AAPL v. Sri Lanka (ICSID/ARB/87/3)
Dissenting Opinion of Samuel K.B. Asante

I concur wholeheartedly in the Tribunal's emphatic dismissal of all the crucial submissions of the Claimant. My dissent stems from the Tribunal's failure to proceed from this premise to the logical and compelling conclusion that the Respondent is not liable. In my opinion, such a conclusion is inescapable in view of the following critical ingredients of the Tribunal's ruling against the Claimant's submission:

1. That Article 2(2) of the Sri Lankan/United Kingdom (S.L./U.K.) Treaty does not impose strict or absolute liability on Sri Lanka with respect to the protection of AAPL' s investments in Sri Lanka.

2. That Sri Lanka is not liable under Article 4(2) of the Treaty—the key provision that prescribes the specific rules governing the responsibility of the host state in respect of damage or losses sustained by a foreign investor during civil disturbances, namely, war or other armed conflict, revolution, a state of national emergency, revolt, insurrection, or riot in such host State.

3. That there was insufficient evidence to establish that Sri Lanka's forces destroyed the Serendib farm—a finding which disposes of the Claimant's central assertion that the Respondent had applied excessive force in perpetrating a wanton destruction of the farm.

4. That the S.L./U.K. Treaty does not absolutely guarantee the property or investments of a foreigner against any loss or damage.

In my respectful opinion, the decision to sustain the claim against Sri Lanka notwithstanding the above rulings against the Claimant is flawed by a basic misconstruction of the most-favoured-nation treatment clause in Article 4(1) of the Treaty, a misapplication of the relevant principles and rules of customary international law to the case and a failure to appreciate the full implications of the formidable security situation and the grave national emergency that confronted the Sri Lankan authorities.

Some Salient Features of the Factual Background

I would like to draw attention to the following uncontested aspects of the factual background to complement the Tribunal's introductory summary of the facts of this case.

1. Serendib Seafoods Ltd. (Serendib) which owned the shrimp growing farm in Batticaloa on the east coast of Sri Lanka, was a Sri Lankan company established for the purposes of a joint venture between a group of Sri Lankan agencies and individuals and Asian Agriculture Products Ltd. (AAPL), a Hong Kong concern. AAPL was a minority shareholder of Serendib; it contributed equity in the amount of 9.9 million rupees (approx. US$300,000) which represented 35% or 48.5% of the share capital depending on whether the preference shares issued to the Export Development Board of Sri Lanka are classified as equity or as a long-term loan. Sri Lankan agencies and individuals provided 60% of the financing for the project, that is, some 43.6 million rupees out of a total of 70.024 million rupees.

2. No evidence was produced at the time of the hearing to establish that any of the Sri Lankan equity holders had been paid compensation or provided with any other settlement in respect of alleged investment losses resulting from the events of January 28, 1987 at the Serendib farm. The Government of Sri Lanka has not made any payments for damage to property.

3. There is no dispute that prior to the counter-insurgency operation launched by the Sri Lankan authorities on January 28, 1987, there was a major insurrection in the northern and eastern provinces of Sri Lanka, resulting in a civil war and that the insurgents, a powerful and well-armed group, had established control of the area surrounding the farm in the Batticaloa district, with their headquarters located in Kokkadicholai, which was 1.5 miles from the southern boundary of the farm.

4. The Managing Director of Serendib was unable to visit the farm for six months prior to January 28, 1987 because of the security situation. He had been unable to visit the farm by the time of the hearing in 1989.

5. The insurgents were engaged in a sophisticated guerrilla warfare against the security forces, and on January 28, 1987, 12 members of the security forces were killed by a mine buried by the rebels a few miles from the farm.

6. The Government's counter-insurgency operation launched on January 28, 1987 resulted in the death of 20 civilians, 15 of whom were claimed by the Government to be insurgents. The Government paid compensation to the families of the Sri Lankans killed during the military operation.

7. During the events of January 28, 1987, the Serendib farm sustained some damage.

The Applicable Law

Several arguments have been canvassed before us concerning the law which should be held applicable in the present case. The essence of the problem here concerns, in my view, the proper construction of Article 42(1) of the ICSID Convention which stipulates:

> The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

In view of this provision, the Claimant contends that while the parties may not have specifically reached agreement on the applicable law, "their mutual submission to the S.L./U.K. Treaty should be considered as tantamount"to the agreement envisaged in Article 42. And, for them, this means that the S.L./U.K. Treaty constitutes the principal source of applicable law in the case.

Although this argument is superficially attractive, it is, strictly speaking, not acceptable. The parties to the case, through the operation of Article 8(1) of the ICSID Convention, have submitted to the jurisdiction of this arbitration tribunal, but this, in itself, does not imply that the parties have agreed on the applicable law. As a matter of principle, jurisdictional questions are clearly distinguishable from issues concerning applicable law, and, in the absence of strong evidence that the parties wished to merge the two, there is no reason to presume that this has taken place. Bowett explains the position as follows:

> Prima facie an arbitration clause affects jurisdiction, not choice of law, and there is no inherent reason why arbitrators should not apply the local law. Such an inference as to the displacement of the local law can only properly be drawn in those cases where the arbitration tribunal must be assumed to be applying international law. Thus, choice of arbitration under the World Bank Convention on the Settlement of Disputes of 1965 would involve the application of Article 42(1) of the Convention which directs an ICSID tribunal, in the absence of an express choice of the law by the parties, to apply the law of the host State (including its rules on the conflict of laws), and such rules of international law as may be applicable.(Bowett, "State Contracts with Aliens", *British Yearbook of International Law*, Vol. LVIX, p. 49 at 52 (1988).

In this regard, it should also be recalled that the parties to the present dispute are not identical with the parties to the S.L./U.K. Treaty. Where the Contracting Parties to a treaty submit a dispute under that treaty to arbitration, then, obviously the substantive law governing the dispute will be the treaty itself (see, e.g., the U.S.-Iran Arbitrations based on the Treaty of Amity of 1955 between the two countries). In the present case, however, the claimants are not, and could not be, a party to the S.L./U.K. pact. Therefore, to invoke the provisions of this treaty as the applicable law, they would have to demonstrate either that the treaty itself authorized this course of action or that the parties to the dispute expressly agree to regard the provisions of the Treaty as the applicable law. On this point, it is also instructive to note that some Unites States bilateral investment treaties actually authorize third parties (i.e., investors) to invoke

the treaties themselves as the applicable substantive law. This is done by specifying in individual treaties that investment disputes which may be submitted to ICSID shall include an alleged "breach of any right conferred or created by this treaty with respect to an investment". (See Article I. C of the U.S. Model BIT).

