IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

382

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

DUPLICATE ORIGINAL
«نسخه برابر اصل»

CHAMBER THREE
CASE NO. 382
AWARD NO. 523-382-3

IRAN-UNITED STATES CLAIMS TRIBUNAL
دیوان داوری دعاوی ایران - ایالات متحده
FILED ثبت شد
DATE 29 OCT 1991
تاریخ ۱۳۷۰ /۸/ ۷

BEHRING INTERNATIONAL, INC.,
Claimant,

and

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

FINAL AWARD

Appearances:

For the Respondents:

Mr. Ali H. Nobari,
Agent of the Government of the Islamic Republic of Iran;
Mr. Nozar Dabiran,
Legal Adviser to the Agent;
Mr. Abbas Ali Rahimi,
Assistant to the Agent;
Mr. Ahmad Amir Moezi,
Legal Adviser to the Ministry of Defence;
Mr. Ahmad Shamloo,
Representative of Islamic Republic of Iran Air Force;
Mr. Moussa Kheirabadi,
Representative of Islamic Republic of Iran Air force;
Mr. Seyed Ahmad Ghoreishi,
Representative of Iran Aircraft Industries.

Also present:

Ms. Lucy F. Reed,
Agent of the Government of the United States of America;
Mr. Michael F. Raboin,
Deputy Agent of the Government of the United States of America.

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I. THE PROCEEDINGS

1. This is a dispute between BEHRING INTERNATIONAL, INC., the Claimant, and the ISLAMIC REPUBLIC OF IRAN AIR FORCE ("IRIAF"), the IRAN AIRCRAFT INDUSTRIES ("IACI") and the GOVERNMENT OF IRAN ("Iran"), collectively the Respondents. The proceedings prior to 21 June 1985 have been set out extensively in Behring International, Inc. and Islamic Republic Iranian Air Force, et al., Interim and Interlocutory Award No. ITM/ITL 52-382-3 (21 June 1985), reprinted in 8 Iran-U.S. C.T.R. 238 (the "Interim Award"). The summary of the proceedings below is limited to the period from 21 June 1985 until 12 November 1990, the date of the Hearing in this Case.

2. As has been set forth in the Interim Award, the Tribunal in Behring International, Inc. and Islamic Republic of Iran Air Force, et al., Decision No. DEC 27-382-3 (19 Dec. 1983), reprinted in 4 Iran-U.S. C.T.R. 89, appointed an expert, Mr. Sigfrid Akselson (the "Expert"), whose terms of reference required him, inter alia, to inventory the Respondents' items of property in the Claimant's warehouse, to determine their condition and, in case of damage, to determine whether such damage occurred prior to 19 January 1981 at which time they were in the Claimant's custody.[1] The Tribunal subsequently ordered the Respondents to advance the costs of the Expert.[2] The Tribunal also stated that it "shall later determine as to which party shall ultimately bear the cost of the expert's work."

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[1] See Behring International, Inc. and Islamic Republic of Iran Air Force, et al., Amendment to Decision No. 27-382-3 (3 May 1984), reprinted in 6 Iran-U.S. C.T.R. 30.

[2] See id.; Behring International, Inc. and Islamic Republic of Iran Air Force, et al., Interim Award No. ITM 46-382-3 (22 Feb. 1985), reprinted in 8 Iran-U.S. C.T.R. 44; Order of 7 November 1985; Order of 15 April 1985.

3. On 10 March 1986 the Expert filed his Final Report comprising an inventory and a description of the condition of the goods which were stored in the Claimant's warehouse .

4. In its Order of 30 April 1986 the Tribunal set time limits for the Claimant and the Respondents to submit their Memorials and evidence. Under this Order the Claimant was to submit its Memorial and evidence by 2 June 1986, the Respondents were to submit their Memorial and evidence by 16 July 1986, and evidence in rebuttal was to be submitted by the Parties by 15 August 1986.

5. In its Order of 13 August 1986 the Tribunal noted that the Claimant had submitted neither its Memorial and evidence nor any extension request, and it extended the time limit for the Claimant to submit the same until 16 September 1986. The Tribunal further stated that, if the Claimant failed to observe the filing date without showing sufficient cause therefor, the Tribunal would consider taking action in accordance with Article 28 of the Tribunal Rules. The time limit for the submission by the Respondents of their Memorial and evidence was extended until 14 November 1986. The time limit for the submission of evidence in rebuttal by both Parties was extended until 15 December 1986.

6. A letter from a Mr. Don Navarro, who appears to be the trustee in bankruptcy of the Claimant,[3] was filed with the Tribunal on 3 October 1986. In pertinent part, this letter reads as follows:

> Due to the condition of the Bankrupt's Estate and other matters bearing upon its administration, I have decided to request that the Bankruptcy Court

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[3] The Claimant filed a petition under Chapter 11 of the United States Bankruptcy Act in April 1985. See Interim Award, at p. 15, reprinted in 8 Iran-U.S. C.T.R. at 247 and para. 16, infra.

> authorize me to abandon pursuit of the above proceeding or request the formal withdrawal thereof. I have instructed the attorneys representing me in this matter to file a formal application forthwith, obtain the necessary hearing date thereon, give notice to those parties which the Judge requires to be notified and pursue such matter aggressively. It is my expectation that a decision will be forthcoming from the Bankruptcy Judge on such Motion within the next six (6) weeks.
>
> I respectfully request the Chamber before whom the above proceeding is pending to continue this matter pending my request being considered by the Court. Promptly upon the disposition by the Court, I will furnish evidence of the Bankruptcy Judge's ruling to the Tribunal for its action.

7. On 14 November 1986 the Respondents filed an extensive set of Memorials and evidence on the merits. By letter filed 15 December 1986 the Respondents notified the Tribunal that, in view of the fact that the Claimant had not filed its Memorial, "there is no necessity at the present time for filing the evidence in rebuttal."

8. In a submission filed on 23 December 1986 the Respondents argued that "[a]lthough Claimant is at liberty to withdraw any one claim or all of them, such withdrawal may have no effect on the jurisdiction of the Tribunal over the counterclaims." The Tribunal was "requested to proceed with [the] Counterclaims and to issue an appropriate award."

9. In response to this submission the Tribunal stated in its Order of 29 January 1987 that:

> The Tribunal notes that since the Respondents did not consent to the Claimant's intended withdrawal of its Claim, and since there are counterclaims pending in this Case, the Claimant's withdrawal would not result in termination of all proceedings in this Case, as the Tribunal would retain its jurisdiction over the counterclaims.
>
> In view of these circumstances, the Claimant shall submit either its formal notice of withdrawal of the claims by 23 February 1987 or submit by 16 April 1987 [its Memorial and evidence].

10. In its Order of 17 February 1988 the Tribunal noted that none of the above required submissions were filed within the time limits and informed the Parties that it would consider application of Article 28, paragraph 3 of the Tribunal Rules if the Claimant, without showing sufficient cause, failed to submit by 16 March 1988 its formal notice of withdrawal of the Claim or its Memorial and evidence.

11. In their submission dated 12 September 1989 the Respondents requested the Tribunal to "apply paragraph 3, Article 28 of the Tribunal Rules to the case, and to declare the Claimant's Claim as extinguished." It was also requested that the Tribunal set a Hearing for deciding the Counterclaims. The Respondents argued that the Claimant withdrew all the Claims brought in Case No. 382 and that the Claimant consistently ignored the Tribunal's Orders for the filing of its Memorial and evidence.

12. In its Order dated 14 December 1989 the Tribunal noted that, since it had not received any formal request from the Claimant for withdrawal or termination of the proceedings, it was still seized of both the Claims and Counterclaims in the Case. Further, because none of the documents requested of the Claimant had been received by the Tribunal, it decided to apply Article 28, paragraph 3 of the Tribunal Rules and accordingly "make an award [on the Claim] on the evidence before it."

