OPINION OF ADVOCATE GENERAL MAZÁK

delivered on 12 June 2008 [1]

I — Introduction

1. By the present appeal, MASDAR (UK) Ltd ('Masdar') asks the Court of Justice to set aside the judgment of the Court of First Instance (Fifth Chamber) of 16 November 2006 in Case T-333/03 *Masdar* v *Commission* [2] ('the judgment under appeal'), by which that Court dismissed Masdar's action pursuant to Articles 235 EC and 288 EC seeking compensation for damage which it allegedly suffered by reason of non-payment for services provided by it in the context of Community assistance projects. It claims from the Commission payment of EUR 448 947.78plus interest.

2. The appeal essentially raises the question whether the Court of First Instance was correct to hold that in the factual and legal context of the present case, where under a Community assistance programme a subcontractor of a (lead) contractor of the Commission did not receive payment from the lead contractor for the services provided by it, the Commission cannot be held liable to compensate the subcontractor on the basis of the principles of prohibition of unjust enrichment, *negotiorum gestio*, the protection of legitimate expectations or the duty of diligence.

II — Factual background

3. In the judgment under appeal, the facts giving rise to the present dispute were set out as follows:

'2. At the beginning of 1994, under the Community programme of Technical Aid to the Commonwealth of Independent States (TACIS), contract MO.94.01/01.01/B002 was signed between the Commission, represented by the Deputy Director-General of Directorate-General (DG) External Economic Relations, and Helmico SA, represented by its managing director.

1 — Original language: English.
2 — [2006] ECR II-4377.

That contract ("the Moldova contract") was entitled "Assistance to Organisation of a Private Farmers' Association" under the project reference TACIS/FD MOL 9401 ("the Moldova project").

3. In April 1996 Helmico and the applicant entered into an agreement whereby Helmico subcontracted to the applicant the provision of some of the services provided for under the Moldova contract.

4. On 27 September 1996 TACIS contract RU 96-5276-00 was signed between the Commission, represented by the Deputy Director-General of DG External Relations, and Helmico, represented by its managing director. By virtue of that contract ("the Russian contract") Helmico undertook to provide services in Russia for a project entitled "Federal Seed Certification and Testing System" with project number FD RUS 9502 ("the Russian project").

5. In December 1996 Helmico and the applicant entered into a subcontract for the Russian project in substantially the same form as the agreement signed in April 1996 in relation to the Moldova project.

6. Towards the end of 1997 the applicant began to be concerned about the fact that payments from Helmico were late. The excuse proffered by Helmico was that the delay was on the side of the Commission. The applicant contacted the Commission's services and discovered that they had paid all Helmico's invoices up to that date. Upon further investigation the applicant discovered that Helmico had been informing it late or incorrectly of the payments received from the Commission ….

7. On 2 October 1998 a meeting took place between a director of Masdar and representatives of the Commission.

8. On 5 October 1998 the Commission sent a letter by fax to Helmico. In that letter, the Commission stated that it was concerned about the fact that differences of opinion among the members of the Helmico consortium could endanger the implementation of the Russian project and stated that adherence to the terms of the Russian contract and the successful completion of the Russian project were of great concern to it. It requested from Helmico an assurance in the form of a declaration signed jointly by Helmico and the applicant that the two parties were in complete agreement about adherence to the terms of the Russian contract and that the Russian project would be completed within the time-limits set. The letter

stated that, failing receipt of such an assurance by Monday 12 October 1998, the Commission would explore alternative means for safeguarding the completion of the project according to the terms of the Russian contract.

9. By fax of 6 October 1998, Helmico replied to the Commission's services stating that differences of opinion between consortium members had been settled and that the successful completion of the Russian project was in no danger whatsoever. That reply stated that the consortium members had agreed that all future payments, including those of invoices currently being processed in respect of the Russian project, should be made to a named bank account of the applicant and not to Helmico's bank account. It also stated as follows:

"It has also been agreed that contract management should be transferred to Mr S, Chairman of Masdar, as of today. Could you please come back to us as soon as possible, confirming your acceptance of these amendments."

10. That letter was signed by Mr T as managing director of Helmico and endorsed in manuscript: "Agreed Mr S, Masdar, 6 October 1998".

11. A letter written in similar terms bearing the same date and countersigned by the chairman of Masdar was sent by Helmico to the Commission in relation to amounts payable in respect of the Moldova contract.

12. On 7 October 1998 Helmico sent the Commission two further letters, signed by Mr T and countersigned by Mr S on behalf of Masdar. …

13. On 8 October 1998 Helmico wrote two letters to the corresponding task managers in the Contracts department of the Commission requesting that all future payments under the Russian contract and the Moldova contract be made to a different account in Helmico's name in Athens. Those letters ended with the following statement:

"This instruction is irrevocable by Helmico without written approval from the chairman of Masdar, Mr S. We would be grateful if you could inform Masdar of payment status, and when payments are made."

14. On 8 October 1998 Helmico and the applicant signed an agreement giving Masdar's chairman power of attorney to transfer funds from the two accounts mentioned in the letters of 7 and 8 October addressed to the Commission.

15. On 10 November 1998 the Commission issued its end-of-project report in respect of the Russian project. Of the six heads of assessment, four were assessed "excellent", one "good" and one "generally adequate". On 26 February 1999 the Commission issued its end-of-project report on the Moldova project, for which two heads of assessment were "good" and four were "generally adequate".

16. In February 1999 Commission officials undertook an audit of the Moldova project and the Russian project. The audit of the Russian project was completed in April 1999. The audit of the Moldova project had not been completed by July 1999.

17. On 29 July 1999 the Commission sent a letter to the applicant in which it stated that the Commission had been notified of the existence of financial irregularities between Helmico and the applicant during the performance of the Russian contract and the Moldova contract and had consequently suspended all payments which had not yet been made; it had initiated a full audit in order to determine whether Community funds had been misappropriated under the Russian contract and the Moldova contract. Being conscious of the applicant's financial difficulties, the Commission informed the applicant that it proposed to pay EUR 200 000 to the account of Helmico referred to in that company's instructions dated 8 October 1998.

18. The sum of EUR 200 000 was paid in August 1999 to that account and was then transferred to the account of the applicant.

19. From December 1999 to March 2000 the chairman of Masdar wrote to various Commission officials, including the Member of the Commission responsible for External Relations, Mr Patten. Among several points raised was the question of payment for the services provided by Masdar.

