U.S. Dollars 9,000,000 (nine million), carrying an overdue interest of 7.5 percent per annum from the date of this Award, if this amount is not paid within sixty days of the notification of the Award;

(5) On the expenses between the Parties to the arbitral proceedings

- that each of the Parties shall bear an equal share of the expenses incurred in the present arbitral proceedings, including the fees and expenses of the Tribunal, and the entirety of its own expenses and fees for its own counsel and others.
- that the Republic of Zaire shall in addition pay to AMT the sum of U.S. Dollars 104,828.96 representing one half of the costs of the proceedings for which advance payments have been made by AMT.

SO DECIDED

Heribert GOLSONG	Sompong SUCHARITKUL	Kéba MBAYE
Arbitrator	President	Arbitrator
Date :	Date : Feb. 5, 1997	Date : 11 février 1997
Place :	Place : San Francisco	Place : Dakar

* Individual opinions of Mr. Heribert GOLSONG and of Mr. Kéba MBAYE are attached to this Award in accordance with Article 48 (4) of the Convention.

1. In order to strengthen the necessary authority of the award, I have joined my colleagues in voting in favor of the operative part of the award.

2. I am, however, unable to follow them on the road of legal reasoning which led my colleagues to establish the responsibility of Zaire for the losses endured by the claimant. While my colleagues based that conclusion on Articles II (4) (general principles of law) and IV (1) (most favored treatment) of the US/Zaire BIT, I consider the responsibility of Zaire clearly established under the provision of Article IV (2) of the BIT. My reasoning is as follows.

3. To assess the responsibility of Respondent for the losses incurred by Claimant because of the undisputed fact of looting and destruction of SINZA's premises in Kinshasa on September 23-24, 1991 and January 28-29, 1993, the Tribunal had to turn to the US/Zaire BIT which has been invoked by Claimant in support of its claim. The BIT is validly in force as of July 28, 1989, that is prior to the losses incurred by Claimant.

4. Several separate provisions of the BIT are relevant in this context.

(i) Article II (4)

> Investments of nationals and companies of either Party shall be accorded fair and equitable treatment and shall enjoy protection and security in the other Party. The treatment, protection and security of investment shall be in accordance with applicable national law, and may not be less than that recognized by international laws.

(ii) Article III states as follows:

> 1. No investment of any part of an investment of a national or a company of either Party shall be

expropriated of nationalized by measures, direct of indirect, tantamount to expropriation, unless the expropriation:

(a) is done for a public purpose;
(b) is accomplished under due process of law;
(c) is not discriminatory;
(d) does not violate any specific provision on contractual stability or expropriation contained in an investment agreement between the national or company concerned and the Party making the expropriation; and
(e) is accompanied by prompt, adequate and effectively realizable compensation.

Compensation shall be equivalent to the fair market value of the expropriated investment. The calculation of such compensation shall not result in any reduction in such faire market value due to either prior public notice or announcement of the expropriatory action, or the occurrence of the event that constituted or resulted in the expropriatory action,. Such compensation shall include interest at a rate equivalent to current international rates from the date of expropriation, and be freely transferable at the prevailing market rate of exchange ont the date of expropriation.

2. If either Party expropriates the investment of any company duly constituted in its territory, and if nationals or companies of the other Party hold shares or any recognized right in the expropriated company, then the expropriating Party shall ensure that such nationals or companies of the other Party receive compensation in accordance with the provisions of the preceding paragraph.

3. Subject to the dispute settlement provisions set forth in this Treaty, a national or company of either Party asserting that its investment was expropriated by the other Party shall have the right to prompt review by the appropriate judicial or administrative authorities of such other Party to determine whether any such expropriation has occurred and, if so, whether such expropriation and any compensation therefor conform to the principe of international law.

(iii) According to Article IV (1):
Nationals or companies of either Party whose investments in the territory of the other Party suffer:

(a) damages due to war or other armed conflict between such other party and a third country, or

(b) damages due to revolution, state of national emergency, revolt, insurrection, riot or act of violence in the territory of such other Party,

shall be accorded treatment no less favorable than that which such other party accords to its own nationals or companies or the nationals or companies of any third country, whichever is the most favorable treatment, when making restitution, indemnification, compensation or any other settlement with respect to such damages.

(iv) Article IV (2) adds to the above provision the following text:

In the event that such damages result from:

(a) a requisitioning of property by the other Party's forces or authorities, or
(b) destruction of property by the other Party's forces of authorities which was not cause in combat action,

the national or company shall be accorded restitution or compensation in accordance with Article III.

5. Claimant has based its request for compensation in the first place on Article IV (2) of the BIT. It is only alternatively that Claimant has invoked Article III (1) BIT and further alternatively Article II (4) BIT.

