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Remedying European legal pluralism

**The *FIAMM* and *Fedon* litigation and the judicial protection of international trade
bystanders**

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Remedying European legal pluralism
The *FIAMM and Fedon* litigation and the judicial protection of international trade
bystanders

*By Marco Dani**

Abstract

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

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1. The “collateral victims” of international trade ... and of European legal pluralism

September 2008 might be regarded as the *mensis horribilis* for the international rule of law at the European Court of Justice. On September 3, in deciding the appeal in *Kadi and Al Barakaat International Foundation*,¹ the Court reviewed (and annulled) for breach of EU fundamental rights an EC regulation giving effect to UN Security Council resolutions on the freezing of funds and economic resources of persons and entities suspected of supporting terrorism. In justifying such a bold assertion of its constitutional jurisdiction, the Court traced a clear distinction between the domains of the international (UN) and EU rule of law² and, on such a basis, it found that nowhere in the EC treaty is there provision for immunity for Community measures implementing UN Security Council Resolutions.³ As a result, it concluded that those measures are no exception to the rule and, notably, that even in such circumstances EC political institutions are expected to comply with the EU standards of fundamental rights protection,⁴ notwithstanding the consequences in terms of international responsibility that this may entail.

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

¹ Joined cases 402/05 P and 415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union*, not yet reported (hereafter: *Kadi*).

² *Kadi*, paragraphs 285-288.

³ *Kadi*, paragraphs 299-300 and 321.

⁴ *Kadi*, paragraphs 303-308.

⁵ Joined cases 120/06 P and 121/06 P, *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Others v Council and Commission and Giorgio Fedon & Figli SpA and Others v Council and Commission*, not yet reported (hereafter: *FIAMM&Fedon*).

measures adopted by the Community institutions”.⁶

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

In fact, scholarly debate tends mainly to stress the progressive side⁷ of this type of European legal pluralism.⁸ Particularly *Kadi* and its constitutional implications have attracted much of the attention of the literature interested in legal pluralism and the protection of fundamental rights.⁹ By contrast, *FIAMM&Fedon*, surely a less spectacular case with a negligible impact on previous case-law, has been largely overlooked in such

⁶ *FIAMM&Fedon*, paragraph 111.

⁷ See e.g. N. Lavranos, ‘Judicial review of Un Sanctions by the European Court of Justice’ (2009) 78 *Nordic Journal of International Law*, 343.

⁸ In this article I shall refer to the notion of “legal pluralism” as distinct from that of “constitutional pluralism”. Whereas the concern of constitutional pluralism is normally the relationships between the EU constitutional order and those of its member states, legal pluralism is used here as a broader framework of analysis which, avoiding the issue of the constitutional nature of international organisations, include the relationships between and across them. On the distinction between constitutional and legal pluralism, see N. Walker, ‘The Idea of Constitutional Pluralism’ (2002) 65 *Modern Law Review*, 336-337.

⁹ See e.g. D. Halberstam, E. Stein, ‘The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural Legal Order’ (2009) 46 *Common Market Law Review*, 13, and G. de Búrca, *The European Court of Justice and the International Legal Order after Kadi*, Jean Monnet Working-Paper, No 01/09, <<http://www.jeanmonnetprogram.org/papers/09/090101.html>>.

discussions. Yet such a gap may be regrettable since this judgement, particularly if contrasted with its contemporaneous *Kadi*, is revealing of how the doctrine of the autonomy of the EC legal order and the insulation of the Community judicature from the international rule of law may be detrimental to the protection of individuals. *FIAMM&Fedon*, therefore, may be regarded as a sort of flipside of *Kadi* and, as such, its discussion may contribute to a more complete assessment of the virtues and vices of European legal pluralism.

The short circuits European legal pluralism may incur in are eloquently represented by the facts of the cases under review. *FIAMM* and *Fedon* export, respectively, stationary batteries for telecommunications and spectacles cases to the United States. Prior to being involved in EU litigation, their exports were subject to tariffs of 3.5% and 4.6% *ad valorem*. Following the protracted violation of WTO obligations by the EC in the bananas litigation,¹⁰ the US government was authorised by the WTO Dispute Settlement Body (hereafter: DSB) to suspend its concessions on certain products as a form of cross-retaliation. As a result, in the period from April 19 1999 to June 30 2001, *FIAMM* and *Fedon* had the rates normally applied to their US exports increased up to 100% *ad valorem* – an occurrence that, in the words of Advocate General Maduro, made them “collateral victims” of the ‘banana war’.¹¹ In order to recover the damages suffered, the firms sued the Council and the Commission at the Court of First Instance claiming their non-contractual liability for unlawful and, subordinately, lawful conduct. The Court of First Instance replied negatively on both grounds. As to the first, it simply restated the consolidated doctrine on the lack of direct effect of WTO provisions, a position that precluded a finding of illegality in relation to the conduct of the EC institutions. As to the second, the Court admitted in principle the possibility of ruling on the civil liability for lawful conduct of the EC institutions. Yet, in the case at stake it considered that the damage suffered by the applicants was not “unusual”, a circumstance that ruled out the award of compensation. *FIAMM* and *Fedon* appealed the Court of First Instance judgement and their case, if not their arguments, received support by AG Maduro. In his Opinion, the AG strongly advocated the case for liability for legal conduct and envisaged

¹⁰ For a detailed account for the ‘banana war’, see J. P. Trachtman, ‘Bananas, Direct Effect and Compliance’ (1999) 10 *European Journal of International Law*, 655.

¹¹ AG Opinion, paragraph 1.

that the applicants might have been entitled to compensation. But, as anticipated,¹² the Court of Justice rejected the appeals of FIAMM and Fedon. In the judgement not only it confirmed its established position on the status of WTO obligations, but went even further, denying the existence in the EC legal order of such a thing as liability for lawful conduct. In the end, the applicants did not manage to recover any of the damages ensuing international trade sanctions. Indeed, the Court of Justice, regardless of all the rulings by the WTO adjudicative bodies on the illegality of the EC regime on bananas, deems that for the purposes of the EC legal order the conduct of the EC institutions is perfectly legal and, as such, does not give rise to a right of compensation. As a result, one might say that FIAMM and Fedon, as well as being collateral victims of the ‘banana war’, also ended up being victims of European legal pluralism.¹³

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

¹² And as predicted by a distinguished commentator, see A. Rosas, ‘Implementation and Enforcement of WTO Dispute Settlement Findings: an EU Perspective’ (2001) *Journal of International Economic Law*, 140.

¹³ As noted by P. C. Mavroidis, ‘It’s alright ma, I’m only bleeding (A Comment on the *Fedon* jurisprudence of the Court of First Instance)’, STALS Research Paper No. 11/2008, <http://www.stals.sssup.it/site/files/stals_MavroidisII.pdf>, 16, “It is hardly compatible with the idea of *Rechtstaat* to accept that, in the name of an international wrong, we should accept redistribution of wealth from innocent bystanders to those providing the motive for the violation”.

2. The *FIAMM and Fedon* litigation before the EC judiciary

At its inception, the *FIAMM&Fedon* litigation consisted of two distinct actions for damages lodged at the Court of First Instance respectively in March 2000 and June 2001. In that period the banana war was still raging in international trade relations and for one year or so US countermeasures had been hitting exports from Europe. By September 2008 – the time when the Court of Justice delivered its final decision on the cases – litigation on banana had long since been settled. In July 2001 US sanctions had been suspended, and since January 2006 a WTO consistent tariff-only regime for imports of bananas had been in place in the Community.¹⁴ Therefore, at the time of the judgements of both the Court of First Instance¹⁵ and the Court of Justice the cases did not have any actual political impact and their salience, let alone applicants' economic interests, concerned mainly their prospective doctrinal implications.

In their actions, *FIAMM* and *Fedon* claimed compensation for the damages suffered during the period of application of US trade sanctions. With their complaints, they targeted the conduct of the Council and the Commission, the charge being that within the period of implementation of 15 months set by the DSB, the latter had failed to bring the EC regime on the import of bananas into compliance with the WTO obligations. The applicants advocated that the increased duty imposed by the United States on their products had caused them serious economic damage. Since those sanctions were a direct consequence of a regulatory regime repeatedly found in breach of international trade law, they claimed compensation under article 288 EC arguing the liability for unlawful and, subordinately, lawful conduct of the defendants.

2.1. Liability of the EC institutions for unlawful conduct

Instinctively, liability for unlawful conduct comes out as the most obvious candidate remedy for holding political institutions accountable in cases like

¹⁴ Article 1 of Council Regulation (CE) No 216/2001 [2001] OJ L31/2.

¹⁵ T-69/00, *Fabbrica italiana accumulatori motocarri Montecchio Spa (FIAMM) and Others v Council and Commission* [2005] ECR II-5393 (hereafter *FIAMM*); T-135/01, *Giorgio Fedon & Figli Spa and Others v Council and Commission* [2005] ECR II-29 (hereafter *Fedon*).

FIAMM&Fedon. In the context of the EC legal order, nevertheless, it seems also the most difficult to pursue. According to the settled case law on article 288, a finding of liability of EC institutions requires the cumulative fulfilment of three conditions: serious illegality of conduct, actual damage and causal link between conduct and the damage pleaded.¹⁶ In cases involving international trade obligations, the first requirement is by far the thorniest to satisfy. Difficulties in this regard concern the status of WTO rules within the Community legal order. Illegality of conduct, indeed, implies that international trade norms can be invoked as a yardstick for review in Community courts. But relying on WTO rules means acknowledging their direct effect, a move that since its seminal decision in *International Fruit Company*¹⁷ the Court of Justice has resolutely resisted.¹⁸ In this regard *FIAMM&Fedon* does not make an exception: the Court of Justice, the Advocate General and the Court of Justice all restated that consolidated line of precedents. Consequently, the claims for liability for unlawful conduct were dismissed, opening the field to some experimentation with the remedy of liability for legal conduct. Nonetheless, a short discussion on the direct effect of WTO obligations may be of some interest not just for the sake of rehearsal of the established judicial doctrine, but also to bring further insight into its rationale and implications as emerging from the cases at issue.

Surely, to challenge the Council and the Commission on the grounds of liability for unlawful conduct was a hard choice of which *FIAMM* and *Fedon* were perfectly aware. In pursuing this remedy they went for two different strategies. First, they attempted to bypass the issue of direct effect and derive a finding of illegality from the alleged violations of other principles such as *pacta sunt servanda*, legal certainty or proper administration.¹⁹ The Court of First Instance had an easy time unmasking such an awkward endeavour.²⁰ The second was much more plausible an idea. The applicants tried to make inroads into the settled case law by advocating the direct effect of the DSB

¹⁶ Case 352/98 P, *Bergaderm and Goupil v Commission* [2000] ECR I-5291. See also *FIAMM&Fedon*, paragraph 106.

¹⁷ Joined cases 21/72 to 24/72, *International Fruit Company and Others* [1972] ECR 1219.

¹⁸ The Court of Justice admits direct effect of WTO obligations only in marginal cases concerning the review of EC measures implementing (Case 69/89, *Nakajima v Council* [1991] ECR I-2069) or referring to (Case 70/87, *Fediol v Commission* [1989] ECR 1781) international trade norms.

