IRAN-UNITED STATES CLAIMS TRIBUNAL

382-312

۳۸۲-۳۱۲

ORIGINAL DOCU

Case No. 382 Date of filing: 21 June 85

** AWARD - Type of Award ITM/ITC
- Date of Award 21 June 85
64 pages in English _____ pages in Farsi

** DECISION - Date of Decision _____
_____ pages in English _____ pages in Farsi

** CONCURRING OPINION of _____
- Date _____
_____ pages in English _____ pages in Farsi

** SEPARATE OPINION of _____
- Date _____
_____ pages in English _____ pages in Farsi

** DISSENTING OPINION of _____
- Date _____
_____ pages in English _____ pages in Farsi

** OTHER; Nature of document: _____
_____
- Date _____
_____ pages in English _____ pages in Farsi

R/12

IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

CHAMBER THREE
CASE NO. 382
AWARD NO. ITM/ITL 52-382-3

DUPLICATE ORIGINAL
«نسخه برابر اصل»

BEHRING INTERNATIONAL, INC.,

Claimant,

and

ISLAMIC REPUBLIC IRANIAN AIR FORCE, IRAN AIRCRAFT INDUSTRIES and THE GOVERNMENT OF IRAN,

Respondents.

IRAN UNITED STATES CLAIMS TRIBUNAL
دادگاه داوری دعاوی ایران ـ ایالات متحده
FILED - ثبت شد
Date 21 JUN 1985 تاریخ
۱۳۶۴ /۳/ ۳۱
No. 382 شماره

INTERIM AND INTERLOCUTORY AWARD

IACI[2] to inventory their goods, all of which were stored in Claimant's Edison, New Jersey warehouse.[3] The Interim Award request was predicated upon allegations that certain specified items were missing from the warehouse and that others had become spoiled or had deteriorated.

Claimant filed its Reply to Respondents' Statement of Defense and Counterclaim on 15 February 1983. With respect to Respondents' request for an Interim Award, Claimant alleged that the items reported as missing had been located and that Claimant was willing to cooperate fully in an inventory. Claimant requested that the Tribunal order Respondents to post security for the costs of such inventory.

On 18 April 1983, Respondents filed a Supplement to their Statement of Defense and Statement of Counterclaim, which set forth a supplemental counterclaim. On 20 July 1983, Respondents filed their Rejoinder.

The Request for an Inventory

On 1 March 1983, the Deputy Agent of the Islamic Republic of Iran requested expedited consideration of Respondents' request for an Interim Award. On 9 March 1983, Respondents filed an affidavit in support of their charge that certain items were missing from Behring's warehouse.

---

[2]Only Respondents IRIAF and IACI claim that Behring retains possession of goods owned by them. Respondent Iran makes no claim for itself to goods in Claimant's warehouse.

[3]Article 26 of the Tribunal Rules permits the Tribunal, at the request of a party, to "take any interim measures it deems necessary in respect of the subject-matter of the dispute," which measures "may be established in the form of an interim award."

After considering Respondents' request and Claimant's 15 February 1983 reply, the Tribunal, by Order dated 18 March 1983, requested Claimant to file, by 29 April 1983, an inventory of the materials belonging to Respondents located in its warehouse. The Tribunal reserved decision on the question of compensation for costs.

On 31 March 1983, Claimant filed a Supplemental Reply to Respondents' Request for Interim Award. This submission contained further evidence in support of Claimant's contention that the items asserted by Respondents to be missing had been located.

On 29 April 1983, Claimant filed a Cross-Petition for Interim Measures of Protection and Answer to Respondents' Supplement to their Statement of Defense and Statement of Counterclaim. Claimant contended that compliance with the Tribunal's 18 March 1983 Order concerning the preparation of an inventory would entail high cost to Claimant and subject it potentially to liability in the event that the unpacking of Respondents' goods caused any damage and/or deterioration. Claimant requested an order either requiring Respondents to perform the inventory themselves or providing that they pay for same and that Claimant be released from liability in the event of any spoliation or damage occurring as a result of such inventory. Claimant also alleged that it had already performed an inventory as early as 1979 ("1979 Inventory") and had supplied copies of this inventory to Respondents on several occasions beginning in 1979.

By Order dated 11 May 1983, the Tribunal vacated its Order of 18 March 1983 requesting an inventory of materials to be produced and ordered Respondents to comment further on the matter.

In its submission of 10 August 1983, Claimant submitted that the request for an inventory had become moot in that Claimant had retained an independent auditor (Touche Ross &

Company) which had verified the accuracy of the 1979 Inventory. Claimant volunteered to forward a copy of the 1979 Inventory and the auditor's certification to Respondents "[u]pon the advice of this Tribunal."

Proposed Sale of Goods and Interim Award Halting Sale

On 7 July 1983, Claimant filed a notice of sale of assets pursuant to the Iranian Assets Control Regulations promulgated by the United States Department of Treasury. See 31 C.F.R. § 535.540(c). The notice specified that Claimant claimed a warehouseman's lien upon Respondents' goods in Claimant's possession at its Edison warehouse. The notice further specified that Claimant intended to sell such goods at a public auction on 15 August 1983 to satisfy debts for storage charges allegedly owed by Respondents. The amount of the lien claimed by Claimant as of the date of the notice was $1,353,871.80.[4]

In response to this notice, Respondents filed, on 4 August 1983, a request for an interim order barring Claimant from selling the goods. Claimant filed a Reply to this request on 10 August 1983.

On 10 August 1983, the Tribunal issued an Interim Award, No. ITM 25-382-3, stating, in pertinent part, as follows:

> The Tribunal considers that the Parties should be afforded an opportunity to more fully present and argue their contentions. However, in view of the fact that the proposed sale is scheduled to proceed on 15 August 1983, the Tribunal finds it appropriate immediately to request that the Claimant take measures to assure

---

[4] This amount included, inter alia, charges for storage and maintenance claimed before the Tribunal. The notice also asserted a lien in the amount of $46,000 for storage charges from the date of notice to the "date of payment or sale."

> that the proposed sale is not carried out until the Parties have had such opportunity and until the Tribunal can render its decision on the Request of the Ministry of Defense.
>
> For these reasons, and pursuant to Article 26 of the Tribunal Rules, the Tribunal, ...
>
> (1) requests the Claimant to take whatever measures are necessary to assure that the sale of assets scheduled for 15 August 1983 is not carried out;
>
> (2) invites the Parties to file by 15 September 1983 any further written submissions they may wish to make in relation to the . . . Requests of the Ministry of Defense, including also the question of which party should bear any costs incurred by the Claimant as a result of not carrying out the sale of assets on 15 August 1983 . . . .

The Tribunal also scheduled a Hearing for 27 September 1983 on Respondents' request for an interim award barring the sale. The operative provisions of the Award were telexed immediately to Claimant's attorney and, in response to inquiries from the Agents of the States Parties, a telexed clarification from the Tribunal followed, on 12 August 1983, to the effect that the "request" contained in paragraph 1 of the Interim Award "is tantamount to and constitutes an order . . . to stop the sale" scheduled for 15 August 1983.

By Order dated 30 August 1983, the Tribunal notified the Parties of its intention to decide the pending issues of interim measures of protection on the basis of the Parties' written submissions as filed in accordance with the Interim Award.

On 15 September 1983, Respondents filed an Application for the Appointment of Expert or Experts for Taking Inventory and Recording the Condition of the Iranian Assets in Custody of Behring International, Inc. Respondents advised the Tribunal that Claimant had informed Respondents that it intended to proceed with the sale despite the Tribunal's Interim Award of 10 August 1983 and that Respondents thus

had been compelled to conclude, on 14 August 1983, a Memorandum of Agreement ("1983 Agreement") halting the sale upon, inter alia, payment to Claimant of $800,000.[5] The 1983 Agreement had cancelled the scheduled auction, thereby mooting Respondents' request for interim measures halting the sale. (As Claimant later informed the Tribunal, this 1983 Agreement "secure[d] for Behring virtually all of the relief it" sought from this Tribunal. See infra note 28 and accompanying text.)

Appointment of Expert

In their 15 September 1983 filing, Respondents also requested the Tribunal to appoint an expert to inventory and examine the condition of all items in Claimant's warehouse belonging to Respondents so as "to ensure that the inventory is accurate and to minimize to the utmost potential future disputes as to the identity, quantity or condition of properties turned over to MOD . . . ."

On 7 October 1983, the Tribunal accepted for filing, in English only "for the time being," Claimant's Reply to Respondents' Ex Parte Application for a Full Inventory of

---

[5] In its submission of 7 October 1983, Claimant argued that the Interim Award was unenforceable. It appears that Respondents in August 1983 unsuccessfully sought to prevent the 15 August 1983 sale through judicial proceedings in the United States. It nowhere appears, however, that the American courts were specifically asked to consider the enforceability per se of the Interim Award. Indeed, the Affidavit of Bruno A. Ristau, Respondents' United States counsel, sworn to 30 August 1983, states that the hearing before the United States District Court for the District of New Jersey on the request of Respondents IRIAF and IACI for a preliminary injunction halting the sale was completed 10 August 1983 before he had learned of the Interim Award issued that day. See also Behring Int'l Inc. v. Imperial Iranian Air Force (D.N.J. 10 Aug. 1983) (transcript of opinion) (denying motion for preliminary and permanent injunction without mention of Tribunal's Interim Award).

Claimant's Warehouse.[6] Respondents filed comments to Claimant's Reply on 18 October 1983. Claimant's submission included a request pursuant to Article 21 of the Tribunal Rules that the Tribunal determine its jurisdiction over the claims and counterclaims as a preliminary matter. No such request had been filed previously. In connection with this request, Claimant contended that the Tribunal lacked jurisdiction over the claims it had filed and over the counterclaims as well.

By Decision dated 19 December 1983, the Tribunal appointed an expert, Mr. Sigfrid Akselson.[7] The Tribunal, in its Decision, determined "that the advice of independent expertise with regard to the status of the goods would assist the Tribunal in the adjudication of this case." The terms of reference for the expert, in summary, required the expert to inventory items in Behring's warehouse belonging to Respondent IRIAF, to determine the condition of each such item, and, "if possible," to give his opinion as to whether any damage or deterioration found to exist "is likely to have occurred during the time before 19 January 1981[8] in which it was in Behring's custody." The Tribunal required Respondents to post $30,000 security for the costs of such inventory and inspection.

Respondents, on 18 January 1984, filed a request to broaden the scope of the expert's terms of reference. Claimant's Comments to Respondents' Proposal to Enlarge the Expert's Duties were filed on 16 April 1984. By an Amendment to Decision dated 3 May 1984, the Tribunal modified the

---

[6]Article 17 of the Tribunal Rules requires, in general, that written submissions to the Tribunal shall be filed in both English and Farsi.

[7]Judge Richard M. Mosk dissented from this Decision.

[8]This date is of jurisdictional significance, as discussed infra note 37 and accompanying text.

expert's terms of reference by including goods belonging to Respondent IACI within the scope of the expert's tasks, and, inter alia, by requiring the expert to submit a preliminary report to the Parties for their possible comments prior to finalizing his report and submitting it to the Tribunal.

On 15 June 1984, after visiting the Behring warehouse on 13 June 1984, the expert prepared a Memorandum to the Tribunal based upon a preliminary review of the tasks he had been assigned to perform. This report, with an accompanying letter, was filed by the Agent of Iran on 10 July 1984. The expert concluded "that the goods have to be transported to a warehouse with suitable space for handling and storing and also including office facilities . . . to make inventory and inspection possible." The expert also estimated that his tasks would take in excess of 30 days to accomplish and cost approximately $64,500.

Requests for Interim Measures Transferring Goods and Decision on Jurisdiction

On 5 July 1984, Respondents filed a request for an order commanding Claimant to release their property and to amend the expert's terms of reference to enable him to carry out his tasks at a new warehouse facility selected by Respondents. Respondents further requested that the Tribunal request the assistance of the appropriate U.S. judicial authorities to enforce such order.

On 30 July 1984, Claimant submitted its comments to Respondents' request, accompanied by an Application to Dismiss Respondent's Counterclaim for Lack of Jurisdiction, or in the Alternative, for Failure to State a Claim upon Which Relief can be Granted. Respondents' reply to that portion of Claimant's submission relating to Respondents' request for an order releasing its property was filed on 8 August 1984.

