OPINION OF ADVOCATE GENERAL LENZ

delivered on 30 June 1992 *

Mr President,
Members of the Court,

A — Facts

1. The present actions for annulment, failure to act and damages relate to a restricted invitation to tender organized with the participation of an interstate organization consisting of a number of ACP States, the Interstate Permanent Committee for Drought Control in the Sahel (hereinafter 'the ICDCS'), pursuant to the Third Lomé Convention (hereinafter 'the Convention'). [1] The tender procedure was designed to implement a regional action programme in the ICDCS Member States financed by the European Development Fund. The applicant Italsolar, a company established in Milan, had submitted a tender which was subsequently rejected by the ICDCS. The claims in the case relate to the Commission's conduct during the tendering procedure, by which, in the applicant's opinion, the Commission acted in breach of its obligations.

2. The programme referred to, which was to be financed under a financing agreement under Article 222 of the Convention and which defines the framework of the invitation to tender here at issue, was submitted by the ICDCS and concerns the use of photovoltaic solar energy in the countries of the Sahel (solar regional programme — SRP). The large-scale introduction of photovoltaic equipment is designed to make the use of solar energy more generally and commonly available throughout the countries of the Sahel. [2] More specifically, the programme involves the use of solar equipment for the operation of pumps, lighting, refrigeration units and the charging of batteries and accumulators. The operation of pumps, which it is intended should represent 95% of peak output, constitutes the most important aspect (Article 1 of the technical annex to the special conditions of tender applicable — Part A of the tender documents). A description of the programme makes it clear that it is to be based on the following principles:

'— Running costs are to be borne by the users;

— The RSP is designed as the first phase in a process of solar energy development based on normal business relations between customers and suppliers, with particular emphasis on after-sale service.'

3. The invitation to tender itself (No 6100.20.94.216 — REG/6116) was based on the above tender documents, which consisted of special conditions of tender (Part A), a technical annex and the general conditions of

* Original language: German.

1 — Third ACP-EEC Convention concluded pursuant to the Decision of the Council and Commission of 24 March 1986, OJ 1986 L 86, p. 1.

2 — Burkina Faso, Cape Verde, Chad, Gambia, Guinea-Bissau, Mali, Mauretania, Niger and Senegal.

tender (Part B). Also applicable were the general provisions regulating public works and supply contracts financed by the European Development Fund. [3] According to Article 3 of Part A of the tender documents, the invitation to tender related to delivery and installation of the equipment referred to above, as well as to the following supplementary services:

— the establishment of a distribution network for spare parts;

— the maintenance of equipment;

— staff training programmes.

4. As regards the details of deliveries and installation services, after-sale service, maintenance and staff training, that article refers to the technical annex.

5. While Article 236(1) of the Convention and Article 45(1) of the general provisions regulating public works and supply contracts set out the general criteria for determining the 'tender that is economically the most advantageous', the result sought by Article 226(2) of the Convention, it is apparent from several passages in Part A of the tender documents that in the case of the invitation to tender in question here, the *after-sale service* offered is — among those criteria — of 'fundamental importance' (see Article X.2 of Part A, together with the penultimate paragraph of Article 1 and Article 3.1 of the technical annex). The latter provision states that tenders not corresponding to the conditions there set out are to be rejected, irrespective of the assessment otherwise made of the quality and price of supplies proposed, and lays down the various requirements which a tender must satisfy in this regard. For every State covered by the lot in question, the tenderer must supply the name and reference of a company which represents it there and which would carry out maintenance work under the responsibility of the successful tenderer. The company concerned must be stable and governed by local law. In this regard, the following data, *inter alia*, were to be included in the tender:

— name of the company, date of establishment, authorized capital of the representative in each State, along with the locations of establishments of that company;

— references for that company with respect to the performance of tasks comparable to those which are the subject of the present invitation to tender;

— nature of the business agreements entered into by the tenderer and its local representative.

6. Article 8 of the technical annex, which governs the composition of tenders, provides that, with regard *inter alia* to after-sale service, documents must be submitted which provide information on the national representative of the successful tenderer and on the resources employed in order to fulfil obligations with respect to after-sale service.

3 — See Council Regulation No 282/72 of 31 January 1972 (French, German, Dutch and Italian versions only), JO 1972 L 39, p. 3.

