
Remedying European Legal Pluralism: The FIAMM and Fedon Litigation and the Judicial Protection of International Trade Bystanders

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Abstract

In FIAMM and Fedon the European Court of Justice has ruled that Community firms hit by US trade sanctions authorized by the WTO Dispute Settlement Body are not entitled to compensation from EC political institutions. The article discusses the cases in the background of current debates on the attitude of the Court of Justice towards international law and, more broadly, on European legal pluralism. From this standpoint, it provides a critical assessment of the legal issues involved in this litigation – internal status of WTO obligations, scope for manoeuvre of EC political institutions in international trade relations, liability for unlawful and lawful conduct – and offers a comparative analysis of its possible solutions, suggesting that a finding of liability for lawful conduct would have been a preferable outcome in both theoretical and substantive terms.

1 The ‘Collateral Victims’ of International Trade . . . and of European Legal Pluralism

September 2008 might be regarded as the *mensis horribilis* for the international rule of law at the European Court of Justice. On 3 September, in deciding the appeal in *Kadi and Al Barakaat International Foundation*,¹ the Court reviewed (and annulled) for

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¹ Joined Cases C–402/05 P and 415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union* [2008] ECR I–6351 (hereafter: *Kadi*).

breach of EU fundamental rights an EC regulation giving effect to UN Security Council resolutions on the freezing of funds and economic resources of persons and entities suspected of supporting terrorism. In justifying such a bold assertion of its constitutional jurisdiction, the Court traced a clear distinction between the domains of the international (UN) and EU rule of law² and, on such a basis, it found that nowhere in the EC Treaty is there provision for immunity for Community measures implementing UN Security Council Resolutions.³ As a result, it concluded that those measures are no exception to the rule and, notably, that even in such circumstances EC political institutions are expected to comply with the EU standards of fundamental rights protection,⁴ notwithstanding the consequences in terms of international responsibility that this may entail.

On 9 September, the Court of Justice (although in a different composition) issued its judgment of appeal in the *FIAMM and Fedon* case,⁵ a long awaited pronouncement in the endless banana saga concerning the rights of international trade bystanders and the civil liability of EC institutions in the event of breach of WTO obligations. Even on this occasion the Court relied on the distinction between the domains of international (WTO) and EC rule of law. But differently from *Kadi*, such judgment can hardly be regarded as an example of brave constitutional adjudication. Quite the opposite; in *FIAMM and Fedon* the Court largely reaffirmed its granitic precedents on the internal status of WTO agreements whereby, 'given their nature and structure, those agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions'.⁶

Nonetheless, *Kadi* and *FIAMM and Fedon* are in many ways fruits of the same tree, since they both assume the idea that the EC Treaty is the supreme law of the land and the Court of Justice its ultimate custodian. In this view, their juxtaposition reveals a rather bleak image of how the *pacta sunt servanda* rule is conceived of in the EU. As mentioned, in *Kadi* the Court declared that EC political institutions, even though they are implementing international law obligations, do not enjoy any immunity as their political discretion remains limited by EU constitutional constraints. Conversely, in *FIAMM and Fedon* the Court appears to admit that when EC political institutions disregard international trade obligations they do enjoy such immunity. In its view, Community law allows virtually unlimited scope for political manoeuvre, no matter if the WTO adjudicative bodies have repeatedly declared illegal Community measures. Surely, there may be valid grounds of justification for such an odd situation and, notably, it may be contended that international norms as well as judicial pronouncements in their respect should not be detached from their specific contexts. Nonetheless, it seems that the general attitude of the EU towards the international rule of law is

² *Ibid.*, at paras 285–288.

³ *Ibid.*, at paras 299–300 and 321.

⁴ *Ibid.*, at paras 303–308.

⁵ Joined Cases C-120/06 P and 121/06 P, *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Others v. Council and Commission and Giorgio Fedon & Figli SpA and Others v. Council and Commission* [2008] ECR I-6513 (hereafter: *FIAMM and Fedon*).

⁶ *Ibid.*, at para. 111.

increasingly controversial, not only in theoretical terms but also for its possible negative repercussions on the legal protection of individuals.

In fact, scholarly debate tends mainly to stress the progressive side⁷ of this type of European legal pluralism.⁸ Particularly *Kadi* and its constitutional implications have attracted much of the attention of the literature interested in legal pluralism and the protection of fundamental rights.⁹ By contrast, *FIAMM and Fedon*, surely a less spectacular case with a negligible impact on previous case law, has been largely overlooked in such discussions. Yet such a gap may be regrettable since this judgement, particularly if contrasted with its contemporaneous *Kadi*, is revealing of how the doctrine of the autonomy of the EC legal order and the insulation of the Community judicature from the international rule of law may be detrimental to the protection of individuals. *FIAMM and Fedon*, therefore, may be regarded as a sort of flipside of *Kadi* and, as such, its discussion may contribute to a more complete assessment of the virtues and vices of European legal pluralism.

The short circuits European legal pluralism may become subject to are eloquently represented by the facts of the cases under review. *FIAMM* and *Fedon* export, respectively, stationary batteries for telecommunications and spectacles cases to the United States. Prior to being involved in EU litigation, their exports were subject to tariffs of 3.5 per cent and 4.6 per cent *ad valorem*. Following the protracted violation of WTO obligations by the EC in the bananas litigation,¹⁰ the US government was authorized by the WTO Dispute Settlement Body (hereafter: DSB) to suspend its concessions on certain products as a form of cross-retaliation. As a result, in the period from 19 April 1999 to 30 June 2001, *FIAMM* and *Fedon* had the rates normally applied to their US exports increased up to 100 per cent *ad valorem* – an occurrence which, in the words of Advocate General Maduro, made them ‘collateral victims’ of the ‘banana war’.¹¹ In order to recover the damages suffered, the firms sued the Council and the Commission at the Court of First Instance claiming their non-contractual liability for unlawful and, subordinately, lawful conduct. The Court of First Instance replied negatively on both grounds. As to the first, it simply restated the consolidated doctrine on the lack of direct effect of WTO provisions, a position which precluded a finding of illegality in relation to the conduct of the EC institutions. As to the second, the Court admitted in

⁷ See, e.g., Lavranos, ‘Judicial Review of UN Sanctions by the European Court of Justice’, 78 *Nordic J Int’l L* (2009) 343 or Tridimas, ‘Terrorism and the ECJ: Empowerment and Democracy in the EC Legal Order’, 34 *ELR* (2009) 103.

⁸ On the use in this context of the notion of ‘legal pluralism’ rather than that of ‘constitutional pluralism’ I rely on the distinction proposed by Walker, ‘The Idea of Constitutional Pluralism’, 65 *MLR* (2002) 317, at 336–337.

⁹ See, e.g., Halberstam and Stein, ‘The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural Legal Order’, 46 *CMLRev* (2009) 13, and de Búrca, ‘The European Court of Justice and the International Legal Order after *Kadi*’, Jean Monnet Working Paper, No. 1/09, available at: www.jeanmonnetprogram.org/papers/09/090101.html.

¹⁰ Trachtman, ‘*Bananas*, Direct Effect and Compliance’, 10 *EJIL* (1999) 655.

¹¹ *Supra* note 5, AG’s Opinion, at para. 1.

principle the possibility of ruling on the civil liability for lawful conduct of the EC institutions. Yet, in the case at stake it considered that the damage suffered by the applicants was not ‘unusual’, a circumstance that ruled out the award of compensation. FIAMM and Fedon appealed the Court of First Instance judgment, and their case, if not their arguments, received support from AG Maduro. In his Opinion, the AG strongly advocated the case for liability for legal conduct and envisaged that the applicants might have been entitled to compensation. But, as anticipated,¹² the Court of Justice rejected the appeals of FIAMM and Fedon. In the judgment not only did it confirm its established position on the status of WTO obligations, but it went even further, denying the existence in the EC legal order of such a thing as liability for lawful conduct. In the end, the applicants did not manage to recover any of the damages ensuing from international trade sanctions. Indeed, the Court of Justice, regardless of all the rulings by the WTO adjudicative bodies on the illegality of the EC regime on bananas, deems that for the purposes of the EC legal order the conduct of the Council and the Commission is perfectly legal and, as such, does not give rise to a right of compensation. As a result, one might say that FIAMM and Fedon, as well as being collateral victims of the ‘banana war’, also ended up being victims of European legal pluralism.

This is *FIAMM and Fedon* in a nutshell. In section 2, I offer a more detailed review of the case and, in particular, a synopsis of the arguments put forward respectively by the Court of First Instance, the Advocate General, and the Court of Justice on the main legal issues arising from the dispute. In section 3, I put forward my own view on the *FIAMM and Fedon* litigation by trying to accommodate its coexisting WTO and EC dimensions. First, the cases are contextualized in the debates on the nature of WTO obligations and the structure of international trade remedies. On such bases, I engage in a comparative analysis of the virtually possible EC remedies, and I argue that the Court of Justice, in sticking to its previous case law, probably opted for the least satisfactory of the available alternatives. Next, in defending the case for an overhaul of the EC system of remedy, I suggest that liability for lawful conduct, in a version which largely reflects the proposal by AG Maduro, might have been a preferable option, at least as WTO and EC law currently stand. Finally, in section 4, I conclude on some broader implications of the case and, particularly, on the lessons we can learn on adjudication in European legal pluralism.

2 The *FIAMM and Fedon* Litigation before the EC Judiciary

At its inception, the *FIAMM and Fedon* litigation consisted of two distinct actions for damages lodged at the Court of First Instance respectively in March 2000 and June 2001. In that period the banana war was still raging in international trade relations, and for one year or so US countermeasures had been hitting exports from Europe.

¹² And as predicted by a distinguished commentator: see Rosas, ‘Implementation and Enforcement of WTO Dispute Settlement Findings: an EU Perspective’, *J Int'l Economic L* (2001) 140.

By September 2008 – the time when the Court of Justice delivered its final decision on the cases – litigation on banana between the EU and the US had long since been settled. In July 2001 US sanctions had been suspended, and since January 2006 a WTO consistent tariff-only regime for imports of bananas had been in place in the Community.¹³ Therefore, at the time of the judgments of both the Court of First Instance¹⁴ and the Court of Justice the cases did not have any actual political impact and their salience, let alone the applicants' economic interests, concerned mainly their prospective doctrinal implications.

In their actions, FIAMM and Fedon claimed compensation for the damages suffered during the period of application of US trade sanctions. With their complaints, they targeted the conduct of the Council and the Commission, the charge being that within the period of implementation set by the DSB they had failed to bring the EC regime on the import of bananas into compliance with the WTO obligations. The applicants advocated that the increased duty imposed by the United States on their products had caused them serious economic damage. Since those sanctions were a direct consequence of a regulatory regime repeatedly found in breach of international trade law, they claimed compensation under Article 288 EC (now Article 340 TFEU), arguing the liability for unlawful and, subordinately, lawful conduct of the defendants.

A *Liability of the EC Institutions for Unlawful Conduct*

At first glance, liability for unlawful conduct comes out as the most obvious candidate remedy for holding political institutions accountable in cases like *FIAMM and Fedon*. In the context of the EC legal order, nevertheless, it seems also the most difficult to pursue. According to the settled case law on Article 288, a finding of liability of EC institutions requires the cumulative fulfilment of three conditions: serious illegality of conduct, actual damage, and causal link between conduct and the damage pleaded.¹⁵ In cases involving international trade obligations, the first requirement is by far the thorniest to satisfy. Difficulties in this regard concern the status of WTO rules within the Community legal order. Illegality of conduct, indeed, implies that international trade norms can be invoked as a yardstick for review in Community Courts. But relying on WTO rules means acknowledging their direct effect, a move which since its seminal decision in *International Fruit Company*¹⁶ the Court of Justice has resolutely

¹³ Art. 1 of Council Reg. 216/2001, OJ (2001) L31/2. Yet, only in December 2009 could the banana dispute be said to have been finally settled with a comprehensive agreement between the EU and Latin American banana producing countries. See the Geneva Agreement on trade in bananas, 15 Dec. 2009, WT/L/784, available at: <http://docsonline.wto.org/DDFDocuments/t/wt/l/784.doc>.

¹⁴ Case T-69/00, *Fabbrica italiana accumulatori motocarri Montecchio Spa (FIAMM) and Others v. Council and Commission* [2005] ECR II-5393 (hereafter *FIAMM*); Case T-135/01, *Giorgio Fedon & Figli Spa and Others v. Council and Commission* [2005] ECR II-29 (hereafter *Fedon*).

¹⁵ Case C-352/98 P, *Bergaderm and Goupil v. Commission* [2000] ECR I-5291. See also *FIAMM and Fedon*, *supra* note 5, at para. 106.

