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COMPENSATION COMMISSION
GOVERNING COUNCIL

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

CONTENTS

List of claimants

Name	Defined
ABB Lummus Crest Holding B.V.	LC Holding
Combustion Engineering Ltd.	Combustion
General Contracting, Importing & Services Enterprises	GENCON Saudi
General Petroleum & Minerals Organisation (Petromin) Mahd ad'Dahab Mine	Petromin
GlobalSantaFe Corporation	GlobalSantaFe
Ipedex 2IM SNC	2IM
Ipedex Production	Ipedex
Petromin Lubricating Oil Company	Petrolube
Petromin Lubricating Oil Refining Company	Luberef
Saudi Aramco Mobil Refinery Company Limited	Samref
Saudi Aramco Shell Refinery Company	Sasref
Tecnologie Progetti Lavori S.p.A.	TPL

List of currencies

Name	Defined
Deutsche Mark	DEM
French franc(s)	FRF
Guilder(s)	NLG
Iraqi dinar(s)	IQD
Italian lira (lire)	ITL
Kuwaiti dinar(s)	KWD
Pound(s) sterling	GBP
Saudi Arabian riyal(s)	SAR
United States dollar(s)	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 (the "Rules") (S/AC.26/1992/10), appointed a panel of Commissioners (the "Panel") composed of Messrs Allan Philip (chairman), Antoine Antoun and Michael Hwang to review energy sector claims submitted by corporations, other private legal entities and public-sector enterprises ("'E1' claims").

2. This report contains the determinations and recommendations of the Panel with respect to the eighth instalment of "E1" claims, consisting of 12 claims submitted to the Panel by the Executive Secretary of the Commission pursuant to article 32 of the Rules (the "eighth instalment" claims).

3. The Governments of the French Republic ("France"), the Italian Republic ("Italy"), the Kingdom of the Netherlands (the "Netherlands"), the Kingdom of Saudi Arabia ("Saudi Arabia") and the United Kingdom of Great Britain and Northern Ireland (the "United Kingdom") filed the eighth instalment claims on behalf of firms operating in their respective countries. The claimants in this instalment advance claim elements arising from the disruption of their businesses, property damage, and the cost of related mitigation efforts, all allegedly caused directly by Iraq's invasion and occupation of Kuwait.

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

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

Claimant	UNCC claim number	Original amount claimed[a]	Amended amount claimed[b]	Submitting Government
Combustion Engineering Ltd.	4002042	3,034,747	3,034,747	United Kingdom
ABB Lummus Crest Holding B.V.	4001385	1,922,928	1,922,928	Netherlands
General Contracting, Importing & Services Enterprises	4002466	25,945,741	15,567,058	Saudi Arabia
Global SantaFe Corporation	4002323	29,677,778	40,683,981	United Kingdom
Ipedex 2IM	4001742	1,093,884	780,443	France
Ipedex Production	4001741	398,433	139,153	France
Tecnologie Progetti Lavori S.p.A.	4000985	208,032,751	206,940,135	Italy
General Petroleum & Minerals Organisation (Petromin) Mahd ad'Dahab Mine	5000217	263,725	263,725	Saudi Arabia
Petromin Lubricating Oil Company	4002830	10,903,308	10,903,308	Saudi Arabia
Petromin Lubricating Oil Refining Company	4002831	2,281,402	2,281,402	Saudi Arabia
Saudi Aramco Mobil Refinery Company Limited	4002834	3,507,754	3,507,754	Saudi Arabia
Saudi Aramco Shell Refinery Company	4002833	7,118,006	6,815,341	Saudi Arabia
Total	---	294,180,457	292,839,975	---

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

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

I. PROCEDURAL HISTORY OF THE CLAIMS

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

6. Pursuant to article 16 of the Rules, the Executive Secretary of the Commission reported to the Governing Council the claims information and new significant factual and legal issues raised by the eighth instalment claims in his thirty-fourth report dated 10 January 2001. 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 additional information and views concerning the Executive Secretary's report. These responses have been taken into consideration by the Panel during its review of the claims.

7. By its first procedural order issued in respect of the eighth instalment claims on 31 October 2000, the Panel directed the transmittal to Iraq of a copy of the original claim file consisting of the claim form, the statement of claim and all supporting documents filed by each of the claimants. The Panel invited Iraq to submit its comments on the claims together with any documentation on which Iraq might wish to rely in support of its comments. Iraq's comments were received on 6 July 2001 and have been reviewed and considered by the Panel.

8. By its second procedural order issued on 20 April 2001, the Panel gave notice of its intention to complete its review of the eighth instalment claims and submit its report and recommendations to the Governing Council within 12 months. This procedural order was transmitted to each of the claimants, through their respective Governments, and to Iraq.

9. In its review of the claims, the Panel has employed the full range of investigative procedures available to it under the Rules. Pursuant to article 34 of the Rules, notifications ("article 34 notifications") were transmitted to each of the claimants, through their respective Governments, requesting additional information in order to assist the Panel in its review of the claims. Because of the complexity of the claims, the Panel engaged consultants with expertise in accounting and asset valuation to assist it in its review and evaluation of those claim elements found to be compensable. In addition, the Panel directed technical inspection missions to the premises of five of the claimants in Saudi Arabia 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.

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

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

II. LEGAL FRAMEWORK

A. Applicable law and criteria

12. The law to be applied by the Panel is set 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

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

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

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

C. Evidentiary requirements

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

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

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

D. Exclusions

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

1. Supplements or amended claims

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

2. The trade embargo and related measures

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

III. CLAIM OF COMBUSTION ENGINEERING LTD.

A. Facts and contentions

1. Introduction

20. Combustion Engineering Ltd. (formerly known as Lummus Crest Limited) ("Combustion") is a corporation organized under the laws of the United Kingdom. It is a member of a multinational group of Lummus Crest companies that provide engineering, procurement and construction supervision services with respect to process plants owned and operated by petroleum, petrochemical and chemical companies.

21. Combustion seeks compensation in the total amount of 1,596,277 Pounds sterling (GBP) for losses related to contracts it entered into with the Iraq State Company for Oil Projects ("SCOP") prior to Iraq's invasion and occupation of Kuwait.[3] It also seeks an unquantified amount of interest on the total amount of its claim from the date of loss, as well as an unspecified amount of compensation for the costs of preparing and presenting its claim.[4] The quantified claimed losses are summarized in table 2 below.

Table 2. Combustion's claim
(Pounds sterling)

Claim element	Original amount claimed
Unpaid contractual amounts	1,542,035
Shut-down expenses	54,242
Total	1,596,277

2. Background information

22. Combustion alleges that, on 10 December 1988, it entered into a contract with SCOP for the supply of gauging systems, control valves, power cables and other goods, as well as supervision services, to be used in the expansion of an oil products tank farm in Iraq (the "Zubair Depot") owned by the Iraqi Ministry of Oil. The total price for the goods and services to be supplied under the contract was originally GBP 6,289,000. However, Combustion and SCOP entered into an addendum to the contract on 29 November 1989, under which the total price was amended to GBP 6,150,065. Of this total amount, the contract provided that GBP 4,848,536 would be financed under the terms of a loan guaranteed by the United Kingdom's Export Credits Guarantee Department (the "ECGD"), and that GBP 1,301,529 would be secured by two irrevocable letters of credit to be established by SCOP in favour of Combustion (outside the terms of the loan guaranteed by the ECGD to Iraq).

23. Combustion further alleges that it entered into a supplemental agreement with SCOP on 13 November 1989 for the supply of additional power cables (the "supplemental goods") to the Zubair Depot at a price of GBP 26,630. Payment for these additional goods was not, however, secured by either the loan guaranteed by the ECGD or the irrevocable letters of credit.

24. The contract provided for the supply of goods and services of both British and non-British origin. The supply of items of British origin in the amount of GBP 4,848,536 (the "eligible value") was financed under a United Kingdom export enhancement programme pursuant to which the ECGD guaranteed a line of credit extended by a group of British banks (led by Midland Bank PLC) to Iraq. This line of credit agreement was entered into between Midland Bank (acting on behalf of itself and three other British banks) and Iraq's Rafidain Bank on 4 July 1988. Under the terms of the line of credit agreement, Midland Bank agreed with Rafidain Bank to make sums available to finance 85 per cent of the British origin component of contracts between Iraqi organizations (such as SCOP) and British exporters (such as Combustion) for the supply of goods and/or services for projects in Iraq. The line of credit agreement provided that it was necessary for Rafidain Bank to apply to Midland Bank for approval in respect of each contract that Rafidain Bank wished to have financed.

25. By the terms of an approval in principle dated 15 November 1989 and a notice of approval dated 4 December 1989, Midland Bank approved the financing of 85 per cent of the eligible value of the contract, amounting to GBP 4,121,255. Moreover, pursuant to the terms of the line of credit agreement and the notice of approval, the amount of GBP 4,121,255 was to be paid out by Midland Bank to Combustion as it made shipments of goods and services under the contract and presented shipping documents and a qualifying certificate to Midland Bank. The approval in principle stipulated that the final date for drawing on the financing of GBP 4,121,255 was 30 September 1990, and that Rafidain Bank was required to repay this principal amount to Midland Bank in 10 equal instalments commencing 15 April 1991.

26. The line of credit agreement and the approval in principle further stipulated that SCOP would pay to Combustion 5 per cent of the eligible value (GBP 242,427) in cash within 30 days of signing the contract. This payment was made. SCOP was also required under the export enhancement programme to secure the remaining 10 per cent of the eligible value (GBP 484,854) by an irrevocable letter of credit. This letter of credit was issued in favour of Combustion by Rafidain Bank on 22 November 1989 and was valid until 31 July 1990.

27. Pursuant to the terms of the contract, SCOP agreed to secure payment for the supply of goods and services of non-British origin in the amount of GBP 1,301,529 by directing that two irrevocable letters of credit be issued in favour of Combustion by Iraq's Rasheed Bank in the amounts of GBP 728,359 and GBP 573,170. These letters of credit were issued on 21 January 1990 and were valid until 31 July 1990.

28. The contract did not specify a payment due date for shipments of goods made pursuant to the contract. Rather, the contract provided that payment "shall be made in percentages of the price" against presentation of shipping documents as required under the terms of the line of credit agreement and the letters of credit.

29. Under the terms of the contract, Combustion was required to complete delivery of the goods within 11 months from the date of issue of the notice of approval. The contract also stipulated that the delivery of the materials "shall be C&F Site [of the Zubair Depot in Iraq] in accordance with INCOTERMS 1980".

30. Each of the letters of credit issued by Rafidain Bank and Rasheed Bank was substantially similar in form, and required the same types of documents to be presented in support of drawings on the letters of credit. Combustion asserts that the terms of the letters of credit did not conform precisely to the terms of the contract and that, as a result, there were significant delays in the examination and approval of its drawings under the letters of credit. Moreover, Combustion asserts that further delays were caused by the requirement that the Embassy of Iraq in London legalize each document presented by Combustion in support of its drawings. Combustion states that its drawings were therefore often considered not to conform to the requirements of the letters of credit issued by the two Iraqi banks and required a waiver of the discrepancies and approval by SCOP for payment.

3. Elements of Combustion's claim

31. Combustion seeks compensation in the total amount of GBP 1,596,277 for losses incurred in relation to the contract and the supplemental agreement. It describes its claim as one involving two elements: (a) unpaid contractual amounts; and (b) out-of-pocket shut-down expenses.

Table 3. Elements of Combustion's claim
(Pounds sterling)

Claim element	Original amount claimed
Unpaid contractual amounts	1,542,035
- Contract goods received by SCOP	1,134,470
- Contract goods of non-British origin	702,247
- Contract goods of British origin	432,223
- Contract goods diverted in transit to Iraq and supplemental goods received by SCOP	407,565
- Contract goods diverted in transit to Iraq	380,935
- Supplemental goods received by SCOP	26,630
Shut-down expenses	54,242
Total	1,596,277

32. In support of its claim for contract-related losses, Combustion has provided copies of the relevant supply contracts and financing agreements, as well as invoices, shipping, storage and insurance documents, correspondence, payroll records, employee expense reports and audited financial statements for the years 1988 to 1992.

(a) Unpaid contractual amounts – GBP 1,542,035

33. Combustion alleges that, as a direct result of Iraq's invasion and occupation of Kuwait, it has not received payment for certain goods shipped to SCOP having a total value of GBP 1,542,035. Of this amount, the amount of GBP 1,134,470 relates to shipments of contract goods received by SCOP prior to Iraq's invasion and occupation of Kuwait. The remaining amount of GBP 407,565 relates to

contract goods shipped to Iraq prior to 2 August 1990 and then subsequently diverted in transit, as well as to supplemental goods received by SCOP prior to 2 August 1990.

(i) Contract goods received by SCOP - GBP 1,134,470

34. The amount of GBP 1,134,470 is comprised of two elements: (a) the amount of GBP 702,247 due under the two letters of credit issued by Rasheed Bank for contract goods of non-British origin; and (b) the amount of GBP 432,223 due under the letter of credit issued by Rafidain Bank for contract goods of British origin.

a. Contract goods of non-British origin - GBP 702,247

35. The amount of GBP 702,247 relates to 12 invoices issued in respect of shipments of contract goods of non-British origin that took place between 26 January and 1 June 1990. Combustion requested payment for these goods under the two letters of credit issued by Rasheed Bank by presenting the required documents to the advising bank (i.e. Rafidain Bank in London) between 6 March and 12 June 1990.

36. Combustion asserts that, due to delays in the legalization of the required documents, the advising bank subsequently sent its 12 drawings to Rasheed Bank to be processed "on a collection basis". Combustion asserts that a further delay in the processing and approval of its drawings later resulted when Rasheed Bank in Baghdad misplaced some of the documents. The misplaced documents were eventually located, through the assistance of a representative of Combustion, by Rasheed Bank on 2 August 1990.

37. Combustion alleges that, but for Iraq's invasion and occupation of Kuwait, the 12 drawings in the total amount of GBP 702,247 would have been approved and paid in August 1990. It states that, pursuant to article 7 of Law No. 57 issued by Iraq's Revolutionary Command Council on 6 August 1990, all of the funds payable to it by Iraq and Iraqi banks and companies were "blocked".[5] Combustion further states that SCOP had previously approved other similar drawings presented with the same type of documentation for payment.

b. Contract goods of British origin - GBP 432,223

38. The amount of GBP 432,223 relates to 12 invoices issued in respect of shipments of contract goods of British origin that took place between 26 January and 5 May 1990. Combustion requested payment for these goods under the letter of credit issued by Rafidain Bank by presenting the required documents to the advising bank (i.e. Midland Bank in London) between 6 March and 11 May 1990. Combustion asserts that, due to delays in the legalization of the required documents, the advising bank subsequently sent its 12 drawings to Rafidain Bank to be processed "on a collection basis".

39. Combustion asserts that one of its representatives was informed on 31 July 1990 by representatives of SCOP and Rafidain Bank that the 12 drawings pending under the letter of credit issued by Rafidain Bank were approved for payment. It further asserts that, but for Iraq's invasion and

occupation of Kuwait and Iraq's blocking of funds payable to it, the 12 drawings in the total amount of GBP 432,223 would have been paid in late 1990.

(ii) Contract goods diverted in transit to Iraq and supplemental goods received by SCOP - GBP 407,565

40. The amount of GBP 407,565 is comprised of two elements: (a) the amount of GBP 380,935 payable in respect of a shipment of contract goods diverted in transit to Iraq; and (b) the amount of GBP 26,630 payable under the supplemental agreement.

a. Contract goods diverted in transit to Iraq - GBP 380,935

41. Combustion's final shipment of goods to SCOP under the contract took place on 27 July 1990. Combustion asserts that, as a direct result of Iraq's invasion and occupation of Kuwait, as well as Iraq's closure of its borders, this shipment was stopped in Bulgaria after 2 August 1990 and returned to the United Kingdom at Combustion's expense. The value of the goods in the shipment totalled GBP 397,800 and was covered by four invoices. Under the ECGD financing arrangement, SCOP paid, in advance, part of the value of the goods of British origin included in the shipment, amounting to GBP 16,865. Combustion has not received payment for the balance of the shipment, the amount owing being GBP 380,935, which was payable under the line of credit agreement and the letters of credit issued by Rafidain Bank and Rasheed Bank.

42. The largest portion of the balance, GBP 286,711, relates to goods of British origin and was payable by Midland Bank under the ECGD-guaranteed line of credit. However, by a letter dated 16 August 1990, the ECGD notified Combustion as follows:

> "As a result of Iraq's poor payment record over recent months and the current invasion of Kuwait ECGD is unable to provide any further cover on these markets and loan drawings have been suspended.
>
> Exporters currently engaged in contracts with buyers in Iraq and Kuwait will also be aware that a number of Statutory Instruments have recently been made to apply sanctions against these two markets. Amongst the effects have been the freezing of Iraqi and Kuwaiti assets and the prohibition (except where subsequently licensed) of exports to Iraq and Kuwait."

43. Combustion subsequently wrote to the Bank of England and requested that Midland Bank be authorized to disburse frozen assets of Iraq in discharge of the amounts owed to Combustion under the contract. This request was denied, and it is unclear from the evidence whether Combustion ever requested payment for the last shipment of goods from Midland Bank or the ECGD under the ECGD-guaranteed line of credit.

44. The remaining balance (GBP 94,224) of the price of the goods in the final shipment, which relates to goods of British and non-British origin, was payable under two letters of credit issued by Rafidain Bank and Rasheed Bank. Combustion asserts that drawings totalling this amount were

presented to the advising banks under these letters of credit immediately upon shipment (in order to comply with their expiry date of 31 July 1990). However, according to Combustion, there was insufficient time for these drawings to be processed prior to Iraq's invasion and occupation of Kuwait. Moreover, the drawings had to be withdrawn by Combustion and the original shipping documents used to reclaim possession of the goods stopped in transit to Iraq. Combustion asserts that, as a direct result of Iraq's invasion and occupation of Kuwait, it has not received payment of the balance from Rafidain Bank (in the amount of GBP 33,730) and Rasheed Bank (in the amount of GBP 60,494).

45. Combustion contends that, notwithstanding the existence of the line of credit agreement and the letters of credit, SCOP was and is obligated to make payment for both the goods received and the materials diverted in transit to Iraq. According to Combustion, the establishment of external financing did not discharge SCOP of its obligation to pay for the goods.

46. Combustion states that it has been unable to sell or otherwise use the materials in the last shipment to mitigate its losses. It asserts that the materials were built for SCOP's specific use and that it is not economically feasible to put them to an alternative use. In its response to the article 34 notification, Combustion estimated that the scrap value of the materials is GBP 6,500.

b. Supplemental goods received by SCOP - GBP 26,630

47. Combustion asserts that, as a direct result of Iraq's invasion and occupation of Kuwait and Iraq's related blocking of funds, it has not received payment for the supplemental goods of GBP 26,630 that were shipped to SCOP on 5 May 1990 and arrived at the Zubair Depot in June 1990.

(b) Shut-down expenses - GBP 54,242

48. Combustion asserts that, as a direct result of Iraq's invasion and occupation of Kuwait, it incurred shut-down expenses in the total amount of GBP 54,242 in connection with the contract. These shut-down expenses are comprised of three elements:

(a) Freight, storage and insurance charges (GBP 15,902);

(b) Home office and employee travelling expenses (GBP 26,337); and

(c) Service charges on bank guarantees (GBP 12,003).

49. Combustion asserts that it incurred additional freight and demurrage charges in the amount of GBP 6,225 in respect of the final shipment of goods that was diverted in transit to Iraq. The shipment was stopped in Bulgaria after 2 August 1990 and returned to the United Kingdom at Combustion's expense. Moreover, Combustion asserts that it later needed to store this shipment of goods in the United Kingdom and has incurred, as of 30 June 1993, storage and related insurance expenses in the amount of GBP 9,677. In its response to the article 34 notification, Combustion stated that the goods remain in storage and that it continues to incur storage and related insurance expenses.

50. According to Combustion, it incurred home office and employee travelling expenses during the months of August to October 1990 in connection with the shutdown of activities under the contract

and the handling of freight, storage, insurance, and payment collection matters. It claims that these expenses, comprised mainly of employee salaries, were in the amount of GBP 26,337.

51. Combustion asserts that it has continued to pay service charges to Lloyds Bank PLC in respect of three "demand" guarantees supporting delivery and performance obligations of Combustion under the contract. Rafidain Bank issued the guarantees in favour of SCOP, and Lloyds Bank agreed, in turn, to give the undertakings required by Combustion to Rafidain Bank. Combustion states that, notwithstanding its attempts to have the service charges terminated, Lloyds Bank continued to levy quarterly service charges on it following Iraq's invasion and occupation of Kuwait. Combustion seeks compensation for service charges totalling GBP 12,003 that it paid to Lloyds Bank (in 1993) in respect of the guarantees for the period from January 1991 to August 1993.

4. Alternative claims

52. As noted above, Combustion seeks compensation for losses totalling GBP 1,596,277. It states that its claim for this amount involves: (a) unpaid contractual amounts totalling GBP 1,542,035; and (b) out-of-pocket shut-down expenses totalling GBP 54,242.

53. In its statement of claim, Combustion also refers to alternative claims for: (1) profits in the amount of GBP 1,294,000 which it would have realized, but for Iraq's invasion and occupation of Kuwait, under the contract and the supplemental agreement; (2) losses in the amount of GBP 248,035 which it realized as a result of not receiving payment for materials shipped to SCOP; and (3) shut-down expenses, including contract materials on hand, in the amount of GBP 435,177. The alternative claims are advanced as alternative theories of recovery and are used by Combustion in its description of different recovery scenarios. Combustion makes it clear, however, that the total value of its claim is GBP 1,596,277.

B. Iraq's response

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

(a) Iraq contends that the last shipment of materials was stopped in Bulgaria and returned to the United Kingdom as a result of the trade embargo imposed on Iraq by Security Council resolution 661 (1990). Iraq considers that the losses incurred in respect of this shipment are not therefore eligible for compensation according to paragraph 9 of Governing Council decision 7 (S/AC.26/1991/7/Rev.1).

(b) According to Iraq, the claim for payments due to Combustion represents a claim for losses caused solely by the trade embargo imposed on Iraq. Iraq states that SCOP and Iraqi banks fully performed their obligations until the trade embargo was imposed, after which time it became impossible for Iraqi banks to carry out transactions and Iraqi funds outside of Iraq were frozen. Iraq contends that Combustion's assertion that the non-payment of outstanding invoices was caused by Law No. 57 issued by Iraq's Revolutionary Command Council is not supported by the facts. Iraq points out that Law No. 57 was issued on 16 September 1990 in response to Security Council resolution 661 (1990) and, by that date, Iraqi banks were already completely cut off from the world banking system as a result of the trade embargo.

(c) Iraq further asserts that the contract between Combustion and SCOP was financed through a loan agreement made between Iraq and a group of British banks. Iraq contends that the claim does not address the implications of this "non commercial" arrangement or the portion of the claim that should have been paid by British banks.

C. Analysis and valuation

55. The Panel finds that Combustion has not provided sufficient evidence to permit the Panel to verify the circumstances and amounts of the losses claimed in the alternative. The Panel's task is therefore to determine whether the claim in the amount of GBP 1,596,277 for unpaid contractual amounts and shut-down expenses is for direct losses resulting from Iraq's invasion and occupation of Kuwait.

1. Unpaid contractual amounts

56. In its first report, the "E2" Panel considered the issue of the compensability of Iraq's debts existing at the time of the invasion and occupation of Kuwait and found that the "object and purpose of the Security Council's insertion of the 'arising prior to' clause [in paragraph 16 of Security Council resolution 687 (1991)] was to exclude from the jurisdiction of the Commission Iraq's old debt."[6]

57. The "E2" Panel also made the following determination:

> "[T]he Panel finds that a rule which best implements the Security Council's intention in resolution 687 (1991) is the following:
>
> > In the case of contracts with Iraq, where the performance giving rise to the original debt had been rendered by a claimant more than three months prior to 2 August 1990, that is, prior to 2 May 1990, claims based on payments owed, in kind or in cash, for such performance are outside of the jurisdiction of the Commission as claims for debts or obligations arising prior to 2 August 1990.
>
> 'Performance' as understood by the Panel for purposes of this rule can mean complete performance under a contract, or partial performance, so long as an amount was agreed to be paid for that portion of completed partial performance."[7]

58. The Panel, as it has in previous reports, adopts these conclusions of the "E2" Panel. The Panel also adopts the "E2" Panel's conclusion that, with respect to debts of an Iraqi party for the supply of goods, the claimant's performance is defined by the delivery of the goods (pursuant to the terms of the contract) and that a claim for non-payment based on a sales contract with an Iraqi party is outside the Commission's jurisdiction if the delivery of the goods took place prior to 2 May 1990.[8]

59. The Panel notes that in its report concerning the fourth instalment of “E2” claims, the “E2A” Panel found that, where the sale of goods to an Iraqi party was to be paid by a letter of credit that has not been honoured by an Iraqi bank, the exporter may base a claim either upon the letter of credit or upon the underlying sales contract.[9] The “E2A” Panel further found that, for the exporter’s claim based upon a letter of credit to be within the Commission’s jurisdiction, the claimant must have: (a) shipped the goods on or after 11 April 1990, (b) presented to the bank documents in conformity with the requirements of the letter of credit on or after 2 May 1990, and (c) not have allowed more than 21 days to elapse between the shipment and the presentation of documents.[10]

60. The Panel has analysed the findings of the “E2A” Panel and adopts its conclusions for the purposes of the review of the present claim. The Panel also adopts the “E2A” Panel’s conclusion that the actions of Iraq’s officials during the invasion and 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.[11]

61. Of the total amount of GBP 1,542,035 claimed by Combustion for unpaid contractual amounts, the Panel finds that the amount of GBP 815,525 relates to 15 invoices issued by Combustion in respect of shipments of contract goods that took place prior to 11 April 1990. Applying the conclusions of the “E2” Panel, the Panel finds that the amount of GBP 815,525 represents a debt or obligation of Iraq that arose prior to 2 August 1990 within the meaning of Security Council resolution 687 (1991). As a result, the claim based on the 15 invoices totalling GBP 815,525 is outside the jurisdiction of the Commission.

62. The remaining balance of the claim for unpaid contractual amounts is in the amount of GBP 726,510. Included in this amount are three shipments of contract goods that took place on 11 April, 21 April and 22 April 1990, respectively. The Panel finds that the amount of GBP 54,627 owed in respect of the shipment made on 22 April 1990 is within the Commission’s jurisdiction and represents a direct loss resulting from Iraq’s invasion and occupation of Kuwait, since the evidence indicates that on 3 May 1990 Combustion presented the required documents for payment of this amount under one of the letters of credit issued by Rasheed Bank. The amounts of GBP 36,418 and GBP 8,205 owed in respect of the other two shipments are not compensable, however, since the evidence indicates that Combustion presented the required documents for payment to Rasheed Bank and Rafidain Bank prior to 2 May 1990.

63. The remainder of the claim for unpaid contractual amounts relates to shipments of goods that took place between 2 May and 2 August 1990. The Panel considers that its analysis of the claim for the amount of GBP 627,260 owed in respect of these shipments must be split between: (a) the shipments of goods that departed for, and arrived in, Iraq between 2 May and 2 August 1990, and (b) the shipment of goods that departed for Iraq on 27 July 1990 but was subsequently diverted in transit.

64. With respect to the goods that were shipped to Iraq between 2 May and 2 August 1990, the Panel finds that the claim based on these shipments is within the Commission’s jurisdiction and is compensable in principle, since the amount of GBP 246,325 owed in respect of these shipments represents a debt or obligation of Iraq that arose after 2 August 1990 within the meaning of Security

Council resolution 687 (1991). The evidence is sufficient, however, to support only GBP 219,695 of this amount, since Combustion did not provide an invoice or shipping documents in support of the claim for the supplemental goods allegedly shipped to SCOP on 5 May 1990.

65. With respect to the goods that were shipped to Iraq on 27 July 1990 but were subsequently diverted in transit and returned to the United Kingdom, the Panel notes that the "E2A" Panel has found that the performance of contracts for the supply of goods to Iraq between 2 August 1990 and 2 March 1991 was rendered impossible as a direct result of Iraq's invasion and occupation of Kuwait.[12] The "E2A" Panel reached this conclusion in view of the prevailing conditions in Iraq, including the military situation in the Persian Gulf region, the repudiation of foreign obligations by Iraqi officials, and the disruption of transportation services to, from and within the Middle East caused by military operations or the threat thereof.[13] The "E2A" Panel has also found that, in the context of losses arising from the diversion of goods destined for Iraq, the claimant's duty to mitigate would generally require that the claimant attempt to sell the undelivered goods to a third party in a reasonable manner and within a reasonable time.[14]

66. The Panel has analysed the findings of the "E2A" Panel and adopts its conclusions for the purposes of the review of the present claim.

67. The Panel finds that the final shipment of goods was diverted as a direct result of Iraq's invasion and occupation of Kuwait. The Panel further finds that, had Iraq's invasion and occupation of Kuwait not occurred, payment for these goods in the amount of GBP 380,935 would have been received by Combustion shortly after 2 August 1990. Applying the conclusions of the "E2A" Panel, the Panel finds that the claim for the unpaid price of the goods shipped to Iraq on 27 July 1990 in the amount of GBP 380,935 is for direct losses resulting from Iraq's invasion and occupation of Kuwait. However, the evidence fails to demonstrate that Combustion made any efforts to resell these goods or otherwise realize some value to reduce its loss. The Panel therefore recommends an award of compensation for the final shipment of contract goods in the amount of GBP 300,490, which the Panel considers to be the difference between the original contract price of the goods and the fair market value of the goods in mid-1991 by which time Combustion should reasonably have mitigated its loss.

68. Based on the foregoing, the Panel recommends an award of compensation to Combustion for unpaid contractual amounts in the amount of GBP 574,812.[15]

2. Shut-down expenses

69. With respect to the claim for shut-down expenses, the Panel finds that the additional freight, storage and insurance charges incurred in respect of the final shipment of contract goods are compensable in principle, since these charges were incurred as a direct result of Iraq's invasion and occupation of Kuwait. The evidence confirms that Combustion incurred additional freight, storage and insurance charges in the amount of GBP 15,902. However, the Panel declines to recommend an award of compensation for such charges incurred beyond 1 August 1991, since the evidence fails to demonstrate that Combustion took any steps to resell the goods or otherwise obtain some realizable

value for them. The Panel therefore recommends an award of GBP 7,235 in respect of the claim for freight, storage and insurance charges.

70. The Panel finds that the home office and employee travelling expenses sought by Combustion do not represent additional or extraordinary expenses. Accordingly, regardless of whether any additional work and travelling was performed by Combustion employees, the Panel finds that such expenses are not compensable losses.

71. Lastly, with respect to the claim for service charges on bank guarantees, the Panel finds that the effect of the trade embargo imposed on Iraq was such that a demand guarantee in favour of an Iraqi party could not legally have been honoured after 6 August 1990. Accordingly, the Panel does not see what benefit Lloyds Bank was providing in return for the service charges it was paid after notice of the embargo had been widely disseminated.[16] The fact that Combustion continued after 6 August 1990 to incur service charges in respect of the guarantees is a matter not directly related to Iraq's invasion and occupation of Kuwait. Accordingly, the Panel recommends no award of compensation for such service charges.

72. Based on the foregoing, the Panel recommends an award of compensation to Combustion for shut-down expenses in the amount of GBP 7,235.

D. Recommendations

73. The Panel's recommendations with respect to the claim of Combustion are summarized in table 4 below.

Table 4. Combustion's claim – recommended compensation
(Pounds sterling)

Claim element	Original amount claimed	Amount of compensation recommended
Unpaid contractual amounts	1,542,035	574,812
Shut-down expenses	54,242	7,235
Total	1,596,277	582,047

IV. CLAIM OF ABB LUMMUS CREST HOLDING B.V.

A. Facts and contentions

1. Introduction

74. ABB Lummus Crest Holding B.V. ("LC Holding") is a corporation organized under the laws of the Netherlands. ABB Lummus Heat Transfer B.V. ("LHT") and ABB Lummus Crest B.V. ("LCV") are both wholly-owned subsidiaries of LC Holding and, like their parent corporation, are incorporated under the laws of the Netherlands.

75. LC Holding, LHT and LCV are members of a multinational group of Lummus Crest companies that provide engineering, procurement and construction supervision services with respect to process plants owned and operated by petroleum, petrochemical and chemical companies.

76. LC Holding seeks compensation in the amount of 3,386,277 Guilders (NLG) for losses related to six contracts that LHT and LCV entered into with Kuwait National Petroleum Company ("KNPC") prior to Iraq's invasion and occupation of Kuwait. LC Holding also seeks an unquantified amount of interest on the total amount of its claim from the date of loss, as well as an unspecified amount of compensation for the costs of preparing and presenting its claim.[17]

77. According to LC Holding, LHT and LCV incurred the claimed losses as a direct result of Iraq's invasion and occupation of Kuwait. LC Holding has been assigned the right, title and interest of LHT and LCV in the claim. The quantified claimed losses are summarized in table 5 below.

Table 5. LC Holding's claim
(Guilders)

Claim element	Original amount claimed
Currency exchange losses	1,485,635
Employee-related losses	76,801
Shut-down expenses	376,773
Loss of return on investment	1,447,068
Total	3,386,277

78. LC Holding states that neither it nor its subsidiaries, LHT and LCV, have received any form of indemnity or payment for the losses claimed. It also states that none of these companies has made a claim for these losses to any insurer or Government.

2. Currency exchange losses

79. LC Holding states that, as a direct result of Iraq's invasion and occupation of Kuwait, five contracts between LHT and KNPC were frustrated. The particulars of these five contracts, which

were at various stages of completion at the time of Iraq's invasion and occupation of Kuwait, are summarized below.

(a) In May 1989, LHT received a purchase order from KNPC for the supply of four gas heat exchangers to the Mina Al-Ahmadi refinery in Kuwait at a price of 305,900 Kuwaiti dinars (KWD) (the "first contract"). These goods were shipped "C&F Kuwait" to KNPC on 30 June 1990 and arrived in Kuwait on 31 July 1990. Under the terms of this contract, payment for the goods was due upon presentation by LHT of original shipping documents to a collecting bank in Kuwait. LHT presented the contractually-stipulated request for payment to the bank on or about 19 July 1990, but did not receive payment for the goods until 2 September 1992. LC Holding states that payment for the goods was delayed because the goods were stolen or destroyed during Iraq's invasion and occupation of Kuwait. Damage caused to KNPC's refineries during Iraq's invasion and occupation of Kuwait, as well as to Kuwait's oil fields and infrastructure, also allegedly contributed to the delay in receiving payment.

