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CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

In His Exalted Name

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.

CONCURRING OPINION OF JUDGE AMELI

I. Introduction

I agree with the dismissal of the claims in this Case, and particularly with the basic reason for this decision, namely, that the Government of the Islamic Republic of Iran, and indeed any government, is not automatically liable for the acts or obligations of private companies or even of state enterprises by virtue of the fact that they may be considered as being under government "control", unless these acts or obligations are specifically and legally attributable to the Government itself. This is consistent with previous decisions of this Tribunal as

well as with prevailing legal doctrine.[1] There can be no suggestion of vicarious liability or respondeat superior in such circumstances, which are the only instances where actions of one person or entity may be attributed to another. To hold otherwise, as Judge Holtzmann seeks to do in his Dissenting Opinion, would amount to making the Government a guarantor of any act or obligation of entities that are separate and distinct from the Government, merely on the basis of a general notion of "control".[2] And yet, in an analogous circumstance in relation to corporations, for instance, a parent corporation is not legally liable per se for the acts or obligations of its subsidiaries or affiliates, despite the fact that there tend to be stronger links of control between them.[3] It would thus be a double standard to impute liability to a government on this notion of control when such imputation of liability is normally not permitted in the corporate world on a corresponding theory.

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[1] See, e.g., International Technical Products Corporation et al., and The Government of the Islamic Republic of Iran et al., Award No. 196-302-3 (28 October 1985); Schering Corporation and The Islamic Republic of Iran, Award No. 122-38-3 (16 April 1984), reprinted in 5 Iran-U.S. C.T.R. 361; Czarnikow Ltd. v. Rolimpex [1979] A.C. 351 (House of Lords), affirming decision of Court of Appeal in [1978] Q.B. 176; Trendtex Trading Corporation v. Bank of Nigeria [1977] 1 Q.B. 529.

[2] This theory elsewhere has been inadvertently referred to as "Big Mullah" theory, which is analogous to a "Big Cowboy" or "Big Brother" theory as in George Orwells' 1984.

[3] In spite of recent trends towards the development of "group liability" in respect of multinational corporations, the primary rule in all jurisdictions regarding the separate legal existence of corporate entities and hence the separation of corporate liability still remains. See, e.g., Schmitthoff, "Group Liability of Multinationals", in Legal Problems of Multinational Corporations 71 (K. Simmonds ed., London, 1977).

Although there are instances in which the corporate veil may be pierced or set aside in order to attach shareholders or principals with liability beyond the assets of the corporation, such piercing of the veil is permissible only in exceptional circumstances. Thus, in the Barcelona Traction Case[4], the International Court of Justice found that no such exceptional circumstances existed to warrant the setting aside of the corporate veil to permit an action of diplomatic protection by the Government of Belgium in respect of about 12 Spanish subsidiary corporations of a Canadian company that had been declared bankrupt and their assets seized and liquidated by Spanish state organs. Also, in the Letelier Case[5] in the United States, the Claimant's application to attach assets of Chile's national airline in New York in execution of a judgment against the Chilean Government for the assassination of Orlando Letelier (former Chilean Ambassador to the United States under the Government of President Salvador Allende), was dismissed by the United States Court of Appeals for failure to justify a departure from the presumption of separate juridical existence that availed even in respect of government instrumentalities, despite the fact that certain funds, staff and aircraft of the airline were used in that regrettable operation. Finally, on the question of imputability of liability for the actions of a controlled entity, the International Court of Justice stated as follows in the Case Concerning Military and

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[4] Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Second Phase (Judgment) 1970 ICJ 3.

[5] Letelier, et al., v. The Republic of Chile and Linea Aerea Nacional-Chile, 748 F. 2d 790 (2d Cir. 1984) rev'd 567 F. Supp. 1490 (S.D.N.Y. 1983) and 575 F. Supp. 1217; the Court of Appeals Decision reprinted in 1984 Mealey's Litigation Reports 1865.

Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America):

> The Court does not consider that the assistance given by the United States to the contras warrants the conclusion that these forces are subject to the United States to such an extent that any acts they have committed are imputable to that State. It takes the view that the contras remain responsible for their acts, and that the United States is not responsible for the acts of the contras, but for its own conduct vis-à-vis Nicaragua, including conduct related to the acts of the contras.[6]

But despite my concurring in the overall decision, there are several observations made en passant in the Award on which I hold different views and which I will therefore address below. I will discuss these issues seriatim under their original headings in the Award.

