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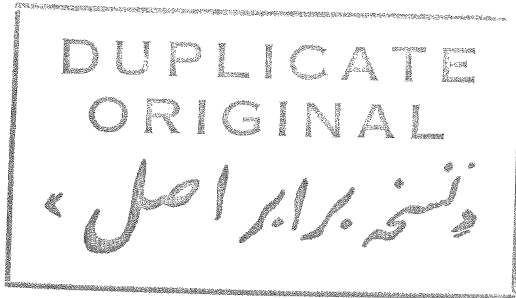
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CASE NO. 325

CHAMBER THREE

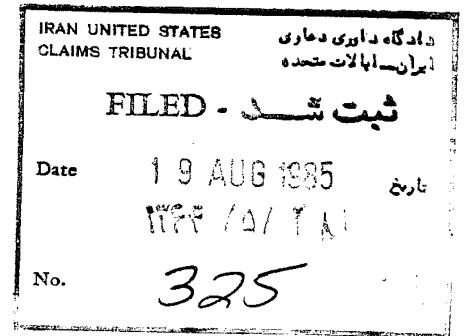
AWARD NO. 187-325-3

FUTURA TRADING INCORPORATED,
Claimant,

and

KHUZESTAN WATER AND POWER AUTHORITY,
Respondent.

AWARD



Appearances:

For the Claimant:

Mr. Alan E. Golomb,
Attorney for Claimant

For the Respondent:

Mr. N. Mokhtari,
Representative of and Legal
Advisor to the Agent of the
Islamic Republic of Iran
Mr. Nowzar Dabiran,
Legal Advisor to the Agent of
the Islamic Republic of Iran
Mr. S. Rabiee,
Assistant to the Agent of the
Islamic Republic of Iran
Mr. S.M.S.M. Ale-Mohammad,
Legal Advisor to Respondent
Mr. M. R. Fatemi,
Technical Advisor to
Respondent
Mr. M. H. Khan,
Procurement and Financial
Expert of Respondent

Also Present:

Mr. Daniel M. Price,
Deputy Agent of the United
States of America
Ms. Loretta Polk,
Office of the Agent of the
United States of America

I. The Proceedings

Claimant, FUTURA TRADING INCORPORATED ("Futura"), filed a Statement of Claim on 15 January 1982 against Respondent, KHUZESTAN WATER AND POWER AUTHORITY ("KWPA").

On 21 June 1982, Respondent filed its Statement of Defence and Statement of Counterclaim.

A Statement of Rebuttal and Response to KWPA's Counterclaim was filed by Claimant 4 August 1982, to which Respondent filed a Rejoinder 2 May 1984.

Claimant filed its Memorial on 17 September 1984 together with an Affidavit of Mahmoud Sadre sworn on 14 September 1984 and a letter dated 11 September 1984 of Mr. Apitz, Treasurer of Claimant. This filing was supplemented by the submission on 8 October 1984 of a letter dated 2 October 1984 to the Tribunal from counsel for Claimant attaching a Certificate of Good Standing issued by the Secretary of State of the State of Delaware on 18 September 1984.

On 26 December 1984 Respondent filed a supplementary statement.

Claimant on 7 February 1985 filed copies of a birth certificate of Patricia Ann O'Hearn and United States passports of Frederick and Dorothy Jean Irving, described in the document covering this submission as United States citizens owning more than 50% of the stock of Claimant, as well as a Certificate of "Renewal and Revival of Charter" from the Secretary of State of the State of Delaware dated 22 August 1980.

Respondent filed on 20 February 1985 its "Supplemental Statement, Amendment of Counterclaim and submission of

Affidavit." This was followed on 25 February 1985 by Respondent's filing of a Hearing Memorial.

A Hearing on all issues in this case was held at the Tribunal on 26 February 1985.

After the Hearing the Tribunal, in an Order filed 7 March 1985, authorized the Parties to file Post-Hearing Memorials by 15 April 1985. By Order of 26 March 1985 this time was extended until 30 April 1985.

Claimant filed its Post-Hearing Memorial on 25 April 1985. Attached to the Memorial was a Certificate of the Secretary of State of the State of Delaware dated 27 March 1985, and a written statement addressed to the Tribunal by Patricia O'Hearn dated 18 March 1985.

Respondent was, by virtue of Orders filed 8 May and 10 June 1985, granted further extensions of time until 28 June 1985 to file its Post-Hearing Memorial. It was filed on the last-mentioned date.

