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Content:

Final award of 27 June 1990 in case no. ARB/87/3

Arbitrators: Ahmed S. El-Kosheri (Egypt), President, Berthold Goldman (France), Samuel K.B. Asante (Ghana)
(dissenting opinion of 15 June 1990)

Parties: Claimant: Asian Agricultural Products Ltd. (AAPL) (Hong Kong); Defendant: The republic of Sri Lanka

Place of proceedings: Washington, D.C.


Subject matters:
- law applicable to substance
- customary international law
- bilateral investment treaties
- interpretation of treaties
- "full protection and security" and "due diligence" do not entail "strict liability"
- most-favourable-rights provision in treaty
- method and burden of proof
- standard of "due diligence"
- standart of compensation
- evaluation of "going concern"

Facts

In 1983, Asian Agricultural Products Ltd. (AAPL), a Hong Kong company, made an officially approved investment in Sri Lanka in the form of participation in the equity capital of the Sri Lankan public company, Serendib Seafoods Ltd. (the company or Serendib). Serendib was established to undertake shrimp culture in Sri Lanka. Serendib's shrimp culture farm was destroyed on 28 January 1987 during a military action conducted by the Sri Lankan security forces against the installation, which was reported to be used by local rebels. AAPL alleged to have suffered a total loss of investment as a result of this action and claimed damages of US$ 8 million from the Government of Sri Lanka.
On 8 July 1987, the International Centre for Settlement of Investment Disputes received a request from AAPL that arbitration proceedings be initiated against Sri Lanka. AAPL relied on the Washington Convention of 1965 to which Sri Lanka is a party and Art. 8(1) of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Sri Lanka for the Promotion and Protection of Investment of 13 February 1980 (the Bilateral Investment Treaty). The Bilateral Investment Treaty was extended to Hong Kong effective 14 January 1981.

Art. 8(1) of the Bilateral Investment Treaty which was invoked as expressing Sri Lanka's consent to ICSID arbitration provides:

"1. Each Contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes (hereinafter referred to as 'the Centre') for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature at Washington 18 March 1965 any legal disputes arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former."

The Arbitral Tribunal held that the Government of Sri Lanka was liable to compensate AAPL for the unlawful requisition and destruction of its investments and awarded as compensation for these losses US$ 460,000 with interest. An Excerpt of the dissenting opinion of Samuel K.B. Asante is included following the Excerpt of the Majority Opinion.

Excerpt

[...]

II. THE TRIBUNAL'S FINDINGS

A. Rule of Interpretation

[7] "From the ... arguments advanced by each of the two Parties to sustain his position, it becomes clear that the only point on which they agree is the applicability of the Sri Lanka/UK Bilateral Investment Treaty as the primary source of law. Beyond that preliminary point, the two Parties are in disagreement, since each Party construes the relevant provisions of the Treaty in a manner fundamentally in conflict with the interpretation given by the other Party to the same provisions. Therefore, the first task of the Tribunal is to rule on the controversies existing in this respect by indicating what constitutes the true construction of the Treaty's relevant provisions in conformity with the sound universally accepted rules of treaty interpretation as established in practice, adequately formulated by l'Institut de Droit International in its General Session in 1956, and as codified in Art. 31 of the Vienna Convention on the Law of Treaties."

[8] "The basic rule to be followed by the Tribunal in undertaking its task with regard to the pending controversial Interpretation issue has been formulated since 1888 in the Award rendered in the Van Bokkelen case (Haiti/USA), where it was stated that:

'for the interpretation of treaty language and Intention, whenever controversy arises, reference must be made to the law of nations and to international jurisprudence (Repertory of International Arbitral Jurisprudence, Volume 1: 1794-1918, Edited by; Vincent CoussiratCoustere and Pierre Michel Eisemann, Nijhoff, Dordrecht/Boston/London, 1989, § 1015, p. 13).'

In essence, the requirement that treaty provisions 'must be interpreted according to the Law of Nations, and not according to any municipal code', emerges from the basic premise expressed by Mr. Vilebster in the following terms:

'When two nations speak to each other, they use the language of nations' (Quoted by the Germany/Venezuela Mixed Claims Commission in the Christern Case, as reproduced in the Repertory referred to herein-above, § 1017, p. 27)."
"The other rules that should guide the Tribunal in adjudicating the Interpretation issues raised in the present arbitration case may be formulated as follows:

**Rule (A)**

- Text of Prof. Basdevant's Pleading in of the PICJ on 5 July 1923 in the *Wimbeldon* case; S. Bastid, *Les Traités Dans la Vie Internationale*, 1985, p. 129, footnote no. 1 - reproducing the text of the Résolution adopted by *l'Institut de Droit International*, Grenada Session, *Annuaire de l'Institut*, vol. 46, 1956, underlining that the rules adopted are only applicable 'lorsqu'il y a lieu d'interpréter un traité'; and I.M. Sinclair, 'The Principles of Treaty Interpretation and Their Application By the English Courts', *International and Comparative Law Quarterly*, vol. 12, (1963), p. 536 referring to the decisions pronouncing that if the meaning intended to be expressed is clear the Courts are 'not at liberty to go further').

