CASES

Jurisdiction – Based on bilateral investment treaty – No contractual relations between claimant investors and Respondent State – Consent to jurisdiction manifested by commencement of proceedings in accordance with treaty – No right of Respondent unilaterally to withdraw consent

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Expropriation – Measures equivalent to – Grant of free-zone status for mining company – Substantial investment in reliance on free-zone status – Subsequent change in government policy leading to revocation of status – Whether measure equivalent to taking – Whether compensation required – Belgium–Burundi Bilateral Investment Treaty, Article 4

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GOETZ AND OTHERS *v.* REPUBLIC OF BURUNDI

(Case No. ARB/95/3)

Award. 10 *February* 1999

(*Arbitration Tribunal*: Weil, *President*; Bedjaoui and Bredin, *Members*)

SUMMARY: *The facts*: — By Decree-law No. 1/30 of 31 August 1992 the Republic of Burundi established a "free-zone regime" allowing certain companies formed in Burundi to benefit from a range of tax and customs exemptions. Obtaining the benefit of this regime was made conditional on the granting of a "free-zone certificate" by the relevant Minister on the advice of a consultative commission; only companies undertaking activities in a "non-traditional sector" were eligible for the regime. Ministerial Order No. 750/14 of 28 September 1992 declared that companies working with minerals were eligible for the regime "on condition that the minerals have undergone a process of conversion in accordance with the particular

provisions laid down, for each type of mineral, by the relevant staff of the Ministries responsible for mines and overseas trade respectively".

AFFIMET SA was formed under Burundian law on 22 December 1992 in Bujumbura. Of its 1,000 shares, 999 were held by six different Belgian nationals and one share was held by a Rwandan national. Its chief object was the production, fining and marketing of precious metals. On 3 February 1993, the company was granted a free-zone certificate by the Minister of Industry and Commerce. On the basis of the certificate, AFFIMET undertook massive investments with a view to realizing its goals.

On 9 July 1993, the Minister informed AFFIMET that differences of opinion had arisen within the Burundian administration as to the proper scope of the regime and that, pending the outcome of a number of studies on the matter undertaken by a Commission, the company could continue to benefit from the free-zone regime only if it deposited a sum equivalent to the duties that it would have to pay if the certificate was withdrawn. Following the completion of the studies, the Minister informed AFFIMET on 20 August 1993 that its free-zone certificate had been suspended. However, by letter of 10 January 1994, the Minister advised AFFIMET that the certificate had come back into force. But following the intervention of the Burundian Prime Minister and a further study by an international consultancy, AFFIMET was informed that, pursuant to Ministerial Order No. 750/184 of 29 May 1995, which provided that the regime no longer applied to companies involved in the extraction and sale of ore, its certificate had been withdrawn.

AFFIMET sought to have the matter resolved via an amicable settlement, and also sought to address the matter at a diplomatic level, with the help of the Belgian Government. Neither of these initiatives succeeded. In consequence, the six shareholders in AFFIMET holding Belgian nationality lodged a request for arbitration with ICSID dated 29 November 1995, founding this request on Article 8 of the 1989 Belgium–Burundi Bilateral Investment Treaty.[1] Burundi having sought and obtained deferrals on several occasions, the first hearing of the Tribunal was eventually held in the absence of the Respondent. Although the Respondent appointed an arbitrator and expressed willingness to co-operate with the Tribunal, it did not file any memorials, nor were its representatives present at any of the oral hearings. Applying Article 45 of the ICSID Convention and Rule 42 of the Arbitration Rules, the Tribunal sought to consider fully the arguments available to the Respondent despite its non-appearance.

In their request the Claimants demanded the annulment of the decision of 29 May 1995 withdrawing the free-zone certificate or, if this were not possible, substantial damages.

Held: — The Republic of Burundi was obliged either to restore the free-zone certificate to AFFIMET or to pay an adequate indemnity to compensate for the loss of this certificate and the privileges entailed by it.

[1] Belgo-Luxembourg Economic Union–Burundi, Convention on the Mutual Promotion and Protection of Investments, Brussels, 13 April 1989: United Nations Registration No. 33517.

(1) Since the event generating this dispute was the decision of 29 May 1995 withdrawing the certificate and not any of the earlier communications between the parties, the Belgium–Burundi Investment Treaty was fully applicable, having been in force since 13 September 1993 (paras. 70–6).

