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**Contents at a glance:**  
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### Arbitration Watch

1. ICSID award against Democratic Republic of Congo annulled
2. ICSID arbitration over Zimbabwe land reform moving forward
3. International Court of Justice to hear rare diplomatic protection case
4. Tribunal constituted in UNCITRAL BIT case between Mittal Steel and Czech Rep
5. Austrian investors eye arbitration with Slovakia over failed airport deal

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**Arbitration Watch:**  
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1. ICSID award against Democratic Republic of Congo annulled,  
By Luke Eric Peterson

In a rare turn of events, a 2004 arbitral award has been annulled in a case at the International Centre for Settlement of Investment Disputes (ICSID) which had pitted a US lawyer against the Democratic Republic of Congo.

Patrick Mitchell, a US national, who had operated a small law firm Mitchell & Associates in the DRC, had earlier convinced an ICSID arbitration tribunal that his business had been expropriated contrary to the 1984 bilateral investment treaty (BIT) between the US and Zaire (now the DRC). However, in a recent as-yet-unpublished November 1, 2006 ruling obtained by Investment Treaty News, an ad-hoc Committee formed at the request of the Democratic Republic of Congo has annulled the earlier arbitral award.

At the root of the ad-hoc Committee's decision to annul the arbitral award is the finding that the original arbitration tribunal had "manifestly exceeded its power" and failed to state its reasons for finding that Mr. Mitchell had made "investments" in the DRC which were covered under the relevant BIT and the ICSID Convention.

In its 27 page ruling, the ad-hoc Committee devoted considerable space to examining a requirement under Article 25(1) of the ICSID Convention which stipulates that jurisdiction of ICSID arbitration tribunals depends upon the existence of a dispute “arising directly out of an investment”.

The ad-hoc Committee examined previous ICSID cases and identified four main characteristics of “investments”, among them the “essential” requirement that investments contribute, in some fashion, to the economic development of the host state.

Having held that a contribution to economic development is an essential characteristic of those investments eligible to fall under the jurisdiction of the ICSID’s investor-state arbitration process, the ad-hoc Committee went on to find that the original tribunal had failed to explain the reasoning as to why it held that Mr. Mitchell’s legal consulting firm could be deemed to have been an “investment” in the DRC.

The ad-hoc Committee found fault with the lack of reasoning in the 2004 arbitral award:

“As a legal consulting firm is a somewhat uncommon operation from the standpoint of the concept of investment, in the opinion of the ad hoc Committee it is necessary for the contribution to the economic development or at least the interests of the State, in this case the DRC, to be somehow present in the operation. If this were the case, qualifying the Claimant as an investor and his services as an investment would be possible; furthermore it would be necessary for the Award to indicate that, through his know-how, the Claimant had concretely assisted the DRC, for example by providing it with legal services in a regular manner or by specifically bringing investors.”

The Committee went on to note:

“The Award is incomplete and obscure as regards what it considers an investment: it refers to various fragments of the operation, without finally indicating the reasons why it regards it overall as an investment, that is, without providing the slightest explanation as to the relationship between the ‘Mitchell & Associates’ firm and the DRC. Such an inadequacy of reasons is deemed to be particularly grave, as it seriously affects the coherence of the reasoning and, moreover, as it opens the door to a risk of genuine abuses, to the extent that it boils down to granting the qualification as investor to any legal counseling firm or law firm established in a foreign country, thereby enabling it to take advantage of the special arbitration system of ICSID.”

Ultimately, the ad-hoc Committee held that the tribunal’s failure to state its reasons seriously affected the coherence of the reasoning as to the existence of an “investment” both in terms of the jurisdictional requirements of the ICSID Convention, as well as the US-Zaire Bilateral Investment Treaty – thus providing grounds to annul the entire arbitral award.

Added to this, the ad-hoc Committee went on to find that the tribunal had manifestly

exceeded its powers by virtue of holding that “returns” from Mr. Mitchell’s Congolese activities were covered as investments. The ad-hoc Committee noted that the US-Zaire BIT covered “reinvested returns”, and inferred from this that non-reinvested returns (for e.g. funds remitted to the United States) were not covered under the definition of investment found in the US-Zaire treaty.

Having found cause to annul the arbitral award on the basis of the original tribunal’s handling of the definition of investment, the ad-hoc Committee noted that it was not strictly necessary to address other grounds for annulment which had been advanced by the DRC. Nevertheless, the ad-hoc Committee did address several of these grounds in the latter part of its ruling.

Of particular note, the ad-hoc Committee offered comments on the decision of the original tribunal to define the concept of expropriation solely through an effects-test (i.e. by looking at the degree of impact upon the claimant) rather than through a test which also took into account the state’s purpose or motive (for e.g. to examine whether the state’s motive had been to promote some important public interest).

