# JUDGMENT OF THE COURT (Second Chamber)

2 December 2004 *

In Case C-226/03 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 22 May 2003,

**José Martí Peix SA,** established in Huelva (Spain), represented by J.R. García-Gallardo Gil-Fournier and D. Domínguez Pérez, avocats,

applicant,

the other party to the proceedings being:

**Commission of the European Communities,** represented by S. Pardo Quintillán, acting as Agent, and J. Guerra Fernández, avocat, with an address for service in Luxembourg,

* Language of the case: Spanish.

THE COURT (Second Chamber),

composed of: C.W.A. Timmermans, President of the Chamber, J.-P. Puissochet and N. Colneric (Rapporteur), Judges,

Advocate General: A. Tizzano,
Registrar: M. Múgica Azarmendi, Principal Administrator,

having regard to the written procedure and further to the hearing on 10 June 2004,

after considering the observations submitted by the parties,

after hearing the Opinion of the Advocate General at the sitting on 7 September 2004,

gives the following

## Judgment

1 In its appeal José Martí Peix SA (hereinafter 'the appellant') seeks the annulment of the judgment of the Court of First Instance of the European Communities of 13 March 2003 (Case T-125/01 *José Martí Peix SA* v *Commission* [2003] ECR II-865,

hereinafter 'the judgment under appeal') dismissing its action for annulment of the Commission decision of 19 March 2001 reducing the grant of aid to the applicant in 1991 for a project to create a joint Spanish-Angolan fisheries enterprise and ordering the appellant to reimburse to it the sum of EUR 639 520 (hereinafter 'the contested decision').

## Legal framework

2 Under Article 44(1) of Council Regulation (EEC) No 4028/86 of 18 December 1986 on Community measures to improve and adapt structures in the fisheries and aquaculture sector (OJ 1986 L 376, p. 7):

'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, or

— if the beneficiary, contrary to the particulars given in his application and incorporated in the decision granting aid, has not begun the work within one year from the date of notification of the decision, or has not, before the end of this period, supplied satisfactory assurances that the project will be carried out, or

— if the beneficiary does not complete the work within a period of two years from the start of the project, except in cases of force majeure.

Decisions shall be notified to the Member State concerned and to the beneficiary.

The Commission shall take steps to recover any sums unduly paid.'

3 Articles 1 and 3 of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests (OJ 1995 L 312, p. 1) provide:

'Article 1

1. For the purposes of protecting the European Communities' financial interests, general rules are hereby adopted relating to homogenous checks and to administrative measures and penalties concerning irregularities with regard to Community law.

2. "Irregularity" shall mean any infringement of a provision of Community law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure.

...

Article 3

1. The limitation period for proceedings shall be four years as from the time when the irregularity referred to in Article 1(1) was committed. However, the sectoral rules may make provision for a shorter period which may not be less than three years.

In the case of continuous or repeated irregularities, the limitation period shall run from the day on which the irregularity ceases. In the case of multiannual programmes, the limitation period shall in any case run until the programme is definitively terminated.

The limitation period shall be interrupted by any act of the competent authority, notified to the person in question, relating to investigation or legal proceedings concerning the irregularity. The limitation period shall start again following each interrupting act.

However, limitation shall become effective at the latest on the day on which a period equal to twice the limitation period expires without the competent authority having imposed a penalty, except where the administrative procedure has been suspended in accordance with Article 6(1).'

## Facts underlying the dispute

4 The facts underlying the action before the Court of First Instance are set out as follows at paragraphs 11 to 34 of the judgment under appeal:

'11 In October 1991 the company José Martí Peix SA (hereinafter "the applicant") submitted to the Commission, through the Spanish authorities, an application for Community financial aid under Regulation No 4028/86, for a project to create a joint Spanish-Angolan fisheries enterprise. That project provided for the transfer, with a view to fishing activities, of three vessels — the *Pondal*, the *Periloja* and the *Sonia Rosal* — to the joint enterprise created by the applicant, the Portuguese company Iberpesca — Sociedades de Pesca Ltda and an Angolan partner, Empromar N'Gunza.

