

OPINION OF ADVOCATE GENERAL
TIZZANO

delivered on 16 September 2004¹

1. In this case, the Spanish company Eduardo Vieira SA (hereinafter 'SAEV' or 'the appellant') is asking the Court of Justice to set aside the judgment of the Court of First Instance of 3 April 2003 in Joined Cases T-44/01, T-119/01 and T-126/01 *Eduardo Vieira and Others v Commission* (hereinafter 'the contested judgment'),² whereby the Court of First Instance dismissed SAEV's action brought against the Commission's 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 Community and the Argentine Republic³ (hereinafter 'the contested decision').⁴

I — Legislative framework

The EEC-Argentina fisheries agreement

2. The legal instrument that has first to be considered for the purposes of this case is the Agreement on relations in the sea fisheries sector between the European Economic Community and the Argentine Republic (hereinafter 'the fisheries agreement' or simply 'the agreement'), which was approved on behalf of the Community by Council Regulation (EEC) No 3447/93 of 28 September 1993 (hereinafter 'Regulation No 3447/93').⁵

3. Article 5(1) sets out the objectives of the agreement, providing as follows:

'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

1 — Original language: Italian.

2 — [2003] ECR II-1209.

3 — Agreement on relations in the sea fisheries sector between the European Economic Community and the Argentine Republic (OJ 1993 L 318, p. 2).

4 — Decision C(2001) 680 final, unpublished.

5 — OJ 1993 L 318, p. 1.

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.'

assistance. A decisive role is played here by the Joint Committee provided for in Article 10 of the agreement (hereinafter 'the Joint Committee'); it has particular responsibility for evaluating the projects for joint enterprises (fifth indent) and recommending the projects to receive financial support (sixth indent), and has also to 'check that the projects are being properly administered and oversee the use of the financial support given to projects in accordance with Article 7 ...' (eighth indent).

4. Article 2(e) of the fisheries agreement defines a joint enterprise (hereinafter also 'joint venture') 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'.

7. The system for selecting the projects to receive financing is defined in a number of annexes and protocols to the agreement to which Articles 6 and 7 refer. In particular, Annex III to the agreement (entitled 'Methods and criteria for project selection') specifies that the projects must be submitted to the Commission of the European Communities through the intermediary of the Member States 'in accordance with Community rules' (Annex III, paragraph 2). The Community then sends the list of projects eligible for financing to the abovementioned Joint Committee which evaluates them and recommends to the competent Argentinian and Community authorities that they approve suitable projects (Annex III, paragraphs 3, 4 and 5).

5. According to Article 5(3), the creation of a joint venture in principle implies the transfer of a Community vessel to Argentinian undertakings; that vessel is then removed from the Community register.

6. Articles 6 and 7 of the fisheries agreement provide for the establishment of a system for selecting those projects setting up joint enterprises that merit Community financial

8. The methods for granting financial assistance to the projects which have been approved are contained in Protocol I to the

agreement 'establishing the fishing opportunities and financial compensation provided for in the Agreement on relations in the sea fisheries sector between the Argentine Republic and the European Economic Community'. This provides for two types of financing benefiting the Community ship-owner and joint enterprise in question.

Argentina shall inform the Joint Committee of how these funds are used.

...

9. In particular, Article 3 of Protocol I provides that:

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 ... '.

'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.

Community rules on joint enterprises in the fisheries sector

2. With a view to encouraging the establishment 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. This financial support in the form of operating capital shall be paid by the Community to the Argentinian enforcement authority, which shall lay down the terms governing its use and its administration.

10. In addition to the legislative framework introduced by the fisheries agreement and its annexes, a number of Community regulations laying down the general rules governing Community intervention in the fisheries sector are also material in this case.

11. Of particular significance is 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 (hereinafter 'Regulation No 4253/88').⁶

12. Article 24 of that regulation provides that '[i]f an operation or measure appears to justify only part of the assistance allocated, the Commission is to conduct a suitable examination of the case' (paragraph 1), following which it 'may reduce or suspend assistance in respect of the operation or measure concerned if the examination reveals an irregularity and in particular a significant change affecting the nature or conditions of the operation or measure for which the Commission's approval has not been sought' (paragraph 2).

13. It is also necessary to cite 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 (hereinafter 'Regulation No 3699/93').⁷

14. Focusing solely on the provisions material to this case, I would point out that Article 8 of that regulation concerns measures by the Member States designed to encourage the scrapping of vessels, their permanent transfer to a third country or their permanent reassignment to uses other than fishing; Article 9 for its part provides for the adoption of measures designed to promote the creation of joint enterprises.

