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EC Liability in the Absence of Unlawfulness

- The FIAMM[1] Case -

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[1] *Fabbrica italiana accumulatori motocarri Montecceio SPA v. Council and Commission (FIAMM)*, T-69/00, (2005) European Court Reports II-5393. See also the parallel case T-135/01 (2005) which is not published in the European Court Reports. *FIAMM*, Joined cases C-120, 121/06 P, not yet reported.

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A. In General

While the European Community has been repeatedly held liable for its non-contractual unlawful acts on the basis of Art. 288.2 EC,[2] the European courts have long been reluctant to find explicit wording that would establish or reject a liability regime for unlawful EC action.[3] Finally in *FIAMM*, the Court of First Instance (CFI) took the decisive step of accepting such liability in principle and developed the criteria for its application.[4] The judgement of the CFI represents a remarkable innovation in two respects. First, it makes reviewable all conduct of the Community and its institutions for the purposes of compensation and thus opens the door to a vast area of liability. Second, it is the very first indication that the EC is to pay compensation for behaviour which is deemed lawful (merely) from the European perspective. In other words, the CFI has undercut the European sovereignty shield that the European Court of Justice (ECJ) so carefully installed in order to protect the European legal order from being pierced by Public International Law. As remarkable and thought provoking this suggestion is, the door has been shut by the ECJ on its recent review of the *FIAMM* decision. In its judgement of 9 September 2008, the Court made it explicitly clear that as of now, there is no such liability of the European Community.[5]

For many, the decision comes a no surprise; for the European industries subject to WTO retaliatory measures like *FIAMM*, it does not worsen their already low standing before EC courts. Why the judgement of the ECJ must, in fact, be welcomed and preferred to that of the CFI is laid down in the following.

2 Already the ECJ in *Lütticke v. Commission*, C-4/69, (1971) E.C.R. 325; *Zuckerfabrik Schöppenstedt v. Council*, C-5/71, (1971) E.C.R. 975; *HNL v. Council and Commission*, Joined C-83, 94/76, 4, 15, 40/77, (1978) E.C.R. 1209; *Mulder et al. v. Council and Commission*, Joined C-104/89, 37/90, (1992) E.C.R. I-3061; also the Court of First Instance in *African Fruit Company v. Council and Commission*, Joined T-64/01, 65/01, (2004) E.C.R. II-521.

3 See, for instance, *Compagnie d'approvisionnement v. Commision*, Joined C-9, 11/71, (1972) E.C.R. 391; *Développement SA et Clemessy v. Commission*, C-267/82, (1986) E.C.R. 1907; *Dorsch Consult v. Council*, C-237/98 P, (2000) E.C.R. I-4549 and *Förde-Reederei v. Council and Commission*, C-170/00, (2002) E.C.R. II-515.

4 *FIAMM*, T-69/00, (2005) E.C.R. II-5393, paras 157, 158.

5 *FIAMM*, Joined C-120, 121/06 P, para. 176.

B. Setting of the Case

The Italian-based producer of stationary batteries, *FIAMM*, comes to Court as just one in a long line of claimants seeking compensation for damages incurred as a result of Community conduct inconsistent with the WTO legal order.[6] Based on Art. 288.2 EC, these actions typically tie in with breaches of WTO law or non-compliance with Panel or Appellate Body decisions as adopted by the DSB. With the *Portugal v. Council* separation of the EC and the WTO legal order in mind, they were dismissed accordingly.[7] *FIAMM* looked at this situation from a different perspective. In this case, the claimant sought to recover damages from retaliatory measures authorised by the DSB under Art. 22.2 DSU and imposed by the US. Indeed, non-implementation of the *Bananas* decision[8] triggered the US to request authorisation for the suspension of concessions.[9] The request

6 For other examples, see *Geert A. Zonnekeyn*, EC liability for non-implementation of adopted WTO panel and Appellate Body Reports – The example of innocent exporters in the Banana case, in: *Vincent Kronenberg*, (ed.), The EU and the International Legal Order: Discord or Harmony?, 2001, 251-272 and *Geert A. Zonnekeyn*, EC liability for non-implementation of WTO dispute settlement decisions – are the dice cast?, Journal of International Economic Law 7 (2004) 2, 483-490.

7 *Biret*, C-94/02 P, (2003) E.C.R. I-10565, paras 55-66, where the Court held that the question of legal effects of DSB rulings is independent from that relating to the direct effect of WTO law. Nearly undoing this distinction are *Léon Van Parys*, C-377/02, (2005) E.C.R. I-1465, para. 51 and *Chiquita Brands*, T-19/01, (2005) E.C.R. II-315, paras 161-166. In these cases, the EC Courts argued that reliance on DSB rulings, similarly to reliance on WTO rules, would interfere with the scope of action available to the Community when implementing DSB decisions.

8 On 9 September 1997 the DSB adopted the Panel Reports as well as the Appellate Body Report following complaints by Ecuador, Guatemala, Honduras, Mexico and the USA (WT/DS27/AB/R). The DSB found 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 (Banana Market Regulation, OJ EC 1993, L 47/1) incompatible with the WTO Agreements, as it included preferential provisions benefiting bananas from ACP countries. The DSB recommended that the Community bring its regime into conformity before the expiry of a reasonable period, set for 1 January 1999. Two amendments of the Banana Market Regulation followed in 1998 (Council Regulation (EC) No. 1637/98, OJ EC 1998, L 210/28 and Commission Regulation (EC) No. 2362/98, OJ EC 1998, L 293/32).

