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Case No. 3211

Date of filing: 30 OCT 86

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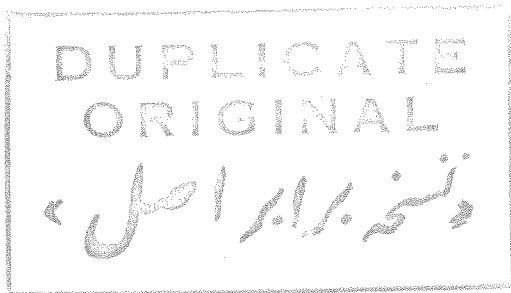
** CONCURRING OPINION of _____
 - Date _____
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 - Date _____
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CASE NO. 324

CHAMBER THREE

AWARD No. 263-324-3

53

FUTURA TRADING INCORPORATED,
Claimant,

and

THE NATIONAL IRANIAN OIL COMPANY,
Respondent.

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه داری دعاوی ایران - ایالات متحدہ
ثبت شد - FILED	
Date	30 OCT 1986 ۱۳۶۵ / ۸ / ۸
No.	324

AWARD

Appearances:

For the Claimant	:	Mr. Alan Golomb Mr. Mark Hapgood Attorneys
For the Respondent	:	Mr. Mohammad K. Eshragh Agent of the Government of the Islamic Republic of Iran Mr. Nozar Dabiran Legal Advisor to the Agent of the Islamic Republic of Iran Mr. Mohammad Habibi Counsel of the National Iranian Oil Company Mr. Allahyar Mouri Attorney for and Rep- resentative of the National Iranian Oil Company
Also Present	:	Mr. John Crook Agent of the Government of the United States of America

1. The Claim in this Case arises originally out of four orders allegedly placed by the NATIONAL IRANIAN OIL COMPANY ("NIOC") with the Claimant, FUTURA TRADING INCORPORATED ("Futura"), for the purchase of certain electrical equipment, including electrical cables. Futura having withdrawn other parts of the claim, the remaining issue in dispute concerns the order for electrical cables. Futura contends, and NIOC disputes, that the cables were ordered by, manufactured for and duly delivered to NIOC. Futura claims NIOC remains obligated to pay Futura for these cables as Futura was unable to obtain payment through a letter of credit issued for that purpose. As an alternative ground the Claimant invokes the theory of unjust enrichment. At issue is also the effect on these proceedings of a judgment obtained by Futura on 29 September 1983 against Bank of America in a United States court based on Bank of America's failure to honor Futura's draw on the abovementioned letter of credit ("Judgment").

I. PROCEDURAL ISSUES

2. On 15 January 1982 Futura filed its Statement of Claim against NIOC. After an exchange of written pleadings which was concluded on 6 December 1984, a Hearing was held at the Tribunal on 3 February 1986.

3. During the course of the proceedings the Claimant amended its claim. As originally stated, the Claimant claimed payment for orders allegedly placed by NIOC pursuant

to four proforma invoices numbered 484/ A-D.¹ As regards the items included in proforma invoice No. 484/B the Claimant conceded in the written pleadings that it had received a total amount of U.S. \$89,080 representing full payment for the transformers in question. At the Hearing the Claimant further declared that it withdrew the part of its Claim identified as the claim for payment of U.S. \$96,240.40 for "twelve panel boards for lighting and distribution" and "five tons of bare copper conductor."² As the Respondent raised no objection thereto, the Tribunal hereby terminates this Case in so far as those three parts of the Claim are concerned. Consequently, the remaining part of the Claim concerns solely the alleged order of electrical cables.

4. On 30 January 1986 the Claimant submitted certain additional pleadings, including new evidentiary material, which it requested the Tribunal to consider. The Claimant explained at the Hearing that this submission also contained facts related to the Judgment.

5. NIOC stated that the Claimant's submission could be accepted only on the condition that NIOC was offered an opportunity to respond thereto.

6. The Tribunal finds that the Claimant has not stated any reason which would explain or excuse the lateness of the

¹ Proforma Invoice 484/A offered "Water proof panels" at the price of U.S. \$282,931; Proforma Invoice 484/B offered "Transformers" at the price of U.S. \$73,236; Proforma Invoice 484/C offered "Copper Conductor" at the price of U.S. \$14,400; and Proforma Invoice 484/D offered certain specified electrical cables at the price of U.S. \$371,715. The total value of these proforma invoices was thus U.S. \$742,282.

² I.e., the terms described in proforma invoices Nos. 484/A and 484/C.

proposed filing. The facts and evidence thus invoked were known and available to the Claimant already in 1983. The Tribunal finds no reason to extend the proceedings by ordering further submissions by the Parties. As a rule the Tribunal does not accept late filings over the objection of the other party, in view of the requirements of fairness to, and equality, between the Parties. Although it finds no reason here to depart from this rule in other respects, the Tribunal decides that due note has to be taken of the facts invoked by the Claimant related to the Judgment. This is so because the Claimant expressly referred to this Judgment in its oral presentation at the Hearing and it is to be decided if this Judgment affects the right of the Claimant to pursue its claim before this Tribunal. Consequently, the Tribunal disregards the submission of the Claimant except as concerns the facts contained therein related to the Judgment obtained by Futura against Bank of America.

