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Case No. 227Date of filing: 11. Nov 87

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Mr Brower

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CASES NOS. 227 and 12384

CHAMBER THREE

AWARD NO. 329-227/12384-3

Case No. 227

EASTMAN KODAK COMPANY, EASTMAN KODAK
INTERNATIONAL SALES COMPANY and
KODAK (NEAR EAST) INC.,

Claimants,

and

THE GOVERNMENT OF IRAN, RANGIRAN
PHOTOGRAPHIC SERVICES CO. (P.J.S.C.),
BANK MELLI, BANK SEPAH, IRANO-BRITISH
BANK and BANK MARKAZI IRAN,

Respondents;

Case No. 12384

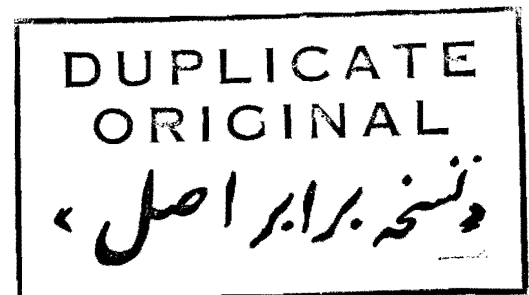
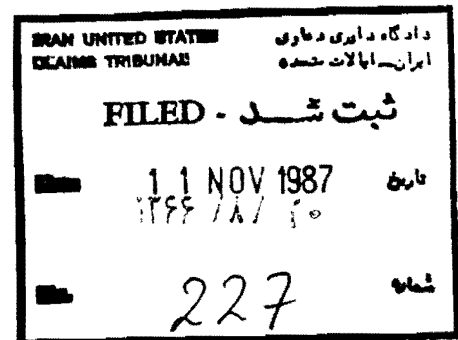
EASTMAN KODAK INTERNATIONAL CAPITAL
COMPANY, INC., a claim of less than
U.S.\$250,000 presented by THE UNITED
STATES OF AMERICA,

Claimant,

and

THE ISLAMIC REPUBLIC OF IRAN,

Respondent.



CONCURRING AND DISSENTING OPINION OF JUDGE BROWER

1. In the Algiers Accords the States Parties agreed that Iran would pay out of the Security Account established pursuant to Paragraph 7 of the General Declaration any Tribunal award against any entity Iran controlled on 19 January 1981,¹ regardless of whether or not Iran (1) ever expropriated such entity,² or even (2) had controlled it at the time the claim arose,³ or (3) would have been responsible to any creditor on any other basis,⁴ and (4) even despite the intervening insolvency or bankruptcy of such entity.⁵ In my view the present Award simply refuses to honor this commitment. Instead it implicitly decides that Iran cannot be held to its word unless it in fact becomes the legal successor to such entity. I dissent from

¹The United States undertook reciprocal obligations vis-à-vis Iranian nationals. The only difference is that the Security Account secures payment only of Awards against Iran.

²Rexnord Inc. and Islamic Republic of Iran, Award No. 21-132-3 at 8 (10 January 1983), reprinted in 2 Iran-U.S. C.T.R. 6, 10 (control found "regardless of whether [respondents] were in effect nationalized or expropriated by Iran").

³Id.; Kimberly-Clark Corporation and Bank Markazi Iran, Award No. 46-57-2 (25 May 1983), reprinted in 2 Iran-U.S. C.T.R. 334 (claim arose as early as June 1978; control asserted September 1980); Raygo Wagner Equipment Co. and Star Line Iran Company, Award No. 20-17-3 (15 December 1982), reprinted in 1 Iran-U.S. C.T.R. 411 (claim arose January 1979; control asserted February 1980).

⁴McLaughlin Enterprises Ltd. and Islamic Republic of Iran, Award No. 253-289-1 at para. 34 (16 September 1986) (claims assertable against controlled entity although Iran not itself liable).

⁵Time, Inc. and Islamic Republic of Iran, Award No. 131-166-2 (29 June 1984), reprinted in 7 Iran-U.S. C.T.R. 8; Rexnord Inc. and Islamic Republic of Iran, Award No. 21-132-3 (10 January 1983), reprinted in 2 Iran-U.S. C.T.R. 6.

this conscious refusal of the Tribunal to implement the will of the States Parties.^{6, 7}

I.

2. On the face of it Respondent Rangiran was controlled lock, stock and barrel by Iran on (and even well before) 19 January 1981.

