JUDGMENT OF THE COURT (First Chamber)

13 January 2005 *

In Case C-254/03 P,

APPEAL under Article 56 of the Statute of the Court of Justice brought on 13 June 2003,

Eduardo Vieira SA, represented by J.-R. García-Gallardo Gil-Fournier and D. Domínguez Pérez, abogados,

appellant,

the other party to the proceedings being:

Commission of the European Communities, represented by S. Pardo Quintillán, acting as Agent, and J. Rivas-Andres and J. Gutiérrez Gisbert, avocats, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: Spanish.

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, N. Colneric (Rapporteur), J.N. Cunha Rodrigues, M. Ilešič and E. Levits, Judges,

Advocate General: A. Tizzano,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 16 September 2004,

gives the following

Judgment

1 By its appeal, Eduardo Vieira SA (hereinafter 'SAEV') asks the Court to set aside the judgment of the Court of First Instance of the European Communities of 3 April 2003 in Joined Cases T-44/01, T-119/01 and T-126/01 *Vieira and Others* v *Commission* [2003] ECR II-1209 (hereinafter 'the contested judgment') in so far as it dismissed the appellant's claim for annulment of the Commission decision of 19 March 2001 reducing the amount of aid granted to project ARG/ESP/SM/26-94 for the purpose of creating a joint enterprise within the framework of the Agreement on relations in the sea fisheries sector between the European Economic Community and the Argentine Republic (hereinafter 'the contested decision').

Legal background

Agreement on relations in the sea fisheries sector between the Community and the Argentine Republic

2 The Agreement on relations in the sea fisheries sector between the European Economic Community and the Argentine Republic (hereinafter 'the fisheries agreement') was approved on behalf of the Community by Council Regulation (EEC) No 3447/93 of 28 September 1993 (OJ 1993 L 318, p. 1).

3 Article 5(1) and (2) of the fisheries agreement provides:

'1. The Parties shall create suitable conditions for the establishment in Argentina of undertakings using capital originating in one or more Member States of the Community and the creation of joint enterprises and joint ventures in the fisheries sector between Argentinian and Community shipowners with the aim of jointly exploiting and, where appropriate, jointly processing Argentinian fishery resources under the conditions laid down in Protocol I and Annexes I and II.

2. Argentina shall grant the undertakings referred to in paragraph 1 access to the fishing opportunities set out in Protocol I in accordance with the provisions of Annexes I to IV.'

4 Article 2(e) of the fisheries agreement defines 'joint enterprise' as 'a company constituted under private law consisting of one or more Community shipowners and one or more Argentinian natural or legal persons bound by a joint enterprise contract for the purpose of exploiting and, where appropriate, processing Argentinian fishery resources with a view to the priority supply of the Community market'.

5 Under Article 5(3) of the fisheries agreement, the creation of a joint enterprise in principle implies the transfer of a Community vessel. That vessel is then removed from the Community register.

6 Under Article 6 of the fisheries agreement:

'The Parties shall select the projects for the joint ventures, Community undertakings established in Argentina and joint enterprises provided for in Article 5, which shall be authorised to take the catch quantities specified in Protocol I. The projects shall be selected in accordance with the methods and criteria set out in Annex III.'

7 Article 7(1) of that agreement provides:

'In order to encourage the establishment of the undertakings provided for in Article 5, the projects selected by the Parties pursuant to Article 6 shall be eligible for financial assistance in accordance with Protocol I.'

8 Paragraph 2 of Annex III to the fisheries agreement provides that projects for the formation of joint enterprises are to be presented to the Commission by the Member States 'in accordance with Community rules'.

9 Under paragraph 3 of Annex III to the fisheries agreement, the Community is to submit to the Joint Committee the list of projects eligible for financial assistance. That provision also provides that:

'The Joint Committee shall evaluate the projects in accordance basically with the following criteria:

(a) technology appropriate to the proposed fishing operations;

(b) species and fishing zones;

(c) modernisation of vessels;

(d) total investment in the project;

(e) investment in onshore plant;

(f) previous experience of Community shipowner and any Argentinian partner in the fisheries sector.'

10 In accordance with paragraphs 4 and 5 of Annex III to the fisheries agreement, projects are to be approved, on the recommendation of the Joint Committee, by the 'Argentinian enforcement authority and the Community'.

