

**THE INTERNATIONAL LEGAL
RESPONSIBILITY OF A HOST STATE FOR THE
DESTRUCTION OF FOREIGN INVESTMENT
LOCATED IN ITS TERRITORY**

**ICSID: Award, Individual Opinion and Declaration
in American Manufacturing & Trading
Incorporated v Republic of Zaire**

36 ILM 1531 (1997)

1 General introduction and background

In recent years on the international stage, it has become very common practice for developing countries, eager to attract the flow of private foreign direct investment capital into their economies, to conclude Bilateral Investment Treaties (BITs) with the developed capital-exporting countries. Recent studies have estimated that, since the 1980s, well in excess of 900 such treaties have been concluded. This note examines the international rights and duties of the contracting parties to one such treaty which was concluded between the United States of America and the then Republic of Zaire, now known as the Democratic Republic of Zaire. It discusses the nature of the international legal responsibility which Zaire as a host state owes foreign nationals and their corporations which invest in her territory under both customary and conventional international law. It is firmly concluded that host states such as the Republic of Zaire clearly act in breach of their international legal responsibilities when they fail to put in place the necessary measures and environment for the protection and security of foreign nationals, their investments, and properties located in the territory of the host state. The note further states that in this area of public international law, it is generally agreed that there is an international minimum standard which applies and a host state cannot rely on its own municipal law and practice which falls below the standard of international law.

In its recent post-independence history, the continent of Africa has experienced long periods of social and economic upheaval and instability, of varying intensity. The long running internal conflicts in Sudan, Somalia, Liberia, Côte D'Ivoire, Rwanda and the Democratic Republic of Congo (until fairly recently known as the Republic of Zaire) are all cases in point. The causes of civil conflict and the resultant political instability in Africa are

complex and varied. They range from issues such as discontent and disaffection of sections of the populace about the non-existence or malfunctioning of democratic institutions to the unequal distribution of political power, influence, economic resources and wealth.

Recent examples which illustrate the above point are the cases of the oil-rich Niger River Delta states in south eastern Nigeria and the northern and western regions of the Republic of Côte D'Ivoire. In the case of the Niger River Delta region, for well over two decades, the population there has consistently complained about the unfair distribution of the proceeds from the oil wealth produced in the region. According to the Niger River regional political leadership, the production of oil in the region has not only resulted in the underdevelopment of the region but also in very serious environmental degradation. Thus, for many years, there have been sporadic outbursts of violent confrontation between community leaders and the youth on the one hand and the Nigerian Federal Security Forces and the various oil companies operating in the delta region on the other. Sometimes, these violent confrontations have resulted in the loss of innocent lives and even incidents of kidnapping of ordinary workers, staff and management of targeted oil companies. Naturally, such incidents have often disrupted oil production and other related activities thereby adversely affecting the economy of the whole country as the oil industry contributes about 80% of the gross national product of Nigeria.

It is well-known that some of the major causes of the events leading to the outbreak of civil conflict between the forces loyal to President Laurent Gbagbo of the Côte D'Ivoire and rebel army units whose members hailed mainly from the northern region of the country, were the long-standing complaints of political discrimination, exclusion and lack of social and economic development and infrastructure.

And yet amidst all these internecine struggles, African states, like many of their counterparts in the rest of the developing world, have embarked on ambitious development programmes, in many cases in partnership with foreign capital, both public and private.

From the beginning of the 1980s through to the end of the 1990s, many African countries, under the guidance of the two Bretton Woods institutions of the International Monetary Fund (IMF) and the World Bank, adopted structural adjustment programmes and other economic reform measures aimed at promoting economic liberalization. In the main, these economic reform measures entailed a general policy of rolling back the prominent role hitherto played by the post-colonial state apparatus in the formulation and management of economic policy. In place of the state machinery, private capital investments would play an enhanced role. In theory this included local and foreign investment but in practical terms it was foreign, both public

and private. In pursuance of the policy of recognizing and allocating an enhanced role in the management of the national economic programme by foreign investment capital, many African and other developing countries were encouraged by the IMF, the World Bank and potential donor countries from the Western developed world, to embark on reforms of their domestic legal regimes governing the entry, establishment and terms of operation of private foreign investment capital. (In the case of the Republic of Ghana, the relevant legislation includes the following laws: The Ghana Investment Promotion Centre Act 478 of 1994; the Mineral and Mining Law PNDCL 153 of 1986 and its various amendments; the Precious Minerals Marketing Corporation PNDCL 219 1989; the Small Scale Gold Mining Law PNDCL 218 1989; the Minerals Commission Law PNDCL 154 of 1986; the Petroleum (Exploration and Production) Law PNDCL 84 of 1984; the Ghana National Petroleum Corporation PNDCL 64 of 1983; and the Petroleum Income Tax Law PNDCL 185 of 1986. In the case of both mainland Tanzania and the Island of Zanzibar the relevant legislation is respectively: the National Investment (Promotion and Protection) Act 10 of 1990, 30 (1991) ILM 890 and the Foreign Investment Act of 1986. In the Republic of Namibia, the applicable legislation is the Foreign Investment Act 27 of 1990, (1992) 31 No 1, ILM 205. In the Kingdom of Swaziland, the currently prevailing legislation is the Swaziland Investment Promotion Act 1 of 1998.)