20. On 22 March 2000 the Director-General of the Common Service for External Relations of the Commission wrote to the chairman of Masdar saying:

"After intensive consultation (in which we considered several options, including a final settlement of both contracts by means of additional payments in favour of Masdar, calculated on the basis of work done and expenditure incurred by you), it has been finally decided by the Commission services to proceed with recovery of the funds previously paid to the contractor, Helmico. Legally, it seems that any direct payments to Masdar (even through Helmico's bank account over which you have power of attorney) would be seen, in case of insolvency of Helmico, as a collusive action by Helmico trustees or creditors; it would be furthermore uncertain whether in a legal dispute between Helmico and Masdar, funds paid by the European Commission could definitely remain with Masdar, in accordance with the Commission's best intentions."

21. On 23 March 2000 the Commission wrote to Helmico informing it that it declined to pay the outstanding invoices and requesting the return of funds totalling EUR 2 091 168.07. The Commission took that course of action having discovered that Helmico had been guilty of fraud in the performance of the Moldova contract and the Russian contract.

22. On 31 March 2000 the applicant brought an action against Helmico before the High Court of Justice of England and Wales, Queen's Bench Division, by which it claimed payment for the services subcontracted under the Moldova contract and the Russian contract totalling EUR 453 000.

23. On 4 April 2000 the Commission issued two formal recovery orders to the attention of Helmico pursuant to Article 28(2) of the Financial Regulation [of 21 December 1977 applicable to the general budget of the European Communities (OJ 1977 L 356, p. 1)]. The details of those documents were communicated to the applicant's lawyers on 1 February 2002 (see paragraph 36 below).

24. On 15 June 2000 the chairman of Masdar sent a fax to the Member of the Commission responsible for External Relations in which he stated:

"18 months ago we alerted the European Commission to the problems which we were having with our partner Helmico on the above two projects. We were given assurances that if we continued with the projects the European Commission would ensure we were paid for our services. We continued to fund and implement the two projects on your

behalf at considerable incremental cost despite the fact that we already realised that Helmico had defrauded Masdar and that these funds would probably be unrecoverable."

25. The reply of the Member of the Commission by letter of 25 July 2000 confirms the position of the Commission expressed in the letter of 22 March 2000.

26. On 5 February 2001 the chairman of Masdar sent another fax to the Member of the Commission responsible for External Relations arguing that the applicant was party to the Russian contract and the Moldova contract concluded with the Commission, and that at the meeting of 2 October 1998 it had been given an assurance that it would be paid if it continued with the Russian project and the Moldova project.

27. In April 2001 the applicant contacted the Commission in order to discuss the possibility of the Commission paying Masdar directly for the work it had done and invoiced to Helmico.

28. By letter of 8 May 2001 the Member of the Commission responsible for External Relations repeated the Commission's view that the applicant was not party to the Russian contract and the Moldova contract.

29. On 21 May 2001 the applicant's lawyers had a meeting with the Commission's services to discuss the possibility of payment being made to the applicant directly for the services it had provided.

30. On 1 August 2001 the applicant's lawyers repeated the request for an ex-gratia payment from the Commission. The applicant asked for payment of EUR 448 947.78 or, in the alternative, EUR 249 314. The first figure corresponded to the total invoiced by Helmico to the Commission which remained unpaid, and the second corresponded to the sum in respect of work done after the discovery of the fraud.

31. On 28 August 2001 a meeting took place between the applicant's lawyers and the Commission's services to discuss the possibility of payment being made to the applicant directly for the services it had provided.

32. On 10 October 2001 the applicant's lawyers sent the Commission a copy of a report prepared in 1998. It was suggested that that report might assist the Commission's services in tracing the directors of Helmico.

33. On 16 October 2001 the Commission replied, stating that the information had been forwarded to the competent services in DG Budget, to the European Anti-Fraud Office and to the financial and contractual unit dealing with TACIS programmes, and that the Commission would take all steps to pursue the directors of Helmico.

34. On 16 October 2001 the applicant's lawyers wrote to the Commission claiming that there was a tacit agreement between the Commission and the applicant that, as from 8 October 1998, the Commission would pay the applicant provided the latter took steps to ensure that the Russian project and the Moldova project were completed. The main arguments advanced in that letter sought to demonstrate that the Commission had accepted that in 1998 the applicant had become the lead contractor of the Russian project. That letter ends with the following statement:

"I would be grateful if you could let me know whether Commission services accept the argument set out in this letter, and if so, whether they are prepared to make an interim payment to Masdar Ltd of EUR 279 711.85 pending completion of the recovery proceedings against Helmico."

35. The arguments put forward by the applicant's lawyers were rejected by letter of the Commission dated 13 November 2001. The letter ended with the following statement:

"The Commission will proceed to recover the funds received by Helmico from Helmico's representatives on the basis of the recovery order. Depending on the

outcome of the recovery, further steps with regard to the use of the amount recovered, if any, may be considered."

36. On 1 February 2002 in a written reply to a request from the applicant's lawyers, the Commission explained that two formal recovery orders had been issued on 4 April 2000 to the attention of Helmico, one with respect to the Moldova contract for an amount of EUR 1 236 200.91 and the second with respect to the Russian contract for an amount of EUR 854 967.16, being a total of EUR 2 091 168.07.

37. In a letter of 27 February 2002 addressed to the Commission, the applicant's lawyers observed that the amounts in the two formal recovery orders corresponded more or less to the amounts listed as having been paid by the Commission to Helmico. They suggested that the Commission did not therefore consider it necessary to issue recovery orders for the amounts billed by Helmico to the Commission but not paid by the latter.

38. On 11 March 2002 the Commission wrote to the applicant's lawyers confirming that the two formal recovery orders issued by the Commission on 4 April 2000 to the attention of Helmico did not cover the amounts billed by Helmico to the Commission but not paid by the latter.

39. On 17 December 2002 the Legal Service of the Commission sent to the applicant's lawyers a schedule of the amounts invoiced by Helmico to the Commission, the dates and amounts of payment and the amounts of payments not made.

40. On 18 February 2003 a meeting was held between the applicant's lawyers and the Commission's services.

41. On 23 April 2003 the applicant's lawyers wrote to the Commission by registered letter which ends with the following statement:

"… unless the Commission services are able to come forward, by 15 May 2003, with a concrete proposal for remunerating my client for the services provided, an application will be made to the Court of First Instance seeking reparation from the Commission pursuant to Articles 235 EC and 288 EC (formerly Articles 178 and 215 of the EC Treaty)."

