptance certificate. Fusas asserted that the final acceptance of the project works was completed on 8 September 1990. Fusas did not provide a copy of the final acceptance certificate nor any other evidence, which would establish that the project works were finally accepted on 8 September 1990. The Panel finds that Fusas failed to provide sufficient evidence to substantiate its claim, and therefore, how it suffered any loss.

423. The Panel recommends no compensation for contract losses relating to all of the eleven unpaid promissory notes.

424. The Panel finds that for the purposes of the Security Council resolution 687 (1991), the deferred payments agreement did not have the effect of novating the debt.

(b) Amounts due for calcium carbide exported to Iraq

425. As evidence of its claim for contract losses, Fusas provided a copy of a letter dated 5 April 1990 from the Treasury and Foreign Trade Consultancy, Banking and Foreign Exchange General Directorate of Turkey. This letter confirmed that as of that date Fusas had not received the amount of USD 46,013 due on the project. Fusas also provided a copy of the custom exit declaration dated 15 August 1989 and a copy of a letter dated 30 January 1990 from the Rafidain Bank. This letter indicates that the purchaser, Eastern Gases Company of Baghdad, had paid the Rafidain Bank in Iraqi dinars, however, the Rafidain Bank was unable to pay Fusas in United States dollars because it did not have the authorisation to do so.

426. In this case, the goods were exported to Iraq on 15 August 1989. Rafidain Bank's letter dated 30 January 1990 clearly indicates that the amount of USD 46,013 had not been paid to Fusas because the Rafidain Bank did not have the authorisation to do so. Fusas failed to provide sufficient evidence to establish that the Rafidain Bank was unable to obtain the authorisation to transfer the amount in United States dollars as a direct result of Iraq's invasion and occupation of Kuwait. The Panel therefore finds that Fusas failed to provide sufficient evidence to establish that the loss was a direct result of Iraq's invasion and occupation of Kuwait.

427. The Panel recommends no compensation for amounts due for calcium carbide exported to Iraq.

(c) Al-Rasheed Detergent Project

428. The Panel finds that for the purpose of the "arising prior to" clause of paragraph 16 of Security Council resolution 687 (1991), Fusas had a contract with Iraq.

(i) Unpaid invoices

429. In support of its claim for unpaid invoices in the amount of USD 28,800, Fusas provided a copy of the contract and a copy of a letter dated 28 June 1990 from Ballestra confirming that Ballestra would pay Fusas the amount of USD 240,000. This letter further states that payments would be made to Fusas after Ballestra receives payments from the State Enterprise "...against [Fusas'] monthly invoices accompanied by monthly reports duly countersigned by [Ballestra's] Site Manager". Fusas also

provided a copy of a letter dated 19 February 1991 from Ballestra confirming that 12 per cent of the project works were completed.

430. In this case, the Panel finds that the work was performed after 2 May 1990 and is, therefore, within the jurisdiction of the Commission. The Panel further finds that Fusas had completed 12 per cent of the project works before it left Iraq. Therefore, in principle, the amount of USD 28,800 is compensable. However, Fusas provided a copy of a letter dated 4 February 1993 from the Exim Bank of Turkey, which indicates that Fusas received partial compensation. This letter states that against a claim of USD 28,800, Fusas has been partially compensated and the amount of USD 17,280 could not be credited to Fusas' account by the bank due to "lack of financial resources". As the amount of USD 17,280 remains unpaid from the claimed amount of USD 28,800, the Panel therefore recommends compensation in the amount of USD 17,280.

(ii) Unrecovered performance bond

431. In support of its claim for the unrecovered performance bond, Fusas provided a copy of the general conditions of the contract and a copy of a financial statement of its branch office in Iraq that shows an amount of IQD 126,843 due for guarantees and performance bonds. Fusas converted this amount to United States dollars at the exchange rate IQD 1 = USD 3.2 resulting in the amount of USD 405,897. Fusas asserted that the amount of USD 405,897 represents the sum of all guarantees not released as at 31 December 1990, and USD 57,280 of this amount is the performance bond for the Rasheed Detergent Plant.

432. In the article 34 notification, Fusas was requested to provide a copy of the performance bond and proof of actual payment. In its reply, Fusas stated that it did not have a copy of the guarantee. Fusas was also unable to provide any documentary or other evidence that might constitute proof of payment. The Panel notes that Fusas failed to provide a copy of the performance bond, and finds that the financial statement provided by Fusas of its branch office in Iraq for the year 1990 does not constitute sufficient evidence of payment. The Panel therefore finds that Fusas failed to provide sufficient evidence to substantiate its claim, and therefore, how it suffered any loss.

(d) Rusafa-Hilla Grain Silo Projects

433. Fusas stated that the Al-Mansoor Contracting Co. was a "Government Co. of Iraq". Additionally, the terms of the contract clearly stipulate that the United States dollar portion of the contract value was to be paid through promissory notes in accordance with the provisions of the banking agreement signed between the Central Banks of Iraq and Turkey. This evidence satisfies the Panel that Fusas had contracted with an Iraqi state agency.

