DECISIONS, AWARDS, AWARDS ON AGREED TERMS, INTERIM AWARDS, INTERLOCUTORY AWARDS, INTERIM AND INTERLOCUTORY AWARDS AND SELECTED ORDERS

COMPONENT BUILDERS, INC.,
WOOD COMPONENTS CO., and
MOSHOFSKY ENTERPRISES, INC.,
Claimants

v.

THE ISLAMIC REPUBLIC OF IRAN,
et al., Respondents

(Case No. 395)

Chamber Three: Mangård, *Chairman;* Brower,[1]
Ansari,[2] *Members*

Signed 10 *January* 1985[3]

ORDER

The following is the text as issued by the Tribunal:

ORDER

By its Order of 28 June 1984, the Tribunal ordered Claimants to

[1 Concurring Opinion, see p. 5 below.]
[2 The signature of Mr. Ansari is accompanied by the following:

In the Name of God

I do not agree with that part of the Order dealing with the stay of the proceedings before the Public Court of Tehran for the following reasons:

First; until such time as the jurisdiction of this Tribunal, which is a restricted one, is established to hear a dispute, it would be illogical and contrary to legal principles for it to request a court of general jurisdiction to stay proceedings with respect to the said dispute.

Secondly; the issuance of such a request prior to the judicial interpretation of the choice of forum clause in the disputed contract, is premature and would indicate that the issue is prejudged.

Thirdly; as explained in my previous opinions and those of other Iranian arbitrators in relation to past similar requests, the stay of proceedings before the Iranian courts are by law restricted to certain specified cases none of which is applicable to the present instance. The request from the Respondents to take the necessary measures to stay the present proceedings before the Iranian court is therefore one which cannot be legally complied with.]
[3 Filed 10 January 1985.]

file by 1 September 1984 their Memorial together with all documentary evidence they intend to rely on, Respondents to file such documents by 15 November 1984, and all parties to file evidence and briefs in rebuttal by 1 January 1985. The Order also stated that a "Prehearing Conference or Hearing will be held on 22 February 1985".

By the Tribunal's Order of 15 August 1984 Claimants were granted an extension of the filing date for their Memorial and subsequently filed their Memorial and evidence on 8 October 1984. The filing date for Respondents' Memorial was first extended to 14 December 1984, and later to 21 January 1985, by the Orders filed respectively on 15 August 1984 and 18 December 1984.

On 8 November 1984, Claimants filed a request for "the Tribunal to take interim measures pursuant to Article 26 of the Tribunal's Rules of Procedure to issue an Order directing Respondents the Islamic Republic of Iran and Bank Maskan Iran to take all appropriate measures to have proceedings in the case of *Bank Maskan Iran* v. *Wood Components Co. and Components Builders, Inc.*, docketed as File No. 1277/61 in Chamber 29 of the Tehran Public Court of Tehran . . . stayed pending the outcome of the proceedings in this claim before the Tribunal".

The Tribunal in its Order of 28 November 1984 noted

> that one requirement for issuance of interim measure is that there appears, *prima facie*, to be a basis on which the jurisdiction of the Tribunal might be founded. After a review of the record, the Tribunal deems it appropriate in this case to consider in conjunction with the request for interim measures, the jurisdictional issues presented by the claims against Bank Maskan described as Claims 1 and 2 of Claimants' Statement of Claim filed 18 January 1982. Inasmuch as Claimants have been summoned to appear before Chamber 29 of the Public Court of Tehran on 13 January 1985, the Respondents shall file no later than 28 December 1984 their comments on Claimant's request for interim measures of 8 November 1984.

The Order also stated that it is the intention of the Tribunal to decide upon Claimants' request for interim measures and upon the related jurisdictional issues on the basis of the papers ordered.