(2) Since the Claimants had undertaken an investment and all six parties were clearly nationals of a Contracting State other than that against which the claim was brought, the Tribunal had jurisdiction *ratione materiae* and *ratione personae* (paras. 77–85).

(3) As nationals of a Contracting State who were controlling figures in the investing company, the Claimants were competent to bring the request in question. However, only those elements of the request that pertained to the legality of the withdrawal of the free-zone certificate on 29 May 1995 were within the Tribunal's jurisdiction; this was not true of the claims for reimbursement of taxes and customs duties which did not fulfil the conditions laid down in Article 8(2) and (3) of the Belgium–Burundi Investment Treaty (paras. 86–93).

(4) Burundi was not liable for fault and the principle of strict liability pertaining to public bodies could not apply to a case which concerned legitimate changes in governmental policy concerning the economy (paras. 100–19).

(5) Burundi had not been guilty of discrimination, nor had it failed in its duty to encourage investments under the Belgium–Burundi Investment Treaty. On the other hand, it had violated its duty under the Treaty to refrain from adopting measures similar to depriving an investor of or restricting its property rights. Burundi would thus be found liable of a breach of international law if it did not either provide adequate and fair compensation within four months of the notice of the decision or grant a new free-zone certificate (paras. 120–37).

Subsequently the parties reached an amicable agreement which, pursuant to Article 43 of the Rules, the Tribunal embodied in its Award, dealing also with unresolved issues of costs.

The text of the award is set out as follows:

Part One: Decision on Liability (2 September 1998) p. 5
Part Two: The Parties' Agreement (23 December 1998) p. 46

FIRST PART: THE DECISION OF 2 SEPTEMBER 1998

(Translation)

[459] On 2 September 1998 the Arbitration Tribunal gave the decision the text of which follows:

I. The Facts

1. By Decree-law no. 1/30 of 31 August 1992 the Republic of Burundi instituted a "free zone regime" allowing certain businesses established in Burundi to benefit from a number of customs and fiscal exemptions as well as from certain facilitative measures in the areas of labour legislation and exchange control. By the terms of the preamble of this Decree-law, this regime aimed to "encourage exports, particularly of non-traditional products, facilitate private investment, both domestic and foreign, generate new jobs and stimulate the circulation of ideas and of technology in the areas of production, management and marketing", as well as "to make Burundian products more competitive on the export market, particularly as against those coming from other developing nations where free zone regimes exist". The Decree-law declared activities falling within a "non-traditional sector" as eligible for the free zone regime—without however giving a definition of this concept or listing the activities envisaged—and made obtaining the benefit of this regime conditional on the receipt of a ministerial agreement entitled a free zone certificate, given on the advice of a consultative commission.

2. The measures necessary to execute Decree-law no. 1/30 of 31 August 1992 were taken by Ministerial Order no. 750 of 28 September 1992. Businesses exporting listed traditional products (ordinary coffee, black tea, cotton-fibre, animal skins, living animals) were declared ineligible for the free zone regime by this text, it being noted, however, that this list could be modified by order of the Minister responsible for overseas trade. As regards minerals, they formed the object of a special provision. By the terms of Article 2 of the order, in effect,

> Minerals can be eligible for the free zone regime on condition that they have undergone a process of conversion in accordance with the particular **[460]** provisions laid down, for each type of mineral, by the relevant staff of the Ministries responsible for mines and overseas trade respectively.

3. On 22 December 1992, by means of an agreement sealed before a notary in Bujumbura, a company limited by shares was formed, governed by Burundian law, and the seat of which was established at Bujumbura, a company known as "AFFINAGE DES METAUX, abbreviated as AFFIMET". By terms of Article 4 of its statutes,

> The company's business is the production, the fining and the marketing of precious metals as well as the purchase on the local, regional and international market of the minerals necessary for such activity.
>
> And generally all financial, commercial, industrial, civil, personal and real property transactions capable of being linked directly or indirectly either to one of the above activities or to any other similar or connected social object.
>
> It can in particular acquire, and carry out all necessary import, export, representative or advisory transactions without the present list being . . . limitative.

