UNITED NATIONS

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Security Council

Distr.
GENERAL

S/AC.26/2001/18
28 September 2001

Original: ENGLISH

UNITED NATIONS
COMPENSATION COMMISSION
GOVERNING COUNCIL

REPORT AND RECOMMENDATIONS MADE BY THE PANEL OF COMMISSIONERS CONCERNING THE SIXTH INSTALMENT OF “E1” CLAIMS

GE.01-64938

CONTENTS

List of claimants

Name	Defined
Gulf Petrochemical Industries Company	“GPIC”
Arab Petroleum Investments Corporation	“APICORP”
Botas Petroleum Pipeline Corporation	“BOTAS”
Turkish Petroleum Refineries Corporation	“TUPRAS”
National Iranian Oil Company	“NIOC”
Iranian Offshore Oil Company	“IOOC”
National Iranian Tanker Company	“NITC”

List of currencies

Name	Defined
Deutsche mark	DEM
Pound sterling	GBP
Iranian rial	IRR
Kuwaiti dinar	KWD
United States dollar	USD

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Introduction

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

2. This report contains the determinations and recommendations of the Panel with respect to the sixth instalment of "E1" claims, consisting of originally five, and finally seven, claims submitted to the Panel by the Executive Secretary of the Commission pursuant to article 32 of the Rules (the "sixth instalment" claims). The issue of the increased number of claims will be addressed in paragraphs 200 - 201.

3. The sixth instalment claims were filed by energy sector companies operating in the State of Bahrain ("Bahrain"), the Islamic Republic of Iran ("Iran"), the Kingdom of Saudi Arabia ("Saudi Arabia") and the Republic of Turkey ("Turkey"). The claimants in this instalment advance claim elements arising from the disruption of their businesses and the cost of related mitigation efforts, allegedly caused directly by Iraq's invasion and occupation of Kuwait.

4. The original claims included in this report are listed in the following table. The claim amounts shown in this table are the aggregate of all amounts claimed in category "E" claim forms filed by the claimants.

Table 1. The sixth instalment of "E1" claims

Claimant	Claim number	Original claim amount (USD)	Submitting Government
Gulf Petrochemical Industries Co.	4000071	10,000,000	Bahrain
Arab Petroleum Investments Corp.	4002828	107,386,853	Saudi Arabia
Botas Petroleum Pipeline Corp.	4001649	1,039,240,274	Turkey
Turkish Petroleum Refineries Corp.	4001712	13,569,556	Turkey
National Iranian Oil Co.	4001340	1,135,804,812	Iran
Total		2,306,001,495	

5. The claims are reflected net of any claims for interest or claim preparation costs. In a letter dated 6 May 1998, the Panel was notified by the Executive Secretary that the Commission intends to resolve the issue of claim preparation costs at a future date. The question of interest is dealt with separately in paragraphs 339 - 344 below. The Panel has rounded figures to the nearest whole currency unit.

I. PROCEDURAL HISTORY OF THE CLAIMS

6. The role and functions of panels of Commissioners operating within the framework of the Commission and the nature and purpose of the proceedings conducted by the panels are both discussed by the Panel in the "Report and recommendations made by the Panel of Commissioners concerning the second Instalment of 'E1' Claims" (S/AC.26/1999/10) (the "Second 'E1' Report"), paragraphs 3 - 4.

7. The secretariat of the Commission (the "secretariat") commenced a detailed preliminary assessment of the sixth instalment claims in February 2000. As a result of this review, a number of formal deficiencies in the claim files were identified, as were a number of areas where further documentation or information would be required from the claimants. Accordingly, detailed notifications with respect to these deficiencies were issued to each of the claimants in the sixth instalment pursuant to article 34 of the Rules (the "article 34 notifications").

8. Pursuant to article 16 of the Rules, the Executive Secretary of the Commission reported to the Governing Council the claims information and new significant factual and legal issues raised by the sixth instalment claims in his thirtieth report dated 17 February 2000. This report was circulated to all Governments and international organizations that filed claims before the Commission and to the Government of the Republic of Iraq ("Iraq"). Pursuant to article 16(3) of the Rules, a number of Governments, including Iraq, submitted information concerning the report to the Commission. This information has been taken into consideration by the Panel during its review of the claims.

9. The Panel issued the first procedural orders relating to the claims on 31 March 2000. In view of the complexity of the issues raised, the volume of the documentation underlying the claims and the amount of compensation sought by the claimants, the Panel classified each of the claims as "unusually large or complex" claims within the meaning of article 38(d) of the Rules.

10. The Panel also instructed the secretariat to transmit to the Government of the Republic of Iraq ("Iraq") the documents filed by the claimants with the claims and invited Iraq to submit its comments on the claims, together with any documentation on which Iraq might wish to rely in support of its comments.

11. In its review of the claims, the Panel has employed the full range of investigative procedures available to it under the Rules. For some claims, the Panel has also been assisted by the responses of the claimants to article 34 notifications, written and verbal questioning and requests for documents. Iraq has filed specific comments on, legal analyses of, and evidence pertaining to the claimed losses. Iraq has also addressed the compensability of some of the individual claim elements.

12. Because of the complexity of the claims, the Panel engaged consultants with expertise in accounting, insurance, marine transportation and petrochemical operations, marketing and pricing to assist it in its review and evaluation of those claim elements found to be compensable.

13. After receiving responses to the article 34 notifications, the Panel directed technical inspection missions to the premises of two of the claimants, National Iranian Oil Company ("NIOC") and Botas Petroleum Pipeline Corporation ("BOTAS"), to review documents and other evidence and to interview witnesses. During these technical inspection missions, the claimants produced numerous witnesses for interview and many thousands of documents for review.

14. The initial work raised specific legal issues and identified areas of the claims for which further factual investigation or evidence was required. To address this need, the Panel prepared questions and formal requests for additional evidence from the claimants. Such questions and requests (collectively referred to herein as "interrogatories") typically sought clarification of statements in the claim or additional documentation regarding the claimed losses. The claimants responded to the Panel's interrogatories with additional information.

15. A procedural order was issued on 25 October 2000 inviting Iraq and claimants NIOC and BOTAS to attend oral proceedings, and to present arguments and evidence on certain limited issues presented in the NIOC and BOTAS claims (the "oral proceedings"). The oral proceedings were held on 10 January 2001.

16. In the procedural order, each claimant and Iraq were given up to one hour to make a principal address to the Panel and an additional one-half hour in which to reply to the points raised in the other's principal address. Prior to the oral proceedings, the claimants and Iraq submitted additional documents, briefs and memoranda. The claimants and Iraq made substantive oral presentations on the identified issues and responded to questions put by the Panel. Iraq specifically reiterated its objections to the procedures of the Commission in every written submission, and at the beginning of its statements on the day of the oral proceedings. The specific issues raised by the Panel, as well as the main arguments advanced by the claimants and Iraq at the oral proceedings, are summarised in the BOTAS section of the report at paragraphs 104 - 107, and the NIOC section of the report at paragraphs 195 - 199.

17. After reviewing the claims, the evidence submitted with the claims, the claimants' responses to the article 34 notifications, the claimants' and Iraq's responses to interrogatories and the arguments presented at the oral proceedings, the Panel made the recommendations outlined in this report.

II. LEGAL FRAMEWORK

A. Applicable law and criteria

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

> "In considering the claims, Commissioners will apply Security Council resolution 687 (1991) and other relevant Security Council resolutions, the criteria established by the Governing Council for

particular categories of claims, and any pertinent decisions of the Governing Council. In addition, where necessary, Commissioners shall apply other relevant rules of international law."

B. Liability of Iraq

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

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

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

C. Evidentiary requirements

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

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

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

D. Exclusions

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

1. Supplements or amended claims

24. The Governing Council determined that, after 1 January 1997, the Commission would not accept any category "E" claims for filing 2/ and that, after 11 May 1998, the Commission would not admit any unsolicited supplements to previously filed claims in category "E" 3/, with the exception of environmental claims. Accordingly, the Panel finds that new claims submitted after 1 January 1997, either for new types

of loss or additional claim elements, are inadmissible as time barred. The Panel also finds that information or documentation submitted in responses to article 34 notifications or procedural orders, or unsolicited supplements delivered after 11 May 1998, may clarify or correct calculations regarding existing claim elements but may not state new loss elements or increase the total amount claimed.

2. The trade embargo and related measures

25. The Governing Council decided, in paragraph 6 of decision 9 (S/AC.26/1992/9), that losses caused solely by the trade embargo and related measures are not compensable. However, where the full extent of a loss arose as a direct result of Iraq's invasion and occupation of Kuwait, it is compensable notwithstanding the fact that it also may be attributable to the trade embargo and related measures. The implications of this decision will be discussed more fully in paragraphs 114 - 146 of this report.

III. CLAIM OF GULF PETROCHEMICAL INDUSTRIES COMPANY, (BSC)

A. Facts and contentions

26. Gulf Petrochemical Industries Company, B.S.C. ("GPIC") was incorporated in Bahrain as a joint stock company on 3 March 1983. GPIC's shares are held in equal proportions between Bahrain National Oil Company of Bahrain, Petrochemical Industries Corporation of Kuwait ("PIC") and Saudi Basic Industries Company of Saudi Arabia ("SABIC"). GPIC operates a petrochemical complex on Sitra Island, Bahrain, that consists of three plants: an ammonia plant, a methanol plant and a utility plant. Through this complex, GPIC manufactures and exports ammonia and methanol. GPIC sells these products pursuant to a marketing arrangement with two of its shareholders, PIC and SABIC.

27. Under the marketing arrangement, GPIC first provides preliminary (pro-forma) invoices to PIC and SABIC for the "gross sales value" of the ammonia and methanol based on the terms of sale negotiated by PIC and SABIC with the customers. PIC and SABIC then sell and deliver the ammonia and methanol to the customers. From the realised sales proceeds, PIC and SABIC deduct "direct selling expenses" for marketing and delivering the ammonia and methanol. These expenses include shipping, insurance, banking costs and marketing commissions. PIC and SABIC receive marketing commissions at a fixed percentage. GPIC's financial records show that GPIC eventually receives "netback revenue", which is the gross sales value of ammonia and methanol less the direct selling expenses.

28. GPIC claims that, as a result of the threat posed by military operations during Iraq's occupation of Kuwait, and the inherent hazards in a potential war situation posed by ammonia, a highly toxic gas, it did not operate its ammonia plant on Sitra Island. Although it continued the operations of its methanol plant, the shutdown of the ammonia plant allegedly affected the production level of the methanol plant, due to technical linkages between the two plants. Therefore, following the shutdown of the ammonia plant, GPIC claims that it lost profits from sales of both ammonia and methanol. "Profits" are defined, for purposes of this claim, as revenues from sales of ammonia and methanol less all expenses incurred to

produce, distribute and market these products. In addition, GPIC claims that it incurred certain extraordinary expenses such as evacuation costs, purchase of safety equipment, gas masks and additional security services. GPIC also claims additional financing costs and overhead costs that it allegedly incurred due to Iraq's invasion and occupation of Kuwait.

29. GPIC initially claimed USD 10,000,000. Subsequently, GPIC amended and reduced its claim to USD 6,081,392. This amended claim amount was inaccurately calculated by GPIC, and should be re-stated as USD 6,081,390. This amendment takes into account duplications between the lost profit claim and the claim for overhead costs. GPIC duly omitted overhead costs from its amended claim amount. It claimed that its amendment is based on more accurate evidence, as GPIC used the time given for the interrogatories to prepare the claim with more detailed information. The original and amended claim amounts are shown in table 2.

Table 2. GPIC's claim

Claim element	Claim amount (USD)	Amended claim amount (USD)
Loss of profits:	7,245,842	5,412,414
Extraordinary expenses:		
Cost of safety contingency measures	288,717	288,717
Evacuation costs	12,259	12,259
Additional financing cost	368,000	368,000
Overhead costs	2,085,182	0
Total extraordinary expenses	2,754,158	668,976
Total	10,000,000	6,081,390 a/

a/ As described in paragraph 29, GPIC's claim elements total USD 6,081,390, but the claim figure quoted by GPIC is USD 6,081,392. The Panel based its investigation on the former, more accurate amount.

B. Iraq's response

30. Iraq raises general objections to GPIC's claim, asserting two main arguments. First, Iraq asserts that GPIC did not establish sufficient causation between its invasion of Kuwait and the losses that GPIC claims to have suffered. Second, Iraq asserts that GPIC has not submitted sufficient or accurate evidence of such alleged losses.

31. In a more specific objection, Iraq alleges that the prices of ammonia and methanol rose abnormally from 2 August 1990 to February 1991 due to its invasion of Kuwait, and that the profits that GPIC earned from these increased prices exceeded the claim amount of GPIC's alleged losses.

32. The Panel took note of Iraq's specific comments and, in the course of the verification and analysis of this claim, has addressed these issues. The Panel discusses Iraq's objections in further detail in the following paragraphs.

C. Loss of profits from ammonia and methanol

33. GPIC initially claimed lost profits of USD 7,245,842. Subsequently, GPIC amended and reduced its claim to USD 5,412,415. In amending its claim amount, GPIC made a calculation error, and the Panel finds that its claim amount should be re-stated as USD 5,412,414. This amended claim amount consists of losses from GPIC's two plant shutdowns, the first of which occurred between 14 August 1990 and 27 August 1990, and the second of which occurred between 17 January 1991 and 18 February 1991. GPIC claims losses of USD 1,277,042 from the first shutdown and losses of USD 4,135,372 from the second shutdown. The details of the losses are as follows:

Table 3. GPIC's loss of profits

Claim element	Claim amount (USD)	Amended claim amount (USD)
14-27 August 1990 shutdown:		
Lost profit		
Ammonia plant	1,350,683	918,483
Methanol plant	82,743	85,954
	1,433,426	1,004,437
Increased production costs		
Natural gas	217,447	201,510
Other	0	71,095
	217,447	272,605
Sub-total	1,650,873	1,277,042
17 January to 18 February 1991 shutdown:		
Lost profit		
Ammonia plant	4,420,998	3,194,329
Methanol plant	640,169	623,421
	5,061,167	3,817,750
Increased production costs		
Natural gas	533,802	209,538
Other	0	108,084
	533,802	317,622
Sub-total	5,594,969	4,135,372
Total	7,245,842	5,412,414

1. First shutdown

34. On 9 August 1990, GPIC's ammonia plant was shut down due to a technical maintenance problem. GPIC claims that, when the maintenance work to overcome this problem was completed, the plant was ready to restart on 14 August 1990. However, GPIC claims that, due to Iraq's recent invasion of Kuwait, the dangers associated with shutdown and restart operations in general, and the inherent hazards associated with ammonia, a highly toxic gas, GPIC decided not to restart the ammonia plant until 27 August 1990 (the "first shutdown"). During the first shutdown, GPIC claims that it lost production of 15,586 metric tons of ammonia.

35. This lost production volume is calculated in two steps. First, GPIC uses an average ammonia production rate of 1,190 metric tons per day, multiplied by approximately 13 days of shutdown, which amounts to a lost production volume of 15,488 metric tons of ammonia. This production rate appears to be based on the average daily production rate in August prior to the shutdown on 9 August 1990. Next,

GPIC calculates that it lost a further 98 metric tons of ammonia, during the resumption of production to full capacity when the ammonia plant was re-started. GPIC applies a netback price of USD 82.99 per metric ton to this lost quantity to arrive at a lost sales value of USD 1,293,482. From this figure, GPIC deducts saved variable costs of USD 374,999, thereby claiming a loss of profit from ammonia sales of USD 918,483 for the first shutdown.

36. During the first shutdown of the ammonia plant, GPIC continued producing methanol at the methanol plant, albeit at a lower level of production. GPIC alleges that, at the time, the safety risk in producing methanol was significantly lower than the risk associated with producing ammonia. However, the shutdown of the ammonia plant resulted in a diminished supply of carbon dioxide, a by-product of ammonia production. Carbon dioxide is usually channelled from the ammonia plant to the methanol plant to produce 125 metric tons of methanol per day. As a result, GPIC claims that it lost 1,544 metric tons of methanol production. GPIC calculates the lost production volume using the rate of 125 metric tons of methanol per day, multiplied by approximately 13 days of carbon dioxide shortage. GPIC applies a netback price of USD 77.28 per metric ton to this lost quantity to arrive at a lost sales value of USD 119,320. From this figure, GPIC deducts saved variable costs of USD 33,366, thereby claiming a loss of profit from methanol sales of USD 85,954 from the first shutdown.

37. In association with the first shutdown, GPIC claims that it incurred increased costs of USD 272,605, comprising inefficient natural gas consumption costs of USD 201,510 and increased variable costs (electricity, catalysts and chemicals) of USD 71,095.

2. Second shutdown

38. The second shutdown of the ammonia plant occurred on 17 January 1991, again allegedly due to the increased level of military operations and the safety risks associated with the ammonia plant. GPIC resumed production on 18 February 1991 when “it became clear that the land campaign to liberate Kuwait had proved successful beyond doubt and no retaliatory actions from Iraq were forthcoming” (the “second shutdown”).

39. During the second shutdown, GPIC claims that it lost production of 38,979 metric tons of ammonia. To calculate this lost production volume, GPIC uses an average ammonia production rate of 1,220 metric tons per day, multiplied by approximately 31 days of shutdown. This production rate appears to be based on the average daily production rate in January 1991 prior to the second shutdown. GPIC applies a netback price of USD 105.59 per metric ton to this lost quantity to arrive at lost sales of USD 4,115,793. From this figure, GPIC deducts saved variable costs of USD 921,464, thereby claiming a loss of profit from ammonia sales of USD 3,194,329 for the second shutdown.

40. In this claim period, GPIC continued producing methanol while the ammonia plant was shut down, albeit at a limited level. As described in paragraph 36, supra, the shutdown of the ammonia plant resulted

in a diminished supply of carbon dioxide, a by-product of ammonia production needed for the additional production of methanol. However, during the second shutdown period, the front-end of the ammonia plant operated for a number of days to supply carbon dioxide to the methanol plant. GPIC claims that it lost 5,385 metric tons of methanol. According to GPIC, it used a different methodology to calculate the lost production volume of methanol during the second shutdown because the methanol production rate varied widely during this period. First, GPIC calculated an "expected" production level of methanol of 26,774 metric tons using an average production rate of 1,217 metric tons of methanol per day, multiplied by 22 days of carbon dioxide shortage. Then, GPIC deducted the volume of methanol actually produced during the same period, arriving at the lost production volume of 5,385 metric tons of methanol. GPIC applied a netback price of USD 139.10 per metric ton to this lost quantity to arrive at a lost sales value of USD 749,053. From this figure, GPIC deducted saved variable costs of USD 125,632, thereby claiming a loss of profit from methanol sales of USD 623,421 for the second shutdown.

41. In association with the second shutdown, GPIC claims that it incurred increased costs of USD 317,622, comprising inefficient natural gas consumption costs of USD 209,538 and increased variable costs (electricity, catalysts and chemicals) of USD 108,084.

3. Verification and analysis – loss of profits

42. In support of this claim element, GPIC submitted production, sales and inventory statistics, as well as management and engineers' reports for the periods between 1988 and 1992.

43. As a preliminary matter, the Panel finds that GPIC established a sufficient causal link between Iraq's invasion of Kuwait and GPIC's potential losses arising out of the plant shutdowns. The Panel finds that, as a petrochemical company, GPIC manages hazardous products such as ammonia, a highly toxic gas, and methanol, a highly flammable liquid. Accordingly, GPIC's operations were acutely exposed to the increased risk of military activities in the region, and the Panel finds it reasonable to link Iraq's invasion of Kuwait to GPIC's decisions, as described herein, with regard to its ammonia plant. 4/

44. Upon a review of the evidence, the Panel finds that GPIC initially shut down its ammonia plant on 9 August 1990 due to technical maintenance problems. The maintenance work was completed and the plant was ready to restart on 14 August 1990. The Panel finds, for the reasons described in paragraphs 34 and 43, that GPIC made a reasonable decision to keep the plant shut down until 27 August 1990.

45. The Panel also finds that GPIC continued the operations of its methanol plant during this period because of a lower safety risk at the methanol plant. Therefore, the Panel finds that, during the first shutdown period, GPIC lost its ammonia output and the additional methanol that it could have produced using the carbon dioxide by-product from its ammonia plant. Based on a review of the production data and engineering reports, the Panel finds that GPIC's production level declined by 15,586 metric tons of ammonia and by 803 metric tons of methanol as a result of the first shutdown.

46. The Panel finds that, during the second shutdown period, GPIC undertook maintenance work that otherwise would have been scheduled for April and May 1991. GPIC subsequently made up for its lost production in the second shutdown period by operating during the scheduled maintenance period. GPIC's production records show that, after the second shutdown period, GPIC continued production until 1992, when the next maintenance period was scheduled. The Panel finds, therefore, that GPIC mitigated its production loss sustained in the second shutdown period to such an extent that its production levels in 1991 were not affected by the second shutdown period.

47. Having established that GPIC incurred a production loss of 15,586 metric tons of ammonia and 803 metric tons of methanol during its first shutdown in August 1990, the Panel examined the profits that GPIC would have realised had the production loss not occurred. Accordingly, the Panel reviewed the prices of ammonia and methanol that GPIC used to estimate its loss of profit and GPIC's estimated saved costs, as well as any increased costs that arose out of the first shutdown.

