3. International Law

59" The Tribunal stated above that one of the fundamental characteristics of the present case is that there is an international 'umbrella agreement' - the Bilateral Treaty - which defines certain rights and obligations of the parties. Whatever control Burundi has over its national law based on its sovereignty, it is also bound, because of that sovereignty, by its international obligations. Hence, the Tribunal's mission is not only to examine the validity and legal consequences of the decision at issue under Burundian law; it is also necessarily to examine the validity and legal consequences of the decision at issue in the light of the international rights and obligations of Burundi.

60" It is thus vis-à-vis the obligations entered into by Burundi under the Bilateral Treaty that the issue of the international validity of the decision to revoke the FTZ licence of AFFIMET must be examined.

61" The Tribunal can easily dismiss the hypothesis that Burundi violated its obligation to 'promote investments' under Art. 2 of the Bilateral Treaty. Claimants do not argue that it did. According to the first paragraph of Art. 2: 'Each Contracting Party shall promote and allow on its territory, according to its legislation, investments made by investors of the other Contracting Party as well as all related activities.' The Tribunal notes that it is precisely to promote foreign investments that Burundi introduced an FTZ regime in its legislation. It was by its sovereign decision that it established conditions for, and limitations to this regime, and that at a given moment it amended the rule governing it. The Treaty is perfectly explicit on this point: each party shall promote investments 'according to its legislation'.

62" It is essentially with respect to Art. 4 of the Bilateral Treaty entitled, 'Measures depriving of, or restricting property rights' that the international validity of the revocation of AFFIMET's FTZ licence must be evaluated. Undoubtedly, the decision at issue is not a measure depriving of, or restricting property rights. However, it appears from the text of Art. 4 that this provision does not concern only such measures stricto sensu; more broadly, it governs all measures 'having a similar effect'. According to the first paragraph of this article, Burundi agreed:

'...not to take any measure depriving of, or restricting property rights or any other measure having a similar effect [italics added by the Tribunal] with respect to investments made on its territory, unless considerations of public interest, security or national interest imperatively require it by way of an exception, in which case the following conditions must be met: (a) the measures shall be taken following a legal procedure; (b) they shall not be discriminatory or contrary to a specific agreement...; (c) they shall provide for adequate and effective
compensation’.

Art. 4(2) clarifies this last condition as follows:

‘The compensation in para. (1) (c) shall equal the market value of the investment on the eve of the day when the measures are taken or are made public. However, when an investment has no such value or when the investor proves that this value of the investment is less than its real and objective value, the compensation shall be calculated on the basis of this latter value.’

63" "According to the claimants, the revocation of their FTZ licence forced them to stop all activity after 13 August 1996, date of the last export, thereby making their investments completely useless and depriving them of the benefits they could expect therefrom. Hence, the measure at issue is a 'measure having a similar effect' as a measure depriving of, or restricting property rights in the sense of Art. 4 Bilateral Treaty. According to Art. 4(1), measures depriving of, or restricting property rights or measures having a similar effect are valid under international law only if certain conditions are met. It is only when one of these conditions is not met that the host State can be regarded as having violated its international obligations under the Treaty and, more particularly, the obligation laid down in Art. 3, to guarantee 'stable security and ... protection' to the investors of the other Contracting Party.

64" "First condition: A measure such as the measure taken with respect to AFFIMET is valid under international law only if 'considerations of public interest, security or national interest imperatively require it by way of an exception'. Obviously, this condition must be examined in the light of Burundian law. It appears from the file of the case that the Burundian authorities established a FTZ, meant to promote investments, in the interest of national economy and equally, to achieve this aim that they initially included gold among the activities for which national interest justified this favourable regime, before they excluded it from the regime. The amendment to this rule was preceded by in-depth studies, one of them carried out by a panel of international experts. In the absence of a legal or factual error, of a manifest error in the evaluation or of an abuse of power, the Tribunal may not substitute its own judgment for the discretionary evaluation made by the Government of Burundi of 'considerations of public interest ... or national interest'. The first condition for the international-law validity of the measure at issue is thus met.