(b) In November 1989, LHT received a purchase order from KNPC for the supply of two tube bundles to the Mina Abdulla refinery in Kuwait at a price of KWD 78,600 (the "second contract"). LC Holding states that these goods were in storage in the Netherlands on 2 August 1990 and would have been delivered to KNPC shortly afterwards but for Iraq's invasion and occupation of Kuwait. Payment for the goods was due upon presentation by LHT of original shipping documents to a collecting bank in Kuwait. LC Holding states that, as a result of damage caused to KNPC's refineries during Iraq's invasion and occupation of Kuwait, as well as to Kuwait's oil fields and infrastructure, these goods could not be delivered until 29 November 1991. LHT did not receive payment for the goods until 19 December 1991.

(c) In December 1989, LHT received a purchase order from KNPC for the supply of two tube bundles to the Shuaiba refinery at a price of KWD 179,100 (the "third contract"). The two tube bundles were in the process of being manufactured in the Netherlands on 2 August 1990 and were to be delivered to KNPC by mid-November 1990. Payment for the goods was due upon receipt by KNPC of LHT's invoice. According to LC Holding, because KNPC had to repair extensive damage caused to KNPC's refineries during Iraq's invasion and occupation of Kuwait, these goods could not be delivered until 9 October 1992. LHT did not receive payment for the goods until 3 February and 24 February 1993.

(d) In January 1990, LHT received a purchase order from KNPC for the supply of 16 tube bundles to the Mina Abdulla refinery at a price of KWD 883,200 (the "fourth contract"). Two shipments containing a total of eight tube bundles were shipped to KNPC on 23 July and 31 July 1990, and the remaining goods were ready for shipment on 2 August 1990. The two shipments were returned to LHT in September 1990. Payment for the goods was due upon presentation by LHT of original shipping documents to a collecting bank in Kuwait. LC Holding states that, as a result of damage caused to KNPC's refineries during Iraq's invasion and occupation of Kuwait, as well as to Kuwait's oil fields and infrastructure, these materials could not be delivered until 3 January 1992. LHT did not receive payment for the goods until 31 December 1991.

(e) In July 1990, LHT received a purchase order for the supply of four tube bundles to the Mina Abdulla refinery at a price of KWD 64,557 (the "fifth contract"). The goods were to be delivered to KNPC by early February 1991 and LHT was to receive payment upon presentation of original shipping documents to a collecting bank in Kuwait. LC Holding states that, as a result of damage caused to KNPC's refineries during Iraq's invasion and occupation of Kuwait, as well as to Kuwait's oil fields and infrastructure, these materials could not be delivered until 20 November 1992. LHT did not receive payment for the goods until 11 January 1993.

80. LC Holding asserts that, as a direct result of Iraq's invasion and occupation of Kuwait, LHT incurred currency exchange losses in respect of the five contracts, each of which was payable according to its original terms in Kuwaiti dinars. It seeks a total of NLG 1,485,635 as compensation for these currency exchange losses.

81. LC Holding states that, shortly after the liberation of Kuwait, representatives of LHT and KNPC met in Kuwait to discuss the reinstatement and resumption of the five contracts. LHT also states that, on 10 June 1991, KNPC agreed with LHT to take delivery of, and make payment for, all goods not yet delivered, as well as to make payment for the goods delivered prior to Iraq's invasion and occupation of Kuwait. LC Holding further states that LHT and KNPC agreed that, since the Kuwaiti dinar had become non-convertible into Guilders and other foreign currencies as from 2 August 1990, the terms of the second, third, fourth and fifth contracts should be amended to provide for payment in United States dollars. According to LC Holding, KNPC recommended that, for purposes of establishing the price of the contracts in United States dollars, the original contract price should be converted using an exchange rate of 3.367 United States dollars for each Kuwaiti dinar. LHT agreed to KNPC's recommendation and, on 11 July 1991, it issued pro forma invoices in United States dollars using this agreed exchange rate for these contracts. KNPC subsequently issued amended purchase orders for the goods under these contracts, allegedly with the understanding that the delivery dates provided in the amended purchase orders were tentative and subject to change (depending on the progress of repairs at its refineries, the extinction of oil well fires and the return of personnel to the refineries).

82. There was no similar agreement reached between LHT and KNPC to amend the terms of the first contract.

83. LC Holding states that corporations organized under the laws of the Netherlands must, according to those same laws, present their financial statements and report revenues and losses in Guilders. It further states that the foreign currency receipts of Dutch corporations (such as LHT) must therefore be converted to Guilders for purposes of measuring any losses, including currency exchange losses.

84. According to LC Holding, LHT incurred currency exchange losses under the second, third, fourth and fifth contracts because the United States dollar dropped in value against the Guilder between the time it issued the pro forma invoices on 11 July 1991 and the time it received payment for the goods. LHT also allegedly incurred a currency exchange loss under the first contract because the Kuwaiti dinar dropped in value against the Guilder between the time it delivered the goods under that contract to KNPC and the time it received payment for the materials.

85. LC Holding has calculated the currency exchange losses allegedly incurred under the second, third, fourth and fifth contracts by comparing the value in Guilders of these contracts on 11 July 1991 with the amounts actually earned in Guilders by LHT when payment was received. It asserts that the losses under these four contracts amounted to NLG 1,239,510.

86. LC Holding has calculated the currency exchange loss allegedly incurred under the first contract by comparing the value in Guilders of this contract on 1 August 1990 with the amount actually earned in Guilders by LHT when payment was received. It asserts that the losses under this contract amounted to NLG 246,125.

87. In support of the claim for currency exchange losses, LC Holding has provided copies of the relevant purchase orders and invoices, as well as correspondence, bills of lading, schedules of currency exchange rates and affidavits of employees and officers of LC Holding and LHT.

3. Employee-related losses

88. On 2 August 1990, LCV had an ongoing contract with KNPC to provide engineering and consulting services for a project at the Shuaiba refinery. LC Holding claims that an employee of LCV who was working on this project was detained by Iraqi forces and eventually transported to Baghdad where he was further detained until 5 September 1990. On that date, the employee was released to the Ambassador of the Netherlands in Baghdad. He then remained under house arrest at the residence of the Ambassador of the Netherlands until he was permitted by Iraqi authorities to leave Iraq for the Netherlands on 9 November 1990.

89. LCV continued to pay the employee's salary during the period of his detention and also paid him a living allowance until 23 November 1990. LC Holding seeks compensation for these payments, as well as for the cost of collect telephone calls made by the employee from Baghdad to his family and the value of LCV-owned funds allegedly abandoned by the employee in a Kuwaiti bank for a total amount of NLG 76,801.

90. In support of this loss element, LC Holding has provided copies of LCV's payment records for the employee during the period July to December 1990, a cash withdrawal receipt from the National Bank of Kuwait dated 8 July 1990 showing an account balance of KWD 306.241 in favour of the employee, telephone bills and an affidavit of the employee.

4. Shut-down expenses

91. LC Holding asserts that, as a direct result of Iraq's invasion and occupation of Kuwait, LHT incurred certain shut-down expenses without reimbursement from KNPC. In particular, LC Holding claims that LHT incurred additional freight, storage and insurance charges totalling NLG 126,644 in relation to the goods under the second and fourth contracts. It also claims that LHT incurred increased manufacturing costs of NLG 35,000 in respect of the third contract. LC Holding further claims that LHT incurred home office and employee travelling expenses in the amount of NLG 215,129 to administer the outstanding contracts with KNPC during the period of Iraq's invasion and occupation of Kuwait, as well as to secure the reinstatement of the contracts after the liberation of Kuwait. It

seeks compensation in the total amount of NLG 376,773 for these various charges and expenses (collectively referred to as "shut-down expenses").

92. In support of this loss element, LC Holding has provided copies of computer printouts summarizing information derived from employee time sheets, expense reports, invoices and other documentation, bills of lading and invoices evidencing storage, handling and insurance charges.

5. Loss of return on investment

93. LC Holding asserts that LHT incurred a loss of return on the amount of its investment under the first, second, third and fourth contracts.[18] It claims that LHT procured goods and incurred manufacturing costs prior to Iraq's invasion and occupation of Kuwait in order to fulfil these contracts. It further claims that, but for Iraq's invasion and occupation of Kuwait, LHT would have been compensated for its investment in goods and manufacturing costs shortly after 2 August 1990.

94. According to LC Holding, the total amount of LHT's investment in goods and manufacturing costs under the first, second, third and fourth contracts was NLG 9,742,000. Moreover, the whole of this investment was allegedly made prior to Iraq's invasion and occupation of Kuwait. Applying the Amsterdam Inter-Banking Offered Rate ("AIBOR") plus 1 per cent (as of 1 August 1990) to the total amount of the investment, LC Holding asserts that LHT sustained a loss of return of NLG 1,447,068 on the investment between 2 August 1990 and the respective dates when it received payment for the goods.

95. In support of the claim for loss of return on investment, LC Holding has provided copies of the purchase orders, bills of lading and other documentation covering the timing of shipments of goods ordered by KNPC, and affidavits of the Controller and Treasurer of LC Holding and the Management Cost Controller of LHT.

B. Iraq's response

96. Iraq raises general objections to LC Holding's claim, asserting two main arguments. First, Iraq asserts that each of the relevant contracts relates to a period prior to 2 August 1990 and that the claim is, by virtue of Security Council resolution 687 (1991), outside the jurisdiction of the Commission. Second, Iraq asserts that the contracts held between LHT and KNPC were executed and settled to the satisfaction of both parties and that LHT was fully compensated by KNPC.

97. Iraq's more specific objections can be summarized as follows.

(a) Iraq contends that LHT's need or desire to exchange into Guilders the payments it received in Kuwaiti dinars or United States dollars was outside the terms of the relevant contracts. It notes that the value of currencies can rise or fall, and it questions whether LHT would have returned any money to KNPC if the United States dollar had appreciated in value against the Guilder.

(b) Iraq argues that the claim for shut-down expenses is exaggerated and includes costs that LHT agreed it would absorb, such as storage, insurance and handling. The claim also includes costs incurred in respect of orders that could have been shipped earlier than they were to KNPC, as well as costs that were compensated by KNPC.

(c) Iraq contends that LC Holding has not submitted sufficient evidence to substantiate its claim for the employee-related losses incurred by LCV.

(d) Iraq states that the claim for loss of return on investment is exaggerated and includes losses that could have been avoided, as well as losses that were compensated by KNPC.

C. Analysis and valuation

98. The Panel finds that the claim for currency exchange losses is not compensable as the losses are too remote to be considered direct losses resulting from Iraq's invasion and occupation of Kuwait. The Panel considers that LHT accepted the risk of foreign currency fluctuations under the five contracts with KNPC when it agreed to receive payment from KNPC in a currency other than Guilders. Accordingly, the Panel recommends no award of compensation with respect to the claim for currency exchange losses.

99. With respect to the claim for employee-related losses in the amount of NLG 76,801, the Panel finds that the salary and living allowance payments made to the employee detained in Kuwait and Iraq represent a loss directly caused by Iraq's invasion and occupation of Kuwait. The Panel also finds that the costs of the employee's collect telephone calls to his family are compensable. Accordingly, since the evidence supports the full amounts claimed for these payments and costs, the Panel recommends an award of compensation in the amount of NLG 74,810 so claimed. However, the Panel recommends no award of compensation for the LCV-owned funds abandoned by the employee in Kuwait, since the evidence fails to demonstrate that LCV has in fact incurred a loss or that it ever pursued the recovery of the funds following the liberation of Kuwait.

100. With respect to the claim for shut-down expenses, the Panel finds that the additional freight, storage, and insurance charges incurred in relation to the goods under the second and fourth contracts are compensable in principle, since these charges were incurred by LHT as a direct result of Iraq's invasion and occupation of Kuwait. The evidence confirms that LHT incurred additional charges in the amount of NLG 126,644.

101. The Panel considers however, that the evidence provided in support of the claims for increased manufacturing costs and home office and employee travelling expenses is insufficient to permit it to verify whether these costs and expenses represent additional expenses incurred as a direct result of Iraq's invasion and occupation of Kuwait. Accordingly, the Panel recommends no award of compensation in respect of these claims.

102. With respect to the claim for loss of return on investment, the Panel finds that payment for the goods delivered under the first contract was delayed as a direct result of Iraq's invasion and occupation of Kuwait. The Panel further finds that delivery and payment under the second, third and fourth contracts were delayed as a direct result of Iraq's invasion and occupation of Kuwait. The

Panel considers that any return on investment loss that resulted from the delays in payment is directly attributable to Iraq's invasion and occupation of Kuwait.[19]

103. In the Panel's view, LC Holding's calculation of the claim for loss of return on investment clearly indicates that it is a claim for interest on the principal amounts owed under the first, second, third and fourth contracts. In other words, it is a claim for the loss of use of money over time caused by the delay in payment of the principal amounts of these four contracts.

104. Governing Council decision 16 (S/AC.26/1992/16) provides that "[i]nterest will be awarded from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful claimants for the loss of use of the principal amount of the award." The decision further provides that "[t]he methods of calculation and of payment of interest will be considered by the Governing Council at the appropriate time", and that "[i]nterest will be paid after the principal amount of awards."

105. The Panel notes that, if, as a direct result of Iraq's invasion and occupation of Kuwait, LHT had not received payment for the goods ordered by KNPC, its claim for the principal amounts not received would have been compensable. It would therefore have received compensation for its loss and eventually would have been entitled to interest on such award under Governing Council decision 16. As LHT did receive payment under the contracts, the Panel finds that LC Holding must, in order to be put on the same footing as other claimants receiving compensation, be entitled to interest on the principal amounts paid late for the period of 759 days in the case of the first contract, 231 days[20] in the case of the second contract, 779 and 800 days, respectively, in the case of the third contract, and 485 days in the case of the fourth contract.[21]

106. The Panel further finds, based on the evidence, that the principal amounts to be employed to calculate the interest losses in this case are the amounts in Kuwaiti dinars that LHT would have received if the original prices of the goods under the first, second, third and fourth contracts had been received at the different times when payment for the goods was anticipated.

107. The Panel recommends that no compensation be awarded with respect to the claimed return on investment losses until the time that interest may be paid on awards made by the Commission. However, it is also the Panel's recommendation that the following awards be made at such time that the payment of interest may take place:

(a) With respect to the first contract, interest on the principal amount of KWD 305,900 for a period of 759 days at the rate to be determined by the Governing Council under decision 16;

(b) With respect to the second contract, interest on the principal amount of KWD 78,600 for a period of 231 days at the rate to be determined by the Governing Council under decision 16;

(c) With respect to the third contract, interest on the principal amounts of KWD 170,145 and KWD 8,955 for a period of 779 and 800 days, respectively, at the rate to be determined by the Governing Council under decision 16; and

(d) With respect to the fourth contract, interest on the principal amount of KWD 883,200 for a period of 485 days at the rate to be determined by the Governing Council under decision 16.

D. Recommendations

108. The Panel's recommendations with respect to the claim of LC Holding are summarized in table 6 below.

Table 6. LC Holding's claim - recommended compensation
(Guilders)

Claim element	Original amount claimed	Amount of compensation recommended
Currency exchange losses	1,485,635	Nil
Employee-related losses	76,801	74,810
Shut-down expenses	376,773	126,644
Loss of return on investment	1,447,068	---[a]
Total	3,386,277	201,454

[a] The Panel's recommendation with respect to the claim for loss of return on investment is stated in paragraph 107 above.

V. CLAIM OF GENERAL CONTRACTING, IMPORTING & SERVICES ENTERPRISES

A. Facts and contentions

1. Introduction

109. This claim is made by General Contracting, Importing & Services Enterprises ("GENCON Saudi") for itself and on behalf of GENCON Overseas. GENCON Saudi is a Saudi Arabian sole proprietorship with its principal place of business located in Dammam, Saudi Arabia. GENCON Overseas is a Dubai sole proprietorship with its principal place of business located in Dubai, United Arab Emirates. GENCON Saudi describes the business relationship between itself and GENCON Overseas as follows: "GENCON OVERSEAS performs its duties on behalf of GENCON (Saudi) outside of Saudi Arabia."

110. A Saudi Arabian national owns both GENCON Saudi and GENCON Overseas.

111. On 2 August 1990, GENCON Saudi was engaged in the business of buying fuel oil, residual oil and bunker fuel (hereinafter collectively "bunker" or "bunkers" as the context requires) from refineries located in Saudi Arabia and in the resale of bunkers to large commercial vessels trading in the Persian Gulf (hereinafter the "bunker trade"). It did not engage in any other business.

112. GENCON Saudi states that, as a result of Iraq's invasion and occupation of Kuwait, it became effectively insolvent and was forced to discontinue its participation in the bunker trade on 30 June 1991. With the cessation of its affiliate's business, GENCON Overseas was also allegedly forced to discontinue its commercial activities. However, neither company subsequently filed for bankruptcy protection nor sought other legal means of protection from its creditors. Both remain existing but inactive business entities.

113. GENCON Saudi originally filed a single claim with the Commission in the total amount of USD 25,945,741, on behalf of both itself and GENCON Overseas, for losses that the two entities purportedly suffered as a result of Iraq's invasion and occupation of Kuwait. As the alleged losses of the affiliated companies have been consolidated and brought as a single claim, for ease of reference the two will be collectively referred to as "GENCON". In November 2001, GENCON decreased the total amount of its claim to USD 15,567,058.

114. GENCON's claim pertains to losses allegedly sustained as a result of being forced to curtail, and ultimately to end, its participation in the bunker trade. The claim can be subdivided into three sub-components under the general category of business interruption losses. These sub-components are: (a) breach of contract claims, in the form of liquidated and actual damages assessed against it by some of its bunker suppliers; (b) bad debts or unpaid accounts receivable pertaining to bunker sale proceeds that were collected by GENCON's business associate (see paragraph 117 below) and are owed to GENCON but which cannot be collected due to the financial insolvency of the business associate; and (c) loss of profits on bunker sales following GENCON's insolvency and the discontinuance of its normal business activities.

115. GENCON's claimed losses are summarized in table 7 below.

Table 7. GENCON's claim
(United States dollars)

Claim element	Original amount claimed	Amended amount claimed
Breach of contract	7,731,645	2,382,381
- Samarec #1	Not specified	796,987
- Samarec #2	Not specified	516,183
- Samarec #3	Not specified	128,682
- Samarec #4	Not specified	274,218
- SITCO	Not specified	666,311
Bad debt losses	Nil	5,349,265[a]
Loss of profits	18,214,096	7,835,412
Total	25,945,741	15,567,058

[a] As part of its amended filing in November 2001, GENCON divided its original claim for breach of contract losses into breach of contract losses and bad debt losses.

2. Nature of GENCON's business activities

116. GENCON's typical business transaction consisted of its purchase of a single lot of bunkers from a Saudi Arabian supplier and the follow-on resale of that lot to a single purchaser. The purchaser was usually the owner of, or agent for, a ship calling in the Persian Gulf, typically a tanker arriving in those waters to load a cargo of crude oil or refined products. GENCON refers to these types of purchase and sale contracts as "back-to-back" contracts.

117. GENCON did not service its customers in the bunker trade by itself. Rather, it participated in an informal joint venture with a Bahrainian business associate, United Energy International Limited ("UEIL"). The two companies did not form any sort of legal association to carry forward their joint business activity. They did not work under a written contract that defined their respective roles and duties in performing the back-to-back contracts. Nor was there any written directive concerning the apportionment between the two of the costs and profits of their informal business association. Nevertheless, GENCON contends that each company was aware of and fulfilled its respective responsibilities in the back-to-back contracts. It states that, notwithstanding the absence of a formal joint venture agreement, the two companies were always able to arrive at mutually acceptable decisions regarding the apportionment of their costs and profits derived from the purchase and resale of each lot of bunkers. Table 8 below summarizes GENCON's description of the two companies' respective responsibilities in their joint venture.

Table 8. Business functions of GENCON and UEIL

GENCON	UEIL
Provision of government permits/authorizations to engage in the Saudi bunker trade. Negotiation of bunker supply/purchase contracts with refinery suppliers. Nomination of loading windows for loading of bunkers into chartered transportation vessels at refineries.	Marketing of bunkers to tanker owners/agents. Negotiation of bunker sale contracts with tanker owners/agents. Chartering of transportation vessels to deliver bunkers to tankers. Provision of letters of credit to refinery suppliers. Billing matters, including payment of refinery suppliers and collection from tanker-owner buyers, and inter-company accounting and division of profits.

118. Generally, the back-to-back contracts were of a "spot" nature with individual lots of bunkers being bought and resold on an as-needed basis as ships were identified and bunker sale terms were agreed. Typically, GENCON would purchase a single lot of bunkers from a refinery seller to match the requirements of its ship owner/agent customer. GENCON executed master agreements with several of its suppliers with the standardized terms of those master agreements being later incorporated, by specific reference, into the individual lot purchase-orders that were subsequently prepared by GENCON or its suppliers. GENCON contends that it usually placed its order for each lot of bunkers by telephone, with follow-up, written confirmation of the order by telex. It states that written documentation setting forth the precise terms of sale between the parties was usually exchanged later – often after the refinery supplier had delivered the lot of bunkers to GENCON. The terms of purchase by GENCON from a refinery were typically "free on board" (FOB) the loading port, and the terms of sale by GENCON to a ship owner or its agent were FOB the ship. Thus, the commercial terms of the back-to-back contracts were such that GENCON was usually required to provide marine transportation for the bunkers from the loading dock of the selling refinery to the flange on the loading hose attached to the ship taking on the bunkers.

119. GENCON's bunker suppliers usually provided limited credit terms, with the purchase price of an individual lot of bunkers becoming due shortly after loading. As a result, the suppliers usually required GENCON to post financial security against the purchase price prior to the load out of the bunkers. As indicated in table 8 above, UEIL usually supplied this security by providing letters of credit on behalf of GENCON.

120. At the time GENCON filed its claim, all petroleum refineries in Saudi Arabia were either wholly or partially owned by the Saudi Arabian Oil Company ("Saudi Aramco"), a Saudi Arabian corporation wholly owned by the Government of Saudi Arabia. Saudi Aramco's subsidiary, Saudi Arabian Marketing Company ("SAMAREC"), operated these refineries. The refineries that were only partially owned by Saudi Aramco were operated by joint venture companies, through which Saudi Aramco held its part interest.

121. Saudi Arabian refineries participated in the bunker trade by directly supplying bunkers to ships trading in the Persian Gulf. In addition, the refineries sold bunkers to a limited number of non-refining concerns, commonly known as "bunker agents", that also engaged in the bunker trade as middle men by buying individual lots of bunkers from the refineries and reselling the bunker lots to ships. GENCON was such a bunker agent.

122. GENCON contends that bunker agents can lawfully engage in the bunker trade in Saudi Arabia only after receiving the consent of the Government to do so. It states that this consent is given in the form of two government-issued permits. The first is a commercial registration permit issued by the Saudi Arabian Ministry of Commerce. The second is an authorization to conduct the bunker trade issued by the Saudi Arabian Ministry of Petroleum and Mineral Resources. GENCON contends that, at the relevant times covered by its claim, only it and a few other bunker agents held the requisite permits, suggesting that permit holders faced limited competition in the bunker trade. GENCON estimates that only eight to 10 bunker agents held the requisite permits during the claim period.

123. GENCON states that it held the two required permits for several years prior to 2 August 1990, and thus it was legally authorized to participate in the bunker trade on the date of Iraq's invasion and occupation of Kuwait. These permits have not been revoked. Thus, GENCON's claim does not assert losses with respect to a reduction in value or loss of its government permits. Rather, it states that, notwithstanding its right to participate in the bunker trade, it has been prevented from doing so because its refinery suppliers now refuse to sell it bunkers. GENCON describes this refusal by Saudi Arabian refiners to supply it with bunkers as "blacklisting".

3. Breach of contract

124. GENCON claims a total of USD 2,382,381 for losses suffered while attempting to perform under five separate back-to-back contracts. Four of the five contracts were with SAMAREC and called for delivery of the bunkers from refineries wholly owned by Saudi Aramco. The fifth was with Shell International Trading Company ("SITCO"), which conducted marketing activities for one of the Saudi Arabian refineries in which Saudi Aramco owned a part-interest through a joint venture company.

125. GENCON placed the orders for the SAMAREC contracts before the commencement of the military operations by the Allied Coalition Forces against Iraq on 17 January 1991. The agreed periods for loading ("loading windows") for these four orders were 14-day periods during late January to mid- February 1991. GENCON placed the SITCO order in May 1991, after the cease-fire had taken hold, and this claim relates to two separate loading windows in the subsequent months of June and July of that year.

126. All five of the back-to-back contracts relate to purchase-orders given by GENCON to the selling refiners for individual lots of bunkers. In each case:

(a) GENCON's joint venture associate, UEIL, negotiated a bunker supply contract for a tanker and requested GENCON to procure the required quantity of bunkers from a Saudi Arabian refiner;

(b) GENCON made follow-on arrangements by telephone (with confirming telex) to reserve the requisite cargo at an agreed price; and

(c) GENCON provided the supplier with its nomination for a loading window at the refinery docks for a transporting tanker, and the refinery supplier accepted GENCON's nomination of a loading window.

127. Most major investments of the GENCON/UEIL joint venture (primarily the cost of supplying marine transportation and the cost of posting financial security against the price of the bunkers) were satisfied by UEIL, and GENCON was not required to place significant amounts of its own capital at risk. UEIL did not file a claim with the Commission with respect to any of its losses in this joint venture.

128. When ordering an individual lot of bunkers from a refiner, GENCON was required to nominate a loading window, that nomination being subject to the agreement of the refinery supplier. Ultimately, the two were to agree on the loading window during which time the transfer of the bunkers was to be made. In each case, GENCON's transporting vessel did not arrive at the refinery docks within the agreed loading window, either because UEIL was unable to "charter-in" a transporting vessel, or because the transporting vessel arrived after the expiration of the agreed loading window. GENCON attributes the failure by its associate to perform its responsibilities under their business arrangement to the exceedingly high charter rates that were prevailing during the claim period.

129. GENCON contends that the high charter rates were caused by operating-cost pressure on ship owners of two types. The first was an increase in premiums on hull and cargo insurance for vessels trading in the Persian Gulf. GENCON states that these increases in premiums resulted from increased risk of vessel damage caused by floating mines laid by Iraqi forces. Additionally, GENCON states that, because of this perception of war risk, ship owners had to pay premiums on the normal wages of the crews of ships calling at ports in the Persian Gulf. GENCON suggests that, if UEIL had chartered-in the transporting vessels at the increased rates, and if the bunker lots had been purchased and resold on the terms agreed with its refinery sellers and the tanker buyers, then the increases in transportation rates would have consumed all of the profits that it expected to earn under the five back-to-back contracts.

130. When the loading dates expired, SAMAREC sought to enforce contractual penalties against GENCON as set forth in a master agreement. SAMAREC contended that the provisions of the master agreement applied to all purchase orders issued by GENCON. The standard terms and conditions in the master agreement called for the assessment of a 10 per cent penalty against the buyer if the agreed quantity of bunkers was not loaded-out and removed within the agreed loading window.[22] SAMAREC billed GENCON for a total of USD 1,716,070 for these four contracts. GENCON claims for the total of these invoices even though it has not paid SAMAREC these penalties, and SAMAREC has not initiated legal action to collect invoices. GENCON contends that the penalties are not owed because it was excused from loading the bunker lots by force majeure, according to the terms of the master agreement.

131. After the passage of the loading window SITCO advised GENCON that it had disposed of the reserved bunker lot by sale to a third party at a price that was lower than the market rate prevailing during the loading period. SITCO invoiced GENCON for the difference in price, plus related costs for storage and transportation, totalling USD 666,311. GENCON claims the amount of this invoice even though it has not paid SITCO. Again, GENCON contends that it was excused from loading the bunker lot by an event of force majeure. SITCO has not filed a legal action against GENCON to collect the invoiced amount.

132. GENCON states that it has not paid the amount claimed by its suppliers because it lacks the requisite funds to do so. It argues that it was placed in this financial situation as a direct result of Iraq's invasion and occupation of Kuwait. GENCON states that it would pay the contractual penalties and damages assessed by SAMAREC and SITCO were it capable of doing so. This is because, according to GENCON, these two refinery suppliers refuse to supply it with bunkers and have stated that they will continue to do so for as long as their invoices remain outstanding. GENCON further states that SAMAREC and SITCO have effectively blacklisted GENCON, insofar as other Saudi Arabian refineries are concerned, and that it cannot find alternative suppliers. Without a source of supply, GENCON states that it cannot work in the bunker trade in Saudi Arabia, despite the fact that it holds the requisite permits to do so. GENCON argues that, once these invoices are paid, its former business status and credit ratings with its suppliers will be restored, and it will once again be allowed to buy bunkers from Saudi Arabian refiners and to continue its business in the bunker trade.

133. Neither SAMAREC nor SITCO has filed claims with the Commission for the invoiced amounts.

4. Bad debt losses

134. GENCON contends that, due to the economic impact of Iraq's invasion and occupation of Kuwait, UEIL was rendered incapable of continuing its key service contributions to the business venture. GENCON states that, sometime after the loading windows expired, when it became apparent that UEIL would be unable to continue to provide the services upon which GENCON relied, it severed its business relationship with UEIL. GENCON states that UEIL was effectively insolvent as of the date when the business relationship was ended.

135. GENCON states that UEIL owes it USD 5,349,265, representing GENCON's share of the profits that the joint venture earned on back-to-back contracts that were performed in the 18-month period prior to 2 August 1990. This receivable is unrelated to the five back-to-back contracts that pertain to GENCON's contract claim.

136. GENCON describes its bad debt claim as follows: "[GENCON] claims for credit losses suffered by GENCON due to UEIL's inability to pay in full GENCON's invoices for its commissions and share of profits."

137. GENCON provided the Panel with correspondence between itself and UEIL, which verifies that GENCON has made a prior claim against the latter for unpaid broker fees on back-to-back transactions that preceded 2 August 1990. GENCON contends that the calculation of these fees is

based on prior course of dealing and business practice, in the absence of an agreement between the two that sets forth their respective roles and responsibilities or the method for allocation of profits and losses.

138. GENCON contends that Iraq's invasion and occupation of Kuwait caused UEIL's insolvency and, but for that event, the business relationship of the two would have continued and UEIL would have, in due course, paid GENCON the amount claimed. GENCON states that it has not brought a legal action against UEIL with respect to the bad debt because, in its opinion, UEIL lacks the assets with which it could satisfy a judgment and, consequently, the legal costs entailed in bringing such a legal action would increase GENCON's losses.

5. Loss of profits

139. GENCON originally estimated that, but for Iraq's invasion and occupation of Kuwait, it would have earned additional profits of USD 18,214,096. In November 2001, GENCON reduced this portion of its claim to USD 7,835,412.

140. GENCON's claim for loss of profits relates partly to loss of profits on the five back-to-back contracts discussed above and partly to loss of profits on those future back-to-back contracts that GENCON contends it would have undertaken had its insolvency and the failure of its bunker supply not forced it out of the bunker trade.

141. GENCON states that it would have earned additional profits of USD 453,000 under the five back-to-back contracts. GENCON calculates its loss of profits on the five back-to-back contracts as follows. GENCON contends that the custom of its relationship with UEIL was such that UEIL would have paid GENCON what it calls an "agent fee" in the amount of USD 1.50 for each metric ton of bunkers that was to be delivered to the purchasing ships. Thus, it has multiplied this agent's fee by the total quantity of bunkers that it ordered from the refinery suppliers under the five back-to-back contracts. This portion of GENCON's claim for loss of profits is shown in table 9 below.

Table 9. GENCON's loss of profits on prior bunker orders
(United States dollars)

Supplier/contract	Bunker quantity (per metric ton)	Agent fee (per metric ton)	Lost profits
SAMAREC # 1	88,000	1.50	132,000
SAMAREC #2	54,000	1.50	81,000
SAMAREC #3	20,000	1.50	30,000
SAMAREC #4	20,000	1.50	30,000
SITCO	120,000	1.50	180,000
Total	302,000	1.50	453,000

142. As shown in table 9 above, GENCON's service responsibilities under its joint venture arrangement with UEIL were such that it was not required to make a significant capital investment in

the bunker trade business. For this reason, it argues that it did not enjoy any measurable cost saving as a result of it not having taken delivery of the five bunker lots. Thus, GENCON states that its loss of agent's fees was a loss of profits and not a loss of revenue.

143. In addition to the profits that GENCON claims it would have earned on agent's fees charged for these five back-to-back contracts, GENCON contends that it could have earned an additional USD 7,382,412 in profits on unspecified back-to-back contracts that it states it would have arranged in the five-year period following the liberation of Kuwait from 2 March 1991 to 2 March 1996.

144. As stated above, GENCON argues that, because of its inability to pay the penalties and contractual damages claimed against it by its two refinery suppliers, SAMAREC and SITCO (relating to the five back-to-back contracts in 1991), it has been blacklisted by all Saudi Arabian refiners. GENCON contends that, because of this blacklisting, it has lost its sources of supply, and therefore has been unable to conduct its normal business in the bunker trade.

145. GENCON states that, but for Iraq's invasion and occupation of Kuwait, the Persian Gulf would not have been mined and the cost of tanker chartering would not have risen. GENCON further states that, if these causative events had not occurred, then it and its business associate, UEIL, would not have lost their sources of bunker supply and would have been able to continue their work in the bunker trade in an unabated fashion.

146. GENCON therefore contends that its current inability to participate in the bunker trade is a direct result of Iraq's invasion and occupation of Kuwait. As a consequence, GENCON seeks recovery of what it contends would have been those future profits that it would have earned had it been able to continue in the bunker trade.

147. GENCON calculates this portion of its claim on the basis of the profits earned in the preceding six financial years, including the financial year ending 30 June 1991.[23] GENCON states that it earned a total of SAR 33,220,859 during those six years. GENCON divides this total figure by six, the quotient of SAR 5,536,809 representing the average annual profits earned by GENCON in the six-year reference period. It then multiplies the amount of SAR 5,536,809 by five to yield the product of 27,684,045 Saudi Arabian riyals (SAR). GENCON contends that this amount is a reasonable estimate of the total profits that it would have earned in the five-year period following the liberation of Kuwait, had the invasion and occupation not occurred. GENCON states that this amount of SAR 27,684,045 equates to USD 7,382,412.[24]

B. Iraq's response

148. In July 2001, Iraq filed a written response to GENCON's claim. Its arguments in that response can be summarized as follows.

(a) GENCON claims force majeure as an excuse for its failure to lift bunker lots under the five back-to-back contracts. Iraq contends that, assuming that its defence is correct, GENCON owes the two claiming suppliers, SAMAREC and SITCO, nothing. There is no legal determination validating the claims made by these two suppliers under these contracts. Iraq contends that until such a determination is made, GENCON has no payment obligation and therefore it has suffered no loss.

