OPINION OF ADVOCATE GENERAL
POIARES MADURO
delivered on 20 February 2008 [1]

1. The confrontation between the United States of America and Europe in what is usually called the 'banana war' could be presented metaphorically as 'eating the banana at both ends'. The banana war has already given rise to innumerable disputes. The present proceedings, which concern the problem of the collateral victims in this war, are merely one more manifestation of it. Nevertheless, these proceedings cannot be said to be of no legal interest; indeed, the contrary is the case. They call upon the Court to resolve hitherto unexplored questions with wide-reaching legal implications.

2. The proceedings before the Court stem from two appeals, one brought by Fabbrica italiana accumulatori motocarri Montecchio SpA and Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC (together referred to as 'FIAMM') against the judgment of the Court of First Instance of the European Communities of 14 December 2005 in *FIAMM and FIAMM Technologies* v *Council and Commission*, [2] and the other lodged by Giorgio Fedon & Figli SpA and Fedon America, Inc. (together referred to as 'Fedon') against the judgment of the Court of First Instance delivered on the same day in *Fedon & Figli and Others* v *Council and Commission* [3] (together referred to as 'the contested judgments'). By those judgments, the Court of First Instance dismissed the actions of FIAMM and Fedon for compensation in respect of damage which they allegedly suffered as a result of the levying by the United States of increased customs duty on imports of stationary batteries and spectacle cases from various Member States as retaliation for the European Community's failure to implement the decision in which the Dispute Settlement Body ('the DSB') of the World Trade Organisation (WTO) found the Community regime governing the import of bananas to be incompatible with the WTO agreements.

3. The pleas raised by the appellants in support of their appeals call on the Court, first, to rule on the effect that a DSB decision finding the Community legislation to be incompatible with the WTO agreements has on the possibility of relying on WTO rules and, secondly, to rule on the principle of, and conditions for, no-fault liability on the part of the Community.

1 — Original language: French.

2 — Case T-69/00 [2005] ECR II-5393 ('the *FIAMM* judgment').

3 — Case T-135/01 ('the *Fedon* judgment').

I — Legal and factual background

A — *Facts*

4. The proceedings stem from a dispute between the European Community and the United States regarding the Community regime governing the import of bananas established by Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organisation of the market in bananas. [4] In response to complaints lodged by several WTO members, including the United States, on 25 September 1997 the DSB found that that regime for trade with third countries was incompatible with the WTO agreements inasmuch as it included preferential provisions benefiting bananas from the ACP States, and recommended that the Community bring it into conformity with its obligations before the expiry of a reasonable period, set as ending on 1 January 1999.

5. For that purpose, the institutions amended the regime for trade in bananas with third countries with effect from 1 January 1999 by means of Council Regulation (EC) No 1637/98 of 20 July 1998 (OJ 1998 L 210, p. 28), supplemented by Commission Regulation (EC) No 2362/98 of 28 October 1998 (OJ 1998 L 293, p. 32). As it considered that this new regime for the import of bananas retained the unlawful features of the preceding regime, on 19 April 1999 the United States obtained authorisation from the DSB to levy customs duty on imports from the Community up to an annual amount of trade of USD 191.4 million, corresponding to the level of nullification or impairment it had suffered. As a consequence, the United States authorities applied, as from 19 April 1999, ad valorem duty of 100% on imports of a list of Community products that they drew up. These included the stationary batteries and spectacle cases exported by the Italian undertakings FIAMM and Fedon respectively.

6. After negotiations with all the parties involved, the Community adopted amendments to the new common organisation of the market in bananas by means of Council Regulation (EC) No 216/2001 of 29 January 2001 (OJ 2001 L 31, p. 2). Then, on 11 April 2001, it concluded with the United States a memorandum of understanding identifying the means of resolving the dispute between them. Against that background, by Regulation (EC) No 896/2001 of 7 May 2001 (OJ 2001 L 126, p. 6), the Commission of the European Communities set out the detailed rules for applying the new Community regime for importing bananas that had been introduced by Regulation No 216/2001. The United States thereupon suspended application of the increased customs duty with effect from 30 June 2001.

7. By applications lodged at the Registry of the Court of First Instance on 23 March 2000 and 18 June 2001 respectively, FIAMM and Fedon requested, on the basis of Article 235 EC and the second paragraph of Article 288 EC, compensation for the damage resulting from the increase in import duty levied on their products by the United States

4 — OJ 1993 L 47, p. 1.

authorities from 19 April 1999 to 30 June 2001 in accordance with the authorisation granted by the DSB pursuant to its finding that the Community regime for importing bananas was incompatible with the WTO agreements.

B — *The contested judgments*

8. In support of their claims for damages, the applicants essentially argued that the Community institutions had acted unlawfully. They maintained that the failure of the Council of the European Union and the Commission to bring the Community regime for importing bananas into conformity with the Community's obligations under the WTO agreements within the period of 15 months allowed by the DSB, when the DSB had found that regime to be incompatible with the WTO rules, constituted unlawful conduct such as to give rise to non-contractual liability of the Community. They stated that even if the WTO agreements were not to be considered to produce direct effects, a determination which would preclude proof of unlawful conduct, the DSB decision finding against the Community should be recognised as having such an effect.

9. In reply, the Court of First Instance observed at the outset that examination of the legality of the conduct of the Community institutions required prior resolution of the question whether the WTO rules could be invoked, in other words 'whether the WTO agreements give rise, for persons subject to Community law, to the right to rely on those agreements when contesting the validity of Community legislation if the DSB has declared that both that legislation and the subsequent legislation adopted by the Community in order to comply with the WTO rules in question are incompatible with those rules'.[5] It pointed out in this regard that according to settled case-law the WTO agreements are not in principle, given their nature and structure, among the rules in the light of which the Community courts review the legality of action by the Community institutions and deduced that in principle the Community cannot incur non-contractual liability by reason of any infringement of the WTO rules. The defendant institutions can be accused of unlawful conduct of this kind in only two exceptional cases. These were not applicable in the case in point, however: notwithstanding a finding of incompatibility made by the DSB, the WTO rules did not, either because of particular obligations which the Community intended to implement or because of an express reference to specific provisions of the WTO agreements, amount to rules of law by reference to which the legality of the institutions' conduct could be assessed.

10. First, the Community did not intend to implement a specific obligation assumed in the context of the WTO[6] in undertaking, after the adoption of the DSB decision of 25 September 1997, to comply with the WTO rules. That is so, according to the Court of First Instance, because the dispute settlement understanding (the 'DSU') does

5 — The *FIAMM* judgment, paragraph 108, and the *Fedon* judgment, paragraph 101.

6 — Within the meaning of Case C-69/89 *Nakajima* v *Council* [1991] ECR I-2069.

not impose a specific obligation on the WTO member to comply with the DSB decision within a set period. By offering the WTO member involved several methods of implementing a decision of the DSB finding a measure incompatible with WTO rules, the DSU in any event accords considerable importance to negotiation between WTO members which are parties to a dispute, even after expiry of the period granted to bring the measure declared to be incompatible into conformity with the WTO rules. It follows that review by the Community courts of the legality of the conduct of the defendant institutions by reference to WTO rules would have the effect of weakening the position of the Community's legislative and executive organs in the search for a negotiated solution to the dispute; in addition, to require the Community courts to refrain from applying Community rules which are shown to be incompatible with the WTO agreements would deprive those organs of the possibility of a negotiated solution. Moreover, the Court of First Instance noted that, in making successive amendments to the Community regime governing the import of bananas, the Council and the Commission did not in fact intend to implement a specific obligation arising from the WTO rules in the light of which the DSB had found that regime to be incompatible with those rules; they sought to reconcile the Community's commitments both under the WTO and to the other signatories to the Fourth Lomé Convention, whilst also safeguarding the objectives of the common organisation of the market (COM) in bananas ('the COM for bananas'). Ultimately, it was a negotiated settlement with the United States that made it possible to end the dispute.

11. Secondly, none of the successive amendments to the Community legislation on the regime governing banana imports expressly mentions specific provisions of the WTO agreements, and can therefore not be regarded as making express reference to them and hence as conferring on individuals rights which they can invoke.[7]

12. The Court of First Instance concluded that the applicants were not entitled to argue, for the purposes of their claim for compensation, that the conduct of which the Council and the Commission were accused was contrary to WTO rules. Since it could not be proved that their conduct was unlawful, one of the three cumulative conditions of non-contractual liability of the Community for unlawful conduct was not met.

