JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)

19 October 2005 *

In Case T-415/03,

Cofradía de pescadores de 'San Pedro' de Bermeo, established in Bermeo (Spain), and the other applicants whose names appear in the Annex to this judgment, represented by E. Garayar Gutiérrez, G. Martínez-Villaseñor, A. García Castillo and M. Troncoso Ferrer, lawyers,

applicants,

v

Council of the European Union, represented by M. Balta and F. Florindo Gijón, acting as Agents,

defendant,

supported by

Commission of the European Communities, represented initially by T. van Rijn and S. Pardo Quintillán, and subsequently by T. van Rijn and F. Jimeno Fernández, acting as Agents, with an address for service in Luxembourg,

* Language of the case: Spanish.

and

French Republic, represented by G. de Bergues and A. Colomb, acting as Agents, with an address for service in Luxembourg,

interveners,

ACTION for damages to compensate for the loss allegedly suffered by the applicants following the Council's authorisation of the transfer to the French Republic of part of the quota for anchovy allocated to the Portuguese Republic,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of M. Jaeger, President, V. Tiili and O. Czúcz, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 17 March 2005,

gives the following

Judgment

Legal context and background to the dispute

1. *Total allowable catches*

1 Article 161(i)(f) of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (OJ 1985 L 302, p. 23, hereinafter 'the Act of Accession') allocated 90% of the total allowable catches (hereinafter 'TACs') for anchovy in International Council for the Exploitation of the Sea area VIII (hereinafter 'ICES area VIII'), namely the Bay of Biscay, to the Kingdom of Spain and 10% to the French Republic. Furthermore, pursuant to the principle of the relative stability of each Member State's fishing activities for each of the fish stocks concerned (hereinafter 'the principle of relative stability'), laid down for the first time in Article 4(1) of Council Regulation (EEC) No 170/83 of 25 January 1983 establishing a Community system for the conservation and management of fishery resources (OJ 1983 L 24, p. 1), the TAC for anchovy in International Council for the Exploitation of the Sea area areas IX and X (hereinafter 'ICES area IX' and 'ICES area X') and area 34.1.1 of the plan drawn up by the Committee for Eastern Central Atlantic Fisheries (hereinafter 'CECAF area 34.1.1'), situated to the west and south-west of the Iberian Peninsula, was divided between the Kingdom of Spain and the Portuguese Republic, approximately 48% being allocated to the Kingdom of Spain and 52% to the Portuguese Republic.

2 Council Regulation (EEC) No 3760/92 of 20 December 1992 establishing a Community system for fisheries and aquaculture (OJ 1992 L 389, p. 1), adopted on the basis of Article 43 of the EC Treaty, provided in Article 2(1):

'As concerns exploitation activities the general objectives of the common fisheries policy shall be to protect and conserve available and accessible living marine aquatic resources, and to provide for rational and responsible exploitation on a sustainable basis, in appropriate economic and social conditions for the sector, taking account of its implications for the marine eco-system, and in particular taking account of the needs of both producers and consumers.

To that end a Community system for the management of exploitation activities is established which must enable a balance to be achieved, on a permanent basis, between resources and exploitation in the various fishing areas.'

3 Article 4 of Regulation No 3760/92 provided:

'1. In order to ensure the rational and responsible exploitation of resources on a sustainable basis, the Council, acting, except where otherwise provided, in accordance with the procedure laid down in Article 43 of the Treaty, shall establish Community measures laying down the conditions of access to waters and resources and of the pursuit of exploitation activities. These measures shall be drawn up in the light of the available biological, socio-economic and technical analyses and in particular of the reports drawn up by the Committee provided for in Article 16.

2. These provisions may, in particular, include measures for each fishery or group of fisheries to:

...

(b) limit exploitation rates;

(c) set quantitative limits on catches;

...'

4 Article 8(1) of Regulation No 3760/92 provided that, in accordance with Article 4, the exploitation rate could be regulated by restricting for the period concerned the volume of catches authorised and, if necessary, the fishing effort.

5 Under Article 8(4)(i) and (ii) of Regulation No 3760/92, the Council, acting by qualified majority on a proposal from the Commission, determined for each fishery or group of fisheries, on a case-by-case basis, the TAC and/or total allowable fishing effort, where appropriate on a multi-annual basis and distributed the fishing opportunities between Member States in such a way as to assure each Member State relative stability of fishing activities for each of the stocks concerned. However, following a request from the Member States directly concerned, account could be taken of the development of 'mini-quotas' and regular quota swaps since 1983, with due regard to the overall balance of shares.

6 The 11th to 14th recitals in the preamble to Regulation No 3760/92 defined the principle of relative stability as follows:

'... for the types of resources for which exploitation rates are to be limited, Community fishing opportunities should be established in the form of fishing availabilities for Member States allocated in quotas and, where necessary, in terms of fishing effort;

... conservation and management of resources must contribute to a greater stability of fishing activities and must be appraised on the basis of a reference allocation reflecting the orientations given by the Council;

... that stability, given the temporary biological situation of stocks, must safeguard the particular needs of regions where local populations are especially dependent on fisheries and related activities ...;

..., therefore, it is in this sense that the notion of relative stability aimed at must be understood.'

7 On the basis of Article 8(4) of Regulation No 3760/92, the Council fixed the TACs for certain fish stocks for 1995 to 2001 by adopting the following regulations:

— Council Regulation (EC) No 3362/94 of 20 December 1994 fixing, for certain fish stocks and groups of fish stocks, the TAC for 1995 and certain conditions

under which they may be fished (OJ 1994 L 363, p. 1), amended, inter alia, by Council Regulation No 746/95 of 31 March 1995 (OJ 1995 L 74, p. 1);

— Council Regulation (EC) No 3074/95 of 22 December 1995 fixing, for certain fish stocks and groups of fish stocks, the TAC for 1996 and certain conditions under which they may be fished (OJ 1995 L 330, p. 1);

— Council Regulation (EC) No 390/97 of 20 December 1996 fixing, for certain fish stocks and groups of fish stocks, the TAC for 1997 and certain conditions under which they may be fished (OJ 1997 L 66, p. 1);

— Council Regulation (EC) No 45/98 of 19 December 1997 fixing, for certain fish stocks and groups of fish stocks, the TAC for 1998 and certain conditions under which they may be fished (OJ 1998 L 12, p. 1);

— Council Regulation (EC) No 48/1999 of 18 December 1998 fixing, for certain fish stocks and groups of fish stocks, the TAC for 1999 and certain conditions under which they may be fished (OJ 1999 L 13, p. 1);

— Council Regulation (EC) No 2742/1999 of 17 December 1999 fixing for 2000 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 limitations in catch are required and amending Regulation (EC) No 66/98 (OJ 1999 L 341, p. 1);

— Council Regulation (EC) No 2848/2000 of 15 December 2000 fixing for 2001 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 limitations in catch are required (OJ 2000 L 334, p. 1).

8 With regard to ICES area VIII, each of the regulations fixed a TAC for anchovy of 33 000 tonnes divided as to 29 700 tonnes for the Kingdom of Spain and 3 300 tonnes for the French Republic, with no distinction being drawn according to where fish were caught. Although, in the original version, Regulation No 2742/1999 provided for a TAC of 16 000 tonnes divided as to 14 400 tonnes for the Kingdom of Spain and 1 600 tonnes for the French Republic, that regulation, as amended by Council Regulation (EC) No 1446/2000 of 16 June 2000 (OJ 2000 L 163, p. 3), also fixed a TAC of 33 000 tonnes.

9 For ICES areas IX and X and CECAF area 34.1.1, for the years 1995 to 1998, the fifth heading in Annex I to Regulation No 746/95, the 13th heading in the Annex to Regulation No 3074/95, the 14th heading in Annex I to Regulation No 390/97 and the 15th heading in Annex I to Regulation No 45/98 each fixed a TAC for anchovy of 12 000 tonnes divided as to 5 740 tonnes for the Kingdom of Spain and as to 6 260 tonnes for the Portuguese Republic. For 1999, the 15th heading in Annex I to Regulation No 48/1999 fixed a TAC for anchovy of 13 000 tonnes divided as to 6 220 tonnes for the Kingdom of Spain and as to 6 780 tonnes for the Portuguese Republic. Lastly, for the years 2000 and 2001, the ninth heading in Annex I D to Regulation No 2742/1999 and the ninth heading in Annex I D to Regulation No 2848/2000 each fixed a TAC for anchovy of 10 000 tonnes divided as to 4 780 tonnes for the Kingdom of Spain and as to 5 220 tonnes for the Portuguese Republic.

