OPINION OF ADVOCATE GENERAL LENZ

delivered on 26 January 1993 *

Mr President,
Members of the Court,

A — Introduction

1. This action for annulment and damages was brought against the Commission by an undertaking which carried out works in the context of a project financed by the fourth European Development Fund (EDF) in accordance with the First Lomé Convention [1] and whose invoices for those works were not settled. The applicant complains of the conduct of the Commission as third party under an attachment order which the applicant had obtained for the settlement of its claims, and as the administrator of the EDF (see Article 11(1) of the internal agreement of 11 July 1975 [2] relating to the fourth EDF, and Article 9(1) of the financing regulation of 27 July 1976 [3] based thereon).

2. In connection with a project of the State of Burkina Faso to provide wells in the province of Komoe, a project which was covered by a financing agreement of 15 December 1987 between that State and the Community, [4] an invitation to tender for drilling 210 boreholes was issued. The contract was awarded to the Office National des Puits et Forages (National Board for Wells and Drilling) ('ONPF'), a body controlled by the State of Burkina Faso. On 15 December 1989 the ONPF concluded a subcontracting agreement with the applicant, a company having its registered office in Burkina Faso, for drilling 60 exploratory boreholes, 50 of which were to be productive. As agreed in the contract, the applicant received an advance payment of 10% of the total contract sum of FCFA 88 837 300.

3. During the period from February to May 1990 in which the applicant carried out the works, it invoiced the ONPF for the balance of FCFA 88 112 000 [5] in four successive statements of account. As this sum was not paid, the applicant sent the ONPF a formal letter of demand on 9 October 1990. At the same time it informed the local representatives of the Commission that the aforesaid accounts had not been settled 'in spite of your payments' and in spite of the clause in the subcontracting agreement, under which the subcontracting works were to be paid for as soon as payment was made by the client to the account of the main contractor (ONPF).

4. Later the ONPF and the Minister for the Water Supply (Ministre de l'eau) stated, without disputing the claim, that the ONPF would do all it could to make some payments. The ONPF also submitted a proposal for settling the account in several instalments.

* Original language: German.

1 — OJ 1976 L 25, p. 1.

2 — Internal agreement on the financing and administration of Community aid, OJ 1976 L 25, p. 168.

3 — Financial regulation applicable to the fourth European Development Fund, OJ 1976 L 229, p. 9.

4 — Annex 1 to the reply.

5 — At the time of the issue of the attachment order (see paragraph 5) this corresponded to ECU 244 992.

5. As the applicant subsequently received no payment from the ONPF, it obtained the issue of a preventive attachment order against the Commission on 6 March 1991 relating to all sums owed by the Commission to the State of Burkina Faso up to a principal sum of FCFA 85 112 000 together with interest and costs. The order was served on the Commission and the State of Burkina Faso through the Belgian Ministry for Foreign Affairs in March 1991.

6. The Commission acknowledged receipt of the order by letter of 17 April 1991.

7. In connection with the project in question, the Commission transferred two sums of FCFA 21 315 426 and FCFA 25 192 693 to the State of Burkina Faso on 6 May 1991 and, during the course of the proceedings before the Court, a further sum of FCFA 15 792 841. In addition 'in 1991' it made payments relating to three other projects in Burkina Faso.

8. After the applicant had protested on 13 May 1991 against the payments of which it was by then aware, the Commission informed it by letter of 14 June 1991 that it did not intend to act upon the attachment order as it was likely to interfere with the proper functioning and the independence of the Communities and that it was for the applicant to seek, if necessary, authorization from the Court of Justice in accordance with Article 1 of the Protocol on the Privileges and Immunities of the European Communities.

9. The applicant takes the view that the conduct of the Commission, as third party under the attachment order and as the administrator of the EDF, was unlawful. It has therefore lodged an application for annulment, the wording of which is reproduced in the Report for the Hearing and the precise purpose of which I shall explain in my analysis. It also asks the Court to find the Commission liable to pay damages of FCFA 85 112 000 together with interest. Finally, it applies for costs against the Commission.