II. Reasons

1. Procedural issues

a) Requests with regard to Case No. 381

The Tribunal "found no need for further action" on the Government's request for consolidation of Case No. 381 with the present Case or else for the dismissal of that portion of the claim in the present Case which is restated in Case No. 381. (Award, p. 14). The main reason for this decision is the fact that Case No. 381 had been transferred at the Government's request (made in that Case, together with other similar requests) to

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[6] ICJ Judgment of 27 June 1986, para. 116.

Chamber One, which was also dealing with Case No. 36. The second reason is the eventual dismissal of the claims in this Case, which is actually an ex facto reason coming after the earlier decision not to consolidate the two cases.

My own view is that the transfer of Case No. 381 to Chamber One is not in itself a sufficient reason for the decision not to consolidate the two cases. This is because the composition of Chamber One, which had heard the parties in Case No. 36 and was in the deliberative stage leading to its decision, had changed in the meantime. Thus, while it is correct that both Cases were "presently before this Chamber", Case No. 381 is in fact before a different panel of Arbitrators in the same Chamber. Thus, the reasons that had justified the transfer of Case No. 381 from Chamber Two to Chamber One of the Tribunal were still present after the transfer, in the absence of a consolidation of the two Cases.

Presently Chamber One consists of the following panels:

1) Böckstiegel, Mostafavi, Holtzmann, (permanent panel)

2) Böckstiegel, Mostafavi, Mosk, (ad hoc panel) and

3) Lagergren, Ameli, Holtzmann (ad hoc panel).

Coordination was possible if, like Cases 37 and 231, Cases 36 and 381 were also decided in a joint award by the same panel deciding Case 36.

Not having done so, two problems arise: (1) res judicata on the part of the Tribunal's decision in Case No. 36, to the extent that it relates to the claims in Case No. 381, and (2) prior judgment for Mr. Holtzmann in sitting in Case No. 381 for hearing the claim again having decided it in Case No. 36.

But because of the existence of three different panels in Chamber One, a further transfer of Case No. 381 to our special panel would not only require a further appointment of two members of that panel for Case No. 381 but also the transfer of that Case from the permanent panel of Chamber One — a solution beyond the powers of this special panel of Chamber One. Moreover it would unreasonably delay the disposition of Case No. 36 whose Hearing had been held a long time ago, while Case No. 381 has not yet been heard.

b) Request for production of documents

I agree not to require the Claimant to produce documentation of the agreements it alleges to have concluded with the two Iranian companies, for the majority have been able to dismiss the claims, with no specific finding as to the existence and validity of any of those agreements. If the claims had not been dismissed, I would have required documentation of the agreements for many reasons including determination of liability and precision in awarding compensation, if any.

2. Merits

a) The claims

Quite significantly, the Tribunal "makes no specific finding as to the existence and validity" of the alleged lease agreements between the Claimant and each of the two Iranian companies. (Award, p. 17). This could not have been otherwise because, first, the two Iranian companies are not parties to this Case, and second, because further evidence or documentation clarifying the alleged contractual relationships — which clearly needed to be substantiated — had not been submitted.

But in order to be able to examine the claims brought against the Government, which were based largely on the alleged contracts, the Majority (of which I am part) had to assume that certain contractual relationships may have existed between the Claimant and those two Iranian companies. But I would emphasize that this is only an assumption that is necessary in the interests of justice to permit examination of the independent merits of the claims against the Government, rather than dismissing those claims ab initio for the absence or insufficiency of evidence on the underlying contracts.

Thus, all other statements in the Award relating to the existence or validity of the Claimant's alleged contractual rights must be seen in this light. Examples are the statement in page 19 of the Award that the evidence "suffices even less to establish Government interference of a nature that would constitute an expropriation of the contract rights" (emphasis added), various references in page 20 to "Flexi-Van's rights under the lease agreements", references to the Iranian companies' alleged default on "rental payments" and failure "to return containers under the agreements in question" (page 21), and to "breaches of the lease agreements" (page 24), as well as references to "the contractual relationship between Iran Express and the Claimant" (page 22), et cetera. All of these statements, and similar ones made to the same effect, cannot be interpreted as amounting to a holding on the existence or validity of any particular contract nor of any breaches thereof, because the Tribunal has recognized that no specific finding can be made on the basis of the available evidence, and has correctly refrained from making any such finding.

