

Date of Dispatch to the Parties: February 21, 1997

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

A W A R D

AMERICAN MANUFACTURING & TRADING, INC.

v.

REPUBLIC OF ZAIRE

ICSID Case ARB/93/1

A W A R D

RENDERED BY THE ICSID ARBITRAL TRIBUNAL

composed of

Mr.	Sompong	SUCHARITKUL	President
Mr.	Heribert	GOLSONG	Arbitrator
	and		
Mr.	Kéba	MBAYE	Arbitrator
Mr.	Nassib	ZIADE	Secretary

RENDERED BY THE ARBITRAL TRIBUNAL

Constituted under the Auspices
of the International Centre for Settlement of Investment Disputes
(ICSID)

in the Matter

AMERICAN MANUFACTURING & TRADING, INC.

v.

REPUBLIC OF ZAIRE

(ICSID CASE ARB/93/1)

Appearance before the Tribunal

For : AMT		For : ZAIRE	
Mr.	Hassan	YAHFOUFI	Mr. Manzila LUNDUM SAL'ASAL
Mr.	Daniel D.	DINUR	H.E. Mr. Ramazani BAYA (designated without appearance)

PART ONE : INTRODUCTION

I : INSTITUTION OF ARBITRAL PROCEEDINGS

- 1.01 American Manufacturing & Trading Corporation (Zaire), Inc. (AMT), an American company incorporated in the State of Delaware of which the majority shareholders are nationals of the United States of America, addressed to the Secretary General of the International Centre for Settlement of Investment Disputes (ICSID) a letter of 25 January 1993, instituting arbitral proceedings against the Republic of Zaire by virtue of Article 36 of the Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States, of 18 March 1965 (the CONVENTION).
- 1.02 After acknowledging receipt of this request for arbitration on 26 January 1993, the Secretary General transmitted on the same day a copy of said request to the Republic of Zaire delivered by special courier to the Minister of Plan of Zaire at Kinshasa, as well as by a registered letter addressed to the Ambassador of Zaire in Washington, D.C. The Secretary-General of ICSID registered the request on 2 February 1993.
- 1.03 The request of AMT is based on the provisions of a Bilateral Treaty concluded between the United States of America and the Republic of Zaire concerning the Reciprocal Encouragement and Protection of Investment (the BIT) of which the English and French text submitted by AMT was certified as true copy by the Secretary of State of the United States of America on 21 February 1995. The BIT was signed on 3 August 1984, and entered into force on 28 July 1989.
- 1.04 By letter of 2 July 1993, received by ICSID on 7 July 1993, the Claimant party informed ICSID of a change of name, and that it would hence forth be called "American Manufacturing & Trading, Inc."

1.05 In the Request for Arbitration (paragraphs 10, 11 and 15) as well as in the Additional Request of 16 March 1993, AMT in its final submission requests the Tribunal to adjudge and declare :-

- (1) That the Republic of Zaire has violated the rights of AMT recognized and protected by the provisions of BIT of 1984;
- (2) That the Republic of Zaire is thereby responsible for failing to fulfill its obligations of protection provided by the BIT, especially as regards the destructions caused by the elements of the armed forces of Zaire on 23-24 September 1991 and on 28-29 January 1993, in respect of damage to the properties and installations belonging to Société Industrielle Zaïroise (SINZA) Société privée à responsabilité limitée (SPRL) limited liability private company. 94 per cent of whose stocks are subscribed by AMT, including all losses suffered by SINZA as the result of the looting; and
- (3) That the Republic of Zaire be condemned to pay to AMT, as a measure of compensation and as damages and interests, an indemnity equivalent to
 - a) The fair market value of all the losses suffered by the investment of AMT in Zaire;
 - b) The loss of profits (*Lucrum Cessans*) which AMT would have acquired on its own behalf; and
 - c) The interests on the amount of compensation under a) and b) at a commercial rate equal to the appropriate international rate of interest for transactions in dollars from 23 September 1991 until the final payment.

1.06 Furthermore, AMT requests the Tribunal (paragraph 16 of the Request for Arbitration) to condemn the Republic of Zaire to pay for all the costs of the arbitral

proceedings, including the fees and expenses of the Members of the Tribunal, the charges for the use of ICSID facilities, as well as all other expenses incurred by AMT in the course of the proceedings, consisting of the total amount of the fees and expenses of its own counsel, advocates and other persons called upon to appear before the Tribunal, and the interests thereon calculated at a commercial rate equal to the appropriate international rate for transactions in dollars from the date of the rendering of the Award until the day of the final payment.

- 1.07 In its Request (paragraph 15), AMT asserts that in the report prepared by a branch office of Lloyds in Zaire on 14 November 1991, the direct losses were estimated at US\$ 10,524,023, without prejudice to the calculation of the total amount of compensation and interests that AMT will subsequently present. In its submission of additional claims of 16 March 1993 (paragraph 3), AMT adds that the value of the goods taken, destroyed or looted during the incidents of 28-29 January 1993 is estimated at US\$ 324,868.

II : CONSTITUTION OF THE TRIBUNAL

- 2.01 Without any positive reaction on the part of the Republic of Zaire to the notification of the Request for Arbitration by ICSID more than 60 days after 2 February 1993, the date of registration of the Request for Arbitration, above all with regard to the nomination of arbitrators, and in the absence of agreement between the Parties, AMT has opted as for the number of arbitrators for the formula to constitute the Tribunal in accordance with the provisions of Article 37 (2)(b) of the Convention which provides for an Arbitral Tribunal composed of three arbitrators : each Party appointing one arbitrator and the President of the Tribunal appointed by agreement of the Parties.
- 2.02 At the same time, AMT has nominated Mr. Heribert GOLSONG, of German nationality as arbitrator and proposed Mr. Robert COUZIN, of Canadian nationality, as President of the Arbitral Tribunal in accordance with Article 3 (1)(a) of the ICSID

Arbitration Rules. In the absence of any nomination by the Government of Zaire more than 90 days following the delivery of notification of registration of the Request for Arbitration to the parties, AMT has requested by its letter of 5 July 1993, addressed to the Chairman of the Administrative Council of ICSID, to appoint the arbitrator not yet appointed and to nominate the arbitrator to perform the function of the President of the Tribunal in accordance with Article 4 (1) of the ICSID Arbitration Rules. The Chairman of the Administrative Council is bound to give effect to this request by AMT within 30 days following its receipt in accordance with Article 4 (4) of the Arbitration Rules, (letter of the Secretary-General of ICSID of 8 July 1993).

- 2.03 By a letter of 13 July 1993, ICSID informed the parties that the Secretary-General intended to recommend to the Chairman of the Administrative Council to appoint to the Tribunal Judge Kéba MBAYE and Professor Sompong SUCHARITKUL and to nominate Professor SUCHARITKUL as President of the Tribunal. Judge Kéba MBaye, national of Senegal, domiciled in Dakar, is a former President of the Supreme Court of Senegal and former Vice-President of the International Court of Justice. Professor Sompong Sucharitkul, national of Thailand, domiciled in San Francisco, United States, is a former member of International Law Commission and a former Ambassador of Thailand. He is currently Professor of Law at Golden Gate University School of Law. The appointments of these arbitrators as well as the nomination of the President of the Tribunal, have been confirmed by the Chairman *ad interim* of the Administrative Council of the Centre and communicated to the Parties on 26 July 1993.

