COUR DE JUSTICE

From
I, ECONOMIC AND MONETARY UNION
WEST AFRICA (UEMOA)

EXCERPT FROM THE REGISTER

Union Economique et Monétaire Ouest Africaine
Le Greffier
Cour de Justice

AVIS N° 001/2000

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PORTANT SUR

File no.° 6-99

The President of the WAEMU Commission, by letter n° 99-144/PC/CJ dated 19 November 1999, in accordance with the provisions of article 27 paragraph 2 of the Statutes of the Court of Justice, requested the opinion of the Court of Justice on the draft WAEMU Community Investment Code.

ha Cour, sitting in General Consultative Assembly under the chairmanship of Mr Yves D. YEHOUESSI, its President, on the report of Mr Mouhamadou Moctar MBACKE, Judge at the Court and in the presence of Messrs :

- Martin Dobo ZONOU, Judge at the Court
- Youssouf ANY MAHAMAN, Judge of the Court*
- Malet DIAKITE, F

Kalédji AFANGBEDJI, irst Advocate General

Advocate General

and assisted by Mr Raphaël P. OUATTARA, Registrar of the Court, examined at its meeting of 2 February 2000 the draft text of the WAEMU Community Investment Code and issued the following opinions and recommendations

L AC O U R

Having regard to the Treaty of the West African Economic and Monetary Union (WAEMU) dated 10 January 1994,

Having regard to Additional Protocol No. 1 on the supervisory bodies of the

WAEMU; Having regard to Additional Act No. 10/96 on the Statutes of the Court of DA

Justice of the WAEMU

Vu le Règlement n° 01/96/CM portant Règlement de Procédures de la Cour de Justice de l'UEMOA ;

Vu Ï The Administrative Rules of the UEMOA Court of Justice dated 9 December 1996;

Having regard to request No 99-144/PC/CJ of 19 November 1999 from the President of the Commission of the UEMOA ;

ON THE SHAPE

The request for an opinion is admissible, as it complies with the relevant legislation in force.

ON THE BACKGROUND

The Court's opinion is based on two main points: general observations and observations on specific products.

I - **GENERAL OBSERVATIONS**

The main features of the draft Code submitted are :

1) its attractive provisions for potential investors, who may be seduced by the guarantees, freedoms and rights provided.

2) its tendency to equalise what States can offer, particularly in the tax field, where a maximum rate of exemption is granted under strict conditions to be met by the investor, on pain of withdrawal of the authorisation.

It is therefore only on this uniform legal basis for all Member States that each State will be able to conclude an establishment agreement with any national or foreign investor.

However, this economic and legal mechanism raises a number of questions

1) The concept of investment as defined in Article 1 may encompass privatisation operations under way in Member States involving public undertakings which are often in a poor state of repair and to which States reserve a special fate on the basis of legislative or regulatory acts, the better to sell them or place them in more expert hands. The investment by the purchaser of the company in such cases may be subject to rules that are not necessarily those described in the present draft, which may be too restrictive or even unsuited to the context of the privatisation.

2) In general, investment, especially in North-South relations, is accompanied by a concerted transfer of technology, which in cooperation relations can be the most important aspect, which means that mention of this objective can be a decisive reminder in the context of an investment code.

3) The provisions of Title IV relating to the settlement of disputes deserve special attention. particular because ue

a) seem to be unaware that arbitration is a method of legal dispute settlement based on the autonomy of the will of the parties to the agreement. This excludes the mandatory use of a conciliation (or arbitration) procedure.

