Title:
ICSID Award, American Manufacturing & Trading, Inc. (USA/Zaire) v. Republic of Zaire, YCA 1997, at 60, 79 et seq.

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Content:

Award of 21 February 1997 in case no. ARB/93/1

Arbitrators: Sompong Sucharitkul (Thailand) president; Heribert Golsong (Germany) and Kéba Mbaye (Senegal)

Parties: Claimant: American Manufacturing & Trading, Inc. (USA/Zaire); Respondent: Republic of Zaire

Place of arbitration: Washington D.C., USA/Paris, France


Subject matters:
- status of US claimant to act on behalf of Zairian company owned by it
- consent of parties to ICSID jurisdiction
- US-Zaire bilateral investment treaty (BIT)
- responsibility of State vis-a-vis investor
- method of calculation of compensation
- alternative basis for establishment of liability

Facts

Société Industrielle Zaïroise (SINZA) is a Zairian company, 94% owned by the US company, American Manufacturing & Trading, Inc. (AMT). On 23-24 September 1991, certain members of the Zairian armed forces stationed at Camp Kolole in Zone de la Gombe broke into and looted SINZA's industrial complex for the production of automotive and dry cell batteries, as well as its commercial complex and stores. The commercial complex was reopened in February 1992, but following another looting incident on 28-29 January 1993, it was permanently closed.

AMT sought compensation from Zaire for the damage it suffered. Zaire relied on Zairian Ordinance Law No. 69-044 of 1 October 1966 which declared inadmissible all actions based on general law in matters of civil liability, seeking to condemn the State to pay compensation for the losses or injuries suffered in connection with the riots or insurrections.

AMT initiated ICSID arbitration on 26 January 1993 relying on a Bilateral Treaty concluded between the United States of America and the Republic of Zaire, in force 28 July 1989, seeking compensation for its direct losses initially estimated at
US$ 10,524,023. In a subsequent submission it also claimed US$ 324,868 related to the 1993 incidents.

Zaire did not react to the notification of the Request for Arbitration. AMT appointed Mr. Heribert Golsong as arbitrator, and the remaining two arbitrators were designated by the Chairman of the Administrative Council, in conformity with the recommendation of the Secretary-General. The Arbitral Tribunal was constituted on 4 August 1993.

The Memorial filed by AMT, requested a sum of US$ 21,574,405 as compensation, with 8% interest. Zaire, in its Counter-Memorial, acknowledged that SINZA had been the object of looting in 1991, "as it was indeed the case with all the others" but objected to the jurisdiction of ICSID, and the admissibility of AMT’s claim.

A date for a first hearing was eventually fixed on 5 and 6 December 1994 in Paris. By letter of 30 November 1994, the Government of Zaire requested a postponement of the hearing. The Arbitral Tribunal notified the parties that the hearing could not be postponed at that late stage and the hearing was held as scheduled. At the hearing Zaire was without representation except in the person of a Counsellor of the Embassy without nomination, authorization or accreditation of any kind. In the course of the hearing on 5 December 1994, the Arbitral Tribunal adopted Procedural Order No. II by which it granted Zaire a period of grace and decided to hold a supplemental hearing in Paris on 13-14 February 1995, provided Zaire would deposit in advance an amount to cover the costs of the hearing. Zaire failed to comply with this offer and the supplemental meeting was not held. After the hearing, Zaire submitted a Counter-Memorial dated 30 May 1994.

The Arbitral Tribunal found that it had jurisdiction ex Art. 25 of the Washington Convention holding that AMT acted in its own capacity as an American enterprise having invested in Zaire. It held Zaire responsible for all the damage caused by the above-mentioned events and condemned Zaire to pay to AMT an all-in sum of US$ 9,000,000 with interest of 7.5% from the date of the award. Mr. Heribert Golsong joined in the majority, but added an individual opinion in which he provided an alternative legal reasoning to establish the responsibility of Zaire. Mr. Kéba Mbaye added a Declaration, opining that the total amount of compensation should not exceed US$ 4,000,000.

Excerpt

[...]

III. THE QUANTUM OF DAMAGES AND THE AMOUNT OF COMPENSATION

[53] "Having firmly established the responsibility of the State of Zaire for all the losses, injuries and damages sustained by AMT, and caused by the acts of violence committed to the detriment of the investment made by AMT on the territory of Zaire, the Tribunal will now determine the quantum of compensation to be paid by Zaire regardless of the existence or absence of fault or independently thereof. Suffice it to prove that Zaire has not fulfilled its obligation of vigilance, and a fortiorissime, Zaire has also breached its obligation to prevent the occurrence of a given event, above all whether there have been acts of violence on the Zairian territory, giving rise to losses, damages and injuries sustained by AMT."