The majority opinion, while not accepting the Claimant's argument, proceeds nonetheless on the basis that the Sri Lanka/U.K. treaty constitutes "the primary source of applicable legal rules". The rationale for this position is said to rest on the conduct of the parties: in their submissions before this Tribunal, both parties rely heavily on the terms of the treaty and, hence, the majority believe that there is mutual agreement on the main source of applicable rules. I find this argument rather unconvincing. In adversarial proceedings such as those before this Tribunal, it is usually in the best interest of each party to respond to all the substantive legal points raised by the other. Thus, where points of substance based on the Treaty were advanced by the Claimant, it was to be expected that the Respondent would address those particular points and *vice versa*; for, the party which ignores this course of action may find ultimately that it has lost the opportunity to present its views on individual issues to the Tribunal. In other words, a response by one party to the interpretation of particular provisions of the Treaty suggested by the other does not necessarily imply that the parties agree that the Treaty constitutes the primary source of legal obligation; instead, it could possibly only demonstrate prudence and caution on both sides. In addition, it seems somewhat unrealistic to say that there was mutual agreement by subsequent conduct when, as a matter of record, both parties have adopted divergent positions on this point. The views of the Claimant have already been noted, while the Respondent, though willing to apply International Law and, in particular, the provisions of the Treaty, maintained that this could be done only because the relevant rules of International Law had become part of the law of Sri Lanka.

In the light of these considerations, the better view is that there was no real agreement between the parties as to the rules of law which should govern this dispute. Accordingly, the second sentence of Article 42(1) of the ICSID Convention should prevail and the majority erred in not applying Sri Lankan law as the main source of law together with "such rules of international law as may be applicable". This is not to suggest that the Sri Lanka/U.K. Treaty is not relevant to the resolution of issues before the Tribunal. On the contrary, by virtue of Article 157 of the Constitution of Sri Lanka, the provisions are fully incorporated into the country's laws and have binding force subject only to such law or executive or administrative action that may be enacted or taken in the interests of national security. Article 157 reads as follows:

> Where Parliament by resolution passed by not less than two-thirds of the whole number of Members of Parliament (including those not present) voting in its favour, approves as being essential for the development of the national economy, any Treaty or Agreement between the Government of Sri Lanka and the Government of any foreign State for the promotion and protection of the investments in Sri Lanka of such foreign State, its nationals, or of corporations, companies and other associations incorporated or constituted under its laws, such Treaty or Agreement shall have the force of law in Sri Lanka, and otherwise that in the interests of national security no written law shall be enacted or made, and no ex-

ecutive or administrative action shall be taken, in contravention of the provisions of such Treaty or Agreement.

The present approach differs from that adopted by the majority in one substantial respect: by placing primary emphasis on Sri Lankan law, it establishes that rules on the protection of property which are municipal in origin should receive as much attention as those incorporated into local law from treaties or custom.

In view of this position, I consider it unfortunate that the Tribunal did not have the benefit of full argumentation from Counsel on the application of those rules of Sri Lankan law which, though municipal in origin, are relevant to the determination of liability for the acts of the Sri Lankan Government and its instrumentalities.

The Issue of Liability

I. The scheme of liability for the protection of property under the S.L./U.K. Treaty

The property protection provisions of the Treaty that are of particular relevance to the case before us are Articles 2, 3 and 4. It was acknowledged by all parties that the provision on expropriation of foreign property, Article 5 is not applicable here.

The full text of the above-mentioned provisions, which does not appear in the majority opinion, reads as follows:

Article 2
Promotion and Protection of Investment

(1) Each Contracting Party shall, subject to its rights to exercise powers conferred by its laws, encourage and create favourable conditions for nationals and companies of the other Contracting Party to invest capital in its territory, and, subject to the same rights, shall admit such capital.

(2) Investments of nationals or companies of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.

Article 3
Most-favoured-nation Provision

(1) Neither Contracting Party shall in its territory subject investments admitted in accordance with the provisions of Article 2 or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State.

(2) Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own nationals or companies or to nationals or companies of any third State.

Article 4
Compensation for losses

(1) Nationals or companies of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the latter Contracting Party accords to its own nationals or companies of any third State.

(2) Without prejudice to paragraph (1) of this Article, nationals and companies of one Contracting Party who in any of the situations referred to in that paragraph suffer losses in the territory of the other Contracting Party resulting from
   (a) requisitioning of their property by its forces or authorities, or
   (b) destruction of their property by its forces or authorities which was not caused in combat action or was not required by the necessity of the situation,

   shall be accorded restitution or adequate compensation. Resulting payments shall be freely transferable.

As intimated above, the provisions of the S.L./U.K. Treaty are to be read against the background of Article 157 of the Sri Lankan Constitution.

1. Article 2(2) prescribes the general standard for the protection of foreign investment. The requirements as to fair and equitable treatment, full protection and security and non-discriminatory treatment all underscore the general obligation of the host state to exercise due diligence in protecting foreign investment in its territories, an obligation that derives from customary international law.

The general nature of the protection standard in Article 2(2) is reflected in the absence of any specific situation or specific compensation standards. Thus Article 2(2) is distinguishable from Articles 4 and 5 which stipulate specific standards to address

special situations, namely losses incurred in civil disturbances and expropriation, respectively.

2. Article 4 prescribes specific rules governing the responsibility of a host state in respect of losses or damage sustained in civil disturbances. Article 4(1) restates the general customary international law principle that excludes liability for compensation where investments suffer losses owing to war or other armed conflict, revolution, state of national emergency, revolt or insurgency, and such loss cannot attributed to the host States or its agents. In such event Article 4(1) does not mandate the payment of any compensation or the provision of restitution. It merely requires that the alien suffering such losses shall be accorded treatment by the host State as regards restitution, indemnification, compensation or other settlement no less favourable than that accorded to its own nationals or to nationals of a third state. This means that nationals and companies of the other contracting party are to be paid compensation only if it is the policy and practice of the host State to pay compensation in these circumstances to its own nationals or the host State has undertaken to offer or does offer, compensation to the nationals or companies of third parties in similar circumstances (See fuller discussion below). No standard of compensation is envisaged here beyond whatever quantum is paid to nationals or companies of the host State or of third states in similar situations.

3. However, without prejudice to Article 4(1), Article 4(2) mandates restitution or adequate compensation in the situations defined in Article 4(1), where the host State's forces or authorities requisition alien property or destroy it and the destruction is not caused in combat action or required by the necessity of the situation. The sanction here is restitution or adequate compensation, a standard lower than prompt, adequate and effective compensation stipulated in Article 5 as the sanction for expropriation. In effect Article 4(2) stipulates narrowly circumscribed exceptions to the general exemption from liability under Article 4(1), where the acts complained of can be unequivocally attributed to the forces or authorities of the host State, and the conduct contravenes the due diligence rule in customary international law.

The exceptional nature of the liability stipulated in Article 4(2) becomes evident under the equivalent provision of Article 4 of the U.K.—Panama Bilateral Investment Treaty (1983) which reads:

> Nationals of companies of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict,revolution, a state of national emergency, revolt, insurrection or riot in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the latter Contracting Party accords to its own nationals or companies or to nationals or companies of any third State, and in the exceptional event of losses suffered resulting from requisitioning or from destruction of property which was not caused in combat action or was not required by the necessity of the situation, the investor shall be accorded restitution or adequate compensation in accordance with the relevant laws. Resulting payments shall be freely transferable.

