



Security Council

Distr.
GENERAL

S/AC.26/1992/15 */
4 January 1993

Original: ENGLISH

UNITED NATIONS COMPENSATION COMMISSION
GOVERNING COUNCIL
Eighth session
Geneva, 14-18 December 1992

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

Decision taken by the Governing Council of the United Nations
Compensation Commission at its 31st meeting, held in
Geneva on 18 December 1992

1. Paragraph 16 of United Nations Security Council resolution 687 reaffirms "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."

2. In paragraph 6 of its Decision S/AC.26/1992/9 on Propositions and Conclusions on Compensation for Business Losses, hereinafter referred to as Decision 9, the Governing Council set out guidelines for awarding compensation for business losses caused by Iraq's unlawful invasion and occupation of Kuwait where the trade embargo and related measures were also a cause, and undertook to provide further guidance on the matter.

*/ Re-issued for technical reasons.

3. The two essential elements of admissible losses are (a) that such losses must be the result of Iraq's unlawful invasion and occupation of Kuwait and (b) that the causal link must be direct. Although the UN trade embargo was imposed in response to Iraq's invasion and occupation of Kuwait, losses suffered solely as a result of that embargo are not considered eligible for compensation because the causal link between the invasion and the loss is not sufficiently direct.

4. The terms of contracts, and transactions that have been part of a business practice or course of dealing, as well as the relevant circumstances will need to be examined by Commissioners to determine whether related claims fall within the scope of the Compensation Commission.

5. In all cases, Commissioners will require evidence that claims fall within the criteria of direct loss as set out in paragraph 16 of resolution 687 in order for them to be eligible for compensation by the Compensation Fund. It will not be enough for claimants to argue that losses were due to the chaotic economic situation following Iraq's unlawful invasion and occupation of Kuwait. There will be a need for detailed factual descriptions of the circumstances of the claimed loss, damage or injury.

6. In its Decisions No. 1 (S/AC.26/1991/1) and No. 7 (S/AC.26/1991/7/Rev.1), the Governing Council decided that compensation payments are available with respect to any direct 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 from or 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.

These guidelines are not intended to be exhaustive. There will be other situations where evidence can be produced showing claims are for direct loss, damage or injury as a result of Iraq's unlawful invasion and occupation of Kuwait.

7. Commissioners will wish to apply relevant valuation methods to different categories of loss. Paragraph 15 of Decision 9 shows various valuation methods for tangible assets depending on the type of asset and the circumstances of the case. Paragraph 18 of Decision 9 shows various valuation methods for losses relating to income producing properties. 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.

8. This paper does not address the issues arising from claimants' attempts to avail themselves of particular sources of recovery, such as to claim against the other party to a contract.

Commentary on Paragraph 6 of Decision 9

9. The first four sentences of paragraph 6 of Decision 9 are now considered in turn. The object is to provide further guidance for Commissioners when they assess claims in respect of business losses of individuals, corporations and other entities. The guidance is also intended to help claimants in presenting their claims. It will be for Commissioners to draw on the principles in this guidance when making their judgements on actual cases which will stand or fall according to their specific factual and legal situations.

I. "The trade embargo and related measures, and the economic situation caused thereby, will not be accepted as the basis for compensation."

(i) The practical effect of this statement is that any loss, damage, or injury resulting solely from the trade embargo and related measures, and the economic situation caused thereby, is not eligible for compensation. The trade embargo and related measures are the prohibitions in United Nations Security Council resolution 661 (1990) and relevant subsequent resolutions and the measures taken by states in anticipation thereof and pursuant thereto, such as the freezing of assets by Governments. The trade embargo against Kuwait was applied from 6 August 1990 to 3 April 1991 during Iraq's occupation of Kuwait. The trade embargo against Iraq was also applied from 6 August 1990 and is still in force.

(ii) "The economic situation caused thereby" is a broader concept. The trade embargo and related measures had wider economic effects, both on international trade and on

economic activity within Kuwait and Iraq. For example, the world price of oil was temporarily higher than it otherwise would have been and, in addition, countries which previously imported oil from Iraq and Kuwait had to find other sources of supply, with effects on transport and transit services and on refinery operating costs. Companies which might have expected to export goods or services to Kuwait or Iraq will have had to look for alternative markets, with potentially depressing effects both on their profits and those of their suppliers.

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

(i) The practical effect of this statement is that compensation will be provided, if and to the extent that loss, damage, or injury resulting directly from Iraq's unlawful invasion and occupation of Kuwait was actually suffered and would have been suffered irrespective of whether the trade embargo and related measures had been in force.

(ii) Particularly in the case of larger and more complex claims, the Commissioners may decide that some losses listed in a claim are a direct result of Iraq's unlawful invasion and occupation of Kuwait and should be compensated and that other losses listed in the same claim resulted solely from the embargo and related measures and are therefore ineligible for compensation. In this situation partial compensation would in principle be payable.

III. "Where 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."

(i) This is intended to show that the full extent of a loss, damage, or injury may be attributed both to Iraq's unlawful invasion and occupation of Kuwait and to the trade embargo and related measures; they are parallel causes.

(ii) Some cases of parallel cause loss may prove difficult to assess. There would be instances at the time of the invasion and embargo when ships diverted because it was unsafe to enter Kuwaiti or Iraqi ports. The Commissioners will need to examine closely the alleged cause of all losses after 6 August 1990 in order to determine the extent to which the loss arose as a direct result of the Iraqi invasion and occupation of Kuwait, and is therefore compensable, even though it could also be considered to

have resulted from the embargo and related measures. If the Commissioners decide that a loss had such a parallel cause, full compensation would in principle be awarded.

IV. "The total amount of compensable losses will be reduced to the extent that those losses could reasonably have been avoided."

(i) The duty to mitigate applies to all claims and not simply to those under discussion in paragraph 6 of Decision 9. The subject of mitigation is referred to in paragraphs 10, 17 and 19 of Decision 9.

10. The guidance contained in the present Decision applies to all types of business losses, including losses relating to contracts, transactions that have been part of a business practice or course of dealing, tangible assets and income-producing properties.