13. The Tribunal also stated that it would inform the Parties in due course with respect to the scheduling of a Hearing relating only to the Counterclaims. By Order of 20 September 1990 the Tribunal set the Hearing for 12 November 1990.

14. At the Hearing only representatives of the Respondents and the Government of the United States were present. No representatives for the Claimant appeared. During the initial stages of the Hearing the Agent of the Government of

the United States informed the Tribunal that Mr. Michael F. Raboin, Deputy Agent of the United States, had received a fax dated 11 November 1990 from Mr. Don Navarro, the trustee in bankruptcy for the Claimant. With the permission of the Tribunal the Agent of the United States proceeded to read this fax. Inter alia, it requested that the Tribunal terminate the proceedings, because of "the futility of pursuing a claim against a defunct, bankrupt corporation whose bankruptcy estate is insufficient to return more than a pittance, at best, to those creditors who timely and properly filed claims in the Behring bankruptcy." The Tribunal decided to reject this communication because it was irregularly and untimely filed and to proceed with the arbitration in the absence of the Claimant since the latter did not show sufficient cause for its failure to appear at the Hearing.[4]

II. BACKGROUND

15. The background of this Case up to 21 June 1985 has been summarized in the Interim Award. The relevant events occurring after 21 June 1985 are described below.

16. By letter filed 27 January 1986 Mr. Don Navarro informed the Tribunal that "on August 5, 1985 the initial [bankruptcy] proceedings were converted from a Chapter 11 proceeding (reorganization) to a Chapter 7 proceeding (liquidation)." Mr. Navarro stated that he "was appointed Trustee of the Estate of Behring, charged with the responsibility to gather and liquidate its assets and proceed to close the Estate as soon as possible."[5]

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[4] See Article 28, paragraph 2 of the Tribunal Rules.

[5] See fn. 3, supra.

17. On 5 August 1985 the Claimant instituted adversary proceedings before the United States Bankruptcy Court for the Northern District of Texas against the Respondents and obtained ex parte a temporary restraining order enjoining IRIAF from interfering with the Claimant's custody and possession of the warehoused goods and protecting the Claimant's custody and possession pending a further hearing by the Bankruptcy Court.

18. On 9 August 1985 the Claimant concluded a third settlement agreement with the Respondents (the "1985 Settlement Agreement"). Its essential terms are as follows:

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MEMORANDUM OF UNDERSTANDING

agreed to on August 9, 1985 between the Islamic Republic of Iranian Air Force and Iran Aircraft Industries on the one part, and Behring International, Inc., on the other part.

. . .

WHEREAS at the commencement of the Behring Chapter 11 Proceeding, BII [Behring International, Inc.] asserted a claim of $347,958.42 plus costs, expenses, interest and attorneys fees against IRIAF under or by reason of an agreement entered into on August 14, 1983 (the "August 1983 Agreement") and BII asserted a possessory lien in the warehoused goods as security for the payment of the amounts claimed (the "Possessory Lien Rights"); and

WHEREAS since the commencement of the Behring Chapter 11 Proceeding, additional claims in excess of $50,000 have accrued which Behring DIP [Claimant as debtor in possession] asserts against IRIAF, which claim Behring DIP contended to be secured by the Possessory Lien Rights and other statutorily established rights against the warehoused goods; and,

. . .

WHEREAS the Claims Tribunal issued an Interim and Interlocutory Award in Case No. 382 on June 21,

1985 (the "Interim Award") which, among other things, directed BII to deliver the warehoused goods to IRIAF within 45 days of the issuance thereof unless a United States Court of competent jurisdiction establishes measures to protect the possessory lien rights asserted by BII in the warehoused goods; and,

WHEREAS following the entry of the Claims Tribunal's Interim Award, Behring DIP instituted adversary No. 385-3653-M against IRIAF et al. (the "Adversary Proceeding") and obtained ex parte a temporary restraining order (the "TRO") enjoining IRIAF from interfering with Behring DIP's custody and possession of the warehoused goods and protecting Behring DIP's custody and possession pending a further hearing by the Court; and,

. . .

1.2. This MOU [Memorandum of Understanding] is subject to approval by the Bankruptcy Court in which the adversary proceeding is pending upon a hearing at such time and after notice to such parties as may be directed by the Court (the "Court Approval"). This MOU is effective and binding upon the parties, subject to such court approval being obtained. Navarro Trustee will forthwith file a motion requesting Court Approval hereof, obtain a hearing date thereon on August 30, 1985 or as soon thereafter as the Bankruptcy Court may schedule the same and cause notice thereof to be given to such parties as may be required by the Bankruptcy Court. Upon Court Approval, the MOU shall be implemented as set forth below. If Court Approval is not given, the MOU shall be of no further effect and a request shall immediately be made for the Court to schedule a hearing upon Navarro Trustee's request for preliminary injunction.

. . .

2. CONTINUATION OF TRO

2.1 The TRO shall, by agreement be continued in full force and effect by the Bankruptcy Court pending (i) Court Approval of the MOU . . . The Agreement to continue the TRO does not constitute and shall not be construed, as a waiver by IRIAF of any rights or privileges which IRIAF enjoys under international law or the domestic law of the United States.

. . .

4. IMPLEMENTATION UPON COURT APPROVAL

4.1 Immediately upon Court Approval, the sum of $310,000.00 (Three hundred ten thousand dollars) shall be deposited into the Registry of the Bankruptcy Court by IRIAF as the agreed amount which Navarro Trustee will accept in settlement of the claims through Sep. 1985, described in [the recitals], to be disbursed by the Bankruptcy Court upon the conditions set forth below:

4.2 Navarro Trustee shall, immediately upon Court Approval, deliver possession of the warehoused goods to IRIAF "as is - where is," and an order shall be entered requiring such delivery, provided the deposit mentioned in paragraph 4.1 is made. IRIAF will, at its sole expense, immediately commence removal of the warehoused goods from the Edison Facility and relocate the same at Sterling, Virginia (the "Virginia Facility"), except for those containers with chemicals which are to be disposed as noted below.

4.3 The containers containing chemicals with a limited shelf life and/or which have leaked will be removed and disposed of by a licensed contractor engaged by IRIAF consistent with applicable U.S./Environmental requirements therefor. The spillage in or about the Edison Facility will be cleaned up by such contractor. The cost for removal, disposal and spillage clean-up of such chemicals will be borne by IRIAF. Further, IRIAF will hold Navarro Trustee harmless from all cost, expense or liability of whatever nature incident to or arising out of the removal and disposition of the chemicals and the spillage clean-up.

. . .

4.5 IRIAF shall obtain all necessary licenses relating to the removal of the warehoused goods from the Edison Facility and relocation thereof to the Virginia Facility at its sole expense.

. . .

4.7 When all warehoused goods have been removed from the Edison Facility, the attorney for IRIAF shall immediately notify Navarro Trustee and the Bankruptcy Court, whereupon the Bankruptcy Court shall order the funds previously paid into the Registry pursuant to paragraph 4.1, together with accrued interest thereon, paid over to Navarro Trustee. Notwithstanding the foregoing notification requirement, the Bankruptcy Court shall order such funds paid over on September 30, 1985 or at such extended date as provided for in paragraph 4.8 below.

. . .