While the ad-hoc Committee acknowledged that there is a divergence in approach by different international arbitration tribunals on this sensitive question, it would ultimately conclude that “the Arbitral Tribunal (in the Mitchell case), in apparently opting for the ‘sole effect’ doctrine, was merely exercising its freedom of judgment.”

By virtue of annulling the arbitral award, the ad-hoc Committee absolved the DRC of having to pay the claimant \$750,000 (USD) plus interest, which had been awarded in the earlier arbitration proceeding.

Mr. Mitchell first turned to ICSID in the autumn of 1999, following a highly-publicized run-in with the DRC Government. Mr. Mitchell’s firm had acted for a Canadian mining corporation, Banro, whose own gold and tin mining interests in the DRC were allegedly expropriated in the late 1990s. Following an (unsuccessful) ICSID arbitration and a filing in the US courts, Banro ultimately reached a deal with the DRC Government in 2002 which paved the way for the Canadian firm to resume mining operations in the country.

However, during the period when Banro was at odds with the DRC, Mr. Mitchell’s law firm attracted the ire of the DRC Government. In June of 1999, Mr. Mitchell’s firm assisted Banro in obtaining a South African court order which confirmed the Canadian company’s ownership of 99 tons of disputed cassiterite (tin). Immediately, thereafter the DRC Government arrested two Banro employees, as well as two members of Mr. Mitchell’s law firm, and placed them on trial for high treason. The DRC which was in the midst of a regional civil war, insisted that it was acting in response to a threat to state security.

Several months later, Mr. Mitchell himself turned to ICSID alleging that his DRC legal offices had been ransacked and his business expropriated.

Sources:

Investment Treaty News will shortly endeavour to make the Nov.1 annulment ruling in the Mitchell v. DRC case available in the ITN on-line documents centre:

<http://www.iisd.org/investment/itn/documents.asp>

## 2. ICSID arbitration over Zimbabwe land reform moving forward, By Luke Eric Peterson

An arbitral tribunal has been constituted in an international arbitration which pits a group of 15 Dutch farmers against their erstwhile host, the Republic of Zimbabwe.

The claimants allege that they have suffered dispossession of their land and agricultural investments in Zimbabwe, without adequate financial compensation, contrary to protections contained in the Netherlands-Zimbabwe bilateral investment treaty. They also allege that Zimbabwe has failed to provide their property with the requisite “protection and security” obliged by the treaty, as well as with the right to transfer payments relating to their investments.

The claim is thought to be the first of its kind against Zimbabwe, despite the fact that many foreign nationals have been affected by that country’s program of land reform and compulsory acquisition.

Agric Africa, a UK-based group which has helped to coordinate the ICSID claim, has received a small grant from the Open Society Initiative for Southern Africa (a non-profit organisation established by the philanthropist George Soros) to support the initiation of the ICSID arbitration.

The claimants were engaged in a variety of different agricultural activities in Zimbabwe, including cattle breeding and the production of tobacco, flowers, maize, coffee and soybeans.

Recently, a three member arbitral tribunal was selected to hear the dispute consisting of Judge Gilbert Guillaume, Ronald Cass, a former dean at the Boston University School of Law, and former Pakistan Justice minister Mohammad Wassi Zafar.

## 3. International Court of Justice to hear rare diplomatic protection case, By Fernando Cabrera Diaz

With the proliferation of international investment treaties, and their frequent offer of an investor-to-state arbitration mechanism, foreign investors increasingly need not rely on their home state to espouse their claims before an international tribunal.

However, starting on Monday November 27th, the International Court of Justice (ICJ)

will hold public hearings at The Hague in a case which pits the Republic of Guinea, acting on behalf of one of its citizens, Ahmadou Sadio Diallo, against the Democratic Republic of Congo (DRC). The hearings will deal with preliminary objections raised by the DRC to the admissibility of the application.

The Republic of Guinea accuses the DRC of unjustly arresting Mr. Diallo on November 5, 1995, and imprisoning him for two and a half months before expelling him from its territory on February 2, 1996. The DRC is also alleged to have confiscated Mr. Diallo's property, including investments, his businesses and bank accounts. Guinea contends that the DRC did all of this because Mr. Diallo sought to recover debts owed to his companies by the DRC and by oil companies with connections to the then-Prime Minister and his cabinet.

Mr. Diallo, a Guinean businessman, spent 32 years living in the DRC (formerly Zaire), during which time he started and successfully ran two companies. One company Africom-Zaire became an official state supplier of paper and other office supplies. The other company, Africacontainers, provided transportation services to the state mining monopoly Gecamines as well as to state connected oil companies Zaire Shell, Zaire Mobil and Zaire Fina.

