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CLAIMS TRIBUNAL

دیوان داری دعاری ایران - ایالات متحدہ

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Case No. 36

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\*\* CONCURRING OPINION of \_\_\_\_\_  
 - Date \_\_\_\_\_  
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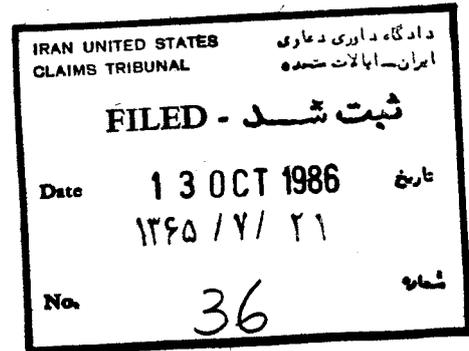


CASE NO. 36  
CHAMBER ONE  
AWARD NO. 259-36-1

FLEXI-VAN LEASING, INC.,  
Claimant,

and

THE GOVERNMENT OF THE ISLAMIC  
REPUBLIC OF IRAN,  
Respondent.



AWARD

Appearances:

- For the Claimant: Mr. M. Ball,  
Ms. S. Kase, Attorneys  
Mr. G. Elkas, Claimant's  
Representative
- For the Respondent: Mr. M.K. Eshragh, Agent of the  
Government of the Islamic  
Republic of Iran  
Mr. A. Nouri,  
Mr. H. Mehdizadeh, Legal  
Advisers to the Agent  
of the Government of the  
Islamic Republic of Iran  
Mr. A. Poosti, Attorney of the  
Islamic Republic of Iran  
Mr. G. A. Jafari, Assistant to the  
Attorney of the Islamic  
Republic of Iran  
Mr. A. Tavassoli, Financial  
Adviser to the Agent of the  
Islamic Republic of Iran
- Also present: Mr. J. Crook, Agent of the  
Government of the United  
States of America  
Ms. J. M. Selby, Deputy Agent  
of the United States of  
America

This Case arises out of lease agreements involving marine transport equipment alleged to have been entered into between the Claimant FLEXI-VAN LEASING, INC. ("Flexi-Van") and two companies it asserts were controlled by the Respondent THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN ("the Government"). These two companies are Star Line Iran, Co. ("Star Line") and Iran Express Lines, Co. ("Iran Express").

I. FACTS AND CONTENTIONS

1. Jurisdiction

Flexi-Van asserts that it is a United States national. It argues that the Government took control of Star Line and Iran Express no later than 29 February 1980 and that through these two companies the Government expropriated Flexi-Van's contract rights in the lease agreements.

The Government has raised several jurisdictional objections. First, it contends that Flexi-Van has not submitted sufficient proof of its United States nationality in accordance with the requirements of the Claims Settlement Declaration. Also, it denies that it controls either Star Line or Iran Express in the sense of Article VII, paragraph 3, of the Claims Settlement Declaration and therefore contends that it is not a proper Respondent in this Case. The Government contends that no claim was outstanding before 19 January 1981 as required by Article II, paragraph 1, of the Claims Settlement Declaration because Flexi-Van made no claim against the two companies prior to October 1981 as demonstrated in part by the fact that the Claimant continued to recover equipment from the two companies through October 1981. It further argues that Flexi-Van was not a party to certain of the lease agreements upon which the claim is

based, but rather that various intermediary persons were the parties to those agreements and only they are the proper claimants.

2. Merits

Flexi-Van argues that the Government controlled both Star Line and Iran Express and caused them to breach and repudiate their lease agreements with Flexi-Van, thereby expropriating Flexi-Van's contract rights under these agreements, including rights to payment of accounts receivable and future rentals, and rights to the return of leased equipment. Accordingly, Flexi-Van seeks to recover from the Government the value of these contract rights as of the date of expropriation. In the alternative, Flexi-Van argues that its claim against the Government is also supportable on the grounds of interference with contractual relations, breach and repudiation of contract and unjust enrichment.

Flexi-Van leases marine transport equipment, mainly cargo containers, chassis and trailers on a world wide basis. Prior to 1979, it leased such equipment to various companies doing business in Iran, including Star Line and Iran Express.

Flexi-Van asserts that it contracted with Star Line and Iran Express on the basis of three standard lease agreements: fixed-term agreement, indefinite-term agreement and hybrid agreement. To demonstrate the contents of these types of agreements, Flexi-Van submitted a copy of each type of agreement. The agreements shared a number of identical provisions. Under each type of agreement, the lessee was required, among other things, to make regular monthly payments to Flexi-Van at a rate agreed to between the parties in the agreement; to protect, repair and maintain the equipment; to return the equipment to Flexi-Van at a

specified location upon the termination of the agreement; and to pay Flexi-Van the value of any equipment not returned. If the lessee failed to perform any of its obligations, then it would be deemed in default, thereby vesting Flexi-Van with the right to terminate the agreement.

The differences between these agreements basically relate to the duration of the lease. Flexi-Van most often used either the fixed-term or the indefinite-term agreement. In the fixed-term lease agreements, the lessee agreed to lease the equipment for a specified period of time. The lessee was obligated to lease the equipment for the entire term of the lease agreement. If the lessee wished to terminate the lease prior to the date of its expiration, it could do so only after paying specified liquidated damages. The lessee further agreed to bear all risk of loss, damage, theft or destruction of the equipment. If the equipment was lost, stolen or destroyed while it was in the possession or control of the lessee, the lessee's obligation to pay rent did not cease until the lessee had (i) provided the lessor with a statement that the equipment had been lost, stolen or destroyed, (ii) paid an amount equal to the replacement value of the equipment and (iii) paid an amount equal to the accrued rent owing for the equipment up to the date of Flexi-Van's receipt of the replacement value.