10. The Commission considers the application to be unfounded, and asks for it to be dismissed with costs against the applicant.

B — Analysis

The application for annulment (second paragraph of Article 173 of the EEC Treaty)

11. I.1. As the applicant has not clearly identified the *contested act* in its application, it is first necessary, in order to adjudicate on this claim, to *define more precisely this aspect of the subject-matter of the action.*

12. In its defence [6] the Commission concludes from the arguments in the application that the decision, notified to the applicant on 14 June 1991, not to give effect to the attachment order and based on the privilege under

6 — Page 5.

Article 1 of the Protocol, must be regarded as the contested act. The applicant concurred in that interpretation in its reply. [7] I too consider this to be correct.

13. As shown by the wording of the claims in the application and a relevant passage in the grounds of the application, [8] the applicant complained that the Commission disregarded the effects of the attachment order because, after being served with it, it made payments to the State of Burkina Faso in May 1991. That conduct appears to be a direct consequence of the act as just defined. It is thus logical to conclude from the claims and arguments formulated in the application that the applicant's wish is that this act be annulled.

14. Defined in those terms, the claim cannot be interpreted as seeking authorization for a measure of constraint (in this case, attachment of a debt) within the meaning of Article 1, third sentence, of the Protocol. Admittedly, it cannot be ruled out in principle that an application for annulment of an act by which a Community institution opposes a measure of constraint by availing itself of a privilege under Article 1 of the Protocol may be construed as an application for authorization by the Court. [9] In this case, however, such a step is out of the question. It is clear from the application as a whole [10] that the applicant assumes that such authorization is not necessary. Firstly, it considers, the debt attached has ceased, since it came to be owed, to form part of the assets of the EDF, which is administered by the Commission, so that the attachment order cannot be regarded as a measure of constraint relating to the property or assets of the Communities. Secondly, the Commission did not contest the validity of the attachment order or at least did not do so in due form and within the prescribed period.

15. Thus the subject-matter of the application will continue to be interpreted as set out above.

16. 2. In order to define the subject-matter of the dispute having regard to the *pleas in law on which the application is based*, it is sufficient to recall the applicant's aforementioned arguments contesting the necessity of authorization from the Court. These can be reduced to a single plea to the effect that in the applicant's view the contested act is contrary to Community law, since the privilege claimed by the Commission does not apply in this case.

17. Within the context defined above, I should like to make a few observations concerning the *admissibility* of the claim. At the hearing the Commission, without expressly contesting admissibility, observed that the course followed by the applicant was 'surprising in terms of procedure'. [11] The Commission raises the question whether it is permissible, in the context of an action for annulment, to contest the lawfulness of a refusal by the Commission to give effect to an attachment order, when such refusal is expressly justified on the ground that the attachment order interferes with the proper functioning of the Community. The Commission wonders whether prior authorization should not have been obtained from the Court under Article 1 of the Protocol so that

7 — Page 3.

8 — Page 9, *in fine*, of the application.

9 — See the order in Case 2/68 *Ufficio Imposte di Consumo Ispra* [1968] ECR 437.

10 — See first indent of the form of order sought and the arguments relating to it on page 8 of the application.

11 — Transcript of the hearing, page 15.

it could examine the Commission's objections. Examining these objections in the context of the present proceedings would be tantamount to striking out that provision.

18. In my view these considerations do not justify the conclusion that the application in this case is inadmissible. As is clear from my definition of the subject-matter of the dispute, the applicant, rather than complaining that the Commission wrongly alleged that the functioning and independence of the Communities would be interfered with, takes the view that Article 1 of the Protocol, which is intended to protect those interests, [12] does not apply in this case, so that no authorization is necessary. The applicant's objections relate to the attachment order is being classified as a 'measure of constraint' in respect of the 'property and assets of the Communities' and to the fact that the Commission cannot, according to the applicant, rely on Article 1 of the Protocol as it did not contest the validity of the order, or at least not in accordance with the proper procedures. Were the applicant correct in its submission, there would indeed be no need for authorization by the Court. [13] The application would not therefore be tantamount to circumventing Article 1 of the Protocol, as the Commission maintains.