7. At the Hearing the Claimant invoked as an alternative ground the theory of unjust enrichment. NIOC objected thereto, arguing that a claim on this theory was not included in the Statement of Claim and that its subsequent assertion constitutes an untimely filing of a new claim. The Tribunal cannot accept NIOC's contention, since, in any event, the Tribunal is not bound by the legal theories invoked by the Parties.

II. JURISDICTION

8. Based on the evidence submitted the Tribunal is satisfied that Futura is a national of the United States within the meaning of Articles II, paragraph 1, and VII, paragraph 1, of the Claims Settlement Declaration. Furthermore, based on substantially similar evidence as invoked in this Case, the Tribunal has previously found Futura to be a United States national in Futura Trading

Incorporated and Khuzestan Water and Power Authority, Award No. 187-325-3, pp. 6 - 8 (19 August 1985).

9. It is not disputed that NIOC is an entity controlled by Iran and therefore a proper Respondent before the Tribunal within the terms of the Claims Settlement Declaration.

10. NIOC has raised the defense that it is not a proper Respondent in this Case and that the party involved was another Iranian entity, Gostaresk Maskan ("GM"). In view of its relation to the merits, this defense will be dealt with subsequently.

11. As concerns subject matter jurisdiction, the Tribunal finds that the claim arises out of a debt or contract within the terms of Article II, paragraph 1 of the Claims Settlement Declaration.

12. Other jurisdictional issues are treated with the merits.

III. THE MERITS

a) THE CONTRACT CLAIM

i) Factual Background

13. Sometime in 1976 NIOC determined to build a certain housing project ("Housing Project") in Esfahan, Iran, and in furtherance thereof NIOC entered into Contract No. CC757 ("Contract CC757") with GM. For the purposes of the Housing Project NIOC caused Bank Markazi to open Letter of Credit No. 04/88094, dated 8 August 1976, in favor of GM and for the account of NIOC, in the amount of U.S. \$6,784,452 ("Letter of Credit").

14. Pursuant to a proforma invoice, numbered 484 D and dated 10 August 1978 ("Proforma Invoice"), an Iranian company ("Nordon") submitted to GM an offer to sell certain specified electrical cables ("Cables"). The Proforma Invoice, which was valid for 60 days, quoted a total price for the Cables of U.S. \$371,715, and stated further that the prices were in U.S. dollars "C&F Bandar Shahpour / Khoramshahr" and that the delivery time was "3 to 3.5 months." The letter under cover of which the Proforma Invoice (with the three other proforma invoices no longer at issue) was sent provided also that "[p]ayment should be made by opening irrevocable, letter of credit for 100% of valid [sic] to be opened in favour of [Futura]."

15. It appears that the Proforma Invoice subsequently was transmitted to NIOC for approval. NIOC agrees that bids such as are represented by the Proforma Invoice "were to be approved by NIOC (as to price and conformity of goods with the standard specifications)." NIOC informed GM by letter of 28 October 1978, signed by Mr. F. Davalloo and headed "SUBJECT: NIOC HOUSING PROJECTS, CONTRACT NO. CC 757 ELECTRICAL ITEMS FOR ESFAHAN SITE NO. 1 (Import Request No. 590)", that "Proforma Invoice No. 484/...D dated 10.8.78, issued by Nordon Company ... was approved by NIOC management" on 23 October 1978 and that "[y]ou are hereby requested to place the order and advise this office accordingly" ("Letter of Acceptance").

16. By letter of 8 November 1978 to Nordon GM forwarded a copy of the Letter of Acceptance from NIOC, stating that "our client has now instructed us to accept your above reference proforma ['No. 484/1775 dated 10 Aug. 1978'] and to proceed with the transfer of a letter of credit to your company...."

17. On 20 November 1978 Nordon addressed a purchase order to Futura, signed by "B. Khosravi", which lists cables with

specifications identical to those contained in the Proforma Invoice ("Purchase Order"). The Purchase Order contains the following notations

SUPPLIERS NAME & ADDRESS

Futura Trading Inc.
P.O. Box 257
Winchester Mass. 01890
U.S.A.

...
OUR ORDER NO.
484/D

...
Delivery: Delivery should be made in 2 months from the date of this order

18. It appears that GM paid 20% down on orders such as that represented by the Proforma Invoice and that the Letter of Credit, by its terms, only covered the remaining 80% of the value of orders. The aggregate value of the Proforma Invoice and the three other proforma invoices (no longer at issue) was U.S. \$742,282. There is no evidence as to when the downpayment of 20%, or U.S. \$148,456.40, was either paid or received, but Futura conceded having received it. The effect of the advances received by Futura on its entitlements will be further discussed below (see paragraph 57, infra).