434. As evidence of its claim for contract losses, Fusas provided a copy of the contract along with the General Terms and Conditions and a copy of the final invoice dated "20 Haz 1989". As proof of payment for the unrecovered performance bond, Fusas provided a copy of a financial statement for its branch office in Iraq.

435. In this case, the contract was signed on 9 December 1987. Contract works were to be finished by 9 December 1988. Fusas alleged that due to certain minor problems, it was granted an extension of 1 year and 25 days and that the provisional acceptance certificate was issued on 4 January 1990. Clause 17 of the General Terms and Conditions provides for a maintenance period of 12 months from the taking over certificate. The documents provided by Fusas indicate that 10 per cent of the contract price, which Fusas asserted relates to retention was to be released upon the issue of the final acceptance certificate. As the provisional acceptance certificate was allegedly issued on 4 January 1990, the maintenance period should have expired on 4 January 1991 after which the final acceptance certificate would have been issued.

436. With respect to its claim for retention monies, Fusas did not provide a copy of the provisional acceptance certificate nor sufficient evidence, which would establish that it was given an extension of one year and 25 days. The Panel therefore finds that Fusas failed to provide sufficient evidence to establish that it was entitled to receive the retention monies upon the issue of the final acceptance certificate on 4 January 1991. With respect to its claim for the unrecovered performance bond, Fusas failed to provide a copy of the performance bond or any independent proof of actual payment. The Panel finds that Fusas failed to provide sufficient evidence to substantiate its claim, and therefore, how it suffered any loss.

3. Recommendation

437. The Panel recommends compensation in the amount of USD 17,280 for contract losses (contracts with Iraqi parties).

B. Contract losses (contracts with non-Iraqi parties)

1. Facts and contentions

438. Fusas seeks compensation in the amount of USD 539,316 for contract losses. The losses were allegedly incurred in connection with two contracts.

(a) Equipment for Al-Rasheed Detergent project

439. Fusas seeks compensation in the amount of USD 35,900 for unpaid retention monies. On 26 January 1990, Ballestra placed an order with Fusas to manufacture equipment and materials for the project for a lump sum price of USD 359,000. Fusas asserted that it received payment of 90 per cent of the total price. In accordance with the terms of the order, the 10 per

cent balance was to be paid to Fusas at the time of "plant acceptance". Fusas further asserted that the project could not be completed due to Iraq's invasion and occupation of Kuwait and therefore seeks compensation for the 10 per cent balance (USD 35,900) of the unpaid amount.

(b) Equipment for Mamoon Detergent project

440. Fusas seeks compensation in the amount of USD 448,416 for unpaid amounts relating to an order placed by Ballestra for the fabrication of steel structures, equipment and vessels for the project. Fusas asserted that due to Iraq's invasion and occupation of Kuwait the manufactured equipment could not be exported to Iraq. Fusas also seeks compensation in the amount of USD 55,000 for storage expenses (total amount claimed USD 503,416).

441. Ballestra placed an order dated 6 June 1990 for the supply of equipment and materials for the project, for a lump sum price of USD 587,810. Manufactured goods were to be delivered "FOT [free on truck] Istanbul" on 15 August 1990. Contract terms were cost and freight to Baghdad, to be delivered after 20 days.

442. Fusas asserted that it commenced fabrication of the steel structures and equipment after the issue of the letter of intent on 13 April 1990 so those goods could be dispatched to Iraq in the first week of September 1990.

443. After Iraq's invasion and occupation of Kuwait, Ballestra in its facsimile dated 30 August 1990 requested Fusas to "put on hold" the order until 1 December 1990. Ballestra also informed Fusas that if the order was not resumed by 1 December 1990, it still wished to buy certain items from Fusas for an amount of USD 113,942. Ballestra purchased an item from the order and certain other items and paid to Fusas the amount of USD 113,942.

444. Fusas seeks compensation in the amount of USD 448,416 for building units 9, 10, 11, 12 and 20 because Ballestra did not purchase this equipment, as it could not be shipped to Iraq due to Iraq's invasion and occupation of Kuwait.

445. Fusas also seeks compensation in the amount of USD 55,000 for expenses incurred on "storage protection and safeguard expenses". Fusas asserted that the "structures and equipment fabricated for Mamoon plant was stored outdoors in Fusas fabrication shop in Turkey". The documents provided by Fusas indicate that it is claiming the amounts of USD 35,680 for storage expenses and USD 19,320 for expenses incurred on sand blasting and painting the equipment.

2. Analysis and valuation

(a) Equipment for Al-Rasheed Detergent project

446. As evidence of its claim for contract losses, Fusas provided a copy of the order dated 26 January 1990 from Ballestra and a copy of a facsimile dated 10 December 1991, also from Ballestra, which confirms that the unpaid balance of 10 per cent of the total amount could not be paid to Fusas as the project works could not be completed due to Iraq's invasion and occupation of Kuwait. Fusas also provided a copy of a letter dated 13 June 1994 from "VAKIFBANK" of Turkey to the Turkish Chamber of Commerce, which confirms that the 10 per cent balance of the total amount remains unpaid as of that date. Fusas also provided customs documents and truck consignment notes, which indicate that the fabricated equipment was sent to Iraq.

