Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 20 March 2014[1]

Joined Cases C-12/13 P and C-13/13 P

Gérard Buono
Jean-Luc Buono
Roger Louis Paul Del Ponte
Serge Antoine Di Rocco
Jean Gérald Lubrano
Jean Lubrano
Jean Lucien Lubrano
Fabrice Marin
Robert Marin
(Case C-12/13 P)
Syndicat des thoniers méditerranéens
Marc Carreno
Jean Louis Donnarel
Jean-François Flores
Gérald Jean Lubrano
Hervé Marin
Nicolas Marin
Sébastien Marin
Serge Antoine José Perez

(Case C-13/13 P)

(Appeal — Fishing quotas — Emergency measures adopted by the Commission — Action for a declaration as to the non-contractual liability of the European Union — Admissibility — Standing of legal persons to bring an action for damages — Non-contractual liability for a lawful act — Application of the judgment in FIAMM by the General Court — Liability for an unlawful act — Compensable damage — Loss of opportunity)

1. In the present joined cases, which are closely linked to Case C-611/12 P (*Giordano* v *Commission*), appeals have been brought against the judgment of the General Court of 7 November 2012 in *Syndicat des thoniers méditerranéens and Others* v *Commission* (T-574/08) dismissing the action for a declaration of the non-contractual liability of the European Union brought by a number of French owners of purse seine fishing vessels and by a trade union representing the interests of the tuna fishing sector. Unlike in Case C-611/12 P, the appellants in the present proceedings have raised a plea, not relied on in the aforementioned Case C-611/12 P, alleging that the European Union is non-contractually liable for a lawful act.

1 — Original language: Spanish.

2. In this Opinion, I shall therefore focus on those aspects which differentiate the two appeals joined in this case from Case C-611/12 P. Also, although the appeals in the present case have been joined, it is important to point out here and now that the respective pleadings are based on different arguments which will warrant different treatment in the course of this Opinion. To complicate matters further, one of the appellants in Case C-13/13 P, the Syndicat des thoniers méditerranéens, a trade union representing the interests of the tuna fishing sector, contests the General Court's decision not to recognise its standing to bring proceedings. I shall be looking at this point too at some length, since it raises the particular issue of the standing of legal persons representing the interests of others in the context of an action for a declaration of the non-contractual liability of the European Union.

I – **Legislative framework**

3. The second paragraph of Article 340 TFEU establishes the rules applicable to the non-contractual liability of the European Union as follows:

'In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.'

4. Bluefin tuna fishing is regulated at both international and European level. Since 1997, the European Union has been party to the International Convention for the Conservation of Atlantic Tunas, whose International Commission for the Conservation of Atlantic Tunas (ICCAT) adopts recommendations and plans with a view to ensuring the conservation of that living aquatic resource. In accordance with the ICCAT's decisions, the European Union has adopted a number of instruments prominent among which, for the purposes of these proceedings, is Regulation (EC) No 520/2007 laying down technical measures for the conservation of certain stocks of highly migratory species and repealing Regulation (EC) No 973/2001 [2] and Regulation (EC) No 1559/2007 establishing a multi-annual recovery plan for bluefin tuna in the Eastern Atlantic and Mediterranean and amending Regulation (EC) No 520/2007. [3]

5. Those provisions of EU law also fall within the scope of Regulation (EC) No 2371/2002 on the conservation and sustainable exploitation of fisheries resources under the common fisheries policy. [4] That instrument introduces a set of general measures aimed at the conservation, management and exploitation of living aquatic resources in the territory of the Member States, in Community waters or by European Union fishing vessels.

6. Prominent among the various measures provided for in Regulation No 2371/2002 is Article 7, entitled 'Commission emergency measures', pursuant to which:

'1. If there is evidence of a serious threat to the conservation of living aquatic resources, or to the marine eco-system resulting from fishing activities and requiring immediate action, the Commission, at the substantiated request of a Member State or on its own initiative, may decide on emergency measures which shall last not more than six months. The Commission may take a new decision to extend the emergency measures for no more than six months.

2. The Member State shall communicate the request simultaneously to the Commission, to the other Member States and to the Regional Advisory Councils concerned. They may submit their written comments to the Commission within five working days of receipt of the request.

2 — Council Regulation of 7 May 2007 (OJ 2007 L 123, p. 3).

3 — Council Regulation of 17 December 2007 (OJ 2007 L 340, p. 8).

4 — Council Regulation of 20 December 2002 (OJ 2002 L 358, p. 59).

The Commission shall take a decision within 15 working days of receipt of the request referred to in paragraph 1.

3. The emergency measures shall have immediate effect. They shall be notified to the Member States concerned, and published in the Official Journal.

4. The Member States concerned may refer the Commission decision to the Council within 10 working days of receipt of the notification.

5. The Council, acting by qualified majority, may take a different decision within one month of the date of receipt of the referral.'

