

[REDACTED]

Date of filing: 1 July '91

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

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

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

** OTHER; Nature of document: _____

 - Date _____
 _____ pages in English _____ pages in Farsi

DUPLICATE
ORIGINAL

نسخہ برابر اصل

CASE NO. 227

CHAMBER THREE

AWARD NO. 514-227-3

EASTMAN KODAK COMPANY,
Claimant,

and

THE GOVERNMENT OF
THE ISLAMIC REPUBLIC OF IRAN,
Respondent.

IRAN-UNITED STATES
CLAIMS TRIBUNAL

دیوان دآوری دعاوی
ایران - ایالات متحدہ

FILED

ثبت شد

DATE

1 JUL 1991

تاریخ ۱۰ / ۴ / ۱۳۷۰

CONCURRING AND DISSENTING OPINION
OF JUDGE BROWER

1. In my Concurring and Dissenting Opinion to the Partial Award in this Case, Eastman Kodak Company, et al. and The Government of Iran, et al., Award No. 329-227/12384-3 (11 November 1987), reprinted in 17 Iran-U.S. C.T.R. 153, 173, I concurred in the Tribunal's finding that Iran is liable to Claimant for "measures affecting [Claimant's] property rights" in Rangiran. I concurred "[i]n order to form a majority in support of further proceedings which may yet result in Claimant being accorded a measure of justice." Concurring and Dissenting Opinion, at n.8. Unfortunately the Tribunal's decision in this Final Award results in an unreasonably low level of compensation to Eastman Kodak for the loss it suffered as a result of Iran's interference in

Rangiran. Again, however, I am compelled to concur in order to form a majority so that Claimant will receive at least some of the recompense it deserves for the loss suffered.

I.

2. I insisted in my Concurring and Dissenting Opinion to the Partial Award that, considering Iran's interference in Rangiran's affairs, Rangiran must be viewed as a controlled entity. The instant Final Award acknowledges that, as a result of Iran's interference, there was at least a partial loss of control on the part of Eastman Kodak, i.e., "the loss of day-to-day management control." Final Award, para. 33. Further, the Final Award finds that this partial loss of control led to the premature liquidation of Rangiran, and that the liquidation caused Eastman Kodak to incur losses which it would not otherwise have incurred.¹ I agree that Iran's interference cut short the life of Rangiran, Eastman Kodak's wholly-owned subsidiary, resulting in Rangiran's premature liquidation and consequent losses to Eastman Kodak. I disagree, however, with the Final Award's assessment of the damage suffered by Eastman Kodak.

3. First, I see no reason for the Final Award's decision to limit the consideration of losses incurred by Eastman Kodak to certain inter-company loans, thereby categorically excluding from assessment the loss of any profits that Rangiran might have generated for Eastman Kodak. In the Partial Award the Tribunal left for determination in a final

¹I will not belabor whether the loss of "day-to-day management control" can be considered to be, realistically, anything other than a loss of control such that Rangiran should have been considered a controlled entity under the Claims Settlement Declaration. I restate my view, however, that simply because "Claimants may have managed ultimately to arrange a decent burial for their defunct enterprise [i.e., the liquidation] . . . [this] should not absolve those accused of killing it." Concurring and Dissenting Opinion, para. 21.

Award the question of whether Iran's "measures affecting property rights" caused damage to Eastman Kodak's "ownership interests" in Rangiran. Partial Award, para. 59-61. Clearly, Eastman Kodak's ownership interests in Rangiran encompassed the financial earnings it reasonably anticipated receiving from its subsidiary.

