JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
16 November 1994 *

In Case T-451/93,

San Marco Impex Italiana SA, a company governed by Italian law, whose registered office is at Modena, Italy, represented by Lucette Defalque, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Alex Schmitt, 62 Avenue Guillaume,

applicant,

v

Commission of the European Communities, represented by Hans Peter Hartvig, Legal Adviser, and Claire Bury, a national official seconded to the Commission, acting as Agents, with an address for service in Luxembourg at the office of G. Kremlis, of the Commission's Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for compensation under Article 178 and the second paragraph of Article 215 of the EEC Treaty for damage suffered in connection with a public

* Language of the case: English.

works contract concluded between the applicant and the Government of the Somali Democratic Republic,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of: A. Kalogeropoulos, President, D. P. M. Barrington and K. Lenaerts, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 8 July 1994

gives the following

Judgment

Summary of the facts

1 On 3 March 1987, the Commission, acting on behalf of the Community, concluded a financing agreement with the Somali Democratic Republic by which it agreed to finance a project put forward by the Somali Government for the design and construction of five bridges across the Shebelli River and one bridge across the Juba River, together with the construction of associated access roads. This agreement

was concluded under the second ACP-EEC Convention, signed at Lomé on 31 October 1979, (OJ 1980 L 347, p. 1 hereafter 'the Second Lomé Convention') and the funds were made available from the Fifth European Development Fund ('the EDF').

2 Following the issue of a call for tenders, on 7 May 1987 the applicant, San Marco Impex Italiana SA, submitted a tender in the sum of ECU 3 685 623. On 18 February 1988, the applicant was informed by the Ministry of Public Works and Housing that its tender had been accepted. On 22 February 1988, a contract was concluded between the applicant and the Somalian Minister for Foreign Affairs as National Authorizing Officer, on behalf of the Somali Ministry of Public Works and Housing. The contract was endorsed by the delegate of the Commission in Somalia ('the delegate') and by Consulint International, consulting engineers, hired by the Somali Government to supervise the construction works.

3 The contract is a 'composite contract': the price of the superstructure for the bridges was to be refunded on a 'repayment' basis (the works carried out were to be paid for on the basis of the cost price with supplements in lieu of profit), the rest of the contract being paid for by the 'unit price' method (under which the works or services are broken down into separate items and a unit price is stated for each item). The unit price is agreed upon conclusion of the contract and the contract price depends on the quantities actually used. As regards sub-base materials, for the six access roads the bill of quantities produced by the applicant specifies, for each of the roads, a unit price of ECU 4.5/m^3, including transport up to 5 km. The bill of quantities also gives a unit price of ECU 0.07/m^3 x km for the transport of sub-base materials in excess of 5 km.

4 The contract stipulated that payments were to be made both in local and foreign currency with a percentage division of 12/88 respectively. All local currency pay-

ments were to be authorized by the National Authorizing Officer, endorsed by the Commission delegate and paid through banks locally. Foreign currency payments were to be authorized by the National Authorizing Officer, endorsed by the Commission delegate but paid via the Commission in Brussels.

5 The works commenced in May 1988.

6 By letter of 6 November 1988, Consulint informed the Ministry of Public Works and Housing of the difficulties encountered in finding, sufficiently close to the sites, one of the sub-base materials for the access roads. In order to resolve the problem, Consulint suggested changing the composition of the sub-base materials for four of the six roads concerned, entailing an increase in the unit cost for them from ECU 4.5/m^3 to ECU 14.3/m^3. It considered that that increase in the unit cost would give rise, for the four roads involved, to an extra cost of about ECU 200 000. For the two other roads, the letter stated that the engineer was studying 'another technical solution that will suit both requirements: technical and financial'. A copy of that letter was sent to the Commission delegation and received by it on the same day.

7 On 2 January 1989, the Ministry of Public Works and Housing wrote to Consulint to authorize the various proposals concerning the project, including the proposed changes to the foundation structure of the access roads owing to the unavailability of appropriate materials. That letter concludes: 'we request you to study and propose technical solutions which will allow reduction of works so that the available budget is not exceeded. Please prepare also a final cost estimate of the project to be submitted for approval — if any — to the delegation of the CEC' (Commission of the European Communities). A copy of that letter was sent to the delegate.

8 By letter of 15 February 1989, the delegate drew the attention of the Ministry of Public Works and Housing to the fact that he had refused to endorse two invoices incorporating price revisions for certain materials (cement, steel, bitumen and diesel fuel) on the ground that the revisions were based only on invoices and not on proof of an increase in market prices. He emphasized that, pursuant to Article 79(1)(iii) of the Special Contract Conditions, price revisions were allowed only against proof of an increase in market prices and proof that the materials had been effectively incorporated into the works.

9 By letters of 20 February and 9 March 1989, the Commission delegate wrote to the Ministry of Public Works and Housing concerning the increased costs of the works in general, pointing out that it was necessary to obtain prior approval from the Commission and from the National Authorizing Officer before incurring additional expenditure.

