EXCERPTS

Date of dispatch to the parties: February 9, 2004

International Centre for Settlement of Investment Disputes

PATRICK H. MITCHELL

v.

THE DEMOCRATIC REPUBLIC OF THE CONGO

Case No. ARB/99/7

AWARD

RENDERED BY THE TRIBUNAL

composed of
Andreas Bucher, President
Yawovi Agboyibo
Marc Lalonde

Secretary of the Tribunal

Martina Polasek

Representing the Claimant	Representing the Respondent
Mr. Saul Shoot and Mrs. Michelle De Menezes Fluxman Rabinowitz-Raphaely Weiner Inc Johannesburg, South Africa	H.E. Kisimba Ngoy Ndalewe, Ministre de la Justice et des Affaires Parlementaires, and Professor André Mazyambo Makengo K., Ministère de la Justice et des Affaires Parlementaires, and Mr. Vincent Kangulumba Mbambi Mbombo & Associés Kinshasa, Democratic Republic of the Congo

THE TRIBUNAL
Makes the following Decision:

A. Introduction

I. The Proceeding

1. On October 6, 1999 the International Centre for Settlement of Investment Disputes (hereinafter "ICSID" of the "Centre") received a Request for arbitration on behalf of Mr. Patrick H. Mitchell (hereinafter "Mr. Mitchell" or "Claimant") against the Democratic Republic of Congo (hereinafter also "Congo", "DRC" or "Respondent"). This Request referred to the seizure by Congolese military forces, on March 5, 1999, of the premises of Mr. Mitchell's legal consulting firm and to the consequences of that seizure. The Request asked the Arbitral Tribunal to issue a final award

> "a) Declaring that the DRC has, in violation of the USA/DRC Bilateral Investment Treaty, Congolese law, and international law, expropriated the assets of Mr. Mitchell;
> b) Requiring the DRC to compensate Mr. Mitchell for all damages suffered by Mr. Mitchell as a result of DRC's actions; and
> c) Granting to Mr. Mitchell all of the costs incurred by him in undertaking this arbitration, including the arbitrators' fees, the fees of any experts, the legal costs incurred by Mr. Mitchell, and any administrative costs."

2. The Request for arbitration was supplemented on behalf of Mr. Mitchell by letters of November 3, 12 and 22, 1999 and of December 6 and 7, 1999, and was registered by the Secretary-General of ICSID on December 10, 1999.

3. The Request refers to Article VII of the Bilateral Treaty concluded on August 3, 1984 between the Republic of Zaïre and the United States of America concerning the Reciprocal Encouragement and Protection of Investments (hereinafter "BIT" or "Treaty"), which provides, in relevant part, under paragraph 4, as follows:

> "4. (a) The national or company concerned may consent in writing to submit the dispute to the Centre or the Additional Facility for settlement by conciliation or binding arbitration.
> (b) 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,
> (i) 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
> (ii) 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."[1]

Prior to the registration of the Request, by letters dated December 6 and 7, 1999 Mr. Mitchell had confirmed that he was not actually, and had not been on the date of the Request for arbitration, a national of the Democratic Republic of Congo and that he satisfied the requirements set out in Article VII (4)(b)(i) and (ii) of the BIT.

4. The Respondent not having responded to Claimant's proposal to submit the dispute to a sole arbitrator selected by the Chairman of the Administrative Council of ICSID, by letter of March 10, 2000 and in accordance with Arbitration Rule 2(3), Claimant informed the Secretary-General of ICSID of his choice of the formula provided in Article 37(2)(b) of the ICSID Convention (hereinafter the "Convention") concerning the number of arbitrators and the method of their appointment. As a result, the Tribunal was to consist of three arbitrators, one arbitrator appointed by each Party and the third, the President of the Tribunal, to be appointed by agreement of the Parties. Pursuant to Arbitration Rule 3(1), Claimant designated Mr. Willard Z. Estey, a national of Canada, to act as the Claimant's appointee to the Tribunal.

5. The arbitrator appointed by Respondent by letter dated May 10, 2000 declined to accept such appointment. The Respondent did not concur in the appointment of the arbitrator proposed by Claimant to be the President of the Tribunal, nor did it appoint another arbitrator.

6. Acting upon a request made by Claimant by letter of October 11, 2000 and in accordance with Article 38 of the Convention and Arbitration Rule 4, the Acting Chairman of the Administrative Council appointed Mr. Yawovi Agboyibo as the second arbitrator and Professor Andreas Bucher as the third and presiding arbitrator of the Arbitral Tribunal. Both Parties expressed their acceptance of the appointment of these arbitrators.

7. In accordance with Arbitration Rule 6(1), the Tribunal was deemed to be constituted and the proceeding to have begun on November 21, 2000, when all three arbitrators had accepted their appointment. Ms. Gabriela Alvarez-Avila was designated as the Secretary of the Tribunal. She was replaced by Ms. Martina Polasek as from August 2002.

8. On January 15, 2001, the Tribunal held its first session with the Parties at the seat of ICSID in Washington, D.C. At that session, the Parties acknowledged that the Tribunal

[1] The English version of the BIT, as provided by Claimant, is a copy of the document submitted to the Senate by the President of the United States on February 26, 1984.

had been properly constituted. It was decided that the languages of the proceeding would be English and French. The pleadings submitted by the Parties would be in one of these languages and accompanied by a translation into the other language. The latter requirement would not apply to annexes of the pleadings and to witness statements.

9. At the same session, it was decided that Claimant would file his memorial on the merits (including translation) no later than March 28, 2001, and that Respondent would file its counter-memorial (including translation) no later than July 13, 2001.

10. Claimant's memorial was filed on March 28, 2001. It repeats the conclusions contained in the Request for arbitration (see paragraph 1), but adds that the compensation sought from Respondent is "in an amount no less than US$ […] plus interest".