12 By decision of 16 December 1991 (hereinafter "the aid decision") the Commission granted the project referred to in the preceding paragraph (project SM/ESP/17/91, hereinafter "the project") Community aid for a maximum

amount of ECU 1 349 550. That decision provided that the Kingdom of Spain would supplement the Community aid by an aid payment of ECU 269 910.

13 In November 1992 the joint enterprise, named Ibermar Empresa de Pesca Ltda, was created and registered in Luanda, Angola. In December 1992 the three vessels of the joint enterprise were registered at the port of Luanda.

14 By decision of 12 May 1993, in response to an application by the applicant, the Commission adopted a decision amending the decision to grant assistance. The amendment took the form of replacing the third country partner, Empromar N'Gunza, by the company Marang, Pesca and Industrias de Pesca Ltda.

15 On 18 May 1993 the Commission received via the Spanish authorities an application for payment of the first instalment of the aid, dated 10 May 1993. That application was accompanied by a set of documents and certificates relating to the creation of the joint enterprise, the registration of the vessels at the port of Luanda, their removal from the Community register and the obtaining of the required fishing licences.

16 On 24 June 1993 the Commission paid 80% of the aid.

17 On 20 May 1994 the applicant sent the Spanish authorities an application for payment of the balance of the aid. It attached to that application a first periodic

progress report on activity, for the period from 20 April 1993 to 20 April 1994. That report stated, inter alia: "Our long-term objectives have had to be modified owing to the sinking of the *Pondal* on 20 July 1993. We immediately asked the Angolan authorities responsible for fisheries to replace it by another vessel of our fleet, but at the time of drafting this report we have not yet obtained the authorisation for that substitution ...".

18 The Commission received the application referred to in paragraph 17 on 7 September 1994 and paid the balance of the aid on 14 September 1994.

19 On 6 November 1995 the Commission received the second periodic progress report, dated 19 June 1995, for the activity period from 20 May 1994 to 20 May 1995. That report referred to the sinking of the *Pondal* on 20 July 1993 and described the difficulties encountered in replacing that vessel, owing to the reluctance of the Angolan authorities.

20 By letter of 20 December 1996 the Commission, since it had not received the third periodic progress report, requested information on that subject from the Spanish authorities, which replied by letter of 22 January 1997 that the report was being drafted.

21 On 20 February 1997 the Spanish authorities received a letter from the applicant, dated 31 January 1997, in which it described the management difficulties experienced by the joint enterprise, caused by the demands made by

the Angolan partner and, on the basis of those difficulties, sought a change in third country for the vessels *Periloja* and *Sonia Rosal.* In that letter, the applicant notified the transfer of those two vessels to the joint enterprise Peix Camerún SARL and applied for authorisation to present the third periodic progress report on activity in the context of the latter enterprise.

22 By letter of 4 February 1997 received by the Commission on 5 March 1997, the Spanish authorities forwarded the requests made by the applicant, with the relevant documentation, and declared themselves in favour of those requests.

23 On 4 April 1997 the Commission replied to the Spanish authorities that the third periodic activity report should have been submitted in September 1996 and that, consequently, that report must be presented following on from the preceding reports and not in the new perspective proposed by the applicant.

24 By letter of 18 June 1997 the Commission asked the Spanish authorities to send the third periodic activity report as soon as possible.

25 In September 1997 the third periodic activity report, covering the period from 20 May 1995 to 20 May 1996, was received by the Commission. In it mention was made of the conduct of the Angolan partner which prevented the pursuit of normal fishing activities. It was stated that the most recent landings of fish from Angola took place in March 1995 and that, in the light of the difficulties arising from that conduct, the Community partners had decided to sell their shares in

the joint enterprise to the Angolan partner and to repurchase the vessels which had been transferred to the project. The report mentioned that, after their repurchase, the vessels had been transferred by the applicant to a Nigerian port, where they had undergone repairs until 1996.

26 By letter of 6 March 1998 the applicant, in reply to a request by the Spanish authorities on 26 February 1998, provided the latter with clarifications as regards the implementation of the project. That letter stated that the joint enterprise's vessels had left Angolan waters during the first quarter of 1995. The documents annexed to that letter showed that the Community shipowners sold their shares in the joint enterprise to the Angolan partner on 3 February 1995.