7. Regulation (EC) No 40/2008 fixes for 2008 the fishing opportunities and associated conditions for certain fish stocks, including bluefin tuna.[5] That regulation introduces catch limits and fixes the quantity of bluefin tuna which can be caught in 2008 by Community vessels in the Atlantic Ocean, in the area east of longitude 45° [W] and in the Mediterranean Sea. Those limits and amounts were amended under Commission Regulation (EC) No 446/2008.[6]

8. In the light of the information supplied at that time by inspectors during inspections carried out on the Member States concerned, it was established that bluefin tuna fishing opportunities in the Atlantic Ocean, east of longitude 45° [W], and in the Mediterranean Sea, assigned to tuna fishing vessels flying the flag of Greece, France, Italy, Cyprus and Malta would be regarded as exhausted on 16 June 2008. Fishing opportunities for purse seiners flying the Spanish flag would be regarded as exhausted on 23 June 2008. In the light of those facts, the Commission, in accordance with Article 7 of Regulation No 2371/2002, adopted Regulation No 530/2008 establishing emergency measures as regards purse seiners fishing for bluefin tuna in the Atlantic Ocean, east of longitude 45°W, and in the Mediterranean Sea.[7] The first three articles of Regulation No 530/2008 provide as follows:

'*Article 1*

Fishing for bluefin tuna in the Atlantic Ocean, east of longitude 45 °W, and the Mediterranean by purse seiners flying the flag of or registered in Greece, France, Italy, Cyprus and Malta shall be prohibited as from 16 June 2008.

It shall also be prohibited to retain on board, place in cages for fattening or farming, tranship, transfer or land such stock caught by those vessels as from that date.

Article 2

Fishing for bluefin tuna in the Atlantic Ocean, east of longitude 45 °W, and the Mediterranean by purse seiners flying the flag of or registered in Spain shall be prohibited as from 23 June 2008.

It shall also be prohibited to retain on board, place in cages for fattening or farming, tranship, transfer or land such stock caught by those vessels as from that date.

5 — Council Regulation of 16 January 2008 fixing for 2008 the fishing opportunities and associated conditions for certain fish stocks and groups of fish stocks, applicable in Community waters and, for Community vessels, in waters where catch limitations are required (OJ 2008 L 19, p. 1).

6 — Regulation of 22 May 2008 adapting certain bluefin tuna quotas in 2008 pursuant to Article 21(4) of Council Regulation (EEC) No 2847/93 establishing a control system applicable to the Common Fisheries Policy (OJ 2008 L 134, p. 11).

7 — Commission Regulation of 12 June 2008 (OJ 2008 L 155, p. 9).

Article 3

1. Subject to paragraph 2, as from 16 June 2008, Community operators shall not accept landings, placing in cages for fattening or farming, or transhipments in Community waters or ports of bluefin tuna caught in the Atlantic Ocean, east of longitude 45 °W, and the Mediterranean Sea by purse seiners.

2. It shall be allowed to land, place in cages for fattening or farming and to tranship in Community waters or ports of bluefin tuna caught in the Atlantic Ocean, east of longitude 45 °W, and the Mediterranean Sea by purse seiners flying the flag of, or registered in Spain until 23 June 2008.'

II – **Background**

A – *Case C-12/13 P*

9. Gérard Buono, Jean-Luc Buono, Roger Del Ponte, Serge Antoine Di Rocco, Jean Gérald Lubrano, Jean Lubrano, Jean Lucien Lubrano, Fabrice Marin and Robert Marin ('the appellants in Case C-12/13 P' or 'the appellants'), are French owners of the respective tuna purse seiners operating in the waters of the Mediterranean Sea. They are all members of the Syndicat des thoniers méditerranéens ('STM').

10. Under the provisions of the EU legislation, the French Republic's bluefin tuna fishing quota for 2008 was 4 164 tonnes, 90% of which was allocated to purse seiners flying the French flag operating in the Mediterranean Sea.

11. The appellants all held a special bluefin tuna fishing licence for 2008 which was subject to an individual fishing quota. The licence permitted fishing from 1 April to 30 June 2008.

12. Having been granted the aforementioned licences, the appellants commenced the fishing season in Mediterranean waters. On 16 June 2008, that season was interrupted as a result of the adoption and entry into force of Commission Regulation No 530/2008, the implementation of which entailed the revocation of the aforementioned fishing licences.

B – *Case C-13/13 P*

13. The Syndicat des thoniers méditerranéens is a trade union, governed by Book IV of the French Code du Travail (Labour Code), membership of which is open only to mariners involved in tuna fishing.

14. Marc Carreno, Jean Louis Donnarel, Jean-François Flores, Gérald Jean Lubrano, Hervé Marin, Nicolas Marin, Sébastien Marin and Serge Antoine José Perez ('the individual appellants in Case C-13/13 P' or 'the individual appellants'), of French nationality, are owners of and/or shareholders in the respective purse seiners operating in the waters of the Mediterranean Sea. They are all members of the STM.

15. As stated in point 10 of this Opinion, the French Republic's bluefin tuna fishing quota for 2008 was 4 164 tonnes, 90% of which was allocated to purse seiners flying the French flag operating in the Mediterranean Sea.

16. The individual appellants all held a special bluefin tuna fishing licence for 2008 which was subject to an individual fishing quota. The licence permitted fishing from 1 April to 30 June 2008.

17. Having been granted the aforementioned licences, the individual appellants commenced the fishing season in Mediterranean waters. On 16 June 2008, that season was interrupted as a result of the adoption and entry into force of Commission Regulation No 530/2008, the implementation of which entailed the revocation of the aforementioned fishing licences.

III – **The procedure before the General Court and the judgment under appeal**

18. The action brought by the STM, the appellants in Case C-12/13 P and the individual appellants for a declaration of the non-contractual liability of the European Union for the prohibition on fishing adopted by Commission Regulation No 530/2008 was received at the Registry of the General Court on 24 December 2008.