6. Not only because of Claimant's request, but also because of the fact that *Prima facie* the issue falls under Article IV (2) BIT, the Tribunal should have turned its attention in the first place to Article IV (2) BIT.

It was thus up to the Tribunal to ascertain whether Article IV (2) as the special rule relevant to the alleged fact is applicable in the present instance. In the affirmative, there would not be any need to take into consideration the other treaty provisions. If Article IV (2) applies, - as I believe - it absorbs the more general provisions of Article II (4), III and IV (1). If Article IV (2) does not apply, and only in this hypothesis, it would become necessary to turn the attention to those more general rules.

7. Article IV (2) refers to a factual situation as partly described in Article IV (1). These two provisions taken together, the first task is to ascertain

(i) that the damage suffered by Claimant was due to "revolt, insurrection, riot or acto of violence" (Article IV (1));

(ii) that the damage resulted from a destruction of property by Zaire's "forces" (Article IV (2));

(iii) and, if so, that the destruction was caused by "forces" acting outside "combat action" (Article IV (2)).

If these three requirements are met, the remedy as prescribed by the last half sentence of Article IV (2) would be " restitution or compensation in accordance with Article III".

8. According to a general principe of law, it is up to the Claimant to prove that the above requirements have been met. It is up to the Tribunal to evaluate the evidence adduced by Claimant.

9. The facts alleged by Claimant and supported by convincing evidence leave no doubt that there has been a destruction of SINZA's property and that the destruction took place on September 23-24, 1991 and January 28-29, 1993. Furthermore, in the award, the Tribunal has established that the destruction took place during riots and by way of acts of violence. This findings meets the first of the above listed three requirements.

10. In my opinion, the second condition is also fulfilled. The destruction was committed by Zairian "forces", that is by member of its armed forces outside combat action.

11. Article IV (2) does not define the word "forces". By following the guidance of the Vienna Convention on the Law of Treaties in its Article 31 (1), the word "forces" as part of the BIT should be understood in (i) its ordinary meaning and in (ii) the context in which it is placed as well as in the light of its object and purpose.

It remains, in particular, to be clarified whether the word "forces" only refers to units of "forces" acting within a given command structure - as has been asserted by my colleague at 7.07 and 7.09 of the award - or whether it also refers to individual members of such forces acting outside or even in defiance of orders of their superiors.

12. According to Webster's Third International Dictionary, 1986, the word "force" means, inter alia, a group of individuals ready for combat. This is the ordinary meaning of the word. It points to individuals as the constituent elements of a "force".

13. The word is placed in the context of an international treaty the object and purpose of which, as stated in its preamble, is "the reciprocal encouragement and protection of investment." In this broader treaty context, the word is part of a set of rules providing inter alia for compensation in case of losses suffered by the foreign investor because of any form of taking of investment property, including acts arising out of civil disturbances, revolts, riot or other act of violence.

More precisely, the word "forces" is used in Article IV (2) of the BIT in a context which is the confirmation of the well-known doctrine of international

customary law referring to objective -- as opposed to "fault" -- responsibility of a State in given situations, including destruction of property by forces acting outside any combat situation. Thus, the Institute of International Law, at its Lausanne Conference in 1927 declared

> L'Etat est responsable des dommages qu'il cause aux étrangers par toute action ou omission contraire à ses obligations internationales, quelles que soit l'autorité de l'Etat dont elle procède: constituants, législative, gouvernementale ou judiciaire.
>
> Cette responsabilité de l'Etat existe, soit que ses organes aient agi conformément, soit qu'ils aient agi contrairement à la loi ou à l'ordre d'une autorité supérieure.
>
> Elle existe également lorsque ces organes agissent en dehors de leurs compétence, en se couvrant de leur qualité d'organes de l'Etat, et en se servant des moyens mis à leur disposition. [Emphasis added.]

14. Under the governance of the said doctrine of objective responsibility of States, several international agreements and arbitral awards have interpreted the word "force" in a manner which englobes illicit acts of miliary personnel or member of other armed forces, even if acting in an isolated manner outside any command structure.

The leading case in this respect is the arbitral decision of the France/Mexico Claims Commission in the matter of *Estate of Jean-Baptiste Caire v. United States* [(1929) Reports of International Arbitral Awards, Vol. V, p. 516 et seq.]. In the said case, a captain and a major of the Conventionist forces in control of Mexico hat demanded money from Mr. Caire under threat of death, and had then ordered the shooting of their victim when he refused to pay. The French-Mexican Claims Commission held as follows:

> The State also bears an international responsibility for all acts committed by its officials or its organs which are delictual according to international law, regardless of whether the official or organ has acted within the limits of his competency or has exceeded those limits ... However, in order to justify the admission of this objective responsibility of the State for acts committed by its officials or organs outside their competence, it is necessary that they should have acted, at least apparently, as authorized officials or organs, or that, in acting, the should have used powers or measures appropriate to their official character ... (emphasis added).