10 The detailed rules for the management of the TACs and quotas were defined by Council Regulation (EEC) No 2847/93 of 12 October 1993 establishing a control system applicable to the common fisheries policy (OJ 1993 L 261, p. 1), which provides in Article 21:

'1. All catches of a stock or group of stocks subject to quota made by Community fishing vessels shall be charged against the quota applicable to the flag Member State for the stock or group of stocks in question, irrespective of the place of landing.

2. Each Member State shall determine the date from which the catches of a stock or group of stocks subject to quota made by the fishing vessels flying its flag or registered in that Member State shall be deemed to have exhausted the quota applicable to it for that stock or group of stocks. As from that date, it shall provisionally prohibit fishing for that stock or group of stocks by such vessels ... The Commission shall be notified forthwith of this measure and shall then inform the other Member States.

3. Following notification under paragraph 2 or on its own initiative, the Commission shall fix, on the basis of the information available, the date on which, for a stock or group of stocks, the catches subject to a TAC, quota or other quantitative limitation made by fishing vessels flying the flag of, or registered in, any Member State are deemed to have exhausted the quota, allocation or share available to that Member State or, as the case may be, to the Community.

When an assessment of this situation as referred to in the first subparagraph is made, the Commission shall advise the Member States concerned of the prospects of fishing being halted as a result of a TAC being exhausted.

Community fishing vessels shall cease fishing in respect of a stock or of a group of stocks subject to a quota or TAC on the date on which the quota allocated for the stock or group of stocks in question to that Member State is deemed to have been exhausted or on the date on which the TAC for the species constituting the stock or group of stocks in question is deemed to have been exhausted ... .'

2. *Exchange of quotas*

11 Under Article 9(1) of Regulation No 3760/92, Member States could, after notifying the Commission, exchange all or part of the fishing availabilities allocated to them.

12 Council Regulation (EC) No 685/95 of 27 March 1995 on the management of the fishing effort relating to certain Community fishing areas and resources (OJ 1995 L 71, p. 5), adopted on the basis of Article 43 of the EC Treaty, provided, in Article 11 (1), that the Member States concerned were to exchange fishing possibilities allocated to them under the conditions referred to in Annex IV, point 1.

13 Under point 1, 1.1 of that Annex:

'Exchanges between France and Portugal will be tacitly renewable for the period 1995 to 2002, subject to the possibility of annual amendment of the conditions thereof by each Member State at the time of the annual fixing of TACs and quotas.

Exchanges concern the following TACs:

(i) a common TAC for anchovy being fixed for ICES areas VIII and IX, 80% of Portugal's fishing possibilities will be transferred every year to France. Quantities must be fished exclusively in waters under the sovereignty or jurisdiction of France;

...'

14 Under point 1, 1.2 of that Annex:

'Exchanges between Spain and France, based on the 1992 bilateral agreement on anchovies, shall become operative as from 1995 with a multi-annual prospect, bearing in mind the concerns of the two Member States, including in particular the level of the annual exchange of quotas, the control measures and the problems of the market, subject to the possibility of annual amendment of the conditions thereof by each Member State at the time of the annual fixing of TACs and quotas.

Exchanges concern the following TACs:

...

(ix) in the case of the TAC for anchovy in ICES area VIII, 9 000 tonnes of Spain's fishing possibilities will be transferred to France every year.'

15 With regard to the TAC for anchovy for ICES areas IX and X and CECAF area 34.1.1, the fifth heading in Annex I to Regulation No 746/95, the 13th heading in the Annex to Regulation No 3074/95, the 14th heading in Annex I to Regulation No 390/97, the 15th heading in Annex I to Regulations No 45/98 and the 15th heading in Annex I to Regulation No 48/1999 each stated in note 3 that, in derogation from the rule that the quota for anchovy allocated in that area could be fished only in the waters under the sovereignty or within the jurisdiction of the Member State concerned, or in international waters of the zone concerned, 'up to 5 008 tonnes [of the Portuguese quota could] be fished in waters of ICES sub-area VIII under the sovereignty or within the jurisdiction of France'.

16 Similarly the ninth heading in Annex I D to Regulation No 2742/1999 stated, in note 2, that 'up to 3 000 tonnes [of the Portuguese quota could] be fished in waters of ICES sub-area VIII under the sovereignty or within the jurisdiction of France'.

17 Lastly, the ninth heading in Annex I D to Regulation No 2848/2000 stated, in note 2, that 'up to 80% [of the Portuguese quota could] be fished in waters of ICES sub-area VIII under the sovereignty or within the jurisdiction of France', which represented 4 176 tonnes.

18 By application lodged at the Court of Justice on 9 June 1995, the Kingdom of Spain brought an action under the first paragraph of Article 173 of the EC Treaty for the annulment of point 1, 1.1, second paragraph, (i), of Annex IV to Regulation No 685/95 and of the fifth heading in Annex I to Regulation No 746/95. The Court dismissed that action as being unfounded (Case C-179/95 *Spain* v *Council* [1999] ECR I-6475; hereinafter 'the judgment of 5 October 1999').

19 By applications lodged at the Registry of the Court of First Instance on 11 March and 27 March 2000, 62 owners of vessels in the provinces of Asturias, La Coruña, Pontevedra and Lugo and three associations of owners of vessels in the provinces of Guipúzcoa, Cantabria and Biscay firstly sought annulment, pursuant to the fourth paragraph of Article 230 EC, of the ninth heading in Annex I D to Regulation No 2742/1999 and, secondly, claimed that, pursuant to Article 241 EC, point 1, 1.1, second paragraph, (i), of Annex IV to Regulation No 685/95 was unlawful. These actions were dismissed as inadmissible (order of the Court of First Instance in Joined Cases T-54/00 and T-73/00 *Federación de Cofradías de Pescadores de Guipúzcoa and Others* v *Council* [2001] ECR II-2691, hereinafter 'the order of 19 September 2001').

20 By judgment in Joined Cases C-61/96, C-132/97, C-45/98, C-27/99, C-81/00 and C-21/01 *Spain* v *Council* [2002] ECR I-3439 (hereinafter 'the judgment of 18 April 2002'), the Court annulled, upon application by the Kingdom of Spain, note 3 to the 13th heading in the Annex to Regulation No 3074/95, note 3 to the 14th heading in Annex I to Regulation No 390/97, note 3 to the 15th heading in Annex I to Regulation No 45/98, note 3 to the 15th heading in Annex I to Regulation No 48/1999, note 2 to the 9th heading in Annex I D to Regulation No 2742/1999 and note 2 to the 9th heading in Annex I D to Regulation No 2848/2000 (hereinafter 'the annulled provisions').

Procedure

21 By application lodged at the Registry of the Court of First Instance on 18 December 2003, 98 shipowners in the Spanish provinces of Guipúzcoa and Biscay and 11 fishermen's associations ('Cofradias de pescadores') in the provinces of Guipúzcoa and Biscay acting on behalf of 59 vessel owner members and themselves (hereinafter 'the applicants') brought the present action on the basis of Article 235 EC and the second paragraph of Article 288 EC.

22 In accordance with Article 44(6) of the Rules of Procedure of the Court of First Instance, at the request of the Registrar, by documents lodged at the Court Registry on 6 and 13 January 2004 the applicants put in order certain annexes to their application.

23 By documents lodged at the Court Registry on 29 March and 29 April 2004 respectively, the Commission and the French Republic applied to intervene in support of the Council's submissions.

24 By orders made on 17 May and 15 June 2004 respectively, the Commission and the French Republic were given leave to intervene.

25 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure, requested the parties to produce certain documents and answer written questions. The parties complied with those requests within the prescribed time-limits.

26 The oral arguments of the parties and their answers to the oral questions were heard at the hearing on 17 March 2005.

27 At the hearing, the applicants' representatives withdrew from the list of applicants the 16 owners of the following vessels: *Gure Leporre, Lezoko Gurutze, Ortube Berria* and *Waksman.*

28 On 31 May 2005, the applicants produced various documents and requested that an expert's report be commissioned to examine the effect of the unlawful transfer and the alleged over-fishing of anchovy on the current fisheries situation. The Council and the Commission submitted their observations on 5 September and 4 July 2005 respectively.