11. The Respondent did not file its counter-memorial at the date initially fixed. On July 26, 2001, it requested the time limit to be extended citing a change at the head of the Ministry of justice. The President of the Tribunal acceded to this request and extended the time limit to September 10, 2001. Respondent's counter-memorial, dated September 3, 2001, was filed on September 17, 2001.

12. In its counter-memorial of September 3, 2001, Respondent requested the Tribunal to decide:

> "*Mainly* : that the ICSID is materially unqualified to know about a litigation which does not relate to "an investment";
>
> *Subsidiarily* as for the meaning [sic]: there has never been any expropriation, in the absence of constitutive elements and evidence;
>
> Since then, the request of M. MITCHELL is not justified and is obviously rash and vexatious;
>
> Consequently, the DRC postulates for the counter claim, the conviction of the petitioner to pay him damages for all prejudice that this case caused, i.e.:
>
> - justice expenses, lawyers' honoraria and experts fees (reserved while waiting for the end of process),
> - and for attack to the good reputation to the DRC: […] $ US."
>
> (Translation supplied by Respondent.)

13. Respondent having thus raised for the first time in its counter-memorial of September 3, 2001 an objection to the Tribunal's competence, as is possible under Arbitration Rule 41(1), the President of the Tribunal, after consultation with the other members of the Tribunal, decided to suspend the proceeding on the merits pursuant to Article 41 of the Convention and Arbitration Rule 41(3) and (4). In reply to a request

from Claimant for a time limit of four months to be set for his counter-memorial on jurisdiction, the President, after consultation with the other members of the Tribunal, extended this limit to February 8, 2002.

14. On January 29, 2002, all concerned learned with deep regret that Mr. Willard Z. Estey, the arbitrator appointed by Claimant, had passed away on January 25, 2002. In accordance with Arbitration Rule 10(2), the proceeding was suspended until the vacancy on the Tribunal was filled. On February 13, 2002, the Tribunal was reconstituted and the proceedings were resumed when Mr. Marc Lalonde, a national of Canada, accepted his appointment as an arbitrator designated by Claimant pursuant to Arbitration Rule 11(1).

15. Claimant's counter-memorial on jurisdiction, dated February 4, 2002, was received by the Centre on February 7, 2002.

16. Having consulted with the Parties, the Tribunal decided to ask the Parties to file a second exchange of pleadings on jurisdiction, giving thereby the Parties the option to exhaust the subject in writing, thus avoiding an oral hearing on the question of jurisdiction, unless later considered necessary by the Tribunal. The President fixed the time limit for the submission of Respondent's memorial in reply to be April 15, 2002. This memorial, dated April 8, 2002, was filed with ICSID on April 19, 2002. As he was invited to do, Claimant submitted to ICSID his rejoinder, dated May 24, 2002, on May 29, 2002.

17. Upon receipt and examination of all these written pleadings, the Tribunal came to the view that it had not received sufficient evidence concerning the investments made by the Claimant in the DRC. As stated in Procedural Order No. 1 of July 11, 2002, the Tribunal, pursuant to Arbitration Rule 41(4), decided to join the Respondent's objection to jurisdiction to the merits. The Tribunal therefore invited the Claimant to file, by October 11, 2002, any complementary observations that he wished to make on his memorial of March 29, 2001 and, in particular, to produce any relevant additional evidence in support of his claim, including all pertinent documents concerning the valuation of "Mitchell & Associates" and the relief claimed. Respondent was granted three months to file its response. Claimant's Reply, dated October 11, 2002, was received by the Centre on October 16, 2002. The Counter-memorial in reply of the Respondent, dated January 7, 2003, was received by the Centre by electronic mail on January 15, 2003, and by ordinary mail on January 31, 2003. Respondent indicated in this brief that it claimed an amount of US$ […] as damages for attacking its reputation and for the costs incurred in this litigation.

18. By its Procedural Order No. 2 of January 17, 2003, the Tribunal invited the Claimant to file a rejoinder to the Respondent's last brief. It provided also for a rebuttal pleading to be filed by Respondent. In a letter dated January 21, 2003, Claimant declared that he did not consider it necessary or appropriate to file a further pleading. He also stated that, having presented his case by way of affidavits, he did not consider necessary to present his case at a hearing at which witnesses and experts would be examined. In reaction to this statement, the Respondent declared in its letter dated February 4, 2003, that under the circumstances it had no further remarks to make, and that in the absence of

any pleading from its opponent, it did not wish to plead its case alone at a hearing. In a letter dated February 27, 2003, Claimant further confirmed that he would prefer the matter to be decided on the basis of the affidavits; he declared, however, to be prepared to participate in a hearing in the event the Tribunal considered oral evidence as necessary in relation to any specific issues.

19. The Tribunal considered that it did not need to hear the Parties' pleadings. By letter of March 10, 2003, it submitted to the Parties several questions in order to better understand certain aspects of the dispute. The Claimant's reply to the questions raised by the Tribunal, dated May 22, 2003, was received by the Centre on May 27, 2003. The Respondent's answer to the questions of the Arbitral Tribunal, dated April 21, 2003, was filed on May 2, 2003. Claimant commented on the Respondent's answers on May 22, 2003 and Respondent did so with regard to Claimant's reply on June 9, 2003. In response to the question raised by the President of the Tribunal whether, in the light of this exchange of briefs, an oral hearing was requested, Respondent stated by an e-mail of June 19, 2003 that it had nothing further to say nor to add to its previous declarations. The Claimant confirmed by letter of June 25, 2003 that it did not consider it necessary to present oral evidence. In response to the Tribunal's further query in respect of the relevant interest rate at March 5, 1999, Claimant answered by a second letter of June 25, 2003 that the rate was 7.75%. This letter was commented upon by Respondent in its letter dated August 22, 2003. Claimant's Counsel filed on September 11, 2003 additional comments prepared by Mr. Mitchell in reply to this letter of Respondent. In the mean time, the Tribunal had invited Claimant, by letter of August 14, 2003, to further explain some of his answers given to the questions raised in the Tribunal's letter of March 10, 2003. Claimant's reply to this letter was given on September 5, 2003. By letter of September 19, 2003, Respondent sent its observations to Claimant's remarks contained in his letters of September 5 and 11, 2003.