(b) Iraq contends that the losses claimed are indirect.

(c) Iraq contends that GENCON entered into the SITCO back-to-back contract after 2 March 1991. Therefore, it argues that any inability by GENCON to take delivery of the bunker lot covered by this contract could not have been caused by Iraq's presence in Kuwait.

(d) Iraq contends that GENCON's contractual disputes with its bunker suppliers were the result of the business practices of itself and its joint venture associate, UEIL, which are unrelated to events in the Persian Gulf during the claim period.

(e) Iraq contends that GENCON did not diligently pursue legal recourse against UEIL for the division of trading profits. The amounts became overdue well before UEIL's financial failure. Had GENCON brought a legal action against UEIL before its insolvency, it may well have collected the overdue amount.

(f) Iraq contends that the financial failures of GENCON and its business associate UEIL were a result of fluctuations in the price of bunker fuel rather than increased transportation costs. Price fluctuations are an inherent risk of doing business, and the two entities, as experienced bunker traders, should have known that greater price swings might occur.

(g) Iraq contends that Saudi Arabia's exports of crude oil increased as a result of Iraq's invasion of Kuwait and the decrease of crude exports from those two countries after imposition of the trade embargo. This should logically have increased the business opportunities of entities involved in the bunker trade in Saudi Arabia, like GENCON.

(h) Iraq contends that GENCON reported its highest six-year profits in the financial year that included 6 August 1990. That being the case, the events of that year did not have a deleterious effect on GENCON's bunker trading business and these profits suggest that GENCON may have financially benefited from those events.

C. Analysis and valuation

1. Breach of contract

149. GENCON contends that it should be awarded compensation for contractual loading penalties assessed, or damages claimed, against it by two of its bunker suppliers. GENCON has not paid the amounts claimed by the two suppliers, and it denies any contractual liability for its failure to load within the prescribed loading windows on grounds that it was temporarily relieved of its loading obligation by the occurrence of an event of force majeure. In fact, GENCON claims entitlement to compensation for a second party's contractual claim against GENCON, the validity of which GENCON denies.

150. The Panel considers that damages allegedly resulting from Iraq's invasion and occupation of Kuwait and which emanate from an alleged breach of contract must be proved with reasonable certainty. In this case, GENCON has not demonstrated that it is contractually liable to SAMAREC and SITCO for the amounts claimed for loading penalties and damages. The Panel notes that neither of the companies has taken legal action against GENCON. The Panel also notes that GENCON has denied the existence of any contractual liability for these amounts. The Panel will only consider actual damage suffered and not contingent liabilities. GENCON has paid nothing, and it therefore cannot properly claim for amounts for which it may not be liable. Under these circumstances, the Panel finds that GENCON has failed to prove that it suffered a loss and recommends no award of compensation for breach of contract.[25]

151. The Panel notes GENCON's argument that it has lost business goodwill and positive credit standings with SAMAREC and SITCO and that it will be unable to repair its business relationships with Saudi Arabian refinery suppliers unless it pays the amounts claimed, which it further contends it is financially unable to do. The Panel finds that, even if GENCON had demonstrated that it had suffered a loss of business goodwill, GENCON provided insufficient evidence that this loss was suffered as a direct result of Iraq's invasion and occupation of Kuwait. In particular, the Panel notes that GENCON's back-to-back contract with SITCO only arose after 2 March 1991.

2. Bad debt losses

152. GENCON has not presented the Panel with evidence concerning how the amount of this receivable was calculated, nor has it provided evidence of any acknowledgement by UEIL that it owes the amount claimed. Neither has GENCON indicated when the receivable became overdue and thus it has not demonstrated that a "bad debt" is owed to it by UEIL. GENCON contends that UEIL's insolvency resulted from the business conditions in the bunker trade that were prevailing in the wake of Iraq's invasion and occupation of Kuwait, but it has not identified the specific events that led to UEIL's financial failure.

153. With respect to GENCON's argument that it would have been futile for it to have brought a legal action against UEIL, the Panel notes that the indebtedness arose from business transactions between the two in the one-and-a-half year period predating 2 August 1990. GENCON has not explained why it did not pursue the collection of this receivable from UEIL before 2 August 1990 at a time when, presumably, UEIL would have been financially capable of paying the debt. The Panel further notes that the business venture continued its activities throughout the whole period of the hostilities, as well as after 2 March 1991.

154. The Panel finds that neither UEIL's indebtedness nor its failure to pay that indebtedness arose as a direct result of Iraq's invasion and occupation of Kuwait. Therefore, the Panel recommends no award of compensation for bad debt losses.

3. Loss of profits

155. The Panel finds that GENCON has not proved that its failure to fulfil the five back-to-back contracts with SAMAREC and SITCO was caused by Iraq's invasion and occupation of Kuwait. The Panel also finds that GENCON has not proved that its withdrawal from the bunker trade after 2 March 1991, and its resultant loss of profits in the following five years, was caused by Iraq's invasion and occupation of Kuwait. Therefore, the Panel recommends no award of compensation to GENCON for loss of profits.

D. Recommendations

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

Table 10. GENCON's claim – recommended compensation
(United States dollars)

Claim element	Original amount claimed	Amended amount claimed	Amount of compensation recommended
Breach of contract	7,731,645	2,382,381	Nil
Bad debt losses	Nil	5,349,265	Nil
Loss of profits	18,214,096	7,835,412	Nil
Total	25,945,741	15,567,058	Nil

VI. CLAIM OF GLOBAL SANTA FE CORPORATION

A. Facts and Contentions

1. Introduction

157. This claim is made by GlobalSantaFe Corporation ("GlobalSantaFe"), as successor to Santa Fe International Corporation ("Santa Fe"). GlobalSantaFe is a Cayman Islands corporation with its principal place of business located in Houston, Texas, United States of America.

158. As the claim arose from events involving Santa Fe and was originally brought in the name of that company, the Panel refers to the claimant as Santa Fe even though all rights to this claim have since passed to the successor company, GlobalSantaFe.

159. SantaFe's original category "E" claim form was filed with the Commission by Santa Fe on 28 October 1993. Santa Fe was, at that time, a Cayman Islands corporation with its principal place of business located in Dallas, Texas, United States of America. In its original statement of claim, Santa Fe sought compensation in the amount of USD 29,677,778 for losses allegedly incurred as a direct result of Iraq's invasion and occupation of Kuwait. On 25 February 1994, Santa Fe increased the amount claimed for those losses to USD 40,683,981.

160. As of the dates of the original filing and the amendment of the claim, Santa Fe was a private company, and all of its equity shares were owned by Kuwait Petroleum Company ("KPC"). Subsequent to filing the claim, KPC sold a portion of its share interest in Santa Fe through two public offerings, after which Santa Fe became a publicly-traded company with its shares listed and sold on the New York Stock Exchange. Santa Fe merged with Global Marine Inc. effective as of 20 November 2001 to form GlobalSantaFe. As a result of the merger between Santa Fe and Global Marine Inc., KPC became a minority shareholder in the newly constituted GlobalSantaFe.

161. For many years prior to 2 August 1990, Santa Fe was engaged in work in the services sector of the petroleum industry. Its primary business activity was the drilling of oil and gas wells (typically for oil and gas exploration and production companies), both on a charter basis (using either "turnkey" or "day rate" conditions) and through the leasing of its drilling rigs. Its services were offered on a worldwide basis, both onshore and offshore.

162. Santa Fe leased four of its land drilling rigs, numbered 121, 139, 142 and 145 (collectively the "lost rigs"), to Kuwait Drilling Company ("KDC") under four separate agreements, all of which predated 2 August 1990 (collectively the "lease agreements"). KDC is a wholly-owned subsidiary of KPC. Thus, the parties to the lease agreements were affiliates at all times relevant to the claim.

163. KDC leased the lost rigs from Santa Fe for the purpose of drilling wells for its affiliated company, Kuwait Oil Company ("KOC"). KOC is also a wholly-owned subsidiary of KPC.[26]

164. The lost rigs were located in Kuwait on 2 August 1990, where they were operating in the service, and were under the custody and control of, KDC pursuant to the terms of the lease

agreements. The lost rigs were not returned to Santa Fe by KDC at the end of the terms of the lease agreements, allegedly because they were either stolen or destroyed by Iraqi forces during the period of Iraq's invasion and occupation of Kuwait.

165. Santa Fe submitted an affidavit of the general manager of KDC in which he stated that the four lost rigs were all located in the northern part of Kuwait on 2 August 1990. He further stated that Iraqi troops took certain of its rig crews hostage, and that KDC ordered the rest of its crews to abandon the Kuwaiti oil fields in which they had been working when it became apparent that the Iraqis were attaching explosives to the wellheads of producing wells. In his affidavit, the general manager repeated information that he had obtained to the effect that the lost rigs, as well as much other KDC equipment, were removed to Iraq by the invading Iraqi forces. Santa Fe produced no other evidence from KDC employees concerning the removal of the lost rigs. Santa Fe states that, following the liberation of Kuwait, it was discovered that the lost rigs had been moved from their drilling locations, and they were never found.

166. Santa Fe makes a claim for loss of revenue under the terms of the lease agreements as well as a technical service agreement.

167. Additionally, Santa Fe claims for the value of the lost rigs and loss of inventories and spare parts that it says it had stored in Kuwait to support its business activities in that country. Santa Fe contends that these stores were stolen or destroyed as a direct result of Iraq's invasion and occupation of Kuwait.

168. Santa Fe also claims for unpaid receivables due from KDC, under the terms of two of the lease agreements, for past services rendered with two of the lost rigs.

169. Finally, Santa Fe claims other costs that it allegedly incurred as a result of Iraq's invasion and occupation of Kuwait, including payments it made to several of its employees who were taken hostage by Iraqi forces, gifts to the families of those hostages, the legal costs entailed in its seeking direction on compliance with trade embargo imposed under Security Council resolution 661 (1990), and the costs of preparing its claim.

170. Santa Fe included the following documents as exhibits to its claim form: copies of the lease agreements for the lost rigs; a copy of the technical service agreement; copies of insurance certificates for the lost rigs; an itemized inventory list pertaining to spare parts and equipment allegedly taken from its Kuwait yard; statements of salary and other employer expenses for the captive employees; invoices and other financial records pertaining to the cost of mobilizing the lost rigs; copies of the drilling contracts between KOC and KDC pertaining to two of the four lost rigs; financial records pertaining to the miscellaneous costs claimed by Santa Fe; affidavits issued by both Santa Fe and KDC employees; and copies of invoices from Santa Fe to KDC issued under the lease agreements.

171. The losses claimed by Santa Fe are summarized in table 11 below.

Table 11. Santa Fe's claim
(United States dollars)

Claim element	Original amount claimed	Amended amount claimed
Loss of revenue	3,962,698	15,553,252
- Unpaid rig demobilization payments (rigs 145, 142, 121 and 139)	Nil	1,068,636
- Unpaid early termination payments (rigs 121 and 139)	3,162,698	13,684,616
- Charges under technical service agreement	800,000	800,000
Other tangible property	23,071,098	24,417,687
- Insured value of lost rigs (rigs 121, 139, 142 and 145) and related equipment ("rig camps")	21,800,000	22,929,000
- Replacement value of lost inventory and rig camps for rig Al Baz)	1,271,098	1,488,687
Payment or relief to others	146,260	146,260
Uncollected receivables	2,202,822	277,139
- Rig mobilization fees (incurred prior to 2 August 1990)	1,565,300	277,139
- Unpaid amounts due from KOC for seconded labour	434,093	Nil
- Unpaid amounts due from KDC for seconded labour	203,429	Nil
Miscellaneous management, legal, travel and other administration costs	294,900	289,643
Total	29,677,778	40,683,981[a]

[a] Sante Fe's amendment increasing the total amount of its claim was timeous. See paragraphs 18 and 159 above.

2. Loss of revenue

172. Santa Fe claims a total of USD 15,553,252 for loss of revenue. This portion of Santa Fe's claim has two elements. The first element, which totals USD 14,753,252, is for amounts that Santa Fe contends became due and payable to it as a result of KDC's early termination of the lease agreements. The second element, which is in the amount of USD 800,000, is for revenue that Santa Fe estimates it would have been paid by KDC under a technical service agreement that was cancelled due to Iraq's invasion and occupation of Kuwait.

(a) Early termination and demobilization payments under lease agreements

173. Santa Fe's claim for losses arising under the lease agreements is comprised of two separate items. Both items involve certain contractual payments that Santa Fe says became due and payable by KDC when the lease agreements were terminated before the expiration of their normal terms. Specifically, Santa Fe claims that it is owed USD 1,068,636 for demobilization payments and USD 13,684,616 for early termination payments under the terms of the lease agreements. Santa Fe contends that the contractual provisions giving rise to these claimed amounts were intended to serve as a form of liquidated damages payable to the rig owner in the event of the early termination of the lease, thereby compensating the rig owner for its loss of expected revenue under the lease.

174. Although the claimant seeks compensation in United States dollars, the payment provisions of the lease agreements were stated in Kuwaiti dinars, and Santa Fe has calculated its claim for loss of revenue in that currency. A summary of the first component of Santa Fe's loss of revenue claim is shown in table 12 below.

Table 12. Summary of contractual claim for early termination and demobilization payments (Kuwaiti dinars)

Rig contract	Amount of demobilization payment	Amount of early termination payment	Total amount of contract payments
145	50,000	Nil	50,000
142	69,260	Nil	69,260
121	99,855	2,007,500	2,107,355
139	86,515	1,906,300	1,992,815
Total	305,630	3,913,800	4,219,430[a]

[a] In its claim, Santa Fe has converted this amount into United States dollars using an equivalent exchange rate of KWD 1 = USD 3.46. Thus, Santa Fe contends that the total of KWD 4,219,430, which it claims for early termination and demobilization payments, is equal to USD 14,753,252.

175. Following Iraq's invasion and occupation of Kuwait on 2 August 1990, KDC declared its lease agreements with Santa Fe to be suspended on grounds of force majeure effective as of 2 August 1990. Thereafter, when the lost rigs were discovered to be missing, KDC declared that the lease agreements had automatically terminated, effective as of the date of the loss of the rigs.[27] KDC did not contest the accuracy of Santa Fe's claim of entitlement to receive compensation for early termination and rig demobilization charges. However, KDC declined to pay Santa Fe the amounts claimed, suggesting that it should seek recourse for its loss from the Commission.

176. There were four separate lease agreements in place between Santa Fe and KDC on 2 August 1990, each covering a separate rig. The lease agreements for rigs 145 and 142 were substantially identical, as were the lease agreements for rigs 121 and 139. The four lease agreements were of different durations, but all extended beyond 2 August 1990.[28] Each contained common language in many of the sections, although the numbering of the sections sometimes differed.

177. The sections which are substantially similar in all four of the lease agreements and which are relevant to Santa Fe's claim for rig demobilization payments read as follows.

(a) Section 2.4: "KDC's Lease Payment [to Santa Fe] shall cease automatically as and when KDC stops receiving a daily rig rate from KOC under the Drilling Contract."[29]

(b) Section 7.3: "Upon return of the equipment to Santa Fe…, KDC shall pay Santa Fe a lump sum demobilization payment of Kuwaiti Dinars One Hundred Thousand (KD 100,000/-) provided that said lump sum payment shall be reduced by Kuwaiti Dinars One Hundred Forty Five (KD 145/-) per day for each day that KDC earns a daywork rate under the Drilling Contract. However, in no event, other than stated in Clause 7.4 below, shall the lump sum be reduced below Kuwaiti Dinars Fifty Thousand (50,000/-). KDC shall have no other costs associated with the export of the Equipment."[30]

(c) Section 12.1: "KDC shall have the right at its sole option to terminate the Agreement at any time by giving Santa Fe thirty (30) days prior written notice without assigning any reason therefore [sic]."[31]

(d) Section 12.3: "This Agreement shall terminate in the event of total loss or compromise loss of the Equipment, provided that in such event the demobilization fee specified in Clause 7 as applicable on the date of the incident causing such loss shall be apportioned as contemplated in Clause 2.4 of the Drilling Contract."[32]

178. The relevant contractual provision pertaining to early termination payments is found only in the rig 121 and rig 139 lease agreements. Section 12.2 reads as follows.

"In the event that KDC so terminates this Agreement during the Period of Agreement, KDC shall pay Santa Fe the lease payments up to the date of termination <u>plus the early termination rate of Kuwait Dinars One Thousand One Hundred (KD 1100/-) per day</u> plus the demobilization payment in accordance with Clause 7.3" [emphasis added].[33]

179. Clause 2.4 of the drilling contract, insofar as is material, reads as follows:

"Should … as a result of a well blowing out, catching fire, or otherwise going out of control the Contractor suffer the total loss, or compromised loss, of the Contractor's rig then this Agreement … shall be deemed to terminate on the date that the well was declared to be out of control. In such event … no further payments [shall be due by the Company] … other than a demobilisation fee, which shall be an apportionment of the demobilisation fee applicable on the day of the incident for equipment <u>undamaged or still serviceable</u> …" [emphasis added].

180. Santa Fe states that, as at 2 August 1990, KDC had paid it daywork rates for the four rigs for the following respective number of days: rig 145 – 244 days; rig 142 – 212 days; rig 121 – one day; and rig 139 – 93 days. Applying these numbers to the formula set forth in section 7.3 (or its equivalent) of

the lease agreements, Santa Fe contends that KDC owes it a total of KWD 305,630 for demobilization payments as shown in table 13 below.

Table 13. Claim for rig demobilization payments
(Kuwaiti dinars)

Rig contract	Maximum payment	Minimum payment	Number of dayrate days	Contractual demobilization rate	Demobilization reduction	Demobilization payment
145	64,620	50,000	244	145	35,380	50,000
142	100,000	50,000	212	145	30,740	69,260
121	100,000	50,000	1	145	145	99,855
139	100,000	50,000	93	145	13,485	86,515
Total	---	---	---	---	---	305,630[a]

[a] In its claim, Santa Fe has consistently used a currency exchange rate of KWD 1 = USD 3.496. Thus, Santa Fe contends that its claim for entitlement to payment of KWD 305,630 in demobilization fee payments corresponds to USD 1,068,636.

181. Santa Fe states that, as of the suspension of the lease agreements by KDC on 2 August 1990, there were respectively 1,733 days and 1,825 days remaining in the unexpired terms of the rig 139 and the rig 121 lease agreements.[34] Again, applying these numbers to the formula set out in section 12.2 of the rig 139 and rig 121 lease agreements, Santa Fe contends that KDC owes it a total of KWD 3,913,800 for early termination payments, as shown in table 14 below.

Table 14. Claim for early termination payments
(Kuwaiti dinars)

Rig contract	Early termination rate	Spud date[a]	Remaining days under the contract	Amount of the early termination payment
139	1,100	1 May 1990	1,733	1,906,300
121	1,100	1 August 1990	1,825	2,007,500
Total	---	---	---	3,913,800[b]

[a] This term is defined in note 27.

[b] Using an exchange rate of KWD 1 = USD 3.496, KWD 3,913,800 = USD 13,684,616.

(b) Charges under technical service agreement

182. Santa Fe claims an amount of USD 800,000 for certain fees that it says it would have been paid by KDC under a technical service agreement that it alleges was cancelled as a result of Iraq’s invasion and occupation of Kuwait. This technical service agreement, executed on 1 July 1988 by Santa Fe[35]

and KDC (the "service agreement"), had an indefinite term and could be cancelled at will on 90 days notice, with or without cause, by either party. The service agreement was in effect on 2 August 1990.

183. The service agreement called for Santa Fe to provide experienced supervisory drilling personnel for the lost rigs and certain other KDC rigs, who would also work to train KDC personnel in the skills and technology of oil well drilling. The service agreement required KDC to pay Santa Fe secondment fees for purposes of reimbursing Santa Fe for the costs of its personnel assigned to KDC. Additionally, the agreement required KDC to pay Santa Fe a "Technical Service Fee" of USD 10,000 per month (the "service fee") for each land drilling rig that KDC was operating.

184. Santa Fe states that, as of 2 August 1990, KDC had 10 land drilling rigs operating in the field (including the four lost rigs). In accordance with the provisions of the service agreement, KDC was paying Santa Fe a total of USD 100,000 per month in service fees. Santa Fe estimates that it would have continued to collect this amount in monthly service fees until at least 31 March 1991, but for Iraq's invasion and occupation of Kuwait. Its estimate is based upon the drilling programme that had been scheduled by KDC. Thus, Santa Fe claims for eight months of service fees totalling USD 800,000 that it alleges it lost as a result of the early termination of the service agreement.[36]

3. Other tangible property

185. Santa Fe claims a total of USD 24,417,687 for its loss of the following items of tangible property: USD 22,929,000 for the value of the four lost rigs and related equipment (which it refers to as "rig camps"); and USD 1,488,687 for the value of certain inventory and spare parts for the rig Al Baz that it contends were taken from its storage yard in Kuwait. Santa Fe claims that the tangible property was removed during the period of Iraq's invasion and occupation of Kuwait, after its personnel had departed from the Kuwaiti oil fields and its storage yard where the property was located, and has not been recovered. A summary of Santa Fe's tangible property claim is shown in table 15 below.

Table 15. Claim for tangible property losses
(United States dollars)

Property	Original amount claimed	Amended amount claimed
Four lost rigs and rig camps	21,800,000	22,929,000
Lost inventory and spare parts for rig Al Baz	1,271,098	1,488,687
Total	23,071,098	24,417,687

186. Santa Fe claims the combined declared insurance value of the four rigs and rig camps. To substantiate its valuation, it submitted copies of the property insurance policies for the four rigs. The most recent policy submitted by Santa Fe is dated 16 November 1991 and sets original limits of coverage as follows: rig 121 – USD 8,300,000; rig 139 – USD 6,500,000; rig 142 – USD 3,500,000; rig 145 – USD 3,500,000; and rig camps – USD 1,129,000.

187. Santa Fe states that the portion of its claim for rig camps is for those lost pieces of equipment that were necessary for the operation of the lost rigs, but which were not fixed to the rigs. It says that the rig camps were included in the lease agreements, and were separately identified on an "equipment list" annexed to those contracts.

188. Santa Fe contends that its insurance coverage for the lost rigs and the rig camps was on a "declared value" basis, meaning that it advised the insurer of the value of the insured assets. Santa Fe argues that the values that it declared for the lost rigs, under the terms of its property insurance policy, represent their true worth as of the date of the loss and that the "declared insurance value" methodology is the proper reference for the valuation of its property loss because it would have received this amount in insurance proceeds following the loss had there not been a "war risk" exclusion in its policy.

189. Santa Fe states that the lost rigs were initially constructed in the following years: rig 121 – October 1979; rig 139 – December 1982; rig 142 – September 1982; and rig 145 – July 1981. Santa Fe states that it was unable to locate the vendors' invoices for the component parts that were incorporated into the construction of the lost rigs. It states that its ownership is substantiated by its inclusion of a full description of the lost rigs and the rig camps in the rig leases, together with the inclusion of these items of tangible property in its accounting records. Santa Fe contends that the condition of the lost rigs should not be judged by initial construction dates because "drilling rigs unlike many other integrated machines (such as automobiles) are the subject of constant preventive maintenance, part replacement, renovation and upgrading to ensure that the rigs are fully capable of meeting the technical and operational requirements of our clients at all times".

190. Santa Fe argues that, despite the age of the lost rigs, they were essentially in "mint" condition when first leased to KDC. It therefore contends that the value of the lost rigs should be based on insured values and that these values should not be adjusted for depreciation. Santa Fe urges the Panel to disregard the lower insured values on the lost rigs that were contained in insurance policies placed by KDC in accordance with the provisions of the lease agreements, the total of the lower insured values being USD 14,000,000, this being USD 7,800,000 less than the value declared by Santa Fe in the subsequently issued policy. Santa Fe has attributed this discrepancy between the two policies to "clerical error".

191. Santa Fe states that the spare parts and inventory items relating to the rig Al Baz were stolen from its Kuwait storage yard, which it had established to support its Middle East drilling operations. The storage yard was apparently administered by a Santa Fe subsidiary, Sphere Supply Inc., but the equipment at issue was owned by Santa Fe. Santa Fe says that the equipment had remained in the yard while the rig Al Baz was being moved from Kuwait to another "zone". Santa Fe submitted an itemized inventory list to substantiate the value of the materials lost from the yard. The list was included in a facsimile-transmitted internal letter dated 10 May 1989. Santa Fe contends that the letter was prepared at the request of the rig manager and was done in anticipation of the rig move. The author of that letter, identified as being an officer of Sphere Supply Inc., did not indicate the basis for his valuation of inventory items, but he did use the word "prices", thereby suggesting that the stated values were based on original acquisition cost. Santa Fe states that it believes that the items on the list

were purchased in 1983, but it was unable to provide any substantiating invoices. Santa Fe states that, because the lost property was spare or replacement equipment, it would have been essentially new. Santa Fe states that it was unable to recover any of this equipment after 2 March 1991.

4. Payment or relief to others

192. Santa Fe claims a total of USD 146,260 for the cost of maintaining four of its employees (the "captive employees") on its payroll during the combined periods of their detention by Iraqi forces and subsequent convalescence and recuperation.

193. Santa Fe states that the captive employees were working on the lost rigs on 2 August 1990, when they were taken hostage by Iraqi military forces. The captive employees were detained by the Iraqis until 11 December 1990. Santa Fe contends that the captive employees could not reasonably have been expected to return to their normal work schedule for approximately two months after their release, due to their need for a period to recover from the effects of their detention. Thus, the claim period covered by this element of Santa Fe's claim begins on 2 August 1990 and ends on 11 February 1991.

194. Santa Fe states that it continued to pay the captive employees their normal salaries during the claim period, even though they did not provide services to Santa Fe during this time. It says that it did so because the detention of the captive employees occurred while they were engaged in Santa Fe's service and also due to Santa Fe's humanitarian concern for their families. Santa Fe says that it also incurred those additional costs that are normally attendant to maintaining employees on its payroll, such as its contribution to the employee medical insurance programme on behalf of the captive employees.

195. Santa Fe admits that it would most probably have incurred the cost of the salaries and payroll costs of the captive employees during the claim period even if Iraq's invasion and occupation of Kuwait had not occurred. However, Santa Fe argues that it was deprived of the services of these employees during the claim period as a direct result of Iraq's invasion and occupation of Kuwait. Thus, Santa Fe seeks compensation for the value of the services of which it was deprived.

5. Uncollected receivables

196. Santa Fe claims a total of USD 277,139 in rig mobilization fees that it contends are owed to it by KDC in accordance with the terms of the rig 121 and rig 139 lease agreements. It states that these costs represent additional mobilization expenses of Santa Fe for which it should have been reimbursed by KDC.

197. Santa Fe contends that this receivable is in the nature of a reimbursement payment that it was entitled to receive as a consequence of it having moved the two rigs on station, at KDC's direction, prior to 2 August 1990. It says that the claim represents Santa Fe's actual costs in making the rig moves. It makes no comparable claim with respect to the rig 145 and rig 142 lease agreements.

198. Although Santa Fe has not cited a contractual provision in support of this claim element, section 4 of the two lease agreements appears to be the relevant provision. This section provides, in part, as follows:

> "KDC will assume the full responsibility of mobilizing the Equipment from its existing stacking location in Oman to its first well location and will also assume the responsibility of rigging up the Equipment at the first well location, as contemplated by the Drilling Contract, for a lump sum mobilization fee of Kuwaiti Dinars Five Hundred Fifty Three Thousand Five Hundred Twenty Three (KD 553,523). KDC in this regard will ask the support and help of Santa Fe to provide assistance in the mobilizing of the Santa Fe Equipment from different locations including Egypt, Houston and Oman and <u>will reimburse Santa Fe their actual cost as approved by KOC</u>" [emphasis added].

199. Santa Fe presented evidence that it incurred costs of USD 2,106,643 in moving the two rigs to their first drilling locations and that KDC had previously paid it a total of USD 1,829,504, in two payments, to defray these costs. The first such payment was made as an advance, prior to the move, and the second payment was made in December 1993, nearly three years after the liberation of Kuwait. Santa Fe does not explain the circumstances under which KDC made the two payments, but it would be reasonable to assume that they were made upon Santa Fe's presentation of invoices. Moreover, Santa Fe offers no explanation as to why it has not previously invoiced KDC for the balance claimed. Santa Fe did not provide evidence that it ever sought reimbursement from KDC or KOC for this amount, nor has it substantiated that either company ever recognized the validity of this part of its claim.

200. The rig 121 and rig 139 lease agreements both have execution dates of 1 January 1990. Santa Fe did not establish the dates on which the rigs were actually moved on location nor the dates when it claims the amounts owed by KDC became payable or overdue.

6. <u>Miscellaneous costs</u>

201. Finally, Santa Fe claims a total of USD 289,643 for a variety of items that it has grouped under the general categories of "Increased Management/Legal Costs/Travel Costs" and "Other Administrative Expenses". Santa Fe states that this portion of its claim represents "increased management and internal legal costs, travel expenses, and communication expenses incurred by Santa Fe and its subsidiaries as a direct result of the Iraqi invasion and occupation of Kuwait".

202. Included in these categories are expenses incurred by Santa Fe for the following items:

(a) USD 16,800 for the time and expenses (including travel costs) of Santa Fe personnel who were involved in the company's efforts to recover the lost rigs and the detained employees;

(b) USD 10,560 in "OFAC compliance" (which is understood to mean the legal and administrative costs caused by Santa Fe's need to comply with trade embargo regulations, as made applicable to Santa Fe's business in Kuwait by the United States Office of Foreign Assets Control);

(c) USD 18,210 for personal non-pecuniary gifts to the families of the detained employees during the period of their detention;

(d) USD 3,526 in legal charges for outside advice on compliance with the various trade sanctions against Kuwait and Iraq;

(e) USD 114,643 for repatriation expenses for expatriate employees and other miscellaneous expenses; and

(f) USD 125,904 for increases in property insurance premiums relating to war risk and terrorist coverage.

B. Iraq's response

203. In July 2001, Iraq filed a written response to Santa Fe's claim. Its arguments in that response are summarized below.

(a) Iraq contends that section 12.2 of the rig 121 and rig 139 lease agreements, which provides for "early termination" penalties, only applies in the event of voluntary "termination" by the lessee without cause. The section was not intended to have application in circumstances of destruction of the rigs due to causes that were beyond the control of the lessee. In that instance, section 12.3, which calls for only the payment of "demobilization fees", was to have overriding effect.

(b) Iraq contends that the demobilization fee was intended to apply only to the equipment that was returned to Santa Fe in an undamaged and serviceable condition. Here, none of the four destroyed rigs was returned to Santa Fe by KDC. Thus, no demobilization fee was due, as there was nothing left to demobilize.

(c) Iraq contends that the latest rig insurance policy submitted to Santa Fe bears a date of 16 November 1991, some eight to nine months after the end of the hostilities. This establishes that the rigs were in existence on this date, and thus they could not have been stolen or destroyed by Iraqi forces.

(d) Iraq contends that the value of the tangible property claim should be adjusted downward to reflect the reduction in the worth of the rigs and rig camps due to depreciation.

(e) Iraq contends that, in addition to depreciation, the rig values should be decreased to reflect the technical obsolescence of the units. Notably, the lost rigs used "an old DC/DC system that employed drilling technology which has been largely replaced on more modern rigs by the more efficient SCR system".

(f) Iraq contends that the internal memorandum submitted by Santa Fe as proof of its loss of equipment and supplies is insufficient to establish either the occasion of the loss or the value of the items located in its Kuwait yard. Santa Fe fails to address the elements of age and depreciation of the items and whether the items had been consumed or had deteriorated between the date of the memorandum and 2 August 1990.

(g) Iraq contends that Santa Fe has not provided any detail as to what property was covered by the insurance policy heading "drilling camps". The insured value of "drilling camps" is not a reliable valuation of whatever property is included in this grouping.

(h) Iraq contends that section 6.1.4 of the lease agreements requires the lessee to procure property insurance on the lost rigs in an amount of only USD 3,500,000 each, substantially less than the amount now claimed as the value of the rigs. As Santa Fe did not require coverage above this limit, this is a reliable indication of its own estimate of the value of lost rigs made prior to when it filed its claim with the Commission.

(i) Iraq contends that Santa Fe is not entitled to compensation for benefits paid to detainees as "compensation for individuals was settled earlier through the individual claims".

(j) Iraq contends that Santa Fe failed to provide support for its claim for additional administrative and travel costs and, in any event, these costs were not incurred as a direct result of Iraq's invasion and occupation of Kuwait. Gifts to the family members of detainees are not compensable.

(k) Iraq contends that increases in insurance premiums that were incurred after 2 March 1991, for specialty coverage such as "terrorist" and "war" risks, were not directly caused by Iraq and therefore are not compensable.

C. Analysis and valuation

1. Loss of revenue

(a) Early termination and rig demobilization payments under lease agreements

204. The Panel has previously determined that it will, when considering the separate claims of differing components of the Kuwaiti petroleum industry, treat the entire Kuwaiti oil sector as a single enterprise, due to the fact that this sector is, in its entirety, a State-owned industry.[37] Thus, the Panel will consider the claim for a contractual payment owed by one Kuwaiti oil sector claimant to its affiliate company, regardless of whether advanced by the creditor or debtor, where it is alleged that the payment was not made as a direct result of Iraq's invasion and occupation of Kuwait.

205. In the circumstances, Santa Fe claims that it is the creditor of its affiliate, KDC. Because the contractual amounts claimed remain unpaid, Santa Fe (rather than KDC) is the proper party to pursue the claim. However, because no legal determination has been made concerning the validity of the contractual claim, the Panel must first consider the wording of the lease agreements to determine whether or not the amounts claimed by Santa Fe are owed by KDC. The Panel considers that this determination of contractual indebtedness is independent of the issue of whether the indebtedness arose as a direct result of Iraq's invasion and occupation of Kuwait.

206. Santa Fe's claim for early termination payments is based on its interpretation of section 12.2 of the rig 121 and rig 139 lease agreements. That section requires KDC to pay an early termination fee "in the event that KDC so terminates this Agreement". The words "so terminates" logically relate to the unilateral termination right given to KDC in the preceding section 12.1. In effect, section 12.2 permits KDC to buy out the remaining term of the lease by paying to Santa Fe a fixed fee equivalent to 80 per cent of the normal daily lease payment for the remaining term of the lease.

207. In contrast, section 12.3 of the rig 121 and 139 lease agreements calls for automatic termination of the lease in the event of the total loss of the rig. This section states that, in the event of such a loss, KDC is to pay Santa Fe a demobilization fee but, notably, makes no mention of the section 12.2 early termination fee.

