OPINION OF ADVOCATE GENERAL MISCHO

delivered on 11 June 2002 [1]

1. The French Republic requests the Court to annul Commission Decision 2001/882/EC of 25 July 2001, on the State aid implemented by France in the form of development assistance for the cruise vessel *Le Levant* built by Alstom Leroux Naval for operation in Saint-Pierre-et-Miquelon [2] (hereinafter 'the contested decision').

I — Legal background

2. Article 4(7) of Council Directive 90/684/EEC of 21 December 1990 on aid to shipbuilding [3] states that:

'Aid related to shipbuilding and ship conversion granted as development assistance to a developing country shall not be subject to the ceiling. It may be deemed compatible with the common market if it complies with the terms laid down for that purpose by OECD Working Party No 6 in its Agreement concerning the interpretation of Articles 6 to 8 of the Understanding referred to in paragraph 6 of this Article or with any later addendum or corrigendum to the said Agreement.

The Commission must be given prior notification of any such individual aid proposal. It shall verify the particular development content of the proposed aid and satisfy itself that it falls within the scope of the Agreement referred to in the first subparagraph.'

II — The contested decision

3. The key points of the contested decision, which sets out the factual background to

1 — Original language: French.
2 — OJ 2001 L 327, p. 37.
3 — OJ 1990 L 380, p. 27.

the present case in its statement of reasons, are as follows:

'The Commission of the European Communities

...

Whereas:

I. Procedure

(1) From an article published in *Lloyd's List*, the Commission learned in late 1998 that the cruise vessel *Le Levant*, built by Alstom Leroux Naval in France at a contract price of FRF 228.55 million had been financed by means of tax concessions available to investors financing the building of the vessel. This aid had not been notified to the Commission. In response to the Commission's enquiries, France provided information about the project by letter dated 12 May 1999. The Commission asked additional questions by letter dated 4 June 1999, to which France replied by letter dated 19 August 1999. France submitted observations by letters dated 12 January and 14 June 2000, the latter letter commenting on the observations submitted by the legal representatives of Compagnie des Îles du Levant (hereinafter referred to as "CIL") in the context of the procedure. The Commission asked further questions in a letter dated 26 February 2001, to which France replied by letters dated 30 April and 11 June 2001.

(2) By letter... dated 2 December 1999, the Commission informed France that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty.

(3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities*.[4] The Commission invited interested parties to submit their comments on the aid.

...

II. Detailed description of the aid

(5) The aid was granted in 1996, when the cruise vessel *Le Levant* was acquired

4 — OJ 2000 C 33, p. 6.

by a group of private investors who put it into joint ownership on the initiative of... The vessel was then leased to CIL, which is a subsidiary of the French company Îles du Ponant, registered in Wallis and Futuna. The investors were authorised to deduct their investment from their taxable income. These tax concessions [of an estimated aggregate value of FRF 78 million] enabled CIL to operate the vessel on attractive terms. The investors have the right and obligation to sell back their shares to... after five years, i.e. at the beginning of 2004. CIL in turn has the right and obligation to buy the shares from... at a price which will enable the value of the aid to be passed on to it. As a condition of the aid, CIL is required to operate the vessel for a minimum of five years, essentially to and from Saint-Pierre-et-Miquelon, and for 160 days a year.

...

V. Assessment of the aid

(16) The aid granted for the vessel in question must be assessed in the light of Article 4(7) of Directive [90/684] given that it concerns aid for shipbuilding granted as development assistance in 1996 under an aid scheme (the Loi Pons) approved in 1992.

(17) Under Article 4(7) of Directive [90/684], aid granted as development assistance to a developing country may be deemed compatible with the common market if it complies with the terms laid down for that purpose by OECD Working Party No 6 in its Agreement concerning the interpretation of Articles 6 to 8 of the Understanding on Export Credits for Ships or with any later addendum or corrigendum to that Agreement (hereinafter referred to as "the OECD criteria"). The Commission must verify the particular development content of the proposed aid and satisfy itself that it falls within the scope of the said Agreement.

...

(21) As the Commission indicated when the Article 88(2) procedure was initiated, the project meets the OECD criteria [relating in particular to the vessel's flag, its owner's country of residence, the public character of the aid and its intensity].