13. In the alternative, the applicants claimed that the conditions for the incurring of non-contractual liability by the Community for damage caused by its institutions even in the absence of unlawful action by them were in any event met, namely the conditions requiring that actual damage has been suffered, that a causal link exists between that damage and the conduct of the institutions and that the damage is unusual and special in nature. The Court of First Instance agreed that '[w]here … it has not been established that conduct attributed to the Community institutions is unlawful, that does not mean that undertakings which, as a category of economic operators, are required to bear a disproportionate part of the burden resulting from a restriction of access to export markets

7 — Within the meaning of Case 70/87 *Fediol* v *Commission* [1989] ECR 1781.

can in no circumstances obtain compensation by virtue of the Community's non-contractual liability'. [8] It also recognised that, as a general principle common to the laws of the Member States, the Community can incur non-contractual liability, even in the absence of unlawful action by its institutions, if the conditions indicated by the applicants are met, because '[n]ational 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'. [9]

14. In verifying that these conditions were met in the case in point, the Court of First Instance held that it was proven that the damage alleged by the applicants was actual and certain. It also found that there was a sufficiently direct causal link between the conduct of the Community institutions and the damage. It was admittedly true that the United States was simply authorised by the DSB to adopt retaliatory measures, and both the drawing-up of the list of products affected and the setting of the rate of increase in import duties were matters falling within its discretion. It was none the less the case that, were it not for the prior finding by the DSB that the Community regime governing the import of bananas was incompatible with WTO rules, the United States would not have been able to seek or obtain such authorisation from the DSB. It was on the basis of the amount of damage suffered by the United States economy as a result of the continued operation of the Community regime governing the import of bananas held to be incompatible with WTO rules that the DSB determined the amount of trade up to which the United States authorities were authorised to suspend their tariff concessions in relation to the Community. The conduct of the defendant institutions therefore necessarily led to adoption of the retaliatory measure by the United States authorities in compliance with the procedures established by the DSU and accepted by the Community, so that their conduct had to be regarded as the immediate cause of the damage suffered by the applicants following the increase in customs duty by the United States.

15. It remained for the applicants to prove that the damage they had suffered was unusual and special. First, they claimed in this regard to be victims of discrimination vis-à-vis other European exporters whose products did not appear on the list drawn up by the United States authorities and even, in the case of FIAMM, of discrimination in relation to the other undertakings penalised by the increased customs duty, since it bore, by itself, 6% of the total sum of the retaliatory measures. Nor could the interest in retaining the rules of the COM for bananas be considered to be an objective of public interest whose importance would justify such adverse consequences. Lastly, they added that the possibility of increased rates of duty introduced by non-member States as a result of a dispute that has arisen in an entirely different sector to the one in which they operate cannot be regarded as a normal risk for an undertaking. However, the Court of First Instance refused to acknowledge that the damage suffered by the applicants was unusual since it did not exceed the limits of the economic risks inherent in their export operations. The suspension of tariff concessions, which is a measure provided for by the WTO agreements, cannot be regarded as

8 — The *FIAMM* judgment, paragraph 157, and the *Fedon* judgment, paragraph 150.

9 — The *FIAMM* judgment, paragraph 159, and the *Fedon* judgment, paragraph 152.

beyond the normal hazards of international trade as currently organised. Accordingly, the risk of this vicissitude has to be borne by every operator who decides to sell his products on the market of one of the WTO members. Hence, any right to compensation based on no-fault liability in the absence of unlawful conduct had to be ruled out in the case in point.

II — Analysis of the appeals

16. It is against these two decisions, the *FIAMM* judgment and the *Fedon* judgment delivered on 14 December 2005, that FIAMM and Fedon respectively have appealed to the Court of Justice. The appellants raise identical pleas in support of their actions. They claim first that the contested judgments lack reasoning since they fail to address one of their principal arguments, relating to their entitlement to rely on the decision adopted by the DSB to establish unlawful conduct on the part of the Community for the purpose of their claim for compensation. They also allege an error of law in the reasoning which led the Court of First Instance to conclude that the damage was not unusual. Lastly, they claim fair compensation for the allegedly unreasonable length of the proceedings before the Court of First Instance. It should also be noted that the Council and the Kingdom of Spain, which maintain that the main appeals should be dismissed, have also lodged cross-appeals in which they seek to have the contested judgments set aside on the grounds that the Court of First Instance was wrong to establish that the Community can be liable for a lawful act, to rule that such liability could be incurred where the Community has failed to exercise a discretionary legislative power and to recognise a direct causal link between the conduct of the institutions and the damage.

17. In examining whether these various pleas in law are well founded, I shall first investigate whether and on what conditions a DSB decision finding Community legislation to be incompatible with WTO law may be relied upon in an action seeking to establish non-contractual liability of the Community based on the unlawful conduct of its institutions. I shall then consider the principle of, and conditions for, no-fault liability on the part of the Community. Finally, I shall assess whether the length of the proceedings before the Court of First Instance was reasonable.

A — *Entitlement to rely on a DSB decision in support of an action to establish non-contractual Community liability for fault*

18. In their first plea, the two appellants rely formally on a defect in the reasoning of the contested judgments in that the Court of First Instance did not address their argument that a DSB decision finding against the Community constitutes a different exception from those of the *Nakajima* and *Fediol* hypotheses to the principle that the WTO agreements cannot be invoked, enabling an individual to rely on those agreements in order to establish unlawful conduct on the part of the Community for the purpose of

finding it liable. According to the appellants, the Court of First Instance merely verified whether the two exceptions to the absence of direct effect of the WTO agreements identified in *Fediol* and *Nakajima* were applicable in the case in point.

19. It would be easy to dismiss this plea on the ground that, far from having constituted the essence of their arguments as to the unlawfulness of the conduct of the Community, that proposition was referred to in only a very ancillary manner before the Court of First Instance, in a footnote to Fedon's application and in only two of the 177 paragraphs of FIAMM's application. Indeed, 'although the Court of First Instance is required to give reasons for its decisions, it is not obliged to respond in detail to every single argument advanced by a party', [10] nor to provide an account that follows exhaustively and one by one all the arguments put forward by the parties to the case. [11] Moreover, the Court of First Instance implicitly rejected the applicants' proposition, because it assessed any effect of a DSB decision only from the point of view of the applicability of the two traditional exceptions to the absence of direct effect of the WTO rules. [12]

20. But in reality, under cover of alleging a formal failure to state adequate reasons, the appellants question the very soundness of this reasoning of the Court of First Instance, according to which the effect of an adverse DSB decision can be examined and assessed only as part of a review of whether the conditions for applying the two traditional exceptions to the principle that the WTO rules cannot be relied upon are met. According to the appellants, apart from the exceptions established by *Fediol* and *Nakajima*, it should be possible to rely on a DSB decision finding Community law to be incompatible with the WTO rules in order to establish the unlawfulness of the Community's conduct if the following circumstances are all present: there is unlawful conduct consisting in the Community's failure to implement that DSB decision within the reasonable period granted for compliance; the unlawful conduct is relied upon in the context of an action for non-contractual liability; and this action for compensation is intended to obtain reparation for the damage suffered as a result of the adoption, by trading partners of the Community, of retaliatory measures authorised by the DSB owing to the failure to implement the DSB decision.

21. In order to assess the merits of the appellants' arguments on this point, I consider it essential to review the case-law of the Court of Justice on the ability to rely on international agreements in general and on WTO law in particular. Only by reminding ourselves of the effect of the case-law and the reasons underlying it will we be able to determine whether it is appropriate to apply it and thus deny the appellants, for the purposes of the claim for compensation and in the specific circumstances of the cases in point, the possibility of relying on the DSB decision finding against the Community.

10 — Case C-197/99 P *Belgium* v *Commission* [2003] ECR I-8461, paragraph 81, and the judgment of 11 January 2007 in Case C-404/04 P *Technische Glaswerke Ilmenau* v *Commission*, paragraph 90.

11 — Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123.

12 — See the *FIAMM* judgment, paragraph 115, and the *Fedon* judgment, paragraph 108.

1. The case-law of the Court of Justice on the ability to rely on international agreements

22. Community case-law on the implications of WTO law in legal proceedings has been and continues to be strongly criticised. It seems to me that opposition to it stems at least in part from the fact that it is often poorly understood. Perhaps the following exposition of its solutions will clear up some of the misunderstandings.

23. These solutions are no more than the application, to the particular case of the WTO agreements, of the solutions developed by the Court on the possibility of relying on international agreements in general in the Community legal system. I would point out from the outset that agreements duly concluded by the Community with third countries or international organisations are 'binding on the institutions of the Community and on Member States' under the terms of Article 300(7) EC. This wording is both a reminder of an agreement's compulsory nature under international law and a statement of the binding force of these agreements under Community law. The Court has logically deduced from this that the provisions of such an agreement, [13] just as those of unilateral acts adopted by the organs established by an external agreement with binding effect on the Communities, [14] 'form an integral part, as from their entry into force, of the Community legal system'. In other words, external agreements which are concluded in accordance with Community law [15] and which therefore have binding effect on the Communities constitute a source of Community legality. The Court has expressly deduced from this that they have primacy over secondary Community legislation [16] and has recognised that it in principle has jurisdiction to determine questions as to the validity of a Community act in the light of an external agreement by which the Communities are bound. [17]

24. Hence, the settled case-law on WTO law, according to which 'the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions', [18] may appear contradictory. How can an international agreement be a rule of the Community legal system but at the same time not a criterion for reviewing the legality of Community acts?

13 — See Case 181/73 *Haegeman* [1974] ECR 449, paragraph 5; Case 12/86 *Demirel* [1987] ECR 3719, paragraph 7; Opinion 1/91 [1991] ECR I-6079, paragraph 37; and Case C-162/96 *Racke* [1998] ECR I-3655, paragraph 41. With regard to the WTO agreements, see in particular Case C-344/04 *International Air Transport Association and Others* [2006] ECR I-403, paragraph 36; Case C-459/03 *Commission* v *Ireland* [2006] ECR I-4635, paragraph 82; and Case C-431/05 *Merck Genéricos — Produtos Farmacêuticos* [2007] ECR I-7001, paragraph 31.

14 — See Case 30/88 *Greece* v *Commission* [1989] ECR 3711, paragraph 13; Case C-192/89 *Sevince* [1990] ECR I-3461, paragraph 9; and Case C-188/91 *Deutsche Shell* [1993] ECR I-363 paragraph 17.