42. By fax dated 15 May 2003 the Commission wrote to the applicant's lawyers suggesting that a meeting should be held to discuss a possible amicable settlement on the basis of which the Commission would pay the applicant EUR 249 314.35 for the work done after discovery of Helmico's fraud, on condition that the applicant provide evidence of an agreement that it would be paid directly by the Commission if it completed the Russian project and the Moldova project.

43. By registered letter of 23 June 2003 the applicant's lawyers replied to the Commission rejecting the Commission's suggestion as a basis for further negotiations, setting out details of the applicant's claim and the terms and conditions on which it would agree to a meeting.

44. That registered letter was followed by a fax dated 3 July 2003 in which the applicant's lawyers requested a reply from the Commission on the possibility of setting up a meeting, before 15 July 2003, on the terms proposed, stating that if such a meeting were not possible an application would be made to the Court of First Instance.

45. By letter dated 22 July 2003 the Commission replied that it did not see any possibility of satisfying the applicant's requests for payment.'

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

4. By application lodged on 30 September 2003, Masdar brought an action for damages before the Court of First Instance, basing its claim for compensation on the principle of the prohibition of unjust enrichment (*de in rem verso*), the principle of *negotiorum gestio*, a breach of the principle of the protection of legitimate expectations and, finally, the fact that the acts of the Commission constitute fault or negligence which caused it loss.

5. An amicable settlement not having been reached by the parties, by the judgment under appeal the Court of First Instance dismissed the action and ordered Masdar to pay the costs on grounds which can be summarised as follows.

6. The Court first set out the conditions under which the Community can, in accordance with settled case-law, incur non-contractual liability under the second paragraph of Article 288 EC for both unlawful conduct and conduct of the Community institutions which has not been shown to be unlawful.

7. It then noted that Masdar's claim for compensation is based, in so far as it relates to unjust enrichment and *negotiorum gestio*, on rules on non-contractual liability which do not entail unlawful conduct on the part of the Community institutions and, in so far as it relates to breach of the principle of the protection of legitimate expectations and fault or negligence of the Commission, on the body of rules on the non-contractual liability of the Community for unlawful conduct.

8. The Court continued by examining the claims based on the *de in rem verso* (unjust enrichment) and *negotiorum gestio* actions.

9. Accepting that a claim for compensation can, in principle, be based on those principles, the Court went on to determine whether the conditions governing the *de in rem verso* action or the action based on *negotiorum gestio* were satisfied in the case in question.

10. It found in that regard that it was clear that in the factual and legal context of that case actions based on unjust enrichment or *negotiorum gestio* could not succeed.

11. In reaching that conclusion, the Court stated that according to the general principles common to the laws of the Member States, those actions could not succeed where the justification for the advantage gained by the enriched party or the principal derives from a contract or legal obligation and that it was generally possible to plead such actions only in the alternative, that is to say, where the injured party had no other action available to obtain what it is owed.

12. In that regard, the Court emphasised the contractual framework in place in the case, namely the contractual relationship between the Commission and Helmico on the one hand and between Helmico and Masdar on the other. It held, in particular, that it was unquestionably Helmico's responsibility to

pay for the work carried out by Masdar and to take on any liability arising from non-payment, and that the possible insolvency of Helmico was no reason for the Commission to take on that liability.

13. The Court concluded that any enrichment of the Commission or impoverishment of the applicant, as it had arisen under that contractual framework, could not be described as being without cause.

14. Similarly, the Court held that the conditions governing the civil action based on *negotiorum gestio* were manifestly not satisfied in the case in question. In that regard, it took the view that as Masdar contacted the Commission services before undertaking to continue the projects, the performance by Masdar of its contractual obligations with regard to Helmico could not reasonably be described as benevolent intervention in another's affairs, and also found that Masdar's argument was in conflict with the principles of *negotiorum gestio* as regards the principal's awareness of the manager's action.

15. Adding that it had not been established that Masdar suffered unusual and special damage going beyond the limits of economic and commercial risks inherent in its operations, the Court concluded that the claims for compensation based on unjust enrichment and *negotiorum gestio* must be dismissed as unfounded.

16. As regards, next, the alleged infringement of the principle of the protection of legitimate expectations, the Court dismissed that plea on the grounds that in its view the examination of the evidence available did not reveal precise assurances given by the Commission which could give rise to reasonable expectations on the part of the applicant, enabling it to rely on that principle.

17. Furthermore, the Court rejected the arguments of Masdar alleging fault or negligence on the part of the Commission as unfounded, holding, essentially, that they were not sufficiently substantiated as regards the duty of care alleged and that no causal link between breach of the alleged obligation and the damage pleaded had been shown.

18. Finally, the Court also dismissed an application by Masdar for a witness to be heard — namely Mr W, a director of

Masdar — regarding the content of the meeting of 2 October 1998. It held, in that regard, that even if such a testimony were to establish, as Masdar had indicated, that the Commission and Masdar had a common intention that Masdar complete the projects concerned, that did not suffice to prove the existence of precise, unconditional and consistent information that the Commission undertook to pay the applicant directly from that date.

IV — Forms of order sought before the Court

19. Masdar claims that the Court of Justice should:

— set aside the judgment under appeal;

— order the Commission to pay to the appellant the sum of EUR 448 947.78 claimed by the appellant at first instance or, failing that, the sum of EUR 249 314.35 or such other sum as the Court considers appropriate, plus interest on the sum chosen;

— order the Commission to pay the costs of the present proceedings and of the proceedings before the Court of First Instance.

20. The Commission contends that the Court should:

— dismiss the appeal;

— in the alternative, should the Court set aside, in whole or in part, the judgment under appeal, dismiss the appellant's claim for monetary compensation;

— order the appellant to pay the costs of the present proceedings and of the proceedings before the Court of First Instance;

— in the alternative, should the Court find for the appellant, order the appellant to bear one third of its own costs of the proceedings before the Court of First Instance.

V — The appeal

A — *Preliminary remarks*

21. Before embarking on an analysis of the grounds of appeal raised by Masdar, some preliminary remarks appear appropriate.

22. As regards, first of all, the context of the present case, it should be noted that it is, as Masdar expressly confirmed at the hearing in the present proceedings, not a matter of dispute between the parties that no direct contractual relationship was established between Masdar and the Commission and that such contractual relationships regarding the performance of services under the Community assistance programmes at issue existed only between Helmico and the Commission on the one hand and between Helmico and Masdar on the other.