If Chairman Lagergren has a view different from mine as to the statement in the Award on this point, then

there is no majority on the point in view of Mr. Holtzmann's dissent. This is particularly so since, contrary to the express words in the Award that "no specific finding" was being made on the point, Mr. Holtzmann's Dissenting Opinion states (at p. 2), that "[t]he Tribunal confirms that these lease agreements existed and were valid."

Although it was not necessary to decide the question in the Award, I consider it necessary to clarify the confusing, unreliable, and incomplete state of the evidence on the alleged agreements, to put it beyond doubt that the Tribunal did not make the confirmation attributed to it by Judge Holtzmann. The Claimant provided three types of agreements or form contracts that it allegedly used in the usual course of its business. The evidence indicated that the first and second types were agreements that, aside from questions relating to the identity and authority of their signatories, had either expired or did not reflect the specific containers and other equipment in respect of which the Claimant had brought its claims against the Government. The third type of agreement was an unfilled form contract that the Claimant alleged to have used in its business with Iranian parties.

Second, the involvement of a chain of related companies organized in the United States, the United Kingdom, Iran and Liberia with similar corporate names and common shareholders and/or officers, had blurred the imputability of even the two specific agreements that were offered. There were thus legitimate questions as to which particular agreements the Claimant had itself entered into with the Iranian companies and in respect of which particular containers and equipment.

Third, there was the additional problem that the agreements offered with regard to Iran Express had been signed by Mr. Uiterwyk who is a common shareholder of both Iran Express and Uiterwyk Corporation, the latter being in the same business and having its own chain of companies worldwide. This suggests a kind of conflict of interest and duty of loyalty together with the possibility of assignments of Uiterwyk's bad debts to Iran Express for collection before this Tribunal. Moreover, the relationship of the Uiterwyk Corporation and family with Iran Express and their authority to act on behalf of Iran Express is squarely at issue in Case No. 381 that has neither been heard nor decided by now.

Fourth, the Arthur Andersen & Co. Report does not resolve the issue for the Tribunal. Arthur Andersen & Co., commissioned by the Claimant, made the Report "solely for submission to the Iran-United States Claims Tribunal and one to be used for no other purpose". Due to confusion in the claim as to its particular Respondents the Government's original Statement of Defence was limited to two pages of general denial and objections. The proper Statement of Defence was in fact only filed after the Hearing as a Post-Hearing Memorial to which the Claimant was allowed to respond. Nevertheless, the Claimant's objection to Respondent's taking exception to the existence, validity and enforceability of the agreements at the Hearing and in its Memorial does not relieve the Tribunal from its own duty to investigate the matter and evaluate the Report. Examination of the auditor and his report at the four-day Hearing raised a number of plausible questions as to the existence of the agreements, as to whether there were 1000 agreements or much less, and the Claimants burden of producing these agreements. For instance Mr. Whalen, the Claimant's expert witness from Arthur Andersen & Co. on the witness stand stated that the equipment claimed was covered by 30 to

100 agreements, rather than 1000. When not on the witness stand however, he later informed the Tribunal that the precise number was 141. (Minutes of the Hearing, page 10.) Upon examination, the Report itself revealed that 11 of the alleged agreements covered 70% of the equipment claimed; that 10% of the agreements could not be located; and that a portion of the contracts located were not even signed. It was in the light of these questions that the Tribunal, prior to the Hearing, granted the Claimant's request to file a Report on the agreements instead of producing them. But this Report only provides secondary evidence as to the agreements, and does not resolve the questions originally raised.

b) The Expropriation claim

aa) The Star Line agreements

I agree with the Tribunal's finding that the evidence before us does not establish "such interference with the Claimant's [alleged] contract rights vis-à-vis Star Line as to engage the Government's responsibility for an expropriation of these rights". However, I disagree with the earlier statement that "it seems clear that Star Line, through the Foundation [for the Oppressed] came under government control". This statement, although obviously hesitant, was made despite the correct observation earlier in the same sentence that there is "no need to determine here" whether Star Line was a controlled entity within the meaning of Article VII, paragraph 3, of the Claims Settlement Declaration. It thus has the character of an obiter dictum rather than a specific finding.