9 Recourse by the United States to Article 22.2 DSU, *EC – Bananas III*, WT/DS27/43, 14 January 1999. Page three, listing the products for which an imposition of increased export duties is requested, refers to, *inter alia***,** lead-acid storage batteries other than of

concerned *inter alia* the import of stationary batteries. When the suspension was authorised in April 1999,[10] the US increased its import duties on stationary batteries from Italy to about 96,5% for a duration of two years.[11] In 2000, the case was brought to the CFI where *FIAMM* claimed damages of around € 12 million. The CFI delivered its judgement in December 2005. In February 2006, it was appealed and referred to the ECJ which issued its decision on 9 September 2008.
Since *FIAMM* explicitly invoked what is now phrased "non-contractual liability in the absence of unlawfulness" as a legal ground for compensation, the Courts could not circumvent the issue this time and needed to rule on the existence of such a liability regime.[12]

C. Non-Contractual Liability for Lawful EC Acts According to the CFI

After the CFI had rejected all classical avenues of compensation by refusing to identify an "unlawful act" for which the EC could be held liable,[13] it turned to the question of whether the EC could be held liable in the absence of unlawful conduct. With reference to *De Boer Buizen*, the Court stated that:

> "Where, as in the present case, it has not been established that conduct attributed to the Community institutions is unlawful, that does not mean that undertakings which, as a category of economic operators, are required to bear a disproportionate part of the burden resulting from a restriction of access to export

a kind used for starting piston engines or as the primary source of power for electric vehicles.

10 Decision of the Arbitrators, *EC – Bananas III*, WT/DS27/ARB, 9 April 1999, para. 8.1. See Notice of the USTR of 19 April 1999 published in the Federal Register 64 Fed. Reg. 19, 209 (1999), announcing the final product list for purposes of retaliatory measures in relation to the *Bananas III* dispute. The list includes: bath preparations, handbags, wallets and similar articles, felt paper and paperboard boxes, lithographs, bed linen, batteries and coffee or tea makers.

11 See *Stefan Haak*, Grundsätzliche Anerkennung der außervertraglichen Haftung der EG für rechtmäßiges Verhalten nach Art. 288 Abs. 2 EG, Europarecht 5 (2006), 696-705.

12 This issue has been brought to the ECJ already in *Biret*, but it was dismissed because it was raised too late in the proceedings.

13 *FIAMM*, T-69/00, (2005) E.C.R. II-5393, paras 108-131.

> markets can in no circumstances obtain compensation by virtue of the Community's non-contractual liability".[14]

The Court came to this finding through reliance on the notion of "general principles common to the laws of the Member States" as laid down in Art. 288 EC.[15] The Court argued that national laws apply - "albeit to varying degrees, in specific fields and in accordance with differing rules" - to systems of non-contractual liability and "even in the absence of unlawful action by the perpetrator of the damage".[16] According to the Court, the fact that Art. 288.2 EC exclusively addresses non-contractual Community liability for *un*lawful behaviour does not restrict the ambit of those general principles. Affirming the *Dorsch Consult* judgement,[17] it also held that the EC, "when damage is caused not shown to be unlawful, can incur non-contractual liability if the conditions as to sustaining actual damage, to the causal link between that damage and the conduct of the Community institution and to the unusual and special nature of the damage in question are all met."[18]

This is a significant shift of focus of EC liability, especially in view of the fact that the Court had easily accepted the actual conduct and causal link requirements on the merits of the case. It shows that the crucial criterion for EC non-contractual liability for lawful conduct is the "unusual and special nature" of the damage. In other words, not the unlawfulness of the EC conduct but the exceptional character of the damages triggers EC liability according to the CFI. It was exactly this last criterion where *FIAMM* could not sustain its case. With reference to its *Dorsch Consult* decision, the CFI specified when it would understand a damage to be of unusual and of special nature:

> "[Damage is] first, **unusual** when it exceeds the limits of the economic risks inherent in operating in the sector concerned and,

[14] *Id.*, para. 157 referring to *De Boer Buizen* v. *Council and Commission*, C-81/86, (1987) E.C.R. 3677, para. 17.

[15] *Id.*, para. 158.

[16] *Id.*, para. 159.

[17] *Dorsch Consult v. Council and Commission*, C-237/98 P, (2000) E.C.R. 4549, para. 19

[18] *FIAMM*, T-69/00, (2005) E.C.R. II-5393, para. 160.

> second, **special** when it affects a particular circle of economic operators in a disproportionate manner by comparison with other operators."[19]

More specifically, concerning economic operators producing, selling or advertising their products on the market of a WTO Member, the CFI found that the suspension of tariff concessions in relation to products from within the Community did not lead to unusual or special damage. Instead, this possibility ranks, according to the Court, among the "vicissitudes inherent in the current system of international trade" and should therefore be foreseen by each operator individually.[20] The fact that the retaliatory measure could be imposed in a different sector of the respective industry or in cases of cross-retaliation in a different industry altogether, did not change the Court's perception. As a result, *FIAMM* was to foresee and bear the risk that EC conduct inconsistent with WTO rules in the agricultural industry could negatively affect its trade with stationary batteries. Similarly, in a number of WTO cases European based international traders have been left without legal remedy because the risk that, for instance, European sanitary policy will impact on trade in Gin, Gucci handbags or bicycles[21] was considered "inherent in their export operations".

