INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES

Annulment Proceedings Regarding the Award
Rendered on February 9, 2004

MR. PATRICK MITCHELL
CLAIMANT

and

THE DEMOCRATIC REPUBLIC OF CONGO
RESPONDENT

Case No. ARB/99/7

DECISION ON THE APPLICATION FOR ANNULMENT OF THE AWARD

Date of Dispatch to the Parties: November 1, 2006

Composition of the *ad hoc* Committee:

President:	Mrs. Antonias Dimolitsa
Members of the *ad hoc* Committee:	Mr. Robert S. M. Dossou Professor Andrea Giardina
Secretary of the Committee:	Mrs. Martina Polasek

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I. Introduction

A. The Object of the Dispute and the Award under Consideration

1. In accordance with the Award of February 9, 2004 ("Award") para. 23, the dispute between Mr. Patrick Mitchell ("Claimant") of the law firm "Mitchell & Associates" and the Democratic Republic of Congo ("DRC" or "Respondent")

> "relates to the intervention ordered by the Military Court of the Democratic Republic of Congo and executed on March 5, 1999 when the premises housing Mr. Mitchell's firm were put under seals, documents qualified as compromising and other items were seized, the employees of the firm were forced to leave the premises and two lawyers, Mr. Risasi and Mr. Djunga, were put into prison. These individuals remained incarcerated until the day of their release by a decision of the Military Court on November 12, 1999, which also ordered the removal of the seals placed on the premises of Mr. Mitchell's firm."

2. According to the Request for Arbitration, the jurisdiction of the International Centre for Settlement of Investment Disputes ("ICSID" or "Centre") is based on the Bilateral Treaty concluded in 1984 between the United States of America and the Democratic Republic of Congo (formerly the Republic of Zaïre) Concerning the Reciprocal Encouragement and Protection of Investment ("Treaty" or "BIT").

3. The Arbitral Tribunal, having joined the examination of the objections to jurisdiction raised by the Respondent to the examination of the merits, rendered its Award of February 9, 2004 ("Award") in resolution of the whole of the dispute. The operative part of the Award states as follows:

> "1. This dispute is within the jurisdiction of the Centre and the competence of this Tribunal.
>
> 2. Mr. Patrick H. Mitchell has been the victim of an expropriation by the Democratic Republic of the Congo in violation of Article III(1) of the Bilateral Investment Treaty between the Democratic Republic of the Congo and the United States of America.
>
> 3. The Democratic Republic of the Congo shall pay to Mr. Patrick H. Mitchell the amount of US$750,000 plus an interest on such amount at an annual rate of 7.75%, commencing on March 6, 1999, until the date of payment.
>
> 4. The counter-claim of the Democratic Republic of the Congo is rejected.
>
> 5. The Democratic Republic of the Congo shall bear its own costs, expenses, counsel fees, including its share of the costs incurred by the Arbitral Tribunal and ICSID.
>
> The Democratic Republic of the Congo shall pay to Mr. Patrick H. Mitchell the total amount of US$95,000, together with interest at an annual rate of 7.75% as from the date of the Award, as a contribution to Claimant's costs, expenses and counsel fees, including his share of the costs incurred by the Arbitral Tribunal and ICSID.
>
> Mr. Patrick H. Mitchell shall bear his costs, expenses and counsel fees, including his share of the costs incurred by the Arbitral Tribunal and ICSID, in any amount higher than US$95,000."

B. The Course of the Annulment Proceedings

4. On June 7, 2004, the Centre received an Application for Annulment ("Application") dated the same day from the Democratic Republic of Congo, regarding the arbitral Award rendered on February 9, 2004. The Application for Annulment was based on two of the grounds set out in Article 52(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "Washington Convention" or "Convention"), namely manifest excess of powers and failure to state the reasons. The application was registered by the Secretary-General of ICSID on July 15, 2004.

5. The Application for annulment of the Award also included a request for the stay of enforcement of the Award on the basis of Article 52(5) of the Convention and Rule 54(1) of the Rules of Procedure for Arbitration Proceedings ("Arbitration Rules"). In accordance with the second sentence of Article 52(5) of the Convention, the Secretary-General notified the parties, when transmitting to them the notice of registration by the Centre of the Application, that enforcement of the Award had been stayed provisionally.

6. The *ad hoc* Committee was constituted on August 24, 2004, following appointment of its members by the Chairman in accordance with Article 52(3) of the Convention. An extension of the time period referred to in Rule 54(2), second sentence, of the Arbitration Rules having been agreed upon by the parties, they were invited to present their observations on the question of the stay of enforcement of the Award. The Centre received the observations of the DRC on October 5, 2004, and the reply of Mr. Patrick Mitchell on October 20, 2004.

7. In accordance with Rule 13 of the Arbitration Rules, a first session was held on October 23, 2004 in Paris, in which the parties participated by telephone conference. Minutes of this first session were prepared in French and in English, the two languages of the proceedings.

8. At the first session, agreement was reached on the dates for a new exchange of written pleadings between the parties on the question of the stay of enforcement of the Award. Consequently, on October 28, 2004 the Centre received the reply from the DRC and on November 3, 2004 the rejoinder from Mr. Patrick Mitchell. The parties stated that they agreed not to hold a hearing on the issue of the stay of enforcement, and the *ad hoc* Committee was also of the opinion that holding such a hearing was not of real use.

9. The decision on the stay of enforcement of the Award was rendered in French and English on November 30, 2004. The *ad hoc* Committee decided that:

> "Enforcement of the Award rendered on February 9, 2004 shall continue to be stayed according to Rule 54(2) of the Arbitration Rules, until the *ad hoc* Committee issues its decision on the application for annulment filed by the Democratic Republic of Congo."

10. In accordance with the agreement reached at the first session of October 23, 2004 regarding the dates for the filing of the parties' written pleadings on the

Application, the Centre received on December 23, 2004 the Claimant's Counter-Memorial in response to the Application, on February 23, 2005 the Reply of the Democratic Republic of Congo to the Counter-Memorial of Mr. Patrick Mitchell, and on March 23, 2005 the Claimant's Rejoinder to the Reply of the Democratic Republic of Congo.

11. Both parties submitted documentation in support of their respective arguments. They also requested that the Centre transmit to the *ad hoc* Committee, in accordance with item 14 of the Minutes of the first session, certain documents from the proceedings before the Arbitral Tribunal. On March 4, 2005, the Centre sent to the *ad hoc* Committee copies of all written pleadings exchanged by the parties before the Arbitral Tribunal, as well as, in accordance with the DRC's request in its Reply of February 23, 2005, copies of certain exhibits from the arbitration proceedings that it had identified.

12. A hearing devoted to oral arguments of counsel to the parties was held in Paris on May 11, 2005, in which participated Mr. Emmanuel Gaillard assisted by Ms. Yas Banifatemi and Ms. Anna Crevon for the Claimant, and Mr. Tshibangu Kalala, Mr. Nicolas Angelet, and Mr. Joe Sepulchre for the Respondent. The hearing was conducted in French, as all the participants preferred to express themselves in that language; however, simultaneous interpretation into English was provided in accordance with item 7 of the Minutes of the first session. A transcript in French of the oral arguments was transmitted to the parties for any possible comments that they had in this respect to be submitted by June 20, 2005. The parties' comments concerned mostly questions of form and did not lead to further discussions.

13. Due to the non-payment by the DRC of the amounts requested by the Centre in accordance with Regulation 14(3) of the Administrative and Financial Regulations, the proceeding was suspended on September 21, 2005 by virtue of the above Regulation. The requested payment was finally made by the DRC and the proceeding was resumed on September 19, 2006. As the presentation of the case by the parties had been already completed, the proceeding was declared closed on September 26, 2006 in accordance with Rule 38 of the Arbitration Rules, applied in accordance with Rule 53 of the Rules.

C. The Application for Annulment

14. The Democratic Republic of Congo requests that the *ad hoc* Committee annul the Award of February 9, 2004 on the basis of Article 52(1) of the Convention, more specifically on the grounds set out under paragraphs 1(b) and 1(e). It further requests that all costs in the annulment proceeding be borne by the Claimant, and that he be ordered to reimburse the DRC for all its costs, including its legal fees.