23. As appears, however, from the information provided by the parties, Helmico, which owes Masdar payment for the performance of services which it had subcontracted to it, must be considered to be insolvent, and its directors are not to be found. Legal proceedings brought by Masdar before the courts of England and Wales, designated under the subcontracts concerned as having jurisdiction over any contractual disputes, to obtain the payment owed to it by Helmico have been stayed indefinitely.

24. It is against that background that Masdar brought the action before the Court of First Instance *against the Commission* claiming, under the head of compensation for damage suffered, inter alia payment for the services supplied [3] plus interest.

25. As Masdar itself set out at the hearing in the present appeal, that claim against the Commission is essentially based on two main lines of argument, namely, first, that the Commission had given assurances to it as to the payment for the services provided and, secondly, that even in the absence of such assurances the Commission has incurred non-contractual liability to pay under the heads, essentially, of unjust enrichment (*de in rem verso*) and *negotiorum gestio*.

3 — The payment claimed corresponds to the total value of the services covered by the invoices in respect of which payment was suspended: see paragraphs 71 and 98 of the judgment under appeal.

26. It should be observed in that regard that, as was made clear by the parties at the hearing, it is not disputed in the present case, as the Court of First Instance suggested in the judgment under appeal, that a claim for damages can, in principle, be based on the abovementioned principles, which both the Court of First Instance in the judgment under appeal and the parties described as relating to the rules on non-contractual liability. Accordingly, the existence in the Community legal order of the principles relied upon by Masdar has not, as such, been objected to or discussed in the present proceedings.

27. Rather, the present appeal turns on the question whether the Court of First Instance was correct in holding that, in any event, on the facts of the case Masdar's claim based on those principles could not succeed.

28. More specifically, Masdar put forward seven pleas in support of its appeal.

29. By its first plea, Masdar alleges that the Court of First Instance erred in law when it found that Masdar had merely acted pursuant to its contractual obligations towards Helmico, as a result of which that Court dismissed the claims founded on unjust enrichment and *negotiorum gestio*. In its second plea, it argues that irrespective of that question the Court of First Instance erred in law by failing to take into consideration both the fact that the Commission had powers of recovery and the way in which those powers were exercised by the Commission. The third plea is directed against the findings of the Court of First Instance that Masdar cannot be said to have acted benevolently, that the Commission was able to manage the project itself and that there is a requirement that the person acting under the principle of *negotiorum gestio* must necessarily act without the knowledge of the principal. By its fourth plea, Masdar claims that the findings of the Court of First Instance on the pleas of unjust enrichment and *negotiorum gestio* on the one hand, and the plea of legitimate expectations on the other, are inconsistent. By its fifth plea, it maintains that in rejecting the claim based on negligence or fault liability, the Court of First Instance erred in considering that insufficient argument had been adduced by Masdar. Lastly, by its sixth and seventh pleas, Masdar claims that the Court of First Instance erred in holding that no assurances had been given to it by the Commission.

30. Since the first, second and third pleas all relate to the claim based on unjust enrichment and *negotiorum gestio*, they will be examined together. The sixth and seventh pleas will also be examined together, as they both challenge the finding of the Court of First Instance that no assurances were given by the Commission, leading to the dismissal of the claim regarding infringement of the principle

of the protection of legitimate expectations. Those two pleas should, moreover, be dealt with before the fourth plea, in which Masdar argues that those findings of the Court of First Instance are inconsistent with the findings relating to unjust enrichment (*de in rem verso*) and *negotiorum gestio*.

B — *Pleas*

1. The first, second and third pleas, concerning the findings of the Court of First Instance on the claim based on unjust enrichment (*de in rem verso*) and *negotiorum gestio*

(a) Main arguments

31. By its first plea, Masdar claims that the Court of First Instance erred in law when it found in paragraphs 98, 99 and 101 of the judgment under appeal that it had merely acted pursuant to its contractual obligations towards Helmico. Having apparently accepted, in paragraphs 146 to 148 of the judgment under appeal, that Masdar was not willing, at the meeting of 2 October 1998, to continue with the performance of its contracts with Helmico, the Court of First Instance should have examined whether Masdar was still under a legal obligation to continue performance of the subcontracts. Under English law, the fraud and substantial failure on the part of Helmico to pay Masdar constituted a sufficiently serious breach which entitled it to treat the contracts as being at an end and to sue for monies owed and damages for Helmico's non-performance. The failure to take account of Masdar's entitlement to terminate the subcontract also amounts to a procedural error.

32. Under the head of its second plea, Masdar contends that, irrespective of whether it acted pursuant to its contractual obligations towards Helmico, the Court of First Instance erred in law by failing to take into consideration, in determining whether the Commission had been unjustly enriched, the fact that the Commission was not in the position of an ordinary contracting party due to its powers of recovery under the Financial Regulation, allowing it to empty previously existing contractual relations of their content. It

notes, in particular, that in all of its reasoning for rejecting the claims based on unjust enrichment and *negotiorum gestio*, the Court of First Instance did not take account of the fact that the Commission waited until April 2000 before it issued a recovery order against Helmico, after Masdar had completed the work.

33. Finally, by its third plea, Masdar challenges, more specifically, certain aspects of the findings of the Court of First Instance as to *negotiorum gestio*. In its view, the reasoning at paragraphs 101 to 103 of the judgment under appeal on *negotiorum gestio* is inconsistent and manifestly irreconcilable with the facts.

34. First, it contends that the Court of First Instance erred in holding that Masdar cannot be said to have acted benevolently. It submits in that regard that its obligations towards Helmico were at an end and the mere fact that Masdar contacted the Commission's services in October 1998 does not prevent its subsequent actions from being benevolent, as no formal document was drawn up at the meeting of 2 October 1998.

35. Secondly, it challenges the finding that the Commission was able to manage the projects itself. It is common knowledge that the reason why the Commission awards projects such as these to external contractors is precisely because it does not have the internal resources to execute such projects. In addition, the Commission did not tell Masdar that it was terminating the contract and going to look for an alternative contractor.

36. Thirdly, Masdar claims that the Court of First Instance erred in considering that the principle of *negotiorum gestio* cannot apply when the principal is aware of the need to take action. While it is true that many cases of that principle arise where the principal does not know of the need to take action to prevent loss to himself, there is no logical reason why the principal should be ignorant of such need.