4. The Final Award concludes that there was "an uninterrupted causal link between Iran's interference, the crystallization of the inherent debts and the loss by Eastman Kodak of any potential for repayment of those amounts," and, moreover, recognizes that the premature liquidation caused "Eastman Kodak [to lose] the potential to generate future revenue from which to satisfy the inter-company debts." Final Award, paras. 41-42 (emphasis added). The Final Award fails, however, to consider the loss of future profits.² Thus, while it acknowledges, in

²The Tribunal, in another case involving interference with property rights, awarded an analogous measure of damages (dividends) when assessing the losses recoverable by a claimant. See Foremost Tehran, Inc., et al. and The Government of the Islamic Republic of Iran, et al., Award No. 220-37/231-1, at pp. 30-35 (10 April 1986), reprinted in 10 Iran-U.S. C.T.R. 228, 251-53. Moreover, the Tribunal regularly considers future profits when assessing damages in cases of expropriation. See, e.g., Phillips Petroleum Company Iran and The Islamic Republic of Iran, et al., Award No. 425-39-2 (29 June 1989), reprinted in 21 Iran-U.S. C.T.R. 79 (Tribunal considered, inter alia, prospective net earnings to determine the fair market value of the enterprise); Starrett Housing Corporation, et al. and The Government of the Islamic Republic of Iran, Award No. 314-24-1 (14 August 1987), reprinted in 16 Iran-U.S. C.T.R. 112 (Tribunal considered, inter alia, the gross profits of the enterprise in making its valuation); Amoco International Finance Corporation and The Government of the Islamic Republic of Iran, Award No. 310-56-3 (14 July 1987), reprinted in 15 Iran-U.S. C.T.R. 189, 289 (Brower Concurring) (Tribunal must consider expected future profits when determining compensation for the expropriation of an enterprise); Phelps Dodge Corp. and Overseas Private Investment Corp. and The Islamic Republic of Iran, Award No. 217-99-2 (19 March 1986), reprinted in 10 Iran-U.S. C.T.R. 122 (the Tribunal considered future profits and the

(Footnote Continued)

accordance with the Partial Award's determination, that the Tribunal must "direct its attention solely to those losses which Eastman Kodak suffered in its capacity as majority shareholder" of Rangiran, Final Award, para. 43; cf. Partial Award, para. 74(d), nevertheless, the Final Award simply ignores the issue of whether the interference caused Eastman Kodak as majority shareholder to suffer the loss of potential to receive profits from its subsidiary.

5. I think it clear that Iran's interference and the consequent premature liquidation destroyed an established probability that Rangiran would have had many years of profitable operation. Given that Rangiran in its first three years had achieved strong sales and had gained a share of the photographic products market in Iran of approximately 26 percent, the volume of which increased after 1979,³ and given that it was backed by a proven and successful company like Eastman Kodak with its skilled worldwide staff and all the resources that it could bring to bear for the benefit of Rangiran, either directly or through its subsidiaries, there is nothing in the record to suggest that Rangiran, absent the interference, would not have been a successful venture. Thus, while it may be that Rangiran, as a young company, did

(Footnote Continued)
uncertainty associated with them when valuing the loss of the claimant's property); American International Group and Islamic Republic of Iran, Award No. 93-2-3 (19 Dec. 1983), reprinted in 4 Iran-U.S. C.T.R. 96, 109 (values company as going concern, "taking into account not only the net book value of its assets but also such elements as good will and likely future profitability, had the company been allowed to continue its business under its former management").

³Citing trade statistics published by the Organization for Economic Cooperation and Development ("OECD"), Claimant presented the actual market data for the years 1980 through 1985 for the conventional photographic products market in Iran. The OECD figures show that, compared with the market's size in 1979, the size of Iran's photographic products market more than doubled by 1984 and held firm in 1985.

not have had a long established record of profits,⁴ its actual performance, taken together with the size of the Iranian market for its products and Eastman Kodak's proven ability to dominate such a market, was sufficient to establish a profit potential that transcended the realm of speculation and constituted a very strong probability. The Final Award, however, does not even address this subject. I would have considered the damage resulting from the loss of the potential for Rangiran to generate profits, and assessed damages accordingly.

