OPINION OF ADVOCATE GENERAL MAZÁK

delivered on 8 May 2008 [1]

1. By the present appeal the Hellenic Republic asks the Court to set aside the judgment of the Court of First Instance (First Chamber) of 17 January 2007 in Case T-231/04 *Greece* v *Commission*, [2] ('the judgment under appeal'), in so far as it wrongly concluded that financial obligations had arisen for the Hellenic Republic as a result of its signature and ratification of an initial memorandum of understanding between the Commission and Member States, its signature of an additional memorandum, and its conduct.

2. In the judgment under appeal the Court of First Instance dismissed as unfounded an action for annulment of the act by which the Commission proceeded to recovery by offsetting of sums owed by the Hellenic Republic following its participation in the Abuja I and II projects to set up a common diplomatic mission in Abuja (Nigeria) for the Commission and a number of Member States of the European Union.

I — Legal framework

A — *Community law*

3. Article 58 of the Statute of the Court of Justice provides as follows:

'An appeal to the Court of Justice shall be limited to points of law. It shall lie on the grounds of competence of the Court of First Instance, a breach of procedure before it which adversely affects the interests of the appellant as well as the infringement of Community law by the Court of First Instance…'

4. Article 71 of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities [3] ('the Financial Regulation') states as follows:

1 — Original language: English.

2 — [2007] ECR II-63.

3 — OJ 2002 L 248, p. 1.

'1. Establishment of an amount receivable is the act by which the authorising officer by delegation or subdelegation:

(a) verifies that the debt exists;

(b) determines or verifies the reality and the amount of the debt;

(c) verifies the conditions in which the debt is due.

2. The own resources made available to the Commission and any amount receivable that is identified as being certain, of a fixed amount and due must be established by a recovery order to the accounting officer followed by a debit note sent to the debtor, both drawn up by the authorising officer responsible. …'

5. Article 72 of the Financial Regulation provides:

'1. The authorisation of recovery is the act whereby the authorising officer by delegation or subdelegation responsible instructs the accounting officer, by issuing a recovery order, to recover an amount receivable which he/she has established. …'

6. Article 73 of the Financial Regulation states:

'1. The accounting officer shall act on recovery orders for amounts receivable duly established by the authorising officer responsible. He/She shall exercise due diligence to ensure that the Communities receive their revenue and shall see that their rights are safeguarded.

The accounting officer shall recover amounts by offsetting them against equivalent claims that the Communities have on any debtor who himself/herself has a claim on the Communities that is certain, of a fixed amount and due. …'

7. Article 78 of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities [4] ('the Implementing Regulation') states as follows:

4 — OJ 2002 L 357, p. 1.

'Procedure

1. The establishment by the authorising officer responsible of an amount receivable shall constitute recognition of the right of the Communities in respect of a debtor and establishment of entitlement to demand that the debtor pay the debt.

2. The recovery order shall be the operation by which the authorising officer responsible instructs the accounting officer to recover the amount established.

3. The debit note shall be to inform the debtor that:

(a) the Communities have established the amount receivable;

(b) payment of the debt to the Communities is due on a certain date (hereinafter "the due date");

(c) failing payment by the due date the debt shall bear interest at the rate referred to in Article 86, without prejudice to any specific regulations applicable;

(d) wherever possible the institution shall effect recovery by offsetting after the debtor has been informed;

(e) failing payment by the due date the institution shall effect recovery by enforcement of any guarantee lodged in advance;

(f) if, after all those steps have been taken, the amount has not been recovered in full, the institution shall effect recovery by enforcement of a decision secured either in accordance with Article 72(2) of the Financial Regulation or by legal action.

The authorising officer shall send the debit note to the debtor with a copy to the accounting officer.'

8. Article 79 of the Implementing Regulation provides:

'Establishment of amounts receivable

To establish an amount receivable the authorising officer responsible shall ensure that:

(a) the receivable is certain and not subject to any condition;

(b) the receivable is of fixed amount, expressed precisely in cash terms;

(c) the receivable is due and is not subject to any payment time;

(d) the particulars of the debtor are correct;

(e) the amount to be recovered is booked to the correct budget item;

(f) the supporting documents are in order; and

(g) the principle of sound financial management is complied with …'

9. Article 83 of the Implementing Regulation states as follows:

'Recovery by offsetting

At any point in the procedure the accounting officer shall, after informing the authorising officer responsible and the debtor, recover established amounts receivable by offsetting in cases where the debtor also has a claim on the Communities that is certain, of a fixed amount and due relating to a sum established by a payment order.'

B — *International law*

10. Article 31 of the Vienna Convention on the Laws of Treaties [5] provides:

‘General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.’

5 — *United Nations Treaty Series*, Vol. 1155, p. 331.

II — Facts and background of the judgment under appeal

11. In the judgment under appeal, the Court of First Instance summarised the facts of the action before it as follows:

'7 Following the transfer of the capital of Nigeria from Lagos to Abuja, the Commission has, since 1993, rented a building in Abuja to house its delegation as well as, temporarily, the representations of a number of Member States, including the Hellenic Republic. Under an arrangement with those Member States (hereinafter the "Abuja I project"), the Commission was subletting a number of offices and provided a number of services to the representations in question. The Member States reached an agreement on the sharing of the costs relating to their representations. The contribution of the Hellenic Republic amounted to 5.5% of the total costs. Having decided that the Hellenic Republic had not paid its debts in that regard, the Commission, in 2004, proceeded to recovery by offsetting of the corresponding sums (see paragraph 44 below).

8 On 18 April 1994, the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Kingdom of the Netherlands, the Portuguese Republic and the Commission (hereinafter "the partners"), on the basis of Article J.6 of the Treaty on European Union (now, after amendment, Article 20 EU), concluded a Memorandum of Understanding (hereinafter "the initial memorandum") concerning the construction, for their diplomatic missions in Abuja, of a joint complex of embassies using joint support services (hereinafter "the Abuja II project"). The initial memorandum was supplemented, following the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, by an accession protocol.

9 Article 1 of the initial memorandum stipulates that the embassies of the participating Member States and the delegation of the Commission are to be distinct diplomatic missions which are subject to the Vienna Convention on Diplomatic Relations of 18 April 1961, and, with regard to the Member States, also subject to the Vienna Convention on Consular Relations of 24 April 1963.

10 Article 10 of the initial memorandum stated that the Commission would act, as coordinator of the Abuja II project, "on behalf of" the other partners.

