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REPORT AND RECOMMENDATIONS MADE BY THE PANEL OF COMMISSIONERS CONCERNING THE FIRST INSTALMENT OF "E2" CLAIMS

GE.98-62748

Contents

Introduction

1. The Governing Council of the Commission (the "Governing Council") appointed the present Panel of Commissioners (the "Panel"), composed of Messrs. Bernard Audit (Chairman), José-María Abascal and David D. Caron, at its twenty-first session in 1996, to review claims filed with the Commission on behalf of corporations and other legal entities in accordance with the relevant Security Council resolutions, the Provisional Rules of Claims Procedure (the "Rules")1/ and Governing Council decisions. This report contains the recommendations to the Governing Council by the Panel, pursuant to article 38(e) of the Rules, concerning claims of four corporations (the "Claims" or "Claimants") described below, each of which seeks compensation for damages allegedly arising out of Iraq's 2 August 1990 invasion and subsequent occupation of Kuwait. A fifth claim, that of Goodman Holdings and Anglo Irish Beef Processors International Limited (collectively referred to herein as "Goodman"), filed with the Commission by the Government of Ireland, was also before the Panel but was withdrawn by Goodman during the proceedings. (See paragraph 30, infra).

2. The Claims submitted to the Panel were selected by the secretariat of the Commission (the "secretariat") from among the category "E" claims on the basis of criteria established under the Rules. These include the date of filing with the Commission and compliance by claimants with the requirements established for category "E" claims in the Rules (such as submission of the claim with proof of incorporation or organization and proof that the person who submitted the claim on behalf of the entity had authority to do so). The most important requirement for this initial group of category "E" claims was that the claims selected present certain threshold legal issues that are relevant to the remaining claims - notably, the issues of what constitutes a "debt or obligation of Iraq arising prior to 2 August 1990" and what constitutes a "direct loss". The Claims adequately raise these issues.

3. In view of the anticipated precedential effect of the resolution of these issues, the Panel has taken particular care to ensure the adequate development of the issues presented by the Claims during the Panel's review period. The Panel has done this through, among other things and as discussed more fully infra, the use of questions to the Claimants and the Government of the Republic of Iraq, consideration of the responses of Governments to the reports of the Executive Secretary issued pursuant to article 16 of the Rules which identify and describe the legal and factual issues present in the Claims, and the assistance of expert consultants. To the extent that these precedential issues are resolved in the present

report, it is anticipated at present that the resolution of future groups of "E2"2/ claims will proceed without such detailed efforts by the Commission.

I. THE CLAIMS

4. The following summaries of the Claims are taken from the submissions made by the Claimants.

A. Continental Construction Limited

5. The claim of Continental Construction, Ltd. ("CCL") was filed with the Commission by the Government of India. CCL is a civil engineering company that specializes in the construction of large civil projects for public entities in India and other countries. At the time of Iraq's invasion of Kuwait, CCL was working on six civil engineering projects located in Iraq, each pursuant to a contract with an Iraqi public entity. CCL alleges the following with regard to circumstances in Iraq on and around 2 August 1990.

6. Its primary operations in Iraq were centred at a project site located outside Baghdad (the "Karkh project"). At the Karkh project site, CCL maintained a worker village capable of housing five thousand workers and fleets of construction equipment and utility vehicles.

7. CCL did not abandon the project site or leave Iraq on or shortly after 2 August 1990. Instead, it continued to work, specifically mentioning that it did so on the Karkh project because the Iraqi contracting authorities withheld payments allegedly due to CCL for work completed prior to Iraq's invasion and occupation of Kuwait. CCL states that by withholding payments, Iraqi authorities forced it to continue working on the Karkh project until January 1991. At the onset of the bombing of Baghdad in late January 1991, Iraqi authorities verbally ordered CCL to abandon the Karkh Project, leave its equipment behind and depart from Iraq via an overland desert route to Jordan. As a result, CCL left behind its construction equipment and property in Iraq.

8. CCL seeks compensation in the amount of US$472,833,095.003/ consisting of the following categories of alleged loss:

a. US$36,828,515.00, for the loss of cash held in non-convertible Iraqi dinars in Iraqi bank accounts which CCL alleges it was forced to abandon;

b. US$42,236,446.00, for the loss of property, equipment and materials in Iraq;

c. US$312,761,901.00, for losses arising from Iraq's failure to pay for contract work provided by CCL (this portion of the claim includes interest charges, at rates specified according to the various contracts); and

d. US$81,006,233.00, for contract-related losses, specified by CCL as lost profits, lost business opportunities, increased expenses, loss of income-producing assets and miscellaneous losses.

B. Gulf Cable

9. The claim of Gulf Cable & Electrical Industries, Co., KSC ("Gulf Cable") was filed with the Commission by the Government of Kuwait. Gulf Cable engages in the manufacturing of electric and telephone cables, electric and telephone wires, and low voltage cable joints. Gulf Cable's manufacturing plants and administrative offices are located in Kuwait City and began operating in 1980. In support of its claim, Gulf Cable alleges the following facts and events.

10. As of 2 August 1990, Gulf Cable's manufacturing plants consisted of two main factory buildings. These are described as a "power cable and dry core telephone cable factory" (the "power cable" factory) and a "jelly filled telephone cable factory" (the "jelly-filled cable" factory). The jelly-filled cable operation was a new venture for Gulf Cable, and as of 2 August 1990 production in that factory had not yet commenced. The civil works (including electrical, mechanical and fire-fighting services) were almost complete and machine installation was in progress as of 2 August 1990. Most of the machines intended for installation were either at the factory or at the port of Kuwait awaiting transfer to the factory.

11. Once it received information of Iraq's invasion and occupation of Kuwait, the following sequence of events took place. First, Gulf Cable's management decided to cease operations. Thereafter, and until early September 1990, only routine security checks were carried out by senior management. In September 1990, Iraqi army personnel occupied the factory premises and ordered the senior management to refrain from visiting the plant without being instructed or permitted to do so. During the period from 2 August 1990 to 2 March 1991, several of Gulf Cable's employees were granted access to the company premises by the occupying Iraqi forces and

had the opportunity of witnessing first-hand the loading of Gulf Cable's equipment and machinery onto Iraqi transport vehicles. In particular, approximately 150 employees of an Iraqi cable company ("Al-Naserya Cable") came to Kuwait City, occupied Gulf Cable's premises and worked at removing all of the machinery contained in the factories, as well as the stores and steel structures of factory buildings and sheds, to Iraq. After 2 March 1991 (the exact date is not specified), senior management returned to the premises and found that the buildings, the remaining equipment and machinery left therein had been extensively damaged.

12. Reconstruction of the power cable factory was completed and production of power cables was resumed in April 1992, but Gulf Cable determined not to proceed with the rebuilding of the jelly-filled cable factory due to "changed circumstances" - specifically, the Kuwaiti Ministry of Post and Telegraph's decision not to proceed with the proposal to include jelly-filled cables in its network. Gulf Cable thereafter decided to produce dry core cables out of the area formerly occupied by the jelly-filled cable factory.

13. Gulf Cable seeks compensation in the amount of US$126,618,792.62, consisting of the following categories of alleged loss:

a. US$4,168,341.78, for contract losses relating to amounts due from customers during the period 2 August 1990 to 2 March 1991;

b. US$10,676,443.23, for damage to real property inflicted on Gulf Cable's factory buildings by the Iraqi occupying forces;

c. US$54,788,945.67, for damage to or destruction of Gulf Cable's other tangible property by the Iraqi occupying forces;

d. US$56,094,383, for lost profits on Gulf Cable's business activities during the period of the occupation and for some time thereafter;

e. US$842,197.90, for expenses incurred by Gulf Cable in resuming operations after 2 March 1991; and

f. US$48,481.02, for claim preparation costs.

C. Hyundai

14. The claim of Hyundai Engineering and Construction Company, Ltd. ("Hyundai") was filed with the Commission by the Government of the Republic of Korea. Hyundai is a construction/engineering company that was working on twenty-one construction/engineering projects in Iraq, Kuwait and Saudi Arabia as of 2 August 1990. In support of its claim, Hyundai alleges the following series of facts and events.

15. In Iraq, on 2 August 1990, Hyundai had five construction projects at various stages of completion. After 2 August 1990 problems arose which made continued work on the Iraqi projects increasingly difficult: communications systems such as telephone and telex were disrupted; the airport in Baghdad was closed; further movement of workers and equipment was impeded; receipt of further payments in the form of crude oil ceased; the engagement of engineering contractors became difficult; and there were increasing problems in making contact with the Iraqi owner's personnel on site. Nonetheless, the Iraqi owners repeatedly asked Hyundai to continue to perform work on the project after 2 August 1990, threatening it with enforcement of Iraqi Law No. 57 which purportedly held foreign contractors responsible for any direct or indirect damages resulting from any delay on the Iraqi project sites. Notwithstanding these threats, Hyundai workers gradually were withdrawn after 2 August 1990.

16. In Kuwait, on 2 August 1990, Hyundai had nine construction projects at various stages of completion. It began evacuating personnel from its project sites in Kuwait immediately upon Iraq's invasion of Kuwait and completed the evacuation on 24 August 1990. During this period, two of its workers died while making an air-raid shelter. The Iraqi army plundered each of its Kuwaiti project sites during Iraq's occupation of Kuwait, causing extensive property and equipment damage and loss.

17. In Saudi Arabia, on 2 August 1990, Hyundai had seven construction projects at various stages of completion. Hyundai describes a generally unsettled atmosphere in Saudi Arabia during the period from 2 August 1990 to 2 March 1991, which allegedly caused a loss of productivity at these project sites. Hyundai states that in the light of Iraq's messages urging Arab countries to overthrow the Government of Saudi Arabia and the massing of Iraqi troops on the Saudi Arabian border, the Korean Embassy advised all Korean workers in the Eastern area of Saudi Arabia to move to Riyadh or Jeddah. For safety reasons, staff and labourers left Saudi Arabia. Iraqi missile attacks against the city of Riyadh and the threat of chemical attacks caused Hyundai's labourers to riot and this in turn caused

inefficiency and loss of productivity. Finally, work on Hyundai's Saudi Arabian projects was impeded by its inability to keep subcontractors on site, by the failure of equipment and raw material suppliers to honour their commitments and by the rises in the price of essential materials.

18. Based on the foregoing allegations, Hyundai first filed a claim for compensation for US$238,428,869, consisting of the following categories of alleged loss:

a. US$138,308,815, for lost property, including construction machinery and equipment, supplies and raw materials, and warehouses and temporary accommodations for workers that were damaged or destroyed at Hyundai's project sites in Iraq, Kuwait and Saudi Arabia during the period 2 August 1990 to 2 March 1991;

b. US$48,133,295, for lost profits on projects Hyundai was forced to abandon as a result of Iraq's unlawful invasion and occupation of Kuwait;

c. US$33,464,556, for contract-based salary payments to workers, paid from the termination of the various projects until repatriation of the workers to their home countries;

d. US$3,482,394, for repatriation costs incurred on behalf of Hyundai's employees who were evacuated from Iraq, Kuwait and Saudi Arabia;

e. US$6,163,658, for financial costs relating to finance charges paid by Hyundai for pre-paid bank bond fees, insurance premiums, equipment deposits and interest due to payment delays; and

f. US$8,872,149, for suspension/termination costs, relating to costs incurred by Hyundai in preparing the various construction sites prior to departure, and rental costs paid for equipment that it was unable to use.

19. On 30 June 1994 the Commission received a supplemental submission from Hyundai. In this supplement, Hyundai sought additional compensation in the amount of US$889,118,983.89 consisting of: (a) US$861,041,396.22 for losses allegedly arising out of its contracts with Iraqi public entities to perform construction work on various projects located within

Iraq; and (b) US$28,077,587.67 for equipment allegedly lost or destroyed at project sites located in Kuwait. Because the supplemental submission arises out of the same factual circumstances as those presented in the Claim initially filed with the Commission, the supplemental submission has been considered by the Panel with the initial claim as a single request for compensation.

D. Technopromexport

20. The claim of V/O Technopromexport ("Technopromexport") was filed with the Commission by the Government of the Russian Federation. Technopromexport is a supplier of comprehensive services for electric power generation and transmission facilities and had been working with Iraqi public entities since the late 1950s.

21. On 2 August 1990 Technopromexport was engaged in work on four projects for Iraqi public entities: (a) the construction of a 1,680 megawatt thermal power plant known as the Youssifiyah thermal power station ("Youssifiyah Station"); (b) design work on a proposed hydroelectric power station at Al-Baghdadi ("Al-Baghdadi Project"); (c) the supply of approximately 20,000 kilometres of transmission lines to Iraq; and (d) the supply of spare parts for two other thermal power stations ("Nassiriyah" and "Najibiyah") and one hydroelectric power station ("Dokan"). Technopromexport alleges the following facts and events concerning these projects.

22. The Youssifiyah Station was the largest project in which Technopromexport was engaged in Iraq as of 2 August 1990. Technopromexport's involvement with this project began on 21 June 1988 when it entered into a contract with the Iraqi General Establishment for Generation and Transmission of Electricity, a Governmental entity later known as the Iraqi Electrical Projects Company. The project involved the construction of a thermal power station with a total generating capacity of 1,260 megawatts. On 12 June 1990, the parties agreed to expand the project to include the construction of two additional 210 megawatt units, bringing the total capacity of the project to 1,680 megawatts. As of 2 August 1990, the project was 24.7 per cent complete. As a result of Iraq's invasion and occupation of Kuwait and the military conflict that followed, all project work was terminated and Technopromexport was forced to evacuate its workers from Iraq. Technopromexport was unable to remove or secure the return of its construction-related equipment and property in Iraq at that time, nor has it been able to secure its return since the end of the hostilities in the Gulf (2 March 1991). Consequently, Technopromexport divides the

damages allegedly suffered in relation to the project into the following three categories: (a) unreimbursed expenses incurred by Technopromexport in the evacuation of its employees; (b) loss of Technopromexport's construction-related property and equipment in Iraq; and (c) contractual losses.

23. The Al-Baghdadi Project involved the preparation of a report concerning the feasibility and design of a large hydroelectric power plant on the Euphrates river in Iraq. The preparation of this report entailed the supply of technical assistance and the utilization of specialized equipment required to conduct engineering research. After Iraq's invasion and occupation of Kuwait, further performance became impossible.

24. Pursuant to two contracts dated 25 March 1989 and 22 November 1989 respectively, Technopromexport agreed to supply Iraqi public entities with aluminum and steel/aluminium conductors for the construction of transmission lines. Technopromexport had supplied 75 per cent of the conductors required under the contract as of 2 August 1990, but contends that further performance was made impossible as a result of Iraq's invasion and occupation of Kuwait.

25. Pursuant to a contract dated 12 October 1986, Technopromexport agreed to supply Iraqi public entities with stand-by equipment, instruments and spare parts for two power stations (the Najibiyah and Nassiriyah stations) and one hydroelectric station (the Dokan station). Technopromexport had delivered approximately 80 per cent of the parts and equipment required under the contract as of 2 August 1990, but contends that further performance became impossible due to Iraq's invasion and occupation of Kuwait. Technopromexport states that virtually all the parts and equipment ordered were custom manufactured specifically for these projects and, accordingly, could not be resold to a third party.

26. Technopromexport seeks compensation in the amount of US$326,352,455.17, consisting of the following categories of alleged loss:

a. US$1,430,062, for costs incurred in evacuating 645 of its employees and their dependants from Iraq;

b. US$46,367,655.52, for the loss of tangible assets, including equipment and material, and costs associated with attempts to safeguard the assets;

c. US$228,070,678.54, for contract-related losses on its contract to design and build the thermal power station (this portion of the Claim includes a request for compensation for lost profits in the amount of US$102,408,619.00);

d. US$3,571,622.23, for contract-related losses on a contract to design the hydroelectric power project;

e. US$8,188,852.09, for contract-related losses on the agreements to supply aluminium and steel/aluminium conductors for the construction of transmission lines;

f. US$3,364,226.99, for contract-related losses on the agreements to supply spare parts for certain thermal power stations located in Iraq; and

g. US$35,359,357.80, for interest on the above amounts.

II. PROCEDURAL HISTORY

27. Pursuant to article 16 of the Rules, the Executive Secretary of the Commission reported the Claims to the Governing Council on 30 April 1996 and 31 July 1996 (“the article “16” reports”). Following the procedure established by article 16, paragraph 3 of the Rules, a number of Governments submitted their information and views on the Executive Secretary’s reports. These responses were transmitted by the secretariat to the Panel pursuant to article 32, paragraph 1 of the Rules.

28. During its first formal meeting in March 1997, the Panel approved the secretariat’s efforts to retain the services of expert consultants to assist the Panel in the review and analysis of the Claims. After a competitive bidding and selection process conducted according to applicable United Nations rules, an internationally-renowned loss adjusting firm was retained in April 1997.

29. In a procedural order dated 14 March 1997, the Panel decided to classify the Goodman claim as an unusually large or complex claim within the meaning of article 38(d) of the Rules. In this procedural order the Panel instructed the secretariat to transmit to the Government of the Republic of Iraq (“Iraq”) the documents filed by Goodman in support of its Claim. The Panel also requested that Goodman respond by 14 June 1997 to questions concerning the Claim, and invited Iraq to submit by 12 September

1997 its responses to the Claim documentation and several questions posed by the Panel.

30. On 12 June 1997 Goodman submitted its responses to the Panel's questions. However, on 18 August 1997 the Commission received from the Government of the Republic of Ireland and from Goodman itself notices of Goodman's withdrawal of its Claim. In the light of these communications, the Panel issued a procedural order on 20 August 1997, pursuant to article 42 of the Rules, acknowledging the withdrawal and terminating the Panel's proceedings with respect to the Goodman Claim.

31. On 3 June 1997 the Panel issued four procedural orders concerning, respectively, the Claims of CCL, Gulf Cable, Hyundai and Technopromexport. These orders contained the Panel's decisions to classify each of these Claims as unusually large or complex within the meaning of article 38(d) of the Rules. In each of these procedural orders, the Panel instructed the secretariat to transmit to Iraq the documents filed by the Claimants in support of their respective Claims. In addition, the procedural orders contained the Panel's request that each Claimant respond by 3 September 1997 to detailed questions annexed to the orders. The orders issued in the CCL, Hyundai and Technopromexport Claims also contained an invitation to Iraq to respond by 3 December 1997 to the Claims and to specific questions addressed to Iraq concerning the Claims.

32. On 3 September 1997 the Commission received the responses of CCL, Gulf Cable, Hyundai and Technopromexport respectively to the procedural orders dated 3 June 1997.

33. After considering the Claims and the responses received, the Panel, during its October 1997 meeting, took two actions. First, on 23 October 1997 the Panel issued a procedural order to Hyundai requesting further specific information concerning its performance of the contracts that are the subject of the supplementary submission. Second, the Panel directed the secretariat and the Panel's expert consultants to undertake an on-site inspection of documents at Gulf Cable's headquarters in Kuwait for the purpose of further evaluating Gulf Cable's lost profits claim. The inspection took place on 2-3 December 1997 and its results were reported to the Panel during its December 1997 meeting.

34. On 17 November 1997, Iraq delivered a letter to the Commission in which it requested that "its legal defence relating to compensation claims filed by Hyundai Company Gulf Cable Company (Kuwait) Technoprom Export Company (Russia) Continental Construction Company CCL (India) be postponed

for at least two months". On 21 November 1997 the Panel issued a procedural order responding to Iraq's request in which the Panel first noted that, in the context of the Commission's mandate, it understood Iraq's letter to be a request for an extension of time to respond to the specific questions addressed to it in the 3 June 1997 procedural orders issued in the CCL, Hyundai and Technopromexport Claims. Second, the Panel stated that the time limits established for claims review in the Rules prevented it from granting extensions of time that might impair the completion of its task within those time limits. While urging Iraq to file answers by the 3 December 1997 deadline, the Panel stated that it would consider responses filed by Iraq after that deadline where such consideration would not hinder its ability to meet its own deadlines for claims review.

35. On 24 November 1997, the Commission received Hyundai's response to the Panel's procedural order dated 23 October 1997.

36. On 22 December 1997, the Commission received responses from Iraq to the questions issued by the Panel on 3 June 1997 concerning the Claims of CCL, Gulf Cable, Hyundai and Technopromexport respectively4/ The Panel reviewed these responses and fully considered them in the course of its deliberations on the Claims.

37. During its meeting of 2-4 February 1998, the Panel concluded that the issues presented by the Claims had been adequately developed and that oral proceedings to explore such issues further were not required.

III. LEGAL FRAMEWORK

A. The nature and purposes of the proceedings

38. The role and tasks of a panel of Commissioners operating within the Commission's framework are set forth in the Secretary-General's report to the Security Council dated 2 May 1991 as follows:

> "The Commission is not a court or an arbitral tribunal before which the parties appear; it is a political organ that performs an essentially fact-finding function of examining claims, verifying their validity, evaluating losses, assessing payments and resolving disputed claims. It is only in this last respect that a quasi-judicial function may be involved. Given the nature of the Commission, it is all the more important that some element of due

process be built into the procedure. It will be the function of the commissioners to provide this element.

"The processing of claims will entail the verification of claims and evaluation of losses and the resolution of any disputed claims. The major part of this task is not of a judicial nature; the resolution of disputed claims would, however, be quasi-judicial. It is envisaged that the processing of claims would be carried out principally by the commissioners. Before proceeding to the verification of claims and evaluation of losses, however, a determination will have to be made as to whether the losses for which claims are presented fall within the meaning of paragraph 16 of resolution 687 (1991), that is to say, whether the loss, damage or injury is direct and as a result of Iraq's unlawful invasion and occupation of Kuwait".5/

39. Three tasks thus have been entrusted to the Panel in the present proceedings. First, the Panel must determine whether the various types of losses alleged fall within the jurisdiction of the Commission. Second, it must verify whether the alleged losses that are in principle compensable have in fact been incurred by a given claimant. Third, it must determine whether losses found to be compensable have been incurred in the amounts claimed.

40. In fulfilling these tasks, the Panel must keep in mind the reality that the vast number of claims before the Commission require the adoption of legal standards and valuation methods that are administrable and that carefully balance the twin objectives of speed and accuracy. Only by adopting such an approach can the thousands of category "E" claims that have been filed with the Commission be efficiently resolved.

41. As described in paragraphs 27 to 37, supra, the Panel, bearing in mind the important issues raised by the present Claims, has made every effort to accomplish the tasks described above. The Panel has also assumed an investigative role that goes beyond reliance solely on the information and argumentation accompanying the Claims.

42. In drafting its report the Panel has not included specific citations to restricted or non-public documents that were produced or made available to it for the completion of its work. The Panel likewise did not recite in detail its valuation of each particular loss element while ensuring that this report clearly indicates those parts of the Claims that were found to be outside the jurisdiction of the Commission. This is required not only

by the nature of the Commission, but also by the great number of claims before the Panels.