¹⁹ *FIAMM*, paragraphs 92-95; *Fedon*, paragraphs 85-88.

²⁰ *FIAMM*, paragraphs 110 and 146; *Fedon*, paragraphs 103 and 139.

decision by finding that the EC regime on imports of bananas had breached international trade law.²¹ Initially, they strived to persuade the Court of First Instance that the *Nakajima* exception was applicable. In the case at hand, they argued, the EC institutions could be seen as implementing a DSB recommendation that, precisely for this reason, could be invoked before the Community courts. The Court of First Instance did not rise to the bait. Once at the Court of Justice, FIAMM and Fedon recalibrated their strategy and made an effort to carve out a further exception to the rule whereby WTO obligations have no direct effect. Notably, they argued for the direct effect of DSB recommendations upon expiration of the reasonable period of time for their implementation. But this attack also came to nothing.

Predictably, not only the outcomes but also the reasoning proffered in the judgements are hardly original. To be sure, the Advocate General made a valuable effort in explaining the Community regime of international agreements. In particular, he clarified that the direct effect of EC law and the possibility of relying on international agreements should be kept conceptually distinct.²² But for the rest, the section on liability for unlawful conduct of *FIAMM&Fedor* contains nothing more than a standard repetition of the familiar arguments inspiring the Community judiciary since *Portugal v Council*.²³ First of all, the reciprocity argument is restated.²⁴ In the Court's view, WTO agreements are reciprocal and mutually advantageous in nature. Accordingly, EC political institutions are entitled to the same scope for manoeuvre as their main commercial partners. Thus, since in the latter international trade rules are not enforced by domestic courts, the same must apply also to the Community.

Direct effect, therefore, struggles with the margins of political discretion that the WTO agreements recognise to their members during the implementation stage. According to the Community courts, to allow the judicial enforcement of international trade constraints would have the consequence of depriving the EC institutions of the possibility afforded by article 22 DSU of negotiating temporary compensation with trade

²¹ *FIAMM*, paragraph 100; *Fedor*, paragraph 93.

²² AG Opinion, paragraphs 27 and 31, noting that whereas Community law as a whole has a capacity to produce direct effects, the same does not automatically apply to international agreements whose effects within the Community legal order depend on their contents, nature and structure. See also *FIAMM&Fedor*, paragraphs 108-110.

²³ Case 149/96, *Portugal v Council* [1999] ECR I-8395.

²⁴ *FIAMM&Fedor*, paragraph 119; *FIAMM*, paragraph 111.

partners.²⁵ More in general and beyond the strictures of the DSU, the very possibility of attaining a diplomatic solution to the dispute would be compromised.²⁶ Of course, Community judges do not overlook the fact that, compared with GATT 1947, the legal dimension of the WTO dispute settlement system has been strengthened.²⁷ Yet in their understanding of the DSU, negotiations continue to occupy a prominent position.²⁸ In fact, not only do they affirm that the DSU allows WTO members several methods for implementing a recommendation of the DSB.²⁹ More critically, they go so far as to claim that neither the expiration of the reasonable period of time set by the DSB to bring the measures in conformity with its recommendation, nor the pronouncement of a ‘compliance panel’ finding that the EC measures are still incompatible with WTO rules result in the exhaustion of the methods for settling disputes available under the DSU.³⁰ On this reading, therefore, the Community courts end up affording EC political institutions a limitless scope for manoeuvre. At any point of the DSU implementation procedure and, virtually, for an indefinite time they will not be held accountable by Community courts.³¹ And, innocent bystanders such as FIAMM and Fedon will ultimately pay the price of their political freedom.

A constitutional account for this doctrinal approach is offered in the Opinion of AG Maduro, who also emphasised the scope for manoeuvre of EC political institutions as the central concern. One might have expected the AG not only to clarify the settled case law, but also to engage with some of the critical positions previously expressed in its regard. Admittedly, the AG recognised that precedents in this field are contentious. Yet, perhaps inhibited by their “unshakeable constancy”,³² he opted for a rather complacent position and joined the defence of the doctrinal status quo. In the section on liability for unlawful conduct of his Opinion, precedents are taken for granted and all the efforts are devoted to highlight their apparently uncontested rationale. The latter is correctly identified in the protection of the margins of political freedom that, on the contrary, the recognition of

²⁵ *FIAMM*, paragraph 112; *Fedon*, paragraph 105.

²⁶ *FIAMM&Fedon*, paragraphs 116-117.

²⁷ *FIAMM*, paragraphs 117-119; *Fedon*, paragraphs 110-112.

²⁸ *FIAMM&Fedon*, paragraph 132; *FIAMM*, paragraph 120; *Fedon*, paragraph 113.

²⁹ *FIAMM&Fedon*, paragraph 116; *FIAMM*, paragraph 121; *Fedon*, paragraph 114.

³⁰ *FIAMM*, paragraph 129; *Fedon*, paragraph 122.

³¹ *FIAMM&Fedon*, paragraph 130; *FIAMM*, paragraph 132; *Fedon*, paragraph 125.

³² AG Opinion, paragraph 36.

direct effect would likely jeopardise.³³ In the words of the AG: “it is only to the extent that the judicial application of WTO law would adversely affect the political freedom of the Community institutions within the WTO sphere that WTO law may not be effectively relied upon before the Court of Justice”.³⁴ On such a basis, the endorsement by the AG of the settled case law is unconditioned. The attempt by the applicants to carve out a further exception for DSB recommendations is dismissed as inconsistent with the established institutional equilibrium.³⁵ And in one of the last paragraphs, the AG goes as far as to admit that “the Community remains free to make the political choice to lay itself open initially to retaliatory measures authorised by the DSB under article 22(2) of the DSU”,³⁶ – a quite tendentious interpretation³⁷ that, particularly if taken in isolation, cannot but confirm the concerns for the respect of the international rule of law in the Community legal order.

Thus far the precedents and their justification. Now a few remarks on their adaptation to the cases at hand and their persuasiveness. Denying direct effect to WTO obligations, indeed, might have been a wise decision.³⁸ But do the reasons put forward fit the facts of the cases? And are they legally sound?

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

³³ AG Opinion, paragraph 35.

³⁴ AG Opinion, paragraph 37. See also paragraphs 38 and 45.

³⁵ AG Opinion, paragraph 48.

³⁶ AG Opinion, paragraph 47.

³⁷ See below section 3.

³⁸ See below section 3.

For sure, when making decisions, courts are not simply expected to stick to the facts of the cases. Sound adjudication must also take into account future repercussions on precedents and legal process. And it is probably from this perspective that one may account for the mismatch between the reasoning of the courts and the context of the cases. Again, on this specific point the Opinion of AG Maduro is instructive. The Advocate General pays little attention to the factual circumstances in which FIAMM and Fedon raised their complaints. His concerns are mostly for the systemic impact of a possible finding of liability. In his words: "... establishing the principle of liability for unlawful conduct by the Community by reason of its failure to comply with a DSB decision within the reasonable period of time allowed would be a sword of Damocles hanging in future over the freedom of the political organs of the Community within the WTO sphere".³⁹ That is to say, international trade diplomats cannot be inhibited by the prospect of civil actions, no matter if the DSB affords them generous time limits for negotiations. Someone – but, critically, not the EC political institutions – will pay for the delays of diplomacy. The *leitmotiv*, in fact, is ‘whatever the circumstances, do not disturb the negotiators’ – an approach that seems not only to rule out the possibility of tailor-made solutions for FIAMM and Fedon, but also to obfuscate legal reasoning.

But apart from the contingencies of FIAMM and Fedon, the sections on liability for unlawful conduct are noteworthy for other more general implications. It is telling, for example, that both the Court of First Instance and the Court of Justice regard civil liability essentially as an obstacle or a threat to the wielding of political power.⁴⁰ When it comes to international trade, courts seem trapped in an antagonistic conception of the relationship between political power and the rule of law. Conversely, no consideration is given to the idea that judicial review or civil liability might contribute to a more considerate exercise of political discretion, one more respectful of international obligations and individual rights. Courts seem quite content to tolerate that EC institutions may run wild, or affirm as they do that if the Community is subject to trade sanctions it is therefore complying fully with WTO rules.⁴¹

Actually, also the interpretation of WTO law and, particularly, of the DSU is

³⁹ AG Opinion, paragraph 51.

⁴⁰ *FIAMM&Fedoron*, paragraph 121, *FIAMM*, paragraph 130; *Fedoron*, paragraph 123.

⁴¹ *FIAMM*, paragraph 103.

puzzling. The Court of Justice, for instance, is quite correct in observing that “the resolution of disputes concerning WTO law is based, *in part*, on negotiations between contracting parties”,⁴² especially if that means that there is also a part of dispute settlement which is about courts, rules and coercion. Yet when requested to define what the limits of political discretion are, it turns to vague legal arguments and one remains with the impression that in fact, no matter what the DSU stipulates, resolution of disputes is *entirely* based on negotiations.

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

Finally, one may also ponder the broader messages emerging from this line of precedents. This is not the place for a thorough discussion of reciprocity, an argument that in the context of WTO law appears at least suspect.⁴³ It is the very idea of recognising a *de facto* immunity to its international trade diplomats that appears scarcely convincing. On a global level, the EU vaunts its general commitment to the rule of law, and in its relationships with third countries it seems particularly eager to teach them that political power and accountability ought to go hand in hand. How does that fit with its approach to international trade obligations? Could it be the case that the Community courts in deferring completely to EC political institutions are silently undermining the overall international credibility of the EU?

⁴² *FIAMM&Fedon*, paragraph 116, italics added.

⁴³ As observed by Mavroidis, *It’s alright ma*, 6-7, reciprocity could be a valid reason to violate a bilateral and not a multilateral treaty.

2.2. *Liability of the Community in the absence of unlawful conduct*

2.2.1. Article 288 EC, the *Dorsch* precedent and “the general principles common to the laws of the member states”

Unanimous rejection of direct effect left the floor virtually open to liability in the absence of unlawful conduct, a remedy whose availability has proven highly contentious. In this respect FIAMM and Fedon could rely on a very limited set of precedents and, notably, on *Dorsch*,⁴⁴ a case relating to the effects of the embargo imposed on Iraq during the First Gulf War (1990-1991). In response to the Iraqi invasion of Kuwait, the UN Security Council had issued a resolution which adopted trade sanctions against Iraq and Kuwait. The resolution had been duly implemented by the Community on behalf of its member states. On its part, the Iraqi government had decided to retaliate and, namely, to freeze the property and assets of the firms from the sanctioning states. The applicant, one of the latter, brought an action against the Community claiming its liability for the damages it had allegedly suffered. Both the Court of First Instance and the Court of Justice dismissed the complaint, although in their reasoning they appeared to acknowledge the existence of a Community principle of liability for lawful act. They had done so at least in the interpretation of FIAMM and Fedon, which the Council and the Commission vigorously contested. The Community courts, in fact, had stated that “in the event of the principle of Community liability for a lawful act being recognised in Community law”⁴⁵ such liability could have been incurred once a number of requirements had been fulfilled – admittedly, a rather ambiguous formulation qualified by the Commission as a “hypothetical reference”.⁴⁶

The opportunity to shed light on that precedent was seized by both the Court of First Instance and the Court of Justice, although with remarkably divergent outcomes. First of all, they reached opposite results as to the scope of article 288 EC. The Court of First Instance took the stance that article 288 is not confined to liability for unlawful

⁴⁴ T-184/95, *Dorsch Consult Ingenieurgesellschaft mbH v Council of the European Union and Commission of the European Communities* [1998] ERC II-667; C-237/98 P, *Dorsch Consult Ingenieurgesellschaft mbH v Council of the European Union and Commission of the European Communities* [2000] ECR I-4549.