208. The issue before the Panel is whether the rig 121 and 139 lease agreements ended as a result of KDC's exercise of its unilateral termination rights or automatically terminated upon the physical loss of the rigs. The Panel finds that it would not have been in KDC's financial interest to have issued Santa Fe a unilateral termination notice under section 12.1, following Iraq's invasion and occupation of Kuwait. The Panel notes that Santa Fe has admitted in its responses to the article 34 notifications that KDC did not issue a termination notice.

209. The Panel finds that KDC lost its use of rigs 121 and 139 on 2 August 1990 and also finds that the rigs were ultimately destroyed or stolen, although the precise date of the losses cannot be determined. The Panel further finds that this loss represented a "total loss of the Equipment" within the meaning of section 12.3. of the rig 121 and 139 lease agreements. Thus, the Panel finds that the two lease agreements automatically terminated under section 12.3 and KDC was not contractually required to pay Santa Fe an early termination fee. In accordance with this reasoning, the Panel recommends no award of compensation for early termination payments.

210. Santa Fe also claims that KDC was required to pay it a "demobilization fee" for all four rigs in accordance with the provisions of section 7.3 (or its equivalent) of the lease agreements. The Panel notes that there is ambiguity between the language found in that section and the wording of section 12.3. Section 7.3 states that KDC's obligation to pay the demobilization fee arises "upon the return of the equipment", a condition precedent that could not have been satisfied here due to the loss of the rigs. By contrast, section 12.3 requires that KDC pay a demobilization fee upon the total loss of the rig.

211. The Panel finds that this apparent conflict is reconciled by the final clause in section 12.3 of the lease agreements which provides that, in the event of a total loss, the demobilization fee is to be "apportioned as contemplated in Clause 2.4 of the Drilling Contract". The drilling contract referred to in section 12.3 of the lease agreements was a separate contract pursuant to which KDC undertook to use the leased rigs to drill wells for KOC. The drilling contract required KOC to pay KDC a demobilization fee equal to that which KDC was obligated to pay Santa Fe under the lease agreements. Clause 2.4 of the drilling contact limits KOC's obligation to pay the demobilization fee in the event of a loss of the drilling rigs due to a well blowout or similar type of casualty loss. In that

event, there was to be "an apportionment of the demobilization fee applicable on the day of the incident for equipment undamaged or still serviceable".

212. The Panel finds that this apportionment language in clause 2.4 of the drilling contract is consistent with the condition precedent found in section 7.3 (or its equivalent) of the lease agreements. The Panel considers that, in both cases, the parties intended to relieve the obligor of part or all of its liability to pay a demobilization fee, to the extent that there was only some or no equipment to demobilize. The Panel also considers that the underlying purpose of a rig demobilization clause is to compensate the rig owner for the substantial cost of moving the rig to its next location or to storage, when the rig lease comes to an end. In the circumstances, the Panel finds that, because the lease agreements terminated due to the total loss of the rigs, Santa Fe was not contractually entitled to receive rig demobilization payments. As there was nothing left to move, Santa Fe could not have incurred any moving costs. The Panel therefore recommends no award of compensation for demobilization payments.

(b) Charges under technical service agreement

213. The Panel finds that, in order to receive compensation for lost fees under the service agreement, Santa Fe must show that, but for Iraq's invasion and occupation of Kuwait, KDC would have continued to utilize Santa Fe's supervisory personnel on 10 of its rigs for the claim period. Santa Fe presented a drilling schedule that purports to indicate the number of wells that would have been drilled but for Iraq's invasion and occupation of Kuwait. Santa Fe argues that this schedule shows that KDC would have engaged the 10 rigs in drilling activities during the claim period, in which event KDC would have continued to call upon Santa Fe to provide personnel for technical drilling assistance. The Panel notes, however, that the drilling schedule appears to be an internal planning document and that Santa Fe provided no evidence that KDC had a binding commitment to Santa Fe to drill the wells listed in the claim period, and if it did, to use Santa Fe's supervisory personnel.

214. The Panel notes that KDC had the contractual right to terminate the service agreement after providing Sante Fe with three months' advance notice. While Santa Fe did not present evidence indicating whether a formal written termination notice was given by KDC on or after 2 August 1990, the Panel finds that the agreement had come to an end as of that date, as Santa Fe began evacuating its personnel from Kuwait at that time. The Panel therefore finds that Santa Fe was entitled to be paid, at most, a service fee for the three months following 2 August 1990. On that date, Santa Fe was providing drilling advisory services to KDC in Kuwait for 10 land rigs, at a monthly rate of USD 10,000 per rig, and therefore it was receiving a total of USD 100,000 in monthly service fees. Applying the three-month contractual notice provision to that monthly rate, the Panel finds that Santa Fe incurred a loss of revenue of USD 300,000 in service fees as a direct result of Iraq's invasion and occupation of Kuwait, and thus an adjustment of USD 500,000 should be made to this element of the claim. As the service agreement was a cost-plus arrangement under which Santa Fe received separate reimbursement for its personnel costs, the Panel finds that no further adjustment is warranted with respect to the costs savings realized by Santa Fe during these three months. Based on the foregoing, the Panel recommends an award of USD 300,000 for loss of revenue under the service agreement.

2. Other tangible property

215. The Panel finds that:

(a) The four lost rigs and rig camps were stolen or destroyed as a direct result of Iraq's invasion and occupation of Kuwait and have not been recovered;

(b) The inventory and spare parts for the rig Al Baz were taken from Santa Fe's storage yard in Kuwait as a direct result of Iraq's invasion and occupation of Kuwait and have not been recovered;

(c) Santa Fe was the owner of this tangible property; and

(d) Santa Fe is entitled to be paid compensation for the value of its loss.

216. It remains for the Panel to determine the value of the lost tangible property. Santa Fe argues that the valuation of the lost rigs should be based on insured value and that the total of the insured value of the lost rigs is USD 21,800,000. The Panel notes that the total insured value is slightly less than the net book value of the lost rigs as shown on Santa Fe's audited financial statements for 1991.

217. In support of its claim based on the insured value, Santa Fe submitted copies of certificates of insurance covering periods prior to Iraq's invasion and occupation of Kuwait. It also submitted a "Verification of Insurance" document, which was prepared by a third-party insurance brokerage company at the request of Santa Fe. The Panel conducted its own independent investigation of the market value of the lost rigs as of the date of loss. The Panel finds that the market value of the lost rigs is consistent with the higher amount declared on the insurance policies taken out by Santa Fe, as opposed to the amounts of insurance coverage that KDC was required to purchase under the terms of the lease agreements. The Panel notes that Iraq did not present any evidence to support its assertion that the lost rigs should be valued on the basis of the lower policy values.

218. The Panel does not accept Iraq's argument concerning the inference to be drawn from Santa Fe's placement of insurance coverage on the lost rigs after the presumed date of loss. The Panel accepts Santa Fe's argument that good business practices dictated its renewal of insurance coverage on the lost rigs pending the confirmation of their loss. The Panel finds that, because of the ongoing oil well fires in the Kuwaiti oil fields following the retreat of Iraqi forces, it is reasonable to assume that Santa Fe was unable to return to this area where the lost rigs were located to investigate its loss for some time. The Panel also notes that Santa Fe's insurer later issued it a credit to its account for that portion of the insurance premium which pertained to the period after 2 August 1990.

219. The Panel investigated Iraq's assertion that the lost rigs were not equipped with "state of the art" control and power systems. The Panel notes that, by 1994, the design of some newly built rigs did incorporate improved systems for control and power distribution. However, the DC/DC control systems that were used on the lost rigs were appropriate for their vintage, and therefore the lost rigs were capable of being operated within accepted industry standards on 2 August 1990. Thus, the Panel finds that it would be inappropriate to make a valuation adjustment to the insured value for technical

obsolescence. The Panel therefore finds that the insured value of USD 21,800,000 represented the market value of the lost rigs as of 2 August 1990 and recommends compensation in that amount.

220. Santa Fe stated that it was unable to provide the Panel with documentation substantiating the acquisition cost of the replacement materials and spare parts classified as rig camps for which it claims USD 1,129,000. The Panel finds that the insurance value separately declared for rig camps may be duplicative of the insurance values declared for the lost rigs themselves. For this reason, and because Santa Fe did not provide evidence in support of the cost of these spare parts, the Panel recommends no award of compensation for this element of the tangible property claim.

221. Santa Fe contends that its claim in the amount of USD 1,488,687 for those inventory items and spare parts taken from its storage yard in Kuwait pertaining to the rig Al Baz is based on an estimate of acquisition prices dating from 1983, as contained in an internal document prepared in 1989. It says that original purchase documentation for these inventory items is unavailable. The Panel notes that Santa Fe did not submit an insurance valuation for this component of its tangible property claim. Santa Fe did not supply the Panel with either cost documentation or insurance valuation for its lost inventory and spare parts. Based on the foregoing and given the age of the inventory as of the date of the loss, the Panel recommends no award of compensation for lost inventory and spare parts.

3. Payment or relief to others

222. The Panel has previously found that compensation paid to employees during the period of their detention by Iraqi forces may be recovered by an employer,[38] but only to the extent that the employer proves these costs. The Panel finds that it is reasonable to extend this finding to include payments made during periods of the recovery of the captive employees immediately following their release, as the employer was deprived of their services during their convalescence, as well as during the period of their wrongful detention by Iraqi forces. The Panel finds that Santa Fe was denied the services of these captive employees during the deprivation period as a direct result of Iraq's invasion and occupation of Kuwait.

223. In its response to the article 34 notifications, Santa Fe confirmed that it had received an insurance payment in the amount of USD 99,696 in partial compensation for its expenses with respect to the captive employees. Thus, the Panel has adjusted the claim by that amount, leaving a balance of USD 46,564.

224. Santa Fe did not provide the Panel with payment receipts or contracts of employment for the captive employees for the claim period, stating that these records were stored in Kuwait and were lost during the period of Iraq's invasion and occupation of Kuwait. To support this component of its claim, Santa Fe provided the Panel with extracts from its monthly payroll records together with a detailed analysis of the salaries and benefits paid to its employees. The Panel notes, however, that the figures in the extracts did not correspond to the amounts claimed with respect to each employee and, despite the Panel's request for clarification, Santa Fe did not provide additional supporting documentation. Accordingly, the Panel finds that Santa Fe has not provided sufficient evidence to

prove that actual payments were made to the captive employees and recommends no award of compensation for payment or relief to others.

4. Uncollected receivables

225. Santa Fe claims that it is owed USD 277,139 by KDC, representing the unpaid balance of "reimbursable" expenses incurred in the mobilization of rigs 121 and 139 to the initial drill sites designated by KDC.

226. The Panel finds that the underlying contractual obligation that is the basis for Santa Fe's claim for uncollected receivables did not arise as a direct result of Iraq's invasion and occupation of Kuwait. Indeed, this obligation would have arisen even if that event had not transpired. Similarly, the Panel finds that Santa Fe provided no evidence to show that KDC was unable to reimburse Santa Fe for its extra rig mobilization expenses as a direct result of Iraq's invasion and occupation of Kuwait, if indeed these claimed amounts are due.

227. Additionally, the Panel must take account of Santa Fe's prior diligence in seeking to collect the amount it claims is due from KDC. Notably, Santa Fe did not discover that it had incurred non-reimbursed rig mobilization costs until a significant time had elapsed following its receipt of KDC's settlement payment. Its discovery of the non-reimbursed costs came as a result of an internal audit of its accounting records. The discovery was made after the affiliation between Santa Fe and KDC had ended. Santa Fe does not present evidence of any collection effort after the 1993 settlement.

228. Based upon these facts, the Panel finds that the non-reimbursed rig moving expense claimed by Santa Fe were not incurred as a direct result of Iraq's invasion and occupation of Kuwait, and recommends no award of compensation for uncollected receivables.

5. Miscellaneous costs

229. In the sequential order of paragraph 202 above, the Panel finds as follows.

(a) The claimed travel expenses are in the nature of claim preparation costs, which will be dealt with by the Governing Council at a later date (see paragraph 529 below).

(b) Santa Fe's costs of compliance with United States regulations enacted in accordance with the trade embargo and related measures imposed under Security Council resolution 661 (1990) are not compensable, as the costs were incurred solely as a result of the trade embargo.[39]

(c) Personal non-pecuniary gifts are not direct losses resulting from Iraq's invasion and occupation of Kuwait.

(d) The expenses for legal advice regarding compliance with the embargo regulations are not direct losses resulting from Iraq's invasion and occupation of Kuwait.

(e) Santa Fe submitted insufficient evidence to verify and support its claim for repatriation and other miscellaneous expenses, and therefore this element is not compensable.

(f) The property insurance policies that Santa Fe had in place on 2 August 1990 excluded war risk. The charges for war risk premiums were in respect of new insurance coverage placed after 2 March 1991, and are thus not direct losses resulting from Iraq's invasion and occupation of Kuwait.

230. Based on the foregoing, the Panel recommends no award of compensation for miscellaneous costs.

D. Recommendations

231. The Panel's recommendations with respect to the claim of Santa Fe are summarized in table 16 below.

Table 16. Santa Fe's claim – recommended compensation
(United States dollars)

Claim element	Original amount claimed	Amended amount claimed	Amount of compensation recommended
Loss of revenue	3,962,698	15,553,252	300,000
Other tangible property	23,071,098	24,417,687	21,800,000
Payment or relief to others	146,260	146,260	Nil
Uncollected receivables	2,202,822	277,139	Nil
Miscellaneous costs	294,900	289,643	Nil
Total	29,677,778	40,683,981[a]	22,100,000

[a] Sante Fe's amendment increasing the total amount of its claim was timeous. See paragraphs 18 and 159 above.

VII. CLAIM OF IPEDEX 2IM SNC

A. Introduction

232. Ipedex International ("International") was a French company that specialized in the commissioning of industrial plants, particularly in the petroleum sector. On 30 December 1991, International merged with Ipedex 2IM SNC ("2IM"),[40] which has filed this claim with the Commission. 2IM states that, as at 2 August 1990, International was involved in the start up of a liquefied petroleum gas complex at Zubair, Iraq (the "project"), pursuant to a contract with Technip-Geoproduction S.A. ("Technip"), which was responsible for the engineering and construction of the project. 2IM states that this contract involved the secondment of 23 of International's start-up engineers and supervisors to the project. 2IM further states that each of these employees was under contract to the project until 31 December 1990. Lastly, 2IM states that, as a result of Iraq's invasion and occupation of Kuwait, International's contract with Technip was terminated prematurely and its employees were detained by Iraq as hostages.

233. 2IM claims 4,091,087 French francs (FRF) for loss of revenue arising from the early termination of the contract, as well as for salaries paid to unproductive employees for the period after 31 December 1990 during which time International could not find other work for them, which it states that International was contractually obliged to do. Its claim is summarized in table 17 below.

Table 17. 2IM's claim
(French francs)

Claim element	Original amount claimed	Amended amount claimed
Loss of revenue	5,385,056	3,741,998
Unproductive labour	349,089	349,089
Total	5,734,145	4,091,087

B. Iraq's response

234. Generally, Iraq states that Technip, as the other party to the contract, and not it, is responsible for any losses suffered by 2IM. Specifically, Iraq states that it should not be responsible for any losses for unproductive labour since International made the decision to continue to pay its employees after they were repatriated and until it found other work for them.

C. Loss of revenue

1. Facts and contentions

235. 2IM originally claimed the amount of FRF 5,385,056 with respect to loss of revenue[41] for the period from 2 August to 31 December 1990, which is the period of time its employees were supposed to be seconded to the project in Iraq. The employees were, however, detained as hostages in Iraq from

2 August to 30 October 1990, when they were repatriated to France. This part of 2IM's claim equals the income 2IM says International would have earned had International been able to invoice Technip for the services of its employees during this period. 2IM calculated its claim by multiplying the daily contract rate for 23 employees who were seconded to the project by the number of days that the employees were supposed to work on the project. The daily contract rates represent salaries, expatriation allowances, employer's social charges, administrative costs and an element of profit.

236. In its response to the article 34 notification, 2IM reduced the amount of its claim to reflect compensation it received from a French compensation fund for salary costs it incurred with respect to the employees on this project who were detained as hostages. The Panel has confirmed that FRF 1,379,990 was received by 2IM for employees who were seconded to the project. 2IM additionally reduced its claim to take into account a partial payment it received from Technip in the amount of FRF 263,068 for services rendered in August 1990 by 2IM employees who remained at work on the project site until they were detained by Iraqi forces. The amended amount claimed by 2IM is therefore FRF 3,741,998.

2. Analysis and valuation

237. The Panel has reviewed the contract with Technip and related documentation, including the individual amendments to the contract for each employee seconded to the project and payroll records. The Panel finds that 23 employees were seconded to the project at the daily contract rates indicated for the number of days the employees were contracted to work on the project, and that the employees continued to be paid during this period.

238. Paragraph 9 of Governing Council decision 9 provides that where "… continuation of the contract became impossible for the other party as a result of Iraq's invasion and occupation of Kuwait, Iraq is liable for any direct loss the other party suffered as a result, including lost profits." The Panel finds that Technip terminated its contract with International as a direct result of Iraq's invasion and occupation of Kuwait and that International in turn lost revenue. The Panel therefore recommends an award of compensation in the amount of FRF 3,741,998 for loss of revenue.

D. Unproductive labour

1. Facts and contentions

239. 2IM claims the amount of FRF 349,089 for salaries that International paid to nine of the 23 employees who were seconded to the project and for whom other work could not be found immediately after 31 December 1990. These employees were on standby for various periods of time between 1 January and 30 June 1991. The Panel has confirmed the detailed calculation 2IM provided with respect to this part of its claim using the payroll records and other documentation provided in support of the claim.

2. Analysis and valuation

240. With respect to salaries paid for unproductive labour, 2IM has not demonstrated that the employees who were on standby after 31 December 1990 would not have been on standby in any event because 2IM has not shown what work it reasonably expected that the employees would otherwise have been doing if Iraq had not invaded Kuwait. The Panel therefore recommends no award of compensation for unproductive labour.

E. Recommendations

241. The Panel's recommendations with respect to the claim of 2IM are summarized in table 18 below.

Table 18. 2IM's claim – recommended compensation
(French francs)

Claim element	Original amount claimed	Amended amount claimed	Amount of compensation recommended
Loss of revenue	5,385,056	3,741,998	3,741,998
Unproductive labour	349,089	349,089	Nil
Total	5,734,145	4,091,087	3,741,998

VIII. CLAIM OF IPEDEX PRODUCTION

A. Introduction

242. Ipedex Production ("Ipedex")[42] is a French company that specializes in the commissioning of onshore oil field facilities and offshore platforms. Ipedex states that, as at 2 August 1990, it was involved in the commissioning of facilities near Kirkuk, Iraq (the "project"), pursuant to a contract with Technip, which was responsible for the engineering and construction of the project. Ipedex states that this contract involved the secondment of 11 highly skilled Ipedex employees to the project. Ipedex states that, as a result of Iraq's invasion and occupation of Kuwait, its contract with Technip was terminated prematurely and its employees were detained by Iraq as hostages until 30 October 1990.

243. Ipedex claims FRF 729,443 for loss of revenue arising from the early termination of the contract, as well as for salaries paid to unproductive employees in respect of the period following their repatriation from Iraq and during which Ipedex could not find other work for them, which it states it was contractually obliged to do. Its claim is summarized in table 19 below.

Table 19. Ipedex's claim
(French francs)

Claim element	Original amount claimed	Amended amount claimed
Loss of revenue	1,836,380	477,236
Unproductive labour	252,207	252,207
Total	2,088,587	729,443

B. Iraq's response

244. Generally, Iraq states that Technip, as the other party to the contract, and not it, is responsible for any losses suffered by Ipedex. Specifically, Iraq states that it did not detain Ipedex's personnel. Iraq relies on a letter from Technip to Ipedex, which was included in the documents provided by Ipedex in support of its claim, and that states that the employees chose to stay in Iraq and continue working. Lastly, Iraq states that it should not be responsible for any losses for unproductive labour since Ipedex made the decision to continue to pay its employees after they were repatriated and until it found other work for them.

C. Loss of revenue

1. Facts and contentions

245. Ipedex originally claimed the amount of FRF 1,836,380 with respect to loss of revenue[43] for the period from 2 August to 30 October 1990, which is the period of time its employees were supposed to be seconded to the project in Iraq. The employees were, however, detained as hostages in Iraq. This

part of Ipedex's claim equals the income Ipedex says it would have earned had it been able to invoice Technip for the services of its employees during this period. Ipedex calculated its claim by multiplying the daily contract rate for 11 employees who were seconded to the project by the number of days that the employees were detained. The daily contract rates represent salaries, expatriation allowances, employer's social charges, administrative costs and an element of profit.

246. In response to the article 34 notification, Ipedex reduced its claim by FRF 273,000 with respect to an individual who was not employed by Ipedex but rather had the status of an independent contractor. Ipedex further reduced the amount of its claim to reflect compensation it received from a French compensation fund for salary costs it incurred with respect to the employees on this project who were detained as hostages. The Panel has confirmed that Ipedex received FRF 656,064 for employees who were seconded to the project. Ipedex additionally reduced its claim to take into account a partial payment it received from Technip in the amount of FRF 430,080 for services rendered in August 1990 by Ipedex employees who remained at work on the project site until they were detained by Iraqi forces. The amended amount claimed by Ipedex is therefore FRF 477,236.

2. Analysis and valuation

247. Applying Governing Council decision 9 as referred to in paragraph 238 above, the Panel finds that Technip terminated its contract with Ipedex as a direct result of Iraq's invasion and occupation of Kuwait and that Ipedex in turn lost revenue as a consequence of this premature termination. The Panel finds that this loss of revenue is a loss directly caused by Iraq's invasion and occupation of Kuwait.

248. The Panel has reviewed the contract with Technip and related documentation. The Panel finds that Ipedex can only be compensated for the loss of revenue for the period that it has demonstrated was covered by the contract with Technip.

249. The Panel also finds that the costs Ipedex incurred in continuing to pay its employees, when they were no longer covered by the Technip contract but were detained as hostages, are losses directly caused by Iraq's invasion and occupation of Kuwait which are compensable under the category of payment or relief to others.

250. The Panel finds that Ipedex provided evidence to support salary payments made to the detained employees for the period of their detention and a reasonable recovery period following their repatriation.

251. Taking into account compensation received by Ipedex from other sources, the Panel recommends an award of compensation in the amount of FRF 45,565 for loss of revenue.

D. Unproductive labour

1. Facts and contentions

252. Ipedex claims the amount of FRF 252,207 for salaries paid to six of the 10 employees who were seconded to the project and for whom other work could not be found immediately following their repatriation to France on 30 October 1990. These employees were on standby for various periods of time between 1 November 1990 and 16 April 1991. The Panel has confirmed the detailed calculation Ipedex provided with respect to this part of its claim using the payroll records and other documentation provided in support of the claim.

2. Analysis and valuation

253. With respect to salaries paid for unproductive labour, Ipedex has not demonstrated that the employees who were on standby after their repatriation would not have been on standby in any event because Ipedex has not shown what work it reasonably expected that the employees would otherwise have been doing if Iraq had not invaded Kuwait. The Panel therefore recommends no award of compensation for unproductive labour.

E. Recommendations

254. The Panel's recommendations with respect to the claim of Ipedex are summarized in table 20 below.

Table 20. Ipedex's claim – recommended compensation
(French francs)

Claim element	Original amount claimed	Amended amount claimed	Amount of compensation recommended
Loss of revenue	1,836,380	477,236	45,565
Unproductive labour	252,207	252,207	Nil
Total	2,088,587	729,443	45,565

IX. CLAIM OF TECNOLOGIE PROGETTI LAVORI S.p.A.

A. Introduction

255. Tecnologie Progetti Lavori S.p.A. ("TPL") is an Italian company that specializes in the design and implementation of large industrial plants. TPL operates mainly outside Italy and, in particular, in oil-producing countries. TPL states that, as at 2 August 1990, it was involved in several major projects relating to the oil, petrochemical and chemical industries in Iraq, Saudi Arabia and Kuwait and alleges that it suffered losses with respect to these projects as a direct result of Iraq's invasion and occupation of Kuwait. TPL estimates that, as at 2 August 1990, the value of its contracts in Iraq was USD 433,100,000, USD 20,000,000 in Saudi Arabia and USD 20,000,000 in Kuwait. TPL states that it had 200 employees working in its head office in Italy and 50 employees working in various locations in Iraq, Saudi Arabia and Kuwait at that date.

256. TPL filed nine category "E" claim forms dated 25 February 1993, in which it claimed a total of USD 208,032,751.[44] TPL filed separate claim forms for each of several projects, a claim form for various losses that were not attributable to a specific project and a claim form for foreign exchange losses and financing costs. The statement of claim, which was filed at the same time as the claim forms, presented a more detailed calculation of the claim and the total amount claimed differed slightly from the claim forms. The Panel finds that the statement of claim constitutes the most accurate statement of TPL's claim. The total amount claimed in the statement of claim is USD 208,123,711.

257. While the claim forms and the statement of claim stated the total amount claimed in United States dollars, various parts of the claim were incurred in currencies other than United States dollars. TPL converted these amounts to United States dollars using exchange rates that it selected. Consistent with its practice in previous instalments, the Panel has assessed these parts of the claim in the currencies in which the expenses were incurred.

258. The Panel notes that TPL appears to have estimated various parts of its claim, and refined, corrected or adjusted its calculations of these amounts in the course of the Panel's review of the claim. This review revealed that, in several instances, the losses TPL alleges it suffered were larger than the amounts it claimed. TPL did not attempt to increase its claim as a result of these subsequent calculations. TPL did, however, reduce its claim in a number of other instances, which is discussed in further detail below. TPL's claim, as amended, is in the amount of USD 206,940,135 as set out in table 21 below.

Table 21. TPL's claim

Claim element	Original amount claimed in category "E" claim form	Original amount claimed in statement of claim	Amended amount claimed
Contract: Iraqi dinars (IQD)	IQD 188,540	IQD 214,540	IQD 201,740
- Prepaid rent	50,000	56,000	56,000
- Lube oil project - Unpaid retention monies - North Gas Kirkuk project - Unpaid retention monies	 125,740 12,800	 145,740 12,800	 145,740 Nil
Contract: Italian lire (ITL)	ITL 28,493,000,000	ITL 28,497,602,919	ITL 27,897,879,895
- Service charges on bank guarantees	277,000,000	281,483,081	99,321,392
- West Qurna project - Equipment and materials in the process of being manufactured - Storage and maintenance costs for balance of equipment and materials - Shut-down expenses	 3,300,000,000 350,000,000 1,000,000,000	 3,300,000,000 350,000,000 1,000,000,000	 3,300,000,000 349,739,167 582,699,498
- C4 conversion project	100,000,000	100,000,000	100,000,000
- Central refinery project - Shut-down expenses	 100,000,000	 100,000,000	 100,000,000
- Lube oil and Sfaya oil field projects	23,366,000,000	23,366,119,838	23,366,119,838
Contract: USD	USD 179,506,092	USD 179,506,307	USD 178,922,660
- West Qurna project - Equipment and materials ready for delivery	 6,213,600	 6,213,600	 5,629,953
- Central refinery project - Work performed	 2,195,000	 2,195,000	 2,195,000
- Lube oil project - Unpaid retention monies - Bad debt	 4,535,225 156,912,267	 4,535,225 156,912,669	 4,535,225 156,912,669
- Sfaya oil field project	9,650,000	9,649,813	9,649,813
Contract: KWD	KWD 108,553	KWD 108,553	KWD 108,553
- Pharmaceutical plant project	108,553	108,553	108,553
Other tangible property: IQD	IQD 217,796	IQD 215,796	IQD 202,903
- Funds on deposit and petty cash	217,796	215,796	202,903
Other tangible property: USD	USD 200,000	USD 200,000	USD 200,000
- Loss of furniture, furnishings and motor vehicles	200,000	200,000	200,000
Payment or relief to others: ITL	ITL 1,848,000,000	ITL 1,859,134,000	ITL 1,859,134,000
Costs related to personnel detained in Iraq	1,500,000,000	1,500,000,000	1,500,000,000
War risk insurance	348,000,000	359,134,000	359,134,000
Payment or relief to others: IQD	IQD 147,000	IQD 147,000	IQD 147,000
Hotel expenses and incidentals	147,000	147,000	147,000
Total (USD)	208,032,751	208,123,711	206,940,135

B. Contract

1. Prepaid rent

(a) Facts and contentions

259. TPL claims IQD 56,000 for rent it paid in advance for three premises located in Iraq that it states it was unable to use during the period of Iraq's invasion and occupation of Kuwait and for a period thereafter because TPL could not resume work on its projects in Iraq. One of the premises was used by TPL as an office and the other two premises were used as accommodation for its expatriate personnel. In support of this part of its claim, TPL provided a report dated 12 April 1993, which summarizes the negotiations between its representative and various landlords to terminate the leases after the end of Iraq's invasion and occupation of Kuwait.

(b) Iraq's response

260. Iraq states that TPL's claim is not a direct result of its entry into Kuwait because TPL entered into leases that required the rent under each lease to be paid for considerable periods of time in advance.

(c) Analysis and valuation

261. The Panel notes that, notwithstanding requests for additional information and evidence, the only evidence provided by TPL in support of this part of its claim was the report dated 12 April 1993 summarizing the negotiations to terminate the leases.[45] The Panel finds that TPL has provided insufficient evidence in support of its claimed loss. Therefore, the Panel recommends no award of compensation in respect of the claim for prepaid rent.

2. Service charges on bank guarantees

(a) Facts and contentions

262. TPL claims ITL 281,483,081 with respect to service charges on bank guarantees TPL was required to provide under the terms of contracts relating to various projects in Iraq. After TPL's banks had agreed to give the undertakings contractually required of TPL to Rafidain Bank, Rafidain Bank issued the guarantees in favour of the Iraq State Company for Oil Projects ("SCOP"). During the course of the Panel's review of TPL's claim, TPL withdrew certain parts of its claim for service charges on bank guarantees and thereby reduced the amount of this claim to ITL 99,321,392.

(i) North Gas Kirkuk project

263. TPL claims ITL 30,023,576 for service charges on guarantees that it was required to provide under a contract entered into in 1980 for the design, supply and construction of a plant in the Kirkuk oil field in Iraq. The work was completed in 1984, and the maintenance period for the work expired in 1987. These service charges are for the period from 15 October 1990 to 15 April 1993. TPL states

that the status of the contract as at 2 August 1990 was that SCOP owed TPL IQD 12,800 representing the balance of retention monies due under the contract.[46]

(ii) Lube oil project

264. TPL claims ITL 69,297,816 for service charges on a guarantee that it was required to provide under a contract dated 30 July 1984 to construct a lube oil production plant at Baiji, Iraq. The final acceptance certificate was issued by SCOP on 11 October 1989, and was effective as at 30 April 1989, provided that certain outstanding work was completed within six months of the date of issue of the certificate. These service charges are for the period from 7 September 1990 to 3 March 1993. As at 2 August 1990, TPL states that three items of work that it estimates would cost USD 50,000 to complete remained outstanding. This project is discussed in further detail in paragraphs 284 to 298 below.

(b) Iraq's response

265. Iraq states that the service charges relate to TPL's contractual obligations that arose prior to 2 August 1990, and that TPL was prevented from completing its obligations by the trade embargo imposed against Iraq.

(c) Analysis and valuation

266. As noted in paragraph 71 above, the Panel finds that the effect of the trade embargo imposed against Iraq was such that a guarantee in favour of an Iraqi party could not legally have been honoured after 6 August 1990. Therefore, it is difficult to see what benefit TPL's banks were providing in return for the service charges that the banks charged and TPL paid after notice of the embargo had been widely disseminated. The Panel finds that service charges on bank guarantees charged after 6 August 1990 are not losses directly arising from Iraq's invasion and occupation of Kuwait because the trade embargo prohibited the guarantees from being honoured. The Panel therefore recommends no award of compensation for the service charges.

3. West Qurna project

(a) Facts and contentions

267. TPL states that, on 14 July 1988, it entered into a sub-contract with a third party to provide certain equipment and materials for the development of the West Qurna oil field in Iraq. The third party had already entered into a contract with SCOP for the development of the field, which provided that the third party would subcontract with other parties for the supply of some of the requisite equipment and materials. SCOP approved the sub-contract between the third party and TPL for the provision of the equipment and materials. TPL states that, as at 2 August 1990, it had equipment and materials ready for delivery for which it claims USD 5,629,953 and equipment and materials in the process of being manufactured for which it claims ITL 3,300,000,000. In addition, TPL states that it incurred storage and maintenance costs of ITL 349,739,167 for some of the equipment and materials that were ready for delivery and waiting to be shipped. Initially, TPL stated that it incurred ITL

1,000,000,000 in shut-down expenses for the head office personnel managing the project. Later, it reduced this part of its claim to ITL 582,699,498.

(b) Iraq's response

268. Iraq states that TPL had completed 99 per cent of the engineering and procurement for the project and delivered 87.7 per cent of the equipment and materials by 2 August 1990, and therefore the claim is outside the jurisdiction of the Commission. Iraq further states that it had made all payments due to the third party, and that TPL's complaint is therefore against that party, although Iraq did not provide any evidence to support this assertion. Lastly, Iraq states that TPL has provided insufficient evidence in support of its claim.

(c) Analysis and valuation

(i) Equipment and materials ready for delivery

269. TPL claims USD 5,629,953 for equipment and materials that were ready for delivery as at 2 August 1990.[47] In support of its claim, TPL provided, among other things, the list of equipment and materials it was required to provide under the sub-contract, the delivery schedule, a list of equipment and materials that it says were ready for delivery as at 2 August 1990, a progress report for the work done in the months of June, July and August 1990, which includes a document entitled "status of items as of 17/09/90",[48] release notes, purchase orders, invoices, agreements with suppliers and proof of payment. According to the terms of the sub-contract, TPL's obligations included both the manufacture and shipment of the equipment and materials.[49] The Panel notes that it is not possible to track every item of equipment and materials to the sub-contract. However, the Panel finds that the totality of the evidence corroborates the claim for the equipment and materials. The Panel further finds that, while the claimed equipment and materials were manufactured, they had not been shipped as at 2 August 1990. The Panel therefore finds that TPL was precluded from performing its contractual obligations as a direct result of Iraq's invasion and occupation of Kuwait.

270. The Panel finds that TPL has provided evidence that supports the amounts of ITL 3,799,488,568 and DEM 179,686, being the currencies in which the expenses were incurred. These sums are net of the amounts that TPL recovered for equipment and materials that were resold to suppliers. The Panel therefore recommends an award of compensation in the amounts of ITL 3,799,488,568 and DEM 179,686 for equipment and materials that were ready for delivery as at 2 August 1990.