B. Applicable law and criteria

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

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

C. Liability of Iraq

44. According to paragraph 16 of Security Council resolution 687 (1991), which, under article 31 of the Rules, forms part of the law applicable before the Commission, "Iraq ... is liable under international law for any direct loss, damage ... or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait". The issue of Iraq's liability for losses falling within the Commission's jurisdiction is therefore resolved.

D. Evidentiary requirements

45. In contrast to the claim forms and standardized evidentiary requirements applicable to individual claimants seeking compensation in the expedited "A", "B" and "C" claim categories, the Governing Council has made it clear that with respect to business losses there "will be a need for detailed factual descriptions of the circumstances of the claimed loss, damage or injury" in order for compensation to be awarded6/

46. Each category "E" claimant was required to submit with its claim form "a separate statement explaining its claim ('Statement of Claim'), supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and the amount of the claimed loss"7/ In addition, claimants were instructed to include in the Statement of Claim the following particulars:

> "(a) The date, type and basis of the Commission's jurisdiction for each element of loss ... ;

(b) The facts supporting the claim;

(c) The legal basis for each element of the claim;

(d) The amount of compensation sought, and an explanation of how this amount was arrived at."8/

47. Where claimants have submitted a statement of claim meeting the Commission's requirements and the statement is supported by documentary or other appropriate evidence, article 35, paragraph 1 of the Rules requires the Panel to "determine the admissibility, relevance, materiality and weight" of such evidence. In so evaluating the evidence before it, the Panel must determine whether it is sufficient to demonstrate the circumstances and amount of the claimed loss.

48. Notwithstanding the use of procedural orders posing specific questions to the Claimants, the Panel observed that certain loss elements were not supported by evidence sufficient to demonstrate the circumstances and amount of the claimed losses.9/

IV. OUTSTANDING LEGAL ISSUES

49. Paragraph 16 of Security Council resolution 687 (1991) provides:

"[The Security Council] [r]eaffirms that 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".

50. Given that paragraph 18 of the same resolution calls for the establishment of a Commission to address claims that fall within paragraph 16, paragraph 16 serves not only to reaffirm the liability of Iraq but also to define the jurisdiction of the Commission.

51. Two significant jurisdictional issues are presented to this Panel by the Claims. First, the Panel is called upon to interpret the clause "without prejudice to the debts and obligations of Iraq arising prior to 2 August 1990" (hereinafter referred to as the "arising prior to" clause). Second, the Panel is required to explore the requirement that the loss, damage or injury for which compensation is claimed be "direct". In

addition, in view of the trade embargo placed on Iraq by the Security Council on 6 August 1990, the Panel must consider the effect of this prohibition on claims related to performance of obligations to Iraq after that date.10/

A. The "arising prior to" clause and the Commission's jurisdiction

52. A number of Governments have submitted responses to the Commission's article 16 reports discussing the "arising prior to" clause. These responses present a variety of interpretations. In general, they seek to identify what debts and obligations of Iraq are excluded from the jurisdiction of the Commission by this clause. Some Governments, however, take the position that the "arising prior to" clause was not intended to have any exclusionary effect on the Commission's jurisdiction. The latter issue must be decided first; for only if it is found that the clause does have an exclusionary effect will it become necessary to determine the precise extent of that exclusion.

53. Other than the text of resolution 687 (1991), the Security Council has provided no explicit guidance on these issues. Likewise, the Governing Council has not made any decision on the application or meaning of the "arising prior to" clause. It is therefore incumbent on this Panel to interpret the meaning and application of paragraph 16.

54. In interpreting Security Council resolution 687 (1991), the Panel takes guidance from the Vienna Convention on the Law of Treaties (the "Vienna Convention"), which provides, in part, that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".11/ Although a resolution of the Security Council is not a treaty within the meaning of the Vienna Convention, the Panel finds that the Convention when referred to with care is relevant to its task of interpretation. The Panel notes in this regard that other international bodies have looked to the Vienna Convention for guidance in interpreting resolutions of the United Nations Security Council12/ Bearing these considerations in mind, the Panel now turns to the two fundamental issues raised by the "arising prior to" clause.

1. Whether the "arising prior to" clause has an exclusionary effect

55. It is contended in some Governmental responses to the article 16 reports addressing the "arising prior to" clause that the only jurisdictional exclusion contained in paragraph 16 of Security Council

resolution 687 (1991) stems from the requirement that the loss be “direct”. The clause “without prejudice to the debts and obligations of Iraq arising prior to 2 August 1990, which will be addressed through the normal mechanisms” is not understood by such Governments to restrict the scope of the Commission’s jurisdiction. Instead, they understand it simply to mean that other fora, in addition to the Commission, remain available to claimants.

56. For the reasons set forth below, the Panel does not share this understanding of the clause. The Panel finds that the “arising prior to” clause does have an exclusionary effect on the jurisdiction of the Commission, and that the phrase “without prejudice” is at the same time intended to emphasize that the jurisdictional exclusion in no way affects the ability of persons or entities to seek recourse for such debts and obligations “through the normal mechanisms”.

57. In considering paragraph 16, the Panel finds the very fact that the “arising prior to” clause was included in the paragraph is a strong indication that the Security Council intended the clause to have some specific meaning other than merely restating what is made clear in the remainder of the paragraph - namely, that Iraq is responsible for direct losses resulting from the invasion and occupation of Kuwait. This is particularly so given that no such clause appeared in prior Security Council resolutions on the same issue.13/

58. The meaning of the clause depends in large part on the interpretation to be given to two phrases contained in the paragraph: the first is the phrase “without prejudice” and the second “which will be addressed through the normal mechanisms”. These are addressed in turn.

59. The phrase “without prejudice”, introducing a subordinate proposition, is ordinarily used to indicate that the subject matter of the subordinate proposition (in this case “debts and obligations of Iraq arising prior to 2 August 1990”) is not to be affected by the proposition in the main sentence. Thus, in ordinary usage, the phrase introduced by “without prejudice” in paragraph 16 should be read to mean that debts and obligations of Iraq arising prior to 2 August 1990 are not to be affected by the Security Council’s determination that Iraq “is liable under international law for any direct loss ... as a result of Iraq’s invasion and occupation of Kuwait”, and that Iraq is liable for the non-excepted debts under the mechanism laid down by the subsequent provisions of the resolution.

60. In ordinary usage, the use of the future tense in legal texts, as in the phrase “which will be addressed through the normal mechanisms” indicates a command. Thus, in this case, the use of the tense indicates that the only avenues for recovery of “debts and obligations of Iraq arising prior to 2 August 1990” are “the normal mechanisms”, and not the Commission, which was established specifically for the purpose of resolving claims arising directly out of Iraq’s invasion and occupation of Kuwait.

61. The Panel is mindful that its interpretation of the resolution, where necessary, should not be based entirely on the English language text. Official texts were prepared in Arabic, Chinese, French, Russian and Spanish as well as English, and these versions are instructive in ascertaining the Security Council’s intentions14/ In examining these other official texts, the Panel finds that they indeed confirm the above interpretation of the phrases “without prejudice”15/ and “which will be addressed through the normal mechanisms”16/

62. The Panel concludes therefore that the ordinary meaning of the phrases “without prejudice” and “which will be addressed through the normal mechanisms” indicate that in using this language the Security Council intended to exclude from the jurisdiction of the Commission “debts and obligations of Iraq arising prior to 2 August 1990”. As discussed below, this finding is reinforced when the purpose of the resolution is considered.

2. The meaning to be given to the clause “debts and obligations of Iraq arising prior to 2 August 1990”

63. Having interpreted paragraph 16 of Security Council resolution 687 (1991) to mean that debts and obligations of Iraq arising prior to 2 August 1990 are to be excluded from the jurisdiction of the Commission, the Panel must identify with precision when they may be considered to have “arisen”. The Panel first considers these issues generally, and then applies its findings to the specific factual situations before it.

(a) Generally

64. Applying the principle of article 31 of the Vienna Convention, which, as stated above, provides in part that “[a] treaty shall be interpreted ... in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”, the Panel first considers the ordinary meaning of the terms of the “arising prior to” clause of paragraph 16 of resolution 687 (1991).

(i) The ordinary meaning to be given to the terms

65. The words “debts” and “obligations” are broad and encompassing. In its ordinary meaning, the word “debt” is a monetary sum due to a creditor. In legal terminology, the word is also used where a payment in kind is due, notably where goods or commodities must be delivered in satisfaction of a prior commitment or by way of compensation. The World Bank, for example, thus defines debts as “obligations to make future payments, in cash or in kind, in specified or determinable amounts and with fixed or determinable rates of interest (which may be zero)”17/ “Obligation” is a somewhat broader term. The concept of “obligation” is taken from Roman law (obligatio) and remains fundamental in civil law systems. In those systems it designates the reverse side of a right which a person enjoys against another person (be they natural or legal)18/ Obligations arise out of contracts (or quasi-contracts) or out of torts (delicts or quasi-delicts) and are classified into obligations to deliver a thing or res (dare), to perform an act, including a payment (obligatio faciendi), or to refrain from doing something (obligatio non-faciendi). Therefore, a debt, as defined above, is but a particular kind of obligation19/ In the context of war reparations, the Treaty of Versailles, in contrast with paragraph 16 of resolution 687 (1991), referred to a “debt or other pecuniary obligation”, which was interpreted as excluding obligations in kind20/ No such restriction exists in this context; by using the words "debts and obligations" conjunctively, not only did the Security Council intend to include all kinds of debts, but it retained the widest possible concept, encompassing anything for which Iraq was answerable to third parties at the relevant time.

66. Concerning the clause “arising prior to”, the ordinary meaning of the word “arise” is to “begin to exist, originate”21/ In legal terminology, "arise" means “to spring up, originate, to come into being or notice”22/ This meaning is confirmed by the other official texts of Security Council resolution 687 (1991) conveying the same meaning23/

67. As paragraphs 65 and 66 demonstrate (and although there is little or no substantive variation among the official versions of paragraph 16), the ordinary meaning of the individual terms in the various official texts does not answer with any specificity the question of when a debt or obligation may be considered to have arisen.

(ii) Absence of a uniform legal meaning to the phrase “arising prior to”

68. A second interpretive method seeks to determine whether there is a consensus among the various legal systems as to when debts or obligations “arise”, “originate” or “come into being”. A starting point for this enquiry is a review of the responses received from Governments to the Commission’s article 16 reports that identified this issue and solicited comments.

69. These responses put forward various manners of assessing when a debt or obligation arises that can be roughly categorized as follows. A few Governments have observed that in particular situations a contractual debt or obligation can arise as early as the conclusion of the contract between the parties (citing, for example, the case of certain kinds of loan contracts). More Governments have taken the position that a debt or obligation arises as of the date all of the conditions precedent to payment have been fulfilled, even if payment is to be made at a later time. Yet more Governments have taken the position that a contractual debt or obligation does not arise until the creditor has an action for the debt - i.e., after performance by the creditor has been completed under the contract, or after the time period established for payment has expired24/ Only then, according to this approach, can the contractual debt or obligation be considered truly "ripe" in any legal sense.

70. The Panel finds that the divergence in views expressed in the article 16 responses results not only from the fact that differences exist between legal systems, but also because the Governments often tried to give a single and abstract answer without reference to the particular purpose to be served by the phrase. The responses thereby failed to reflect that significant differences exist even within a given legal system as to when a debt or obligation arises, depending upon the context in which the concept is used. In the light of these various and often conflicting views across and within different jurisdictions, the Panel finds that there is no definite and universal legal concept of when a debt or obligation may be considered to have arisen.

(iii) The object and purpose of the “arising prior to” clause

71. The lack of a sufficiently specific ordinary meaning to the terms or a shared legal meaning of the phrase “arising prior to” is not surprising when it is considered that the question of when a debt or obligation should be said to arise will depend fundamentally on the object and purpose

underlying the particular rule. The meaning of the phrase “arising prior to” can be understood only through the purpose it serves. Indeed, article 31 of the Vienna Convention recognizes that treaty interpretation is not simply a matter of discovering and then applying ordinary or legal definitions, but requires the enquiry to consider also the meaning to be given to the terms “in their context and in the light of [the treaty’s] object and purpose”. The same canon of interpretation is applied to legislative enactments in many municipal legal systems (where it is sometimes known as teleological interpretation). The Panel finds that it is only in considering the object and purpose of Security Council resolution 687 (1991) that paragraph 16 may be understood and applied to the Claims at hand.

72. The Panel finds that the object and purpose of the Security Council's insertion of the “arising prior to” clause was to exclude from the jurisdiction of the Commission Iraq’s old debt. The exclusion of this pre-existing foreign debt from payment through the Fund is understandable when one considers its sheer size. Although the estimates of Iraq’s foreign debt during the 1980s vary, one of the lowest estimates, acknowledged by Iraq, was approximately US$42 billion as of 1990. The debt was substantial and known to the public - including the Security Council - before resolution 687 (1991) was adopted. Paying off this debt out of the Fund would have resulted in a significant diversion of the resources available to compensate the victims most directly affected by the invasion of Kuwait. Such a diversion of resources would have greatly undermined the very purpose of the Commission and Fund, and would have created an unanticipated mechanism for the compensation of creditors long unpaid. It was this old debt that the Security Council sought to exclude by the insertion of the “arising prior to” clause.

73. The Panel finds it very significant that the Security Council specifically identified “debts and obligations of Iraq arising prior to 2 August 1990" even though there also is a requirement that compensable losses be “direct”. Two explanations are possible. First, the Security Council, even if believing that all losses based on such old debt could not be “direct”, sought to emphasize that it should not be viewed as compensable before this Commission. Second, the Security Council, thinking it somehow possible that old debt might legally be new under some applicable law, sought to emphasize that it should not be viewed as compensable before this Commission. Whatever the case, the Security Council’s addition of the “arising prior to” clause emphasizes the exclusion of such debts and obligations.

74. The ascription by the Panel of this object and purpose to paragraph 16 is supported by the context of resolution 687 (1991). First, this resolution is concerned with losses caused by an invasion and occupation that lasted approximately seven months and which was felt primarily within the territory of Kuwait. The purpose of this Commission is to provide compensation to the victims of those illegal acts. The Panel notes that the Governing Council in decision 9 has indicated that compensable losses, although primarily tortious or delictual, may also include actual losses suffered in relation to contracts with Iraq 25/ Simultaneously, however, it is clear that this Commission is not to address all the debts and obligations of Iraq which may be claimed somehow to not have been paid as a result of Iraq's invasion and occupation of Kuwait. Second, the two paragraphs immediately following paragraph 16 support the conclusion that the purpose of the "arising prior to" clause was the exclusion of Iraq's old debt from the Commission by emphasizing Iraq's continuing duty to service and repay that debt. These paragraphs provide as follows:

> "17. Decides that all Iraqi statements made since 2 August 1990 repudiating its foreign debt are null and void, and demands that Iraq adhere scrupulously to all of its obligations concerning servicing and repayment of its foreign debt;
>
> "18. Decides also to create a fund to pay compensation for claims that fall within paragraph 16 above and to establish a Commission that will administer the fund;"

Paragraph 17 relates to the general obligation of Iraq to adhere to the servicing and repayment of its foreign debt. Paragraph 18 relates to the complementary and co-existent obligation - the obligation defined in paragraph 16 to compensate victims of Iraq's unlawful invasion and occupation of Kuwait - the terms of that obligation to be defined through the operation of the Commission.

75. Paragraphs 16, 17 and 18 considered together thus indicates that the Security Council, in establishing the compensation fund (the "Fund") in paragraph 18, did not intend that this Fund be used to pay off the Iraqi foreign debt mentioned in paragraph 17. Paragraph 17 expressly directs Iraq to "adhere scrupulously to all of its obligations concerning servicing and repayment of its foreign debt". Consequently, the Panel finds that the "arising prior to" clause of paragraph 16 represents an exclusion of debts and obligations of Iraq that should be understood in relation to the foreign debt that Iraq itself is obligated to service and repay directly and not through the Fund established in paragraph 18.

76. This interpretation also is confirmed by the subsequent practice and statements of the Security Council in the implementation of resolution 687 (1991). A particularly significant element of this practice involved the analysis of the contribution mechanism for the Fund and its relationship to the continuing obligation of Iraq to service and repay its debt.

77. Paragraph 19 of resolution 687 (1991) directed the Secretary-General of the United Nations "to develop and present to the Security Council for decision ... recommendations for the fund to meet the requirement for the payment of claims established in accordance with paragraph 18 ..." In accordance with paragraph 19, the Secretary-General presented a report to the Council on 2 May 1991 (S/22559) which contained, at paragraph 13, an undertaking by the Secretary-General to suggest to the Security Council a percentage figure of the value of Iraq's petroleum exports that would represent Iraq's contribution to the Fund. On 30 May 1991 the Secretary-General presented his analysis in the form of a note, annexed to a letter addressed by him to the President of the Security Council (S/22661). In this note, the Secretary-General offered the following analysis:

> "5. Estimates of the foreign exchange expenditures of the Iraqi economy for strictly civilian purposes during the 1980s vary. By taking account of historical relationships of consumption and investment to GDP and their import intensity, and data on net service imports as provided by Iraq, it is estimated that about $8 billion may be required to sustain a level of civilian imports in 1991 consistent with the needs of the Iraqi economy.
>
> "6. Iraq's total external debt and obligations have been reported by the Government of Iraq at $42,097 million as of 31 December 1990.[26/] However, the exact figure of Iraq's external indebtedness can only be ascertained following discussions between Iraq and its creditors. To estimate debt servicing requirements it is assumed that Iraq reschedules its debts at standard Paris Club terms.
>
> "7. With oil exports expected to reach about $21 billion by 1993 imports should absorb about 48 per cent of export earnings and debt servicing approximately 22 per cent. I suggest, therefore, that compensation to be paid by Iraq (arising from section E of resolution 687) should not exceed 30 per cent of the annual value of the exports of petroleum and petroleum products from Iraq".

78. Adopting the Secretary-General's analysis, the Security Council decided, in resolution 705 (1991), that "compensation to be paid by Iraq (as arising from section E of resolution 687 [1991]) shall not exceed 30 per cent of the annual value of the exports of petroleum and petroleum products from Iraq".27/

79. It is thus clear that the percentage of its oil resources which Iraq was to contribute to the Fund in order to make compensation for loss or damage arising out of its invasion and occupation of Kuwait was determined by taking into account the fact that Iraq would at the same time honour its pre-existing external debt out of its remaining resources.

80. For these reasons, the Panel finds the Security Council's exclusion of old debt from the jurisdiction of the Commission is consonant with the requirement that Iraq continue paying and servicing directly its debt, as provided in paragraph 17 of resolution 687 (1991). This determination by the Panel leads it to the necessity of drawing a line between what the Security Council intended that Iraq pay through the Fund, and what the Council intended that Iraq continue paying directly itself.

(iv) Debts and obligations within the "arising prior to" clause exclusion

81. The determination of exactly what constitutes the old debt of Iraq defines the scope of the jurisdictional exclusion in paragraph 16. Therefore the Panel's task is to devise an administrable rule for the identification of those debts as opposed to the debts that could be termed truly "new" as of 2 August 1990; only the latter are within the Commission's jurisdiction.

82. In considering what debts and obligations are old in the sense of "arising prior to" clause of paragraph 16, the Panel found it necessary to trace the growth of Iraq's foreign debt during the 1980s. In undertaking this examination of the recent history of Iraq's foreign debt, the Panel notes that the most widely-shared international definitions of the phrase "foreign debt" includes any debt incurred both by the State (public debt) and its residents (private debt) as soon as that debt is incurred. The Organization for Economic Development and Cooperation (OECD), for example, defines foreign debt to include short, medium and long-term debt from four main sources: bilateral and multilateral developmental debt; debt arising from non-concessional lending by multilateral institutions; export credit debt (official and officially guaranteed private export credits); and other private debts, set at market terms.28/

83. Iraq's substantial foreign debt is a relatively recent phenomenon. Indeed, Iraq's practice with respect to foreign suppliers of goods and services until the late 1970s, or even the early 1980s, appears to have been to pay its debts on a current basis. Before that time, each Iraqi Government authority was required to implement work and projects within the allocated cost in an already-approved budget, and no authority was permitted to commence the execution of any project or enter into any obligation unless a credit allocation for the work or obligation in question had already been provided for in the Iraqi National Development Plan and the relevant annual investment budget29/ Furthermore, article 59 of the Iraqi regulations for the "Execution and Follow-Up of Projects of Works of the National Development Plan", issued pursuant to Regulation 14 of the Iraq Board of Planning on 19 January 1975, provided that the Iraqi contract party must not delay in making payments required under contract.

84. In the case of construction contracts, the source of three of the four Claims, actual payment terms were generally governed by the Iraqi Standard General Conditions of Civil Engineering Works, issued by the Iraqi Board of Planning on 12 June 1972. The conditions contained therein were based for the most part on the FIDIC General Conditions for Works of Civil Engineering.30/ These provisions included terms providing that payment for work performed be made on a monthly basis according to monthly progress reports issued by the contractor. As regards supply contracts, there did not appear to be standard general conditions; however, as in the case of construction contracts, Iraq's practice prior to the growth of its foreign debt was to pay upon receipt of the underlying shipping documents and invoices.31/

85. Iraq's foreign debt became significant only during the 1980s32/ The main factors which contributed to its emergence and rapid growth are generally identified as the decline in oil prices at the end of the 1970s (with the resulting corresponding decrease in Iraq's oil revenues), the adverse effect of the war with the Islamic Republic of Iran on Iraq's economy (in terms of both increased military expenditures and decreased income due to the destruction of assets, including oil exporting facilities), and the maintenance - and in some cases the increase - of public sector spending by Iraq notwithstanding the constraints created by the first two factors.33/

86. With the rapid growth of its foreign debt, Iraq changed its foreign trade practices and began to request credit from its suppliers, even for ordinary consumer goods and medical supplies, where it had previously incurred foreign credits "only with the greatest of care"34/ The country

became increasingly dependent on the willingness of foreign suppliers to finance operations in Iraq through, among other things, extended payment terms.35/ The distortion of normal conditions in Iraq's international trade during the mid- to late 1980s resulting from Iraq's foreign debt was also manifest in the fact that it no longer paid its then existing debts on originally-contracted terms, but required deferments in order to allow it the time needed to gather the funds necessary to make payments that became due and to clear debts that were overdue. As time went on, Iraq continuously renegotiated and rescheduled its debts with its contracting partners.36/

87. Keeping this history and the object and purpose of paragraph 16 in mind, the Panel finds that the old debts of Iraq certainly include the debts that already existed as of the end of the conflict with the Islamic Republic of Iran, i.e., in August 1988. But these same debts, as described, also distorted the entire economy of Iraq with the consequence that some old debts may appear to be new as of 2 August 1990. In some instances, old and overdue debts were rescheduled. The rescheduling of such old debts perhaps renewed them under applicable law, but did not make them new debts in the sense of resolution 687 (1991). In other instances, unusually long payment terms were granted to Iraq, and such terms in this context mask the true age of the debt. These unusually long payment terms as described were a consequence of the magnitude of the old debt; but for those unusually long payment terms, the debts and obligations involved would be a part of the old debt. Therefore the Panel concludes that the only way to distinguish what was "old and overdue" from what was actually new debt as of 2 August 1990 is to discount the effects of the foreign debt on Iraq's ability to make contractual payments owed - i.e., the rescheduling and unusually long payment terms obtained by Iraq from foreign parties in the 1980s.37/

88. Iraq's practice before the rise of its foreign debt is the best indicator of what normal practice would have been in 1990 but for that debt. As found earlier, Iraq, before the influence of its foreign debt on its economy and balance of payments, paid its contractual debts on a current basis. In the case of construction/engineering contracts, payment on a "current basis" includes a time period, usually one to three months depending upon the size of the underlying contract, between the issuance by a contractor of an interim certificate for payment, which time period is usually explained by the need for the owner and its engineers to ensure that the work was performed according to specifications. A similarly brief time period is common in the case of supply contracts, again depending upon the size of the contract. In many instances, such a period of time is

occasioned by the need of the supplier to fulfill, and the purchaser to verify, contractual conditions precedent to payment 38/

89. A foreign party contracting with Iraq therefore reasonably could have expected to have been paid within three months of the issuance of an interim certificate for payment, a bill of lading, or other relevant document that, according to the underlying contract, evidenced the completion of a particular performance.39/ The period of three months thus represents the outer limits of normal or standard commercial practice in the context of the claims before the Commission.