Forms of order sought

29 The applicants claim that the Court should:

— declare that, by transferring, in accordance with Regulations No 3074/95, No 390/97, No 45/98, No 48/1999, No 2742/1999 and No 2848/2000, part of the quota for anchovy allocated to the Portuguese Republic in ICES area IX to the French Republic in such a way as to allow that quota to be fished in ICES area VIII, the Council rendered the Community non-contractually liable;

— order the Council to make good the loss suffered and, if appropriate, to pay interest on late payment;

— order the Council to pay the costs and order the Commission and the French Republic to bear their own costs.

30 The Council, supported by the Commission and the French Republic, contends that the Court should:

— dismiss the action as inadmissible as regards the fishermen's associations of Guipúzcoa and Biscay acting, as applicable, on behalf of their members or themselves, the owners of the vessels *Dios te salve*, *Gure Leporre*, *Lezoko Gurutze*, *Ortube Berria*, *Tuku Tuku* and *Waksman*, and with regard to the damage suffered before 18 December 1998;

— in any event, dismiss the action as unfounded;

— order the applicants to pay the costs.

Law

31 The Council, supported by the Commission and the French Republic, claims that the action is in part inadmissible, inasmuch as it is brought by the fishermen's associations of Guipúzcoa and Biscay and by certain applicant shipowners. In addition, the Council claims that the action is inadmissible in part on the ground that it is out of time.

32 It follows from the judgment in Case C-23/00 P *Council* v *Boehringer* [2002] ECR I-1873, paragraph 52, that it is for the Court of First Instance to assess what is required in the circumstances of the case for the proper administration of justice. In the present case, the Court of First Instance considers it appropriate to rule first on the substance of the action.

33 In support of the present action, the applicants submit that the conditions to which the right to reparation is subject, pursuant to the second paragraph of Article 288 EC, are met.

34 It should be noted that, according to settled case-law, as regards the Community's non-contractual liability for the unlawful conduct of its institutions, 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 be shown to have occurred and there must be a direct causal link between the infringement attributable to the Community and the damage sustained by the injured parties (see Joined Cases T-332/00 and T-350/00 *Rica Foods* and *Free Trade Foods* v *Commission* [2002] ECR II-4755, paragraph 222, and Case T-195/00 *Travelex Global and Financial Services and Interpayment Services* v *Commission* [2003] ECR II-1677, paragraph 54; see also, to that effect, 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).

35 According to the case-law, if one of the conditions required in order for the Community to incur non-contractual liability is not satisfied, the action must be dismissed in its entirety without its being necessary to examine the other conditions (Case C-104/97 P *Atlanta* v *Commission and Council* [1999] ECR I-6983, paragraph 65; Case T-40/01 *Scan Office Design* v *Commission* [2002] ECR II-5043, paragraph 18).

36 In the present case, it must be ascertained whether the three conditions are met.

1. *Sufficiently serious breach of a rule of law conferring rights on individuals*

Arguments of the parties

37 The applicants claim that, by authorising the Portuguese fleet to fish in ICES area VIII pursuant to the annulled provisions, the Council committed a sufficiently serious breach of rules of law conferring rights on individuals.

38 Firstly, on the question whether the breach is sufficiently serious, the applicants submit that the decisive criterion in that regard is the manifest and serious disregard by the Community institution concerned of the limits on its discretion. Where the institution in question has only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (*Bergaderm and Goupil* v *Commission*, cited in paragraph 34 above, paragraphs 41 and 42, and *Commission* v *Camar and Tico*, cited in paragraph 34 above, paragraph 53).

39 In the present case, the applicants state that, by adopting the annulled provisions, the Council, as is clear from the judgment of 18 April 2002, infringed the principle of relative stability in Article 8(4)(ii) of Regulation No 3760/92 and Article 161(1)(f) of the Act of Accession. Furthermore, the applicants take the view that the Council has thereby, on the one hand, infringed the principles of the protection of legitimate expectations and legal certainty, in that the situation of the Spanish fleet authorised to fish for anchovy in ICES area VIII was altered by the action of a Community institution which was not entitled to make such an alteration and which acted by means other than those laid down for the amendment of an international treaty such as the Act of Accession. On the other hand, it has misused its powers by increasing

the TAC in ICES area VIII without fixing a new TAC on the basis of new scientific and technical data as provided for by Regulation No 3760/92 and by avoiding use of the procedures laid down for that purpose, which necessarily required amendment of the Act of Accession.

40 According to the applicants, the loss suffered because of those breaches is the result of the failure to observe the limits imposed by the legislation in force applicable to the distribution of fishing opportunities. Those limits are clear and precise and allow the Council no margin of discretion. The first limit consists of the need to adopt measures which do not have the effect of altering a legal situation created by an international treaty, in this case the Act of Accession, namely the fact that the Kingdom of Spain has the right to 90% of the TAC for anchovy in ICES area VIII. The second limit arises from point 1, 1.1, second paragraph, (i), of Annex IV to Regulation No 685/95 and from Article 8(4)(ii) of Regulation No 3760/92, which do not confer on the Council any power to make decisions authorising an exchange of quotas, such authorisation being subject to fulfilment of the conditions laid down by those provisions, namely the fixing of a common TAC and a request from the Member States concerned. In those circumstances, it is difficult to take the view that the Council had any discretionary power.

41 In that regard, the applicants state that they dispute neither the Council's use of its power to fix TACs by area nor its power to unify the management of separate areas and to fix a common TAC, nor even its power to authorise quota transfers in theory. What is at issue in the present case is the manner in which the quota transfer between the French Republic and the Portuguese Republic was authorised in the specific case when the principle of relative stability precluded any discretionary power.

42 According to the applicants, since the Council did not have any wide discretion to alter the quota for anchovy allocated to the Kingdom of Spain, it cannot, contrary to the Council's submission, be required in addition that the breach be serious and manifest.

43 Firstly, with regard to the degree of clarity and precision of the rule, the applicants consider that it is not relevant to cite a supposed disparity between the judgment of 5 October 1999 and that of 18 April 2002, by reason of the absolute clarity of the annulled provisions.

44 Secondly, with regard to the allegedly excusable nature of the error of law committed by the Council, the applicants submit that the provisions at issue in the judgment of 5 October 1999 were not the annulled provisions. Regulation No 685/95, which was the subject of the first judgment, does not contain the complete set of rules governing the quota transfer scheme which was considered in the second action; the quota exchange declared unlawful presupposed the existence of a right to fish held on the part of the Portuguese Republic in ICES area VIII. That right to fish was introduced only by the annulled provisions. There is therefore no disparity in the Court's interpretation of a similar provision. According to the applicants, on the contrary, the judgment of 5 October 1999 confirms, in paragraphs 51 and 52, the fact that a transfer which does not maintain the overall balance of the shares, that is to say the quotas by area following the principle of relative stability, cannot be lawful. In paragraph 45 of the judgment of 18 April 2002, the Court of Justice specifically confirmed that observance of national quotas, which is a condition for transfer between different areas, was vital. The Council's authorisation of a transfer of quotas for anchovy in ICES area VIII between the Portuguese Republic and the French Republic, without having first fixed a common TAC for the areas concerned, constitutes, moreover, an inexcusable error, given that it was committed in breach of rules adopted by the Council.

45 Finally, with regard to the deliberate nature of the breach, the applicants take the view that the Council was fully aware of the fact that it had relied on a legal fiction in order to deprive the Kingdom of Spain of its rights to a quota for anchovy equivalent to 90% of the fishing opportunities in ICES area VIII since, as is clear from paragraph 36 of the judgment of 18 April 2002 and paragraph 25 of the judgment of 5 October 1999, the Council itself states that it could not lawfully alter the distribution of quotas without first having obtained from the Kingdom of Spain a release of its quota for anchovy or, failing that, shown grounds for a considerable increase in the TAC proportionally equivalent to 10 times the fishing opportunities for anchovy which it proposed to grant to the French Republic in ICES area VIII.

46 Consequently, the Council, by adopting the unlawful provisions in question, committed a sufficiently serious breach of Community law.

47 With regard to the Commission's argument that the Court of Justice did not, in the judgment of 18 April 2002, deal with the principles of legal certainty and protection of legitimate expectations, the applicants submit that they have the right to adduce all legal arguments which appear to them to be appropriate to support their claims, whether or not those arguments were accepted by the Court in the action for annulment. In their view, the action for annulment was independent of the action to establish liability, the only link between the action for annulment brought by the Kingdom of Spain and the present case being the fact that the decision given in the first action settled the question whether there was unlawful conduct on the part of the Council, and thus one of the criteria required in order for the Community to be held liable must be considered fulfilled.