(ii) Equipment and materials in the process of being manufactured

271. TPL claims ITL 3,300,000,000 for equipment and materials that were in the process of being manufactured by third-party suppliers as at 2 August 1990. TPL states that the equipment and materials were at various stages of manufacture at that date and that it was required to cancel the various orders and pay all or part of the related costs. TPL's claim is limited to the amounts it paid to the third-party suppliers as opposed to the original contract price, which was USD 7,667,520. In support of its claim, TPL provided, among other things, the list of equipment and materials it was required to provide under the sub-contract, a list of the equipment and materials in the process of being

manufactured that it says it had to cancel, the delivery schedule and the progress report referred to in paragraph 269 above, the purchase orders, the agreements made with the third-party suppliers cancelling the orders, invoices and proof of payment. Again, the Panel finds that the totality of the evidence corroborates the claim for the equipment and materials notwithstanding that it is not possible to track each item to the contract. The Panel finds that ITL 2,087,591,812 of the amount claimed is supported by the evidence. The Panel also finds that TPL took reasonable steps to mitigate its loss by cancelling the orders and making the arrangements it did with the third-party suppliers. The Panel therefore recommends an award of compensation in the amount of ITL 2,087,591,812 for the equipment and materials that were in the process of being manufactured.

(iii) Storage and maintenance costs for balance of equipment and materials

272. TPL originally claimed ITL 350,000,000 for storage and maintenance of some of the equipment and materials that were ready for delivery. TPL calculated the claim amount by totalling the invoices (ITL 371,159,167) and subtracting the scrap value it obtained (ITL 21,420,000) and rounding off the balance. TPL later revised its claim to the exact amount of ITL 349,739,167. As discussed in paragraph 270 above, TPL was able to sell some of the equipment and materials back to the original suppliers after Iraq's invasion and occupation of Kuwait. TPL further states that it tried unsuccessfully to sell the remaining equipment and materials and eventually scrapped them in July 1992. As noted in paragraphs 65 and 66 above, the Panel accepts the conclusions of the "E2" Panel that a claimant must generally have attempted to sell undelivered goods to a third party in a reasonable manner and within a reasonable time. The Panel finds that TPL has provided supporting invoices in a total amount of ITL 366,030,167. However, the Panel only recommends an award of compensation for storage and maintenance costs incurred up to 1 August 1991 because that is the date by which the Panel considers that TPL should reasonably have decided to scrap the equipment and materials. The Panel therefore has deducted ITL 139,257,083 for costs incurred after 1 August 1991 and ITL 21,420,000 for the scrap value realized. The Panel therefore recommends an award of compensation in the amount of ITL 205,353,084 for storage and maintenance costs.

(iv) Shut-down expenses

273. TPL claims ITL 582,699,498 for expenses incurred by personnel in its head office in order to shut down the project. The amount of this claim based on the evidence provided is actually ITL 562,384,279. TPL makes this claim, and two others that are discussed later in this report, for such expenses. The Panel observes, as have other panels, that these expenses, which will generally exist on any project, are usually part of the overhead and are dealt with by contractors, such as TPL, in a variety of ways. A contractor will, however, generally seek to recover the costs through the contract price at some stage during the execution of the contract. The Panel finds that, since TPL by its own estimation had completed 99 per cent of the engineering and procurement for the project and delivered 87.7 per cent of the equipment and materials, for which it has invoiced the third party and been paid, it is likely that TPL has already recovered all or at least a very considerable part of these expenses. In the absence of any evidence as to the amount, if any, TPL recovered, the Panel recommends no award of compensation for shut-down expenses.

4. C4 conversion project

(a) Facts and contentions

274. TPL states that, on 9 January 1990, it signed a contract with Technical Corps for Special Projects ("Techcorp"), which was a division of Iraq's Ministry of Industry, to supply engineering services, materials and equipment for a plant near Baghdad, Iraq. The value of the contract was USD 29,100,000. Sezione Speciale per l'Assicurazione del Credito all'Esportazione ("SACE") was to insure 90 per cent of the financing that TPL was to provide Techcorp under the contract. The contract provided that it was to be effective when: (a) it had been signed by both parties and approved by the relevant Iraqi authorities, (b) TPL had issued the required performance bond and down payment guarantee, (c) TPL had received the down payment, (d) all the financing facilities were available and (e) the process design packages from the licensors were also available. The contract further provided that TPL, with Techcorp's agreement, was to start the engineering and requisitioning activities notwithstanding that the contract was not yet effective.

275. TPL states that, as at 2 August 1990, the contract had been signed by both parties and approved by the relevant Iraqi authorities. TPL further states that the other conditions had not been completed as at that date because SACE had not yet approved the financing. TPL states that, notwithstanding that the contract was not yet effective, it undertook start up of the project and began the work contemplated by the contract. TPL claims ITL 100,000,000 for work performed under the contract prior to 2 August 1990, which involved general project co-ordination, start-up activities and design, as well as for the costs of shutting the project down after 2 August 1990, which involved archiving technical, contractual and administrative documentation as required by its corporate policies.

(b) Iraq's response

276. Iraq states that the reason the contract was not yet effective as at the date of its entry into Kuwait was because the conditions in the contract concerning the guarantees as well as the financing, which it states were completely within TPL's control, had not been met. Iraq further states that TPL did not request a meeting as contemplated by the contract when these conditions had not been met six months after the contract was signed. Iraq also states that there was no agreement that TPL was to commence the work and TPL unilaterally shut down the project.

(c) Analysis and valuation

277. The Panel notes that, although the contract contemplates work being commenced prior to its effective date, the contract does not address how TPL was to be paid for this work. However, the Panel considers that, if the contract had taken effect, TPL would have recovered these costs, as well as its shut-down expenses, during the term of the contract. The Panel finds that TPL has provided documentation which demonstrates that it undertook the work on this project with Techcorp's concurrence as contemplated by the contract and that there were ongoing communications between the parties, such that a request for a meeting when the contract was still not effective six months after it was signed would have been unnecessary. The Panel also finds that nothing in the documentation

provided suggests that the contract would not have proceeded as intended, and TPL had an extensive working history in Iraq. TPL has provided detailed calculations, together with supporting documentation, of the costs it incurred. The Panel finds that Iraq's invasion and occupation of Kuwait was the direct cause of the project collapsing and TPL's inability to recover these costs. Based on the evidence provided, and after making adjustments for certain overheads that TPL would have incurred in any event, the Panel recommends an award of compensation in the amount of ITL 59,637,075 for work undertaken after 2 May 1990 as well as shut-down expenses incurred after 2 August 1990.

5. Central refinery project

(a) Facts and contentions

278. TPL states that, on 10 December 1989, it signed a contract with Techcorp to supply engineering services, materials and equipment, construction supervision and start-up assistance for a refinery near Baghdad, Iraq. The value of the contract was USD 150,000,000. TPL was to provide Techcorp with financing as part of their agreement, and SACE was to insure 90 per cent of the financing. The provisions with respect to the effective date of the contract are for all intents and purposes the same as the contract for the C4 conversion project described in paragraph 274 above, including that TPL was to begin work notwithstanding that the contract was not yet effective.

279. TPL states that, by 2 August 1990, the contract had been signed by both parties and approved by the relevant Iraqi authorities. TPL further states that the other conditions had not been completed as at that date because SACE had not yet approved the financing. TPL states that, notwithstanding that the contract was not yet effective, it undertook start up of the project and began the work contemplated by the contract. TPL claims USD 2,195,000 for work performed on the contract up to 2 August 1990, which it states was 9.1 per cent of the detailed engineering and procurement services required under the contract, and ITL 100,000,000 for the costs of shutting the project down after 2 August 1990.

(b) Iraq's response

280. Iraq states that this contract likewise was not yet effective as at the date of its entry into Kuwait because TPL was responsible for providing the guarantees and securing the financing, which it had failed to do. Iraq further states that TPL did not request a meeting as contemplated by the contract when the contract was still not effective six months after having been signed. Iraq also states that TPL undertook the work to avoid the delay penalty which applied if the work was not completed within the stipulated time.

(c) Analysis and valuation

281. The Panel notes that, as was the case with the C4 conversion project, although the contract contemplates work being commenced prior to its effective date, the contract does not address how TPL was to be paid for the work. The Panel again considers that, if the contract had taken effect, TPL would have recovered these costs, as well as its shut-down expenses, during the term of the contract. The Panel finds that TPL has provided documentation which demonstrates that it undertook the work on this project with Techcorp's concurrence as contemplated by the contract and that there were

ongoing communications between the parties, such that a request for a meeting when the contract was still not effective six months after it was signed would have been unnecessary. The Panel also finds that nothing in the documentation provided suggests that the contract would not have proceeded as intended, and TPL had an extensive working history in Iraq. TPL has provided detailed calculations, together with supporting documentation, which demonstrates how it calculates the progress it had achieved on the project, as well as the costs it incurred in shutting down the project. The Panel similarly finds that Iraq's invasion and occupation of Kuwait was the direct cause of the project collapsing and TPL's inability to recover these costs.

282. With respect to TPL's claim for the work it performed under the contract, TPL calculated its claim by multiplying the contract value of the detailed engineering and procurement services by the percentage of work it claimed it had completed as at 30 July 1990. Given that the contract was not yet effective, the work performed by TPL had neither been invoiced to Techcorp nor approved for payment by Techcorp. Furthermore, there was no detailed budget to compare with the tender stage estimates. TPL did, however, provide monthly progress reports as required under the terms of the contract, which the Panel finds are sufficient contemporaneous evidence of the work completed. Applying the same methodology used by TPL, the Panel finds that TPL achieved 5.27 per cent of the detailed engineering and procurement services between 2 May and 2 August 1990. The Panel therefore recommends an award of compensation in the amount of USD 1,271,124 for the work TPL performed after 2 May 1990.

283. The Panel notes that the actual costs incurred by TPL on the project are much higher than the costs TPL incurred during the period in respect of which the Panel has recommended compensation based on the progress achieved during that period. The difference is due to the other costs that a contractor, such as TPL, would have included in its contract price and sought to recover through that price at some stage during the execution of the contract. As discussed in paragraph 273 above, shut-down expenses are an example of such costs. Here, however, the Panel finds that the progress achieved by TPL as at 2 August 1990 was less than 5 per cent of the overall contract price. The Panel therefore considers that TPL would not have recovered any of its shut-down expenses as part of the amount the Panel has recommended as compensation for the work performed under the contract as set out in paragraph 282 above. Based on the evidence provided, and after making adjustments for certain overheads that TPL would have incurred in any event, the Panel recommends an award of compensation in the amount of ITL 92,063,303 for shut-down expenses incurred after 2 August 1990.

6. Lube oil project

(a) Facts and contentions

284. TPL states that, on 30 July 1984, it entered into a contract, together with other contractors, with SCOP to construct a lube oil production plant at Baiji, Iraq. TPL states that it was to supply services, materials, construction and start up of some units over a period of 36 months. The lump sum contract prices stipulated for TPL's part of the work were the amounts of USD 232,500,000 and IQD 7,286,973. TPL, through a series of transactions, also provided SCOP with financing in the amount of USD 136,436,900 (plus interest), of which SACE insured 90 per cent. SCOP was required to repay

the financing in 10 instalments from 30 March 1988 to 30 September 1992. SCOP did not pay any instalments that were due prior to 2 August 1990. TPL claims, on behalf of itself and SACE, the amount of USD 156,912,669 for principal and interest as a result of SCOP's non-payment.

285. TPL also claims, on its own behalf, the amounts of USD 4,535,225 and IQD 145,740 for unpaid retention monies. TPL states that the final acceptance certificate, which was the prerequisite to the release of the United States dollar portion of the retention monies, and one of the prerequisites to the release of the Iraqi dinar portion, was issued by SCOP on 11 October 1989, and was effective as at 30 April 1989, provided that certain outstanding work was completed within six months of the date of the certificate. TPL states that, as at 2 August 1990, three items remained outstanding. TPL estimates that the cost to complete this work was approximately USD 50,000. Two of the outstanding items were related to work required under the original contract as opposed to work which TPL states it subsequently agreed to do in an effort to try and resolve all remaining issues between the parties. TPL states that, by 2 August 1990, the plant had been operating for nearly three years without incident. With respect to the Iraqi dinar portion of the retention monies, TPL acknowledges that two certificates from Iraqi authorities remained outstanding, which were also required for the release of this portion.

(b) Iraq's position

286. Iraq states that TPL does not have any authority to bring a claim on SACE's behalf. Iraq further states that the claim relates to non-payment for goods and services TPL provided long before Iraq's entry into Kuwait and involves normal commercial dealings that were stopped by the trade embargo.

(c) Analysis and valuation

(i) Bad debt - TPL

287. As noted in paragraph 284 above, TPL, on behalf of itself and SACE, claims the entire amount of principal and interest due under the financing provided as part of TPL's contract with SCOP. TPL's claim is limited to 10 per cent of this amount because SACE reimbursed it for the balance.

288. As discussed by the Panel in paragraphs 57 and 58 above, the Security Council, in paragraph 16 of resolution 687 (1991), reaffirmed that Iraq was liable for any direct loss, damage or injury resulting from its invasion and occupation of Kuwait "without prejudice to the debts and obligations of Iraq arising prior to 2 August 1990, which will be addressed through the normal mechanisms". The "E2" Panel has previously interpreted the words "the debts and obligations of Iraq arising prior to 2 August 1990" in the context of construction and supply contracts, and has concluded that "where the performance giving rise to the original debt had been rendered by a claimant more than three months prior to 2 August 1990 that is, prior to 2 May 1990, claims based on payments owed"[50] are outside the jurisdiction of the Commission. This Panel, as it has done previously, accepts this conclusion.

289. The Panel finds that the financing that TPL provided to SCOP was a deferred payment agreement that had the effect of allowing SCOP to delay payment for the work performed. Therefore, only the portion of the loan amount that is attributable to work performed and materials provided after 2 May 1990 is within the jurisdiction of the Commission. With the exception of the outstanding work,

which is discussed further below, TPL had completed the contract prior to 2 May 1990 as evidenced by the issuance of the final acceptance certificate. The Panel therefore recommends no award of compensation for TPL's claim for non-payment of instalments due from SCOP under the financing provided as part of the contract.

(ii) Bad debt – SACE

290. TPL has provided SACE's written instructions to include its portion of the loss, which is 90 per cent of the principal and interest due under the financing provided as part of TPL's contract with SCOP, in TPL's claim.

291. The Panel notes that an insurer's claim for reimbursement of a payment made under an insurance policy is eligible for compensation to the extent that the payment was made for a loss that would have been compensable by the Commission in the absence of insurance. The Panel finds (as have other panels) that, if this requirement is not met, the claim is not compensable regardless of whether the insurer was obliged to pay under the policy.[51] Therefore, the Panel's task is first to consider whether the alleged loss is compensable.

292. As discussed in paragraph 289 above, the Panel finds that TPL had completed the contract prior to 2 May 1990. The Panel similarly finds that SACE's claim for reimbursement of payments made to TPL arising from SCOP's default is not compensable because it relates to work performed prior to 2 May 1990. The Panel therefore recommends no award of compensation for SACE's claim for reimbursement of payments made by it to TPL arising from SCOP's default.

(iii) Unpaid retention monies

293. With respect to the retention monies, 2 per cent of both the United States dollar and the Iraqi dinar portions of TPL's share of the lump sum contract price that had been retained remained unpaid as at 2 August 1990. TPL's claim for unpaid retention monies therefore consists of two components.

294. First, TPL claims USD 4,535,225 that was payable upon issuance of the final acceptance certificate.[52] The final acceptance certificate was issued by SCOP on 11 October 1989, and was effective as at 30 April 1989, provided that certain outstanding work was completed within six months of the date of issue of the certificate. As at 2 August 1990, of the three items that remained, which TPL estimates would have cost USD 50,000 to complete, only two arose from the original work contemplated by the contract.

295. Correspondence sent by TPL to SCOP suggests that TPL had been trying to settle these and other issues with SCOP for some time. The other issues related to extra work that TPL agreed to do at the time the final acceptance certificate was issued. In a letter to SCOP dated 2 June 1990, in which TPL reviewed the history of the project, TPL stated that these items arose after the maintenance period but that it nonetheless had agreed to undertake them in order to conclude the project.

296. From a letter TPL wrote to SCOP on 24 June 1990, apparently following a meeting with SCOP, it appears that the parties were to provide the Iraqi Minister of Oil with their respective positions, and

the Minister was in turn to make a final decision. TPL states in this letter that it had provided its position on 4 June 1990. The letter of 24 June 1990 appears to have been sent by TPL as a further request to resolve all outstanding matters between TPL and SCOP. TPL states that, in the time that elapsed between these two letters, it had performed further work so as to leave only the three items referred to earlier outstanding.

297. Second, TPL claims IQD 145,740. These monies were not paid as at 2 August 1990 because the required clearance certificates from the Iraqi Customs and Excise Authorities and the Income Tax Commission had not been issued. The release of these monies was also dependent on the final acceptance certificate.

298. The Panel finds, as have other panels, that retention monies are a form of security held by an owner to ensure fulfilment by a contractor of its obligations to remedy defects appearing before or during the maintenance period for the work undertaken or, alternatively, a fund from which the employer can reimburse itself if the contractor does not remedy the defects.[53] The Panel considers that TPL and SCOP had been in ongoing negotiations since 1989 when the maintenance period had expired with respect to the outstanding work that TPL was still required to complete and notwithstanding that the final acceptance certificate (which was the precondition to the release of the United States dollar portion of the retention monies and one of the preconditions to the release of the Iraqi dinar portion of the retention monies) was issued during that period. The Panel therefore finds that TPL has not demonstrated that SCOP's failure to release the retention monies was a direct result of Iraq's invasion and occupation of Kuwait. The Panel therefore recommends no award of compensation for the unpaid retention monies.

7. Sfaya oil field project

(a) Facts and contentions

299. TPL states that, on 30 July 1984, it entered into a contract with SCOP to construct a gathering system and treatment plant in the Sfaya oil field in Iraq. The lump sum contract price was the amounts of USD 10,240,000 and IQD 38,200. TPL, through a series of transactions, also provided SCOP with financing in the amount of USD 8,704,000 (plus interest), of which SACE insured 90 per cent. TPL states that SCOP accepted the plant in 1987 when it took over the plant. SCOP was required to repay the financing in 10 instalments from 30 April 1987 to 30 October 1991. SCOP did not pay any instalments that were due prior to 2 August 1990. TPL claims, on behalf of itself and SACE, the amount of USD 9,649,813 for principal and interest as a result of SCOP's non-payment.

(b) Iraq's response

300. Iraq states that TPL does not have any authority to bring a claim on SACE's behalf. Iraq further states that the claim relates to non-payment for goods and services TPL provided long before Iraq's entry into Kuwait and involves normal commercial dealings that were stopped by the trade embargo.

(c) Analysis and valuation

301. Applying the Panel's findings in paragraphs 289 and 292 above concerning the application of the "arising prior to" rule and the compensability of payments made by insurers, respectively, the Panel recommends no award of compensation for non-payment of instalments due by SCOP under the financing TPL provided as part of the contract and reimbursement of payments made by SACE to TPL arising from SCOP's default.

8. Lube oil and Sfaya oil field projects

(a) Facts and contentions

302. TPL states that, sometime after SCOP defaulted on the payments due under the financing for the lube oil and Sfaya oil field projects discussed above, TPL was required to repay the lenders that had purchased the indebtedness, which was represented by promissory notes with recourse. TPL states that it incurred foreign exchange losses and financing costs in the amount of ITL 23,366,119,838 from the time it repaid the lenders until it was reimbursed by SACE.

(b) Iraq's response

303. Iraq states that this claim relates to debts from projects completed long before its entry into Kuwait and that any failure on its part to discharge its obligations was a result of the trade embargo.

(c) Analysis and valuation

304. As discussed above, the Panel finds that the financing that TPL provided to SCOP pursuant to the contracts for the lube oil and Sfaya oil field projects consisted of deferred payment agreements that had the effect of allowing SCOP to delay payment for the work performed. No portions of the loan amounts are attributable to work performed and materials provided after 2 May 1990. Moreover, SCOP was in default under the agreements long before Iraq's invasion and occupation of Kuwait. The Panel finds that, where a claim is so closely connected with an underlying transaction, and the date on which the debt arose under the underlying transaction takes the claim outside the jurisdiction of the Commission, the related claim is likewise outside the Commission's jurisdiction. The Panel therefore finds that TPL's foreign exchange losses and financing costs arising from SCOP's default under the financing are not direct losses resulting from Iraq's invasion and occupation of Kuwait and recommends no award of compensation.

9. Pharmaceutical plant project

(a) Facts and contentions

305. TPL states that, on 14 September 1983, as part of a consortium, it contracted to build a pharmaceutical plant for Kuwait Pharmaceutical Industries Company ("KPIC") in the Shabhan industrial area in Kuwait. TPL's share of the contract was KWD 1,260,739. The maintenance certificate was issued on 13 December 1987, but a fiscal clearance certificate, which was also a prerequisite to the release of the retention monies, had not been issued as at 2 August 1990. TPL

secured the fiscal clearance certificate from the Kuwaiti authorities in 1992 after its efforts in this regard were suspended by Iraq's invasion and occupation of Kuwait. TPL states that KPIC went bankrupt in 1992. TPL claims KWD 108,553 for its share of the unpaid retention monies.

(b) Iraq's response

306. Iraq states that the claim relates to non-payment for goods and services provided a long time before its entry into Kuwait, and that the claim has nothing to do with Iraq. Iraq further states that, as it is evident in the documents submitted by TPL in support of this part of its claim that the Government of Kuwait agreed to pay TPL, TPL should pursue payment with that Government.

(c) Analysis and valuation

307. The Panel finds that TPL has not demonstrated that KPIC's failure to release the retention monies was a direct result of Iraq's invasion and occupation of Kuwait because the precondition to the release of the monies had not been fulfilled for a considerable period of time prior to 2 August 1990. The Panel therefore recommends no award of compensation for the unpaid retention monies.

10. Recommendations - contract

308. Based on the foregoing, the Panel recommends an award of compensation for contract losses in the amount of USD 6,778,894. A summary of the individual recommendations contained within this claim element appears in table 22 below.

Table 22. Recommendations - contract

Claim element	Amended amount claimed		Amount of compensation recommended	
Prepaid rent	IQD	56,000		Nil
Service charges on bank guarantees	ITL	99,321,392		Nil
West Qurna project				
- Equipment and materials ready for delivery	USD	5,629,953	ITL	3,799,488,568[a]
			DEM	179,686
- Materials in the process of being manufactured	ITL	3,300,000,000	ITL	2,087,591,812
- Storage and maintenance costs for balance of equipment and materials	ITL	349,739,167	ITL	205,353,084
- Shut-down expenses	ITL	582,699,498		Nil
C4 conversion project	ITL	100,000,000	ITL	59,637,075
Central refinery project				
- Work performed	USD	2,195,000	USD	1,271,124
- Shut-down expenses	ITL	100,000,000	ITL	92,063,303
Lube oil field project				
- Bad debt	USD	156,912,669		Nil
- Unpaid retention monies	USD	4,535,225		Nil
	IQD	145,740		Nil
Sfaya oil field project	USD	9,649,813		Nil
Lube oil and Sfaya oil field project	ITL	23,366,119,838		Nil
Pharmaceutical plant project	KWD	108,553		Nil
Total (USD)		204,011,376		6,778,894

[a] The amount of compensation recommended by the Panel for equipment and materials ready for delivery corresponds to USD 3,392,435 using the August 1990 mid-point rate of exchange as indicated in the United Nations Monthly Bulletin of Statistics referred to earlier in this report.

C. Other tangible property

1. Funds on deposit and petty cash

(a) Facts and contentions

309. TPL claims IQD 202,903 for cash on deposit in an Iraqi bank as well as cash in its Iraqi branch office that was left behind when the office was vacated at the time of Iraq's invasion and occupation of Kuwait. TPL provided financial statements for its Baghdad branch office for the year ended 31 December 1990 and bank statements for the first six months of 1990 in support of this part of its claim.

(b) Iraq's response

310. Iraq states that Iraqi dinars on deposit in Iraqi banks were to be used for a claimant's expenses within Iraq and could not be exchanged into a foreign currency until all claims arising from the work

which with the claimant was involved had been settled, and that TPL was aware of these requirements. Iraq also states that a claimant may withdraw any funds remaining after claims relating to its work are settled. Iraq further states that TPL has not provided any evidence to support its claim for lost petty cash.

(c) Analysis and valuation

311. The Panel finds that TPL has provided insufficient evidence to demonstrate the circumstances and amount of this loss. The financial statements for the year ended 31 December 1990 show both the funds on deposit and petty cash as assets. Insofar as the funds on deposit are concerned, neither the financial statements nor the bank statements support the amount claimed. The Panel therefore recommends no award of compensation for the funds on deposit and petty cash.

2. Loss of furniture, furnishings and motor vehicles

(a) Facts and contentions

312. TPL claims USD 200,000 for the loss of furniture, furnishings and motor vehicles located at its branch office in Baghdad, which were purchased in United States dollars, Kuwaiti dinars, Iraqi dinars and Italian lire. TPL states that the property's value was USD 250,000 when it was acquired in the late 1980s and the claim amount reflects its depreciated value. TPL provided a list of items imported, which appears to have been updated following Iraq's invasion and occupation of Kuwait, some pro forma invoices and shipping documents, an extract from the balance sheet for the Iraqi branch office and a list of motor vehicles "surrendered" in 1992.

(b) Iraq's response

313. Iraq states that, since the items in question were imported without TPL having to pay custom duties, TPL has no right to use or dispose of them until all claims arising from projects with which it was involved have been settled. Iraq further states that the evidence provided by TPL indicates that it transferred the items to SCOP in settlement of its accounts from these projects and therefore TPL cannot now make a claim for their loss.

(c) Analysis and valuation

314. The Panel finds that TPL has provided insufficient evidence of its ownership of the furniture, furnishings and motor vehicles, the condition of these items, their value or that they were lost as a direct result of Iraq's invasion and occupation of Kuwait.

315. While TPL has provided a list of motor vehicles that were surrendered to Iraqi authorities, the cover letter refers to a list of furniture and furnishings that were also apparently surrendered. TPL has not adequately explained why it surrendered these items. It appears that these items were actually confiscated by Iraqi authorities after 2 March 1991. The "E3" Panel has concluded that the confiscation of assets by Iraq after 2 March 1991 was a wholly independent event and is therefore

outside the Commission's jurisdiction, a finding with which this Panel agrees.[54] The Panel therefore recommends no award of compensation for the lost furniture, furnishings and motor vehicles.

3. Recommendations - other tangible property

316. Based on the foregoing, the Panel recommends no award of compensation for losses related to other tangible property. A summary of the individual recommendations contained within this claim element appears in table 23 below.

Table 23. Recommendations - other tangible property

Claim element	Amended claim amount	Amount of compensation recommended
Funds on deposit and petty cash	IQD 202,903	Nil
Loss of furniture, furnishings and motor vehicles	USD 200,000	Nil
Total (USD)	852,421	Nil

D. Payment or relief to others

1. Costs related to personnel detained in Iraq

(a) Facts and contentions

317. Seventeen of TPL's employees who had been working on projects in Iraq and Kuwait on 2 August 1990 were detained by Iraqi forces and subsequently moved to Baghdad where they continued to be detained for different periods of time ranging from 12 September to 15 December 1990. TPL claims ITL 1,500,000,000 for salaries paid to the employees, as well as related costs, during their detention. In support of this part of its claim, TPL has provided a detailed spreadsheet analysing the cost of each employee, together with supporting evidence, including payroll records.

(b) Iraq's response

318. Iraq states that there is no evidence TPL's employees were detained and that they were in Iraq to carry out work on various projects with which TPL was involved, which they were prevented from completing by the trade embargo.

(c) Analysis and valuation

319. The Panel, as it has in previous reports, finds that the salaries paid to foreign staff working in Iraq and Kuwait, which were paid after productive work had ceased until their repatriation, are compensable.[55] Notwithstanding that TPL's employees were detained for various times, TPL claimed four months' costs for each employee. The Panel has therefore recalculated TPL's claim to reflect the number of days during which the employees were actually detained and a reasonable recovery period.

The Panel has made further deductions from the claim amount because there was insufficient evidence to support all of the costs claimed. The Panel therefore recommends an award of compensation in the amount of ITL 840,869,100 for costs related to personnel detained in Iraq.

2. War risk insurance

(a) Facts and contentions

320. TPL claims ITL 359,134,000 for life and permanent disability insurance coverage it purchased for employees who were working on projects in Iraq and Kuwait and detained as hostages in Iraq, and employees who were working on a project in Saudi Arabia. TPL's claim also includes amounts paid for the dependants of these employees who were with them in these countries. TPL provided lists of the various employees and dependants for whom coverage was purchased, the relevant insurance policies and proof of payment of the premiums in support of this part of its claim. The coverage was for varying periods from 2 August 1990 to 27 January 1991.

(b) Iraq's response

321. Iraq states that TPL's decision to acquire life and permanent disability insurance coverage for TPL's employees was not a direct result of its entry into Kuwait.

(c) Analysis and valuation

322. The Panel finds that the evidence provided by TPL demonstrates that the life and permanent disability insurance it acquired was additional to the ordinary coverage for its employees and their dependants. With respect to the insurance obtained on behalf of employees who were detained in Iraq, other panels have previously found costs such as these to be compensable in principle as a result of "hostage-taking or other illegal detention" within the meaning of paragraph 34 (e) of Governing Council decision 7 concerning claims of Governments and international organizations.[56] The Panel similarly concludes that the cost of such insurance coverage is compensable in principle within the meaning of paragraphs 21 and 22 of Governing Council decision 7 concerning claims by corporations and other entities, and that it was reasonable for TPL to obtain this coverage both for its employees and their dependants who were with them. The Panel further finds that TPL's decision to acquire coverage for employees and dependants in Saudi Arabia was reasonable having regard to where these individuals were located. The Panel accordingly recommends an award of compensation in the amount of ITL 359,134,000 for war risk insurance.

3. Hotel expenses and incidentals

(a) Facts and contentions

323. TPL claims IQD 147,000 for the cost of accommodation and food that it provided its employees and their dependants detained in Iraq as well as a per diem allowance it paid each employee during his detention. TPL has provided a list of expenses and a statement confirming the per diem allowance it paid in support of this part of its claim.

(b) Iraq's response

324. Iraq says the very nature of the claim demonstrates that these individuals were not being detained as hostages, and therefore the costs did not result from its entry into Kuwait.

(c) Analysis and valuation

325. The Panel considers that the costs of support provided to detained employees, such as accommodation and food, and costs incurred in facilitating communication between detained employees and members of their families, are compensable in principle.[57] The Panel finds, however, that TPL has not provided satisfactory evidence to support its claim because it has not adequately explained how these costs were arrived at in the absence of any evidence of the actual costs, nor has TPL provided a sufficient explanation of how the per diem allowance was calculated and paid to its employees who were detained in Iraq. The Panel therefore recommends no award of compensation for these costs.

4. Recommendations - payment or relief to others

326. Based on the foregoing, the Panel recommends an award of compensation for payment or relief to others in the amount of USD 1,035,110. A summary of the individual recommendations contained within this claim element appears in table 24 below.

Table 24. Recommendations - payment or relief to others

Claim element	Amended claim amount	Amount of compensation recommended
Costs related to personnel detained in Iraq	ITL 1,500,000,000	ITL 840,869,100
War risk insurance	ITL 359,134,000	ITL 359,134,000
Hotel expenses and incidentals	IQD 147,000	Nil
Total (USD)	2,076,338	1,053,836

E. Recommendations

327. The Panel's recommendations with respect to the claim of TPL are summarized in table 25 below.

Table 25. TPL's claim - recommended compensation

Claim element	Amended amount claimed	Amount of compensation recommended
Contract: IQD	IQD 201,740	Nil
- Prepaid rent	56,000	Nil
- Lube oil project - Unpaid retention monies	145,740	Nil
Contract: ITL	ITL 27,897,879,895	ITL 2,444,645,274
- Service charges on bank guarantees	99,321,392	Nil
- West Qurna project - Equipment and materials in the process of being manufactured - Storage and maintenance costs for balance of equipment and materials - Shut-down expenses	3,300,000,000 349,739,167 582,699,498	2,087,591,812 205,353,084 Nil
- C4 conversion project	100,000,000	59,637,075
- Central refinery project - Shut-down expenses	100,000,000	92,063,303
- Lube oil and Sfaya oil field projects	23,366,119,838	Nil
Contract: USD	USD 178,922,660	USD 4,663,559
- West Qurna project - Equipment and materials ready for delivery	5,629,953	3,392,435[a]
- Central refinery project - Work performed	2,195,000	1,271,124
- Lube oil project - Unpaid retention monies - Bad debt	4,535,225 156,912,669	Nil Nil
- Sfaya oil field project	9,649,813	Nil
Contract: KWD	KWD 108,553	Nil
- Pharmaceutical plant project	108,553	Nil
Other tangible property: IQD	IQD 202,903	Nil
- Funds on deposit and petty cash	202,903	Nil
Other tangible property: USD	USD 200,000	Nil
- Loss of furniture, furnishings and motor vehicles	200,000	Nil
Payment or relief to others: ITL	ITL 1,859,134,000	ITL 1,200,003,100
- Costs related to personnel detained in Iraq	1,500,000,000	840,869,100
- War risk insurance	359,134,000	359,134,000
Payment or relief to others: IQD	IQD 147,000	Nil
- Hotel expenses and incidentals	147,000	Nil
Total (USD)	206,940,135	7,832,730

[a] For convenience, the amount of compensation recommended for this claim element appears in United States dollars notwithstanding that the expenses were incurred in Italian lire and Deutsche Mark.

X. CLAIM OF GENERAL PETROLEUM & MINERALS ORGANISATION (PETROMIN) MAHD AD'DAHAB MINE

A. Facts and contentions

1. Introduction

328. In its category "E" claim form dated 27 October 1993, the claimant ("Petromin") described itself as "General Petroleum & Minerals Organisation (Petromin) Mahd ad'Dahab Mine". The Panel established that Petromin is an agency of the Saudi Arabian Government. At the time of filing its claim, Petromin operated a separate business unit, in the nature of a division, styled Mahd ad' Dahab mine ("the mining division"). The mining division acted as an independent legal entity, maintained its own separate management, was capable of suing and being sued in its own name and produced separate annual financial statements. In 1993 the Saudi Arabian Marketing and Refining Company ("SAMAREC") was established for the purpose of assuming control over all of Petromin's petroleum interests. Petromin continued to administer the mining division until 1997, whereupon all of the rights and assets of the mining division were transferred to a newly established company, "Saudi Arabian Mining Company", trading under the name Ma'aden ("Ma'aden"). In terms of Ma'aden's articles of association, all of Petromin's rights and assets in the mining division were transferred to Ma'aden in consideration for ordinary shares in the capital of Ma'aden. At all material times the Government of Saudi Arabia was the sole beneficial shareholder in both Petromin and Ma'aden.