15. Annex IV to Regulation No 3699/93 lays down the maximum level of the premiums which may be disbursed for the purposes of Articles 8 and 9 of the regulation. In particular, paragraph (1)(1)(a) provides that the premium for scrapping of a vessel or for setting up joint enterprises may not exceed an amount to be calculated by reference to the characteristics of the vessel scrapped or transferred, using the preceding table. Paragraph (1)(1)(b) provides that premiums for the permanent transfer of a vessel may not exceed the maximum amount for the scrapping premiums referred to in paragraph (1)(1)(a), less 50%.

16. I should finally mention Council Regulation (EEC) No 4028/86 of 18 December 1986 on Community measures to improve and adapt structures in the fisheries and aquaculture sector (hereinafter 'Regulation No 4028/86').⁸ Although that regulation was

6 — OJ 1988 L 374, p. 1. That regulation was amended by Regulation (EEC) No 2082/93 (OJ 1993 L 193, p. 20).

7 — OJ 1993 L 346, p. 1.

8 — OJ 1986 L 376, p. 7. That regulation was amended, in chronological order, 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 by Council Regulation (EEC) No 3946/92 of 19 December 1992 (OJ 1992 L 401, p. 1).

repealed as of 1 January 1994,⁹ and is not therefore applicable to the circumstances of this case, it is necessary to cite a provision on which one of the grounds of appeal relies.

17. That provision is Article 44(1), according to which the Commission may suspend, reduce or discontinue financial assistance to joint enterprises if the project is not carried out as specified. As part of that procedure, the Commission is required to consult the Standing Committee for the Fishing Industry.

II — Facts and procedure

The facts underlying the dispute, the pre-litigation procedure and the contested decision

18. The following extract is taken from the section of the contested judgment setting out the facts:

‘18 Within the framework of the fisheries agreement, [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.

...

25 By decision of 25 July 1995 (hereinafter “the decision to grant assistance of 25 July 1995”) [or simply 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, of ECU 1 881 936

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

⁹ — See Article 9 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).

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

fisheries resources as stipulated in those provisions. Consequently, the Commission informed SAEV that the aid might be reduced if SAEV failed to provide satisfactory explanations justifying the infringement.

...

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

20. The Commission was not satisfied by the justifications SAEV provided and adopted the contested decision, ordering SAEV to reimburse the amount of EUR 419 446 (Article 2). That decision did not, however, affect the assistance allocated to the joint venture VASA.

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.

21. In the grounds for its decision, the Commission noted that '[p]ursuant to Article 1 of [the] decision [to grant assistance], 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'. The Commission emphasised that the 'creation of joint enterprises in Argentina has the aim of exploiting Argentinian fishery resources' and that '[p]oint 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'. The Commission further noted that 'as from 5 July 1996, the

19. By letter of 21 April 1998, the Commission informed SAEV that the departure of the vessel from Argentinian waters constituted an infringement of Article 5(1) of the fisheries agreement and Article 3(1) of Protocol I to that agreement, since it made it impossible to exploit the Argentinian

vessel *Ibsa Cuarto* ceased its fishing activities in the Argentinian Exclusive Economic Zone (hereinafter “EEZ”) and began to fish in international waters for Patagonian tooth-fish, without prior notification to the Commission of that fact and without having obtained its authorisation’.¹⁰

Procedure before the Court of First Instance and the contested judgment

22. On those grounds, as stated in the contested judgment, ‘the Commission concludes, in point 9 of Decision C(2001) 680 final, 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.’¹¹

23. By application lodged at the Registry of the Court of First Instance on 8 June 2001, SAEV brought an action for the annulment of Decision C(2001) 680 final of 19 March 2001. According to the contested judgment, the pleas entered concerned: (i) the absence of a legal basis or an incorrect legal basis for the contested decision (paragraphs 79 to 112); (ii) the absence of significant changes to the project which could have warranted a reduction in aid (paragraphs 113 to 135); (iii) breach of the principle of proportionality (paragraphs 136 to 154); (iv) incorrect application of Community legislation concerning the reduction of financial aid (paragraphs 155 to 164); (v) breach of the principle of a reasonable time-limit and breach of the principles of the protection of legitimate expectations and of legal certainty (paragraphs 165 to 185); (vi) infringement of the right to be heard (paragraphs 186 to 190).

24. By its contested judgment, the Court of First Instance dismissed the application and ordered SAEV to pay the costs.

10 — Unofficial translation of the Spanish text of the decision.

11 — Paragraph 41.

Procedure before the Court of Justice

25. By an appeal lodged on 16 June 2003, SAEV asked the Court of Justice to set aside the judgment of the Court of First Instance and order the Commission to pay the costs at first instance and on appeal.