15 — For a reminder of that condition, see my Opinion in Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation* v *Council and Commission*, pending before the Court, point 23.

16 — See, even recently, Case C-286/02 *Bellio F.lli* [2004] ECR I-3465, paragraph 33. With regard to the GATT or WTO agreements, see Case C-61/94 *Commission* v *Germany* [1996] ECR I-3989, paragraph 52, and *International Air Transport Association and Others*, paragraph 35.

17 — See Joined Cases 21/72 to 24/72 *International Fruit Company and Others* [1972] ECR 1219, paragraphs 6 and 7.

18 — Case C-149/96 *Portugal* v *Council* [1999] ECR I-8395, paragraph 47; Case C-76/00 P *Petrotub and Republica* [2003] ECR I-79, paragraph 53; Case C-93/02 P *Biret International* v *Council* [2003] ECR I-10497, paragraph 52; Case C-377/02 *Van Parys* [2005] ECR I-1465, paragraph 39; Case C-351/04 *Ikea Wholesale* [2007] ECR I-7723, paragraph 29; Case T-18/99 *Cordis* v *Commission* [2001] ECR II-913, paragraph 50; and Case T-19/01 *Chiquita Brands and Others* v *Commission* [2005] ECR II-315, paragraph 114.

(a) The condition for reliance on international agreements

25. In order to serve as a yardstick for assessing the legality of a Community act and, in more general terms, in order that application of the provisions of an international agreement can be sought before a court, an international agreement must also be capable of judicial application. In other words, it must also be capable of being relied upon before the courts, that is to say 'be capable of conferring rights on citizens of the Community which they can invoke before the courts', [19] that is to say again to have 'direct effect'. [20]

26. It may have been thought that this requirement to have direct effect was linked to, and confined to, proceedings for a preliminary ruling as to an act's validity, the context in which it had initially been laid down. In *International Fruit Company and Others* the Court had expressly ruled that the condition of direct effect had to be met 'before invalidity can be relied upon before a national court'. [21] This wording contributed to a degree of confusion between the questions of the possibility of relying on international agreements and of the direct effect of Community law, [22] and it undoubtedly explains some of the misunderstandings. However, the two concepts of the direct effect of international agreements and the direct effect of Community law differ.

(i) The concept of the direct effect of an international agreement

27. The two concepts of the direct effect of international agreements and the direct effect of Community law are assessed differently. By reason of the object and general scheme of the Treaty establishing the European Community, Community law as a whole has a capacity to produce direct effects, an ability confirmed when the Community provision at issue is clear, precise and unconditional. [23] Nothing of the kind applies to international agreements binding on the Communities. They may be accorded a direct effect by the signatories to the agreement who have so agreed, just as they may agree the opposite. Indeed, 'in conformity with the principles of public international law Community institutions which have power to negotiate and conclude an agreement with a non-member country are free to agree with that country what effect the provisions of the agreement are to have in the internal legal order of the contracting parties'. [24] If that question has not been settled explicitly by the agreement, it falls to the courts of each contracting party

19 — *International Fruit Company and Others*, paragraph 8; see also, to the same effect, Joined Cases C-300/98 and C-392/98 *Dior and Others* [2000] ECR I-11307, paragraph 44; *Cordis* v *Commission*, paragraph 46; and *Chiquita Brands and Others* v *Commission*, paragraph 114.

20 — *Dior and Others*, paragraph 45.

21 — *International Fruit Company and Others*, paragraph 8.

22 — As pointed out especially by Rideau, J., 'Les accords internationaux dans la jurisprudence de la Cour de justice des Communautés européennes', *Revue générale du droit international public,* 1990, p. 289, particularly p. 357.

23 — See Case 26/62 *van Gend & Loos* [1963] ECR 1.

24 — *Portugal* v *Council*, paragraph 34; for an earlier judgment, see Case 104/81 *Kupferberg* [1982] ECR 3641, paragraph 17.

to do so. [25] It is apparent from the case-law of the Court that an international agreement has direct effect in the Community legal system only subject to the dual condition that the terms, nature and general scheme of the agreement do not prevent it being relied upon and that the provisions relied upon appear, in the light of both the object and purpose of the agreement and of its context, to be unconditional and sufficiently precise, in other words contain a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure. [26]

(ii) The scope of the condition that international agreements must have direct effect

28. The two concepts also differ in scope. It is clear from *Germany* v *Council* [27] that the direct effect of an international agreement determines the ability to rely on it not only before a national court but also before a Community court, in other words that this condition applies irrespective of the nature of the action in support of which a plea based on infringement of an international agreement is adduced. It is also apparent from that judgment that it applies irrespective of the status of the applicant, whether he be an individual or a privileged applicant.

29. The Community courts have thus refused to allow the WTO agreements to be relied upon not only in the context of a reference for a preliminary ruling as to validity [28] but also in an action for annulment [29] or one for compensation. [30] They have refused to hear a plea based on infringement of WTO law, whether raised by an individual or by a Member State.

30. Although the attribution of such implications to the direct effect of international agreements has often been criticised by some legal writers, it is fully justified. As guardian of the Community legal order, the Court of Justice must, if a rule deriving from the international legal order is relied upon, define its effects in an all-embracing and uniform manner that is valid for the entire Community legal order. It is thus easy to see that the requirement for an international agreement to have a direct effect is necessary whatever the type of action and the status of the applicant, and whether the dispute has been brought before national courts or before the Community courts. [31]

25 — Ibid.

26 — See Case 17/81 *Pabst & Richarz* [1982] ECR 1331, paragraph 27, *Kupferberg*, paragraphs 22 and 23, *Demirel*, paragraph 14, the Opinion of Advocate General Darmon in *Demirel*, which summarises all of the case-law on this issue (point 18), *Racke*, paragraph 31, *Dior and Others*, paragraph 42, and *International Air Transport Association and Others*, paragraph 39; see also the Opinion of Advocate General Kokott in Case C-308/06 *Intertanko and Others*, pending before the Court, point 48.

27 — Case C-280/93 [1994] ECR I-4973, paragraphs 103 to 112.

28 — See *Van Parys*; with regard to the GATT, see the earlier judgment in *International Fruit Company and Others*.

29 — See *Portugal* v *Council*.

30 — See, for example, *Cordis* v *Commission*, paragraphs 44 to 60.

31 — As some legal writers (see Kovar, R., 'Les accords liant les Communautés européennes et l'ordre juridique communautaire', *RMC*, 1974, p. 352, especially pp. 358 and 359) or members of the Court (Joliet, R., *Le droit institutionnel des Communautés européennes — Les institutions — Les sources — Les rapports entre ordres juridiques*, Liège, 1983, especially pp. 256 and 257) had perfectly and presciently understood.

31. As the two conditions relating to the direct effect of international agreements and the direct effect of Community law thus differ so markedly, in both concept and scope, it would undoubtedly be wise to use different terms to describe them in future in order to avoid any unfortunate confusion, and hence to speak only of the possibility of relying on international agreements.

(iii) The ability to rely on WTO law

32. Applying this analytical matrix to the GATT, the Court ruled that the great flexibility of its provisions and its underlying principle of negotiations undertaken on the basis of reciprocal and mutually advantageous arrangements prevented its being relied on. [32] Put another way, the spirit, general scheme and terms of the agreement did not create an obligation to recognise it as having direct effect. [33] As we know, the Court has reached the same conclusion with regard to the WTO agreements, [34] even though some believe it should have decided otherwise, given the strengthened dispute settlement mechanism put in place by those agreements. The Court has based its denial of direct effect to WTO law as a whole on the following two considerations.

33. First, despite the judicial format of the dispute settlement system, the agreement still leaves wide scope for negotiation between parties, even where the member concerned has failed to implement the rulings and recommendations of the DSB. Consequently, to require courts not to apply internal rules that are incompatible with the provisions of the agreement would deprive the Community institutions of that opportunity to reach negotiated solutions.

34. Secondly, some of the Community's trading partners refuse to allow the agreement to be relied on in any circumstance. The Community's legislative and executive organs must be permitted the same latitude so as not to create an imbalance in the application of the WTO rules, since the WTO is based on the principle of reciprocity and mutual advantage.

35. It follows from these considerations that the WTO agreements are to be interpreted as leaving the Community institutions a margin of political freedom in the context of the WTO that recognition of the direct effect of the agreements would be likely to jeopardise. Also the Court considers that in this domain it could not encroach on the prerogatives of the political authorities without upsetting the institutional equilibrium.

32 — See *International Fruit Company and Others*.
33 — See *Germany* v *Council*, paragraph 110.
34 — In *Portugal* v *Council*.

36. As we know, the merits of this line of argument has been fiercely debated in the literature [35] and sometimes contested by the Advocates General. [36] It has appeared to contradict reasoning previously developed by the Court with regard to the direct effect of this or that international agreement. [37] The solution deduced from this line of argument — namely, that WTO law does not have direct effect — has none the less been confirmed with unshakeable constancy by subsequent case-law.

37. However, the fact that WTO law cannot be relied upon before a court does not mean that it does not form part of the Community legal system. From this point of view, the formulation used by the Court in *Portugal* v *Council* is undoubtedly unfortunate. It nurtures a belief that an international agreement does not form part of the body of Community legality, whereas it is merely a question of the provision's enforceability, of the jurisdiction of the courts to take cognisance of it. In reality, this is what the Court, albeit clumsily, has intended to say. It declines to include the WTO agreements among the rules in the light of which it reviews the legality of acts of the Community institutions because, given the nature of the WTO rules, it is not possible to 'accept that the role of ensuring that Community law complies with those rules devolves directly on the Community judicature'. [38] Hence this case-law must be understood not as denying that the WTO rules are a source of Community law but as affecting their significance before a court. Otherwise, how can it be explained that the denial of relevance before a court is only partial? 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.