In contrast, the indefinite-term lease agreement was a contract for a minimum period of time. It was automatically renewed for new successive periods of the same length as the initial period at the end of each rental period unless the lessee had notified the lessor that he wanted to terminate the contract and had returned the leased equipment to a location specified in the lease agreement. As with the fixed-term lease agreements, the lessee was obligated to continue paying rent on leased equipment that had been lost, stolen or destroyed until the lessee had notified the lessor

and paid the lessor an amount equal to the replacement value of the equipment as well as the accrued rentals owing up until the date of Flexi-Van's receipt of the replacement value.

Flexi-Van states that it also negotiated a number of hybrid lease agreements with Iran Express that incorporated characteristics of both fixed-term and indefinite-term lease agreements. The hybrid lease agreements included provisions not found in either of the two standard forms of agreements. Although the start and end dates of the rental term were specified, the lessee was allowed to terminate these lease agreements on specified dates prior to the expiration date without paying liquidated damages, provided that it gave Flexi-Van 90 days advance written notice of its intention to terminate and that it returned all equipment to Flexi-Van in accordance with the terms of the lease agreements. If the equipment was lost, stolen, or destroyed, the lessee must pay Flexi-Van an amount equal to the casualty value of the equipment, defined in the lease agreement as a percentage of the replacement value decreasing over the time from 103 percent to 60 percent. At the expiration of the specified rental term of a hybrid lease agreement, rental charges were to remain in effect for 180 days at the rate charged during the preceding period. After 180 days, if any of the equipment still remained in the possession of the lessee, the rate increased to a specified daily amount, effective until it returned the equipment to Flexi-Van.

Flexi-Van argues that the majority of the lease agreements in question were executed either by Star Line or Iran Express or by authorized agents on their behalf. With respect to lease agreements which either mentioned the name of the company's authorized agent or which were executed in the name of the agent, Flexi-Van states that bills were sent either to the agent or to the company in question for

collection. According to Flexi-Van some lease agreements, however, were unsigned or could not be located. Nevertheless, Flexi-Van argues that the existence and validity of these unsigned or unlocated agreements have been confirmed through its computerized lease billing system. In any event, Flexi-Van contends, both Iran Express and Star Line received and benefited from equipment under these agreements and are therefore bound by them. Moreover, Flexi-Van asserts that both companies paid invoices rendered pursuant to the agreements and thereby acknowledged the validity of those agreements.

Flexi-Van contends that Star Line and Iran Express ceased to make payments for the monthly rental of containers and other equipment, Star Line as from mid-1978 and Iran Express as from March 1979. Faced with mounting unpaid rentals and concerned about possible damage to or loss of equipment, Flexi-Van in July 1979 appointed an agent in Iran, Richard Maass, a West German national, to attempt to obtain the release of its equipment. Between July 1979 and October 1981, Mr. Maass succeeded in recovering hundreds of pieces of equipment leased to Star Line in Iran. During this time, however, Mr. Maass was allegedly impeded from recovering equipment by officials from both companies and by Government officials. In particular, he allegedly was stopped by the staff of Iran Express from entering an Iran Express terminal in Khorramshahr in the Spring of 1980, and prevented by company personnel and Government officials from taking inventories of Star Line terminals. He also alleged that the equipment was often wrongfully taken away by Government organizations and put to official use. In October 1981 Flexi-Van arrived at the conclusion that further attempts to recover equipment would be useless and abandoned the recovery efforts.

Flexi-Van argues that the Government took control of both Star Line and Iran Express no later than 29 February 1980. With regard to Iran Express, Flexi-Van contends that in February 1980 three Government-appointed directors accompanied by Revolutionary Guards entered the offices of Iran Express in Tehran, occupied the offices and ousted the directors and managers of the company from control. The Government then allegedly appointed new directors from the Ministry of Roads and Transportation. Moreover, Flexi-Van argues that Iran Express admitted that it was administered by the Government in litigation before a United States court in 1981.

With regard to Star Line, Flexi-Van has submitted evidence which, it contends, demonstrates that the Foundation for the Oppressed ("the Foundation"), which is in turn controlled by the Government, confiscated and took complete control of Star Line at least since early 1980. Further, Flexi-Van argues that in Raygo Wagner Equipment Co. and Star Line Iran Co., Award No. 20-17-3, p. 6 (15 December 1982), the Tribunal held that Star Line is controlled by the Government.

Flexi-Van further argues that at the same time the Government took control of Iran Express and Star Line (i.e., at least by 29 February 1980), it also caused them to breach and repudiate their agreements with Flexi-Van, thereby expropriating its rights under these agreements. With regard to Iran Express, Flexi-Van contends that, in addition to failing to pay rent and impeding Mr. Maass' recovery efforts, Iran Express failed to return equipment when the leases in question had expired. Furthermore, Flexi-Van submitted a telex dated 21 February 1980 sent to the Ports and Shipping Organization of the Ministry of Roads and Transportation by Uiterwyk Corporation. In this telex, Uiterwyk Corporation stated that it had been "requested by our principal, Iran Express Lines, by our affiliate, Iran Express Terminal Corp., and by our shipping container

lessors" to demand the release of certain pieces of equipment and that if this was not done then "[w]e will be forced to consider your actions and omissions to be assertions of wrongful domination and control over the [equipment]". Flexi-Van further contends that this telex was not answered.