After the Hearing the Chairman of the Chamber resigned. Pursuant to Article 13(5) of the Tribunal Rules he participated in this Award.

II. Jurisdiction

A. The Contentions of the the Parties.

Claimant asserts that it is a national of the United States within the meaning of Articles II (1) and VII (1) of the Claims Settlement Declaration. It further contends that it is a corporation duly established and existing at all relevant times under the law of the State of Delaware and owned more than 50% by United States citizens.

As evidence for its alleged U.S. nationality Claimant has submitted a letter of 11 September 1984 from Claimant's Treasurer stating that "Futura is a U.S. corporation incorporated in the State of Delaware." At the Hearing it submitted also a Certificate of the Secretary of State of Delaware dated 3 October 1975 to which was attached a copy of the Certificate of Incorporation as of that date of "Futura Incorporated", which is asserted to be the previous name of Claimant. Claimant further has submitted Certificates of the Secretary of State of the State of Delaware dated 22 August 1980 and 27 March 1985 attesting that the Certificate of Incorporation of "Futura Incorporated" was filed on 3 October 1975, that a Certificate of Amendment changing the corporate title of the company to "Futura Trading Incorporated" was filed on 24 October 1975 and that a Certificate of Renewal and Revival of Charter of Futura Trading Incorporated was filed on 22 August 1980. The Certificate of 27 March 1985, as well as a separate Certificate of the Secretary of State of the State of Delaware dated 18 September 1984, further attest that as of those respective dates Futura Trading Incorporated was duly incorporated in that State, was in good standing and had a legal corporate existence.

The 11 September 1984 letter of Claimant's Treasurer states that "more than fifty per cent of the stock in Futura are owned by citizens of the United States of America, to wit: Patricia O'Hearn [and] Frederick Irving." At the Hearing Claimant's counsel stated that the two named individuals in fact have owned approximately 80% of the stock of Claimant at least since the beginning of 1979. Claimant has submitted the birth certificate of Patricia Ann O'Hearn, according to which she was born in the United States, and a written, unsworn, statement by Patricia O'Hearn, dated 18 March 1985, stating "that I am presently the owner of 51 per cent of the stock of claimant Futura Trading, Inc. and I have owned 51 per cent of the said stock for a continuous

period of time from September 1979 (prior to the claim at issue having arisen) to the date hereof." Claimant has also filed with the Tribunal a copy of the United States passport of Frederick Irving. According to that copy Mr. Irving was born in Rhode Island, U.S.A., and the passport was issued on 8 December 1983 for a period of ten years.

In its supplementary statement filed on 26 December 1984, and in submissions filed thereafter, Respondent has contested Claimant's alleged United States nationality. According to KWPA not enough evidence in this regard has been submitted by Claimant. It is asserted that the above-mentioned letter of Claimant's Treasurer and the passport of Frederick Irving and birth certificate of Patricia O'Hearn do not constitute sufficient proof of such nationality. The letter of the Treasurer, it is argued, apart from being unacceptable on the ground of a master-servant relationship between Claimant and its Treasurer, does not specify the number of the shares held by various shareholders and the continuity of their respective holdings, and the passport and birth certificate likewise do not indicate the number of shares owned by the persons in question. The written statement by Patricia O'Hearn is, according to Respondent, devoid of any validity as it "has not been attested by formal authority" and is a mere declaration of a person who herself is an interested party. Apart from this, KWPA contends, there is no evidence of continuous nationality of this person or of continuous ownership by her of more than 50% of the shares. Without contesting Claimant's corporate existence since 1975, Respondent further contends that "it is still not known what relation exists between the three firms Futura Incorporated, Futura Trading Incorporated and American Futura Trading Incorporated and which of these names is the real and correct name of the Claimant."

Respondent, in its "Post Hearing Memorandum" filed 28 June 1985, further submits that the "decision relating to the nationality be with held [sic] until the decision in relation to Case No. A-20 is announced," or that at least the pleadings submitted by the Government of the Islamic Republic of Iran in that case be taken into account in the present case.

In its Statement of Defence, as well as in its supplementary statement filed on 26 December 1984, Respondent also alleged that only Iranian courts are competent to hear the case. In connection with its jurisdictional and procedural defences Respondent has also referred to the alleged inattributability of the claim to KWPA.