By Order dated 22 August 1984, the Tribunal scheduled a meeting of the Parties with the Tribunal for 7 September 1984 to clarify questions connected with the transfer of Respondents' properties from the Claimant's warehouse facility as requested by Respondents on 5 July 1984. By Order dated 6 September 1984, and in implementation of Presidential Order No. 27, the Tribunal postponed until further notice the meeting of the Parties.[9]

On 10 September 1984, Respondents filed their comments on Claimant's application to dismiss Respondents' counterclaims.

Meeting of the Parties

By Order dated 15 January 1985, the Tribunal rescheduled for 12 February 1985 the meeting of the Parties. That meeting was held as scheduled, with the expert and representatives of Claimant and Respondents (including United States counsel on both sides) in attendance. At the meeting, the Parties presented their views concerning Respondents' request for transfer of their goods. The Parties also addressed other issues pending before the Tribunal, including the issue of the Tribunal's jurisdiction over both the claims and the counterclaims and with respect to Respondents' request. In this connection, Claimant reiterated its request that the Tribunal decide its jurisdiction over the claims and counterclaims as a preliminary matter and before deciding Respondents' request for transfer of their goods. The expert presented his views concerning the scope and magnitude of his tasks and the unsuitability of Claimant's warehouse both for performing such tasks and for conserving the goods.

---

[9]Presidential Order No. 27, issued on 5 September 1984, postponed until further notice all proceedings before the Tribunal.

Decision to Determine Jurisdiction as Preliminary Matter

Following this meeting, the Tribunal, on 22 February 1985, rendered Interim Award No. 46-382-3. The Tribunal, inter alia, decided to determine its jurisdiction over the claims and counterclaims as a preliminary matter, pursuant to Article 21(4) of the Tribunal Rules. With respect to such decision, the Tribunal noted as follows:

> [T]he Tribunal requests that the Parties submit any written evidence and memorials they wish the Tribunal to consider, relating only to jurisdiction, by 29 March 1985. In light of the fact that the Parties have already expressed themselves on the jurisdictional issues in their written submissions and at the meeting of 12 February 1985, it is not anticipated that any extensions will be granted. After 29 March 1985, the Tribunal will determine whether any further oral argument on jurisdictional issues is necessary.

By Order dated 7 March 1985, the Tribunal requested the Parties "to reserve the alternative dates of 4 April 1985 and 11 April 1985 for the purpose of conducting a Hearing on jurisdictional issues, in the event that, pursuant to . . . the Interim Award, the Tribunal determines that such a Hearing is necessary."

By communication received 22 March 1985, Claimant's attorney advised the Tribunal that Claimant could not be available 4 April 1985 but that Claimant could be present on 11 April 1985 "in the event the Tribunal determines that a formal hearing on the issue of jurisdiction is necessary." Claimant's Final Submission Re: Jurisdiction was filed on 2 April 1985.

In view of the disruption of commercial airline service to and from Iran, the Tribunal, by Order dated 4 April 1985, postponed until further notice any possible Hearing and extended Respondents' deadline for filing its submission on jurisdiction to 16 April 1985.

On 16 April 1985, still awaiting Respondents' written submission on jurisdiction, the Tribunal scheduled a possible joint Hearing on jurisdiction and second meeting of the Parties (which Claimant had requested on 22 March 1985) for 2 May 1985.

By Order dated 19 April 1985, the deadline for Respondents to file their submission on jurisdiction was further extended to 1 May 1985, for the same reasons set forth in the 4 April 1985 Order.

Respondents, on 23 April 1985, requested postponement of the possible joint Hearing on jurisdiction and second meeting of the Parties, alleging difficulties in obtaining airline tickets for travel to the Tribunal. On 25 April 1985, Respondents filed their brief on jurisdiction.

The Tribunal examined these most recent submissions relating to jurisdiction and, by Order dated 3 May 1985, cancelled the proposed Hearing and confirmed that it would decide its jurisdiction on the basis of the Parties' written submissions and prior oral argument.[10] The Tribunal noted "that neither submission raises relevant issues of law or fact that have not already been discussed by the Parties in their previous written filings and/or orally before the Tribunal at the 12 February 1985 meeting of the Parties." The Tribunal thus determined that a Hearing on jurisdiction was not in fact necessary, and noted "that its second purpose in scheduling the proposed Hearing (i.e. convening a meeting of the parties to facilitate settlement) has been frustrated as the Respondents have found it impossible to attend."

---

[10] Although the Order was not filed until 3 May 1985, the Tribunal had informed the Parties of the cancellation by telephone, on 26 April 1985, after having received and examined Respondents' brief.

On 7 June 1985, Respondents filed a supplemental brief on jurisdiction.

Decision on Interim Measures

With respect to Respondents' request for interim measures ordering the transfer of their goods, the Tribunal, in its Interim Award No. 46-382-3 of 22 February 1985, decided that a prima facie showing of jurisdiction had been made sufficient to enable it to entertain generally requests for interim measures.

The Tribunal determined, however, that it would be inappropriate to grant the full interim relief requested prior to determining its jurisdiction as a final matter. Nevertheless, based upon the presentations of the Parties and the expert at the meeting of the Parties, the Tribunal found "that the parties agree that the facility in which the goods are currently stored is inadequate to preserve and protect the goods and the Tribunal deems their removal to a more modern air-conditioned and humidity-controlled facility to be essential to conserve the goods," and determined that certain interim measures were then appropriate.[11] The Tribunal took the initial step of ordering the expert to begin his assigned tasks as soon as possible. Respondents were ordered to post additional security covering the costs of the expert's work, for a total deposit outstanding of

---

[11]As described at the meeting of the Parties, Claimant's warehouse consists of two adjoining facilities -- a modern, air-conditioned portion and an older, non-air-conditioned, non-humidity controlled annex. Respondents' goods have been stored in the annex, while Claimant has subleased the main facility subject to termination on short notice.

$100,000,[12] and both Parties were ordered to provide the expert with a copy of the 1979 Inventory.

In its Interim Award, the Tribunal left unresolved the issue of where the expert would perform his tasks. The Tribunal gave Claimant the option of having such work performed in the modern portion of its Edison warehouse, because Claimant had indicated its preference for such an arrangement at the 12 February 1985 meeting of the Parties.[13]

In response to this provision of the Interim Award, Claimant submitted to the Tribunal a communication on 5 March 1985, to which the Tribunal responded by Order dated 7 March 1985. Further communications sent by Claimant's counsel were received on 22 March 1985 and 11 April 1985, to which the Tribunal responded by Order filed 16 April 1985. These communications and Orders clarified certain issues raised by Claimant concerning the prospective use by the expert of Claimant's modern warehouse facility.[14]

---

[12]The initial deposit of $30,000, which the Tribunal required in its Decision of 19 December 1983, was received in two equal payments, on 11 January 1984 and 17 February 1984, by IRIAF and IACI, respectively. Of the additional $70,000 deposit required by the Tribunal in its Interim Award of 22 February, the Tribunal to date has received only $35,000, which amount was received from IRIAF on 22 March 1985. The Tribunal in its order of 16 April 1985, noted that a balance of $35,000 remained owing on the deposit, and ordered its remittance within 15 days. Respondents have not yet complied.

[13]Claimant was requested by the Interim Award to notify the Tribunal of its intentions, and was reassured, since to make the modern warehouse portion available would require termination of the lease to a subtenant, that "it will be compensated . . . for the reasonable value of the use of such facility during the period required by the expert for performance of his work" out of Respondents' deposit.

[14]See infra note 45.

To date, Claimant has not notified the Tribunal that it will make its modern warehouse facility available to protect the goods and to permit the expert's work, although it advised the Tribunal 11 April 1985 that such facility would become vacant by 30 April 1985 due to the subtenant's notice to quit.

Claimant's Bankruptcy

By communication dated 21 May 1985, Claimant formally advised the Tribunal that, on or before 23 April 1985, it had filed a petition under Chapter 11 of the United States Bankruptcy Act. The communication further noted and requested as follows:

> [P]ursuant to the [U.][S.] [B]ankruptcy [A]ct, all proceedings are automatically stayed. [I]n any event, [B]ehring requests a 90 day postponement to allow the debtor-in-possession sufficient time to analyze proceedings pending at [T]he [H]ague.

Current Status of Case

To summarize, the Tribunal presently is faced with two preliminary issues. First, Respondents have requested interim measures of protection seeking the transfer of their goods from Behring's warehouse facility in Edison, New Jersey to a warehouse they have selected. Respondents also continue to seek to have the expert perform the tasks assigned to him by the Tribunal, namely to inventory and inspect the goods and to determine, to the extent possible, whether any deterioration or other damage to the goods occurred before or after 19 January 1981.

The second issue currently pending before the Tribunal is Claimant's challenge to the Tribunal's jurisdiction with respect to all claims and counterclaims filed.

The Tribunal must also analyze the effect, if any, of Claimant's bankruptcy petition on these proceedings and address its request for a 90 day "postponement."

II. BACKGROUND

As is evident from the foregoing section of this Interim and Interlocutory Award, the proceedings in this case have been complicated. To understand the procedural web in which this case has become entangled and to understand Claimant's paradoxical challenge to the Tribunal's jurisdiction over the Claim which Claimant itself filed, it is necessary to examine not only the proceedings before the Tribunal, as outlined above, but also the broader history of the case, involving parallel proceedings in United States courts and related events.[15]

Pursuant to contracts executed in 1975, Claimant had provided freight-forwarding services to IIAF and IACI, utilizing its warehouse in Edison, New Jersey. In early 1979, a dispute arose between the Parties, causing Claimant to file suit, on 28 February 1979, in the United States District Court for the District of New Jersey. In conjunction with such suit, Claimant obtained a $1.5 million prejudgment attachment authorization covering all of Respondents' property in its warehouse. Behring Int'l Inc. v. Imperial Iranian Air Force, 475 F. Supp. 383 and 396 (D.N.J. 1979) (two opinions). On 7 November 1979, just three days prior to the seizure of 52 American hostages in Iran, the Parties resolved their dispute by executing the

---

[15] To date, the dispute between the Parties has resulted in at least two decisions of the United States Court of Appeals for the Third Circuit and four written opinions of the United States District Court for the District of New Jersey, as well as this Interim and Interlocutory Award, two other Interim Awards and various Decisions by this Tribunal, notwithstanding the fact that the Parties ostensibly settled their dispute -- twice.

1979 Settlement Agreement and filing such agreement with the Court, which confirmed and incorporated the agreement in a consent order on 9 November 1979.

In pertinent part, that Agreement provided as follows:

> 1. I.R.I.A.F. will, within one week of the execution of this Agreement, deposit to [a] Trust Account $635,000.00, and the Trustees will draw a check payable to Behring for the $635,000.00 which I.A.C.I. has verified as being owed.
>
> * * *
>
> 3. Behring will consent to an order of the District Court removing temporary restraints which have been placed on I.R.I.A.F. and I.A.C.I. materials by previous order of that Court which order shall incorporate the terms of this Agreement by reference so that any party hereto may on short notice, seek the assistance of the Court (including contempt proceedings) in compelling specific performance of this Agreement.
>
> 4. Concurrent with the lifting of restraints, I.R.I.A.F. will put into the Trust Account at Broad Street National Bank of Trenton an additional $230,000.00 to secure the additional claims which Behring has against I.R.I.A.F., I.A.C.I. and the Iranian Navy until all the terms of the settlement have been satisfied.
>
> 5. Behring will furnish documentation, in accordance with past practice, to support its claims for expenses and line item charges against I.R.I.A.F., I.A.C.I. and the Iranian Navy in excess of $635,000.00 . . . . With respect to all such excess sums as to which there is not dispute over the adequacy of documentation, those sums shall be paid to Behring within 30 days after submission of the documentation . . . .
>
> 6. In the event of a dispute between the parties as to the adequacy of the documentation to be provided by Behring pursuant to Section 5 above, . . . that dispute shall be settled by arbitration . . . and the arbitrators' decision shall be binding and final.
>
> * * *
>
> 11. I.R.I.A.F. and I.A.C.I. will arrange for WRAMS, Inc. or other carrier(s) to remove the I.R.I.A.F., I.A.C.I. and Iranian Navy (if any) materials from the warehouse and transport them to

McGuire AFB for transshipment to Iran. Behring will cooperate with WRAMS personnel in having the materials removed by having the materials placed at the Edison warehouse loading docks.