19. III. As, therefore, the possible reservations regarding the admissibility of the application for annulment, which might follow from the Commission's arguments at the hearing, are ultimately irrelevant, I shall now turn to the *merits* of the application.

20. 1. First of all it must be observed that the preventive attachment order secured by the applicant constitutes a measure of 'constraint' within the meaning of Article 1, third sentence, of the Protocol. Unless the order is discharged or amended on grounds of domestic law, it will, under Articles 1451 and 1458 of the Code Judiciaire (Belgian Judicial Code), [14] prevent the Commission, as the administrator of the EDF, from paying for a period of three years sums owed by the EDF to the State of Burkina Faso amounting to the attached debt. Neither can the Commission pay these sums to the applicant and obtain release from the debt until the attachment is converted into an order for execution in accordance with Article 1489 et seq. of the Code Judiciaire.

21. 2. It is on that basis that it is necessary to examine the applicant's first argument to the effect that the measure as described above does not relate to the 'property' or 'assets' of the Community within the meaning of Article 1, third sentence, of the Protocol because, when the monies owed to the State of Burkina Faso fell due, they became the property of that State and not of the Commission.

22. We can dismiss that argument at once. In this respect, the Commission rightly relies on the order of 11 April 1989 in the *Société Générale* case, [15] where a creditor of the Belgian State had obtained a garnishee order against the Commission which was stated to cover all sums, funds, stocks, shares or objects in respect of which the European Communities were indebted or might subsequently be indebted to the Belgian State for

12 — For more details see paragraph 66 below.

13 — As is so when the measure (notification of assignment of salary) does not change the legal position of the Community as debtor and therefore does not interfere with the functioning of the Community institutions: order in Case C-85/63 *Grand Magasins à l'Innovation* [1963] ECR 195.

14 — Law of 10 October 1967, *Moniteur Belge*, 31 October 1967.

15 — Case C-1/88 SA *Générale de Banque* v *Commission* [1989] ECR 858.

any reason and on any grounds whatsoever. [16] The creditor had asked the Court for a declaration that Article 1 of the Protocol did not affect the execution of the garnishee order or, alternatively, that the Court should grant authorization for it to be executed in the normal way. After the creditor stated before the Court that it limited the scope of the garnishee order at issue to the sums owed by the Communities to the Belgian State by way of rent, it sought a declaration that authorization was unnecessary (principal claim) or authorization in respect of the amounts owed as rent only (alternative claim). [17]

23. The Court dismissed the principal claim on the following grounds:

'Even if, under the applicable national law, the garnishee order were to be regarded as the seizure of an asset belonging to the debtor, it is nevertheless liable to constitute a measure of restraint within the meaning of Article 1 of the Protocol. The Court has consistently held that every garnishee order served on the Communities may, in certain circumstances, interfere with the functioning and independence of the Communities.'

24. In the light of this reasoning the applicant's argument cannot be upheld.

25. In its second argument the applicant relies on Article 1452 of the Code Judiciaire and claims that the Commission did nothing to contest the validity of the order, except dispatch the letter of 14 June 1991, which could not be treated as equivalent to a declaration by the third party within the meaning of the above provision and which was sent after expiry of the period prescribed. This argument raises the question whether the Commission must claim the privilege granted by Article 1 of the Protocol in the form and within the time-limit prescribed by a provision such as Article 1452 of the Code Judiciaire in order not to forfeit the privilege or at least the possibility of asserting it.

26. The answer to that question must, in my opinion, be in the negative. As stated above, an attachment order is a measure of constraint which falls within the scope of Article 1 of the Protocol. The obligation upon the third party debtor to make a declaration in accordance with Article 1452 of the Code Judiciaire is a consequence of that order. [18] Such obligation is therefore one of the 'effects' which a measure of constraint has 'under the applicable national law' [19] and which Article 1 of the Protocol of the Communities is intended to prevent, unless there is a recognized exception to the principle of immunity from execution. The obstacle set up by that provision to the measures of constraint envisaged therein could therefore be removed through the conduct of the Commission mentioned above only if Community law referred to domestic law (that is, to provisions such as Article 1452 of the Code Judiciaire) for the purposes of such derogation from the principle laid down in that article of the Protocol.