48. Based on the supporting documentation provided, the Panel calculated GPIC's loss based upon the netback prices GPIC used for ammonia of USD 82.99 per metric ton, and for methanol of USD 77.28 per metric ton. Applying these prices to the above volume of production loss, GPIC would have obtained revenues of USD 1,293,482 from ammonia and USD 62,056 from methanol. The Panel also calculated that GPIC would have saved variable production costs of USD 276,340 (based on variable costs of USD 17.73 per metric ton) for ammonia and USD 16,124 (based on variable costs of USD 20.08 per metric ton) for methanol. On this basis, GPIC could have obtained additional profits of USD 1,017,142 from ammonia and USD 45,932 from methanol. In addition, the Panel reviewed the reasonableness of GPIC's claimed excess costs for the first shutdown. Based on a review of the production data, gas consumption reports and management reports, the Panel calculated that, due to the first shutdown, GPIC incurred excess gas consumption costs of USD 46,134, excess catalyst and chemicals costs of USD 34,900 and no excess electricity costs. Taking these excess costs into account, the Panel calculated that GPIC's total loss of profit due to the first shutdown would be USD 1,144,108 based upon the prices used by the claimant.

49. The Panel finds, however, that the loss of profits alleged to have arisen in August 1990 does not represent GPIC's real loss as a corporate entity because it continued most of its operations during the entire period of Iraq's invasion and occupation of Kuwait. The lost production period in August 1990 is too short a reference period to be used for assessing all of the effects of Iraq's invasion of Kuwait on GPIC. Therefore, the Panel finds that, in order to put GPIC in the position in which it would have been but for Iraq's invasion of Kuwait, it is appropriate that the verification encompass the period in which GPIC allegedly suffered losses due to Iraq's invasion of Kuwait, and the period during which benefits might have been derived by GPIC from the same cause. The Panel also finds that any such loss must be calculated by estimating GPIC's profit level in a hypothetical no-invasion scenario and comparing it to the actual profits that GPIC earned during the whole period in which GPIC's operations were affected.

50. Accordingly, the Panel reviewed GPIC's accounts and sales data to ascertain whether GPIC actually did incur a loss of profits from the sales of ammonia and methanol over the entire period. As GPIC sustained most of its alleged losses between August 1990 and March 1991, the Panel defined this period as "the claim period".

51. First, the Panel estimated the volume of ammonia and methanol that GPIC could have sold if Iraq's invasion and occupation of Kuwait had not occurred (the "no-invasion volume"). Taking into account the considerable fluctuations in GPIC's sales volumes, the frequency of shutdowns and accounting differences in recording sales by GPIC, the Panel calculated that GPIC's no-invasion volume during the claim period for ammonia would have been approximately 234,695 metric tons, and that the no-invasion volume for methanol during the claim period would have been approximately 271,941 metric tons. During the same period, the Panel calculated that GPIC actually sold approximately 219,109 metric tons of ammonia, and approximately 271,138 metric tons of methanol.

52. The Panel estimated "no-invasion netback prices" of ammonia and methanol using GPIC's average netback prices for ammonia and methanol from August to the end of March for the years 1989 to 1993. The Panel then compared these prices with GPIC's actual netback prices achieved during the claim period. GPIC's netback prices represent the gross sales price, less direct selling expenses.

53. From the above calculations and estimates, it became clear that the average netback prices that GPIC achieved during the claim period were much higher than the average netback prices that GPIC achieved in the year prior to and the two years subsequent to Iraq's invasion of Kuwait. Further, if the Panel applies the difference in prices to the volume sold during the claim period, the increase in profits exceeds the amount of GPIC's losses.

54. GPIC argues that the increase in its profits during the claim period was attributable to a general global trend of increased prices for ammonia and methanol, unrelated to Iraq's invasion of Kuwait. GPIC submitted evidence to demonstrate that ammonia and methanol prices are generally not affected by movements in crude oil prices, and therefore were buffered from the effects of Iraq's invasion on crude oil prices. GPIC further argued that the fluctuations in the international prices of ammonia and methanol were driven by factors other than Iraq's invasion of Kuwait and the military events that ensued, as there were even greater fluctuations in the years preceding and subsequent to Iraq's invasion of Kuwait. In addition, GPIC asserts that its share of the world market for ammonia and methanol was too insignificant for the first and second shutdowns to affect the international market prices.

55. To address the above arguments, the Panel addressed two main issues: whether ammonia and methanol prices increased during the time of Iraq's invasion and occupation of Kuwait and, if so, what the prices of these products would have been if no invasion had occurred.

56. The Panel finds that ammonia and methanol prices increased during the claim period. To determine whether the price increases of ammonia and methanol should be attributed to Iraq's invasion of Kuwait, the Panel analysed various applicable market factors that would have affected price increases for ammonia and methanol. The market factors considered include the price of natural gas, which is the feedstock of ammonia and methanol, the average global plant utilisation rates of manufacturing units, and the general supply and demand trends for ammonia and methanol in the relevant markets. In its analysis of these factors, the Panel concluded that the sharp rise in prices that occurred during the time of Iraq's invasion and occupation of Kuwait could not be said to be attributable to normal market forces as contended by GPIC. Rather, the Panel concluded that the increase was attributable to Iraq's invasion of Kuwait, particularly the stock build-up outside the Middle East caused by the perceived but unrealised war risk, and actions by consumers and suppliers to cover or "hedge" an anticipated interruption in the supply of ammonia and methanol.

57. The evidence submitted demonstrates that, although GPIC's production levels declined briefly in 1990 due to Iraq's invasion, GPIC obtained higher prices for its ammonia and methanol during the latter half of 1990 and during 1991, and that these prices were inflated due to Iraq's invasion of Kuwait.

58. The Panel estimated what the average monthly prices of ammonia and methanol would have been during the claim period if Iraq had not invaded and occupied Kuwait. Using, inter alia, market data gathered from suppliers and consumers of ammonia and methanol, the Panel developed benchmark prices of ammonia and methanol, and estimated the price variances that occurred due to Iraq's invasion and occupation of Kuwait. Applying these price data to GPIC's no-invasion volumes with certain adjustments, the Panel estimated that GPIC would have earned a no-invasion netback revenue of USD 16,799,650 from the sales of ammonia and USD 13,587,811 from the sales of methanol during the claim period. Therefore, GPIC would have earned a total no-invasion netback revenue of approximately USD 30,387,461.

59. The Panel calculated that, during the claim period, GPIC earned actual netback revenues of USD 18,474,850 from the sale of ammonia and USD 28,155,219 from the sale of methanol. Therefore, the Panel finds that GPIC earned a total netback revenue of USD 46,630,069 during the claim period, or USD 16,242,608 more than it would have earned had Iraq's invasion of Kuwait not occurred. The Panel also calculated that GPIC would have had a net savings of production costs of USD 105,321. 5/

4. Conclusions and recommendations – loss of profits

60. Based on the above calculations, the Panel concludes that, due to Iraq's invasion of Kuwait and its effect on ammonia and methanol prices, GPIC earned increased profits from the sale of ammonia and methanol of approximately USD 16,347,929 during the claim period. These increased profits far exceeded its claim for lost profits of USD 5,412,414 from the loss of sales of ammonia and methanol

during the time of Iraq's invasion and occupation of Kuwait. Therefore, the Panel recommends no compensation for this claim element.

D. Cost of safety contingency measures

61. GPIC claims that, as a result of Iraq's invasion and occupation of Kuwait, it incurred certain extraordinary costs to ensure the safety of its employees and petrochemical plants. These costs relate to, inter alia, the purchases of safety equipment for the plants and gas masks for employees, as well as the wages paid for additional security guards for the plants. GPIC claims USD 288,717 for this claim element.

62. As stated in paragraph 43, supra, the Panel finds that the very nature of petrochemical plants and the attendant potential risks justify GPIC's extraordinary preventive measures aimed at minimising dangers associated with damage to its plants. The Panel finds that GPIC's decisions to purchase additional safety equipment for the employees, and to increase the number of security guards in order to prepare for an evacuation, represent reasonable and proportionate measures in response to the risk of potential spill-over of Iraq's threats against Saudi Arabia.

1. Verification and analysis – safety measures

63. In support of this claim element, GPIC submitted purchase requisitions, invoices and accounts. The additional expenses for safety measures consisted of additional equipment costs of USD 171,567, additional security guard wages of USD 50,350 and plant improvement expenditures of USD 66,250. The Panel notes that, as a result of a calculation error, GPIC claimed USD 288,717 instead of USD 288,167. Therefore, the Panel finds that GPIC's claim for safety contingency measures should be re-stated as USD 288,167.

64. GPIC claims that it purchased additional equipment such as gas masks, foam generators, breathing apparatus, lightweight gas suits and other items totalling USD 171,567 due to Iraq's invasion and occupation of Kuwait. Purchase requisitions were provided for all of these items, but actual supplier invoices and proof of payment were not made available. However, an analysis of GPIC's "protective clothing account" indicates increased costs of up to USD 70,000 during the relevant period (between January and March 1991) compared to the cost of these items in 1989 and 1990. Therefore, the Panel finds that GPIC has substantiated its claim for additional equipment costs up to the amount of approximately USD 70,000.

65. GPIC claims that, because of Iraq's invasion of Kuwait, it incurred additional security guard costs of USD 50,350, comprising additional security guard wages of USD 23,850 and overtime charges for normal security personnel of USD 26,500. An analysis of invoices and accounts provided in support of additional security guard costs indicates increased costs in excess of USD 23,850. However, no documentation was

provided to support the overtime charges for normal security personnel. Therefore, the Panel finds that GPIC has substantiated its claim up to the amount of USD 23,850 for additional security guard costs.

66. GPIC claims that it incurred costs of USD 66,250 in taking safety measures at its ammonia plant, such as “binding” the wall at the ammonia storage area and draining the ammonia storage tanks to prevent hazardous gas leaks in the event that the ammonia storage facilities were attacked during Iraq’s invasion of Kuwait and subsequent military activities. GPIC did not submit any evidence pertaining to these costs and, accordingly, the Panel concludes that no compensation should be awarded for this claim element.

2. Conclusions and recommendations – safety measures

67. Based on the above analysis and calculations, the Panel concludes that GPIC has substantiated USD 93,850 of its claim for the cost of safety contingency measures.

E. Evacuation cost

68. Between December 1990 and March 1991, GPIC claims that it bought air tickets to repatriate its employees and members of their families to their countries of origin. GPIC states that this cost is in addition to what is normally included in the employment contracts of its expatriate employees. GPIC claims USD 12,259 for this claim element.

1. Verification and analysis – evacuation cost

69. GPIC submitted copies of flight tickets, purchase requisition forms, internal correspondence and accounts to support its claim. Further, GPIC submitted a sample of an employment contract to demonstrate that the cost of airfares incurred during this period were in addition to the normal travel entitlement of its expatriate employees. An analysis of the above documentation indicates that GPIC underestimated the amount it paid to repatriate its employees and their families. The Panel therefore finds that GPIC’s claim of USD 12,259 for evacuation costs is reasonable and supported by the evidence submitted.

2. Conclusions and recommendations – evacuation cost

70. Based on the above analysis, the Panel concludes that GPIC’s claim for evacuation costs of USD 12,259 is substantiated. This does not imply that the Panel would find it compensable, as its ultimate conclusion in paragraph 79 makes that analysis unnecessary.

F. Additional financing cost

71. According to GPIC, it was due to receive sales revenue of USD 10,500,000 from its customers through PIC when Iraq’s invasion of Kuwait occurred. As a result of Iraq’s invasion of Kuwait, the debt

remained outstanding for six months while GPIC continued to borrow at a cost of over seven per cent per annum in order to carry out its operations. GPIC claims that, but for Iraq's invasion of Kuwait, it would not have had to incur the associated financing cost. GPIC claims USD 368,000 for this claim element.

1. Verification and analysis – financing cost

72. In support of this claim element, GPIC submitted correspondence and accounting documentation. An analysis of the documentation confirms that the borrowing cost for GPIC was in excess of seven per cent per annum and that GPIC had loans outstanding well in excess of the amount used in the claim calculation. The documentation also demonstrates that GPIC was due to receive an amount exceeding USD 10,500,000 from PIC at end of August 1990, and that PIC eventually paid most of the outstanding debt by the end of 1991.

73. At the outset, the Panel finds that this claim element is essentially a claim for interest that GPIC could have earned on the delayed receivable due from PIC. The Panel first considers whether PIC or Iraq should be liable to GPIC for the interest on the delayed receivable amount. GPIC's marketing contract with PIC does not specify whether PIC would be liable to GPIC for interest in the event of a delay in payment. GPIC claims that PIC was not obliged to pay interest on the delayed receivable, since the delay was due to reasons of force majeure.

74. Based upon the marketing contract mentioned above, correspondence between GPIC and its bank, as well as correspondence between PIC and its customers, the Panel finds that PIC was merely acting as an agent for GPIC, and its inability to receive payments was due to the customers' compliance with the international sanctions in force against Kuwait during that period. Under the circumstances, it appears that PIC had no liability to GPIC for interest where PIC had not received the payments from its customers to forward to GPIC. Therefore, the Panel finds that, prima facie, GPIC has the right to claim its interest loss before the Commission.

75. The Panel must next consider whether GPIC's interest loss was due to Iraq's invasion of Kuwait, and hence is compensable. In a letter dated 1 April 1991 from PIC to a major customer, it was clear that the customer delayed the payments to PIC due to the sanctions in force against Kuwait. PIC demanded payment as soon as it was apparent that the sanctions were about to be lifted and, thereafter, forwarded these payments to GPIC. Based on the evidence submitted, the Panel finds that the loss was actually caused by the customers' refusal to pay PIC in compliance with the embargo on Kuwait at the relevant time, and not directly caused by Iraq's invasion of Kuwait. 6/

2. Conclusions and recommendations – financing cost

76. Based on the above analysis, the Panel recommends no compensation for GPIC's claim for additional financing cost

G. Conclusion

77. In order to put GPIC in the position that it would have been in but for Iraq's invasion of Kuwait, the Panel finds that it should consider all the extraordinary effects of the invasion to which GPIC was exposed and, accordingly, compare GPIC's actual position with the position GPIC would have been in had Iraq's invasion of Kuwait not occurred.

78. The Panel notes that, as a whole, Iraq's invasion of Kuwait did not adversely affect GPIC's financial position as a corporate entity despite the fact that it sustained a loss of production for 14 days in 1990 and incurred additional expenses as set out above. The Panel's findings show that, during the claim period, GPIC increased its profits by approximately USD 16,347,929, due to higher average netback prices of ammonia and methanol in the claim period compared to the "no-invasion" average netback prices in the same period. As explained in paragraphs 56 - 59, supra, the price increases benefiting GPIC were caused by Iraq's invasion of Kuwait. The increase in profits achieved by GPIC as a result of the increased prices far exceeds GPIC's total claim amount of USD 6,081,390.

79. Taking the above analysis into account, the Panel finds that GPIC's total alleged losses arising from Iraq's invasion of Kuwait should be set off against its increased profits arising from the same event. Accordingly, the Panel recommends that no compensation be awarded for the whole of this claim, as shown in table 4.

Table 4. GPIC'S claim - recommended compensation

Claim element	Claim amount (USD)	Amended claim amount (USD)	Panel's adjustments (USD) a/	Panel's recommendation (USD)
Loss of profits:	7,245,842	5,412,414	5,412,414	nil
Extraordinary expenses:				
Cost of safety contingency measures	288,717	288,717	288,717	nil
Evacuation costs	12,259	12,259	12,259	nil
Additional financing cost	368,000	368,000	368,000	nil
Overhead costs	2,085,182	0	0	nil
Total extraordinary expenses	2,754,158	668,976	668,976	nil
Total	10,000,000	6,081,390	6,081,390	nil

a/ The Panel acknowledges that, although GPIC substantiated certain claim elements in its claim, those amounts are not awarded due to the increased profits GPIC achieved.

IV. CLAIM OF ARAB PETROLEUM INVESTMENTS CORPORATION

80. Arab Petroleum Investments Corporation ("APICORP") is a joint stock company incorporated under the laws of Saudi Arabia. APICORP states that it has a 32 per cent equity stake in Arab Company for Detergent Chemicals ("ARADET"), which it describes as a joint venture based in Iraq. The other shareholders in ARADET include Iraq (with a 32 per cent stake), Petromin of Saudi Arabia (with a 10 per cent stake), Petrochemical Industries Companies of Kuwait (with a 10 per cent stake), Arab Mining Company of Jordan (with a 10 per cent stake) and the Arab Investment Company of Saudi Arabia (with a six per cent stake).

81. APICORP seeks compensation in the amount of USD 107,386,853 for losses resulting from Iraq's invasion of Kuwait. APICORP asserts that it acts on behalf of ARADET in bringing this claim, but it offers no proof that it has authority to do so. The claimed losses are described in the table below.

Table 5. APICORP'S claim

Claim element	Claim amount
LAB plant	
Property damage	USD 20,000,000
Loss of profits	USD 12,000,000
STPP plant	DEM 114,000,000
Total a/	USD 107,386,853

a/ These losses are expressed in the currency originally designated by the claimant. The total is listed in the United States dollar equivalent at a rate of exchange chosen by the claimant.

A. Facts and contentions

1. LAB plant - property damage

82. APICORP states that, prior to Iraq's invasion of Kuwait, ARADET constructed a plant for the production of linear alkyle benzene (the "LAB plant") in Iraq. The LAB plant was damaged as a result of air raids.

83. APICORP claims that, because the United Nations trade embargo made it impossible to obtain certain materials and services, ARADET could only make "preliminary" repairs to the LAB plant. It states that the cost of these repairs was USD 12,000,000, and estimates that the additional cost of completing the repairs after the trade embargo was lifted would be USD 8,000,000. Therefore, it seeks compensation in the amount of USD 20,000,000 for physical damage to the LAB plant.

2. LAB plant - loss of profits

84. APICORP claims that the damage to the LAB plant caused the facility to operate well below its normal capacity. This allegedly caused ARADET to lose USD 12,000,000 in profits between January 1991 and January 1992. APICORP seeks compensation for this loss. 7/

3. STPP plant

85. APICORP states that, prior to Iraq's invasion of Kuwait, ARADET hired a contractor to build a Sodium Tripoly Phosphate plant (the "STPP plant") in Iraq, although it does not disclose the identity of that contractor. The STPP plant had not yet been completed on 2 August 1990.

86. The construction of the STPP plant was consequently interrupted by Iraq's invasion of Kuwait. APICORP claims that, due to this interruption, the contractor requested compensation in the amount of DEM 94,000,000 from ARADET. APICORP seeks compensation in the amount of the contractor's claim against ARADET.

87. In addition, APICORP states that, prior to Iraq's invasion of Kuwait, ARADET incurred DEM 40,000,000 in expenses related to the STPP contract and requests compensation for this loss.

88. From its claimed losses, APICORP deducts the value of certain equipment ordered by ARADET and manufactured prior to Iraq's invasion of Kuwait. APICORP claims that the value of this equipment, which was being stored in Antwerp, Belgium, was DEM 20,000,000.

89. Accordingly, APICORP seeks compensation in the amount of DEM 114,000,000 for ARADET's claimed losses in relation to the STPP plant.

B. Iraq's response

90. On 31 October 2000, and subsequently on 10 December 2000, Iraq submitted a narrative explanation and evidence regarding the relationship between APICORP and ARADET. According to that information, APICORP acted as guarantor for the contract between ARADET and the STPP plant contractor, although it was not a signatory to the contract. Iraq states that, when ARADET failed to pay the contractor, APICORP, ARADET and the contractor entered into arbitration proceedings. Iraq provided correspondence from ARADET's Acting General Manager to Iraq's Ministry of Oil confirms that ARADET did not authorise APICORP to file this claim with the Commission.

C. Verification and analysis

91. The Panel notes that, in support of its claim, APICORP has provided only an excerpt of a memorandum to legal counsel dated 9 November 1992 describing the STPP contractor's claim against ARADET. This memorandum refers to a binder of primary documentary evidence in support of the claim. Such evidence was not provided to the Commission. No evidence of any kind was provided in support of ARADET's or APICORP's other claim elements.

92. In addition, APICORP has not provided evidence in English of either its equity stake in ARADET or its legal authority to seek compensation on behalf of that company. 8/ On the other hand, Iraq has submitted evidence indicating that APICORP had no such authority.

93. In an article 34 notification issued on 27 January 2000, a number of deficiencies in APICORP's claim were noted, including the absence of supporting evidence. APICORP was asked to correct these and other deficiencies by 22 March 2000. The Commission received no response to this request.

94. On 28 June 2000, the Panel issued a procedural order instructing APICORP to respond to the questions set forth in the article 34 notification by 4 August 2000. In reply, APICORP stated in a letter dated 22 July 2000 that it would not be able to submit any additional documentary evidence.

95. After reviewing the evidence supplied by Iraq, the Panel investigated the status of the STPP contractor, whom Iraq had identified as Abay Engineering S.A. ("Abay"), and learned that Abay had filed a related claim with the Commission. On 29 September 2000, the Governing Council approved the "Report and recommendations of the 'E3' Panel of Commissioners concerning the tenth instalment of 'E3' claims" (S/AC.26/2000/18). In its report, the "E3" Panel recommended that no award be made to Abay for losses arising from work at the STPP plant because those losses had been the subject of a binding arbitration involving APICORP, ARADET and Abay.

