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INTERNATIONAL COURT OF JUSTICE

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

**OBSERVATIONS OF THE REPUBLIC OF GUINEA
ON THE PRELIMINARY OBJECTIONS OF THE
DEMOCRATIC REPUBLIC OF THE CONGO**

VOLUME II

(Annexes)

7 July 2003

[Translation by the Registry]

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ANNEX OG 1

MEMORANDUM FROM THE COMMERCIAL DIVISION OF GÉCAMINES
DATED 22 APRIL 1982, ON THE CARRIAGE OF PRODUCTS IN LOCAL CONTAINERS

Note to the Secretary General

Re: Transport of our products in local containers

1. Introduction

This memorandum considers the desirability of using local containers for the carriage — to the ports of Matadi and Kalemie — of our products for export.

It follows an offer by the Africontainers company to place at our disposal its containers loaded with lubricants for Gécamines which are discharged into our installations (see Africontainers letter No. MZM/BMM/IN/0023/82 of 19 January 1982 and mission report No. 7,672/DCO/DIR of 4 April 1982, point 2.5).

.....

3. Africontainers offer

The company proposes to place at the disposal of Gécamines empty containers that we could use to ship exportable products to Matadi or Kinshasa (and subsequently perhaps to Kalemie).

Since 1979 it has been shipping lubricants in containers — on behalf of Fina, Mobil and Shell — to Gécamines.

.....

As the carriage costs of returning the empty containers are very high, Africontainers is seeking to make the operation profitable by concluding a service contract with Gécamines.

.....

7. Conclusion

Gécamines has been endeavouring for some time to improve the local carriage of its products so that they are brought to market in the best possible condition.

Containerization, even in local containers, would greatly facilitate transport operations. It is technically and administratively feasible; the tonnage required is available and actually exceeds the capacity offered.

The cost of the operation remains the major problem.

But it should already be noted that, in view of the facilities and maintenance time resulting from containerization, it is quite likely that a request for a reduction in rates may be made to the local carriers in the future.

We hereby request your comments on this means of transport and on the offer made by Africontainers, so that we may possibly engage in discussions with the company on the practical details and costs of its service.

ANNEX OG 2

**INVOICE NO. 11 OF 8 SEPTEMBER 1983 IN AN AMOUNT OF Z 132,530,000 FROM
AFRICOM-ZAIRE TO THE FINANCE AND BUDGET DEPARTMENT —
INFORMATION TECHNOLOGY DIRECTORATE**

Ref. No.	Number	Article	Net unit price Z	Total net amount Z
1 Ex.	2,500,000	Lined listing paper for computers (40 cm x 28 cm) specially designed for computers in tropical countries; storable for 12 years without deterioration	23.00	57,500,000
2 Ex.	1,120,000	Listing paper for computers	31.50	35,280,000
3 Ex.	600,000	Listing paper for computers	42.95	25,770,000
4 Ex.	300,000	Listing paper for computers	46.40	13,980,000
		Total		132,530,000
One hundred and thirty-two million five hundred and thirty thousand zaires				
		Articles imported by air		
	<p>N.B. In the event of a devaluation, prices to be adjusted to take account of the exchange rate in force. In the event of currency fluctuation, prices to be adjusted in line with the exchange rate in force each day.</p> <p>(See Decision No. 82/CAB/FIN & Budget/83 of 16 December 1983, done at Kinshasa)</p>			<p>(Signed) [illegible]</p> <p>Commercial Department</p>

ANNEX OG 3

LETTER NO. 1277 OF 30 DECEMBER 1983 FROM THE FINANCE AND BUDGET DEPARTMENT —
STATE DEPOSITORY AND PRINTING DIRECTORATE —
TO THE STATE COMMISSIONER FOR THE BUDGET

Re: Transmission of Africom-Zaire file for payment

Sir,

Further to my letter No. 1269/CH.M./M.G.I.-SAMAFOS/83 of 27 December 1983 concerning the price quotation for the order placed with Africom-Zaire, the supplier has acknowledged that my objection was justified (see its letter No. DAS/KK/058/83 of 27 December 1983).

It agreed to maintain the quotation of 8 September 1983 and supplied additional cartons of tabulating paper as follows:

- To 50 cartons (1 ex) @ Z 1,150,000, it added 200 cartons;
 - To 47 cartons (2 ex) @ Z 1,464,750, it added 186 cartons;
 - To 60 cartons (3 ex) @ Z 1,288,500, it added 240 cartons;
 - To 60 cartons (4 ex) @ Z 1,398,000, it added 240 cartons.
- As the doubts regarding this file have now been dispelled, I hereby transmit for payment the Africom-Zaire file comprising:
- Its invoice No. 014/83 of 20 December 1983 in an amount of Z 5,301,250 (five million three hundred and one thousand two hundred and fifty zaires).

(Signed) [illegible]

ANNEX OG 4

6 SEPTEMBER 1984

**INTERNAL LETTER OF GÉCAMINES ON THE IMMOBILIZATION
OF AFRICONTAINERS CONTAINERS**

We have just received two letters in which Africontainers draws our attention to some regrettable irregularities in the use of the containers.

According to Africontainers, two containers that arrived in the Kolwezi oil depot in February 1984 but were destined for Gécamines-Kipushi were not re-despatched until the end of June 1984. Meanwhile those two containers, 526 428 and 526 403, lay forgotten in Luilu for almost four months.

Other irregularities: for almost three months the Kolwezi lubricant depot used 12 Africontainers containers to store empty barrels. Gécamines used at least 35 containers to transport empty barrels from Kolwezi to Likasi without the authorization of the company that owns the containers and without paying the cost of rental, from January to June 1984.

Moreover, 16 other containers are alleged to have lain idle in the Panda Central Store until 12 August 1984, the date on which the Africontainers Agency Chief visited Likasi on an inspection mission.

I need not remind you that a very lengthy immobilization of the containers beyond the agreed time-limit is harmful not only to Africontainers, owing to the delay in return of the containers to Kinshasa for reuse and the substantial loss of earnings occasioned thereby; but also to Gécamines, which may have to pay substantial immobilization charges as a result.

Furthermore, Africontainers has just informed us that henceforth Gécamines will pay the costs of immobilization for any container retained in its facilities for more than 15 days after its receipt. Management of that company has already requested its officials in Shaba to invoice the immobilization of all containers used without their knowledge to forward empty barrels from the Kolwezi lubricant depot to Likasi.

In view of the above, we hope that you will issue your staff in the Groups with the necessary instructions to ensure harmonious management of the containers.

Thank you for your co-operation.

(Signed) Esanga ey'Issola BASSUKU.
Director, Import/Export Division

ANNEX OG 5

CONTRACT OF 1 OCTOBER 1984 BETWEEN GÉCAMINES AND ZAIRE MOBIL OIL

CARRIAGE CONTRACT

The following preliminary conditions are recorded:

That Zaire Mobil Oil is equipped for container carriage via the national network;

That the containers are 20 feet long, with a volume of 30 m³ and a maximum capacity of 18 tons, and that they have been approved for national carriage by Onatra and the SNCZ and are held to be in perfect condition;

That Zaire Mobil Oil must guarantee its customer Gécamines a regular supply of petroleum products and derivatives, particularly oils;

That Zaire Mobil Oil wishes to take responsibility for organizing the carriage and delivery of a portion of its products to Gécamines under a programme drawn up at the beginning of each month;

That Gécamines agrees to receive the lubricants in containers and that it will lease the containers for the carriage of mining products from Shaba to Kinshasa;

That Zaire Mobil Oil will communicate to Gécamines each month the number of empty containers available from its stock in Kinshasa.

The following is hereby decided and agreed:

- Article 1: 1.01: Zaire Mobil Oil undertakes to organize carriage of a portion of its lubricant products by container;
- 1.02: Under the terms of the present contract, the organization of one-way transport shall comprise:
- loading of Zaire Mobil Oil's products in containers at its premises and by its staff;
 - forwarding of the containers to Onatra's public port at Kinshasa or any other private or public port;
 - delivery of the containers to the river carrier, attested by a bill of lading.
- 1.03 Zaire Mobil Oil's empty containers, as stipulated above, shall be loaded for the return journey with Gécamines mining products for export.
- 1.04 The signing of the present contract implies, in the case of Zaire Mobil Oil, possession of a sufficient stock of containers to ensure that the requirements of Gécamines are adequately met.

.....

Article 5: Duration of the contract

The present contract is concluded for a period of one year from the date of its signature and the rates may be revised only by common consent, primarily in the event of a change in the monetary parity of the zaire.

The contract shall be tacitly renewed for successive periods of at least one year unless one of the parties gives written notice to the other by registered letter 90 days prior to the date of expiry.

Article 6: Termination

Should one of the parties fail to abide by the terms of the present contract, either by causing delays in delivery or reshipping through lack of equipment or by jeopardizing the safety, reputation or policy of the other party through manifest staff negligence, the latter party shall be entitled to terminate the present contract by simple written notice of ten days.

Such termination shall entail no compensation on the part of the diligent party.

.....

Done at Kinshasa, 1 October 1984

(Signed) R.J. VIDAL
Zaire Mobil Oil.

(Signed) B. ROUSSEAU and M. TSCHIKUZ
Gécamines.

ANNEX OG 6

LETTER OF 22 OCTOBER 1986 TO THE CEO OF RENAPI
REGARDING AN ORDER PLACED WITH AFRICOM-ZAIRE

From the Finance and Budget Department

Office of the State Commissioner

Re: Africom-Zaire

Sir,

I have the honour to acknowledge receipt of your letter No. 0273/PDG/RENAPI/86 of 17 June 1986 concerning the above-mentioned matter.

I noted from the letter that "the Africom-Zaire company's goods are on site in Kinshasa, that the company is prepared to sell them to RENAPI at the price quoted in the tender and that you are willing to take delivery of the merchandise in your warehouses as goods delivered in advance in respect of the order to be placed in the second half of 1986 following full execution of current order 001/RENAPI/86".

Under these circumstances, in the light of the content of letters No. AFC/DAS/IN/016/86 of 30 April 1986 and No. AFC/DAS/IN/018/86 of 19 July 1986 and taking into account the real need of the public utilities for the goods in question and the advantages offered by the deal with Africom-Zaire in terms of immediate availability of the goods, price stability and the staggering of payments, I have approved the order and signed the order forms, which are annexed hereto.

The instalments duly proposed by the Africom-Zaire company and accepted by us will be paid in accordance with the following schedule and will cover the total amount of the deal, i.e., Z 28,382,872.70:

— 31 October 1986	Z 5,000,000.00
— 30 November 1986	Z 5,000,000.00
— 31 December 1986	Z 5,000,000.00
— 31 January 1987	Z 5,000,000.00
— 28 February 1987	Z 5,000,000.00
— 31 March 1987	Z 3,382,872.70

Kindly note also that I reject the supplier's proposed condition of an increase of 20 % for each month of delay in payment.

I await your report concerning reception of the goods.

(Signed) Djamboleka Loma OKITONGONO
State Commissioner for Finance,
Budget and Securities.

ANNEX OG 7

EXTRACT FROM AN OFFER BY SCHIFFSWERFT GERMERSHEIM
FOR THE CONSTRUCTION OF A SELF-PROPELLED CONTAINER BARGE
FOR AFRICONTAINERS SPRL — DATED 5 FEBRUARY 1987

To: The CEO of Africontainers, Mr. Diallo Amadou Sadio

Sir,

Further to your request of 27 August 1986, we have pleasure in making you the following offer:

Construction and delivery of 1 (one) self-propelled container barge,
the main dimensions being as follows:

length	approx. 63.00 m
width	approx. 12.00 m
depth	approx. 2.60 m
draught for 605 t	approx 1.50 m
power	2 x 368 KW
number of containers (20')	28
capacity of the cargo hold	approx. 1,295 m ³

.....
Total price:

DM 4,233,000.-- FOB European maritime port

In words: four million two hundred and thirty-three thousand Deutsche Mark

.....

Delivery time:

The delivery time for the self-propelling container barge ... will be 10 (ten) months at the shipyard, following signature of the contract and receipt of the first instalment.

Validity:

This offer remains valid until 15 May 1987.

.....

(Signed) H.-R. REICHEL and [illegible]
Schiffswerft Germersheim.

ANNEX OG 8

LETTER NO. 430 OF 15 JULY 1987 FROM THE MANAGING DIRECTOR OF SOFIDE
TO AFRICONTAINERS REGARDING THE PROPOSAL FOR THE
ACQUISITION OF A CONTAINER VESSEL

To: The CEO of Africontainers, Mr. Diallo Amadou Sadio

Sir,

Re: Your proposal for the acquisition of a container vessel
Your ref.: AFC/DA/IN/041/87 of 29 June 1987

We acknowledge receipt of the above-mentioned letter.

In response, we wish to inform you that we are prepared to pursue our consideration of your file. However, it should be noted that the self-financing costs are estimated at Z 245,000,000, a portion of which, namely Z 145,000,000, represents customs charges; the balance of Z 91,000,000 consists of bridging interest (Z 75,000,000), start-up working capital (Z 2,000,000) and shipping costs (Z 14,000,000). In the event of benefits being conferred under the Investment Code, the customs charges would be reduced to Z 14,000,000 and the total amount of self-financing required to Z 105,000,000.

As it has been estimated that the project will take two years to complete, you will have one year to raise the own resources that form part of the financing plan. We wish to advise you in that connection that submission of your file to our decision-making bodies will depend on either production of a payment schedule from the Zairean State in respect of its arrears of debt to you or of a firm promise to pay you in the short or medium term, or on presentation of an approval agreement under the Investment Code and evidence of ability to pay the bridging interest for 1988 and 1989, amounting to roughly Z 48,000,000.

