JUDGMENT OF THE COURT (Grand Chamber)

9 September 2008 *

In Joined Cases C-120/06 P and C-121/06 P,

TWO APPEALS under Article 56 of the Statute of the Court of Justice, brought on 24 and 27 February 2006 respectively,

Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM), established in Montecchio Maggiore (Italy),

Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC, formerly Fabbrica italiana accumulatori motocarri Montecchio Technologies Inc. (FIAMM Technologies), established in East Haven, Delaware (United States of America),

represented by I. Van Bael, A. Cevese and F. Di Gianni, avocats,

appellants,

the other parties to the proceedings being:

Council of the European Union, represented by A. Vitro, S. Marquardt and A. De Gregorio Merino, acting as Agents,

* Language of the case: Italian.

Commission of the European Communities, represented by P.J. Kuijper, V. Di Bucci, C. Brown and E. Righini, acting as Agents, with an address for service in Luxembourg,

defendants at first instance,

Kingdom of Spain, represented by E. Braquehais Conesa and M. Muñoz Pérez, acting as Agents, with an address for service in Luxembourg,

intervener at first instance (C-120/06 P),

and

Giorgio Fedon & Figli SpA, established in Vallesella di Cadore (Italy),

Fedon America, Inc., established in Wilmington, Delaware (United States of America),

represented by I. Van Bael, A. Cevese, F. Di Gianni and R. Antonini, avocats,

appellants,

the other parties to the proceedings being:

Council of the European Union, represented by A. Vitro, S. Marquardt and A. De Gregorio Merino, acting as Agents,

Commission of the European Communities, represented by P.J. Kuijper, V. Di Bucci, C. Brown and E. Righini, acting as Agents, with an address for service in Luxembourg,

defendants at first instance,

supported by:

Kingdom of Spain, represented by M. Muñoz Pérez, acting as Agent, with an address for service in Luxembourg,

intervener on appeal (C-121/06 P),

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, G. Arestis and U. Lõhmus, Presidents of Chambers, K. Schiemann (Rapporteur), E. Juhász, A. Borg Barthet, M. Ilešič, J. Malenovský, J. Klučka, E. Levits and C. Toader, Judges,

Advocate General: M. Poiares Maduro,
Registrar: J. Swedenborg, Administrator,

having regard to the written procedure and further to the hearing on 3 July 2007,

after hearing the Opinion of the Advocate General at the sitting on 20 February 2008,

gives the following

Judgment

1 By their appeals, Fabbrica italiana accumulatori motocarri Montecchio SpA and Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC (together referred to as 'FIAMM') and Giorgio Fedon & Figli SpA and Fedon America, Inc. (together referred to as 'Fedon') respectively request the Court to set aside the judgment of the Court of First Instance of the European Communities of 14 December 2005 in Case T-69/00 *FIAMM and FIAMM Technologies* v *Council and Commission* [2005] ECR II-5393 (Case C-120/06 P) and the judgment of the Court of First Instance of 14 December 2005 in Case T-135/01 *Fedon & Figli and Others* v *Council and Commission* (Case C-121/06 P). By those judgments ('the *FIAMM* judgment' and 'the *Fedon* judgment' respectively or, together, 'the judgments under appeal'), the Court of First Instance dismissed the actions brought by FIAMM and Fedon seeking compensation for the damage allegedly suffered by them on account of the increased customs duty which the Dispute Settlement Body ('the DSB') of the World Trade Organisation (WTO) authorised the United States of America to levy on imports of their products, following a finding by the DSB that the Community regime governing the import of bananas was incompatible with the agreements and understandings annexed to the Agreement establishing the WTO.

2 By order of the President of the Court of Justice of 8 August 2006, the Kingdom of Spain was granted leave to intervene in support of the forms of order sought by the Council of the European Union and the Commission of the European Communities in Case C-121/06 P.

3 By order of the President of the Court of Justice of 12 April 2007, Cases C-120/06 P and C-121/06 P were joined for the purposes of the oral procedure and the judgment.

Legal context

The WTO agreements

4 By Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-94) (OJ 1994 L 336, p. 1), the Council approved the Agreement establishing the WTO and the agreements in Annexes 1 to 4 to that agreement ('the WTO agreements').

5 Article 3(2) and (7) of the Understanding on Rules and Procedures Governing the Settlement of Disputes ('the DSU'), which forms Annex 2 to the Agreement establishing the WTO, provides:

'2. The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognise

that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

…

7. Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement. The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorisation by the DSB of such measures.'

6 Article 7 of the DSU provides that panels established at the request of a complaining party are to make such findings as will assist the DSB in making recommendations or in giving rulings on the matters submitted to that body. Under Article 12(7) of the DSU, where the parties to the dispute do not manage to develop a mutually satisfactory solution, the panel is to submit its findings in the form of a written report to the DSB.

7 Under Article 16(4) of the DSU, within 60 days after the date of circulation of a panel report to WTO members, the report is to be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.

8 Article 17 of the DSU provides for the establishment of a standing Appellate Body responsible for hearing appeals from panel cases. Under Article 17(6), an appeal is limited to issues of law covered in the panel report and legal interpretations developed by the panel. As is apparent from Article 17(13), in the report which it is called upon to provide the Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel.

9 Article 17(14) of the DSU provides:

'An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members….'

10 Article 19(1) of the DSU states:

'Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.'

11 Article 21 of the DSU, which is headed 'Surveillance of Implementation of Recommendations and Rulings', provides:

'1. Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.

…

3. At a DSB meeting held within 30 days after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so. The reasonable period of time shall be:

(a) the period of time proposed by the Member concerned, … approved by the DSB; or, in the absence of such approval,

(b) a period of time mutually agreed by the parties to the dispute …; or, in the absence of such agreement,

(c) a period of time determined through binding arbitration …

…

5. Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. …

6. The DSB shall keep under surveillance the implementation of adopted recommendations or rulings. … Unless the DSB decides otherwise, the issue of implementation of the recommendations or rulings shall be placed on the agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time pursuant to paragraph 3 and shall remain on the DSB's agenda until the issue is resolved….

…'

12 Article 22 of the DSU, headed 'Compensation and the Suspension of Concessions', provides:

'1. Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.

2. If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually

acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorisation from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.

3. In considering what concessions or other obligations to suspend, the complaining party shall apply the following principles and procedures:

(a) the general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment;

(b) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sectors under the same agreement;

(c) if that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to other sectors under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement;

…

(f) for purposes of this paragraph, "sector" means:

(i) with respect to goods, all goods;

…

…

4. The level of the suspension of concessions or other obligations authorised by the DSB shall be equivalent to the level of the nullification or impairment.

…

6. When the situation described in paragraph 2 occurs, the DSB, upon request, shall grant authorisation to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by consensus to reject the request. However, if the Member concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in paragraph 3 have not been followed where a complaining party has requested authorisation to suspend concessions or other obligations …, the matter shall be referred to arbitration. … Concessions or other obligations shall not be suspended during the course of the arbitration.

7. … The DSB shall … upon request, grant authorisation to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator, unless the DSB decides by consensus to reject the request.

8. The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached. In accordance with paragraph 6 of Article 21, the DSB shall continue to keep under surveillance the implementation of adopted recommendations or rulings, including those cases where compensation has been provided or concessions or other obligations have been suspended but the recommendations to bring a measure into conformity with the covered agreements have not been implemented.

…'

The Community legislation on the common organisation of the market in bananas, and the related dispute within the WTO

13 On 13 February 1993, the Council adopted Regulation (EEC) No 404/93 on the common organisation of the market in bananas (OJ 1993 L 47, p. 1), Title IV of which was devoted to trade with third countries and contained preferential provisions for bananas originating in certain African, Caribbean and Pacific States ('ACP States') that were co-signatories to the Fourth ACP–EEC Convention signed at Lomé on 15 December 1989 (OJ 1991 L 229, p. 3).

14 Following complaints lodged in February 1996 by several WTO members, including the United States of America, the regime governing that trade became the subject of a dispute settlement procedure.

15 In its report, the Appellate Body found that certain elements of that trading regime were incompatible with the obligations entered into by the Community under the WTO agreements and recommended that the DSB request the Community to bring the regime into conformity with those obligations. This report was adopted by decision of the DSB on 25 September 1997 ('the DSB's decision of 25 September 1997').

16 On 16 October 1997, the Community informed the DSB, in accordance with Article 21(3) of the DSU, that it would respect its international obligations.

17 Pursuant to Article 21(3)(c) of the DSU, the reasonable period of time within which the Community had to comply with its obligations was set by arbitral award as expiring on 1 January 1999.

18 As is apparent from recital 2 in its preamble, Council Regulation (EC) No 1637/98 of 20 July 1998 amending Regulation No 404/93 (OJ 1998 L 210, p. 28) altered the regime governing trade in bananas with third countries having regard to the fact that 'the Community's international commitments under the [WTO] and to the other signatories [to] the Fourth ACP-[EEC] Convention should be met, whilst achieving at the same time the purposes of the common organisation of the market in bananas'.

19 Commission Regulation (EC) No 2362/98 of 28 October 1998 laying down detailed rules for the implementation of Regulation No 404/93 regarding imports of bananas into the Community (OJ 1998 L 293, p. 32) became applicable on 1 January 1999.

20 Since the United States of America took the view that the new Community regime governing the import of bananas that had thereby been established preserved the unlawful elements of the previous regime, in breach of the WTO agreements and

the DSB's decision of 25 September 1997, on 14 January 1999 it requested the DSB, pursuant to Article 22(2) of the DSU, to authorise suspension of the application to the Community and its Member States of tariff concessions and related obligations under the General Agreement on Tariffs and Trade (GATT) 1994 and the General Agreement on Trade in Services (GATS), in respect of trade amounting to USD 520 million.

21 As the Community objected to that amount and maintained that the principles and procedures laid down in Article 22(3) of the DSU had not been observed, the DSB decided, on 29 January 1999, to refer this matter to arbitration, on the basis of Article 22(6) of the DSU.

22 By decision of 9 April 1999, the arbitrators found that several provisions of the new Community regime governing the import of bananas were contrary to provisions of the WTO agreements and set the level of nullification or impairment suffered by the United States of America at USD 191.4 million per year.

23 On 19 April 1999, the DSB authorised the United States of America to levy customs duty in respect of trade amounting to up to USD 191.4 million per year on imports originating in the Community.

24 On the same day, the United States authorities imposed ad valorem import duty at a rate of 100% on various products. These products, originating in Austria, Belgium, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Portugal, Spain, Sweden or the United Kingdom, included 'lead-acid storage batteries other than of a kind used for starting piston engines or as the primary source of power for electric vehicles' and 'articles of a kind normally carried in the pocket …, with outer surface of sheeting of plastic, of reinforced or laminated plastics'.

25 The Community regime governing the import of bananas was further amended by Council Regulation (EC) No 216/2001 of 29 January 2001 amending Regulation No 404/93 (OJ 2001 L 31, p. 2).

26 Recitals 1 to 6 in the preamble to Regulation No 216/2001 state:

'(1) There have been numerous close contacts with supplier countries and other interested parties to settle the disputes arising from the import regime established by Regulation (EEC) No 404/93 … and to take account of the conclusions of the [panel] set up under the dispute settlement system of the [WTO].

