School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law
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Award Name and Date:

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

Case Report by:

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Summary:

In its decision on liability, the Tribunal assumed jurisdiction over the dispute between Antoine Goetz and other Belgian investors against Burundi under the Convention between the Belgium-Luxembourg Economic Union and the Republic of Burundi on Reciprocal Promotion and Protection of Investments. The dispute concerned legitimacy and consequences of a ministerial decision issued by Burundi to Claimants' locally owned entity, AFFIMET. The disputed decision deprived AFFIMET of certain benefits previously conferred upon it by means of a certificate of free zone. Claimants requested annulment of the withdrawal decision or payment of damages.

The Tribunal found no violation of Burundian national law at the time the withdrawal decision was adopted. It further concluded that the measure was adopted in the public interest, was not discriminatory and followed the procedure prescribed by law. It further found that unless Burundi compensated AFFIMET for deprivation of the investment, Burundi would be found in breach of its international obligation under the BIT. On that basis, the Tribunal decided that Burundi was either to terminate the disputed measure or pay adequate and effective compensation to AFFIMET within four months of the Tribunal's decision.

Following the parties' settlement agreement, which provided for reimbursement of taxes and customs duties sought by Claimants in the framework of the arbitration proceedings and reinstatement of the certificate of free zone, the Tribunal issued its decision on costs. The award rendered on 10 February 1999, included the Tribunal's decision on liability of 2 September 1998 and the parties' settlement agreement of 23 December 1998, accompanied by the Protocol attesting to the settlement agreement of the dispute and the Special Protocol on the functioning of AFFIMET.

Main issues: default of a party, settlement, jurisdictional – personal (legal person versus natural person), material (dispute directly related to foreign investment), choice of law, discrimination, compensation, public interest, state responsibility

Tribunal: Mr. Prosper Weil (President), Mr. Jean-Denis Bredin (appointed by Claimants), Mr. Mohammed Bedjaoui (appointed by Respondent)

Claimants' Counsel: Mr. Dominique Herbosch, Anvers, Belgium

Respondent's Counsel: Ministry of Justice, Bujumbura, Burundi

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Digest:

1. Relevant Facts and Procedural Dates

Claimants are six Belgian nationals, shareholders of Affinage des Metaux ("**AFFIMET**"), a limited liability company incorporated in the Republic of Burundi and headquartered in Bujumbura (¶ 3). Together Claimants held 999 of AFFIMET's 1000 shares, of which 750 were owned by Antoine Goetz (¶ 3). AFFIMET produced, refined and sold precious metals on local, regional and international markets (¶ 3). Respondent is the Republic of Burundi ("**Burundi**" or "**Respondent**") (¶ 1).

On 3 February 1993, AFFIMET was granted a certificate of free zone001/93 (the "**certificate of free zone**") that conferred upon it certain tax and customs exemptions in accordance with the Decree-law No. 1/30 of 31 August 1992 establishing a "free-zone regime." The dispute arose as a result of the withdrawal of the certificate of free zone on 29 May 1995 by means of Ministerial Ordinance 750/184 (the "**Ordinance**") and subsequent withdrawal decision of the same date (the "**withdrawal Decision**") (¶¶ 15-16).

AFFIMET challenged the Ordinance at the Administrative Court of Bujumbura (¶ 17) and initiated an amicable settlement procedure. On 1 September 1995, AFFIMET also requested diplomatic support from the Belgian Government. These initiatives proved unsuccessful (¶ 17). On 5 June 1995, AFFIMET gave notice to the Ministry of Justice of Burundi that absent amiable settlement of the dispute, it would resort to arbitration at the International Centre for Settlement of Investment Disputes ("**ICSID"**), as provided for in the Convention between the Belgium-Luxembourg Economic Union and the Republic of Burundi on Reciprocal Promotion and Protection of Investments (the "**BIT**") (¶ 17). The following day, AFFIMET sent its formal notice to Burundi, as required under Article 8 of the BIT (¶ 17). On 29 November 1995, Claimants filed their Request for Arbitration, which was registered by the ICSID Secretariat on 18 December 1995 (¶ 18).

On 29 February 1996, absent an agreement on the number and the method of arbitrator appointment, Claimants proposed to apply the appointment procedure under Article 2(3) of the ICSID Arbitration Rules and Article 37(2) of the ICSID Convention. They then proceeded to nominate Professor Jean-Denis Bredin as an arbitrator and proposed Professor Andreas Bucher as the Tribunal's President. On 12 March 1996, Respondent requested that AFFIMET withdrew its arbitration claim in order to facilitate an amicable resolution of the dispute, AFFIMET refused (¶ 23). One week later, Respondent appointed Judge Bedjaoui as its arbitrator and nominated Judge Keba Mbaye as President (¶ 24). On 25 June 1996, the Chairman of ICSID's Administrative Council appointed professor Prosper Weil as President of the Tribunal, and the Tribunal was constituted the following day (¶¶ 22, 26).