329. The claim in question relates to rights and assets transferred by Petromin to Ma'aden in 1997 as described in paragraph 328 above. During the course of the Panel's investigations, the claimant was at all material times represented by officials employed by Ma'aden. Petromin continued to exist at the time of the Panel's investigations, but had divested itself of its interest in the subject matter of the claim. As a preliminary matter, the Panel finds that in 1997 Ma'aden acquired the rights to the claim filed by Petromin. Notwithstanding the foregoing, and for the sake of continuity, the claimant will be referred to in the remainder of this section of this report as "Petromin".

330. At the time of filing its claim, Petromin conducted business as a gold mine, deriving approximately 90 per cent of its revenue from the sale of gold and the remainder from the sale of associated metals, silver, zinc and copper mined at its sites in Saudi Arabia. Petromin's principal place of business is located in Riyadh, Saudi Arabia. Petromin maintains a branch office in Jeddah and various other premises throughout Saudi Arabia.

331. Petromin claims compensation in the amount of USD 263,725 under the categories of loss described in the category "E" claim form as "business transaction or course of dealing" and "other". Petromin subdivides its claim into the loss elements described in table 26 below.

Table 26. Petromin's claim
(United States dollars)

Claim element	Original amount claimed	
Business transaction or course of dealing		207,691
- Increased transportation and insurance costs	42,806	
- Opportunity losses	164,885	
Other		56,034
- Manpower and personnel costs	50,400	
- Communications	4,876	
- Insurance of imported purchased materials	758	
Total		263,725

2. Business transaction or course of dealing

332. At the time of filing its claim, Petromin operated a gold mine at Mahd ad'Dahab ("the mine"), approximately 150 kilometres north-east of Jeddah. The mine's annual yield of approximately 110,000 ounces of gold made the establishment of a gold refinery uneconomical. Petromin accordingly shipped the unrefined gold extracted from the mine in two forms - the first in the form of bullion containing gold, silver and associated base minerals to a specialist bullion refiner in London, and the second in the form of bulk flotation concentrate ("concentrate") containing a lesser purity of the minerals to concentrate refiners in Japan and Sweden. The concentrate was transported by ship in the form of 50-kilogram bags while the bullion was transported by air.

333. Petromin alleges that, as a direct result of Iraq's invasion and occupation of Kuwait, it incurred increased insurance and transportation charges of USD 42,806 in relation to the shipment of concentrate to Japan and Sweden in the period between 20 August 1990 and 22 April 1991.

334. Petromin alleges that, in the ordinary conduct of its business, it is compelled, in terms of its founding Royal decree, to sell all of its refined gold to the Saudi Arabian Monetary Authority ("SAMA") (i.e. the Saudi Arabian Central Bank). In terms of the contractual arrangements subsisting with its refiners at the time, Petromin would receive the refined gold from its bullion refiner within seven days of the initial despatch of the bullion from Saudi Arabia, and from its bulk concentrate refiners within 60 days of despatch of the concentrate. Petromin alleges that, upon receipt of the refined gold, it would place the gold in a safe at a commercial bank in Jeddah. Petromin would from time to time sell to SAMA varying quantities of gold. The price per ounce of gold sold to SAMA was calculated as 90 per cent of the ruling market price of gold, as determined on the relevant date of sale by reference to the "London P.M. fixing" of the gold price.

335. Petromin alleges that, as a result of general disruptions to existing transportation schedules and delays in arranging insurance and freight, four shipments of bullion to Petromin's London bullion refiner were delayed by an average of 27 days in the period between 14 January and 4 April 1991.

Similarly, two shipments of concentrate being despatched to Petromin's Swedish concentrate refiner were delayed during the period between 10 January and 11 February 1991 by an average of 22 days.

336. Petromin alleges that, but for the delays, it would have earned interest on the proceeds of the delayed shipments from its bankers at the rate of 8 per cent per annum for the duration of the delay. On this basis Petromin calculates that, as a result of the delays, it lost interest in the amount of USD 164,885.

3. Other

337. The amount of USD 56,034 claimed under this category of loss is separated by Petromin into manpower and personnel costs of USD 50,400, communication costs of USD 4,876 and additional insurance costs of USD 758 on imported materials.

338. In relation to additional manpower costs, Petromin alleges that 17 Filipino workers employed in various capacities at the mine who had been on home leave in December 1990 had not returned to work in January 1991. Petromin alleges that the reason for the failure of the employees to return was the unstable situation in the Middle East generally, caused by Iraq's invasion and occupation of Kuwait. As a result, Petromin instructed its recruitment agent in Manila to hire 17 replacements. The recruitment agent charged a placement fee of SAR 937.50 per replacement. Additionally, the recruitment agent was instructed to furnish each replacement with an airline ticket from Manila to Jeddah and a pocket money allowance of SAR 100 per employee. The recruitment agent procured the air tickets in accordance with his instructions at a cost of SAR 2,535 per employee. Petromin alleges that it paid the recruitment agent USD 16,196 for the fees and disbursements described in this paragraph.

339. Petromin alleges that 37 of its employees were delayed in returning to work from their vacation in December 1990. In general the employees in question had been on vacation in their home country, the Philippines. Petromin adopted a policy according to which half of the number of additional unscheduled days of vacation taken by each employee was subtracted from the employee's accrued leave entitlement and the remaining half was allocated to an "exceptional leave" provision. Where an employee had insufficient accrued leave days to discharge his half of the unscheduled vacation days, the remainder was borne by the employee in the form of unpaid leave. The ultimate consequence of the policy described above was that Petromin and its employees shared the cost of the unscheduled vacation days in equal proportions. Petromin claims compensation for its half share of the cost of the unscheduled vacation days based upon the number of days recorded in the "exceptional leave" provision valued at the prorated basic salary of each employee concerned. The aggregate cost claimed by Petromin is USD 12,352.

340. Petromin alleges that 33 employees on home leave in the Philippines in December 1990 could not return directly from Manila to Jeddah as a result of disruptions to airline schedules. The employees in question were re-routed via Singapore. The rerouting resulted in an additional cost to Petromin of USD 20,592 in regard to the airfares as well as USD 1,260 in respect of terminal fees of USD 12 and hotel accommodation at the rate of USD 30 per day for 30 of the returning employees.

341. Petromin alleges that it incurred costs of USD 3,543 as a result of permitting its expatriate employees each to make one three-minute telephone call to their families in their home countries during the time of Iraq’s invasion and occupation of Kuwait in order to reassure the employees’ family of the safety of the employee concerned.

342. Petromin alleges that it incurred additional costs to communicate with its recruitment agent in Manila in the amount of USD 1,333 in relation to the replacement of non-returning employees referred to in paragraph 338 above and the re-routing of returning employees referred to in paragraph 340 above.

343. Petromin alleges that it incurred additional insurance premium costs of USD 758 in relation to the importation of items of equipment required at its mine.

B. Iraq’s response

344. As a general proposition, Iraq states that the claim is unsupported by explanations and relevant evidence. Iraq alleges that the claimed losses (if actually incurred) are indirect and not in any way connected to Iraq’s entry into Kuwait. Iraq contends that Petromin earned additional profits due to increases in the prices of its gold and silver at the time. Iraq contends that the alleged losses should be set off against the increased profits.

345. Iraq disputes that the increased transport and shipping insurance charges were directly caused by the events in Iraq and Kuwait at the time, and contends that the increases could have been caused by a multitude of other factors.

346. Iraq states that the increase in freight and insurance charges for shipments abroad are based upon invoices dated between 22 October 1990 and 22 May 1991 (two months after the date of Iraq’s invasion of Kuwait and three months after the cease-fire, respectively). Iraq alleges that the period in question is indicative of the fact that the increased costs were not caused by its entry into Kuwait. Iraq points out that a portion of the increased charges is described by Petromin as “currency adjustment factor”. Iraq states that it is not responsible for the currency fluctuations in question and cannot be held liable for these losses. Iraq states that the increase in insurance premium costs were caused by the Allied Coalition Forces’ war efforts and are not compensable in accordance with Governing Council decision 19 (S/AC.26/Dec.19/1994).

347. Iraq further states that Petromin provided no information concerning the fluctuation in the price of gold and silver, or whether Petromin made additional profits due to the increase in the price of the metals. Iraq contends that the average price of gold in the second quarter of 1990 was USD 365 per ounce, while it was USD 382 per ounce, USD 379 per ounce and USD 370 per ounce for the following three consecutive quarters.

348. Iraq further states that Petromin has not properly explained the causes of the delay of the shipments and how these delays are alleged to have been caused by Iraq’s entry into Kuwait. Iraq also

alleges that the calculation of the opportunity losses has been performed by Petromin on the assumption of an interest rate of 8 per cent, which Iraq contends is unrealistic.

349. With respect to the replacement of personnel, Iraq alleges that Petromin has failed to explain the reason for the replacement of the personnel in question. Iraq states that certain of the replaced personnel appear to have departed from Petromin between November 1990 and January 1991 and that the departures may have been caused by the termination of the contracts of the employees in question, which would have occurred notwithstanding Iraq's entry into Kuwait.

350. With respect to the losses described as "exceptional leave for vacationers", "increase in air fare for returning employees, "cost of accommodation and terminal fees for returning employees" and "telephone/telex to Singapore for arrangement of flights", Iraq contends that the Panel has been unnecessarily burdened by the claimant with trivialities. Iraq also states that no need for the provision of exceptional leave existed, as the employees in question departed in December 1990 and returned of their own volition in February 1991, during the hostilities. Iraq states that the costs in question are unrelated to its entry into Kuwait and would in any event have been incurred in the ordinary course of business. Iraq states that the granting of exceptional leave may relate to Petromin's failure to make proper travel arrangements for its staff members.

351. With respect to the insurance of imported materials, Iraq states that Petromin has provided no explanation or evidence in support of this claim element, and contends that the cost is unrelated to its entry into Kuwait.

C. Analysis and valuation

1. Business transaction or course of dealing

352. With respect to the increased insurance and transportation charges, Petromin provided copies of the contracts regulating the refining of its concentrates by both the Swedish and the Japanese refiners that were operative at the time. Both contracts imposed upon Petromin the obligation to pay the costs of shipment and insurance in respect of the concentrates to their destination on a "Free Alongside" (FAS) basis. Petromin provided invoices and proof of payment of the increased costs, correspondence with the refiners and accounting records for the period prior to Iraq's invasion and occupation of Kuwait. Petromin proved that in the period between 2 August 1990 and 30 March 1991, its freight costs in respect of nine concentrate shipments from Jeddah to Sweden increased by USD 35,019. Of this amount, USD 5,279 had been incurred after 2 March 1991.

353. Petromin alleged that, for seven of the shipments to Sweden, the relevant insurance premiums had increased by USD 2,717. In relation to five shipments of concentrate from Jeddah to Osaka, Japan, Petromin claimed that it paid increased freight and insurance costs of USD 4,019. However, Petromin produced no evidence to support the historical cost of transporting and insuring its concentrates shipped to Japan, nor of the insurance premiums in respect of concentrates shipped to Sweden.

354. The Panel has previously recognized that increased insurance costs paid in respect of shipments of goods from Red Sea ports in Saudi Arabia would in principle be compensable, provided these costs were not related to increased production and had not been incurred after 2 March 1991.[58] The Panel finds that, in the present case, Petromin has demonstrated that the increased freight costs were imposed upon Petromin by the suppliers of transportation. Petromin was unable to avoid incurring the increased costs and would have had to terminate its ordinary business operations in order to do so.[59]

355. The Panel finds that Petromin has established that it paid the increased freight costs as a direct result of Iraq's invasion and occupation of Kuwait in the period from 2 August 1990 to 2 March 1991 in the amount of USD 29,740. The Panel recommends an award of compensation of this amount for increased freight costs.

356. With respect to the opportunity losses of USD 164,885, Petromin contends that its usual practice had been to retain a stockpile of refined gold with a local commercial bank in Jeddah. Petromin's stock records reflected that, during the second half of 1990, it maintained stocks of gold at the commercial bank in excess of 475 kilograms. Petromin paid a fee to the bank for the services and did not earn interest on the deposited gold.[60] Petromin alleges that the decision to sell its refined gold and the quantities to be sold to SAMA at any given time were matters entirely within its own discretion and that the decision to sell gold was generally taken at times when the market price of gold appeared to Petromin to be favourable. The Panel finds it significant that Petromin would not immediately sell its gold to SAMA but would do so pursuant to a commercial decision. Petromin did not allege or establish that the gold shipments which it contends were delayed would have been sold to SAMA immediately upon receipt. The Panel notes that the evidence suggests that the gold in question would likely have been added to Petromin's existing stockpile. In the period between the date upon which the gold was received and placed in the bank safe and the date upon which it was ultimately sold to SAMA, Petromin would have earned no interest. The evidence shows that, at all material times, Petromin maintained excess stocks of gold from which it could draw in order to make sales to SAMA. At no time was Petromin's stockpile of gold depleted. The stock records reflect that Petromin continued to increase the size of its gold stockpile after Iraq's invasion and occupation of Kuwait. In the circumstances the Panel finds that Petromin has failed to show that it suffered the loss alleged. The Panel therefore recommends no award of compensation for business transaction or course of dealing.

2. Other

357. With respect to the cost of replacing the 17 non-returning employees, Petromin explained that the SAR 100 per employee would in any event have been paid to the original employees had they in fact returned. On this basis the Panel finds that the pocket money allowance was not an additional cost incurred as a direct result of Iraq's invasion and occupation of Kuwait. Additionally, the Panel finds that Petromin failed to provide proof of payment for the recruitment agent's placement fees or the cost of the air tickets. For these reasons the Panel recommends no award of compensation for the costs of recruiting replacement employees.

358. In regard to the cost of the exceptional leave provision, Petromin did not provide records of the actual vacation schedule, the revised vacation schedule or its payroll records for 1990 and 1991, notwithstanding the Panel's requests. The Panel accordingly recommends no award of compensation for exceptional leave.

359. The Panel finds that Petromin failed to provide sufficient supporting evidence in regard to the rerouting costs. The Panel accordingly recommends no compensation for this claim element. Petromin substantiated the terminal fees and hotel accommodation for 30 of the returning employees by providing a list of the employees, the invoice and proof of payment of the hotel accommodation and proof of payment (in the form of used ticket stubs) for the additional terminal fees. The Panel therefore recommends an award of compensation in the amount of USD 1,260 for terminal fees and hotel accommodation.

360. The Panel finds that Petromin provided no substantiating evidence in regard to the cost of the three-minute overseas telephone calls, the additional communication expenses and the increased insurance premiums. The Panel therefore recommends no award of compensation for these claim elements.

D. Extraordinary profits

361. The Panel investigated whether Petromin had increased its production or generated extraordinary profits as a direct result of Iraq's invasion and occupation of Kuwait. Petromin's production and sales records and relevant annual financial reports reflected no extraordinary deviation from the historical trend for both production and profits. The Panel finds that Petromin earned no extraordinary profits as a direct result of Iraq's invasion and occupation of Kuwait.

E. Recommendations

362. The Panel's recommendations with respect to the claim of Petromin are summarized in table 27 below.

Table 27. Petromin's claim – recommended compensation
(United States dollars)

Claim element	Original amount claimed	Amount of compensation recommended
Business transaction or course of dealing	207,691	29,740
- Increased transportation and insurance costs	42,806	29,740
- Opportunity losses	164,885	Nil
Other	56,034	1,260
- Manpower and personnel costs	50,400	1,260
- Communications	4,876	Nil
- Insurance of imported purchased materials	758	Nil
Total	263,725	31,000

XI. CLAIM OF PETROMIN LUBRICATING OIL COMPANY

A. Facts and contentions

1. Introduction

363. Petromin Lubricating Oil Company ("Petrolube") was incorporated in Saudi Arabia as a joint stock company in 1969. At all material times, 71 per cent of the shares of Petrolube were held by Petromin and the remaining 29 per cent were held by Mobil Investments S.A. In 1996 Petromin's shares in Petrolube were transferred to Saudi Aramco.

364. Petrolube's principal business consists of the blending and marketing of oil lubricants for the domestic and export markets. Petrolube owns and operates three blending plants in Jeddah, Jubail and Riyadh, Saudi Arabia, at which it produces lubricants for sale under its own "Petromin Oils" brand name, as well as for most of the major international oil companies under their respective brands.

365. Petrolube claims compensation in the amount of SAR 40,830,448[61] under the loss category described as "other" in the category "E" claim form, for losses that it asserts were directly caused by Iraq's invasion and occupation of Kuwait. Petrolube subdivided its claim into the loss elements described in table 28 below.

Table 28. Petrolube's claim
(Saudi Arabian riyals)

Claim element	Original amount claimed
Loss of profits	9,537,248
Additional salary costs	2,819,657
Losses related to maintaining excess stocks	1,614,514
Increase in base oil prices	19,744,946
Increase in additive prices	5,881,341
Increased insurance costs	71,422
Increased transportation costs	994,212
Gas masks	167,100
Total	40,830,440

2. Loss of profits

366. Petrolube alleges that it suffered a shortfall in export sales of 85,154 barrels of lubricating oil between 1 July 1990 and 31 December 1991. Petrolube alleges that its budget for the period in question contemplated that it would sell 173,000 barrels of differing grades of lubricating oils on the export market. Petrolube states that, out of the total of 173,000 barrels mentioned above, 85,154 barrels would have been exported to Jordan, Yemen, Sudan, Mauritania and Kuwait ("the affected States"). Petrolube contends that, as a direct result of Iraq's invasion and occupation of Kuwait, it

decided that henceforth no sales of lubricating oil would be permitted to the affected States. Petrolube's representative alleged that this restriction, which, save in the case of Kuwait, was self imposed, had resulted from the political stance adopted by the affected States. Petrolube alleges that it sustained an average loss of profits per barrel of SAR 112, calculated by subtracting its variable and freight costs from the expected sale price per barrel for the 85,154 barrels it expected to export to these countries.

3. Additional salary costs

367. Petrolube alleges that it paid its employees an allowance of an additional 15 per cent of their basic salaries from 1 January to 30 April 1991, and an additional 10 per cent from 1 May to 31 August 1991. Petrolube contended that the payment was made in order to combat a rising trend of employee attrition. Additionally, certain of Petrolube's staff were deployed in Riyadh and Jubail and numerous staff were required to travel between all three of Petrolube's sites.

4. Losses related to maintaining excess stocks

368. Petrolube contends that it was obliged to maintain excess stocks of lubricants to meet potential emergency requirements during 1991. Petrolube alleges that it stored excess stocks to the value of SAR 32,290,270 in warehouse facilities in Jubail and Jeddah. Stocks having a value of SAR 197,147 and SAR 32,093,123 were stored respectively at Jubail and Jeddah. Petrolube alleges that, as a result of having allocated capital resources to the production of the excess stocks, it was deprived of the opportunity of earning 5 per cent interest on the money, as it would otherwise have done. Petrolube accordingly claims compensation for this interest loss in the amount of SAR 1,614,514.

5. Increase in base oil prices

369. Petrolube generally purchased all of the four different grades of base oils required in the production of its lubricating oils from its main supplier, Luberef (whose claim is dealt with from paragraph 406 below). Petrolube alleges that its relationship with Luberef was an arms' length commercial arrangement, regulated by a long-term supply contract. The contract in question provided that Petrolube would purchase base oils from Luberef at a price to be determined according to an established formula. The formula took into account the daily base oil market prices published in a standard industry pricing report known as "ICIS-LOR".

370. Petrolube alleges that Luberef increased the price of base oils on 1 September and again on 15 October 1990. Petrolube states that these increases were extraordinary as, historically, Luberef had only increased its prices once or twice in any given 12-month period. Petrolube states that the two price increases in question were a direct result of Iraq's invasion and occupation of Kuwait. Petrolube calculates that, in the period from 1 September 1990 to 31 January 1991, it paid Luberef an additional SAR 19,744,946 in regard to a total of 75 purchases of base oil.

6. Increase in additive prices

371. The lubricating oils produced by Petrolube are created by blending the base oils described in paragraph 369 above with chemical additives such as detergents, dispersants and anti-friction agents. At the time of Iraq's invasion and occupation of Kuwait, Petrolube procured its additives from two suppliers in Saudi Arabia.

372. Petrolube alleges that the two additive suppliers increased the price of their products by the aggregate amount of SAR 5,881,341 during the period from October 1990 to November 1991. Petrolube's calculations are based upon a comparison of the additive costs paid during this period with the additive costs paid during the one-year period prior to Iraq's invasion and occupation of Kuwait.

7. Increased insurance costs

373. Petrolube alleges that it paid an additional SAR 71,422 in respect of increased war risk insurance during the period from 6 August 1990 to 10 July 1991. The increased war risk insurance is alleged to have been imposed by Luberef's insurers in regard to the export of shipments of finished lubricating oil to overseas destinations.

8. Increased transportation costs

374. Petrolube alleges that it paid increased transportation charges of SAR 994,212 to four local road-transportation firms. The transport services in question were supplied to Petrolube for the purpose of conveying finished products to the point of sale or use within Saudi Arabia. Petrolube alleges that the cost of delivering products to zones within Saudi Arabia that were close to the areas of military operations increased as a result of surcharges ranging from 10 to 85 per cent imposed by the transportation companies. Petrolube alleges that the surcharges were imposed by the transportation companies on the basis that the drivers of the vehicles concerned were paid additional remuneration, and that journeys to these areas had become more difficult and time consuming due to the military build-up in the Eastern Province of Saudi Arabia.

9. Gas masks

375. Petrolube alleges that it paid SAR 167,100 to several local suppliers for the acquisition of 580 gas masks during February 1991. Petrolube alleges that the gas masks were distributed to its staff at its Jubail plant and Dammam sales office. Petrolube subsequently reduced this claim amount by SAR 40,000 as a result of the discovery that it had received a payment of this amount in partial reimbursement of the cost from the Saudi Arabian Civil Defence Authority.

B. Iraq's response

376. As a general proposition, Iraq states that the claim is unsupported by explanations and relevant evidence. Iraq alleges that the claimed losses (if actually incurred) are indirect and not in any way connected to Iraq's entry into Kuwait. Iraq contends that Petrolube earned additional profits due to

increases in the sale prices of its products and its additional production at the time. Iraq contends that the alleged losses should be set off against the increased profits.

377. With respect to the loss of profits claim, Iraq states that Petrolube has provided insufficient information about the duration of the interruption of exports and the types and quantities of lubricants involved. Iraq states that it is difficult to respond to the allegations in the claim in the absence of the relevant information and evidence. Iraq suggests that Petrolube supplied the products destined for export to the Allied Coalition Forces instead, and that the losses are not compensable pursuant to Governing Council decision 19.

378. With respect to the additional salary costs, Iraq contends that the amounts were paid by Petrolube to its employees in order to increase production and earn additional profits.

379. Iraq states that the claim for the additional costs of storing excess stock is not adequately explained or substantiated and appears to be a military cost.

380. With respect to the increase in base oil prices, Iraq states that all of Petrolube's base oils were acquired from Luberef. Iraq states that Luberef increased its base oil prices due to higher handling charges. Iraq alleges that the first price increase took place on 26 June 1990, over a month prior to Iraq's entry into Kuwait, and that all the price increases were unrelated to this event.

381. With respect to the increase in additive prices, Iraq states that the price sensitivity of the lubricant market is of such a nature that all increases in additive prices are directly passed on to the consumer of the product. Iraq alleges that, in this instance, Petrolube would similarly have passed on the additional cost to its customers and may have earned additional profits as a result.

382. With respect to the increased insurance costs, Iraq states that the evidence and explanations filed in support of this claim element are inadequate.

383. With respect to the additional transportation costs, Iraq alleges that the invoices provided by Petrolube make it clear that the costs are of a military nature as the deliveries in question were made to the Allied Coalition Forces.

384. Iraq alleges that the gas masks purchased by Petrolube were unnecessary in the circumstances.

C. Analysis and valuation

1. Loss of profits

385. The loss of profits was divided by Petrolube into two separate reporting periods: The first from 1 July to 31 December 1990 ("the first period") and the second from 1 January to 31 December 1991 ("the second period").

386. Petrolube claims that, during the first period, it expected to sell 73,000 barrels of lubricants to the affected States but, due to Iraq's invasion and occupation of Kuwait, only sold 18,676. Petrolube

alleges that it would have earned profits of SAR 82 per barrel on the rounded shortfall in sales of 54,000 barrels. The Panel confirmed the actual sales of 18,676 barrels and the anticipated profits of SAR 82 per barrel by reference to Petrolube's management accounts for 1990.

387. In regard to the second period, Petrolube alleges that, but for Iraq's invasion and occupation of Kuwait, it would have sold 100,000 barrels of lubricants on the export market, but was only able to sell 36,874. Petrolube contends that, of the total shortfall of 63,126 barrels in the second period, 31,154 barrels were not sold as a result of the decision not to export to the affected States. Petrolube alleges that it would have earned profits of SAR 164 per barrel on the shortfall of 31,154 barrels in the second period. Based on its examination of a summary of Petrolube's export sales in the second period, the Panel established that Petrolube's actual sales to the affected States were 11,289 barrels and that the projected sales to the affected States referred to in the management accounts were 50,187 barrels. The Panel notes that the evidence suggests that Petrolube actually suffered a shortfall of 38,898 barrels. The Panel also notes that the figures reflected in the summary of export sales were confirmed by information extracted from Petrolube's accounting system during the technical inspection mission described in paragraph 9 above. Based on the information provided, the Panel finds that the claimed shortfall of 31,154 barrels was reasonably stated and was probably less than the actual shortfall for the second period.

388. The Panel confirmed the anticipated profits of SAR 164 per barrel by reference to Petrolube's 1991 management accounts and the trial balance for 1991 in regard to the variable cost portion of the calculation.

389. The Panel finds that Petrolube's decision to terminate its exports to all of the affected States, except Kuwait, was the direct cause of its loss. This decision was independently taken by Petrolube and was not a direct result of Iraq's invasion and occupation of Kuwait. The loss of profits that would have resulted from sales to Kuwait, was directly caused by Iraq's invasion and occupation of Kuwait. The Panel notes however that, although Petrolube's export sales to Kuwait were reduced during the claim period, the volume of domestic sales increased at least by a corresponding amount. The Panel also notes that the domestic sales price during the claim periods was higher than the export sales price so that Petrolube did not suffer a loss as a result of the lost sales to Kuwait. The Panel accordingly recommends no award of compensation for loss of profits.

2. Additional salary costs

390. Petrolube provided a copy of a signed resolution of its board of directors dated 26 April 1991 confirming that the temporary monthly allowance of 15 per cent would be reduced to 10 per cent with effect from 1 May 1991 and cease on 31 August 1991. The resolution makes it clear that the temporary monthly allowance had been previously authorized by the Saudi Arabian Minister of Petroleum and Mineral Resources. The Panel finds that Petrolube has established that the additional salary costs were necessarily incurred in order to counteract a rising trend of employee attrition, directly caused by Iraq's invasion and occupation of Kuwait.[62]

391. During the course of the technical inspection mission, referred to more fully in paragraph 9 above, Petrolube's representatives advised that the payroll records relevant to the payment of the temporary monthly allowance had been destroyed. However, a separately maintained account in the general ledger, entitled "remote allowance" reflected that Petrolube had separately recorded the cost of the temporary monthly allowance in financial year 1991/1992 to be SAR 3,531,809, an amount exceeding the claimed amount of SAR 2,819,657. Additionally, a sample of an individual payslip obtained from the personal records of one senior member of Petrolube's staff indicated that the payments had been made as alleged. Petrolube also provided notifications which it had issued to its staff, advising of the payment of the temporary monthly allowance, as well as a summary of the costs separated between Petrolube's three sites at Jeddah, Jubail and Riyadh.

392. Petrolube substantiated payment to its staff of the temporary monthly allowances, in the aggregate amount of SAR 1,796,018.

393. As it has previously held, the Panel finds that costs of this nature incurred after 2 March 1991 are not compensable. The Panel finds that SAR 1,239,831 of the substantiated temporary monthly allowance was incurred after 2 March 1991. Taking into account this adjustment, the Panel recommends an award of compensation in the amount of SAR 556,187 for loss of profits.

3. Losses related to maintaining excess stocks

394. Petrolube was unable to provide detailed stock records in support of this claim element. Petrolube provided quarterly stock records for the period from 31 December 1989 to 31 December 1991. These records demonstrated generally an increase in stock holdings after 2 August 1990, but did not, in the Panel's view, show that the increase was a direct result of Iraq's invasion and occupation of Kuwait. For these reasons the Panel finds that Petrolube has failed to provide sufficient evidence in support of the alleged losses, and therefore recommends no award of compensation for losses related to maintaining excess stocks.

4. Increase in base oil prices

395. Petrolube provided copies of telexes from Luberef indicating that the base oil prices had been increased with effect from 1 September 1990 and 15 October 1990. Petrolube also provided detailed calculations of the increased prices comparisons with historical prices, copies of invoices and statements from Luberef together with proof of payment of the amounts claimed.

396. Petrolube also provided copies of letters to its customers, indicating that its own prices of finished lubricating oils had been increased as a direct result of the increased prices of both base oil and additives. The Panel finds, based upon these records, that Petrolube passed on the increased cost of base oils to its own customers, and has accordingly not suffered a compensable loss. The Panel therefore recommends no award of compensation for increase in base oil prices.

5. Increase in additive prices

397. Petrolube provided copies of the contracts with its additive suppliers, effective at the time of Iraq's invasion and occupation of Kuwait, copies of invoices, delivery notes and proof of payment. Additionally Petrolube demonstrated, by reference to pre-invasion invoices and schedules of purchases, that the additive prices had increased as alleged.

398. The Panel has established, however, that Petrolube passed on all of the increased base oil and additive prices to its customers, as mentioned in paragraph 396 above. For this reason the Panel finds that Petrolube has not demonstrated that it suffered a compensable loss. The Panel therefore recommends no award of compensation for increase in additive prices.

6. Increased insurance costs

399. Petrolube provided a summary of insurance costs for the period 6 August 1990 to 10 July 1991 and two sample invoices. Petrolube did not provide the Panel with any additional invoices or proof of payment, notwithstanding requests that these documents be made available. The Panel finds that Petrolube has provided insufficient evidence to substantiate this claim. The Panel accordingly recommends no award of compensation for increased insurance costs.

7. Increased transportation costs

400. Petrolube provided three internal memoranda explaining the reasons for the increased transportation costs to be associated with transportation to areas close to zones of military operations. A further internal memorandum dated 16 January 1991 reflected that premiums of between 10 and 85 per cent would be paid to three separate local road transportation firms. The bulk of these premiums were associated with transportation to the military forces stationed in the Eastern Province of Saudi Arabia.

401. The claimant provided invoices from the transportation firms but did not provide the relevant proof of payment in respect of these costs. As described in paragraph 396 above, the Panel established that Petrolube passed on its increased costs to its customers and, in particular, the internal management accounts for the 1991 financial year demonstrate that Petrolube passed on these increased transportation costs to its customers.

402. For these reasons the Panel recommends no award of compensation for increased transportation costs.

8. Gas masks

403. Petrolube provided supplier invoices and proof of payment for the acquisition of the gas masks in the amount of SAR 127,050. Petrolube demonstrated that the gas masks in question had no residual value and had been written off entirely in its accounts. The Panel finds that these costs were incurred by Petrolube as a direct result of Iraq's invasion and occupation of Kuwait, and recommends an award of compensation in the amount of SAR 127,050 for gas masks.

D. Extraordinary profits

404. The Panel has previously held that extraordinary profits earned by claimants as a result of increases in crude oil production and higher crude oil prices were to be set off against claimed losses (the Seventh “E1” Report, Part Two, at paragraph 149, and the “Report and recommendations made by the Panel of Commissioners concerning the sixth instalment of ‘E1’ claims”, (S/AC.26/2001/18), (the “Sixth ‘E1’ Report”), at paragraphs 215 to 217). In the case of Petrolube, these considerations are not applicable. Unlike crude oil producers, Petrolube is not in the business of extracting and selling crude oil. Rather, as a consumer of base oils, it did not benefit from either higher crude oil prices or the opportunity to exploit changes in the crude oil market caused by Iraq's invasion and occupation of Kuwait. In its examination of Petrolube’s financial and production records, the Panel found that Petrolube earned increased operating profits in the financial years ended 31 December 1990 and 31 December 1991. The Panel finds, however, that these profits were not related to an increase in production as a direct result of Iraq’s invasion and occupation of Kuwait; that the increased profits were attributable to a number of factors, including the increase in market prices of Petrolube’s products; and that these factors resulted from market conditions prevailing during that period. Therefore, the Panel finds that Petrolube did not earn extraordinary profits as a direct result of Iraq’s invasion and occupation of Kuwait and that no set-off is required.

E. Recommendations

405. The Panel’s recommendations with respect to the claim of Petrolube are summarized in table 29 below.

Table 29. Petrolube claim – recommended compensation
(Saudi Arabian riyals)

Claim element	Original amount claimed	Amount of compensation recommended
Loss of profits	9,537,248	Nil
Additional salary costs	2,819,657	556,187
Losses related to maintaining excess stocks	1,614,514	Nil
Increase in base oil prices	19,744,946	Nil
Increase in additive prices	5,881,341	Nil
Increased insurance costs	71,422	Nil
Increased transportation costs	994,212	Nil
Gas masks	167,100	127,050
Total	40,830,440	683,237

XII. CLAIM OF PETROMIN LUBRICATING OIL REFINING COMPANY

A. Facts and contentions

1. Introduction

406. Petromin Lubricating Oil Refining Company ("Luberef") was incorporated in Saudi Arabia as a limited liability company on 28 August 1976. At all material times, 70 per cent of Luberef's shares were held by Petromin, and 30 per cent were held by Mobil Petroleum Company Inc., a corporation organized and existing under the laws of the state of Delaware, United States of America. Petromin's shares in Luberef were transferred to Saudi Aramco in 1998.

407. Luberef conducts business as a refiner of lubricating oils. At the time of Iraq's invasion and occupation of Kuwait, Luberef owned and operated a single lubricating oil refinery in Jeddah.

408. Luberef claims compensation in the amount of SAR 8,555,257[63] under the categories of loss described on its category "E" claim form as "contract" and "other". Luberef further divided its claim into the claim elements described in table 30 below.