11 Under Article 11 of the initial memorandum, the Commission is authorised to undertake architectural feasibility studies for the Abuja II project, as well as initial costings and design developments. That article also provides for the conclusion of an additional Memorandum

of Understanding covering "detailed building design, sharing of costs and individual participating partners legal interests in the premises on completion of the [Abuja II] project" (hereinafter the "additional memorandum"). Finally, Article 11 provides for the setting-up of a permanent Steering Committee, comprising representatives of all the partners and chaired by the Commission, to coordinate and control the Abuja II project. The permanent Steering Committee is to give regular reports to the Working Party on Administrative Affairs, established in the Council in the framework of the Common Foreign and Security Policy (CFSP) (hereinafter the "CFSP Working Party on Administrative Affairs").

12 Article 12 of the initial memorandum reads as follows:

"The [Abuja II] project will be directly financed, upon approval of the [additional memorandum] referred to in Article 11, by contributions from participating partners, reflecting the share of the project allocated to each partner. The contribution by the Commission will be paid from the appropriate budget line.

The costs of preparation of the project (phase 1) will be paid by the Commission from its administrative appropriations. These costs are estimated at ECU 140 000. If the [Abuja II] project is carried out, these costs will be reimbursed by contributions from all participating partners reflecting their individual share of the project."

13 Article 13 of the initial memorandum states:

"All participating partners guarantee, upon approval of the [additional memorandum], the payment of their total costs. The total costs for each partner will consist of:

(a) the full costs for each partner's individual part of the project,

(b) each partner's share of the costs for the common and public areas, calculated in the same proportion as its share of the sum of individual areas."

14 Article 14 of the initial memorandum provides that the Commission, with the agreement and participation of the partner Member States, will make all payments to third parties (contractors).

15 Article 15(1) of the initial memorandum stipulates:

"If a partner decides to withdraw from the [Abuja II] project by not signing the [additional memorandum] referred to in Article 11, the terms of this Memorandum of Understanding, including the financial obligations referred to in Articles 12 and 13, will cease to apply to the withdrawing partner."

16 On 29 March 1995, the Community, represented by the Commission, concluded a first contract for a joint venture between Dissing & Weitling arkitektfirma A/S, the winner of an architectural competition organised by the Commission for the Abuja II project, on the one hand, and COWIconsult Consulting Engineers and Planners A/S (hereinafter "the consultants"). Under Article 1 of that contract, the Commission confirms the intention of the participating partners to conclude a "contract" with the consultants. Under Article 2, the consultants undertake to begin design work for the project in question. The cost of that design work amounted to EUR 212 547.59.

17 At meetings between representatives of the responsible services of the foreign ministries of the Member States concerned and the architects, Dissing & Weitling arkitektfirma, the real needs of the representation of each Member State and their respective share of the expenditure were determined.

18 On 26 October 1995, the "Buildings" sub-working party, established in the framework of the CFSP, met. According to the minute of the meeting, the sub-working party requested that the Commission:

"…

— finish work on the [outline design] phase;

— make the necessary arrangements with the firm of architects for elaboration of the [scheme design phase] within the time-limits laid down by the [permanent Steering Committee];

— conclude the contracts [relating to the soil survey and investigation of the construction site], that latter [contract] being essential to the drafting of the additional memorandum;

— and advance the funding linked to these steps."

19 The sub-working party confirmed that "the sums paid by the Commission [would be] considered to be an advance on its share of the ad hoc autonomous fund, which has been agreed beforehand as the appropriate method of financing the [Abuja II] project" and that "[i]n the case of a failure to execute the project, the other partners shall reimburse the Commission under the procedures agreed for previous phases".

20 On 24 November 1995, the permanent Steering Committee (see paragraph 11 above) met. The minute of that meeting states that a "technical assistance" contract with the consultants, for a value of EUR 2 676 369 (hereinafter the "principal contract") had been submitted for approval to the Commission's Advisory Committee on Procurements and Contracts (ACPC). It also stated that "in the case of a failure to execute the project, the other partners shall reimburse the Commission".

21 On 27 December 1995, the Commission concluded the principal contract. That contract concerned the outline and scheme design phases of the Abuja II project (Articles 4.4 and 4.5), as well as possible detailed design (Article 4.6).

22 On 19 September 1996, the CFSP Working Party on Administrative Affairs approved the scheme design.

23 On 21 November 1996, the CFSP Working Party on Administrative Affairs asked the Commission to make ad hoc arrangements in order to allow the architects to start work on the detailed design. The Working Party indicated that the formal contract for that phase would be concluded after the additional memorandum had been finalised. At that meeting, the Commission informed the Working Party of the amount that it had advanced until 15 November 1996 for the preparation of the Abuja II project, namely approximately EUR 2.8 million.

24 On 24 February 1997, the CFSP Working Party on Administrative Affairs met again and decided not to wait for the additional memorandum to be finalised before proceeding to the drawing-up of the detailed design and contractual documents. The minute of that meeting contains the following resolutions:

"The Commission [is invited] to make the necessary arrangements with the architects for the elaboration of these documents and to advance the funds needed for these tasks according [to] modalities agreed for the project. Like on previous occasions, such advance payments by the Commission will later be reimbursed by other participants according to the procedures foreseen to this end in [the initial memorandum]."

25 In the months that followed, several Member States withdrew from the Abuja II project. On 28 April 1997, the CFSP Working Party on Administrative Affairs asked the Commission to "arrange bilaterally for the reimbursement of the Danish share of project-related costs incurred by the Commission on behalf of participating partners". A similar decision was taken following the withdrawal of Ireland in September 1997, and the withdrawals of the Portuguese Republic, the Republic of Finland and the Kingdom of Sweden.

26 On 12 November 1997, the Commission concluded with the architects an addendum to the principal contract, the object of which was the drawing-up of detailed plans and the reimbursement of travel expenses, for a value of EUR 1 895 696.

27 On 18 June 1998, the CFSP Working Party on Administrative Affairs mentioned the possibility of a withdrawal of the Kingdom of Belgium from the Abuja II project. It is clear from the minute of that meeting that the permanent Steering Committee pointed out that the Kingdom of Belgium would pay its share of the costs as agreed after the approval of the scheme design.

28 On 10 June 1998, a payment order for EUR 153 367.70, corresponding to the share of the Hellenic Republic in the initial phase of the project, namely 5.06% of the total costs, was sent by the Commission to the Hellenic Republic. The deadline for payment was 31 December 1998.