11 Protocol I to the fisheries agreement concerns 'fishing opportunities and financial compensation'. Article 1 sets annual catch limits for the surplus species (Patagonian grenadier, Argentine shortfin squid, Patagonian rockcod and/or roughhead grenadier) and non-surplus species (*Merluccius hubbsi*) covered by the fisheries agreement.

12 Joint enterprises are authorised to catch the surplus and non-surplus species referred to in the quantities specified in Protocol I (Article 6 of the fisheries agreement) and are eligible for financial assistance in accordance with that protocol (Article 7 of the fisheries agreement).

13 To that end, Article 3 of Protocol I provides:

'1. ... the Community shall provide financial assistance for the formation of joint enterprises ...

This financial assistance ... shall be paid to the Community owner to cover part of his financial contribution to the establishment of a joint enterprise ... and/or to remove the vessels in question from the Community register.

2. With a view to encouraging the establishment and development of joint enterprises, the Community shall grant to joint enterprises established in Argentina financial support of fifteen (15) per cent of the amount paid to the Community owner ...

...

4. The provisions governing applications for and the grant of Community assistance to the Community owner as referred to in paragraph 1 shall be laid down in accordance with the relevant Community rules in force.

...'

Community legislation on joint enterprises in the fisheries sector

14 On 18 December 1986, the Council adopted Regulation (EEC) No 4028/86 on Community measures to improve and adapt structures in the fisheries and aquaculture sector (OJ 1986 L 376, p. 7). That regulation, as amended successively by Council Regulation (EEC) No 3944/90 of 20 December 1990 (OJ 1990 L 380, p. 1), Council Regulation (EEC) No 2794/92 of 21 September 1992 (OJ 1992 L 282, p. 3) and Council Regulation (EEC) No 3946/92 of 19 December 1992 (OJ 1992 L 401, p. 1) (hereinafter 'Regulation No 4028/86'), provides, in Articles 21a to 21d, that the Commission may grant various types of financial aid to projects of joint fisheries enterprises, for an amount varying as a function of the tonnage and age of the vessels concerned, in so far as those projects comply with the conditions laid down in the regulation.

15 Article 21a of Regulation No 4028/86 defines 'joint enterprise' as a company incorporated under private law 'comprising one or more Community shipowners and one or more partners from a third country ..., set up for the purpose of exploiting and, where appropriate, using the fishery resources of waters falling within the sovereignty and/or jurisdiction of such third country, primary consideration being given to the supply of the Community market'. The Commission is to grant financial aid for joint enterprise projects 'used to cover the financial contribution of the Community partner or partners corresponding to the capital invested in the joint enterprise' (Article 21c(1)).

16 Article 44 of Regulation No 4028/86, which was applicable until 31 December 1993, provides:

'Throughout the period for which aid is granted by the Community, the authority or agency appointed for the purpose by the Member State shall send to the Commission on request all supporting documents and all documents showing that the financial or other conditions imposed for each project are satisfied. The Commission may decide to suspend, reduce or discontinue aid, in accordance with the procedure laid down in Article 47:

— if the project is not carried out as specified, or

— if certain conditions imposed are not satisfied ...'.

17 With the adoption of Council Regulation (EEC) No 2080/93 of 20 July 1993 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards the Financial Instrument for Fisheries Guidance (OJ 1993 L 193, p. 1) and Council Regulation (EC) No 3699/93 of 21 December 1993 laying down the criteria and arrangements regarding Community structural assistance in the fisheries and aquaculture sector and the processing and marketing of its products (OJ 1993 L 346, p. 1), the management and financing of joint enterprises were integrated into the Financial Instrument for Fisheries Guidance (FIFG). The Member States are now responsible for selecting which joint enterprise projects to finance. They are also responsible for the management and control of those projects.

18 Under Article 9(1) of Regulation No 2080/93, Regulation No 4028/86 was repealed with effect from 1 January 1994. The latter regulation and its implementing provisions nevertheless continued to apply to applications for financial aid submitted before that date.

19 The third indent of Article 3(1) of Council Regulation (EEC) No 4253/88 of 19 December 1988, laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 374, p. 1), as amended by Council Regulation (EEC) No 2082/93 of 20 July 1993 (OJ 1993 L 193, p. 20) (hereinafter 'Regulation No 4253/88'), provides that, in implementing the objectives referred to in Article 1 of Regulation No 2052/88, the Commission is to ensure, within the framework of the partnership, consistency between assistance from the Funds and assistance provided from resources from the Community budget allocated to other actions for structural purposes. Under Article 24 of Regulation No 4253/88, the Commission, after a suitable examination of the case in which 'an operation or measure appears to justify neither part nor the whole of the assistance allocated' (paragraph 1), 'may reduce or suspend assistance in respect of the operation or a measure concerned if the examination reveals an irregularity or a significant change affecting the nature or conditions for the implementation of the operation or measure for which the Commission's approval has not been sought' (paragraph 2).