Quite apart from the fact that is no need to make any finding on government control, since the claims have been dismissed on substantive grounds, the evidence which

the Tribunal regards as having established such government control in a "seemingly clear" manner is in fact contradictory and inconclusive. That is why it only seemed clear. But it is on the other hand quite clear to me that government control has NOT been proved by that evidence.

The evidence relied upon by the Tribunal in this regard includes a decision by the Islamic Revolutionary Court dated 19 December 1979 that gave an "order for the confiscation of the Star Line Iran Company" and put its management "for the time being at the disposal of the Abadan Branch of the Foundation for the Oppressed" (emphasis added). This was followed by a countermanding letter dated 21 January 1980, submitted in evidence by the Government, 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". But this letter was also apparently followed by a further countermanding letter, submitted in evidence by the Claimant, dated 3 February 1980 and issuing from the Prosecutor of the Islamic Revolution of Abadan and Khorramshahr to the Tehran Branch of the Foundation, which purported to cancel the previous countermanding letter, and concluded that the "confiscation of Star Line remains valid and must be carried out accordingly."

But that is not the end of it. There was one additional piece of evidence submitted by the Government, which the Tribunal did not consider relevant in the evaluation of the chain of orders and countermanding orders. This was a decision of Ayatollah Gilani the Chief Judge of the Central Islamic Revolutionary Court of the country, the final authority above all the authorities who had issued the preceding orders and countermanding orders. This decision of 25 March 1980 (5

Farvardin 1359) by the Chief Judge had been issued on application by Mr. Manuchehr Saniee, then the Managing Director of Star Line, "to remove Mr. Akbari's illegal judgment of 15.11.1358 (February 4 1980)". The decision of the chief Judge specifically stated that the said judgment was "null and void and the order to expropriate the properties should be revised". (Emphasis in original.) The Chief Judge further instructed Mr. Qodousi, General Prosecutor of the Islamic Revolution of Iran, to "take the necessary measures" including compensation "for any losses or damages sustained".

The Tribunal concluded on the basis of the previous evidence that "not later than February 1980 Star Line was confiscated and put at the disposal of the Foundation". But as the above account shows, the confiscation order, after having been apparently countermanded and then apparently reinstated, was finally declared "null and void" in a decision of the Chief Judge.

There was also the evidence contained in Mr. Maass' Affidavit on this point, stating that he "learned about" a Revolutionary Court decree confiscating Star Line and placing it under the control of the Foundation, and further that "it was well-known to him" that all important decisions in Star Line had to be made by the Foundation's representatives. But this Affidavit adds nothing to the probative value of the previously cited pieces of evidence, being hearsay evidence, and also in view of the status of Mr. Maass as an employee and agent of the Claimant and the fact that he was not made available as a witness before the Tribunal to enable us and the Respondent to assess the veracity of his testimony. The Tribunal rightly notes these and other weaknesses in Mr. Maass' Affidavit and correctly refrains from basing any findings on it.

All this leads to the inescapable conclusion, in my opinion, that far from establishing that Star Line had been confiscated and put under Government control, the totality of the evidence before the Tribunal on this issue was not only unclear, but was also, at best, inconclusive.

bb) The Iran Express agreements

Here again although acknowledging that "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", (Award, footnote No. 8) the Award makes an obiter dictum observation that "from early 1980 on Iran Express came under Government control." (Award, p. 22). Since admittedly there was no need for such an observation the Award makes no valid holding or even finding of Government control over Iran Express. Besides, for not having my support the statement just quoted loses the necessary effect, considering that I am the only member concurring in the Award.

In fact it is improper to make even such observations in the Award where the Tribunal is well aware that the resolution of this issue is of significant importance to the Uiterwyk Case, where the Iranian respondents have been able to come forward with crucial evidence from the major Iranian shareholder of Iran Express and others rejecting all kinds of government control over the company.

Moreover, the Tribunal's observation of Government control over Iran Express is not sufficiently supported by the evidence. In my considered opinion, the evidence on this point is even more open to different interpretations, and is not inconsistent with the Government's

assertions that Iran Express had only been placed under "temporary administration" (analogous to receivership) for the purpose of investigating that company's affairs.

The affidavits of Mr. Uiterwyk and Mr. Maass, both of which referred to Mr. Seyed Mahmoud Shams as one of the new Government-appointed directors of Star Line, were based on hearsay and also suffered from the same kind of defects mentioned earlier in relation to Mr. Maass. The Tribunal could thus not attach any value to those affidavits.