Considering that the Court set out to establish a liability for lawful EC acts in order to open avenues of compensation for every harmful consequence of the conduct of the EC and its institutions, this is indeed a somewhat paradoxical result.

19 *Id.*, paras 202-211, emphasis added.

20 *Id.*

21 *Cf.* Decision by the Arbitrators, *EC – Hormones*, WT/DS48/ARB, 12 July 1999, paras 72-73. Annex II lists products for the suspension of concessions as proposed by the claimant Canada. Decision by the Arbitrators, *EC – Hormones*, WT/DS26/ARB, 12 July 1999, paras 83-84. In notice by the USTR of 27 July 1999 published in the Federal Register 64 Fed. Reg. 40, 638 (1999), the United States published its intention to retaliate by additional duties imposed on pork, Roquefort cheese, onions, truffles, dried carrots, liver of goose, fruit juice, chicory, and mustard.

D. Non-Contractual Community Liability According to the ECJ

The ECJ recently overruled the jurisdiction of the CFI.[22] In its judgement, the Court dealt with the existence and criteria of Community liability for *unlawful* and *lawful* EC conduct. Concerning the former, it noted that in accordance with the settled case law of the ECJ, Art. 288.2 EC means that the non-contractual liability of the Community and the exercise of the right to compensation for damage suffered depend on the satisfaction of a number of conditions. These conditions relate to the *unlawfulness* of the conduct of which the institutions are accused, the damage as such, and the existence of a causal link between that conduct and the damage.[23] With regard to liability in the event of *lawful* EC conduct, the ECJ made it clear that as Community law currently stands, "no liability regime exists under which the Community can incur liability for conduct falling within the sphere of its legislative competence in a situation where any failure of such conduct to comply with the WTO agreements cannot be relied upon before the Community courts".[24]

I. Liability for Unlawful EC Conduct

In the consistent interpretation by the Court, unlawfulness of the conduct of which the institutions are accused is the very first condition to be satisfied for the non-contractual liability of the Community. [25]

However in *FIAMM*, the applicants contended for the first time before the CFI that the Community institutions acted unlawfully in failing to bring the Community legislation into conformity with WTO law within the period specified by the DSB for implementation, the ECJ confirmed the judgement of first instance. Accordingly, Community courts cannot review the legality of the conduct of the Community institutions in the light of WTO rules notwithstanding the expiry of the implementation period.[26] For that reason,

22 *FIAMM*, joined cases C-120, 121/06 P, judgement of 9 September 2008, not yet reported.

23 *Id.*, para 164, emphasis added.

24 *Id.*, para. 176, emphasis added.

25 *Id.*, para. 106, with reference to *Oleifici Mediterranei v. EEC*, 26/81, (1982) E.C.R. 3057, para. 16; *KYDEP v. Council and Commission*, C-146/91, (1994) E.C.R. I-4199, para. 19.

26 *Id.*, paras 108-133.

both Courts could find no conduct by an institution of an unlawful nature. The ECJ clearly pointed out that, "where the Community courts find that there is no such act or omission by an institution of an unlawful nature, so that the first condition for non-contractual Community liability [under Art. 288.2 EC] is not satisfied, they may dismiss the application in its entirety without it being necessary for them to examine the other preconditions for such liability […]".[27]

The ECJ then turned to its established jurisprudence concerning the direct applicability of international treaty law in the Community legal order. Following its review standard shown in *Kupferberg*, the Court considered that the effects of the Community's international treaty relations within the Community may not be determined without taking into consideration the international origin of the provisions in question. In conformity with the principles of public international law, Community institutions which have power to negotiate and conclude such an agreement are free to agree with non-member States what effects the provisions of the agreement are to have in the internal legal order of the contracting parties. If that question has not been expressly dealt with in the agreement, it is the Courts', and in particular the Court of Justice, that has the task of answering it.[28] In *International Fruit Company*, the very first judgement considering the 'external' direct effect[29] of international law within the Community, the Court established the principle that it falls within its jurisdiction to examine whether the provisions of an international agreement confer on individuals the right to rely on that agreement when they contest the validity of a Community measure.[30] In exercising its authority the Court considers, in

27 *Id.*, para. 166, with reference to *KYDEP v. Council and Commission*, C-146/91, (1994) E.C.R. I-4199, paras 80 and 81.

28 *Id.*, para. 108 with reference to the cases *Kupferberg*, 104/81, (1982) E.C.R. 3641, para. 17, and *Portugal v. Council*, C-149/96, (1999) E.C.R. I-8395, para. 34, as well to *Germany v. Council*, C-280/93, (1994) E.C.R. I-4973, para. 110. Concerning EC secondary legislation, the ECJ referred to *Intertanko and Others*, C-308/06, (2008) E.C.R. I-0000.