We therefore request you to let us know what arrangements you envisage to ensure that the debt is serviced during the period of execution of the project.

(Signed) Kazadi MEMBU
Chief Executive Officer.

ANNEX OG 9

LETTER NO. 076 OF 16 OCTOBER 1987 FROM AFRICONTAINERS TO THE STATE
COMMISSIONER FOR TRANSPORT AND COMMUNICATIONS REQUESTING A
NAVIGATION PERMIT IN RESPECT OF A PROPOSED CONTAINER VESSEL

Sir,

We have the honour to inform you that as part of our efforts to promote the vertical integration of our business, we are currently arranging investments, with the assistance of SOFIDE, aimed at the purchase of a container vessel.

Our existing business activities involve the leasing of containers which are used to load goods and transport them to the interior of the country, primarily on the basis of contracts with oil companies and Gécamines.

However, despite the existence of a sizable and rapidly growing potential market, the expansion of our business has been thwarted by the haphazard organization of convoys of container vessels by Onatra, the only river carrier currently in a position to use this transport system. This difficulty prompted us to envisage an integrated investment project aimed at achieving a certain measure of self-reliance.

To facilitate our negotiations both with our funding source and with the Investment Commission to obtain benefits under the Code, we kindly request your consent in principle to our navigation in national waters with the vessel we propose to purchase.

(Signed) DIALLO Amadou Sadio
Chief Executive Officer.

ANNEX OG 10

LETTER OF 10 NOVEMBER 1987 FROM AFRICOM-ZAIRE
TO THE STATE COMMISSIONER FOR FINANCE

Re: Request for compensation,
tax assessment articles 460.888 to 680.427
in respect of current account No. 64.295

Sir,

We hereby kindly request you to authorize your Department to provide compensation for the sum of Z 3,378,712.30 (three million three hundred and seventy-eight thousand seven hundred and twelve zaires, thirty makutas), which represents the total amount of tax assessed and imposed on us by the taxation authorities.

The sum relates to assessment articles Nos. 460,888 to 680.427 in respect of our current account No. 64295 in their books.

The above sum will be deducted from the amount of our claims against your Department.

(Signed) DIALLO Amadou Sadio
Chief Executive Officer.

cc: Director of Taxation
Accountant General

ANNEX OG 11

LETTER NO. 0156/CAB/FIN/88 OF 13 JANUARY 1988 FROM MR. KINZONZI,
ASSISTANT STATE COMMISSIONER FOR FINANCE, TO THE DIRECTOR OF THE
INFORMATION TECHNOLOGY DIVISION OF THE DEPARTMENT OF FINANCE

Re: Shortage of listing paper in the
Information Technology Directorate

Sir,

Further to your many reports on the shortage of listing paper in the Information Technology Directorate and pursuant to decision No. 82/CAB/FIN&BUDGET/83 of 16 December 1983 against calling for tenders, I hereby authorize you to take delivery of the following consignments from the Africom-Zaire company:

1. batch located in your premises:

300 cartons (2 ex) x 1,000 sheets

34 cartons (3 ex) x 500 sheets

66 cartons (4 ex) x 500 sheets

400 cartons

2. batch located in the premises of Africom:

64 cartons (A/4) x 500 sheets

93 cartons (A/1) x 1,000 sheets

1 carton (A/1) x 2,000 sheets

420 cartons (A/3) x 500 sheets

246 cartons (A/2) x 1,000 sheets

824 cartons

Kindly make contact with the above-mentioned supplier to arrange for delivery and report back to me.

(Signed) Prof. KINZONZI Mvutukidi Ngindu Kogbia.

ANNEX OG 12

**DELIVERY NOTE DATED 18 JANUARY 1988 FOR LISTING PAPER SUPPLIED BY
AFRICOM-ZAIRE AS MENTIONED IN LETTER NO. 156 OF 13 JANUARY 1988**

To: Department of Finance

Information Technology Directorate

Ref. No.	Number	Article	Remarks
		See letter No 0156/CAB/CED/FIN/88 of 13 January 1988 from the Deputy State Commissioner for Finance	
A/2	244	1,000-sheet cartons of listing paper totalling	244,000 sheets
A/3	419	500-sheet cartons of listing paper totalling	209,500 sheets
A/4	65	500-sheet cartons of listing paper totalling	32,500 sheets
A/1	96	<u>1,000-sheet cartons of listing paper</u> totalling	<u>96,000 sheets</u>
			582,000 sheets
		Delivered to the Information Technology Directorate's storage depot	
		(Signed) [illegible]	(Signed) [illegible]
		Commercial Department	Duly delivered

ANNEX OG 13

**LETTER NO. 425 OF 30 JANUARY 1988 FROM THE STATE COMMISSIONER
FOR FINANCE TO THE MANAGING DIRECTOR OF AFRICOM-ZAIRE
REGARDING THE LATTER'S CLAIMS AGAINST THE TREASURY**

Re: Africom's claims against the Treasury

Sir,

I acknowledge receipt of your letter No. 002/A.C.Z./MK/88 of 23 January 1988 concerning the above-mentioned matter.

I wish to inform you that your file has been transmitted to the Settlement and Arbitration Court for investigation. You will be invited to attend the sitting at which a decision is taken on the file.

On behalf of the Deputy First State Commissioner,

(Signed) Prof. KINZONZI Mvutukidi Ngindu Kogbia
State Commissioner for Finance.

ANNEX OG 14

LETTER OF 3 FEBRUARY 1988 FROM MR. LOUNCÉNY KOUYATE,
COUNSELLOR AT THE GUINEAN EMBASSY, KINSHASA, TO THE
GUINEAN MINISTER FOR FOREIGN AFFAIRS, CONAKRY

Sir,

I have the honour to report to you that one of our nationals, Mr. Diallo Amadou Sadio, commonly known as "Diallo Cravate", has been accused of defrauding the State of Zaire of a sum of 170,700,000 zaires for the benefit of the "Africom-Zaire" company, of which Mr. Diallo is the CEO.

Mr. Diallo "Cravate" has been living in Zaire (Kinshasa) for more than 20 years. This charge was discussed at length in an extended radio and television broadcast on 20 January 1988 and was also front-page news in all newspapers published in the Zairean capital.

I am enclosing an excerpt from the article published in *AZAP (Agence Zaire Presse)* in its issue No. 2300 of 22 January 1988 concerning this serious situation.

Mr. Diallo, who had not been disturbed or arrested prior to 22 January 1988, thought it advisable to gather together the documents in his possession in order to defend himself before the press, as though in defiance of the State.

They consist basically of invoices relating to orders for paper and other office supplies allegedly placed with him by the Department of Finance and many other State authorities. Mr. Diallo reportedly also has in his possession official correspondence between the different State Commissioners who have successively headed the Department of Finance and Africom-Zaire.

Although Mr. Diallo "Cravate" has had no contact with the Embassy for more than a year, we have tried in vain to get in touch with him on several occasions to obtain more detailed information and to provide all necessary advice.

As matters had by then got out of hand, Mr. Diallo was served with a warrant by two police officers on Monday 25 January 1988 and taken to the Principal Public Prosecutor's Office in Kinshasa for investigation. On Wednesday 27 January 1988 he was transferred to the big prison of Makala located at a distance of 8 km from the city of Kinshasa.

We are following developments in the case and will report to you in detail as soon as we have obtained all the facts.

(Signed) Louncény KOUYATE
Counsellor

Chargé d'affaires a.i.

ANNEX OG 15

**LETTER NO. 0639 OF 4 JULY 1988 FROM MR. SAMBWA PIDA NBAGUI,
FIRST ZAIREAN STATE COMMISSIONER, TO THE PRESIDENT OF THE JUDICIAL COUNCIL**

Re: Africom-Zaire file or Diallo Amadou case

Sir,

By letter No. CAB/SGA/MPR/051/EL/88 of 1 April 1988, of which you received a copy, the Deputy First Secretary General of the MPR presented me with the file relating to Mr. Diallo Amadou, who is at present in detention.

As the case is currently being investigated by the Judicial Council, I should be grateful if you would examine the file in the light of the evidence furnished by the Deputy First Secretary General.

I wish to make clear that the order given by my predecessor to bring Mr. Diallo before a court cannot be interpreted as a directive or as guidance to the Judicial Council on how it should deal with the file.

(Signed) Sambwa PIDA NBAGUI
Member of the Central Committee.

ANNEX OG 16

**LETTER NO. 431 OF 21 JANUARY 1989 FROM THE PROCUREUR GÉNÉRAL
AT THE COURT OF APPEAL OF KINSHASA TO MR. DIALLO**

I have the honour to inform you that the annotated judicial case file opened against you has been closed for inexpediency of prosecution.

(Signed) [Illegible]

Procureur Général.

ANNEX OG 17

LETTER (1989 - DATE ???) TO THE PROCUREUR GÉNÉRAL AGREEING THAT CURRENT PROCEEDINGS AGAINST MR. DIALLO ARE INAPPROPRIATE

Reference No. CJ/CAB PRES/ 685/D.1-1/D

I acknowledge receipt of your report of 25 January 1989 on the above mentioned case and would inform you that I endorse your view that the current proceedings are inappropriate.

(Signed) N'Singa Udjuu Ongwakebi UNTUBE.

ANNEX OG 18

LETTER OF 30 NOVEMBER 1989 FROM MR. DIALLO TO THE GOVERNOR OF THE BANK
OF ZAIRE REQUESTING PAYMENT OF ZAIRE'S DEBTS TO AFRICOM

Reference No. 018/AFZ/89

Sir,

We hereby remind you that, on the instructions of the founding President, President of the Republic, the Department of Finance, with the authority of the Secretary of State for Finance, accepted in a letter dated 13 November 1987, in settlement of the debt owed to Africom by the public treasury, the payment of this debt in five tranches totalling Z 178,700,000 which, under the clauses of the contract, must be updated or calculated according to its present value.

The same year, to our great surprise, the former Prime Minister, citizen Mabi Mulumba, sent you a letter, Ref. No. 2663/CAB/CED/FIN/87 asking you, with a view to the examination of the Africom file, to suspend payment of these bills until further notice.

We would also like to remind you that the alleged examination of the Africom-Zaire file was nothing but the settling of a political score. For that purpose, we were curiously made a scapegoat.

On conclusion of the examination referred to in the letter of the former Prime Minister, the Government, through the judicial authority, absolved us of all suspicion and accusations.

Please note the opinion of the judicial council on this case, in its letter of 28 January 1989, annexed to this letter.

Consequently, we would be grateful if you would settle our bills, referring to the original instructions written to you by the former Secretary of State for Finance on the instructions of the President of the Republic.

Please accept, Sir, the assurances of my highest consideration.

(Signed) Amadou Sadio DIALLO.

ANNEX OG 19

APPLICATION LODGING AN APPEAL BY AFC AGAINST ZAIRE-FINA, DATED 17 DECEMBER 1994

Application Lodging an Appeal to Quash

By: Africontainers, a private limited company . . ., acting through its managing director, Mr. Diallo Amadou Sadio . . ., empowered for said purpose by Article 15 of the Articles of Association and by the provisions of the minutes of the Extraordinary General Meeting of Members held on 18 April 1980 . . .;

Represented by Maître Kankonde Batubenga May a Luebo, *Avocat*, more specifically identified above;

Appellant

Against: Zaire-Fina, a public company limited by shares . . .

Respondent

Africontainers, a private limited company, more specifically identified above, has the honour to submit the following judgment to the Supreme Court of Justice for quashing: Judgment R.C.A. 17.229, handed down in defended proceedings between the parties on 24 February 1994 by the Court of Appeal of Kinshasa/Gombe, sitting in exercise of its civil and commercial jurisdiction as an appellate court, in the case between the Appellant and Zaire-Fina . . .

I. Facts and procedural history

The facts underlying the case have not changed and are as set out by the Appellant in its Application instituting proceedings.

While the *Tribunal de Grande Instance* of Gombe, ruling on those facts, more or less upheld the Appellant's claims, the appellate court in the judgment under appeal confined itself to an examination of procedural form and ruled that the original action was inadmissible because the minutes of the Extraordinary General Meeting of Members of the Appellant, pursuant to which Mr. Diallo Amadou Sadio was appointed managing director, were null and void for not having been prepared by a Notary.

Thus upholding the Respondent's appeal from the trial court judgment, despite the defects in it, the appellate judgment held inadmissible the Appellant's action before the trial court.

The present appeal, of which the merits are as follows, is lodged against that appellate judgment:

II. In law:

First ground, based on the violation of Articles 49 and 68 of the Decree of 23 June 1960, Article 15 of the Appellant's Articles of Association, Articles 2, 23 and 68 of the Code of Civil Procedure and Article 11 of the Transitional Constitution:

First subdivision: Validity of the minutes of the 18 April 1980 Extraordinary General Meeting of Members

To show that Mr. Diallo Amadou Sadio was the Managing Director and therefore the Appellant's lawful representative in respect of the appealed judgment, the Appellant adduced, in addition to its Articles of Association, the minutes of the Extraordinary General Meeting of Members held . . . on 18 April 1980; those minutes, duly notarized, were filed with the Clerk's Office for the new register at the *Tribunal de Grande Instance* of Gombe on 11 August 1980.

A photocopy of these minutes certified by the Clerk responsible for the new commercial register was even produced.

The fact that these minutes, bearing annotations in respect of registration with the notary and the official filing references, were entered in the record before the Court of Appeal of Kinshasa/Gombe is formally attested to in the appellate judgment as follows: "It also holds that the fact that the annotations in respect of registration with the notary and the official filing references are unaccompanied by the notary's signature strips the document of legal force."

