Case Report on *Saipem* v. *Bangladesh*

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IN ICSID Case No. ARB/05/7, *Saipem* v. *Bangladesh*, decision on the merits dated 30 June 2009, the tribunal (composed of Gabrielle Kaufmann Kohler, President, Christoph Schreuer and Sir Phill Otton) held Bangladesh liable under a bilateral investment treaty for unlawfully expropriating Saipem's right to ICC arbitration through the interference of Bangladesh's courts. The tribunal also found that Bangladesh violated the New York Convention and committed an abuse of rights under general principles of international law. The tribunal awarded Saipem the amount that the ICC tribunal had awarded, with simple interest. It refused to award Saipem legal costs.

The *Saipem* award provides a rich platform for discussion of several contentious issues currently brewing in the international investment arbitration community. One of those issues is the line tribunals are drawing between contract rights and treaty rights.

The question of whether purely contract-based, commercial arbitration claims are being 'dressed up' as investment treaty claims was the subject of discussion at the American Society of International Law Annual Meeting in 2009 at the roundtable panel on 'Mapping the Future of Investment Treaty Arbitration'. The panel discussed, *inter alia*, the differences between international commercial arbitration and international investment treaty arbitration. One of the panelists warned that arbitrators must be wary of wearing a commercial arbitration 'hat' when determining distinct issues of international law and state responsibility under investment treaties.[1]

The *Saipem* award, without entering into a discussion of where a line should or should not be drawn between commercial and international investment treaty arbitration, nevertheless sheds some important light on the debate. The *Saipem* award focuses on the point at which a state's behaviour during an international commercial arbitration dispute governed by the ICC Rules triggers new obligations under an investment treaty, the ICSID Convention, the New York Convention and under general principles of international law. The *Saipem* award also leaves open a number of unanswered questions.

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1 *See* discussion by Toby Landau, QC in (2009) *ASIL Proceedings* (forthcoming).

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I. SAIPEM'S ICC DISPUTE

Saipem, an Italian company, entered into a contract to build a gas pipeline with Petrobangla, a state-owned company of Bangladesh. The contract was governed by the law of Bangladesh. The contract contained an ICC clause, designating Dhaka, Bangladesh, as the seat of the arbitration.

A dispute arose when, following completion of the pipeline and its takeover by Petrobangla, Petrobangla refused to repay the retention money stipulated in the contract, even though Saipem had released a warranty bond. The parties disagreed on whether a letter 'to extend or pay' constituted a call on the warranty bond and whether Petrobangla had initiated an action to obtain payment under the warranty bond.[2] Saipem initiated ICC arbitration under the terms of the contract. The members of the ICC tribunal were Werner Melis (Chair), Riccardo Luzzatto and the late Ian Brownlie.

The ICC tribunal held its hearings in Dhaka. After Petrobangla failed in a number of procedural requests before the ICC tribunal, such as requesting that a witness statement be struck and seeking information regarding Saipem's insurance policy, it decided to resort to the courts of Bangladesh. On 16 November 1997, Petrobangla filed an action in a court of Dhaka seeking the revocation of the authority of the ICC tribunal, based on allegations of arbitral misconduct. Petrobangla also applied to the High Court Division of the Supreme Court of Bangladesh to stay all further proceedings of the ICC tribunal. A week later, the Supreme Court of Bangladesh issued an injunction restraining Saipem from proceeding with the ICC arbitration.

Saipem filed a written objection to Petrobangla's action seeking the revocation of the ICC tribunal's authority. In April 2000, the court of Dhaka issued a decision revoking the authority of the ICC tribunal, finding that a miscarriage of justice had taken place based on the way in which the ICC tribunal had handled evidence. Following the revocation of the ICC tribunal's authority by the Dhaka court, the ICC tribunal nevertheless proceeded with the arbitration. Petrobangla continued to resort to the courts of Bangladesh to seek to set aside the ICC tribunal's orders. When the ICC tribunal finally handed down an award in which it found Petrobangla liable for damages, Petrobangla sought to have the award set aside. The High Court Division of the Supreme Court of Bangladesh denied the application finding it 'misconceived and incompetent inasmuch as there is no Award in the eye of the law, which can be set aside … A non-existent award can neither be set aside nor can it be enforced' (ICC Award on merits at para. 50).