26. On 15 December 2003, the Commission submitted a response, pursuant to Article 104 of the Rules of Procedure. It asked the Court to declare a number of the grounds of appeal to be manifestly inadmissible and to dismiss the remainder; in the alternative, it asked the Court to dismiss the appeal in its entirety; the Commission also asked that the appellant should be ordered to pay the costs.

27. Since the parties wished to forgo a hearing, the Court decided, pursuant to Article 44b of the Rules of Procedure, to give judgment without holding the oral part of the procedure.

III — Legal analysis

28. SAEV relies on six grounds in support of its appeal. It contends in particular that the Court of First Instance erred in law in its judgment concerning: (i) the legal basis of

the contested decision; (ii) the role of the Joint Committee and the Argentinian authorities; (iii) the application of Article 44 of Regulation No 4028/86 in the context of the procedure to reduce the financial assistance; (iv) the application of Regulation No 3699/93 to calculate the amount of the reduction of the financial assistance; (v) force majeure; and (vi) the need to obtain authorisation from the Commission to leave the Argentinian fishing zone.

The first ground of appeal

29. By its first ground of appeal, the appellant is disputing the finding of the Court of First Instance that ‘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 decision on that regulation, and in particular on Article 24 thereof’.¹²

30. By way of preliminary, the Commission objects that the first ground of appeal is inadmissible, as it simply replicates a plea the appellant previously relied on at first instance.

¹² — Paragraph 94.

31. In that connection, I would point out that it is settled case-law of the Court of Justice that it follows from Article 225 EC, the first paragraph of Article 58 of the Statute of the Court of Justice and Article 112(1)(c) of the Rules of Procedure of the Court of Justice that an appeal against a judgment of the Court of First Instance cannot merely '[repeat] or [reproduce] verbatim the pleas in law and arguments previously submitted to the Court of First Instance, including those based on facts expressly rejected by that Court',¹³ unless the 'appellant challenges the interpretation or application of Community law by the Court of First Instance'.¹⁴

32. It seems to me that, in this case, the appellant is in fact challenging not only the interpretation of the provisions of the fisheries agreement and of the Commission's decision to grant assistance at the point in time when the contested decision was adopted, but also the way in which the Court of First Instance interpreted those provisions in the contested judgment.

33. I therefore consider that the first ground of appeal is admissible.

34. Turning now to the merits of the issue, it is first necessary briefly to consider the line of reasoning that the Court of First Instance followed in finding that Regulation No 4253/88 was, essentially, applicable to the case (see point 29 above).

35. In that connection, the Court of First Instance first stated that since, under the fisheries agreement, the Community is competent to grant financial aid for the creation of joint enterprises, 'it must also have the power to reduce that aid if the conditions under which it was granted have not been observed'.¹⁵ The Court of First Instance points out that that conclusion follows from 'the general principles of law common to the legal systems of the Member States, such as the principle which prohibits unjust enrichment or that which allows bilateral commitments to be unilaterally terminated when one of the contracting parties fails to comply with its obligations'.¹⁶

36. That said, the Court of First Instance went on to consider whether Article 24 of Regulation No 4253/88, which puts those principles into effect in the field at issue here,

13 — See Joined Cases C-199/01 P and C-200/01 P *IPK-München v Commission* [2004] ECR I-4627, paragraphs 48 and 49. See also the order of 25 March 1998 in Case C-174/97 P *FFSA and Others v Commission* [1998] ECR I-1303, paragraph 24, and Case C-41/00 P *Interporc v Commission* [2003] ECR I-2125, paragraph 16.

14 — See *IPK-München v Commission*, cited in footnote 13 above, paragraph 50. See also Case C-210/98 P *Salzgitter v Commission* [2000] ECR I-5843, paragraph 43; *Interporc v Commission*, cited in footnote 13 above, paragraph 17; as well as the order in Case C-488/01 P *Martinez v Parliament* [2003] ECR I-13355, paragraph 39).

15 — Paragraph 85.

16 — Paragraph 86.

confers on the Commission a specific power to adopt the contested decision.¹⁷

Community vessels and opens new fishing zones to Community shipowners "meets the objectives of the Community structural policy" in the fisheries sector.¹⁹ For that reason, the Commission did not make an error in applying Regulation No 4253/88 to the case.

37. On that point, after noting that the decision to grant assistance is expressly based solely on Regulation No 3447/93, which approved the fisheries agreement, the Court of First Instance pointed out that '[h]owever, Article 1(1) of those decisions states that the aid is granted "under the conditions established by the provisions laid down in the [fisheries] agreement ..., the applicable Community law and the provisions in the Annexes."¹⁸

39. According to the appellant, however, the Court of First Instance committed an error in law in taking the view that the above-mentioned reference to the 'applicable Community law' could also include Regulation No 4253/88.