10 By letter of 25 April 1989, the Ministry of Public Works and Housing asked the National Authorizing Officer to authorize the Commission delegate to request additional financing of about ECU 1 615 000 for the project in order to take account, among other things, of the price increases of certain materials (cement, steel, diesel oil, labour) and the difficulties caused by the unsuitability of one of the sub-base materials for the access roads.

11 By letter of 8 May 1989, the National Authorizing Officer informed the Ministry of Public Works and Housing of his refusal to request additional funding on the ground, *inter alia*, that any price revision liable to increase the cost of the project should have been the subject of a prior request to the Commission delegate and the National Authorizing Officer. A copy of that letter was sent to the delegate.

12 By note of 14 June 1989, the delegate asked the Commission Directorate-General for Development to take the necessary preparatory steps in the event of the National Authorizing Officer agreeing to lodge a request for increased funding. He emphasized that he considered that the applicant's work was carried out to a high standard and that the extra cost appeared to be justified on purely technical grounds. He also stated that the additional costs derived in particular from a decision to change the structure of the bridges, the increase in the unit cost of the sub-base materials, the need to change the location of certain bridges and changes made necessary by land erosion and an irrigation project.

13 On 10 August 1989, a request for additional funding of ECU 750 000 was submitted by the National Authorizing Officer. The request was forwarded to the Commission under cover of a letter from the delegate of 23 August 1989.

14 On 28 August 1989, anticipating that additional funding would be forthcoming, the Department of Highways submitted to the National Authorizing Officer for approval an Addendum No 1 to the contract, drafted by Consulint. The addendum was signed by the applicant, the National Authorizing Officer and the Ministry of Public Works and was sent to the Commission delegate for endorsement.

15 On 18 December 1989, the delegate was informed by telex that the Commission had agreed to provide additional funding of ECU 750 000. The delegate informed the National Authorizing Officer of that decision by letter of 21 December 1989.

16 By letter of 25 December 1989, the Department of Highways informed Consulint that 'Addendum No 1 (supplementary fund) has been approved'. Consulint sent a copy of that letter to the applicant on 27 December 1989, stating that the additional funding of ECU 750 000 had been approved 'as per Addendum No 1'.

17 By letter of 6 February 1990, the Commission delegate informed the Department of Highways that he was not able to endorse the addendum submitted. He suggested a modified version and submitted it for signature in the following terms: 'I enclose copies of the proposed addendum and, to settle this matter, I should be grateful to receive it signed as soon as possible and endorsed by the National Authorizing Officer of the EDF'.

18 The revised version of the addendum was signed by the applicant on 10 February 1990, by the Minister of Public Works on 7 February 1990 and by the National Authorizing Officer on 17 February 1990; it was then sent to the Commission delegate, who received it on 1 March 1990.

19 On 1 March 1990, the Commission delegate wrote to the Ministry of Public Works informing it that he refused to endorse the addendum, essentially on the ground that the applicant was not entitled to a unit price revision for sub-base materials. In a further letter of the same date, also addressed to the Ministry of Public Works, the delegate emphasized that, in addition to the matter of the composition of sub-base materials, he still awaited from the applicant supporting details for the price revisions for cement (+50%) and steel (+60%). For that reason also, he was unable to endorse the addendum.

20 On 6 June 1990, the delegate, after consulting the Commission Legal Service, informed the National Authorizing Office of the EDF's final position concerning the increase in the unit price for sub-base materials and the revision of prices for certain other materials. The EDF's view was that the increase in the unit price for sub-base materials was contractually prohibited by virtue of the fact that the ten-

derers were required to verify the availability of suitable materials locally before tendering. Other tenderers might have bid higher rates precisely because they had correctly evaluated local conditions. The price revisions requested under Article 79 of the General Conditions had to be substantiated by reference to market prices at the place of origin.

21 By letter of 7 June 1990, the National Authorizing Officer informed the Ministry of Public Works and Housing that it was in complete agreement with the legal opinion expressed by the European Commission's officials regarding the payment of revised prices to the applicant. A copy of that letter was sent to the delegate.

22 In December 1990, civil war broke out in Somalia. In January 1991, the Commission's delegation was closed.

23 By letter of 1 March 1991, the Commission's Director-General for Development wrote to the applicant in his capacity as Chief Authorizing Officer — the authority ultimately responsible under Article 121(1) of the Lomé convention for managing the EDF's resources — to inform it that he had temporarily assumed the functions of the National Authorizing Officer, on the basis of Article 60 of the Financial Regulation applicable to the Fifth EDF, since he believed that the National Authorizing Officer was no longer in a position to carry out his duties. In this capacity, the Chief Authorizing Officer informed the applicant that he was terminating its contract under Article 93(1) of the General Conditions as from 1 March 1991. He also invited the applicant to submit claims for work done up to 28 February 1991.

24 Article 60 of the Financial Regulation applicable to the Fifth EDF (OJ 1981 L 101, p. 12), to which reference is made in the first paragraph of this letter, provides:

'Where the chief authorizing officer of the EDF is aware of delays in the procedures relating to projects financed by the EDF he shall, in conjunction with the national authorizing officer, make all contacts necessary to remedy the situation.