90. Based on the above, the 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.40/

91. In devising this rule, the Panel consciously has selected a time period which may have the effect of including borderline claims within the Commission's jurisdiction, rather than running the risk of excluding claims that should qualify according to the Security Council's intention. This determination, it should be stressed, does not mean that all amounts claimed for work performed on or after 2 May 1990 are compensable. The Panel is merely stating here that amounts claimed for work performed on or after this date are properly within the jurisdiction of this Commission. The determination of compensability must include the consideration of other factors, chief among them being the requirement that the loss be direct. However, before turning to the discussion of directness (see paragraphs 106-173, infra), the Panel provides further clarification of the rule by applying it to the specific factual scenarios that are presented by the Claims.

(b) Specific situations

(i) Deferred payment arrangements

92. Some of the Claims are based on deferred payment arrangements with Iraq, entered into after it became apparent that Iraq could not pay on a timely basis amounts owed for work performed or goods or services provided. The Claimants contend that these arrangements constituted obligations that were separate and distinct from the original contracts and therefore were new debts as of their date.

93. The negotiation of these deferred payment arrangements was typically conducted with Iraq not by the contractor or supplier itself, but rather by its Government. Typically, the Government negotiated on behalf of all of the contracting parties from the country concerned who were in a similar situation. The deferred payment arrangements with Iraq were commonly entered into under a variety of forms, including complicated crude oil barter arrangements under which Iraq would deliver certain amounts of crude oil to a foreign State to satisfy consolidated debts; the foreign State then would sell the oil and, through its central bank, credit particular contractors' accounts.

94. Iraq's debts were typically deferred by contractors who could not afford to "cut their losses" and leave, and thus these contractors continued to work in the hope of eventual satisfaction and continued to amass large credits with Iraq. In addition, the payment terms were deferred for such long periods that the debt servicing costs alone had a significant impact on the continued growth of Iraq's foreign debt41/

95. It is the finding of the Panel that these kinds of arrangements go to the very heart of what the Security Council described in paragraph 16 of resolution 687 as the debt of Iraq arising prior to 2 August 1990. It is this very kind of obligation which the Security Council had in mind when, in paragraph 17 of resolution 687 (1991), it directed Iraq to "adhere scrupulously" to satisfying "all of its obligations concerning servicing and repayment".

96. Therefore, irrespective of whether such deferred payment arrangements may have, as the Claimants argue, created new obligations on the part of Iraq under a particular applicable municipal law, they did not do so for the purposes of resolution 687 (1991) and are therefore outside the jurisdiction of this Commission.

(ii) Money owed for work performed or services provided

97. In some of the Claims before the Panel, the claimant had fully completed its called-for performance under a particular contract as of 2 August 1990. Applying the "arising prior to" rule to such a case, the Panel concludes that if performance had been fully rendered more than three months prior to 2 August 1990, the claim for compensation is not within the jurisdiction of this Commission.

98. In other cases, performance of the contract work by the claimant was ongoing as of 2 August 1990 - that is, performance was not fully complete as of 2 August 1990. In such cases, the Panel will apply the "arising prior to" rule, as explained in paragraph 90, supra, to those portions of the performance that are separately identifiable in so far as the parties agreed in the contract that a particular payment would be made for a particular portion of the overall work called for under the contract.

99. In the case of claims for compensation for work allegedly performed on or after 2 May 1990, the burden is on the claimant to establish the date on which the work had been performed in accordance with the underlying contract. Satisfactory proof of the time of a given performance will include the production to the Commission of the documentation that had been agreed by the parties to represent proof of work performed, such as interim payment certificates or bills of lading. It is not necessary, however, to establish that a particular certificate actually relates to the specific progress made during that billing period - for example, a specific number of bricks laid or hours worked. Rather, it is sufficient that the parties have agreed between themselves that such certificate represents the stated value of that segment of the overall project. In this sense, in determining the date of performance the Panel will look to the dates of relevant documents rather than the actual time the work may in fact have been completed.

100. Where the underlying contract provided as a condition precedent to payment approval or certification by the owner (or an engineer retained by the owner) of the documents (e.g., payment certificates) submitted by the contractor for payment, and such approval or certification did not occur prior to 2 August 1990, the Panel applies the "arising prior to" rule as follows. Where the owner's approval or certification should have occurred more than three months prior to 2 August 1990, according to the terms of the underlying contract, but did not, claims for compensation for such amounts are not within the jurisdiction of this Commission. Where owner's approval or certification should have occurred within three months prior to

2 August 1990, according to the terms of the underlying contract, but did not, claims for compensation for such amounts that should have been approved or certified in that period are properly before this Commission.

(iii) Accelerated payment/liquidated damages clauses

101. Contracts with Iraq commonly contained provisions expressly setting forth the claimant's rights in the event that work on the projects was frustrated by an act of war or otherwise through no fault of the claimant. Some of the Claimants argue that, notwithstanding any jurisdictional exclusion imposed by resolution 687 (1991), such provisions should govern and compensation should be awarded according to the terms of these provisions. This argument cannot be upheld because the resolution itself dictates for this Commission the consequences of Iraq's invasion and occupation of Kuwait on ongoing contracts with Iraq and therefore supersedes any contractual arrangements bearing on this subject matter. A contrary conclusion would have the effect of rendering compensable by the Commission old debts which resolution 687 (1991) has provided are not within the Commission's jurisdiction. It is the finding of the Panel, therefore, that such contractual agreements or clauses can not defeat the "arising prior to" exclusion. Consistent with the Security Council's instruction, the concerned claimants will have to seek relief from Iraq in other fora.42/

(iv) Advance contract payments

102. In large-scale construction contracts, it is typical for the owner to pay an amount to the contractor prior to or simultaneous with the commencement of work on the project in order to assist the contractor in financing the start-up costs of the contract (such as those of drawing up plans, mobilizing equipment, purchasing supplies and materials, and payment of wages and salaries). Typically, such advance payments are repaid by the contractor over time through reductions in the amount invoiced to the owner - that is, reductions in the interim certificates issued by the contractor.43/ Often, the "performance" by the contractor that triggers the owner's obligation to pay the advance is simply the signing of the contract by the contractor. In other cases, the contractor must perform some preliminary task, such as those described above, to trigger the obligation to pay the advance. In any event, applying the "arising prior to" rule to claims for compensation for an advance owed but not paid, it is the finding of the Panel that in order for compensation to be awarded, a claimant must show that the condition precedent to payment (such as the signing of the contract) was performed by the claimant, and the performance

of this condition occurred within three months prior to 2 August 1990. In cases where performance of the condition precedent had already taken place on 2 May 1990, this Commission has no jurisdiction over a claim for compensation for the advance payment owed but not paid.

(v) Retention payments

103. Retention payments in construction contracts may be described as amounts withheld from the periodic payments made by the owner to the contractor for work performed. It is "one of the securities held by the [owner] to ensure fulfillment by the Contractor of his obligations in respect of defects".44/ Contracts with Iraq typically contained provisions for the partial withholding of payments as retention money, and set forth the conditions for its subsequent release. Typically, and by way of example only, one half of the accumulated retention money would be repaid upon issuance of a "take-over" certificate for the project, and the other half upon expiration of a "defects period" specified in the contract45/ In any event, it is clear that "performance" by the contractor for purposes of release of the retention money could only be completed when the contractual conditions precedent to the release were met. Where those conditions were satisfied prior to 2 May 1990, this Commission has no jurisdiction over a claim for compensation for those retention monies. If those conditions were satisfied on or after 2 May 1990, this Commission has jurisdiction over the claim for compensation for the retention money.

(vi) Payments for goods shipped

104. In some of the Claims, the Claimants shipped goods to Iraq pursuant to contracts entered into before 2 August 1990. In such cases, "performance" means the delivery of the goods in question pursuant to the terms of the contract. The burden is on the claimant to provide adequate proof of performance and the date thereof. This can be done by producing to the Commission the appropriate documents called for under the contract, such as bills of lading.

105. Applying the "arising prior to" clause, the Panel finds that, where claimants had completed performance (i.e., delivered the goods, as evidenced by appropriate documentation) more than three months prior to 2 August 1990, claims for the recovery of amounts owed by Iraq for that performance shall be considered to have arisen prior to 2 August 1990 and, as such, outside the jurisdiction of this Commission. In cases where deliveries of goods were made within three months prior to 2 August 1990,

claims for compensation for amounts owed by Iraq for such performance meet the "arising prior to" test.

B. The "direct loss" requirement

106. Security Council resolution 687 (1991) provides that Iraq is liable "for any direct loss, damage ... or injury ... as a result of Iraq's unlawful invasion and occupation of Kuwait". Without further guidance, the concept of what constitutes a "direct loss" would be difficult to define or apply with precision.46/ In this instance, however, the Panel can refer to specific instructions in Governing Council decisions on the issue, in particular, decisions 7, 9 and 15.47/

107. Paragraph 21 of Governing Council decision 7 is the seminal rule on "directness" for category "D", "E" and "F" claims. It provides in relevant part that compensation is available:

> "[W]ith respect to any direct loss, damage, or injury to corporations and other entities as a result of Iraq's unlawful invasion and occupation of Kuwait. This will include any loss suffered as a result of:
>
> (a) Military operations or threat of military action by either side during the period 2 August 1990 to 2 March 1991;
>
> (b) Departure of persons from or their inability to leave Iraq or Kuwait (or a decision not to return) during that period;
>
> (c) Actions by officials, employees or agents of the Government of Iraq or its controlled entities during that period in connection with the invasion or occupation;
>
> (d) The breakdown of civil order in Kuwait or Iraq during that period; or
>
> (e) Hostage-taking or other illegal detention."48/

108. The text of paragraph 21 is not exclusive and leaves open the possibility that there may be causes of "direct loss" other than those enumerated. Decision 15 of the Governing Council confirms this: "[t]here will be other situations where evidence can be produced showing claims are for direct loss, damage or injury as a result of Iraq's unlawful invasion and occupation of Kuwait".49/ Should that be the case, the claimants will

have to show that a loss which was not suffered as a result of one of the five categories of events in paragraph 21 is nevertheless a “direct” one. In any case, decison 7 makes clear that a “direct loss” must be a loss suffered as a result of Iraq’s invasion and occupation of Kuwait.

109. While the language “as a result of” contained in paragraph 21 is not defined further in decision 7, Governing Council decision 9 provides guidance as to what may be considered to constitute “losses suffered as a result of” Iraq’s invasion and occupation of Kuwait. Decision 9 discusses the three main general categories of loss types that prevail among the category “E” claims: losses in connection with contracts, losses relating to tangible assets and losses relating to income-producing properties.

110. Thus, decisions 7 and 9 provide specific instructions to the Panel as to how the “direct loss” requirement must be interpreted. It is against this background that the Panel will now examine the loss types presented to determine whether, with respect to each, the requisite causal link - a ”direct loss” - is present.50/

111. Several provisions of decisions 7 and 9 are specific as to the location of the events underlying the loss. For example, paragraph 21(b) of decision 7 provides that losses resulting from the “[d]eparture of persons from or their inability to leave Iraq or Kuwait” during the relevant period are to be considered direct losses. The specification of location in these decisions therefore has a particular significance. Consequently, it is from the perspective of the location of the Claimants’ activities that the Panel will discuss the claims presented for the purpose of determining what constitutes a “direct loss”. For the present Claimants, the losses and damages for which compensation is sought relate to their activities in Kuwait, Iraq and Saudi Arabia.

1. Iraq

112. The losses claimed that arise out of activity in Iraq all relate to the premature termination of contractual construction and engineering activities for Iraqi contracting parties. It is alleged, to a greater or lesser degree, by each of the Claimants asserting such losses (CCL, Hyundai and Technopromexport) that they (or rather their employees) departed from Iraq during the relevant period, and that they were rendered unable to perform their contractual activities and forced to leave behind significant property they held in Iraq. Consequently, the Claimants seek various contractual payments and compensation for the property left behind. Furthermore, they claim for the resulting loss of profits they allege would

have been earned upon the completion of the contract works. According to the Claimants, the bulk of the damages that they suffered and for which they claim compensation thus has its source in the departure of their employees from Iraq which rendered the contracts impossible to perform.

113. Large scale construction and engineering projects require the presence of large numbers of employees. Therefore, the inability to maintain a workforce at a project site inevitably results in the impossibility to perform the contract works. This inability was particularly acute in Iraq and Kuwait during the period of 2 August 1990 to 2 March 1991, from where workforces departed en masse and in haste at some point during the relevant period. That the inability to maintain a workforce in Iraq or Kuwait during the relevant period was the direct result of Iraq's unlawful invasion and occupation of Kuwait is reflected in decision 7, in that proof of the rationale for a departure from Iraq and Kuwait during the relevant period is not required.

114. Consequently, it is the finding of the Panel that, based on paragraph 21(b) of decision 7, where a contract required the physical presence of personnel in Iraq, and a claimant has established that its workforce departed from Iraq during the period from 2 August 1990 to 2 March 1991, that claimant will have established the requisite causal link between Iraq's invasion and occupation of Kuwait and any losses resulting from its inability to maintain a workforce at the project sites. The losses presently before the Panel resulting from the departure of employees include losses in connection with contracts, losses in relation to tangible assets, evacuation and relief costs, loss of monies on deposit and loss of future profits on related projects. These are examined in turn.

(a) Losses in connection with contracts to which Iraq was a party

115. With regard to losses related to breaches of contract, frustration of contract, or impossibility of performance of a contract to which Iraq was a party, decision 9 provides in relevant part:

> "8. Where Iraq itself was a contracting party and breached its contractual obligations, Iraq is liable under general contract law to compensate for all actual losses suffered by the other contracting party, including, inter alia, losses relating to specially manufactured goods. Future lost profits may be compensable in such a case if they can be calculated under the contract with reasonable certainty. An alternative measure of damages may apply where a governing contract specifically provides for a particular measure,

except that the amount of compensation provided should not exceed the loss actually suffered. Breaches of contract not resulting from the invasion and occupation of Kuwait are not within the jurisdiction of the Commission.

"9. Where Iraq did not breach a contract to which it was a party, but 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. In such a situation, Iraq should not be allowed to invoke force majeure or similar contract provisions, or general principles of contract excuse, to avoid its liability".

116. The Panel notes that decision 9, at paragraph 10, also addresses the situation of contracts to which Iraq was not a party. The Panel must therefore consider the definition of the word "Iraq" as used in decision 9 and indeed throughout the Governing Council's decisions. It is the Panel's understanding that at the time of the adoption of decision 9, the Governing Council used the word "Iraq" to mean the Government of Iraq, its political subdivisions, or any agency, ministry, instrumentality or entity (notably public sector enterprises) controlled by the Government of Iraq. With regard to the Claims before the Panel relating to losses in Iraq, the only contracts at issue are contracts between the Claimants on the one hand and Iraqi governmental agencies and ministries on the other. Consequently, only paragraphs 8 and 9 are relevant to the present discussion concerning losses in Iraq.

117. In its response to the Commission's article 16 report, Iraq argues that it committed no breach of contract since it did not ask the contracting companies to leave the sites of their work, and even insisted that they remain to carry on the work. However, it is clear from the documents submitted by the Claimants that they are not relying on paragraph 8 of decision 9, but rather on paragraph 9. There is no evidence in the record before the Panel that any of the Claimants considered that, or acted as if, Iraq was in breach of its contractual obligations as of 2 August 1990 or by the date when the last employee of a Claimant left Iraq. Unlike paragraph 8, paragraph 9 does not require proof of breach but rather proof that continuation of the contract became impossible for the claimant as a result of Iraq's invasion and occupation of Kuwait. The Claimants have provided sufficient evidence of the impossibility of continuing to perform work after 2 August 1990, based on the departure of employees - in some cases shortly after 2 August 1990, while in others not until January 1991. The Panel therefore concludes that the contracts in question became

impossible to perform as a result of Iraq's invasion and occupation of Kuwait.

118. Paragraph 9 provides that if a contract with Iraq became impossible to perform after 2 August 1990, Iraq is liable for "any direct loss the other party suffered as a result, including lost profits". The Panel interprets "direct loss" in this context to mean only those losses that would, as of the date of the impossibility, reasonably be expected by both parties to the contract to occur given the nature of the work, the terms of the underlying contract and the cause of the impossibility to perform (in these cases, the departure of employees as a result of Iraq's invasion and occupation of Kuwait).

(b) Losses in relation to tangible assets located in Iraq

(i) Departure as the basis for directness

119. Concerning losses of tangible property located in Iraq, decision 9 provides in relevant part as follows:

> "12. Where direct losses were suffered as a result of Iraq's invasion and occupation of Kuwait with respect to tangible assets, Iraq is liable for compensation. Typical actions of this kind would have been expropriation, removal, theft or destruction of particular items of property by Iraqi authorities. Whether the taking of property was lawful or not is not relevant for Iraq's liability if it did not provide for compensation.
>
> "13. In a case where business property had been lost because it had been left unguarded by company personnel departing due to the situation in Iraq and Kuwait, such loss may be considered as resulting directly from the invasion and occupation".

120. None of the Claimants alleges that Iraqi authorities expropriated, removed, stole or destroyed the Claimants' property in Iraq. The Claimants rely primarily on paragraph 13 of decision 9 rather than paragraph 12 in support of their claims for compensation for the loss of physical assets located in Iraq during the relevant period.

121. Iraq denies liability for damages to physical assets located in Iraq arguing that the companies in question abandoned those assets. Further, Iraq asserts that the companies did not conform to contractual provisions regarding termination under which they should have contacted the

appropriate Iraqi authorities prior to departure in order to ensure that assets were inventoried and safeguarded. In some instances Iraq claims that it took steps to protect the Claimants' property abandoned in Iraq.

122. The Claimants themselves do not dispute the fact that their employees departed from Iraq without adhering to underlying contract terms regarding termination. However, the employees' untimely departures are precisely the kinds of departures contemplated by paragraph 21 of decision 7 and paragraph 13 of decision 9. These paragraphs do not require the departure to have been conducted in conformity with whatever contractual provisions may have existed; furthermore, it would be contrary to the Governing Council decisions to require the departures to have taken place according to the contract terms.51/

123. Applying paragraphs 21 of decision 7 and paragraph 13 of decision 9, therefore, the Panel finds that in the case of physical assets located in Iraq as of 2 August 1990, if a claimant can demonstrate that it evacuated its employees from Iraq during the relevant period thus leaving the property unguarded, the claimant will have established the requisite causal link between Iraq's invasion and occupation of Kuwait and the loss of the assets the claimant can prove were in Iraq as of 2 August 1990.

(ii) Duty to mitigate damages upon departure

124. Paragraph 6 of decision 9 provides, in fine, that "[t]he total amount of compensable losses will be reduced to the extent that those losses could reasonably have been avoided". Paragraph 9.IV of decision 15 specifies that this duty to mitigate extends to all kinds of losses, including, among other things, that of tangible assets. The question of the extent and nature of the duty to mitigate has been raised in the Commission's article 16 reports. The responding Governments, with the exception of Iraq, have all emphasized that the duty imposed must be no more than was reasonable under the circumstances.

125. Some Governments have taken the position that what was reasonable under the circumstances in Iraq after 2 August 1990 was the departure of employees, and that claimants were not required to remove equipment and material - actions that these Governments state would have been impossible in any event after 2 August 1990. Other Governments have taken the position that what was reasonable under the circumstances must be evaluated by the Panel on a case-by-case basis. Two Governments have drawn a distinction between voluntary employee departures and forced departures,

contending that a duty to mitigate (i.e., to remove equipment and material from Iraq) extends only to claimants whose employees voluntarily departed.

126. The Panel agrees with the second view expressed. The kinds of steps that might be taken to mitigate the loss of tangible assets can vary. Claimants might have attempted to store or cover such assets prior to departure from Iraq. They might also have attempted to remove such assets from Iraq at or about the time the employees departed. In addition, claimants might have, after the cessation of hostilities in Iraq, returned to Iraq in an effort to secure control of the assets.

127. While it is possible that particular claimants attempted some or all of these acts in mitigation, the evidence is clear that it would be unreasonable under the circumstances that pertained in Iraq at the time for the Panel now to impose upon claimants an absolute duty to have engaged in any or all of these actions. Although it was in some sense the choice of the Claimants to withdraw from Iraq, the withdrawals were ultimately hurried, untimely as regards the work being performed, and conducted under difficult conditions.

128. With respect to a duty to have taken steps to protect the equipment, such as painting it with protective coatings or covering the equipment with tarpaulins, the Panel notes that the losses for which the Claimants seek compensation are total losses of the physical assets present in Iraq as of the departure of their workforces from Iraq. Such losses could not have been avoided by covering or painting the equipment.

129. As for the alleged duty to have removed the assets from Iraq at the time of departure, the Panel notes that in the Claims before it, the assets in question consisted of vast amounts of heavy construction equipment. Such equipment cannot readily be demobilized and exported in the best of circumstances, let alone during a time when the acquisition of transportation and reasonable freight was problematic. Furthermore, it is the opinion of the Panel that attempts to remove equipment and machinery from Iraq at that time would have been futile. The evidence is clear that under normal circumstances, the removal of equipment from Iraq was a time-consuming process, requiring approval of the Iraqi employer followed by approval by the Iraqi State Commission for Customs. It is the opinion of the Panel that such approvals would not have been forthcoming under the circumstances.