20 Pursuant to Article 54 of Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds (OJ 1999 L 161, p. 1), Regulation No 4253/88 was repealed with effect from 1 January 2000. However, that article provides that the repeal is 'without prejudice to Article 52(1)'. Under the latter provision, Regulation No 1260/1999 'shall not affect the continuation or modification, including the total or partial cancellation, of assistance approved ... by the Commission on the basis of Council Regulation ... No 4253/88'.

Facts

21 The facts of the action brought before the Court of First Instance are set out in the contested judgment as follows:

'18 Within the framework of the fisheries agreement, the Spanish undertaking [SAEV] proposed a project to create a joint enterprise called Vieira Argentina, SA (hereinafter 'VASA'), comprising SAEV and an Argentinian shipowner. The project proposed fishing for the species Patagonian toothfish. The Community vessel *Ibsa Cuarto*, subsequently renamed *Vieirasa XII*, was to be transferred to the project.

19 By letter of 13 October 1994, the Commission informed SAEV that the project could not be considered, since the species referred to was not among the species covered by the fisheries agreement.

20 By letter of 20 October 1994, the Spanish authorities then sent the Commission documents declaring a change in the catch plan which the appellant had sent to

them. That plan referred to catching, within the Argentinian Exclusive Economic Zone (EEZ), surplus species mentioned in Protocol I to the fisheries agreement: Patagonian grenadier, roughhead grenadier and Patagonian rockcod.

21 By letter of 8 December 1994, the Commission informed SAEV that its project had not been recommended by the Joint Committee of 5 and 6 December 1994, since the Argentinian partner insist[ed] on retaining the Patagonian toothfish (a species not covered by the fisheries agreement) in the catch plan of the project presented to the Argentinian authorities.

22 By fax of 12 December 1994, SAEV informed the Commission that the Argentinian partner had "renounced the plan to fish for Patagonian toothfish, in a letter sent to the Argentinian Directorate-General of fisheries and agriculture on 24 November 1994".

23 The Argentinian authorities approved the project in Resolution No 14/95 of 14 July 1995 and issued the *Vieirasa XII* with a fishing permit for surplus species, under which the vessel could catch 1 204 tonnes of roughhead grenadier, [1 204 tonnes of Patagonian rockcod], 301 tonnes of Patagonian grenadier and 301 tonnes of other species.

24 By letter of 18 July 1995, the joint enterprise VASA applied to the Argentinian authorities for a supplementary permit, for Patagonian toothfish, to be added to the fishing permit granted on the basis of the fisheries agreement.

25 By decision of 25 July 1995 (hereinafter "the decision to grant assistance ...") the Commission approved the grant of financial aid to the project proposed by SAEV (project ARG/ESP/SM/26-94) "under the conditions established by the provisions laid down in the [fisheries] agreement ..., the applicable Community law and the provisions in the Annexes" (Article 1).

26 Annex I to the decision to grant assistance of 25 July 1995 establishes the financial aid granted to SAEV, in the sum of ECU 1 881 936. That annex also sets the amount of aid granted to the joint enterprise VASA, which receives aid equal to 15% of the amount granted to SAEV, that is, ECU 282 290.4. The total aid for the project is thus ECU 2 164 226.4.

27 Annex I to the decision to grant assistance of 25 July 1995 provides:

"The information contained in the present annex may not be altered without prior authorisation by the Argentinian authorities and the Commission."

28 By resolution of 14 November 1995, the Argentinian authorities granted the *Vieirasa XII* a definitive fishing permit which reduced the tonnage of surplus species to 750 tonnes of roughhead grenadier, 230 tonnes of Patagonian rockcod and 230 tonnes of Patagonian grenadier and which included a new fishing permit for 1 800 tonnes of Patagonian toothfish.

29 On 27 June 1996, the Commission paid the first instalment (80%) of the aid.

30 The vessel *Vieirasa XII* permanently left Argentinian waters on 5 July 1996 in order to fish in international waters.