As noted below, the U.K. Govt. intended the entire scheme of liability, as reflected in Articles 2, 4 and 5 , to incorporate established principles of customary international law. Thus Article 4(2) incorporates and refines the due diligence rule in respect of the particular case of investment losses sustained in war, armed conflict, revolution, state of national emergency, revolt or insurgency. The provision, in effect, specifically defines breach of the due diligence rule in its prohibition of destruction of alien property by State authorities where such destruction is not caused in combat action or by the necessity of the situation. This definition of culpable conduct exhausts the grounds of liability of the host State in all the situations defined in Article 4(1).

Since Article 4 contains specific rules governing the particular case of investment losses sustained in civil disturbances — the situation presented by this case — this provision must, in accordance with a well-settled principle of treaty interpretation, prevail over the general property protection provision in Article 2(2). This principle which is captured by the maxim: "Generalia specialibus non derogant"was enunciated by Grotius as follows:

> Among agreements which are equal in respect to the qualities mentioned, that should be given preference which is most specific and approaches most nearly to the subject in hand; for special provisions are ordinarily more effective than those that are general.... *De iure belli ac pacis*, Lib. II. Cap., XXIX.

Harazti further elaborates on this principle in the following terms:

> Another principle of interpretation of a technical nature emerges in connection with the well-known thesis "generalia specialibus non derogant". According to this principle proclaimed by Grotius, at the interpretation of treaties the proper course is to guarantee priority to the specific provisions against the provisions of a general nature of the treaty, or in other words, the existence of a specific provision will withdraw a question governed by it from under the effect of the general provisions of the treaty. This principle starts from the logical assumption that if the parties inserted in the treaty a specific provision to govern a certain question, then they intended to settle this question definitively in this way, which circumstance cannot be affected by provisions of a wider or more general character in whose respect the specific provision constitutes a sort of exception. *Some Fundamental Problems of the Law of Treaties* (1973).

The principle was applied by the ICJ in the First *Admissions Case* (1948) ICJ Rep. 57 at 64, where the Court applied the more specific Article 4 of the United Nations Charter instead of the general provision of Article 24 on admission of new Members.

> It has been sought to base on the political responsibilities assumed by the Security Council, in virtue of Article 24 of the Charter, an argument justifying the necessity of according to the Security Council as well as the General assembly complete freedom of appreciation in connection with the admission of new Members. But Article 24, owing to the very general nature of its terms, cannot, in the absence of any provision affect the special rules for admission which emerge from Article 4.
>
> The foregoing considerations establish the exhaustive character of the conditions prescribed in Article 4.

In the *Case Concerning the Payment of Various Serbian Loans Issued in France*, PCIJ, Series A 20/21, p. 30, the Permanent Court of International Justice applied this principle of interpretation as follows:

> it is argued that there is ambiguity because in other parts of the bonds, respectively, and in the documents preceding the several issues, mention is made of francs without specification of gold. As to this, it is sufficient to say that the mention of francs generally cannot be considered as detracting from the force of the specific provision for gold francs. The special words, according to elementary principles of interpretation, control the general expressions. The bond must be taken as a whole, and it cannot be so taken if the stipulation as to gold francs is disregarded.

Since it is not disputed that the Tribunal is confronted with a claim arising from losses or damage sustained in a civil commotion falling squarely within the purview of the situations defined in Article 4(1), Article 4 must prevail over Article 2(2) as the applicable provision. This means that Article 4 exhausts all the possible grounds of liability. Consequently, it is not open to the Tribunal to invoke Article 2(2) as the basis for the Respondent's liability after a definitive ruling that the Respondent is not liable under Article 4(2).

The only issue then is whether the Respondent can still be held liable under Article 4(1) notwithstanding the rejection of the Respondent's liability under Article 4(2). As intimated above and more fully explained below, such a result is precluded by a proper interpretation of the national and most favoured treatment clauses in Article 4(1), which neither mandate payment of compensation nor constitute a direct and independent, substantive source of liability.

Article 3 prescribes the general standards of national and most-favoured-nation treatment and I agree with the majority opinion that it is not an issue in this case, and that the Claimant's reliance on it in construing strict liability out of Article 2(2) is misconceived.

II. The Claimant's submissions

The principal contention of the Claimant is that Sri Lanka is in breach of Article 2(2) of the Treaty which imposes strict or absolute liability. More particularly, the Claimant argues that the stipulation that investments shall enjoy "full protection and security"imposes strict or absolute liability on the host country, a standard which is more rigorous than the due diligence principle in customary international law. This argument is anchored on the general theory that BITs do not merely incorporate pre-existing customary international law, but also prescribe, in many cases, more rigorous legal standards for the protection of foreign property. Thus, as *lex specialis* between the U.K. and Sri Lanka the provisions of the Treaty are not necessarily congruent with customary international law. I agree with the Claimant that a bilateral investment treaty may prescribe standards in particular provisions which go beyond the norms of customary international law. However, I share the view of the majority that the Claimant's submission on the meaning to be ascribed to the term "full protection and security"in Article 2(2) of the U.K./Sri Lanka Agreement of 1980 is not supported by relevant judicial precedents and other authorities and is untenable as a matter of law. More specifically, as the Tribunal emphasizes, the notion that "full protection and security"connotes strict liability for injury and thereby constitutes an unqualified guarantee on the part of the Respondent is broadly incompatible with the decision of Umpire Ralston in the *Sambiaggio Case* (1903) and with clear *dicta* in the recent Judgment of a Chamber of the International Court of Justice in the *Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)* (1989).

In rejecting the Claimant's position on this point, the Tribunal notes that "even stronger wordings like 'the most constant protection and security'"have been utilized in bilateral treaties concluded to encourage the flow of foreign investment. This is an important observation because, in addition to the evidence adduced by the majority, there are grounds for the view that the expression "the most constant protection and security"does not imply absolute liability in international law. In the *Case Concerning United States Diplomatic and Consular Staff in Tehran (Judgment)*, one issue considered by the International Court of Justice was whether Article II, paragraph 4 of the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States and Iran was important in the assessment of United States claims on behalf of two of its private nationals held hostage in Iran. In substance, Article II, paragraph 4 specified that nationals of each Party should receive the "most constant protection and security"within the territories of the other. If this expression was read by the Court as synonymous with absolute liability, then, once injury to the private nationals had been demonstrated, Iran would have been held liable, irrespective of the cause of the injury. This was not, however, the course followed in the Judgment. Rather, the Court makes no reference to absolute liability in this context, and, in reaching its conclusions pays attention to the question whether fault could be imputed to the Iranian Government. The Court, it is true, does not expressly consider the position of the private individuals in detail, but it indicates, in paragraph 67 of the Judgment, that, as regards the activities of the militant students, it was the "inaction"of the Iranian Government which rendered it liable under Article II, paragraph 4. This suggests that, for the Court, the "most constant security and protection"provision did not obviate the need to assess whether Iran had exercised due diligence in the circumstances.

Furthermore, within the narrow confines of Article 2(2) of the U.K./Sri Lanka Treaty itself, the interpretation proffered by the Claimants as to the meaning of "full protection and security"would lead to a rather eccentric result. The first sentence of Article 2(2) assures investors "fair and equitable treatment"and "full protection and security"at the same time. Since it has not been suggested that the phrase "fair and equitable treatment"connotes strict liability, the Claimant's interpretation would have the effect of imposing strict liability and the due diligence standard at the same time — a result that would be self-contradictory.