D. Conclusions and recommendations

96. The Panel finds that there is no evidence to support the claimed losses. APICORP has not proven that it has the necessary standing to bring this claim on behalf of ARADET, and it has not raised the issue on its own behalf. Furthermore, without co-operation and evidence from APICORP, the Panel cannot verify the existence or grounds for any payments by APICORP to Abay. Because APICORP's claim fails for lack of authority and evidence, the Panel need not consider ancillary issues, including the consequences of ARADET'S status as an Iraqi company or joint venture. The Panel recommends that no compensation be awarded with respect to this claim as summarised below.

Table 6. APICORP'S claim - recommended compensation

Claim element	Claim amount	Panel's adjustments	Panel's recommendation
LAB plant			
Property damage	USD 20,000,000	USD 20,000,000	nil
Loss of profits	USD 12,000,000	USD 12,000,000	nil
STPP plant	DEM 114,000,000	DEM 114,000,000	nil
Total a/	USD 107,386,853	USD 107,386,853	nil

a/ These losses are expressed in the currency originally designated by the claimant. The total is listed in United States dollar equivalent at a rate of exchange chosen by the claimant.

V. CLAIM OF BOTAS PETROLEUM PIPELINE CORPORATION

A. Facts and contentions

97. BOTAS Petroleum Pipeline Corporation ("BOTAS") is a corporation owned by the Turkish State with operations in the petroleum and gas transportation business. In 1973 the Governments of Turkey and Iraq entered into an agreement to build a pipeline to transport crude oil from Kirkuk, Iraq, to the Turkish port of Ceyhan (the "Iraq-Turkey pipeline") for both Turkish consumption and for export. Pursuant to this agreement, Turkey was responsible for the construction and operation of the portion of the Iraq-Turkey pipeline located in Turkey, the loading of crude oil onto vessels at the Ceyhan marine terminal, and all expenses related thereto. In return, it would receive throughput fees from Iraq, as described in the following paragraphs.

98. BOTAS was established by the Government of Turkey in 1974 to perform these functions. Its Iraqi counterpart was the Iraqi National Oil Company ("INOC"), a state-owned oil marketing entity responsible for the payment of throughput fees to BOTAS.

99. The Iraq-Turkey pipeline consists of two lines. The first line, with a transport capacity of 35 million tons per year, began operating in 1976. The capacity of the line was increased to 46.5 million tons per year in 1984. In 1987 a second line was brought into operation, thereby increasing the pipeline's annual rated transport capacity to 70.9 million tons.

100. BOTAS claims that it earned additional revenues from services it provided to vessels loading Iraqi crude oil at the Ceyhan marine terminal and from the purification and sale of low gravity oil recovered from vessel ballasts.

101. BOTAS alleges that, starting on 7 August 1990, the operation of the Iraq-Turkey pipeline was suspended. This occurred for two reasons. First, BOTAS acknowledges that the pipeline was shut down

due to the imposition, on 6 August 1990, of the United Nations trade embargo pursuant to Security Council resolution 661 (1990) (the "trade embargo"). Turkey complied with the trade embargo, which made further exports of Iraqi crude oil through the pipeline impossible. Second, BOTAS alleges the pipeline was shut down due to its location in a theatre of actual or threatened military operations.

102. BOTAS claims that the shutdown of the Iraq-Turkey pipeline caused it to lose revenue of USD 1,269,877,578 between 7 August 1990 and the reopening of the pipeline under the United Nations "oil for food" programme in 1996. From this amount, it subtracts USD 230,637,304 in expenses saved as a result of the shutdown, resulting in a total claimed loss of USD 1,039,240,274, net of interest on the loss. Its claimed net revenue losses and cost savings are described below:

Table 7. BOTAS' claim

Claim element	Claim amount (USD)
Lost revenues	
Throughput fee differential	65,700,000
Minimum annual remuneration	1,126,664,478
Ceyhan losses	77,513,100
Subtotal	1,269,877,578
Saved expenses	(230,637,304)
Total	1,039,240,274

B. Iraq's response

103. Iraq relies on a telex from BOTAS to State Oil Marketing Organization of Iraq ("SOMO") 9/ dated 7 August 1990, stating that "... due to the decision taken by United Nations Security Council [to impose the trade embargo]," the Ceyhan jetty would be closed as of that date. Iraq suggests that it was only logical to cease throughput under those circumstances, given that no vessels would be allowed to load and transport Iraqi crude from the Ceyhan terminus of the Iraq-Turkey pipeline. Iraq also argues that Turkey had a duty to mitigate its losses by petitioning the United Nations for an exception to the trade embargo, and makes additional objections to the claim.

C. The oral proceedings

104. In its procedural order dated 26 October 2000, the Panel requested that BOTAS and Iraq participate in oral proceedings, and address the issue of "[w]hether some or all of the [c]laimant's losses are attributable to causes other than the trade embargo".

105. In its principal address, BOTAS reiterated arguments made in its statement of claim, discussed at paragraphs 101 - 102. In summary, BOTAS contended that it suffered direct losses from Iraq's breach of its contractual obligations to ensure a continuous flow of crude oil through the Iraq-Turkey pipeline and to make contractually mandatory payments. BOTAS also emphasised that the amount of its claim for compensation understated its actual losses. BOTAS asserted that its losses were not caused by the trade embargo because Iraq had notified BOTAS that it was significantly decreasing the volume of oil through the Iraq-Turkey pipeline prior to the date of the embargo. BOTAS relied upon a telex from SOMO dated 6 August 1990, attributing the reduced throughput to "operational" difficulties. While it postulates that Iraq's invasion of Kuwait was the true cause of the reduction, BOTAS concedes it has no evidence to support that hypothesis.

106. In response to a question from the Panel, BOTAS stated that Iraq would not have been able to deliver the volume of crude oil required under the transport contract due to damage sustained to Iraq's oil production and transportation infrastructure following increased military operations in January 1991. BOTAS stated that it was unable to estimate how long after January 1991 it would have taken for Iraq to resume delivery of crude oil through the Iraq-Turkey pipeline at a level sufficient to permit compliance with its contractual obligations.

107. Iraq argued that the BOTAS claim should have been deemed a governmental claim and reviewed by the Commission in category "F". In support of this proposition, Iraq contended that BOTAS was wholly owned by the Government of Turkey, and noted that the transport contract was signed by representatives of the two States. 10/ Iraq also argued that the closure of the Iraq-Turkey pipeline was a unilateral decision taken by the Government of Turkey in order to comply with the trade embargo. Iraq contended that losses resulting from the closure were not compensable according to paragraph 9 of Governing Council decision 7. 11/ In addition, Iraq argued that losses claimed in relation to port services and ballast purification were in any event not direct because such losses did not arise from the suspension of the transport contract, but rather from a decline of peripheral economic activity as a consequence of the absence of Iraq-Turkey pipeline operations. Finally, Iraq argued that the claimant had failed to mitigate its losses because no "efficient operator" would maintain a workforce and pipeline services in readiness for a period of six years.

D. Lost revenue claims

1. Contractual obligations

108. Under the contractual arrangements that govern the operation of the Iraq-Turkey pipeline (the "transport contract"), INOC must deliver through the pipeline at least 35 million metric tons of crude oil per year (the "minimum throughput"). It must pay BOTAS a fee of USD 0.75 per barrel of crude oil whether or not the minimum throughput is achieved. Therefore, BOTAS is guaranteed a minimum level of annual remuneration (the "MAR") of USD 195,825,000, which is calculated by multiplying the

minimum throughput of 35 million metric tons (with one metric ton comprising 7.46 12/ barrels), by the fee of USD 0.75 per barrel.

109. According to the transport contract, the amount of the fee that BOTAS receives with respect to each barrel of throughput decreases as the volume of throughput delivered through the Iraq-Turkey pipeline increases. The agreement establishes five fee bands:

1. USD 0.75 per barrel up to a quantity of 35 million metric tons;
2. An average of USD 0.60 per barrel up to a quantity of 46.5 million metric tons;
3. An average of USD 0.56 per barrel up to a quantity of 50 million metric tons;
4. An average of USD 0.50 per barrel up to a quantity of 60 million metric tons; and
5. An average of USD 0.43 per barrel up to a quantity of 70.9 million metric tons.

110. For volume in the second to fifth fee bands inclusive, the fee is adjusted on a “sliding” scale, the effect of which is to reduce the total fee per barrel as volume transported increases. This is called the throughput fee differential (the “TFD”).

111. Fees with respect to crude oil delivered through the Iraq-Turkey pipeline during a given calendar quarter are paid by INOC to BOTAS during the next calendar quarter. The per barrel fee charged in connection with such throughput is based on projected throughput for the calendar year. The projection is based, in turn, on actual throughput during the current calendar year to date. Therefore, if throughput during the first calendar quarter of a given year is equal to X, the applicable fee per barrel for that quarter is that which corresponds to an annual throughput of four times X. The projection is revised each quarter based upon the actual throughput during the previous quarter(s).

112. BOTAS states that, after the Iraq-Turkey pipeline was shut down, INOC stopped paying its contractually-obligated fees. BOTAS alleges that this was the result of Iraq’s invasion of Kuwait, while Iraq relies on the telex described in paragraph 103 to support its position that the trade embargo caused the shutdown. BOTAS requests that the Panel consider the dangerous conditions during the time of Iraq’s invasion and occupation of Kuwait, as well as the extensive damage to Iraq’s oil production and transportation systems, to be parallel causes of its loss. The legal significance of this request will be described in greater detail in paragraphs 126 - 134.

113. BOTAS' loss of revenue claim consists of two components: the TFD, which it seeks for 1990, and the MAR, which it seeks for the years 1991 to the end of 1996. The compensability of each of these two components will be considered at paragraphs 114 - 121 and 123 - 134 respectively.

(a) Throughput fee differential

114. BOTAS contends that 45.9 million metric tons of crude oil were transported through the Iraq-Turkey pipeline during 1990 prior to its shutdown. During that period, BOTAS charged INOC USD 0.40 for each barrel of throughput. This was the fee that would have applied if Iraq had continued to deliver crude oil through the Iraq-Turkey pipeline until the end of the 1990 calendar year at the same rate as it did prior to the shutdown.

115. However, as described at paragraph 101, no crude oil was delivered after the 7 August 1990 shutdown. Therefore, the actual throughput for 1990 fell short of the projected throughput for 1990 that had been used to determine pre-invasion per barrel throughput fees. Accordingly, BOTAS contends that the per barrel fee applied to the 45.9 million metric tons that were delivered should have been USD 0.593 per barrel, the higher fee applicable in the event of a total annual throughput of 45.9 million metric tons, and not the USD 0.40 per barrel actually applied. 13/

116. BOTAS claims that, under the transport contract, INOC is required to pay BOTAS the difference between the fees actually charged prior to Iraq's invasion of Kuwait and the fees that it would have received if the Iraq-Turkey pipeline's annual throughput had been correctly estimated. BOTAS states that the difference between the two amounts is USD 65,700,000, and requests compensation in that amount. 14/

(i) Verification and analysis - TFD

117. In support of this claim element, BOTAS provided the transport contract, extracts of financial statements for the claim period and other evidence. During a verification mission to Turkey, BOTAS provided access to more detailed financial records for the relevant period, as well as other data.

118. The Panel's findings regarding the validity of the transport contract and the obligations of Iraq created thereunder may be found at paragraphs 124 - 125. It is undisputed that Iraq did not make shipments in 1990 sufficient to qualify for the lower rates. Therefore, under the transport contract, Iraq would owe BOTAS USD 65,700,000.

119. As discussed in paragraph 103, Iraq contends that only the trade embargo prevented it from shipping oil in sufficient quantities to qualify it for the lower, expected rate. The historical evidence demonstrates that Iraq routinely achieved the projected throughput levels and qualified for the lower rates.

(ii) Conclusions and recommendations - TFD

120. BOTAS itself made reference to the trade embargo when, on 7 August 1990, it sent Iraq the telex and closed the Ceyhan jetty. On that date, five days after Iraq's invasion of Kuwait, developments in the war zone did not indicate a risk of a nature that in itself could reasonably justify the closing of the Iraq-Turkey pipeline, and BOTAS did not provide any evidence that the risk to installations and personnel on that date was the actual explanation for its decision to close the Iraq-Turkey pipeline.

121. The Panel finds that INOC's inability to ship additional quantities of crude oil through the Iraq-Turkey pipeline during the balance of 1990 was a direct result of BOTAS' compliance with the trade embargo. Technically nothing prevented INOC from making the shipment, and BOTAS has been unable to identify a parallel cause for INOC's inability to ship additional quantities of crude oil during that year, following BOTAS' shutdown of the Iraq-Turkey pipeline on 7 August 1990. With the pipeline closed, INOC was prevented from achieving the total throughput volume in 1990 corresponding to the USD 0.40 TFD (as calculated by BOTAS prior to the shutdown of the pipeline). Thus, the Panel finds that the circumstances giving rise to BOTAS' claim with respect to the TFD were caused solely by the trade embargo. Accordingly, the Panel recommends no compensation for this portion of the claim.

(b) Minimum annual remuneration fee

122. BOTAS claims that, for the period from 1 January 1991 to 30 September 1996 inclusive, the total MAR it should have received was USD 1,126,664,478. This amount is derived from the formula explained in paragraph 108, multiplied by the 2,100 days of the claim period. 15/

(i) Verification and analysis - MAR

123. In support of this claim element, BOTAS provided copies of the transport contract, extracts of financial statements for the claim period and other evidence. During a verification mission to Turkey, BOTAS provided access to more detailed financial records for the relevant period, as well as other data. It is undisputed that Iraq has not paid the MAR due in respect of the period indicated by the claimant.

a. Contract terms

124. The MAR fee is a contractual obligation that Iraq ordinarily would have been bound to pay in each year that began with the transport contract in force and during which Iraq failed to make the minimum shipments required. A complete review of the evidence reveals that the transport contract was at all relevant times a valid, effective contract. In addition, the Panel has determined that charges such as the MAR fee are reasonably and customarily agreed to in contracts for the transportation of oil and natural gas, in order to compensate the owner of a pipeline for the high fixed costs that it must incur.

125. Although the transport contract contains a force majeure provision, Iraq is unable to take advantage of this provision to excuse its failure to pay. The provision, by its own terms, limits Iraq to force majeure events for which it is not itself responsible. Pursuant to Security Council resolution 687 (1991), Iraq is liable for the direct losses resulting from its unlawful invasion and occupation of Kuwait. As Iraq has pointed to no other source of force majeure, the Panel notes that Governing Council decision 9 precludes Iraq from relying on the force majeure provision of the transport contract to excuse its failure to perform.

b. Application of Governing Council decisions

126. The Governing Council has previously accepted a recommendation from the "E2" Panel in its fourth instalment report, which held that:

> "Apart from the trade embargo and its related measures, the actions of Iraq's officials during Iraq's occupation of Kuwait, the military operations conducted to liberate Kuwait, and the ensuing breakdown of civil order in Iraq, directly caused Iraq's failure to pay its debts after 2 August 1990 ... Losses resulting therefrom are, therefore, direct losses ..." 16/

127. Iraq contends, however, that the trade embargo actually prevented it from complying with the transport contract, not just from making the requisite MAR payment. Iraq maintains that the MAR obligation did not arise until Iraq, due to the embargo, failed to ship the minimum annual throughput. Thus, in Iraq's view, the trade embargo is the cause of its failure to meet the MAR obligation, because the embargo prevented Iraq from fulfilling the annual throughput minimum. In response, BOTAS asserts that the embargo did not prevent Iraq from making the payments required by the transport contract. BOTAS contends that, because the MAR obligation was an independent contractual promise, the cause of Iraq's inability to ship oil is irrelevant.

128. In 1990, INOC shipped more than the 35 million metric ton minimum throughput during the period between 1 January and 2 August 1990, thus avoiding any additional payments under the MAR fee provisions of the transport contract for the 1990 calendar year. BOTAS' MAR claim therefore accrues on 1 January 1991. The Panel finds that, at that time, the only cause proven for the Iraq-Turkey pipeline's closure was the embargo. When military activity escalated on 17 January 1991, however, considerable damage was done to the Iraqi oil industry in itself sufficient to have prevented Iraq from fulfilling its obligation to ship oil through the pipeline as more fully described in paragraph 130. This damage constitutes a "parallel" cause, as explained in paragraph 6 of Governing Council decision 9, which states:

> "Compensation will be provided to the extent that Iraq's unlawful invasion and occupation of Kuwait constituted a cause of direct loss, damage, or injury which is separate and distinct from the trade embargo and related measures."

129. The Governing Council explained this language in paragraph 9 of Governing Council decision 15:

> "The practical effect of this statement is that compensation will be provided, if and to the extent that loss, damage, or injury resulting directly from Iraq's unlawful invasion and occupation of Kuwait was actually suffered and would have been suffered irrespective of whether the trade embargo and related measures had been in force.
>
> Particularly in the case of larger and more complex claims, the Commissioners may decide that some losses listed in a claim are a direct result of Iraq's unlawful invasion and occupation of Kuwait and should be compensated and that other losses listed in the same claim resulted solely from the embargo and related measures and are therefore ineligible for compensation. In this situation partial compensation would in principle be payable."

c. Length of parallel causation period

130. The Panel has reviewed certain independent reports and surveys indicative of the extent of damage caused to Iraq's crude oil production and transportation capabilities as the result of the commencement of military activities in January 1991. The evidence indicates that, beginning with the escalation of military activities on 17 January 1991, Iraq would have been unable to meet the minimum annual throughput requirements even if the embargo had not been in place. The reports and surveys establish that Iraq would have been unable to export oil beginning on 17 January 1991 and continuing thereafter through the major part of 1991. As a result, even if Iraq had been able to resume oil exports in late 1991, the amount, if any, it could have exported is entirely speculative, and in any event, it would have been unable to export in quantities sufficient to meet the minimum annual throughput requirements for calendar year 1991.

131. The question remains, however, as to how long Iraq would have continued to be unable to ship sufficient oil and, hence, how long the MAR obligation would not have been met for reasons other than the trade embargo. While the evidence regarding the state of Iraq's oil industry indicates clearly that Iraq would have been unable to ship the requisite amount of oil in 1991, the evidence regarding later years is less clear. There is some evidence that Iraq continued to be unable to meet the quantity requirements beyond 1991. Other evidence appears to show that, in the absence of the trade embargo, Iraq would have been able to export at least the minimum amounts required in 1992 and the following years. In these circumstances, the Panel finds that there is insufficient evidence to show that BOTAS' compensable losses extended beyond 1991.

(ii) Conclusions and recommendations - MAR

132. Based on the foregoing, the Panel finds that BOTAS was owed but did not receive the MAR payments for the years 1991-1996. The Panel finds that, in the absence of the trade embargo, Iraq would

have been unable to meet the contract minimum in 1991, due to its inability to produce and/or transport sufficient oil to the Iraq-Turkey pipeline, and considering its domestic consumption needs. Thus, in the Panel's view, there was a parallel cause, other than the trade embargo, for INOC's failure to deliver oil into the Iraq-Turkey pipeline during the year 1991 in sufficient quantities to satisfy the MAR volume. Accordingly, the Panel finds that BOTAS' claim for the MAR due in 1991 is supported by the evidence and is compensable.

133. The Panel also finds, however, that the trade embargo should be deemed to be the sole cause of all MAR losses arising in the years following 1991.

134. Therefore, the Panel recommends that BOTAS receive compensation for this claim element in the amount of the MAR incurred and owed under the transport contract for the year 1991, which is USD 195,300,000. 17/

2. Ceyhan losses

135. BOTAS states that, prior to Iraq's invasion of Kuwait, crude oil from the Iraq-Turkey pipeline was loaded onto vessels at its Ceyhan marine terminal. At Ceyhan, BOTAS provided port services - including loading, mooring and cleaning - to such vessels. In addition, it processed ballasts from the vessels to obtain low gravity oil, which it then sold to local refineries.

136. BOTAS claims that the shutdown of the Iraq-Turkey pipeline caused a drastic decrease in the number of visits by oil tankers to Ceyhan. As a result, it was able to provide fewer services at that location. BOTAS claims that, between 1 January 1991 and 30 September 1996, it lost revenues of USD 67,599,000 with respect to port services and USD 9,914,100 with respect to residual oil purification.

(a) Verification and analysis - Ceyhan

137. To value its loss, BOTAS has calculated the amount of revenue from Ceyhan port services and oil ballast purification that it earned in the 31 months immediately prior to Iraq's invasion of Kuwait in connection with each barrel of pipeline throughput loaded at the marine terminal. Such revenues averaged USD 0.045 per barrel loaded in the case of port services, and USD 0.007 per barrel loaded in the case of ballast processing. BOTAS then multiplied, in each case, the per barrel revenues by the minimum guaranteed throughput over the claim period.

138. In support of this claim element, BOTAS has provided detailed financial records with respect to the claim period and schedules of fees charged for services provided at Ceyhan.

139. The historical data support BOTAS' claim for the level and price of the port services. Furthermore, the evidence supports BOTAS' claim that the reason that this income was lost was that the shipment of oil through the Iraq-Turkey pipeline ceased.

140. As noted above, Iraq asserts that the suspension of shipments was the result of the trade embargo and, therefore, that all losses alleged to result therefrom, including this claim, are not compensable.

(b) Conclusions and recommendations - Ceyhan

141. For the same reasons as those discussed in connection with the claim for the MAR fee in paragraphs 126 - 134, the Panel determines that, until 17 January 1991, BOTAS' loss was due to the trade embargo, while after 17 January 1991, Iraq would have been unable to make the expected shipments of oil due to increased military activity against Iraq in 1991. Thus, the loss of port services income in Ceyhan would have been incurred from that date, even in the absence of the trade embargo.