6. Second, I respectfully disagree with the Final Award's refusal to compensate Claimant for losses relating to certain trade advances. The Final Award concludes, as to long-term cash advances owed by Rangiran to Eastman Kodak, that they "constituted long-term investments by Eastman Kodak in its subsidiary, and were made in its capacity as majority shareholder," and therefore fall to be considered as part of the Final Award. Final Award, para. 49. I concur. As to the trade (i.e., credit) advances of Eastman Kodak and its subsidiaries, however, the Final Award decides that "[a]lthough the prospect of repayment of these debts also was lost as a result of the liquidation of Rangiran, the Tribunal finds that such losses do not represent damage to property rights belonging to Eastman Kodak in its capacity as shareholder of Rangiran within the meaning of Article II, paragraph 1 of the Claims Settlement Declaration." Id., para. 45. Here I dissent.

7. In the circumstances I fail to discern any material distinction between advances of cash and advances of goods or services on credit justifying acceptance of the former as investments but denying such status to the latter. Both

⁴As discussed in paragraph 13, infra, Rangiran in the second quarter of 1979 earned its first quarterly profit, even though this was during the height of the revolution in Iran.

should be included in an assessment of the damage to the property rights of Eastman Kodak in its capacity as majority shareholder because both categories of debts were, by their nature and from a factual and practical point of view, forms of investment made by Eastman Kodak and its wholly-owned subsidiaries in the "fledgling" subsidiary Rangiran.

8. Eastman Kodak, as the parent company, could coordinate for its own strategic reasons the provision of cash advances, or goods and services, from itself or from its other subsidiaries to Rangiran. For example, Eastman Kodak has stated that it "made start-up loans to Rangiran" but also that "Rangiran purchased most of its resale inventory from [Eastman Kodak International Sales Company, Inc.], the Eastman Kodak subsidiary which generally exported Kodak products from the United States to Kodak companies and distributors abroad." A review of Rangiran's balance sheets for the fiscal years 1977 through 1979 shows that both the cash advances and the advances of goods or services to Rangiran were unsecured. The trade advances from Kodak affiliates represented the single largest category of debts among Rangiran's liabilities in 1977 and 1978, until Eastman Kodak made a large cash advance to Rangiran in 1979. The suggestion that unsecured credits on that scale were granted "irrespective of [the parties'] corporate relationship" strains credulity. Final Award, para. 45. They represented "a disproportionately high ratio of debt when compared with the assets of the company" no less than did the cash advances and like them they "were unsecured." Id., para. 49. Further, the Notes in the financial statements for 1977 and 1978, under the heading "Trade Payables to Affiliated Companies," state clearly that these trade advances "represent mainly purchases from Eastman Kodak International Sales Company, Inc., a wholly-owned subsidiary of Eastman Kodak Company, Inc., USA." The Notes to the 1979 statement, under the category "Due to Kodak Companies," provide a breakdown of the trade payables owed by Rangiran to each of Eastman Kodak's subsidiaries. Thus, it is plainly apparent that the parties to these transactions "were relying on the

corporate relationship[s] between them," and on the central managing decisions made by the parent, Eastman Kodak, in making available in large quantity the cash, goods and services which Rangiran used throughout its first three years of operation.⁵ Cf. id., para. 49.

9. In sum, the record should have dispelled any notion that these trade advances were merely "arms-length transactions" "incurred in the normal course of business." Final Award, para. 45. Instead, the record supports the view that they were part of the "property rights" belonging to Eastman Kodak in its capacity as majority shareholder.

II.

10. The main point to be made is that I believe the application of an "adjustment of 50%" to the total value of the promissory notes (including the interest accrued thereon as of the date of the interference) results in an unreasonable and improperly low level of compensation to Eastman Kodak for the loss it suffered. Simply put, the 50 percent reduction is extreme and without support in the record.

⁵The fact that Eastman Kodak, in pleading one alternative theory of its case, stated that "the goods or services were supplied pursuant to ordinary business relationships between the claimants and Rangiran," does not preclude the finding I suggest.

I would have included an amount of approximately Rls. 1,639,769 (or U.S.\$23,262 at a rate of U.S.\$1 = 70.49 Rls.) in the value of the net current liabilities owed by Rangiran to Eastman Kodak, and, in addition, an amount equal to the value of the trade advances that Rangiran owed Eastman Kodak's wholly-owned subsidiaries, totalling approximately Rls. 115,106,012 (or U.S.\$1,632,941 at the same rate as above). Because the subsidiaries are wholly owned by Eastman Kodak, the parent, any loss they suffer clearly is a loss that redounds to the detriment of Eastman Kodak.