48 With regard to the Commission's argument that the regulations adopted by the Council fixing the TACs are annual and may legitimately vary from year to year, so that there was no infringement of the principles of legal certainty and protection of legitimate expectations, the applicants submit that the subject-matter of these proceedings is the distribution of quotas allocated to the Member States once the TAC has been fixed which, in all cases and for each year in which an unlawful transfer was authorised, should be, for ICES area VIII, in the proportion of 90/10 as between the quota allocated to the Kingdom of Spain and that allocated to the French Republic, but this was not the case.

49 Secondly, with regard to the breach of rules of law conferring rights on individuals, the applicants submit, first, that the principle of relative stability infringed by the Council in the provisions annulled by the judgment of 18 April 2002 constitutes a higher-ranking rule of law.

50 According to the applicants, Article 161(1)(f) of the Act of Accession contains one of the fundamental principles of the common fisheries policy. Moreover, the regulations whose provisions were annulled are the annual implementing acts in respect of Regulations No 3760/92 and No 685/95. Accordingly, although the rules are of the same rank, those regulations should, in their aim and content, have observed the principles established by the latter regulations, which determine the objectives laid down by the original legislation, in particular in Article 33 EC.

51 In that regard, the applicants state that the possibility of ceding the fishing rights for which the Council argues also stems from the implementation of the principle of relative stability. In any event, what is at issue in the present case is the prior allocation of quotas. As is clear from paragraph 47 of the judgment of 18 April 2002, an exchange of fishing opportunities presupposes that those opportunities have previously been allocated in accordance with the principle of relative stability and requires a request from the Member States concerned. The Court of Justice, moreover, accepted that the principle of relative stability is a higher-ranking rule of law by annulling the provisions which were contested before it.

52 Next, the applicants submit that the Act of Accession, inasmuch as it grants the Kingdom of Spain 90% of the catches of anchovy in ICES area VIII, the principle of relative stability, which offers additional guarantees with regard to retention of that share, and the limits imposed on the Council by Article 8(4)(ii) of Regulation No 3760/92, namely the existence of a request from the State concerned, and by point 1, 1.1, second paragraph, (i), of Annex IV to Regulation No 685/95, namely the fixing of a single TAC, create rights of which they are the beneficiaries, or, at the very least, a legitimate expectation of such rights. If a quota of 90% of the TAC for anchovy for the disputed area goes to the Kingdom of Spain, the beneficiaries of the fishing rights for that species in that area are the economic operators who make the catches, in the present case the applicants and other undertakings owning vessels authorised to fish.

53 In that regard, firstly, the applicants point out that, in accordance with the 12th and 14th recitals in the preamble to Regulation No 3760/92, the allocation of quotas is to

be made on the basis of the importance of traditional fishing activities, the particular needs of regions where local populations are especially dependent on fisheries and related activities and the temporary biological situation of stocks, which shows that the particular situation of the economic operators authorised to fish in ICES area VIII and their rights were taken into account when the TAC for anchovy was fixed for that area.

54 The applicants take the view that recognition of a right or a legitimate expectation of a right resulting from the principle of relative stability in favour of the applicants is the only interpretation which can be reconciled with the rationale of the rule, namely the maintenance of the standard of living of the populations in question rather than the 'enrichment' of the legal heritage of the States by the recognition that the latter have a right the economic value of which is indisputable, in the present case the right to fishing opportunities. Consequently, the State is merely the fiduciary holder of the fishing opportunities for anchovy attributed in application of the principle of relative stability, which appears in the Act of Accession in the form of a quota, the anchovy fishing vessels of the Spanish fleet in the waters of the Bay of Biscay who are registered on the relevant list and authorised to fish there being the true economic beneficiaries of the fishing opportunities in question.

55 With regard to the Commission's argument that the Court of First Instance has already ruled in its judgment in Case T-196/99 *Area Cova and Others* v *Council and Commission* [2001] ECR II-3597 that the principle of relative stability cannot confer subjective rights on individuals infringement of which gives rise to a right to compensation, the applicants submit that the phrase cited by the Commission is reasoning by the Court which is *obiter dictum*, in a context in which the application of the principle of relative stability was not at issue. Such a statement does not constitute the *ratio decidendi* of the judgment and, consequently, the assertion which it contains can in no way be regarded as case-law for the purposes for which the Commission seeks to use it.

56 The applicants point out, moreover, that the Court of First Instance has clearly established that the persons concerned may in any event, in so far as they consider

themselves the victims of damage arising directly from the ninth heading in Annex I D to Regulation No 2742/1999, challenge it in the context of proceedings to establish non-contractual liability under Articles 235 and 288 EC (see order of 19 September 2001, paragraph 85).

57 They submit that if the Commission's theory were to be accepted, the principle of the right to effective legal protection would be infringed. The Council's unlawful act would in any event go unpunished, since the damage of which it is the cause could not be made good, given that the State cannot seek compensation. The applicant owners of vessels would be deprived of a fishing right — or, at the very least, of the legitimate expectation of such a right — which Community law itself recognises them as having and, consequently, of the catches which would have been the result of exercising that right but which were, however, made by the fleet which benefited from the transfer. Ultimately, the effective allocation of the fishing opportunities once the quotas had been exchanged was made with impunity, contrary to the provisions of Article 161(1)(f) of the Act of Accession.

58 Secondly, the applicants note that, pursuant to Article 33 EC, one of the objectives of the common agricultural policy is to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture. In order to achieve that objective, the aim of the quotas is to ensure that each Member State has a share of the Community TAC on the basis of the abovementioned criteria. The applicants point out that only fishing vessels flying the flag of, or registered in, each Member State may fish against its quotas (Case C-216/87 *Jaderow* [1989] ECR 4509, paragraph 16).

59 Thirdly, the applicants state that, pursuant to Spanish Law No 3/2001, on the one hand, the distribution of fishing opportunities between vessels may be expressed in concrete terms in volume of catches and be made on the basis of past fishing activity and, on the other hand, readjustment or reduction of fishing opportunities imposed

by the European Union or by international treaties must affect each vessel in a proportionate manner in accordance with a principle of fairness, so that the relative position of each operator is maintained. It follows that the reduction in the quota for anchovy allocated to the Kingdom of Spain has had negative repercussions on the acquired rights of the applicants.

60 The Council, supported by the Commission, submits that the first condition for recognition of a right to reparation under Community law is not satisfied since, on the one hand, the rules of law infringed by the Council were not intended to confer rights on individuals and, on the other, those infringements were not sufficiently serious.

Findings of the Court

61 As pointed out in paragraph 34 above, the first condition for recognition of a right to reparation under Community law is breach of a rule of law by the Community institution concerned, that rule of law must be intended to confer rights on individuals and the breach must be sufficiently serious.

62 In those circumstances, it is appropriate to ascertain in turn whether the Council, by adopting the conduct complained of, breached a rule of law, if so, whether that rule of law is intended to confer rights on individuals and whether its breach is sufficiently serious.

Unlawfulness of the Council's conduct

63 As a preliminary point, it is necessary to determine precisely what conduct by the Council is claimed by the applicants to be unlawful.

64 It is common ground that, by the present action, the applicants seek to obtain reparation of the loss caused to them by the annulled provisions, by which the Council authorised the Portuguese Republic, for the period between 1996 and 2001, to fish for part of its quota for anchovy in the waters of ICES area VIII which are under the sovereignty or jurisdiction of the French Republic. That is the fishing authorisation granted to the Portuguese Republic in ICES area VIII which was declared unlawful by the Court of Justice in the judgment of 18 April 2002.

65 It is appropriate to point out that the annulled provisions were intended to implement point 1, 1.1, second paragraph, (i), of Annex IV to Regulation No 685/95, pursuant to which, in the context of an agreement for the exchange of fishing opportunities tacitly renewable for the period between 1995 and 2002, the Portuguese Republic ceded to the French Republic 80% of its fishing opportunities in ICES area IX so that that quantity might be fished exclusively in the waters under the sovereignty or jurisdiction of the French Republic in ICES area VIII. Since the Portuguese Republic did not, however, hold fishing rights in ICES area VIII, the annulled provisions were intended to create those rights.

66 It should be noted that, although, in the judgment of 18 April 2002, the Court of Justice annulled the authorisation given by the Council to the Portuguese Republic to fish for part of its quota for anchovy in ICES area VIII, it did not, however, rule on the lawfulness of the transfer by the Portuguese Republic of its anchovy fishing opportunities in ICES area VIII to the French Republic, since that transfer was endorsed in its judgment of 5 October 1999.