* * *

14. Behring will, without charge, allow I.R.I.A.F. and I.A.C.I. materials to remain in the Edison warehouse until all such materials are removed for shipment to Iran. However, it is agreed that all materials will be removed from the Edison warehouse prior to December 15, 1979, and if said materials have not been removed from the Edison warehouse prior to December 15, 1979, Behring shall nevertheless receive all payments to which it is entitled under this Settlement Agreement unless such inability to remove them is caused or contributed to by the conduct of Behring. In no event will the materials in question be allowed to remain at the Edison warehouse beyond December 15, 1979.[16]

* * *

16. When all of the foregoing conditions of settlement have been either fulfilled, waived or otherwise satisfied . . . , I.R.I.A.F. and Behring will join in a request for a consent order directed to the District Court to order such sum to be paid to Behring out of the Trust Account as is necessary to complete payment of the amounts owed by I.R.I.A.F., I.A.C.I. and the Iranian Navy to Behring, plus $1,000,000 and any additional amount remaining in the Trust Account is to be returned to I.R.I.A.F., exclusive of interest which accrues after the execution of this Agreement on all sums to which Behring is entitled pursuant to the terms hereof, which accrued interest shall be paid to Behring.

17. Upon completion of all steps described above, with the exception of any dispute under paragraph 6, Behring and I.R.I.A.F. and I.A.C.I. will cause Civil Action No. 79-675, including all claims and counterclaims asserted or unasserted, against any party, to be dismissed with prejudice on the records of the Court.

18. The parties will execute and exchange

---

[16]This deadline was later extended to 15 January 1980 at an additional cost to Respondents of $3,000.

> releases releasing all claims and counterclaims of each of the parties (asserted or unasserted), arising out of or in connection with the subject matter or activities described in the pleadings in Civil Action No. 79-675 or the contracts between them. Said releases shall be executed by the appropriate officer of each of the parties.

The 1979 Settlement Agreement also contained, in paragraph 12, mutual indemnification clauses. Respondents IRIAF and IACI agreed to defend and indemnify Behring against all third party vendor claims relating to the release of the goods to IRIAF and IACI. Behring agreed to defend and indemnify IRIAF and IACI against subcontractor or third party claims relating to the performance of the freight forwarding agreements between the Parties.

Pursuant to the agreement, IRIAF apparently deposited funds sufficient to create a balance of at least $1,865,000 in the Trust Account.

One week after the execution of the 1979 Settlement Agreement, and only five days after its confirmation by the District Court, the President of the United States, on 14 November 1979, issued an Executive Order freezing all Iranian assets within the jurisdiction of the United States ("the freeze order").[17] Exec. Order No. 12,170, 44 Fed. Reg. 65,279. It is undisputed that the Executive Order and implementing regulations had the effect of blocking the funds in the Trust Account. The Parties disagree, however, on the precise effect the Executive Order and accompanying regulations had on Respondents' ability to remove the goods from Behring's warehouse as contemplated by paragraph 14 of the 1979 Settlement Agreement.

---

[17] The description of events involving United States courts and administrative agencies, included here solely as background information, is drawn from various United States court opinions. See Behring Int'l Inc. v. Imperial Iranian

(Footnote Continued)

Prior to the freeze order, Claimant had received $635,000 from the Trust Account, pursuant to paragraph 1 of the 1979 Settlement Agreement. After 14 November 1979, Claimant applied to the Treasury Department's Office of Foreign Assets Control ("OFAC") to unblock the Trust Account. In April 1980, OFAC issued a license authorizing the transfer of an additional $500,000, which transfer took place on 7 May 1980. A later request by Claimant for a second license to unblock the balance of the Trust Account was denied by OFAC.[18]

In August 1980, Claimant began invoicing Respondents for storage and maintenance charges incurred after the 1979 Settlement Agreement. The first set of these monthly invoices covers the period 15 January 1980 through 31 January 1981. In its invoices through 1980, Behring billed Respondents at the rate of $15,000 per month. The invoice for January 1981 is in the amount of $17,000.

Following the execution of the Algiers Accords on 19 January 1981,[19] which settled the hostage crisis and obligated the United States to unfreeze Iranian assets and

---

(Footnote Continued)
Air Force, 699 F.2d 657 (3d Cir. 1983); Behring Int'l, Inc. v. Imperial Iranian Air Force, No. 79-675, slip op. (D.N.J. 5 Nov. 1981) (hereinafter cited as "Behring, slip op.").

[18] A suit by Claimant in the United States District Court for the District of New Jersey for a declaratory judgment and mandamus ordering OFAC to unblock the account was unsuccessful. Behring Int'l, Inc. v. Miller, 504 F. Supp. 552 (D.N.J. 1980).

[19] The Declaration of the Government of the Democratic and Popular Republic of Algeria, reprinted in 20 Int'l Legal Mat'ls 224 (1981) (the "General Declaration") and the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, reprinted in 20 Int'l Legal Mat'ls 230 (1981) (the "Claims Settlement Declaration") are collectively referred to as the "Algiers Accords."

terminate certain litigation in United States courts against Iran in favor of adjudication by this Tribunal, OFAC reconsidered its prior decision and issued Claimant a second license, on 26 February 1981, authorizing the transfer of $847,432.47, the then balance of the Trust Account including accrued interest. Pursuant to an outstanding order of the District Court, dated 16 December 1979, Claimant received $503,000 of this amount.[20]

Later in 1981, Claimant attempted to compel specific performance of the 1979 Settlement Agreement by filing a motion in the District Court, seeking, in the words of that Court, inter alia, to

> (1) enforce the settlement agreement as to the transfer of the balance of the trust account, $373,386.61; (2) enforce the settlement agreement as to the removal of IRIAF's and IACI's property located in Behring's Edison warehouse or, alternatively, obtain an order in aid of litigant's rights because of the Iranian defendants' failure to remove the property . . . .

Behring, slip op. at 4. In an opinion filed on 5 November 1981, the District Court denied Claimant's motion in part and granted it in part. Id. at 1. With respect to Claimant's motion to order the transfer of the balance of the Trust Account, the District Court held that disputes as to amounts owing prior to 19 January 1981 had to be presented to this Tribunal under the terms of the Algiers Accords. Id. at 6. With respect to Claimant's motion seeking an order specifically enforcing paragraph 14 of the 1979 Settlement Agreement, obligating Respondents to remove the goods from Claimant's warehouse, the Court likewise held

---

[20] This amount, added to the $500,000 unblocked and transferred 7 May 1980, appears to represent (a) the $1,000,000 referred to in paragraph 16 of the 1979 Settlement Agreement and (b) the $3,000 consideration for extension of the deadline for taking delivery of the goods (see supra note 16).

that the claim must be filed with the Tribunal. Id. Finally, with respect to that portion of Claimant's motion relating to storage and maintenance charges accruing after 19 January 1981, the Court held that:

> The charge for storage after January 19, 1981, however, is a claim that arose subsequent to the date the Algerian Declarations were signed. Thus, this claim need not be presented to the Tribunal and is not suspended by Executive Order 12294. This court has jurisdiction to decide this issue and finds that Behring is entitled to the cost of storing and maintaining defendants' property from January 20, 1981 to the present. Behring has certified this cost as being $17,000 per month until June 30, 1981 and $23,000 per month thereafter.

Id. at 6-7.

By Order dated 30 December 1981, the District Court awarded Claimant the sum of $228,670 from the Trust Account, which amount represented Claimant's certified storage and maintenance charges for the period 20 January 1981 to 31 December 1981. Claimant promptly withdrew these funds. The Order further specified that Behring was entitled to be paid for storage and maintenance charges accruing after 31 December 1981 from the Trust Account at the rate of $23,000 per month. Apparently, the Trust Account has been virtually, if not completely, depleted for the satifaction of these charges.

It is against this background that Claimant filed its Statement of Claim with the Tribunal. The claim as originally filed comprised two main elements. First, it sought the sum of $392,798.17, plus interest, which amount allegedly represented the balance of monies originally due under the terms of the 1979 Settlement Agreement.[21] Second,

---

[21]Apparently, this claim represented the balance of the Trust Account on or about the date the Claim was filed, increased by amounts withdrawn from it pursuant to the (Footnote Continued)

Claimant sought compensation for storage and maintenance charges incurred in warehousing Respondents' goods over the period 15 January 1980 through 19 January 1981. Specifically, it claimed $183,645.20, representing storage and maintenance charges actually invoiced to Respondents, and $248,584.80, representing the purported difference between Claimant's invoiced charges and its actual costs. Claimant's claims thus relate only to storage and maintenance costs incurred prior to 19 January 1981, presumably because a United States District Court had exercised jurisdiction in respect of charges accruing after that date, and had awarded payments thereof from the Trust Account.[22]

Concurrently, Claimant continued to seek payment of both pre- and post-19 January 1981 charges through United States courts and through the exercise of its asserted possessory warehouseman's lien on Respondents' property. Claimant appealed that aspect of the District Court's judgment referring to this Tribunal a portion of its claim pending there. As analyzed by the United States Court of Appeals for the Third Circuit, Claimant presented a threefold argument in support of its contention that the

---

(Footnote Continued)
District Court's order in respect of post-19 January 1981 storage and maintenance charges, since such amounts were paid from the Account pursuant to an attachment and not as of right under the 1979 Settlement Agreement. Essentially, this first element of Claimant's demands appears to comprise the $230,000 deposited pursuant to paragraph 4 of the 1979 Settlement Agreement, plus accrued interest.

[22]In its Statement of Claim, Claimant nonetheless reserved the right to amend its claim to cover such charges:

> In the event of a reversal of the District Court ruling on appeal, or any other circumstances which defeat Behring's recovery of these monies, Behring may prosecute its post-January 19, 1981 claims which at this time total approximately $230,000. Behring does not waive its rights in this regard.

Statement of Claim note 1 at 8.

provisions of the Claims Settlement Declaration vesting jurisdiction in the Tribunal over claims arising on or before 19 January 1981 did not apply to Claimant. Claimant urged

> (1) that its demand for payment was not a claim outstanding as of January 19, 1981; (2) that the choice of forum clause in the original contract vitiated the effect of the [Claims Settlement] Declaration and Executive Order; and (3) that Behring falls within a special exception for warehousemen.

Behring Int'l, Inc. v. Imperial Iranian Air Force, 699 F.2d 657, 661 (3d Cir. 1983). The Court of Appeals rejected each of these contentions and affirmed the ruling of the District Court, though it used different reasonin[23]

After apparently depleting the Trust Account, Claimant, on 16 November 1982, applied to OFAC for a license authorizing the sale of all or part of Respondents' property. See 31 C.F.R. § 535.540 (47 Fed. Reg. 31,682, 22 July 1982). Claimant, on 28 February 1983, provided the United States with an agreement indemnifying the United States in the event that this Tribunal should hold the United States liable to Iran for damages attributable to the issuance of such a license and OFAC issued a license (No. IR-1568), on 23 May 1983, authorizing Claimant to conduct a public sale on 15 August 1983. As noted in the preceding section, Claimant filed a notice of such sale with the Tribunal only on 7 July 1983. The purpose of the sale was to satisfy a

---

[23]The appellate court held Behring's claims to be barred "not by a withdrawal of jurisdiction . . . but by a change in substantive law." Behring Int'l, Inc. v. Imperial Iranian Air Force, 699 F.2d 657, 666 (3d Cir. 1983).

The Tribunal also notes that Respondents appealed that portion of the District Court's decision authorizing Behring to draw on the Trust Account to satisfy its claim for storage charges accruing after 19 January 1981. The Third Circuit, however, did not reach the merits of Respondents' contention because their appeal had not been timely filed. Id. at 661.

warehouseman's lien Claimant alleges to exist under New Jersey law, in the amount of unpaid storage, maintenance and other charges accrued over the period 15 January 1980 through 20 June 1983.

After attempting unsuccessfully to block such sale through United States court proceedings, and apparently convinced that Claimant would not comply with the Tribunal's Interim Award of 10 August 1983, Respondents entered into the 1983 Agreement with Claimant to forestall such sale. Its terms are as follows:

MEMORANDUM OF AGREEMENT

This memorandum incorporates the essential terms of an agreement reached between Behring International, Inc. ("Behring") and the Islamic Republic of Iran (representing all of its subordinate agencies and instrumentalities) ("Iran"). The parties agree to execute a final settlement agreement promptly after 12 p.m., August 17, 1983, incorporating the terms of this agreement and including a final settlement between them, as provided for hereinafter.

