20 Years of Investment Treaty Jurisprudence

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27 June 2010 marks the 20th anniversary of investment treaty jurisprudence. On 27 June 1990, the tribunal in *Asian Agricultural Products Ltd. v. Sri Lanka* (ICSID Case No. ARB/87/3) (*AAPL*) dispatched its final award to the parties. The *AAPL* tribunal (Dr. Ahmed Sadek El-Kosheri (President), Professor Berthold Goldman and Dr. Samuel Asante) was the first to be "seized by an arbitration request exclusively based on a treaty provision and not in implementation of a freely negotiated arbitration agreement directly concluded between the Parties…" (para. 18, Final Award). This despite the fact that "arbitration without privity" had been available under investment treaties since at least 1969. *AAPL* turned out to be the launching point for a body of distinct investment treaty jurisprudence and the first of over 350 investment treaty cases that have arisen over the past 20 years.

The basics facts and outcome in *AAPL* are well known. The majority of the tribunal found Sri Lanka had breached its obligation under the Sri Lanka/UK BIT to exercise due diligence in the protection of the investor's shrimp farm during military operations. The majority awarded damages of US$460,000 based on AAPL's 48% shareholding in the joint venture company, Serendib, which operated the shrimp farm. The damages in question represented the value of Serendib's tangible assets. In a forceful dissent, Dr. Asante disagreed with the majority's interpretation of the treaty, found that the investor had not established Sri Lankan forces were responsible for the damages in question and stated that damages should have been limited to US$ 300,000, the amount of AAPL's equity investment.

Although the Final Award is probably best known for its finding that a treaty-based "full and protection security" obligation imposes an obligation of due diligence on the state and not strict liability for damages (and that this obligation is essentially a codification of customary international law), the Final Award is regularly cited for a variety of legal issues. Indeed, *AAPL* has been cited in over 50 investment treaty arbitration decisions and awards.

Interestingly, and unlike the many cases that have followed, Sri Lanka does not appear to have contested jurisdiction, despite the fact that AAPL was a minority shareholder and was claiming damages in a shrimp farm that was owned by a Sri Lankan company. As a result, the Final Award is often cited for the proposition that shareholders can bring an investment treaty claim regardless of whether the treaty explicitly permits indirect claims.

AAPL is also cited for the proposition that an investor is entitled to the more favourable treatment in another treaty by virtue of an MFN clause. The majority was of the view that AAPL could obtain the benefit of more favourable treatment provisions in other investment treaties, but rejected the argument that other treaties provided more favourable treatment. The case is also regularly cited for its findings on burden of proof, that consent to ICSID jurisdiction can arise from an investment treaty and that claims for future profits should be disregarded where there is an insufficient history of actual

operations.

Rereading the award I was struck by the familiarity of the preliminary issues to be addressed—applicable law, interpretation, attribution and the depth of the tribunal's reference to international law sources, in particular older international arbitration decisions and the writing of publicists. The Tribunal emphasized that bilateral investment treaties are "not a self-contained legal system" but have to be "envisaged within a wider juridical context in which rules from other sources are integrated though implied incorporation methods, or by direct reference to certain supplementary rules…" This is an important principle to highlight in light of current debates about the fragmentation of international law and the relationship between a state's investment treaty and other obligations under public international law.