19. On 25 March 2010, the President of the Sixth Chamber of the General Court stayed the proceedings pending the judgment of the Court of Justice in *AJD Tuna*[8] and the decisions of the General Court in *Norilsk Nickel Harjavalta and Umicore* v *Commission*[9] and *Etimine and Etiproducts* v *Commission*.[10] Once those cases had been decided, the parties were invited to comment on their consequences for the present proceedings.

20. On 12 April 2011, the General Court was informed that the appellants in Case C-12/13 P had changed their counsel.

21. In its written and oral submissions, the STM sought an order from the General Court declaring the European Union to be non-contractually liable for the damage caused by Regulation No 530/2008. The STM did not, however, call into question the legality of that regulation, and thus based its claim on the existence on the part of the European Union of non-contractual liability for a lawful act. The STM also claimed that the General Court should order the Commission to pay a sum of EUR 30 000 by way of non-material damages which would be invested in the distribution of information on European fishing legislation among trade union members.

22. In their written and oral submissions, the individual appellants in Case C-13/13 P sought an order from the General Court declaring the European Union to be non-contractually liable for the damage caused by Regulation No 530/2008. Like the STM, the individual appellants did not, however, call into question the legality of that regulation, and thus based their claim on the existence on the part of the European Union of non-contractual liability for a lawful act. The individual appellants in Case C-13/13 also claimed that the General Court should order the Commission to pay the following respective amounts:

— a symbolic EUR 1 to Marc Carreno;

— EUR 351 685 to Jean Louis Donnarel;

— a symbolic EUR 1 to Jean-François Flores;

— EUR 237 160 (or, before tax, EUR 474 320) to Gérald Jean Lubrano;

— a symbolic EUR 1 to Hervé Marin, Nicolas Marin, Robert Marin and Sébastien Marin; and

— EUR 838 970 to Serge Antoine José Perez.

8 — Case C-221/09 [2011] ECR I-1655.

9 — Case T-532/08 [2010] ECR II-3959.

10 — Case T-539/08 [2010] ECR II-4017.

23. In their written and oral submissions, the appellants in Case C-12/13 P sought an order from the General Court declaring the European Union to be non-contractually liable for the damage caused by Regulation No 530/2008. Although they initially based their claim on the European Union's non-contractual liability for a lawful act, following the judgment of the Court of Justice in *AJD Tuna*, the appellants in Case C-12/13 P also based their action before the General Court on the unlawful nature of the aforementioned regulation. They further claimed that the General Court should order the Commission to pay the following respective amounts:

— EUR 323 053 (or, before tax, EUR 564 956) to Gérard Buono and Jean-Luc Buono;

— EUR 518 707 (or, before tax, EUR 703 707) to Roger Louis Paul Del Ponte;

— EUR 388 047 (or, before tax, EUR 634 207) to Serge Antoine Di Rocco;

— EUR 213 588 to Gérald Lubrano;

— EUR 212 358 to Jean Lubrano and Jean Lucien Lubrano; and

— EUR 466 655 (or, before tax, EUR 610 820) to Fabrice Marin and Robert Marin.

24. All the appellants also claimed that the General Court should order the Commission to pay the costs.

25. For its part, the Commission contended that the General Court should dismiss the action in its entirety and order the appellants to pay the costs.

26. By judgment of 7 November 2012, the General Court declared the action brought by the STM to be inadmissible, dismissed the actions brought by the other appellants and ordered all the appellants to pay the costs.

27. As regards the STM's standing to bring proceedings, the General Court cited the settled case-law of the Court of Justice to the effect that trade associations have the right to bring proceedings under Article 268 TFEU only where they are able to assert in law either a particular interest of their own which is distinct from that of their members or a right to compensation which has been assigned to them by others. The General Court concluded that the STM had demonstrated neither a particular interest of its own nor a right to compensation assigned to it by a third party; on that ground it held the action to be inadmissible.

28. Next, the General Court analysed the plea to the effect that the European Union is non-contractually liable for an unlawful act. On this point, the General Court had regard exclusively to the requirement of actual and certain damage. In keeping with the judgment in *Cofradía de pescadores 'San Pedro' de Bermeo and Others* v *Council*,[11] the General Court held that a fishing quota is merely a theoretical maximum catch limit and does not constitute an individual right of the person to whom it is allocated. Since the appellants' case was based on their having been unable to exhaust their quotas because of a Commission decision, the General Court concluded that they had not proved that the damage sustained was actual and certain. It therefore dismissed the plea.

11 — Case T-415/03 [2005] ECR II-4355.

29. Finally, the General Court examined the plea alleging that the European Union is non-contractually liable for a lawful act. After reiterating the relevant case-law of the Court of Justice, the General Court considered whether the damage sustained was unusual. In the General Court's view, fishing activity has two particular features: quotas do not confer subjective rights and the results of the activity are unpredictable. The General Court held that those two features were sufficient to support the rejection of the claim as to the unusual nature of the damage sustained, and, for that reason, rejected that plea as well.

IV – **The appeal and the form of order sought**

30. The appeals lodged by the appellants in Case C-12/13 P and Case C-13/13 P against the judgment of the General Court of 7 November 2012 were received at the Registry of the Court of Justice on 11 January 2013.

31. By order of 26 February 2013, the President of the Court of Justice joined Cases C-12/13 P and C-13/13 P for the purposes of the written and oral procedures and the judgment, in accordance with Article 54 of the Rules of Procedure of the Court of Justice.