(b) Modifications to the principle that the WTO rules may not be relied upon

38. Community case-law has made a number of modifications to the principle that WTO law may not be relied upon, which are possible only because WTO law constitutes part of the Community legal system. Moreover, those modifications are based on the

35 — Within a very abundant body of literature, the following in particular may be noted: Eeckhout, P., 'The domestic legal status of the WTO Agreement: interconnecting legal systems', *CMLR*, 1997, p. 11; Kuijper, P.J. and Bronckers, M., 'WTO law in the European Court of Justice', *CMLR*, 2005, p. 1313; Peers, S., 'Fundamental Right or Political Whim? WTO Law and the European Court of Justice', in de Burca, G. and Scott, J. (eds), *The EU and WTO*, 2001, p. 111.

36 — See in particular the Opinion of Advocate General Saggio in *Portugal* v *Council* and the Opinion of Advocate General Tesauro in Case C-53/96 *Hermès* [1998] ECR I-3603, points 28 to 37.

37 — It is sufficient to compare this reasoning with the analysis carried out by the Court in *Kupferberg*, paragraphs 17 to 22, with regard to another international agreement.

38 — *Portugal* v *Council*, paragraphs 46 and 47, and *Van Parys*, paragraph 53.

very considerations that justify the general refusal to allow the WTO rules to be invoked. They are of three types.

39. First, Community legislation [39] and national measures [40] must be interpreted in accordance with WTO law. Such an obligation cannot affect the institutions' scope for negotiation in the event of a dispute with their WTO partners. That is clear when this obligation bears on national law. It is also true when it applies to Community acts. Interpretation in keeping with WTO law is required only in so far as that is possible. The institutions are thus given the option of preferring the path of a negotiated solution, by adopting or retaining an act that is clearly contrary to WTO law.

40. Secondly, agreements may also serve as the basis for a finding that a Member State has failed to fulfil its obligations. [41] This solution is also easy to comprehend. The absence of a Community act that is contrary to WTO law demonstrates the will of the institutions to comply with it. Hence, a Member State cannot unilaterally evade the obligations resulting from WTO law. Also, a finding that it is in breach in no way prevents the institutions from deviating in future from the WTO rule that is the basis of that finding at the cost of a negotiated solution.

41. Lastly, a plea based on infringement of WTO law is admissible, even when it is raised in support of a challenge to the legality of a Community act, in two instances: [42] either where the Community intended to implement a particular obligation assumed in the context of the WTO, [43] or where the Community measure, by referring expressly to specific provisions of the WTO agreements, conferred on individuals the right to invoke them. [44] Since the WTO agreements do not oblige the contracting parties, either explicitly or when interpreted in the light of their subject-matter and purpose, to accord the agreements direct effect in their legal systems, each of the signatories is free to determine the legal means appropriate for attaining their bona fide performance in its legal system, [45] in other words to decide whether it intends to grant individuals the right to rely on their provisions. The two instances mentioned above are the expression of such a desire on the part of the Community. By that very fact, it signals that it intends to comply with WTO law, thereby voluntarily forgoing the room for manoeuvre in the application of the WTO rules enjoyed by some contracting parties that refuse to accord any direct effect to those rules.

39 — See *Commission* v *Germany*, paragraph 52; Case C-335/05 *Řízení Letového Provozu* [2007] ECR I-4307, paragraph 16; and *Merck Genéricos — Produtos Farmacêuticos*, paragraph 35.

40 — See *Hermès*, paragraph 28, and *Dior and Others*, paragraph 47.

41 — See *Commission* v *Germany*.

42 — These instances are recalled in particular in *Portugal* v *Council*, paragraph 49.

43 — The *Nakajima* hypothesis. For an application, see *Petrotub and Republica*, paragraphs 52 to 56.

44 — The *Fediol* hypothesis.

45 — See *Portugal* v *Council*, paragraph 35.

2. The impact of a DSB decision finding against the Community

42. The appellants' arguments fall within the framework of this case-law. They ask the Court to determine whether and to what extent a DSB decision finding Community legislation to be incompatible with a provision of the WTO agreements can also overturn the refusal as a matter of principle to allow the agreements to be relied upon, thus precluding any review of the compatibility of secondary Community legislation with the agreements. To that end, they stress the binding nature of the DSB decision in order to maintain that they must be able to rely on it and complain that it has not been implemented, even though the WTO agreements themselves cannot be invoked. Presented in this manner, the argument is undeniably clumsy. As the Council has rightly retorted, a DSB decision cannot produce wider effects than the WTO rules which it has found to have been infringed. The question that the Court is asked to answer is therefore more precisely whether, to repeat the words of the Court of First Instance in the contested judgments, 'the WTO agreements give rise, for persons subject to Community law, to the right to rely on those agreements when contesting the validity of Community legislation if the DSB has declared that both that legislation and the subsequent legislation adopted by the Community in order to comply with the WTO rules in question are incompatible with those rules'. [46]

43. The appellants complain that in the contested judgments the Court of First Instance gave a negative answer to that question. However, in ruling as it did, the Court of First Instance merely followed the previous line of case-law. The Court of Justice had, in fact, already indicated that it is impossible to rely on a DSB decision unless the WTO rules can also be relied on. [47] Admittedly, the question whether a DSB decision finding against the Community can overturn the principle that WTO law cannot be relied upon remained in suspension. Moreover, the Court of Justice had, it is true, appeared initially to have opened the door on this point, having reproached the Court of First Instance for having failed to respond to an argument that the legal effects of a DSB decision vis-à-vis the European Community 'called into question the Court's finding that the WTO rules did not have direct effect and provided grounds for a review by the Community courts of the legality of Directives … in the light of those rules in the action for damages brought by the then applicant'. [48] The door was swiftly closed again, however, the Community courts ruling that reliance could be placed, notwithstanding the lack of direct of effect of the WTO rules, on the incompatibility of a Community act with WTO law — even where that incompatibility was found by a DSB decision — in the context of a reference for a preliminary ruling as to validity [49] or in support of an action for damages [50] only within the narrow framework defined by the *Nakajima* and *Fediol* solutions.

46 — The *FIAMM* judgment, paragraph 108, and the *Fedon* judgment, paragraph 101.

47 — Indeed, the Court has already stated that, if an individual pleads failure to have regard to the compulsory nature of a DSB decision for the Community, that is tantamount to alleging infringement of the compulsory effect of the WTO agreement, which is possible only if that agreement has direct effect (see Case C-104/97 P *Atlanta and Others* v *European Community* [1999] ECR I-6983, paragraphs 17 to 23).

48 — See *Biret International* v *Council*, paragraph 57.

49 — See *Van Parys*.

50 — See *Chiquita Brands and Others* v *Commission*.

44. FIAMM and Fedon are not ignorant of this case-law. They nevertheless dwell on the particular features of their case compared with the earlier cases in order to claim a different outcome. To that end, they state that the Court is being asked to rule on the possibility of relying on a DSB decision after expiry of the reasonable period laid down for compliance therewith in order to obtain compensation for damage actually suffered as a result of retaliatory measures. In their opinion, it is therefore a novel case, since the judgment in *Van Parys* dealt with the inability to rely on a DSB decision for the purpose of assessing the validity of a Community act in the context of a reference for a preliminary ruling; it is also novel because in *Chiquita Brands and Others* v *Commission*, a case which likewise concerned a claim for compensation for damage suffered as a result of a persisting infringement of WTO rules ascertained by the DSB, the applicant had, however, confined itself to claiming application of the *Nakajima* exception.

45. In order to assess whether the appellants' arguments are well founded, it is necessary to return to the basis of the very principle that WTO law cannot be relied on before the courts. It should again be remembered that the possibility of relying on the WTO agreements as a whole has been categorically refused in principle, given their nature and structure, and that there can be room for application of the WTO rules by the courts only in so far as that would affect neither the scope for negotiations that the WTO agreements accord to contracting parties, even in the event of a dispute, nor the reciprocity and balance in the application of the commitments undertaken with regard to the WTO; in short, only in so far as that would not restrict the political freedom that the nature and structure of the WTO agreements allow the contracting parties with regard to the application of the provisions of those agreements. It is therefore necessary to determine whether, in the particular context of the cases at issue, allowing the appellants to rely on the DSB decision to establish the unlawfulness of the conduct of the Community with a view to obtaining reparation for the damage suffered as a result of the increased customs duty imposed by the United States in retaliation for the Community's failure to implement the DSB decision would adversely affect the political freedom of the Community's legislative and executive organs in the framework of the WTO.