With regard to Star Line, Flexi-Van also argues that it failed to pay rent, impeded Mr. Maass' recovery efforts, and failed to return equipment where leases had expired. In addition, it submitted the text of a message bearing the date of 18 February 1980, addressed to Star Line, stating that its efforts to recover its equipment had been ignored by Star Line. This message concludes by warning that Flexi-Van will continue to try to obtain its equipment by whatever means are available to it.

Flexi-Van argues that it is entitled to compensation for its expropriated rights under the lease agreements, including accounts receivables as of 29 February 1980, future rentals which it calculated up to the date of the Hearing in this Case (13 - 16 September 1983), the replacement costs of the unrecovered equipment and the recovery and repair costs of the equipment. Flexi-Van's claim consists of the following:

Accounts receivable as  
of 29 February 1980

Star Line	3,164,766
Iran Express	407,966
	-----
	\$ 3,572,762

Unpaid rentals for the  
period 1 March 1980 -  
31 August 1983

Star Line	261,629
Iran Express	1,663,440
	-----
	\$ 1,925,069

Replacement costs on  
unrecovered equipment

Star Line	565,810
Iran Express	1,770,741
	-----
	\$ 2,406,391

Recovery and repair costs  
of equipment

	\$ 742,888
	=====

Total	\$ 8,647,110
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Present value as of 29 February  
1980 reduced at a rate of 12 %  
per annum

7,670,681

Interest at 12 % per annum  
through 29 February 1980

395,276

Interest at the same rate  
from 1 March 1980 to 1  
March 1985

4,602,408

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Total amount of claim	\$ 12, 980,689 <sup>1</sup>
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<sup>1</sup> Additionally, Flexi-Van seeks interest from 1 March 1985 through the date of payment of the Award at the rate of \$76,707 per month.

In the alternative, as noted above, Flexi-Van argues that its claim is supportable on three other grounds: interference with contractual relations, breach of contract, and unjust enrichment. These three alternatives, Flexi-Van states, would all result in awarding the same amount as the expropriation claim, except that as to the unjust enrichment ground Flexi-Van does not seek equipment recovery and repair costs.

Flexi-Van states that by Orders dated 7 January 1983 and 18 April 1983, the Tribunal (1) required it to submit the report of Arthur Andersen & Co., an independent accounting firm, summarizing the voluminous documents supporting Flexi-Van's claim and evaluating its calculation of amounts due; (2) gave the Respondent the right to inspect the lease agreements and other relevant documents in Flexi-Van's offices in the United States; and (3) authorized the Respondent to file any comments on the Arthur Andersen Report before the Hearing. Flexi-Van argues that the Respondent neither inspected these documents nor asked for the opportunity to do so. In addition, it argues that the Respondent did not comment on the Arthur Andersen Report until the Hearing. Accordingly, Flexi-Van contends that the Respondent may not contest the accuracy of its calculations.

Finally, Flexi-Van admits that it received a payment of \$900,000 from its insurance company after 19 January 1981 in partial compensation for its loss of equipment to Star Line. It asserts, however, that this insurance company retains a right of subrogation to any proceeds received by Flexi-Van pursuant to any Award in this Case. Flexi-Van therefore argues that the amounts to which it is entitled from the Government should not be reduced by the amount of insurance proceeds received from its insurance company.

The Government denies that it has taken over or controls Star Line or Iran Express and that it is liable for Flexi-Van's claim. The Government contends that Flexi-Van has failed to prove both that it owned the equipment in question or that the two companies entered into lease agreements with Flexi-Van regarding this equipment. As to Star Line, the Government asserts that this company was exclusively a service company which provided various types of services to vessels calling on Iranian ports. Star Line's activities did not, according to the Government, involve leasing of cargo containers or other cargo handling equipment, and the company had therefore no reason to enter into leasing contracts regarding such equipment. To the extent that containers were discharged in Iran from ships to which Star Line provided services, such containers were invariably leased by others and returned to the ships when they had been emptied. Even if the Government had expropriated the two companies, only the position of the shareholders would have changed and not the company's juridical personality. These juridical persons were themselves liable for their debts and obligations, not the Government. For these reasons, the Government denies that it has expropriated Flexi-Van's contract rights, interfered with any contractual relations at issue or caused either of the two companies to breach contracts with Flexi-Van.

With respect to Flexi-Van's unjust enrichment argument, the Government denies that it has been enriched at all. In particular, the Government asserts that it has not been enriched by the equipment that Flexi-Van left in Iran. The Government points to the statement in the affidavit of Richard Maass, Flexi-Van's agent in Iran from July 1979 to October 1981, that he "took note of the condition of each container and recommended to Flexi-Van which pieces of equipment to try to recover". This statement, the

Government asserts, confirms its view that Flexi-Van, through its agent, segregated new and sound equipment from old and dilapidated equipment and exported only the former while leaving the latter behind in Iran. The Government goes on to state that Flexi-Van may recover 149 containers from Star Line provided that Flexi-Van indemnifies the Government against any third party claims, bears the costs of such removal, and reimburses Star Line for the damages and costs it allegedly incurred in safeguarding these containers. With respect to Iran Express, the Government argues that all the assets of Iran Express were destroyed in attacks by the Iraqi troops on the port of Khorramshahr which began in September 1980. Thus, the Government contends that it has not been enriched by nor is it liable for the loss of any such equipment which may have belonged to Flexi-Van.

The Government also contests the impartiality and accuracy of the Arthur Andersen Report. It argues that, in any event, any loss that Flexi-Van has suffered has been compensated by the insurance proceeds it received and therefore any amounts that Flexi-Van may be entitled to must be reduced by the amount of such insurance proceeds.

Each Party requests its costs of arbitration.