Another level at which African states have been encouraged to offer protective arrangements to foreign investors is through ratification or accession to the convention establishing the World Bank Multilateral Investment Guarantee Agency (MIGA). (See “Convention Establishing The Multilateral Investment Guarantee Agency” 11 October 1985, set forth in (1985) 24 ILM No 6, 1598-1638. For an earlier draft of this convention; and see “World Bank: Draft Convention Establishing the Multilateral Investment Guarantee Agency” 8 March 1985 (May 1985) XXIV ILM No 3 668-715.) The general purpose of this convention is to encourage the increased flow of direct equity and other forms of investment from the developed capital – exporting countries to the developing capital – importing ones by issuing guarantees for individual and corporate investments in its developing member countries against four types of non-commercial risk. These are the risk of loss flowing from the host government’s restrictions on currency conversion and transfers; the risk of expropriation of the investment by the host state; the risk of repudiation of contractual commitments by the host state; and the risk of armed conflict and civil disturbance.

Another mechanism through which African and other developing countries have sought to encourage and protect the free flow of foreign investments into their economies is by the negotiation and conclusion of Bilateral Investment Treaties (BITs) (see in general Dolzer and Stevens *International Centre for Settlement of Investment Disputes Bilateral Investment Treaties* (1995). For specific United Kingdom and USA practice, see respectively

Denza and Brooks "Investment Protection Treaties: United Kingdom Experience" 1987 36 *ICLQ* 908-923; Gundeon "United States Bilateral Investment Treaties: Comments On The Origin, Purposes And General Treatments Standard" 1986 4 *International Tax and Business Lawyer* 105; and Sachs "The 'New' US Bilateral Investment Treaties" 1984 2 *International Tax and Business Lawyer* 192.), which derive their origin from the nineteenth and early twentieth century Friendship, Commerce and Navigation (FCN) treaties commonly concluded by the USA and the United Kingdom (see Wilson *US Commercial Treaties and International Law* (1960)). As was intimated by Sornarajah ("The Climate Of International Arbitration" June 1991 8 *Journal of International Arbitration* 82-85) more than a decade ago, the increased conclusion of BITs between developed and developing states, which incorporate clauses providing for arbitration and other forms of peaceful settlement of investment disputes under the auspices of the International Centre for the Settlement of Investment Disputes (ICSID), is assuming a welcome trend. In recent years, several investment disputes involving the interpretation and application of various BIT provisions have been submitted for ICSID arbitration, resulting in awards being rendered. (See, eg, *ICSID Tribunal: Final Award in Asian Agricultural Products (AAPL) v Republic of Sri Lanka*, 30 (May 1991) ILM No 3 577; *ICSID Award, Individual Opinion and Declaration in American Manufacturing & Trading, Inc v Republic of Zaire*; *ICSID Award in Compania de Agues del Aconquia, SA v Argentine Republic* 40 (March 2001) ILM No 2 426; *ICSID Award in: Lanco International INC v Argentine Republic (Preliminary Decision on Jurisdiction of the Arbitral Tribunal)* 40 (March 2001) ILM No 2 457; *ICSID Award in: Mihaly International Corporation v Democratic Socialist Republic of Sri Lanka* 41 (July 2002) 41 ILM 881-953; and *ICSID Decision on Annulment in Compania de Agues del Aconquia SA and Vivendi Universal (formerly Compagnie General des Eaux) v Argentine Republic* 41 (Sept 2002) ILM No 5 1135.)

This note deals with one such dispute submitted to ICSID arbitration pursuant to the provisions of a USA-Zaire Bilateral Investment Treaty. The note will focus on the arbitration tribunal's approach to various issues of public international law, such as whether or not the former state of Zaire, now the Democratic Republic of Congo (DRC), engaged state responsibility by failing to fulfill its treaty obligations to the USA incorporated company under the USA-Zaire BIT. Questions such as the substantive content of the competing national and international minimum standards for the treatment of foreign nationals and their investments by host states will be discussed. The paper will also consider certain important questions relating to the jurisdiction and competence of the ICSID tribunal to hear the dispute. The Zairean objections to the competence of the tribunal to consider the matter raised interesting questions of international legal interpretation involving the relevant provisions of the ICSID convention. Also, a related issue which will be briefly examined is the procedure followed in the constitution and

conduct of the proceedings of the tribunal. In this regard, it will be submitted that certain aspects of the procedural issues, especially with regard to the conduct and attitude of the respondent state, Zaire, tended to affect the character of the conclusions ultimately reached by the tribunal.

2 The consideration of certain important preliminary questions

2.1 The background to the request for ICSID arbitration and the Constitution of the Arbitration Tribunal

The claimant company, the American Manufacturing & Trading Corporation Incorporated (AMT), was incorporated in the state of Delaware in the United States of America. Its majority shareholding was held and controlled by US nationals. AMT invested in the Republic of Zaire through its majority shareholding in a locally incorporated Zairean company known as the *Societe Industrielle Zairoise* (SINZA), and *Societe Privée à responsabilité* (SPRL). SINZA built and managed a factory and other installations which manufactured batteries for commercial purposes.

On the 25 January 1993, the AMT company instituted arbitration proceedings via the ICSID against the Republic of Zaire pursuant to the provisions of Article 36 of the Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States of 18 March 1965 (see *ICSID: Award, Individual Opinion and Declaration in American Manufacturing & Trading Inc v Republic of Zaire* 36 (Nov 1997) ILM No 6 1535 par 1.01-1.05).