29 In *Van Gend en Loos* and *Flaminio Costa v. E.N.E.L.*, the ECJ decided that EC law, as well as being supreme and not to be overridden by national orders, could also be relied upon by individuals as well as States, thus establishing the concept of 'internal' direct effect. See Case *Flaminio Costa v. E.N.E.L.*, 6/64, (1964) E.C.R. 585, 601 and Case *Van Gend en Loos*, 26/62, (1963) E.C.R. 3.

30 *International Fruit Company and Others*, Joined C-21 to 24/72, (1972) E.C.R. 1219, para. 19 (with regard to the GATT 1947). Other more recent confirmations are *Intertanko and Others*, C-308/06, (2008) E.C.R. I-0000, para. 45; *IATA and ELFAA*, C-344/04, (2006) E.C.R. I-403, para. 39.

accordance with its case-law,[31] "whether the nature and the broad logic of the international treaty preclude direct applicability of its provisions and, in addition, whether the content of the specific treaty provisions appear to be unconditional and sufficiently precise".[32] With particular regard to the EC - WTO relationship, *FIAMM* reaffirms the traditional view taken by the ECJ that the WTO agreements are not, in principle, among the rules against which the legality of actions adopted by the Community institutions can be measured.[33] This fits in with the *Portugal v. Council* judgement, where the Court made it clear that it would maintain its approach towards world trade law, also *post* the General Agreement on Tariffs and Trade (GATT) of 1947, pursuant to which it considers the resolution of disputes, now under the institutional framework of the WTO, still largely negotiations-based. Following this reasoning, the possibility to come to a mutually acceptable solution is not exhausted with the rendering of a WTO report or the expiry of the implementation period.[34]

For the Court, it is consistent with such a legal perception to object to a review of the EC measure's legality also after the expiry of that period because this enables the Community to find a solution which is acceptable to the complaining WTO Member and in conformity to the WTO rules.[35] Also in this specific case, the Court saw no room for a legality review without compromising the ability of the Community to reconcile its obligations, under the WTO agreements, with those in respect of the ACP States, and with the requirements inherent in the implementation of the common agricultural policy. To accept that the Community courts have the direct responsibility for ensuring that Community law complies with the

31 *Intertanko and Others*, C-308/06, (2008) E.C.R. I-0000, para. 45.

32 *FIAMM*, Joined C-120, 121/06 P, para. 110.

33 *Id.*, para. 111, with reference to *OGT Fruchthandelsgesellschaft*, C-307/99, (2001) E.C.R. I-3159, paras 25-28; *Portugal v. Council*, C-149/96, (1999) E.C.R. I-8395, para. 47; *Biret*, C-94/02 P, (2003) E.C.R. I-10565, para. 52; and *Léon Van Parys*, C-377/02, (2005) E.C.R. I-1465, para. 39.

34 *Id.*, paras 115-117. with reference to *Léon Van Parys*, C-377/02, (2005) E.C.R. I-1465, para. 52. *Cf. inter alia* on the subject *Jan Klabbers*, International Law in Community Law: The Law and Politics of Direct Effect; Yearbook of European Law 21 (2001-2002), 263-298*; Trevor C. Hartley*, International Law and the Law of the European Union – A Reassessment, British Yearbook of International Law 72 (2001), 1-35; *Judson O. Berkey*, The European Court of Justice and Direct Effect for the GATT, European Journal of International Law 9 (1998), 626-657; *Anne Peters*, The Position of International Law Within the EC Legal Order, German Yearbook of International Law 40 (1997), 9-77.

35 *Id.*, para. 117.

WTO rules would, according to the judgement, effectively deprive the Community's legislative or executive organs of the scope for manoeuvre enjoyed by their counterparts in the Community's trading partners.[36] That this applies, irrespective of whether a legality review was sought for the purpose of annulment proceedings or for an action for compensation[37]was substantiated by the Court by drawing attention to the negative consequences that compensatory actions would have on regulation in the public interest and on the regulating institution in question.[38]

Further to this, the Court rejected the CFI's contention that a distinction should be drawn between the direct effect of the WTO rules imposing substantive obligations and the direct effect of a decision of the DSB. This is the most recent confirmation of the more specific, but equally settled case law pursuant to which individuals cannot challenge the legality of the conduct of the Community institutions in the light of DSB decisions before Community courts.[39] In holding that the DSB decision has no object other than to declare the (in)consistency of a WTO Member's conduct with the obligations assumed under the WTO, the ECJ claims that DSB decisions following from panel or Appellate Body reports carry no separate meaning which could oust the negotiability of the process and could therefore be relevant to the direct applicability and reliance before Community courts.[40] On that basis, the ECJ agreed with the conclusion of the CFI that even the most precise recommendation or ruling adopted by the DSB is "no more capable than those rules of conferring upon individuals a right to rely thereon before the Community courts for the purpose of having the legality of the conduct of the Community institutions reviewed".[41] Like the CFI, it did not feel competent, in the circumstances of the present case, to review the legality of the Community banana regime in light of the WTO rules. Necessarily, the ECJ came to the conclusion that in *FIAMM* there was no

36 *Id.*, para. 118., with reference to *Léon Van Parys*, C-377/02, (2005) E.C.R. I-1465, paras 49, 50, 53.

37 To this effect, with regard to the period preceding the expiry of the reasonable period of time allowed for implementing a decision of the DSB, see *Biret*, C-94/02 P, (2003) E.C.R. I-10565, para. 62.