**Rule (B)**

In the interpretation of treaties ... we ought not to deviate from the common use of the language unless we have very strong reasons for it (…) words are only designed to express the thoughts; thus the true significiation of an expression in common use is the idea which custom has affixed to that expression (another passage from Vattel relied upon by the USA/Venezuela Mixed Commission in the *Howland* case, *op. cit.*, p. 16 - *cf. Award of the Mexico/USA Mixed Commission of 1871 in the William Barron case, Ibid.*, 1023, p. 30, emphasizing that: 'interpretation means finding in good faith that meaning of certain words, if they are doubtful, which those who used the words must have desired to convey, according to the usage of speech (usus loquendi)'; Alexander's award of 1899 in the *Treaty of Limits* case between Costa Rica and Nicaragua *Ibid.*., § 1025, p. 31, declaring that: 'words are to be taken as far as possible in their first and simplest meanings', 'in their natural and obvious sense, according to the general use of the same words', 'in the usual sense, and not in any extraordinary or unused acceptation'; S. Bastid, *op. cit.*, p. 129, reproducing the Resolution adopted in 1956 by *l'Institut de Droit International* according to which: 'L'accord des parties s'étant réalisé sur le texte, il y a lieu de prendre le sens naturel et ordinaire de ce texte comme base d'interprétation'; and I.M. Sinclair, *op. cit.*, p. 537, reporting that: 'the Court .... is bound to construe them (the words) according to their natural and fair meaning').

**Rule (C)**

takes into consideration what is normally called: 'le sens général, l'esprit du Traité', or 'son économie générale' (Award rendered in 1914 by the Permanent Court of Arbitration in the *Timor Island* case between the Netherlands and Portugal, *Repertory, op. cit.*, § 1019, p. 28; decision of the Bulgarian/Greek Mixed Arbitration Tribunal rendered in 1927 in the *Sarrapoulos case, Repertory*, vol. II: 1919-1945, 5 2020, p. 21-22; The 1926 *Paula Mendel* case where the Germany/USA Mixed Claims Commission disregarded 'a literal construction of the language' since it 'finds no support in the other provisions of the Treaty as a whole'. Hence, 'it cannot stand alone and must fall' *Repertory* vol. II, S 2025, p. 25; and the Decision of the Germany/Venezuela Mixed Claims Commission of 1903 in the *Kummerow* case which stated that: 'it is a uniform rule of construction that effect should be given to every clause and sentence of an agreement', *Repertory, op. cit.*, vol. I, § 1031, p. 38).

**Rule (D)**

In addition to the 'integral context', 'object and intent', 'spirit', 'objectives', 'comprehensive construction of the treaty as a whole', recourse to the rules and principles of international law has to be considered a necessary factor providing guidance within the process of treaty interpretation. (Resolution of *l'Institut de Droit International, op. cit.*, Art. I(2) which stipulates: "les termes des dispositions du traité doivent être interprétés dans le contexte entier, selon la bonne foi et à la lumière des principes du droit international"; Paragraph 3(c), of Art. 31 of *Vienna Convention on the Law of Treaties* containing reference to: "all relevant rule of international law applicable in the relations between the parties", and the Award rendered in 1928 by the France/Mexico Claims Commission in the *Georges Pinson* case, which stated among 'les principes généraux d'interprétation': 'Toute convention internationale doit être réputée s'en référer tacitement au droit international commun, pour toutes les questions qu'elle ne résout pas elle-même en termes exprès et d'une façon différente' *Repertory, op. cit.*, vol. II, § 2023, p. 24).
"Rule (E)

is simply an application of the ... wider legal principle of 'effectiveness' which requires favouring the interpretation that gives to each treaty provision 'effet utile'.

"Rule (F)

'When there is need of interpretation of a treaty it is proper to consider stipulations of earlier or later treaties in relation to subjects similar to those treated in the treaty under consideration' (Award of the Mexico/USA General Claims Commission of 1929 rendered in the Elton case, Repertory, vol. II, § 2033, p. 35). Thus, establishing the practice followed through comparative law survey of all relevant precedents becomes an extremely useful tool to provide an authoritative interpretation."