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[2] *See Saipem SpA* v. *Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, paras. 15–22. *See also* W.W. Park *Respecting the New York Convention*, ICC International Court of Arbitration Bulletin, Vol. 18/No. 2 (2007), pp. 2–4, available at http://www.williamwpark.com/publications.htm.

II. SAIPEM'S ICSID DISPUTE

Saipem then brought a claim before ICSID under the Agreement between the Government of the Republic of Italy and the Government of the People's Republic of Bangladesh on the Promotion and Protection of Investments dated 20 March 1990 ('the BIT'). Saipem relied principally on articles 5 and 9 of the BIT. Article 5, 'Nationalization or Expropriation', provides in paragraphs 1 and 2:

> 1. Investments to which this Agreement relates shall not be subject to any measure which might limit permanently or temporarily their joined rights of ownership, possession, control or enjoyment, save where specifically provided by law and by judgements or orders issued by Courts or Tribunals having jurisdiction.
> 2. Investments of investors of one of the Contracting Parties shall not be directly or indirectly nationalized, expropriated, requisitioned or subjected to any measures having similar effects in the territory of the other Contracting Party, except for public purposes, or national interest, against immediate full and effective compensation, and on condition that these measures are taken on a non-discriminatory basis and in conformity with all legal provisions and procedures.

Article 9 of the BIT, 'Settlement of Disputes Between Investors and the Contracting Parties' provides in paragraphs 1 and 2:

> 1. Any disputes arising between a Contracting Party and the investors of the other, relating to compensation for expropriation, nationalization, requisition or similar measures including disputes relating to the amount of the relevant payments shall be settled amicably, as far as possible.
> 2. In the event that such a dispute cannot be settled amicably within six months of the date of a written application, the investor in question may submit the dispute, at his discretion for settlement to:
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> (a) the Contracting Party's Court, at all instances, having territorial jurisdiction;
> (b) an ad hoc Arbitration Tribunal, in accordance with the Arbitration Rules of the 'UN Commission on International Trade Law' (UNCITRAL);
> (c) the 'International Centre for the Settlement of Investment Disputes', for the application of the arbitration procedures provided by the Washington Convention of 18th March 1965 on the 'Settlement of Investment Disputes between States and Nationals of other States', whenever, or as soon as both Contracting Parties have validly acceded to it.

Saipem claimed that Petrobangla had resorted to the local courts which had colluded with Petrobangla to sabotage the ICC arbitration. It further contended that

the contract containing the ICC clause was an investment that was expropriated as a result of the denial of Saipem's right to arbitration under the contract.

As noted above, the investor-dispute settlement provisions of the Bangladesh–Italy BIT are limited to claims for expropriation. Saipem therefore did not claim losses for violations of fair and equitable treatment, nor did it allege that a denial of justice had occurred. Rather, Saipem relied exclusively on the claim that its right to arbitration was expropriated.

The tribunal made the following key findings regarding expropriation: (1) 'Saipem's residual contractual rights under the investment as crystallized in the ICC award' was a property right that was expropriated (para. 128); (2) the 'substantial deprivation' by the Bangladeshi courts of that right was tantamount to an expropriation (paras 129, 133); (3) Bangladesh's expropriation was illegal (paras. 201–202); (3) Bangladesh committed an abuse of rights under international law (paras. 160–161); and (4) Bangladesh violated the New York Convention (paras 167–168, 170).