AMT's request for arbitration was based on the provisions of a BIT concluded between the USA and the Republic of Zaire on 3 August 1984, which came into force on 28 July 1989. This treaty was aimed at the reciprocal promotion, encouragement and protection of foreign investment in the territories of the two contracting states. In its request for arbitration and the additional request filed on 16 March 1993, the claimant company prayed the tribunal to adjudge and declare the following matters:

- (a) That the Republic of Zaire violated the rights of the claimant company, AMT, which were recognized and protected by the provisions of the 1984 USA-Republic of Zaire BIT.
- (b) That the Republic of Zaire should be held internationally responsible for failing to fulfill its treaty obligations of protection provided by the BIT, especially with regard to the destruction by elements of its armed forces of properties and installations belonging to SINZA, a Zairean incorporated company whose shares were 94% owned by AMT. The claimant company alleged that the destruction and looting of SINZA's properties occurred on 23-24 September 1991 and 28-29 January 1993.

- (c) The claimant company further requested that the Republic of Zaire be condemned to pay to it an indemnity or compensation calculated on the following basis:
- the fair market value of all the losses suffered by AMT's investment in Zaire;
 - the loss of the future profits (*lucrum cessans*) which AMT would have reaped from its investment in Zaire;
 - the payment of interest on the total amount of compensation payable by the Republic of Zaire. The interest was to be calculated at a commercial rate equal to the appropriate international rate of interest for transactions denominated in US Dollars from 23 September 1991 to the date of final payment.

In addition, the claimant company requested that the Republic of Zaire be ordered to pay all the costs of the proceedings before the tribunal including the fees and expenses of its members and also the costs and other expenses incurred by it. (*ICSID: Award, Individual Opinion and Declaration in American Manufacturing & Trading Inc v Republic of Zaire supra* par 1.05.)

2.2 *The Constitution of the Arbitration Tribunal*

A notable feature of the proceedings was the rather ambivalent and at times even uncooperative attitude of the respondent state. The nonchalant and non-committal attitude of Zaire to the arbitration proceedings proved very costly for it in the end. Further comment on this matter will be made in a later section.

The respondent state did not react positively to the arbitration proceedings especially with respect to the nomination of arbitrators who would constitute the tribunal. In the absence of any response from the Republic of Zaire, the claimant company indicated its wish that the tribunal be constituted in accordance with the formula provided for in Article 37(2)(b) of the Washington Convention of 1965. This provided for the tribunal to be composed of three arbitrators, with each party appointing one arbitrator while the tribunal's president would be appointed by mutual agreement of the parties. AMT subsequently nominated its arbitrator and proposed another arbitrator to be appointed as president of the tribunal in accordance with Article 3(1)(a) of the ICSID Arbitration Rules. In the absence of any nomination or response from the Republic of Zaire more than 90 days after the delivery of the notification of registration of the Request for Arbitration to the parties (*ICSID: Award, Individual Opinion and Declaration in American Manufacturing & Trading Inc v Republic of Zaire supra* 1536 par 1.07), AMT addressed a letter to the chairman of the ICSID Administrative Council. AMT requested that the arbitrator not yet appointed be appointed and that a third arbitrator be nominated and designated as the chairman of

the tribunal (*ICSID: Award, Individual Opinion and Declaration in American Manufacturing & Trading Inc v Republic of Zaire supra* par 2.02). Subsequently, in a letter dated 13 July 1993, ICSID informed the parties that its Secretary General would recommend to the chairman of the ICSID Administrative Council that he should appoint a second arbitrator and also a third one who would be designated as the president of the tribunal. This was duly done. (*ICSID: Award, Individual Opinion and Declaration in American Manufacturing & Trading Inc v Republic of Zaire supra* par 2.03-2.04. Judge Mbaye, a Senegalese national, former president of the Supreme Court of Senegal and former Vice-President of the International Court of Justice, was appointed as the second arbitrator and member of the tribunal. Professor Surharitkul, a national of Thailand domiciled in the US, former member of the International Law Commission and former Ambassador of Thailand was appointed as the third arbitrator and President of the tribunal. Thus, the tribunal was constituted as follows: Mr Sompong Surharitkul – President, Mr Heribert Golsong – Member and Judge Kéba Mbaye – Member.)

2 3 *Other important procedural developments*

The tribunal held its first session with the disputing parties on 1 October 1993. It was devoted to discussing the procedures that would be followed in the arbitration including the holding of hearings and the submission of written by the parties. Only the representatives of the claimant company attended this session; the Republic of Zaire was not represented. It, however, chose to participate only in the written phase of the proceedings and submitted to the tribunal a counter-memorandum and a rejoinder in response to the written and additional memoranda submitted by AMT (*ICSID: Award, Individual Opinion and Declaration in American Manufacturing & Trading Inc v Republic of Zaire supra* 1537-1538 par 3.01-3.19).

The next phase of the proceedings was the arrangement for the oral hearing in Paris, France, in 1994, at which the parties and their representatives would present their evidence by calling witnesses where necessary and submitting their conclusions. Both parties designated and forwarded to the tribunal their representatives. However, in the case of the respondent state, Zaire, by a letter dated 30 November 1994, it requested the tribunal to postpone the oral hearings until the end of January 1995. This request was opposed by the claimant company. In the event, the tribunal rejected Zaire's request and proceeded with the oral hearings without any real representation of Zaire except for the counselor of the Zairean Embassy in France. He was physically present during the proceedings but "without nomination, authorization or accreditation of any kind" (*ICSID: Award, Individual Opinion and Declaration in American Manufacturing & Trading Inc v Republic of Zaire supra* 1540 par 3.23).