7. The invitation to tender was divided into three lots, each of which included different Sahel States:

Lot No 1: Cape Verde, Gambia, Guinea-Bissau, Mauritania and Senegal;

Lot No 2: Burkina Faso and Mali;

Lot No 3: Chad and Niger.

8. According to Article IV.4 of Part A of the tender documents, tenderers could submit offers — which had to be separate — for one, two or three lots. The tender which was economically the most advantageous under the criteria set out in the technical annex was to be determined separately for each individual lot. In order to make it possible to compare the various systems and services, it was provided that all three lots were not to be awarded to the same tenderer.

9. Following the applicant's request that it be admitted to the restricted invitation to tender, which it had submitted pursuant to Notice No 2731 concerning a pre-qualification procedure, [4] the executive secretary of the ICDCS informed it by letter of 6 July 1989 that it should send in its tender drawn up in accordance with the tender dossier, before 6 November 1989 to the Directorate General for Development (DG VIII) of the Commission. The applicant submitted a tender within the prescribed period *for the second and third lots.*

10. After the opening of the envelopes received, the tenders were examined and evaluated and information and explanations of various kinds were sought from tenderers. By letter of 14 November 1989 from DG VIII, the applicant was requested to submit additional information concerning the technical specifications of its equipment, references relating to its previous use in overseas countries, prescribed procedures for its installation and arrangements for after-sale service.

11. The applicant forwarded all that information within the period stipulated.

12. On 27 November 1989, a delegation was sent to the appplicant's premises to carry out technical examinations of its products.

13. After the applicant had, following a request by the ICDCS, extended the period of validity of its tender by two months beyond the period laid down in Article XVI of Part A of the tender documents, the ICDCS proposed that the contract be awarded provisionally to undertakings other than the applicant and that the trial phase with those undertakings be commenced in accordance with Article 5 of the technical annex to Part A of the tender dossier. That proposal was approved by the Commission on 30 April 1990.

14. The ICDCS accordingly informed the applicant by telex message of 3 May 1990 that its tender had been rejected; it subsequently confirmed that fact by letter of 7 May 1990.

4 — OJ 1988 S 62 of 29 March 1988.

15. On 7 May 1990 the applicant wrote to the Commission, referring solely to the telex message, as it had obviously not yet received the confirmatory letter of 7 May. It pointed out that if that message (of 3 May) signified the applicant's exclusion from the invitation to tender and if it should receive definitive confirmation, it would treat such exclusion as totally unlawful for very serious reasons which it would not fail to make known to the Commission. It accordingly reserved the right to bring the matter before the appropriate courts. It stressed, *inter alia*, that when the envelopes had been opened its tender had turned out to be economically the most advantageous and that the companies which it had chosen to represent it in each country were competent undertakings. Any exclusion measure which was not objectively justified would, according to the applicant, result in the annulment of the entire tender procedure.

16. The letter concluded as follows:

'Trusting that the communication we have received is the result of a misunderstanding, we should be obliged to receive your prompt reply'.

17. The Commission replied by letter of 12 June 1990 from the Director-General of DG VIII informing the applicant that the power to decide the award of the lots was vested in the executive secretary of the ICDCS, given that the RSP, under which the contracts were to be awarded, was implemented under the responsibility of that body. The Commission added that it had, in any event, carefully monitored the matter and the ICDCS had obtained the assistance of international experts in order to assess the technical specifications of the various tenders. Furthermore, the decision as to which tender was economically the most advantageous took account, in accordance with the tender documents, not only of the quality of the individual items of equipment but also of the viability of the installations and, in particular, of the after-sale service and maintenance guarantees offered. In the context of that procedure, the Director-General had to confirm, to his regret, that Italsolar's tender, which demonstrated undeniable advantages justifying the extension of the period of its validity, had been rejected by the executive secretary of the ICDCS. If the applicant considered it had to express its reservations with respect to the award procedure, such reservations ought to be communicated to the ICDCS. However, the Administration was, according to the fifth subparagraph of Article 45(2) of the general provisions for public works and supply contracts, not required to declare the reasons for its choice.