(a) Expropriation claim

The Tribunal had previously held in its Decision on Jurisdiction that 'the right to arbitrate and the rights determined by the Award are in theory capable of being expropriated' (para. 122). Applying this theory in the merits stage of the arbitration, the Tribunal discussed several problematic conditions at issue in the case with respect to the claim of expropriation, namely: '[i] the so-called illegality of the expropriation; [ii] the need to exhaust local remedies; [iii] whether Saipem had accepted the risk of revocation of the arbitrators' authority by agreeing to Dhaka as the seat of the arbitration; [and iv] whether the expropriatory act [could] be attributed to Bangladesh and thus engage Bangladesh's responsibility under the BIT' (para. 123).

Taking each of these issues in turn, the Tribunal rejected Saipem's claim that the disputed actions were illegal due to lack of jurisdiction and collusion and conspiracy between Petrobangla and the Bangladeshi courts. First, addressing Saipem's contention that the Bangladeshi courts' lacked jurisdiction to revoke the authority of the ICC Arbitral Tribunal (para. 138), the Tribunal held that 'it is not established that the ICC Court's authority as regards revocation is exclusive under the applicable Bangladeshi law' (para. 144). Second, the Tribunal further rejected Saipem's claim of illegality based on conspiracy and collusion between Petrobangla and the Bangladeshi courts stating that '[t]he fact that the Bangladeshi courts eventually ruled in favour of Petrobangla does not in and of itself constitute evidence of conspiracy or collusion' (para. 147). However, the Tribunal did find merit in Saipem's claims that the disputed actions were illegal based on abuse of right (paras 149–161; discussed in more detail below) and violation of the New York Convention (paras 163–169; discussed in more detail below).

The Tribunal next addressed whether Saipem needed to exhaust local remedies in order to establish a claim of expropriation. First, the Tribunal noted that 'exhaustion of local remedies does not constitute a substantive requirement

of a finding of expropriation by a court' (para. 181). Further, even if there were such a substantive requirement, Saipem 'would be deemed to have satisfied it under the circumstances' (para. 182) given the appeals Saipem filed and the 'considerable time and money [spent] seeking to obtain redress without success although the allegation of misconduct was clearly ill-founded' (para. 183).

Next, regarding whether Saipem had accepted the risk of revocation of the arbitrators' authority, the Tribunal noted that Saipem's acceptance of Dhaka as the seat of arbitration and consequent submission to the jurisdiction of Bangladeshi courts did not excuse an abusive intervention by the Bangladeshi courts (para 185–187).

Finally, the Tribunal attributed the illegal actions of the Bangladeshi judiciary to the state of Bangladesh noting that 'it is self-evident…that the courts are part of the State…in the meaning of Article 4 of the ILC Articles' (para. 190).

(b) Abuse of Right

Regarding the determination that Bangladesh committed an abuse of rights, the ICSID decision noted that 'the Tribunal is of the opinion that the Bangladeshi courts exercised their supervisory jurisdiction for an end which was different from that for which it was instituted and thus violated the internationally accepted principle of prohibition of abuse of rights' (para. 161). The ICSID Tribunal reviewed the ICC procedural orders on which the Bangladeshi courts relied determining that there was not 'the slightest trace of error or wrongdoing' (para. 155) by the ICC Tribunal. Furthermore, the ICSID Tribunal noted that the Bangladeshi court 'simply took as granted what Petrobangla falsely presented' (para. 157) and that the ICC Arbitrators were not 'consulted, let alone heard, by the courts of Bangladesh during the process leading to the decision revoking their authority' (para. 158). For these reasons, the ICSID Tribunal determined that 'the standard for revocation used by the Bangladesh courts and the manner in which the judge applied that standard to the facts indeed constituted an abuse of right' (para. 159).

(c) Violation of New York Convention

With respect to the violation of Article II of the New York Convention by the Bangladeshi courts, the Tribunal stated, 'it is the Tribunal's opinion that a decision to revoke the arbitrators' authority can amount to a violation of Article II of the New York Convention whenever it *de facto* "prevents or immobilizes the arbitration that seeks to implement that [arbitration] agreement" thus completely frustrating if not the wording at least the spirit of the Convention' (para. 167).