130. Similarly, with respect to a duty to return to Iraq after the cessation of hostilities to regain possession of the equipment, the Panel

finds that it is not reasonable to believe that contractors would have been any more successful, for practical or political reasons, after 2 March 1991 than at the time its employees departed 52/ Additionally, it reasonably cannot have been expected that companies, by returning to Iraq, should have placed themselves and their employees at risk of penalty for failure to complete work on the projects.

131. For these reasons, the Panel finds that it is not appropriate to impose on claimants a general duty to have taken steps to secure the removal or return of their tangible assets from Iraq either during the period 2 August 1990 to 2 March 1991 or afterwards.

(iii) Mitigation costs incurred

132. In one of the Claims before the Panel it is alleged that steps were actually taken in mitigation. Specifically, Technopromexport seeks compensation for costs associated with spraying protective coatings on its equipment and covering it with tarpaulins prior to the departure of its employees. The Panel's finding that it is not appropriate to impose on claimants a general duty to have taken steps in mitigation of asset losses does not bar a claim for compensation where such steps were actually taken by particular claimants. If it is found that such steps were undertaken in good faith and were reasonable in cost, the Panel concludes that compensation may be awarded for the costs incurred to the extent proven 53/

(c) Evacuation and relief costs

133. Paragraph 21(b) of decision 7 specifically provides that losses suffered as a result of the "[d]eparture of persons from or their inability to leave Iraq" are to be considered the direct result of Iraq's invasion and occupation of Kuwait. Consistent with decision 7, therefore, the Panel finds that evacuation and relief costs incurred in assisting employees in departing from Iraq are compensable to the extent proven.

134. Paragraph 22 of decision 7 provides that "payments are available to reimburse payments made or relief provided by corporations or other entities to others - for example, to employees, or to others pursuant to contractual obligations - for losses covered by any of the criteria adopted by the Council". This means that where a claimant has proven that a payment was made, as a form of relief or otherwise, in connection with one of the acts or consequences described in paragraph 21 of decision 7, then such a payment is compensable by this Commission. Moreover, while this provision gives as an example payments made to employees according to

contract, there is no requirement that an employer be contractually bound to have made such a payment; the sole requirement is that the payment be made in connection with one of five general constituent acts or consequences of the invasion described in paragraph 21 of decision 7.

(d) Other losses in Iraq

135. The Claimants seek compensation for losses relating to bank accounts in Iraq and other contract losses.

(i) Monies on deposit in Iraqi bank accounts

136. One of the Claimants (CCL) seeks compensation for the loss of the use of financial assets held on deposit in Iraqi financial institutions as of 2 August 1990.

137. Specifically, CCL acknowledges, as Iraq asserts, that the funds in question (Iraqi dinars) still exist in Iraq in the original accounts into which the funds were deposited. As such, these funds have not been "expropriated, removed, stolen or destroyed"; there has been no loss of these funds and therefore no compensation may be awarded on that basis. CCL, however, seeks compensation for the loss of use of these funds in an amount equal to the amount of funds on deposit.

138. In support, CCL argues that its "forced departure and the circumstances created by the War have rendered these funds useless", in that they have "precluded CCL from expending its cash balances on work and export costs as anticipated". More precisely, CCL relies on two contentions: first, that it cannot transfer the funds out of Iraq because it is prohibited from doing so, and second, that it cannot get the benefit of the funds within Iraq because it has no continuing construction projects within Iraq upon which these funds may be spent.

139. With regard to the first contention, the Panel notes that the funds were non-transferable and non-exchangeable from the beginning, so that Iraq's invasion and occupation of Kuwait did not change their status. Iraq has confirmed this in its responses to the Panel's questions. The status of those funds is fundamentally different from that of the funds held in Iraqi bank accounts in the case of the Egyptian Workers' Claims.54/ The claimants in that claim had an expectation of ultimately being paid by the Iraqi banks in United States dollars and an underlying agreement to guarantee that expectation.55/ There were no such expectations or agreements in the case of CCL. Therefore, any losses suffered as a result

of the non-transferability of these Iraqi dinar deposits cannot be attributable to Iraq's invasion and occupation of Kuwait and cannot provide a basis for compensation by this Commission.

140. The second contention similarly fails to establish a compensable loss. Acknowledged by CCL in the expression of this contention is the fact that these funds were intended to be fully expended in Iraq in the course of completing current or future Iraqi projects. The use that was intended to be made of these funds by CCL was therefore to satisfy local costs and expenses; once CCL's employees departed from Iraq, no further local costs and expenses were incurred. Therefore, because the funds are still in existence, and still, as Iraq acknowledges, the property of CCL, no compensable "loss of use" has occurred. In fact it may readily be argued that CCL continues to own Iraqi dinar funds whereas if its contracts with Iraq had been completed as originally intended, those funds would have been completely expended. CCL's contention that it would have used these funds on future Iraqi projects suffers from an additional problem: CCL has provided no evidence that any such projects were imminent or even likely. Consequently, the Panel concludes that the claim for loss of use in this regard is speculative and not compensable by this Commission.

(ii) Future profits on unrelated projects

141. CCL seeks compensation for the loss of future profits based on its inability to submit a contract bid for a particular project located in Sri Lanka. The Claimant alleges that the failure to submit the bid was the result of its inability to secure the necessary bid bonds, which itself resulted from the economic losses it suffered in Iraq during the relevant period. The Panel finds that the damage alleged resulted from the economic consequences to the Claimant of Iraq's invasion and occupation of Kuwait rather than the acts of the invasion and occupation themselves. Such losses are not "direct losses" and therefore are not compensable by this Commission.

2. Kuwait

142. The alleged losses in Kuwait arise out of the abrupt cessation of business in Kuwait on or shortly after 2 August 1990, the destruction or loss of assets and evacuation costs. Because the territory of Kuwait was the target of the invasion and occupation, businesses in Kuwait suffered all of its acts and consequences, such as those described in paragraph 21 of decision 7. It follows that each of the constituent acts or consequences of the invasion and occupation enumerated in decision 7 can

provide the requisite causal link between losses suffered in Kuwait and Iraq's invasion and occupation of Kuwait.

143. It is the finding of the Panel therefore, that based on paragraph 21 of decision 7, where a claimant demonstrates that its business enterprise was located in Kuwait and ongoing as of 2 August 1990, and that such business suffered loss or damage, the claimant has established the requisite causal link between Iraq's invasion and occupation of Kuwait and the loss or damage suffered. The losses presently before the Panel that were suffered in Kuwait include losses in connection with contracts, losses in relation to tangible assets, losses relating to income-producing property, and evacuation and relief costs. These are now examined in turn.

(a) Losses in connection with contracts to which Iraq was not a party

144. With regard to losses relating to breaches of contract, frustration of contract, or impossibility of performance of a contract to which Iraq was not a party, decision 9 provides in relevant part:

> "10. Where losses have been suffered in connection with contracts to which Iraq was not a party, the following conclusions apply. Iraq is responsible for the losses that have resulted from the invasion and occupation of Kuwait. A relevant consideration may be whether the contracting parties could resume the contract after the lifting of the embargo against Kuwait, and whether they have in fact resumed the contract. Iraq principally cannot be relieved from its responsibility by force majeure provisions of contracts to which it is not a party or contract excuse rules of other applicable laws".

145. In the Claims, contracts to which Iraq was not a party include contracts between two Kuwaiti parties, a Kuwaiti and a non-Kuwaiti party, as well as sub-contractor arrangements not involving an Iraqi party56/ In these situations, the Panel finds that the language of paragraph 10 of decision 9 requires that, unlike the situation of contracts with Iraq, claimants provide specific proof that the failure to perform was the direct result of Iraq's invasion and occupation of Kuwait. It should not, for example, stem from a debtor's economic decision to use its available resources to ends other than discharging its contractual obligation, for such an independent decision would be the direct cause of the non-payment and the resulting loss would therefore not be compensable. Adequate proof that a contracting party's inability to perform resulted from Iraq's invasion and occupation of Kuwait would include a showing that performance was no longer possible, for example because the contracting party, in the

case of an individual, was killed, or in the case of a business, ceased to exist or was rendered bankrupt or insolvent, as a result of Iraq's invasion and occupation of Kuwait.

(b) Losses relating to tangible assets located in Kuwait

146. Concerning losses of tangible property located in Kuwait during the relevant period, paragraphs 12 and 13 of decision 9 (see paragraph 119, supra) provide adequate bases for a finding of direct loss. In Kuwait, the immediate and apparent cause of the alleged losses suffered generally was actual military action - the action of the invading and occupying Iraqi armed forces. In addition to the destruction caused by the invasion itself, there is ample evidence that Iraqi troops actively participated in the looting of construction project sites, businesses and factory premises during their occupation of Kuwait. In some cases Iraqi civilians were brought to Kuwait for the specific purpose of identifying valuable assets to remove.57/

147. In addition, workforces located in Kuwait, like those located in Iraq, were generally required to evacuate in haste on or shortly after 2 August 1990, a fact which provides another link between losses alleged and Iraq's invasion and occupation of Kuwait. Finally, there is significant evidence in the records of the Claims that civil order broke down during and in the aftermath of Iraq's invasion and occupation, another cause identified in paragraph 21 of decision 7. Indeed, in its responses to the Panel's questions, Iraq alleges that the damages to Gulf Cable's assets could have been caused before Iraq's entry to the company premises and after Iraq's withdrawal from Kuwait.

148. Therefore, applying paragraphs 12 and 13 of decision 9, the Panel finds that insofar as a claimant can prove the loss of assets that were in Kuwait as of 2 August 1990, the claimant will have established the requisite causal link between the loss of those assets and Iraq's invasion and occupation of Kuwait.

(c) Losses relating to income-producing properties

149. A claimant will have made the requisite showing of a causal link between Iraq's invasion and occupation of Kuwait and losses relating to an income-producing property in Kuwait if it can establish that the business was interrupted, taken over or destroyed as a result of Iraq's invasion of Kuwait. Given the well documented evidence of the widespread destruction of Kuwaiti property and the breakdown of civil order in Kuwait caused by

Iraq's invasion and occupation, and the Commission's own inspections of Kuwaiti properties undertaken since the inception of the Commission, the burden on claimants to produce specific evidence will be low.

150. Paragraphs 16-19 of decision 9 govern losses relating to income-producing properties. The conclusions stated with regard to these kinds of losses "are based on the premise that the business affected was a going concern, i.e., it had the capacity to continue to operate and generate income in the future".58/ With respect to which losses may be considered to be a direct result of Iraq's invasion and occupation of Kuwait, paragraph 17 of decision 9 provides as follows:

> "17. In principle, Iraq is liable to compensate for the loss of a business or commercial entity as a whole resulting from Iraq's invasion and occupation of Kuwait. In the event that the business has been rebuilt and resumed, or that it could reasonably have been expected that the business could have been rebuilt and resumed, compensation may only be claimed for the loss suffered during the relevant period."

151. Decision 15 incidentally provides further elucidation of the proper interpretation to be given to paragraph 17 of decision 9. Paragraph 7 of decision 15 provides that:

> "When compensation for losses of future earnings and profits is assessed, documentary evidence such as a contract should be presented wherever possible, and where no contract existed, other evidence should be submitted to enable losses of future earnings to be calculated with reasonable certainty. Such evidence should wherever possible be broadly equivalent to contracts that were in existence, or prove that such contracts or projections of future trading patterns existed. Paragraph 17 of decision 9 states that, in the case of a business which has been, or could have been, rebuilt and resumed, compensation would be awarded for the loss from cessation of trading to the time when trading was, or could have been, resumed. In the case of a business or course of trading which it was not possible to resume, the Commissioners would need to calculate a time limit for compensation for future earnings and profits, taking into account the claimant's duty to mitigate the loss wherever possible".

152. Thus, three separate and distinct kinds of loss relating to income-producing properties are considered to be "direct losses" as described in decisions 9 and 15: (a) the loss of "business" (which may be defined as

contracts or courses of dealing that had the potential of future earnings and profits), ongoing and active as of 2 August 1990.59/ (b) losses associated with the destruction of a business that was or could have been rebuilt; and (c) losses associated with the destruction of a business that was not and could not have been rebuilt. These distinctions are considered further for valuation purposes in paragraphs 241-247, infra.

(d) Evacuation and relief costs

153. Paragraph 21(b) of decision 7 provides that losses suffered as a result of the "[d]eparture of persons from or their inability to leave ... Kuwait" are to be considered the direct result of Iraq's invasion and occupation of Kuwait. Consistent with decision 7 therefore, the Panel finds that evacuation and relief costs incurred in assisting employees in departing from Kuwait are compensable to the extent established by the claimant. Paragraph 22 of decision 7 specifically adds that "payments are available to reimburse payments made or relief provided by corporations or other entities to others - for example, to employees, or to others pursuant to contractual obligations - for losses covered by any of the criteria adopted by the Council". As in the case of such payments made with respect to activities in Iraq (paragraphs 133-34 supra), this means that where a claimant has proven that a payment was made, as a form of relief or otherwise, in connection with one of the acts or consequences described in paragraph 21 of decision 7, then such a payment is compensable by this Commission. Moreover, while this provision gives as an example payments made to employees according to contract, there is no requirement that an employer be contractually bound to make such a payment; the sole requirement is that the payment have been made in connection with one of the five general constituent acts or consequences of the invasion described in paragraph 21 of decision 7.

3. Saudi Arabia

154. One of the Claimants, Hyundai, alleges losses in connection with its activities in Saudi Arabia for which it claims compensation. These losses arise from a decline in employee productivity, a decline in equipment productivity, damage to unattended vehicles during the relevant period and damage to property resulting from the oil fires in Kuwait, all occurring during the period 2 August 1990 to 2 March 1991. Hyundai relies on two of the constituent acts of Iraq's invasion and occupation of Kuwait expressly mentioned in decision 7 as providing the direct causal link between Iraq's invasion and occupation of Kuwait and the damages it allegedly suffered:

military operations in the case of the oil fire damage, and the threat of military action in the case of the productivity and vehicles losses.

155. Referring, again, to decisions 7 and 9 for guidance in determining how "direct loss" must be interpreted with respect to losses incurred outside Iraq and Kuwait, the Panel notes that these decisions describe situations and loss types that are specifically and closely related to the invasion and occupation of Kuwait. The Panel concludes that losses suffered outside of Iraq or Kuwait, at a minimum, must also be specifically and closely related to the invasion and occupation of Kuwait.

156. In order to determine what losses incurred outside Iraq or Kuwait are properly to be considered direct losses resulting from Iraq's invasion and occupation of Kuwait, the term "as a result of" as used in paragraph 21 of decision 7 must be closely circumscribed around one or more of the constituent acts or consequences identified in paragraph 21 that are not, by their terms, specific to Iraq and Kuwait only. It is the finding of the Panel, therefore, that, unless the claimant makes a special showing as described in paragraph 108, supra, the loss for which compensation is claimed must be one that is an immediate consequence of either: (a) military operations or the threat of military action by either side during the period 2 August 1990 to 2 March 1991; (b) actions by officials, employees or agents of the Government of Iraq or its controlled entities during that period in connection with the invasion or occupation; or (c) hostage-taking or other illegal detention.

(a) Losses resulting from military operations

157. In the case of loss or damage resulting from military operations, the causal inquiry is different for losses suffered in Saudi Arabia from that required for losses suffered in Kuwait, simply because Kuwait was actually invaded and occupied by Iraqi forces while Saudi Arabia was not. The military operations that resulted in damage in Saudi Arabia were sporadic events that did not bring about the kind of systematic and thorough damage and injury inflicted by the military operations that took place all over Kuwait during the relevant period. The Panel therefore concludes that unlike a claimant alleging a loss in Kuwait, one seeking compensation for loss or damage arising out of military operations in Saudi Arabia must make a specific showing that the loss or damage for which compensation is claimed resulted from a specific military event or events. If such a showing is made, the claimant will have established the requisite causal link between the loss or damage and Iraq's invasion and occupation of Kuwait.

(b) Losses resulting from the threat of military actions

158. Decision 7 provides that “losses suffered as a result of [the] threat of military action by either side during the period 2 August 1990 to 2 March 1991” will be considered to be the direct result of Iraq’s invasion and occupation of Kuwait. The specific identification of the threat of military action in decision 7 as an accepted basis for direct loss is significant because in many instances, the losses claimed in Saudi Arabia will have resulted from a response to a “threat of military action” that did not ultimately culminate in the military operation threatened. But the reference to the threat of military actions in decision 7 is also problematic because of the wide range of threats of military action that were present during the period 2 August 1990 to 2 March 1991, and the even wider range of subjective responses by those possibly affected make this causal basis for direct loss potentially quite large.

159. Decision 7 does not describe or define what constitutes a “threat of military action” for purposes of assessing compensability under Security Council resolution 687 (1991). The Panel interprets the meaning of that phrase with reference to the rules of interpretation set forth in article 31 of the Vienna Convention on the Law of Treaties (see paragraph 54, supra). The Panel finds that the ordinary meaning of the phrase “threat of military action” requires that the threat meet a minimum threshold of seriousness, such seriousness being gauged with reference to, inter alia, the level of military action threatened, and the capability and credibility of the entity issuing the threat. Thus, for example, it is the opinion of the Panel that a threat by Iraq to undertake military action beyond the range of its military capabilities is not one which meets the minimum threshold of seriousness.

160. In addition to the requirement of a minimum threshold as to the seriousness of the threat, the drafting history of decision 1 - the text of which was later incorporated into decision 7 - indicates that the phrase “threat of military action” should be strictly interpreted in terms of its geographic scope. The Panel notes that the second working paper of the Governing Council presented the proposed language that would later become paragraph 21(a) of decision 7 as “[m]ilitary operations of either side during the period of 2 August 1990 to 2 March 1991”. The Panel further notes that during a subsequent Working Group meeting, it was proposed that the words “or threat of military operations” should be inserted between the words “operations” and “of”, because it was observed at the time that there were many cases where people were forced to flee Iraq or Kuwait not because of military confrontation, but because of the imminent threat of military

operations. This new language was recommended by the Working Group to the Governing Council, and on 2 August 1991 a new draft, containing the proposed language, was formally reported to the Governing Council by the Working Group and later adopted by the Governing Council as the final version of paragraph 21(a) of decision 7.

161. This drafting history shows that the Governing Council intended threats resulting in compensable losses to include only those threats that were highly credible in the light of actual military operations. The Panel thus concludes that the issue of what constitutes a threat requires examination of the actual theatre of military operations during the relevant period. The Panel acknowledges that it does so with the benefit of hindsight, but notes that the Governing Council itself, after all, likewise did so in debating and issuing decision 7[60]/

162. As regards the territory of Saudi Arabia, the evidence is clear that it was credibly threatened with military action by Iraq during the period 2 August 1990 to 2 March 1991. Not only did Iraq's President clearly articulate verbal threats against the territory of Saudi Arabia, but Iraqi forces were massed along the Saudi border and "scud" missiles were aimed at Saudi Arabia. These threats therefore meet the requirements of paragraph 21(a) of Governing Council decision 7 since they were sufficiently credible and serious, and intimately connected to the relevant military operations. Indeed, actual military clashes between Iraqi ground forces and allied coalition forces, including Saudi Arabian troops, took place on Saudi Arabian soil, and actual "scud" missile attacks were inflicted on Saudi Arabia.[61]/

163. The Panel therefore concludes that a claimant seeking compensation for loss or damage arising out of the threat of military action must make a specific showing of how the loss or damage alleged was the direct result of a credible and serious threat that was intimately connected to Iraq's invasion and occupation of Kuwait. If such a showing is made, the claimant will have established the requisite causal link between the loss or damage alleged and Iraq's invasion and occupation of Kuwait.

4. Influence of the trade embargo

164. Security Council resolution 661 (1990), adopted on 6 August 1990, provides in relevant part as follows:

> "3. Decides, that all States shall prevent:

(a) The import into their territories of all commodities and products originating in Iraq or Kuwait exported therefrom after the date of the present resolution;

(b) Any activities by their nationals or in their territories which would promote or are calculated to promote the export or trans-shipment of any commodities or products from Iraq or Kuwait; and any dealings by their nationals or their flag vessels or in their territories in any commodities or products originating in Iraq or Kuwait and exported therefrom after the date of the present resolution, including in particular any transfer of funds to Iraq or Kuwait for the purposes of such activities or dealings;

(c) The sale or supply by their nationals or from their territories or using their flag vessels of any commodities or products, including weapons or any other military equipment, whether or not originating in their territories but not including supplies intended strictly for medical purposes, and, in humanitarian circumstances, foodstuffs, to any person or body in Iraq or Kuwait or to any person or body for the purposes of any business carried on in or operated from Iraq or Kuwait, and any activities by their nationals or in their territories which promote or are calculated to promote such sale or supply of such commodities or products;

4. Decides that all States shall not make available to the Government of Iraq or to any commercial, industrial or public utility undertaking in Iraq or Kuwait, any funds or any other financial or economic resources and shall prevent their nationals and any persons within their territories from removing from their territories or otherwise making available to that Government or to any such undertaking any such funds or resources and from remitting any other funds to persons or bodies within Iraq or Kuwait, except payments exclusively for strictly medical or humanitarian purposes and, in humanitarian circumstances, foodstuffs;

5. Calls upon all States, including States non-members of the United Nations, to act strictly in accordance with the provisions of the present resolution notwithstanding any contract entered into or license granted before the date of the present resolution;”

165. These provisions, subsequent resolutions and other measures are referred to by the Governing Council as the “trade embargo and related measures”,62/ and will be referred to hereinafter as the “trade embargo”.

The existence of the trade embargo raises the issue of the extent to which a loss, damage or injury is compensable even though it may be considered to be attributable to the trade embargo as well as Iraq's invasion and occupation of Kuwait.63/

166. The Governing Council addressed this issue in decisions 9 and 15. However, its pronouncements still leave room for interpretation. Paragraph 6 of decision 9 provides that the "trade embargo and related measures, and the economic situation caused thereby, will not be accepted as the basis for compensation". Because the trade embargo was instituted shortly after Iraq's invasion and occupation of Kuwait, it may be difficult, specifically in cases where performance by a claimant was ongoing as of 6 August 1990 (such as a shipment of goods to Iraq that had not yet reached the Iraqi port of destination as of 6 August 1990) to distinguish the actual cause of the non-performance of a contract as between the invasion and occupation on the one hand and the trade embargo on the other.