447. This Panel has held that retention monies are a form of security held by an employer to ensure fulfilment by a contractor of its obligations to complete the project and to remedy defects after take over of the completed project by the employer.

448. The Panel notes that Fusas had received 90 per cent of the contract value and the 10 per cent balance was to be paid at the time of plant acceptance. According to the terms of the order, Fusas had to manufacture certain equipment and transport it to Iraq. The documents provided by Fusas indicate that the equipment had been sent to Iraq. The Panel also notes that Ballestra has not filed a claim for compensation with the Commission. The Panel finds that the project was ongoing on 2 August 1990 and that Fusas' inability to collect the 10 per cent balance was the direct result of Iraq's invasion and occupation of Kuwait. The Panel therefore recommends compensation in the amount of USD 35,900 for unpaid retention monies.

(b) Equipment for Mamoon Detergent project

449. As evidence of its claim for contract losses, Fusas provided a copy of the order and a copy of a facsimile dated 27 June 1990 from Fusas to Ballestra indicating that the goods would be partially ready for shipment by 30 August 1990. It also provided a copy of a facsimile dated 12 July 1990 from Ballestra in which Ballestra insisted that the goods should be ready for shipment by the first week of September 1990. Fusas also provided a copy of a facsimile dated 30 August 1990 from Ballestra requesting it to hold the order until 1 December 1990. It also provided a copy of a facsimile dated 17 September 1990 from Ballestra, asking Fusas to use the ready equipment for other projects if work at the Mamoon project would not proceed due to Iraq's invasion and occupation of Kuwait.

450. In support of its claim for storage expenses, Fusas provided copies of correspondence exchanged with Ballestra.

451. In this case, the order was placed on 6 June 1990 and Fusas asserted that it commenced the fabrication of the equipment after the letter of intent was issued on 13 April 1990. The Panel notes that in July 1990, Ballestra insisted that the equipment should be ready for shipment in the first week of September 1990. On 30 August 1990, Ballestra asked Fusas to hold the order until 1 December 1990. The Panel therefore finds that the goods fabricated by Fusas could not be shipped to Iraq as a direct result of Iraq's invasion and occupation of Kuwait. The Panel also notes that Ballestra has not filed a claim for compensation with the Commission.

452. In the article 34 notification, Fusas was requested to provide the net cost of the equipment because the contract price included cost and freight to Baghdad. In its reply, Fusas advised that it would have incurred expenditure in the amount of USD 43,700 in freight costs, packing costs, and stamps and export duties. Fusas also advised that it had sold the equipment as scrap for a total value of USD 57,678. In arriving at an appropriate recommendation for compensation, the Panel finds that amounts should be deducted from the claimed amount of USD 448,416 to take account of (i) expenses which Fusas would have incurred in shipping the goods to Iraq, and (ii) the sale proceeds realised by Fusas. This results in a figure of USD 347,038, which the Panel recommends be compensated to Fusas.

453. With respect to its claim for expenses incurred on sand blasting or painting the equipment, Fusas failed to provide any invoices or other proof which would establish that it incurred the alleged expenses. The Panel therefore finds that Fusas failed to provide sufficient evidence to substantiate its claim, and therefore, how it suffered any loss.

454. With respect to its claim for storage expenses, Fusas asserted that it did not "pay the sum of USD 35,680 to another party. It was the assessed loss of Fusas". While the Panel accepts that Fusas may not have paid the claimed amount to another party nonetheless the Panel finds that Fusas has failed to establish that it incurred any expenses in relation to this loss item, and therefore, how it suffered any compensable loss.

3. Recommendation

455. The Panel recommends compensation in the amount of USD 382,938 for contract losses (contracts with non-Iraqi parties).

C. Loss of tangible property

1. Facts and contentions

456. Fusas seeks compensation in the amount of USD 1,033,110 for loss of tangible property. This amount includes USD 283,110 for loss of inventory, USD 250,000 for loss of camp, and USD 500,000 for loss of vehicles. Fusas asserted that it had to leave behind all its property at the time it left Iraq.

(a) Loss of inventory

457. With respect to its claim for loss of inventory, Fusas appears to be claiming for office furniture, electrical equipment and assorted electronic items that it left in its office in Baghdad, Iraq.

(b) Loss of camp

458. With respect to its claim for loss of camp, Fusas appears to be claiming for heavy camp equipment and plant. Fusas stated that it had lodging facilities, a labour camp and a stockyard in the "Meshtel Quarter of Baghdad at the border at 39 B Project opposite to Duty Free shop". The camp could house 200 people and was equipped with a restaurant. The camp also had mechanical workshops and a stockyard "full of erection vehicles, cranes, tools and equipment kept in 30 Nos. of 40 feet containers".

(c) Loss of vehicles

459. Fusas appears to be claiming for the loss of 11 vehicles, which it allegedly left behind in Iraq.

2. Analysis and valuation

(a) Loss of inventory

460. In support of its claim for loss of inventory, Fusas provided its financial accounts produced for the Iraqi authorities for the years ending 31 December 1989 and 1990. It also provided an internally generated inventory list dated 3 August 1990. This list indicates the description of the items and their quantity.