On 12 December 1984, Claimants filed a request for a Hearing on jurisdiction. On 28 December 1984, Respondent Bank Maskan requested an extension of at least two and one half months for the filing of their Memorial and evidence. On 4 January 1985, Respondent Bank Maskan filed its comments on Claimants' 8

November 1984 request for interim measures. Respondent Bank Maskan, *inter alia*, requested that a Hearing be held "to deal with the special question of jurisdiction".

In light of the outstanding request for interim measures and procedural history of this case, the Tribunal deems it appropriate that the oral proceeding scheduled for 22 February 1985 be a Pre-Hearing Conference on all issues combined with a Hearing on the request for interim measures and on related jurisdictional issues. Respondent the Islamic Republic of Iran is granted an extension until 5 February 1985 to file a Memorial on the request for interim measures and on the related jurisdictional issues. By 18 February 1985 the Parties may file, if they wish, any submissions on the issues specified in the separate form attached hereto.

Inasmuch as the Claimants have been summoned to appear before the Public Court of Tehran on 13 January 1985, the Tribunal requests Respondents the Islamic Republic of Iran and Bank Maskan Iran to take all appropriate measures to ensure that the proceedings before the Public Court of Tehran be stayed until at least 90 days after the Hearing to be held on 22 February 1985.

The Order of 18 December 1984, insofar as it sets dates for Memorials to be filed by Respondents and Rebuttals to be filed by all the Parties, is hereby cancelled. The question of setting new dates will be considered by the Tribunal after the Pre-Hearing Conference on all issues and the Hearing on interim measures and on related jurisdictional issues to be held on 22 February 1985 at Parkweg 13, The Hague at 10:00 o'clock a.m.

CONCURRING OPINION OF CHARLES N. BROWER TO ORDER[1]

I concur in the Chamber's Order of 10 January 1985 which temporarily restrains Iranian judicial proceedings so as to afford this Tribunal an opportunity to hold a hearing on Claimant's request under Article 26 of the Tribunal Rules for interim measures concerning the same proceedings and simultaneously to hold a hearing on the question of whether or not the Tribunal has jurisdiction over certain claims here presented,[2] or whether instead Article II, paragraph 1 of the Claims Settlement Declaration excludes

[1 Filed 16 January 1985.]

[2] Claimants and Respondents both have requested this separate hearing on the jurisdictional issues of the case. I believe the rationale for the Tribunal's Order would apply equally, however, if not, indeed, *a fortiori*, had no such separate hearing been scheduled.

them from our ambit as *inter alia* "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".

In registering my concurrence I believe it important to refute the somewhat contradictory assertions in Judge Ansari's dissent (1) that the instant Order cannot "logically" issue because the Tribunal's jurisdiction has not yet been definitively established and (2) that said Order has indeed precipitously "prejudged" the question of the Tribunal's jurisdiction in favor of Claimants. Neither objection is valid.

Under the particular circumstances of this case the Tribunal has chosen to protect both its "jurisdiction to determine jurisdiction" and its power to order interim measures by mandating a brief delay in the Iranian judicial proceedings thereby permitting this Tribunal an opportunity to complete reasoned consideration of the issues presented. *See* I. Shihata, *The Power of the International Court to Determine its own Jurisdiction* 47 (1965); *see also* V.S. Mani, *International Adjudication, Procedural Aspects* 287 (1980) ("A tribunal expected to perform its judicial functions must be presumed to have power to regulate matters of its incidental jurisdiction"). This in no way prejudges the jurisdictional issues; instead it preserves them for effective adjudication.[3] Indeed, the Tribunal would have prejudged the jurisdictional issues *de facto* by failing to act as it now has done and thereby leaving the Iranian court free to act in possible derogation of this Tribunal's jurisdiction.