(22) However, the development criterion is not met in this case. The key point is that the French estimates of the economic benefits are based on the assumption that the vessel will call in at Saint-Pierre-et-Miquelon 50 times per season (over the 160 days from late May to the end of October during which climatic conditions in the area permit cruising)....

(23) The reality is very different. According to information submitted by the French authorities in their letter of 30 April 2001, nine cruises were undertaken in 1999 and 11 in 2000 which included Saint-Pierre-et-Miquelon in their itinerary (as starting/finishing point). Since the cruises either departed or arrived in Saint-Pierre, there were only 11 stopovers in the port of Saint-Pierre in the 1999 and 2000 seasons combined, and not 100 as initially estimated by the French authorities.

(24) According to the same letter, 18 cruises to or from Saint-Pierre were planned for 2001, including five new mini-cruises that both arrive and depart from Saint-Pierre. This gives a total of 12 stopovers at the port of Saint-Pierre in 2001 compared with the 50 initially estimated.

(25) On the basis of the figures for 1999 and 2000, the Commission has concluded that the assumptions underlying the calculation of the economic benefits for Saint-Pierre-et-Miquelon were wrong. It has therefore recalculated the estimated economic benefits, using the French figures but taking into account the much lower number of port visits.

(26) With regard to the direct economic benefits, the French estimates are that spending linked to operation of the vessel would be FRF 10.8 million per annum. Local spending by passengers is estimated at FRF 1.2 million per annum. In both cases, the data are based on 50 port visits a year. However, as indicated above, the vessel visited the port only 5.5 times a year in 1999 and 2000. It plans to make 12 visits this year.

(27) Given the nature of the economic benefits envisaged in the calculations (food, equipment, port fees, etc.), it can be assumed that they are proportional to the number of visits to the

port. The benefits are put at FRF 12 million a year on the basis of 50 visits. Assuming that the economic calculations made by France are correct with regard to the impact of the ship's visits and taking into account the number of visits in 1999 and 2000, the benefit to the islands would amount to 5.5/50 or 11% of the initial estimates. For 2001, the benefits would be 12/50 or 24% of the initial estimates.

(28) Over each of the last two years, the real benefits would therefore have been 11% of FRF 12 million, i.e. FRF 1.32 million. According to the French authorities, some 760 passengers embarked or disembarked at Saint-Pierre in each of those two years. Assuming an economic impact of FRF 1.32 million, this would imply spending of FRF 1 700 per person, which seems reasonable given that passengers are not likely to spend more than one night on the islands before or after a cruise.

(29) For 2001, the benefits can be estimated at 24% of FRF 12 million, i.e. FRF 2.88 million. For the next two years, the cruise schedule is not known. Taking the figure for 2001, the total economic benefit to Saint-Pierre-et-Miquelon over the five years 1999-2003 would be 1.32 + 1.32 + 3 × (2.88), i.e. FRF 11.28 million. Since the total value of the aid is FRF 78 million, this is almost seven times greater than the economic value of the benefit to the islands.

(30) As far as direct jobs are concerned, the French authorities have stated that priority would be given to employing residents of Saint-Pierre-et-Miquelon among the 55 crew. However, the only information that has been provided is that four former fishermen from the islands have been trained to work on the ship. The presumption must be that the crew does not to any large extent come from the islands.

(31) The claims concerning other indirect benefits (the development of infrastructure and the possibility of other cruise operators visiting the islands) have not been and probably cannot be quantified. Moreover, they are not directly relevant to the development character of this particular project or to the proportionality of the aid involved. It is therefore not necessary

to take them into account in this assessment.

(32) Finally, the Commission cannot accept the argument put forward by the French authorities to the effect that a longer period than five years should be taken into account since there is no obligation on CIL to continue operating the vessel to or from Saint-Pierre-et-Miquelon after that period.

(33) In light of the foregoing, the Commission therefore concludes that it has not been possible to establish that this project was indeed a development project. The alleged benefits in terms of direct job creation have not been substantiated and are not based on realistic assumptions. Moreover, the alleged direct economic benefits are significantly less than the aid involved, resulting in a clear lack of proportionality between the aid and the intended economic impact.