167. Paragraph 6 of decision 9 goes on to state that "[w]here, for example, the full extent of the loss, damage or injury arose as a direct result of Iraq's unlawful invasion and occupation of Kuwait, it should be compensated notwithstanding the fact that it may also be attributable to the trade embargo and related measures". A commentary on that rule is set forth at paragraphs 9 and 10 of decision 15 where it is stated that compensation may be awarded first, where the invasion and occupation is found to have been a "separate and distinct" cause of the alleged loss notwithstanding the fact that the trade embargo was in existence, and second, where it is found that the invasion and occupation and the trade embargo were "parallel causes" of the full loss. Decision 15 does not elaborate on the interrelationship of these two provisions.

168. A number of Governments have taken up the issue of the meaning and application of these provisions in responses to the Commission's article 16 reports. They generally reach the same conclusion, namely that so long as a claimant can demonstrate that the loss suffered was a direct result of Iraq's invasion and occupation of Kuwait, the existence of the trade embargo - i.e., whether or not the loss could also have been attributed to the trade embargo - does not affect the question of compensability.

169. The Panel is in agreement with this conclusion. The key is the requirement, stated throughout decisions 9 and 15, that a claimant must establish that the loss, damage or injury for which it seeks compensation was a direct result of Iraq's invasion and occupation of Kuwait. The notion of "parallel cause", as expressed in decision 15, cannot be

understood to mean that both the trade embargo and Iraq's invasion and occupation of Kuwait were contributing factors of a given loss; but rather that the loss could be attributed, separately and distinctly, to both. Thus, even in the situation defined by the Governing Council as "parallel cause", the fact that the trade embargo might have by itself been sufficient to cause a given loss does not bar a claim provided that the loss, damage or injury complained of was, in any event, a direct loss, damage or injury resulting from Iraq's invasion and occupation of Kuwait.

C. Performance of obligations to Iraq after 6 August 1990

170. Several of the Claimants seek compensation for work that was performed in Iraq after 2 August 1990 and until the departure of their employees, which in one case took place as late as January 1991. These portions of the Claims raise the question of whether compensation for the amounts in question should be denied on the basis that the performance of work constituted a violation of the trade embargo.

171. A number of Governments have discussed this matter in responses submitted to the Commission's article 16 reports. The arguments presented unfold into two distinct issues. One is whether the trade embargo covered activities within Iraq so long as those activities did not result in the transhipment of goods or the transfer of capital into or out of Iraq. Most Governments take the position that it did not, so that compensation for whatever was performed within Iraq may be awarded. Other Governments, however, contend that the scope of the trade embargo extends to any kind of commercial activity undertaken or even continued after 6 August 1990 with Iraq, so that no compensation for losses related to such activity may be awarded. The other issue raised is that of the direct application of Security Council resolution 661 (1990). The resolution required member states to prohibit their nationals from trading with Iraq but was not directed at individuals or corporations themselves. Although many responses take the position that the resolution is not directly applicable, they nevertheless conclude that it constitutes a bar to any recovery for commercial activities performed in Iraq after 6 August 1990.

172. While there is indeed a question as to whether Security Council resolution 661 (1990) and related resolutions are directly applicable to individual citizens or corporations, the Panel is of the opinion that not giving full force to the resolution in its proceedings would plainly run against a clear mandate of the United Nations. Given that the Commission's very existence, authority and means to award compensation are themselves United Nations creations, the Panel is not prepared to take such a

position. Moreover, taking into account whether a given Member State implemented the trade embargo resolution into its domestic law or not would have the unfortunate effect of discriminating in favour of those claimants who were under no compulsion to refrain from the acts proscribed because some States did not promptly implement the resolution.

173. Concerning the scope of the trade embargo, the Panel finds that by its terms it applies only to the import or export of goods or capital into or from Iraq after 6 August 1990. In other words, a plain reading of resolution 661 (1990) leads to the conclusion that the Security Council intended to capture within the prohibitions of the resolution only activity consisting of or leading to the import or export of goods or capital into or from Iraq. Therefore, the provision of construction/engineering services within Iraq by non-Iraqi firms to Iraqi parties pursuant to contracts that were ongoing as of 6 August 1990, insofar as it does not involve the transfer or transportation of goods or capital to or from Iraq, does not violate the terms of the trade embargo. Work that does involve the transfer of goods or capital to or from Iraq after 6 August 1990 violates the terms of the trade embargo and is not compensable.

V. COMPENSABILITY OF THE CLAIMS PRESENTED

174. The Panel now turns to consider the compensability of the Claims before it in the light of the relevant Governing Council decisions and the conclusions reached above. In considering the compensability of the loss types alleged, the Panel again notes that the Governing Council decisions attach particular significance to the location of the loss. Therefore it is from the dual perspective of location and loss type that the various claims are classified in order to asess their compensability.

A. Claims relating to assets located in Iraq as of 2 August 1990

1. Physical assets

175. Applying paragraph 13 of decision 9, the Panel has determined that in the case of physical assets located in Iraq as of 2 August 1990, if a claimant can demonstrate that its employees departed from Iraq during the relevant period, the claimant will have established the requisite causal link between Iraq's invasion and occupation of Kuwait and the loss of the assets the claimant can prove were in Iraq as of 2 August 1990. See paragraphs 119-123, supra.

176. CCL, Hyundai and Technopromexport each allege that their employees departed from Iraq during the relevant period, and that as a result they lost assets that were left unattended in Iraq. The factual circumstances with respect to each differ slightly. CCL adds that by withholding payments due, Iraqi authorities "forced" it to continue working on a particular project in Iraq until January 1991, at which time it was ordered to leave and abandon its equipment and machinery. Hyundai contends that due to the departure the majority of its employees from Iraq during the relevant period, its assets located in Iraq were left virtually unattended, and subject to plunder by individuals and severe damage. In its responses to the Panel's questions, Hyundai clarified for the Panel that as of January 1991, only twenty Hyundai employees remained at the Hyundai "Iraqi Project Operations Center" or "IPOC", its Iraqi branch office and equipment depot, located in Baghdad.64/

177. In its responses to the Panel's questions, Iraq advances several arguments against providing compensation. First, Iraq contends that some of the projects in question were primarily completed and handed over prior to 2 August 1990. Iraq argues that it should not be held responsible for assets that had been left on site by the Claimants after they had officially completed their work. However, the undisputed fact is that while a significant portion of the Claimants' work in Iraq had been completed prior to 2 August 1990, all of the work was not completed and removal of the equipment from Iraq had not taken place as of the date the Claimants' employees departed from Iraq. Moreover, given the large size of the projects in Iraq and the volume of equipment necessary to perform under the contracts, it is unreasonable to expect that the Claimants should have removed their equipment from Iraq at the time their employees departed from Iraq.

178. Second, Iraq argues that all the materials left on site (i.e., within the control of the Claimants) were the responsibility of the Claimants, that the Claimants had appointed their own watchmen, and that consequently, Iraq had no responsibility for safeguarding the materials and equipment. This argument, however, ignores the fact that decisions 7 and 9 do not require that Iraq have assumed responsibility for property located in Iraq in order for it to be liable for the loss of that property; all that is required is that the loss can be attributed to one of the acts or consequences of Iraq's invasion and occupation of Kuwait (notably, the departure of employees from Iraq during the relevant period).

179. Third, Iraq argues that the Claimants have failed to specify the thefts alleged. Again, the compensability of the losses alleged depends

only on whether a claimant can demonstrate a direct causal connection between each loss and Iraq's invasion and occupation of Kuwait (such as, in the Claims, that it resulted from the departure of its employees from Iraq during the relevant period) and not on the claimant proving that a specific act, such as theft or vandalism, caused the loss.

180. Fourth, Iraq argues that the property in question is neither damaged nor lost, but still available to the Claimants in Iraq. Iraq further argues that the Claimants failed to take any steps from 2 March 1991 onwards to coordinate with Iraq for the return of the property. However, for the reasons stated in paragraph 129-130, supra, the Panel does not impose upon the Claimants a general obligation to have returned to Iraq to regain possession of its equipment.

181. Finally, Iraq argues that it should not be held responsible for any asset loss resulting from the Claimants' departures from Iraq because the Claimants did not adhere to contract provisions relating to early termination (such as, for example, providing notice to the other party) prior to departing. It is the finding of the Panel, however, that paragraph 21 of decision 7 and paragraph 13 of decision 9 impliedly exclude the imposition of a general duty upon the Claimants to have adhered to the terms of underlying contracts with Iraq prior to departure65/

182. The Claimants have established to the satisfaction of the Panel that they were engaged in contract work in Iraq as of 2 August 1990 that required the presence of personnel, equipment, machinery and materials. They have further established to the Panel's satisfaction that most if not all of their personnel departed from Iraq during the relevant period, leaving behind a significant amount of that equipment, machinery and material. It is the conclusion of the Panel, therefore, that the Claimants have established the requisite causal link between Iraq's invasion and occupation of Kuwait and the loss of the equipment, machinery and assets which the Claimants can prove were in Iraq at that time.

183. Another issue relating to asset claims in Iraq concerns costs incurred by Technopromexport to protect property it left behind. In that case, it is clear that these steps were taken as a result of Iraq's invasion and occupation of Kuwait. The Panel finds it is reasonable that these actions were undertaken to assure the continued safety and protection of the relevant equipment. As such, the prudent costs incurred by Technopromexport in taking these actions are compensable.

2. Monies held in Iraqi bank accounts

184. CCL seeks compensation for the loss of funds held in bank accounts. For the reasons set forth in paragraphs 136-140, supra, the Panel finds that there is no compensable loss.

B. Claims relating to contracts with Iraq

1. Money owed for work performed or services provided

185. CCL, Hyundai and Technopromexport each seek compensation for Iraq's failure to pay for work performed or services provided by them in Iraq pursuant to contracts with Iraqi authorities. In each case, the work for which compensation is claimed was performed both before and after 6 August 1990. No work for which compensation is sought was performed after 2 March 1991. Because, in each case, the work performed after 6 August 1990 was in the nature of construction activities carried on within Iraq and did not involve the transfer or transport of goods, services or finances to or from Iraq, the Panel finds that such work did not violate the trade embargo. See paragraphs 164-169, supra.

186. In many of the contracts before the Panel, performance was fully completed by the Claimants long before 2 August 1990. For example, CCL includes in its claim a request for compensation for work that had been performed in 1985, Hyundai for work that had been performed in the early 1980s and Technopromexport for work that had been performed in 1988. In support of their contention that the amounts owed by Iraq should be compensated by this Commission regardless of the date of performance, these Claimants offer several arguments.

187. First, CCL, Hyundai and Technopromexport rely on similar arguments based on the existence between the Claimants and Iraq of credit agreements and deferred payment arrangements. In some instances the credit agreements were entered into between the Government of Iraq, on the one hand, and the Governments of India and the former Soviet Union, respectively, on the other. In other instances the credit was extended to Iraq by the contracting parties themselves, and in the case of Hyundai, this included barter oil arrangements. Essentially, the Claimants' argument is that by deferring Iraq's payment obligations, these agreements created new obligations on the part of Iraq and these new obligations do not constitute debts of Iraq arising prior to 2 August 1990. The Panel's conclusions concerning the effect of such deferred payment arrangements is set forth fully at paragraphs 92-96, supra.66/ In short, these arrangements and

agreements cannot have the effect of rendering compensable debts that originated prior to 2 August 1990.

188. Second, CCL and Technopromexport direct the Commission's attention to the clauses relating to "frustration" in the respective underlying contracts. The Claimants assert that in the case of frustration of contract, these clauses accelerate the payments due under the contract, in effect giving rise to a new obligation on the part of Iraq to pay all the amounts due and owing under the contract regardless of when the underlying work was performed. The Panel has concluded that claimants may not invoke such contractual agreements or clauses before the Commission to avoid the "arising prior to" exclusion established by the Security Council in resolution 687 (1991); consequently, this argument must fail67/

189. In the case of CCL, compensation is sought for money owed by Iraq for work performed by CCL on the Karkh, Diwaniyah, Ashtar 89, Sulaimaniyah, Nassiriyah and West Bank projects. For the Karkh project, the evidence provided by the Claimant indicates that the work performed for which compensation is sought - work on Stage I, Stage IIA and Stage IIB--was performed prior to 2 May 1990 (the date adopted by the Panel, see paragraph 90, supra).68/ Similarly, for the Diwaniyah, Sulaimaniyah, Nassiriyah and West Bank projects, the evidence provided indicates that the work in question was performed prior to 2 May 199069/ As regards the Ashtar 89 project, the evidence establishes that the Claimant's work began in June 1990; as such, the amounts owed by Iraq for the work performed by the Claimant on this project are properly compensable by this Commission.

190. Hyundai's substantial claims for money owed by Iraq for work performed are confined to its Supplemental Claim. However, in this claim Hyundai has singularly failed - although given the opportunity by the Panel through the issuance of procedural orders - to establish the dates when it completed performance on the various Iraqi projects for which it claims payment from Iraq. Hyundai has relied instead on its arguments that the barter oil and deferment arrangements effectively created new obligations that did not arise prior to 2 August 1990. However, as determined above, such arrangements cannot serve to render compensable debts that originated prior to 2 August 1990. The evidence presented indicates that the work for which Hyundai seeks compensation in its Supplemental Claim was performed prior to 2 May 1990 and, consequently, requests for compensation for these amounts owed is outside the jurisdiction of this Commission. See paragraphs 92-96, supra.

191. Technopromexport's claim for compensation for work performed on projects located within Iraq relates to the Youssifiyah Station and the Al-Baghdadi Project. With respect to the Youssifiyah Station, the Claimant has produced satisfactory documentation - in the form of payment certificates and invoices submitted to Iraq - to demonstrate the nature of the work performed and the date of completion of that work. The Panel finds that the payment certificates, which were prepared on a monthly basis for each preceding month's work, constitute adequate evidence of the date and extent of performance. The invoices merely serve to confirm the value to the Claimant and Iraq of the work performed. In the case of the Youssifiyah Station contract, therefore, the Panel finds that the claim for work performed as reflected in payment certificates dated after 2 May 1990 is compensable; the claim for work performed as reflected in payment certificates prior to 2 May 1990 is not compensable, as the money owed constitutes a debt or obligation of Iraq arising prior to 2 August 1990. For the Al-Baghdadi Project contract work, given the nature of the performance required under the contract, the invoices constitute adequate evidence of the timing and value of performance by the Claimant. The invoices issued for the Al-Baghdadi Project contract (invoices 1-3) are all dated prior to 2 May 1990. Therefore, compensation may not be awarded by this Commission for the amounts reflected in these invoices.

192. A related item is Technopromexport's claim for compensation for work allegedly performed on the Al-Baghdadi Project but for which it had not submitted an invoice as of 2 August 1990. Technopromexport explains that it did not do so because Iraq was required under the contract to approve the invoice for the prior stage work before Technopromexport could submit the invoice for the following stage. Technopromexport argues that the reason why Iraq failed to approve the prior works in time was the invasion and occupation of Kuwait. However, a review of the evidence indicates that the invoice for the prior stage work had been submitted by Technopromexport in January 1990; under the contract, Iraq had 30 days to approve this invoice. The fact that Iraq should have approved the preceding invoice such a long time before 2 August 1990 is evidence that its failure to approve that invoice was unrelated to the invasion and occupation of Kuwait. The Claimant has failed to provide any information to overcome this conclusion, that is, evidence that would establish a direct connection between the failure to approve invoices and Iraq's invasion and occupation of Kuwait. Consequently, the claim for the amounts not invoiced is not compensable.

2. Retention monies

193. Technopromexport seeks compensation for retention monies that were withheld from the invoices submitted by Technopromexport to Iraq for the civil engineering and construction work portion of the Youssifiyah Station. The evidence submitted by the Claimant in support of this portion of its Claim clearly indicates that the amounts withheld as retention monies were only to be repaid by Iraq upon completion of both the project and the issuance by the Claimant of certain certificates of completion. Because the work on the project was ongoing as of 2 August 1990, these conditions precedent could not have been satisfied; for that reason, the Panel determines that Technopromexport's request for compensation for these amounts is properly within this Commission's jurisdiction.

194. CCL seeks compensation for retention monies withheld at several projects: Karkh, Diwaniyah, Sulaimaniyah, Nassiriyah and West Bank.

195. With respect to the Karkh and Diwaniyah projects, the underlying conditions of contract produced by the Claimant establish that the retention monies were to be repaid upon both issuance of the "final certificate" and the lapse of a maintenance period for the project. In its responses to the Panel's questions, Iraq contends that another condition precedent to payment of the retention monies was the presentation of a certificate of obligation from the Iraqi General Committee of Customs; however, the Panel found no evidence of any such requirement. In any event, with respect to the Karkh project, it does not appear that the conditions were or could have been satisfied prior to 2 May 1990. As such, the claim for these amounts is properly within the jurisdiction of this Commission.

196. Concerning the Diwaniyah retention monies, the evidence indicates that CCL finished work on this project as early as 1984. The fact that the project was completed so long before 2 August 1990 is evidence that Iraq's failure to pay the retention monies either constituted an obligation arising prior to 2 August 1990 or was unrelated to the invasion and occupation of Kuwait. The Claimant has failed to provide any information that would overcome this inference; that is, evidence that would establish a direct connection between the failure to pay the retention monies and Iraq's invasion and occupation of Kuwait. As such, the claim for the Diwaniyah retention monies is not compensable.

197. With respect to the retention monies for the Sulaimaniyah, Nassiriyah and West Bank projects, the analysis is similar. The evidence produced by

the Claimant relating to the date of performance of its work on these projects indicates that it completed performance at the latest in 1982. As such, the claims for retention monies for these projects are not compensable.

3. Payments due for goods shipped

198. Technopromexport seeks compensation for equipment and materials shipped pursuant to several different contractual arrangements with Iraq. The first arrangement concerns Technopromexport's undertaking to manufacture in the former Soviet Union certain machinery and equipment intended for the Youssifiyah Station and to ship them to Aqaba, Jordan. The second arrangement concerns Technopromexport's agreement to organize the transportation of this machinery and equipment by a carrier from the port at Aqaba to the project site in Iraq. The third concerns the delivery of equipment by Technopromexport to the Al-Baghdadi Project. The fourth and fifth respectively concern the delivery of conductors and spare parts to various projects in Iraq.

199. With respect to the first arrangement (the manufacture of certain machinery and equipment for Iraq and their shipment to the port at Aqaba, Jordan), Technopromexport alleges that the equipment and material were shipped as per the contract and are still being held in Aqaba by local warehousing authorities. Technopromexport contends that because title passed to Iraq once the equipment was transferred to the carrier, it cannot regain control of these items and it cannot resell them.

200. First, the Panel notes that Technopromexport's contention regarding transfer of title is not supported by the terms of the sale. Technopromexport's argument is that the equipment and material in question was shipped "C&F". This, however, only means that when the goods "pass the ship's rail" (i.e., when the goods are placed on the ship for transport to the destination) risk, not title, passes to the buyer.70/ The Panel nevertheless finds that because the goods were delivered to the port of destination and because risk, and therefore control, was transferred, it is not reasonable to impose upon the Claimant a duty to have regained control of the goods for the purpose of trying to sell them.

201. Second, the evidence produced by Technopromexport in support of this portion of its Claim (bills of lading, invoices and lists of the material and equipment shipped) indicates that the shipments began in 1989 and continued until the end of July 1990; no shipments took place after 6 August 1990. The evidence indicates that each journey from the port of

Ismail in the former Soviet Union to the port of Aqaba took seven to nine days, and that Technopromexport sent Iraq an invoice on or about three months after the date of corresponding bills of lading. "Performance" is defined in the underlying contract between Technopromexport and Iraq as the manufacture of the machinery and equipment and their subsequent shipment over a period of time "C&F Aqaba port"; thus, performance may only be considered to have been completed as of the date when the items were shipped in conformity with the contract. The evidence of such performance is contained in the bills of lading corresponding to each shipment, which show the shipment dates and the corresponding commercial terms.

202. Applying the rule concerning debts and obligations of Iraq arising prior to 2 August 1990 (see paragraph 90, supra), the Panel finds that Technopromexport's claims for compensation for shipments of machinery and equipment that took place prior to 2 May 1990, as evidenced by the bills of lading, are not properly within the jurisdiction of the Commission. Shipments that took place after 2 May 1990 and before 6 August 1990, as evidenced by the bills of lading, are compensable to the extent they have been proven by the Claimant.

203. With respect to the second arrangement (Technopromexport's agreement to arrange for the transportation of the machinery and equipment by a carrier firm from the port at Aqaba to the project site in Iraq), Technopromexport alleges that more than forty shipments under this arrangement had taken place as of 2 August 1990, the date when shipping from Aqaba to the project site became impossible.

204. The underlying contract does not describe with any particularity the performance required of the Claimant in this regard; specifically, it is unclear whether the Claimant completed performance merely by retaining the carrier or by ensuring that the deliveries actually took place. Because, however, the contract provides separately for this transportation function, the Panel concludes that the benefit of this particular bargain to Iraq was not just the retention of the transport firm, but rather the actual transportation required under the contract. The Claimant, although requested by the Panel, has not provided copies of the documentation provided to it by the carrier. The evidence of performance that has been produced by the Claimant are the invoices sent by the Claimant to Iraq, on a pro-rata shipment basis, showing that the particular shipments were made. The Panel notes, however, that Technopromexport has failed to produce invoices to support six of these shipments; therefore, no compensation may be awarded for the corresponding amounts. With respect to the remaining invoices, applying the "arising prior to" rule, the Panel finds that claims

for compensation based on invoices dated prior to 2 May 1990 constitute debts and obligations of Iraq arising prior to 2 August 1990 and may not be the subject of compensation.

205. With respect to the third, fourth and fifth arrangements, it is clear from the underlying contracts that "performance" under these contracts included not only the manufacture of the equipment, conductors and spare parts in question, but also the subsequent supply of those items to the designated project site. As such, the appropriate measure of when performance was completed for purposes of determining when Iraq's obligation to pay arose is the date when shipment was completed in accordance with the terms of the contract, as evidenced by the corresponding bills of lading. In the case of these contracts, claims for compensation based on invoices dated prior to 2 May 1990 constitute debts and obligations of Iraq arising prior to 2 August 1990 and may not be the subject of compensation.

4. Payments due for goods manufactured but not shipped

206. Technopromexport seeks compensation for equipment and material that was manufactured in the former Soviet Union but had not, as of 2 August 1990, been shipped to Iraq. The amount claimed is for the value of the equipment manufactured and the ongoing costs of storing the equipment in the former Soviet Union.

207. According to the terms of the underlying contract, performance is defined as the manufacture of the equipment and material plus their shipment "C&F Aqaba port". Because the material and equipment had not been shipped as of 2 August 1990, performance had not been completed as of that date. Therefore the "arising prior to" clause does not bar any portion of this part of the Claim.

