

COURT OF JUSTICE OF THE WEST AFRICAN  
ECONOMIC AND MONETARY UNION (WAEMU)

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PUBLIC HEARING OF EIGHTEEN (18) DECEMBER TWO  
THOUSAND AND THIRTEEN (2013)

The Court of Justice of the WAEMU, meeting in ordinary session on eighteen (18) December two thousand and thirteen (2013), in which were seated :

Action for assessment of legality

Charles Afolabi ABIALA  
( -Mr Cyrille DJIKUI,  
-Antoine-Marie Claret Bedie)

Against

- WAMU Council of Ministers
- Commission banking of  
the BCEAO

**Composition of the Court :**

- M. Daniel L. FERREIRA,  
Chairman
- Mr Ousmane DIAKITE, Judge
- Mr Honorat ADJOVI, Judge
  
- Mr Abalo P. PETCHEBIA,  
General Counsel
  
- Fanvongo SORO, Registrar

Mr Daniel Lopes FERREIRA, President of the Court,  
Chairman;

Mr. Ousmane DIAKITE and Mr Honorat  
ADJOVI, Judges, Members ;

in the presence of Mr Abalo Pgnakiwé PECHELEBIA,  
Advocate General;

assisted by Maître Fanvongo SORO, Registrar;

delivered the following judgment:

BETWEEN :

M. Charles Afolabi ABIALA, formerly residing and domiciled in Abomey-Calavi (Benin), with an address for service at the chambers of his counsel at Carré N°4125 "P", Avenue Monseigneur Steinmetz Akpakpa, 01 B.P. 1199 Tel. 21333228, Cotonou,

Advised by :

- Maître Antoine-Marie Claret BEDIE, Avocat au Barreau du Bénin, Carré N°4125 "P", Avenue Monseigneur Steinmetz Akpakpa, 01 B.P. 1199 Tél : 21333228, Cotonou, E-mail : [bclarema@yahoo.fr](mailto:bclarema@yahoo.fr) ;
- Cyrille DJIKUI, Member of the Benin Bar, Carré 370 Maro-Militaire Face Ciné le Bénin, Cotonou, 01B.P. 2595, Tel: 21315507, E-mail: [cadjkui@intnet.bj](mailto:cadjkui@intnet.bj) ;

Applicant, on the one hand  
;

AND

1. The Council of Ministers of the West African Monetary Union (WAMU),
2. The BCEAO Banking Commission,  
Defendants, on the other  
hand ;

# **THE COURT**

**HAVING REGARD TO** the request of Mr Charles Afolabi ABIALA, dated nineteen (19) June 2009;

**HAVING REGARD TO** the documents notified by the Registrar of the Court; **HAVING REGARD TO**

the other documents produced and attached to the file;

**HAVING REGARD TO** the WAEMU Treaty;

**HAVING REGARD TO** Additional Protocol No. 1 on the supervisory bodies of the WAEMU ;

**HAVING REGARD TO** Additional Act n°10/96 of ten (10) May one thousand nine hundred and ninety-six (1996) on the Statutes of the Court of Justice of the WAEMU ;

**HAVING REGARD TO** Regulation n°01/95/CM of the first (1<sup>er</sup>) August one thousand nine hundred and ninety-five (1995) on the Staff Regulations of UEMOA Officials;

**HAVING REGARD TO** Regulation n°01/96/CM of five (05) July one thousand nine hundred and ninety-six (1996) on the Rules of Procedure of the WAEMU Court of Justice;

**HAVING REGARD TO** Regulation No. 01/2012/CJ of twenty-one (21) December two thousand and twelve (2012) on the Administrative Rules of the Court of Justice of the WAEMU ;

**HAVING REGARD TO** Order n°32/2013/CJ of fourteen (14) November two thousand and thirteen (2013) on the composition of the plenary session to sit at the ordinary public hearing;

**HAVING REGARD TO** the summonses sent to the parties;

**HEARD** Mr Honorat ADJOVI, Judge-Rapporteur, in his report;

**HAVING** heard the Opinion of Mr Abalo Pgnakiwé PECHELEBIA, Advocate General;

Having deliberated in accordance with Community law ;

# **I. FACTS AND PROCEDURE**

## **1.1. THE FACTS**

Whereas the facts of the case as set out by the applicant are as follows:

**That** the applicant was Chairman of the Board of Directors of the African Investment Bank (A. I. B.), an investment bank whose registered office was in Cotonou and which, having started its activities on the third of July two thousand and six (2006), was very soon confronted with difficulties;