If, for any reason whatsoever, services have been rendered but further delay in the clearance, authorization or payment gives rise to difficulties likely to call into question the full performance of the contract, the Chief Authorizing Officer may take all appropriate measures to resolve these difficulties, to remedy, where necessary, the financial consequences of the resultant situation and, more generally, to enable the project or projects to be completed under the best economic conditions. He shall inform the national authorizing officer of such measures as soon as possible. If payments are thus made by the Commission to the beneficiary of the contract, the Community shall automatically acquire that beneficiary's right as creditor vis-à-vis the national authorities.'

25 Article 93(1) of the General Conditions, to which reference is also made in this letter, provides that where the administration unilaterally orders the definitive cessation of performance of the contract, the latter shall be immediately terminated and that the contractor is entitled to compensation for any loss which such termination, not attributable to him, may have caused him.

26 By letter of 22 March 1991, M. A. Young Associates, Chartered Surveyors, informed the Commission of their intention to compile on behalf of the applicant

an exhaustive schedule of direct loss and expense sustained through the cancellation of the works.

27 By letters of 19 December 1991 and 10 January 1992, lawyers for the applicant informed the Commission that a list of the amounts claimed was still being prepared and requested immediate payment of the outstanding invoices.

28 Under cover of a letter of 7 February 1992, the applicant's lawyers forwarded to the Commission a full statement of the amounts requested, totalling ECU 4 389 498.40. The statement is divided into five sections: the first sets out the unpaid invoices, the second and third indicate the amounts claimed on the basis of the Commission's letter of 1 March 1991, and the fourth and fifth relate to interest.

29 By letter of 15 April 1992, the Commission rejected the claim made by the applicant's lawyers on the grounds that, essentially, it was physically impossible to verify the claim, that certain parts of it had been contested by the Somali Government, that the amount claimed far exceeded the funds available and that the Chief Authorizing Officer, acting for the National Authorizing Officer, had a limited mandate under Article 60 of the Financial Regulation.

Procedure and forms of order sought by the parties

30 By application lodged at the Registry of the Court of Justice on 7 July 1992, the applicant brought the present action for compensation. The written procedure

before the Court of Justice was completed on 4 February 1993 upon lodgement of the rejoinder. Following the entry into force on 1 August 1993 of Council Decision 93/350/ECSC, EEC, Euratom of 8 June 1993, amending Decision 88/591/ECSC, EEC, Euratom establishing the Court of First Instance of the European Communities, the case was referred to the Court of First Instance by order of the Court of Justice of 27 September 1993.

31 The applicant claims that the Court should:

order the Commission to pay the applicant:

— a total amount of ECU 4 389 498.40;

— interest at the rate of 8% as from the date of lodgement of the application;

— the costs, including legal fees.

32 The defendant contends that the Court should:

(i) dismiss the application as unfounded;

(ii) order the applicant to pay the costs.

The first head of claim: non-payment of certain invoices

The parties' arguments

33 The applicant argues that in refusing to endorse the invoices in question the delegate committed four faults of a non-contractual nature rendering the Commission liable under the second paragraph of Article 215 of the EEC Treaty.

34 The first fault identified by the applicant is that the delegate acted ultra vires. The applicant considers that under the division of powers provided by the Second Lomé Convention it is not up to the delegate to check details of amounts claimed in invoices which have been certified by the consulting engineer and in respect of which the National Authorising Officer has issued payment authorizations. This is because the Commission is not privy to the works contract and because its powers are limited to preparing and adopting financing decisions, monitoring the tendering procedure, overseeing the execution of the works as a whole and the proper functioning of the procedure and, if necessary, acting as mediator. In any event, the applicant considers that the refusals to endorse in this case were not justified.

35 The second fault identified by the applicant is that the delegate acted in breach of a duty incumbent upon him. The applicant argues that, whatever decision the delegate may have initially taken regarding the eligibility for EDF-funding of the expenses claimed in the contested invoices, the Chief Authorizing Officer's decision to finance the credit overruns on the project had the effect of imposing on the Commission an obligation to meet these expenses, whatever the form of any addendum drawn up by the parties to the contract. In response to the Commission's argument that the commitment to grant additional funds was made only to the Somali Democratic Republic and not to the contractor, the applicant also argues

that, by virtue of a principle common to all the Member States, a creditor may seek from the debtors of its debtor the amounts which they owe to the latter. Respect of the principle of legal certainty implied an obligation on the Commission to take the steps necessary to remedy delays in payment.

36 The third fault is that the Commission acted in breach of the applicant's legitimate expectation. The applicant argues that, in the manner in which it granted additional funding to pay for the changes requested by the National Authorizing Officer and in the manner in which it amended Addendum No 1 and sent it for signature, the applicant was entitled to expect the Commission to sign the addendum and to pay the invoices relating to it.

37 The fourth fault identified by the applicant is that the Commission's administration is inadequately organized. The applicant argues that since the Chief Authorizing Officer had taken the decision to grant additional funding and since all the other parties had signed Addendum No 1 in the terms required by the Commission, the latter was under an obligation to so arrange matters that it signed Addendum No 1 itself and also that the invoices in respect of the works in question were paid in accordance with the terms of that addendum. Its failure to do so amounts to an inadequate organisation of its services.