67 In that judgment, the Court of Justice rejected the pleas of annulment put forward by the Kingdom of Spain against the provision providing for that transfer, namely point 1, 1.1, second paragraph, (i), of Annex IV to Regulation No 685/95. The compatibility of that provision with Community law was thus definitively resolved by the judgment of 5 October 1999, and is therefore *res judicata* (see, to that effect, the Opinion of Advocate General Alber in *Spain* v *Council* (judgment of 18 April 2002, points 47 and 79).

68 Nevertheless, it must be considered whether the unlawful authorisation given to the Portuguese Republic to fish for part of its quota for anchovy in ICES area VIII constitutes conduct capable of giving rise to reparation. In that regard, the applicants submit that the Council's conduct which gave rise to their loss infringed the principle of relative stability, the Act of Accession, the principles of legal certainty and protection of legitimate expectations and that that conduct constituted a misuse of powers.

— Infringement of the principle of relative stability

69 By the judgment of 18 April 2002, the Court of Justice held that, by authorising, by way of the annulled provisions, the Portuguese Republic to fish for part of its quota for anchovy in ICES area VIII between 1996 and 2001, the Council infringed the principle of relative stability, since Spain did not receive 90% of the fishing opportunities allocated to it in ICES area VIII.

— The other infringements alleged by the applicants

70 The applicants submit that the Council's conduct infringed, in addition to the principle of relative stability, the Act of Accession and the principles of legal certainty and protection of legitimate expectations and that that conduct constituted a misuse of powers.

71 It is true that in its judgment of 18 April 2002 the Court of Justice did not find that the Council had committed the infringements and misused its powers as alleged above.

72 Nevertheless, it has been consistently held that actions for damages are independent of actions for annulment (order in Case C-257/93 *Van Parijs and Others* v *Council and Commission* [1993] ECR I-3335, paragraphs 14 and 15, and judgment in Case T-20/94 *Hartmann* v *Council and Commission* [1997] ECR II-595, paragraph 115), so that the annulment of a measure giving rise to damage or a declaration of its invalidity is not required before an action for compensation can be brought.

73 The existence of a right to reparation pursuant to Community law depends on the nature of the infringements alleged, since application of the second paragraph of Article 288 EC requires that the infringement complained of should be sufficiently serious and that the rule of law should confer rights on individuals.

74 Consequently, it must be examined whether the conduct of the Council complained of infringed, in addition to the principle of relative stability, the Act of Accession and the principles of legal certainty and protection of legitimate expectations, and whether the conduct constituted a misuse of powers.

75 Firstly, it should be noted that infringement of the Act of Accession has been established, since by authorising the Portuguese Republic to fish for part of its quota for anchovy in ICES area VIII the Council, as the Court of Justice held in paragraph 42 of the judgment of 18 April 2002, deprived the Kingdom of Spain of the 90% of the anchovy TAC fishing opportunities in ICES area VIII allocated to it. The allocation to the Kingdom of Spain of 90% of the anchovy TAC fishing opportunities in that area is provided for in Article 161(1)(f) of the Act of Accession.

76 Secondly, with regard to the principles of legal certainty and protection of legitimate expectations, this Court finds, however, that their infringement has not been established. The applicants' argument is based on the premiss that the Council could not lawfully, in any event, authorise the Portuguese Republic to fish for anchovy in ICES area VIII. That premiss is incorrect. In that regard, it is appropriate to note that the Court, in the judgment of 18 April 2002, held:

'44 The contested provisions cannot be justified by Article 11(1), read in conjunction with point 1, 1.1, second paragraph, (i), of Annex IV to Regulation No 685/95, the latter provision providing that once a common TAC for anchovy is fixed for ICES areas VIII and IX, 80% of Portugal's fishing possibilities will be transferred every year to France. Quantities must be fished exclusively in waters under the sovereignty or jurisdiction of France.

45 The finding in paragraphs 51 and 52 of [the judgment of 5 October 1999] that the transfer to France of Portugal's fishing opportunities was carried out under a common TAC covering ICES areas VIII and IX turns out to be incorrect. In order to meet the condition that a common TAC for anchovy be fixed for ICES areas VIII and IX, a condition to which the exchange of fishing opportunities between Portugal and France is made subject by point 1, 1.1, second paragraph, (i), of Annex IV to Regulation No 685/95, it would have been necessary for the Council to fix a single TAC for anchovy for ICES area VIII and ICES areas IX, X, CECAF 34.1.1, which it did not do, as it admits in its pleadings. The purported common management of two distinct TACs, as contended by the Council, cannot satisfy that condition. Moreover, it is not disputed in this case that the two TACs relate to two stocks that are biologically differentiated.

...

47 Nor can the contested provisions be justified by Articles 8(4)(ii) and 9(1) of Regulation No 3760/92, which provide for the conclusion of agreements relating to quota swaps. Article 8(4)(ii) states expressly that a request from the Member States directly concerned is necessary before account may be taken of such a swap by the Council. In the present case no such request was made by Spain, which is nevertheless directly concerned since the exchange of quotas resulted in an increase in the fishing opportunities for anchovy in ICES area VIII. As far as Article 9(1) is concerned, it must be observed that an exchange of fishing opportunities as provided for by the article presupposes that those opportunities have previously been allocated in accordance with the principle of relative stability. That was not the case for the years 1996 to 2001, as is clear from paragraph 42 of this judgment.'

77 It follows that the Council was, in theory, still entitled, pursuant to point 1, 1.1, second paragraph, (i), of Annex IV to Regulation No 685/95 and to Article 8(4)(ii) of Regulation No 3760/92, to authorise the Portuguese Republic to fish for anchovy in ICES area VIII, provided either that a common TAC had been fixed for ICES area VIII and for ICES area IX, or that all the Member States directly concerned had requested it to do so.

78 Consequently, the applicants cannot claim that the principle of legal certainty was infringed by the annulled provisions, since the applicable legislation authorised the Council in principle to adopt them. For the same reason, the applicants were also not justified in entertaining a legitimate expectation that an existing situation would be maintained since it could be altered by the Council in the exercise of its discretion, especially in an area such as the common agricultural policy, in which the institutions have a wide discretion (see, to that effect, *Area Cova and Others* v *Council and Commission*, cited at paragraph 55 supra, paragraph 122).

79 With regard, finally, to the alleged misuse of powers, according to settled case-law a measure is vitiated by misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence, to have been taken with the exclusive or main purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty (*Rica Foods and Free Trade Foods* v *Commission*, cited at paragraph 34 supra, paragraph 200).

80 In the present case, it should be noted that the applicants put forward no evidence to show that the annulled provisions were not adopted in order 'to ensure a better utilisation of fishing possibilities for anchovy', as provided for in the fourth recital in the preamble to Regulation No 746/95.

81 It follows from all the foregoing considerations that the conduct of the Council complained of is unlawful in that it infringes the principle of relative stability and the Act of Accession.

82 In those circumstances, it must then be considered whether the rules of law infringed by the Council were intended to confer rights on individuals and, if so, whether those infringements are sufficiently serious.

Existence of a rule of law conferring rights on individuals

83 According to case-law, for the Community to be held non-contractually liable, the unlawfulness alleged must involve infringement of a rule of law intended to confer rights on individuals (*Bergaderm and Goupil* v *Commission*, cited at paragraph 34 supra, paragraph 42, and *Commission* v *Camar and Tico*, cited at paragraph 34 supra, paragraph 53).

84 Consideration must therefore be given to the question whether the principle of relative stability and Article 161(1)(f) of the Act of Accession may be regarded as being intended to confer rights on individuals.

85 In that regard, it must be noted at the outset that, contrary to the Council's submissions, it is unimportant whether or not the rule of law infringed constitutes a higher-ranking rule of law (see, to that effect, *Bergaderm and Goupil* v *Commission*, supra, paragraphs 41, 42 and 62). The arguments put forward by the parties on this point are therefore invalid.

86 Further, it has been held in case-law that a rule of law is intended to confer rights on individuals where the infringement concerns a provision which gives rise to rights for individuals which the national courts must protect, so that it has direct effect (Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame* [1996] ECR I-1029, paragraph 54), a provision which creates an advantage which could be defined as a vested right (see, to that effect, Case T-113/96 *Dubois et Fils* v *Council and Commission* [1998] ECR II-125, paragraphs 63 to 65), a provision which is designed for the protection of the interests of individuals (Joined Cases 83/76, 94/76, 4/77, 15/77 and 40/77 *HNL and Others* v *Council and Commission* [1978] ECR 1209, paragraph 5), or a provision which entails the grant of rights to individuals, the content of those rights being sufficiently identifiable (Joined Cases C-178/94, C-179/94, C-188/94 to C-190/94 *Dillenkofer and Others* [1996] ECR I-4845, paragraph 22).