20. The Tribunal met for a deliberation in Paris on October 15 and 16 , 2003.

21. By a letter dated January 13, 2004, the Parties were informed that the proceeding was closed. Each Party submitted a statement of costs incurred or borne by it in this proceeding. In his reply to Respondent's answers to the Tribunal's letter of March 10, 2003, Claimant requested to be awarded an additional amount of US$ 530,000.00 to cover the costs of Claimant's counsel in the event the award would be in his favour, this amount being payable by Respondent in case it would not pay the amount of the award within the time provided for by the Tribunal.

22. In conformity with the choice of two languages applicable to this proceeding, this award has been drafted in English and in French.

II. The source of the dispute

[…]

31. The dispute brought by Claimant via the Centre before this Tribunal raises basically the question whether the measures taken by the Government of the DRC in respect of Mr. Mitchell's firm constituted an expropriation relating to an investment of Mr. Mitchell in the DRC and, in the affirmative, whether Claimant is entitled to be indemnified by Respondent. In Respondent's view, however, this dispute does not come under the jurisdiction of ICSID or this Tribunal's competence. This challenge of the Tribunal's competence has to be examined first.

B. The Arbitral Tribunal's Jurisdiction

32. The Tribunal is asked to decide whether Claimant's Request for arbitration comes under the jurisdiction of ICSID and the competence of this Tribunal. It is not disputed that both Parties validly expressed their consent to ICSID arbitration, as provided for in Article VII of the Bilateral Investment Treaty concluded between the Democratic Republic of the Congo and the United States of America. As Respondent has stated, its objection to jurisdiction is solely one to the qualification of Claimant's activity in the Congo as an investment.

33. It is further argued by Respondent that under Article III(3) of the BIT, Claimant was required to submit his request first to the competent judicial or administrative authority in the DRC. By not having done so, the claim could not be brought before this Tribunal. However, this is manifestly not what results from the provision referred to. Under that rule, indeed, the recourse to state authorities is a right, but not an obligation of the investor, who is free to have direct recourse to the mechanism provided for in Article VII of the BIT for the settlement of disputes.

I. The position of the Parties

1. *The Respondent*

[…]

2. The Claimant

[…]

II. Analysis by the Tribunal

40. In considering the objection raised by the Democratic Republic of the Congo and directed against the jurisdiction of the Centre and the Tribunal's competence in this case, the Tribunal must begin with considering whether the dispute in the instant case arises directly out of an investment within the meaning of Article 25(1) of the ICSID Convention.

41. It is well known that the Convention does not define the term "investment" and that various proposals made during the negotiations in that regard failed. This is reflected in the Report of the Executive Directors in the following words:

> "27. No attempt was made to define the term "investment" given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre (Article 25[4])." (1 ICSID Reports 28; ICSID Convention, Regulations and Rules, ICSID/15/Rev.1, Washington 2003, p. 44)

42. This statement indicates that the authors of the Convention have chosen a broad approach to the concept of investment. As noted during the drafting of the Convention, a Contracting State that prefers to limit the scope of the Centre's jurisdiction can do so by making the declaration provided for in Article 25(4) of the Convention. The Democratic Republic of the Congo has not made such a declaration and has, therefore, accepted the broad scope of the subject matter jurisdiction governed by the Convention.

43. As indicated in the statement quoted above, an important factor in determining whether a dispute qualifies as an investment dispute under the Convention is the consent given by the Parties. The State Parties' consent to submit a certain category of disputes to the Centre's jurisdiction does contain the determination that such disputes are to be considered as related to investments within the meaning of the ICSID Convention. Even if, in a particular case, a dispute arises out of an investment within the meaning of the Convention, one must further examine, however, whether such a dispute relates to an investment as defined in the Parties' consent to ICSID arbitration.

44. The Tribunal must accordingly look with particular care at the definition of the notion of investment given in the Bilateral Investment Treaty concluded between the Congo and the United States (BIT). This Treaty contains in Article VII the expression of these States' consent to the ICSID arbitration mechanism.

45. In support of its conclusion that the firm of Mr. Mitchell, including its assets and business prospectives, qualifies as an investment under the BIT, Claimant refers to Article 1, letter (c), which reads as follows:

> "For the purposes of this Treaty,

(c) ‘investment’ means every kind of investment, owned or controlled directly or indirectly, including equity, debt, and service and investment contracts; and includes:

(i) tangible and intangible property, including all property rights, such as liens, mortgages pledges, and real security;

(ii) a company or shares of stock or other interests in a company or interests in the assets thereof;

(iii) a claim to money or a claim to performance having economic value, and associated with an investment;

(iv) intellectual and industrial property rights, including rights with respect to copyrights, patents, trademarks, trade names, industrial designs, trade secrets and know-how, and goodwill;

(v) licenses and permits issued pursuant to law, including those issued for manufacture and sale of products;

(vi) any right conferred by law or contract, including rights to search for or utilize natural resources, and rights to manufacture, use and sell products; and

(vii) returns which are reinvested.

Any alteration of the form in which assets are invested or reinvested shall not affect their character as investment."