A. Behring assumes the following obligations:

1. To cancel the sale of Iran's property located at its Edison, N.J., warehouse ("the stored property"), scheduled for August 15, 1983;

2. To relinquish and waive its possessory lien under N.J.S.A. 12A:7206, 7209, for any storage charges up to and including September 15, 1983, related to the stored property;

3. To use its best efforts to facilitate the removal by Iran of the stored property from its Edison, N.J., warehouse and to permit Iran to consolidate and palletize the stored property for purposes of removing it from Behring's loading dock during normal business hours;

4. To provide reasonable access to representatives of Iran to inspect the stored property and to turn over to Iran at the Edison, N.J., warehouse all existing records, inventories

and other documents generated in connection with the transportation and storage of the stored property;

5. To provide to Iran a copy of the U.S. Treasury license permitting removal of the stored property to another warehouse in the United States.

B. Iran assumes the following obligations:

1. To pay to Behring the sum of $675,000 by 10:30 a.m., August 15 1983, by certified or cashiers check or by wire transfer to an account designated by Behring.

2. To pay simultaneously into an interest-bearing trust account maintained by Kaplan Russin & Vecchi an amount of $125,000, which payment shall also be made by certified or cashier's check or by wire transfer and verified to Behring by Kaplan Russin & Vecchi.

3. To remove all of its stored property from Behring's Edison, N.J., warehouse not later than September 15, 1983. Upon failure to remove the stored property by that date, Iran shall pay by the first day of each month thereafter, all actual costs incident to the maintenance and warehousing of the stored property after September 15, 1983, which costs shall not exceed $23,000 per month.

4. Not later than 12:00 noon, Wednesday, August 17, 1983, Iran shall advise Behring in writing whether the settlement agreed to herein comprises a total settlement of all claims and counterclaims between Iran and Behring, or whether Claim No. 382 pending before the Iran-United States Claims Tribunal is excluded from this settlement.

In the event that the aforementioned Claim No. 382 is not included in the settlement, the amount of $125,000 deposited in the Kaplan Russin & Vecchi trust account shall immediately be paid to Behring and nothing contained in this memorandum of agreement shall affect the rights of the parties in Claim No. 382, supra.

5. The Agreement memorialized herein is solely for the benefit of the parties hereto and does not affect the rights of Iran against the United States of America under the Algiers Accords of January 19, 1981.

> Behring and Iran agree to maintain this Memorandum of Agreement and the follow-on agreement confidential, and not to disclose the terms thereof except as may be required by law or in the course of legal proceedings.[24]

Pursuant to Paragraph B(4) of the Agreement, Iran later advised Claimant that it would not opt for a global settlement; thus, the claims and counterclaims pending here were not settled or compromised by the 1983 Agreement. This fact is memorialized in the follow-on agreement, executed by the Parties in September 1983.

After executing the 1983 Agreement, Respondents assert that they began attempts to contract with another warehouseman to remove the goods from Claimant's warehouse and store them in a new facility and to obtain a Treasury license authorizing such transfer. It was at this stage that Respondents, on 15 September 1983, petitioned the Tribunal for the appointment of an expert to inventory and examine the goods in Claimant's warehouse prior to their removal so as to protect the rights of the Parties with respect to the claims and counterclaims filed here. See supra at 7.

According to Respondents, they made final arrangements to remove the goods in late June 1984. On 20 June 1984, Respondents allegedly entered into a long term contract with a new warehouse facility, Victory Vans Corporation, for the transport and storage of Respondents' property at a modern warehouse facility located in Virginia. On 26 June 1984, the United States Treasury Department allegedly issued a license authorizing the transfer of Respondents' property from the Behring facility in New Jersey to the Victory Vans facility in Virginia. Perhaps predictably, a dispute arose

---

[24] Since the Parties on both sides have filed copies of this Agreement with the Tribunal and none have requested confidentiality, the Tribunal sees no reason to accord it such treatment.

between the Parties as to the terms and conditions of the transfer and the transfer never took place.

Pursuant to paragraph B(3) of the 1983 Agreement, Claimant, beginning on 22 February 1984, has invoiced Respondents for post-15 September 1983 warehousing costs. Respondents have paid these invoices in part and have disputed them in part. The invoices have included itemized charges for (1) rent, (2) security services, (3) legal fees, (4) utilities, and (5) management fees. Respondents have apparently paid the charges for rent and utilities, while disputing their obligation to pay the remaining charges. According to Respondents, for the period September 1983-June 1984 the amount in dispute aggregated $99,196.67. With respect to subsequent months, Claimant, at the meeting of the Parties of 12 February 1985, provided the Tribunal with copies of invoices for the period May through November 1984. The invoices for July through November total $100,852.08. The Parties have not provided the Tribunal with information as to amounts paid on these invoices, or whether later invoices were sent and paid.

III. REASONS FOR AWARD

A. Effect of Claimant's Bankruptcy Petition

Claimant's most recent submission, informing the Tribunal of its bankruptcy petition, raises issues addressed appropriately at the outset of this Award. The communication notes, without elaboration, that "all proceedings" are automatically stayed pursuant to the United States Bankruptcy Act and "in any event" Claimant requests a 90 day postponement of proceedings here. It is not clear whether or not Claimant is contending that the United States Bankruptcy Act requires the Tribunal to stay its proceedings. It is also not clear exactly of what Claimant is requesting postponement, as no filing or other deadlines are presently outstanding.

To the extent Claimant is asserting that Tribunal proceedings are required to be stayed by operation of United States municipal law, we disagree. To the extent Claimant is requesting a blanket stay of proceedings, the Tribunal denies such request, although it will consider Claimant's circumstances in scheduling further proceedings and in the context of specific extension requests filed after the issuance of further scheduling orders.

Irrespective of the provisions of the United States Bankruptcy Act, neither the Algiers Accords nor the Tribunal Rules anywhere contemplate that proceedings here can in any way be regulated by the municipal law of either the United States or Iran. Indeed, the very purpose of establishing the Tribunal was to remove certain claims from the jurisdiction of the courts of the States Parties to this international forum. Plainly, permitting United States law to continue to regulate proceedings with respect to claims filed here and otherwise within our jurisdiction would contravene such intent.

Moreover, the Tribunal observes, but does not decide, that the automatic stay provision of the United States bankruptcy statute, 11 U.S.C.A. § 362 (West Supp. 1985), does not purport to stay proceedings commenced by, as opposed to against, the debtor. Such stay also appears not to extend extraterritorially, as a matter of United States law, to foreign arbitral proceedings, at least those involving a foreign party lacking minimum current contacts with the United States. In Fotochrome, Inc. v. Copal Co., Ltd., 517 F.2d 512, 516 (2d Cir. 1975) (applying Bankruptcy Act of 1938), the United States Court of Appeals for the Second Circuit held that a bankruptcy court's order could not operate to stay arbitral proceedings pending in Japan, commenced by a Japanese corporation against the debtor in bankruptcy, where the bankruptcy court lacked personal

jurisdiction over the Japanese corporation.[25] The Court also held that the resulting arbitration award was recognizable and enforceable, subject to confirmation as such by a United States court pursuant to the provisions of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards[26] without review of the underlying claim by the bankruptcy court. It seems all the more unlikely that a United States court would venture to interfere directly with an arbitral proceeding before an international tribunal established with the agreement of the United States Government.

As to Claimant's request for a postponement, the Tribunal notes that no filings are presently scheduled, and the Parties are awaiting this Interim and Interlocutory Award. The Tribunal determines that it is inappropriate to delay the issuance of an Award because of a party's bankruptcy, which bankruptcy can have no direct effect on the matters under consideration.

B. Jurisdiction

1. Jurisdiction Over the Claim

This case is unique among Tribunal cases for here the Tribunal's jurisdiction over the Claim is contested by Claimant, not Respondents. As originally stated, the Claim includes claims for (1) amounts allegedly owed under the

---

[25] See also Westbrook, The Coming Encounter: International Arbitration and Bankruptcy, 67 Minn. L. Rev. 595, 599 (1983) ("Foreign arbitration proceedings are not subject to the automatic stay of the bankruptcy court unless the foreign party to the proceeding has sufficient contacts with the United States to subject it to in personam jurisdiction in the United States").

[26] Opened for signature 10 June 1958, 21 U.S.T. 2517, T.I.A.S. 6997, 330 U.N.T.S. 35, implemented in the United States by 9 U.S.C. §201 et seq.

1979 Settlement Agreement;[27] (2) amounts representing the actual costs of maintaining and storing Repondents' property during the period 15 January 1980 through 19 January 1981; (3) interest on the above; (4) attorney's fees and costs; and (5) punitive damages. As noted above, Claimant also has notified the Tribunal of a contingent claim for post-19 January 1981 storage and maintenance charges in the event its recovery of such monies through the United States courts is defeated. In addition, Claimant, throughout its pleadings, requests specific performance of the 1979 Settlement Agreement. Although the 1983 Agreement and follow-up agreement expressly state that they do not affect claims and counterclaims pending here, Claimant contends that only its claims (1), (4) and (5) above survive. See Claimant's submission of 7 October 1983 at 3.[28]

(a) Contentions of the Parties

In support of its contention that the Tribunal lacks jurisdiction over its claim, Claimant first argues that the choice of forum provisions contained in the 1979 Settlement Agreement deprive the Tribunal of jurisdiction. Specifically, Claimant refers to Paragraphs 3 and 6 of the Settlement Agreement. See supra at 17. Claimant argues that it contracted for and obtained the right to sue for specific performance in the United States courts and that the Tribunal therefore lacks jurisdiction over the claim, as well as over all counterclaims.

---

[27] See supra note 21 and accompanying text.

[28] Claimant represented that payment to it of $800,000 under the 1983 Agreement produced "virtually all of the relief" it had sought. Its claims (1), (4) and (5) comprise claims for $392,798.17 under the 1979 Settlement Agreement, plus various attorney's fees, costs, interest and punitive damages. See supra at 22.

Claimant also argues that the Tribunal lacks jurisdiction because no claim was outstanding on or before 19 January 1981, as required by the Claims Settlement Declaration. In its submission of 30 July 1984, at 3, Claimant argues that

> both Behring's and Iran's claims for specific performance were extinguished and the Tribunal's jurisdiction defeated with the execution of the November 7, 1979 Settlement Agreement . . . and the execution of a consent order on November 9, 1979 whereby both Iran and Behring agreed . . . that the United States District Court for the District of New Jersey would retain jurisdiction.

Counsel for Claimant reiterated these arguments before the Tribunal at the 12 February 1985 meeting of the Parties.

In its 2 April 1985 final submission on jurisdiction, Claimant presents several new jurisdictional contentions. First, Claimant argues that it never consented to arbitration before the Tribunal nor has it ever invoked the Tribunal's jurisdiction. Second, Claimant argues that the Third Circuit Court of Appeals never decided that the Tribunal had jurisdiction; rather, the court only made a preliminary finding that there were some facts upon which the Tribunal "might" find that the case is within its jurisdiction. Third, Claimant argues that the Tribunal cannot take jurisdiction based merely upon a showing of the possibility of jurisdiction but that there must be a certainty of jurisdiction before the case can be adjudicated here. Finally, Claimant argues that the Tribunal is an inconvenient forum.

In addition to these arguments, the Tribunal takes note of the arguments advanced by Claimant before both the United States District Court for the District of New Jersey and the United States Court of Appeals for the Third Circuit in support of its position before such courts that the Tribunal lacks jurisdiction, even though such arguments were not pressed here.

Respondents do not contest the Tribunal's jurisdiction to adjudicate the Claim and argue that the Tribunal has jurisdiction with respect to all aspects of the claims and counterclaims.

(b) Decision

Article II(1) of the Claims Settlement Declaration defines the Tribunal's jurisdiction as follows:

> An international arbitral tribunal (the Iran-United States Claims Tribunal) is hereby established for the purpose of deciding claims of nationals of the United States against Iran and claims of nationals of Iran against the United States, and any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim, if such claims and counterclaims are outstanding on the date of this Agreement [19 January 1981], whether or not filed with any court, and arise out of debts, contracts (including transactions which are the subject of letters of credit or bank guarantees), expropriations or other measures affecting property rights . . . and excluding claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts, in response to the Majlis position.

