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INTERNATIONAL COURT OF JUSTICE

AHMADOU SADIO DIALLO
(REPUBLIC OF GUINEA v.
DEMOCRATIC REPUBLIC OF THE CONGO)

PRELIMINARY OBJECTIONS
PRESENTED BY
THE DEMOCRATIC REPUBLIC OF THE CONGO

VOLUME I

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INTRODUCTION

0.01. On 23 December 1998 the Minister for Foreign Affairs of the Republic of Guinea transmitted an Application instituting proceedings against the Democratic Republic of the Congo to the Registrar of the International Court of Justice. That Application was entitled "Application for purposes of diplomatic protection". It was accompanied by a document entitled "Memorial of the Republic of Guinea", which enlarged upon the claims set out in the Application and which will accordingly be considered, in the present pleadings, as an essential component of that Application. In those documents the Republic of Guinea expressed its intention to exercise diplomatic protection in respect of one of its nationals, Mr. Ahmadou Sadio Diallo (hereinafter "Mr. Diallo"), a businessman resident in the Congo since the early 1960s, seeking reparation for injury and loss resulting from internationally wrongful acts allegedly committed by the authorities of Zaire, mainly against two Congolese companies run by Mr. Diallo. The sum claimed by the Republic of Guinea was evaluated at the outset at no less than US\$ 36 billion, together with bank and default interest at respective annual rates of 15 per cent and 26 per cent from the end of 1995¹. That amount, which represents several times the entire foreign debt of the Democratic Republic of the Congo, is probably one of the highest — if not the highest — that has ever been claimed before an international court.

0.02. The Application was filed in the Registry of the Court on 28 December 1998 and the case was added to the Court's General List under No. 103. By an Order of 25 November 1999 the Court fixed 11 September 2000 as the time-limit for the filing of a Memorial by the Republic of Guinea and 11 September 2001 as the time-limit for the filing of a Counter-Memorial by the Democratic Republic of the Congo. At the request of the Republic of Guinea, those time-limits were extended by an Order of 8 September 2000. In that Order, the President of the Court extended to 23 March 2001 the time-limit for the filing of a Memorial by the Republic of Guinea and to 4 October 2002 the time-limit for the filing of a Counter-Memorial by the Democratic Republic of the Congo. The Republic of Guinea duly filed its Memorial on 23 March 2001 within the time-limit as thus extended. Without formally renouncing the claim to some 40 billion US dollars as presented in the Application, it requested the Court to evaluate the amount of the reparation at a later stage of the proceedings.

0.03. In this document the Democratic Republic of the Congo will be raising two preliminary objections to the Court's examination on the merits of the complaint filed by the Republic of Guinea. The Democratic Republic of the Congo does not intend to challenge the Court's jurisdiction, which is established on the basis of the declarations accepting the compulsory jurisdiction of the Court filed by the Democratic Republic of the Congo and by the Republic of Guinea, respectively, on 8 February 1989 and 11 November 1998. After a careful analysis of the applicant State's Application and Memorial, it would appear however that the Republic of Guinea is attempting to exercise its diplomatic protection under conditions that do not meet the requirements of international law in such matters. The legal prerequisites for a State to be entitled to exercise its diplomatic protection in favour of one of its nationals are not satisfied in the present case on two levels.

— First, the Republic of Guinea's Application seeks reparation for losses allegedly incurred by two companies which did not have Guinean nationality, on the pretext that they were run by one of its nationals, Mr. Diallo. The Republic of Guinea therefore has no *locus standi* in the present case, since a claim of diplomatic protection seeking to obtain reparation for an

¹Application instituting proceedings filed in the Registry of the Court on 28 December 1998 (hereinafter "Application of the Republic of Guinea"), p. 37.

infringement of the rights of persons who are not nationals of the applicant State cannot be upheld under international law.

- Secondly, even if the Republic of Guinea were found to have *locus standi* in the present case, neither Mr. Diallo nor the companies run by him have exhausted the remedies by which they could have sought reparation for such damage within the domestic legal system of the Democratic Republic of the Congo.

These two circumstances give rise to substantial objections as to the admissibility of the Application submitted by the Republic of Guinea.

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0.04. It is therefore perfectly normal for the Democratic Republic of the Congo to seek to avail itself of the possibilities given to it by the Rules of Court and in particular Article 79 thereof. In this respect the Republic of Guinea is not entitled to claim that the present preliminary objections are filed too late. Admittedly, Article 79 of the current Rules of Court expressly provides that “[a]ny objection by the respondent to the jurisdiction of the Court or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits, shall be made in writing as soon as possible, and not later than three months after the delivery of the Memorial . . .”. However, that text was adopted following an amendment of 5 December 2000 with the express stipulation that

“[t]he amended rules shall come into force on 1 February 2001, and shall as from that date replace the rules adopted by the Court on 14 April 1978, *save in respect of any case submitted to the Court before 1 February 2001, or any phase of such a case, which shall continue to be governed by the rules in force before that date*”².

Since the present case was referred to the Court on 23 December 1998, it is necessary to apply the Rules of 14 April 1978, which were in force at the time the Application was filed and which provide, in Article 79, that

“[a]ny objection by the respondent to the jurisdiction of the Court or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits, shall be made in writing within the time-limit fixed for the delivery of the Counter-Memorial . . .”.

The present document submitting preliminary objections, within the meaning of the Rules of Court, and filed within the time-limit fixed by the Court for the delivery of the Counter-Memorial, is therefore in total conformity with Article 79 as cited above.

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0.05. In the Memorial that it filed on 23 March 2001, the Republic of Guinea, undoubtedly being aware of the serious issues of admissibility that are raised in the present case, devoted an entire chapter to a prior rebuttal of the two objections to be set out in the present pleadings³. With respect to the first of those objections, the Republic of Guinea claimed that it was simply acting in favour of Mr. Diallo, an individual who is one of its nationals and purportedly entitled to benefit from the “diplomatic protection of shareholders”⁴ or even, in the alternative, from the “protection of the rights of shareholders by substitution for the company owned”, which is said to be justified

²Emphasis added by the Democratic Republic of the Congo.

³Memorial of the Republic of Guinea (MG), Chapter 4, entitled “The right of the Republic of Guinea to exercise its diplomatic protection on behalf of Mr. Diallo”.

⁴*Ibid.*, pp. 80-92, paras. 4.16-4.50.

by “considerations of equity”⁵. As to the second objection, the Republic of Guinea claims that the prerequisite of exhausting local remedies is met in the present case because of the “impossibility for Mr. Diallo to give effect to this principle”⁶. The Democratic Republic of the Congo will address all of those arguments in the present pleadings.

0.06. At the outset, however, the DRC is somewhat surprised that the Republic of Guinea has attempted to relieve the burden of proof lying with it as applicant State, by respectfully requesting the Court to excuse it for what it calls “some deficiencies of form”⁷ in its Memorial, on the basis of grounds, but also with effects, that are questionable to say the least.

0.07. With respect to the grounds on which it relies, the Republic of Guinea goes as far as to refer, in the context of its dispute with the Democratic Republic of the Congo, to “the great difficulties which it faces” and in particular to “its extremely serious structural economic and financial problems” together with “tension on its borders” and “a huge influx of refugees from neighbouring countries”. The Democratic Republic of the Congo feels a certain unease in this respect for it should not be forgotten that it was the choice of the Republic of Guinea to submit a case to the Court in respect of matters that could have been — and could still be — settled within the Congolese domestic legal system, bearing in mind that the main issues are disputes between two Congolese companies and a number of their partners whose trading activities are also pursued in the Congo. The Democratic Republic of the Congo is unaware of the reasons that have led the Republic of Guinea to embark upon lengthy and costly proceedings in these circumstances but, be that as it may, it considers that the factors invoked should, if they are to be accepted at all, inure to the benefit of the respondent State, which did not choose, for its part, to become involved in the present proceedings. In this respect, the Democratic Republic of the Congo need not remind the Court that it is one of the countries most seriously affected by armed conflicts with disastrous humanitarian consequences. The most critical sources, it should be recalled, in assessing the consequences of the war waged on Congolese territory by foreign powers since 1998, estimate the number of deaths at two to three million.

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0.08. The Republic of Guinea moreover complains that it has failed to obtain sufficient evidence in support of its allegations, explaining this by Mr. Diallo’s expulsion, which is said to have prevented him from producing certain relevant documents. The applicant State therefore requests the Court to “make use of its powers of investigation to gather any additional items of evidence which it may deem useful”, pursuant to Article 44, paragraph 2, of its Statute and Article 66 of its Rules⁸. Once again the Democratic Republic of the Congo is, to put it mildly, astounded by the attitude of the applicant State, which very clearly insinuates that the Congolese authorities are in some way prone to withholding evidence. The present case mainly concerns disputes between two Congolese companies and some of their trading partners, in respect of alleged breaches of contract governed by Congolese law. A number of the disputes in question are currently pending before Congolese courts on whose dockets the cases concerned are listed. The Democratic Republic of the Congo, to the extent that it is relevant to the present case, has evidently appended the documents concerned to the present pleadings and, if it should prove necessary, would be happy to co-operate in establishing the facts by supplying additional documents. In these circumstances, it is difficult to understand why it would be necessary for the Court to carry out a fact-finding visit under Article 66 of its Rules, even though the Congolese authorities would obviously be happy to receive members of the Court for such a visit should it be considered worthy

⁵MG, pp. 93-96, paras. 4.51-4.59.

⁶*Ibid.*, pp. 100 *et seq.*

⁷*Ibid.*, p. 5, para. 1.7.

⁸MG, pp. 5-6, para. 1.09.

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of interest in the context of the present proceedings. The Republic of Guinea's allegations are particularly incongruous as they are moreover refuted by the facts and in particular by Mr. Diallo's visible ease in obtaining certain documents even at the present time. The Democratic Republic of the Congo observes in this respect that the Republic of Guinea appended to its Memorial the submissions of the State Counsel at the Congolese Supreme Court of Justice in the cases *Africom-Zaire v. PLZ* and *Africontainers-Zaire v. Fina*. As that type of document should remain strictly confidential until the delivery of the judgment, the Applicant's possession of those submissions can be regarded with great suspicion. In truth however, the Democratic Republic of the Congo is by no means embarrassed by the contents of the documents in question and raises no objection as to their use as factual evidence capable of shedding light on the judicial debate. But it is certainly surprising, in view of the foregoing, that the Applicant should venture to present Mr. Diallo as a person who encounters difficulties in gathering evidence in the Congo.

0.09. In this respect, the Democratic Republic of the Congo makes a point at the outset of objecting to the use of those "deficiencies of form" in Guinea's Memorial, whether or not they are excusable, as any form of justification for certain particularly regrettable methods used in that document. The Republic of Guinea, while expressly accepting that the Court "does not need to rule on the intent of the Democratic Republic of the Congo"⁹, succeeds in effect, through peremptory affirmations, in casting discredit on the Congolese authorities who allegedly engaged in an outright conspiracy if the Guinean Memorial is to be believed. We are thus led to believe that Mr. Diallo's expulsion was "*expressly intended to prevent Mr. Diallo conducting his business and recovering moneys due*"¹⁰, and that it was "*executed for the sole purpose of preventing the investor from realizing his investment*"¹¹ or that, in the context of the commercial disputes between *Africontainers-Zaire* and *Shell*, "*it can only be assumed that, in view of the size of the sums involved, the Democratic Republic of the Congo received substantial kickbacks in return*"¹². Those extremely serious accusations are not supported by any factual evidence, any document or any reference whatsoever. Contrary to the applicant State's assertions, its entire demonstration seems to rest on the allegedly malevolent intentions of the Congolese authorities. The Democratic Republic of the Congo leaves the Court to draw its own conclusions from this bizarre way of "establishing" the facts. In any event, it wishes to point out that any acceptance of the "deficiencies of form" in the Guinean Memorial may by no means serve as an excuse for such an approach and above all should not be given any credence.

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0.10. Having identified those precise points, the Democratic Republic of the Congo will seek in this document, pursuant to Article 79, paragraph 2, of the Rules of Court, to "set out the facts and the law on which the objection is based", along with the submissions, a list of documents in support and the pertinent evidence. Pursuant to paragraph 5 of that same Article, the statements will be "confined to those matters that are relevant to the objection" and more precisely to the two objections enumerated above. The following pages will therefore successively present:

- the statement of fact on which the two preliminary objections are based (Chap. I),
- the first of those objections, whereby the Republic of Guinea does not have *locus standi* in the present proceedings (Chap. II), and
- the second objection, whereby the required exhaustion of local remedies has not been fulfilled in the present case (Chap. III).

⁹MG, p. 65, para. 3.60.

¹⁰*Ibid.*, p. 62, para. 3.56; emphasis added by the DRC.

¹¹*Ibid.*, p. 63, para. 3.57; emphasis added by the DRC.

¹²*Ibid.*, p. 64, para. 3.59; emphasis added by the DRC.

CHAPTER I. THE FACTS UNDERLYING THE OBJECTIONS TO ADMISSIBILITY

1.01. The facts underlying the two preliminary objections which will be set out below, can be summed up as follows: the Republic of Guinea has attempted to bring before the Court a dispute between Congolese companies and other economic operators in the Congo, i.e., a dispute that is above all a matter of Congolese commercial law and falls within the jurisdiction of the Congolese courts. The Democratic Republic of the Congo will enlarge upon those factual elements in this chapter and will draw the following conclusions:

- first, and this will essentially form the basis of the first preliminary objection concerning the Republic of Guinea's lack of *locus standi*, the present dispute mainly pertains to disagreements between two Congolese companies and other economic operators in the Congo, with Mr. Diallo always acting in his management capacity in relation to those companies, and
- secondly, and this will form the basis of the second preliminary objection concerning the non-exhaustion of local remedies, it appears clearly that all the remedies available within the Congolese domestic legal system are far from being exhausted.

1.02. At the same time, the Democratic Republic of the Congo will generally rebut the version of events presented by the applicant State in its Memorial, which either seeks to minimize or conceal the factors which have just been mentioned, or simply contains erroneous allegations. Before going into the details of this rebuttal, the following two explanations on methodology are also called for.

1.03. First, the Democratic Republic of the Congo will not seek in this chapter to address each and every one of the erroneous factual allegations contained in Guinea's Application or Memorial. Its rebuttal will be more general and in addition to introducing the specifically legal chapters devoted to the two preliminary objections, it will also show that the version of events set out in the Guinean Memorial does not stand up to closer analysis. If we were to proceed otherwise, by systematically and comprehensively addressing all of Guinea's erroneous accusations or insinuations — of which some examples have already been mentioned in the introduction¹³ — it would prove particularly fastidious especially as, pursuant to Article 79 of the Rules of Court, a statement of fact must be limited to the factual elements underlying the preliminary objections.

1.04. On this subject, secondly, the Democratic Republic of the Congo, at this stage, will refrain as far as possible from becoming involved in a debate on the merits of the case and from responding to the Guinean accusations that the Congolese authorities violated a number of rules of international law applying to the present case. The present preliminary objections rely on factual evidence which, as we emphasized at the outset, concerns disputes which have occurred in the Congo between trading partners and which are governed by Congolese law. It will therefore be necessary to explain how those disputes arose and developed, including by reference to the relevant rules of Congolese law. The questions of international law will not however be addressed at this stage without, of course, implying that the Congo in any way acknowledges the claims put forward by Guinea in that respect.

1.05. Having clarified those points, the Democratic Republic of the Congo will, in the following pages, set out the facts underlying the preliminary objections. At this stage, it will refrain from going into any detail on each one, but the most controversial relevant facts will be

¹³*Supra*, para. 0.09.

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enlarged upon in the two chapters devoted, respectively, to the Republic of Guinea's lack of *locus standi* and to the non-exhaustion of local remedies in the present case. The presentation of the facts will successively address each of the commercial disputes that the Guinean Application seeks to bring before the Court. Some of those disputes are relatively complex and have given rise to developments occurring over many years. In order to give the Court as clear a picture as possible, the relations between the companies run by Mr. Diallo and each of their trading partners will be examined in turn. This will cover the relations with the State of Zaire (Sec. 2), with the public corporations Gécamines (Sec. 3) and Onatra (Sec. 4), and with the private companies Fina (Sec. 5), Shell (Sec. 6), Mobil Oil (Sec. 7) and PLZ (Sec. 8). However, before systematically examining those trading relations and their evolution, it will first be necessary to give a brief overview of how Mr. Diallo settled in Zaire and of the type of activities pursued by his two companies (Sec. 1). Mr. Diallo's expulsion from Zaire, in January 1996, will then be addressed (Sec. 9). This background information will be helpful before looking at the conditions in which the Republic of Guinea filed its Application before the Court, claiming to exercise its diplomatic protection in the person of Mr. Diallo (Sec. 10).

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Section 1. Mr. Diallo's settlement in Zaire, the setting-up of the companies Africom-Zaire and Africontainers-Zaire and their early years of activity

1.06. Mr. Ahmadou Sadio Diallo is a Guinean national who settled in Zaire (then the Republic of the Congo) in the early 1960's. At the outset, Mr. Diallo chose to pursue his activities by setting up companies of which he was to be the chief executive. He thus set up his first company under the name Africom-Zaire to pursue activities of a very general nature but mainly focusing on import and export¹⁴. In 1979, Mr. Diallo set up a second private limited company under the name of Africontainers-Zaire, with two other partners. Mr. Diallo participated in the creation of that second company in his capacity as managing director of Africom-Zaire, which held 30 per cent of the shares in Africontainers-Zaire, with the remainder being divided between the other two partners¹⁵. Less than one year later, in April 1980, a General Meeting of the shareholders of Africontainers-Zaire ratified a major change in the company's shareholder structure, with the result that the share capital of Africontainers-Zaire was to be divided between Africom-Zaire (60 per cent of shares) and Mr. Diallo (40 per cent)¹⁶. It appears that these shareholdings did not undergo any subsequent change. Mr. Diallo thus became, *de facto*, the sole managing director of those two companies incorporated under the laws of Zaire, both being registered with the Companies Registry of the city of Kinshasa¹⁷. The two companies, set up with the Zairean legal form SPRL (private limited company), had separate legal personality from that of their shareholders¹⁸. Accordingly it was not in a personal capacity, i.e., as an individual of Guinean nationality, but through the intermediary of those Zairean legal entities, that Mr. Diallo was to pursue his trading activities in Zaire. It will therefore be necessary, in the remainder of this statement of facts, to focus on the activities of those companies, because those legal entities were to become embroiled in trading disputes to an extent that was probably unprecedented in the history of the Congo.

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1.07. Despite the fact that its corporate purpose was defined in relatively broad terms¹⁹, Africontainers-Zaire mainly specialized in container transport, which at that time was not a very widespread activity in Zaire²⁰. The company rapidly developed its activities in this field, by leasing its containers to various trading partners. It thus entered into a number of contracts with oil companies operating in Zaire for the purpose of transporting lubricants in containers to regions in the interior of the country. Such agreements were thus signed *inter alia* with the companies Zaire Mobil Oil (hereinafter "Mobil Oil" or "Mobil") on 1 October 1980, and Zaire Shell (hereinafter "Shell") on 24 July 1981²¹. One of the biggest public corporations in Zaire, under the name "Générale des Carrières et des Mines" (hereinafter "Gécamines"), was also one of the customers of Africontainers-Zaire, with whom Gécamines signed an agreement for the carriage of ores from the regions where they were mined (in the province of Shaba) to the ports of Kinshasa or Matadi from

¹⁴See article from *Jeune Afrique*, 16 February 1984, p. 16 (MG, Ann. 18).

¹⁵See the articles of association of Africontainers-Zaire, MG, Ann. 1.

¹⁶See the minutes of that general meeting, MG, Ann. 3.

¹⁷Memorial of the Republic of Guinea, Anns. 1 and 2.

¹⁸See the Decree of 27 February on commercial companies, Art. 1 of which provides that "commercial companies with legal status pursuant to the present Decree shall have separate legal personality from that of their shareholders" [*translation by the Registry*]; *infra*, para. 2.14.

¹⁹Under Art. 3 of the articles of association of Africontainers-Zaire, the corporate purpose of the company was to carry on "any commercial activities in the broadest sense, in particular buying and selling, import and export, the carriage of goods, construction, commission and brokerage transactions, . . ." (MG, Ann. 1).

²⁰See above-mentioned article from *Jeune Afrique* (*supra*, note 14).

²¹MG, Anns. 6 and 8.

where those ores were exported²². Those commercial relations were consolidated by the signing, on 13 July 1983, of a major contract between the companies Zaire Fina (hereinafter "Fina"), Mobil, Gécamines and Africontainers-Zaire (hereinafter "the Tripartite Contract")²³. The object of that contract was to streamline the transport operations covered by the various agreements mentioned above. Once the containers had been unloaded, rather than sending them back empty the parties to the Tripartite Contract thus implemented the following system: the Africontainers-Zaire containers were loaded with petroleum products to be transported from Kinshasa to a destination deeper into the country. After delivery, the containers were transferred to other cities (Lubumbashi and Luilu) where Gécamines possessed operating bases, to be loaded with ores, which were then transported to Kinshasa. A supplementary agreement was signed on 1 August 1983 to include the company Shell as a party²⁴. The Africontainers-Zaire containers were to be transported, along these various routes, by the Office National des Transports (hereinafter "Onatra"), another Zairean public undertaking.

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1.08. The Tripartite Contract was performed without any real problems until 1986, when major development work was started at the port of Kinshasa. As a result of this work, the container unloading (stripping) operations were relocated from the port of Kinshasa to that of Matadi, 350 km from the capital. That decision caused certain difficulties for the circulation of the containers of the various freight forwarders operating on that route, because of the extended distance requiring longer turnaround times and because a certain number of containers remained at a standstill for varying durations in the port of Matadi. This was the first serious difficulty which arose in the relations between Africontainers-Zaire and its trading partners, and in particular with Onatra, as will be seen below. Numerous other disputes were to follow, concerning both Africom-Zaire and Africontainers-Zaire. Further details of those disputes will now be set out by the Democratic Republic of the Congo. It would observe, at the outset, that these disputes were all between two companies whose Congolese nationality has not been called into question, and some of their trading partners pursuing activities in the Congo. All the disputes concerned contractual undertakings governed by Congolese law.

²²Agreement of 29 June 1982, *ibid.*, Ann. 12.

²³*Ibid.*, Ann. 13. Despite the fact that there were four, then five, parties, this contract will always be referred to in this document as the "Tripartite Contract" because it had three categories of parties: Africontainers-Zaire as forwarding agent, Gécamines and the oil companies (Mobil and Fina, joined shortly afterwards by Shell).

²⁴MG, Ann. 14.

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Section 2. The dispute between Africom-Zaire and the State of Zaire

1.09. In the 1980s the company Africom-Zaire enjoyed relatively steady commercial relations with the State of Zaire²⁵. In June 1986 the State of Zaire placed an order with the company Africom-Zaire for significant quantities of stationery²⁶. Those orders amounted in total to 28,382,872.70 zaires. A schedule for the payment of that sum had been proposed by Africom-Zaire and accepted by the competent Zairean authorities²⁷. It provided for the full payment of the receivable by the end of March 1987. When the State of Zaire failed to comply with that payment schedule, Mr. Diallo sent a letter of reminder to the State Commissioner for Finance, dated 17 January 1987²⁸. In December 1987, the State Commissioner for Finance informed the Governor of the Bank of Zaire that he agreed to pay the sum owed to Africom-Zaire in respect of the 1986 order, by five bills of exchange covering monthly instalments between January and April [*sic*] 1988²⁹. However, in spite of that undertaking, the scheduled instalments were never paid and the Republic of Zaire remained the debtor of Africom-Zaire for an amount which still needs to be determined precisely³⁰. No other action appears to have been taken by Africom-Zaire since that time for the purpose of collecting its debt. In particular, no such legal proceedings have been brought against the State of Zaire, neither by the company Africom-Zaire nor by Mr. Diallo acting in any capacity whatsoever. The Democratic Republic of the Congo will address the legal consequences of this circumstance in Chapter III of these Preliminary Objections. Similarly, the Democratic Republic of the Congo will subsequently consider the fact that this dispute involves the contractual rights of a Zairean company and not any right that may belong to Mr. Diallo individually (Chapter II).

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1.10. Neither the Republic of Zaire nor the Democratic Republic of the Congo more recently have ever disputed the fact that the State owed the said amount to the company Africom-Zaire. The financial difficulties experienced by the country for a certain number of years have not, however, enabled it to pay off the debt. In accordance with the established practice in such matters, the amount of the unpaid balance of that receivable was incorporated into the Congolese domestic public debt. This matter was accordingly entrusted to the Office de la Gestion de la Dette Publique (OGEDEP) in order to find a satisfactory solution³¹. The debt owed to Africom-Zaire was thus treated in the same way as those of a considerable number of Congolese companies which hold liquidated debts against the Congolese State. Those companies generally remain in contact with the OGEDEP and regularly have their debts certified by the Minister for Finance and the Budget as well as by the OGEDEP³². The company Africom-Zaire is thus far from being an isolated case. In any event, this dispute only involves an insignificant amount and it is the only dispute that directly concerns the Congolese State. By contrast, the disputes between the Congolese companies run by Mr. Diallo and their other trading partners have much higher amounts at stake.

²⁵See *inter alia* the letter of 19 July 1986 from the State Commissioner for Finance to the managing director of Africom-Zaire referring to an order for listing paper placed in 1983 and in respect of which the balance was paid off by the State in 1985 and 1986 (*ibid.*, Ann. 34).

²⁶See the two order forms of 18 June 1986, MG, Anns. 30 and 31. This order was confirmed by letter of 22 October 1986 from the State Commissioner for Finance to the Chairman of the Régie National des Approvisionnements et Imprimerie ("RENAPI"), *ibid.*, Ann. 36.

²⁷See the letter of 22 October 1986 from the State Commissioner for Finance to the Chairman of the Régie National des Approvisionnements et Imprimerie ("RENAPI"), MG, Ann. 36.

²⁸*Ibid.*, Ann. 37.

²⁹*Ibid.*, Ann. 51.

³⁰*Ibid.*

³¹*Ibid.*, Ann. 71.

³²Preliminary Objections of the Democratic Republic of the Congo (POC), Ann. 57.

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Section 3. The dispute between Africontainers-Zaire and Gécamines

1.11. As the Democratic Republic of the Congo has already stated, the trading relations between Africontainers-Zaire and Gécamines date back to 1982. The two companies started working together under very promising conditions. Africontainers-Zaire admittedly sent letters to the management of Gécamines, on several occasions, in which the managers of the freight forwarder expressed their concern that containers were remaining at a standstill for long periods in the Gécamines depots, that they were not being used (with the resulting problems of “downtime” for Africontainers-Zaire) or that they were being used by Gécamines without the authorization of the owner company³³. However, those problems did not give rise to any serious disputes or to any evaluated claims, at least not at the outset. The dispute nevertheless degenerated subsequently, among other things because of the difficulties caused by the closure in 1986 of the port of Kinshasa and with the resulting extension in container turnaround times.

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1.12. A slew of letters were thus exchanged between Africontainers-Zaire and Gécamines concerning the issues of standstills and the improper use of the containers, together with the financial consequences of this situation for the freight forwarder³⁴. In a number of its replies, Gécamines laid the responsibility for this situation on certain operators involved in the same transport activities and above all on Onatra³⁵. The dispute between the two partners subsequently focused on three essential points. The first concerned the claim submitted by Africontainers-Zaire in 1991 involving eight of its containers that the company accused Gécamines of having damaged and rendered unusable³⁶. The second concerned the dispute over the immobilization of the Africontainers-Zaire containers in the Gécamines depots. That dispute worsened and gave rise in July 1991 to an initial evaluated claim by the forwarding agent, which estimated at just over three billion zaires the loss that it had incurred as a result of the situation³⁷. The third point concerned the allegations by Africontainers-Zaire that Gécamines was responsible for serious breaches of the 1983 Tripartite Contract, in particular by having certain goods transported by other trading partners, including by oil companies that were parties to the contract. Africontainers-Zaire complained that such conduct breached a clause in the 1983 Contract which, it claimed, attributed it exclusive rights to provide such transport services³⁸.

1.13. With respect to the first of these issues, Gécamines quickly dismissed the claims of Africontainers-Zaire, which had evaluated the replacement value of the damaged containers at US\$ 17,000 per unit³⁹. For the public undertaking, by contrast, the value of a new container amounted at the time to US\$ 3,000 and that of a second-hand container to US\$ 1,200, according to the information that it had obtained on this subject from a foreign freight operator⁴⁰. After initially proposing to restore the eight containers of Africontainers-Zaire to their original condition⁴¹,

³³See *inter alia* MG, Anns. 19, 20 and 25.

³⁴See *inter alia, ibid.*, Anns. 25, 88, 90, 95.

³⁵See *inter alia* the letter of Gécamines dated 5 April 1990, *ibid.*, Ann. 62.

³⁶See the letter of Africontainers-Zaire dated 26 June 1991, MG, Ann. 87.

³⁷See the debit note of 3 July 1991, *ibid.*, Ann. 88.

³⁸See letter of 9 September 1991, *ibid.*, Ann. 95.

³⁹See above-mentioned letter of 26 June 1991, *ibid.*, Ann. 87.

⁴⁰Letter of 16 July 1991, *ibid.*, Ann. 90.

⁴¹Letter of 7 January 1992, *ibid.*, Ann. 98.

Gécamines proposed to pay the freight forwarder US\$ 1,400 per unit by way of compensation⁴². This amount corresponded to the value of a container as initially declared by Africontainers-Zaire when that company had applied for trading approval to the Zairean authorities⁴³. That proposal was not accepted by Africontainers-Zaire and the dispute has still not been settled to date. This is also the case for the other two above-mentioned issues, which were joined to the first in a subsequent attempt at settlement, notwithstanding their different origins.

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1.14. Since that time the two parties have had a certain number of discussions concerning all of these disputes, without however reaching a final settlement to date. Negotiations were thus started between Africontainers-Zaire and Gécamines in 1995⁴⁴, and continued until the summer of 1997⁴⁵. In view of the complexity of the case and the number of other freight forwarders which had filed complaints concerning the loss of their containers, Gécamines moreover set up its own special committee for the settlement of disputes concerning the containers (the CLC) on 17 January 1997. As a result of the various meetings just mentioned, more precise details of the situation were established and the freight forwarder admitted that the number of containers concerned by its claim had been overestimated. Thus, at the meeting of 2 July 1997, Africontainers-Zaire admitted that seven out of the 20 containers that it had included in a debit note of 1995 had in fact already been returned to it⁴⁶. It was not known what had become of the other six containers and Africontainers-Zaire undertook at that same working meeting to carry out research for the purpose of identifying their precise location⁴⁷. There was similar uncertainty concerning twelve other containers included on another list drawn up by Africontainers-Zaire showing a total of 28 containers⁴⁸. The very identification of the prejudice actually suffered by the freight forwarding company thus proved problematic and the merits of its claims for compensation in respect of that prejudice were similarly found to be questionable. However, notwithstanding the progress accomplished during the 1997 negotiations, the discussions between Africontainers-Zaire and Gécamines were broken off abruptly at a time when the prospect of a settlement appeared likely.

1.15. Gécamines had drawn up a new schedule of work with the various freight forwarding companies concerned, with a view to entering into a final agreement with each one of them⁴⁹. Working meetings were accordingly scheduled from 29 September to 3 October 1997 between Gécamines and the company Africontainers-Zaire for the purpose of seeking a final settlement of the commercial dispute between them. On 26 September 1997, Gécamines thus sent an invitation to the company Africontainers-Zaire, asking it to take part in this new series of working meetings. That invitation was actually received by Mr. N'Kanza, administrative director of the company Africontainers-Zaire, on 29 September 1997⁵⁰. The representatives of the company initially took part in those meetings but then withdrew on the instructions of Mr. Diallo.

⁴²Letter of 7 January 1992.; the second page of the letter containing that proposal has been reproduced by mistake on the back of the Memorial of the Republic of Guinea, Ann. 99.

⁴³*Ibid.*

⁴⁴See minutes of the meeting held by the parties on 1 June 1995, MG, Ann. 151.