In regard to Bangladesh's contention that Saipem's failure to exhaust remedies in Bangladesh precluded it from making a claim of an expropriation of its right to arbitration, the tribunal observed that 'Article 26 of the ICSID Convention reverses the position existing under traditional international law in that it presumes that States parties to the Convention waive the requirement of exhaustion of local remedies as a condition of consent to international adjudication' (para. 175).

III. BANGLADESH'S 'DRESS-UP' ARGUMENT

One of the key issues before the *Saipem* tribunal was whether, as Bangladesh asserted, Saipem's claim was illegitimately brought under the BIT because it was really a commercial dispute that arose under a contract governed by the ICC with Dhaka as the seat of the arbitration. Bangladesh submitted that Saipem's 'claim is in reality a contractual claim dressed up as a treaty claim'.[3] Bangladesh hoped that its dress-up argument would foreclose jurisdiction under the BIT on the ground that a tribunal should not elevate 'pure' contractual claims into treaty claims.

ICSID tribunals, faced with similar legal arguments, have consistently found that there is a difference between a cause of action deriving from a contract and a cause of action deriving from a treaty. For example, the ad hoc committee in the *Vivendi Annulment* decision concluded that:

> [a] treaty cause of action is not the same as a contractual cause of action; it requires a clear showing of conduct which is in the circumstances contrary to the relevant treaty standards.[4]

The issue of the boundary between a contractual dispute and an investment treaty dispute has proved particularly contentious where the contract at issue contains a forum selection clause. Respondents have argued that the forum selection clause forecloses an investor's right to pursue investment treaty arbitration. That argument has proved unsuccessful, however, as tribunals have found that a forum selection clause does not waive or foreclose rights under international law. For example, in *SGS* v. *Philippines* the tribunal concluded that a forum selection clause in a contract would not preclude or waive an investor's claims arising out of a treaty:

> It is, to say the least, doubtful that a private party can by contract waive rights or dispense with the performance of obligations imposed on the States parties to those treaties under international law.[5]

The tribunals in *SGS* v. *Pakistan*[6] and *SGS* v. *Philippines*,[7] while taking different views on the question of whether contract breaches also amounted to breaches of the respective treaties, both concluded that the existence of contract claims could

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[3] Counter Memorial of Bangladesh, p. 14, para. 1.43 as noted in the tribunal's decision on jurisdiction at para. 139.

[4] *Compañia de Aguas del Aconquija SA and Vivendi Universal* v. *Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para. 113.

[5] *SGS Société Générale de Surveillance SA* v. *Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, para. 154.

[6] *SGS Société de Surveillance SA* v. *Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, para. 190.

[7] *SGS Société Générale de Surveillance SA* v. *Republic of the Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, para. 154.

not foreclose or waive an investor's right to have its international rights under a treaty adjudicated before an ICSID tribunal.[8]

The tribunal in *Aguas del Tunari* v. *Bolivia* concluded that a concession contract with a forum selection clause providing that disputes would be settled in Bolivian courts would not preclude the investor's rights brought under an investment treaty:

> As to the requirement that the separate document deal with the same matters and parties, the Tribunal finds that the jurisdiction of the Bolivian courts recognized under Article 41.2 of the Concession, even if it were found to be exclusive, does not extend to the same obligations or parties raised by the Claimant under the BIT. Claimant in the instant proceeding does not raise a claim against the Water Superintendency, as a party to the Concession, but rather raises a claim against the Republic of Bolivia itself as party to the BIT.[9]

Another angle of a waiver issue arose in *Bayindir* v. *Pakistan* where the investor brought contract and treaty claims, then withdrew the contract claims.[10] Pakistan had contended that 'Bayindir's (treaty) claims, however skillfully repackaged, are inextricably bound up with the Contract'.[11] At the merits stage, Pakistan argued that since the investor had withdrawn the contract claims, there could be no more legal basis for the Treaty claims. The tribunal disagreed:

> As a threshold matter, the Tribunal recalls that its jurisdiction covers treaty and not contract claims. This does not mean that it cannot consider contract matters. It can and must do so to the extent necessary to rule on the treaty claims. It takes contract matters, including the contract's governing municipal law, into account as facts as far as they are relevant to the outcome of the treaty claims. Doing so, it exercises treaty not contract jurisdiction.[12]

The *Bayindir* tribunal, quoting the tribunal in the *Vivendi Annulment* decision, further observed:

> the Tribunal would not be applying the contract by deciding a contractual issue, determining the parties' respective rights and obligations or granting relief under the agreement. It would be doing no more than the Respondent concedes is its right – *i.e.* taking the contractual background into account in determining whether or not a breach of the Treaty has occurred.[13]

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[8] *See* Stanimir Alexandrov, 'Breaches of Contract and Breaches of Treaty: the Jurisdiction of Treaty-based Arbitration Tribunals to Decide Breach of Contract Claims in *SGS* v. *Pakistan* and *SGS* v. *Philippines*' in (2004) 5(4) *J World Investment and Trade* (August) 555.

[9] *Aguas de Tunari, SA* v. *Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, para. 114.

[10] As observed in para. 63 of the tribunal's final award, Bayindir had requested the tribunal to decide: 'At the outset of the jurisdictional hearing, Bayindir withdrew its independent argument that the Tribunal has jurisdiction also over the Contract Claims: it appears to us that our claim for treaty breaches is so strongly expressed that it is not necessary for us to turn to alternative and fall-back mechanisms to pursue our claims by asserting as we did in Part VI of our counter memorial that even if there is no treaty BIT breaches made out nonetheless we can make a freestanding contract claim as the basis of our jurisdiction under ICSID and under the BIT': *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S.* v. *Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009.

[11] *Bayindir*, Decision on Jurisdiction, 14 November 2005, para. 139.

[12] *Bayindir*, Award, 27 August 2009, para. 135.

[13] *Ibid.* para. 136. Quoting *Vivendi Universal S.A.* v. *Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, para. 7.3.9.

Bayindir not only lends support to the notion that a contract may be considered a mere fact that gives rise to a separate legal dispute under a treaty and international law, but its holding also means that even if the facts governing the alleged treaty dispute are inextricably tied to a contract, the withdrawal of a claim under the contract during the arbitral proceedings does not necessarily affect the integrity of a treaty claim.

The extent to which contract claims and treaty claims overlap, intersect or take entirely separate paths is a highly fact-specific matter that will continue to be fought in investment arbitration on a case-by-case basis. However in principle it appears well-settled that a contract, even one with an exclusive jurisdiction clause, does not necessarily foreclose the right to arbitrate a dispute arising under a treaty.[14]

There is another element that appears to underlie decisions concerning the difference between contract and treaty rights such as *Saipem* and *Vivendi II*, a principle of international law developed long before the advent of investment treaties, that the repudiation by a state of an investor's contract rights (in the case of *Saipem*, a right to arbitration in a contract) is the equivalent of a taking of the investor's property.[15] This principle was applied in the *Norwegian Shipowners* case,[16] where the tribunal found that the United States was liable for the expropriation of property when it used its governmental power to repudiate contractual obligations to Norwegian shipbuilders. Similarly, in the *Jalapa Railroad* case (cited in the *Vivendi II* award in 2007), the United States–Mexico Mixed Claims Commission found that Mexico's use of its governmental power to abrogate its contractual obligations to foreign investors amounted to a confiscation of property under international law:

> In the circumstances, the issue for determination is whether the breach of contract alleged to have resulted from the nullification of clause twelve of the contract was an ordinary one involving no international responsibility or whether said breach was effected arbitrarily by means of a governmental power illegal under international law … the 1931 decree of the same Legislature … was clearly not an ordinary breach of contract. Here the Government of Veracruz stepped out of the role of contracting party and sought to escape vital obligations under its contract by exercising its superior governmental power. Such action under international law has been held to be a confiscatory breach of contract.[17]