(b) Loss of camp

461. In support of its claim for loss of camp, Fusas provided copies of two police reports dated 13 May 1991 and 4 December 1991, respectively. These reports indicate that certain items (i.e. electronic typewriter, photocopying machine, garments and assorted electronic items) were stolen from its camp. It also provided a list entitled "Machine and Outfit List" dated June 1989. This list describes the equipment, the quantity and the model and the name of the manufacturer.

(c) Loss of vehicles

462. In support of its claim for loss of vehicles, Fusas provided an English translation of a letter dated 27 September 1991 from the company secretary of its branch office in Iraq, which states that a small truck, a photocopying machine and two typewriters were stolen from the branch office. It also provided a list of 11 vehicles dated August 1990, which indicates the model, the chassis and engine numbers, the temporary permit

numbers and the dates of "latest extension of car permit by General Customs Direct" of Iraq.

463. In order to establish a loss of tangible property claim, this Panel has found that a claimant must submit evidence such as certificates of title, receipts, purchase invoices, bills of lading, insurance documents, customs records, inventory lists, asset registers, hire purchase or lease agreements, transportation documents and other relevant documents generated prior to 2 August 1990. A claimant must also provide evidence which would establish that it paid for the tangible property or confirm the value of the tangible property. The Panel has taken note of Fusas' assertion that it left all its documents in its Baghdad office.

464. The Panel finds that Fusas failed to submit sufficient evidence to demonstrate its title to or right to use the assets and the value of those assets. The Panel finds that Fusas failed to submit sufficient evidence to substantiate its loss of tangible property claim.

3. Recommendation

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

D. Payment or relief to others

1. Facts and contentions

466. Fusas seeks compensation in the amount of USD 322,000 for payment or relief to others. Fusas asserted that it incurred expenditure in the amount of USD 300,000 for compensation paid to its employees, and USD 22,000 for evacuation costs.

(a) Compensation paid to employees

467. Fusas asserted that at the time of Iraq's invasion and occupation of Kuwait, it had 46 employees working at the Al-Rasheed Detergent project site. The employer refused to issue exit visas and compelled Fusas to continue working. Fusas further asserted that it managed to negotiate with the employer to issue two to three exit visas every week for its employees and the last of its employee left Iraq on 17 October 1990.

468. Fusas also asserted that it "faced extreme pressure from the families of these labours" and upon their return to Turkey, it had to pay compensation to them. In its reply to the article 34 notification, Fusas stated that compensation was paid due to "both goodwill and obligation" and also because it had terminated the contracts of its employees.

469. Fusas further asserted that it used to give bonuses to its employees. Incentives were given to employees depending upon their length of service, performance and the profits obtained from the projects. Bonuses were given to employees even prior to Iraq's invasion and occupation of Kuwait.

470. Fusas asserted that it gave compensation in the amount of USD 300,000 in 3 instalments of USD 100,000 each to its employees for the months of August, September and October 1990. Fusas also indicated that all its employees received USD 2,500 as compensation from the Commission.

(b) Evacuation costs

471. Fusas seeks compensation in the amount of USD 22,000 for expenses incurred on evacuating its employees from Iraq. Fusas did not provide much information relating to this loss element. However, in its reply to the article 34 notification, it stated that it had to pay exorbitant amounts both to hire taxis to transport its employees and to obtain exit visas.

2. Analysis and valuation

(a) Compensation paid to employees

472. As evidence of its claim for payment or relief to others, Fusas provided signed copies of payroll records for the months of August, September and October 1990. It also provided an incomplete copy of the payroll for the month of July 1990, and reports, which indicate that bonuses were paid even prior to Iraq's invasion and occupation of Kuwait. It also provided a list containing the names of the 46 employees, and copies of the exit visas from the passports of only seven employees, which indicates that they departed from Iraq on different dates.

473. Fusas failed to explain why it continued to pay compensation to all the 46 employees from August to October 1990, when two to three employees departed from Iraq every week and the last employee left Iraq on 17 October 1990.

474. The total amount of wages paid to the 46 employees in the month of July 1990 was USD 36,653. Therefore, the payment of USD 100,000 each month was much higher than the usual payroll of USD 36,653, which Fusas confirmed. Fusas failed to provide a breakdown of the amounts paid as salaries, bonuses and amounts paid "due to goodwill and obligation". It also failed to provide a breakdown of amounts paid to the employees due to the termination of their contracts. The Panel also notes that the signatures of the employees on the payroll records for the months of August to October 1990 do not match with the signatures on the regular monthly payroll records.

475. Fusas also failed to explain how the payment of salaries and bonuses to the employees on their return to Turkey for the months of August, September and October 1990 was due or incurred as a direct result of Iraq's invasion and occupation of Kuwait.

476. The Panel therefore finds that Fusas failed to provide sufficient evidence to substantiate its claim or that the alleged loss was suffered as a direct result of Iraq's invasion and occupation of Kuwait.

(b) Evacuation costs

477. Fusas did not provide any evidence in support of its claim for this loss element nor did it explain how the claimed amount was calculated. The Panel therefore finds that Fusas failed to provide sufficient evidence to substantiate its claim, and therefore, how it suffered any losses.