⁴⁵ *Dorsch*, Court of First Instance, paragraphs 59 and 80; Court of Justice, paragraph 18.

⁴⁶ *FIAMM&Fedon*, paragraph 148. Also the AG held that the case law in this regard was in a “potential” state, see AG Opinion, paragraph 61.

conduct and also includes liability in the absence of illegality.⁴⁷ Support for such an interpretation was found in the text of article 288,⁴⁸ referring more neutrally to “non-contractual liability”, and in *De Boer Buizen*,⁴⁹ another quite obscure precedent strained by Court for its contingent purposes.⁵⁰ The Court of Justice did not endorse such interpretation and decided to stick with the more mainstream precedents conflating “non-contractual liability” and liability for unlawful conduct.⁵¹

The Community Courts achieved very different results also as to the meaning of *Dorsch*. The Court of First Instance drew from the latter the requirements for liability in the absence of unlawful conduct,⁵² a position which implicitly recognises the authority of that case as a precedent in this field. The Court of Justice, by contrast, followed the Commission and downplayed *Dorsch* to the status of a simply hypothetical reference.⁵³ Such a narrower approach did not rest only on a different interpretation of the relevant case law, but included also a reference to the condition for having non-contractual liability enshrined in article 288, namely that damages be made good “in accordance with the general principles common to the laws of the Member States”.

If in *Dorsch* the Community courts had remained silent on this specific point, also in *FIAMM&Fedon* they did not go too far in delving into the issue. The Court of First Instance added only an exceedingly superficial statement, one whereby “national laws on non-contractual liability allow individuals, albeit to varying degrees, in specific fields and in accordance with differing rules, to obtain compensation in legal proceedings for certain kinds of damage, even in the absence of unlawful action by the perpetrator of the damage”.⁵⁴ But apart from this, it did not feel bound to put forward at least some examples, or to specify the fields and the conditions required in the relevant legal systems

⁴⁷ *FIAMM*, paragraphs 157-158; *Fedon*, paragraphs 150-151.

⁴⁸ But see also article 41(3) of the Charter of Nice.

⁴⁹ Case 81/86, *De Boer Buizen BV v Council and Commission* [1987] ECR 3677.

⁵⁰ *De Boer Buizen* is quoted in *FIAMM* at paragraph 157 as a precedent for liability in the absence of unlawful conduct. Yet in the quoted passage (paragraph 17), the Court of Justice had only incidentally affirmed that if certain economic actors have to bear a disproportionate burden attributable to restrictions on export markets “it would be for the Community institutions to provide a remedy by adopting the appropriate measures”. The Court, therefore, far from expressing the existence of a specific judicial remedy, seems to invite more generically all the EC institutions to consider the introduction of compensatory devices.

⁵¹ *FIAMM&Fedon*, paragraphs 164-167, 170.

⁵² *FIAMM*, paragraph 160; *Fedon*, paragraph 153.

⁵³ *FIAMM&Fedon*, paragraphs 168-169.

⁵⁴ *FIAMM*, paragraph 159; *Fedon*, paragraph 152.

for a finding of liability. More details were offered by AG Maduro. In endorsing the application to the cases of liability in the absence of unlawful conduct (in his words: no-fault liability), the AG picked out some references from the French, Spanish and German legal practice.⁵⁵ But despite this effort, he did not persuade the Court of Justice.⁵⁶ The latter at first noted that member states award compensation for damages ensuing economic legislation only in exceptional and special circumstances and, critically, only in the case of a sufficiently serious breach of a superior rule of law for the protection of individuals.⁵⁷ Then, it went on to observe that a comparative examination of the laws of the member states does not reveal the existence of common general principles on liability in the absence of unlawful conduct.⁵⁸ But also such assertion, like the opposite in the judgement of the Court of First Instance, was not documented at all. The Court of Justice, in fact, seemed content to certify that no remedy was available for FIAMM and Fedon, and to remind the economic operators involved in international trade that their commercial position might be affected by various circumstances, among which the possibility of being targeted by trade sanctions.⁵⁹

2.2.2. Liability in the absence of unlawful conduct at the Court of First Instance and the Advocate General

Having accepted at least in principle the possibility of awarding compensation damages even in the absence of unlawful conduct, the Court of First Instance and the Advocate General had to articulate the requirements for such type of liability. The Court of First Instance, apparently relying on *Dorsch*,⁶⁰ identified them in turn in an actual and certain damage, a causal link between the damage and the conduct of the defendant institution and the unusual and special nature of the damage. Such configuration was disputed in appeal by the defendants: not only did they ask the Court of Justice to set

⁵⁵ AG Opinion, paragraphs 55, 58, 62, 63.

⁵⁶ *FIAMM&Fedon*, paragraph 176.

⁵⁷ *FIAMM&Fedon*, paragraphs 171-174.

⁵⁸ *FIAMM&Fedon*, paragraph 175.

⁵⁹ *FIAMM&Fedon*, paragraph 186.

⁶⁰ At paragraph 160 the Court of First instance quotes paragraph 19 of the Court of Justice ruling in *Dorsch*. It can be noted that in the *Dorsch* ruling by the Court of First Instance (paragraph 80) liability seems subject to a further requirement, notably the absence of a general economic interest pursued by the legislation at hand.

aside on the whole the idea of civil liability for lawful conduct but, subordinately, they invoked more stringent requirements.

The Advocate General did not side with them. In his Opinion, after having exposed the constitutional reasons in favour of this remedy,⁶¹ he suggested only some minor adjustment to the *Dorsch* requirements. Contrary to the position of the defendants, he maintained that this type of liability extends to legislative, and not only administrative, acts or omissions.⁶² Moreover, he denied that compensation be conditional on the absence of a general economic interest in the legislation causing the damage.⁶³ For his part, he requested only that the damage, alongside being special and unusual, be also serious in nature.⁶⁴ Quite clumsily, then, he advocated that only EU citizens could benefit from this remedy.⁶⁵

On such bases, only the Advocate General envisaged that FIAMM and Fedon could be entitled to compensation. The Court of First Instance, instead, considered that one of the requirements was absent and, therefore, dismissed their complaints. To be sure, the Court had found that the financial losses suffered by the applicants amounted to actual and certain damage.⁶⁶ It had ruled in favour of them also on the causal link, noting that despite trade sanctions resulting from a discretionary choice by the US government, a sufficiently direct causal nexus could be detected between the increase in US customs duty and the retention by the Community of WTO-inconsistent measures.⁶⁷ Particularly on causation, the Court had been rather effective in emphasising the responsibility of the EC institutions. Differently from *Dorsch*, where the latter had successfully claimed to act as agents of the UN Security Council,⁶⁸ in this case they could be held accountable as genuinely responsible for the conduct at stake. In addition, retaliation in *FIAMM&Fedon* could not be treated as an unpredictable consequence of a regulation, but as an objectively foreseeable possibility codified in the DSU.

On these points, the Advocate General and the Court of First Instance came to the

⁶¹ See below section 3.

⁶² AG Opinion, paragraph 67.

⁶³ AG Opinion, paragraph 79.

⁶⁴ AG Opinion, paragraph 76.

⁶⁵ AG Opinion, paragraph 68.

⁶⁶ *FIAMM*, paragraphs 167-169; *Fedon*, paragraphs 160-167.

⁶⁷ *FIAMM*, paragraphs 178-185; *Fedon*, paragraphs 172-179.

⁶⁸ *Dorsch*, Court of First Instance, paragraphs 73-74.

same conclusion. Critically, their approaches differed as to the unusual nature of the damage. Apart from the seriousness requirement, both of them appeared to share the notion that damage is unusual when “it exceeds the economic risks inherent in operating in the sector concerned”.⁶⁹ Yet the Court of First Instance found that the damage suffered by FIAMM and Fedon had not been unusual as trade sanctions are part of the normal vicissitudes of international trade.⁷⁰ As noted in an instant comment to the pronouncement,⁷¹ car accidents are also normal vicissitudes of traffic, but they happen to be compensated. Nonetheless, the Court dismissed the complaints of the applicants.

A more considerate position on this point was presented by AG Maduro. In his Opinion,⁷² he found that the Court of First Instance had failed to consider that the unusual nature had to be assessed in relation to the economic risks inherent in the industry in which FIAMM and Fedon operated. Accordingly, he convincingly concluded that, there being no reasonable link between the legislation on banana imports and the markets of spectacles and industrial batteries, the damage could be qualified as unusual.⁷³ On this basis, he suggested that the case should have been referred back to the Court of First Instance for scrutiny on the special and serious nature of the damage.

2.3. *Towards a legislative protection of international trade bystanders?*

At the end of this survey of the *FIAMM&Fedon* litigation, it would be inaccurate to conclude that the Court of Justice turned a deaf ear to the condition of international trade bystanders. True, none of the requests by the applicants was accepted. Yet in the last part of its ruling, the Court devoted a few passages to specifying that the dismissal of the complaints did not prejudice the possibility for the Community legislature to provide some forms of compensation.⁷⁴ The call for a legislative solution did not rest on a merely purposive declaration. The Court, indeed, went on to consider that, according to its

⁶⁹ *FIAMM*, paragraph 202; *Fedon*, paragraph 191; AG Opinion, paragraph 76.

⁷⁰ *FIAMM*, paragraphs 203, 205, 208, 209; *Fedon*, paragraphs 192, 194, 197, 198.

⁷¹ EU Law Blog, <http://eulaw.typepad.com/eulawblog/2006/01/banana_saga_cas.html> (last visited 29 June 2009).

⁷² AG Opinion, paragraphs 82-83.

⁷³ Also at this point a comparison with *Dorsch* may be interesting. In that case the Court rightly found that the damage was not unusual since the firms were perfectly aware of the fact that Iraq was a high-risk country.

⁷⁴ *FIAMM&Fedon*, paragraph 181.

precedents, legislation interfering with the right to property or the freedom to pursue a trade or profession must be proportionate. Then, it added that “a Community legislative measure whose application leads to restrictions of the right to property and the freedom to pursue a trade or profession that impair the very substance of those rights in a disproportionate and intolerable manner, *perhaps precisely because no provision has been made for compensation calculated to avoid or remedy that impairment*, could give rise to non-contractual liability on the part of the Community”.⁷⁵

The Court of Justice, therefore, seems to alert the EC legislators as to their responsibility towards affected parties. The former may well decide to opt for a breach of international trade obligations. Yet, in doing so, they should also arrange adequate compensatory instruments for the latter in the event of retaliation. No provision for compensation, indeed, may turn out to affect the proportionality of their conduct and, ultimately, to entitle the affected parties to judicial compensation for unlawful conduct. In the end, therefore, the Court of Justice appears to rehabilitate the initial idea of bypassing the issue of direct effect of WTO obligations that FIAMM and Fedon had unsuccessfully attempted.⁷⁶ Nevertheless, it remains to be seen how far this doctrine will go and, notably, how much the EC political institutions will be receptive to this kind of warning.