⁴⁵See the minutes of 2 and 7 July 1997, MG, Anns. 224 and 226.

⁴⁶*Ibid.*

⁴⁷*Ibid.*

⁴⁸*Ibid.*

⁴⁹See POC, Anns. 5 and 6.

⁵⁰See POC, Ann. 7.

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1.16. It is true that, shortly before the invitation, Gécamines had sent a letter of protest to Africontainers-Zaire concerning the fraudulent conduct by employees of Africontainers-Zaire to the detriment of Gécamines and which had just been exposed⁵¹. That conduct, which dated back to the 1980s but which Gécamines had just discovered, consisted of “introducing into the batch of containers despatched to Lubumbashi on its behalf” a number of additional containers which were despatched to the same town by Africontainers-Zaire on behalf of other local companies. It would have cost about US\$1,000 per unit for the company Africontainers-Zaire to have sent the containers back to Kinshasa empty. By incorporating them fraudulently into the regular batch of containers despatched to Gécamines, Africontainers-Zaire was getting it to cover the cost of returning those additional containers to Kinshasa. Initially, Gécamines had recorded 186 cases of similar fraudulent use and was seeking to pursue its investigations further⁵². It may be assumed that this practice, adopted for a long time by Africontainers-Zaire, may be one of the factors explaining why, despite a number of threats to such effect⁵³, Africontainers-Zaire never referred its dispute with Gécamines to the courts of Zaire. The Democratic Republic of the Congo will return to this issue in Chapter III of the present document, where it sets out its objection concerning the non-exhaustion of internal remedies.

1.17. In any event, it transpired that the prospects for final settlement initiated by the negotiations in September 1997 were fruitful for a number of freight forwarding companies which took part in those meetings. Thus, during this second round of negotiations, Gécamines reached an amicable solution with the companies Kincontainers, ATAF and FLUCOCO, which in total recovered several hundred thousand US dollars further to those discussions⁵⁴. Interestingly, it can be noted from the documents containing those agreements that these companies were invoicing the lease of their containers at prices which were six to twenty times lower than those charged by Africontainers-Zaire⁵⁵.

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1.18. The totally excessive nature of the financial claims by Africontainers-Zaire appears moreover to have played quite a significant role in bringing this major dispute to a stalemate. Since it first submitted its claims, Africontainers-Zaire had reviewed its demands several times according to the number of containers that it considered to have been immobilized in the Gécamines depots or improperly used by Gécamines. Africontainers-Zaire also claimed that it was taking into account the updating of its prices, thereby allowing it to submit increasingly high financial demands. The loss it had suffered because of that situation was evaluated by the company in 1992 at a total amount of over US\$30 million⁵⁶, whilst the estimate of this prejudice had risen by 1996 to a total of over US\$14 billion — more than the entire foreign debt of the Democratic Republic of the Congo!⁵⁷ The negotiations held in 1997 did not result in any re-evaluation by Africontainers-Zaire of the amount that it claimed it was owed by Gécamines.

⁵¹Letter DAT/DIR/45.137/97 of 17 September 1997, POC, Ann. 8.

⁵²*Ibid.*

⁵³See *inter alia* the bailiff's order served on Gécamines at the request of Africontainers-Zaire, on 5 February 1996, MG, Ann. 198.

⁵⁴See POC, Ann. 9, pp. 36-39.

⁵⁵*Ibid.*, pp. 29-39.

⁵⁶See the minutes of the meeting held by the parties on 1 June 1995, MG, Ann. 151, p. 2.

⁵⁷See the bailiff's order served on Gécamines at the request of Africontainers-Zaire on 5 February 1996, MG, Ann. 198.

1.19. The merits of most of these claims were firmly contested by Gécamines during the 1997 negotiations. For such purpose, Gécamines used some well-developed legal arguments to the effect that:

- the 1983 Tripartite Contract did not contain any exclusivity clause for the benefit of Africontainers-Zaire;
- the claim of Africontainers-Zaire based on the improper use of its containers was largely overstated;
- the claim of Africontainers-Zaire concerning the updating of the invoices issued to Gécamines was hardly realistic since all those invoices had been paid by the public corporation at the time of issue — i.e., in the case of the first invoices, twelve years prior to the requested updating by Africontainers-Zaire;
- since the time-limit for the filing of a claim was two years as from the delivery of the containers partially or totally damaged (Art. 27, Sect. 2, of the Commercial Code), the claim was time-barred, being filed ten years after the material time.

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This firm position did not prevent the public undertaking from acknowledging that a certain number of issues remained unquestionably in dispute between the two companies and for which compensation would most probably be due to Africontainers-Zaire. Three claims, amounting respectively to US\$786,387.20 (in respect of the immobilization of 28 containers in the Gécamines depots), US\$523,852 (in respect of the loss of 20 containers) and US\$44,520.00 (covering six invoices for services remaining unpaid by Gécamines) can thus be classified in that category of issues. Following the withdrawal by Africontainers-Zaire from the negotiations in October 1997, it was no longer possible to clarify the positions of the companies concerned with respect to those three above-mentioned claims. In any event, Gécamines remains fully prepared, even now, to resume negotiations with Africontainers-Zaire on that basis, or even to submit this dispute to the Congolese courts, should the parties fail to arrive at a satisfactory settlement.

1.20. The foregoing statement of fact once again reveals a key point. Whilst Mr. Diallo, according to the facts, played an extremely important role in the emergence, the development and the continuation of these disputes, he always acted in the name and on behalf of a Congolese company with its own legal personality, i.e., Africontainers-Zaire. From the outset, he claimed to be collecting the debts of that company, moreover by virtue of contracts entered into by that same company. It was once again on behalf of Africontainers-Zaire and not in his own name that he subsequently submitted exorbitant financial claims. In legal terms, the parties to the dispute have always been two entities incorporated under the laws of Zaire and then of the Congo, i.e., Africontainers-Zaire and Gécamines. The dispute between Africontainers-Zaire and Onatra can also be characterized in the same manner.

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Section 4. The dispute between Africontainers-Zaire and Onatra

1.21. The dispute which progressively developed between Africontainers-Zaire and Onatra had the same background as that between the former and Gécamines. The temporary closure of the port of Kinshasa in 1986 was again the starting point for the breakdown in relations between the two trading partners.

1.22. Following the cargo-handling problems encountered by Onatra at the Kinshasa river-port and the redevelopment and modernization work being carried out there, Gécamines convened a meeting with the freight forwarding companies concerned by that situation. The meeting was held at Lubumbashi on 11 July 1986 and was attended by the companies ATAF, Kincontainers, Fluconza, Mobil Oil and Africontainers-Zaire. At that meeting, Gécamines informed the participants of the decision taken on 26 June 1986 by Gécamines, Onatra and the SNCZ (*Société Nationale des Chemins de fer du Zaire*) to relocate all local container unpacking operations from the river-port of Kinshasa to the seaport of Matadi because of the reconstruction work at Kinshasa⁵⁸. All the freight forwarders present at the meeting, including Africontainers, understood and accepted the merits of that decision and its terms were recorded in the minutes of the meeting dated 5 July 1986. All the freight forwarding companies observed on that occasion that they would be obliged to charge Onatra for what they referred to as the "immobilization or extended turnaround" of their containers at the sea-port of Matadi. In the context of those temporary measures, Onatra accordingly undertook to re-dispatch the empty containers to Kinshasa as quickly as possible after their unpacking at the port of Matadi in order to allay the fears expressed by the freight forwarders on that issue.

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1.23. However, just one year after that operation started, Africontainers was the only company to file a claim with Onatra for "immobilization and extended turnaround of its containers at the port of Matadi"⁵⁹. Africontainers calculated unilaterally the consequent loss allegedly suffered by it, constantly updating that calculation on the basis of an interest rate of 20 per cent per month of late payment, so that the sum claimed from Onatra by way of compensation rose from 7,541,600 zaires in August 1987 to 6,980,254, 068 zaires in April 1990.⁶⁰

1.24. After examining Africontainers' claim, Onatra made a proposal for an out-of-court settlement of the dispute. Following negotiations between the two parties, it was agreed that Onatra would pay Africontainers lump-sum compensation of 150 million zaires (at that time representing 254,360 US\$) in three monthly instalments. That settlement was recorded in a compromise agreement signed by both parties on 6 June 1990 in order to put an end to the dispute⁶¹. Onatra fulfilled its obligations by paying Africontainers the total amount agreed.

1.25. The compromise settlement was however challenged by Africontainers shortly afterwards. In a letter of 12 October 1990, the company repudiated the settlement agreed a few months earlier and submitted a new claim to Onatra for an amount of over 42 billion zaires⁶². Africontainers justified that claim on the ground that Onatra had concealed the fact that it had been

⁵⁸MG, Ann. 32.

⁵⁹See for example POC, Ann. 17.

⁶⁰POC, Anns. 18 and 19.

⁶¹MG, Ann. 69.

⁶²MG, Ann. 72.

improperly using for its own purposes a certain number of containers belonging to the company (whereas, according to Africontainers, the compromise settlement pertained only to the containers' immobilization), and that the number of containers concerned had been substantially underestimated. Those claims were firmly rejected by Onatra, which *inter alia* replied that the compromise settlement of June 1990 clearly covered both immobilization and the improper use by Onatra of the freight forwarder's containers⁶³. As Onatra pointed out, the letter in which Africontainers set out its claim stated its subject matter to be the "immobilization and improper use" of the company's containers. The minutes of the compromise settlement specifically stated that the parties had met "in order to examine the file relating to the dispute as set out in the letter of Africontainers-Zaire S.P.R.L. no 027/AFC/90 of 26 April 1990". Clearly, there could have been no doubt as to the purpose of the meeting in the minds of those who attended it at the time. Thus the challenge, on that ground, to the agreement reached between the two parties in June 1990 appeared to be manifestly unfounded. Accordingly, Onatra thereafter firmly maintained its initial opposition to this new claim⁶⁴.

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1.26. Africontainers has nevertheless continued to maintain the substantial financial claims formulated by it in October 1990. Those claims have moreover been accompanied on occasion by others of a still stranger nature, but which well reflect Mr. Diallo's true personality. In a letter to Onatra dated July 1992 — signed personally by Mr. Diallo — Africontainers asserted that "we are the pioneers of local container transport in Zaire and . . . Onatra should pay us a royalty on account of the advantages provided by that means of transport and of the profit you have gained from it"⁶⁵. That claim would appear to have been regarded as justified by the fact — according to a statement by Africontainers one year earlier — that "our company has rendered considerable services to Onatra and to mankind thanks to the genius of its chairman and chief executive Mr. Diallo"⁶⁶. It is true that no formal value has ever been placed on these claims; Africontainers has simply observed in this respect that "Onatra, like all the beneficiaries of his genius, . . . owes a debt of sincere gratitude" to Mr. Diallo⁶⁷.

1.27. To this dispute, there was then added a further one, albeit of far more limited scope. It originated in the loss by Onatra of two containers belonging to Africontainers, which fell into the River Zaire in December 1988 whilst being transported by Onatra⁶⁸. Onatra never questioned the principle of its liability for that incident, but the two parties were unable to agree on the amount due to Africontainers by way of compensation, as the latter's claims were regarded as excessive by the State-owned corporation⁶⁹. Whilst Onatra proposed to replace the two containers and to pay compensation of 18.9 million zaires to cover Africontainers' loss of earnings resulting from the unavailability of its containers, Africontainers was for its part claiming over two billion zaires in compensation under that head⁷⁰. The size of the claim resulted from the application to the compensation for unavailability of a commercial interest rate of 25 per cent per annum⁷¹. In spite of various subsequent initiatives by Onatra, which also submitted other proposals for settlement⁷², the dispute has remained unsettled to date and Africontainers has never responded to the most recent proposals made by Onatra in December 1992.

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⁶³POC, Ann. 22.

⁶⁴POC, Ann. 22.

⁶⁵POC, Ann. 29.

⁶⁶POC, Ann. 30.

⁶⁷*Ibid.*

⁶⁸See the letter on this subject from Africontainers-Zaire to Onatra, dated 10 May 1990, POC, Ann. 31.

⁶⁹See *inter alia* minutes of the meeting of 13 March 1991 between the two parties, POC, Ann. 24.

⁷⁰*Ibid.*

⁷¹POC, Ann. 23.

⁷²See *inter alia* Anns. 25, 26 and 32.

1.28. Like Gécamines, Onatra has always addressed Africontainers' claims with a serious and professional attitude. Onatra's numerous attempts at settlement with a view to finding a solution to its disputes with Africontainers bear witness to that attitude. Similarly, Onatra has not hesitated to undertake internal audits in order to verify the merits of the claims by Africontainers. In this respect, *inter alia*, an inspection was undertaken by its services in Matadi in October and November 1989 in order to check the situation of the containers on the spot and the extent of any anomalies⁷³. Such initiatives show that Onatra has handled these claims in good faith and has certainly not adopted any policy of systematic obstruction or opposition to Africontainers' claims. The best evidence of this is the fact that, when the claims were properly founded, they resulted not only in acceptance of liability by the State-owned corporation but also in significant financial reparation.

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1.29. Those events may help to explain why, as in the case of its dispute with Gécamines, Africontainers never referred any claim against Onatra to the courts of Zaire, despite the lapse of five years between the time when Onatra confirmed its final refusal of Africontainers' claims in the first of the above-mentioned disputes and the date when Mr. Diallo was forced to leave Zaire. These factual elements will be reviewed in connection with the objection regarding non-exhaustion of local remedies, in Chapter III below. As to the argument of the Republic of Guinea's lack of *locus standi* (which will be demonstrated in Chapter II), this will be based on the fact that in this dispute, like the other disputes underlying these proceedings, the parties were and remained Zairean (later Congolese) legal persons: Africontainers-Zaire and Onatra. Here again, all claims and demands were submitted in the name and on behalf of Africontainers-Zaire as a legal person and creditor and holder of direct contractual rights.

⁷³See Inspection Report, POC, Ann. 15.

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Section 5. The dispute between Africontainers-Zaire and Fina

1.30. Like the dispute between Onatra and Africontainers-Zaire, the dispute between the latter and the company Fina covers two separate issues. The first stems from the loss by Fina of two containers belonging to Africontainers, and the second from the operation of the 1983 Tripartite Contract.

1.31. On 14 March 1987, seven containers entrusted to Zaire Fina by the freight forwarders Trans-Tshikem and Africontainers-Zaire fell into the Congo River on the way from Kinshasa to Lubumbashi. Five of those containers belonged to Trans-Tshikem and two to Africontainers-Zaire. Fina accepted liability for this incident and undertook to compensate the two freight forwarding companies for the loss suffered. Under the insurance policy taken out by Fina to cover claims of this type, the *Société Nationale d'Assurance (SONAS)* made a compensation payment to cover the loss suffered by the freight forwarders. Trans-Tshikem accepted the payment as proposed.

1.32. On 30 June 1990, Fina offered to Africontainers-Zaire the sum of 684,310 zaires, which had been paid to it by SONAS as compensation for the loss of the two containers. Africontainers initially regarded the proposed sum as insufficient and refused to accept payment. Only one year later, on 16 April 1991, did Africontainers finally take payment of that amount from the Registry of the *Tribunal de grande instance* of Kinshasa-Gombe, where it had been deposited by Fina as a payment into court.

1.33. However, having collected the sum offered as compensation, on 10 March 1993 Africontainers issued proceedings against Fina before the *Tribunal de grande instance* of Kinshasa-Gombe, claiming payment of the replacement value of the two lost containers, together with damages for the loss incurred as a result of the incident. In its judgment of 12 August 1993, the court ordered Fina to pay the plaintiff company a total of US\$38 million in compensation⁷⁴. Fina lodged an appeal against that decision and the Kinshasa-Gombe Appeal Court, in its judgment of 24 February 1994, reversed the judgment of the court below and found the suit of Africontainers-Zaire to be inadmissible⁷⁵. On 23 February 1995 the original plaintiff in turn appealed against the Appeal Court's decision. That further appeal remains pending to date before the Supreme Court of the Congo⁷⁶. There have been no further developments in this case, apart from later on in 1995, when the Public Prosecutor filed his submissions with the Supreme Court, recommending that the Appeal Court decision be quashed and that the proceedings on the merits should accordingly be reopened⁷⁷.

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1.34. The second dispute between Africontainers-Zaire and Fina relates to the operation and interpretation of the 1983 Tripartite Contract. As in its dispute with Gécamines, Africontainers submitted a number of complaints against Fina, *inter alia* accusing it of breach of an alleged exclusivity clause in the contract⁷⁸. Africontainers also sought to update the rates applicable to the

⁷⁴POC, Ann. 53.

⁷⁵POC, Ann. 54.

⁷⁶See the letter from the Chief Registrar of the Supreme Court of Justice, POC, Ann. 55.

⁷⁷MG, Ann. 149.

⁷⁸See *inter alia* the exchange of correspondence between Fina and the lawyer of Africontainers-Zaire, POC, Anns. 48 and 49.

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rental of its containers by Fina. It calculated its loss in this regard at over 14 million U.S.\$⁷⁹. Both of Africontainers' claims were rejected by Fina on the grounds that the 1983 contract did not contain any exclusivity clause and that there could be no question of updating Africontainers' rates retrospectively, all of the commercial invoices received from the latter having been long since paid by Fina⁸⁰. Moreover, Fina had already had occasion to point out that, by contrast, Africontainers had failed a number of times to provide the services required by the 1983 contract; Fina had then invited Africontainers to make contact again as and when it felt itself in a position to resume performance of the contract⁸¹. Here again, this attitude unquestionably shows the good faith of the oil company. Whilst it firmly dismissed those claims of Africontainers that it regarded as unfounded, it never sought to reproach the latter for its own failures in its performance of the 1983 contract, but on the contrary invited it to resume commercial relations as soon as it felt itself able to do so. This shows, once again, that there was certainly no policy of systematic obstruction and opposition directed at the Zairean companies managed by Mr. Diallo.

1.35. After over two and half years of silence in this dispute, Africontainers reiterated its claims against Fina in November 1995. It was at this time that the freight forwarder sent debit notes to Fina for a total amount of over US\$ 2.6 billion⁸². Once again, those amounts were arrived at by the application of exorbitant interest rates (350 per cent for 1993, 422 per cent for 1994, etc.)⁸³, whereas the initial claim by Africontainers-Zaire against Fina, according to the figures presented by the company itself, amounted to just over 323,000 dollars⁸⁴. These claims were again firmly rejected by Fina's lawyer on 16 November 1995⁸⁵.

1.36. This second aspect of the overall dispute between Africontainers-Zaire and Fina was never submitted to the courts of Zaire and has resulted in no further developments to date. The Democratic Republic of the Congo will return to this issue when it shows that local remedies have not been exhausted (Chapter III). It would also point out that, once again, it is Africontainers-Zaire as a distinct legal person, holder of direct contractual rights, which has been acting in connection with this litigation, and this merely confirms the factual basis for denying the Republic of Guinea *locus standi* in the present case (Chapter II).

⁷⁹See *inter alia* the exchange of correspondence between Fina and the lawyer of Africontainers-Zaire, POC, Anns. 48 and 49.

⁸⁰See letter of 9 February 1993, POC, Ann. 49. This letter recalls the positions already expressed beforehand by Fina on these two matters (see in this context the letter of 15 May 1992, POC, Ann. 50).

⁸¹See letter of 14 April 1992, POC, Ann. 51.

⁸²MG, Ann. 182.

⁸³*Ibid*, p. 2 of debit note.

⁸⁴*Ibid*, pp. 1 and 7 of debit note.

⁸⁵POC, Ann. 52.

Section 6. The dispute between Africontainers-Zaire and Shell

1.37. The dispute between Africontainers-Zaire and Shell also stems from the 1983 Tripartite Contract. For many years, however, the performance of that contract did not raise any difficulty between the two trading partners. It was only in May 1992 that Africontainers-Zaire suddenly submitted various claims against the oil company⁸⁶. The freight forwarder thus accused Shell of unlawfully breaching the contracts of 1981 and 1983 and claimed from it the sum of US\$10 million as compensation for breach of contract and US\$1,758,750 for unfair competition⁸⁷. Those claims were promptly rejected by Shell, which argued, like the other parties to the contract, that the latter did not contain any exclusivity clause in favour of Africontainers-Zaire⁸⁸.

1.38. However, it was only two and a half years later, in early 1995, that Africontainers decided to bring the dispute before the courts, seeking by way of principal claim that Shell be ordered to pay it just over US\$13 million for the breaches of the 1981 and 1983 contracts, together with US\$10 million in damages. The Kinshasa-Gombe *Tribunal de grande instance* upheld the first of the those claims in its judgment of 3 July 1995, in which it also ordered the defendant company to pay US\$50,000 to Africontainers-Zaire as damages⁸⁹. It also ordered "the immediate enforcement of the judgment notwithstanding any right of appeal and without security for costs, only in respect of the principal amount of US\$13,106,704.39"⁹⁰.

1.39. The Court based its decision principally on the fact that "the debt [was] certain and [had been] verified and acknowledged by the defendant"⁹¹. However, Shell has always disputed the certainty of the debt in question and has undoubtedly never acknowledged it. In reality, the court reached that conclusion in its judgment on the basis of an accounting document submitted by Africontainers-Zaire. It was in fact a document from the auditors Coopers & Lybrand, who had been asked by Shell to audit its accounts for the year 1993. In this context, the oil company sent a circular letter dated 28 February 1994 to all its suppliers and other service providers, in which it asked each of them, as was its normal practice, to contact the auditors for the purpose of confirming the existence of any debts owed by Shell⁹². This letter was thus received by Africontainers, like all of Shell's other suppliers and service providers⁹³. Taking advantage of this opportunity, Africontainers returned the document in question to Coopers & Lybrand on 15 March 1994, and in addition to minor debts acknowledged by Shell in a total amount of US\$540.59, it added a fictitious claim against the oil company for US\$13,106,704.39⁹⁴. This was thus a purely unilateral claim, which unfortunately, because it appeared in a document emanating from the auditors, was taken by the Kinshasa-Gombe *Tribunal de grande instance* to have been acknowledged by Shell.

⁸⁶See letter to Shell from Africontainers-Zaire dated 25 May 1992, POC, Ann. 59.

⁸⁷*Ibid.*

⁸⁸See letter from Shell to Africontainers-Zaire dated 17 July 1992, POC, Ann. 60.

⁸⁹MG, Ann. 153.

⁹⁰*Ibid.*, third folio of judgment.

⁹¹*Ibid.*

⁹²POC, Ann. 61.

⁹³POC, Ann. 62.

⁹⁴*Ibid.*

1.40. In spite of the uncertainties surrounding that judgment — or perhaps precisely because of them — Africontainers-Zaire then sought to have it enforced. However, Shell attempted to oppose that action by applying to the Kinshasa-Gombe Appeal Court for a stay of execution, requesting that the operative provision ordering immediate enforcement be set aside⁹⁵. At the same time, Shell filed an appeal against the first-instance decision as a whole⁹⁶. In its judgment of 24 August 1995, the Kinshasa-Gombe Appeal Court nevertheless dismissed Shell's opposition to immediate enforcement because the Appellant had not produced "an original execution copy or a certified copy of the judgment appealed against"⁹⁷. Shell then lodged a further appeal before the Supreme Court of Justice⁹⁸.

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1.41. As those further proceedings did not suspend the immediate enforcement of the judgment, Africontainers-Zaire pursued that enforcement. The first-instance judgment was served on Shell by a bailiff on 29 August 1995⁹⁹. Bailiffs commenced execution against Shell's property on 13 September 1995. The execution and seizure were however interrupted by a telephone call from the Vice-Minister of Justice ordering the bailiff to "leave things as they were"¹⁰⁰. The procedure was resumed shortly afterwards, as the Minister of Justice had requested the President of the Kinshasa-Gombe Appeal Court to "make the necessary arrangements for the enforcement of the judgment" whereby the Appeal Court had dismissed Shell's application to stay immediate enforcement of the first-instance judgment¹⁰¹. The Minister asserted, in support of this request, that "following a review of decision R.C.A. 18.307 of 24 August 1995, rendered by the Court of Appeal of Kinshasa-Gombe, there has been no patent failure of justice" in connection with the action to stay execution¹⁰². In parallel to the freezing of Shell's bank accounts¹⁰³, some of its property was seized shortly afterwards, as is attested *inter alia* by an execution report of 6 October 1995¹⁰⁴.

1.42. The appeal proceedings on the merits — which have never been affected by the enforcement proceedings in respect of the first-instance judgment — have since seen a new development with the decision of the Kinshasa-Gombe Appeal Court of 20 June 2002¹⁰⁵. That decision vacated the first-instance judgment and ordered Shell to pay Africontainers-Zaire the sums of US\$540.59 in capital and US\$1,000 in damages. The Appeal Court thus dismissed the claim by Africontainers concerning Shell's alleged breaches of the 1983 contract, whilst acknowledging the existence of minor debts still owed by Shell to the freight forwarding company. To date, Africontainers has not reacted to that decision.

1.43. Lastly, as in its dispute with Fina, Africontainers-Zaire sent Shell a debit note dated 29 September 1995 concerning the updating of invoices issued to the oil company between 1982

⁹⁵POC, Ann. 66.

⁹⁶POC, Ann. 63.

⁹⁷See operative part of judgment, POC, Ann. 65.

⁹⁸POC, Ann. 67.

⁹⁹MG, Ann. 167.

¹⁰⁰See execution report, MG, Ann. 171.

¹⁰¹Letter of 28 September 1995, MG, Ann. 177.

¹⁰²*Ibid.*

¹⁰³See summary note of 11 October 1995, POC, Ann. 72.

¹⁰⁴MG, Ann. 171.

¹⁰⁵POC, Ann. 64.

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and 1990¹⁰⁶. The approach and method of calculation of the amounts that Africontainers considered itself to be owed by Shell are identical to those used for the note sent to Fina. Once again, the application of the same exorbitant interest rates led Africontainers to claim from Shell a total amount of over US\$1.8 billion¹⁰⁷, whereas the sum initially claimed from Fina by Africontainers amounted only, according to Africontainers' own figures, to just over US\$277,000¹⁰⁸.

1.44. This claim, which was of course rejected by Shell, was never submitted to a court by Africontainers. The Democratic Republic of the Congo will return to that point in Chapter III. It will also address, with respect to the issue of *locus standi* (Chapter II), the fact that the plaintiff is, here again, Africontainers-Zaire, i.e., a legal person incorporated under Congolese law, and not Mr. Diallo acting personally or on the basis of his individual rights.

¹⁰⁶MG, Ann. 178.

¹⁰⁷*Ibid.*

¹⁰⁸*Ibid.*, pp. 1 and 7 of the debit note.

Section 7. The dispute between Africontainers-Zaire and Mobil Oil

1.45. The dispute between Africontainers-Zaire and the oil company Mobil Oil is very similar to those described in the previous pages. The operation of the 1983 Tripartite Contract was once again challenged by Africontainers, this time in a letter of 24 April 1992 to the oil company¹⁰⁹. The claim submitted by Africontainers was for an amount of over US\$13 million, by way of compensation for losses allegedly suffered by the freight forwarder as a result of the breach by Mobil Oil of its obligations under contracts entered into between the two companies in 1980 and 1983. Mobil immediately rejected those claims, arguing *inter alia* that the 1980 contract had been terminated and superseded by the 1983 Tripartite Contract, and therefore could not provide a basis for any claim whatever¹¹⁰. The oil company went on to observe that the non-performance of the 1983 contract, which had been noticeable for some time, was due to the fact that Africontainers was no longer providing regular services, and in no way attributable to Mobil¹¹¹. Lastly, Mobil also notified Africontainers of its termination of the 1983 contract, giving 10 days' notice pursuant to the relevant provisions therein¹¹².

1.46. With the exception of a letter to Mobil dated 29 May 1992, in which it gave further particulars of its claims¹¹³, Africontainers did not contact Mobil again until late 1995 and never addressed the arguments put forward by the oil company in rejecting its claims. In early November 1995, Africontainers used the same method as with the two other oil companies that were parties to the 1983 contract and sent Mobil Oil a global debit note for a total amount of almost US\$1.7 billion¹¹⁴. Here again, the same causes produced the same effects and it was the application of exorbitant interest rates that produced this figure from the debt initially claimed by Africontainers against Mobil, namely just over US\$250,000¹¹⁵. Mobil Oil, once again, firmly rejected those claims in a letter of 23 November 1995¹¹⁶.

1.47. In spite of the clear opposition to its claims, Africontainers-Zaire never referred the dispute to the courts of Zaire and this is further evidence of the failure to exhaust local remedies in the present case (Chapter III). In any event, it is once again the Congolese company Africontainers-Zaire that is the party to this particular dispute and not Mr. Diallo personally, which only serves to confirm the Republic of Guinea's lack of *locus standi*.

¹⁰⁹POC, Ann. 40.

¹¹⁰See letter of 12 May 1992, POC, Ann. 42.

¹¹¹*Ibid.*

¹¹²*Ibid.*

¹¹³POC, Ann. 43.

¹¹⁴MG, Ann. 183.

¹¹⁵*Ibid.*

¹¹⁶POC, Ann. 44; see also the letter from Mobil to the *Fédération des entreprises du Congo* dated 28 June 1999, in which the oil company reiterated the reasons why Africontainers-Zaire's claims were unfounded (POC, Ann. 45).

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Section 8. The dispute between Africom-Zaire and PLZ

1.48. Unlike most of the other disputes described in the preceding pages, that between Africom-Zaire and the company *Plantations Lever au Zaïre* (“PLZ”) does not stem from the 1983 Tripartite Contract or the disputes arising from its performance. This dispute can be traced back to the tenancy agreement entered into between the two parties on 1 November 1975, under which PLZ leased one of the apartments owned by it to Africom-Zaire, which made the property available to its managing director Mr. Diallo. From 1991 onwards, Africom-Zaire stopped paying the rent due to PLZ. Despite receiving formal notice to pay, Africom-Zaire continued to refuse to pay the rent demanded, arguing that the landlord was applying the rates applicable to furnished accommodation, whereas the apartment used by Mr. Diallo as managing director was unfurnished.

1.49. In response to this persistent failure to pay, PLZ decided to terminate the lease with effect from 30 April 1992 and, in the latter part of that year, referred the matter to the Kinshasa-Gombe *Tribunal de grande instance*, seeking the eviction of Africom-Zaire and the payment of outstanding rent, amounting to US\$32,964 as of 19 November 1992. For its part, Africom-Zaire filed a counter-claim against PLZ, requesting the Court to order PLZ to pay it the sum of over US\$32 million, which was alleged to represent the “excess monthly rate paid for over 17 years by Africom-Zaire as if the rented apartment were furnished when it was not”¹¹⁷. Africom-Zaire further sought US\$200,000 in damages.

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1.50. In its judgment of 24 August 1993, the Kinshasa-Gombe *Tribunal de grande instance* dismissed the claim of PLZ and granted the counter-claim of Africom-Zaire. The court thus ordered PLZ as defendant to the counter-claim to pay US\$90,000 in damages and US\$32,364,225.25 on account of excess rent and reimbursement of tenant’s guarantees. The outstanding rent due to PLZ, i.e., US\$16,784, was deducted from that amount¹¹⁸.

1.51. PLZ immediately filed an appeal against that decision. In its judgment of 9 March 1994, the Kinshasa-Gombe Appeal Court reversed the first instance judgment on the ground of “insufficient reasoning” and ordered Africom-Zaire both to pay the outstanding rent and to vacate the apartment¹¹⁹. In turn, in August 1994, Africom-Zaire lodged its own appeal against the Appeal Court judgment. The case is still pending before the Congolese Supreme Court of Justice¹²⁰. There have been no further developments in the case since then, except for the filing in 1995 by the Supreme Court Prosecutor of his submissions recommending that the Appeal Court decision be quashed (thus reopening the proceedings on the merits)¹²¹.

1.52. This dispute, which is somewhat atypical compared to the other disputes underlying the present proceedings, may well seem trivial in this context. It nevertheless confirms Mr. Diallo’s tendency, in any context whatsoever — the Democratic Republic of the Congo would venture to write “under any pretext whatsoever” — to advance financial claims which always prove to be exorbitant and to have no connection with reality, and always on behalf of the companies managed

¹¹⁷MG, Ann. 130.

