Outline

I. The new institutional framework of EU external relations: High Representative, European External Action Service and EU Delegations [Monday, 10th December 2012]
   1. The main actors of EU foreign relations after Lisbon
      a. The ‘Communitarian’ bodies
      b. The intergovernmental entities
      c. The coordinators: the High-Representative and the EEAS
   2. EU representation in multilateral fora and third countries
      a. The external representation of the European Union
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II. EU climate change policy [Tuesday, 11th December 2012]
   1. Introduction: what the EU is doing about climate change
      a. Two directions: adaptation & mitigation
      b. Two spheres of action: Internal & external
   2. Internal: mainstreaming climate change into EU policies and development pathway
      a. EU 2020
      b. Roadmap to 2050
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      a. COPs & Rio+20
      b. EU-China cooperation (and litigation) on climate change
   4. Focus: EU Emission Tradings System:
      a. Historical development & future perspectives
      b. How does ETS works?
      c. ECJ litigation on ETS: an overview;

III. EU & International customary law [Thursday, 13th December 2012]
   1. International customary law in the EU legal order: role and relationship with EU legislative competence
   2. European litigation on ETS:
      a. National allocation plans
      b. ETS lawfulness & case Arcelor
   3. Discussion of case ATAA (Required reading, see below), on the applicability of EU emission trading scheme to the aviation sector;

IV. International trade law in the EU legal order [Friday, 14th December 2012]
   1. The WTO system
   2. The EU participation in the WTO
   3. WTO agreements as domestic law of the Union?
   4. Discussion of cases Portugal v Council and FIAMM (Required readings, see below).

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Reading Materials

In order to promote active participation to class discussions and to enhance the comprehension of presented topics, students are strongly encouraged to read the materials and especially the case law enlisted below before the tutorials take place.

All ECJ judgements can be found online at <http://curia.europa.eu>

I. The new institutional framework of EU external relations: High Representative, European External Action Service and EU Delegations [Monday, 10th December 2012]


1. Further readings:
   a. ECJ Case law:
      i. Case C-149/85, Wybot v Faure, [1986] ECR 2391;
      iii. Case C-91/05, Commission v Council (‘ECOWAS’), [2008] ECR I-03651;
   b. Articles & contributions:

II. EU climate change policy [Tuesday, 11th December 2012]

1. Basic readings:
   b. Council of the European Union, 7 September 2005, Joint Declaration on Climate Change between China and the European Union;

2. Further readings:
   a. ECJ Case law:
   b. Articles & contributions


III. EU & Internal customary law [Thursday, 13th December 2012]
1. Required reading: Case C-366/10, Air Transport Association of America and Others v Secretary of State for Energy and Climate Change, not yet reported;
2. Further readings:
   a. ECJ case law:
      i. Opinion of Advocate General Kokott, Case C-366/10, Air Transport Association of America and Others v Secretary of State for Energy and Climate Change, not yet reported;
   b. Articles:

IV. International trade law in the EU legal order [Friday, 14th December 2012]
1. Required readings:
   b. Joined Cases C-120/06 P and C-121/06 P, Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM), Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC (C-120/06 P), Giorgio Fedon & Figli SpA and Fedon America, Inc. (C-121/06 P) v Council of the European Union and Commission of the European Communities, [2008] ECR I-6513.
2. Further readings:
   a. ECJ Case law:
      i. Case 87/75, Conceria Daniele Bresciani v Amministrazione Italiana delle Finanze, [1976] ECR 00129;

b. Articles & contributions
Lecture I
Monday, 10\textsuperscript{th} December 2012

The new institutional framework of EU external relations
The European External Action Service: towards a common diplomacy?