38. According to the Court of First Instance, '[t]he reference to the "applicable Community law" must be understood as a reference to, inter alia, Regulation No 4253/88', since it 'has an extremely wide field of application', which also includes 'actions for structural purposes' relating to financial instruments other than the Structural Funds. The Court of First Instance goes on to say that '[t]he financial aid granted for the creation of joint enterprises under the fisheries agreement has a structural purpose. As the second recital in the preamble to the [decisions] to grant assistance ... states, the creation of joint enterprises, which entails the transfer of

40. The appellant accepts that, under a general principle of law, the Commission can reduce financial assistance if the conditions originally laid down have not been observed, but it objects that the fisheries agreement contains no provision of that nature and that the decision to grant the assistance refers expressly to Regulation No 3447/93 alone. Since the fisheries agreement constitutes a *lex specialis* in this field, it can be derogated from only on the basis of an express provision of law. In the absence of such a provision, and especially of an express reference to Regulation No 4253/88, that regulation cannot apply, even though it constitutes the *lex generalis* covering joint enterprises in the fisheries sector.

17 — Paragraphs 87 to 89.

18 — Paragraphs 90 and 91. The section cited appears in paragraph 91.

19 — Paragraph 92.

41. Let me say straight away that I do not find the appellant's objection persuasive.

implication — that that principle may be derogated from, it seems to me that the Court of First Instance was right to consider that the Commission was entitled to adopt the contested decision on the basis of Article 24 of Regulation No 4253/88.

42. Even accepting that the fisheries agreement should be classified as a *lex specialis* in relation to the provisions on financing the actions for structural purposes which Regulation No 4253/88 contains, the fact remains that, as we know, a special law has to be interpreted narrowly and may derogate from the general law only if and to the extent that it effectively and explicitly lays down provisions in the area it is designed to regulate. In all other respects, the general law continues to apply.

45. Nor can it be objected, as the appellant does, that the broad interpretation of the expression 'the applicable Community law' which the Court of First Instance has adopted results in excessive legal uncertainty for the beneficiaries of the financial assistance. That reference is not, as the appellant would have us believe, a reference to 'any rules' but, as frequently happens in such cases, it is a reference to the relevant Community rules and related principles, that is to say to provisions with which a diligent economic operator is completely familiar or which he can, at any rate, easily identify.

43. In this case, not only does the fisheries agreement not govern the point at issue here, but it actually refers to the 'relevant Community rules' (see Article 3(4) of Protocol I) as far as 'applications for and the grant of Community assistance to the Community owner ...' are concerned. Furthermore, Article 1 of the decision to grant assistance in turn refers to 'the applicable Community law'.

46. In the light of the foregoing, I therefore propose that the Court should dismiss the first ground of appeal.

The second ground of appeal

44. If, added to that, and as the appellant itself acknowledges, the possibility of reducing the assistance improperly used follows from a general principle, and the agreement contains nothing to suggest — even by

47. By its second ground of appeal, which is divided into two parts, SAEV claims that the

Court of First Instance made an error in law in finding that the Commission was not required to consult the Joint Committee (first part of the plea) and the Argentinian authorities generally (second part of the plea) before reducing the aid.

entirety by both the Community and the Argentinian authorities, and that the Court of First Instance therefore erred when it classified them differently. Contrary to the finding of the Court of First Instance therefore, the decision to grant the aid cannot be considered to be a unilateral Community act which the Commission alone is competent to adopt.

48. To gain a better understanding of the arguments the appellant raises, it is necessary to point out that in paragraphs 105 and 106 of the contested judgment, the Court of First Instance stated that '[t]he selection and evaluation of projects to create joint enterprises fall under the international component of the fisheries agreement. The creation of such enterprises is an instrument of cooperation between the Community and the Argentine Republic in the fisheries sector. ... [t]he selection of projects requires an evaluation by the Joint Committee and approval by both the Community and the Argentinian authorities.

By contrast, the grant of financial 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.'

49. In regard to that finding, the appellant objects that both components are an integral part of the same agreement, approved in its

50. In that connection, I have first to consider whether the distinction the Court of First Instance makes has any basis in the agreement itself. In that regard, I would first point out that, while it is true, and indeed evident, that the consent of all the parties is essential if an international agreement is to be effectively concluded, that has no bearing on the allocation of responsibilities for its implementation. Whether joint action by the contracting parties or action by one or other of them is required in fact depends on the interpretation of those provisions of the agreement which are material in any given circumstances.

51. In this case, therefore, it is necessary to establish whether, as regards the provisions on financing Community shipowners for the fisheries projects selected, it was the common, albeit implicit, intention of the parties — underlying the agreement in question —

that only one of them should have that competence.

