COURT OF JUSTICE OF THE ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

In the mater of

LA SOCIETE AFRICA AGRO-INDUSTRIE BENIN SA and Mr. Carlo TESEI v. REPUBLIC OF BENIN AND OTHERS

Application No. ECW/CCJ/APP/39/20 - Judgment No. ECW/CCJ/JUD/13/24

JUDGMENT

ABUJA

On 29th May 2024

SUIT No ECW/CCJ/APP/39/20

JUDGMENT No. ECW/CCJ/JUD/13/24

BETWEEN:

1. LA SOCIETE AFRICA AGRO-INDUSTRIE BENIN SA

2. MR. CARLO TESEI ..... APPLICANTS

And

1. THE REPUBLIC OF BENIN

2. MR. PATRICE TALON

3. LA ASSOCIATION INTERPROFESSIONNELLE DE COTON (AIC)

..... DEFENDANTS

COMPOSITION OF THE COURT:

Hon. Justice Gberi-Be OUATTARA ..... Presiding Judge

Hon. Justice Sengu Mohammed KOROMA - Member

Hon. Justice Ricardo Claúdio M. GONÇALVE..... Member/Judge Rapporteur

ASSISTED BY:

Dr. Yaouza OURO-SAMA ..... Chief Registrar

REPRESENTATION OF PARTIES

SCP Bensimhon-Associés, Me Marc Bensimhon, Me Julien Bensimho ..... Counsel for the Applicants

L'Agent Judiciaire du Trésor ..... Counsel for the Defendant

JUDGMENT

1. This is the Court's Judgment read virtually in an open court, in accordance with Article 8 (1) of the Practice Directions on Electronic Case Management and Virtual Court Sessions, 2020.

II. DESCRIPTION OF THE PARTIES

2. The first Applicant is AFRICA AGRO INDUSTRIE BENIN SA, a Public Limited Company, with a share capital of 10,000,000 CFA francs, with its registered head office in the housing block: 519-F, Quartier Zongo, Cotonou, Benin, represented by its Chairman of the Board of Directors, Mr. Carlo TESEI, domiciled in this capacity at the aforementioned head office.

3. The second Applicant is Mr. Carlo TESEI, of Italian nationality, born on July 4, 1959, in Macerata, Italy, resident in Benin with residence in housing block: 519-F, Quartier Zongo, Cotonou, Benin.

4. The Defendant is the State of the Republic of Benin, a Member State of the Economic Community of West African States, ECOWAS and a

signatory to the African Charter on Human and Peoples' Rights, hereafter the African Charter.

5. The second Defendant is Mr. Patrice TALON, resident at Palais de la Marina, Cotonou, Benin.

6. The third Defendant is LA ASSOCIATION INTERPROFESSIONNELLE DE COTON (AIC), with registered head office in Cotonou, 061 BP: 18, in the person of its legal representative, residing, in this capacity, at said registered head office.

III. INTRODUCTION

7. In the instant case, the Applicants came to claim a violation of their human rights, because on August 25, 2016, the second Applicant set up the company AFRICA AGRO INDUSTRIE BENIN SA, with the aim of building and operating a cotton ginning factory; despite having obtained all the necessary administrative authorizations for the construction and operation of the said factory, Mr. Patrice TALON, the President of Benin, decided to take over the cotton sector and, as a result, the Association Interprofessionnelle de Coton (AIC) filed an appeal on May 4, 2017, against the aforementioned authorizations obtained by the company, the second Applicant, alleging, in particular, that it should have given its prior consent, which it did not; subsequently, the Ministry of Industry, Trade and Crafts arbitrarily annulled the installation permit obtained by the second Applicant, by decision dated May 11, 2017; the second Applicant filed an Internal Administrative Appeal on May 29, 2017, but it was rejected; despite having filed two administrative appeals, on August 4, 2017 and March 26, 2018, with the administrative section of the Cotonou

Court of First Instance, none of the appeals reached the trial stage at first instance.

IV. PROCEEDINGS BEFORE THE COURT

8. The application initiating proceedings (doc. 1) accompanied by 50 (fifty) Exhibits were lodged at the Registry of this Court on 22nd September 2020.

9. On September 30, 2019, the Defendants were duly served, but only the Defendant State, the Republic of Benin, submitted its defense (doc. 2) on November 30, 2020, which was served on the Applicants on December 1 of the same year.

10. On January 22, 2021, the Applicants submitted their reply (doc. 3), which was served on the Defendants on January 25, 2021.

11. On 25 February 2021, the Defendant State submitted its rejoinder (doc. 4), which was served on the Applicants on 16 March 2021.

12. On 16 March 2022, the Applicants submitted their reply to the rejoinder (doc.5), which was served on the Defendants on 17 March 2022.

13. The parties were heard at a virtual hearing held on 13th December 2023, at which they formulated their oral submissions on the merits of the case. The trial of the case was initially scheduled for February 12, 2024, and was later set for May 28, 2024.

V. APPLICANT'S CASE

a. Summary of Facts:

14.The cotton sector in Benin: A sector "run" by Mr. Patrice TALON, President of the Republic of Benin:

15. Benin is the main cotton producer in West Africa, with 732,373 tons of cotton produced in 2019 [Exhibit no. 1: Article from the magazine "Jeune Afrique": Benin-agriculture: the cotton sector resumes its way forward march].

16. This sector is considered by Mr. Patrice TALON, President of Benin, to be his "reserved property", to the point of being nicknamed "The King of Cotton".

17. He believes that only he and his family can work in this sector. He controls the various regulatory bodies for the cotton industry in Benin, and in particular the Association Interprofessionnelle de Coton (AIC). He uses the AIC to dominate the cotton sector and expel those who might compete with his interests or those of his family members. For example, in April 2019, the company SEICB, managed by Mr. Martin Rodriguez, was expropriated from its cotton ginning factory in favor of a company close to Mr. Patrice TALON [Exhibit no. 2: Various press articles on the expropriation of the SEICB company from its cotton ginning factory]. Thus, of the 18 cotton ginning factories in Benin, the TALON Industrial Group owns 16, i.e. 11 SODECO factories and 5 ICA factories.

18. Mr. Patrice TALON thus wishes to become the only operator in the cotton sector in Benin. To do this, he uses the means of the State and, in particular, prevents companies that have been arbitrarily expelled from the sector, prevented of obtaining legal protection of their rights. This is the context of the instant case [Exhibit No. 3: Several press articles on Mr. Patrice TALON's monopolistic drive in the cotton sector].

19.Mr. Carlo TESEI, a stakeholder in the cotton sector in Benin:

20. Mr. Carlo TESEI is a specialist in the marketing of African cotton, particularly Benin cotton. He is also a specialist in factory marketing [Exhibit no. 4: CV of Mr. Carlo TESEI]. He has worked for more than ten years in Benin in the cotton trade, namely through the companies SINCRATEIA TRADING and IMC CORPORATION, of which he is the owner [Exhibit no. 5: Contracts for the purchase of Beninese cotton by the company SINCRATEIA TRADING]. He is a recognized and valued professional [Exhibit no. 6: Press articles about Mr. Carlo TESEI].

21. Creation of the company AFRICA AGRO INDUSTRIE BENIN SA, with the aim of building and operating a cotton ginning factory:

22. In June 2016, Mr. Carlo TESEI met with Benin's Minister of Planning and Investment, who proposed the creation of a cotton ginning factory in Benin. Carlo TESEI was strongly encouraged to create such factory, and was motivated to set it up in the Minister's hometown of DJOUGOU. After considering and forecasting his turnover, he accepted the proposal [Exhibit no. 4: Preview].

23. Many prior steps taken:

24. On August 25, 2016, the Beninese company AFRICA AGRO INDUSTRIE BENIN SA was incorporated with the aim of building and operating this cotton ginning factory. Mr. Carlo TESEI holds 99.55% of the shares in the company AFRICA AGRO INDUSTRIE BENIN [Exhibit no. 7: Articles of Association of AFRICA AGRO INDUSTRIE BENIN SA; Exhibit No. 8: K-bis of the AFRICA AGRO INDUSTRIE BENIN SA]. A plot of land in the city of Djougou was made available to the company AFRICA AGRO INDUSTRIE BENIN SA, for the installation of the factory [Exhibit no. 9: Provision of land].

25. Extremely concerned about complying with Beninese regulations, AFRICA AGRO INDUSTRIE BENIN SA carried out all the preliminary studies required, including a feasibility study, an environmental study, an application for approval under the Industrial Free Zone Scheme and applications for permits [Exhibit No. 10: Feasibility study, Exhibit No. 11: Environmental study, Exhibit No. 12: Application for approval to the Industrial Free Zone Scheme].

26. Administrative authorizations received:

27. AFRICA AGRO INDUSTRIE BENIN SA has thus obtained all the necessary administrative authorizations for the construction and operation of the factory.

28. Thus, on December 19, 2016, the company AFRICA AGRO INDUSTRIE BENIN SA obtained a receipt issued by the Ministry of Industry, Trade and Crafts, establishing that the application for authorization complied with Article 36 of the Decree of October 13, 2003, on the organization and operation of the Industrial Free Zone [Exhibit No. 13: receipt stating that the application complied].

29. On January 30, 2017, a decree was issued by Benin's Ministry of Industry, Trade and Crafts, indicating that the ginning project planned by AFRICA AGRO INDUSTRIE BENIN SA complies with environmental standards [Exhibit No. 14: decree of compliance with environmental standards].

30. On April 13, 2017, the Ministry of Industry, Trade and Crafts gave AFRICA AGRO INDUSTRIE BENIN SA the final go-ahead to begin construction of the cotton ginning factory [Exhibit No. 15: final construction permit].

31. Finally, on April 13, 2017, the company AFRICA AGRO INDUSTRIE, in full compliance with Beninese regulations, obtained all the necessary permits to build and operate a cotton factory in Djougou.

32. Numerous investments were made based on the authorizations received (purchase of land, purchase of equipment, financial investments, etc.).

33. Mr. Carlo TESEI thus confidently invested the sum of 3 million euros of his personal funds in AFRICA AGRO INDUSTRIE BENIN SA, which corresponds to two thirds of the funds necessary for the creation and operation of the cotton ginning factory [Exhibit No. 16: list and figures of the investments made].

34. AFRICA AGRO INUSTRIE BENIN SA thus began construction of the factory, ordering ginning machines, leveling the land, building three warehouses, building infrastructure (fences, offices, water tower), drilling boreholes, building the water network, carrying out all the preparatory studies, etc.

35. Recovery of the cotton sector by Mr. Patrice TALON, President of Benin, and his family members:

36. Unfortunately, it was during this period that Mr. Patrice TALON, President of Benin, decided to recover the cotton sector, which he considered to be "his reserved property", so that he and his relatives could own 100% of the market shares in this very lucrative sector.

37. Agence France Presse (AFP) investigated this takeover and discovered that Mr. Patrice TALON and his relatives did everything they could to become the exclusive owners of Benin's cotton sector.

38. AFP indicates that this appropriation was made through the Association Interprofessionnelle de Coton (AIC), at the head of which

Mr. Patrice TALON appointed one of his relatives [Exhibit no. 17: AFP article "The cotton harvest in Benin: a monopolistic race for white gold". Thus, several independent players in the cotton sector were expelled in order to guarantee the monopoly of Mr. Patrice TALON and his relatives].

39. Abrupt and arbitrary withdrawal of the authorizations granted:

40. It is in this context that the Association Interprofessionnelle de Coton (AIC) filed an appeal on May 4, 2017 against the authorization obtained by the company AFRICA AGRO INDUSTRIE BENIN SA to install a cotton ginning factory, claiming that it should have given its consent beforehand, and maintaining that the quantities of cotton produced did not allow work to be done on a new cotton ginning factory, which is totally false [Exhibit no. 18: Appeal lodged by AIC].

41. This surprising action aimed at preventing the company AFRICA AGRO INDUSTRIE BENIN SA from accessing the cotton ginning market in Benin, in order to protect the interests of Mr. Patrice TALON and his relatives. Following this, the Ministry of Industry, Trade and Crafts arbitrarily annulled the installation permit obtained by the company AFRICA AGRO INDUSTRIE BENIN SA by decision dated May 11, 2017 [Exhibit No. 19: Annulment of the authorization - decision of 11 May 2017].

42. Then, on May 16, 2017, the same ministry arbitrarily annulled the receipt of compliance with the rules of the Industrial Free Zone Scheme obtained by the company AFRICA AGRO INDUSTRIE BENIN.