As was pointed out earlier, this lack of commitment to a proper and professional handling of the arbitration process by the Government of the Republic of Zaire proved to be very unhelpful to its case. The manner in which this case was handled by the Zairean government was highly unfortunate and did injustice not only to the state of Zaire but also the tribunal as it was denied the opportunity of fully hearing and considering all versions of the dispute. It should, however, be pointed out in fairness to the tribunal and to its credit, that whenever possible, it sought, *propriu motu*, to consider and evaluate the possible responses and arguments which would have been presented by the Republic of Zaire.

Lastly, it bears observing that the conduct of the arbitration proceedings by Zaire was symptomatic of the decay in governance and the dysfunctional state into which the country was beginning to sink. It signalled the build-up to the state of social, economic and political instability leading to the uprising against the dictatorship of President Mobutu Seseko, his overthrow and the subsequent chain of events which ensued but which fall outside the purview of this article.

3 The question of the competence of the ICSID Tribunal to conduct the arbitration

Even though the respondent did not effectively participate in the oral proceedings, it presented to the tribunal both a written counter-memorandum and a rejoinder. In these written submissions, the Government of Zaire raised a number of objections to the jurisdiction of ICSID and the competence of the tribunal to hear the arbitration (*ICSID: Award, Individual Opinion and Declaration in American Manufacturing & Trading Inc v Republic of Zaire supra* 1538 par 3.09-3.13). This section will fully discuss these jurisdictional issues in some detail for a variety of reasons. First, a substantial part of the tribunal's award is devoted to a consideration of these issues. Secondly, and perhaps more importantly, the arguments advanced by Zaire in support of its jurisdictional objections sometimes went to substantive issues which lay at the heart of the dispute.

Before discussing the jurisdictional objections raised by Zaire, it is important to briefly recall the nature and legal basis of the claim of AMT. In its memorandum, AMT explained the origins of the investments it made through SINZA, the Zairean incorporated company which was engaged in industrial and commercial activities in Zaire, namely the production and sale of automotive and dry cell batteries and the importation and resale of consumer goods and foodstuffs (*ICSID: Award, Individual Opinion and Declaration in American Manufacturing & Trading Inc v Republic of Zaire supra* 1537 par 3.03). It further explained that SINZA suffered losses due to the destruction of its property located in the industrial complex which was looted by certain members of the Zairian armed forces stationed at Camp

Kolole in Zone de la Gombe. These soldiers were also alleged to have broken into the commercial complex and the stores and destroyed, damaged and carried away all the finished goods and almost all the raw materials and other objects of value found on the premises.

Even though the commercial complex was re-opened in February 1992, it had to be closed down again after the soldiers embarked on a second destruction of the place between 28-29 January 1993 (*ICSID: Award, Individual Opinion and Declaration in American Manufacturing & Trading Inc v Republic of Zaire supra* par 3.04). As has already been discussed in section 1, AMT, on the basis of the above losses suffered by its nearly wholly owned subsidiary company, SINZA, requested the tribunal to declare that the respondent, Zaire, had engaged state responsibility and was therefore liable to pay it indemnity or compensation. In its memorandum, AMT based its claims on the provisions of Article 42 (1) of the ICSID or Washington Convention of 1965, and also Articles II(4), III(i) and IV(2) of the USA-Zaire Bilateral Investment Treaty of 1984 (*ICSID: Award, Individual Opinion and Declaration in American Manufacturing & Trading Inc v Republic of Zaire supra* 1538 par 3.07).

3 1 The nature of the jurisdictional objections raised by the Republic of Zaire

In its written counter-memorandum and rejoinder, Zaire raised a number of important objections to the jurisdiction and competence of the ICSID to conduct the arbitration. These objections will be discussed in some detail in this sub-section, while sub-section 3 2 below will examine how the tribunal reasoned and eventually disposed of them.

The first objection dealt with an alleged defect in the capacity of AMT as an applicant in the disputes, as it could not act in the name of SINZA. In essence, the respondent's argument was that, in terms of the 1965 ICSID Convention, ICSID did not have the jurisdiction to entertain the dispute because there was in fact no dispute between the Republic of Zaire and AMT, an American company. The respondent argued that in actual fact, the dispute was between the Republic of Zaire and SINZA, a Zairean incorporated company whose properties and assets were damaged and looted by some elements of the Zairean armed forces.

The second objection raised by Zaire was that, even if it was assumed that there was a dispute between AMT and the Republic of Zaire, AMT was in fact in breach of the provisions of Article VIII of the USA-Zaire BIT which required that firstly, there should be an attempt to settle the dispute through consultation between the representatives of the parties. If that failed, then other diplomatic channels should be used. It was only after the failure of all these channels that the claimant could have recourse to ICSID arbitration.

Thirdly, Zaire contended that the claim was inadmissible as it did not comply with the provisions of articles II, IV and IX of the BIT because AMT failed to adduce any evidence to the effect that the state of Zaire, “has granted in like circumstances a treatment no less favourable to SINZA than it had accorded to its own nationals or companies” (*ICSID: Award, Individual Opinion and Declaration in American Manufacturing & Trading Inc v Republic of Zaire supra* par 3.11).