11. Under the Final Award's approach the one variable that must be considered carefully in determining the proper amount to award Claimant is the risk that, as of the date of interference in November 1979, Eastman Kodak would not have received full repayment of the principal amounts of the advances plus contractual interest thereon from Rangiran. I think that that risk was far less than 50 percent.

12. The record in the Case on this point is rather one-sided. While the Claimant submitted ample evidence in support of its position that Rangiran was, and would continue to be, a successful venture in Iran, the Respondent submitted nothing to rebut the point. The Final Award thus disregarded evidence in the record in favor of speculation that future unforeseeable conditions in Iran would impair Rangiran's ability to be a successful venture.⁶ My view on this point stems from the same facts noted above with respect to Rangiran's anticipated future profitability. These facts bear repeating.

13. Rangiran was a wholly owned subsidiary of Eastman Kodak, subject to Eastman Kodak's management decisions. Eastman Kodak thus could eliminate the effects that inflation and other factors might have had on the relative value of its advances to Rangiran.⁷ Ignoring the

⁶Iran's market for photographic products increased after 1979 even though Iran was involved in a war with Iraq. See supra n.3.

⁷To the extent that the time value of money and inflation were factors which, in the Final Award's view, might have reduced the relative value of the promissory notes to Eastman Kodak, there are two points that should be considered. First, in 1979 the expectation was that over a longer period of time inflation would decrease, not increase. For example, a comparison of the three month rate (10.21%) to the five year rate (9.4%) for United States Treasury notes in 1979 (which are relatively risk free) demonstrates that longer obligations included an expectation that inflation would go down. Thus the eight percent rate
(Footnote Continued)

interference, as the Tribunal must when determining whether Eastman Kodak would have received full repayment of the advances, the only factor that Eastman Kodak could not control entirely was the risk that Rangiran might not produce sufficient revenues to repay the advances. However, the record shows that although Rangiran had carried losses in its first three years of operation, nevertheless, it had produced its first quarterly profit in the second quarter of 1979 and had maintained a positive ratio of current assets to current liabilities prior to the interference by Iran. As noted above, Rangiran had achieved strong sales and a large share of the photographic products market in Iran in its first three years. Further, Rangiran was managed and backed by Eastman Kodak, with its skilled worldwide staff and all the resources that it could bring to bear on Rangiran, either directly or through its subsidiaries, and which had a demonstrated record of success and an undisputed consumer market share of 30-40 percent in many countries around the world. In fact, there is nothing in the record to suggest that Rangiran, under such management and absent

(Footnote Continued)

on the long term advances made by Eastman Kodak to Rangiran can be viewed to have approximated reasonably the long term expectations at that time as to the time value of money. Second, assuming that inflation might increase, or decrease, the important point is that Rangiran was a wholly owned subsidiary of Eastman Kodak, subject to Eastman Kodak's decisions. Therefore Eastman Kodak could have acted, at any time, to eliminate the effect that inflation might have had on the advances. For example, if inflation increased thereby having an unfavorable effect relative to the interest rate on the advances, Eastman Kodak could have adopted various options to neutralize that effect, including re-financing the advances at a higher contractual interest rate, capitalizing them to equity, or even paying them off more quickly. While a third-party purchaser of any such advances would have had to consider expectations about inflation because it would not be able to alter the contractual interest rate, Eastman Kodak, as the parent of Rangiran, could decide to change that rate at any time. Furthermore, it is only fair to assume that Eastman Kodak would have acted as a rational economic agent, taking whatever measures were necessary to maintain the value of its investment in Rangiran in the form of the advances, so that any inflationary effects would be eliminated.

the interference, would not have been a successful venture. Furthermore, in 1979 the Iran-Iraq war and the subsequent slump in oil prices affecting Iran's economy were not foreseeable. Thus, an even greater market size for conventional photographic products in Iran would have been expected in 1979 than the actual market figures that were used by Claimant to demonstrate Rangiran's future profitability.⁸

⁸Under the Claimant's conservative assumptions, Rangiran would have earned U.S.\$4.65 million in pre-tax dollars by the end of 1982. Moreover, the Claimant used actual market figures for the years 1980-1985, see supra n.3, while in 1979 an even greater market size for photographic products would have been expected because the Iran-Iraq war and the subsequent slump in oil prices affecting Iran's economy were not foreseeable.