(2) Analysis of all the options presented by the Commission suggests that establishment in the medium term of an import system founded on the application of a customs duty at an appropriate rate and application of a preferential tariff to imports from ACP [States] provides the best guarantees, firstly of achieving the objectives of the common organisation of the market as regards Community production and consumer demand, secondly of complying with the rules on international trade, and thirdly of preventing further disputes.

(3) However, such a system must be introduced upon completion of negotiations with the Community's partners in accordance with WTO procedures, in particular Article XXVIII of the [GATT 1994]….

(4) Until the entry into force of that regime, the Community should be supplied under several tariff quotas open to imports from all origins and managed in line with the recommendations made by the [DSB]. …

(5) In view of the contractual obligations towards the ACP [States] and the need to guarantee them proper conditions of competition, application to imports of bananas originating in those countries of a tariff preference of EUR 300 per tonne would allow the trade flows in question to be maintained. This will entail in particular the application to such imports of zero duty under the … tariff quotas.

(6) The Commission should be authorised to open negotiations with supplier countries having a substantial interest in supplying the Community market to endeavour to achieve a negotiated allocation of the first two tariff quotas….'

27 On 11 April 2001, the United States of America and the Community concluded a memorandum of understanding identifying 'the means by which the long-standing dispute over the EC's banana import regime can be resolved'. That memorandum provided that the Community undertook to 'introduce a tariff-only regime for imports of bananas no later than 1 January 2006'. The memorandum defined the measures which the Community undertook to take during the interim period expiring on 1 January 2006. In return, the United States of America undertook to suspend provisionally the imposition of the increased customs duty which it was authorised to levy on Community imports.

28 Following the adoption of Commission Regulation (EC) No 896/2001 of 7 May 2001 laying down detailed rules for applying Regulation No 404/93 as regards the arrangements for importing bananas into the Community (OJ 2001 L 126, p. 6), the United States of America suspended application of its increased customs duty. From 1 July 2001, import duty on stationary batteries and articles of a kind normally carried in the pocket originating in the Community was reduced to its initial rate of 3.5% and 4.6% respectively.

The actions brought before the Court of First Instance, the course of the proceedings before it and the judgments under appeal

The actions

29 The business activities of FIAMM relate in particular to stationary batteries, and those of Fedon to spectacle cases and associated accessories falling within the category of articles of a kind normally carried in the pocket.

30 Since FIAMM and Fedon considered the Community to be liable for the damage which they claimed to have suffered as a result of the fact that these products were among those subject to the increased customs duty imposed by the United States authorities between 19 April 1999 and 30 June 2001, they brought before the Court of First Instance actions for compensation, founded on Article 235 EC in conjunction with the second paragraph of Article 288 EC, against the Council and the Commission.

31 The principal claim advanced by FIAMM and Fedon was that the Community had incurred non-contractual liability by reason of the unlawful conduct of its institutions. As is apparent from paragraphs 69 and 92 to 95 of the *FIAMM* judgment and paragraphs 63 and 85 to 88 of the *Fedon* judgment, they contended more specifically, as regards the unlawful conduct alleged, that the failure of the Council and the Commission to adopt amendments to the Community regime governing the import of bananas such as to bring it into conformity with the obligations entered into by the Community under the WTO agreements within the time-limit laid down by the DSB infringed the principle *pacta sunt servanda*, the principles of the protection of legitimate expectations and of legal certainty, their rights to property and pursuit of an economic activity and, finally, the principle of proper administration.

32 In the alternative, FIAMM and Fedon claimed, in particular, that the Community had incurred non-contractual liability even in the absence of unlawful conduct of its institutions.

Proceedings before the Court of First Instance

33 It is apparent from paragraphs 48 to 59 of the *FIAMM* judgment and paragraphs 48 to 55 of the *Fedon* judgment that the proceedings before the Court of First Instance took the following course.

34 FIAMM's action was brought on 23 March 2000 (Case T-69/00). The Kingdom of Spain was granted leave to intervene in that case by order of 11 September 2000.

35 Fedon's action was brought on 18 June 2001 (Case T-135/01).

36 Following a request made by the Commission pursuant to the second subparagraph of Article 51(1) of the Rules of Procedure of the Court of First Instance, both cases were reassigned to a chamber in extended composition, composed of five judges, by decisions of the Court of First Instance of 4 July and 7 October 2002.

37 Following the departure from office of the Judge-Rapporteur initially designated in those cases, a new Judge-Rapporteur was appointed on 13 December 2002.

38 By order of 3 February 2003, the case which gave rise to the *FIAMM* judgment and the cases which gave rise to the judgments of the Court of First Instance of 14 December 2005 in *Laboratoire du Bain* v *Council and Commission* (Case T-151/00) and *Groupe Fremaux and Palais Royal* v *Council and Commission* (Case T-301/00) were joined for the purposes of the oral procedure. A hearing was held in those cases on 11 March 2003.

39 By decisions of 23 March and 1 April 2004, the Court of First Instance reopened the oral procedure in those cases and referred to the Grand Chamber of the Court of First Instance both them and the related cases which gave rise to the judgments of the Court of First Instance of 14 December 2005 in *CD Cartondruck* v *Council and Commission* (Case T-320/00) and *Beamglow* v *Parliament and Others* (Case T-383/00) and to the *Fedon* judgment. These six cases were joined for the purposes of the oral procedure by order of 19 May 2004.

40 The hearing was held on 26 May 2004.

The judgments under appeal

41 By the judgments under appeal, the Court of First Instance dismissed the actions brought by FIAMM and Fedon.

42 The Court first dismissed, in paragraphs 84 to 150 of the *FIAMM* judgment and paragraphs 77 to 143 of the *Fedon* judgment, those applicants' actions for compensation in so far as they were founded on the regime governing non-contractual liability for unlawful conduct of the Community institutions.

43 Paragraph 100 of the *FIAMM* judgment is worded as follows:

'The applicants observe that all the principles infringed by the defendants are higher-ranking and are designed to protect individuals. Before the United States increased the import duty, the WTO regime directly granted the applicants the right to import their products into the United States paying the original import duty at the reduced rate of 3.5%. Even if the WTO agreements are not to be regarded as directly applicable, such effect must be accorded to the [DSB's] decision [of 25 September 1997] that found against the Community, which meets all the conditions laid down for that purpose by Community case-law.'

44 Paragraph 93 of the *Fedon* judgment is couched in the following terms:

'The applicants observe that, even if the WTO agreements were to be considered not to have direct effect, the DSB's decision [of 25 September 1997] that found against the Community should on the other hand be recognised as having such a property. The Court of Justice has acknowledged that it has the power to review the legality of actions of the Community institutions where, as here, they intended to implement a specific obligation assumed within the framework of the GATT.'

45 Ruling on the preliminary question as to whether the WTO rules could be relied upon, the Court of First Instance held in particular, in paragraphs 108 to 115 of the *FIAMM* judgment and paragraphs 101 to 108 of the *Fedon* judgment:

'108 [101] Before examining the legality of the conduct of the Community institutions, it is necessary to decide whether the WTO agreements give rise, for persons subject to Community law, to the right to rely on those agreements when contesting the validity of Community legislation if the DSB has declared that both that legislation and the subsequent legislation adopted

by the Community in order to comply with the WTO rules in question are incompatible with those rules.

109 [102] The applicants rely in this connection on the principle *pacta sunt servanda*, which is one of the rules of law with which the Community institutions must comply when carrying out their functions, being a fundamental principle of all legal orders and particularly of the international legal order (Case C-162/96 *Racke* [1998] ECR I-3655, paragraph 49).

110 [103] However, the principle *pacta sunt servanda* cannot be asserted against the defendants in the present case since, in accordance with settled case-law, the WTO agreements are not in principle, given their nature and structure, among the rules in the light of which the Community courts review the legality of action by the Community institutions ([judgment in Case C-149/96] *Portugal* v *Council* [[1999] ECR I-8395], paragraph 47; order in Case C-307/99 *OGT Fruchthandelsgesellschaft* [2001] ECR I-3159, paragraph 24; and judgments in Joined Cases C-27/00 and C-122/00 *Omega Air and Others* [2002] ECR I-2569, paragraph 93, Case C-76/00 P *Petrotub and Republica* v *Council* [2003] ECR I-79, paragraph 53, and Case C-93/02 P *Biret International* v *Council* [2003] ECR I-10497, paragraph 52).

111 [104] First, the Agreement establishing the WTO is founded on reciprocal and mutually advantageous arrangements which distinguish it from those agreements concluded between the Community and non-member States that introduce a certain asymmetry of obligations. It is common ground that some of the most important commercial partners of the Community do not include the WTO agreements among the rules by reference to which their courts review the legality of their rules of domestic law. To review the legality of actions of the Community institutions in the light of those rules could therefore lead to an unequal application of the WTO rules depriving the legislative or executive organs of the Community of the scope for manoeuvre enjoyed by their counterparts in the Community's trading partners (*Portugal* v *Council*, cited … above, paragraphs 42 to 46).

112 [105] Second, to require the courts to refrain from applying rules of internal law which are incompatible with the WTO agreements would have the consequence of depriving the legislative or executive organs of the contracting parties of the possibility afforded by Article 22 of the DSU of entering into negotiated arrangements, even on a temporary basis, in order to arrive at mutually acceptable compensation (*Portugal* v *Council*, cited … above, paragraphs 39 and 40).

113 [106] It follows that in principle the Community cannot incur non-contractual liability by reason of any infringement of the WTO rules by the defendant institutions (Case T-18/99 *Cordis* v *Commission* [2001] ECR II-913, paragraph 51, [Case T-30/99] *Bocchi Food Trade International* v *Commission* [[2001] ECR II-943], paragraph 56, and Case T-52/99 *T. Port* v *Commission* [2001] ECR II-981, paragraph 51).

114 [107] It is only where the Community intends to implement a particular obligation assumed in the context of the WTO or where the Community measure refers expressly to specific provisions of the WTO agreements that the Court can review the legality of the conduct of the defendant institutions in the light of the WTO rules (see, as regards the GATT 1947, Case 70/87 *Fediol* v *Commission* [1989] ECR 1781, paragraphs 19 to 22, and [Case C-69/89] *Nakajima* v *Council* [[1991] ECR I-2069], paragraph 31, and, as regards the WTO agreements, *Portugal* v *Council*, cited … above, paragraph 49, and *Biret International* v *Council*, cited … above, paragraph 53).

115 [108] However, notwithstanding the existence of a decision of the DSB finding the measures taken by a member to be incompatible with WTO rules, neither of those exceptions is applicable in this instance.'

46 The Court of First Instance then stated the reasons why it considered that neither of those exceptions could apply.

47 With regard to the exception based on an intention to implement a specific obligation assumed within the WTO, the Court held as follows in paragraphs 116, 121, 122 and 125 to 137 of the *FIAMM* judgment and paragraphs 109, 114, 115 and 118 to 130 of the *Fedon* judgment:

'116 [109] In undertaking, after the adoption of the [DSB's] decision of 25 September 1997, to comply with the WTO rules, the Community did not intend to assume a specific obligation in the context of the WTO capable of justifying an exception to the principle that WTO rules cannot be relied upon before the Community courts and of allowing the latter to review the legality of the conduct of the Community institutions by reference to those rules.