Thus, by deliberately refusing to examine this item of evidence, which had been properly placed on record by the Appellant, and thereby failing to recognize the legal force of that evidence, the appealed judgment violated all the legal provisions referred to above.

The only appropriate sanction for said violation is the quashing of the appealed judgment in full.

Second subdivision: *Ultra vires* act, abuse of authority and insufficient reasoning

It can further be seen from the reasoning set out in the first subdivision of this ground that the appealed judgment is not legally reasoned.

As shown by the appealed judgment, the minutes of the Extraordinary General Meeting of Members of the Appellant were not presented and accepted for official filing until after they had been authenticated by the notary, as evidenced by the annotations concerning registration with the notary and by the fact that the minutes were accepted for filing by the Clerk only because they were authentic, in accordance with the requirements of Articles 2, 3 and 49 of the Decree of 23 June 1960.

Thus, in the appealed judgment it should have been deduced from the annotations concerning registration with the notary in Kinshasa before the official filing and from the Clerk's acceptance of the minutes for filing, as well as from the certification of the photocopy of the minutes, that they were proper and the legal effects thereof should then have been recognized.

By thus rejecting an item of evidence which the Appellant had placed on record and by so doing in a decision which stated, in favour of the Respondent, that weight could be given even to plain photocopies of the Articles of Association which the Respondent had produced, the appellate court not only manifested discrimination to the detriment of the Appellant and at the same time

committed an abuse of authority or an *ultra vires* act, but also thereby failed to state statutorily required, legally sufficient grounds for its decision.

Inadequacy of grounds, invariably deemed equipollent with an absence of grounds, makes that judgment appropriate for quashing.

Third subdivision: Discrimination

If the discrimination obvious in the appealed judgment — involving, on the one hand, the production by the Respondent of a plain photocopy of the Articles of Association and, on the other, a document provided by the Clerk to the Appellant in the form of a certified photocopy — is not already legally inadmissible pursuant to Article 11 of the Transitional Constitution, given that the Court of Appeal accepted the instrument appointing Mr. Herman Leferink even though submitted in the form of a private document, while at the same time rejecting the minutes of the Extraordinary General Meeting of Members of the Appellant, it must be decided that the Court of Appeal should have taken the minutes into account as tantamount to a private document, on the same basis as the instrument appointing Mr. Leferink.

This utterly groundless discrimination is the best possible proof that the reasoning underlying the judgment challenged by the Appellant was inadequate, as the Appellant rightly claims.

Thus, the appealed judgment should be quashed in its entirety.

While this third subdivision of the present ground for quashing is new, it can be raised at any time, even raised for the first time before the Supreme Court of Justice, because it is based on the violation of a Constitutional provision and relates to the sound administration of justice.

As this ground is justified, it should lead to the quashing of the appealed judgment in its entirety.

Second ground, drawn from the violation of Articles 1, 2, and 3 of the Royal Decree of 22 June 1926, Article 7 of the Decree of 27 February 1887, Article 29 of the Appellant's Articles of Association, and Articles 23 and 68 of the Decree of 7 March 1960 establishing the Code of Civil Procedure

First subdivision: Representation in legal proceedings

First part: Wrong or mistaken application of the law

Under Article 29 of the Respondent's Articles of Association:

“lawsuits, whether prosecuted or defended, shall be conducted on behalf of the company by the Board of Directors, acting through its Chairman or Vice-Chairman, or any other person pursuant to authority delegated by decision of the Board of Directors”.

It is evident from the statements in the special power-of-attorney dated 15 September 1993 given to Maître Mushigo a Gazanga Gigombe by the Respondent, by means of which an appeal was lodged on its behalf against the appellate judgment, that Mr. Hermanus Leferink failed to state that he was bringing the appeal as representative of the Board of Directors. On the contrary, he

claimed directly to represent the Respondent in his capacity as Director/Managing Director and Vice-Chairman of the Board of Directors.

In the judgment now under appeal, in respect of which that power-of-attorney was produced, the appellate court should have found *proprio motu* that the disputed power-of-attorney was improper and, consequently, found that Mr. Leferink lacked capacity to represent the Respondent in legal proceedings.

By holding that the power given to Maître Mushigo was a proper one, even though that power stated that Mr. Leferink, not the Board of Directors, was the direct representative of Fina-Zaire, the appellate court in the judgment under appeal was wrong or mistaken in its application of Article 7 of the Decree of 27 February 1887, Article 68 of the Code of Civil Procedure and Article 29 of the Respondent's Articles of Association.

Accordingly, that judgment should be quashed in its entirety.

Second part: Violation of Articles 1, 2 and 3 of the Royal Decree of 22 June 1926 and Article 68 of the Code of Civil Procedure

Objections (*fins de non recevoir*) were raised before the appellate court based on the failure to authenticate the minutes of the Board of Directors meeting at which Mr. Leferink was promoted simultaneously to the posts of Director/Managing Director and Vice-Chairman of the Board of Directors and on the lack of approval by Presidential Order of that appointment, as required by Article 1 (6) (d). In the judgment under appeal the court ruled that the appeal brought by Mr. Leferink on the Respondent's behalf was proper or admissible. It did so notwithstanding that: first, pursuant to Article 29 of the Articles of Association, Mr. Leferink, even when duly vested with his authority as both Director/Managing Director and Vice-Chairman of the Board of Directors, could not directly represent the Respondent in legal proceedings; and, secondly, to be valid or effective, such an appointment had to be approved by Presidential Order, since it involved someone (Mr. Leferink) given the power to run the company and sign on behalf of it.

In this respect, the appellate court engaged in reasoning which is specious at best. Citing an ambiguous judgment handed down by the Supreme Court of Justice, the appellate court observed:

“It was moreover to this effect that it has been held that the Royal Decree imposes no obligation on a public company limited by shares to set out in its Articles of Association the names of those persons holding the power to run the company and sign on its behalf (Supreme Court of Justice, 14 July 1993, R.C. 1605, *SOFIDE v. Binza Salawa and Son*, unpublished)”.

Instead of inferring from the possibility of two separate Orders at the time a company is formed — and in particular from the fact that approval of the Board of Directors as a corporate body by way of Order must be followed by another Order approving the persons responsible for running the company and entrusted with the power to sign on its behalf — and from the need for separate Orders that an Order is required whenever a person is appointed to run the company and sign on its behalf or to lead the Board of Directors, a corporate body, the appellate court preferred to ignore this possibility, this distinction in circumstances, and to reason, in conflict with the terms of such an Order, that by the term “persons”, the legislator meant “bodies”.

Finally, the immobility which characterizes the body, the Board of Directors, and the excessive mobility of the individuals leading this body or having the power to run the company and sign on its behalf are the best possible proof of both the validity of the distinction which must be drawn between the terms “body” and “persons having the power to run the company and sign on its

behalf" and the need for Presidential approval whenever there is a change in the persons having the power to run the company and sign on its behalf.

In the case under examination, Mr. Leferink's appointment as Director/Managing Director and Vice-Chairman of the Board of Directors needed to be approved by Presidential Order in order to be valid and effective.

Having failed to receive any such approval, Mr. Leferink's appointment is inoperative; it is ineffective against third parties, including the Appellant.

Accordingly, the appeal brought by Zaire-Fina under the circumstances described above should have been declared inadmissible for want of approval.

As the appellate court failed however to do that, the appealed judgment should be quashed in its entirety.

Second subdivision: Falsity of the minutes of the 5 September 1991 meeting of the Respondent's Board of Directors

Concerning Mr. Leferink's appointment

First part: Mr. Leferink's removal

Aside from taking account of minutes from the 5 September 1991 meeting of the Respondent's Board of Directors which were submitted by the Respondent in the form of a private instrument, in flagrant disregard of Articles 2, 3 and 49 of the Decree of 23 June 1960 and Article 3 of the Royal Decree of 22 June 1926, the appellate court recognized Mr. Leferink as Vice-Chairman of the Board of Directors. However, it is clear from the face of those minutes that Mr. Leferink had just been relieved of all duties on the Board of Directors and that he had been replaced in those positions by Mr. Jacques Damseaux.

As Mr. Leferink was relieved of all his duties on the Respondent's Board of Directors on 5 September 1991, he was, on 13 September 1993, without the authority to claim — if not relying on a falsified document in claiming — to be Director/Managing Director and Vice-Chairman of the Respondent's Board of Directors.

Thus, in holding in the appealed judgment that Mr. Leferink still possessed the authority either to represent the Respondent in legal proceedings or to represent the Board of Directors pursuant to the minutes of the Board of Directors meeting held at the Respondent's registered office on 5 September 1991, even though those minutes were in the form of a private document, the appellate court was wrong or mistaken in its application of all the provisions — legal provisions as well as those in the Articles of Association — referred to above.

The only adequate remedy for this violation is to quash the appealed judgment, without remand.

Second part: Difference in the signatures on the minutes and the power-of-attorney

It can be seen from the minutes of the Board of Directors meeting on 5 September 1991 at the company's registered office and the power-of-attorney dated 15 September 1993 given to Maître Mushigo a Gazanga Gingomba that the signatures appearing on those documents are not

identical. They differ in that, in particular, one of them includes a hanging tail while the other does not, in addition to the fact that the first name of the individual in question is "Hermanus" in the minutes of the Board of Directors meeting and "Herman" on the power-of-attorney.

This raises the question whether the disputed power-of-attorney was signed by Mr. Herman Leferink, who appears to have left the Respondent when he was relieved of all his duties both on the Respondent's Board of Directors and within the Respondent itself.

Thus, the appeal lodged by the Respondent against the judgment rendered by the *Tribunal de Grande Instance* of Kinshasa/Gombe under the number R.C.61.538 was brought by means of a bogus power-of-attorney.

In holding that the appeal lodged by the Respondent under the circumstances described was admissible, the appellate court was wrong or mistaken in its application of all the legal provisions referred to above and, accordingly, thereby violated them.

The only adequate remedy for this violation is to quash the appealed judgment in its entirety, without remand.

This second subdivision of the second ground is new. As a new argument, it would normally be barred from the proceedings, but, as it is a matter of *ordre public*, involving as it does the capacity of parties to a case, it is permissible for the first invocation of this ground to be in proceedings before the Supreme Court of Justice.

As it is fully justified, this ground, as broken down into its two subdivisions, should lead to the quashing without remand of the appealed judgment.

Accordingly, the appellate decision should be quashed.

Thus, the undersigned *Avocat*, acting for the Appellant, prays that it may please the Court:

- Finding the present appeal admissible, to uphold it;
- To quash the appealed judgment in its entirety and without remand in respect of the appeal lodged by the Respondent;
- To tax costs to the Respondent.

Kinshasa, 27 December 1994

Counsel for the Appellant
(Signed) Maître Kankonde Batubenga MAY A LUEBO

List of Exhibits: [Not translated]

ANNEX OG 20

**CIRCULAR NO. 002 OF 13 MARCH 1995 FROM THE MINISTER OF JUSTICE TO
DISTRICT AND OFFICE HEADS IN THE CITY OF KINSHASA**

Circular No. 002/CAB/MIN/RI. J & GS/95

To: Inspector-General of Judicial Agencies
in Kinshasa/Gombe

To: District and Office Heads in the city of Kinshasa

Re: Establishment of a Stamp of Approval of Execution

During my official introduction on 3 August 1995, I deplored the greatly deteriorated state of the judicial system in our country, which is preventing the advent of true democracy and the rule of law, together with its necessary corollary, social peace, as well as economic development.

This deterioration is due above all to grossly unjust judicial decisions taken in civil and commercial matters and their unseasonable execution, often on weekends, by unscrupulous bailiffs.

As stated in my circular No. 001/CAB/MIN/RI. J and GS/95 of 25 October 1995, these judicial decisions result in unjust enrichment the effects of which extend to halting production in some firms.

These decisions, bearing the enforcement clause taken from Article 21 of the Code of Civil Procedure, attest to the patent abuse of that statutory text, which has been invoked as justification in many instances of graft and corruption.

And bailiffs, following suit after the judges who hand down these unjust decisions, are known for arbitrarily carrying out execution procedures with a view to disturbing the social peace.

Accordingly, having regard to the urgency, I have taken the following decisions:

1. In civil and commercial matters, decisions must henceforth be approved by the Inspectorate-General before they can be executed.
2. Where movable property is attached, the judgment debtor shall be appointed custodian and shall be informed of the provisions of Article 83 of the Penal Code, Volume II, applicable in the event of fraudulent conversion of said property.

Kinshasa, 13 November 1995

(Signed) Joseph N'SINGA UDJUU

ANNEX OG 21

**SERVICE OF BRIEF IN RESPONSE DATED 15 MARCH 1995
IN THE CASE AFC V. FINA**

RC 1950

Service of brief in response

In the year nineteen hundred ninety-five, on the fifteenth day of March:

At the request of:

Zaire Fina, a public company limited by shares, . . .

I the undersigned . . .

Served on:

Africontainers, a private limited liability company, . . .

The brief filed in the Clerk's Office of the Supreme Court of Justice on 15 March 1995 by the Respondent, in response to the application lodging an appeal to quash submitted by the Appellant;

And, to ensure that the party served is aware thereof,

I left for it at its elected domicile, and having dealt with . . ., a copy of this notice of service, together with a copy of the brief referred to above.

(Signed)

BRIEF IN RESPONSE

RC 1950

For: Zaire Fina, a public company limited by shares, . . .

Respondent

Against: Africontainers, a private limited liability company, . . .