32. The appellants in Case C-12/13 P claim that the Court should:

— set aside the judgment under appeal;

— declare the European Union to be non-contractually liable;

— order the Commission to pay the costs.

33. The appellants in Case C-13/13 P claim that the Court should:

— set aside the judgment under appeal;

— declare the European Union to be non-contractually liable;

— order the Commission to pay the costs.

34. For its part, the Commission contends that the Court should:

— dismiss the appeal;

— in the alternative, dismiss the action for a declaration of non-contractual liability;

— order the appellants to bear the costs incurred in this appeal and at first instance.

V – **The appeals**

A – *The admissibility of various pleas (C-12/13 P and C-13/13 P)*

35. Before analysing the issues central to these appeals, it is important to point out that some of the pleas relied on are of doubtful admissibility. This is the case with the plea alleging an error in the assessment of the inherent financial risk, relied on by the appellants in Case C-13/13 P, and the plea alleging infringement of the fundamental right to property, relied on by the appellants in Case C-12/13 P.

36. In the case of the first plea, the appellants call into question the General Court's analysis of the function of quotas, the existence of a subjective right and the predictability of the exhaustion of the quota. However, that plea does not appear to have been formulated independently, since it continues the line of argument supporting the previous plea, concerning the European Union's non-contractual liability for a lawful act. In those circumstances, in so far as that plea reproduces arguments already present in other pleas relied on in the application, I consider that it should be dismissed.

37. The same is true of the plea relied on in Case C-12/13 P, alleging infringement of fundamental rights. The appellants base their arguments on the fundamental right to property with view to demonstrating that the damage is compensable. That, however, is the very issue under debate in the plea alleging the European Union's non-contractual liability for an unlawful act. Consequently, for the same reason as that given in the previous point, I propose that this plea be declared inadmissible.

B – *The plea that the STM has standing to bring an action for a declaration as to the non-contractual liability of the European Union (C-13/13 P)*

38. The STM complains that the General Court incorrectly applied the conditions of standing applicable to legal persons in the context of actions for a declaration as to the non-contractual liability of the European Union. The STM considers that, when analysing the admissibility of its action, the General Court distorted the facts material to the proceedings, did not take into account the duty to defend the general interest performed by the STM and the autonomous nature of the damage sustained by it.

39. In order to assess whether that plea is well-founded, it is necessary to give a brief summary of the case-law of the Court of Justice in this regard.

40. Since the judgment in *Union syndicale and Others* v *Council*,[12] the Court of Justice has required legal persons claiming compensation for damage resulting from an act of the Communities to prove the autonomous nature of that damage. In other words, a legal person cannot claim for damage collectively sustained by its members, but only for the damage specifically sustained individually by it.[13]

41. In addition, a second scenario became apparent following the judgment in *Ireks-Arkady* v *Council and Commission*,[14] to the effect that legal persons are also permitted to bring an action for damages where they are the assignees of the right to compensation. In that scenario, the beneficiary is then deemed to be the legal person to whom the right has been assigned, not the assignor, thus conferring standing to bring proceedings on the assignee.[15]

42. While it is for the applicant to prove that he satisfies those conditions, it must also be pointed out, in the specific context of an action for a declaration as to the non-contractual liability of the European Union, that the first condition of standing to bring proceedings (autonomous nature of the damage) is closely linked to one of the substantive conditions of liability (actual and certain nature of the damage). There is clearly potential for overlap between the requirement of autonomous damage as a condition of standing to bring proceedings and the requirement that the damage must be actual and certain. If the burden of proving the autonomy of the damage is very onerous, there is a risk that the condition of autonomy will effectively amount to a requirement of actual and certain damage. It is therefore important to separate the two stages at which a legal person must prove, on the one hand, that the

12 — Case 72/74 [1975] ECR 401.

13 — See to the same effect Case 114/83 *Société d'initiatives et de coopération agricoles* v *Commission* [1984] ECR 2589, paragraphs 3 to 5.

14 — Case 238/78 [1979] ECR 2955.

15 — See, to that effect, Joined Cases 256/80, 257/80, 265/80, 267/80 and 5/81 *Birra Wührer and Others* v *Council and Commission* [1982] ECR 85, paragraphs 8 to 14, and order in Case T-53/96 *Syndicat des producteurs de viande bovine and Others* v *Commission* [1996] ECR II-1579, paragraph 11.

damage is autonomous and, on the other hand, that it is actual and certain. Otherwise, there is a risk that the conditions of standing will be transformed into conditions of substance, which must be avoided if the applicant is not to be subjected to an excessive burden of proof with the ultimate effect of barring his access to justice.

43. In the present case, the STM complains that the General Court did not find that it had fulfilled either of the two conditions set out above.

44. As regards the condition that the person seeking damages must be the assignee of the right to compensation, the General Court is right to find that the STM's claim is independent of the individual claims brought by the individual appellants in the same case. Otherwise, the applicants would not have brought individual actions alongside the action brought by the STM. Consequently, the General Court did not commit an error of law in stating in paragraphs 24 to 27 of the judgment under appeal that the STM was not acting as assignee of the rights to compensation held by a number of its members.

45. The condition relating to the autonomous nature of the damage sustained by the legal person merits particular attention. In this regard, the General Court took the view that the STM had not proved the non-material damage alleged.

46. It is true that the STM's application does not contain any specific indication of the damage sustained by the STM. The only mention made of this in the application appears in the final form of order sought, which reproduces the *petitum* and contains a claim for compensation for non-material damage to be awarded to the STM in a lump sum of EUR 30 000, to be invested in training programmes for its members.