31 SAEV submitted a request for payment of the balance of the aid on 25 February 1997.

32 By letter of 21 April 1998, the Commission informed SAEV that the procedure for reducing Community aid could be initiated in the absence of a satisfactory reply from the undertaking. In that letter, the Commission stated that the departure of the vessel from Argentinian waters on 5 July 1996 constituted an infringement of Article 5(1) of the fisheries agreement and Article 3(1) of Protocol I to that agreement, since joint enterprises are established with the aim of exploiting and, where appropriate, processing Argentinian fishery resources.

33 On 19 May 1998, SAEV submitted its observations. In that letter, it set out the reasons on the basis of which it considered that the conditions for granting financial aid had not been infringed.

34 By letter of 9 June 1999, the Commission informed SAEV that it was of the opinion that "the explanations set out in [the] letter of 19 May 1998 [did] not make it possible to conclude that the relevant Community law was complied with, but [confirmed] that the vessel left Argentinian waters on 5 July 1996". The Commission explained that it had therefore "decided to reduce the aid granted to that project". The letter set out the method for calculating the reduction and concluded that the Commission should be reimbursed the amount of EUR 355 477. The Commission stated that, in the absence of agreement by SAEV to the proposed solution, it would have to "continue the procedure for reduction and recovery in progress".

35 That letter was followed by an exchange of correspondence between SAEV (letters of 16 July 1999, 21 December 1999 and 5 April 2000) and the Commission services (letters of 23 September 1999 and 28 February 2000). Meetings also took place between representatives of SAEV and the Commission services.

36 By letter of 14 September 2000, the Commission informed SAEV that a new calculation had led it to consider that an amount of EUR 419 446 would have to be repaid.

37 SAEV, which considered that the Commission had unlawfully failed to pay it the balance of the Community aid, gave formal notice to the Commission to do so by letter of 21 September 2000.

38 By letter of 16 October 2000, the Commission informed SAEV that the procedure for reducing the aid granted to the Community shipowner was in progress and that a decision in the matter would be taken after consultation with the Standing Committee for the Fishing Industry.

39 By [the contested decision], addressed to the Kingdom of Spain and SAEV, the Commission reduced the financial aid which had been granted to that undertaking. Article 2 of the decision requires SAEV to reimburse the amount of EUR 419 446. The decision contains no determination on a possible reduction in the aid granted to the joint enterprise VASA.

40 The grounds for [the contested decision] are as follows:

"2. Pursuant to Article 1 of [the] decision (decision to grant assistance of 25 July 1995), the aid was granted under conditions established by the provisions laid down by the ... fisheries agreement, the applicable Community legislation and the provisions in the Annexes ...

3. The ... fisheries agreement, and in particular Article 5(1) thereof, states that the creation of joint enterprises in Argentina has the aim of exploiting Argentinian fishery resources under the conditions laid down in Protocol I and Annexes I and II; under Article 6, joint enterprises are authorised to take the catch quantities specified in Protocol I.

4. Point 3.2.1 of Part B of the application for Community aid completed and signed by [SAEV] expressly states that the Commission only grants financial aid to projects which intend to exploit fishery resources in waters which are under the sovereignty or jurisdiction of the third country taking part ...

5. ...

6. Consequently, the granting of Community aid for the creation of the joint enterprise at issue applied only to catches carried out by the fishing vessel *Ibsa Cuarto*, of the species mentioned in the Annexes to the decision (aid decision of 25 July 1995), that is to say, roughhead grenadier, Patagonian grenadier and Patagonian rockcod, and located in Argentinian waters.

7. As from 5 July 1996, the vessel *Ibsa Cuarto* ceased its fishing activities in the Argentinian EEZ and began to fish in international waters for Patagonian toothfish, without prior notification to the Commission of that fact and without having obtained its authorisation."

41 After pointing out that it learned of that situation on 2 July 1997, the Commission concludes, in point 9 of [the contested decision], that SAEV had not complied with the conditions for granting financial aid. It goes on, in points 10 to 13 of the decision, to calculate the reduction of the aid in question. It first states that SAEV is entitled, under the scale of assessment laid down in Regulation No 3699/93, to aid of EUR 688 187 for the definitive transfer of the *Vieirasa XII* to the joint enterprise. The balance of the aid granted it by the decision to grant assistance of 25 July 1995 is therefore EUR 1 193 749 (1 881 936 – 688 187). Since the *Vieirasa XII* was active for only 12 months (of the 36 months stipulated) in Argentinian waters, the Commission concludes that SAEV is entitled to only one third of the EUR 1 193 749 envisaged, that is to say, EUR 397 916. The total amount of reduced aid is therefore, according to the Commission, EUR 1 086 103 (397 916 + 688 187). SAEV, which had already received 80% of the aid (EUR 1 505 549) is therefore required to reimburse EUR 419 446 to the Commission.'