¹¹⁸*Ibid.*

¹¹⁹See in this respect the further appeal to the Supreme Court (MG, Ann. 146).

¹²⁰See letter from Chief Registrar of the Supreme Court, POC, Ann. 47.

¹²¹MG, Ann. 146.

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and wholly owned by him¹²². Above all, it shows once again how Mr. Diallo uses the companies he manages to put forward abusive claims. These factual matters, which again show that Congolese judicial remedies have not been exhausted (Chapter III), are directly relevant in confirming the Republic of Guinea's lack of *locus standi* (Chapter II). They also provide a better understanding of the circumstances in which the Zairean authorities finally decided, in 1995, to expel him from their country¹²³, as they had had enough of Mr. Diallo's behaviour, which "[was breaching] Zairean public order, particularly in economic, financial and monetary matters".

¹²²This tendency is shown by many other incidents. In this context, the Democratic Republic of the Congo will confine itself to mentioning the letter from Mr. Diallo's lawyer to the Paris branch of Citibank, dated 19 October 1992. The letter refers to a delay by the bank in crediting Mr. Diallo's account, in which he had deposited US\$8,000. The sum claimed by way of compensation for the non-pecuniary damage alleged to have been suffered by Mr. Diallo (i.e., the alleged damage to his credibility vis-à-vis his commercial partners) was evaluated at over US\$23 million (MG, Ann. 115).

¹²³See Decree No. 0043 of 31 October 1995 (POC, Ann. 75).

Section 9. Mr. Diallo's detention and deportation from Zaire

1.53. In early autumn 1995, it became clear that Mr. Diallo's behaviour, in relation both to the trading partners of Africom-Zaire and Africontainers-Zaire and to influential figures outside the country, had begun to raise serious problems. As the Democratic Republic of the Congo has stated in the preceding pages, Mr. Diallo had submitted a proliferation of claims against State-owned corporations and private companies with which Africontainers-Zaire had enjoyed commercial relations, relying for such purpose on arguments that were clearly unfounded. It would be something of a euphemism to say that the methods used to calculate the compensation claimed in this context were based on extortionate rates of interest. It is perhaps not irrelevant to recall that the total sum claimed by Mr. Diallo as owed to the companies under his management came to over US\$36 billion, plus bank and moratory interest¹²⁴, which represents almost three times the amount of the Democratic Republic of the Congo's total foreign debt, which has been calculated at some US\$12 billion. It goes without saying that such claims, together with the publicity with which Mr. Diallo surrounded them, were likely to have a serious effect on the operation of the companies concerned, of which some, like Gécamines, played a leading role in Zaire's economy. In this connection, the Zairean authorities also discovered that Mr. Diallo had been involved in currency trafficking and that he was moreover guilty of a number of attempts at bribery. Thus, Mr. Diallo made numerous attempts to bribe Zairean judicial and political officials with a view to obtaining the payment of Africontainers-Zaire's fictitious debts referred to above. Some of the oil companies affected by such claims even made official representations to the Zairean authorities to denounce Mr. Diallo's reprehensible conduct¹²⁵. Mr. Diallo was obviously ready to use all possible means in order to achieve his goals.

1.54. Faced with all these incidents and the resultant risks to public order, the Zairean authorities accordingly decided to order Mr. Diallo's removal from their territory. The deportation order against him was issued on 31 October 1995¹²⁶. The grounds given for the deportation were expressly based on the fact that "the presence and conduct [of the person concerned in Zaire] have breached and continue to breach Zairean public order, particularly in economic, financial and monetary matters".¹²⁷ Mr. Diallo was deported pursuant to a provision of the Congolese Immigration Law of 12 September 1983. Article 15 of that Law provides: "the President of the Republic may, by a duly reasoned order, expel from Zaire any foreigner who, by his presence or conduct, breaches or threatens to breach the peace or public order"¹²⁸. In the light of the facts available to them, it will be readily understood why the Zairean authorities found that Mr. Diallo's conduct "breached" or, at the very least, "threatened to breach the peace or public order".

1.55. A number of subsequent developments have confirmed the nuisance potential of Mr. Diallo's presence in this respect, since he not only harassed the trading partners of his companies by bombarding them with demands that were both unfounded and exorbitant, but he also engaged, shortly after the deportation order against him was issued, in what can only be called a disinformation campaign aimed at the highest organs of the Zairean state, but also at important figures from outside the country. Thus on 30 November 1995 Mr. Diallo sent letters to the Zairean Prime Minister, to the Minister for Planning and to the Minister for Finance, in which all of his

¹²⁴See the figures given in the submissions of the "Memorial" filed by the Republic of Guinea in support of its Application.

¹²⁵See joint letter from Mobil and Fina dated 15 November 1995, POC, Ann. 74.

¹²⁶Order No. 0043 pertaining to the deportation of a non-Zairean National, POC, Ann. 75.

¹²⁷*Ibid*

¹²⁸POC, Ann. 73.

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financial claims against trading partners of his companies were represented as being the result of established and undisputed claims¹²⁹. Copies of those letters were sent to many other Zairean government ministers, but also to the President of the International Court of Justice, to the President of the Republic of Guinea, to the President of ECOWAS, to the Dean of the Diplomatic Corps in Zaire and to the Ambassadors to Zaire of Guinea, the United States, the United Kingdom and Belgium¹³⁰. Mr. Diallo's largely unjustified claims, as well as the publicity that he saw fit to give them, were obviously liable to cause serious harm to Zaire by undermining the image of the country, especially in foreign business circles.

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1.56. Shortly afterwards, in December 1995, Mr. Diallo was arrested and detained for the first time, under the deportation procedure pursuant to the Congolese Immigration Law of 12 September 1983. Under Article 15 of that Law, foreigners against whom deportation proceedings have been initiated, and who are liable to evade their enforcement, may be held at a detention centre by the Administrator-General of the CNRI (National Intelligence Centre), or by his representative, for a period of 48 hours. In cases of absolute necessity, that period may be extended by further periods of 48 hours, up to a maximum of 8 days. That period of detention was never exceeded in the present case. In this respect, the Republic of Guinea's assertion that Mr. Diallo was detained for no less than 75 days in total (5 November 1995 to 10 January 1996, then 17 January to 31 January 1996) at the very least needs to be qualified. This claim is based exclusively on newspaper sources, which were themselves derived from a press release of the Association *Avocats Sans Frontières*¹³¹. That version of the facts is nevertheless contradicted by certain elements in the case file itself. It is noteworthy in this respect that, during the period when Mr. Diallo was allegedly locked in a prison cell without any contact with the outside world, namely from 5 November 1995 to 10 January 1996, he nevertheless sent three letters, signed personally and dated 30 November 1995, to the Prime Minister of Zaire, to the Minister for Finance and to the Minister for Planning — as stated earlier by the Democratic Republic of the Congo¹³². It may legitimately be asked how Mr. Diallo was able to write those letters during a period when, according to the Republic of the Guinea, he was being incarcerated and brutalized in a Congolese Immigration Department (SNIP) cell. It is, moreover, particularly striking to note that Mr. Diallo, purportedly locked in a cell, deprived of his liberty and being subjected to brutal treatment, makes no reference in those letters to the ordeal allegedly being inflicted on him by that same Zairean Prime Minister at the request of the oil companies. At a time when he is said to have been imprisoned, mistreated and awaiting deportation from Zaire, Mr. Diallo curiously seems to have been more concerned about recovering the debts of Africontainers-Zaire than about his freedom and immigration status in Zaire. Finally, it is somewhat difficult to understand how Mr. Diallo could have spent weeks under lock and key with nothing to eat or drink, as Guinea nevertheless seems to be claiming. In conclusion, it is clear that the version of the facts presented by the Republic of Guinea concerning this aspect of the case is far from being established or based on hard evidence. The allegation that Mr. Diallo was a victim of mistreatment is based on no evidence whatever, or even on any credible reasoning.

1.57. It should further be pointed out at this stage that the measure taken against Mr. Diallo was in no way exceptional. Thus numerous orders for expulsion from Zairean territory, similar to that affecting Mr. Diallo, were issued during the same period against foreign nationals for similar reasons, pursuant to the 1983 statute. To mention just one example, on 22 February 1995, six months before Mr. Diallo's deportation, the Zairean Government ordered the deportation of

¹²⁹MG, Anns. 187, 188 and 189.

¹³⁰*Ibid.*, p. 5.

¹³¹See *inter alia* MG, Anns. 190, 191 and 193.

¹³²See *supra*, para. 1.55.

84 foreign nationals on grounds related to the maintenance of public order in economic matters¹³³. This shows that Mr. Diallo's removal from Zaire was not the only such case, and that measures of this kind, far from constituting reprisals or the persecution of individuals, were, on the contrary, implemented as part of a campaign by the Zairean Government of the time against corruption and white-collar crime involving certain foreign nationals in Zaire.

1.58. Mr. Diallo was finally deported from Zaire on 31 January 1996. Since then, he has not lodged any form of appeal against that action. This is a factor that will obviously be addressed in Chapter III to show that not all local remedies have been exhausted. By contrast, Mr. Diallo has succeeded in persuading the Guinean authorities to espouse his exorbitant claims, which led Guinea to file an Application for diplomatic protection before the International Court of Justice in December 1998.

¹³³POC, Ann. 76.

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Section 10. The Guinean Application seeking to obtain reparation for damage allegedly suffered by the companies Africom-Zaire and Africontainers-Zaire

1.59. On 28 December 1998 the Republic of Guinea filed with the Registry of the Court an "Application for purposes of diplomatic protection", which consists in an espousal of Mr. Diallo's claims to "recover substantial debts owed to his businesses by the State and by the oil companies established on its territory and of which the said State is a [shareholder]"¹³⁴. Pursuant to the Rules of Court, that Application sets out facts on which it is based. That part of the Application entitled "Sums Claimed"¹³⁵ is devoted solely to particulars of the debts allegedly owed to the companies Africom-Zaire and Africontainers-Zaire by the Congolese State, Gécamines, Zaire Fina and Zaire Shell, and Citibank Zaire¹³⁶. It was on that basis that the Republic of Guinea requested the Court in its submissions:

"As to the form: To admit the present Application.

As to the merits: To order the authorities of the Democratic Republic of the Congo to make an official public apology to the State of the Republic of Guinea for the numerous wrongs done to it in the person of its national Ahmadou Sadio Diallo;

To find that the sums claimed are certain, liquidated and legally due;

To find that these sums are properly payable by the Congolese State, in accordance with the principles of State responsibility and civil liability;

To order that the Congolese State pay to the State of Guinea on behalf of its national, Mr. Diallo Ahmadou Sadio, the sums of US\$31,334,685,88.45 and Z14,207,092,872.7 in respect of the financial loss suffered by the latter;

To pay also to the State of Guinea damages equal to 15 per cent of the principal award, that is to say US\$4,700,202,883.26 and Z2,131,062,430.0;

To award to the Applicant State bank and moratory interest at respective annual rates of 15 per cent and 26 per cent from the end of the year 1995 until the date of payment in full;

To order that the said State return to the Applicant all the non-monetary assets set out in the list of miscellaneous claims;

To order that the Democratic Republic of the Congo submit within one month an acceptable schedule for the repayment of the above sums.

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In the event that the said timetable is not produced by the date indicated, to authorize the State of Guinea to seize the assets of the Congolese State wherever they may be found, up to an amount equal to the principal sum due and such further amounts as the Court shall have ordered.

¹³⁴Application instituting proceedings filed in the Registry of the Court on 28 December 1998 (hereinafter Application of the Republic of Guinea), p. 3.

¹³⁵Application of the Republic of Guinea, p. 13.

¹³⁶Application of the Republic of Guinea, pp. 13-27.

*To order that the costs of the present proceedings be borne by the Congolese State.*¹³⁷

The submissions in the Republic of Guinea's Application, reproduced above *in extenso*, are quite clear. The Applicant is seeking to obtain the recovery of debts set out by it in detail as items of fact, and is thus claiming over US\$36 billion from the Democratic Republic of the Congo plus bank and moratory interest at the respective rates of 15 per cent and 26 per cent since 1995. That sum purportedly covers all of the debts allegedly owed to Africom-Zaire and Africontainers-Zaire and clearly constitutes the essential subject-matter of Guinea's Application.

1.60. In its Memorial filed on 23 March 2001, the Republic of Guinea would appear, at least provisionally, to have abandoned any attempt at evaluating the reparation which forms the subject-matter of its Application. Nevertheless, that Memorial still calls for "full reparation on account of the injury suffered by the Republic of Guinea in the person of its national", and which "shall take the form of compensation covering the totality of the injuries caused by the internationally wrongful acts of the Democratic Republic of the Congo including loss of earnings, and shall also include interest"¹³⁸. Thus the essential purpose of the claim is still, as it was when the Application was filed, to recover debts owed to Africom-Zaire and Africontainers-Zaire. The Republic of Guinea moreover expressly confirms, in the chapter devoted to its right to exercise diplomatic protection, that this is a case of "shareholder's diplomatic protection"¹³⁹ or, as appropriate, of "the protection of shareholders' rights by substitution for the company"¹⁴⁰.

0 4 5 1.61. These facts demonstrate that the strategy developed by Mr. Diallo at the time when he was pursuing his commercial activities in Zaire — namely, attempting to obtain excessive sums from his trading partners by means of claims submitted by legal persons acting on his behalf — appears to be continuing even before the Court. In this respect, the provisional abandonment of a claim amounting to over US\$30 billion is hardly reassuring for the Democratic Republic of the Congo, which, judging from Mr. Diallo's conduct in the past, is justified in maintaining the most serious fears for the subsequent course of the proceedings.

1.62. Moreover, the fact that the Republic of Guinea is requesting the Court to settle disputes between two Congolese companies and certain of their trading partners for alleged breaches of contracts governed by Congolese law is of direct relevance to the basis set out by the Democratic Republic of the Congo for its preliminary objections in the following two chapters.

First, it is clearly apparent that the Application essentially seeks reparation arising from the violation of alleged rights of two companies which do not possess Guinean nationality. It is on that basis that the Democratic Republic of the Congo will demonstrate the Republic of Guinea's lack of *locus standi* in the present case (Chapter II).

Secondly, in the light of the Guinean Application and pleadings, it will readily be observed that the competent Congolese courts are in the best position to settle these disputes, which are essentially contractual in character. Since Mr. Diallo, even through the intermediary of his companies, has not seen fit to exhaust those remedies, the Democratic Republic of the Congo will further show that the requirement of the exhaustion of local remedies has not been satisfied in the present case (Chapter III).

¹³⁷Application of the Republic of Guinea, p. 37, original emphasis.

¹³⁸MG, Submissions, p. 108,

¹³⁹MG, title of first subdivision of that chapter, p. 80.

0 4 6 Conclusions of Chapter I

1.62. All of the foregoing elements show that the version of the facts presented by the Republic of Guinea in its written pleadings, according to which Mr. Diallo was the victim of a persecution campaign orchestrated covertly by the Zairean State in order to prevent him from pursuing his economic activities and ultimately to secure the gradual expropriation of his property and of the companies managed by him, is patently groundless. The fact that the two companies managed by Mr. Diallo continued to operate for more than a year and a half after he was obliged to leave Zaire, and that they still exist today, is sufficient evidence of the absence of any such intention. On the contrary, the documents in the case show that the disputes to which Mr. Diallo's two companies were parties — disputes which, moreover, in most cases he conjured up himself, without any real basis — are quite ordinary commercial disputes. This litigation has been treated by the trading partners of Mr. Diallo's companies with seriousness and good faith, although they did not hesitate to indicate their firm opposition when Africom-Zaire or Africontainers-Zaire submitted unfounded claims or financial demands that had no basis in reality. While the gradual deterioration of the situation ultimately led to Mr. Diallo's deportation from Zaire, that measure was adopted in accordance with existing law and was never intended to produce definitive effects which would have permanently prevented Mr. Diallo from exercising his rights with respect to the companies that he managed and still manages. On the basis of those elements, certain of which will be restated and amplified in the remainder of these Preliminary Objections, the Democratic Republic of the Congo will thus show, first, that Guinea has no *jus standi* (Chapter II) and, secondly, that local remedies have not been exhausted (Chapter III).

¹⁴⁰MG, title of second subdivision of that chapter, p. 93.

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CHAPTER II. THE APPLICATION IS INADMISSIBLE BECAUSE
THE REPUBLIC OF GUINEA HAS NO *JUS STANDI*

2.01. As the Democratic Republic of the Congo has explained in the last section of Chapter I of these Objections, the essential aim of Guinea's Application is to obtain compensation for the totality of the losses suffered by two companies, Africom-Zaire and Africontainers-Zaire, of which Mr. Diallo is the managing director. These two companies do not possess his nationality, since they are Congolese — a fact never disputed by the Republic of Guinea. It is clear, therefore, that the Applicant has no *jus standi* in this case.

2.02. In international law, *jus standi* is defined as “the capacity justifying the power to bring an action and governing the admissibility of the action”¹⁴¹. [*Translation by the Registry*] In the field of diplomatic protection, it means that the State making the application must be that of the injured party's nationality, as provided in Article 44 of the Draft Articles of the International Law Commission on State Responsibility for Internationally Wrongful Acts, of which the General Assembly took note in December 2001^{142,143}. Failing that, the request must be considered inadmissible.

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2.03. Since Guinea's Application seeks compensation for a violation of the rights of persons not possessing its nationality, namely the Congolese companies Africom-Zaire and Africontainers-Zaire, it must accordingly be rejected as inadmissible. The fact that the principal shareholder of these companies, Mr. Diallo, is of Guinean nationality cannot affect this conclusion. Here, reference should be made to the Court's reasoning and conclusions in the *Barcelona Traction* case¹⁴⁴, which offers a great many similarities to the present one. In that case, the Applicant, Belgium, claimed to be protecting the Belgian shareholders of a company which did not have that nationality. Spain, the Respondent, raised an objection based on Belgium's *jus standi*. The objection was upheld by the Court on the basis of a reasoning which has lost none of its relevance today, and which can only lead to a ruling that Guinea's Application is inadmissible.

2.04. In its Memorial, the Republic of Guinea seeks to escape the application of these well-established legal principles on the basis of a two-pronged argument. First, it claims that, in the particular circumstances of the present case, it has the capacity to accord “shareholder's diplomatic protection”, to use the precise words employed by the Applicant¹⁴⁵. Secondly, it claims that, on grounds of equity, the Republic of Guinea is entitled to provide “protection of shareholders' rights by substitution for the company”¹⁴⁶.

¹⁴¹J. Salmon (dir.), *Dictionnaire de droit international public*, Brussels, Bruylant-AUPELF, 2001, Preface by Gilbert Guillaume, p. 916.

¹⁴²ILC, 53rd Sess., 23 April-1 June and 2 July-10 August 2001, G.A., *Doc. 56th Sess., Supp. No. 10 (A/56/10)*.

¹⁴³See also Article 1 of the Draft Articles on Diplomatic Protection adopted by the Drafting Committee of the International Law Commission, ILC, 54th Session, 29 April-7 June 2002, 22 July-16 August 2002, A/CN.4/L.613/Rev. 1, 7 June 2002.

¹⁴⁴Case concerning *Barcelona Traction, Light and Power Company, Limited*, (new Application), Judgment of 5 February 1970, *I.C.J. Reports 1970*, p. 2 (hereinafter *Barcelona Traction* case).

¹⁴⁵MG, p. 80, Title 1.

¹⁴⁶MG, p. 93, Title 2.

2.05. The Democratic Republic of the Congo will show below that neither of these two arguments can confer *jus standi* on the Applicant. First, the Republic of Guinea is not entitled in this case to claim a right of “shareholder’s diplomatic protection” (Sec. 1). Secondly, it is self-evident that the notion of the “protection of shareholders’ rights by substitution for the company” is unacceptable in international law, and in particular in the present case (Sec. 2).

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Section 1. Guinea is not entitled in this case to claim a right of “shareholder’s diplomatic protection”

2.06. In theory, the Republic of Guinea appears to accept the relevance of the *Barcelona Traction* case to the present one, even though, curiously, it makes little reference to this decisive precedent. In point of fact, however, Guinea’s argument consists in emptying that judgment of principle of its substance, by seeking to infer from it a right on the part of the shareholders’ State of nationality to file a claim in the event of the violation of the rights of a company which does not possess that nationality.

2.07. The basis of the Republic of Guinea’s position is that in the *Barcelona Traction* case the Court recognized that it was possible for the State of nationality of a company’s shareholders, in very specific conditions, to exercise diplomatic protection, namely, “if the act complained of is aimed at the *direct* rights of the shareholder *as such*”¹⁴⁷. According to the Republic of Guinea, it need only claim to be exercising diplomatic protection with respect to the rights of Mr. Diallo as shareholder¹⁴⁸ in order to avoid having its action declared inadmissible. The Applicant even considers that it is “*legitimate to equate a violation of the company’s rights, resulting in prejudice to shareholders, with the violation of their direct rights*”¹⁴⁹. It further asserts that the “direct rights of shareholders must be construed broadly”, so as to cover, *inter alia*, the “right to property, which includes the value of the securities held, etc.”¹⁵⁰. So it is in no way surprising that the Republic of Guinea, even if theoretically in the guise of “*shareholder’s diplomatic protection*”, should claim on account of all the losses allegedly caused to the two Congolese *companies* by acts imputable to the Congo. The logical conclusion of this argument is that any violation of the rights of a company which caused the latter prejudice, by triggering a drop in the value of its shares, would involve not only financial loss to the shareholders, but also a violation of their rights. In other words, any violation of the rights of the company would involve a violation of the rights of its shareholders. The confusion in this case between the personality of the shareholder and those of the two companies is such that, in one passage in its Memorial, the Applicant goes so far as to assert that “Mr. Diallo is incapable of recovering the substantial debts owed to *him*”, in reality referring to alleged debts owed not to Mr. Diallo personally but to the two companies managed by him¹⁵¹.

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2.08. A simple comparison of the argument of the Republic of Guinea with the language used by the Court in the *Barcelona Traction* case shows how misconceived this argument is: how can a simple financial loss caused to shareholders by a violation of the rights of the company be assimilated to a violation of the “*direct*” rights of the shareholder “*as such*”? The scale of this misconception became apparent only once it has also been shown that:

— international law does not accept that a violation of the rights of the company is assimilable to a violation of the rights of its shareholders (A);

¹⁴⁷*Barcelona Traction case, I.C.J. Reports 1970, p. 37, para. 47.*

¹⁴⁸In reality, Mr. Diallo is not, strictly speaking, a “shareholder” of Africom-Zaire and Africontainers-Zaire. Rather, in Zairean, then Congolese law, he is the owner of “*parts*” [undivided shares] in these private limited companies. Since the Republic of Guinea uses the term “shareholder”, and since this difference in terminology has no decisive bearing on this case, the Democratic Republic of the Congo will, where appropriate, use this expression in the interests of clarity.

¹⁴⁹MG, p. 83, paras. 4.24 and 4.25; emphasis added by the Democratic Republic of the Congo.

¹⁵⁰MG, p. 91, para. 4.46.

¹⁵¹MG, p. 7, para. 1.16; emphasis added by the Democratic Republic of the Congo.

— and that the case law relied upon by the Applicant, which is not relevant here, does not in fact contradict this principle (B).

In this context, the Democratic Republic of the Congo will show, lastly, that

— international law only accepts the protection of the direct rights of shareholders as such in very restricted circumstances, which are not present here (C).

A. International law does not accept that a violation of the rights of a company is assimilable to a violation of the rights of its shareholders

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2.09. The argument defended by the Republic of Guinea is totally at variance with current international law, which, in diplomatic protection claims, refuses to assimilate the rights of a company to those of its shareholders. This refusal to assimilate the rights of the company to those of shareholders stems from the very logic of the institution of diplomatic protection (1); this is why any such assimilation was rejected by the International Court of Justice in the *Barcelona Traction* case (2), in which the Court did not accept the thesis then put forward by Belgium and today reiterated by the Republic of Guinea (3); it is thus not surprising that the thesis of assimilation should have been rejected by most writers (4).

1. The refusal to assimilate company rights to those of shareholders follows from the very logic of the institution of diplomatic protection

2.10. To gain a true measure of the extent of the traditional distinction between the person of a company and that of its shareholders, it should first be recalled how international law conceives generally of the institution of diplomatic protection. Thus, according to the classic formula, it is said that, in exercising such protection, “a State is in reality asserting its own rights — its right to ensure, in the person of its subjects, respect for the rules of international law”¹⁵². It is for this reason that, in order to be admissible, an application must be capable of being based on an injury to the rights of a person possessing the nationality of the applicant State:

“This right is necessarily limited to intervention [by a State] on behalf of its own nationals because, in the absence of a special agreement, it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection.”¹⁵³

Conversely, it is settled case law that

“[w]here the injury was done to the national of some other State, no claim to which such injury may give rise falls within the scope of the diplomatic protection which a State is entitled to afford nor can it give rise to a claim which that State is entitled to espouse”¹⁵⁴.

That is perfectly logical, bearing in mind further that “only the party to whom an international obligation is due can bring a claim in respect of its breach”¹⁵⁵. In the absence of any injury to the

¹⁵²*Mavrommatis Palestine Concessions, Judgment of 30 August 1924, P.C.I.J., Series A, No. 2, p. 12.*

¹⁵³*Barcelona Traction, Light and Power Company, Limited, I.C.J. Reports 1970, p. 33, para. 36 and Panevezys-Saldutiskis Railway, Judgment of 28 February 1939, P.C.I.J., Series A/B, No. 76, p. 16.*

¹⁵⁴*Panevezys-Saldutiskis Railway, Judgment of 28 February 1939, P.C.I.J., Series A/B, No. 76, p. 16.*

¹⁵⁵*Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, Advisory Opinion of 2 April 1949, I.C.J. Reports 1949, pp. 181-182.*

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rights of a national — and, of course, in the absence of any direct injury to the rights of the applicant State — there can be no question of seeking to engage the responsibility of the respondent State, for, as the Court has made clear, “[r]esponsibility is the necessary corollary of a right”¹⁵⁶.

2.11. If we apply these general principles to the case of a violation of the rights of a company, which possesses its own personality, and hence its own nationality, the solution is clear beyond doubt: only the State of nationality of the company can consider its rights to have been violated in such a case, and hence only that State can make a claim for reparation. Thus a violation of the rights of a company cannot be assimilated to that of the rights of its shareholders.

2. The refusal to assimilate company rights to those of shareholders follows from the Court’s decision in the *Barcelona Traction* case

2.12. Strangely, the Republic of Guinea asserts in its Memorial that this issue has never been settled by the Court¹⁵⁷, and goes as far as to claim that it is “no longer possible to dispute, in principle, the admissibility of a diplomatic protection claim by the State of nationality of the shareholders where these are *indirectly injured by the violation of the rights of a company possessing a different nationality*”¹⁵⁸. The applicant State derives this assertion from a distinguished Belgian writer¹⁵⁹, cited at the time by Belgium in support of its argument in the *Barcelona Traction* case¹⁶⁰.

2.13. But, precisely, in that case the Court took a position firmly removed from that stated here, which is hardly surprising if we resituate this debate within the framework of the general principles governing diplomatic protection as recalled above. The Democratic Republic of the Congo would like at this point in its argument to cite a number of extracts from the 1970 Judgment which, in its view, are directly relevant to the present case:

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“Notwithstanding the separate corporate personality, a wrong done to the company frequently causes prejudice to its shareholders. But the mere fact that damage is sustained by both company and shareholder does not imply that both are entitled to claim compensation. Thus no legal conclusion can be drawn from the fact that the same event caused damage simultaneously affecting several natural or juristic persons. Creditors do not have any right to claim compensation from a person who, by wronging their debtor, causes them loss. *In such cases, no doubt, the interests of the aggrieved are affected, but not their rights.* Thus whenever a shareholder’s interests are harmed by an act done to the company, it is to the latter that he must look to institute appropriate action; for although two separate entities may have suffered from the same wrong, it is only one entity whose rights have been infringed.”¹⁶¹

¹⁵⁶*Barcelona Traction, Light and Power Company, Limited, I.C.J. Reports 1970*, p. 33, para. 36.

¹⁵⁷MG, p. 83, para. 4.24.

¹⁵⁸MG, p. 90, para. 4.44; emphasis added by the Democratic Republic of the Congo.

¹⁵⁹Paul de Visscher, “*La protection diplomatique des personnes morales*”, *Collected Courses of The Hague Academy of International Law*, 1961-I, Vol. 103, p. 472.

¹⁶⁰See for example *Barcelona Traction, Light and Power Company, Limited (new Application: 1962) (Belgium v. Spain)*, *I.C.J. Pleadings*, Vol. I, institution of proceedings and start of written pleadings, Memorial of the Belgian Government, p. 161.

¹⁶¹*Barcelona Traction, Light and Power Company, Limited, I.C.J. Reports 1970*, p. 35, para. 44, emphasis added by the Democratic Republic of the Congo.

The principle laid down by the Court is crystal clear, and runs directly counter to the argument of the Republic of Guinea. Even supposing that the Democratic Republic of the Congo owes a debt to the companies Africom-Zaire and Africontainers-Zaire, and that they themselves are in debt to Mr. Diallo, the latter does not have “any right to claim compensation from a person who, by wronging [his] debtor, causes [him] loss”. In other words, Mr. Diallo has “undoubtedly suffered injury to his interests, but not to his rights”. It follows that Guinea’s Application cannot be admitted.

2.14. In this regard the Democratic Republic of the Congo notes that the fact that under Congolese law the companies Africom-Zaire and Africontainers-Zaire possess distinct legal personalities is not denied by Guinea. Thus Congolese law (Zairean as it was at the relevant time) recognizes several types of company, which include the private limited company. The Decree of 27 February 1887 on Commercial Companies, as amended to date, thus provides in its first Article that “[c]ommercial companies recognized by law in accordance with this Decree shall constitute juridical persons distinct from those of their members”. Article 36 of this same instrument provides that “[a] private limited company (SPRL) is a company formed by individuals undertaking only to provide resources, which makes no public appeal for funds and the shares of which shall be uniform and issued in the name of the holder and shall not be freely transferable”. [Translation by the Registry.] Thus there can be no doubt in the present case as to the distinction of principle between the personality of the two companies and that of their shareholder.

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2.15. In its Memorial, the Republic of Guinea claims on the contrary that it can escape the application of these well-established rules by emphasizing the closeness of the links between the shareholder and the companies in question: “under the companies’ articles, Mr. Diallo has sole authority to act on their behalf and to manage them, while also being the strategic and commercial driving force behind them”¹⁶². As the Democratic Republic of the Congo has shown above, Guinea’s entire argument seeks in reality to confuse as far as possible the legal personalities of the two companies with that of their shareholder.

2.16. Here again, it suffices to refer to the Court’s Judgment in the *Barcelona Traction* case to answer this objection:

“However, it has been argued in the present case that a company represents purely a means of achieving the economic purpose of its members, namely the shareholders, while they themselves constitute in fact the reality behind it. It has furthermore been repeatedly emphasized that there exists between a company and its shareholders a relationship describable as a community of destiny. The alleged acts may have been directed at the company and not the shareholders, but only in a formal sense: *in reality, company and shareholders are so closely interconnected that prejudicial acts committed against the former necessarily wrong the latter*; hence any acts directed against a company can be conceived as directed against its shareholders, because both can be considered in substance, i.e., from the economic viewpoint, identical. *Yet even if a company is no more than a means for its shareholders to achieve their economic purpose, so long as it is in esse it enjoys an independent existence*. Therefore the interests of the shareholders are both separable and indeed separated from those of the company, so that the possibility of their diverging cannot be denied.”¹⁶³

¹⁶²MG, p. 91, para. 4.48.

¹⁶³*Barcelona Traction, Light and Power Company, Limited, I.C.J. Reports 1970*, pp. 35-36, para. 45; emphasis added by the Democratic Republic of the Congo.