47. Clearly, the mere reference to the existence of non-material damage, without any further indication of the precise circumstances of that damage, is not capable of supporting a claim for damages. However, in the light of the application, I consider that the General Court committed an error of law in declaring *the action* inadmissible on the ground that the STM lacked standing to bring proceedings, because the deficiency in the application was so significant as to affect the application itself instead.

48. As we know, Article 44 of the Rules of Procedure of the General Court requires, among other conditions, that the application should state 'the subject-matter of the proceedings and a summary of the pleas in law on which the application is based'. Non-compliance with that requirement justifies the application being declared inadmissible, but not the inadmissibility of the action for lack of standing to bring proceedings, as I have stated on other occasions.

49. In the present case, the action cannot be declared inadmissible for lack of standing to bring proceedings because we do not know what non-material damage the STM has sustained, as STM has made no reference to it at any point in the application. It would be appropriate to declare the STM's action inadmissible on the ground of lack of standing to bring proceedings if, once the damage and the precise circumstances of it had been explained, a manifest lack of evidence were found. In the present case, however, the application not only refrains from commenting on the evidence, but also omits to make any reference to the damage itself, which makes it difficult even to attempt to assess whether the action is admissible.

50. I therefore propose that the Court of Justice make a substitution of grounds and declare that the General Court committed an error of law in declaring the action brought by the STM to be inadmissible, since, in fact, the application should have been declared inadmissible on the ground that it did not comply with the requirement laid down in Article 44(1)(c) of the Rules of Procedure of the General Court.

51. None the less, since the outcome of that conclusion does not alter the outcome of the proceedings at first instance, the plea relied on by the STM must be dismissed as ineffective.

C – *The pleas that the European Union is non-contractually liable for an unlawful act (C-12/13 P)*

52. The appellants in Case C-12/13 P complain that the General Court committed an error of law in finding that the damage sustained by them was not 'certain'. They argue that the General Court did not correctly assess the loss of earnings or, in the alternative, the loss of opportunity suffered as a result of Regulation No 530/2008. In their opinion, the fact that the regulation itself points out that the appellants exhausted their quotas in previous seasons and that Spanish purse seiners would exhaust their quotas during the extra week granted to them is sufficient to confirm the existence of 'certain' damage.

53. As a preliminary point, the Commission considers that this plea is inadmissible inasmuch as it concerns a new matter which was not raised in the application at first instance. As to the substance, the Commission rejects the approach adopted and reiterates the position it adopted in the proceedings at first instance, to the effect, essentially, that there is no right to exhaust the quota and that the damage is therefore unquantifiable. In its submission, that fact alone justifies the General Court's conclusion that the damage sustained was not 'certain'.

54. As regards the admissibility of the plea, I am in no doubt that it is perfectly admissible, since the parties did not extend the pleas in law in support of their action unilaterally, but in response to the request made by the General Court following the judgment of the Court of Justice in *AJD Tuna*. In the light of that judgment, the General Court invited the parties to state their views in writing and orally at the hearing, since, in that case, the Court of Justice had held Regulation No 530/2008 to be invalid. I therefore consider that the extension of the pleas relied on at first instance, as now reflected in the present appeal, was legitimate and this plea cannot be declared inadmissible.

55. With regard, now, to its substance, I consider that, for the purposes of addressing this plea, it is sufficient for me to refer to my Opinion in Case C-611/12 P, in particular points 38 to 69, where I examine in detail whether a loss of opportunity is compensable. For the reasons set out there, which are readily applicable to the present appeal, since the judgments appealed against in both cases were framed in the same terms and on the basis of the same arguments, I consider that the General Court committed an error of law.

56. I therefore propose that the Court of Justice should uphold the plea relied on by the appellants in Case C-12/13 P, to the effect that there has been an error in the interpretation of the second paragraph of Article 340 TFEU in relation to the 'certain' nature of the damage sustained by the appellants.

D – *The plea that the European Union is non-contractually liable for a lawful act (C-12/13 P and C-13/13 P)*

57. Both the appellants in Case C-12/13 P and the individual appellants in Case C-13/13 P maintain that the General Court committed an error of law in finding that Regulation No 530/2008 does not constitute a restriction amounting to 'unusual' and 'special' damage.

58. I would point out first of all that I shall refer to the plea relied on in Case C-13/13 P only in relation to the individual appellants, since, as I have already explained, I take the view, subject to the qualifications mentioned above, that the General Court was right to dismiss the STM's action as inadmissible.

59. The appellants in Case C-12/13 P refer very briefly to the Advocate General's Opinion in *FIAMM and Others* v *Commission* in support of their *petitum*.[16] The individual appellants in Case C-13/13 P criticise the General Court for having held that the holding of a quota does not equate to the holding of a subjective right, for having incorrectly applied the concept of 'inherent economic risk' and for having distorted the function of the quota.

60. The Commission, for its part, submits that, in so far as it relates to non-contractual liability for a lawful act, the judgment under appeal raises an issue of interpretation, since it not clear whether the General Court recognises the existence of liability of this kind or not. The Commission therefore proposes that the Court of Justice make a substitution of grounds and dismiss the appeal, confining its judgment to a finding that such liability does not exist or a declaration that the General Court's analysis of the unusual nature of the damage was included for the sake of completeness.