### 3. Procedural issues

On 1 June 1984, the Government filed a "Request to Dismiss Repetitious Claims Relating to Containers and/or to Consolidate Case No. 36 with Case No. 381". In particular, the Government asked that "claims involving containers, particularly the two claims under No. 36 and No. 381, be consolidated and considered together". Should this request not be granted, the Government sought "the dismissal of that

portion of the claim in Case No. 36 (i.e. claim involving containers allegedly retained by Iran Express Lines) which is exactly repeated in Case No. 381". Flexi-Van opposed these requests. It argued that consolidation was unnecessary because the Claimants in Case No. 381, who are not parties in this Case, have stated that any amount awarded to Flexi-Van in Case No. 36 would reduce the corresponding portion of the claim in Case No. 381 by the same amount; and further, because the transfer of Case No. 381 to Chamber One provides a complete safeguard against the possibility of an award imposing double liability.

With regard to evidentiary issues, the Government requested that Flexi-Van be ordered to submit the original in Farsi of an alleged 1977 certificate by the Ministry of Roads and Transportation concerning the operations of Star Line, or else to strike it as evidence. The Government also requested that Flexi-Van submit documents supporting the total amount it states it received as insurance proceeds.

In its Post-Hearing Memorial, the Government further made a number of requests for the production of documents underlying Flexi-Van's claim. It requested, inter alia, the Tribunal to order Flexi-Van to submit all duly signed agency agreements and lease agreements that might relate to its claims, or else to dismiss claims related to them; the monthly invoices allegedly sent to Star Line and Iran Express; the so-called "aging" and "activity" reports; delivery receipts for the containers received by the two companies; documentation with regard to recovery and replacement costs; Flexi-Van's balance sheets for the years 1977, 1978, 1979, 1980, 1981 and 1982 with attachments and copies of payments shown in the ledger; and photocopies of the ledgers of Flexi-Van and Uiterwyk Corporation (one of the Claimants in Case No. 381) showing the entries relating to Flexi-Van in Uiterwyk's accounts, as well as Uiterwyk's certified financial reports in this regard.

Flexi-Van requested that all these requests for production of further documents be denied. It argued that further documentation should not be required in view of the procedures established by the Tribunal for the submission of Flexi-Van's documentation, for its auditing and its inspection by the Respondent, and considering that the Respondent did not avail itself of the opportunity to inspect Flexi-Van's back-up documentation.

Flexi-Van has requested that the Tribunal refuse to consider the evidence appended to the Respondent's Post-Hearing Memorial. Submission of such evidence, Flexi-Van contends, was not authorized by the Tribunal, and considering it would be unfair and unwarranted in light of Tribunal practice and the Tribunal Rules of Procedure. The Government has not commented on this request.

II. REASONS

1. Procedural issues

a) Requests with regard to Case No. 381

With regard to the Government's request for consolidation of Case No. 381 with Case No. 36 or else "dismissal of that portion of the claim in Case No. 36 . . . which is exactly repeated in Case No. 381", the Tribunal notes that on 11 November 1983 Case No. 381 was transferred on the Government's request to Chamber One, and consequently both Case No. 36 and Case No. 381 are presently before this Chamber. In view of this and the dismissal of Flexi-Van's claims in this Award, the Tribunal finds no need for further action with regard to the Government's requests for consolidation or dismissal.

b) Request for production of documents

The Tribunal finds it unnecessary to require the Claimant to produce further documentation, for it is able to form a basis for deciding the Case on the record before it.

c) Request to reject certain evidence

The Tribunal admits all evidence submitted during the course of the proceedings since none was such as to cause any prejudice.

2. Jurisdiction

Based on the evidence submitted by the Claimant, the Tribunal is satisfied that the Claimant is a national of the United States within the meaning of Article VII, paragraph 1, of the Claims Settlement Declaration pursuant to the standards set forth in Flexi-Van Leasing, Inc. and Government of the Islamic Republic of Iran, Case No. 36 (Order of 20 December 1982) and General Motors Corporation and Government of the Islamic Republic of Iran, Case No. 94 (Order of 21 January 1983). See also Case No. A20, Decision No. DEC 45-A20-FT (10 July 1986). The Government of the Islamic Republic of Iran is a party within the jurisdiction of the Tribunal pursuant to Article VII, paragraph 3, of the Claims Settlement Declaration.

3. Merits

a) The claims

At the Hearing, the Claimant clarified the bases of its claim.<sup>2</sup> During the Hearing it presented a written submission stating (1) that the Government took control of Star Line and Iran Express no later than approximately 29 February 1980 and caused them to breach and repudiate their contracts with Flexi-Van, thereby expropriating Flexi-Van's contract rights, including rights to payment of accounts receivable and future rentals, and its rights to the return of leased equipment. In the same submission, the Claimant also put forward alternative views arguing (2) that the Government prevented payments of amounts due under leases and return of equipment from about 29 February 1980; (3) that the Government is liable for the breach and repudiation of contracts by its controlled entities, Star Line and Iran Express; and (4) that the Government has been unjustly enriched through the retention and use of Flexi-Van's equipment. Primarily, the Claimant thus seeks the value of its allegedly expropriated contract rights from the Government.