I am fortified in this conclusion by the fact that the official commentary on Article 1 of the OECD Draft Convention on the Protection of Foreign Property (*International Legal Materials*, Vol.2 (1963), p. 241) expressly states that:

> The phrase "fair and equitable treatment", customary in relevant bilateral agreements, indicates the standard set by international law for the treatment due by each State with regard to the property of foreign nationals... The standard re-

quired conforms in effect to the "minimum international standard"which forms part of customary international law. (*Ibid.*, p. 244).

Moreover, in its explanation on the meaning to be ascribed to "most constant protection and security", the official commentary on the Draft Convention indicates that this term refers to "the obligation of each Party to exercise *due diligence* as regards actions by public authorities as well as others in relation to property."(*Ibid.*, emphasis added). The probative value of these explanations is of course diminished by the fact that the OECD Draft Convention never actually entered into force. Nevertheless, there appears to be no evidence which suggests that the explanations noted above were regarded as controversial by OECD member States.

I am therefore in agreement with the Tribunal in dismissing the Claimant's submission on the interpretation of Article 2(2).

However, as explained above, I would go further and hold that Article 2(2) is, in any case, not applicable to this case on the ground that, as a general provision, Article 2(2) must yield to the special provision of Article 4 which specifically governs the particular facts before the Tribunal. Article 2(2) therefore does not, in my opinion, provide a basis for the Respondent's liability.

The alternative submission of the Claimant is that the Respondent is in breach of Article 4(2) of the Treaty. More specifically, the Claimant contends that the security forces of Sri Lanka perpetrated a rampant destruction of the SSL farm on 28 January 1987 and that such destruction was neither caused in combat action nor caused by the necessity of the situation. The Tribunal again firmly rejected this submission, and I wholeheartedly agree.

In the first place, the Tribunal held that there was insufficient evidence to sustain the contention that the Sri Lankan security forces destroyed the farm. I strongly endorse this ruling particularly in view of the significant fact that the evidence adduced by the Claimant did not establish destruction of the Serendib farm or indeed of any property by the security forces. This means that the Claimant was unable to meet the first requirement of establishing the Respondent's liability under Article 4(2). Moreover, this finding is fatal to the Claimant's central allegation that the Respondent carried out a rampant destruction of the farm.

Secondly, the Tribunal ruled that the destruction of the farm was caused in combat action. That finding provides an additional basis for rejecting the Respondent's liability under Article 4(2). I concur.

The majority is no doubt correct when it emphasizes that the term "combat action"must be understood in the modern context of guerilla warfare in which military confrontation frequently takes the form of sporadic attacks on adversaries who are unprepared to retaliate. "Combat"should, therefore, not be viewed in unduly restrictive terms, and, in this regard, the decision of the English House of Lords in the case of *Adams v. Naylor* (1946) 2 All E.R. 241, though certainly not binding in this arbitration, may be instructive. In this case, the military authorities in the United Kingdom during the Second World War had constructed a minefield along a part of the Lancashire coast as a provision against invasion. A child who was playing in the area of the minefield was killed when he accidentally triggered one of the mines, while one of his

companions sustained serious injuries. In the ensuing litigation for damages, the key issue was whether the death and injury resulted from the use of the mine "in combating the enemy". The House of Lords held unanimously that the mine was being used for combat activities and expressly rejected the view that "combating"necessarily involves actual, active fighting between adversaries. This broad interpretation is to be recommended and, hence, in the present case, the better view must be that the actions of the Sri Lankan authorities during "Operation Daybreak"fell within the ambit of "combat action"irrespective of whether there is convincing proof of on-the-spot resistance on the part of the "Tiger"rebels.

The dismissal of the Claimant's submissions under Article 4(2), the key provision governing the liability of the host State in civil disturbances, is highly significant. Article 4(2) is critical, first, because as the *lex specialis* between Sri Lanka and the U.K., spelling out specific grounds of liability in the particular situations defined in Article 4(1), it must prevail as the definitive and exhaustive source of liability in respect of the conduct of the armed forces of the host State. Secondly, Article 4(2), in any case, incorporates, amplifies and exhausts the due diligence rule in the particular case of civil disturbances. It follows that there is no further recourse with respect to liability for losses sustained in civil disturbances if the Claimant fails under Article 4(2).

I am fortified in this view by the authoritative account of the evolution of British bilateral investment treaties by Denza and Brooks, officials of the British Foreign Service who, in their article on the subject, explained the relationship between customary international law and the provisions of the U.K. bilateral investment treaties as follows:

> Careful thought was given as to whether the model should merely reflect the customary international law on the protection of foreign property or should go beyond it and give the investor a higher standard of protection. Industry — and in particular the Confederation of British Industry who provided intensive and constructive criticism at this formative stage — pressed for very high standards which would have prohibited much of the treatment described as "creeping expropriation". The Foreign and Commonwealth Office on the other hand, as prospective salesmen of the finished product and acutely conscious of the argument whether the classical standards of protection still reflected the modern law, hesitated. Some of the articles in the draft would of course impose obligations which did not derive from customary international law — for example the provisions for most-favoured-nation treatment and national treatment, on exchange control freedom for investments and returns from them, on subrogation and on compulsory arbitration. But the most politically sensitive provisions — on expropriation, compensation for damage sustained during armed conflict or revolt and on the nationality of individuals and companies — were drafted in considerable detail but not so as to go beyond what was thought to reflect international law. (*International and Comparative Law Quarterly*, 1987, Vol. 36, p. 908 at 911).

The above passage makes clear that Article 4 — the provision on compensation for damage sustained during armed conflict — reflects international law.

III. The issue of the Respondent's liability under Article 4(1)

Notwithstanding the ruling against the Claimant's submissions under Articles 2(2) and 4(2) of the Treaty, the Tribunal has held that Article 4(1) provides a further

basis for the Respondent's liability. My views diverge sharply form the majority on the important issue of the interpretation of Article 4(1).

In this regard, it is worth noting that the Claimant itself disavowed any intention of grounding the Respondent's liability in the provisions of Article 4(1) or customary international law. More particularly, the Claimant did not advance any submissions on the meaning and effect of the national and the most-favoured-nation treatment clauses of Article 4(1), nor did it contend that these clauses provided a basis of the Respondent's liability. Indeed, these clauses were hardly argued by both parties.