3. The case for an overhaul of EC remedies for breaches of WTO obligations

Previous analysis has revealed a number of contentious aspects in the solutions the Community courts have given to the *FIAMM&Fedon* litigation. As a matter of fact, the Court of Justice could choose between three outcomes to the case: dismissal of the complaints or liability for unlawful or lawful conduct. Each of them implied different views as to the nature of the WTO agreements, the scope for manoeuvre of EC political institutions in international trade relations and the allocation of the corresponding costs. Contrary to how it may appear, the Court of Justice, by sticking to its precedents, has probably opted for a rather extreme and quite inadequate solution. Indeed, in dismissing the arguments on civil liability of the Council and the Commission, it has exclusively

⁷⁵ *FIAMM&Fedon*, paragraph 184, *Italic added*.

⁷⁶ The applicants did not seem to have invoked a breach of proportionality before the Court of First Instance. Yet their complaint that EC institutions underestimated the negative effects that US trade sanctions could have had on Community economic actors and, by doing so, they infringed the principle of proper administration is clearly evocative of the reasoning suggested by the Court of Justice.

aimed at ensuring that they enjoy a *de facto* immunity without considering the corresponding costs, which have been shifted to less influential economic actors.⁷⁷

That outcome was not inevitable, and it can be contended that some form of pecuniary compensation was preferable. Yet, in discussing in turn liability for unlawful and lawful conduct as more appropriate answers for this kind of conflicts, I am not going to claim that they were neither compelling nor optimal solutions. At the end of my assessment in this section, such remedies will result as only *relatively* preferable to the ruling adopted by the Court of Justice. In fact, also these solutions also contain weak points which shall be carefully weighed before suggesting what should have been the proper outcome of the cases.

Admittedly, for the Community courts deciding *FIAMM&Fedon* was not an easy task as those cases epitomise the whole range of difficulties that judicial bodies may encounter in operating simultaneously *within* and *across* fragmented legal systems. In such circumstances, courts, like other institutions, grapple with the problem of ensuring coherent solutions in the absence of an overarching superior or external discipline of the relationships between the relevant legal systems. Yet what is peculiar to courts is that they, more than any other institution, are expected to formulate coherent and reasoned responses to such dilemmas. Coherence and rational discourse, however, cannot but be contextual, for in a highly fragmented legal environment as the one at hand there is not a single and neutral perspective where multiple legitimate claims of authority and jurisdiction can be reconciled.⁷⁸

Furthermore, the background of *FIAMM&Fedon* was one marked by more specific difficulties associated with the WTO legal system. The problem of the collateral victims of international trade reflects some longstanding and well-known ambiguities and shortcomings of the WTO system of remedies which still invite some element of reform on a global level. For instance, had the WTO offered at least as one of its possible trade sanctions some form of financial compensation, the *FIAMM&Fedon* litigation would probably never have arisen. In such a backdrop, therefore, the search for EC remedies should be best conceived of as a fallback option. But if this is true, it seems inappropriate

⁷⁷ Mavroidis, *It's alright ma*, 14.

⁷⁸ Walker, *cit.*, 338.

to place on the Community all the blame for the unsatisfactory outcome of the case.

This said, and notwithstanding all the problems the WTO remedy system may have, the attitudes of both the political and judicial organs of the Community in the cases at issue can be criticised on policy and legal grounds. First, the political institutions. As hinted by the Court of Justice, some piece of legislation aiming to cushion the impact of trade retaliation on collateral victims could have been adopted, in particular if the EC institutions deem, as they seem to do,⁷⁹ that they can persist in breaches of WTO obligations irrespective of the rulings of the WTO adjudicative bodies.⁸⁰ Moreover, on the judicial side, it can be argued that the EC courts had sufficient room for deciding the case in more equitable and legally sound terms. By rejecting any form of liability, the Court of Justice not only has failed to reduce the negative impact of trade sanctions on international trade bystanders but, critically, it has shaped the EC system of remedies in a way that probably misconceives the language and the spirit of the WTO agreements.

This latter point is precisely where my alternative view of the cases is rooted. From the standpoint of the EC courts, *FIAMM&Fedon* was not one out of many routine cases where the lack of direct effect of WTO obligations needed to be reaffirmed. That litigation was an important occasion to refine the interface between the WTO and EC legal systems and, namely, to accommodate the current WTO system of enforcement and Community remedies. The Court of Justice missed that opportunity and, arguably, it did so because it failed to bring in and adequately discuss a number of context-dependent variables of the WTO legal system which could have led to a different understanding of the cases. To prove this latter statement, I will point out some aspects of the broader debate on the structure of the WTO remedies and the nature of international trade obligations which can shed some light on the *FIAMM&Fedon* litigation and the legal issues arising therein (subsection 3.1). On such bases and, particularly, once the legal context of that litigation will be fully disclosed, the case for liability of the EC institutions for the breach of WTO obligations, be it for unlawful or lawful conduct, will appear more

⁷⁹ A. Tancredi, 'EC Practice in the WTO: How Wide is the 'Scope for Manoeuvre'?' (2004) 15 *European Journal of International Law*, 947.

⁸⁰ Such instruments could have been conceived either in general or *ad hoc* terms. A general legislative instrument could have established that all economic actors have a right to compensation whenever hit by trade sanctions. As an alternative, the EC political institutions could have provided compensation on an *ad hoc* basis when they decided in the case at stake to persist even beyond the DSU limits in the violation of their WTO obligations.

convincing (subsection 3.2).

3.1. *In search of the nature and the structure of the WTO agreements*

Conventional accounts of the context of international trade law stress the evolution of the GATT-WTO system and, more specifically, the ‘legalisation’ of its dispute settlement as one of the most telling and, possibly, far reaching innovations brought about by the Uruguay round.⁸¹ By embracing the rule of law, those arguments run, the GATT has moved away from a diplomacy-based framework towards a more rule-oriented one where regulatory principles of international trade are felt to be for real.⁸²

To be sure – and despite the *Bananas* saga may appear evidence to the contrary – legalisation has rapidly become a distinctive trait of the WTO system. In fact, by incorporating the ethos of the rule of law, not only has the reformed DS system endowed GATT principles with a more robust system of enforcement, but, more crucially, it has meant a comprehensive process of epistemological redefinition of the international trade legal framework.⁸³ Yet, important as it may be at a symbolic and theoretical level, from an analytical perspective the discourse on legalisation does not seem as productive and conclusive. Notably, in deciding on issues such as the nature of WTO obligations or the direct effect of international trade principles, an unqualified reference to the rule of law is unlikely to deliver straightforward solutions. Since there is no natural condition of the law, the answers to those questions must be based on a more specific account of the WTO legal system and, notably, of the structure of its remedies. Indeed, the binding force of WTO obligations – as much as those of national constitutional provisions or EC treaty principles – may be construed as a vector resulting from the combination of the specified substantive rule and the applicable procedure for its enforcement.⁸⁴

As to the substantive dimension of WTO obligations, the Marrakech agreements contain some important innovations. True, much of the GATT *acquis* has been confirmed, though with significant amendments. Yet, provisions in the SPS and TBT

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

⁸² J. Pauwelyn, ‘Enforcement and Countermeasures in the WTO: Rules are Rules – Toward a More Collective Approach’ (2000) 94 *The American Journal of International Law*, 341-342.

⁸³ J. H. H. Weiler, ‘The Rule of Lawyers and The Ethos of Diplomats – Reflections on the Internal and External Legitimacy of WTO Dispute Settlement’ (2001) 35 *Journal of World Trade*, 191.

⁸⁴ Trachtman, *cit.*, 655-656.

agreements seem remarkably distant from the original GATT idea of balancing trade concessions and, because of their regulatory texture, they may appear amenable to direct effect, at least in its broader version.⁸⁵ Moreover, the inclusion of the TRIPS has brought within the field of international trade substantive rules which may go even further as they place rights and obligations on individuals. As such, they might appear apt for direct effect even in narrower terms.⁸⁶

On the procedural side, as mentioned, advancements towards the canons of the rule of law have been remarkable. Legalisation of the dispute settlement surfaces at several junctions in the DS procedure. Firstly, the DS system is conceived of as compulsory and exclusive.⁸⁷ Then, the complaining parties are entitled with the rights to have a panel established, to have a panel (or Appellate Body) report adopted by the DSB and, eventually, to retaliate in case the losing party persists in its breach.⁸⁸ Such elements and, critically, the removal of the veto powers previously recognised to the defendant and losing parties to a dispute at each of those steps, have appeared as strengthening the binding force of WTO provisions and, arguably, as contributing to a tacit redefinition of their nature. Despite their original transactional character, international trade obligations are regarded as undergoing a process of growing collectivisation and, particularly, as expressing principles which may transcend the individual interests of the members.⁸⁹

Nevertheless, careful consideration of the current remedy system reveals also that an entirely collective approach to international trade obligations remains problematic. Certain aspects of trade sanctions exist which are still reminiscent of the original GATT transactional matrix. Thus, if there is a transition towards a rule-oriented trade regime, it has only partially occurred. In fact, although the finding of a breach by the WTO adjudicative bodies may be deemed as creating a secondary international law obligation on the losing party to bring its conduct into conformity with the agreements,⁹⁰ the WTO

⁸⁵ On the debate on the concept of direct effect and its possible versions, see P. Craig, G. de Búrca, *EU Law – Text, Cases and Materials* (OUP, 2003), 178-182.

⁸⁶ P. Eeckhout, 'The domestic legal status of the WTO agreement: interconnecting legal systems' (1997) 34 *Common market law review*, 33.

⁸⁷ Article 23.2 DSU.

⁸⁸ See, in turn, articles 6.1, 16.4 (and 17.14) and 22.6 DSU.

⁸⁹ C. C. Carmody, 'WTO Obligations as Collective' (2006) 17 *European Journal of International Law*, 419.

⁹⁰ Article 19 DSU. In the language of the law of state responsibility, a secondary obligation is an obligation stemming from non-respect of the *pacta sunt servanda* principle to stop the illegal act. See P. C.

system does not guarantee respect of the contract. True, the DSU indicates specific performance in the form of withdrawal of the inconsistent measure as the preferred remedy. Yet, such rule is essentially purposive as the DSB can only *recommend* to the member concerned to bring its measure into conformity with the WTO agreements.⁹¹ In such a framework, and despite the fact that the implementation of DSB recommendations is subject to a multilateral system of supervision, effective compliance rests exclusively with the defaulting member. Losing parties, indeed, are normally allowed the necessary time to amend or repeal the measure incompatible with WTO obligations, or to negotiate alternative arrangements with the complainants.⁹² But if the former do not implement the DSB recommendation in due time, the latter may resort only to the most rudimentary of the international law remedies, namely retaliation in the form of temporary suspension of concessions or other obligations.⁹³ And it is precisely at this stage that the WTO remedy system displays its ultimate bilateral structure.⁹⁴ Although the adoption of countermeasures and the definition of the level of suspension of concessions are multilaterally authorised by the DSB, sanctions remain bilateral in nature as they essentially impinge upon the trade relationships between the complaining and the losing parties.⁹⁵ As a result, it is not surprising that the effects of WTO obligations are mostly perceived as confined to the state-to-state dimension, with no compelling consequences on the validity of the measure at issue within the domestic legal systems.⁹⁶

Mavroidis, 'Remedies in the WTO Legal System: Between a Rock and a Hard Place' (2000) 11 *European Journal of International Law*, 767.

