



ORIGINAL DOCUMENTS IN SAFE

Case No. 227

Date of filing: 8 July '91

\*\* AWARD - Type of Award \_\_\_\_\_  
- Date of Award \_\_\_\_\_  
\_\_\_\_\_ pages in English \_\_\_\_\_ pages in Farsi

\*\* DECISION - Date of Decision \_\_\_\_\_  
\_\_\_\_\_ pages in English \_\_\_\_\_ pages in Farsi

\*\* CONCURRING OPINION of \_\_\_\_\_  
- Date \_\_\_\_\_  
\_\_\_\_\_ pages in English \_\_\_\_\_ pages in Farsi

\*\* SEPARATE OPINION of \_\_\_\_\_  
- Date \_\_\_\_\_  
\_\_\_\_\_ pages in English \_\_\_\_\_ pages in Farsi

\*\* DISSENTING OPINION of Judge Ansari  
- Date 8 July '91  
12 pages in English \_\_\_\_\_ pages in Farsi

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- Date \_\_\_\_\_  
\_\_\_\_\_ pages in English \_\_\_\_\_ pages in Farsi

IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعوی ایران - ایالات متحدہ

In the Name of God



CASE NO. 227  
 CHAMBER THREE  
 AWARD NO. 514-227-3

EASTMAN KODAK COMPANY,  
 Claimant,

and

THE GOVERNMENT OF IRAN,  
 Respondent,

IRAN-UNITED STATES CLAIMS TRIBUNAL	دیوان داوری دعوی ایران - ایالات متحدہ
FILED	ثبت شد
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DISSENTING OPINION OF  
 JUDGE PARVIZ ANSARI

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The Award's reasoning and conclusions are mainly based on a few assumptions that not only are incorrect, but also contradict the findings of Partial Award No. 329-227/12384-3 issued in this case (Partial Award). I initially review some of the findings of the Partial Award which are relevant to this discussion.

The proceedings in this case were conducted in two stages. The Claimant originally raised two major claims. In the first one, Eastman Kodak and other Claimants appeared as creditors of Rangiran (creditors' claim). The second major claim was raised against Iran by Eastman Kodak as the majority shareholder of Rangiran (shareholders' claim). In the shareholder's claim, "Eastman Kodak, as the majority shareholder of Rangiran, alleges that Iran's action with respect to Rangiran amounted to an expropriation of its shares in Rangiran, and Iran on that ground is liable to compensate Eastman Kodak for the value of those shares" (para. 57 of the Partial Award). The subject of the creditors' claim was trade debts that Rangiran allegedly owed to the Claimants including advances allegedly made by Eastman Kodak to Rangiran in the amount of \$3,368,243 as evidenced by three promissory notes. In the Partial Award the creditors' claims including Eastman Kodak's claim for credits advanced to Rangiran were dismissed for lack of jurisdiction. The Tribunal found that Rangiran was not an entity controlled by Iran as required by the Claims Settlement Declaration.

As to the shareholder's claim, the Tribunal decided that Iran's interference did not rise to the level of an expropriation or of a deprivation of ownership rights. The Tribunal, however, found that a certain degree of interference with Eastman Kodak's property rights as the majority shareholder of Rangiran existed, and deferred its decision on this issue until such time as the parties have been given an opportunity to address it. Paragraph 74(d) of the Partial Award describes the remaining issue to be considered and defines the measure of the Tribunal's jurisdiction as follows:

The final disposition of Case No. 227 is deferred until such time as the Parties have been given an opportunity to submit the evidence on which they wish to rely in support of their contentions on the issue whether the interference with the Claimant's property rights here found attributable to the Respondent Iran has caused damages to Eastman Kodak as the majority shareholder of Rangiran Photographic Services Company (P.J.S.C.) and what compensation, if any, is due to the latter. The Tribunal therefore retains jurisdiction over the claim raised in Case No. 227 by Eastman Kodak Company in its capacity as majority shareholder of Rangiran Photographic Service Company (P.J.S.C) against the Government of Iran.

Therefore it is obvious that after the issuance of the Partial Award the only remaining claim before the Tribunal is one for the damages, if any, to Eastman Kodak in its capacity as shareholder of Rangiran, as a result of Iran's interference. This, however, should not be confused with the damage that Eastman Kodak might have incurred as a result of nonpayment of credits it had advanced to Rangiran. The Award simply ignores this fact and confuses the question of the effect of Iran's interference on Eastman Kodak's property rights as shareholder of Rangiran (shareholder's claim) with the effect of the same interference on nonpayment of credits advanced to Rangiran by Eastman Kodak (creditor's claim).