61. In order to address the question of the European Union's non-contractual liability for a lawful act, reference should be made, principally, to the judgments of the Court of Justice in *Dorsch Consult* v *Council and Commission*[17] and *FIAMM and Others* v *Commision*. In those cases, the content of which does not need to be reproduced in detail here, the Court held that, if the principle of such liability came to be recognised, at the very least three conditions, namely the fact of damage, the existence of a causal link between it and the act concerned and the unusual and special nature of the damage, would all have to be satisfied in order for liability to be incurred.[18]

62. It is important to point out that the reasoning underlying the judgments in *Dorsch Consult* and *FIAMM* is hypothetical. In other words, the Court of Justice does not say that non-contractual liability on the part of the European Union for a lawful act exists, but sets out the conditions that would be applicable to it *if such liability were to be recognised in EU law*. The judgment in *FIAMM and Others* v *Commission*, delivered eight years after the judgment in *Dorsch Consult*, confirms in the most categorical terms the hypothetical nature of such liability.

63. It seems legitimate to ask why the Court reasons along these lines. In my view, the answer to that question is to be found in the case-law prior to *Dorsch Consult* and *FIAMM and Others* v *Commission*.

64. In the 1970s, the Court of Justice had occasion to rule on the possibility that the then European Economic Community might incur liability for a lawful act, more specifically in *Compagnie d'approvisionnement, de transport et de crédit and Others* v *Commission*. In that case, the Court dealt with a plea alleging liability for a lawful act by stating that 'any' liability for a 'valid legislative measure'[19] was inconceivable in a situation such as that in the case in question. This is where the ambiguity in the definition of the scope of non-contractual liability for a lawful act begins, since the use of the word 'any' in reference to such liability highlights the Court's hesitation in this regard.

65. The reasoning by way of hypothesis continued in *Biovilac* v *EEC*, where the Court of Justice held that liability for a lawful act 'would have to be applied … if the concept of liability without fault were accepted in Community law'.[20] The Court none the less stopped short of specifying whether such a concept existed at the time when it delivered that judgment. The same approach is taken in the judgment in *Développement SA and Others* v *Commission*, in which the Court again emphasises that '[there is no] need to examine whether such a principle of strict liability exists in the Community's legal system'.[21]

16 — Joined Cases C-120/06 P and C-121/06 P [2008] ECR I-6513.

17 — Case C-237/98 P *Dorsch Consult* [2000] ECR I-4549.

18 — *Dorsch Consult*, paragraph 19, and *FIAMM*, paragraph 169.

19 — Joined Cases 9/71 and 11/71 [1972] ECR 391, paragraph 46.

20 — Case 59/83 [1984] ECR 4057, paragraph 28.

21 — Case 267/82 [1986] ECR 1907, paragraph 33.

66. This brings us to *Dorsch Consult*, where the Court of Justice addresses this question again, although this time, following the creation of the General Court, in the context of an appeal. On the issue of non-contractual liability for a lawful act, the General Court had taken an approach very similar to that set out in the foregoing points, concluding that the Community had not incurred non-contractual liability for a lawful act, but reasoning, as the Court of Justice had in the past, hypothetically, 'in view of the particular features of this case'.[22] The Court of Justice raised no objection to such a line of reasoning and upheld the decision of the General Court in its entirety, reiterating that non-contractual liability for a lawful act is a concept which remains unconfirmed.[23]

67. In *FIAMM and FIAMM Technologies* v *Council and Commission*,[24] the General Court considered that the time had come to make a declaration recognising the existence of the European Union's non-contractual liability for a lawful act. However, in its judgment on the appeal against that judgment, the Court of Justice corrected that finding by the Court of First Instance and held that, 'as Community law currently stands, no liability regime exists under which the [European Union] can incur liability for conduct falling within the sphere of its legislative competence'.[25]

68. The foregoing account having been given, it is appropriate now to analyse how the General Court applied that case-law in the judgment under appeal.

69. The General Court begins by describing in detail, in paragraphs 69 to 75 of the judgment under appeal, the general lines of reasoning followed by the Court of Justice in *FIAMM and Others* v *Council and Commission*. Although it reproduces a number of findings from that judgment, it does not at any point refer to paragraph 176, that is to say, the passage in which the Court of Justice specifically rules out the existence at present of non-contractual liability on the part of the European Union for a lawful act.

70. Thereafter, the General Court proceeds directly to answer the question of whether, in the situation at issue, the European Union has incurred non-contractual liability for a lawful act. To that end, the General Court, having regard to the condition that the damage allegedly sustained must be unusual, concludes that no such damage has arisen.

71. In conclusion, the General Court, in paragraph 86 of the judgment under appeal, duly finds that the conditions that would have to be satisfied in order for the European Union 'to be able, if such a regime were to exist', to incur non-contractual liability for a lawful act have not been satisfied. That conditional clause is the only indication which the General Court gives of the fact that the judgment is not accepting that the European Union is non-contractually liable for a lawful act but is assessing the applicant's claim in the purely hypothetical context of a future, but not present, review of cases concerning the European Union's non-contractual liability for a lawful act.

72. Although the judgment under appeal is ambiguous in some respects, there is no doubt that it is in line with the Court's previous case-law. After all, this form of reasoning by hypothesis which has developed since the 1970s may well be of questionable clarity, but the fact remains that it is the line of argument which the Court of Justice has employed when considering the non-contractual liability of the European Union for a lawful act. It would be contradictory to criticise the General Court for adopting this type of reasoning by hypothesis when the Court of Justice itself has been doing so for decades.