Appellant

The Respondent in the above case, entered on the Court's civil list under the number 1950, has the honour of filing with you its brief in response to the application lodging an appeal filed in the Clerk's Office of the Court on 3 February 1995.

I. Introduction

Before responding in respect of the various grounds invoked by the Appellant, the Respondent wishes first to state as follows:

Since its incorporation in 1977, by instrument registered on 18 October 1977 with the Notarial Office of Kinshasa under number 35.801, folios 196 to 212, volume CDXV, Zaire Fina has been run by 7 Managing Directors, in the following order:

- From 18 October 1977 to 3 March 1979, by Mr. Paul de Smet;
- From 3 August 1979 to 16 December 1980, by Mr. Jean Roger Lambrechts;
- From 16 December 1980 to 8 September 1986, by Mr. Henricus Brat;
- From 8 September 1986 to 27 July 1988, by Mr. Baudouin Velge;
- From 27 July 1988 to 5 September 1991, by Mr. Herman Leferink;
- From 5 September 1991 to 2 June 1993, by Mr. Jacques Damseaux; and
- From 2 June 1993 to date, once again by Mr. Herman Leferink.

II. Responses to arguments

1. The Appellant's first ground: "Based on the violation of Articles 49 and 68 of the Decree of 23 June 1960, Article 15 of the Appellant's Articles of Association, Articles 2, 23 and 68 of the Code of Civil Procedure and Article 11 of the Transitional Constitution"

(a) The first subdivision

(1) Main argument: inadmissibility

It should first be pointed out that the first subdivision of the ground is not clearly expressed and that, similarly, in the discussion the Appellant fails to cite the precise provisions violated by the appellate court.

Accordingly, the Respondent invites the Supreme Court to dismiss the first subdivision of this ground for lack of clarity (*obscuri libelli*).

(2) In the alternative

The Appellant claims that the appealed judgment is insufficiently reasoned.

It is apparent from the challenged judgment that, on the contrary, the Court of Appeal carefully and judiciously set out the reasons for its judgment.

Indeed, in respect of the point at issue the appellate decision states: "The Court notes, as does the appellant, that the notary's signature does not appear on the certified copy (*expédition*) of the minutes of the General Meeting which formalized Mr. Diallo Amadou's appointment as Africontainers' Managing Director. Further, the respondent itself admits in its written submissions summarizing its oral argument (see pp. 3 & 2 and 3) that the official in charge of the trade registry accepted for filing an instrument which had not been signed by the notary. But it adds that the document provided to its opponent does indeed bear the notary's signature and seal.

The Court points out in this regard that, in respect of commercial companies, the only instruments binding on third parties are those filed with the Clerk's Office. Thus, the only document which the Court can consider is the certified copy (*expédition*) unsigned by the notary which was filed with the Clerk. It also holds that the fact that the annotations in respect of registration with the notary and the official filing references are unaccompanied by the notary's signature strips the document of legal force.

That being so, the Court infers that the Clerk for the trade registry accepted an instrument which was void and that the certified photocopy which he issued relates to a void instrument.

It follows from the foregoing that Mr. Diallo Amadou, who gave a power-of-attorney to lodge the cross-appeal, has not substantiated his capacity and that Maître Bisimina was therefore not empowered to bring the appeal on behalf of the respondent. Accordingly, the cross-appeal shall be held inadmissible for want of capacity."

It is thus clear and obvious that the appealed judgment was fully reasoned; it follows that the first subdivision of the ground is unfounded and should be rejected by the Supreme Court.

(b) The second subdivision of the ground: “Ultra vires act, abuse of authority and insufficient reasoning”

(1) Main argument: inadmissibility

As in the case of the first subdivision of the ground, so in respect of this subdivision: the Appellant fails to specify the exact legal provision violated by the Court of Appeal. What is even more serious is that the Appellant claims that the Court of Appeal “exceeded” [acted *ultra vires*] or “abused” its authority. If such is the case, the Appellant should have lodged its application with the administrative division of the Supreme Court. It follows that this subdivision of the ground, as worded and expounded, is patently obscure; the Supreme Court should dismiss it for unintelligibility (*obscuri libelli*).

(2) In the alternative

Should the Supreme Court perchance admit this subdivision of the ground, it should nevertheless rule it to be without merit.

In respect of this precise point, as set out above in the response to the first subdivision of the ground, the Court of Appeal judgment is adequately reasoned. The second subdivision of the ground should therefore be rejected by the Supreme Court.

(c) The third subdivision of the ground: “Discrimination”

(1) Main argument: inadmissibility

Aside from the fact that it is a new argument (as the Appellant itself admits), the third subdivision of the ground is factually wrong.

The Court of Appeal did not base its decision to reject the Appellant’s minutes on the fact that they were in private form; rather, it relied on the absence of the notary’s signature in rejecting the disputed minutes.

In support of this contention the Respondent cites paragraphs 8 and 9 on the sixth page of the appealed judgment and paragraphs 1, 2 and 3 on the seventh page of that judgment, which is accurately set out above.

It follows from these various considerations that the third subdivision of the ground should be rejected by the Supreme Court.

Further, the Respondent adds — if any further argument is needed — that the Appellant’s reliance on Article 11 of the Transitional Constitution is misplaced.

To show this, the Respondent believes it appropriate to quote Article 11.

Article 11 reads: “All Zaireans are equal before the law and are entitled to equal protection under the law.

In matters of education and access to jobs in the public sector and in all other matters, no Zairean may be subject to discrimination, whether resulting under the law or an executive act, by virtue of his or her religion, [racial] or ethnic group, sex, birthplace, residence or political beliefs.”

The Respondent concludes from the foregoing that the Appellant's first ground is unfounded and therefore invites the Supreme Court to reject it.

2. The second ground: "drawn from the violation of Articles 1, 2, and 3 of the Royal Decree of 22 June 1926, Article 7 of the Decree of 27 February 1887, Article 29 of the Appellant's Articles of Association, and Articles 23 and 68 of the Decree of 7 March 1960 establishing the Code of Civil Procedure"

(a) The first subdivision: "representation in legal proceedings"

First part thereof: "wrong or mistaken application of the law"

In the first part of the first subdivision of the second ground the Appellant argues that Mr. Herman Leferink, [illegible text] Director/Managing Director and Vice-Chairman of the Board of Directors, "failed to state that he was bringing the appeal as representative of the Board of Directors" and that the power-of-attorney [illegible text] given to Maître Mushigo to lodge the appeal therefore [illegible text].

The Appellant concludes from this that "the appellate court in the judgment under appeal was wrong or mistaken in its application of Article 7 of the Decree of 27 February 1887, Article 68 of the Code of Civil Procedure and Article 29 of the Respondent's Articles of Association".

The Respondent contends that these legal provisions were not violated in the appealed judgment.

Article [illegible text] of the Respondent's Articles of Association, quoted by the Appellant in its application, addresses two possibilities:

1. Whenever a lawsuit is initiated by the Chairman or Vice-Chairman of the Board of Directors, it is in no way necessary for the Chairman or Vice-Chairman in question to state expressly that he is acting on behalf of the Board of Directors.
2. On the other hand, any another individual wishing to act in legal proceedings on behalf of the Company may do so only "pursuant to authority delegated by special decision of the Board of Directors".

In the present case, the broad intent of the legal provisions cited in the ground was indeed respected. Thus, no violation was committed in the appellate decision which could lead to its quashing by the Supreme Court. It follows that the first part of the first subdivision of the second ground should be rejected by the Supreme Court.

Second part thereof: "Violation of Articles 1, 2 and 3 of the Royal Decree of 22 June 1926 and Article 68 of the Code of Civil Procedure"

In respect of this part of the first subdivision of the second ground, the Respondent invites the Supreme Court to refer to its Judgment of 14 July 1993, RC.1605, *SOFIDE v. Binza Salawa and Son*. The Court should therefore reject the second part of the first subdivision of the ground.

(b) Second subdivision: “Falsity of the minutes of the 5 September 1991 meeting of the Respondent’s Board of Directors”

First part: “Mr. Leferink’s removal”

The Appellant claims that Mr. Leferink was relieved of his duties. It adds:

“As Mr. Leferink was relieved of all his duties on the Respondent’s Board of Directors on 5 September 1991, he was, on 13 September 1993, without the authority to claim— if not relying on a falsified document in claiming— to be Director/Managing Director and Vice-Chairman of the Respondent’s Board of Directors.”

In arguing that Mr. Leferink had been removed from office, the Appellant commits a gross, unforgivable error.

While it is true that in its first, second and fourth resolutions the Respondent’s Board of Directors appointed Mr. Jacques Damseaux as Managing Director, Director and Vice-Chairman to replace Mr. Herman Leferink on 5 September 1991, it must also be acknowledged that in the second, third and fourth resolutions at its meeting on 2 June 1993 the Respondent’s Board of Directors elected Mr. Leferink as Vice-Chairman and Managing Director to replace Mr. Damseaux.

It follows that the first part of the second subdivision is factually incorrect and should be rejected.

Second part

The Appellant raises an issue in respect of Mr. Leferink’s signature. This argument would require the Court to investigate the Appellant’s factual allegations, which the Court is forbidden to do. It follows that this ground is inadmissible and must be dismissed.

It follows from the foregoing that the second ground should be dismissed by the Supreme Court.

For these reasons

The undersigned Respondent submits that it should please the Court simply to dismiss the Appellant’s appeal.

Kinshasa, 14/03/1995
For the Respondent
(Signed)

List of Exhibits: *[Not translated]*

ANNEX OG 22

CERTIFICATE OF LACK OF MEANS No. 01 OF 12 JULY 1995

Republic of Zaire

City of Kinshasa
Social Affairs Urban Division
Kinshasa/Kasa-Vubu
Luozi No. 1
Social Welfare Office

Certificate of lack of means No. 01/DUAS/B.2/0974/95

The undersigned, Ir. Y. F. Ngiesi Mi Lusu, Head of the Social Affairs Urban Division, hereby certifies that Mr. Diallo Amadou Sadio, of Guinean nationality, statutory administrator of the company Africontainers SPRL, resident at No. 20, Immeuble PLZ, 9th floor, in the zone of Gombe, is declared temporarily destitute, insolvent and lacking any means of subsistence, after examination of his file.

In witness whereof, this document is issued to him for all legal intents and purposes, more especially in his case against Zaire-Shell before the *Tribunal de grande instance* of Gombe, under case No. RC 63.824.

Kinshasa, 12 July 1995

(Signed) Ir. Y. F. NGIESI MI LUSU
Head, Urban Division.

ANNEX OG 23

Order No. 10455/D.15/95

Issue of documents without fees, 18 July 1995

We, Célestin Ngwanda Shagitunga Gisupa, President of the *Tribunal de grande instance* of Kinshasa/Gombe, assisted by Mr. Th. Omekenge-Emange, Divisional Court Registrar;

Having regard to the application of the company Africontainers lodged on 13 July 1995 by Maître Bizimana Nsoro Kyoya, in order to obtain, without payment of fees, the documents pertaining to enforcement of the judgment rendered by this court in case R.C.63.824;

Whereas in support of its application, the applicant has produced the official report terminating proceedings, issued by the tax auditor on 14 August 1991, which records the insolvency of the said company;

Whereas all these documents, taken together, reveal the utter impossibility, for the applicant, to pay the fees and proportional taxes for which it is liable;

Having regard to Article 35 of Judicial Administration Order No. 299/79 of 20 August 1979;

Hereby authorize the Divisional Registrar of this court to issue to the applicant, without prior collection of the relevant fees and proportional tax, the execution copy and ordinary copy of the above-mentioned judgment, subject to his liability to recover the amount due immediately after execution of this order;

Hereby order the fees to be paid by the applicant;

The Divisional Registrar,
Th. OMEKENGE-EMANGE.

The President,
C. NGWANDA SHAGITUNGA GISUPA.

Certified true copy
Kinshasa, 18 July 1995
(Signed) The Divisional Registrar,
Th. OMEKENGE-EMANGE.

ANNEX OG 24

Republic of Zaire

Ministry of Justice and Keeper of Seals

**Certificate attesting non-submission of an application for
stay of execution No. 0309/95 of 24 July 1995**

The undersigned, Albert Tamba Tsana, Chief Registrar of the Court of Appeal of Kinshasa/Gombe, hereby certifies that, at the date of issue of this certificate, no request has been lodged by the company Zaire-Shell SARL against the judgment rendered by the *Tribunal de grande instance* of Kinsasha/Gombe on 3 June 1995 under RC 63.824;

Plaintiff: Africontainers SPRL, registered in the new trade register under No. 844, with registered offices in Kinshasa, corner of *avenue Sénégalais* and *avenue du Bas-Zaires*, proceedings initiated and pursued by Mr. Diallo Amadou, Managing Director;

Defendant: Zaire-Shell SARL, with registered offices in Kinshasa, 1513 *boulevard du 30 juin*, Gombe district;

This judgment was notified to the Zaire-Shell company at the request of the Africontainers company by bailiff Noël Roland Manzambi of Kinshasa, on 21 July 1995, at the head office of the company, personal service to Mr. Banza, Head of Planning and Budget Department.

Done at Kinshasa, 24 July 1995
(Signed) Albert TAMBATA TSANA
Chief Registrar

ANNEX OG 25

**Report for the purpose of obtaining authorization for enforcement of
the judgment rendered in the AFC/Shell case dated 23 July 1995**

The parties to the proceedings had concluded an exclusive rights contract for the sale of containers to Zaire-Shell by Africontainers, which had also undertaken to supply the defendant, Zaire-Shell, with all its products.

The Africontainers company sued Zaire-Shell for breach of this contract, demanding payment of damages and of its contractual debt.