b) Because of the need for uniformity in the interpretation and application of Community law, the WAEMU Court of Justice has exclusive jurisdiction to settle disputes concerning the interpretation or application of Community law;

c) bodies such as the OHADA Common Court of Justice and Arbitration, the International Centre for Settlement of Investment Disputes (ICSID), not to mention the International Chamber of Commerce (ICC) or national arbitration centres such as those recently set up in Dakar and Abidjan, are not courts but, in accordance with their respective arbitration rules, organise procedures applied by arbitrators freely appointed by the parties, whereas courts such as the UEMOA Court of Justice and the OHADA Court of Justice, as public law courts, exercise exclusive jurisdiction, one in matters of Community law and the other in matters of unified instruments, without competing or accidental jurisdiction being totally excluded,

d) The above-mentioned arbitration regulations (OHADA, ICSID), like all other regulations, provide for a specific pre-litigation conciliation procedure. This pre-litigation recourse can only be discretionary and in no way compulsory. The Commission is statutorily a body whose powers are limited by Article 16 of the Treaty and it cannot, without risking a breach of the Treaty, set itself up as a body for the settlement, even conciliatory, of disputes, its role under the terms of the Treaty being, among many other functions, to ensure the application of Community law and to remedy breaches thereof and not to bring States closer to their co-contractors in investment matters. This function of pre-litigation settlement can perfectly well be envisaged by the parties according to their sovereign will, conciliation not being obligatory in this case;

e) the coexistence in the present text of OHADA uniform laws and WAEMU Community law will give rise to problems of conflicting decisions and even legal bases, if not conflicts of jurisdiction between the WAEMU Court of Justice and the OHADA Court of Justice. Moreover, where disputes arising or to arise from the application of this draft code are to be settled by arbitration, a private jurisdiction, the right to refer for a preliminary ruling may not be admissible before the WAEMU Court. Furthermore, it is questionable whether the OHADA Court can rule as a court of cassation in cases where Community law is at issue without referring to the WAEMU Court of Justice. It cannot refer a case to the WAEMU Court of Justice because it is not a national court. On the other hand, can the WAEMU Court of Justice include in secondary Community law the OHADA uniform acts whose Treaty, it is true, has been ratified by all the WAEMU Member States? If so, what about the exclusivity of the OHADA Common Court of Justice and Arbitration in the application and interpretation of uniform acts, as provided for in Article 14 of the Treaty? The same exclusivity is reserved for the WAEMU Court of Justice as regards the interpretation and application of Community law issued by the competent bodies of the Union.

As the draft text refers both to the OHADA Uniform Acts and to WAEMU Community law, a case involving the application of both legal systems would be likely to set the two jurisdictions against each other.

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En conclusion, le mode de règlement par voie arbitrale des litiges nés de l'application du projet of ğé submitted, which has the particularity of calling on guarantees of impartiality, because nota oot nfment of the foreign nationality of the significant investors, effectively leads ã 6ption of a l'adc mode of settlement by a private justice because conceived and organized according to le

- The Court of Justice of the UEMOA will not have jurisdiction to review the uniformity of the application and interpretation of the applicable Community law. However, the UEMOA Court of Justice may incidentally be called upon to give a preliminary ruling if the competent arbitral tribunal has recourse to the courts of the Member States in accordance with the law of the contract. In short, there is nothing to prevent disputes arising under this code from falling within the ordinary jurisdiction of the national courts, subject to compromises or arbitration clauses that relieve the state courts of jurisdiction in favour of private justice.

II - **SPECIFIC COMMENTS**

Visas

The last two references to ICSID and OHADA as arbitration bodies seem unnecessary because these are not the only arbitration rules to which States and investors may have recourse, and it is not usual for texts to refer to arbitration rules, which are left to the free choice of the parties.

Definitions

The notion of establishment agreement referred to in Article 20 is not defined. It is an agreement defining the reciprocal rights and obligations of the host State and the investor.

Article 2

The name used in the title does not correspond to the name used in this article.