Further, from the facts in the record and what is suggested in the Claimant's earnings analysis for Rangiran, I think that a five year period is supportable for repayment of the advances to Eastman Kodak. It must be understood that the longer the period one assumes for repayment, the lower would be the corresponding risk of non-payment. If Eastman Kodak operated its subsidiary Rangiran for ten years or more, logic dictates that Rangiran thus would have become an established business which, over this time, would have been generating revenues that could be used toward the repayment of the advances. Again, it would be unfair to assume that Eastman Kodak would have acted with respect to Rangiran otherwise than as a rational economic agent trying to maximize a return on its investment.

Finally, in considering the amount to award Eastman Kodak, I think it is improper to speculate that Eastman Kodak might have chosen not to repay the advances immediately, but rather to reap a return on its investment in Rangiran through other measures such as having dividends issued. Of course Eastman Kodak, as the parent company, for its own strategic reasons, could have decided on several courses of action to receive a return on its investment in Rangiran. It could have had the advances repaid as quickly as possible; converted them to equity and then paid dividends; or, if inflation was running low, it may have preferred to leave the advances outstanding for a longer period. All of these possibilities, however, are speculative and quite unrelated to our central concern of how Eastman Kodak's property rights were damaged as a result of the interference. Therefore, in assessing the loss that Eastman Kodak incurred, we should not be considering Eastman

(Footnote Continued)

14. Under the Final Award's approach for quantifying damages to Eastman Kodak the critical factor is the risk that, as of the date of interference, Eastman Kodak would not have received full repayment of the advances plus contractual interest thereon. I believe that any uncertainty about Rangiran's future prospects could support, at most, a reduction of the total value of the advances by not more than 15 percent.⁹

III.

15. After a reasonable reduction to reflect the possibility that repayment would not be in full, I would have applied interest at the rate of 10% per annum to the amount awarded, in accordance with the practice in Chamber Three, accruing from the date of the interference to the date on which the Escrow Agent instructs payment out of the Security Account. The 10 percent rate is the proper interest rate to apply because, consistent with the theory of compensation in the Final Award, what is being awarded to Eastman Kodak is not the contractual value of the lost debts themselves, but the loss of the prospect of repayment of these advances. Moreover, reference to the advances is made only in an effort to begin to assess the quantum of the damage incurred by Eastman Kodak in its capacity as the majority shareholder of Rangiran. Given this theoretical underpinning, it is inconsistent, on the one hand, to refuse to award the full principal amount of the advances because they serve only as a starting point for approximating the loss incurred by Eastman Kodak, yet, on the other hand, to apply the contractual interest rate to the amount that is awarded. Yet this is exactly what the Final Award has done.

⁹Such a reduction would approximate a discounting similar to that which occurs when a market judgment is made that a particular bond should be sold at a discount from its face value.

16. Last, I see no reason for denying Eastman Kodak compensation for its costs of arbitration. Claimant has submitted an affidavit substantiating costs of U.S.\$687,444. The Claimant has been the successful party in obtaining an award from this Tribunal. Therefore, in fairness, I would have granted all of the Claimant's non-legal costs, totaling U.S.\$91,444, and not less than U.S.\$200,000 as a "reasonable" amount for attorney's fees. See Sedco, Inc. and National Iranian Oil Company, Award No. 309-129-3 (2 July 1987), reprinted in 15 Iran-U.S. C.T.R. 23, 184 (the Tribunal, noting that the claimant had "substantially . . . prevailed on its claims before us," awarded the out-of-pocket costs of arbitration in full and a reasonable sum for attorney's fees).

Dated, The Hague
1 July 1991


Charles N. Brower