The proceedings before the Court of First Instance and the contested judgment

22 By application lodged at the Registry of the Court of First Instance on 8 June 2001, SAEV brought an action for annulment of the contested decision.

23 By the contested judgment, the Court of First Instance dismissed the action and ordered the appellant to pay the costs.

Forms of order sought on appeal

24 SAEV claims that the Court should:

— declare the present appeal admissible;

— set aside the contested judgment;

— order the Commission to pay all the costs of the proceedings before the Court of Justice as well as those incurred at first instance.

25 The Commission contends that the Court should:

— declare that the first plea, the second part of the second plea and the third and fifth pleas on appeal are manifestly inadmissible;

— dismiss the appeal in its entirety, or, as the case may be, that part thereof declared admissible;

— order the appellant to pay the costs of the appeal.

The appeal

26 In support of its appeal, SAEV relies on six pleas alleging infringement of Community law:

— breach of the fisheries agreement as regards the legal basis of the contested decision;

— breach of the fisheries agreement as regards the role of the Joint Committee and the Argentinian authorities;

— breach of the fisheries agreement as regards application of Article 44 of Regulation No 4028/86 in the course of the aid reduction procedure;

— breach of the fisheries agreement as regards application of Regulation No 3699/93 when the amount of the reduction in the aid was calculated;

— breach of the fisheries agreement as regards force majeure;

— breach of the fisheries agreement as regards the need to obtain the Commission's authorisation to leave the Argentinian fishing zone.

The first plea in law

Arguments of the parties

27 SAEV disputes the findings of the Court of First Instance at paragraph 94 of the contested judgment, according to which 'since the aid was, correctly, granted on the basis of Regulation No 4253/88, among others, the Commission was substantively competent to base the contested decisions on that regulation, and in particular on Article 24 thereof'.

28 In that regard, SAEV submits that the Court of First Instance erred in law in finding that the decision to grant aid was based on Regulation No 4253/88, since Article 1 of that decision refers to 'the applicable Community law'.

29 According to SAEV, the fisheries agreement contains no specific provision concerning a possible reduction or withdrawal of aid. In the actual grounds for the decision granting the aid, only Regulation No 3447/93 is mentioned and no other provision of Community law is cited. Theoretically, therefore, the fisheries agreement appears to be the sole legal basis of that decision.

30 The Commission considers that that argument is inadmissible on the ground that it is essentially identical to that put forward at first instance.

31 As to the substance, the Commission submits inter alia that, as the Court of First Instance held, the reference to the applicable Community law should be interpreted, in particular, as a reference to Regulation No 4253/88. That regulation applies, in accordance with the third indent of Article 3(1), thereof, to various assistance provided from resources from the Community budget allocated to other actions for structural purposes. The financial assistance granted for the formation of joint enterprises under the fisheries agreement has a structural purpose.

Findings of the Court

— Admissibility of the plea in law

32 It must be borne in mind that provided that the appellant challenges the interpretation or application of Community law by the Court of First Instance, the points of law examined at first instance may be discussed again in the course of an appeal. Indeed, if an appellant could not thus base his appeal on pleas in law and arguments already relied on before the Court of First Instance, an appeal would be deprived of part of its purpose (see the order in Case C-488/01 P *Martinez* v *Parliament* [2003] ECR I-13355, paragraph 39, and case-law cited).

33 However, it is clear from Article 225 EC, from the first paragraph of Article 58 of the Statute of the Court of Justice and from the first paragraph of Article 112(1)(c) of the Rules of Procedure of the Court that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside, and also the legal arguments specifically advanced in support of the appeal (see *Martinez* v *Parliament*, paragraph 40, and case-law cited).

34 In the present case, the first plea in law seeks to put at issue the position taken by the Court of First Instance on a question of law submitted to it, namely the interpretation of provisions, firstly, of the fisheries agreement and, secondly, of the decision to grant assistance. SAEV has identified precisely the error in law which it claims was made by the Court of First Instance and has criticised the interpretation of Community law on which that error was based.