…

121 [114] The DSU … allows the WTO member involved several methods of implementing a recommendation or ruling of the DSB finding a measure incompatible with WTO rules.

122 [115] Where immediate withdrawal of the incompatible measure is impracticable, the DSU envisages, in Article 3(7), that the member harmed may be granted compensation or may be authorised to suspend the application of concessions or other obligations on an interim basis pending the withdrawal of the incompatible measure (see *Portugal* v *Council*, cited … above, paragraph 37).

…

125 [118] Even on expiry of the period of time set for bringing the measure declared incompatible into conformity with WTO rules and after authorisation and adoption of measures granting compensation or suspending concessions under Article 22(6) of the DSU, considerable importance is still accorded to negotiation between the parties to the dispute.

126 [119] Article 22(8) of the DSU thus makes it clear that the suspension of concessions or other obligations is temporary in nature and states that the suspension is only to be applied "until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached".

127 [120] Article 22(8) further provides that, in accordance with Article 21(6), the DSB is to continue to keep the implementation of adopted recommendations or rulings under surveillance.

128 [121] In the event of disagreement as to the compatibility with a WTO agreement of measures taken to comply with the DSB's recommendations and rulings, Article 21(5) of the DSU provides that the dispute is to be decided "through recourse to these dispute settlement procedures", which include pursuit by the parties of a negotiated solution.

129 [122] Neither the expiry of the period set by the DSB for the Community to bring its banana import regime into conformity with the DSB's decision of 25 September 1997 nor the decision of 9 April 1999, by which the DSB arbitrators expressly found that the new mechanism for banana imports established by Regulations No 1637/98 and No 2362/98 was incompatible with WTO rules, resulted in exhaustion of the methods for settling disputes made available by the DSU.

130 [123] To that extent, review by the Community courts of the legality of the conduct of the defendant institutions by reference to WTO rules could have the effect of weakening the position of the Community negotiators in the search for a mutually acceptable solution to the dispute that is consistent with WTO rules.

131 [124] In those circumstances, to require courts to refrain from applying the rules of internal law which are incompatible with the WTO agreements would have the consequence of depriving the legislative or executive organs of the contracting parties of the possibility afforded in particular by Article 22 of the DSU of entering into a negotiated arrangement even on a temporary basis (*Portugal* v *Council*, cited … above, paragraph 40).

132 [125] The applicants are therefore wrong in inferring from Articles 21 and 22 of the DSU an obligation on the WTO member to comply, within a specified period, with the recommendations and rulings of the WTO bodies and in contending that DSB rulings are enforceable unless the contracting parties unanimously oppose this.

133 [126] Moreover, in again amending, by Regulation No 216/2001, the banana import regime, the Council sought to reconcile various divergent objectives. The preamble to Regulation No 216/2001 thus states, in the first recital, that there were numerous close contacts in order, in particular, "to take account of the conclusions of the [panel]" and, in the second recital, that the new import system envisaged provides the best guarantees both "of achieving the objectives of the [COM for bananas] as regards Community production and consumer demand" and "of complying with the rules on international trade".

134 [127] It was, ultimately, in return for the Community's undertaking to establish a tariff-only regime for imports of bananas before 1 January 2006 that the United States of America agreed, as set out in the memorandum

of understanding concluded on 11 April 2001, to suspend provisionally the imposition of the increased customs duty.

135 [128] Such an outcome could have been jeopardised by intervention of the Community courts in reviewing the legality by reference to WTO rules of the conduct of the defendant institutions in the present case with a view to awarding compensation for the loss sustained by the applicants.

136 [129] The Court notes in this regard that, as the United States of America has expressly stated, the memorandum of understanding of 11 April 2001 does not in itself constitute a mutually agreed solution for the purposes of Article 3(6) of the DSU and that the question of implementation by the Community of the DSB's recommendations and rulings was still included on 12 July 2001, that is to say after the present action had been brought, on the agenda of the meeting of the DSB.

137 [130] It follows that the defendant institutions did not intend, by amending the Community regime at issue governing the import of bananas, to implement specific obligations arising from the WTO rules and in the light of which the DSB had found that regime to be incompatible with those rules.'

48 The Court also ruled out any application of the exception derived from express reference to specific provisions of the WTO agreements, after having in particular found in paragraph 142 of the *FIAMM* judgment and paragraph 135 of the *Fedon* judgment that 'the preambles to the various regulations amending the banana import regime do not show that the Community legislature referred to specific provisions of the WTO agreements when it purported to bring the regime into conformity with those agreements'.

49 The Court thus concluded, in paragraphs 144 and 145 of the *FIAMM* judgment and paragraphs 137 and 138 of the *Fedon* judgment, that, 'notwithstanding a finding of

incompatibility made by the DSB, the WTO rules do not in the present case, whether because of particular obligations which the Community intended to implement or because of an express reference to specific provisions, amount to rules of law by reference to which the legality of the institutions' conduct may be assessed' and that 'the applicants are not entitled to argue, for the purposes of their claim for compensation, that the conduct of which the Council and the Commission are accused is contrary to WTO rules'.

50 After observing in paragraph 146 of the *FIAMM* judgment and paragraph 139 of the *Fedon* judgment that 'the complaints advanced by the applicants based on breach of the principles of the protection of legitimate expectations and of legal certainty, on infringement of the right to property and to pursuit of an economic activity and, finally, on failure to observe the principle of proper administration all rest on the premiss that the conduct of which the defendant institutions are accused is contrary to WTO rules', the Court deduced, in paragraphs 147 and 140 of those judgments, that, 'inasmuch as those rules are not among the rules by reference to which the Community courts review the legality of the Community institutions' conduct, these complaints [would] therefore be rejected'.

51 In the light of the foregoing, the Court found, in paragraph 149 of the *FIAMM* judgment and paragraph 142 of the *Fedon* judgment, that, 'since it [had] not been proved that the conduct of which the defendant institutions [were] accused was unlawful, one of the three cumulative conditions of non-contractual liability of the Community for unlawful conduct [was] not met'. Consequently, it dismissed the applicants' first head of claim.

52 As regards the head of claim founded on a regime providing for non-contractual Community liability even in the absence of unlawful conduct of the institutions, the Court first of all affirmed the existence of such a regime in paragraphs 157 to 160 of the *FIAMM* judgment and paragraphs 150 to 153 of the *Fedon* judgment, stating as follows:

‘157 [150] Where, as in the present case, it has not been established that conduct attributed to the Community institutions is unlawful, that does not mean that undertakings which, as a category of economic operators, are required to bear a disproportionate part of the burden resulting from a restriction of access to export markets can in no circumstances obtain compensation by virtue of the Community’s non-contractual liability (see, to this effect, Case 81/86 *De Boer Buizen* v *Council and Commission* [1987] ECR 3677, paragraph 17).

158 [151] The second paragraph of Article 288 EC bases the obligation which it imposes on the Community to make good any damage caused by its institutions on the “general principles common to the laws of the Member States” and therefore does not restrict the ambit of those principles solely to the rules governing non-contractual Community liability for unlawful conduct of those institutions.

159 [152] 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.

160 [153] When damage is caused by conduct of the Community institution not shown to be unlawful, the Community can incur non-contractual liability if the conditions as to sustaining actual damage, to the causal link between that damage and the conduct of the Community institution and to the unusual and special nature of the damage in question are all met (Case C-237/98 P *Dorsch Consult* v *Council and Commission* [[2000] ECR I-4549], paragraph 19).’

53 The Court then concluded that the applicants had sustained actual and certain damage.

54 It further held that a direct causal link existed between the conduct of the Community institutions with regard to the importing of bananas into the Community and the damage thereby sustained by the applicants.

55 Finally, the Court held that the damage incurred by FIAMM and Fedon was not unusual in nature, and therefore rejected their claims in so far as they were founded on the regime providing for liability of the Community in the absence of unlawful conduct of its institutions.

56 In reaching this conclusion, the Court held in particular, in paragraphs 205 and 207 of the *FIAMM* judgment and paragraphs 194 and 196 of the *Fedon* judgment:

> '205 [194] … the possibility, which has come about in the present case, of tariff concessions being suspended as provided for by the WTO agreements is among the vicissitudes inherent in the current system of international trade. Accordingly, the risk of this vicissitude has to be borne by every operator who decides to sell his products on the market of one of the WTO members.
>
> …
>
> 207 [196] In addition, it is clear from Article 22(3)(b) and (c) of the DSU, an international instrument which was publicised appropriately so as to ensure that Community operators were aware of it, that the complaining member of the WTO may seek to suspend concessions or other obligations in sectors other than that in which the panel or Appellate Body has found a violation by the member concerned, whether under the same agreement or another WTO agreement.'

The forms of order sought and the course of the proceedings before the Court of Justice

57 FIAMM, in Case C-120/06 P, and Fedon, in Case C-121/06 P, claim respectively that the *FIAMM* judgment and the *Fedon* judgment should be set aside. They each put forward two pleas in law in support of their appeal.

58 By their first plea, they submit that the judgments under appeal lack reasoning and are unfounded so far as concerns one of the main arguments — regarding direct effect of decisions of the DSB — underlying their respective applications for damages by reason of unlawful conduct of the Community.

59 By their second plea, FIAMM and Fedon submit that, in concluding that the damage incurred by them was not unusual in nature and accordingly rejecting their claim for compensation founded on a liability regime applicable in the absence of unlawful conduct of the Community institutions, the Court of First Instance gave reasons that were insufficiently explained, illogical and at variance with the relevant settled case-law.

60 They each further claim that the Court should:

— give a substantive ruling confirming their entitlement to compensation arising out of the defendants' liability for an unlawful act or for a lawful act;

— in any event, order the defendants to pay the costs both of the appeal proceedings and of the proceedings at first instance.

61 In the alternative, FIAMM and Fedon request the Court to grant them fair compensation on account of the unreasonable duration of the proceedings before the Court of First Instance and to grant such further relief as fairness might require.

62 The Council contends that the Court should:

— replace certain of the Court of First Instance's grounds or partially set aside the judgments under appeal, declaring that non-contractual liability of the Community in the absence of an unlawful act is inapplicable in respect of a failure to take legislative action or, in the alternative, declaring that the factors required for such liability are not present;

— dismiss the appeals as unfounded;

— order the appellants to pay the costs.

63 The Commission contends that the Court should:

— dismiss the appeals, altering, in so far as is necessary, the grounds of the judgments under appeal;

— in the alternative, dismiss the claims put forward at first instance seeking compensation for damage;

— in the further alternative, refer the cases back to the Court of First Instance in order for the proceedings to be resumed and the damage for which compensation may be awarded to be quantified, in accordance with Article 61 of the Statute of the Court of Justice;

— order the appellants to pay the costs.