However close they may be in factual and economic terms, the links between a company and its shareholders do not prevent them from remaining separate entities in law, inasmuch as they possess distinct legal personalities. The argument of the Republic of Guinea on this point thus cannot be upheld.

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2.17. The Republic of Guinea further claims that in reality its rights have been infringed by the Democratic Republic of the Congo, since the measures complained of indirectly caused prejudice to its national. Thus the applicant State contends that “Mr. Diallo, owner of the Congolese companies Africom-Zaire and Africontainers-Zaire, sees the value of his assets currently reduced to zero by the unlawful conduct of the Democratic Republic of the Congo”¹⁶⁴. The logic relied on consists, here again, in claiming that, when the rights of the company are violated and prejudice is caused thereby to its shareholders, the latter’s rights are affected, and thus ultimately the rights of the State of nationality of those shareholders.

2.18. In the *Barcelona Traction* case, Belgium too had sought to rely on this argument, which was also rejected by the Court:

“It has also been contended that the measures complained of, although taken with respect to *Barcelona Traction* and causing it direct damage, constituted an unlawful act vis-à-vis Belgium, because they also, though indirectly, caused damage to the Belgian shareholders in *Barcelona Traction*. This again is merely a different way of presenting the distinction between injury in respect of a right and injury to a simple interest. But, as the Court has indicated, evidence that damage was suffered does not *ipso facto* justify a diplomatic claim. Persons suffer damage or harm in most varied circumstances. This in itself does not involve the obligation to make reparation. Not a mere interest affected, but solely a right infringed involves responsibility, so that an act directed against and infringing only the company’s rights does not involve responsibility towards the shareholders, even if their interests are affected.”¹⁶⁵

Doctrine too has drawn a basic distinction between rights — rights protected by law which are capable of supporting an international claim — and interests, which, even though they may be seriously affected, do not attract legal protection or, in consequence, jurisdictional protection¹⁶⁶. In claiming to “identify an attack on company rights, resulting in damage to shareholders, with the violation of their direct rights”¹⁶⁷, the Republic of Guinea effectively completely disregards this distinction.

3. The argument now relied on by the Republic of Guinea is in reality similar to that put forward by Belgium in the *Barcelona Traction* case

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2.19. Doubtless aware that its position is directly contradicted by the Court’s most authoritative jurisprudence, the applicant State attempts to claim that its argument can be distinguished from that put forward by Belgium in the *Barcelona Traction* case. Thus the Memorial states that “Guinea is not attempting to bring the Congolese companies within the ambit of its diplomatic protection as Belgium had sought to do in the *Barcelona Traction* case”¹⁶⁸.

¹⁶⁴MG, p. 92, para. 4.49.

¹⁶⁵*Barcelona Traction, Light and Power Company, Limited, I.C.J. Reports 1970*, p. 36, para. 46; emphasis added by the Democratic Republic of the Congo.

¹⁶⁶J. Salmon (ed.), *Dictionnaire de droit international public, op. cit.*, “*intérêt*”, meaning A, p. 596.

¹⁶⁷MG, p. 83, paras. 4.24 and 4.25.

¹⁶⁸MG, p. 80, para. 4.15.

2.20. This assertion is surprising to say the least, given that the Belgian Government had in 1962 filed an Application specifically seeking “reparation for damage claimed to have been caused to a number of Belgian nationals, said to be shareholders in the [company]”, as the Court had already noted in its Judgment of 24 July 1964¹⁶⁹. The arguments subsequently developed by Belgium are, quite clearly, all based on the protection of shareholders, and not on the protection of the company, as these extracts from the Belgian submissions sufficiently demonstrate:

“Considering that the acts and omissions contrary to international law attributed to the organs of the Spanish State had the effect of despoiling the Barcelona Traction company of the whole of its property and of depriving it of the very objects of its activity, and thus rendered it practically defunct;

Considering that Belgian nationals, natural and juristic persons, shareholders in Barcelona Traction, in which they occupied a majority and controlling position, and in particular the Sidro company, the owner of more than 75 per cent. of the registered capital, on this account suffered direct and immediate injury to their interests and rights, which were voided of all value and effectiveness;

.....
by depriving [the company] of the whole of its property, the acts and omissions contrary to international law attributed to the Spanish authorities rendered the company practically defunct and directly and immediately injured the rights and interests attaching to the legal situation of shareholder as it is recognized by international law; that they thus caused serious damage to the company's Belgian shareholders and voided the rights which they possessed in that capacity of all useful content”¹⁷⁰.

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Moreover the Court itself states in its Judgment that “[t]he claim is presented on behalf of natural and juristic persons, alleged to be Belgian nationals and shareholders in . . . Barcelona Traction”¹⁷¹. That is why the Court states that it will address itself to the question of the right of Belgium to exercise diplomatic protection of Belgian shareholders, “the measures complained of having been taken in relation not to any Belgian national but to the company itself”¹⁷².

2.21. Thus the applicant State cannot claim that the *Barcelona Traction* case is not relevant here because of a difference between the argument developed by it in the present proceedings and that formulated at the time by Belgium. On the contrary, reading the few extracts which have thus been cited, one clearly has the impression of rereading virtually unchanged certain passages from the Memorial of the Republic of Guinea. In both cases, it has sought to “identify a violation of the company’s rights, causing injury to the shareholders, with the violation of their personal rights”, or, as a celebrated authority has written in regard to the Belgian argument, “to contend that injury to the company’s assets — in the case in question it was alleged that the injury was to the entirety of the assets — resulted in direct and immediate prejudice to the rights of the shareholders”¹⁷³. [Translation by the Registry] Thus in both cases it suffices to apply the same reasoning as that adopted in the *Barcelona Traction* case in order to reject this argument.

¹⁶⁹*I.C.J. Reports 1964*, p. 9 and *I.C.J. Reports 1970*, p. 16.

¹⁷⁰*Barcelona Traction case, I.C.J. Reports 1970*, pp. 23 and 25-26.

¹⁷¹*Ibid.*, p. 31, para. 28.

¹⁷²*Ibid.*, p. 32, para. 32.

¹⁷³M. Diez de Velasco, *La protection diplomatique des sociétés et des actionnaires*, collected courses of the Hague Academy of International Law (RCADI), 1974, I, Vol. 141, p. 152.

4. The refusal to identify the company's rights with shareholder's rights is confirmed by a major section of doctrine

2.22. The refusal to identify company and shareholder's rights is a long-standing rule, already formulated by Edwin Borchard in his reference work:

“International tribunals which have passed upon the matter have held in many cases that the nationality of the corporation and not of its stockholders governs the jurisdiction of the commission. On the other hand, citizens of the claimant government, stockholders in or representing a liquidator a solvent corporation formed under the laws of the defendant government, were denied standing before arbitral commissions, when attempting to enforce a corporate claim.

That the nationality of the corporation rather than that of the stockholders must control the jurisdiction of international tribunals in claims growing out of corporate losses appears evident from the fact that the corporation, the trustee, possesses the entire legal and equitable title to a claim as part of the assets of the corporation, whereas the stockholder possesses only an equitable right, enforceable in a court of equity, to an accounting and to compel the proper management of the company by its directors. The stockholder, therefore, having no legal title to the corporate property of a solvent corporation, can hardly be recognized by an international tribunal acting under the usual form of a protocol as a proper party claimant, and only under exceptional protocols . . . has this been done.”¹⁷⁴

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Current doctrine also takes this view, making it clear that, in a diplomatic protection claim in a situation where it is a company's rights which are alleged to have been violated, “in that case, it is in principle the personality — and the nationality — of the company, a legal person, which takes precedence”¹⁷⁵ [*translation by the Registry*]. In the course which he taught at the Academy of International Law not long after the Court had rendered its Judgment in the *Barcelona Traction* case, Professor Diez de Velasco notes that

“the admissibility of claims before international courts or tribunals on account of wrongs done to companies depends on the nationality of the companies. The company is the entity in which the right over its assets is vested and the shareholder could only claim compensation based on equity.”¹⁷⁶ [*Translation by the Registry.*]

The author bases himself *inter alia* on a practice which shows that on occasion States have refused to make a diplomatic protection claim in favour of shareholders of their nationality on account of measures affecting the company. In other cases, it is the State to which a claim of this type is being made which has refused to consider it for the same reason¹⁷⁷. Precedents to this effect are also cited by Moore¹⁷⁸ as well as by Jiménez de Aréchaga¹⁷⁹. These at all events demonstrate that there is no uniform State practice — far from it — which would allow company rights to be identified

¹⁷⁴E. M. Borchard, *The Diplomatic Protection of Citizens Abroad*, New York, The Banks Law Publishing Co., 1928, pp. 623-624.

¹⁷⁵P. Daillier and A. Pellet (Nguyen Quoc Dinh), *Droit international public*, 6th ed., Paris, LGDJ, 1999, p. 733, No. 489.

¹⁷⁶M. Diez de Velasco, *La protection diplomatique des sociétés et des actionnaires*, op. cit., p. 149.

¹⁷⁷*Ibid.*

¹⁷⁸J. B. Moore, *International Law Digest*, Vol. IV, pp. 644-647, para. 985: *Antioquia*; *Queen v. Arnold*; *Compania Salitrera del Peru*.

¹⁷⁹Jiménez de Aréchaga, “International Responsibility”, in M. Sorensen (ed.), *Manual of Public International Law*, London, Macmillan, New York, St Martin's Press, 1968, p. 580.

with those of shareholders¹⁸⁰. Professor Verhoeven's statement of the position in international law is in similar terms: "Where it is a legal person that is in issue, the ICJ has held, in the *Barcelona Traction* case, that only the State of its nationality is entitled to exercise a diplomatic protection claim on its behalf."¹⁸¹ [*Translation by the Registry*].

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2.23. One could give many more examples¹⁸². The Democratic Republic of the Congo would observe in this regard that, notwithstanding certain dissenting voices, the most authoritative doctrine states very clearly that the question of the assimilability of corporate rights with those of shareholders arises equally where the measures complained of are attributable to the State of nationality of the company. To this effect we would cite in particular one of the leading reference works of contemporary public international law:

"Where there are only two States involved, the State of the corporate seat and the State of nationality of the shareholders, the problem can be resolved by reference to the principle governing corporate nationality . . .

If the company must have the nationality of the State on whose territory it has established its corporate headquarters, and if the measures which the prejudiced shareholders have been taken by that State, *it is clear that a claim by the shareholders' State is inadmissible.*"¹⁸³ [*Translation by the Registry*]

2.24. In conclusion, the argument of the Republic of Guinea expressly seeking to identify a violation of the company's rights with an injury to the rights of its shareholders is manifestly contradicted not only by jurisprudence, but also by doctrine. The precedents cited to the contrary by the applicant State in no way impugn this conclusion.

B. The precedents cited by the Republic of Guinea are incapable of supporting its claim

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2.25. In support of its argument seeking to "identify a violation of the company's rights causing prejudice to the shareholders with a violation of their personal rights"¹⁸⁴, the applicant State bases itself essentially on old arbitral jurisprudence, on two decisions, one arbitral the other judicial, given in 1989, and on a certain practice of the European Human Rights Commission. None of these cases, however, can offer any assistance for purposes of the present proceedings, since in every one of them the issue of a right to make a claim on behalf of corporate shareholders was clearly dealt with in a specific conventional instrument. We shall show this by analysing in turn the three categories of case.

¹⁸⁰Jiménez de Aréchaga, "International Responsibility", in M. Sorensen (ed.), *Manual of Public International Law*, London, Macmillan, New York, St Martin's Press, 1968, p. 580.

¹⁸¹J. Verhoeven, *Droit international public*, Brussels, Larcier, 2000, p. 637.

¹⁸²I. Brownlie, *Principles of Public International Law*, *op. cit.*, p. 495.

¹⁸³P. Daillier and A. Pellet, Nguyen Quoc Dinh, *Droit international public*, 6th ed., Paris, LGDJ, 1999, p. 733, No. 489; emphasis added.

¹⁸⁴MG, p. 83, paras. 4.24 and 4.25.

1. The irrelevance to the present proceedings of the old arbitral case law cited by the Republic of Guinea

2.26. The applicant State cites in support of its argument the Awards in the *Ruden*, *Delagoa Bay Railway Company*, *Salvador Commercial Company*, *Shufeldt* and *Alsop* cases, made between 1870 and 1930. None of these five cases is however relevant to the present proceedings.

(a) Irrelevance of the Ruden case

2.27. As its first precedent the Republic of Guinea cites the *Ruden* case, without however quoting any passage from the decision. It confines itself to noting that the Mixed Commission which decided this case allowed the claim of an American partner in a Peruvian corporation against the Peruvian State, and hence concluding that “the arbitrator was looking behind the abstract notion of corporate personality and focusing solely upon the private person of the partner”¹⁸⁵.

2.28. A reading of the two reports of the decision shows however that it is at the very least a distortion of the position to regard the *Ruden* case as a relevant precedent¹⁸⁶. Thus it should be noted that the Convention signed on 4 December 1868 between the United States and Peru expressly provided for the possibility of claims by “corporations, firms or individuals” possessing the nationality of one of the States parties¹⁸⁷. In that case the Commission held quite simply that Mr. Ruden’s claim was inadmissible in so far as it related to rights of the company, since this did not have American nationality, but that it was admissible in relation to the protection of his own individual rights. Since this latter possibility was specifically provided for in the Convention establishing the Commission’s jurisdiction, the case is totally irrelevant as regards the ordinary law of diplomatic protection. Thus a noted commentator has written:

“The possibility exists of two distinct claims: one on behalf of the association as such, and one on behalf of the members. The question is, in what circumstances will the latter lie? Is it also possible to admit that either the association or the members are entitled to claim in respect of *the same damage*? The decision in *Ruden & Co.* does not go into these questions . . .”¹⁸⁸

Moreover, the same author considers that the principal interest of this case lies in the doctrinal commentary reproduced in the *Recueil des arbitrages internationaux*, whose conclusions he considers to be mistaken¹⁸⁹.

2.29. In any event one cannot but have the most serious reservations as to the very principle of citing this case as a precedent capable of reflecting the state of positive international law. Thus Moore states in regard to this Commission:

¹⁸⁵MG, p. 85, para. 4.31.

¹⁸⁶An account of this decision can be found in J. B. Moore, *History and Digest of the International Arbitrations to Which the United Nations has been a Party*, Washington, Government Printing Office, 1898, Vol. II, pp. 1653-1655 (in English), and also in La Pradelle and Politis, *Recueil des arbitrages internationaux*, Vol. II, 1924, pp. 589-593 (in French).

¹⁸⁷J. Mervyn Jones, “Claims on behalf of Nationals who are Shareholders in Foreign Companies”, *BYBIL*, 1949, p. 227.

¹⁸⁸*Ibid.*, p. 228.

¹⁸⁹*Ibid.*, pp. 227-228.

“The commissioners jointly subscribed a declaration by which they bound themselves, in the language of the convention, impartially and carefully to examine and decide *to the best of their judgment and according to justice and equity*, without fear, favor, or affection to their respective countries, all the matters referred to them for their decision.”¹⁹⁰

The words emphasized sufficiently demonstrate that in this case we are in a situation going well beyond the strict and rigorous application of existing positive law in which the International Court of Justice engages pursuant to Article 38 of its Statute.

(b) *The irrelevance of the Delagoa Bay Railway case*

2.30. In its Memorial the Republic of Guinea appears to cite the Award in the *Delagoa Bay Railway* case, rendered on 29 March 1900, as a precedent confirming that it is possible for the shareholders' State to exercise diplomatic protection on their behalf in regard to measures taken against the company. Guinea's reasoning on this point is however, in the opinion of the Democratic Republic of the Congo, far from clear. No quotation or clear proposition deduced from this Award is cited in support of its status as a precedent; the applicant State confines itself to reproducing word for word — albeit without attribution — the summary of the case made by Charles Rousseau in his *Traité de droit international public*¹⁹¹.

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2.31. A careful reading of the Award offers little enlightenment in this regard. Thus at no point does the tribunal address the issue of diplomatic protection and the conditions of admissibility which that involves. This issue had in fact been settled under the terms of the arbitral agreement which provided:

“The mandate which the three governments have agreed to refer to the arbitration tribunal is to fix, as it shall deem most just, the amount of the compensation due by the Portuguese Government to the claimants of the other two countries, in consequence of the rescission of the concession of the Lourenço Marques Railroad, and the taking possession of that railroad by the Portuguese Government . . .”¹⁹²

Once this agreement had been signed, it is self-evident that the Arbitral Tribunal had only to apply its terms and to decide, perfectly logically, to grant the amount of the compensation to the two Governments concerned and to those claiming through them.

2.32. Finally, the value of this precedent must be further qualified in view of the doubts which it incidentally raises as to whether the Tribunal did strictly speaking base its decision on positive international law. As the Award itself states, it had very general authority to rule “as it shall deem most just”¹⁹³. This doubtless explains the reservations expressed by certain writers in regard to the decision, in which “the principles to be applied are not precisely defined”¹⁹⁴.

¹⁹⁰J. B. Moore, *History and Digest, op. cit.*, Vol. II, p. 1640; emphasis added by the Democratic Republic of the Congo.

¹⁹¹MG, pp. 85-86, paras. 4.32-4.33; para. 4.33 reproduces word for word Charles Rousseau's account of the case in *Droit international public*, Paris, Sirey, Vol. V, p. 134, No. 137.

¹⁹²Article I of the Protocol of 13 June 1891, Survey of International Arbitrations 1794-1989, ed. Stuyt, Nijhoff, p. 168; La Fontaine, *Pasicrisie internationale, histoire documentaire des arbitrages internationaux*, Berne, Stämpfli & Cie., 1902, p. 398.

¹⁹³Article I of the Protocol as cited above, and point II of the award, *ibid.*

¹⁹⁴J. Mervyn Jones, “Claims on behalf of Nationals who are Shareholders in Foreign Companies”, *op. cit.*, p. 231.

(c) *The irrelevance of the Salvador Commercial Company case*

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2.33. According to the applicant State, the *Salvador Commercial Company* case constitutes a relevant precedent for purposes of the present proceedings, inasmuch as, by decision of 8 May 1902, the Arbitral Tribunal seized of the dispute accepted a diplomatic protection claim by the United States in favour of shareholders in a Salvadoran company¹⁹⁵. As is however pointed out by Charles Rousseau — whose account of the case is again borrowed word for word without attribution by the Republic of Guinea¹⁹⁶ — the value of this decision is at the very least questionable, given the weakness of its reasoning¹⁹⁷.

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2.34. Thus, in regard to the specific problem of the right to protect the American shareholders, the arbitrators confined themselves to citing the *Delagoa Bay Railway* case¹⁹⁸, from which, as we have already seen, nothing decisive can be deduced, apart from showing that it is possible for two States to submit such an issue to arbitration. And specifically, it is evident that in the *Salvador Commercial Company* case El Salvador had accepted that the issue of any violation of the rights of the American shareholders should be submitted to the tribunal, pursuant to an agreement drafted in terms which left no doubt in this regard. Thus the subtitle of the agreement refers to “submission to arbitration of the claims against the Republic of Salvador of the Salvador Commercial Company and other citizens of the United States, stockholders in the corporation styled ‘El Triunfo Company, Limited’ . . .”¹⁹⁹. Moreover the Award refers clearly to this, stating, after recalling how the dispute had arisen and then developed, that, “having found it impossible to adjust the said differences by diplomatic negotiations, it was agreed by the said United States of America and the Republic of Salvador to refer the said disputes to the arbitrament and award . . .”²⁰⁰. In both cases, whether it be the *Delagoa Railway* or the *Salvador Commercial Company*, the arbitrators simply found that the respondent State had by agreement accepted that a dispute with foreign shareholders should be submitted for settlement to a judicial body. It is difficult to see what could be inferred from this as regards other cases, and in particular for the present proceedings, which involve the general rules of diplomatic protection, as there is no specific agreement between the two States concerned derogating from those rules.

2.35. There is a further essential difference between the *Salvador* case and the present one: according to the majority of the arbitrators, the Salvadoran authorities had effectively adopted measures directly affecting the personal rights of the shareholders vis-à-vis their company²⁰¹. These included: the arbitrary replacement of directors of the Salvadoran company by other directors, apparently in the pay of the State²⁰², the calling of meetings of the company’s governing bodies without notifying the American majority shareholders²⁰³, refusal to allow those shareholders to examine certain company documents²⁰⁴, etc. The Republic of Guinea contends that “in both cases the normal functioning of the corporate organs was blocked by the action of the respective

¹⁹⁵MG, pp. 86-88, paras. 4.34-4.38.

¹⁹⁶MG, p. 86, para. 4.34. Apart from the first sentence, this paragraph reproduces word for word, but without attribution, passage in Charles Rousseau, *Droit international public, op. cit.*, p. 136, No. 137.

¹⁹⁷*Ibid.*

¹⁹⁸*Ibid.*, p. 479.

¹⁹⁹See the actual title of the agreement, *ibid.*, p. 459.

²⁰⁰*Ibid.*, p. 468.

²⁰¹See the commentary of J. B. Moore, *Digest, op. cit.*, Vol. VI, pp. 649-650.

²⁰²RIAA, Vol. XV, pp. 474-475.

²⁰³*Ibid.*, p. 475.

²⁰⁴*Ibid.*

State authorities”²⁰⁵. The essential difference is that there is nothing in the circumstances of the present case to suggest that the Zairean, and subsequently Congolese, authorities interfered in the internal operation of Africom-Zaire and Africontainers-Zaire. There was never any question of arbitrarily replacing their directors, or of intervening in the procedure for directors’ meetings. In the *Salvador* case by contrast, the respondent State had directly prevented shareholders from exercising their rights in relation to their company. It can be readily understood that in these circumstances the arbitrators allowed a diplomatic protection claim, the possibility of such a claim having indeed been clearly accepted by Salvador — as already stated — in the arbitration agreement.

2.36. Finally, it should further be noted in respect of this precedent that this appears to be more in the nature of an equitable judgment than a rigorous application of positive international law. At all events, the arbitrators justify their decision with three general references to a “sense of justice”²⁰⁶, to a “rule of natural justice”²⁰⁷ and, again, to “natural justice”²⁰⁸.

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(d) *Irrelevance of the Shufeldt case*

2.37. The Republic of Guinea further cites the *Shufeldt* case in an attempt to find a decision which supports its argument²⁰⁹. In that Award, given on 24 July 1930, the Arbitral Tribunal did indeed reject the argument of the respondent State — Guatemala — that the United States could not validly protect its national since the acts in question were directed at a Guatemalan company and not at Mr. Shufeldt personally²¹⁰.

2.38. Once again, however, no particular inference can be drawn from that case for purposes of the present one. Apart from the fact that, here again, the arbitration was founded more on “natural justice” than on formal sources of positive international law²¹¹, it suffices to read the arbitral convention to appreciate that the issue had been settled by agreement. Thus, under that convention, Guatemala expressly accepted that the tribunal should exercise its jurisdiction in regard to the rights of Mr. Shufeldt as a United States citizen²¹². It was on this basis that, in respect of the argument put forward by Guatemala in the course of the proceedings which sought to challenge this consent on the ground that Mr. Shufeldt had entered into a partnership possessing legal personality under local law, the tribunal stated that

“any other view with regard to this question of partnership would be contrary to the provisions of the protocol of arbitration, which submits this question: ‘Has P. W. Shufeldt . . . the right to claim pecuniary indemnisation?’ What does the word ‘right’ in this question mean? It can only mean an equitable right of which international law takes cognizance. It can not mean legal right enforceable only in keeping with Guatemalan law, for if that was so this case never would have been referred to an international tribunal which does not administer municipal law.

²⁰⁵MG, p. 88, para. 4.38.

²⁰⁶RIAA, Vol. XV, p. 478.

²⁰⁷*Ibid.*, p. 477, *in fine*.

²⁰⁸*Ibid.*, p. 478.

²⁰⁹MG, pp. 88-89, paras. 4.39-4.40.

²¹⁰RIAA, Vol. II, pp. 1080-1102.

²¹¹*Ibid.*, p. 1098.

²¹²*Ibid.*, p. 1081.

If this point raised by the Guatemalan Government was sound why should they have consented to arbitration? They referred to arbitration not the rights of Shufeldt & Co. but those of Shufeldt and this notwithstanding the provision in the contract requiring the formation of a partnership, put therein for the purpose of preventing such an arbitration.”²¹³

This extract sufficiently demonstrates that the tribunal’s entire reasoning was based on the terms of the arbitral agreement, which the respondent State could not seek subsequently to avoid by raising an objection which it had clearly waived.

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2.39. For its part, the Democratic Republic of the Congo has by contrast never accepted, whether by special agreement or otherwise, that an arbitral or judicial forum should adjudicate on Mr. Diallo’s rights under conditions other than those provided for by general international law.

(e) *The irrelevance of the Alsop case (second phase)*

2.40. The same conclusion can be drawn in regard to the *Alsop* case, also cited by the Republic of Guinea. In that case, the arbitrators rejected Chile’s argument that it had no jurisdiction because the measures in question were directed at a Chilean company and not at Mr. Alsop himself²¹⁴.

2.41. Here again a simple reading of the relevant passages of the Award, dated 5 July 1911, leave no doubt on this point. In this regard the Democratic Republic of the Congo is bound to record its surprise at the passage quoted by the Republic of Guinea on page 90 of its Memorial, which, very significantly, omits an essential part of the tribunal’s ruling²¹⁵. For a proper understanding of that reasoning, the following passages need to be quoted *in extenso*:

“The Chilean Government, in the case presented to Your Majesty, again suggests that, as the firm was registered in Chile, and is a Chilean company, their grievances cannot properly be the subject of a diplomatic claim, and that the claimants should be referred to the Chilean courts for the establishment of any rights they may possess.

We hardly think that this contention is seriously put forward as precluding Your Majesty from dealing with the merits of the case. *It would be inconsistent with the terms of reference of Your Majesty*, and would practically exclude the possibility of any real decision on the equities of the claim put forward . . .

We are clearly of opinion, *looking to the terms of reference* and to all the circumstances of the case, that such a contention, if intended to be seriously put forward by Chile, should be rejected.”²¹⁶

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Two conclusions may be drawn from this quotation.

²¹³ *RIAA*, Vol. II, p. 1098.

²¹⁴ *MG*, pp. 89-90, paras. 4.41-4.43.

²¹⁵ In the opinion of the Democratic Republic of the Congo, one could even take the view that the passage as quoted by Guinea never appeared in the Award. The sentence “it would practically exclude the possibility of any real decision on the equities of the claim put forward” was never formulated in those precise terms by the tribunal, which, as can be seen from the passage cited below, turns essentially on the phrase “the terms of reference of Your Majesty”, which Guinea has simply quietly omitted.

²¹⁶ *RIAA*, Vol. XI, pp. 359-360; emphasis added.

2.42. First, the tribunal bases its decision on the terms of the agreement giving it jurisdiction, concluding from them that they are incompatible with the argument relied on in the proceedings by the respondent State. Thus that agreement had stated that

“the Government of the United States of America and the Government of the Republic of Chile resolved that, as they had not been able to agree as to the amount equitably due to the claimants in the Alsop case, they would submit the whole controversy to his late Majesty King Edwards VII as an *amiable compositeur* to determine the amount equitably due to the said claimants”²¹⁷.

The tribunal logically concluded from this that Chile had accepted that it should rule on the merits and that it was therefore not open to it to raise an objection seeking to prevent the tribunal from exercising its jurisdiction. If the agreement had not expressly stated that the issue submitted to arbitration was that of the amount of reparation due to the plaintiffs, there is nothing to indicate that the claim would have been held admissible. On the contrary, it should be recalled that, in reality, the agreement was entered into after the Commission had initially refused to examine the claim because it related to injuries to the Chilean company and not to one of its shareholders²¹⁸.

2.43. Finally, it should be stressed that in this case the King of England was expressly empowered by the parties to adjudicate as “*amiable compositeur*”. And that explains why he relies on matters clearly based on considerations of expediency, such as the fear that the solution favoured by Chile would increase tension between the two countries. In these circumstances, there is at all events good reason to qualify the scope of this precedent as an expression of the state of positive international law, even at the relevant time²¹⁹.

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2.44. A careful analysis of the five arbitral awards cited by the Republic of Guinea leads to an identical conclusion: in each one of these cases, the arbitrators base themselves on an arbitral agreement which on the one hand permitted it to adjudicate without confining itself to the application of positive international law and, on the other hand, contained a clear waiver by the respondent State to any right to raise an objection preventing the tribunal from ruling on the merits. These are thus situations radically different from that obtaining in the present case, where the Court’s remit is to apply the law, and it is not seised under some form of special agreement whereby it is entrusted by the Democratic Republic of the Congo and the Republic of Guinea with the task of ruling on the merits of the dispute regarding the interests of Mr. Diallo.

2.45. We would, moreover, confirm at this point that the argument developed here by the Democratic Republic of the Congo is very clearly supported by the precedent of *Barcelona Traction*. Thus in that case Belgium had contended, as the Republic of Guinea does today, that “the right of protection of the national State of the shareholders has been recognized in a number of arbitral awards”²²⁰. In that connection, the applicant State had *inter alia* cited the *Delagoa Bay*

²¹⁷RIAA, Vol. XI, p. 355.

²¹⁸M. Diez de Velasco, *La protection diplomatique des sociétés et des actionnaires*, *op. cit.*, p. 137.

²¹⁹See Charles Rousseau, *Droit international public*, *op. cit.*, p. 137, No. 137.

²²⁰I.C.J. Pleadings, *Barcelona Traction, Light and Power Company, Limited (new Application 1962) (Belgium v. Spain)*, Vol. I, Institution of proceedings and initial pleadings, Memorial of the Belgian Government, p. 54, para. 320.

Railway Company and *El Triunfo* cases (the latter also being known as the *Salvador Commercial Co* case), as well as *Schufeldt*²²¹. As we know, the Court was not convinced by this argument, and explained this precisely by emphasizing the particular circumstances of the precedents cited, which were clearly founded on specific convention instruments:

“The Parties have also relied on the general arbitral jurisprudence which has accumulated in the last half-century. However, in most cases the decisions cited rested upon the terms of instruments establishing the jurisdiction of the tribunal or claims commission and determining what rights might enjoy protection; they cannot therefore give rise to generalization going beyond the special circumstances of each case. Other decisions, allowing or disallowing claims by way of exception, are not, in view of the particular facts concerned, directly relevant to the present case.”²²²

Thus a leading work of reference concludes from this that

“[i]n the *Barcelona Traction* case the International Court of Justice regarded such decisions as resting upon the terms of the instruments establishing the tribunals, or as having been decided by way of an exception, and as therefore not directly relevant to the general rule of international law regarding the protection of shareholders . . .”²²³

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2.46. The conclusions drawn by the Court in 1970 are clearly still valid; these old arbitrations, whether previously cited by Belgium or today by the Republic of Guinea, are based on specific conventional procedures which cannot be transposed into the ordinary law of diplomatic protection.

2. The recent jurisprudence cited by the Republic of Guinea is not relevant to the present case

2.47. Doubtless aware that it cannot found its argument on this old and irrelevant jurisprudence, the applicant State cites two further precedents whose conclusions appear, at first sight, more aptly transposable to the present case. Thus it contends that international law “tends towards a more concrete and effective recognition of protectable rights”²²⁴, and that this may be inferred from an arbitral award and a decision of the International Court of Justice, both dating from 1989, namely the *Biloune* and *ELSI* cases. However, these two precedents by no means have the scope that the Republic of Guinea seeks to accord to them, and it is apparent that they too are irrelevant for purposes of the present proceedings.

(a) Irrelevance of the *Biloune* case

2.48. The decision in the case of *Biloune v. Ghana Investment Centre (GIC)* was handed down on 27 October 1989 by an Arbitral Tribunal under the presidency of Judge Schwebel. The Republic of Guinea cites this passage from the Award, in which the Tribunal accepts that the claim by Mr. Biloune acting in his personal capacity is admissible, despite the fact that the contract in question had been entered into by a company having separate legal personality (MDCL), but of which he was the principal shareholder:

²²¹*I.C.J. Pleadings, Barcelona Traction, Light and Power Company, Limited (new Application 1962) (Belgium v. Spain)*, Vol. I, Institution of proceedings and initial pleadings, Memorial of the Belgian Government, pp. 154-155.