The Tribunal notes at the outset that the Iranian parties to the alleged lease agreements, namely, Star Line and Iran Express, are not before it in this Case. However, the Tribunal has found it unnecessary to address the question regarding the existence of particular lease agreements between the Claimant and those two Iranian companies. But

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<sup>2</sup> Insofar as the Claimant, in its Post-Hearing Memorial to which no written answer was given, purports to modify the essence of the bases of its claim, such modification is not admissible.

in examining the merits of the claims brought against the Government, the Tribunal has assumed that certain contractual relationships existed between the Claimant and the two Iranian companies. However, the Tribunal makes no specific finding as to the existence and validity of each and every one of the thousands of the alleged leases.

b) The expropriation claim

aa) The Star Line agreements

Flexi-Van argues that the Government took control of Star Line no later than 29 February 1980. In that connection, Flexi-Van submitted a copy of a decision dated 19 December 1979 by the Islamic Revolutionary Court of Khorramshahr and Abadan in which that Court gave an "order for the confiscation of the Star Line Iran Company, and put[] its management for the time being at the disposal of Abadan Branch of the Foundation For The Oppressed." In response, the Government submitted a letter dated 21 January 1980 in which the General Prosecutor of the Islamic Revolution informed the Foundation that the "confiscation and expropriation of [Star Line] and its properties is hereby lifted". Flexi-Van, however, submitted a later countermanning letter, dated 3 February 1980, from the Prosecutor of the Islamic Revolution of Abadan and Khorramshahr to the Tehran Branch of the Foundation, with a copy to the Abadan Branch, ruling that: "With due regard to the context of the letter of the prosecutor's office, the judgment of the Islamic Revolutionary Court of Abadan and Khorramshahr with respect to confiscation of Star Line, remains valid and must be carried out accordingly."

The Government denies that it confiscated Star Line or put it under the control of the Foundation and it further denies any other interference with the Claimant's contract rights.

In addition to the documentary evidence described, the Claimant submitted an affidavit of Richard Maass whom it had employed to seek to recover its containers that had remained in Iran. Mr. Maass stated in his affidavit that in early 1980 he learned about a Revolutionary Court decree confiscating Star Line and placing it under the control of the Foundation, that between January 1980 and September 1981 the Foundation appointed three representatives consecutively to supervise the operations of the company, and that it was well-known to him that all important decisions in Star Line had to be made by the Foundation's representatives. Mr. Maass stated that in the course of his recovery efforts he dealt with all three of the Foundation's representatives, as well as with a Worker's Committee that had been formed in Star Line. According to him, that Committee had no power to make any decisions, but rather "every word they said had to be sanctioned by the [Foundation]". He added that he was prevented from taking inventories by Star Line personnel and Government officials, that it became more difficult to recover Flexi-Van equipment after Star Line came under Government control and that equipment was taken from terminals and put to other uses. Mr. Maass' statements seem to reflect the general relation as it existed between Star Line and the Foundation from some time in 1980.

The Claimant has submitted a letter dated 29 June 1980, in which "Star Line Iran affiliated to the Foundation for the Oppressed" advised that several containers should be delivered to Mr. Maass as Flexi-Van's representative. In a letter dated 27 April 1981, the Foundation asked Star Line to deliver a number of containers to Mr. Maass. The Tribunal observes, however, that the second letter is dated after 19 January 1981, the critical date for the purpose of this Case.

The above evidence establishes that not later than February 1980 Star Line was "confiscated" and "put[] at the disposal" of the Foundation.<sup>3</sup> While there is no need to determine here whether this made, as other Chambers have previously held,<sup>4</sup> Star Line an entity controlled by the Government of Iran within the meaning of Article VII, paragraph 3, of the Claims Settlement Declaration, it seems clear that Star Line, through the Foundation, came under Government control. Experience from other similar cases points to the possibility that all or the majority of Star Line's shares were confiscated and transferred to the Foundation. In any event, Star Line remained a separate legal entity, and surely did not become an organ or department of the Government. What the evidence in this Case does not show, however, are the form and the details of such control, to what extent, if at all, this constituted interference with the management of Star Line or with its business decisions, or what consequences that had with regard to the company's agreements.

The evidence suffices even less to establish Government interference of a nature that would constitute an expropriation of the contract rights. The Tribunal stated in the Tippets Case that "assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international

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<sup>3</sup> The Tribunal has held in Hyatt International Corporation and Government of the Islamic Republic of Iran, Interlocutory Award No. ITL 54-134-1, p. 31 (17 September 1985) that the Foundation is an instrumentality controlled by the Government of Iran within the meaning of Article VII, paragraph 3, of the Claims Settlement Declaration.

<sup>4</sup> Raygo Wagner Equipment Co. and Star Line Iran Co., Award No. 20-17-3, p. 6 (15 December 1982), reprinted in 1 Iran-U.S. C.T.R. 411, 413; Seaco, Inc. and Islamic Republic of Iran, Award No. 61-260-2, para. 17 (20 June 1986).

law .... ".<sup>5</sup> In the present Case, the property, in respect of which the Claimant must establish government interference for its expropriation claim to succeed, are Flexi-Van's rights under the lease agreements. The mere fact that the Government through the Foundation controls Star Line does not as such encompass an expropriation of the Claimant's rights that derive from its lease agreements with Star Line. Expropriation of the Claimant's contract rights can only be found in case of interference with these contract rights themselves, and a basic condition for such a finding is that such interference be attributable to the Government.<sup>6</sup>

The Claimant does not assert that the Government has itself interfered with its contract rights, but rather that it has done so through the Foundation. To give rise to an expropriation claim this would require that, from the time it came under the control of the Foundation, Star Line had acted under orders, directives, recommendations or instructions from the Foundation or the Government when it did not pay rentals or return the leased equipment to the Claimant.<sup>7</sup> Even if, as Mr. Maass stated, representatives of the Foundation were directly involved in decisions not to return containers to the Claimant, this did not constitute the kind of government interference that would amount to expropriation of Flexi-Van's contract rights. Before Star

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<sup>5</sup> Tippets, Abbet, McCarthy, Stratton and TAMS-Affa Consulting Engineers of Iran, Award No. 141-7-2, p. 11 (29 June 1984), reprinted in <sup>6</sup> Iran-U.S. C.T.R. 219, 225.