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[14] The *Aguas del Tunari* v. *Bolivia* tribunal, having concluded that the contract in question did not waive the investor's right to seek arbitration before ICSID, nevertheless noted in dicta that it believed that a waiver was not impossible in theory, as long as certain conditions were met: 'Assuming that parties agreed to a clear waiver of ICSID jurisdiction, the Tribunal is of the view that such a waiver would be effective. Given that it appears clear that the parties to an ICSID arbitration could jointly agree to a different mechanism for the resolution of their disputes other than that of ICSID, it would appear that an investor could also waive its rights to invoke the jurisdiction of ICSID. However, the Tribunal need not decide this issue in this case'. *See Aguas de Tunari, SA* v. *Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, para. 118. *See also*, *Compañía de Aguas del Aconquija SA and Vivendi Universal* v. *Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment, 3 July 2002, para. 76.

[15] *See Rudloff Case* (Interlocutory), American–Venezuelan Commission, IX United Nations Reports of International Arbitral Awards (Recueil des Sentences Arbitrales) 250. The tribunal held that '[t]he taking away or destruction of rights acquired, transmitted and defined by a contract is as much a wrong, entitling the sufferer to redress, as the taking away or destruction of tangible property'.

[16] Award, 13 October 1922, I United Nations Reports of International Arbitral Awards (Recueil des Sentences Arbitrales) 307.

[17] *Jalapa Railroad and Power Co. Claim*, American Mexican Claims Commission, Decision No. 13, Whiteman, ed. *Digest of International Law*, Dept. of State Pub. No. 2859, Arbitration Series No. 9, p. 540 (1948).

The point at which a state 'step[s] out of the role' of an ordinary commercial partner and exercises state power to dissolve or interfere with an investor's rights is what triggers obligations under international law. The *Saipem* tribunal's approach, as made clear in its final award, was not as much focused on the point at which contract and treaty rights intersected or overlapped, but rather on the point at which Bangladesh's behaviour, unrelated to the contract in question, gave rise to obligations under the BIT as well as other principles of international law.

The final award contemplated the facts in terms of two distinct disputes: one between Saipem and Petrobangla and one between Saipem and Bangladesh. The interference of the Bangladesh courts in finding that the ICC award was 'no Award in the eye of the law' is the point at which, according to the *Saipem* ICSID tribunal, a new dispute was triggered, one between Saipem and the Government of Bangladesh, concerning Bangladesh's responsibility under general principles of international law, under a BIT, and under the New York Convention. The ICC dispute, and the contract containing the ICC clause, were thus treated as facts giving rise to a separate dispute under international law, one that was unaffected by a forum selection clause in the contract.[18]

IV. CONCLUSION

While the issue of the relationship between contract and treaty rights will continue to be a fact-specific, contentious issue in investment treaty arbitration, *Saipem* v. *Bangladesh* will most certainly survive as an important example of how an ordinary commercial dispute can evolve into one that triggers a host state's treaty obligations. Moreover, the *Saipem* tribunal clearly viewed the investment treaty (in the words of the tribunal in *Asian Agricultural Products Ltd (AAPL)* v. *Republic of Sri Lanka*) as 'not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but [rather, one that] has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature'.[19] The extent to which an investment treaty may act as a gateway to allow the tribunal to apply other principles of international law, and indeed other international treaties that touch on the issues before them, will continue to play an important role in the development of investment treaty arbitration law.

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[18] In para. 191, the Tribunal found that '[w]ith respect to Petrobangla's actions, the Tribunal has found no treaty breach. Its actions in the context of the ICC Arbitration were not official acts of the government and hence could not have amounted to an expropriation. As a result, the issue of attribution does not arise in connection with Petrobangla.'

[19] *Asian Agricultural Products Ltd (AAPL)* v. *Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, para. 21.