208. The evidence produced in support of this portion of the Claim by the Claimant in response to the Panel's procedural order includes "trust deposit receipts" acknowledged by Iraqi officials after 2 August 1990. These documents identify the equipment that was manufactured and provide that Technopromexport would continue to hold the equipment at its warehouses in the former Soviet Union. In its response to Technopromexport's Claim, Iraq explains that these trust deposit receipts were acknowledged by Iraq, in lieu of shipping documents, in order to permit Technopromexport to get paid by Iraq for the equipment and material. While Technopromexport was not in fact paid, the Panel finds that these

trust deposit receipts are adequate evidence of the fact that Technopromexport incurred the manufacturing costs.

209. The costs of storing this equipment were incurred with the acknowledgment, if not outright agreement, of Iraq after Iraq's invasion and occupation of Kuwait was well underway and after the embargo was in place. Indeed, the trust deposit receipts state that "due to the embargo it is not possible to dispatch to 'Youssifiyah Thermal Power Station' the equipment manufactured". In this case, the loss alleged (the storage costs) would not have been incurred absent the trade embargo. This loss did not arise out of the departure of Technopromexport employees from Iraq, or any of the enumerated actions or events set forth in paragraph 21 of decision 7.

210. The only argument offered by the Claimant to connect these costs with Iraq's invasion and occupation of Kuwait is mitigation of damages - namely that these costs were reasonably incurred to prevent the deterioration of the equipment. However, the Claimant admits that storing this equipment and machinery instead of attempting to sell it to third parties was a decision undertaken by the Claimant in the hopes of continuing contractual relations after the embargo had been lifted.71/ The Panel finds, therefore, that this was not so much an action in mitigation as a calculated business decision taken in the context of continuing contractual discussions with Iraq. In any event any loss suffered resulted from the embargo. For either reason, such losses may not be compensated by this Commission.

5. Other contract-related claims

211. CCL, Hyundai and Technopromexport seek compensation for a variety of miscellaneous losses related to their contractual relations with Iraq.

212. CCL argues that Iraq continued to use physical assets that had been left behind by CCL at a project site (the "Ashtar 89" project), and consequently seeks compensation in the nature of "hire charges" for Iraq's use of these assets. However, CCL is also claiming compensation for the value of these assets on the basis that they were lost to CCL as of the time of the departure of its employees. The Panel, having determined that the Claimant will be compensated for the loss of the assets at the time its employees departed from Iraq (see paragraphs 119-123, supra), concludes that to give satisfaction to the Claimant for subsequent "hire charges" would amount to double compensation.

213. Hyundai seeks compensation for the loss of employee productivity costs incurred in relation to its Iraqi contracts.72/ The alleged losses concern the fact that Hyundai continued to pay its employees in Iraq after productive work had ceased and until these employees were repatriated to their home countries. The Panel determines that such salary and wage costs, particularly in the case of foreign workers and considering that no productive work could be performed by these employees in the circumstances, are contract-related losses directly related to Iraq's invasion and occupation of Kuwait. As such, these costs are compensable to the extent proven by the Claimant.

214. Hyundai also seeks compensation for "termination costs" in relation to its Iraqi contracts. The meaning of that phrase was clarified by Hyundai in its response to the Panel's questions as the non-wage costs, such as housing, food, clothing and transportation, associated with maintaining a workforce in Iraq until repatriation. These are therefore an extension of the loss of employee productivity claim, and as such the Panel finds that these associated costs are compensable as direct losses resulting from Iraq's invasion and occupation of Kuwait.

215. In the case of salaries for Hyundai's Korean employees, the Claimant seeks compensation for salaries that it continued to pay after repatriation of the employees to Korea. The Claimant, however, does not explain why its Korean employees could not have been assigned to other productive tasks after their repatriation. For this reason, the Panel concludes that salary costs paid after repatriation should not be compensated.

216. Technopromexport contends that under the terms of the Youssifiyah Station contract with Iraq it was to order machinery and equipment for the Youssifiyah Station from third party manufacturers, to pay for that equipment and machinery itself, and then to seek reimbursement from Iraq under the underlying contractual payment terms (which included the provision of State and company credits) for the value of the equipment purchased plus a commission to Technopromexport of 2.5 per cent of the purchase price.

217. In this case, "performance" by Technopromexport is defined in the underlying contract as the ordering of, and payment for, the items required. In its responses to the Panel's questions Technopromexport produced documents which demonstrate that it ordered and paid for DM 4,200,000 worth of equipment and machinery. Payment of that sum actually was made by Technopromexport on 21 August 1990; as such, the claim for compensation for this amount is properly within the jurisdiction of the

Commission. Technopromexport, however, has failed to provide proof of payment for the remaining amounts claimed; therefore, no compensation may be awarded for these amounts.

218. Finally, Technopromexport seeks compensation for the costs associated with maintaining its branch office in Baghdad (i.e., rental and other office costs) after the departure of its employees. The Panel finds that these costs were incurred not because of Iraq's invasion and occupation of Kuwait, but rather because of the Claimant's independent business decision to maintain the office for whatever future economic gains it might bring. As such, no compensation may be awarded for these costs.

6. Expenses related to the contracts

219. CCL and Hyundai seek compensation for bank and insurance fees incurred in relation to loans which they had to obtain to continue their contract work in Iraq.

220. In the case of CCL, these fees include counter-guarantee and insurance premium charges for foreign currency loans for the Karkh and Diwaniyah projects, as well as interest paid on Karkh loans. A review of the evidence produced in support of these claims confirms that these loans were still active as of 2 August 1990, but also that the loans were only made necessary because of Iraq's delay in paying under the Karkh and Diwaniyah contracts. Because the Panel has concluded that Iraq's failure to pay constitutes a debt of Iraq that arose prior to 2 August 1990, the costs incurred by CCL to maintain the loans made necessary because of Iraq's failure to pay cannot be considered to be direct losses resulting from Iraq's invasion and occupation of Kuwait. As such, these amounts may not be compensated by this Commission.

221. In the case of Hyundai, the costs consist of bank fees relating to the maintenance of performance bonds for nine of its projects[73]/ The evidence produced by the Claimant indicates that it concluded work on these projects long before 2 August 1990. The Claimant has provided no explanation as to how the fact that these performance bonds were still outstanding as of 2 August 1990 could be directly related to Iraq's invasion and occupation of Kuwait. Based on the evidence concerning the completion dates of these projects and the Claimant's failure to demonstrate a connection between these costs and Iraq's invasion and occupation of Kuwait, no compensation may be awarded for these costs by this Commission.

7. Lost profits

222. Decision 9 provides that where "continuation of the contract [with Iraq] 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"74/ Therefore, the Panel finds that in cases where a contract with Iraq was ongoing as of 2 August 1990 and the contract became impossible to perform as a direct result of Iraq's invasion and occupation of Kuwait, the claimant is entitled to profits it could reasonably have earned on the contract had it been able to complete performance. See paragraphs 115-118, supra.

223. In considering what claimants could reasonably have earned as profits for contracts ongoing in Iraq in the late 1980s, the Panel is mindful of Iraq's difficulties in making timely payments from the early 1980s onwards and their strong negative impact on the profitability of projects ongoing in Iraq. The unique economic situation in Iraq from the early 1980s onwards, which has been described in detail earlier in this report, makes past profit performances of companies in Iraq (i.e., during the 1970s and early 1980s) unreliable indicators of future profit performance (i.e., what profits would have been in the 1990s had the claimants been permitted to complete performance). Therefore, in evaluating claims for lost profits on Iraqi operations, the Panel will require specific and persuasive evidence of ongoing and expected future profitability; absent such evidence, no compensation will be made for allegations of lost profits on contracts with Iraq.

8. Other financial claims

224. A portion of CCL's claim is entitled "other miscellaneous claims" and relates to monies paid by CCL to Iraqi authorities as appeal bonds and deposits paid to Iraqi utilities for the provision of utility services.

225. The appeal bond payments concern two situations. In one, CCL was penalized by the Iraqi customs authorities, and thereafter appealed. According to CCL, to appeal a penalty in Iraq the penalized party must first pay the entire penalty. CCL states that it paid the entire penalty, pursued its appeal, and that as a result of the appeal its penalty was reduced. The difference between the amount CCL paid in order to be allowed to initiate the appeal and the amount it was eventually required to pay was, according to CCL, never returned to it. CCL seeks this amount as compensation. In the other situation CCL also paid a bond for the purpose of appealing a penalty, but the appeal was not heard as of the date of

CCL's departure from Iraq. CCL seeks compensation in the full amount of the penalty paid. The Panel, however, finds that the Claimant has failed to establish how these penalties were direct losses resulting from Iraq's invasion and occupation of Kuwait.

226. Some of the other "miscellaneous claims" have been acknowledged by CCL to have been re-paid by Iraq in Iraqi dinars into CCL's bank accounts within Iraq; this concerns, specifically, deposits paid by CCL to the General Commissioner for Customs, the General Establishment for Post, Telegrams and Telephone, and the State Establishment for Electricity. The Panel's conclusions concerning these bank accounts and the funds contained therein are discussed at paragraphs 136-140, supra.

227. The remaining payments allegedly made by CCL and for which it now seeks compensation are unclear, and their relation to CCL's work in Iraq unexplained.75/ The Panel finds that CCL has not met its burden of explaining the nature of these alleged payments or the relationship between the loss of these monies and Iraq's invasion and occupation of Kuwait. Indeed, CCL has not established through documentary evidence the fact that these monies were in fact paid.

C. Other claims in Iraq

1. Employee repatriation costs

228. In accordance with decision 7, the Panel finds that the costs associated with repatriating employees from Iraq between 2 August 1990 and 2 March 1991 are in principle compensable to the extent the costs are proven by the claimant. Compensable costs consist of transportation costs from Iraq and "temporary and extraordinary expenses" related to the repatriation, including items such as lodging and food while in transit76/ See paragraphs 133-34, supra.

229. Hyundai and Technopromexport both seek compensation for the costs of evacuating employees from Iraq. These costs are compensable to the extent proven. However, Technopromexport, while providing lists of the employees evacuated, has failed to provide any evidence that it in fact incurred these costs. As such, the Panel cannot recommend an award for these costs.77/

2. Costs associated with the death of employees

230. Hyundai seeks compensation for costs associated with the death of two employees while engaged in the construction of a bomb shelter at a project site in Iraq during the relevant period. The Panel finds that the bomb shelter was built as a direct result of the military activity associated with Iraq's invasion and occupation of Kuwait. Therefore, the issue of the amount of compensation to be awarded is properly before the Panel.

D. Claims relating to assets in Kuwait as of 2 August 1990

231. Gulf Cable seeks compensation for assets in Kuwait that were lost or damaged during Iraq's invasion and occupation. As stated above, applying paragraphs 12 and 13 of decision 9, the Panel finds that insofar as a claimant can prove that it departed from Kuwait during the relevant period and subsequently lost assets that it owned and that were present in Kuwait as of 2 August 1990, the claimant will have established the requisite causal link between the loss of those assets and Iraq's invasion and occupation of Kuwait. Issues relating to the proper valuation method to be applied to lost or damaged assets, and the level of proof that is required to establish the fact of loss, are discussed below.

E. Claims associated with contracts in Kuwait

1. Goods provided but not paid for

232. Gulf Cable seeks compensation for amounts owed for goods provided to Kuwaiti and non-Kuwaiti parties prior to 2 August 1990, and which remain unpaid. The Panel finds that claimants must provide specific proof that the debtor's failure to pay was the direct result of Iraq's invasion and occupation of Kuwait, and not, for example, the result of a deliberate economic decision to allocate its available resources to certain ends rather than others. Gulf Cable has failed to establish that the reason for the non-payment for the goods supplied was a direct result of Iraq's invasion and occupation of Kuwait. Consequently, compensation may not be awarded for this alleged loss.78/

2. Other contract-related claims

233. Hyundai seeks compensation for a number of different kinds of contract-related losses and expenses relating to the termination of its contracts in Kuwait. The first relates to a contractual arrangement with the Kuwaiti owners whereby a certain amount was to be deducted from the

monthly payment owed to Hyundai, and in return for this reduction, Hyundai would become the owner of certain designated equipment and materials. Hyundai contends that as a result of Iraq's invasion and occupation of Kuwait, it never received the benefit of the bargain - it did not receive the equipment and materials even though the appropriate amounts had been deducted from its payments during the life of the project. The Panel finds that these losses are properly a continuing obligation of the Kuwaiti owners and not a direct loss resulting from Iraq's invasion and occupation of Kuwait.

234. The second item under this heading concerns rental costs paid in advance by Hyundai for the land and camps to house its temporary workers in Kuwait and adjacent to the project sites. The Panel notes that it is customary to pay such costs in advance, and finds that the Claimant's inability to receive the benefit of the amounts paid in rent during the relevant period was the direct result of Iraq's invasion and occupation of Kuwait. As such, these costs are compensable to the extent proven by the Claimant.

235. The third item under this heading is for the costs incurred in renovating the camps so that work on the projects could be resumed. Even though such costs were incurred following the liberation of Kuwait, they were a widespread consequence of the destruction inflicted on the landscape of Kuwait in the course and immediate aftermath of Iraq's invasion and occupation. The Panel finds therefore that these costs were incurred as a direct result of that invasion and occupation and as such are compensable to the extent proven by the Claimant.

236. The fourth and final item under this heading relates to costs incurred in preparing for the second time certain "as-built" drawings for one of the project sites. Hyundai states that it had prepared and handed over to the owner, as of 2 August 1990, most of the drawings called for under the contract, but that these were destroyed during Iraq's invasion and occupation of Kuwait. Hyundai seeks compensation for the costs it incurred after 2 March 1991 in recreating the drawings destroyed. Hyundai alleges that the Kuwaiti owner required it to recreate these drawings, notwithstanding the fact that they had been handed over to the owner prior to 2 August 1990, on the grounds that the contract required that a complete set of drawings be provided to the owner. However, the evidence provided by Hyundai in support of this claim of loss - the contract in question - does not support the facts and legal conclusions alleged. Questions such as risk of loss in the event of handing over of most of the drawings remain unanswered. The Panel concludes therefore that Hyundai has failed to

establish that the loss was a direct result of Iraq's invasion and occupation of Kuwait. Consequently, this portion of the Claim is not compensable.

237. Hyundai also seeks compensation for the loss of productivity of its employees in Kuwait during the period after Iraq's invasion and occupation and until these employees were repatriated to their home countries. As in the case of a similar loss alleged in Iraq, this loss consists of salaries and wages paid to employees who were unable to perform productive work. In the case of salaries and wages paid until repatriation, the Panel considers such costs, particularly in the case of foreign workers and considering the fact that productive work was not obtained from these employees in return, to be contract-related losses that are directly related to Iraq's invasion and occupation of Kuwait.

238. As is also the case in the similar loss alleged in Iraq, it is clear from the evidence that Hyundai continued to pay certain salaries after repatriation to Korea. The Claimant does not explain why its Korean employees remained unproductive after repatriation or how this circumstance could be attributed to Iraq's invasion and occupation of Kuwait. Consequently, the salary costs incurred in relation to payments made after the repatriation of certain employees to Korea are not compensable.

239. Gulf Cable seeks compensation for what it terms to be "restart expenses" incurred after Iraq's departure from Kuwait. The evidence produced does not reveal how the particular expenses incurred by Gulf Cable for which it is claiming compensation are other than the ordinary expenses incurred as part of an ongoing business enterprise. Consequently, the Claimant has failed to demonstrate that these expenses were incurred as a direct result of Iraq's invasion and occupation of Kuwait; the claim for compensation for these costs is rejected.

3. Expenses related to the contracts

240. Hyundai seeks compensation for financial costs incurred in the course of maintaining its contractual bonds and insurances in Kuwait[79]/ There is adequate evidence that the underlying Kuwaiti projects were ongoing as of 2 August 1990 and that these costs were therefore incurred as a direct result of Iraq's invasion and occupation of Kuwait. As such, they should be compensated to the extent proven by the Claimant.

F. Claims relating to income-producing properties in Kuwait

241. As stated above, three separate and distinct situations relating to the loss of income-producing properties are contemplated and described in decisions 9 and 15 (see paragraph 152, supra). The Claims before the Panel present only the second situation: Gulf Cable's losses associated with the destruction of a business that were or could have been rebuilt.

242. In that situation, decision 15 specifies that "compensation would be awarded for the loss from cessation of trading to the time when trading was, or could have been, resumed".80/ The Panel interprets this to mean that compensation for lost business in such a case may be awarded for the period between the cessation of operations and the time when the business reasonably could have resumed production at the pre-invasion capacity. This is important when it is considered that, particularly in the case of large factory premises, the resumption of operations was not likely to have taken place all at once, but rather would have occurred incrementally as machines were repaired or replaced. Consequently, to limit the period wherein compensation may be awarded to the time it took to begin any level of production would not adequately compensate such claimants.

243. Similarly, the Panel is mindful of the fact that delays in the resumption of production may have occurred that cannot rightfully be attributed to Iraq's invasion and occupation of Kuwait. For example, if a claimant took an inordinate amount of time to get a particular piece of equipment on line because of its own or a contractor's delay, that delay may be considered to have broken the chain of causation. Finally, the Panel notes that the time taken to resume operations varies from industry to industry: for example, professional service firms requiring relatively little infrastructure and equipment, such as accounting firms, can reasonably be expected to have resumed operations in a shorter period than large manufacturing businesses. These guidelines have been applied by the Panel when it considered the amount of the losses alleged in the Claims presently before it.81/

244. Gulf Cable seeks compensation in the amount of KD 16,142,000 for lost profits for the period 2 August 1990 through 31 December 1996. The Claimant has calculated its lost profits as the difference between projected profits for this period and actual profits earned during this period. Projected profits were calculated based on the average profit earned during the six years immediately preceding Iraq's invasion and occupation.

245. Gulf Cable has provided the Panel with evidence sufficient to establish the interruption of its business during the course of, and as a result of, Iraq's invasion and occupation of Kuwait. After the departure of Iraqi troops and personnel from Gulf Cable's premises and the State of Kuwait, the management of Gulf Cable set about the task of rebuilding its power cable business but decided not to pursue its plans for producing jelly-filled cable. Operations at its power cable factory were resumed in March 1992. Both the power cable and the jelly-filled cable operations constitute businesses that were or could have been rebuilt for purposes of analysing the alleged loss in the light of relevant Governing Council decisions.

246. In the case of the power cable factory, Gulf Cable alleges that trading was resumed - which it defines as the resumption of trade at the "previous level of operations and profits considering all other factors" - on 1 January 1997. As such, it seeks lost profits for the entire period from 2 August 1990 through 31 December 1996.

247. The Panel does not agree with Gulf Cable's definition of when "trading was resumed" for the present purposes. As stated above, the Panel interprets this clause of decision 9 to mean that compensation for lost profits may be awarded for the period between the cessation of operations and the time when the business reasonably could have resumed production at the pre-invasion capacity. It is the finding of the Panel that while Gulf Cable may not have reached pre-invasion profit levels until December 1996, the power cable factory could have resumed production at the pre-invasion capacity in March 1992, when the plant was commissioned. The Panel will therefore consider compensation for lost profits for Gulf Cable's power cable factory for the period 2 August 1990 to 31 March 1992.

248. Hyundai seeks compensation for profits allegedly lost on the KURES-3 site during the relevant period. It bases its estimate of lost profits on what it considers comparable sites in the Middle East. However, the Claimant has failed to provide the Panel with information concerning actual performance on the site prior to the departure of its employees from Iraq. Unlike the situation in Iraq, profit performance in Kuwait prior to 1990 is likely to serve as a valid indicator of future performance in that State (i.e., post-2 August 1990). Without this information, however, the Panel concludes that the Claimant has not provided sufficient information upon which an award of compensation may be made for the alleged lost profits.

G. Other claims in Kuwait

249. Hyundai seeks compensation for the costs incurred in evacuating its employees from Kuwait and repatriating them to their home countries. For the reasons stated above (see paragraph 153, supra), such costs are considered by the Panel to be costs incurred as a direct result of Iraq's invasion and occupation of Kuwait, and as such appropriate for compensation by this Commission to the extent proven by Hyundai.

H. Claims in Saudi Arabia

250. Hyundai was actively working on several large construction projects in Saudi Arabia as of 2 August 1990. Hyundai alleges that it suffered various kinds of losses relating to these activities in Saudi Arabia as a result of Iraq's invasion and occupation of Kuwait.

1. Physical asset claims

251. Hyundai seeks compensation for damage to physical assets located in Saudi Arabia. The damage alleged is of two kinds: damage resulting from the nearby oil fires in Kuwait, and damage resulting from non-use of assets during the relevant period. With respect to the former, Hyundai contends that it had to clean the oil residue from its buildings and vehicles and then repaint them. The Panel finds that with respect to these costs, the Claimant has established that the damage was suffered as a direct result of Iraq's invasion and occupation of Kuwait given that the oil fires were ignited in the course of such events and given the proximity of Saudi Arabia to the fires. With respect to damage resulting from the non-use of assets, the evidence of costs incurred reveals nothing more than standard vehicle maintenance costs (oil changes and lubrications, for example). The Claimant has failed to establish the connection between these kinds of ordinary costs and Iraq's invasion and occupation of Kuwait.

2. Claims relating to contracts

252. Hyundai seeks compensation for salaries and wages paid to its employees in Saudi Arabia because these employees were not fully productive during the relevent period as a result of Iraq's invasion and occupation of Kuwait ("employee productivity losses"). The losses for which compensation is claimed are identical to those alleged by Hyundai in the case of employees who were in Iraq and Kuwait.

253. In the case of employee productivity losses in Saudi Arabia, the issue of "directness" is different from that presented in Iraq and Kuwait. The evidence produced by Hyundai establishes that some delays in Saudi Arabia were indeed suffered. However, Hyundai's projects were located throughout the territory of Saudi Arabia, and the Panel finds that the degree of impact of events in Saudi Arabia could not have been the same in all places and at all times during the relevant period: the more removed from the location of the actual invasion and occupation, the more evidence is required of claimants seeking losses to establish to the Panel's satisfaction that the employee productivity losses were in fact incurred because of Iraq's invasion and occupation of Kuwait. Indeed, the evidence also indicates that most of the delays were suffered after 16 January 1991, the date the allied coalition forces commenced their air offensive. In accordance with the above consideration, the Panel recommends compensation only for those delays that Hyundai has established to be the direct result of Iraq's invasion and occupation of Kuwait. The associated costs of maintaining the workforce in Saudi Arabia (food, shelter and clothing, claimed as "extra cost for site operation") have been similarly examined.

254. Hyundai also seeks compensation for the time its equipment was left idle in Saudi Arabia during the relevant period. Here, however, Hyundai has failed to establish an actual loss, particularly since the life of the equipment in question was extended by approximately the same amount of time it allegedly was idle and generating additional income for Hyundai once productive work was resumed after 2 March 1991.