29 On 9 December 1998, the additional memorandum was signed by the Federal Republic of Germany, the Hellenic Republic, the French Republic, the Italian Republic, the Kingdom of the Netherlands, the Republic of Austria and the Commission. Article 11 of the additional memorandum provides for the creation of a special fund to finance the project.

30 Under Article 14 thereof, the additional memorandum was to be provisionally applied from the first day of the second month after its signature and enter into force on the first day of the second month following the date on which the Member States and the Commission declared that it had been ratified.

31 On 28 April 1999, the Commission issued a call for tender for the construction of the embassies of the Member States concerned and of the Commission

delegation (OJ, S 82/1999). It was stated therein that the embassy of the Hellenic Republic was to have an area of 677 m^2.

32 On 3 September 1999, the Commission "reiterated" its request of 1998 in the CFSP Working Party on Administrative Affairs that the Member States reimburse it for the sums paid to consultants for the scheme design phase. The Commission stated that some Member States had already paid the amounts due, but that others, including the Hellenic Republic, had not reimbursed it before the due date of 31 December 1998. The Commission added that a further invoice would be sent to all partners concerning, first, the costs of the detailed design (phase) and, second, the costs caused by the redesign of the complex after the withdrawal of the Kingdom of Belgium, the Kingdom of Spain and the Portuguese Republic.

33 On 20 September 1999, the permanent Steering Committee met to finalise the pre-qualification of construction companies. The representative of the Hellenic Republic signed the minute of the meeting. A call for tender was published in the Official Journal S 54/2000 of 17 March 2000.

34 By payment order of 17 February 2000, the Commission requested payment from the Hellenic Republic of EUR 168 716.94 for the drawing-up of the call for tender for the detailed design.

35 On 22 June 2000, the permanent Steering Committee decided to adopt a new project approach (hereinafter "Abuja Light"), which was made necessary by the withdrawal of the French Republic. The Abuja Light project provided in particular for the omission of common buildings and common technical installations, and a reduction of the construction area. The representative of the Hellenic Republic at that meeting indicated his agreement with the project, subject nonetheless to the approval of his superiors. On 29 June 2000, the Commission sent the minute of the meeting of 22 June 2000 to the Hellenic Republic and asked it for an official reply regarding the Abuja Light project.

36 On 5 September 2000, the Commission reiterated its request to the representatives of the Hellenic Republic. After another reminder dated 14 September 2000, the Commission sent a letter on 25 September 2000 to the Hellenic Republic by fax, giving a deadline for response of 30 September 2000 and stating that a failure to respond would be understood as a withdrawal from the project. On 2 October 2000, the Greek authorities informed the Commission that they were unable to give a formal answer regarding the Abuja Light

project. Consequently the Commission responded, on the same day, that it had asked the architects to proceed with the redesign of the Abuja II project without including the Hellenic Republic.

37 By letter of 28 January 2002, the Commission sent a debit note for EUR 1 276 484.50 to the Hellenic Republic for the construction costs of the Abuja II project. The Commission subsequently cancelled this debit note.

38 After setting up its own embassy in Abuja, the Hellenic Republic vacated the temporary buildings it was occupying as a partner of the Abuja I project on 13 July 2002.

39 By letter of 11 October 2002, the Commission formally notified the Hellenic Republic of the outstanding debit notes regarding the Abuja I and Abuja II projects and requested that it pay a total amount of EUR 861 813.87 and USD 11 000.

40 Following negotiations between the parties, the Commission reminded the Hellenic Republic, by letter of 31 January 2003, that the latter had not paid its debts relating to the Abuja I and Abuja II projects and requested that it pay a total amount of EUR 516 374.96 and USD 12 684.89 by the end of February 2003. The Commission added that, in the case of failure to pay by that deadline, it would enforce recovery of the amounts in question by all means available under the law.

41 During the months that followed, the Hellenic Republic and the Commission discussed the amounts of the sums due.

42 On 29 December 2003, the Hellenic Republic sent its Permanent Representative to the European Union a letter worded as follows:

"Given that the European Commission maintains its position regarding our country's debt for the Abuja II project by applying the offsetting procedure, we ask you to monitor that procedure and to inform us whether, and to what extent, it has been used, so that the Hellenic Republic can examine the possibility of taking action against the European Commission.

As regards the Abuja I project, we would note that we have admitted our debt up

to May 2002, while the amount claimed by the Commission covers the period up to July 2002 and after. Given that we have the intention to pay the aforementioned debt, we ask you to make contact with the competent financial services of the Commission in order to verify the elements of the exact total amount of our debt in euro up to May 2002."

43 On 16 February 2004, the Commission sent a letter to the Hellenic Republic identifying the latter's outstanding debts for the Abuja I and Abuja II projects. It is apparent from the table attached to that letter, which mentions in particular 11 unpaid debit notes for the Abuja I and Abuja II projects, that the Commission was requesting payment of EUR 565 656.80 from the Hellenic Republic. In that letter, the Commission stated:

"The Hellenic Republic forwarded the following claim for payment to the Commission:

2000GR161PO005OBJ 1 MAINLAND GREECE — Interim payment — EUR 4 774 562.67.

Under the payment conditions laid down in [the second subparagraph of Article 73(1) of the Financial Regulation], the Commission shall proceed to the offsetting of the debts and amounts receivable, taking interest for late payment into account, where necessary.

Where the claims that you have communicated are greater than the amounts offset, the net amount to which you are entitled will be transferred to you as soon as possible…"

44 On 10 March 2004, the Commission transferred funds to the Hellenic Republic under the Regional Operational Programme for mainland Greece. However, instead of paying an amount of EUR 4 774 562.67 (see paragraph 43 above), the Commission only transferred EUR 3 121 243.03. It thus proceeded to recovery by offsetting the amount not yet paid by the Hellenic Republic, of which EUR 565 656.80 concerned the Abuja I and Abuja II projects (hereinafter "the contested act").'

III — Proceedings before the Court of First Instance and the judgment under appeal

12. The Hellenic Republic brought an action against the act of offsetting before the Court

of Justice, which was later referred to the Court of First Instance and registered as Case T-231/04. In the proceedings before the Court of First Instance, the Hellenic Republic relied on a single plea in law, alleging infringement of the initial and additional memoranda of understanding and of the provisions of the Financial Regulation and Regulation No 2342/2002.