The share capital of AFFIMET is represented by a thousand shares divided between six Belgian shareholders (these being 750 shares for Mr Antoine Goetz, 230 shares

for Ms Theresia Pooters and 19 shares for four other persons) and one shareholder with Rwandan nationality (1 share).

4. By letter of 2 January 1993 AFFIMET requested to be given the status of a free business.

5. On 1 February 1993 the consultative commission for the free zone regime concluded "unanimously that the activities of this business are eligible for the free zone regime", and two days later, that is to say on 3 February 1993, the Minister for Industry and Commerce delivered the free zone certificate to AFFIMET. Under the terms of this certificate,

> The activities of the business are: the production of 99.9% pure silver, of 99.9% pure gold in grain and in ingots; the manu-**[461]**facture of alloys and jewellery, the treatment and fining of precious metals, and the cutting of precious metals.

The certificate subjected the company's activities to certain conditions. It indicated in particular that the business had to initiate its activities by 1 July 1993 at the latest. It added that if the company had not begun its activities by that date, it exposed itself to the risk of having its certificate annulled.

6. On the strength of this certificate, AFFIMET effected, according to the claimants "massive investments with the goal of optimally achieving its corporate aims". Without the Tribunal having to pronounce at this stage on the well-foundedness or otherwise of this claim, it notes that according to AFFIMET these investments had reached 2 million dollars by June 1995 (letter to Amex International of 9 June 1995).

7. The granting of the certificate was followed by what the Minister for Industry and Commerce, in a letter of 9 July 1993, termed "disputes regarding the interpretation of the texts governing the company's activities". These divergences of opinion, the Minister noted, "formed the basis of instructions which could hinder the functioning of your company". From the evidence to be found in the dossier it seems in effect that the Burundian administrative and governmental staff took different views at the same time as regards the legality of the certificate being granted when the applicable texts relating to minerals had not yet been published and as regards the eligibility of activities relating to gold and precious minerals to benefit from the advantages of the free zone regime. In this same letter of 9 July 1993, the Minister for Industry and Commerce informed AFFIMET that

> After consultations with the staff of the Minister responsible for mines, the following has been decided:
> 1) A commission will be put into place to examine the viability of keeping gold and other minerals within the free zone regime . . . The members of the commission will doubtless visit your company in order to take account of the investment already realised.
> 2) In order to verify that your company is conforming with the undertakings given in return for the free zone certificate, an investigation will instituted to this end. **[462]**
> 3) Pending the decisions that will follow from the commission's recommendations, the company AFFIMET is authorised to pursue its activities within the free zone regime once a sum equivalent to the customs charges that would be demanded if the ordinary business regime applied is deposited. This deposit will be reimbursed if the administration is satisfied that the company has respected its undertakings.

8. In its report dated 30 July 1993 the Commission created by the Government, whilst concluding "that the refining (of gold) is a non-traditional activity eligible for the advantages of the free zone regime" and that "the company AFFIMET has acquired its free zone certificate in a valid fashion and can in consequence carry out its activities within the context of this law", declared itself nonetheless as "deploring" the fact that "the lack of co-operation between the staff responsible for commerce and those responsible for mines" had led to an "impasse . . . as regards the future of the Burundian free zone regime". The commission decried in particular the fact that the provisions necessary to fix the degree of processing required for each mineral had not been taken, and it recommended that this lacuna should be quickly filled. This lacuna, it added, was imputable to the administration, and could not be attributed to AFFIMET, which had "fulfilled all the conditions laid down by the law". As regards the ease of coming within the law, the commission declared itself as having "strong worries that the law governing this regime was so liberal that the State of Burundi risked not being able to reap all the expected benefits". In the specific case of AFFIMET, it considered however that the shortfall due to fiscal and customs exemptions could be regarded as "facilitative measures accepted by the government as attracting investors to the free zone regime"; it noted in particular the size of the investments made by AFFIMET, the benefits gained by Burundi from the development of the gold industry, the creation of jobs and the technology made available.

9. A "Note on the AFFIMET free zone regime dossier" written by the Agency for the promotion of foreign trade was passed to the Minister for Industry and Commerce on 30 July 1993.[1] Having noted the significance for the national economy of the promotional measures taken by the government with the goal of attracting investors and of guaranteeing the security of their investments, the note decried the divisions that had sprung up between the various **[463]** competent authorities as regards the application to gold of the free zone regime as well as the restrictive measures taken in regard to AFFIMET on 9 July. The note concluded in these terms:

> As it relates to the present analysis, we strongly recommend that all of the rights of the company AFFIMET should be entirely restored. We also recommend that other businesses should set up in this sector and benefit from the same advantages.
>
> If it is necessary to reformulate a given legal provision, the staff involved should work together and propose the necessary modifications to the relevant authorities. In the meantime, the business will continue to enjoy all its rights.