64 Both in Case C-120/06 P, in which it lodged a response in its capacity as a party to the proceedings before the Court of First Instance, and in Case C-121/06 P, in which it has the status of intervener before the Court of Justice, the Kingdom of Spain contends that the Court should:

— dismiss the appeal in so far as it relates to liability for an unlawful act of the defendant institutions;

— partially set aside the judgment under appeal and find that liability for a lawful act does not exist in Community law or, in the alternative, dismiss the appeal in so far as it relates to the liability of the defendant institutions for a lawful act or, in the further alternative, dismiss the appellants' claim for compensation for a lawful act;

— declare the claim for compensation based on the unreasonable duration of the proceedings before the Court of First Instance to be inadmissible;

— order the appellants to pay the costs.

65 After the Council and the Commission had lodged their responses in Cases C-120/06 P and C-121/06 P and the Kingdom of Spain had lodged its response in Case C-120/06 P, FIAMM and Fedon were, upon application by them, granted the right to submit a reply under Article 117(1) of the Rules of Procedure of the Court of Justice.

66 In Case C-120/06 P, the Court Registry received by fax, within the periods referred to in Article 117(1) and (2) respectively of the Rules of Procedure, FIAMM's reply and its response to the cross-appeal brought by the Council. The originals of those pleadings were not, however lodged at the Court Registry within the period of 10 days referred to in Article 37(6) of the Rules of Procedure. Consequently, those pleadings, and the originals thereof belatedly received at the Registry, were excluded from the proceedings and returned to FIAMM.

67 In Case C-121/06 P, Fedon lodged neither a reply nor a response to the Council's cross-appeal. Fedon and the Commission lodged observations on the statement in intervention of the Kingdom of Spain.

The first plea in the main appeals

Arguments of the parties

68 By their first plea, FIAMM and Fedon submit that the judgments under appeal lack reasoning and are unfounded as regards one of the main arguments put forward in

support of their respective applications for damages in respect of unlawful conduct of the Community.

69 They state that, as the Court of First Instance indeed noted in paragraph 100 of the *FIAMM* judgment and paragraph 93 of the *Fedon* judgment, during both the written procedure and the hearing they dwelt on the specific legal effects attaching to the DSB's decision of 25 September 1997 that found against the Community. They thus submitted that the existence of such a decision constitutes, alongside the two types of exception already laid down by *Fediol* v *Commission* and *Nakajima* v *Council*, a third case where it is appropriate to allow a breach of the WTO agreements by the Community institutions to be pleaded before the Community courts, in particular exclusively for purposes of compensation.

70 The assessments of the Court of First Instance and the mere reference to previous case-law contained in paragraphs 110 to 112 of the *FIAMM* judgment and paragraphs 103 to 105 of the *Fedon* judgment are irrelevant in this regard, since that case-law rules on a different question, namely whether a substantive rule contained in the WTO agreements can be relied upon for the purpose of reviewing the legality of Community legislation and of declaring, where appropriate, such legislation to be inapplicable.

71 As is apparent, in particular, from paragraphs 114 and 115 of the *FIAMM* judgment and paragraphs 107 and 108 of the *Fedon* judgment, the Court of First Instance took the DSB's decision of 25 September 1997 into consideration only in order to determine whether, given its existence, either of the exceptions already established in the case-law to the rule that the WTO agreements lack direct effect could apply here.

72 In so doing, the Court of First Instance did not take appropriate account of the arguments of FIAMM and Fedon to the effect that, after the expiry of the reasonable period of time allowed for implementing the DSB's decision of 25 September 1997, the Community then had just two options, namely to comply or not to comply with that decision. The flexibility of the WTO dispute settlement system, a feature which in particular enables the parties to pursue negotiated solutions and upon which

the case-law recalled in paragraph 112 of the *FIAMM* judgment and paragraph 105 of the *Fedon* judgment, establishing that it is not possible to review the legality of Community legislation in the light of the WTO agreements, is founded, is accordingly lacking here. In those circumstances there is nothing to preclude direct effect being accorded to a decision of the DSB.

73 Furthermore, a finding of unlawfulness which merely takes note of the failure to comply with the DSB's decision of 25 September 1997 within the period allowed does not require the substance of the Community measure at issue to be examined and cannot therefore affect the way in which the Community decides to put an end to the unlawfulness, any solution remaining possible provided that it is consistent with the WTO agreements and accepted by the opposing party.

74 Nor did the Court of First Instance take appropriate account of the arguments of FIAMM and Fedon that, unlike an application for annulment or a reference for a preliminary ruling on the validity of a measure, an action for compensation cannot result in the Community measure concerned being eliminated or rendered inapplicable or, therefore, in the responsible bodies of the parties to the WTO agreements being denied the possibility of entering into negotiated arrangements. That line of argument is particularly apposite because in the present instance the application for compensation is being examined after the conclusion of the dispute.

75 The same considerations provide grounds for rejecting the argument, recalled in paragraph 111 of the *FIAMM* judgment and paragraph 104 of the *Fedon* judgment, regarding the fact that the WTO agreements are founded on reciprocal and mutually advantageous arrangements.

76 The Council submits that the Court of First Instance in fact examined in parallel the possibility of relying on WTO rules and on the DSB's decision of 25 September 1997, as is apparent inter alia from paragraph 129 of the *FIAMM* judgment and paragraph 122 of the *Fedon* judgment.

77 The judgments under appeal are, moreover, consistent with the case-law stating that the WTO agreements are not in principle among the rules in the light of which the Court of Justice is to review the legality of measures adopted by the Community institutions, and the Court of First Instance correctly held that neither of the two permitted exceptions to that principle is applicable here.

78 Since the WTO agreements are not intended to confer rights on individuals, the Community likewise cannot incur liability by reason of any infringement of those agreements if the scope for manoeuvre enjoyed by WTO members with a view to complying or not complying with a decision of the DSB is not to be prejudiced.

79 The Council further contends that the distinction drawn by the appellants between the legal effects attached to a DSB decision and those resulting from the substantive rules which that decision has found to have been infringed is artificial. Such a decision can be taken into consideration in an action for compensation only in so far as those substantive rules have previously been found to have direct effect.

80 In the Commission's submission, at first instance FIAMM and Fedon did not in any way put forward the possibility of relying directly on a DSB decision as a specific and independent theory enabling the unlawfulness of action of the Community to be established or centre their arguments on this point. They essentially set out standard arguments in order to establish that the failure to amend the Community legislation so as to comply with the WTO agreements after the DSB's decision of 25 September 1997 involved a breach of higher-ranking rules of law.

81 It was only as a subsidiary point that FIAMM and Fedon simply contended, without expanding upon and otherwise substantiating this assertion, that, should the WTO agreements not be directly applicable, the DSB's decision of 25 September 1997 should have direct effect.

82 The Court of First Instance, which is not indeed required to rule on each of the arguments put forward by the applicants, accordingly took account of the arguments of FIAMM and Fedon in an appropriate manner, mainly concentrating, in paragraphs 108 to 150 of the *FIAMM* judgment and paragraphs 101 to 143 of the *Fedon* judgment, on an examination of the conduct of the Community institutions, but not without referring to the effects of the DSB's decision of 25 September 1997 in paragraphs 108 and 144 of the *FIAMM* judgment and paragraphs 101 and 137 of the *Fedon* judgment. In view of the, even implicit, grounds of the judgments under appeal, FIAMM and Fedon are, furthermore, able to understand the reasons for which the Court of First Instance held that the institutions' conduct had not been established to be unlawful, even after a decision of the DSB.

83 If the Court of Justice were nevertheless to hold that the grounds of the judgments under appeal are insufficient, it could uphold their operative parts while supplementing their grounds.

84 The question whether the WTO agreements may be relied upon by individuals who have suffered damage in order to contest the validity of Community legislation, in a situation where a DSB decision has found that legislation to be incompatible with the WTO agreements and the reasonable period of time granted for complying with the DSB decision has expired, was decided by the Court in the negative in Case C-377/02 *Van Parys* [2005] ECR I-1465.

85 Any distinction between review of the legality of Community action with a view to a finding of invalidity and such review with a view to the award of compensation is, in this regard, irrelevant. Furthermore, to compensate the industry affected by measures providing for suspension which are consistent with the WTO agreements would prejudice the rebalancing of concessions to which those measures contribute and would therefore prejudice reciprocity.

86 The Kingdom of Spain also takes the view that the judgments under appeal satisfy the obligation to state reasons. The Court of First Instance referred, in paragraph 100 of the *FIAMM* judgment and paragraph 93 of the *Fedon* judgment, to the proposition advanced by FIAMM and Fedon regarding the direct effect of a DSB decision and, in paragraphs 116 to 150 of the *FIAMM* judgment and paragraphs 109 to 143 of the

Fedon judgment, it refuted that proposition in examining the question whether the existence of such a decision enables the Community courts to review the legality of the conduct of the Community institutions in the light of WTO rules.

87 Furthermore, the Court of First Instance did not err in law in concluding that it was impossible to carry out such a review in the case in point. In particular, the risk for the Community of laying itself open to actions for damages would be liable to weaken its position and to lead it not to contemplate the possibility of exhausting all the ways in which disputes may be settled, including in particular the possible adoption of retaliatory measures by the opposing party and the subsequent search for a solution.

88 Nor is there any justification in law for drawing a distinction according to whether the review of the legality of the Community's action takes place with a view to the annulment of a measure or with a view to the award of compensation, since the criteria for such review are invariable and in particular cannot depend on whether or not there is damage or on the time at which the damage is alleged.

Findings of the Court

89 First of all, as the Advocate General has observed in point 20 of his Opinion, although, according to its heading, the first plea is intended to raise a lack of reasoning in the judgments under appeal, examination of the content of the appeals reveals that the latter also contain substantive complaints regarding the approach adopted by those judgments; those complaints were, moreover, the focus of most of the debate between the parties both during the written procedure and at the hearing. It is therefore appropriate, for the purposes of ruling on the first plea, to distinguish its two parts, concerning, first, a lack of reasoning in the judgments under appeal and, second, an error of law committed by the Court of First Instance in relation to the

conditions under which the Community can incur liability for the unlawful conduct of its institutions.

First part of the plea

90 The question whether the grounds of a judgment of the Court of First Instance are contradictory or inadequate is a question of law which is amenable, as such, to judicial review on appeal (see, inter alia, the judgment of 11 January 2007 in Case C-404/04 P *Technische Glaswerke Ilmenau* v *Commission*, paragraph 90).

91 It should however be recalled, first, that, as the Court of Justice has repeatedly held, the requirement that the Court of First Instance give reasons for its decisions cannot be interpreted as meaning that it is obliged to respond in detail to every single argument advanced by the appellant, particularly if the argument was not sufficiently clear and precise (see, inter alia, Case C-274/99 P *Connolly* v *Commission* [2001] ECR I-1611, paragraph 121; Case C-197/99 P *Belgium* v *Commission* [2003] ECR I-8461, paragraph 81; and *Technische Glaswerke Ilmenau* v *Commission*, paragraph 90).

92 Examination of the applications lodged by FIAMM and Fedon before the Court of First Instance reveals, first of all, that the assertion relating to the possible direct effect of the DSB's decision of 25 September 1997 does not appear at all in the section of those applications intended to establish that an infringement of the WTO agreements by the Community exists or can be relied upon. The assertion can be found in a section of the applications seeking to demonstrate that the higher-ranking rules of law which are thus alleged to have been infringed, and which include, in particular, the principle *pacta sunt servanda* and the WTO agreements, are 'intended to protect individuals', so that there would be compliance in that regard with one of the conditions which the case-law requires to be met in order for liability of the Community for unlawful conduct of its institutions to be put in issue.