27 By letter of 26 June 1998 the Commission asked the Spanish authorities to provide information concerning the state of the project. In reply to that letter, on 2 July 1998 those authorities sent the Commission the applicant's letter of 6 March 1998.

Pre-litigation procedure

28 In a letter of 26 July 1999 addressed to the applicant and to the Spanish authorities, Mr Cavaco, Director-General of the Fisheries Directorate of the Commission (DG XIV), announced that, in accordance with Article 44(1) of Regulation No 4028/86, the Commission had decided to reduce the aid initially granted to the project on the ground that, in contrast to the requirements laid down in that regulation and by Regulation No 1956/91, the joint enterprise had not exploited for three years the fisheries resources of the third country mentioned in the decision to grant assistance. As regards the vessel *Pondal*, that letter stated that it was possible to deduce from the documents received by the Commission that the vessel had been exercising its activities from 20 April to 20

July 1993 — that is, for three months — when it sank, which justified a reduction in aid of ECU 160 417. Nevertheless, it added that the Commission's calculation was subject to obtaining information establishing that that sinking constituted a case of *force majeure*. As regards the *Periloja* and *Sonia Rosal*, it stated that the information available to the Commission showed that those two vessels had exercised their activities in Angolan waters on behalf of the joint enterprise from 20 April 1993 to 20 April 1994 and from 20 May 1994 to 3 February 1995, the date the applicant sold its shares in the joint enterprise, namely for a total period of 21 months, which justified a reduction in the aid of ECU 114 520. In total, the planned reduction therefore amounted to ECU 274 937, the reimbursement of which the Commission intended to claim from the applicant, which had been paid the whole of the aid beforehand. The letter stated that, failing formal agreement to the proposed solution by the applicant within 30 days, the Commission would continue with the procedure for reducing the aid.

29 On 5 October 1999 the applicant sent the Commission its comments on the latter's letter of 26 July 1999. In essence, it provided information seeking to establish that the sinking of the *Pondal* was a case of *force majeure* and stated that it had tried to replace it by another vessel of its fleet but had not been able to do so because of the conduct of the Angolan authorities. As regards the *Periloja* and *Sonia Rosal*, it explained that the difficulties caused by the Angolan partner had obliged it to transfer the activity of those vessels to Cameroonian waters. It pointed out that this change had been notified to the Spanish authorities in January 1997. It stressed that the formal requirements for creating and operating the joint enterprise had been satisfied and that its activities had envisaged supplying the Community market by priority.

30 On 9 November 1999 a meeting took place between the Commission and the applicant.

31 Following that meeting, the applicant sent the Commission a statement of observations on 18 February 2000 in which it pleaded that the facts complained of by the Commission were time-barred and that the Commission had acted in breach of the principles of due care and of good administration.

32 By letter of 25 May 2000 addressed to the applicant and to the Spanish authorities, Mr Smidt, Director-General of the Fisheries Directorate of the Commission, stated that a reading of the documents provided by the applicant on 5 October 1999 had indicated that the sinking of the *Pondal* occurred on 13 January 1993, and not on 20 July 1993 as the applicant had informed the Commission, and that in those circumstances the absence of any reference to that sinking in the application for payment of the first instalment of the aid presented by the applicant in May 1993 and the statement in the first and second periodic reports on the activities of the joint enterprise that the sinking took place on 20 July 1993 constituted irregularities of such a kind as to warrant discontinuing the part of the aid relating to the vessel in question. Since that part of the aid amounted to ECU 525 000 and the Commission confirmed its position as set out on 26 July 1999 as regards the two other vessels belonging to the joint enterprise, that letter proposed to take the total amount of the reduction of the aid to ECU 639 520. The letter also set out the Commission's objections as regards the applicant's claims concerning the time-bar on the proposed measures of reduction and recovery. It stated that if the applicant had not, within 30 days, notified its agreement to the proposed solution or provided information likely to warrant a change in the Commission's position, the Commission would continue the reduction and recovery procedures.

