

*This case summary was prepared in the course of research for
[S Ripinsky with K Williams, Damages in International Investment Law \(BIICL, 2008\)](#)*

Case summary

American Manufacturing & Trading Inc. v Zaire

Year of the award: 1997

Forum: ICSID

Applicable investment treaty: United States – Zaire BIT (concluded 1984, in force 1989)

Arbitrators Mr. Sompong Sucharitkul – President Mr. Heribert Golsong Mr. Keba Mbaye	Timeline of the dispute 25 January 1993 – request for arbitration 4 August 1993 – arbitral tribunal constituted 21 February 1997 – arbitral award
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I. Executive Summary

AMT, a US company, was a majority shareholder of the Zairian company SINZA, engaged in the production and sale of automotive and dry cell batteries and in the importation and resale of consumer goods and foodstuffs.

In 1991, soldiers of the Zairian armed forces destroyed, damaged or carried away the property, finished goods, raw materials and other objects of value belonging to SINZA. In 1993, another episode of looting occurred in relation to SINZA's property.

AMT brought a dispute before an ICSID Tribunal claiming violations by Zaire of its obligations under the US-Zaire BIT and requesting compensation in the amount of US\$ 14.3 million plus interest and costs. Zaire did not contest the fact of destroying and damaging SINZA's property by its soldiers but opposed the AMT's claim for compensation.

The Tribunal found violations by Zaire of the general BIT "protection and security" standard as well as of the special BIT provision regarding compensation for losses sustained by investments due to armed conflicts, riots or acts of violence. The Tribunal went on to determine the amount of damages representing the "actual market value of the properties destroyed". The Tribunal took into account the independent expert's report on the value of destroyed property, but in exercising its discretion and basing itself on equitable principles, the Tribunal doubled that amount. However, the Tribunal also indicated that the awarded amount was lower than it could have been because the investor ought to have been aware of high political and business risks when investing in a country like Zaire. The final award was US\$ 9 million.

II. Factual Background and Claims of the Investor

American Manufacturing & Trading Inc. ("AMT"), a US company, held a 94% share in SINZA, a company established under the laws of Zaire (now the Democratic Republic of Congo). SINZA was engaged in industrial and commercial activities in Zaire, namely in the production and sale of automotive and dry cell batteries, as well as in the importation and resale of consumer goods and foodstuffs.

In 1991, certain members of the Zairian armed forces destroyed property located in the industrial complex for the production of automotive and dry cell batteries; they also broke into a commercial complex and the stores owned by SINZA and 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 1992 but destroyed for the second time in 1993. Since then, it remained permanently closed. (para.3.04) The two occasions of looting and destruction of SINZA's property (in 1991 and in 1993) were the measures at issue in this case.

AMT requested arbitration by an ICSID Tribunal claiming violations by Zaire of its obligations under the US-Zaire BIT (in force since 1989). In particular, AMT contended that Zaire had failed to respect its general obligation to afford "protection

and security” for the AMT’s investment. Additionally, AMT claimed that Zaire had to pay compensation under a special BIT article which provided for compensation for losses sustained due to war or similar events. AMT claimed a total compensation in the amount of US\$ 14.3 million plus interest and costs.

Zaire did not contest the fact of destroying and damaging the SINZA’s property by its soldiers but opposed the AMT’s claim for compensation on the grounds that other victims of looting of the early 1990-s (domestic businesses and other foreign investments) had not been compensated for similar losses and thus were not treated more favourably than SINZA and AMT.

III. Findings on Merits¹

A. Protection and Security (Article II)

Article II(4) of the BIT provided that investments “shall enjoy protection and security” which might not be less than that recognized by international law. The Tribunal found that Zaire had “manifestly failed” to comply with the standard of vigilance and care, required by this Article and under international law. The Tribunal determined that Zaire did not take any precautionary measure that would serve to ensure the protection and security of the AMT’s investment and thus Zaire should be held responsible for the consequences. (paras.6.04-611)

B. Losses Sustained Due to an Act of Violence (Article IV)

The BIT also contained a special Article IV on compensation for damages due to war or similar events, including riots and acts of violence. In the Tribunal’s assessment, this Article served to further reinforce the standard of protection and security contained in Article II of the BIT. The Tribunal found that Zaire should be held responsible under Article IV for the AMT’s losses resulting from the events of 1991 and 1993. (paras. 6.12-6.14)

Thus, the Tribunal established Zaire’s international responsibility under two provisions of the BIT and proceeded to determining the principles and amount of compensation.