The Agreement defines "claims of nationals" of the United States as "claims owned continuously, from the date on which the claim arose to the date on which this Agreement enters into force, by nationals of that state . . . ." Article VII(2). As relevant here, a "national" of the United States is defined as

> a corporation or other legal entity which is organized under the laws of . . . the United States or any of its states or territories, the District of Columbia or the Commonwealth of Puerto Rico, if, collectively, natural persons who are citizens of such country hold, directly or indirectly, an interest in such corporation or entity equivalent to 50 per cent or more of its capital stock.

Article VII(1)(b).

(1) Nationality

Claimant has asserted, and Respondents have not contested, that it is a national of the United States within the terms of the Claims Settlement Declaration. In the caption to its Statement of Claim, Claimant notes that it is a Texas corporation. In view of the lack of a challenge from Claimant or Respondents as to the veracity of this assertion, and the absence of any contention by any Party that Claimant is not in fact at least 50 percent owned by United States natural persons, the Tribunal concludes that Claimant is a national of the United States within the meaning of Article VII(1)(b) of the Claims Settlement Declaration.

With respect to the continuous nationality requirement embodied in Article VII(2), no Party contests jurisdiction on this ground. The Tribunal finds that Claimant has owned the claims it asserts at all relevant times. (See also (2) below.)

(2) Subject Matter Jurisdiction

The Tribunal also rules that it has jurisdiction over the Claim as presented. All of the claims are based on the 1979 Settlement Agreement and seek relief based on alleged breaches of that Agreement. The jurisdictional requirement in Article II(1) of the Claims Settlement Declaration that the claim arise out of "debts, contracts . . . expropriations or other measures affecting property rights" is thus satisfied. (Emphasis added.)

The Claims Settlement Declaration also requires that claims filed here must have been outstanding as of 19 January 1981. In this connection, Claimant first argued before United States courts that its suit there for specific performance of the 1979 Settlement Agreement did not constitute an outstanding claim within the meaning of the

Claims Settlement Declaration required to be brought here because (1) its request for specific performance was equitable in nature and (2) the claim had been "perfected" and there was no genuine dispute as to the amount owed. Behring Int'l, Inc. v. Imperial Iranian Air Force, 699 F.2d 657, 661-62 (3d Cir. 1983). As noted, Claimant, in pleadings filed here, also argues that the Claim was not outstanding on the required date because it was "extinguished" by the 1979 Settlement Agreement.

The Tribunal determines these arguments to be without merit in the context of the claims filed here. Claimant's characterization of its claim before the United States courts as equitable in nature, presumably based upon the argument that it there sought specific performance of the 1979 Settlement Agreement, is inapposite here as the prayer for relief seeks only money damages. In any case, whether Claimant chooses to characterize its Claim as one in equity or in law, such characterization has no jurisdictional significance under the Algiers Accords. General Principle B of the General Declaration provides:

> It is the purpose of both parties, within the framework and pursuant to the . . . [General Declaration and Claims Settlement Declaration] to terminate all litigation as between the Government of each party and the nationals of the other, and to bring about the settlement and termination of all such claims through binding arbitration. Through the procedures provided in the . . . [Claims Settlement Declaration], the United States agrees to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration. (Emphasis added.)

The United States thereby obligated itself to terminate all proceedings in United States courts involving claims, jurisdiction over which was conferred upon the Tribunal in the Claims Settlement Declaration. Because the United

States obligation to terminate all "legal" proceedings was expressly intended to relate to "all litigation," without any distinction between those of a legal as opposed to equitable nature, the Tribunal finds no basis for excluding claims in equity from its jurisdiction.[29]

Similarly, neither the General Declaration nor the Claims Settlement Declaration offers a basis for distinguishing between "perfected" and "unperfected" claims. Moreover, we fail to see how Claimant's Claim has been "perfected." Those portions of the 1979 Settlement Agreement relating to the claims do not specify precise amounts owing to Claimant; thus, neither the claim for the balance of the Trust Account, the claim for additional storage and maintenance charges, nor any of the remaining claims has been liquidated, much less perfected.

As to Claimant's contention before the United States courts that there is no dispute as to amounts owed under the 1979 Settlement Agreement, the Tribunal simply notes that Respondents, in their Statement of Defense, have challenged Claimant's entitlement to all amounts claimed. Thus, a dispute arising prior to 19 January 1981 now exists, irrespective of whether Respondents took formal actions to notify Claimant of such dispute, either by objecting to documentation or noticing arbitration, as contemplated in the 1979 Settlement Agreement.

For analogous reasons, the Tribunal rejects Claimant's argument that the 1979 Settlement Agreement "extinguished"

---

[29] The Tribunal observes that the United States, pursuant to Executive Order 12,294 (24 Feb. 1981), suspended United States litigation of "All claims which may be presented to the Iran-United States Claims Tribunal . . . and all claims for equitable or other relief in connection with such claims . . . ." (Emphasis added.) See also 31 C.F.R. § 535.222(a), 46 Fed. Reg. 14,335 (1981).

all claims. That Agreement purports to have extinguished, and can only have extinguished, preexisting claims and counterclaims, i.e., those relating to the 1975 freight forwarding contract, as raised in Claimant's 1979 United States lawsuit. Even if that Agreement had resolved on its face all the issues presented by the claim asserted here -- which, as we have already determined, it did not -- Respondents' alleged failures to comply with the Agreement constitute breaches of contract, each giving rise to a claim. The Statement of Claim alleges such breaches, all of which occurred prior to 19 January 1981. Consequently, they constitute claims outstanding on that date and within the jurisdiction of this Tribunal.

Claimant's next jurisdictional argument, concerning the choice of forum provisions in the 1979 Settlement Agreement, like its equity exclusion argument, has no foundation within the Claims Settlement Declaration. The fact that the Parties agreed in the 1979 Settlement Agreement to arbitrate certain disputes and to submit to the jurisdiction of the United States District Court for the District of New Jersey for purposes of ordering specific performance of that agreement is simply irrelevant to the jurisdictional considerations mandated by the Claims Settlement Declaration. Claims otherwise within the jurisdiction of the Tribunal are, under the terms of the Claims Settlement Declaration, excluded only if they arise "under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts, in response to the Majlis position." Article II(1).[30] The Agreement contains no parallel exclusion for choice of forum clauses specifying a

---

[30] A second exclusion, not relevant here, excludes claims related to the seizure of the 52 United States nationals on 4 November 1979. See Paragraph 11, General Declaration.

particular form of arbitration, United States courts or other fora. Construing Article II(1) in accordance with the expressio unius est exclusio alterius canon of construction, the Tribunal, like the Third Circuit Court of Appeals, concludes that the choice of forum clauses at issue here do not divest the Tribunal of jurisdiction. The Tribunal also notes that nothing in the Algiers Accords expressly or impliedly carves out an exception from the Tribunal's jurisdiction for warehousemen or others holding Iranian property subject to possessory liens. Accordingly, the Tribunal rejects Claimant's arguments to the contrary.

With respect to Claimant's most recent jurisdictional arguments, the Tribunal finds such contentions also to be irrelevant to the jurisdictional considerations mandated by the Claims Settlement Declaration. The Tribunal fails to comprehend Claimant's contention that it has neither invoked nor consented to the Tribunal's jurisdiction. Unlike its more recent submissions, Claimant's Statement of Claim contains no reference whatsoever to its now professed "protective" nature. Claimant's first suggestion that its Statement of Claim has a "protective" character appears in its 7 October 1983 submission, which, coincidentally, was filed after execution of the 1983 Agreement under which Claimant received, apparently, a large portion of the relief it seeks here. The indisputable fact remains that Claimant invoked the jurisdiction of the Tribunal by filing a Statement of Claim here and, under the Claims Settlement Declaration and Tribunal Rules, Respondents were thus entitled to file certain counterclaims. While Claimant remains free to withdraw any and all of its claims for relief, such withdrawal can have no effect on the Tribunal's jurisdiction over the counterclaims, unless the Tribunal were to determine that it had no jurisdiction over the claims as originally filed. To date, the claims have not been withdrawn and in any event the Tribunal finds no basis for holding that they do not fall within the scope of its jurisdictional grant.

Claimant's arguments directed at whether the Third Circuit Court of Appeals did or did not conclude that the Tribunal had jurisdiction likewise are irrelevant. Only the Tribunal has jurisdiction to determine its jurisdiction as a final matter and the findings of other tribunals are not binding upon us. Furthermore, the Tribunal's jurisdiction over claims by United States nationals against Iran is exclusive vis-a-vis the courts of Iran and the United States;[31] therefore, a decision by the Tribunal will prevail over any contrary decision of United States or Iranian courts.[32] In this case, moreover, this Tribunal's assumption of jurisdiction over the claims is in accord, and not in conflict, with the decision of the United States courts.

The Tribunal need not address Claimant's contention that there must be a certainty of jurisdiction rather than the mere possibility of jurisdiction before a case can be adjudicated here. The Tribunal's determinations above constitute a conclusive and certain adjudication of its jurisdiction.

---

[31]Article VII(2) of the Claims Settlement Declaration provides: "Claims referred to the arbitration Tribunal shall, as of the date of filing of such claims with the Tribunal, be considered excluded from the jurisdiction of the courts of Iran, or of the United States, or of any other court." See also Sec. 1, Exec. Order 12,294 (24 Feb. 1981) pursuant to which the United States suspended "All claims which may be presented to the . . . Tribunal . . . except as they may be presented to the Tribunal."

[32]Article IV of the Claims Settlement Declaration provides that "[a]ll decisions and awards of the Tribunal shall be final and binding." See also Article 32(2) of Tribunal Rules; E-Systems, Inc. and Government of Islamic Republic of Iran, Interim Award No. 13-388-FT at 10 (4 Feb. 1983), 2 Iran-U.S. C.T.R. 51, 57 ("[T]he award to be rendered in this case by the Tribunal, which was established by inter-governmental agreement, will prevail over any decisions inconsistent with it rendered by Iranian or United States courts . . . .").

Finally, Claimant's forum non conveniens argument, like most of its other jurisdictional arguments, raises objections beyond the ambit of the jurisdictional considerations set forth in the Claims Settlement Declaration. The Tribunal recognizes that proceedings in The Hague may be less convenient to some of the parties before it than would be their accustomed municipal forum. However, the Tribunal's jurisdiction over claims, as conferred by the States Parties, is exclusive; hence, it has no power to order any party to seek a more convenient forum.

In conclusion, the Tribunal holds that it has jurisdiction over all of the elements of the Claim set forth in Claimant's Statement of Claim.

2. Jurisdiction over the Counterclaim

(a) Description of Counterclaim

In their Statement of Defense and Statement of Counterclaim Respondents set forth three counterclaims. First, Respondents alleged that in breach of the 1979 Settlement Agreement Claimant (1) failed to pay the outstanding bills of Iranian Islamic Republic Shipping Lines ("IRSL"), formerly Arya National Shipping Lines, and (2) refused to remove temporary restraints and to cooperate in enabling Respondents to inventory and remove their goods, resulting in deterioration damages and missing goods. In connection with this counterclaim, Respondents sought nullification of a $1.5 million attachment order allegedly outstanding on its goods, specific performance of the 1979 Settlement Agreement so as to enable MOD to take delivery of IACI and IRIAF property in Claimant's warehouse, and restitution or damages for missing and/or damaged goods.

Second, Respondents alleged that Claimant unjustifiably collected funds totalling $392,798.17 paid by Respondents into the Trust Account referred to in the 1979 Settlement

Agreement. Claimant had collected such funds through proceedings before the United States District Court for the District of New Jersey. See supra at 22. Respondents allege that any claim of Claimant to such funds was within the Tribunal's exclusive jurisdiction and thus the District Court lacked jurisdiction to adjudicate the matter. Respondents further allege that the funds in the Account were wrongfully used for purposes other than those specified in the 1979 Settlement Agreement.

Third, Respondents claimed attorney's fees incurred in defending themselves in United States courts against Claimant's efforts to advance claims purportedly within the exclusive jurisdiction of the Tribunal. Such efforts included Claimant's 1981 attempt to obtain specific performance of the 1979 Settlement Agreement and its alleged repeated efforts to notice a sale of Respondents' goods. Respondents also seek attorney's fees in connection with presenting their case before the Tribunal.