But beyond that, the Tribunal gives much weight to a telex dated 15 July 1982, addressed to an attorney defending Iran's interests in litigation brought against it in the United States, which was signed by Mr. Shams as "temporary administrator" of Iran Express. But, first of all, this telex is a post-Declaration (post-19 January 1981) material and cannot properly be admitted by the Tribunal to prove a fact the Claimant had to prove as having occurred prior to the Declaration.[7] Secondly, it was as a result of violation by the Government of the United States' of General Principle B of the Declaration of the Government of Algeria, in not terminating but allowing the continuation of such litigation in the United States, that made it necessary to defend against such litigation and hence the sending of that telex. Thus, having arisen from the wrongful act or omission of the United States, that telex should not have been admitted as evidence of Government control.

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[7] Continenal Grain Export Corporation and Union of Constumers Cooperatives for Iranian Workers, Award No. 243-112-1, paras. 9-11 (6 August 1986) citing in accord Shannon and Wilson, Inc. and Atomic Energy Organization of Iran, Award No. 207-217-2, para. 12 (5 December 1985).

The other piece of evidence and the only one Chamber Two explains and considers as dispositive of the issue in the Seaco Case, also filed in this Case, was not found to be valuable enough to be considered by this Chamber. The evidence was an "Answer", dated 2 October 1981, a Post-Declaration (19 January 1981) material, in a United States litigation by a Florida attorney for Iran Express Lines, Limited, rather than Iran Express Lines Company. The Respondent denies that Iran Express retained Mr. Goldman or Mr. Shack, then an attorney for the Government of Iran in Washington, D.C. It also denies that Iran Express authorized them to take the positions they had taken in that Answer. The Respondent submits contemporaneous telexes sent to Mr. Shack, in which Iran Express denies that it had come under government control and asserts that it was a private company doing business under the Iranian Commercial Code.

Moreover, contrary to Chamber Two's description, the unauthorized Answer did not defend that Case on the ground of sovereign immunity but gave notice "that it intends to raise an issue as to the applicability of the law of Iran; more specifically Law 6738 enacted June 1979 in Iran which required private corporations including Defendant herein to be administered by the Government of the Islamic Republic of Iran." (Emphasis added.) It is clear that this statement does not say that Iran Express was administered by the Government pursuant to that law and hence also does not indicate the date from which the law was enforced against the company, if it was enforced against it at all. In fact the holding of Chamber Two is also silent as to the date from which the law was applied against Iran Express and on which it came under Government control. Consequently, the Tribunal in this Case did not consider the Seaco Case a proper precedent upon which to base its obiter dictum observation, but dealt

with other material and only gave the Seaco Case as a footnote. (Award, p. 19.)

Finally, the telex of 15 July 1982 referred to above did not even indicate conclusively that Mr. Shams was managing Iran Express on a full-time basis as a going concern and on behalf of the Government, for if that were the case it would most certainly have been sent from the office of Iran Express and would have borne that company's telex number. Instead, it was sent from a different company, IRIT, that is Iran International Transport Company, where Mr. Shams was a permanent official.

The Government's assertion was that Mr. Shams was appointed by the Ministry of Roads and Transportation as "administrator" for a brief period to investigate the affairs of Iran Express. This was quite natural and plausible particularly in view of the proliferation of litigation in the United States against that company to which the Government had been forcibly attached by the various claimants. However, that investigation had indicated that Iran Express was not an active company as its owners had departed from Iran and had in fact taken the bulk of its records and other items of property with them. These facts are attested to in the Affidavit of Mr. Paksima in the Uiterwyk Case.

Nevertheless, the Tribunal expresses doubts as to whether the function of Mr. Shams was merely to investigate an allegedly dormant company, and, to the contrary, concludes that other evidence "suggests that he was managing Iran Express which had indeed come under government control". This other evidence was another telex, dated 17 November 1981, sent by the Ministry in connection with settlement negotiations with Uiterwyk Corporation, which stated that Iran Express was "under governmental administration".