46. One striking feature of this definition is the fact that all items listed in this provision are mentioned for illustrative purposes. They do not have the effect of restricting in any manner the notion of an investment and the scope of the subject matter of the BIT. Indeed, as stated expressly in the introductory part of this provision, "‘investment’ means every kind of investment, owned or controlled directly or indirectly". Anything that follows in the definition quoted above is included in this concept. This has not the effect, however, of excluding items which may qualify as an investment while they may not be included in any of the items listed. In addition to Article I, the BIT contains in Article II, dealing with "treatment of investment", a list of "associated activities", that are to be treated like investments and include, *inter alia*, "the making, performance and enforcement of contracts" (paragraph 2, letter c).

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

48. The Tribunal finds that in respect of items of Mr. Mitchell’s property seized during the intervention of the military forces on March 5, 1999, the requirement listed under Article I(c)(i) of the BIT is met. This concerns movable property and any documents, like files, records and similar items. It further appears from the text of the provision as quoted that the investor’s right to "know-how" and "goodwill" (iv) as well as the right to exercise its activities (vi) are elements which are stated as being covered by

the protection of investments under the BIT. This concerns also the payments registered on the accounts of Mr. Mitchell in the United States to which Claimant refers in order to demonstrate his activity within the DRC. Indeed, these payments are based on bills for fees referring to legal consultations provided by Mr. Mitchell and his employees through the office “Mitchell & Associates” within the DRC.

49. Respondent opposes in particular to the jurisdiction of this Tribunal the fact that, in its view, the activity of Mr. Mitchell’s legal firm does not qualify as a "service" in respect of the BIT and Congolese law. These legal sources, in case of lack of an appropriate definition, would also have to be completed with the laws and usages of international commerce.

50. On this particular question, the Tribunal has to stress firstly that the definition of an investment, as a material element of the definition of the scope of the consent to arbitration contained in Article VII of the BIT, is contained in the text of the BIT, which may have to be completed by an appropriate interpretation of this instrument. Such a concept, like any other concept retained as a matter of international law in this agreement, cannot be determined on the basis of the domestic law of one of the Parties. The principle of interpretation to be applied is contained in paragraph 1 of Article 31 of the Vienna Convention on the law of treaties of 1969, which reads as follows: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

51. Although it appears correct to state, as is done by the Respondent, that Mr. Mitchell’s law firm does not qualify as an investment under the Congolese Investment Code, with regard to, in particular, the definitions contained in Articles 1, 4 and 7, this does by no means have the effect of excluding the assets and any other items connected with the firm from the notion of investment retained by the BIT. The same conclusion must apply to any other notion of "service" contained in other parts of Congolese domestic law. For this reason, the Tribunal does not have to examine, in relation to the question of its jurisdiction, whether Mr. Mitchell’s firm had or did not have the permission to perform activities as attorney-at-law or legal consultant. The Tribunal notes, however, that according to the law on the organization of the profession of attorney-at-law of September 28, 1979, in addition to their exclusive right to represent clients before the Courts, attorneys are permitted to provide legal counseling to parties outside the judiciary context, but the same law does not stipulate that such an activity would be an exclusive privilege of attorneys, nor that it would require an authorization.

52. With regard to the notion of "service contracts" as contained in the introductory part of Article I(c) of the BIT, the Tribunal notes that this notion is not further defined in the Treaty and that the exceptions listed in the Annex on behalf of the Republic of Zaïre are not helpful in this respect. Similarly, the associated activities referred to in Article II, which include "the making, performance and enforcement of contracts", do not contain any element of restriction in respect of service contracts. Nor does the Treaty support the interpretation of the DRC according to which legal counseling and activities as attorney-at-law, in order to be included in the notion of service under the BIT, should have been affirmatively and expressly qualified as such in the Treaty. Such approach has not been

chosen by the Contracting States to the BIT, neither in respect of legal services nor in respect of any other service. There does not exist either, as has been suggested by Respondent, a limitation of the scope of the BIT exclusively to commercial matters.

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

54. The Tribunal further observes that the matter of interpretation of the notion of "service contracts", as contained in Article I(c) of the BIT, is anyhow not determinative for the decision on the question of the Tribunal's jurisdiction. Indeed, as the definition in the provision referred to states explicitly, the notion of "service and investment contracts" is used for purposes of illustration only. Under the BIT, the notion of investment means "every kind of investment". Article VII on consent to ICSID arbitration is equally broad in this respect, when it states the following:

> "1. For the purposes of this Article, an investment dispute is defined as a dispute involving
>
> (a) ...
>
> (b) ...
>
> (c) an alleged breach of any right confirmed or created by this Treaty with respect to an investment."

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

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

as it is not supplemented by the appropriate restrictions, does equally include, under the ICSID Convention, and, as demonstrated, under the BIT, "smaller" investments of shorter duration and with more limited benefit to the host State's economy.

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

C. The Merits of the Dispute

I. The applicable provisions of the BIT

58. The Investment Treaty concluded in 1984 between the United States of America and the Democratic Republic of Congo ("Zaïre" at that time) contains a number of provisions on the protection of investments that can be found in many other Treaties of this kind. Article II of this BIT is dealing with the "Treatment of Investment" and it provides under paragraph 4 as follows:

> "Investments 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. Neither Party shall in any way impair by arbitrary and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investment made by nationals or companies of the other Party. Each Party shall observe any obligation it may have entered into with regard to investment of nationals or companies of the other Party."

59. One particular and important aspect of such protection of investments concerns the protection in case of measures of expropriation or nationalization. Article III of the BIT, under the heading "Compensation for Expropriation", provides in this respect, under paragraph 1, in its first part, the following:

> "No investment or any part of an investment of a national or a company of either Party shall be expropriated or nationalized by the other Party or subjected to any other measure or series of measures, direct or indirect, tantamount to expropriation, unless the expropriation:
> (a) is done for a public purpose;
> (b) is accomplished under due process of law;
> (c) is not discriminatory;

(d) does not violate any specific provision on contractual stability or expropriation contained in an investment agreement between the national or company concerned and the Party making the expropriation; and
(e) is accompanied by prompt, adequate and effectively realizable compensation."

