Development Fund might cause damage to third parties.

2. Having regard to the responsibilities conferred on it in the interest of the Community by Articles 121 and 123 of the Second ACP-EEC Convention, the Commission is under a duty, in order to ensure the economical administration of the resources of the European Development Fund, to make certain, before approving the award of a contract financed by that fund, that the tender accepted is the lowest, is economically the most advantageous and does not exceed the sum earmarked for the contract.

OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT
delivered on 14 May 1985 *

Mr President,
Members of the Court,

1. Introduction

The applicants, hereinafter referred to as the Italian Consortium, seek the following relief:

1.1. The annulment under Article 173 of the EEC Treaty of a decision of the Commission preventing them from continuing negotiations with the Ethiopian Electric Light and Power Authority (Eelpa) in connection with the award of a public works contract under the Second Lomé Convention, in particular Articles 120 to 132 thereof; in the alternative,

1.2. Should it appear that the Commission made no decision in that regard, a declaration under Article 175 of the EEC Treaty that the Commission failed to act; in the further alternative,

1.3. Compensation under Articles 178 and 215 of the EEC Treaty for the damages and expenses caused by the aforesaid decision or unlawful conduct.

In the interests of a proper understanding of those claims, summarized at the beginning of the application and set out in detail in the form of five heads in the applicants' conclusions, in the second part of this Opinion I shall adopt the summary of the facts and relevant provisions contained in the Report for the Hearing.

In the third part of my Opinion I shall then analyse the applicants' first two claims.

In the fourth part of my Opinion I shall deal with the claim for damages and with the interlocutory application made by the Italian Consortium for the production of documents, and in the fifth part of my Opinion I shall draw conclusions from my analysis of the aforesaid claims.

* Translated from the Dutch.

2. Facts and relevant legal provisions

2.1. The Provisional Military Government of Socialist Ethiopia, acting through the intermediary of the Ethiopian Electric Light and Power Authority (Eelpa) in its capacity as 'employer', issued an invitation to tender (No 1824) in respect of a project to divert the River Amarti (Supplements to the Official Journal of the European Communities S 132 of 14 July 1982, p. 3, and S 193 of 6 October 1982, p. 3).

2.2. The employer requested that the project be financed by the Fifth European Development Fund [hereinafter referred to as 'the Fund'], set up by the Internal Agreement of 1979 on the financing and administration of Community aid (Official Journal 1980, L 347, p. 210), within the framework of the Second ACP-EEC Convention, which was signed at Lomé on 31 October 1979 and approved by Council Regulation (EEC) No 3225/80 of 25 November 1980 (Official Journal 1980, L 347, p. 1). The Notice of Invitation to Tender stated that in the event of the project not being approved no contract would be awarded.

2.3. The Lomé Convention defines the respective responsibilities of the ACP States and of the Community regarding the administration of the programme of financial and technical cooperation.

2.4. Under Articles 108 (2) and 120 the ACP States are responsible for implementing the projects and programmes adopted jointly with the Community and financed by the latter. In that regard they are responsible for preparing, negotiating and concluding any contracts which are necessary for the implementation of the projects. Under Article 122 the Government of each ACP State is to appoint a national authorizing officer, who is to ensure, in close cooperation with the chief authorizing officer, that there is equality of conditions for participations in invitations to tender, that there is no discrimination and that the tender which is economically the most advantageous is chosen. He is to prepare and, after obtaining the agreement of the Commission's delegate, issue invitations to tender, receive tenders, preside over their examination, decide the outcome of the examination, which he is to transmit to the delegate with a proposal for the placing of the contract, and sign contracts.

2.5. Article 108 (5) places on the Community the responsibility for preparing and taking financing decisions. Under Article 121 the Commission is to appoint the chief authorizing officer, who is to ensure that financing decisions are carried out and is to be responsible for managing the Fund's resources; he is to commit, clear and authorize expenditure and ensure, in close cooperation with the national authorizing officer, that there is equality of conditions for participations in invitations to tender, that there is no discrimination and that the tender selected is economically the most advantageous. In that connection he is to approve the dossiers before invitations to tender are issued, receive the result of the examination of the tenders and approve the proposal for the placing of the contract. Under Article 123 the Commission is to appoint a delegate to represent it in each ACP State. The delegate may, in certain cases, approve invitation to tender dossiers and be present at the opening of tenders. Under Article 123 (2) (c) he is to approve the proposal for the placing of the contract wherever the following three conditions are fulfilled: the tender selected is the lowest, it is economically the most advantageous and it does not exceed the sum earmarked for the contract.