38 As regards the first fault which the applicant alleges the delegate committed, the Commission submits that its actions were consistent with the allocation of powers under the Convention and that its delegate was fully entitled to refuse to endorse the addendum since he considered that the conditions for Community funding were not met. If that were not the case, the Commission's ability to ensure the protection of EDF funds would be undermined.

39 As regards the alleged non-performance of a duty, the Commission states that it had no direct contractual relationship with the applicant. It does not deny that it took a primary decision to provide additional funding but it considers that that was a commitment only to the Somali Government. In any event, a provisional commitment of that kind cannot in itself give rise to an obligation to pay invoices not covered by the Financing Agreement. The Commission doubts whether it is clearly established that the applicant can be regarded as a creditor of the Somali Government, thereby enabling it to approach the Commission direct as its debtor's debtor. In any event, because of the division of powers and responsibilities under the Lomé Convention, the debts of the Somali Government cannot be transferred to the Commission.

40 As regards the alleged breach of the principle of the protection of legitimate expectation, the Commission replies, first, that it had no direct relationship with the applicant and that if the additional works were requested by the local authority, such requests were made in the context of that authority's contractual relationship with the applicant. It adds that it had always made clear its position on invoices relating to certain of the extra works, so that the Somali authorities could not have assumed that Addendum No 1 would be endorsed in the form in which it was presented.

41 The Commission considers that the argument alleging inadequate organization of its administration does not disclose any specific organizational inadequacy and is not supported by any evidence. In any event, in the absence of an obligation to pay it cannot be under any obligation to mobilize its services to effect payment.

The Court's assessment

42 In its first head of claim, the applicant is seeking compensation for damage it alleges it suffered as a result of the delegate's refusal to endorse certain invoices. It is important to bear in mind that in assessing this claim the Court is not making any determination regarding the applicant's contractual entitlement to the amounts claimed in these invoices. This is an issue to be determined by arbitration, in accordance with Article 132 and Annex XIII of the Second Lomé Convention, and not by this Court, whose jurisdiction under Article 178 and the second paragraph of Article 215 of the EEC Treaty is limited to issues of non-contractual liability. In any event, it is clear from the papers before the Court that there is no contractual relationship between the applicant and the Commission and, indeed, this is wholly consistent with the view expressed by the Court of Justice according to which EDF-financed public works contracts are to be considered as national contracts involving only the ACP State and the contractor (Case 33/82 *Murri Frères* v *Commission* [1985] ECR 2759).

43 However, although there is no contractual relationship between the Commission and the applicant, it is clear from the case-law of the Court of Justice that the Commission may be liable under Article 215, second paragraph, of the EEC Treaty to make good damage suffered by third parties as a result of acts committed by the delegate in the performance of his duties (Case 118/83 *CMC* v *Commission* [1985] ECR 2325).

44 In this respect, this Court considers that the Commission is liable to make good damage suffered by contractors engaged under EDF-financed public works contracts as a result of a wrongful refusal on the part of a delegate to endorse invoices submitted by them.

45 In this case, the applicant argues that the delegate's refusal to endorse the invoices was wrongful and, in support of this, identifies four particular faults. First, it maintains that in refusing to endorse the delegate acted ultra vires; secondly, it considers that the delegate's refusal to endorse amounts to a breach of duty; thirdly, it considers that it had a legitimate expectation that the invoices would be endorsed and, finally, it argues that the refusal to endorse is the result of an inadequate organization of the Commission's services.

The first fault: the delegate acted ultra vires in refusing to endorse

46 The applicant's argument is primarily to the effect that, under the division of powers provided by the Second Lomé Convention, delegates are not entitled to refuse to endorse invoices which have been approved by the consultant engineer and in respect of which the National Authorizing Officer has issued a payment authorization. The applicant also argues that, in any event, the refusals in this case were not justified.

47 As regards, first of all, the question of whether delegates are ever entitled to refuse to endorse, the Court notes that Article 108(4)(f) of the Second Lomé Convention provides that 'the Community and the ACP States shall bear joint responsibility for ensuring that the projects and programmes financed by the Community are executed in accordance with the arrangements decided upon and with the provisions of the Convention'.

48 To this end, Article 123(3) of the Second Lomé Convention provides:

'(a) The delegate shall make sure, on behalf of the Commission, that the projects and programmes financed from the Fund's resources administered by the Commission are properly implemented from the financial and technical angles.

(b) Accordingly, the delegate shall endorse contracts, riders thereto and estimates, as well as payment authorizations issued by the national authorizing officer.'

49 Similarly, Article 61 of the Financial Regulation of 17 March 1981 applicable to the Fifth EDF provides that 'during the performance of operations, the delegate shall verify on the spot and on the basis of records that work carried out or services rendered tally with their descriptions given in the financing agreements, contracts or estimates'.

50 The Court considers that it follows clearly from these provisions that a Commission delegate is entitled to and, indeed, must refuse to endorse invoices submitted by contractors where he has substantial grounds for doubting that the conditions for Community funding have been met.