15. The grounds on which the Application for Annulment was based were reduced during the proceedings. In its Application dated June 7, 2004, the DRC cited the following grounds:

(i) Manifest excess of powers with regard to the Arbitral Tribunal's jurisdiction in respect of the definition of investment;

(ii) Manifest excess of powers with regard to the identity of the Claimant and with regard to the "arising directly out of" relationship between the dispute and the investment;

(iii) Manifest excess of powers with regard to the law applicable to the dispute;

(iv) Manifest excess of powers with regard to the failure to apply Article VII(3) of the BIT to the dispute for purposes of determining the admissibility of the request of Mr. Patrick Mitchell; and

(v) Failure to state reasons for the jurisdiction *ratione materiae* of the Arbitral Tribunal with regard to the identity of the Claimant, the characterization of the measures under dispute as expropriation, and the amount of compensable damages.

16. Subsequently, in its Reply to the Counter-Memorial of Mr. Patrick Mitchell dated February 23, 2005, the DRC dropped its second ground for annulment based on a manifest excess of powers with regard to the "arising directly out of" relationship between the dispute and the investment in view of the identity of the Claimant; it also abandoned its fourth ground for annulment based on a manifest excess of powers for failure to apply Article VII(3) of the BIT to the dispute. The Respondent further dropped the second part of its fifth ground for annulment, based on the failure to state reasons regarding the identity of the Claimant.

17. In the final analysis, the Respondent's grounds for annulment are the following:

(i) Manifest excess of powers with regard to the Arbitral Tribunal's jurisdiction in respect of the definition of investment;

(ii) Manifest excess of powers with regard to the law applicable to the dispute; and

(iii) Failure to state reasons for the jurisdiction *ratione materiae* of the Arbitral Tribunal with regard to the characterization of the measures under dispute as expropriation, and the amount of compensable damages.

18. The Claimant, Mr. Patrick Mitchell, opposes the arguments of the DRC and considers the Application for Annulment to be abusive, arguing that the Respondent seeks to review the merits of the Award. He therefore requests that the *ad hoc* Committee reject all grounds for annulment invoked by the DRC and, pursuant to Article 52(4) and of Chapter VI of the Convention, have the Respondent bear all the costs of this proceeding, including legal fees.

D. Principles and Structure of the Present Decision

19. The *ad hoc* Committee considers it appropriate to discuss briefly its role within the annulment system established by Article 52 of the Washington Convention. No one has the slightest doubt – all the *ad hoc* Committees have so stated, and all authors specializing in the ICSID arbitration system agree – that an annulment proceeding is different from an appeal procedure and that it does not entail the

carrying out of a substantive review of an award. In the case at hand, the parties, while agreeing in principle on such distinction, have turned their attention to this issue on a number of occasions; indeed, the grounds invoked by the Respondent in respect of the Award are sometimes based on arguments which touch upon the merits of the case. The *ad hoc* Committee is fully aware of the risk to which the nature of this case exposes it. Nor is there any doubt that the grounds for annulment set out in Article 52 must be examined in a neutral and reasonable manner, that is, neither narrowly nor extensively.[1] An *ad hoc* Committee should not decide to annul an award unless it is convinced that there has been a substantial violation of a rule protected by Article 52. In this case, the grounds invoked for annulment by the Respondent are, on one hand, manifest excess of powers, Article 52(1)(b), which the Arbitral Tribunal allegedly committed in respect of its jurisdiction *ratione materiae* and in respect of the law applicable to the dispute, and, on the other hand, the failure to state reasons, Article 52(1)(e), relating to the Award as regards jurisdiction, the qualification as an expropriation of the disputed measures and the valuation of the compensation.

20. As regards the ground for annulment under Article 52(1)(b) raised by the Respondent with respect to jurisdiction, it is here a question of the positive and habitual aspect of the excess of powers whereby the Arbitral Tribunal is reproached for having done what it did not have the right to do, namely in that it declared itself competent on the basis of an investment which was not one. In contrast, as regards the same ground raised with respect to the applicable law, it is a question of the negative aspect of the excess of powers: the Arbitral Tribunal is reproached for not having done what it was obligated to do, namely in that it did not examine all the provisions of the Treaty. In the context of Article 52, however, the excess of powers has no consequence unless it is manifest. [2] If an excess of powers is to be the cause of an annulment, the *ad hoc* Committee must so find with certainty and immediacy, without it being necessary to engage in elaborate analyses of the award.[3]

21. As regards the ground for annulment under Article 52(1)(e) invoked by the Respondent in respect of jurisdiction, the qualification of the measures under dispute as an expropriation and the valuation of the compensation, the *ad hoc* Committee is of the opinion that a failure to state reasons exists whenever reasons are purely and simply not given, or are so inadequate that the coherence of the reasoning is seriously affected. In other words, the Committee embraces the position adopted by the *ad hoc* Committee in the *MINE* case,[4] according to which *"the requirement that an Award*

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[1] Along these lines, see *Maritime International Nominees Establishment* [MINE] *v. Republic of Guinea* (Case No. ARB/84/4), Decision partially annulling the Award, December 22, 1989, 5 ICSID Rev. – Foreign Inv. L. J. 95 (1990); *Wena Hotels Limited v. Arab Republic of Egypt* (Case No. ARB/98/4), Decision on Application for Annulment, February 5, 2002, 41 I.L.M. 933 (2002); *Compania de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* (Case No. ARB/97/3), Decision on Annulment, July 3, 2002, 19 ICSID Rev. – Foreign Inv. L. J. 89 (2004).

[2] On the meaning of the term "manifest," the *ad hoc* Committee provides the following dictionary definitions. In French: "*dont l'existence ou la nature est évidente. V. certain, évident, indiscutable, visible"* (Le Robert) and especially (Cornu) : *" criant ; qui appelle et justifie incontestablement une intervention, une réaction"* or (with a different nuance) *"grave parce que nécessairement perceptible, grossier, flagrant."* In English: "*plain, open, clearly visible to the eye or obvious to the understanding; apparent; not obscure or difficult to be seen or understood"* (Webster's); *"Manifest means easily noticed or obvious"* (Cambridge International Dictionary of English).

[3] Along these lines, see *Wena Hotels Limited v. Arab Republic of Egypt, op. cit.*, note 1.

[4] *Maritime International Nominees Establishment* [MINE] *v. Republic of Guinea, op. cit.*, note 1.

has to be motivated implies that it must enable the reader to follow the reasoning of the Tribunal on points of fact and law. It implies that, and only that. […] *This minimum requirement is in particular not satisfied by either contradictory or frivolous reasons."* Indeed, it is evident that a seriously contradictory reasoning would be equivalent to a failure to state reasons under Article 52(1)(e), provided that the contradiction is at the same time apparent, to a point such that the *ad hoc* Committee cannot be reproached for engaging in an analysis of the merits.

22. The Application for Annulment includes various criticism of the Award that relates to the two grounds for annulment under 1(b) and 1(e) of Article 52. Since the existence of an investment, which is a condition for the Arbitral Tribunal's jurisdiction, and the law applicable to the expropriation are both contested by the Respondent on the basis of the two grounds for annulment taken cumulatively, the *ad hoc* Committee is of the opinion that its consideration of the matter will be more orderly and efficient if it focuses its analysis first on the issue of jurisdiction/investment as regards the two grounds (Chapter II), secondly on the applicable law/expropriation as regards the same two grounds (Chapter III), and finally on the valuation of the compensation as regards the second ground alone (Chapter IV). The relevant paragraphs of the Award will be indicated in parentheses in the text which follows.

II. Manifest Excess of Power and Failure to State Reasons with Regard to Jurisdiction: The "Investment"

A. The findings of the Arbitral Tribunal

23. As mentioned in the Award itself, the Respondent argued that the dispute did not fall within the jurisdiction of ICSID or the competence of the Arbitral Tribunal. More specifically, the Respondent maintained first that the activity of the "Mitchell & Associates" firm could not be qualified as an investment because by its nature it did not contribute to the economic and social development of the host State; in other words, this activity may have contributed to the promotion of the investor himself, but could not in any way contribute to the economic benefit of Congo (para. 34). Second, the Respondent maintained that the legal counseling activity of the "Mitchell & Associates" firm could not be considered as a commercial activity covered by the Treaty between the Democratic Republic of Congo and the United States (para. 35). Third, the Respondent contended that the notion of "service" used in the Treaty should be understood to be a commercial or economic service related to investments, and that legal consulting cannot constitute an activity covered by this notion (para. 36). Fourth and last, the Respondent maintained that the activity of the "Mitchell & Associates" firm did not satisfy the objective requirements of an investment, given the fact that such activity did not constitute a long-term operation nor was it materialized by a significant contribution of resources, and that it was not of such importance for the country's economy that it distinguished itself from an ordinary commercial transaction (para. 37).