(34) The Commission finds that France has unlawfully implemented the aid in question in breach of Article 88(3) of the Treaty. The aid is not consistent with the Shipbuilding Directive and is therefore incompatible with the common market. It must therefore be recovered with interest.

...

Has adopted this decision:

Article 1

The state aid which France has implemented in the form of tax concessions and as development assistance for the cruise vessel *Le Levant*, built by Alstom Leroux Naval for operation in the French overseas territory of Saint-Pierre-et-Miquelon, cannot be regarded as genuine development assistance within the meaning of Article 4(7) of the directive [90/684] and is therefore incompatible with the common market.

Article 2

1. France shall take all necessary measures to discontinue and recover from the investors, as the direct beneficiaries and current

owners of the cruise vessel, the aid referred to in Article 1 and unlawfully made available to the beneficiary.

•

2. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of this decision. The aid to be recovered shall include interest from the date on which it was at the disposal of the beneficiaries until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid.

...'

III — The application

4. By application dated 8 October 2001, the French Republic claims that the Court should annul the contested decision and order the Commission to pay the costs.

5. The Commission asks the Court to find the action unfounded and to dismiss it, and to order the French Republic to pay the costs.

IV — Analysis

6. The French Republic has developed only one plea in law, relating to the assessment of the 'development' component of the aid at issue. It considers that the finding of the Commission *that the aid did not constitute development assistance* could have been reached only by reason of errors of fact and of law and manifest errors of assessment, which ought to lead to annulment of the contested decision.

7. The French Government accepts that the Court has recognised that the Commission has a degree of discretion in the matter. It refers in this regard to paragraph 20 of the judgment of the Court in *Germany* v *Commission*, [5] where it was held that:

'First, by providing that the aid in question "may" be deemed compatible with the common market if it complies with the provisions of the abovementioned OECD

5 — Case C-400/92 [1994] ECR I-4701.

Agreement, Article 4(7) [of Directive 90/684] confers a discretion on the Commission. Second, according to the second subparagraph of Article 4(7) the Commission is required not only to satisfy itself that the aid complies with the OECD criteria but also to verify the particular development content of the proposed aid.'

8. However, the French Government is of the view that the Commission has exceeded the limits of this power. In support of this plea in law, it has developed what are in essence four arguments.

The first argument

9. The French Government argues first that the objectives relating to the creation of employment have indeed been achieved. The Commission was wrong to find that only four former fishermen had been trained to work on the ship and that the crew did not to any large extent come from the islands.

10. According to the French Government, 17 crew members were recruited in the West Indies and 12 in Saint-Pierre-et-Miquelon. The permanent workforce allocated to the vessel was therefore in conformity with the estimate (55 posts) and 11 groundhandling posts were created, rather than the 5 that were estimated.

11. The Commission submits that the French Government's claim that the objectives regarding employment have been achieved is clearly unfounded, as being completely contrary to the facts and circumstances of the case.

12. The Commission refers to the various letters addressed to it by the French authorities in reply to its requests for information which, it submits, disclose the following factual background:

— *Le Levant* has a crew of 55 persons, of whom 10 are officers, 8 are sailors and 35 are employees providing hotel, restaurant and entertainment services;

— for the vessel to be entitled to fly the French flag it is a requirement in this

case that the captain, the bridge officers and the engineers should be French, and that at least one half of the crew should be French sailors;

— while the requirement to employ French nationals arising from the use of the French flag means that it cannot be guaranteed that these will be from Saint-Pierre, the shipowner undertook to give preference to people from there and participates in this respect in the retraining scheme for redundant employees in the fishing sector (four sailors were undergoing training to serve on the *Le Levant*);

— the 11 to 12 indirect posts created on land were part-time jobs relating to reception and transfer.

13. The Commission maintains that its finding recorded at paragraph 37 of the statement of reasons of the contested decision is consistent with the information provided by the French authorities during the pre-litigation procedure.

14. The Commission submits that the claim made in the application that 12 crew members had been engaged in Saint-Pierre-et-Miquelon is not substantiated by the information provided to the Commission during the administrative procedure. These matters, which are not supported by the documentation relied on in the application, must therefore be held to be new matters on which the French Government cannot be allowed to rely before the Court.