"Rule (G)


"Rule (H)

'The term actor in the principle onus probandi actori incumbit is not to be taken to mean the plaintiff from the procedural standpoint, but the real - claimant in view of the issues involved' (Ibid., p. 332). Hence, with regard to 'the proof of individual allegations advanced by the parties in the course of proceedings, the burden of proof rests upon the party alleging the fact' (Ibid., p. 334, and Durward V. Sandifer, Evidence before International Tribunals, University Press of Virginia, Charlottesville, (1975), p. 127, footnote 101).

"Rule (I)

'A Party having the burden of proof must not only bring evidence in support of his allegations, but must also convince the Tribunal of their truth, lest they be disregarded for want, or insufficiency, of proof' (Cheng, op. cit., p. 329-331, with quotations from the supporting authorities).
"Rule (J)"

'The international responsibility of the State is not to be presumed. The party alleging a violation of international law giving rise to international responsibility has the burden of proving the assertion' (The Tanger Horses case (1924); the Corfu Channel case (1949), and the Belgium Claims case (1930) referred to by Cheng, at p. 305-306).

"Rule (K)"

International tribunals are 'not bound to adhere to strict judicial rules of evidence'. As a general principle 'the probative force of the evidence presented is for the Tribunal to determine' (Sandifer, op. cit. pp. 9 and 17, Award of 1896 rendered in the Fabiani case between France and Venezuela, Repertory, op. cit., vol. I, p. 412-413; and the 1903 Award rendered in the Franqui case by the Spain/Venezuela Mixed Claims Commission, which considered this rule as expressing 'the unanimous conviction of the most conspicuous writers upon international law' and relying inter alia on Art. 15 of the Rules for Arbitration between Nations adopted in 1875 by l'Institut de Droit International, and what Mérignhac wrote at p. 269 of his Traité de l'Arbitrage International, U.N. Reports, op. cit., vol. X, p. 751-753).

"Rule (L)"

In exercising the 'free evaluation of evidence' provided for under the previous Rule, the international tribunals 'decided the case on the strength of the evidence produced by both parties', and in case a party 'adduces some evidence which prima facie supports his allegation, the burden of proof shifts to his opponent' (Sandifer, op. cit., pp. 125, 129, 130, 170-173, relying upon the Parker case of 1962 adjudicated by the Mexico/USA General Claims Commission, U.N. Reports, op. cit., vol. IV, p. 36-41; the ICJ's Ambatielos and Asylum cases).

"Rule (M)"

Finally, 'In cases where proof of a fact presents extreme difficulty, a tribunal may thus be satisfied with less conclusive proof, i.e., prima facie evidence' (Cheng, op. cit., p. 323-325, with quotations from the supporting authorities and cited with approval by Sandifer, at p. 173).

"In the light of all the legal Rules from (A) to (M) stated herein-above, it becomes clear that Art. 4(2) regulated a specific situation by adopting a standard of responsibility representing a certain degree of particularity, and which becomes applicable only in cases characterized by the cumulative existence of three factors:

(a) - that the destruction of property not only occurred during hostilities, but more precisely such destruction has been proven to be committed by the governmental forces or authorities themselves;

(b) - that the destruction was not caused in combat action, since the higher standard of liability ('adequate compensation' payable in 'freely transferable' currency) is linked with the assumption of unjustified destruction committed out of combat; and

(c) - that the destruction was not required by the necessity of the situation, as the existence of a combat would not be sufficient per se to alleviate the responsibility of the governmental forces and authorities, once it has been proven that the security forces bypassed the reasonable limits by undertaking unnecessary destruction.

"Moreover, it has to be noted that the foreign investor who invokes the applicability of said Art. 4(2) assumes a heavy burden of proof, since he has, in conformity with Rules (G) and (J), to establish:
(i) - that the governmental forces and not the rebels caused the destruction;

(ii) - that this destruction occurred out of 'combat';

(iii) - that there was no 'necessity', in the sense that the destruction could have been reasonably avoided due to its unnecessary character under the prevailing circumstances."

[...]
the value of his share-holding in the joint-venture entity (Serendib Company).

[88] "In the absence of a stock market at which the price for Serendib's shares were quoted on 27 January 1987 (the day preceding the events which led to the destruction of the value of AAPL's Investment in Serendib's capital), the evaluation of the shares owned by AAPL in Serendib has to be established by the alternative method of determining what was the reasonable price a willing purchaser would have offered to AAPL to acquire its share holding in Serendib.