24. The *ad hoc* Committee deems it worthwhile to cite below a number of extracts from the Award in which the Arbitral Tribunal examined the arguments of the Respondent and ultimately concluded that it did have jurisdiction, which passages were those discussed most extensively in the context of the criticisms of the Award:

"47. The Tribunal has received ample information about the activities exercised by Mr. Mitchell in the DRC, which allow it to answer the question concerning the existence of an investment of the Claimant in the DRC. These elements of information include in particular the declarations made by the former clients of the firm, the agreements concluded with former associates who left the firm in 1991 and the income statements for the years 1996 to 1998.

48. The Tribunal finds that in respect of items of Mr. Mitchell's property seized during the intervention of the military forces on March 5, 1999, the requirement listed under Article I(c)(i) of the BIT is met. This concerns movable property and any documents, like files, records and similar items. It further appears from the text of the provision as quoted that the investor's right to "know-how" and "goodwill" (iv) as well as the right to exercise its activities (vi) are elements which are stated as being covered by the protection of investments under the BIT. This concerns also the payments registered on the accounts of Mr. Mitchell in the United States to which Claimant refers in order to demonstrate his activity within the DRC. Indeed, these payments are based on bills for fees referring to legal consultations provided by Mr. Mitchell and his employees through the office "Mitchell & Associates" within the DRC.

[…]

53. It appears therefore to the Tribunal that in the absence of any indication directing to the exclusion from the scope of the Treaty of particular activities that may be considered as services, such a concept should be given a broad meaning, covering all services provided by a foreign investor on the territory of the host State. In this respect, the concept of service is a notion proper to the BIT. There is no indication that such a concept should be interpreted in light of other agreements containing the notion of services, like those concluded within the GATT or WTO, where such a notion is used for other purposes, different from those which were prevalent at the time of the signing of the BIT in 1984. Therefore, the services typically offered by a firm providing legal advice as did the Claimant's firm are covered by the notion of services used by the BIT.

[…]

55. The Tribunal can draw from these elements of definition the conclusion that the BIT contains a definition of the notion of investment which is as broad as the concept is used in the ICSID Convention. In addition to movable property, Claimant transferred into Congo money and other assets which constituted the foundations for his professional activities which came to an end the day of the seizure of his firm or soon thereafter. Together with the returns on the initial investments, which also qualify as investments (see Article I(c) of the BIT), these activities and the economic value associated therewith qualify as an investment within the meaning of the BIT and the ICSID Convention.

56. The Respondent further argues that Claimant's activity does not qualify as an investment as it does not satisfy the objective requirements in this respect. Respondent mentions the fact that such activity does not constitute a long-term operation nor is it materialized by a significant contribution of resources, and that it is not of such importance for the State's economy that it distinguishes itself from an ordinary commercial transaction. The Tribunal notes, however, that these elements, while they are frequently present in investment projects, are not a formal requirement

for the finding that a particular activity or transaction constitutes an investment. Such a concept, as long as it is not supplemented by the appropriate restrictions, does equally include, under the ICSID Convention, and, as demonstrated, under the BIT, "smaller" investments of shorter duration and with more limited benefit to the host State's economy.

57. The Tribunal concludes, accordingly, that Mr. Mitchell's property detained in the Offices of Mitchell & Associates and the resources and activities related to this firm qualify as an investment within the meaning of the ICSID Convention and the BIT. Therefore, the Tribunal decides that this dispute is within the jurisdiction of ICSID and the competence of this Tribunal."

B. The Analysis of the *ad hoc* Committee

1. The Investment in the Context of ICSID

25. In accordance with Article 25(1) of the Convention, the jurisdiction of the Centre depends upon the existence of a dispute "arising directly out of an investment." Reference to this article at the outset is unavoidable; this is what the Arbitral Tribunal also did, and then went on to observe and recall that there is no definition of investment contained in the Convention. Indeed, in the case at hand the question is not so much one of determining whether there is an "arising directly out of" relationship, but rather whether there is an "investment." In the opinion of the *ad hoc* Committee, in view of the absence in the Convention of an explicit definition of the concept of investment, it is in the parties' agreement or in the applicable investment treaty that one should look for such definition, whether it is broad or less broad. In doing so, the fact that a State has not made use of the notification option provided for under Article 25(4) of the Convention may not be understood to mean that that State has taken a certain position regarding the very concept of investment. It is then necessary to verify the conformity of the concept of investment as set out in the parties' agreement or in the BIT with the concept of investment in the Washington Convention, as this latter results from the interpretation of the Convention in accordance with Article 31.1 of the Vienna Convention on the Law of Treaties, as well as from ICSID case law, to the extent the latter may contribute to defining the concept. Indeed, such concept of investment should prevail over any other 'definition' of investment in the parties' agreement or in the BIT, as it is obvious that the special and privileged arrangements established by the Washington Convention can be applied only to the type of investment which the Contracting States to that Convention envisaged.

(a) <u>The Relevant Provisions of the BIT between the Democratic Republic of Congo and the United States</u>

26. In the case at hand, there is no direct agreement between Mr. Mitchell and the DRC, but the bilateral Treaty between the Democratic Republic of Congo and the United States contains, in its Article VII, the offer made by each State to potential investors of the other State to settle their disputes through the ICSID mechanism. This Treaty, like most treaties of its type, contains an enumerative and non exhaustive approach to investment, which makes it possible to apply the protection provided by the Treaty to a range of rights and assets of the foreign investor. But it does not contain, properly speaking, a definition of investment as such. The relevant provisions

of the Treaty are found in its Article I ("Definitions") under item (c) and in its Article II ("Treatment of Investment") under item 2. These provisions provide as follows:

> **"Article I Definitions**
> For the purposes of this Treaty:
> […]
> (c) "Investment" means every kind of investment, owned or controlled directly or indirectly, including equity, debt, and service and investment contracts; and includes:
>
> (i) tangible and intangible property, including all property rights, such as liens, mortgages, pledges, and real security;
> (ii) a company or shares of stock or other interests in a company or interests in the assets thereof;
> (iii) a claim to money or a claim to performance having economic value, and associated with an investment;
> (iv) intellectual and industrial property rights, including rights with respect to copyrights, patents, trademarks, trade names, industrial designs, trades secrets and know how, and goodwill;
> (v) licenses and permits issued pursuant to law, including those issued for manufacture and sale of products;
> (vi) any right conferred by law or contract, including rights to search for or utilize natural resources, and rights to manufacture, use and sell products; and
> (vii) returns which are reinvested.
>
> Any alteration of the form in which assets are invested or reinvested shall not affect their character as investment."

> **"Article II Treatment of Investment**
> […]
> 2. Each Party shall accord existing or new investments in its territory of nationals or companies of the other Party, and associated activities, treatment no less favorable than that which it accords to investments and associated activities of its own nationals or companies or of nationals or companies of any third country, whichever is the most favorable.
>
> Associated activities include:
> (a) the establishment, control and maintenance of branches, agencies, offices, factors or other facilities for the conduct of business;
> (b) the organization of companies under applicable national laws and regulations; the acquisition of companies or interests in companies; the management, control, maintenance, use, and expansion, and the sale, liquidation, and dissolution of companies organized or acquired;
> (c) the making, performance and enforcement of contract;
> (d) the acquisition (whether by purchase, lease or otherwise), possession with rights of ownership, and disposition (whether by sale, testament or otherwise), of property, both tangible and intangible;
> (e) the leasing of real property required for the conduct of business;
> (f) the acquisition, maintenance, and protection of intellectual property rights, patents, trademarks, trade secrets, trade names, licenses and other approvals of products and manufacturing processes, and other industrial property rights; and
> (g) the borrowing of funds, the purchase and issuance of equity shares, and the purchase of foreign exchange for imports."

