OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 22 MAY 1984 [1]

Mr President,
Members of the Court,

1. The application and its object

On the basis of an objection if inadmissibility lodged by the Commission, I am dealing exclusively today with the *admissibility* of the application brought by STS Consorzio per Sistemi di Telecomunicazioni via Satellite SpA in Case 126/83. The application seeks a declaration that the decisions adopted by the local delegate of the Commission approving the award of two important contracts to a competitor of the applicant are void. The contracts in question were for the provision of satellite earth stations for the ACP States of Papua New Guinea and Kiribati. The placing of the contracts formed part of open invitation to tender No 1861 issued by the South Pacific Bureau for Economic Cooperation. The Bureau was acting in that matter on behalf of the two abovementioned ACP States and signed the relevant supply contracts on 13 April and 6 June 1983. The contracts were approved by the Commission's delegate pursuant to Article 123 of the Second Lomé Convention [hereinafter referred to as "the Convention"] on 21 April and 9 June respectively.

More specifically, the applicant claims in its application that the Court should:

1. Declare that the measure(s) of approval adopted by the chief authorizing officer or the delegate of the Commission [2] is unlawful and therefore void "inasmuch as it adversely affects the applicant's rights and is unlawful on the ground that it infringes the provisions of the Lomé Convention of 30 October 1979 and is vitiated by abuse of power";

2. "Also declare that the annulment of the abovementioned measure(s) entails the annulment of all measures adopted pursuant to it."

2. The objection of inadmissibility

The Commission raised an objection of inadmissibility in relation to that application in a pleading dated 12 August 1983.

It refers in particular to Articles 108, 120, 121 (2), 122 (3), 123 and 132 of the Convention and also to Article 173 of the EEC Treaty. It claims, first, that the approval given by its delegate is not a measure within the meaning of Article 173, against which an action may be brought (pp. 7 and 8 of the Objection). Secondly, the Commission considers (at pp. 9 to 11) that even if the measure of approval is a decision against which an action may be brought, the application is nevertheless inadmissible under the second paragraph of Article 173. The measure, if deemed to be a decision, is neither addressed to the applicant, nor of direct and individual concern to it though addressed to another person. The applicant is directly concerned solely by the decision (decisions, in fact) awarding the contract adopted by the national authorizing officer. In that connection, the Commission refers to the Opinion of Mr Advocate General Gand in *Alcan* (Case 69/69, *Alcan Aluminium* v

1 — Translated from the Dutch.

2 — In relation to the difficulty of identifying those decisions, see Part 3.3 of this Opinion. I have added the plural in brackets as in fact two decisions are involved.

Commission, [1970] ECR 385) and to the judgment of the Court of 13 May 1971 in *International Fruit Company* (Joined Cases 41 to 44/70, [1971] ECR 411). Thirdly, it alleges that the application is inadmissible because it does not comply with Article 38 (1) of the Rules of Procedure, inasmuch as it does not state "the subject-matter of the dispute and the grounds on which the application is based" (p. 12 of the Objection). The last-mentioned submission must in my opinion be rejected. It is based on the assumption that the indication of "the subject-matter of the dispute and the grounds on which the application is based" must at the same time contain amplification of and *prima facie* evidence in support of the applicant's allegation that its tender was definitely the most advantageous. I do not consider that that view is supported by the rule of procedure cited above. If accepted, moreover, it would interfere with the proper administration of justice in applications such as this if they were in fact otherwise admissible. Even if an unsuccessful tenderer was present at the opening of tenders and knows their general contents, he will be unable to amplify his submission that his tender was the most advantageous until the rival tenders have been produced.

I shall consider the first two grounds in the objection of inadmissibility further in Part 4 of my Opinion. In its observations of 27 September 1983 the applicant puts forward, in particular, an interpretation of the provisions referred to by the Commission in Chapter 6 of Title VII of the Convention which differs from that of the Commission. I shall therefore now examine further the meaning of the most relevant provisions of the Convention. However, I shall at the same time consider certain other relevant provisions which are not to be found in the Convention itself.