SUMMARY Created by the Lisbon Treaty the European External Action Service (EEAS) should bring together, within an autonomous diplomatic institution, the services of the Commission and the Council responsible for external affairs. From an administrative point of view this means the creation of the post of High Representative for Foreign Affairs. But it includes another innovative feature: by receiving within its fold staff from national diplomatic services it intends to associate the Member States in a process that may lead to the emergence of a common diplomatic culture. Until the decision of 26th July the organisation of the service was the subject of intense discussion between the players involved. With the support of the Parliament, the Commission has defended its “community” prerogatives whilst the Member States have made sure they have representatives in key positions within the new service.

In the end although the creation of the EEAS should lead to an improved interweaving of community and intergovernmental rationale in terms of Europe’s external policy the danger of incoherence between the institutions and a lack of coordination between national diplomats is nevertheless real. But the service offers Europeans a real opportunity to strengthen their influence on the international stage just as the Member States’ individual positions are being eroded.

INTRODUCTION The establishment of the European External Action Service (EEAS) results directly from the Lisbon Treaty that entered into force on 1st December 2009. After months of discussion the Member States, the Commission and the European Parliament agreed on the organisation and the functioning of the Service thereby enabling the adoption of the decision creating the EEAS on 26th July 2010 [1]. After the appointment of a stable President of the European Council, Herman Van Rompuy and a High Representative for Foreign Affairs and Security Policy, Catherine Ashton, will this new body enable the European Union to assert itself in a more efficient and coherent fashion on the international stage?

BACKGROUND With the Lisbon Treaty the European external policy has undergone two major reforms.

The first comprises a rapprochement between the two old pillars established by the Maastricht Treaty; the “Community” pillar over which the European Commission has the upper hand and the “Common Foreign and Security Policy” pillar, which by nature is more intergovernmental.

The draft European Constitution in which the Lisbon Treaty mainly found inspiration with regard to its content initiated the interweaving of these two pillars by merging the position of commissioner for external relations (held in the old Commission by Benita Ferrero-Waldner) and that of “High Representative” for the CFSP (created by the Amsterdam Treaty and held from 1999 to 2009 by Javier Solana). It was also decided that the new “double-hatted” High Representative (member of the European Commission and representative of the Union for Foreign Affairs and Security Policy) would chair the Foreign Affairs Council (quasi-monthly) thereby giving it an additional role to provide impetus to the detriment of the former “rotating presidencies” held by the Member States.

The second reform is the creation, to the benefit of the High Representative, of a “European External Ac-
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The European External Action Service (EEAS). In this respect Article 27-3 of the Treaty on the European Union (TUE) revised by the Lisbon Treaty indicates that: “This service shall work in cooperation with the diplomatic services of the Member States and shall comprise officials from relevant departments of the General Secretariat of the Council and of the Commission as well as staff seconded from national diplomatic services of the Member States. The organisation and functioning of the European External Action Service shall be established by a decision of the Council. The Council shall act on a proposal from the High Representative after consulting the European Parliament and after obtaining the consent of the Commission.”

The establishment of the EEAS thus translates, in administrative terms, the double-hatting of the new High Representative. In effect, it merges the services of the two EU institutions that have hitherto been actively involved in the formulation and conduct of EU external relations. At the Commission this mainly means the Directorate General for External Relations (DG Relex), although many other directorates are involved (DG Enlargement, DG Development, DG Humanitarian Aid, Europaid etc …). The Council Secretariat (CSG) is a Council service (body that brings together the ministers of the 27 Member States); in particular it assists the State that is ensuring the rotating presidency and which, as such, chairs the institution and its preparatory bodies (Committee of Permanent Representatives, Committee for Policy and Security, working groups etc …). Before the creation of the CFSP by the Maastricht Treaty there was a secretariat for European Policy Cooperation that was integrated into the European institutions by the Single Act of 1986. From then on external relations were followed by the CSG and an entire Directorate (DG E) as well as by a Policy Unit, a Crisis Planning and Management Directorate, a Civilian Planning and Conduct Capability, a European Union Military Staff and a “Situation Centre” (SitCen) for intelligence purposes.