- 2.04 Upon notification of the acceptance by Judge MBaye and Professor Sucharitkul, the Arbitral Tribunal of ICSID was thus constituted on 4 August 1993 in accordance with ICSID Arbitration Rule 6 (1). The establishment of the Tribunal and its composition were duly notified to the Parties on 4 August 1993. The Arbitral Tribunal is composed of :-

Mr. Sompong	SUCHARITKUL	President
Mr. Heribert	GOLSONG	Member
Mr. Kéba	MBAYE	Member

Mr. Nassib G. Ziadé, Counsel, ICSID, was designated as Secretary of the Tribunal by the Secretary-General of ICSID.

III : PROCEDURAL DEVELOPMENTS

A. THE FIRST SESSION OF THE TRIBUNAL

3.01 On 1 October 1993, the Arbitral Tribunal held its first meeting with the Parties in Washington, D.C. This session was devoted exclusively to the questions concerning organization of the procedures to follow, including the written proceedings as well as the oral proceedings. In the absence of representation on the part of Zaire, the oral phase of the proceedings has become inevitable. The Tribunal fixed the time-limits for the filings of the Memorial and the Counter-Memorial by the Parties. The conclusion of the Tribunal were recorded in details in the Minutes of the Meeting for preliminary procedural consultation of 1 October 1993, of which a copy was distributed to each Party to the dispute.

B. WRITTEN PLEADINGS FILED BY THE PARTIES

3.02 In accordance with the time-limits fixed for the filing of written pleadings and the requests made by each Party in turn for extension of the time-limits thus fixed by the Tribunal, the Parties filed the following written pleadings :

- a) The Memorial by the Claimant
on 9 December 1993;

- b) The Counter-Memorial by the Respondent raising at the same time an objection to the jurisdiction of ICSID and of the Tribunal
on 30 May 1994;
- c) The Reply by the Claimant, replying and making observations on the objection to the jurisdiction of ICSID and of the the Tribunal
on 17 June 1994;
- d) The Rejoinder by the Respondent
on 19 July 1994.

3.03 a) The Memorial, filed by the Claimant on 9 December 1993 with 8 annexes, reiterated and consolidated the claims contained in the Request for Arbitration of 20 January 1993 and the Additional Request of 16 March 1993, giving an account of the events preceding and giving rise to the dispute between the Parties. The Memorial recalled the origin of the investments made by AMT which through SINZA was engaged in industrial and commercial activities in Zaire, namely, (a) the production and sale of automotive and dry cell batteries; and (b) the importation and resale of consumer goods and foodstuffs.

3.04 In its Memorial, AMT gave further details of the losses suffered by SINZA as the result of the destruction of property located in the industrial complex for the production of automotive and dry cell batteries and the looting on 23-24 September 1991 by certain members of the Zairian armed forces stationed at Camp Kolole in Zone de la Gombe. These soldiers also broke into the commercial complex and the stores, destroyed, damaged and carried away all the finished goods and almost all the raw materials and objects of value found on the premises. The commercial complex was reopened in February 1992, but since the second destruction of 28-29 January 1993, it was permanently closed.

- 3.05 In the Annexes, the Memorial estimated the total amount of compensation at US\$ 14,339,610. This total comprises : (a) US\$ 12,793,850 for the industrial complex in 1991; (b) US\$ 1,220,900 for the commercial complex and the two stores in 1991; and (c) US\$ 324,860 for the physical damage suffered by the commercial complex and the two stores in 1993.
- 3.06 AMT requested a sum of US\$ 21,574,405 to be paid by the Government of Zaire as compensation, plus 8 per cent interest on this sum since 23 September 1991, and for the sum of US\$ 305,368 since 30 January 1993. In addition, AMT claimed compensation for all expenses incurred in the course of the proceedings, the two reports of Lloyds for US\$ 126,500, and all other expenses and fees paid by AMT including those of the Centre, of the Members of the Tribunal as well as of the Counsel and Advocate and other expenses that the Tribunal may consider appropriate.
- 3.07 In its Memorial, AMT based its claims on the provisions of Article 42 (1) of the Convention and on Articles II (4), III (1) and IV (2) of the BIT.
- 3.08 b) The Counter-Memorial filed by the Respondent on 30 May 1994, contained a summary of the facts, emphasizing that SINZA *"has been the object of looting in 1991, as it was indeed the case with all the others"*.
- 3.09 The Counter-Memorial raised several preliminary objections to the jurisdiction of ICSID and consequently to the competence of the Tribunal, on the ground of a defect in the status of AMT without the capacity to act in the name of SINZA. The Respondent challenged the jurisdiction of ICSID to entertain the case instituted by AMT, without the existence of a dispute between AMT and the Republic of Zaire, but in the actual case, the dispute was ultimately between SINZA, a Zairian Company, and the Republic of Zaire.
- 3.10 Zaire raised the objection based on AMT's failure to comply with Article VIII of

- the BIT, requiring settlement of dispute by means of consultation between representatives of the two Parties and, failing that, by other diplomatic channels. The Counter-Memorial maintained that it was only after all these means had failed that it would have been possible to have recourse to ICSID Arbitration.
- 3.11 The Counter-Memorial raised another objection on the ground of inadmissibility of AMT's request for non-compliance with Articles II, IV and IX of the BIT without adducing any evidence that the State of Zaire *"has granted in like circumstances a treatment no less favorable to SINZA than it had accorded to its own nationals or companies"*.
- 3.12 Besides, Zaire relied on Article IX of the BIT which stipulates that the present Treaty (BIT) shall not supersede, prejudice, or otherwise derogate from the laws, regulations, administrative practices or procedures or adjudicatory decisions of either Party, basing itself on Zairian Ordinance Law No. 69-044 of 1 October 1966, relating to the injuries suffered as the result of the disturbances which declared inadmissible all actions based on general law in matters of civil liability, seeking to condemn the State to pay compensation for the losses or injuries suffered in connection with the riots or insurrections. The Counter-Memorial confirmed as a consequence that the claim made by AMT was inadmissible, because the Treaty under reference could not derogate from this legal provision on public policy matters.
- 3.13 Finally, the Government of Zaire raised an additional objection based on the inadmissibility of AMT's claim for violations of Articles 45 and 46 of the Code of Investment of Zaire, AMT being a United States company which has never made any direct investment in the State of Zaire, whereas SINZA, the direct investor for this purpose is a legal entity of Zairian nationality, exclusively empowered to institute arbitral proceedings under Article 45 of Zairian Investment Code.
- 3.14 c) The Reply, filed by AMT on 17 June 1994, answered the objections raised

by the Government of Zaire to the jurisdiction of ICSID and consequently to the competence of the Tribunal. AMT presented its observations on the questions of inadmissibility of its claims as to the jurisdiction of ICSID as well as its merits.

3.15 In its Reply, AMT rejected all the objections and exceptions raised by the Respondent, underlying the fact that it was AMT which was always the direct investor in Zaire, as majority stockholder of SINZA, an industrial corporation established in Zaire but deemed to be a legal entity of United States nationality for the purpose of ICSID jurisdiction.

3.16 In this Reply, the Claimant took occasion to propose the date for the hearing before the Tribunal in the course of the first week of September 1994. After consultation with the Parties, the Tribunal fixed the date of the beginning of hearing on 4 November 1994 at the headquarters of ICSID in Washington, D.C. and this date was communicated to the Parties by the Secretary of the Tribunal in his letter of 23 August 1994. On 13 October 1994, AMT requested that this date be postponed till after 4 November 1994. Upon this request, the Tribunal fixed 5 and 6 December 1994 as new dates for the hearing of the Tribunal at the offices of the World Bank in Paris.