3. Analysis of the relevant provisions in the light of the facts of the case

3.1. So far as is relevant here Article 108 of the Convention, cited by the Commission, provides in particular that:

The ACP States are responsible for preparing, negotiating and concluding contracts (Article 108 (2) (d), repeated in Article 120).

The ACP States and the Community bear joint responsibility for taking the necessary implementing measures (for projects and programmes) to ensure equality of conditions for participation in invitations to tender and contracts (Article 108 (4) (d)).

The Community is responsible for preparing and taking financing decisions on projects and programmes.

3.2. From *Article 108 (2) (c), (4) (c), and (5) and Articles 111 to 113* it appears, first, that projects (which must be distinguished from measures implementing them) are prepared by the ACP States. Next, they are appraised by the ACP State concerned and the Community in close collaboration. Lastly, it appears that the Community *alone* is responsible for preparing and taking financing decisions on projects and programmes (Articles 108 (5) and 113). The Financing Agreement relevant in this case, provided for by Article 115 of the Convention, is attached to the Commission's Objection in Annex I. From Annex No 1 to the Financing

Agreement it appears *inter alia* that contracts must be placed in accordance with the General Conditions of Contract which are contained in Annex No 3 to the Financing Agreement. Those General Conditions contain *inter alia* a non-discrimination clause in relation to tendering procedures (Article VI) and a clause on the settlement of disputes (Article XV). The main provision in that clause is that in the case of a request for compensation made by a party to a contract, the ACP State concerned can require payment by the European Development Fund ("the Fund") in settlement of any dispute only if the Commission has given its prior agreement thereto. In relation to that problem I refer to the similar problem which I considered in my Opinion of 10 April 1984 in *Murri* (Case 33/82). The provision is of indirect importance in this case in so far as reference was expressly made in relation to that case to the *prior* agreement of the Commission. As to the question what other legal remedies might be available to the applicant in the present case, the following provision from Article XV of the General Conditions is of more direct importance: "For the purposes of implementing Article 132 and Annex XIII of the Second Lomé Convention, the ACP State shall insert in contracts financed by the Fund a clause worded as follows: 'As a transitional measure and pending the entry into force of Rules of Arbitration specific to public contracts financed by the European Development Fund, any dispute will be definitively settled in accordance with the rules of conciliation and arbitration of the International Chamber of Commerce.' "

As we shall see, Article 132 of the Convention itself has a similar lack of clarity as regards the question whether it relates to disputes arising during the tendering *procedure* or solely to disputes relating to the implementation of a *contract* subsequently concluded. By contrast, the Conditions of the Invitation to Tender in the project in question (Annex 4 to the application) are quite clear in that respect. Article XXIV of those Conditions, by referring to Article 24 of the General Conditions, makes it unequivocally clear that recourse may be had to the arbitration procedure solely "where disagreement arises in the course of performance of the contract" and therefore *not* where disagreement arises in relation to the tendering procedure preceding the contract. *On the basis of that article alone, it thus seems clear that in fact the alternative channel of appeal referred to by the Commission, namely arbitration, is not available to the applicant.*

3.3. According to Article 121 (2) the chief authorizing officer of the Fund appointed by the Commission, apart from complying with the obligations in relation to payment set out in paragraph (1) must also, in close cooperation with the national authorizing officer, "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". Moreover, by virtue of that paragraph he must "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, subject to the powers exercised by the Commission delegate under Article 123". From that provision it is in my view plain that the suggestion made by the Commission that the chief authorizing

officer is empowered exclusively, and even then only in cooperation with the national authorizing officer, to take financing decisions (first para. on p. 6 of the Objection) is inaccurate. The chief authorizing officer also has independent powers (power of approval) and these extend to ensuring that the above-mentioned substantive criteria, including the principle of non-discrimination, are observed in the invitation to tender. Moreover, it is clear from Article 121 alone that application of the distinction known in French law between the "ordonnateur" [authorizing officer] (who is responsible for authorizing expenditure) and "comptables publics" [financial controllers] (who are responsible for making actual payments) does not suffice to render the application inadmissible,[1] for this case concerns *inter alia* a measure of approval adopted by the chief authorizing officer, against which according to the aforesaid distinction in French law an appeal is not in fact automatically excluded.