37. The Commission submits that the first plea is inadmissible and in any event manifestly unfounded. It notes that Masdar has never claimed before the Court of First Instance that it had terminated its contracts with Helmico and that it is clear from the file that it did in fact not terminate them. Under English law it is true that a fundamental breach may entitle the innocent party to terminate the contract, but it is not that

breach as such that puts an end to it. It is also not correct that the Court of First Instance did not rule on that question, since it stated, at paragraph 103 of the judgment under appeal, that Masdar continued to perform its contracts with Helmico.

38. As regards the arguments advanced concerning the powers of recovery of the Commission, the Commission submits that the Court of First Instance did reply in substance to all of the arguments put forward in support of the contention that the Commission had been unjustly enriched. The action based on unjust enrichment could not succeed on the grounds that the Commission derived its advantage from its contract with Helmico, and Masdar was under an obligation to act owing to its subcontract with that party.

39. Finally, in rebuttal of the third plea, the Commission observes, in particular, that the conclusion that the Commission was able to manage its own affairs is a question of fact, not open to be called into question on appeal, and that, in any event, the finding in paragraph 97 et seq. of the judgment under appeal that Masdar acted pursuant to its contracts with Helmico is sufficient to reject the arguments on *negotiorum gestio*.

(b) Assessment

40. First of all, it should be recalled that in the Community legal order the appeals procedure laid down in Article 225 EC is not designed to provide for a general re-examination by the Court of Justice of the application brought before the Court of First Instance.

41. In fact, according to settled case-law, the jurisdiction of the Court of Justice in an appeal is limited to a review of the findings of law on the pleas argued before the Court of First Instance. [4] Consequently, the Court of Justice has jurisdiction, in such proceedings, solely to examine whether the argument put forward in the appeal identifies an error of law vitiating the judgment under appeal. [5] To that effect, moreover, under Article 225 EC, the first paragraph of Article 58 of the Statute of the Court of Justice and Article 112(1)(c) of the Rules of Procedure of the Court of Justice, an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal. [6]

4 — See, to that effect, Case C-348/06 P *Commission* v *Girardot* [2008] ECR I-833, paragraph 49, and Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 59.

5 — See, to that effect, *Commission* v *Girardot*, cited in footnote 4, paragraph 49; Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraph 35; and Case C-76/01 P *Eurocoton and Others* v *Council* [2003] ECR I-10091, paragraph 47.

6 — See, to that effect, inter alia, Case C-7/95 P *John Deere* v *Commission* [1998] ECR I-3111, paragraph 19, and Case C-208/03 P *Le Pen* v *Parliament* [2005] ECR I-6051, paragraph 39 and the case-law cited therein.

42. Accordingly, I shall not assess below the overall approach of the Court of First Instance as regards the principles of unjust enrichment and *negotiorum gestio* referred to, primarily, in the first three pleas, in particular their application under the head of liability for conduct not shown to be unlawful, [7] since that question has not been raised in the present appeal. [8]

43. I consider it appropriate, nevertheless, before examining the merits of the concrete pleas put forward by Masdar, first to make a few general remarks on the concepts of unjust enrichment and *negotiorum gestio* in order to put the findings of the Court of First Instance challenged here into context.

44. As regards non-contractual liability, the second paragraph of Article 288 EC imposes on the Community the obligation to make good any damage caused by its institutions 'in accordance with the general principles common to the laws of the Member States'.

45. As Masdar itself has recognised in its application, that provision cannot be understood as meaning that the principles governing non-contractual liability applied by the Community Courts must — or even could — exactly correspond to those existing in the laws of all the Member States or that they could somehow be deduced 'mechanically' as common denominators from those laws. [9] To a certain extent, therefore, as is generally the case with general principles of law as a legal source, until there is settled case-law on the matter discussing the concrete content of such a principle can be very much like discussing the shape of a ghost. The solution applied by the Court of First Instance in the framework of Article 288 EC should, however, be inspired by the basic characteristics of the relevant concepts in the national legal orders, adapted, where necessary, to meet the specific requirements of Community law.

46. That being said, as to the *de in rem verso* and *negotiorum gestio* actions relied upon by Masdar in the present case, a comparison of the legal orders of the Member States reveals a great diversity as regards their recognition and application.

7 — See, for a thorough discussion of Community liability in the absence of unlawful conduct, the recent Opinion of Advocate General Poiares Maduro in Joined Cases C-120/06 P and C-121/06 P *FIAMM and FIAMM Technologies* v *Council and Others*, pending before the Court, points 53 to 83.

8 — Moreover, the present case does not, in my view, raise an issue which can be considered to be a matter of public policy which could or should be raised by the Court of Justice of its own motion. See in that regard the strict criteria proposed by Advocate General Jacobs in his Opinion in Case C-210/98 P *Salzgitter* v *Commission* [2000] ECR I-5843, points 140 to 143, according to which (1) it must be determined whether the rule infringed is designed to serve a fundamental objective of the Community legal order and whether it plays a significant role in the achievement of that objective; (2) it must be established whether the rule infringed was laid down in the interest of third parties or the public in general and not merely in the interest of the persons directly concerned; (3) the breach of the rule should be manifest, meaning that both the Court and third parties can easily detect the breach and identify it as such.

9 — See, to that effect, point 55 of the Opinion of Advocate General Poiares Maduro in *FIAMM and FIAMM Technologies* v *Council and Others*, cited in footnote 7.

47. In general, however, the attitude of the legal systems of the Member States in that regard can be characterised as very cautious, and this applies even more so to *negotiorum gestio* than to unjust enrichment. Whilst the former principle, in particular, is even unknown in certain legal orders, it can be said that where those principles exist as a foundation of liability, it is generally possible to rely on them only under strict conditions and as a subsidiary means of redress. As a rule, those actions or principles function as 'gap fillers' and pleas of last resort inspired by general considerations of justice and equity, which is why in many instances they have been recognised and developed mainly by the judiciary.

48. Similarly, liability arising under those principles is as a rule strictly subsidiary to any contractual liability. Indeed, the scope of the principles of both unjust enrichment and *negotiorum gestio* as a legal basis for liability is generally informed in the Member States concerned by the aim of preserving the principle that a contract cannot, as a general rule, confer rights or impose obligations arising under it on any person except the parties to it (privity of contract) and, in a more general sense, legal certainty.

49. Accordingly, the existence of a contractual relationship would as a rule exclude reliance on the prohibition of unjust enrichment, since performance in such a context would not be considered as being 'without cause', and it would also be considered as running counter to the requirement of benevolent or uninterested management of another's affairs underlying, in general terms, the notion of *negotiorum gestio*.