⁹¹ Article 19 DSU.

⁹² Article 21.3 DSU.

⁹³ Article 22 DSU. As noted, WTO remedies do not seem to include the remedy of reparation. On the *ex nunc* nature of WTO remedies, see Mavroidis, *Remedies in the WTO*, 774-776.

⁹⁴ The bilateral nature of trade sanctions emerges clearly in the text of article 3.7 DSU: "[...] 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-a-vis the other Member*, subject to authorisation by the DSB of such measures" (italics added). Moreover, in article 22.4 DSU, the level of suspension of concessions or other obligations authorised by the DSB is equivalent to the level of nullification or impairment *for the complaining parties*.

⁹⁵ Pauwelyn, *Rules are rules*, 337. It may be argued that only in case of trade compensation WTO sanctions can be regarded as collective in nature. Article 22.1 DSU, indeed, provides that "compensation ... shall be consistent with the covered agreements". Such provision is normally interpreted as meaning that in granting compensation, losing parties must respect the most-favoured-nation principle and, therefore, are expected to lift trade barriers to all WTO members.

⁹⁶ In fact, in *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152, 8 November 1999, paragraph 7.72, the panel has affirmed "neither the GATT nor the WTO has so far been interpreted by

Since its inception such a system of enforcement has been widely criticised. It has been pointed out that in authorising further trade restrictions, it inherently contradicts the WTO constitutive purpose.⁹⁷ Moreover, it has been noted that countermeasures in international trade often end up being self-punishing for the complainants and amplifying the relative economic importance of the parties, their effective availability depending on the economic power and trade dependency of the latter.⁹⁸ Finally, current trade sanctions have been found to negatively affect economic freedom in both exporting and importing countries,⁹⁹ especially in the case of innocent bystanders such as FIAMM and Fedon.¹⁰⁰ To face these evident shortcomings, alternative solutions have surely been suggested such as introducing more collective sanctions and reparation¹⁰¹ or forms of financial compensation.¹⁰² In the cases under review, the last solution reveals all its potential appeal. Firstly, resources obtained from financial compensation could be employed by the complaining parties to relieve at least partially those economic actors within their jurisdictions which concretely suffer from illegal trade restrictions. Secondly, by paying a sum equivalent to all or part of the damages resulting from their measures, losing parties could avoid retaliation and, thus, prevent the adoption of the sanctions that often end up hitting collateral victims.¹⁰³

However, in the current international trade system this solution is not readily available and, at best, it might be part of a reform-package of the DSU. At the moment, WTO trade sanctions include only remedies in the form of voluntary trade compensation or suspension of concessions. In such a context, the binding force of WTO obligations must be defined and gauged within a system which has certainly legalised and made more collective its enforcement mechanisms but, critically, it has done so only until the end of

GATT/WTO institutions as a legal order producing direct effect. Following this approach, the GATT/WTO did *not* create a new legal order the subjects of which comprise both contracting parties or Members and their nationals” (Italic in the original).

⁹⁷ S. Charnovitz, ‘Rethinking WTO Trade Sanctions’ (2001) 95 *The American Journal of International Law*, 810.

⁹⁸ See Mavroidis, *Remedies in WTO*, 807-808, Pauwelyn, *Rules are rules*, 338 and Charnovitz, *cit.*, 814-615.

⁹⁹ Charnovitz, *cit.*, 810-811.

¹⁰⁰ M. Bronkers and N. van der Broek, ‘Financial Compensation in the WTO – Improving the Remedies of the WTO Dispute Settlement’ (2005) *Journal of International Economic Law*, 103-104.

¹⁰¹ Pauwelyn, *Rules are rules*, 342-346.

¹⁰² Bronkers and van der Broek, *cit.*, 109-111.

¹⁰³ For an overall assessment of financial compensation see Bronkers and van der Broek, *cit.*, 109-123.

the so-called implementation stage. Afterwards, remedies remain weak and do not seem to fit the idea of a purely rule-oriented trade regime where obligations are conceived of as public goods.¹⁰⁴ The overall result is a system which does not seem to have resolved its seminal tension between diplomacy and the rule of law – an ambivalence that may bring about consequences on the way WTO obligations are conceived of as well as on their possible effects within members' legal orders.

Indeed, it is noteworthy that because of such ambivalence in both scholarly debates and international trade practice the question of the binding nature of WTO obligations is contentious. After the ratification of the Marrakech Agreements, for instance, the *American Journal of International Law* hosted an eloquent exchange between Bello and Jackson on this issue.¹⁰⁵ According to the former, the WTO rules were considered as “simply not ‘binding’ in the traditional sense” as, like in their GATT predecessor, “when a panel established under the WTO Dispute Settlement Understanding issues a ruling adverse to a member, there is no prospect of incarceration, injunctive relief, damages for harm inflicted or police enforcement”.¹⁰⁶ In Jackson's approach, instead, the innovations contained in the DSU meant that “an adopted dispute settlement report establishes an international law obligation upon the member in question to change its practice to make it consistent with the rules of the WTO agreements and its annexes”.¹⁰⁷ As a result, in this view countermeasures were considered only as temporary measures in the event of noncompliance.¹⁰⁸

Whereas the latter approach seems the most persuasive in both textual and policy terms,¹⁰⁹ it must also be taken into account that the practice of international trade is as ambiguous and may justify alternative interpretations. In this regard, one may remember

¹⁰⁴ Pauwelyn, *Rules are rules*, 338.

¹⁰⁵ J. H. Bello, ‘The WTO Dispute Settlement Understanding: Less Is More’ (1996) 90 *The American Journal of International Law*, 416 and J. H. Jackson, ‘The WTO Dispute Settlement Understanding – Misunderstanding on the Nature of Legal Obligation’ (1997) 91 *The American Journal of International Law*, 60.

¹⁰⁶ Bello, *cit.*, 416-417. One source of ambiguity in the debate seems to be the meaning attributed to the adjective “binding”. In Bello's view, bindingness is conceived of in strict imperative and state terms. In our view, conversely, the binding nature of a legal provision can be subject to different qualifications depending on their context of application.

¹⁰⁷ Jackson, *Misunderstanding on the nature of legal obligation*, 60.

¹⁰⁸ Jackson, *Misunderstanding on the nature of legal obligation*, 63.

¹⁰⁹ See the arguments put forward by J. H. Jackson, ‘International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to “Buy Out”?’ (2004) 98 *The American Journal of International Law*, 114-123.

that in *EC-Bananas*¹¹⁰ the arbitrators appeared to endorse the idea that full compliance is the ultimate objective of a rule-oriented trade regime when they affirmed that the objective of the DS system is to induce the implementation of DSB recommendations. Such an interpretation has brought an author to note that a WTO member that has agreed to pay trade compensation or whose concessions have been suspended cannot be considered as complying with its international obligations but, quite the opposite, it must be regarded as persisting in illegal conducts.¹¹¹ A conclusion that, if transferred to the battlefield of *FIAMM&Fedon* cases, would have illuminated the issue of the validity of the EC conduct after the DSB recommendation and, notably, after the WTO adjudicative bodies had found that the Community had not complied with that.

But notwithstanding the legal merits of the latter position, in a number of other cases – arguably, some of the most sensitive ones¹¹² – WTO members, in a posture that echoes Bello’s arguments, have opted for a different strategy and, namely, they have decided to pay trade sanctions¹¹³ rather than complying with their WTO primary and secondary obligations. Here, alternative accounts for the WTO remedy system find fertile ground. By drawing from public policy and economic contract theories, for instance, ‘efficient breach’ has been advocated as a central feature of the WTO DS system.¹¹⁴ In such alternative framework, countermeasures are no longer regarded as means to induce unconditional compliance, but as liability rules serving the objective of facilitating efficient deviations from previous commitments by WTO members after a change in circumstances. The WTO remedy system, therefore, would allow violations to persist as long as the violator is willing to pay their price.¹¹⁵

The *FIAMM&Fedon* litigation might embody this latter situation. In those cases it is far from clear whether the EC breach of WTO obligations was actually efficient. However, it does seem clear that for WTO purposes it was a breach, and that the

¹¹⁰ *EC-Bananas*, Arbitration report, WT/DS27/ARB, (April 9, 1999), paragraph 6.3.

¹¹¹ Mavroidis, *Remedies in WTO*, p. 800.

¹¹² Apart from the lack of implementation of the DSB recommendations in *Bananas*, the EC is notoriously defaulting on the DSB recommendations in the *Hormones* dispute.

¹¹³ More appropriately, to shift the costs of their breach to less influential segments of their society.

¹¹⁴ W. F. Schwartz and A. O. Sykes, ‘The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization’ (2002) 31 *The Journal of Legal Studies*, 179. For a critical discussion of this view, see Jackson, *Comply or “Buy out”*, 122.

¹¹⁵ Schwartz and Sykes, *cit.*, 189.

Community took advantage of the ambiguities in the WTO remedy system to continue a strategy of selective exit from international trade obligations. In this view, the choice of the Court of Justice not to recognise the direct effect to WTO obligations is coherent in that the lack of direct effect performs for an individual member the same function of political filter guaranteed by the consensus rule in the adoption of panel decisions under GATT 1947.¹¹⁶ Yet, in deciding so, the Court not only has endorsed a legal solution where the costs of EC breaches are shifted to underrepresented economic actors, but it has implicitly supported an interpretation of the WTO DS system that does not completely match with the latter rule-oriented rationale or, at least, ambitions.

And here is the gist of *FIAMM and Fedon*. If we can agree with the Court of Justice that its jurisdiction includes the qualification of the internal status of the WTO agreements,¹¹⁷ it is not entirely convincing how it has fulfilled that task. How should the EC courts respond to the WTO commitment to the rule of law? Should they endorse the ambitions of the latter by enforcing the ruling of its adjudicative bodies or admit that Community political institutions take advantage of the weakness of the system of remedy and, eventually, justify selective exit? And what about the costs associated with the latter strategy? Those were the questions one would expect the Court of Justice to answer rather than the umpteenth repetition of its previous case-law. As said, solutions in this regard may well vary as they depend very much on how one interprets the DSU rules and conceives of the nature of WTO obligations. In fact, the issue at stake was not whether the WTO obligations are binding or not¹¹⁸ but, critically, how their binding nature as resulting from the WTO remedial apparatus must be qualified for EC purposes.