²²²*I.C.J. Reports 1970*, p. 40, para. 63.

²²³R. Jennings, A. Watts (Eds.), *Oppenheim's International Law*, 9th ed., Longman, 1992, p. 519, para. 152.

²²⁴MG, p. 66, para. 3.62.

“The Tribunal also finds that, in the circumstances of this case, and particularly having regard to GIC’s knowledge of Mr. Biloune’s role of financing and directing the project, Mr. Biloune, though not a party to the GIC Agreement, may assert his own claim arising out of his investment in MDLC.”²²⁵

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2.49. Guinea failed however to quote the sentences directly following this passage, which are however indispensable in order to understand the tribunal’s reasoning:

“The Respondents have not disputed this conclusion, which finds support in Article 22 of the GIC Agreement. The first paragraph of that article prohibits expropriation of an approved enterprise, and the second expressly protects a ‘person who owns, whether wholly or in part, the capital’ of such an enterprise.

GIC is the entity originally named as the Respondent in this arbitration. As signatory to the GIC Agreement, GIC is clearly bound by it and its arbitration clause . . .”²²⁶.

In these circumstances, it is hardly surprising that the tribunal found that the rights of Mr. Biloune had been injured by the measures in question²²⁷.

2.50. Thus the *Biloune* case, far from modifying existing international law, must be interpreted as a direct reflection of the older case law set out above. This precedent simply confirms that a court or tribunal is entitled to rely on the terms of an arbitral agreement in order to remove any preliminary bar to the exercise of its jurisdiction. In particular, there is nothing to preclude a provision in an agreement giving an arbitral tribunal jurisdiction to rule on the rights of shareholders of a company where such shareholders are alleged to have been injured by acts directed at the company itself. The fact that it was thought necessary to make specific provision for this in an arbitral agreement clearly shows that it represents an exception to general international law. Contrary to what the Republic of Guinea appears to believe in this regard, the *Biloune* case in no sense represents a trend towards a “more concrete and effective recognition of protectable rights”, since the rights in question were upheld by the Arbitral Tribunal only because they were specifically addressed in an instrument on which the Tribunal’s jurisdiction was founded. Once again, the Democratic Republic of the Congo recalls, however, that no such agreement has been concluded in the present case, so that it is indeed the ordinary law of diplomatic protection which applies.

(b) *Irrelevance of the ELSI case*

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2.51. The Republic of Guinea further cites in support of its argument the 1989 Judgment of a Chamber of the International Court of Justice in the *ELSI* case. According to the Applicant, in that case the Chamber stated that injury to a company’s assets could be regarded as a violation of the rights of shareholders to control and manage their company²²⁸. It is claimed that, in so holding, the Court defined the rights of a shareholder to control and manage his companies in such a way that it would permit Mr. Diallo to regard himself as personally injured by the actions directed at his

²²⁵MG, p. 67, para. 3.62; *ILR.*, Vol. 95, p. 204.

²²⁶*Ibid.*

²²⁷MG, p. 66, para. 3.62.

²²⁸*Ibid.*, p. 83, para. 4.26.

companies²²⁹. If we take Guinea's reasoning to its logical conclusion, then it would seem that the position of principle adopted by the Court in the *Barcelona Traction* case was profoundly modified, if not reversed, in 1989: the requisition of a company would permit the national State of the shareholders, through the rights of control and management which they enjoy, to exercise its diplomatic protection in their favour, irrespective of the nationality of the company concerned.

2.52. Such reasoning cannot be upheld, and one would be hard put to it to find in the text of that Judgment any evidence of such an about-turn in the jurisprudence. In reality, the Chamber does not even cite the *Barcelona Traction* precedent at this stage in its decision, quite simply because it is not even ruling on the issue of corporate and shareholders' nationality in the context of a State's diplomatic protection claim. In this regard, it should be recalled that the only objection as to admissibility raised by Italy in the *ELSI* case was its claim that its domestic remedies had not been exhausted; at no point did the respondent State claim that the Application was inadmissible on grounds of the Italian nationality of the requisitioned company. That question was in fact clearly dealt with in Article III of the 1948 Treaty of Friendship, Commerce and Navigation between the United States and Italy, under which corporations of either of the high contracting parties had the right to "organize, control and manage" corporations of the other party. Thus, once it had rejected the objection based on the non-exhaustion of local remedies, all the Court had to do was to interpret this specific provision in order to determine, at the merits stage of the case, whether the disputed requisition had affected this right under the agreement to "organize, control and manage"²³⁰. In these circumstances the Democratic Republic of the Congo has some difficulty in comprehending Guinea's contention that "[i]t is of no importance . . . that the Court ruled on the basis of the provisions of the above-mentioned Treaty"²³¹. In the *ELSI* case, the Chamber neither applied nor interpreted general international law governing the nationality of claims. It did not rule upon the scope of the "individual rights of shareholders as such", to cite the formula used in the *Barcelona Traction* case.

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2.53. Reading the separate opinion of Judge Oda confirms this view. Thus the judge begins by restating the general law on diplomatic protection, quoting the relevant passages from the *Barcelona Traction* case in support of the proposition that

"[a]s the Court explained in 1970, such rights — which have been described as the 'direct rights' (*droits propres*) of shareholders — do not connote any right of action on behalf of the corporate entity. On the contrary, they rather constitute rights vis-à-vis that entity."²³²

Judge Oda makes it quite clear that shareholders' rights are conceivable only in terms of rights against the company itself. Thus:

"the shareholders may approve a policy at their meetings, and the company will be responsible for its implementation. While the company will thus be responsible to its shareholders for any failure in that regard, those shareholders cannot claim any rights other than vis-à-vis the company. Accordingly, if it is found that the policy has been thwarted by the controversial act of a third party, there may be grounds for deeming the rights of the company to have been infringed — but not the 'direct rights' of the shareholders. It follows that they have no *jus standi* vis-à-vis the third party in question."²³³

²²⁹MG, p. 84, para. 4.27.

²³⁰*I.C.J. Reports 1989*, p. 50, para. 70.

²³¹MG, p. 84, para. 4.28.

²³²*I.C.J. Reports 1989*, p. 85.

²³³*Ibid.*

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But in that case the question at issue was whether a conventional instrument — the 1948 Treaty — had modified this general régime. It was at this point that Judge Oda put forward an interpretation which, in his own words, “is rather different from the one adopted by the Chamber in its Judgment”²³⁴. Thus the judge appears to criticize the Chamber for having interpreted the Treaty as an exception to the general rules governing diplomatic protection, whereas, in his view, the contrary was the case. It is clearly apparent that the debate among the judges was not in regard to the status of general international law, but over the interpretation of a specific conventional instrument. F. A. Mann takes the same view when, after carefully analysing the terms of the Judgment, he states:

“The foregoing review seems to establish that the Judgment of the Chamber does not include any substantial contribution to the clarification or even the evolution of customary international law. On the other hand, insofar as treaty law is concerned, several lessons are to be learned.”²³⁵

2.54. Finally, the Democratic Republic of the Congo fails to see what lesson can be drawn from the *ELSI* case which would be relevant to the present one, other than confirmation of the fact that it is possible to agree and define by treaty the rights to which the shareholders of certain companies may be entitled. As Judge Oda’s opinion sufficiently demonstrates, this in no sense involves any challenge to the general law, which remains solidly rooted in the solution reached by the Court in the *Barcelona Traction* case.

3. The irrelevance of certain decisions of the European Human Rights Commission

2.55. Finally, the Republic of Guinea devotes a few lines to the practice of the European Human Rights Commission, citing, but without going into detail, three cases which are claimed to support its position²³⁶. None of these three decisions, which were given within a quite specific institutional and conventional framework, applicable at regional level, is however relevant to the circumstances of the present case.

2.56. The applicant State begins by citing the decision rendered on 4 October 1966 in the case of *X v. Austria*²³⁷. The Applicant accused the Austrian State of having violated his right of property by taking various measures against a company of which he held 91 per cent of the shares, the company having been declared bankrupt and had its assets sold at an abnormally low price by the liquidator. It was in this context that the European Human Rights Commission ruled in favour of the Applicant, holding that Article 1 of the First Protocol to the European Human Rights Convention had been violated by Austria.

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2.57. The Democratic Republic of the Congo has some difficulty in understanding how this case could be regarded as a precedent relevant for purposes of the present case. There, the Commission simply stated its view that “the Applicant is to be considered a victim, within the

²³⁴*I.C.J. Reports 1989*, p. 87

²³⁵F. A. Mann, “Foreign Investment in the International Court of Justice: the *ELSI* Case”, *AJIL*, 1992, p. 99; see also D. Alland, *Droit international public*, Paris, P.U.F., 2000, p. 416, No. 380.

²³⁶MG, pp. 90-91, para. 4.45.

²³⁷Application No. 1706/62, *Reports of decisions of the Human Rights Commission*, No. 21, Strasbourg, March 1967, pp. 34 *et seq.*

meaning of Article 25 of the Convention, of the alleged violations of the Protocol”²³⁸. It is clear from the context that the Commission is in no way ruling upon the conditions set by international law for the exercise by a State of its diplomatic protection in favour of its nationals who are company shareholders. The Application in question was brought not by one State against another but, under Article 25 of the Convention, by a private individual against a State. In the event, the Applicant was moreover a national of the respondent State. In these circumstances, one has serious difficulties in comprehending how anyone could claim to derive any decisive lesson from this case. The Commission moreover expressly states that it is ruling only in relation to Article 25 of the Convention, which refers very generally “to any person, non-governmental organization or group of individuals claiming to be the victim” of a violation of the Convention. At no time does the Commission suggest that its findings are capable of being transposed to the radically different hypothesis of a diplomatic protection claim by one State against another, made moreover in the absence of any special conventional instrument. It should further be noted that in that case the Applicant complained, *inter alia*, of interference with his right to manage the company and in particular of the refusal on the part of the State authorities to give effect to certain of his management decisions²³⁹. He accused Austria of having violated his rights in connection with bankruptcy proceedings, at a time when the company was in process of liquidation and its shareholders found themselves directly concerned by the measures taken by the public authorities²⁴⁰. The factual circumstances of that case are thus very different from those obtaining in the present one.

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2.58. The Republic of Guinea further cites the cases of *Yarrow Plc. v. United Kingdom*²⁴¹ and *S and T v. Sweden*²⁴².

— In the first of these cases, the Commission rejected as inadmissible the claims of three applicants who were shareholders in a company which was moreover itself an applicant, and at which the State measures in question had been specifically directed. The Commission based its decision in particular on the circumstance that, contrary to the situation in the case of *X v. Austria*, the plaintiffs did not have a decisive holding in the Yarrow company and that, in law,

“The Court has held that the term ‘victim’ in Article 25 of the Convention ‘denotes the person directly affected by the act or omission which is in issue’, (Eckle Case, Judgment of 15 July 1982, para. 66; see also *Klass Case*, Series A. Vol. 28, para. 33).

.....

In the circumstances the Commission considers that the matters complained of in the present application had only an indirect effect on the second, third and fourth applicants and not a direct affect such as to entitle them to claim to be ‘victims’ for the purposes of Article 25 of the Convention.”²⁴³

²³⁸Application No. 1706/62, *op. cit.*, p. 44.

²³⁹*Ibid.*, p. 46, 4.

²⁴⁰*Ibid.*, pp. 47-49, 7.

²⁴¹Decision of 28 January 1983, Application No. 9266/81, *Decisions and Reports*, No. 30, Strasbourg, February 1983, pp. 155-226.

²⁴²Decision of 11 December 1986, Application No. 11189/84, *DR*, No. 50, Strasbourg, February 1987, pp. 121-161.

²⁴³Decision of 28 January 1983, *op. cit.*, p. 221.

A simple reading of the relevant extract from the decision shows that, like the precedent in *X v. Austria*, the *Yarrow* case is relevant only for purposes of interpretation of Article 25 of the European Human Rights Convention. Even in that context, moreover, the Commission found there that the Application was inadmissible.

- The case of *S and T v. Sweden* also concerns the right of shareholders to be regarded as “victims” within the meaning of Article 25 of the European Convention. In that case the Commission took the view that the circumstances were similar to those in the *Yarrow* case. It accordingly restated the same principles and cited the same precedents. The same findings were again reached. We cannot see, here either, what inference can be drawn from this jurisprudence which would go beyond a particular interpretation of a specific provision of the European Human Rights Convention. In none of these cases was there any question of examining the conditions laid down by general international law for the exercise by a State of diplomatic protection in favour of shareholders of a company not possessing its nationality.

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2.59. In short, the only point at issue in these three cases was whether the shareholders of companies affected by certain measures taken by a State party to the European Human Rights Convention could be regarded as “victims”, in the specific sense of that term in the context of the Convention²⁴⁴. If so, such persons could directly seize the Convention’s institutions and benefit from its specific protective régime whereas, if not, they could not. In any event, this issue has no effect on the general régime of diplomatic protection, which, for its part, always makes the admissibility of a claim on behalf of shareholders of a foreign company subject to a violation of the “direct rights” of such shareholders “as such”. However, as the Democratic Republic of the Congo will show in the following pages, that is not the case in the present proceedings.

C. International law allows for the protection of the direct rights of shareholders as such only under very restrictive conditions, which are not satisfied in the present case

2.60. It has already been noted that, in the *Barcelona Traction* case, the Court accepted that it was in principle possible for a State to bring proceedings where the acts complained of were aimed at the “direct rights of the shareholders as such”²⁴⁵. The Democratic Republic of the Congo has already shown above that this could in no circumstances lead the Court to “identify an attack on company rights, resulting in damage to shareholders, with the violation of their direct rights”, as the Republic of Guinea sought to do²⁴⁶. It still remains for us to show that, correctly interpreted, the restrictive hypothesis of an attack on “direct rights of shareholders as such” (1) does not correspond to the particular circumstances of the present case (2).

1. The hypothesis of an attack on the “direct rights of shareholders as such” by definition concerns only relations between the shareholders and the company

2.61. In order properly to comprehend the scope of this rule, it is necessary to analyse in detail the language used by the Court in its reference Judgment:

²⁴⁴V. R. Abraham, “Article 25”, in L. E. Pettiti, E. Decaux and P. H. Imbert (Eds), *La convention européenne des droits de l'homme*, Paris, Economica, 1995, p. 588.

²⁴⁵*I.C.J. Reports 1970*, p. 36, para. 47.

²⁴⁶MG, p. 83, paras. 4.24 and 4.25.

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“The situation is different if the act complained of is aimed at the direct rights of the shareholder as such. It is well known that there are rights which municipal law confers upon the latter distinct from those of the company, including the right to any declared dividend, the right to attend and vote at general meetings, the right to share in the residual assets of the company on liquidation. Whenever one of his direct rights is infringed, the shareholder has an independent right of action.”²⁴⁷

This *obiter dictum* begins by laying down a principle, then illustrates it with particular examples. In both cases, it is clear that what is referred to are rights which the shareholder can hold only in the context of his relations with the company.

2.62. As regards the principle, it should first be noted that the Court is not here opening the door to diplomatic protection on behalf of shareholders' rights, without qualification. They must be “direct” rights of shareholders envisaged “as such” and not simply “rights as a shareholder”²⁴⁸ or the “direct rights of shareholders”, as the applicant State seeks to claim²⁴⁹. [As to the word “*propre*”, its ordinary meaning refers to that “which pertains specifically to somebody or to something, characterizing it and distinguishing it in a special way”²⁵⁰.] This simply confirms, in accordance with what has already been said above, that shareholders' rights cannot be identified with those of the company, as the Republic of Guinea seeks to do. The phrase “as such” adds a second condition: the rights concerned must belong to the individual concerned by virtue of *his status as shareholder*, and not in any other capacity. Hence, by definition, what is envisaged here can only be the rights of shareholders in their relations with the company, since it is only from the company that they can claim to derive their shareholders' rights. Conversely, the shareholder cannot have any direct right, as such, in seeing that contracts entered into by the company with a third party are complied with, for in that case the right is not direct (it is the company's right which is involved), nor can it pertain to the shareholder “as such” (any person, whether or not a shareholder, can have rights of this kind).

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2.63. This interpretation is confirmed by the list of examples provided by the Court: the right to a dividend, the right to attend and vote at general meetings, the right to share in the residual assets of the company on liquidation, are all rights which, by definition, the shareholder can invoke only against the company, subject to certain conditions and in accordance with certain procedures laid down in the company's articles and in the commercial law of the legal order concerned. Those doctrinal writers who have addressed this issue have favoured the same view, either citing the same examples or others, but still concerning the company's “internal affairs”, that is to say its relation with its shareholders²⁵¹. No one cites as a “right of shareholders as such” the right that the company should not suffer injury, whether as a result of non-performance of a contract to which it was party or as a result of some extra-contractual liability. For his part, Judge Tanaka noted that “a preponderant shareholding in the general meeting would confer on the shareholder right of control, but this so-called right cannot be said to be a ‘right’ in the proper sense, but mere ‘interest’”²⁵². He further illustrates the notion of shareholders' rights by citing: “the right to dividends, the right to

²⁴⁷*I.C.J. Reports 1970*, p. 36, para. 47.

²⁴⁸MG, p. 67, para. 3.63.

²⁴⁹*Ibid.*, p. 91, para. 4.46.

²⁵⁰Dictionnaire Larousse de la langue française, “*propre*”.

*Note by the Registry: in the English version of *Barcelona Traction* the word “*propre*” is rendered as “direct”, to which this definition is clearly not applicable.

²⁵¹M. Shaw, *International Law*, Cambridge, CUP, 4th ed., 1997, p. 566; J. Vehoeven, *Droit international public*, *op. cit.*, p. 638.

²⁵²*Barcelona Traction* case, separate opinion of Judge Tanaka, *I.C.J. Reports 1970*, p. 125.

surplus assets in case of liquidation, the right to vote in general meetings, the right of minority shareholders to sue for the liability of directors, the right to transfer shares, the right to request certificates, etc.”²⁵³.

2.64. In these circumstances, the acts in respect of which a diplomatic protection claim may be brought on behalf of the direct rights of shareholders as such are extremely limited. As Professor Brownlie states:

“The shareholders may receive diplomatic protection from the state of their nationality in certain situations, namely, *when the act of the respondent state affects the shareholder’s legal rights (for example, the right to receive dividends) as such, . . .*”²⁵⁴

Professor Diez de Velasco mentions more specifically:

“preventing the shareholder from taking part in the company’s general meeting or from exercising his voting rights there, prohibiting a company from paying dividends to foreign shareholders because they are foreigners or levying discriminatory taxation on dividends from shares held by foreigners”²⁵⁵. [*Translation by the Registry*]

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Once again, we would emphasize the very restrictive nature of such cases; to take the last example cited, there is no suggestion that arbitrary taxation of the company would violate the direct rights of shareholders as such. Only the taxation of *dividends* and not taxation on the assets or activities of the company itself is referred to. In other words, once again the admissibility of the claim is subject to there being what one might term “interference” in the relations between the company and its shareholders.

2.65. It will also be recalled that Judge Oda, in his separate opinion appended to the *ELSI* Judgment, considered that the direct rights of shareholders as such “rather constitute rights vis-à-vis [the company]”²⁵⁶ and that, accordingly, “if it is found that the policy has been thwarted by the controversial act of a third party, there may be grounds for deeming the rights of the company to have been infringed — but not the ‘direct rights’ of the shareholders. It follows that they have no *jus standi* vis-à-vis the third party in question.”²⁵⁷

2.66. Existing international practice, although very scant in this field, confirms this view. Thus, in what is often called the *Antioquia* case, the United States refused to accord its diplomatic protection to one of its nationals, a shareholder in a foreign company, on the ground that, “[i]f his individual shares, specifically as the property of an American, should be unjustifiably confiscated, a different question would be raised; but as a corporator he had no individual property in the chattels or credits of the corporation”²⁵⁸. The reasoning clearly confirms the principle: if the State confiscates the shareholders’ shares, their direct right of ownership as shareholder is violated; that is not the case where it is the company itself which is targeted. The same reasoning may moreover be applied if we return to the circumstances of the *Salvador Commercial Co.* case, already analysed earlier. In that case — in any event not readily transposable here for reasons already explained —

²⁵³ *Barcelona Traction* case, separate opinion of Judge Tanaka, *I.C.J. Reports* 1970, p. 125.

²⁵⁴ I. Brownlie, *Principles of Public International Law*, 5th ed., *op. cit.*, p. 491; emphasis added by the Democratic Republic of the Congo.

²⁵⁵ M. Diez de Velasco, *La protection diplomatique des sociétés et des actionnaires*, *op. cit.*, p. 148.

²⁵⁶ *I.C.J. Reports* 1989, p. 85.

²⁵⁷ *Ibid.*

²⁵⁸ J. B. Moore, *Digest*, *op. cit.*, Vol. VI, p. 644, para. 985.

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the tribunal based its decision on measures which could be regarded as aimed directly at the direct rights of the shareholders vis-à-vis their corporation²⁵⁹, such as the arbitrary replacement of directors of the Salvadoran company by other directors, apparently in the pay of the State²⁶⁰, the calling of meetings of the company's governing organs without notice to the majority American shareholders²⁶¹, the refusal to allow those shareholders access to certain company documents²⁶², etc. The Salvadoran State had clearly interfered in the internal affairs of the company, interference which, in this particular case, could be equated with a violation of the rights of the shareholders as such.

2. The Republic of Guinea cannot claim to protect the direct rights of a shareholder as such, since the measures complained of do not concern the relations between that shareholder and the companies whose capital he owns

2.67. The Republic of Guinea expressly states that it is adopting a broad definition of the "direct right of shareholders", the words "as such" having thus — significantly — disappeared²⁶³, which it effectively does by claiming that it covers "both functional rights — the right effectively to control and manage the company — and property rights — the right to receive dividends and rights of ownership, including the economic value of the shares held, etc."²⁶⁴. The Democratic Republic of the Congo will address in turn each of the two categories proposed by the applicant State in order to show that the direct rights of Mr. Diallo as shareholder are not at issue in the present case, whether they be his "functional rights" or his "property rights".

(a) The measures complained of are not aimed at the "functional rights" of Mr. Diallo as shareholder in Africom-Zaire and Africontainers-Zaire

2.68. The Republic of Guinea claims to derive a violation of the direct rights of its national as shareholder from the fact that

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"[t]hus, under the companies' articles, Mr. Diallo has sole authority to act on their behalf and to manage them, while also being the strategic and commercial driving force behind them. Even though the companies have not been formally confiscated since his expulsion in January 1996, Mr. Diallo no longer has any possibility of exercising his rights and responsibilities as owner and sole shareholder and managing director of the companies in question, in which he has invested substantial sums. He is several thousand kilometres away and is up against a State which is hostile towards him and shows no scruples with regard to the means employed to achieve its ends. It is, *inter alia*, impossible for him to supervise his employees, to visit the premises where his companies carry out their activities, or to meet his clients: it is therefore totally impossible for him to run his companies. Further, he is obviously unable to pursue the proceedings initiated to recover the moneys owed, or even to obtain enforcement of the judicial decisions rendered in the DRC and, thereby, to recover the debts owing to him."²⁶⁵

This argument is doubly incorrect.

²⁵⁹J. B. Moore, *Digest, op. cit.*, Vol. VI, pp. 649-650.

²⁶⁰RIAA, Vol. XV, pp. 474-475.

²⁶¹*Ibid.*, p. 475.

²⁶²*Ibid.*

²⁶³MG, p. 91, para. 4.46.

²⁶⁴*Ibid.*

²⁶⁵MG, pp. 91-92, para. 4.48.

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2.69. First, in purely factual terms, the Democratic Republic of the Congo has great difficulty in grasping Guinea's argument. Is it really credible to claim that the director of a company cannot exercise his power of management and control from a foreign territory, even if this is situated several thousand kilometres from the places where the company carries on its business? Modern means of communication as well as, quite simply, the possibility of delegating executive tasks to local managers, including through the appointment of a new chief executive, undeniably represent appropriate means for managing a company, whether in the Democratic Republic of the Congo or elsewhere. Many Congolese corporations are indeed managed by individuals of foreign nationality, who reside on foreign territory and conclude contracts, see that they are performed and receive dividends, without necessarily visiting the site of their activities in person or being physically present there. Under Article 81 of the Commercial Corporations Decree of 27 February 1887, referred to earlier, it is always open to shareholders to have themselves represented (at general meetings of the members of a commercial company) by an appointee of their choice, albeit subject to the conditions laid down in the company's articles. The management and control of such companies is thus in no sense "totally impossible", to repeat the pleonastic expression employed by the Republic of Guinea to make its point. The Democratic Republic of the Congo would observe in this regard that, notwithstanding what the applicant State would have us believe, Mr. Diallo himself continued to manage Africontainers-Zaire, including pursuing the proceedings for recovery of that company's debts, even well after the month of January 1996. All Mr. Diallo needed to do was to appoint representatives and lawyers to act on his behalf and on his instructions, as would appear moreover to have occurred, including in the present proceedings²⁶⁶. Such was in particular the position noted throughout the negotiations with Gécamines, which continued for over a year and a half after Mr. Diallo's removal from the territory, a point which the Democratic Republic of the Congo has already demonstrated and to which it will return when it will show that local remedies within the Congo have not been exhausted²⁶⁷. Finally, it should be noted that, in the month of March 1997, that is to say over a year and a half after his removal from Congolese national territory, Mr. Diallo was still writing personally to the Congolese Government with a view to securing its support in the cases involving Africom-Zaire and Africontainers-Zaire²⁶⁸. In these circumstances, to contend that its national is "obviously unable" to pursue the proceedings initiated to recover the moneys owed is a piece of pure question-begging.

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2.70. Further, and in any event, the Democratic Republic of the Congo would observe that, in accordance with the legal principles which it has just recalled, the point at issue is not whether or not the companies have been confiscated (whether formally, or informally as the Republic of Guinea implies). Rather, what has to be determined is whether the shares, dividends or specific rights of Mr. Diallo as shareholder have been affected. Thus the applicant State must show that the measures complained of are, to use the language of the Court in the *Barcelona Traction* case, "aimed at" the direct rights of Mr. Diallo as shareholder. In this case it is difficult to claim that Mr. Diallo's removal from the territory, which is the only measure complained of at this stage, was "aimed at" his right to supervise staff, meet clients, or physically visit the place of business of those companies, to cite the only three examples given in the Memorial. In reality, Guinea does not even seek to show that Mr. Diallo's rights as shareholder were affected as such. It simply claims (wrongly as the Democratic Republic of the Congo has shown) that the effects of the measure complained of (removal from the territory) were to prevent him from fully exercising his rights. We are a long way from the circumstances obtaining in the *Salvador Commercial Co.* case, in which the government had contrived to remove the directors from office in order to take control of the company. There is absolutely nothing to suggest — and again the Republic of Guinea does not even so contend at this stage — that Mr. Diallo's removal from Zairean territory represented a measure aimed at his rights as shareholder.

²⁶⁶See below, paras. 3.29 and 3.30.

²⁶⁷See above, paras. 1.14-1.16, and below, para. 3.29.

²⁶⁸MG, Ann. 218.

2.71. In conclusion, Guinea's argument regarding the "functional rights" of its national is unfounded both in fact and in law. Its rights are neither affected nor fundamentally prejudiced by the removal of Mr. Diallo from Zairean territory, the only measure complained of at this point. Moreover, there is no judicial decision, work of doctrine or other authority cited in the pleadings of the Republic of Guinea which would lend support to the broad interpretation of the notion of "direct rights of shareholders as such" relied on it.

(b) *The measures complained of were not directed at Mr. Diallo's property rights as shareholder in the companies Africom-Zaire and Africontainers-Zaire*

2.72. The applicant State claims, in regard to what it describes as "property rights" of its national, that

"[a]s a result of the conduct of the Congolese authorities, Mr. Diallo, the owner of the Congolese companies Africom-Zaire and Africontainers, sees the value of his property currently reduced to zero by the unlawful conduct of the DRC. The internationally wrongful acts committed by the DRC are preventing him from controlling and managing his companies and from pursuing the recovery of the debts owed to him by the State itself and by various private companies (largely controlled by the State itself) and even from pursuing the effective recovery of debts which are the subject of final judicial decisions.²⁶⁹"

2.73. The Democratic Republic of the Congo has already replied in substance to the essence of this argument; over and above the fact that no final decision has been adopted in any of the judicial proceedings in this case²⁷⁰, we would further observe that it is still possible for Mr. Diallo to control and manage the companies, and that the measures complained of were not directed at Mr. Diallo's right to do so. The Congo would now make the further point that this passage in the Guinean Memorial provides yet another demonstration of the applicant State's deliberate, near-total confusion of rights, personalities and property of the two Congolese companies with those of their managing director. In this context, the notion of direct "property rights" of Mr. Diallo as shareholder has clearly lost all meaning and is in any event fundamentally incompatible with international law as it stands today.

2.74. The Republic of Guinea refers on a number of occasions to Mr. Diallo as the "owner" of the companies Africom-Zaire and Africontainers-Zaire²⁷¹. It is from this standpoint that it considers that the companies in question form part of the assets of Mr. Diallo and that, in seeking to recover debts owed to the company, he is in fact seeking to recover "moneys owed to *him*" or "debts owed to *him*"²⁷². The pronouns emphasized refer to Mr. Diallo, whereas in reality these are debts owed to the two companies, but the distinction is considered as irrelevant, since the companies form part of Mr. Diallo's assets.

²⁶⁹MG, p. 92, para. 4.49.

²⁷⁰See above, Chapter I of the present Objections.

²⁷¹Right from the opening lines of the Application, the Republic of Guinea refers in very general terms in regard to Mr. Diallo to "proceedings to recover substantial debts owed to *his businesses* by the State and by the oil companies established on its territory and of which the said State is a shareholder" (Application of Guinea, p. 1; emphasis added by the Democratic Republic of the Congo). See also, for example, MG, pp. 101, para. 4.71, 103, para. 4.75, and the first point of the submissions of the Republic of Guinea, MG, p. 108.

²⁷²MG, p. 92, paras. 4.48 and 4.49 ; emphasis added by the Democratic Republic of the Congo.

2.75. It suffices to pursue the logic of Guinea's argument to appreciate how misguided it is, for, ineluctably:

- if Mr. Diallo is the owner of two companies, then he is the owner of two persons, which are however here reduced to the status of property capable of being owned, notwithstanding that they are recognized as possessing distinct legal personalities — a fact which no one disputes;
- if the two companies form part of Mr. Diallo's assets, then so does their property; thus all their assets, including moneys owed to them, are under a single ownership (that of Mr. Diallo); the very notion of separation of property as a result of separation of personalities loses all meaning;
- finally, taking the argument to its logical conclusion, the liabilities of the companies must also be those of Mr. Diallo himself, something which Guinea is at pains to avoid stating (for it appears that what applies to credits does not apply to debits, and for this purpose Mr. Diallo does indeed accept a separation of personalities and property rights), but which follows logically from its argument.

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2.76. Thus Guinea develops an argument which, under cover of the notion of "direct rights of shareholders as such", ends up denying any separation of legal personalities and, more fundamentally, running counter to a number of general principles of the general theory of law. It seeks to ignore the fact that, in law, Mr. Diallo should be regarded merely as owner of the *shares* of the two companies and not of the companies themselves and that, in consequence, a shareholder (even a sole shareholder) is not himself the owner either of the companies' property or of moneys owed to them. Moreover, Mr. Diallo cannot claim to be the sole creditor of these two companies, since, while shareholders have a specific claim to any dividends on their shares, there may of course be other persons to whom those companies owe moneys. Hence, even supposing that the companies should succeed in all the claims against their debtors, Mr. Diallo clearly could not claim to be the owner of the moneys recovered. These would form part of the assets of the company concerned and could clearly be used, in whole or in part, to make good debts owed to other creditors, to cover operational costs, or indeed to pay the wages of the company's employees. It is only once all these debts have been paid that, like any shareholder, Mr. Diallo could claim dividends or, in the event of bankruptcy, payments out of the proceeds of liquidation. But, even in that event, account would still have to be taken of the obligation, both on the company and then on the shareholders, to meet current requirements in regard to income and property taxes. Mr. Diallo's strategy, whereby he seeks to obtain in proceedings before the International Court of Justice the totality of the sums claimed by the two companies managed by him, without any regard for other creditors of those companies or for the debts or liabilities encumbering them, is totally incompatible with the most elementary general principals of commercial law, which not only distinguishes the personalities and property of private limited companies from those of their shareholders, but also requires that account be taken not only of their assets but also of their liabilities.