87 It must be reiterated that, pursuant to Article 8(4)(i) and (ii) of Regulation No 3760/92, the Council was to distribute the fishing opportunities between Member States in such a way as to assure each Member State relative stability of fishing activities for each of the stocks concerned. Applying that principle, Article 161(1)(f) of the Act of Accession allocated to the Kingdom of Spain a share of 90% of the TAC for anchovy in ICES area VIII, the balance of 10% being allocated to France. It is that distribution that the Council disregarded by adopting the annulled provisions in that their effect was that the Kingdom of Spain did not obtain 90% of the fishing opportunities for anchovy in that area.

88 In that regard, it must be observed that, in *Area Cova and Others* v *Council and Commission*, cited at paragraph 55 supra (paragraph 152), the Court has already held that, since the principle of relative stability concerns only relations between Member States, it cannot confer individual rights upon private parties, the infringement of which would give rise to a right to compensation in accordance with the second paragraph of Article 288 EC.

89 The principle of relative stability reflects a criterion for the distribution between Member States of Community fishing opportunities in the form of quotas allocated to the Member States. As the Court of Justice held in Joined Cases C-63/90 and C-67/90 *Portugal and Spain* v *Council* [1992] ECR I-5073, paragraph 28, the principle of relative stability does not therefore confer on fishermen any guarantee that they can catch a fixed quantity of fish, since the requirement of relative stability must be understood as meaning merely maintenance of a right to a fixed percentage for each Member State in that distribution.

90 Furthermore, it should also be observed that, pursuant to Article 9(1) of Regulation No 3760/92, the Member States could exchange all or part of the fishing availabilities allocated to them, as shown by the facts of the present case. No indication was to be found in the procedure to be followed for such an exchange that might lead to a finding of the existence of rights held by the fishermen of the transferring Member State.

91 As the Court held in paragraph 54 of the order of 19 September 2001, the sole object of Article 161(1)(f) of the Act of Accession is to apportion the quota for anchovy in ICES area VIII; it makes no reference to the situation of anchovy fishermen in the two countries who may fish in that area nor, a fortiori, to any obligation on the Council's part to take account of the particular situation of those fishermen when it authorises a transfer of the quota for anchovy from a contiguous area to that area.

92 It follows that the grant to the Kingdom of Spain, pursuant to the principle of relative stability, of a share of 90% of the TAC for anchovy in ICES area VIII does not, as such, confer any right on Spanish fishermen to fish for anchovy in that area, any such fishing opportunities being the result solely of national legislation determining the conditions governing anchovy fishing in ICES area VIII.

93 In those circumstances, it must be considered that the principle of relative stability and Article 161(1)(f) of the Act of Accession identify with sufficient precision the States as holders of the fishing rights and define the content of those rights, showing that those rules of law are not intended to confer rights on individuals within the meaning of the case-law cited above.

94 Indeed, as the applicants point out, in accordance with the 13th recital in the preamble to Regulation No 3760/92, the relative stability provided for by that regulation must take account of the particular needs of regions where local populations are especially dependent on fisheries and related activities. As the Court of Justice has held, it follows that the aim of the fishing quotas is to ensure for each Member State a share of the Community's TACs, determined essentially on the basis of the catches from which traditional fishing activities, the local populations dependent on fisheries and related industries of that Member State benefited before the quota system was established (Case C-4/96 *NIFPO and Northern Ireland Fishermen's Federation* [1998] ECR I-681, paragraph 47; see also, regarding Regulation No 170/83, Case C-3/87 *Agegate* [1989] ECR 4459, paragraph 24, and *Jaderow*, cited in paragraph 58 supra, paragraph 23).

95 The Court considers, therefore, that it is for the Council, when allocating fishing opportunities among the Member States, to reconcile, for each of the stocks concerned, the interests represented by each Member State with particular regard to its traditional fishing activities and, where relevant, its local populations and industries dependent on fishing (*NIFPO and Northern Ireland Fishermen's Federation*, cited in paragraph 94 supra, paragraph 48).

96 However, it must be pointed out that, in paragraph 153 of the judgment in *Area Cova and Others* v *Council and Commission*, cited in paragraph 55 supra, the Court of First Instance also held that traditional fishing rights can enure only to the benefit of States, to the exclusion of individual vessel owners, so that the latter cannot rely on an individual right the infringement of which entitles them to compensation under the second paragraph of Article 288 EC.

97 It follows that the principle of relative stability and Article 161(1)(f) of the Act of Accession are not intended to confer rights on individuals within the meaning of the case-law cited. Consequently, without its being necessary to consider whether the breach of those rules by the Council is sufficiently serious, it must be concluded that the first condition under which a right to reparation will be recognised by Community law is not present in this case.

2. *The loss claimed*

Arguments of the parties

98 The applicants submit that the Council's alleged unlawful conduct has caused them four types of damage.

99 Firstly, the applicants point out that the annulled provisions had the immediate effect of depriving the Spanish fleet in the Bay of Biscay of the right to fish for 90% of the catches under the 'new TAC', calculated by adding the TAC formally approved for each year in ICES area VIII and the additional tonnes of anchovy allocated to the French fleet in ICES area VIII following the transfer of the Portuguese quota for

ICES area IX which the Council authorised. The anchovy fished in ICES area VIII constitutes the only unit where management is differentiated. Accordingly, all catches made at sea by a fishing unit are deducted from the TAC for ICES area VIII and are not available for other fishing units of the fleet authorised to fish there.

100 According to the applicants, that loss is certain and actual. Since 90% of the TAC for anchovy in ICES area VIII fixed each year by the Council went to the Spanish fleet and the transfer of quotas between areas was unlawful, an increase in the TAC that did not take into account the principle of relative stability leads inevitably to the conclusion that, during the period when that de facto increase in the TAC was in force, the Spanish fleet and thus the applicants were deprived of part of the fishing rights which had been allocated to them under the TAC actually operating for those years; this could be calculated by adding to the TAC for anchovy fixed by the regulations, namely 33 000 tonnes per annum, that corresponding to the transfer authorised, namely 5 008 tonnes in 1996, 1997, 1998 and 1999, 3 000 tonnes in 2000 and 4 176 tonnes in 2001. That loss was caused to the applicants directly, since they benefited from fishing rights under the quotas.

101 The applicants admit that it is true that, for loss to arise, the anchovy had to be fished and it is probable that the Spanish fleet would not have fished the entire quota allocated to the Kingdom of Spain, even without the transfer. However, the situation is that there was a transfer and the anchovy were fished not by the Spanish fleet but by the French fleet, and this was done over and above the quota allocated to the French Republic.

102 On the basis of an economic assessment of their loss carried out by the Instituto Tecnológico Pesquero y Alimentario (Technological Institute for Fisheries and Food) (hereinafter 'the AZTI report'), which is annexed to the application, the applicants estimate that the unlawful transfer of quotas led to an average increase of

4 500 tonnes per annum to be fished in ICES area VIII; that increase was calculated by deducting from the total of the catches made by the French fleet the TAC quota which would have been allocated to that fleet without the transfer that was declared unlawful. The applicants assess the total value of the excess catches made by the French fleet as compared with the quota which it would have had without that transfer between 1996 and 2001 at EUR 51 722 830.

103 The applicants state in that regard that their action does not therefore relate to the excess fishing opportunities of the French fleet, but to the excess catches made as compared with the fishing opportunities lawfully allocated to that fleet. Thus the loss suffered cannot depend, as the Council claims, on whether or not the Spanish fishing fleet fishes for a quantity of anchovy close to the limit of catches laid down by the regulations, but on an indisputable fact, namely the excess catches made by the French fleet as a result of the unlawful transfer of quotas.

104 Secondly, the applicants take the view that the unlawful conduct of the Council has caused them to suffer additional loss, in that it led to an alteration in the market conditions in the Basque Autonomous Community during the period in question, since both demand and prices decreased. On the basis of the AZTI report, the applicants estimate their total loss in that regard, for the period 1996 to 2001, at EUR 3 953 989.