I agree with the Tribunal that Article 4(1) covers the situation where investment losses are sustained in circumstances where there is no convincing evidence to sustain attribution to the authorities of the host State or indeed to any other person. However, it is my view that it is fundamentally erroneous to construe Article 4(1) in such a manner as to impose a substantive liability to pay compensation. This provision does not prescribe a substantive obligation on the part of the host State to pay compensation where foreign investments sustain losses by reason of war or other armed conflict, revolution, a state of national emergency, revolt or other civil disturbance. It merely requires that, in these situations, the foreign investor be accorded national treatment or most-favoured-nation treatment with respect to compensation, restitution, indemnity or other settlement. The words "shall be accorded treatment as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the latter Contracting Party accords to its own nationals or companies or to nationals of any third state"mean that no issue of paying compensation arises unless it has been established to the Tribunal that the host State has provided or undertaken to provide "restitution, indemnification, compensation or other settlement"for its own nationals or companies or the nationals or companies of a third State. In other words, the foreign investor does not derive any benefit from Article 4(1) unless some right or privilege has been explicitly granted by the host State to its nationals or companies or to the nationals or companies of a third State in similar circumstances. With regard to national treatment, such a right or privilege will be assured by an explicit provision of domestic law or other domestic measure. The most-favoured-nation treatment clause, on the other hand, will be triggered into operation by the conclusion of a treaty or the adoption of a specific policy or measure by the host State granting a right or privilege or concession to the nationals or companies of a third State with respect to compensation or other forms of settlement. It bears emphasis that national and most-favoured-nation treatment does not derive from customary law. (See generally Wilson, *U.S. Commercial Treaties and International Law*, 1960, Gudgeon *op. cit.*, Denza and Brooks *op. cit.*)

This interpretation is fully supported by the analysis of Scott Gudgeon, Assistant Legal Adviser to the U.S. State Department, and a key negotiator of U.S. Bilateral Investment Treaties. In his commentary on Article III (3)[1] of the Model U.S. Bilateral

[1] Nationals or companies of either Party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national emergency, civil disturbance or similar events, shall be accorded treatment by such other Party no less favourable than that accorded to its own nationals or companies or to nationals or companies of any third country, whichever is the most favourable treatment, as regards any measures it adopts in relation to such losses.

Investment Treaty, 1984 which corresponds to Article 4(1) of the U.K./Sri Lanka Treaty, Gudgeon stressed the non-obligatory nature of the provision as follows:

> Following the example of the European BITs, the U.S. BITs provide two standards of treatment in the event of property loss resulting from war or civil disturbance. First, if compensation is offered for losses from war or civil disturbance (including terrorism), the host country must provide the investment of the treaty partner with the better of either national or MFN treatment. *The provision does not mandate that the host country provide compensation; it merely requires that if such payment is made, it be made on terms that are equal to those offered nationals or other foreign interests*. (My italics). (Gudgeon, "United States Bilateral Investment Treaties: Comments on the Origin, Purposes and General Treatment Standards", *International Tax and Business Lawyer*, Vol. 4, 105, 1986).

Wayne Sachs reached the same conclusion when analyzing the same provision in his article "The 'New' U.S. Bilateral Investment Treaties", *International Tax and Business Lawyer*, Vol. 2, 192 (1984):

> *Compensation for other losses:*
>
> The BITs also include compensation rules for losses caused by war between the host state and any third country or by revolution, insurrection, riot or terrorism. These provisions of Article IV are wholly new to U.S. commercial treaty practice, but mirror both foreign treaty practice (for example the British BITs contain similar provisions) and recent changes in U.S. Law.
>
> Unlike the absolute terms of Article III *obligating* the host state to compensate protected investors for expropriated property regardless of the circumstances, compensation for damages enumerated in Article IV is only granted on a national/MFN basis. Thus, while the host is not obligated to compensate anyone, it must treat protected investors no less favourably than it does local investors and those from third countries when arranging restitution, indemnification, compensation or other appropriate settlement.

Sachs indeed emphasizes that this provision is only comparative and not mandatory.

In their above-mentioned article on U.K. Investment Protection Treaties, Denza and Brooks commented on Article 4 of the U.K.-China Bilateral Investment Treaty (1986) as follows:

> Article 4 requires most-favoured-nation treatment to be given to investors of one party who have suffered loss due to war, armed conflict, revolution, national emergency, revolt or riot in the territory of the other....
>
> Investors who, in the circumstances referred to above, suffer loss either resulting from the requisition of their property or from the destruction of their property where this is not caused by combat action or is not required by the necessity of the situation, receive restitution or reasonable compensation.

The U.K. concept of MFN treatment in respect of losses sustained in civil disturbances is lucidly illustrated in the formulation of the concept in Article VI of the U.K.-Philippines BIT (1980) which reads:

> If a Contracting Party makes restitution, indemnification, compensation or other settlement for losses suffered owing to war or other armed conflicts, revolution, a state of national emergency, revolt, insurrection or riot in the territory of such

> Contracting Party, it shall accord to the nationals or companies of the other Contracting Party whose investments in the territory of the Contracting Party have suffered such losses, treatment no less favourable than that which the Contracting Party shall accord to companies or to nationals of any third state.

It hardly needs mention that the effect of the above clause is identical to that of the MFN clause in Article 4(1) of the S.L./U.K. Treaty; in both provisions a basic precondition for invoking most-favoured-nation treatment is the provision of "restitution, indemnification, compensation or other settlement"by the host State to a national or company of a third State.

In the case before us, no evidence has been adduced to establish that Sri Lanka provides or has offered compensation or other settlement to its nationals or companies or the nationals or companies of a third State in similar circumstances. It follows that the essential prerequisite for invoking national or most-favoured-nation treatment has not been satisfied.

In particular, AAPL is not entitled to most-favoured-nation treatment in the absence of any proof that Sri Lanka has entered into a treaty or adopted a specific measure providing for compensation or other settlement for the national or a company of a third State in the situations defined in Article 4(1). With the greatest respect, it is a fundamental error to construe the MFN treatment clause as denoting the treatment to be accorded to all aliens as a general obligation by virtue of customary international law. The reasoning of the Tribunal seems to be this: Article 4(1) requires Sri Lanka to accord MFN treatment to nationals or companies of the U.K. Sri Lanka has an obligation under customary international law to pay compensation to aliens from all countries. Therefore, by virtue of renvoi, Sri Lanka has an obligation to pay compensation to the Claimant under Article 4(1). By employing the concept of renvoi in interpreting Article 4(1), the Tribunal reaches the untenable result of substituting a general standard of property protection derived from customary international law for a specific undertaking of Sri Lanka to a national or a company of a third State. Such an interpretation confuses MFN treatment, a creature of treaty, with the tenets of general international law, and constitutes a fundamental misconception as to the very notion of most-favoured-nation treatment. In this regard, I can do no better than to cite the pleadings of the U.K. Government in the *Ambatielos Case : (Greece v. U.K.) Pleadings, Oral Arguments, Documents*, U.K. Rejoinder p. 245 at 258–60:

> Even more important, there is the question of what is involved in the conception of most-favoured-nation treatment. Most-favoured-nation treatment denotes (as its name implies) the treatment accorded to the most-favoured-nation by virtue of a specific undertaking towards it individually — not the treatment accorded as a matter of general obligation to all nations by virtue of universally binding, and already existing, rules of basic international law. If the latter treatment is owed to a given country, it is not so owed by virtue of any most-favoured-nation obligation, but by reason of the inherent obligations of general international law. Most-favoured-nation treatment is essentially treatment that would not be owed but for a specific undertaking to grant it. This is not the case with treatment owed by virtue of general rules of international law.
>
> It follows that a right to most-favoured-nation treatment is quite outside, and has nothing to do with, a right to treatment according to the general rules of international law. Indeed, it could more properly be maintained that the latter treatment, so far from being implied by most-favoured-nation treatment, constituted least-favoured-nation treatment, since it is owed automatically to all countries, even the least specially privileged.