¹⁶ Joined Cases 21/72 to 24/72, *International Fruit Company and Others* [1972] ECR 1219.

resisted.¹⁷ In this regard, *FIAMM and Fedon* does not make an exception: the Court of Justice, the Advocate General, and the Court of Justice all restated that consolidated line of precedents. Consequently, the claims for liability for unlawful conduct were dismissed, opening the field to some experimentation with the remedy of liability for legal conduct. Nonetheless, a short discussion on the direct effect of WTO obligations may be of some interest, not just for the sake of rehearsal of the established judicial doctrine, but also to bring further insight into its rationale and implications as emerging from the cases at issue.

Surely, to challenge the Council and the Commission on the grounds of liability for unlawful conduct was a hard choice of which *FIAMM* and *Fedon* were perfectly aware. In pursuing this remedy they went for two different strategies. First, they attempted to bypass the issue of direct effect and derive a finding of illegality from the alleged violations of other principles such as *pacta sunt servanda*, legal certainty, or proper administration. The Court of First Instance had an easy time unmasking such an awkward endeavour.¹⁸ The second was much more plausible an idea. The applicants tried to make inroads into the settled case law by advocating the direct effect of the DSB decision finding that the EC regime on imports of bananas had breached international trade law.¹⁹ Initially, they strove to persuade the Court of First Instance that the *Nakajima* exception was applicable. In the case at hand, they argued, the EC institutions could be seen as implementing a DSB recommendation which, precisely for this reason, could be invoked before the Community Courts. The Court of First Instance did not rise to the bait. Once at the Court of Justice, *FIAMM* and *Fedon* recalibrated their strategy and made an effort to carve out a further exception to the rule whereby WTO obligations have no direct effect. Notably, they argued for the direct effect of DSB recommendations upon expiration of the reasonable period of time for their implementation. But this attack also came to nothing.

Predictably, not only the outcomes but also the reasoning proffered in the judgments are hardly original. To be sure, the Advocate General made a valuable effort in explaining the Community regime of international agreements.²⁰ But for the rest, the sections on liability for unlawful conduct contain nothing more than a repetition of the familiar arguments inspiring the Community judiciary since *Portugal v. Council*.²¹

First of all, the reciprocity argument is restated.²² In the Court's view, WTO agreements are reciprocal and mutually advantageous in nature. Accordingly, EC political institutions are entitled to the same scope for manoeuvre as their main commercial

¹⁷ The ECJ admits direct effect of WTO obligations only in marginal cases concerning the review of EC measures implementing (Case 69/89, *Nakajima v. Council* [1991] ECR I-2069) or referring to (Case 70/87, *Fediol v. Commission* [1989] ECR 1781) international trade norms.

¹⁸ *FIAMM*, *supra* note 14, at paras 110, 146.

¹⁹ *Ibid.*, at para. 100.

²⁰ *Supra* note 5, AG's Opinion, at paras 27 and 31. See also *FIAMM and Fedon*, *supra* note 5, at paras 108–110.

²¹ Case C-149/96, *Portugal v. Council* [1999] ECR I-8395.

²² *FIAMM and Fedon*, *supra* note 5, at para. 119; *FIAMM*, *supra* note 14, at para. 111.

partners. Thus, since in the latter international trade rules are not enforced by domestic courts, the same must apply also to the Community.

Direct effect, therefore, struggles with the margins of political discretion that the WTO agreements recognize to their members during the implementation stage. According to the Community Courts, to allow the judicial enforcement of international trade constraints would have the consequence of depriving the EC institutions of the possibility afforded by Article 22 DSU of negotiating temporary compensation with trade partners.²³ More in general and beyond the strictures of the DSU, the very possibility of attaining a diplomatic solution to the dispute would be compromised.²⁴ Of course, Community judges do not overlook the fact that, compared with GATT 1947, the legal dimension of the WTO dispute settlement system has been strengthened.²⁵ Yet in their understanding of the DSU negotiations continue to occupy a prominent position.²⁶ In fact, not only do they affirm that the DSU allows WTO members several methods for implementing a recommendation of the DSB.²⁷ More critically, they go so far as to claim that neither the expiration of the reasonable period of time set by the DSB to bring the measures into conformity with its recommendation, nor the pronouncement of a 'compliance panel' finding that the EC measures are still incompatible with WTO rules results in the exhaustion of the methods for settling disputes available under the DSU.²⁸ On this reading, therefore, the Community Courts end up affording EC political institutions limitless scope for manoeuvre. At any point of the DSU implementation procedure and, virtually, for an indefinite time they will not be held accountable by Community Courts.²⁹ And innocent bystanders such as FIAMM and Fedon will ultimately pay the price of their political freedom.

A constitutional account of this doctrinal approach is offered in the Opinion of AG Maduro, who also emphasized the scope for manoeuvre of EC political institutions as the central concern. One might have expected the AG not only to clarify the settled case law, but also to engage with some of the critical positions previously expressed in its regard. Admittedly, the AG recognized that the case law in this field is questionable. Yet, perhaps inhibited by its 'unshakeable constancy',³⁰ he decided to join the defence of the doctrinal status quo. In the section on liability for unlawful conduct of his Opinion, this case law is taken for granted and all the efforts are devoted to highlighting its rationale. The latter is identified in the protection of the margins of political freedom that, on the contrary, the recognition of direct effect would likely jeopardize.³¹ In the words of the AG, 'it is only to the extent that the judicial application of WTO law would adversely affect the political freedom of the Community institutions within the WTO

²³ *Ibid.*, at para. 112.

²⁴ *FIAMM and Fedon*, *supra* note 5, at paras 116–117.

²⁵ *FIAMM*, *supra* note 14, at paras 117–119.

²⁶ *FIAMM and Fedon*, *supra* note 5, at para. 132; *FIAMM*, *supra* note 14, at para. 120.

²⁷ *FIAMM and Fedon*, *supra* note 5, at para. 116; *FIAMM*, *supra* note 14, at para. 121.

²⁸ *Ibid.*, at para. 129.

²⁹ *FIAMM and Fedon*, *supra* note 5, at para. 130; *FIAMM*, *supra* note 14, at para. 132.

³⁰ *Supra* note 5, AG's Opinion, at para. 36.

³¹ *Ibid.*, at para. 35.

sphere that WTO law may not be effectively relied upon before the Court of Justice'.³² On such a basis, the endorsement by the AG of the settled case law is unconditioned. The attempt by the applicants to carve out a further exception for DSB recommendations is dismissed as inconsistent with the established institutional equilibrium.³³ And in one of the last paragraphs, the AG goes as far as to admit that 'the Community remains free to make the political choice to lay itself open initially to retaliatory measures authorised by the DSB under article 22(2) of the DSU'³⁴ – a quite tendentious interpretation³⁵ which, particularly if taken in isolation, cannot but confirm the concerns for the respect of the international rule of law in the Community legal order.

Thus far the precedents and their justification. Now a few remarks on their adaptation to the cases at hand and their persuasiveness. Denying direct effect to WTO obligations, indeed, might have been a wise decision.³⁶ But do the reasons put forward fit the facts of the cases? And are they legally sound?

First, verbatim repetition of precedents has caused a quite evident mismatch in the cases under review. As said, resistance to direct effect and civil liability for unlawful conduct hinges mainly on the argument that judicial review in the light of WTO rules may compromise the possibility of negotiating temporary compensation and, more broadly, the political freedom of EC political institutions. Yet, at the time of the judgments not only had the deadline for negotiating compensation expired long before but, most importantly, the 'banana war' between the EU and US had already been settled and a new EC regulatory regime was coming into force. So how could the Courts seriously argue that a finding of illegality could weaken the bargaining power of EC political institutions? How could the recognition of direct effect to WTO obligations affect their scope for manoeuvre in the cases at stake?

For sure, when making decisions, courts are not simply expected to stick to the facts of the cases. Sound adjudication must also take into account future repercussions on the case law and legal process. And it is probably from this perspective that one may account for the mismatch between the reasoning of the Courts and the context of the cases. Again, on this specific point the Opinion of AG Maduro is instructive. The Advocate General pays little attention to the factual circumstances in which FIAMM and Fedon raised their complaints. His concerns are mostly for the systemic impact of a possible finding of liability. In his words, 'establishing the principle of liability for unlawful conduct by the Community by reason of its failure to comply with a DSB decision within the reasonable period of time allowed would be a sword of Damocles hanging in future over the freedom of the political organs of the Community within the WTO sphere'.³⁷ That is to say, international trade diplomats cannot be inhibited by the prospect of civil actions, no matter if the DSB affords them generous time limits for

³² *Ibid.*, at para. 37. See also at paras 38 and 45.

³³ *Ibid.*, at para. 48.

³⁴ *Ibid.*, at para. 47.

³⁵ See below sect. 3A.

³⁶ See below sect. 3B.

³⁷ *Supra* note 5, AG's Opinion, at para. 51.

negotiations. Someone – but, critically, not the EC political institutions – will pay for the delays of diplomacy. The *Leitmotiv*, in fact, is ‘whatever the circumstances, do not disturb the negotiators’ – an approach which seems not only to rule out the possibility of tailor-made solutions for FIAMM and Fedon, but also to obfuscate legal reasoning.

But apart from the contingencies of FIAMM and Fedon, the sections on liability for unlawful conduct are noteworthy for other more general implications. It is telling, for example, that both the Court of First Instance and the Court of Justice regard civil liability essentially as an obstacle or a threat to the wielding of political power.³⁸ When it comes to international trade, courts seem trapped in an antagonistic conception of the relationship between political power and the rule of law. Conversely, no consideration is given to the idea that judicial review or civil liability might contribute to a more considerate exercise of political discretion, one more respectful of international obligations and individual rights. Courts seem quite content to tolerate that EC institutions may run wild, or affirm, as the latter do, that if the Community is subject to trade sanctions it is therefore complying fully with WTO rules.³⁹

Actually, also the interpretation of WTO law and, particularly, of the DSU is puzzling. The Court of Justice, for instance, is quite correct in observing that ‘the resolution of disputes concerning WTO law is based, *in part*, on negotiations between contracting parties’,⁴⁰ especially if that means that there is also a part of dispute settlement which is about courts, rules, and coercion. Yet, when requested to define what the limits of political discretion are it turns to vague legal arguments, and one remains with the impression that in fact, no matter what the DSU stipulates resolution of disputes is *entirely* based on negotiations.

This raises more profound doubts about the Community Courts’ construction of the WTO agreements. One could observe, for example, that if the absence of direct effect in *International Fruit Company* was probably an accurate translation in the Community field of the non-binding nature of the GATT dispute settlement, its retention in the current context acquires the totally different meaning of ensuring the possibility of selective exit strategies. Again, this is by no means to say that the DSU calls unequivocally for direct effect. More prudently, this is to affirm that probably the legal arguments offered to justify its absence do not accurately take into account the reforms introduced by the Marrakech Agreements. And that, for instance, in the light of the DSU direct effect might have become a matter of degree rather than a question to be answered in ‘yes or no’ terms.

Finally, one may also ponder the broader messages emerging from this line of case law. This is not the place for a thorough discussion of reciprocity, an argument that in the context of WTO law appears at least suspect.⁴¹ It is the very idea of recognizing a

³⁸ *FIAMM and Fedon*, *supra* note 5, at para. 121, *FIAMM*, *supra* note 14, at para. 130.

³⁹ *Ibid.*, at para. 103.

⁴⁰ *FIAMM and Fedon*, *supra* note 14, at para. 116, italics added.

⁴¹ As observed by Mavroidis, ‘It’s alright ma, I’m only bleeding (A Comment on the *Fedon* jurisprudence of the Court of First Instance)’, STALS Research Paper No. 11/2008, available at: www.stals.sssup.it/site/files/stals.MavroidisII.pdf, at 6–7, reciprocity could be a valid reason to violate a bilateral and not a multilateral treaty.

de facto immunity to its international trade diplomats that appears scarcely convincing. On a global level, the EU vaunts its general commitment to the rule of law, and in its relationships with third countries it seems particularly eager to teach them that political power and accountability ought to go hand in hand.⁴² How does that fit with its approach to international trade obligations? Could it be the case that the Community courts in deferring completely to EC political institutions are silently undermining the overall international credibility of the EU?