3. I believe that the evidence in the record leaves no doubt that by the end of 1979 Rangiran had become an entity controlled by Iran within the meaning of the Claims Settlement Declaration. The Award itself recognizes that Iran blocked all access to Rangiran's assets except by Government order, vested full management authority in the company's Workers' Council, and appointed a provisional manager to see that its will was carried out. Any one of these three events taken alone should be sufficient to establish that Rangiran was taken into Iran's control. See Sedco, Inc. and National Iranian Oil Co., Award No. ITL 55-129-3 at 40-41

⁶The result is that substantial and largely uncontested debts remain unpaid. The major portion of the claim is for loans made but not repaid and goods sold but for which payment was not made. Iran submitted financial statements of Rangiran Photographic Services Company (P.J.S.C.) ("Rangiran") showing as an outstanding liability the loans received in substantially the amounts claimed. Similarly, the unpaid invoices for goods supplied were not disputed nor was receipt of the goods denied, and the financial statements submitted by the Respondents show as outstanding liabilities the amounts claimed as trade debts.

⁷In order to form a majority in support of further proceedings which may yet result in Claimant being accorded a measure of justice I nonetheless am compelled to concur in the Tribunal's finding that Iran is liable to Claimants for "measures affecting [their] property rights" in Rangiran. I also concur in releasing Claimant Eastman Kodak Company from its guarantee in favor of the Irano-British Bank; in the dismissal of Bank Tejarat's counterclaim; and in the termination of proceedings against Bank Melli and Bank Sepah.

(28 Oct. 1985); Cal-Maine Foods, Inc. and Islamic Republic of Iran, Award No. 133-340-3 at 10 (11 June 1984), reprinted in 6 Iran-U.S. C.T.R. 52, 58-59; Raygo Wagner Equipment Co. and Star Line Iran Co., Award No. 20-17-3 at 6 (15 December 1982), reprinted in 1 Iran-U.S. C.T.R. 411, 413. Together they constitute cumulative conclusive proof of a controlled entity.

4. The Award concludes instead that as a result of Iran's interference in Rangiran's affairs the Claimants and the Government established a system of "joint management" over Rangiran. (Para. 43.) I am unable, however, to find anything "joint" about it; it was a distinctly one-way street, not a two-way one. Surely the Government's total control over the company's funds, its direction of everyday operations through the Workers' Council, and the "election" of Rangiran's original shareholder-appointed managers by vote of the workers show that the shareholders retained no control over the company's affairs. Even if the shareholder-appointed management was able to carry out some of its own decisions, which is by no means evident, the fact that the Government's representatives retained a power of veto deprives the shareholders of any semblance of control. In a situation of supposed joint management it is vital to ascertain whether the decisions of one of the partners could be thwarted by the other, or whether one of the partners could act without the approval of the other. I think it is absolutely clear in this case that Rangiran's shareholder-selected managers could take no actions against the will of the Government managers, but there is no indication that any act of the Government managers was subject to Claimants' approval. As of the end of 1979 "control" of the company thus rested solely in the Government.

5. The details of Iran's actions with respect to Rangiran confirm that their purpose and effect was none other than to vest effective control over Rangiran in government-appointed

persons, to the exclusion of the shareholders. The initial act, freezing of the company's bank accounts, was clearly not prompted by financial or judicial concerns, even if such motives might be considered to have any effect on the existence of control, which is debatable. Rather, according to the Respondent Rangiran, the freeze was prompted by certain anti-western employees of Rangiran⁸ who were "doubtful about the performance" of the Iranian management installed by the American shareholders, and complained to the Revolutionary Council, the Bonyad Mostazafan (the entity responsible for operating expropriated businesses) and the Revolutionary Public Prosecutor. The resulting seizure of control over Rangiran's financial assets in response to these complaints was clearly intended to assert government control over the company's affairs, and it certainly had the intended result.

6. Similarly, the Revolutionary Public Prosecutor's written order empowering Rangiran's Workers' Council, theretofore apparently a kind of collective bargaining organization, "to supervise the importation, delivering and sale of the company's products" was all-inclusive, covering the entire range of Rangiran's activities. Testimony offered by Claimants' representatives confirms that the Council thereafter set prices, arranged sales, approved all expenditures and set salaries.