43. Thus, within 15 days, all the authorizations granted to the company AFRICA AGRO INDUSTRIE BENIN SA by the State of Benin were withdrawn without reason, and the amounts invested, based on these

authorizations, were wasted. Instructions were given to exclude the company AFRICA AGRO INDUSTRIE BENIN, and to expel it from the cotton market, monopolize its investments and recover its future market shares. This decision to exclude is a political decision, which was taken in the interests of Mr. Patrice TALON and his relatives.

44. The Beninese press, which at the time of the eviction still had some freedom, echoed this by clearly stating that cotton in Benin is "the reserved property of the AIC and Talon".

45. According to the press, this is an "act of the Sovereign" on the part of Mr. Patrice TALON, namely through the use of "weapons" of the Beninese State to ensure hegemony in the cotton sector. Thus, the newspaper "La Nouvelle Tribune" wrote in its edition of Thursday, July 5, 2016 that: "*Authorizing someone to commit to funding a project and then stopping it midway a few weeks later shows the nature of the regime we're dealing with. But this decision, to put it simply, seems like a fatwa. From now on, it must be understood that no one should dare venture into the cotton sector, which has become the reserved property of the AIC led by Mathieu ADJOVI, who is just one of Talon's employees*" [Exhibit no. 20: Article from the newspaper "La Nouvelle Tribune": "How the government cheated the company AFRICA AGRO INDUSTRIE" and Exhibit No. 21: Article from the newspaper "La Nouvelle Tribune": "Confusion and contradictions in the government"].

46. Total loss of investments made and expected turnover:

47. The Applicants Carlo TESEI and the company AFRICA AGRO INDUSTRIE BENIN SA lost the 3 million euros that were invested in the creation of this cotton ginning factory. They also suffered a significant operating loss corresponding to the expected turnover.

48. Devaluation of the shares of AFRICA AGRO INDUSTRIE BENIN SA:

49. The Applicant AFRICA AGRO INDUSTRIE BENIN SA suffered a total devaluation of its shares, which led to a real impoverishment of its shareholders' assets.

50. Initiation of administrative proceedings against the State of Benin:

51. Not wanting this injustice to go unpunished, the Applicant AFRICA AGRO INDUSTRIE BENIN filed an Internal Administrative Appeal on May 29, 2017, stating that it had not violated any of the provisions relating to the granting of authorization and approval for the creation, opening and operation of a cotton ginning factory and that it had taken substantial measures and investments following an invitation from the Government of Benin to make the said investments [Exhibit No. 22: Internal Administrative Appeal].

52. By letter dated July 21, 2017, the State of Benin simply rejected its application [Exhibit 23: Reply to the Internal Administrative Appeal].

53. Then, on August 4, 2017, it filed an administrative appeal against these two annulment decisions with the administrative section of the Cotonou Court of First Instance, asking the Court to find that the authorization to set up the ginning factory created irrevocable rights for the benefit of the company AFRICA AGRO INDUSTRIE BENIN; to find that the State of Benin, by arbitrarily annulling the aforementioned authorization decision, had abused its powers, in flagrant violation of the principle of acquired rights, and should therefore annul the decisions preventing the Applicant AFRICA AGRO INDUSTRIE BENIN from building and operating the cotton ginning factory, which it had been

authorized to build and operate [Exhibit No. 24: Administrative appeal filed on August 4, 2017].

54. On March 26, 2018, the Applicant AFRICA AGRO INDUSTRIE BENIN SA also filed a second action for compensation for the damages it suffered, in the amount of 34,450,000,000 CFA francs (thirty-four billion, four hundred and fifty million CFA francs) [Exhibit No.25: Administrative appeal filed on March 26, 2018].

55. Total obstruction of administrative proceedings against the State of Benin, denial of justice:

56. The State of Benin decided to obstruct these proceedings so that the Applicant AFRICA AGRO INDUSTRIE BENIN could not obtain protection of its rights before the Administrative Court of Cotonou.

57. The Applicant repeatedly asked the Cotonou Administrative Court to order the State of Benin to submit a statement of defense, which it never did [Exhibit 26: AFRICA AGRO INDUSTRIE BENIN's applications to the Court].

58. The State of Benin voluntarily took its time and thus communicated its reply to the administrative annulment proceedings on December 17, 2018, i.e. a year and a half after the originating application was filed, and communicated a new pleading on February 10, 2020, i.e. more than two and a half years after the appeal was filed [Exhibit No. 27: Reply from the State of Benin].

59. The Defendant immediately asked the Court, after the presentation of this last pleading, by letter dated April 6, 2020, that the case be closed and that a hearing be scheduled. Likewise, the claim for compensation has still not been approved, despite multiple applications by the Applicant to set a hearing date. To date, almost three years after AFRICA AGRO

INDUSTRIE submitted its applications, none of the appeals it has lodged have reached the judgment stage at first instance. This is a real denial of justice, which shows that it cannot get its rights protected in Benin.

b. Pleas in Law

60. The Applicants cited Articles 7 and 14 of the African Charter.

61. They further relied on the international jurisprudence.

c. Reliefs Sought

62. The Applicants sought from the Court to:

i) Find that the Applicant Carlo TESEI suffered a violation by the State of Benin, Mr. Patrice TALON and the Association Interprofessionnelle de Coton of his property rights, protected by Article 14 of the African Charter on Human and Peoples' Rights;

ii) Find that the company AFRICA AGRO INDUSTRIE BENIN SA has suffered a violation by the State of Benin, Mr. Patrice TALON and the Association Interprofessionnelle de Coton of the following rights, protected by Articles 7 and 14 of the African Charter on Human and Peoples' Rights: the right to property, the right of access to a court and the right of access to a fair trial;

iii) Find that these violations cause Applicant Carlo TESEI the following damages: loss of his investments, devaluation of the shares of Applicant AFRICA AGRO INDUSTRIE BENIN SA that he holds, and moral damages;

iv) Consequently, order the State of Benin, Mr. Patrice TALON and the Association Interprofessionnelle de Coton jointly and severally to pay him the following sums:

- Three million euros in losses on his investments;

- Sixty million CFA francs in moral damages;

v) Find that these violations cause the Applicant AFRICA AGRO INDUSTRIE BENIN SA the following damages: turnover expected and not achieved due to the arbitrary withdrawal of authorizations, lawyers' fees incurred in the internal process, which is the subject of denial of justice, moral damages and reimbursement of legal costs related to this process;

vi) Consequently, order the State of Benin, Mr. Patrice TALON and the Association Interprofessionnelle de Coton jointly and severally to pay it the following sums:

a) 51 billion 704 million CFA francs in expected and unrealized turnover;

b) 25 million CFA francs, unless more precise figures are available, as legal costs incurred in the internal proceedings;

c) 100 million CFA francs in moral damages;

d) 29 million CFA francs as reimbursement of legal costs in the instance case.

VI. DEFENDANT'S CASE

Summary of Facts:

63. By correspondence dated August 3, 2016, the Applicant AFRICA AGRO INDUSTRIE BENIN SA submitted to the Commission for approval of the Industrial Free Zone Scheme an application for approval

408

of the said scheme for the installation of a cotton ginning factory in Djougou.

64. While awaiting delivery of said approval, the chairman of the committee signed, for the benefit of the Applicant AFRICA AGRO INDUSTRIES BENIN SA, compliance receipt No. 398/MICA/DGDI/DPI/A-ZFI/SCA of December 19, 2016 (Opposing party's Exhibit No. 13).

65. Without waiting for the decree approving it, the Applicant AFRICA AGRO INDUSTRIES BENIN SA undertook to import production equipment with suspension of customs duties.

66. On April 13, 2017, the Minister of Industry, Trade and Crafts granted it an industrial installation permit No. 0510/DC/SGM/DGDI/DESI/SA without any respect for the procedure laid down in the matter (opposing party's Exhibit No. 15).

67. This is how, on May 4, 2017, by act of Flora KOSSOUHO, bailiff in Cotonou, the Association Interprofessionnelle de Coton (AIC) withdrew from a Internal Administrative Appeal brought before the Minister of Industry, Trade and Crafts (opposing party's Exhibit No. 18).

68. On the same day, the aforementioned notice was served on the Applicant AFRICA AGRO INDUSTRIES BENIN SA; the action was based on an agreement known as the Framework Agreement between the State and the Association Interprofessionnelle de Coton of January 7, 2009, the purpose of which is:

- clarify the roles and responsibilities of the State and the private sector in the cotton sector;

- recognize the Association Interprofessionnelle de Coton (AIC) as the only organization in the cotton sector;

- establish general rules for the organization and operation of the sector, based on agreements between the professional families who are members of the Association Interprofessionnelle de Coton;

- liaise between the State and the AIC.

69. Article 9 of the aforementioned convention recognizes the AIC as the only interprofessional organization in the sector, of which it is the institutional support and representative body.

70. Article 19 of the same convention adds that "... *the authorization of the increase of the national cottonseed ginning capacity by the installation of new ginning factories or by the extension of the capacity of existing factories is the joint responsibility of the State and the Association Interprofessionnelle de Coton, according to the evolution of the level of the national cottonseed production*" (Exhibit No. 1: Convention known as the Framework Agreement between the State and the Association Interprofessionnelle de Coton of January 7, 2009).

71. In fact, the industrial installation permit was issued to the Applicant AFRICA AGRO INDUSTRIE BENIN SA, without prior consultation with the AIC.

72. The same applies to the Approval Committee's decision on the Industrial Free Zone Scheme.

73. However, the cotton ginning capacity already installed is higher than the level of national cottonseed production during the period.

74. It was under such conditions that the Minister of Industry, Trade and Crafts took decision No. 26/MICA/DC/SGM/DGDI/SA of May 11, 2017, regarding the annulment of Industrial Installation Permit no. 0510/MICA/DC/SGM/DGDI/DESI/SA of April 13, 2017 (Opposing party's Exhibit No. 19).

75. As a result of the annulment by the Minister of Industry, Trade and Crafts, the Director General of Industrial Development sent the Company AFRICA AGRO INDUSTRIE BENIN correspondence no. 076/MICA/DGDI/DPI/SCA of May 16, 2017, to notify it of the expiry of the Receipt of Conformity given to it as part of its approval to the Industrial Free Zone Scheme.

76. Following these decisions, the Applicant AFRICA AGRO INDUSTRIES BENIN SA lodged an Internal Administrative Appeal (opposing party's Exhibit No. 22) to which the administrative authority responded with an explicit decision to reject (opposing party's Exhibit No. 23).

77. It was following this response that the Applicant Africa Agro Industries initiated the following 03 proceedings:

"1. SUIT NUMBER 06903/2017

78. This case concerns an application for a stay of execution lodged by the applicant AFRICA AGRO INDUSTRIE on August 30, 2019, at the Registry of the Court of First Instance of Cotonou, competent in administrative matters.

79. In response, the State of Benin filed its pleadings on March 9, 2018, at the Registry of the Court seized of the appeal.

80. It should be noted that this procedure was unsuccessful due to the withdrawal of the case by Applicant AFRICA AGRO INDUSTRIE BENIN on May 8, 2019 (Exhibit 2: Letter withdrawing the case dated May 11, 2018, from AFRICA AGRO INDUSTRIE BENIN to the President of the 2nd Administrative Chamber of the Cotonou Court of First Instance).

2. SUIT NUMBER 6368/2017

81. This case concerns the action for annulment for abuse of power brought by the applicant AFRICA AGRO INDUSTRIE BENIN before the Administrative Chamber of the Cotonou Court of First Instance, pursuant to an application dated July 11, 2017.

82. The State of Benin filed its defense on December 14, 2018, to which the applicant AFRICA AGRO INDUSTRIE replied in its pleading filed on March 5, 2019.

83. In response, the State of Benin filed a rejoinder with the Registry of the Court on August 26, 2019, and the Applicant stated, by letter dated January 13, 2020, that it had no further observations to make (Exhibit No. 3: Letter waiving rejoinder dated January 13, 2020, sent by the Company AFRICA AGRO INDUSTRIE to the Chief Registrar of the Court).

3- SUIT NUMBER 02163/2018

84. The applicant AFRICA AGRO INDUSTRIE also brought an action before the Court of First Instance of Cotonou, which has jurisdiction in administrative matters, dated March 30, 2018, seeking an order that the State of Benin and the Association Interprofessionnelle de Coton pay the sum of 34,450,000,000 (thirty-four billion, four hundred and fifty million) CFA francs.