142. However, unlike the Panel's analysis of the MAR, where Iraq's invasion of Kuwait absolutely precluded resumption of commercial activities, the Panel is not persuaded that BOTAS' port losses were directly caused by Iraq's invasion of Kuwait.

143. The port of Ceyhan is located outside the zone of military operations. 18/ The Panel considers that it cannot be said that the commencement of military action within the war zone directly impeded vessels from calling at the port.

144. INOC's obligation to pay BOTAS the 1991 MAR fee was based on the conclusion that INOC had a contractual obligation to do so, which it failed to satisfy due to a parallel cause, other than the trade embargo. In the Panel's view, this constituted direct causation. Conversely, INOC had no contractual obligation to ensure that vessels called at the Ceyhan port. In point of fact, had there been no invasion of Kuwait by Iraq, and had INOC paid the MAR fee in the claimed years in lieu of delivering oil into the Iraq-Turkey pipeline, INOC would have owed no legal damages to BOTAS for BOTAS' lost business opportunities resulting from the reduction in the number of vessels calling at the port.

145. It is true that the loading facilities at Ceyhan are an integral part of the Iraq-Turkey pipeline operation, and it is logical to assume that, because INOC provided the oil that was shipped through the Iraq-Turkey pipeline to the Ceyhan port, its failure to deliver oil during 1991 and subsequent years did result in a loss of business to the port. Nevertheless, this loss of business was, in the Panel's view, an indirect result of Iraq's invasion of Kuwait. The Panel notes that certain purchasers of crude and port services at the Ceyhan port, such as TUPRAS, another claimant in this instalment, purchased substitute crude oil and services from other markets to fulfil their needs. While it seems obvious from BOTAS' evidence that much of the replacement supplies bypassed Ceyhan, the loss of business to a competing port, facility or company does not constitute a loss directly attributable to Iraq's invasion of Kuwait, nor did BOTAS prove a contractual right to receive fees from vessels calling at the port. The Panel received no evidence identifying an actual customer in the war zone with whom BOTAS had a reasonable expectation of doing business.

146. Therefore, the Panel finds that the claimant's loss of port services income from Ceyhan is not compensable.

E. Saved expenses

147. BOTAS states that, after its shutdown, it kept the Iraq-Turkey pipeline in operational condition and continued to implement its normal maintenance programme. In order to perform such maintenance, and because Turkish law makes it difficult to terminate the employment of full-time workers, BOTAS was not able to reduce its payroll expenses after the shutdown.

148. BOTAS states that the only cost reduction resulting from the shutdown was lower electricity expenses. It initially claimed that it saved USD 230,637,304 over the claim period, based upon estimates and assumptions regarding consumption. BOTAS deducts this amount from its claimed lost revenues because it used less electricity when oil was no longer being pumped through the pipeline. In response to the Panel's procedural order setting the oral proceedings, BOTAS submitted evidence of its 1998 electricity consumption. In 1998, the Iraq-Turkey pipeline operated at a rate closest to the 35 million metric tons found to constitute the 1991 MAR. The resulting saved electricity over the same claim period was USD 109,081,161.

149. To prove the extent of its claimed saved expenses, BOTAS provided extracts of financial statements and monthly electricity invoices with respect to the claim period. Actual consumption of electricity in 1998 averaged USD 51,943.41 per day, at the original 1991 price per kilowatt hour. The Panel finds that the electricity cost needed to pump the 1991 MAR should be deducted from BOTAS' award as a saved expense.

150. The Panel considered Iraq's contention that BOTAS should have been able to mitigate its losses by reducing its workforce and maintenance schedule during the period when INOC was not delivering oil. The Panel finds that it was reasonable for BOTAS to have maintained the Iraq-Turkey pipeline in operational condition, as it had no way of knowing when Iraq would be able to resume oil deliveries, and it was under a contractual obligation to transport any oil that INOC delivered. The Panel further finds that it was reasonable for BOTAS to maintain its workforce, particularly in light of the constraints on its ability to terminate employees.

151. For these reasons, the Panel finds that the only cost savings realised by BOTAS as a result of the shutdown were saved electricity expenses. Therefore, the recommended amount of compensation to BOTAS covering the MAR for the year 1991 should be reduced by USD 18,959,345, representing the estimated cost savings BOTAS achieved as a result of the Iraq-Turkey pipeline closure in 1991.

F. Conclusion

152. Based on the foregoing, the Panel recommends that BOTAS be awarded USD 176,340,655, representing the amount it would have received as the 1991 MAR payment, less the saved electricity expenses achieved as a result of the non-operation of the Iraq-Turkey pipeline during that year. The Panel's full recommendation for the claimant is set out in the following table:

Table 8. BOTAS' claim - recommended compensation

Claim element	Claim amount (USD)	Panel's adjustments (USD)	Panel's recommendation (USD)
Lost revenues			
Throughput fee differential	65,700,000	65,700,000	nil
Minimum annual remuneration	1,126,664,478	931,364,478	195,300,000
Ceyhan losses	77,513,100	77,513,100	nil
Subtotal	1,269,877,578	1,074,577,578	195,300,000
Saved expenses	(230,637,304)	(211,677,959)	(18,959,345)
Total	1,039,240,274	862,899,619	176,340,655

VI. CLAIM OF TURKISH PETROLEUM REFINERIES CORPORATION

153. Turkish Petroleum Refineries Corporation ("TUPRAS") is a Turkish state-owned corporation with operations in the crude oil refining business. TUPRAS seeks compensation in the amount of USD 13,569,556 for losses incurred as a result of Iraq's invasion of Kuwait. TUPRAS' claim is summarised as follows:

Table 9. TUPRAS' claim

Claim element	Claim amount(USD)
Freight charges and ocean loss	6,751,427
Additional war risk insurance	6,808,950
Product loss	9,179
Total	13,569,556

A. Freight charges and ocean loss

154. TUPRAS alleges that, prior to Iraq's invasion of Kuwait, it entered into a contract to purchase approximately 7.5 million metric tons of crude oil from State Oil Marketing Organisation of Iraq ("SOMO"). Of this quantity, 2.6 million metric tons were allocated to a TUPRAS refinery located at

Kirikkale, Turkey. The crude oil intended for the Kirikkale refinery was to be delivered by the Iraq-Turkey pipeline from Iraq to the port of Ceyhan, Turkey, from where it would go on to Kirikkale by means of another pipeline.

155. TUPRAS claims that the Iraq-Turkey pipeline was shut down as a result of Iraq's invasion of Kuwait. Due to the interruption of its contract with SOMO, TUPRAS had to obtain crude oil for the Kirikkale refinery (the "replacement oil") from sources other than Iraq. The replacement oil was shipped to the port of Ceyhan, and then delivered to Kirikkale by pipeline.

156. TUPRAS alleges that the interruption caused it to incur sea transportation charges of USD 5,200,055 and ocean loss (crude oil lost during sea transportation) in the amount of USD 1,551,372. TUPRAS states that it would not have incurred these expenses if the Iraq-Turkey pipeline had not been shut down. Accordingly, TUPRAS requests compensation in the amount of USD 6,751,427 for losses associated with the Kirikkale refinery.

1. Verification and analysis – freight charges and ocean loss

(a) TUPRAS' contentions

157. In support of its freight charges and ocean loss claim, TUPRAS provided a copy of its crude oil sales contract with SOMO, a schedule of transportation expenses incurred during the last eight months of 1990, and several invoices that have not been translated into English as required by article 6(5) of the Rules.

158. TUPRAS asserts that SOMO was bound by a contractual obligation to supply oil to TUPRAS, and that this oil would have been transported through the Iraq-Turkey pipeline had Iraq not invaded Kuwait. TUPRAS claims that the interruption in deliveries of Iraqi crude oil forced TUPRAS to secure alternative supplies of crude oil from other markets, and thus caused it to incur additional costs. In TUPRAS' view, Iraq's invasion of Kuwait is the cause of its losses because the invasion caused the shutdown of the Iraq-Turkey pipeline, which in turn caused TUPRAS' losses.

159. Central to TUPRAS' claim is the suspension of crude oil deliveries through the Iraq-Turkey pipeline. TUPRAS acknowledges that the shutdown of the pipeline prevented performance by SOMO, thus requiring TUPRAS to obtain oil elsewhere. TUPRAS claims that the Iraq-Turkey pipeline was shut down as a result of Iraq's invasion of Kuwait and, therefore, that the trade embargo was not the cause of its losses.

(b) Iraq's response

160. Iraq argues that, in the absence of the trade embargo, SOMO would have been able to perform its contractual obligations. Thus, in Iraq's view, the trade embargo is the sole cause of any losses that TUPRAS might have incurred. Iraq also asserts that TUPRAS' revenues increased in 1990 and 1991, compared to pre-invasion amounts, and that any increased costs should be offset against such increased profits. Finally, Iraq questions the accuracy of certain factual assertions by TUPRAS which, in light of the Panel's findings regarding this claim, need not be investigated in greater detail.

2. Conclusions and recommendations - freight charges and ocean loss

161. The Governing Council requires the Panel to determine what would, in all probability, have occurred "irrespective of whether the trade embargo and related measures had been in force". 19/ As discussed in the claim of BOTAS, at paragraphs 130 - 133, supra, the Panel finds that, in the absence of the trade embargo, Iraq probably would have continued to ship crude oil at least until the commencement of hostilities with the Allied Coalition Forces on 17 January 1991. After that time, the Panel finds that Iraq would have been unable to export crude oil through at least the remainder of 1991 because of the damage to Iraq's infrastructure resulting from military activities, and thus for reasons other than the trade embargo.

162. The evidence presented by TUPRAS regarding its claim for freight charges and ocean loss indicates that these additional costs were incurred in the period between 6 August 1990 and 31 December 1990. Thus, all of the losses were incurred in the period during which the Panel finds that, but for the trade embargo, Iraq probably would have continued to export crude oil. TUPRAS acknowledges that, had SOMO continued to ship crude oil through the Iraq-Turkey pipeline, TUPRAS would not have incurred the additional charges for which it now seeks compensation. In the absence of the trade embargo, then, TUPRAS would have incurred no losses. The Panel finds that the trade embargo is the sole cause of the freight charges and ocean losses claimed by TUPRAS. For this reason, the Panel recommends that no compensation be awarded to TUPRAS for this element of the claim.

163. In addition to the foregoing, the Panel notes that TUPRAS has not provided evidence sufficient to permit an accurate calculation of the additional freight charges and ocean loss. Although the Panel has made several requests for this information, TUPRAS has not provided it, ultimately replying that no further evidence could be found as a result of events related to earthquakes that occurred in Turkey subsequent to the time that the original claim was filed. Therefore, even if the claim had been found to be compensable, the Panel would still have recommended that no compensation be awarded on the grounds that the claimant failed to substantiate its claim with sufficient evidence.

B. Additional war risk insurance

164. TUPRAS states that, as a result of Iraq's invasion and occupation of Kuwait, insurance underwriters began to charge additional war risk premiums with respect to cargo loaded at ports located in the Persian Gulf and vessels transporting the cargo. Because a major portion of TUPRAS' crude oil and oil product requirements were transported by sea from this region, it incurred significant additional expenses from September 1990 to the end of July 1991. TUPRAS claims that the additional expenses amounted to USD 6,808,950, and seeks compensation in that amount.

165. In support of its additional war risk insurance claim, TUPRAS has provided two schedules listing instances of additional war risk insurance purchased after Iraq's invasion of Kuwait. Several copies of insurance policies and invoices, most of which have not been translated into English, were also provided.

1. Verification and analysis – additional war risk insurance

166. TUPRAS has provided little evidence in support of its claim for additional war risk insurance costs. Because TUPRAS did not provide English translations for the relevant insurance policies and invoices, the Panel cannot determine whether those documents support its claim. Further, the two schedules noted above are internal corporate records suggesting that TUPRAS may have incurred some additional unquantified war risk insurance costs during some unspecified period. When requested, however, TUPRAS could neither produce any evidence that verified the schedules nor could it prove when and in what amounts the additional war risk insurance costs had been incurred. The Panel considers that it has given the claimant ample opportunity to prove this element of the claim through the submission of appropriate evidence.

167. As noted above, TUPRAS contends that evidence may have been destroyed and/or lost during the earthquakes that struck Turkey. The claimant has not, however, attempted to explain what evidence would have existed or how that evidence might have supported its claim. In fact, TUPRAS has not alleged that the evidence destroyed or lost was relevant to or used in the preparation of this claim. In the absence of the most rudimentary information regarding the lost evidence, or any explanation as to why the claimant failed to submit the evidence with the original claim, the Panel finds that this element of TUPRAS' claim must be reviewed as it is presented, i.e., with little or no supporting evidence.

2. Conclusions and recommendations – additional war risk insurance

168. The Panel is unable to verify this element of the claim due to lack of evidence. Accordingly, the Panel recommends that no compensation be awarded for increased war risk insurance premiums.

C. Product loss

169. TUPRAS states that, at the time of Iraq's invasion of Kuwait, it had a contract to import 180,000 metric tons of diesel oil per year from Iraq. The diesel oil was to be transported by road from Iraq to Turkey.

170. Towards the end of August, three trucks carrying such diesel oil arrived at the border between Iraq and Turkey and were turned back, presumably as a result of the trade embargo. Subsequently, the trucks were seized and their cargo forcibly emptied by Iraqi forces. As a result, TUPRAS alleges that it incurred a loss of USD 9,179, the value of the lost diesel oil. TUPRAS seeks compensation in that amount.

1. Verification and analysis – product loss

171. In support of this loss element, TUPRAS has provided a list identifying the three shipments seized by Iraqi forces, correspondence from the trucking company and the Turkish customs authorities describing the events surrounding the loss, a list of diesel oil liftings by the trucking company, and two SOMO invoices with respect to diesel oil sold to TUPRAS.

172. The Panel finds that there is sufficient evidence to support TUPRAS' claim that three truck loads of diesel oil were seized and emptied at the direction of Iraqi military forces. There are two witness accounts that substantially corroborate each other, one of which is a contemporaneous official record of the Government of Turkey. Further, TUPRAS submitted corporate records of the quantity and price of the lost diesel oil, which establish its value. TUPRAS did not, however, submit proof that it paid for the lost diesel oil.

2. Conclusions and recommendations – product loss

173. Because TUPRAS did not produce any proof that it paid for the lost diesel oil, the Panel must consider the possibility that SOMO bore this loss. Even if TUPRAS paid for the diesel oil, it has not argued that the detention of the trucks at the border was caused by anything other than the trade embargo. Accordingly, the Panel recommends that TUPRAS be awarded no compensation for this element of the claim. The resulting recommendations with regard to the TUPRAS claim are shown in table 10.

Table 10. TUPRAS' claim - recommended compensation

Claim element	Claim amount (USD)	Panel's adjustments (USD)	Panel's recommendation (USD)
Freight charges and ocean loss	6,751,427	6,751,427	nil
Additional war risk insurance	6,808,950	6,808,950	nil
Product loss	9,179	9,179	nil
Total	13,569,556	13,569,556	nil

VII. CLAIM OF NATIONAL IRANIAN OIL COMPANY

A. Facts and contentions

174. National Iranian Oil Company ("NIOC") and various affiliated and subsidiary entities (hereinafter collectively referred to as the "group of companies") produce, process, transport, market and sell crude oil originating in the Islamic Republic of Iran ("Iran"). NIOC alleges that, as a result of Iraq's invasion and occupation of Kuwait, it and its subsidiaries incurred a loss of sales revenue, increased costs and damage to certain operating assets. These alleged losses are detailed in the following sections of this report.

175. On 22 August 1994, NIOC filed its claim seeking compensation for losses allegedly sustained by its group of companies, which are identified and discussed below at paragraphs 181 - 192. NIOC filed five category "E" claim forms (the "claim forms") on behalf of the group of companies, claiming an aggregate compensation of USD 1,135,804,812. These claims were grouped by the Commission for processing and assigned claim number 4001340. NIOC's claim, as set out in the originally submitted claim forms, sought compensation as follows:

Table 11. NIOC's original claim

Claimant/Entity	Claim amount (USD)
NIOC/Export Sales	191,891,640
NIOC/National Iranian Drilling Company	600,000
NIOC/Onshore Production	146,193,480
IOOC/Offshore Production	735,048,000
National Iranian Tanker Company	62,071,692
Total	1,135,804,812

176. NIOC's statement of claim, which was filed at the same time as the claim forms, presented a different and more detailed calculation of the claim. In the statement of claim, the claimant entities differed slightly from the entities listed in the claim forms. The total amount specified in the statement of claim, however, differed significantly from the amounts listed in the claim forms. For example, in NIOC's statement of claim, the losses attributed to National Iranian Drilling Company are included in the claim of Offshore Production Management. Additionally, while the claim forms stated the claim amounts in United States dollars, the interim calculations in the statement of claim were made partly in United States dollars, and partly in Iranian rials and British pounds. In its statement of claim, NIOC converted the interim figures into United States dollars at exchange rates it selected.
NIOC submitted no further claim documents prior to 11 May 1998, the date beyond which claims filed in category "E" could not be amended to increase the amount claimed or to advance claims for previously unidentified loss types. This deadline is explained in paragraph 24, supra.

177. As a preliminary observation, the Panel notes that it was unable to reconcile the amounts claimed by NIOC on the claim forms with the documentary evidence submitted by the NIOC group of companies which, in all cases, fell short of substantiating the claimed amounts. The Panel also notes that NIOC submitted one statement of claim in support of all of the claim forms, thus suggesting that the claimant intended this document to summarise its consolidated claim. The Panel further notes that NIOC relied on the amounts set out in the statement of claim as the starting point in its responses to the Commission's claim investigation procedures.

178. The Panel considers that, in this particular case, the statement of claim more accurately reflects NIOC's claim and its allocation of losses to the divisions and subsidiaries with which it is affiliated. 20/ For these reasons, and considering that the total amount claimed in the statement of claim is less than the amount set out in the claim forms, the Panel finds that NIOC's statement of claim constitutes a more accurate statement of NIOC's claim, as shown in the following table:

Table 12. NIOC's amended claim

Claimant/Entity	Claim amount (USD)
NIOC/Export Sales	345,591,447
NIOC/International Affairs	249,970,055
NIOC/Onshore Production	7,559,582
IOOC/Offshore Production	31,717,771
National Iranian Tanker Company	62,139,285
Total	696,978,140

179. In the course of the review of the claim undertaken by the Panel, NIOC further refined, corrected and adjusted its calculations of specific claim elements. In particular, NIOC alleged and offered to prove that losses suffered by certain of its divisions were substantially larger than those reflected in its amended claim. While the claimant is permitted to correct calculations and conform the claim to the evidence, the Panel finds that the claimant may not increase the total amount of the claim beyond the claim amount stated on 11 May 1998, which was USD 696,978,140 in the aggregate for NIOC and its group of companies. The Panel therefore used this number as the basis of its investigation and report.

180. As discussed in the following sections of the report, during the claim review process, up to and including the oral proceedings held on 10 January 2001, the Panel sought to obtain information concerning the nature and identity of the companies within NIOC's group that had actually suffered the alleged losses. Based on the information provided by the claimant during these investigations, the Panel directed that the claim be severed into three separate claims, and the losses identified in NIOC's amended

claim be apportioned among the legal entities identified by the claimant and verified by the Panel in the remainder of this report.

181. NIOC is a corporation created under Iranian law. Since 1980, companies in the Iranian oil sector have been owned by the State and directed by the Ministry of Petroleum. NIOC is governed by an assembly, which sets policy and makes major decisions. It is administered by a board of directors, which implements the assembly's policies and decisions and provides guidelines for the operations of the company.

182. NIOC's principal commercial activity is the production and sale of crude oil from Iran's oilfields. NIOC is the only company authorized to produce and sell this crude oil. It does so for the benefit of the Government in respect of export sales, and for its own account in respect of domestic sales.

183. NIOC's main export terminal at the time of Iraq's invasion of Kuwait was Kharg Island, in the northern part of the Persian Gulf, near the border between Iran and Iraq and close to Kuwait. NIOC alleges that the military activities in this region of the Persian Gulf caused its customers to refuse to sail to Kharg Island to collect oil. As a result, NIOC was forced to transfer its export loading operations to Lavan Island, a facility further to the south and outside the area of military operations, or to charter vessels to ship the crude to customers at ports outside the region. Prior to Iraq's invasion of Kuwait, Lavan Island was a minor export terminal, handling much smaller quantities of crude oil exports than Kharg Island. NIOC further alleges that, due to the threat that military activities might disrupt the production and export of oil from Iran, NIOC produced and exported as much crude oil as possible, even where no buyer was immediately identified, as a precaution against future disruptions. These factors caused the NIOC group of companies to incur increased costs.

184. As discussed more fully below, NIOC alleges that production from its onshore fields declined as a result of the disruption of its normal distribution operations. NIOC claims that the decline in production resulted in lower export sales revenues and seeks compensation in the amount of USD 345,591,447 for this alleged sales loss. 21/

185. NIOC International Affairs ("International Affairs") is the marketing and contracting division of NIOC. International Affairs negotiates sales with buyers, allocates crude oil production amongst buyers, and arranges for the delivery or storage of the oil. At all relevant times, International Affairs was an unincorporated operating division of NIOC.