10. On 20 August 1993 the Minister for Industry and Commerce informed AFFIMET that

> the effects of the free zone certificate no 001/93 handed over to you on 3 February 1993 are suspended from today in accordance with the decision taken by the Council of Ministers on 17 August 1993.

[1] According to the terms of the covering letter, it related to a "confidential note". This note was submitted for the Tribunal's dossier by the claimants at their own risk.

11. By letter of 10 January 1994, the Minister advised AFFIMET that the measure indicated in his letter of 20 August 1993 had been "lifted", and added:

> Your free zone certificate no 001/93 granted you on 3 February 1993 has come fully back into force.

12. The Prime Minister objected to this decision of the Minister for Industry and Commerce in a letter of 3 February 1994. The Prime Minister considered in effect that this decision went against that taken by the Council of Ministers on 17 August 1993 to suspend the application of the free zone regime to minerals pending the publication of applying provisions. In consequence, the Prime Minister demanded that the Minister for Industry and Commerce annul his decision and "restore the situation of the company AFFIMET to within the context of the decision taken by the Council of Ministers on 17 August 1993".

[464] 13. On 24 March 1994 the Prime Minister designated a "national team" charged with assisting an international consultancy, the company AMEX INTERNATIONAL, of Washington, in the study of the advantages and the disadvantages of making minerals in general, and gold in particular, eligible for the free zone regime. In its report returned to the Prime Minister on 22 April 1994, the national team criticised the conditions in accordance with which the free zone regime had been created and its benefit accorded to AFFIMET. It considered nonetheless that it would be "difficult and delicate to again withdraw the certificate from AFFIMET without damaging consequences for the reputation of the state of Burundi" and recommended in consequence to "keep the status quo for the moment and (to) hasten the study of the eligibility of minerals for the free zone regime". A definitive decision on the subject of giving the certificate to AFFIMET, it suggested, could be taken "in the light of the conclusions of this study".

14. The AMEX INTERNATIONAL Report, entitled "Study on the reform of legislation on the free zone regime", was returned to the Minister for Industry and Commerce on 25 April 1995. In this voluminous report, the international consultancy proceeded to a "diagnostic" of the legislation on the free zone regime, and described its "strengths and failings". One of its principal conclusions was that "the cause of the problem is . . . the approval of a company which exercises a traditional activity", existing prior to the creation of the free zone regime.

15. On 29 May 1995 the Minister for Industry and Commerce informed AFFIMET that the free zone certificate had been withdrawn from it:

> In execution of the decision taken by the Council of Ministers on this Friday 26 May 1995 and of the Ministerial Order no 750/184 of 29 May 1995, I have the duty of informing you that the free zone certificate no 001/93 granted to you on 3 February 1993 has been withdrawn.

16. The relevant administrative staff were told of this decision by a letter from the Minister of the same date, to which was joined the text of the Ministerial Order no 750/184 of 29 May 1995 "involving measures to execute Decree-law no 1/30 of 31 August 1992 involving the creation of a free zone regime in Burundi". This order abrogated and replaced order no 750/14 of 28 September 1992 the provisions

of which it replicated word for word with the exception of the first article, which provided as follows:

> **[465]** Businesses exercising the supposedly traditional activities in the following list are not eligible for the free zone regime:
> a. The production and marketing of ordinary coffee;
> b. The production and marketing of black tea;
> c. The production and marketing of cotton fibre;
> d. The production and marketing of animal skins;
> e. The production and marketing of live animals;
> *f. The research, extraction, enriching, refining and/or fining, the purchase and the sale of minerals.*[2]
> This list can be modified by order of the Minister responsible for overseas trade on consultation with the Council of Ministers.

The effect of this order was from then on to add activities relating to minerals to the list of activities regarded as non-traditional and thus not eligible for the free zone regime.