51 In order to determine whether or not the delegate's refusal to endorse in this case was justified, the Court must be informed of the subject matter of the relevant invoices. The applicant's pleadings seem to suggest that the delegate's objections to the contested invoices relate either to the fact that they incorporated price increases for cement, steel and bitumen which had not been substantiated by reference to the market price or to the fact that they concerned the sub-base for the access roads, for which the unit-price had increased from ECU 4.5/m^3 to ECU 14.3/m^3. In order to clarify this, the Court put a written question to the applicant asking it to confirm that this was the case and, if it was not, to specify the invoices concerned,

produce copies and specify their subject matter. Although the applicant's answer to this question appears to suggest that some of the invoices which the delegate refused to endorse relate to matters other than the two mentioned above, the applicant did not provide the Court with any more precise details.

52 In these circumstances, the Court can only assess the applicant's claim to the extent that it is founded on an alleged wrongful refusal on the part of the delegate to endorse invoices incorporating price increases for cement, bitumen and steel, on the one hand, and an increase in the unit-price for the sub-base material for the access roads, on the other hand.

53 The price increases for cement, steel and bitumen were refused by the delegate because they were not supported by proof of an increase in the market price of these materials at point of origin or of their effective incorporation into the works.

54 In the Court's view, it is clear from Article 79(1)(iii) of the Special Conditions that increases in the costs of materials are to be allowed to the contractor only where there has been an increase in market price of these products between the date of tender and the date of purchase.

55 In these circumstances, the Court considers that the delegate was entitled to require the proofs in question and to refuse to endorse the invoices until these proofs were produced. This was particularly the case as research carried out by him tended to suggest that there had been no increase in the market price of the type of cement in question during the relevant period.

56 Since the applicant has produced no evidence to show that it produced these proofs, when requested to do so by the delegate, the Court must conclude that his refusal to endorse the relevant invoices was justified.

57 As regards the question of the increase in the unit-price of the sub-base for the access roads, the Court notes that it is not contested that, in preparing its tender, the applicant seriously underestimated the availability, close to the sites, of one of the required components.

58 In this regard, the Court notes that paragraph 2 of the preamble to the Bill of Quantities as accepted by the applicant clearly provides that 'the contractor shall visit the site and carefully and fully acquaint himself with the local conditions throughout the works and ascertain the availability of water and locally obtained materials and shall make all and every allowance in his rates to cover any contingency that may arise' and that the applicant admits, on page 5 of its Reply, that it did not carry out a thorough investigation prior to submitting its bid.

59 The applicant claims that, because of flooding at the relevant time, none of the tenderers were in a position to carry out the necessary investigations near to the sites, and that it was to take account of this difficulty that they were also required to quote for haulage of the sub-base materials over distances greater than 5 km.

60 However, the Court considers that it is clear from the Bill of Quantities that the applicant tendered a firm unit-price for the sub-base for the access roads and that this unit-price may have played an important role in the comparison of tenders.

61 Also, the evidence produced by both the Commission and the applicant itself shows that the additional costs to the project arising from the increased unit-price were incurred without obtaining prior approval from the appropriate national authority, the National Authorizing Officer.

62 In these circumstances, and taking account of the fact that the unit-price tendered was in fact less than one third of the unit-price ultimately charged, the Court considers that the delegate was entitled to refuse to endorse the relevant invoices.

63 In reaching this conclusion, the Court is also rejecting the argument put forward by the applicant according to which the Commission should bear responsibility for acts committed by Consulint who, the applicant claims, gave it no choice but to use the more expensive sub-base components. As is clear from the documents before the Court, Consulint was appointed to supervise the implementation of the works under a contract concluded with the Somali Government and can in no way be considered as having acted as an agent of the Commission.

64 For these reasons, the Court concludes that the delegate did not exceed his powers in refusing to endorse the relevant invoices.

The second fault: breach of duty

65 As the provisions of the Second Lomé Convention and the Financial Regulation quoted above make clear, the delegate was under a duty to refuse to endorse the invoices in question as long as he had reason to believe that the conditions for Community financing had not been met.

66 The Court cannot accept the applicant's argument that the decision taken by the Chief Authorizing Officer to grant additional funding for the project had the effect of putting an end to this duty and of placing the delegate under a duty to endorse the invoices. For such a decision to have this effect, it would have to explicitly order the delegate to endorse the invoices despite his reserves. No such order was given in this case.

67 As regards the applicant's argument to the effect that a contractor engaged under an EDF funded contract is entitled to claim against the Commission debts which are owed to it by the ACP State, the Court notes that the applicant has not yet established, in the appropriate forum, that any debts are in fact owed to it by the Somali Government.

68 In any event, even if it was established that the applicant is contractually entitled to claim payment of the contested invoices against the Somali Government, it would not necessarily follow that these amounts could then be claimed against EDF funds, since these funds can only be released for expenses which are justified having regard to the applicable legislative and contractual provisions.

69 For these reasons, the Court concludes that there was no breach of duty on the part of the delegate in refusing to endorse the invoices.