186. International Affairs claims that, as a result of the increase in transportation activity brought about by NIOC's need to ship crude oil to customers who would not sail to the Persian Gulf, it incurred increased transportation costs. In addition, the increased production undertaken as a precaution against disruption of exports caused International Affairs to incur increased storage costs. International Affairs seeks compensation in the amount of USD 249,970,055 for these increased costs. 22/

187. NIOC Onshore Production Management (“Onshore Production”), an unincorporated division of NIOC at the time its alleged losses were sustained, develops Iran’s onshore oil and gas fields, produces and processes crude oil and natural gas and transports them to the relevant ports. Subsequent to the events at issue in this claim, Onshore Production was re-organised as a separate corporation and re-named National Iranian South Oil Fields Company.

188. Onshore Production claims that it incurred additional expenses related to the transportation of crude oil, and that it incurred losses of product when storage shortages forced it to flare quantities of butane and propane. Onshore Production seeks compensation in the amount of USD 7,559,582 for the increased costs and product losses.

189. At the time of Iraq’s invasion and occupation of Kuwait, Iranian Offshore Oil Company (“IOOC”), a wholly owned subsidiary of NIOC, was responsible for the development and production of crude oil in Iranian territorial waters. In 1995, a division of NIOC, Offshore Production Management (“Offshore Production”), assumed IOOC’s responsibilities, and IOOC was re-organised and assumed different responsibilities under the name of Petroleum Development Engineering Company. Although the claims are submitted by NIOC/ Offshore Production, it was actually the predecessor company, IOOC, that sustained the losses. Accordingly, in this report the Panel will refer to IOOC, the entity in existence at the time of the alleged losses.

190. IOOC claims that its operating costs increased as a result of Iraq’s invasion of Kuwait. The principal increased expense resulted from the need to transfer crude oil loading operations from Kharg Island to Lavan Island. IOOC seeks compensation in the amount of USD 31,717,771 for these increased costs. 23/

191. National Iranian Tanker Company (“NITC”) is a corporation created under Iranian law. It was a wholly-owned subsidiary of NIOC throughout the claim period. NITC provides marine transportation and related services to companies operating in the petroleum industry.

192. NITC claims that transportation, insurance and employee costs increased as a result of Iraq’s invasion of Kuwait. In addition, NITC seeks reimbursement for the costs incurred in moving its terminal operations out of the war zone for the duration of the military activities in early 1991. NITC seeks compensation in the amount of USD 62,139,285 for these costs. 24/

B. Iraq’s response

193. Iraq first raises a procedural objection to NIOC’s claim. Iraq alleges that this claim should have been reviewed as a governmental claim under category “F”, and not as a corporate claim under category “E”, because NIOC is a state controlled entity.

194. Iraq further argues that NIOC did not suffer a loss because it increased its crude oil production to take advantage of the inflated oil prices that occurred due to Iraq's invasion of Kuwait. Iraq asserts, by reference to published OPEC production documents, that NIOC increased its production from an average of 2.8 million barrels per day in 1989, to 3.1 million barrels per day in 1990, to 3.4 million barrels per day in 1991. Iraq contends that NIOC earned extra profits exceeding its alleged losses due to the invasion-related increases in price and volume.

C. The oral proceedings

195. In its procedural order dated 26 October 2000, the Panel requested that NIOC, any of its relevant subsidiaries and Iraq participate in oral proceedings, and address the following issues:

> "[w]hether the [c]laims of wholly owned subsidiaries NITC and Offshore Production Management should be considered separately from the [c]laim of NIOC;
>
> [w]hether subsidiary-parent relations were conducted at arms length;
>
> [w]hich of the various NIOC related entities actually sustained the claimed losses; [and]
>
> [w]hether NIOC sustained a compensable loss of export sales as a direct result of Iraq's invasion and occupation of Kuwait".

196. In its principal address, NIOC argued that it had suffered a compensable loss of export sales because its sales decreased and the costs associated with those sales increased as a direct result of Iraq's invasion of Kuwait. NIOC acknowledged that it had benefited from the increase in oil prices over the same period, but argued that these amounts should not be set off against its losses. NIOC noted that the increased price benefited all oil producing countries, including countries outside the Middle East such as Nigeria and Venezuela. NIOC contended that it would be inequitable to deprive Iran of the benefits that accrued to other oil producing countries when those countries did not incur the higher costs forced on NIOC due to its proximity to the war zone. NIOC claimed that during the period of greatest increased prices, it suffered a loss of profit because it was unable to export at its usual capacity. 25/

197. NIOC stated that it was a separate legal entity from its subsidiaries, NITC and IOOC/Offshore Production. NIOC asserted that these companies had separate operations and budgets, and referred to supporting evidence previously filed with the Commission. NIOC asserted that inter-company transactions were conducted at arm's length at all times relevant to the claim.

198. Iraq argued that the claimant had based its claim on selective events and time periods. Iraq contended that, based on publicly available figures, NIOC earned more than USD 7,500,000,000 in

increased profits during the seven-month period of Iraq's invasion and occupation of Kuwait, as compared to the preceding seven-month period.

199. In addition, Iraq contended that the losses claimed by NIOC are not compensable because they are not direct. Iraq argued that to award compensation for oil not sold in January and February 1991 would unjustly enrich NIOC because NIOC ultimately produced and sold the oil made the subject of its claim. Finally, Iraq stated that, based on the theory of alter ego, the claims of all of the NIOC-related entities should be considered to be governmental claims, as each of these companies was owned, directed and operated by the Government of Iran.

D. Findings on corporate structure

200. Although five claim forms were submitted without regard to the legal status of the entities involved, the Panel finds that the losses presented by these entities are properly characterized as three distinct claims. The Panel concludes that the claims of unincorporated divisions of NIOC should be considered as a part of NIOC's claim. Thus, the claims of NIOC export sales, International Affairs and Onshore Production will be treated as a composite claim advanced by NIOC. However, in instances where wholly-owned subsidiaries were duly formed and independently operated, the Panel finds that they should be considered as separate claimants.

201. The resulting clarification of claimants and claim amounts, as reflected in the table below, formed the basis of the Panel's verification efforts.

Table 13. Separate NIOC claimants

Claimant/Entity	Claim amount (USD)
NIOC	603,121,084
IOOC/Offshore Production	31,717,771
National Iranian Tanker Company	62,139,285
Total	696,978,140

E. The claims of NIOC and its divisions

1. NIOC – loss of profit from export sales

202. NIOC claims that, as a result of Iraq's invasion of Kuwait, the volume of its crude oil export sales declined by 20,431,000 barrels in January and February 1991. Prior to that time, NIOC exported crude oil produced both from its onshore and offshore fields. Most of the crude oil produced in Iran is delivered by

pipeline directly to Kharg Island, Iran's main export terminal in the Persian Gulf. The crude oil is ordinarily stored, treated and exported from Kharg Island.

203. As explained at paragraph 183, supra, NIOC claims that the risk of military operations in the Persian Gulf in early 1991 necessitated a temporary transfer of export activities from Kharg Island to Lavan Island. NIOC claims that due, inter alia, to difficulties in transporting the oil to customers, crude oil export sales from its onshore fields decreased in January and February 1991 compared to the sales achieved during the two month period of November and December 1990. 26/ NIOC quantifies its claim by multiplying the volume shortfall in crude oil exports of 20,431,000 barrels, by the average market prices of "Iranian light" crude of USD 19.80 and "Iranian heavy" crude of USD 14.68 for the months of January and February 1991 respectively. From this amount, NIOC deducts USD 23,736,553 for saved production costs, resulting in a claimed amount of USD 345,591,447 as shown in the following table:

Table 14. NIOC's loss of profit from export sales

Claim element	Claim amount (USD)
Export sales revenue loss	369,328,000
Saved production costs	(23,736,553)
Total	345,591,447

(a) Verification and analysis – NIOC loss of profit from export sales

204. In support of this claim element, NIOC submitted sales, production, and accounting documents. The Panel reviewed, inter alia, annual reports, monthly sales and production data, price data, general ledgers, trial balances, invoices and the trading and income statements of NIOC. Extensive interviews of NIOC personnel were also conducted in the verification of this claim element.

205. At the outset, the Panel finds that, contrary to what is contended by NIOC: 1) a two-month claim period, January and February 1991, is an inadequate length of time to accurately determine the loss of profits that NIOC sustained from an alleged decline in crude oil export sales due to Iraq's invasion of Kuwait, and 2) any loss of profits that NIOC suffered cannot be determined by reference to invasion-affected prices. In order to restore NIOC to the position that it would have been in but for Iraq's invasion of Kuwait, it is appropriate that the verification encompass the period in which NIOC allegedly suffered losses due to Iraq's invasion of Kuwait, and the period during which benefits might have been derived by NIOC from the same cause. The Panel finds that any such loss must be calculated by comparing NIOC's actual export sales volume and profits during the claim period with an estimate of what the export sales volume and profits would have been during the same period in a hypothetical no-invasion scenario.

206. Accordingly, the period that the Panel finds appropriate to determine NIOC's loss is NIOC's accounting period of 21 July 1990 to 20 July 1991 (the "claim period"). This period encompasses NIOC's alleged losses as well as any benefits that NIOC might have derived from the invasion.

207. The Panel first estimated what NIOC's export sales volume of crude oil would have been from 21 July 1990 to 20 July 1991 (the "no-invasion volume"). Based on NIOC's July 1990 OPEC quota of 3.14 million barrels per day, and taking into account crude oil supplied by NIOC for Iran's domestic consumption and crude exchange transactions, the Panel estimates that NIOC could have exported and sold approximately 781,465,000 barrels of crude oil in that period. The Panel finds that this is the most appropriate method by which NIOC's no-invasion export sales volume can be estimated. A longer historical analysis of export sales volume encompassing the years prior to 1989 would be distorted by the effects of the war between Iran and Iraq on NIOC's exports. Between 1980 and 1989, NIOC's exports fluctuated due to damage to and reconstruction of its oil infrastructure.

208. Next, the Panel reviewed the volume of crude oil that NIOC actually exported and sold between 21 July 1990 and 20 July 1991. The Panel calculated actual sales from NIOC's export sales data. Based upon that evidence, the Panel concludes that NIOC exported and sold approximately 850,011,814 barrels of crude oil between 21 July 1990 and 20 July 1991.

209. The Panel accordingly concludes that NIOC's export sales volume of crude oil increased by approximately 68,546,814 barrels during the claim period, compared to the no-invasion export volume estimated in paragraph 207.

210. The Panel further considered whether NIOC suffered any loss of profits during the period of Iraq's invasion and occupation of Kuwait. The Panel first estimated the profits that NIOC could have earned in a no-invasion scenario. In order to do this, the Panel applied a price of USD 16.25 per barrel to NIOC's no-invasion volume of 781,465,000 barrels of crude oil, which is the average price that NIOC achieved on its crude oil export sales during the 12 months ended 20 July 1990 and the 12 months ended 20 July 1992. The Panel concluded that this price reasonably reflected the average price that NIOC would have achieved for its crude export sales in a no-invasion scenario. The above price was also adjusted to reflect the proportion of CIF/FOB sales that NIOC typically achieved prior to the invasion.

211. Based on the above calculations, the Panel finds that NIOC would have earned revenues of approximately USD 12,698,806,250 from crude oil export sales between 21 July 1990 and 20 July 1991 if Iraq's invasion of Kuwait had not occurred ("no-invasion revenues").

212. Next, the Panel reviewed NIOC's sales journals and annual reports to determine NIOC's actual revenues from crude oil export sales between 21 July 1990 and 20 July 1991. The documents demonstrate that NIOC earned revenues of approximately USD 17,777,737,960 from its actual export sales of 850,011,814 barrels of crude oil in that period.

213. Therefore, the Panel finds that the evidence submitted by NIOC demonstrates that the difference between NIOC's no-invasion revenues of USD 12,698,806,250 and actual revenues of USD 17,777,737,960 from increased crude export sales volume and prices resulted in increased revenues to NIOC of approximately USD 5,078,931,710 in the 21 July 1990 to 20 July 1991 accounting period. The Panel calculated that NIOC would have sustained marginal production costs of USD 79,514,304 27/ from the increased export sales, and that the net increased profit that NIOC would have earned would be approximately USD 4,999,417,406. This increase in profits during the claim period exceeds the alleged loss of profits of USD 345,591,447 during the months of January and February 1991 for which NIOC is claiming compensation.

214. As stated above, NIOC asserts that it is entitled to the increased profits earned during the period of Iraq's invasion and occupation of Kuwait, as well as compensation for the loss that occurred in January and February 1991. NIOC contends that it would be discriminatory if it were not allowed to benefit in the same way that other oil producers outside the war zone benefited from the increased price of oil.

(b) Conclusions and recommendations – NIOC loss of profit from export sales

215. In order to assess NIOC's actual loss, the Panel considered all of the extraordinary effects of Iraq's invasion of Kuwait upon NIOC's crude oil export sales operations during the claim period. The Panel finds that Iraq's invasion of Kuwait had two major effects on NIOC's export sales operations. First, NIOC exported a greater volume of crude oil than prior to Iraq's invasion of Kuwait because, inter alia, there was no OPEC quota in force during that time. Second, NIOC was able to sell crude oil at a higher price than it could have achieved if Iraq's invasion of Kuwait had not occurred. Consequently, the Panel finds that NIOC was in a better financial position than it would have been in if Iraq's invasion of Kuwait had not occurred.

216. Further, the Panel finds that NIOC should not be allowed to claim a loss that arose out of Iraq's invasion of Kuwait without taking into account the benefits that arose out of the same event. The Panel concedes that other oil producers around the world benefited from an invasion-related oil price increase. However, these same producers are not claiming for damages before the Commission, and therefore the question of an offset does not arise.

217. The Panel finds that, because NIOC's increased profits of USD 4,999,417,406 during the period of Iraq's invasion and occupation of Kuwait far exceed its claimed losses of USD 345,591,447 allegedly arising out of the same event, these increased profits should be set off against the claims of NIOC and its unincorporated divisions, as shown in table 12, and denominated as NIOC's claim in table 13. Accordingly, the Panel recommends that no compensation be awarded for NIOC's claimed loss of profits from crude export sales.

2. NIOC division - International Affairs

218. International Affairs claims that, as a result of Iraq's invasion of Kuwait, it incurred increased and extraordinary expenses in carrying out its marketing functions, as described at paragraph 186, supra. On behalf of International Affairs, NIOC claims USD 249,970,055 for these expenses. 28/ A majority of the expenses relate to the increased hire of vessels, oil cargo-related payments and payments for extra crude oil storage tank capacity.

(a) Verification and analysis – International Affairs

219. Typically, Iranian crude oil is sold on one of three bases: FOB (Free On Board), CIF (Cost, Insurance and Freight) and C&F (Cost and Freight). International Affairs alleges that, historically, it sold more crude oil on an FOB basis. For sales on a CIF or C&F basis, the crude oil ordinarily would be transported using vessels owned by NITC or foreign vessels chartered by NITC.

220. As explained at paragraph 183, supra, during the period of Iraq's invasion and occupation of Kuwait, the buyers of Iranian crude oil allegedly refused to buy oil FOB Kharg Island, resulting in an increased and urgent need for vessels to transport crude oil from Kharg Island to the buyers either at Lavan Island or outside the Persian Gulf. Further, International Affairs claims that the Government of Iran instructed it to store and sell as much oil as it could outside Iran in order to mitigate against the possible disruption of production or export operations. In addition, no OPEC quota limiting oil production was in operation during this period. Therefore, in this period, International Affairs hired extra storage and vessels to ship oil to buyers or potential buyers outside the Persian Gulf, and to store as much crude oil as possible there.

221. NIOC claims on behalf of International Affairs that, as a result of the increased storage and transportation activities, it incurred extra expenses in hiring vessels and storage tanks to ship to various ports and store oil at various destinations. In addition, it incurred extra expenses in insuring its increased oil cargoes and conducting surveys and inspections on increased crude oil loading. The claim elements are described separately below:

Table 15. NIOC division - International Affairs’ claim

Claim element	Claim amount (USD)
Extra storage tanks	8,114,840
Delay costs in unloading crude oil	89,280,000
Transportation costs:	
Increased freight costs due to CIF sales	59,567,367
Increased costs of hiring vessels	77,385,048 a/
Insurance costs:	
Insurance premium on increased cargo of crude oil	2,371,053
Increased insurance premium on crude oil	49,724
Increased payroll expenses	42,000
Loss of crude oil in the course of loading and discharging for CIF deliveries (“ocean loss”)	12,710,023
Survey expenditures	450,000
Total	249,970,055

a/ NIOC subsequently reduced this claim amount to USD 19,040,000 in response to interrogatories from the Panel.

(i) Extra storage tanks

222. NIOC claims USD 8,114,840 for the cost of hiring additional storage capacity at Le Havre and Rotterdam. International Affairs alleges that, as a result of Iraq’s invasion of Kuwait, it was forced to store its crude oil in safer regions away from the Persian Gulf. Prior to that time, International Affairs alleges that it hired less storage capacity at Le Havre and Rotterdam at lower rates. However, as a result of Iraq’s invasion of Kuwait, it was forced to hire additional storage capacity at higher rates from September 1990 to March 1991.

223. In support of this claim element, International Affairs submitted, inter alia, storage agreements and letters from the storage tank hire companies with monthly rental rates charged prior to, during and subsequent to the claim period. Based on these documents, the Panel finds that the alleged increased rates were not directly caused by Iraq’s invasion of Kuwait. The increased rates reflect additional facilities, throughput fees and handling fees incurred due to the greater volume of crude oil NIOC exported during the period. The increased rates also reflected normal annual rate increases that International Affairs failed to prove were related to Iraq’s invasion of Kuwait. The Panel also finds that International Affairs did not provide sufficient documentary evidence to substantiate a portion of this claim relating to additional storage capacity rented for six months from September 1990.

(ii) Delay costs in unloading crude oil

224. NIOC claims USD 89,280,000 for the cost of longer delays in unloading crude oil at buyers' destinations compared to the period prior to Iraq's invasion of Kuwait. International Affairs claims that it chartered an increased number of vessels during the period to export and store the crude oil produced because there was a shortage of land storage capacity. However, there were delays in unloading the oil due to a shortage of customers during this period. According to International Affairs, some vessels would remain at anchor at the loading port as floating storage, while other vessels would head towards north-western Europe, where they expected to sell the cargo. International Affairs allegedly incurred costs for the delays in unloading the crude oil from these vessels as some of these vessels would float on the nearby waters until International Affairs found buyers for its crude oil. The calculation of the claim amount is based on an average vessel hire rate of USD 30,000 per day, multiplied by 2,976 days, being the aggregate additional period that the vessels took to unload the crude oil at their destinations, compared to the period before Iraq's invasion of Kuwait.

225. In support of this claim element, International Affairs submitted schedules listing the vessels' names, bill of lading dates, destinations, discharge dates, actual voyage dates and the number of delay days for the 12 months ended 2 August 1991 compared to the 12 months ended 2 August 1990. This was to demonstrate that the delay days increased during the time of Iraq's invasion and occupation of Kuwait compared to the period before the invasion. The evidence shows that the claimed vessel hire rate of USD 30,000 was not applicable throughout the entire claim period. For vessels chartered by NITC from third parties, this rate only applied from mid-January 1991. International Affairs appears to have obtained lower hire rates prior to this period. As a result, the Panel finds that this claim element is overstated by at least USD 20,000,000.

(iii) Increased costs due to CIF sales

226. NIOC claims USD 59,567,367 for the increased freight cost and other expenditures (such as port and fuel costs) incurred as a result of increased sales on a CIF basis. International Affairs alleges that, as a result of Iraq's invasion of Kuwait, NIOC exported an increased amount of crude oil on a CIF basis, compared to the one year period prior to Iraq's invasion of Kuwait. International Affairs states that, but for the invasion, it would have sold most of its crude oil on an FOB basis, which it claims is commercially more favourable for NIOC. International Affairs claims that the additional costs arising from CIF sales could not be fully recovered from buyers, despite charging higher prices for CIF sales. The claim amount is based on the alleged increased volume of 39,711,578 barrels of crude oil exported by NIOC on a CIF basis, multiplied by USD 1.50, the average unrecovered shipping and related costs per barrel that International Affairs maintains it lost on CIF sales.

227. In support of this claim element, International Affairs submitted schedules outlining the calculations, loading statistics and a report of crude oil export cargo insured on a CIF basis prepared by

International Affairs' marine insurance underwriters. The Panel finds that the documents submitted by International Affairs for this claim element were insufficient to demonstrate that International Affairs actually sustained an average USD 1.50 per barrel in excess freight costs for its crude oil exports due to Iraq's invasion of Kuwait. Further, a review of differences between FOB and CIF costs did not clearly show that International Affairs sustained increased and unrecovered costs per barrel due to CIF sales.

(iv) Increased cost of hiring vessels

228. NIOC originally claimed USD 77,385,048 for the hire of shuttle and storage boats to store, transfer and export crude oil to various destinations, but subsequently acknowledged that, taking into account duplications with NITC's claim, its claim would be more accurately calculated as USD 19,040,000. 29/

229. In support of this claim element, International Affairs submitted schedules of calculation of the USD 19,040,000 amount, an addendum to an NITC contract and accounting ledgers. The Panel's review of this claim element and NITC's claims for increased boat charter hire revealed additional duplications amounting to USD 3,584,000. Consequently, the Panel concludes that this claim element is overstated by at least that amount.