255. Finally, Hyundai includes costs allegedly incurred as a result of the suspension of project works in Saudi Arabia ("extra costs to temporary works" and "additional consultant fee"). These items are rejected by the Panel on the basis that the Claimant has failed to establish the connection between them and Iraq's invasion and occupation of Kuwait[82]/

3. Claims for evacuation costs

256. Hyundai seeks compensation for the costs allegedly incurred in evacuating some of its employees from Saudi Arabia. In this case there are significant issues of "directness" that the Claimant has failed to resolve to the satisfaction of the Panel. The record shows that most of Hyundai's employees remained in Saudi Arabia during the relevant period. It also shows that Hyundai brought new workers into Saudi Arabia during that same period. The selective evacuation is not explained by Hyundai, and raises the issue of whether the departure and replacement of personnel was a result of Iraq's invasion and occupation of Kuwait or simply occurred in

the ordinary course of personnel management. In view of the lack of evidence on this issue, the Panel concludes that this portion of the Claim is not compensable.

VI. VALUATION OF COMPENSABLE CLAIMS

257. Having determined which portions of the Claims are compensable, the Panel must recommend the appropriate amount of compensation to be awarded for each. Before doing so, however, it will address some evidentiary considerations specific to this part of its task.

A. Evidentiary considerations

258. Some claimants have relied on certain documents prepared by or acknowledged by Iraqi officials as evidence of the value of the loss suffered; the Panel must assess the weight to be accorded to such evidence. It must also specify the role of expert consultants retained in order to assist it in determining appropriate valuations.

1. Protocols with Iraq

259. CCL and Technopromexport both presented as evidence of the value of the losses suffered certain documents prepared by or acknowledged by Iraqi officials. In the case of CCL, the documents in question contain lists of equipment apparently signed by Iraqi officials at the time of CCL's departure from Iraq. In the case of Technopromexport, the evidence is more substantial, and consists of actual protocols between Technopromexport and the Iraqi contracting parties, agreed after 2 March 1991, in which Iraq appears to acknowledge the amounts owed to Technopromexport for contract works, asset losses and other costs incurred in the wake of its departure from Iraq.

260. Concerning the documents produced by CCL, Iraq, in its responses to the Panel's questions, denies that the lists were acknowledged by any responsible Iraqi official and also denies that these lists can represent any acknowledgment of value. The Panel agrees with the latter statement. The documents are one and two page lists of assets with single United States dollar totals, alleged by the Claimant to represent the value of the items listed; the Claimant admits that the lists were prepared by a CCL employee as a final act prior to departing from Iraq. The record nonetheless might reflect a contemporaneous CCL estimation of value. There is not enough, however, in these documents to warrant relying on them as a serious record of the value of the CCL equipment in Iraq at the time. CCL

has failed to provide the Panel with additional information concerning the records utilized by its employee in order to arrive at the values stated. Considering the documents in the totality of these circumstances, the Panel concludes that they may not be relied upon to determine value for the purpose of awarding compensation.

261. Concerning the documents produced by Technopromexport, Iraq, in its responses to the Panel's questions, acknowledges the protocols in question, but argues that it never intended them to be an admission of value. Iraq also points out that the statements concerning value or loss were expressly conditioned upon Iraq reviewing underlying documentation concerning the stated value or loss.

262. The Panel likewise finds the protocols to have little probative value. They were agreed at a time when Iraq was anxious to resume the particular project works and were steps towards achieving that end. The statements contained in these agreements must therefore be assessed against that background - a desire to reach a settlement in order to resume the works. Viewed in this manner, these protocols, at most, appear to be a statement of the settlement Iraq would be willing to reach, after having had an opportunity to review the underlying documentation, if the projects were resumed. The projects have not been resumed. Consequently, the Panel determines that in these circumstances such documentation may not be relied upon in reaching conclusions regarding the amount of compensation.

2. The Panel's use of expert consultants

263. Article 36 of the Rules provides that a "panel of Commissioners may: ... (b) request additional information from any other source, including expert advice, as necessary". Because the Claims presented complex issues relating to the quantification of losses suffered at large construction projects and factory premises, the Panel determined at an early stage of the proceedings to request expert advice pursuant to article 36. As stated, the Panel obtained the assistance of a firm experienced on an international level - and particularly the Gulf region - with loss adjusting and accounting issues arising from both the wholesale destruction of assets and the abrupt cessation of business activities.

264. Under the Panel's supervision and guidance, the expert consultants reviewed the evidence submitted by the Claimants (including the responses to the procedural orders), information obtained from two of the Claimants during on-site inspections conducted with the secretariat, and material prepared by the secretariat concerning the Claims. Considering all of this

information, the expert consultants advised the Panel regarding the quantification of the Claims. Such advice generally was based on, among other things: the expert consultants' opinion as to whether particular documentation, alone or together with other documentation, tended to support a corresponding claim for money damages; the application of general loss adjusting principles, such as depreciation and betterment (see paragraph 271, infra); comparisons of the level and type of evidence that claimants usually are able to produce to demonstrate losses arising out of catastrophic events not dissimilar in their effects to war situations (such as fire, hurricanes or floods); and cross-checks of documentation submitted to ensure completeness.

265. The Panel carefully reviewed the views and calculations of the experts and, in conformity with general principles of law, exercised its discretion in assessing the amount of compensation that should be awarded. The Panel's use of expert consultants in this manner is consistent with the previous practice of the Commission83/ as well as the established practice of other international claims tribunals and commissions84/

B. Assessment of the Claims

1. Contract and contract-related claims

266. In each case the Panel required evidence to establish that the Claimants performed the work called for under the contract, and evidence that established the value of that work. Typically, such evidence included invoices for work performed and the underlying payment certificates or shipping documents. Where such documentation was not provided, the Panel has not recommended compensation in the amount claimed.

2. Lost profits

267. For projects in Iraq, compensation for lost profits was only recommended where the Panel concluded that there was a realistic possibility of profits being earned. The Claimants who were engaged in construction projects in Iraq were not able to demonstrate a reasonable likelihood of earning profits on their ongoing projects in Iraq. The evidence produced by these Claimants indicated only that Iraq was becoming more and more indebted to them and that their continued presence in Iraq reflected motivations other than a realistic expectation of earning profits. The Claimants' failure to provide sufficient information concerning the method of calculating the lost profit claimed also argued against any award. The only exception to this is the contract entered into

by Technopromexport for the supply of conductors and spare parts to Iraq. There the evidence suggests a sufficient regularity of payment by Iraq, such that the Panel concludes that a level of profit was reasonably expected.

268. In the case of Gulf Cable, the evidence clearly indicated that a profitable business was interrupted on 2 August 1990. The Claimant provided the financial statements and balance sheets generated by the company every year since its inception as well as its production records. Together, these documents enabled the Panel to form a clear picture of the Claimant's profitability upon which its recommendation is made.

3. Physical assets

269. In valuing the physical assets lost during the relevant period for purposes of claiming compensation the Claimants used a variety of methods. Indeed, the methods differed within Claims according to the kind of asset for which compensation was being sought. In all cases, the Panel required evidence that the asset existed prior to 2 August 1990 and that it was owned by the Claimant as of 2 August 1990. A significant factor in the Panel's calculation of compensation for asset losses was the Claimants' failure to meet these requirements. Indeed, most of the lists of assets produced (typically containing hundreds of items in different categories such as plant and machinery, equipment, supplies and materials) did not correspond to the numbers of items claimed. The amounts recommended have been adjusted accordingly.

270. In terms of actual valuation, the Claimants used a variety of methods for different items, including book value, market value, replacement value and depreciated replacement value (which may be defined as the cost of purchasing a new item less accumulated depreciation on the old). All of these methods are acceptable under decision 9. To the extent these valuation methods were confirmed as reasonable by the independent sources consulted by the Panel, the Panel accepted the Claimant's calculations as made. In one case, a Claimant presented alternate valuation methods - book value and a lower market value - for the same items. In this case, the Panel valued the equipment using the market value calculation, on the basis that this better reflects the Claimant's ability to replace the item.

271. The Panel also utilized two specific valuation tools in arriving at its final valuations of assets: betterment and depreciation. Betterment occurs when old and used items are replaced with new or better ones; in such cases, a significant increase in value can be realized. Where the

Claimants did not use a method of valuation that accounts for betterment, the Panel made appropriate adjustments in the value. In some instances, this had a significant impact on the amount awarded.

272. As regards depreciation, the Panel notes that it tended to be conservatively measured by the Claimants. Specifically, the Claimants argued that they should be permitted to utilize a much longer period of depreciation than the period actually used in their financial records. They contended that "book depreciation" was typically recorded in their books and records at a short period because book depreciation was utilized for accounting and tax purposes, whereas a longer period of depreciation more accurately reflected the actual value of the assets to them.

273. The Panel is aware that in many cases, especially that of construction equipment and machinery, the value of an asset to a company can in fact be higher than the value at which that asset is carried on its books. Consequently, the Panel has, in the majority of instances, accepted the Claimant's evidence of depreciation. In some cases, however, the Panel has determined that the depreciation utilized was not reasonable given the equipment in question. For example, in the CCL claim the Panel has utilized a shorter life for the assets listed as air conditioners, furniture and fixtures and typewriters, rather than the more extended periods claimed. The Panel assessed Gulf Cable's claim for computer equipment on the same basis.

4. Financial assets

274. Gulf Cable has claimed for cash allegedly held at the company safe and stolen by the occupying Iraqi troops. The petty cash records produced by the company indicate that amounts of this size were regularly on hand in the company's safe, and that the amount claimed was recorded as being on hand as of the date of Iraq's invasion. The Panel therefore determines that a recommendation of compensation in the amount claimed is warranted.

5. Evacuation costs

275. Hyundai, in its response to the Panel's Order, provided copies of invoices paid for air fares and exit visas for most of the workers evacuated at Hyundai's expense. For these costs the Panel recommends compensation. In the case of certain Thai workers, Hyundai alleges that the Government of Thailand intends to hold it responsible for the costs incurred by the Government of Thailand in evacuating Hyundai employees of Thai nationality from Kuwait. However, Hyundai has not demonstrated that

it actually incurred these costs; as such, it may not receive compensation for them.

C. Currency exchange rate and interest

276. While many of the costs incurred by the Claimants were expended in currencies other than United States dollars, the Commission's awards are made in that currency.85/ Therefore the Panel must determine the appropriate rate of exchange to apply to losses expressed in other currencies.

277. CCL, Hyundai and Technopromexport have each argued that their contracts contained agreed-upon currency exchange rates and therefore that these agreed exchange rates should apply to all of their losses. Typically, the contract rate was substantially higher than the prevailing commercial rate.

278. The Panel agrees that the exchange rate specified in a contract is the appropriate exchange rate for contract losses suffered in currencies other than United States dollars, as this was specifically bargained for and agreed by the parties. However, the same reasoning and conclusion do not apply to losses that are not contract based. Generally, items such as lost or damaged assets, lost profits and evacuation costs are not contemplated by the parties when agreeing to an exchange rate in their contracts. Therefore, for non-contractual losses, the Panel determines the appropriate exchange rate to be the prevailing commercial rate, as evidenced by the United Nations Monthly Bulletin of Statistics, as of the date the Panel determines it appropriate to apply that rate86/

279. The next issue is that of the appropriate date on which the exchange rate is to be applied to compensable losses suffered in currencies other than United States dollars and that are not subject to contractual rates of exchange. Courts and tribunals generally use one of three dates in determining the appropriate date: the date of loss; the date of judgment; or the date of payment in execution of judgment. The Panel notes that previous Panels have already decided this issue in favour of the first87/ The Panel joins with these decisions and will apply the currency exchange rate as of the date the loss is determined to have occurred.

280. This choice is in harmony with decision 16 of the Governing Council, which 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".88/

281. Accordingly, the Panel, in determining for each of the Claims the date when the compensable losses occurred, determines not only the appropriate currency exchange rate to apply to losses stated in currencies other than United States dollars, but also the date from which interest will accrue in accordance with decision 16.

282. The Panel notes that the date a particular loss occurred depends upon the characteristics of that loss. With respect to the Claims, the compensable losses vary significantly in kind and in location. The Panel therefore determines the dates of the losses before it considering these two factors.

283. In the cases of CCL, Hyundai and Technopromexport, all the losses in Iraq and Kuwait were incurred upon the departure of the Claimants' employees from Iraq and Kuwait. For these losses, therefore, the Panel considers the date of loss to be the date of departure of the last employees of each respective company during the period 2 August 1990 to 2 March 1991. In the case of CCL, the evidence indicates that this date is 31 January 1991. In the case of Hyundai, the date is 24 August 1990 for losses in Kuwait and 17 January 1991 for losses in Iraq. In the case of Technopromexport the date is 1 January 1991.

284. With respect to the appropriate rate of exchange to apply to losses suffered in currencies other than United States dollars and not governed by contractual exchange rates by CCL, Hyundai and Technopromexport in Iraq and Kuwait, the Panel notes that during the entire period of the occupation of Kuwait there was a significant disturbance of the exchange rate for the Iraqi dinar and the Kuwaiti dinar which resulted from Iraq's invasion and occupation of Kuwait. The Panel therefore uses the exchange rates for the Iraqi dinar and the Kuwaiti dinar that prevailed immediately before the invasion and occupation of Kuwait for the purpose of determining compensation to be awarded for these losses89/

285. The compensable losses suffered by Gulf Cable relate only to its activities in Kuwait. Nonetheless, the determination of the appropriate date of loss depends upon the type of loss for which compensation is awarded.

286. Gulf Cable's loss of financial and physical assets occurred with its loss of control over those assets - 2 August 1990, the date of Iraq's

invasion and occupation of Kuwait. The rate of exchange available as of 2 August 1990 will therefore be applied in determining the appropriate amount of compensation to be awarded for these items of loss.

287. Gulf Cable's claims relating to lost profits concern losses suffered over an extended period, so that another method of determination of the appropriate date of loss is warranted. The Panel determines the period during which Gulf Cable suffered compensable lost profits to be that from 2 August 1990 to 31 March 1992, the date when Gulf Cable could have resumed production at its pre-invasion capacity. Because the loss of profits was suffered regularly over this period of time, the Panel selects the mid-point of this period, 1 June 1991, as the date of loss. Concerning the appropriate rate of exchange to be applied to this loss, the Panel applies the average of the monthly commercial rates available during this period.

D. Claims preparation costs

288. 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 at this time.

E. Quantification of the Claims

289. Based upon its review and analysis of the Claims, the Panel makes the following determinations concerning the quantification of the Claims, as summarized by general loss category in the following table. The amounts are stated in United States dollars.

Amount originally claimed */				
Claimant	CCL	Gulf Cable	Hyundai	Technopromexport
Amount (US$)	472,833,095.00	126,618,792.62	1,127,547,852.89	326,352,455.17
Quantification by loss element				
	CCL	Gulf Cable	Hyundai	Technopromexport
Contract (Iraq)	4,433,413.00	N/A	3,745,532.67	59,791,235.76
Contract (Kuwait)	N/A	0.00	1,410,883.67	N/A
Contract (Saudi Arabia)	N/A	N/A	5,195,499.50	N/A
Lost profits (Iraq)	0.00	N/A	0.00	219,555.70
Lost profits (Kuwait)	N/A	18,257,864.38	0.00	N/A
Physical assets (Iraq)	11,583,862.91	N/A	7,696,175.00	21,950,258.84
Physical assets (Kuwait)	N/A	36,856,317.54	15,094,866.00	0.00
Physical assets (Saudi Arabia)	N/A	N/A	161,808.00	N/A
Financial assets (Iraq)	0.00	N/A	N/A	N/A
Financial assets (Kuwait)	N/A	27,528.65	0.00	N/A
Evacuation costs (Iraq)	0.00	N/A	640,022.00	0.00
Evacuation costs (Kuwait)	N/A	N/A	431,688.00	N/A
Evacuation costs (Saudi Arabia)	N/A	N/A	0.00	N/A
Claims preparation costs	To be determined	To be determined	To be determined	To be determined
Interest	To be determined	To be determined	To be determined	To be determined
Total per Claimant	16,017,275.91	55,141,710.57	34,376,474.84	81,961,050.30
Total				187,496,511.62

*/ For the breakdown by loss element of the Claims as filed by each respective Claimant, see paragraphs 5-26, supra.

VII. RECOMMENDATIONS

290. Based on the foregoing, the Panel recommends that the following amounts be paid in compensation for direct losses suffered by the Claimants as a result of Iraq's unlawful invasion and occupation of Kuwait:

a. Continental Construction Limited: US$16,017,275.91;

b. Gulf Cable & Electrical Company KSC: US$55,141,710.57;

c. Hyundai Construction & Engineering Company Ltd.: US$34,376,474.84; and

d. V/O Technopromexport: US$81,961,050.30.

Geneva, 9 May 1998

(Signed) Mr. Bernard Audit
Chairman

(Signed) Mr. José-María Abascal
Commissioner

(Signed) Mr. David D. Caron
Commissioner

Notes

1/ S/AC.26/1992/10.

2/ Subsequent to the submission of the Claims to the Panel, the Panel assumed responsibility for the "E2" group of claims, which is defined as including, in addition to the Claims, all claims filed in category "E" excluding those filed by Kuwaiti corporations, oil companies, construction/ engineering companies and import/export companies.

3/ In each case, the Claimants have requested compensation in United States dollars although in many instances the particular losses claimed were incurred in other currencies. As discussed in paragraphs 276-287, infra, in recommending awards, the Panel does not rely on the currency exchange rates used by the Claimants, but rather on a rate considered appropriate in view of the type of loss and the date the loss was suffered. However, for purposes of the summaries that follow, the losses are stated as asserted by the Claimants.

4/ Claimants inquired as to the availability to them of Iraq's responses. Given the investigative role assumed by the Panel, it is for the Panel to decide whether further clarification by the Claimants is necessary. The Rules do not grant the Claimants a right to receive filings. In this instance, the Panel concluded that no further clarification was necessary.

5/ "Report of the Secretary-General pursuant to paragraph 19 of Security Council resolution 687 (1991)" (S/22559), paras. 20 and 25. The quoted sections were included in section II of the Secretary-General's report, which the Governing Council was instructed to take into account when implementing Security Council resolution 687 (1991). See also paragraph 5 of Security Council resolution 692 (1991).

In its response to the Panel's procedural orders Iraq raises general objections to the process proposed by the Secretary-General, approved by the Security Council and followed by the Commission. The Panel does not consider such objections in this report. It is the opinion of the Panel, however, that great care has been taken to protect the legitimate interests of both Iraq and the Claimants.

6/ "Compensation for Business Losses Resulting from Iraq's Unlawful Invasion and Occupation of Kuwait where the Trade Embargo and Related Measures Were also a Cause" (S/AC.26/1992/15), para. 5 (hereinafter referred to as "decision 15").

7/ "United Nations Compensation Commission Claim Form for Corporations and Other Entities (Form E): Instructions for claimants", para. 6. This requirement is repeated at article 35, paragraph 1 of the Rules.

8/ Ibid.

9/ In its decision 46, the Governing Council has recently re-emphasized the need for documentary evidence to support a claim for loss. Recalling the requirement that category "E" claims must be supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and amount of the claimed loss, the Governing Council decided that "no loss shall be compensated by the Commission solely on the basis of an explanatory statement provided by the claimant". "Decision concerning explanatory statements by claimants in categories 'D', 'E' and 'F' taken by the Governing Council of the United Nations Compensation Commission at its 75th meeting, held on 2 February 1998 at Geneva" [S/AC.26/Dec.46 (1998)].

10/ Security Council resolution 661 (1990).

11/ Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties, adopted and opened for signature on 23 May 1969, entered into force 27 January 1980 (United Nations, Treaty Series, vol. 1155, p. 331). The full text of article 31 reads:

"Article 31. General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended".

12/ In Prosecutor v. Dusko Tadic, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 made use of the Vienna Convention in interpreting its constitutive Statute. The Tribunal in that instance wrote: "Although the Statute of the International Tribunal is a sui generis legal instrument and not a treaty, in interpreting its provisions and the drafters' conception of the applicability of the jurisprudence of other courts, the rules of treaty interpretation of the Vienna Convention on the Law of Treaties appear relevant". Prosecutor v. Dusko Tadic a/k/a "Dule" case No. IT-94-1-T (Trial Chamber Decision of 10 August 1995), para. 18.

13/ See Security Council resolutions 674 (1990) and 686 (1991).

14/ As stated in paragraph 54, supra, the Panel takes guidance from the Vienna Convention even though the Convention is not directly applicable in this instance.

The Panel concludes that it should take particular care with article 33 of the Vienna Convention which addresses the interpretation of treaties authenticated in two or more languages. Article 33, paragraph 4, of the Vienna Convention provides that where there are differences between "authenticated" texts, "the meaning which best reconciles the texts having regard to the object and purpose of the treaty shall be adopted". The Panel notes that although the phrase "authenticated text" does not appear within the Security Council's Rules, Arabic, Chinese, English, French, Russian and Spanish are "both the official and the working languages of the

Security Council" (rule 41 of the Provisional Rules of Procedure of the Security Council).

Putting aside the question of whether an official text should be regarded as the equivalent of an authenticated text, the Panel believes that the principles of interpretation it employs on critical precedential issues such as those presented by the Claims should reflect the realities of the drafting process. In short, the analogy between treaties and United Nations resolutions "must be treated with considerable caution, bearing in mind that in the law of treaties the status of 'authenticated text' derives from the agreement of the parties, and is not [as with United Nations Security Council resolutions] imposed by mere procedure" (Shabtai Rosenne, On Multi-Lingual Interpretation, 6 Is. L. Rev. 360, 361 [1971]). The Panel notes also that, prior to conclusion of the Vienna Convention, the International Court of Justice in the South-West Africa voting procedure advisory proceeding, when faced with interpreting a General Assembly resolution, gave a preference to the French version having found that it seemed to "express more precisely the intention of the General Assembly" (Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South-West Africa, Advisory Opinion, I.C.J. Reports 1955, p. 67 et seq. at p. 72). Thus the Panel finds that article 33, paragraph 4, of the Vienna Convention does not necessarily provide an appropriate rule of interpretation given the differences in circumstances between the negotiation of a treaty and the drafting, discussion and passage of Security Council resolution 687 (1991). Rather, the Panel takes notice of the fact that English was the working language used in the drafting and discussion of resolution 687 (1991), and as such, the English language version should be the starting point of any inquiry into the meaning and application of the resolution. The Panel looks to the other official language versions so as to confirm, or where necessary, resolve ambiguities in the meaning suggested by the English text.