The third fault: breach of the principle of legitimate expectation

70 The applicant considers that in view of the Commission's conduct it had a legitimate expectation that the delegate would endorse the contested invoices.

71 In order to succeed in its argument, the applicant has to show that, as a result of some act or omission on the part of the Commission or its delegate, it committed itself to incurring expenditure which it had cause to believe would be met by EDF funds.

72 The acts or omissions which the applicant alleges gave rise to its legitimate expectation relate to the Commission's decision to provide additional funding and to the delegate's behaviour in amending and then refusing to endorse Addendum No 1.

73 The Court notes that the vast majority of the contested invoices predate both the Commission's decision to provide additional funding (communicated to the delegate on 18 December 1989 and to the applicant on 27 December 1989) and the sending of the delegate's letter proposing an amended Addendum No 1 (sent on 6 February 1990). It follows that the expenses claimed in these invoices could not have been incurred on the basis of any legitimate expectation to which these events gave rise.

74 In fact, it appears from the documents before the Court that only three invoices were issued after the decision to grant additional funding was taken. As regards the

first of these, namely the invoice issued on 31 December 1989, the applicant has provided no proof whatsoever that it relates to expenditure incurred after the applicant was informed of the decision to grant additional funding. As regards the two invoices issued in May 1990, the applicant has provided no proof that they relate to expenses incurred before 1 March 1990, the date on which the delegate made clear beyond any doubt that he had no intention of endorsing invoices incorporating the increased unit-price of the sub-base material or price revisions for materials which were not justified by reference to market prices.

75 For these reasons, the applicant's argument founded on a breach of its legitimate expectation has to be rejected.

The fourth fault: inadequate organization of the Commission's services

76 As the Commission has correctly pointed out, the applicant's fourth argument presupposes a duty on the part of the Commission to endorse the invoices. Since the Court has established that no such duty existed, it follows that the fourth argument must be rejected.

77 In any event, the Court considers that where an applicant is seeking compensation for damage which it alleges was caused by the inadequate organization of the defendant institution's administration, it must at least identify some malfunction of the administration giving rise to the damage in question. In this case, the applicant has not produced any argument or evidence from which the Court can deduce that the Commission's administration failed to operate correctly.

78 Since the applicant has failed to establish that the refusal to endorse the relevant invoices was wrongful, it follows that the first head of claim must be dismissed.

The second head of claim: the failure by the Commission to pay compensation following the termination

The parties' arguments

79 The applicant states that, by letter of 1 March 1991, the Director-General of DG VIII, as Chief Authorizing Officer of the EDF, informed it that he had temporarily assumed the functions of the National Authorizing Officer and that he had decided to terminate the works contract with effect from 1 March 1991, pursuant to Article 93(1) of the General Conditions. The applicant also states that the letter from the Chief Authorizing Officer ends by requesting it to submit its claims to the Commission. Notwithstanding that invitation, and despite the applicant's having prepared a complete statement of losses and expenses directly incurred as a result of cancellation of the works, which it submitted to the defendant on 7 February 1992, the latter refused to make any payment.

80 The applicant considers that the Commission's refusal to provide compensation for t he damage suffered as a result of cancellation of the contract must be regarded as a fault rendering it liable since it constitutes non-performance of an obligation, derives from inadequate organization of the Commission's administration and infringes the principles of legal certainty and of the protection of legitimate expectations.

81 The Commission argues that by terminating the contract it merely acted within the limits of Article 60 of the Financial Regulation, which forms an integral part of the

Financing Agreement by virtue of Article 7 of the latter. It considers that its powers under Article 60 relate only to its commitments and responsibilities as set out in the Financing Agreement and that, therefore, it could not be held liable in respect of all claims relating to the contractual relationship between the Somali Government and the applicant.

82 The Commission also argues that, even though it did not expressly say so in its letter of 1 March 1991, it intended to settle claims only to the extent to which they were justified and were covered by existing commitments (that is to say, up to ECU 5 million). However, the applicant submitted a consolidated statement in an amount far beyond the balance still available, containing a number of claims which were disputed by the Somali authorities. In those circumstances, and in view of the fact that physical verification of the works was impossible, the Commission decided to await a new stable Government in Somalia before making a final decision.

The Court's assessment

83 In its second head of claim, the applicant is seeking compensation to which it considers it is entitled as a result of a letter sent to it on 1 March 1991 by the Director-General of the Commission's Directorate-General for Development, in his capacity as Chief Authorizing Officer. This letter reads as follows:

'Due to the persisting turbulence in Somalia and the inability of the National Authorizing Officer to carry out his duties, I as Chief Authorizing Officer, on the basis of Article 60 of the Financial Regulations governing contracts financed by the EDF, have temporarily assumed the functions incumbent on the National Authorizing Officer.

As adequate conditions of security in Somalia for resumption of the performance of your contract cannot be guaranteed within the foreseeable future, I regret to inform you that your contract will be terminated in application of Article 93(1) of the General Conditions for Works Contracts. The termination of your contract will take effect as of 1 March 1991.

As far as claims relating to your consultancy services (sic) incurred up to 28 February are concerned, you are kindly requested to submit these claims to the Commission of the European Communities, Directorate-General for Development ... .'