*tion. Argentina shall inform the Joint Committee of how these funds are used' (Article 3 (2)).*²⁰

52. I consider that a careful reading of the provisions of the agreement on the projects to be financed confirms the analysis of the Court of First Instance. Those provisions in fact indicate that there are measures for the implementation of the agreement itself for which the Community is responsible; others for which Argentina is responsible; and others still for which the 'parties' are responsible, that is to say both the Community and Argentina, within the framework of the Joint Committee (see point 6 above).

53. In particular, Article 5(3) of the agreement provides that '[t]he Community ... shall facilitate the inclusion of Community vessels'; Article 6 actually stipulates that '[t]he Parties shall select the projects'; Article 7(1) refers to 'projects selected by the Parties'. Moving on to Protocol I, I should point out that Article 3 thereof provides that 'the Community shall provide financial assistance for the formation of joint enterprises', and then makes a distinction between the aid disbursed to the Community shipowner and the aid payable to the joint enterprise. While the former is 'paid to the Community owner' (Article 3(1)) observing the terms and procedures for payment 'in accordance with the relevant Community rules in force' (Article 3(4)), the latter 'shall be paid by the Community to the Argentinian enforcement authority, which shall lay down the terms governing its use and its administra-

54. On the basis of the foregoing, it can therefore be concluded, for the purposes of this case, that the grant of aid to Community shipowners for the projects selected is in fact a task which the agreement confers on the Community authorities alone.

55. Nor — though the appellant seeks to do this — is it possible to rebut such a conclusion by citing the fact that Article 10, eighth indent, of the fisheries agreement lists among the duties of the Joint Committee that it is to check that 'the projects are being properly administered and oversee the use of the financial support given to projects in accordance with Article 7 ...'. In point of fact, the latter article provides that the aid is to be granted in accordance with Protocol I which, in establishing the procedure for the grant of assistance, specifies the responsibilities of each of the authorities involved. That protocol gives the Joint Committee a role only in relation to aid given to joint enterprises, as stated above, and for scientific and technical cooperation,²¹ but makes no mention of assistance disbursed to the Community shipowners.

²⁰ — All my italics.

²¹ — See Article 4(2) of Protocol I.

56. That leads me to conclude that the Court of First Instance was right to find that the grant of the aid constitutes a unilateral measure for the implementation of the fisheries agreement which falls within the competence of the Community authorities alone.

57. That said, I come now to the second part of the ground of appeal, which turns on the interpretation of Annex I to the decision to grant assistance and, in particular, the footnote according to which '[t]he information contained in the present annex may not be altered without prior authorisation by the Argentinian authorities and the Commission'.

58. The appellant maintains essentially that since the amount of aid to be disbursed to the Community shipowner is fixed in the annex, the Court of First Instance erred in its finding that the contested decision: (i) 'cannot be regarded as a decision which changes the "information contained" in the original decision to grant assistance within the meaning of that footnote'; (ii) and should be categorised as 'an autonomous decision penalising failure to comply with the conditions to which the grant of aid is subject',²² which could be adopted without consulting the Argentinian authorities.

59. The Commission considers that this part of the second ground of appeal is inadmissible for reasons fundamentally the same as those cited in relation to the first ground of appeal (see point 30 above).

60. It seems to me, however, that, for the same reasons as I set out on that occasion (see point 31 et seq. above), that objection must be dismissed, given that the appellant is criticising the construction the Court of First Instance placed upon the provision at issue.

61. As far as the merits of the question are concerned, I have no difficulty in acknowledging that the reasoning of the Court of First Instance on this point seems to be overly apodictic. However, it is my view that its findings have fundamentally to be upheld.

62. It in fact seems to me that in interpreting the decision to grant assistance, and therefore also the footnote to the annex in question, it is necessary to take account of the legal framework within which that decision fits, namely the fisheries agreement and, in particular, the provisions allocating to the Commission and Argentinian authorities respectively responsibility for administering the funding for which the agreement provides. As we have seen above, although the

²² — Paragraph 110.

former and the latter are responsible for selecting and evaluating projects, competence to grant assistance to Community shipowners is given to the Commission alone (see points 54 to 56 above).

63. I therefore consider that the Court of First Instance has made no error in law in concluding that only the Commission could adopt the contested decision, notwithstanding the footnote which has been cited.

64. In the light of the foregoing, I propose that the Court should dismiss the second ground of appeal in its entirety.

The third ground of appeal

65. By its third ground of appeal, the appellant claims that the Court of First Instance has made an error in law by dismissing the complaint that, by consulting the Standing Committee for the Fishing Industry before reducing the aid, the Commission applied Article 44 of Regulation No 4028/86. Such application is in breach of the fisheries agreement which does not provide for that committee to play any role, and is also unjustified by reason of time, given that the SAEV joint enterprise project was submitted after 1 January 1994, the date on

which that regulation was repealed (see point 16 above).