The Parties' contentions regarding jurisdiction over counterclaims are presented below in Section IV.

B. The Tribunal's Findings.

In light of the evidence submitted by Claimant, and considering that Respondent raised no objection as to Claimant's nationality until nearly three years after the Statement of Claim was filed and has submitted no evidence on this point, the Tribunal is justified in concluding that the Claimant corporation was a corporation organized under the laws of the State of Delaware¹ and was owned to the requisite extent by United States nationals continuously from the time the claim is alleged to have arisen in

¹The Tribunal notes that although "American Futura Trading Inc." is referred to in earlier captions in this case, the text of all of Claimant's pleadings refer to "Futura Trading Inc." The Parties adopted the inaccurate caption only after the Tribunal mistakenly began using that caption in its Order of 2 July 1982.

November 1979 until 19 January 1981 as required by Article II(1) of the Claims Settlement Declaration.

The argument that determinations of nationality should not be made (and necessarily no awards made) pending the decision of the Full Tribunal in Case No. A20 is analogous to the request discussed in R. J. Reynolds and The Islamic Republic of Iran, Award No. 145-35-3 at 21 (6 August 1984), where this Chamber held:

Finally, the argument that interest must not be allowed pending the Full Tribunal decision in Case No. A19 should not affect the above conclusions. . . . When the issue of interest was previously raised informally in the Full Tribunal, the prevailing opinion was that pending an eventual decision on the subject by the Full Tribunal, each Chamber shall resolve issues of interest in cases before it according to its own best judgment. The three chambers have consistently done so. To act otherwise would have meant blocking the work of the Tribunal for an unforeseeable length of time, as interest is claimed in practically every case.

The same considerations apply even more in the instant case. Withholding decisions on interest would not prevent the rendering of awards on the merits (exclusive of interest at that time) but suspension of jurisdictional determinations would for an indeterminate time bring the work of the Tribunal to a halt as such determinations are necessary in virtually every case. For these reasons, the three Chambers have consistently made determinations of corporate nationality notwithstanding the pendency of Case A20. Respondent's request is therefore denied.

Inasmuch as no forum selection clause is involved in the present case, Respondent's objection to jurisdiction on the basis that only Iranian courts are competent in this matter is not accepted.

Claimant asserts, and Respondent concedes, that Respondent is an agency, instrumentality, or entity controlled by the Government of Iran.

As Claimant asserts a claim for goods sold and delivered prior to 19 January 1981, it is evident that the claim arose out of a debt or contract within the meaning of Article II(1) of the Claims Settlement Declaration.

III. Merits

A. Facts and Contentions of the Parties.

On 9 August 1978 Respondent KWPA entered into a contract ("Contract DP-7") with ISCO of Iran, Ltd. ("ISCO"), a private Iranian joint stock company, which contract allegedly involved a construction project for power transmission lines.

According to Futura it was selected and introduced to KWPA by ISCO as the material supply contractor for the transmission lines project. Claimant submitted to "Khuzestan Water and Power Authorities, Power Division Ahwaz, c/o ISCO of Iran, Building 222, Tehran, Iran" on 15 August 1978 and 21 August 1978 letters enclosing proforma invoices for "attention and approval" by the addressee. The two invoices, designated 13578-IR/1 ("IR/1") and 13578-IR/2 ("IR/2") and referring to Contract DP-7, offered to sell and deliver various goods, including creosoted wooden poles, for prices stated only globally in each such invoice: \$4,968,028 with respect to IR/1, and \$1,102,500 in regard to IR/2. Both letters included the statement "Validity: 45 days from the date of this proforma", and requested immediate issuance of a letter of credit to be valid until 20 March 1979.

Respondent argues that the two original proforma invoices issued in August 1978 were not accepted by it

because they did not separately state prices of individual items and therefore could not serve as a basis for the opening of a letter of credit. It alleges that subsequently a revised set of the two invoices were provided by Claimant. These had the same number and date as the original proforma invoices; however, certain items had been deleted and prices had been reduced. The result, KWPA asserts, was a revised total for IR/1 of \$4,143,484.42 and for IR/2 of \$992,250, or a total of \$5,135,734.42 instead of the original \$6,070,528. Respondent argued at the Hearing that the reduced proforma invoices did not contain any limits as to their validity. Respondent further contends that it opened the letter of credit in entire conformity with the amended, "valid", proforma invoices and that at that point a contract was concluded for the delivery of the goods indicated in the invoices and at the prices stated therein.