38 *FIAMM*, Joined C-120, 121/06 P, paras 121-131. See also, in particular, *HNL*, Joined C-83, 94/76, 4, 15, 40/77, (1978) E.C.R. 1209, para. 5, and *Brasserie du pêcheur* and *Factortame*, Joined C-46, 48/93, (1996) E.C.R. I-1029, para. 45.

39 *Id*., paras 125-126.

40 *Id*., paras 127-128.

41 *Id*., para. 129.

unlawful act or omission by an EC institution on which a non-contractual liability of the Community could be based.

II. Community Liability in the Absence of Unlawfulness

Later in the judgement, the ECJ specifically addressed the existence of Community liability for lawful conduct. The Court admitted that in *Dorsch Consult*, it had specified some of the conditions under which liability could be incurred *if* Community liability for a lawful act was recognised Community law.[42] This allowed the Court to infer that it had established the basis and principles of such a regime. From this point, the Court was eventually compelled to be explicit about the existence of Community liability for lawful acts. While it did not reject the notion altogether, the Court came to the conclusion that Community law, as it currently stands, does not support liability of the Community for conduct which fails to comply with the WTO agreements.[43] Accordingly, *FIAMM* failed before the ECJ because Community law does not (yet) accept liability of its institutions in the absence of unlawfulness. In other words, because there was, from the Community perspective, no unlawful EC conduct and no established other principle among the Member States, there was also no liability regime under which the Community could have been held liable for conduct falling within the sphere of its legislative competence.[44]

Like the CFI, the ECJ drew from Art. 288.1 EC and, more specifically, from the notion of "general principles common to the laws of the Member States". Comparative analysis was therefore key to both Courts. Contrary to the CFI however, the ECJ found it in no way clear that there was a convergence of legal systems among the Member States upholding a principle of liability in the case of a *lawful* act or omission of the public authorities.[45] In Art. 288.2 EC the Court simply saw an "expression of the general principle familiar to the legal systems of the Member States that an *unlawful* act or omission gives rise to an obligation to make good the damage caused".[46] This does not, according to the Court, include legislative

42 *Dorsch Consult v. Council and Commission*, C-237/98 P, (2000) E.C.R. 4549, para. 18. See also, in similar terms, Case *Biovilac v. EEC*, 59/83, (1984) E.C.R. 4057, para. 28.

43 *FIAMM*, Joined C-120, 121/06 P, para. 176.

44 *Id.*

45 *Id*., para. 175.

46 *Id*., para. 170 with reference to *Brasserie du pêcheur and Factortame*, Joined C-46, 48/93, (1996) E.C.R. I-1029, paras 28 and 29.

measures which involve choices of economic policy unless a sufficiently serious breach of a superior rule of law for the protection of the individual has occurred.[47]

E. In Conclusion

FIAMM is yet another illustration of the poor legal standing that European based international traders have when they get trapped in between the obligations which the Community assumes on the international plane and its persistent disregard resulting from a differing policy choice. In a nutshell, *FIAMM* failed before the CFI because it should have foreseen the imposition of trade sanctions on stationary batteries as a result of WTO inconsistent agricultural policy. At review, the contention did not succeed because the ECJ considered there exists no liability regime (yet) for lawful behaviour common to the laws of the Member States that could be taken up and applied by the Community as a general principle under Art. 288.2 EC. Despite the attempt of the Court of First Instance to find new ways of remedying damages of EU citizens, both Courts stood firm by their view that the legality of Community conduct in the WTO context is not reviewable and on that basis irrelevant to the Community's non-contractual liability for unlawful conduct of its institutions. Taking consistency and plausibility as the relevant benchmark, the decision of the ECJ must clearly be welcomed because it follows a long established jurisprudential reasoning and formulates objective standards of EC non-contractual liability. Indeed, from that perspective, the half-hearted approach taken by the CFI to accept liability for lawful EC conduct in principle, but to dress it in clothes that simply won't fit to any situation appears unsatisfactory (II.). Furthermore, the way in which the Court of First Instance came to acknowledge the existence of a Community principle concerning liability for lawful EC conduct deserves critical attention (I.). Finally, it is necessary to assess *FIAMM* in its broader context - that is its relation to the preceding case law on the interplay between international and European law (III.) and the more practical consequences which traders bear out of WTO-inconsistent

[47] *Id*., paras 167, 172. See also, *inter alia*, *Compagnie d'approvisionnement, de transport et de crédit* and *Grands Moulins de Paris v. Commission*, Joined C-9, 11/71, (1972) E.C.R. 391, para. 13; *HNL*, Joined C-83, 94/76, C-4, 15, 40/77, (1978) E.C.R. 1209, para. 4; *Les Grands Moulins de Paris v. EEC*, C-50/86, (1987) E.C.R. 4833, para. 8; and *AERPO and Others v. Commission*, C-119/88, (1990) E.C.R. I-2189, para. 18.

behaviour of the EC and which supposedly prompted the CFI's most recent advance (F.).