Framed along these lines, discussion could have been structured along at least three different scenarios, each of them entailing a distinct conceptualisation of the WTO obligations and, as a reflection, distinct configurations of the EC remedies. Surely, not all of them represent sound interpretations of the nature of the international trade obligations and the structure of the WTO remedies. Nevertheless, it seems important to put them

¹¹⁶ Trachtman, cit., 660 and 665, where it is remembered that two panel reports on bananas regulation under GATT 1947 had not been adopted.

¹¹⁷ See Case 104/81, *Kupferberg* [1982] ECR 3641, paragraph 17, and *Portugal v Council*, cit., paragraph 34.

¹¹⁸ J. Pauwelyn, 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?' (2003) 14 *European Journal of International Law*, 928.

forward as all of them can contribute to the search for an adequately balanced system of internal remedies. In this spirit, the remainder of this subsection illustrates such scenarios with their underlying conceptualisations of WTO obligations. In the following subsection, that content will be translated into the corresponding Community remedies.

In scenario 1, WTO obligations are conceived of as collective in nature and, therefore, regarded as public goods or rules that transcend the interests of WTO members. As such, they are not available to the members and they could possibly be interpreted as affording protection to individuals' economic freedoms.¹¹⁹ On this premise, scenario 1 suggests that under no circumstances are WTO members entitled to contract out their commitments under the WTO agreements or to settle disputes in a way which is not consistent with the latter provisions. Their duty is simply to obey the regulatory principles mandated by the WTO agreements and, what is more, the DSB recommendations.

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

At this point of time it may well be the case that the losing party voluntarily complies with its primary and secondary WTO obligations. This may happen for a variety of reasons spanning from a genuine commitment to the rule of law to the difficulty of settling a trade dispute or the costs (political, economic, reputational, etc.) of persisting in a breach. Yet, losing parties may also opt for a scenario 3. Here, the disposable nature of international trade obligations is taken to another extreme than in scenario 1, since members either carry on in negotiations beyond the limits set forth in the DSU or, more simply, stay idle and endure trade sanctions. As noted, this latter option envisions a type of selective exit which, be it efficient or not, could contrast with the DSU rationale. Yet,

¹¹⁹ On the distinction between bilateral and collective obligations in public international law, see Pauwelyn, *Bilateral or Collective*, 908-925.

as witnessed by the *Bananas* saga, circumstances may arise where WTO members consider it, *de jure* or *de facto*, a viable option. As such, it must be included in our discussion for its possible implications in terms of responsibility of the Community institutions.

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

3.2. *Civil liability of the EC institutions in the case of breach of WTO obligations*

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

To respond to such questions it is useful to bring in the scenarios outlined at the end

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

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

3.2.1. Liability for unlawful conduct: a limited direct effect of WTO obligations?

The first alternative to the doctrinal status quo might have been awarding compensation damages for unlawful conduct of the Community institutions. That was arguably the solution more in line with *pacta sunt servanda*, a principle on which public international law, the WTO and the EC legal orders converge.¹²⁰ That remedy, in its possible variants, may also be regarded as the correct translation of the first two scenarios presented in the previous subsection.

The main argument in support of this type of action is rather straightforward: did the WTO adjudicative bodies find that the decision by the Commission and the Council to maintain in force WTO-inconsistent measures infringed primary and secondary international trade obligations? Then, if the Court of Justice wishes to take seriously *pacta sunt servanda*, it should enforce those findings in the EC legal order and, notably, it should rule that also for Community purposes the Commission and Council acted

¹²⁰ See, respectively, articles 26-27 Vienna Convention of the Law of the Treaties, article XVI WTO and article 300(7) EC.

illegally. To be sure, that was not for the Court an easy solution to endorse since a ruling like that would have inevitably questioned thirty or more years of consolidated judicial doctrine.¹²¹ Most importantly, recognising direct effect, even if for liability purposes only, would have meant undermining the institutional choice inherent in that line of cases, notably to accord to the EC political institutions the broadest scope for manoeuvre in trade relations.

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

For instance, it was observed that under scenario 1 WTO obligations are collective in nature and in no circumstances can they be contracted out by WTO members. A similar interpretation, if transferred to the field of Community remedies, would have a huge impact since WTO obligations would originate thick constitutional-like principles which should be unconditionally enforced against Community legislation and political institutions – an outcome that may perhaps satisfy a fundamental rights-inspired conception of international trade law¹²² but that, in the prevalent view, does not fit the text and the spirit of the WTO contract. In this respect, therefore, I definitely side with the Court of Justice¹²³ in rejecting direct effect as the default rule since that solution is not compatible with the transactional elements embedded in the WTO agreements and the structure of their remedy system.

At this stage it seems that WTO rules lack the structural premises for direct effect.

¹²¹ At this point my view probably differs from that argued in Mavroidis, *It's alright ma*, 16-17, whereby *FIAMM&Fedon* are not cases about direct effect. Here, I am inclined to side with the EC courts since I believe that discussion of direct effect in the context of liability for unlawful conduct is difficult to escape. In fact, if such liability requires a finding of illegality, how could the conduct of EC institutions have been found unlawful unless by acknowledging that it infringes WTO rules? Nevertheless, I recognise that Mavroidis might be right if illegality is construed as a violation of a non WTO principle such as proportionality – a solution that the Court of Justice also seems ready to admit for the future (see above section 2.3).

¹²² E. U. Petersmann, 'Human Rights, International Economic Law and 'Constitutional Justice'' (2008) 19 *European Journal of International Law*, 769.

¹²³ Notably, with its case law on GATT 1947.

Not only do international trade obligations seem essentially designed for an application in their specialised system of dispute settlement,¹²⁴ but, critically, they also fall short of the procedural requirements which arguably made direct effect possible in the Community. Indeed, in the original doctrinal approach of the Court of Justice,¹²⁵ the strategy to enlist national courts in the enforcement of Community rules is, if not structurally dependent, for sure strongly influenced by the existence of the preliminary ruling procedure.¹²⁶ It was largely through that channel that the Court of Justice and national courts could extract from Community rules tailor-made individual rights and norms for domestic application. Had the treaties not provided for a similar device, it can be easily imagined that Community law would have received a treatment not wholly different from the one that national courts normally reserve for other sources of international law.

To some extent, this is what happens to WTO rules when they are claimed before Community Courts. The WTO agreements, despite being internationally binding on EC institutions, do not provide procedural channels connecting international trade adjudicative bodies to members' courts. In such regime, when WTO obligations are invoked before the Court of Justice, the latter cannot but respond negatively. Certainly, this attitude finds an explanation in the light of the *real-politik* motives which do play a prominent role in shaping the position of the Court of Justice on the status of international trade rules.¹²⁷ Yet the same outcome can be justified also on purely legal terms, for domestic courts, lacking the possibility of interacting with the WTO adjudicative bodies, cannot rely on *ad hoc* official interpretations of the relevant international obligations. This is why as a matter of principle the Court is right in denying the direct effect of WTO obligations, even though I find this line of arguments more persuasive than that on reciprocity and scope for manoeuvre which notoriously inspires its precedents.

WTO obligations, therefore, are to be considered as *prima facie* inapplicable before the EC judiciary. But are there circumstances which justify a rebuttal of this

¹²⁴ Trachtman, cit., 658; see also Eeckhout, cit., 32.

¹²⁵ Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, ECR 1.

¹²⁶ P. Craig, 'Once upon a Time in the West: Direct Effect and the Federalization of EEC Law' (1992) 12 *Oxford Journal of Legal Studies*, 453.

¹²⁷ S. Peers, 'Fundamental Right or Political Whim? WTO Law and the ECJ', in G. de Búrca and J. Scott (eds), *The EU and the WTO: Legal and Constitutional Issues* (Hart Publishing, 2001), 121-123.

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

The Court of Justice dismissed this point by arguing – correctly, in my view – that the effects of DSB recommendations cannot be separated from those of WTO rules.¹²⁸ Nonetheless, if considered in our previous discussion, the conclusion whereby WTO obligations – and not DSB recommendations! – do not exert any legal effect within the EC legal order at all stages of the DS procedure neither appears compelling nor seems entirely persuasive. How can we accept the argument that even when the WTO adjudicative bodies have decided on the same case pending before the Court of Justice, their rulings have no clout in the Community judiciary?¹²⁹

Probably, the answer in this regard should be more nuanced than that offered by the Court of Justice. As mentioned, lack of direct effect makes sense particularly in cases where the invocation of WTO is abstract, that is to say, where the DSB has not issued any specific recommendation on the case pending before the Court of Justice.¹³⁰ Were the Court of Justice to enforce WTO rules under similar conditions, it could simply offer its own interpretation which, however authoritative and based on WTO precedents, would still remain a unilateral move, albeit disguised under internationally friendly cloaks.¹³¹

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

¹²⁹ Eeckhout, *cit.*, 51.

¹³⁰ Either because the case has not been decided yet, or because it has not been brought before the WTO adjudicative bodies.

¹³¹ In fact, a pronouncement by the EC courts at this stage would probably interfere with the jurisdiction of WTO adjudicative bodies as defined at article 23(2) a) DSU.

But when the WTO adjudicative bodies have decided on the same or related cases,¹³² is the lack of direct effect justified yet? If direct effect were dependent only on the existence of an *ad hoc* official interpretation of the relevant rule, it could be argued that, after a ruling by the WTO adjudicative bodies, international trade rules can be relied on by the Court of Justice. Despite the absence of preliminary ruling, indeed, at this point the Court of Justice appears in the position to translate within the EC legal order a custom-built interpretation of international trade rules by the WTO adjudicative bodies. Yet, even if at this junction there is an *ad hoc* and official interpretation, I am still reluctant to acknowledge direct effect to WTO rules as this would still contradict the text and the spirit of the DSU. In other words, an *ad hoc* interpretation can be a necessary condition for direct effect of WTO obligations but not a sufficient one.

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

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

¹³² As in *FIAMM&Fedon*, where the cases brought before the EU courts are clearly a ramification of the cases concerning the EC regulation of the banana market.

(or not acted) illegally.

In this respect, I find that such a solution could be upheld only in exceedingly marginal cases, notably when the reasonable period of time has expired and no action has been undertaken by the losing party. Only under similar circumstances FIAMM and Fedon might be right, since the DSU also provides that in similar situations, being the breach out of question, the complaining parties can bypass compliance review and directly request the DSB to authorise suspension of concessions or other obligations.¹³³ Conversely, where it is not so clear whether the losing party has complied with the DSB recommendation and, namely, when the losing party, as in our cases, has modified its WTO inconsistent measures, it seems that the jurisdiction of EC courts is still pre-empted. In fact, in such circumstances the DSU provides that complaining parties cannot resort to retaliation, but they are to activate a ‘compliance panel’ in order to have the contentious measure reviewed.¹³⁴ As a consequence, in my view only at the very end of the implementation procedure¹³⁵ could the EC courts declare that the conduct of the Community institutions is illegal for internal purposes, and then proceed with the scrutiny on the other liability requirements.¹³⁶ Put this way, therefore, direct effect of WTO obligations would be a rather rare event and, apparently, another narrow exception added to *Fediol* and *Nakajima*.

