REPORT FOR THE HEARING
in Case C-182/91 *

I — Facts and procedure

Under the first ACP-EEC Convention, signed in Lomé on 28 February 1975 (OJ 1976 L 25, p. 1) ('the Lomé Convention'), the Community decided to finance, from the resources of the fourth European Development Fund ('the EDF'), a project submitted by Burkina Faso to provide the rural population of the Province of Comoe with 240 wells ('the project').

On 18 December 1987 a finance agreement for the project was drawn up by the Community, represented by the Commission, and Burkina Faso pursuant to Article 40 of the Lomé Convention.

In connection with the project, an invitation to tender was issued in June 1988 by the State of Burkina Faso for drilling 210 boreholes. In August 1989 the contract was awarded to the Office National des Puits et Forages ('ONPF'). On 15 December 1989 the ONPF concluded a subcontract with the applicant for the drilling of 60 exploratory holes, 50 of which were to be productive, as part of the project. The value of the contract awarded to the applicant was estimated at FCFA 88 837 300. It is not disputed that a sum equivalent to 10% of the contract price was paid by the ONPF to the applicant on account.

The works were carried out by the applicant to the satisfaction of the State of Burkina Faso and the Commission. Nevertheless, according to the applicant, the ONPF has to this day still not paid the outstanding amount of FCFA 85 112 000, despite a formal demand for payment addressed to the Director-General of the ONPF on 9 October 1990 by the applicant. Neither the latter nor the Minister for the Water Supply dispute the applicant's claim and they have made promises of payment which the parties agree have not been fulfilled to this day.

On 6 March 1991 the applicant, in order to secure its claim, obtained the issue of a preventive attachment order against the Commission pursuant to Article 1445 of the Belgian Judicial Code in respect of all amounts owed by the Commission to the State of Burkina Faso, totalling a principal sum of FCFA 85 112 000, together with interest and the costs of attachment. On 11 March 1991 the order was served, through the Belgian Minister of Foreign Affairs, on the Commission which acknowledged receipt by letter of 17 April 1991.

It is common ground that, after the attachment order, the Commission made certain payments totalling FCFA 62 300 960 to Burkina Faso in connection with the project. The Commission also made certain other payments to Burkina Faso in respect of other

* Language of the case: French.

projects for which contracts had been awarded to the ONPF.

In a letter of 14 June 1991 the Commission informed the applicant that it intended to take no action on the attachment order as 'it would be likely to interfere with the proper functioning and the independence of the Communities' and it was for the applicant, if necessary, to request authorization from the Court of Justice under Article 1 of the Protocol on the Privileges and Immunities of the European Communities. It is common ground that no proceedings of this nature were brought before the Court of Justice.

II — Written procedure and forms of order sought by the parties

The application of Forafrique Burkinabe SA was lodged at the Court Registry on 12 July 1991.

The written procedure followed the normal course.

Upon hearing the Report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry and assigned the case to the Fifth Chamber.

The applicant claims that the Court should:

— declare that Article 1 of the Protocol on the Privileges and Immunities of the European Communities is not applicable to the attachment order issued against the Commission on 6 March 1991 and consequently declare the attachment valid;

— on the basis of Article 173 of the EEC Treaty, declare that by disregarding the effects which the attachment produces under the applicable national law, the Commission exceeded its powers;

— on the basis of Article 178 and the second paragraph of Article 215 of the EEC Treaty, declare that, by thus acting unlawfully to the prejudice of the applicant, the Commission has incurred non-contractual liability;

— on the basis of the same articles, declare that, by failing to supervise or by inadequately supervising the use and allocation of the EDF funds for which it is responsible, the Commission has incurred liability on the grounds of tortious conduct;

— declare that the said gross negligence and serious misconduct is the direct cause of the serious, irreparable damage suffered by the applicant;

— order the Commission to pay the applicant compensation of FCFA 85 112 000 together with interest thereon, assessed at FCFA 2 814 560 as at 20 January 1991; and

— order the Commission to pay the costs in accordance with Articles 69 and 73 of the Rules of Procedure.

The defendant Commission contends that the Court should:

— dismiss the application as unfounded;

— order the applicant to pay the costs.

III — Pleas in law and arguments of the parties

With regard to the Commission's conduct with respect to the attachment order, the *applicant* claims that it was unnecessary to ask the Court of Justice for authorization to enforce the order against the Commission. According to the applicant, the funds attached by the order had become payable and were therefore not part of the resources of the EDF managed by the Commission, but of those of the beneficiary, namely Burkina Faso. Therefore the attachment was not a measure of constraint in relation to the property and assets of the Community which would justify protection under Article 1 of the Protocol on the Privileges and Immunities of the Communities ('the Protocol'). Moreover, pursuant to the Belgian Judicial Code, the third party against whom the attachment order is issued must make a declaration of the sums or assets covered by it within 15 days of service, failing which he may be declared responsible for payment of the debt giving rise to the order. In the present case, however, the Commission had done nothing to contest the validity of the order apart from writing the letter of 14 June 1991 which, according to the applicant, could not be treated as a declaration by the third party and which in any case was not sent within the time-limit specified by the provisions of Belgian national law, cited above.