[89] "Certainly, all the physical assets of Serendib, as well as its intangible assets, have to be taken into consideration in establishing the reasonable value of what the potential purchaser Gould have been willing to offer on 27 January 1987 for acquiring AAPL's shares in Serendib. But the reasonable price should have reflected also Serendib's global liability at that date; i.e., the aggregate amount of the current debts, loans, interests, etc. due to Serendib's creditors.

[90] "Consequently, the Tribunal is of the opinion that the determination of the percentage of AAPL's share-holding in Serendib's capital is a false problem, since the relevant factor is to establish a comprehensive Balance sheet which reflects the result of assessing the global assets of Serendib in comparison with all the outstanding indebtedness thereof at the relevant time. For the purpose of evaluating the market price of AAPL's shares on 27 January 1987, the result would be ultimately the same whether or not the 'preference shares' of Sri Lankas Export Development Board technically qualify under the domestic companies law as part of Serendib's capital. Assuming that the correct legal interpretation of the Sri Lankan Law would lead to include among Serendib's capital assets the value of the 'preference shares' issued in favour of the Export Development Board as a security for the cash money funds already supplied to the Company, Serendib's capital assets would have on one hand, to be considered increased. But on the other band, the global amount of the Development Board's disbursements together with the accruing interests due on 27 January 1987, should be taken into consideration in reflecting Serendib's global indebtedness. In other words, in case the 'preference shares' of Export Development Board decrease AAPL's percentage of share-holding in Serendib's equity capital, this would not ultimately affect the value of AAPL's shareholding.

[91] "In the language of figures, a 48% ordinary share-holding in an equity capital amounting to 21,464,241 Sri Lankan Rupees (S-L.Rs.) equals 37% shareholding in an entity having a total capital of S-L.Rs. 28,184,241 (i.e., by adding the value of the preference shares). At the other side of the equation, assuming 48% of loan liabilities totalling S-L.Rs. 70,024,000, is the same as acquiring 37% of the global indebtedness amounting to S-L.Rs. 76,744,000.

[92] "Taking into consideration the above-stated preliminary remarks of general character, the Tribunal is faced with no legal objections in allocating to the claimant compensation for the damages which were effectively incurred due to the destruction of a substantial part of Serendib's physical assets, thus rendering the legal entity in which AAPL invested out of business since 28 January 1987. In essence, Serendib ceased as of that date to be a 'going concern' capable of realizing profits, thus causing AAPL's investment therein to become a total loss.

[93] "In the light of all the elements of evidence provided by both Parties,... the Tribunal considers that the fair evaluation exclusively based on Serendib's tangible assets leads to value AAPL's investment in that company at a total amount of 460,000 US Dollars.

[94] "Nevertheless, the major part of the claimant's pleas were directed towards obtaining 5,703,667 US dollars as compensation for a variety of other claimed damages, which include intangible assets, mainly 'goodwill', and loss of future profits.

[95] The admissibility of such claims raised serious legal objections from the respondent, which are expressed in the following two quotations:

(a) - 'International arbitral tribunals are bound to project future on the basis of the past, Serendib's history offers no sound basis for projecting any future profitability';

(b) - 'The loss of crops to be harvested in the future has usually been considered to be too speculative and indefinite to be included as a proper element of damage under international law'.
[96] "In the Tribunals view, it is clearly understood that the evaluation of the 'going concern' which is Serendib Company in the present case, has for unique objective the determination of what could be the reasonable market value of the Company's shares under the circumstances prevailing on 27 January 1987.

Hence, as a general rule all elements related to subsequent developments should not be taken as such into consideration, and *lucrum cessans* in the proper sense could not be allocated in the present case for which the precedents concerning unlawful expropriation claims or liability for unilateral termination of a State contract are of no relevance. The only pertinent question in the present case would be to establish whether Serendib .... had by then developed a 'good will' and a standard of 'profitability' that renders a prospective purchaser prepared to pay a certain premium over the value of the tangible assets for the benefit of the Company's 'intangible' assets. Consequently, the projection of future profits in function of the 'Discounted Cash Flow Method' (DCF) has to be envisaged simply as a tool to assess the level of Serendib's future profitability under all relevant circumstances prevailing at the beginning of 1987.

[97] "In this respect, it would be appropriate to ascertain that 'goodwill' requires the prior presence on the market for at least two or three years, which is the minimum period needed in order to establish continuing business connections, and during that period substantial expenses are incurred in supporting the management efforts devoted to create and develop the marketing network of the company's products, particularly in cases like the present one where the Company relies exclusively on one product (shrimps) exportable to a single market (Japan). The possible existence of a valuable 'goodwill' becomes even more difficult to sustain with regard to a company, not only newly formed and with no records of profits, but also incurring losses and under-capitalized. A reasonable prospective purchaser would, under these circumstances, be at least doubtful about the ability of the Company's balance sheet to cease being in the red, in the sense that the future earnings become effectively sufficient to off-set the past losses as well as to service the loans which exceed in their magnitude the Company's capital assets.