In the same vein, the USA/Mexican Claims Commission in the *Youman* case [(1926), Reports of International Arbitral Awards iv. 110 at 116] stated

> Soldiers inflicting personal injuries or committing wanton destruction or looting always act in disobedience of some rules laid down by superior authority. There could be no liability whatever for such misdeeds if the view were taken that any acts committed by soldiers in contravention of instructions must always be considered as personal acts (emphasis added).

15. Absent any definition of the word "forces" in Article IV (2), it is the general meaning of the word in customary international law which is controlling. This leads us to admit that the Zairian soldiers who committed the looting and destruction of SINZA's premises and property on September 23-24, 1991 and again on January 28-29, 1993, are to be considered "forces" in the meaning of Article IV (2). It has not been established that they acted under instructions or only with the tolerance of their immediate superiors, but they acted certainly "outside combat action," the only additional requirement of Article IV (2). What is decisive is that the soldiers acted by using the "powers [and) measures appropriate to their official character." It is an undisputed fact that the soldiers wore their uniform and made use of means of transportation (trucks) of the army and of heavy equipment to break into the premises of SINZA. They also carried their army rifles and other arms, and made

use of hand grenades. Moreover, they transported the stolen goods to the army barracks.

16. Even if it were correct to state - which I dispute for the reasons given above - that the term "forces" only refers to "organized forces", the statement made by President Mobutu as Supreme Commander of the Zairian Army, indicates that the looting of September 1991 - and by implication also the looting of January 1993 - has been carried out not only ba a handful of soldiers acting in isolation, but by the "Army".

17. The Supreme Chief of the Zairian Army, in a statement published by the official news agency of Zaire on October 5, 1991 and produced during the arbitration proceedings, with specific reference to the incidents, in Kinshasa in September, 1991, asked the Zairian soldiers to "regagner la confiance de la population et redorer le blason des forces armées (sic!) terni à la suite des malheureux incidents". ..., the reputation of the "army" had to be restored. If the head of the respondent State agrees that the "Army" as such had been implied in the incidents, how then is it correct, as my colleague have done, to exclude the applicability of Article IV (2) simply because the army, in their view, did not act in an "organized" fashion.

18. Taking all this into consideration, I am satisfied that the destruction of SINZA's property was caused by Zairian forces, acting outside combat action. The responsibility for the destruction is therefore to be imputed to Zaire, the respondent in the present case.

19. It seems appropriate to add an additional argument in support of this conclusion.

The provision of Article IV (2) is a special feature of the US/Zaire BIT. A similar provision is to be found only in a relatively small number of the hundreds of BIT's presently in force.

A provision similar to Article IV (2) was introduced for the first time by the United Kingdom in its BI with Egypt of June 11, 1975 - incidently the first BIT ever concluded by the UK. The provision then appears in the large majority of the more than 60 BIT's signed by the UK. A similar provision found entrance also in a few BITs concluded by the US and now is part of the US model BIT since 1995. Finally, the European Energy Charter Treaty of 1994 (in 34 I.L.M. 374) contains in its Article 12 an almost identical text.

20. The provision is thus a special clause in a few treaties only. If the interpretation of the BIT as accepted by my colleagues in the award were correct, Article IV (2) would, for all practical purposes, become useless.

This, in turn is contrary to a basic rule of international treaty law on the interpretation of treaties, according to which it has to be assumed that each treaty rule has a practical effect ("effet utile") as confirmed by the Roman law principle "Ut res magis valeat quam pereat".

21. My colleagues have not been persuaded by my reasoning. As a consequence, they have not followed the rather stringent requirements of prompt, adequate and effectively realizable compensation as laid out by Article III, to assess the measure of compensation in the favor of the Claimant. However, it seems to me that the strict application of Article III could not have brought about an amount of compensation substantially different of the one we have agreed upon in the dispositif of the Award.

London,
February 10, 1997

Heribert Golsong

DECLARATION

by

MR. Kéba MBAYE, Arbitrator

Although concurring in the reasoning of the Tribunal, I am still convinced that the sum of U.S. Dollars 9,000,000 (nine million) awarded to the Claimant exceeds by far the injuries actually sustained by the Claimant and the profits including the interests it could have reasonably expected. In my opinion, the total amount of compensation, inclusive of the principal, interests and all other claims, should not exceed U.S. Dollars 4,000,000 (four million)

Kéba MBAYE
Arbitrator