(b) Characteristics of the Investment under the Washington Convention

27. There are four characteristics of investment identified by ICSID case law[5] and commented on by legal doctrine,[6] but in reality they are interdependent and are consequently examined comprehensively. The first characteristic of investment is the commitment of the investor, which may be financial or through work; indeed, in several ICSID cases the investor's commitment mainly consisted in its know-how.[7] Other characteristics of investment are the duration of the project and the economic risk entailed, in the sense of an uncertainty regarding its successful outcome. The fourth characteristic of investment is the contribution to the economic development of the host country, a matter which the *ad hoc* Committee will review at some length in that it is a key point of the debates in the Annulment Proceedings. Indeed, while the Respondent regards the contribution to economic development as an "essential element" of investment which, if found wanting, must prompt the Arbitral Tribunal to declare that it lacks jurisdiction,[8] the Claimant Mr. Patrick Mitchell regards this contribution to economic development – which he does not contest constitutes one of the criteria for the existence of an investment[9] – as a supplementary condition used heretofore in order to justify the broadening of the concept of investment and as somewhat duplicating with the investor's commitment .[10]

28. The Preamble of the Washington Convention sets forth a number of basic principles as to its purpose and aims, which imbue the individual provisions of the Convention, including Article 25, which makes it needless to mention that the Convention was concluded under the auspices of the International Bank for Reconstruction and Development itself:

> "Considering the need for international cooperation for economic development, and the role of private international investment therein; […]."

29. It is thus quite natural that the parameter of contributing to the economic development of the host State has always been taken into account, explicitly or

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[5] *Fedax N.V. v. Republic of Venezuela* (Case No. ARB/96/3), Decision on Objections to Jurisdiction, July 11, 1997, 5 ICSID Rep. 186 (2002); *Ceskoslovenska obchodni banka, a.s* [CSOB] *v. Slovak Republic* (Case No. ARB/97/4), Decision on Objections to Jurisdiction, May 24, 1999, 14 ICSID Rev. – Foreign Inv. L. J. 251 (1999); *Salini Construttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* (Case No. ARB/00/4), Decision on Jurisdiction, July 23, 2001, 129 Journal du droit international 196 (2002) [English translations of French original in 42 ILM 609 (2003), 6 ICSID Rep. 400 (2004)].

[6] Christoph Schreuer, *The ICSID Convention: a Commentary*, Cambridge University Press, 2001, p. 140, who actually identifies five characteristics of investment, differing as to the commitment characteristic: on the one hand, he considers that the commitment must be substantial, and on the other hand, he includes in the characteristics a certain regularity of profit and return; Sébastien Manciaux *« Investissements étrangers et arbitrage entre Etats et ressortissants d'autres Etats – Trente ans d'activité du CIRDI »*, Litec 2004, pp. 63 et seq.

[7] *Holiday Inns S.A. and others v. Morocco*, (Case No, ARB/72/1), Decision on jurisdiction, May 12, 1974, described by Pierre Lalive in "*The first 'World Bank' Arbitration (Holiday Inns v. Morocco) – Some Legal Problems,"* 51 British Year Book of International Law 123 (1980); *Amco Asia Corporation and others v. Republic of Indonesia* (Case No. ARB/81/1), Decision annulling the Award, May 16, 1986, 25 I.L.M. 1439 (1986); *Salini Construttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, *op. cit.* note 5.

[8] Respondent's Reply to the Claimant's Counter-Memorial of February 23, 2005, p. 39.

[9] Claimant's Rejoinder to the Reply of the DRC of March 23, 2005, p. 15.

[10] Transcript of the hearing of May 11, 2005, p. 37.

implicitly, by ICSID arbitral tribunals in the context of their reasoning in applying the Convention, and quite independently from any provisions of agreements between parties or the relevant bilateral treaty.

30. Indeed, in the *Salini* case,[11] the contribution to the economic development of the host State was explicitly set as a "criterion" for an investment which was subsequently taken into account in respect of the construction of a highway, which led to the conclusion that the highway was clearly of public interest. Similarly, in the *Fedax* case,[12] which involved promissory notes issued by the Republic of Venezuela to guarantee a loan equivalent to their amount, the arbitral tribunal observed that: "*It is quite apparent that the transactions involved in this case are not ordinary commercial transactions and indeed involve a fundamental public interest* […] *There is clearly a significant relationship between the transaction and the development of the host State.*" Finally, in the *CSOB* case,[13] which involved a 'consolidation agreement' between the Czech Republic, Slovakia, and the Czechoslovak bank *CSOB*, with each of the two new States guaranteeing the reimbursement of the loan granted by *CSOB* to its national Collection Company, the Arbitral Tribunal observed that: "*Under certain circumstances a loan may contribute substantially to a State's economic development* […] [The] *undertaking involved a significant contribution by CSOB to the economic development of the Slovak Republic within the meaning of the Convention.*" While it is true that in these cases, where explicit reference was made to the "contribution to the economic development of the host State," the concept of investment was somewhat 'broadened,' this does nothing to alter the fundamental nature of that characteristic. It is thus found that, in another group of cases where the contribution to the economic development of the host State had not been mentioned expressly, it was doubtless covered by the very purpose of the contracts in question – all of which were State contracts – which had an obvious and unquestioned impact on the development of the host State.[14]

31. In addition to the foregoing, it bears noting that Professor Schreuer regards the contribution to the economic development of the host State as "*the only possible indication of an objective meaning"* of the term "investment."[15] In other words, the parties to an agreement and the States which conclude an investment treaty cannot open the jurisdiction of the Centre to any operation they might arbitrarily qualify as an

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[11] *Salini Construttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, op. cit.,* note 5.
[12] *Fedax N.V. v. Republic of Venezuela, op. cit.,* note 5.
[13] *Ceskoslovenska obchodni banka, a.s.* [CSOB] *v. Slovak Republic, op. cit.,* note 5.
[14] See, for example, *Alcoa Minerals of Jamaica Inc. v. Jamaica* (Case No. ARB/74/2), Decision on Jurisdiction and Competence, July 6, 1975, 4 YBCA 206 (1979); *Tradex Hellas S.A. v. Republic of Albania* (Case No. ARB/94/2), Award, April 29, 1999, 14 ICSID Rev. – Foreign Inv. L. J.197 (1999); *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (Case No. ARB/01/13), Decision on Objections to Jurisdiction, August 6, 2003, 18 ICSID Rev. – Foreign Inv. L. J. 301 (2003); *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines* (Case No. ARB/02/6), Decision on Objections to Jurisdiction, January 29, 2004, http://www.worldbank.org/icsid/cases/.
[15] *Op. cit.,* note 6, § 88, p. 124: *"The only possible indication of an objective meaning that can be gleaned from the Convention is contained in the Preamble's first sentence, which speaks of "the need for international co-operation for economic development and the role of private international investment therein" […] Therefore, it may be argued that the Convention's object and purpose indicate that there should be some positive impact on development."*

investment. It is thus repeated that, before ICSID arbitral tribunals, the Washington Convention has supremacy over an agreement between the parties or a BIT.

32. This said, the problem does not arise in the case at hand, since not only are the aforementioned provisions of the Bilateral Treaty between the Democratic Republic of Congo and the United States altogether usual and in no way exorbitant, but the same Treaty also recognizes clearly in its Preamble

> "that agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of both Parties."

Moreover, this is a provision that appears in all bilateral treaties signed by the United States, and was even emphasized in the Preamble to the *2004 Model BIT*.[16]

33. The *ad hoc* Committee wishes nevertheless to specify that, in its view, the existence of a contribution to the economic development of the host State as an essential – although not sufficient – characteristic or unquestionable criterion of the investment, does not mean that this contribution must always be sizable or successful; and, of course, ICSID tribunals do not have to evaluate the real contribution of the operation in question. It suffices for the operation to contribute in one way or another to the economic development of the host State, and this concept of economic development is, in any event, extremely broad but also variable depending on the case.

2. The Reasoning of the Arbitral Tribunal

34. It bears recalling that the case at hand did not involve a "*readily recognizable*"[17] investment, as it concerned a legal counseling firm established by a U.S. citizen in the DRC. It is the first time that such an operation was considered within the special arbitration system of ICSID as a dispute between a State and an investor from another State. Moreover, during the proceedings before the Arbitral Tribunal, the DRC had concretely contested the existence of an investment, mainly in respect of the criterion of the contribution to the economic development of the country[18].