B Liability of the Community in the Absence of Unlawful Conduct

1 Article 288 EC, the Dorsch Precedent and ‘The General Principles Common to the Laws of the Member States’

Unanimous rejection of direct effect left the floor virtually open to liability in the absence of unlawful conduct, a remedy the availability of which has proven highly contentious. In this respect the applicants could rely on a very limited set of precedents and, notably, on *Dorsch*,⁴³ a case relating to the effects of the embargo imposed on Iraq during the First Gulf War. In response to the Iraqi invasion of Kuwait, the UN Security Council had issued a resolution which adopted trade sanctions against Iraq and Kuwait. The resolution had been duly implemented by the Community on behalf of its Member States. On its part, the Iraqi government had decided to freeze the property and assets of the firms from the sanctioning states. The applicant, one of the firms hit by Iraqi retaliation, brought an action against the Community claiming its liability for the damage it had allegedly suffered. Both the Court of First Instance and the Court of Justice dismissed the complaint, although in their reasoning they appeared to acknowledge the existence of a Community principle of liability for lawful act. They had done so at least according to the interpretation of *FIAMM* and *Fedon*, which the Council and the Commission vigorously contested. The Community Courts, in fact, had stated that ‘in the event of the principle of Community liability for a lawful act being recognised in Community law’⁴⁴ such liability could have been incurred once a number of requirements had been fulfilled – admittedly, a rather ambiguous formulation qualified by the Commission as a ‘hypothetical reference’.⁴⁵

The opportunity to shed light on that precedent was seized by both the Court of First Instance and the Court of Justice, although with remarkably divergent outcomes. First of all, they reached opposite results as to the scope of Article 288 EC. The Court

⁴² See, particularly, the text of the new Art. 3.5 TEU, referring, *inter alia*, to ‘free and fair trade’ and the ‘strict observance and development of international law’ as objectives of the EU.

⁴³ Case T-184/95, *Dorsch Consult Ingenieurgesellschaft mbH v. Council of the European Union and Commission of the European Communities* [1998] ERC II-667; Case C-237/98 P, *Dorsch Consult Ingenieurgesellschaft mbH v. Council of the European Union and Commission of the European Communities* [2000] ECR I-4549.

⁴⁴ *Ibid.* (CFI), at paras 59 and 80; (ECJ), at para. 18.

⁴⁵ *FIAMM and Fedon*, *supra* note 5, at para. 148. Also the AG held that the case law in this regard was in a ‘potential’ state: see *ibid.*, AG’s Opinion, at para. 61.

of First Instance took the stance that Article 288 is not confined to liability for unlawful conduct and also includes liability in the absence of illegality.⁴⁶ Support for such an interpretation was found in the text of Article 288,⁴⁷ referring more neutrally to 'non-contractual liability', and in *De Boer Buizen*,⁴⁸ another quite obscure precedent strained by the Court of First instance for its contingent purposes.⁴⁹ The Court of Justice did not endorse such interpretation and decided to stick with the more mainstream precedents conflating 'non-contractual liability' and liability for unlawful conduct.⁵⁰

The Community Courts achieved very different results also as to the meaning of *Dorsch*. The Court of First Instance drew from the latter the requirements for liability in the absence of unlawful conduct,⁵¹ a position which implicitly recognizes the authority of that case as a precedent in this field. The Court of Justice, by contrast, followed the Commission and downplayed *Dorsch* to the status of a simply hypothetical reference.⁵² Such a narrower approach did not rest only on a different interpretation of the relevant case law, but included also a reference to the condition for having non-contractual liability enshrined in Article 288, namely that damages be made good 'in accordance with the general principles common to the laws of the Member States'.

If in *Dorsch* the Community Courts had remained silent on this specific point, also in *FIAMM* and *Fedon* they did not go too far in delving into the issue. The Court of First Instance added only an exceedingly superficial statement, one whereby 'national laws on non-contractual liability allow individuals, albeit to varying degrees, in specific fields and in accordance with differing rules, to obtain compensation in legal proceedings for certain kinds of damage, even in the absence of unlawful action by the perpetrator of the damage'.⁵³ But apart from this, it did not feel bound to put forward at least some examples, or to specify the fields and the conditions required in the relevant legal systems for a finding of liability. More details were offered by AG Maduro. In endorsing the application to the cases of liability for lawful conduct (in his words: no-fault liability), the AG picked out some references from the French, Spanish, and German legal practice.⁵⁴ But despite this effort, he did not persuade the Court of Justice.⁵⁵ The latter at first noted that Member States award compensation for damage ensuing from economic legislation only in exceptional and special circumstances and, critically, only

⁴⁶ *FIAMM*, *supra* note 14, at paras 157–158.

⁴⁷ But see also Art. 41(3) of the Charter of Fundamental Rights.

⁴⁸ Case 81/86, *De Boer Buizen BV v. Council and Commission* [1987] ECR 3677.

⁴⁹ *De Boer Buizen* is quoted in *FIAMM*, *supra* note 14, at para. 157 as a precedent for liability in the absence of unlawful conduct. Yet in the quoted passage (para. 17), the ECJ, far from establishing the existence of a specific judicial remedy, invited more generically all the EC institutions to consider the introduction of compensatory devices to sustain economic actors disproportionately affected by restrictions on export markets.

⁵⁰ *FIAMM and Fedon*, *supra* note 5, at paras 164–167, 170.

⁵¹ *FIAMM*, *supra* note 14, at para. 160.

⁵² *FIAMM and Fedon*, *supra* note 5, at paras 168–169.

⁵³ *FIAMM*, *supra* note 14, at para. 159.

⁵⁴ *Supra* note 5, AG's Opinion, at paras 55, 58, 62, 63.

⁵⁵ *FIAMM and Fedon*, *supra* note 5, at para. 176.

in the case of a sufficiently serious breach of a superior rule of law for the protection of individuals.⁵⁶ Then it went on to observe that a comparative examination of the laws of the Member States does not reveal the existence of common general principles on liability for lawful conduct.⁵⁷ But equally this assertion, like the opposite in the judgment of the Court of First Instance, was not documented at all. The Court of Justice, in fact, seemed content to certify that no remedy was available for the applicants, and to remind the economic operators involved in international trade that their commercial position might be affected by various circumstances, among which was the possibility of being targeted by trade sanctions.⁵⁸

2 *Liability for Lawful Conduct at the Court of First Instance and the Advocate General*

Having accepted, at least in principle, the possibility of awarding compensation even in the absence of unlawful conduct, the Court of First Instance and the Advocate General had to articulate the requirements for this type of liability. The Court of First Instance, drawing from *Dorsch*,⁵⁹ identified them in turn as an actual and certain damage, a causal link between the damage and the conduct of the defendant institution, and the unusual and special nature of the damage. Such configuration was disputed on appeal by the defendants: not only did they ask the Court of Justice to set aside the whole the idea of civil liability for lawful conduct but, subordinately, they invoked more stringent requirements.

The Advocate General did not side with them. In his Opinion, after having exposed the constitutional reasons in favour of this remedy,⁶⁰ he suggested only some minor adjustment to the *Dorsch* requirements. Contrary to the position of the defendants, he maintained that this type of liability extends to legislative, and not only administrative, acts or omissions.⁶¹ Moreover, he rejected the suggestion that compensation be conditional on the absence of a general economic interest in the legislation causing the damage.⁶² For his part, he requested only that the damage, alongside being special and unusual, be also serious in nature.⁶³ Quite clumsily, then, he advocated that only EU citizens could benefit from this remedy.⁶⁴

On such a basis, only the Advocate General envisaged that the applicants could be entitled to compensation. The Court of First Instance, instead, considered that one of the requirements was absent and, therefore, dismissed their complaints. To be sure, the Court had found that the financial losses suffered by the applicants amounted to actual and certain damage.⁶⁵ It had ruled in favour of them also on the causal link,

⁵⁶ *Ibid.*, at paras 171–174.

⁵⁷ *Ibid.*, at para. 175.

⁵⁸ *Ibid.*, at para. 186.

⁵⁹ *FIAMM*, *supra* note 14, at para. 160.

⁶⁰ See below sect. 3A.

⁶¹ *Supra* note 5, AG's Opinion, at 67.

⁶² *Ibid.*, at para. 79.

⁶³ *Ibid.*, at para. 76.

⁶⁴ *Ibid.*, at para. 68.

⁶⁵ *FIAMM*, *supra* note 14, at paras 167–169.

noting that despite trade sanctions resulting from a discretionary choice by the US government, a sufficiently direct causal nexus could be detected between the increase in US customs duty and the retention of WTO-inconsistent measures by the Community.⁶⁶ Particularly on causation, the Court had been rather effective in emphasizing the responsibility of the EC institutions. Unlike in *Dorsch*, where the latter had successfully claimed to act as agents of the UN Security Council,⁶⁷ in this case they could be held accountable as genuinely responsible for the conduct at stake. In addition, retaliation in *FIAMM and Fedon* could not be treated as an unpredictable consequence of a regulation, but as an objectively foreseeable possibility codified in the DSU.

On these points, the Advocate General and the Court of First Instance came to the same conclusion. Critically, their approaches differed as to the unusual nature of the damage. Apart from the seriousness requirement, both of them appeared to share the notion that damage is unusual when 'it exceeds the economic risks inherent in operating in the sector concerned'.⁶⁸ Yet the Court of First Instance found that the damage suffered by the applicants had not been unusual as trade sanctions are part of the normal vicissitudes of international trade.⁶⁹ As noted in an instant comment on the pronouncement,⁷⁰ car accidents are also normal vicissitudes of traffic, but they happen to be compensated. Nonetheless, the Court dismissed the complaints of the applicants.

A more considerate position on this point was presented by AG Maduro. In his Opinion,⁷¹ he found that the Court of First Instance had failed to consider that the unusual nature had to be assessed in relation to the economic risks inherent in the industries in which *FIAMM* and *Fedon* operated. Accordingly, he concluded that, there being no reasonable link between the legislation on banana imports and the markets of spectacles and industrial batteries, the damage could be qualified as unusual.⁷² On this basis, he suggested that the case should have been referred back to the Court of First Instance for scrutiny on the special and serious nature of the damage.

C Towards a Legislative Protection of International Trade Bystanders?

At the end of this survey of the *FIAMM and Fedon* litigation, it would be inaccurate to conclude that the Court of Justice turned a deaf ear to the condition of international trade bystanders. True, none of the requests by the applicants was accepted. Yet, in the last part of its ruling, the Court devoted a few passages to specifying that the dismissal

⁶⁶ *Ibid.*, at paras 178–185.

⁶⁷ *Dorsch* (CFI), *supra* note 43, at paras 73–74.

⁶⁸ *FIAMM*, *supra* note 14, at para. 202; *supra* note 5, AG's Opinion, at para. 76.

⁶⁹ *FIAMM*, *supra* note 14, at paras 203–209.

⁷⁰ EU Law Blog, available at: http://eulaw.typepad.com/eulawblog/2006/01/banana_saga_cas.html (last visited 29 June 2009).

⁷¹ *Supra* note 5, AG's Opinion, at paras 82–83.

⁷² Also at this point a comparison with *Dorsch*, *supra* note 43, may be interesting. In that case the Court rightly found that the damage was not unusual since the firms were perfectly aware of the fact that Iraq was a high-risk country.

of the complaints did not prejudice the possibility for the Community legislature to provide some forms of compensation.⁷³ The call for a legislative solution did not rest on a merely purposive declaration. The Court, indeed, went on to consider that, according to its precedents, legislation interfering with the right to property or the freedom to pursue a trade or profession must be proportionate. Then, it added that ‘a Community legislative measure whose application leads to restrictions of the right to property and the freedom to pursue a trade or profession that impair the very substance of those rights in a disproportionate and intolerable manner, *perhaps precisely because no provision has been made for compensation calculated to avoid or remedy that impairment*, could give rise to non-contractual liability on the part of the Community’.⁷⁴

The Court of Justice, therefore, seems to alert the EC legislators to their responsibility towards affected parties. The former may well decide to opt for a breach of international trade obligations. Yet, in doing so, they should also arrange adequate compensatory instruments for the latter in the event of retaliation. No provision for compensation, indeed, may turn out to affect the proportionality of their conduct and, ultimately, to entitle the affected parties to judicial compensation for unlawful conduct. In the end, therefore, the Court of Justice appears to rehabilitate the initial idea of bypassing the issue of direct effect of WTO obligations which FIAMM and Fedon had unsuccessfully attempted.⁷⁵ Nevertheless, it remains to be seen how far this doctrine will go and, notably, to what extent the EC political institutions will be receptive to this kind of warning.

3 The Case for an Overhaul of EC Remedies for Breaches of WTO Obligations

The above analysis has revealed a number of contentious aspects in the solutions the Community Courts gave to the *FIAMM and Fedon* litigation. As a matter of fact, the Court of Justice could choose between three outcomes to the case: dismissal of the complaints or liability for unlawful or lawful conduct. Each of them implied different views as to the nature of the WTO agreements, the scope for manoeuvre of EC political institutions in international trade relations, and the allocation of the corresponding costs. Contrary to how it may appear, the Court of Justice, by sticking to its precedents, opted probably for a rather extreme and quite inadequate solution. Indeed, in dismissing the arguments on civil liability of the Council and the Commission, it aimed exclusively at ensuring that they enjoy a *de facto* immunity without considering the corresponding costs, which have been shifted to less influential economic actors.⁷⁶

⁷³ *FIAMM and Fedon*, *supra* note 5, at para. 181.