The *Tribunal de grande instance* of Kinshasa/Gombe, in a judgment deemed to have been given after both parties had been heard, ordered the company [*illegible*] Shell to pay the plaintiff, Africontainers, the equivalent in Zairean currency of the sum of US\$13,106,704.39, under an immediately enforceable order, together with the sum of US\$50,000 by way of damages.

Restitution order No. 0455/D.15/95 of 17 July 1995 was issued to the applicant.

Process was served on the defendant by the bailiff, Noël Roland Manzambi, on 21 July 1995, and certificate No. 0309/95, attesting non-submission of an application for stay of execution, was filed on 24 July 1995.

The Applicant wishes to apply for an order making the judgment immediately enforceable, and requests authorization for that purpose. The request should be granted.

Done at Kinshasa, 25 July 1995
(Signed) MUBENGA MALALA Sylvain
Incumbent Registrar.

ANNEX OG 26

Notice of 13 October 1995 revoking the seizure of property belonging to Shell

[Not translated: illegible]

ANNEX OG 27

Notice of arrest dated 5 November 1995

[Not translated: illegible]

ANNEX OG 28

**LETTER FROM GÉCAMINES OF 18 NOVEMBER 1996
TO THE CEO OF AFRICONTAINERS**

Sir,

We wish to inform you that, as a result of our investigations in the two Kasai and on the SIZARAIL network, Gécamines has obtained reliable information regarding the disputed containers.

In the light of this information, we hereby request you to suspend invoicing for demurrage in performance of the tripartite contract for the containers that have not yet been returned.

To that end, we request you to get in touch with the Business and Marketing Directorate in Kinshasa to obtain an overview of the situation with respect to the containers leased by your undertaking to our company.

(Signed) YAWILI NYI ZONGIA
Deputy Delegate General.

ANNEX OG 29

Report of the contact meeting with freight forwarders under the tripartite contract held in Kinshasa on 9 December 1996

At the request of Gécamines, a contact meeting with the freight forwarders was held on Monday 9 December 1996 in the Export Department of Gécamines in Kinshasa.

The meeting, convened for the purpose of informing the freight forwarders of Gécamines' position on the national container dispute, was attended by the following participants:

Freight forwarders:

- AFC: Mr. Kanza, Director of operations
Mr. Ibrahim, Cashier
ATAF: Mr. Sabi, Head of Commercial/Travel Department
Flucosa: Mr. Etaka, Head of Personnel
Kincontainers: Mr. Tumba, Representative of the Administrator - Director General

Gécamines: Mr. Mbaya K., Director of the Export Department
Mr. Lumuna P.

Observers: Mr. Muanza Mande, Managing Administrator of TTC/Tshikem.

1. Introduction

After welcoming the participants, the meeting Chairman and Director of the Export Department said that the remodelled Gécamines company was anxious to find a solution to its dispute with the freight forwarders under the tripartite contract.

After reading the letter sent to the freight forwarders on 18 November 1996 by the Management Committee, in which the freight forwarders were requested to stop invoicing demurrage charges, the Chairman informed participants that, following investigations carried out in the two Kasai Provinces and on the Sizarail network, Gécamines had collected reliable information enabling it to re-examine the files at issue in a more responsible manner.

Despite the amicable settlement that had been reached, Gécamines requested the freight forwarders to take account of the difficult situation prevailing at the present time, which made it impossible to address all the complaints made immediately. They were therefore asked to show flexibility and understanding with regard to the solution that would be proposed.

After mentioning the attempts made by certain freight forwarders in the past to take legal action, the Chairman invited them to co-operate in the search for solutions. However, he acknowledged the dilatory and improper actions attributable to those previously responsible for dealing with the files. As the files had changed hands since November 1996, he requested the freight forwarders to place their trust in him. In conclusion, he summed up the position of Gécamines in two points:

- (a) Gécamines acknowledged owing payment to the freight forwarders for the rental of national containers that had not to date been returned.
- (b) Gécamines accepted the principle of payment of the charges due to the freight forwarders. However, the payment procedures would be defined after consideration of each individual file and in the light of the company's financial capabilities.

2. Proposed order of business

After the Chairman's statement, the following order of business was proposed, and participants were asked to insert any items they deemed necessary.

Order of business with the freight forwarders

1. Containers to be considered as subject to dispute
 - 1.1. Containers covered by the tripartite contract.
 - 1.2. Containers to be struck from the list submitted by the freight forwarders.
 - 1.3. Determination of the number of days of demurrage.
 - 1.4. Rates to be applied to containers in dispute.
 - 1.5. Cessation of invoicing.
2. Residual value of decommissioned containers
 - 2.1. Declared purchase value at the time of licensing.
 - 2.2. Service life of a new container.
 - 2.3. Service life of a second hand container.
 - 2.4. Determination of residual value.
3. Use of containers on the Kin/Matadi route
 - 3.1. Causes.
 - 3.2. Number of containers shipped to Matadi.
 - 3.3. Cases subject to prescription.
 - 3.4. Rates to be applied in the cases agreed for consideration.
4. Determination of the amount payable

After examining the framework proposed by Gécamines for determining the amount payable, the freight forwarders approved the order of business to be followed at the working sessions.

3. *Force majeure* hindrance to performance of the contract

Gécamines considered that the decline in production, from 470,000 tonnes per year to 50,000 tonnes per year, and the halting of traffic on the national route as from January 1993, pending establishment of Sizarail, constituted an act of God that had prevented proper performance of the contract. This instance of *force majeure*, which was moreover provided for in Article 9.01 of the tripartite contract, was an act independent of the will of the parties bound by the contract. The participants were invited to take that into account, since they were all in the same position and could not ship their transcontainers from Lubumbashi.

4. Statements by the freight forwarders

Following the statement by the meeting Chairman, the floor was given to the freight forwarders who took turns to speak, in the following order:

ATAF: The ATAF delegate complained about the inordinate length of time taken by Gécamines both to collect the relevant information and to convene the meeting. He also protested against the priority given by Gécamines to payments of rental fees for foreign-owned international containers, payments which were made to the detriment of the local freight forwarders.

— While acknowledging the merits of the comments made by ATAF, Gécamines emphasized that the cases to be examined involved matters of dispute. It had taken some time to conduct investigations in order to clarify the situation. The fact that the files were entrusted to the Commercial Directorate based in Kinshasa was an act of good will on the part of the Management Committee, which had thus saved the freight forwarders the cost of travelling to Lubumbashi.

Flucoza: The Flucoza delegate, for his part, considered that there was manifest bad faith on the part of Gécamines, which for two years had taken no action on the invoices and claims of the freight forwarders.

— Gécamines cited the internal problems which had hampered processing of the container dispute file. It was now in different hands, and participants were assured that it would be dealt with promptly.

AFC: The head of the AFC delegation urged participants to keep to the order of business proposed by Gécamines.

Following the exchange of views, the parties agreed on the timetable set out below:

— Week of 3 to 9 February 1997:

working sessions with ATAF from 2 p.m. to 4.30 p.m.

— Week of 10 to 16 February 1997:

working sessions with KINC from 2 p.m. to 4.30 p.m.

— Week of 17 to 23 February 1997:

working sessions with Flucoza from 2 p.m. to 4.30 p.m.

— From 24 February 1997:

working sessions with AFC from 2 p.m. to 4 p.m.

The meeting, having started at 10.25 a.m., rose at 11.25 a.m.

Done at Kinshasa, 11 December 1996
(Signed) Lumuna MABUNGU
Rapporteur

ANNEX OG 30

MINUTES OF THE WORKING MEETING WITH AFC HELD ON 3 JULY 1997 IN CONNECTION WITH CONSIDERATION OF THE CONTAINER DISPUTES

In the context of its ongoing consideration of the files in the container dispute, the Committee set up by Gécamines held a working meeting on 3 July 1997 with a delegation from AFC at the headquarters of Gécamines in Kinshasa.

In attendance:

AFC

Mr. NKANZA NE KONGO: Representative of AFC

Mr. IBRAHIM DIALLO: Cashier at AFC

Maître KABASELE KABASELE: Lawyer of AFC

Gécamines

Mr. KAKONGE SAKALA (DCI): Chairman of the Container Dispute Committee

Maître KIENGE DYASHI (JUR): Member of the Container Dispute Committee

Mr. Pierre LUMUNA (TIE): Member of the Container Dispute Committee

Agenda

Harmonization of container dispute statistics

1. Preliminary issue

Before starting the meeting, the Gécamines party stipulated as a precondition for signing the minutes of the discussion between the two parties that the AFC party should produce a power of attorney conferring on it the authority validly to engage the responsibility of AFC.

AFC replied that there was a letter in which Mr. Diallo, the CEO of Africontainers, requested Mr. Nkanza and Mr. Ibrahim Diallo to negotiate with Gécamines and to involve the lawyers and representative of the Embassy of Guinea to the Congo in the discussions. In any case, added the AFC lawyer, before leaving Zaire (now Democratic Republic of the Congo), Mr. Diallo had left powers of attorney at the Mayar chambers for pending disputes.

2. Decommissioned containers

2.1. Harmonization

AFC presented evidence of the shipping of six containers that the Gécamines party had not taken into account at the meeting of 2 July 1997.

Gécamines noted that four of these containers were intended for oil companies. With regard to the other two containers that AFC claimed to have shipped to Kolwezi for Gécamines, the latter promised to check the accuracy of the references provided by AFC.

2.2. Legal aspects

The Gécamines party stated that, in the case of containers intended for oil companies, which were not covered by the tripartite contract, its responsibility should be perceived as falling under Article 252 of the [illegible] Code, i.e. that the containers should be returned.

AFC argued that the fact that Gécamines had kept and used its non-contractual containers constituted unjust enrichment and such base conduct could not therefore be invoked as a defence.

In response, Gécamines stressed that the principle of *nemo auditur . . .* was not applicable in the case and that, in accordance with the spirit of Article 252 of the above-mentioned Code, AFC must take account of all necessary and appropriate expenditure undertaken to maintain the AFC containers (caretaking, storage, maintenance).

AFC replied that Gécamines would do better to proceed against the oil companies as guarantors.

Gécamines preferred to reserve its position in that regard.

2.3. Agreed number of containers

At the end of the discussions and following verification [illegible] AFC, the two parties struck four containers from the list and kept only two. This brings to nine the number of containers to be returned.

3. **Date of the next meeting**

The two parties agreed to meet on Tuesday 8 July 1997 at 9 a.m.

For AFC

(Signed) Mr. N'KANZA NE KONGO
Mr. Ibrahim DIALLO
Mr. Nicolas KABASELE KABASELE.

For Gécamines

Mr. KAKONGE SAKALA
Maître Kienge Dyashi
Mr. Pierre LUMUNA.

ANNEX OG 31

**Letter of 21(29?) May 1998 from the Mayor of Gombe municipality
regarding AFC containers (request for removal)**

[Not translated: illegible]

ANNEX OG 32

**Letter of 19 June 1998 from the Mayor of Gombe municipality regarding
AFC containers (notice that containers are scattered throughout town)**

[Not translated: illegible]

ANNEX OG 33

THREE DOCUMENTS FROM AFRICONTAINERS
(24 JUNE 1988, 29 JUNE 1988, 7 JULY 1988) ON THE LOCATION OF CONTAINERS:
EXECUTION OF AN ORDER FOR REMOVAL OF THE CONTAINERS

24 June 1988

AFC containers stored within the precincts of the Office of Public Works by decision of the Gombe local authorities.

1. 526 318
2. 526 405
3. 526 277
4. 525 624

For Africontainers
(Signed) N'KANZA NE KONGO

For the Office of Public Works
(Signed) [illegible]

For the local authorities
(Signed) [illegible].

29 June 1988

AFC containers stored within the precincts of the Office of Public Works by decision of the Gombe local authorities.

- | | |
|-------------|-------------|
| 1. 526 320 | 17. 525 769 |
| 2. 526 332 | 18. 525 747 |
| 3. 526 423 | 19. 525 736 |
| 4. 526 403 | 20. 525 751 |
| 5. 526 425 | |
| 6. 527 694 | |
| 7. 526 408 | |
| 8. 525 738 | |
| 9. 525 748 | |
| 10. 525 575 | |
| 11. 525 620 | |
| 12. 526 408 | |
| 13. 527 693 | |
| 14. 526 402 | |
| 15. 525 757 | |
| 16. 525 765 | |

For Africontainers
(Signed) N'KANZA NE KONGO

For the Office of Public Works
(Signed) [illegible]

For the local authorities
(Signed) [illegible].

7 July 1988

AFC containers stored within the precincts of the Office of Public Works ([illegible]) by decision of the Gombe local authorities.

- | | |
|---------------------------|---|
| 1. 526 421 | 23. 525 591 |
| 2. 526 311 | 24. CAXU 408290/5(40) |
| 3. 525 770 | 25. 241186/2 ([illegible]) |
| 4. 525 741 | 26. TEXU 317225/5 ([illegible]) |
| 5. 525 612 | 27. GRIU 110782/1 ([illegible]) |
| 6. 630 924/0 | 28. TRIU 272258/2 ([illegible]) |
| 7. 526 401 | 29. [illegible] |
| 8. 526 325 | 30. Spare parts container ([illegible]) |
| 9. 525 627 | |
| 10. 525 616 | |
| 11. 526 345 | |
| 12. 525 778 | |
| 13. 527 696 | |
| 14. 525 749 | |
| 15. 525 757 ([illegible]) | |
| 16. 526 308 | |
| 17. 525 781 | |
| 18. 526 426 | |
| 19. 526 307 | |
| 20. 525 770 | |
| 21. 525 777 | |
| 22. 526 320 | |

For Africontainers
(Signed) N'KANZA NE KONGO

For the Office of Public Works
(Signed) [illegible]

For the local authorities
(Signed) [illegible].