This confusion between the right of a shareholder and the right of a creditor could be observed in the following paragraphs of the Award:

By liquidating Rangiran prematurely, however, Eastman Kodak lost even the potential to generate future revenue from which to satisfy the inter-company debts. (para 41)

Iran's interference crystallized the inherent debts at that moment in time and caused the Claimant to lose any prospect it had of repayment. The Tribunal finds there to be an uninterrupted causal link between Iran's interference, ..... and the loss by Eastman kodak of any potential for repayment of those amounts.... (para. 42)

The Tribunal's attempts to quantify that loss relate not to the value of Rangiran, ....., but to the loss suffered by Eastman Kodak as a result of the ..... loss of any potential of repayment of the sums found to have been advanced by Eastman Kodak in its capacity as majority shareholder of Rangiran. (para. 56)

As the Tribunal's award is based not on the value of Rangiran but on the loss suffered by Eastman Kodak as a result of the crystallization of the inherent debts ..... and the loss of potential of their repayment. (para. 59)

The majority overlooks the fact that the credits provided to Rangiran by Eastman Kodak are not Eastman Kodak's shareholder's right in Rangiran. Rangiran's commercial debts to Eastman Kodak are Eastman Kodak's creditor's right. Considering the effect of Iran's interference on the nonpayment by Rangiran of its debts to its creditor (Eastman Kodak) is in fact entertaining the creditors' claim. The fact that Eastman Kodak at the same time was the creditor and the shareholder of Rangiran is of no relevance and does not give it a right to recover a claim which is in fact a creditor's claim, in the name of shareholder's claim. By ignoring this fact the majority in effect litigates and entertains Eastman Kodak's creditors' claim under another rubric, in plain contradiction with the findings of the Partial Award. The Award's constant reference to the loss of potential of repayment of the advances proves this point. It is quite clear that in the context of loss of potential of repayment of the advances, Eastman Kodak can only have a standing as creditor. The alleged loss suffered by Eastman Kodak as the result of Iran's interference, *i.e.*, the loss of potential of repayment of advances, is a loss to the creditor. Eastman Kodak only in its capacity as a creditor can have a claim for non-recovery of its advances to Rangiran. The same promissory notes which in the Award have wrongly been characterized as certain of Eastman Kodak's assets, or Eastman Kodak's property right as majority shareholder of Rangiran, were in fact the subject of Eastman Kodak's creditors' claim in the first stage of this litigation. Eastman Kodak itself identified

the amount of promissory notes as the creditors' claim in contrast to its claim as the shareholder of Rangiran. The Tribunal by issuing the Partial Award dismissed the creditors' claim. Therefore it is in contradiction with the Partial Award, as well as Eastman Kodak's position, and contradicts the well established rule of law, to retry the creditors' claim under a different rubric.

#### Liquidation of Rangiran

The Award's conclusion as to the responsibility of Iran is based on the assumption that the decision to liquidate Rangiran was solely and directly due to the interference, and that the liquidation resulted in damage to Rangiran and eventually to Eastman Kodak. Neither of these assumptions is valid. The assumption that Rangiran was forced to liquidation is not right, because firstly, it is in contradiction with the findings of the Partial Award. Secondly, it is not supported by the facts and evidence in the case.

The Partial Award in paragraphs 45 and 46 reads as follows:

45) On 10 March 1980 Rangiran's shareholders decided to vote Rangiran into liquidation. The Claimants, through the declaration of Mr. Gilges, Eastman Kodak's in-house attorney, have explained this decision by stating that the shareholders were faced with two choices:

(i) simply abandon Rangiran entirely; or (ii) vote liquidation so as to freeze Rangiran's liabilities, which otherwise would continue to accrue; to attempt an orderly termination of its employees and winding up of their salary and severance claims; and -- most significantly -- thereby to minimize the risk that the physical threats to the safety of our local management team would be carried out.

46) The Tribunal finds that the Claimants have not substantiated the implied allegation by Mr. Gilges that the decision to liquidate Rangiran was taken under duress.

It is noteworthy that according to the Partial Award the decision to liquidate Rangiran not only was not forced upon it, but quite to the contrary, this decision is characterized as the significant demonstration of Eastman Kodak's freedom of decision making, and as an important consideration in finding that Rangiran was not an entity controlled by Iran (Partial Award paras. 47, 48 & 58). Furthermore, the Partial Award, while explaining the decision of the shareholders of Rangiran to liquidate this company, in the last sentence of paragraph 54 concludes as follows:

In any event, irrespective of the reasons for which they [shareholders of Rangiran] decided to adopt such a course of action they must accept the consequences stemming therefrom.

Therefore any argument in order to hold Iran responsible for the liquidation of Rangiran and its consequences is contrary to the holdings of the Partial Award.