Beyond the administrative merging of the two institutions of the rue de la Loi (the GD Relex has its HQ in the “Charlemagne” building, next to the “Berlaymont”, the Commission HQ, whilst opposite is the “Justus Lipsius” building where the Council Services are based) the treaty contains an additional novelty. By the inclusion into the EEAS of diplomats from the Member States it fosters the hope that Jean Monnet’s “functionalist” method might be applied to diplomacy (the traditional domain of State sovereignty and there of inter-governmentalism), thereby leading to the emergence of “de facto solidarity” and a common diplomatic culture.

Here lies the most interesting element in the creation of the European External Action Service. Fundamentally the Lisbon Treaty has not changed the decision making procedures with regard to the European Union’s external policy: matters which until now were the “community” reserve are still mainly driven by the Commission (particularly external aid programmes that are consequential in total: around 7 billion € per year) and policy matters generally continue to be decided by unanimity in the Council [2]. At that time to accommodate the British the President of the European Convention, Valéry Giscard d’Estaing relinquished enhancing the qualified majority vote. As a result the amendments were of just a procedural nature and it remains to be seen whether these technical adjustments will lead to the emergence of a true common diplomacy. In particular, will the institutionalised collaboration between the staff of the Member States, the Commission and the Council that have hitherto acted more in competition than in cooperation in itself be able to generate more ambitious, better coordinated and more efficient European external action?

**THE NEGOTIATION AND ITS ACTORS**

As the TEU indicates the decision establishing the organisation and functioning of the European Service for External Action was due to be unanimously approved by the Council based on a proposal by the High Representative and after approval by the European Commission, with the European Parliament only being consulted on the matter. However the latter tried to influence this negotiation as much as it could since it was also supposed to approve the modification of the financial regulations (with regard to the EEAS budget) and that of the status of the staff (with regard to recruitment procedures).

Before the Lisbon Treaty even came into force on 1st December 2009, a report had been approved under the Swedish Presidency by the European Council of 29th-30th October 2009, reflecting a broad consensus on the creation of the service. In the report it had been agreed
that the EAS would be a service of sui generis nature, distinct from the Commission and the Council Secretariat; that the crisis management structures (i.e. Common Security and Defence Policy CSDP tools, CFSP budget) would be integrated into the Service while keeping their essentially intergovernmental nature; that it would play a strategic role in the financial programming of aid instruments (jointly with the Commission); that it would cover all geographical areas in the world, though enlargement and trade policies would continue to fall within the Commission’s remit; and finally that no distinction should be made between the three staffing sources (and with equal treatment) i.e. the Commission, the CSG and the Member States. The Commission delegations for their part would be turned into EU delegations integrated into the service and placed under the authority of the High Representative.

Given the late entry into force of the new Treaty, the Commission was sworn in only in February 2010, although José Manuel Barroso had already been confirmed back in September for a second mandate as Commission President, while Herman Van Rompuy (Permanent President of the European Council) and Catherine Ashton (High Representative) had been appointed by the European Council on 19th November 2009. In setting out his new college and with the support of the European Parliament, José Manuel Barroso seemingly sought to ensure a strong influence of the Commission over the new European diplomatic service. He was aided in this because Catherine Ashton was from the outgoing Commission herself (she had succeeded Peter Mandelson as Trade Commissioner) and José Manuel Barroso had appointed his former Head of Cabinet, João Vale de Almeida [3] to the influential position of Director General of the DG Relex.

Using his power to attribute portfolios within the college, José Manuel Barroso also decided that three commissioners would ‘flank’ Ms. Ashton within her field of responsibility qua Vice President of the Commission: a commissioner for enlargement and neighbourhood policy (Ștefan Füle, Czech Republic), a commissioner for development (Andris Piebalgs, Latvia), and a commissioner for humanitarian aid (Kristalina Georgieva, Bulgaria). Moreover, the Commission President ensured that trade, an area of EU exclusive power, would fall outside the Vice President’s attribution altogether. Such a careful distribution of portfolios suggested that the Commission would keep primary responsibility over significant aspects of EU external relations, alongside the EAS, notably with respect to neighbouring East European and Mediterranean countries, where the EU probably exercises its strongest influence.