<sup>6</sup> International Technical Products Corporation and Government of the Islamic Republic of Iran, Award No. 196-302-3, p. 46 (28 October 1985).

<sup>7</sup> See Schering Corporation and Islamic Republic of Iran, Award No. 122-38-3, p. 17 (16 April 1984), reprinted in <sup>5</sup> Iran-U.S. C.T.R. 361, 370.

Line came under Government control, it had defaulted on rental payments and failed to return containers under the agreements in question. After it was taken over by the Foundation, Star Line continued to refuse rental payments and to return containers as it had done before. The evidence described does not bear out that this was done on the instruction of the Government. Therefore, the Tribunal cannot find such interference with the Claimant's contract rights vis-à-vis Star Line as to engage the Government's responsibility for an expropriation of these rights.

bb) The Iran Express agreements

Flexi-Van also argues that the Government took control of Iran Express no later than 29 February 1980. To prove this, Flexi-Van submitted an affidavit by Robert H. Uiterwyk in which he asserts that in February 1980 Iran Express came under Government control. Mr. Uiterwyk states that he had been a shareholder of Iran Express and its deputy managing director from the time the company was formed in 1974 until late February or early March 1980 when he and the other non-Iranian members of the board of directors of Iran Express were informed by the Iranian board members that three government-appointed directors accompanied by Revolutionary Guards had entered the offices of Iran Express in Tehran, had occupied the offices and ousted the directors and managers of the company from control. Mr. Maass in his affidavit explained that the new government-appointed directors were officials from the Ministry of Roads and Transportation. Both Mr. Uiterwyk and Mr. Maass affirmed that one of the newly-appointed members was Mr. Seyed Mahmoud Shams. In fact, Mr. Shams signed as "temporary administrator" of Iran Express a telex dated 15 July 1982 addressed to an attorney in litigation in the United States.

The Government acknowledged that Mr. Shams was appointed by the Ministry of Roads and Transportation as "administrator" for a brief period to investigate Iran Express' position, but it asserts that he later stopped this work and that neither the Ministry nor any other government entity controlled or supervised Iran Express which became an inactive company.

As the above-mentioned telex shows, Mr. Shams acted for Iran Express at least until July 1982. It is doubtful, however, whether his function was merely to investigate an allegedly "dormant" company. To the contrary, further evidence before the Tribunal suggests that he was managing Iran Express which had indeed come under Government control. Thus, on 17 November 1981, the Ministry in a telex concerning settlement negotiations with Uiterwyk Corporation stated that Iran Express was "under governmental administration".

Based on this evidence, the Tribunal is satisfied that from early 1980 on Iran Express came under Government control.<sup>8</sup> As in the case of Star Line, however, what this evidence does not show is the kind and extent of control that was exercised, and particularly what effect it had on Iran Express' agreements with the Claimant. The Government denies that it interfered with the contractual relationship between Iran Express and the Claimant. Flexi-Van submitted two pieces of evidence to support its claim. First, in his affidavit, Mr. Maass stated that he was stopped by the staff of Iran Express from entering an Iran Express terminal in Khorramshahr in the Spring of 1980 in order to conduct an

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<sup>8</sup> As with Star Line, there is no need to determine whether the record in the present Case establishes that Iran Express is a controlled entity within the meaning of Article VII, paragraph 3, of the Claims Settlement Declaration. The Tribunal so held in Seaco, Inc. , supra, para. 18.

inventory. Second, Flexi-Van presented a telex dated 21 February 1980 sent to the Ports and Shipping Organization ("PSO") of the Ministry of Roads and Transportation by Uiterwyk Corporation. This telex demanded, on behalf of Iran Express and others, the release of certain pieces of equipment and stated that failure to do so would lead to the conclusion that the PSO was asserting wrongful control over the equipment. Neither Mr. Maass' affidavit nor the 21 February 1980 telex demonstrate Government acts unreasonably interfering with Flexi-Van's contract rights sufficient to constitute an expropriation. Therefore, the Tribunal must also dismiss Flexi-Van's expropriation claim against Iran Express.

c) Interference with contractual relations

In the alternative, the Claimant argues that its claim is supportable on the ground that the Government, commencing about 29 February 1980, interfered with its contractual relations by preventing payments of amounts due under the leases and return of equipment. Once again, convincing evidence in support of these rather specific forms of interference is missing. Star Line and Iran Express, although Government controlled entities, must be assumed to make their own decisions about their commercial dealings, having a substantial freedom in their day to day activities, unless there is evidence to suggest otherwise. It would also have been surprising if the fate of the containers would have been the main concern of the new Revolutionary Government. In contrast, in the Foremost Case, the Tribunal found that it was established by the evidence, that in a controlled company, Pak Dairy, the "withholding of declared

cash dividends for two successive years" was a specific interference attributable to the Government.<sup>9</sup>

Accordingly, this alternative claim must also be dismissed.

d) Breach of contract

As a further alternative ground, Flexi-Van asserts that the Government is liable for the breach and repudiation of the lease agreements by its controlled entities Star Line and Iran Express. As already noted, although both companies came under Government control, they continued to exist as separate entities. It is not disputed that both Star Line and Iran Express had stopped making rental payments and had refused to return equipment even before they came under Government control in February 1980.