19. On 10 May 1979 Futura received "Advice No. 451523-QQ/04/88094" of Bank of America in New York notifying it that Letter of Credit No. 04/88094 "IN FAVOR OF GOSTARESH MASKAN CO. FOR ACCOUNT OF NATIONAL IRANIAN OIL COMPANY, TEHERAN ... HAS NOW BEEN TRANSFERRED TO YOU" and that it was available to Futura up to the aggregate sum of U.S. \$593,825.60 "BY YOUR DRAFTS DRAWN AT SIGHT ON US ACCOMPANIED BY DOCUMENTS SPECIFIED BELOW COVERING 80% INVOICE VALUE OF MERCHANDISE TO BE DESCRIBED IN INVOICE AS: ... CABLES. C AND F BANDAR SHAHPUR." This advice further required "... CABLES TO BE SHIPPED NOT LATER THAN JULY 9 1979." The expiration date of the credit was set at 10 October 1979. On 7 June 1979, however, Bank of America advised Futura that the

Letter of Credit had been amended extending the shipment and expiration dates to 1 December 1979.

20. An Italian company, Alfacavi, had originally been named as the manufacturer for the Cables by Nordon in a letter to NIOC of 6 September 1978, i.e., one month following the submission of the Proforma Invoice. The Cables were, however, eventually produced by a Spanish company, General Cable CEAT, S.A. of Barcelona ("CEAT"). On 5 October 1979 Futura informed GM, by telex, that the Cables were ready to be shipped but that the only available port in Iran was Khorramshahr. On 11 October 1979 GM replied by telex that the Letter of Credit had been amended to allow shipment to Khorramshahr.

21. It appears that, prior to shipment, Futura caused the Cables to be inspected by Robert W. Hunt Company, Engineers, as is evidenced by a "Certificate No. 6772" dated 2 October 1979.

22. Futura notified GM by telex that the Cables were shipped from Barcelona to Khorramshahr on 12 October 1979 and that their expected date of arrival in Khorramshahr was 26 October 1979. GM was notified by telex on 16 October 1979 that the name of the vessel was "ARYA MARMAR PRL 53."

23. According to shipping documents submitted, including a Bill of Lading (the number of which is illegible on the copy submitted to the Tribunal) dated 11 October 1979 ("Bill of Lading"), "48 REELS" of "COOPER [sic] CABLE" marked

THE BANK MARKAZI
IRAN L/C No. 04/88094
NATIONAL IRANIAN OIL
COMPANY-TEHRAN
ORDER No. 2015/484/D
PROFORMA INVOICE 484/D
IRANIAN CUSTOM TARIFF 85/19

were shipped by Arya National Shipping Lines from Barcelona to Khorramshahr. The Bill of Lading further stated "Notify address: ... NATIONAL IRANIAN OIL COMPANY TEHRAN P/CTA DE FUTURA TRADING (P.O.BOX 257) Winchester MA 01890-USA" and that the vessel was "ARIA MARMAR PRL 53."

24. It appears from the record that the Cables in fact did arrive in Khorramshahr. The Parties disagree, however, as to when they arrived.

25. On 9 November 1979 Futura issued Invoice Number 484/6024 ("Invoice") to NIOC for "Order Number 2015/484 D" bearing, inter alia, the following notations and statements:

SOLD TO:
National Iranian Oil Company
Tehran, IRAN
(NIOC Project 484-D)

SHIP TO:
Bank Markazi Iran
Tehran, Iran
L/C No. 04/88094
National Iranian Oil Company
Order No. 484D

Total C&F Khorramshahr	US \$	520,401.00
Less 20% Downpayment Received		<u>104,080.00</u>
Draft amount for 80% of Invoice	US\$	416,321.00

26. On the same day, i.e., 9 November 1979, Futura submitted to Bank of America in New York City sight draft No. 484/6024 under Bank of America's "Ref. No. 451423QQ," drawing U.S. \$ 416,321 "under Letter of Credit No. 04/88094 of Bank Markazi, Iran." The draft also noted:

Value Received and Charges to Account of National Iranian Oil Company

27. It appears that payment under the Letter of Credit was forestalled initially by the intervention of the order of the President of the United States immobilizing Iranian assets in the United States on 14 November 1979. Subsequently, however, Bank of America notified Futura that:

[N]otwithstanding your presentation on December 12, of License No. I-104 dated December 11, 1979 issued by Federal Reserve Bank of New York, we still are unable to effect the payment you require because of attachments levied upon the property of the Bank Markazi, Iran, Teheran, at our office.