35. The Award (paras. 48 and 55 cited above) identifies as elements constituting Mr. Patrick Mitchell's investment:

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[16] *"The Government of the United States of America and the Government of [Country] (hereinafter the "Parties");*
Desiring to promote greater economic cooperation between them with respect to investment by nationals and enterprises of one Party in the territory of the other Party;
Recognising that agreement on the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties;
Agreeing that a stable framework for investment will maximize effective utilization of economic resources and improve living standards; […]"

[17] Aron Broches, cited by Christoph Schreuer, *op. cit.*, note 6, § 86, p. 124: "[…] *Mr. Broches recalled that none of the suggested definitions of the word "investment" had proved acceptable. He suggested that while it might be difficult to define the term, an investment was in fact readily recognizable."*

[18] Counter-Memorial of September 3, 2001, p. 8, 11 and 12; Counter-Memorial in Response of April 8, 2002, p. 7; Counter-Memorial in Reply of January 7, 2003, p. 9.

- the movable property and any documents, like files, records and similar items, of the firm, as per item I(c)(i) of the BIT;
- rights with respect to know-how and goodwill as well as the right to exercise his activities, as per item I(c)(iv);
- the payments registered on the accounts of Mr. Patrick Mitchell in the United States, which came from fees referring to legal consultations provided within the DRC.

36. With the exception of the payments, to which the *ad hoc* Committee will return later, the elements identified by the Award for purposes of affirming the existence of an investment fall well within the scope of application of the Treaty as they are "included" in the term "investment" pursuant to Article I(c) of the Treaty. But do these elements, absent further discussion, make it possible to affirm the existence of an investment within the meaning of the Washington Convention?

37. As the DRC has contested whether legal consulting services come within the notion of "services" included in the introductory portion of item I(c) of the Treaty, the Arbitral Tribunal considered that the concept of service must be broad in scope, including "any service provided by a foreign investor," and especially the services normally provided by a legal consulting firm, as was the case of the Claimant's firm (para. 53). The *ad hoc* Committee cannot but observe two things: first, that resolving the question of application of the concept of service within the meaning of the Treaty to legal consulting services by stating that this concept embraces "any service provided by a foreign investor," is to fall into a vicious circle, inasmuch as the Award does not explain why in this case the Claimant was an investor; and second, that item I(c) of the Treaty speaks of "every kind of investment, […] including […] service and investment contracts," and not of "every kind of service." This said, it is easy to follow the Award as regards the inclusion of a legal consulting firm within the concept of service, but that is not the issue at hand.

38. In the opinion of the *ad hoc* Committee, one should avoid confusing the economic operation or project – which, if it fulfills certain characteristics, becomes the investment within the meaning of the Convention and the Treaty, even if it is "smaller" and "of shorter duration and with more limited benefit to the host State's economy" (para. 56) – with all the rights and assets protected by the Treaty because they are part of the operation or project, or concern the same in one way or another. In this case, by the nature of things, it is the services of the "Mitchell & Associates" firm that would or would not constitute the investment within the meaning of the Convention and the Treaty, and certainly not the minimal 'investment' in the strictly economic sense of the term that Mr. Patrick Mitchell made with a view to establishing and exercising his profession in the DRC. It is true that the latter would be protected by the Treaty, but because it related to the operation or project constituting the investment. However, nothing is said in the Award about the content of the services of the "Mitchell & Associates" firm that would justify the decision to qualify them as an investment.

39. As a legal consulting firm is a somewhat uncommon operation from the standpoint of the concept of investment, in the opinion of the *ad hoc* Committee it is necessary for the contribution to the economic development or at least the interests of the State, in this case the DRC, to be somehow present in the operation. If this were

the case, qualifying the Claimant as an investor and his services as an investment would be possible; furthermore, it would be necessary for the Award to indicate that, through his know-how, the Claimant had concretely assisted the DRC, for example by providing it with legal services in a regular manner or by specifically bringing investors. It does appear, according to the statements of both parties,[19] that some U.S. investors had indeed consulted the "Mitchell & Associates" firm. However, the Award itself is actually mute on this issue. The vague indication set forth in para. 47 of the Award, to the effect that the Arbitral Tribunal had received ample information about the activities exercised by Mr. Mitchell, including in particular the declarations made by former clients of the firm, the agreements concluded with former associates, and income statements, fail to fill this gap. The same holds true as regards the passing reference made in para. 71 of the Award with respect to the loss of clients, according to which "many clients had been asking the firm for counseling in relation to requests to be presented to State authorities."

40. The Award is incomplete and obscure as regards what it considers an investment: it refers to various fragments of the operation, without finally indicating the reasons why it regards it overall as an investment, that is, without providing the slightest explanation as to the relationship between the "Mitchell & Associates" firm and the DRC. Such an inadequacy of reasons is deemed to be particularly grave, as it seriously affects the coherence of the reasoning and, moreover, as it opens the door to a risk of genuine abuses, to the extent that it boils down to granting the qualification as investor to any legal counseling firm or law firm established in a foreign country, thereby enabling it to take advantage of the special arbitration system of ICSID.

41. The *ad hoc* Committee thus concludes that the Award is tainted by a failure to state reasons, in the sense that the inadequacy of reasons is such that it seriously affects the coherence of the reasoning as to the existence of an investment in accordance with Article 25(1) of the Convention and the Bilateral Treaty between the United States of America and the Democratic Republic of Congo, on which relied the jurisdiction of the Arbitral Tribunal.

3. Excess of Power? Manifest Excess of Power?

42. The *ad hoc* Committee now reverts to the question of the returns of the "Mitchell & Associates" firm as an element constituting the investment identified by the Arbitral Tribunal as above in para. 48 of the Award:

> "[…] are elements which are stated as being covered by the protection of investments under the BIT. This concerns also the payments registered on the accounts of Mr. Mitchell in the United States."

This conclusion is repeated in para. 55 of the Award where, again with reference to movable property, money, and other assets which the Claimant had transferred into the DRC for purposes of establishing his firm, the Arbitral Tribunal adds the following sentence:

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[19] See, for the Claimant, the transcript of the hearing of May 11, 2005, p. 20, and for the Respondent, its Reply to the Counter-Memorial of Mr. Patrick Mitchell of February 23, 2005, p. 43.

> "Together with the returns on the initial investments, which also qualify as investments (see Article I(c) of the BIT), these activities and the economic value associated therewith qualify as an investment within the meaning of the BIT and the ICSID Convention."

The returns are thus, it clearly appears, deemed by the Arbitral Tribunal to be an element constituting the investment, even though the returns in question were, according to the Award itself (para. 48), registered on the accounts of Mr. Patrick Mitchell in the United States and, moreover, Mr. Mitchell never referred to his returns before the Arbitral Tribunal in order to establish ICSID jurisdiction (as it clearly results from paras. 38-39 of the Award concerning the position of the Claimant).

43. The finding of the Arbitral Tribunal on this point is rather surprising, in that Article I(c) of the BIT includes in the concept of investment under item (vii) "returns which are reinvested." Consequently, 'non-reinvested' returns cannot be included in the concept of investment and be protected by the Treaty. This *a contrario* interpretation of one of the items on an enumerative list, even one that is not exhaustive, is fully in keeping with the logic and the spirit of a BIT and is equivalent to an interpretation "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose," in accordance with Article 31(1) of the Vienna Convention on the Law of Treaties of 1969, which codifies a rule of customary international law.[20]

44. The discussion of the returns of Mr. Patrick Mitchell identified as an element of his investment led, during the Annulment Proceedings, to another question on which the Respondent placed great emphasis. This is the Claimant's sheltering of his income from Congolese taxation, alleged by the Respondent in support of its ground of manifest excess of power as to the jurisdiction of the Arbitral Tribunal in respect of the definition of the investment: not only did the Claimant in no way contribute to the economic development of the Respondent, but by removing his income from the latter's tax system he "knowingly and voluntarily acted against the development of the DRC."[21] This argument was not raised by the Respondent during the proceedings on the merits; moreover, tax avoidance – assuming it to have existed – however shocking it may be in the eyes of the DRC, relates to the merits of the case and in any event is not determining as to the existence *per se* of an investment. Consequently, the *ad hoc* Committee need not express an opinion on this argument by the Respondent.

45. The *ad hoc* Committee has already identified a serious failure to state reasons as to the existence of an investment on which the jurisdiction of the Arbitral Tribunal would be based. If this had not been the case and the Award had been adequately and cohesively reasoned as to the existence of an investment by the Claimant, the error committed by the Arbitral Tribunal as to the inclusion of non-reinvested returns in the notion of investment could not be identified as a manifest excess of power. An *ad hoc* Committee ought not to sanction an error of interpretation of the Treaty – as awkward

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[20] Along these lines, see International Court of Justice, *Case Concerning the Arbitral Award of 31 July 1989*, 12 November 1991, (Guinea-Bissau v. Senegal), Rec. 1991 §48 [in French], English summary at http://www.icj-cij.org/icjwww/icases/igbs/igbs_isummaries/igbs_isummary_19911112.htm.