But what about the impact of such a proposal? First, there might be clear advantages at a symbolic level. I have already mentioned that this proposal for civil liability for unlawful conduct takes seriously the international rule of law, not only in its substantive aspects but, critically, also in its jurisdictional and procedural dimensions. In fact, by enforcing WTO rules as interpreted by WTO adjudicative bodies and only after the DSU remedies are exhausted, there is no doubt that the Court of Justice would send a signal of strong commitment to international law – a stance rather at the opposite of its

¹³³ In this regard, I endorse the solution to the question of ‘sequencing’ proposed in Mavroidis, *Remedies in WTO*, 795-799.

¹³⁴ Article 21.5 DSU. It is noteworthy that the United States in *Bananas* obtained an authorisation to suspend their concessions without a prior finding by a compliance panel. The latter, nevertheless, was available at the time of FIAMM and Fedon actions.

¹³⁵ We may need to wait until the Appellate Body has decided according to article 21.5 DSU for the EC courts to have jurisdiction.

¹³⁶ Note that bystanders could take actions only at a later stage, notably in presence of retaliatory measures by the complaining party. Indeed, only at that moment would they suffer an actual damage.

current attitude on WTO whereby the Community is to maximise its role of international player by taking advantage of a *de facto* immunity of its political institutions. In my view, should it embrace such a new position, the EC not only would show in a tangible way its normative commitment to the rule of law and international cooperation but, most importantly, it could also improve its overall reputation in its international trade and non trade relations. Indeed, are we really sure that the dividend of limitless political discretion outweighs that of credibility?

However, from a different perspective, the idea that in international trade the Community does not have limitless discretion and, crucially, that the EC judiciary is eventually entitled to guarantee the WTO contract remains thorny. I have noted above that my proposal would consist only of a slight overruling of current case law. It could be added also that its impact would be quantitatively minimum as overall the Community can boast a rather fine compliance record as to its international trade obligations.¹³⁷ But what about its qualitative impact? Here, it must be noted that the cases in which the Community decides to exit international trade commitments are often the most politically contentious. Are we really sure it is a good idea to entitle the EC judiciary to enforce the WTO contract precisely in such controversies? A realistic appraisal of both international trade dynamics and the posture of the judiciary in politically hot issues suggests that this alternative, however appealing in terms of principle, would probably turn out to be too controversial for only a Court to endorse.

Then, there are also a number of more technical problems associated to liability for unlawful conduct. First, although postponed in time, my proposal eventually implies a finding of illegality of the conduct of Community institutions – an element which for good reasons might discourage the recognition of direct effect, even in this qualified and residual version. As stressed by the Advocate General and the Court of Justice,¹³⁸ notwithstanding annulment and liability are separate causes of actions, a finding of illegality by the Court of Justice constitutes *res iudicata*. A similar declaration, far from remaining confined to liability cases, mandates the *ex officio* annulment of the measure at hand, a perspective hardly appealing for political bodies that might have deliberately

¹³⁷ See B. Wilson, 'Compliance by WTO members with adverse WTO dispute settlement rulings: the record to date' (2007) 10 *Journal of International Economic Law*, 400-401.

¹³⁸ AG Opinion, paragraph 49, and *FIAMM&Fedon*, paragraphs 123-124.

opted for a breach of international trade obligations. Most importantly, even if restricted to liability cases, a finding of illegality would open the door not only to the claims of collateral victims of international trade, but, critically, also to the actions brought by its ‘official troops’ (in our case, bananas importers or exporters).¹³⁹ But whereas the former may claim only the economic losses engendered by trade sanctions, the latter would be in the position to seek compensation for illegal trade restrictions and, therefore, to vindicate significant sums of money as retrospective damages.¹⁴⁰ Even in this limited version, therefore, direct effect would entail not only a legal restriction on the scope for manoeuvre of the political institutions, but also a significant exposure of the Community budget.

Still, in both legal and policy terms such a solution is preferable to that endorsed by the Court of Justice. The latter has only envisioned a *pro futuro* remedy, notably it has invited the EC institutions to consider some form of compensation for international trade bystanders or similar situations, otherwise it could find their conduct in violation of the principle of proportionality. Now, one may reflect on the consequences of a finding of illegality in a single case like *FIAMM&Fedon*, where a recognition of direct effect would have not even curtailed the scope for manoeuvre of political institutions. Predictably, a deluge of liability actions for past damages would have followed, with rather painful consequences for the Community budget. Yet, wouldn’t that be more effective a lesson for the EC political institutions? Wouldn’t they have been more persuasively induced to introduce legislative compensation next time?

But even at this point, a word of caution is probably worthwhile. Let us assume for a moment that the Court of Justice finds the conduct of the Community illegal. Are we sure that for the purposes of EC liability such a finding is sufficient? Also in this regard, a ruling of liability is likely to meet further obstacles. First, according to the *Schöppenstedt* test,¹⁴¹ illegality for liability purposes must be qualified as “serious” and it must be proved that the infringed superior rule intended to confer rights to individuals. As to the latter requirement, I think that only an overly narrow interpretation of the direct effect

¹³⁹ AG Opinion, paragraph 50.

¹⁴⁰ Yet, the WTO agreements do not seem to rule out the possibility of a unilateral reparation by the members, see Mavroidis, *Remedies in WTO*, 775.

¹⁴¹ Case 5/71, *Aktien-Zuckerfabrik Schöppenstedt v. Council* [1971] ECR 975.

requirements would constitute an obstacle. But as to the seriousness requirement, more problems are likely to arise for complaining parties. As well known, in *Bergaderm*¹⁴² the Court of Justice stated that liability will attach to the Community where its institutions have acted not merely illegally but egregiously. In this regard, a finding of seriousness depends on the margin of discretion recognised to the concerned institution. In the case of political acts, an EC institution may be found responsible only where it “manifestly and gravely disregarded the limits on its discretion”.¹⁴³ How does this apply to our cases? How much discretion do the Community institutions enjoy in implementing the DSB recommendations? Again, a closer look at the DSU provisions may prove illuminating. Article 19 allows broad discretion to the WTO members since, even when the Appellate Body suggests ways to implement the DSB recommendations, such suggestions are not binding on the losing party.¹⁴⁴ In my view, this means that only in the marginal event that the losing party stays idle during the reasonable period of time, can it be taken for granted that its conduct is seriously illegal. In other circumstances, the Court of Justice should accurately review the compliance reports and try to find out whether the violation is serious. Here, should the Court find that discretion has been manifestly and gravely disregarded, it could move swiftly to a scrutiny on the damage and causation along the arguments illustrated in section 2.2.2. Conversely, should the Court conclude that the violation is not manifest and grave enough to be qualified as serious, it would fall in a situation where a finding of illegality does not give entitlement to compensatory damages – a scenario that would probably displease political institutions and damaged individuals alike.

3.2.2. Liability for lawful conduct and compensation of innocent bystanders

Liability for lawful conduct, as far as it avoids some of the inconveniences associated with a finding of illegality, cannot but appear as a particularly attractive solution. Like the ruling by the Court of Justice, such a remedy can be adequately understood in the light of scenario 3. In this context political institutions decide to maintain their violations of WTO obligations even beyond the limits set by the DSU and

¹⁴² Case 352/98P, *Laboratoires Pharmaceutiques Bergaderm v. Commission* [2000] ECR I-5291.

¹⁴³ *Bergaderm*, paragraph 43.

¹⁴⁴ Mavroidis, *Remedies in WTO*, 784-788.

to endure the corresponding countermeasures. But unlike the judgement in *FIAMM&Fedon*, that remedy allows that the Community institutions be held partially accountable for such a political choice.

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

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

Next, a number of more detailed legal issues must be resolved. To proceed with this remedy, indeed, the scope of article 288 must first be clarified. This again invites a discussion on *Dorsch*: is that an appropriate precedent? Did the Community courts affirm

in it the existence of liability for lawful conduct? Or did they merely refer to that in hypothetical terms?

To be sure, language in *Dorsch* is exceedingly ambiguous, and one may only wonder why the Courts felt the need to bring in that remedy and spell out its requirements if not to apply them. A possible explanation may be that, in fact, in *Dorsch* the courts did apply those requirements. Two arguments may corroborate such interpretation. First, there is language in the reasoning proving that the Courts clearly intended to ascertain whether those requirements were fulfilled. For example, the Court of First Instance, right after having defined the conditions for liability for lawful conduct, goes on to state that “*it is therefore necessary to consider whether the alleged damage exists [...] whether that damage is a direct result of the Council’s adoption of [the legal conduct], and whether the damage alleged is such as to render the Community liable in respect of a lawful act within the meaning of the abovementioned case-law*”.¹⁴⁵ Similar language is employed also by the Court of Justice.¹⁴⁶ Most importantly, not only in those passages is the reasoning less ambiguous, but in the remaining parts of the judgements the courts undertake a thorough and articulate scrutiny on actual and certain damage, on the causal link and the unusual and special nature of the damage. Probably too much of an effort for just a hypothetical reference which, if really such, might have enabled a far more synthetic dismissal.

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

The point, as previously noted, is poorly reasoned in both the judgements of the Court of First Instance and the Court of Justice, and only the Advocate General delved to some extent into the issue. Particularly the methodological reflections of the latter must be taken into account at this stage. AG Maduro, indeed, observed that the comparative inquiry envisaged by article 288 can follow two main and, in many ways, opposing approaches. According to the former – arguably, that inspiring the defendants and the

¹⁴⁵ *Dorsch*, paragraph 59, *Italic added*.

¹⁴⁶ *Dorsch*, paragraph 19.

Court of Justice – common principles “[...] stem only from the almost mechanistic superimposition of the law of each Member State and the retention of only the elements that match exactly”.¹⁴⁷ If adopted, such methodology is likely to confirm the negative appraisal on liability for lawful conduct of *FIAMM&Fedon*. Indeed, comparative analyses reveal not only that in a broad majority of member states liability for lawful conduct is unheard of, but, critically, that even in the member states where the Advocate General claims that the principle is accepted, it is actually contentious or enforced in far stricter terms.¹⁴⁸ On the contrary, if there is a truly genuine common tradition, it may be easily identified in a principle of legislative-based compensation for lawful conduct of political institutions.

The Advocate General, however, also suggested a different reading of article 288. He noted that “[...] the Court has the task of drawing on the legal traditions of the Member States in order to find an answer to similar legal questions arising under Community law that both respects those traditions and is appropriate to the context of the Community legal order. From that point of view, even a solution adopted by a minority may be preferred if it best meets the requirements of the Community system”.¹⁴⁹ According to such contextual approach, one has not to spend so much time in sophisticated comparative investigations. What is crucial is the identification of the functional concerns peculiar to the context of the Community system since only the principles which meet them will pass through the filter of article 288. Following this latest approach, the Advocate General illustrated a number of aspects which might have supported the introduction of liability for lawful conduct. Here is a short summary of them with further concurring arguments.

Firstly, AG Maduro observes that this device would complete the system of Community remedies and, particularly, it would allow the individuals to challenge the EC institutions irrespective of their inability to rely on WTO rules.¹⁵⁰ In opposition to this argument, the Commission had advocated that liability for lawful conduct is accepted

¹⁴⁷ AG Opinion, paragraph 50.