⁷⁴ *Ibid.*, at para. 184, italics added.

⁷⁵ Although the applicants did not seem to have invoked a breach of proportionality before the CFI.

⁷⁶ Mavroidis, *supra* note 41, at 14.

That outcome was not inevitable, and it can be contended that some form of pecuniary compensation was preferable. Yet, in discussing in turn liability for unlawful and lawful conduct as more appropriate answers for this kind of conflict, I do not seek to claim that they were either compelling or optimal solutions. At the end of my assessment, I will argue that such were only *relatively* preferable to the ruling adopted by the Court of Justice. In fact, those solutions also contain weak points which shall be carefully weighed before I suggest what the proper outcome of the cases should have been.

Admittedly, for the Community Courts, deciding *FIAMM and Fedon* was not an easy task since those cases epitomize the whole range of difficulties that judicial bodies may encounter in operating simultaneously *within* and *across* fragmented legal systems. In such circumstances, courts, like other institutions, grapple with the problem of ensuring coherent solutions in the absence of an overarching superior or external discipline of the relationships between the relevant legal systems. Yet what is peculiar to courts is that they, more than any other institution, are expected to formulate coherent and reasoned responses to such dilemmas. Coherence and rational discourse, however, cannot but be contextual, for in a highly fragmented legal environment such as the one at hand there is not a single and neutral perspective where multiple legitimate claims of authority and jurisdiction can be reconciled.⁷⁷

Furthermore, the background of *FIAMM and Fedon* was one marked by more specific difficulties associated with the WTO legal system. The problem of international trade bystanders reflects some longstanding shortcomings of the WTO system of remedies which still invites some element of reform on a global level.⁷⁸ For instance, had the WTO offered at least as one of its possible trade sanctions some form of financial compensation,⁷⁹ the *FIAMM and Fedon* litigation would probably never have arisen. Indeed, by paying the complaining parties of the *Bananas* dispute a sum equivalent to the damages resulting from its measures, the EU could avoid retaliation and, thus, prevent the adoption of trade sanctions. Moreover, resources obtained from financial compensation could be employed by the complaining parties to relieve those economic actors within their jurisdictions which concretely suffered from illegal trade restrictions. Against such a backdrop, therefore, the search for EC remedies should be best conceived of as a fallback option. But if this is true, it seems inappropriate to place on the Community alone all the blame for the unsatisfactory outcome of the case.

This said, and notwithstanding all the problems the WTO remedy system may have, the attitudes of both the political and judicial organs of the Community in the cases at issue can be criticized on policy and legal grounds. First, the political institutions. As hinted by the Court of Justice, some piece of legislation aiming to cushion the impact of

⁷⁷ Walker, *supra* note 8, at 338.

⁷⁸ See, e.g., Pauwelyn, 'Enforcement and Countermeasures in the WTO: Rules are Rules – Toward a More Collective Approach', 94 *AJIL* (2000) 335, and Charnovitz, 'Rethinking WTO Trade Sanctions', 95 *AJIL* (2001) 801.

⁷⁹ Bronkers and van der Broek, 'Financial Compensation in the WTO – Improving the Remedies of the WTO Dispute Settlement', 8 *J Int'l Economic L* (2005) 101.

trade retaliation on collateral victims could have been adopted, in particular if the EC institutions deem, as they seem to do,⁸⁰ that they can persist in breaches of WTO obligations irrespective of the rulings of the WTO adjudicative bodies. Such instruments could be conceived in either general or *ad hoc* terms. A general legislative instrument could establish that all economic actors have a right of compensation whenever hit by trade sanctions. Alternatively, the EC political institutions could provide compensation on an *ad hoc* basis when they decided in the case at issue to persist in the violation of their WTO obligations even beyond the DSU limits. Moreover, on the judicial side, it can be argued that the EC Courts had sufficient room for deciding the dispute in more equitable and legally sound terms. By rejecting any form of liability, the Court of Justice not only failed to reduce the negative impact of trade sanctions on international trade bystanders but, critically, it shaped the EC system of remedies in a way which probably misconceives the language and the spirit of the WTO agreements.

This latter perspective is precisely where my alternative view of the cases is rooted. From the standpoint of the EC Courts, *FIAMM and Fedon* was not one out of many routine cases where the lack of direct effect of WTO obligations needed to be reaffirmed. That litigation was an important occasion on which to refine the interface between the WTO and EC legal systems and, namely, to accommodate the current WTO system of enforcement and Community remedies. The Court of Justice missed that opportunity and, arguably, it did so because it failed to bring in and adequately discuss a number of context-dependent variables of the WTO legal system which could have led to a different understanding of the cases. To prove this latter statement, I will point out some aspects of the broader debate on the structure of the WTO remedies and the nature of international trade obligations which can shed some light on the *FIAMM and Fedon* litigation (section 3A). On this basis and, particularly, once the legal context of that dispute is fully disclosed, the case for liability of the EC institutions for the breach of WTO obligations, be it for unlawful or lawful conduct, will appear more convincing (section 3B).

A *In Search of the Nature and the Structure of the WTO Agreements*

Conventional accounts of the context of international trade law stress the ‘legalization’ of the GATT/WTO dispute settlement as one of the most telling and, possibly, far reaching innovations brought about by the Uruguay round.⁸¹ By embracing the rule of law, those arguments run, the GATT has moved away from a diplomacy-based framework towards a more rule-oriented one where regulatory principles of international trade are felt to be for real.

To be sure – and despite the fact that the *Bananas* saga may appear to provide evidence to the contrary – legalisation has rapidly become a distinctive trait of the WTO system. In fact, by incorporating the ethos of the rule of law, not only has the reformed

⁸⁰ Tancredi, ‘EC Practice in the WTO: How Wide is the “Scope for Manoeuvre”?’, 15 *EJIL* (2004) 947.

⁸¹ The relevant literature is endless. For an evolutionary survey on the nature of the GATT–WTO legal framework see Pauwelyn, ‘The Transformation of World Trade’, 104 *Michigan L Rev* (2005) 1.

DS system endowed GATT principles with a more robust system of enforcement, but, more crucially, it has meant a comprehensive process of epistemological redefinition of the international trade legal framework.⁸² Yet, important as it may be at a symbolic and theoretical level, from an analytical perspective the discourse on legalization does not seem as conclusive. Notably, in deciding on issues such as the nature of WTO obligations and their possible direct effect, reference to the rule of law is unlikely to deliver straightforward solutions. Since there is no natural condition of the law, the answers to those questions must be based on a more specific account of the WTO legal system and, notably, of the structure of its remedies. Indeed, the binding force of WTO obligations – as much as that of national constitutional provisions or EC treaty principles – may be construed as a vector resulting from the combination of the specified substantive rule and the applicable procedure for its enforcement.⁸³ At both of these levels, the qualification of WTO norms may appear quite uncertain.

As to the substantive dimension of WTO obligations, the Marrakesh agreements contain some important innovations. True, much of the GATT *acquis* has been confirmed, though with significant amendments. Yet, provisions in the SPS and TBT agreements seem remarkably distant from the original GATT idea of balancing trade concessions and, because of their regulatory texture, they could appear amenable to direct effect, at least in the broader version of that doctrine.⁸⁴ Moreover, the inclusion of the TRIPS has brought within the field of international trade substantive rules which may go even further as they place rights and obligations on individuals. As such, they might appear apt for direct effect even in narrower terms.⁸⁵

On the procedural side, as mentioned, advancements towards the canons of the rule of law have been remarkable. Legalization of the dispute settlement surfaces at several junctions in the DS procedure. First, the DS system is conceived of as compulsory and exclusive.⁸⁶ Then, the complaining parties are entitled to have a panel established, to have a panel (or Appellate Body) report adopted by the DSB, and, eventually, to retaliate if the losing party persists in its breach.⁸⁷ Such elements and, critically, the removal of the veto powers previously accorded to the defendant and losing parties to a dispute at each of those steps, have appeared as strengthening the binding force of WTO provisions and, arguably, as contributing to a tacit redefinition of their nature. Despite their original transactional character, international trade obligations are regarded as undergoing a process of growing collectivization and, particularly, as expressing principles which may transcend the individual interests of the members.⁸⁸

⁸² Weiler, 'The Rule of Lawyers and The Ethos of Diplomats – Reflections on the Internal and External Legitimacy of WTO Dispute Settlement', 35 *J World Trade* (2001) 191.

⁸³ Trachtman, *supra* note 10, at 655–656.

⁸⁴ On the different versions of the notion of direct effect see P. Craig and G. de Búrca, *EU Law – Text, Cases and Materials* (2003), at 178–182.

⁸⁵ Eeckhout, 'The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems', 34 *CML-Rev* (1997) 33.

⁸⁶ Art. 23.2 DSU.

⁸⁷ See, respectively, Arts 6.1, 16.4 (and 17.14) and 22.6 DSU.

⁸⁸ Carmody, 'WTO Obligations as Collective', 17 *EJIL* (2006) 419.

Nevertheless, careful consideration of the current remedy system reveals also that an entirely collective approach to international trade obligations remains problematic. Certain aspects of trade sanctions exist which are still reminiscent of the original GATT transactional matrix. Thus, if there is a transition towards a rule-oriented trade regime, it has only partially occurred. Indeed, although the finding of a breach by the WTO adjudicative bodies may be deemed as creating a secondary international law obligation on the losing party to bring its conduct into conformity with the agreements,⁸⁹ the WTO system does not guarantee respect of the contract. True, the DSU indicates specific performance in the form of withdrawal of the inconsistent measure as the preferred remedy. Yet, such rule is essentially purposive as the DSB can only *recommend* to the member concerned to bring its measure into conformity with the WTO agreements.⁹⁰ In such a framework, effective compliance rests exclusively with the defaulting member. Losing parties, indeed, are normally allowed the necessary time to amend or repeal the measure incompatible with WTO obligations, or to negotiate alternative arrangements with the complainants.⁹¹ But if the former do not implement the DSB recommendation in due time, the latter may resort only to the most rudimentary of the international law remedies, namely retaliation in the form of temporary suspension of concessions or other obligations.⁹² And it is precisely at this stage that the WTO remedy system displays its ultimate bilateral structure. Although the adoption of countermeasures and the definition of the level of suspension of concessions are multilaterally authorized by the DSB, sanctions remain bilateral in nature as they essentially impinge upon the trade relationships between the complaining and the losing parties.⁹³ As a result, it is not surprising that the effects of WTO obligations are mostly perceived as confined to the state-to-state dimension, with no compelling consequences on the validity of the measure at issue within the domestic legal systems.⁹⁴

Since its inception such a system of enforcement has been widely criticized as contradicting the WTO constitutive purpose and amplifying the relative economic importance of parties. Alternative solutions have been suggested, and they might be part of a reform-package of the DSU. Yet, at the moment the binding force of WTO obligations must be defined and gauged within a system which has certainly made more collective

⁸⁹ Art. 19 DSU. In the language of the law of state responsibility, a secondary obligation is an obligation stemming from non-respect of the *pacta sunt servanda* principle to stop the illegal act. See Mavroidis, 'Remedies in the WTO Legal System: Between a Rock and a Hard Place', 11 *EJIL* (2007) 767.

⁹⁰ Art. 19 DSU.

⁹¹ Art. 21.3 DSU.

⁹² Art. 22 DSU. As noted, WTO remedies do not seem to include the remedy of reparation: see Mavroidis, *supra* note 89, at 774–776.

⁹³ Pauwelyn, *supra* note 78, at 337.

⁹⁴ Indeed, in *United States – Sections 301–310 of the Trade Act of 1974*, WT/DS152, 8 Nov. 1999, para. 7.72, the panel affirmed 'neither the GATT nor the WTO has so far been interpreted by GATT/WTO institutions as a legal order producing direct effect. Following this approach, the GATT/WTO did *not* create a new legal order the subjects of which comprise both contracting parties or Members and their nationals' (italics in the original).

its enforcement mechanisms but, critically, has done so only until the end of the so-called implementation stage. Afterwards, remedies remain weak and do not seem to fit the idea of a purely rule-oriented trade regime where obligations are conceived of as public goods.⁹⁵ The overall result is a system which does not seem to have resolved its seminal tension between diplomacy and the rule of law – an ambivalence which may reflect in the way WTO obligations are conceived of as well as in their possible effects within members' legal orders.