85. The parties regularly exchanged their pleadings in this case, namely:

- Defense lodged on May 14, 2019, at the Registry of the Cotonou Court of First Instance;

- Reply submitted by AFRICA AGRO INDUSTRIE on December 6, 2019;

- Rejoinder from the State of Benin, dated January 21, 2020.

86. It should be noted that Applicant AFRICA AGRO INDUSTRIE has not yet responded to the last pleading in this case.

87. Several proceedings were therefore initiated by the Applicant and are regularly followed by the parties. If Applicant AFRICA AGRO INDUSTRIE sometimes refrains from replying by express letter, at other times it refrains from reacting without reason.

88. While the various proceedings initiated by it are ongoing, it is hurrying to bring the case to this Court.

89. However, the ECOWAS Court has no jurisdiction to hear the case since the Defendant State has not ratified Protocol A/SP.1/01/05 on the Court, nor has it published it.

90. In principle, the commitments contained in international conventions, treaties, agreements or additional acts or protocols modifying them only have definitive effect in relation to the State when they are regularly transposed into domestic law.

91. In this sense, Article 147 of the Beninese Constitution states: "*Treaties or agreements that have been duly ratified have, from the moment they are published, greater authority than laws. Thus, not only must a treaty be ratified, but it must also be published.*"

92. In this case, Benin has never ratified Protocol A/SP.1/01/05.

93. In the absence of ratification, the process by which the State of Benin intended, in relation to Protocol A/SP.01/01/05, to limit its sovereignty by submitting to this international commitment cannot be considered successful.

94. In fact, from the fact-finding carried out with the public administrations involved in the process of ratifying international

agreements, it appears, in accordance with the conclusions of the Constitutional Court of Benin in decision DCC 20 434 of April 20, 2020, that:

- The Assembly regularly noted, through its administrative secretary-general, that it had never been consulted by the government to authorize the ratification of the protocol and therefore did not authorize its ratification;

- The Minister for Foreign Affairs and Cooperation notes that while Benin has signed the protocol, it has not ratified it;

- The Keeper of the Seals, Minister of Justice and Legislation argued that the protocol states that "*will enter into force definitively after ratification by at least nine (9) signatory States, in accordance with the constitutional rules of each Member State*", but Benin has not ratified it; that, furthermore, by establishing the Community Court of Justice as the supranational judge of human rights violations committed in Benin, this Additional Protocol modifies the organization of the jurisdictions and the internal laws governing them and can therefore only be ratified in accordance with Article 145 (1) of the Constitution, by judicial authorization, which has not been forthcoming.

95. All these findings can be found in the grounds of the decision DCC 20 434 of April 30, 2020, of the Constitutional Court of Benin (Exhibit No. 4: Decision DCC 20 434 of April 30, 2020, of the Constitutional Court of Benin).

96. The Constitutional Court of Benin, noting that Benin had never ratified the Protocol on the ECOWAS Court of Justice, issued the following decision:

"*Consequently,*

Article 1: - Declares that Additional Protocol A/SP.1/01/05 of January 19, 2005, cannot be invoked against the State of Benin because it has not been ratified under a law issued by the National Assembly, promulgated and published in the Official Journal.

Article 2 - Declares that the successive governments that have given-heed to the various processes initiated based on the ECOWAS Additional Protocol A/SP.1/01/05 of 19 January 2005, in the absence of a ratification law, promulgated and published in the official gazette, have violated Article 35 of the Constitution.

Article 3 - Declares that all acts arising from the implementation of the ECOWAS Additional Protocol A/SP.1/01/05 of January 19, 2005, are null and void in relation to Benin."

97. Benin is therefore not a subject of the ECJ jurisdiction.

98. The State of Benin cannot, therefore, file a defense before the ECJ, a jurisdiction in which it is not a subject, without violating its own law.

99. Therefore, the ECOWAS Court of Justice does not have jurisdiction to hear the Applicant's Application.

b. Pleas in Law

99. The Defendant based its pleading on Article 147 of its Constitution of Republic of Benin.

b. Reliefs Sought

100. The Defendant State seeks from the Court to:

- Note that the entry into force of an international instrument in Benin is the result of ratification and publication;

405

- Note that Benin has never ratified the Protocol on the ECOWAS Court of Justice;

- Note that the State of Benin is not a subject of the ECJ jurisdiction;

- Consequently, declare itself lacking jurisdiction.

VII. APPLICANTS' REPLY

101. The Applicants replied by claiming, in summary, that Benin is a de facto signatory to the Treaty establishing ECOWAS and, consequently, is a party to the ECOWAS Court of Justice; that the establishment of the Court results from Article 15 of the Revised Treaty of 24 July 1993, signed and duly ratified by Benin; that the Court's jurisdiction is governed by Protocol A/P1/7/91, signed in Abuja on July 6, 1991; that this Protocol entered into force in the internal legal order of Benin following its ratification by the Head of State: that it is Additional Protocol A/SP.01.01.05 of January 19, 2005 on the amendment of Protocol A/P.1/7/91 which gives Beninese nationals the right to bring an action directly before the ECJ when they consider themselves to be victims of a violation of their rights; that based on Articles 45 and 46 of the Vienna Convention, ratified by Benin, and taking into account that the State of Benin has so far never raised the inapplicability of Protocol A/SP.1/01/05 of January 19, 2005 in its pleadings on the merits before the ECJ, the plea relating to non-compliance with the ratification procedure provided for by the Constitution of Benin is inoperative; that the State of Benin, based on the principle of *forum prorogatum*, has tacitly accepted the possibility for its citizens to appeal directly to the ECOWAS Court of Justice.

VIII. DEFENDANT'S REJOINDER

102. The Defendant replied, reiterating its pleas regarding the lack of jurisdiction of this Court to examine the instant action.

IX – ON THE JURISDICTION

103. In its defense, the Defendant State pleaded that this Court lacked jurisdiction to decide on the merits of the instant case.

104. To this end, invoking Article 147 of the Constitution of Benin, it claimed that it had neither ratified nor published Protocol A/SP.1/01/05, the Constitutional Court of the Defendant State having ruled: "*that Additional Protocol A/SP.1/01/05 of January 19, 2005 is not enforceable against the State of Benin because it has not been ratified under a law passed by the National Assembly, promulgated and published in the Official Journal* and that *the successive governments that have given-heed to the various processes initiated based on the ECOWAS Additional Protocol A/SP.1/01/05 of January 19, 2005, in the absence of a ratification law, promulgated and published in the Official Gazette, violated Article 35 of the Constitution, and therefore declared that all acts arising from the implementation of the ECOWAS Additional Protocol A/SP.1/01/05 of January 19, 2005 are null and void in relation to Benin*".

105. It concludes that the Defendant State is therefore not a subject of the ECJ jurisdiction, so it cannot present a defense before this Court for not being subject to its jurisdiction.

106. With regard to this preliminary objection of lack of jurisdiction, the Applicants, on the other hand, claim that this Court has jurisdiction to hear the case on the merits, having argued to that effect in the terms already described in paragraph 101, the contents of which are as if hereby reproduced in seriatim

The Court's Analysis

107. With regard to this preliminary objection, the Court recalls that a State cannot invoke its domestic law as a legal justification for failing to comply with its international obligations. This stems from the well-known principle of international law that States are sovereign and bound by the treaties they have freely entered into.

108. It is a principle of contract law that a party cannot unilaterally change the terms of a contract after it has been concluded.

109. If it were possible for States to use their domestic laws as a justification for non-compliance with international obligations, they could change their domestic laws whenever they deemed it necessary in order to evade their international obligations.

110. The Defendant's Constitution is the fundamental norm of its legal system, the basis of its domestic law and an integral part of it. The Defendant cannot rely on its Constitution to derogate the international obligations that it has freely entered into.

111. The 2005 Protocol is very clear when it states that it enters into force provisionally, once signed by the Heads of State and Government of the Member States and definitively once ratified by at least nine (9) signatory states, in accordance with the constitutional rules of each State.

112. With regard to the Defendant, it signed the 2005 Protocol on January 19, 2005, so it entered into force provisionally, which is sufficient for it to be bound by it, being a part to it. It should be remembered that signature is one of the methods recognized and accepted in international law for the entry into force of a treaty (see Articles 11 and 12 of the 1969 Vienna Convention on the Law of Treaties).

113. That Protocol entered in force definitively with the ratification of nine Member States, so that even if the Defendant has not ratified the

Protocol, it is bound by its provisions, since more than nine Member States (excluding the Defendant) have already ratified it (see *HANS CAPEHART WILLIAMS SR & 1 OR v. REPUBLIC OF LIBERIA & 4 ORS JUDGMENT NO ECW/CCJ/JUD/25/15 @ pg. 15*).

114. It should be noted that the issue of non-ratification or non-domestication of the Court's protocols has already been addressed and dealt with several times by this Court.

115. A study of this case law shows that this pleading, although often invoked, has always been rejected by the Court, for various reasons, and the Court has adopted a uniform position in defense of its jurisdiction to hear the merits of the case, when the non-ratification or non-domestication of the Protocols on the Court is invoked (see, by way of example, the following cases: *A. MUSA SAIDYKHAN V. THE GAMBIA, JUDGMENT NO. ECW/CCJ/RUL/04/09 [2010] COL. 153-154, PARAS 48-49-50); B. BAKARY SARRE AND 28 OTHERS AGAINST MALI, JUDGMENT No. ECW/CCJ/03/11 [2011] ECR. 71-73, PARAGRAPHS 34-35; C. MOUKHTAR IBRAHIM AMINU V. THE FEDERAL REPUBLIC OF NIGERIA AND OTHERS, JUDGMENT NO. ECW/CCJ/RUL/03/11 [2011] ECR 183, PARAS 38-50); E. THE TRUSTEES OF THE JAMA'A FOUNDATION AND 5 OTHERS V. THE FEDERAL REPUBLIC OF NIGERIA AND 1 OTHER, [2012] CASEBOOK 315; F. DEYDA HYDARA AND 2 OTHERS AGAINST GAMBIA, JUDGMENT NO. ECW/CCJ/RUL/03/11 [2011] ECR 183, PARAS 38-50). DEYDA HYDARA AND 2 OTHERS AGAINST GAMBIA, JUDGMENT No. ECW/CCJ/RUL/19/12, COLLECTION OF JURISPRUDENCE 2012, P. 329, P. 335; G. SIMONE EHIVET AND MICHEL GBAGBO AGAINST CÔTE D'IVOIRE, JUDGMENT No. ECW/CCJ/JUD/03/13, [2013] COL. 35; H. HANS CAPEHART*

408

WILLIAMS AGAINST LIBERIA, ECW/CCJ/JUD/25/15, [2014] ECR 471; VAENTINE AYIKA AGAINST THE REPUBLIC OF LIBERIA, JUDGMENT No. ECW/CCJ/JUD/09/12/REV [2012] ECR 153).

116. For the above reasons, the Defendant State's plea of lack of jurisdiction is unfounded and the Court so declares.

117. Therefore, with regard to the jurisdiction to hear the case, the Court notes that the Applicants allege the violation of the right to property, the violation of the right of access to a court, the violation of the right to be tried within a reasonable time and the violation of the right of access to an impartial court or tribunal, guaranteed by Articles 14 and 7, respectively, of the African Charter on Human and Peoples' Rights, hereafter the Charter.

118. The Court therefore declares itself competent to rule on the alleged violation of human rights, in accordance with Article 9(4) of Protocol A/P1/7/91 on the Community Court of Justice (Protocol), which states: "*The Court has jurisdiction in cases of human rights violations occurring in any Member State*" [see also the cases, *HISSÈNE HABRÉ v. REPUBLIQUE DU SENEGAL, Judgment No.* ECW/CCJ/RUL/03/2010, CCJRL (2010) p. 43, § 53-61; MAMADOU TANDJA v. REPUBLIC OF NIGER Judgment No. ECW/CCJ/JUD/05/10 CCJRL (2011), pag. 105 ff.; PRIVATE ALIMU AKEEM v. REPUBLIC FEDERAL OF NIGERIA, Ruling N° ECW/CCJ/RUL/05/11, CCJRL (2011), pag. 121 ff.*]*

X. ADMISSIBILITY

119. The instant case was brought by a legal person (commercial company AFRICA AGRO INDUSTRIE BENIN, LIMITED COMPANY), duly registered in the Defendant State, under number RCCMRB/COT/16B17155, with its registered office at Cartier Jak au lot 431 Cotonou and by a natural person, In the instant case, Mr. Carlo Tesei.