18. By a letter of 9 July 1990 addressed to the executive secretary of the ICDCS, the applicant requested withdrawal of the decision excluding it and authorization for it to participate in the subsequent stages of the procedure, in particular the laboratory tests, until the contract was definitively awarded. In the absence of measures favourable to it, the applicant stated that, as its tender was economically the most advantageous, it intended to initiate the arbitration procedure provided for in Article 238 of the Convention in order to secure recognition of its right to participate in the procedure and to have the contract awarded to it or, failing that, to have damages paid to it.

19. On 4 December 1990 Italsolar lodged an application with the International Chamber of Commerce for arbitration proceedings against the ICDCS.

20. An application to the Court for interim measures made by Italsolar, by a separate document, was dismissed by order of the President of the Court of 25 October 1990.

21. The applicant considers that its exclusion from the tender procedure and the Commission decision sent to it by letter of 12 June 1990 are both unlawful. In any event, the Commission failed to take the measures necessary to protect the applicant's interests and this resulted in its incurring serious damage for which it seeks compensation from the Commission.

22. The applicant claims that the Court should:

(i) declare null and void the Commission decision notified to the applicant by letter of 12 June 1990;

(ii) in the alternative, declare that the Commission has failed to take the measures which it was required to adopt in relation to the applicant;

(iii) order the Commission to made good the damage caused to the applicant;

(iv) order the Commission to pay the costs, including those relating to the application for interim measures.

23. The Commission contends that the Court should:

(i) declare the application inadmissible in so far as it is based on Articles 173 and 175 of the EEC Treaty or, in the alternative, dismiss it as unfounded;

(ii) dismiss the application as unfounded in so far as it is based on Article 178 and the second paragraph of Article 215 of of the EEC Treaty;

(iii) order the applicant to pay the costs, including those relating to the application for interim measures.

24. On the question whether the claim for damages is well founded, the Commission argues primarily that it considered the proposal of the ICDCS to be compatible with the conditions of tender in view of the shortcomings established in the after-sale service offered by the applicant and that it was for that reason unable to find any reason for opposing that proposal.

B — Analysis

I — *The claims based on Articles 173 and 175 of the EEC Treaty*

25. *1.* The dispute as to the admissibility of these claims essentially concerns the distribution of areas of competence between the Commission, which for this purpose is represented by a Chief Authorizing Officer and a delegate in accordance with Articles 226(1) and 228(1) of the Convention, and the administrative body acting for the participating ACP States (in this case, the ICDCS) for the purposes of implementing, pursuant to Article 192 and Article 215 et seq. of the

Convention, operations financed by the European Development Fund. Two separate issues have to be decided in this regard: the award of the contract as such, and the financing out of Fund resources.

26. So far as concerns the distribution of areas of competence in this connection, the applicant clarified at the hearing the (unclear) arguments it put forward in the written procedure. It expressed the view in the written procedure that even though the power to negotiate and conclude contracts financed by the European Development Fund is vested in the ICDCS, [5] the Commission none the less has wide powers with regard to the organization and supervision of the tender procedure. [6] In the situation which gave rise to the *CMC* case, [7] the Commission opposed the exclusion of the tender which was economically the most advantageous and the Court did not find that to be in any way irregular. [8]

27. In support of its claim under Article 175, the applicant also added that the Commission has a duty to exercise care with regard to the tender procedure, that is to say, it must ensure that the awarding authority complies with the principles of equality and non-discrimination and that it selects the tender which is economically the most advantageous. [9] By not intervening for the purpose of ensuring that the applicant's tender would be readmitted to the tender procedure, the Commission was guilty of a culpable omission. [10]

28. However, the applicant did not expressly state a view in the written procedure as to whether the powers and duties referred to also concerned in law (apart from the issue of financing under Article 192(4) of the Convention) the *award of the contract* and the *procedure* implemented for that purpose. Rather, it referred principally to the *de facto* position of the Commission: the legal measure which resulted in damage to the applicant formally (but only formally) bore the signature of the executive secretary of the ICDCS; [11] the invitations to tender financed by the European Development Fund were administered by the Commission, whereas the participation of the ACP States was purely formal in character. [12] Thus, it was the Commission itself which sent the technical delegation to the applicant's premises, whilst the ICDCS had argued against sending the delegation and had prevented its own representative from taking part. [13]

29. During the oral procedure, the applicant invoked Article 192(3)(d) of the Convention, which provides as follows:

'The ACP States and the Community shall bear joint responsibility for:

...