Here again, I disagree as to the admissibility of this telex and as to the conclusion drawn upon it. To take the last point first, the statement quoted from that telex was not inconsistent with the Government's assertion that Iran Express was under temporary governmental administration of an investigative nature. It could not therefore be used in itself as an effective rebuttal of that assertion. Moreover, this piece of evidence was also post-Declaration material, and was therefore inadmissible to prove a fact prior to the Declaration. Finally, in a similar circumstance in the PepsiCo Case[8] this same Tribunal consisting of the same Judges and in an Award issued on the same day, had rejected evidence submitted by the Respondents for the reason that it related to settlement negotiations between the parties. The Tribunal should therefore have applied the same principle here and excluded this telex as well.

c) Interference with Contractual Relations

d) Breach of Contract

With respect to these two headings of the Award, my discussion above on the assumption made by the Tribunal that certain contractual relations may have existed between the Claimant and the two Iranian companies apply.

e) Unjustified Enrichment

I agree with the Award that the concept of unjus-

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[8] PepsiCo, Inc. and The Government of the Islamic Republic of Iran, et al., Award No. 260-18-1, p. 33, n.4 (11 October 1986).

tified enrichment[9] appears in various forms in the different legal systems of the world, including Iran and the United States. But there are significant differences in the content and application of the doctrine in the different legal systems, both as to the conditions precedent and subsequent for unjustified enrichment. To begin with, the Award's citation of Articles 336 and 337 of the Iranian Civil Code, if examined closely, would indicate a number of such limitations. Those Articles read as follows:

> 336. If a man acts at the order of another and if according to custom and usage a wage is payable for such an act, or if the man who has acted is accustomed and disposed to undertake such work, then he can claim pay for his work, unless it is shown that he acted gratuitously.
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> 337. If anyone benefits from another's property when permission has been clearly expressed or understood, the owner of the property will be entitled to the reasonable equivalent of any such profit, unless it is clear that permission was given without (any question of) payment.[10]

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[9] Although the Award uses the term "unjust enrichment," I principally prefer the term "unjustified enrichment" if not "enrichment without cause."

[10] M. Sabi's translation. The French translation of these Articles by Professors Adle and Sotoudeh are as follows:

> Article 336. — Si quelqu'un fait, sur l'ordre d'autrui, un travail qui, d'après la coutume, est sujet à rétribution, ou s'il appartient à cette catégorie de gens qui, habituellement, se prêtent à accomplir de tels travaux, il doit être rétribué pour son travail à moins qu'il ne soit établi qu'il

(Footnote Continued)

The Claimant in the present Case argued that the Government has been enriched unjustifiably to the extent that the two Iranian companies' debts were not paid. The Tribunal correctly rejected this argument, for it would have been absurd to sustain such a claim on the basis of unjustified enrichment. Such argument is not only aimed at bringing in and assigning the alleged contractual liability of the two companies to the government according to the terms of those agreements, but also at disregarding the characteristic features of unjustified enrichment. Unjustified enrichment even in municipal law is limited to actual benefit minus all losses. With considerable difficulty such cause of action can be accepted to have entered into international law and be applied to a situation where arguably there are other parties and agreements pursuant to which the primary claims could be brought. Consequently the claim of unjustified enrichment must be subject to the inherent limitations of its doctrine. One such limitation has already been recognized by this Tribunal in the Sea-Land Case, where it was held that unjustified enrichment "does not permit the Tribunal to compensate [the Claimant] for the loss of unpaid debts, freight charges, and termination expenses, none of which resulted in the enrichment of PSO or the Government."[11] In that decision the

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(Footnote Continued)
a agi avec l'intention de faire une libéralité.

Article 337. — Celui qui, avec l'autorisation expresse ou tacite du propriétaire, retire un profit quelconque de la chose d'autrui, doit un dédommagement (à fixer à dire d'experts) au propriétaire de la chose, à moins qu'il ne soit établi que l'autorisation avait été donnée en vue d'une jouissance gratuite.

[11] Sea-Land Services, Inc. and The Islamic (Footnote Continued)

Tribunal also denied that the enrichment must correspond to the cost of about $3 million the claimant incurred in the construction of a port facility (Ro-Ro ramp) fixed to the land and under possession of PSO in Bandar Abbas. Unpaid debt cannot even constitute the subject matter of an expropriation. This commonly held view was also expressed by the Tribunal in International Systems, where it stated: "The Respondents' failure to renew a contract or their failure to pay a debt cannot be said to amount to expropriation...."[12]

Moreover, the claim for unjustified enrichment was for the first time raised in the Hearing in this Case by the Claimant when submitting the bases of its claim in writing. The Respondent did not object to this late presentation of a new cause of action, although it raised concern about its need to prepare a proper defence to this new cause of action, and the Tribunal allowed Post-Hearing Memorials. I would have preferred formulation of such causes of action in the Statement of Claim so that the pleadings and evidence, in particular those of the respondent, can address the issues of both fact and law.