I. Legal Basis of EC Non-Contractual Liability in the Absence of Unlawfulness

Both the ECJ and CFI located the legal basis of EC non-contractual liability in the absence of unlawfulness in Art. 288.2 EC according to which the Community is, "*in accordance with the general principles common to the laws of the Member States*, to make good any damage caused by its institutions"[48]. For a long time, general principles of Community law have been identified and developed by the Community courts.[49] They belong to the body of law by means of which the Courts may account for fundamental considerations like good governance[50] and interpret the Community liability principle as such. [51]

In *FIAMM*, the CFI recognised Art. 288.2 EC as triggering Community liability also in the absence of unlawfulness and, based on that contention, sought to establish the Community basis for a re-distribution of costs resulting from the institutions' freedom to act in the public interest. The Court seemed to have arrived at its findings partly from a comparative analysis and partly from free evaluation. The Court held that such a liability principle existed in the Community legal system even where only some of the Member States have known it as part of their national legal systems. AG *Maduro* agreed with the CFI's interpretation and confirmed the suitability of "non-fault liability", in particular in the WTO context.[52] In his Opinion before the ECJ, he noted that although guidance must be sought by the "most characteristic provisions of the systems of domestic law, [the Court] must above all ensure that it adopts a solution appropriate to the needs and

48 Emphasis added.

49 They are relevant irrespective of whether the Community conduct in question is directly applicable in the Community legal order.

50 *E.g.* for the principle of non-discrimination, *HNL*, Joined Cases 83, 94/76, 4, 15 and 40/77, (1978) E.C.R. 1209, paras 5, 6; for the right to property, the principles of non-discrimination, of equality, and of proportionality, *Zuckerfabrik Bedburg*, Case 281/84, (1987) E.C.R 49; for the principles of legal certainty and legitimate expectations, *CNTA v. Commission*, Case 74/74, (1975) E.C.R. 533; for the misuse of powers, *AERPO v. Commission*, C-119/88, (1990) E.C.R. I-2189.

51 See *Laboratoires Pharmaceutiques Bergaderm and Goupil v. Commission*, C-352/98 P, (2000) E.C.R. I-5291, paras 41-43.

52 Opinion of Attorney General *Maduro* in *FIAMM*, C-120, 121/06 P, paras 55 to 60.

specific features of the Community legal system"[53]. According to his understanding, even a "solution adopted by a minority may be preferred if it best meets the requirements of the Community system"[54].

Indeed, in some Member States, there is such a liability regime based on the principle of equal treatment or of the right to property.[55] However this is only true for about half of the Member States' legal systems.[56] With no substantive comparative analysis and no indication as to *which* of the Member States apply the principle, the Court can scarcely be found to have based its conclusion on "general principles *common* to the laws of the Member States". Why did the CFI then suddenly accept this liability principle? Equity concerns certainly played a role. The Court's reading of Art. 288.2 EC according to which the very purpose of the provision "is to make good *every* harmful consequence, even a remote one, of conduct" of the EC and its institutions reflects this motivation.[57] However, to base such vast liability on indefinite wording by using almost free design and interpretation is simply too big of an argumentative gap to bridge. Even within the laws of the Member States in question, such liability is considered the exception. Any enquiry for such far-reaching liability should be in accordance with the wording of the Treaty. Also, the broader an obligation is made, the higher the standards on the explicitness of the statutory basis are and on the interpreting body to firmly observe it. An objective test should thus be the core of an extension of the Community liability regime. In this respect, it seems insufficient to indicate the existence of liability without actually engaging in a substantive enquiry. The more so as constructing "non-fault" liability to compensate for non-invokable faults

53 *Id*., para. 55.

54 *Id*.

55 For example in France, one citizen need not bear more of the burden imposed by the pursuit of general interests than another. Also, it is not far from the German "Sonderopfertheorie" as laid down in Article 839 Bürgerliches Gesetzbuch (German civil code) and Article 34 Grundgesetz (German constitution). *Cf.* analysis by *Stefan Haack*, Grundsätzliche Anerkennung der außervertraglichen Haftung der EG für rechtmäßiges Verhalten nach Art. 288 Abs. 2 EG, Europarecht 5 (2006), 696, 701.

56 *Armin von Bogdandy*, Art. 288 EGV, in: *Eberhard Grabitz & Meinhard Hilf* (eds), Das Recht der Europäischen Union, loose-leaf January 2008, para. 94; *Stefan Haak*, Die außervertragliche Haftung der Europäischen Gemeinschaft für rechtmäßiges Verhalten ihrer Organe, 1995, 46-74; *Stefan Haak*, Grundsätzliche Anerkennung der außervertraglichen Haftung der EG für rechtmäßiges Verhalten nach Art. 288 Abs. 2 EG, Europarecht 5 (2006), 696-705; *Jan Schöder*, Rechtsschutz gegenüber rechtmäßigem Handeln der Europäischen Union, 2005.

57 *FIAMM*, T-69/00, (2005) E.C.R. II-5393, para. 177, emphasis added.

of the Community on the international plane is not convincing. Neither the French nor the German liability regime quite fit to this constellation. The ECJ thus rightly pointed out that an extension of Community law on liability is in no way compelling. Admittedly, it appears doubtful whether the Courts will ever recognise a liability regime concerning lawful EC behaviour on the basis of such a high standard. It is, however, at least also in doubt whether to open a vast area of Community conduct to compensation claims on such weak grounds and to rectify persistent disregard of WTO obligations by a liability principle that builds on lawful behaviour.