Fourthly, Zaire relied on the provisions of Article IX of the BIT which provided that the BIT shall not supersede, prejudice or otherwise derogate from the laws, regulations, administrative practices or procedures or adjudicatory divisions of either party. More specifically, Zaire referred to the provisions of her Ordinance Law 69-044 of 1 October 1966 relating to the injuries suffered as a result of the disturbances. The law declared inadmissible all actions based on the general law in matters of civil liability, seeking to condemn the state to pay compensation for losses or injuries suffered in connection with riots or insurrections. Zaire contended that, consequently, the BIT could not derogate from the provisions of the above law which dealt with important matters of national policy (*ICSID: Award, Individual Opinion and Declaration in American Manufacturing & Trading Inc v Republic of Zaire supra* par 3.12).

The final objection was that AMT’s claims for the alleged violations of Articles 45 and 46 of the Zairean Code of Investment were inadmissible because AMT was a US company which did not make any direct investment in the state of Zaire. The company which made a direct investment in Zaire was SINZA which was a legal entity of Zairean nationality and which had the exclusive capacity to institute arbitral proceedings under Article 45 of the Zairean Investment Code (*ICSID: Award, Individual Opinion and Declaration in American Manufacturing & Trading Inc v Republic of Zaire supra* par 3.13).

In its reply, AMT rejected all these objections, explaining that it was always the direct investor in Zaire as it was the majority shareholder of SINZA, an industrial corporation established in Zaire but which should be deemed to be a legal entity of US nationality for the purposes of ICSID jurisdiction (*ICSID: Award, Individual Opinion and Declaration in American Manufacturing & Trading Inc v Republic of Zaire supra* par 3.15).

In its rejoinder, the Government of Zaire reconfirmed its position on the issues regarding the lack of jurisdiction on the part of ICSID and the inadmissibility of the AMT claims, and also completely rejected all the allegations put forward by AMT in support of its claim for compensation plus interest.

In conclusion, the position of the Republic of Zaire was that it had never disputed that the property of SINZA was damaged. It went on to admit that SINZA was actually subject to the same plight as those who were victims of the looting of 1991 and 1993. But then, Zaire maintained that “the question of compensation is something else, because none of these victims has ever received any treatment more favourable than that accorded to SINZA” (*ICSID: Award, Individual Opinion and Declaration in American Manufacturing & Trading Inc v Republic of Zaire supra* par 3.18 (respondent’s emphasis)). The respondent further argued that, to the best of the knowledge of the Government of Zaire, no victim of the lootings of 1991 and 1993 was ever paid any compensation by the Zairean Government and pointed out that no proof of the payment of such compensation was furnished by AMT.

3.2 *The response of the tribunal to the jurisdictional objections raised by the respondent state, Zaire*

The tribunal examined the merits of each of the objections raised by the Republic of Zaire to the jurisdiction of ICSID and the tribunal. The tribunal assumed, without any explanation of any sort, that it had the jurisdiction to determine whether or not it could hear the dispute. This is what is sometimes referred to as the doctrine of *competenz kompetanz*. The tribunal also made a curious statement to the effect that it had decided to join the issue of jurisdiction to the merits of the case, but in the end, wisely decided that “on the other hand, the tribunal deems it its duty to ascertain whether it is properly seized of the case and that it shall, in all cases, examine the question of its own competence before embarking upon consideration of the merits of the case” (*ICSID: Award, Individual Opinion and Declaration in American Manufacturing & Trading Inc v Republic of Zaire supra* 1541-1542 par 4.09 and 5.01-5.02). It is submitted that this was the correct course of action to follow as in most cases where the jurisdiction of the forum is challenged by one of the parties, tribunals would first clear that hurdle before proceeding to consider the merits of the case.

The tribunal decided to examine all the grounds of objections raised by Zaire against its jurisdiction. First, it examined the three prerequisites to ICSID jurisdiction as provided for in Article 25 of the ICSID Convention of 1965, which should exist before a tribunal can lawfully be seized of jurisdiction to hear the dispute. These three prerequisites are:

- (a) There must be a legal dispute arising out of an investment;
- (b) The dispute must have arisen between a contracting state and a national of another contracting state; and
- (c) The parties must have consented to submit their dispute to ICSID (*ICSID: Award, Individual Opinion and Declaration in American Manufacturing & Trading Inc v Republic of Zaire supra* par 5.04).

With respect to (a) above, that is, whether or not there was a legal dispute between the parties (*ratione materiae*), the tribunal's response was brief and to the point. It pointed out that there was very little discrepancy between the parties that there was a dispute of a legal nature requiring a legal solution (*ICSID: Award, Individual Opinion and Declaration in American Manufacturing & Trading Inc v Republic of Zaire supra* par 5.06).

The next issue to be considered was (b) above, that is, whether or not there existed a dispute between a contracting state and a national of another contracting state (*ratione personae*). Regarding this issue, Zaire did not dispute that AMT was an American company. It rather argued that precisely because it was an American company which had never made any direct investment in Zaire, it lacked the capacity or standing to be a party to a dispute against Zaire. The above argument deployed by the Government of Zaire was roundly rejected by the tribunal, on the strength of the provisions of the USA-Zaire BIT itself. The tribunal referred to the preambular provisions of the treaty, Article I dealing with the definition of the term "company" and also paragraph (c) of Article I which defines the term "investment".