28. Futura made inquiries to NIOC directly and received a telexed response from NIOC on 18 December 1979 stating that "WE HAVE ... PASSED A COPY OF YOUR TELEX 91 DATED 12.12.79 ON THE ABOVE PROJECT TO THE NIOC ENGINEERING AND CONSTRUCTION FOR APPROPRIATE ACTION WITH THE REQUEST THAT THEY INFORM YOU OF SAME" Thereafter, the Claimant, unable to receive payment through the Letter of Credit in the United States, sought payment under the Letter of Credit via Bank Melli Iran in Hamburg, Germany. The Parties agree that by July 1980 Futura definitely had been precluded from realizing under the Letter of Credit. It is undisputed that Futura has not otherwise received payment of the invoiced amount.

ii) The Contentions of the Parties

29. On the basis of the foregoing Futura contends that a contract was entered into between Futura and NIOC. NIOC placed an order for the Cables with Futura, Futura caused the Cables to be manufactured according to NIOC's specifications and the Cables were duly delivered to NIOC. Futura concedes it has received a downpayment amounting to 20% of the invoiced value of the Cables, and claims now payment by NIOC for the remaining 80%, i.e., U.S. \$416,321. Futura also claims interest on this amount at the allegedly commercial rate of 12% as well as its costs of arbitration.

30. NIOC's defense is basically that it disputes that any contract was reached with respect to the Cables and, in any event, that it involved the named parties, Futura and NIOC.

To the extent that a contract was entered into, NIOC asserts, the purchasing party was GM and not NIOC, which places the present claim outside the jurisdiction of this Tribunal, and the selling party was Nordon and not Futura, which likewise renders the Claim inadmissible. In any event, NIOC contends, Futura was in breach of the alleged contract, particularly by failing to deliver the Cables in time.

31. Futura contends that the Letter of Credit constitutes, in itself, a contract between the Parties. It argues that, in any event, together with all other evidence submitted, the Letter of Credit proves the existence of a contract between Futura and NIOC. With reference to the evidence submitted, Futura argues that its contention that it acted through its Iranian agent, Nordon, "... is a matter of mere logic [and that] no exhibit is available or necessary to demonstrate this fact." As regards the proper respondent, Futura maintains that GM acted as an agent for NIOC, for the purposes of the transaction here at issue. GM was only to carry out the bidding process on behalf of NIOC, it is alleged, and agreements entered into by GM were thus binding on NIOC. This is evidenced, the Claimant points out, by the fact that NIOC was the party causing issuance of the Letter of Credit which subsequently partially was transferred to Futura for payment of the Cables as well as other correspondence in evidence in this Case. The proper contracting party is thus NIOC and not GM.

32. As concerns the proper owner of the Claim, NIOC argues specifically that the only party known to the Respondent was Nordon and that Futura appeared only as an intermediary for Nordon. Thus Nordon and not Futura is the proper owner of the Claim. NIOC relies on a letter dated 16.2.1359 (6 May 1980). The letter, signed by Nordon, was addressed to NIOC, "Construction projects supervisor Attention : Mr Frooz Davalloo", was headed "Subject : Contract No. CC757, NIOC

construction project" and contains an account of the transaction here at issue. In this letter Nordon refers to Futura as "American agent of Nordon" and states, inter alia, the following:

Meanwhile, in order to expedite the work and avoid fragmentation of the L/C, Nordon decided to request opening of a single L/C for all four items³. To this end, Nordon designated Futura Trading Inc., an American Company, to act as intermediary and asked [GM] to transfer the letter of credit to Futura's name. [GM], the original holder of letter of credit, asked its bank (the Bank of America) to transfer to Futura that portion of the L/C which at first was issued in Nordon's name.

...

Meanwhile, since Nordon is the only party known by the four manufacturing companies [sic] who received Nordon's original order, we are now under constant pressure by them to receive the goods that are ready for delivery....

33. NIOC further disputes that GM acted as agent for NIOC. NIOC contends that, pursuant to Contract CC757, GM was an independent contractor with the obligation to refer to tender and obtain bids on various items to be procured. The bids were then approved by NIOC, after which GM, which was designated "Housing Project Contractor," would place orders with various manufacturers. NIOC asserts it was named only for convenience in order to simplify customs clearances, issuance of letters of credit and similar matters. NIOC thus concludes that GM was the contracting party with respect to any agreement reached for the Housing Project.

34. With respect to performance under the alleged contract, Futura contends it performed fully pursuant to its terms. It contends that NIOC, however, was in breach by failing to ensure that Futura was paid for the invoiced value of the

³ I.e., the items listed in the four proforma invoices 484/A-D (see note 1, supra).

Cables either by extending the Letter of Credit or otherwise.

35. NIOC, on the other hand, alleges that Futura was in breach of the contract, if contract there was, especially by 1) substituting the originally named manufacturer with CEAT without NIOC's knowledge or agreement; 2) not providing, in a timely manner, for inspection of the Cables that were to be shipped; 3) and not delivering the Cables until October 1980. NIOC further contends that it was not, at any point of time, informed by either Futura or Nordon that shipment was due and in progress and that shipment was due from Spain and not from Italy.