13. By the first part of the plea, the Hellenic Republic alleged infringement of the initial and the additional memoranda.

14. At the outset the Court of First Instance dealt with the question whether it had jurisdiction to hear the application given that one of the sums which was set off came within the scope of Title V of the EU Treaty, in respect of which the Court has no jurisdiction because such competence is not specified in Article 46 EU. However, since the Commission had proceeded to recover the disputed amounts by means of an act pursuant to the Financial Regulation and Regulation No 2342/2002, the Court of First Instance concluded that the act of offsetting was covered by Community law and in consequence was open to challenge under Article 230 EC. The Court of First Instance therefore considered that it had jurisdiction to hear the application.

15. The Court of First Instance then went on to examine the financial liability of the Hellenic Republic for the Abuja I and Abuja II projects.

16. With regard to the Abuja I project, the Hellenic Republic had acknowledged that it was liable for rent and operating costs, but disputed its liability for the total amount of EUR 72 714.47, for which the Commission was holding it liable. The Court of First Instance held that the Hellenic Republic had failed to show that the Commission had made an error regarding the amount payable. Moreover, the Hellenic Republic had not contested the numerous debit notes it had received and had not explained why it was not liable for the difference between the debt it acknowledged and the amount requested by the Commission. Thus the argument by which the Hellenic Republic denied its liability for the debts relating to the Abuja I project could not be accepted.

17. As to the Abuja II project, the Court of First Instance pointed out that for more than six years — from 18 April 1994 until 30 September 2000 — the Hellenic Republic, by its conduct, consistently gave the other partners to understand that it was continuing to participate in the Abuja II project. After the signature of the additional memorandum in December 1998, it took part in that project for almost another two years.

18. The Court of First Instance inferred from those facts that an assessment of the Hellenic Republic's obligations could not be based solely on the initial and the additional memoranda, but had also to take into account the expectations which that Member State's conduct had led its partners to entertain.

19. In that connection the Court of First Instance stated that the principle of good faith is a rule of customary international law, which is binding on the Community and on the other participating partners and that it is the 'corollary in public international law of the principle of protection of legitimate expectations'.

20. The Court of First Instance then noted that, since the Hellenic Republic had signed the initial memorandum, which it also ratified, it was one of the partners participating in the Abuja II project and as such owed certain enhanced obligations of cooperation and solidarity towards the other participants.

21. The Court of First Instance observed that the initial memorandum concerned the preliminary phases of the Abuja II project and that, once that phase had been completed, the partners had decided, before signing the additional memorandum, to carry on with the project and to bear the costs concerning the detailed design of the building. Indeed, at a meeting on 24 February 1997, which was attended by two representatives of the Hellenic Republic, the partners authorised the Commission to make the necessary arrangements with the architects to draw up detailed plans without awaiting the additional memorandum. The Court of First Instance found that, in so doing, the partners went further than the preliminary phases, thereby necessarily concluding an implied agreement to carry out the project. Since the partners decided at the meeting of 24 February 1997 to carry out the project, they were no longer free — in the view of the Court of First Instance — to withdraw from it without reimbursing their share of the preliminary and subsequent expenditure.

22. The Court of First Instance went on to observe that although certain Member States subsequently withdrew from the project the Hellenic Republic did not conduct itself in such a way as to give rise to doubts as to its participation and on 9 December 1998 the Hellenic Republic signed the additional memorandum, together with the other partners which had not withdrawn from the project. The Court of First Instance took note of the fact that it was not until the summer of 2000 that the Hellenic Republic, for the first time, showed reticence with regard to its continued participation.

23. According to the Court of First Instance, it is common ground that the Hellenic Republic was entitled to withdraw from the project but, in view of the evolution of the undertakings given after the initial phase, and notwithstanding the non-ratification of the additional memorandum, the Hellenic Republic could not withdraw without being held liable for the expenditure linked to its participation in the Abuja II project.

24. Moreover, the Court of First Instance held that the Hellenic Republic's financial obligations also arose from the terms of the initial memorandum, specifically from Article 15(1) thereof. Under that provision, a State can escape the financial obligations relating to the project by not signing the additional memorandum. However, the Court of First Instance suggested that, where a State has signed the additional memorandum (as in the case of the Hellenic Republic), the reverse is equally true.

25. As to the argument that the ratification of the additional memorandum is a necessary condition for its entry into force, the Court of First Instance held that, in accordance with Article 14 of the additional memorandum, the latter applied provisionally to the Hellenic Republic from 1 February 1999 until October 2000. For the Court of First Instance this implied that the Hellenic Republic could not disregard that provisional application by pleading that it had not ratified the additional memorandum.

26. Lastly, in relation to the Hellenic Republic's argument that the increase in the cost of the project could be regarded as a 'fundamental change of circumstances' that would relieve it of its financial obligations, the Court of First Instance held that in the case of a building construction project the increase in the cost of the project cannot be considered a 'fundamental change of circumstances'. Furthermore the Hellenic Republic had accepted the increase in the cost of the project, which was known since the beginning of the Abuja II project, and had not raised any objections when its share of the project had grown following the withdrawal of several Member States between 1997 and 1999.

27. For all those reasons the Court of First Instance held that the Hellenic Republic had to be held liable for all the costs relating to its participation in the Abuja II project.

28. The Court of First Instance therefore rejected the first part of the plea as unfounded.

29. By the second part of the single plea, the Hellenic Republic alleged infringement of the Financial Regulation and Regulation No 2342/2002.

30. As to the submission by the Hellenic Republic that manifest uncertainty surrounded the amount of, and justification for, the sums claimed in respect of both the Abuja I and the Abuja II projects, the Court of First Instance emphasised that offsetting under Article 73(1) of the Financial Regulation is not precluded where one of the debts is disputed or where there are negotiations between the Commission and the debtor regarding those debts, since otherwise the debtor could indefinitely delay the recovery of a debt.

31. The Court of First Instance considered that, even if there may have been uncertainty regarding the amounts receivable in 2002, the Commission came to a definite conclusion, following exchanges between the parties and a fresh examination of the case-file, as regards the amounts due in 2004 when it proceeded to recovery.

32. Furthermore, the Court of First Instance stated that the Hellenic Republic had not produced any evidence to show that the Commission had failed to follow the procedure laid down in the regulations in question or that the Commission was not justified in concluding that the amount receivable was 'certain, of a fixed amount and due'. Therefore the conditions laid down for recovery by offsetting were fulfilled at the time of the contested act.