The definition of the term "investment" is provided as follows: "every kind of investment, owned or controlled directly or indirectly, including equity, debt, and service and investment contracts". It also includes "a company or shares of stock or other interests in a company or interests in the assets thereof" (*ICSID: Award, Individual Opinion and Declaration in American Manufacturing & Trading Inc v Republic of Zaire supra* 1544 par 5.14). In justifying its rejection of the argument of Zaire that AMT lacked *locus standi* in the dispute, the tribunal correctly observed as follows:

"It is uncontested that SINZA belongs to AMT 94 per cent and that AMT, formed in the United States of America with 55 per cent of its shares owned by United States citizens, is controlled by the Americans, and hence is a US company. Thus, SINZA should be considered in terms of the perfectly clear provisions of the treaty as an investment of AMT. It follows that SINZA falls within the category of juridical persons envisaged in Article 25(2) of the Convention as previously cited. It is not called into question whether, as Zaire suggests AMT can act in the name of SINZA. AMT acts in its own name and in its capacity as an American enterprise having invested in Zaire, that is to say, a national of a state party having a dispute with another state party which has welcomed his investments on its territory" (*ICSID: Award, Individual Opinion and Declaration in American Manufacturing & Trading Inc v Republic of Zaire supra* par 5.15).

The view of the tribunal that it is not only direct investment by a foreign national or company in a foreign country which will qualify it as a foreign investor worthy of being an applicant for ICSID arbitration under a BIT is essentially correct. This position has been adopted in similar cases by the International Court of Justice and other ICSID tribunals which have stated the principle that a foreign shareholder in a locally incorporated company qualifies as a foreign investor who may enjoy diplomatic protection by its country of nationality against the host country where the company of

investment is located. In the case of *Electronica Sicula SPA (ELSI) (United States) v Italy* (see International Court of Justice: Judgement in *Case Concerning Electronica Sicula SPA (ELSI) (United States) v Italy* 28 (Sept 1989) ILM No 5, 1109), where two US companies wholly owned ELSI, an Italian incorporated company, the ICJ held that the United States could espouse their claims and exercise her right of diplomatic protection on their behalf against Italy under the provisions of a bilateral Treaty of Friendship, Commence and Navigation (ICN) concluded between the USA and Italy.

The third prerequisite as stipulated in Article 42(1) of the ICSID Convention relates to (c) above, that is, whether or not the parties consented to the submission of the dispute to ICSID arbitration. In the view of the tribunal, the relevant question to ask was whether, beyond the provisions of the BIT which provided for the submission of investment disputes to ICSID arbitration, there was still a need for evidence of consent to ICSID arbitration of the specific dispute between the Republic of Zaire and AMT. The tribunal found evidence of the agreement between the parties the fact that AMT opted for ICSID arbitration and Zaire agreed to submit any dispute she may have with a national of the USA to ICSID arbitration under the BIT (*ICSID: Award, Individual Opinion and Declaration in American Manufacturing & Trading Inc v Republic of Zaire supra* 1545 par 5.23), concerning the interpretation and application of its provisions.

The tribunal then went on to consider the other supplementary or objections raised by Zaire. In her second objection, Zaire contended that as ICSID only had jurisdiction to entertain disputes between a contracting state and a national of a contracting state, the tribunal could not be properly seized of the dispute as it was between Zaire and SINZA, a Zairean company. The tribunal rejected this contention as it had already found that in fact the dispute was between AMT and Zaire (*ICSID: Award, Individual Opinion and Declaration in American Manufacturing & Trading Inc v Republic of Zaire supra* 1546 par 5.24-5.25).

The third objection raised by Zaire was that AMT had failed to comply with the provisions of Article VII of the BIT before instituting the arbitral proceedings. Article VII of the BIT provided that “any dispute between the parties concerning the interpretation or application of this treaty should, if possible, be resolved through consultations between the representatives of the two parties, and if this should fail, through other diplomatic channels”. The tribunal swiftly rejected this argument. It explained that the provisions of Article VII of the BIT did not refer to the type of dispute between AMT and Zaire. Instead, it referred to disputes which might arise between the USA and the Republic of Zaire which were the contracting state parties to the BIT (*ICSID: Award, Individual Opinion and Declaration in American Manufacturing & Trading Inc v Republic of Zaire supra* par 5.28).

The fourth objection raised by Zaire was that AMT had violated Articles II, IV and IX of the BIT. As these provisions of the BIT related to the standard of treatment to be accorded to investments and the amount of compensation to be paid under certain circumstances, the tribunal correctly determined that they went more to the merits of the dispute than to jurisdiction (*ICSID: Award, Individual Opinion and Declaration in American Manufacturing & Trading Inc v Republic of Zaire supra* par 5.29-5.32).

The fifth objection raised by Zaire was that AMT's claim violated Article IX of the USA-Zaire BIT. Article IX was entitled "Preservation of Rights" and provided as follows:

"This treaty shall not supersede, prejudice or otherwise derogate from:

- (a) laws and regulations, administrative practices or procedures, or adjudicatory divisions of either party;
- (b) international legal obligations; or
- (c) obligations assumed by either party, including those contained in an investment agreement or an investment authorization,

whether extant at the time of entry into force of this treaty or thereafter, that entitle investments, or associated activities, of nationals or companies of the other party to treatment more favorable than that accorded by this treaty in like situations" (*ICSID: Award, Individual Opinion and Declaration in American Manufacturing & Trading Inc v Republic of Zaire supra* par 5.33).