65" "Second condition: In order to be valid under international law, the measure must not only be based on valid grounds, it must also have been taken 'according to a legal procedure'. It has been established supra that this is the case here. The international-law validity of the measure, which depends, in this case too, on its validity with respect to national law, is thus established with respect to this second condition.

66" "Third condition: in order to be valid under international law, the measure must not be discriminatory or contrary to a specific agreement between the investor and the host State. This condition is not a problem. We already remarked that the claimants do not allege any discrimination with respect to enterprises in a similar situation. Also, since the granting of an FTZ licence is not a contract but ensues from a unilateral measure of the Burundian administration, there can be no question of a measure which is 'contrary to a specific agreement'.

67" "The last condition thus remains. In order to be valid with respect to the Bilateral Treaty, the measure must provide for the payment of 'adequate and effective compensation', which must be calculated according to the principles set out in Art. 4(2), quoted above. The Treaty thus consecrates on the international level one of the main principles of French administrative law - and, in so far as it is inspired by it, of Burundian law - that is, that the State must pay a financial compensation for its privileges if it places a special and abnormally heavy burden [on someone] in the general interest. In contracts, this principle is expressed in the so-called fait du prince theory, which is applied to State contracts in arbitral jurisprudence. According to this theory, the administration may unilaterally modify certain rights and obligations under the contract or even terminate the contract when the general interest so requires, but must compensate the other contracting party. In non-contractual matters, this principle is the basis for the jurisprudence
concerning the non-tortious liability of the State for legislative or administrative acts - be they rules or individual - which place a special and abnormally heavy burden on a private party in the general interest.

68" "In the present case, the last condition of Art. 4 Treaty for the validity of a 'measure having a similar effect' as a measure depriving of, or restricting property rights is not met at present, since the revocation of the FTZ licence, issued on 29 May 1995, did not provide for adequate and effective compensation, as is required for its validity under international law.

69" "The Tribunal does not deem, however, that this circumstance suffices to make the measure at issue invalid according to international law. The Treaty requires adequate and effective compensation; contrary to what certain national laws provide concerning expropriation, the Treaty does not require preliminary compensation.

70" "Hence, the issue of the international-law validity of the decision of 29 May 1995 shall remain in abeyance. There are two possibilities. Either Burundi meets the condition of the adequate and effective compensation within a reasonable time by paying compensation according to the criteria and requirements in Art. 4(2) Treaty, in which case the international-law validity of the decision of 29 May 1995 shall be finally established; or Burundi does not meet this last condition for the international-law validity of its decision within a reasonable time, in which case it violates the international obligation it entered into under the Bilateral Treaty - to which it adhered in the full and free exercise of its international sovereignty - 'not to take any measure depriving of, or restricting property rights or any other measure having a similar effect with respect to investments made on its territory' unless certain conditions are met. Burundi would then be liable under international law both for violating the obligation in Art. 4 to abstain from taking any measure having a similar effect as a measure depriving of, or restricting property rights, and for violating the obligation in Art. 3 to guarantee 'stable security...and protection' to Belgian investments on its territory.

71" "The situation would change if Burundi decided to give back the FTZ status to AFFIMET. In such case, the international-law validity of Burundi's act would no longer be a problem. The reinstatement of the FTZ licence of AFFIMET would obviously have effect only for the future, and the issue of compensation for the damages between the date on which the licence was revoked and the date on which it was given back could arise. The Tribunal deems, however, that since the revocation of the licence was valid under Burundian national law and since the Burundian State is not liable under its national law, there would be no compensation for such damages, provided they could be proven.

72" "In other words, in order to assure the international-law validity of its decision to revoke AFFIMET's licence, Burundi is obliged to grant the adequate and effective compensation to the claimants that is provided for in Art. 4 Bilateral Treaty, unless it chooses to give back the FTZ licence. This choice is to be made by the Burundian Government in its sovereignty. Unless Burundi takes either measure within a reasonable time, its [revocation] is invalid under international law, and the Tribunal will draw the appropriate conclusions from this fact."


Referring Principles:

- XI.1 - Compensation for expropriation