(d) taking the necessary implementing measures to ensure equality of conditions for participation in invitations to tender and contracts;

5 — Reply p. 8.
6 — Idem.
7 — Judgment in Case 118/83 *CMC* v *Commission* [1985] ECR 2325.
8 — Application, p. 17.
9 — Reply, p. 5.
10 — Application, p. 18.
11 — Application, p. 10.
12 — Application, pp. 15 and 16.
13 — Reply, pp. 1 and 2.

...'

30. From a comparison of that provision with Article 192(2)(d), under which the ACP States are responsible for

'preparing, negotiating and concluding contracts',

the applicant concluded that the ACP States and the Community are *jointly* responsible for the tendering procedure up to and including the award of the contract, while the ACP State in question is competent (in the period following the award of the contract) solely for the conclusion of the contract with the successful tenderer. The Commission representative's approval of the proposal for a provisional award by the ACP State (see Article 228(3)(d) and (e) of the Convention) is a necessary precondition for the award of the contract itself.

31. While I will consider in my analysis of the action for annulment the question whether or not there is conduct on the part of the Commission amounting to interference in the ICDCS's area of competence, the question of principle concerning the allocation of competences should now be dealt with.

32. In its judgment in *STS*, [14] which it subsequently confirmed in its judgemnt in *CMC*, [15] *Murri* [16] and *Clemessy*, [17] the Court came to the conclusion on this point, after an examination of the provisions of the Second Lomé Convention relevant to the case, [18] that

'contracts financed by the Fund remain national contracts which the authorities of each ACP State have the power to prepare, negotiate and conclude.' [19]

33. With regard to the powers of the delegate and the Chief Authorizing Officer (the Commission's representatives) under Article 123 of the Second Lomé Convention (Article 228 of the Third Convention, which applies here), the Court held at paragraph 16 of its judgment in *STS* that

'the measures adopted by the Commission's representatives during that procedure, whether approvals or refusals to approve, endorsements or refusals to endorse, are solely intended to establish whether or not the conditions for Community financing are met. They are not intended to interfere with the principle that the contracts in question remain national contracts which the ACP States alone are responsible for preparing, negotiating and concluding, and they cannot have that effect.'

14 — Judgment in Case 126/83 *STS* v *Commission* [1984] ECR 2769.

15 — Cited above.

16 — Judgment in Case 33/82 *Murri Frères* v *Commission* [1985] ECR 2759.

17 — Judgment in Case 267/82 *Développement SA and Clemessy* v *Commission* [1986] ECR 1907.

18 —

Lomé II		Lomé III
Art. 108(2)	=	Art. 192(2)
Art. 120	=	Art. 225(3)
Art. 122	=	Art. 227
Art. 108(5)	=	Art. 192(4)
Art. 121	=	Art 226
Art. 123(1)(a)	=	Art. 228(1)(a)

19 — Paragraph 13 of the judgment in *STS*.

34. At a later point in that judgment (end of paragraph 18), the Court stated that:

'[Tenderers] have legal relations only with the ACP State which is responsible for the contract, and measures adopted by the representatives of the Commission cannot substitute in relation to them a Community decision for the decision of the ACP State, which has sole power to conclude and sign that contract.'

35. An examination of those passages, taken together, makes it clear that the exclusive competence of the ACP States is by no means limited to the signing of contracts with successful tenderers following the award of those contracts. The ACP States remain responsible for the tendering *procedure*, since the Commission's representatives may intervene at that stage only for reasons connected with Community financing (paragraph 16), but are also responsible for the decision to award the contract itself, as is made clear by the use of the phrase 'national contracts' [20] and also confirmed by Article 45 of the provisions regulating public works and supply contracts. [21] As regards more particularly the circumstance, disputed by the applicant, that the scope of the Commission's agreement to the proposal for a provisional award is restricted to questions of finance, not only is the abovementioned paragraph 16 of the judgment in *STS* of importance in this respect but also the further finding by the Court in that judgment (paragraph 19), namely that

'the measure by which the Commission's representative approved the award of the contested contracts to Telspace is not of "direct" concern to STS within the meaning of the second paragraph of Article 173 of the EEC Treaty.'