93 Also, that assertion was expressed, from the angle described above, only very much as a subsidiary point, since FIAMM and Fedon simply submitted that, if direct effect and the resulting status of a rule protecting individuals were not to be accepted in the case of the WTO agreements, they should be as regards decisions of the DSB.

94 Finally, that assertion, which, as regards FIAMM, takes up two paragraphs of an application of 177 paragraphs and, as regards Fedon, is contained in a footnote, is not, either in the applications or in the replies subsequently lodged by FIAMM and Fedon, expanded upon or accompanied by a specific line of argument intended to support it.

95 It follows from the foregoing that, contrary to what FIAMM and Fedon contend in the very specific arguments which they devote to this question in the context of their appeals under the cover of a request that the reasoning of the judgments under appeal be reviewed, they did not in their applications to the Court of First Instance in any way state with the clarity and precision which would have been required that the direct effect which may attach to decisions of the DSB would justify the establishment of failure to comply with them as a new, third, exception to the principle that the WTO agreements cannot be relied upon for the purposes of reviewing the legality of secondary Community legislation. As is apparent from Fedon's application and FIAMM's reply, they, on the contrary, expressly invoked one of the two traditionally accepted exceptions to that principle, submitting that in this instance the Community indicated that it intended to implement a specific obligation assumed within the framework of the GATT.

96 Second, it should also be recalled that the obligation to state reasons does not require the Court of First Instance to provide an account which follows exhaustively and one by one all the arguments put forward by the parties to the case and that the reasoning may therefore be implicit on condition that it enables the persons concerned to know why the Court of First Instance has not upheld their arguments and provides the Court of Justice with sufficient material for it to exercise its power of review (see, in particular, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 372, and the judgment of 25 October 2007 in Case C-167/06 P *Komninou and Others* v *Commission*, paragraph 22).

97 It is apparent, first of all, from paragraph 108 of the *FIAMM* judgment and paragraph 101 of the *Fedon* judgment that in the case in point the Court of First Instance sought to decide whether the WTO agreements, including the DSU and its provisions devoted to the implementation of decisions of the DSB, confer on persons the right to rely on those agreements when contesting the validity of Community legislation 'if the DSB has declared that both that legislation and the subsequent legislation adopted by the Community in order to comply with the WTO rules in question are incompatible with those rules'.

98 Next, likewise referring to 'the WTO agreements' as so defined, the Court of First Instance explained, in paragraphs 110 to 112 of the *FIAMM* judgment and paragraphs 103 to 105 of the *Fedon* judgment, that, in accordance with settled case-law and for the reasons recalled by the Court of First Instance, those agreements are not in principle among the rules in the light of which the Community courts review the legality of action by the Community institutions.

99 Finally, it is to be noted that the judgments under appeal do contain considerable explanation of the legal effects that may attach to a decision of the DSB, in particular where the period of time allowed for implementation of the decision has expired.

100 While it is true that that explanation appears in passages of the judgments under appeal in which the Court of First Instance examined whether one of the two exceptions traditionally accepted by the case-law to the principle that the WTO agreements cannot be relied upon by individuals was applicable in the case in point, the fact remains that the findings made by the Court of First Instance at that juncture responded in an implicit, but nevertheless certain, manner to the specific arguments which are alleged in the appeals not to have been dealt with by the Court.

101 Thus, it is apparent in particular from paragraphs 129 to 131 of the *FIAMM* judgment and paragraphs 122 to 124 of the *Fedon* judgment that the Court of First Instance held, after an examination of the relevant provisions of the DSU, that the expiry of the period of time allowed for the Community to bring its banana import regime into conformity with the DSB's decision of 25 September 1997 had

not resulted in exhaustion of the methods for settling disputes made available by the DSU. The Court also stated in this connection that review of the legality of the conduct of the defendant institutions could have the effect of weakening the position of the Community negotiators in the search for a mutually acceptable solution to the dispute consistent with WTO rules and, in some cases, of thus depriving the legislative or executive organs of a contracting party of the possibility afforded in particular in Article 22 of the DSU of entering into a negotiated arrangement even on a temporary basis.

102 Furthermore, in paragraph 132 of the *FIAMM* judgment and paragraph 125 of the *Fedon* judgment, the Court of First Instance concluded its analysis in this regard, holding that the applicants were therefore wrong in inferring from Articles 21 and 22 of the DSU an obligation on the WTO member to comply, within a specified period, with the recommendations and rulings of the WTO bodies and in contending that DSB rulings are enforceable unless the contracting parties unanimously oppose this.

103 In so deciding, the Court of First Instance ruled, implicitly at the very least, on the applicants' assertion that direct effect should be accorded to such recommendations or such rulings once the period of time allowed for their implementation has expired.

104 It follows from all of the foregoing that the grounds of the judgments under appeal deal adequately with the arguments set out by the applicants at first instance and that they in particular enable the Court of Justice to exercise its power of judicial review, so that the first part of the plea must be declared unfounded.

Second part of the plea

105 The following should be stated in relation to the second part of the first plea, alleging an error of law regarding the circumstances in which liability for unlawful conduct of the Community can found an action.

106 The Court has consistently interpreted the second paragraph of Article 288 EC as meaning that the non-contractual liability of the Community and the exercise of the right to compensation for damage suffered depend on the satisfaction of a number of conditions, relating to the unlawfulness of the conduct of which the institutions are accused, the fact of damage and the existence of a causal link between that conduct and the damage complained of (see, inter alia, Case 26/81 *Oleifici Mediterranei* v *EEC* [1982] ECR 3057, paragraph 16, and Case C-146/91 *KYDEP* v *Council and Commission* [1994] ECR I-4199, paragraph 19).

107 Here, the applicants essentially contended in support of their claim for compensation before the Court of First Instance that the Community institutions acted unlawfully, and therefore wrongfully, in failing to bring the Community legislation into conformity with the WTO agreements within the reasonable period of time that the Community was allowed for that purpose after a decision of the DSB had found that legislation to be incompatible with the WTO agreements.

108 It is to be observed in that regard that the effects within the Community of provisions of an agreement concluded by the Community with non-member States may not be determined without taking account of the international origin of the provisions in question. In conformity with the principles of public international law, Community institutions which have power to negotiate and conclude such an agreement are free to agree with the non-member States concerned what effect the provisions of the agreement are to have in the internal legal order of the contracting parties. If that question has not been expressly dealt with in the agreement, it is the courts having jurisdiction in the matter and in particular the Court of Justice within the framework of its jurisdiction under the EC Treaty that have the task of deciding it, in the same

manner as any other question of interpretation relating to the application of the agreement in question in the Community (see, in particular, Case 104/81 *Kupferberg* [1982] ECR 3641, paragraph 17, and *Portugal* v *Council*, paragraph 34), on the basis in particular of the agreement's spirit, general scheme or terms (see, to this effect, Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, paragraph 110).

109 Therefore, specifically, it falls to the Court to determine, on the basis in particular of the abovementioned criteria, whether the provisions of an international agreement confer on persons subject to Community law the right to rely on that agreement in legal proceedings in order to contest the validity of a Community measure (see, with regard to the GATT 1947, Joined Cases 21/72 to 24/72 *International Fruit Company and Others* [1972] ECR 1219, paragraph 19).

110 As is apparent from its case-law, the Court considers that it can examine the validity of secondary Community legislation in the light of an international treaty only where the nature and the broad logic of the latter do not preclude this and, in addition, the treaty's provisions appear, as regards their content, to be unconditional and sufficiently precise (see, in particular, Case C-308/06 *Intertanko and Others* [2008] ECR I-4057, paragraph 45 and the case-law cited).

111 As regards, more specifically, the WTO agreements, it is settled case-law that, 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 (see, in particular, *Portugal* v *Council*, paragraph 47; *Biret International* v *Council*, paragraph 52; and *Van Parys*, paragraph 39).

112 It is only where the Community has intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the WTO agreements, that it is for the Court to review the legality of the Community measure in question in the light of the WTO rules (see *Biret International* v *Council*, paragraph 53, and *Van Parys*, paragraph 40 and the case-law cited).

113 The Court has already held that the common organisation of the market in bananas, as introduced by Regulation No 404/93 and subsequently amended, is not designed to ensure the implementation in the Community legal order of a particular obligation assumed in the context of the GATT and does not refer expressly to specific provisions of the GATT either (order in *OGT Fruchthandelsgesellschaft*, paragraph 28).

114 As regards, in particular, Regulation No 1637/98 and the regulations adopted to implement it, the Court stated in *Van Parys*, paragraph 52, that they do not expressly refer to specific provisions of the WTO agreements.

115 The Court also held in that judgment that, by undertaking after the adoption of the DSB's decision of 25 September 1997 to comply with the WTO rules and, in particular, with Articles I(1) and XIII of the GATT 1994, the Community did not intend to assume a particular obligation in the context of the WTO, capable of justifying an exception to the principle that WTO rules cannot be relied upon before the Community courts and enabling the Community courts to review the legality of Regulation No 1637/98 and the regulations adopted to implement it in the light of those rules (see, to this effect, *Van Parys*, paragraphs 41 and 52).

116 It should be remembered that the decisive factor here is that the resolution of disputes concerning WTO law is based, in part, on negotiations between the contracting parties. Withdrawal of unlawful measures is admittedly the solution recommended by WTO law, but other solutions are also authorised (*Omega Air and Others*, paragraph 89).

117 The Court thus held in *Van Parys*, paragraph 51, that the expiry of the period granted by the DSB for implementation of its decision of 25 September 1997 does not imply that the Community had exhausted the possibilities under the DSU of finding a solution to the dispute between it and the other parties. In those circumstances, to require the Community courts, merely on the basis that that period has expired, to

review the legality of the Community measures concerned in the light of the WTO rules could have the effect of undermining the Community's position in its attempt to reach a mutually acceptable solution to the dispute in conformity with those rules.

118 Referring in particular to the memorandum of understanding concluded with the United States of America on 11 April 2001, the Court observed more specifically that such an outcome, by which the Community sought to reconcile its obligations under the WTO agreements with those in respect of the ACP States, and with the requirements inherent in the implementation of the common agricultural policy, could have been compromised if the Community courts had been entitled to review the legality of the Community measures in question in the light of the WTO rules upon the expiry of the reasonable period of time granted by the DSB (see, to this effect, *Van Parys*, paragraphs 49 and 50).

119 The Court also pointed out that to accept that the Community courts have the direct responsibility for ensuring that Community law complies with the WTO rules would effectively deprive the Community's legislative or executive organs of the scope for manoeuvre enjoyed by their counterparts in the Community's trading partners. It is not in dispute that some of the contracting parties, including the Community's most important trading partners, have concluded from the subject-matter and purpose of the WTO agreements that they are not among the rules applicable by their courts when reviewing the legality of their rules of domestic law. Such lack of reciprocity, if accepted, would risk introducing an imbalance in the application of the WTO rules (*Van Parys*, paragraph 53).