**That** these difficulties were, according to the applicant, exploited for ulterior motives which led to disciplinary proceedings against the directors of A. I. B. ;

**That** this is how :

- by decision no. 351/CB/C of twenty-three (23) September two thousand and eight (2008), the Commission Bancaire summoned the directors of A. I. B. to a hearing as part of a disciplinary procedure;
- On fifteen (15) December two thousand and eight (2008), the Commission Bancaire issued Decision no. 372/CB/C to compulsorily retire him as Chairman of the Board of Directors of A. I. B. ;

**That** by request dated twenty-three (23) January two thousand and nine (2009), the applicant lodged an appeal against decision no. 372/CB/C of fifteen (15) December two thousand and eight (2008) with the WAMU Council of Ministers which, after examining his case file, on twenty-seven (27) January two thousand and nine (2009) lodged an appeal against decision no. 372/CB/C of fifteen (15) December two thousand and eight (2008) with the WAMU Council of Ministers.

(27) March two thousand and nine (2009), has decided as follows:

- *In formal terms, your appeal is admissible;*
- *In substance, Commission Bancaire Decision 372/CB/C of 15 December 2008 is confirmed in its entirety, in application of the banking regulations in force in the European Union;*

**That**, according to the applicant, this provision is contained in the letter from the President of the Council of Ministers dated six (06) April two thousand and nine (2009), which was served on him by bailiff on twenty-eight (28) April two thousand and nine (2009);

**That**, in accordance with Article 8 of Additional Protocol No. 1 relating to the supervisory bodies of the Union and Article 15.2 of Regulation No. 01/96/CM laying down the rules of procedure of the WAEMU Court of Justice, the applicant brought an action before the Court of Appeal to assess the legality of the decision of the WAEMU Council of Ministers;

## **1.2. THE PROCEDURE**

**Whereas** by application dated 19 June 2009, registered at the Registry of the Court of Justice on 25 June 2009 under number 05/2009 and served on the Council of Ministers of WAEMU, in the person of its President, by letters from the Registrar of the Court of Justice of WAEMU dated 1<sup>er</sup> July 2009, 8 October 2009 and, by way of reminder, 18 March 2010, Maîtres Cyrille DJIKUI and Antoine-Marie Claret BEDIE, avocats inscrits au barreau du Bénin, ont introduit, au nom et pour le compte de Monsieur Charles ABIALA, un recours en annulation de la décision n° 1941/MEF/ES-01 du 06 avril 2009 du Conseil des Ministres de l'UMOA confirmant la décision n° 372/CB/C du 15 décembre 2008 de la Commission Bancaire portant sa démission d'office du Président du Conseil d'administration de " African Investment Bank (A.I.B.) S.A";

**Considering** that following the filing of the application, Order No 10/09 was issued on 30 June 2009 to set the amount of the security to be paid by Mr Charles Abiala pursuant to Article 26(6) of Regulation No 01/96/CM laying down the Rules of Procedure of the WAEMU Court of Justice at fifty thousand (50 000) francs; That the payment of this security was made on twenty-seven (27) July two thousand and nine (2009) as evidenced by the security receipt on file;

Whereas previously, the President of the Court appointed the Judge-Rapporteur in the case in question by Order No. 11/2009/CJ of thirty (30) June two thousand and nine (2009);

**Considering** that by Order No. 017/2011/CJ issued on four (4) October two thousand and eleven (2011), the President of the Court declared the written procedure closed;

**Considering** that by further Order No 010/2013/CJ of twenty-five (25) June two thousand and thirteen (2013), the President of the Court appointed a new Judge-Rapporteur;

## **II. SUBMISSIONS OF THE PARTIES**

**Considering** that the applicant requests the Court of Justice of the WAEMU, pursuant to Article 9 of Additional Protocol I relating to the supervisory bodies of the WAEMU, to:

- declare his appeal admissible;
- declare all decisions taken against him null and void;

**Considering** that the Council of Ministers of WAMU has not acted on the notifications made to it and, as a result, has not brought any claim to the attention of the Court;

### **III. PLEAS AND ARGUMENTS OF THE APPLICANT**

#### **3.1. ON ADMISSIBILITY**

**Considering** that Mr Charles Abiala bases his appeal on the provisions of Article 8 of Additional Protocol No 1 relating to the supervisory bodies of the Union and Article 15.2 of Regulation No 01/96/CM on the Rules of Procedure of the WAEMU Court of Justice and considers that his appeal is admissible in the light of the aforementioned provisions;