33. Lastly, the Court of First Instance rejected the submission by the Hellenic Republic that the Commission was not authorised to proceed to recovery by offsetting because the amounts in issue were receivable by the partners, not by the Community, and the offsetting did not therefore pursue the protection of the Communities' financial interests, which is the objective of the abovementioned regulations. The Court of First Instance considered, on the contrary, that the amounts in issue were receivable by the Community because the Commission was acting as the agent of the partners participating in the Abuja I and II projects.

34. The Court of First Instance therefore rejected the second part of the single plea as unfounded.

IV — Forms of order sought before the Court of Justice

35. The Hellenic Republic claims that the Court should:

— allow the present appeal;

— set aside the judgment of the Court of First Instance in so far as it is contested;

— grant the application in accordance with the form of order sought;

— order the Commission to pay the costs.

36. The Commission contends that the Court should:

— declare the appeal inadmissible;

— in the alternative, declare the appeal manifestly unfounded and dismiss the appeal in its entirety;

— in any event, order the appellant to pay the costs.

V — The appeal

A — *Grounds of appeal*

1. First ground of appeal

37. The Hellenic Republic submits that the Court of First Instance misinterpreted Articles 12, 13 and 15 of the initial memorandum of understanding, Article 14 of the additional memorandum and the principles of good faith and of the protection of legitimate expectations.

38. The Hellenic Republic submits that the Court of First Instance erred in holding that the obligations of the Member States in connection with the Abuja II project were determined by the conduct of each Member State, rather than being of a purely contractual nature determined by the provisions of those two memoranda. On a proper construction of Articles 12, 13 and 15 of the initial memorandum of understanding and Article 14 of the additional memorandum, however, it has to be accepted that financial obligations had not arisen for the Hellenic Republic since it had merely signed the additional memorandum and had not ratified it. Accordingly, the Hellenic Republic had not approved that memorandum and, in consequence, the conditions for incurring financial obligations had not been met in the case of that Member State.

39. The Hellenic Republic submits that the principle of good faith is relevant only for the purposes of determining whether a Member State was taking part in the Abuja II project, not for determining the obligations resulting from such participation. Those obligations must be determined exclusively on the basis of the contractual provisions, the conduct of the Member State being of no relevance in that regard.

40. In that connection, the Hellenic Republic maintains that the Court of First Instance misconstrued Article 13 of the initial memorandum which, 'upon approval of the [additional memorandum]', requires 'the payment of their total costs' by the Member States concerned. The mere provisional application of the additional memorandum is not sufficient to give rise to the financial obligations laid down in Articles 12 and 13 of the initial memorandum, which require the approval of the additional memorandum.

41. The Court of First Instance also misinterpreted Article 14 of the additional memorandum which made it clear that it was necessary for the additional memorandum to be approved by ratification in order for it to enter into force and thus for financial obligations to arise for participating Member States.

2. Second ground of appeal

42. The Hellenic Republic submits that the Court of First Instance misinterpreted Article 15 of the initial memorandum of understanding in holding that, prior to signature of the additional memorandum, an agreement to implement the project was implicitly concluded by the partners on 24 February 1997 and that in this way Article 15(1) was set aside or at least amended.

B — *Admissibility*

1. First plea of inadmissibility

43. The Commission contends that the appeal is inadmissible on the ground that it is founded on the interpretation of memoranda of understanding which do not form part of Community law. Thus the appeal is not based on any of the grounds listed in Article 58 of the Statute of the Court of Justice as constituting a possible basis for an appeal.

44. Article 58 of that Statute provides that an appeal to the Court of Justice is to be limited to points of law. That provision is understood as confining the appellate jurisdiction of the Court of Justice to a review of the legality of the decision of the Court of First Instance.

45. In the present case, a difficulty arises from the fact that, as the Court of First Instance expressed it, 'the relations between the Commission and the Member States resulting from their cooperation in the design, planning and execution of the Abuja I and Abuja II projects come within the scope of Title V of the EU Treaty'. [6] However, as the Court of First Instance rightly noted 'under the EU Treaty, in the version arising from the Treaty of Amsterdam, the powers of the Court of Justice are exhaustively listed in Article 46 EU. That article makes no provision for any jurisdiction of the Court in respect of the provisions of Title V of the EU Treaty.' [7] Thus, the memoranda of understanding do not as such fall within the jurisdiction of the Court.

46. Nevertheless, with regard to the dispute before it, the Court of First Instance held that 'it is not disputed that the Commission proceeded to recover the disputed amounts by means of an act adopted pursuant to the Financial Regulation and Regulation No 2342/2002, so that the act of offsetting is covered by Community law'. [8]

6 — Paragraph 74 of the judgment under appeal.
7 — Paragraph 73 of the judgment under appeal.
8 — Paragraph 74 of the judgment under appeal.

47. The Court of First Instance further held that 'it is apparent from the scope of the Financial Regulation, and in particular Article 1 thereof, that the procedure of recovery by offsetting laid down in Article 73(1) thereof applies only to sums falling under the Community budget. It is not disputed that the Commission was authorised, under Article 268 EC, which provides for both Community expenditure and certain expenditure occasioned for the institutions by the provisions of the Treaty on European Union relating to the common foreign and security policy, to assign to the Community budget the costs incurred in respect of the Abuja I and Abuja II projects.' [9]

48. In my view, the Court of First Instance has drawn the correct logical inferences from Article 268 EC, which provides that not only Community expenditure, but also certain expenditure occasioned for the institutions by the provisions of the Treaty on European Union relating to the common foreign and security policy, is to be assigned to the Community budget. That provision is mirrored by Article 28(2) EU. Those provisions have had the effect of assimilating to a large extent the budgetary treatment of such expenditure with that of the expenditure incurred under the EC Treaty. [10] It follows that Article 73(1) of the Financial Regulation, which provides for the offsetting of debts to the Community against any debtor who in turn has a claim on the Community, is equally applicable to expenditure which has been occasioned for the institutions by the provisions of the Treaty on European Union relating to the common foreign and security policy and which has been assigned to the Community budget as it is to Community expenditure.

49. As an act of Community law, the act of offsetting is subject to review by the Community judicature under Article 230 EC. Such review, if it is to be effective and comprehensive, will often [11] require verification of the existence of the debts being set off. In the present case, the Court of First Instance had to construe both the initial and the additional memoranda, in so far as their interpretation was necessary in order to ensure comprehensive judicial review of the legality of the act of offsetting.