15. The Commission adds that the French Government's claim that 17 members of the crew were recruited in the West Indies is irrelevant in a case where the 'development' component has consistently been presented as relating only to the development of Saint-Pierre-et-Miquelon, to the exclusion of all other eligible countries within the meaning of Directive 90/684.

16. In its reply, the French Government admits that the Commission was not informed in good time of the nationality of recruits taken on since its letter of 12 May 1999, which had indicated that four sailor-fishermen were undergoing training.

17. The French Government has nevertheless confirmed that 12 crew members were indeed recruited in Saint-Pierre-et-Mique-

lon, stating that the list of crew members for 1999, 2000 and 2001 shows 14 inhabitants of the islands, to which 11 or 12 part-time land-based jobs fall to be added.

18. As the French Government itself recognises that the factual basis of its first argument was not intimated to the Commission at the stage of the pre-litigation procedure laid down in Article 88 EC, it is my opinion that this argument cannot be admitted.

19. As the Court held at paragraph 34 of its judgment in *Germany* v *Commission*, [6] '... it must be borne in mind that, according to settled case-law, the legality of a decision concerning aid is to be assessed in the light of the information available to the Commission when the decision was adopted...'. [7]

20. It follows that, when challenging a decision of the Commission concerning aid, a Member State cannot rely on factual matters that have not been raised in the course of the pre-litigation procedure laid down in Article 88 EC. [8]

21. The French Government also claims that the requirement to recover the aid declared to be incompatible with the common market which follows from the contested decision is liable to affect the operation of the vessel and the continuity of local employment.

22. Suffice it to record in this regard that the French Government's argument refers to difficulties which are alleged to arise in relation to recovery of the aid. Where these difficulties make the proper implementation of the decision completely impossible, they are a defence available to a Member State in an application by the Commission under Article 88(2) EC for failure to fulfil a Treaty obligation. [9]

6 — Case C-288/96 [2000] ECR I-8237.

7 — See also Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, paragraph 16, and Case C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraph 33.

8 — See Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* [1994] ECR I-4103: '... The Kingdom of Spain cannot rely on that element since it was put forward for the first time in the application to the Court rather than in the course of the pre-litigation procedure laid down in Article 93 of the Treaty' (paragraph 31).

9 — Cases C-350/93 *Commission* v *Italy* [1995] ECR I-699, paragraph 16, Case C-404/97 *Commission* v *Portugal* [2000] ECR I-4897, paragraph 39, and Case C-261/99 *Commission* v *France* [2001] ECR I-2537, paragraph 23.

23. On the other hand, difficulties of this kind do not affect the validity of a decision relating to State aid, as is the issue in the present case. The fact that a decision may be difficult to implement does not make it unlawful.

24. I am therefore of the opinion that the first argument raised by the French Government is not well founded.

The second argument

25. Secondly, the French Government challenges the Commission's assessment relating to economic benefits.

26. More specifically, the French Government claims in its application that the Commission could not assess the economic benefits of the aid for the period from 2001 to 2003 in calculating by way of extrapolation from the figures determined for the years 1999 and 2000 without committing an error of law. This is all the more so because the two original figures were affected by technical problems with the vessel.

27. The Commission replies in its defence that this argument is based on a reading of the contested decision that is clearly erroneous.

28. The Commission's calculations were not in fact based on the figures for 1999 and 2000, but on those for the year 2001. The Commission gives the following explanation:

'Accepting the calculations of the French Government (which were based on an estimate of 50 visits by the vessel each season to Saint-Pierre-et-Miquelon — see paragraph 22), the contested decision finds that during the 1999 and 2000 seasons there were only 11 visits in total, whereas their numbers should have been 100 under the initial calculations (see paragraph 23), the number of visits planned for 2001 being 12 (see paragraph 24). On this basis, the contested decision assesses the real benefits for each of the years 1999 and 2000 at

FRF 1.32 million (see paragraph 28) and for the year 2001 at FRF 2.88 million. Thereafter, the contested decision states:

(29) For 2001, the benefits can be estimated at 24% of FRF 12 million, i.e. FRF 2.88 million. *For the next two years* [the years *2002* and *2003*], the cruise schedule is not known. *Taking the figure for 2001*, the total economic benefit to Saint-Pierre-et-Miquelon over the five years 1999-2003 would be 1.32 + 1.32 + 3 × (2.88), i.e. FRF 11.28 million. Since the total value of the aid is FRF 78 million, this is almost seven times greater than the economic value of the benefit to the islands.' [10]

29. It therefore follows unquestionably from paragraph 29 of the statement of reasons of the contested decision that in the absence of information relating to the cruise schedule for 2002 and 2003, the Commission based its calculations for these years on the figure estimated for 2001 and not on the figures for 1999 and 2000.