#### **3.2. AT THE BOTTOM**

**Considering** that the applicant relies on :

- the illegality of the notification of twenty-eight (28) March two thousand and nine (2009) in that, on the basis of the provisions of Article 45 of the WAEMU Treaty and the last paragraph of Article 31 of the Annex to the Convention creating the Banking Commission, the decision of the Council of Ministers should have been notified to it in its entirety and this notification should have been made by the Chairman of the Council of Ministers and not by the National Director for Benin of the Central Bank of West African States, as was the case here;
- the unlawfulness of the summons to appear before the Commission Bancaire in that the legal formalities provided for in Article 25 of the Annex to the Agreement creating the Commission Bancaire and in point II of Circular No 01-90 of 20 December 1990 relating to general information on the Commission Bancaire were not complied with, the summons was not sent to him *intuitu personae* and did not bring to his attention the facts of which he was accused, nor did it inform him that he could lodge an objection, which prevented him from organising his defence;
- the illegality of the hearing session of fifteen (15) December two thousand and eight (2008) in that, apart from the introduction of the said session and the reading of the charges, the entire hearing took place under the chairmanship of a commissioner sitting *intuitu personae*, whereas Article 3 of the Annex to the Agreement creating the Commission Bancaire provides that the Governor of the Central Bank is the Chairman of the Commission Bancaire and in the event of impediment, the Commission Bancaire is chaired by his representative;
- the unlawfulness of the findings of the Commission Bancaire's audit of A.I.B. in November 2008 in that the findings of the on-site inspections referred to in Decision No 372 of 15 December 2008, which constituted the bulk of the evidence against him, remained confidential and were never communicated to any director of A.I.B., in breach of Article 19 of the Annex to the Agreement establishing the Commission Bancaire, which states: "The findings of on-site inspections shall be brought to the attention of the Commission Bancaire".

To the knowledge of the Minister of Finance, the Central Bank and the Board of Directors of the institution concerned or the equivalent body";

**Considering** that the applicant also invokes the illegality of the sanctions for breach of Articles 22 and 23 of the Annex to the Convention creating the Commission Bancaire in that no formal notice was sent to African Investment Bank in accordance with the aforementioned Article 22, so that the latter cannot be deemed to have breached banking regulations within the meaning of the said Article;

He added that he had never been given the opportunity to defend himself since the summons to attend a hearing as part of the disciplinary procedure had illegally skipped the essential stage provided for in articles 22, 23 and 25 of the Annex to the Convention creating the Commission Bancaire and by point II of Circular No 01-90 of twenty (20) December nineteen hundred and ninety (1990) and that Decision No 1941/MEF/ES-01 of six (06) April two thousand and nine (2009) of the WAMU Council of Ministers and Decision No 372/CB/C of fifteen (15) December two thousand and eight (2008) of the Commission Bancaire suffer cruelly from a lack of reasoning and thus violate the provisions of Article 44 of the Treaty, 30 of the Annex to the Convention setting up the Commission Bancaire and point II of Circular No 01-90 of twenty (20) December one thousand nine hundred and ninety (1990);

## **IV. GROUNDS FOR THE JUDGMENT**

### **4.1. THE COURT'S JURISDICTION**

Whereas Article 2 of the WAEMU Treaty specifies that by the said Treaty, the High Contracting Parties have completed the WAEMU established between them, so as to transform it into the West African Economic and Monetary Union;

**That** article 112, paragraph 1<sup>er</sup> stipulates, with regard to the revision of the WAMU Treaty, that in due course, the Conference of Heads of State and Government shall adopt a Treaty merging the WAMU Treaty and the WAEMU Treaty;

**That** it results from the coexistence of the two Treaties - WAMU and WAEMU - which constitute the same body of rules governing WAEMU that since the tenth (10th) of January 1994, the date of entry into force of the WAEMU Treaty, the organs of the Union, in particular those of management which are the Conference of Heads of State and Government and the Council of Ministers, are at the same time for WAMU and for WAEMU;

**Considering** that decisions taken by the Council of Ministers within the framework of the WAMU Treaty may thus be referred to the Court of Justice, one of whose powers is to hear, by virtue of Article 8 paragraph 2 of Additional Protocol No. I relating to the supervisory organs of the WAMU, appeals for assessment of legality against any act of an organ of the Union which gives rise to a complaint;

**That** the Court has jurisdiction to hear the action for annulment of Decision No 1941/MEF/ES-01 of six (06) April two thousand and nine (2009) of the WAMU Council of Ministers;