Table 30. Luberef's claim
(Saudi Arabian riyals)

Claim element	Original amount claimed
Contract	1,400,000
Other	7,155,257
- Increased insurance premiums	53,831
- Daily food expenditure	37,064
- Overtime payment	3,863,129
- Contract workers cash compensation	63,539
- War risk allowance to employees	2,670,733
- Contract workers overtime compensation	466,961
Total	8,555,257

2. Contract

409. Luberef alleges that in approximately late 1988 it had scheduled a major turnaround for its refinery to take place in April 1991. Luberef states that it schedules such turnarounds at roughly three-year intervals, during which time all production operations at the refinery are shut down. On 5 March 1990 Luberef entered into a contract with a Japanese construction firm ("the constructor") pursuant to which, among other things, even short chimney stacks ("short stacks") would be replaced by two tall chimney stacks ("tall stacks").

410. The constructor was required to connect the tall stacks to the refinery plant so that the tall stacks could replace the short stacks. The tie-in could not be performed at a time when the refinery was operational. For this reason, Luberef had scheduled its turnaround and the tie-in to take place simultaneously, in order to take advantage of an otherwise unavoidable shutdown of refinery operation. The date for the commencement of the tie-in had been contractually agreed as 27 April 1991. The constructor was required to complete the tie-in within 28 days of 27 April 1991.

411. In its statement of claim, Luberef indicates that it seeks compensation in the amount of SAR 1,400,000 that it paid to the constructor for its increased costs of performance caused by the delay in commencement of work on the tie-in.

412. Luberef states that the turnaround was postponed several times as a result of Iraq's invasion and occupation of Kuwait. The final postponement, in respect of which Luberef paid the constructor the compensation referred to in paragraph 411 above was the postponement of the turnaround from June to 28 September 1991.

413. Luberef contends that the delay in the refinery turnaround was a direct result of Iraq's invasion and occupation of Kuwait, that this had in turn led to the delay of the tie-in and that, as a result, it was contractually obliged to pay compensation to the constructor.

3. Other

(a) Increased insurance premiums

414. Although Luberef generally supplied base oils to the domestic market which it had itself refined from crude oil, from time to time higher demand made it necessary for Luberef to import refined base oils from abroad. Between 16 October and 23 December 1990 Luberef imported six consignments of refined base oil. Luberef alleges that the cost of war risk insurance in respect of the shipments exceeded the historical average by SAR 53,831. This additional cost resulted from the relevant insurance companies increasing the rate of war risk insurance from 0.0275 per cent to 0.0625 per cent of the value of the shipment in five of the cases and from zero to 0.035 per cent in one case.

(b) Daily food expenditure

415. Luberef alleges that in January 1991 it implemented an emergency plan according to which it rearranged its ordinary daily shift pattern from four shifts of eight hours (during which one shift would always be resting) to two shifts of 12 hours. As a result, employees were required to be present at its refinery for longer periods of time. Luberef provided free meals to the employees in respect of those meals that they would ordinarily have consumed at their homes. Luberef contends that the cost of providing these meals was SAR 37,064 during January and February 1991.

(c) Overtime payment

416. Luberef alleges that, after implementing the emergency plan described in paragraph 415 above, its machinery operators, maintenance, administrative and technical staff were required to remain in

attendance at the refinery in excess of their ordinary eight-hour workdays. The excess hours spent at work by each employee were compensated in the form of overtime payments, calculated at the rate of 150 per cent of the employee's ordinary hourly rate of remuneration. Luberef's claim in regard to this claim element was calculated by aggregating the monthly overtime payments from August 1990 to 15 September 1991. The total overtime payments in this period amounted to SAR 3,863,129. Luberef alleges that, in the ordinary course of its business, it did not typically require its employees to work overtime and that its normal overtime cost was zero. Luberef accordingly claims compensation for the entire overtime cost during the period from August 1990 to 15 September 1991.

(d) Contract workers' cash compensation

417. Luberef explained that, in the ordinary course of its business, it employs contract workers. These workers are not directly employed by Luberef, but are employed by an employment contractor, who is under a contractual obligation to make specialized labour available to Luberef on an as-needed basis. The employees are typically skilled in trades or professions not directly related to Luberef's core refinery operations. They generally fall into categories such as maintenance workers and bookkeeping staff. The employment contractor was responsible for placing the workers at Luberef's disposal. The workers recorded their time spent at Luberef on a daily time sheet. Luberef paid the contractor an agreed hourly rate for each worker, inclusive of a commission. The contractor in turn paid the workers. Luberef alleged that it had always been company policy to pass on to the contract workers any extraordinary benefit received by its own employees. Luberef had implemented the 15 per cent additional salary payment, as described in paragraph 418 below for its own employees. Luberef accordingly decided to pay an equivalent benefit to the contract workers, although in this case the percentage increment was 7.5 per cent as opposed to 15 per cent. Furthermore, the additional benefit was not retroactive, as it was for Luberef's employees (see paragraph 418 below).

(e) War risk allowance to employees

418. Luberef paid its employees an additional 15 per cent of their basic salaries from 10 October 1990 to February 1991. The additional payment was reduced from 15 per cent to 10 per cent on 1 March 1991 and terminated on 31 August 1991. Luberef alleged that the payment was made as a direct result of Iraq's invasion and occupation of Kuwait. The decision to implement the additional payment appears to have been motivated by a directive from the Saudi Arabian Minister of Petroleum and Mineral Resources and by the adoption of the same measure by other employers in the Jeddah area.

(f) Contract workers' overtime compensation

419. Luberef alleges that, just as its own employees were required to work in excess of their normal working hours, so too were the contract workers. Luberef alleges that it paid the contract workers SAR 466,961 for overtime between 1 August 1990 and 15 September 1991, calculated at the rate of 150 per cent of each employee's ordinary hourly rate of remuneration.

B. Iraq’s response

420. As a general proposition, Iraq alleges that the claimed losses (if actually incurred) are indirect and not in any way connected to Iraq’s entry into Kuwait. Iraq contends that Luberef earned additional profits due to increased production and the increase in the selling prices of its products. Iraq contends that the alleged losses should be set off against the increased profits.

421. Iraq alleges that no explanations and evidence of the alleged losses have been provided.

422. With respect to the contract loss claim, Iraq points out that the only substantiating evidence of the loss is a copy of the minutes of a meeting between Luberef and the constructor indicating that a settlement between the two had been reached. Iraq contends that the turnaround was scheduled for commencement in June 1991, but that the constructor postponed it with no explanation until 28 September 1991. Iraq contends further that the alleged delay was unrelated to its entry into Kuwait and was more likely related to higher demand for refined products and the associated increase in operating capacity.

423. With respect to the increase in insurance charges, Iraq points out that the invoices relied upon by Luberef span the period from 16 October 1990 to 18 May 1991, two months of which fell after the end of military operations in the area. Iraq also contends that Luberef’s geographical location is far removed from Kuwait and that the increased insurance payments are unwarranted for this reason.

424. With respect to the costs of daily food expenditure and overtime payment to employees, Iraq alleges that Luberef describes the employees concerned as having been “garrisoned”. This, Iraq contends, makes it clear that the expenses are related to war efforts or military operations, which are not compensable in terms of Governing Council decision 19.

425. Iraq alleges that many of the recipients of the overtime payments were employed in administrative, financial accounting and maintenance capacities. Iraq alleges that the payment of overtime allowances to these employees was unwarranted as the work in question was of a routine nature.

426. Iraq states that Luberef has provided insufficient evidence in support of the claim for contract workers’ cash compensation and alleges that the payment of what appears to be a 7.5 per cent war premium to contractors is indicative of the fact that Luberef’s operations were running normally and that additional profits were earned by Luberef.

427. With respect to the war risk allowance paid to employees, Iraq alleges that Luberef paid its staff members an additional 15 per cent of their basic salaries from October 1990 until the end of February 1991 and a 10 per cent increment from March 1991 until the end of August 1991. Iraq states that Luberef has provided insufficient evidence in support of this claim element, and alleges that the payments were in any event made as incentives to the employees for the purpose of increasing Luberef’s production.

428. With respect to the payment of overtime for contract workers, Iraq states out that the payments were made to contactors for amounts arising from the hiring of workers in the nature of typists, store keepers, secretaries, accounts clerks, welders, fabricators, painters, electricians, and gardeners. Iraq contends that the inclusion of a large volume of supporting invoices to support claims for relatively modest amounts is a deliberate waste of time and resources.

C. Analysis and valuation

1. Contract

429. Luberef contends that all of its contemporaneous records were destroyed in a flood in 1999. Accordingly no detailed management reports of the decision to postpone the turnaround or the factors motivating this decision were available. Luberef was also not able to provide a detailed analysis of how it calculated the claim amount of SAR 1,400,000 and in respect of what specific costs this amount was paid. Notwithstanding a request by the Panel, Luberef could not point to any specific provision in the contract in terms of which it would have been obliged to compensate the constructor. Furthermore, Luberef was not able to provide proof that it had paid the amount to the constructor. In the absence of this supporting evidence, the Panel finds that Luberef has not adequately explained or substantiated its claim. The Panel therefore recommends no award of compensation for contract.

2. Other

(a) Increased insurance premiums

430. Luberef provided insurance certificates with regard to all six shipments and one pre-invasion insurance certificate dated 28 July 1990 reflecting the pre-invasion rate of war risk insurance to be 0.0275 per cent of the value of the cargo. Luberef has, notwithstanding the Panel's requests, not provided proof of payment of the additional premiums or additional evidence of the usual rate paid prior to Iraq's invasion and occupation of Kuwait. Luberef alleges that these documents were destroyed in the flood mentioned in paragraph 429 above. Notwithstanding the Panel's request that Luberef submit alternative proof of payment in the form of confirmation from the insurers concerned, no such evidence was provided. As a result of Luberef's inability to substantiate the claimed amount, the Panel recommends no award of compensation for increased insurance premiums.

(b) Daily food expenditure

431. Luberef provided a copy of the emergency plan as well as four petty cash payment vouchers supported by a typed list in the form of an invoice reflecting items of food purchased by Luberef. The petty cash vouchers were approved for payment by Luberef's general manager. All of the costs were incurred in January and February 1991. Based upon the explanations provided by Luberef, the Panel finds that Luberef implemented the emergency plan in order to ensure continuous operations at its refinery and to remain prepared for potential emergencies. The Panel finds that the provision of food to its employees by Luberef was a reasonable component of the emergency plan and was caused directly by Iraq's invasion and occupation of Kuwait. The Panel finds that Luberef has substantiated

this portion of its claim. The Panel accordingly recommends an award of compensation in the amount of SAR 37,064 for daily food expenditure.

(c) Overtime payment

432. Luberef provided a monthly summary of its overtime costs from 2 August 1990 to 15 September 1991, and a payroll summary of overtime payments for the same period.

433. Notwithstanding the Panel's specific request, Luberef did not provide evidence to support the assertion that its normal overtime costs prior to August 1990 had been zero. The Panel finds that Luberef has provided insufficient evidence to substantiate the claim and accordingly recommends no award of compensation for overtime payment.

(d) Contract workers' cash compensation

434. Luberef provided two payment order numbers with manuscript schedules indicating how the claimed amount was calculated. Additionally, Luberef provided a copy of its agreement with the employment contractor. Luberef did not, however, provide proof of payment of the claimed amounts. As a result of Luberef's inability to substantiate the claimed amount, the Panel recommends no award of compensation for contract workers' cash compensation.

(e) War risk allowance to employees

435. In relation to the 15 per cent allowance paid in respect of the period October 1990 to 28 February 1991, Luberef provided a "Master Employee list" for each department of its business, reflecting the particulars of each individual employee. Additionally Luberef provided hand-written schedules reflecting adjustments to the allowance in the case of absentee employees. Luberef substantiated the 10 per cent allowance paid in respect of the period from 1 March to 15 August 1991 by providing monthly payroll summary printouts. The totality of the evidence substantiates Luberef's allegation that the payments were made. As it has previously recognized,[64] the Panel finds that costs of this nature are not compensable in respect of the period after 2 March 1991. The Panel therefore recommends an award of compensation in the amount of SAR 1,398,930 for this claim element, corresponding to the amount paid by Luberef to employees for war risk during the period between 10 October 1990 and 2 March 1991.

(f) Contract workers' overtime compensation

436. Luberef provided a copy of the contract operative at the time together with sales invoices from the contractor and payment vouchers. Luberef explained that in substance there existed no difference between its relationship with its own employees and the contract employees. The Panel accordingly finds that the payments described under this claim element are in the nature of employee remuneration. The Panel finds that all costs of this nature incurred after 2 March 1991 are not compensable.[65] Luberef substantiated the payment of contract workers' overtime compensation as a direct result of Iraq's invasion and occupation of Kuwait for the period from 2 August 1990 to 2

March 1991 of SAR 229,021. The Panel accordingly recommends an award of compensation in this amount for contract workers' overtime compensation.

D. Extraordinary profits

437. The Panel has previously held that extraordinary profits earned by claimants as a result of increases in crude oil production and higher crude oil prices were to be set off against claimed losses (the Seventh "E1" Report, Part Two, at paragraph 149, and the Sixth "E1" Report at paragraphs 215 to 217). In the case of Luberef, these considerations are not applicable. Unlike crude oil producers, Luberef is not in the business of extracting and selling crude oil. Rather, as a consumer of crude oil, it did not benefit from either higher crude oil prices or the opportunity to exploit changes in the crude oil market caused by Iraq's invasion and occupation of Kuwait. In its examination of Luberef's financial and production records, the Panel found that Luberef earned increased operating profits in the financial years ended 31 December 1990 and 31 December 1991. The Panel finds, however, that these profits were not related to an increase in production as a direct result of Iraq's invasion and occupation of Kuwait; that the increased profits were attributable to a number of factors, including the increase in market prices of Luberef's products; and that these factors resulted from market conditions prevailing during that period. Therefore, the Panel finds that Luberef did not earn extraordinary profits as a direct result of Iraq's invasion and occupation of Kuwait and that no set-off is required

E. Recommendations

438. The Panel's recommendations with respect to the claim of Luberef are summarized in table 31 below.

Table 31. Luberef's claim – recommended compensation
(Saudi Arabian riyals)

Claim element	Original amount claimed	Amount of compensation recommended
Contract	1,400,000	Nil
Other	7,155,257	1,665,015
- Increased insurance premiums	53,831	Nil
- Daily food expenditure	37,064	37,064
- Overtime payment	3,863,129	Nil
- Contract workers cash compensation	63,539	Nil
- War risk allowance to employees	2,670,733	1,398,930
- Contract workers overtime compensation	466,961	229,021
Total	8,555,257	1,665,015

XIII. CLAIM OF SAUDI ARAMCO MOBIL REFINERY COMPANY LIMITED

A. Facts and contentions

1. Introduction

439. Saudi Aramco Mobil Refinery Company Limited ("Samref") was incorporated in Saudi Arabia as a limited liability company on 28 June 1981. Samref's shares are held in equal proportions between Saudi Aramco and Mobil Yanbu Refining Company, Inc. ("Mobil"). At the time of Iraq's invasion and occupation of Kuwait, the shares in Samref were owned by Saudi Aramco's predecessor in title, Petromin, and Mobil in equal proportions. Petromin's shares in Samref were transferred to Saudi Aramco in 1993.

440. Samref operates a crude oil refining facility in Yanbu, on the Red Sea coast of Saudi Arabia. Samref's operational activities are the production, handling and shipment of refined petroleum products for export. At all material times, all of Samref's products were purchased by its two shareholders, Mobil and Petromin, in equal proportions and at prices established according to a predetermined formula.

441. Samref alleges that, as a direct result of Iraq's invasion and occupation of Kuwait, it made payment or provided relief to others in the amount of SAR 13,136,540 for which it seeks compensation. Samref divides the claimed amount into three categories: the payment of additional salary costs, the purchase of gas masks for use by employees and costs incurred in relation to the potential evacuation of employees from Yanbu. Table 32 below reflects Samref's claim.

Table 32. Samref's claim
(Saudi Arabian riyals)

Claim element	Original amount claimed
Additional salary costs	9,836,715
Gas masks	3,003,625
Evacuation costs	296,200
Total	13,136,540

2. Payment or relief to others

(a) Additional salary costs

442. Samref alleges that, after Iraq's invasion and occupation of Kuwait on 2 August 1990, it experienced an unusually high rate of employee attrition and that it was difficult to hire replacements to work in the Yanbu area, due to the threat of hostilities. Samref alleges that, as a result, it took a decision to pay its staff an across-the-board increase of 15 per cent of their basic salaries for each month from 1 October 1990 to 30 April 1991 and an additional 10 per cent for the period from 1 May to 31 August 1991. The total additional amount paid to the employees for the period from 1 October

1990 to 31 August 1991 was SAR 9,836,715. This amount includes the additional amount of SAR 397,965 paid to Mobil employees seconded to Samref ("secondees") over the same period but calculated on the basis of a monthly increment of USD 4,000 per employee.

(b) Gas masks

443. Samref alleges that in February 1991 it purchased a total of 3,080 gas masks of varying sizes for distribution to its 969 employees and their dependants at a total cost of SAR 3,003,625.

(c) Evacuation costs

444. Samref alleges that it paid SAR 296,200 for the hire of three buses to be placed on standby for the period from 13 January to 12 March 1991 in order to evacuate dependants and non-essential staff from Yanbu in the event of an emergency.

B. Iraq's response

445. As a general proposition, Iraq alleges that the claimed losses (if actually incurred) are indirect and not in any way connected to Iraq's entry into Kuwait. Iraq contends that Samref earned additional profits due to increased production at its refinery and the increase in the prices of its products. Iraq contends that the alleged losses should be set off against the increased profits.

446. In relation to the claim for increased salary costs, Iraq disputes that the additional payments to Samref's staff were made for the purpose of their retention. Iraq contends that the true reason for the payment was to comply with the order of the Government of Saudi Arabia to increase production of fuel required for military operations against Iraq. Iraq contends that the increased salary costs are not compensable in accordance with Governing Council decision 19 and decisions of the Commission made pursuant thereto.

447. Iraq alleges that the timing of the additional payments is indicative of the fact that the payments were made for the purpose of increasing production. In this regard, Iraq points out that the payments were commenced with effect from October 1990, three months after Iraq's entry into Kuwait, and terminated in August 1991, six months after the end of the military activities.

448. In relation to the claim for the cost of acquiring gas masks, Iraq contends that the date of purchase (30 January 1991) makes it clear that the purchase had no direct relation to the entry of Iraqi forces into Kuwait. Iraq also states that the chemical weapons against which the gas masks were intended to provide protection were not used in the conflict. Iraq states that Samref was geographically located out of any danger arising from chemical weapons and was also not threatened by Iraq. For these reasons Iraq states that Samref was not justified in incurring the expense.

449. In relation to the evacuation costs, Iraq contends that the period of the rental of the three buses (from mid-January 1991 to mid-March 1991) makes it clear that the transaction had no direct relation to the entry of Iraqi forces into Kuwait in August 1990. Iraq alleges that the costs were incurred as a result of the planned military activities against Iraq and are therefore not compensable. Iraq also states

that the documentation relied upon by Samref in relation to this claim element requires additional clarification.

C. Analysis and valuation

1. Additional salary costs

450. Samref provided evidence that 11 of its employees resigned in September 1990. This number constituted a significant increase over the monthly average of between four to six resignations in the seven months from 1 January to 31 July 1990. Samref alleges that, in order to combat further resignations, it was compelled by circumstances to introduce the temporary allowance. In addition, competing employers located in Yanbu had introduced similar temporary allowances. Accordingly, Samref believed that its employees would be unwilling to continue to work at Samref and would either leave the vicinity or would find alternative employment in Yanbu if the incentive was not introduced.

451. The Panel examined an internal memorandum dated 10 November 1990 indicating that Samref's staff had been advised that the temporary monthly allowance of 15 per cent would be paid with effect from 1 October 1990. On 25 April 1991, the staff were advised that the allowance would be reduced from 15 per cent to 10 per cent, with effect from 1 May 1991 and would cease entirely with effect from 1 September 1991. The memorandum pointed out that the reason for the reduction in the temporary monthly allowance was that the "crisis" was now over.

452. Samref provided a monthly summary of the cost of the allowance as well as extracts from its payroll records. During the course of a technical mission to Saudi Arabia described at paragraph 9 above, Samref provided copies of payslips, which the Panel finds were supported by entries in Samref's payroll journal.

453. The Panel finds, however, that Samref did not provide sufficient evidence to support its claim of SAR 397,965, which represents the aggregate of the additional USD 4,000 paid each month to each Mobil secondee for the period from 1 October 1990 to 1 September 1991.

454. The Panel finds that Samref has adequately established that it paid the temporary monthly allowance to its own employees as a direct result of Iraq's invasion and occupation of Kuwait for the period from 1 October 1990 to 2 March 1991. Based upon Samref's own views of the situation at the time, it is clear that Samref itself considered the rationale for the payment of the allowance to have disappeared by April 1991. As it has previously held,[66] the Panel finds that payments of this nature after 2 March 1991 are not a direct result of Iraq's invasion and occupation of Kuwait. The Panel accordingly finds that Samref should receive compensation for the costs shown to have been paid in respect of the period from 1 October 1990 to 2 March 1991. The Panel finds that, of the total claimed amount of SAR 9,836,715, an amount of SAR 4,638,048 was paid in respect of the period from 3 March to 1 September 1991. The Panel finds also that Samref has not substantiated its claim for the allowance paid to Mobil secondees in the amount of SAR 397,965. For these reasons the Panel recommends an award of compensation in the amount of SAR 4,800,702 for additional salary costs.

2. Gas masks

455. Samref purchased a total of 3,080 gas masks of differing sizes for its 969 employees in February 1991. Samref alleged that its staff had conveyed their fears to Samref management at the time and that Samref's action was consistent with the other major employers in Yanbu. Samref states that it took the measures for security reasons as well as to allay the anxieties expressed by its staff.

456. Samref provided a copy of the relevant supplier invoice dated 6 February 1991 and proof of payment of the full amount claimed of SAR 3,003,625. Samref's manpower report of 9 November 1990 confirmed the number of employees at the time to be 969. The quantity of gas masks purchased appeared to the Panel to be reasonable based on the fact that each employee was entitled to sufficient units for himself and his family. Samref provided evidence that the useful life of equivalent gas masks was five years. Samref wrote off the entire cost of the acquisition of the gas masks in the year of acquisition and alleged that its employees had not been required to return the gas masks. A small number of masks remained in storage at Samref's premises at the time of the Panel's investigations. These were alleged to have no value due to the expiry of their useful lives. The aggregate residual value of the gas masks was accordingly alleged to be nil.

457. The Panel finds that Samref incurred the costs of acquisition of the gas masks as a direct result of Iraq's invasion and occupation of Kuwait. The Panel, therefore, recommends an award of compensation in the amount of SAR 3,003,625 for gas masks.

3. Evacuation costs

458. Samref alleges that, shortly after Iraq's invasion and occupation of Kuwait on 2 August 1990, many of its employees had requested the management to explain what steps were being taken in order to plan for any possible need to evacuate staff from the refinery. In order to alleviate its employees' anxieties, Samref entered into a contract with its transportation supplier pursuant to which three large buses with drivers were placed at Samref's disposal in order to evacuate staff and dependants. In terms of the contract the buses were made available from 13 January to 12 March 1991.

459. Samref provided a copy of the contract with the bus operating company together with proof that it had paid the full amount claimed of SAR 296,200 for the period from 13 January to 12 March 1991. The Panel finds that the costs and charges associated with the rental of the buses and the duration of the contract were both reasonable, having regard to the shortage of available buses at the time.

460. The Panel finds that Samref incurred the cost of hiring buses for the purpose of evacuating employees and their families as a direct result of Iraq's invasion and occupation of Kuwait and recommends an award of compensation in the amount of SAR 296,200 for evacuation costs.

D. Extraordinary profits

461. The Panel has previously held that extraordinary profits earned by claimants as a result of increases in crude oil production and higher crude oil prices were to be set off against claimed losses (the Seventh "E1" Report, Part Two, at paragraph 149, and the Sixth "E1" Report at paragraphs 215 to

217). In the case of Samref, these considerations are not applicable. Unlike crude oil producers, Samref is not in the business of extracting and selling crude oil. Rather, as a consumer of crude oil, it did not benefit from either higher crude oil prices or the opportunity to exploit changes in the crude oil market caused by Iraq's invasion and occupation of Kuwait. In its examination of Samref's financial and production records, the Panel found that Samref earned increased operating profits in the financial years ended 31 December 1990 and 31 December 1991. The Panel finds, however, that these profits were not related to an increase in production as a direct result of Iraq's invasion and occupation of Kuwait; that the increased profits were attributable to a number of factors, including the increase in market prices of Samref's products; and that these factors resulted from market conditions prevailing during that period. Therefore, the Panel finds that Samref did not earn extraordinary profits as a direct result of Iraq's invasion and occupation of Kuwait and that no set-off is required.

E. Recommendations

462. The Panel's recommendations with respect to the claim of Samref are summarized in table 33 below.

Table 33. Samref's claim – recommended compensation
(Saudi Arabian riyals)

Claim element	Original amount claimed	Amount of compensation recommended
Additional salary costs	9,836,715	4,800,702
Gas masks	3,003,625	3,003,625
Evacuation costs	296,200	296,200
Total	13,136,540	8,100,527

XIV. CLAIM OF SAUDI ARAMCO SHELL REFINERY COMPANY

A. Facts and contentions

1. Introduction

463. Saudi Aramco Shell Refinery Company ("Sasref") was incorporated in Saudi Arabia as a limited liability company on 20 July 1981. Sasref's shares are held in equal proportions between Saudi Aramco and Shell Saudi Arabia (Refining) Limited ("Shell"). Sasref conducts business as a refiner of crude oil at Jubail, about 300 kilometres south of Kuwait on the Persian Gulf coast, in the Eastern Province of Saudi Arabia.

464. Sasref claims compensation under the category "payment or relief to others" in the amount of SAR 26,656,933. Sasref subdivided the claimed amount into personnel related expenditure, costs of construction of a tanker loading facility, costs of acquiring protective equipment and amounts expended for protecting the sea water cooling system at Jubail. Table 34 below reflects Sasref's claim.

Table 34. Sasref's claim
(Saudi Arabian riyals)

Claim element	Original amount claimed	Amended amount claimed
Personnel-related expenditure	24,215,535	23,140,291
Construction of tanker loading facility	58,235	Nil
Protective equipment	1,534,010	1,534,010
Sea water cooling system	849,153	849,153
Total	26,656,933	25,523,454

2. Personnel-related expenditure

465. Sasref separated the personnel-related expenditure into 11 separate subcategories of expense related to its employees and independent contractors. Sasref alleges that it paid SAR 9,031,248 to its employees as an across-the-board 15 per cent addition to the basic salary of each employee for the period from 1 October 1990 to 30 April 1991 and an additional 10 per cent from 1 May to 31 August 1991. Sasref contends that the payments were a direct consequence of Iraq's invasion and occupation of Kuwait as its workforce of approximately 630 people had become restive and fearful of an invasion of Saudi Arabia and of open hostilities throughout the Eastern Province of Saudi Arabia. Sasref alleges that it made the payments pursuant to instructions from the Saudi Arabian Minister of Petroleum and Minerals and in order to ensure ordinary and uninterrupted operations at its refinery.

466. Sasref alleges that it permitted the evacuation of the family members of its employees to other parts of Saudi Arabia. As a result of staff visiting their evacuated families, levels of staff absence increased. In order to maintain ordinary operations at the refinery, staff members were required to

work additional overtime hours. Sasref compensated employees for overtime in accordance with ordinary company policy and domestic labour legislation at the rate of 150 per cent of each employee's basic rate of hourly remuneration. Sasref estimated that it paid overtime of SAR 2,951,751 from 1 September 1990 to 31 August 1991 in excess of the historical average paid for an equivalent period.

467. Sasref alleges that, in accordance with a long-standing employment policy, staff members were entitled to convert additional overtime into a corresponding amount of vacation time in lieu of cash remuneration ("Time Off In Lieu" or "TOIL"). Sasref estimated that it incurred additional costs as a result of this practice, aggregating to SAR 3,465,519 for the period from 2 August 1990 to 1 April 1991.

468. Sasref alleges that, as a further incentive to its employees, it provided additional meals to employees from February to April 1991 at a total cost of SAR 500,000. Sasref also alleges that it made company telephone facilities available to employees for communication with family members at a total cost of SAR 2,037,802.

469. Sasref alleges that the independent contractors retained for the purpose of supplying maintenance and other services to the company commenced with the payment of additional inducements to their own employees as a result of Sasref's introduction of the payments as described in paragraph 465 above. Sasref alleges that it compensated the independent contractors for these additional costs, and in turn seeks compensation in the aggregate amount of SAR 1,766,699.

470. Sasref alleges that a major maintenance shutdown had been scheduled for January and February 1991, that contracts had been established with four independent contractors to perform the work and that the contractors had already mobilized manpower and equipment at the time of Iraq's invasion and occupation of Kuwait. Sasref alleges that the maintenance work was postponed until October 1991 due to the disruption of staff availability and the consequent inability of Sasref to complete the final planning and performance of the shutdown. Sasref alleges that, as a result of the delays, it was compelled to pay the four contractors an aggregate premium of SAR 1,157,079 in excess of the contracted amounts, in order for them to maintain their respective workforces in a state of readiness until the shutdown could proceed.

471. Sasref alleges that it paid SAR 2,275,414 for the costs of airline tickets, visas and accommodation for staff and family members evacuated from the Eastern Province of Saudi Arabia to various destinations as a direct result of Iraq's invasion and occupation of Kuwait.

472. Sasref alleges that it provided additional air transportation to employees visiting family members evacuated to their home countries at a cost of SAR 9,006.

473. Sasref alleges that it incurred total costs of SAR 921,017 in respect of additional fees paid to the Jubail Academy (the international school at Jubail) and a retainer paid to two Dutch teachers.

474. Sasref alleges that it hired four buses to be used between 29 August and 28 September 1990 for the evacuation of staff members from the Jubail refinery at a total cost of SAR 100,000.

3. Construction of tanker loading facility

475. Sasref alleges that its refined products had previously been transported exclusively by ship for export from the Jubail refinery. Sasref states that it had no facilities for the delivery of fuel to road tankers. A wholly-owned subsidiary of Petromin, Samarec [67] requested Sasref to construct a road tanker loading facility for the purpose of supplying gasoline, diesel and kerosene to the Allied Coalition Forces stationed in Saudi Arabia. Sasref alleges that Samarec reimbursed all of the costs of construction, save for a single invoice in the amount of SAR 58,235, in respect of which Sasref seeks compensation.

4. Protective equipment

476. Sasref alleges that it established and equipped a communications centre, acquired miscellaneous emergency materials, constructed a floating boom around the inlet of the Jubail city cooling water system and provided staff members with reserve gasoline tanks and gas masks for themselves, their family members and certain independent contractors. The alleged cost to Sasref for all of these measures amounted to SAR 1,534,010.

5. Sea-water cooling system

477. Sasref alleges that it incurred costs in the amount of SAR 849,153 for its share of protecting the sea water cooling system at Jubail from the risk of oil pollution after Iraq's invasion and occupation of Kuwait.

B. Iraq's response

478. As a general proposition, Iraq alleges that the claimed losses (if actually incurred) are indirect and not in any way connected to Iraq's entry into Kuwait. Iraq contends that Sasref earned additional profits due to increased production at its refinery and the increase in the prices of its products. Iraq contends that the alleged losses should be set off against the increased profits.

479. Iraq points to allegations in the statement of claim in which Sasref contends that it had specifically incurred additional costs to meet the requirements of the Government of Saudi Arabia and the Allied Coalition Forces. Iraq contends that Sasref's activities generated extraordinary profits and should not be compensated for this reason, but also because the costs in question were incurred in support of military operations and are not eligible for compensation pursuant to Governing Council decision 19.

480. Iraq alleges that, on the instructions of the Government of Saudi Arabia, Sasref paid the additional 15 per cent salary increment on condition that payment would be terminated upon the resumption of normal conditions. Iraq contends that conditions were normal at all times and that the payment of the increment for a period of six months after the cease-fire was unwarranted.

481. With respect to additional overtime and vacation in lieu of overtime, Iraq contends that these additional costs to Sasref were brought about by Sasref's "duties and wishes" and that Iraq was not the

cause. Iraq also alleges that the overtime costs for the month of August included compensation to employees for overtime actually performed in July 1990, which was unrelated to any of Iraq's actions.

482. With respect to the costs of evacuating and returning dependants of staff members, Iraq alleges that these costs are unrelated to its entry into Kuwait and are not supported by sufficient evidence.

483. Iraq contends that the telephone privileges extended by Sasref to its employees were abused and that the costs incurred by Sasref should be recovered from the Saudi Arabian Government and the Allied Coalition Forces, on the grounds that these were the "people it was serving".

484. Iraq contends that the additional payments to Sasref's independent contractors were made with the underlying intentions of maximizing production, keeping the refineries operating, supplying the Allied Coalition Forces and earning additional profits.

485. With respect to the costs associated with the delay of the refinery shutdown, Iraq contends that Sasref had sufficient time between 2 August 1990 and January 1991 to arrange with the contractors in a manner that would have avoided the payment of additional charges.

486. With respect to evacuation costs, Iraq contends that the evidence indicates that certain costs were incurred in relation to the travel of staff members and not their dependants, and that certain travel and accommodation took place until six months after the cease-fire. Iraq also contends that certain of the visa and related formality costs are costs in the nature of ordinary costs associated with the maintenance of an expatriate workforce.

487. Iraq alleges that the additional education expenses would in any event have been incurred in the ordinary course of business.

488. With respect to the unrecovered construction costs of the fuel loading facility, Iraq alleges that Sasref should have recovered this amount from Samarec and has established no basis of recovery from Iraq.

489. Iraq contends that the costs of protective equipment have been inflated by the inclusion of unnecessary items.

C. Analysis and valuation

1. Personnel-related expenditure

490. Sasref provided a spreadsheet particularizing its calculations of the amount of SAR 9,031,248, a summary of individual employee numbers, listing the basic monthly salary of each employee for the period from August 1990 to April 1991 and a statement confirming that the monthly figures had been extracted from Sasref's payroll records.

491. Sasref also provided sample copies of employment contracts for both Saudi Arabian and expatriate employees and a copy of an internal memorandum recording the decision to pay employees the additional 15 per cent with effect from 1 October 1990.

492. Sasref also provided a copy of the written instruction from the Minister of Petroleum and Minerals to decrease the additional payment from 15 per cent to 10 per cent with effect from 1 May 1991 and to cease the payment with effect from 1 September 1991.

