

CASES

Antoine Goetz and others v. Republic of Burundi (ICSID Case No. ARB/95/3)

Introductory Note

The award rendered on February 10, 1999 in the case Antoine Goetz and others v. the Republic of Burundi contains the Arbitral Tribunal's decision on liability and the amicable settlement of the parties. Under Rule 43(2) of the Arbitration Rules of the Centre, if the parties reach an agreement, they can request the Tribunal to embody such settlement in an award. Since the inception of ICSID, this is the third award out of four¹ which embodies the settlement of the parties.

The proceedings were instituted on November 29, 1995 by Mr. Antoine Goetz and five other Belgian investors against Burundi. The dispute concerned AFFIMET, a company incorporated in Burundi involved in the production and marketing of precious metals, owned by the six Belgian investors. The company was granted a "certificate of free zone" by Burundi in 1993. The free zone regime conferred tax and customs exemptions. However, two years later Burundi withdrew the certificate on the grounds that the free zone regime no longer applied to companies involved in the extraction and sale of ore. As a result of the withdrawal of the certificate of free zone, the Belgian individuals incurred losses. They brought the case on a basis of consent to arbitration under the ICSID

¹ The other awards embodying the settlement of the parties were rendered in the cases *Guadalupe Gas Products Corporation v. Nigeria* (Case No. ARB/78/1), *WRB Entreprises and Grenada Private Power Limited v. Grenada* (Case No. ARB/97/5), and *Joseph C. Lemire v. Ukraine* (Case No. ARB(AF)/98/1), which is also published in this issue.

Convention contained in the 1989 bilateral investment treaty between the Belgium-Luxembourg Economic Union and Burundi (the BIT).

The request was registered by the Secretary-General of ICSID on December 18, 1995. In the absence of prior agreement between the parties on the number of arbitrators and the method of their appointment, they agreed on the formula provided in Article 37(2)(b) of the ICSID Convention, i.e., a Tribunal consisting of three arbitrators, one appointed by each party, and the third, who would be the President of the Tribunal, appointed by agreement of the parties. The claimants appointed Professor Jean-Denis Bredin, a French national, and Burundi appointed Judge Mohammed Bedjaoui, an Algerian national.

The parties having failed to agree on the third arbitrator, the claimants invoked Article 38 of the ICSID Convention which provides that, if the Tribunal has not been constituted within ninety days after the notice of registration of the arbitration request, the Chairman of the Administrative Council shall, at the request of either party and after consulting both parties as far as possible, appoint the arbitrator or arbitrators not yet appointed. The Chairman of the Administrative Council appointed Professor Prosper Weil, a French national, as the third arbitrator and President of the Tribunal.

When Burundi appointed Judge Bedjaoui, it informed the Centre that this would not prevent it from raising any objections to jurisdiction. However, Burundi never raised such an objection; nor did it appear at the sessions of the Arbitral Tribunal or file any memorials. Therefore, the Tribunal applied the provisions of Article 45 of the ICSID Convention and Rule 42 of the Arbitration Rules which deal with the situation of a defaulting party.

In the course of the proceeding, the parties entered into negotiations to reach a settlement agreement. Aware of these parallel negotiations, the Tribunal decided not to render an award but instead to render a decision on liability. The Tribunal decided on September 2, 1998 that the withdrawal of the certificate of free zone constituted a measure tantamount to expropriation, defined in Article 4 of the BIT as a “measure depriving of or restricting property rights.” However, the Tribunal specified that Burundi would be declared liable only if it did not provide adequate and fair compensation to the investors within four months of the notice of the decision. Alternatively, Burundi could grant a new certificate of free zone to AFFIMET.

The September 2, 1998 decision addresses several interesting issues regarding the interpretation of the BIT. These issues include the scope of

the disputes covered by the BIT (paras. 70-73), the applicable law (paras. 94-99), and the expropriation clause (paras. 124-133).

Following that decision, the parties reached on December 23, 1998 a settlement agreement whereby Burundi agreed to reimburse AFFIMET the taxes and custom duties it had to pay, amounting to almost US\$3 million, and to create a new free zone regime. At the request of the parties, the Tribunal embodied this settlement agreement in an award and decided that the parties should share the costs incurred by the Centre in connection with the proceeding.

The February 10, 1999 award was rendered in French. Both parties have recently given ICSID their consent for the award to be published. The text of the award is reproduced below and is posted in PDF format on ICSID's website at www.worldbank.org/icsid.

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