30. I therefore agree with the Commission when it states that the argument of the French Government relating to extrapolation is based on an incorrect reading of the contested decision.

10 — Emphasis as in the original.

31. Moreover, the French Government does not return to the complaint relating to extrapolation in its reply.

32. On the other hand, it does observe in the latter that the figure of 100 visits during the years 1999 and 2000 was not put forward by it, but by the Commission. In a letter to the Commission dated 12 May 1999, the French Government had restricted itself to a figure of 50 calls. It states that each stopover comprises two calls, one on arrival and the other on departure of the vessel.

33. The Commission takes the view that this argument has no substance and is, in any event, inadmissible. It points out that in their letter of 12 May 1999, the French authorities include in the operating expenses of the vessel 'costs of stopovers (50 calls)', amounting to FRF 750 000.

34. As regards the suggestion made by the French Government in its reply that each stopover comprises two calls, the Commission submits that it is contrary to the concept of a stopover, as defined in dictionaries of the French language. It maintains that the terms 'stopover' and 'call' are synonymous, and accordingly that one stopover comprises one call and not two.

35. Furthermore, the definition proposed by the French Government was not mentioned at any stage of the procedure leading to the contested decision, even though the Commission had clearly shown the importance it attached to the number of stopovers throughout the preparatory enquiries. The proposed definition should therefore be held to be inadmissible.

36. In my opinion, as the Commission rightly points out, the French Government's complaint founded on an alleged error in the figure of 100 visits during 1999 and 2000, as mentioned in paragraph 23 of the statement of reasons of the contested decision, is inadmissible.

37. This complaint was made for the first time in the reply. It cannot be treated as a development of the complaint relating to extrapolation made by the French Government in its application. In the application, the French Government does not question (as it does in its reply) the number of stopovers estimated for 1999 and 2000 recorded by the Commission in paragraph 23 of the statement of reasons of the contested decision, but restricts itself to stating (wrongly, as has just been pointed out), that the figures relating to economic benefits in 1999 and 2000 could not serve as a basis for calculating the economic benefits for the years 2002 and 2003.

38. In any event, the complaint relating to the number of visits in 1999 and 2000 is unfounded.

39. In making this complaint, the French Government in effect alleges that in the contested decision the Commission overestimated the number of stopovers scheduled for 1999 and 2000, relying on an incorrect interpretation of a figure put forward by the French Government in its letter of 12 May 1999.

40. In this letter, the French Government provided an estimate of 50 'calls' (a year). Paragraph 23 of the statement of reasons of the contested decision shows that the Commission understood these 50 'calls' to mean 50 'stopovers' a year, that is to say 100 stopovers for the years 1999 and 2000.

41. If the argument put forward by the French Government in its reply were correct, this would mean that the Commission should have not have based its calculations on an estimate of 50 visits a year but on one of only 25 visits a year, as according to the

French Government each visit comprises two calls.

42. It suffices to confirm that the Commission was not in any way wrong in interpreting the 50 'calls' relied on by the French Government as meaning 50 'stopovers'. As the Commission rightly states, there is no linguistic or other reason for holding that 'call' should not mean the same as 'stopover'.

43. Therefore, if the French Government had none the less wanted to support an interpretation, which would be unusual to say the least, of each 'stopover' comprising two 'calls', it should have so informed the Commission at the time of the pre-litigation procedure. Not having done this, it is not open to it in the present proceedings to criticise the Commission for having treated 'call' as meaning the same as 'stopover'.

44. In its reply, the French Government also states that the most recently available figures show that the economic benefits resulting from the aid have increased to EUR 492 000 in 1999, to EUR 349 000 in 2000 and to EUR 821 000 in 2001, that is to say more than EUR 1 600 000 for the first three years of the vessel's operation.