Respondents supplemented these counterclaims in their 18 April 1983 Supplement to the Statement of Defense and Statement of Counterclaim. This submission contained a "supplemental" counterclaim alleging that Claimant failed to deliver an artificial kidney ordered in 1978 by the Health Department of the Ministry of Defense and delivered to Claimant for transshipment to Iran. This counterclaim seeks an award compelling Claimant to deliver the relevant materials or, in the alternative, ordering Claimant to pay the value of the merchandise, $7,626.17, with interest.

(b) General Objections

Claimant has filed jurisdictional challenges to the counterclaims as a whole as well as specific challenges to individual counterclaims. Claimant's general challenges may be summarized as follows. First, Claimant alleges that Respondents' counterclaims were not outstanding on 19 January 1981 because they had been extinguished prior to that date by the 1979 Settlement Agreement. Second, Claimant argues that the counterclaims are improper because the Government of Iran seeks parallel relief against the Government of the United States in other cases pending before the Tribunal. Third, Claimant contends that the counterclaims do not arise out of the same contract, transaction or occurrence that constitutes the subject matter of its Claim, as required by Article II(1) of the Claims Settlement Declaration. In this connection, Claimant argues that the counterclaims do not allege any material failure on Claimant's part to perform the 1979 Settlement Agreement, which Agreement is the only contract sued upon by Claimant before the Tribunal. Fourth, and in the alternative, Claimant argues that it cannot be liable to Respondents as a matter of law and therefore seeks dismissal of the counterclaims for failure to state a claim upon which relief can be granted.

The Tribunal addresses these general contentions prior to examining the jurisdictional objections directed to individual counterclaims.

Claimant's contention that Respondents' counterclaims were not outstanding on 19 January 1981 because they had been extinguished by the 1979 Settlement Agreement is identical to its contention that its Claim was not outstanding on that date and must be rejected for the same reasons. Respondent's first and second counterclaims allege breaches of the 1979 Settlement Agreement and thus could not have been extinguished by such Agreement.

With respect to Claimant's contention that Respondents' counterclaims do not arise out of the subject matter of Claimants' claim, the Tribunal accepts Claimant's contention in part and rejects it in part. The Claim, as specified by Claimant and as determined by the Tribunal, arises out of the 1979 Settlement Agreement. Respondents' first counterclaim, alleging two breaches of the express terms of the 1979 Settlement Agreement, clearly arises out of the same contract and is thus within the Tribunal's jurisdiction. Respondents' second counterclaim, contesting collections by Claimant from the Trust Account of sums deposited pursuant to the 1979 Settlement Agreement, necessarily also arises out of the "same contract, transaction or occurrence that constitutes the subject matter" of the claim asserted under the 1979 Settlement Agreement.

Respondents' third counterclaim, however, seeking attorney's fees incurred in connection with litigation in United States courts, cannot be said to arise out of the "same contract, transaction or occurrence" as Claimant's claims under the 1979 Settlement Agreement and thus must be dismissed. For a counterclaim to "arise out of" a contract, it must allege a breach of an obligation created by that contract. No such breach is alleged here. The 1979 Settlement Agreement, far from prohibiting litigation in United States courts, specifically contemplated that the Parties could petition the United States District Court for the District of New Jersey for specific performance of the Agreement, and the District Court expressly retained jurisdiction over the agreement for such purpose.

The "supplemental" counterclaim, relating to the artificial kidney, does not differ substantively from Respondents' first counterclaim, alleging a failure to enable Respondents to remove their goods, and, in effect, constitutes nothing more than a specific counterclaim

subsumed within that more general counterclaim.[33] Having determined that the general counterclaim arises out of the same subject matter of the Claim, the Tribunal necessarily concludes likewise with respect to this more detailed specification of counterclaim.

Claimant's next objection to the counterclaims, on the grounds that the Government of Iran is seeking relief parallel to that sought here against the United States in other cases pending here, does not withstand scrutiny. Claimant cites claims A11, A15, B11, B62 and B67 as "claims involving Iran's rights against the United States for the same claims or damages it advances in parallel fashion against Behring in the instant proceedings." Submission of 30 July 1984 at 52. Both of the "A" cases cited by Claimant involve disputes concerning obligations of the United States, under the General Declaration, to transfer certain Iranian assets to Iran and to terminate litigation in U.S. courts.[34] The obligations of the United States and Iran under the General Declaration are distinct from and independent of the obligations of Respondents and Behring under the 1979 Settlement Agreement. While one of these claims may, in part, involve related facts, [35] it does not

---

[33]Because the supplemental counterclaim merely clarifies and details a timely filed counterclaim, it was not required to have been filed with the Statement of Defense.

[34]In Case A11, Iran contends that the United States violated its obligations under Point IV of the General Declaration by failing to freeze and provide reports on alleged assets belonging to the Shah and located in the United States. Case A15 is an omnibus claim by Iran alleging a variety of breaches of the General Declaration by the United States including failures to transfer certain financial and non-financial assets and to act appropriately with respect to litigation involving Iran in United States courts.

[35]In Case A15, Part II, Iran contends that the United
(Footnote Continued)

necessarily follow that such claims are duplicative or that their separate maintenance prejudices the rights of any of the Parties involved. The Tribunal finds Claimant's objections in this regard not to be sustainable.

Similarly, none of the "B" cases cited by Claimant is duplicative of any counterclaim in the instant case. Neither Case B11 nor Case B62 involves either Claimant or the goods in its warehouse and Case B67 is no longer pending, having been finalized as an Award on Agreed Terms.[36]

Claimant's remaining general challenge to the counterclaims is not jurisdictional and therefore is not appropriate for consideration at this stage of the proceedings. Claimant's application to dismiss the counterclaims for failure to state a claim upon which relief can be granted, apart from having no basis in the Tribunal Rules, would require the Tribunal to reach the merits of the dispute. For example, Claimant argues that it cannot be responsible for deterioration claims advanced by Respondents because its status with respect to Respondents' property after January 1980 was that of a gratuitous bailee having no duty of care, but rather only liability for gross negligence

---

(Footnote Continued)
States breached its obligations under the General Declaration by failing to transfer to Iran certain non-financial assets including Respondents' goods held in Claimant's warehouse. The claim requests, inter alia, the transfer of the goods, an award of damages covering depreciation and deterioration of all non-transferred property, and an award of damages equal to all storage charges incurred with respect to such property after 19 January 1981. That claim is related to the claim pending here only in the sense that the same physical property is involved in both cases. The claims are not duplicative because they seek relief from different parties arising out of different obligations.

[36] Ministry of Roads and Transportation and Port of Vancouver, Washington, Award No. 79-B-67-2 (12 Sept. 1983).

or bad faith. It would be inappropriate for the Tribunal to decide the merits of this contention without evidence and argument as to, inter alia, the nature of the deterioration damage, if any, and the nature of the relationship between the Parties at all relevant times. Accordingly, Claimant's contention that it cannot be liable to Iran as a matter of law is to be decided by the Tribunal in its final award on the merits.

(c) Individual Objections to Counterclaims

In addition to challenging the Tribunal's jurisdiction over the counterclaims generally, Claimant advances jurisdictional objections to several of the counterclaims individually. These issues are addressed in conjunction with questions raised by the Tribunal on its own motion.

(1) Counterclaim for Breach of 1979 Settlement Agreement

(i) Payment to IRSL

Respondents claim an unspecified sum as owing to IRSL, formerly Arya National Shipping Lines, under the terms of the 1979 Settlement Agreement. Claimant argues the Tribunal lacks jurisdiction over this counterclaim because Claimant has not alleged any claim against IRSL and, therefore, no counterclaim can be filed on behalf of IRSL.

Claimant's obligation to pay certain outstanding bills owed to IRSL is set forth in the 1979 Settlement Agreement. Paragraph 2 of that Agreement provides in relevant part as follows:

> Behring will, within one week after payment of the $635,000.00 [into the Trust Account by IRIAF pursuant to paragraph 1] pay Arya National Shipping Lines the amount of their outstanding bills documented in accordance with FMC regulations for I.R.I.A.F. and I.A.C.I. shipments

> arising out of freight forwarding contracts between the parties and with respect to material handled by Behring . . . .

Paragraph 2 constitutes a third-party beneficiary contract. Under such an arrangement, the promisee (Respondents) may assert a claim against the promisor (Claimant) on its own behalf irrespective of any independent right of the third-party beneficiary (IRSL). See, e.g., A. Corbin, Contracts § 812 (1951). Thus, the counterclaim may be brought by Respondents on their own behalf. Claimant's argument that a counterclaim cannot be filed on behalf of a non-party is therefore inapposite. Accordingly, the Tribunal rules that it has jurisdiction over the counterclaim for monies allegedly required to be paid to IRSL under paragraph 2 of the 1979 Settlement Agreement.

(ii) Refusal to Make Removal of Goods Possible and Damages for Missing or Deteriorated Goods

Apart from the issue on the merits of the nature of Claimant's duty to safeguard Respondents' property, the counterclaim for damages to such property raises an important jurisdictional question appropriate for resolution at this stage in the proceedings. Assuming the allegations in the Statement of Counterclaim to be true and correct, i.e., that Claimant had a duty of some sort to protect the goods and/or assist in their removal, and it breached such duty, the question remains as to the effect on such counterclaim of the provision in the Claims Settlement Declaration limiting the Tribunal's jurisdiction to counterclaims "outstanding" as of 19 January 1981. The Tribunal rules that it has jurisdiction over the counterclaim only to the extent that any deterioration or other damage was caused by a breach of duty on the part of Claimant occurring on or prior to 19 January 1981. If a breach occurred on or prior to 19 January 1981, the Tribunal has jurisdiction to adjudicate a counterclaim for all reasonably foreseeable damages accruing thereafter, proximately caused by such breach,

irrespective of when such damages began to accrue or whether such damages continued beyond 19 January 1981.[37]

(2) Counterclaim for Unjustifiable Collection of Funds in Trust Account

This counterclaim seeks repayment of all funds paid to Claimant from the Trust Account other than payments expressly contemplated in the 1979 Settlement Agreement. In effect, it relates to payments for storage and maintenance charges made after 19 January 1981 pursuant to order of the District Court. The amount of this counterclaim as originally stated, $382,798.17, represents the balance of the Trust Account (deriving from the deposit of $230,000 made pursuant to paragraph 4 of the 1979 Settlement Agreement) as of 31 December 1981. On that date, Claimant withdrew $228,670 pursuant to the 30 December 1981 order of the District Court allowing it to satisfy a judgment issued by the Court for storage and maintenance charges for the period 20 January 1981 through 31 December 1981. The order further allowed Claimant to withdraw $23,000 per month thereafter, which Claimant apparently did until the account essentially was and is now depleted. The crux of this counterclaim is that Claimant drew on this amount in satisfaction of asserted debts which were outside the scope of the 1979 Settlement Agreement provision establishing it, i.e., to pay post-19 January 1981 charges out of a sum paid into the Trust Account to cover pre-1979 Settlement Agreement claims.

Claimant terms this counterclaim "frivolous" and argues that in applying to the Third Circuit Court of Appeals for

---

[37]Conscious of the practical difficulties presumably to be encountered in developing proof now as to whether the alleged delicts occurred within this jurisdictional period, the Tribunal, in its Decision of 19 December 1983 appointing an expert, directed him to determine, "if possible," whether any damage or deterioration that did occur took place before or after 19 January 1981.

return of the funds sought here Respondents effectively submitted to that Court's jurisdiction and should therefore be precluded from bringing the identical claim here. As we understand such argument, Claimant contends that by appealing to the Third Circuit, on jurisdictional grounds, a District Court judgment ordering it to pay storage charges of between $17,000 and $23,000 per month acruing after 19 January 1981, which appeal was rejected as untimely filed, Respondents consented to the jurisdiction of that Court and waived their right to contest the storage charges here.

Claimant's argument contradicts Claimant's position here with respect to our jurisdiction over its Claim and lacks merit. In contesting the District Court's assertion of jurisdiction to adjudicate post-19 January 1981 charges Respondents cannot be thought to have conceded in any way the very jurisdiction they opposed.

Nonetheless, the Tribunal notes that the wrongs complained of appear on the basis of the present record all to have occurred after 19 January 1981. To the extent the counterclaim thus was not outstanding on that date, it must be dismissed.