35 The first plea in law is therefore admissible.

— The validity of the plea in law

36 Article 3(4) of Protocol I to the fisheries agreement states that the provisions governing the grant of Community assistance to the Community owner as referred to in paragraph 1 are to be laid down in accordance with the relevant Community rules in force.

37 Similarly, Article 1(1) of the decision to grant assistance provides that the assistance is granted under the conditions established by the provisions laid down, inter alia, by the applicable Community law.

38 In the second recital in its preamble, that decision refers to the objectives of the Community structural policy in the fisheries sector. The reference to the applicable Community law made in Article 1 of that decision must therefore be understood as a reference to the law relating to actions for structural purposes.

39 Article 24 of Regulation No 4253/88, entitled 'Reduction, suspension and cancellation of assistance', applies, inter alia, to aid for structural purposes. As follows from the title and from Article 3(1) of that regulation, Article 24 covers not only assistance financed by the Structural Funds but also that financed from Community budget resources applied to other actions for structural purposes such as those at issue in the present case.

40 Therefore the Court of First Instance was correct in finding, in paragraph 92 of the contested judgment, that the reference to the 'applicable Community law' must be understood as a reference to, inter alia, Regulation No 4253/88.

41 It follows from the above that the first plea in law must be rejected.

The second plea in law

Arguments of the parties

42 The second plea in law is divided into two parts.

43 In the first part, SAEV submits that the Court of First Instance infringed Community law and the fisheries agreement by holding that the Commission was not required to consult the Joint Committee. It criticises the Court's findings in paragraphs 104 and 106 of the contested judgment that 'the fisheries agreement is divided into two parts: the international component, concerning cooperation between the Community and the Argentine Republic, and the Community component, which includes, inter alia,

the financing granted by the Commission to Community shipowners for the creation of joint enterprises under the fisheries agreement' and that the 'aid to Community shipowners for projects which are selected is a unilateral measure by the Community and therefore comes under the Community component of the fisheries agreement'. In that regard, SAEV refers to another fisheries agreement concluded by the Community which, unlike the agreement at issue here, gives the Joint Committee far more restricted powers. It concludes that, at least on a consultative basis, it is not possible to exclude the Committee's participation.

44 The Commission counters, inter alia, that neither the fisheries agreement nor Regulation No 3447/93 nor the applicable Community law contains any provision requiring the Joint Committee compulsorily to be consulted regarding the reduction or withdrawal of financial aid granted by the Community.

45 By the second part of the second plea in law, the appellant submits that the Court of First Instance infringed Community law and the fisheries agreement by holding that the Commission was not required to consult the Argentinian authorities before reducing the financial aid. It points out that the footnote on page 1 of Annex I to the decision to grant assistance contains a notice that 'the information contained in the present annex may not be altered without prior authorisation by the Argentinian authorities and the Commission'. That notice also applies to the amount of assistance granted.

46 The Commission considers that this part is inadmissible because the appellant merely reiterates the arguments submitted to the Court of First Instance and in any event it is unfounded.

Findings of the Court

47 Although there is no need to rule on the admissibility of this plea, it must be held that it is in any event unfounded.

48 As the Advocate General rightly points out in points 52 to 56 and 62 of his Opinion, the grant of financial aid is a task which the fisheries agreement confers on the Community authorities alone.

49 Given that there is no requirement to consult the Joint Committee or the Argentinian authorities with regard to such a grant, it is not possible to argue that there is such a requirement in the converse case.

50 Consequently, the second plea in law must be rejected.

The third plea in law

Arguments of the parties

51 By its third plea in law, SAEV submits that the Court of First Instance erred in law by rejecting the plea in the action for annulment based on the application of the legislation governing reductions in financial aid. It claims that the Commission applied Article 44 of Regulation No 4028/86, repealed by Regulation No 2080/93

(which came into force on 1 January 1994). On 20 November 2000, the Commission consulted the Standing Committee for the Fishing Industry in accordance with Articles 44 and 47 of Regulation No 4028/86. The agenda of that committee included the heading 'Discussion and views with vote — procedure under Article 44 of Regulation (E[E]C) No 4028/86 (management committee)'. That heading is entirely contrary to the findings of the Court of First Instance, which held at paragraph 158 of the contested judgment that 'the fact that the Commission consulted a committee the consultation of which was prescribed by Regulation No 4028/86 does not show that the contested decision ... was based on that regulation'.