36. As to the first alleged breach, NIOC contends that Nordon was committed to cause the initially named Italian company, Alfacavi, to produce the Cables. NIOC relies on the letter from Nordon to GM dated 6 September 1978, in which Nordon states that "[f]urther to our quotation No.484/1575 dated 10th Aug 1978 please note the name of the manufacturers of the equipments offered ... Cables Alfacavi"

37. In response Futura contends that as neither the Proforma Invoice, nor the Purchase Order, nor, indeed, the Letter of Credit, named any manufacturer, the alleged agreement did not include a commitment to any particular manufacturer named. Futura further contends that, at the time, CEAT's prices were lower than Alfacavi's and that, in any event, cables such as the Cables here at issue are fungible products. It is therefore not of relevance to the purchaser which manufacturer is chosen as long as the cables met contract specifications.

38. As to the second alleged breach, NIOC contends that the Cables should have been inspected prior to shipping but that this was not done. Consequently, shipment should not have

been allowed. NIOC relies on a provision contained in the Letter of Credit issued by NIOC in favor of GM which requires the production of, inter alia:

5. Inspection certificate issued by R.W. HUNT Co, in 6 copies.

39. Futura responds that the Cables in fact were inspected on 2 October 1979 (see paragraph 21, supra), although such an inspection was not, in any event, a requirement under the terms of the contract. For the latter point Futura relies on a letter dated 18 April 1979 addressed to Bank Markazi Iran, Office of Foreign Exchange, signed "[o]n behalf of the National Iranian Oil Company", and headed "L/C No.04/88094," which stated, inter alia:

4. Regarding the letter of credit that is to be extended until end December 1979; please omit the condition requiring inspection and submission certificate from Hunt Company.

40. As to the third alleged breach, NIOC contends that contrary to what would be expected from the shipping documents the Cables were sent by Futura from Spain only approximately ten months later than the Claimant contends, or around 14 August 1980, and that the Cables arrived in Khorramshahr only on 12 September 1980. NIOC relies on a letter dated 10.8.59 (1 November 1980), signed by GM and addressed to the Ministry of Petroleum, Mr. Forooz Davalloo, "Construction project supervisor engineering and construction". This letter states, inter alia:

Subject: Housing projects, contract No. CC 757 order for four electrical equipments (Transformers, cables, panel boards, bar copper conductor) relevant to letter of Credit No. 09/88094 and back to back L/C No.0451423/QQ.

...

As of this date ... the remaining three items, which were scheduled to have been shipped during the second half of 1979, were not shipped from their

country of origin due to blocking of Iran's account in the Bank of America, as a result of which Futura was not paid for prices of the goods.

...

In one of the letters we received from Futura ... reference was made to entrance and unloading of a certain cargo of cables, manufactured by "Ceat" Factory, in one of the NIOC warehouses at Port Khoramshahr. This information was immediately passed on to Tranloo-Express Company, which was asked to make a prompt study of the subject and report its findings.

Through its Khoramshahr Office, Tranloo-Express did the necessary investigation and in its letter No. 543 dated 19/7/59 (October 11, 1980) reported that a cargo with following specifications had been unloaded at NIOC [y]ard in Port Khoramshahr.

Specifications of delivered cargo :

- 1) Kind and quantity of the material :
48 rolls of cable with total weight of Kg. 152,275.
- 2) Name of the carrier ship and the bill of lading No.:
Iran Marmar Safar No. 53. Administration bill of lading No. 192 and sea bill of lading No. 20.
- 3) Entry and unloading date: 21/6/59 (Sep.12,1980).
- 4) Origin of the material : Winchester, U.S.A., General cable (Ceat) Plant.
- 5) Label : Central Bank of Iran for NIOC - L/C No. 04/88094

On the other hand, since we have no access to any documents needed for releasing the cargo from custom, we have requested from Mr. Moeini, Executive Director of Nordon and Futura intermediary in Iran, to give us any information about shipment and unloading of the cargo.

Thus based on the above-mentioned points, we are enclosing copy of letter No. 543 dated 19/7/59 (October 11, 1980) from Tranloo-Express regarding entrance and unloading of the said cargo at NIOC yard in Port Khoramshahr. [This letter is not in evidence in this Case]. We also remind you, as stated in the Tranloo-Express letter, their investigation of this matter was done prior to the war and closing of Khoramshahr custom office, and at present there is nothing to be done.

41. Futura relies on the submitted shipping documents in order to prove that the Cables were in fact shipped prior to 1 December 1979 and on the letter dated 1 November 1980 invoked by NIOC above (see paragraph 40, supra) to prove that the Cables in fact did arrive in Khoramshahr.