After taking control of Star Line and Iran Express in early 1980, as described above, the Government would only be liable for the damages arising out of breaches of the lease agreements if it had caused the two companies to breach these agreements or prevented them from fulfilling them. Indeed, this is what Flexi-Van itself asserts when it argues that the Government "had the final say as to whether these companies would meet their contractual obligations to Flexi-Van". Again, what is required for the Claimant to prevail on this alternative ground is to demonstrate and show through which actions the Government forced the two companies to breach their lease agreements with the

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<sup>9</sup> Foremost Tehran, Inc. and Government of the Islamic Republic of Iran, Award No. 220-37/231-1, pp. 24-29 (11 April 1986).

Claimant.<sup>10</sup> It is also clear from the McLaughlin Case<sup>11</sup> that the Government of Iran is not automatically liable for contractual obligations belonging to a company which is considered to be controlled by it within the meaning of Article VII, paragraph 3, of the Claims Settlement Declaration. However, Flexi-Van has failed to present proof of any action of the Government that caused either of these companies to breach the lease agreements. Absent such proof, the Government cannot be held liable for breaches of the lease agreements by Star Line and Iran Express.

e) Unjust enrichment

Finally, the Claimant bases its claim on the further alternative ground of unjust enrichment. The Claimant contends that the Government has been unjustly enriched through the retention and use of Flexi-Van's equipment. In this connection, it asserts that Government organizations took away containers, and that they were used by them and by private individuals for official and private purposes. The Claimant seeks compensation in an amount to be measured according to the terms of the lease agreements and that would thus equal the sum of the accounts receivable, the unpaid rentals and the replacement costs. The Government denies that it has

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<sup>10</sup> Cf. Constantine A. Gianopolus and Government of the Islamic Republic of Iran, Award No. 237-314-1, p. 8 (20 June 1986).

<sup>11</sup> McLaughlin Enterprises, Ltd. and Government of the Islamic Republic of Iran, Award No. 253-289-1, p. 15 (16 September 1986). See also Aeronutronic Overseas Services, Inc. and Government of the Islamic Republic of Iran, Award No. 238-158-1, para. 75 (20 June 1986).

been enriched by the containers that the Claimant left in Iran.

The concept of unjust enrichment appears in various forms in the different legal systems of the world, including Iran and the United States.<sup>12</sup> The Tribunal has confirmed that "[i]t is codified or judicially recognized in the great majority of the municipal legal systems of the world, and is widely accepted as having been assimilated into the catalogue of general principles of law available to be applied by international tribunals".<sup>13</sup> The Tribunal has observed that, "[t]his concept represents a principle based on justice and equity".<sup>14</sup> "The rule against unjust enrichment is inherently flexible as its underlying rationale is 'to re-establish a balance between two individuals, one of whom has enriched himself, with no cause, at the other's expense'. Its equitable foundation makes it necessary to take into account all the circumstances of each specific situation".<sup>15</sup>

Before the principle of unjust enrichment can be applied to this claim, the effect of the lease agreements on this cause of action must be considered. The Tribunal has ruled earlier that a substitute right of action based on unjust

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<sup>12</sup> See Iranian Civil Code, Article 336 and 337; American Law Institute, Restatement of the Law of Restitution §1 (1937).

<sup>13</sup> Sea-Land Service, Inc. and Government of the Islamic Republic of Iran, Award No. 135-33-1, p. 27 (22 June 1984), reprinted in 6 Iran-U.S. C.T.R 149, 168 (footnotes omitted).

<sup>14</sup> Shannon and Wilson, Inc. and Atomic Energy Organization of Iran, Award No. 207-217-2, para. 17 (5 December 1985).

<sup>15</sup> Sea-Land, supra, p. 28, reprinted in 6 Iran-U.S. C.T.R. 169 (footnotes omitted).

enrichment does not arise where a contract binding on both parties exists. In that circumstance "the issue of whether a performance of the contract results in any 'enrichment' of a party and whether such enrichment is 'unjust' in relation to the other party, cannot be decided without specifically determining the contractual rights and obligations of the parties."<sup>16</sup> The sole Respondent in the present Case, the Government of Iran, was not a party to any of the lease agreements, which were concluded between the Claimant and Star Line and Iran Express respectively. Thus, the existence of those agreements does not form an obstacle to the Claimant's bringing a claim for unjust enrichment against the Respondent Government.

It is inherent in the principle of unjust enrichment that there must have been an enrichment of one party to the detriment of the other. Where there is no "beneficial gain"<sup>17</sup> to the party allegedly enriched, the remedy of unjust enrichment is not available. When this theory is relied on to engage a state's international responsibility, the predominant view seems to be that damages for unjust enrichment should be measured in terms of the extent to which that State has been enriched.<sup>18</sup> The benefit obtained

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<sup>16</sup> T.C.S.B., Inc. and Iran, Award No. 114-140-2, pp. 21-22 (16 March 1984), reprinted in 5 Iran-U.S. C.T.R. 160, 172.

<sup>17</sup> Jiménez de Aréchaga, State Responsibility for the Nationalization of Foreign Owned Property, 11 N.Y.U. J. Int'l L. & Pol. 179, 182 (1978).

<sup>18</sup> See, e.g., Francioni, Compensation for Nationalization of Foreign Property: The Borderland between Law and Equity, 24 Int'l Comp. L. Quar. 255, 272 (1975); Jiménez de Aréchaga, supra id.; Rodríguez Iglesias, El Enriquecimiento Sin Causa Como Fundamento de Responsabilidad Internacional, 34 Revista Espanola de Derecho Internacional (Footnote Continued)

by the enriched party is an indispensable element of the remedy of unjust enrichment.