Indeed, because of such ambivalence in both scholarly debates and international trade practice the question of the binding nature of WTO obligations is contentious.⁹⁶ A first approach is embodied by the arbitration report in *EC – Bananas*.⁹⁷ Here, the arbitrators appeared to endorse the idea that full compliance is the ultimate objective of a rule-oriented trade regime when they affirmed that the objective of the DS system is to induce the implementation of DSB recommendations. Such an interpretation has brought an author to note that a WTO member which has agreed to pay trade compensation or the concessions of which have been suspended cannot be considered as complying with its international obligations but, quite the opposite, it must be regarded as persisting in illegal conduct.⁹⁸

Whereas this view seems the most persuasive in both textual and policy terms,⁹⁹ it must also be taken into account that the practice of international trade is more ambiguous and may justify alternative interpretations. In a number of disputes – arguably, some of the most sensitive ones¹⁰⁰ – WTO members have decided to pay trade sanctions¹⁰¹ rather than comply with their WTO primary and secondary obligations. Here, alternative accounts for the WTO remedy system have found fertile ground. By drawing from public policy and economic contract theories, for instance, 'efficient breach' has been advocated as a central feature of the WTO DS system.¹⁰² In this alternative framework, countermeasures are no longer regarded as a means to induce unconditional compliance, but as liability rules facilitating efficient deviations from previous commitments by WTO members after a change in circumstances. The WTO remedy system, therefore, would allow violations to persist as long as the violator is willing to pay their price.¹⁰³

⁹⁵ Pauwelyn, *supra* note 78, at 338.

⁹⁶ See, for instance, the exchange between Bello, 'The WTO Dispute Settlement Understanding: Less Is More', 90 *AJIL* (1996) 416 and Jackson, 'The WTO Dispute Settlement Understanding – Misunderstanding on the Nature of Legal Obligation', 91 *AJIL* (1997) 60.

⁹⁷ *EC – Bananas*, Arbitration report, WT/DS27/ARB, 19 Apr. 1999, at para. 6.3.

⁹⁸ Mavroidis, *supra* note 89, at 800.

⁹⁹ See the arguments by Jackson, 'International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to "Buy Out"?', 98 *AJIL* (2004) 109, at 114–123.

¹⁰⁰ Apart from the lack of implementation of the DSB recommendations in *Bananas*, the EC is notoriously defaulting on the DSB recommendations in the *Hormones* dispute.

¹⁰¹ More appropriately, to shift the costs of their breach to less influential segments of their society.

¹⁰² Schwartz and Sykes, 'The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization', 31 *J Legal Studies* (2002) 179. For a critical discussion of this view see Jackson, *supra* note 99, at 122.

¹⁰³ Schwartz and Sykes, *supra* note 102, at 189.

The *FIAMM and Fedon* litigation may embody this latter situation. In those cases it is far from clear whether the EC breach of WTO obligations was actually efficient. However, it does seem clear that for WTO purposes it was a breach, and that the Community took advantage of the ambiguities in the WTO remedy system to continue a strategy of selective exit from international trade obligations. In this view, the choice of the Court of Justice not to recognize the direct effect of WTO obligations is coherent in that the lack of direct effect performs for an individual member the same function of political filter guaranteed by the consensus rule in the adoption of panel decisions under GATT 1947.¹⁰⁴ Yet, in deciding so, the Court not only endorsed a solution where the costs of EC breaches were shifted to underrepresented economic actors, but implicitly supported an interpretation of the WTO DS system that does not completely match the latter rule-oriented rationale or, at least, ambitions.

And here is the gist of *FIAMM and Fedon*. If we can agree with the Court of Justice that its jurisdiction includes the qualification of the internal status of the WTO agreements,¹⁰⁵ it is not entirely convincing how it has fulfilled that task. How should the EC Courts respond to the WTO commitment to the rule of law? Should they endorse the ambitions of the latter by enforcing the ruling of its adjudicative bodies or admit that Community political institutions may take advantage of the weakness of the system of remedy and, eventually, justify selective exit? And what about the externalities associated with the latter strategy? Those were the questions one would expect the Court of Justice to answer rather than the umpteenth repetition of its previous case law. As said, solutions in this regard may well vary as they depend very much on how one interprets the DSU rules and conceives of the nature of WTO obligations. In fact, the issue at stake was not whether the WTO obligations are binding or not¹⁰⁶ but, critically, how their binding nature as resulting from the WTO remedial apparatus should be qualified for EC purposes.

Framed along these lines, discussion could have been structured along at least three different scenarios, each of them entailing a distinct conceptualization of the WTO obligations and, accordingly, distinct configurations of the EC remedies. Surely, not all of them represent sound interpretations of the nature of the international trade obligations and the structure of the WTO remedies. Nevertheless, it seems important to put them forward as each of them can contribute to the search for an adequately balanced system of internal remedies. In this spirit, the remainder of this section illustrates such scenarios with their underlying conceptualizations of WTO obligations. In the following section, that content will be translated into the corresponding Community remedies.

¹⁰⁴ Trachtman, *supra* note 10, at 660 and 665, where it is remembered that two panel reports on bananas regulation under GATT 1947 had not been adopted.

¹⁰⁵ See Case 104/81, *Kupferberg* [1982] ECR 3641, at para. 17, and *Portugal v. Council*, *supra* note 21, at para. 34.

¹⁰⁶ Pauwelyn, 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?', 14 *EJIL* (2003) 928.

In scenario 1, WTO obligations are conceived of as collective in nature and, therefore, regarded as public goods or rules which transcend the interests of WTO members. As such, they are not available to the members and they could be interpreted as affording protection to individuals' economic freedoms.¹⁰⁷ On this premise, scenario 1 suggests that under no circumstances are WTO members entitled to contract out of their commitments under the WTO agreements or to settle disputes in a way which is not consistent with those provisions. Their duty is simply to obey the regulatory principles mandated by the WTO agreements and, what is more, the DSB recommendations.

Scenario 2 brings together more moderate conceptualizations of WTO obligations in collective and bilateral terms. Accordingly, the rigidity of international trade constraints is softened: obligations are partially disposable, WTO members may negotiate their commitments within the margins allowed by the DSU and settle their disputes consistently with the covered agreements. However, after the reasonable period of time for implementation, losing parties to a dispute are required to comply with DSB recommendations.

At this point it may well be the case that the losing party voluntarily complies with its primary and secondary WTO obligations. Yet, it may also opt for a scenario 3. Here, the disposable nature of international trade obligations is taken to a different extreme from that in scenario 1, since members either carry on in negotiations beyond the limits set out in the DSU or, more simply, stay idle and endure trade sanctions. As noted, this latter option envisages a type of selective exit which, be it efficient or not, could contrast with the DSU rationale. Yet, as witnessed in the *Bananas* saga, circumstances may arise where WTO members consider it a viable option. As such, it must be included in our discussion as to its possible implications in terms of responsibility of the Community institutions.

To sum up, the ambivalent profile of the WTO system of remedies may be conducive to remarkably different characterizations of the binding nature of international trade obligations. Throughout the *Bananas* saga, the EC political institutions seemed to support the last scenario, namely the notion that WTO obligations can be bought out even beyond the limits established by the DSU. The Court of Justice, in its *FIAMM and Fedon* ruling, implicitly accepted that approach with scant consideration of the possible alternatives. In doing so, it endorsed a radically pluralist approach whereby what has been found illegal for WTO purposes may be perfectly legal for Community ones. Admittedly, there may be plenty of theoretical explanations out there for such a conclusion, and even this article, although for essentially tactical reasons, will suggest that the Court should probably not have gone so far as to declare the conduct of EC institutions illegal. Yet, the problem with pluralism is that when economic actors are asked to pay for trade sanctions, start to lose market shares, and, eventually, are obliged to relocate their productions to avoid countermeasures (as *FIAMM* and *Fedon* eventually did), reality tends to appear in a dramatically monist perspective. In the

¹⁰⁷ On the distinction between bilateral and collective obligations in public international law see *ibid.*, at 908–925.

absence of appropriate adjustments, the legal niceties of pluralism shed a grim light over the WTO–EC system of economic governance and, ultimately, undermine its already contested legitimacy.

B Civil Liability of the EC Institutions in the Case of Breach of WTO Obligations

In *FIAMM and Fedon* the Court of Justice, by awarding compensation, would have probably saved the day or, at least, lessened the negative impact on innocent bystanders of the Community exit strategy in the *Bananas* litigation. But how could the Court pursue a similar solution? Was a ruling on liability for lawful or unlawful conduct preferable? And what about the counteractive interest of the EC political institutions to have a broad, possibly limitless, scope for manoeuvre in trade relations?

To respond to such questions it is useful to bring in the scenarios outlined at the end of the previous section, and to elaborate their possible implications in the field of EC remedies. By combining the different configurations of WTO obligations with the Community requirements for civil liability, a number of solutions can be devised which, although with different degrees of persuasiveness, all seem plausible in abstract legal terms. Legal fluency, however, is but one of the concerns for the judiciary, especially in cases such as those under review. Findings on liability for lawful or unlawful conduct bring about different consequences as to the scope for manoeuvre of the EC political institutions and the domestic allocation of the costs for the breaches of WTO obligations. Since a realistic discussion must take into account the external impact of judicial rulings, those aspects cannot be ignored as they too contribute to the assessment of the overall quality of adjudication.

The next sections address the key questions of the case – the issue of direct effect and the possibility of liability for legal conduct – and spell out their different legal and policy implications. As to the other requirements necessary for a finding of liability, they refer to the relevant analyses put forward in section 2.

1 Liability for Unlawful Conduct: A Limited Direct Effect of WTO Obligations?

The first alternative to the doctrinal status quo might have been awarding compensation for the unlawful conduct of the Community institutions. That was arguably the solution more in line with *pacta sunt servanda*, a principle on which public international law, the WTO, and the EC legal orders converge.¹⁰⁸ That remedy, in its possible variants, may also be regarded as the correct translation of the first two scenarios presented in the previous section.

The main argument in support of this type of action is rather straightforward: did the WTO adjudicative bodies find that the decision by the Commission and the Council to maintain in force WTO-inconsistent measures infringed primary and secondary

¹⁰⁸ See, respectively, Arts 26–27 Vienna Convention of the Law of the Treaties, Art. XVI WTO, and Art. 300(7) EC.

international trade obligations? Then, if the Court of Justice wishes to take seriously *pacta sunt servanda*, it should enforce those findings in the EC legal order and, notably, it should rule that also for Community purposes the Commission and Council acted illegally. To be sure, that was not for the Court an easy solution to endorse, since a ruling like that would have inevitably questioned 30 or more years of consolidated judicial doctrine. Most importantly, recognizing direct effect, even if for liability purposes only, would have meant undermining the institutional choice inherent in that line of cases, notably to accord to the EC political institutions the broadest scope for manoeuvre in trade relations.

Under such a general heading, though, civil liability may be subject to several constructions with remarkably different impacts on the political discretion of the Community and the precedents of the Court of Justice. Here is where our scenarios may turn out to be useful analytical devices, since they allow us to structure the discussion on direct effect in more gradual terms than the black-or-white approach followed by the Community judges.

For instance, it was observed that under scenario 1 WTO obligations are collective in nature and in no circumstances can they be contracted out by WTO members. A similar interpretation, if transferred to the field of Community remedies, would have a huge impact, since WTO obligations would originate thick constitutional-like principles which should be unconditionally enforced against Community legislation and political institutions – an outcome which may perhaps satisfy a fundamental rights-inspired conception of international trade law¹⁰⁹ but which, on the prevalent view, does not fit the text and the spirit of the WTO contract. In this respect, therefore, I definitely side with the Court of Justice in rejecting direct effect as the default rule since that solution is not compatible with the transactional elements embedded in the WTO agreements and the structure of their remedy system.

At this stage it seems that WTO rules lack the structural premises for direct effect. Not only do international trade obligations seem essentially designed for an application in their specialized system of dispute settlement,¹¹⁰ but, critically, they also fall short of the procedural requirements which arguably made direct effect possible in the Community. Indeed, in the original doctrinal approach of the Court of Justice,¹¹¹ the strategy to enlist national courts in the enforcement of Community rules is, if not structurally dependent, certainly strongly influenced by the existence of the preliminary ruling procedure. It was largely through that channel that the Court of Justice and national courts could extract from Community rules tailor-made individual rights and norms for domestic application. Had the treaties not provided for a similar device,

¹⁰⁹ Petersmann, 'Human Rights, International Economic Law and "Constitutional Justice"', 19 *EJIL* (2008) 769.

¹¹⁰ Trachtman, *supra* note 10, at 658; see also Eeckhout, *supra* note 85, at 32.