ANNEX OG 34

UNIVERSITY OF MINNESOTA
HUMAN RIGHTS LIBRARY

Exceptions to the Exhaustion of Domestic Remedies (Arts. 46 (1), 46 (2) (a) and 46 (2) (b) of the American Convention on Human Rights), Advisory Opinion OC-11/90, 10 August 1990, Inter-Am. Ct. H.R. (Ser. A) No. 11 (1990) requested by the Inter-American Commission on Human Rights

Present:

Hector Fix-Zamudio, President
Orlando Tovar-Tamayo, Vice-President
Thomas Buergenthal, Judge
Rafael Nieto-Navia, Judge
Policarpo Callejas-Bonilla, Judge
Sonia Picado-Sotela, Judge

Also present:

Manuel E. Ventura-Robles, Secretary

The Court, composed as above, renders the following Advisory Opinion:

1. By note of 31 January 1989, the Inter-American Commission on Human Rights (hereinafter "the Commission"), submitted to the Inter-American Court of Human Rights (hereinafter "the Court") an advisory opinion request regarding Articles 46 (1) (a) and 46 (2) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention").

2. The request for an advisory opinion poses the following questions:

"1. Does the requirement of the exhaustion of internal legal remedies apply to an indigent, who because of economic circumstances is unable to avail himself of the legal remedies within a country?

'2. In the event that this requirement is waived for indigents, what criteria should the Commission consider in making its determination of admissibility in such cases?'

1. Does the requirement of the exhaustion of internal legal remedies apply to an individual complainant, who because he is unable to retain representation due to a general fear in the legal community cannot avail himself of the legal remedies provided by law in a country?

'2. In the event that this requirement is waived for such persons, what criteria should the Commission consider in making its determination of admissibility in these cases?'"

3. In setting out the considerations that prompted the advisory opinion request, the Commission stated the following:

“1. Indigency

‘The Commission has received certain petitions in which the victim alleges that he has not been able to comply with the requirement of the exhaustion of remedies set forth in the domestic legislation because he cannot afford legal assistance or, in some cases, the obligatory filing fees.

The Commission is aware that some States provide free legal assistance to persons who qualify because of their economic status. However, this practice does not obtain in all of the countries and even in those countries where it exists, it often covers only highly urbanized areas.

When the legal remedies of a State are not in fact available to an alleged victim of a violation of human rights and should the Commission be obligated to dismiss his complaint for failure to meet the requirement of Article 46 (1) (a), does this not bring into play the possibility of a discrimination based on “social condition” (Art. 1 (1) of the Convention)?’

2. Lack of Counsel

‘Complainants have alleged to the Commission that they have been unable to retain counsel to represent them, thereby limiting their ability to effectively pursue the internal legal remedies putatively available at law. This situation has occurred where an atmosphere of fear prevails and lawyers do not accept cases which they believe could place their own lives and those of their families in jeopardy.

When, as a practical matter, such a situation occurs and an alleged victim of a human rights violation brings the matter to the attention of the Inter-American Commission on Human Rights, should the Commission admit such a complaint or dismiss it as inadmissible?’”

4. The Commission designated its Chairman and its first and second Vice-Chairmen to act jointly or separately as its delegates in all matters relating to the instant advisory opinion request.

5. In a note of 9 February 1989, the Secretariat, acting pursuant to Article 52 of the Rules of Procedure of the Court, requested written observations and other relevant documents on the issues involved in the instant advisory opinion request both from the member States of the Organization of American States (hereinafter “the OAS”) and, through the Secretary-General of that Organization, from all the organs listed in Chapter VIII of the OAS Charter.

6. The President of the Court directed that the written observations and other relevant documents be filed with the Secretariat before 1 July 1989.

7. Responses to the Secretariat's communication were received from the governments of Argentina, Costa Rica, Dominican Republic, Jamaica, and Uruguay¹.

8. The International Human Rights Law Group, a non-governmental organization, submitted an *amicus curiae* brief.

9. A public hearing was held on 12 July 1989, to enable the Court to hear the oral arguments of the member States and the OAS organs with regard to the issues raised in the request.

10. At this public hearing, the Court heard the following representatives:

For the Inter-American Commission on Human Rights:

— Oliver H. Jackman, President and Delegate;

— David J. Padilla, Assistant Executive Secretary.

For the Government of Costa Rica:

— Carlos Vargas-Pizarro, Agent and Director for Legal Affairs of the Ministry of Foreign Affairs.

Judge Hector Gros-Espiell, then the President of the Court, presided over this hearing. However, he subsequently resigned from his position as Judge.

11. The Commission has a clear and legitimate interest in seeking advisory opinions from the Court on questions regarding the promotion and protection of human rights in the inter-American system (The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75), Advisory Opinion OC-2/82 of 24 September 1982, Series A, No. 2, paras. 14-16; Restrictions to the Death Penalty (Arts. 4 (2) and 4 (4) American Convention on Human Rights), Advisory Opinion OC-3/83 of 8 September 1983, Series A, No. 3, para. 42, and Habeas Corpus in Emergency Situations (Arts. 27 (2), 25 (1) and 7 (6) American Convention on Human Rights), Advisory Opinion OC-8/87 of 30 January 1987, Series A, No. 8, para. 8).

12. No valid reasons exist for the Court to exercise its discretionary power to decline to render an advisory opinion even when formal requirements of admissibility are met ("Other Treaties 'Subject to the Advisory Jurisdiction of the Court (Art. 64 American Convention on Human Rights), Advisory Opinion OC-1/82 of 24 September 1982, Series A, No. 1, paras. 30 and 31; Habeas Corpus in Emergency Situations (Arts. 27 (2), 25 (1) and 7 (6) American Convention on Human Rights), *supra* 11, para. 10; Judicial Guarantees in States of Emergency (Arts. 27 (2), 25 and 8 American Convention on Human Rights), Advisory Opinion OC-9/87 of 6 October 1987, Series A, No. 9, para. 16, and Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89 of 14 July 1989, Series A, No. 10, para. 27).

13. The Court, therefore, admits the request for advisory opinion and will now proceed to address it.

¹These and all other important documents related to this Advisory Opinion will be published in the Court's Series B publications.

14. The questions submitted by the Commission call for an interpretation by the Court of Article 46 (1) (a) and 46 (2) of the Convention, which reads as follows:

“Article 46:

1. Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements:
 - ‘(a) that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law’;
2. The provisions of paragraphs 1 (a) and 1 (b) of this article shall not be applicable when:
 - ‘(a) the domestic legislation of the State concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated’;
 - (b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or
 - (c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.”

15. Article 46 (2) (c) does not have any relevance to the questions before the Court. The remaining provisions — subparagraphs (a) and (b) — do and require closer analysis.

16. Article 46 (1) (a) provides that, for a petition to be ruled admissible by the Commission, it is necessary that the remedies under domestic law have been pursued and exhausted, while subparagraph 2 considers the circumstances in which this requirement does not apply.

17. Article 46 (2) (a) applies to situations in which the domestic law of a State party does not provide appropriate remedies to protect rights that have been violated. Article 46 (2) (b) is applicable to situations in which the domestic law does provide for remedies, but such remedies are either denied the affected individual or he is otherwise prevented from exhausting them. These provisions thus apply to situations where domestic remedies cannot be exhausted because they are not available either as a matter of law or as a matter of fact.

18. Article 46 (2) makes no specific reference to indigents, the subject of the first question, nor to those situations in which a person has been unable to obtain legal representation because of a generalized fear in the legal community to take such cases, which the second question addresses.

19. The answers to the questions presented by the Commission thus depend on a determination of whether a person’s failure to exhaust domestic remedies in the circumstances posited falls under one or the other exception spelled out in Article 46 (2). That is, whether or under what circumstances a person’s indigency or inability to obtain legal representation because of a generalized fear among the legal community will exempt him from the requirement to exhaust domestic remedies.

20. In addressing the issue of indigency, the Court must emphasize that merely because a person is indigent does not, standing alone, mean that he does not have to exhaust domestic remedies, for the provision contained in Article 46 (1) is of a general nature. The language of Article 46 (2) suggests that whether or not an indigent has to exhaust domestic remedies will depend on whether the law or the circumstances permit him to do so.

21. In analysing these issues, the Court must bear in mind the provisions contained in Articles 1 (1), 24 and the relevant parts of Article 8 of the Convention, which are closely related to the instant matter and read as follows:

“Article 1. Obligation to Respect Rights

‘1.The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.’

Article 24. Right to Equal Protection

‘All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.’

Article 8. Right to a Fair Trial

‘1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

.....

- (d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
- (e) the inalienable right to be assisted by counsel provided by the State, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law; . . .”

22. The final section of Article 1 (1) prohibits a State from discriminating on a variety of grounds, among them economic status the meaning of the term discrimination employed by Article 24 must, then, be interpreted by reference to the list enumerated in Article 1 (1). If a person who is seeking the protection of the law in order to assert rights which the Convention guarantees finds that his economic status (in this case, his indigency) prevents him from so doing because he cannot afford either the necessary legal counsel or the costs of the proceedings, that person is being

discriminated against by reason of his economic status and, hence, is not receiving equal protection before the law.

23. [P]rotection of the law consists, fundamentally, of the remedies the law provides for the protection of the rights guaranteed by the Convention. The obligation to respect and guarantee such rights, which Article 1 (1) imposes on the States Parties, implies, as the Court has already stated, the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights (Velásquez Rodríguez Case, Judgment of 29 July 1988, Series C, No. 4, para. 166; Godínez Cruz Case, Judgment of 20 January 1989, Series C, No. 5, para. 175).

24. In so far as the right to legal counsel is concerned, this duty to organize the governmental apparatus and to create the structures necessary to guarantee human rights is related to the provisions of Article 8 of the Convention. That article distinguishes between accusation[s] of a criminal nature and procedures of a civil, labour, fiscal, or any other nature. Although it provides that [e]very person has the right to a hearing, with due guarantees . . . by a . . . tribunal in both types of proceedings, it spells out in addition certain minimum guarantees for those accused of a criminal offence. Thus, the concept of a fair hearing in criminal proceedings also embraces, at the very least, those minimum guarantees. By labelling these guarantees as minimum guarantees, the Convention assumes that other, additional guarantees may be necessary in specific circumstances to ensure a fair hearing.

25. Subparagraphs (d) and (e) of Article 8 (2) indicate that the accused has a right to defend himself personally or to be assisted by legal counsel of his own choosing and that, if he should choose not to do so, he has the inalienable right to be assisted by counsel provided by the State, paid or not as the domestic law provides . . . Thus, a defendant may defend himself personally, but it is important to bear in mind that this would only be possible where permitted under domestic law. If a person refuses or is unable to defend himself personally, he has the right to be assisted by counsel of his own choosing. In cases where the accused neither defends himself nor engages his own counsel within the time period established by law, he has the right to be assisted by counsel provided by the State, paid or not as the domestic law provides. To that extent the Convention guarantees the right to counsel in criminal proceedings. But since it does not stipulate that legal counsel be provided free of charge when required, an indigent would suffer discrimination for reason of his economic status if, when in need of legal counsel, the State were not to provide it to him free of charge.

26. Article 8 must, then, be read to require legal counsel only when that is necessary for a fair hearing. Any State that does not provide indigents with such counsel free of charge cannot, therefore, later assert that appropriate remedies existed but were not exhausted.

27. Even in those cases in which the accused is forced to defend himself because he cannot afford legal counsel, a violation of Article 8 of the Convention could be said to exist if it can be proved that the lack of legal counsel affected the right to a fair hearing to which he is entitled under that Article.

28. For cases which concern the determination of a person's rights and obligations of a civil, labour, fiscal, or any other nature, Article 8 does not specify any minimum guarantees similar to those provided in Article 8 (2) for criminal proceedings. It does, however, provide for due

guarantees; consequently, the individual here also has the right to the fair hearing provided for in criminal cases. It is important to note here that the circumstances of a particular case or proceeding — its significance, its legal character, and its context in a particular legal system — are among the factors that bear on the determination of whether legal representation is or is not necessary for a fair hearing.

29. Lack of legal counsel is not, of course, the only factor that could prevent an indigent from exhausting domestic remedies. It could even happen that the State might provide legal counsel free of charge but neglect to cover the costs that might be required to ensure the fair hearing that Article 8 prescribes. In such cases, the exceptions to Article 46 (1) would apply. Here again, the circumstances of each case and each particular legal system must be kept in mind.

30. In its advisory opinion request, the Commission states that it has received certain petitions in which the victim alleges that he has not been able to comply with the requirement of the exhaustion of remedies set forth in the domestic legislation because he cannot afford legal assistance or, in some cases, the obligatory filing fees. Upon applying the foregoing analysis to the examples set forth by the Commission, it must be concluded that if legal services are required either as a matter of law or fact in order for a right guaranteed by the Convention to be recognized and a person is unable to obtain such services because of his indigency, then that person would be exempted from the requirement to exhaust domestic remedies. The same would be true of cases requiring the payment of a filing fee. That is to say, if it is impossible for an indigent to deposit such a fee, he cannot be required to exhaust domestic remedies unless the State provides some alternative mechanism.