The Award's statement that unjustified enrichment "is widely accepted as having been assimilated into the catalogue of general principles of law" is quoted from the Sea-Land Case, which in turn cites secondary sources of a few publicits and the Case of Lena Goldfields of

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(Footnote Continued)
Republic of Iran, et al., Award No. 135-33-1 (20 June 1984), p.33; 6 Iran-U.S. C.T.R. 149, 172.

[12] International Systems & Controls and Industrial Devolopment and Renovation Organization of Iran, et al., Award No. 256-439-2 (26 September 1986) para. 98.

1930.[13] It ignores the 1931 Case of Dickson Car Wheel Company that denies that unjustified enrichment by then had been transplanted to the field of international law. The Dickson Case states as follows:

> The interpretation of the theory of unjust enrichment has encountered serious difficulties in its practical application in municipal law. There is no doubt that at the present time that theory is accepted and applied generally by the countries of the world, even in the absence of a specific law, but the difficulty rests in fixing the limits within which it can and must be applied.
>
> In order that an action in rem verso may lie in municipal law it is necessary that the following elements coexist:
>
> 1. That there be an enrichment of the defendant.
> 2. That this enrichment be the direct consequence of a patrimonial injury suffered by the plaintiff. That is, that the same causative act create simultaneously the enrichment and the detriment.
> 3. That the enrichment of the defendant be unjust.
> 4. That the injured person have in his favor no contractual right which he could exercise to compensate him for the damage. (See Bonnecase. Sup. de Baudry. T. III, pages 216 to 372.)
>
> It is obvious that the theory of unjust enrichment as such has not yet been transplanted to the field of international law as this is of a juridical order distinct from local or private law. (Emphasis added.)[14]

Compensation for unjustified enrichment, being based on equity, should not cause any loss to the respondent.

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[13] Reprinted in 36 Cornell L. Q. 31; 3 Whiteman, Damages in International Law 1739 (1943).

[14] 4 R.I.A.A. 669, 676 (1974).

It should not only be limited to the actual extent of enrichment but the amount of compensation should be reduced to reflect any expense or disadvantage suffered by the respondent in connection with the original acquisition of the benefit or arising from the restitution. Thus, for example, the recepient's duty of restitution is terminated or diminished if what he received is destroyed or lost by whatever cause, including lending the property to a trickster, investing it in an industrial enterprise which is dismantled after the war, donating it to others or selling it at a loss, spending money on what he received in the belief that he was entitled to keep it, allowing claims to prescribe, surrendering claims or assuming obligations from which he cannot release himself without loss. Other costs of acquisition and restitution, such as brokerage charges, costs of unsuccessful execution, and the expense and risks of return, must also be deducted from any compensation. In sum, the claimant must always bear the risk of any events which negative or reduce the actual benefit accruing to the respondent.[15] This is one of the characteristic features of enrichment liability.

In English law when "constructive trust" is invoked for restitution of unjustified enrichment, the defence of estoppel also allows the courts to limit the extent of restitution or compensation, if any. This is so in particular where a respondent is asked to restore excess personal income that was paid by mistake under circumstances inducing him to believe that he was entitled to

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[15] K. Zweigert and H. Kötz, 2 An Introduction to Comparative Law, 208, 251-57 (trans. T. Weir 1977); Schreuer, Unjustified Enrichment in International Law 22 Am. J. Int'l L. 281, 287 (1974).

the full amount.[16] It is also the case where the unjustified benefit arose between parties who were already in a duty relationship with each other when the benefit accrued to one party as a result of a breach of duty by the other.[17]

The English law position that the duty of restitution imposed on the party enriched rests on "natural justice and equity," is utilized under American law to weigh up the "equities" in each individual case. Thus, American law takes account of situations where no actual benefit remained to the defendant out of what he had acquired to deny any restitution or compensation. Thus, in one leading case the New York Court of Appeals held that restitution should not be granted "if payment has caused such a change in the position of the other party that it would be unjust to require him to refund."[18] Furthermore, Section 142 of the American Law Institute's Restatement of the Law of Restitution also makes "change of circumstance" a good defence to all restitutionary claims. Such "change of circumstance, under both German and American law, is found to exist where the enrichment had disappeared: for example, destruction, loss or theft of the object received; unprofitable use or sale at a loss; expenses incurred on the property received; the assumption of legal obligations which are unavoidable or avoidable only at a loss; the surrender of rights or securities; the omission to exercise one's right in due time; unprofitable investment of money received; gifts made out of what was received; and peculation by staff.