[98] "Furthermore, according to a well established rule of international law, the assessment of prospective profits requires the proof that:

the numerous decisions rendered by the Iran/USA Claims Tribunal to that effect, and interestingly the Author's reference to the DCF calculations provided by the Expert Accountants of the Parties which contain 'élement de conjecture' looking: 'guère moins spéculatifs et tout aussi obscurs que les prophéties de Nostradamus'- p. 24).

[99] "The claimant itself,... reproduced a long quotation from the Award rendered on 14 July 1987, by the Chamber presided by the late Michel Virally, in the case AMOCO International Finance Corporation v. Iran, which after clearly distinguishing the *lucrum cessans* from the 'future prospects' of profitability that constitutes an element to be taken into consideration in evaluating the 'going concern', find necessary to emphasize the need to prove that:

'the undertaking was a "going concern" which had demonstrated a certain ability to earn revenues and was, therefore to be considered as keeping such ability for the future' (S 203 of the Award...).

The fact that Serendib exported for the first time two shipments to Japan during the same month of January 1987 when it's farm was destroyed, does not sufficiently demonstrate in the Tribunals opinion a certain ability to earn revenues' in a manner that would justify considering Serendib - by exporting for the first time in its short life - able to keep itself commercially viable as a source of reliable supply on the Japanese market.

[100] "In the light of the above-stated considerations, and taking into account all the evidence introduced by both Parties with regard to the existence or nonexistence of 'intangible assets' capable of being evaluated for the purpose of establishing the total appropriate value of Serendib on 27 January 1987, the Tribunal comes to the conclusion that neither the 'goodwill' nor the 'future profitability' of Serendib could be reasonably established with a sufficient degree of certainty.

[101] "Without putting into doubt the binding force of the rules requiring that the intangible assets including 'goodwill' and 'future profitability' of an enterprise have to be reflected in the evaluation of a 'going concern', the Tribunal's opinion is established on considering the assumptions upon which the claimant's projection were based in the present case insufficient in evidencing that Serendib was effectively by 27 January 1987, a 'going concern' that acquired a valuable 'goodwill' and enjoying a proven 'future profitability', particularly in the light of the fact that Serendib had no previous
record in conducting business for even one year of production.

[102] "Therefore, all the amounts of claimed compensation for 'intangible assets', as well as for 'future earnings' are rejected."

[...]

VII. INTEREST AND COSTS

A. Interest

[105] "The claimant requested interest at the rate of 10% per annum as of the date of the losses incurred (28 January 1987), and the respondent did not raise any objection with regard to, either the principle of entitlement to interests in case the Government's responsibility is sustained by the Tribunal, or to the suggested rate of 10% per annum.

[106] "In accordance with a long established rule of international law expressed since 1872 by the Arbitral Tribunal which adjudicated the Alabama case between the UK and USA, 'it is just and reasonable to allow interest at a reasonable rate' (Repertory, op. cit., vol. I, § 1382, p. 343). In implementation of the above-stated rule, and in view of the Parties' attitude indicated hereinafter, the present Tribunal deems appropriate to allocate interest on the amount of US$ 460,000 granted to the claimant as previously stipulated at the rate of 10% per annum.

[107] "The only pending issue in this respect relates to the date from which that interest starts accruing. The survey of the literature reveals that, in spite of the persisting controversies with regard to cases involving moratory interests, the case-law elaborated by international arbitral tribunals strongly suggests that in assessing the liability due for losses incurred the interest becomes an integral part of the compensation itself, and should run consequently from the date when the State's international responsibility became engaged (cf. R. Lillich, 'Interest in the Law of International Claims', Essays in Honor of Vade Saario and Toivo Sainio, (1983), pp. 55-56).

[108] "Therefore, and taking into account that Art. 8(3) of the Sri Lanka/UK Bilateral Investment Treaty reads: "Art. 31 of the Vienna Convention on the Law of Treaties reads: "General rule of interpretation (1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. (2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. (3) There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.(4) A special meaning shall be given to a term if it is established that the parties so intended."
Centre as provided in Arts. 28 and 36 of the Convention...

**Referring Principles:**

- IV.5.3 - Interpretation in favor of effectiveness of contract
- VII.6 - Duty to pay interest
- XI.1 - Compensation for expropriation
- XII.1 - Distribution of burden of proof
- XII.3 - Circumstantial evidence