With regard to the payments by the Commission to the State of Burkina Faso after the service of the order, the applicant takes the view that, apart from deliberately infringing the statutory provisions of national law of a Member State applicable in this particular case, the Commission also exceeded its powers and committed a patently unlawful act to the detriment of the applicant's property.

In this connection, the applicant observes that it has been consistently held that the Community may incur non-contractual liability, and the right to compensation for damage suffered may arise only if there has been an illegal act by the Community institutions, if there is real damage and if there is a causal link between such act and the damage. In the present case, according to the applicant, the Commission committed a number of acts or omissions constituting serious misconduct. Although it was responsible for funding projects and for managing and supervising the funds of the EDF, the Commission allowed an ACP State to divert EDF funds from the agreed purpose and to leave unpaid invoices due in respect of work carried out as part of such a project and, furthermore, disregarded the legitimate rights of a subcontractor and, finally, continued to make payments to that State without any taking steps to ensure that the funds paid out reached their proper destination and were used for the proper purpose. According to the applicant, such an attitude not only constitutes a failure to fulfil the obligations imposed on the Commission by the Lomé Convention, the internal agreements and the financial regulations, but also causes serious and irreparable damage to the applicant, the Commission having knowingly made itself a party to the breach of contractual obligations.

The *Commission* notes that the applicant purports to base its action on both Article

173 of the EEC Treaty, on the one hand, and Article 178 and the second paragraph of Article 215, on the other. In respect of the action for annulment, the Commission contends that the applicant has omitted to specify the contested act. The Commission takes the view that the contested act is, in substance, the position adopted by the Commission in the letter of 14 June 1991 refusing to take account of the preventive attachment order. The applicant has put forward, in contesting that position, several considerations of a general nature from which it is difficult to deduce the grounds of annulment pleaded.

As regards the effect of the letter, the Commission observes that it had made no declaration as third party under the attachment order precisely because it refused to act on the order, claiming immunity from execution under Article 1 of the Protocol. According to the Commission, such immunity may be relied upon without obeying any condition concerning time-limits imposed by Belgian law, the question whether the immunity is permissible being a strictly Community matter subject to review by the Court of Justice.

The Commission makes a number of observations concerning its refusal to take account of the preventive attachment order. Firstly, the State of Burkina Faso is indeed the creditor of the third party, namely the Commission, but it has not been shown that it is the debtor of the party who obtained the order, namely the applicant, because the applicant has a contractual relationship with the ONPF alone. The Commission therefore takes the view that the applicant ought to have had the attachment order directed to the State of Burkina Faso as against the ONPF.

Secondly, the Commission contends that the effect of Article 1 of the Protocol is precisely to release the Communities from complying with national rules governing the seizure of assets. The aim of that provision is to avoid any interference with the proper functioning and independence of the Communities (see the order in Case 1/87 SA *Universe Tankship* [1987] ECR 2807). In the present case the Commission states that it relied upon the privileges and immunities of the Communities on the ground that the attachment order might have interfered with the proper functioning and independence of the Communities and the creditor had not applied to the Court for authorization pursuant to Article 1 of the Protocol. As regards the applicant's argument that authorization from the Court was not required because the funds attached were no longer part of the EDF's resources and that the attachment was not therefore a measure of constraint with regard to the property and assets of the Community, this argument was rejected by the Court in its order in Case 1/88 SA *SA Générale de Banque* [1989] ECR 857, where the Court held that even if, under the applicable national law, the garnishee order were to be regarded as a seizure of an asset belonging to the debtor, it was nevertheless liable to constitute a measure of constraint within the meaning of Article 1 of the Protocol. The Commission concludes that, as the creditor failed to obtain authorization from the Court to attach the sums owed by the Communities to the State of Burkina Faso, the legality of the contested act cannot be questioned.

In any event, the Commission takes the view that, even if the Court were to find that the measure at issue was not liable to interfere

with the proper functioning and independence of the Communities, the sole consequence would be to authorize the applicant to issue an attachment order in the future, but certainly not to annul the contested decision.

With regard to the merits of its objection to releasing funds due to the State of Burkina Faso, the Commission observes that the Court stated in its order in the *SA Générale de Banque* case, cited above, that the functioning of the Communities may be hampered by measures of constraint affecting the financing of common policies or the implementation of action programmes established by the Communities. In that respect the Commission observes that the attachment order covers all the sums owed by the Commission to the State of Burkina Faso. Even if it were limited to the amount claimed by the applicant, the attachment would incontestably have an adverse impact on the allocation of Community funds for other purposes in the public interest. Moreover, the execution of the order would seriously disrupt the strict division of powers between the Commission and each ACP State, as provided for by the Lomé Convention.