(v) Insurance premium on increased cargo

230. NIOC claims USD 2,371,053 for the increased cost of insurance premiums on the crude oil shipped out of Iran. The increased cost of insurance premiums is calculated based on the value of crude oil (the number of barrels multiplied by the price) shipped on a CIF basis during the claim period. The Panel notes that there is potential duplication between this claim element and the claim for increased costs due to CIF sales, described in paragraphs 226 - 227, supra. However, since the claim for increased costs due to CIF sales could not be substantiated by the claimant, the Panel could not review this claim element for potential duplication.

231. In support of this claim element, International Affairs provided a schedule calculating the claim amount and some invoices. The Panel concluded that the cargo insurance premium for crude oil of 0.04625 per cent, and the additional insurance premium for aged vessels (between 15 and 20 years) of 0.05 per cent, remained unchanged during the period of Iraq's invasion and occupation of Kuwait. The additional insurance premium paid by International Affairs was essentially the normal insurance premium rates applied to the increased volume of crude oil exported during the claim period, and the increased value of that crude oil resulting from the increased prices caused by Iraq's invasion of Kuwait. Therefore, the Panel concludes that International Affairs did not sustain an increase in insurance premium rates, and the additional volume NIOC shipped does not entitle it to an award in respect of this claim element.

(vi) Increased insurance premium on crude oil

232. NIOC claims USD 49,724 for the increased cost of insurance premiums with respect to crude oil stored in vessels. The claimed amount is based on various percentage rates on the sums insured for Iranian crude oil stored in vessels at sea in excess of 90 days, between 26 March 1991 and 9 August 1991.

233. In support of this claim element, International Affairs provided insurance company debit notes. The Panel requested insurance policies from 1989 to the end of 1992 to support this claim element; however, International Affairs did not provide these to the Panel. Based on the evidence submitted, the Panel finds that the insurance company debit notes confirm that these insurance premiums were charged to International Affairs. However, the Panel finds that it remains unproven that International Affairs actually paid these premiums in full, or that the increased cost of premiums was incurred due to Iraq's invasion of Kuwait.

(vii) Increased payroll expenses

234. NIOC claims USD 42,000 for the cost of paying its existing personnel to oversee the discharge and reloading of crude oil in various ports outside Iran. International Affairs alleges that, as a result of Iraq's invasion of Kuwait, it sent additional personnel to oversee the discharge and reloading of crude oil in various overseas ports, as more crude oil was shipped to and stored outside of Iran during this period.

235. In support of this claim element, International Affairs provided documents showing the names of affected employees, destinations, dates of departure, number of work days and the amounts paid to the employees. It is unclear from the evidence whether the additional employee hours were required due to the increase of crude oil exports during the claim period, from which NIOC benefited, or due to the emergency situation created by Iraq's invasion of Kuwait. Therefore, the Panel concludes that there is insufficient evidence to demonstrate that International Affairs sustained extraordinary payroll expenses for these employees due to Iraq's invasion of Kuwait.

(viii) Loss of crude oil in the course of loading and discharging for CIF deliveries ("ocean loss")

236. NIOC claims USD 2,978,368 and USD 9,731,655 for "ocean loss" of 0.5 per cent and 0.2 per cent respectively. International Affairs alleges that, as it was forced to ship more of its crude oil on a CIF basis, it lost additional volumes of crude oil in the course of loading and discharging. Ocean loss is calculated by International Affairs as the difference between the crude oil volume loaded and the crude oil volume discharged for all the CIF deliveries during the claim period. International Affairs alleges that it incurred ocean losses of 0.5 per cent, a normal rate of ocean loss, on an excess shipment of CIF sales of 39,711,578 barrels at USD 15 per barrel. Further, it states that it incurred excess ocean losses of 0.2 per cent on all of its CIF shipments, totalling 324,388,326 barrels, also at USD 15 per barrel. The Panel notes

that there is some apparent duplication between this claim element and the claim for increased cost due to CIF sales. However, since the claim for increased costs due to CIF sales could not be substantiated, the Panel did not review this claim element for potential duplication.

237. In support of this claim element, International Affairs provided CIF boat sheets documenting the volume of crude oil upon loading and the volume of crude oil upon discharge. It did not, however, produce the terms of its CIF sales contracts. The Panel finds that, failing any evidence about the precise contents of the sales contracts, NIOC has not substantiated its allegation that an increase in the sale of oil on a CIF basis, and a corresponding decrease in the sale of oil on an FOB basis, has caused it to incur damage resulting from ocean loss or, if such damage occurred, that it is due to Iraq's invasion and occupation of Kuwait.

(ix) Survey expenditures

238. NIOC claims USD 450,000 for additional crude oil survey costs allegedly incurred as a result of the increased handling of crude oil during CIF deliveries. International Affairs states that at least one inspection is needed for every shipment of crude oil leaving Iran and for every transfer of crude oil by pipeline from storage tanks in Rotterdam and Le Havre. The claim amount is therefore calculated based on the number of ships involved (150 vessels), multiplied by an average inspection cost estimated by NIOC at USD 3,000.

239. In support of this claim element, International Affairs provided documents relating to the following: inspection cost for crude oil transferred through storage tanks in Rotterdam for the period of 3 March 1990 to 28 November 1991 inclusive; inspection cost of vessels loaded with crude oil at British Petroleum Tanks or pipeline transfers to buyers' tanks for the period of 20 March 1990 to 20 June 1993 inclusive; and inspection cost for vessels at discharge ports for the period of 6 January 1990 to 30 August 1991 inclusive. The Panel reviewed these documents and confirmed that average inspection costs of USD 3,000 were charged to International Affairs. However, the Panel finds that International Affairs did not provide sufficient documentation to prove that these surveys were extraordinary costs incurred due to Iraq's invasion and occupation of Kuwait.

(b) Conclusions and recommendations – International Affairs

240. Following its finding to treat NIOC and its unincorporated divisions as one corporate entity at paragraph 200, supra, the Panel finds that NIOC's extraordinary profits should be set off against the claims of NIOC and its unincorporated divisions. The alleged losses of International Affairs are effectively those of NIOC. As the Panel finds that NIOC's increased profits of approximately USD 4,999,417,406 well exceed the alleged combined losses of NIOC and those of its divisions as shown in table 12, and denominated as NIOC's claim in table 13, supra, the Panel recommends that no compensation be awarded for the claim of International Affairs, totalling USD 249,970,055. As the above

discussion of International Affairs' claim demonstrates, this finding does not imply that International Affairs' claim for compensation would have necessarily succeeded had NIOC's extraordinary profits been less than the amount claimed.

3. NIOC division - Onshore Production

241. Onshore Production claims that, as a result of Iraq's invasion of Kuwait, it incurred additional expenses with respect to transportation, hiring extra communication channels, cleaning up oil-spills and replacing air filters. In addition, Onshore Production claims that it incurred a loss from the forced flaring of butane and propane. On behalf of Onshore Production, NIOC claims USD 2,616,716, GBP 522,000 and IRR 264,022,000. The claim elements are set forth in the table below:

Table 16. NIOC division - Onshore Production's claim

Claim element	Claim amount
Transportation costs:	
Sea transport costs	USD 1,305,545 IRR 10,180,490
Land transport costs	IRR 138,046,360
Air transport costs	IRR 70,000,000
Hire of communication channels	IRR 2,245,200
Clean-up of oil spill	GBP 522,000 IRR 43,549,950
Increased cost for replacement of air filters	USD 929,500
Product loss from flaring ("LPG")	USD 381,671
Total a/	USD 7,559,582

a/ These losses are expressed in the currency originally designated by the claimant. The total is listed in United States dollar equivalent at a rate of exchange chosen by the claimant. GBP 522,000 was converted to USD 1,002,240 and the cumulative amount of IRR 264,022,000 was converted to USD 3,940,626.

(a) Verification and analysis – Onshore Production

(i) Transportation costs

242. NIOC claims USD 1,305,545 and IRR 218,226,850 for additional transportation costs incurred between 3 August 1990 and 2 March 1991. According to Onshore Production, Iraq's invasion of Kuwait caused a disruption of regular air and sea transportation. As a result, it claims to have incurred additional costs to maintain the regular flow of cargo and personnel in this period. In addition, it incurred increased transportation expenses such as the rental of helicopters, aeroplanes, trucks and cars, which were

collectively used to help extinguish fires from the burning Kuwait oil wells, assist Kuwaiti refugees into Iran and transfer facilities from Kharg Island to Lavan Island. Consequently, NIOC claims sea transport losses of USD 1,305,545 and IRR 10,180,490, land transport expenses of IRR 138,046,360, and air transport costs of IRR 70,000,000.

243. In support of this claim element, Onshore Production submitted an affidavit explaining the losses and the calculation of the claim amount, as well as an invoice dated April 1991 reflecting transportation costs incurred to transport Kuwait refugees into Iran during the period of Iraq’s invasion and occupation of Kuwait. On more than one occasion, the Panel requested further supporting documentation, such as invoices, agreements and proof of payment for this claim element. However, Onshore Production did not comply with these requests. The Panel concludes that this claim element remains unsubstantiated.

(ii) Hire of communication channels

244. NIOC claims IRR 2,245,200 for the hire of additional radio channels between 18 January 1991 and 2 March 1991. According to Onshore Production, during the time of Iraq’s invasion and occupation of Kuwait, numerous warships entered the Persian Gulf and the volume of radio communication in the region increased dramatically. As a result, the existing radio channels used by Onshore Production were adversely affected by frequency interference. Onshore Production claims that it hired three additional radio channels and three technicians to maintain the quality of communications at the pre-invasion level.

245. In support of this claim element, Onshore Production submitted an affidavit explaining the loss and the calculation of the claimed amount. On more than one occasion, the Panel requested further supporting documentation, such as invoices and proof of payment for this claim element. However, Onshore Production did not comply with these requests. The Panel concludes that this claim element remains unsubstantiated.

(iii) Clean-up of oil spill

246. NIOC claims GBP 522,000 and IRR 43,549,950 for the cost of cleaning up oil spills during the months of January and February 1991. These expenses consist of cleaning chemicals, rental of a tug and the wages of personnel involved in the clean-up operation. Onshore Production states that, during the period of Iraq’s invasion and occupation of Kuwait, millions of barrels of oil were poured into the Persian Gulf. Onshore Production was responsible for cleaning up an oil spill in the vicinity of Kharg Island. Onshore Production claims that 1,000 barrels of “OSD chemicals” were bought from the United Kingdom for this purpose and that a tugboat was leased from NITC. In addition, 10 employees were assigned for a period of 30 days to the clean-up operation.

247. In support of this claim element, Onshore Production submitted an affidavit explaining the loss and the calculation of the claim amount, as well as an invoice for the purchase of chemicals in 1992. On

more than one occasion, the Panel requested further supporting documentation, such as invoices and proof of payment for this claim element. However, Onshore Production did not comply with these requests. The Panel concludes that this claim element remains unsubstantiated.

(iv) Increased cost for replacement of air filters

248. NIOC claims USD 929,500 for the additional cost of replacing turbine filters used in its operations in Khuzestan. Onshore Production alleges that, when Kuwait's oil wells were burning at the end of Iraq's occupation, a substantial amount of smoke and other pollutants from the oil well fires damaged components of the turbines. As a result, Onshore Production replaced the air filters for the turbines at a more frequent rate than prior to that time, in order to protect the turbines. Onshore Production estimates the claim amount based on the type, number and price of filters replaced.

249. In support of this claim element, Onshore Production submitted an affidavit explaining the loss and the calculation of the claim amount, two purchase orders dated December 1991 and July 1992 respectively, and shipping documents dated June 1992. On more than one occasion, the Panel requested further supporting documentation sufficient to demonstrate the increased consumption and replacement costs of the air filters. However, Onshore Production did not comply with these requests. The Panel concludes that this claim element remains unsubstantiated.

(v) Product loss from flaring

250. NIOC claims USD 381,671 for the sales value of its LPG products, liquid propane and butane. Due to military activity in the Persian Gulf, Onshore Production claims that LPG tankers could not load the LPG products from its refinery in Bandar Mahshahr and that, as a consequence, its refinery cooling system had to be shut down. As the refinery cooling system was needed for the proper and safe storage of the LPG products, Onshore Production could not continue storing the LPG products in the storage tanks at the refinery and it was forced to flare the products. Onshore Production claims that it flared 2,174 tons of propane at a cost of USD 128.25 per ton and 734 tons of butane at a cost of USD 140.13 per ton.

251. In support of this claim element, Onshore Production submitted an affidavit explaining the loss and the calculation of the claim amount, as well as documents showing the prices of propane and butane. On more than one occasion, the Panel requested further supporting documentation sufficient to demonstrate that there was an actual revenue loss from the flaring of these products due to Iraq's invasion of Kuwait. However, Onshore Production did not comply with these requests. The Panel concludes that this claim element remains unsubstantiated.

(b) Conclusions and recommendations – Onshore Production

252. As demonstrated above, despite numerous requests, the Panel finds that Onshore Production did not submit sufficient evidence to support any of its claim elements. The Panel, therefore, recommends that no compensation be awarded for the claim submitted on behalf of Onshore Production.

F. The claims of NIOC's subsidiaries

1. Iranian Offshore Oil Company

253. IOOC claims that, as a result of Iraq's invasion of Kuwait, it incurred various increased costs of operations in order to carry out its functions. Due to military activities in the Persian Gulf, IOOC claims that 3,000 of its employees faced delays in travelling from the Iranian mainland to Kharg Island, Lavan Island and Siri Island. Further, it had to hire vessels to relocate its loading facilities from Kharg Island to Lavan Island, pay war bonuses and undertake increased personnel insurance premiums. In addition, IOOC claims that it incurred higher contractual costs for certain repairs, increased maintenance costs due to the shutdown of some offshore oil wells and an extra payment for hire of a drilling rig from National Iranian Drilling Company. IOOC claims IRR 360,000,000 and USD 26,344,635.74 for these costs. The claim elements are set forth in table 17 below:

Table 17. Iranian Offshore Oil Company's claim

Claim element	Claim amount
Employee time	IRR 360,000,000
Salaries and insurance	USD 1,000,000
Transfer of loading terminal and storage costs	USD 2,000,000
Payments to other contractors:	
Payment to National Iranian Drilling Company	USD 600,000
Costs of Reshadat pipeline repair	USD 172,636
Withdrawn claim	USD 1,500,000
Maintenance cost for Foroozan and Abuzar wells	USD 21,072,000
Total a/	USD 31,717,771

a/ These losses are expressed in the currency originally designated by the claimant. The total is listed in United States dollar equivalent at a rate of exchange chosen by the claimant. IRR 360,000,000 was converted to USD 5,373,134.82. IOOC subsequently reduced this claim amount to USD 13,713,538 in response to interrogatories from the Panel.

(a) Verification and analysis – Iranian Offshore Oil Company

(i) Employee time

254. IOOC claims IRR 360,000,000 for the cost of continuing to pay the normal salaries of its employees, though the employees worked shorter periods due to Iraq’s invasion of Kuwait. According to IOOC, its employees normally travel from the mainland to the islands of Lavan, Siri and Kharg by regular Iran Air flights. IOOC has an annual contract with Iran Air to provide flight services for its employees to the above islands. IOOC claims that, due to increased military activities, the flights were suspended for a month, from “mid-January to mid-February”. Consequently, 3,000 of IOOC’s employees had to travel to the islands by alternative means, which prolonged their journey to work. IOOC calculates that it paid an average of IRR 20,000 per day for the equivalent of 18,000 days of idle time for the 3,000 employees. IOOC estimates that each employee had to travel six times a month and that each employee remained idle for one day on each journey.

255. In support of this claim element, IOOC provided a list of expenses allegedly incurred due to the cancellation of flights to the offshore oil platforms. IOOC also provided, in summary form, the alternative mode of transportation used to transport IOOC employees to the islands for work, letters with brief details on the number of employees involved and a calculation of employee costs. The Panel requested evidence, including payroll records to demonstrate that IOOC paid full wages to under-utilised employees, or any other supporting documents to demonstrate that IOOC incurred extraordinary employee-related costs as a result of Iraq’s invasion of Kuwait, as well as proof of payment of these costs. IOOC did not submit the documentation requested to support this claim element.

(ii) Salaries and insurance

256. IOOC claims USD 1,000,000 for the cost of paying extra wages and insurance premiums. IOOC alleges that, due to Iraq’s invasion of Kuwait, it had to pay extra wages and personnel insurance premiums in order to maintain crews for its oil tankers.

257. In support of this claim element, IOOC provided a calculation of the claim amount, but no underlying documentary evidence to support the calculation. The Panel requested evidence, including invoices and proof of payment to demonstrate that these costs were extraordinary costs incurred and paid due to Iraq’s invasion of Kuwait. IOOC did not submit the documentation requested to support this claim element.

(iii) Transfer of loading terminal and storage costs

258. IOOC claims USD 2,000,000 for the additional cost of hiring storage tankers and vessels. IOOC alleges that, due to the military activities in the Persian Gulf, it relocated and transferred its products and

crude oil loading terminals from Kharg Island to Lavan Island. In the relocation operation, IOOC claims that it hired three additional storage tankers to transport its oil products and three shuttle tankers to move various loading facilities.

259. In support of this claim element, IOOC provided internal correspondence dealing with transfer costs, charter parties and a calculation of the claim amount. The Panel requested evidence, including invoices and proof of payment, to demonstrate that these costs were extraordinary costs incurred and paid due to Iraq's invasion of Kuwait. IOOC did not submit the documentation requested to support this claim element.

(iv) Payment to National Iranian Drilling Company

260. IOOC claims USD 600,000 for the cost of renting two drilling rigs from National Iranian Drilling Company ("NIDC"), a wholly owned subsidiary of NIOC. According to IOOC, the two drilling rigs were scheduled to be transferred from Soroosh oilfield to the Foroozan oilfield. Due to Iraq's invasion of Kuwait, these rigs were transferred to the Resalat oilfield, which is situated further away from the war zone. As the Resalat oilfield is further south from the Foroozan oilfield, the transfer period was delayed by 20 days and, therefore, the drilling rigs were idle between 1 January 1991 and 20 January 1991. IOOC claims that it nevertheless paid NIDC the rental costs for the 20 days and thus incurred additional cost of rental.

261. In support of this claim element, IOOC provided a calculation sheet of the claim amount, daily rental rates of drilling rigs published in an industry journal and notification of the approval of NIOC's Board of Directors for NIDC to charge IOOC for the rigs' rental. The Panel requested evidence, including correspondence, invoices and bank statements to demonstrate that IOOC incurred extraordinary rig rental costs due to Iraq's invasion of Kuwait, and that it actually paid NIDC for these costs. IOOC did not submit the documentation requested to support this claim element.

(v) Costs of Reshadat pipeline repair

262. IOOC claims USD 172,636 for the increased cost of repairing the Reshadat pipeline. According to IOOC, after the contract for repair of the pipeline was awarded, the repair site was designated a war zone. Repairs allegedly ceased between 4 February 1991 and 3 March 1991. Therefore, IOOC incurred additional costs under the contract, including increased war insurance premiums of USD 64,522, fuel costs of USD 102,000 and shipment costs of USD 6,114.

263. IOOC provided the contract for the Reshadat pipeline repair, an invoice from the contractor containing a breakdown of the additional repair costs and proof of payment. The Panel finds that IOOC established that it paid an additional USD 172,636 to repair the Reshadat pipeline as a result of Iraq's invasion of Kuwait.

(vi) Withdrawn claim

264. IOOC claimed USD 1,500,000 for the increased cost of hiring a contractor to re-drill 22 wells in the Abuzar field. During the technical inspection mission to Iran, IOOC withdrew this claim. Subsequently, the withdrawal was confirmed in writing by NIOC in its response to further interrogatories from the Panel.

(vii) Maintenance cost for Foroozan and Abuzar wells

265. IOOC claims USD 6,572,000 and USD 14,500,000 for the costs of maintaining its wells. IOOC claims that, due to Iraq's invasion of Kuwait, it shut some of its wells in the offshore fields of Foroozan and Abuzar between 16 January 1991 and 30 January 1991 because of their proximity to the war zone in the Persian Gulf. In addition, it delayed the re-drilling of 22 wells in Abuzar for 121 days from February 1991 to June 1991. According to IOOC, the shut in wells had to be maintained at a certain pressure level for safety reasons. As a result, IOOC incurred the expense of installing various gauges and valves to maintain the pressure of the shut in wells during this period.

266. IOOC provided a letter stating the number of wells that needed maintenance while they were shut, and a number of "materials issue vouchers" describing the materials used for maintenance in support of this claim element. The Panel requested supporting documentation to demonstrate that IOOC incurred extraordinary maintenance costs due to Iraq's invasion of Kuwait, as well as proof of payment for these costs. IOOC did not submit the documentation requested to support this claim element.

(b) Conclusions and recommendations – Iranian Offshore Oil Company

267. Despite numerous requests, the Panel finds that IOOC did not submit sufficient evidence to support the majority of its claim elements, with the exception of the Reshadat pipeline repair. The Panel recommends an award of USD 172,636 for the Reshadat pipeline repair claim, but recommends that no compensation be awarded for the remainder of the claim elements submitted on behalf of IOOC.