¹⁴⁸ See C. Harlow, *State Liability – Tort Law and beyond* (OUP, 2004), 60-61, D. Fairgrieve, *State liability in tort: a comparative law study* (OUP, 2003), ch. 5, particularly 144-148, A. Lazari, *Modelli e paradigmi della responsabilità dello stato* (Giappichelli editore, 2005), 239-250.

¹⁴⁹ AG Opinion, paragraph 50.

¹⁵⁰ AG Opinion, paragraph 58.

only in France as a substitute for the lack of judicial review of legislation by ordinary courts. Since Community courts can review legislation, that principle ought to be regarded as peculiar to the French context and, therefore, not transferable to the Community.¹⁵¹ AG Maduro contended that compensation for lawful conduct makes sense especially in the light of the French case. Notwithstanding the Community system of judicial review of legislation, when it comes to WTO obligations the EC legislative enjoys a *de facto* immunity, a condition which can be regarded as functionally equivalent to that justifying liability for lawful conduct in France.

Secondly, the Advocate General argues that liability for lawful conduct would meet the requirements of good governance.¹⁵² Aware of the possibility of a civil action in case of non compliance with DSB recommendations, political institutions would be induced to a more careful exercise of their political discretion. In particular, costs for international trade bystanders and advantages accruing to the economic sectors protected by WTO-inconsistent measures would be better assessed. And, eventually, the Community could be held accountable for such decision without reducing its margins of political discretion.

Thirdly, the Advocate General notes that liability for lawful conduct may be conducive to a more efficient allocation of the costs associated to a breach of WTO obligations.¹⁵³ In this regard, his reference to the French notion of *égalité devant les charges publiques* appears extremely appropriate. In his words: “[...] as all public activity is assumed to benefit the society as a whole, it is normal that citizens must bear the resulting burdens without compensation, but if, in the general interest, the public authorities cause particularly serious damage to certain individuals and to them alone, the result is a burden that does not normally fall on them and which must give rise to compensation; the compensation, borne by the society via taxation, restores the equality that has been upset”.¹⁵⁴ As seen, in *FIAMM&Fedon* the costs resulting from breaches of WTO obligations affected disproportionately a particular segment of economic actors. With liability for lawful conduct, Community courts would have been in the position to restore equality by transferring to society the cost of the political choice to violate

¹⁵¹ *FIAMM&Fedon*, paragraphs 151-152.

¹⁵² AG Opinion, paragraph 59.

¹⁵³ AG Opinion, paragraph 60.

¹⁵⁴ AG Opinion, paragraphs 62-63, 75.

international trade obligations.

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

In states' public law, the absence of liability for lawful conduct of political institutions is normally accounted for with arguments drawing from the representative nature of the latter and the democratic character of policy-making.¹⁵⁵ But in the context of *FIAMM&Fedon*, democracy and *volonté générale* may hardly be invoked to advocate the immunity of EU institutions. In fact, regulations on the common organisation of the banana market were adopted according to article 37(2) EC and, therefore, with a procedure based on qualified majority voting of the Council and the mere consultation of the European Parliament. Considering the quite remarkable discrepancy in democratic input between that procedure and national legislative decision-making, it would not have been misplaced for the Court of Justice to compensate that gap and, namely, to inject in the EU legal system some more doses of judicial accountability.

Finally, a functional rather than mechanistic reconstruction of the principles common to the laws of the member states could have made sense also in the broader context of the precedents on EC remedies. Even recently, the field of remedies has been the one where the Court of Justice has introduced the most radical deviations from states' law. Take for example *Simmenthal*,¹⁵⁶ *Francovich*¹⁵⁷ or *Köbler*¹⁵⁸: can we convincingly maintain that the Court in those cases recognised states' common principles of law? Can we really argue that in suggesting, say, the non application of legislation by national courts or the liability of supreme courts it was simply acknowledging a pre-existing *ius commune Europeum*? Liability for lawful conduct would have not been an isolated case but, as much as those precedents, it would have met a functional concern of the Community legal framework. Critically, in one crucial element it would have differed from them and introduced an innovation: in that case a finding of liability would have held accountable Community and not states' institutions. It would be rather telling if this were the ultimate reason for the dismissal of the complaints.

¹⁵⁵ On the original antithesis between democracy conceived as *volonté générale* and liability of the legislative, see R. Bifulco, *La responsabilità dello stato per atti legislativi* (Cedam, 1999), 14-27.

¹⁵⁶ Case 106/77, *Amministrazione delle finanze v Simmenthal* [1978] ECR 629.

¹⁵⁷ Cases 6-9/90, *Francovich and Bonifaci v Italy* [1991] ECR I-5537.

¹⁵⁸ Case 224/01, *Köbler v Austria* [2003] ECR I-10239.

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

In conclusion, the acceptance of previous arguments could have led the Court to refine the EC system of remedies and, notably, to consolidate liability for lawful conduct as an autonomous cause of action. Once recognised in principle, then, a finding in favour of the complainants would have rapidly followed since all the requirements, as interpreted by the Court of First Instance and adjusted by the Advocate General, would have been easily accomplished.

4. Concluding remarks

This article started with an analogy between the rulings in *Kadi* and *FIAMM&Fedon*. It was noted that in both of them the Court of Justice relied on the doctrine of the autonomy of the Community legal order, although such notion has been conducive to remarkably different outcomes in terms of individuals' protection. Indeed, in both cases the applicants advocated the violation of their property rights and economic freedoms, and even at a procedural level their individual positions could be

assimilated,¹⁵⁹ neither of them having been heard by the competent institutions before the adoption of the contested measures.¹⁶⁰ Nevertheless, only in *Kadi* the Court held that EU fundamental rights had been unduly restricted, whereas in *FIAMM&Fedon* it decided to defer to the Council and the Commission, leaving the applicants only the residual possibility of seeking some redress at the European Court of Human Rights.¹⁶¹

Aside from such remarkable differences of outcomes, *Kadi* and *FIAMM&Fedon* can equally be regarded as eloquent examples of the challenges the judicial authorities face in the context of European legal pluralism. As previously observed, the current proliferation of overlapping legal orders and the resulting coexistence of multiple legitimate claims of constitutional and interpretive authority do not reflect either a pre-defined comprehensive institutional architecture or an intelligent constitutional design that the judiciatures can passively enforce.¹⁶² To the contrary, the absence of an all-encompassing discipline of the interactions between legal orders allows significant margins of interpretive discretion that the courts can employ to downplay the conflicts and limit the negative or unexpected implications of legal pluralism. In a similar context, therefore, the creativity of the interpreters and, critically, their responsibility are enhanced. Increasingly, litigation requires them to mature a sort of cubist sensibility, whereby they can grasp the reality of the case from all the relevant directions at once. In adjudication this results in a call for awareness and deference to the objectives, the procedures and the institutions of other legal systems.¹⁶³ Only in this way a sufficient degree of coherence and stability in the interactions can be ensured, and the cases under review are probably the most persuasive warning against the dangers of ruling in the light of exclusively internal legal coordinates.

Indeed, the critical review of the *FIAMM&Fedon* judgement has revealed many of the shortcomings of exclusivism. The analysis has questioned the apparently

¹⁵⁹ I owe this point to Petros Mavroidis.

¹⁶⁰ In *FIAMM&Fedon* it can be argued that none of the applicants was heard by the EC institutions when they opted for selective exit and it became clear that the United States would have targeted a specific list of products.

¹⁶¹ Unfortunately, the applicants have decided not to bring an action before the Court of Strasbourg.

¹⁶² On the quest for an overarching legal discipline of the interactions between legal orders, see W. T. Eijsbouts, L. Besselink, ‘The Law of Laws’ – Overcoming Pluralism’ (2008) 4 *European Constitutional Law Review*, 395.

¹⁶³ M. Poiares Maduro, ‘Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism’ (2007) 2 *European Journal of Legal Studies*, <<http://www.ejls.eu/index.php?id=2>>.

uncontroversial solution enforced by the Court of Justice. Notably, it has shown how EC law and the WTO agreements allow for broader margins of interpretive discretion than the Community Courts are ready to admit. This has allowed alternative solutions to the cases to be put forward and compared with the ruling of the Court of Justice. In such comparative exercise all the interests at stake have been weighed: respect of the international rule of law, scope for manoeuvre and accountability of political institutions, allocation of the costs between economic actors, exposure of the EU budget, legal implications inherent in each of the solutions. Against such a richer backdrop, it has been noted that although the first best option for this type of cases probably lies at WTO level and requires a reform of the system of remedies, the Community courts could endorse alternative solutions providing a more considerate balance of the interests at issue. Actually, the ruling in *FIAMM&Fedon* seems exceedingly skewed since rather than accommodating many interests it privileges only the political discretion of EC institutions. This dubious solution is attained through a questionable interpretation of the WTO agreements and the *Dorsch* precedent, and with a rather strict construction of the general principles common to the laws of the member states in the field of state liability. The overall result is that for Community purposes economic actors targeted by countermeasures are charged with the costs of WTO breaches, and have to make do only with the promise that in the future the lack of compensatory instruments in the relevant legislation will be sanctioned by the Court of Justice on proportionality grounds.

If not optimal, the case for civil liability in both of its general variants appears more persuasive. Liability for unlawful conduct, especially if construed according to the idea of a limited direct effect of international trade obligations, relies on a more accurate interpretation of the WTO substantive and procedural rules. The impact on political discretion is minimal as only selective exit is ruled out. For the rest, the scope for manoeuvre of Community institutions remains broad, the latter being only brought back within the generous boundaries traced by the DSU. Nevertheless, there are two major problems with this solution that probably advise against its adoption. Firstly, it is likely to be exceedingly expensive in economic terms. A finding of illegality exposes the EU budget to actions for damages resulting not only from trade sanctions but, critically, also from trade restrictions. Arguably, if adopted in *FIAMM&Fedon* this solution could have

engendered a salutary shock and it might have increased the awareness of the EC political institutions as to the consequences of WTO violations. Yet, if regularly applied, such remedy could result in too much of a burden for EU finances. Secondly, this remedy is expensive also from an institutional perspective. The idea of measuring the liability of EC political institutions in the light of the DSU, appealing as it may be in legal and theoretical terms, is rather demanding for the judiciary. Courts are expected not only to be familiar with the WTO dispute settlement, but also to embark on difficult assessments as to the seriousness of the illegality which in most of the cases are likely to discourage even the most favourably disposed judge. Finally, courts would probably be requested to second-guess difficult political choices such as the decision to maintain breaches of international trade obligations despite a DSB ruling – again, another scarcely appealing prospect for a thoughtful judge.

It is in the light of these latest considerations that even those who in principle might find attractive the remedy of liability for unlawful conduct could tactically subscribe to liability for lawful conduct as a more viable option. True, such a solution, like the one enforced by the Court of Justice, is in tension with *pacta sunt servanda* and does not sufficiently defer to WTO rules and procedures. Yet this remedy escapes much of the problems associated to a finding of illegality: it allows for broad political discretion, though it ensures some form of accountability, it provides economic compensation to collateral victims of international trade without excessively exposing the EU budget. On the whole, if not the finest of the solutions, at least an option which deserved more consideration. It is unfortunate that the Court of Justice, perhaps for the only sake of preserving the integrity of its precedents, did not decide to experiment it.