36. For all the above reasons, the applicant's views on the distribution of competences in the tendering procedure cannot be accepted.

37. *2.* In the light of the context just set out, the applications based on Articles 173 and 175 are inadmissible on several grounds.

38. (a) So far as the application based on Article 173 is concerned, its admissibility depends on whether or not it relates to a measure capable of producing legal effects. [22] The applicant takes the view that the dis-

20 — See also the order of the President of the Court on the application for interim measures in Case C-257/90 R [1990] ECR I-3841 (paragraph 18), in which it is stated essentially that it is the ICDCS which has the power to *decide* both for and against the award of a contract.

21 — With regard to the procedure to be followed by the committee and the administrative services of the ACP State in question involved in the examin-ation of the tenders, those provisions state as follows:
'1. The committee shall propose to *the administration* the most economically advantage-ous offer ...
2. ...
For information purposes, *the administration* shall notify its choice to the tenderer chosen by it by means of a registered letter with a form for acknowledgment of receipt ...
The administration shall also send registered letters to the other tenderers informing them that their tenders have been rejected.
The administration shall not be required to disclose the reasons for its choice ...
4. If *the administration* decides to discontinue the invitation to tender, it shall inform all tenderers to that effect.'
(my emphasis).

22 — See, for example, the order of 4 October 1991 in Case C-117/91 *Bosman* v *Commission* [1991] ECR I-3353, paragraph 13.

puted letter of 12 June 1990 constitutes such a measure. In this regard it rearranged as follows in the oral procedure the (rather unclear) [23] submissions which it had made in the written procedure: the letter represents a two-fold decision by the Commission. On the one hand, it implicitly communicates approval of the applicant's exclusion through its agreement with the provisional award of the contract. On the other hand, informs Italsolar of its refusal to adopt measures to rectify the situation, that is to say, with the objective of securing the applicant's readmission to the tender procedure.

39. I am unable to concur in that view of the matter. All that the Commission has done in that letter is to explain from its own perspective the legal position with regard to competences, the criteria for the award of the contract and the formal provisions applicable and to confirm — on the basis of its knowledge of the circumstances — that the ICDCS had not accepted the tender submitted by the applicant.

40. The only measure capable of producing legal effects is the ICDCS measure mentioned in the letter, to which, however, the Commission does no more than refer. Neither according to the Commission's account given in the letter nor in reality (as we have seen with regard to the distribution of competences) can that measure be attributed to the Community. The applicant's submission that it was only formally the ICDCS which decided on the disputed exclusion cannot alter that conclusion. There is nothing whatever to suggest that the Commission adopted measures in that regard which lay outside its competence or that it exercised undue influence on the ICDCS with the objective of securing the applicant's exclusion from the award of the contract. While Italsolar has argued that the Commission, by sending out the technical delegation, took decisions which ought to have been taken by the ICDCS (a point which the Commission disputes), it has not contradicted the Commission's account, according to which, wholly consistent with the distribution of competences, the proposal for the provisional award of the contract to a different tenderer emanated from the ICDCS.

41. So far as concerns any agreement by the Commission to the provisional award of the contract, this is nowhere mentioned in the contested letter, and even in its application Italsolar appears to proceed on the basis that the provisional award is still outstanding. [24]

42. I am also unable to accept that the Commission turned down a request from the applicant to rectify the situation. That too is scarcely surprising, since the applicant made no express request to that end in its letter of

23 — Italsolar states on pages 10 and 11 of its application that if the Commis-sion had adopted a clear position (*vis-à-vis* ICDCS) demonstrating the illegality of the applicant's exclusion, this would undoubtedly have prevented such exclusion. By refusing in its disputed letter to adopt the measures necessary to protect the interests of the applicant, so the argument runs, the Commis-sion took a decision which affected the applicant's legal rights. On page 18 of its application, Italsolar argues that the Commission decision upholding the applicant's exclusion must be declared null and void (it appears from the alternative submissions that the applicant is proceeding on the basis that this 'decision' was communicated in the disputed letter). It is not clear what the relation between these two points of view is. At page 4 in its reply, Italsolar argues that the Commission's letter represents its definitive position on the facts here set out by the applicant and expresses the Commission's refusal to correct the error complained of by the applicant.

24 — See p. 11 of the application.