16 — See preceding footnote, paragraph 3 of the order.

17 — Paragraph 6 of the order.

18 — Cf. G. de Leval, *La saisie-arrêt*, Liège 1976, page 217, paragraph 142.

19 — Cf. the order in Case 1/87 *Universe Tankship* v *Commission* [1987] ECR 2807, paragraph 3.

27. That is, however, not the case. An express reference is nowhere to be found. In my opinion, there is no implicit reference either, as this would obviously run counter to the aims of Article 1 of the Protocol. Firstly, it would allow Member States — against whose measures the provision seeks to protect the Community — to influence the extent of the protection afforded. Secondly, differences would arise in the scope of the principle of immunity from execution from one Member State to another, which again would be contrary to the spirit of the abovementioned provisions. What Article 1 seeks to achieve is uniformity in the application of that principle, as is evidenced by the exclusive jurisdiction conferred on the Court. The applicant's argument does not therefore withstand examination in the light of Article 1 of the Protocol.

28. For the sake of completeness I should add that it is not the purpose of Article 1452 of the Code Judiciaire to adopt provisions concerning a derogation from the principle of immunity from execution, its purpose, it would appear, is rather to ensure that the creditor who obtained the attachment is accurately informed on the legal relationship between the principal debtor and the third-party debtor, so that he can decide how to proceed in full knowledge of the facts. [20]

29. For all those reasons the fact that the Commission did not observe the formal requirements and the time-limit laid down in Article 1452 of the Code Judiciaire when asserting its privileges does not remove the privileges themselves or the possibility of asserting them.

30. 4. In addition to the examination of the two aspects mentioned above, the applicant's arguments cause me to examine a further problem. In basing its application for annulment on the fact that the Commission 'did nothing' to 'contest the validity of the attachment order', the applicant raises the question of how far the privilege under Article 1 of the Protocol is affected by the fact that the Commission was silent between the serving of the order in March 1991 and its letter of 14 June 1991. In fact it is hardly surprising that the applicant relies on the Court's order in the *Universe Tankship* case. [21] In that case a creditor of the Belgian State planned to serve a garnishee order on the Commission in respect of sums owed by the Commission to the Belgian State and applied to the Court for authorization to do so. The Court made the following observations (paragraphs 4 to 7 of the order):

'The extent of the legal protection provided by the procedure for authorization by the Court would be greater than that which the procedure is designed to ensure if the institution to which the garnishee order was addressed did not consider that there were any grounds for opposing it.

Consequently it is only in cases where the Community institution concerned objects that the intended garnishee order might interfere with the functioning and independence of the Communities that a creditor is entitled to apply to the Court for authorization pursuant to Article 1 of the said Protocol.

In the present case, in its observations submitted to the Court on 26 February 1987,

20 — *De Leval*, ibid.; *Chabot/Leonard, Saisie Conservatoire et Saisie-Exécution*, Brussels 1979, p. 274.

21 — See footnote 19.

the Commission of the European Communities stated that it had no objections regarding the garnishee order for which the applicant seeks authorization.

Accordingly, at the present stage of the proceedings instituted by the applicant, the application for authorization is devoid of purpose.'

31. The Court came to a similar decision in the *Limited company X* case [22] concerning authorization for a creditor of a Community official to effect the proposed service of an attachment order on the official's salary (paragraphs 7 to 9):

'The legal protection which this authorization is intended to give would exceed its aim if a third party, being an institution, which has an attachment order served upon it considers that it has no grounds for opposing a requirement to pay into the hands of a creditor of one of its officials all or part of the sums which it owes or will owe to the latter. On the other hand, if the institution were opposed to being served with an attachment order or were to take the view subsequently that it should oppose the proceedings to obtain the order or the execution of the order, it would fall to the Court to decide the matter on application by the parties.