84 Counsel for the Commission accepted at the oral hearing that the reference to 'consultancy services' in this letter is a mistake. The letter, apparently, was in a standard form. Both parties have proceeded on the basis that the letter intended to refer to contractual services.

85 It is clear from the applicant's pleadings that its second head of claim can be divided into two distinct sub-heads. The first sub-head concerns amounts arising under the works contract prior to its termination on 1 March 1991. These amounts were claimed in section 2 of the consolidated statement of account submitted on 7 February 1992 (annex 43 to the application) and relate to costs arising as a result of the disruption and prolongation of the contract. In the second sub-head, the applicant is claiming compensation for losses suffered by it as a result of the termination of the contract on 1 March 1991. These amounts were claimed in section 3 of the abovementioned consolidated statement of account and relate primarily, but not exclusively, to the alleged destruction and theft of plant and equipment and the repatriation of staff.

86 In assessing these claims it is important, once again, to emphasise that the purpose of the present proceedings is only to determine whether the Commission committed a fault which caused damage to the applicant and that it is not for this Court to determine any contractual rights which the applicant may have against the Somali Government arising out of the works contract.

87 The first stage of the Court's examination of the second head of claim will therefore be to determine whether the Commission acted wrongfully in refusing to meet the claims contained in sections 2 and 3 of the consolidated statement of account.

88 With regard to each of the two sub-heads, the applicant puts forward the same arguments in support of its view that the Commission acted wrongfully. These are, first, that the Commission was under a duty to meet these claims, secondly, that the Commission's refusal to meet them was in breach of the applicant's legitimate expectation as well as the principle of legal certainty and, thirdly, that the refusal to meet the claims derives from an inadequate organization of the Commission's services.

The first sub-head: amounts arising as a result of the prolongation and disruption of the contract

89 The first question to be considered by the Court is whether there was a duty on the Commission to meet the claims, submitted in section 2 of the consolidated statement of account, relating to costs incurred prior to termination of the contract.

90 In this regard, the Court notes, first, that it has not been argued by the applicant that the Commission is responsible for the disruption or delays which gave rise to the costs claimed in section 2 of the consolidated statement. Nor has any evidence been produced which could lead the Court to such a conclusion.

91 Secondly, it is clear that since the Commission was not a party to the works contract, there could be no contractual duty upon it to meet the claim. If the applicant considers that it is contractually entitled to the amounts claimed in section 2 of the consolidated statement, this is a matter to be determined by arbitration in accordance with Article 132 and Annex XIII of the Second Lomé Convention.

92 Finally, the Court does not consider that a duty to meet the claim could have arisen as a result of the Chief Authorizing Officer's decision to invoke Article 60 of the Financial Regulation applicable to the Fifth EDF. This provision, which forms the legal basis for the invitation issued by the Chief Authorizing Officer to submit claims, allows the Commission, inter alia, to transfer funds to contractors other than on foot of a payment authorization issued by the National Authorizing Officer. It is an exceptional measure which was invoked in this case because the National Authorizing Officer was unable to fulfil his functions following the outbreak of civil war.

93 It is clear from its wording (see paragraph 24 above) that Article 60 allows but does not oblige the Commission to make payments to a contractor where delays in clearance or authorization occur at national level.

94 In these circumstances, the Court concludes that the Commission was under no obligation to meet the claim submitted in section 2 of the consolidated statement of account.

95 The second question to be determined is whether, as the applicant argues, the Commission's refusal to meet the applicant's claim for work done prior to termination of the contract is in breach of the principles of legal certainty and of the protection of legitimate expectations.

96 In order to succeed in this claim, the applicant would have to show that, at the time it incurred the expenses to which the claim relates, it had legitimate grounds for believing that the Commission would refund them. However, in this case, the applicant is founding its claim on an alleged promise to pay contained in a letter sent after the expenses in question were incurred and, for this reason alone, the claim must be rejected.

97 In any event, the Court considers that, in view of the approach taken by the delegate since 1 March 1990, the applicant knew or should have known that the Commission would only meet claims which it considered were justified having regard to the applicable legislative and contractual provisions and that it was likely to have doubts as to whether expenses incurred as a result of the prolongation and disruption of the contract could be met out of EDF-funds.

98 It follows that there was no breach of the applicant's legitimate expectations or of the principle of legal certainty.

99 Finally, the applicant argues that the refusal to compensate it derives from an inadequate organization of the Commission's services and is therefore in breach of the principle of sound administration.

100 In the Court's view, this argument presupposes a duty on the part of the Commission to meet the claim. Since the Court has established that no such duty exists, this argument must be dismissed as irrelevant.

101 In any event, as the Court pointed out in its assessment of the first head of claim, where an applicant seeking compensation under Articles 178 and 215 of the Treaty bases its argument on an alleged failure by an institution to organize properly its services, it must at least identify some particular malfunction of the defendant's administration. In this case, the applicant has not identified any particular malfunction of the administration.

102 The Court concludes that the Commission did not act wrongfully in refusing to meet the claims submitted in section 2 of the consolidated statement of account relating to costs incurred as a result of the prolongation or disruption of the contract.