5. FINAL JUDGMENT

5.1 Immediately after the removal of all of the warehoused goods from the Edison Facility and relocation at the Virginia Facility by IRIAF and the payment of the funds to Navarro Trustee as provided in Section 4 above, a final order shall be entered in the Adversary Proceeding which:

a. confirms the delivery to and receipt of custody and possession of the warehoused goods by IRIAF on an "as is - where is" basis;

b. confirms payment to Navarro Trustee of the agreed settlement amounts;

. . .

e. confirms that the claim filed by BII against IRIAF in the Claims Tribunal, Case No. 382, and the counterclaims asserted against BII in that case by IRIAF are not affected by the MOU, the proceedings herein or by the Order to be entered by the Bankruptcy Court, and that nothing contained in the MOU, or any action taken by the parties pursuant thereto shall waive or release the defenses to the counterclaims or any pre-January 19, 1981 claims of Navarro Trustee against IRIAF;

f. confirms that Navarro Trustee shall assert no claims or demands against IRIAF for warehouse charges in the Claims Tribunal in Case No. 382; and

g. confirms that Navarro Trustee shall have waived, relinquished and released any Possessory Lien Rights and Statutorily Established Rights in and to the warehoused goods.

. . .

19. Apparently, the above agreement was approved by the United States Bankruptcy Court. The Respondents subsequently paid U.S.$310,000.00 to the Claimant.

20. The goods stored at the Claimant's warehouse in Edison, New Jersey were removed between 13 and 20 September 1985 by Victory Van Corporation to its warehouse located in Sterling, Virginia, except for a number of chemicals which had

to be destroyed for safety reasons. During the removal, Mr. Lennart Lomner, an assistant to the Expert, Mr. Ali Partovi, a representative of IRIAF, as well as representatives of the United States Department of the Treasury, Victory Van Corporation, the insurance adjustors and a security agency were present.

21. The physical inventory of the goods was carried out by the Expert at the Victory Van Warehouse from 24 September to 22 November 1985. In the course of the inventory a number of visits were made by representatives of the United States Navy, Army and Air Force. On 27 November 1985 two boxes with material classified as confidential were removed by the United States Navy representative from the Victory Van Warehouse on the asserted grounds that the warehouse was not approved for storage of classified materials.[6]

III. THE CLAIMS

A. Elements of the Claim

22. As originally stated in its Statement of Claim, the Claimant seeks (1) an award in the amount of U.S.$432,230.00 (plus interest) representing the warehouse and storage costs allegedly incurred by the Claimant from 15 January 1980 through 19 January 1981, (2) an award in the amount of U.S.$392,798.17 (plus interest) representing the balance in the Trust Account allegedly due to the Claimant as of 31 December 1981, pursuant to paragraph 16 of the 1979

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[6] See Islamic Republic of Iran and United States of America, Decision No. DEC 52-A15(II:A and II:B)-FT (24 Nov. 1986), reprinted in 13 Iran-U.S. C.T.R. 173.

Settlement Agreement[7], (3) an award for attorney's fees and costs, and (4) an award for sanctions and punitive damages. The Claims under (1), (2) and (4) will be discussed in paragraphs 23-35, infra. The Claim under (3) is decided upon in paragraph 70, infra.

B. Jurisdiction

23. In the Interim Award the Tribunal held that it had jurisdiction over all elements of the Claim.[8]

C. Merits

(1) Claim for storage costs allegedly incurred by the Claimant from 15 January 1980 through 19 January 1981 (plus interest)

24. The Claimant originally requested the Tribunal to issue an award in its favor in the amount of "approximately U.S.$432,230.00 [excluding interest] representing the warehouse and storage costs incurred by Behring from January 15, 1980 through December 31, 1981." As explained in the Interim Award[9], the Claimant obtained at least partial relief for its alleged storage costs accrued after 19 January 1981 pursuant to a United States District Court Order dated 30 December 1981.

25. According to the Claimant the amount of U.S.$432,230.00 is the aggregate of (1) U.S.$183,645.20, representing the

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[7] For the essential terms of this Agreement, see Interim Award, at p. 17 and following, reprinted in 8 Iran-U.S. C.T.R. at 249.

[8] See Interim Award, at p. 40 and p. 63, reprinted in 8 Iran-U.S. C.T.R. at 266 and 282.

[9] See Interim Award, at p. 22, reprinted in 8 Iran-U.S. C.T.R. at 253.

storage and maintenance charges invoiced to the Respondents for the period commencing 15 January 1980 through 19 January 1981, and (2) U.S.$248,584.80, representing "the difference between the invoiced and the actual costs of maintaining and storing the Respondents' property" during the same period.

26. To determine whether the Claimant is entitled to the above amount, the Tribunal reviews several statements made by the Claimant during the course of these proceedings and the 1985 Settlement Agreement. In its Reply to the Respondents' Ex Parte Application for a Full Inventory of the Claimant's Warehouse filed on 7 October 1983, the Claimant admitted that "as a practical matter the Memorandum of Agreement [i.e., the 1983 Settlement Agreement] secures for Behring virtually all of the relief it seeks by way of its protective Statement of Claim filed with the Tribunal with the exception of the relief sought in paragraphs 1, 4 and 5 [i.e., the Claim for the balance in the Trust Account, attorney's fees and costs and punitive damages] of Behring's Statement of Claim." Pursuant to the 1983 Settlement Agreement, the Respondents had paid to the Claimant the amount of U.S.$800,000.00. In its filing of 30 July 1984 the Claimant again affirmed that "Behring received from Iran most of its expenses and costs for the period prior to 19 January 1981 and the parties entered into a memorandum agreement of August 14, 1983 [i.e., the 1983 Settlement Agreement]." It thus appears that the Claimant itself recognized that its Claim for alleged storage charges during the period from 15 January 1980 until 19 January 1981 had been satisfied.

27. That the Claim for alleged storage charges is moot is also evidenced by the 1985 Settlement Agreement, which provides in relevant part as follows:

> 5.1. Immediately after the removal of all the warehoused goods from the Edison Facility and relocation at the Virginia Facility by IRIAF and the payment of funds to Navarro Trustee as

> provided in Section 4 above, a final Order shall be entered in the Adversary Proceeding which:
>
> . . .
>
> e. confirms that the claim filed by BII against IRIAF in the Claims Tribunal, Case No. 382, and the counterclaims asserted against BII in that case by IRIAF are not affected by the MOU, the proceedings herein or by the Order to be entered by the Bankruptcy Court, and that nothing contained in the MOU, or any action taken by the parties pursuant thereto shall waive or release the defenses to the counterclaims or any pre-January 19, 1981 claims of Navarro Trustee against IRIAF; and
>
> f. confirms that Navarro Trustee shall assert no claims or demands against IRIAF for warehouse charges in the Claims Tribunal in Case No. 382;

(Emphasis added).

28. Although the Tribunal has not been advised formally whether the above final order was ever entered in the adversary proceeding, the underscored portion of Article 5.1 of the 1985 Settlement Agreement and the Claimant's former statements clearly demonstrate that it essentially had abandoned its Claim for recovery of storage costs allegedly incurred from 15 January 1980 through 19 January 1981. The Tribunal, therefore, holds that this Claim must be dismissed.

(2) Claim for the balance in the Trust Account as of 31 December 1981 (plus interest)

29. According to the Claimant the balance in the Trust Account amounted to U.S.$392,798.17 (excluding interest) as of 31 December 1981. This balance later was reduced to U.S.$164,128.17 because the Claimant was allowed to withdraw the sum of U.S.$228,670.00 from the Trust Account, representing storage and maintenance charges for the period from 20 January 1981 to 31 December 1981, pursuant to the Order

of the United States District Court.[10] Despite this reduction, the Claimant considers that "if this Claims Tribunal finds that Behring is entitled to the balance of the monies due to it pursuant to the [1979 Settlement Agreement], Behring can no longer be paid that amount from the Trust Account since it has been depleted pursuant to the District Court Order. Therefore, Behring respectfully submits that any award in its favor must be satisfied from the Security Account established pursuant to the terms of the Algerian Declarations."

30. The Respondents reply that the Claimant is not entitled to any of its claims because it has failed to perform a number of obligations under the 1979 Settlement Agreement, inter alia, its obligation to pay its debts to Arya National Shipping Lines (predecessor to the Iranian Islamic Republic Shipping Lines ("IRSL")) under paragraph 2 of the 1979 Settlement Agreement and its obligation to cooperate in removing the properties from the warehouse under paragraph 16 of the same Agreement.