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2.77. Finally, the Democratic Republic of the Congo has to confess its total perplexity at the applicant State's assertion that "[a] shareholder has a legal personality distinct from that of the company"²⁷³ and that, accordingly, "Mr. Diallo, the majority shareholder in the companies Africom-Zaire and Africontainers, has his own legal personality distinct from that of those companies"²⁷⁴. As far as the Democratic Republic of the Congo is aware, there has never been any question of according legal personality to a natural person, even if that person should be a shareholder (or partner) in a corporation. Once again, the Guinean argument appears to seek to

²⁷³MG, p. 80, para. 4.15.

²⁷⁴*Ibid.*

engender confusion in an area where the principle is relatively simple: either it is a company with legal personality which has suffered injury to its rights, in which case it is the company itself — or its State of nationality — which is entitled to bring proceedings; or it is a shareholder whose rights as such have been injured, and it is he, and his State of nationality, who can validly claim to have been wronged. There is no intermediate situation capable, through the medium of the “legal personality of a natural person” — a notion totally unknown to the law — of conferring on a shareholder’s State of nationality capacity to bring proceedings on account of violations of the rights of the company.

2.78. These elementary principles of commercial law can be clearly deduced from an analysis of doctrine and of certain arbitral awards. In this regard, Professor Diez de Velasco cites the *Kunhardt* case, in which arbitrators dismissed a claim by an American company, *Kunhardt and Co.*, a majority shareholder in a Venezuelan corporation. He explains that

“the American and Venezuelan arbitrators agreed that shareholders’ claims cannot be accepted in respect of injury to corporate property, for the shareholders, whether individually or collectively have no ownership rights in respect of the property of corporation; they enjoy that right only in respect of a proportionate share of the company’s assets on dissolution”²⁷⁵ [*translation by the Registry*],

due account being taken of the rights of the other creditors²⁷⁶. Thus, in the Award we find the perfectly logical statement that,

“the shareholders of an anonymous corporation are not co-owners of the property of the said corporation during its existence; they only have in their possession a certificate which entitles them to participate in the profits and to become owners of proportional parts of the property and values of the corporation when this one makes an adjudication as a consequence of its final dissolution”²⁷⁷.

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The distinction of principle between corporate property and shareholders’ rights, and the fact that shareholders have no rights of ownership over the corporate property, were also very clearly reconfirmed in the case of the *Deutsche Amerikanische Petroleum Gesellschaft*²⁷⁸.

2.79. In short, the Republic of Guinea merely confirms the true nature of its claim when it asserts that Mr. Diallo, in seeking to recover the debts of the two companies, is simply acting to recover “moneys owed to him” or “the debts owed to him”. This assimilation and constant confusion as between the person of the shareholder and that of his company are totally contrary to existing international law. Guinea’s Application must accordingly be held inadmissible and, as the Democratic Republic of the Congo will now show, that conclusion cannot be challenged on account of “considerations of equity”.

²⁷⁵M. Diez de Velasco, *La protection diplomatique des sociétés et des actionnaires*, *op. cit.*, p. 151.

²⁷⁶*RIAA*, Vol. IX, p. 176.

²⁷⁷*Ibid.*, Vol. IX, p. 179.

²⁷⁸M. Diez de Velasco, *La protection diplomatique des sociétés et des actionnaires*, *op. cit.*, p. 151 and *RIAA*, Vol. II, pp. 781-795.

0 8 8 Section 2. The Republic of Guinea cannot claim in this case to exercise a right of “protection of shareholders’ rights by substitution for the company” on grounds of equity

2.80. The applicant State invokes “considerations of equity” in order to justify the right . . . to exercise its diplomatic protection, independently of the violation of the shareholders’ direct rights”²⁷⁹. This argument is based entirely on the circumstance that, contrary to the situation in the *Barcelona Traction* case, the State whose responsibility is at issue is also the State of nationality of the company concerned. Here, it is claimed that, because the two companies which the Republic of Guinea seeks to protect against the Democratic Republic of the Congo have Congolese nationality, it would be equitable to admit the claim of the applicant State by “substitution for the company”²⁸⁰.

2.81. This limb of the Guinean argument cannot be upheld any more than the previous one. Thus the Democratic Republic of the Congo will show, in the first place, by way of principal argument, that the Guinean argument based on equity is simply inadmissible here and, secondly, in any event, that it would be in no way “equitable” to allow Mr. Diallo to be protected in this case “in substitution” for the companies whose shares he holds.

A. The argument of the Republic of Guinea, founded on equity *contra legem*, cannot be upheld in the present case

2.82. As is well known, when we speak of equity the following must be distinguished:

- equity *infra legem*, that is to say, to quote the Court’s jurisprudence: “that form of equity which constitutes a method of interpretation of the law in force, and is one of its attributes”²⁸¹;
- equity *praeter legem*, that is, “the type of equity whose function is to make good any gaps or deficiencies in the law”²⁸² [*translation by the Registry*];
- equity *contra legem*, that is, “the aspect of equity which performs an eliminatory function, imposing a solution that is contrary to, or at least totally independent of, existing rules of law”²⁸³ [*translation by the Registry*].

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In the present case there can be no doubt that what the Republic of Guinea is asking the Court to do is to apply this latter category of equity, since it is effectively seeking a solution “contrary to, or at least totally independent of, the existing rules of law”.

2.83. At this stage of its argument the applicant State accepts that we are in a situation different from that of diplomatic protection as it is understood in positive international law. Thus equity is invoked only “independently of the violation of the direct rights of the shareholders” (the expression is used twice) with a view to seeking protection “by substitution for the company” (according to the language of the title which introduces Guinea’s argument). It accordingly follows that, by definition, diplomatic protection can be exercised by the national State of the shareholder, notwithstanding that his rights are not affected (for, if they were, it would suffice to apply the existing law and make a protection claim in respect of his direct rights as a shareholder), but only

²⁷⁹MG, p. 93, para. 4.52

²⁸⁰According to the title on p. 93 of Guinea’s Memorial.

²⁸¹*Frontier Dispute* case, *I.C.J Reports 1986*, pp. 567-568.

²⁸²J. Salmon (ed.), *Dictionnaire de droit international public*, *op. cit.*, p. 43

²⁸³*Ibid.*, p. 442

those of the company. Since the latter's State of nationality cannot protect it, the shareholder's State is entitled to provide protection by substitution; thus we have two possibilities:

- either the shareholder's national State acts "by substitution" on behalf of the company not having its nationality, with a view to providing it with redress, the shareholder being the indirect beneficiary of the operation;
- or the national State acts on behalf of its shareholder, but without there being any question of providing redress in respect of the shareholder's direct rights, which, *ex hypothesi*, have not been infringed.

090 It is clear that, however the matter is envisaged, such "diplomatic protection" goes far beyond what positive international law provides. As has been already pointed out, the latter is based on a logic whereby any violation of the rights of a foreign national is also a violation of the rights of his State of nationality. It is this circumstance, and this circumstance alone, which justifies recourse to diplomatic protection. Conversely, if no right of its nationals is violated then no right of the State is violated and, in consequence, that State can in no circumstances have any capacity to act. In other words, the Republic of Guinea is asking the Court to accept its claim despite the fact that none of its rights have been violated, whether directly or in the person of one of its nationals. In other words, we are in a situation here going far beyond a function of "making good gaps or deficiencies in the law" (equity *praeter legem*) and *a fortiori* a simple "method of interpretation of the law" (equity *infra legem*).

2.84. The Court cannot allow itself to take such an extreme position. Under Article 38 of its Statute, its duty is to "apply the law as it finds it and not to create it"²⁸⁴. The same precautions must be taken as those applied by the Chamber in the *Frontier Dispute* case:

"It is clear that the Chamber cannot decide *ex aequo et bono*. Since the Parties have not entrusted it with the task of carrying out an adjustment of their respective interests, it must also dismiss any possibility of resorting to equity *contra legem*. Nor will the Chamber apply equity *praeter legem*."²⁸⁵

Likewise in the present case the Parties have not had recourse to the option available under Article 38, paragraph 2, of the Court's Statute by asking it to decide the case *ex aequo et bono*. The Court's position here is not like that of the arbitrators or Mixed Commissions certain of whose decisions have been cited by the Republic of Guinea, who were appointed under the relevant arbitration agreements as "*amiables compositeurs*", or permitted to have recourse to natural justice, or to equity as understood in its widest sense. As the highest international judicial forum, recognized and respected by all States, the Court applies existing international law, and not some individual notion of justice.

B. In any event, the solution advocated by the Republic of Guinea is not an equitable one.

091 2.85. Even assuming that the Court were to accept that it apply equity in the extremely broad sense that the applicant State ascribes to it, the result would not be fundamentally different. In the first place, the solution advocated by the Republic of Guinea, which consists in authorizing protection by the national State of the shareholders where the company has the nationality of the respondent State, is not, even in principle, equitable (1). Secondly — and this second limb of the

²⁸⁴*South-West Africa, Second Phase, I.C.J. Reports 1966*, p. 48, para. 89; see also *Fisheries Jurisdiction case, I.C.J. Reports 1974*, p. 33, para. 78.

²⁸⁵*I.C.J. Reports 1986*, p. 567, para. 28; see also *North Sea Continental Shelf cases, I.C.J. Reports 1969*, p. 47, para. 85 and p. 48, para. 88.

argument will involve addressing in greater detail the particular factual circumstances of the present case — the application of that principle in this case would lead to an inequitable result (2).

1. The solution advocated by the Republic of Guinea is not in principle an equitable one

2.86. The *Dictionnaire de droit international public* defines equity in very general terms as a “sure and spontaneous sense of what is just and unjust”²⁸⁶ [translation by the Registry]. The general nature of this definition should not lead us to underestimate its usefulness. In order for equity to be applied in law, and in particular if it is to be so applied with a view to making good deficiencies and even to circumventing the terms of positive law, it must be capable of being applied on the basis of a spontaneous sentiment that is, one which is very widely shared. In other words, any attempt to avoid a rule of law — particularly a rule of international law — can be envisaged only in relation to a universal conception of equity and not on the basis of any individual notion.

2.87. However, an analysis of doctrine and jurisprudence shows that, even in principle, an applicant State’s right to protect shareholders in substitution for a company possessing the nationality of the respondent State is far from being unanimously accepted. By way of argument in support of its position, the Republic of Guinea confines itself to citing the separate opinions of Judges Jessup and Fitzmaurice appended to the *Barcelona Traction* Judgment.²⁸⁷ With all due respect to those concerned, the Democratic Republic of the Congo observes that those two opinions, if not totally isolated, are very far from being able to claim to reflect a universal point of view and thus to embody a “sure and spontaneous sense of what is just”. Thus we find not only individual judges and writers (a), but also arbitral decisions (b), which very clearly take a contrary view.

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(a) *The possibility of protection by the national State of the shareholders where the company possesses the nationality of the respondent State is regarded as inequitable by a number of judges and writers*

2.88. Sufficient evidence of this can, in the first place, be found in the following extracts from the separate opinions of other judges in the same case. Thus Judge Padilla Nervo states:

“I do *not* concur with the view that the national State of the shareholders may exercise diplomatic protection when the act complained of was done by the national State of the company, for this would be equivalent to admitting that any State, on the pretext of protecting the interests of the shareholders in a foreign company, may deny the existence of the legal entity of companies organized in accordance with the laws of the national State of such companies.

I have reservations about paragraph 92 of the Judgment. For the reasons stated above I am of the opinion that the so-called theory to which the paragraph refers does not have any validity. The fact that the Judgment ends the paragraph with the sentence: ‘*Whatever the validity of this theory may be, it is certainly not applicable to the present case, since Spain is not the national State of Barcelona Traction*’ should not be interpreted as an admission that such ‘theory’ might be applicable in other cases where the State whose responsibility is invoked is the national State of the company. This is a fundamental point in the field of intervention on behalf of nationals who are shareholders in foreign companies of limited liability.

²⁸⁶J. Salmon (ed.), *Dictionnaire de droit international public*, op. cit., p. 441.

²⁸⁷MG, pp. 93-96.

Regardless of the numerous cases of protection which took place in the past — outside international law or contrary to it — by the use of economic, political or military pressure, it is worth recalling that — also in the past — in other cases when a stand was taken within a legal point of view and respect for the sovereignty of other States, there has been a historical recognition of the separate entity of corporations of limited liability, and the opinions given in such instances did stress the independent existence of a company as juridical person . . .²⁸⁸

Although adopting different reasoning, Judge Morelli shares the same reluctance to accept that the national State of the shareholders may intervene in their favour on the pretext that the company possesses the nationality of the respondent State:

“On the other hand it must be recognized that diplomatic protection of a company really may be impossible when there is no foreign State to exercise it. This would be so in the case of a company which had the nationality of the very State whose international obligation was in question.

Nevertheless, to say that in such a case the national States of the shareholders are entitled to protect the latter’s interests because there is no possibility of their benefiting indirectly from any protection afforded the company would be to make havoc with the system of international rules regarding the treatment of foreigners. It would, furthermore, be a wholly illogical and arbitrary deduction.

For to envisage the possibility of indirect protection in certain eventualities is tantamount to recognizing the absence, so far as shareholders are concerned, of any direct protection on the part of international law — to recognizing, in other words that international law does not consider the interests of shareholders, as simple interests, worthy of its protection and that it consequently refrains from imposing upon a State, in this connection, any obligations toward shareholders’ national States. This negative attitude on the part of international law cannot be reversed on the ground that the interests of shareholders might, in other circumstances, benefit from a purely indirect protection. Such artificial and illogical reasoning would lead to the creation, for the interests of shareholders, of a direct protection such as their national States might take up: the very protection which is refused by international law.²⁸⁹

2.89. A substantial section of doctrine adopts a similar position. Thus Professor Jiménez de Aréchaga concludes his study of the question of diplomatic protection of shareholders in the following terms :

“These rules of international law concerning claims — their espousal by states, the condition of continuing nationality, the requirement of violation of rights as a basis for valid action — have often been criticized as illogical and conducive to injustice and unpredictability in their practical application.

Such criticism misses the point. A perfect protection of aliens or of foreign investments is not the aim nor the *ratio legis* of these rules of international law. The interests comprehended and protected by such rules are not those of individuals but of states in the maintenance of a balanced system which, on one side, affords an admittedly limited degree of protection to foreign interests, and on the other, respects the sovereignty and domestic jurisdiction of the territorial state.

²⁸⁸*I.C.J. Reports 1970*, pp. 257-258

²⁸⁹*Ibid.*, pp. 240-241, para. 12.

The existing rules represent the essential conditions, historically developed, on which the territorial state is prepared to accept claims presented by another state on behalf of persons residing or having interests in it. They constitute a *modus vivendi*, a well-balanced compromise, gradually and peacefully evolved and accepted both by states interested in extending the scope of diplomatic protection and states interested in restricting it. Naturally states are free to agree with like-minded states on any correctives or improvements which might, among themselves, do away with the particular inconveniences or hardships resulting from the rules, as through agreements for the international protection of human rights.”²⁹⁰

We would also cite to the same effect Professor Ian Brownlie, who, with reference to the purported exception to the inability of the State of nationality of the shareholders to exercise its diplomatic protection in the absence of any infringement of the direct rights of those shareholders as such, observes that

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“the exception, if it exists, is anomalous ‘since it ignores the traditional rule that a State is not guilty of a breach of international law for injuring one of its own nationals’ [Jessup, p. 192]. It is arbitrary to allow the shareholders to emerge from the carapace of the corporation in this situation but not in the others. If one accepts the general considerations of policy advanced by the Court then this alleged exception to this rule is disqualified.”²⁹¹

(b) *A right of protection of the part of the State of nationality of the shareholders where the company has the nationality of the respondent State has been regarded as inequitable in a number of arbitral awards*

2.90. An analysis of old case law, consisting of awards based on equity and justice, confirms that protection by the State of nationality of the shareholders against the national State of the company has never been accepted as reflecting a “sure and spontaneous sense of what is just”. The *Baasch & Römer* Award is a good example of this. There, the Mixed Commission, ruling under the terms of the arbitral convention “according to justice”²⁹², rejected on the basis of the following considerations a complaint by Dutch shareholders of a Venezuelan company whose property had been destroyed:

“It is not necessary to consider this claim further than to accede to the position taken by the learned agent of the respondent Government. It is a Venezuelan corporation created and existing under and by virtue of Venezuelan law and has its domicile in Venezuela. This Mixed Commission has no jurisdiction over the claim. It is the corporation whose property was injured. It may have a rightful claim before Venezuelan courts, but it has no standing here. The shareholders being Dutch does not affect the question. The nationality of the corporation is the sole matter to be considered. This claim is therefore dismissed without prejudice.”²⁹³

The same Commission ruled to the same effect and on the same grounds in the *Jacob M. Henriquez* case:

“Both the learned agent for the respondent Government and the honourable commissioners thereof assert as lawyers, and the latter with the added responsibility of

²⁹⁰Jiménez de Aréchaga, *International Responsibility*, *op. cit.*, p 581.

²⁹¹I. Brownlie, *Principles of Public International Law*, 5th ed., *op. cit.*, p. 495.

²⁹²Article I of the Protocol of 28 February 1903, *RIAA*, Vol. X, p. 709.

²⁹³*RIAA*, Vol. X, p. 726.

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his oath as such commissioner, that this association, or partnership, or mercantile establishment, by whatever name it may be called, was in fact and law, by virtue of the Venezuelan code governing such associations and establishments, of Venezuelan origin and domicile; that it is therefore not a Dutch citizen or subject, but Venezuelan, and hence this Commission has no jurisdiction over it or any claim which it may present or which may be presented for it.²⁹⁴

In both cases the Commission refused to admit a complaint by the shareholders against measures directed at a corporation possessing the nationality of the respondent State. Since the arbitral convention on which its jurisdiction was based authorized it to rule "according to justice", the Commission could theoretically have accepted such a complaint on grounds of equity. It did not do so, and these precedents confirm that in principle a right of protection of foreign nationals in the case of acts affecting the company possessing the nationality of the respondent State, while it may on occasion have found favour with certain judges or writers, is far from being universally accepted. Such a possibility cannot therefore be regarded as an equitable solution justifying a decision which circumvents or goes beyond existing positive law.

2. Application of the solution advocated by the Republic of Guinea would in this case lead to an inequitable result

2.91. The Democratic Republic of the Congo will now show that, even assuming that, in principle, a right of protection of the shareholder by his national State were accepted as justified, application of this principle to the case of Mr. Diallo would prove to be fundamentally inequitable.

2.92. In the section of its Memorial purportedly justifying protection of Mr. Diallo by substitution for the two companies whose shares he holds, the applicant State apparently does not see fit to conduct an in-depth analysis of the circumstances of the case so as to show that the solution which it advocates would indeed be an equitable one here. In reality, after making certain general assertions of no application in the present case, the Republic of Guinea confines itself, all in all, to just a few lines of argument as follows:

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"Similarly, the facts of the present case, that is to say the respective nationalities of the companies and the shareholders and the existence of internationally wrongful acts which have caused serious injury to the company, must lead to the conclusion — irrespective of the grounds based on a violation of the shareholders' direct rights, which have also been infringed here — that Guinea's claim in this case is admissible."²⁹⁵

2.93. The Democratic Republic of the Congo can but express its surprise at the brevity of this reasoning, particularly as, on analysis, it is clear that this is not so much a reasoned argument as mere question-begging. The applicant State fails totally to explain why in this case the protection of its national would be justified for reasons of equity so overriding that they would oblige the Court to circumvent existing positive law by subordinating it to a principle which has always been highly controversial. The Republic of Guinea appears to take the view that, in *all* cases where a shareholder considers himself to have been injured by acts against a company having the nationality of the State author of those acts, proceedings by substitution would be justified. Such a contention would be contrary to the very notion of equity, which, as we know, is applicable only in relation to the particular circumstances of the case in question²⁹⁶.

²⁹⁴ *RIAA*, Vol. X, p. 727.

²⁹⁵ *MG*, p. 96, para. 459.

²⁹⁶ Case concerning the *Interpretation of the Agreement between the WHO and Egypt*, *I.C.J. Reports 1980*, p. 96; *Continental Shelf (Tunisia/Libya)*, *I.C.J. Reports 1982*, p. 60, para. 72.

2.94. Our Guinean opponents will doubtless provide the necessary justification on this point at a later date. At this stage of the debate, the Democratic Republic of the Congo will rebut certain arguments which may be deduced from a reading of the Memorial as a whole. The overall pattern which implicitly emerges from Guinea's pleadings is as follows:

- equity permits the Republic of Guinea to exercise a right of “protection by substitution” not on grounds of an injury to its own rights, but for essentially disinterested reasons;
- Mr. Diallo's notably upright personality and integrity, on which the applicant State has laid consistent emphasis, would in particular justify such protection;
- finally — and this is again a decisive factor — equitable protection would be justified “as a last resort”, since Mr. Diallo has been deprived of any other means of enforcing his rights.

However, none of these three arguments can withstand analysis.

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(a) *The exercise of “equitable protection by substitution” would result in a régime of discriminatory protection*

2.95. The first argument which may be deduced from Guinea's pleadings poses a problem of principle. What would happen if, tomorrow, it were to be accepted that, notwithstanding that none of its rights had been infringed (for, once again, in the contrary case existing positive international law would suffice to deal with the matter), a State could protect its nationals who held shares in a company not possessing its nationality? The result would inevitably be a system where:

- first, within a particular State foreigners would enjoy greater protection than nationals;
- secondly, and more generally, certain foreigners would enjoy greater protection than other foreigners, since certain States would inevitably be more willing or able to develop a policy of active protection; and
- thirdly, as between foreigners who were nationals of the same State, those enjoying better relations with the authorities of their State would be at an advantage in relation to the others.

In Mr. Diallo's case, it is above all the first and third of these points which are at issue but, in any event, it is undeniable that the system of “protection by substitution” defended by the Republic of Guinea would lead to three particularly unjustified types of differential treatment.

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2.96. As long as we remain within the framework of diplomatic protection as it exists in positive law, it follows from the logic of that institution that such differences in treatment are in no way arbitrary. Thus the State which exercises diplomatic protection has a discretionary power deriving from the fact that, in so doing, in reality it is simply protecting its own rights. And a State cannot readily be criticized for defending its own rights in one case while refusing, on policy grounds deriving from its sovereignty, to do so in others. But, *ex hypothesi*, a right of protection by substitution on the basis of equity cannot logically be justified in terms of the State's discretionary power to protect its rights. In the present case, the State is claiming to act in a disinterested manner in order to protect a person whose direct rights have not been injured, on grounds of the morally offensive nature of the situation. However, in such circumstances, a differential application of the right of protection by reason of the nationality of the individual protected cannot be justified, any more than it would be justified to accord preference to certain foreigners rather than to others.

2.97. The consequences flowing from the solution proposed by the applicant State are thus profoundly inequitable. As the Court has stated: "although 'Equity does not necessarily imply equality' (*North Sea Continental Shelf, I.C.J. Reports 1969*, p. 49, para. 91), where there are no special circumstances the latter is generally the best expression of the former"²⁹⁷. In the present case, shareholders in Congolese companies having suffered indirect loss as a result of injuries to the rights of their company are not all being treated on an equal footing. Some, like Mr. Diallo, are able to enjoy the protection of their national State by reason of their status as foreigners and of the good relations which they enjoy with their national authorities. Others will not benefit from this protection by substitution and will simply remain subject to the ordinary law. This would indeed be differential treatment lacking any "objective and reasonable basis", that is to say, legally speaking, discrimination²⁹⁸.

(b) To have regard to Mr. Diallo's conduct must result in "protection by substitution" being characterized as inequitable

2.98. The entire argument of "equitable protection by substitution" is based on the compassion supposedly aroused by the situation of a foreign shareholder who has purportedly suffered loss as a result of arbitrary action by the State. The Democratic Republic of the Congo has however already shown that, notwithstanding the almost idyllic image which the applicant State seeks to project²⁹⁹, Mr. Diallo's personality and the conduct adopted by him since the commencement of this case are far from being irreproachable. In light of what has been stated above, it is clear that Mr. Diallo has made arbitrary and unjustified claims, embodying financial claims totalling over 30 billion American dollars, that is to say almost three times the external debt of the entire Democratic Republic of the Congo. It was moreover these fraudulent and antisocial activities which motivated his removal from Zairean territory by decision of the competent authorities in January 1996.

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2.99. The particular circumstances of the present case appear to fall rather under the head of the principle of "clean hands", which has been explained as follows by one school of doctrine:

"The foreign natural or legal person must have conducted himself in a proper manner towards the territorial State, complying with its laws and not interfering in domestic political matters, in order to be able to claim the diplomatic protection of his own State . . .

A State cannot submit a claim in favour of a natural or legal person — which it is entitled to protect diplomatically as against another State — if that person has not conducted himself in a proper manner towards that other State."³⁰⁰ [*Translation by the Registry*]

In his leading study, Professor Wittenberg considers that this can be a ground for rendering a claim inadmissible:

"International jurisprudence has often so held, either because the foreigner has committed a criminal offence or because he has sought to play a role in the political life of the country incompatible with his alien status . . . In such cases the foreigner

²⁹⁷*Frontier Dispute case, I.C.J. Reports 1986*, p. 633, para. 150.

²⁹⁸J. Salmon (ed.), *Dictionnaire de droit international public, op. cit.*, "discrimination", meaning B, p. 344.

²⁹⁹See for example MG, pp. 11-12, para. 2.6.

³⁰⁰L. Garcia-Arias, *La doctrine des 'clean hands' en droit international public, Annuaire des anciens Auditeurs de l'Académie de droit international*, 1960, Vol. 30, pp. 14-22

renders himself subject to all measures by which the State seeks to maintain law and order, such as imprisonment if guilty or even as a suspect, penal sanctions, expulsion.”³⁰¹ [*Translation by the Registry*]

The theory of “clean hands” is thus regarded by a major school of doctrine, both old and current, as a ground rendering a diplomatic protection claim inadmissible³⁰². Indeed the Republic of Guinea also appears to subscribe to this view, since in its Application it expressly states that, in order to enjoy diplomatic protection, “the individual protected must have ‘clean hands’”³⁰³.

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2.100. The Democratic Republic of the Congo takes the contrary view, along with another section of doctrine, that this does not represent the current state of positive international law³⁰⁴. That does not however mean that the Congo ascribes no consequence to the improper conduct of a foreigner who subsequently claims to be entitled to diplomatic protection. *A fortiori*, such consequence must be drawn if the Court should decide to base its judgment on considerations of equity, as the Republic of Guinea requests it to do. In that case it is self-evident that Mr. Diallo’s conduct cannot remain without consequences and undoubtedly represents a relevant circumstance for purposes of assessing the equitable nature of the solution proposed.

2.101. Thus, Mr. Diallo’s improper conduct constitutes a further reason for dismissing as inequitable the attempt by the applicant State to protect an individual who not only has suffered no violation of his direct rights but has also conducted himself in a manner which has shown itself to be highly abusive and improper.

(c) *Mr. Diallo’s refusal to exhaust all the remedies available in the Democratic Republic of the Congo would in any event render any protection by substitution inequitable*

2.102. The entire argument on the need to allow an “equitable right of protection by substitution” relies on the fact that the shareholder in question allegedly has no further remedy available to him in order to enforce his rights. There can be hardly a writer on the subject who does not hold that this exceptional form of protection must be subject to the exhaustion of all local remedies available within the State where the internationally wrongful acts in question are alleged to have been committed³⁰⁵.

2.103. The Democratic Republic of the Congo will show, however, in its argument below on the second ground of inadmissibility, that Mr. Diallo is very far from having exhausted all the remedies available to him.

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2.104. In these circumstance, it is self-evident that the equity argument loses all meaning. No one has ever contended that it is equitable to admit a diplomatic protection claim when not only

³⁰¹J. C. Wittenberg, *La recevabilité des réclamations devant les juridictions internationales*, RCADI [Collected Courses of the Hague Academy of International Law, 1932 II, Vol. 31, p. 64.]

³⁰²See for example M. Borcard, *Diplomatic Protection of Citizens Abroad*, *op. cit.*, pp. 713 *et seq.*; L. Cavare, *Le droit international public positif*, Second Edition, Paris, Pedone, 1961, p. 264; P.M. Dupuy, *Droit international public*, Paris, Dalloz, p. 454, No. 478 and, *semble*, D. Alland, *Droit international public*, *op. cit.*, pp. 416-417.

³⁰³Application of the Republic of Guinea, p. 32.

³⁰⁴J. Salmon, *Des “mains propres” comme condition de recevabilité des réclamations internationales*, AFDI, 1964, pp. 225-266.

³⁰⁵See for example the very clear statement to this effect by P. de Visscher, *La protection diplomatique des personnes morales*, *op. cit.*, p. 474.

have the rights of the protected person not been injured, but the latter has not even exhausted the remedies available to him on the territory of the respondent State.

2.105. In conclusion, the equity argument as formulated by the applicant State cannot be upheld for a number of concordant reasons:

- first, because, given that the argument would, *ex hypothesi*, apply only where there had been no injury to the direct rights of Mr. Diallo as shareholder, it would involve going beyond what is provided by positive international law, which is not part of the Court's remit;
- secondly, because, in any event, any circumvention of positive law could be envisaged only if the solution advocated was universally regarded as equitable, which is far from being the case in regard to the right of protection by substitution for the company concerned;
- finally, because of the practical consequences which application of the solution advocated by the Republic of Guinea would involve, whether it be a discriminatory protection régime or the endorsement of a claim by an individual who has certainly failed to conduct himself in relation to the Congolese State and to his trading partners in a proper manner, or to exhaust — or even in some cases to institute — the judicial settlement procedures available to him under the domestic legal order of the Democratic Republic of the Congo.

Conclusion of Chapter II

2.106. The Democratic Republic of the Congo has shown that the Republic of Guinea has no capacity to act in the present case. The object of the proceedings instituted by the applicant State is essentially to obtain reparation for the violation of the rights of two persons not possessing its nationality, the Congolese companies Africom-Zaire and Africontainers-Zaire. The fact that the interests of the managing director of those two companies, Mr. Diallo, may have been affected by the measures complained of cannot render the Application admissible. In reality, even if certain aspects of the two cases are clearly very different, the Republic of Guinea is essentially restating today the argument relied on by Belgium in the *Barcelona Traction* case, one quite clearly dismissed by the Court in its 1970 Judgment. In this regard, the broad and extensive notion of “direct rights of shareholders as such” as it emerges from the Guinean Memorial cannot be upheld, since it involves a total confusion between the respective personalities and properties of the company and its shareholder. Since the applicant State cannot claim that its own rights have been violated, it is not entitled to invoke considerations of equity in order to circumvent the positive international law as it stands today which the Court is charged with applying pursuant to its Statute. Alternatively, even supposing that the Court were to accept that it should apply considerations of equity *contra legem* as it is asked by the Republic of Guinea to do, it is clear, for all of the reasons just set out, that the latter has still not come close to showing that a right of protection “by substitution” would be justified in the present case. Guinea’s Application is thus clearly inadmissible and furthermore, as the Democratic Republic of the Congo will show in the following chapter, the condition of prior exhaustion of local remedies is not satisfied in the present case.

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CHAPTER III. THE APPLICATION IS INADMISSIBLE BECAUSE LOCAL REMEDIES
HAVE NOT BEEN EXHAUSTED

3.01. Given that the Application of the Republic of Guinea is a diplomatic protection claim, it must, in addition to satisfying the requirement in regard to the nationality of the claim, satisfy a further condition: exhaustion of local remedies. According to a classic dictum of the Court:

“The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system.”³⁰⁶

The fact that the rule of the exhaustion of local remedies is rooted in contemporary international law is fully confirmed by the most recent work of the International Law Commission. Thus the rule is reaffirmed both in the Articles on the Responsibility of States for Internationally Wrongful Acts, of which the General Assembly took note in its resolution of 12 December 2001³⁰⁷, and in the draft Articles on Diplomatic Protection, where, naturally, substantial passages are devoted to it³⁰⁸.