#### **4.2. ADMISSIBILITY OF THE ACTION**

**Considering** that the decision of the Council of Ministers was served on the applicant on 28 April 2009 and that the appeal was lodged by application dated 19 June 2009, registered at the Registry of the Court of Justice on twenty-five (25) June two thousand and nine (2009) under number 05/2009 ;

That it should be held that it complies with the provisions of Article 8 of Additional Protocol No 1 relating to the supervisory bodies of the Union and Article 15.2 of Regulation No 01/96/CM laying down the rules of procedure of the Court of Justice of the WAEMU and should be declared admissible;

#### **4.3. ON THE BACKGROUND**

##### **a) On the illegality of the notification of 28 March 2009**

**Considering** that the reality of the notification is not contested;

**Whereas** none of the provisions dealing with appeals against decisions of the Commission Bancaire in the Annex to the Convention setting up the Commission Bancaire describes the form of the decision of the Council of Ministers;

**Considering** that under these conditions, the applicant is not entitled to claim that the decision of the Council of Ministers should have been notified to him in its entirety and in its formal substance, whereas letter No 1941/MEF/CS-01, delivered to him by a bailiff at the request of the National Director for Benin of BCEAO, has as its subject "Decision relating to the appeal lodged with regard to decision No 372/CB/C of 15 December 2008 of the Banking Commission, carrying compulsory resignation";

In addition, the aforementioned letter is addressed to Mr Charles Abiala by the President of the Council of Ministers of the UMOA and, as a result, the National Director for Benin of the BCEAO and the bailiff were merely relays enabling the notification required by the texts invoked by the applicant to be carried out;

**Considering** that, in any event, Mr Charles ABIALA's action for annulment was only declared admissible because the correspondence he received carries the decision of the Council of Ministers; otherwise, his application would have had to be accompanied, in accordance with Article 26 paragraph 4 of Regulation No 01/96/CM on the rules of procedure of the WAEMU Court of Justice, by the decision that he claims was not notified to him;

**That** the plea alleging illegality of the notification of twenty-eight (28) April two thousand and nine (2009) should be rejected;

## **b) Illegality of the summons to appear before the Commission Bancaire**

**Considering** that the hearing of Mr Charles ABIALA by the Commission Bancaire took place on fifteen (15) December two thousand and eight (2008) and resulted in Decision No 372/CB/C of fifteen (15) December two thousand and eight (2008) to compulsorily resign as Chairman of the Board of Directors of African Investment Bank (AIB) SA;

It follows that the failure to comply with the legal formalities provided for in Article 25 of the Annex to the Convention setting up the Commission Bancaire and in point II of Circular No 01-90 of twenty (20) December nineteen hundred and ninety (1990) relating to general information on the Commission Bancaire should have been raised before this body and at its hearing;

**Considering** that none of the documents produced by Charles Abiala show that the said arguments were developed before the Banking Commission, still less in his application to the Council of Ministers;

In any event, the action for annulment submitted to the WAEMU Court of Justice concerns Decision No 1941/MEF/ES-01 of six (06) April two thousand and nine (2009) of the WAEMU Council of Ministers, whereas the above arguments only concern the summons to appear before the Banking Commission;

The plea that the summons to appear before the Commission Bancaire was unlawful should be rejected;

## **c) On the unlawfulness of the hearing held on 15 December 2008**

**Considering** that the argument that, apart from the introduction of the meeting and the reading of the charges, the entire hearing took place under the chairmanship of a commissioner sitting *intuitu personae* in breach of Article 3 of the Annex to the Agreement establishing the Commission Bancaire, which provides that the Governor of the Central Bank is the Chairman of the Commission Bancaire, which is chaired, if the Governor is unable to attend, by his representative, must also be rejected;

Indeed, there is nothing in the file to suggest that it was brought to the attention of the Council of Ministers whose decision is being challenged before the Court, and Decision No 372/CB/C of fifteen (15) December two thousand and eight (2008) states that the meeting was chaired by the Governor of the BCEAO, who signed it;

**That** the plea alleging illegality of the hearing session of fifteen (15) December two thousand and eight (2008) should be dismissed;



**d) On the illegality of the conclusions of the Commission Bancaire's audit of A. I. B. in November 2008**

**Considering** that there is nothing in the file to show that this argument was brought to the attention of the Council of Ministers whose decision is challenged before the Court;

In addition, the Commission Bancaire states in its decision no. 372/CB/C of 15 December 2001 that (15) December two thousand and eight (2008), produced by the applicant, that by order issued on thirty-one (31) October two thousand and eight (2008) by the Cotonou Court of First Instance, the operation of the deliberative bodies of A.I.B. was suspended at the request of the company, LA LOYALE D'ASSURANCES, due to a dispute over the transfer of shares in the bank;