66. The appellant cites in particular an agenda of that committee which, it alleges, proves that the Commission consulted it, not as a superfluous measure, but actually in order to comply with the procedure compulsorily prescribed by Regulation No 4028/86.

67. In that connection, I would point out that this piece of evidence was already submitted to the Court of First Instance which found 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'.²³

68. It is settled case-law that, in the context of appeal proceedings, the Court of Justice 'is not competent to find the facts or, as a rule, to examine the evidence which the Court of First Instance accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the Court of First Instance alone to assess the

²³ — Paragraph 158.

value which should be attached to the evidence produced to it That appraisal does not therefore constitute, save where the clear sense of that evidence has been distorted, a point of law which is subject, as such, to review by the Court [of Justice].'²⁴

the Commission was entitled to calculate the whole of the reduction of the assistance on the basis of Regulation No 3699/93. In particular, the Court of First Instance erred in its finding that the Commission had done no more than apply the abovementioned regulation by analogy. According to the appellant, the regulation was applied directly, in breach of the fisheries agreement, which does not provide for any reference to it.

69. Since the appellant complains neither of a breach of the general principles of law and the rules of procedure in relation to the burden of proof nor of a distortion of the evidence, but merely submits to the Court of Justice the same evidence it produced at first instance, in order to obtain a second evaluation, it seems to me that this ground of appeal must be considered to be inadmissible.

72. In order to facilitate an understanding of the appellant's arguments, it is necessary, by way of preliminary, to refresh our memory of the relevant provisions of Regulation No 3699/93 and the way in which the Commission has applied them.

70. I therefore propose to the Court that it declare the third ground of appeal inadmissible.

73. Paragraph 1(1) of Annex IV to that regulation determines the procedures for calculating the assistance which may be granted. In particular, paragraph (1)(1)(a) identifies the maximum premiums which may be disbursed for the scrapping of a vessel and for setting up joint enterprises; paragraph (1)(1)(b) specifies that the premiums paid to the beneficiaries for the permanent transfer of a vessel to a third country may not exceed the maximum amounts for the scrapping premiums referred to in paragraph (a), less 50%.

The fourth ground of appeal

71. By its fourth ground of appeal, SAEV claims that the Court of First Instance committed an error in law in finding that

74. In this case, the Commission took the view that although the appellant was in breach of the conditions governing the grant

²⁴ — See Case C-330/01 *Hortiplant v Commission* [2004] ECR I-1763, paragraph 36. See also Case C-185/95 P *Baustahlge- webe v Commission* [1998] ECR I-8417, paragraph 24, and Joined Cases C-24/01 P and C-25/01 P *Glencore and Compagnie Continentale v Commission* [2002] ECR I-10119, paragraph 65.

of financial assistance, this did not alter the fact that it had actually transferred the vessel *Ibsa Cuarto* to the joint enterprise. The Commission therefore decided to calculate the definitive amount of the assistance to which the appellant was entitled by excluding from its calculation of the reduction the portion of the assistance linked to the transfer. Consequently, it based its calculation on what Regulation No 3699/93 prescribes in similar circumstances. It therefore calculated the amount that would have been due to the appellant on the basis of paragraph (1)(1)(a) of Annex IV to the regulation and then applied a reduction of 50%, considering the outcome of that calculation to be the amount of the assistance that should remain unaltered despite the vessel's departure from Argentinian waters.

Instance found that neither of the two instruments on which the contested decision is based (Regulation No 4253/88 and Regulation No 3447/93) nor the fisheries agreement contain specific provisions concerning the portion of the assistance payable in respect of the transfer of a Community vessel. It therefore concluded that '[t]he Commission, which was bound only by the principle of proportionality in calculating the definitive amount of aid due to the appellant, 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. In acting in that way, it took care to harmonise the treatment accorded to an enterprise created under the fisheries agreement with that accorded to joint enterprises falling within the scope of Regulation No 3699/93.'²⁵

75. The appellant contends that, in contrast to the findings of the Court of First Instance, that calculation constitutes direct application of Regulation No 3699/93. This is because the Commission did not use the tables annexed to the fisheries agreement to calculate the total amount of the contribution that had then to be reduced by 50%, in accordance with the criterion laid down by Regulation No 3699/93. The Commission had in fact already used Regulation No 3699/93 to calculate the theoretical initial amount of the assistance, to which it then applied the reduction. By so doing, the Commission improperly fixed the portion of the aid to be left unaltered at a lower level than the amount actually due.