120 As is apparent from the Court's case-law, there is also no reason to draw a distinction in these various respects according to whether the legality of the Community action is to be reviewed in annulment proceedings or for the purpose of deciding an action for compensation (see to this effect, with regard to the period preceding the expiry of the reasonable period of time allowed for implementing a decision of the DSB, *Biret International* v *Council*, paragraph 62).

121 First, as the Court has pointed out, the prospect of actions for damages is liable to hinder exercise of the powers of the legislative authority whenever it has occasion to adopt, in the public interest, legislative measures which may adversely affect the interests of individuals (Joined Cases 83/76, 94/76, 4/77, 15/77 and 40/77 *Bayerische HNL Vermehrungsbetriebe and Others* v *Council and Commission* [1978] ECR 1209, paragraph 5, and Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame* [1996] ECR I-1029, paragraph 45).

122 Second, any determination by the Community courts that a Community measure is unlawful, even when not made in the exercise of their jurisdiction under Article 230 EC to annul measures, is inherently liable to have repercussions on the conduct required of the institution that adopted the measure in question.

123 Thus, in particular, it is settled case-law that when the Court rules, in proceedings under Article 234 EC, that a measure adopted by a Community authority is invalid, its decision has the legal effect of requiring the competent Community institutions to take the necessary measures to remedy that illegality, as the obligation laid down in Article 233 EC in the case of a judgment annulling a measure applies in such a situation by analogy (see, in particular, the order of 8 November 2007 in Case C-421/06 *Fratelli Martini and Cargill*, paragraph 52 and the case-law cited).

124 There is nothing to suggest that the position should be different in the case of a judgment delivered in an action for compensation in which it is found that a measure adopted by the Community or a failure by it to act is unlawful. As the Advocate General has observed in point 49 of his Opinion, any determination by the Community courts that a measure is unlawful, even when made in an action for compensation, has the force of res judicata and accordingly compels the institution concerned to take the necessary measures to remedy that illegality.

125 The distinction which the appellants seek to draw between the 'direct effect' of the WTO rules imposing substantive obligations and the 'direct effect' of a decision of the DSB, asserting that it should be open to individuals to have the legality of the conduct of the Community institutions reviewed by the Community courts in the light of the DSB decision itself if such a review is not possible in the light of the WTO rules which that decision has found to have been infringed, calls for the following comments.

126 Even though the Court has not yet been required to rule expressly on such a distinction, it nevertheless necessarily follows from its case-law mentioned above that there is no basis for the distinction.

127 In holding that the WTO rules which have been found by a decision of the DSB to have been infringed cannot, notwithstanding the expiry of the period of time laid down for implementing that decision, be relied upon before the Community courts for the purpose of having the legality of the conduct of the Community institutions reviewed by the Community courts in the light of those rules, the Court has necessarily excluded such a review in the light of the DSB decision itself.

128 A DSB decision, which has no object other than to rule on whether a WTO member's conduct is consistent with the obligations entered into by it within the context of the WTO, cannot in principle be fundamentally distinguished from the substantive rules which convey such obligations and by reference to which such a review is carried out, at least when it is a question of determining whether or not an infringement of those rules or that decision can be relied upon before the Community courts for the purpose of reviewing the legality of the conduct of the Community institutions.

129 A recommendation or a ruling of the DSB finding that the substantive rules contained in the WTO agreements have not been complied with is, whatever the precise legal effect attaching to such a recommendation or ruling, no more capable than those rules of conferring upon individuals a right to rely thereon before the Community courts for the purpose of having the legality of the conduct of the Community institutions reviewed.

130 First, as is apparent from paragraphs 113 to 124 of the present judgment, the considerations linked to the nature of the WTO agreements and to the reciprocity and flexibility characterising them continue to obtain after such a ruling or recommendation has been adopted and after the reasonable period of time allowed for its implementation has expired. The Community institutions continue in particular to have an element of discretion and scope for negotiation vis-à-vis their trading partners with a view to the adoption of measures intended to respond to the ruling or recommendation, and such leeway must be preserved.

131 Second, as is apparent from Article 3(2) of the DSU, recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the agreements concerned. It follows in particular that a decision of the DSB finding an infringement of such an obligation cannot have the effect of requiring a party to the WTO agreements to accord individuals a right which they do not hold by virtue of those agreements in the absence of such a decision.

132 It should, in particular, be recalled in this regard that the Court has already held in relation to the provisions of the GATT 1994, which have been found by the DSB to have been infringed in the present case, that those provisions are not such as to create rights upon which individuals may rely directly before the courts by virtue of Community law (see, to this effect, the order in *OGT Fruchthandelsgesellschaft*, paragraphs 25 and 26).

133 It follows from all of the foregoing considerations that the Court of First Instance rightly decided that, notwithstanding the expiry of the period of time allowed for implementing a decision of the DSB, the Community courts could not, in the circumstances of the case in point, review the legality of the conduct of the Community institutions in the light of WTO rules.

134 Since, therefore, neither part of the first plea in the appeals is well founded, this plea must be dismissed.

The second plea in the main appeals, the cross-appeals and the claims seeking the substitution of grounds

Arguments of the parties

135 By a second plea, FIAMM and Fedon submit that, in holding when it examined their claims expressed in terms of no-fault Community liability that the damage suffered by them was not unusual in nature, the Court of First Instance adopted illogical reasoning and infringed certain principles that are well established in the case-law.

136 According to FIAMM and Fedon, in the judgments under appeal the Court of First Instance in particular misapplied the dual requirement that damage must be, first, foreseeable and, second, inherent in operating in the sector concerned if it is to be classifiable as usual.

137 Damage caused by customs penalties imposed by a non-member State in the industrial-battery or spectacle-case sector following a dispute in the banana sector is not inherent in the first two of those sectors, as is attested in particular by Article 22(3)(a) of the DSU. Such damage is all the less foreseeable because of its novel punitive nature and because it is unprecedented in GATT and WTO history and in relations between the Community and the United States of America.

138 The Court of First Instance's reasoning that, as Article 22(3) of the DSU authorises the adoption of retaliatory measures, the damage incurred is not unusual is contradictory. To take the view that damage is usual because it is the consequence of an act permitted by the applicable law is tantamount to denying that damage caused by a

lawful act can give rise to liability, but this possibility is accepted by the judgments under appeal.

139 The Council contends that the Court of First Instance was right in holding that the alleged damage falls within the normal risks which an exporter must assume given the current arrangements for world trade.

140 However, it contests some of the grounds of the judgments under appeal and asks the Court either to substitute various grounds in those respects or, ruling on the cross-appeals brought by it in this regard, to set aside those judgments in part.

141 First, since barely half of the Member States' legal systems provide for the possibility — which moreover is subject to very strict conditions — of obtaining compensation for damage resulting from certain lawful acts of public authorities, the Council contests the statement, appearing in paragraph 160 of the *FIAMM* judgment and paragraph 153 of the *Fedon* judgment, according to which a general principle common to the Member States exists that enables the liability of the Community to be put in issue even in the absence of unlawful conduct on the part of its institutions.

142 Even assuming that such a principle can be established, the Court of First Instance was in any event wrong in its view that it is capable of applying in a situation such as that here since, in particular:

— liability for legislative omission would limit both the freedom of choice inherent in the Commission's right of initiative and the legislature's discretion, calling into question the separation of powers and institutional balance intended by the Treaty;

— the lack of proportionality between Community liability for an unlawful legislative measure, which is subject to very strict conditions as regards the unlawfulness of the conduct, and liability for a lawful legislative omission, which would require only special and unusual damage and therefore be more easily brought into play, betrays an inconsistency;

— the position thus adopted by the Court of First Instance conflicts with the reasoning followed by it in concluding that it is not possible to rely on WTO rules in an action for compensation founded on unlawful Community conduct, in particular with the need not to deprive the Community organs of the scope for manoeuvre enjoyed by the organs of the Community's trading partners.

143 Second, the judgments under appeal wrongly concluded that there was damage that was certain, since FIAMM and Fedon had not proved the existence, extent or the precise amount of such damage.

144 Third, with regard to the causal link, the Court of First Instance failed to observe the requirement that the damage must be a sufficiently direct consequence of the conduct of the institution concerned. There is no automatic link between the DSB's decision of 25 September 1997 and the introduction of the increased customs duty at issue, since the United States authorities, in the exercise of their discretion, decided in principle to impose the duty and determined the products upon which it would be charged and its rate when, in particular, they could have accepted the compensation offered by the Community.

145 The Commission too submits that the Court of First Instance rightly concluded in the judgments under appeal that there was no unusual damage. In order for damage to be usual, it is in particular not necessary for the risk of it occurring to be inherent in the sector in which the business operates. Involvement in international trade is, whatever the product market concerned, accompanied by the risk that an importing country will adopt decisions affecting trade for the most diverse reasons.

146 While thus concluding that the second plea in the appeals should be dismissed, the Commission submits however, like the Council, that the Court of First Instance made various errors of law as regards the question of Community liability in the absence of unlawful conduct on the part of its institutions. Since the operative parts of the judgments under appeal are nevertheless justified, it asks the Court of Justice to substitute various grounds in this regard.

147 First, so far as concerns the affirmation as to the very existence of the principle of such liability, the Court of First Instance could not, according to the Commission, make so significant an innovation on the basis of merely the vague reasoning contained in paragraph 159 of the *FIAMM* judgment and paragraph 152 of the *Fedon* judgment.

148 This principle has never been accepted by the case-law, which has systematically left the question to one side, merely setting out a purely hypothetical reference framework in this regard without in any way laying down the conditions under which and fields and situations in which such liability could where appropriate be incurred.

149 Furthermore, by setting out in paragraph 160 of the *FIAMM* judgment and paragraph 153 of the *Fedon* judgment the conditions to which liability is subject, the Court of First Instance implicitly but necessarily held that this principle applies in the type of situation covered by the present case, without establishing, however, whether such a conclusion is justified in the light of principles common to the legal systems of the Member States.

150 In particular, the Court of First Instance did not focus its examination on instances of liability of the public authorities resulting from legislative activity, referring on the contrary, in paragraph 159 of the *FIAMM* judgment and paragraph 152 of the *Fedon* judgment, in the most general manner to the possibility of obtaining compensation from the perpetrator of damage in the absence of fault on his part.

151 However, examination of the 25 legal orders of the Member States indicates that, in contrast to cases such as expropriation in the public interest or compensation paid by the State for damage caused by dangerous activity on its part or on account of a specific relationship between it and the victim, which are irrelevant here, any obligation to pay compensation as a result of a lawful State act reflecting a broad discretion, on account for example of considerations of solidarity or fairness, is unknown to the law of a large number of Member States. While liability of such a type can be found, in exceptional circumstances, in the legal orders of certain other Member States, it is, as a general rule, limited solely to administrative acts, with the notable exception of French law which alone clearly accepts this type of liability in the case of legislative activity, provided that the damage is unusual, special, serious and direct, that the legislature is not pursuing the common good and that the legislature has not ruled out compensation as a matter of principle.

