

# EXCERPTS

## TRANSLATION FROM ORIGINAL IN FRENCH

Case No.ARB/99/7

PATRICK H. MITCHELL

v.

THE DEMOCRATIC REPUBLIC OF THE CONGO

Dissenting opinion

By

Yawovi Agboyibo

Arbitrator

### INTRODUCTION

1. I regret that I cannot associate myself with the Award rendered by the Tribunal in the dispute between the Democratic Republic of the Congo and Mr. Patrick Mitchell.
2. I should like to make clear, however, that I entirely agree with the passages of the Award dealing with the source of the dispute, the respective positions of the parties and the stages of the proceeding.
3. I should also like to note that the Tribunal correctly examined the problems raised in this case by basing itself primarily on the rules accepted by both parties, in particular the ICSID Convention and the Bilateral Investment Treaty of August 3, 1984.
4. Without prejudice to the comments I shall now make with regard to the precondition of jurisdiction, I think that the Tribunal rightly applied the above-mentioned rules to the issue of whether or not Mr. Patrick Mitchell was the victim of expropriation of his law firm in the DRC. I believe that, in view of their consequences, the measures applied to the firm are tantamount to an expropriation, even though the Congolese authorities may have acted legally or did not intentionally seek the effects produced.
5. If I do not agree with the Award, it is because, in my opinion, the Tribunal has not provided appropriate responses to the other two points argued by the parties:
  - *the investment required for the dispute to be within the jurisdiction of the Arbitral Tribunal (A);*
  - *the bases for evaluation of the compensation claimed by Mr. Patrick Mitchell (B).*

**A. CONCERNING THE INVESTMENT REQUIRED FOR THE DISPUTE TO BE  
WITHIN THE JURISDICTION OF THE ARBITRAL TRIBUNAL**

6. The evaluation of the investment required for the dispute to be within the jurisdiction of the Arbitral Tribunal was strongly influenced by the fact that the parties placed more emphasis in their debate on the **form** than on the **content** of the notion of investment.

7. In refusing to recognize the jurisdiction of the Arbitral Tribunal, the DRC relied exclusively on the ground that *the activity as an attorney or legal counsel does not qualify as an investment* without taking into account the elements alleged by the Claimant as being investments.

8. The DRC contends, among other things, that the activity as an attorney or legal counsel does not qualify as a service within the meaning of Article I (c) of the BIT which provides a definition of the term investment. It also argues that the license to operate delivered to the Claimant is not in conformity with the Congolese Investment Code. It contends, moreover, that the profession of attorney-at-law or legal counsel is not considered as a commercial activity falling under the scope of the BIT.

9. The Tribunal is correct in rejecting the various facets of the argument. I should simply like to note that I do not understand why the Tribunal insisted on including among the grounds for the Award that it “*does not have to examine, in relation to the question of its jurisdiction, whether Mr. Mitchell’s firm had or did not have the permission to perform activities as attorney-at-law or legal consultant*” (Award, para. 51). It could have omitted these grounds, especially since it responded immediately thereafter to the concern expressed by the DRC. In reality, I find it surprising that the Tribunal implies that the Claimant could have set up business in the host country without conforming to the regulations and administrative procedures referred to in Articles II (9) and IX (a) of the BIT.

10. That being said, I agree with the decision that the activity as an attorney or legal counsel may serve as a framework for an investment justifying the jurisdiction of the Tribunal.

11. *But can one go so far as to say that the activity as an attorney or legal counsel constitutes in itself an investment as defined in the BIT and the ICSID Convention* (Award, paras. 52 and 53)?

*Likewise, I wonder if it is possible to qualify as an investment justifying the jurisdiction of the Arbitral Tribunal:*

- *the service contracts by which Mr. Patrick Mitchell provided legal assistance to his clients* (Award: paras. 46 and 48);
- *the goodwill of the Claimant* (para. 48);
- *the payments registered on his accounts in the United States of America* (para. 48);
- *the right to exercise the activity of legal counsel* (para. 48).

12. Following the exchanges of views on these various issues, the Tribunal concluded that “...*the resources and activities related to this firm [Patrick Mitchell] qualify as an investment within the meaning of the ICSID Convention and the BIT*” (para. 57).