From the factual point of view it is undisputed that Rangiran was liquidated pursuant to the decision of its shareholders. The minutes of Extraordinary General Meeting of Shareholders of Rangiran dated 10 March 1980 demonstrate that the decision was reached freely and unanimously. Nothing in these minutes or any other evidence before the Tribunal indicates that the decision to liquidate Rangiran was the result of interference of Iran or was influenced by it. Eastman Kodak itself took part in the process of liquidation and presented its claim for repayments of the credits which it had paid to Rangiran by sending the letter of 12 May 1980 to the Board of Liquidators of Rangiran.

On 31 August 1981 the Extraordinary General Meeting of Shareholders of Rangiran with the presence of all the shareholders and members of the Board of Liquidators of Rangiran was held. Minutes of this meeting show that the shareholders

of Rangiran unanimously decided to declare Rangiran bankrupt. Page 2 of the minutes states the following:

"After deliberations, it was unanimously resolved that the company be declared as bankrupt and that its bankruptcy be notified to the competent authorities."

Nothing in these minutes suggests that the previous decision of the shareholders to liquidate Rangiran or the present decision to declare it bankrupt was the result of the interference of Iran or was influenced by it. In fact there is not a single item of evidence to suggest that from the date of interference until the date of the above mentioned meeting (31 August 1981) or at any time before the initiation of the present litigation before the Tribunal, Eastman Kodak made any complaint about interference in Rangiran, or suggested that it had to liquidate Rangiran as the result of such interference. Pursuant to Eastman Kodak's bankruptcy petition dated 14 November 1981 the Public Court of Tehran declared Rangiran bankrupt, and insolvent as of 31 October 1977. Considering that Eastman Kodak did not appeal against the decision of the Court, the most reasonable conclusion is that it consented to the judgement of the Court and its findings, including the date of insolvency. Under the circumstances it is not admissible from Eastman Kodak to forfeit its previous position and conduct by alleging that it was forced to liquidate Rangiran or to declare it bankrupt.

#### Likelihood of Repayment of Advances

Apart from the conceptual errors referred to above, the Award's conclusion is ultimately based on another unproven assumption that Rangiran would have become a profitable company in future. Since repayment of any part of the debts in question was fully dependent on Rangiran's ability to make such payment in the future, a finding on the existence of damage and its quantum depends on a decision on the ability of Rangiran to generate profit in its future operations. Therefore in order to

award any damages, it should have been proved that Rangiran as it stood at the time of interference was capable of generating revenues, sufficient to maintain its operations and repay its debts. This in turn requires examination of Rangiran's conditions before the interference, and its future based on the evidence then existing. The majority without explaining the rationale and justification for its findings, and despite the undisputed evidence and previously recorded losses of Rangiran, simply assumes that Rangiran would have become very profitable in future.

As far as the undisputed facts of the case are concerned, Rangiran was running at a very substantial loss throughout its years of operation. In order to determine Rangiran's condition before the interference and its likely future potential for repayment of its debts there is no need to resort to speculation. The financial statements of Rangiran for the whole period of its operation until just a few weeks before the interference in question are before the Tribunal. The first act of interference according to Eastman Kodak took place in November 1979, and Rangiran's last financial statement prepared before the interference is for its fiscal year of 1979 which ended on 31 October 1979. The financial statement of Rangiran demonstrates a steady trend of losses, year by year. Rangiran was losing money under almost any conditions. Rangiran suffered a substantial loss in the 1977 fiscal year, when its share of the market of photographic products in Iran was 6.9%. In 1978 Rangiran allegedly increased its market share to 30.6% but it continued to lose money. The net loss in the 1978 fiscal year was U.S.\$ 518,424. In the fiscal year of 1979 (1 November 1978 to 31 October 1979), Rangiran's share of the market dropped to 25.7%, and it suffered a net loss of U.S.\$ 556,286,45. This was Rangiran's financial condition at the end of the 1979 fiscal year, just a few weeks before any interference. It suffered an accumulated loss of U.S.\$2,326,000 for its three years of operation, and a considerable decline in its share of the market of photographic products. As the financial statements of

Rangiran clearly show, Rangiran's performance during these three years was not just an unlucky incident or passing sickness, it was clearly a steady trend which in all likelihood was to continue in future. There is not a single item of evidence in the record to suggest that, as the majority has concluded, the steady trend of loss in Rangiran's operations would have suddenly changed into a period of very high profitability.

In deciding the financial condition and capabilities of Rangiran at the time of interference the Tribunal should have based its judgement on the financial statements of Rangiran which are the contemporaneous and undisputed evidence of the actual condition of Rangiran at the time of interference. However the majority chooses to ignore all these facts and follows the trail of fantasy. The majority in effect decides that Rangiran would have suddenly become profitable in future in a way that would have enabled it not only to curb its annual loss of more than half a million dollars but also to repay nearly 3.5 million dollars as principal and interest to Eastman Kodak. Considering the real condition of Rangiran at the time of interference, such a conclusion is nothing but pure fantasy.