II. Unusual and Special Damage

The short lived optimism which rose among scholars and European traders concerning a possible liability of the EC in the absence of unlawful action was somewhat limited by its particular formulation. While in *Dorsch Consult*, the ECJ addressed, albeit hypothetically, the conditions of such a liability regime, *FIAMM*, for the first time, applied them. In fact, *FIAMM* shows that, if liability of lawful EC acts was accepted, it is the unusual and special nature of the damage which serves to balance the risks between applicant and Community. In this respect, the CFI established that economic risks inherent in the operation of a business are attributable not only across different sectors of the same industry but also from one industry to another. This rather inclusive determination requires each trader to follow at all times all market, legal and political developments at all levels of interrelation and regulation, and to provide for sufficient security. It also means that compensation is generally denied to EC exporters incurring damage from WTO authorised retaliatory measures. *Kuijper* and *Bronckers* share this view and compare the situation of trade sanctions with that of other WTO advantages (extension of concessions by Most-Favoured Nation (MFN)) and disadvantages (trade barriers on the basis of *e.g.* GATT Art. XX) which traders may incur in course of their business operations. Accordingly, both consider trade sanctions as yet another indication of the reciprocal nature of the WTO.[58]

On closer scrutiny however, trade sanctions and other barriers to trade are not as easily comparable in terms of their regulatory concept and structural background: First, different from trade sanctions, other barriers to trade give priority to non-trade policies such as human safety, the

[58] *Pieter-Jan Kuijper & Marco Bronckers*, WTO law in the European Court of Justice, Common Market Law Review 42 (2005) 5, 1313-1355, 1339.

environment or national security. Trade sanctions are in contrast purely trade-motivated. Their very purpose is to cause damage to innocent traders. Second, retaliatory action shall hit traders unexpectedly. If the WTO recognized that its Members may prepare for trade sanctions and thus buy out of their original obligations, not only would the enforcement mechanism be ineffective but also the integrity of the WTO rules as a whole be at risk. On the other hand, restrictive trade regulations provided for under the WTO agreements as a legitimate means of economic ruling are not authorised *ad hoc* but formulated on an abstract legal basis which seeks to make their application certain, conclusive and predictable to the trader. Finally, because MFN multiplies the bilateral concessions made to some WTO Members, the interdependencies in this area of economic regulation can no longer be dissolved for each Member individually.[59] Instead, the WTO system evolved to an objective legal order with parallel claims rather than relative rights and reciprocal duties.[60] WTO Members and institutions pursue common objectives and act in a qualified structure of regulation, law administration and enforcement.[61] The world trade order follows legal rules which are considered to bring about just treatment and fair results. Authorised barriers to trade other than sanctions move within the objective order just as expressions of conflicting policies. Trade sanctions move outside this position, accepted only as temporary means necessary *to re-establish* a level playing field.

In essence, the world trade order is not as policy driven as is mandated by the ECJ and some scholars. Legal principle establishes stable ground for traders to arrange their business operations according to the framework that the WTO offers in this specific sector. If the home country violates this framework, they should anticipate economic changes. The situation is however different for traders from a different industrial sector or a different industry. Cross-retaliation oversteps the limits of adequacy; its consequences are inherently unusual to the targeted operator. Still, this form of remedial action remains essential to the WTO enforcement mechanism

59 The Appellate Body Report in the *EC - Bananas III* case reflects this. See WT/DS/27/AB/R, paras 136-138. Also, the competitive conditions principle is an illustration of the "inextricable interwoven" claims.

60 Similar *Ernst-Ulrich Petersmann*, Violation-Complaints and Non-Violation Complaints in Public International Trade Law, German Yearbook of International Law 34 (1991), 175, 181.

61 *Ilka Neugärtner*, Die *actio popularis* in der WTO, 2003, 88-115.

notwithstanding the minimum standards laid down in Art. 22.3 Dispute Settlement Understanding.

Whether an adequate link exists between the export of stationary batteries and the European banana market - which could explain an attribution of economic risk - is most doubtful. Doubts appear to have motivated *FIAMM* to appeal. Also AG *Maduro* suggested to the ECJ that the judgement of the CFI should be set aside based on an erroneous interpretation of the unusual and special damage criterion.[62] Finally, the reasoning of the Court is at odds with its initial approach to extend Community liability in order to more equitably re-distribute the cost of EC breaches of international/WTO law. The ECJ needed not to address this issue because it had already rejected the existence of Community liability for lawful conduct.

III. Circumvention of the Established Case Law

In addition, it should be mentioned that the route taken by the Court of First Instance burdens the long settled case law on the separation of the EC and WTO legal order or, more specifically, on the direct effect and invokability of WTO obligations and DSB decisions. Indeed, compensating affected retaliation victims despite the non-invokability of the triggering action, means granting a relief that was until that point persistently denied to them. It is true that the recognition of liability in the absence of unlawfulness would not lead to the annulment of a Community act for breach of WTO law. Its acceptance however, although not compelling the Community institutions to comply with the WTO rules, inevitably pressures them to revise their conduct in the light of the assumed WTO obligations. While this result appears to many not quite undesirable, it is simply ignorant of the previous judicial policy. In this respect, the ECJ has found a rigid but consistent solution.