3. Recommendation

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

E. Interest

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

F. Recommendation for FusasTable 30. Recommended compensation for Fusas

<u>Claim element</u>	<u>Claim amount</u> (USD)	<u>Recommended compensation</u> (USD)
Contract losses (contracts with Iraqi parties)	1,791,839	17,280
Contract losses (contracts with non-Iraqi parties)	539,316	382,938
Loss of tangible property	1,033,110	nil
Payment or relief to others	322,000	nil
Interest	717,055	(--)
<u>Total</u>	<u>4,403,320</u>	<u>400,218</u>

480. Based on its findings regarding Fusas' claim, the Panel recommends compensation in the amount of USD 400,218. In relation to Fusas' claim for contract losses (contracts with Iraqi parties), the Panel finds the date of loss to be 2 August 1990. In relation to Fusas' claim for contract losses (contracts with non-Iraqi parties) the Panel finds the date of loss to be 2 August 1990, for the unpaid retention monies relating to the Al-Rasheed Detergent project, and 30 August 1990 for the unpaid amounts relating to the Mamoon Detergent project.

XVIII. HASAN CANPOYRAZ INSAAT MÜTEAHHITLIGI

481. Hasan Canpoyraz Insaat Müteahhitligi ("Hasan") is a corporation organised according to the laws of Turkey operating in the construction industry.

482. In the "E" claim form, Hasan sought compensation in the amount of USD 2,475,273 for contract losses and loss of tangible property.

483. For the purposes of this report, the Panel has reclassified an amount of USD 400,000, which Hasan had included in its claim for loss of tangible property, as loss of real property. Accordingly, the Panel considered the amount of USD 2,475,273 for contract losses, loss of real property and loss of tangible property, as follows:

Table 31. Hasan's claim

<u>Claim element</u>	<u>Claim amount</u> <u>(USD)</u>
Contract losses	1,802,952
Loss of real property	400,000
Loss of tangible property	272,321
<u>Total</u>	<u>2,475,273</u>

A. Contract losses

1. Facts and contentions

484. Hasan seeks compensation in the amount of USD 1,802,952 for contract losses. The losses were allegedly incurred in connection with three contracts for projects in Iraq.

485. First, on 18 April 1982, Hasan entered into a contract with the Ministry of Irrigation, Public Institution of Land Improvement of Iraq (the "Ministry") for the execution of the Kut Drainage Scheme project in Iraq (the "Kut Project"). The contract price was USD 10,717,562.

486. Second, on 22 June 1982, Hasan entered into a contract with the Ministry for the execution of the Razzaza Main Drainage project in Iraq (the "Razzaza Project"). The contract price was USD 4,467,404.

487. Third, on 14 April 1982, the Ministry awarded the Iskandaria Mahaweel Scheme Stage Two contract (the "Mahaweel Project") to a consortium comprising Hasan and Do™an Aksel, another Turkish company. Hasan asserted that due to the effects of the war between Iran and Iraq, Do™an Aksel withdrew from the consortium on 1 January 1984. Do™an Aksel assigned its share of the contract to Hasan. The contract price was USD 14,999,435.

(a) Kut Project and Razzaza Project

488. Hasan asserted that the project works for the Kut Project finished on 1 November 1984 and that the final acceptance took place on 1 November 1985.

489. Hasan asserted that the project works for the Razzaza Project finished in November 1984 and that the final acceptance took place in November 1985.

490. Hasan also asserted that the unpaid retention monies for both of the projects were to be released after it had obtained the necessary clearance certificates from the authorities in Iraq. Hasan stated that the required clearance certificates could not be obtained until 1990 due to the war between Iran and Iraq and the administrative delays caused by the authorities in Iraq.

491. Hasan asserted that the unpaid retention monies amount to USD 196,000, and USD 426,020 for the Razzaza and Kut Projects, respectively. Hasan alleged that due to the economic effects of the war between Iran and Iraq, the Central Banks of Iraq and Turkey agreed that payments for Hasan's work would be made through bonds with a two-year maturity date. Hasan further alleged that on 22 July 1990, two bonds were presented to the Central Bank of Iraq. However, as a result of Turkey's embargo on Iraq the operation was frozen by the Central Bank of Iraq. Hasan seeks compensation in the amounts of USD 196,000 and USD 426,020 relating to the unpaid retention monies for both the projects, respectively.

(b) Mahaweel Project

492. Hasan asserted that the preliminary acceptance of the project works took place in January 1985. However, the final acceptance of the project works never took place due to Iraq's invasion and occupation of Kuwait. Hasan seeks compensation for five types of contract losses, as set out in the following table:

Table 32. Hasan's claim for contract losses in relation to the Mahaweel Project

<u>Claim element</u>	<u>Claim amount</u> (USD)
Promissory notes	300,352
Performance bond	372,163
Commission and interest	25,417
Final payment	99,820
Retention monies	383,180
<u>Total</u>	<u>1,180,932</u>

493. Hasan seeks compensation in the amount of USD 300,352 for unpaid promissory notes. Hasan asserted that the Ministry issued two promissory notes to the consortium in the amounts of USD 200,235 (payable on 26 October 1989) and USD 100,117 (payable on 9 September 1989), respectively. Hasan contended that the promissory notes were not honoured and the Central Bank of Iraq had promised to pay them in August 1990.