33 On 10 July 2000, the applicant sent the Commission its observations on the latter's letter of 25 May 2000. In essence, it stated that the *Pondal* sank on 13 January 1993 but that it was not removed from the Angolan register until 20 July 1993, which explained why the sinking was not mentioned in the application for payment of the first instalment of the aid and the reference to

the latter date in the first periodic report on activity. As regards the two other vessels, it maintained that it was established that it had notified the change of third country to the Spanish authorities in January 1997. It also claimed it had acted in good faith in the matter.

34 On 19 March 2001 the Commission adopted a decision reducing the aid granted to the project to EUR 710 030 and ordering the applicant to reimburse it the amount of EUR 639 520 ...'.

**The judgment under appeal**

5 By an application lodged at the Registry of the Court of First Instance on 8 June 2001, the appellant brought an action against the Commission for the annulment of the contested decision under Article 230 EC.

6 In the judgment under appeal the Court of First Instance dismissed the action as unfounded.

7 At paragraphs 81 to 95 of the judgment under appeal, the Court of First Instance examined the appellant's plea based on Article 3(1) of Regulation No 2988/95 and expiry of the limitation period in respect of the facts:

'81 First, as regards the sinking of the *Pondal*, it should be observed that the irregularity established, correctly, in the contested decision consists in the fact that the applicant at first concealed that sinking and subsequently commu-

nicated an incorrect date for it. The actions for which the applicant is criticised in relation to the sinking of the *Pondal* must be considered to constitute a continuous irregularity within the meaning of the second subparagraph of Article 3(1) of Regulation No 2988/95, in that they were identical in substance — that is, an infringement by the applicant of its duty to provide information and act in good faith as regards that sinking. It must therefore be held, in accordance with that same provision, that as regards the irregularity concerning the *Pondal*, the limitation period began to run "from the day on which the irregularity ceases".

82 In that regard, although, admittedly, the applicant indicated the occurrence of the sinking of the *Pondal* in the first periodic report on the activity of the joint enterprise, sent to the Spanish authorities on 20 May 1994, it admitted at the hearing that it was only in its document of 5 October 1999, which contained its comments on the Commission's letter of 26 July 1999, that it first informed the Commission of the exact date of that sinking, namely 13 January 1993, and not 20 July 1993 as it had stated until then. In those circumstances, it must be held that the irregularity linked to the applicant's breach of its duty to provide information and to act in good faith as regards the sinking of the *Pondal* ended on 5 October 1999. The applicant cannot in those circumstances rely on the limitation period as regards the facts found in the contested decision concerning that vessel.

...

91 The alleged facts as regards the *Periloja* and *Sonia Rosal* must be considered to constitute a continuous irregularity within the meaning of the second subparagraph of Article 3(1) of Regulation No 2988/95, since they continued until 20 May 1996, the date which, according to the third periodic report on the activity of the joint enterprise, marks the end of the compulsory triennial period of activity for that enterprise and on which the irregularity definitively took the

form claimed in the contested decision, namely the failure by those two vessels to engage in activities in Angolan waters for 15 of the 36 months making up the abovementioned period. In those circumstances, the limitation period of four years must, in accordance with the same provision of Regulation No 2988/95, be considered as having run "from the day on which the irregularity ceases" — in this case, 20 May 1996.

92 By virtue of the third subparagraph of Article 3(1) of Regulation No 2988/95 the limitation period is interrupted by any act of the competent authority notified to the person in question, relating to investigation or legal proceedings concerning the irregularity.

93 In the present case, on 26 July 1999 the Commission sent the applicant a letter informing it of the commencement of a reduction procedure linked to irregularities concerning, inter alia, the activity of the vessels *Periloja* and *Sonia Rosal*. It is clear from Article 44(1) of Regulation No 4028/86 (...) that the Commission is the competent authority, within the meaning of the provision referred to in the preceding paragraph, to reduce the aid granted on the basis of that regulation. Moreover, the letter of 26 July 1999 must, as the applicant itself states (...), be considered to refer to proceedings concerning the abovementioned irregularities. In those circumstances, it must be considered as an act interrupting the limitation period within the meaning of the third subparagraph of Article 3(1) of Regulation No 2988/95.