7 May 1990. In that letter Italsolar pointed out the fact that, and the reasons for which, it considered its exclusion to have been unlawful, reserved the right to bring the matter 'before the appropriate courts' and expressed its view that an exclusion without objective justification would lead to the annulment of the entire tendering procedure. Furthermore, Italsolar expressed its hope that the problem was the result of a 'misunderstanding', and it requested the Commission for a 'reply'.

43. In the light of all those factors, it must be held that the application based on Article 173 is inadmissible for the lack of any measure capable of producing legal effects.

44. Should the Court nevertheless interpret the Commission's letter as meaning that it does in fact contain the agreement (to the provisional award of the contract) or the refusal (to rectify the situation) which are criticized by the applicant, such acts could not in any event be of direct concern to the applicant. [25] This finding is also in no way affected by the Court's judgment in *Piraiki-Patraiki*, [26] which was cited by the applicant. At issue in that case was whether or not authorization by the Commission of protective measures under the second subparagraph of Article 130(1) of the Act of Accession of the Hellenic Republic was a matter of direct concern to the applicants, Greek manufacturers of cotton yarn. That authorization allowed France to impose quota restrictions for a specified period on imports of cotton yarn from Greece. The Court held that the Commission's decision could not have affected the applicants in the absence of implementing measures adopted at national level, but that nevertheless, in view of the conduct of the French authorities both before and at the time of their request, there was no more than a merely theoretical possibility that they would not make use of the authorization granted them by the Commission's decision. The Court accordingly held that the applicants were directly affected. The crucial distinction between that case and the present one lies in the fact that the Commission's authorization in *Piraiki-Patraiki* related to the protective measure itself, whereas here the measures taken by the Commission's representatives concern only the financing by the European Development Fund and the decisions touching on the progress and result of the actual tendering procedure are taken independently at ICDCS level.

45. The action would accordingly also be inadmissible in the event that the Court should not share my interpretation of the Commission's letter of 12 June 1990.

46. (b) With regard to the application based on Article 175 of the EEC Treaty, there is in the first place no evidence of the condition of admissibility set out in the second paragraph of that article, to the effect that the Commission must have been called upon 'to act'. The only letter capable of being interpreted as such a request is the letter of 7 May

25 — See paragraph 19 of the judgment in *STS*.

26 — Judgment in Case 11/82 *Piraiki-Patraiki and Others* v *Commission* [1985] ECR 207.

1990. However, contrary to the relevant requirements, [27] that letter at the very least leaves open the question as to *which* measures the Commission is being called on to adopt. [28]

47. Furthermore, as we have already seen, any measure adopted by the Commission pursuant to Article 215 et seq. of the Convention would be addressed to the ICDCS and not to the applicant. That is particularly so with respect to the request that the ICDCS readmit the applicant to the tendering procedure, a request which, in the applicant's view, the Commission wrongfully omitted to make. As a measure for ensuring proper financing (or more precisely, as an allusion to the Commission's view that a failure to consider the request would place in question the financing on the part of the EDF), this would be of direct concern only to the ICDCS. In so far as the applicant submitted during the oral procedure that the failure (in the first instance, in respect of the conduct just described) lay in the fact that the Commission did not oppose the applicant's exclusion, the same considerations apply *mutatis mutandis*.

48. In such cases of measures to be addressed to a third party, which do not directly affect the applicant, the conditions laid down in the third paragraph of Article 175 are not satisfied, even if legal effects are attriuted to those measures. [29] The action is for that reason inadmissible under that provision. [30]

II — *The claim based on Articles 178 and 215 of the EEC Treaty*

49. 1. (a) On the question of the *admissibilty* of this claim. I would refer in the first instance to the Court's finding in *CMC*, subsequently confirmed in its judgments in *Murri* and *Clemessy*, that

'it would be wrong to dismiss the possibility that acts or conduct of the Commission or its officials and agents in connection with projects financed by the European Development Fund might cause damage to third parties'. [31]

50. The Court continued:

'Any person who claims to have been injured by such acts or conduct must therefore have the possibility of bringing an action, if he is able to establish liability, that is, the existence of damage caused by an illegal act or by illegal conduct on the part of the Community'. [32]

27 — See the Opinion delivered by Advocate General Roemer in Case 8/71 *Deutscher Komponistenver-band* v *Commission* [1971] ECR 705, at p. 716.