Therefore in the present stage of the proceedings instituted by the applicant, the request for authorization is pointless.'

22 — Order in Case SA 1/71 [1971] ECR 363.

32. Does all this mean that the Commission's silence as regards the service of the attachment order had the effect of setting aside the privilege under Article 1, third sentence, of the Protocol?

33. This question arises because the Commission's letter of 17 April 1991 acknowledged receipt of the attachment order, but said nothing in any way on the question whether it would avail itself of Article 1 of the Protocol.

34. In resolving this problem we should bring to mind the structure of Article 1, third sentence, of the Protocol, which has two facets: the *rule* stating that the property and assets of the Communities may not be the subject of any administrative or legal measure of constraint, and the *exception*, stating that the rule does not apply if the court so authorizes.

35. By virtue of that structure, the Community is protected against measures of constraint in so far and as long as they are not authorized by the Court.

36. If we now compare this structure with the case-law cited above, it becomes clear that, in the view of the Court, apart from the case of authorization by itself, there can be a further exception to the rule contained in Article 1, third sentence. This exception arises where the institution concerned

'did not consider that there were any grounds for opposing it (the garnishee order)'. [23]

37. As is correctly pointed out in academic legal writing, [24] this means that Article 1, third sentence, of the Protocol does not apply if the institution itself had *waived* the protection afforded by this provision. In applying the exception as thus defined, it should however be noted that the strict rule/exception mechanism in the said provision offers a substantial degree of legal certainty which is required in such a sensitive area as that of measures of constraint, in respect both of the Community's interests protected and of the interests of the citizen resorting to the measure of constraint. The same degree of legal certainty must, therefore, also be guaranteed if immunity is waived.

38. This necessarily means that such waiver must be expressed *clearly and unambiguously* in order to remove the blocking effect of Article 1, third sentence, of the Protocol.

39. This view is confirmed by comparable provisions of public international law relating expressly to waiver.

40. For example, the Agreement on the Privileges and Immunities of the United Nations [25] (Section 2) states that:

'The United Nations, its property and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process *except in so far as in any particular case it has expressly waived its immunity.*'

41. The Vienna Convention of 18 April 1961 on Diplomatic Relations [26] provides in Article 22(1) that:

'The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except *with the consent* of the head of the mission.'

42. The conclusion that a clear, unambiguous waiver is required is not affected by the abovementioned orders of the Court, and in particular the order in the *Universe Tankship* case. Admittedly, in paragraph 5 of that order it is stated that

'It is only in cases where the Community institution concerned objects that the intended garnishee order may interfere with the functioning and independence of the Communities, that a creditor is entitled to

23 — Order in the *Universe Tankship* case, paragraph 4; very similar to the order in the *Limited company X* case, paragraph 7.

24 — See C. Schmidt, "*Le Protocole sur les Privilèges et Immunités des Communautés Européennes*", *Cahiers de Droit Européen*, 1991, pp. 67 and 69.

25 — Agreement of 13 February 1946, UNTS Vol. 1, p. 15.

26 — UNTS Vol. 500, page 95.

apply to the Court for authorization pursuant to Article 1 of the said Protocol.'

43. However, that consideration is explained by the stage of the proceedings at which the order was made by the Court. The attachment concerned was merely *planned*. At that stage no authorization is in fact yet required (and any application for it is thus devoid of purpose) unless the institution concerned had already raised objections to the planned measure in advance and had invoked Article 1 of the Protocol. Only when the attachment order has been served upon the institution and it has thus had the opportunity to determine its response to this specific measure (in particular, the possibility of waiving the rights conferred by Article 1 of the Protocol) may authorization become necessary. [27]

44. If we now examine the present case in this light, we shall see that the Commission at no time gave any positive indication — even implicitly — that it consented to attachment for the purpose of Article 1 of the Protocol (that is to say, that it waived its rights under that provision). Mere 'silence' is not sufficient, at least in the absence of special circumstances which could result in its being construed as consent, to remove the blocking effect of that provision.