94 Accordingly, even if, on the basis of a literal reading of the first subparagraph of Article 3(1) of Regulation No 2988/95, the limitation period of four years laid down in that provision is considered to run, in respect of a continuous irregularity, from the day on which that irregularity ceased even when the competent authority does not learn of that irregularity until later, as in the

present case, the sending of the letter of 26 July 1999, which took place before the expiry of the period of four years, which began on 20 May 1996, interrupted that period and caused a new period of four years to run as from 26 July 1999. It follows that, at the time when the contested decision was adopted, the facts constituting the irregularity as regards the *Periloja* and *Sonia Rosal* were not time-barred.

95 In the light of the foregoing considerations, the plea relating to the limitation period must be rejected.'

**Forms of order sought and the annulment plea**

8 The appellant claims that the Court should:

— declare this appeal admissible;

— annul the judgment under appeal;

— order the Commission to pay the totality of the costs incurred before both the Court and the Court of First Instance.

9 The Commission contends that the Court should:

— dismiss the appeal in part as manifestly inadmissible or, in the alternative, as unfounded;

— for the remainder dismiss the appeal as unfounded;

— in the alternative, if the appeal plea raised by the appellant were to be upheld hold the allegations in the fifth part of the Commission's pleading to be substantiated (non-applicability of Article 3 of Regulation No 2988/95 to the irregularities in this case) and dismiss the action for annulment as unfounded;

— order the applicant to pay the costs of both proceedings.

10 In support of its appeal the appellant raises a single plea based on the erroneous interpretation of the concept of 'continuous irregularity' mentioned in the second subparagraph of Article 3(1) of Regulation No 2988/95.

## The appeal

11 Before the Court of First Instance the appellant maintained that the contested decision had to be annulled because at the time when it was adopted the limitation period in respect of the facts on which the reduction in the grant of aid was founded had expired.

12 In its appeal the appellant alleges that at paragraphs 81 and 91 of the judgment under appeal the Court of First Instance rejected that plea, holding that the conduct alleged against it had to be regarded as constituting a continuing irregularity for the purposes of the second subparagraph of Article 3(1) of Regulation No 2988/95.

13 This single plea may be divided into two limbs, the first relating to the situation of the *Pondal* vessel and the second to the situation of the vessels *Sonia Rosal* and *Periloja*.

14 It is appropriate first to examine the second limb.

*The second limb of the single plea: the vessels Sonia Rosal and Periloja*

15 In connection with the second limb of the single plea, the appellant maintains that the irregularity constituted by the departure of the vessels *Sonia Rosal* and *Periloja* from Angola is not continuing within the meaning of the concept of 'continuous irregularity' in the second subparagraph of Article 3(1) of Regulation No 2988/95 but specific and that the point from which time began to run was February 1995 when those vessels left Angolan waters.

16 In that connection it should be recalled that under Article 1(2) of Regulation No 2988/95 an irregularity presupposes a breach of a provision of Community law resulting from 'an act or omission' by an economic operator.

17 Where the omission occasioning the breach of the provision of Community law persists, the irregularity is 'continuous' for the purposes of the second subparagraph of Article 3(1) of Regulation No 2988/95.

18 The Court of First Instance was right to adjudge at paragraph 91 of the judgment under appeal that the facts alleged in regard to the *Periloja* and *Sonia Rosal* had to be considered to constitute a continuous irregularity within the meaning of the aforementioned provision, and that the limitation period of four years had to be considered to have run 'from the day on which the irregularity ceases' — in this case, 20 May 1996.

19 In that connection it should be recalled that in Part B of Annex I to Commission Regulation (EEC) No 1956/91 of 21 June 1991 laying down detailed rules for the application of Regulation No 4028/86 (OJ 1991 L 181, p. 1), applicants' attention is drawn to the fact that the grant of such assistance is dependent, in particular, on whether the joint enterprise is intended to engage in exploiting the fishery resources situated in the waters of the non-Member State concerned.

20 It is clear from the judgment under appeal that the appellant undertook, in accordance with the requirement laid down in the decision to grant aid, read with the applicable legislation, to exploit the resources of the Angolan waters with the vessels *Periloja* and *Sonia Rosal* for three years, that is to say until 20 May 1996.

21 Accordingly, the appellant cannot maintain that the irregularity occurred only in February 1995. In fact, although the irregularity did indeed commence at that time when the vessels in question left Angola, it continued until the end of that period of three years.