60. As the Parties to this dispute have not concluded an agreement in respect of the applicable law, the Tribunal, pursuant to Article 42(1) of the ICSID Convention, shall apply the law of the Contracting State party to the dispute and such rules of international law as may be applicable. The most prominent rules of international law applicable to investment disputes are the rules embodied in investment treaties to which the host State is a party. The BIT concluded in 1984 contains the rules of international law applicable to the merits of this dispute. As the DRC is a party to the BIT, the rules of this Treaty are equally to be considered as part of the law of the State party to this dispute.

II. The notion of expropriation

61. It is not argued in this case that any formal measure of expropriation of Mr. Mitchell's firm had been taken. Claimant contends that the seizure of his firm, including all measures related to such seizure, constitutes an event which has to be qualified as being, directly or indirectly, tantamount to an expropriation, within the meaning of Article III(1) of the BIT, as quoted above.

62. As a factual matter, it is not disputed between the Parties that on March 5, 1999, an intervention executed by military forces of the DRC took place, without having been announced. During this intervention, which lasted for several hours, the premises housing the firm of Mr. Mitchell were searched and put under seals, documents qualified as compromising were seized and two lawyers, […] and […], put into prison. These individuals remained under arrest for eight months, until the day they were released by a decision of the Military Court on November 12, 1999, which ordered also the removal of the seals placed around the premises of Mr. Mitchell's firm and the return of the documents that had been seized.

63. Whereas Claimant asserts that the documents taken by the military forces have never been returned, Respondent contends that this had been done. The Military Court refers in its decision to such documents, without further precision. Thus, there is evidence before the Tribunal that part of the firm's documentation and files have been seized on March 5, 1999. Respondent, which has been the holder of these documents during the critical period, has not shown to the Tribunal any proof of their return or restitution, like a copy of a receipt signed by a staff-member of Claimant's firm. Respondent argues that according to Congolese law, it was up to […] and […] to collect the documents that were seized and that, if they failed to do so, those documents were deemed to be abandoned; no evidence has been produced in this respect. However, the issue whether the seized documents have been returned or not, is not relevant to the resolution of this dispute. Indeed, Claimant does not seek a relief relating to the return of files or other documents,

nor does he claim property he may have lost during the events in 1999. Claimant seeks compensation for damage suffered from the loss of clients and the closing of the firm that occurred on March 5, 1999 and that he continued to suffer after […] and […] had been released.

64. Claimant produced before the Tribunal a number of affidavits made by authorized representatives of companies doing business in the DRC which were clients of Mr. Mitchell's firm at the relevant time, including […] and its […] and […]. It results from these statements, that these clients no longer had recourse to the services of the Claimant's firm as from March 5, 1999, and that they did not return seeking such services when […] and […] were released, at a time when Mr. Mitchell's concerns for his own safety did not allow him to re-enter the territory of the DRC. Respondent did not contest nor discuss the fact that Claimant's firm lost clients as a consequence of the intervention of March 5, 1999.

65. On the basis of the statements made by representatives of companies which were clients of the firm of Mr. Mitchell, and considering the negative impact that the seizure, operated by military forces for purported reasons related to the security of the DRC, and the subsequent closing of the firm, must have had on the clients of Claimant's firm, the Tribunal concludes that the intervention which took place on March 5, 1999 ended with the total loss of the firm as an entity providing legal services in the DRC.

66. The Tribunal has not been given information that the Claimant's firm had reopened anytime after its closing in March 1999. Both Parties mention that Mr. Mitchell went to the Congo, in April 2002 according to the Respondent and in the middle of 2002 according to Claimant. Claimant filed with the Tribunal an "Amicable Settlement Agreement" ("Accord de Règlement Amiable") concluded between […] and […].
[…]

67. Respondent's main objection to the claim is that the Mitchell & Associates firm has not been victim of any measure of expropriation and that, therefore, no compensation is due under such title. For the Respondent, indeed, the BIT uses the term expropriation, but it does not contain any definition. Such definition, it says, has therefore to be found by reference to national law, which is in this case the law of the Congo. As stated by Respondent, the law No. 77-001 of February 22, 1977 does provide for expropriation for a public purpose, but it can relate to immovable property only. Even if one would consider that the seizure of movable property would be tantamount to an expropriation, this could be of concern, in the instant case, for the seized documents only. However, these documents have been the subject of a regular seizure which cannot be assimilated to an expropriation. Respondent contends that, as a consequence of the decision of the Military Court, these documents have been returned.

68. The Tribunal cannot follow Respondent's arguments in this respect. The State Parties to the BIT have, by necessity, agreed upon an autonomous regime on the protection of investors in case of expropriation, based on international law. If, for each Contracting State, it would be permitted to refer to its own national law to determine the cases qualifying as an expropriation, each State Party to the Treaty would be able to

define for its own country the scope of the protection which the Treaty provides to investors. Thus, if one follows Respondent's view, no protection would be warranted in respect of investments in the DRC composed of financial funds, companies, rights to intellectual property, or returns from other investments, all of them being assets different from immovable property and therefore not subject to expropriation under the law of the Congo, notwithstanding the fact that these assets are mentioned on the list of the investments protected under the BIT (Art. I). Such a view in respect of the protection of investments in case of expropriation is manifestly not what the State Parties to the BIT had in mind. Pursuant to Article II(4) BIT, quoted above, the protection of investments shall be in accordance with national laws but it "may not be less than that recognized by international law".

69. Moreover, Respondent's objection does not reflect that the principle of the obligation to offer compensation in case of nationalization or expropriation is contemplated in the Constitution of the DRC of 1994 (Art. 22) and constitutes one of the generally recognized principles of international law, as this has been stated by the Arbitral Tribunal seized through ICSID with the dispute in the matter *Ltd. Benvenuti et Bonfant Srl vs. the Government of the People's Republic of the Congo* (ICSID Case No. ARB/77/2, Award of August 8, 1980, see International Legal Materials 1982 p. 740, 758, para. 4.64).