120. At first sight, since the first Applicant is not a human being or natural person, it may be questioned whether, in the light of Article 10(d)(i) of the 2005 Protocol, it has *locus standi* to bring the instant action.

121. The *locus classicus* on the interpretation of Article 10(d) of the Protocol to the Court is the case *Dexter Oil Ltd v. Liberia, (Judgment No: ECW/CCJ/APP/03/19)*, where the Court harmonized its previous decisions on the interpretation of Article 10(d) of the Protocol on the Court, limiting access to the court for human rights violations to individuals only, but at the same time admitting exceptions ("except under internationally accepted conditions"). The established exceptions under which legal persons can ground an action are rights that are fundamental rights, not dependent on human rights, including notably the right to a fair hearing, the right to property and the right to freedom of expression.

122. In the instant action, the Applicant **AFRICA AGRO INDUSTRIE BENIN, LIMITED COMPANY** claimed the violation of the right to property, the right of access to a court, the violation of the right to a decision within a reasonable time and the violation of the right of access to an impartial court or tribunal, guaranteed by Articles 14 and 7 of the Charter, respectively. These rights are perfectly compatible with its nature as a legal person, and the Applicant's locus standi is therefore well established.

123. There are two further aspects of the instant action which require the Court's assessment, namely: *(i) whether the Applicant Carlos Tesei has locus standi to bring an action formulating claims identical to those of the Applicant Africa Agro Industrie Benim, Limited Company and* (ii) *whether the action is admissible in relation to the second and third Defendants.*

i) Whether the Applicant Carlos Tesei has locus standi to bring claims identical to those of the Applicant Africa Agro Industrie Benim, Limited Company.

124. The second Applicant's allegations of violation of his property rights as an investor/shareholder reflect the damage suffered by the first Applicant, which is the aggrieved company of which the first Applicant is a shareholder.

125. In the practice of international law, in addition to treaty-based protections, certain principles related to shareholder claims can be recognized as customary international law. These principles, which often arise in the context of disputes involving investments made by shareholders in foreign countries, can include the prohibition of arbitrary or discriminatory treatment of foreign investors and the obligation of States to compensate for the violation of property rights and related rights of foreigners.

126. These principles, together with others, form the legal framework within which shareholders' claims are judged in international law and can provide them with legal remedies for violations of their rights related to their investments in a foreign country.

127. One of those principles relevant to the instant case is the "***rule against recovery of reflective losses***" which must be examined to determine whether the Second Applicant's claims are admissible.

128. The rule against the recovery of *reflective damages* is a legal principle which, in general, prevents shareholders from claiming compensation for the loss in value of their shares due to acts committed against the company. This is due to the fact that these losses are considered "*a reflection*" of the loss suffered by the company itself and that it is the applicant with legal standing to seek compensation for the right that has been violated.

129. In the case of *ALGOM RESOURCES LIMITED & OTHER AGAINST THE REPUBLIC OF SIERRA LEONE, JUDGMENT No. ECW/CCJ/JUD/03/23 at page 32 (not reported),* the Court referred to the ICJ's application of the principle of separate legal personality in international law in the *Barcelona Traction* case, where it noted the following:
"Despite its separate legal personality, a damage caused to the company often causes damage to its shareholders. But the mere fact that the damage is suffered by both the company and the shareholders does not mean that both are entitled to claim compensation. Thus, whenever a shareholder's interests are harmed by an act committed against the company, it is to the latter that he must turn to bring the appropriate action, because, although two different entities may have suffered the same damage, it is only to an entity that the rights have been violated." (BARCELONA TRACTION, LIGHT POWER AND COMPANY LTD (JUDGMENT) [1970] ICJ Reports 3, paragraph 44).

130. The application of the rule against the recovery of reflective damages presupposes that a shareholder cannot claim a loss suffered by the company, for example, compensation based on a decrease in the market value of the shares or a probable decrease in dividends.

131. In such cases, it is said that a shareholder's loss is merely a "reflection" of the loss suffered by the company, and that the company (or its liquidator) is the proper Applicant (see the decision of the UK Supreme Court in the case between *MAREX FINANCIAL LTD v SEVILLEJA [2020] UKSC 31, 15 JULY 2020).*

132. As indicated in the case *Barcelona Traction*, the exceptions to the rule allow shareholders to bring an independent action when the losses they suffer are separate and distinct from those of the company. Similarly, creditors were exempted from the scope of the rule in order to allow them to recover their losses regardless of any potential action the company might take.

133. In order to be able to bring an independent action, the shareholder must demonstrate that he has an independent cause of action against the defendant, in circumstances where the company has none, and that he has suffered a personal loss due to an act attributable to the defendant.

134. In fact, shareholders have a series of principles that aim to balance their rights and interests with the need to protect the autonomy of the company and the interests of other stakeholders, including direct actions for damages that have been directly caused to them; unfair damage if the company's business is being conducted in a way that unfairly affects the interests of shareholders; fair and equitable proceedings for the company to be dissolved

if the directors are deemed to be acting in a way that affects the interests of shareholders, etc.

135. The Court is not unaware that shareholders can bring claims directly against a host State under investment agreements if they are directly affected by the State's actions, such as expropriation or discriminatory treatment.

136. However, in a human rights action, as in the instant case, the independent action of the shareholders or individual employee must be based on a violation of their human rights due to unlawful actions against the company, provided that this is a legal damage separate and distinct from the damage suffered by the company (*see the ALGOM RESOURCE case on pages 36-37 pages 14-15*).

137. Thus, when the violation against the shareholder is not separate and distinct from that against the company, shareholders should file complaints indirectly through the company in which they hold shares, especially if the company itself has a cause of action against the host State.

138. In the case *sub judice*, the second Applicant, in his attempt to particularize the violation he suffered, stated that the arbitrary revocation of the authorizations and licenses issued to the first Applicant to operate resulted in the devaluation of the company's shares and the loss of his investments, constituting a violation of his property rights protected by Article 14. He claims that the annulment of the operating permits and licenses led to his impoverishment, since the sum of three (3) million euros he had invested in the First Applicant was lost. He asks the Court to order the Defendant to compensate him for the depreciation of the shares he holds in the first Applicant.

139. However, the second Applicant's loss, which he describes as a violation of his right to property, is merely a "reflection" of the company's loss, and therefore only the company can be the legitimate Applicant for any compensation for the violation caused by the Defendant's conduct.

140. The second Applicant, as an individual shareholder, does not allege nor has he been able to prove any violation of his human rights that would constitute a legal damage distinct and separate from the damage suffered by the company so that he could have *locus standi* for an action independent of the company.

141. Based on the foregoing analysis, the Court finds that the second Applicant has no personal interest capable of being protected in this action and therefore lacks legal standing compatible with the admissibility requirements of Article 10(d) of the 2005 Additional Protocol.

142. Consequently, the Court finds that the claims of the second Applicant Carlos TESEI are inadmissible.

143. Furthermore, the Court finds that the first Applicant's case is admissible against the Defendant State, since it complies with Article 10(d)(i) and (ii) of the said Protocol.

ii) Whether the action is admissible against the second and third Defendants

144. The instant case was brought not only against the Defendant State, but also against the second Defendant, Mr. Patrice TALON, President of the Republic of Benin, residing at Palais de la Marina, Cotonou, Benin and also against the Association Interprofessionnelle de Coton (AIC), with registered head office in Cotonou, 061 BP: 18, in the person of its legal representative, residing in that capacity, at the said registered head office.

145. The question arises as to whether the second and third Defendants are proper parties in the instant case, that is to say, whether the action is admissible against the two Defendants.

146. The provisions of Articles 9 and 10 of the 2005 Additional Protocol specify the categories of entities and individuals against whom a complaint can be lodged. These provisions are clear in stating that only Member States and ECOWAS Institutions can be brought before the Court, for violation of Human rights.

147. In its interpretation and application of the provisions of Articles 9 and 10 of the said Protocol, the Court has ruled in several cases that only States that are contracting parties to the ECOWAS Revised Treaty and the African Charter and other similar human rights treaties can be sued before the Court for alleged human rights violations occurring on their territory. Consequently, neither individuals, nor agents, nor organs of a Member State can be brought as defendant parties before this Court for human rights violations [see *THE REGISTERED TRUSTEES OF THE SOCIO-ECONOMIC RIGHTS & ACCOUNTABILITY PROJECT (SERAP) & 10 ORS V. THE FEDERAL REPUBLIC OF NIGERIA & 4 ORS ECW/CCJ/JUD/16/14 PAGE 22-23. PETER DAVID V. AMBASSADOR RALPH UWECHUE ECW/CCJ/APP/04/09 (2010) CCJELR].*

148. Furthermore, according to the international principle of State responsibility, reiterated by the Court in several decisions, Member States are responsible for the acts or omissions of their agents, institutions or bodies acting in their official capacity, even if such acts have been committed outside the scope of their competence or in violation of national legislation.

149. Thus, in cases where the agents of a State violate the rights of one or more individuals, such violations will be imputable to the State, whether they have been sanctioned by it, thus establishing its international responsibility for the acts and/or omissions of those [see *TIDJANE KONTE & ANOR V. REPUBLIC OF GANA ECW/CCJ/JUD/11/14 @ PAGE 16. AIRCRAFTWOMAN BEAUTY IGBOBIE UZEZI v. THE FEDERAL REPUBLIC OF NIGERIA. RULING NO. ECW/CCJ/RUL/01/21PAGE 18-20. COL.] MOHAMMED SAMBO DASUKI (RTD) V THE FEDERAL REPUBLIC OF NIGERIA ECW/CCJ/JUD/23/16 PAGE 28].*

150. The Court notes that both the Second Defendant, Mr. Patrice TALON, and the Third Defendant, the Association Interprofessionnelle de Coton, are not Member States or an ECOWAS Institution: the Second Defendant, although Head of State of the First Defendant, is brought before the Court in his personal capacity and not as Head of State. However, even if he had been sued as head of State, he is certainly not the one representing the Defendant state before an international court. The third Defendant is merely an institution of the first Defendant, the State of Benin, and all the acts carried out by it are imputed to that State.

151. Consequently, the Court considers that the Applicants' case is not admissible in relation to the second and third Defendants, and the second and third Defendants are therefore excluded from the proceedings on the grounds that they are not proper parties before the Court.

152. Accordingly, the Court will hear the instant case only against the first Defendant and will designate it as Defendant (State of Benin) henceforth, while disqualifying all references made in the proceedings regarding the second and third Defendants, who are not proper parties in the instant case, which renders the action inadmissible as regards the second and third Defendants.

153. Having said that, the Court finds that although the First Applicant is not a natural person, the human rights whose violation it claims are rights that are not exclusive to human beings.

154. Furthermore, the application is not anonymous and has not been filed while the same matter is pending before another international court for judgment. The Court therefore finds that the applicant's action is admissible only against the first Defendant, the State of Benin, and so declares.

XI. MERIT

155. The Court then goes on to analyze the human rights allegedly violated by the Defendant State.

On the alleged violation of the Applicant's right to property

408

The Case of the Applicant

156. The Applicant's claims regarding the alleged violation of this right have been summarized above and are set out in paragraphs 24 to 31, 34, 40 to 42, 48 and 49, the contents of which are as if hereby reproduced in seriatim.

The Case of The Defendant

157. The Defendant's allegations are set out in paragraphs 63 to 67 and 69 to 75, to which reference is made.

The Court's Analysis

158. The right to property is provided for in Article 14 of the Charter, which states the following *"The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."*

159. Before delving into the analysis of the property right claimed by the Applicant, *retius*, the right "to operate a cotton ginning factory", it is necessary to define the concept of property.

160. Property, in its simplest form, can be defined as an asset that people can claim by presenting a legal title, proof of ownership or any document that confers the right of ownership. The concept of property or possession is interpreted very broadly. It covers a range of economic interests including: movable or immovable property, tangible or intangible interests such as shares, patents, an arbitration award, the right to a pension, the right to exercise a profession, the right of a landlord to

receive rent, economic interests relating to the management of a company, etc. (See *CENTRO EUROPA 7 S.R.L. AND DI STEFANO V. ITALY (PETITION No. 38433/09) STRASBOURG JUDGMENT OF JUNE 7, 2012).*

161. In the instant case, it is important to note that the nature of the property that the Applicant claims to have is not physical property, i.e. land and buildings, but the right to build and operate a factory.

162. The question that needs to be asked is whether the Applicant has the right it claims and whether that right can be classified as a property right.