Futura denies that there was ever an agreed revision of the proforma invoices and contends that its offer (whether original or revised) lapsed when KWPA failed to open the required letter of credit within 45 days.

On 9 May 1979 KWPA first opened through Bank Markazi, the issuing bank, with Manufacturers Hanover Trust Company in New York City as the advising bank, a letter of credit in favour of Claimant, numbered 09/96623 and referring to invoice IR/1 in the amount of \$4,143,484.42. Having learned informally in March 1979 that such a letter of credit was to be opened, however, Claimant had written to ISCO on 4 April 1979 that, inter alia, the amount was "less than our original price of \$4,968,028 on Proforma Invoice dated August 15, 1978 which had a validity date of forty-five days from the date of Proforma." This letter further indicated that due to cost increases the prices of various materials had increased since the issuance of the proforma, including a 22% increase for creosoted wooden poles.

On 29 June 1979 Claimant was notified that the letter of credit had been increased by \$992,250; on 9 October 1979 it was further increased by \$327,740.78², to a total of \$5,463,475.20. Even after these increases the letter of credit never covered the total original proforma price of \$6,070,520, a price which Claimant alleges rose ultimately to \$6,838,654.98.

On 12 July 1979, Claimant sent ISCO a telex stating, inter alia, that "FOB PRICES WILL REMAIN VALID UP TO 31.8.1979 SUBJECT TO INCREASE OF LETTER OF CREDIT FOR EXTRA FREIGHT COST" totalling \$570,000. The same day Claimant dispatched a second telex to ISCO clarifying that these "FOB PRICES" were the increased ones discussed in the letter of 4 April 1979. Only the contents of the first telex were conveyed by ISCO to KWPA, however. Claimant started shipping various materials described in the two August 1978 proforma invoices even before the letter of credit had reached the above-mentioned total of \$5,463,475.20, and continued delivering such materials until April 1980. Claimant submitted invoices for the shipments in the total amount of \$5,642,894.52.

On or about 2 November 1979 Claimant arranged the shipment of 2,000 creosoted wooden poles which, according to the packing list, were "Sold to: Khozestan Water and Power Authority c/o ISCO of Iran..." Likewise the Certificate of Origin dated 2 November 1979 indicates the poles were sold to KWPA. Under date of 19 November 1979 the Claimant similarly issued its invoice for the poles to KWPA in the amount of \$542,809. A corresponding sight draft dated 21 November 1979 was sent to Manufacturers Hanover Trust

²This appears to be the amount claimed by Respondent to have been stated for certain items in the alleged revised proforma invoices but then deleted from them.

Company for a drawing on the letter of credit. It is this shipment that forms the basis of Claimant's claim, for \$542,809 plus interest at the rate of 18 per cent per annum, as payment was never made.

In February 1980 the Parties arranged to move the balance of the letter of credit to a Swiss bank in order to facilitate payment of further shipments. On 10 April 1980 Bank Markazi requested the Swiss bank by telex "TO AVOID ANY NEGOCIATION [SIC] OF SHIPPING DOCS UNTIL FURTHER NOTICE." On 23 March 1981 the letter of credit expired in accordance with its terms.

Respondent KWPA admits that it has received the poles but asserts that the sale was pursuant to a contract between Claimant and ISCO. Respondent alleges it opened the letter of credit only to provide facilities for ISCO to import materials from abroad, at the cost and expense of ISCO, Respondent asserts, as provided for in the contractual arrangements between KWPA and ISCO. KWPA argues that in arranging the letter of credit it merely represented ISCO and therefore the claim lies against ISCO rather than Respondent.

Claimant alleges that there were no contractual arrangements between Claimant and ISCO, but rather that it was KWPA that was responsible for the opening of the letter of credit and otherwise Claimant's counterpart in the transactions concerning the delivery of the materials. According to Claimant, ISCO was acting only as an agent for KWPA, mainly to receive information on behalf of its principal.

Emphasizing that the delivery of the wooden poles was not a separate sale but part of a larger transaction for which Claimant allegedly has collected too much already, Respondent denies the merits of Futura's claim in any event.