42. Lastly, Futura notes that NIOC has not raised any objection to the invoiced price, either contemporaneously or in the present proceedings. In any event it contends that the price differential (of U.S.\$148,686) between the Proforma Invoice and Invoice No. 484/6024 was caused by a sharp increase in manufacturing costs which occurred prior to receipt of the Letter of Acceptance and the letter from GM of 8 November 1978 (see paragraph 16, supra), but after the expiry of the 60 day validity of the Proforma Invoice. Consequently, Futura contends it was not bound by the price offered and is now entitled to the invoiced price. Futura argues further that, since NIOC paid without objections the invoiced price for transformers ordered in the same way (U.S.\$89,080), even though such price exceeded the proforma offered price (U.S.\$73,230), it has accepted the validity of the invoiced price.

iii) The Findings of the Tribunal

43. The Tribunal notes initially that the Claimant does not allege, nor does the evidence suggest, the existence of any single document containing all the terms and conditions of the alleged contract between it and NIOC.

44. The Tribunal further notes the Claimant's argument that the Letter of Credit in itself constitutes a contract between NIOC and Futura and that NIOC's alleged payment obligation arises therefrom. The Tribunal disagrees. A letter of credit is, by its very nature, a means of payment for an obligation arising out of a contract reached prior to or in connection with the issuance of the letter of credit.

Furthermore, although the Letter of Credit may be used as evidence of the existence of an underlying contract, and of certain underlying contractual terms and conditions, it is too incomplete to constitute alone the basic contract as claimed in the present case.

45. As further evidence the Claimant relies on the Proforma Invoice, which undisputably constitutes an offer made 10 August 1978 for the sale of the Cables. The Letter of Acceptance was, however, dated 28 October 1978 and indeed received at a date subsequent to the expiry of the 60 day validity of the offer. The Tribunal thus finds that no contract was formed by the Proforma Invoice and the Letter of Acceptance. This is Futura's own position as it invokes the expiry of the offer contained in the Proforma Invoice as a ground for entitlement to alter the price offered.

46. The Tribunal thus has to determine, on the basis of the record before it, whether a contract otherwise can be inferred by the conduct of the parties involved.

47. The Tribunal must first determine who the parties were to the alleged contract. Futura contends, and NIOC disputes, that Nordon was Futura's agent. The Tribunal notes that although NIOC took objection to this contention of Futura from an early stage in the proceedings, the Claimant has explicitly declined to submit any agency agreement between Futura and Nordon. On the basis of the record before it, the Tribunal disagrees with the Claimant that Nordon's agency relationship vis-à-vis Futura is self-evident and a "matter of logic". The Tribunal finds, however, that the weight of the evidence supports Futura's contention. First of all, Futura was named as the beneficiary of the Letter of Credit. Furthermore, in the letter dated 1 November 1980 from GM to the Ministry of Petroleum GM refers to Nordon as the "Futura intermediary in Iran." Finally, the fact that Nordon issued the Proforma

Invoice as well as the Purchase Order supports, rather than contradicts, the Claimant's contention. Consequently, the Tribunal finds that Nordon acted on behalf of Futura for the purposes of the transaction here at issue. As the owner of the claim thus is Futura, the Tribunal has jurisdiction.

48. NIOC further disputes that it was a party to any contract with Futura. It contends that GM acted as an independent contractor and not as an agent for NIOC. The Tribunal finds that the legal relationship between NIOC and GM cannot be clearly determined from the record before it. As noted in Futura Trading Incorporated and Khuzestan Water and Power Authority, Award No. 187-325-3, p. 16 (19 Aug. 1985):

The legal distinction between an agent and an independent contractor can not be discerned solely from the practice of the entity involved. An agent may act in a highly independent fashion while an independent contractor, given sufficiently complex contractual arrangements, may appear indistinguishable from the entity it is serving.

The Tribunal finds, however, that the record submitted to the Tribunal sufficiently supports the Claimant's contention that NIOC was the principal on the other side of the contract so as to place on NIOC the burden of adducing contrary evidence. The Tribunal notes that NIOC, however, has failed to submit Contract CC757 which allegedly would have enabled the Tribunal to verify GM's status vis-à-vis NIOC. The Tribunal thus finds that the Respondent has not sustained its burden. Based on the foregoing the Tribunal accepts the Claimant's contention that the proper Respondent in this Case is NIOC and not GM, and that, consequently, the Tribunal's jurisdiction is not impaired.

49. As to the terms of the alleged contract itself, the Tribunal finds that the record before it does not conclusively evidence any agreement between the Parties as to the selling price for the Cables. The Tribunal notes,

however, that the record contains no contemporaneous objection on the part of NIOC as to the substantial differential between the offered price and the actually invoiced price. Nor has NIOC at any stage of the present proceedings raised any objection to the price increase or, indeed, alleged that the invoiced price would not be reasonable. Moreover, in similar circumstances, NIOC paid an invoiced price for transformers which exceeded the proforma price originally offered. Based on the foregoing the Tribunal finds that an implied acceptance of the invoiced price for the Cables reasonably can be inferred from NIOC's conduct.