494. Hasan seeks compensation in the amount of USD 372,163 for a performance bond issued in respect of the project, which it alleged that the Ministry failed to release.

495. Hasan seeks compensation in the amount of USD 25,417 paid to the Halk Bank of Turkey for the issue of the performance bond.

496. Hasan seeks compensation in the amount of USD 99,820 relating to the amount stated in the "final certificate". Hasan asserted that the Ministry failed to release the amount.

497. Hasan seeks compensation in the amount of USD 383,180 relating to unpaid retention monies.

2. Analysis and valuation

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

499. The Panel finds that for the purpose of the "arising prior to" clause of paragraph 16 of Security Council resolution 687 (1991), Hasan had, in all cases, a contract with Iraq.

(a) Kut Project and Razzaza Project

500. As evidence of its claim for contract losses, Hasan provided work completion certificates for both of the projects. The Panel finds that the work to which the claim for unpaid retention monies relates was performed prior to 2 May 1990.

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

(b) Mahaweel Project

502. As evidence of its claim for contract losses, Hasan provided copies of both the promissory notes and a demand letter from the Halk Bank of Turkey relating to commission for the performance bond. Hasan did not provide any other documentation in support of its claim for contract losses. The Panel

notes that Hasan stated all its relevant documents were left behind when it departed from Iraq.

503. The project works were preliminarily accepted in January 1985. However, due to Iraq's invasion and occupation of Kuwait, the final acceptance never took place. The Panel finds that all work under the contract was performed prior to 2 May 1990. The Panel also finds that Hasan failed to provide sufficient evidence to demonstrate that the final acceptance of the project works could not take place due to Iraq's invasion and occupation of Kuwait. The Panel consequently finds that all the contract losses resulting from the alleged failure to issue the final acceptance certificate were not the direct result of Iraq's invasion and occupation of Kuwait.

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

3. Recommendation

505. The Panel recommends no compensation for contract losses.

B. Loss of real property

1. Facts and contentions

506. Hasan seeks compensation in the amount of USD 400,000 for loss of real property. Hasan asserted that its prefabricated buildings, workshop and dormitories were damaged during Iraq's invasion and occupation of Kuwait.

2. Analysis and valuation

507. As sole evidence of its claim for real property losses, Hasan provided a copy of an asset register for June 1985, which had been certified by the Turkish embassy in Baghdad. In the article 34 notification, Hasan was requested to provide evidence of the amounts of the real property losses incurred. Hasan was also requested to provide evidence of its ownership of, or other proprietary interest in, the real property at the time the loss or damage occurred. In its reply, Hasan stated that it did not have time to secure documents at the time of Iraq's invasion and occupation of Kuwait as its priority was to leave Iraq as quickly as possible and that it left all its documents in Iraq at the time when it departed.

508. The Panel finds that the 1985 asset register constitutes insufficient evidence of Hasan's title to or right to use the property alleged to have been destroyed and the existence of the property in Iraq as of 2 August 1990.

3. Recommendation

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

C. Loss of tangible property

1. Facts and contentions

510. Hasan seeks compensation in the amount of USD 132,500 and DEM 218,400 (USD 139,821) (total amount claimed USD 272,321) for loss of tangible property. It asserted that it was not permitted to re-export some of its machinery and equipment, which was "left unattended in our construction sites in Iraq". However, in the Statement of Claim, Hasan stated that the machinery and equipment was kept in Iraq to be used if new work was to be undertaken.

2. Analysis and valuation

511. As evidence of its claim for loss of tangible property, Hasan provided two lists entitled "Fixtures to be Exported from Iraq", which were certified by the Turkish embassy in Baghdad in 1985 and 1986. These lists contain the description of equipment and machinery, the year of purchase of the items, and their value in 1985 and 1986. Hasan also provided purchase invoices relating to certain machinery and equipment.

512. In its reply to the article 34 notification, Hasan narrowed the scope of its claim stating that except for the "prefabricated buildings and their contents", all the other items on the list certified in 1985 were re-exported to Turkey. With respect to the items on the list certified in 1986, Hasan stated that most of the items were re-exported back to Turkey and the remaining items were at the project site "awaiting final acceptance".

513. Hasan also advised that the machinery and equipment were imported into Iraq on a temporary basis. However, it failed to provide customs certificates to the Panel because "no customs certificates [were] on hand therefore no submission [was] possible".

514. The Panel finds that Hasan failed to provide sufficient evidence to demonstrate that the machinery and equipment alleged to have been lost was in Iraq in 1990 or that the alleged loss was suffered due to Iraq's invasion and occupation of Kuwait.