The Spanish Presidency, the first rotating presidency of the Council according to the new Lisbon Treaty rules, was caught out somewhat by the entry into force of the latter. It had prepared its presidency according to the old model and was looking forward to asserting itself on the international stage with an ambitious external agenda that reflected Spanish priorities with many summits planned in the USA, Latin America, the Mediterranean countries (Union for the Mediterranean summit), Morocco etc. All too soon Spain had to tone down its ambitions allowing Herman Van Rompuy to preside over the European Council and Catherine Ashton chair the Foreign Affairs Council. However matters were so arranged as to console it. Some summits with third countries were held in Spain, allowing José Luis Zapatero to chair them (but the summit with the USA and that with the Union for the Mediterranean were postponed). Spanish Foreign Minister Miguel Moratinos represented Catherine Ashton on several trips abroad (for example in the South Caucasus) or chaired several ministers’ sessions in her stead. All of this led to criticism by MEPs who believed the essence of the treaties was not being respected.

Incidentally during its presidency Spain played an important role as a transition between the old and the new system; presidency of COREPER and the Political and Security Committee (since the PSC still has no permanent presidency) [4] and member of the small team of diplomats and high ranking civil servants from the institutions (13 in all) asked by Catherine Ashton to prepare the Council’s draft decision with regard to the establishment of the service.

As for the Member States, their interests and concerns have varied. On the whole, they have sought – especially the big ones – to counter the Commission’s attempts to take control of the EEAS. Their involvement in the service is indeed vital for the success of the envisioned co-existence between the loosely coordinated Member States’ diplomatic under the CFSP,
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and the integrated “Communitarian” external relations (based on law, common policies and external aid). In an area so imbued with national sovereignty as foreign policy, it is essential to ensure a good level of cooperation between Brussels and other European capitals, notably the biggest of them. So far the UK has been well served since it is the country of origin of the High Representative. France wanted Catherine Ashton to be assisted by a powerful Secretary General. Pierre Vimont, former French permanent representative in Brussels currently France’s Ambassador in Washington was appointed to this position on 25th October [5]. Germany also showed an interest in the job but since it is due to take the position of Council Secretary General relinquished by Pierre de Boissieu (who will retire), it may have to lower its ambitions and be satisfied with a hierarchically more modest post (but not less important): the position of Deputy Secretary General for Political Affairs (the equivalent of political director) has been earmarked for Helga Schmid, at present head of the CSG’s policy unit; whilst a Pole may take the post of Deputy Secretary General of Operational (administrative) Affairs [6]. While big Member States have thus attempted to snatch key positions within the future Service, others, in particular the small Member States and the new Member States from Central and Eastern Europe have asked for a fair representation of all nationalities, at all levels, in order avoid the big states holding the reins on European diplomacy.

On the basis of the October 2009 Presidency Report Lady Ashton and her team drafted a decision on the EEAS which was tabled on 25th March 2010. The drafting process and the initial negotiations were facilitated by her close coordination with the Commission and the Member States which had already approved the October Report and which had been included in the draft’s writing (discussions with the COREPER, inclusion of some in Catherine Ashton’s team). After final discussions with the COREPER on the draft decision, the Foreign Affairs Council which met on 26th April approved a policy agreement between the Member States and the Commission. The procedure followed is noteworthy: traditionally it is the Commission that takes legislative initiative before entering a ‘trilogue’ with the presidency (Member States’ representatives) and the European Parliament; this time it was the High Representative who negotiated with the Council (COREPER, presidency) and mainly the Commission but also with the European Parliament and even the Council Secretariat (‘quadrilogue’ or ‘pentalogue’).