[21] Respondent's Reply to the Counter-Memorial of Mr. Patrick Mitchell of February 23, 2005, p. 44.

as it may be – when, even in the absence of such error, the result would have been the same.

46. But here the error is certainly not one of inadvertence and compounds the failure to state reasons. It is an arbitrary reference, made two or even three times in the Award (paras. 48, 55, and 57 less clearly, in speaking of "resources"), to the returns collected by the Claimant in the United States being treated as an element constituting the investment, which runs counter to the clear and precise provision of the Treaty and compounds reasoning which is already incomplete and obscure. The *ad hoc* Committee is thus inclined to believe that the Arbitral Tribunal forced the concept of investment in the case at hand in order to affirm its jurisdiction. This is perhaps attributable to the discomfort engendered in the Arbitral Tribunal by the factual circumstances of the case, namely the violent dispossession of the Claimant's property and good will. The fact remains, however, that this combination of flaws in the Award is such that an excess of power on the part of the Arbitral Tribunal must be acknowledged.

47. It is a manifest excess of power: on the first reading of the Award, even before examining the Treaty, questions arise as to the basis for the jurisdiction of the Arbitral Tribunal in general, and the reader is disconcerted to find that returns received in the United States and non-reinvested in the host State are identified as an element of the investment within the meaning of a Bilateral Investment Treaty.

48. The *ad hoc* Committee is thus obligated to annul the Award of February 9, 2004 due to the failure to state reasons and manifest excess of powers committed by the Arbitral Tribunal in its decision to declare itself competent. It is evident that this annulment, as it concerns the very jurisdiction of the Arbitral Tribunal, cannot but relate to the Award as a whole, making it somewhat superfluous to examine the other criticisms expressed by the DRC about the Award. However, given the importance of certain arguments debated between the parties in respect of these criticisms, the *ad hoc* Committee deems it useful to discuss the other grounds briefly. Needless to say, the discussion which follows is written as if the "Mitchell & Associates" firm did constitute a genuine investment and the Arbitral Tribunal properly considered that it had jurisdiction.

III. Manifest Excess of Power and Failure to State Reasons with Regard to the Applicable Law: The "Expropriation"

A. The Non-Application of Article X(1) of the BIT

49. The Committee finds that it is in consideration of the facts and in application of Article III(1) of the Treaty on "Compensation for Expropriation" – the standard provision of all BITs regarding the undertaking of States not to expropriate or nationalize an investment or subject it to "any other measure or series of measures, direct or indirect, tantamount to expropriation," except under certain conditions including "done for a public purpose" and "accompanied by prompt, adequate, and effectively realizable compensation" – that the Arbitral Tribunal decided (para. 71) that:

> "[…] the measures taken by the military authorities of the DRC are tantamount to an expropriation of Mr. Mitchell's investment, including the loss of clients who no longer made use of the services provided by the firm."

50. The DRC argues that the Award failed to take into account Article X(1) of the Treaty on "Measures not precluded by this Treaty." This article provides as follows:

> "This Treaty shall not preclude the application by either Party of measures necessary in its territory for the maintenance of public order and morality, the fulfillment of its obligations with respect to the maintenance and restoration of international peace and security, or the protection of its own essential security interests."

1. The Ground of Manifest Excess of Power

51. According to the Respondent, Article X(1) effectively determines the scope of application of the Treaty and makes it completely nonapplicable, or determines the scope of exclusion from it and consequently makes Article III nonapplicable. In substance, the DRC argues that Article X(1) determines the range of the undertakings engaged in by the States under Article III; that the Treaty, being the applicable law according to the Award, constitutes a "body of rules" that should have been taken into consideration by the Arbitral Tribunal in its entirety. This is especially so because the DRC had expressly called the attention of the Arbitral Tribunal to the state of war in the Congo and had made reference to the circumstances making the disputed measures necessary in order to address what it characterized as a "threat to State security." Consequently, the Arbitral Tribunal would have had before it all the information necessary – not to forget the international press, which was focusing attention on the armed conflict in Congo and its relations with the exploitations of that country's natural resources – to bring Article X of the Treaty to bear. In not having done so, still according to the Respondent, it manifestly exceeded its powers as regards the applicable law.

52. The Award devotes an entire chapter to the concept of expropriation. While the Award does not provide an analysis of the Treaty and its Article III(1), one can easily understand why the sealing of the "Mitchell & Associates" firm, the seizure of documents considered to be compromising, and the imprisonment of two lawyers, as well as the subsequent loss of clients by the firm, were deemed by the Award to be a measure equivalent to an expropriation. Parenthetically, the *ad hoc* Committee notes that seizure is commonly taken to constitute a measure equivalent to expropriation.[22] Indeed, the Arbitral Tribunal dealt only with the effect that the measure had for the 'investor', that is, privation from the use of his 'investment', in order to consider such privation equivalent to an expropriation. It did not concern itself with the finality of

[22] See, *inter alia,* an explicit discussion in document ACP-CEE 2172/92 of the Council of the European Communities entitled *"Community Position on Investment Protection Principles in the African, Caribbean and Pacific States,"* Brussels, November 3, 1992, which was drawn up in the context of the Lomé IV Convention to establish a basis and provide advice for the negotiation of bilateral treaties: *"4. Expropriation (i) Scope of "expropriation": Protection against expropriation should extend to any measures attributable to the host government which have the effect of depriving an investor of his ownership or control of, or a substantial benefit from, his investment. This formula is intended to capture myriad forms of expropriation, including nationalisation, confiscation, sequestration, seizure and attachment."*

that measure in the eyes of the judiciary of the DRC that handed it down, which was to investigate a presumed criminal violation and punish it. The Arbitral Tribunal did not assess the possibility of regarding this not as a measure equivalent to an expropriation, but as a court measure that was driven by circumstances and was temporary, separate from any desire of the host State to threaten an investment, a measure which caused Mr. Mitchell and two Congolese nationals to suffer irreparable damages in the context of an ICSID proceeding.

53. However, the fact that the Arbitral Tribunal focused solely on the impact that the measure had on the 'investment' corresponds to the application of the tantamount principle which is consistent with the spirit of investment treaties, namely the protection of investors. It bears noting in this regard that the 1992 Directives of the World Bank[23] had already expressly mentioned "measures which have similar effects" and that a number of investment treaties also explicitly refer to "measures of tantamount effect."[24] It also bears noting that in the case of *Metalclad v. Mexico*, concerning the application of Article 1110 of the NAFTA Treaty which is similar to Article III(1) of the BIT (without mention of the effect), the Arbitral Tribunal made reference only to the effect of the measure for the investor, without taking into account the purpose sought by the expropriating authority.[25] This appears to be a practice of arbitrators – at present a majority of them – in international investment disputes when they are assessing the tantamount character.[26]

54. In any event, regardless of the various positions adopted in legal doctrine and case law on the question of determining whether the effect should be the sole and unique criterion to be used in assessing an indirect expropriation or a measure tantamount to expropriation, or whether the purpose sought by the State is also to be

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[23] *"Guidelines on the Treatment of Foreign Direct Investment Issued by the Development Committee,"* 7 ICSID Rev. – Foreign Inv. L. J. 295 (1992), Section IV, *"Expropriation and unilateral alterations or termination of contracts," § 1: "A State may not expropriate or otherwise take in whole or in part a foreign private investment in its territory, or take measures which have similar effects, except where this is done in accordance with applicable legal procedures, in pursuance in good faith of a public purpose, without discrimination on the basis of nationality and against payment of appropriate compensation."*

[24] This is the case, for example, of the bilateral investment protection treaties concluded between the United States and Senegal, the United States and Tunisia, the United States and Mozambique; it is also the case for the document of the Council of the European Communities entitled *"Community Position on Investment Protection Principles in the African, Caribbean and Pacific States," op. cit.*, note 21; furthermore, it is the case of the bilateral treaties concluded by France, the Greco-Egyptian treaty (See *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt* (Case No. ARB/99/6), Award, April 12, 2002, 18 ICSID Rev. – Foreign Inv. L. J 602 (2003)), as well as the BIT between Burundi and the Belgo-Luxembourg Economic Union (See *Antoine Goetz and others v. Republic of Burundi* (Case No, ARB/95/3), Award embodying the parties' settlement agreement, February 10, 1999, 15 ICSID Rev. – Foreign Inv. L. J 457 (2000)).