105 Thirdly, the applicants consider that the unlawful conduct of the Council of which they complain weakened the competitive position of the Spanish fleet as opposed to that of the reinforced French fleet, since France was in a position to support its fleet operating in the fishing grounds in question, largely thanks to the transfer of fishing opportunities which the Court annulled. The applicants base their case in this regard on three relevant parameters which enable the activities of the French fleet to be measured: the growth in the number of fishing vessels and the practices used, total catches and the indirect limits on the fishing effort which are the result of the premature exhaustion of the French quota of the TAC for anchovy in ICES area VIII. It follows, on the other hand, that the viability of the Spanish fleet in the Bay of

Biscay was seriously compromised in the medium and long term because of the over-fishing of common resources in the Bay of Biscay area and the resulting decrease in the anchovy stocks in ICES area VIII. That entails both a reduction in the effective fishing opportunities for the fleet, regardless of the TAC fixed, and a significant risk of reduction in the Community TAC for anchovy for those fishing grounds.

106 Fourthly, the applicants submit that the transfer of fishing opportunities in favour of the French fleet in ICES area VIII is one of the main causes of the over-fishing of resources, since it allows that fleet to fish almost all year round. As proof, the applicants point out that the Spanish fleet was not able to use up its quota of the TAC for anchovy in recent years because of the excessive catches made of that stock by the French fleet. The actual and certain harm caused to the Spanish fleet by the over-fishing of resources by the French fleet has ensued until now, in a tangible way, from the fact that it is impossible to make larger catches. In the future it will consist in reduced effective fishing opportunities, since the stock of anchovy is reducing, affecting the medium and long-term economic viability of the Spanish fleet.

107 According to the applicants, the weakening of the competitive position of the Spanish fleet and the over-fishing of resources constitute actual and certain damage, regardless of the fact that precise calculation thereof must be made separately and at a later date.

108 With regard to the criticisms made by the Council of the method used in the AZTI report, the applicants submit, firstly, that any assessment of damage sustained or loss of profit of necessity implies that there must be a prior assessment of the profits which could have been made if the fact giving rise to the damage had not occurred and, secondly, that the AZTI report used the method which economists considered the most scientifically valid in order to allocate to each vessel of the Spanish fleet owned by an applicant its share of the total loss. If the Council intends to dispute the quality of that method or its scientific rigour, it should give its reasons for so doing.

109 The Council considers that the applicants have not proved that they suffered any loss.

Findings of the Court

110 According to case-law, the Community cannot be deemed to incur liability unless the applicant has in fact suffered 'actual and certain' damage (Joined Cases 256/80, 257/80, 265/80, 267/80 and 5/81 *Birra Wührer and Others* v *Council and Commission* [1982] ECR 85, paragraph 9; Case T-99/98 *Hameico Stuttgart and Others* v *Council and Commission* [2003] ECR II-2195, paragraph 67) and damage that is quantifiable (Case T-108/94 *Candiotte* v *Council* [1996] ECR II-87, paragraph 54). Purely hypothetical and indeterminate damage does not, however, give rise to a right to reparation (see, to that effect, Case T-267/94 *Oleifici Italiani* v *Commission* [1997] ECR II-1239, paragraph 73).

111 It is incumbent upon the applicants to produce to the Community judicature the evidence to establish the fact and the extent of the loss which he claims to have suffered (Case T-575/93 *Koelman* v *Commission* [1996] ECR II-1, paragraph 97, and Case T-184/95 *Dorsch Consult* v *Council and Commission* [1998] ECR II-667, paragraph 60; see also, to that effect, Case 26/74 *Roquette Frères* v *Commission* [1976] ECR 677, paragraphs 22 to 24).

112 It is therefore necessary to consider whether the applicants have shown that they have suffered actual and certain loss.

113 Firstly, the applicants submit that they suffered a loss in that they were deprived of the right to fish for 90% of the 'new TAC', calculated by adding to the TAC fixed for ICES area VIII the quota transferred. In their application, the applicants estimate that their loss in that regard is equivalent to the value of the excess catches made by the French fleet in comparison with its lawful quota.

114 It should be noted that, in paragraph 42 of the judgment of 18 April 2002, the Court held that, because of the authorisation given to the Portuguese Republic to fish for part of its quota for anchovy in ICES area VIII, the Kingdom of Spain, although it had actually been allocated 90% of the TAC for anchovy for that area, nevertheless, in breach of the principle of relative stability, did not obtain 90% of the fishing opportunities for anchovy there. The authorisation given to the Portuguese Republic to fish for part of its quota for anchovy in ICES area VIII increased the fishing opportunities for anchovy in that area without the Kingdom of Spain being able to make use of 90% of that additional quota for anchovy.

115 Furthermore, it is also common ground that the increase in fishing opportunities for anchovy in ICES area VIII between 1996 and 2001 allowed the French Republic, because of the transfer by the Portuguese Republic of its quota in that area pursuant to Annex IV to Regulation No 685/95, to make extra catches of anchovy in that area.

116 However, contrary to the applicants' submissions, none of the above facts shows that they have suffered actual and certain damage.

117 It is appropriate to point out that, as the Court of Justice has already held, the principle of relative stability means only the maintenance of a fixed percentage of the volume of catches available for each of the stocks in question, that volume being likely to change, and not the guarantee of a fixed amount of catches (Case 46/86 *Romkes* [1987] ECR 2671, paragraph 17).

118 It follows that the quota of 90% of the TAC fixed for ICES area VIII allocated to the Kingdom of Spain constitutes only a theoretical limit on the maximum catch which must in no event be exceeded by the Spanish fleet. Nevertheless, that quota does not in any way mean, however, that the Spanish fleet was in fact assured of fishing 90% of the TAC for anchovy in ICES area VIII. In that regard, although the parties disagree whether the Spanish authorities had a discretionary power to grant fishing rights, nevertheless it is common ground that fishermen active in ICES area VIII do not hold any individual quota granted by the Spanish authorities on the basis of national legislation.

119 In those circumstances, the mere fact that the applicants did not obtain 90% of the fishing opportunities for anchovy in ICES area VIII shows solely theoretical and hypothetical damage, the reality of which depends on the actual catches made by the Spanish fleet. Moreover, the applicants expressly recognise this when they state, in their reply, that 'the Spanish fleet probably would not have fished its entire quota had there been no transfer'.

120 With regard to the fact that the French fleet made excess catches in relation to its initial quota before the transfer, that in no way proves, of itself, that the Spanish fleet suffered loss in terms of fewer catches. Since the share of the TAC for anchovy allocated constitutes a theoretical maximum limit, the mere fact that the French fleet fishes more does not, contrary to the applicants' claims, show that the Spanish fleet fished less or that it was prevented from fishing more.

121 It follows that the facts put forward in the application do not prove the existence of actual and certain damage.

122 In any event, the value of the excess French catch, estimated at EUR 51 722 830, cannot show the extent of the loss suffered by the applicants. There is no correlation between the volume of catches actually made by the entire French fleet and the volume of catches which the applicants could have made.

123 To the extent that the loss claimed by the applicants is based on the sole fact that the French fleet made excessive catches in relation to its lawful quota, the arguments put forward by the applicants must be rejected.

124 Further, it must be noted that the hypothetical damage claimed by the applicants would be actual and certain if it appeared that the catches of anchovy made by the French fleet in ICES area VIII under the additional quota allocated to the Portuguese Republic in that area restricted the effective opportunities for the Spanish fleet active in that area to fish for anchovy by preventing it from making additional catches within the limit of 90% of the fishing opportunities in ICES area VIII, when account is taken of the quota that the Portuguese Republic was authorised to fish for in that area.

125 In that regard, however, the fact remains that, although the applicants have emphasised the excess quantities fished by the French fleet in relation to the quota lawfully available to it in ICES area VIII, nevertheless they have never tried to quantify the volume of additional catches which they could have made in the absence of the annulled provisions.

126 Moreover, it is appropriate to observe that it is not disputed that, during the period 1996 to 2001, the Kingdom of Spain never used up its quota of 90% of the TAC initially fixed for ICES area VIII, that quota corresponding, for each year in question, to 29 700 tonnes of anchovy.

127 Since the Spanish fleet did not, in any of the years in question, use up its quota for anchovy in ICES area VIII, the fact that the French fleet exceeded the quota lawfully allocated to it is irrelevant for the purpose of showing that the Spanish fleet suffered a loss, since, in any event, it was possible for that fleet to fish more anchovy in ICES area VIII under the TAC fixed for that area.

128 In that regard, the applicants have not, moreover, claimed that the Spanish fleet itself limited its catches with a view to spreading these over the whole year without exceeding the quota of 29 700 tonnes, so that if that fleet had been informed that an additional quota of anchovy was available, it would have fished for more.