17. AFFIMET protested against this measure before various authorities either directly or through the intermediary of its lawyer. It addressed itself to the Minister for Industry and Commerce, to the Prime Minister, to the World Bank. It called upon the Administrative Court of Bujumbura to hear a claim for the striking down of the decision withdrawing its certificate as a free business. On 5 June 1995 it informed the Minister for Justice that unless there was an amicable settlement it would resort to the procedure for arbitration in the context of the International Centre for the Settlement of Investment Disputes (ICSID), since this was provided for by the Treaty signed between the Belgium–Luxembourg union and the Republic of Burundi concerning the reciprocal protection and encouragement of investments. The following day 6 June 1995 its lawyer proceeded to notify the Government of Burundi in writing of the dispute as envisaged by Article 8 of this Treaty. On 1 September 1995 it requested the diplomatic support of the Belgian government. These initiatives, as well as several others of the same type, did not produce any solution.

[466] 18. It was in these conditions that by claim dated 29 November 1995 the six shareholders with Belgian nationality of AFFIMET, holders of 999 of the 1,000 shares in the company, "acting in their capacity as founders of the company", called upon the Secretary-General of ICSID to hear a request for arbitration in the context of and in reliance on the Treaty for the settlement of investment disputes between States and nationals of other States. This request was founded on Article 8 of the Treaty between the Belgium–Luxembourg union and the Republic of Burundi concerning the reciprocal protection and encouragement of investments signed 13 April 1989. This request was registered by the secretary of ICSID on 18 December 1995.

[2] Italics added.

II. The Procedure

A. *The Constitution of the Arbitral Tribunal*

19. By letter of 4 January 1996 the claimants communicated to the Secretary-General of ICSID that, the parties not having agreed in advance on the number and the manner of selection of the arbitrators, they proposed, relying on Article 2(1)(a) of ICSID Arbitration Rules, the constitution of a Tribunal of three members, each party selecting an arbitrator and the two arbitrators thus selected being responsible for the nomination of a third arbitrator as President of the arbitral Tribunal.

20. By letter of 29 February 1996 the claimants, affirming that the 60-day period following the recording of the claim, envisaged by Article 2(3) of the Arbitration Rules, had expired "without any reaction from the opposing party", selected Professor Jean-Denis Bredin, a lawyer at the Paris Bar, as "co-arbitrator" and proposed Professor Andreas Bucher, a lawyer at the Geneva Bar, as "President". Professor Bredin accepted this nomination on 11 March 1996.

21. By letter of the same day the Republic of Burundi let it be known that it had chosen, "in reliance on Article 2(3) of the Arbitration Rules, the formation of the Tribunal envisaged by Article 37(2)(b) of the Treaty". It added that it reserved "the right in the appropriate case to raise the issue of the arbitral Tribunal's lack of jurisdiction and/or the lack of foundation of the claim filed before the said Tribunal".

[467] 22. On 1 March 1996 ICSID informed the parties that it appeared from their correspondence that they had both opted for the method of forming a Tribunal envisaged by Article 37(2)(b) of the Treaty and that it was left to the Republic of Burundi, on the one hand to select an arbitrator, and on the other to accept the nomination of Professor Bucher as President or to propose another person to fulfil this function.

23. On 12 March 1996 the Republic of Burundi demanded that AFFIMET withdraw the claim for arbitration in order to facilitate the study of the dossier with the goal of securing an amicable settlement. AFFIMET rejected this proposal by letter of 15 March 1996.

24. On 18 March 1996 the Republic of Burundi informed the Secretary-General of ICSID that it proposed Mr Mohammed Bedjaoui, President of the International Court of Justice, as arbitrator, and Mr Keba Mbaye, a judge at the International Court of Justice, as President. It added that this proposal "did not prevent (it) from raising any objection based on jurisdiction that (it regarded) as useful at any time" and indicated that it continued to hold out its proposal for the suspension of proceedings in order to allow amicable settlement of the dispute. The judge Bedjaoui accepted his nomination on 22 March 1996.

25. On 28 March 1996 the claimants informed the Secretary-General of ICSID that they did not accept the proposal for the nomination of judge Mbaye as President of the arbitral Tribunal and confirmed their proposal to nominate Professor Bucher to fill this role.

26. On 30 May 1996 the claimants, noting that the Tribunal had not been constituted within 90 days of the recording of the claim for arbitration, asked the President