50. In my view, as a logical consequence of the fact that the Court of First Instance was entitled to make legal findings as regards the two memoranda of understanding and proceeded to do so, it is quite legitimate that, at the level of an appeal before the Court of Justice, a ground of appeal can concern the interpretation given to those

9 — Paragraph 111 of the judgment under appeal. As far as it is relevant for the present case, Article 268 EC states: 'Administrative expenditure occasioned for the institutions by the provisions of the Treaty on European Union relating to common foreign and security policy and to cooperation in the fields of justice and home affairs shall be charged to the budget. The operational expenditure occasioned by the implementation of the said provisions may, under the conditions referred to therein, be charged to the budget.'

10 — See Philippe Léger, *Commentaire article par article des traités UE et CE*, 2000, p. 1806.

11 — This would for example not be the case where the act of offsetting was challenged merely on procedural grounds.

two memoranda. However, while such a ground of appeal concerns a question of law which must be addressed in the present case in order to verify the legality of an act of Community law (the act of offsetting), that ground of appeal is not, in fact, based on an alleged misinterpretation of Community law. Since the grounds of appeal relied on by the appellant are not among those specified in Article 58 of the Statute of the Court of Justice, it must be determined whether the Court of Justice may nevertheless decide on grounds of appeal based on such questions of law.

51. In that connection, it should first be pointed out that, in the context of proceedings other than appeals, the Court of Justice has frequently been called upon to construe provisions of public international law. [12]

52. Secondly, it must be recalled that the purpose of the appeals procedure is to provide a system of two-tier legal protection which enhances the legitimacy of judicial decisions. [13]

53. Lastly, it cannot be ruled out that a restrictive reading of Article 58 of the Statute of the Court of Justice would have effects for other types of appeal, where questions of law are involved which do not, strictly speaking, concern the interpretation of Community law. This is the case of appeals against judgments made by the Court of First Instance pursuant to Article 238 EC. In such proceedings, the Court of First Instance is likely to make findings based mainly, if not exclusively, on the national law applicable to the contract containing the arbitration clause. If the Commission's plea based on Article 58 of the Statute of the Court of Justice were to be upheld in the present case in relation to findings concerning Title V of the EU Treaty, this might in my view also preclude an appellant of a judgment of the Court of First Instance pursuant to Article 238 EC from successfully invoking errors of law concerning findings made by the Court of First Instance under a given national law. To my mind, that is difficult to reconcile with the desire to provide a system of two-tier legal protection.

54. I am therefore of the view that the grounds of law relating to the interpretation of the memoranda of understanding must be regarded as falling within the ambit of the questions of law that are amenable to review by the Court in the context of this appeal.

55. The first plea of inadmissibility should therefore be rejected.

12 — See, for a recent example, in an infringement proceeding, C-459/03 *Commission* v *Ireland* [2006] ECR I-4635, and, in a preliminary reference, C-431/05 *Merck Genéricos* [2007] ECR I-7001.

13 — See D. Waelbroeck, 'Le transfert des recours directs au Tribunal de première instance des Communautés européennes — vers une meilleure protection des justiciables?', *La réforme du système juridictionnel communautaire*, Éditions de l'université de Bruxelles, 1994, at pp. 87 to 97.

2. Second plea of inadmissibility

56. The Commission contends that the appeal is inadmissible because the grounds of appeal are ineffective. In the Commission's view, the judgment under appeal would remain valid even in the unlikely event that the two grounds of appeal were regarded as admissible and well founded. More precisely, the Commission maintains that the appellant does not question the finding in paragraph 100 of the judgment under appeal to the effect that only the parties which withdrew from the project without signing the additional memorandum are liberated from their financial obligations, by contrast with those parties which signed the additional memorandum without ratifying it. Nor, according to the Commission, does the appellant dispute the finding at paragraph 101 of the judgment under appeal that the Hellenic Republic also incurs financial liability as a result of the provisional application of the additional memorandum.

57. Although the Hellenic Republic may not have specifically attacked the findings in paragraphs 100 and 101, it follows clearly from its argument concerning the first ground of appeal and the parts of the judgment under appeal to which it refers that the Hellenic Republic disagrees fundamentally with the Court of First Instance's findings in those paragraphs. First, it disputes the legal finding that, according to Article 15(1) of the initial memorandum, the signature of the additional memorandum of understanding entails financial obligations for the Hellenic Republic that differ from those of parties which have not signed the additional memorandum. Second, in so far as the Hellenic Republic rejects the possibility that financial obligations arose before the ratification of the additional memorandum, and explicitly argues that the Court of First Instance misconstrued Article 14 of the additional memorandum which provides for the provisional application of that memorandum, it is necessarily disputing that the provisional application of the additional memorandum to its signatories could have the effect of imposing financial obligations on the signatories of the additional memorandum who failed to ratify the latter. Clearly, therefore, the first ground of appeal also covers the findings of the Court of First Instance set out in paragraphs 100 and 101 of the judgment under appeal. In consequence, if the Court were to declare the first ground of appeal well founded, it would by implication be declaring that the findings made by the Court of First Instance in paragraphs 100 and 101 of the judgment under appeal are invalid.

58. This plea of inadmissibility must therefore be rejected.

C — *Substance*

1. First ground of appeal

59. The key issue in the present case is whether the Court of First Instance has

erred in finding that the Hellenic Republic had a financial debt towards the Community budget deriving from financial obligations incurred by virtue of its planned participation in the Abuja II project.

60. In the judgment under appeal, the Court of First Instance assessed the existence of financial obligations in the light of the wording of the initial and the additional memoranda, as well as in the light of the principle of good faith and protection of legitimate expectations. In addition, in paragraphs 100 and 101 of the judgment under appeal, the Court of First Instance found that a financial obligation had arisen on the basis of Article 15(1) of the initial memorandum (given that the Hellenic Republic had signed the additional memorandum), and from the fact that, under Article 14 of the additional memorandum, the latter was to apply provisionally with effect from the first day of the second month after its signature.

61. The Hellenic Republic submits that the determination of a financial obligation should be based exclusively on the terms of the contractual provisions and that the conduct of the Hellenic Republic may not be taken into account for the purposes of determining the existence of any financial obligations. In substance, the Hellenic Republic takes the view that the contractual clauses alone are relevant and that no financial obligation could arise before it had expressed its consent to be bound by the additional memorandum, that is to say, before it had ratified that memorandum.