This article needs to be reworded as follows

"This code, known as the "WAEMU Community Investment Code", shall apply, subject to the provisions of Article 3 below, throughout the Community territory to any investment made therein, regardless of the *nationality of the investor or the sector of the investment.*

Article 3

This article could be reworded as follows:

"Pending the introduction of Community measures to harmonise legislation in these a r e a s , as provided for within the Union, mining, oil and gas extraction and processing operations shall be subject to the same conditions as other activities.
/The *national law of the Member States* shall *continue to apply.*

Article 4:

a) 3ᵉ paragraph, 1*" line:

Read: "Within a period of two months from the date of notification of the (a request

Article 5 :

This provision limits the validity of the legal links between these undertakings and the Member States to a period of years, and should be read in conjunction with the provisions of Article 28, which provide for the maintenance of the legal links between the undertakings concerned and the Member States.

The code of conduct applies to all agreements and approvals concluded prior to the code until they expire under the terms of the agreement.

It should be stressed in this respect that the advantages granted by the host State to investors may be based on bilateral treaties on the promotion and protection of investments concluded between the host State and the investor's State; this brings us back to the provisions of Article 14 of the Union Treaty.

Article 6

Paragraph 2, 4th line :

The references to articles 21 et seq. do not seem appropriate, as compensation may be awarded in a non-contentious manner, and the application of the provisions of articles 21 et seq. relating to the settlement of disputes is only a contingency and is not the normal form of compensation.

This paragraph may end after the words: "except for reasons of public utility".

Article 16

Paragraph 2, 2nd" lìgne provides, after expiry of the time limits for responding, for the granting of an approval, which does not contain your particular advantages granted; the administration should be given the option of regularising the implicit approval by a supplementary document containing the particular advantages to which the investor may legally claim, failing which, the holder of an implicit approval is not in a situation comparable to that which has been duly approved.

Article 17

Does the fact that a Community regulation refers to OHADA's statutory and legal rules not make this text an act of integration into Community law, in other words, does it not constitute interference in an autonomous legal order?

In any event, this coexistence or reference in the same Code to provisions of the two Treaties which are independent of each other is likely to create legal ambiguities in the interpretation and application of this Code.

This is also the place to emphasise the need for consultation between the two organisations, WAEMU and OHADA, with a view to coordinating both their standard-setting policy and their respective jurisdictions, which exercise their jurisdictional control over the same jurisdictions in the Member States and in areas that are not clearly defined.

Article 18

a) Paragraph 1 3eSign

Read. "...suspended by virtue of a legislative, judicial or administrative measure", for "...by law,

the judge or the administration".

Article 19 :

The dispositions of this article creating Investment Promotion Centres (IPCs) and their powers organisaand operating rules in the Community act memp
qui est the regulation on the investment code, may give rise to ambiguity, in that these bodies may be interpreted as being of Community nature, whereas they are public services under national law. Recourse to the directive seems more appropriate because it allows each Member State to adopt transposing acts creating its centre with the same powers and the same operating rules and within the framework of its administrative organisation.

TITLE IV: **Articles 20 et seq.**

These articles have already been the subject of general observations concerning the conception of the settlement of disputes arising from the present Code. The following observations are simply a supplement to what has been said above ,

Article 20:

This article will have to be completely revised. It adopts gradual dispute settlement procedures involving compulsory mediation by the Commission before any other procedure, while offering a variety of remedies in which inter-state courts such as the WAEMU Court of Justice share jurisdiction with arbitration organisations.

As pointed out in the general observations, the method of settling disputes arising under the Code may fall within the jurisdiction of the public law courts (national courts and the UEMOA Court of Justice) because of the Community nature of the Code, and in order to strengthen impaniality in the settlement of disputes, Member States and their investor co-contractors are given the option of having recourse to international arbitration in accordance with the arbitration rules of their choice (which, moreover, need not be cited), This removes the Court of Justice from any judicial review of the interpretation and application of the Code, except in the limited cases where arbitral tribunals have recourse to the national courts to take certain interim measures or where the parties to the arbitration bring proceedings before the national courts for enforcement of final arbitral awards. In the latter cases, preliminary rulings may accidentally be used in the context of what are, after all, formal proceedings.