The fact that the power of approval of the chief authorizing officer relates to an approval *preceding* the placing of a contract (the *proposal* for the placing of the contract) is confirmed by a comparison of Article 121 (2) with Article 122 (2) (d) and (e). Taking that in conjunction with the second sentence of Article 121 (2), it seems logical to conclude that the national authorizing officer may not sign the contract until his *proposal* for the placing of the contract has been approved. Such approval therefore appears to be a clear administrative act, whose legal consequences are not, however, defined in further detail.

According to Article 123 (2) (c) the Commission's delegate approves "within one month the national authorizing officer's proposal for the placing of the contract wherever the three following conditions are fulfilled: the tender selected is the lowest, it is economically the most advantageous and does not exceed the sum earmarked for the contract". In addition, Article 123 (3) (b) provides *inter alia* that the contracts signed (after approval of the *proposals* for the placing of the contract) must be endorsed by the delegate.

From the information provided by the Commission in this case, it does not appear that a *proposal* for the placing of the contract was approved prior to the signing of the contract. During the oral procedure, the Commission's representative stated that there were preliminary *consultations,* but from the Commission's Objection it must be inferred that only the placing of the contract or the contract itself was approved by the delegate, and *retrospectively* at that (Objection, p. 4 and Annexes Nos 3 and 4). The "approval" must therefore have been based on Article 123 (3) (b) and not Article 123 (2) (c). If my analysis of the Convention is correct, the procedure actually followed, according to the Commission's Objection, was contrary to Articles 121 to 123 inclusive of the Convention and was therefore incompatible with the safeguards laid down for all tenderers in Article 121 (2). That the purpose of the latter provision is to provide such a safeguard would seem to be confirmed by Articles 125 (1), 126 (1) and (2) (b), 127 (1) and 130 of the Convention.

3.4. Article 132 of the Convention provides that: "Any dispute arising between the authorities of an ACP State and a contractor, supplier or provider of services on the occasion of the placing or performance of a contract financed by

1 — The aforesaid distinction is clearly set out in Article 8 et seq. of the Financial Regulation of 17 March 1981 applicable to the Fifth European Development Fund (annexed to the Commission's Objection).

the Fund shall be settled by arbitration in accordance with rules of procedure adopted by the Council of Ministers." I have already explained that it is clear from the General Conditions of the relevant Financing Agreement that an undertaking whose tender is unsuccessful *cannot*, contrary to the Commission's assertion, have recourse to the arbitration procedure. Although Article 132 refers to disputes arising on the occasion of the *placing* of a contract and not only to disputes arising on the occasion of the performance of a contract, it would be difficult to formulate such an application for arbitration by an unsuccessful undertaking. As far as the International Chamber of Commerce is concerned, arbitration presupposes the existence of an arbitration agreement between the party inviting tenders and the undertaking concerned. However, in practice a tenderer can enter into such an agreement with the party inviting tenders in relation to the placing of the contract itself only before, or at the time when, he submits his tender. The ACP States concerned have no clear obligation under the General Conditions of Tender examined above to enter into such an agreement with each tenderer. Moreover, no indication has been given in these proceedings of the existence of any such agreements, which would apply equally to unsuccessful tenderers.