As for the European Parliament in particular, which is accustomed to working in all transparency, its positions have benefited from a publicity that has been inversely proportionate to its formal power on the decision [7]. The treaties are clear on this: the EEAS is established by the Commission and the Council while Parliament is in principle only consulted. The latter has nevertheless used all leverages at its disposal (approval of the amended financial and staff regulations) to promote its own conception of the Service. The European Parliament, notably via its two rapporteurs, Elmar Brok (EPP,DE) and Guy Verhofstadt (ALDE, BE) have actively advocated the idea of a “Communautarian” Service attached to the Commission over which Parliament would be able to exercise tighter control than if it was more intergovernmental in nature. In particular the Parliament pleaded for the participation in the EEAS leadership of the Commissioners for Neighbourhood Policy, for Development Aid and Humanitarian Aid, as well as the appointment of political deputies instead of senior civil servants (such as SG’s and Deputy SG’s) to give support and represent Catherine Ashton who might not be able to face her many calendar commitments alone. The Parliament also asked that appointees to senior EEAS posts (i.e. Heads of Delegations and EU Special Representatives to one specific region or conflict) be auditioned by the relevant parliamentary Committee.

After difficult negotiations with the European Parliament a compromise was found in Madrid at the end of June 2010. Hence Parliament approved this on 8th July after the formal approval of the Commission on 20th July and the Council adopted the decision creating the EEAS on 26th July. Finally the new financial regulation and new staff status were approved by the European Parliament on 20th October last.

THE CHOICES MADE FOR THE FUNCTIONING OF THE SERVICE

As agreed in October 2009, the decision establishing the EEAS includes in article 1 that this is an autonomous body in relation to the Commission and the CSG
and the idea of the sui generis service has since been abandoned. This autonomy is enhanced by the fact that it is treated as an "institution" due to the status of its staff and that it has its own budget within that of the Union over which the Parliament can exercise budgetary control. The Service comprises a central administration and Union delegations to third countries and to international organisations. It is under the authority of the High Representative for Foreign Affairs and assists the Commission and its President as well as the President of the European Council.

The Service is managed by an "executive" Secretary General who, together with the High Representative, her two deputies and various directors form a collegial management ('policy board' in the Service's draft internal organisation chart). The EEAS is composed of several Directorate General comprising several geographic, multilateral and thematic desks, a Directorate General for Administration, and a Directorate General for Crisis Management that are kept separate from the 'Community' domain (on France's request the decision creating the EEAS went together with a declaration by Catherine Ashton on this point). The Union's external delegations are part of the Service and report to the High Representative but can accommodate personnel from the Commission.

The unification of the Union's external representation should be expressed in a permanent presidency (by EEAS civil servants) of around twenty preliminary Council bodies [9] and also via the fact that most of the time the Union's delegations will ensure the tasks of the former rotating presidencies in the third countries (contact with authorities on behalf of the Union, preparation of the reports of the heads of delegation, chairing of meetings at the Union's embassies).

Recruitment should be based on merit and adequate on gender and geographical balance. Staff from three sources (CSG, Commission, Member States' diplomatic services) should be treated equally which means that Member States' staff will have the status of "temporary agents", civil servants from the Commission and the CSG would become a new category of European civil servant. This tripartite principle also applies to the recruitment procedure (tripartite constitution of selection panels), but the Commission achieved the right to veto over the choices made by Head of Delegation.

Long term it is expected that Member States' diplomats will occupy at least one third of the 'administrator' positions in the EEAS – Parliament has stipulated that at least 60% would be occupied by European civil servants.

Indeed, in view of the diplomatic and military staff already working in the EU institutions, notably in the crisis management structures or as 'seconded national experts' ("SNEs") [10], the required amount of EEAS staff of Member States' origin already represents a major quota. The decision specifies precisely which Commission and CSG's services are 'seconded' to the EEAS: particularly the DG Relex as well as a share from the DG Development which guarantees that the service will cover all geographical regions.

