



THE UNCC AND IRAQ'S LIABILITY FOR CORPORATE CLAIMS

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On October 1, 1990, President George Bush addressed the United Nations General Assembly on Iraq's recent invasion of Kuwait. He characterized the invasion as "a throwback to another era, a dark relic from a dark time. [Iraq] has plundered Kuwait. It has terrorized innocent civilians. It has held even diplomats hostage."¹ He then argued that "Iraq and its leaders must be held liable for their crimes of abuse and destruction."²

On April 8, 1991, the Security Council responded to the international outcry over the invasion and destruction of Kuwait by reaffirming that Iraq "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."³ To enforce this declaration, the Security Council directed the Secretary General to create a fund to pay compensation for such claims and ordered that Iraq contribute to the fund based on a percentage of the value of its petroleum exports.⁴

One month later, to implement Resolution 687, the Security Council decided to establish at its Geneva headquarters the United Nations Compensation Commission (UNCC).⁵ In addition to its enforcement duties, the Security Council directed the UNCC to establish a "process by which the funds will be allocated and claims paid [and to develop] appropriate procedures for evaluating losses, listing claims and verifying their validity and resolving disputed claims in respect to Iraq's

liability."⁶ Although claims commissions are not new to international law, many scholars have heralded the establishment of the UNCC by the international community as "unique and unprecedented."⁷ Indeed, the UNCC is the first claims commission of its kind established by the Security Council.⁸

The UNCC Governing Council has and will appoint panels of commissioners to review and resolve claims. The commissioners are experts in law, accounting, finance, insurance, environmental damage assessment, and other relevant fields.⁹ Among the categories of claims the UNCC will decide are claims of corporations damaged by Iraq's invasion and occupation of Kuwait. As of April 25, 1995, the UNCC has received 6,394 corporate claims from corporations in 64 countries, seeking over \$61 billion in damages from Iraq.¹⁰ Although to date the UNCC has focused on "priority claims" involving individual claimants damaged by the war, it is now preparing to begin deciding the claims of corporations. Indeed, a number of major U.S. law firms, including White & Case, Shearman & Sterling and Bryan Cave are reportedly now pressing their clients' corporate claims before the UNCC.¹¹

The UNCC has decided that a broad range of losses suffered by corporations resulting from Iraq's invasion and occupation of Kuwait are compensable. Claims can be based on contracts breached by Iraq, losses suffered in "connection with contracts to which Iraq is not a party," and lost property. Interestingly, the UNCC has

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HARBOR MAINTENANCE TAX ON EXPORTS HELD UNCONSTITUTIONAL

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In a significant victory for U.S. exporters, a three-judge panel of the U.S. Court of International Trade ("CIT"), an Article III federal court possessing exclusive jurisdiction over a variety of international trade matters, held on October 25, 1995 that the imposition of Harbor Maintenance Taxes ("HMT") (also widely referred to as "Harbor Maintenance Fees" or "HMF") assessed by the U.S. Customs Service on the value of goods exported by vessel is an unconstitutional tax on exports. *U.S. Shoe Corp. v. United States*, Slip Op. 95-173 (Ct. Int'l Trade, Oct. 25, 1995).

The HMT

The HMT was established in Section 1402 of the Water Resources Development Act of 1986, codified in 26 U.S.C. s.4461-62. The tax is imposed on the value of goods which are both imported and exported on commercial vessels through U.S. ports. (The decision does not apply to the tax as it relates to imports). Exporters which are subject to the tax are required to make quarterly payments of the tax and file quarterly reports with the U.S. Customs Service within 31 days of the quarter end. 19 C.F.R. s.24.24. From 1987 to 1991, the tax was assessed at the rate of 0.04%, and was raised to its current rate of 0.125% in 1991. At the end of fiscal year 1994, the government had collected \$2.7 billion in a Harbor Maintenance Trust Fund ("Trust Fund"), of which \$700 million was derived from unconstitutional export taxes. Slip Op. 173 at 45-46 (J. Musgrave, concurring). The fund also had a surplus of \$453 million, which is expected to balloon to nearly \$1.7 billion by the end of fiscal year 1999. *Id.*

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UNCC and Iraq's Liability

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ruled that property loss claims need not be based solely on Iraqi expropriation or damage caused by military operations. Corporations are expressly permitted to submit claims for business property that had been lost because it "had been left unguarded by company personnel departing due to the situation in Iraq and Kuwait."¹² Never theless, many corporate claimants will have difficulty proving that their Gulf War losses are compensable by the UNCC.