31. Thus, the first question presented to the Court by the Commission is not whether the Convention guarantees the right to legal counsel as such or as a result of the prohibition of discrimination for reason of economic status (Art. 1 (1)). Rather, the question is whether an indigent may appeal directly to the Commission to protect a right guaranteed in the Convention without first exhausting the applicable domestic remedies. The answer to this question given what has been said above, is that if it can be shown that an indigent needs legal counsel to effectively protect a right which the Convention guarantees and his indigency prevents him from obtaining such counsel, he does not have to exhaust the relevant domestic remedies. That is the meaning of the language of Article 46 (2) read in conjunction with Articles 1 (1), 24 and 8.

32. The Court will now turn to the second question. It concerns the exhaustion of domestic remedies in situations where an individual is unable to obtain the necessary legal representation due to a general fear in the legal community of a given country. The Commission explains that, according to what some complainants have alleged, [t]his situation has occurred where an atmosphere of fear prevails and lawyers do not accept cases which they believe could place their own lives and those of their families in jeopardy.

33. In general, the same basic principles govern this question as those which the Court has deemed applicable to the first question. That is to say, if a person, for a reason such as the one stated above, is prevented from availing himself of the domestic legal remedies necessary to assert a right which the Convention guarantees, he cannot be required to exhaust those remedies. The State's obligation to guarantee such remedies is, of course, unaffected by this conclusion.

34. Article 1 of the Convention provides not only that the States parties have an obligation to respect the rights and freedoms recognized [t]herein, it also requires them to ensure to all persons

subject to their jurisdiction the free and full exercise of those rights and freedoms. The Court has already had occasion to emphasize that this provision imposes an affirmative duty on the States. It is also important to note that the obligation to ensure requires the State to take all necessary measures to remove any impediments which might exist that would prevent individuals from enjoying the rights the Convention guarantees. Any State which tolerates circumstances or conditions that prevent individuals from having recourse to the legal remedies designed to protect their rights is consequently in violation of Article 1 (1) of the Convention. As the Court has stated:

“when it is shown that remedies are denied for trivial reasons or without an examination of the merits, or if there is proof of the existence of a practice or policy ordered or tolerated by the government, the effect of which is to impede certain persons from invoking internal remedies that would normally be available to others . . . resort to those remedies becomes a senseless formality. The exceptions of Article 46 (2) would be fully applicable in those situations and would discharge the obligation to exhaust internal remedies since they cannot fulfil their objective in that case. (Velásquez Rodríguez Case, *supra* 23, para. 68; Godínez Cruz Case, *supra* 23, para. 71, and Fairén Garbi and Solís Corrales Case, Judgment of 15 March 1989; Series C, No. 6, para. 93.)”

35. It follows therefrom that where an individual requires legal representation and a generalized fear in the legal community prevents him from obtaining such representation, the exception set out in Article 46 (2) (b) is fully applicable and the individual is exempted from the requirement to exhaust domestic remedies.

36. The Court is of the opinion that, in the cases posited by the Commission, it is the considerations outlined that render the remedies adequate and effective in accordance with generally recognized principles of international law to which Article 46 (1) refers; namely, remedies suitable to address an infringement of a legal right and capable of producing the result for which [they were] designed (Velásquez Rodríguez Case, *supra* 23, paras. 64 and 66; Godínez Cruz Case, *supra* 23, paras. 67 and 69, and Fairén Garbi and Solís Corrales Case, *supra* 34, paras. 88 and 91).

37. The second part of both questions submitted relates to the standards the Commission should apply in determining the admissibility of the claims analysed herein.

38. In addressing this issue it is clear that the test to be applied must be whether legal representation was necessary in order to exhaust the appropriate remedies and whether such representation was, in fact, available.

39. It is for the Commission to make this determination. It must be emphasized, nevertheless, that all determinations made by the Commission before the case was referred to the Court are fully reviewable by the latter (Velásquez Rodríguez Case, Preliminary Objections, Judgment of 26 June 1987, Series C, No. 1, para. 29; Fairén Garbi and Solís Corrales Case, Preliminary Objections, Judgment of 26 June 1987, Series C, No. 2, para. 34, and Godínez Cruz Case, Preliminary Objections, Judgment of 26 June 1987, Series C, No. 3, para. 32).

40. The exhaustion of domestic remedies is a requirement for admissibility and the Commission must bear this in mind at the appropriate time and provide both the State and the complainant with the opportunity to present their respective positions on this issue.

41. Under Article 46 (1) (a) of the Convention and in accordance with general principles of international law, it is for the State asserting non-exhaustion of domestic remedies to prove that such remedies in fact exist and that they have not been exhausted (Velásquez Rodríguez Case, Preliminary Objections, *supra* 39, para. 88; Fairén Garbi and Solís Corrales Case, Preliminary Objections, *supra* 39, para. 87, and Godínez Cruz Case, Preliminary Objections, *supra* 39, para. 90). Once a State party has shown the existence of domestic remedies for the enforcement of a particular right guaranteed by the Convention, the burden of proof shifts to the complainant, who must then demonstrate that the exceptions provided for in Article 46 (2) are applicable, whether as a result of indigency or because of a generalized fear to take the case among the legal community or any other applicable circumstance. Of course, it must also be shown that the rights in question are guaranteed in the Convention and that legal representation is necessary to assert or enjoy those rights.

42. For these reasons, the Court, is of the opinion:

unanimously

1. That if his indigency or a general fear in the legal community to represent him prevents a complainant before the Commission from invoking the domestic remedies necessary to protect a right guaranteed by the Convention, he is not required to exhaust such remedies.

unanimously

2. That if a State party has proved that domestic remedies are available, the complainant must then demonstrate that the exceptions contemplated in Article 46 (2) apply and that he was prevented from obtaining the legal counsel necessary for the protection of rights guaranteed by the Convention.

Done in Spanish and English, the Spanish text being authentic, at the seat of the Court in San Jose, Costa Rica, 10 August 1990.

Hector Fix-Zamudio, President
Orlando Tovar-Tamayo, Vice-President
Thomas Buergenthal, Judge
Rafael Nieto-Navia, Judge
Policarpo Callejas-Bonilla, Judge
Sonia Picado-Sotela, Judge
Manuel E. Ventura-Robles, Secretary

ANNEX OG 35

[Extracts]

Decree of 27 February 1887 on commercial corporations as amended and updated

SECTION I: GENERAL PROVISIONS

Article 1

Commercial corporations recognized by law in accordance with this Decree shall constitute juridical persons distinct from those of their members.

The law recognizes the following as commercial corporations: general partnerships; limited partnerships; private limited companies; public limited companies; co-operatives.

Article 2

Corporate documents shall be void unless full copies and extracts are filed within six months of their date with the registry of the *Tribunal de grande instance*.

They shall be published in the *Journal Officiel* by courtesy of the Minister of Justice.

Any person may consult them free of charge in the archives of *Tribunal de grande instance* registries.

Article 3

Any amendment to the corporate documents shall be void unless filed in the same way as the documents themselves.

Powers of attorney granting powers of management and the right of official signature and documents withdrawing those powers shall be subject to the same rules.

Article 4

If a failure to file results in documents being void, such nullity cannot be relied upon by the members against third parties.

Article 5

Corporate documents shall be published as extracts in the *Journal Officiel* at the expense of the parties concerned.

The extract shall contain the following as a minimum, depending on the nature of the company:

1. precise details of the members;
2. the corporate name or designation of the corporation;
3. its registered office;
4. its purpose;
5. the amount of capital and how it is formed;
6. details of each contribution in kind, the conditions under which it is made and the name of the contributor;
7. mortgage charges on contributed immovable property;
8. the conditions to which the sale of rights contributed as options are subject;
9. the way in which profits are to be shared;
10. the date on which the corporation commenced and its duration;
11. the names of persons authorized to manage and bind the corporation and their powers;
12. the beginning and end of each accounting year;
13. the time for the members' annual general meeting.

The extract shall be signed, by notaries in the case of authentic documents, and in the case of simple contracts by all the members or by one of them with a special power of attorney for the purpose from the other members.

Article 6

No public limited company can be set up in the Congo until it has been authorized by decree.

.....

Article 7

Corporations shall act through their representatives, whose powers shall be established by the act of incorporation or by subsequent documents executed pursuant to the act of incorporation.

.....

Article 11

Any false statement, information or fraudulent omission in the documents filed that is intended to deceive third parties shall be punished as fraud.

Article 12

No corporation may possess or acquire more than 10,000 hectares of land without express authorization. We, i.e. our Council of General Administrators, will rule on requests for authorization. Any acquisition contrary to the present Article shall be null and void.

.....

SECTION IV: PRIVATE LIMITED COMPANIES

Paragraph 1: General

Article 36

A private limited company 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.

Article 37

The name chosen by the company shall include the words "Société privée à responsabilité limitée 'SPRL'".

Article 38

All documents, invoices, advertisements, publications or other communications issued by the company must state its name and the precise location of its registered office.

Article 39

No advertising with a view to obtaining capital for a private limited company is permitted.

No loan may be entered into by a private limited company by way of an issue of bonds to order or to bearer.

Article 40

The act of incorporation shall fix the amount of authorized capital. This shall be fully subscribed.

Each share shall be half paid up at least, except shares corresponding to contributions in kind, which shall be fully paid.

The authorized capital must be sufficient for the normal operation of the enterprise, having regard to reasonable forecasts.

.....

Article 41

The object of the business must be precisely defined and limited. It may not relate to insurance, the raising of capital or savings.

Article 42

A private limited company may at any time, by unanimous agreement of the members, change itself into another type of company, without that change giving rise to a new legal person and subject to third-party rights.

Paragraph 2: Formation and increase of capital

Article 43

A private limited company must be set up by an authentic document, failing which the company shall be a nullity.

This may either be invoked against third parties by the members or by the company among the members. It operates only from the date of the request seeking the declaration that it is void.

Article 44

Each member must be a party to the document, in person or through a special representative.

Article 45

The document shall state:

1. the exact description of the members;
2. the designation of the company;
3. its registered office;
4. its purpose;
5. the amount of capital and how it is formed;
6. the specification of each contribution in kind, the conditions under which it is made and the name of the contributor;
7. mortgage charges on contributed immovable property;
8. the conditions to which the sale of rights contributed as options are subject;
9. the way in which profits are to be shared;
10. the date on which the company commenced and its duration;
11. the names of persons authorized to manage and bind the company and their powers;

12. the beginning and end of each accounting year;
13. the time for the members' annual general meeting.

Powers of attorney shall include the particulars in 4, 5, 6, 7 and 8 above.

Article 46

The formalities and conditions prescribed for formation are also required for any increase in capital.

Article 48

Any action brought by a private limited company whose founding document has not been published in accordance with Article 5 shall be declared inadmissible if the defendant so requests before any defences on the merits.

Article 49

Any agreed amendment to the documents of a private limited company shall be void unless made by authentic document.

Any document changing the statutes, or concerning the appointment and removal of managers, auditors and liquidators or the method of liquidation, or changing the registered office shall be published in accordance with Article 5.

They cannot be invoked against third parties whose rights and duties originated prior to publication. Nevertheless third parties may take advantage of them.

Paragraph 3: Shares

Article 50

The capital shall be divided into equal shares, with or without designation of value.

Shares that are not representative of capital may not be created.

Article 51

Each share confers an equal entitlement in the exercise of members' prerogatives as well as in the distribution of profits and the products of liquidation.

Article 55

A register of members shall be kept at the registered office and shall include:

1. precise particulars of each member;
2. the number of shares belonging to each member;

3. information on payments made;
4. transfers of shares *inter vivos* with dates, signed and dated by the transferor and the transferee or their proxies;
5. transfers on death and the allocation of shares with dates, signed and dated by the management and the beneficiaries or their proxies;
6. allocation of life interests or pledges.

Any member or any third party may have access to this register.

Paragraph 4: Management and supervision

Article 64

A private limited company shall be managed by one or more persons, who may be members or non-members, called managers.

Article 65

Managers shall be appointed either in the instrument of incorporation or by the general meeting, for a period which may be fixed or indeterminate.

Article 66

The statutes may provide for the grouping of shares, each group having the power to elect one or more managers separately.

Article 67

Unless the statutes provide otherwise, member-managers appointed for the life of the company can be removed only for good cause, by a general meeting deliberating under the conditions required for amendments to the statutes.

Other managers can be removed at any time.

Article 68

Each manager shall have all the powers to act on behalf of the company in all circumstances and to perform the administrative acts and take the measures that the purpose of the company implies.

However, the statutes or the general meeting may limit these powers, and may stipulate *inter alia* that if there are several managers they shall act on a collegiate basis.

No limitation whatever can be invoked against bona fide third parties.

Article 69

The statutes, the general meeting or the management may entrust the day-to-day management of the company and special powers to agents or other proxies, whether members or not.

Article 70

A sole manager who has an interest in an operation opposed to that of the company is obliged to submit the matter to the general meeting, which may appoint an *ad hoc* proxy to carry out that operation.

If there are several managers, the one faced with this conflict of interest must advise his colleagues of the fact, have his declaration officially endorsed and may take no part in the decision. An account of this shall be given at the first general meeting before any other proceedings.

Article 71

Oversight of the management shall be entrusted to one or more administrators, who need not be members, called "auditors".

If there are more than one of these, the statutes or the general meeting may require them to act on a collegiate basis.

If the number of members does not exceed five, the appointment of auditors is not compulsory, and each member shall have the powers of an auditor.

Paragraph 5: The general meeting

Article 78

The general meeting of members shall have the widest powers to perform or ratify acts concerning the company.

Unless the statutes provide otherwise, the general meeting shall have the right to amend them.

Article 79

Notwithstanding any provision to the contrary, all members shall have the right to take part in general meetings and shall be entitled to one vote per share.

Article 80

Unless the statutes provide otherwise, members may express their votes in writing or by any other means that guarantees the authenticity of the will expressed.