70. An expropriation of an asset invested is a measure by which the host State, acting for a public purpose, deprives the investor of his title in respect of such asset, totally or in part. Such title can be property or a receivable or any other right which constitutes an asset qualified as an investment by the definition given in Article I of the BIT. As indicated in Article III(1) of the BIT, the notion of an expropriation is not a formal one, which would imply that a decision of an authority of the State would be needed in order to qualify a taking of title as an expropriation. This notion is to be understood as substantial in nature, which means that it covers any measure which is, directly or indirectly, tantamount to an expropriation. The Protocol added to the Treaty further stipulates that "direct or indirect measures tantamount to expropriation" may include "the levying of taxes equivalent to indirect expropriation, the compulsory sale of all or part of an investment, or the impairment or deprivation of the management, control, or economic value of an investment".

71. In the Tribunal's view, the measures taken by the military authorities of the DRC are tantamount to an expropriation of Mr. Mitchell's investment, including the loss of clients who no longer made use of the services provided by the firm. Done as it was under dramatic circumstances, as is the case in a sudden intervention of military forces, the search and the sealing of the premises of the firm, the detention of two employees for the purported reason of the security of the State, the intervention of March 5, 1999 ended up with the total loss of the firm's clients. That loss is to be explained not only by the fact that the firm ceased to offer services and by the circumstances relating to the intervention on March 5, 1999, but also by the fact that many clients had been asking the firm for counseling in relation to requests to be presented to State authorities, for which Mitchell & Associates was no longer a credible reference after March 5, 1999.

72. The arrest of two employees lasted more than eight months and Mr. Mitchell considered preferable to stay abroad waiting for the situation to improve in respect of his safety. The expropriation initiated by the intervention of March 5, 1999 has, therefore, not produced results that could be qualified as being of an exclusively transitory nature. The loss of clients was definitive. It is correct to say that the Military Court ordered the restitution of the documents which had been seized. Such restitution has not been evidenced before this Tribunal. Even if it had occurred, such return would manifestly not have been an incentive for the clients to return. The Tribunal cannot, therefore, share Respondent's view that the removal of the seals, the release of the two employees and the restitution of the items seized for the purpose of the inquiry did re-establish the Claimant in his rights.

73. Under the BIT, an expropriation is prohibited if it does not conform with all of the five requirements listed in Article III(1), quoted above. Claimant contends, firstly, that the expropriation he suffered was not made for a public purpose (lit. a) and under due process of law (lit. b) and that it was discriminatory (lit. c). Secondly, he affirms that the measures directed against him were not accompanied by "prompt, adequate and effectively realizable compensation" (lit. e).

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

[…]

III. The right to receive compensation

76. Claimant affirms, without being contested by Respondent on this point, that he did not receive any compensation in relation to the intervention of March 5, 1999 and its consequences. As the measures taken by the Government of the DRC in respect of the firm of Mr. Mitchell have not been accompanied by a compensation as contemplated in letter e) of Article III(1) BIT, the Government has acted in violation of Article III(1). Such a violation of an undertaking made in the Treaty creates an obligation upon Respondent to repair the economic prejudice thereby suffered by Claimant.

77. The compensation to which a victim of an expropriation is entitled is defined in the second part of Article III(1) of the BIT in the following terms:

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

By reference to this provision, the Tribunal has to determine the "fair market value" of Mr. Mitchell's firm as of March 5, 1999.

78. For the purpose of analyzing this value, Claimant has produced an evaluation prepared by […]. This expert has reviewed Mitchell & Associates' income statements for the fiscal years ending December 31, 1996 through December 31, 1998, the firm's financial statements for the fiscal years ending February 29, 1996 through February 28, 1999, and the firm's accounting records for the years 1996 through 1998. Moreover, […] indicates that he did interview Mr. Mitchell regarding the background and nature of the firm's practice and that he did research economic and industry data. Professor Maritz has concluded that the "fair market value" of the firm at the relevant time was US$ […]. […] assumed that the firm not only would have continued to service existing clients but would have acquired new clients, particularly in the mining and banking sectors. Accordingly, he concluded that if the seizure had not occurred, the firm's future profits would have been at least the amount earned in 1998, which is US$ […] per year. On the basis of this estimated profit, the expert consulted by Claimant used the so-called Capitalized Earnings Approach, under which the expected profits are divided by a risk factor (24 percent in the present instance), which results in a value of the firm to be US$ […]. He also found that in dividing this value by the expected profits (US$ […]), such value would have been realized over a period of 4.16 years, which corresponds to the period during which Mr. Mitchell would have continued to practice law in the Congo if the seizure had not occurred. Using also the Discounted Future Earnings Method, […] arrived at the identical figure of a value of US$ […].

79. Claimant has submitted combined income statements for the years 1996, 1997 and 1998, prepared by […]. They record the income and expenses incurred. For each year, these statements are divided in three parts, reflecting payments made, respectively, through the accounts of Mitchell & Associates in Seattle (Washington, USA) and Johannesburg (South Africa, RSA), as well as the payments provided in cash in local currency in Kinshasa. For reasons related to the monetary fluctuations in the DRC, most clients paid their fees in US$ to the accounts of Mitchell & Associates in the USA or in the RSA, whereas payments in cash were usual in the Congo.