50. The Tribunal notes that the Claimant has not attempted to list all the terms and conditions of the alleged contract. The Tribunal has found that the Proforma Invoice, the Letter of Acceptance and the Letter of Credit, including its amendments, are not per se contractually formative documents. These documents do evidence, however, the essential terms and conditions of a contract between the Parties. The Tribunal finds that, in any event, the following terms were included in a contract between the Parties:

- a. Futura undertook to supply NIOC with the Cables as specified and listed in the Proforma Invoice.
- b. Futura was to provide for shipment C&F Bandar Shahpur or Khoramshahr by 1 December 1979.
- c. The selling price was U.S.\$520,401.
- d. The payment conditions were that 20% of the selling price was to be paid in advance and that 80% of the price was to be collected by a draft on the Letter of Credit on the terms and conditions contained therein.

51. Based on the foregoing, the Tribunal concludes that although the Parties were not bound by any written agreement, the Parties have both conducted themselves in such a way as to create a contract for the sale and purchase of the Cables.

52. The Parties dispute whether or not certain additional terms and conditions formed part of the contract and whether or not either party was in breach thereof.

53. NIOC contends, and Futura disputes, that Futura breached a contractual term by replacing the originally named manufacturer of the Cables, Alfacavi, with CEAT. The Tribunal finds, however, that even if Futura's substitution of Alfacavi with CEAT would constitute a breach of the contract, NIOC has not alleged any damage caused by this breach. In any event, the Tribunal finds that such a breach would not be of such an essential nature as to exonerate NIOC from its obligations under the contract.

54. The Tribunal disagrees with NIOC's contention that inspection of the Cables prior to shipment was a condition of the contract. Although the original Letter of Credit issued by NIOC to GM did contain such a requirement, it is evidenced that such condition was withdrawn by NIOC and thus did not form part of the contractual terms and conditions as between NIOC and Futura. In any event, the evidence submitted establishes that the Cables actually were duly inspected in accordance with the original Letter of Credit.

55. NIOC finally alleges that the Cables were not shipped in time or received by it. The Tribunal has found that the terms of shipment were C&F Bandar Shahpour or Khorramshahr by 1 December 1979. The Tribunal notes that the Bill of Lading, which evidences shipment of the Cables, is dated 11 October 1979, i.e., well before the required shipping time of 1 December 1979. Furthermore, C&F terms of shipment means that the seller must pay the costs and freight necessary to bring the goods to the named destination but that the risk of loss of or damage to the goods is transferred from the seller to the buyer when the goods pass the ship's rail in the port of shipment. The shipping documents evidence that the Cables were accepted for shipment by the

carrier and that freight was prepaid to Khorramshahr. Although the Tribunal finds it established that NIOC factually was unable to benefit from the use of the Cables as they were unloaded in Khorramshahr only ten months after shipment and as officials of NIOC in Tehran had no knowledge of their arrival before Khorramshahr became involved in the war between Iraq and Iran, these facts do not exonerate NIOC from its payment obligations, given the contractual terms and conditions of sale.

56. In conclusion, the Tribunal finds that NIOC agreed to purchase the Cables from Futura, that the Cables were manufactured according to specifications and that the cables were shipped to NIOC as required by the contract. Futura accordingly fulfilled the terms of the contract, resulting in a contractual entitlement to the unpaid invoiced amount, i.e., U.S.\$416,321.

57. No Party has argued that the invoiced price of U.S. \$520,401 should be reduced by any amount other than the U.S.\$104,080 allocated to the cables from the U.S.\$148,456.40 (or 20%) downpayment originally made for the four categories of items (including the Cables). A further U.S.\$17,816 has been allocated from this down payment to the transformer sale. Thus U.S. \$26,560.40 remains from that down payment. No Party has commented regarding that sum, but in view of the finding of the Tribunal in this Case (see paragraph 65, infra), the Tribunal need not here decide whether or not these remaining U.S. \$26,560.40 of the down payment received by the Claimant could affect the Claimant's entitlements in this Case.

b) UNJUST ENRICHMENT

58. As an alternative ground to the contract claim Futura invokes the theory of unjust enrichment. The Tribunal's

finding of a contractual basis for the Claim disposes of this alternative ground.

c) RECOVERY FROM BANK OF AMERICA

i) The facts

59. It appears from the proceedings that on 6 April 1982 Futura filed a suit against Bank of America in a United States court. Futura alleged that Bank of America had acted negligently in not obtaining, before 14 November 1979, authority from Bank Markazi as issuing bank, or from the Respondent as account party, to pay Futura upon its presentation of the documents required under the Letter of Credit. On 29 September 1983 a Judgment was rendered in favor of the Claimant for payment of the same amount as Futura claims in this Case, U.S. \$416,321, together with interest thereon. Bank of America paid the Judgment on 7 October 1983.

ii) The Contentions of the Parties

60. Futura claims entitlement to maintain its claim before this Tribunal on the ground that two suits can be pursued, simultaneously or successively, for the same relief, if, as it alleges to be the case here, they are based on different causes of action. Futura concedes, however, that it would be inequitable for it to recover and retain the same relief twice. Should Futura be successful before this Tribunal, Futura alleges to be bound by applicable law and by an agreement with Bank of America to hand over to Bank of America any amounts received up to the amount that Bank of America paid in satisfaction of the Judgment. Any sums

received in excess thereof would be divided equally between Futura and Bank of America. Finally Futura contends that any other finding by the Tribunal than to award it the Claim would allow the Respondent to be unjustly enriched, since the fact that Futura was able to collect its money from a third party cannot relieve the Respondent of its obligation to pay for the goods it received in conformity with the contract with Futura.