31. More specifically, the Respondents answer that the Claimant is referring to the amount of U.S.$230,000.00 mentioned in paragraph 4 of the 1979 Settlement Agreement. According to the Respondents this amount is payable to the Claimant pursuant to paragraphs 5 and 6 of that Agreement only if there is "no dispute as to the adequacy of the documentation which is to be provided by Behring in support of its probable additional claims (if any)." The Respondents contend that they never received such documentation and that they therefore should not be held liable for the claimed balance. They furthermore argue that this balance was a "provisional amount for the payment of Behring's probable additional claims to the extent such

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[10] See Interim Award, at p. 22, reprinted in 8 Iran-U.S. C.T.R. at 253.

claims could be substantiated" and that it would be "an exceptionally unusual coincidence if Behring asserts that its additional claims happened to correspond exactly to the balance in the Trust Account!"

32. According to the Claimant the Respondents did receive the documentation and no bona fide dispute exists. Furthermore, even if such dispute existed, it should not preclude the Claimant from being paid the balance in the Trust Account, as paragraph 6 of the 1979 Settlement Agreement states that "[n]o dispute under this provision shall preclude or delay any other payments due Behring under the terms of this Agreement." The Respondents reply that the term "any other payment" refers to the amounts of U.S.$635,000.00 and U.S.$1,000,000.00 envisaged in paragraphs 1 and 16 of the 1979 Settlement Agreement, respectively, and not to the balance in the Trust Account and that, consequently, there is no obligation "to pay the money deposited in the Trust Account pursuant to paragraph 4 of the Settlement Agreement in respect of which there is a dispute."

33. In order to justify its claim for the balance in the Trust Account, the Claimant invokes paragraph 16 of the 1979 Settlement Agreement. This paragraph reads as follows:

> When all of the foregoing conditions of settlement have been either fulfilled, waived or otherwise satisfied, and all I.R.I.A.F. and I.A.C.I. goods presently in the Edison warehouse have arrived at McGuire Air Force Base or on December 15, 1979 whichever is earlier (provided that the failure of the goods to reach McGuire AFB has not been caused or contributed to by the conduct of Behring), IRIAF 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 $1,000,000.00 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.

(Emphasis added). The Tribunal finds that according to the above, if any balance remained in the Trust Account, it was to be returned to IRIAF and not to the Claimant. Paragraph 16 of the 1979 Settlement Agreement can therefore not form the basis for the Claimant's allegation that it is entitled to the amount of U.S.$392,798.12 (plus interest). Furthermore, the Claimant has provided no evidence (i.e., copies of documentation allegedly supplied to the Respondents) to indicate that it is owed any sums under the 1979 Settlement Agreement. The record is clear, as noted in the Interim Award, that the Claimant received the respective sums of U.S.$635,000.00 and U.S.$1,000,000.00 provided for under that Agreement. Because the Claimant has provided no documentation to the Tribunal to indicate that there are any other amounts which the Respondents allegedly owe to the Claimant under the terms of paragraph 16, the Claim for the balance of monies in the Trust Account must be rejected.

(3) Claim for sanctions and punitive damages

34. The Claimant originally also sought an award "imposing sanctions and punitive damages against the Respondents, I.R.I.A.F. and I.A.C.I., for their willful, deliberate and continued failure and/or refusal to comply with the terms of the [1979 Settlement Agreement]." The Claimant has failed, however, to advance any argument in support of his asserted entitlement to such "sanctions and punitive damages."

35. The Tribunal finds that neither the record nor Tribunal precedent warrants the granting of such "sanctions and punitive damages" in the particular circumstances of this Case. This Claim therefore is also dismissed.

IV. THE COUNTERCLAIMS

A. Elements of the Counterclaims

36. The Counterclaims, as originally submitted by the Respondents in their Statement of Defense and Counterclaim filed 2 December 1982, were repeatedly modified during the course of these proceedings, particularly by the Respondents' Explanatory Brief filed 14 November 1986 and their submission filed 9 November 1990. The Respondents further qualified their Counterclaims during the Hearing held on 12 November 1990.

37. A number of the Counterclaims which the Respondents initially included in their Statement of Defense and Counterclaim have been mooted by the removal of the goods from the Claimant's warehouse (see paragraph 20, supra). The remaining relief sought therein comprises the following: (1) an award ordering the Claimant to pay IRSL's alleged outstanding bills (plus interest), (2) an award for damages resulting from the alleged loss and deterioration of the goods which were stored at the Claimant's warehouse, (3) an award ordering the Claimant to pay the amount of U.S.$392,798.17 (plus interest), which the Respondents allege was withdrawn unlawfully from the Trust Account established pursuant to the 1979 Settlement Agreement, (4) an award for attorney's fees and costs incurred by the Respondents before the United States courts, and (5) an award for attorney's fees and costs incurred before the Tribunal. On 18 April 1983 the Respondents submitted a supplemental Counterclaim alleging that the Claimant failed to deliver an artificial kidney ordered in 1978 by the Health Department of the Ministry of Defense, which purportedly had been delivered to the Claimant for transshipment to Iran.[11]

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[11] See Interim Award, at p. 41, reprinted in 8 Iran-U.S. C.T.R. at 267.

38. In their Explanatory Brief the Respondents listed the following as their relief sought: (1) an award for restitution of U.S.$4,490,600.00 (plus interest) which the Respondents assert they paid for storage services never rendered, (2) an award for damages in the amount of U.S.$481,735,765.12 (plus interest) as compensation for goods lost or stolen from the Claimant's warehouse, (3) an award for damages in the amount of U.S.$500,000,000.00 "as compensation to Respondents for disturbance of the logistics system and support of forces due to non-delivery and destruction of parts and pieces and impossibility of replacement," and (4) an award for attorney's fees and costs. The relationship between item (1) of this paragraph and item (3) of paragraph 37 will be discussed in paragraph 48, infra. The Counterclaims described in items (2) and (3) of this paragraph seem to be specifications of the initial Counterclaim for damages under item (2) of paragraph 37. It consequently appears that the Respondents are no longer seeking an award for damages resulting from the alleged deterioration of their goods stored at the Claimant's warehouse, but that they are limiting their Counterclaim to damages caused by the alleged disappearance of a number of these goods. This was confirmed by the Respondents during the Hearing. It also became apparent during the Hearing that the Respondents maintain their Counterclaims based on the Claimant's alleged failure to pay the outstanding bills of IRSL and to deliver the artificial kidney.

39. On 9 November 1990, just a few days before the Hearing, the Respondents filed a submission which again substantially modified the nature of their relief sought. Some parts of the Counterclaim for damages caused by their goods being allegedly lost or stolen were either withdrawn or decreased. Further, the Respondents requested the Tribunal to suspend other parts of this Counterclaim, and the entire Counterclaim for consequential damages in the amount of U.S.$500,000,000.00, on the grounds of the alleged relationship between these Counterclaims and certain claims

asserted in Cases B-1 and B-61 currently pending before the Tribunal. Finally, the Respondents reduced their Counterclaims for restitution and for attorney's fees and costs to U.S.$213,200.00 and U.S.$295,000.00, respectively.

40. Taking into account all of the qualifications of the Counterclaims offered by the Respondents during these proceedings, the following sums up the final relief sought by them:

(1) an award ordering the Claimant to pay IRSL's alleged outstanding bills (plus interest);

(2) an award for restitution of U.S.$213,200.00 (plus interest);

(3) an award for damages in the amount of U.S.$7,626.15 (plus interest) resulting from the alleged loss of the artificial kidney;

(4) an award for damages resulting from the alleged disappearance of goods stored at the Claimant's warehouse in the amount of U.S.$64,456,959.88 (plus interest);

(5) an award for attorney's fees and costs, including the cost of the Expert appointed by the Tribunal, in the amount of U.S.$295,000.00; and

(6) suspension of (a) some parts of the Counterclaim for damages resulting from the alleged disappearance of goods formerly stored at the Claimant's warehouse and (b) the entire Counterclaim for consequential damages in the amount of U.S.$500,000,000.00 until the rendering of an award by the Tribunal in Cases B-1 and B-61.