¹¹¹ Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration* [1963] ECR 1.

it can be easily imagined that Community law would have received treatment not wholly different from that which national courts normally reserve for other sources of international law.

To some extent, this is what happens to WTO rules when they are claimed before Community Courts. The WTO agreements, despite being internationally binding on EC institutions, do not provide procedural channels connecting international trade adjudicative bodies to members' courts. In such a regime, when WTO obligations are invoked before the Court of Justice, it cannot but respond negatively. Certainly, this attitude may find an explanation in the light of the *real-politik* motives which do play a prominent role in shaping the position of the Court of Justice on the status of international trade rules.¹¹² Yet the same outcome can be justified also on purely legal terms, for domestic courts, lacking the possibility of interacting with the WTO adjudicative bodies, cannot rely on *ad hoc* official interpretations of the relevant international obligations. This is why as a matter of principle the Court is right in denying the direct effect of WTO obligations, even though I find this line of argument more persuasive than those on reciprocity and scope for manoeuvre which notoriously inspire its precedents.

WTO obligations, therefore, are to be considered as *prima facie* inapplicable before the EC judiciary. But are there circumstances which justify a rebuttal of this presumption? Also in this regard, the answer from the Court of Justice is well known. In its case law, lack of direct effect is a *iuris tantum* presumption subject only to the *Nakajima* and *Fediol* exceptions. Otherwise, opposition to direct effect is monolithic, no matter the substantive content of the relevant WTO obligation or the stage of the enforcement procedure at which it is invoked. But this is where the arguments unsuccessfully defended by FIAMM and Fedon come in. Why not acknowledge a third exception (or expand the scope of *Nakajima*) in the case of a breach of a DSB recommendation? Why not accept the direct effect of DSB recommendations when the cases at stake are the same or are closely related?

The Court of Justice dismissed this point by arguing – convincingly, in my view – that the effects of DSB recommendations cannot be separated from those of WTO rules.¹¹³ Nonetheless, if considered in the light of our previous discussion, the conclusion whereby WTO obligations – and not DSB recommendations! – do not exert any legal effect within the EC legal order at all stages of the DS procedure appears neither compelling nor entirely persuasive. How can we accept the argument that even when the WTO adjudicative bodies have decided on the same case pending before the Court of Justice, their rulings have no clout in the Community Courts?¹¹⁴

¹¹² Peers, 'Fundamental Right or Political Whim? WTO Law and the ECJ', in G. de Búrca and J. Scott (eds), *The EU and the WTO: Legal and Constitutional Issues* (2001), at 121–123.

¹¹³ *FIAMM and Fedon*, *supra* note 5, at para. 128; see also the AG's Opinion, at paras 42–43. On the interpretive and not law-making nature of the DSB decision see von Bogdandy, 'Legal Effects of World Trade Organization Decisions Within European Union: A Contribution to the Theory of the Legal Acts of International Organizations and the Action for Damages Under Article 288(2) EC', 39 *J World Trade* (2005) 49.

¹¹⁴ Eeckhout, *supra* note 85, at 51.

Probably, the answer in this regard should be more nuanced than that offered by the Court of Justice. As mentioned, lack of direct effect makes sense, particularly in cases where the invocation of the WTO is abstract, that is to say, where the DSB has not issued any specific recommendation on the case pending before the Court of Justice.¹¹⁵ Were the Court of Justice to enforce WTO rules under similar conditions, it could simply offer its own interpretation which, however authoritative and based on WTO precedents, would still remain a unilateral move, albeit disguised under an internationally friendly cloak.¹¹⁶ But when the WTO adjudicative bodies have decided on the same or related cases,¹¹⁷ is the lack of direct effect justified still? If direct effect were dependent only on the existence of an *ad hoc* official interpretation of the relevant rule, it could be argued that, after a ruling by the WTO adjudicative bodies, international trade rules can be relied on by the Court of Justice. Despite the absence of a preliminary ruling, indeed, at this point the Court of Justice appears in the position to translate within the EC legal order a custom-built interpretation of international trade rules by the WTO adjudicative bodies. Yet, even if at this junction there is an *ad hoc* and official interpretation, I am still reluctant to acknowledge direct effect for WTO rules, as this would still contradict the text and the spirit of the DSU. In other words, an *ad hoc* interpretation can be a necessary condition for direct effect of WTO obligations but not a sufficient one.

To justify my reluctance, scenario 2 may be brought into the picture. Under that approach, the losing party to a trade dispute enjoys broader margins of discretion and, critically, a 'reasonable period of time' to comply with its WTO secondary obligations. A similar instrument is particularly important since, during that phase, the defaulting member can negotiate the necessary adjustments with trade partners and the domestic constituencies affected by the DSB ruling in order to arrange strategies for a gradual convergence towards WTO compliance. Thus, it is clear that anticipating at this stage the direct effect of WTO obligations would entail an element of interference in an extremely thorny procedural phase which the DSU agreement appears to have reserved to the political discretion of its members.

Yet, if not after the DSB recommendation, what about direct effect of WTO obligations at the end of the reasonable period of time, as suggested also by FIAMM and Fedon?¹¹⁸ At this very stage, their argument goes, members are expected to comply and they cannot be excused for persisting in their breaches. As noted, if losing parties decide to undergo trade sanctions according to the DSU and carry on with negotiations, they cannot pretend that in doing this they are acting legally. As a consequence, it might make sense for the Court of Justice to find that, in failing to implement the DSB

¹¹⁵ Either because the case has not been decided yet, or because it has not been brought before the WTO adjudicative bodies.

¹¹⁶ In fact, a pronouncement by the EC Courts at this stage would probably interfere with the jurisdiction of WTO adjudicative bodies as defined at Art. 23(2)(a) DSU.

¹¹⁷ As in *FIAMM and Fedon*, *supra* note 5, where the cases brought before the EU Courts are clearly a ramification of the cases concerning the EC regulation of the banana market.

¹¹⁸ And as hinted by the ECJ in Case C-93/02 P, *Biret International SA v. Council* [2003] ECR I-10497.

recommendation within the reasonable period of time, EC political institutions have acted (or not acted) illegally.

In this respect, I find that such a solution could be upheld only in exceedingly marginal cases, notably when the reasonable period of time has expired and no action has been undertaken by the losing party. Only under similar circumstances might the applicants be right. In similar situations, since a persistent breach of WTO obligations is out of the question, the DSU allows the complaining parties to bypass compliance review and directly request the DSB to authorize suspension of concessions or other obligations.¹¹⁹ Conversely, where it is not so clear whether the losing party has complied with the DSB recommendation and, namely, when the losing party, as in our cases, has modified its WTO inconsistent measures, it seems that the jurisdiction of EC Courts is still pre-empted. In fact, in such circumstances the DSU provides that complaining parties cannot resort to retaliation, but they are to activate a ‘compliance panel’ in order to have the contentious measure reviewed.¹²⁰ As a consequence, in my view only at the very end of the implementation procedure¹²¹ could the EC Courts declare that the conduct of the Community institutions is illegal for internal purposes, and then proceed with the scrutiny of the other liability requirements.¹²² Put this way, therefore, direct effect of WTO obligations would be a rather rare event and, apparently, another narrow exception added to *Fediol* and *Nakajima*.

But what about the impact of such a proposal? First, there might be clear advantages at a symbolic level. I have already mentioned that this proposal for civil liability for unlawful conduct takes seriously the international rule of law, not only in its substantive aspects but, critically, also in its jurisdictional and procedural dimensions. In fact, by enforcing WTO rules as interpreted by WTO adjudicative bodies and only after the DSU remedies are exhausted, there is no doubt that the Court of Justice would send a signal of strong commitment to international law – a stance rather at the opposite pole to that of its current attitude to the WTO, whereby the Community is to maximize its role as international player by taking advantage of a *de facto* immunity on the part of its political institutions. In my view, were it to embrace such a new position, the EC not only would show in a tangible way its normative commitment to the rule of law and international cooperation but, most importantly, it could also improve its overall reputation in its international trade and non-trade relations. Indeed, are we really sure that the dividend of limitless political discretion outweighs that of credibility?

¹¹⁹ In this regard, I endorse the solution to the question of ‘sequencing’ proposed in Mavroidis, *supra* note 89, at 795–799.

¹²⁰ Art. 21.5 DSU. It is noteworthy that the US in *Bananas* obtained an authorization to suspend its concessions without a prior finding by a compliance panel. The finding, nevertheless, was available at the time of the FIAMM and Fedon actions.

¹²¹ We may need to wait until the Appellate Body has decided according to Art. 21.5 DSU for the EC Courts to have jurisdiction.

¹²² Note that bystanders could take action only at a later stage, notably in presence of retaliatory measures by the complaining party. Indeed, only at that moment would they suffer actual damage.

However, from a different perspective, the idea that in international trade the Community does not have limitless discretion and, crucially, that the EC judiciary is eventually entitled to guarantee the WTO contract remains thorny. I have noted above that my proposal would consist only of a slight overruling of current case law. It could be added also that its impact would be quantitatively minimal, as overall the Community can boast a rather fine compliance record as to its international trade obligations.¹²³ But what about its qualitative impact? Here, it must be noted that the cases in which the Community decides to exit international trade commitments are often the most politically contentious. Are we really sure it is a good idea to entitle the EC judiciary to enforce the WTO contract precisely in such controversies? A realistic appraisal of both international trade dynamics and the posture of the judiciary in politically sensitive cases suggests that this alternative, however appealing in terms of principle, would probably turn out to be too controversial for a Court to endorse.

Then, there are also a number of more technical problems associated with liability for unlawful conduct. First, my proposal eventually implies a finding of illegality of the conduct of Community institutions which, although postponed in time, remains an element which for good reasons might discourage the recognition of direct effect, even in this qualified and residual version. As stressed by the Advocate General and the Court of Justice,¹²⁴ notwithstanding the fact that proceedings for annulment and liability are separate causes of actions, a finding of illegality by the Court of Justice constitutes *res judicata*. A similar declaration, far from remaining confined to liability cases, mandates the *ex officio* annulment of the measure at hand, a perspective hardly appealing for political bodies which might have deliberately opted for a breach of international trade obligations. Most importantly, even if restricted to liability cases, a finding of illegality would open the door not only to the claims of collateral victims of international trade, but, critically, also to the actions brought by its 'official troops' (in our case, bananas importers or exporters).¹²⁵ But whereas the former may claim only the economic losses engendered by trade sanctions, the latter would be in the position to seek compensation for illegal trade restrictions and, therefore, to recoup significant sums of money as retrospective damages.¹²⁶ Even in this limited version, therefore, direct effect would entail not only a legal restriction on the scope for manoeuvre of the political institutions, but also a significant exposure of the Community budget.

Still, in both legal and policy terms such a solution is preferable to that endorsed by the Court of Justice. The Court has envisaged only a *pro futuro* remedy; notably it has invited the EC institutions to consider some form of compensation for international trade bystanders or similar situations, since otherwise it could find their conduct in

¹²³ See Wilson, 'Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings: the Record to Date', 10 *J Int'l Economic L* (2007) 397, at 400–401.

¹²⁴ *FLAMM and Fedon*, *supra* note 5, AG's Opinion, at para. 49, and judgment, at paras 123–124.

¹²⁵ *Ibid.*, AG's Opinion, at para. 50.

¹²⁶ Yet the WTO agreements do not seem to rule out the possibility of unilateral reparation by the members: see Mavroidis, *supra* note 89, at 775.

violation of the principle of proportionality. Now, one may reflect on the consequences of a finding of illegality in a single case like *FIAMM and Fedon*, where a recognition of direct effect would not even have curtailed the scope for manoeuvre of political institutions. Predictably, a deluge of liability actions for past damage would have followed, with rather painful consequences for the Community budget. Yet, would that not be a more effective lesson for the EC political institutions? Would they not have been more persuasively induced to introduce legislative compensation next time?