Zaire inferred from the foregoing provisions that since her own domestic law Ordinance Law 69-044 of 1 October 1966 relating to losses and injuries caused by disturbances, declared inadmissible any action based on ordinary law in matters of civil liability which sought to condemn the state to compensate for damage caused either by riots or insurrections, the AMT claim was inadmissible before the tribunal. The respondent added that the provisions of the BIT could not derogate from the provisions of the Zairean ordinance law on public policy matters as referred to above (*ICSID: Award, Individual Opinion and Declaration in American Manufacturing & Trading Inc v Republic of Zaire supra* par 5.33-5.34).

The tribunal rejected Zaire's arguments as unfounded for two reasons. Firstly, it is trite law that in public international law, the specific provisions of a treaty will supersede the provisions of municipal law. Secondly, the interpretation which Zaire sought to place on the provisions of Article IX of the BIT would effectively defeat the purpose of the article in the treaty, that is, to preserve treatment of foreign investment which would be more favorable than that accorded in the BIT (*ICSID: Award, Individual Opinion and Declaration in American Manufacturing & Trading Inc v Republic of Zaire supra* par 5.35-5.37).

The sixth and final ground raised by Zaire related to her first ground, namely that it was SINZA which had the capacity to initiate the arbitration proceedings in accordance with Article 45 of the Zairean Investment Code. This ground had already been rejected by the tribunal as not well founded

(*ICSID: Award, Individual Opinion and Declaration in American Manufacturing & Trading Inc v Republic of Zaire supra* par 5.38-5.39).

Propriu motu, the tribunal raised and considered a possible ground based on Article VII of the BIT. This article required of parties to the dispute to initially seek to resolve it through consultation and negotiation. It is only when they have failed to settle the dispute through these two means of settlement that they may resort to any means of settlement. The tribunal pointed out that the evidence contained in paragraphs 12 and 13 of AMT's request for arbitration showed that it had made many efforts to consult with Zaire with a view to resolving the dispute, without success. This ground was also found to be baseless (*ICSID: Award, Individual Opinion and Declaration in American Manufacturing & Trading Inc v Republic of Zaire supra* par 5.40-5.45).

After a thorough and detailed scrutiny of all the objections and arguments of the parties, especially the submissions of the respondent state, the tribunal found on the question of the admissibility of the claim "that none of the grounds advanced by Zaire or by the tribunal itself in support of lack of competence on the part of the tribunal is valid and that the proceeding instituted by AMT before ICSID is perfectly admissible" (*ICSID: Award, Individual Opinion and Declaration in American Manufacturing & Trading Inc v Republic of Zaire supra* 1548 par 5.46).

4 The basis of international legal responsibility of the Republic of Zaire

Having considered and dismissed all the jurisdictional objections to its competence to hear the dispute, the tribunal proceeded to examine the merits of the case by determining whether or not the Republic of Zaire had engaged international legal responsibility by failing to discharge its obligations under the BIT. In its claim, AMT alleged that the Republic of Zaire was in violation of the provisions of the USA-Zaire BIT, especially Articles II(4), III and IV(1)(b) and (2)(b). In view of the fact that, of all the provisions of the 1984-BIT invoked by AMT, Article II(4) is the most significant, its provisions are set forth hereunder in *extenso*:

"Article II: Treatment of Investment

- (4) Investment of nationals and companies of either Party shall at all times be accorded fair and equitable treatment and shall enjoy protection and security in the territory of the other Party. The treatment, protection and security of investment shall be in accordance with applicable national laws and may not be less than that recognized by international law ... Each Party shall observe any obligation it may have entered into with regard to investment of nationals or companies of the other Party" (*ICSID: Award, Individual Opinion and Declaration in American Manufacturing & Trading Inc v Republic of Zaire supra* par 6.04).

Faced with AMT's claims that it did not fulfill its obligations to provide protection and security to its investments in Zaire, the response of Zaire was not to deny or challenge this. Instead, Zaire admitted that SINZA "has been the object of looting in 1991 as indeed it was the case with all the others". Zaire then continued to contend that AMT did not provide any evidence to prove that the Republic of Zaire "has accorded in like circumstances a treatment less favorable to SINZA than that which it has accorded to its own nationals or companies" (*ICSID: Award, Individual Opinion and Declaration in American Manufacturing & Trading Inc v Republic of Zaire supra* 1549 par 6.09).

In other words, the argument of the Republic of Zaire was that it admitted failing to show any vigilance or putting in place any measures which would protect and secure the investments of the claimant company. The state should, however, not be held internationally liable because the same omission on its part applied to its own nationals, and to foreign companies whose investments were located in Zairean territory. This was a classical invocation of the national treatment standard as against the international minimum standard stipulated in paragraph 4 of Article II of the BIT. This was roundly rejected by the tribunal. It found as follows:

"The tribunal deems it sufficient to ascertain, as it has done, that Zaire has breached its obligation by taking no measure whatever that would serve to ensure the protection and security of the investment in question. The tribunal finds that Zaire has breached the obligation it has contracted by signing the above-cited provisions of the BIT in the face of the events from which the ensuing disastrous consequences have been sufficiently described in the documents filed with the Tribunal. Zaire is responsible for its inability to prevent the disastrous consequences of these events adversely affecting the investments of AMT which Zaire had the obligation to protect" (*ICSID: Award, Individual Opinion and Declaration in American Manufacturing & Trading Inc v Republic of Zaire supra* par 6.08).