**Considering** that it follows from the foregoing that the argument based on the violation of Article 19 of the Annex to the Agreement creating the Commission Bancaire, which provides that *"The conclusions of on-site inspections shall be brought by the Commission Bancaire to the attention of the Minister of Finance, the Central Bank and the Board of Directors of the institution concerned or the body acting in its stead"*, is not relevant;

**That** the plea alleging that the findings of the audit were unlawful should be dismissed. A. I. B. by the Commission Bancaire in November 2008;

**e) On the illegality of the penalties for breach of Articles 22 and 23 of the Annex to the Agreement establishing the Commission Bancaire**

**Considering** that Article 22 of the Annex to the Convention setting up the Commission Bancaire has not been infringed in that it contains a mere power ;

**Considering** that, with regard to the argument that there has been a breach of Articles 23 and 25 of the Annex to the Convention setting up the Commission Bancaire and of point II of Circular No 01-90 of twenty (20) December nineteen hundred and ninety (1990), it should be noted that Decision No 351/CB/C of twenty-three (23) March two thousand and eight (2008) summoning the directors of A. I. B. to a hearing as part of a disciplinary procedure includes the infringements found by the Commission Bancaire and on which the said directors explained themselves after receiving and responding to the summons. for a hearing, in the context of disciplinary proceedings, includes the infringements found by the Commission Bancaire, which the said directors explained after receiving and responding to the summons; that, in any event, the applicant points to violations allegedly committed by the Commission Bancaire, which issued Decision No 372/CB/C of fifteen (15) December two thousand and eight (2008), whereas his appeal seeks the annulment of Decision No 1941/MEF/ES-01 of six (06) April two thousand and nine (2009) of the WAMU Council of Ministers;

**Considering** that with regard to the argument that Decision No 1941/MEF/ES-01 of six (06) April two thousand and nine (2009) of the WAMU Council of Ministers and Decision No 372/CB/C of fifteen (15) December two thousand and eight (2008) of the Commission Bancaire suffer cruelly from a lack of reasoning and thus violate the provisions of Article 44 of the Treaty, 30 of the Annex to the Convention setting up the Commission Bancaire and point II of Circular No 01-90 of twenty (20) December nineteen hundred and ninety (1990), there is a need to

to point out that the obligation to state reasons laid down in the aforementioned Article 30 relates solely to injunctions, decisions, opinions and proposals of the Commission Bancaire, whose decision is not, in the present case, the subject of the action for annulment;

**That** also and contrary to the claims of the applicant, Decision No. 372/CB/C of fifteen (15) December two thousand and eight (2008) of the Banking Commission contains the reasons underlying the pronouncement of the compulsory resignation of Mr Charles ABIALA and Decision No. 1941/MEF/ES-01 of six (06) April two thousand and nine (2009) of the WAMU Council of Ministers, which did no more than confirm it in all its provisions after a proper examination of the case in all its aspects, endorsed the same reasons;

It follows that Article 44 of the WAEMU Treaty, which requires the Council of Ministers to give reasons for its decisions, has not been infringed;

**That, as** a result of the foregoing, the action for annulment of Decision No 1941/MEF/ES-01 of six (06) April two thousand and nine (2009) of the WAMU Council of Ministers should be dismissed;

## **V. EXPENSES**

Whereas it is clear from the provisions of Article 60 of the Rules of Procedure of the Court that any unsuccessful party shall be ordered to pay the costs;

Since the applicant has been unsuccessful in his pleas, it is appropriate, pursuant to the above provisions, to order him to pay all the costs.

## **FOR THESE REASONS**

**The Court, ruling publicly, by default against the Council of Ministers of WAMU, defendant and in matters of Community law :**

### **In form :**

- **declares itself competent to assess the legality of Decision No 1941/MEF/ES-01 of six (06) April two thousand and nine (2009) of the WAMU Council of Ministers;**
- **declares Mr Charles Afolabi Abiala's appeal admissible; Merits**

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- **Dismisses Mr Charles Afolabi Abiala's claim as unfounded;**
- **order Mr Charles Afolabi Abiala to pay all the costs.**

**Thus made, judged and pronounced in public hearing in Ouagadougou on the day, month and year above.**

**And signed by the Chairman and the Registrar.**

**Illegible signatures follow,**

**For a certified copy, Ouagadougou, 19**

**December 2014**

**The Registrar,**

**Fanvongo SORO**