46. From that perspective, the first question relates to whether such political freedom continued to exist in the specific circumstances of the cases in point. The answer would certainly be in the affirmative if the reasonable period for implementation of the DSB decision had not yet expired. The Court has already stated that 'the Community courts cannot, in any event, carry out a review of the legality of the Community measures in question, particularly not in the context of an action for damages under Article 178 of the Treaty, without rendering ineffective the grant of a reasonable period for compliance with the DSB recommendations or rulings, as provided for in the dispute settlement system put in place by the WTO agreements'.[51] But as FIAMM and Fedon rightly point out, the reasonable period that the Community had been allowed to comply with the DSB decision had expired on 1 January 1999 and, in a decision of 19 April 1999, the DSB had found that on 1 January the Community legislation continued to be incompatible with the rules of the WTO. Hence, they contend, since no

51 — *Biret International* v *Council*, paragraph 62.

satisfactory compensation had been agreed during the 20 days following the date of expiry of the reasonable period of time — a possibility provided for in Article 22(2) of the DSU — the Community could no longer seek negotiated solutions. It had no choice but to comply with the DSB decision or to lay itself open to retaliatory measures by refusing to do so. As we can see, the debate hinges ultimately on the binding force of the DSB decision: does the DSU require the rulings and recommendations of the DSB to be implemented in full?

47. To be frank, I do not share the appellants' analysis on this point. [52] It is true that Article 22(1) of the DSU gives preference to full implementation of a recommendation to bring a measure into conformity with the WTO agreements and, under Article 3(7), in the absence of a solution that is mutually agreed between the parties and compatible with the agreements, the first objective of the DSU is usually to secure the withdrawal of the measures found to be incompatible. However, it cannot be concluded from this that, to adopt the wording of the case-law, [53] the DSU determines the appropriate legal means of ensuring that the DSB decision, and hence the WTO rules which the DSB has found to have been infringed, is applied in good faith in the legal order of the contracting parties. 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. Furthermore, as the Court of Justice has already noted [54] and the Court of First Instance recalled in the contested judgments, [55] even at the expiry of the period allowed to bring the measure declared to be incompatible with the WTO rules into conformity and even after the authorisation and adoption of retaliatory measures, an important place continues to be reserved at all events for negotiation between the parties to the dispute. Article 22(8) of the DSU thus emphasises the temporary nature of the suspension of concessions and stipulates that the suspension shall only be applied 'until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached', subject to the sole condition, enunciated in Article 3(5) of the DSU, that that solution be compatible with the WTO agreements. Moreover, by the successive amendments to the Community regime for banana imports that had been found to be incompatible with the WTO rules, the Council and the Commission did not seek to remove the provisions ruled to be unlawful; they attempted at one and the same time to take account of the findings of the DSB, to honour the commitments they had made towards the other signatories to the Fourth Lomé Convention and to safeguard the objectives of the COM for bananas; and it was by concluding an agreement with the United States on 19 April 2001 that the dispute was finally laid to rest. It could admittedly be objected that the implementation of the recommendations and rulings of the DSB cannot be avoided, and that such a negotiated solution is yet another way of

52 — Even though they find support in the Opinions of some Advocates General (see the Opinion of Advocate General Alber in *Biret International* v *Council* and that of Advocate General Tizzano in *Van Parys*).

53 — See *Portugal* v *Council*, paragraph 41.

54 — See *Van Parys*, paragraphs 42 to 51. See also *Chiquita Brands and Others* v *Commission*, paragraph 164.

55 — See the *FIAMM* judgment, paragraphs 125 to 129, and the *Fedon* judgment, paragraphs 118 to 123.

implementing the DSB decision. [56] However, whether one views the perennial possibility of reaching a negotiated solution to the dispute as a freedom limited to the choice of the means of implementing DSB decisions or as the freedom to prefer an alternative to implementation of the decision, it still constitutes freedom of choice.

48. Hence, would the political freedom that the Community in any event enjoys within the legal framework of the WTO be undermined if, for the purpose of invoking the fault-based liability of the Community, it were possible to rely on WTO rules which a DSB decision has found to have been infringed? Put another way, would that freedom be restricted if, in an action for damages, the Community courts found the conduct of the Community to be unlawful, a finding that recognition of an ability to rely on the WTO rules would permit? The appellants complain that the Court of First Instance so asserted. [57] They claim that the purpose of a finding of unlawfulness is not to have the Community measure contrary to WTO law declared invalid or to have it annulled, as in the context of a reference for a preliminary ruling as to validity illustrated by the *Van Parys* case or in that of an action for annulment; such a judicial ruling would undoubtedly affect the ability of the Community's legislative and executive organs to seek a negotiated solution, since it would oblige the institutions to remove the measure declared invalid or annulled from the legal order of the Union. According to the appellants, the finding of unlawfulness in the present cases is intended only to meet one of the three conditions to which the Community's fault-based non-contractual liability is subject; it would have no impact on the effectiveness of the Community measure held to be incompatible with the WTO agreements.

49. Here too, the appellants' arguments fail to convince me. It is true that a determination by the Community courts in an action for damages that Community legislation found by the DSB to be incompatible with WTO law is unlawful does not lead formally to either the annulment or the invalidation of that legislation, which thus remains an integral part of the legal order and theoretically applicable. The finding of unlawfulness by the Community court nevertheless constitutes res judicata. Hence, the political organs of the Community could not allow such unlawfulness to persist, short of disregarding the principle of a Community based on the rule of law. They would be under an obligation to eliminate that unlawfulness by repealing or withdrawing the legislation concerned. It would therefore become impossible for them to seek a negotiated solution that would enable them to achieve an optimum balance between the different interests involved, as they did in the present instance by means of the last legislative amendments to the Community regime for banana imports. Their scope for political manoeuvre would thus undeniably be jeopardised.

50. Moreover, a finding of fault-based liability on the part of the Community would give all undertakings affected either by the Community measure that is incompatible with the WTO rules or by the retaliatory measures the opportunity to bring actions

56 — See, to that effect, the Opinion of Advocate General Alber in *Biret International* v *Council*, points 74 to 88, and that of Advocate General Tizzano in *Van Parys*, points 56 and 57.

57 — See the *FIAMM* judgment, paragraphs 130 to 135, and the *Fedon* judgment, paragraphs 123 to 128.

and obtain compensation for the entire damage they have suffered. The prospect of such a financial burden would likewise force the political organs of the Community to eliminate the Community measure held incompatible with the WTO rules and hence restrict the freedom of conduct they are permitted by the legal order of the WTO.

51. Lastly, the appellants object that acceptance of the possibility of reliance on the DSB decision to obtain compensation for the damage caused by the retaliatory measures adopted as a result of the failure to implement the decision would no longer have any effect on the political freedom of the Community organs, since Fedon's claim for compensation was lodged after the trade dispute had been settled, and FIAMM's was at least examined after it had been resolved. However, 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.

52. It follows from the foregoing considerations that one cannot but uphold the refusal of the Court of First Instance to conduct in the actions for damages a review going beyond the *Fediol* and *Nakajima* exceptions of the legality of the conduct of the defendant institutions in the light of the WTO rules which the DSB had found to have been infringed by the Community.

B — *Liability of the Community in the absence of fault*

53. The appellants complain that the Court of First Instance adopted an erroneous definition of unusual damage, which led it wrongly to deny that such damage exists in the present cases. In defence, the Council, the Commission and the Kingdom of Spain endorse the analysis of the Court of First Instance that the damage suffered by the appellants was not unusual and thus express their satisfaction with the operative part of the contested judgments rejecting any no-fault liability on the part of the Community, but they criticise the Court of First Instance for having established the very principle of liability for a lawful act, for having acknowledged its applicability to the cases at issue, for having set insufficiently restrictive conditions for it and for having wrongly accepted that some of those conditions were met, in particular the one relating to the direct causal link. They therefore suggest that the Court of Justice should replace some of the grounds of the contested judgments, and even, in the case of the Council and the Kingdom of Spain which lodged cross-appeals to that effect, set aside the contested judgments in part. I shall assess the merits of the arguments of the various parties by examining in succession the question of the principle of no-fault Community liability, that of its field of application and finally that of the conditions in which it is incurred.

1. The principle of no-fault Community liability

54. The Council, the Commission and the Kingdom of Spain dispute the existence — in their view, affirmed by the Court of First Instance without stating adequate reasons — of a principle of Community liability in the absence of unlawful conduct of its organs as a general principle common to the laws of the Member States; they maintain that well under half of the Member States have enshrined such a principle in their legal systems and the number even falls to two if the act giving rise to the damage is a legislative act. It is true that the Court of First Instance, without excessive concern to prove the point, confined itself to basing the principle of Community liability in the absence of unlawful conduct on the statement that '[n]ational 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'. [58] The second paragraph of Article 288 EC requires that reparation by the Community for damage caused by its institutions comply with 'the general principles common to the laws of the Member States'.

55. But should the second paragraph of Article 288 EC be read as authorising an approach regarding the public authorities' non-contractual liability to be incorporated into Community law only if it is shared by all of the Member States? Can the discovery of a 'general principle common to the laws of the Member States' stem only from the almost mechanistic superimposition of the law of each Member State and the retention of only the elements that match exactly? I do not think so. Such a mathematical logic of the lowest common denominator would lead to the establishment of a regime for Community liability in which the victims of damage attributable to the institutions would have only a very slim chance of obtaining compensation. [59] Although the Court of Justice must certainly be guided by the most characteristic provisions of the systems of domestic law, it must above all ensure that it adopts a solution appropriate to the needs and specific features of the Community legal system. In other words, 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. To be persuaded that this is so, one need only recall the example of the 'Vertrauensschutzprinzip' which was enshrined in Community law even though it

58 — The *FIAMM* judgment, paragraph 159, and the *Fedon* judgment, paragraph 152. For a reiteration of this approach and identical grounds, see Case T-279/03 *Galileo International Technology and Others* v *Commission* [2006] ECR II-1291, paragraphs 144 to 147.