3.17 d) The Rejoinder, filed by the Republic of Zaire on 19 July 1994, reconfirmed the position of the Government of Zaire as reflected in the Counter-Memorial and earlier documents, regarding lack of jurisdiction on the part of ICSID and the inadmissibility of AMT's claim, rejecting all allegations put forward by AMT in support of its claim for compensation plus interests, which the Claimant alleged that the State of Zaire had the duty to pay.

3.18 In short, the Republic of Zaire has never contended on the merit that the property of SINZA was not damaged. SINZA was actually subjected to the same plight as those who were victims of the looting of 1991 and 1993. But, the Rejoinder further maintained, that *"the question of compensation is something else, because none of these*

victims has ever received any treatment more favorable than that accorded to SINZA". To the best of the Government of Zaire's knowledge, no victim of the looting of 1991 and 1993 has been compensated by the Zairian Government, for which no proof of compensation was ever furnished by AMT.

3.19 In the end, the Republic of Zaire reaffirmed its disposition with regard to ICSID, which has never been one of disdain, as AMT had led to believe, and that it was a false accusation by AMT.

C. THE ORAL PROCEDURE

3.20 a) Representation of the Parties : By letter dated 2 November 1994, AMT communicated to ICSID the names of the persons composing its representation :

1. Mr. Hassan YAHFOUFI, President of AMT; and
2. Mr. Daniel D. DINUR, Counsel and Advocate.

Apart from these representatives, the following witnesses would give evidence before the Tribunal :

1. Mr. David W. NICHOLAS, a U.S. national;
2. Mr. Madioko Julian MUTSHUNU, a Zairian national; and
3. Mr. Firas Mohammad YAHFOUFI, a Lebanese national.

3.21 By a letter No. 130.03/000817, dated 30 November 1994, from Minister LUNDA-BULULU to the President of the Tribunal, the Government of Zaire nominated its representation to the oral procedure, as follows :

1. Attorney Manzila Lundum SAL'ASAL, Advocate of the Government in this case; and
2. His Excellency Mr. Ramazani BAYA, ambassador of the

Republic of Zaire to France.

3.22 b) The Oral Hearing By the above-cited letter of 30 November 1994, the Government of Zaire requested a postponement of the hearing until towards the end of January 1995. Having notified the Parties that the hearing could not at this stage be postponed and was as such maintained, the Tribunal held the sittings of the oral hearing in Paris on 5 December 1994 as scheduled, having also received a communication from the Claimant opposing any postponement of the hearing, (Procedural Order No. 2, 6 December 1994).

3.23 The oral hearing took place in Paris, as scheduled, at the offices of the World Bank on 5 and 6 December 1994. The Claimant, AMT, was represented by the persons previously designated. However, the Respondent remained without representation except in the person of a Counsellor of the Embassy without nomination, authorization or accreditation of any kind.

3.24 AMT thus proceeded to present its proofs and all grounds in support of its claims for reparation for the losses and injuries caused by members of the armed forces of Zaire during the destructions of 1991 and 1993 and the injurious consequences which ensued. The Tribunal heard the evidence given by two witnesses as well as a deposition of an expert concerning the assessment of compensation and interests thereon. The witnesses and the expert were questioned by the Arbitrators and by the President of the Tribunal on 5 December 1994, as provided by Article 35 of the Arbitration Rules.

D. PROCEDURAL ORDER NO. II

3.25 In the course of the hearing on 5 December 1994 at the offices of the World Bank in Paris, the Tribunal adopted a Procedural Order No. II, of which the relevant Paragraphs read as follows :

THE TRIBUNAL...

Having noted that the Respondent failed to present its case at the oral hearing, and

Having duly deliberated thereon,

GRANTS the Respondent a period of grace in accordance with Article 45 (2) of the ICSID Convention and ICSID Arbitration Rule 42, and in the present case

DECIDES to hold a supplemental hearing in Paris on 13 and 14 February 1995, provided that

a) The Republic of Zaire informs the Arbitral Tribunal that it agrees to cover the fees and expenses of the Arbitrators as well as the administrative fees related to such hearing, and

b) The Republic of Zaire deposits not later than 25 January 1995 the funds requested by the Secretary of the Tribunal in his letter of today's date to cover the fees and expenses referred to above.

3.26 The Republic of Zaire has not chosen to confirm either its intention to appear before the Tribunal in the course of the supplemental hearing scheduled for 13 and 14 February 1995, or its acceptance of the conditions stipulated in paragraphs a) and b) of the Procedural Order No. II, cited above. The supplemental hearing was thus never held in Paris.

3.27 The time has come for the Tribunal to pronounce upon the questions presented by the Parties as to the competence of ICSID and that of the Tribunal itself, as well as on the merit of the dispute. The Tribunal will therefore examine these questions

successively before reaching its conclusions.

PART TWO : QUESTIONS OF COMPETENCE

IV : GENERAL CONSIDERATIONS : OBJECTION TO THE COMPETENCE

4.01 The various procedural steps relating to the competence of the Tribunal have been mentioned and described in paragraphs 1, 2 and 3 above.

4.02 After the Tribunal had had its first session at the headquarters of ICSID in the absence of Zaire, the Respondent, the latter submitted a "Counter-Memorial" dated 30 May 1994. Zaire never failed to take that opportunity to express its gratitude to the Tribunal for acceding to its request for an extension of the time-limit for the filing of its Counter-Memorial.

4.03 In its Counter-Memorial, Zaire maintains that the Tribunal is incompetent to hear the case brought before it by AMT. In support of this proposition, Zaire resorts to the following :

- Lack of status;
- Incompetence of ICSID to consider the proceeding instituted before it by AMT;
- Non-compliance by AMT with Article VIII of Zaire-U.S. Treaty (BIT); and
- Violations of Articles II, IV and IX of the same Treaty.

Zaire further concludes that AMT's claim was inadmissible by reason of its violations of Articles 45 and 46 of the Zairian Investments Code.

4.04 In its Rejoinder of 19 July 1994, Zaire reiterates its argument regarding the

inadmissibility of AMT's claim for the reasons elaborated in the Counter-Memorial which Zaire reconfirms in its entity.

4.05 The core defense of Zaire consists in the argument that the Zairo-United States Treaty may well relate to the natural and juridical persons of the United States or Zairian nationality; and although AMT is clearly a U.S. company, it has never made any direct investment in its name in the Republic of Zaire. According to Zaire, AMT has furnished no proof whatsoever of its direct investment. Zaire indicates that AMT has merely participated, as a stockholder, in the investment made by SINZA, a Zairian company. Zaire thereupon concludes that SINZA, being a Zairian company, cannot benefit from the Zaire-U.S. Treaty. Deducing consequences from this observation, Zaire contends that the Centre is without competence, considering that the dispute in question is between a State and a national of the same State, such a dispute has never entered into the scope of application of the Convention.

4.06 In its Rejoinder, Zaire denies ever entertaining any disdainful attitude towards the Tribunal and explains that its failures were due to the *"unfortunate and disastrous"* consequences triggered by the disturbances which happened to take place in the country.