163. The Court notes that the right to operate a factory is not specifically provided for in the Charter. However, to the extent that such a right may be a property, it falls within the scope of Article 14 of the Charter.

164. This right to property, guaranteed by the Charter, gives the owner of an asset, whether movable or immovable, the right to enjoy it undisturbed. This provision states that the owner has the right to use his property, the right to enjoy its fruits and the right to dispose of it. Therefore, any denial to the owner of the enjoyment of any of these elements of the right constitutes a violation of his right to property (see *SUNDAY OLANIRAM AYODEJI v. FEDERAL REPUBLIC OF NIGERIA CASE NO. ECW/CCJ/APP/69/21 JUDGMENT NO. ECW/CCJ/JUD/33/23, § 123; DIAWARA OUMAR V REPUBLIC OF CÔTE D'IVOIRE JUDGMENT NO: ECW/CCJ/JUD/34/21 PAGE 30; AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS V KENYA (MERIT) (2017) 2 AFCLR 9 37, 124).*

165. However, property rights are not absolute, as they can be interfered with in accordance with the law and in the interests of public or community needs. This implies that States have the right to control the use of property through the application of appropriate laws. Therefore, any interference with the intact usufruct of the property can only be justified when carried out in the public interest and in compliance with the said laws. (see *SUNDAY OLANIRAM AYODEJI v. FEDERAL REPUBLIC OF NIGERIA SUIT No. ECW/CCJ/APP/69/21 ACRDICTION No. ECW/CCJ/JUD/33/23, §§ 124 to 127; SOCIÉTÉ DE PROMOTION AGRICOLE ET INDUSTRIELLE, SOPAI, SA v. REPUBLIC OF THE CÔTE D'IVOIRE SUIT NO ECW/CCJ/APP/44/22 JUDGMENT NO ECW/JUD/48/23 § 89; DEXTER OIL LIMITED V. REPUBLIC OF LIBERIA; JUDGMENT No.: ECW/CCJ/JUD/03/19 PAGES 24 AND 25; ALHAJI HAMMANI V. FEDERAL REPUBLIC OF NIGERIA & 4 ORS; JUDGMENT No.: ECW/CCJ/JUD/04/07 PAGE 12).*

166. In order to determine whether the right to property has been infringed, the Court must examine the following questions: i) whether the Applicant has the right to property that he claims; ii) whether there has been interference with the full enjoyment of the property; iii) whether the infringement was in accordance with the law; iv) whether it was done in the interests of the public (see *A SOCIÉTÉ DE PROMOTION AGRICOLE ET INDUSTRIELLE, SOPAI, SA, SOPAI, SA v. REPUBLIC OF CÔTE D'IVOIRE: PROCEDURE No. ECW/CCJ/APP/44/22 - JUDGMENT No. ECW/JUD/48/23 §§ 92 to 99; LA SOCIÉTÉ DAMOU-SO SARL V. REPUBLIC OF MALI: JUDICIAL PROCEDURE No: ECW/CCJ/APP/10/18 ACJUDGMENT No: 22/21 §40; and LA SOCIÉTÉ BEDIR SARL V. REPUBLIC OF NIGER, ACJUDGMENT No: ECW/CCJ/JUD/11/20 §54).*

i) Whether the Applicant has the property rights it claims

167. As stated above, the first condition for establishing a property right is proof of the property right by the Applicant.

168. In the instant case, the Applicant Africa Agro Industrie Benin SA was incorporated on August 25, 2016, with the aim of building and operating a cotton ginning factory (Exhibit 7 Africa Agro Industrie Company Statutes; Exhibit 8: K -bis of Africa Africa Agro Industrie). In addition, a plot of land in the town of Djougou was made available to the company, on which the cotton ginning factory was to be set up (Exhibit 9 - provision of land). On December 19, 2016, Africa Agro Industrie obtained a receipt issued by the Ministry of Industry, Trade and Crafts attesting to the conformity of the application for authorization/approval to the Industrial Free Zone Scheme (Exhibits no. 10, 11 and 12). On January 30, 2017, the Ministry of Industry, Trade and Crafts issued a decree stating that Africa Agro Industrie's ginning project complies with environmental standards (Exhibit no. 14) and on April 13, 2017, the Ministry of Industry, Trade and Crafts granted Africa Agro Industrie authorization for the industrial installation of a cotton ginning factory (Exhibit no. 15: final construction permit).

169. These facts are proven by the documents referred to in the text, as well as by the Defendant itself, which did not call them into question, but made express reference to them.

170. It is widely established that companies play a fundamental role in the modern economy, with a view to developing the production, distribution and consumption of goods and services.

171. In order to satisfy consumer expectations and needs, companies aim at developing, producing and marketing goods and services, as well as providing jobs and contributing to economic and social development.

172. A company is a social body that can only make a contribution to society if it is profitable. Its purpose is to generate profit by selling products. The purpose of a company is to produce or provide a quality service at the lowest practicable cost, and to make a fair and necessary profit on the sale.

173. Nobody starts a company just because it's pretty, or just to say they're an entrepreneur. Anyone who starts a company expects and needs to make a profit on his/her investment, in order to make the company financially viable.

174. In the instant case, it is well established that the Applicant obtained (after its incorporation) all the authorizations for its normal operation, including authorization to build a cotton ginning factory.

175. The Applicant started building a factory to gin cotton and purchased machinery for this purpose (see Exhibits 44 and 45 for photos of the factory and invoices for the purchase of cotton ginning machinery).

176. Thus, knowing that the purpose of a company is to provide goods or services to meet the needs and desires of consumers, in order to generate profit for its owners or shareholders, and knowing further that many companies have the purpose of playing a positive role in society and the environment, contributing to economic and social development, providing employment opportunities for their workers, we must conclude that the authorizations obtained by the Applicant conferred on it the right to operate

a cotton ginning factory and to benefit from the advantages that such an operation could give it.

177. This right, being an asset, falls within the broad concept of property (see *TEDU - TRE TRAKTORER AB, 7 JULY 1989, A 159, PAGE 21, § 53 and MEGADAT. COM SRL, OF APRIL 8, 2008, § 63, and REPORT OF NOVEMBER 10, 1987, A 159, PAGE 28*).

178. In fact, in Administrative Law, authorization is an act by which an administrative body allows someone to exercise a pre-existing right or competence. In order to carry out this specific activity, the Applicant company, which was set up to build and operate a cotton ginning factory, could only do so through authorization granted on a case-by-case basis by the administrative authority, so that it had to apply to the Ministry of Industry, Trade and Crafts for authorization to exercise its right.

179. Having obtained all the authorizations to exercise the right to operate a cotton ginning factory, and knowing that property does not only concern tangible assets and that it is a concept independent of the formal qualifications given by domestic law, the authorizations granted to the Applicant constitute an asset that must be considered a property right and therefore a property under the terms of Article 14 of the Charter.

180. It has therefore been established that the Applicant is effectively the owner, in the light of Article 14 of the Charter.

ii) Whether there has been interference with the peaceful enjoyment of the Applicant's property

Applicant's submissions

181. On May 4, 2017, the Association Interprofessionnelle de Coton (AIC) filed an appeal against the authorization obtained by the company AFRICA AGRO INDUSTRIE BENIN SA to install a cotton ginning factory, claiming that it should have given its consent beforehand, and maintaining that the quantities of cotton produced did not allow work to be done on a new cotton ginning factory [Exhibit No. 18: Appeal lodged by AIC].

182. Following this, the Ministry of Industry, Trade and Crafts annulled the installation permit obtained by the company AFRICA AGRO INDUSTRIE BENIN SA by decision dated May 11, 2017 [Exhibit No. 19: Annulment of the authorization - decision of 11 May 2017].

183. Then, on May 16, 2017, the same Ministry annulled the receipt of compliance with the rules of the industrial free zone, obtained by the company AFRICA AGRO INDUSTRIE BENIN.

184. Thus, within 15 days, all the authorizations granted to the company AFRICA AGRO INDUSTRIE BENIN SA by the State of Benin were withdrawn without reason, and the amounts invested based on these authorizations were wasted.

Defendant's submissions

185. The Defendant does not contest the annulment of the authorizations by the Minister of Industry, Trade and Crafts.

The Court's Analysis

186. Even if the right to property has been established, the Applicant must also prove that the Defendant interfered with the usufruct of its property (see

LA SOCIÉTÉ DAMOU-SO SARL V. REPUBLIC OF MALI and LA SOCIÉTÉ BEDIR SARL V. REPUBLIC OF NIGER (SUPRA).

187. The Court reaffirms that the right to property generally implies that the owner has the right to freely enjoy his property and does not accept any arbitrary interference, in particular by the Government and its agents (see *COL. MOHAMMED SAMBO DASUKI (RTD) v. THE FEDERAL REPUBLIC OF NIGERIA ECW/CCJ/JUD/23/16 PAGE 27. See also BENSON OLUA OKOMBA v. REPUBLIC OF BENIN ECW/CCJ/JUD/05/17, PAGE 20).*

188. It should be recalled that the right to property guaranteed by the Charter gives the holder the right to the undisturbed enjoyment of his/her property. The right to property guarantees the owner the right to use the property (*usus*), the right to enjoy the fruits of the property (*fructus*) and the right to dispose of it or transfer it to another (*abusus*). Depriving an individual of any of these elements is considered a violation of his/her property rights. (See *AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS V KENYA (MERIT) (2017) 2 AFCLR 9 37, 124).*

189. In the case *sub judice*, the facts described above, alleged by the Applicant and not denied by the Defendant, establish, without a shadow of a doubt, that the orders annulling the authorizations previously granted had a direct impact on the Applicant's business activity, with all the negative consequences that could arise from this, since, with the annulment of the aforementioned authorizations, the Applicant was simply prevented from carrying out the business activity that was the basis for its creation.

iii) On whether the interference was carried out according to law

Applicant's submissions

190. These are set out in paragraphs 181 to 184, the contents of which are as if hereby reproduced in seriatim.

Defendant's Submissions

191. The Defendant, in its pleadings, claims that the authorizations granted to the Applicant were not subject to prior consultation with the Association Interprofessionnelle de Coton (AIC), as the only entity responsible for organizing the cotton sector, and that Article 19 of the Convention known as the Framework Agreement between the State and the AIC of 7 January 2009 establishes that "... *the authorization of the increase of the national capacity of cotton seeds ginning by the installation of new ginning factories or by the extension of the capacity of the existing factories is the joint responsibility of the State and the Association Interprofessionnelle de Coton, according to the evolution of the level of the national production of cotton seeds.*" (Exhibit 1: Convention known as the Framework Agreement between the State and the Association Interprofessionnelle de Coton of January 7, 2009).

192. The Defendant also claims that the cotton ginning capacity already installed is higher than the level of national cotton seed production during the period.

The Court's Analysis

193. The Court recalls that, even when a Applicant's claim to property is well-founded, it is a settled fact that the right to property provided for in Article 14 of the African Charter is not absolute, since it may be infringed

by the Defendant in the interest of public needs or in the general interest of the community and in accordance with the provisions of the appropriate laws (see *SUNDAY OLANIRAM AYODEJI v. FEDERAL REPUBLIC OF NIGERIA Case No. ECW/CCJ/APP/69/21 Judgment No. ECW/CCJ/JUD/33/23, §§ 124 to 127; DEXTER OIL LIMITED v. REPUBLIC OF LIBERIA Judgment No. ECW/CCJ/JUD/03/19 PAG. 24).*

194. For interference to be legal, it must be carried out in accordance with the law.

195. The expression "in accordance with the law" is synonymous with legality. In other words, the act in question must be carried out within the framework of a law - national or international - which if done otherwise would make it illegal.

196. The purpose of the expression "in accordance with the law" is to ensure that the scope for arbitrary interference in rights by the executive authority is limited by the national legislative or judicial authority. It is a fundamental principle of the rule of law and safeguards against the arbitrary exercise of power. It is a fundamental aspect of international human rights law [see the case between *SOCIÉTÉ DAMOU-SO SARL AGAINST THE STATE OF MALI, JUDGMENT No. ECW/CCJ/22/21* of June 25, 2021 (paragraphs 57-59).

197. The principle of legality is inherent in the Charter as a whole and must be respected, regardless of the other conditions laid down in Article 14. This is all the more necessary given that no action can survive illegality, as the Latin expression goes: "*ex turpi causa non oritur actio*" [see the case between *SOCIÉTÉ BEDIR SARL AGAINST THE REPUBLIC OF NIGER. JUDGMENT No. ECW/CCJ/JUD/11/20 OF JULY 1, 2020. P. 33, 69].