62. At the outset it may be recalled, as I mentioned earlier with regard to the admissibility of the present application, that the two memoranda at issue were adopted under Title V of the Treaty on the European Union concerning the common foreign and security policy, commonly referred to as 'the second pillar' of the European Union. The provisions of that Title give rise to rights and obligations governed by international law. [14] This implies that, legally speaking, the memoranda are international agreements, [15] which, as is stated in their preamble, appear to have been concluded between the European Commission, on the one hand, and a number of States, including the Hellenic Republic, on the other. [16] It follows from the nature of those legal instruments that they must be construed in accordance with the rules of public international law. [17]

63. In this regard, it follows from customary international law, as codified [18] in Article 31 of the Vienna Convention on the Laws of

14 — See, to this effect, Maria-Gisella Garbagnati Ketvel, 'The jurisdiction of the European Court of Justice in respect of Common Foreign and Security Policy', *International and Comparative Law Quarterly*, vol. 55, January 2006, pp. 77 to 120, at p. 82; I. Macleod, I.D. Hendry and S. Hyett, *The External Relations of the European Communities*, Clarendon Oxford Press, 1996, at p. 424.

15 — To support this finding, it may be pointed to the fact that it appears that the memoranda require ratification by the parties before they can enter into force. Such formality is in principle reserved to conventional acts of public international law.

16 — While this kind of agreements certainly raise a number of interesting legal issues, such as the power of the Commission to conclude such agreements under Title V of the EU Treaty, it certainly goes beyond the scope of the present case to analyse them in further depth.

17 — As far as the additional memorandum is concerned, this finding does not, in my view, preclude the application, whenever they can be identified, of 'general principles common to the legal systems of the Member States of the European Community', as is stated in Article 13(2) of the additional memorandum, in conjunction with the rules of international law.

18 — It has indeed been recognised by the International Court of Justice that the principles embodied in Articles 31 and 32 of the Vienna Convention reflect customary international law (*Libya* v *Chad*, ICJ Reports 1994, p. 4, paragraph 41).

Treaties, that there are three main elements of treaty interpretation: (i) the text; (ii) the context; and (iii) the object and purpose.

64. In the case of the memoranda at issue, the provision which is most relevant for the purposes of determining the financial obligations of a withdrawing party is certainly Article 15(1) of the initial memorandum. It governs the effects of the withdrawal of a partner from the Abuja II project. It provides, in essence, that if a partner decides to withdraw from the Abuja II project by not signing the additional memorandum, the terms of the initial memorandum — including the financial obligations referred to in Articles 12 and 13 thereof — will cease to apply to the withdrawing partner.

65. It is clear that the Hellenic Republic questions the finding of the Court of First Instance in paragraph 100 of the judgment under appeal [19] in that it states in its application in the present case that the legal situation of a State which has signed but not ratified the additional memorandum, and which is therefore not a party to the additional memorandum, is no different — especially as regards the financial obligations — from the legal situation of a State which has never signed the additional memorandum.

19 — 'As the Hellenic Republic acknowledged (see paragraph 56 above), it is quite clear from Article 15(1) of the initial memorandum that a participating partner which does not sign the additional memorandum can escape the financial obligations relating to the project (see paragraph 15 above). However, is not disputed that the Hellenic Republic did sign the additional memorandum. In the circumstances of the case, Article 15(1) of the initial memorandum must be read exactly contrary to the interpretation given to it by the Hellenic Republic.'

66. In my view, that argument cannot be upheld.

67. First, Article 15(1) of the initial memorandum expressly refers to the signature of the additional memorandum, not to its ratification. That indicates that the parties agreed to attach special importance, in the context of the withdrawal of parties from the Abuja II project, to the signature of the additional memorandum rather than to its ratification. This choice of a future event as a starting point for the unfolding of certain legal effects is independent of the fact that only the ratification of the additional memorandum allows the additional memorandum to enter into force.

68. There is thus nothing to suggest that the additional memorandum of understanding had to be ratified and had to enter into force in order for the provisions on withdrawal laid down in Article 15(1) of the initial memorandum to unfold their legal effects.

69. In my view, the Court of First Instance was therefore entitled to make the finding, in paragraph 100 of the judgment under appeal, that the Hellenic Republic's financial obligations arise from the terms of the initial memorandum. To my mind, that is sufficient to mean that the judgment of the Court of First Instance should be upheld.

70. Second, and in support of that last conclusion, it is important to point out that, by its signature, the Hellenic Republic had agreed, in accordance with Article 14 of the additional memorandum, that the latter memorandum should apply provisionally with effect from the first day of the second month following the signature until its entry into force following ratification by the signatories or the notification to the other signatories of the intention not to ratify the agreement.

71. While, as I showed above, the signature of the additional memorandum is sufficient for Article 15(1) of the initial memorandum to unfold its legal effects, the fact that the additional memorandum was provisionally applied has additional significance for the purposes of determining whether the Hellenic Republic was already bound by financial obligations when it withdrew from the Abuja II project.

72. Although an international agreement does not in principle have binding effect on a signatory State until after ratification, [20] contracting parties can provide that an agreement will apply provisionally before its entry into force. [21] The purpose of such provisional application is to remove any incentive for signatories to defect from a treaty regime through delay or failure to ratify the treaty by forcing them to bear the costs of treaty obligations immediately at the time of the signing. [22]

73. Therefore the fact that the signatories of the additional memorandum agreed that it should have provisional application clearly shows their intention to accept the effects, whether financial or other, flowing from the provisional application of the memorandum until such time as a signatory notified the other partners of its intention not to ratify the additional memorandum.

74. I consequently consider that the Court of First Instance did not err in finding, in paragraph 101 of the judgment under appeal, that the Hellenic Republic could not disregard that provisional application by pleading that it had not ratified the memorandum.

20 — Normally a signatory will only be bound under international law after it has ratified the agreement according to the rules of its domestic law.

21 — Article 25 of the Vienna Convention on the Laws of Treaties.

22 — Alex. M. Niebrugge, 'Provisional application of the Energy Charter Treaty: the Yukos arbitration and the future place of provisional application in international law', *Chicago Journal of International Law*, summer 2007, vol. 8, pp. 355, 359.

75. It follows that the Court of First Instance could rightly establish in paragraphs 100 and 101 of the judgment under appeal that the existence of a financial obligation follows from Article 15(1) of the initial memorandum and the provisional application of the additional memorandum.