59 — Likewise, Advocate General Roemer rejected the application of the 'rule of the lowest limit' that would result if it were decided to adopt only rules existing in all the Member States (Opinion in Case 5/71 *Zuckerfabrik Schöppenstedt* v *Council* [1971] ECR 975, especially 989). He stated that what is important 'is not the unanimity of the legal systems of all Member States, nor a kind of vote ending in a majority finding; no, it is rather a matter of looking at … evaluative comparative law ("wertende Rechtsvergleichung")' (Opinion in Joined Cases 63/72 to 69/72 *Werhahn Hansamühle and Others* v *Council and Commission* [1973] ECR 1229, especially 1259). He even suggested that 'the best elaborated national rules' might serve as a guideline (Opinion in *Zuckerfabrik Schöppenstedt* v *Council*, especially 989) in order 'to ascertain which legal system emerges as the most carefully considered' (Opinion in *Werhahn Hansamühle and Others* v *Council and Commission*, especially 1260). In my view, however, it is not a question of seeking the best legal solution but of identifying the one that will be the most appropriate in the context of, and for the needs of, the Community legal system.

occurred only in German law. Hence, the fact that only Spanish and French law provide for the public authorities to incur liability by reason of a lawful legislative act cannot prevent such liability being recognised in Community law.

56. The decisive question is whether such a solution would best meet the specific needs of the Community legal system. That does not mean that the principle of public authorities' liability for a lawful legislative act should be enshrined in the Community legal order inasmuch as it would appear to be the best legal solution, and as such must be adopted in the Community legal order. Its enshrinement in Community law can only be the result of a comparison of the mechanisms adopted in this respect by the different national legal systems in order to identify the solution best suited to the particular requirements of the Community legal order. [60]

57. In my view, that is indeed the case. Establishing a principle of no-fault Community liability would make it possible, in the interests of justice, to offset the severity of the conditions for the incurring of fault-based Community liability, linked in particular to the need for a sufficiently serious breach of a rule of law protecting individuals, [61] in order to give the victims of particularly serious damage suffered as a result of the conduct of the Community institutions the possibility of obtaining compensation. The appropriateness of such a solution no doubt explains why the Court has never ruled out the possibility of enshrining it in Community law. [62] Moreover, although this legal solution is to be found only in some national legal systems, the concern it expresses and the protection it provides for legal interests are also taken into account in other legal systems, even if, as we shall see, [63] different legal mechanisms are employed.

58. In the particular context of the cases in point, this solution appears to be even more appropriate. Unable to rely on WTO rules, individuals who have reason to complain of conduct of Community institutions contrary to the WTO agreements cannot, as we have seen, plead the unlawfulness of that conduct. They are consequently denied access both to

60 — For an illustration of this method with regard to the right to strike, which aims to compare a solution accepted in national law with the particular requirements of the Community legal order, see my Opinion in Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union* [2007] ECR I-10779, point 60.

61 — See Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraphs 41 and 42.

62 — See Joined Cases 9/71 and 11/71 *Compagnie d'approvisionnement, de transport et de crédit and Grands Moulins de Paris* v *Commission* [1972] ECR 391, paragraph 46; Joined Cases 54/76 to 60/76 *Compagnie industrielle et agricole du comté de Loheac and Others* v *Council and Commission* [1977] ECR 645, paragraph 19; Case 59/83 *Biovilac* v *EEC* [1984] ECR 4057, paragraph 29; Case 267/82 *Développement and Clemessy* v *Commission* [1986] ECR 1907, paragraph 33; Case C-237/98 P *Dorsch Consult* v *Council and Commission* [2000] ECR I-4549, paragraph 18; Case T-196/99 *Area Cova and Others* v *Council and Commission* [2001] ECR II-3597, paragraph 171; Case T-170/00 *Förde-Reederei* v *Council and Commission* [2002] ECR II-515, paragraph 56; Case T-195/00 *Travelex Global and Financial Services and Interpayment Services* [2003] ECR II-1677, paragraph 161; Case T-99/98 *Hameico Stuttgart and Others* v *Council and Commission* [2003] ECR II-2195, paragraph 60; and Joined Cases T-64/01 and T-65/01 *Afrikanische Frucht-Compagnie and Internationale Fruchtimport Gesellschaft Weichert* v *Council and Commission* [2004] ECR II-521, paragraphs 150 and 151.

63 — See below, at point 63 of this Opinion.

an action for annulment and to a reference for a preliminary ruling as to validity or an action for damages on grounds of fault. In the absence of the enshrinement of the principle of no-fault Community liability, even those who, as a result of the unlawful conduct, have suffered particularly serious damage would be deprived of all judicial protection. In this connection, it will be noted that enshrinement by the French Conseil d'État (Council of State) of no-fault liability for legislation is often presented as compensation for the inability of French administrative courts to act as an arbiter of law by exercising a review of constitutionality.

59. In addition, the acceptance of a principle of no-fault liability would meet the requirements of good governance. It would force the political authorities, if they envisage retaining Community legislation despite expiry of the reasonable period of time granted for compliance with a DSB decision that has found it to be incompatible with the WTO rules, to assess better the costs that could ensue for citizens of the Union and to set them against the advantages that would accrue to the economic sector or sectors concerned if the Community legislation were retained. This would not reduce the discretion of the institutions in the WTO context but ensure that that discretion was exercised advisedly.

60. Lastly, recognition of a principle of no-fault liability would leave it to the Community legal system to allocate within the Community the consequences of the institutions' freedom of action in the WTO context. It would no longer be for trading partners to choose in their discretion, through the retaliatory measures they adopt, which category of Community economic operators must bear the cost of that freedom; it would be for the Community to decide whether that cost must be borne solely by the undertakings affected by such measures or distributed over society in general.

61. For the reasons I have just indicated, the cases in point therefore in my view offer an opportunity or even impose a duty to take the case-law of the Court a step further. Enshrining in Community law a principle of no-fault Community liability would advance the case-law from potential to settled, from the era of uncertainties to that of solutions. [64]

62. The establishment of a principle of no-fault Community liability could take its inspiration from the notion of the equality of citizens in bearing public burdens on which French administrative law has based liability for legislation. The reasoning may be summarised as follows: as all public activity is assumed to benefit society as a whole, it is

64 — To use a formula borrowed from Picod, F. and Coutron, L., 'La responsabilité de la Communauté européenne du fait de son activité administrative', in Auby, J.B. and Dutheil de la Rochère, J., *Droit administratif européen*, Bruylant, 2007, p. 171; see especially pp. 204 to 208.

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 society via taxation, restores the equality that has been upset.

63. This idea is not very far removed from the 'Sonderopfertheorie' of German law, according to which individuals who, by reason of lawful public action, suffer a 'special sacrifice', that is to say damage equivalent to expropriation, must be granted reparation. Presented in this manner, no-fault Community liability could also be based on property rights, which are protected in the Community legal system as a general principle of law in accordance with the constitutional traditions common to the Member States. It would express the idea that even lawful action by the Community's legislative body cannot have an effect equivalent to expropriation without compensation being granted. [65]

65 — For an early example of such an insight, see the Opinion of Advocate General Sir Gordon Slynn in *Biovilac* v *EEC*; see especially p. 4091. Moreover, this idea appears, in some way or another, in most of the legal systems (see Amaral, M.L., *Responsabilidade do Estado e dever de indemnizar do legislador*, Coimbra Editora, 1998, p. 474 et seq.).

2. The field of application of no-fault Community liability

64. As regards the field of application of such a principle of no-fault liability, the Commission, in particular, complains that after recognising that such liability can apply only 'in specific fields', [66] the Court of First Instance did not feel bound to name the fields involved. However, that was not necessary for resolving the cases in point. It was sufficient for the Court of First Instance to satisfy itself that no-fault liability could apply in those cases — as it found by implication since it verified that the conditions for its application were met. But this is the point with which both the Commission and the Council take issue too. The following observations must therefore be made in this regard.

65. First, contrary to the picture which both the Commission and the Council seek to present, it is not so much a principle of liability for a lawful act that the Court of First Instance established, rightly in my view, in the contested judgments. It is, more broadly, absolute liability, even in the absence of fault. In other words, liability is incurred regardless of the need for fault — which it would be for the applicant to prove — to be the cause of the damage. Liability can even extend to acts that are unlawful but do not constitute a sufficiently serious infringement.

66 — See the *FIAMM* judgment, paragraph 159, and the *Fedon* judgment, paragraph 152.

66. Secondly, in contrast to the Council, I do not see why this regime of absolute liability could not also be applied to failures to legislate. The parallel established by the Council with the failure to act referred to in Article 232 EC is irrelevant, as it is a question of no-fault liability. In any event, it is not a failure to take legislative action that is at issue in the present cases. Both the Council and the Commission took several initiatives within the reasonable period of time allowed (modification of the Community regime for banana imports, negotiations), which moreover are mentioned by the Council itself in its written pleadings, but those initiatives proved unable to ensure correct implementation of the DSB decision.