The special character of this international Tribunal requires that it be free to fashion limited preliminary restraints of the kind here imposed. In various municipal systems "interlocutory relief is granted within weeks, days or even hours of the threatened detriment and this is anticipated in the procedure by which it is granted in most jurisdictions". J. Elkind, *Interim Protection, A Functional Approach* 191 (1981). Such speed of deliberation cannot be assumed in international claims litigation, however. As one commentator has written,

> [b]ut international tribunals . . . are beset by reasons for procrastination from which ordinary courts are exempt . . . documents [may need] to be transmitted over long distances. There are difficulties of language. The parties are states, and the procrastination inherent in governmental action is proverbial.

[3] This Tribunal has ordered such temporary restraints in the past. *See Ford Aerospace & Communications v. The Islamic Republic of Iran*, Interim Award No. 28-159-3 at 5 (20 October 1983) [3 IRAN-U.S. C.T.R. 384 at 386].

E. Dumbauld, *Interim Measures of Protection in International Controversies* 7 (1932). In such a context the ability to order temporary restrictions on parties may be vitally necessary to preserve the *status quo* and thereby ensure due consideration of a request for interim measures notwithstanding that the claims it concerns may concededly pose substantial jurisdictional issues.[4]

This conclusion as to purely preliminary restraints does not contradict the rule that for interim measures subsequently to be ordered there must appear *prima facie* to be a basis on which the jurisdiction of the Tribunal might be founded. *See Ford Aerospace & Communications v. The Islamic Republic of Iran*, Interim Award No. 39-159-3 (4 June 1984) at 8;[5] *Bendone-Derossi International v. The Islamic Republic of Iran*, Interim Award No. 40-375-1 (7 June 1984) at 4 and the Concurring Opinion of Howard M. Holtzmann thereto (8 June 1984).[6] Rather it expresses a necessary corollary: In order to preserve its ability to act effectively on a request for interim measures, the Tribunal may as necessary impose temporary restraints[7] unless there is a manifest lack of jurisdiction.[8]

If an international tribunal validly can indicate provisional

[4] The International Court of Justice has likewise recognized the necessity and appropriateness of temporary restraints. In *Prince of Pless Case*, 1933 P.C.I.J., ser. A/B, No. 54, 150 (Order of 11 May), the Prince of Pless was served with summonses on 20 April 1933 indicating that unless certain taxes were paid within fifteen days, action would be taken against his property. On 2 May 1933, Germany, in relation to a dispute it had filed with the Permanent Court of International Justice on 18 May 1932, requested the P.C.I.J. to order as interim relief that the Polish Government not take any action against the Prince of Pless pending the decision of the P.C.I.J. on the dispute before it. With the fifteen days limit to expire in two days and with the Court not in session, the President on his own initiative called upon the Polish Government by telegram to extend the fifteen day limit. *See* Sztucki, J., *Interim Measures in the Hague Court* 161 (1983); Elkind, J., *Interim Protection, A Functional Approach* 93-4 (1981). This practice is now confirmed in Article 74(4) of the Rules of the Court: "Pending the meeting of the Court, the President may call upon the parties to act in such a way as will enable any order the Court may make on the request for provisional measures to have its appropriate effect."

[5] 6 IRAN-U.S. C.T.R. 104 at 108.]

[6] 6 IRAN-U.S. C.T.R. 130 at 131 and 133.]

[7] One authority aptly describes such preliminary restraints as "provisional measure[s] of the second order". Sztucki, J., *Interim Measures in the Hague Court* 161 (1983).

[8] In other words the "benefit of the doubt" given a claimant as to the existence of jurisdiction when interim measures are considered (*see Military and Paramilitary Activities in and Against Nicaragua* (Nic. v. U.S.), 1984 I.C.J. 169, 207 (Dissenting Opinion of Judge Schwebel to Provisional Measures Order of 10 May) must be given all the more where temporary restraints are sought to preserve the Tribunal's power to consider such interim measures. A similar threshold test is utilized in Article 36, paragraph 3 of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *signed* 18 March 1965, *entered into force* 14 October 1966, 575 U.N.T.S. 160 (1966) whereby a request for arbitration is registered unless "the dispute is manifestly outside the jurisdiction of the Centre".