50. Moreover, as regards more particularly the (triangular) contractual relationship at issue in the present case, it appears that in the vast majority of Member States, for various reasons including considerations of causality, it would generally be denied to a subcontractor in a position comparable to that of Masdar to obtain, on the basis of unjust enrichment or *negotiorum gestio*, direct redress from the party contracting with the lead contractor, that is to say, from a party in a position similar to the Commission's in the present case.

51. Against that background, the approach of the Court of First Instance was, in my view, essentially consistent with the basic characteristics of the concepts of unjust enrichment and *negotiorum gestio* in the laws of the Member States when it held, on the basis of the detailed reasoning in paragraphs 96 to 104

of the judgment under appeal, that the conditions for establishing a claim based on those principles are not met in a case such as the case under consideration.

52. Its central argument, set out in paragraphs 97 and 98 of the judgment under appeal, was that such a case must be assessed, in principle, within the framework of the contractual relationships at issue and thus on the basis of contractual liability.

53. Against that background, turning, specifically, to the first plea advanced by Masdar, it should be noted that Masdar does not assert that its subcontracts with Helmico had been terminated or were invalid when it continued performance. Rather, it submits that, given the breach of contract by Helmico, it was entitled to terminate the contract and that the Court of First Instance should have examined whether it was still under a legal obligation to continue performance.

54. However, even though it may be true that due to Helmico's non-fulfilment of its contractual obligations, Masdar was entitled to cease providing the services concerned and terminate the contract, that is not the point in the present context. The point is, rather, that the relationship between Masdar and Helmico was still governed by the subcontracts between them, since the breach of contract, consisting in this case in the non-payment by Helmico, does not as such cancel the contract, but results, as the Court of First Instance rightly noted in paragraph 98 of the judgment under appeal, in contractual liability being incurred by the defaulting party.

55. As liability based on unjust enrichment and *negotiorum gestio* is, as the Court of First Instance rightly held in paragraphs 97 to 100, secondary to such contractual liability, it could, without committing an error of law, dismiss Masdar's claim based on those principles irrespective of a possible entitlement on the side of Masdar to terminate the contracts. In those circumstances, it cannot, moreover, be claimed that the Court of First Instance committed a procedural error by having failed to have regard to Masdar's entitlement to terminate the contracts.

56. The first plea is therefore unfounded.

57. As regards, next, the criticism that, when examining the claims based on unjust enrichment and *negotiorum gestio*, the Court of First Instance should have taken account of the fact that the Commission had powers of recovery under the Financial Regulation, I also fail to see how that factor would be relevant with regard to the assessment of those claims.

58. As is clear from paragraphs 99 and 100 of the judgment under appeal, the Court of First Instance excluded the applicability of those principles essentially on the grounds that, due to the contractual nature of the services provided — the Commission having derived its advantage from its contract with Helmico and Masdar having acted under its subcontract with that party — any enrichment of the Commission could not be described as being without cause and exceptional liability based on *negotiorum gestio* could not be incurred.

59. Furthermore, contrary to Masdar's contention, in view of the privity of contract it cannot be maintained, as the Commission has rightly observed, that the recovery orders, issued in respect of Helmico, would empty the contractual relationship between the subcontractor Masdar and the contractor Helmico of all material content.

60. The second plea is therefore unfounded.

61. As regards, finally, the specific errors in law the Court of First Instance allegedly committed in the manner in which it applied the concept of *negotiorum gestio* in paragraphs 101 to 103 of the judgment under appeal, it should be borne in mind that, according to the general principles common to the laws of the Member States, as the Court of First Instance correctly held in paragraph 100 of the judgment under appeal, that principle can only constitute a basis for liability under very exceptional conditions. [10]

62. Against that background, first, the Court of First Instance was, in my view, correct to hold in paragraph 101 of the judgment under appeal that performance by the applicant of its contractual obligations with regard to Helmico cannot reasonably be described as benevolent intervention in another's affairs. In particular, any entitlement on the part of Masdar to terminate its contracts with Helmico is certainly not sufficient to categorise, on the contrary, Masdar's provision of services as benevolent.

63. Secondly, in the context of the management of projects such as those at issue in the present case, in respect of *negotiorum gestio* it is irrelevant whether the Commission would have been able to execute the projects itself, since also under normal conditions such projects are often, as in the present case, executed through contractors of the Commission and not by itself. Accordingly, the Court of First Instance could rightly refer to the statement made by the Commission in the letter of 5 October 1998 that it would 'explore

10 — See points 46 to 50 above.

alternative means for safeguarding the completion of the project' in order to show that the contention by Masdar was wrong that the Commission was not able to manage the projects in question.

64. Lastly, the Court of First Instance's statement in paragraph 101 of the judgment under appeal that the 'manager's action is generally carried out without the knowledge of the principal, or at least without the latter being aware of the need to act immediately' accords, in my opinion, with the concept of *negotiorum gestio* and the strict conditions relating to its application.

65. In particular, that finding, which is only one of several reasons given by the Court of First Instance in paragraph 101 in support of its conclusion that the conditions governing the civil action based on *negotiorum gestio* were not satisfied, is not called into question by the contention that there may be particular instances where that principle applies notwithstanding the awareness of the principal, as in the example provided by Masdar, concerning a seriously ill but conscious person being driven by a third party to hospital, which is obviously not comparable to the present case.

66. The arguments advanced under the head of the third plea are therefore unfounded.

67. It follows from the foregoing that the first three pleas put forward against the findings of the Court of First Instance relating to unjust enrichment and *negotiorum gestio* must be dismissed.

2. The fifth plea, alleging that in rejecting the claim based on negligence or fault liability, the Court of First Instance erred in considering that insufficient argument had been adduced by Masdar

(a) Main arguments

68. By its fifth plea, Masdar claims that in rejecting its claim based on negligence or fault liability, the Court of First Instance erred in considering that insufficient argument has been adduced by it, given that the matter speaks for itself in the particular circumstances in which the Commission exercises powers of recovery under the Financial Regulation.

69. It maintains that the Commission, despite knowing since October 1998 of the irregularities committed by Helmico, first allowed or even encouraged the appellant to complete the work and then exercised its powers of recovery, thus depriving Helmico of all resources received from the contracts. The Commission was aware that that would disable the mechanism for paying Masdar which was established with the Commission's knowledge and acquiescence. In those circumstances, the only possible conclusion is that the Commission, which was under a duty of care, acted with negligence or recklessness as to the harmful consequences for Masdar.