198. In the case of *SINY DIENG AGAINST THE REPUBLIC OF SENEGAL, § 287 ECW/CCJ/JUD/23/20,* of October 26, 2020, the Court endorsed the observation of the European Court of Human Rights by adopting that: "*Thus, the principle of legality requires that interference with the right to property be provided for by a law, which must be published and accessible, and which must have certain qualitative characteristics in order to be compatible with the rule of law" (Cf. ECHR, JAMES AND OTHERS v. THE UNITED KINGDOM, CASE No. 8793/79, JUDGMENT OF 21 FEBRUARY 1986, No. 67).*

199. For the ECOWAS Court of Justice, the expression "in accordance with the law" refers to the principle of legality, which requires an existing, published, accessible law with certain characteristics compatible with the rule of law.

200. In Beninese domestic law, the law includes the Constitution, the texts and principles that make up the constitutionality bloc, the law issued by Parliament and the regulatory acts issued by the various administrative authorities (President of the Republic, Ministers, Mayors, etc.).

201. Under Article 54 of the Constitution of Benin, the President of the Republic exercises regulatory powers. As such, it can issue ordinances and regulatory decrees (Article 55 of the Constitution). Decrees must comply with certain essential formalities: they must be issued after deliberation by the Council of Ministers, be signed by the ministers responsible for their implementation and be published in the Official Journal.

202. The framework agreement revised on November 13, 2019, incorporated into Benin's internal legal order by decree No. 2020-021 of January 8, 2020, is, like the framework agreements that preceded it, a regulation applicable to the cotton sector in Benin. Article 2 of decree 2020-021 of January 8, 2020,

states that "***the revised framework agreement shall serve as the general regulation for the cotton sector in the Republic of Benin***".

203. In the Defendant State, the Framework Agreement has always been brought into force by decrees, in compliance with the substantive formalities laid down by the Constitution of Benin. As such, it has been and continues to be part of the legal system of the Beninese State. Together with the decree bringing it into force, it constitutes a source of legality. In this respect, the objective of the framework agreement is quite explicit.

204. In short, the Framework Agreement between the State and the Association Interprofessionnelle de Coton (AIC), insofar as it is put into effect by decree, constitutionally a source of legality, constitutes a law within the meaning of Article 14 of the African Charter on Human and Peoples' Rights.

205. In addition, the decree that brought it into force and its purpose are quite explicit as to its function, which is to be a general regulation for the cotton sector in the Republic of Benin. The Agreement has all the qualities required of a law: existence, competent authority, publication, accessibility, and accuracy.

206. That said, in the case at hand, the Court observes that since there is a convention known as the Framework Agreement between the State and the Association Interprofessionnelle de Coton, which is the same thing as saying a law, an agreement that regulates the legal framework that must be complied with before issuing any authorization for exploitation in the cotton sector, the lack of prior hearing of the AIC constitutes a defect in the chain of procedural acts that legally must be observed in order to obtain the license.

207. Failure to comply with this formality, when it is not legally dispensed with, constitutes a failure to comply with an essential formality of an administrative act, leading, as a rule, to its invalidity (annulment), In the instant case, the annulment of the authorizations granted to the Applicant.

208. From this perspective, the Defendant's actions are supported by the law, which In the instant case is the Framework Agreement referred to above, legislation that must be observed in the process of granting authorizations.

209. However, it is necessary to know whether, in view of the interests at stake, the Defendant's action in annulling the authorizations previously granted, although formally based on the law, withstands a more in-depth analysis in the light of the public interest and the principle of proportionality.

iv) Whether the Defendant's action was taken based on the public interest and whether it is proportionate

Applicant's submissions

210. The Applicant submits that on August 4, 2017, an administrative appeal was lodged against the two annulment decisions before the administrative section of the Cotonou Court of First Instance, requesting the said Court to find that the authorization for the installation of the ginning factory **created irrevocable rights for its benefit**; to find that the State of Benin, by arbitrarily annulling the aforementioned authorization decision, **had made abusive use of power, with flagrant violation of the principle of acquired rights**, and should therefore annul the decisions that prevented it from building and operating the cotton ginning factory, which it had been

authorized to build and operate (bold ours) [see Exhibit No. 24: Administrative appeal filed on August 4, 2017].

Defendant's Submissions

211. The Defendant did not specifically contest the Applicant's allegations regarding irrevocable rights and rights acquired based on the authorizations granted to it. The Defendant merely claims that there was a violation of the Framework Agreement since the authorizations were granted without the prior opinion of the AIC.

The Court's Analysis

212. However, at no point in the instant case did the Defendant invoke the public interest to justify the annulment of the authorizations granted to the applicant.

213. Instead, it argued that the authorizations were annulled because the AIC had not been heard beforehand and claimed that the cotton ginning capacity already installed is higher than the level of national cottonseed production during the period.

214. However, with regard to the allegation that the cotton ginning capacity already installed is higher than the level of national production, it was up to the Defendant, in addition to alleging, to prove this fact.

215. The Court recalls that its case law firmly establishes the principle that he/she who asserts a fact bears the burden of providing such proof (see *LA SOCIETE BEDIR SARL V REPÚBLICA DO NÍGER ECW/CCJ/JUD/11/20, PAGE 18, PARAGRAPH 55; MR CHIEKH GUEYE V SENEGAL ECW/CCJ/JUD/21/20).*

216. In the instant case, the Defendant has not offered any evidence to support this claim, so this fact has not been proven.

217. Having said that, it is necessary to know whether the Defendant's behavior is proportional given the facts of the case under analysis.

218. On the one hand, we have the Applicant which, trusting in the public powers of the Defendant (and having obtained various authorizations that allowed it to operate the cotton ginning activity), made several investments that were simply lost, and the Applicant also suffered a loss of operation corresponding to the turnover that it could legitimately expect to obtain.

219. On the other hand, we have the Defendant which, for lack of prior authorization from the AIC, decides to overrule all the licenses previously granted, without invoking the public interest in such annulment and without respecting in the slightest the expectations, possibly legitimate, of the Applicant.

220. The Applicant argues that the annulment of the permits was arbitrary, did not respect its acquired rights and that the investment it made was based on the trust it placed in the Defendant's authorities.

221. It is clear from these allegations that the Applicant is referring to the Defendant's violation of the **principle of legal certainty**, a principle which in its subjective dimension is commonly referred to by the doctrine as the principle of the protection of trust.

222. Thus, based on this claim, the Court must assess whether the requirements of legitimate expectations are met, to the point of deserving protection.

223. The Court has already stated that the main documents on the recognition and protection of Fundamental Human Rights does not make express reference to a right with regards to the legal security - only to the security of the individual.

224. However, this principle, which is expressly enshrined in the criminal sphere [when the retroactivity of criminal laws prejudicial to the defendant is prevented, and the principle of the legality of punishment is defended when it is enshrined that no penalty can be inflicted if it was not provided for at the time the offense was committed (cf. Articles 2 and 3 of the African Charter)], must be understood as implicitly recognized in the Charter and if it is invoked by the parties, the Court has a duty to examine it on a case-by-case basis.

225. The principle of protecting trust depends on three requirements, namely: 1) the action or omission of one party, capable of generating expectations in another, which represents a situation in accordance with a declaration, document or behavior; 2) the good faith of the party which trusted; 3) a contradictory change in the situation represented, generating the imputation of responsibility for trust to the party which acted contrary to the expectations they induced.

226. In the case *sub judice*, the Defendant, on the one hand, approved several authorizations to the Applicant, which based on these acquired the right to operate the cotton ginning factory, having invested in order to start its activity; on the other hand, the Applicant's good faith is manifested. In fact, the Defendant didn't even question this; finally, after granting the Applicant the aforementioned authorizations, the Defendant went back on its decision and annulled them, on the grounds that the AIC had not been heard beforehand in the process of granting them.

227. Therefore, in the instant case, the requirements for the protection of the Applicant's trust have been met and the existence of this principle necessarily has logical consequences.

228. In fact, legitimate expectations mean that the public authority must not deliberately frustrate the fair expectations it has created in a beneficiary. The obligation of public authorities not to violate legitimate expectations and to act in good faith is inherent to the democratic rule of law.

229. Legitimate expectations also function as a guarantee for the public administration, which plans its actions according to the State's declarations and behavior, in the face of the public administration's power to create rules or to annul invalid acts and revoke acts that have become inconvenient or inopportune.

230. Thus, based on the principle of trust, the State is limited in its freedom to alter its conduct and modify acts that have produced advantages for the beneficiaries, even if they are illegal, attributing patrimonial consequences for these alterations, always by virtue of the trust generated. The State must therefore, as a whole, respect legal certainty, which implies the duty to protect the trust generated by its actions in private individuals.

231. The Court points out that the principle of legality and the protection of trust cannot coexist, but that a weighing-up process is necessary to decide which of the two will prevail in a specific case.

232. Furthermore, the Court recalls that the principle of the protection of legitimate expectations is a limit on the power of administrative self-protection, and the thesis that the Public Administration, even without a specific legal rule, is limited in its power to overrule illegal acts, given the principles of legal certainty and legitimate expectations, is perfectly defensible.

233. Returning to the case at hand, the Court begins by recalling that since there had been a violation of AIC's prior hearing, a fact that could possibly lead to the overruling/annulment of the permits, the Defendant could resume the procedure, issuing new permits, after remedying the defect (i.e. granting AIC the opportunity to exercise its right to a prior hearing), while at the same time it could ultimately re-examine the Applicant's claim in the light of the factual circumstances existing at the time it was going to issue the said permits.

234. The annulment, without further ado, of the authorizations previously granted disproportionately sacrificed the legitimate expectations of the Applicant. The content of the Applicant's property right (the right to operate the cotton ginning business) was totally emptied and irreparably jeopardized, and the Defendant did not invoke any public interest to justify its action.

235. The Defendant did not take into account the legitimate expectations of the Applicant, because if it did, it could easily have found a less aggravating solution, such as maintaining the authorizations previously granted, while adding certain conditions, with the Defendant's public entities being responsible for monitoring compliance.

236. By maintaining the authorizations, under certain conditions, the Defendant would have respected the Applicant's right to exploit the commercial activity while at the same time being able to impose certain

limits on it, more or less strict, monitoring its actions, all of this with a view to balance public and private interests.

237. Indeed, the legitimate expectations of the Applicant in the instant case cannot be ignored, since, based on the trust (obtained with the authorizations granted to it by the Defendant), it was not only legitimate to believe that the Defendant would not deprive it of right to operate the cotton ginning activity, but also that all the investment it had made, as a result of the authorizations obtained, would be protected.

238. The right to exploit the cotton ginning activity (which was revoked by the Defendant for alleged illegality and therefore not exercised by the Applicant because of that revocation) constitutes a legitimate expectation, linked to the right to property, provided for in Article 14 of the African Charter (see the case *STRETCH C. UNITED KINGDOM, OF 24.06.2003, CONSIDERING 35 OF THE EUROPEAN COURT JUDGMENT*).

239. Thus, the Applicant's legitimate hope of being able to exercise the right to exploit the cotton ginning activity (an asset that was totally ignored by the Defendant) constitutes an asset, and the Defendant's behavior, in addition to being disproportionate, was not aimed at protecting any public interest, so such conduct violates Article 14 of the Charter.

*

240. The Applicant also claims a violation by the Defendant State of its: a) right of access to a court; b) right to be tried within a reasonable time and c) right of access to an impartial court or tribunal.

241. The Court now proceeds to analyze each of the rights, allegedly violated.

a) The alleged violation of the right of access to a court.

Applicant's submissions

242. The Applicant's claims relevant to the analysis of this right can be found in paragraphs 51 to 59, the contents of which are as if hereby reproduced in seriatim.

Defendant's Submissions

243. On its part, the Defendant's submissions, relevant to the consideration of this right, are set out in paragraphs 77 to 88, the contents of which are as if hereby reproduced in seriatim.

The Court's Analysis

244. Article 7 of the African Charter reads as follows:

"1. Every individual shall have the right to have his cause heard. This comprises:

a) *the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;*

b) *the right to be presumed innocent until proved guilty by a competent court or tribunal;*

c) *the right to defense, including the right to be defended by counsel of his choice;*

d) *the right to be tried within a reason- able time by an impartial court or tribunal.*

2. No one may be condemned for an act or omission which did not constitute a legally punishable offense at the time it was committed.