45. The Commission's response is that these figures post-date the contested decision and are therefore inadmissible.

46. In any event, the Commission rejects the new figures as being irrelevant. They are neither explained nor justified. It doubts that the most recent figures provided in relation to economic benefits and the number of cruises operated during the three years in question (11 in 1999, 9 in 2000 and 12 in 2001) are consistent.

47. The Commission also observes that the production of these figures, and in particular those for 2001, in the reply of 31 January 2002, suggests that it was possible for this information to be calculated one month after the end of a financial year. But as regards the years 1999 and 2000, the Commission points out that the French Government did not provide this information during the administrative procedure.

48. Once again, it suffices to record that 'the most recently available figures' mentioned by the French Government in its reply were not known to the Commission at the date on which the contested decision was adopted.

49. It follows that these figures cannot affect the legality of the contested decision. As has just been pointed out, that is a question to be addressed having regard to the information available to the Commission at the time the contested decision was made.

50. In the second argument, the French Government also mentions the increase in tourism and the benefits in the field of training which the vessel *Le Levant* has brought about.

51. I am however of the opinion that these items of information do not put in issue the Commission's findings in paragraph 31 of the statement of reasons of the contested decision, according to which the indirect benefits relating to infrastructure and the possibility of other cruise operators visiting the islands have not been quantified and are not relevant to the development character of the project in question.

52. Lastly, the French Government argues that the Commission has not questioned similar projects in an overseas territory, as is shown by its decision of 30 March 1999 relative to the cruise vessel *Renaissance* operating in French Polynesia.

53. The Commission replies by saying that the fact that it has previously accepted other projects of a similar kind relating to overseas territories has no bearing on the aid in question. It simply shows that the Commission is not innately opposed to this kind of assistance where the conditions laid down in Article 4(7) of Directive 90/684 are met.

54. It is sufficient to note that the French Government has not provided specific evidence to show that the case of the vessel *Le Levant*, on the one hand, and that of the *Renaissance*, on the other, are identical to one another and have been treated differently by the Commission.

55. It follows from the above that the French Government's second argument is not well founded.

The third argument

56. Thirdly, the French Government argues in the application that it is incorrect to claim that the estimates relating to economic benefits were based on an assumption of 160 days a year passed by the vessel in question in the Saint-Pierre-et-Miquelon area. It states that the original commitment was for only 130 days a year. This target was exceeded in 2001 (135 days) and nearly achieved in 1999 (121 days) as also in 2000 (119 days).

57. The Commission submits that this claim is contrary to the facts and circumstances of the case and based on an incorrect reading of the contested decision.

58. The Commission states that the only information provided on this matter by the French authorities at the time of the preparatory enquiries leading to the adoption of the contested decision is to be found in their letters of 12 May 1999 and 14 June 2000, both of which clearly refer to an operating period of 160 days a year.

59. According to the Commission, it follows that its finding at paragraph 22 of the statement of reasons of the contested decision does not reflect any error of fact.

60. The Commission also adds that the claim in the application that the vessel spent 121 days in 1999, 119 days in 2000, and 135 days in 2001 in the area is nowhere reflected in the information provided to the Commission at the stage of the administrative procedure. According to the Commission, these alleged facts, which are furthermore nowhere substantiated, are again a new matter on which the French Government is not entitled to rely before the Court.

61. In its reply, the French Government accepts that the figure of 160 days is incorrect and is a clerical error for which it offers apologies to the Commission and the Court. It states that the true position is one of 120 to 130 days, corresponding to the period of operation starting at the end of May and ending in the beginning of October.

62. In its rejoinder, the Commission takes note of the fact that the French Government accepts that it had referred to 160 days instead of 130. It rejects the excuse

given, namely that a clerical error was involved.

63. It is sufficient in this regard to note that the French Government itself accepts that it informed the Commission that the period of operation was one of 160 days a year.

64. It seems unlikely that a simple clerical error was involved, given that the same figure was mentioned twice, namely in the letters of 12 May 1999 and 14 June 2000.