F. *FIAMM* and the Recovering of Damages From EC Non-Compliance With DSB's Rulings

If *FIAMM* at first instance seeks to give effect to the WTO rules through the back door of liability in the absence of lawfulness, if it means to overcome the non-invokability of the action by focusing on the resulting

[62] Opinion of Attorney General *Maduro* in *FIAMM*, C-120, 121/06 P, para. 83.

damage instead, where does this leave the ECJ and its jurisprudence on the WTO-EC relationship? And are the dice cast with the latest refusal of the ECJ to accept WTO penetration into the Community[63] - or need the plausibility of the Court's attitude as such to be reconsidered?

From a policy point of view, the protectionist approach of the ECJ expresses its unwillingness to submit to a strong and international adjudicating body as the DSB. In terms of legal argument, it is the lack of precision and the general political nature of the WTO and its dispute settlement system which underlie the refusal to grant external direct effect.[64] More specifically with regard to DSB decisions, the Court denied them any separate meaning which could oust the negotiability of the process and, on that account, be relevant to the direct applicability and reliance upon before Community courts.[65]

This position can be criticised in three respects: First, a WTO report adopted by the DSB is an absolute and precise clarification of the consistency of a Member's measure with the WTO agreements. Also, it is a binding determination of the existence of a WTO breach. Secondly, while it is true that the disputing Members shall engage in consultations before bringing the matter before a panel and that a mutually accepted solution in conformity with the WTO rules is preferred to the litigation of the matter (Arts 3.4-7, 4 Dispute Settlement Understanding), these stipulations, when viewed in the greater context of the Understanding, rather support the idea that *quasi*-judicial proceedings shall not commence until the parties have otherwise attempted to settle their dispute. The jurisprudence on cases where the measure was terminated *post* the establishment of the panel and the explicit commitment to the rule of law, transparency and consistency confirm the legal function of the WTO adjudicators. In other words, once a case is referred to the DSB, the appointed bench will render a decision based on legal principles. Thirdly, to accept the direct effect of a WTO report does not necessarily mean impairing the scope of action of the Community on the international plane. It is correct that, in accordance with Art. 3.2, sentence 3 Dispute Settlement Understanding, the recommendations and rulings of the DSB can not add to or diminish the

63 As put for discussion by *Geert A. Zonnekeyn*, EC liability for non-implementation of WTO dispute settlement decisions – are the dice cast?, Journal of International Economic Law 7 (2004) 2, 483-490 already after the *Biret* judgement.

64 See in particular *International Fruit Company* and *Germany v. Council*; Joined C-120, 121/06 P, *FIAMM*, paras 110-133.

65 *Id*., paras 127-128.

rights and obligations provided for in the agreements concerned. A determination of WTO (in)consistency does not, however, alter the rights and obligations provided in the covered agreements. A decision restates the right or obligation under the covered agreements and applies it to the measure at stake. Unless in cases of judicial activism (being the true subject of the provision), a restatement of the law does not preclude negotiations within the limits of the WTO agreements. It follows from Art. 19 Dispute Settlement Understanding that Members found in breach with their obligations are to bring their measure into conformity with WTO law. The disputants are, in principle, free to agree on whatever implementation they consider appropriate, provided they move within the framework of the WTO rules. Also because the ECJ does not seek to clear the Community from its duty to re-establish a WTO consistent situation, it is suggested to allow affected traders a certain reliance on the attested WTO breach. To safeguard sufficient freedom of the EC to negotiate the particular WTO consistent solution, such action should be limited to liability (covering the damages which occur after the declaration of inconsistency) and directly attach to the unlawfulness of the Community action. Admittedly, the suggested advance creates a major shift in understanding of the EC – WTO relationship. On the other hand, it would allow interim solutions for traders who are targets and instruments of the Members to pursue their WTO non-compliant policies and to induce compliance with the decisions adopted by the DSB.[66]

The question which *FIAMM* raises is whether we want to close the gap in judicial protection and if so, on what basis. Is it better to socialise the damages incurred by the WTO inconsistent behaviour or to grant limited or even full review? *FIAMM* is also the latest peak of the growing discontent with the existing policy towards retaliation victims. However, the construction of a new liability regime for lawful EC conduct on the ground of "unlawful" (WTO-inconsistent) behaviour, which cannot be invoked before EC Courts, is quite unsatisfactory and also unnecessary, if the ECJ came to accept the rule-orientated nature of the WTO dispute settlement. It is indeed more plausible and sustainable to remedy damages on the basis of

[66] Without doubt, the WTO is no value-sharing community like the EU but its Members follow a common objective and are a community of legal principle (vielleicht besser "community based on legal principles"?). EC conduct triggering international trade disputes is usually motivated by political interests, such as the protection of health in the context of the prohibition of selling/the import ban on hormone treated beef. The WTO does account for those policies on the basis of scientific and the precautionary principle(s) and gives the Members ample room for regulation.

the unlawfulness of the EC conduct instead of granting compensation for unusual and specific damages.

Finally, from the WTO perspective, the Community liability in the absence of unlawfulness does not appear suggestive. By offsetting the negative effects of trade sanctions though installing internal balancing mechanisms, WTO Members would compromise the integrity of the WTO and the effectiveness of its enforcement system. In contrast, liability on the basis of unlawful conduct would strengthen the WTO legal order because giving individuals limited means to redress breaches of WTO law puts added pressure on the Community to reach a positive solution of the dispute more quickly.