KWPA alleges that Claimant has failed to deliver all of the ordered merchandise and that this breach of contract released Respondent from any duty to pay. Claimant responds that any initial inability to deliver some of the merchandise was caused by KWPA's delay in opening the letter of credit, that the official U.S. embargo on exports to Iran prevented later shipments and that in any event Respondent's failure to pay for the 2,000 poles excused Futura from whatever contractual duties it might have had. In any case, Claimant argues that non-delivery of some goods would not relieve KWPA from the duty to pay for those actually delivered inasmuch as KWPA was thereby unjustly enriched. Respondent rejoins that the export embargo cannot be invoked as a valid excuse for non-performance, at least not after the transfer of the letter of credit to a Swiss Bank.

Respondent argues that the prices charged and paid for goods actually delivered were in many cases in excess of those indicated in the proforma invoices. Hence KWPA argues that Claimant in effect already has been paid the correct revised proforma invoice price for the 2,000 poles. Thus Futura invoiced \$5,642,894.52 and collected \$5,249,256.52³ for shipped goods the value of which Respondent, on the basis of the alleged revised proforma invoices, places at \$4,465,799. As regards the wooden poles, which were shipped in three consignments (the third forming the basis of Claimant's claim), the alleged overpricing totals \$101,527.08.

Futura argues that ISCO advised KWPA of the price increases and that the latter's acceptance of goods, including the wooden poles, constituted an acceptance of

³According to the Statement of Defence Claimant had collected \$5,035,085.52, but in the submission filed by Respondent on 26 December 1984 the amount was given as indicated in the text.

such increased prices. That the total amount of invoices submitted for the various goods exceeded the amount of the letter of credit does not in Claimant's view relieve KWPA from its duty to pay, as the letter of credit never reflected the correct prices. Thus, with regard to the 2,000 wooden poles, Futura alleges that KWPA accepted the delivery with full knowledge of the price increases and of the actual price of \$542,809, and is legally bound to pay the price.

KWPA denies ever having been informed of any price increases as alleged by Claimant. In any case Respondent alleges that the price invoiced for the poles is excessive: The proforma invoices provided for \$441,282, and the price charged the Claimant by the manufacturer was \$420,309.60. Futura asserts that this is in no way relevant, for apart from a fair profit due to Futura plus a down payment made to the manufacturer, the difference covered many expenses incurred by Futura and was quite reasonable. Moreover, Respondent has not paid any amount for the poles in question.

Finally, KWPA argues that Claimant may not invoke unjust enrichment as a ground for its claim because that theory was raised too late, the first time being at the Hearing.

B. Findings of the Tribunal.

1. The Contractual Basis of the Claim.

Claimant bases its claim on the actual sale, delivery and acceptance of 2,000 wooden poles. Respondent alleges that the shipment of 2,000 poles was only one part of a larger contract for the sale of goods. The Tribunal concludes that no contract was formed relating to the transactions involved in the instant case.

Claimant's 15 August 1978 letter to KWPA c/o ISCO submitted its "proforma [IR/1] invoice in 3 copies for your kind attention and approval." It requested that a letter of credit be opened immediately and be valid up to 20 March 1979, and stated that the offer would remain valid for 45 days from the date of the proforma. On 21 August 1978, Claimant presented its second proforma invoice, IR/2, with a cover letter containing the same requirements and limitations set forth in the 15 August letter.

Although Claimant avers that it never agreed to a revision of the prices offered in the first set of proforma invoices the Tribunal finds there is strong evidence that it did. The revised proforma invoices appear to be signed on each page by the then President of Futura, Edward James Birdsall. Moreover, Claimant in its first telex of 12 July 1979, in referring to original prices, uses prices from the revised set of proformas produced by KWPA. Whatever may have been the truth, however, Respondent did not open a letter of credit within the required 45 days and Claimant's offer lapsed.⁴

The Tribunal also concludes that Respondent did not accept Claimant's subsequent offer of 12 July 1979. The letter of credit was not increased as requested, an act which was a condition of acceptance and which definitely would have evidenced Respondent's agreement to those prices. Nor is the acceptance of some shipments in this case

⁴It was argued on behalf of Respondent at the Hearing that this second set of invoices was submitted without the covering letter containing a 45-day limit for acceptance. The Affidavit of Hossein Padidar submitted by Respondent states, however, in paragraph 6: "I know further that Futura, under the said proformas and its own conditions had set a 45-day limit" So far as the Tribunal can determine from the record before it the revised proformas were dated late August 1978.

evidence of acceptance of the 12 July offer. The Tribunal therefore concludes that at no time was an overall contract concluded by Claimant with anyone for sale and delivery of the items listed on the proforma invoices at a specified price.