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3.02. The applicability of the local remedies rule in the present case is not challenged by the Republic of Guinea, at least in principle³⁰⁹. In its argument on this point, the applicant State emphasizes rather that the exhaustion of local remedies cannot be regarded as an absolute rule and that a number of the conditions which a State’s internal remedies must satisfy in order for the rule to apply are not met in the present case. Thus the Republic of Guinea considers that it was impossible in practice for Mr. Diallo to have recourse to the various local remedies established by Congolese law and that, in any event, those remedies must be regarded as ineffective, for they had not enabled Mr. Diallo effectively to protect his rights³¹⁰.

3.03. The Democratic Republic of the Congo in no way seeks to challenge the proposition that the local remedies rule must be interpreted in light of international practice and jurisprudence, which have long admitted that a State’s local remedies must satisfy certain conditions in order for their exhaustion to be required. More specifically, the exhaustion of local remedies presupposes that the existence of procedures providing for remedies within the legal order of the State concerned can be demonstrated, and that such remedies are accessible and effective³¹¹. The difference of views between the Democratic Republic of the Congo and the Republic of Guinea thus relates not to the principle that the remedies offered by a State must satisfy these conditions before they can be exhausted, but whether, in practice, the remedies existing within the legal order of Zaire, and subsequently of the Congo, effectively met these requirements.

³⁰⁶*Interhandel, Preliminary Objections, Judgment, I.C.J. Reports 1959*, p. 27.

³⁰⁷Resolution 56/83, Article 44.

³⁰⁸See Articles 10 *et seq.*, of the draft; see also the report of the International Law Commission on the work of its 53rd Session, doc. A/56/10, paras. 185 *et seq.*

³⁰⁹MG, para. 4.60.

³¹⁰*Ibid.*, paras. 4.70-4.81.

³¹¹See, *inter alia*, C. F. Amerasinghe, *Local Remedies in International Law*, Cambridge, Grotius, 1990, Chaps. VII and VIII; I. Brownlie, *Principles of Public International Law*, 5th ed., Oxford, OUP, 1998, p. 499; R. Jennings and A. Watts (eds.), *Oppenheim’s International Law*, 9th ed., Longman, 1992, p. 525, para. 153.

3.04. It should, however, be observed in this regard that the conformity with such conditions of the remedial procedures and mechanisms provided for in a State's legal order is not a matter that may be contested lightly. Thus the rule itself is founded on the presumption that the internal legal order of the State whose conduct is in dispute is capable of offering the individual claiming to have been the victim of wrongful acts on the part of that State the possibility of taking effective steps to safeguard his rights³¹². But that presumption involves specific consequences in regard to the burden of proof. As certain eminent contemporary authors have put it:

“The existence of a presumption [that a State's local remedies would enable an individual who claims he has been wronged to protect his rights] means that it is for the individual to bear the essential burden of proof; he will have to show that he has indeed attempted to make effective use of all of the internal procedures theoretically available.”³¹³ [*Translation by the Registry.*]

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Thus, according to these authors, it is for the Republic of Guinea to prove that its national has exhausted local remedies within the Democratic Republic of the Congo. The Republic of Guinea appears, moreover, to accept this, stating that it is “well aware that it must prove that its national observed the principle of the exhaustion of local remedies”³¹⁴. In reality, international law shares the burden of proof between applicant and respondent States. It is for the respondent State to demonstrate the actual existence, within its legal order, of remedies capable of utilization in the case, whereas it is primarily the applicant State which bears the burden of establishing that such remedies do not satisfy the conditions laid down by international law in order for their exhaustion to be required before that State may espouse the claim of one of its nationals³¹⁵.

3.05. In accordance with this apportionment of responsibilities, the Democratic Republic of the Congo will begin by showing that remedies enabling Mr. Diallo to safeguard his rights existed within the legal order of Zaire, and subsequently of the Congo (Section 1). For its part, the Republic of Guinea has, by contrast, been unable to show that such remedies were, and have always remained, inaccessible to Mr. Diallo (Section 2), or that such remedies and procedures were, or are still, ineffective (Section 3). In the following pages the Democratic Republic of the Congo will show, on the contrary, that such remedies indeed corresponded to the definition proposed by the applicant State itself when it defines the term as referring to “any legal remedy capable of leading to a satisfactory result in respect of the subject-matter of the international application”³¹⁶.

3.06. At this point a comment in regard to methodology is called for. The disputes opposing, on the one hand, Africom-Zaire and Africontainers-Zaire and, on the other, those companies' trading partners or the Congolese State, cannot all be treated on the same basis for purposes of the local remedies rule. In practice the various disputes differ considerably in this regard. In some cases, the companies managed by Mr. Diallo brought proceedings the course of which has been described in the first chapter of these Observations. Such was the case for the disputes between Africontainers-Zaire and Africom-Zaire and, respectively, Shell, Fina and PLZ³¹⁷. In many other

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³¹²See, *inter alia*, Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims*, New York, Banks Law Publishing, 1928, p. 817, para. 381.

³¹³Alain Pellet and Patrick Daillier (Nguyen Quoc Dinh), *Droit international public*, 6th ed., Paris, LGDJ, 1999, p. 776, No. 490.

³¹⁴MG, p. 97, para. 460.

³¹⁵See in this respect the rule set out in Draft Article 15 of the Draft Articles on Diplomatic Protection proposed by the Special Rapporteur, John Dugard, in his Third Report, 2002.

³¹⁶See the definition set out in the MG, para. 4.66, and the reference, footnote 260.

³¹⁷See above, paras. 1.30-1.36 (Fina), 1.37-1.44 (Shell), and 1.48-1.52 (PLZ).

cases the file shows that no legal proceedings were ever begun at any time, either by Mr. Diallo's companies or by Mr. Diallo in his own name. These differences in situation will be recalled whenever necessary in the following pages.

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Section 1. There existed and still exists, within the legal order of Zaire and subsequently of the Congo, remedies enabling Africontainers-Zaire and Africom-Zaire, as well as Mr. Diallo himself, to safeguard their rights

3.07. In its Memorial the Republic of Guinea does not, strictly speaking, dispute the fact that there did exist, in the legal order of Zaire and subsequently in that of the Congo, remedial procedures and mechanisms, judicial or other, enabling the companies in question or Mr. Diallo himself to safeguard their rights. The argument made by the applicant State in this regard consists rather in contending that the existing remedies must either be regarded as ineffective, in that they would not have permitted Mr. Diallo or the companies managed by him to obtain satisfaction, or that they were not accessible in practice, at least once Mr. Diallo had been removed from Zairean territory.

3.08. These arguments will be addressed in detail in the following pages. However, the Democratic Republic of the Congo wishes to dispel forthwith any ambiguity in regard to the issue of the actual existence, within the Zairean, and subsequently Congolese, legal order, of remedial procedures and mechanisms enabling Africom-Zaire and Africontainers-Zaire to safeguard their rights.

3.09. The facts themselves show, beyond all possible doubt, that mechanisms of this kind indeed existed, and continue to exist, in the Democratic Republic of the Congo. This was particularly clear in the case of the three disputes submitted to the ordinary Zairean courts. In their disputes with Shell, Fina and PLZ, Africontainers-Zaire and Africom-Zaire were able to have recourse to the Zairean courts, which, moreover, decided in their favour at first instance. The details of these proceedings have already been set out in the first chapter of these Observations, and will be to some extent repeated and analysed when the Democratic Republic of the Congo addresses Guinea's claims that the proceedings were ineffective³¹⁸. As regards the issue of the actual existence of remedies, the only one dealt with at this stage, these three sets of proceedings are sufficient evidence that such remedies did indeed exist within the Zairean legal order.

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3.10. Even if this will require a more detailed demonstration, the existence of similar remedies is likewise established for the other disputes in which Africontainers-Zaire and Africom-Zaire were involved. The Democratic Republic of the Congo will successively demonstrate this for the disputes of these companies with other private companies (A), with State undertakings (B) and with the Zairean State itself (C). In none of these cases, as the Democratic Republic has already recalled, has Mr. Diallo, whether in the name of the companies managed by him or in his own name, even sought to utilize any of the judicial procedures available. Yet such procedures clearly existed, and the Republic of Guinea cannot claim the contrary in order to excuse the negligent conduct of its national in this regard.

A. Remedies were available against the private companies

3.11. The existence of remedies against Mobil Oil is evident. That company clearly enjoys a status no different from that of its counterparts, Shell and Fina, and could thus perfectly well have been sued, like the latter, before an ordinary Kinshasa court. Thus, no obstacle can be derived from the specific features of the Zairean, then Congolese, judicial order which could explain the decision of Africontainers-Zaire not to have recourse to ordinary judicial means in order to settle its dispute with Mobil.

³¹⁸For further details on this point, see *infra*, paras. 3.43 *et seq.*

B. Remedies were available against public undertakings

3.12. The situation is no different in regard to the two public undertakings — Gécamines and Onatra — whose acts are claimed to have caused injury to Africontainers-Zaire. This is clear both in light of existing legislation and of specific precedents.

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3.13. As regards existing legislation, it should be noted that Gécamines and Onatra are public undertakings of the Congolese State, governed by Law No. 78-002 of 6 January 1978 laying down general provisions applicable to public undertakings, as amended and consolidated to date³¹⁹. As public undertakings, these two entities possess legal personality, assets and their own decision-making organs. They enjoy managerial autonomy, under the supervision of the government authorities. They can sue and be sued before the ordinary domestic courts, where they enjoy no immunity from suit or from execution³²⁰. Thus the Republic of Guinea could not claim that these undertakings were in principle immune from suit in order to justify the failure of Africom and Africontainers to act.

3.14. Moreover, evidence from current practice confirms that it is perfectly possible for any creditor of either of these public undertakings to sue them before the ordinary Congolese courts. Thus, in the recent past, a number of proceedings have been instituted both against Gécamines and against Onatra. By way of example, the following cases may be cited:

- *Soretac v. Gécamines* (judgment of the Kinshasa-Gombe *Tribunal de grande instance*, 9 May 1994, RC 62.342, and Kinshasa Court of Appeal)³²¹;
- *Musungale Kabamba v. Onatra* (judgment of the Kinshasa-Gombe Court of Appeal, 30 October 1997, RCA 13.459/13.650)³²²;
- *Kiyoko Botaka v. Onatra* (judgment of the Matadi Court of Appeal, 7 April 1999, RCA 1804)³²³;
- *Bokungo Wakota v. Onatra* (judgment of the Kinshasa-Gombe Court of Appeal, 22 April 1999, RCA 20.044)³²⁴.

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3.15. In all these cases, the plaintiffs were seeking to recover commercial debts on which the two undertakings had defaulted. It is thus undeniable that remedies did exist within the Congolese legal order whereby State undertakings such as Gécamines or Onatra could be held liable, *inter alia* on account of their non-performance of contractual obligations owed to private parties.

C. Remedies were available against the Zairean State

3.16. The existence of remedies against the Zairean State, in respect of which Africom-Zaire was the holder of an unpaid debt, is equally clearly established. Here again, the possibility of bringing a liability claim against the Congolese State before the domestic courts on account of facts of this kind is confirmed both by existing legislation and by evidence from recent practice.

³¹⁹See POC, Anns. 10 and 33.

³²⁰See *ibid.*, Arts. 2, 3 and 9 of the 1978 Law.

³²¹POC, Ann. 11.

³²²*Ibid.*, Ann. 38.

³²³*Ibid.*, Ann. 36.

³²⁴*Ibid.*, Ann. 34.

3.17. As regards current legislation, we would cite the Congolese Judicial Code, which provides generally, in its opening Article, that “[e]very person wishing to bring proceedings against another shall provide the registrar of the court where the claim is to be made with all necessary particulars for the preparation of the writ . . .” and, more specifically, in its Article 8, that “proceedings shall be issued as follows: (1) against the Republic of Zaire, in the person or in the offices of the President of the Republic or of the Governor of the Region (Province) of the seat of the court which is to hear the case . . .”³²⁵ [*translation by the Registry*]. Thus Zairean (subsequently Congolese) law expressly provides for the possibility of proceedings against the public authorities. There is thus no specific feature of local law which would give credence to the argument that no remedy exists.

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3.18. Recent practice, moreover, confirms that these provisions are far from having a merely theoretical scope. The case of *Abdoul Karim v. Congolese State* is one of those which confirm this. The plaintiff, a Lebanese national settled in the Democratic Republic of the Congo for many years, sued the Congolese State before the Kinshasa-Gombe *Tribunal de grande instance* for recovery of a commercial debt of approximately US\$ 5 million. The court found in his favour³²⁶, enabling the plaintiff to recover his debt, which related to services provided by him in connection with the construction of the headquarters of the national police at Kinshasa in 1981.

3.19. Whether in respect of the oil companies with which Africontainers-Zaire conducted a commercial relationship, of the State undertakings Gécamines and Onatra, or of the Zairean State itself, it is thus clear that there existed within the legal order of Zaire, and subsequently of the Congo, remedies which it would have been open to Mr. Diallo to utilize, on behalf of the companies which he was managing or on his own behalf, in order to raise a liability claim against their trading partners on account of the alleged non-performance of certain contractual obligations. Moreover, as the Democratic Republic of the Congo will now show, such remedies were fully accessible and would have enabled Mr. Diallo and his companies effectively to safeguard their rights, even after Mr. Diallo had been obliged to leave Zairean territory.

³²⁵POC, Ann. 1.

³²⁶See Judgment RC 72.792, 3 February 2000; POC, Ann. 2.

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Section 2. The Republic of Guinea has not shown that the existing remedies under the Zairean, then Congolese, legal order were or are unavailable or inaccessible

3.20. As has been stated above, rather than disputing directly the actual existence under the Congolese legal order of remedies which would have enabled Mr. Diallo and Africom-Zaire and Africontainers-Zaire to protect their rights, the Republic of Guinea has based its argument on two heads of criticism, challenging on the one hand the accessibility, and on the other the effectiveness, of such remedies. This second head will, as we have said, be addressed in section 3 of this chapter, whilst the Democratic Republic of the Congo will rebut the first in the paragraphs which follow.

3.21. As it has already stated, the Democratic Republic of the Congo in no way disputes the principle that only remedies which are effectively available — and hence accessible to the plaintiff — have to be exhausted. This principle is solidly rooted in the international legal order, and constitutes a widely accepted restriction on the requirement of the exhaustion of local remedies³²⁷. It is very clearly apparent, however, that there is nothing in the circumstances of the present case which would permit the conclusion that it was impossible for Mr. Diallo to utilize the mechanisms and procedures offered by Zairean law which would have enabled him to safeguard his rights.

3.22. The Republic of Guinea does not appear to dispute the availability or accessibility of the remedies existing within the Zairean legal order in respect of the period during which Mr. Diallo was lawfully residing on Zairean territory. It is only in respect of the period following Mr. Diallo's removal from Zairean territory that the applicant State makes this argument. That claim cannot, however, be upheld, by reason of considerations based both on the manner in which the existing law provides for the representation of litigants before the courts and on specific evidence on file which show that the absence of Mr. Diallo from Zairean territory did not prevent the prosecution of proceedings already commenced (A). Moreover, further evidence likewise shows that it was physically possible for Mr. Diallo to organize such legal representation (B).

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A. The absence of Mr. Diallo from Zairean territory was not an obstacle to the prosecution of proceedings already commenced

3.23. The Republic of Guinea's entire argument consists in claiming that, from the moment he could no longer enter Zairean territory, Mr. Diallo found himself deprived of the possibility of exercising his remedies before the local courts. Thus, according to the applicant State's Memorial:

“Mr. Diallo did investigate several possibilities of redress, including both traditional and administrative remedies, while he was still entitled to reside freely and safely in the Democratic Republic of the Congo, before quite particular circumstances, namely his abrupt expulsion, excluded any other possibility of redress.”³²⁸

The Republic of Guinea emphasizes this point, referring to the “impossible situation in which the Democratic Republic of the Congo placed Mr. Diallo”³²⁹.

³²⁷C. F. Amerasinghe, *Local Remedies in International Law*, *op. cit.*, p. 191; see also Draft Article 14 (f) of the Draft Articles on Diplomatic Protection proposed by the Special Rapporteur, John Dugard, in his third report on diplomatic protection, 2002.

³²⁸MG, para. 4.70.

³²⁹*Ibid.*

3.24. This argument clearly cannot be upheld, so manifest is it that the commencement or prosecution of proceedings, judicial or other, in no way requires the physical presence of an individual on national territory. It is sufficient, in order so to find, to refer to Zairean law, or to the substantial practice in this field, including that shown in documents on file in this case.

3.25. Zairean law on judicial procedure contains no provision requiring the presence of the plaintiff on national territory in order for legal proceedings to be validly conducted before the courts. The 1960 Code of Civil Procedure provides in this regard that “the parties shall appear in person or through a duly authorized advocate”³³⁰, and stipulates that “[t]he power of representation at law includes the right of appearance, the right to take all procedural steps and to plead for the party, and the right to speak on his behalf”³³¹. Thus there was nothing in law to prevent Mr. Diallo from authorizing one or more representatives to participate in the legal proceedings commenced on behalf of the companies managed by him, or indeed to institute new proceedings in other disputes, even after he had been removed from Zairean territory.

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3.26. There is, moreover, a substantial practice in this regard, which confirms that these procedural rules are effectively reflected in practice. The Democratic Republic of the Congo will not at this stage set out the numerous examples which demonstrate that it is possible to conduct legal proceedings from outside the country, through the intermediary of advocates or representatives *ad litem*. It is sufficient to examine the actual evidence in the disputes between the companies managed by Mr. Diallo and certain of their trading partners in order to appreciate that Guinea’s argument on this point is wrong.

3.27. In this regard the Democratic Republic of the Congo would point out that the legal proceedings commenced in 1993 and 1995 by Africontainers-Zaire and Africom-Zaire against Fina, Shell and PLZ have continued to pursue their course since then. The precise stages reached in these cases will be stated when the issue of the effectiveness of the remedies is addressed. At this point it suffices to say that

- in one of these cases (*Africontainers-Zaire v. Shell*), a decision was rendered by the Kinshasa-Gombe Court of Appeal several years after Mr. Diallo’s departure from Zairean territory, namely on 20 June 2002³³²;
- the two other cases (*Africom-Zaire v. PLZ* and *Africontainers-Zaire v. Fina*) are still pending before the Supreme Court of Justice, and remain entered on its List³³³.

It is thus clear that the proceedings already instituted by Mr. Diallo on behalf of the companies managed by him have not been suspended because of his removal from the national territory.

3.28. Certain of the evidence on file shows, moreover, that Mr. Diallo was in a position, even after he had been obliged to leave Zairean territory, not only to have his companies represented in the proceedings already pending, but also to continue negotiations and, if necessary, to commence new proceedings before the Zairean — then Congolese — courts having jurisdiction in the other pending proceedings.

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³³⁰Code of Civil Procedure of the Congo, Art. 14, para. 1.

³³¹*Ibid.*, para. 3.

³³²POC, Ann. 64; see above, paras. 1.37 *et seq.*

³³³See above, paras. 148 *et seq.* and paras. 1.30 *et seq.*

3.29. The Democratic Republic of the Congo would note particularly in this regard that Africontainers-Zaire continued to participate in negotiations with Gécamines until October 1997, that is to say more than a year-and-a-half after Mr. Diallo's expulsion. The nature of the representatives of Africontainers-Zaire at these meetings is particularly noteworthy. Thus it appears from the minutes of the meetings held at the headquarters of Gécamines on 2 and 7 July 1997 that Africontainers-Zaire was represented there by two members of its senior management (Messrs. Kanza Ne Kongo and Ibrahim Diallo), *as well as by two Congolese lawyers* (Maîtres Musangu and Kabasele)³³⁴. Negotiations between these same parties were again organized in September and October 1997³³⁵, but no result could be reached, since the representatives appointed by Mr. Diallo had ceased to attend. It would certainly appear reasonable to ask oneself why, if the interests of Africontainers-Zaire could be defended by two lawyers in commercial negotiations, they could not also have been so defended before the courts.

3.30. The Democratic Republic of the Congo likewise notes that a third lawyer, Maître Alpha O. Diallo, intervened as counsel for Mr. Diallo and was evidently responsible for the preparation of the Memorial filed by the Republic of Guinea by way of supplement to the Application filed by that State with the Court in December 1998³³⁶. The involvement of this Guinean advocate in the case, where he acted for a significant period as Mr. Diallo's counsel, is moreover amply confirmed by the various documents reproduced by the Republic of Guinea in the volume of annexes appended in its Memorial³³⁷.

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3.31. The argument that these remedies were inaccessible to the companies Africontainers-Zaire and Africom-Zaire, acting under Mr. Diallo's direction, thus appears to be clearly unfounded. The same applies to the Republic of Guinea's contention that Mr. Diallo's alleged lack of financial means in practice prevented him from bringing new proceedings.

B. Mr. Diallo's financial situation did not prevent him from having himself represented before the Zairean courts

3.32. The Republic of Guinea emphasizes the material poverty in which Mr. Diallo allegedly found himself following his removal from the territory, the effect of which is claimed to have deprived him of any possibility of access to the Zairean courts; thus it stresses in this regard: "the state of extreme poverty into which the internationally wrongful acts of the DRC itself had plunged Mr. Diallo, who found it materially impossible to initiate further, evidently costly, proceedings, or even to provide for his basic needs . . ." ³³⁸. The applicant State accordingly concludes that it was impossible for Mr. Diallo to exhaust the local remedies existing within the Zairean legal order³³⁹.

³³⁴MG, Anns. 224 and 226.

³³⁵See the letter of 26 September 1997 from Gécamines to Africontainers, acknowledged on the 29th of that month (POC, Ann. 7).

³³⁶The first page of this document includes the following: "By: the Republic of Guinea, as protector of its national, Mr. Diallo Ahmadou Sadio . . . [i]nvestor of Guinean nationality, protected by the State of Guinea, advised by Maître Alpha O. Diallo." This form of words thus leaves a certain doubt as to whether it is as counsel to Mr. Diallo (rather than as counsel to the Guinean State) that the lawyer intervenes in these proceedings. However, the involvement of Maître Alpha O. Diallo in prior phases of the dispute (see on this point the following footnote) clearly shows that he initially took part as personal counsel to Mr. Diallo. This at the very least suggests that Mr. Diallo is perhaps playing a certain role in the organization of the defence of the Republic of Guinea in the present proceedings.

³³⁷See, for example, the two letters of 4 February 1998 to the President and the Minister of Justice of the Democratic Republic of the Congo, and the two letters of 16 March 1998 to the same individuals, mentioning the possibility of an ICSID arbitration (MG, Anns. 245, 246, 248 and 249).

³³⁸MG, para. 4.77.

³³⁹MG, para. 4.81, *in fine*.

3.33. Guinea's argument is not supported by any serious reasoning, if indeed any reasoning at all. Mr. Diallo's alleged "extreme poverty", the fact that it was "materially impossible to initiate further proceedings" or even "to provide for his basic needs", are mere assertions made without any other form of substantiation, or indeed reference to evidence. And the applicant State has likewise failed to demonstrate the existence of any legal rule introducing a further exception to the basic principle of exhaustion of local remedies.

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3.34. As to the strictly factual aspects of Guinea's argument, there is absolutely nothing to show that Mr. Diallo found himself in a "state of extreme poverty" from the month of January 1996. Nor, moreover, is there any presumption decisively favouring such a view. On the contrary, Mr. Diallo's financial situation does not appear to have constituted an obstacle to the involvement of two counsel in the above-mentioned negotiations, and of a third lawyer in the preparation of the argument developed by the Republic of Guinea with a view to espousing Mr. Diallo's claim. Thus the Republic of Guinea appears to have peculiarly little foundation for its invocation of this circumstance in its attempt to justify Mr. Diallo's non-exhaustion of international remedies by arguing that it was materially impossible for him to obtain access to such remedies. The facts clearly contradict this proposition.

3.35. In any event, even supposing that it were proven — *quod non* — Mr. Diallo's lack of means could not, in law, justify his failure to exhaust the legal remedies which the Congolese domestic legal order placed and continues to place at his disposal. On the contrary, it is clear that the principle that such a defence cannot be validly invoked in this regard is solidly rooted in international law. As is stated in one of the principal reference works on the issue of exhaustion of local remedies:

“[i]t has been confirmed on more than one occasion that lack of pecuniary means on the part of the alien claimant or individual does not constitute a valid reason for not pursuing local remedies . . . In the area of human rights protection the same rule has been applied.”³⁴⁰

The author bases himself on jurisprudence from which it can very clearly be deduced that, even where the plaintiff finds himself in a difficult financial situation, the obligation to exhaust local remedies continues to apply³⁴¹. It is moreover significant that the Republic of Guinea itself cites *not a single* legal authority in support of its claim that such a situation is recognized as capable of excluding application of the rule. It is, on the contrary, well established that, in general international law, lack of financial means does not constitute a justification for the non-exhaustion of local remedies.

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3.36. It is thus futile for the Republic of Guinea to seek to rely on this defence in an attempt to escape the application of the rule in this case. Neither Mr. Diallo's "extreme lack of means", which is contradicted by many documents in the case file, nor the exception to the obligation to exhaust local remedies which is claimed to flow from it, have begun to be proved. Guinea's defence demonstrates rather the unease which it clearly feels on account of the negligence of its national, or rather of the strategy of a businessman which consists in presenting himself as a victim and at the same time refusing to have recourse to the remedies available to him.

3.37. In more general terms, again as regards the issue of the accessibility of the remedies existing within its domestic legal order, the Democratic Republic of the Congo notes that, despite

³⁴⁰C. F. Amerasinghe, *Local Remedies in International Law*, *op. cit.*, p. 212 and the references cited.

³⁴¹*Ibid.*

the very substantial disturbances which have affected the country since 1996, the domestic courts have never ceased to function. The numerous judicial decisions handed down during that period are sufficient evidence of this³⁴². It cannot be denied that the circumstances of civil war, then of international conflict, experienced by the Congo in the course of recent years have on occasion had a negative impact on the effective and timely functioning of the courts. This factual situation has not, however, had the effect of rendering any local remedy inaccessible. This applies particularly to the disputes at issue in the present proceedings, which have been, or which could have been, brought before courts having their seat in the country's capital. Thus each of the companies involved in these proceedings has its headquarters at Kinshasa, permitting them, in accordance with Congolese procedural law, to bring their cases before the courts of that city. In this regard, it should be recalled that the direct effects of the war, with the exception of a very short period of a few days in August 1998, never affected the city of Kinshasa. The courts of that jurisdiction continued in any event to function without any particular impediment. Thus it would likewise serve no purpose for the Republic of Guinea to cite that circumstance in order to justify the non-exhaustion of local remedies by Africom-Zaire or Africontainers-Zaire, by claiming that those remedies were not accessible during the period in question.

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3.38. The remedies existing within the Zairean legal order have always been, and have at all times remained, fully accessible to Mr. Diallo so as to enable him to safeguard his rights and those of the companies managed by him. That conclusion is founded both on the legal position (the right to institute legal proceedings before the Zairean courts without being present within the country's territory) and on more practical considerations, drawn from the case file itself. The fact that Africontainers-Zaire continued to be represented by Zairean lawyers until autumn 1997 shows clearly that Mr. Diallo and the companies managed by him had the means to protect their rights, even after the latter was obliged to leave Zairean territory. The argument that Mr. Diallo's removal from the territory made it impossible for him to have recourse to the legal remedies existing within the Zairean legal order manifestly lacks any serious foundation and cannot therefore be upheld. The same applies to the second head of criticism formulated by the Republic of Guinea in regard to those remedies, namely that Mr. Diallo was not required to exhaust them because they were ineffective.

³⁴²See, *inter alia*, by way of example, the various decisions referred to in the present pleading.

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Section 3. The Republic of Guinea has not shown that the existing remedies under the Zairean, then Congolese, legal order were or are ineffective

3.39. In its pleadings the Republic of Guinea has not confined itself to challenging the accessibility of local remedies within the Zairean legal order. It has also insistently disputed the effectiveness of such remedies. In this regard the applicant State emphasizes *inter alia* the fact that the Zairean political authorities suspended in an unjustified and arbitrary manner enforcement of the judgment of the Kinshasa-Gombe *Tribunal de grande instance* awarding damages to Africontainers-Zaire against Shell³⁴³. This, according to Guinea's argument, is an example of an unlawful practice, precluding the application of the rule of the exhaustion of local remedies³⁴⁴. The Republic of Guinea also argues that "[v]arious other judicial proceedings brought by Mr. Diallo on behalf of Africontainers-Zaire or Africom-Zaire produced no result"³⁴⁵. That is claimed to be the case in the proceedings between Africontainers-Zaire and Fina, where it is said "no action has been taken" on an application for cassation filed by Africontainers-Zaire in 1994³⁴⁶. A similar claim is made in regard to the case of *Africom-Zaire v. PLZ*, which is said to illustrate the "deficiencies of Zairean justice"³⁴⁷. The applicant State accordingly concludes in regard to these three cases that, "even if the courts had found in his favour, Mr. Diallo had scant hope of achieving a satisfactory judicial settlement of his disputes with his trading partners"³⁴⁸. The Republic of Guinea regards this as a sufficient ground for considering that in this case the requirement of the exhaustion of local remedies has been met, since this does not require recourse to "a remedy which manifestly has no chance of success"³⁴⁹.

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3.40. The applicant State likewise cites the non-judicial remedies to which Mr. Diallo had recourse and their lack of success. In this regard the Republic of Guinea recalls the various approaches made to the Zairean political and administrative authorities with a view to recovering the debts owed to Africom-Zaire and Africontainers-Zaire. Here again the applicant State, noting that "[a]ll these steps failed to produce any result", accordingly concludes that the remedies existing within the Zairean legal order, whether judicial or non-judicial, are ineffective³⁵⁰.

3.41. Notwithstanding these various arguments, the applicant State is far from having shown in a convincing and serious manner that Zairean local remedies could not be regarded as effective within the meaning of international law and that, hence, their exhaustion was not required in the present case. The conclusions reached by the Republic of Guinea on this point appear particularly hasty and cannot withstand a serious examination of how the Zairean, and subsequently Congolese, judicial institutions operated in practice, from which it can be seen that the remedies available were not only in existence and accessible, but also effective. For this purpose, the Democratic Republic of the Congo will apply the criteria of effectiveness generally accepted in international law. Our position will therefore be, for purposes of the present analysis, that a remedy must be regarded as effective if it enables the plaintiff to protect his rights without being deprived of all chance of

³⁴³MG, paras. 4.71 and 4.72.

³⁴⁴*Ibid.*, para. 4.78.

³⁴⁵*Ibid.*, para. 4.73.

³⁴⁶*Ibid.*

³⁴⁷*Ibid.*, para. 4.74.

³⁴⁸*Ibid.*

³⁴⁹*Ibid.*

³⁵⁰*Ibid.*, para. 4.77.

success³⁵¹, and appears adequate for the object sought by the plaintiff³⁵². Of course, despite what the applicant State appears to suggest, the “effectiveness” of a remedy in no sense implies that the plaintiff will necessarily succeed in every one of his claims. It does not mean that anyone having recourse to the available remedies will be ensured of success, but that they have a chance of success. It is thus, as far as possible, by reference to the results achieved in other similar cases brought before the Congolese courts that the effectiveness of the remedies in question will be assessed in the following pages.

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3.42. Having clarified this point, the Democratic Republic of the Congo will now show that there is nothing which would enable it to be said that the remedies available within the Zairean, and subsequently Congolese, legal order were ineffective within the meaning of international law. This applies as much to the legal proceedings instituted by Africontainers-Zaire and Africom-Zaire (A) as to disputes which were never submitted to the Zairean, then Congolese, judicial authorities (B), including the expulsion order made against Mr. Diallo (C).