Article 21

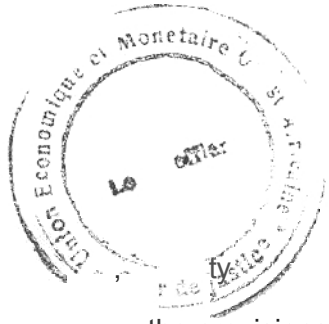
This article on the Commission's ex officio mediation raises the following problem

1) the Commission's competence to exercise such powers,

2) respect for the parties' willingness to have recourse to a mediator and conciliator in the context of an arbitration dispute,

3) the composition of the Conciliation Committee, which is not an emanation of the Commission,

4) the exclusion of the conciliation bodies provided for in the aforementioned arbitration rules.



Article 22:

The same ob- the provisions of Article 20 may be deemed to have been accepted by
Neither the Additional Protocol on judicial control, nor the Statute of the Court of Justice, nor its Rules of Procedure make it possible to make the admissibility of an action against a Community act subject to prior referral by the Commission. Moreover, since arbitration tribunals provide private justice, judicial review by the Court of Justice cannot be exercised directly over them.

In conclusion, in the case of disputes of an economic nature between public Member States and investors who are natural persons or legal entities governed by private law, the parties involved should be given the option of applying either to the national courts, which are the ordinary courts even in Community matters (with the possibility of a preliminary referral to the WAEMU Court of Justice), or of resorting to an arbitration settlement of their choice by means of an arbitration clause or a compromise agreement.

Article 23

This article may not be included in this text, as all stages of an action for failure to fulfil obligations by Member States are governed by the WAEMU Constitutive Treaty. Paragraph 2 of the article relating to the Commission's prior mediation is contrary to the aforementioned Treaty, as an action for failure to fulfil obligations has a different purpose, namely the objective and internal control of Member States' commitments within the Union, and does not concern private law entities such as investors in their relations with States.

Article 27:

This article seems to establish a specific procedure for drafting or amending the investment code regulation, which may call into question the drafting of Community acts as provided for in the WAEMU Treaty.

It is true that in the area of investment protection and promotion texts, clauses are often included as a preventive measure to ensure the stability and even the inviolability of legal measures taken in favour of the investor, clauses which border on respect for the sovereignty of States.

Article 28

In the case of bilateral treaties signed between States on the promotion and protection of investments, the provisions of Article 14 of the WAEMU Treaty should apply, as stated above in Article 5.

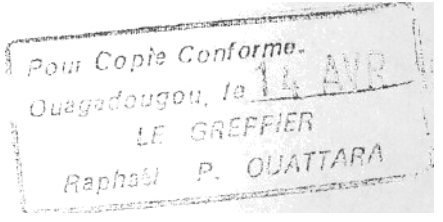
Article 29

The new measures to be taken by the Commission do not comply with the Treaty.

Article 30

The "notification" measures provided for are unnecessary and unusual in this case; the publication provisions are sufficient.

And signed by the Chairman, the Reporter and the Registrar.



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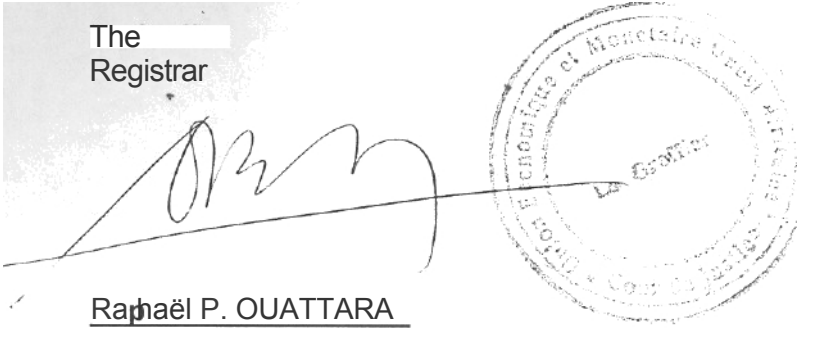
The Registrar



Raphaël P. OUATTARA