4.07 The Tribunal notes that it has amply taken into consideration the circumstances referred to by Zaire throughout the proceedings. The Tribunal has in effect demonstrated a deep understanding in regard to Zaire.

4.08 In any event, as Zaire itself admits, it follows clearly from the facts of the case that Zaire has been in default, while invoking the incompetence of ICSID and of the Tribunal.

4.09 After having carefully examined the different arguments raised by Zaire to persuade the Tribunal to declare itself incompetent, the Tribunal has decided to join the preliminary objections to the merits of the case. 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.

V. QUESTIONS RELATING TO THE COMPETENCE OF THE TRIBUNAL AND THAT OF ICSID

A. REGISTRATION OF THE REQUEST FOR ARBITRATION

5.01 The competence of the Tribunal is obviously derived from that of the Centre. One may presume that by registering the Request for Arbitration of AMT, the Secretary General of ICSID does not consider, "on the basis of the information contained" in the Request "that the dispute is manifestly outside the jurisdiction of the Centre". In reality, the Secretary-General would not have registered this Request if, in accordance with Article 36 (3) of the Convention on the Settlement of Investment Disputes between States and Nationals of other States, it was otherwise. Nevertheless, this fact does not prevent the Tribunal from examining the competence of ICSID, because, evidently Article 36 (3) does not confer upon the Secretary-General of ICSID, responsible for the registration of Request, notably as concerns verification of the competence of the Centre, the task other than a mere obligation of an extremely light control which in the execution does not, in any sense, bind the Tribunal in any way in the latter's appreciation of its own competence or lack thereof. The Tribunal will still have a number of questions to raise and also to find answers thereto.

5.02 In the process, the Tribunal will have to apply, in the present case, in addition to the Convention and the Rules of Procedure for Arbitration proceedings (Arbitration Rules), the Bilateral Treaty between the United States of America and the Republic of Zaire concerning the Reciprocal Encouragement and Protection of Investment (BIT).

Neither Party has contested the applicability of this Treaty to the present case.

B. GROUNDS ADVANCED BY ZAIRE FOR ITS OBJECTIONS TO THE COMPETENCE

5.03 The Tribunal will now examine the different grounds upon which Zaire founds its objections to the competence. It will, in addition, inquire into every question relating to its competence, as is already indicated.

(1) First Ground : The three prerequisites of ICSID Competence

5.04 In the first place, the Tribunal must respond to the question whether ICSID is competent in the present case. The problem of competence of the Centre is treated in Article 25 of the Convention. For this purpose, three conditions are required :

- 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 the Centre.

5.05 The Tribunal will take up these three conditions for verification of the fulfillment.

(a) A LEGAL DISPUTE (*RATIONE MATERIAE*)

5.06 Is it a legal dispute?

Under Article 25 of the Convention, "*The jurisdiction of the Centre shall extend to any legal dispute...*"

In this regard, there does not seem to be the least discrepancy between the Parties and the Tribunal is of the view that there is clearly a legal dispute and not

a dispute of another nature, the dispute requiring the application of rules of law and calling for legal solutions.

- (b) A DISPUTE BETWEEN A STATE AND A NATIONAL OF ANOTHER STATE (*RATIONE PERSONAE*)

5.07 Is it a dispute between a Contracting State and a national of another Contracting State?

The same Article 25 of the Convention expressly provides that the dispute must be between "a Contracting State (or any constituent subdivision or agency of a Contracting State) and a national of another Contracting State". In this case, the Contracting State is the Republic of Zaire. The dispute is with AMT. Is AMT truly, in accordance with Article 25, "a national of another Contracting State"? Zaire admits that AMT is clearly a national of another Contracting State, the United States of America. The Tribunal, in turn, reaches the same conclusion. Article 25 (2) defines what is regarded as a national of a Contracting State, as follows :

- (a) "Any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and
- (b) "Any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which

the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention."

5.08 The criticism of Zaire is not directed against the nationality of AMT but rather against its status or capacity to act. In effect, on its first ground in the Counter-Memorial, Zaire denies that AMT possesses any capacity to act in the present case. To support this argument, Zaire recalls that Article 1 of the Treaty identifies the beneficiaries of the advantages "which it has in mind and cites, on the one hand the juridical person, national of one of the Signatory States of the Treaty...", and on the other, "natural persons of Zairian nationality or of American nationality who invest in the United States or in the Republic of Zaire", and Zaire thus contends that AMT "is not an investor in the Republic of Zaire". An investor, in the view of Zaire, is certainly SINZA in its own country, an investor in whose name AMT could not act. AMT therefore does not have the capacity to act, according to Zaire.

5.09 The Tribunal finds that the dispute is brought before the Centre by AMT. It does not consider it possible to contest that AMT is not a juridical person with United States nationality. Besides, an appropriate document has been filed with the Tribunal which clearly proves this fact. It suffices for this purpose to refer to the developments contained in paragraphs 4.03 to 4.05 above. Furthermore, it should be recalled, Zaire also recognizes this fact.

5.10 Indeed, Zaire denies that the dispute is with AMT. It regards the dispute rather as being with SINZA that has assumed the function of Claimant, since it is SINZA that has been established in the territory of Zaire, which has operated the industry damaged

by the destruction, the object of the dispute. Besides, Zaire continues, SINZA is a Zairian company and the dispute it has with Zaire would have to be settled in accordance with the normal law of Zaire, and not by and in accordance with the procedure provided by the ICSID Convention.

5.11 The Tribunal does not concur in the argument presented by Zaire because it does not find it pertinent. In fact, Zaire itself recognizes in its Reply (page 2, paragraph 2 (1) in fine) that AMT "*invested by participating in the capital of SINZA*". But at the same time, Zaire contends that the fact that AMT participated in the capital even at one hundred per cent (100 %) to form a Zairian company, SINZA, does not confer upon AMT any power to act in the place and instead of SINZA.

5.12 This reasoning has not convinced the Tribunal. For the Tribunal, the Zaire-United States Treaty concerning the Reciprocal Encouragement and Protection of Investments (BIT) states, in its preamble, that "*The two States parties, desiring to promote greater economic cooperation between themselves*", particularly "*with respect to investment by nationals and companies of each Party in the territory of the other Party.*"

5.13 And in Article I on definitions, it is provided in paragraph (a) that "*Company means any kind of juridical entity, including any corporation, company, association, or other organization, that is duly incorporated, constituted, or otherwise duly organized, regardless of whether or not the entity is organized for pecuniary gain, privately or governmentally owned, or organized with limited or unlimited liability.*"

5.14 In paragraph (c) of the same Article I, the authors of the Treaty have made it even more abundantly clear when they define the term "investment". In effect, it is provided that the term "*investment means every kind of investment, owned or controlled directly or indirectly, including equity, debt, and service and investment contracts; and*

includes : ii) "*A company or shares of stock or other interests in a company or interests in the assets thereof.*"

5.15 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 U.S. 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 person 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.

5.16 For the foregoing reasons, the argument based on the defect in the capacity of the Claimant must be rejected.

(c) THE CONSENT OF THE PARTIES TO THE DISPUTE
(*RATIONE VOLUNTATIS*)

5.17 Is there absence of consent of the Parties?

The Tribunal will now examine, as earlier stated, whether the Parties have consented to submit the dispute to the Centre. Such a question is directly linked to the first ground already examined.