7. Finally, Dr. Khodakhah's appointment by the Revolutionary Council, then the highest governmental body, "to have complete supervision on the manner of operations of the workers council, the management, the financial affairs and good performances of Rangiran" was implemented by his visits

⁸ Rangiran's submission to the Tribunal described the employees who lodged the complaint as "devoted personnel." The Farsi word translated as "devoted" is "mota'ahhed," which may also be translated as "dedicated."

to Rangiran's premises, during which he called meetings, examined books, and held an election to determine whether the managers appointed by the shareholders should remain in office or be replaced. This clearly is more than mere regulatory oversight, and confirms the pervasiveness of Iran's control over Rangiran as of late 1979.⁹

8. The Award carefully refrains from actually determining whether Iran's "joint management" of Rangiran transformed Rangiran into a controlled entity in late 1979, and instead concludes implicitly that Claimants' subsequent decision, in March 1980, to seek to liquidate the company and ensuing events demonstrate that even if the shareholders had not in fact retained control over Rangiran they reacquired it, apparently to the exclusion of Iran. I find this to be entirely inconsistent with reality.

9. It seems obvious that the fact that Rangiran's shareholders could meet in New York and sign documents formally authorizing a liquidation does not give any indication as to whether the shareholders actually retained any control or succeeded in reasserting it. No doubt any of the many claimants alleging before this Tribunal expropriation of corporations they formerly controlled could have taken similar actions, but the ability to engage in such formalities requires no actual control and evidences none.

⁹The Award decides that Dr. Khodakhah's appointment was only "minor and temporary" and thus not an important indication of control. (Para. 42.) It is clear, however, that his mandate was to ensure that the company was operated according to Government desires, as he was specifically instructed to keep the Revolutionary Council informed as to Rangiran's operations, a duty which must be understood to arise out of more than mere institutional curiosity. If after his initial visits to the company's premises his role became less visible, this is no indication that he was any less successful. Indeed, there would be no need for further demonstrative assertions of control if there was no longer any question as to where control resided.

10. I believe the Tribunal has been negatively influenced by Claimants' not quite convincing explanations as to why they, uniquely among claimants before the Tribunal, undertook steps to liquidate as they did. The Claimants explained that they were attempting to protect Rangiran's Iranian management from threats to their safety and to protect Kodak's corporate interests by eliminating the risk that a "renegade" former subsidiary, now entirely outside their control and instead in the hands of a clearly hostile and unpredictable government, might somehow -- perhaps through continued use of the Kodak trade name -- cause the shareholders unforeseen damage. I think the Tribunal has not been persuaded, and skepticism often leads to suspicion. Acknowledging myself no little perplexity as to Claimants' true motives, the point is that it makes absolutely no difference why Kodak decided to liquidate. What is determinative is the fact that the liquidation was permitted to proceed only with the permission and under the supervision of Iranian Government authorities.

11. The Award states (para. 54) that "[t]he Claimants were able . . . to have their decision to liquidate the company implemented" with the cooperation of the Workers' Council (Para. 18). This is only half true and seriously mischaracterizes the actual situation. The first decision of the shareholders in implementation of the liquidation was immediately to cease operations and terminate all employees. This decision was rejected out of hand by the Workers' Council, however, and therefore never implemented. Rangiran itself explained to the Tribunal that:

The personnel decided to continue the company's business until the disposition of service pay of the employees as well as the future of the company was established.

Since the lawful owners of the company had already decided to liquidate, it is clear that the Workers' Council expected

the decision as to the "future of the company" from some other source. Only after negotiations held under the auspices of the Revolutionary Prosecutor did the liquidation proceed, and then only after the Revolutionary Prosecutor had demanded the appointment of the head of the Workers' Council as one of the Board of Liquidators' representatives in Iran. Thus the involvement of the Workers' Council in the liquidation -- what the Award terms "co-operation" -- was not occasioned by the request or even the free agreement of the shareholders, but by Government order. As the appointment itself states, the head of the Workers' Council was appointed to the liquidation board expressly

by virtue of his having been appointed by one of the officers of the Attorney General as its representative and having been responsible for the custody of the assets of the company since the departure of management.

12. Thus it is incorrect to consider the liquidation as evidence that the shareholders retained or regained control. On the contrary, it is confirmation that all control, even the right to terminate operations and liquidate the company, had been assumed by Iran.

II.