22 It follows from the foregoing considerations that the second limb of the single plea must be rejected.

*The first limb of the single plea: the vessel Pondal*

23 In the context of the first limb the appellant makes two allegations.

24 First, it alleges that the information occasioning withdrawal of the financial aid was obtained following unsuccessful investigations started more than four years after the occurrence of the irregularity, that is to say the sinking of the vessel and, secondly, that the limitation period concerning communication of the false information had expired.

The second allegation

25 In its second allegation, which it is appropriate to take first, the appellant maintains that communication of the erroneous information should be regarded as a single infringement committed on the date of communication. The *dies a quo* is not therefore the day on which the Commission discovered the error.

26 That assertion is correct. In fact, the contested decision was adopted on the basis of Article 44(1) of Regulation No 4028/86. As may be inferred from the contested decision, read with the letter of 26 July 1999 to which it refers, the Commission

reduced the assistance originally granted to the appellant's project on the ground that it had not observed the conditions laid down in the decision granting aid and the applicable Community legislation by not exploiting the fishery resources of Angola for a three-year period. It was only as an additional matter that in that decision the Commission noted that the fact of not communicating, at the time of the request for payment of the first instalment of the aid, that is to say 10 May 1993, that the *Pondal* had sunk on 13 January 1993, constituted a serious breach.

27 As in the case of the *Sonia Rosal* and the *Periloja*, the irregularity relating to the third vessel forming part of the project continued until the end of the three-year period, that is to say until 20 May 1996, which is therefore the *dies a quo*.

28 Accordingly, the Court of First Instance erred in law in considering at paragraphs 81 and 82 of the judgment under appeal that, in regard to the *Pondal*, the limitation period began to run from 5 October 1999.

29 None the less, if the grounds of a judgment of the Court of First Instance reveal an infringement of Community law but its operative part appears well founded on other legal grounds the appeal must be dismissed (Case C-30/91 P *Lestelle* v *Commission* [1992] ECR I-3755, paragraph 28; Case C-210/98 *Salzgitter* v *Commission* [2000] ECR I-5843, paragraph 58 and Case C-312/00 P *Commission* v *Camar and Tico* [2002] ECR I-11355, paragraph 57).

30 In that regard the Commission letter of 26 July 1999 was an investigative document, as the appellant also acknowledges at point 47 of his appeal. That letter specifically sought to investigate irregularities and to reduce the aid depending on the details of the sinking of the *Pondal*. It interrupted the limitation period with the consequence that investigations were not time-barred.

31 It cannot be maintained, contrary to the appellant's assertion, that the erroneous information constitutes the irregularity and that, consequently, the *dies a quo* is 20 May 1994, the date on which the appellant informed the Spanish authorities of the sinking of the *Pondal*. As is plain from paragraph 26 hereof, that information is not relevant for the purposes of establishing the irregularity justifying the contested decision.

32 Nor can it be maintained that it is sufficient that the evidence provided by the recipient actually exists and is reviewable. Even on the supposition that in the present case the Commission was in breach of its duty of diligence, it does not follow that the limitation period began to run before the date on which the obligation on the part of the appellant to exploit Angola's fishery resources came to an end.

33 Accordingly, the second allegation cannot be upheld.

The first allegation

34 As to the first allegation it is sufficient to state that it is based on a false premiss. In fact, as was stated at paragraph 26 hereof, the material irregularity is the failure to exploit the fishery resources of Angola for three years with the *Pondal* or a replacement vessel and not the sinking of that vessel which occurred even before commencement of the project.

35 In those circumstances there is no need to rule on this allegation's admissibility which was called in question by the Commission.

36 Consequently, the first limb of the single plea must be rejected.

37 It follows from all the foregoing considerations that the appeal must be dismissed.

## Costs

38 Under Article 122(1) of the Rules of Procedure, where the appeal is unfounded the Court is to make an order as to costs. Under Article 69(2) thereof, applicable to the appeal procedure under Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleadings. Since the Commission sought an order as to costs against José Martí Peix SA and the latter has been unsuccessful, it must be ordered to pay the costs of this appeal.

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

**1. Dismisses the appeal;**

**2. Orders José Martí Peix SA to pay the costs.**

Signatures.