Since the majority does not explain the reasons for its findings and fails to identify any evidence in the record or any other sources of information that lead it to believe in a sudden and dramatic financial revival of Rangiran, it is almost impossible to comment on its position. What scarce justification the Award offers in support of its findings is so ambiguous and without merit that it is of very little help to the reader in understanding the legal and factual basis of the majority's decision. In order to show the degree of the confusion of the majority in its desperate attempt to find some excuses and justifications for its decision, it is worthwhile to quote from the Award itself:

The Tribunal is mindful of the fact that, had Rangiran not been liquidated, Eastman Kodak would have received repayment of these advances only over a period of time, if at all. Repayment would have been dependent

upon Rangiran generating revenues over a continued period. (para. 51)

The Tribunal has no way of knowing with certainty whether, if Rangiran had been permitted to continue trading to the present day, the advances would have been repaid in part or in full, or whether, due to insufficient revenue or other reasons, they would remain on the balance sheet as long-term liabilities.... (para. 52)

In all fairness, I believe that the most logical conclusion of the foregoing observations should have been the dismissal of the Claim. An award must be based on the facts that the Tribunal can satisfactorily ascertain, or on the facts that can be assumed to have existed, but an award cannot be based on events and contentions that the Tribunal is admittedly doubtful of. Much to my regret, it is evident that the Award's finding of damage and the quantum thereof is admittedly based on ignorance but not on knowledge. In very simple terms, what the Award pronounces is that since it is not certain if there was actual damage or not, and since there is no way to assess the quantum of damage, it is appropriate to award a part of the damage which is claimed. Such an approach to a dispute, without any hesitation, falls short of the minimum standard of fairness and reasonableness which is expected from an international tribunal or any other judicial body.

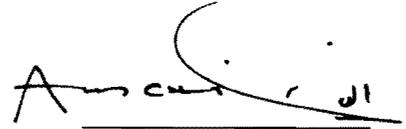
Furthermore, as evidenced by the judgement of the Public Court of Tehran, Rangiran was bankrupt and insolvent as of 14 October 1977, because its liabilities were exceeding its assets. It is therefore impossible to imagine what damage the interference could have caused Rangiran or its major shareholder Eastman Kodak. As mentioned before, the decision to file the petition of bankruptcy with the Public Court of Tehran on 14 November 1981 was taken by Eastman Kodak as the majority shareholder of Rangiran. Pursuant to that petition the Court declared Rangiran bankrupt and insolvent as of 31 October 1977. Most regrettably the majority ignores the decision of the Iranian Court taken well within its jurisdiction. The judgement

of the Iranian Court should have been given full effect particularly due to the fact that Eastman Kodak consented to the judgement and did not appeal against it. The decision of the Iranian Court concerning the financial status of Rangiran as an insolvent company is conclusive and binding on Eastman Kodak as well as the Tribunal. Furthermore, common sense dictates the acceptance of the judgement of the Iranian Court at least as evidence of the financial condition of Rangiran at the time of interference. There is no doubt that the Iranian court was in a better position, and had a better chance to examine and to determine Rangiran's financial condition. Moreover, the Court's judgement was based on the expert's opinion on the issue of bankruptcy. There has been no allegation of injustice or unfairness with regard to the procedures and the decision of Iranian Court.

The majority's justification for ignoring the judgement of the Iranian Court is wrong, unfounded, and misplaced. The majority, in order to justify its position, in paragraph 55 of the Award cites Rexnord Inc. and The Islamic Republic of Iran, Award No. 21-132-3 (10 Jan. 1983), reprinted in 2 Iran-U.S. C.T.R. as precedent. However, Rexnord is not relevant to the present case. In Rexnord the question was one of jurisdiction. In Rexnord the jurisdiction of the Tribunal was challenged due to the fact that concurrent with the proceedings before the Tribunal, a liquidation process with respect to the corporations involved in that case was underway. The Tribunal in Rexnord decided that the existence of a concurrent liquidation process in Iran did not preclude the jurisdiction of the Tribunal. In the present case the judgement of the Iranian Court is relied on with regard to the merits of the case and as evidence of Rangiran's financial status at the time of interference. The judgement of the Public Court of Tehran is relied on to prove that Rangiran was bankrupt and insolvent and that its value at the time of interference was nil and that Iran's interference could have caused no damage to a company that was insolvent long before the date of interference.

In the light of the foregoing, I dissent to the Award and believe that the Claimant's Claim must be dismissed in toto.

The Hague,  
8 July 1991

A handwritten signature in black ink, appearing to read 'Ansari', with a large, sweeping flourish above the name.

Parviz Ansari