80. Respondent did not comment in any detail on these statements. The Government of the DRC objects, however, that the statements relating to accounts in the USA and the RSA are in fact connected to activities of the Claimant in those two countries. As they are, in the Respondent's view, unrelated to any service provided in the Congo, they are irrelevant for the evaluation of the Claimant's firm in the DRC. On the basis of the statements of income and the billings filed as evidence of such income, the Tribunal is satisfied that the incomes referred to in these statements are related to services provided by the Claimant's firm in the DRC. The clients to whom these billings were addressed were seeking and have been provided with services of the firm in the Congo. The fact that most payments were addressed to Mr. Mitchell's office in the USA does in no way imply that the office in the DRC did act as a mere sub-contractor. Anyhow, even if this would have been the case, the prejudice caused by the loss of the clients in the Congo would have been the same.

81. For the year 1998, which Claimant takes as the main basis for the calculation of his loss, the combined income statement, covering revenue accrued in all three countries (RSA, USA, DRC), shows (in US$):

[…]

These amounts show a net amount of […] which reflects in Claimant's view the profit in US$ for 1998.

82. The income statements relating to the accounts in the USA and the RSA are supplemented by (1) the journal recording all incomes and expenses, (2) bank statements, (3) a list of payments of client fees and (4) billings to clients.

[…]

87. In respect of the accounts held at the Office in Kinshasa, the Tribunal accepts that Claimant's documentation is incomplete as a consequence of the intervention in March 1999. No adverse consequences should be drawn against Claimant for the lack of documents which have been taken away by the military forces and not returned. […]. The Tribunal finds that the variations and differences appearing when consulting these accounts, as well as the small amounts on balance, do not justify taking them into account for the purpose of establishing the commercial value of the firm, the profit of which results essentially from the accounts held in the USA.

88. The analysis of the statements presented and of the information further provided by Claimant lead the Tribunal to the understanding that the effective profit was US$ […] for 1996, US$ […] for 1997 and US$ […] for 1998. […].

[…]

90. In respect of the funds transferred from Claimant's US bank accounts to the DRC office and to the RSA office, Claimant affirms that they represent the expenditure that had already been taken into account in the expenses recorded for the offices in the DRC

and in the RSA. Thus, to deduct such inter-office transfers would amount, in Claimant's view, to a double-counting of these expense items. Claimant further contends that the expenses that were funded by the inter-office transfers were brought on the accounts in the DRC and RSA offices and already appear in the combined income statement prepared by […]. The Tribunal, however, observes that the payments debited on the accounts of the US office for the purpose of funding the DRC and the RSA offices were reasonably to be credited on the accounts of the latter offices, before the expenses of these offices were actually paid with the respective amounts. Claimant has not provided the Tribunal with any further detail about these transfers. The accounts of the RSA office contain several deposits originating from the US office. Therefore, when these payments are deducted from the amount on credit of the US account and subsequently credited to the DRC/RSA accounts, no double-counting occurs. Therefore, these amounts cannot be added to the figure representing the profits made through the US office.

91. Claimant contends that in order to assess the level of profitability which would have occurred in the future, the appropriate figure is determinable by averaging the three years 1996 to 1998 either by simple average or weighted average. In the Tribunal's view, such an approach is reasonable in light of the important variations in the annual results. The variations in the annual results are considerable. The decrease in profit in 1998 has not been explained as being exceptional, apart from the fact that the bonus paid to […] was particularly high that year. It has been noted also that certain expenses are included in the loss registered in the RSA. In addition, some weight has to be given to the lack of more structured and readable accounts, despite the repeated queries addressed to Claimant. The Tribunal therefore concludes that an amount of US$ […] could reasonably be retained as an expected annual benefit as from 1999.

92. The evaluation of the period subsequent to the events of March 1999 during which profit is to be anticipated is a delicate matter. The Tribunal observes that […] did not explain the manner in which he applied (1) the Capitalized Earnings Approach and (2) the Discounted Earnings Method, nor did he demonstrate how these methods take into account the particular circumstances related to Mitchell & Associates activity. After a first query addressed to Claimant in its letter of March 10, 2003, the Tribunal wrote again to the Claimant through its letter of August 14, 2003, in the following terms:

> "…, Claimant has given a short reply only to the question raised by the Tribunal in its March 10, 2003 letter concerning […] evaluation (questions No. 2 and 3), basically repeating what has already been written in the first Memorial on the merits. Claimant is invited again to reply fully to the questions raised, in order to allow the Tribunal to understand (1) the methods of calculation that have been applied and (2) the determination of the factor for capitalization which would support the conclusion that the benefit of the Firm was to be expected for a period of 4.16 years as from March 1999 in the particular market of provision of legal services in the DRC."

In its answer of September 5, 2003, Claimant explained that the income used was the last two years annualised results. The amount of US$ […] was used as an extremely conservative estimate of the future earnings, assuming no growth in earnings and already taking account of the developments within the DRC. Claimant added that the

capitalization rate of 24% was based on the average rate used in all transactions valued by […] since 1992 and involving similar firms of attorneys. In this respect, says Claimant, both the DRC and South Africa are to be classified as relatively similar in country status, which allows the use of the same rate. However, these statements have not been supported by appropriate evidence, the Claimant's adding only that he offers to brief a further expert if the Tribunal finds that the explanation by […] is inadequate. Claimant did not explain to the Tribunal to what extent the economic and industry data collected by […], which have not been presented to the Tribunal, support the estimated profit anticipated for more than 4 years as from March 1999.

93. The Tribunal acknowledges that the mining and banking sector in which the Claimant was particularly involved, are among the most profitable parts of the Congo's economy, despite a lack of political stability in that country. However, the commercial value that Claimant identifies essentially as his know-how and client-basis can hardly be given an asset-value of more than four years. First of all, the capitalization rate of 24% used by […] might be valid in the South African context; however, one cannot assimilate the economic and political environment of the Congo to that of South Africa. A higher capitalization rate would clearly be required in the case of the Congo. Secondly, it has been established that Mr. Mitchell visited the Congo some time in 2002, without being interfered with. In the circumstances, the Tribunal finds that a shorter period would be more realistic, which it establishes at three years. It results from this that the "fair market value" of Mitchell & Associates was at the relevant time US$ 750,000.