65. Besides, as the Commission points out, the letter of 12 May 1999 mentions that 'operations from Saint-Pierre-et-Miquelon will be for a period of approximately 160 days a year from the beginning of June to the *end of October*'. [11] The five months from the beginning of June to the end of October do indeed constitute a period of 160 days.

66. I am therefore of the opinion that the French Government has not shown that the Commission was wrong to retain the figure of 160 days in paragraph 22 of the statement of reasons of the contested decision. Its third argument is accordingly not well founded.

The fourth argument

67. Fourthly, the French Government claims that even if the economic benefits were lower than the amount of the assistance, it is appropriate to assess these benefits in the context of the islands, having regard in particular to their size and economic potential.

68. In this regard, the French Government states that the economic situation has deteriorated by reason of the decline in fishing and the slowing down in the rate of investment in the building and public works sectors. The Saint-Pierre-et-Miquelon area faces serious financial difficulty. The assistance in question is all the more important in such a case.

69. In support of its position, the French Government states that according to the analysis carried out by the Institute of Broadcasting for the Overseas Territories the year 2000 and the previous year were dominated by problems relating to rede-

11 — Author's emphasis.

ployment and economic diversification. This was supported by the list annexed to the Decision on the association of the overseas countries and territories (OCTs) with the European Community of 27 November 2001 [12] and by the European Development Fund which ranks Saint-Pierre-et-Miquelon amongst the OCTs considered to be the least developed.

70. The Commission points out that the analysis used in the contested decision takes into account information provided by the French authorities relating to employment and to the direct economic benefits arising from the operation of the vessel.

71. The Commission also notes that it had mentioned the economic benefits to the islands at paragraph 29 of the statement of reasons of the contested decision and that this gave a figure of FRF 1 735 per inhabitant for the five year period, that is to say an annual average of FRF 347. This is comparable to the estimate provided by the French authorities in their letter of 27 April 2001, which mentioned a sum of approximately FRF 300 per inhabitant. It must also be compared to the gross domestic product (GDP) per head of Saint-Pierre-et-Miquelon, namely FRF 66 930, which classes the islands in the first quartile of the 'richest' of the countries listed in the United Nations development programme.

72. The Commission submits that the report of the Institute of Broadcasting for the Overseas Territories referred to by the French authorities was not mentioned during the administrative procedure and, in any event, does not affect its assessment of the economic benefits resulting from the aid. It refers to other passages of the report which cast doubt on the picture given by the French Government.

73. Should the French Government's argument be accepted?

74. That Government criticises the Commission for not having adequately taken into account the size and economic potential of the islands when assessing the economic benefits.

75. However, the French Government fails to specify in what way the Commission's assessment of the economic benefits would be affected by these matters, assuming always (as it denies) that it had not taken them into account.

12 — OJ 2001 L 314, p. 25.

76. The French Government in fact limits itself to describing the serious difficulties of an economic and financial nature faced by the Saint-Pierre-et-Miquelon territory.

77. As the Commission rightly observes, these difficulties are not sufficient for assistance linked to shipbuilding and ship conversion to be qualified as 'development assistance to a developing country' within the meaning of Article 4(7) of Directive 90/684.

78. Not only must the country in question be in a situation requiring development, but the relevant assistance must also make an effective contribution to that development.

79. The contested decision is based on the fact that the second element is lacking. This is clear from paragraph 33 of the statement of reasons, which states that:

'In light of the foregoing, the Commission therefore concludes that it has not been possible to establish that this project was indeed a development project. The alleged benefits in terms of direct job creation have not been substantiated and are not based on realistic assumptions. Moreover, the alleged direct economic benefits are significantly less than the aid involved, resulting in a clear lack of proportionality between the aid and the intended economic impact.'

80. It follows in my opinion that in restricting itself to showing that Saint-Pierre-et-Miquelon is in a difficult economic and financial situation, the French Government has again failed to show that the assistance in question should be held to be 'development assistance' within the meaning of Article 4(7) of Directive 90/684 or that in basing its decision on the absence of any real effect on the development of the islands, the Commission's assessment was wrong.

81. In my view, the French Government's fourth argument is therefore also not well founded.

V — Conclusion

82. In light of all the foregoing I propose that the Court should:

— dismiss the application;

— order the French Republic to pay the costs.