On 3 December 1996, Respondent requested suspension of the arbitral proceedings in light of the settlement negotiations that had been under way between the parties (¶ 33). Respondent failed to appear at the subsequent first session of the Tribunal scheduled for the following day (¶ 34). At the first session, held in Respondent's absence, Claimants objected to Respondent's request and the arbitral proceeding continued (¶ 34). On 14 January 1997, the Tribunal scheduled a preliminary conference to assist the parties in their settlement negotiations. But having received no confirmation of attendance from Respondent, the Tribunal ultimately cancelled the conference (¶ 36).

Subsequently, Respondent failed to appear at Tribunal's sessions, did not raise any jurisdictional objections and did not submit any written pleadings or documents. The Tribunal therefore applied Article 45 of the ICSID Convention and Rule 42 of the Arbitration Rules concerning the party that fails to present its case (¶ 34). At every stage of the proceedings, Respondent was sent minutes of oral proceedings and was contacted in writing and by telephone by the President of the Tribunal (¶ 50).

On 26 February 1997, Claimants submitted their Memorial (¶ 37), requesting: 1) annulment of the Ordinance and the withdrawal Decision; 2) reimbursement of taxes and customs paid, and the currency exchanged during the period of suspension of certificate of free zone and after its withdrawal; 3) compensation for losses, including lost profit due to the halt of commercial operations; and 4) an order requiring Burundi to pay costs of arbitration and all additional expenses (¶ 60). In the alternative, Claimants requested payment of damages and legal interest (¶ 61). Respondent, having requested and received several extensions for the submission of its Counter-Memorial, ultimately failed to file its pleading on the date set forth by the Tribunal (¶¶ 37, 39, 41-43).

On 1 December 1997, the Tribunal held a hearing in the absence of the Respondent (¶ 46). Two months later, Claimants submitted further written responses to the factual and legal questions posed by the Tribunal (¶ 48).

On 3 March 1998, Respondent proposed for the parties to file a joint request for the suspension of the arbitral proceeding in light of the settlement negotiations. Claimants refused and notified the Tribunal accordingly (¶ 49).

2. Analysis of the Tribunal regarding Jurisdiction

In view of the fact that Respondent had raised no jurisdictional objections and pursuant to Article 42(4) of the ICSID Rules of Arbitration, the Tribunal proceeded to examine its jurisdiction *proprio motu* (¶ 79). The Tribunal affirmed its jurisdiction (¶ 85) over the claim

concerning legitimacy and consequences of the withdrawal Decision and declined jurisdiction over the claim for reimbursement of taxes, customs duties and convertible currency paid by AFFIMET (¶ 93).

2. 1. Analysis of the Tribunal's jurisdictional basis and the nature of dispute

As a preliminary matter, the Tribunal made a general observation to the effect that BITs reflect the will of the State Parties to guarantee investments of their own nationals in the territory of other States through the interplay of international relations and the protection of international law (¶ 64), and that the obligation to respect the rights of foreign nationals on its territory in accordance with its national and international law is nothing more than the exercise of the sovereign power of States(¶ 65).

Concerning consent to jurisdiction, the Tribunal found that the BIT embodied the consent of the parties as a fundamental jurisdictional requirement under Article 25(1) of the ICSID Convention (¶ 67). Based on prior examples of arbitral practice, the Tribunal found that Burundi consented to arbitration under the ICSID Convention by ratifying the BIT, and Claimants gave their consent to participate in arbitration proceedings by submitting their Request for Arbitration (¶ 81). The Tribunal further remarked that the case at hand was one of the first in the ICSID case law in which the applicable treaty included a choice of law clause (¶ 68). An increased use of such clauses—which refer to the relevant treaty, as well as principles and rules of international law—restored the role of international law in regulating (in parallel with the national law) the relations between the host State and foreign investors (¶ 69).

The Tribunal further noted that the dispute arose under the BIT, rather than a State contract (¶ 63) and the considerations pertaining to an investment contract were therefore inapposite (¶ 74). The Tribunal found that the request for and the issuance of the certificate of free zone did not amount to a contract, and rather constituted a unilateral legal relationship between AFFIMET and Burundi (¶ 75).

2. 2. Analysis of jurisdiction

In analysing the BIT's temporal scope, the Tribunal observed that the free zone regime law, creation of AFFIMET and issuance of the certificate of free zone predated the entry into force of the BIT on 13 September 1993 (¶ 70). The fact giving rise to the dispute, *viz*. withdrawal of the certificate of free zone on 29 May 1995, post-dated the BIT's entry into force. The Tribunal concluded therefore that the laws in force at the time of the disputed withdrawal Decision included the BIT and must have been respected by Burundi (¶ 71).