The Commission considers the action for non-contractual liability to be based on the complaint that it continued to make payments to the State of Burkina Faso without taking account of the attachment order. It is of the opinion that a quasi-delict could have been established only if the Court had authorized attachment and the Commission had persisted in not giving effect to that enforcement measure, which was not so in this case.

As regards its part in implementing the projects funded by the EDF, the Commission points out that, under Article 55 of the Lomé Convention, the ACP States are responsible for implementation and therefore the Commission does not have the right to deal directly with the enterprises which tender for or are awarded contracts. Moreover, it is clear from the Court's case-law that contracts for which EDF aid is granted are national contracts under which the undertakings have no involvement in the exclusive relations between the Commission and the ACP States. In the present case the Commission made the payments relating to works carried out after it had satisfied itself that the work had in fact been done. The Commission had no power to interfere in the strictly contractual relationship between the ONPF and one of its subcontractors.

In its reply the *applicant* points out that, in so far as its action is based on Article 173 of the Treaty, its seeks the annulment of the Commission's decision of 14 June 1991 refusing to give effect to the attachment order issued against it on 6 March 1991.

The applicant then contests the Commission's assertion that it has not been shown that the State of Burkina Faso was the applicant's debtor. On this point the applicant claims, firstly, that the ONPF is a public-law body wholly controlled by the State of Burkina Faso, with no powers of independent financial management, subordinate to the Ministry for the Water Supply and subject to its authority and supervision. Secondly, the State of Burkina Faso has expressly acknowledged that it owes the sums claimed by the applicant and such acknowledgment can also be relied upon as against the Commission.

With regard to the Commission's non-contractual liability, the applicant observes that it does not only complain that the Commission failed to give effect to the attachment order issued against it. The Commission was formally notified that there had been fraud by an ACP State in the course of implementing projects financed by the EDF, to the detriment of the applicant in particular, but the Commission took no steps to end the fraud or to protect the legitimate financial interests of the applicant and the Communities. In this connection the applicant raises a number of complaints.

Firstly, it takes the view that the Commission refused to give effect to an attachment order validly served upon it. The applicant observes that, by keeping silent for over three months, the Commission adopted a negligent attitude to the prejudice of the applicant. In particular, if the applicant had had to apply for authorization beforehand, the practical effect of the attachment would have been nullified.

Secondly, the Commission failed to discharge its obligation to supervise and monitor the use of Community funds for their proper purpose. Moreover, once the Commission is informed of fraud consisting in the diversion of Community funds from the agreed purpose, it has an obligation to react and protect the legitimate financial interests of third parties and the Communities.

Thirdly, the applicant takes the view that the Commission's obligations relating to the management of the EDF must be seen in the broader context of its obligation to safeguard the Communities' financial interests, illustrated in particular by the Resolution of the Council and the Representatives of the Member States, meeting within the Council, of 13 November 1991 concerning the protection of the financial interests of the Communities (OJ 1991 C 328, p. 1). In that resolution the Council expressed its concern at fraud committed at the expense of the financial interests of the Communities and affirmed that responsibility rests with the Community institutions to take suitable measures to prevent and combat this phenomenon. According to the applicant, the Commission did nothing in this case to prevent and combat fraud committed at the expense of the applicant and the financial interests of the Communities; this failure to act renders the Commission liable and has a direct causal link with the damage sustained by the applicant.

In its rejoinder, the *Commission* makes a number of observations.

As regards the action for annulment, the Commission repeats that the ONPF has a separate legal personality from that of the State of Burkina Faso and therefore the applicant has no claim against the State. It also repeats that it was perfectly entitled to rely on Article 1 of the Protocol, even after expiry of the time-limit applicable under Belgian law.

With regard to the action for compensation, the Commission observes that it is settled

case-law that, for the institutions' non-contractual liability to be incurred, an applicant must prove the illegality of the conduct complained of, the reality of the damage, and the existence of a causal link between that conduct and the alleged damage. In the present case the applicant has not established all the conditions to which liability on the part of the Community is subject.

The Commission then examines the complaints in the reply relating to the illegality of the conduct alleged against it. It repeats that it is entitled to plead immunity in execution proceedings. It adds that it had no empower to interfere in strictly contractual relations between the ONPF and one of its subcontractors, in accordance with the Court's case-law on the division of powers between the Commission and each ACP State. Finally, it observes that the Council resolution cited by the applicant cannot create obligations on the part of the Commission.

As to the causal link between conduct complained of and the damage claimed, the Commission submits that the Court has consistently held that the damage must be directly attributable to the operative event. In this case the immediate origin of the alleged damage is the failure by the ONPF to discharge its contractual obligations, and the Commission points out that, within the limits of its powers, it did make representations to the local authorities in an attempt to settle the dispute.

D. A. O. Edward
Judge-Rapporteur