IV. Findings on Damages

A. Law Applicable to the Determination of Damages

The question of applicable law was not discussed by the Tribunal. In fact, the Tribunal applied the BIT rules supplemented by rules of international law. The Tribunal refused to apply domestic law of Zaire, which prevented claims for compensation by the State of damage sustained as a result of looting of early 1990-s.

¹ Zaire also raised a number of objections to the Tribunal’s jurisdiction and to the admissibility of AMT’s claims but all these objections were dismissed by the Tribunal (on this, see Part II of the award).

B. Standard of Compensation

The Tribunal referred to the international law requirement that compensation must “restore to [the investor] the conditions previously existing as if the event had never occurred or taken place”. (para.6.21) This is consonant with the well-known pronouncement in the *Chorzow* case, although the Tribunal did not explicitly refer to this case. As for the standard of compensation, the Tribunal stated that it was necessary to assess “the true value or the actual market value of the properties destroyed or the losses suffered by AMT” (para.7.13)

The Tribunal noted that the award of compensation should be made “regardless of the existence or absence of fault or independently thereof”. (para.7.01)

To determine an appropriate amount of compensation, the Tribunal saw two options, which it saw as alternative:

- 1) to determine this amount “with precision and on a solid basis of a well-defined scientific evidence”;
 - 2) to exercise “sovereign discretion to determine the amount of compensation [...] taking into account the actual injury suffered.”
- (para.6.21)

C. Heads of Damages and Valuation

The Tribunal noted that when determining the method of compensation, one should take into account the “realities of the current situation” in Zaire, referring to the unstable political and business environment in Zaire. This especially concerns an award of lost profits and interest. In Tribunal’s view, these elements cannot be compensated in the same manner as if the investment had been made in a country with a stable investment environment, like Germany or Switzerland. The Tribunal stated that the investor should not be unjustly enriched by means of compensation and that compensation had to take into account the political, economic, financial and other risks that had to be known to the investor who chose to invest in a country such as Zaire. (para.7.14-7.15)

The Tribunal expressly stated that it based its award on “equitable principles”. On this basis, it determined that Zaire had to compensate AMT for the “very losses” which had been caused by the 1991-1993 acts of violence and looting. (para.7.16) It is not clear what exactly the Tribunal meant by the “very losses” but it appears that, taking into account the situation in Zaire, it decided to limit the amount of compensation to the property and goods destroyed and to exclude, at least to a certain extent, *lucrum cessans*.

The Tribunal appointed an independent expert to evaluate the damage suffered by SINZA in 1991-1993. This expert produced a report which contained the following heads:

- damages to the equipment of the production line;
- damages to the building belonging to AMT;
- value of goods damaged;
- losses suffered by AMT due to looting (factory inventory and vehicles).

In total, the losses were estimated by the expert to be US\$ 4.45 million dollars.

The Tribunal did not say in how far its award was based on the expert's report. It only stated that in determining the quantum of compensation, it exercised its "discretionary and sovereign power" and took into account all circumstances of the case. It thus awarded to AMT an "all-inclusive" amount of US\$ 9 million (two times higher than the amount suggested by the expert), without a breakdown into heads of damages. The Tribunal did not explain how it arrived at this figure.

D. Interest

The Tribunal awarded interest at a rate of 7.5% per annum, from the date of the award (in case a principal awarded sum was not paid within 60 days of the award).

V. Implications / Initial Analysis

- In this **non-expropriation case**, the Tribunal used the standard of **fair market value** of the destroyed property.
- To determine the amount of compensation due, the Tribunal may exercise its **discretion**. It does not necessarily need to base its damages award on scientific evidence (precise valuation).
- When awarding compensation, a tribunal may take into account "**equitable principles**".
- Amount of compensation should take into account **political, business and other risks** existing in a country at the time of investment (i.e. for example, an investor who lost his investment in Switzerland will receive a higher compensation than the one who invested in a country like Zaire?). Link with the *CMS v. Argentina* case.
- The approach of the Tribunal to determining the **object of compensation** is different from the one in *Asian Agricultural Products* (1990). Both cases are similar in a way that both concerned an investment in the form a shareholding. However, in *Asian Agricultural Products* the Tribunal estimated the "reasonable price" a buyer would pay for the shareholding (in particular, it deducted company's liabilities from the total value of assets), while in this case this was not done and the Tribunal focused on the value of destroyed property.
- The issue of **fault** is not being taken into account when considering the appropriateness and the amount of compensation (in this as well as other cases).
- **Interest** was awarded only from the date of the award, not earlier (the Tribunal said that the earlier interest was subsumed by the lump sum of the compensation).
- Not clear what **heads of damages** were included in the lump sum awarded (in particular, lost profits).