The first question that comes to mind is this : Is it necessary, in the present case, that there must be consent between the State (Zaire) and the national (AMT) of another State (U.S.A.), to submit the dispute to the Centre? The bilateral Treaty does not suffice since it provides that the disputes of the type to be considered by the Tribunal must be justiceable before ICSID.

21

In other words, does the consent of the United States creates an obligation for its national? Should there not be, in addition to that consent, also the consent by AMT itself relating to a specific dispute? Can the United States impose upon its national the passage of consent to ICSID? Or, better still, in the absence of AMT's consent, will the Treaty signed by the United States of America and Zaire suffice to take its place?

5.18 The Tribunal holds that this question must be answered in the negative. The requirement of the consent of the parties does not disappear with the existence of the Treaty. The Convention envisages an exchange of consents between the Parties. When Article 25 states in paragraph 1 that "the parties" must have consented in writing to submit the dispute to the Centre, it does not speak of the States or more precisely, it speaks of a State and a national of another State. It appears therefore that the two States cannot, by virtue of Article 25 of the Convention, compel any of their nationals to appear before the Centre; this is a power that the Convention has not granted to the States.

5.19 By the same token, reference should be made to Article VII, paragraph 2 of the Treaty, which provides : *"Each Party hereby consents to submit investment disputes to the International Centre for the Settlement of Investment Disputes (Centre) for settlement by conciliation or binding arbitration."* This provision is further clarified by paragraph 3, *in fine*, of the same Article VII which reads : *"If the dispute cannot be resolved through consultation and negotiation, then the dispute shall be submitted for settlement in accordance with the applicable dispute-settlement procedures upon which the Parties to the dispute may have previously agreed."*

5.20 It appears clearly that if Zaire and the United States agree that the disputes of the type which is submitted to the Tribunal could be brought before ICSID, they have thus, each on its part, accepted the competence of ICSID to be eventually proceeded against by a national of the other co-contracting State. But this acceptance is not automatic for all disputes, the Parties in question, (that is to say, a State and a national of another State), remain masters of the procedure of their choice which they may deem appropriate

to apply in order to resolve an emerging dispute. This is the way it is necessary to understand the meaning of Article VII, paragraph 3, *"in fine"*, and sub-paragraph (a) of paragraph 4 of the same Article.

5.21 On the other hand, to be more convinced, it is enough to read paragraph 4 of Article VII of which sub-paragraph (b) is thus worded : *"Once the national or company concerned has so consented, either party to the dispute may institute proceedings before the Centre or Additional Facility at any time after six months from the date upon which the dispute arose"*, provided the *"dispute has not, for any reason, been submitted by the national or company for resolution in accordance with any applicable dispute settlement procedures previously approved by the parties to the dispute"*, and *"the national or company concerned has not brought the dispute before the courts of justice or administrative tribunals or agencies of competent jurisdiction of the Party that is a party to the dispute."*

5.22 Finally, it is convenient to cite the end of paragraph 4, which reads : *"If the parties to the dispute disagree over whether conciliation or binding arbitration is the more appropriate procedure to be employed, the procedure desired by the national or company concerned shall be followed."* A right of option is thus recognized for the national of the other contracting State.

5.23 It seems that upon reading this provision of the Treaty, it cannot be contended that consent of the parties to come before ICSID simply results from a pre-existing agreement by the United States and Zaire. It is therefore necessary to show that there has also been an agreement between the Parties, or in the absence of this agreement, it would have been necessary to apply Article VII, paragraph 4 *in fine* which confers upon a national of the other State the power to compel the State party to the dispute to appear before the Centre. This is very much the case before us.

In the present case, it happens that AMT (the national envisaged in paragraph 4)

has opted for a proceeding before ICSID. AMT has expressed its choice without any equivocation; this willingness together with that of Zaire expressed in the Treaty, creates the consent necessary to validate the assumption of jurisdiction by the Centre.

(2) Other Supplementary Grounds Examined by the Tribunal

5.24 The second ground raised by Zaire is founded on the fact that ICSID is competent only to entertain proceedings between nationals and juridical persons of different nationalities and the present case is apparently a proceeding between SINZA, a Zairian corporation and the Republic of Zaire, the competence of the said ICSID is therefore not well-founded in this case.

5.25 The Tribunal has already found in paragraphs 5.06 to 5.16 above that the present case is in fact between AMT and Zaire, by virtue of the Convention and the Treaty between the United States of America and Zaire. The argument advanced by Zaire as its second ground cannot therefore be sustained, an argument which, in the ultimate analysis, is but an aspect of the first ground already rejected by the Tribunal.

5.26 In the third place, Zaire has raised a ground based upon AMT's failure to apply Article VIII of the Zaire-U.S. Treaty before instituting arbitral proceedings.

This Article provides that *"Any dispute between the Parties concerning the interpretation or application of this Treaty should, if possible, be resolved through consultations between representatives of the two Parties, and if this should fail, through other diplomatic channels."*

5.27 Zaire contends that, to the best of its knowledge, AMT has not used, as a prior requirement, the various means of dispute resolution referred to above, before addressing ICSID, and in so doing deduces from this fact that AMT has violated the above cited provision, which should entail rejection of its claim.

5.28 The Tribunal notes that Article VIII of the Treaty, as the title suggests *"Settlement of Disputes between the Parties concerning Interpretation or Application of this Treaty"*, does not relate to the dispute of the type which is brought before it, but rather the disputes between two signatory States as to the interpretation or application of the Treaty. It follows that this ground also must fail.

5.29 The fourth ground presented by Zaire is based on the alleged violation of Articles II, IV and IX of the Zaire-U.S. Treaty. Article II relates to the investments and prescribes the obligation of the parties to apply to these investments the most favorable treatment.

5.30 As for Article IV, it concerns compensation in certain circumstances.

5.31 These two provisions are clearly concerned with the merit of the case and the Tribunal does not see how they can be invoked to pre-empt the admissibility of AMT's claim, subject to the reservation regarding its soundness.

5.32 Consequently, the Tribunal declares these grounds inadmissible.

5.33 The fifth ground presented by Zaire is founded on the alleged violation of Article IX of the Zaire-U.S. Treaty. Article IX, entitled "Preservation of Rights", runs :
"This Treaty shall not supersede, prejudice, or otherwise derogate from :

- (a) laws and regulations, administrative practices or procedures, or adjudicatory decisions 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."

5.34 Zaire deduces from these provision that "*Ordinance-Law No. 69-044 of 1 October 1966 relating to losses and injuries caused by the disturbances, declaring inadmissible any action based on ordinary law in matters of civil liability and seeking to condemn the State to compensate for the damage caused either by riots or insurrections...*", AMT's claim is inadmissible. This Treaty cannot derogate from the prescription of the above-cited ordinance-Law in public policy matters.

5.35 This way of proceeding cannot be retained by the Tribunal. In effect, the Treaty is supreme over the law. But what is more decisive is that Zaire gives to Article IX an interpretation which is untenable.

5.36 Certainly, the manner in which Article IX of the Treaty is formatted could mislead any reader and could entail an interpretation not in conformity with the object and purpose of the provisions in question. Such an interpretation would lead to an absurd result and an unacceptable fact. A careful reading, consistent with the title of the Article, clearly shows that a typographical error has tempted us to join the part of the Article starting with "*Whether extant at the time of entry into force of this Treaty or thereafter, that entitle investments.....*" to paragraph (c) only, whereas, although the French word "*donne*" does not end with "*ent*" in French, and does not take a plural form, the end of paragraph (c) concerns points (a), (b), and (c), and has no other object but to preserve the treatments which would remain more favorable than those resulting from the Treaty. The format in the English version of Article IX reaffirms this method of viewing the provision.