67. Thirdly, there is no valid reason for limiting no-fault Community liability to cases where the damage stems from a non-legislative act, as the Commission maintains. Under the second paragraph of Article 288 EC, the Community is under an obligation to make good 'any damage caused by its institutions', without distinguishing their activities according to whether they are administrative or legislative. Furthermore, particularly serious damage may, in the general interest, be inflicted on certain operators both by the legislative and by the administrative authorities. Moreover, in the cases in point the modification of the Community regime for importing bananas that was held to be inadequate was the result both of a Council parent regulation and a Commission implementing regulation. Finally and incidentally, such a limitation is, in my view, inappropriate, given the insufficient distinction between legislative and administrative acts in Community law as it currently stands. In the final analysis, only damage resulting from the application of a provision of primary law cannot give entitlement to compensation. [67]

68. Lastly, in the particular context of compliance with the WTO agreements which is pertinent to the cases in point, only citizens of the Union might rely on this system of no-fault liability to claim compensation for especially serious damage allegedly caused to them, in the general interest, by the Community institutions. The political authorities cannot be required, nor can it be open to them, for the purposes of exercising their freedom of action within the context of the WTO, to assess as well the costs of their decisions for operators from third countries. Within the framework of the Community powers exercised by the institutions in the field of external trade policy, the concept of a 'rupture' in the equal distribution of public burdens can therefore be conceivable only between citizens of the Union. It cannot therefore be validly argued, as the Council submits, that the recognition of no-fault liability in the context of the application of WTO law would disregard the principle of reciprocity, since the Community's main trading partners do not have such liability.

69. Stated, justified and circumscribed in this way, the function of the principle of no-fault Community liability is clear. There is no question of compelling the Community institutions to comply with WTO rules by

67 — See Case T-113/96 *Dubois et Fils* v *Council and Commission* [1998] ECR II-125, paragraphs 40 to 48.

restricting their political freedom. It is only a question of ensuring that the costs resulting from the political choices they make do not affect the equality of citizens of the Union in shouldering public burdens.

70. The predisposition of the Council and the Commission against enshrining the principle of no-fault Community liability is understandable. Legislative and administrative activities should not be exposed, through the establishment of an overgenerous liability mechanism, to a risk that could impede the very exercise of those activities. Legitimate though it be, this concern cannot obstruct the recognition of a principle of no-fault Community liability. Both the account taken of it and the way in which it is set against the concern for the balanced apportionment of public burdens must be reflected in the scope set for that liability and the conditions laid down for it to apply.

3. The conditions for no-fault Community liability

71. The Council and the Commission dispute first the validity of the findings of the Court of First Instance regarding the satisfaction of the conditions inherent in any liability mechanism, which are therefore not unique to the regime for no-fault liability. They allege that the Court of First Instance misconstrued the concept of actual and certain damage and the rules on the burden of proof. However, the Court of First Instance was fully entitled to find that the defendants did not dispute that the applicants had suffered actual damage to their businesses as a result of the rise in the prices of their products caused by the increased customs duty, and that they merely maintained that the applicants had been incapable of mitigating the effects by adopting appropriate measures. Moreover, it used the statistics produced by the Commission, which reveal a fall in the total volume of imports of batteries and spectacle cases into the United States during the period in which the increased rate of duty was applied, in finding that the reality of the damage was proven. [68]

72. The defendants also make a more serious complaint that the Court of First Instance misconstrued the requirement that the damage be a sufficiently direct consequence of the misconduct of the institution concerned. [69] They assert that there is no automatic link between the failure of the Community to implement the DSB decision finding against it and the imposition of the increased customs duty, as the conduct of the United States authorities in the exercise of their discretion broke the causal link between the conduct of the Community institutions and the damage claimed. First, the United States authorities refused the compensation offered to them by the Community under Article 22(1) and (2) of the DSU. Secondly, they freely chose to ask the DSB for authorisation to adopt retaliatory measures and to use the authorisation obtained and, for that purpose, they established in their discretion

68 — See the *FIAMM* judgment, paragraphs 166 to 170, and the *Fedon* judgment, paragraphs 159 to 162.

69 — See Joined Cases 64/76, 113/76, 167/78, 239/78, 27/79, 28/79 and 45/79 *Dumortier frères and Others* v *Council* [1979] ECR 3091, paragraph 21. See also Case T-178/98 *Fresh Marine* v *Commission* [2000] ECR II-3331, paragraph 118.

the list of products affected and the amount of the duties. It is true that the United States was under no obligation whatsoever to react as it did to the Community's failure to implement the DSB decision within the reasonable period allowed. Nevertheless, the reaction of the United States authorities constitutes one of the options made available by the DSU in the event of a failure to implement a DSB ruling or recommendation, and hence was foreseeable. As the Court of First Instance pertinently noted, 'the withdrawal of concessions in relation to the Community which took the form of the increased customs duties on imports is to be regarded as a consequence resulting objectively, in accordance with the normal and foreseeable operation of the WTO dispute settlement system accepted by the Community, from the retention in force by the defendant institutions of a banana import regime incompatible with the WTO agreements'.[70] Hence, far from breaking the chain of causality between the conduct of the Community and the alleged damage, the measures taken by the United States authorities appear rather to be links in that chain. The Court of First Instance therefore rightly regarded the Community's conduct as the 'immediate cause'[71] of the damage suffered by the applicants.

73. Let us now turn to the conditions specific to the regime of no-fault liability. According to the appellants, the Court of First Instance adopted and applied an erroneous concept of unusual damage. In contrast, the defendants, while accepting the concept of unusual damage developed by the Court of First Instance, consider the conditions it laid down for the incurring of no-fault liability to be inadequate and thus ask the Court of Justice to supplement the grounds of the contested judgments by adding a further requirement that there be no entirely general interest pursued by the conduct of the institutions that caused the damage.

74. In order to assess the merit of these different assertions it is necessary to state the conditions to which no-fault liability of the Community must be subject. In my view, they must be dictated by the very foundations on which this system of liability rests. As I have been at pains to show, the principle of no-fault liability may be based both on the idea of a 'rupture' in the equality of citizens in shouldering public burdens and on the protection that must be given to the fundamental right to property. Hence, the only damage for which no-fault liability creates the right to compensation is that which is both unusual and special.

75. Just as they enjoy the resulting benefits, all individuals must bear, without compensation, the ordinary disadvantages stemming from the organisation of life in society and the actions of the public authorities for that purpose. In some ways, it is a question of public burdens that must be regarded as falling normally on the persons concerned. Even though these burdens do not weigh uniformly on all citizens, the courts are not able to re-establish perfect equality. That would be to impose a disproportionate and inappropriate duty on them. Despite being asymmetrical, public burdens must therefore, as a matter of principle, be regarded as falling normally on individuals and consequently as bestowing no right to compensation. The

70 — The *FIAMM* judgment, paragraph 183, and the *Fedon* judgment, paragraph 177.

71 — The *FIAMM* judgment, paragraph 185, and the *Fedon* judgment, paragraph 179.

situation is different, however, when public actions cause unusual and special damage.

76. Damage must be classified as unusual when it appears to be such by reason both of the conditions in which it occurs and its intrinsic characteristics. Unusual damage is, first of all, damage that exceeds the limits of the economic risks inherent in operating in the sector concerned, in other words damage stemming from the materialisation of a risk that the victim could not reasonably have foreseen, against which he could not protect himself. But that is not sufficient. It must also be serious. Otherwise the burden cannot be regarded as unusual, and the damage would not verge on expropriation that cannot be left uncompensated in view of the protection that must be given to the right to property. That does not mean that the damage must be equivalent to total and definitive loss of ownership, but it must nevertheless entail sufficiently serious harm to the attributes of the right to property (*usus, fructus* and *abusus*). It must again be stressed that it is immaterial whether that harm to the right to property is lawful or unlawful if it occurs within the framework of liability not based on fault.

77. On the other hand, in a system of liability based on equality in bearing public burdens, even if the damage can be classified as unusual in the sense I have just defined, it cannot give the right to compensation unless it is also special in nature. That is the case only if it affects no more than a small number of individuals or, more precisely, if it affects a particular category of economic operators with disproportionate severity by comparison with other operators. It is only in that situation that equality in bearing public burdens would be ruptured.

78. Set out and defined in this way, the conditions for damage to be classified as unusual and special are sufficiently restrictive so that, contrary to the assertions of the Commission, the applicability of this system of no-fault liability in the cases in point does not affect the political freedom of the institutions in the WTO sphere, which has led the Court of Justice to conclude that the WTO rules cannot in principle be relied on. The number of victims able to claim damage who meet these requirements will, in any event, always be very small, so that the burden of any compensation on the Union's budget will never be sufficiently large to constrain the conduct of the Community's political organs within the context of the WTO.

79. Should no-fault liability on the part of the Community be made subject to an additional condition that there be no general economic interest pursued by the act or conduct that causes the damage? This is what both the Council and the Commission demand and complain that the Court of First Instance failed to impose in the contested judgments. They can rely to that effect on certain decisions of the Community courts which, departing from the general line of case-law, have added that requirement. [72] In

72 — See *Compagnie d'approvisionnement, de transport et de crédit and Grands Moulins de Paris* v *Commission*, paragraphs 45 and 46; *Förde-Reederei* v *Council and Commission*, paragraph 56; and *Afrikanische Frucht-Compagnie and Internationale Fruchtimport Gesellschaft Weichert* v *Council and Commission*, paragraph 151.

other words, if the act or conduct that caused the damage was adopted in the interest of society as a whole and not in order to favour particular interests, any compensation would be precluded. In my view, there is no reason to adopt this additional condition demanded by a minority strand of case-law. I do not consider it appropriate, because equality in bearing public burdens and the protection to be accorded to the right to property demand that economic operators who have suffered unusual and special damage be compensated, even if the measure that caused the damage was justified by a general economic interest. Nor do I consider it necessary, as the conditions that the damage be unusual and special are sufficiently restrictive for the political authorities' freedom of action in the pursuit of a general economic interest not to be affected by fear of possible liability.