2.6. Article 130 provides that the criteria for selecting the tender which is economically the most advantageous must take into account *inter alia* the qualifications of, and the guarantees offered by, the tenderers, the nature and conditions of implementation of the works or supplies and the price, operating costs and technical value of those works or supplies.

2.7. Pending the adoption of general conditions applicable to the award and performance of works contracts, as provided for by Article 131, a joint declaration, which forms Annex XII to the Convention, refers, in the case of ACP States which, like Ethiopia, were not party to the Yaoundé Convention, to their national legislation or established practices regarding international contracts.

2.8. Annex XIII to the Convention, entitled 'Joint Declaration on Article 132 of the Convention', provides that, pending the adoption by the Council of Ministers of the arbitration rules provided for by that article, the final decision on disputes relating to the placing or performance of a contract is to be taken in accordance with the rules on conciliation and arbitration of the International Chamber of Commerce.

2.9. Under the Conditions of Tender, tenderers were required to demonstrate their technical experience, their competence to undertake the works (Clause IT-1, 4 (c)) and their current financial capability (Clause IT-1, 4 (d)); those factors were to be examined by a tender committee appointed by the employer, which could include the Commission's delegate and the consulting engineer (Clause IT-1, 4, third paragraph).

2.10. It was stated that the employer did not bind itself to award the contract to the lowest tenderer, but would take into careful consideration the whole of the information given in the tender and its appendices. The successful tenderer would be informed of the acceptance of his tender and would be invited to send to Addis Ababa a representative with a proper power of attorney for the purpose of executing the contract (Clause IT-11).

2.11. By 5 November 1982, the final date for the submission of tenders, Eelpa had received three tenders submitted by the three Italian undertakings, which had joined together to form a consortium (the Italian Consortium), by Rush & Tompkins BV, a company incorporated under Netherlands law and a subsidiary of Rush & Tompkins Group PLC, and by Boskalis Westminster-Baresel, a company incorporated under English law. Eelpa accepted that the tender of Rush & Tompkins BV, which was transmitted by telex, had been duly submitted since the circumstances causing the delay in the despatch of the tender documents amounted to a case of *force majeure*. That decision was contested neither by the Commission's delegate nor by the chief authorizing officer, despite formal objections on the part of the Italian Consortium, which claimed that, under the terms of Clause IT-5 of the Conditions of Tender, tenders submitted by telex or cable would not be considered.

2.12. On 8 November 1982, the date on which the tenders were opened, the following tenders (expressed in millions of ECU) were recorded:

Rush & Tompkins BV 24.3
Italian Consortium 26.7
Boskalis Westminster-Baresel 28.2.

2.13. Called upon to evaluate the tenders, the consulting engineers, the Danish firm Kampsax, produced a report in which they recommended that negotiations be entered into with the Italian Consortium.

2.14. It is clear from the minutes of the meeting of the Tender Committee held on

24 February 1983 — which were signed by the delegate and another representative of the Commission — that the Committee discussed the technical competence, the financial capability, the proposed schedule of work and the financial proposal of each tenderer on the basis of the engineers' report and an earlier draft thereof. The Committee mentioned in its minutes the slight modification made by the engineers to the conclusions in their report in favour of Rush & Tompkins BV; this was attributable to additional documents which were supplied by Rush & Tompkins BV after the submission of the initial tender documents. The Committee decided unanimously that Rush & Tompkins BV failed to qualify on the basis of three of the four stated criteria and recommended that the Italian Consortium be invited to attend for negotiations.

2.15. The Directorate-General for Development proceeded to make an assessment on the basis of the tender documents, the final report of Kampsax and the recommendation made by the Tender Committee on 24 February 1983, documents which the delegate had transmitted to the chief authorizing officer, and reached the conclusion that the lowest tender, namely that of Rush & Tompkins BV, was technically and financially acceptable and was economically the most advantageous tender.

2.16. On 3 March 1983, Eelpa sent to the Italian Consortium a telex communication inviting it to send a representative to commence negotiations on 14 March 1983 and, if these were successful, to sign a contract.