5.37 It follows that this ground is also unfounded.

5.38 The sixth and final ground presented by Zaire is based in essence on its first ground, (that is to say, it is SINZA that has the capacity to act) and rests on the provisions of Article 45 of the Zairian Investments Code which provides for an arbitral proceeding organized by Articles 159 to 174 of Titles III and IV of the Code of Procedure of Zaire.

5.39 The Tribunal has already responded to this argument. This last ground is not well founded either.

5.40 It remains for the Tribunal to recall Article VII of the Treaty.

5.41 Under paragraph 3 of Article VII of the Treaty, the parties to the dispute shall initially seek to resolve the dispute by consultation and negotiation. And it is only when the parties have failed to settle their dispute by these two means of settlement that they have to resort to another method of settlement.

5.42 This ground is raised by the Tribunal *proprio motu*.

5.43 When Article VII is carefully read, it will become clear that the efforts of negotiation and consultation have not been slight. There have been serious endeavors. In fact, by way of illustration the Parties can agree on any of the third-party dispute settlement procedures, of which the decisions are non-binding, such as the machinery of enquiry available under the ICSID Additional Facility.

5.44 In the case on hand, there have been incontestably serious negotiation attempts undertaken by AMT. These endeavors are recalled in paragraphs 12 and 13 of the Request for Arbitration filed by AMT on 20 January 1993. They result profusely from the documents filed. Unfortunately, they have been without any success.

5.45 It follows that this last ground also is unfounded.

5.46 It thus appears 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.

PART THREE : QUESTIONS OF MERIT

VI. THE RESPONSIBILITY OF THE STATE OF ZAIRE

6.01 After having examined the questions of competence, of the Centre as well as of the Tribunal, and having reached an affirmative conclusion, by discarding each of the grounds invoked by the Republic of Zaire in support of its objections to the competence and by dismissing *proprio motu* other conceivable grounds for declining jurisdiction by ICSID and the Tribunal itself, the Tribunal must now examine the questions of merit.

A. LEGAL BASIS OF STATE RESPONSIBILITY

6.02 Once the questions of competence have been determined in the affirmative, it is necessary in the first place to determine the legal basis of the right to compensation and consequently the quantum of the compensation.

6.03 AMT suggests in paragraph 11 of its Request for Arbitration dated 25 January 1993, and repeated in its Memorial of 8 December 1993 that the Republic of Zaire has breached its obligations arising out of the Bilateral Treaty between Zaire and the United States of America of 1984 (BIT). These obligations are incorporated in the various provisions of the BIT, in particular, Articles II (4), III and IV (1)(b) and (2)(b).

6.04 a) **Obligation of Protection and Security of Investment**

In the first place, AMT invokes its right to the treatment of protection and security corresponding to the obligation provided by Article II paragraph 4 of the BIT which reads :

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."*

6.05 The obligation such as cited above contracted by the Republic of Zaire and the United States of America constitutes an obligation of guarantee for the protection and security of the investments made by nationals and companies of one or the other Party, in the case before us, by American nationals or companies, AMT, in the territory of Zaire, at Kinshasa. The obligation incumbent upon Zaire is an obligation of vigilance, in the sense that Zaire as the receiving State of investments made by AMT, an American company, shall take all measures necessary to ensure the full enjoyment of protection and security of its investment and should not be permitted to invoke its own legislation to detract from any such obligation. Zaire must show that it has taken all measure of precaution to protect the investments of AMT on its territory. It has not done so, by mere recognition of the existing reality of the damage caused while designating SINZA as the victim and alleging that its own national legislation has exonerated Zaire from all obligations to make reparation for the injuries sustained on its territory in the

circumstances such as those giving rise to the present dispute. In this regard, the Tribunal has demonstrated the contrary.

6.06 These treatments of protection and security of investment required by the provisions of the BIT of which AMT is beneficiary must be in conformity with its applicable national laws and must not be any less than those recognized by international law. For the Tribunal, this last requirement is fundamental for the determination of the responsibility of Zaire. It is thus an objective obligation which must not be inferior to the minimum standard of vigilance and of care required by international law.

6.07 The question to be considered relates to the means by which to ascertain whether there has been a breach of duty on the part of the State of Zaire in regard to its obligation of vigilance, such as provided by Article II paragraph 4 of the BIT to ensure the protection and security of the investment made by AMT in Zaire. What then is the practical criterion to determine the level of the precautionary measure to be taken by the receiving State consistent with the minimum standard recognized by international law? More particularly, what are the appropriate measures to be adopted by the Republic of Zaire in the circumstances to protect the security of the investment of AMT? Has Zaire taken any of these measures? These questions are not at all answered by Zaire.

6.08 It would not appear useful for the Tribunal to enter into the debate whether in the case on hand Zaire is bound by an obligation of result or simply an obligation of conduct. 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.

6.09 *Res ipsa loquitur* : what has happened is self-explanatory without requiring extraneous proof. Yet, Zaire has never denied its breach of the obligation of vigilance. Simply, admits Zaire that it is SINZA which "has been the object of looting in 1991 as indeed it was the case with all the others." But, continues Zaire, AMT has not adduced any evidence to show that the State 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." Or else, Zaire could have contended that it has accorded to SINZA a treatment no less favorable in the circumstances than that which it has accorded to nationals or companies of any third State whatsoever.

6.10 If the argument advanced by Zaire does not seem altogether unfounded, the fact remains that Zaire has manifestly failed to respect the minimum standard required of it by international law. It should be added that Zaire has equally failed to perform a similar obligation with regard to a third State or all other third States. 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.

6.11 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 necessary to protect and ensure the security of the investment made by AMT in its territory.

6.12 b) **Obligation to prevent losses resulting from the event envisaged
in Article IV paragraph 1 (b)**

The engagement of the responsibility of the State of Zaire is more specifically reinforced by the provisions of Article IV paragraph 1 (b) of the BIT : titled : Compensation for Damages due to War and Similar Events", covering, in part the cases in which :

"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..."

6.13 Without discussing for the moment the question of the quantum of appropriate compensatory indemnity, it suffices to confirm once more the engagement of the responsibility of the State of Zaire for all the losses resulting "from riot or act of violence in the territory of such other Party", in this case, Zaire. Such is the case without the Tribunal enquiring as to the identity of the author of the acts of violence committed on the Zairian territory. It is of little or no consequence whether it be a member of the Zairian 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.

6.14 It is by the process of this two-fold reasoning based on the double legal foundation of the bilateral Treaty, either Article II (4), or Article IV (1)(b), or the combination of both provisions that the Tribunal arrived at the conclusion that the Republic of Zaire is inevitably responsible for the losses and damages resulting from the events of 23-24 September 1991 and of 28-29 January 1993, without having to determine by whom these losses were caused. And this falls directly within the scope of Article IV paragraph (1)(b) of the said Treaty, which serves at the same time to reinforce further the engagement of the responsibility of the State of Zaire for ensuring the protection and security of the investment made by AMT on the Zairian territory in accordance with

Article II paragraph 4 of the BIT, as well as the obligation to prevent the occurrence of any act of violence on its territory. It is the duty or obligation to prevent the occurrence of a given event that is at issue.