A. The Method of Assessment of Compensation

[54] "There are apparently several different methods of assessment of the quantum or the total amount of compensation plus interests thereon which should be equitable in the circumstances of the present case. Two different criteria seem to attract the attention of AMT as claimant. The first is the criterion reflected in the most favorable treatment as required by the minimum standard provided in Art. II(4) of the Zaire-US Bilateral Treaty. The second criterion preferred by AMT is the one proposed in Art. III of the Treaty. This article, entitled 'Compensation for Expropriation' provides for compensation 'equivalent to the fair market value of the expropriated investment'. The said compensation shall include interests at a rate equivalent to current international rates from the date of expropriation, and be freely transferrable at the prevailing
market rate of exchange on the date of expropriation'. The case in hand is clearly not a case of expropriation. But can it be assimilated to expropriation? The answer of the Tribunal is in the negative.

[55] "AMT has invoked, in support of its preference, Art. IV(2)(b) of the Zaire-US Bilateral Treaty as the legal basis for its claim for compensation in accordance with Art. III of the said Treaty, viewing the case as one of ‘destruction of property by the forces or the authorities of the other Party which was not caused in combat actions’. It appears that this choice was essentially prompted by AMT’s preference as to the method of calculation of compensation and interests thereon which should be allocated to it (Art. III of the BIT). But for the Tribunal, the essence lies in the determination with certainty the basis of the responsibility and on that basis it may proceed to fix the just compensation due to AMT.

[56] "It has never been alleged that the destructions in question, neither that of 23-24 September 1991 nor that of 28-29 January 1993, were caused in combat actions. It is necessary to ascertain further whether there was ‘destruction of property by the forces or the authorities’ of the Republic of Zaire.

[57] "AMT maintains that the destructions of both events in September 1991 and January 1993 were committed by the Zairian armed forces from Camp Kokolo. It is true that they appeared to be (in whole or in part - in this regard, the Tribunal is not certain) soldiers in uniform with weapons of the army, including grenades and automatic weapons belonging to the armed forces. The question to be considered by the Tribunal is whether the destruction of property was committed by the Zairian forces or authorities not in combat actions in the sense of Art. IV(2)(b) of the BIT.

[58] "To obtain more precise clarification on sub-paragraph (b) of paragraph 2 of Art. IV, it is sufficient to read carefully once more sub-paragraph (a) which speaks of requisition of property by ‘the forces’ or ‘the authorities’ of the other party, an action which can be assimilated to expropriation. It is suddenly apparent that in fact this relates to the organized forces, which even according to the evidences furnished by the only witness heard in this case is not at all the case in the circumstances of this case.

[59] "In the present case, it is true from the information received that they were the military, at least persons in military attire who manifestly acted individually without any one being able to show either that they were organized or that they were under order, nor indeed that they were concerted. The nature of the looting and. the destruction of property which were looted show clearly that it was not ‘the army’ or ‘the armed forces’ that acted as such in the circumstance. And this in no way resembles expropriation or requisition by the State.

[60] "And the fact that thereafter the President of the Republic of Zaire decided of his own accord to pardon these persons who acted in 1991 and in 1993 against the property of others does not alter anything in the circumstance. On the contrary, it clearly shows that they were separate individuals and not the forces that performed the action, because the Tribunal does not see how one could speak of a pardon similar to an armistice if it was the armed forces that acted in a given circumstance. An armistice may be either of a general or a personal character, but it must always refer to a determinate offense.1 Moreover, an armistice or such a pardon to persons who acted in 1991 and in 1993 does not entail in international law the effect of exculpating for those receiving pardon save to the extent and from the point of view of Zairian law, and does not produce the result of exoneration for the responsibility of the State of Zaire in respect of the destruction of property belonging to nationals or companies and forming integral part of the investment made by them in Zaire.

[61] "The Tribunal does not consider it necessary to insist on this question beyond measure. In effect, its relevance is not here discussed as a foundation of the responsibility of Zaire. That is why the Tribunal prefers at this stage to concern itself with the method of calculation of the amount of compensation to which AMT is entitled because of the injury sustained.