Article 81

Companies may always be represented by a proxy of their choice, subject to compliance with the conditions set forth in the statutes.

Article 82

At least one general meeting must be held every year, at the place and time stated in the statutes.

Article 83

The management and the auditors, if any, may convene a general meeting at any time.

They must convene a general meeting at the request of members holding one fifth of the total number of shares.

If the management takes no action on this request within a reasonable time, the meeting may be ordered by the court.

Article 84

The notice of a general meeting shall contain the agenda and shall be sent by registered mail to each of the members 20 days before the meeting.

If the agenda includes amendments to the statutes, the purpose of the proposed amendments must be clearly stated in the notice of the meeting.

If the proposed amendment relates to the purpose of the company, a special report by management on this amendment containing a recent statement and summary of the company's assets and liabilities must be annexed to the notice of the meeting.

Article 85

When a reduction of capital or a reduction in the number of shares is involved, the notice of the meeting must state how the proposed reduction will be carried out.

If the reduction is to be made by a repayment to the members, this repayment can only be made six months after publication of the decision.

In no case may the reduction of capital adversely affect the rights of third parties.

Article 86

The statutes shall determine how the proceedings of the general meeting shall be conducted.

In the absence of such provisions, appointments shall be made and decisions taken according to the ordinary rules of deliberative meetings.

In the event of a tied vote, the person presiding over the meeting shall have a casting vote. The minutes shall be signed by the members of the board and by the members who request it. Authentic copies shall be signed by the management.

Article 87

Decisions by the general meeting shall be by a simple majority, whatever the number of shares held by the members present or represented.

When amendments to the statutes are involved, the members present or represented must hold at least half the total number of shares.

If this condition is not met, a non-compliance report shall be prepared, a new meeting shall be called, and the proceedings of the second meeting shall be valid irrespective of the number of shares held by the members present or represented. An amendment can be passed only by a majority of three quarters of those voting in the ballot. If the amendment relates to the purpose or the nationality of the company, the required majority shall be increased to four fifths of the votes.

Article 88

The management shall have the right to adjourn any meeting on the spot for six weeks for all or any of the items on the agenda, but can exercise this right only once for each subject.

This adjournment cancels any decision taken in relation to the latter.

Paragraph 6: Inventory, balance sheet, profit and loss account

Article 89

The management must close off the books of account at the end of each accounting period.

Article 90

Every year the management shall draw up an inventory showing real and personal property values as well as all the amounts receivable and payable by the company, with an annex summarizing all its commitments, in particular sureties and other guarantees as well as amounts receivable and payable by each member, manager and auditor to or from the company.

Article 91

The balance sheet and profit and loss account must clearly and exactly reflect the assets position of the company and the positive or negative results of its activities.

Article 92

On the assets side the balance sheet must show separately the real property values and the saleable values, amounts due to the company from the members, managers and auditors and in particular the amounts due from the members to pay up the shares that they have applied for.

The liabilities side shall clearly show the depreciation necessary, the debts of the company to itself such as capital and reserves or other debts, debts burdened by pledge or mortgage, the company's debts to the members, managers and auditors and other debts.

Article 93

Every year the management must make a report on the completion of its mandate and on the company's operations during the accounting period.

This report must comment on the balance sheet and profit and loss account and make proposals regarding the allocation of any profits.

Article 94

If there is an auditor, the management must pass to him the inventory, the balance sheet, the profit and loss account and the management's report, with all supporting documents, at least 40 days before the annual general meeting.

Within 15 days at the latest the auditors must report on their audit, on how the accounts have been kept and on the documents passed to them by the management. This report must contain their observations and proposals.

Article 95

During the 20 days preceding the annual general meeting any member, in person or through a proxy of his choice, may consult the inventory, the balance sheet, the profit and loss account, the management's report and where appropriate the auditors' report, at the registered office.

The balance sheet, profit and loss account and reports shall be annexed to the notifications to attend.

Article 96

The annual general meeting shall hear the management's report, and if appropriate the auditors' report.

It shall consider and rule on the balance sheet and profit and loss account and on the allocation of profits.

It shall then give a decision, by special . . . on the discharge of the managers and, of any auditors.

Such discharge shall be valid only [if] the balance sheet and profit and loss account are free from omissions and contain no false statement concealing the true position of the company and, as regards acts . . . only if these are specifically mentioned on the agenda.

Article 97

There can be no distribution of profits to the members if the capital is in deficit as long as the latter has not been restored or reduced to a corresponding extent.

Article 98

The balance sheet and profit and loss account shall be filed by the management within 30 days of their approval in the business register at the registered office.

Paragraph 8: Liability

Article 102

Notwithstanding any provision to the contrary, the parties to the founding document shall be deemed to be founders.

In the case of an increase in capital, the managers in office shall be deemed to be founders and shall bear the corresponding responsibilities.

Article 103

Notwithstanding any provision to the contrary, the founders shall be jointly and severally liable to the company or to interested parties:

- for any part of the capital that is not validly subscribed; they shall be deemed to be subscribers by operation of law;
- for the actual paying-up of shares as provided for in Article 40;
- for sharing the loss that is an immediate consequence either of the nullity of the company or the absence or falseness of the prescribed statements.

To be relieved of liability, the founders must prove that they themselves were deceived.

Article 106

In the event of bankruptcy, composition with creditors or a request for time to pay creditors within two years of the formation of the company, the founders may be held liable, jointly or not according to the circumstances, for its commitments in the proportion set by the court if the capital was insufficient to ensure the operation of the firm having regard to reasonable forecasts.

Article 107

The managers and auditors of a private liability company shall not undertake any personal obligation in relation to the commitments of the company.

Article 108

The managers shall be liable in accordance with the law for the performance of the mandate that they received and for misconduct in their management.

They shall be jointly and severally liable to the company, to the members or to third parties for any damage resulting from breaches of the provisions of the present Decree or of the company statutes.

They shall be released from this liability as regards breaches in which they had no part only if no misconduct is attributable to them and if they declared these breaches to the next general meeting after they had notice of them.

The liability of auditors, as derived from their duty of supervision and monitoring, shall be determined according to the same rules as for the liability of managers.

Article 109

In the event of bankruptcy, composition with creditors or a request for time to pay creditors, managers, former managers or persons who have actually had the power of management may be held liable, jointly or not, for all or part of the debts that arose over five years:

1. if they jeopardized the financial position of the company by their withdrawals;
2. if, due to their acts, disruption of the accounting system makes it impossible to keep track of the company's operations;
3. if they have been guilty of fraud or theft to the detriment of creditors or members.

Article 110

The creditors may have the payments stipulated in the statutes and essential to the preservation of their rights ordered by the court; the company can have the action set aside by paying the debt in full, after deducting the discount.

The managers in person are required to give effect to judgments given for this purpose.

The creditors may exercise the rights of the company as to payments to be made and due for payment against the members, in accordance with Article 64, Book III of the Civil Code.

Article 112

Members who have wrongfully received dividends not charged against actual profits shall be required to repay them to the company.

Managers who have allocated such dividends to the members shall be jointly liable with them to repay the said dividends to the company.

SECTION VI: LIMITATION OF ACTIONS

Article 125

Rights of action against commercial corporations shall become statute-barred after the same period as rights of action against individuals.

Article 126

The limitation period shall be five years in respect of:

1. all rights of action against members or shareholders, with effect from their withdrawal from the corporation, or from a formal act of dissolution of the corporation, or from its statutory date of termination;

.....

ROYAL DECREE OF 22 JUNE 1926 ON PUBLIC LIMITED LIABILITY COMPANIES

Article 1

Our authorization, required for establishing a public limited liability company in the Democratic Republic of Congo, shall be subject *inter alia* to the following conditions:

.....

2. There shall be at least seven members;
3. The share capital shall be fully subscribed;
4. Each share shall be at least one-fifth paid up by a payment in cash or by an actual contribution. The fact that the last three conditions above have been met must be recorded in the company's statutes.
5. The assets shall be in proportion to the company's purpose;
6. The company's statutes shall state:
 - (a) the purpose of the company;
 - (b) the corporate name or title of the company. This must be different from that of any other company.
 - (c) the exact description of the members and the extent of their responsibilities;
 - (d) the description of persons having the powers of management and of signing for the company;
 - (e) the exact description of members who have to contribute assets, stating the obligations of each. When the contribution is not in cash, it must be described in detail and the conditions under which it is made must be stated;
 - (f) transfers for valuable consideration during the previous five years of the real property contributed to the company during the previous five years, and the conditions under which they were made;

The provisions in (c) and (f) above shall not apply to the statutes of a public limited company specially and exclusively formed either to take over all the assets and liabilities and all aspects of the business of a Belgian limited company conducting its business in the Democratic Republic of Congo or to take over part of the assets and aspects of the business in Congo of a Belgian limited company conducting part of its business in Congo.

- (g) mortgage charges on property contributed;
- (h) the conditions imposed on the sale of rights contributed as options;
- (i) the reason for and the nature of special benefits conferred on each of the founders;
- (j) the amount, at least the approximate amount, of the fees, expenses, remuneration or charges, whatever their form, for which the company is responsible or which are charged to it by reason of its formation;

(k) the registered office. This may be set up only in the Republic;

(l) the life of the company. This may not exceed thirty years.

However, companies whose purpose is the exploitation of concessions granted by the competent authority may be formed for the duration of the concession. Other companies may have their lives successively extended in the forms prescribed for amendments to the statutes, for a fresh term expiring in thirty years.

.....

8. The statutes shall comply with the following rules:

(a) all shareholders, owners of securities or shares representing capital shall have the right, notwithstanding any provision to the contrary but in conformity with the rules in the statutes, to vote in person or by proxy.

When these securities or shares are of equal value, each shall give a right to one vote.

When they are unequal in value or their value is not mentioned, each shall automatically confer the right to a number of votes proportional to the share of capital that it represents . . . ; fractions of a vote shall not be taken into account.

.....

**ORDER-LAW NO. 66-341 OF 7 JUNE 1966 ON THE REGISTERED AND
ADMINISTRATIVE OFFICES OF CORPORATIONS HAVING THEIR
MAIN CENTRE OF OPERATIONS IN THE CONGO**

.....

Article 1

Corporations whose main centre of operations is situated in the Congo must have their administrative seat in the Congo.

“Administrative seat” means the place where the corporation has its central administration and where general meetings and board meetings are held.

.....

COMPANY LAW

Ministerial Order No. CAB/EN/0025/72 of 17 June 1972 concerning the statutes of public limited liability companies

.....

The Minister of the National Economy

Having regard to the Constitution;

Having regard to the terms of the Decree of 27 February 1887 concerning commercial companies;

Having regard to the Royal Order of 22 June 1926 concerning public limited liability companies;

Having regard to the Decree of 23 June 1960 supplementing the legislation on commercial companies;

Having regard to *ordonnance-loi* No. 69-302 of 26 June 1969 establishing the Investment Code;

Having regard to the steady rise in the number of requests for authorization of changes to company statutes, notably with respect to capital increases and decreases; granted the Minister of the National Economy's duty to anticipate the possible impact on the national economy as a whole of any changes in individual production units to ensure a balanced economic policy;

Having regard to the urgency;

ORDERS:

Title 1

On changes to statutes and capital increases and decreases

Article 1

The statutes of the companies concerned, presented to the National Economy Department, for review and approval by the President of the Republic, must be accompanied by the following financial statements:

1. For the two financial years prior to the capital increase/decrease:

(a) an inventory of assets;

(b) the profit and loss accounts;

(c) the cash flow statements;

(d) a list of creditors, indicating the starting dates and the repayment schedules of payables;

2. For the year following the capital increase/decrease, the following statements:

- (a) the projected balance sheet, profit and loss account and cash flow statement;
- (b) a list of creditors, indicating the starting dates and the repayment schedules of payables before and after the capital increase/decrease;
- (c) the reasons advanced for the capital increase/decrease.

Title 2
On the creation of companies

Article 1

For a certain number of years and in any case no less than three, detailed projections will have to be submitted for:

- (a) the balance sheets;
- (b) the cash flow statements;
- (c) the profit and loss accounts.

Article 2

Additional information might also be required from companies having benefited from the advantages of the Investment Code (general or special framework schemes).

Article 3

The present Order enters into force with effect from the date of signature.

Done at Kinshasa, 17 June 1992

(Signed) Ndongala TADI LEVA
Minister of the National Economy.

ORDER-LAW NO. 86-028 OF 5 APRIL 1986
ESTABLISHING THE INVESTMENT CODE

.....

Article 5

Individual or collective property rights acquired by the investor in accordance with Zairean law are guaranteed by the Constitution of the Republic of Zaire.

Such rights cannot be impugned save on grounds of the public interest and pursuant to a statutory enactment, and subject to payment of fair and equitable compensation to the person whose rights have been infringed.

.....

Title 5
Guarantees of rights of transfer

Article 31

Freedom to transfer funds in connection with investment operations is guaranteed by the State, in accordance with the general law. However, should restrictions become necessary, foreign investments admitted to the benefit of the present Code shall, in respect of the operations set out in Article 32 to 34 below, enjoy a treatment no less favourable than that for current commercial cash transactions.

Article 32

The State guarantees to foreign investors the right to transfer their dividends. It also guarantees the right to transfer revenue generated by dividends reinvested in Zaire.

Article 33

The State guarantees the right to transfer royalties, principal, interest and related charges payable by a Zairean business under the general régime or the conventional régime in respect of service of a debt contracted abroad in order to finance its investment.

Article 34

There shall also be a right of transfer in respect of any compensation for expropriation payable to a foreigner under Article 5 above.

.....