A. The local remedies available under the Zairean legal order were effective as regards the disputes submitted to the courts by Africontainers-Zaire and Africom-Zaire

3.43. As the Democratic Republic of the Congo has already explained³⁵³, the companies managed by Mr. Diallo were involved in three sets of proceedings before the Zairean courts. The first of these was between Africontainers-Zaire and Fina and concerned the loss by the oil company of two containers belonging to Africontainers-Zaire. The second was between Africontainers-Zaire and Shell-Zaire and concerned a debt which the former claimed was owed to it by the latter under the tripartite contract of 1983. The third case was between PLZ and Africom-Zaire and concerned the lease of the apartment occupied by Mr. Diallo in Kinshasa. The outcome of these cases shows that the legal remedies existing within the Zairean legal order must be regarded as effective in light of the criteria identified by international law in the matter. This conclusion applies to each of the above-mentioned cases.

3.44. Before addressing them individually, we would observe that, in each of these three cases, the court seised at first instance upheld the claims of Africom-Zaire and Africontainers-Zaire and made an order for damages against the defendant companies³⁵⁴. The Applicant can hardly therefore plead that these remedies were ineffective at that stage of the proceedings. It is true that these three cases subsequently underwent further, sometimes complex, procedural developments. However, there is nothing in the subsequent course of these proceedings that would justify the conclusion that the remedies offered by Zaire’s domestic legal order were ineffective. This applies both to the case of *Africontainers-Zaire v. Shell* (1) and to the cases of *Africontainers-Zaire v. Fina* (2) and *PLZ v. Africom-Zaire* (3).

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1. Local remedies proved effective in the case of *Africontainers-Zaire v. Shell*

3.45. In the case of *Africontainers-Zaire v. Shell*, the judgment rendered on 3 July 1995 by the Kinshasa-Gombe *Tribunal de grande instance* was appealed by the defendant company, which had been ordered to pay substantial damages at first instance. Notwithstanding this appeal, steps

³⁵¹See, *inter alia*, Third Report of J. Dugard on Diplomatic Protection, 2002, para. 20; A. Pellet and P. Daillier (Nguyen Quoc Dinh), *Droit international public*, 6th ed., *op. cit.*, p. 776, No. 490; I. Brownlie, *Principles of Public International Law*, 5th ed., *op. cit.*, p. 500.

³⁵²C. F. Amerasinghe, *Local Remedies in International Law*, *op. cit.*, p. 171.

³⁵³See above, Chapter I and the references cited in footnote 316.

³⁵⁴*Ibid.*

were taken to execute the first instance judgment, and their implementation resulted in various procedural incidents, to which the Democratic Republic of the Congo will return later³⁵⁵. The appeal decision, given on 22 June 2002 by the Kinshasa-Gombe Court of Appeal, confirmed the ruling against Shell, although it reduced the amount of the damages payable to Africontainers-Zaire to an amount significantly less than that awarded at first instance, on grounds of lack of evidence in support of the plaintiff company's original claim³⁵⁶. Thus the proceedings ultimately enabled Africontainers-Zaire to win its case before the Congolese domestic courts. This clearly confirms the effectiveness of Congolese domestic proceedings, since they enabled Africontainers-Zaire effectively to enforce its rights, despite the fact that Mr. Diallo was at the time absent from Congolese territory.

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3.46. This conclusion cannot be affected by the fact that the plaintiff company did not ultimately obtain from the courts the total amount that it was claiming. Quite apart from the fact that this reduction in its financial claims was manifestly justified in light of the evidence in the case, it should be recalled that the criterion of the effectiveness of local remedies cannot mean that a private individual whose claim a State wishes subsequently to espouse must necessarily win his case before the local courts, irrespective of whether his claim is well founded. The essence of the judicial function consists specifically in determining to what extent the claims of the parties to the proceedings are properly founded and in deciding the dispute accordingly. In other words, there can clearly be no question of contesting the effectiveness of local remedies simply because the plaintiff's initial claims were not upheld in full. What is significant here is the fact that the existing legal procedures within the Democratic Republic of the Congo enabled the respondent company to safeguard its rights, and clearly cannot be said to offer no chance of success.

3.47. However, independently of the actual result of these proceedings, the Republic of Guinea challenges the effectiveness of Zairean local remedies on the grounds of the difficulties encountered by Africontainers-Zaire in its attempts to enforce the judgment given in its favour by the Kinshasa-Gombe *Tribunal de grande instance* in July 1995. The applicant State contends in this regard that the Vice-Minister of Justice instructed the bailiff responsible to suspend the seizure of Shell's property. The effect of this, according to the Memorial, was that the judgment "would never be enforced"³⁵⁷. More specifically, the Republic of Guinea contends that:

"[s]uch an act, which contravenes the principle of the separation of powers, also sets at naught the principle of *res judicata*, which represents the authority underlying any decision of the courts . . . Such an act was all the more likely to extinguish any hope that Mr. Diallo might have had of achieving a judicial settlement of his many legal proceedings in that it was not an isolated occurrence. The enforcement of the court's decision was similarly blocked by the then Prime Minister in person, Mr Kengo wa Dondo, in October 1995."³⁵⁸

The Zairean head of Government is moreover likewise accused, in another passage in the Guinean pleadings, of having given the "order to rescind the warrant for the seizure of Zaire-Shell's assets"³⁵⁹. It is these circumstances which lead the applicant State to the more general conclusion that the alleged impediments to the enforcement of the decision of July 1995 reflect an "unlawful

³⁵⁵See below, para. 3.49

³⁵⁶See above, paras. 1.37 *et seq.*

³⁵⁷MG, para. 4.71.

³⁵⁸*Ibid.*, para. 4.72.

³⁵⁹*Ibid.*, para. 4.79.

administrative practice”, the existence of which justifies³⁶⁰ the fact that in this case the local remedies under the Zairean legal order were not exhausted — or indeed even utilized — by Mr. Diallo.

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3.48. This view of matters requires serious qualification, being manifestly mistaken on a number of points and totally unfounded on others. Thus the Republic of Guinea is quite wrong when it states that the judgment rejecting the application by Shell to prevent execution of the judgment rendered by the Kinshasa-Gombe *Tribunal de grande instance* on 3 July 1995 “would never be enforced”, as a result of the instruction given by the Vice-Minister of Justice, during a previous attempted execution, “for the property to be left in place”. This assertion is in fact contradicted by the actual course of events. The Democratic Republic of the Congo would recall in this regard that, while the Vice-Minister of Justice did indeed issue a decision causing the execution carried out on 13 September 1995 to be suspended³⁶¹, that suspension was of very short duration. Thus the Minister of Justice rapidly requested the president of the Court of Appeal to “take the necessary measures to execute” the above-mentioned judgment of the Court of Appeal, on the ground that, following a careful examination of that decision, it was evident “that there [was] no manifest error”³⁶². And, very significantly, execution recommenced a short time later, as is shown by, *inter alia*, the report on the execution levied on the assets of Shell dated 6 October 1995³⁶³. Similarly, an attachment order was issued against Shell’s bank accounts during the same period, as is shown by the minutes of the meeting between the parties at the offices of the Inspectorate-General of Courts [*Inspectorat Général des cours et tribunaux*]³⁶⁴. It is thus clearly wrong to claim, as the Republic of Guinea does, that this decision was never enforced.

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3.49. The other assertions by the applicant State in this regard are for their part totally unfounded. This is particularly so in the case of the accusations that the Zairean Prime Minister at the time, Mr. Kengo wa Dondo, had prevented enforcement of the judicial decision in question or ordered the withdrawal of the warrant of execution on the goods of Shell. These charges are not backed up by any document in the file, and are again contradicted by the very fact that execution was indeed levied on property of Shell in October 1995. The passages in Guinea’s pleadings referred to in the paragraphs in which these charges are laid contain no mention whatever of any instrument issued by the then Prime Minister of Zaire in order to block execution of the judgment in question, or to secure the release of the property already seized. The charges made on this point by the Republic of Guinea in paragraphs 4.72, 4.78 and 4.79 of its Memorial are supported by references to paragraphs 2.63 to 2.72, as well as to other unspecified paragraphs³⁶⁵. But paragraphs 2.63 to 2.72 deal with the detention and expulsion of Mr. Diallo, and not with any decision by the then Prime Minister of Zaire in connection with execution of the judicial decision in question on the property of Shell. Thus the file as it stands contains no evidence whatever of any “unlawful administrative practice”, suffered by Mr. Diallo. None of the arguments relied on in this regard by the Republic of Guinea can be upheld, the applicant State’s claims being either contradicted by the facts themselves or totally without foundation.

³⁶⁰MG, para. 4.78.

³⁶¹See the Bailiff’s Report, MG, Ann. 171.

³⁶²Letter of 28 September 1995, MG, Ann. 177.

³⁶³This report is moreover produced by the applicant State itself (MG, Ann. 179).

³⁶⁴See the summary record of 11 October 1995, POC, Ann. 72.

³⁶⁵The Democratic Republic of the Congo has so far been unable to identify the other paragraphs referred to in footnote 273. We shall doubtless be able to continue the judicial debate on this point once the Republic of Guinea has provided additional information in this regard.

3.50. Lastly, and in any event, it should be noted that there is express provision in Zairean law for the executive power to play a role in the enforcement of judicial decisions. Thus, in response to certain criticisms, in particular by foreign investors, of the operation of the Congolese judicial system, the Democratic Republic of the Congo has created an *ad hoc* administrative body, the Inspectorate-General of Courts [*Inspectorat Général des services judiciaires*], consisting exclusively of senior members of the judiciary, whose task is to review the regularity of certain judicial decisions notified to it. Thus, when the enforcement of a judicial decision is liable to provoke social unrest or to lead to serious public disorder, the Minister of Justice can suspend its enforcement and request the Inspectorate-General of Courts to review it. After hearing all the parties and the judge or judges who gave the decision in question, the Inspectorate sends a report to the Minister of Justice. In light of this report, the Minister of Justice may either withdraw the suspension and permit enforcement of the decision to continue or maintain the suspension in force and invite the parties, in the case of a final decision, to negotiate a settlement under the guidance of senior members of the judiciary with a view to safeguarding certain national interests and interests of the parties concerned. This type of procedure, which is moreover to be found in a number of African States, is thus in no way contrary to the principle of the separation of powers as it is conceived of in that part of the world, and the Democratic Republic of the Congo can only express its surprise at the criticisms of the applicant State in this regard. There can in any event be no question here of an unlawful administrative practice, this being, on the contrary, a practice provided for and defined by law.

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3.51. It follows clearly from these elements of fact and law that the Republic of Guinea has been unable convincingly to establish that there was in this case any unlawful administrative practice which would have justified Mr. Diallo's failure to exhaust local remedies on the ground that such remedies must be regarded as ineffective. The Democratic Republic of the Congo will likewise now show that, despite the fact that the other legal proceedings commenced by Africontainers-Zaire have so far not achieved a final settlement, there is nothing to indicate, in their respect either, that the local remedies sought should be regarded as ineffective.

2. Local remedies proved effective in the case of *Africontainers-Zaire v. Fina*

3.52. In the case of *Africontainers-Zaire v. Fina*, Africontainers-Zaire once again succeeded at first instance. Thus, by a judgment of 12 August 1993, the Kinshasa-Gombe *Tribunal de grande instance* ordered the defendant company to pay substantial damages following the loss in the River Zaire of two containers belonging to Africontainers-Zaire³⁶⁶. That decision was, however, reversed by a judgment given on 24 November 1994 by the Court of Appeal of the same jurisdiction³⁶⁷. Africontainers-Zaire then, on 23 February 1995, filed an application for cassation of this latter decision. That application is currently pending before the Supreme Court of Justice³⁶⁸. It should however be noted that there have been certain developments since the application was filed, the *Ministère public* having in the meantime filed his submissions in the case³⁶⁹. It should be noted that the submissions are in favour of cassation, thus of a reopening of the proceedings on the merits. Here again, even if the Supreme Court of Justice has not yet ruled on this case, there is thus nothing to indicate that the existing procedures within the legal order of the Democratic Republic of the Congo offer no chance of success, and are not capable of enabling Africontainers-Zaire or Mr. Diallo to defend their rights against their trading partners. On the contrary, the above-mentioned submissions of the *Ministère public* show very clearly that the plaintiffs' chances of success in such proceedings are real and effective.

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³⁶⁶POC, Ann. 53.

³⁶⁷*Ibid.*, Ann. 54.

³⁶⁸See above, para. 1.33.

³⁶⁹MG, Ann. 149.

3.53. Notwithstanding those submissions, the Republic of Guinea appears to dispute the effectiveness of the remedies just referred to on account of the time which has elapsed since the application for cassation was filed against the decision of the Kinshasa-Gombe Court of Appeal. Thus seven years have gone by since that decision was handed down and the Supreme Court of Justice has still not ruled on the application.

3.54. The Democratic Republic of the Congo does not dispute that particularly long delays can render local remedies ineffective. Thus it is widely accepted that, where it is impossible to have a dispute decided within a reasonable period, that can render a claim before the local courts pointless or futile³⁷⁰. In such cases local remedies cannot be considered effective and their exhaustion is not required in order to make it possible for the claim of a private individual alleging injury to be taken up at international level. In view of the particular situation in which the Democratic Republic of the Congo has found itself for some years, it would not, however, appear that the duration of the proceedings in the case between Africontainers-Zaire and Fina has gone beyond what may be regarded as reasonable.

3.55. First, it is clear that a delay of a few years is not *prima facie* long enough to be problematic in relation to the norms generally accepted in international law. In this regard the Democratic Republic of the Congo notes that, in the *Interhandel* case, the Court did not consider that a period of ten years between the commencement of proceedings by the Swiss company before the United States courts and the date when the case, after being taken as far as the Supreme Court, was referred back to the American courts of first instance represented an unreasonable delay which should lead it to conclude that the remedies offered by the legal order of the United States must be regarded as ineffective³⁷¹. In the present case we are still a long way off a delay of ten years.

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3.56. Moreover, it is clear that the notion of a reasonable period cannot be determined in a rigid manner, by reference to predetermined periods, including in relation to the subject-matter with which we are concerned here³⁷². In this regard it should be recalled that the Supreme Court of Justice of the Democratic Republic of the Congo receives appeals against decisions from all of the courts in the Congo's immense territory, irrespective of the subject-matter, whether civil, commercial or criminal. Each of these applications must be examined individually, with proper respect for the rights of the respondent, which in practice involves what may appear to be lengthy delays between the filing of the application and the rendering of the decision.

3.57. In these circumstances, it is clear that a delay of seven years cannot be regarded as excessive, to the extent that the remedies existing within the Congolese domestic legal order should, on this sole account, be considered ineffective. These conclusions can moreover largely be applied to the third case, between Africom-Zaire and PLZ, which presents a profile similar to that of the case which we have just discussed.

³⁷⁰See *inter alia* C. F. Amerasinghe, *Local Remedies in International Law*, *op. cit.*, pp. 203 and 205; see also the draft Article 14 (e) of the Draft Articles on Diplomatic Protection proposed by the Special Rapporteur, John Dugard, in his third report, 2002.

³⁷¹*I.C.J. Reports 1959*, pp. 18 and 26.

³⁷²See *inter alia* Olivier Corten, *L'utilisation du "raisonnable" par le juge international*, Brussels, Bruylant, 1997, p. 433 and the decisions cited therein; C. F. Amerasinghe, *Local Remedies in International Law*, *op. cit.*, pp. 205 and 206.

3. Local remedies proved effective in the case of *Africom-Zaire v. PLZ*

3.58. In the case of *PLZ v. Africom-Zaire*, the Kinshasa-Gombe *Tribunal de grande instance* upheld the counter-claim by Africom-Zaire against the plaintiff company, and by judgment of 24 August 1993³⁷³ ordered the latter to pay substantial damages. PLZ appealed against this decision, which was reversed by the Kinshasa-Gombe Court of Appeal on 9 March 1994³⁷⁴. At the same time the Court of Appeal ordered Africom-Zaire to pay damages to the plaintiff company. Africom-Zaire then, on 26 August 1994, filed an application for cassation of that decision. Currently, this case is still pending before the Supreme Court of Justice. As in the case between Africontainers-Zaire and Fina, the *Ministère public* has filed his submissions which, here too, recommend cassation of the Court of Appeal judgment³⁷⁵.

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3.59. In view of the course which these proceedings have taken, there is thus no reason, in this case either, to question the effectiveness of the remedies open to Mr. Diallo, acting on behalf of the companies managed by him. As with the other proceedings analysed in this section, there is nothing to suggest that existing procedures offered no chance of success. The submissions of the *Ministère public*, while clearly not binding on the Supreme Court of Justice, should rather lead to the opposite conclusion. And, even if the delay of the Supreme Court of the Democratic Republic of the Congo in ruling on the application slightly exceeds that noted in the case of *Africontainers-Zaire v. Fina*, it nonetheless does not exceed the accepted norms in this regard, as recalled above, in particular in the specific circumstances prevailing in the Democratic Republic of the Congo.

3.60. In conclusion, analysis of the decisions rendered in the three disputes where legal proceedings have been undertaken by no means leads to the conclusion that the legal remedies open to Africom-Zaire and Africontainers-Zaire should be regarded as ineffective. Our analysis shows, on the contrary, that these procedures offered, and continue to offer, real chances of success to the plaintiffs, subject of course to their claims being founded on firm and properly established grounds. In light of the course of the proceedings in these three cases, Guinea's argument that the remedies available in Zaire, and then in the Democratic Republic of the Congo, should be regarded as futile because of their ineffectiveness, cannot be upheld. The same conclusion applies, moreover, to the commercial disputes in respect of which Africom-Zaire and Africontainers-Zaire did not see fit to commence legal proceedings in order to secure compensation for the various contractual breaches which they claim to have suffered.

B. The local remedies within the Zairean legal order could have been effective for the commercial disputes which Mr. Diallo, or the companies managed by him, did not see fit to submit to the local courts

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3.61. As the Democratic Republic of the Congo has already explained, the companies managed by Mr. Diallo are involved in a considerable number of disputes with various trading partners, and also with the Zairean State itself³⁷⁶. However, as far as the present proceedings are concerned, legal proceedings of the type described in the preceding pages represent the exception. In respect of the majority of these disputes, Africontainers-Zaire and Africom-Zaire have long

³⁷³See above, paras. 1.48 *et seq.*

³⁷⁴*Ibid.*

³⁷⁵MG, Ann. 146.

³⁷⁶See above, paras. 1.08 *et seq.*

conducted themselves in a largely passive manner, confining themselves to sending their trading partners payment reminders, or compensation claims of an often exaggerated nature³⁷⁷. Thus, notwithstanding the disputes existing between Africom-Zaire and Africontainers-Zaire and, respectively, the Zairean State, the public undertakings Gécamines and Onatra, and Mobil Oil, no legal proceedings have ever been undertaken by the plaintiff companies, or on their behalf, against these various trading partners.

3.62. However, there is no reason to doubt the effectiveness of the remedies available within the Zairean, and then Congolese, legal order against these entities. In a previous section of these pleadings the Democratic Republic of the Congo has demonstrated the existence within its legal order of remedies capable of being used to engage the responsibility of the Congolese State or of State undertakings such as Gécamines or Onatra, *inter alia* in the context of commercial disputes³⁷⁸. The various precedents cited there show that these remedies are far from being purely formal in nature. They have in fact shown themselves in practice to have been extremely effective for plaintiffs having had recourse to them, since in every instance the latter have succeeded.

— In the *Abdul Karim* case, the Congolese State was ordered by the Kinshasa-Gombe *Tribunal de grande instance* to pay the plaintiff damages amounting to almost 150 million Congolese Francs³⁷⁹.

— In the case of *Soretac v. Gécamines*, the defendant undertaking was likewise ordered to pay damages on account of its non-payment for goods ordered from the plaintiff company. This decision was confirmed on appeal, and property of Gécamines was seized and put up for public sale in execution of the judgment against this public undertaking³⁸⁰.

1 3 2 — Yet again, the ordinary courts before which claims had been brought against Onatra did not hesitate, in the cases of Bokungu Wankota, Kiyoko Botaka and Musungiele Kabamba, to make orders against Onatra for the payment of damages, sometimes of substantial sums, where they considered that the public undertaking had breached its contractual obligations to its trading partners³⁸¹. It should be noted that in these three cases Onatra voluntarily executed the judgments against it³⁸².

These precedents show that there clearly exist within the Congolese domestic legal order effective remedies, which offer real chances of success to plaintiffs seeking to assert, whether against the Congolese State itself or public undertakings, rights deriving from contracts entered into with these various entities.

3.63. In its pleadings the Republic of Guinea has totally failed to demonstrate that there would have been any different outcome to claims brought by Africontainers-Zaire against Gécamines, Onatra and the Zairean State, if the plaintiffs had decided to take them to the Zairean courts. The applicant State's claim that the remedies available against the Zairean State and Zairean public undertakings were not required to be exhausted because of their ineffectiveness must clearly be dismissed.

³⁷⁷See above, paras. 1.35, 1.43 and 1.46.

³⁷⁸See above, paras. 3.12 *et seq.*

³⁷⁹POC, Ann. 2.

³⁸⁰*Ibid.*, Ann. 11.

³⁸¹*Ibid.*, Anns. 34, 36 and 38.

³⁸²*Ibid.*, Anns. 35, 37 and 39.

3.64. The Republic of Guinea appears, however, to claim that local remedies had been validly exhausted, inasmuch as Mr. Diallo had made a number of non-judicial approaches to the Zairean political authorities, and subsequently to the Congolese authorities, with a view to enforcing his claims³⁸³. According to Guinea, it should therefore be considered that this requirement, which covers “both judicial and non-judicial remedies”³⁸⁴, was not breached in this case.

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3.65. This argument cannot be accepted by the Court. While the obligation to exhaust remedies indeed extends to *all* the remedies offered by the law (“legal remedies”), whether judicial or other, this does not weaken the rule, but indeed strengthens it. In other words, the non-exhaustion of judicial remedies cannot be excused by the fact that alternative remedies have been exhausted, and the converse is also true. As the International Law Commission’s Special Rapporteur clearly explained in regard to the issue of diplomatic protection: “‘Legal’ remedies clearly include judicial remedies. The foreign national *must exhaust all the available judicial remedies* provided for in the municipal law of the respondent State.”³⁸⁵ The rule is perfectly clear. While it may be that remedies other than judicial remedies must be exhausted because they represent remedies “offered by the law”, judicial remedies must in any event be exhausted, and this requirement cannot be avoided by reliance on the fact that recourse has been had to non-judicial remedies and failed.

3.66. Finally, the Republic of Guinea has failed in its attempt to show that, following certain non-judicial approaches undertaken by Mr. Diallo, the remedies offered by the Zairean legal order must be regarded as exhausted. In reality, nothing can justify the fact that the existing available judicial remedies were not even explored in several of the cases which Guinea seeks today to submit to this Court’s jurisdiction, in particular those of Africontainers-Zaire with the Zairean State, with the public undertakings Gécamines and Onatra and with Mobil Oil. Here, the existence of non-judicial remedies constitutes not a defence, but an additional requirement which must be satisfied before an international claim may validly be filed. It is from this standpoint that, even in relation to Mr. Diallo’s removal from the territory in the month of January 1996, it must be considered that local remedies have not been exhausted.

C. The local remedies within the Zairean legal order could have been effective in challenging Mr. Diallo’s expulsion order

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3.67. Since his removal from Zairean national territory, Mr. Diallo has never asked the competent authorities to reconsider their position and to permit him to return to the country. The important change of régime which occurred in May 1997, and which was marked by a radical change of leadership and in the internal and external policy of what then became the “Democratic Republic of the Congo”, could at least have raised the hope that decisions taken under the presidency of Marshal Mobutu would be reversed or annulled. Mr. Diallo could have taken this opportunity to ask the new authorities for permission to return to Congolese territory in order finally to settle all of the outstanding disputes with the trading partners of Africom-Zaire and Africontainers-Zaire. Nothing of the sort happened, and Mr. Diallo preferred to make a direct approach to the Guinean authorities in order to seek their espousal of his claim for some US\$ 40 billion against the Democratic Republic of the Congo.

³⁸³See above, para. 3.40.

³⁸⁴MG, p. 99, para. 4.66.

³⁸⁵Second report on diplomatic protection, doc. A/CN.4/514, 28 February 2003, p. 7, para. 13 (emphasis added by the DRC). See *inter alia*, similarly, C. F. Amerasinghe, *Local Remedies in International Law*, op. cit., p. 161; Ian Brownlie, *Principles of Public International Law*, 5th ed., op. cit., p. 499.

3.68. However, while it is clearly distinct from the various commercial disputes just discussed, the order for Mr. Diallo's removal from national territory at the start of the year 1996 could also have been challenged with a prospect of success within the framework of Zaire's domestic legal order. Thus there is a general principle of administrative law whereby it is always possible to approach the authority having taken the measure in question, and if necessary that authority's hierarchical superior, in order to request it to reconsider a decision. True, this is an informal possibility, the procedure for which is not strictly regulated by law, but there can be no doubt that it exists.

3.69. There is moreover a substantial practice in this regard, including in respect of orders to leave the territory issued under the Law of Alien Settlement and Abode [*loi sur l'établissement et le séjour des étrangers*]. At this stage the Democratic Republic of the Congo will confine itself to citing two examples, which clearly demonstrate that it is possible not only to make such an application, but also to succeed in practice.

- A first example is the application made to the National Immigration Commission by a Lebanese national, Mr. Yaghi, against a 1995 order for his removal from Zairean territory³⁸⁶. This application resulted in the withdrawal, the following year, of the expulsion order against the applicant³⁸⁷.
- Mention may also be made of the application by a Belgian national, Mr. Villers, against a 1989 decision to expel him from Zairean territory. This application resulted in a ministerial decree which, in 1996, withdrew the order previously made against the applicant³⁸⁸.

In light of these precedents, it cannot be claimed that no remedy capable of resulting in the effective withdrawal of the order for Mr. Diallo's removal from national territory was available in Zaire, or subsequently in the Democratic Republic of the Congo.

3.70. Just as with the commercial disputes in which the companies managed by Mr. Diallo were involved, the Republic of Guinea is thus not justified in disputing the effectiveness of local remedies in regard to the order removing Mr. Diallo from the territory. Thus the practice shows that there are effective remedies against such decisions, and that such procedures can result in the withdrawal of the original expulsion order. As a standard work puts it:

“The rules require that recourse should be had to all legal remedies available under the local law which are in principle capable of providing an effective and sufficient means of redressing the wrongs for which, on the international plane, the respondent State is alleged to be responsible, *even if those remedies may be regarded as of an extraordinary nature.*”³⁸⁹

Clearly, it is difficult to see what in this case could have prevented Mr. Diallo from undertaking internal proceedings to challenge or reverse a measure which he regarded as unjustified.

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³⁸⁶See the letter of 25 April 1996 from Mr. Yaghi to the Chairman of the Immigration Commission, POC, Ann. 69.

³⁸⁷See letter of 26 August 1996, *ibid.*

³⁸⁸POC, Ann. 68.

³⁸⁹R. Jennings and A. Watts (Eds.), *Oppenheim's International Law*, 9th ed., *op. cit.*, p. 524, note 6, inverted commas omitted, emphasis added by the Democratic Republic of the Congo.

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3.71. Generally, it thus appears that there did exist within the Zairean legal order various effective remedies which would have enabled Mr. Diallo and the companies managed by him effectively to assert their rights. Such remedies were available both against the private companies with which Africontainers-Zaire or Africom-Zaire maintained a commercial relationship and against State undertakings such as Gécamines and Onatra, and against the Zairean State itself. Numerous precedents show that these remedies offer plaintiffs real chances of success, and that they may accordingly be regarded as fully effective for purposes of international law. The Republic of Guinea is thus unjustified in claiming that these remedies were ineffective, and their exhaustion was clearly required for each of the disputes in question. As the Democratic Republic of the Congo has pointed out above, it is the applicant State which bears the burden of proving such ineffectiveness, if it wishes to escape the operation of the requirement of exhaustion of local remedies in a given situation. Clearly, no such proof has been made in the present case.

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Conclusion of Chapter III

3.72. Whether in the course of the 1980s, when the first disputes between Africontainers-Zaire and Africom-Zaire and their trading partners first began to emerge, or in the period following Mr. Diallo's removal from Zairean territory, it is thus clear that there have always existed, and still continue to exist within the Congolese legal order, remedies which would have enabled Mr. Diallo and the companies in question to safeguard their rights. These remedies met, and continue to meet, all the requirements of international law in the matter. In particular, they were always accessible to Mr. Diallo, including after he was obliged to leave Zairean territory. By the same token, those remedies are effective and, as numerous precedents have shown, are by no means deprived in practice of any chance of success. The Republic of Guinea's argument that these remedies were not required to be exhausted in this case because it was impossible in practice for Mr. Diallo to implement them, or because of their alleged ineffectiveness, thus cannot be upheld.

3.73. The parallel drawn by the applicant State between the present case and the conclusion reached in the *Elettronica Sicula S.p.A. (ELSI)* case, where the Court observed that "[i]t is never easy to decide, in a case where there has in fact been much resort to the municipal courts, whether local remedies have truly been 'exhausted'",³⁹⁰ is clearly totally irrelevant. In the present case we are clearly far removed from such a situation. Rather than constant resort to the municipal courts (as was the situation in the *Elettronica Sicula S.p.A. (ELSI)* case, when no less than three parallel proceedings had been undertaken by different litigants, *in the context of one and the same dispute*)³⁹¹, what we find here is rather a systematic under-utilization of the local remedies. Despite a few threats of judicial proceedings, made from time to time to certain of the trading partners of Africontainers-Zaire by the latter's lawyer³⁹², the attitude of Africontainers-Zaire and of Mr. Diallo in several of the cases underlying the present proceedings was marked above all by passivity, and by total inaction at judicial level. In this regard, the Republic of Guinea's claim — supported by scant evidence — that the Zairean courts were ineffective looks like a pathetic excuse, seeking to justify retrospectively such ill-excusable passivity.

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3.74. In reality, this case is precisely one of those where the requirement of exhaustion of local remedies comes into its own, and for whose proper settlement, before the courts best suited and equipped for the purpose, it has always been designed. Thus the present proceedings derive primarily from perfectly straightforward commercial disputes, for which the "natural" and logical forum is of course the domestic courts. It is only in the event that, following recourse to all of these local remedies, the plaintiff has been unable to safeguard his rights, that the Court could entertain such a claim. It is clear that this condition is not met in the present case, and that the Republic of Guinea has been unable to demonstrate convincingly that the remedies available within the Zairean, and subsequently Congolese, legal order did not satisfy the requirements of international law in the matter. There is thus no reason justifying the non-exhaustion — and in several cases, a refusal even to act — of the local remedies available to settle the disputes between Africontainers-Zaire and Africom-Zaire and their trading partners. It is for all of these reasons that the Application submitted by the Republic of Guinea on behalf of Mr. Diallo must be declared inadmissible.

³⁹⁰*I.C.J. Reports 1989*, p. 47, para. 63; cited in para. 4.77 of the Memorial of the Republic of Guinea.

³⁹¹Thus proceedings had been brought in that case by Raytheon (*I.C.J. Reports 1989*, p. 38, paras. 39 and 40), by ELSI (*ibid.*, p. 38, para. 40), and by the trustee in bankruptcy (*ibid.*, p. 39, para. 41).

³⁹²See *inter alia* the letter to Onatra of 18 July 1991 (MG), Ann. 91.

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SUBMISSIONS

The Democratic Republic of the Congo respectfully requests the Court to adjudge and declare that the Application of the Republic of Guinea is inadmissible,

- (1) on the ground that the Republic of Guinea has no status to exercise diplomatic protection in the present proceedings, since its Application seeks essentially to secure reparation for injury suffered on account of the alleged violation of rights of companies not possessing its nationality;
- (2) on the ground that, in any event, neither the companies in question nor Mr. Diallo have exhausted the available and effective local remedies existing in Zaire, and subsequently in the Democratic Republic of the Congo.

1 October 2002

Tshibangu KALALA.
Co-Agent of the Democratic Republic of the Congo