But even at this point, a word of caution is probably worthwhile. Let us assume for a moment that the Court of Justice finds the conduct of the Community illegal. Are we sure that for the purposes of EC liability such a finding is sufficient? Also in this regard, a ruling of liability is likely to meet further hurdles. First, according to the *Schöppenstedt* test,¹²⁷ illegality for liability purposes must be characterized as ‘serious’, and it must be proved that the infringed superior rule was intended to confer rights on individuals. As to the latter requirement, I think that only an overly narrow interpretation of the direct effect requirements would constitute an obstacle. But as to the seriousness requirement, more problems are likely to arise for complaining parties. As is well known, in *Bergaderm*¹²⁸ the Court of Justice stated that liability attaches to the Community where its institutions have acted not merely illegally but egregiously. In this regard, a finding of seriousness depends on the margin of discretion recognized to the institution concerned. In the case of political acts, an EC institution may be found responsible only where it ‘manifestly and gravely disregarded the limits on its discretion’.¹²⁹ How does this apply to our cases? How much discretion do the Community institutions enjoy in implementing the DSB recommendations? Again, a closer look at the DSU provisions may prove illuminating. Article 19 allows broad discretion to the WTO members since, even when the Appellate Body suggests ways to implement the DSB recommendations, such suggestions are not binding on the losing party.¹³⁰ In my view, this means that only in the marginal event of inertia by the losing party during the reasonable period of time can it be taken for granted that its conduct is seriously illegal. In other circumstances, the Court of Justice should accurately review the compliance reports and try to find out whether the violation is serious. Here, should the Court find that discretion has been manifestly and gravely disregarded, it could move swiftly to scrutiny of the damage and causation along the arguments illustrated above. Conversely, should the Court conclude that the violation is not manifest and grave enough to be characterized as serious, it would fall into a situation where a finding of illegality does not give entitlement to compensatory damages – a scenario which would probably displease political institutions and damaged individuals alike.

¹²⁷ Case 5/71, *Aktien-Zuckerfabrik Schöppenstedt v. Council* [1971] ECR 975.

¹²⁸ Case C-352/98P, *Laboratoires Pharmaceutiques Bergaderm v. Commission* [2000] ECR I-5291.

¹²⁹ *Ibid.*, at para. 43.

¹³⁰ *Mavroidis*, *supra* note 89, at 784–788.

2 Liability for Lawful Conduct and Compensation of Innocent Bystanders

Liability for lawful conduct, as far as it avoids some of the inconveniences associated with a finding of illegality, cannot but appear as a particularly attractive avenue. Like the ruling by the Court of Justice, such a remedy can be adequately understood in the light of scenario 3. In this context, political institutions decide to maintain their violations of WTO obligations even beyond the limits set by the DSU and endure the corresponding countermeasures. But unlike the judgment in *FIAMM and Fedon*, that remedy allows the Community institutions to be held partially accountable for such a political choice.

Clearly, the appeal of liability in the absence of unlawful conduct lies in the fact that it completely skips the direct effect issue. As such, it dodges all the discussions on the precedents of the Court of Justice on the internal status of WTO law, and it also escapes the treacherous requirement of a serious violation of a superior rule of law. Moreover, it allows forms of compensation which, in both quantitative and subjective terms, are more limited than those in liability for unlawful conduct. In fact, being compensation calibrated on the level of suspension of concessions or other obligations defined by the DSB, it would not cover the damages relating to trade restrictions, but only the prospective damages ensuing from trade sanctions. Therefore, only bystanders such as *FIAMM* and *Fedon* would be entitled to compensation and, considering the limited number of cases where countermeasures are actually applied against the Community, also their impact on the budget would be much more contained. Critically, also the incentive for the EC legislator to regulate this type of compensation would be considerably reduced.

The crux of liability for lawful conduct lies elsewhere. First of all, scepticism may arise at a very general level. Like the decision by the Court of Justice, the assertion that what is illegal in Geneva may be legal in Luxembourg may be detrimental to the external legitimacy of both the WTO and the Community. In this aspect, it may be noted that the facts of *FIAMM and Fedon* differ remarkably from those in *Dorsch*. In the latter case, the legality of the regulation implementing the UN sanctions against Iraq was uncontested. In *FIAMM and Fedon*, instead, it was unquestionable that the Council and the Commission breached WTO obligations, and only for internal or tactical purposes could it be maintained that their conduct was lawful. As a consequence, in cases of this kind, reference to this type of liability is somewhat artful and, ultimately, justified only by the need to grant some relief to those who were negatively affected by conduct which cannot be declared illegal.

Next, a number of more detailed legal issues must be resolved. To proceed with this remedy, indeed, the scope of Article 288 must first be clarified. This again invites a discussion on *Dorsch*: is that an appropriate precedent? Did the Community Courts in that case affirm the existence of liability for lawful conduct? Or did they merely refer to it in hypothetical terms?

To be sure, the language in *Dorsch* is exceedingly ambiguous, and one may only wonder why the Courts felt the need to bring in that remedy and spell out its requirements if not to apply it. A possible explanation may be that, in fact, in *Dorsch* the Courts did

apply those requirements. Two arguments may corroborate such an interpretation. First, there is language in the reasoning proving that the Courts intended to ascertain whether those requirements were fulfilled. Indeed, the Court of First Instance, immediately after having defined the conditions for liability for lawful conduct, goes on to state that '*it is therefore necessary to consider whether the alleged damage exists . . . whether that damage is a direct result of the Council's adoption of [the legal conduct], and whether the damage alleged is such as to render the Community liable in respect of a lawful act within the meaning of the abovementioned case-law*'.¹³¹ Similar language is also employed by the Court of Justice.¹³² Most importantly, not only in those passages is the reasoning less ambiguous, but in the remaining parts of the judgments the Courts undertake a thorough and articulate scrutiny of actual and certain damage, and of the causal link and the unusual and special nature of the damage. This is probably too much of an effort¹³³ for a hypothetical reference which, if it were really only hypothetical, might have enabled a far more synthetic dismissal.

To ground liability for lawful conduct convincingly on Article 288, then, some consideration of 'the general principles common to the laws of the member states' is certainly required. Can we really affirm the existence of such a common legal tradition? On what basis?

The point, as noted above, is poorly reasoned in both the judgments of the Court of First Instance and the Court of Justice, and only the Advocate General delved to some extent into the issue. The methodological reflections of the last must be particularly taken into account at this stage. AG Maduro, indeed, observed that the comparative inquiry envisaged by Article 288 can follow two main and, in many ways, opposing approaches. According to the former – arguably, that inspiring the defendants and the Court of Justice – common principles 'stem only from the almost mechanistic superimposition of the law of each Member State and the retention of only the elements that match exactly'.¹³⁴ If adopted, such methodology is likely to confirm the negative appraisal of liability for lawful conduct of *FIAMM and Fedon*. Indeed, comparative analyses reveal not only that in a broad majority of Member States liability for lawful conduct is unheard of, but, critically, that even in the Member States where the Advocate General claims that the principle is accepted it is actually contentious or enforced in far stricter terms.¹³⁵ On the contrary, if there is a truly genuine common tradition, it

¹³¹ *Dorsch*, *supra* note 43, at para. 59, italics added.

¹³² *Ibid.*, at para. 19.

¹³³ 30 paras (60–89) in the ruling of the CFI!

¹³⁴ *Supra* note 5, AG's Opinion, at para. 50.

¹³⁵ See C. Harlow, *State Liability – Tort Law and beyond* (2004), at 60–61; D. Fairgrieve, *State Liability in Tort: a Comparative Law Study* (2003), ch. 5, particularly at 144–148; A. Lazari, *Modelli e paradigmi della responsabilità dello stato* (2005), at 239–250.

may be easily identified in a principle of legislative-based compensation for the lawful conduct of political institutions.¹³⁶

The Advocate General, however, also suggested a different reading of Article 288. He noted that ‘the Court has the task of drawing on the legal traditions of the Member States in order to find an answer to similar legal questions arising under Community law that both respects those traditions and is appropriate to the context of the Community legal order. From that point of view, even a solution adopted by a minority may be preferred if it best meets the requirements of the Community system’.¹³⁷ According to such a contextual approach, one need not spend so much time in sophisticated comparative investigations. What is crucial is the identification of the functional concerns peculiar to the context of the Community system, since only the principles which meet them will pass through the filter of Article 288. Following this latest approach, the Advocate General illustrated a number of aspects which might have supported the introduction of liability for lawful conduct. Here is a short summary of them with further concurring arguments.

First, AG Maduro observes that this device would complete the system of Community remedies and, particularly, would allow individuals to challenge the EC institutions irrespective of their inability to rely on WTO rules.¹³⁸ In opposition to this argument, the Commission had advocated that liability for lawful conduct is accepted only in France as a substitute for the lack of judicial review of legislation by ordinary courts. Since Community Courts can review legislation, that principle ought to be regarded as peculiar to the French context and, therefore, not transferable to the Community.¹³⁹ AG Maduro contended that compensation for lawful conduct makes sense especially in the light of the French case. Notwithstanding the Community system of judicial review of legislation, when it comes to WTO obligations the EC legislature enjoys a *de facto* immunity, a condition which can be regarded as functionally equivalent to that justifying liability for lawful conduct in France.

Secondly, the Advocate General argues that liability for lawful conduct would meet the requirements of good governance.¹⁴⁰ Aware of the possibility of a civil action in the event of non-compliance with DSB recommendations, political institutions would

¹³⁶ However, it can be argued that Member States (with the only exceptions of Sweden and Denmark, which reserved on this point), as parties to the Council of Europe, should observe principle II of Recommendation No. R(84)15 of the Committee of Ministers to the member states relating to public liability, according to which ‘[e]ven if the conditions stated in Principle I are not met [liability for unlawful conduct], reparation should be ensured if it would be manifestly unjust to allow the injured person alone to bear the damage, having regard to the following circumstances: the act is in the general interest, only one person or a limited number of persons have suffered the damage and the act was exceptional or the damage was an exceptional result of the act’. The Recommendation is available at: [www.coe.int/t/e/legal_affairs/legal_cooperation/administrative_law_and_justice/Texts_& Documents/Conv_Rec_Res/Recommendation\(84\)15.asp](http://www.coe.int/t/e/legal_affairs/legal_cooperation/administrative_law_and_justice/Texts_& Documents/Conv_Rec_Res/Recommendation(84)15.asp).

¹³⁷ *Supra* note 5, AG’s Opinion, at para. 50.

¹³⁸ *Ibid.*, at para. 58.

¹³⁹ *FIAMM and Fedon*, *supra* note 5, at paras 151–152.

¹⁴⁰ *Ibid.*, AG’s Opinion, at para. 59.

be induced to exercise their political discretion more carefully. In particular, costs to international trade bystanders and advantages accruing to the economic sectors protected by WTO-inconsistent measures would be better assessed. And, eventually, the Community could be held accountable for such decision without reducing its margins of political discretion.

Thirdly, the Advocate General notes that liability for lawful conduct may be conducive to a more efficient allocation of the costs ensuing from a breach of WTO obligations.¹⁴¹ In this regard, his reference to the French notion of *égalité devant les charges publiques* appears extremely appropriate. In his words, ‘as all public activity is assumed to benefit the society as a whole, it is normal that citizens must bear the resulting burdens without compensation, but if, in the general interest, the public authorities cause particularly serious damage to certain individuals and to them alone, the result is a burden that does not normally fall on them and which must give rise to compensation; the compensation, borne by the society via taxation, restores the equality that has been upset’.¹⁴² As seen, in *FIAMM and Fedon* the costs resulting from breaches of WTO obligations disproportionately affected a particular segment of economic actors. With liability for lawful conduct, Community Courts would have been in a position to restore equality by transferring to society the cost of the political choice to violate international trade obligations.

Compensation for lawful conduct may be viewed as an available solution also in the light of other aspects peculiar to the Community legal framework.

In national public law, the absence of liability for the lawful conduct of political institutions is normally accounted for by arguments drawing from their representative nature and the democratic character of policy-making.¹⁴³ By definition, public activities are meant for the welfare of society and, as a rule, particular notions of the public good result from democratic deliberations in which virtually all the segments of society are supposed to have a say. Whereas at state level this may justify a reluctant attitude towards a form of liability which is potentially expansive and could overexpose the judiciary in politically sensitive areas, the same argument appears misleading if transferred to Community policy-making. In the context of *FIAMM and Fedon*, for example, democracy and *volonté générale* may hardly be invoked to advocate the immunity of EC institutions. First, the decision to exit international trade obligations was made at a mere diplomatic level with no involvement of democratic institutions. Secondly, regulations on the common organization of the banana market were adopted according to Article 37(2) EC, i.e., a procedure based on qualified majority voting of the Council and the mere consultation of the European Parliament. Considering the quite remarkable discrepancy in democratic input between those procedures

¹⁴¹ *Ibid.*, at para. 60.

¹⁴² *Ibid.*, at paras 62–63, 75. A similar principle is stated in the Recommendation on public liability, *supra* note 136, point 25 of the Explanatory memorandum.

¹⁴³ On the original antithesis between democracy conceived as *volonté générale* and liability of the legislative see R. Bifulco, *La responsabilità dello stato per atti legislativi* (1999), at 14–27.

and national legislative decision-making, it would not have been misplaced for the Court of Justice to compensate for that gap and to inject into the EU legal system a further dose of judicial accountability.