4. The question of admissibility

4.1. *The subject-matter of the question of admissibility.* An examination of the application in the light of the other information contained in the file and the relevant provisions reveals that the principal transactions to which the application for a declaration of nullity relates can only be the measures of approval adopted by the Commission's delegate, the existence of which has not been contested. As I have already stated at the beginning of my Opinion, those measures of approval were adopted on 21 April and 9 June 1983 respectively, *after* the signing of the contracts concluded with the successful undertaking. In the light of the considerations I have set out above and the copies of the approvals produced to the Court the latter must be regarded as measures falling within the terms of Article 123 (3) (b), that is to say, endorsements of contracts already concluded. During the proceedings, moreover, the applicant made no mention of any other particular measures of approval, and no other indication of their existence has arisen in the course of the proceedings. The general wording of the application and of the applicant's observations of 27 September 1983 (I refer to the second full sentence on page 2) does in fact embrace any measure of approval relating to a *proposal* for the placing of a contract, that is to say, prior to the placing of a contract. Since in spite of the relevant provisions there has been no sign of the existence of such measures and the applicant has also not disputed that the measures of approval adopted by the Commission constitute the chief subject-matter of its application, I shall in my examination of the question of admissibility devote some attention, solely for the sake of completeness, *also* to any other measures of approval which may have been adopted but have not yet come to light.

The applicant's second claim is derived from the first and concerns the annulment of all measures adopted pursuant to the contested approval. It may be assumed that that refers primarily to the placing of the contract with a competitor and to the contracts subsequently concluded with that competitor.

4.2. *Examination of the objection of inadmissibility in the light of the scope of*

Article 173 ratione materiae. As I have said, the Commission's chief contention is that the contested measures of approval are not legal measures against which an action may be brought by a private undertaking under Article 173. In its opinion those measures of approval are merely accessory to the decision placing the contract, for which the relevant ACP State is exclusively responsible. The sole consequence of the endorsement of the concluded contract by the Commission delegate (under Article 123 (3) of the Convention) is, in its view, to make possible the financing of the contract in question by the Fund (which means primarily the authorization of payments from the Fund). As that is likewise a legal consequence, the argument is not sufficient in my view to show that the measure of approval in question is not a legal measure against which an action may be brought, in so far as the other conditions in Article 173 are also met. For example, such an action would certainly appear to be open to any Member State if an endorsement were given in breach of the Convention. The same conclusion applies to any measures of approval under Article 123 (3) (c) (prior approval of *proposals* for the placing of a contract), though as has been stated there do not appear to have been any in this case. It may even be asked whether such measures of approval are a necessary pre-condition for the placing and signing of the contract. Since that article constitutes an independent safeguard and, as I have said, there is no possibility of arbitration as suggested by the Commission in relation to the final decision placing a contract, one might also ask whether a right of action before the Court of Justice might not be desirable. Since there has been no evidence of such measures of approval in this case, however, I do not consider it advisable to settle that question in these proceedings. In particular, the decision in Case 118/83 *(Muratori* v *Commission),* in which the application was formulated in different terms, must not be prejudiced.

4.3. *Examination in the light of the scope of Article 173* ratione personae (second paragraph). As I have said already (in Part 2 of this Opinion), the Commission claims secondly that the application is in any event inadmissible because the measure of approval is clearly addressed to the national authorizing officer and is not of direct and individual concern to the applicant, as an unsuccessful undertaking. Therefore, in its view, the applicant has not met the conditions laid down in the second paragraph of Article 173.

I regard this second submission on the part of the Commission as well-founded. It is not disputed by the applicant that the contested decisions of approval of 21 April and 9 June 1983 were addressed to the national authorizing officer, and certainly not to the applicant. It also seems to me clear that it was not that approval but rather the prior placing and signing of the contracts by the competent authorities of the ACP States concerned which had direct consequences for the applicant. It should be noted that the position in this case is not comparable with that in the fourth *Simmenthal* case (Case 92/78, [1979] ECR 777), because there the contested decision of the Commission *preceded* the rejection of the tender submitted by the applicant in that case following the relevant invitation to tender, contained a binding order and hence was certainly the direct cause of the rejection of its tender. Nor are the facts on which this case is based comparable with those concerned in the Court's judgment of 23 November 1978 in Case 56/77, *Agence Européenne d'Interims* v *Commission* ([1978] ECR 2215). There the action challenged the