22 — Case T-184/95 *Dorsch Consult Ingenieurgesellschaft* v *Council and Commission* [1998] ECR II-667, paragraph 69.

23 — See *Dorsch Consult*: '*in the event of* the principle of Community liability for a lawful act *being accepted* in Community law, such liability *would require* …' (paragraph 18).

24 — Case T-69/00 [2005] ECR II-5393.

25 — Paragraph 176.

73. There is no getting away from the fact that, essentially, the General Court's analysis of the 'unusual' nature of the damage is by way of a response provided for the sake of completeness. In this sense, and from this point of view, it is clear that, in the material context, the appellants, in seeking compensation for the totality of the damage sustained as a result of Regulation No 530/2008, have not demonstrated the 'unusual' nature of that damage. Moreover, the damage in question is aggravated and amounts to more than a mere loss of a market quota, as the General Court correctly pointed out when referring to the settled case-law of the Court of Justice. The very function of Article 7 of Regulation No 2371/2002 is to enable the Commission to adopt conservation measures aimed at ensuring a balance between the protection of marine resources and the pursuit of an economic activity. In the specific context of non-contractual liability for a lawful act, which is entirely different from that of non-contractual liability for an unlawful act, damage that has arisen as a consequence of the Commission's legitimate exercise of a power which is provided for in the legal order of the European Union cannot readily be considered 'unusual'. Moreover, that power must be exercised in accordance with technical criteria which, as the Commission has argued, were duly placed on record at the time when the prohibition was adopted.

74. In the light of all the foregoing, and in conclusion, I consider that the General Court did not commit an error of law in finding that the appellants had not sustained 'unusual' damage in the event that the European Union were to be recognised as being non-contractually liable for a lawful act.

75. Consequently, I consider that the plea must be dismissed.

VI – **Final judgment in the dispute (C-12/13 P)**

76. In accordance with Article 61 of the Statute of the Court of Justice, 'if the appeal is well founded, the Court of Justice shall quash the decision of the General Court' and 'may itself give final judgment in the matter where the state of the proceedings so permits'.

77. In my view, the Court of Justice is in a position to give judgment on part of the dispute in Case C-12/13 P.

78. It is settled case-law in this regard that, in matters relating to the non-contractual liability of the European Union for unlawful conduct on the part of its institutions and agencies, a right to reparation is recognised where three conditions are met: the rule of law infringed must be intended to confer rights on individuals and the breach must be sufficiently serious, actual damage must have been shown to have occurred and, lastly, there must be a direct causal link between the breach of the obligation attributable to the European Union and the damage sustained by the injured parties. [26]

A – *The rule of law infringed must be intended to confer rights on individuals and the breach must be sufficiently serious*

79. As I have already pointed out, the present case is characterised by the fact that the rule of law infringed is none other than the principle of non- discrimination on grounds of nationality, as the Court of Justice confirmed in *AJD Tuna*. The Court's case-law in this regard is extensive, infringement of that crucial principle of the European Union being enough to support a finding that the breach is sufficiently serious. [27]

26 — See inter alia Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraph 42, Case C-312/00 P *Commission* v *Camar and Tico* [2002] ECR I-11355, paragraph 53, and Case C-472/00 P *Commission* v *Fresh Marine* [2003] ECR I-7541, paragraph 25.

27 — See inter alia Joined Cases 83/76 and 94/76, 4/77, 15/77 and 40/77 *HNL and Others* v *Council and Commission* [1978] ECR 1209, paragraph 5, *Ireks-Arkady*, paragraph 11, Case 106/81 *Kina* v *EEC* [1982] ECR 2885, paragraphs 22 to 25, and Case C-63/89 *Assurances du credit* v *Council and Commission* [1991] ECR I-1799, paragraphs 14 to 23.

80. That said, the aforementioned principle is the only rule of law infringed; none of the other principles relied on by the appellants in Case C-12/13 P having been breached, since the Court of Justice had occasion to consider the possible infringements by Regulation No 530/2008 of the principles of proportionality, protection of legitimate expectation and the right to property, among others. The only flaw which may be said to vitiate the aforementioned regulation following the exhaustive analysis carried out by the Court of Justice in *AJD Tuna* concerns the principle of non-discrimination on grounds of nationality. The appellants were prevented, in breach of that principle, from pursuing their fishing activities one week earlier than purse seiners flying the Spanish flag.

81. The condition that there must be an infringement of a rule of law intended to confer rights on individuals and that the breach must be sufficiently serious is therefore fulfilled.

B – *Direct causal link between the breach attributable to the European Union and the damage sustained by the injured party*

82. I also consider that there is a direct causal link between the infringement attributable to the European Union and the damage sustained by the injured party, since it is clear that Regulation No 530/2008 is the sole cause of the interruption to the activities of the appellants in Case C-12/13 P.

83. It is none the less important to add a qualification which dictates the scope of the liability owed.

84. As I have already said, the unlawful cause of damage to the appellants in Case C-12/13 P is the breach of the principle of non-discrimination on grounds of nationality arising from the unjustified difference in treatment between purse seiners flying the Spanish flag and other purse seiners. Since Spanish purse seiners enjoyed an extra week of fishing activity, the aforementioned appellants were deprived of a precious period of activity which *was* available to other craft.