First, Resolution 687 expressly excludes from the UNCC's mandate "debts and obligations of Iraq arising prior to 2 August 1990."¹³ Thus, for example, a claim based on Iraq's refusal to pay for goods sold and delivered prior to August 2, 1990 would not be compensated by the UNCC, even if Iraq based its refusal on the fact that the Gulf War made its performance impossible.¹⁴

Second, the UNCC erected a causation hurdle that claimants most overcome by deciding that the "trade embargo and related measures, and the

economic situation caused thereby, will not be accepted as the basis for compensation."¹⁵ In accordance with Resolution 687, the UNCC explained that "[c]ompensation 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."¹⁶ Finally, corporate claimants will have to show that they mitigated damages.¹⁷

Whether the proceeds of Iraqi oil sales are actually garnished when such sales resume to fund UNCC awards remains to be seen. What is clear is that the Security Council has taken concrete steps to hold Iraq liable for the damages it inflicted upon corporations and others by its illegal invasion and occupation of Kuwait. In so doing, the international community has established an important precedent, which may serve to deter similar unlawful aggression in the future.

ENDNOTES

1. *Transcript of President's Address to U.N. General Assembly*, *The New York Times*, October 2, 1990 at A6.
2. *Id.*
3. S.C. Res. 687, U.N. SCOR, 46th Sess., 2981st mtg. par.16, U.N. Doc. S/RES/687 (1991), reprinted in 30 I.L.M. 847, 852 (1991).
4. *Id.* pars.18-19.
5. S.C. Res. 692, U.N. SCOR, 46th Sess., 2987th mtg. par.3, U.N. Doc. S/RES/692 (1991), reprinted in 30 I.L.M. 864 (1991).
6. S.C. Res. 687 p.19.
7. David J. Bederman, *The United Nations Compensation Commission and the Tradition of International Claims Settlement*, *J. of Int'l Law and Politics* Vol. 27 No. 1 (Fall 1994) at 1-2.
8. Stanley J. Glod, *International Claims Arising from Iraq's Invasion of Kuwait*, 25 *Int'l Law* 713, 714 (1991).
9. Arthur W. Rovine and Grant Hanessian, *Making Iraq Pay for Gulf War Losses: Legal Causation is an Important Issue for U.N. Commission*, *New York Law Journal*, May 15, 1995, at S3.
10. *Id.*
11. Ken Myers, *Gulf War Continues for U.S. Lawyers: Attorneys Battle Iraq in Courtroom Over Billions in Invasion-related Damages*, *The National Law Journal*, June 20, 1994, at A1.
12. *Decision taken by the Governing Council of the United Nations Compensation Commission during its 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* [Decision 9], U.N. Compensation Commission, 4th Sess., 23rd mtg. pars.7-15, U.N. Doc. S/AC.26/1992/9 (1992), reprinted in 31 I.L.M. 1037 (1992).
13. S.C. Res. 687 p.16.
14. Of course, the hypothetical claimant in this example would still be free to pursue its claim against Iraq in any other appropriate forum.
15. *Decision 9* par.6.
16. *Id.*
17. *Id.*

Immigration Update

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The Major Highlights of Business Related Issues Which Were Held Over for Full Consideration in the Judiciary Committee Are as Follows

Replacement of the overseas experience for all permanent categories with 3 years experience in the United States which can be gained on a nonimmigrant visa (note: They did not increase the stay on H-1B or L visas from 3 years), no experience requirement for H-1Bs;

Dual intent restored except for aliens working for H-1B dependent employers;

Introduction of H-1B dependent concept similar to the House version—10%

threshold, dependent employers must pay tax as described in S.1394 and must show steps to decrease dependency on H-1B workers—no other details provided by Subcommittee staff;

Tax reduced to 10% of compensation package or \$10,000 (whichever is greater)—25% of tax can be offset if company has internal training program;

Outstanding Researchers and Professors reinstated with new recruitment attestation requirements but not subject to fee (Senator Simon unsuccessfully tried to reinstate the category with no changes from current law);

Senator Kyl was defeated in an amendment to eliminate the Requirement that employers pay 105%

of the prevailing wage to the alien employee;

Expanded Lay-off prohibition—Senator Kennedy was successful in an amendment that completely bars the hiring of an H-1B or permanent immigrant if the United States employer has laid off a United States citizen or permanent resident 6 months before and 90 days after the date of the petition.

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