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Resumed Fourth Session

Geneva, 6 March 1992

Decision taken by the Governing Council of the United Nations Compensation Commission during the resumed Fourth Session, at the 23rd meeting, held on 6th March 1992

Propositions and Conclusions on Compensation for Business Losses: Types of Damages and Their Valuation
I. LOSSES IN CONNECTION WITH CONTRACTS OR PAST BUSINESS PRACTICE

A) Contracts

7. The following general conclusions apply with regard to Iraq's liability for contract losses.

Contracts with Iraq

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.

Contracts where Iraq is not a party

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.

B) Past business practice

11. Where a loss has been suffered relating to a transaction that has been part of a business practice or course of dealing, Iraq is liable according to the principles that apply to contract losses. No liability exists for losses related to transactions that were only expected to take place based on a previous course of dealing.

II. LOSSES RELATING TO TANGIBLE ASSETS

15. Depending on the type of asset and the circumstances of the case, one of several valuation methods may be used. Methods typically used to value tangible assets are book value and replacement value. Book value is considered to mean value at which an asset is carried on a balance sheet. Book value at any time is cost of an item minus accumulated depreciation. Replacement value is considered to mean the amount required to obtain an asset of the same kind and status as the asset damaged or lost. Replacement value would not normally allow for replacement of an old item with a new one.

III. LOSSES RELATING TO INCOME-PRODUCING PROPERTIES
18. For the valuation of income-producing properties there are several alternative concepts. One is to measure by reference to costs, which leads to the determination of book value. Another is to determine the value of the property as a going concern. This is often done by reference to the market value of similar properties. Where such market value cannot be ascertained, the economic or current value of that asset can be ascertained by the discounted cash flow (DCF) method or by the price/earnings (P/E) method. The DCF method calculates the value at one specified time of cash flows that are to be received at a different time by discounting the yearly net cash flows to present value, with the discount rate including cost of capital and risk components. The price/earnings method takes as a basis past periods’ business results and then capitalises them by the application of a multiple (P/E ratio) which reflects expectations about future performance and growth, or lack of it.

19. In principle, the economic value of a business may include loss of future earnings and profits where they can be ascertained with reasonable certainty. In the case of the loss of businesses and their earning capacity resulting from the invasion and occupation of Kuwait, it can be expected that a number of such businesses can be or could have been rebuilt and resumed. The method of a valuation should therefore be one that focuses on past performance rather than on forecasts and projections into the future. Compensation should be provided if the loss can be ascertained with reasonable certainty based on prior earnings or profits. For example, the loss of any earnings or profits during the relevant time period could be calculated by a multiple of past earnings and profits corresponding to that time period.

Referring Principles:

- VI.3 - Force majeure
- VII.1 - Damages in case of non-performance
- VII.2 - Principle of foreseeability of loss
- VII.3.2 - Calculation of damages
- XI.1 - Compensation for expropriation