The Tribunal's interpretation of the MFN treatment clause in Article 4(1) has far reaching implications for other MFN provisions of the Treaty. Thus, the application of the renvoi device to a construction of the principal MFN provision of the Treaty, Article 3, would have the effect of obligating the host State to accord to nationals of the other Contracting Party no less favourable treatment than that which it is required by customary international law to accord to the nationals or companies of any third State. This would obliterate the juridical distinction between the concept of most-favoured-nation treatment, a creature of treaty, and the general requirements of customary international law and would ascribe an unexpected and untenable meaning to Article 3.

Furthermore, even if the most-favoured-nation clause in Article 4(1) encompasses customary international law, which I of course consider erroneous, it cannot be lightly assumed that Sri Lanka unreservedly subscribes to and applies the body of rules and principles of customary international law enunciated by the Tribunal as applicable to the protection of foreign property, particularly having regard to the express reservation made in the interest of national security under Article 157 of the Sri Lanka Constitution. It is a notorious fact that the Tribunal's attention was not drawn to a single instance of Sri Lanka paying compensation to any foreigner who had sustained loss or damage resulting from the civil commotion in which the country had been embroiled for nearly a decade.

For all the above reasons, it is my view that having regard to the Tribunal's definitive ruling that the Respondent is not liable under Article 4(2), and the lack of any proof that Sri Lanka has provided or specifically undertaken to provide compensation or other settlement to the national or company of a third state in the circumstances set forth in Article 4(1), the Tribunal is precluded from invoking the due diligence rule by virtue of either Article 4(1) or Article 2(2) to sustain the claim in this case.

This makes it unnecessary for me to address the relevant principles and rules of customary international law and their application to the facts of this case. However, in view of the Tribunal's crucial reliance on general international law in sustaining the liability of the Respondent, I would like to point out that my assessment of the relevant customary international law and its application to the factual circumstances in this case points to the opposite conclusion.

IV. The position at customary international law

The majority opinion goes to great lengths to stress only the exceptional situations in which a host country may be held liable for loss or damage sustained by aliens in armed conflict or other civil commotion, but pays scant attention to the general rule of customary international law that a host State is not liable for such losses or damage. Numerous publicists and decisions of international tribunals overwhelmingly support the position that, as a general rule, a host State is not liable under customary interna-

tional law for losses or damage sustained by a foreigner due to war, armed conflict, insurrection, revolt, riot, a national emergency or other civil disturbances.

Some authorities maintain that this general rule is subject to some exceptions, and that liability is admissible in certain situations, such as wanton destruction of property perpetrated by the forces of the host State (See McNair below). But the existence of such a general rule excluding liability is well-settled. Another way of formulating this general rule of non-responsibility is that a host State's obligation to exercise due diligence with respect to the protection of alien property is easily discharged in the face of an insurrection or other civil commotion resulting in a temporary loss of control by the host country over the area of insurgency. In short, in these circumstances, there is a presumption that the due diligence rule has been complied with. (See Eagleton, *The Responsibility of States in International Law*, p. 150). As Brownlie explains:

> The general rule of non-responsibility rests on the premises that, even in a regime of objective responsibility, there must exist a normal capacity to act, and a major internal upheaval is tantamount to *force majeure*. (*Principles of Public International Law*, 1979, 3rd Edition, p. 453).

The position is lucidly stated by Hall as follows:

> When a government is temporarily unable to control the acts of private persons within the dominions owing to insurrection or civil commotion, it is not responsible for injury which may be received by foreign subjects in their person or property in the course of the struggle, either through the measures which it may be obliged to take for the recovery of its authority, or through acts done by the part of the population which has broken loose from control.
>
> (Hall, *International Law*, p. 274.)

In his *Law and Procedure of International Tribunals*, Ralston cites a string of decisions of international tribunals to illustrate the well-settled principle:

> That the alien residing in a state exposed to war is compelled to accept, together with the citizens of the state, for himself and for his property, the dangers incident to surrounding conditions, and no more than they, possess a right to compensation therefor.
>
> (Ralston, *Law and Procedure of International Tribunals*, p. 386).

In the *Blumenkson Case* before The Mexican-American Commission of 1868, Thornton, Umpire elaborated upon this principle as follows:

> During the actual carrying out of hostilities the umpire does not consider that the property of a foreigner residing in the besieged city, more particularly when that is real property, can be looked upon as more sacred than that of the natives. It is not shown nor has the umpire any reason to believe that any indemnity was granted to Native Mexicans on account of similar damages; neither can the Mexican Government be expected to compensate foreigners for damages done to their real property by reason of actual hostilities for the purpose of delivering the country from a foreign enemy. Those who prefer to take up residence in a foreign country must accept the disadvantages of that country with its advantages whatever they may be.
>
> (Moore 3669 quoted in Ralston pp. 386-7).

The same principle was asserted in the *Upton Case* before the American-Venezuelan Claims Commission, when Bainbridge Umpire, declared that the Claimant:

> must be held, in going into a foreign country, to have voluntarily assumed the risks as well as the advantages of his residence there. Neither claimant nor his property can be exempted from the evils incident to a state or war to which all other persons and property within the same territory were exposed.
>
> (Ralston 389, Ven. Arb. of 1903; Morris Report 387).

Lord McNair, relying on the reports of legal advisers to the British Government, has enunciated the following five principles on the responsibility of lawful Governments for the consequences of insurrection and rebellion, which incorporate the general rule of non-responsibility and the exceptions thereto.

1. A state on whose territory an insurrection occurs is not responsible for loss or damage sustained by a foreigner unless it can be shown that the Government of that State was negligent in the use of, or in the failure to use, the forces at its disposal for the prevention or suppression of the insurrection.

2. This is a variable test, depending on the circumstances of the insurrection.

3. Such a State is not responsible for the damage resulting from military operations directed by its lawful government unless the damage was wanton or unnecessary, which appears to be substantially the same position of belligerent States in an international war.

4. Such a State is not responsible for loss or damage caused by the insurgents to a foreigner after that foreigner's State has recognized the belligerency of the insurgents.

5. Such a State can usually defeat a claim in respect of loss or damage sustained by resident foreigners by showing that they have received the same treatment in the matter of protection or compensation, if any, as its own nationals (the plea of diligentia quam in suis).

(Cited by Brownlie, 452-453).

As Brownlie rightly points out, these principles are substantially similar to those enunciated by writers of other nationalities. They are, furthermore, substantially consistent with the authorities cited above.

It hardly needs mention that these principles are also consistent with, and indeed informed, the carefully crafted provisions of Article 4 of the S.L./U.K. Treaty (Vide Denza & Brooks above).