408

No penalty may be inflicted for an offense for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender."

245. With regard to the right under consideration, the Court recalls that this right is violated when there are economic barriers that in practice hinder the effectiveness of this right; when excessively high fees are charged by the State justice system as a condition for those who wish to take legal action to guarantee the protection of their rights, and also in cases where, although there is an initial waiver of fees, there is a fear that the citizen will be forced, in the event of a judicial defeat, to pay exorbitant amounts to the State for the use of the judicial machinery, especially when there is a risk of losing one's property to pay such expenses.

245. The right of access to the court does not only mean the right to bring a case before the court, but also the guarantee of substantially equal treatment between all procedural subjects when giving effect to this right.

246. Therefore, the legislation of the Member States must contain practical mechanisms that reduce procedural inequalities by placing the parties on an equal footing with regard to the procedural rights arising from the guarantee of access to justice (see in this regard the Judgment of the Inter-American Court of Human Rights in the case *RUANO TORRES AND OTHERS vs. EL SALVADOR).*

247. The guarantee of the right of access to justice must be analyzed in harmony with due process of law, insofar as the State must guarantee that access to justice is not just formal.

248. In order to ensure this right of access of a substantial nature, it is necessary for the judicial proceedings to be carried out with all the guarantees inherent in due process of law.

249. In fact, the two rights complement each other since due process of law is an instrument that contains within it a wide range of procedural guarantees (such as observance of the adversarial process, the right to appeal against a judgment, rules of jurisdiction established *ex ante* to guarantee the impartiality of judges, etc.), guarantees that ensure to the Applicant the full realization of substantial justice, the ultimate objective of the access to justice clause.

250. With regard to its content, the Court recalls that the guarantees of due process constitute a set of substantive and procedural requirements that must be observed in procedural instances so that people are in a position to adequately defend their rights in the face of any type of act by the State that may affect them, with emphasis on the right to an effective remedy against the violation of rights of any kind.

251. States parties have a real duty to provide efficient, speedy judicial protection, with all the guarantees inherent in due process of law. In fact, there is no point in an applicant having a legal right of access to justice if the legal system does not guarantee them an effective remedy for the protection of violated rights.

252. Thus, there is a violation of the right to an effective remedy (and, consequently, due process of law) when, for example, judicial decisions are not adequately reasoned, when there is no consideration of the arguments of

the parties in the decision contrary to their claim, when there is no freedom to produce the evidence necessary to demonstrate the facts on which the right is based, and also when there is no effective implementation and enforcement of such decisions, since the impossibility or ineffectiveness of enforcing the decision may constitute a denial of justice and make the State party liable for violation of procedural guarantees (especially those of arts. 7 and 26 of the Charter)

253. Having said that, let's return to the case at hand.

254. It is duly proven that after the annulment of the authorizations granted to the Applicant, it lodged three actions before the courts of the Defendant State (see paragraphs 77 to 88).

255. The facts listed by the Applicant do not include any allegations that it faced economic barriers created by the Defendant in the course of the aforementioned lawsuits; that there was discriminatory treatment in the processing of the aforementioned lawsuits; that the Defendant refused it the right to lodge an appeal against orders that were unfavorable to it, situations that would clearly constitute a violation of the right of access to the Court and due process of law.

256. In those circumstances, the Court finds that the Defendant did not violate the Applicant's right of access to the Court.

b) The alleged violation of the Applicant's right to have its case heard within a reasonable time

257. In order to substantiate the violation of the above right, the Applicant alleges that the refusal of the Administrative Chamber of the Cotonou First Class Court of First Instance to hear the actions brought by it almost three years ago constitutes a violation of its right of access to a court; that the said actions were not included in the list of hearings scheduled for trial.

258. The Defendant State claimed that following the annulment of the authorizations previously granted to the Applicant, it filed an appeal, to which the administrative authority responded with an explicit decision of rejection and that it was following this rejection that the Applicant filed three lawsuits that are still being processed in the Court of the Defendant State.

The Court's Analysis

259. The right to be tried within a reasonable time by an impartial court or tribunal is provided for in Article 7 (1) (d) of the African Charter as well as in Articles 26 of the African Charter; 9 (3) and 14 (3) (c) of the ICCPR; 8 (1) of the American Convention and 6 (1) of the European Convention, which establish that everyone has the right to be heard "*within a reasonable time*".

260. The right to an impartial hearing within a reasonable time is one of the cardinal elements of a fair trial and is intended not only to avoid keeping people too long in a state of uncertainty about their fate but also to serve the interests of justice.

261. The right under consideration points to an adequate procedural protocol and to the reasonableness of the time limit for the decision, in the sense that the jurisdictional protection occurs in useful time or in a consonant time limit, being that the examination of a cause in a reasonable time constitutes an essential element for the good and proper administration of justice, a guarantee inherent in the right of access to the courts and to effective judicial

protection, while the infringement of this right, which can be extended to any type of process, amounts to the State's liability under the African Charter.

262. In General Comment No. 32, para. 35, the Human Rights Committee stated that to be tried without undue delay is a guarantee that relates not only to the time by which the trial must commence, but also to the time by which it must end, and the sentence is delivered: all stages must be carried out '*without undue delay*'.

263. To make this right effective, a procedure must be available so that proceedings can proceed 'without undue delay', both in the Court of First Instance and on appeal (see ibid).

264. Thus, the aforementioned Committee wrote in the case *EARL PRATT AND IVAN MORGAN v. JAMAICA*, Communication No. 210/1986 & 225/1987, 6 April 1989, para. 13.3 that: "*As to the second issue under article 14, the Committee has noted that the delays in the judicial proceedings in the authors' cases constitute a violation of their rights to be heard within a reasonable time. The Committee first notes that article 14, paragraph 3 (c), and article 14, paragraph 5, are to be read together so that the right to review of conviction and sentence must be made available without undue delay. In this context the Committee recalls its general comment on article 14, which stipulates, inter alia, that "all stages [of judicial proceedings] should take place without undue that delay, in order to make this right effective, a procedure must be available to ensure that the trial will proceed without undue delay, both in first instance and on appeal*" (see also Human Rights Committee, Communications No. 1089/2002, *ROUSE v. PHILIPPINES*, §7.4; No. 1085/2002, *TARIGHT, TOUADI, REMLI AND YOUSFI v. ALGERIA*, §8.5).

265. On the question of the reasonableness of the duration of proceedings, whether civil or criminal, the particularities of the case must be borne in

mind, taking into account primarily the complexity of the case, the defendant's conduct and the way the matter was handled by the administrative bodies and judicial authorities. [see *AMOUZOU HENRI ET 5 AUTRES v. REPUBLIC DE CÔTE D' IVOIRE,* Judgment No. ECW/CCJ/JUD/04/09, LRCCJ (2009) § 93, *MR. IBRAHIM SORY TOURÉ AND MRISSIAGA BANGOURA v. THE REPUBLIC OF GUINEA*, §108; see also European Court of Human Rights, cases KEMMACHE v. FRANCE, judgment of 27 November 1991, Series A, No. 218, p. 20, § 50 (criminal); *MARTINS MOREIRA v. PORTUGAL*, judgment of 26 October 1988, Series A, No. 143, p. 17, § 45 (civil)] as well as the matter at issue in the proceedings and the importance thereof to the applicant (see inter alia *FRYDLENDER V. FRANCE [GC]* no. 30979/96§43, ECHR 2000-VII).

266. The African Commission in the "PRINCIPLES AND GUIDELINES ON THE RIGHT TO A FAIR TRIAL AND LEGAL ASSISTANCE IN AFRICA", p.15 §5 and the African Court, in the case *ALEX THOMAS v. UNITED REPUBLIC OF TANZANIA*, Application No. 005/2013 § 103 and 104, and Inter-American Court in the case *SAUREZ-ROSERO v. ECUADOR*, §72) follow in the same vein.

267. In relation to case complexity it must be borne in mind that all aspects of the case are relevant to assess whether it is complex.

268. Complexity may relate to both issues of fact as well as of law. For example, consideration must be given to the nature of the facts to be established, the number of accused and witnesses, international elements, consolidation of cases, and the intervention of other persons in the proceedings (vide NUALA MOLE AND CATHARINA HARBY, "THE RIGHT TO A FAIR TRIAL, A GUIDE TO THE IMPLEMENTATION OF ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS", pág. 26).

269. It should be noted, in relation to the applicant's conduct, that if he causes a delay in the normal processing of the case, this obviously weakens his claim. However, the applicant cannot be penalized for having made use of the various procedures available to pursue his defense. An applicant is not obliged to actively cooperate to expedite proceedings that could lead to his/her own conviction. However, if the Applicant tried to speed up the process, this will be considered in his favor (see European Court, case *YAGCI AND SARGIN v. TURKEY* § 66).

270. With regard to the conduct of the competent authorities, only delays attributable to the State are relevant, since only these can be taken into account in determining compliance with the reasonable time of guarantee. The State is, however, responsible for the delays caused by all its administrative or judicial authorities (see N*uala Mole and Catharina Harby*: "*The right to a fair trial, A guide to the implementation of Article 6 of the European Convention on Human Rights*", p. 27).

271. The Human Rights Committee in the case *CLIFFORD MCLAWRENCE v. JAMAICA*, Communication No. 702/1996 (para.5.11), where there was a 31-month delay between conviction and appeal, noted that: "*The author has claimed violations of article 14, paragraphs 3 (c) and 5, on account of "undue delays" of the criminal proceedings in his case. The Committee notes that the State party itself admits that a delay of 31 months between trial and dismissal of the appeal is "longer than is desirable" but does not otherwise justify this delay. In the circumstances, the Committee concludes that a delay of 31 months between conviction and appeal constitutes a violation of the author's right, under article 14, paragraph 3 (c), to have his proceedings conducted without undue delay. The Committee notes that in the absence of any State party justification, this finding would be made in similar circumstances in other cases.*" (bold is ours).

272. The ECtHR has also held that the existence of long periods during which proceedings are not conducted, without any justification, is not acceptable in terms of the reasonableness of the time-frame of proceedings (in this sense, see paragraph 33 of the judgment delivered on 24/11/1994, Suit No. 15287/89, *BEAUMARTIN v. FRANCE*, in HTTP://HUDOC.ECHR.COE.INT/ENG), having also considered that an excessive pendency of proceedings is not sufficient justification to exempt the State from its responsibility to ensure the delivery of judicial decisions in a reasonable time.

273. It should also be noted that according to the jurisprudence of the same court, even if temporary insufficiencies of means may exempt States from responsibility for delays in the delivery of judicial decisions, situations of insufficiency that extend over time and are structural in nature may not be considered to preclude such responsibility (see paragraph 40 of the judgment delivered on 10/08/1984, Suit No. 8990/80, *GUINCHO v. Portugal*, available at http://hudoc.echr.coe.int/eng).

*

274. Turning to the case at hand, following the annulment of the authorizations granted to the Applicant to begin construction of the cotton ginning factory (see Exhibits no. 13 and 19 gathered to the originating application, the contents of which are as if hereby reproduced in seriatim.), it can be seen that:

i) The Applicant filed an Internal Administrative Appeal on May 29, 2017, stating that it had not violated any of the provisions relating to the granting of authorization and approval for the creation, opening and operation of a cotton ginning factory, having made substantial investments following an invitation from the Government of Benin for the construction of said factory

(see Exhibit No. 22 gathered to the originating application, the contents of which are as if hereby reproduced in seriatim;

ii) The Minister of Industry, Trade and Crafts, by letter dated July 21, 2017, rejected the said appeal (see Exhibit No. 23 gathered to the originating application, the contents of which are as if hereby reproduced in seriatim).

iii) Subsequently, on August 4, 2017, the Applicant filed an administrative appeal against these two annulment decisions before the administrative section of the Cotonou Court of First Instance, asking the Court to find that the authorization for the installation of the ginning factory created irrevocable rights for its benefit; find that the Defendant, by arbitrarily annulling the said authorization decision, has abused its power; that there has been a flagrant violation of the principle of acquired rights, and that it should therefore annul the decisions preventing it from building and operating the cotton ginning factory, which it was authorized to build and operate (see Exhibit No. 24 gathered to the originating application, the contents of which are as if hereby reproduced in seriatim- Administrative appeal filed on August 4, 2017));

iv) On March 26, 2018, the Applicant also filed a second appeal for compensation for the damages it suffered, in the amount of 34,450,000,000 CFA francs (thirty-four billion, four hundred and fifty million CFA francs) (see Exhibit No. 25 gathered to the originating application, the contents of which are as if hereby reproduced in seriatim- Administrative appeal filed on March 26, 2018);

vi) The Applicant repeatedly asked the Cotonou Administrative Court to order the State of Benin to submit a statement of opposition (see Exhibit No. 26 gathered to the originating application, the contents of which are as if hereby reproduced in seriatim);

vii) The Defendant State filed its defense in the administrative proceedings for annulment on December 17, 2018, i.e. one and a half years after the originating application was filed, and served a new pleading on February 10, 2020, i.e. more than two and a half years after the appeal was filed (see Exhibit No. 27 gathered to the originating application, the contents of which are as if hereby reproduced in seriatim - Defendant's defense);

viii) At the time this action was filed (September 22, 2020), the Applicant had been waiting for more than 3 years for the Court's decision on the appeals filed on August 4, 2017, and March 26, 2018.