80. The conditions that I have just stated are those that the majority of the case-law has laid down as having to be met at all events, while refraining from enshrining no-fault Community liability in Community law. The Court has thus expressly made no-fault liability of the Community subject to the existence of unusual and special damage. [73] It has also rejected the existence of no-fault liability because the alleged damage was merely the result of the ordinary commercial risk taken by an economic operator in the sector concerned [74] or because it did not exceed 'the limits of the economic risks inherent in operating in the sector concerned'. [75] Similarly, in the contested judgments the Court of First Instance made the Community's no-fault liability subject to there being unusual and special damage, which it defined as follows: 'damage is, first, unusual when it exceeds the limits of the economic risks inherent in operating in the sector concerned and, second, special when it affects a particular circle of economic operators in a disproportionate manner by comparison with other operators'. [76] By ruling in this way, it positioned itself in the mainstream of the settled case-law that it has developed. [77]

81. However, FIAMM and Fedon dispute neither the need for damage to be unusual and special nor the definition of those characteristics set out in the contested judgments. They rely on an error of law in the meaning of the definition of unusual damage that the Court of First Instance adopted and applied. The Court of First Instance ruled that the damage suffered by the applicants had not exceeded the limits of the economic risks inherent in their exporting activities, since the possibility of retaliatory measures is provided for in the DSU and can therefore not be regarded as beyond the normal hazards of international trade as currently organised, so that the harmful consequences that might ensue have to be borne by any operator who decides to sell his products on the market of one of the WTO members. In other words, because the instrument governing inter-

73 — See *Dorsch Consult* v *Council and Commission*, paragraphs 18 and 53.

74 — See *Développement and Clemessy* v *Commission*, paragraph 33.

75 — *Biovilac* v *EEC*, paragraphs 28 and 29.

76 — The *FIAMM* judgment, paragraph 202, and the *Fedon* judgment. paragraph 191.

77 — Among earlier judgments, see in particular *Afrikanische Frucht-Compagnie and Internationale Fruchtimport Gesellschaft Weichert* v *Council and Commission*, paragraphs 150 and 151; see subsequently *Galileo International Technology and Others* v *Commission*, paragraphs 147 and 148.

national trade legally provides for retaliatory measures, such measures are necessarily foreseeable by any exporting undertaking. It is a risk inherent in exporting activities.

82. As the appellants rightly maintain, by ruling in this manner the Court of First Instance failed to have regard to the fact that the unusual nature of damage is assessed in relation to the economic risks inherent in operating in the sector concerned, in other words that damage is unusual [78] where it is not the manifestation of a risk inherent in operating in the sector concerned. That is the case where there is no link between the act or conduct causing the damage and the economic sector in which the undertakings suffering the damage operate. In the absence of such a link, the damage cannot be regarded as the manifestation of a normal commercial risk against which a prudent operator could and should have protected himself. This is the thrust of the case-law. The following have been considered usual: damage suffered by a maritime transport company as a result of amendment of the transitional tax exemption arrangements for products subject to excise duty and sold on ships during sea-crossings between Member States, [79] and damage suffered by a producer of basic feedingstuffs for piglets and poultry made from whey as a result of the entry into force of certain Community regulations on the sale of skimmed-milk powder for use in feed for pigs and poultry. [80]

78 — If it is also sufficiently serious.

79 — See *Förde-Reederei* v *Council and Commission*, paragraphs 58 to 60.

80 — See *Biovilac* v *EEC*, paragraphs 27 to 30.

83. In the present cases, there is no link between the adoption and retention of the legislation on the Community scheme for banana imports and the damage suffered as a result of the retaliatory measures by Community exporters of spectacle cases and industrial batteries. That damage could not therefore be regarded as usual for these operators, particularly as under Article 22(3) of the DSU retaliatory measures must first be applied to the same sector as that in which a violation of WTO law has been ascertained. For that reason, the contested judgments must be set aside as being vitiated by an error of law. It will be for the Court of First Instance, after having asked the appellants for the necessary information, to assess whether the damage on which they rely is also unusual in that it constitutes sufficiently serious harm to the attributes of the right to property, and to rule on whether that damage is special.

C — *The unreasonable length of the proceedings*

84. Lastly, the appellants seek fair compensation for the unreasonable length of the proceedings before the Court of First Instance. Fedon's request can be dismissed easily on the basis of Article 112(1)(c) of the Rules of Procedure of the Court of Justice on the ground of inadmissibility, being devoid of any statement of grounds.

85. There remains the request from FIAMM, which states that the Court of First Instance took almost five years and nine months to deliver judgment in its case, and hence alleges infringement of the right to a judicial decision within a reasonable period, which is a constituent of the right to fair legal process enshrined in Article 6(1) of the European Convention on Human Rights and safeguarded in the Community legal system as a general principle of law. The appellant relies for that purpose on *Baustahlgewebe* v *Commission*, [81] in which the Court of Justice recognised that right to be applicable to cases before the Court of First Instance and, as a consequence, agreed to hear on appeal a plea claiming irregularity of the procedure before the Court of First Instance in view of the proceedings' allegedly unreasonable duration. It considers the period to judgment to be excessive, given the clarity of the questions of fact, the fact that the conduct of none of the parties had contributed to prolonging the procedure and the fact that the Court of First Instance did not have to deal with exceptional circumstances. The appellant maintains that this procedural irregularity has harmed its interests in that, as a result of the loans raised to pay the increased customs duties, it is now heavily in debt and has been forced to negotiate the sale of the majority of its share capital to an investment fund in exchange for the assumption of its bank debt.

86. In defence, the Commission again pleads first that the plea is inadmissible and, to that end, states in particular that the alleged procedural irregularity had no effect on the outcome of the dispute. However, Article 58 of the Statute of the Court of Justice does not require that the breach of procedure before the Court of First Instance be of such consequence in order for it to be raised; it merely requires that it 'adversely affects the interests of the appellant'. That indeed appears to be the case, as the length of the proceedings contributed to increasing the size of the appellant's debt. Although in the case of a procedural irregularity based on the excessive length of the proceedings before the Court of First Instance the condition that the appellant's interests be adversely affected has sometimes been interpreted as requiring that the irregularity have an impact on the outcome of the dispute, that has occurred solely where the plea based on that irregularity was raised in support of claims for the setting aside of the judgment of the Court of First Instance. [82] In the present case, this plea is raised only in order to obtain fair compensation.

87. In contrast, claims seeking fair compensation must be treated as demanding reparation of the damage due to the unreasonable length of the proceedings before the Court of First Instance. The claim made by the appellant in *Baustahlgewebe* v *Commission* for a reduction in the fine imposed by the Commission and confirmed by the Court of First Instance — a claim based on the unreasonable time taken to reach judgment in that case before the Court of First Instance — was indeed also treated as a request for compensation. [83] Although 'for reasons of economy of procedure and in order to ensure an immediate and effective remedy regarding

81 — Case C-185/95 P [1998] ECR I-8417.

82 — See *Baustahlgewebe* v *Commission*, paragraph 49, and the order in Case C-39/00 P *SGA* v *Commission* [2000] ECR I-11201, paragraph 46.

83 — See the analysis by Advocate General Léger in his Opinion in *Baustahlgewebe* v *Commission*, points 46 to 76.

a procedural irregularity of that kind' [84] the Court of Justice nevertheless upheld the appellant's submissions and agreed to deduct the amount of compensation from the fine, it is sufficient to note that in any case such a set-off is not possible in the present case.

88. The claims for fair compensation therefore had to be made before the Court of Justice [85] in an action for non-contractual liability based on Articles 235 EC and 288 EC, which has to be brought against the institution or institutions whose conduct caused the damage. As the Court has ruled, 'it is in the interests of a good administration of justice that where Community liability is involved by reason of the act of one of its institutions, it should be represented before the Court by the institution or institutions against which the matter giving rise to liability is alleged'. [86] As the Commission has rightly observed, the defendants in the present proceedings are the Council and the Commission, whereas the excessive length of the proceedings of which the appellant complains is ascribable to the Court of First Instance, which is part of the institution of the Court of Justice. The application for fair compensation must therefore be declared inadmissible both *ratione materiae* and *ratione personae*.

84 — *Baustahlgewebe* v *Commission*, paragraph 48.

85 — I endorse the arguments presented by Advocate General Léger (Opinion in *Baustahlgewebe* v *Commission*, points 66 to 71) as regards the jurisdiction of the Court of Justice to hear such an action, and not the Court of First Instance.

86 — See *Werhahn Hansamühle and Others* v *Council and Commission*, paragraph 7.

III — Conclusion

89. In the light of all the grounds I have just stated, I propose that the Court should:

— set aside the judgments of the Court of First Instance of the European Communities of 14 December 2005 in Case T-69/00 *FIAMM and FIAMM Technologies* v *Council and Commission* and Case T-135/01 *Fedon & Figli and Others* v

Council and Commission on the ground that they are vitiated by an error of law consisting in a misinterpretation of the concept of unusual damage and refer the cases back to the Court of First Instance; and

— rule that the claims of Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) and Fabbrica italiana accumulatori motocarri Montecchio Technologies Inc. (FIAMM Technologies) and of Giorgio Fedon & Figli SpA and Fedon America, Inc. seeking fair compensation are inadmissible.