45. 5. Since, therefore, as none of the arguments in support of the application for annulment is valid, the application must be dismissed as unfounded.

27 — This is how I understand the order in the *Limited company X* case also.

The application for damages (Articles 178 and 215 of the EC Treaty)

46. As the Court is aware, it is a prerequisite for Community liability under the second paragraph of Article 215, that the act imputed to the institution is unlawful, that damage has been caused and that there is a causal link between that act and the damage claimed. [28]

47. 1. As regards the identification of the allegedly unlawful conduct, two factors are clear from the claim and the grounds of claim formulated in the application. The applicant complains that

— the Commission did not comply with the attachment order in that it paid various sums from the EDF to the State of Burkina Faso after service of the order;

— although the applicant did not receive the sums owed to it for works carried out in connection with a project financed by the EDF because EDF funds were misappropriated, the Commission continued to make payments without ensuring that the funds were used for the proper purpose.

48. Both these complaints will be examined in detail below. I also have some comments on an argument developed in the reply. [29] The applicant's basic complaint is that the

28 — Settled case-law: see, most recently, judgment in Case C-257/90 *Italsolar* v *Commission* [1993] ECR I-9, paragraph 33.

29 — Page 9.

Commission allowed it to believe with good reason — for three months prior to its letter of 14 June 1991 — that it had no objection to the attachment order. It claims that the Commission's silence was negligent and caused damage to it. However, since this argument constitutes a new plea submitted out of time for the purposes of Articles 38(1)(c) and 42(2) of the Rules of Procedure, it will be mentioned only briefly.

49. II. The damage in respect of which the applicant seeks compensation lies in the fact that the balance owed to it — FCFA 85 112 000 — has not yet been paid.

50. III. Let us therefore examine the separate complaints.

51. 1. The applicant complains that the Commission acted in breach of the attachment order by making payments and takes the view that this is an infringement of Article 1 of the Protocol which the Commission wrongly invokes.

52. That complaint must be rejected. As explained already, the attachment order in this case comes within the scope of the above provision, no exception to the rule laid down therein (authorization by the Court or consent by the Commission) having arisen at the time of the payments. Therefore the Commission did not infringe Article 1 of the Protocol by making the payments.

53. 2. (a) The complaint regarding the conduct of the Commission *vis-à-vis* the misappropriation of EDF funds has certain similarities with the complaint examined above. As shown by the arguments in the application, which were further developed at the hearing, the applicant takes the view that the Commission, as the administrator of the EDF, in order to safeguard the interests of the applicant ought, quite simply, not to have continued making payments to the State of Burkina Faso in connection with the project at issue. It ought to have suspended the payments until the applicant's claims had been met, or made the payments directly to the applicant. In the context of the complaint now under consideration, the applicant is concerned not with the position of the Commission as a third-party debtor in the light of Article 1 of the Protocol, but with its position as the administrator of the EDF in the light of the rules according to which the Fund operates. The applicant, as I understand its submissions, does *not* criticize the Commission's conduct *before* the alleged misappropriation of EDF funds because it has made no submissions as to whether or how the Commission could have *prevented* that irregularity. The applicant is, rather, concerned with the Commission's conduct after it was informed of those matters. According to the application, such conduct is in breach of 'the Lomé Conventions, the internal agreements and the financial regulations'.

54. That plea is best understood as a complaint of failure to comply with the rules relating to the Community aid at issue here, namely

— the first Lomé Convention; [30]

30 — See footnote 1.

— the Internal Agreement of 11 July 1975; [31]

— the Financial Regulation of 25 July 1976. [32]

55. The Commission takes the view that its only obligation as administrator of the EDF with regard to the proper use of the resources provided through the Fund is to check, before making payments, that the works tendered for have actually been carried out. In this connection it refers to Articles 58 and 59 of the aforementioned Financial Regulation. It adds that, in view of the division of competences between the Commission and the relevant ACP State, it is not allowed to interfere in the contractual relations between the ONPF and its subcontractors. In its rejoinder, however, it adds that it informed the authorities of Burkina Faso of the specific case of the applicant and made an effort, within the limits of its powers, to settle the dispute through the local authorities. At the hearing it also pointed out that it postponed for a certain period the last three payments relating to the project at issue. This was done in order to exert pressure on the local authorities. However, the funds finally had in the end to be released, as the situation had become intolerable. [33]

56. Finally, in the rejoinder the Commission denied that there was a causal link between its conduct and the damage caused to the applicant.