6.15 c) **Obligation to make restitution or to pay compensation for the destruction of property "by the forces or authorities of the other Party which was not caused in combat action"**

Furthermore, AMT alleged in its Request for Arbitration and in its Memorial that the losses and damages suffered by SINZA resulted from "the destruction of property by the forces or the authorities of the other Party which was not caused in combat action".

6.16 It is true that the damages and injuries sustained by AMT were not caused in combat actions. However, there has never been any claim that the injuries suffered in the course of the events of 23-24 September 1991 and of 28-28 January 1993 were caused in combat actions.

6.17 The only question that occupies the attention of the Tribunal up till now is whether there is a third reason to strengthen still further the responsibility of the State of Zaire with particular regard to the losses and damages suffered by AMT during the course of the above mentioned events. This third reason, if there ever was one, would merely serve as a complementary ground to engage the responsibility of the State of Zaire. The Tribunal could very well leave aside the question whether there is in reality a third legal basis in this case to engage once more the responsibility of Zaire for the same losses or injuries incurred to the detriment of AMT.

6.18 The Tribunal does not see any use in seeking to reach a definite conclusion to establish for the third time the responsibility of the Republic of Zaire, for the same losses and for the same injuries caused to the detriment of AMT. The Tribunal therefore refrains from making any pronouncement on this very question.

6.19 The Tribunal fails to see any usefulness in searching for yet an additional legal ground on which to found the responsibility of the State of Zaire by application of Article IV paragraph 2 (b) of the Zaire-U.S. Bilateral Treaty in favor of AMT. When it subsequently examines this question, it will not be to draw any conclusions regarding responsibility, but it will be simply to review the method of evaluation of the compensation due to AMT.

B. LEGAL CONSEQUENCES OF STATE RESPONSIBILITY

6.20 With the establishment of doubly reinforced legal foundation for the responsibility of the State of Zaire vis-a-vis AMT, it is now time to examine the legal consequences flowing from the ascertainment of international responsibility of the State of Zaire.

6.21 The delicate question that the Tribunal is called upon to consider is how the Tribunal should proceed to assess the amount of compensation or indemnification required by international law in order to restore to AMT the conditions previously existing as if the events had never occurred or taken place. This question may be better examined in the light of a critical analysis of the amount of compensation and interests thereon which the Tribunal must determine with precision and on a solid basis of a well-defined scientific measurement. Otherwise as an alternative, the Tribunal could have recourse to another path to follow, that of exercising its sovereign discretion to determine the amount of compensation to be paid to AMT by the Republic of Zaire, taking into account the actual injury suffered.

6.22 Zaire contends in its Rejoinder of 19 July 1994 that "*The Republic of Zaire has never claimed that the property of SINZA was never damaged. SINZA has been subjected to the same plight as all those who were victims of the looting in 1991 and 1993.*" "But", adds Zaire, "*the question of compensation is something else, because none of these victims has been accorded a treatment more favorable than SINZA.*"

6.23 The question of the amount of compensation should be considered separately from the question of responsibility which has been definitively determined. Zaire has claimed that it has now fulfilled all the obligations it was bound to perform if only no one could provide any proof that Zaire had accorded a treatment in regard to indemnification or compensation more favorable than that it has accorded to SINZA or to AMT, the Claimant in the present instance. Zaire adds that, having offered no one any compensation, it has in this sense not violated the principle of equality and of non-discrimination of treatment.

6.24 The argument as presented above by the Republic of Zaire could only be appreciated by the Tribunal to the extent that Zaire had accorded a favorable treatment to one of its own nationals or companies or to one of the nationals or companies of any third State whatsoever. In the absence of such a treatment, there would not be any possible comparison to ascertain the level or even the type of the treatment, whether by means of restitution, compensation or indemnification, or else precisely Zaire has not accorded any indemnity, any compensation. Accordingly, the Tribunal does not find such an argument sustainable. The contention of the Republic of Zaire is untenable. It is therefore rejected by the Tribunal. The only remaining issue is that envisioned in Article II of the BIT, that is to say the treatment, the protection and security at least equivalent to "*those recognized by international law.*" It is therefore upon this basis that the Tribunal will proceed to assess the compensation due to AMT.

PART FOUR : THE QUANTUM OF DAMAGES THE AMOUNT OF COMPENSATION

7.01 Having firmly established the responsibility of the State of Zaire for all the losses, injuries and damages sustained by AMT, and caused by the acts of violence committed

to the detriment of the investment made by AMT on the territory of Zaire, the Tribunal will now determine the quantum of compensation to be paid by Zaire regardless of the existence or absence of fault or independently thereof. Suffice it to prove that Zaire has not fulfilled its obligation of vigilance, and *a fortioris*, Zaire has also breached its obligation to prevent the occurrence of a given event, above all whether there have been acts of violence on the Zairian territory, giving rise to losses, damages and injuries sustained by AMT.

A. THE METHOD OF ASSESSMENT OF COMPENSATION

7.02 There are apparently several different methods of assessment of the quantum or the total amount of compensation plus interests thereon which should be equitable in the circumstances of the present case.

7.03 Two different criteria seem to attract the attention of AMT as Claimant. The first is the criterion reflected in the most favorable treatment as required by the minimum standard provided in Article II paragraph 4 of the Zaire-U.S. Bilateral Treaty. The second criterion preferred by AMT is the one proposed in Article III of the Treaty. This article, entitled "Compensation for Expropriation" provides for compensation "*equivalent to the fair market value of the expropriated investment*". The said compensation shall "*include interests at a rate equivalent to current international rates from the date of expropriation, and be freely transferrable at the prevailing market rate of exchange on the date of expropriation*". The case in hand is clearly not a case of expropriation. But can it be assimilated to expropriation? The answer of the Tribunal is in the negative.

7.04 AMT has invoked, in support of its preference, Article IV paragraph (2)(b) of the Zaire-U.S. Bilateral Treaty as the legal basis for its claim for compensation in accordance with Article III of the said Treaty, viewing the case as one of "*destruction*

of property by the forces or the authorities of the other Party which was not caused in combat actions". It appears that this choice was essentially prompted by AMT's preference as to the method of calculation of compensation and interests thereon which should be allocated to it (Article III of the BIT). But for the Tribunal, the essence lies in the determination with certainty the basis of the responsibility and on that basis it may proceed to fix the just compensation due to AMT.

7.05 It has never been alleged that the destructions in question, neither that of 23-24 September 1991 nor that of 28-29 January 1993, were caused in combat actions. It is necessary to ascertain further whether there was "*destruction of property by the forces or the authorities*" of the Republic of Zaire.

7.06 AMT maintains that the destructions of both events in September 1991 and January 1993 were committed by the Zairian armed forces from Camp Kokolo. It is true that they appeared to be (in whole or in part - in this regard, the Tribunal is not certain) soldiers in uniform with weapons of the army, including grenades and automatic weapons belonging to the armed forces. The question to be considered by the Tribunal is whether the destruction of property was committed by the Zairian forces or authorities not in combat actions in the sense of Article IV paragraph 2(b) of the BIT.

7.07 To obtain more precise clarification on sub-paragraph (b) of paragraph 2 of Article IV, it is sufficient to read carefully once more sub-paragraph (a) which speaks of requisition of property by "the forces" or "the authorities" of the other Party, an action which can be assimilated to expropriation. It is suddenly apparent that in fact this relates to the organized forces, which even according to the evidences furnished by the only witness heard in this case is not at all the case in the circumstances of this case.