493. During the course of the technical inspection mission, described at paragraph 9 above, the Panel investigated Sasref's payroll records. Sasref provided a revised schedule, indicating that it reduced its claim for these costs by SAR 121,171. Sasref provided no evidence in relation to salary payments of SAR 15,979. In all other respects, the Panel was satisfied that the claimed amount in respect of all Sasref employees (the employees described in paragraph 494 below are dealt with separately), was documented and substantiated. The Panel finds that these costs were incurred as a direct result of Iraq's invasion and occupation of Kuwait, and are compensable insofar as they relate to the period from 2 August 1990 to 2 March 1991.[68] For these reasons, the Panel recommends the award of compensation for additional salary costs paid to Sasref employees in the amount of SAR 3,546,640.

494. The additional salary costs of SAR 9,031,248 claimed by Sasref include an amount of SAR 2,004,316 paid to staff members of Shell seconded to Sasref ("Shell secondees"). The amounts paid to Shell secondees were similarly based upon a salary increment of 15 per cent for the period from 1 October 1990 to 30 April 1991, and a 10 per cent increment for the period from 1 May to 31 August 1991. The Panel established that, in accordance with Sasref's personnel policy manual and the relevant agreement between Shell and Sasref, Shell secondees were entitled to receive allowances equivalent to those paid to Sasref employees. Additionally, Shell management in London had specifically instructed Sasref to pay the allowance. The Panel investigated each secondees' individual payslips for the relevant period. Applying its previous finding referred to in paragraph 454, the Panel finds that costs of this nature incurred after 2 March 1991 are not compensable. The Panel established that a total of SAR 394,333 was paid to the Shell secondees in respect of services rendered after 2 March 1991. Adjusting the claim by this amount, the Panel finds that SAR 1,609,983 was paid by Sasref to Shell secondees for the period from 1 October 1990 to 2 March 1991. The Panel recommends compensation in this amount.

495. In respect of the claim for additional overtime of SAR 2,951,751, Sasref provided copies of its personnel policy manual and of the relevant provisions of the applicable labour law. These documents confirm that Sasref was obliged to compensate its employees for overtime at the rate of 150 per cent of their normal remuneration.

496. Sasref provided a statement confirming that the monthly overtime figures had been extracted from its payroll records. The Panel noted discrepancies between the supporting statement and the monthly analysis of overtime payments. Additionally, Sasref did not provide sufficient proof of its historical overtime costs, in spite of the Panel's request. The Panel accordingly recommends no compensation for additional overtime.

497. In respect of the claim of SAR 3,465,519 for TOIL, Sasref provided a copy of the relevant provision of its personnel policy manual, a copy of an internal memorandum dated 26 August 1990 dealing with leave entitlement during the period of the conflict and a copy of a file note particularizing the number of days of leave taken by staff members as a result of the TOIL rule from August 1990 to March 1991.

498. Sasref's personnel policy manual provided that TOIL was limited to 10 days per year. Sasref was not able to demonstrate that this provision had been adhered to. The Panel requested Sasref to furnish particulars of the historical average cost of TOIL. Pursuant to this request, Sasref indicated that it estimated its monthly average cost of TOIL to be SAR 200,000, but that no evidence to support this contention was available. Sasref indicated, however, that it reduced its claim for compensation for this claim element from SAR 3,465,519 to SAR 670,461. In the absence of the relevant evidence requested by the Panel, the Panel finds that Sasref has not substantiated its claim. The Panel accordingly recommends that no compensation be awarded for TOIL.

499. With respect to the cost of providing meals to employees, Sasref explained that, prior to Iraq's invasion and occupation of Kuwait, it had provided each employee with meal coupons to the value of SAR 150 per month at no cost to the employee concerned. The meal coupons could be exchanged for meals at Sasref's canteen by the employees. Sasref had contracted with a catering firm for the supply of meals at its canteen. As a result of Iraq's invasion and occupation of Kuwait, Sasref decided to increase the allowance from SAR 150 to SAR 300 per month. Sasref estimated the additional cost incurred in this way to have been SAR 500,000 for the period from 1 February to 30 April 1991. The Panel requested Sasref to provide extracts from its accounting ledgers and copies of receipts or records demonstrating that the employees had been issued with the coupons as well as records establishing the actual cost to Sasref of providing the meals. Sasref replied to the Panel's request by stating that the records were not available. As a result of Sasref's inability to supply the relevant evidence, the Panel finds that Sasref has not substainted its claim. The Panel accordingly recommends that no compensation be awarded for additional meal costs.

500. With respect to the cost of compensation for telephone calls, Sasref explained that it had awarded each employee an additional allowance, paid through the monthly payroll, of SAR 200. Additionally, Sasref had made a direct payment of the equivalent amount to Shell secondees. Sasref alleges that it paid SAR 1,540,101 to its employees via the monthly payroll and SAR 125,512 directly to Shell secondees in respect of compensation for telephone calls. Notwithstanding the Panel's request, Sasref did not provide payroll slips in regard to the portion of the amount paid to employees through the payroll, nor did it provide explanations of how it had calculated the balance of this claim element. The Panel finds that Sasref has not substantiated the amount claimed. The Panel accordingly recommends that no compensation be awarded for compensation for telephone calls.

501. Sasref alleges that it established a communications centre at its premises from where staff could make personal telephone calls at the expense of the company. Sasref estimated that the cost of routine telephone calls prior to Iraq's invasion and occupation of Kuwait had averaged SAR 300,000 per quarter. Sasref alleges that the total cost of telephone calls for the quarter ending 6 March 1991 was

SAR 672,189, and that the difference (of SAR 372,189) from the historic average was comprised of personal telephone calls made pursuant to the introduction of the privilege.

502. The Panel requested Sasref to provide evidence of the average monthly telephone costs in the two years prior to Iraq's invasion and occupation of Kuwait. Notwithstanding this request, Sasref did not provide any documents to support its historical costs. In the absence of the relevant evidence, the Panel finds that Sasref has not substantiated its claim. The Panel accordingly recommends no compensation for telephone costs.

503. With respect to the additional allowance of SAR 1,766,699 paid to contractors, Sasref provided a summary of 60 payment vouchers aggregating to the amount of SAR 1,175,904 and four general accrual entries for payments to contractors amounting to SAR 590,795 during the period from August 1990 to March 1991. Sasref also provided copies of the general accrual vouchers, payment vouchers supplier invoices and an internal office memorandum dealing with the allocation of the costs.

504. Pursuant to the technical inspection mission described at paragraph 9 above, Sasref confirmed in writing that it withdrew the claim for compensation of SAR 590,795 and additionally reduced its claim by an amount of SAR 363,278 as a result of a duplication it had since discovered. The amended claim amount was accordingly SAR 812,626, (the document reflecting the withdrawal erroneously states that the revised claim amount is SAR 891,952).

505. The Panel reviewed the 60 internal payment vouchers, invoices and proof of payment. The Panel found that an amount of SAR 96,020 was unsupported by an appropriately detailed invoice and that a transposition error of SAR 600 had been made on another invoice. Save for these two amounts, the Panel found the claim to be substantiated. As it has previously held, the Panel finds that costs of this nature incurred after 2 March 1991 are not compensable. The Panel accordingly recommends compensation in the amount of SAR 631,683 for additional allowances paid to independent contractors.

506. With respect to the claim for evacuation costs of SAR 2,275,414, Sasref provided internal payment vouchers and supplier invoices aggregating to SAR 1,822,989. In regard to an amount of SAR 337,115, only internal journal entries were provided. The amount of SAR 115,310, comprised of entry and exit visa costs, was supported only by an internal memorandum dated 27 December 1993. In response to the Panel's request for clear proof of payment in regard to all items comprising this claim element, Sasref indicated that the evidence was not available. The Panel finds that Sasref has not substantiated its claim and recommends no award of compensation for evacuation costs.

507. With respect to the claim for additional costs caused by the delay of the refinery maintenance shutdown, the Panel found the claimed amount of SAR 1,157,079 to be comprised of payments to four separate contractors, engaged by Sasref. Sasref established that the refinery shutdown had originally been scheduled for August 1990 but was postponed until February 1991 and again until October 1991. The decision to postpone the shutdown had been taken at the management committee level in order to maintain continuous operations at the refinery. The Panel requested Sasref to provide copies of the four contracts and proof of payment of all of the amounts paid to the contractors. Sasref alleged that

two of the four contracts had been destroyed and that proof of payment of all of the amounts was not available. Additionally, Sasref was not able to provide an explanation of the basis of the calculation of the largest single payment of SAR 747,800 made to one of the contractors.

508. The Panel finds that, in the absence of relevant evidence, Sasref has not substantiated its claim, and accordingly recommends no compensation for shutdown delay costs.

509. Sasref withdrew the claim for additional air transportation costs in the amount of SAR 9,006, in its written response to the Panel's requests for further information.

510. With respect to the claim for education costs in the amount of SAR 921,017, Sasref explained that it was obliged under its contract with Shell to pay in full for the primary education (normally in their own language) of the children of Shell secondees. Under its personnel policy manual it was also obliged to pay in full the education costs of the children of directly-hired expatriate employees (up to a maximum of SAR 22,500 per child).

511. Sasref claimed that, as a result of Iraq's invasion and occupation of Kuwait, it paid an additional SAR 856,517 to the Jubail Academy (the International School at Jubail). Sasref alleges that as a result of the reduction in the number of pupils attending the school, the school fees per child increased. The increase in the school fees for the first and second semesters of the school year 1990/1991 was alleged to be SAR 856,517. Sasref also explained that two Dutch-speaking teachers had returned to the Netherlands as a result of Iraq's invasion and occupation of Kuwait. Sasref alleged that it had agreed to pay a retainer to the Dutch teachers to ensure that they remained available to return to work at the school after the conclusion of hostilities.

512. The Panel requested Sasref to explain how the costs were additional to the ordinary education costs paid by it, and to substantiate this explanation by reference to accounting records of the average education costs paid in the two years prior to and two years after Iraq's invasion and occupation of Kuwait. Notwithstanding this request, Sasref did not provide the requisite explanations or evidence. Sasref also did not demonstrate that it had paid the retainer to the two Dutch teachers nor did it adequately explain the origin of its obligation to do so. For these reasons the Panel finds that Sasref has not substantiated its claim. The Panel accordingly recommends that no compensation be awarded for education costs.

513. In regard to the claim for the costs of stand-by transportation for evacuation in the amount of SAR 100,000, Sasref provided a copy of a letter dated 22 August 1990 from Sasref to the lessor of the buses confirming that four buses would be rented to Sasref from 29 August to 29 September 1990, at a cost of SAR 25,000 per bus. Sasref also provided a copy of a payment advice document, indicating that it had paid the lessor in full for the lease of the buses. The Panel finds that the costs were reasonably incurred by Sasref and were paid. The Panel accordingly recommends compensation in the amount of SAR 100,000 for the hire of buses.

2. Construction of tanker loading facility

514. Sasref withdrew this element of the claim, in writing, in response to the Panel's enquiries. The Panel accordingly recommends no award of compensation for construction of tanker loading facilities.

3. Protective equipment

515. The Panel requested Sasref to provide particulars of the nature of work undertaken and materials purchased in regard to the communication centre, to explain why the costs in regard to miscellaneous emergency materials were incurred and to substantiate all of the separate items comprising this claim element with the relevant supplier invoices and proof of payment. Notwithstanding the Panel's requests, Sasref did not provide the explanations and evidence. The Panel accordingly recommends no award of compensation for protective equipment.

4. Sea-water cooling system

516. Of the total claimed amount of SAR 849,153, Sasref was unable to demonstrate that the amount of SAR 500,000 was incurred or paid. Sasref provided two invoices and the associated proof of payment demonstrating that it had paid the amount of SAR 349,153 to the Saudi Petrochemical Company ("SADAF"). The costs in question had been apportioned by SADAF between a syndicate of 12 industrial firms operating at Jubail, in proportion to the volume of sea water consumption of each firm. Sasref's share of the costs represented 3.6 per cent of the total cost. Sasref provided a copy of a memorandum of understanding between itself, Saudi Arabian Basic Industries Corporation ("SABIC") (represented by SADAF) and the Royal Commission for Jubail and Yanbu. Under the memorandum of understanding Sasref bound itself to contribute to the costs of protecting the integrity of the sea-water cooling canal system at Jubail. Sasref's share of the costs was to be assessed at a later time based upon an equitable allocation. Sasref explained that it had subsequently agreed with SADAF to pay for a share of the costs based upon its proportion of use of the sea water from the cooling water canal system. Sasref provided schedules in support of the allocation of the costs to all of the members of the syndicate.

517. The Panel notes that, during the period in which it was reviewing Sasref's claim for expenses incurred to protect the sea-water cooling system at Jubail, the "F4" Panel was reviewing several claims concerning expenses of a co-ordinated national response to oil spills resulting from Iraq's invasion and occupation of Kuwait ("the 'F4' claims"). The "F4" claims concern expenses of a similar type to those claimed by Sasref. The Panel reviewed documents submitted by the "F4" claimants and determined that there was no material risk of duplication between the "F4" claims and Sasref's claim in respect of its payment for measures taken to protect the sea-water cooling system of the Jubail industrial area. The Panel notes that the "F4" Panel considered claims for such expenses to be compensable. The Panel adopts the views of the "F4" Panel and finds that efforts to protect the sea-water cooling system are compensable in principle. The Panel notes, however, that the "F4" Panel made adjustments to the claim for expenses incurred by the "F4" claimants in respect of activities in the Jubail area for a variety of reasons, including the fact that those claimants had not accounted for the residual value of equipment.

518. The Panel finds that, unlike the "F4" claimants, Sasref had no possibility of benefiting from the residual value of the equipment purchased to protect the sea-water cooling system at Jubail. The Panel finds that Sasref has proved that it paid its 3.6 per cent share of the costs of protecting the sea-water cooling system. The Panel finds that Sasref has substantiated this portion of its claim and recommends an award of compensation in the amount of SAR 349,153 for costs incurred to protect the sea-water cooling system.

D. Extraordinary profits

519. The Panel has previously held that extraordinary profits earned by claimants as a result of increases in crude oil production and higher crude oil prices were to be set off against claimed losses (the Seventh "E1" Report, Part Two, at paragraph 149, and the Sixth "E1" Report at paragraphs 215 to 217). In the case of Sasref, these considerations are not applicable. Unlike crude oil producers, Sasref is not in the business of extracting and selling crude oil. Rather, as a consumer of crude oil, it did not benefit from either higher crude oil prices or the opportunity to exploit changes in the crude oil market caused by Iraq's invasion and occupation of Kuwait. In its examination of Sasref's financial records, the Panel found that Sasref earned increased operating profits in the financial years ended 31 December 1990 and 31 December 1991 as compared to the financial year ended 31 December 1989. The Panel finds, however, that the increased profits were attributable to a number of factors, including the increase in market prices of Sasref's products; and that these factors resulted from market conditions prevailing during that period. Therefore, the Panel finds that Sasref did not earn extraordinary profits as a direct result of Iraq's invasion and occupation of Kuwait and that no set-off is required.

E. Recommendations

520. The Panel's recommendations with respect to the claim of Sasref are summarized in table 35 below.

Table 35. Sasref's claim – recommended compensation
(Saudi Arabian riyals)

Claim element	Original amount claimed	Amended amount claimed	Amount of compensation recommended
Personnel-related expenditure	24,215,535	23,140,291	5,888,306
Construction of tanker loading facility	58,235	Nil	Nil
Protective equipment	1,534,010	1,534,010	Nil
Sea-water cooling system	849,153	849,153	349,153
Total	26,656,933	25,523,454	6,237,459

XV. INCIDENTAL ISSUES

A. Currency exchange rate

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

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

523. In the circumstances, the Panel finds that the appropriate currency exchange rate to be applied to the claims advanced in the eighth instalment in currencies other than the United States dollar is the rate prevailing on the date of loss, as outlined in table 36 below.

B. Interest

524. All claim figures in this report are net of any individual interest claims advanced by the claimants.

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

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

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

528. In accordance with these determinations, table 36 below summarizes the dates of loss from which interest will run for those claims in respect of which the Panel has recommended an award of compensation.

Table 36. Dates of loss

Claimant and loss element	Date of loss
Combustion Engineering Ltd.	
- Unpaid contractual amounts	2 August 1990
- Shut-down expenses	1 February 1991
ABB Lummus Crest Holding B.V.	
- Employee-related losses	27 September 1990
- Shut-down expenses	29 March 1991
Global Santa Fe Corporation	
- Loss of revenue	16 September 1990
- Other tangible property	2 August 1990
Ipedex 2IM SNC	
- Loss of revenue	16 October 1990
Ipedex	
- Loss of revenue	16 September 1990
Tecnologie Progetti Lavori S.p.A.	
- Equipment and materials being manufactured	2 August 1990
- Storage and maintenance costs	30 January 1991
- Preliminary work	2 August 1990
- Shut-down expenses	2 August 1990
- Equipment and materials ready for delivery	2 August 1990
- Unpaid retention monies	2 August 1990
- Costs related to personnel detained	8 October 1990
- War risk insurance	30 October 1990
General Petroleum & Minerals Organisation (Petromin) Mahd ad'Dahab Mine	
- Increased transportation and insurance costs	15 October 1990
- Manpower and personnel costs	24 February 1991
Petromin Lubricating Oil Company	
- Additional salary costs	1 February 1991
- Gas masks	14 February 1991
Petromin Lubricating Oil Refining Company	
- Daily food expenditure	30 January 1991
- War risk allowance to employees	20 December 1990
- Contract workers overtime compensation	15 October 1990
Saudi Aramco Mobil Refinery Company Limited	
- Additional salary costs	15 December 1990
- Gas masks	15 February 1991
- Evacuation costs	11 February 1991
Saudi Aramco Shell Refinery Company	
- Personnel-related expenditure	15 December 1990
- Sea-water cooling system	28 May 1991

C. Claims preparation costs

529. All claim figures in the body of this report are net of any claims preparation costs advanced by the claimants. In a letter dated 6 May 1998, the Panel was notified by the Executive Secretary of the Commission that the Governing Council intends to resolve the issue of claims preparation costs at a future date. Accordingly, the Panel takes no action with respect to claims for such costs.

XVI. SUMMARY OF RECOMMENDATIONS

530. Table 37 below summarizes the Panel's recommended awards of compensation.

Table 37. Panel's recommended awards of compensation

Claimant	Original amount claimed (original currency)	Amount of compensation recommended (original currency)	Original amount claimed (USD)	Amended amount claimed (USD)	Amount of compensation recommended (USD)
Combustion Engineering Ltd.	GBP 1,596,277	GBP 582,047	3,034,747	3,034,747	1,106,685
ABB Lummus Crest Holding B.V	NLG 3,386,277	NLG 201,454	1,922,928	1,922,928	107,892
General Contracting, Importing & Services Enterprises	USD 25,945,741	Nil	25,945,741	15,567,058	Nil
Global SantaFe Corporation	USD 29,677,778	USD 22,100,000	29,677,778	40,683,981[a]	22,100,000
Ipedex 2IM	FRF 5,734,145	FRF 3,741,998	1,093,884	780,443	735,456
Ipedex Production	FRF 2,088,587	FRF 45,565	398,433	139,153	8,702
Tecnologie Progetti Lavori S.p.A.	USD 208,032,751	USD 7,832,730	208,032,751	206,940,135	7,832,730
General Petroleum & Minerals Organization (Petromin) Mahd ad'Dahab Mine	USD 263,725	USD 31,000	263,725	263,725	31,000
Petromin Lubricating Oil Company	SAR 40,830,440	SAR 683,237	10,903,308	10,903,308	182,440
Petromin Lubricating Oil Refining Company	SAR 8,555,257	SAR 1,665,015	2,281,402	2,281,402	444,597
Saudi Aramco Mobil Refinery Company Limited	SAR 13,136,540	SAR 8,100,527	3,507,754	3,507,754	2,163,025
Saudi Aramco Shell Refinery Company	SAR 26,656,933	SAR 6,237,459	7,118,006	6,815,341	1,665,543
Total (USD)	---	---	294,180,457	292,839,975	36,378,070

[a] Sante Fe's amendment increasing the total amount of its claim was timeous. See paragraphs 18 and 159 above.

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

Geneva, 5 June 2002

(Signed)	Mr. Allan Philip Chairman
(Signed)	Mr. Antoine Antoun Commissioner
(Signed)	Mr. Michael Hwang Commissioner

Notes

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

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

[3] On its claim form, Combustion indicates that, although the total value of its claim is GBP 1,596,277, it is asserting claims in the alternative. The alternative claims are described in paragraph 53 of this report.

[4] For the reasons set out in paragraphs 524-529 of this report, the Panel makes no recommendations with respect to the claims for interest and claims preparation costs.

[5] Article 7 of Law No. 57 provides: "All properties, assets and related income belonging to governments, organizations, companies and banks of the countries which have issued unjust resolutions against Iraq shall be blocked." Although Law No. 57 is stated to be effective from 6 August 1990, it was promulgated on 16 September 1990.

[6] "Report and recommendations made by the Panel of Commissioners concerning the first instalment of 'E2' claims", (S/AC.26/1998/7), (the "First 'E2' Report"), para. 72.

[7] Ibid., paragraph 90.

[8] Ibid., paragraph 104.

[9] "Report and recommendations made by the Panel of Commissioners concerning the fourth instalment of 'E2' claims", (S/AC.26/2000/2), (the "Fourth 'E2' Report"), para. 96.

[10] Ibid., paragraphs 91-96.

[11] Ibid. paragraphs 106-116.

[12] Ibid., paragraph 123.

[13] Ibid., paragraph 122.

[14] Ibid., paragraph 202. The "E2A" Panel considered that, in the context of contracts with Iraqi parties for the sale of non-perishable goods, a claimant's duty to mitigate began on 16 January 1991 (the date of commencement of the military operations of the Allied Coalition forces against Iraq) since, at that time, it should have been clear that the possibility of continuing a commercial relationship with an Iraqi customer was seriously jeopardized.

[15] See paragraphs 62, 64 and 67 of this report.

[16] This finding is consistent with that made by the "E3A" Panel at paragraph 92 of the annex to its "Report and recommendations made by the Panel of Commissioners concerning the twenty-first instalment of 'E3' claims", (S/AC.26/2001/21).

[17] For the reasons set out in paragraphs 524-529 of this report, the Panel makes no recommendations with respect to the claims for interest and claims preparation costs.

[18] LC Holding does not assert that LHT incurred a loss of return of investment under the fifth contract, presumably because LHT had not, as at 2 August 1990, commenced any work under that contract.

[19] As LC Holding did not claim for a loss of return on investment under the fifth contract, the Panel makes no findings or recommendations in respect of any return on investment loss that may have been incurred under that contract.

[20] The evidence demonstrates that KNPC paid LHT interest on the principal amount of the second contract for the period from 1 September 1990 to 1 May 1991. Accordingly, the Panel finds that LC Holding is not entitled to interest on the principal amount of the second contract for this period.

[21] This finding is consistent with that made by the Panel in its "Report and recommendations made by the Panel of Commissioners concerning the fifth instalment of 'E1' claims", (S/AC.26/2000/1), (the "Fifth 'E1' Report"). See paragraphs 55 and 64.

[22] The 10 per cent penalty was measured against the agreed purchase price. The relevant provision can be found in section 8.2 (a) of the master agreement between SAMAREC and GENCON, which reads as follows:

> "In case BUYER fails (a) to lift any nominated quantity for lifting in any month and accepted by SELLER, and/or causes any delay resulting in loss of production due to any reason other than those set forth in Article 11 (Force Majeure) hereunder, or (b) to lift any quantity, as per his quarterly lifting schedule prescribed in Article 2.5 of Part II of this Contract, then BUYER shall pay to SELLER for each Metric Ton so unlifted ten percent (10 per cent) of the price as set out in Article 4 of this Contract. SELLER, however, shall be entitled, at its sole discretion, to deduct the unlifted quantity of product from the total contractual quantity and/or terminate this Contract".

[23] GENCON's financial year ends on 30 June. The annual profits figures used in the calculation were for the six years beginning on 1 July 1986 and ended on 30 June 1991. As a Saudi Arabian business entity, GENCON's financial returns are kept in Saudi Arabian riyals, as is required by the laws of that country. In its statement of claim GENCON claims that it had earned profits in five of these six years.

[24] Using the conversion rate chosen by GENCON of SAR 3.75 = USD 1.

[25] The Panel notes that other Panels have found contingent liability claims not to be compensable. See, for example, "Report and recommendations made by the Panel of Commissioners concerning the third instalment of 'F2' claims" (S/AC.26/2002/7), para. 111, where the "F2" Panel considered a claim for compensation in respect of claims which had not been, and might never be, brought by construction contractors against the claimant for amounts deducted and retained by the claimant from final payments to the contractors. The "F2" Panel determined that even if such claims were to be brought by the contractors, the outcome of such claims could not be predicted. Moreover, as the claimant retained the amounts, the "F2" Panel found that the claimant had not suffered any loss.

[26] KPC, KDC and KOC all filed separate claims with the Commission for damages sustained as a result of Iraq's invasion and occupation of Kuwait. The claims of KPC and KOC were considered by the Panel in the Second "E1" Report and its "Report and recommendations concerning the fourth

instalment of ‘E1’ claims” (S/AC.26/2000/16), (the “Fourth ‘E1’ Report”). The KDC claim will be reviewed by the Panel in its report concerning the tenth and ultimate instalment of “E1” claims. The Panel has verified that none of the claims made by Santa Fe are duplicative of claims made by these three companies.

[27] Since the date of the theft or destruction/theft of the rigs is unknown, a precise termination date cannot be determined.

[28] The three lease agreements for rigs 121, 139 and 142 all bore the same execution dates of 1 January 1990. The rig 121 and rig 139 lease agreements had five-year terms, which were to commence on the “spud date” (a technical slang term used in the drilling industry to denote when the drilling of a well first commences), which the parties estimated to be 1 August 1990. Thus, under their estimates, the normal five-year terms of the rig 121 and rig 139 lease agreements should have expired on 31 July 1995. The rig 142 lease agreement had a shorter three-year term, also running from the spud date (but did not provide an estimate of the parties’ expectation of the spud date). The rig 145 lease agreement, which was executed on the earlier date of 1 December 1989, had the shortest term of 16 months but, unlike the other three lease agreements, the term of the rig 145 lease agreement began on the fixed date of 1 December 1989 and was to continue until the fixed termination date of 31 March 1991.

[29] The capitalized term “Drilling Contract” is separately defined in section 1.1 of the lease agreements. There it says that the Drilling Contract is that individual drilling contract whereby KDC agreed to drill specific wells for KOC, using the lost rigs. There was apparently a separate drilling contract for each of the four lost rigs.

[30] The same language can be found at section 6.3 of the rig 145 lease agreement, save that the maximum lump sum amount is KWD 64,620 rather than the KWD 100,000 lump sum amount found in the rig 142/121/139 lease agreements.

[31] The same language is found at section 11.1 of the rig 145 lease agreement.

[32] The same language is found at section 11.3 of the rig 145 lease agreement. Section 2.4 of the Drilling Contract speaks of apportioning the demobilization fee amongst the equipment that was “undamaged”, suggesting that the demobilization fee was not payable for equipment that was found to be so damaged (or destroyed) that it would not be moved to another location.

[33] Notably, sections 11.2 and 12.2 (respectively) of the rig 145 and rig 142 lease agreements omit the highlighted language and read as follows: “In the event that KDC so terminates this Agreement during the Period of Agreement, KDC shall pay Santa Fe the lease payments up to the date of termination plus the demobilization payment, in accordance with Clause 6.3.”

[34] Refer to note 28 above, which discusses the terms of duration of the rig 121 and rig 139 lease agreements. The five-year terms in these two agreements were to commence on the spud dates for the first wells to be drilled by the two rigs, the parties having estimated that those drilling operations would begin in both cases on 1 August 1990. In the circumstances, rig 139 began drilling operations earlier than expected, on 1 May 1990. Thus, the five-year term for the rig 139 lease agreement began on that date. Santa Fe submitted the affidavit of a KDC field manager stating that the first well using rig 121 was spudded on 1 August 1990. To calculate the number of days that were subject to the “early termination rate” of USD 1,l00 (as set forth in sections 12.2 of the two agreements), Santa Fe determined the number of days that expired between the spud dates for both rigs (when the lease terms commenced) and 2 August 1990 (when the rig lease agreements were suspended). In the case of rig 139, the period from 1 May to 2 August 1990 measured 93 days. In the case of rig 139, the period was the one day of 1 August 1990. In claiming for 1,733 and 1,825 days of payment entitlement at the

"termination rate" of USD 1,100 per day, under the respective rig 139 and rig 121 lease agreements, Santa Fe has deducted the period of days during which the two rigs earned the higher drilling rates of KWD 1,380 per day – that period being 93 days in the case of rig 139 and one day in the case of rig 121.

[35] While the service agreement was executed in the name of the parent company, Santa Fe, its performance obligations were to be satisfied by its wholly-owned subsidiary, Santa Fe Drilling Company.

[36] KDC apparently considered the service agreement to be at an end as of 2 August 1990, as it ceased all payments under the agreement on that date.

[37] See "Report and recommendations made by the Panel of Commissioners appointed to review the well blowout control claim (the 'WBC Claim')", (S/AC.26/1996/5/Annex), paras. 55-61; and the Fourth "E1" Report, paragraph 163.

[38] See "Report and recommendations made by the Panel of Commissioners concerning the third instalment of 'E1' Claims", (S/AC.26/1999/13), (the "Third 'E1' Report"), paras. 59-60.

[39] See paragraph 19 above.

[40] Since filing its claim with the Commission, 2IM has amalgamated with Ipedex Production, whose claim is also considered by the Panel in this instalment, to form Ipedex SNC. For convenience, the Panel has dealt with these two claims separately in this report.

[41] This claim has been characterized as a claim for loss of revenue rather than lost profits because 2IM has incurred all the related staff and administration costs.

[42] Since filing its claim with the Commission, Ipedex has amalgamated with Ipedex 2IM SNC, whose claim is also considered by the Panel in this instalment, to form Ipedex SNC. For convenience, the Panel has dealt with these two claims separately in this report

[43] This claim has been characterized as a claim for loss of revenue rather than lost profits because Ipedex has incurred all the related staff and administration costs.

[44] As explained in the note to table 1 of this report, this is the total amount of compensation requested by TPL on the original claim forms converted by the Commission to United States dollars, where necessary, using the August 1990 mid-point rate of exchange as indicated in the United Nations Monthly Bulletin of Statistics. TPL used a different rate of exchange in preparing its claim, which resulted in slightly different totals on both its claim forms and statement of claim.

[45] In response to the Panel's requests, TPL has stated repeatedly that Iraqi law required it to retain much of its documentation in Iraq, where it had a branch office, and accordingly such documentation is no longer accessible or available. TPL has not provided any particulars of such legal requirements. Further, TPL has not adequately explained, as requested by the Panel, why it has not produced any of the documentation that might reasonably be expected to be found in its head office in Italy.

[46] TPL withdrew its claim for IQD 12,800 representing the balance of retention monies due under the contract with respect to the North Gas Kirkuk project in the course of the Panel's review of the claim.

[47] TPL originally sought the amount of USD 6,213,600 on the basis of the contractual value (USD 7,295,601) of the equipment and materials that were ready for delivery as at 2 August 1990 less

the sale proceeds it received from the sale of some of the equipment and materials back to the original suppliers (USD 1,082,000). Later, TPL reduced its claim to USD 5,629,953 by deducting its estimated profit element. The expenses were, however, incurred in currencies other than United States dollars and it is in these currencies that the Panel has assessed this part of the claim.

[48] The progress report, as well as a list of the equipment and materials ready for delivery, was appended to an agreement between TPL and the third party to document the status of the work under the contract as at 2 August 1990.

[49] See the First "E2" Report, paragraph 104.

[50] Ibid., paragraph 90.

[51] See, for example, "Report and recommendations made by the Panel of Commissioners concerning the first instalment of 'E/F' claims", (S/AC.26/2001/6), para. 35.

[52] Two per cent of the United States dollar portion of TPL's share of the lump sum contract price is actually USD 4,650,000. TPL erroneously claimed a lower amount. As TPL did not seek to amend this part of its claim in the time limited for doing so, TPL's claim is limited to the lower amount.

[53] "Reports and recommendations made by the Panel of Commissioners concerning the fourth instalment of 'E3' claims", (S/AC.1999/14), (the "Fourth 'E3' Report"), para. 96.

[54] Ibid., paragraph 154.

[55] The Third "E1" Report, paragraphs 479-481.

[56] See, for example, "Report and recommendations made by the Panel of Commissioners concerning the fourth instalment of 'F1'claims", (S/AC.26/2000/13), para. 283.

[57] See also "Report and recommendations made by the Panel of Commissioners concerning the seventh instalment of 'E2' claims", (S/AC.26/2001/11), para. 107.

[58] See, for example, "Report and recommendations made by the Panel of Commissioners concerning part two of the seventh instalment of 'E1' claims", (S/AC.26/2001/R.XX), (the "Seventh 'E1' Report, Part Two"), para. 73.

[59] The Panel finds that Petromin's claim is distinguishable from the claims referred to in paragraph 63 of "Report and recommendations of the Panel of Commissioners concerning the third instalment of 'E2' claims", (S/AC.26/1999/22), for the reason that Petromin is not engaged in the transportation industry, and accordingly did not have the flexibility to avoid the costs in question, as mentioned in paragraph 77 of that report.

[60] The Panel notes in passing that Petromin's business practice has since changed. It now deposits its refined gold with a bullion bank in London and earns interest on its gold deposits.

[61] On its category "E" claim form, Petrolube stated its loss in United States dollars as USD 10,903,308. Petrolube attached a separate schedule to its claim form reflecting the breakdown of its claim, stated both in United States dollars and Saudi Arabian riyals. During the course of its investigations the Panel established that Petrolube conducts most of its business and maintains its accounting records in Saudi Arabian riyals. The Panel has accordingly conducted its review of the claim in Saudi Arabian riyals.

[62] The Panel has previously recognized, in principle, the compensability of costs of this nature incurred in Saudi Arabia. See for example, the Third "E1" Report, paragraph 318. See also the Seventh "E1" Report, Part Two, paragraphs 66 and 229.

[63] On its category "E" claim form, Luberef stated its loss in United States dollars as USD 2,281,402. Luberef attached a separate schedule to its claim form reflecting the breakdown of its claim, stated both in United States dollars and Saudi Arabian riyals. During the course of its investigations the Panel established that Luberef conducts most of its business and maintains its accounting records in Saudi Arabian riyals. The Panel has accordingly conducted its review of the claim in Saudi Arabian riyals.

[64] See, for example, the Seventh "E1" Report, part two, paragraph 66.

[65] Ibid.

[66] Ibid.

[67] The Panel previously dealt with the corporate status of Samarec in the Seventh "E1" Report, part two, paragraph 150.

[68] See note 64 above.