2.17. On arriving at Addis Ababa, the representatives of the Italian Consortium were informed, on 15 March 1983, that the negotiations could not take place, since the Commission had 'ordered' that negotiations be opened with Rush & Tompkins BV.

2.18. On 25 April 1983, Eelpa sent to the Italian Consortium a telex communication explaining that for reasons beyond its knowledge and control it was unable to proceed with the scheduled negotiations; it was forced to start negotiations with Rush & Tompkins BV in strict compliance with a decision made by the Commission alone, despite its strong objections and disagreement on grounds of the tenderer's lack of financial and technical qualifications. Reference was made to a telex communication sent by Kampsax to Eelpa, in which the consulting engineers repeated their view that the lowest tenderer, Rush & Tompkins BV, was unqualified and that Rush & Tompkins Group PLC, which was considered qualified, was not the tenderer.

2.19. As early as 14 January 1983 Rush and Tompkins Group PLC had sent to Kampsax a telex communication explaining that the holding company, whenever necessary, gave an unconditional guarantee of the performance of works by its subsidiary. Subsequently Rush & Tompkins Group PLC sent to Eelpa a formal guarantee, dated 22 April 1983, which was subsequently replaced by a similar guarantee, dated 21 June 1983.

2.20. By telex communication of 19 April 1983, Eelpa invited Rush & Tompkins BV to attend at Addis Ababa for contract negotiations and to produce further documentary evidence of its technical competence and financial capability.

2.21. In a supplementary evaluation report, produced at the request of Eelpa on the basis of documents supplied on 5 May by Rush & Tompkins BV, the consulting engineers adhered to their conclusion that the tenderer, although supported by the Rush & Tompkins Group PLC, was neither technically nor financially qualified to carry out the project. Eelpa accepted that conclusion and decided that the scheduled negotiations could not take place.

2.22. After further consideration of the documents and consultation with the Ethiopian authorities and the consulting engineers, the Commission adhered to its conclusion that the contract should be awarded to Rush & Tompkins BV.

2.23. In a memorandum of 6 June 1983, the consulting engineers, Kampsax, concluded that Rush & Tompkins BV, supported by Rush & Tompkins Group PLC, should be awarded the contract. This was accepted by Eelpa, and the chief authorizing officer gave his agreement on 10 June 1983. On 6 July 1983, the contract was concluded between Eelpa and Rush & Tompkins BV and was endorsed by the national authorizing officer and the Commission's delegate on the authority of the chief authorizing officer.

2.24. The proposal for financing the project was approved by the Fund Committee on 22 February 1983 and the Commission took the final financing decision on 7 March 1983.

2.25. When the representations which it made to the Commission with a view to securing a re-examination of the case and a change in the Commission's attitude met with no success, other than interviews on 12 April and 13 June 1983 with officials from the competent directorate-general, the Italian Consortium announced, on 16 June 1983, its intention to institute proceedings.

3. The first two claims

The applicants' first two claims (conclusions 1 and 2) must in my view be declared inadmissible on the basis of the Court's judgment of 10 July 1984 in Case 126/83 (*STS Consorzio* v *Commission* [1984] ECR 2769).

That conclusion is not affected by the differences referred to by the applicants at the hearing between the circumstances of this case and those on which that judgment was based.

In the first place, at the hearing the applicants put forward as a pertinent difference the fact that Eelpa in its capacity as employer stipulated in its Conditions of Tender that the validity of any prospective contract was conditional upon the European Development Fund agreeing to finance it. Since that condition was laid down by the employer, it is the employer alone that is responsible for it. The fact that the employer stipulates such a condition cannot alter the division of competence between the Community and the ACP States as described in the aforesaid judgment or in itself provide any basis for liability on the part of the Community.

Secondly, the applicants correctly point out that the *STS* case was concerned solely with Article 123 (3) (b) of the Second Lomé Convention, while in this case they rely on Article 123 (2) (c) of the Convention. That observation, correct as far as it goes, is of no avail to the applicants, since the reasoning contained in that judgment clearly applies to Article 123 as a whole. In that regard reference may be made in particular to paragraphs 15 and 16 of the judgment. That such a general application was intended is also clear if the judgment is compared with my Opinion in that case.

Since I think it clear, in the light of the Court's judgment in the *STS* case, that the applicants' first two claims are inadmissible, I do not think it is necessary to deal with the substance of their submissions on those points.