52 The Commission considers that this plea in law is inadmissible because the appellant, firstly, repeats the arguments submitted to the Court of First Instance and, secondly, has again provided purported proof in the form of the agenda which has already been considered by the Court of First Instance.

53 On the substance, the Commission notes that the use of the procedure laid down in Article 44 of Regulation No 4028/86 was voluntary, in no way prejudiced the appellant and was an additional guarantee of impartiality.

Findings of the Court

54 By its third plea in law, SAEV seeks to challenge the findings of the Court of First Instance in paragraph 158 of the contested judgment which, in so far as they draw a legal conclusion from a fact, must be considered a legal characterisation which may be reviewed by the Court of Justice.

55 The Court of First Instance did not err in law in holding that the mere consultation of a committee, as provided for by Regulation No 4028/86, is not of itself sufficient

to entail inclusion of that regulation in the legal basis for the contested decision, which was taken following that consultation.

56 The third plea in law must therefore be rejected as being unfounded.

The fourth plea in law

Arguments of the parties

57 By its fourth plea in law, SAEV submits that, in paragraph 159 of the contested judgment, the Court of First Instance recognised that the Commission applied the scale of aid fixed by Regulation No 3699/93. However, according to SAEV, the Commission was not guided, by analogy, by the provisions of that regulation, as the Court of First Instance states in paragraph 163 of its judgment, but applied it directly. Consequently, the Commission applied two separate regulations: Regulation No 4028/86, specifically Article 44 thereof, with regard to the procedure, and Regulation No 3699/93 for calculation of the amount of the reduction. It should have calculated the reduction on the basis of the scale in Regulation No 3699/93 whilst remaining within the framework of the fisheries agreement and taking account of the scales fixed by that agreement.

58 The application of the scale fixed by Regulation No 3699/93 to enterprises subject to the scheme set up under the fisheries agreement creates discrimination to the extent that, for joint enterprises, the scale used as a basis is much lower than that set under the fisheries agreement.

59 The Court of First Instance therefore erred in law by refusing to accept that the Commission should have calculated the reduction on the basis of the aid granted to the joint enterprise pursuant to the fisheries agreement by imposing a reduction of 50% similar to that provided for in Regulation No 3699/93 and should not have applied that regulation directly.

60 Application of the scale fixed by Regulation No 3699/93 imposes an additional penalty on the beneficiary.

61 The Commission was not justified in applying that scale, since the fisheries agreement made no reference to the general legislation on that particular point.

62 The Commission points out that, in paragraph 157 of the contested judgment, the Court of First Instance held that 'neither Regulation No 4028/86 nor Regulation No 3699/93 constitutes the legal basis for the contested decision'. The Commission did not apply those regulations, but was merely guided by them by analogy.

Findings of the Court

63 By its fourth plea in law, SAEV essentially claims that the Court of First Instance erred in law by refusing to accept that the Commission should not have applied Regulation No 3699/93 directly.

64 However, SAEV does not dispute the findings of the Court of First Instance, in paragraph 163 of the contested judgment, that the Commission was bound only by the principle of proportionality in calculating the definitive amount of aid due to the appellant.

65 It was therefore only on the basis of the principle of proportionality that the Court of First Instance held that the Commission was fully entitled to be guided, by analogy, by the provisions of Regulation No 3699/93 in order to establish the amount due to the appellant for the transfer of the vessel.

66 Although SAEV argues that, by accepting that the Commission was right to apply the scale laid down in Regulation 3699/93, the Court of First Instance erred in law, it has failed to show to what extent that application constitutes an infringement of the principle of proportionality.

67 The fourth plea in law must therefore be rejected.

The sixth plea in law

Arguments of the parties

68 By its sixth plea in law, which it is appropriate to examine before the fifth, SAEV complains that the Court of First Instance breached the fisheries agreement by

declaring in paragraphs 124 and 125 of the contested judgment that the appellant was required to inform the Commission of the problems it encountered in carrying out the projects and that it should not have left the Argentinian fishing zone without the prior approval of the Commission even if it had received express authorisation from the competent Argentinian authority, which was required to inform the Commission of the situation during the meetings of the Joint Committee.

69 The finding of the Court of First Instance in paragraph 124 of the contested judgment that correct information would have enabled the Commission to take possible measures to adapt the fisheries agreement to the new circumstances, pursuant to Article 9(1) of the agreement, cannot be accepted. According to SAEV, the Commission would have been well aware of the circumstances and the conservation measures adopted by the Argentinian authorities since the association of joint enterprises involved had submitted a request to the Council and the Commission that such measures be adopted.