Likewise the Tribunal does not from the acts of delivery and acceptance find individual sale contracts for each shipment because once again the Parties appear not to have agreed upon a price.

Given that no contract is found to be applicable to the transaction involved, and given that the Tribunal is not limited to the legal theories offered by the Parties but instead may make its own legal analysis of the dispute presented, the Tribunal now considers an alternative basis for recovery, unjust enrichment.

2. Unjust Enrichment.

Futura has submitted numerous documents concerning this shipment, all pointing to KWPA as the intended and actual recipient of the 2,000 poles. Futura's invoice dated 19 November 1979 for the shipment indicates that the goods were "[s]old to: Khozestan Water and Power Authority." Futura's request of 21 November 1979 to Manufacturers Hanover Trust Company for payment under the letter of credit indicates that the amount received should be "Charge[d] to Account of Khozestan Water - Power Authority." Likewise the Certificate of Origin and the packing list which accompanied the shipment indicate that the 2,000 wooden poles were sold to KWPA. A telex to Bank Markazi Iran from Claimant's supplier of the wooden poles states that the "THE POLES ARRIVED IN AHWAZ AND WERE ACCEPTED BY KWPA." A similar telex from the supplier to KWPA likewise states "THE POLES ARRIVED IN AHWAZ AND WERE ACCEPTED BY YOU."

The Parties agree that Claimant was not paid for this shipment by negotiation of the shipping documents under the letter of credit.

Claimant argues that because the evidence shows KWPA to have accepted delivery of and yet not paid for the poles, KWPA has been unjustly enriched. KWPA argues that ISCO was an independent contractor performing a turnkey project for KWPA and that ISCO in performance of the turnkey project was the purchaser of the 2,000 poles. The question thus arises as to whether ISCO and not KWPA may be said to be the party which is unjustly enriched.

The legal relationship between KWPA and ISCO can not be clearly determined from the record before the Tribunal. There is ample evidence in the record that a contract, designated DP-7, existed between KWPA and ISCO. KWPA, the only Party to this case who clearly would have this contract in its possession, has not supplied the Tribunal with a copy of the contract.⁵ 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. In this sense the legal distinction between an agent and an independent contractor can only be ascertained by reference to the contract establishing the relationship and the Tribunal does not have the applicable contract before it in this case. Thus KWPA has not

⁵ Respondent KWPA does supply the texts of what are allegedly "Clause 20", "Clause 24" and "Article 12" of Contract DP-7. These two clauses and one article are supplied without any authentication and, in the opinion of the Tribunal, even if accepted do not clearly establish ISCO as an independent contractor in this respect.

sustained its burden to prove that ISCO benefitted rather than it.⁶

The Tribunal therefore concludes that KWPA was the party enriched.

The Tribunal finds the invoiced amount of \$542,809 to be a reasonable measure of the extent to which KWPA was enriched. The price offered for all the wooden poles in August of 1978 in the revised proformas, anticipating delivery in the first months of 1979, was \$2,299,000. The total price invoiced by Claimant for the three shipments of poles delivered to Respondent in the fall of 1979 was \$2,400,528.92. This increase appears entirely reasonable in light of the later date of shipment. The Tribunal therefore awards Claimant \$542,809.

3. Alleged Breach of Contract by Claimant.

Respondent argues that Claimant breached its contractual obligations by failing to deliver many of the items listed on the proforma invoices and that KWPA was thereby released from its duty to pay Claimant's invoice. Having decided that no contract was formed in the instant case, however, the Tribunal concludes that Claimant was not under any duty to make further shipments to Iran.

4. Alleged Overpricing of Delivered Goods.

Respondent also argues that because Claimant overpriced and received payment for other items shipped to Iran, the

⁶The Tribunal also notes no allegation has been made or evidence presented to indicate that KWPA has paid to ISCO the price of the poles or that ISCO has sought such payment.

Claimant in effect has already received payment under the letter of credit for its November 1979 shipment of 2,000 wooden poles. As stated above, the Tribunal concludes that prices were not agreed to by the Parties for the goods Respondent alleges to have been overpriced. Respondent has not submitted evidence as to the value of such other shipments and therefore has not made any showing of a right to an equitable setoff. The Tribunal, having examined such evidence as is before it concerning the goods delivered and accepted, can find no evidence that, failing an agreement on the price, the prices charged for such goods were higher than current market price and therefore unreasonable.