94. Claimant submits that the rate of interest applicable to this amount is the Federal Reserve Board of Governors Bank prime loan rate which was at 7.75 percent in March 1999. Respondent argues that this matter is governed by the law of the DRC, which provides for a rate not higher than 6% in respect of civil law claims and 8% in commercial matters, to be determined as from the date of the filing of the claim with the court. In reply, Claimant, without arguing about the applicable law, contends that Congolese law gives power to the courts to determine the rate of interest in a range between 6% and 12% and that in tort actions, the injured party may recover interest on the damages from the date of the loss. Respondent rejects this explanation, adding in particular that under Congolese law, a tort claim cannot produce interest before it comes into legal existence by a court order awarding the principal amount. The Tribunal, however, has to apply the pertinent provisions of the BIT which prevail over Congolese domestic law. Pursuant to the second paragraph of Article III(1) of the BIT (corresponding to the third paragraph of the same provision in the French version), "compensation shall include interest at a rate equivalent to current international rates", to be fixed as "from the date of expropriation". The Tribunal is of the view that the rate indicated by Claimant is appropriate. Therefore, the annual rate of 7.75% shall apply to the amount of US$ 750,000 as from March 6, 1999.

95. In conclusion, the Tribunal decides that Respondent has to pay to Claimant the amount of US$ 750,000 plus interest thereon at a rate of 7.75% per annum from March 6, 1999 until the date of payment.

D. The Counter-claim of the DRC

96. In its counter-memorial of September 3, 2001, Respondent presented a counter-claim on damages for the amount of one million US dollars "for nuisances caused by the petitioner" and "for attack to the good reputation to the DRC". In its counter-memorial in reply of January 7, 2003, Respondent indicated an amount of US$ […], covering both the damages for attacking the reputation of the DRC and for the costs incurred by the latter for its defense in this litigation. In the answer given to the questions raised by the Tribunal in its letter of March 10, 2003, Respondent explained the difference between these two amounts by the costs related to its defense in this proceeding.

97. In view of the Tribunal's conclusion that Claimant has been the victim of an expropriation in violation of Article III(1) of the BIT and that Respondent shall be required to pay Claimant an appropriate compensation, the Tribunal concludes that the counter-claim is not founded in the light of the outcome of this dispute. The allocation of costs will be dealt with below.

E. The division of the costs of these proceedings

98. Claimant requests that Respondent be required to reimburse to him all his costs incurred in undertaking this arbitration, including the arbitrators' fees, the fees of any expert, the legal costs incurred by Mr. Mitchell and any administrative costs. Claimant's costs have been identified as US$ 206,560 (divided in US$ 172,337.40 and R 243,223.81).

99. Respondent requests that Claimant be required to pay the DRC all costs incurred as expenses in the present litigation, including fees of arbitrators and experts. Respondent's costs have been identified as US$ 307,907.50.

100. Taking into account that Respondent did oppose without success the Tribunal's jurisdiction and that its objections to the merits of the claim have been rejected by the Tribunal, as well as its counter-claim, while Claimant has been successful with respect to a part of his claim only, the Tribunal finds appropriate that Respondent shall bear its own costs, expenses and counsel fees and that it shall contribute to Claimant's costs by the amount of US$ 35,000. Claimant shall bear its own costs, expenses and counsel fees above this amount of US$ 35,000. The costs incurred by the Arbitral Tribunal and ICSID have been settled by Claimant in the amount of US$ 110,000 and by Respondent in the amount of US$ 70,000. The Tribunal decides that Respondent shall bear its share and shall further pay to Claimant the amount of US$ 60,000, who will bear the costs of the Tribunal he paid above the latter amount. Therefore, Respondent shall pay to Claimant

the total amount of US$ 95,000, together with interest at an annual rate of 7.75% as from the date of the Award.

101. The Tribunal rejects moreover Claimant's request to be awarded an amount of US$ 530,000 in case Respondent would not pay the amount awarded within the time limit provided for by the Tribunal. Indeed, apart from the fact that the Tribunal's decision cannot include an indemnity for an hypothetical prejudice, Arbitration Rule 28 does not allow the allocation of costs incurred by a party after the closure of the proceeding.

F. Decision

102. On the basis of the reasons given above, the Tribunal, by a majority, finds as follows:

1. This dispute is within the jurisdiction of the Centre and the competence of this Tribunal.

2. Mr. Patrick H. Mitchell has been the victim of an expropriation by the Democratic Republic of the Congo in violation of Article III(1) of the Bilateral Investment Treaty between the Democratic Republic of the Congo and the United States of America.

3. The Democratic Republic of the Congo shall pay to Mr. Patrick H. Mitchell the amount of US$ 750,000.00 plus an interest on such amount at an annual rate of 7.75%, commencing on March 6, 1999, until the date of payment.

4. The counter-claim of the Democratic Republic of the Congo is rejected.

5. The Democratic Republic of the Congo shall bear its own costs, expenses, counsel fees, including its share of the costs incurred by the Arbitral Tribunal and ICSID.

   The Democratic Republic of the Congo shall pay to Mr. Patrick H. Mitchell the total amount of US$ 95,000, together with interest at an annual rate of 7.75% as from the date of the Award, as a contribution to Claimant’s costs, expenses and counsel fees, including his share of the costs incurred by the Arbitral Tribunal and ICSID.

Mr. Patrick H. Mitchell shall bear his costs, expenses and counsel fees, including his share of the costs incurred by the Arbitral Tribunal and ICSID, in any amount higher than US$ 95,000.

	[signed]	[signed]
Yawovi Agboyibo Arbitrator	Andreas Bucher President of the Tribunal	Marc Lalonde Arbitrator
	Cologny, January 14, 2004	Montreal, January 26, 2004