2. National Iranian Tanker Company

268. National Iranian Tanker Company ("NITC")is responsible for marine transportation of crude oil and refined products. It also maintains loading and storage facilities used during the transportation process. Prior to and at the time of Iraq's invasion of Kuwait, NITC was a wholly-owned subsidiary of NIOC, and its services were fully utilised by the NIOC group of companies. Subsequently to the filing of the claim, all of NITC's shares were sold to entities unrelated to NIOC, and NITC began to contract on the international market to provide vessels and services to third parties not affiliated with NIOC. NITC's claim elements are set out in table 18 below:

Table 18. National Iranian Tanker Company's claim

Claim element	Claim amount
Insurance costs	USD 795,199
Cost of charter hire:	
Cancelled charters	USD 1,205,143
Voyage charter increases	USD 35,675,917
Time charter increases	USD 515,520
War bonuses for crews	IRR 49,922,960 USD 334,388
Transfer of loading facilities:	
Mobilization and demobilization	USD 259,000
Loss of vessel fenders	USD 60,000
Daily hire rates	USD 2,115,000
Vessel shuttle between Kharg and Lavan	USD 12,687,000
Port charges	USD 6,690,000
Vessel standby	USD 936,000
Product trans-shipment	USD 180,000
Total a/	USD 62,139,285

a/ These losses are expressed in the currency originally designated by the claimant. The total is listed in United States dollar equivalent at a rate of exchange chosen by the claimant. IRR 49,922,960 was therefore converted at a rate of IRR 67 to total USD 745,118.80. NITC subsequently reduced this claim amount to USD 18,431,118 in response to interrogatories from the Panel. An arithmetic error of USD 59,001 is also reflected in the total amount claimed.

(a) Insurance costs

(i) Verification and analysis

269. NITC claims that it paid higher war risk insurance premiums as a result of Iraq's invasion of Kuwait. As proof, it offers telex invoices from ship owners, identifying "extra war risk" charges, and partial proof of payment for those charges. At the Panel's request, NITC also provided copies of contracts of hire for the affected vessels, known as charter parties. Amendments to the charter parties establish NITC's obligation to pay extra premiums in the event of hostilities between specifically enumerated countries, including Iraq and Kuwait. Finally, NITC produced rate schedules from its insurers showing the increase in premium rates for various Middle East and Persian Gulf destinations during and immediately following the period of Iraq's invasion and occupation of Kuwait.

270. NITC's primary loading terminal, Kharg Island, is in the far northern part of the Persian Gulf, designated by the Allied Coalition Forces to be part of the war zone. The claim for insurance costs is

limited both geographically and temporally: it seeks compensation for vessel movements north of 24 degrees, Kharg Island's location, between January and March 1991, the period of increased military operations in the Persian Gulf. The extra insurance premiums amount to USD 795,199, comprised of USD 539,623 for crude carriers and USD 255,576 for product carriers. Of that amount, proof of payment for USD 204,350 was not produced, leaving USD 590,849 for which evidence of payment was provided.

271. The charges NITC incurred when chartering vessels for the benefit of NIOC's International Affairs division are the subject of a contract between those two entities. NITC acknowledges that, pursuant to that contract, it received reimbursement from International Affairs "based on the charter party agreements between NITC and [the vessel owners]". As described in paragraph 269, NITC was obligated to pay the increased war risk premiums under the relevant charter parties with the vessel owners.

(ii) Conclusions and recommendations

272. The Panel finds that NITC's increased insurance premiums were or could have been passed on to International Affairs. 30/ Consequently, the Panel recommends no award for this claim element.

(b) Cost of charter hire

(i) Verification and analysis

273. NITC claims that its vessel charters were interrupted by Iraq's invasion of Kuwait and subsequent military activities. NITC hired vessels both on time charter, for a fixed period of time, and voyage charter, for a single journey. The time charters included war clauses allowing the owners to cancel the charter parties if specified hostilities arose. In addition, the hire rates charged for both time and voyage charters increased during the period of Iraq's invasion and occupation of Kuwait, particularly for journeys through the Persian Gulf.

a. Cancelled charters

274. Iraq's invasion of Kuwait triggered the war clauses in NITC's time charters with Troodos, a vessel agent, resulting in the cancellation of four charters. When NITC failed to return the vessels in accordance with the agreements, Troodos billed NITC for the value of the services Troodos lost by virtue of its vessels' unavailability.

275. NITC refused to pay Troodos' demand and litigation ensued on numerous issues, including the matter of the cancelled charters. As a part of the dispute, Troodos demanded USD 6,830,075 for use of the four vessels after cancellation of the charter parties in accordance with the war clauses.

276. In addition, Troodos demanded USD 468,000 for an increase in the hire rate for a product tanker. This charge, for which NITC also claims reimbursement, will be discussed herein at paragraphs 285 - 286. Other issues raised in the Troodos litigation are unrelated to NITC's claim before the Commission.

277. In 1993, the two parties resolved all of their outstanding disputes for a lump sum payment of USD 5,000,000 from NITC to Troodos. NITC seeks reimbursement of USD 1,205,143, which is the portion of the settlement with Troodos that NITC alleges relates to the cancelled charters.

b. Voyage charter increases

278. NITC claims that its voyage charter rates increased by a total of USD 35,675,917. Of that amount, freight rates for crude carriers account for USD 29,669,646, and demurrage rates for the same vessels account for USD 3,437,271. Freight rates for product tankers comprise the remaining USD 2,569,000.

279. NITC calculates the increase in crude freight rates by comparing the actual costs incurred during the period of Iraq's invasion and occupation of Kuwait to what it claims was the average rate prior to that time. According to NITC, it paid 60 per cent of worldscale prior to that time. Worldscale is an index representing hire rates charged for voyage charters at a given time. The reasonableness of NITC's historical rate of 60 per cent was confirmed by reference to a survey undertaken for NITC by an independent third party survey that lists worldscale rates from 1988-1993, excluding vessels departing the Persian Gulf during the period of Iraq's invasion and occupation of Kuwait. The Panel also examined NITC's voyage charters for the period between August 1990 and January 1991 because no such survey was available for that period. Based upon that evidence, the Panel finds that 60 per cent of worldscale or less was standard for NITC hire rates.

280. During the claim period, which NITC has limited to 17 January to 4 March 1991 inclusive, NITC paid between 61 per cent and 87.5 per cent of worldscale for freight shipped under 26 separate voyage charters. The claim amount is calculated by multiplying the quantity of crude shipped in each instance by the worldscale rate charged under the relevant voyage charter. That number, minus the amount that would have been charged for each cargo of freight using 60 per cent of worldscale, equals the claim amount of USD 29,669,646.

281. Similarly, NITC calculates its increased demurrage costs by comparing actual charter rates for demurrage during the claim period, 17 January to 4 March 1991 inclusive, to the average rate it paid prior to that time. NITC claims that its average demurrage rate prior to Iraq's invasion of Kuwait was USD 23,000 per day. The reasonableness of this amount was confirmed by reference to NITC's voyage charters prior to and following the claim period. With the exception of one voyage, undertaken on 8 January 1991, all of NITC's sampled voyage charters included demurrage rates of USD 23,000 or less.

The one exception noted was a demurrage rate of USD 23,500 per day, incurred one week prior to NITC's claim period when the rates were increasing.

282. During the claim period, actual demurrage rates under the voyage charters ranged from USD 23,250 to USD 32,500 per day. NITC calculated the claim amount by multiplying the demurrage rate charged for each of the 26 voyages by the number of days of delay. The amount that would have been charged for that period of delay using a demurrage rate of USD 23,000 per day was subtracted from the actual charge in order to derive the claim amount.

283. NITC claims that it incurred increased freight rates of USD 2,569,000 in eight voyage charters for product tankers. NITC states that the hire rates paid during the claim period were 30 per cent more than the amounts charged prior to the claim period. Although NITC offered proof that it paid the claimed amount for the eight voyages, it did not provide evidence sufficient to substantiate that this amount represented a 30 per cent increase over historical rates.

c. Time charter increases

284. NITC claims that its time charter hires increased by USD 515,520 as a result of Iraq's invasion of Kuwait.

285. As described more fully in paragraphs 274 - 277, NITC chartered some of its vessels from Troodos and, upon the outbreak of hostilities, claims to have incurred additional charges in order to continue operating the vessels in the Persian Gulf. NITC ultimately paid these charges as part of its global settlement with Troodos. The settlement included claims that have now been submitted to the Commission and claims wholly unrelated to Iraq's invasion of Kuwait.

286. One of the vessels, POLYANTHUS, was hired under a time charter to be used as a product storage vessel in the Persian Gulf. Troodos required a supplemental payment of USD 4,000 per day, termed a "war supplement", in excess of the rate it had charged NITC for hire of the vessel. NITC multiplies the daily war supplement by the 117 days that the vessel was under hire, to reach a claim amount of USD 468,000. Although NITC's payment was made as part of the USD 5,000,000 global settlement discussed in paragraph 277, NITC claims that it paid all of Troodos' requested war supplement, as it had agreed to and verified the amount.

287. NITC also time chartered three service boats on 1 September 1990. After military activities escalated in January 1991, the owner increased the daily hire rate from USD 2,650 to USD 3,250 per day, retroactive to the beginning of the charter period. NITC claims it was required to pay the increased rate in order to avoid forfeiting its rights to the boats by operation of the war clauses in the charter parties. On 1 March 1991, the parties entered into new time charters at a rate of USD 2,900 per day. Although the

amount remained higher than the pre-war rate, NITC claims only for the period during which the rate was USD 3,250.

288. For two of the vessels, NITC provided the charter parties, invoices and proof of payment amounting to USD 195,307. This amount was calculated by multiplying the increase in daily rate, USD 600, by the number of days the vessels were in service, 325.5104 days in total. Adequate evidence was not provided to support the claimed increase in hire rate of USD 1,863 for the third vessel.

(ii) Conclusions and recommendations

289. The Panel finds that NITC sustained increased costs to charter vessels as a result of Iraq's invasion and occupation of Kuwait. NITC proved that several time charters were cancelled due to operation of the war clauses. However, the Panel notes that, once the time charters were cancelled, NITC could have avoided this loss by expeditiously returning the vessels to their owners. At the oral proceedings, NITC confirmed that it was unable to do so because cargo owned by NIOC was on board, and additional time was needed to nominate substitute vessels and off-load the cargo. As NITC undertook this action on behalf and for the benefit of NIOC, the Panel finds that NIOC should have borne the loss. Consequently, the Panel recommends no award for this claim element.

290. Although the Panel received evidence suggesting that NITC's hire rates for voyage charters, demurrage and time charters increased during the time of Iraq's invasion and occupation of Kuwait, the Panel recommends no award to NITC for this claim element either. The Panel has reviewed invoices from NITC to NIOC indicating that the increased rates were passed on to NITC's customer, International Affairs. Contractual terms and witness interviews confirm that it was NIOC's division International Affairs, rather than NITC, that ultimately bore or should have borne this loss. The Panel does not recommend that NIOC recover the cost of increased hire rates, however, because NIOC's increased profits as a result of Iraq's invasion of Kuwait more than offset the claimed additional vessel hire expenses, as explained in paragraphs 215 to 217.

(c) War bonuses for crews

291. NITC claims that, as a result of Iraq's invasion of Kuwait, it was required to compensate the crews of NITC-owned vessels entering the war zone during the period between 17 January and 4 March 1991. It claims that war bonuses for Iranian crews on its vessels amounted to IRR 49,922,960, comprised of IRR 43,061,988 paid to tanker workers and IRR 6,860,972 paid to tanker staff. Foreign crews on those vessels received war bonuses totalling USD 334,388.

(i) Verification and analysis

292. NITC produced its board of directors' resolution instructing the company to increase compensation for both domestic and foreign crews working in the war zone. Crew members received a 100 per cent increase in their salary for each day they worked in the war zone. Payroll records were produced to prove that the domestic tanker staff received these payments. NITC provided witnesses who testified that the domestic tanker workers were likewise compensated, but the relevant payroll records for the tanker workers could not be located. For foreign crews, check requests and payment instructions, or the checks themselves, were provided to demonstrate payment.

293. NITC provided testimony to establish the number of days each crew member worked in the war zone. NITC demonstrated through payroll registers, checks and testimony that no crew member was credited for more than 47 days of war zone work.

(ii) Conclusions and recommendations

294. The Panel finds that NITC was obligated to pay war bonuses to both Iranian and foreign crews on NITC–owned vessels. The "E2" Panel of Commissioners considered the compensability of this type of payment in its third instalment report. 31/ The "E2" Panel found that additional payments made to employees were compensable to the extent that they were reasonable in amount and not reimbursed by a third party. The Panel supports that view. Thus, the Panel recommends an award of IRR 6,860,972 to compensate NITC for payments to domestic tanker staff. The United States dollar equivalent recommended by the Panel is discussed in paragraphs 326 - 338. Because no proof of payment was offered with regard to domestic tanker workers, the IRR 43,061,988 allegedly paid to that group is not recoverable due to lack of evidence. The Panel also recommends an award of USD 334,388 for war bonus payments to foreign crews working on NITC-owned vessels.

(d) Transfer of loading facilities

(i) Verification and analysis

295. NITC's primary loading and transfer facilities were located at Kharg Island. As other panels of Commissioners have found, transportation in this area was considered dangerous because of, among other things, Iraq's deployment of explosive mines in Kuwait's territorial waters. Some of these mines broke free of their moorings and were discovered in the vicinity of Kharg Island. Once military activities escalated in 1991, the risk increased. NITC also alleges that many vessels refused to load at Kharg Island. As a result, NITC transferred terminal operations from Kharg Island to Lavan Island for the duration of Iraq's occupation of Kuwait.

a. Mobilization and demobilization

296. NITC moved four very large crude carriers ("VLCCs") from their stations at Kharg Island to Lavan Island for use in lieu of jetties, which would have been available at Kharg Island but which were less developed at Lavan Island. The movement of the vessels beginning on 19 January 1991, and their eventual return on 4 March 1991, resulted in three vessels being out of service for two days each. NITC claims only one out-of-service day for the fourth vessel, as it was redelivered to its owner at Lavan Island and did not make the return trip to Kharg Island.

297. According to NITC, each vessel was hired at a rate of USD 25,000 per day. The USD 175,000 claim amount is calculated by multiplying USD 25,000 by seven days: two days for each of three vessels and one day for the fourth. The charter party for the fourth vessel confirms that the daily hire rate was USD 25,000. The verification of the value of the other three vessels is complicated by the fact that they were owned by NITC. NITC and NIOC had a contract for NIOC's use of the NITC vessels. That contract specifies a daily rate of USD 32,000, and the Panel was never able to satisfactorily discern why the contract rate was not applied in calculation of this claim element. 32/

298. NITC also claims USD 84,000 for the cost of extra fuel, called bunker fuel, used by the four vessels during the mobilization and demobilization process. But for Iraq's invasion of Kuwait, NITC alleges that the vessels could have remained at anchor at Kharg Island with minimal expenditure of bunker fuel. NITC calculates this loss by estimating bunker consumption of 120 metric tons per day per vessel. It claims that the cost of the fuel was approximately USD 100 per metric ton. It multiplies the resulting USD 12,000 per day rate by the seven out-of-service days required to move the vessels to and from Lavan Island.

b. Loss of vessel fenders

299. During the transfer of NITC's operations from Kharg Island to Lavan Island, the VLCCs were equipped with fenders, which acted as boat bumpers to prevent damage while other vessels were along side the VLCC lightering, or transferring, the crude oil. Two fenders were lost during the transfer of operations, and NITC states that it could not stop in the war zone to commence a search and recovery effort. NITC claims that each fender had a residual value of USD 30,000, for a total claim of USD 60,000. As proof of the value, NITC submitted contemporaneous written reports regarding the loss, as well as invoices for identical fenders purchased just prior to Iraq's invasion of Kuwait.

c. Daily hire rates

300. Once the VLCCs were delivered to Lavan Island, they were used as a substitute for jetties. Witnesses testified that facilities at Lavan Island were far less developed than those at Kharg Island. The VLCCs were moored offshore to allow them to discharge crude directly to incoming vessels, thus

increasing the number of vessels that could receive crude oil simultaneously for shipment. NITC refers to this lightering operation as utilisation of “mother vessels”.

301. The three NITC-owned vessels described in paragraphs 296 - 297 were designated the mother vessels. They remained at Lavan Island for 47 days, the duration of the increased military activities between January and March 1991. Because the vessels were stationary, rather than in navigation, NITC claims that a reasonable daily hire rate for each vessel was USD 15,000. The claim for USD 2,115,000 is derived by multiplying the daily rate by 47 days for each of the three vessels.

d. Vessel shuttle between Kharg Island and Lavan Island

302. The main transportation hub was moved from Kharg Island to Lavan Island, as described in the preceding sections of this report. However, the pipeline and storage facilities could not be effectively moved from the war zone, so vessels shuttled crude oil from Kharg Island, where it was collected, to Lavan Island, for further international shipment. Ten NITC-owned vessels were time chartered by NIOC to shuttle crude oil from the fixed facilities at Kharg Island to the transportation hub at Lavan Island.

303. NITC claims that the hire rates for the vessels involved in the shuttle of crude amounted to USD 10,816,000. For each of the ten vessels involved in the operation, NITC determined the number of days the vessel was in use and multiplied that number by USD 32,000, the daily hire rate. All of the vessels were owned by NITC, so the hire rate was derived from the contract between NITC and International Affairs. NITC claims that it could have earned USD 32,000 per vessel on the open market if the vessels had not been required for shuttle operations.

304. For each of the 10 vessels, NITC calculated the fuel oil expenditure necessary to conduct shuttle operations. NITC multiplied the number of round trips each vessel made by USD 100 per metric ton, the estimated cost of fuel. NITC estimated that each vessel expended 100 metric tons per day of fuel oil while in navigation, 33/ and 30 metric tons per day of fuel oil when not in navigation. This results in a total fuel expenditure claim of USD 1,871,000.

e. Port charges

305. NITC claims that it incurred port charges each time the shuttle vessels entered the ports at Kharg Island or Lavan Island. It estimates that those charges averaged USD 130,000 for VLCCs and USD 170,000 for ULCCs entering Kharg Island. Those charges are multiplied by the number of shuttle trips undertaken by each vessel to reach a claim amount of USD 3,710,000 for port charges at Kharg Island.

306. NITC claims that port charges at Lavan Island averaged USD 110,000 for VLCCs and USD 140,000 for ULCCs. Using the same formula described in the preceding paragraph, NITC calculates that it incurred USD 2,980,000 in port charges for shuttle vessels entering Lavan Island.

307. NITC provided the charter agreement and translated invoices to demonstrate the port charges assessed by the port authorities. It also provided relevant information regarding the size, weight and berthing times for a sampling of the affected vessels. The Panel's review of the translated invoices indicates that the port charges were assessed in Iranian rials, and so the Panel verified the reasonableness of those fees in the original currency, even though the statement of claim converted those charges to United States dollars at a rate chosen by the claimant. The Iranian rial equivalent for the Kharg Island port charges described in paragraph 305, using IRR 67 to USD 1, the rate applied by the claimant to convert the charges to United States dollars, would total IRR 248,570,000. Similarly, the Iranian rial equivalent for the Lavan Island port charges described in paragraph 306, applying the same exchange rate, would total IRR 199,660,000.

308. From the information described in the preceding paragraph, the Panel was able to calculate charges for given voyages, and thus assess the reasonableness of the port charges estimate used in NITC's claim. The Panel also confirmed that NITC's charter agreement did not specifically allow reimbursement for the charges, and that NITC did not seek reimbursement from NIOC in its monthly invoices.

f. Vessel standby

309. According to NITC, two of its vessels, KHARG 2 and KHARG 4, were on standby at Kharg Island for 13 days.

310. Consistent with the methodology used to value the cost of shuttle operations, NITC refers to its contract with NIOC to establish the daily hire rate it could have obtained if Iraq’s invasion of Kuwait had not necessitated the reassignment of these two vessels to assist in the transfer of the loading terminal to Lavan Island. Two vessels on standby for 13 days at a rate of USD 32,000 per day amounts to a total claim of USD 832,000 for hire cost.

311. Because the vessels were on standby, rather than in navigation, NITC calculates its fuel costs at a rate of 40 metric tons per day. 34/ It claims that two vessels expending that amount of fuel for 13 days would incur costs of USD 104,000, employing the USD 100 per metric ton cost of fuel used elsewhere in its claim.

312. Although the Panel requested an explanation of the need for standby vessels, and how that need allegedly arose from Iraq’s invasion of Kuwait, NITC did not supply any additional information or documentation in support of this claim element.

g. Product trans-shipment

313. In addition to the crude oil transportation operations that were relocated to Lavan Island, NITC alleges that three product tankers were moved from the war zone at Kharg Island to the relative safety of Lavan Island.

314. In order to move the three vessels from Kharg Island to Lavan Island, NITC claims it incurred a charter hire expense of USD 120,000. It also claims extra fuel oil expenditures of USD 60,000, for a total of USD 180,000.

315. The three vessels undertook a two-day round trip voyage at a daily hire rate of USD 20,000. Additional fuel oil was expended to make the trip from Kharg Island to Lavan Island and back again. NITC utilizes the USD 100 per metric ton cost of fuel discussed infra, and multiplies this by a fuel consumption rate of 100 metric tons per day, its estimate of fuel consumption for vessels in navigation. Both the hire rate and fuel figures are multiplied by six days, representing the three vessels each undertaking a two day voyage.

(ii) Conclusions and recommendations

316. The Panel concludes that the transfer of loading facilities from Kharg Island to Lavan Island was necessitated by Iraq's invasion of Kuwait and subsequent military activities. As was the case in the claim for increased hire rates, however, the Panel finds that NIOC was contractually required to or did reimburse NITC for the hire and fuel expenses of the vessels involved in mobilization, lightering, shuttling, standby and demobilization operations. Consequently, NITC has not suffered any loss in respect of these claim elements, and NIOC may not recover the expenses because its increased net profits exceed the combined total of its increased operating costs, including the costs associated with vessel hire and fuel.