103 The Court will now examine whether the Commission acted wrongfully in refusing to compensate the applicant for losses arising as a result of the termination of the works contract.

The second sub-head: losses incurred as a result of the termination of the contract

104 The first question to be determined is whether the decision taken by the Chief Authorizing Officer to terminate the contract under Article 93(1) of the General

Conditions gave rise to a duty on the part of the Commission to compensate the applicant for the losses arising from the termination.

105 The Court notes that Article 93(1) of the General Conditions pursues two separate objectives. In the first place, it can be considered as providing a legal basis for the termination of EDF-financed contracts, prior to completion of the works, by the ACP State. Secondly, it also provides that where such termination occurs the contractor is entitled to be compensated for loss arising from the termination which is not attributable to him.

106 Since EDF-financed contracts are national contracts, Article 93(1) envisages that they be terminated by the ACP State and not by the Commission. However, in the present case, it was not the ACP State but the Director-General of the Commission's Directorate-General for Development, acting in his capacity as Chief Authorizing Officer, who terminated the contract. He took this initiative because it was clear to him that, as a result of the civil war, the National Authorizing Officer was no longer in a position to exercise his authority. The civil war in Somalia had broken out in December 1990 and the Somali Government had been overthrown shortly afterwards so that by March 1991 there was no government to maintain law and order and no minister to exercise the powers of the National Authorising Officer.

107 In the Court's view, the fact that the Chief Authorizing Officer used Article 93(1) of the General Conditions as a legal basis for terminating the contract in these circumstances does not imply that the Commission is liable to pay any compensation to which the applicant may be entitled under this provision. In any event, it has not been established that any damage alleged to have been suffered by the applicant resulted from the termination of the contract by the Chief Authorizing Officer.

108 None of the losses alleged to have been suffered under this sub-head, as formulated by the applicant — plant or equipment lost or stolen; cost of launching and erection equipment necessary for preliminary works; cost of meeting engineers' requirements including houses and office equipment; repatriation of all expatriate staff and personnel; cost of professional fees in preparing claims arising out of the alleged suspension, cancellation, disruption and prolongation of the contract; cost of head-office equipment; cost of bituminous materials stored off site; value of work done at date of termination — is shown to have been caused by the termination of the contract. Indeed the applicant has not proved that he was still on the site at the date of termination of the contract.

109 For these reasons, the Court considers that the Commission's refusal to compensate the applicant for the losses arising from the termination was not in breach of a duty incumbent upon it.

110 The second question to be considered is whether the letter of 1 March 1991 gave rise to a legitimate expectation on the part of the applicant that the Commission would pay any compensation to which the applicant may be entitled under Article 93(1) of the General Conditions.

111 The applicant argues that by referring to Article 93(1) of the General Conditions, in the second paragraph of the letter of 1 March 1991, the Commission committed itself to indemnifying it in accordance with that provision.

112 In the Court's opinion, it is clear from a reading of the letter of 1 March 1991 that it could not have given rise to a legitimate expectation on the part of the applicant that the Commission would compensate it for losses resulting from the termination of the contract. The last paragraph of the letter, although it specifically invites the applicant to submit claims for work done up to the date preceding the termination, makes no reference to claims arising as a result of the termination.

Article 93(1) of the General Conditions was indeed mentioned in the second paragraph of the letter but this was because it forms the legal basis for terminations of EDF-financed contracts. The mere fact that it was mentioned in this context cannot be taken as constituting an undertaking by the Commission to pay compensation.

113 It follows that there was no breach of the applicant's legitimate expectations or the principle of legal certainty.

114 The final question to be determined is whether, as the applicant argues, the refusal to compensate it derives from an inadequate organization of the Commission's services and is therefore in breach of the principle of sound administration.

115 Once again, this argument must be rejected since the applicant has neither established that the Commission was under a duty to pay nor identified, in its pleadings, any particular malfunction of the defendant's administration.

116 It follows that the Commission did not commit a fault in refusing to meet the claim submitted in section 3 of the consolidated statement of account relating to losses incurred as a result of the termination of the contract.

117 Since the applicant has failed to establish that the Commission has committed a fault of any kind in refusing to meet its claim, the second head of claim must also be dismissed.

118 It should be pointed out in any event, as regards the loss which the applicant alleges it suffered, that the onus of proof is on the applicant to show, not only that the Commission committed some fault, but also that the loss alleged to have been suffered by the applicant was caused by the fault alleged and not by civil war, theft or other extraneous cause. This the applicant has totally failed to do either by argument or evidence.

119 Since the applicant has failed in both heads of claim, the application must be dismissed.

Costs

120 Under Article 87(2) of the Rules of Procedure, an unsuccessful party is to be ordered to pay the costs if they are asked for in the opposite party's pleadings. Since the applicant has failed in its submissions, it must be ordered to pay the costs as applied for by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs.

Kalogeropoulos Barrington Lenaerts

Delivered in open court in Luxembourg on 16 November 1994.

H. Jung
Registrar

A. Kalogeropoulos
President