41. As the Tribunal already has noted in the Interim Award, the Respondents' Counterclaim based on the alleged loss of the artificial kidney "in effect constitutes nothing more than a specific counterclaim subsumed" within the Counterclaim described in item (4) hereabove.[12] The Tribunal therefore will not discuss it independently but as part of that more general Counterclaim.

B. Counterclaim for payment of IRSL's alleged outstanding bills (plus interest)

(1) Jurisdiction

42. The Tribunal held in the Interim Award that it had jurisdiction over the Respondents' Counterclaim for IRSL's alleged outstanding bills (plus interest).[13]

(2) Merits

43. This Counterclaim is based on paragraph 2 of the 1979 Settlement Agreement, which reads as follows:

> 2. Behring will, within one week after payment of the $635,000.00 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. Behring represents that all other inland and overseas freight charges for which I.R.I.A.F. and I.A.C.I. have been billed by Behring and for which Behring has received reimbursement from I.R.I.A.F. or I.A.C.I. have been paid.

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[12] See Interim Award, at p. 43, reprinted in 8 Iran-U.S. C.T.R. at 269.

[13] See Interim Award, at p. 47 and p. 63, reprinted in 8 Iran-U.S. C.T.R. at 271 and 282.

44. The Respondents claim that, although the Claimant received the amount of U.S.$635,000.00 "the IRSL's books and records do not show the receipt of the due amounts as required by the Settlement Agreement." They consequently request the Tribunal to render "[a]n award ordering Behring to pay IRSL's outstanding bills plus interest as of the date they were due for payment."

45. In reply the Claimant asserts that this Counterclaim is unfounded because it "in fact [paid] the full amount owed to IRSL within seven days of receipt of the monies from IRIAF and IACI". As proof of this payment the Claimant submitted a copy of a check no. 091867, in the amount of U.S.$83,979.98 and dated November 16, 1979, made payable to Arya National Shipping Lines, the predecessor to IRSL. The copy also shows what appears to be the reverse side of the check with stamps indicating that it had been presented for payment and cancelled.

46. The Respondents deny that the copy of the check constitutes evidence of the payment as required under paragraph 2 of the 1979 Settlement Agreement. This denial is based on the assertion that IRSL's files do not reflect receipt of the check and on statements by IRSL officials. They further argue that the money has not been credited to the account of IRSL because the "[r]espective bank has not acknowledged receipt of the check" and the Claimant never received a certificate of clearance from IRSL. The Respondents also argue that the Claimant did not produce a receipt for the delivery of the check to IRSL. Finally, they claim that the monies owed to IRSL exceed the amount of the check.

47. The Tribunal notes that the Respondents never have specified in their submissions the amount that the Claimant owed IRSL. Neither have they filed any evidence in the form of invoices or bills proving that payments by the Claimant were due to IRSL. When questioned about this during the Hearing, the Respondents stated that they were not claiming

more than the amount appearing on the check although they initially had maintained that "[t]he monies owed to Arya exceed the amount [mentioned on it]". They also argued that the copy of the check should be regarded as an admission by the Claimant of its indebtedness. The Respondents, however, also have alleged that the same copy does not constitute proof of payment, inter alia, because "[a]pparently, Claimant Behring drew a cheque payable to the shipping company, photostat copied the cheque, kept or destroyed the original and produced the photostat copy for the satisfaction of the Tribunal." The Tribunal finds no support in the record for this contention which was invoked for the first time more than three years after the original filing of the copy of the check. To the contrary, the Tribunal considers that the stamps on what appears to be the reverse side of the check indicate that it had been presented for payment and cancelled. This proof of payment is further corroborated by the fact that the Respondents have not submitted any contemporaneous correspondence or documentation indicating that they pursued their claim for payment subsequent to the date of the check. Under these circumstances the Tribunal believes that it would not be justified to regard the copy of the check - the only piece of evidence filed by any of the Parties regarding this particular Counterclaim - as an admission of liability on behalf of the Claimant, but, at the same time dismiss it as proof of payment. Since the Respondents have not presented any evidence to disprove in any satisfactory way that the payment was made, the Tribunal finds that the copy of the check submitted by the Claimant, and particularly the stamps appearing on its back, constitute sufficient prima facie evidence to hold that the Claimant complied with its obligations under paragraph 2 of the 1979 Settlement Agreement. Compare Ultrasystems Incorporated and Islamic Republic of Iran, et al., Final Award No. 89-84-3, p. 2 (7 Dec. 1983), reprinted in 4 Iran-U.S. C.T.R. 77, 78. The Tribunal therefore dismisses this Counterclaim.

C. Counterclaim for restitution of U.S.$213,200.00

48. The Counterclaim for U.S.$213,200.00 is what remains of the Respondents' Counterclaim for restitution of U.S.$4,490,600.00, after having been decreased pursuant to their submission filed 9 November 1990 (see paragraph 39, supra). The Counterclaim for restitution of U.S.$4,490,600.00, in turn, is an amendment to the initial Counterclaim for U.S.$392,798.17 introduced in the Respondents' Statement of Defense and Counterclaim. Since the Tribunal, as explained below in paragraph 50, determines that it lacks jurisdiction over the remaining Counterclaim for U.S.$213,200.00, it need not decide whether the Counterclaim for U.S.$4,490,600.00 would have constituted a proper amendment to the original Counterclaim for U.S.$392,798.17 as stated in the Statement of Defense and Counterclaim.

49. As the Parties have not specifically addressed the issue of whether the Tribunal has jurisdiction over the claim for restitution of the U.S.$213,200.00, the Tribunal must do so on its own motion. Parguin Private Joint Stock Company and United States of America, Award No. 275-12783-3, para. 10 (15 Dec. 1986), reprinted in 13 Iran-U.S. C.T.R. 261, para. 10; Burton Marks, et al., Interlocutory Award No. ITL 53-458-3, p. 11 (26 June 1985), reprinted in 8 Iran-U.S. C.T.R. 290, 296-297; Component Builders, Inc., et al. and Islamic Republic of Iran, Interim and Interlocutory Award ITM/ITL 51-395-3, p. 11 fn. 5 (27 May 1985), reprinted in 8 Iran-U.S. C.T.R. 216, 224 fn. 9; United States of America and Islamic Republic of Iran, Award No. 106-B-24-1, p. 4 (24 Jan. 1984), reprinted in 5 Iran-U.S. C.T.R. 97, 99.

50. According to Article II, paragraph 1 of the Claims Settlement Declaration this Tribunal has been established "for the purpose of deciding claims of nationals of the United States against Iran 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 [19 January 1981]." It appears from the record that no payments were made to the Claimant on or prior to 19 January 1981, except for the sums of U.S.$635,000.00 and U.S.$500,000.00 which were collected from the Trust Account prior to 14 November 1979 and on 7 May 1980, respectively.[14] These sums, however, constitute part of the payments provided for under paragraphs 1 and 16 of the 1979 Settlement Agreement. They have no relationship whatsoever to the payments made by the Respondents for storage services allegedly provided by the Claimant after the execution of the 1979 Settlement Agreement, and therefore cannot be part of the amount for which restitution is claimed. Since there is no evidence in the record showing that the amount of U.S.$213,200.00 was paid to the Claimant on or prior to 19 January 1981, it is evident that no Counterclaim for its return could have been outstanding as of 19 January 1981. See Houston Contracting Company and National Iranian Oil Company, et al., Award No. 378-173-3, p. 161 (22 July 1988), reprinted in 20 Iran-U.S. C.T.R. 3, 118. Consequently, this Counterclaim must be dismissed for lack of jurisdiction.