317. Conversely, the Panel finds that the loss of NITC's physical property, the boat fenders, was not and could not be invoiced to NIOC. The Panel therefore recommends an award of USD 60,000 for NITC's loss of the two boat fenders.

318. Finally, the Panel finds that the increased port charges were paid as a result of the increased operations between Kharg Island and Lavan Island. The Panel is satisfied that the need to transfer the loading facilities from Kharg Island to Lavan Island, outside the war zone, was a direct result of Iraq's invasion of Kuwait and subsequent military activities. Had NITC failed to do so, it would have faced the threat of collision with floating mines, involvement in military activities or, at the very least, an unacceptable risk to its property and crews. The Panel finds that NITC's port expenses during the resulting operations were reasonable, and recommends an award of IRR 448,230,000 for this claim element. The exchange rate applied by the Panel to convert the Iranian rial recommended award into the United States dollar free market equivalent is discussed in paragraphs 326 - 338.

(e) Recommended compensation to NITC

319. As set forth in table 19 below, the Panel recommends that NITC be awarded USD 394,388 and IRR 455,090,972.

Table 19. NITC's claim – recommended compensation

Claim element	Claim amount	Panel's adjustments	Panel's recommendation
Insurance costs	USD 795,199	USD 795,199	nil
Cost of charter hire:			
Cancelled charters	USD 1,205,143	USD 1,205,143	nil
Voyage charter increases	USD 35,675,917	USD 35,675,917	nil
Time charter increases	USD 515,520	USD 515,520	nil
War bonuses for crews	IRR 49,922,960 USD 334,388	IRR 43,061,988 0	IRR 6,860,972 USD 334,388
Transfer of loading facilities:			
Mobilization and demobilization	USD 259,000	USD 259,000	nil
Loss of vessel fenders	USD 60,000	0	USD 60,000
Daily hire rates	USD 2,115,000	USD 2,115,000	nil
Vessel shuttle between Kharg and Lavan	USD 12,687,000	USD 12,687,000	nil
Port charges	USD 6,690,000	0	IRR 448,230,000
Vessel standby	USD 936,000	USD 936,000	nil
Product trans-shipment	USD 180,000	USD 180,000	nil
Total a/	USD 62,139,285	IRR 43,061,988 USD 54,368,779	IRR 455,090,972 USD 394,388

a/ These losses are expressed in the currency originally designated by the claimant. The total is listed in United States dollar equivalent at a rate of exchange chosen by the claimant. IRR 49,922,960 was therefore converted at a rate of IRR 67 to total USD 745,118.80. NITC subsequently reduced this claim amount to USD 18,431,118 in response to interrogatories from the Panel. An arithmetic error of USD 59,001 is also reflected in the total amount claimed.

G. Conclusion

320. The Panel has determined that NIOC's claims should be considered together with the claims of its unincorporated divisions, International Affairs and Onshore Production. Due to the increased volume and price of crude oil during the claim period, the Panel recommends that NIOC's claims be set off against its increased profits. The Panel has determined that the claim of NIOC's subsidiary IOOC should be considered separately from those of NIOC. The Panel finds that IOOC proved its claim for the increased cost of repairing the Reshadat pipeline in the amount of USD 172,636. The Panel also has determined that the claim of NIOC's subsidiary NITC should be considered separately from those of NIOC. The Panel finds that NITC proved its claim for war bonuses to crews in the amount of IRR 6,860,972 and USD 334,388, its loss of vessel fenders in the amount of USD 60,000, and its extraordinary port charges in the amount of IRR 448,230,000. The Panel's conclusions regarding the NIOC group of companies are summarized in the following table:

Table 20. NIOC claimants - recommended compensation

Claim element	Claim amount (USD)	Panel's adjustments	Panel's recommendation
NIOC	603,121,084	USD 603,121,084	nil
IOOC/Offshore Production	31,717,771	USD 31,545,135	USD 172,636
National Iranian Tanker Company	62,139,285	IRR 43,061,988 USD 54,368,779	IRR 455,090,972 USD 394,388
Total	696,978,140	IRR 43,061,988 USD 689,034,998	IRR 455,090,972 USD 567,024

VIII. INCIDENTAL ISSUES

A. Currency exchange rate

321. The Panel notes that several of the claimants have advanced claims in currencies other than United States dollars. Except as specifically noted in this report, the Panel has assessed all such claims in the original claim currencies. However, the Commission issues its awards in United States dollars. Accordingly, the Panel is required to determine the appropriate rate of exchange to apply to recommended awards expressed and assessed in currencies other than United States dollars.

1. Date of loss

322. Consistent with the approach taken in previous reports, the Panel finds that the appropriate currency exchange rate to be applied to the claims advanced in the sixth instalment in currencies other than the United States dollar is the rate prevailing on the date of loss.

323. The Panel finds that war bonuses were earned by NITC's crews while working during the period January to March 1991. However, NITC did not pay these bonuses to the crew members until some time later. The claimant established that payments were made within approximately two to three months of the date the payments were earned.

324. Similarly, the Panel finds that the port charges were incurred during the period January to March 1991, but were actually paid two to three months later.

325. The Panel therefore finds that NITC suffered no loss of use of its funds until the dates on which payments were made to the crews and the port authorities. On this basis, and due to the large number of payments made on differing dates within the March to June payment period, the Panel finds that the date of loss should be the mid-point of the payment period, or 15 April 1991.

2. Applicable exchange rate

326. The Panel recognizes that, in previous reports, it and other panels of Commissioners have relied upon the United Nations Monthly Bulletin of Statistics for determining commercial exchange rates into United States dollars for recommended awards of compensation. 35/ The Panel considers, however, that there may be circumstances in which there were few international financial transactions in a particular currency that would give rise to a single objectively reliable exchange rate at the time the loss was incurred.

327. The Panel addresses this issue because of the significant differences between the various United States dollar – Iranian rial exchange rates prevailing during the claim period, including the rates published in the United Nations Monthly Bulletin of Statistics.

328. The "D2" Panel of Commissioners, when addressing a similar issue, acknowledged the need to consider such matters on a case-by-case basis:

> "Where losses are claimed for money in currencies other than United States dollars and it is established from the evidence in the claim file that the [otherwise applicable] exchange rate ... would result in either under-compensation or over-compensation, the Panel determined that it will select a conversion rate based on the evidence that most closely compensates the claimant for the value of the loss suffered."

329. The Panel therefore considered evidence on the various exchange rates used to convert Iranian rials to United States dollars during the period between 1991 and 2000 in order to determine the rate to apply to losses asserted by NITC with respect to war bonuses paid in 1991 to Iranian crews. The Panel also addresses this issue with regard to port charges incurred by NITC during shuttle operations between

Kharg Island and Lavan Island. In both instances, the payments were made by NITC in Iranian rials from an Iranian rial bank account.

330. In their various submissions, the NIOC group of claimants utilise several different rates, including USD 1 = IRR 70, USD = IRR 68.55 and USD 1 = IRR 67. These rates are similar to the rates quoted in the United Nations Monthly Bulletin of Statistics applicable during the claim period and are consistent with one of the "official" rates applicable at that time. As described more fully below, however, these exchange rates are significantly different from other official exchange rates used in Iran during 1991 at a time when all transactions in Iranian rials were essentially controlled and set by the central banking authority of Iran.

331. Based on its investigations, the Panel finds that, from 21 January 1991 until 21 March 1993, there were three official rates used in Iran, and an additional unofficial rate that was widely recognised. The exchange rate systems during that period are briefly described in the following paragraphs.

332. The basic official rate was available for oil exports, imports of essential goods, imports for "priority projects" and the servicing of official debt. This rate appears to have been available to state entities and exporters, and is one of the rates used by the claimants in their claims. This rate varied between USD 1 = IRR 68 and USD 1 = IRR 70 between March and June 1991.

333. The competitive rate was available for imports of goods and services not covered by the basic official rate. This rate remained fixed at USD 1 = IRR 600 throughout the period March to June 1991.

334. The floating rate, set by the central bank according to market supply and demand for the currency, was available for non-oil exports, imports not covered by the basic official rate or competitive rate and most other service transactions. Between March and June 1991, this rate varied between USD 1 = IRR 1,357 and USD 1 = IRR 1,379.

335. The free non-bank market rate was an unofficial rate. It was the open market rate at which foreign exchange was freely bought and sold by officially authorised dealers. Between March and June 1991, this rate ranged from USD 1 = IRR 1,375 to USD 1 = IRR 1,394.

336. Because the Iranian rial losses were assessed against and paid by NITC in Iranian rials, the Panel concludes that its task is to determine the market value of the rial at the date of loss in order to compensate NITC for the actual value of its losses.

337. Both the basic official and competitive rates were artificially set and controlled by the central banking authority, whereas the floating and free non-bank market rates more accurately reflected the actual market value of the Iranian rial. The Panel therefore finds that the appropriate rate to be used in

converting Iranian rials to United States dollars for NITC's losses incurred in Iranian rials is the average of the floating rate and the free non-bank market rate.

338. For both the war bonuses to Iranian crews and the port charges, the Panel adopts the average of the floating and free non-bank market rates prevailing during the loss period of March to June 1991. Accordingly, the Panel finds the appropriate rate, given the specific circumstances, is USD 1 = IRR 1,375. The Panel's resulting recommended United States dollar award for NITC's compensable losses is set out in the following table:

Table 21. NITC's claim – recommended compensation (United States dollars)

War bonus recommendation in IRR	6,860,972
Port charges recommendation in IRR	448,230,000
	455,090,972
Exchange rate: USD 1 = IRR 1,375	
US dollar equivalent: IRR 455,090,972/1,375	USD 330,975
Recommendation for NITC's other losses (foreign crew bonuses and vessel fenders)	USD 394,388
Total	USD 725,363

B. Interest

339. All claim figures in the body of this report are net of any individual interest claims advanced by the claimant.

340. In accordance with Governing Council decision 16, "[i]nterest will be awarded from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful claimants for the loss of use of the principal amount of the award". 36/ The Governing Council further specified that "[i]nterest will be paid after the principal amount of awards", while postponing a decision on the methods of calculation and payment of interest.

341. The task of the Panel, therefore, is to determine the date from which interest should run for the losses for which compensation is recommended in this instalment.

342. With respect to BOTAS, the Panel finds that INOC's obligation to make the 1991 MAR payment arose on 1 January 1992. Under the terms of the transport contract, the last date for timely payment by INOC was 9 February 1992, from which date interest for late payment accrues. 37/ Therefore, the Panel recommends that 9 February 1992 be the date from which interest to BOTAS should accrue.

343. With regard to IOOC, the Panel recommends that the date of loss be the date IOOC paid the contractor for the extra Reshadat pipeline costs, 30 March 1992.

344. The Panel recommends that interest be awarded to NITC from 15 April 1991 for the reasons described in paragraphs 322 - 325.

IX. RECOMMENDATIONS

345. The following table summarises net claims and the Panel's recommended awards:

Table 22. Panel's recommended compensation

Claimant	Claim number	Amended claim amount (USD)	Submitting Government	Panel's recommendation (USD)	Interest start date
Gulf Petrochemical Industries Co.	4000071	6,081,392	Bahrain	nil	
Arab Petroleum Investments Corp.	4002828	107,386,853	Saudi Arabia	nil	
Botas Petroleum Pipeline Corp.	4001649	1,039,240,274	Turkey	176,340,655	9 February 1992
Turkish Petroleum Refineries Corp.	4001712	13,569,556	Turkey	nil	
National Iranian Oil Co.	4001340	603,121,084	Iran	nil	
IOOC/Offshore Production	4005988	31,717,771	Iran	172,636	30 March 1992
National Iranian Tanker Co.	4005989	62,139,285	Iran	725,363	15 April 1991
Total		1,863,256,215		177,238,654	

Geneva, 23 March 2001

(Signed) Mr. Allan Philip
Chairman

(Signed) Mr. Antoine Antoun
Commissioner

(Signed) Mr. Michael Hwang
Commissioner

Notes

1/ "Provisional Rules for Claims Procedure", (S/AC.26/1992/10).

2/ Pursuant to Governing Council decision 30 (S/AC.26/Dec.30 (1995)), the deadline for filing category "E" and "F" claims was 1 January 1996. At the Governing Council's twenty-second session the Council decided that late claims in categories "E" and "F" would be considered for filing if submitted before 1 January 1997 and if based on strong original contemporaneous evidence as to the claimant's good faith (S/AC.26/SR.63).

3/ This decision was made at the Governing Council's twenty-seventh session (S/AC.26/SR.77).

4/ The Panel notes that a claim based on an incident occurring outside Kuwait or Iraq needs to be more fully substantiated in order to establish the necessary causal link between the loss and Iraq's invasion and occupation of Kuwait. GPIC has met the requirement for a higher standard of proof in this instance. See the Panel's adoption of "F1" and "C" Panel findings in "Report and recommendations made by the panel of Commissioners concerning the third instalment of 'E1' claims," paragraphs 69-80 (S/AC.26/1999/13).

5/ Because GPIC's production volumes declined slightly during the claim period, GPIC's saved production costs exceed its extraordinary costs incurred due to Iraq's invasion of Kuwait. Therefore, its increased netback revenue that is attributed to Iraq's invasion of Kuwait is not adversely affected by cost elements, and GPIC would have saved costs of approximately USD 105,321 during the claim period.

6/ The trade embargo against Kuwait was applied from 6 August 1990 to 3 April 1991. See Governing Council decision 15, paragraph 9 (I,i) (S/AC.26/1992/15).

7/ It does not, however, claim for profits lost in 1992 and 1993 on the grounds that those losses were caused by the trade embargo and not by Iraq's invasion of Kuwait.

8/ Article 6(5) of the Rules requires all submissions to be translated into English.

9/ The telex does not make clear why SOMO rather than INOC was involved in the notification process.

10/ The Panel does not address this issue here, as Iraq already made this argument with respect to a claim in the Well Blowout Control Claim, which the Panel considered in paragraphs 47-54 of that Report (S/AC.26/1996/5/Annex). This Report was approved by decision 40 of the Governing Council (S/AC.26/Dec.40(1996)).

11/ S/AC.26/1991/7/Rev.1.

12/ While the claimant uses 7.46 barrels in its claim, a detailed review of annual report statistics indicates 7.44 barrels per metric ton would be a more accurate calculation of the actual volume conversion rate. The Panel performed its subsequent calculations using the 7.44 figure. This results in a difference in the claim amount of USD 3,020,642.

13/ Although BOTAS contends that the applicable rate should have been USD 0.593, that figure does not correspond to the terms of the transport contract. The Panel reaches a different number than the claim amount when performing the calculations using the USD 0.593, further suggesting an arithmetic error on the part of the claimant. Because the Panel concludes that this claim element is not compensable, the discrepancy is immaterial.

14/ BOTAS states that it has not received payment for invoices issued to INOC in the amount of USD 61,500,000. This amount represents throughput fees owed by INOC in respect of crude oil delivered through the Iraq-Turkey pipeline but not paid for prior to 2 August 1990. However, BOTAS does not seek compensation for this amount.

15/ BOTAS calculates its daily loss of MAR fees as USD 536,506.8943, again using the 7.46 per barrel conversion figure. The Panel concludes that BOTAS probably inverted the nine and the four, as the Panel's calculations indicate that 536,506.8493 reconciles with the claim amount. The daily loss is multiplied by 2,100 days to reach the total amount. The Panel also acknowledges that BOTAS attempted to amend the number of days in its claim period from 2,100 to 2,170.

16/ See Report and recommendations made by the panel of Commissioners concerning the fourth instalment of "E2" claims, (S/AC.26/2000/2), paragraph 115.

17/ This amount differs from BOTAS' MAR claim amount because the Panel used the more accurate 7.44 barrels per metric ton figure, instead of BOTAS' proposed 7.46 barrels per metric ton. Hence, the annual fee was calculated as 35 million metric tons, multiplied by 7.44 barrels per ton, multiplied by USD 0.75 per barrel.

18/ The "E2" panel of Commissioners, in paragraph 65 of the Second "E2" Report, found:

> "The military operations of the Allied Coalition [F]orces were directed at Iraqi forces in Iraq and Kuwait. The geographic scope of such operations thus includes Iraq, Kuwait and such immediately adjacent land territory, waters and airspace as were a necessary part of the conduct of such operations … [A]lthough aircraft operations were staged from airbases in south eastern Cyprus and southern Turkey, the Panel finds that neither staging area placed Cyprus or Turkey within the zone of military operations …"

19/ Governing Council decision 15, paragraph 9.II(i).

20/ This appears consistent with statements made by the claimant at the oral proceedings on 10 January 2001 (the "oral proceedings"). On that occasion NIOC attributed losses to the companies and divisions identified in the statement of claim, rather than to those identified on the claim form, although the amounts claimed by NIOC on behalf of these entities differed from amounts claimed in previous written submissions.

21/ At the oral proceedings, NIOC proposed an alternate valuation theory that would result in an alleged loss of profit from export sales of USD 249,554,061.

22/ In response to article 34 notifications, International Affairs sought to increase its claimed loss to USD 305,810,653, which it again sought to increase after the technical mission to Tehran to USD 325,053,606, and finally sought to increase to USD 328,000,000 at the oral proceedings.

23/ Based upon questions asked in article 34 notifications and on technical mission to Tehran, IOOC reduced its claim to USD 13,713,539, then to USD 12,213,539. These changes reflect the claimant's inadvertent use of United States dollars instead of Iranian rials in IOOC's original submission of maintenance cost for the Foroozan and Abuzar wells, as well as an overlap between IOOC's claim and losses alleged by other NIOC-related entities.

24/ At the oral proceedings, NITC confirmed that some of its losses were reimbursed by International Affairs, and reduced its claim to USD 18,431,118 to reflect that fact.

25/ NIOC proposed an alternative basis by which to quantify its loss, based on the difference between actual and planned production, comparing production for the two year period prior to its claim period (as compared to targets in its five year production plan) to its production in the two years following that claim period. This was the subject of endnote 21, supra.

26/ As previously noted, NIOC offers an alternate theory to quantify this claim element. Given the Panel's finding on the actual export sales profits at paragraph 217, this alternate theory need not be explored further as the actual profits achieved far exceed either claim figure.

27/ NIOC alleges that these production costs were IRR 77.84 per barrel, which amounts to IRR 1,590,349,040 in light of the actual production volumes achieved during the claim period. NIOC applies a conversion rate of IRR 67 to USD 1. The Panel questioned, in paragraphs 326 - 338 of this report, the fairness and accuracy of that exchange rate, choosing to apply instead a rate of IRR 1,375 to USD 1. Either exchange rate results in a net increase in profits to NIOC exceeding the total of all its claimed costs. As the exchange rate does not affect the Panel's reasoning or decision, the Panel need not address the appropriate rate to be applied to the production costs incurred by NIOC.

28/ As discussed in note 22, International Affairs subsequently sought to increase this amount on three occasions. The total amount claimed by NIOC and its divisions may not increase, by means of amendment, the amount claimed as of 11 May 1998. However the Panel's finding on the issue of the actual profits NIOC achieved make consideration of the amended numbers unnecessary. The actual profits more than offset the increased cost under any of International Affairs' proposed amended numbers.

29/ In response to article 34 notifications, International Affairs decreased this claim element to USD 19,040,000 because it found a duplication between its claim and NITC's claims for increased boat charter hire. The amended claim amount is calculated based on the number of vessels used by International Affairs between 8 August 1990 and 8 August 1991 (68 vessels) multiplied by an average of seven days of operation and an average hire rate of USD 40,000 per day.

30/ NITC offered to amend its claim to deduct amounts, such as this one, that were or could have been recovered from International Affairs. Because the effect of this and other changes was to increase the total amount claimed by NIOC above the amount of the claim as stated on 11 May 1998, the charges attributable to International Affairs are discussed in conjunction with NITC's claim. Had the increased amended claim been allowed, it still would have been offset by the increase in profit achieved by NIOC and attributable to its divisions, such as International Affairs.

31/ Report and recommendations made by the panel of Commissioners concerning the third instalment of category "E2" claims, paragraph 100.

32/ The Panel notes that the daily hire rate quoted by the claimant for VLCCs owned by NITC is USD 15,000 in paragraph 301. The claimant states that the lower rate applied in that portion of the claim because the vessels were stationary.

33/ The Panel notes that, in its claim for bunker fuel at paragraph 298, NITC uses 120 metric tons per day per vessel. This discrepancy is due to the larger size of the vessels involved in that portion of the claim.

34/ The Panel notes that NITC estimated standby fuel consumption at 30 metric tons per day in other portions of its claim. Because the Panel does not recommend an award based on either estimate, it need not resolve this discrepancy.

35/ The United Nations Monthly Bulletin of Statistics currency conversion rates are the mid-point rates prevailing for each month for the specified currency. In the case of Iranian rials during the relevant period, the central banking authority in Iran set the rate which in turn was used by the United Nations Monthly Bulletin of Statistics. On 21 December 1993, the International Monetary Fund rate became the official rate, and the United Nations Monthly Bulletin of Statistics began reporting that rate, which was approximately 26 times larger than its pre-1993 rate.

36/ S/AC.26/1992/16.

37/ Article 9.3 of the transport contract provides as follows: "Final settlement of the remuneration payable during any calendar year shall be made within one month from the end of that year. If a balance remains outstanding, such balance shall be paid with a period not exceeding the ninth day of the month February in the new year."