As a matter of *rationae materiae*, the Tribunal found that the dispute regarding the legitimacy of the decision ending the benefits of the free zone regime and potential remedies met the requirements of Article 25 of the ICSID Convention that limit disputes to legal disputes directly related to an investment (¶ 83). Likewise, the six AFFIMET shareholders held Belgian nationality without simultaneously holding Burundian nationality and therefore met the requirements of Article 25 as a matter of *rationae personae* (¶ 84).

2. 3. Analysis of admissibility

As part of its admissibility analysis, the Tribunal looked at Claimants' (1) *jus standi*; and (2) fulfilment of the BIT's preliminary procedural requirements (¶ 86).

The Tribunal found that Claimants had *jus standi* (¶ 89) despite being natural persons, as opposed to a legal entity that was the target of the governmental measure concerned, *i.e.* AFFIMET (¶ 88).

The Tribunal reiterated the accepted interpretation of Article 25 of the ICSID Convention, confirming that an entity with a nationality of the host State may bring an ICSID claim if the respective State agrees to consider it as a national of the home State on the basis of foreign control (¶ 88). The Tribunal concluded that AFFIMET had standing to bring the claim as a Burundian entity controlled by Belgian nationals. Moreover, the Tribunal recalled a series of ICSID claims successfully prosecuted by foreign corporate entities with control over local companies. The Tribunal saw no reason to dismiss a claim of foreign individual investors, shareholders who exercise control over their locally incorporated company (¶ 89).

Further, the Tribunal concluded that Claimants fulfilled the preliminary procedural requirements of the BIT with regard to the legitimacy and legal consequences of the Ordinance and the withdrawal Decision (¶ 92): (1) they gave notice required under Article 8(2) of the BIT, attaching the required sufficiently detailed memorandum; (2) AFFIMET formally requested diplomatic support of the Belgian Government in settling the dispute; and (3) they validly submitted their Request for Arbitration after 3 months of unsuccessful settlement efforts through direct and diplomatic means (¶ 91). The procedural requirements were, however, not met and the claims were therefore inadmissible as regards the reimbursement of taxes and customs duties paid and the convertible currency paid by AFFIMET during the relevant period (¶ 92).

3. Tribunal's Analysis of the Merits

3. 1. Analysis of applicable law

Pursuant to Article 42(1) of the ICSID Convention, the Tribunal applied the law set forth in article 8(5) of the BIT (¶ 96), in particular the national law of the contracting party on the territory of which the investment was located, along with the provisions of the relevant BIT and generally accepted principles and rules of international law (¶ 94). Moreover, by operation of Article 7 of the BIT, the parties' rights and obligations were governed by international and national law, including the free zone regime established by Burundian law (¶¶ 95-96).

The Tribunal held that the relation between the Burundian national law and international law was based on complementarity. Burundian law was applicable based on an explicit provision established in the BIT. International law, in its turn, applied for two reasons: (1) the Burundian legislation incorporated international law, which made the latter directly applicable; and (2) Burundi was bound by international obligations that it had undertaken voluntarily by ratifying the BIT, and the legitimacy of the Burundian actions under its national laws was thus to be assessed in light of the international obligations it had undertaken (¶ 98). Further, in the event of a conflict between the rules, Article 7 of the BIT instructed the Tribunal to apply the provisions most favourable to the investor (¶ 99).

3. 2. Analysis of Burundian law

The Tribunal rejected Claimants' allegation that the withdrawal Decision violated Burundian administrative law (¶ 101). In light of Respondent's failure to present its case, the Tribunal had the benefit of studying only the information on the Burundian law submitted by Claimants. On the basis of that information, the Tribunal concluded that (1) the benefits acquired by AFFIMET prior to the withdrawal of the Certificate could not have been recovered retroactively (¶ 102); (2) Burundi did not revoke the certificate of free zone on illegal grounds, rather the certificate was revoked as part of a legislative modification (¶ 103). The Tribunal further found that the contested decision could only be deemed illegal if (1) the legislative act upon which the withdrawal decision was based had been tarnished by illegality; or (2) the decision was illegal in itself (¶ 104). Claimants argued that the Ordinance was illegal because (1) it infringed by regulatory means upon a lawfully acquired right; and (2) it was an individual measure disguised as a regulatory measure (¶ 105).

The Tribunal found no contradiction between the decree-law establishing the free zone regime and the Ordinance (¶ 106). The ministerial ordinance of 28 September 1992 in particular listed the activities eligible for the benefits of the free zone regime and expressly provided for potential modifications of the regime by means of ministerial ordinance (¶ 106). The rights acquired by Claimants were therefore not based on the decree-law, but rather on the subsequent ordinance of 28 September 1992. The Ordinance of 29 May 1995 in its turn lawfully made minerals ineligible for the benefits of the free zone (¶ 107). The Tribunal also found that the subject measure was not of individual application and in fact another company, EJUMEAU, was subject to the same measure (¶ 108). The Tribunal also rejected Claimants' contention that the formalities followed at the time of the issuance of the certificate of free zone should have been followed at the time of its withdrawal (¶ 110).