D. Counterclaim for damages

51. As explained in paragraphs 36-40, supra, the Respondents have introduced Counterclaims for two sorts of damages: loss of some of their goods formerly stored at the Claimant's warehouse (including the artificial kidney) and "disturbance of the logistics system and support of forces".

52. Regarding jurisdiction over this Counterclaim, the Tribunal already has ruled in the Interim Award that

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[14] See Interim Award, at pp. 20-21, reprinted in 8 Iran-U.S. C.T.R. at 251-252.

> 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.[15]

With regard to the alleged breach of duty by the Claimant, the Respondents essentially assert that the Claimant has failed (i) to allow the goods to be removed from the warehouse and (ii) to use adequate care in storing the goods despite receiving substantial payments.

(1) The Claimant's alleged failure to release the goods

53. The obligations of the Parties under the 1979 Settlement Agreement concerning removal of the goods are found in its paragraphs 11 and 14:

> 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. and 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.
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> ...
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> 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 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

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[15] See Interim Award, at p. 47, reprinted in 8 Iran-U.S. C.T.R. at 271.

will the materials in question be allowed to remain at the Edison warehouse beyond December 15, 1979.[16]

54. It is undisputed that under the above provisions the Respondents had a duty to remove the goods from the warehouse and the Claimant was obliged to allow such removal[17]. However, the Parties disagree on why such removal did not occur until September 1985. The Respondents contend that they "were at all times pertinent hereto prepared to take delivery of their properties," but that the Claimant breached its obligations under the 1979 Settlement Agreement by failing to consent to an Order of the United States District Court removing temporary restraints, failing to cooperate in allowing the Respondents to inventory the goods, ignoring their telexes and denying their representatives access to the warehouse. In particular, the Respondents claim that a meeting with the Claimant was held in London on 8 December 1981 to discuss removal of at least some of the goods. They also claim that they sent a representative, Mr. Karim Mokri, to the United States in early December 1981 to make arrangements for removal of the goods, but that the Claimant refused to allow him to enter the warehouse. The Respondents further contend that they sent several telexes, in particular telex no. 1/1401-62-171 dated 6 July 1982, seeking delivery of the goods but that the Claimant never bothered to answer.

55. The Claimant disputes each of these allegations, claiming that it was willing to allow the Respondents to remove their goods,[18] but that the Respondents themselves

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[16]The Parties later agreed to extend this date until 15 January 1980 in return for payment of U.S.$3,000 to the Claimant.

[17]Similar duties also were incorporated in paragraphs A.3. and B.3. of the 1983 Settlement Agreement.

[18]Later in 1984 the Claimant changed its position on
(Footnote Continued)

neglected to take steps for removal and, consequently, they are to be blamed for any damages suffered. It denies that it refused to cooperate in the taking of an inventory, contending rather that "in November and December of 1979, Behring representatives and representatives of I.R.I.A.F. and I.A.C.I. conducted an extensive inventory of the materials" and that "[a]ll parties thereafter received a copy of the inventory." The Claimant asserts that it responded to each and every telex it became aware of. Further, the Claimant explains that it was willing to open its warehouse to the Respondents' representatives but that it had not received prior notice of Mr. Karim Mokri's visit and consequently it requested him to wait a few days but he refused to do so. The Claimant asserts that the "[n]egotiations [in December 1981] broke down for reasons unknown to Behring." In support of its position the Claimant has submitted the affidavit of Mr. George A. Murphy, former Vice President of the Claimant, which was introduced in the United States District Court proceedings on 25 August 1981. Mr. Murphy claims that

> Behring, in a good faith effort to free its warehouse of defendants' property, authorized and instructed Behring's counsel on or after January 14, 1980, the final day of defendants' authorized use of the warehouse, to cooperate with defendants in accomplishing the removal of the property. In fact, elaborate arrangements were made to transfer and secure the property from Behring's Edison facility to McGuire Air Force Base. To this end and on January 24, 1980, Behring joined the defendants in an application for a Treasury license which would have allowed such a place-to-place transfer.
>
> ...

(Footnote Continued)
this issue, arguing that it would not render performance under the 1983 Settlement Agreement (i.e., allow removal of the goods) until the Respondents "specifically performed" certain conditions allegedly called for in the 1979 Settlement Agreement, namely, their undertaking to indemnify the Claimant against third-party vendors' claims and signing a general release.

> On April 29, 1980, and pursuant to arrangements including those made with the United States Air Force to secure the property at McGuire Air Force Base, a license for a place-to-place transfer in fact issued from the Treasury. Defendants, however, failed to accomplish the removal of the material during this time period and the license expired pursuant to its own terms on September 29, 1980.

The application for the Treasury license and the Treasury license itself have not been submitted as evidence to the Tribunal. In reply to this contention, the Respondents have asserted that "Behring's allegation that it went so far as to obtain special licenses from the United States Department of Treasury which permitted [the Respondents] to remove its materials from Behring's warehouse is completely false."

56. The Tribunal notes that a number of the alleged failures on the part of the Claimant to allow the removal of the goods are claimed to have occurred only after 19 January 1981 (i.e., the Claimant's ignoring telexes and denying Mr. Mokri access to the warehouse). In light of the jurisdictional guidelines set by the Tribunal in its Interim Award and, in particular the requirement that a breach of duty by the Claimant would have to have occurred on or prior to 19 January 1981, these allegations, even if proven true, cannot form a basis for the Tribunal's jurisdiction over this Counterclaim.

57. In support of their position that the Claimant breached its duty to release the materials which were stored at the Edison warehouse, the Respondents argued, inter alia, that Behring "failed to consent to an Order of the District Court removing temporary restraints" in violation of Article 3 of the 1979 Settlement Agreement. Article 3 of the 1979 Settlement Agreement, inter alia, states that "Behring will consent to an order of the District Court removing temporary restraints which have been placed on [the Respondents'] materials by previous order of that court." The Tribunal finds that this allegation is not confirmed by the record.

According to the United States District Court's Consent Order dated 9 November 1979, a copy of which was filed by the Claimant, all temporary restraints previously imposed by this Court on the Respondents' materials were to be removed concurrent with the deposit of the sum of U.S.$365,000.00 by the trustees[19] in the Trust Account. That this Order was consented to by the Claimant is clearly evidenced by the following text appearing thereon: "Consented to on behalf of Behring International, Inc. by [signature], Attorney for Plaintiff." As regards the amount to be deposited in the Trust Account, the Tribunal is satisfied that this condition for the removal of the restraints was met. The Tribunal notes in this respect that Mr. Robert W. Delventhal, attorney for the Claimant, wrote in a letter dated 7 December 1979 addressed to Mr. Richard P. Brown, Jr., attorney for the Respondents that "[a] Consent Order releasing temporary restraints on the material at Behring's Edison warehouse has been executed by the Court and the additional sums necessary to satisfy the terms of the [1979 Settlement Agreement] have been paid to the Trust Account." The lack of any correspondence between the Parties subsequent to the Consent Order pursuing the issue of the deposit and the fact that, apparently, no motion was ever filed with the United States District Court to enforce the Consent Order as to the deposit of the requisite amount in the Trust Account further confirm that this aspect of the Consent Order was complied with. Even if that were not the case, it is beyond dispute that the obligation to deposit the said sum was incumbent upon the trustees, not upon the Claimant. Consequently, any failure to deposit this money cannot, in any case, be construed as a breach on the part of the Claimant of its duty to release the Respondents' materials.