13. Apparently sensing how unsatisfactory is its conclusion, in light of all this evidence, that Iran did not control Rangiran, the Award attempts to justify this holding by defining "control" to have a meaning different from what I believe the States Parties agreed. The Claims Settlement Declaration states simply that any entity "controlled" by either State Party is a proper respondent against whom qualifying claims may be brought. This is in harmony with General Principle B of the General Declaration, which simply

refers to "claims . . . against . . . state enterprises."¹⁰ (Emphasis added.) The Claims Settlement Declaration places no limits on the source, purpose, duration or effect of such control, it being clear that if control is exercised by a State Party at 19 January 1981, for whatever purpose and by whatever means, the entity so controlled is liable here to suit.

14. The Award seriously misreads -- or rather rewrites -- this section of the Claims Settlement Declaration, however, holding that an entity in fact controlled by a State Party, such as Rangiran, may nevertheless not be a "controlled entity" under the Claims Settlement Declaration unless the "pertinent circumstances" of a particular case justify that State Party being "fully substituted for the respondent 'controlled entity' for the purpose of payment of all damages for which such entity may be held liable." (Paras. 49 and 52.) The Award apparently requires a showing that the State Party involved somehow legally deserves the burden of the controlled entity's debts independently of the duty to pay under the Claims Settlement Declaration; thus it emphasizes that in this Case the procedure for payment out of the Security Account results in Iran being "fully substituted" for a respondent and concludes that such procedure

is more than a simple procedural mechanism of enforcement of the awards rendered by the Tribunal, freeing American claimants from any need to seek enforcement through municipal procedures.

(Para. 53).

¹⁰The Tribunal has held that the General Principles stated in the General Declaration "constitute an integral part of the 'commitments' made by the two Governments" and are not merely "a preamble" devoid of "operative provisions." Islamic Republic of Iran and United States of America, Award No. ITL 63-A15(I:G)-FT at paras. 16, 18 (20 August 1986).

15. The most basic flaw in the Award's reasoning is that in interpreting a term (control) applicable equally to both States Parties it refers predominately to a provision (the Security Account) applicable only to one, namely Iran. Certainly control must have the same meaning in regard to both States Parties; therefore, a particular part of the bargain between them which applies to only one of them is contextually irrelevant.

16. Moreover, the Award's confusion reflects a fundamental misunderstanding of the effect of a finding that a respondent is a controlled entity. While the Claims Settlement Declaration includes a controlled entity in its definition of "United States" and "Iran," that neither effects nor reflects any legal substitution of either State Party for entities it controls, nor does it deprive the controlled entity of its independent juridical identity. See Flexi-Van Leasing, Inc. and Islamic Republic of Iran, Award No. 259-36-1 at 19 (13 October 1986).¹¹ A claim brought against a controlled entity is not a claim against the State Party. See McLaughlin Enterprises, Ltd. and Islamic Republic of Iran, Award No. 253-289-1 at para. 34 (16 September 1986) (a claim against a controlled entity is not a claim against Iran). That because of the Algiers Accords the payment of an Iranian controlled entity's debt to American claimants

¹¹The error of the Award's "substitution" standard is evident by comparison with prior Tribunal cases. For example, in Flexi-Van the Tribunal specifically held that a company which it recognized as an entity controlled by Iran within the meaning of the Claims Settlement Declaration "remained a separate legal entity, and surely did not become an organ or department of the Government." The Tribunal also noted that control over a company by Iran sufficient to support the Tribunal's jurisdiction need not "constitute interference with the management of [the company] or with its business decisions." Id. at 19 & n.4.

(but to no others) may be made out of the Security Account does not mean that the debt becomes Iran's (let alone that an American controlled entity's debt becomes that of the United States). The Security Account is merely an agreed means for payment of debts to American claimants by all Iranian respondents at the Tribunal, including agencies or subdivisions of the Iranian government for whose debts it otherwise would legally be liable, and controlled entities, for which it might or might not be. Simply stated, Iran agreed to secure payment of debts owed by "controlled entities" to American claimants as part of the settlement of an international crisis, but that does not mean that the Security Account is available only for payment of debts for which Iran otherwise would have been legally responsible.