61. NIOC disputes the Claim on the ground that Futura, in any event, cannot be allowed to recover the same relief twice.

iii) The Findings of the Tribunal

62. The Tribunal agrees generally with Futura's contention that a party is entitled to pursue suits based on two different causes of action although the relief sought may be the same. In the present case, the suit against Bank of America was not primarily based on the contract with NIOC or on the Letter of Credit. Rather it was a negligence action based on breach of Bank of America's duties toward Futura. This negligence suit arose, however, out of circumstances which are both factually and legally related to the present Case. The cause of action against Bank of America was, to a great extent, if not exclusively, dependent on the fact that, at the time of the Judgment, Futura had been unable to recover payment from NIOC through the Letter of Credit or otherwise. In other words, had Futura been successful before this Tribunal prior to adjudication of the suit against Bank of America, the damage Futura suffered would, in any event, have been reduced by the satisfaction Futura would thereby have received as a result of its contract claim here. Under the present circumstances, however, the Tribunal finds that although the satisfaction Futura obtained by the Judgment does not extinguish NIOC's

obligations, it means, in practice, that Futura has suffered no damage. Pursuant to the principle actio non datur non damnificato the Tribunal therefore finds that Futura no longer has a cause of action in the present proceedings. Such cause of action as it might have had at the date of filing the present claim has been rendered moot by subsequent events. In addition, Futura concedes, and the Tribunal agrees, that allowing Futura to recover both under the present claim as well as the Judgment rendered would be inequitable.

63. Futura has cited two reasons why it still should be entitled to recover on its claim before this Tribunal. Firstly, it argues that its success here would not result in a double recovery because it is bound, both by applicable law and contractually, to hand over to Bank of America any amounts recovered (up to the amount paid in satisfaction of the Judgment). The Tribunal cannot accept this argument by Futura. Irrespective of the fact that the purported agreement with Bank of America is not in evidence, and the fact that Futura has failed to substantiate its alleged legal obligations vis-à-vis Bank of America, the Tribunal finds that Futura's theory would have the paradoxical and unacceptable effect of permitting unjust enrichment of Bank of America. Bank of America has no right to recover against anyone the damages which it was required to pay Futura by a judgment of a competent United States Court. Nor is it entitled to be reimbursed for the amount of the Letter of Credit which it did not pay. In any event, according to the Tribunal, the Security Account cannot be used in order to create an unjust enrichment on the part of a U.S. corporation which, furthermore, is not a party to a claim submitted to this Tribunal.

64. The Tribunal is no more impressed by Futura's second argument that it should be entitled to recover here because a dismissal of its Claim would entail an unjust enrichment

of NIOC. This argument appears to pertain more to issues of morality than to the application of the doctrine of unjust enrichment and a consideration of issues of morality is clearly outside the scope of the functions of this Tribunal. As concerns the theory of unjust enrichment, the Tribunal notes that, as matters stand today, Futura has suffered no damage, which in itself precludes it from successfully relying on this theory. Furthermore, the Tribunal deems it relevant to note that NIOC never had the actual benefit of the Cables.

65. On the basis of the foregoing, and although the Tribunal has found that NIOC contractually would be liable to compensate Futura for the Cables, the Tribunal concludes that it is unable to award Futura such compensation because of Futura's present want of a cause of action in the present Case. Consequently the Tribunal dismisses Futura's Claim.

IV. COSTS

66. Each Party shall bear its own costs of arbitration.

V. AWARD

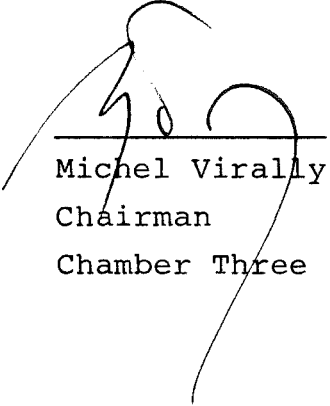
67. For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

a) The Claim by FUTURA TRADING INCORPORATED is dismissed.

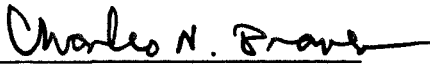
b) Each Party shall bear its own costs of arbitration.

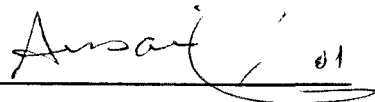
Dated, The Hague
30 October 1986



Michel Virally
Chairman
Chamber Three

In the name of God


Charles N. Brower
Dissenting Opinion


Parviz Ansari Mo'in
Concurring Opinion