As already pointed out above, Article 4(1) confirms the general rule of non-responsibility, while Article 4(2) defines narrowly circumscribed exceptions to this general rule, where the due diligence principle may be breached. Article 4(2), in short, elaborates the due diligence rule reflected in the specific prohibition of wanton or unnecessary force (McNair Principle (111), by defining the precise situations where State conduct would be culpable. Thus destruction of property where the destruction is not caused in combat action or by the necessity of the situation constitutes culpable conduct or unnecessary or wanton use of force, and therefore a violation of the due dili-

gence rule. Article 4(2) thus incorporates, refines and exhausts the due diligence rule with respect to the consequences of the categories of civil disturbances defined in Article 4(1). It follows that it is inadmissible to invoke the due diligence rule as a basis of liability when liability has been rejected under Article 4(2).

V. Application to the facts

It would be instructive to apply the McNair principles to the facts in this case.

The first principle raises the question as to whether the Sri Lankan Government can be faulted for its failure to discharge its sovereign duty of preventing or suppressing the insurrection.

In the case before the Tribunal, it is not disputed that the Claimant's alleged loss of investments occurred during a major insurrection which resulted in a temporary loss of control by the Sri Lankan Government over the insurgent area, and that an armed conflict ensued from such insurrection. In the words of the Claimant:

> It is accepted that in nearly all the west side the Batticaloa Lagoon (about 28 miles long) civil government was virtually absent for many months prior to January 28, 1987. Groups of militants were in control of different areas. The Tigers were in control of the Manmunai area and surrounding villages. One of these villages, Kokkadicholai, situated about 1.5 miles from the southern boundary of the farm, became headquarters of the Tigers sometime in the early months of 1986. The right of the Government to restore civil administration in such areas — the largest of them being the northern Jaffna peninsula — is of course not disputed.

Thus there is no dispute between the parties as to the existence of intense rebel activity not only in the Kokkadicholai area, but also the entire peninsula where the SSL farm was located. It is equally agreed that the situation warranted an appropriate attempt by the Government to regain control of the area, and that this was a legitimate and praiseworthy act of a sovereign Government. In this regard, it was never suggested by the Claimant or the Tribunal that the Government had been negligent in the use or failure to use the forces at its disposal for the prevention or suppression of the insurrection. The Government, in fact, applied itself energetically in employing its forces for the suppression of the insurrection that had been launched by determined, formidable and well armed insurgents in inaccessible terrain.

Thus the breach of the first two of the McNair principles is not in issue.

With regard to the third McNair principle, any allegation that the Government's security forces were guilty of wanton destruction of property has been disposed of by the Tribunal in its crucial finding that there was insufficient evidence to establish that the security forces destroyed the Serendib farm. No question of wanton destruction of property arises if the fundamental premise, namely, destruction of property by the security forces is non-existent. Thus the Claimant failed to establish the fundamental factual basis of the claim, namely that the Government's security forces had used excessive force in its military operation resulting in the wanton destruction of the farm.

It follows that Sri Lanka is not liable under this critical principle of customary international law — a conclusion which is consistent with the Tribunal's rejection of the Respondent's liability under Article 4(2) of the Treaty.

McNair's fourth principle which deals with the consequences of the recognition of the insurgents by the home country of the foreign investor does not apply to this case.

Finally, Sri Lanka cannot be faulted for breach of the fifth principle which prescribes national treatment for the foreigner, since there was no proof that Sri Lankans holding equity interests in SSL or indeed any other Sri Lankan national who has suffered investment losses in similar circumstances had been provided with compensation or other settlement.

Although the Tribunal is unable to find the Sri Lankan Government liable on the grounds that its security forces were guilty of wanton destruction of the Serendib farm, it nevertheless finds the Government's conduct culpable by reason of its alleged failure to use "peaceful available high-level communication in order to get any suspect elements excluded from the farm' s staff". According to the majority opinion, such a precautionary measure "would have been essential to minimize the risks of killings and destruction when planning to undertake a vast military counter-insurgency operation in that area for regaining lost control.... Failure to take this precaution violated the due diligence principle which requires undertaking all possible measures to prevent eventual occurrence of killings and property destruction.

The Tribunal's ruling here does not question the extent of the force used by the Government in its military operation; it raises the more fundamental question as to whether the Government's recourse to a military operation as well as the timing of such operation was warranted. This issue does not fall within the purview of any of the five McNair principles and touches on the sovereign prerogatives of a Government fighting for its very life.

I find the Tribunal's decision unconvincing for the following reasons:

1. There seems to be a basic inconsistency between the Tribunal's finding that the Government is not guilty of wanton destruction of property and the ruling that the Government's failure to take certain precautions resulted in "eventual occurrence of killings and property destruction". A legitimate act of a sovereign Government to regain control cannot be faulted merely because of incidental destruction of property. The prospect of "eventual occurrence of killings and destruction of property"does not necessarily vitiate the legitimate action of a Government unless it is demonstrated that the Government applied unnecessary force and was otherwise guilty of wanton destruction. However, the Tribunal's own earlier ruling does not sustain the commission of such excesses.

2. The Tribunal's enunciation and application of due diligence rule fails to take into account the national emergency and extraordinary conditions under which the Government mounted a strategic and highly sensitive security operation to regain its sovereign control of the area of insurgency. The Government was confronted with essentially a *force majeure* situation. Once it is conceded that the Government had a compelling sovereign duty to undertake a military operation to regain control, the timing and modalities of the security operation must surely fall within its exclusive discretion.

In this regard the Tribunal should be slow to second-guess the tactics and strategies of military commanders on the ground.

3. The precautionary measure envisaged by the majority opinion would have been a reasonable police measure if the situation to be addressed was no more than an ordinary case of civil disorder. However, in the face of a major insurrection launched by well-armed insurgents engaged in a sophisticated guerilla warfare against Government forces, it seems unrealistic to expect a major counter-insurgency operation to be preceded by routine police warnings. It does not seem feasible or reasonable to expect the Government to take such a step when launching a sensitive security operation against powerful insurgents who had infiltrated the entire Batticaloa area.

In urging this precautionary measure, the Tribunal placed considerable reliance on the protestations of the Managing Director of Serendib about co-operating with the security forces to remove all suspected rebels from the farm. However, the Managing Director did confirm in the hearings that he had been compelled by the security situation to absent himself from the Serendib farm for as long as six months prior to the events of January 28, 1987. He was therefore not in a position to effect the removal of any suspect rebels from the farm. Nor was the remainder of the farm management in a position to prevail over the insurgents in such a matter. The control exercised by the insurgents over the whole area, the previous acts of property destruction and theft, and even murder committed on the farm by the insurgents and the farm management's nervous attempts to secure a peaceful haven for its operations all ruled out any meaningful prospect of the farm management securing the removal of "suspect rebels"from the farm by peaceful means.

It has to be stressed also that the security forces did not single out the Serendib farm for special treatment. "Operation Day-Break"was a major, comprehensive military operation that was designed to regain government control over the entire Manmunai area.

4. The majority opinion hardly adverts to the fact that the insurrection had developed into a full-scale civil war with tragic loss of life on both sides. On the day of "Operation Day-Break"13 members of the Government's security forces were killed by rebel activity prior to the military engagement at the farm. 12 of these were blown up by a mine buried a few miles away from the farm. Furthermore, there is credible evidence that fire was directed from the farm against the helicopters and troops of the security forces on January 28, 1987. The death of Inspector Alwis and the injuries sustained by PC Siriwardene attest to this.