57. (aa) In connection with this plea, it should first be pointed out that if an ACP State commits or tolerates irregularities of the type discussed here, the Commission has no means of forcing it to put an end to the situation thus created, except through its payment procedures. The Commission cannot therefore be accused of failing to take action other than in that way.

58. (bb) Do the Commission's payment procedures provide a basis for an obligation, on account of breach of the Lomé Convention, the Internal Agreement or the Financial Regulation, to make good the damage?

59. Let us first examine whether this is the case in so far as the Commission, according to the applicant, *did not postpone payments* in order to *exert pressure on the authorities of Burkina Faso to induce the ONPF to discharge its obligations to the applicant*. Even assuming that the Commission did nothing of the sort, contrary to what it contended — in my view belatedly — at the hearing, the answer to this question is, I think, in the negative.

60. In the first place, I can find no basis in the three instruments mentioned above for the Commission to proceed in this way. Next, as regards Article XVIII(2) of Annex 3 to the financing agreement applicable in this case — which empowers the Commission to suspend payment in the event of breach of the agreement — the applicant has not argued that the State of Burkina Faso, through its conduct, acted in breach of that specific agreement. Finally it is not at all clear whether the applicant's claims would have been satisfied if the Commission had in

31 — See footnote 2.
32 — See footnote 3.
33 — Page 30 of the transcript of the hearing.

fact taken the step in question. It must be noted, on this point, that the payments by the Commission, in so far as they related at all to the project under discussion here, had no specific connection with the works carried out by the applicant. The applicant's complaint of 9 October 1990 to the local representative of the Commission, [34] taken in conjunction with the Commission's submissions in the rejoinder, [35] indicate rather that the EDF funds earmarked for payment for the applicant's work had been disbursed by the Commission before the complaint reached it. Given these circumstances, I consider it to be pure speculation to assume that the ONPF would have discharged its obligations to the applicant if the payments in question had been suspended. The applicant has given no explanation at all of how the ONPF might have been in a position to do so, after the sums intended for the applicant had been misappropriated, particularly if further payments which it expected did not materialize. From this point of view, there is therefore no sufficient indication that the Commission's conduct had the necessary *causal link* with the damage sustained by the applicant.

61. The same applies in so far as the Commission, as the applicant made clear at the hearing, ought to have suspended the payments *in order to induce the ONPF to consent to direct payment by the Commission to the applicant*. In the absence of evidence that the Commission's payments related specifically to the works carried out by the applicant, it could not have been ruled out that, in the event of such consent, the claims of other creditors would be left unsatisfied instead of those of the applicant. There is no way of knowing whether the ONPF would have agreed to this. Thus even the causal link between the Commission's conduct and the damage sustained by the applicant is not proven. Furthermore, I have grave doubts as to the lawfulness of the course of action which the applicant considers the Commission ought to have taken. Admittedly, Article XIII of Annex 3 of the financing agreement provides that the Commission should take all suitable measures to ensure that payment orders made out to persons awarded EDF-funded contracts are executed as quickly as possible. It might indeed be asked whether this clause, which gives the undertakings awarded contracts an advantage because their interest in prompt payment coincides with the Community's interest in the most effective use of its funds and the ACP State's interest in the rapid discharge of its obligations, can also apply in favour of a subcontractor where the principal contract was awarded to a State-controlled undertaking. However, this effect can arise only as a repercussion of the protection given to the financial interests of the Community and the interests of the ACP State: the latter — and not the contractors — is the recipient of the Community's payments (see Article 7 of the financing agreement) and it is responsible for the execution of the financed projects (Article 55 of the First Lomé Convention). In this respect it should be observed that if the Commission had taken the step that the applicant considers it ought to have taken, it would have interfered in the distribution between the subcontractors of the ONPF of the risk engendered by the alleged irregularities — without any discernable advantage for the correct use of the said funds or for

34 — No 3 cited above.
35 — Page 6.

the financial situation of Burkina Faso or that of the ONPF. [36]

62. The Commission is therefore not liable to make compensation for damages by reason of the fact that it did not respend the payments.