13. I do not share this opinion. The Tribunal, in my view, is mistaken.

14. It is true that contracts for legal assistance and the other activities referred to in the Award as constituting an investment are protected by the BIT. But Article II (2), which provides for such protection, took care to designate the activities in question by a specific term, “**associated activities**,” to mark their difference from the notion of “**investment**.” The nuance is not accidental. Nor is it by chance that the Treaty refers to “investment activities,” not in Article I (c) concerning the definition of investment, but in Article II, devoted to the treatment of investments. Although they benefit from the same protection, the two notions are distinct.

15. Insofar as the jurisdiction of the Tribunal is dependent solely on the evidence of an investment, the Tribunal should base its analysis on this notion. Once the required investment has been established, the protection thereof rightfully extends to associated activities and products, such as goodwill, service contracts, and fees.

This list of elements protected by the Treaty must be taken into account in applying the notions of expropriation and compensation.

16. The Tribunal was thus erroneous in its belief that it would attain the same result by qualifying as an “investment” *activities associated with investments*.

17. Besides, I do not think that the flexibility of the notion of investment can be used to cover every **service** referred to in Article I (c) of the BIT. A service, just like property, receivables, debt or any other element referred to in Article I (c) of the BIT, may not be qualified as an investment unless it is involved in a production process. “**Goods or services invested**” cannot be confused with “**goods or services produced**.” In the present instance, the services provided to third parties by the Claimant in the DRC and fees billed or returned for consideration are products of investment. It could be otherwise only if these fees were reinvested. Then they would constitute an investment within the meaning of Article I (c) (vii) of the Treaty.

18. Likewise, ordinary goodwill is the result of investment, not an element of investment. This is the case under the Treaty. It is also true under Congolese law, and in general in countries with a French legal tradition. In all these countries, goodwill is not included among the elements of investment. The only exception is the case of transfer of goodwill, where the transferee acquires a right of non-competition vis-à-vis the transferor; this right may be qualified as an investment in terms of the intellectual and industrial property rights referred to in Article I (c) (iv) of the BIT. This exception does not apply in the present instance, since the Claimant has not proved that the transfer of assets agreement he signed on March 31, 1991 with his former associates included a transfer of goodwill clause.

19. I have also wondered how the Tribunal could have speculated on the flexibility of the notion of investment to the point of extending its application to income registered by Patrick Mitchell in his accounts in the United States of America and in the Republic of South Africa, without concerning itself with the scope of coverage of the BIT.

20. In reality, the only investment to which Mr. Patrick Mitchell referred in his supplementary memorial of October 11, 2001, under heading G (points 39-51), is constituted by the assets he

acquired by the transfer of assets agreement he signed on March 31, 1991 with his former partners, [...]. He did not mention goodwill, legal assistance contracts or fees in the above-mentioned memorial except under the heading of compensation. Thus, unlike the Tribunal, the Claimant did not extend the notion of investment to associated activities.

21. But now we come to the heart of the matter: why did the Tribunal combine the two notions? Is it because it felt that the investment as established by the BIT and the ICSID convention would not be significant enough to justify the Tribunal's jurisdiction? I had personally thought at one stage of the Tribunal's exchanges that the assets acquired by the Claimant as a result of the transfer of assets agreement of March 31, 1991 might justify the jurisdiction of the Tribunal. But I came to understand as I listened to the Tribunal that we ran the risk of being inconsistent if we qualified as an investment the movable property, files, records, and other documents present in the office at the time of the seizure. Actually, if proper care is not taken, Mr. Patrick Mitchell could ultimately take advantage of his authorization to practice the profession of legal counsel in order to claim entitlement to argue before the ICSID Tribunal. This would open the door to countless abuses.

22. We must thus avoid confusion in applying the notion of investment. It is one thing to invest, and another to "practice activities."

23. By confusing "investment" with "associated activities," the Tribunal has given an inappropriate response to the objection to its jurisdiction, wrongly basing itself on the volume of Mr. Patrick Mitchell's activities in order to maintain that in this case there was an investment within the meaning of the BIT and the ICSID Convention.

## **B. CONCERNING THE BASES FOR EVALUATION OF COMPENSATION CLAIMED BY MR. PATRICK MITCHELL**

24. The Tribunal was asked to respond to the question of whether it was necessary, in determining the compensation claimed by Mr. Patrick Mitchell, to take into account only the fair market value of his office in the DRC, or if the value of his other two offices in the United States of America and in the Republic of South Africa should also be included.