28 — See paragraphs 15, 16 and 42 above.

29 — See the orders in Case C-371/89 *Emrich* v *Commission* [1990] ECR I-1555, at paragraph 5, and in Case C-72/90 *Asia Motor France* v *Commission* [1990] ECR I-2181, paragraph 10.

30 — Paragraph 29 of the judgment in *CMC*.

31 — Paragraph 31 of the judgment in *CMC*.

32 — Ibid.

51. The Court has thus accepted, in accordance with the principle of the autonomy of actions for damages vis-à-vis actions for annulment [33] and for failure to act, [34] that the admissibility of actions for damages cannot be impaired by the fact that the special legal nature of the Commission measures precludes an action being brought for annulment or failure to act.

52. (b) The Commission has not disputed the admissibility of the claim for damages. It has only described as inadmissible the quantification of the claim in the reply.

53. On that point, it should be noted that Italsolar, in its application, expressly reserved the right to quantify the damages before specifying, in that document, the nature of the two separate heads of damage put forward: on the one hand, the costs incurred in drawing up the tender and, on the other, the profit which it would have earned had the contract been awarded to it.

54. In its reply the applicant quantified the heads of damage put forward. [35]

55. In those circumstances, I understand the claim as formulated as a request (more particularly specified through the information contained in the reply) for a declaration in respect of the two heads of damage mentioned, and I would refer to the view consistently taken by the Court, which has expressly held that such claims as further particularized are admissible in the light of Article 38(1) of the Rules of Procedure. [36]

56. 2. As regards the question whether that claim is *well founded*, three conditions must first be satisfied: first, the conduct alleged against the institution must be unlawful; secondly, damage must have resulted; thirdly, there must be a causal link between that conduct and the damage complained of. [37]

57. As will become apparent, it is sufficient in the present case to consider the question whether or not the Commission's conduct was unlawful.

58. (a) So far as concerns the identification of that breach and particularly of the conduct in point, it would appear that the applicant, for the purposes of its claim for damages, is not putting forward anything separate from the arguments in support of its other claims. It follows from its written and oral submissions, as I have already shown during my examination of the applications

33 — See the judgment in Case 175/84 *Krohn* v *Commission* [1986] ECR 753, in particular paragraph 32.

34 — See the judgment in Case 4/69 *Lutticke* v *Commission* [1971] ECR 325, in particular paragraph 6.

35 — LIT 478 624 000 as the cost of participating in the tender procedure and 15% of the price tendered for each lot as profit lost (the prices for each lot are set out in Annex 5 to the application).

36 — Judgment in Case 25/62 *Plaumann* v *Commission* [1963] ECR 95; see also the judgment in Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061, paragraphs 10 and 11.

37 — Established case-law of the Court: see, for example, the judgment in Case C-87/89 *Sonito and Others* v *Commission* [1990] ECR I-1981, paragraph 16.

based on Articles 173 [38] and 175, [39] that we are dealing here with two types of conduct: in the first place, that concerning the agreement to the provisional award of the contract to a different tenderer and the applicant's exclusion (implicitly connected with that award) and, secondly, that concerning the failure to intervene for the purpose of securing the applicant's readmission to the tendering procedure.

59. The applicant is of the opinion that the Commission erred in accepting the ICDCS's view that the after-sale service offered by the applicant did not satisfy the requirements laid down.

60. (b) On this basis we can immediately reject the objection of inapplicability (Article 184 of the EEC Treaty), which the applicant raised in respect of Article 45(2)(1) and Article 45(4) of the provisions regulating public works and supply contracts. The applicant has indeed failed to make clear whether it intends to raise this objection in the case of all or only some of its claims. However, it is clear to me that the applicant's complaint relates to a breach of principles of substantive law, with the result that the applicability of the provisions mentioned above, which concern the confidentiality of the minutes of the tender committee and the duty (expressly denied) to provide reasons for the choice made, can have no effect on the decision in their case.

61. Furthermore, those provisions, as the Commission correctly pointed out, set the standard, not for the conduct of the Commission, but rather for the conduct of the administration of the non-member country in question and of the tender committee, whose composition and method of operation are based on the provisions of that State (see Articles 42 and 45 of the provisions regulating public works and supply contracts).