129 Furthermore, since in the present case the unused part of the fishing opportunities always exceeded 25% of the quota, even amounting to more than 50% between 1996 and 1998, it cannot be claimed that the Spanish fleet applied any self-imposed limit on its anchovy fishing activities.

130 In any event, even if the excess catches made by the French fleet in ICES area VIII did show that the Spanish fleet was restricted in its fishing opportunities, it must be noted that in the present case the applicants cannot claim any actual and certain damage in that regard. The fishing opportunities for anchovy unused by the Spanish fleet under the quota allocated to the Kingdom of Spain during the period 1996 to 2001 always amounted to a volume greater than the French fleet's excess catches, as determined by the applicants, in that area during that period.

131 Therefore, even if the French catches were made to the detriment of the Spanish catches, it seems that the applicants still had fishing opportunities available which they had not used and which were allocated to the Kingdom of Spain in compliance with the limit of 90% of the TAC fixed for the area before the transfer authorised by the annulled provisions, in the amount of 29 700 tonnes.

132 The fact that it was impossible for the Spanish fleet to use up the quota allocated to the Kingdom of Spain, or even to use a substantial part thereof, is also shown by the fact that, pursuant to the second paragraph of point 1, 1.2(ix) of Annex IV to Regulation No 685/95, the Kingdom of Spain agreed to transfer to the French Republic, on an annual basis, 9 000 tonnes (12 000 tonnes in 2000) under its fishing opportunities of the TAC for anchovy in ICES area VIII, beginning in 1996, so that the effective quota available to the Kingdom of Spain in that area with effect from 1996 amounted not to 29 700 tonnes, but to 20 700 tonnes (17 700 tonnes in 2000). Thus, although, in this action, the applicants claim that they suffered a loss owing to the fact that the French Republic was authorised to fish for approximately 5 000 extra tonnes in ICES area VIII in addition to the initial quota of 3 300 tonnes allocated pursuant to the Act of Accession, it appears that, in the same period, the Kingdom of Spain transferred almost a third of the quota allocated to it in that area by the Act of Accession.

133 For those reasons, the applicants cannot claim to have suffered a restriction of their effective fishing opportunities in ICES area VIII. That is also confirmed by the fact that, according to the data provided by the Council and not disputed by the applicants, it appears that, both in 1994, before the Portuguese Republic had authorisation to fish for anchovy in ICES area VIII, and in 2002, after that authorisation was withdrawn, the Kingdom of Spain was a long way from using up its quota, the catches of anchovy made in area VIII in those years amounting, respectively, to 11 230 and 7 700 tonnes. It follows that the applicants did not therefore suffer any actual and certain restriction on their fishing opportunities during the period in question.

134 Consequently, for all the reasons set out above, it must be concluded that neither the fact that the applicants did not have the benefit of 90% of the fishing opportunities available to the Kingdom of Spain in ICES area VIII nor the fact that the French fleet made excess catches in that area shows that the applicants suffered actual and certain loss capable of giving rise to compensation in the context of the present case.

135 Secondly, the applicants submit that the Council's supposedly unlawful conduct led to a reduction in prices and in demand.

136 In that regard, it is sufficient to state that there is nothing in the file and, in particular, no data produced in the AZTI report to show that such a reduction actually occurred. In particular, that report merely presents, according to a table which is included in the application, an assessment of the financial 'losses' allegedly suffered by the Spanish fleet, with the setting out of mathematical formulae whose parameters are not explained and without putting forward any evidence as to the market prices during the period in question. Furthermore, in the light of the evidence produced by the parties in answer to a written question put by the Court, it became apparent that the average price of anchovy had not fallen between 1996 and 2001. The applicants' arguments that the Council's alleged unlawful conduct led to a reduction in prices and demand cannot therefore succeed.

137 Thirdly, the applicants claim that they have suffered damage by reason of a weakening of their competitive position in relation to the French fleet.

138 In that regard, as the Council rightly submits, the applicants have put forward no concrete evidence to show the alleged weakening of their competitive position but have merely made vague and general assertions. The applicants' claim is, therefore, unfounded on that point.

139 Fourthly, the applicants claim that they have suffered a loss because of over-fishing and erosion of resources.

140 It must be stated here as well that the applicants have produced no concrete evidence to support their claim relating to the erosion of resources, but merely make vague and general assertions in that regard. At the most, they submit that such erosion is shown by the fact that the Kingdom of Spain has never been able to use up its quota. However, that mere assertion appears to be without foundation, since the TAC for the period in question, which was fixed annually, with account being taken, in accordance with the provisions of Articles 4 and 8 of Regulation No 3760/92, of the state of natural resources, in the light of available scientific opinion, was not altered during the period in question, remaining at 33 000 tonnes.

141 Finally, in so far as the applicants seek compensation for future damage, it is sufficient to state that they have failed to establish that the damage alleged is imminent and foreseeable with sufficient certainty (see, to that effect, *Hameico Stuttgart and Others* v *Council and Commission*, cited in paragraph 110 above, paragraph 63).

142 In that regard, the applicants claim that the TAC for anchovy was reduced to 11 000 tonnes in 2003. That claim is incorrect. It is apparent from Annex I D to Council Regulation (EC) No 2341/2002 of 20 December 2002 fixing for 2003 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 2002 L 356, p. 12), that the TAC for anchovy for ICES area VIII for the year 2003 was fixed at 33 000 tonnes. Moreover, that TAC was maintained at 33 000 tonnes both in 2002 (Annex I D to Council Regulation (EC) No 2555/2001 of 18 December 2001 fixing for 2002 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 limitations in catch are required (OJ 2001 L 347, p. 1)) and 2004 (Annex I B to Council Regulation (EC) No 2287/2003 of 19 December 2003 fixing for 2004 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 2003 L 344, p. 1)).

143 Finally, with regard to the request for measures of enquiry made by the applicants on 31 May 2005, it is appropriate to point out that a request for measures of enquiry made after the oral procedure is closed can be admitted only if it relates to facts which may have a decisive influence and which the party concerned could not put forward before the close of the oral procedure (Case C-227/92 P *Hoechst* v *Commission* [1999] ECR I-4443, paragraph 104). In the present case, it should be noted, firstly, that the applicants have not put forward any evidence at all to show that, at the time they lodged their application, they were not able to support their assertion in relation to over-fishing and erosion of resources. In particular, they do not explain why it was not possible, at the stage when the application was made or at the latest when the reply was lodged, to request an expert's report. It follows that the request is inadmissible.

144 Furthermore, the fact remains that, in any event, the request for measures of enquiry is not relevant. None of the documents produced by the applicants either establishes or even puts forward the theory that the reduction in the catches or the bad biological condition of the stock in 2005 could be due to the provisions annulled by the judgment of 18 April 2002 or to earlier over-fishing of anchovy. On the contrary, it is apparent from the 'Arrantza 2003' report, prepared by the Instituto Tecnológico Pesquero y Alimentario, annexed to the rejoinder, that the life cycle of anchovy is very short and the anchovy population very variable, so that there may be, from one

year to the next, periods of crisis in the population, and indeed periods of scarcity. Thus, according to that report, in 2002, the biomass of breeding stock, estimated at 56 000 tonnes, was within safe biological limits, that is to say, above the precautionary biomass limit. In that situation, the documents produced by the applicants cannot have any decisive influence on the outcome of the dispute.

145 The request for measures of enquiry made by the applicants must, therefore, be rejected.

146 On all the above grounds, it must be concluded that the applicants have not shown that they suffered actual loss, as claimed.

147 Since the applicants have not proved either that there was a sufficiently serious breach of a rule of law conferring rights on individuals or that there was actual loss, it must be concluded that the Community cannot be held liable, without there being any need to ascertain whether the condition relating to the causal link between the unlawfulness alleged and the loss claimed has been established.

148 It follows from the foregoing that the action brought by the applicants must be dismissed as unfounded, without there being any need for the Court to rule on the arguments concerning admissibility.

Costs

149 Under Article 87(2) 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 applicants have been unsuccessful, they must be ordered to pay the costs, in accordance with the forms of order sought by the defendant.

150 Under Article 87(4) of the Rules of Procedure, Member States and institutions which have intervened in the proceedings are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicants to bear their own costs and those of the Council;

3. Orders the French Republic and the Commission to bear their own costs.

Jaeger Tiili Czúcz

Delivered in open Court in Luxembourg on 19 October 2005.

E. Coulon M. Jaeger

Registrar President