3. Recommendation

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

D. Recommendation for Hasan

Table 33. Recommended compensation for Hasan

<u>Claim element</u>	<u>Claim amount</u> <u>(USD)</u>	<u>Recommended</u> <u>compensation</u> <u>(USD)</u>
Contract losses	1,802,952	nil
Loss of real property	400,000	nil
Loss of tangible property	272,321	nil
<u>Total</u>	<u>2,475,273</u>	<u>nil</u>

516. Based on its findings regarding Hasan's claim, the Panel recommends no compensation.

XIX. KISKA INSAAT TAAHHÜDÜ ISLERI A.S.
(KISKA CONSTRUCTION CORPORATION)

517. Kiska Insaat Taahhüdü Isleri A.S. ("Kiska") is a corporation organised according to the laws of Turkey operating in the construction industry. Kiska seeks compensation in the amount of USD 2,920,161 for contract losses.

Table 34. Kiska's claim

<u>Claim element</u>	<u>Claim amount</u> (USD)
Contract losses	2,920,161
<u>Total</u>	<u>2,920,161</u>

A. Contract losses

1. Facts and contentions

518. Kiska seeks compensation in the amount of USD 2,920,161 for contract losses. The losses were allegedly incurred in connection with two contracts relating to projects in Iraq.

519. On 10 July 1981, Kiska entered into a contract with the Ministry of Irrigation and Agriculture, State Organization for Irrigation and Reclamation Projects of Iraq (the "Ministry") for the execution of the Abu Ghraib Irrigation, Drainage and Road Systems Project in Iraq (contract number ISK 2157) (the "Abu Ghraib Project"). The contract price was IQD 24,030,338.

520. On 27 July 1983, Kiska entered into a sub-contract with Al-Sanea, a Kuwaiti construction company, pursuant to which Kiska agreed to perform sub-contracting works on the Muqdadiya-Diyala Irrigation and Drainage Project in Baghdad (the "Drainage Project"). The sub-contract stipulated that Al-Sanea would nominate Kiska as the "nominated sub-contractor". In the Statement of Claim, Kiska stated that it was the nominated sub-contractor of the Ministry of Irrigation and Agriculture of Iraq.

(a) Abu Ghraib Project

521. The project works were completed on 22 February 1985. Kiska asserted that, from the beginning of 1983, the Ministry had difficulty in making payments under the contract. It further asserted that certain payments were made in the form of oil. In 1986, the Central Banks of Turkey and Iraq entered into a deferred payment agreement pursuant to which the Ministry issued 14 promissory notes with a two-year maturity date. Payment was made in United States dollars. Kiska asserted that although payments were delayed, 12 promissory notes were eventually honoured. Kiska seeks compensation in the amount of USD 917,671 relating to the amounts due under

the remaining two promissory notes, which it alleged were not paid due to Iraq's invasion and occupation of Kuwait. The two unpaid promissory notes were issued on 14 March 1988 and 19 September 1988, respectively.

(b) Drainage Project

522. According to the sub-contract, the project works were to be completed within 16 months. Kiska asserted that the project works were carried out between 23 July 1983 and 31 December 1988. Kiska failed to explain the reasons for the delay in the completion of the project works. Kiska further asserted that after the completion of the project works, on 12 February 1989, it reached a "reconciliation" with Al-Sanea, which showed that the amount of USD 2,002,490 was owed to Kiska.

523. Kiska seeks compensation in the amount of USD 2,002,490 for losses allegedly incurred on the Drainage Project. The claim is for unpaid amounts due for work performed (USD 1,252,345) and unpaid retention monies (USD 750,145).

524. Kiska stated that the retention monies remained unpaid because both Al-Sanea and Kiska were not in Iraq when the maintenance period expired. The Panel notes that the sub-contract provided for the release of the retention monies at the commencement of the maintenance period. Under the terms of the sub-contract, Kiska also had to comply with the requirements of the maintenance period provided for in the main contract between Al-Sanea and the Ministry of Irrigation and Agriculture.

2. Analysis and valuation

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

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

(a) Abu Ghraib Project

527. As evidence of its claim for contract losses, Kiska provided a copy of the work completion certificate, which indicates that the project works were completed on 22 February 1985. It also provided copies of the promissory notes and correspondence from the Central Bank of Turkey confirming that the promissory notes remain unpaid. The Panel finds that the work to which the claim for unpaid promissory notes relates, was performed prior to 2 May 1990.

528. The Panel recommends no compensation for contract losses in respect of work performed prior to 2 May 1990, as they relate to debts and obligations

of Iraq arising prior to 2 August 1990 and, therefore, are outside the jurisdiction of the Commission.

529. The Panel finds that for the purpose of Security Council resolution 687 (1991), the deferred payment agreement entered into between the Central Banks of Turkey and Iraq did not have the effect of novating the debts.

(b) Drainage Project

530. As evidence of its claim for contract losses, Kiska provided a copy of the sub-contract with Al-Sanea and the reconciliation dated 12 February 1989.

531. With respect to its claim for unpaid retention monies in the amount of USD 750,145, Kiska failed to provide a copy of the main contract between the Ministry of Irrigation and Agriculture and Al-Sanea, which contained the terms relating to the maintenance period. It also failed to provide information about or evidence of the commencement and the completion dates of the maintenance period. The Panel therefore finds that Kiska failed to provide sufficient evidence to substantiate its claim, and, therefore, how it suffered the alleged loss. The Panel recommends no compensation for unpaid retention monies.