76. It is therefore doubtful whether, for the outcome of the present appeal, it is at all relevant whether the Court of First Instance erred in its application of the principles of good faith and of the protection of legitimate expectations in connection with Articles 12, 13 and 15 of the initial memorandum of understanding and Article 14 of the additional memorandum of understanding.

77. In any event and for the sake of completeness, it may be briefly stated that to my mind the Court of First Instance could also rely on the principle of good faith in support of the conclusion that a financial obligation existed for the Hellenic Republic as a result of its ratification of the initial memorandum and signature of the additional memorandum.

78. As the Court of First Instance correctly pointed out, the principle of good faith is a rule of customary international law which has been recognised by the Permanent Court of International Justice established by the League of Nations. [23] It is, to some extent, [24] the counterpart in public international law, of the principle of protection of legitimate expectations, existing in the Community legal order. [25]

79. It can be added that, more recently, the International Court of Justice stated that '[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith'. [26]

80. However, the precise definition [27] and role of the principle of good faith in international law are not easy to grasp. [28] Nevertheless, it appears to be common ground that the principle of good faith, when applied to conventional relations under international

23 — Judgment under appeal, paragraph 85.

24 — The equivalence between the two principles is in my view not total, since the principle of good faith in public international law appears to have a wider scope than the principle of legitimate expectations under Community law.

25 — I believe the use of the word 'counterpart' is more appropriate in this connection because it is more neutral than the word 'corollary', which the Court of First Instance used in paragraph 87 of the judgment under appeal in reliance on that Court's case-law in Case T-115/94 *Opel Austria* v *Council* [1997] ECR II-39, paragraph 93. Indeed, to my mind, the term 'corollary' necessarily implies that the Community law principle of protection of legitimate expectations precedes, in time and importance, the international law principle of good faith. In this connection reference may also be made to the Opinion of Advocate General Jacobs in Case C-162/96 *Racke* [1998] ECR I-3655, who, in point 76 thereof, did not use the term 'corollary' but put it as follows: '[i]n Opel Austria the international law principle of good faith was married to the Community law principle of protection of legitimate expectations'.

26 — *Australia* v *France* (Nuclear Tests Case), ICJ Reports 1974, p. 253, at p. 268.

27 — For a definition, see J.F. O'Connor, *Good Faith in International Law*, Dartmouth Publishing Company, 1991, p. 124.

28 — See inter alia Michel Virally, 'Review essay: good faith in public international law', *The American Journal of International Law*, 1983, Vol. 77, p. 130.

law, implies a reasonable and equitable application of conventional provisions to the circumstances of the individual case. The principle of good faith is especially a guiding principle for the interpretation of factual circumstances. [29]

81. What seems to be most relevant to the case before the Court is that good faith requires that the intention expressed be consistent with the real intention, and, more generally, that the legal reality be consistent with the legal appearance (that is to say, consistent with the appearances created by statements or conduct on the part of the legal actors). [30] This effect of the principle of good faith seems to coincide with the principle '*allegans contraria non est audiendus*', commonly known as the principle of estoppel under international law. [31]

82. In view of the various facts established by the Court of First Instance, by which the Hellenic Republic led the other parties to entertain the expectation from April 1994 until September 2000 that it would continue to participate in the Abuja II project, the Court of First Instance rightly referred to the principle of good faith in support of its conclusion that the Hellenic Republic could not withdraw without being held liable for the expenditure related to its participation in the Abuja II project.

83. That finding is supported — beyond that general understanding of the principle of good faith — by the existence of an enhanced obligation of good faith [32] which is incumbent upon Member States of the European Union as regards their relations with one another and with the institutions of the European Union as a result of their membership of the EU. [33] In the present case, such an obligation applied to the Hellenic Republic in its relations with the Commission and the partner States in the Abuja II project.

84. For all those reasons, I am of the view that the first ground of appeal is unfounded.

29 — Serge Sur states in *L'interprétation de droit international public*, Paris, Librairie générale de droit et de jurisprudence, 1974: 'l'interprétation des circonstances n'est pas soumise à des règles, encore moins à des méthodes très précises. Leur diversité constitue une base multiple et il ne reste qu'un principe, celui de la bonne foi.' See also Elisabeth Zoller, *La bonne foi en droit international public*, Pedone, 1977, p. 227.

30 — See Michel Virally, cited in footnote 28, at pp. 131 and 133.

31 — Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals*, ed. Martinus Nijhoff — The Hague, 1953, pp. 141–142; Lord McNair, *The Laws of Treaties*, Oxford Clarendon Press, 1961, p. 485. As explained by Lord McNair, this principle prevents a party who makes or concurs in a statement, on which another person relies to the extent of influencing its position, from later asserting a different state of affairs.

32 — See Elisabeth Zoller, cited in footnote 29, p. 157. The author considers that strengthened good faith (the author uses the expression 'bonne foi renforcée') exists in international organisations, applying both to Member States and the organs of the organisation.

33 — The existence of such a strengthened obligation to act in good faith is in my view reflected in Article 11(2) EU which provides that '[t]he Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity'. This is supported by the fact that, as far as the EC Treaty is concerned, it is recognised that a strengthened good faith seems to be at least implicitly reflected in the obligation of loyal cooperation contained in Article 10 EC (see, Vlad Constantinesco, 'L'article 5 CEE, de la bonne foi à la loyauté communautaire', *Du droit international au droit de l'intégration* (Liber amicorum Pierre Pescatore), Nomos, 1989, pp. 97–114, at p. 101).

2. Second ground of appeal

85. Since I consider that financial obligations had already arisen for Greece from the provisions of the initial and the additional memoranda, it appears irrelevant for the outcome of the present appeal whether the Court of First Instance was right in determining that such financial obligations also arose from an implied agreement concluded at the meeting of 24 February 2007.

86. The second ground of appeal is therefore ineffective and should be rejected.

87. It follows from all the foregoing considerations that the appeal must be dismissed in its entirety.

VI — Costs

88. Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings pursuant to Article 118 of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Commission has applied for costs against the Hellenic Republic, and the Hellenic Republic has been unsuccessful, the Hellenic Republic must be ordered to pay the costs.

VIIí — Conclusion

89. For the reasons set out above, I propose that the Court should:

(1) dismiss the appeal;

(2) order the Hellenic Republic to pay the costs.