With regard to the specific invocation of the national treatment principle by Zaire, as already pointed out, the tribunal rejected it outright, while observing as follows:

"In effect, the argument advanced by Zaire that it has not accorded to nationals and companies of these states any protection or reparation, is not pertinent for the tribunal. Since the repetition of breaches and failures to perform similar obligations it owes to third states will not in any way exonerate the objective responsibility of the state of Zaire for the breach of its obligation of the treatment of protection and security it owes to AMT by virtue of Article II paragraph 4 of the BIT.

Consequently, the reasoning presented by Zaire is not acceptable. The responsibility of the state of Zaire is incontestably engaged by the very fact of an omission by Zaire to take every measure to protect and ensure the security of the investment made by AMT in its territory" (*ICSID: Award, Individual Opinion and Declaration in American Manufacturing & Trading Inc v Republic of Zaire supra* par 6.10-6.11).

The tribunal further held that the international legal liability of Zaire was further reinforced by the provisions of Article IV paragraph 1 (b) of the BIT. It referred to the provisions of the BIT which enjoined contracting parties to pay compensation for damages caused by war or similar events to:

“1. Nationals or companies of either party whose investments in the territory of the other party suffer ...

- (b) damages due to revolution, state of national emergency, revolt, insurrection, riot or act of violence in the territory of such other Party” (*ICSID: Award, Individual Opinion and Declaration in American Manufacturing & Trading Inc v Republic of Zaire supra* 1550 par 6.12 (emphasis supplied by the tribunal)).

The tribunal observed that Zaire would be held responsible for all the losses incurred by the claimant company, without the need to enquire about the identity of the perpetrators of such losses. In this respect, it said:

“Such is the case without the tribunal enquiring as to the identity of the author of the acts of violence committed on the Zairean territory. It is of little or no consequence whether it be a member of the Zairean armed forces or any burglar whatsoever. This responsibility Zaire cannot set aside by invoking its own national legislation. It is an international obligation which Zaire has freely contracted within the framework of the BIT” (*ICSID: Award, Individual Opinion and Declaration in American Manufacturing & Trading Inc v Republic of Zaire supra* par 6.13).

5 A brief evaluation of the tribunal award

To a large extent, the outcome of this dispute was conditioned or determined by the way in which the respondent state, Zaire, handled the proceedings. Zaire was at pains to explain to the members of the tribunal that its attitude and conduct was not a manifestation of disrespect but that it should be seen as a failing due to the country's internal problems. At customary international law, there is an objective international minimum standard under which a host state is to provide protection and security to foreign nationals and their property located in its territory. In many cases, the BIT provisions have reproduced this international minimum standard. In the dispute at hand, the Republic of Zaire committed herself under the 1984 USA-Zaire BIT to exercise due diligence in taking precautionary measures to provide protection and security to US nationals and companies which invested in her territory. Throughout the arbitration proceedings, Zaire consistently proclaimed that it took no such measures whatsoever even though she knew that elements in her armed forces were twice involved in lootings which resulted in damage and loss to the property of SINZA, a company in which the claimant company had invested. It was clearly very disingenuous on the part of Zaire to invoke the national treatment principle by relying on the provisions of her municipal legislation in the face of clear commitments undertaken in the 1984 BIT. This was further evidence of the lack of proper preparation and handling of the case on the part of the Government of Zaire.

6 Summary and conclusion

For the past two decades, many African countries, like their counterparts in the developing world, have adopted various economic adjustment programmes and other reform measures. Key elements in all these programmes are usually the roll-back of the state apparatus role in the

management of the national economy and a substantial increase in the role of private investment, usually of foreign provenance.

In line with these economic reform programmes, many African countries embarked on reforms of their domestic legislation on foreign investment and the development of natural resources, especially in the mining sector. Several of these countries also concluded bilateral investment treaties with mainly developed capital-exporting countries. The aims of these bilateral agreements are to encourage a greater flow of foreign investment into the economies of the developing countries by *inter alia* assuring their protection and security and in many cases guaranteeing them against certain non-commercial risks such as expropriation without the payment of compensation.

The dispute in this case arose from one such bilateral investment treaty which was concluded between the USA and the then Republic of Zaire. Many African and other developing countries fail to realize that the conclusion of such agreements involves the assumption of reciprocal rights and duties. This means that the contracting party in whose territory the foreign investment will normally be located, undertakes to put in place policies, systems and measures which will enable it to successfully discharge its treaty obligations.

In the case under review, the Republic of Zaire, by its own admission, failed to do this, thereby engaging international legal responsibility. Zaire's case before the tribunal was further worsened by the nonchalant and amateurish way in which it was handled and presented. Clearly, in the circumstances, it could be said that the case of Zaire was not fully and competently presented to the tribunal in spite of the fact that the tribunal went to great lengths to accommodate her. The manner in which Zaire handled this dispute is certainly not a model to be followed by African and other developing countries which may in future be parties to investment disputes before the ICSID and other *ad hoc* tribunals.

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