7.08 In the present case, it is true from the information received that they were the military, at least persons in military attire who manifestly acted individually without any one being able to show either that they were organized or that they were under order.

nor indeed that they were concerted.

7.09 The nature of the looting and the destruction of property which were looted show clearly that it was not "the army" or "the armed forces" that acted as such in the circumstance. And this in no way resembles expropriation or requisition by the State.

7.10 And the fact that thereafter the President of the Republic of Zaire decided of his own accord to pardon these persons who acted in 1991 and in 1993 against the property of others does not alter anything in the circumstance. On the contrary, it clearly shows that they were separate individuals and not the forces that performed the action, because the Tribunal does not see how one could speak of a pardon similar to an armistice if it was the armed forces that acted in a given circumstance. An armistice may be either of a general or a personal character, but it must always refer to a determinate offense.

7.11 Moreover, an armistice or such a pardon to persons who acted in 1991 and in 1993 does not entail in international law the effect of exculpating for those receiving pardon save to the extent and from the point of view of Zairian law, and does not produce the result of exoneration for the responsibility of the State of Zaire in respect of the destruction of property belonging to nationals or companies and forming integral part of the investment made by them in Zaire.

7.12 The Tribunal does not consider it necessary to insist on this question beyond measure. In effect, its relevance is not here discussed as a foundation of the responsibility of Zaire. That is why the Tribunal prefers at this stage to concern itself with the method of calculation of the amount of compensation to which AMT is entitled because of the injury sustained.

7.13 As between the two methods of assessment of the amount of compensation to be paid to AMT by the Republic of Zaire, the Tribunal does not see any substantial difference in practice. In principle, it is necessary to assess the true value or the actual

market value of the properties destroyed or the losses suffered by AMT. Is it necessary to add on top of that also the current interest to the total sum of compensation from the date of each destruction occurring in the territory of Zaire? The answer of the Tribunal will have to take into account the existing conditions of the country and not by making abstraction based on a criterion for the assessment which does not correspond at all to the reality, nor to the current happenings in Zaire, nor indeed to the commercial and industrial activities of the Claimant.

7.14 AMT would have liked to adopt a method of calculating compensation including interests practicable in the normal circumstances prevailing in an ideal country where the climate of investment is very stable, such as Switzerland or the Federal Republic of Germany. The Tribunal does not find it possible to accede to this way of evaluating the damages with interests in the circumstance under consideration, in which it is apparent that the situation remains precarious and that the *lucrum cessans* or the loss of profits is not at all measurable without a solid base on which to found any profit to take or for predicting the growth or expansion of the investment made. It would be neither practical nor reasonable to apply the method of assessment of compensation in a way so far removed from the striking realities of the current situation.

7.15 Preferably, the Tribunal will opt for a method that is most plausible and realistic in the circumstances of the case, while rejecting all other methods of assessment which would serve unjustly to enrich an investor who, rightly or wrongly, has chosen to invest in a country such as Zaire, believing that by so doing the investor is constructing a castle in Spain or a Swiss chalet in Germany without any risk, political or even economic or financial or any risk whatsoever.

B. COMPENSATION FOR THE LOSSES SUSTAINED

7.16 For practical reasons founded on equitable principles, the Tribunal finds that the Republic of Zaire which is responsible in international law, is under a duty to

compensate AMT for the very losses which have been caused by the acts of violence and looting occurring in September 1991 and in January 1993.

7.17 In effect, the Republic of Zaire has pleaded in its Rejoinder that *"No one on earth could ignore the fact that for the past four years, the Republic of Zaire has been going through a most painful and unfortunate period in its history."* Zaire continues, *"This requires a benevolent and compassionate attention on the part of all our partners, even those who have encountered unfortunate and disastrous consequences, for there was a time when these same persons were enjoying the benefit of the good situation of the State of Zaire."*

7.18 The Tribunal has never denied the Republic of Zaire any opportunity to defend itself for the sake of good administration of justice. The Tribunal has never forsaken the principle of the right to be heard. Even without the Republic of Zaire entering an appearance to present its case, the Tribunal fully takes into account the situation in Zaire.

7.19 The Tribunal appointed Mr. Bernard Decaux, of French nationality, former civil servant of the World Bank, as independent expert for the purpose of evaluating the damages and losses suffered by Société SINZA (Zaire) in 1991/1993. Having assumed his functions to this end on 26 June 1996, the expert prepared and submitted his report on 5 September 1996 on the evaluation of the damages and losses suffered. According to the expert, the evaluation of the damages and losses suffered by Société SINZA (Zaire) in 1991/1993 is as follows :-

1. Damages to the equipments of the production line (dry cell and car battery)	US \$
- Dry cell production line	1,750,000
- Car battery production line	1,465,000
- Factory repair shop	<u>72,500</u>
Subtotal	3,287,500

2. Damages to the building belonging to AMT	
- Factory building	311,000
- Office building	28,500
- Living quarters	<u>86,600</u>
Subtotal	426,100
3. Value of goods damaged	
- In offices (furnitures and equipment)	22,500
- In living quarters (furnitures and equipment)	<u>25,900</u>
Subtotal	48,400
4. Losses suffered by AMT (looting)	
- Factory inventory	670,000
- Vehicles	20,500
- Merchandise and cash in the retail store	
- Accounts receivable	
- Appraisal fees	
Subtotal	<u>690,500</u>
5. TOTAL (1+2+3+4)	4,452,500

7.20 This report was submitted to the Parties. It was contested by AMT in its response of 15 October 1996. The Republic of Zaire has not submitted its observations.

7.21 Thus the Tribunal must now determine the amount of compensation. The Tribunal proceeds to exercise its discretionary and sovereign power to determine the quantum of compensation that the Republic of Zaire shall pay to AMT, taking into account all the circumstances of the case before it.

PART FIVE : THE DECISIONS OF THE TRIBUNAL

FOR REASONS STATED IN THE PRECEDING PARTS OF THE PRESENT AWARD,

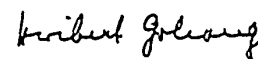
THE TRIBUNAL UNANIMOUSLY DECIDES

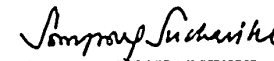
- (1) **On the competence**
- that the Tribunal is competent to adjudicate the dispute between the Parties which is within the jurisdiction of the Centre, being a legal dispute arising out of an investment between a Contracting State and a national of another Contracting State in accordance with Articles 25 and 41 of the said Convention;
- (2) **On the admissibility of the Request for Arbitration**
- that the Request for Arbitration made in writing in the Request of 25 January 1993 is admissible;
- (3) **On the responsibility of the State of Zaire**
- that the responsibility of the Republic of Zaire as the Respondent is constituted for all the damage caused by the events of 23-24 September 1991 and of 28-29 January 1993, the object of the claim for compensation by AMT;
- (4) **On the claim for compensation**
- that the Republic of Zaire is condemned to pay to AMT for the injuries sustained by the latter (inclusive of the principal, interests and all other claims) an all-inclusive total sum of

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
Arbitrator


Sompong SUCHARITKUL
President

Kéba MBAYE
Arbitrator

Date : February 10, 1997
Place : London

Date : Feb 5, 1997
Place : San Francisco

Date :
Place :

* 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.