70 In that regard, the Commission notes the wording of Article 24 of Regulation No 4253/88, which provides that it may reduce or suspend assistance if an examination of the case reveals an irregularity or a significant change for which its approval has not been sought. Even if it could be deduced from the fisheries agreement that the Commission would in the end be informed of the departure of a vessel from Argentinian waters by the Argentinian authorities at the meetings of the Joint Committee, the appellant has disregarded the obligation to provide information and to act in good faith to which the recipients of Community aid are subject.

Findings of the Court

71 It is clear from Annex I to the decision to grant assistance that the information contained therein may not be altered without prior authorisation from the Argentinian authorities and the Commission.

72 In the same annex is the reference to the amended project (ARG/ES/SM/26-94) for the creation of a joint enterprise submitted by SAEV, which expressly provides for the exploiting or processing of Argentinian fishery resources.

73 The Court of First Instance was therefore correct in holding, in paragraph 125 of the contested judgment, that the vessels operated by the joint enterprises should not have left the Argentinian EEZ without prior approval from the Commission.

74 Consequently, the sixth plea in law must be rejected.

The fifth plea in law

Arguments of the parties

75 The appellant submits that the Court of First Instance did not take full account of the Commission's obligations as regards the legal characterisation of certain facts as cases of force majeure.

76 The Court of First Instance held in paragraph 145 of the contested judgment that the Commission was not obliged to take account of the depletion of fishing stocks in

the contested decisions, but that the appellant should have sought prior authorisation from the Commission before leaving Argentinian waters.

77 That finding is contrary to the judgment of the Court of First Instance in Joined Cases T-61/00 and T-62/00 *APOL and AIPO* v *Commission* [2003] ECR II-635, paragraph 72, in which it was held that the existence of an administrative practice, even one that is not based on any legislation, under which the Commission considers whether there is a case of force majeure which should cause it to refrain from discontinuing aid may bind the Commission each time a case of force majeure is pleaded before it.

78 The appellant submits that, in its letter of 28 February 2000, the Commission appeared to accept that this was a case of force majeure. The Commission itself indicated that it could treat the period of inactivity of the vessel *Vieirasa XII* in Argentinian waters, between 5 July 1996 (departure from Argentinian waters) and 31 December 1996 (end of the biological rest period of the Patagonian toothfish), as an active period. The departure of the vessel from the Argentinian EEZ was solely and exclusively for reasons of force majeure.

79 The Commission considers that this plea in law is inadmissible since at no time was force majeure pleaded at first instance.

80 On the substance, the Commission submits that it never gave any indication that there might be a case of force majeure. It considers that the departure of the vessel from Argentinian waters does not fulfil the conditions necessary for it to be deemed justified by any reasons of force majeure because the existence of 'abnormal and unforeseeable' circumstances has not been demonstrated. In any event, the depletion of the stocks in question cannot be considered an unforeseeable circumstance.

Findings of the Court

81 The plea in law is admissible. In paragraph 105 of its application originating proceedings, SAEV pleaded, as part of the plea headed 'Problems posed by the application, in the alternative, of the general legislation on joint enterprises', that there was a contradiction between the method used for the calculation of the reduction in the aid and the fact that, during the procedure, the Commission accepted that the departure from Argentinian waters at the time of the prohibition on fishing which was unilaterally laid down by the Argentinian authorities constituted a case of force majeure.

82 On the substance, the Court of First Instance rightly considered that the Commission did not have to take into account the depletion of the fish stocks in the area involved. It pointed out in that regard that, in any event, the appellant should have sought the prior authorisation of the Commission before leaving Argentinian waters. As is clear from the examination of the sixth plea in law, that finding is correct. The same would be true if the circumstances pleaded by SAEV constituted a case of force majeure.

83 The fifth plea in law must therefore be rejected.

Costs

84 Under the first paragraph of Article 122 of the Rules of Procedure, where an appeal is well founded, the Court is to make a decision as to costs. Under Article 69(2) of those rules, rendered applicable to appeal proceedings by Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in

the successful party's pleadings. Since the Commission applied for SAEV to be ordered to pay the costs and the appellant has been unsuccessful, it must be ordered to pay the costs of the appeal.

On those grounds, the Court (First Chamber) hereby:

1. Dismisses the appeal;

2. Orders Eduardo Vieira SA to pay the costs.

[Signatures]