63. Nor, finally, may it be claimed that the Commission should have made *payments directly to the applicant*. If it had done so, those payments would not have had the effect of discharging the Commission from its obligations and would not have been in conformity with proper administration of the EDF (see Article 30 of the Financial Regulation).

64. (b) In so far as the applicant argues in its reply that the Commission has a general duty to protect the financial interests of the Community, the Member States and third parties, that duty, if it is to be recognized, can only exist within the confines of the Commission's actual powers. This is clear from point G of the Resolution of 13 November 1991 [37] on which the applicant bases its arguments in this regard. Any such general duty could not therefore alter the conclusions reached in the preceding paragraph.

65. 3. Allow me in conclusion to examine briefly the applicant's argument — which, as I have said, is submitted out of time — that the Commission wrongfully allowed it for three months to assume that it had no objection to the attachment order.

66. It does indeed seem to me that the Community institutions are under a duty to take all measures which are possible according to reasonable criteria and are appropriate for enabling the right enshrined in Article 1, third sentence, of the Protocol to be exercised. That right is intended to enable the formal obstacle to the measures of constraint referred to in the provision to be lifted by the Court of Justice — by way of authorization — whenever it is not required for the functioning and independence of the Community. [38] It constitutes a guarantee which is accorded directly to the individual on the basis of the Protocol [39] and which, in view of the functional and limited character of the privileges and immunities, [40] constitutes the necessary corrective to the rule in Article 1, third sentence, of the Protocol.

67. It would, however, detract from the practical effect of that guarantee if the Community institutions were allowed, by taking advantage of the principle that the privilege conferred by Article 1, third sentence, of the Protocol applies even when not claimed, to remove from the scope of measures of constraint obtained by individuals property in respect of which the Court might have given authorization under that provision. The Community institutions are, on the contrary, under a duty, as I said at the outset, as far as is necessary and possible, to assist individuals in exercising their rights. Breach of that obligation may, under the same conditions as

36 — See the similar considerations in the judgment in Case C-257/90 *Italsolar* v *Commission* [1993] ECR I-9, paragraph 34.

37 — Resolution of the Council and of the representatives of the governments of the Member States meeting within the Council concerning the protection of the financial interests of the Communities, OJ 1991 C 328, p. 1.

38 — See order in Case C-2/88 Imm. *Zwartveld* [1990] ECR 3365, paragraphs 19 and 20.

39 — Order in Case 2/68 *Ufficio Imposte di Consumo Ispra* [1968] ECR 437.

40 — Order in *Zwartveld*, cited above, paragraph 20.

any other unlawful conduct by a Community institution, give rise to a claim for compensation under the second paragraph of Article 215 of the Treaty.

68. In order to apply that principle to individual cases, the special characteristics of each case must be taken into account. In the present case it should be noted that the Commission, having had sufficient time to determine its position, made payments, without giving due notice to the applicant, in respect of which the possibility of authorization from the Court of Justice could not be dismissed out of hand. The payments in question are those relating to the project in the completion of which the applicant was also involved.

69. Such conduct would have called for extremely thorough examination if the applicant had contested it in good time. However, since that is not the case and, moreover, since the applicant itself denies the existence of a causal link between the Commission's conduct and the alleged damage and since, finally, it has not been claimed that the Court would have given authorization if an application to that effect had been made at the time, this argument must be rejected.

C — Conclusions

70. For all these reasons I propose that the Court:

— dismiss the application as unfounded;

— order the applicant to pay the costs in accordance with Article 69 of the Rules of Procedure.