The Claimant is in accord with this when it states that the "Respondent, to avoid unjust enrichment at Flexi-Van's expense, must pay Flexi-Van the value of the benefits received by Iran and its controlled entities through their retention of the equipment". While the Claimant argues that benefit in this sense "is the retention of property regardless of what the wrongdoer does with the property", the Tribunal has held that compensation may be granted only if the Government -- either itself or through its organs or departments -- had the benefit and made actual use of the property left in Iran.<sup>19</sup>

To support the assertion of retention of the containers by the Government, the Claimant relies on the affidavit of Mr. Maass. Mr. Maass stated that late in 1980 and in 1981 "it became apparent that the containers were either being taken away by various government organizations from terminals and warehouse sites or even leased by the terminal operators to the Ministry of Agriculture, as I learned from Mr. Siyapoosh at Star Line Iran Company". Mr. Maass went on to state that when travelling in the countryside he saw Flexi-Van containers "used by Iranians for storage purposes", that he saw containers converted into housing for people, and that in one place he saw military units housed in containers. Finally, he stated that "I know that the Iranian army also took Flexi-Van . . . containers for military use".

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(Footnote Continued)

379, 393 (1982). For a more reserved view see, e.g., J.-P. Laviac, Protection et Promotion des Investissements 204 (1985).

<sup>19</sup> See Sea-Land, supra, pp. 31-32, reprinted in 6 Iran-U.S. C.T.R. 171-72.

The Government denies that it was enriched by containers that the Claimant left in Iran. It asserts that the Claimant, through its agent, segregated new and valuable containers from old and dilapidated equipment and exported only the former while leaving the latter behind in Iran. The Government sees this confirmed by the statement of Mr. Maass that he "took note of the condition of each container and recommended to Flexi-Van which pieces of equipment to try to recover". Further, the Government has proposed that the Claimant may recover 149 containers from Star Line provided that the Claimant indemnifies the Government against any third party claims, bears the removal costs and reimburses Star Line for the costs incurred in safeguarding the containers. With respect to Iran Express, the Government contends that all the assets of Iran Express were destroyed in attacks by the Iraqi troops on the port of Khorramshahr that began in September 1980.

Mr. Maass, on whose affidavit the Claimant relies in this respect, has given no figures as to the number of containers he observed or knew were in the possession of the Government. As to those containers that Mr. Maass stated he saw being used by private persons or companies, the Government cannot be deemed to have derived any benefit therefrom. With regard to the containers that Star Line is alleged to have leased to the Ministry of Agriculture -- which Mr. Maass stated he learned from a representative of Star Line's Worker's Council -- the use of such containers would not constitute an unjust enrichment of the Government, for if there were such a lease the Ministry would have paid rental to Star Line. Only the instance where Mr. Maass stated he saw military units housed in containers could constitute actual use of Flexi-Van equipment by the Government. To similar effect is Mr. Maass' statement that "it became apparent that the containers were . . . being taken away by various government organizations".

The record also includes a telex, dated 21 February 1980, in which Uiterwyk Corporation, acting on behalf of "Iran Express Lines" and "Iran Express Terminal Corp." as well as various unnamed "container lessors", demanded the return of certain containers said to be in the possession and use of the Ports and Shipping Organization at Port Khorramshahr. That telex, however, does not specify whether these containers were owned by the Claimant or by some other company, and, therefore, does not evidence that the Government had the use and benefit of the Claimant's equipment. Thus, the only evidence on this point is the above-described affidavit of Mr. Maass, the Claimant's agent during the relevant period. In weighing that affidavit, the Tribunal observes that his statements about the whereabouts, identity, and quantity of the containers are so general and imprecise as to be incapable of supporting a fair assessment of the amount of enrichment, if any. The Claimant did not present Mr. Maass at the Hearing as a witness, so it was impossible to question him and thereby, perhaps, clarify the matter. In these circumstances, the Tribunal could not, in justice, base a monetary award on such a vague affidavit, unexplained by oral testimony. To do so would be arbitrary and improper. Accordingly, the Tribunal finds that the claim for unjust enrichment must be dismissed.

Although the Claimant has not expressly made this argument, it may be inferred from the amounts claimed that it considers the Government also to have been unjustly enriched to the extent that Star Line's and Iran Express' debts were not paid. However, in the absence of further clarification, the Tribunal is not prepared to interpret the unjust enrichment claim as formulated, based on the fact "that the Government has been unjustly enriched through the retention and use of Flexi-Van's equipment", as encompassing a claim for unpaid debts.

e) Costs

Each of the Parties shall bear its own costs.

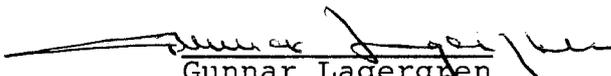
III. Award

For the foregoing reasons,

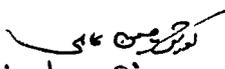
THE TRIBUNAL DETERMINES AS FOLLOWS:

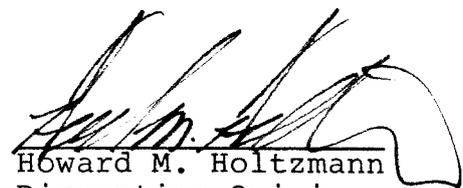
- a) The claims of FLEXI-VAN LEASING, INC. are dismissed.
- b) Each Party shall bear its own costs.

Dated, The Hague,  
11 October 1986

  
Gunnar Lagergren  
Chairman  
Chamber One

In the name of God

  
Koorosh-Hossein Ameli  
Koorosh-Hossein Ameli  
Concurring Opinion

  
Howard M. Holtzmann  
Dissenting Opinion