[25] *Metalclad Corporation v. United Mexican States*, (Case No. ARB(AF)/97/1), Award, August 30, 2000, 16 ICSID Rev. – Foreign Inv. L. J. 168 (2001): *"Thus, expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State."*

[26] See Yves Nouvel, *"Les mesures équivalant à une expropriation dans la pratique récente des tribunaux arbitraux,"* RGDIP 2002, pp. 79 et seq.

taken into account, it cannot but be found in the case at hand that the Arbitral Tribunal, in apparently opting for the "sole effect" doctrine, was merely exercising its freedom of judgment.

55. Turning now to what is really argued against the Award, namely the manifest excess of powers as to the applicable law, the Committee finds, first, as clearly set out by the Claimant, that Article X(1) of the Treaty is a provision relating to the causes for exemption from liability, or, in other words, a provision which precludes the wrongfulness of the behavior of the State[27] in certain exceptional circumstances, and not a provision which delimits the scope of application of the Treaty. Namely, by application of Article X(1) and following some scrutiny by the Arbitral Tribunal concerning the need for the measures undertaken, the DRC might have been spared the reproach of having violated its international obligation to protect U.S. investors.

56. Second, the Committee finds that Article X(1) was not invoked by the DRC before the Arbitral Tribunal; the DRC simply referred to the measures to maintain order and security in the context of its factual argument as to the legitimacy of dispossessing the Claimant. There is no doubt that, as clearly stated by the *ad hoc* Committee in the *MINE* case,[28] the annulment proceeding *"is not an occasion to present arguments and submissions which a party failed to make in the underlying proceedings,"* but that issue is not raised here in the same manner; this is because while Article X(1) itself was not adduced by the DRC, the threat to State security was actually inserted into the debate before the Arbitral Tribunal through its written pleadings and the documentation it submitted (in particular the decision to remand the charged Mr. Djunga and Mr. Risasi before the Military Court of Order) in order to justify the intervention of the military against the "Mitchell & Associates" firm. Is it possible to find a manifest excess of powers in the fact that, in these circumstances, the Arbitral Tribunal did not examine Article X(1) of the Treaty?

57. It is entirely conceivable that, in view of the specific circumstances of the intervention of the military forces against the "Mitchell & Associates" firm, the well known state of war in Congo,[29] and the DRC's contestation of the qualification of the measures under dispute as an expropriation, the Arbitral Tribunal would have been welcome to address *ex proprio motu* the other provisions of the Treaty, which might potentially excuse taking such measures against the Claimant. A comparable approach would have been along the lines of the adage *jura novit curia* – on which the DRC leaned heavily during the Annulment Proceeding – but this could not truly be required of the Arbitral Tribunal, as it is not, strictly speaking, subject to any obligation to

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[27] See, for example, International Court of Justice, *Case concerning the Gabcikovo-Nagymaros Project (Hungary-Slovakia)*, Decision of September 25, 1997, Rec. 1997 §§ 51-52 : *"The Court considers, first of all, that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. It observes moreover that such ground for precluding wrongfulness can only be accepted on an exceptional basis* […] *Thus, according to the Commission, the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met."*

[28] *Maritime International Nominees Establishment* [MINE] *v. Republic of Guinea, op. cit.*, note 1.

[29] This situation was widely known not only through the international press, but also through a series of UN Security Council Resolutions issued during the period of the arbitration proceedings.

apply a rule of law that has not been adduced; this is but an option – and the parties should have been given the opportunity to be heard in this respect – for which reason it is not possible to draw any conclusions from the fact that the Arbitral Tribunal did not exercise it. Furthermore, the *ad hoc* Committee notes that even if the Arbitral Tribunal had examined Article X(1) of the Treaty, if it had checked the need for the measures – regardless of the degree of such a check – and if it had concluded that they were not wrongful, this would not necessarily have had any impact on evaluating the act of dispossessing Mr. Mitchell, and on the need for compensation; possibly, it could have had an influence on the calculation of the amount of such compensation.[30] Consequently, it is evident that manifest excess of powers does not apply in this instance.

2. The Ground of Failure to State Reasons

58. As regards the ground of failure to state reasons adduced by the Respondent, still as regards the application of Article X(1), it is certain that there can be no serious discussion of "failure to state reasons" in the case of a provision not adduced before the Arbitral Tribunal. In the case at hand, the failure to state reasons is all the less warranted given that para. 74 of the Award, even though it is set out in the context of Article III(1) and the criterion of public purpose, the existence of which was contested by the Claimant, seems to the Committee also to cover, implicitly, the scope of Article X(1):

> "On the first point [i.e. § 73: "Claimant contends, firstly, that the expropriation he suffered was not made for a public purpose (lit. a)"], the Tribunal does not have to rule on it since the sole purpose of the claim is to provide Mr. Mitchell with compensation for the prejudice he suffered. It is true that the decision of the Military Court of November 12, 1999 stated that the arrest of Messrs. Risasi and Djunga was not justified and that, with the exception of two cars requisitioned by the army, all items that have been seized had to be returned. Respondent argues, however, that on March 5, 1999, the authorities of the Congo had sufficient reasons to fear for the security of the State and to justify an intervention and an investigation, the principal reason relating to the risk that the product of the sale of the 99 tons of cassiterite would go to SAKIMA SARL, a company which was, in the view of the Congolese authorities, run by certain individuals with ties to the rebellion against the Government of the DRC. The Tribunal does not dispose of enough information to evaluate, under all pertinent angles, the situation as it existed in March 1999. It cannot make a statement, therefore, on Respondent's argument that there existed, at the relevant time a public purpose and a legitimate power of the military forces, based

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[30] See along these lines, and predating the Washington Convention, A.A. Fatouros, *Government Guarantees to Foreign Investors*, Columbia University Press, 1962, pp. 307 et seq., and far more recently, Dominique Carreau & Patrick Juillard, *« Droit international économique »*, 4e éd., Paris, LGDJ, 1998, and further, bearing witness to the existence of a principle of international law in this regard, the draft articles on the responsibility of States for internationally wrongful acts adopted by the International Law Commission and annexed to United Nations General Assembly Resolution A/RES/56/83 of December 12, 2001. Article 27 of that draft reads:

"Consequences of invoking a circumstance precluding wrongfulness:
The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:
(a) Compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;
(b) The question of compensation for any material loss caused by the act in question."

> on the Constitution or the Law, that would have justified, at least as a preventive measure, the intervention which did actually occur."

Since the Tribunal did not dispose of "enough information to evaluate, under all pertinent angles, the situation as it existed in March 1999" as to the existence of a public purpose under Article III(1), it logically also did not have, *a fortiori*, enough information as to a threat to the security of the State under Article X(1) which might have made the measure undertaken "necessary."

59. Furthermore, the *ad hoc* Committee can only repeat, as mentioned above, that even if it were assumed that the Arbitral Tribunal had examined Article X(1) and had agreed that the measures undertaken were not wrongful, this would not have ruled out the need for compensation.

60. From whatever angle, the Committee is of the opinion that there would not have been any reason, in the case at hand, to annul the Award for failure to state reasons in respect of the application of Article X(1).

B. The Non-Application of Articles II and IV of the Treaty: The Ground of Failure to State Reasons

61. The DRC further argues, albeit less fierce fully and rather *ad abundatiorem cautelam*, that the Award suffers from a failure to state reasons as to qualifying the measures under dispute as expropriation, as the Arbitral Tribunal did not take into account Article II ("Treatment of Investment") and Article IV ("Compensation for Damages due to War and Similar Events") of the Treaty. It argues that the Arbitral Tribunal should have interpreted and applied Article III(1) in light of Articles II(4) and IV, which would have led it to conclude that there was no expropriation.

62. The *ad hoc* Committee sees no purpose being served by specifically examining these criticisms of the Award, all the more so since the provisions in question do not have the same likelihood of 'applicability' in the case at hand as does Article X(1). The Committee shall confine itself to stressing that the application of these provisions of the Treaty was not adduced before the Arbitral Tribunal; several of the considerations set forth above with regard to Article X could be transposed to the non-application of Articles II(4) and IV, and, in any event, the ground of failure to state reasons cannot be applied in the case of provisions not adduced before the tribunal ruling on merits.