C. Interim Measures

1. Contentions of the Parties

In support of their request for an Interim Award ordering, inter alia, Claimant to release their property from its New Jersey warehouse, Respondents contend that they will suffer irreparable injury if such relief is not granted. Respondents allege as follows:

> Respondents' properties are stored under conditions wholly unsuited to the maintenance and preservation of the delicate electronic equipment, computers and aircraft spare parts . . . worth scores of millions of dollars. The properties are deteriorating rapidly, and the damages incurred by

> Respondents are irreparable, since some of the properties are irreplacable. In addition, there are now strong indications that some items of properties are missing from Claimant's warehouse. It is manifest now that the only reason Claimant seeks to retain custody of the properties is to use that custody as a leverage to extract from Respondents a total relinquishment of their counterclaims for losses incurred as a result of Claimant's neglience and wilful breach of its duties as a warehouseman.

Respondents also allege that they will suffer irreparable harm if the expert is not able to perform his responsibilities under the Tribunal's terms of reference.

In addition, Respondents contend that they are suffering continuing monetary expenses as a result of Claimant's alleged failure to release the goods. These expenses principally involve storage charges at the Victory Van Storage facility in Virginia for which Respondents have contracted, but which they have not yet been able to utilize.

Apart from the various jurisdictional objections raised by Claimant and discussed above, Claimant objects to the issuance of an Interim Award as requested by Respondents on the grounds that it "cannot be compelled to render performance of the 1983 Agreement without Iran first specifically performing the 1979 Agreement, particularly insofar as that Agreement calls for indemnification of . . . [Claimant by Respondents] against claims by U.S. vendors and a complete release nullifying, inter alia, all property deterioration claims."[38] In this connection, Claimant objects to the removal of Respondents' property to an alternate location unless Respondents satisfy six conditions: (1) Respondents provide Claimant with an adequate release and

---

[38] Submission of 30 July 1984 at 23. The release requirement is set forth in paragraph 18. See supra at 18-19.

indemnification, as contemplated by the 1979 Settlement Agreement; (2) Respondents fully pay Claimant its warehousing costs, including disputed items, through the date of release; (3) Respondents produce a certificate of insurance covering their property and/or an agreement to accept the risk of loss; (4) Respondents agree to comply with all applicable regulations, including, but not limited to Treasury regulations and munitions regulations under the United States Arms Export Control Act; (5) Respondents allow Claimant access to the property at the alternate location and; (6) the transfer take place in the presence of a surveyor or other representative retained by Claimant's insurance carrier.

Respondents object to conditions (1) through (5) outlined above. They object to providing the release since they contend that Claimant is liable for deterioration damage and missing goods. Respondents argue that they are obligated to provide Claimant with the release contemplated in Paragraph 18 of the 1979 Settlement Agreement only upon the discharge by Claimant of all of its obligations under that Agreement. Respondents further note that the issue of whether Claimant has discharged such obligations is sub judice in these proceedings. As to Claimant's demand for indemnification against third party vendor claims, Respondents assert that Claimant cannot be liable to third parties as a matter of law and, in any case, no third party claims have yet been filed formally.

With respect to Claimant's second condition, Respondents contend that they have paid in full all warehousing and utility costs which they undertook to pay in the 1983 Agreement. Respondents argue that they have not paid attorneys' fees, management fees and costs for security services invoiced by Claimant, since these are not

maintenance and warehousing costs within the meaning of the 1983 Agreement.[39]

Respondents also challenge Claimant's third condition, contending that Claimant has no legal interest in their property once it leaves its warehouse and thus has no legal basis for requiring insurance. Similarly, with respect to the fourth condition, Respondents argue that Claimant has no enforcement function regarding United States laws and regulations. Respondents also would deny Claimant any right of access to the new warehouse, contending that Claimant has no recognizable property interest in their property and thus no legal basis for imposing such a condition.

Respondents do not object to the presence of representatives of Claimant's insurance carrier at the transfer of the goods.

2. Decision

Article 26 of the Tribunal Rules, which rules were chosen by the States Parties in the Claims Settlement Declaration,[40] provides, in part, that:

> At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.

---

[39] See paragraph B(3), supra at 26.

[40] Article III(2) provides that "the Tribunal shall conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) except to the extent modified by the Parties or by the Tribunal to ensure that this Agreement can be carried out." The Tribunal did not modify UNICTRAL Rule 26.

In addition to this expressly granted power, the Full Tribunal has ruled that the Tribunal has "an inherent power to issue such orders as may be necessary to conserve the respective rights of the Parties and to ensure that this Tribunal's jurisdiction and authority are made fully effective." E-Systems, Inc. and Government of Islamic Republic of Iran, Interim Award 13-388-FT at 10 (4 Feb. 1983), 2 Iran-U.S. C.T.R. 51, 57.[41] Applying these standards, the Tribunal determines that the conservation of both the goods and the rights of the Parties requires that the Respondents' property be transferred to an alternate location. Accordingly, we grant the request for interim measures, subject to the conditions set forth below.

The Tribunal first finds that Respondents' property must be removed from its present location in the annex portion of Claimant's Edison, New Jersey warehouse facility in order to prevent unnecessary damage and/or deterioration. The conditions under which the goods are presently stored are inadequate to conserve and protect them and irreparable prejudice to Respondents' asserted rights may result if they

---

[41] On the inherent power of international tribunals to indicate interim measures of protection, see also Northern Cameroons Case (Preliminary Objections) (Cam. v. U.K.) 1963 I.C.J. 15, 103 (Judgment of 2 Dec.) (separate opinion of Fitzmaurice, J.) ("Although much (though not all) of this incidental jurisdiction [inter alia, to decree interim measures of protection] is specifically provided for in the Court's Statute, or in Rules of Court which the Statute empowers the Court to make, it is really an inherent jurisdiction, the power to exercise which is a necessary condition of the Court -- or any court of law -- being able to function at all"); Gramaphone Co. Ltd. v. Deutsche Grammophon AG and Polyphonwerke AG, 1 Trib. Arb. Mixtes 857 (1922) (ordering interim measures without express authorization in Tribunal's rule of procedure); J. Elkind, Interim Protection: A Functional Approach 162-63 (1981); B. Cheng, General Principles of Law as Applied by International Courts and Tribunals 269 (1953); cf. E. Dumbauld, Interim Measures of Protection in International Controversies 143-44, 181 & n.1 (1932). But see J. Sztucki, Interim Measures in the Hague Court 61-67 (1983).

are not transferred to a more appropriate facility.[42] The Tribunal made this finding in its Interim Award of 22 February 1985 and reaffirms that conclusion.

---

[42] Irreparable prejudice has long been recognized as a basis for ordering provisional relief in international law. See, e.g., Case Concerning the Legal Status of the South-Eastern Territory of Greenland (Nor. v. Den.), 1932 P.C.I.J., ser. A/B, No. 48, p. 277 at 284 (Order of 3 Aug.) (noting that "the Court has ruled that 'the object of the measures of interim protection contemplated by the Statute of the Court is to preserve the respective rights of the Parties pending the decision of the Court', in so far, that is, as the damage threatening these rights would be irreparable in fact or in law"); Fisheries Jurisdiction Cases (U.K. v. Ice.), 1972 I.C.J. 12, 16 and (W. Ger. v. Ice.), 1972 I.C.J. 30, 34 (Interim Protection Orders of 17 Aug.) ("the right of the Court to indicate provisional measures . . . presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute . . . ."); Nuclear Tests Cases (Austral. v. Fr.), 1973 I.C.J. 99, 103 and (N.Z. v. Fr.), 1973 I.C.J. 135, 139 (Interim Protection Orders of 22 June).

A definition of "irreparable prejudice" is elusive; however, the concept of irreparable prejudice in international law arguably is broader than the Anglo-American law concept of irreparable injury. While the latter formulation requires a showing that the injury complained of is not remediable by an award of damages (i.e., where there is no certain pecuniary standard for the measure of damages, 43 C.J.S. Injunctions § 23), the former does not necessarily so require. See Anglo-Iranian Oil Co. Case (U.K. v. Iran), 1951 I.C.J. 89, 94 (Interim Protection Order of 5 July) (ordering, inter alia, joint control of contested oil company with profits to be deposited in escrow account. Arguably, rights sought to be protected susceptible to reparation by award of damages); Fisheries Jurisdiction Case (U.K. v. Ice.), 1972 I.C.J. 12, 13 (Interim Protection Order of 17 Aug.) (ordering Iceland not to enforce extension of exclusive fishing zone beyond pre-existing 12 mile limit. Arguably, any damage to U.K. fishing industry reparable by damages); Goldsworthy, Interim Measures of Protection in the International Court of Justice, 68 Am. J. Int'l L. 258, 269 (1974) ("the [I.C.J.] test is not whether adequate compensation can ultimately be provided but whether 'irreparable prejudice' would be occasioned to the rights of the applicant if interim protection is refused").

Secondly, a transfer is necessary to enable the Tribunal's expert to perform his assigned tasks. [43] As noted, the expert has advised the Tribunal that he cannot perform such tasks with the goods in their current location. The Tribunal deems the prompt completion by the expert of his inventorying and inspection functions important to a proper resolution of this case and determines interim measures to be appropriate to define and confine the dispute.[44]

Having concluded in its Interim Award of 22 February 1985 that a transfer of the goods from Claimant's warehouse annex was necessary, which conclusion is reaffirmed above, the Tribunal sought, at Claimant's urging, to arrange a

---

[43] In various submissions, Claimant has objected to the Tribunal's decision appointing an expert. In one filing, Claimant "respectfully submitted that the appointment of an expert was ultra-vires and without adequate notice, totally unnecessary, ill-conceived, without precedent, and without any regard for Behring's rights whatsoever." Submission of 25 April 1984 at 5. The Tribunal, however, notes that the Tribunal Rules authorize the Tribunal to appoint experts "to report to it, in writing, on specific issues to be determined by the Tribunal," Article 27(1), and the Tribunal has apppointed experts in other cases. The Tribunal further notes that, pursuant to Article 27(3) and (4) and the expert's terms of reference, Claimant will have an opportunity to comment on both the expert's preliminary report and his final report.

[44] The International Court of Justice has, on numerous occasions, indicated interim measures ordering parties to disputes before it, inter alia, not to take any action which might "aggravate or extend" the dispute submitted to the Court. E.g. Nuclear Tests Cases (Austral. v. Fr.), 1973 I.C.J. at 106 and (N.Z. v. Fr.), 1973 I.C.J. at 142 (Interim Protection Orders of 22 June); Fisheries Jurisdiction Cases (U.K. v. Ice.), 1972 I.C.J. at 17 and (W. Ger. v. Ice.), 1972 I.C.J. at 35 (Interim Protection Orders of 17 Aug.). See also J. Elkind, supra note 41 at 224-30 (concluding that interim protection should be available generally to prevent the aggravation or extension of a dispute); E. Dumbauld, supra note 41 at 27-28 (listing "[t]o facilitate the conduct of proceedings" as a type of measure pendente lite).

their present location to the modern portion of the warehouse. The Tribunal on numerous occasions encouraged Claimant to make the modern portion of its warehouse facility available for better storage of the goods and for performance of the expert's work, with the understanding that its reasonable costs and expenses would be compensated. Claimant, however, sought to impose conditions on such use which the Tribunal determined to be unreasonable. See Orders of 7 March 1985 and 16 April 1985.[45]

Since a transfer within Claimant's own warehouse has not been made possible, the Tribunal sees no alternative to transferring the goods to a warehouse selected by

---

[45]As noted in its Order of 16 April 1985, the Tribunal received a communication from Claimant on 11 April 1985 in which Claimant advised the Tribunal of its position with respect to the use of its main warehouse:

> [I]n this latter regard, [B]ehring is prepared to allow the [T]ribunal expert to perform an inventory of [I]ranian material in the main warehouse so long as it understood that (1) [B]ehring is willing to do this voluntarily and does not accede to the jurisdiction of the [I]ran-[U]nited [S]tates [C]laims [T]ribunal, (2) that [B]ehring past and future expenses will be currently paid, and (3) the expert wqqqll [sic] not attempt to make a determination as to whether or when property suffered deterioration damage . . . .