In its application to the court, Guinea alleges that as a result of the business activities of Mr. Diallo's firms he was owed large amounts of money by the DRC and local oil companies. After failed attempts to recover the debts via negotiations Mr. Diallo took action in the courts, bringing legal proceedings first against Zaire Shell. He was ultimately awarded 13 million USD, an amount which was upheld on appeal.

Guinea alleges that Zaire Shell, along with the other two oil companies, feared that the Zaire Shell award might set a precedent for future awards against them, and exerted their influence upon public officials in order to have Mr. Diallo expelled from the DRC.

The Diallo case was brought to the ICJ by Guinea in December of 1998. Eight years later, the first hearing is scheduled to examine the DRC's preliminary objections.

A source at the ICJ tells Investment Treaty News that this type of time-lag is commonplace in ICJ disputes. Unlike other dispute resolution avenues such as the International Centre for Settlement of Investment Disputes (ICSID), the ICJ has a single panel of judges. This panel usually meets in full to hear disputes, except for some minor motions in those rare cases where the parties agree otherwise.

When the hearing commences on Monday the court will publish each side's written pleadings on its website (<http://www.icj-cij.org/icjwww/idocket/igc/igcframe.htm>). After the hearing the court will deliberate on the DRC's objection and if it upholds the objection the case will likely be removed from the docket. If the court rejects the objections voiced by the DRC, the case may then move to a hearing on the merits, which according to a source at the ICJ is not likely to occur until at least late 2007 due to the current demands on the court.

Sources:

The Republic of Guinea's application which can be found on the ICJ web site at:  
[http://www.icj-cij.org/icjwww/idocket/igc/igc\\_orders/igc\\_iapplication\\_19981228.pdf](http://www.icj-cij.org/icjwww/idocket/igc/igc_orders/igc_iapplication_19981228.pdf)

ICJ Press Release 2006/36: <http://www.icj-cij.org/icjwww/idocket/igc/igcframe.htm>

UN International Law Commission's Draft articles on Diplomatic Protection:  
[http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9\\_8\\_2006.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_8_2006.pdf)

#### 4. Tribunal constituted in UNCITRAL BIT case between Mittal Steel and Czech Rep, By Luke Eric Peterson

An arbitral tribunal has been constituted in an investment treaty case which pits the Mittal Steel Group against the Czech Republic. Mittal brought its claim pursuant to the Netherlands-Czech Republic bilateral investment treaty, alleging that it was unjustly excluded from bidding on Vitkovice, a Czech steel company slated for privatization.

According to one Czech media report, the Government excluded the Mittal firm from the tender because of an earlier quarrel between Mittal Steel and Vitkovice over the price of iron ore supplied to the Czech plant.

The resulting arbitration is being carried out under the auspices of the UNCITRAL rules of arbitration, and the proceedings are closed to the public.

The arbitrators selected to resolve the dispute are Prof. Piero Bernardini, of the Luiss Guido Carli University in Rome; Prof. Christopher Greenwood, of the London School of Economics; and Lord Steyn, a retired UK Law Lord.

The Czech Republic faces an unclear number of investment treaty arbitrations at present. A query to the Czech Finance Ministry had not been returned at press time. It is known that the Republic is defending against separate investment treaty arbitrations brought by Eastern Sugar, Saluka Investments BV, European Media Ventures, and Pren Nreka/Zipimex – all of which have been discussed at one time or another in Investment Treaty News.

#### 5. Austrian investors eye arbitration with Slovakia over failed airport deal, By Damon Vis-Dunbar

Austrian investors with a contract to buy a majority stake in Slovakia's Bratislava airport are moving closer to arbitration some two months after their privatization agreement was severed.

The TwoOne consortium - consisting of Vienna airport (Flughafen Wien AG), the financial group Penta and Raiffeisen Zentralbank – had won a tender for a majority stake in two Slovakian airports, Kosice and Bratislava.

While the Kosice airport deal was successfully completed last month, the agreement to take a majority stake in the Bratislava airport encountered problems when the Slovak Antimonopoly Office failed to approve sale. A cabinet decision officially cancelled the contract in October.

In its decision, the Slovakian competition authority held that allowing the Vienna airport consortium to control the nearby Bratislava airport would “create one entrepreneur without any competitive pressure.”

Michael Fazekas, who heads the Austrian consortium, said talks are being held with the Slovakian government. However, if they do not make more progress over the next few weeks the consortium would seek a settlement through international arbitration. He said that TwoOne was weighing whether arbitration would be pursued under its contract with the government, under the Austrian-Slovakia bilateral investment treaty, or both.

The Slovakian government is bracing for arbitration, according to local news reports. A government spokesperson said two law firms are helping with the current negotiations, but that the government would announce a tender to select a law firm if the dispute proceeds to arbitration.

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