These conditions of civil war, in my opinion, constituted an extraordinary situation which did not admit of reliance on the type of leisurely police precautionary measures envisaged by the Tribunal. In the circumstances I would reject any finding of negligence or lack of due diligence against the Respondent. This opinion is reinforced by the significant fact that the applicable rules and principles of customary international law, the regime of property protection under the S.L./U.K. Treaty and Article 157 of the Constitution all recognize that the requirements of national security warrant a departure from the normal principles of responsibility in respect of the protection of foreign property. The precautionary measures insisted on by the Tribunal would unduly fetter the discretionary powers of a sovereign Government in taking all necessary security and military measures when the very life of the State is at stake. According to Eagleton, when a host State is fighting for its very existence it is assumed that it has complied with the due diligence rule and is therefore not liable (The Responsibility of States in International Law, p. 150).

5. The majority decision also raises troublesome questions of causation. The Claimant's contention was that the wanton destruction of the Serendib farm by Sri Lankan security forces was directly responsible for its investment losses. Although this argument itself was subject to several objections, the Tribunal's decision makes the causal link even more remote. The Tribunal has ruled that there was no convincing evidence to sustain the charge that the security forces destroyed the Serendib farm. It now holds that the failure of the Respondent to take peaceful precautionary measures prior to its counter-insurgency operation led to the Claimant's investment losses. This means that the Respondent is being held accountable even if the damage to the farm was inflicted by the insurgents or indeed by a third party. Such a doctrine of causation is unwarranted. It seems illogical to hold a government responsible because third parties have taken advantage of the occasion of the Government's legitimate operation to commit unlawful acts. The Tribunal's decision raises the question whether the ultimate cause of AAPL' s investment losses was not the ferocious insurrection that led to the counter-insurgency operation; or AAPL' s continued involvement in the farm notwithstanding the overwhelming evidence of intense rebel activity in the area.

The Issue of Damages

The Tribunal's basic misconstruction of Article 4(1) of the S.L./U.K. Treaty is thrown into sharp relief in the matter of computing damages for the Claimant. The Tribunal, in effect, purports to apply a precise standard of compensation under Article 4(1) when that provision prescribes no such standard. As discussed above, Article 4(1) is distinguishable from Articles 4(2) and 5 in two crucial respects. First, Article 4(1), unlike the other two provisions, does not mandate the payment of compensation; it merely prescribes national and MFN treatment with respect to compensation. Second, Article 4(1) does not specify any specific standard of compensation whereas the other two provisions stipulate precise compensation standards, namely, "adequate"and "freely transferable"compensation in the case of Article 4(2) and "prompt, adequate and effective"compensation under Article 5. Article 5 thus stipulates the highest standard of compensation, followed by Article 4(2), whilst Article 4(1) does not prescribe any specific or precise standard. It is evident from the scheme of compensation under the Treaty that if it was the intention of the Treaty to allow the recovery of a specific quantum of compensation under Article 4(1), that provision would have gone beyond a general indication of the possible forms of settlement — e.g., restitution, indemnification and compensation — which may be provided under national or MFN treatment. The absence of any precise compensation standard in Article 4(1) clearly reinforces the

essentially comparative and discretionary nature of the compensation provisions under Article 4(1).

Despite the absence of any stipulated compensation standard in Article 4(1), the Tribunal is able to arrive at a quantum of compensation relying on rules and principles that are normally applicable to the calculation of compensation for expropriation under Article 5 or compensation for damage to property under Article 4(2). This contravenes the scheme of compensation under the Treaty. In my opinion, the only standard of compensation that is admissible under Article 4(1) is a standard that has actually been applied or established with respect to nationals or companies of the host State or a third State under the national and most-favoured-nation treatment clauses, respectively. Since no such standard had been applied or established, there was no basis for the Tribunal's computation of compensation for the Claimant.

In view of my position that the Respondent is not liable, it is unnecessary for me to address the computation of damages at length. I would however point out that if liability had been established I would have concurred in the Tribunal's drastic reduction of the damages sought by the Claimant. Indeed, I would have gone further in limiting the recovery to the actual amount of the Claimant's equity investment, viz., US$300,000. The main ground for this quantum is that the claim for compensation on the basis of going concern and future profits is not warranted by the facts of this case. The prospects for the project were too uncertain to justify such claim. See *Phelps Dodge Corp. and Overseas Private Investment Corp. v. Iran, International Legal Materials*, Vol. XXV, No. 3, p. 619. In this regard I agree with the Tribunal that there was no basis for accepting the element of "intangible assets"or goodwill, or the claim for future profits. Furthermore, there was no proof of the actual value of the physical assets that were damaged. The Claimant's computation of compensation was flawed by several factors which I need not elaborate, since they are substantially addressed in the Tribunal's decision. In view of the foregoing, the fairest basis for compensation, if any, would be the actual amount of AAPL' s equity contribution.

I should add that if the Tribunal were competent to decide the case *ex aequo et bono*, I would have recommended the said amount of U.S.$300,000 as an *ex-gratia* award by the Government. However, I remain firmly convinced that, on strictly legal grounds, the claim must be dismissed. Our jurisdiction is strictly limited to adjudication in accordance with the applicable rules of law. I can find no basis for proceeding inexorably to award compensation when the preconditions for such an award are nonexistent. The special rules relating to losses sustained during war, armed conflict, insurrection, a state of national emergency, etc. under the Treaty, general international law and the Sri Lankan Constitution expressly envisage a situation where the host State will be exempt from liability to pay compensation notwithstanding the fact that the investor has sustained a loss. In my view, there is nothing to be gained from denying Sri Lanka the benefit of this exemption even though I acknowledge that the loss sustained by the foreign investor in the circumstances of this case is unfortunate. Perhaps it is worth emphasizing that the Constitution of Sri Lanka, the S.L./U.K. Treaty and other applicable rules and principles of international law do not insure foreign investment against all risks and losses and that Sri Lanka's essentially hospitable and liberal

foreign investment regime does not require it to assume the obligation to provide such insurance.

I would stress that the Tribunal's interpretation of the S.L./U.K. Treaty as well as its application of the relevant international law is at variance with the understanding and views of officials who have been intimately involved in the formulation of U.K. Bilateral Investment Treaties and the conduct of U.K. practice in this area. The Tribunal's decision equally collides with Sri Lanka's concept of the effect of bilateral investment treaties in Sri Lanka having regard to the express reservation stipulated in Article 157 of the Sri Lanka Constitution in respect of measures taken in the interest of national security. Furthermore, the Tribunal's construction of Article 4(1) of the S.L./U.L Treaty reads more into that provision than is evident to U.S. officials who have negotiated similar provisions under U.S. bilateral investment treaties. In my view the Tribunal should not confer a benefit on AAPL where none has been provided by the Parties to the S.L./U.K. Treaty.

The Tribunal's decision seems to be a good illustration of the old adage that hard cases make bad law.

Samuel K.B. Asante
June 15, 1990.