measures in cases over which it later finds it has no jurisdiction (*see, e.g. Anglo-Iranian Oil* (U.K. v. Iran) 1951 I.C.J. 105 (Order of 22 August) and 1952 I.C.J. 92 (Judgement of 22 July)) surely this Tribunal has the power to order a limited stay of proceedings in the courts of a State Party so as to protect its ability to consider a request for interim measures concerning such proceedings.[9]

I believe it appropriate as well to address again the contention implicit in the dissent of Judge Ansari that under Iranian law proceedings in Iranian courts can be stayed only at the request of both parties.[10] I have discussed this issue in the past. *See* Concurring Opinion of Charles N. Brower (19 June 1984) to *Ford Aerospace & Communications v. The Islamic Republic of Iran*, Interim Award No. 39-159-3 (4 June 1984).[11]

Leaving aside my previously expressed doubts as to the alleged inflexibility of Iranian municipal civil procedure on this point, which persist, such contention simply is irrelevant. The duty of a State Party to the Algiers Accords to ensure that judicial proceedings in its national courts are stayed when so requested by this Tribunal arises under the Algiers Accords (as implemented by the Tribunal Rules) and thus is an obligation imposed by international law. As Judge Sir Gerald Fitzmaurice noted,

> the principle that a State cannot plead the provisions (or deficiencies) of . . . its constitution as a ground for the non-observance of its international obligations . . . is indeed one of the great principles of international law, informing the whole system and applying to every branch of it.

Fitzmaurice, "The General Principles of International Law

[9] *See, E-Systems* v. *The Islamic Republic of Iran*, Interim Award No. 13-388-FT (4 February 1983) at 10 ("This 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") 2 *Iran-U.S. C.T. Rep.* 51, 57. The broad wording of Article 26 of this Tribunal's Rules ("the arbitral tribunal may take any interim measures it deems necessary . . .") may be read as explicit authority for "provisional measure[s] of the second order". Article 26 does not limit the inherent power of the Tribunal, however. *See Rockwell International* v. *The Islamic Republic of Iran*, Interim Award No. 20-430-1 (6 June 1983) at 4 ("The consistent practice of the Tribunal indicates, that this inherent power is in no way restricted by the language in Article 26 of the Tribunal Rules") 2 *Iran-U.S. C.T. Rep.* 369, 371. *See also Veerman* v. *Fed. Rep. of Germany*, I Decisions of the Arbitral Commission, No. 1 (Lagergren, Arndt & Edelman, arbs.) (Arbitral Commission on Property, Rights and Interests, 1958) at 119, 120 (a tribunal has "inherent power to issue orders as may be necessary to conserve the respective rights of the parties").

[10] Judge Ansari argues only that the instant Order "cannot be legally complied with" by Iran but does not suggest that this Tribunal lacks power to issue it.

[11] 6 IRAN-U.S. C.T.R. 104 at 110.]

Considered from the Standpoint of the Rule of Law" 92 *Recueil des Cours (1957-II)* 85 (1958).[12]

This principle of the supremacy of international law over municipal law in interstate legal relations is enshrined in Article 4 of the International Law Commission's Draft Articles on State Responsibility, adopted at the Commission's twenty-fifth session, which provides that the "characterization [of an 'act of a State . . . as internationally wrongful by international law'] cannot be affected by the characterization of the same act as lawful by internal law". The Commission's commentary to this article collects numerous decisions of the Permanent Court of International Justice, the International Court of Justice and arbitral tribunals in support of this basic principle of state responsibility. *See, e.g., S. S. Wimbledon*, (U.K., Fra., Japan, Italy & Pol. v. Ger.) 1923 P.C.I.J., ser. A, No. 1, at 29-30 (Judgement of 17 August); *Treatment of Polish Nationals*, 1932 P.C.I.J., ser. A/B, No. 40, at 24-25 (Advisory Opinion of 4 February); *Reparations for Injuries*, 1949 I.C.J. 180 (Advisory Opinion of 11 April); and *Wollemborg*, 14 U.N.R.I.A.A. 289 (Ital.-U.S. Conciliation Comm., Decision of 24 September 1956).