152 Furthermore, the principle specific to French law cannot be transferred to the Community legal order. While the basis of that principle is the fact that, in France, judicial review by the Conseil d'État (Council of State) of the constitutionality of laws is precluded, Community law provides for review of the legality of measures of the legislature by reference to the Treaty and fundamental principles and for the possibility of the liability of the Community to be put in issue if those higher-ranking norms are infringed.

153 Second, the Commission submits that, in concluding in the judgments under appeal that there was real and certain damage, the Court of First Instance in particular distorted the Commission's arguments, failed to verify specifically that the damage was real and certain and infringed the principles for determining who has the burden of proof.

154 Third, the Commission contends, for reasons analogous to those set out by the Council, that the Court of First Instance erred in the legal characterisation of the facts in concluding that the condition relating to the causal link was met in the case in point.

155 The Kingdom of Spain also contends that the second plea in the appeals should be dismissed. As practice shows, there is nothing unforeseeable or exceptional in the imposition of retaliatory measures within the framework of the WTO, including in sectors other than those concerned by a dispute.

156 By the cross-appeal which it has brought in Case C-120/06 P and in its statement in intervention in Case C-121/06 P, the Kingdom of Spain further requests that the judgments under appeal be set aside in so far as the Court of First Instance held that Community law includes, by way of a general principle common to the Member States, a system of liability for lawful acts. Moreover, in conferring upon that principle a scope as wide as that resulting from the conditions set out in paragraph 160 of the *FIAMM* judgment and paragraph 153 of the *Fedon* judgment, the Court of First Instance failed to have regard to the finding which it itself made in paragraph 159 of the *FIAMM* judgment and paragraph 152 of the *Fedon* judgment.

157 Acceptance of the possibility of Community liability for a legislative omission although no rule obliging the Community to act can be invoked by the person harmed disregards the principle of reciprocity which the Court of First Instance relied on in rejecting the possibility of liability for unlawful conduct.

158 In its observations on the statement in intervention of the Kingdom of Spain, Fedon contends that the Court of First Instance was right in holding that a principle of liability for lawful conduct of the Community institutions has been laid down and delimited by settled case-law, as the Court of Justice noted in *Dorsch Consult* v *Council and Commission*.

159 Since the second paragraph of Article 288 EC is intended to safeguard the fundamental principle of a State based on the rule of law that protects individuals and, in particular, their rights to property and pursuit of an economic activity, it must, having regard to the liberal orientation of the Community legal system, be interpreted in such a way as to favour the most liberal principles characterising the legal systems of the Member States. In addition, in a Union composed of 25 Member States this

provision must be interpreted flexibly if it is not to be rendered inapplicable. In the case in point, the legal systems of the new Member States should nevertheless not be taken into account, since the relevant enlargement occurred after the material time.

160 Fedon further submits that the objection put forward by the Kingdom of Spain relating in particular to the fact that the conduct complained of consists of an omission is inadmissible as it was not raised at first instance. In any event, the Community can incur liability for both omissions and acts of the institutions.

Findings of the Court

161 In the first plea of their respective cross-appeals, the Council has contended that the *FIAMM* and *Fedon* judgments should be set aside, and the Kingdom of Spain that the *FIAMM* judgment should be set aside, on the ground that the Court of First Instance erred in law in establishing a principle of Community liability in the absence of unlawful conduct attributable to its institutions or, in any event, in holding that such a principle is applicable in the case of conduct such as that at issue in the case in point. Without bringing a cross-appeal, the Commission asks the Court to retain the operative parts of the judgments under appeal but to substitute grounds to the same effect.

162 Since the grounds of challenge as so formulated dispute the very existence or very applicability of the liability regime which the judgments under appeal applied, they should be considered first.

163 Indeed, if the error of law pleaded were proved, there would no longer be any need to rule on the second plea in the main appeals, concerning the unusual nature of

the damage incurred, or on the other two pleas in the cross-appeals, respectively concerning the lack of certainty of the damage and the lack of a causal link, as the liability regime to which those three conditions are supposed to relate would not exist or not be applicable.

The first plea in the cross-appeals and the claims seeking the substitution of grounds, according to which a regime of no-fault liability, as established by the judgments under appeal, does not exist

164 It should be pointed out first of all that, in accordance with the settled case-law noted in paragraph 106 of the present judgment, the second paragraph of Article 288 EC means that the non-contractual liability of the Community and the exercise of the right to compensation for damage suffered depend on the satisfaction of a number of conditions, relating to the unlawfulness of the conduct of which the institutions are accused, the fact of damage and the existence of a causal link between that conduct and the damage complained of.

165 The Court has also repeatedly pointed out that that liability cannot be regarded as having been incurred without satisfaction of all the conditions to which the duty to make good any damage, as defined in the second paragraph of Article 288 EC, is thus subject (*Oleifici Mediterranei* v *EEC*, paragraph 17).

166 The Court has accordingly held that, where the Community courts find that there is no act or omission by an institution of an unlawful nature, so that the first condition for non-contractual Community liability under the second paragraph of Article 288 EC is not satisfied, they may dismiss the application in its entirety without it being necessary for them to examine the other preconditions for such liability, namely the fact of damage and the existence of a causal link between the conduct of the

institutions and the damage complained of (see, in particular, *KYDEP* v *Council and Commission*, paragraphs 80 and 81).

167 The Court's case-law enshrining, in accordance with the second paragraph of Article 288 EC, both the existence of the regime governing the non-contractual liability of the Community for the unlawful conduct of its institutions and the conditions for the regime's application is thus firmly established. By contrast, that is not so in the case of a regime governing non-contractual Community liability in the absence of such unlawful conduct.

168 Contrary to what the Court of First Instance stated in the judgments under appeal, it cannot, first of all, be deduced from the case-law prior to those judgments that the Court of Justice has established the principle of such a regime.

169 As the Court of Justice noted in particular in *Dorsch Consult* v *Council and Commission*, paragraph 18, a judgment to which the Court of First Instance refers in paragraph 160 of the *FIAMM* judgment and paragraph 153 of the *Fedon* judgment, the Court has on the contrary hitherto limited itself, as set out in settled case-law, to specifying some of the conditions under which such liability could be incurred in the event of the principle of Community liability for a lawful act being recognised in Community law (see also, in similar terms, Case 59/83 *Biovilac* v *EEC* [1984] ECR 4057, paragraph 28). It was solely on that basis that the Court noted in *Dorsch Consult* v *Council and Commission*, paragraph 19, that if the principle of such liability came to be recognised, at the very least three conditions, comprising the fact of damage, the existence of a causal link between it and the act concerned and the unusual and special nature of the damage, would all have to be satisfied in order for liability to be incurred.

170 Secondly, as regards the liability regime recognised in Community law, the Court, while noting that it is to the general principles common to the laws of the Member States that the second paragraph of Article 288 EC refers as the basis of the non-contractual liability of the Community for damage caused by its institutions or by its servants in the performance of their duties, has held that the principle of the

non-contractual liability of the Community expressly laid down in that article is simply an expression of the general principle familiar to the legal systems of the Member States that an unlawful act or omission gives rise to an obligation to make good the damage caused (*Brasserie du pêcheur and Factortame*, paragraphs 28 and 29).

171 As regards, more specifically, liability for legislative activity, the Court moreover pointed out at a very early stage that, although the principles in the legal systems of the Member States governing the liability of public authorities for damage caused to individuals by legislative measures vary considerably from one Member State to another, it is however possible to state that the public authorities can only exceptionally and in special circumstances incur liability for legislative measures which are the result of choices of economic policy (*Bayerische HNL Vermehrungsbetriebe and Others* v *Council and Commission*, paragraph 5).

172 The Court has therefore held in particular that, in view of the second paragraph of Article 288 EC, the Community does not incur liability on account of a legislative measure which involves choices of economic policy unless a sufficiently serious breach of a superior rule of law for the protection of the individual has occurred (see, inter alia, Joined Cases 9/71 and 11/71 *Compagnie d'approvisionnement, de transport et de crédit and Grands Moulins de Paris* v *Commission* [1972] ECR 391, paragraph 13; *Bayerische HNL Vermehrungsbetriebe and Others* v *Council and Commission*, paragraph 4; Case 50/86 *Les Grands Moulins de Paris* v *EEC* [1987] ECR 4833, paragraph 8; and Case C-119/88 *AERPO and Others* v *Commission* [1990] ECR I-2189, paragraph 18).

173 It has further pointed out, in this connection, that the rule of law the breach of which must be found has to be intended to confer rights on individuals (see to this effect, inter alia, Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraphs 41 and 42, and Case C-282/05 P *Holcim (Deutschland)* v *Commission* [2007] ECR I-2941, paragraph 47).

174 The Court has, moreover, stated that the strict approach taken towards the liability of the Community in the exercise of its legislative activities is attributable to two considerations. First, even where the legality of measures is subject to judicial review, exercise of the legislative function must not be hindered by the prospect of actions for damages whenever the general interest of the Community requires legislative measures to be adopted which may adversely affect individual interests. Second, in a legislative context characterised by the exercise of a wide discretion, which is essential for implementing a Community policy, the Community cannot incur liability unless the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers (see, in particular, *Brasserie du pêcheur and Factortame*, paragraph 45).

175 Finally, it is clear that, while comparative examination of the Member States' legal systems enabled the Court to make at a very early stage the finding recalled in paragraph 170 of the present judgment concerning convergence of those legal systems in the establishment of a principle of liability in the case of unlawful action or an unlawful omission of the authority, including of a legislative nature, that is in no way the position as regards the possible existence of a principle of liability in the case of a lawful act or omission of the public authorities, in particular where it is of a legislative nature.

176 In the light of all the foregoing considerations, it must be concluded that, as Community law currently stands, no liability regime exists under which the Community can incur liability for conduct falling within the sphere of its legislative competence in a situation where any failure of such conduct to comply with the WTO agreements cannot be relied upon before the Community courts.

177 In the case in point, the conduct which the appellants allege to have caused them damage comes within the context of establishment of a common organisation of the market and clearly falls within the sphere of legislative activity of the Community legislature.

178 It is immaterial in this regard whether that conduct is to be regarded as a positive act, namely the adoption of Regulations No 1637/98 and No 2362/98 following the DSB's decision of 25 September 1997, or as an omission, namely the failure to adopt measures calculated to ensure the correct implementation of that decision. Failure on the part of the Community institutions to act can also fall within the legislative function of the Community, including in the context of actions for damages (see, to this effect, *Les Grands Moulins de Paris* v *EEC*, paragraph 9).

179 It follows from all of the foregoing that, in affirming in the judgments under appeal the existence of a regime providing for non-contractual liability of the Community on account of the lawful pursuit by it of its activities falling within the legislative sphere, the Court of First Instance erred in law.

180 However, two further points should be made.

181 First, the finding in paragraph 179 of the present judgment is made without prejudice to the broad discretion which the Community legislature enjoys where appropriate for the purpose of assessing whether the adoption of a given legislative measure justifies, when account is taken of certain harmful effects that are to result from its adoption, the provision of certain forms of compensation (see to this effect, with regard to agricultural policy, Joined Cases C-20/00 and C-64/00 *Booker Aquaculture and Hydro Seafood* [2003] ECR I-7411, paragraph 85).

182 Second, it is to be remembered that it is settled case-law that fundamental rights form an integral part of the general principles of law the observance of which the Court ensures.