85. As the liability which the appellants seek to establish is based on an unlawful act, and having ruled out in the previous point the existence of any other flaws of unlawfulness vitiating Regulation No 530/2008, I consider that the only causal link that exists is between the act constituting the discrimination, that is to say the extra week of fishing that was available to purse seiners flying the Spanish flag, and the damage sustained. The discrimination declared unlawful by the Court of Justice left the appellants in a worse position for one week only, but not during the following week, in which all purse seiners, including the Spanish ones, were prevented from pursuing their activity.

86. The fact that the European Union's non-contractual liability is based primarily on the unlawfulness of the damage, as the appellants in this case have alleged it to be, therefore means that the causal link must be confined to connecting the unlawful acts to the damage sustained. It must not connect acts other than the unlawful act to that damage, however closely connected those acts may be to the circumstances of the case. As the unlawful act established concerns the week during which the appellants were unjustifiably prevented from pursuing an economic activity, this is the relevant period of time for the purposes of non-contractual liability for an unlawful act.

87. I therefore propose that the Court of Justice confine the causal link to that in existence in the period from 16 to 23 June 2008, during which Regulation No 530/2008 unlawfully prohibited the fishing activity of the appellants but not that of Spanish purse seiners.

88. The condition that there must be a direct causal link between the infringement attributable to the European Union and the damage sustained by the injured party is therefore fulfilled, provided that the damage is confined to the period from 16 June to 23 June 2008.

C – *Actual and certain damage*

89. Finally, it must be determined whether actual and certain damage has been shown to have occurred.

90. As I had occasion to make clear in points 49 to 61 of my Opinion in *Giordano* v *Commission*, the case-law of the Court of Justice has repeatedly accepted that the certain nature of damage does not necessarily have to be absolute. There may after all be certain damage in the case of a serious loss of opportunity directly caused by an unlawful act of the European Union. I shall not repeat in these proceedings what I have already said in points 38 to 69 of that Opinion, it being sufficient for me to point out here that a serious loss of opportunity constitutes actual and certain damage which is amenable to compensation.

91. The documents before the Court show that the appellants in Case C-12/13 P held a fishing licence which allowed them to pursue an economic activity until 30 June 2008. It is also a fact, not called into question by the Commission, that the fishing quotas of shipowners such as the appellants were exhausted in previous years and generally.

92. In addition, the fact that there was strong evidence that the fishing grounds would be exhausted before the end of the season does not seem to have prevented purse seiners flying the Spanish flag from fishing between 16 and 23 June 2008, including in the same waters as those normally fished by purse seiners flying the French flag, such as those of the appellants in Case C-12/13 P.

93. It is precisely because the loss of opportunity does not cover the full amount of earnings lost that the arguments put forward by the Commission simply confirm that the likelihood that the appellants would have continued to fish their quota during the week from 16 to 23 June 2008 was not absolute, although this in no way diminishes the serious nature of the opportunity lost.

94. However, the parties to the proceedings at first instance did not have an opportunity to discuss in detail exactly how much the appellants in Case C-12/13 P were likely to have earned in the period from 16 to 23 June 2008. That question, which is closely linked to the quantification of the damage sustained, was not discussed in the terms set out here during the proceedings before the General Court.

95. I therefore propose that the Court of Justice refer the case back, in part, to the General Court so that it may give a ruling, in the light of the arguments set out above, on the precise quantification of the damage sustained by the appellants.

VII – **Costs**

A – *Case C-12/13 P*

96. Although I have proposed that the case be referred back, in part, to the General Court, I consider that the principal aspects of the main issue in the present appeal have been resolved. I therefore propose, in accordance with Article 138(1) and Article 184(2) of the Rules of Procedure, that the Court of Justice order the Commission to pay the costs of the proceedings at first instance in Case T-574/08, in which the judgment was given on 7 November 2012, and of the appeal.

B – *Case C-13/13 P*

97. In accordance with Article 138(1) and Article 184(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs to be awarded against the appellants and the pleas in law relied on by the latter have been dismissed, the appellants must be ordered to pay the costs.

VIII – **Conclusion**

98. In the light of all the foregoing considerations, I propose that the Court of Justice:

In Case C-12/13 P:

(1) set aside the operative part of the judgment of the General Court of 7 November 2012 in Case T-574/08 *Syndicat des thoniers méditerranéens and Others* v *Commission* solely as regards the grounds based on non-contractual liability of the European Union for an unlawful act, as set out in paragraphs 48 to 66 of the judgment;

(2) uphold the action for a declaration of non-contractual liability and declare the European Union to be non-contractually liable for the adoption of Commission Regulation No 530/2008 of 12 June 2008 establishing emergency measures as regards purse seiners fishing for bluefin tuna in the Atlantic Ocean, east of longitude 45 °W, and in the Mediterranean Sea, it having been proved that the conditions governing the non-contractual liability provided for in the second paragraph of Article 340 of the Treaty on the Functioning of the European Union are met;

(3) refer the case back to the General Court for a ruling on the quantification of the damage sustained by the appellants;

(4) order the Commission to pay the costs of the proceedings at first instance in Case T-574/08, in which judgment was given on 7 November 2012, and of the appeal.

In Case C-13/13 P:

(5) dismiss the appeal;

(6) order the Syndicat des thoniers méditerranéens, Marc Carreno, Jean Louis Donnarel, Jean-François Flores, Gérald Jean Lubrano, Hervé Marin, Nicolas Marin, Sébastien Marin and Serge Antoine José Perez to pay the costs of the appeal.