70. Masdar submits, finally, that the limit of liability for pure financial loss should, in comparison with the conditions governing liability for pure financial loss under English law, be extended in the Community law context, having regard to the special powers of recovery of the Commission, where it is obvious that the effect of the recovery order will be to deny payment to innocent subcontractors. Alternatively, it should be extended to the special circumstances of this case.

71. In the opinion of the Commission, the arguments adduced by Masdar are both inadmissible, in that they purport to challenge findings of fact, and irrelevant in that they in fact address a point which was not considered by the Court of First Instance. It submits that the Court of First Instance was correct to conclude that Masdar had simply not substantiated its argument and to dismiss the claim based on fault.

(b) Assessment

72. First of all, it should be noted that Masdar's pleadings before the Court of First Instance based on negligence or fault liability were related to the conduct of the Commission in so far as it suspended payments to Helmico, as that court expressly stated in paragraph 140 of the judgment under appeal, without being contradicted in that regard by Masdar in the present proceedings. Accordingly, in paragraphs 140 and 141 of the judgment under appeal, to which the fifth plea refers, the Court of First Instance examined only whether the Commission acted negligently or with fault by suspending the payments to Helmico.

73. It follows that, inasmuch as Masdar refers to the issue of the recovery orders, which is a decision of the Commission which must be

distinguished from the earlier suspension of payments in 1999, and argues that the Commission thereby deprived it ultimately of payment by Helmico and invokes various other facts of the case not directly related to that suspension or having occurred subsequently, Masdar's arguments are, as the Commission rightly observed, irrelevant and cannot be effective.

74. That part of the fifth plea must therefore be dismissed.

75. As regards, next, the allegation that the Court of First Instance erred in considering, in paragraph 141 of the judgment under appeal, that insufficient argument had been adduced by Masdar in support of its claim or with regard to the origin and scope of that duty, it should be observed, first, that the lack of substantiated argument in that regard was, as appears from that Court's reasoning in that paragraph, only one of the grounds on which the plea based on fault or negligence was rejected as unfounded. The Court of First Instance also considered that it was not shown that there was a causal link between breach of the alleged obligation and the damage pleaded. It follows that even if it were true that a duty of care of the kind alleged by Masdar existed, this could in itself not affect the conclusion of the Court of First Instance rejecting that plea.

76. Secondly, although it can certainly be said that in the performance of its tasks the Commission is under a general duty of diligence as it is also bound by the principle of good administration [11] and, depending on the circumstances, by various other obligations, it is far from clear that there would be a specific duty relating to the interests of a third party in a contractual situation such as that in the present case which would prevent the Commission from suspending payments under circumstances such as those here. The matter does not therefore speak for itself, as Masdar submitted, in the particular circumstances referred to, nor can it be upheld, a priori, that the Commission acted with negligence or recklessness as to the harmful consequences for Masdar.

77. It is therefore my view that, in relation to the arguments advanced by Masdar in support of its plea regarding fault or negligence, the Court of First Instance was entitled to hold that Masdar had not sufficiently substantiated its claim.

11 — See, to that effect, for example Case C-501/00 *Spain* v *Commission* [2004] ECR I-6717, paragraph 52.

78. It follows that the fifth plea must be rejected in its entirety.

3. The sixth and seventh pleas, concerning the findings of the Court of First Instance to the effect that no assurances had been given by the Commission

(a) Main arguments

79. By its sixth and seventh pleas, Masdar challenges the reasoning in the judgment under appeal leading to the rejection of Masdar's claim that assurances giving rise to legitimate expectations had been given by the Commission.

80. In support of those pleas, Masdar submits, first, that the Court of First Instance erred in holding that there was no evidence before that Court to prove that the assurances relied upon by Masdar were communicated at the meeting of 2 October 1998. Given the reasons at paragraphs 143 and 149 of the judgment under appeal for refusing to hear evidence about those assurances, it was not open to the Court of First Instance to make such findings.

81. Masdar contends, secondly, that the Court of First Instance erred in holding that it was highly unlikely that the assurances referred to had been communicated. The Court of First Instance's basis for that assessment was incorrect and incomplete in that it disregarded the particular context of the case, which included Masdar's right to terminate the subcontracts and the Commission's right to suspend the main contracts and issue recovery orders. Furthermore, according to Masdar it is inconceivable that a common intention of both the Commission and Masdar that the projects be completed and Masdar be paid for its work, as referred to at paragraph 148 of the judgment under appeal, could have arisen other than by the communication, by one means or another, of reciprocal assurances.

82. Thirdly, Masdar submits that the Court of First Instance erred in law in holding, in paragraph 128 of the judgment under appeal, that the Commission's failure to take minutes of the meeting of 2 October 1998 established the informality of that meeting and thus erroneously discounted the possibility that the Commission had communicated the assurances relied on.

83. Masdar notes, finally, that against that background there can be little doubt that assurances were given by the Commission.

84. The Commission, by contrast, maintains that, by those pleas, Masdar in reality seeks to re-open questions of fact and that they are therefore inadmissible. In any event, the Court of First Instance examined in detail the question whether or not precise assurances had been given and its conclusions on that point were correct.

(b) Assessment

85. By the arguments advanced in support of the sixth and seventh pleas, Masdar seeks, essentially, to challenge the assessment by the Court of First Instance, in paragraphs 119 to 130 of the judgment under appeal, as to whether the assurances relied upon by Masdar were given at the meeting of 2 October 1998, maintaining that the Court of First Instance should have concluded, in view of the circumstances of the case, that indeed such assurances were communicated by the Commission.

86. Masdar is thus clearly calling into question the Court of First Instance's assessment of the evidence relating to the communication of assurances.

87. It must therefore be recalled that, in an appeal, the Court of Justice has no jurisdiction to establish the facts or, in principle, to examine the evidence which the Court of First Instance accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the Rules of Procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the Court of First Instance alone to assess the value which should be attached to the evidence produced to it. [12]

12 — See Case C-260/05 P *Sniace* v *Commission* [2007] ECR I-10005, paragraph 35; *John Deere* v *Commission*, cited in footnote 6, paragraph 22; and Joined Cases C-403/04 P and C-405/04 P *Sumitomo Metal Industries and Nippon Steel* v *Commission* [2007] ECR I-729, paragraph 38.