4. The third claim

4.1. *Admissibility*

The Commission also disputes the admissibility of the claim for damages, which is stated more specifically in conclusions (3) and (4) of the application. Since the claim for damages in conclusion (3) stands and falls with the admissibility of the first two claims, in my view that claim must indeed be declared inadmissible. It seeks compensation for the damage caused by the acts or failures to act which the applicants seek in their first two claims to have declared unlawful.

The fourth conclusion, however, is independent of the first two claims and reads as follows:

'(4) As a further subordinate hypothesis, to award the applicants monetary compensation and full indemnification for the damage caused to the applicants by the Commission's illegal conduct, should it be found by this Honourable Court that there exists no act, acts, measures, failure or failures by the Commission, subject to review under Articles 173 and 175.'

In paragraph 20 of the judgment in the *STS* case the Court expressly left open the question whether such an action for damages based on the second paragraph of Article 215 of the EEC Treaty was admissible.

The Commission's argument that the claim for damages in this case is a disguised application for annulment is in my view justified in so far as it refers to the applicants' third conclusion.

On the other hand, I think that the applicants' argument that to declare inadmissible the claim for damages on the sole ground that its result could be equivalent to that of an application for annulment would be to ignore the independent nature of that remedy is correct with regard to their fourth conclusion. The potentially independent nature of an action for damages is also confirmed by paragraph 20 of the *STS* judgment and in fact follows from other judgments of the Court regarding the second paragraph of Article 215 of the EEC Treaty. This part of the Commission's argument must therefore be rejected.

The Commission's argument for inadmissibility based on Article 38 (1) of the Rules of Procedure (insufficient details concerning the extent of the damage suffered) must also in my view be rejected. In the application the subject-matter of the dispute is sufficiently well defined with regard to this claim for damages to meet the requirements laid down in that provision. The nature of the damage for which compensation is claimed is also adequately described in the application. As the Court has consistently held, it is only at a later stage of the proceedings that the precise extent of the damage suffered must be fixed.

In my view conclusion (4) of the application must therefore be regarded as admissible. In that respect I consider to be of particular relevance the obligation which Article 121 (2) of the Convention lays on the chief authorizing officer, namely to 'ensure equality of conditions for participations in invitations to tender, and see to it that there is no discrimination and that the tender selected is economically the most advantageous'. The fact that that is an independent obligation of the chief authorizing officer is underlined in paragraph 15 of the *STS* judgment, in which it is indicated that that obligation applies both to the chief authorizing officer and to the delegate. Having regard to the nature of the obligations I think it clear, moreover, that

they exist in part for the protection of tenderers.

4.2. *The substance of the case*

(a) The *applicants* consider that the conduct of the Commission viewed as a whole is unlawful. The Commission did not abide by the Conditions of Tender and is guilty of a breach of the principles of equal treatment and non-discrimination. From the receipt and the opening of the tenders it disregarded the principles of good faith, fairness and impartiality applicable in contractual relations. It rejected the proposal for the placing of the contract approved by the delegate, prevented the signing of the contract, which had come into being by the mere fact of the agreement reached between the parties, and forced Eelpa to begin negotiations with Rush & Tompkins BV; yet it refuses to provide any information at all regarding the proceedings. It arrogated to itself the powers of the ACP State by entering into negotiations directly with Rush & Tompkins BV and allowing that company to submit new material and modify its tender, and by persuading the engineers to change their report.

(b) With regard to that argument the Commission correctly points out in the first place that according to Article 123 (2) (c) the delegate is to approve within one month the national authorizing officer's proposal for the placing of the contract wherever three conditions are fulfilled: the tender selected is the lowest, it is economically the most advantageous and it does not exceed the sum earmarked for the contract.

First of all, it appears from point 2.14 of the summary of the facts set out above and from Annex 3 to the reply that in this case there was no proposal on the part of the national authorizing officer but only a meeting of the Tender Committee at which a recommendation was made to the employer; the meeting was attended by both the national authorizing officer and by the delegate and the minutes were signed *inter alia* by the Commission's delegate. The signing by the delegate of the minutes of such a meeting of a group whose rôle is to advise the employer cannot be regarded as approval within the meaning of Article 123 (2) (c), since it is clear that nothing more than a recommendation to the employer was involved. It does not appear, nor is it even asserted, that the delegate gave his approval in any other way to a proposal by the national authorizing officer to award the contract to the applicants.