Further, the Tribunal disagreed with Claimants that Article 34 of the decree-law establishing the free zone regime made a limited list of violations an exclusive ground for withdrawal of the Certificate (¶ 111). Indeed, the withdrawal was not based on a violation, but rather it followed a modified set of eligibility criteria established in the public interest that retracted the benefits conferred upon investors earlier (¶¶ 111-12).

The Tribunal also rejected the allegation that the "minerals" category referred to in the Ordinance did not cover "precious metals" (¶¶ 113-14). The Tribunal noted *inter alia* that Antoine Goetz in his request for the issuance of a certificate of free zone did not draw a distinction between minerals and precious metals (¶ 115).

Claimants alleged that absent any Burundian statutory provision on remedies, the theory of strict liability should be applicable to the actions taken by Burundi. The Tribunal disagreed holding that Burundi could not be held liable without fault as a result of the introduction of legitimate modifications to governmental policies (¶¶ 117-119).

3. 3. Analysis of international law

The Tribunal observed that its analysis was not limited to the matters of Respondent's national law but necessarily extended over Respondent's international obligations (¶ 120). Against this background, the Tribunal considered the Claimants' allegation of discrimination based on the relevant provision of the International Covenant on Economic, Social and Cultural Rights, to which both Burundi and Belgium were parties. The Tribunal did not,

however, find Claimants' reference to the Covenant useful, absent evidence suggesting worse treatment of Belgian investors than other investors in similar circumstances (¶ 121).

The Tribunal held that following the halt of AFFIMET's activities on 13 August 1996, Claimants were deprived of their investments as a result of a measure that had effect similar to depriving or restricting its ownership right. Such measure was prohibited under Article 4 of the BIT, unless four criteria had been met by the host State (¶ 124). The Tribunal then proceeded with its analysis of the four criteria, finding that (1) Burundi withdrew the certificate of free zone in the public interest, (2) following the required legal procedures and (3) without discrimination (¶¶ 126-28). With regard to the fourth criteria, the Tribunal observed that (4) Burundi failed to pay adequate and effective compensation to Claimants as provided for in Article 4(c) of the BIT (¶ 129). However, the BIT did not require to pay prior compensation (¶ 130); consequently, Burundi still had an opportunity to remain in compliance with the BIT, subject to payment of the compensation without undue delay (¶ 131).

4. Decision

In order to comply with its international obligations, the Tribunal provided two alternatives to Burundi to be fulfilled within four months of its decision: either (1) to terminate the contested measure by reinstating the benefits of the free zone to AFFIMET with or without prior repeal of the Ordinance; or (2) to pay to AFFIMET adequate and effective compensation without delay under Article 4 of the BIT in the amount of either the market value as of 28 May 1995 or the real and objective value to be proven by Claimants, including interest at a reasonable commercial rate (¶¶ 135, 137). The Tribunal made no decision as to the amount and methods of compensation at that stage of the proceeding (¶ 137).

4 .1. Settlement

Under Article 43 of the ICSID Arbitration Rules, the Tribunal integrated into the Award a Settlement Protocol in relation to an Settlement Agreement ("**Protocol**"), which contained a Special Convention relating to the Operation of AFFIMET ("**Special Convention**"). Under the Protocol, Burundi and Claimants agreed to the following (1) Burundi to reimburse USD 2,989,636 to AFFIMET in the form of taxes and customs duties paid during the suspension of the certificate of free zone, and 8% commercial interest up to the date of the payment; (2) signing of the Special Convention; (3) AFFIMET to withdraw any claims before ICSID in relation to the dispute at hand; and (3) costs to be decided by the Tribunal.

The Special Convention was effective for a period of 10 years and provided, *inter alia*, that AFFIMET (1) was authorised to purchase and refine on the territory of Burundi any minerals containing precious and semi-precious metals; and (2) was exempted from a list of taxes and customs duties.

4. 2. Costs

Following the parties' settlement, the Tribunal made the following decision on costs: (1) each party was to bear its expenses incurred in the support of its claims; (2) ICSID procedural costs were to be borne equally between the parties, and as Claimants advanced the entirety of such costs, Respondent was to reimburse Claimants half of that amount, with 8% interest in case of delay; and (3) in accordance to Article 1 of the Protocol, Burundi was ordered to pay

Claimants USD 2,989,636 in 12 instalments starting on 31 March 1999, with 8% interest starting with the second instalment (¶¶ 7-8).