88. Save where the evidence adduced before the Court of First Instance has been distorted, that court's appraisal of the evidence does not therefore constitute a point of law which is subject to review by the Court of Justice. [13]

89. As no such distortion of the facts and evidence put before the Court of First Instance has been alleged or, in any event, substantiated by Masdar in the present case, it follows that the sixth and seventh pleas are inadmissible in so far as they are directed against the assessment of the evidence by the Court of First Instance.

90. Moreover, as regards, in particular, Masdar's reference to the refusal of the Court of First Instance in paragraphs 143 to 149 of the judgment under appeal to hear witness evidence concerning the 2 October 1998 meeting, it should be pointed out, first, that according to settled case-law, the Court of First Instance is the sole judge of any need to supplement the information available to it concerning the cases before it. [14] In particular, the Court of Justice has held that even where a request for the examination of a witness refers precisely to the facts on which and the reasons why a witness should be examined, it falls to the Court of First Instance to assess the relevance of the application to the subject-matter of the dispute and the need to examine the witness named. [15]

91. That is exactly what the Court of First Instance did in the relevant passages of its judgment, finding in paragraph 148 thereof that the intended content of the testimony would in any event not suffice to prove the relevant fact, namely the existence of assurances on the part of the Commission as to the payment of Masdar.

92. Secondly, in so far as Masdar seems to suggest in that context that there is an inconsistency in the judgment under appeal between the reasons for refusing to hear witness evidence and the finding that the assurances relied upon were not given, that allegation is unfounded since, as the Court of First Instance rightly observed in paragraph

13 — Case C-53/92 P *Hilti* v *Commission* [1994] ECR I-667, paragraph 42, and Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 49.

14 — See, inter alia, Case C-315/99 P *Ismeri Europa* v *Court of Auditors* [2001] ECR I-5281, paragraph 19; Case C-136/02 P *Mag Instrument* v *OHIM* [2004] ECR I-9165, paragraph 76; and Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 67.

15 — See, inter alia, *Sniace* v *Commission*, cited in footnote 12, paragraph 78, and *Dansk Rørindustri and Others* v *Commission*, cited in footnote 14, paragraph 68.

148 of the judgment under appeal, the existence of a common intention between the parties that Masdar complete the project and receive payment for its work is clearly different from the giving of precise assurances by the Commission that it would pay Masdar directly.

93. It follows that the sixth and seventh pleas must be rejected.

4. The fourth plea, alleging that the findings of the Court on the pleas of unjust enrichment and *negotiorum gestio* on the one hand, and the plea of legitimate expectations on the other, are inconsistent

(a) Main arguments

94. Masdar complains that, when it examined the application of the principle of the protection of legitimate expectations, the Court of First Instance found that the narrow conditions for its application were not satisfied, even though the underlying understanding of that Court was that Masdar was induced by the Commission to continue to provide the services (paragraph 101 of the judgment under appeal) and that Masdar and the Commission had a common intention that Masdar complete the projects and be paid for its work (paragraph 148 of the judgment under appeal).

95. With similar arguments to those advanced in the previous pleas, it argues that something may have happened at the meeting of 2 October 1998 and/or during the subsequent exchanges with the Commission which had the effect of inducing Masdar to continue to provide the services required by its subcontract with Helmico. While that 'something' may not fall within the narrow test used by the Court of First Instance to establish a claim based on legitimate expectations, it was certainly sufficiently effective to persuade Masdar to continue to provide the services, which shows that the Court of First Instance was wrong to conclude that the evidence available did not reveal precise assurances given by the Commission enabling it to rely on such a claim.

96. It submits, in the alternative, that the test used by the Court of First Instance is too narrow, and produces an unjust result in cases such as the present case. It should therefore be ruled that precise assurances can be inferred in circumstances such as those in the present case.

97. Lastly, Masdar disputes the finding at paragraph 103 in the judgment under appeal that by continuing to work on the project it was running a commercial risk that could be described as normal. No right-minded commercial person would have continued to work in the circumstances in question unless the conduct of the Commission had been such as to induce in that person a legitimate expectation that it would be paid for the services provided.

98. According to the Commission, the arguments advanced in the framework of that plea are inadmissible and in any event manifestly unfounded.

(b) Assessment

99. As regards, first, the alleged inconsistency of the findings of the Court of First Instance in paragraph 101 on the one hand and paragraph 148 of the judgment under appeal on the other, that claim is, at least in part, based on a misreading of the former paragraph referred to, in which that Court merely stated: 'The manager's action is generally carried out without the knowledge of the principal, or at least without the latter being aware of the need to act immediately. Yet the applicant itself submits that its choice to continue with the work in October 1998 was induced by the Commission.'

100. Read in its context, it is clear that the aim of that statement of the Court of First Instance was to highlight the contradiction between Masdar's claim based on *negotiorum gestio* and its argument relating to the protection of legitimate expectations to the effect that the Commission induced it to continue to provide the services, rather than to endorse the latter argument. Moreover, Masdar seems implicitly to confirm that the Court of First Instance did not share that view by submitting that it should have made a finding with regard to some event having the effect of inducing it to continue the work.

101. In any event, even though, as Masdar maintains, it was the underlying understanding of the Court of First Instance that Masdar was induced by the Commission to continue to provide the services, that does not necessarily amount to saying that precise assurances, founding a claim in legitimate expectations, had been given.

102. Similarly, I have already rejected the claim regarding inconsistent reasoning in respect of the finding of the Court of First Instance in paragraph 148 of the judgment under appeal that Masdar and the Commission had a common intention as to the completion of the projects.

103. The remaining arguments put forward in support of the fourth plea are again directed against the finding of the Court of First Instance that no precise assurances were given, which is, as I have already mentioned, a finding based on an appraisal of facts which cannot as such be challenged in an appeal. [16]

104. Suffice it to state in that regard, as rightly emphasised by the Commission at the hearing, that it is far from convincing to argue that the only explanation for the fact that Masdar continued the work — even if the commercial risk thereby taken could be considered higher than normal — could be that the Commission had given it, at the meeting on 2 October 1998 and/or during subsequent exchanges, the assurances relied upon by Masdar.

105. The fourth plea must therefore also be rejected.

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

VI — Costs

107. 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 Masdar, and Masdar has been unsuccessful, Masdar must be ordered to pay the costs.

16 — See points 87 and 88 above.

VII — Conclusion

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

(1) dismiss the appeal;

(2) order Masdar to pay the costs.