Secondly, it is clear from point 2.12 of my summary of the facts that the tender submitted by the Italian Consortium was not the lowest tender. Even though the national authorizing officer later adopted the recommendation of the Tender Committee, it is clear that the delegate *could not* approve a proposal on those terms. The applicants' argument that the requirement in question should be interpreted as meaning the lowest tender submitted by a technically and financially qualified undertaking finds no support in the wording or intention of that article. On the contrary, it seems to me that any departure from the principle that the contract should be awarded to the lowest tenderer on the basis that the latter lacks the necessary qualifications is of such far-reaching significance in the context of the financial responsibility of the Community that it must be considered a prerogative of the chief authorizing officer. He must in particular inquire whether the 'lowest

tender' is also the 'economically most advantageous tender', as the Commission correctly pointed out, referring to Article 130 of the Convention.

This argument — put forward by the applicants to show that the Commission's conduct was unlawful — must therefore in my view be rejected.

(c) The remainder of the arguments put forward by the applicants to demonstrate that the Commission's conduct was unlawful are based on the assertion that, on the basis of the Conditions of Tender, the General Conditions of the European Development Fund and more generally the rules for the award of international contracts, the Commission did not have the right to allow the lowest tenderer to supplement, modify or improve its offer at a later stage, in particular by providing supplementary guarantees from the group to which it belonged.

As has already been mentioned in point 2.9 of this Opinion, under the Conditions of Tender tenderers were required to demonstrate their technical experience, their competence to undertake the works (Clause IT-1, 4 (c)) and their current financial capability (Clause IT-1, 4 (d)); these factors were to be examined by a Tender Committee appointed by the employer, which could include the Commission's delegate and the consulting engineer (Clause IT-1, 4, third paragraph). As was stated in point 2.14 of this Opinion, that Committee decided unanimously that the lowest tenderer failed to fulfil three of the four stated criteria.

However, such a decision and the accompanying recommendation to the employer on the basis of point IT-11 of the Conditions of Tender to enter into negotiations with the applicants naturally do not affect the aforesaid provisions of the Convention concerning the approval of a proposal made by the national authorizing officer to the chief authorizing officer on the basis of that recommendation.

With regard to the subsequent events, it is clear, in my view, that the chief authorizing officer did not approve any such proposal in favour of the applicants. In my view, that failure to grant approval cannot in itself be regarded as unlawful, if for no other reason than that the applicants were not the lowest tenderers. The documents relating to the case do not make it entirely clear on the basis of what contacts the chief authorizing officer and the national authorizing officer finally arrived at the conclusion that the lowest tenderer did in fact have the technical and financial qualifications required by the Conditions of Tender. That question does not however seem to me to be of decisive importance. On the basis of the information at the Court's disposal it is clear that the employer's consulting engineer, whether or not under pressure from the chief authorizing officer, asked the lowest tenderer for further information on its tender, under note 12 of the Instructions to Tenderers of the International Federation of Consulting Engineers. It is also clear, on the basis *inter alia* of Annexes 1 and 2 to the defence and of a declaration of guarantee produced during the proceedings at the request of the Court, that in response to the consulting engineers' request for further information the holding company of the group to which the lowest tenderer belongs

gave a guarantee of the technical and financial qualifications of the tenderer. Finally, it is clear that the employer's consulting engineers and subsequently the employer itself, as well as the national authorizing officer and the chief authorizing officer, regarded that guarantee as sufficient for the lowest tenderer to be considered qualified to carry out the works. A brief summary of the last stage of those proceedings is included in point 2.23 of this Opinion.

At the hearing the applicants denied that note 12 of the Instructions to Tenderers (whose applicability in this case was not as such disputed) could provide a foundation for the procedure followed.

The relevant part of note 12 is the first paragraph, which reads as follows:

'Tenderers should be advised that the Employer, or the Engineer on behalf of the Employer, may ask any tenderer for clarification of his tender, but that no tenderer will be permitted to alter his tender price after tenders have been opened. Clarifications which do not change the tender price may be accepted and modified in the contract.'