532. With respect to its claim for the remaining amount of USD 1,252,345, the Panel finds that all work under the sub-contract was performed prior to 2 May 1990.

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

3. Recommendation

534. The Panel recommends no compensation for contract losses.

B. Recommendation for Kiska

Table 35. Recommended compensation for Kiska

<u>Claim element</u>	<u>Claim amount</u> <u>(USD)</u>	<u>Recommended</u> <u>compensation</u> <u>(USD)</u>
Contract losses	2,920,161	nil
<u>Total</u>	<u>2,920,161</u>	<u>nil</u>

535. Based on its findings regarding Kiska's claim, the Panel recommends no compensation.

XX. ZDH ENTERNASYONAL INSAAT TAAHHÜT ORTAKLIGI
(ZDH INTERNATIONAL CONSTRUCTION GROUP)

536. ZDH Enternasyonal Insaat Taahhüt Ortakligi ("ZDH") is a corporation organised according to the laws of Turkey operating in the construction industry. ZDH seeks compensation in the amount of DEM 3,668,072 (USD 2,348,317) for contract losses.

Table 36. ZDH's claim

<u>Claim element</u>	<u>Claim amount</u> (USD)
Contract losses	2,348,317
<u>Total</u>	<u>2,348,317</u>

A. Contract losses

1. Facts and contentions

537. ZDH seeks compensation in the amount of DEM 3,668,072 (USD 2,348,317) for contract losses. The losses were allegedly incurred in connection with a contract which it entered into with the Ministry of Irrigation and Agriculture, State Commission for Irrigation and Reclamation Projects, of Iraq (the "Ministry") on 24 December 1979.

538. The contract was for the execution of Abu Ghraib Irrigation, Drainage and Road Systems Projects. The work completion certificate provided by ZDH indicates that the contract price was IQD 25,102,934.

539. ZDH asserted that from 1983 onwards, the Ministry had difficulty in effecting payments under the contract, which eventually led to the signing of a banking agreement between the Central Banks of Iraq and Turkey in 1986. ZDH stated that, pursuant to the terms of this banking agreement, on 27 December 1986, the Ministry issued a promissory note for a total value of DEM 3,668,072 covering the balance remaining owing to ZDH. The promissory note was due for payment on 27 December 1988. ZDH alleged that the promissory note was not honoured due to Iraq's invasion and occupation of Kuwait.

2. Analysis and valuation

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

541. The Panel finds that for the purpose of the "arising prior to" clause of paragraph 16 of Security Council resolution 687 (1991), ZDH had a contract with Iraq.

542. ZDH did not provide a copy of the contract. The work completion certificate indicates that the project works were completed on 27 October 1984 and the maintenance period expired on 27 October 1985. The Panel finds that the work to which the claim for unpaid promissory note relates was performed prior to 2 May 1990.

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

544. The Panel finds that for the purpose of Security Council resolution 687 (1991), the banking agreement did not have the effect of novating the debts.

3. Recommendation

545. The Panel recommends no compensation for contract losses.

B. Recommendation for ZDH

Table 37. Recommended compensation for ZDH

<u>Claim element</u>	<u>Claim amount</u> <u>(USD)</u>	<u>Recommended</u> <u>compensation</u> <u>(USD)</u>
Contract losses	2,348,317	nil
<u>Total</u>	<u>2,348,317</u>	<u>nil</u>

546. Based on its findings regarding ZDH's claim, the Panel recommends no compensation.

XXI. RECOMMENDATIONS

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

- (a) Walter Bau-Aktiengesellschaft: NIL;
- (b) Wayss & Freytag AG: NIL;
- (c) Westinghouse-Controlmatic GmbH: NIL;
- (d) Wolff & Müller GmbH & Co KG: NIL;
- (e) Ansal Properties and Industries Ltd.: NIL;
- (f) M/s. Bhandari Builders (Private) Limited: NIL;
- (g) M/s. Bhandari Builders (Private) Limited: NIL;
- (h) Byucksan Development Co., Ltd.: NIL;
- (i) Nam Kwang Engineering & Construction Co., Ltd.: NIL;
- (j) Internationale Funderingsgroep bv: USD 1,720,000;
- (k) National Construction Company (Pakistan) Limited: NIL;
- (l) Mercator - Mednarodna Trgovina, d.d. (Mercator - International Trade, Ltd.): NIL;
- (m) NCC International AB: NIL;
- (n) Fusas Fuat Soylu Construction and Industry Inc. Co.: USD 400,218;
- (o) Hasan Canpoyraz Insaat Müteahhitligi: NIL;
- (p) Kiska Insaat Taahhüdü Isleri A.S. (Kiska Construction Corporation): NIL; and
- (q) ZDH Enternasyonal Insaat Taahhüt Ortakligi (ZDH International Construction Group): NIL.

Geneva, 12 December 2000

(Signed)

Mr. David Mace
Commissioner

(Signed)

Mr. Werner Melis
Chairman

(Signed)

Mr. Sompong Sucharitkul
Commissioner