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[19]The trustees of the Trust Account are Mr. Richard P. Brown, Jr., attorney for the Respondents, Colonel A. (Footnote Continued)

58. Concerning the Respondents' contention that the Claimant failed to cooperate in allowing the Respondents to inventory the goods, the Tribunal notes that both Parties acknowledge that an inventory was taken in 1979, although it was never filed with the Tribunal.

59. That the failure to remove the goods from the warehouse was not due to a breach by the Claimant of its duty to release the properties is further evidenced by a number of statements made by the Respondents themselves. In their Statement of Defense, the Respondents asserted the following:

> [O]n 14th November 1979, the President of the United States froze all Iranian assets in the United States and, thus, [the Respondents were] not able to take any action to remove [their properties] from Behring's warehouse until the Algiers Declarations were adhered to by Iran and the United States of America.

(Emphasis added). The record also includes a Memorandum of Law which was originally filed by the Respondents in the proceedings before the United States District Court. The following statement appears in this Memorandum:

> On November 14, 1979, one week after the parties settled their claims, President Carter declared a national emergency and froze all Iranian assets (Executive Order 12170, 44 Fed. Reg. 65729, November 15, 1979, followed by the Iranian Assets Control Regulations, 31 C.F.R., Part 535). The Executive Order and its implementing regulations immobilized the Iranian property stored in the Behring facility and prevented its removal.

(Emphasis added). Considering the above statements and the lack of any persuasive proof establishing any act by the

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(Footnote Continued)
Zarrabi, representative of the Respondents, Mr. Robert W. Delventhal, attorney for the Claimant, and Mr. George Murphy, representative of the Claimant.

Claimant occurring on or prior to 19 January 1981 that could be construed as a breach of its duty to allow the goods to be removed, the Tribunal finds that it is not proven that such breach occurred during the relevant jurisdictional period.[20]

(2) The Claimant's alleged failure to adequately store the goods

60. The Respondents also maintain that the Claimant had a duty to use care and diligence in storing their properties but that it breached this duty. The Claimant denies both of these contentions. The Tribunal must investigate whether the Claimant had any duty of care in respect of the goods stored at the warehouse and, if so, whether this duty was breached on or prior to 19 January 1981.

(i) The Claimant's duty in respect of the goods stored at its warehouse

61. On the basis of its interpretation of the 1979 Settlement Agreement, the Claimant argues that it was a gratuitous bailee up to 15 December 1979 (i.e., the date by which the 1979 Settlement Agreement provided the goods were to be removed, later postponed until 15 January 1980, see footnote 16, supra), and that it therefore could be held liable only for gross negligence, bad faith, willful misconduct or fraud. After this date, the Claimant asserts it had "absolutely no legal obligation" to maintain the goods and that it "no longer had a duty even to exercise a slight degree of care with regard to the property."

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[20] The Tribunal does not express any opinion in this Case as to whether the Presidential Order of 14 November 1979 did or did not prevent the goods from being removed. Its decision with respect to the allegation that the Claimant breached its duty to allow the goods to be removed (Footnote Continued)

62. The Respondents reply that the Claimant was not a gratuitous bailee because it received substantial payments for providing storage services which in reality it neglected to render. According to the Respondents the Claimant should be considered a warehouseman. In support of this contention, the Respondents argue that the Claimant itself claimed to be entitled to the status of warehouseman in order to obtain the permission from the United States authorities to sell the goods at public auction. They further maintain that the Claimant, as a warehouseman, had the duty to prevent the property from being damaged, lost or stolen.

63. The Tribunal notes that the Claimant received substantial sums from the Respondents during the period in which the goods were stored at its warehouse. It follows from the invoices the Claimant submitted to the Tribunal in support of claims for storage costs allegedly incurred from 15 January 1980 through 19 January 1981 that the Claimant recognized that the money it claimed was intended to cover the costs of "the retention and maintenance of material and equipment owned by the Government of Iran." Furthermore, the Claimant filed with the Tribunal a second affidavit of Mr. George A. Murphy, its former Vice President, which was submitted in the United States District Court proceedings on 25 August 1981 in support of claims for recovery of storage costs. In this document, the Claimant argues that it is entitled to such recovery because it "was forced to continue to staff the warehouse, pay rent and maintained all overhead costs including ADT security services, insurance, heat and electricity." In its application for a license from the United States Department of Treasury to publicly

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(Footnote Continued)
is based on the Respondents' above statements and, more importantly, the lack of evidence establishing such breach on or prior to 19 January 1981.

sell the goods stored at its warehouse[21], the Claimant also maintained that the Respondents owed approximately U.S.$750,000.00 "for costs and expenses actually incurred by it in connection with the storage and maintenance of certain material owned by [the Respondents]" between 15 January 1980 and 1 November 1982. In support of this application, the Claimant invoked a New Jersey statute (N.J.S.A. 12 A:7-209) which, in relevant part, reads as follows:

> A warehouseman has a lien against the bailor on the goods covered by a warehouse receipt or on the proceeds thereof in his possession for charges for the storage or transportation (including any terminal charges), insurance, labor or charges present or future in relation to the goods, and for expenses necessary for the preservation of the goods or reasonably incurred in their sale pursuant to law.

In the same document, the Claimant asserts that, as a warehouseman, it was required to perform services "including but not limited to: ... providing adequate, well-secured warehousing space." The Tribunal thus finds that the Claimant itself recognized that it had a duty in relation to the goods and that this duty implied that, at a minimum, it had to take reasonable measures to adequately store the Respondents' property, a duty that did not lapse on 15 December 1979.

(ii) The Claimant's alleged breach of duty to adequately store the goods

64. In arguing that the Claimant breached its duty to adequately store the goods, the Respondents focus on the condition of the warehouse where the goods were stored. According to the Respondents there was a marked difference in condition of the front part of the building, which

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[21] See Interim Award, at p. 5 reprinted in 8 Iran-U.S. C.T.R. at 240.

allegedly was at the disposal of another company and was suited for the storage of goods, and the rear part (the "Extension Facility") which was used as storage room for their property. The Respondents state that the Extension Facility was "a ruined building annexed to the modern warehouse." It allegedly was abandoned and lacked ventilation, adequate lighting and sanitary facilities, was permeated with dirt, rubbish, harmful smells and vermin, and was unfit for performing an inventory. Containers and chemical substances had deteriorated, with their contents leaking and emitting noxious odors. The Respondents state that they observed these conditions in June 1984 when the Parties' representatives and the Expert met at the Behring warehouse to make a preliminary inspection of the facilities and stored goods. In support of their allegations the Respondents also have referred to the findings of the Expert and the affidavit of Mr. Ali Partovi. Mr. Partovi notes that the front of the warehouse "is equipped with all the requirements of administration and storage," but that the Respondents' goods were stored in the rear part of the warehouse, in a "dilapidated roofed space" in conditions as described above. He further states that the goods had been stored in these conditions for seven years from 1979 until their release.

65. The Claimant denies the assertion that the goods were stored in a dilapidated building. According to the Claimant "[t]he extension facility, while it lacks air conditioning, is heated, ventilated, adequately lighted and suited for the purpose" of storing the Respondents' goods. The Claimant states that the rubbish referred to by the Respondents may be a reference to construction materials located outside the building. The Claimant denies that there are vermin in the building. As to noxious odors, the Claimant maintains that it brought this problem to the Respondents' attention in the past, but that it was advised by them not to employ Kramer Chemical, a subcontractor, for cleaning up stored chemicals.

66. The Tribunal finds that the Respondents' allegations as to the condition of the Extension Facility in 1984 appear to be supported by the findings of the Expert. In his preliminary report dated 26 June 1984 he wrote that "the goods have to be removed to more suitable facilities before inventory and inspection can be made." He further stated that "[i]nventory and inspection cannot be made at Behrings [sic] Warehouse due to lack of space and environmental reasons. Thus the goods have to be transported to a warehouse with suitable space for handling and storing and also including office facilities (telephone, typewriter, word processor, copying machine, etc.) to make inventory and inspection possible." In his final report dated 31 January 1986 the Expert further mentions that "the warehouse had a thick layer of dust on the floor and on everything else in the building" and, he notes "the inferior storage conditions at the Edison warehouse."