15/ In the Arabic text, the phrase used is "duna'l massass", which can best be translated into English as "without touching" or "without concerning". The sense is one of creating an exception, or a separate category for these types of debts and obligations. The Chinese phrase used is "zai bu yingxiang zhe zhong zhaiwu he yiwu de qingkuang xia" which has the sense in English of "under the condition that there is no negative impact". In the French text, the phrase used is "sans préjudice", which carries the same sense as the phrase "without prejudice" in English. In the Russian text, the phrase used is "bez utcherba", which is closely akin to "without affecting" in English, and which also suggests a separate categorization. In the Spanish text, the phrase used is "sin perjuicio", which corresponds to "independently of" in English; again, the sense is one of creating a separate category for these prior debts and obligations.

English language equivalents and translations for the original texts in Arabic, Chinese, French, Russian and Spanish have been provided by the Panel and the secretariat, and as such do not constitute official UN translations.

16/ The Arabic text uses the phrase "walati syajri", which can be translated as "which will", and suggests, as does the English text, the imperative. The Chinese phrase used is "jiang tongguo zhengchang banfa jiejue", which can be translated as "which will be resolved through normal channels", also indicating an imperative. Similarly, the phrase in French, "qui seront reglées", suggests, as does the Arabic text, that these prior debts and obligations ("ses dettes et obligations antérieures") must be resolved elsewhere and not before the Commission. (In French legal texts, the future tense is often used, as well as the present indicative, as a substitute for the imperative: "À la vérité, le présent de l'indicatif n'est pas le seul substitut de l'impératif. Le futur l'est aussi, assez fréquemment", Gérard Cornu, Linguistique juridique (Paris, Montchrestien, 1990), p. 271.) In the Russian text, the phrase used is "kotoriie budut

uregulirovani s pomoshiiu obitchnih mechanizmov", which can be fairly rendered as "which will be regulated through usual mechanisms" in English, again indicating that only such other mechanisms are available to adjudicate prior debts and obligations of Iraq. Finally, the Spanish text also uses the future: "que se considerarán por los conductos normales", which, in legal language, is also the expression of a command.

17/ World Bank Debt Reporting System Manual 3 [1989].

18/ The word obligation is also used to designate the link between the persons involved ("vinculum juris").

19/ The two words are indeed described as synonymous. See G. Cornu, Vocabulaire juridique, 1st ed. V€ Dette (Paris, Press Universitaire de France, 1987).

20/ See Ernst Wolff, The Problem of Pre-War Contracts in Peace Treaties, (London, Stevens & Son Ltd., 1946), pp. 61-133.

21/ Della Thompson, ed., The Concise Oxford Dictionary, 9th ed., Oxford, Clarendon Press, 1995).

22/ Henry Campbell Black, Black's Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern, 5th ed. (St Paul, West Publishing, 1979).

23/ The Arabic text uses the phrase "alnashiaa kabl ethnayn abb aghostos 1990" which may be translated into English as "which were established prior to 2 August 1990". The Chinese phrase used is "yi qian" which has the sense of existing before. The French text refers to "dettes et obligations antérieures au 2 août 1990", and the Spanish text uses similar language: "deudas y obligaciones anteriores al 2 agosto de 1990". The words "antérieures" in French and "anteriores" in Spanish clearly designate something that existed by the time of reference - in this case the date of 2 August 1990. The Russian phrase "voznikshih do" may be translated into English as "that happened before" or "that existed before", also suggesting a definite sense of the past.

24/ In some instances, the obligation to pay arises before performance is completed or even due; for example, pursuant to an agreement between the parties to that effect.

25/ "Propositions and Conclusions for Business Losses: Types of Damages and Their Valuation" (S/AC.26/1992/9)(hereinafter referred to as "decision 9").

26/ In its letter to the Security Council dated 16 August 1991, the Government of Iraq confirmed the "external debt and financial commitments" figure of US$42,097 million. "Letter from the Permanent Representative of Iraq to the United Nations, addressed to the President of the Security Council" (S/22957).

27/ Security Council resolution 705 (1991).

28/ External Indebtedness of Developing Countries: Present Situation and Future Prospects (OECD, Paris, 1979), p. 6. "The amount of outstanding debt is merely an expression of foreign loan resources which have not yet been repaid", p. 16.

29/ S. Majid, Report prepared for the United Nations Compensation Commission, p. 3 (on file with Commission), citing T. Al-Alewi, Guidelines for Execution of Projects of National Development Plans, pp. 24-25 and Iraq

Regulations for Execution and Follow-Up of Projects and Works of the National Development Plans (1975), art. 8.

30/ Majid, note 29 supra, at p. 3, citing Dr. S. Al Keshtini, Study of the General Conditions of Works of Civil Engineering pp. 24-25.

31/ Majid, note 29 supra, at p. 8.

32/ See, e.g., Alnasrawi, Abbas., The Economy of Iraq; Oil, Wars, Destruction of Development and Prospects, 1950-2010 (Westport, Greenwood Press, 1994), p. 109:

> "Iraq has always been one of the few developing countries that managed to stay away from contracting foreign loans. The only significant exception was a number of loans extended by the Soviet Union and other centrally planned economies, most of which were to be paid in oil.
>
> "As the war with Iran continued, the government found itself forced to borrow to finance the war. Three sources of loans were identified. First, loans extended by the Arab Gulf states, mainly Saudi Arabia and Kuwait, soon after the outbreak of the war. The government of Iraq has always maintained that such funds, which amounted to $40 billion, were supplied as assistance rather than loans to help it in its war with Iran. Another $35 billion was owed to Western governments and banks. Third, another $11 billion was owed to the Soviet Union and other Eastern European governments. It should be pointed out that Iraq's debt-service obligations were projected to be $8 billion, 55 per cent of its oil revenue in 1989".

See also, Lawrence Freedman and Efraim Karsh, The Gulf Conflict 1990-1991, Diplomacy and War in the New World Order (Princeton, Princeton University Press, 1993), p. 37 ("[I]t increasingly became evident that Iraq had emerged from the war a crippled nation. From a prosperous country with some $35 billion in foreign exchange reserve in 1980, Iraq had been reduced to dire economic straits, with $80 billion in foreign debt and shattered economic infrastructure"); and The Economist Intelligence Unit (hereinafter "EIU"), "Iraq Country Profile 1989-90" (1990), p. 33 ("Iraq's balance of payments situation before the war with Iran was such that the government was able to avoid raising loans abroad as a matter of principle for many years. Since 1981, however, in the face of growing current account deficits, the country has taken on enormous overseas borrowing".) Further, the Economist Intelligence Unit Quarterly Economic Review of Iraq from 1979 through 1990 tracks the growth of Iraq's growing balance of trade deficits during that period.

33/ See Alnasrawi, note 32 supra, at p. 89 ("In the context of its professed investment programs, the government could not finance more than 16.8 per cent and 1.8 per cent of the allocations for 1982 and 1983 respectively. This should not be surprising, given the drastic decline in oil revenue and the claims of war conditions on Iraq's meagre financial resources".)

34/ EIU, "Quarterly Economic Review of Iraq", 3d Quarter 1982, pp. 13-14 (1982).

35/ EIU, "Quarterly Economic Review of Iraq", 1st Quarter 1983, p. 17 (1983); EIU, "Quarterly Economic Review of Iraq", 1984 No. 4, p. 11 ("survival rests on external credit") (1982).

36/ See, e.g., Robert S. Mason, Iraq, A Country Study, Area Handbook Series, Federal Research Division, Library of Congress, 1990, p. 126 ("[i]n a process of constant renegotiation with its creditors, Iraq had deferred payment by rescheduling loans".)

37/ The Panel is mindful of the fact that payment terms which appear at one time to be unusually long will, if persisting over a sufficient period of time, become the norm rather than the exception, and that extended payment terms indeed became the business practice with Iraq as the 1980s progressed. However, because the Panel is required to determine the jurisdiction of the Commission based, in part, on excluding what the Security Council has defined in resolution 687 (1991) as Iraq's foreign debt, that foreign debt, and its effects on payment terms, cannot be considered the "norm" for purposes of resolving the claims before this Commission.

Moreover, it is not the existence of unusual payment terms and conditions in a contract, in and of themselves, that render a debt "new" or "old" for purposes of resolution 687 (1991). Rather, the relevance of unusually long payment terms is that the debt would ordinarily be considered "old" but for them. If that were not the case, practically every claim seeking compensation for contracts with Iraq that is before the Commission would have to be excluded from the Commission's jurisdiction, since the vast majority of contract debt claims before the Commission - even those debts incurred on the eve of 2 August 1990 - reflect commercial payment terms that were unusual in length. Such a result would not be consistent with the intent of either the Security Council in adopting resolution 687 (1991), or the Governing Council in adopting decisions 7, 9 and 15.

38/ International trade practice relies on mechanisms, such as letters of credit or international factoring, aimed to guarantee performance by all contracting parties, in which the seller parts with the goods upon receipt of notification by a bank of the establishment of a latter of credit and receives payment against presentation of the required documents evincing performance, in cash or negotiable instruments. The buyer is financed by its bank, which collects later in accordance with its credit agreements with the buyer and not by the seller. In small or medium transactions, and where there are established relationships between the parties, other mechanisms are used, such as the intervention of international factoring providers mixed with short payment terms. See, for example, The ICC Model International Sales Contract (Paris, ICC Publishing, December 1997), section B, General Conditions, art. 5.1. Therefore, as a general rule, in international trade, "current basis" does not necessarily mean immediate payment upon invoicing, but rather a reasonable time after invoicing.

39/ A review and analysis of other claims within the category "E" group for debts owed for goods supplied and losses arising out of interrupted shipments of goods on or about 2 August 1990 reveals that Iraqi buyers at that time systematically required payment terms in excess of 90 days while buyers in other countries did not.

40/ As will be seen in Part IV.B, infra, in many instances, the same exclusion would in any event result by application of the requirement in paragraph 16 of Security Council resolution 687 (1991) that the losses alleged be the direct result of Iraq's invasion and occupation of Kuwait.

41/ See e.g., Alnasrawi, note 32 supra, p. 109 ("For its part the government admitted that its foreign debt amounted to $42.1 billion. To service this debt, the government projected total payment of $75.1 billion to its creditors over a five-year period".)

42/ The Panel notes further that decision 9 supports this conclusion in that it provides that a subject contract may be considered to calculate a "particular measure" of damages, but is silent as to whether a contract may be considered to determine the issue of compensability (decision 9, para. 8).

43/ See "Guide to the Use of FIDIC Conditions of Contract for Works of Civil Engineering Construction", 4th ed. (Lausanne, Fédération Internationale des Ingénieurs-Conseils, 1989), p. 142.

44/ Ibid., p. 136.

45/ A "defects period" is typically a warranty period, during which the owner has the opportunity of claiming against the contractor for defects that become apparent during a specified initial period of operation.

46/ Other terms such as "remoteness", "foreseeability" and "proximate" are sometimes used by commentators and tribunals to describe the same concept. See B. Cheng, General Principals of Law as applied by International Courts and Tribunals (London, Stevens & Sons, 1953) p. 243 ("It is only true to say that in the majority of cases, in which the epithets 'direct' and 'indirect' are applied to describe the consequences of an unlawful act, they are in fact being used synonymously with 'proximate' and 'remote.'") See also, A.M. Honoré, "Causation and Remoteness of Damage", in A. Tunc (ed.), International Encyclopedia of Comparative Law, vol. XI: Torts (part 1)(1983), p. 7-2.

47/ In addition, prior panels of Commissioners have addressed the issue, and their determinations, while not directly on point, also provide guidance. See "Report and Recommendations made by the Panel of Commissioners Concering the First Instalment of Individual Claims fo Damages up to US$100,000 (Category "C" Claims)(S/AC.25/1994/3 and Corr. 1)(hereinafter "the First 'C' Report"); "Report and Recommendations made by the Panel of Commissioners concerning the Egyptian Workers' Claims (Jurisdictional Phase)" (S/AC.26/1995/R.20/Rev.1)(hereinafter the "Egyptian Workers' Claims Report"), and "Report and Recommenations made by the Panel of Commissioners concering Part One of the First Instalment of Claims by Governments and International Organizations (Category "F" Claims)"(S/AC.26/1997/6) (hereinafter "Part One of the First 'F' Report").

48/ "Criteria For Additional Categories of Claims" (S/AC.26/1991/7/Rev.1)(hereinafter referred to as "decision 7")

49/ Decision 15, para. 6. Decision 15 emphasizes that for an alleged loss or damage to be compensable, "the causal link must be direct" (para. 3).

50/ A related and intertwined issue concerns the application of the Governing Council's decisions relating to the trade embargo to claims for compensation. Because of the special applicability of these decisions, they are discussed in more detail at paragraphs 164-169, infra.

51/ Such contractual provisions commonly address the situation of early termination of works under normal circumstances; they do not apply to extraordinary events let alone where such events were set in motion by the other party, as in the present case. Moreover, paragraph 21 of decision 7 and paragraph 13 of decision 9 require that the chaotic situation caused by Iraq's invasion and occupation of Kuwait be taken into account when assessing the damages caused by the resulting departure of employees. Therefore, to require that claimants have adhered to formal contractual obligations regarding termination in Iraq during the relevant period would both defeat the original intent of the parties and be contrary to the intents and purposes of Security Council resolution 687 (1991) as well as the specific provisions of decisions 7 and 9.

52/ Practically, the difficulties encountered in exporting equipment from Iraq would only have increased after the war given the post-war problems of communications in Iraq. Politically, the contractors would

have found themselves in an entirely new situation in Iraq.

53/ It is worth noting that to the extent this equipment remains in Iraq and is in Iraq's possession, Iraq will have realized the benefit of Technopromexport's work in mitigation.

54/ Egyptian Workers' Claims Report, p. 63. In that situation, the Panel specifically found that while the workers' salaries were deposited in Iraqi banks, the Iraqi banks were obligated according to underlying agreements to transfer equivalent amounts in United States dollars to specified bank accounts in Egypt.

55/ Ibid, para. 186.

56/ Paragraph 10 of decision 9 also covers situations where an Iraqi party is indirectly involved - for example, in the case of contracts between a contractor and a sub-contractor where the contractor was itself contracting with Iraq but the subcontract was only between the main contractor and the sub-contractor (i.e., there was no privity of contract between the sub-contractor and Iraq). The conclusions reached by the Panel regarding decision 10 apply equally to these situations even though performance of the contract took place outside of Kuwait.

57/ Indeed, documents produced by Gulf Cable in the course of the Commission's on-site inspection reveal the organized and systematic nature of the plunder by Iraqi troops. One particular log book prepared by an Iraqi official was left behind in Gulf Cable's premises by the departing Iraqi troops and contains a detailed record of equipment and material taken, noting the date and time the goods were transported from Gulf Cable's premises, the truck used for the transportation, the driver of the truck, and the intended destination in Iraq for the goods.

58/ Decision 9, para. 16.

59/ See decision 9, para. 11.

60/ The Panel, in accordance with article 31 of the Rules, additionally considered whether rules of general international law contributes to an understanding of the meaning of the phrase "threat of military action". The Panel concludes, however, that the legal notion of a threat of military actions in international law is not well developed. Cf. Ramana Sadurska, "Threats of force", American Journal of International Law, vol. 82, No. 2 (April 1988), at p. 239 (noting that "formal legal appraisals of threats to use force are conspicuously rare in the international arena"), p. 266. There are several possible reasons for this. In some cases, threats of military action have been followed by military action, so questions of responsibility or compensation invariably focus on the harm caused by the military action rather than the threat. Another explanation is that threats that do not escalate to military action are relatively common in international relations while the fora available for compensation for losses resulting from such threats are so limited that, typically, no responsive action is pursued by the target of a threat that does not materialize. See comment on article 2, paragraph 4 of The Charter of the United Nations in The Charter of the United Nations: A Commentary, B. Simma, ed. (New York, Oxford University Press, 1994), p. 118.

61/ The conclusion on this issue by the panel of Commissioners reviewing claims in category "F" is consistent with this understanding. Specifically, that Panel concluded that the costs of evacuating embassy staff from Saudi Arabia and Israel by Governments "in the exercise of their protective functions" are compensable on the basis of a conjunctive reading of paragraph 21(a) - i.e., a finding that "'military operations or [the]

threat of military action' were directed against Saudi Arabia and Israel in addition to Kuwait and Iraq" - and that these kinds of losses are the kinds of losses "that should be compensated on the same basis as those costs incurred by Governments in evacuating persons from Iraq or Kuwait". Part One of the First "F" Report (S/AC.26/1997/6), p. 28.

62/ See decision 9, para. 6.

63/ The paragraph is clear that losses attributable only to the trade embargo are not compensable by this Commission.

64/ That all of Hyundai's employees did not depart from Iraq during the relevant period does not mean that Hyundai has not established the requisite causal link between the departure of employees and the loss of its equipment, machinery and materials. At the time of Iraq's invasion and occupation of Kuwait, Hyundai had over one thousand employees in Iraq. The twenty employees who remained in Iraq as of January 1991 could not have been expected to protect as vast an amount of machinery and equipment as Hyundai had at its project sites in Iraq as of 2 August 1990, particularly during a period of such turmoil and particularly when those employees remained at Hyundai's central office in Baghdad and were not at the sites of Hyundai's operations in Iraq. It is the finding of the Panel that under these circumstances, an insufficient number of Hyundai employees remained in Iraq to protect the equipment, machinery and materials.

65/ See paras. 121-122, supra.

66/ This holding necessarily rejects Hyundai's further contention that its entitlement to payment under the barter oil and other credit arrangements in place with Iraq was destroyed as a result of Iraq's invasion and occupation of Kuwait. Because it was found that there is no entitlement to payment before this Commission, this contention is moot. For the same reason, the equity arguments offered by CCL and Technopromexport in favour of compensating Iraq's debts that arose prior to 2 August 1990 are rejected.

67/ See para. 101, supra. In any event, none of the Claimants has demonstrated that they satisfied their respective burdens under those clauses - notably, the obligation to give notice of the frustration - or that they were excused from fulfilling that requirement. The Panel notes that, in response to Iraq's argument that the Claimants should have notified it prior to their departure from the projects, the Panel has stated that it was unwilling to place such a burden on the Claimants; the Panel is similarly unwilling to give the Claimants the benefit of not being required to adhere to those requirements.

68/ For Stage I, the date of the last interim certificate (No. 57) is December 1987. Although the "final invoice" for this work is dated 5 August 1990, it is clearly a cumulative bill and includes amounts owed for work performed in 1985; as such, it is not evidence of the time of performance. For Stage IIA, the final bill is dated 16 June 1988; for Stage IIB the final bill is dated 10 July 1988.

69/ For the Diwaniyah project, the evidence submitted by the Claimant provides no clear dates for the completion of performance by the Claimant; however, the Claimant's responses to the Panel's procedural order indicates that most of the work was performed prior to 1989. Other evidence indicates that the remaining work was completed at least prior to February 1990. For the Sulaimaniyah, Nassiriyah and West Bank projects, the evidence established that the Claimant had completed work as early as 1982 and as late as 1984.

70/ INCOTERMS 1980.

71/ The Claimant has offered no proof, other than unsupported allegations, that the equipment in question - ower generation equipment - was so unique that it could not be sold on the open market. Indeed, it is the Panel's understanding that there is a ready international market for this kind of equipment and material. Consequently, the Panel does not accept the Claimant's argument that it could not have sold this equipment to third parties because it was unique to the Iraqi project.

72/ In its original claim submission, Hyundai also included a claim for lost productivity of the equipment at its Iraqi sites. In its responses to the Panel's procedural order dated 3 June 1997, Hyundai decided to withdraw this portion of the Claim.

73/ Identified by the Claimant as the Haifa 5, Railn, 701, Almus, ITL-50, Yosy-12, Yosy-13, Falusa and IS-400.

74/ Decision 9, para. 8.

75/ These include payments to Iraqi Railways, Namiq Rafiq, Sabah Saleh Yassin, Post & Telegraph Department, the General Directorate of Taxes and the State Organization for Post, Telephone & Telegraph.

76/ First "C" Report, p. 78 ("[e]xpenditures incurred in connection with the claimant's departure during the jurisdictional period, are presumptively related to Iraq's invasion and occupation of Kuwait. However, relocation-related costs that are not temporary and extraordinary in nature may not be compensated. Thus, on-going ordinary living expenses which would have been incurred in any event, e.g., normal telephone charges, dental expenses, cable television service, school fees, etc., are not compensable".) See also, First "D" Report, para. 128, and Part One of the First "F" Report, para. 85.

77/ In fulfilling its obligation to avoid the possibility of double compensation, the Panel has examined the Claims for potential overlaps with other claims in category "E" and other claim categories. This examination revealed that the Government of the Russian Federation has filed a category "F" claim in which it claims compensation for evacuating Russian workers from Iraq, including some 640 Technopromexport employees.

78/ The Panel notes further that "bad debts" in the amounts claimed are not outside the normal scope of bad debts experienced by companies of the size of Gulf Cable in the ordinary course of their business.

79/ Hyundai seeks compensation for an amount of interest owed by Kuwaiti residents, which allegedly accumulated during the period of delay in paying the amounts owed. The Panel finds this to be so akin to a claim for interest on an amount recommended as compensation that it would be inappropriate to make an award at this time; rather, as Governing Council decision 16 states, the issue of the amount of interest to be awarded will be determined after the principal amount of awards is paid out.

80/ Decision 15, para. 7.

81/ See also, decision 15, para. 7.

82/ In addition, for the reasons explained in paragraphs 45-48, supra, these items are unsupported by the evidence.

83/ See, e.g., WBC Claim Report, paras. 9-10 and Part One of the "F" Panel Report, para. 107 and accompanying notes.

84/ See generally, Gillian M. White, The Use of Experts by International Tribunals (Syracuse University Press, 1965), p. 143; Starrett Housing Corp. v. Iran, Iran-U.S. Claims Tribunal Reports, vol. 16 (1987) p. 112 et seq., at p. 199 ("[T]he Tribunal adopts as its own the conclusions of the Expert on matters within his area of expertise when it is satisfied that sufficient reasons have not been shown that the Expert's view is contrary to the evidence, the governing law, or common sense. On the other hand, the Tribunal does not hesitate to substitute its own judgment of what is reasonable with respect to matters that do not require expertise as to accounting or valuation methodology".)

85/ See First "C" Report at note 76 and accompanying text.

86/ The United Nations Monthly Bulletin of Statistics is the source of commercial exchange rates for all preceding Commission reports and recommendations, and will also be used as the source for such rates here.

87/ Part One of the First "F" Report, para. 100. For a discussion of the application of this method in international practice, see First "C" Report, pp. 29-32.

88/ Governing Council decision 16, "Awards of Interest" (S/AC.26/1992/16). In this decision the Governing Council further specified that "[i]nterest will be paid after the principal amount of awards", while postponing decision on the methods of calculation and payment of interest.

89/ Part One of the First "F" Report, paras. 102 and 46.