IV. Counterclaims

A. The Contentions of the Parties.

Respondent KWPA has put forward three counterclaims. It contends that the Tribunal has jurisdiction over the counterclaims, as the "counterclaim of this Authority and the claim filed by the Claimant originate from a single source and both relate to letter of credit No. 09/96623." In support of the merits of its counterclaims Respondent makes the same allegations which it has put forward as defences to Claimant's claim.

In its first counterclaim Respondent alleges that Claimant overdrew from the letter of credit in the amount of \$1,166,653.92 by submitting invoices to the advising bank in amounts greater than the alleged contract prices. Second, Respondent asserts that Claimant has failed to deliver goods contractually promised via the proforma invoices at prices totalling \$655,263.20. Third, KWPA claims "damages arising out of non-execution" of the project for which Claimant was supplying materials allegedly due to Claimant's failure to

deliver certain items, in the total amount of 140,000,000 Rials.⁷

Claimant denies the merits of the Counterclaims. It contends that it neither overdrew from the letter of credit nor delayed the project by any unjustified non-shipment or otherwise.

B. The Tribunal's Findings.

Inasmuch as the merits of Respondent's arguments that Claimant failed to deliver certain items and overpriced certain items that were delivered have already been discussed and rejected supra when raised as defences to the claim of Futura, the Tribunal need not decide whether it possesses jurisdiction over the first two counterclaims presented. Respondent's final counterclaim for consequential damages is premised on the same alleged failure to deliver and thus need not be examined either. Respondent's counterclaims are therefore denied.

V. Interest

The Tribunal awards interest at the rate of 10% per annum starting on the date Claimant presented a sight draft,

⁷In its Statement of Counterclaim Respondent claimed \$1,177,095.52 for the alleged overdrawing from the letter of credit, as well as \$2,731,740 for damages allegedly incurred due to delays of the development project caused by non-shipment of all commodities ordered by KWPA. The three counterclaims in their more or less final form were specified in Respondent's "Supplemental Statement, Amendment of Counterclaim and submission of Affidavit" filed 20 February 1985; however, the amount of the alleged damages due under the third counterclaim was not given until the Hearing Memorial filed 25 February 1985.

21 November 1979, to the date payment of this Award is ordered by the Escrow Agent.⁸

VI. Costs

Claimant has not requested costs for legal representation and assistance at any time in these proceedings and has presented no evidence to this Tribunal concerning its other costs. In light of these circumstances, the Tribunal is compelled by Articles 38 and 40 of the Tribunal Rules to decide that each Party shall bear its own costs of arbitration. See Sylvania Technical Systems and The Islamic Republic of Iran, Award No. 180-64-1 at 35 (27 June 1985).

VII. Conclusions

For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

Khuzestan Water and Power Authority is obligated to pay to Futura Trading Incorporated the sum of Five Hundred Forty-Two Thousand Eight Hundred and Nine United States Dollars (U.S.\$542,809), plus interest at the rate of ten percent (10%) per annum (365 day year), from and including 21 November 1979 up to and including the date on which the Escrow Agent instructs the Depository Bank to effect payment out of the Security Account.

The counterclaims of Khuzestan Water and Power Authority are dismissed.

⁸Judge Brower would prefer that the Chamber adopt and apply consistently an interest formula related to market conditions so as to compensate more realistically for damages suffered. See Sylvania Technical Systems, Inc. and The Islamic Republic of Iran, Award No. 180-64-1 at 30-34 (27 June 1985). On such basis he would award interest at a rate of 12 percent.

The above obligation shall be satisfied out of the Security Account established pursuant to paragraph 7 of the Declaration of the Government of the Democratic and Popular Republic of Algeria dated 19 January 1981.

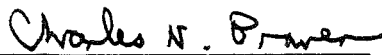
This Award is submitted to the President of the Tribunal for the purpose of notification to the Escrow Agent.

Dated, The Hague
19 August 1985

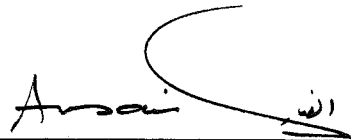


Nils Mangård
Chairman
Chamber Three

In the Name of God



Charles N. Brower



Parviz Ansari Moin
Dissenting Opinion