67. In order for the Tribunal to have jurisdiction over this Counterclaim it must be established that the Claimant, on or prior to 19 January 1981, breached its duty to adequately store the goods. To the extent that inferior storage conditions may be construed as a breach by the Claimant, it would need to be proven that such inferior conditions existed on or prior to 19 January 1981. In connection therewith, the Respondents maintain that their property was stored in the Extension Facility for seven years from 1979 onwards. In contrast, the Claimant alleges that "on or about August of 1983, Behring moved the so called Iranian property from one location within the warehouse to another, i.e. an extension to the warehouse connected by a single sliding door to the main warehouse were [sic] the property now resides." As there is no further evidence in the record on this issue, it is unclear to the Tribunal where precisely the Respondents' property was located in the warehouse during the relevant jurisdictional period. Furthermore, assuming arguendo that the goods were stored in the Extension Facility during this period, there

is no evidence in the record that, at that time, inferior storage conditions already existed there. In the face of this lack of evidence, the Tribunal concludes that it has not been established that the goods were stored in unsuitable storage space on or prior to 19 January 1981 and that, consequently, it is not proven that the Claimant, on or prior to 19 January 1981, breached its duty to adequately store the goods.

68. Apart from the assertion that the Extension Facility was not suited for the storage of their property, the Respondents have alleged that "some of their properties [were] mysteriously missing from Behring's warehouse" and that "they [had] received intelligence that their properties [had been] sold in the market." However, the Respondents have not identified any particular act of the Claimant, occurring during the relevant jurisdictional period, that might be construed as an unlawful sale of their materials.[22] In any case, the Tribunal finds no evidence in the record proving that such unlawful sales occurred on or prior to 19 January 1981.

(3) Conclusion as to the Tribunal's jurisdiction

69. Because no breach of duty on the part of the Claimant occurring on or prior to 19 January 1981 has been proven, the Tribunal concludes that it has no jurisdiction over the Counterclaim for damages. Consequently, the Counterclaims described in item (3) and (4) of paragraph 40 are dismissed and the request for suspension described in item (6) of the same paragraph has been mooted.

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[22] In their Statement of Counterclaim the Respondents referred to the INS equipment as an example of such missing material. It appears that this equipment (save for one item no. 1259) was eventually retrieved in early 1983. Regarding item no. 1259, there is no indication in the record that it was unlawfully sold by the Claimant.

V. COSTS

70. The Claimant's claim for attorney's fees and costs is denied.

71. The Respondents request that they be reimbursed for the costs associated with the Expert and attorneys' fees and costs which they incurred in a total amount of U.S.$297,594.00. In accordance with Tribunal precedent, a Party's conduct during the arbitral proceedings may be taken into account in determining the appropriate amount of costs to award. The Tribunal on several occasions has held that a party is entitled to the reimbursement of extra costs which it was forced to bear because of the other party's inappropriate conduct. See Ministry of National Defence of the Islamic Republic of Iran and Government of the United States of America, et al., Award No. 247-B59/B69-1, pp. 5-6 (15 Aug. 1986), reprinted in 12 Iran-U.S. C.T.R. 33, 36; International Schools Services, Inc. and Islamic Republic of Iran, et al., Award No. 290-123-1, para. 49 (29 Jan. 1987), reprinted in 14 Iran-U.S. C.T.R. 65, para. 49; Sedco, Inc. and National Iranian Oil Company, et al., Award No. 309-129-3, para. 586 (7 July 1987), reprinted in 15 Iran-U.S. C.T.R. 23, para. 586.

72. Because of the Claimant's inappropriate conduct, particularly its failure to respond to the Tribunal's Orders of 30 April 1986, 13 August 1986, 24 January 1987 and 17 February 1988, the Respondents were forced to incur higher attorney's fees and costs than otherwise would have been necessary. The Tribunal, therefore, finds it reasonable to award the Respondents U.S.$60,000 as estimated compensation for such extra costs.

73. The Tribunal notes that the Respondents deposited a total of U.S.$173,489.98 to be held in escrow for payment to

the Expert and that funds of U.S.$172,535.73 were expended for the Expert's assistance.[23] The total deposit in the escrow account amounted to U.S.$173,839.98.[24] Therefore the Respondents are entitled to receive a refund of the balance in the escrow account. Given the determination of the Tribunal on both the Claims and Counterclaims and the circumstances of this Case, particularly the fact that the Claimant's inappropriate conduct had no influence on the amount of the Expert's fees, the Tribunal, in light of Article 40.1 of the Tribunal Rules, determines that it is reasonable to apportion equally between the Parties the costs associated with the Expert. The Respondents therefore are entitled to collect U.S.$86,267.86 from the Claimant as reimbursement for the costs incurred in connection with the Expert's assistance.

VI. THE AWARD

74. In view of the foregoing,

THE TRIBUNAL HEREBY AWARDS AS FOLLOWS:

1) The Claim of BEHRING INTERNATIONAL, INC. for storage costs allegedly incurred from 15 January 1980 through 19 January 1981 (plus interest) is dismissed on the merits.

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[23] The accounting records indicate that the Expert was paid a total of U.S.$172,055.94. There also were accompanying bank and miscellaneous charges of Dfl. 1,405.80 (at an average exchange rate of Df. 2.93 per U.S.$1= U.S.$479.79). The total amount expended for the Expert's assistance thus was U.S.$172,535.73.

[24] The U.S.$350.00 difference between U.S.$173,839.98 and U.S.$173,489.98 is explained by the remittance to the escrow account in May 1986 of the proceeds of the sale of a photocopier used in the course of the taking of the inventory by the Expert.

2) The Claim of BEHRING INTERNATIONAL, INC. for the balance in the Trust Account as of 31 December 1981 (plus interest) is dismissed on the merits.

3) The Claim of BEHRING INTERNATIONAL, INC. for sanctions and punitive damages is dismissed on the merits.

4) The Counterclaim of the ISLAMIC REPUBLIC OF IRAN AIR FORCE, IRAN AIRCRAFT INDUSTRIES and THE GOVERNMENT OF IRAN for payment of the Iranian Islamic Republic Shipping Lines' alleged outstanding bills (plus interest) is dismissed on the merits.

5) The Counterclaim of the ISLAMIC REPUBLIC OF IRAN AIR FORCE, IRAN AIRCRAFT INDUSTRIES and THE GOVERNMENT OF IRAN for restitution of U.S.$213,200.00 (plus interest) is dismissed for lack of jurisdiction.

6) The Counterclaim of the ISLAMIC REPUBLIC OF IRAN AIR FORCE, IRAN AIRCRAFT INDUSTRIES and THE GOVERNMENT OF IRAN for damages resulting from the alleged disappearance of goods stored at BEHRING INTERNATIONAL, INC.'s warehouse is dismissed for lack of jurisdiction.

7) The Claim of BEHRING INTERNATIONAL, INC. for attorney's fees and costs is dismissed.

8) BEHRING INTERNATIONAL, INC. is obligated to pay U.S.$60,000.00 to the Respondents as reimbursement for attorney's fees and costs.

9) The Respondents are entitled to a refund of the balance in the Tribunal's account No. 24.58.28.583. BEHRING INTERNATIONAL, INC. is

obligated to pay U.S.$86,267.86 to the Respondents as reimbursement for the costs incurred in connection with the Expert's assistance in this Case.

Dated, The Hague,
29 October 1991

Gaetano Arangio-Ruiz
Chairman
Chamber Three

In the Name of God

Richard C. Allison

Mohsen Aghahosseini
Dissenting, except concurring in dismissal of the claims.