actual award of the contract by the Commission to one of the applicant's competitors. The applicant's real aim in this case is likewise to obtain the annulment of the actual placing of the contracts and of the contracts subsequently concluded with its competitor, as is apparent from paragraph 2 of its claim. However, as those contracts were placed by the ACP States concerned and therefore could not be challenged before this Court, the applicant endeavours to achieve the same result by presenting the award of the contracts and the contracts themselves as consequences of the contested measure of approval. The applicant cannot succeed, however, quite simply because the contracts had already been awarded and had become binding.[1] The fact that if its action succeeded the contracts could no longer lawfully be financed by the Fund does not justify the conclusion that the applicant is directly concerned by the measures of approval. On the contrary, it is quite obvious that (the annulment of) the measures of approval can at most be of only indirect concern to the applicant, if for example the loss of those financing facilities were to induce the ACP States in question to terminate the contracts. I do not consider it necessary to examine further the question whether such a legal consequence is possible.

For the sake of completeness I would also add at this point that my opinion would perhaps have been different if the applicant had contested a genuine measure of approval within the meaning of Article 123 (2) (c). However, since there has been no evidence of the existence of such an approval and the applicant has not disputed the assumption that only the subsequent measures of approval referred to by the Commission are relevant in this case, I consider it undesirable, for the reasons set out above, to express an opinion on that question in these proceedings.

4.4. *Limitation of this Opinion to the individual case.* At first sight, it might be thought that the conclusion thus reached would mean that an unsuccessful undertaking has no legal remedy at all where a contract is placed contrary to the provisions of the Convention. Indeed, it has already appeared that, contrary to the Commission's assertion, the applicant almost certainly cannot make an application under the arbitration procedure provided for in Article 132 of the Convention (in this regard I refer to Part 3.2 of this Opinion). However, it would be premature to draw the general conclusion that in such cases no legal protection is available. First, it is conceivable that an action may be available before a national court of the ACP State in question. However, I regard as more important the fact that my Opinion is expressly limited to the subject-matter of the application. Case 118/83 *(Muratori)*, the subject-matter of the application is formulated in quite different terms, refers to measures adopted by the Community in relation to the applicant itself, and furthermore is based on Article 215 of the EEC Treaty. In my Opinion I have carefully avoided prejudicing in any way the adjudication of that case, which is entirely differently constructed and is also based on quite different facts. As I have stated, from the point of view of the proper ad-

1 — However, in this connection I also refer to the comments made by Mr Advocate General Reischl at pages 2242 to 2244 of his Opinion in Case 56/77 (cited above), with which I concur. They give further reasons why the applicant cannot in any case obtain the annulment of the contracts challenged by it.

ministration of justice I have considered it important to leave open the question how an application challenging an approval within the terms of Article 123 (2) (c) of the Convention (not present in this case), would have to be judged.

5. Conclusion

Finally, I have also considered whether on account of the apparent uncertainty as to whether, prior to the endorsement given under Article 123 (3) (b) of the Convention, the prescribed approval was also given pursuant to Article 123 (2) (c), it might be advisable to consider the issue of admissibility together with the substance of the case. However, as I have already said, the applicant has not disputed that the measures of approval contested by it were the measures of approval of 13 April and 6 June 1983 referred to by the Commission. Also, it is apparent from the copies of those measures produced by the Commission that they were endorsements of the kind referred to in Article 123 (3) (b). The applicant is itself to blame for not clearly stating in its written and oral observations on the objection raised by the Commission that its application challenged primarily not those endorsements, but the measures of approval referred to in Article 123 (2) (c). Under those circumstances I consider, albeit after some hesitation, that I cannot propose that the objection should be considered together with the substance of the case.

On the basis of the examination set out above, I therefore conclude in this particular case as follows:

5.1. The application is inadmissible;

5.2. The applicant should be ordered to pay the costs.