[62] "As between the two methods of assessment of the amount of compensation to be paid to AMT by the Republic of Zaire, the Tribunal does not see any substantial difference in practice. In principle, it is necessary to assess the true value or the actual market value of the properties destroyed or the losses suffered by AMT. Is it necessary to add on top of that also the current interest to the total sum of compensation from the date of each destruction occurring in the territory of Zaire? The answer of the Tribunal will have to take into account the existing conditions of the country and not by making abstraction based on a criterion for the assessment which does not correspond at all to the reality, nor to the current happenings in Zaire, nor indeed to the commercial and industrial activities of the claimant.
“AMT would have liked to adopt a method of calculating compensation including interests practicable in the normal circumstances prevailing in an ideal country where the climate of investment is very stable, such as Switzerland or the Federal Republic of Germany. The Tribunal does not find it possible to accede to this way of evaluating the damages with interests in the circumstance under consideration, in which it is apparent that the situation remains precarious and that the lucrum cessans or the loss of profits is not at all measurable without a solid base on which to found any profit to take or for predicting (the growth or expansion of the investment made. It would be neither practical nor reasonable to apply the method of assessment of compensation in a way so far removed from the striking realities of the current situation.

Preferably, the Tribunal will opt for a method that is most plausible and realistic in the circumstances of the case, while rejecting all other methods of assessment which would serve unjustly to enrich an investor who, rightly or wrongly, has chosen to invest in a country such as Zaire, believing that by so doing the investor is constructing a castle in Spain or a Swiss chalet in Germany without any risk, political or even economic or financial or any risk whatsoever.”

B. Compensation for the Losses Sustained

“For practical reasons founded on equitable principles, the Tribunal finds that the Republic of Zaire which is responsible in international law, is under a duty to compensate AMT for the very losses which have been caused by the acts of violence and looting occurring in September 1991 and in January 1993. In effect, the Republic of Zaire has pleaded in its Rejoinder that 'No one on earth could ignore the fact that for the past four years, the Republic of Zaire has been going through a most painful and unfortunate period in its history.' Zaire continues, 'This requires a benevolent and compassionate attention on the part of all our partners, even those who have encountered unfortunate and disastrous consequences, for there was a time when these same persons were enjoying the benefit of the good situation of the State of Zaire.'

The Tribunal has never denied the Republic of Zaire any opportunity to defend itself for the sake of good administration of justice. The Tribunal has never forsaken the principle of the right to be heard. Even without the Republic of Zaire entering an appearance to present its case, the Tribunal fully takes into account the situation in Zaire.

The Tribunal appointed Mr. Bernard Decaux, of French nationality, former civil servant of the World Bank, as independent expert for the purpose of evaluating the damages and losses suffered by Société SINZA (Zaire) in 1991/1993. Having assumed his functions to this end on 26 June 1996, the expert prepared and submitted his report on 5 September 1996 on the evaluation of the damages and losses suffered. According to the expert, the evaluation of the damages and losses suffered by Société SINZA (Zaire) in 1991/1993 is as follows:

1. Damages to the equipments of the production line .... 3,287,500
2. Damages to the building belonging to AMT .... 426,100
3. Value of goods damaged .... 48,400
4. Losses suffered by AMT (looting) .... 690,500

Total US$ 4,452,500

This report was submitted to the parties. It was contested by AMT in its response of 15 October 1996. The Republic of Zaire has not submitted its observations.

Thus the Tribunal must now determine the amount of compensation. The Tribunal proceeds to exercise its
discretionary and sovereign power to determine the quantum of compensation that the Republic of Zaire shall pay to AMT, taking into account all the circumstances of the case before it.”

IV. THE DECISIONS OF THE TRIBUNAL

[69] "For the reasons stated in the preceding parts of the present award, the Tribunal unanimously decides

(1) On the competence
(2) On the admissibility of the Request for Arbitration
(3) On the responsibility of the Republic of Zaire
(4) On the claim for compensation

(5) On the expenses between the parties to the arbitral proceedings

[70] The award was signed by all three arbitrators with the addition of the following text: "Individual opinions of Mr. Heribert Golsong and of Mr. Kéba Mbaye are attached to this Award in accordance with Art. 48(4) of the Convention."

[...]

1 Note General Editor. The arbitrators were apparently referring to an "amnesty”.

Referring Principles:

XI.1 - Compensation for expropriation