Finally, a functional rather than mechanistic reconstruction of the principles common to the laws of the Member States could have made sense also in the broader context of the case law concerning EC remedies. Even recently, the field of remedies was the one where the Court of Justice introduced the most radical deviations from the Member States' law. Take, for example, *Simmenthal*,¹⁴⁴ *Francovich*,¹⁴⁵ or *Köbler*.¹⁴⁶ Can we convincingly maintain that the Court in those cases recognized common principles of the law of the Member States? Can we really argue that in suggesting, say, the non-application of legislation by national courts or the liability of supreme courts it was simply acknowledging a pre-existing *ius commune Europeum*? Liability for lawful conduct would not have been an isolated case but, like those precedents, it would have met a functional concern of the Community legal framework. Critically, in one crucial element it would have differed from them and introduced an innovation: in that case a finding of liability would have held the Community and not the states' institutions accountable. It would be rather telling if this were the ultimate reason for the dismissal of the complaints.

If admitted, liability for the lawful conduct of Community institutions could be conveniently structured according to the requirements established in *Dorsch*, perhaps with the further insistence on the seriousness of the damage proposed by the Advocate General. Conversely, the limitation of standing to EU citizens suggested by him seems quite hazy and deserves a word of clarification. In fact, EU citizens as such are rarely the targets of trade sanctions, the latter hitting mostly goods or services exported by Community economic actors. Yet, in AG Maduro's reasoning, the idea of limiting standing to EU citizens emerges as a reflection of the principle of *égalité devant les charges publiques*: only the subjects who ordinarily bear the burdens associated with the pursuit of the general interest should be entitled to some form of protection when some of those burdens affect them in a disproportionate manner. Arguably, this is also the principle which should guide the Court in defining the standing requirements in actions for liability for lawful conduct. In the case of trade sanctions, for instance, rather than looking to formal requirements such as the citizenship of the applicant or its establishment, the Court should ascertain whether the actual applicant is genuinely connected to the EU or, conversely, if he or she is a free rider abusing the newly introduced remedy.

In conclusion, the acceptance of previous arguments could have led the Court to refine the EC system of remedies and, notably, to consolidate liability for lawful conduct as an autonomous cause of action. Once recognized in principle, then, a finding

¹⁴⁴ Case 106/77, *Amministrazione delle finanze v. Simmenthal* [1978] ECR 629.

¹⁴⁵ Cases C-6-9/90, *Francovich and Bonifaci v. Italy* [1991] ECR I-5537.

¹⁴⁶ Case C-224/01, *Köbler v. Austria* [2003] ECR I-10239.

in favour of the complainants would have rapidly followed since all the other requirements, as interpreted by the Court of First Instance and adjusted by the Advocate General, would have been easily met.

4 European Legal Pluralism: From an Exclusivist to a Cubist Sensibility in Adjudication

This article started with an analogy between the rulings in *Kadi* and *FIAMM and Fedon*. It was noted that in both of them the Court of Justice relied on the doctrine of the autonomy of the Community legal order, although this notion has been conducive to remarkably different outcomes in terms of individuals' protection. Indeed, in both cases the applicants argued that there had been a violation of their property rights and economic freedoms. Even at a procedural level the relevant individual positions could be assimilated, neither of them having been heard by the competent institutions before the adoption of the contested measures. Nevertheless, only in *Kadi* did the Court hold that EU fundamental rights had been unduly restricted. In *FIAMM and Fedon*, it decided to defer to the Council and the Commission, leaving the applicants only the residual possibility of seeking some redress at the European Court of Human Rights.¹⁴⁷

Aside from such remarkable differences of outcome, *Kadi* and *FIAMM and Fedon* can equally be regarded as telling examples of the challenges the judicial authorities face in a context of marked legal pluralism. The current European legal landscape witnesses a proliferation of overlapping legal orders as well as the competition between their distinct claims of normative and interpretive authority. For such processes reflect neither a pre-defined comprehensive institutional architecture nor an intelligent constitutional design,¹⁴⁸ European legal pluralism may rightly be regarded as a troublesome source of normative ambiguity¹⁴⁹ and even conflicts. In certain circumstances, positive answers to the latter may be derived from institutional reforms in a legal system. In the cases examined, for example, the reform of WTO remedies and, notably, the introduction of financial compensation could avert trade sanctions and, consequently, litigation and jurisdictional conflict. In other circumstances (or in the same, if institutional reforms are not adopted), political institutions seem often inclined to pass the buck to courts. When this occurs, solutions to conflicts rest ultimately on judicial responsibility and creativity.

¹⁴⁷ Unfortunately, the applicants have decided not to bring an action before the Court of Strasbourg.

¹⁴⁸ See Eijsbouts and Besselink, "The Law of Laws" – Overcoming Pluralism', 4 *European Constitutional L Rev* (2008) 395, who are on the quest for an overarching legal discipline of the interactions between legal orders.

¹⁴⁹ Póitares Maduro, 'Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism', in J. L. Dunoff and J. Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (2009), at 13.

The *FIAMM and Fedon* litigation offers a clear representation of this reality. The above discussion reveals that once cases at the intersection between legal systems reach the courts, conflicts between the relevant normative and interpretive claims may be more tractable than one could initially imagine. The absence of an all-encompassing discipline governing the interactions between legal orders allows significant margins of interpretive discretion which the courts can employ to adjust conflicts and limit the negative or unexpected implications of legal pluralism. True, the available solutions may be far from optimal in terms of adequate consideration of all the relevant interests involved in litigation, and in choosing between them courts may end up being highly exposed to allegations of judicial activism.¹⁵⁰ This aspect would invite further theoretical efforts and, notably, the formulation of a methodology to increase the predictability and constructively handle this type of legal and jurisdictional conflict. Although this topic is beyond the aims of this article, the critical discussion of *FIAMM and Fedon* may nonetheless be instructive and contribute to that debate with a few insights.

The main lesson to be learned from that judgment is that an exclusivist approach to adjudication fails in terms of both process and substance. Entirely conceived within only the Community legal framework, the ruling of the Court of Justice displays no sign of awareness of (not to mention deference to) the decisions taken by the WTO adjudicative bodies in the related *Bananas* dispute. Insulation of the Community legal order is strategic in that judgment, and doctrinal orthodoxy plays a major role in this regard. Particularly the lack of direct effect of WTO agreements, in a version which probably goes beyond the original rationale of that doctrine, performs the crucial function of shielding the Court of Justice from external interferences and, notably, of preventing it from coming to terms with the substantive arguments concerning the illegality of the Community regime on bananas. Questionable interpretations of the DSU and the *Dorsch* precedent, and a formalistic construction of the general principles common to the laws of the Member States in the field of state liability converge towards the same end.

By failing to address and take into account the outcomes of legal practice developed outside the EC legal order, the Court of Justice sets a bad precedent in the relationships with other legal systems, not just in terms of process. What is worse, the mono-dimensional conceptualization of the *FIAMM and Fedon* litigation yields a judicial outcome which is problematic also from a substantive perspective. As shown, in that dispute the Courts had to keep many balls in the air: respect for the international rule of law, allocation of costs between economic actors, exposure of the EU budget, legal implications inherent in each of the available judicial solutions, scope for manoeuvre, and accountability of political institutions. Nevertheless, a close analysis of the case has shown that the Court of Justice decided to keep just one of them and drop the others. Rather than accommodating many interests, the Court privileged political discretion of EC

¹⁵⁰ *Ibid.*, at 14.

institutions above all, leaving the applicants with the remote promise that it would do better next time.

The critical review of *FIAMM and Fedon* illustrates that a number of alternative solutions for that dispute were possible. Crucial for their achievement was the demise of exclusivism and the embrace of a conceptual framework more attuned to a context of legal fragmentation. Against such background, litigation increasingly requires courts to develop a sort of cubist sensibility, whereby they can grasp the reality of the case from all the relevant directions at once. In adjudication, this results in a call for awareness and deference¹⁵¹ to the substantive, procedural, and jurisdictional claims of other legal systems. The shift to such a cubist sensibility does not entail the removal of adjudication from the native legal context in which courts regularly operate. In fact, courts cannot but continue to enforce the norms of their legal systems, with their distinct functional concerns, legal vocabularies, standards of adjudication, and, critically, ties with other legal systems. Yet, what courts may reasonably be expected to do in a context of fragmentation and interaction between legal systems is to use strategically the available margins of discretion and, notably, converge with their judicial outcomes towards the regulatory and adjudicative solutions devised in a related legal environment.

In both its variants, the case for civil liability in *FIAMM and Fedon* may be viewed as a rather interesting example in this regard. Liability for unlawful conduct, especially if construed according to the notion of limited direct effect of international trade obligations, offers the highest degree of substantive, procedural, and jurisdictional deference towards the WTO. The regulatory outcomes, the articulation of the enforcement procedure, the jurisdiction of the WTO adjudicative bodies are all elements which find the utmost consideration in the formulation of that remedy. Apart from a slight modification in the case law on direct effect, liability for unlawful conduct also fits perfectly with the established Community legal coordinates. Yet, preference for this remedy does not reflect just the concern for a sound legal process and smoother systemic interactions. Overall, also in substantive terms liability for unlawful conduct seems to perform more satisfactorily than the solution endorsed by the Court of Justice. As observed, its impact on political discretion is minimal as only selective exit is ruled out. For the rest, the scope for manoeuvre on the part of the Community institutions remains broad, being brought back only within the generous boundaries traced by the DSU.

Nevertheless, two major problems with this solution probably advise against its adoption. First, it is likely to be exceedingly expensive in economic terms. A finding of illegality exposes the EU budget to actions for damages related not only to trade sanctions but, critically, to trade restrictions. Arguably, if adopted in *FIAMM and Fedon* this solution could have administered a salutary shock and it might have increased the awareness of the EC political institutions of the consequences of their WTO violations. Yet, if regularly applied, such a remedy could result in too much of a burden on

¹⁵¹ *Ibid.*, at 28.

EU finances. Secondly, this remedy is costly also from an institutional perspective. The idea of measuring the liability of EC political institutions in the light of the DSU, appealing as it may be in legal and theoretical terms, is rather demanding for the judiciary. Courts are expected not only to be familiar with the WTO dispute settlement, but also to embark on thorny assessments as to the seriousness of the illegality which, in most of the cases, would discourage even the most favourably disposed judge. Finally, courts would probably be requested to second-guess political choices such as the decision to maintain breaches of international trade obligations despite a DSB recommendation – again, another scarcely appealing prospect for a thoughtful judge.

It is in the light of these latest considerations that even those who in principle might find attractive the remedy of liability for unlawful conduct could tactically subscribe to liability for lawful conduct as a more viable option. In conceptual terms, this would surely constitute a deflection from deference. A similar move, indeed, maintains a crucial degree of impermeability between the EC and the WTO legal systems which preserves the conduct of the EC political institutions from a finding of illegality and its costly implications. Yet, a similar expedient by no means should detract the Court of Justice from considering the WTO normative and interpretive claims. On the contrary, in opting for an alternative to liability for unlawful conduct, the Court of Justice could still apply a couple of precautions with a view to cushioning the impact of its tactical choice on the WTO legal system.

The first precaution concerns legal reasoning and addresses the necessity to account for the choice of not deferring to the relevant WTO ruling. As observed, disguising the lack of deference to precedents through an abstract invocation of the doctrine of lack of direct effect of WTO obligations serves judicial and legal interactions badly. A more considerate approach would lead the Court either to defend an interpretation of the WTO agreements inspired to the 'efficient breach' doctrine or, preferably, to justify with substantive legal arguments the EU resistance to the penetration of the WTO ruling.

The second precaution refers to the substantive solution of the case. In choosing between the possible alternatives to deference (in *FIAMM* and *Fedon* they were essentially the dismissal of the complaints and liability for lawful conduct), the Court should still opt for the one having the lesser impact on the substantive, jurisdictional, and procedural claims of the related legal system. In this view, liability for lawful conduct appears as the preferable choice. Apart from escaping many of the problems associated with a finding of illegality, it allows for broad political discretion and provides economic compensation to international trade bystanders without excessively exposing the EU budget. In this, it also displays a degree of awareness for the WTO normative and judicial claims. The political choice to maintain the breaches of WTO obligations is indirectly penalized and assisted with some element of judicial accountability, and also compensation of bystanders responds to the normative commitments (if not to the rules) inspiring the law of international trade.

Admittedly, such a solution, like that enforced by the Court of Justice, remains in tension with the *pacta sunt servanda* principle. Moreover, in the light of the *Francovich* experience, one could also fret that a damages principle designed for functional

reasons might soon become applicable well beyond its original purposes. On the whole, however, liability for lawful conduct appears, if not the finest of the solutions, at least an option which deserved more consideration. It is unfortunate that the Court of Justice, perhaps only for the sake of preserving the integrity of its prior case law, did not decide to experiment with it.