IV. Failure to State Reasons with Regard to the Evaluation of the Compensation

A. The Arbitral Tribunal's Findings

63. The Arbitral Tribunal calculated the damages sustained by Mr. Patrick Mitchell on the basis of Article III(1) of the Treaty, which stipulates that "Compensation shall be equivalent to the fair market value of the expropriated investment." It examined Mr. Mitchell's various accounts in Congo, the United States, and South Africa, and found, on the one hand (para. 79), that:

> "For reasons related to the monetary fluctuations in the DRC, most of the clients paid their fees in US$ to the accounts of Mitchell & Associates in the USA or in the RSA, whereas payments in cash were usual in the Congo."

It found, on the other hand (para. 80), that the payments to the accounts in the United States and South Africa:

> "are related to services provided by the Claimant's firm in the DRC."

Finally, the Arbitral Tribunal retained only the payments recorded on Mr. Mitchell's accounts in the United States (para. 87), clarifying that:

> "The Tribunal finds that the variations and differences appearing when consulting these accounts [the accounts held at the Office in Kinshasa], as well as the small accounts on balance, do not justify taking them into account for the purpose of establishing the commercial value of the firm, the profit of which results essentially from the accounts held in the USA."

B. The DRC's criticism

64. The DRC argues that the Award suffers from a failure to state reasons in various different ways, which are summarized as follows:

(i) The Award uses as its basis for calculating the damage to Mr. Mitchell the projection into the future, over three years, of the income from the three preceding years, without providing clear explanations in this respect: If Mr. Mitchell's return to the DRC meant that the effects of the expropriation had come to an end, the measures taken against the "Mitchell & Associates" firm would not have resulted in "the total loss of the firm as an entity providing legal services in the DRC" (para. 65 of the Award) and the loss of clients would not have been definitive (contrary to what is stated in para. 72 of the Award); there would thus be contradictory reasoning. If, on the other hand, the three-year period selected was not associated with the end of the effects of the expropriation upon Mr. Mitchell's return to Congo, that the reasoning behind the Award is incomplete and incomprehensible.

(ii) The Arbitral Tribunal chose a method for valuation of compensation consisting in projecting past profits into the future, without taking account of political circumstances and of the state of war in Congo, which had profoundly disrupted the Congolese economy.

(iii) The Arbitral Tribunal took into account the affidavit of SAKIMA SARL in order to conclude that the measures under dispute had resulted in the loss of clients by Mr. Mitchell, while the DRC had presented in its discussion of the facts that there were ties between that company and Mr. Patrick Mitchell (this would constitute not only a failure to state reasons, but also – according to an argument raised by Respondent three times, yet incidentally[31] – a serious violation of a procedural rule).

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[31] Application for Annulment and Stay of Enforcement of the Award of February 9, 2004, dated June 7, 2004, § 40; Respondent's Reply to the Counter-Memorial of Mr. Mitchell of February 23, 2005, § 66; Transcript of the hearing of May 11, 2005, p. 17.

(iv) Once the Award accepted that all the services invoiced by Mr. Mitchell's offices in the United States and South Africa were performed in the DRC – thus limiting those offices to an invoicing function – it could not without contradicting itself take into account the expenses of those offices.

(v) The Arbitral Tribunal does not explain why it calculated the amount of the compensation without taking into account the impact of the Congolese and/or U.S. tax systems.

(vi) The Award took into account the full market value of the "Mitchell & Associates" firm without inquiring into the share of each of the partners in that office.

C. The *ad hoc* Committee's analysis

65. There is no question that all the criticisms formulated by the DRC pertain to questions on the merits. This said, Article 52(1)(e) may be applicable, even in respect of questions on the merits, when the reasoning of the Arbitral Tribunal is inadequate or contradictory. It must nevertheless be observed, first, that the reasoning of the Arbitral Tribunal as to the valuation of the compensation is lengthy and detailed, covering six pages of the Award, and it appears from its very wording that the parties had ample opportunity to express themselves on all the issues relating to that valuation. The Committee will examine the various points raised by the DRC in a summary manner, within the limits of a control of the coherence of the reasoning, and without expressing itself on any possible poor decision which it is not called upon to correct in any event.

(i) As to the first point raised by the DRC, the Committee is of the opinion that, although Mr. Mitchell's return to the DRC was in fact mentioned, among other elements, in para. 93 of the Award, there does not appear to be any direct connection between that reference and the three-year duration selected by the Arbitral Tribunal; consequently, there is no reason to speak of contradictory reasoning. The use of the three-year period stems from the Arbitral Tribunal's assessment of the valuation made by Mr. Maritz, the certified public accountant presented by the Claimant and whose expertise was used as the basis for calculating compensation. This assessment is sovereign, and even though the Arbitral Tribunal does not fully explain itself on this point, the *ad hoc* Committee does not consider that its reasons can be characterized as incomplete or inconsistent.

(ii) On the second point raised by the DRC, the Committee finds that the Tribunal's assessment was based, as above, on the expert opinion of Mr. Maritz, who used a conventional calculation method for determining the fair market value of an enterprise. The Arbitral Tribunal adopted a lower capitalization rate than the one adopted by the expert, duly taking into account "the economic and political environment of the Congo." The existence of a failure to state reasons on this point cannot be supported.

(iii) On the third point raised by the DRC, it appears from the wording of the Award (para. 64) that the Arbitral Tribunal ruled on the loss of clients of the "Mitchell & Associates" firm on the basis of statements from various clients of that firm, and

not solely on the affidavit from SAKIMA SARL. As the Tribunal is "judge of the admissibility of any evidence adduced and of its probative value" (Rule 34(1) of the Arbitration Rules), in the case at hand there can neither be a failure to state reasons nor a serious violation of a rule of procedure. This is all the more true in that the Respondent failed to contest except quite indirectly the credibility of this witness, and is consequently not permitted to raise such an argument during the Annulment Proceeding.

(iv) On the fourth point raised by the DRC, the inclusion in the compensation calculation of any particular expenditure may be freely determined by the Arbitral Tribunal. In the case at hand, the inclusion of a high amount of expenses for the U.S. and South Africa offices when they should have been limited to invoicing activities does not constitute contradictory reasoning, but a possible incorrect finding, which is outside the mission of the *ad hoc* Committee.

(v) Everything stated with regard to the fourth point raised by the DRC stands as well for the fifth point, which refers to the non-consideration of the impact of the Congolese and/or U.S. tax systems in the calculation of compensation. Moreover, as this argument was raised by the DRC for the first time during the Annulment Proceeding, it is inadmissible.

(vi) Finally, on the last point raised by the DRC, the question of the legal status of the "Mitchell & Associates" firm was adduced before the Arbitral Tribunal in order to contest Claimant's standing, and not in the context of the calculation of compensation. While it is true that the Arbitral Tribunal might have briefly explained why its calculation of the compensation for the Claimant, an individual, is based on total revenue of the "Mitchell & Associates" firm, it can be discerned from the Award (paras. 23, 62 of the French version of the Award, especially) that it apparently considered Messrs. Djunga and Risasi as "employees" or "collaborateurs" of the firm and not as partners. This cannot be regarded as a failure to state reasons, especially since both parties in their pleadings used the terms "employees" and "partners" indiscriminately.

66. In conclusion, the Award is not tainted by a failure to state reasons as regards the valuation of the compensation; it therefore could not have been annulled for this reason on the basis of Article 52(1)(3).

V. Decision

67. In consideration of the foregoing, the *ad hoc* Committee unanimously decides to:

- Annul the Award of February 9, 2004 on the grounds of manifest excess of powers and failure to state reasons (Article 52(1)(b) and (e) of the Convention) owing to the decision of the Arbitral Tribunal to accept its jurisdiction on the basis of the existence of an investment within the meaning of the Washington Convention; such annulment applies necessarily to the Award in its entirety, pursuant to Article 52(3) of the Convention.

- Order the equal sharing of the costs of the Annulment Proceeding between the parties, with each bearing the expenses incurred for its own defense, including legal fees, which in this case, in consideration of all the circumstances of this Annulment Proceeding, appears to the *ad hoc* Committee to be fair and equitable. Consequently, since the DRC has solely been responsible for making the advance payments covering the costs of the Annulment Proceeding, amounting to USD 200,000, Claimant is ordered to pay the DRC the amount of USD 100,000.

Signed

Robert Dossou
October 19, 2006

Signed

Andrea Giardina
October 26, 2006

Signed

Antonias Dimolitsa
(President)
October 27, 2006