77. In the light of the foregoing, it seems to me that an analysis of this ground of appeal should focus on clarifying whether, in this case, the application by analogy of the rules set out in Regulation No 3699/93 constituted a reasonable and appropriate course to take in order to ensure the protection of the Community's financial interests, or whether, conversely, it resulted in a calculation of the definitive aid that was disproportionately disadvantageous to SAEV's interests.

78. In that connection, I would point out that the aid granted for the creation of a joint

76. For my part, I would point out that in the contested judgment the Court of First

²⁵ — Paragraph 163.

enterprise, within both the framework of Regulation No 3699/93 and that of the fisheries agreement, comprises, in theory at least, two components, one pertaining to the removal of a vessel from the Community register and the other pertaining to financial participation in a joint enterprise.

register, given that the structural benefit that the Community gains from its removal is the same, whatever the vessel's final destination. The difference between the total aid that a shipowner receives in one or other set of circumstances seems to me to be attributable to the component involving financial participation in the joint venture.

79. While it is true that it does not seem possible to extract from a reading of paragraph (1)(1)(a) to Annex IV to the regulation alone an indication of the weight to be attached to each component, it is also true that it is possible to deduce indirectly from paragraph (1)(1)(b) the maximum amount of the component pertaining to removal from the Community register. In fact, since paragraph (1)(1)(b) provides that the maximum amount of aid for the permanent transfer of a vessel which does not involve the creation of a joint enterprise is 50% of that provided for in respect of the creation of a joint enterprise on the basis of paragraph (1)(1)(a), it follows that, even in the context of the 'complex' of aid under paragraph (1)(1)(a), the component pertaining to the transfer of the vessel cannot exceed 50% of the total.

80. As far as the fisheries agreement is concerned, however, I can identify nothing that allows the amount of the two components of the aid to be determined. I see no reason why, however, if the vessels have the same characteristics, a ceiling higher than that provided for by Regulation No 3699/93 should be assigned to the component pertaining to the vessel's removal from the

81. I therefore consider that the Court of First Instance was right to describe the procedure the Commission employed as the application by analogy of Regulation No 3699/93, in accordance with the principle of proportionality.

82. I would add that, in any event, the appellant cannot complain that it has suffered any damage, given that the Commission was not required to fix the amount of the component of the aid pertaining to removal from the Community register at the maximum limit. In point of fact, paragraph (1)(1)(b) of Annex IV to Regulation No 3699/93 provides that the premiums for the permanent transfer of a vessel to a third country *may not exceed* the maximum amounts of payments for the scrapping premiums referred to in paragraph (1)(1)(a), less 50%. It follows that even if the Commission had opted to base the initial figure on the tables annexed to the fisheries agreement, instead of the less generous tables attached to the regulation, in the absence of further clarifying legislation, I do not consider that the principle of proportionality would have prevented the Commission from fixing the amount payable to the appellant

for the vessel's removal from the register at a similar (or lower) level than was actually decided. The Commission could in fact legitimately have used the margin of discretion available to it under that provision to apply a percentage reduction in excess of 50%.

83. In the light of the foregoing, I therefore propose that the Court should dismiss the fourth ground of appeal.

The fifth ground of appeal

84. According to the appellant, the Commission should have deemed the fact that the vessel *Vieirasa XII* left Argentinian waters to be the consequence of force majeure, namely a result of the depletion of Argentinian fish stocks and the limit and bans on fishing that were consequently put in place by the Argentinian authorities. By taking a different view of that issue, the Court of First Instance is alleged to have committed an error in law.

85. The Commission objects, by way of preliminary, that this complaint is inadmis-

sible since the appellant made no reference to force majeure at first instance.

86. In that context, I should point out immediately that, on the basis of the information contained in the case-file transferred by the Court of First Instance, the appellant did not, in fact, at first instance, enter a plea based on the Commission's obligation to designate the circumstances in question a case of force majeure. It merely objected, under the plea entitled 'Problems posed by the application, in the alternative, of the general legislation on joint enterprises', to an alleged contradiction between the method used to calculate the reduction in the aid and the fact that, in the course of the procedure, the Commission had acknowledged that the departure from Argentinian waters at a time when Argentinian authorities had unilaterally imposed fishing bans did constitute a case of force majeure.²⁶

87. The Court of First Instance itself, however, recognised that, in the proceedings before it, the appellant had maintained that 'the departure from Argentinian waters *was necessary* as a result of the depletion of fish stocks in the Argentinian EEZ, or of fishing prohibitions or limitations ordered by the Argentinian authorities'.²⁷

²⁶ — Paragraph 105 of the application to the Court of First Instance.

²⁷ — Paragraph 123. My italics.