275. Furthermore, to date, more than six years later, there is no news in the case file that the court has ruled on such appeals.

276. However, the appraisal and integration of the concept of justice within a 'reasonable time' or of obtaining a decision within a 'reasonable time' is an evaluation process that must be assessed *in concreto* and from a global perspective, with the starting point in the instant case (administrative appeals) being the date on which the application to initiate the proceedings is lodged with the competent court and the end point being the date on which the final decision is delivered.

277. All this, and according to the jurisprudence cited above, taking into consideration the criteria of the complexity of the case, the behavior of the parties, the performance of the competent authorities in the case, the subject matter of the case, and the significance that it may have for the Applicant, criteria that are evaluated and assessed in concrete terms given the circumstances of the case.

278. In the instant case, the Defendant has not provided any justifiable reason, the burden of which was on it, to justify the additional period of 6 years that the Applicant has been awaiting the decisions of the

aforementioned Court in relation to the two appeals above (see *KAM SIBIRI ERIC v. STATE OF BURKINA CASE: CASE NO. ECW/CCJ/APP/53/20 - JUDGMENT NO. ECW/CCJ/JUD/10/2023 § 97)*

279. The Defendant has a legal duty to care and to adopt all actions or conducts and or measures so as to provide an effective and expeditious response to the public service of justice, examining and deciding the claims of individuals and resolving the cases brought before it, wherefore failing to do so makes is liable for the damages caused as a result of its wrongful acts.

280. Accordingly, this Court finds that the conduct of the Defendant's agents constitutes a violation of the right provided for in Articles 7 (d) of the African Charter, 9 (3) and 14 (3) (c) and (5) of the ICCPR. Therefore, the Applicant's claim is well founded in this respect.

c) The Defendant State's alleged violation of the right to an impartial court or tribunal

Applicant's submissions

281. The Applicant alleged that it suffered a total obstruction of all its cases before the Defendant's Administrative Court; such an obstruction constitutes a denial of justice since its case has been awaiting judgment for more than three years; the Applicant further claims that it suffers a flagrant violation of its right of access to an impartial court or tribunal since it cannot get the Defendant's judiciary to protect its rights; the Defendant's judiciary is totally enslaved by the executive power; the Judiciary of the Defendant is threatened, pressured, sanctioned and imprisoned when it takes decisions that displease the executive power of the Defendant; the magistrates of the Defendant State cannot exercise their office with serenity and impartiality

because they are threatened, punished or even imprisoned when they take decisions that displease the authorities in power; the criminal courts of the Defendant are used to persecute political opponents, journalists and economic competitors and the same happens with the civil and administrative courts.

Defendant's Submissions

282. The Defendant did not expressly contest the aforementioned facts.

The Court's Analysis

283. In addition to being enshrined in Article 7(d) of the African Charter, the applicant's right allegedly violated is also provided for in the Universal Declaration of Human Rights (Article 10); the American Declaration of Human Rights (Article 26(2)); the American Convention on Human Rights (Article 8(1)); the International Covenant on Civil and Political Rights (Article 14(I)); and the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 6(I)).

284. The impartiality of the judge is a necessary condition for a fair decision insofar as it is a question of the absence of judicial interest in the fate of any of the parties as to the outcome of the case.

285. There are two tests to assess whether a court is impartial; the first consists in seeking to determine a particular judge's personal conviction or interest in a given case (subjective test); and the second in ascertaining whether the judge has offered sufficient guarantees to remove any legitimate doubt in this regard (objective test) [see *JUSTICE JOSEPH WOWO v. THE REPUBLIC OF GAMBIA JUDGMENT NO ECW/CCJ/JUD/09/19@ Pg. 25)].*

286. The subjective aspect of impartiality is about ascertaining the personal conviction of a particular judge in a specific case. Subjective impartiality (psychological impartiality, mental impartiality, not taking an interest in the case or taking sides with anyone) is characterized by the absence of any identification between the judge and the applicant or defendant. Subjective impartiality has a direct relationship with the analysis of the psyche of the procedural subjects who have a duty to maintain this peculiar state of mind, under penalty of vitiating the procedural relationship. Such impartiality has to do with the mind of the judge **and this kind of judicial impartiality is always presumed until proven otherwise.**

287. On the other hand, objective impartiality is characterized by the fact that the judge does not act as a party, remaining equidistant. It's about a specific judge who can offer sufficient guarantees to exclude any reasonable doubt as to his impartiality. The premise here is that the judge in the case should be seen as a third party, unrelated to the interests of the parties.

288. In the instant case, the Court finds that the facts on which the Applicant relies to demonstrate the lack of impartiality of the judges of the Defendant State have not been proven. The burden was on the Applicant. The Applicant makes serious and worrying statements about the Defendant's judicial system, but that is not enough. It has an obligation to prove such allegations, which it has clearly failed to do (see *LA SOCIETE BEDIR SARL V REPÚBLICA DO NÍGER ECW/CCJ/JUD/11/20, PAGE 18, PARAGRAPH 55; MR CHIEKH GUEYE V SENEGAL ECW/CCJ/JUD/21/20).*

289. Thus, in the light of the concepts of subjective and objective impartiality set out above, the Applicant is unable to establish that the judges to whom the pending cases are assigned already have preconceived ideas about them,

to such an extent that their intervention in said cases vitiates the entire legal-procedural relationship and should therefore be considered suspect.

290. We must not lose sight of the fact that the cases in question are still pending and are awaiting judgment and a subsequent decision. Therefore, in the absence of proof from the Applicant, **the presumption of subjective impartiality enjoyed by the judges of the Defendant State is not removed.**

291. Likewise, from an objective point of view, in the absence of proof of the facts alleged by the Applicant, the Court cannot find that the judges in the case have behaved as if they were parties to the pending proceedings, so that, a priori, it can be concluded that they are prevented from intervening in those proceedings.

292. For the foregoing reasons, the Court finds that the violation of the Applicant's right to an impartial judge to examine the cases pending before it in the Defendant State has not been established.

XII. COMPENSATION

Claims made by the Defendant Afro Agro Industrie Benin SA

293. The Applicant seeks that the Defendant be ordered to pay compensation for financial damages, specifically for the loss of expected but unrealized turnover. It expected a profit over the next fifteen years of operation of 51 billion 704 million CFA francs, corresponding to 38 million 390 thousand euros. The Applicant also seeks that the Defendant be ordered to pay the legal costs it incurred in order to defend itself in these proceedings, in the amount of 29 million CFA francs. The Applicant also claims to have suffered moral damage for having been arbitrarily excluded from the economic sector in which it excelled and which was its only sector of activity. For these non-

pecuniary damages, it seeks that the Defendant be ordered to pay 60,000,000 (sixty million) CFA francs.

Defendant's Submissions

294. The Defendant said nothing about the claims for damages.

The Court's Analysis

295. In the case at hand, we must not lose sight of the fact that the Applicant's claims here are practically the same as those it brought before the courts of the Defendant State, and that it is still awaiting a decision.

296. However, this Court cannot anticipate the decision that the Defendant's courts will make on the matter of compensation for any damage suffered by the Applicant. As the cases are pending in the jurisdiction of the Defendant, the Applicant may or may not win the case. Furthermore, the financial damage caused by the loss of turnover expected over the next 15 years are forecasts by the Applicant which may or may not come to pass. The Court notes that these are claims for early returns, which lack certainty. The Court cannot therefore award compensation for future losses. (In this regard, see *DIAWARA OUMAR V REPUBLIC OF COTE D'IVOIRE, PETITION No: ECW/CCJ/APP/17/21, JUDGMENT No. 34/21, PAGE 36*). In relation to the amount of non-pecuniary damage, the Court finds that there is no evidence to determine it, as it is based on calculations made by the Applicant, whose starting point is difficult to understand and which have not been proven beyond reasonable doubt.

Finally, with regard to the procedural costs incurred by the parties, both this court and the Defendant's court have their own rules for determining who should be responsible for paying them, and it does not necessarily have to be the Defendant in a case who bears these costs. For these reasons, the Court dismisses the Applicant's claim for damages.

297. The Court recalls, however, that it is a principle of international law that "*every person who has suffered a violation of his or her human rights is entitled to a fair and equitable remedy*" (see Judgment No. ECW/CCJ/JUD/01/06, rendered in the case, *DJOT BAYI TALBIA & OTHERS v. FEDERAL REPUBLIC OF NIGERIA & OTHERS, in CCJ ELR (2004-2009).*

298. Since the Court has found a violation of the Applicant's right to property, as well as a violation of its right to a decision within a reasonable time, which are human rights of the Applicant, and not rights of any other nature, it must fix an amount that it considers fair and equitable for the reparation of those rights.

299. However, such compensation cannot be interpreted as anticipating the outcome of the decision to be handed down by the Defendant's courts in the analysis they have to make in order to know whether the factual and legal assumptions on which the proceedings brought by the Applicant and which are still pending are based. This is merely reparation for the violation of the Applicant's human rights found in the instant case.

300. For the foregoing reasons, the Court, having regard to its case law, sets the amount of compensation for the violation of the Applicant's human rights at 40,000,000 (forty million) CFA francs.

XIII. COSTS

301. The Applicants sought that the Defendant be condemned to pay the costs. The Defendant said nothing about the costs.

302. Article 66 (1) of the Court's Rules of Procedure provides that "The judgment or order that ends the process decides on expenses."

303. Paragraph 2 of the same Article states that "*The unsuccessful party is ordered to pay the costs if so decided.*"

304. And paragraph 4 of the same article allows the Court to apportion expenses or decide that each party should bear its own, if there is partial maturity or exceptional circumstances.

305. Thus, considering the circumstances of the case, the Court understands that Defendant State must bear the costs.

XIV. OPERATIVE CLAUSE

306. For these reasons, the Court held a public hearing and having heard both parties:

On the Jurisdiction

i). Declares **that** it entertains jurisdiction to hear the cause.

On the Admissibility

ii). Declares admissible the claim brought by the applicant Africa Agro Industrie Benin SA Limitada against the Defendant State of Benin.

iii). Dismisses as inadmissible the claims brought by the Applicant Carlo TESEI against the Defendant State of Benin.

iv). Dismisses the action as inadmissible as regards the Defendants Patrice TALON and the Association Interprofessionnelle de Coton.

Merits

v). Declares established a violation of the right to property of the Applicant Afro Agro Industrie Benin SA public limited company, provided for and guaranteed by Article 14 of the African Charter.

vi). Declares as not established the violation of the right of access to a court provided for in Article 7 (1) (a) of the African Charter.

vii). Declares as established the Applicant's right to a decision within a reasonable time under Article 7(1)(d) of the African Charter.

viii). Declares as not established the violation of the right to an impartial tribunal provided for in Article 7 (1) (d) of the African Charter.

ix). Dismisses all the other form of order sought by the Applicant.

Compensation

x) Orders the Defendant to pay the Applicant the sum of 40,000,000 (forty million) CFA francs for the violation of its property rights and to obtain a decision within a reasonable time.

XV. THE COSTS

Pursuant to Article 66(4) of the Rules of Procedure of the Court, and taking into account the circumstances of the case, the costs shall be borne by the Defendant State.

Signed by:

Hon. Justice Gberi-Be OUATTARA - Presiding Judge

Hon. Justice Sengu Mohammed KOROMA - Member

Hon. Justice Ricardo C.M. GONÇALVES - Member/Judge Rapporteur

Assisted by:

Dr. Yaouza OURO-SAMA - Chief Registrar _____

Done in Abuja, on the 29th of May 2024, in Portuguese and translated into French and English.