17. The Award's stringent view of the threshold that must be surmounted to find State Party control of an entity is inconsistent with the Tribunal's jurisprudence. Whether or not one accepts the Award's premise (paras. 49-51) that the concept of "control" as applied to a claimant asserting an indirect claim, as provided in Article VII(2) of the Claims Settlement Declaration, is different from the concept as applied to a respondent, as contained in Article VII(3) and (4), the fact is that in the first instance control must be based at least in part on "ownership interests" whereas in the second case there are no prescriptions as to form. If, then, indirect control of a claim by a claimant "may be demonstrated in several ways," Alcan Aluminium Ltd. and Ircable Corporation, Award No. 41-91-3 at 6 (3 May 1983), reprinted in 2 Iran-U.S. C.T.R. 294, 297, including "through the Managing Director" appointed by less than 50 percent of the shares, SEDCO, Inc. and National Iranian Oil Company, Award No. ITL 55-129-3 at 18, 22 (28 October 1985), it stands to reason that State Party control of a respondent may take varied and less substantial forms, as the Tribunal has repeatedly affirmed in ruling that the appointment by a State Party of a "provisional" manager alone results in its

control of the subject enterprise. See cases cited at paragraph 3, supra. The fact that the Security Account was part of the bargain between the States Parties should no more alter this result today than it has heretofore.

III.

18. The Award intends to give the Claimants their day in court on their principal claim nonetheless by affording them an opportunity to satisfy the Tribunal that they have been damaged by Respondents' "measures affecting [Claimants'] property rights." In doing so, however, the Award expressly finds that Claimants were not expropriated and were not otherwise "deprived of their ownership rights." (Para. 58.) The Award therefore requires Claimants in the further proceedings to prove that Respondent Iran's "interference has caused damage" to them. (Para. 61.)

19. I agree, of course, that once the Tribunal has found Iran did not control Rangiran as of 19 January 1981 it is precluded from finding that by that date Rangiran nonetheless was expropriated in the usual sense. An expropriation ordinarily implies that the State involved has itself acquired the benefit of the affected alien's property or at least has been the instrument of its redistribution. None of that can occur if the State exercised no control.

20. A State also may deprive an alien of ownership rights, however, without effectuating a transfer of such rights, by simply destroying them. This may occur in the absence of the State ever "controlling" such property rights. The Award here concludes that this also did not occur and this holding I find premature at best.

21. The Award relies in this respect first on the fact that legal title to Claimants' shares in Rangiran "was unaffected by Iran's interference." (Para. 58.) This simply is saying there was no transfer, i.e., no expropriation, which is beside the point so far as a deprivation is concerned. Second, the majority "has attached particular importance" to the Claimants' decisions "to liquidate and to declare Rangiran bankrupt" much after the events claimed to have constituted to the deprivation. The fact that Claimants may have managed ultimately to arrange a decent burial for their defunct enterprise, however, should not absolve those accused of killing it.¹² I would at least have left it open

¹²It is conceded that in fiscal year ending 31 October 1978, the first full year of its operations, Rangiran had sales of \$13.2 million, and that even for fiscal year 1979, during the most intense period of revolutionary disruption, and while the company was still controlled by Claimants, Rangiran succeeded in making total sales of \$11.6 million. In 1980, however, following Iran's "measures," despite a more stable political and social situation in Iran, sales plummeted to but a fraction, i.e., \$0.39 million. Thus once Iran interfered with Rangiran it deteriorated from a thriving concern to annual gross sales less even than the balance of its outstanding debts to Claimants. It is small wonder that such results eventually led Claimants to attempt to liquidate Rangiran and later to declare it bankrupt.

Financial statements submitted showed that Rangiran, while initially experiencing net losses, nevertheless maintained a healthy ratio of current assets to current liabilities, and always had the ability to meet its obligations as they came due. Projections performed by Rangiran in late 1978 suggested that the company would start earning a profit beginning in 1979. While in light of the severe economic and social disruptions which began in November 1978 -- concurrently with Rangiran's fiscal year 1979 -- the projections were not met, sales were nevertheless substantial, and in the second quarter of 1979 (1 February - 30 April) the company indeed showed a profit of \$1.6 million, confirming the improving situation of the company and Claimant's expectations of its future profitability.

for Claimants to argue this point in the further proceedings.¹³

Charles N. Brower

Charles N. Brower

¹³The Parties and the Tribunal in the proceedings heretofore had concentrated on the possibility that assertion of Iranian control over Rangiran extended so far as to result in its expropriation. The issue of whether or not a total deprivation occurred without an accompanying transfer of property to Iran is raised for the first time by the findings of the present Award.