88. It cannot therefore be completely excluded that the ground of appeal in question may be seen as further developing the claim at first instance. I do not consider it necessary, however, to dwell on that issue, because the complaint seems to me to be manifestly unfounded in any event.²⁸

90. In the light of the foregoing, I propose that the Court should dismiss the fifth ground of appeal.

The sixth ground of appeal

89. In fact, it is sufficient to bear in mind that, according to settled case-law, 'the concept of "force majeure" ... is not limited to absolute impossibility but must be understood in the sense of abnormal and unforeseeable circumstances, outside the control of the operator concerned, the consequences of which, in spite of the exercise of all due care, could not have been avoided'.²⁹ As the Commission has rightly pointed out, even accepting that the depletion of Argentinian fish stocks and the consequent restrictive measures constituted abnormal circumstances, they could certainly not be considered to be unforeseeable. I believe it can therefore be stated, without needing to analyse the further complaints attached by the appellant in the context of this ground of appeal, that the abovementioned circumstances cannot be designated a case of force majeure.

91. By its final complaint, SAEV claims that the Court of First Instance infringed the fisheries agreement by stating that 'recipients of Community financial aid are under an obligation to provide information and to act in good faith. That is an obligation inherent in the system of such aid and is essential to its functioning ... In accordance with that obligation, the applicants should have informed the Commission of the problems they encountered in carrying out their projects.'³⁰

92. The Court of First Instance is also alleged to have erred in finding that 'the vessels operated by the joint enterprises should not have left the Argentinian EEZ without prior approval by the Commission, since the exploitation and processing of Argentinian fishery resources was one of the main conditions to which the grant of Community financial aid was subject'.³¹

28 — See Case 23/00 P *Council v Boehringer* [2002] ECR I-1873, paragraphs 51 and 52, from which it is clear that, for reasons of procedural economy, the Community Courts can dismiss an action on the merits without having to rule on objections of inadmissibility raised by the opposing party.

29 — See Case C-208/01 *Parras Medina* [2002] ECR I-8955, paragraph 19, and the case-law cited therein.

30 — Paragraph 124.

31 — Paragraph 125.

93. According to the appellant, the fact that it had the express authorisation of the Argentinian authorities was in itself sufficient to legitimise its departure from Argentinian waters, given that, on the one hand, it was for those authorities alone to regulate the activity of fishing vessels and, on the other, the Commission would in any event have been informed of what had happened through the Joint Committee.

94. Finally, the appellant contends that, since the Commission was informed by the association of joint enterprises of the depletion of the fish stocks and the measures adopted by the Argentinian authorities, the Court of First Instance erred in finding that '[c]orrect 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'.³²

95. For my part, I would point out that, in my earlier analysis of the second ground of appeal, I concluded that the Court of First Instance was right to consider the decision to grant aid a unilateral Community act (see point 56 above). Therefore, it only remains for me to add that, as the Commission rightly points out, in accordance with Article 24 of Regulation No 4253/88, any significant

change to a project must be authorised by the Commission. Since the contested decision falls within the Community component of the fisheries agreement, authorisation from the Argentinian authorities alone could not compensate for the failure to involve the Commission.

96. I would further point out, as the Court of Justice has stated, that 'it is essential for the proper functioning of the system of controls set up to ensure proper use of Community funds that applicants for aid provide the Commission with information that is reliable and not liable to mislead it'.³³

97. Therefore, the very failure to meet that obligation to provide information and act in good faith means that the Commission is entitled to reduce the aid granted, regardless of whether it has obtained the information from other sources and of any consequences the transmission of that information may have.

³³ — Case C-500/99 P *Conserve Italia v Commission* [2002] ECR I-867, paragraph 100, which upheld the judgment of the Court of First Instance in Case T-216/96 *Conserve Italia v Commission* [1999] ECR II-3139, paragraph 71. See also Case T-180/00 *Astipescia v Commission* [2002] ECR II-3985, paragraph 93, and Case T-180/01 *Euroagri v Commission* [2004] ECR II-364, paragraph 83.

³² — Paragraph 124.

98. On the basis of the foregoing, I therefore propose that the Court should dismiss the final ground of appeal also.

IV — Costs

Final considerations

99. Since, in my opinion, all the grounds of appeal submitted by SAEV should be dismissed as inadmissible or unfounded, I propose that the Court should dismiss the appeal in its entirety.

100. In the light of Article 69(2) of the Rules of Procedure and the conclusions I have reached concerning the dismissal of the appeal, I consider that the appellant should be ordered to pay the costs.

V — Conclusions

For the reasons set out above, I propose that the Court of Justice should dismiss the appeal against the judgment of the Court of First Instance of 3 April 2003 in Joined Cases T-44/01, T-119/01 and T-126/01 *Eduardo Vieira and Others v Commission*, and order the appellant to pay the costs of the proceedings before both the Court of First Instance and the Court of Justice.