The Commission's commentary further reiterates that "an act of a state must be characterized as internationally wrongful as soon as it constitutes a breach of an international obligation, even if the act does not contravene any of the obligations imposed by the State's internal law and even in the extreme case in which, under that law, the State was actually bound to adopt such conduct . . . [t]here is no exception to the principle . . .". *Report of the International Commission on the Work of its Twenty-Fifth Session*, paragraph 58, U.N. Doc. A/9010/Rev. 1, *reprinted in* II *Yearbook of the International Law Commission 1973* at 161, 184, 188, U.N. Doc. A/CN.4/Ser. A/1973/Add. 1.

Iranian government entities likewise have endorsed this principle of state responsibility before this Tribunal. *See, e.g.*, Reply of the Ministry of Defense of the Islamic Republic of Iran in Case B1 filed 29

[12] Likewise a State is responsible for the acts of its judiciary. *See* Articles 5 and 6 of the International Law Commission's Draft Articles on State Responsibility and the Commentary thereto *reprinted in II Yearbook of the International Law Commission 1973* at 191-98, U.N. Doc. A/CN.4/Ser.A/1973/Add. 1: Simpson, J.L., and Fox, H., *International Arbitration* 262 (1959); Eagleton, C., *The Responsibility of States in International Law* 69 (1928); Concurring Opinion of Howard M. Holtzmann and Richard M. Mosk (9 February 1983) to *E-Systems v. The Islamic Republic of Iran*, Interim Award No. 13-388-FT (4 February 1983) at 16, 2 *Iran-U.S. C.T. Rep.* 57, 64; Concurring Opinion of Richard M. Mosk (21 October 1983) to *Ford Aerospace & Communications v. The Islamic Republic of Iran*, Interim Award No. 28-159-3 (20 October 1983) at 4 [3 IRAN-U.S. C.T.R. 384 at 387].

November 1982 at 9 ("a State cannot plead its own law as an excuse for non-compliance with international law").

For these reasons the instant order constitutes a valid exercise of this Tribunal's authority and places on Respondents (including the Respondent State Party) the obligation under international law to ensure that the Order is heeded by the municipal judicial authorities involved.

THE GOVERNMENT OF THE UNITED STATES OF AMERICA,
on behalf and for the benefit of
J.D. MARSHALL INTERNATIONAL, INCORPORATED, *Claimant*

v.

THE ISLAMIC REPUBLIC OF IRAN, *Respondent*

(Case No. 11507)

Special Chamber: Böckstiegel, *Chairman;* Aldrich, Ansari, *Members*

Signed 15 *January* 1985[1]

AWARD NO. 158-11507-SC

The following is the text as issued by the Tribunal:

AWARD ON AGREED TERMS

1. On 19 January 1982, the Government of the United States of America filed a claim with the Tribunal on behalf and for the benefit of the Claimant J.D. Marshall International, Incorporated (hereinafter named "Marshall") against the Islamic Republic of Iran as Respondent within the meaning of Article VII, paragraph 3, of 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 Islamic Republic of Iran of 19 January 1981 ("Claims Settlement Declaration").

2. On 5 October 1984, Marshall and Bank Sepah New York Agency, entered into a Settlement Agreement, signed by them, resolving the matters in dispute between them, whereby it is agreed, *inter alia*, that Bank Sepah shall pay to the Claimant the amount of U.S. $41,557.00 in complete and final settlement of all claims and counterclaims now existing or capable of arising in connection with this Case.

3. On 17 December 1984 a Joint Request for an Award on Agreed Terms was filed with the Tribunal, signed by the Agent of the Islamic

[1 Filed 15 January 1985.]