At the hearing the applicants argued that that text cannot provide a basis for alterations in the terms of the tender. In particular, it does not permit the addition of a binding guarantee from a person who is not a tenderer. In my view that interpretation must in any event be rejected where the tenderer belongs to a group and the guarantee is given by the holding company of that group. It is common knowledge and, as can be seen from the authorities and case-law cited by the Commission on pages 10 and 11 of its defence and from Annexes 1 and 2 to the defence, it is true in particular of a holding company under English law that it is at least *possible* for such a company to give a guarantee of the performance of its subsidiaries' obligations. The examination of the question whether in this case either by law or under an express guarantee such recourse to the holding company was possible may in my view certainly be termed 'clarification'. According to a statement made at the hearing by the Chairman of Fidic's organization for tender procedures it is not normal practice for the employer, in the Conditions of Tender, to request such a guarantee from the parent company of a wholly-owned subsidiary. In practice such a guarantee is therefore not automatically submitted with the tender. Where circumstances so require it is normally requested during the negotiations between the employer and the tenderer, under the procedure laid down in note 12 of the Fidic rules. The guarantee can relate both to financial and to technical qualifications. In itself I am unwilling to attribute decisive significance to that statement, made at a late stage of the proceedings. I do however regard it as a confirmation of what must be inferred from the passage of note 12 of the Fidic rules quoted above, viewed in conjunction with the rules of international company law. In the expert's opinion submitted by the applicants at the hearing in reply to that statement I could find no sound counter-argument on that point. On the basis of the relevant general principles of company law I think it in particular incorrect that paragraph 14 of that opinion treats the parent company of the wholly-owned subsidiary as a new tenderer.

In the second sentence of the first paragraph of note 12 it is expressly made clear that 'clarifications' can indeed lead to additions to or modifications of the contract, in relation to the terms of the tender, as long as there is no change in the tender price. In this case it is not disputed that the guarantee provided was not accompanied by any change in the tender price.

On the basis of those findings I conclude that the Commission did not act unlawfully in insisting, on the basis of the powers and obligations accruing to the chief authorizing officer under Article 121 (2) of the Convention, on further information regarding the tender of the lowest tenderer pursuant to note 12 of the Fidic rules. Nor do I find unlawful conduct in the fact that on 10 June 1983, on the basis of that further information, the chief authorizing officer approved the proposal of the national authorizing officer, made at the beginning of that month, to award the contract to the lowest tenderer.

In my view conclusion (4) of the application must therefore be dismissed as unfounded.

(d) On the basis of the above findings I can deal briefly with the application brought by the applicants under Article 91 of the Rules of Procedure for an order requiring the Commission to produce a number of documents, which were not precisely defined. Article 121 (2) of the Convention, as interpreted in the *STS* judgment (see paragraph 15), imposes an independent obligation on the chief authorizing officer to ensure equality of conditions for participations in invitations to tender and see to it that there is no discrimination and that the tender selected is economically the most advantageous. As I have already said, I think that those obligations are in part intended to protect the interests of tenderers.

On the basis of that obligation I think that whether or not a party makes such an application it is in principle possible for the Court, under Article 21 of its Statute, to order the Commission to produce at least such internal documents and letters to the national authorizing officer and any third parties as the Court considers necessary in order to investigate whether the chief authorizing officer or the Commission has acted contrary to that obligation. Having regard to the Court's interpretation of that obligation, in my view the ACP State concerned cannot oppose the production of such documents, from which it will appear in what manner the chief authorizing officer satisfied his obligations. I also think it important that the Court should expressly recognize that possibility in its judgment, or at least expressly leave the matter open. Moreover, provided that the subject-matter on which information is required is sufficiently identified, I think that it is often impossible and therefore unnecessary for applicants to provide more exact details of the documents concerned than were given in this case. In this case, however, I think on the basis of my analysis of the information available that the production of additional information is not necessary in order to assess the merits of the applicants' conclusion without infringing the *audi alteram partem* principle. I therefore propose that the interlocutory application brought on 23 December 1983 under Article 91 (1) of the Rules of Procedure for an order requiring the Commission to produce such additional information should be dismissed.

5. Conclusion

In conclusion I therefore propose that the Court:

5.1. Declare inadmissible conclusions 1, 2 and 3 of the applicants;

5.2. Dismiss conclusion 4 of the applicants as unfounded;

5.3. Dismiss the application which the applicants brought on 23 December 1983 (reserved until final judgment by an order of 29 February 1984) for an order requiring the Commission to produce certain documents;

5.4. Order the applicants to pay the costs.