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16 Skyring v. Greenwood, (1825) 4 B. & C.281, 107 Eng. Rep. 1064.

17 Deutsche Bank v. Beriro, (1895) 73 L.T. 669.

18 Mayer v. New York, 63 N.Y. 455 (1875).

It is also indisputable that the unjustified enrichment doctrine, where applicable and subject to these limitations, is a subsidiary means of recourse available only where no other cause of action is present. The Tribunal's recognition of this point in both Sea-Land and the present Case is indicative of the problem the Uiterwyk Case would face in litigating the identical part of the claim against Iran Express. If the claim was admissible against Iran Express in the Uiterwyk Case, it would not have been sustainable in Case No. 36 under the unjustified enrichment theory. Otherwise the dual availability of the Tribunal to one claim in Cases 36 and 381 will be to the prejudice of all other claimants before the Tribunal, who did not file their claims twice — once by the principal and once by the agent, once by the parent corporation and once by the subsidiary corporation, and so on. In fact, in the early days of its operation, Chamber One of the Tribunal unanimously dismissed an identical claim that had been filed twice under different case numbers. This was the Tribunal's Order of 20 October 1982 in Dow Chemical Company and The Government of the Islamic Republic of Iran, et al., Case Nos. 257 and 499. By that Order the Tribunal terminated the proceedings in one of the identical claims while maintaining the other for further proceedings.

The Award's statement that "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", is further limited to the government's liability for enrichment by the organs or departments that under municipal law do not possess separate juridical personality or do not have the capacity to sue or be sued.

The Award's statement gives as footnote the Award in Sea-Land, pp. 31-32, reprinted in 6 Iran-U.S. C.T.R. 171-72. In the Sea-Land Case the claim, brought against the Government and the Ports and Shipping Organization of Iran was dismissed as against the Government, while it was granted as against the Ports and Shipping Organization. Consequently the statement just quoted from the Award in the present Case is further limited to the liability of the particular organization that was not only directly enriched but was also specifically made a party to the dispute. It does not extend to any indirect enrichment of the government through unidentified organs and departments that are separate juridical entities under the municipal law and not made party to the dispute.

With regard to the Uiterwyk Corporation's so-called telex, dated 21 February 1980, apart from the weaknesses the Award mentions, it is not clear if it is a telex at all, for it reflects neither the telex number of the sender and the receiver nor the "answer back" of the receiver to demonstrate that it was received. The content of the "telex" indicates that it was addressed to both PSO in Khorramshahr and the Ministry of Roads and Transportation in Tehran, but there is no indication that it was received by either of them. Moreover, the document is in English rather than the Persian language of its addressees. For a notice to be effective it is crucial that it be in the language of its addressee, in particular where there is no prior contractual relationship or course of conduct between the parties.

This piece of evidence has been frequently offered by a number of claimants and dealt with by the Tribunal. Nonetheless it is again brought forward in this Case and apparently this is not the last time. After ascertaining the admissibility of such evidence as to the circum-

stances and propriety of its procurement the Tribunal must make sure that it is not deciding an aspect of the Case on the basis of evidence that is precluded by a prior decision. The Award in this Case, although not directly dealing with the procurement issue, dismisses the telex for its lack of specificity and pertinence to the Claimant's equipment in question. For instance the fate of RayGo Wagner's two Model MHE-80 port packers[19] and Flexi-Van's containers and other equipment alleged to have been demanded by the so-called telex of 21 February 1980 has already been decided by the Tribunal.

III. Conclusion

Nevertheless, in spite of these defects in the Award, I consider the Case as having been correctly decided and I concur in the dismissal of the claims. However, since the various elements in the reasoning of the Tribunal I have examined above were not necessary for the final decision, they must naturally be considered as obiter dicta.

The Hague,
Dated, 19 Aban 1365/ 10 November 1986

Koorosh-Hossein Ameli

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19 RayGo Wagner Equipment Company and Iran Express Terminal Corporation Award No. 30-16-3 (18 March 1983), reprinted in 2 Iran-U.S. C.T.R. 141, 144-46.