183 With regard, more specifically, to the right to property and the freedom to pursue a trade or profession, the Court has long recognised that they are general principles

of Community law, while pointing out however that they do not constitute absolute prerogatives, but must be viewed in relation to their social function. It has thus held that, while the exercise of the right to property and to pursue a trade or profession freely may be restricted, particularly in the context of a common organisation of the market, that is on condition that those restrictions in fact correspond to objectives of general interest pursued by the Community and that they do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed (see, inter alia, Case 265/87 *Schräder HS Kraftfutter* [1989] ECR 2237, paragraph 15; *Germany* v *Council*, paragraph 78; and Case C-295/03 P *Alessandrini and Others* v *Commission* [2005] ECR I-5673, paragraph 86).

184 It follows 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.

185 Having regard to the features of the present cases, it should also be noted that it follows from the Court's case-law that an economic operator cannot claim a right to property in a market share which he held at a given time, since such a market share constitutes only a momentary economic position, exposed to the risks of changing circumstances (see to this effect, in particular, *Germany* v *Council*, paragraph 79, and *Alessandrini and Others* v *Commission*, paragraph 88). The Court has also stated that the guarantees accorded by the right to property or by the general principle safeguarding the freedom to pursue a trade or profession cannot be extended to protect mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity (Case 4/73 *Nold* v *Commission* [1974] ECR 491, paragraph 14).

186 An economic operator whose business consists in particular in exporting goods to the markets of non-member States must therefore be aware that the commercial position which he has at a given time may be affected and altered by various circumstances and that those circumstances include the possibility, which is moreover

expressly envisaged and governed by Article 22 of the DSU, that one of the non-member States will adopt measures suspending concessions in reaction to the stance taken by its trading partners within the framework of the WTO and will for this purpose select in its discretion, as follows from Article 22(3)(a) and (f) of the DSU, the goods to be subject to those measures.

187 Although it follows from paragraphs 176 and 179 of the present judgment that the Court of First Instance erred in law, it is settled case-law that, if the grounds of a judgment of the Court of First Instance disclose an infringement of Community law but its operative part is shown to be well founded on other legal grounds, the appeal must be dismissed (see, in particular, Case C-320/92 P *Finsider* v *Commission* [1994] ECR I-5697, paragraph 37; Case C-150/98 P *ESC* v *E* [1999] ECR I-8877, paragraph 17; and Case C-210/98 P *Salzgitter* v *Commission* [2000] ECR I-5843, paragraph 58).

188 That is the case here. The Court has held that Community law as it currently stands does not provide for a regime enabling the liability of the Community for its legislative conduct to found an action in a situation where any failure of such conduct to comply with the WTO agreements cannot be relied upon before the Community courts. The claims for compensation by the applicants sought in particular to put in issue the liability of the Community for such conduct. Accordingly, the Court of First Instance could only dismiss those claims, whatever the arguments put forward by the applicants to support them (see, by analogy, *Salzgitter* v *Commission*, paragraph 59). The Court of First Instance would thus have been obliged to dismiss the applicants' claims on that basis if it had not made the error of law that led it to dismiss them on other grounds (see, by analogy, *Finsider* v *Commission*, paragraph 38, and *ESC* v *E*, paragraph 18).

189 It follows that, although the first plea relied upon in support of the cross-appeals is well founded, it is of no consequence and must therefore be dismissed (see, by analogy, *Salzgitter* v *Commission*, paragraph 60).

The second plea in the main appeals and the second and third pleas in the cross-appeals

190 In the light of the finding made in paragraph 176, and the matters set out in paragraph 163, of the present judgment, there is no need to examine the second plea in the main appeals, concerning the unusual nature of the damage allegedly suffered by FIAMM and Fedon, or the second and third pleas in the cross-appeals, respectively concerning the lack of certainty of that damage and the lack of a causal link between that damage and the conduct of the Community institutions.

The claims for compensation on account of the duration of the proceedings at first instance

Arguments of the parties

191 In the alternative, FIAMM and Fedon seek fair compensation having regard to the excessive duration of the proceedings at first instance.

192 Relying on Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraphs 26 to 49, FIAMM submits in this regard (i) that the case is of considerable financial importance to it, (ii) that the questions of fact here are very clear, (iii) that the conduct of none of the parties contributed to prolonging the procedure and (iv) that the Court of First Instance did not have to deal with exceptional circumstances.

193 The Commission contends that the forms of order sought by FIAMM and Fedon are inadmissible in this respect.

194 In the case of Fedon's appeal, the inadmissibility is dictated firstly by Article 112(1)(c) of the Rules of Procedure of the Court of Justice, since Fedon has not stated any reasons at all to substantiate the claim.

195 Also, in the case of both appeals, the forms of order sought are necessarily inadmissible *ratione materiae*. First, as is apparent from Articles 57 and 58 of the Statute of the Court of Justice, an appeal cannot concern new facts that have not already been set out at first instance. Second, the length of the proceedings before the Court of First Instance cannot be characterised as a breach of procedure, in the absence of any effect on the outcome of the cases.

196 Finally, the forms of order sought are also inadmissible *ratione personae*, since the Community is represented in the present proceedings by the Council and the Commission and not by the Court of Justice, of which the Court of First Instance — to which the conduct giving rise to the liability alleged is attributed here — forms an integral part.

197 Furthermore, compensation on grounds of fairness like the compensation granted in *Baustahlgewebe* v *Commission* cannot be envisaged here as FIAMM and Fedon are not obliged to pay into the Community budget a sum that is capable of being reduced.

198 Finally, the length of the proceedings before the Court of First Instance is in any event explained by the complexity of the cases, by the procedural hazards linked to the joinder of a multiplicity of cases brought in five different languages and involving three institutions and an intervener, by the reassignment of those cases to a larger

chamber and by the fact that *Van Parys*, a case raising similar questions of principle, was pending before the Court of Justice.

199 According to the Kingdom of Spain, the claims of FIAMM and Fedon are inadmissible as they were not relied upon at first instance and therefore could not be dealt with in the judgments under appeal.

Findings of the Court

200 The appellants' claims seeking reasonable satisfaction on account of the fact that the proceedings before the Court of First Instance exceeded a reasonable duration cannot be upheld here.

201 As regards Fedon's claim, suffice it to state that, while the claim is set out in the form of order sought, it is not mentioned at all in the main body of the appeal.

202 As provided in Article 112(1)(c) of the Rules of Procedure, an appeal is to contain the pleas in law and legal arguments relied on. Since such pleas and arguments, which are to be distinguished from the form of order sought by the action, referred to in Article 112(1)(d), were here entirely absent from Fedon's appeal, it follows that the claim for reasonable compensation made by it, for which no reasoning at all is given, must be dismissed as manifestly inadmissible.

203 As regards FIAMM's claim, it must be pointed out that, where there is no indication that the length of the proceedings affected their outcome in any way, a plea that the proceedings before the Court of First Instance did not satisfy the requirements concerning completion within a reasonable time cannot as a general rule lead to the setting aside of the judgment delivered by the Court of First Instance (see, to this effect, *Baustahlgewebe* v *Commission*, paragraph 49).

204 In the present case, FIAMM has indeed not asserted that the allegedly excessive duration of the proceedings affected their outcome, or requested that the *FIAMM* judgment be set aside on this basis.

205 As is apparent from Article 113(1) of the Rules of Procedure, any appeal is to seek to set aside, in whole or in part, the judgment of the Court of First Instance and, as the case may be, to seek the same form of order, in whole or in part, as that sought at first instance.

206 In this regard, it is to be observed that in *Baustahlgewebe* v *Commission*, upon which FIAMM relies, the appeal before the Court of Justice was brought against a judgment in which the Court of First Instance had imposed a fine on the appellant for infringement of the competition rules, in exercise of the unlimited jurisdiction which it enjoys for that purpose and which the Court of Justice itself may exercise when it sets aside such a judgment of the Court of First Instance and rules on the action.

207 In paragraph 33 of that judgment, the Court of Justice noted the appellant's right to fair legal process within a reasonable period and in particular to a decision on the merits of the allegations of infringement of competition law made against it by the Commission and of the fines imposed on it in that regard.

208 After holding that such a period had, in the case in point, been exceeded by the Court of First Instance, the Court of Justice decided, for reasons of economy of procedure and in order to ensure an immediate and effective remedy regarding a procedural irregularity of that kind, that in the circumstances the requisite reasonable satisfaction could be granted by setting aside and varying, solely in relation to determination of the amount of the fine, the judgment of the Court of First Instance (*Baustahlgewebe* v *Commission*, paragraphs 47, 48 and 141).

209 By contrast, the present appeal challenges a judgment of the Court of First Instance dismissing an action for compensation brought on the basis of the second paragraph of Article 288 EC.

210 It follows that the setting aside of such a judgment cannot lead to the grant of reasonable satisfaction for the excessive duration of the proceedings before the Court of First Instance by variation of the judgment under appeal, since in such proceedings the Court of First Instance is not in any event, any more than the Court of Justice on appeal, called upon to order the applicants to pay a sum from which that reasonable satisfaction could, where appropriate, be subtracted.

211 Accordingly, FIAMM's claim seeking reasonable satisfaction for the allegedly excessive duration of the proceedings before the Court of First Instance must also be dismissed as inadmissible.

212 It should, moreover, be pointed out that, even though in this instance the proceedings before the Court of First Instance did last a considerable time, the reasonableness of a period must be appraised in the light of the circumstances specific to each case and, in particular, the importance of the case for the person concerned, its complexity and the conduct of the applicant and of the competent authorities (see, inter alia, *Baustahlgewebe* v *Commission*, paragraph 29, and Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraph 210).

213 It should be stated with regard to the conduct of the competent authority and the degree of complexity of the case that the considerable length of the proceedings before the Court of First Instance is in this instance capable of being largely explained by a combination of objective circumstances relating to the number of parallel cases successively brought before that court and to the importance of the legal questions raised by them.

214 Those circumstances provide the explanation as to why a series of procedural hazards arose which had a decisive contribution in delaying the conclusion of the cases concerned and which cannot here be considered unusual, such as the joinder, in the light of the connection between them, of six cases brought in a number of different languages, or their reassignment, first to a chamber in extended composition, then to a new Judge-Rapporteur following the departure of the Judge-Rapporteur initially designated and, finally, to the Grand Chamber of the Court of First Instance, this final reassignment being itself accompanied by the reopening of the oral procedure.

Costs

215 Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. The first subparagraph of Article 69(4) of the Rules of Procedure provides that Member States which intervene in the proceedings are to bear their own costs.

216 Since the Council and the Commission have applied for costs and FIAMM and Fedon have been unsuccessful, FIAMM and Fedon must be ordered to pay the costs.

217 The Kingdom of Spain will bear its own costs.

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

1. Dismisses the main appeals;

2. Dismisses the cross-appeals;

3. Orders Fabbrica italiana accumulatori motocarri Montecchio SpA, Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC, Giorgio Fedon & Figli SpA and Fedon America, Inc. to bear the costs incurred by the Council of the European Union and the Commission of the European Communities;

4. Orders the Kingdom of Spain to bear its own costs.

[Signatures]