In response, the Tribunal (1) confirmed that by making its modern warehouse available for the expert's work (with compensation), Claimant would incur no prejudice to its pending request for dismissal of its claims for lack of jurisdiction; (2) declined to anticipate the merits of these claims, however, by granting Claimant's request for a determination now that it is entitled to all the warehousing expenses claimed from Respondents in this case; and (3) declined to amend the terms of reference of the expert's work previously ordered, which Claimant had demanded as a condition of making its own modern warehouse facility available for such work. Also, the Tribunal noted that Claimant could hardly be prejudiced by failing to recover at this time the warehousing costs claimed from Respondents because, presumably, no current or prospective subtenant would pay them either.

Respondents.[46] In the circumstances of this case, it would be impractical for this international Tribunal to maintain control of the goods through a warehouse selected by and subject to the direction of the Tribunal. Certain of the goods may require repackaging, special maintenance or special handling, involving daily management decisions for

---

[46]Although Respondents have requested such a transfer as part of the final relief sought in their counterclaim, the overlap between the final and interim relief sought does not compel the conclusion that the request for interim measures is an improper attempt to obtain an interim judgment. Compare Chorzów Factory Case (Indemnification) (Ger. v. Pol.), 1927 P.C.I.J., ser. A, No. 12, at 10 (Order of 21 Nov.) (rejecting request for interim payment of idemnity as a request that "cannot be regarded as relating to the indication of measures of interim protection, but as designed to obtain an interim judgment in favour of a part of the claim formulated in the Application") with Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1979 I.C.J. 4, 16 (Interim Protection Order of 15 Dec.) (granting interim measures ordering release of hostages, which relief was also requested as part of final relief, because "purpose of the . . . request appears to be not to obtain a judgment, interim or final, on the merits of its claims but to preserve the substance of the rights which it claims pendente lite" and distinguishing Chorzów on ground that "the request there sought to obtain from the Court a final judgment on part of a claim for a sum of money"). Where, as here, Respondents' right to eventual possession of the goods is uncontested -- indeed, Claimant's Statement of Claim demands that Respondents take possession of their goods -- and such right will be prejudiced to the extent of deterioration damage presently occurring to unique goods, an order transferring the goods is an appropriate interim measure of protection and does not constitute an interim judgment. Moreover, the Tribunal notes that, in the circumstances of this case, a transfer of possession to Respondents as a provisional measure is broadly analogous to the interim relief of transfer of possession which is available in the United States in a common law or statutory action of replevin. See N.J. Stat. Ann. 2A: 59-1 et seq.

The decisions to be taken by this Tribunal in respect of Respondents' goods have been recognized by the United States courts to be within our sole jurisdiction. See Behring Int'l, Inc. v. Imperial Iranian Air Force 699 F.2d 657, 661 (3d Cir. 1983) (affirming District Court holding that "request that Iran be ordered to remove its property from Behring's warehouse . . . must . . . be presented to the Tribunal").

which the Tribunal cannot assume responsibility. Moreover, the use of a third party conservator is unnecessary in this case as Respondents' title to the goods and eventual right to possession as between the Parties is undisputed.[47]

A conclusion that a transfer of the goods is warranted, however, does not mean that Claimant's asserted rights with respect to the goods should go unprotected. Although Respondents' ownership of the goods is uncontested, the record in this case suggests that Claimant nonetheless may assert a possessory security interest in the goods. Specifically, Claimant has contended in the past that it has a warehouseman's lien on the goods. Such lien, under New Jersey law, which would govern any rights and responsibilities of Claimant as a warehouseman, secures "charges for storage or transportation . . . , insurance, labor, or charges present or future in relation to the goods, and for expenses necessary for preservation of the goods . . . ." N.J. Stat. Ann. 12A:7-209(1). In effect, the statutory lien confers a security interest for such charges. If Claimant in fact qualifies for such lien, his security interest might be defeated by any transfer of the goods because the lien is possessory. N.J. Stat. Ann. 12A:7-209(1) and (4). Respondents, however, argued before United States courts that Claimant did not qualify for the lien.

The Tribunal should not rule definitively on the existence of the lien, especially because the lien would not be necessary to secure any charges at issue in this case. Claimant's claim for pre-19 January 1981 warehousing charges

---

[47] While Article 26(1) of the Tribunal Rules refers to ordering deposit of goods forming the subject-matter of the dispute with a third person as a potential interim measure, such measure does not purport to be an exclusive remedy, see Sanders, Commentary on UNCITRAL Arbitration Rules, II Y.B. Com. Arb. 172, 196 (1977), and, for the reasons discussed in the text, is found not to be an appropriate measure in this case.

Claimant's claim for pre-19 January 1981 warehousing charges is fully secured by the Security Account established pursuant to paragraph 7 of the General Declaration,[48] since such claim has been filed here and determined to be within the Tribunal's jurisdiction. A lien, to the extent it exists, would, in our view, be necessary to secure only unpaid warehousing costs accruing for a period not encompassed by our jurisdiction as invoked by Claimant. Indeed, Claimant's lien with respect to charges accruing from 20 January 1981 up to and including 15 September 1983 was expressly relinquished in the 1983 Agreement[49] in exchange for a payment, apparently in satisfaction of the underlying claim covering such period.

The Tribunal determines that Claimant's warehouseman's lien securing its claim to disputed warehousing charges, to the extent it exists, requires protection. Prejudice would result to Claimant if an action by the Tribunal purported to divest Claimant of any secured creditor status it might have.

The Tribunal does not have sufficient facts before it to determine the precise amount of disputed warehousing charges protected by any applicable lien. Certainly, the Tribunal lacks jurisdiction to adjudicate any dispute

---

[48] Pursuant to paragraph 7, a $1 billion Security Account was established by Iran "to be used for the sole purpose of securing the payment of, and paying, claims against Iran in accordance with the Claims Settlement Agreement." Iran is obligated under this provision also to replenish the Security Account, as necessary, to maintain a minimum balance of $500 million. See also paragraph 1(d)(ii), Technical Agreement with N.V. Settlement Bank of the Netherlands (17 Aug. 1981). Thus the Security Account furnishes Claimant full security for its claims here. Presumably, a New Jersey statutory lien would provide security only to the extent of the value at an auction of the goods subject to such lien.

[49] See paragraph A(2), supra at 25.

relating to post-15 September 1983 warehousing charges because (1) no such claim is before it, and (2) any such dispute would be outside the Tribunal's jurisdiction since it would arise out of the 1983 Agreement and thus not have been outstanding on 19 January 1981. For all these reasons, this Tribunal is not the appropriate forum for determining just how any possessory lien of Claimant is to be protected.

Nonetheless, the Tribunal may allow for a court of the United States, if and to the extent it deems it appropriate, to take interim measures not in conflict with this Award to safeguard such security interest[50] and stay its order transferring the goods to afford Claimant an opportunity to petition a court of competent jurisdiction for such provisional relief and to implement any order issued by such court. See Article 26(3) of Tribunal Rules.[51] Such cooperation between this international Tribunal and the municipal courts of one of the States Parties to the Algiers Accords is made necessary by the operation of the peculiar jurisdictional provisions of the Accords upon the even more peculiar facts and circumstances of this case. Simply stated, our jurisdiction does not encompass the entirety of the transaction in which the Parties are involved, yet those aspects within our jurisdiction cannot be adjudicated without potentially prejudicing the rights of the Parties in related disputes outside our jurisdiction.

---

[50] Claimant's security interest, to the extent it exists, could be protected, for example, by requiring Respondents to post a cash deposit, bank guarantee or bond.

[51] Article 26(3) provides:

> A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

The Tribunal now turns to the conditions for release established by Claimant, and addresses them in turn and in the context of the request for interim measures.

Claimant's request for a complete release from liability in respect of the goods is denied. Liability, if any, remains to be adjudicated by the Tribunal and Claimant is not prejudiced in any irreparable fashion if it loses possession of the goods prior to such adjudication.

Claimant's asserted entitlement to an indemnity from liability for third party vendor claims, as contemplated by paragraph 12 of the 1979 Settlement Agreement, is provisionally confirmed as a condition of this Interim and Interlocutory Award.[52] Claimant may become subject to such claims upon its release of the goods and therefore could be prejudiced if the Tribunal were not to provide such protection at this time. Respondents have not contested the validity of this provision per se, although they argue that the entire 1979 Settlement Agreement has been aborted. Respondents also contend that Claimant has not provided evidence that any third party vendor claims have been filed formally.

---

[52]Paragraph 12 provides, in pertinent part:

> I.R.I.A.F. and I.A.C.I. shall defend and indemnify Behring against all loss, costs (including attorney's fees), damage, liability and expenses incurred or claimed in respect to all actions, suits, proceedings, demands, assessments, judgments, liens, costs or expenses incident to any claims (founded or unfounded) made by any vendor against Behring related to the release of material to I.R.I.A.F. or I.A.C.I.

By its terms, this indemnity provision appears to be self-executing, unlike paragraph 18 relating to the execution of mutual releases, supra at 18-19.

If no claims have been filed, Respondents have little to fear from application of this indemnity agreement. If third party vendor claims do arise, however, it appears, prima facie, from the 1979 Settlement Agreement that the Parties intended the cost of such claims to be borne by Respondents. Such indemnity is confirmed as an interim measure only, however, without prejudice to the Tribunal's final ruling on Claimant's entitlement thereto.[53] In other words, in taking possession of the goods pursuant to this Interim and Interlocutory Award, Respondents IRIAF and IACI automatically accept as a condition thereof the obligations set forth in paragraph 12 of the 1979 Settlement Agreement, until the issuance of a Final Award in this case.

The request regarding a certificate of insurance is denied. The Tribunal agrees with Respondents that Claimants will have no legal interest in the goods once they leave the Behring warehouse and thus sees no legal basis, at this point in the proceedings, for requiring insurance.

Claimant's request with respect to assuring compliance with all United States Treasury and munitions control regulations applicable to the transfer of the goods is not properly addressed to this Tribunal. Respondents are independently required by United States law to obtain all necessary licenses and authorizations prior to effecting the transfer of the goods. No action of this Tribunal in this case can either diminish or augment Respondents' responsibilities under United States law in these respects.

The Tribunal, at this stage of the proceedings, denies Claimant's request for general access to the property at the

---

[53] If the Tribunal ultimately determines that Claimant is not entitled to indemnification from vendor claims, the Tribunal may in its Final Award order Claimant to reimburse Respondents for all costs incurred with respect to such indemnity.

new warehouse. However, the Tribunal will consider favorably specific requests to examine the goods for purposes related to this case.

Claimant's final request, that the transfer take place in the presence of a surveyor or other representative of its insurance carrier, as set forth in its submission of 30 July 1984, is granted as such request is reasonable and has been accepted by Respondents.

IV. AWARD

In view of the foregoing,

THE TRIBUNAL HEREBY AWARDS AS FOLLOWS:

1. The Tribunal decides that it has jurisdiction over the Claim and over Respondents' two counterclaims for breach of the 1979 Settlement Agreement, including Respondents' supplemental counterclaim. The counterclaim for attorney's fees and costs incurred with respect to United States litigation is hereby dismissed, as is the counterclaim for unjustifiable collection of monies from the Trust Account insofar as it seeks recovery based on acts occurring after 19 January 1981.

2. The Tribunal orders Claimant to release and deliver to Respondents IRIAF and IACI all goods belonging to them at its Edison, New Jersey facility on or before the date forty-five (45) days from the date of this Award. If, however, before such date Claimant applies to a court of competent jurisdiction within the United States to establish measures protecting Claimant's security interest, if any, in such goods, such release and delivery, and the date thereof, shall be subject to such reasonable conditions not in conflict with this Award as such court may impose to that end.

3. A surveyor or other representative of Claimant's insurance carrier shall be permitted to be present at Claimant's Edison, New Jersey facility during the release and delivery of the goods provided for in paragraph 2 above.

4. The Tribunal confirms provisionally Respondents' undertaking, as contained in paragraph 12 of the 1979 Settlement Agreement, to indemnify Claimant against vendor claims, as a condition of said Respondents taking delivery of their goods as set forth in paragraph 2 above.

5. The Tribunal orders that the expert shall postpone commencement of his work until such time as (a) the release and delivery to Respondents called for by paragraph 2 above has been completed, and (b) the remaining $35,000 deposit for the expert's work owed by Respondents pursuant to the Tribunal's Interim Award of 22 February 1985, as confirmed by its Order of 16 April, 1985, is paid in full.

Dated, The Hague
21 June 1985

Nils Mangård
Chairman
Chamber Three

In the Name of God

Charles N. Brower

Parviz Ansari Moin