62. (c) The unlawfulness of the Commission's conduct might, as the applicant argues, result from the fact that it wrongfully accepted the ICDCS's view that the after-sale service offered by the applicant did not satisfy the requirements laid down. If it should transpire that there was such an error on the part of the Commmission, it would then be necessary to consider which measures it should have taken in the light of the situation and whether on that ground the omissions complained of constitute unlawful conduct.

63. In my opinion, however, there is insufficient evidence to support the existence of such an error on the part of the Commission.

64. With regard to this point, the applicant expressly stated in its reply to the request of 14 November 1989 [40] that the proposed arrangements for after-sale service could not be made if one of the two lots (Lot No 2) were to be awarded to a different tenderer. [41]

38 — Paragraph 38 above.

39 — Paragraph 46 above.

40 — See paragraph 10 above; Annex 6 to the application.

41 — That is the global comment in the reply concerning Lot No 3. With regard to Lot No 2, Italsolar points out that it treated Lots Nos 2 and 3 as constitut-ing a single unit for the purposes of the investment required for after-sale service.

65. This condition regarding the arrangements for after-sale service is at variance with the abovementioned clause in the tender documents under which tenders for individual lots must be separate and the economically most advantageous tender must be selected separately for each individual lot. [42] Thus the applicant's tender, so far as concerned after-sale service, and thus an essential aspect of the invitationto tender, [43] was made subject to an inadmissible condition in respect of both lots.

66. It is thus in principle of no importance how the qualifications and experience of the individual firms proposed by the applicant as its representatives in the countries covered by the two disputed lots are to be assessed.

67. In addition, however, the applicant failed to provide sufficient evidence that its tender for Lot No 2 satisfied the requirements laid down. The tender for that lot accordingly suffered from a further defect. In addition, the defect in the tender for Lot No 3 caused by the inadmissible condition already mentioned is all the more serious in the light of the fact that that condition, namely the award of the contract for Lot No 2, appears impossible to fulfil in view of the inadequacies of the after-sale service proposed in respect of that lot.

68. On that point, the defendant submitted in its defence, without being contradicted, that the Tagui company, designated by the applicant as its representative in Burkina Faso, is an undertaking engaged in the distribution of petroleum products. Admittedly, the applicant did point out in its reply that Tagui could, by reason of its links with the ENI Group (to which Italsolar also belongs), have sent some of its local technicians to Italy to enable them to attend a course on photovoltaic technology. However, in its reply to the request mentioned above, which in particular concerned the qualifications of the staff of the firm acting *in situ* in each country, the applicant mentioned this further training measure as no more than a possibility.

69. Nor has the applicant maintained that Tagui had experience in the construction or maintenance of individual essential components of the plant to be installed. As Italsolar itself conceded at the hearing in connection with the discussion of the suitability of the Toutelec company from Niger (proposed by the applicant as its representative in one of the countries covered by Lot No 3), it is in particular (but not exclusively) the pumps which merit special attention with regard to maintenance and after-sale service. However, there is nothing to prove that Tagui has any experience or qualifications in this area.

70. I am for that reason unable to find anything wrong with the defendant's choice consisting in approval of the applicant's exclusion, as implied through its acceptance

42 — See paragraph 8 above.
43 — See paragraph 5 above.

of the proposed award of the contract to a different tenderer. The same conclusion also applies, of course, quite apart from the scope of the Commission's powers, to the fact that the Commission failed to take any steps to secure the applicant's readmission to the tender procedure.

71. Finally, none of these conclusions can be undermined by the applicant's argument concerning the alleged attempts by a certain person to obtain a percentage of the contract price through extortion. It has not been proven that unlawful payments secured in such a manner played any role in the selection of the tenderers to whom the contracts were provisionally awarded. The copies of telex messages submitted by the applicant with its reply (in so far as they are at all plausible) demonstrate at most that the applicant itself conducted negotiations with that person.

C — Conclusion

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

— dismiss the applications under Articles 173 and 175 of the EEC Treaty as inadmissible;

— dismiss the application under Articles 178 and 215 of the EEC Treaty as unfounded;

— order the applicant to pay the costs of the proceedings, including those relating to the application for interim measures, in accordance with Article 69 of the Rules of Procedure.