25. It decided to take into account the value of the three offices, because "*[o]n the basis of the statements of income and the billings filed as evidence of such income, the Tribunal is satisfied that the incomes referred to in these statements are related to services provided by the Claimant's firm in the DRC. The clients to whom these billings were addressed were seeking and have been provided with services of the firm in the Congo. The fact that most payments were addressed to Mr. Mitchell's office in the USA does in no way imply that the office in the DRC did act as a mere sub-contractor*" (Award, para. 80).

26. I dissociated myself with the Tribunal's reasoning because I found it shocking.

27. In clarification of my opinion, I should like to note that no one disputes the fact that Patrick Mitchell's office in the DRC is legally distinct from his offices in the other two countries, and that it has its own local clientele and operating account.

28. It is also agreed that, in respect of the clients living abroad on whose behalf the DRC office acted at the request of the offices in the USA and RSA, it was the latter which billed and collected the fees.

Contrary to the views expressed in the Award, it is undeniable that, for the clients abroad, the Kinshasa office provided services merely as a sub-contractor acting on behalf of the offices in USA and RSA. Furthermore, by every indication, the funds transferred to the DRC office by the offices in the USA and RSA were re-transfers of fees in consideration for the services thus provided. The re-transferred fees plus the internal income constitute, in my view, the only income that can be compared with expenses in determining the income statement for the operation of the Kinshasa office. The “capitalized earnings approach” used by the Tribunal to determine the market value of the “investment” allegedly expropriated from Mr. Patrick Mitchell must be applied to this last-mentioned income statement.

29. Why did the Tribunal choose to base itself on the consolidated revenue of the three offices? It would certainly not have done so if the income accrued by the Kinshasa office for the fiscal year 1998 had been substantial.

30. As it happens, for the fiscal year 1998 the operating account of the DRC office showed a deficit of US\$ [...]; billings filed and expenses paid amounted respectively to US\$ [...]. This statement certainly had some influence on the position taken by the Tribunal.

31. As it was necessary to hand down a sentence, there could have been another way of circumventing the problem. The Tribunal could have combined the capital earnings approach with a method that would determine the net assets of the office on the date of the actions of which the Congolese authorities are accused. The Tribunal could merely have invited the Claimant to provide it with appropriate information on the firm’s assets and liabilities; he had not yet done so, since the only element of evidence available to the Tribunal was the agreement which he had signed in 1991 with his partners to transfer a modest amount of assets. This step would have at least enlightened the Tribunal on the investments associated with the premises housing his firm in the DRC and all the other property he acquired subsequent to March 31, 1991.

32. I do not understand why the Tribunal ruled out this action, which I proposed, and instead chose to follow the reasoning by which the offices in the USA and DRC were merely billing and collection offices for services provided by the DRC office.

33. This move by the Tribunal first of all violates the scope of application of the BIT of August 28, 1984. The Treaty can only cover Patrick Mitchell’s office in the DRC. Its effects cannot be extended to offices opened by the Claimant in other countries.

34. Secondly, the action will have serious consequences in that it constitutes an open and inadmissible means of supporting a mechanism invented by Mr. Patrick Mitchell to illegally transfer abroad the income generated by his office in the DRC.

35. If Article V (1) (a) of the Bilateral Treaty of August 28, 1984 guarantees Mr. Patrick Mitchell the free transfer of his returns in the DRC, it is on the express condition that he conform with the prescribed procedures in Congolese law and that he pay income taxes (Article V (3)).

36. However, by his method of billing and collecting fees abroad, Mr. Patrick Mitchell has, over the years, shielded the bulk of his revenues from the application of these regulations.

37. The Tribunal cannot close its eyes to such practices without betraying the objectives of the BIT and the ICSID Convention.

38. It is legally and morally unacceptable for Mr. Patrick Mitchell to be demanding with respect to the provisions of the BIT that favor him while his own behavior is detrimental to the development of the host country.

The Tribunal should not, in my view, consider granting compensation for any alleged prejudice to income that was illegally transferred abroad at the expense of the DRC.

### **CONCLUSION**

39. In view of the foregoing, I believe that it is contrary to law and justice that the Tribunal is not only granting to Mr. Patrick Mitchell the amount of US\$ 750,000, plus interest at an annual rate of 7.75%, but is further sentencing the DRC to pay US\$ 95,000 as a contribution to the Claimant's costs, expenses and counsel fees, including his share of the costs incurred by ICSID.

40. For these reasons I abstained from signing the Award.

[signed]

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Yawovi Agboyibo

Lomé, January 23, 2004