In the initial phase, given the limited creation of new posts – the decision includes a principle of cost-efficiency and rationalisation and there is already overlapping between the DG Relex, Commission and the DG E of the CSG – the European diplomatic service is initially due to total 1,500 administrators (70 % of whom in the central offices), i.e. a total number of around 3000 people including administrative staff (and up to 6000 if the delegation staff seconded by the Commission are added).

More than half of the administrators' posts are initially to be taken by Commission civil servants (DG Relex, part of the DG Development –for the African, Caribbean and Pacific countries (ACP) and delegation staff working in the diplomatic area). About one hundred administrators' posts are initially to be created within the Service in 2010 (including 80 in delegations) and 350 will be added by 2013.

The new posts are open to diplomats from the Member States [11], which means that they will progressively rise to meet the quota of one third: hence of around 30 heads of delegation posts renewed in the summer of 2010, national diplomats took one third which already guarantees them nearly 10% of the 125 heads of delegation positions.

This situation has not failed to cause a certain amount of discontent on the part of high ranking civil servants at the Commission who work in the area of external relations since they consider that their career prospects are now being impeded. To this we might add the dif-

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8. It is foreseen that the heads of the EEA’s delegations will be informed by receiving a copy of the instructions sent by the Commission to the Delegations.

9. This is the Political and Security Committee (PASC) working groups which focus on the CFE/S or mixed subjects (eg geographical groups except for the EFTA group; groups working on the UN, disarmament and non-proliferation, Human Rights, the OSCE, crisis management). Annex II of the decision 2009/909/ EU stipulates that any bodies in the areas of trade and development (Category 1); as well as certain horizontal preliminary bodies working in the main in the area of the CFSP (Category 3) such as the group of advisers on external relations (RELEX); the "Terrorism" group (international aspects) (COTER); the "Application of Law" group (COJUR); the "Maritime Law" group (CDLR); the "International Public Law" group (CDLR); the "International Public Law" group (CDLR); the "International Public Law" group (CDLR); the "International Public Law" group (CDLR).

10. There are more than 200 SNEs (administrator level) working at present on external policy at the Commission and the CSG (military staff apart). It was decided that their transfer to the EEAS would be undertaken in agreement with their Member State and that in the end there would no longer be any SNE’s in the Service.

11. The quality of belonging to a "national diplomatic service" is left to the discretion of each Member State but a liberal practice should be established as is the case in France: a non-diplomatic civil servant can apply to the EEAS as long as he has some experience and competence in external relations and/or in European policy.
The European External Action Service: towards a common diplomacy?

ficulty associated with geographical quotas to which the new Member States, which recently entered the system, are particularly sensitive: indeed they are under-represented in the area of external relations - less than 10% of top civil servants for 20% of the Union’s population – increasing their number after the most recent wave of recruitment from 2 to 6 heads of delegation. Given these category or national claims Catherine Ashton intends to insist on the criteria of merit and competence.

Although it is planned that the Service’s civil servants will come from the Commission, the CSG and the Member States and that a principle of staff mobility will apply (mobility between Brussels and the delegations, time of service limited to 8 years in principle – 10 exceptionally – for national diplomats [12] ), it cannot be ruled out that in time some of the Service’s staff will become permanent and the organic link between this and the institution of origin may weaken thereby enhancing the institutional autonomy of the EEAS. The diplomats seconded to the Service will in theory be more independent than the SNE’s since they will be seconded for a longer span of time and will be remunerated by the Service only. But it will be necessary to see how matters unfold in practice since these diplomats will continue to report to their original Member State for the continuation of their career. All of this incidentally is a significant problem in the light of the management of the Community’s civil service.

The financial programming of the European external aid instruments (the Development Cooperation Instrument, the European Development Fund, the European Instrument for Democracy and Human Rights, the Neighbourhood Instrument, the Instrument for Cooperation with Industrialised Countries, the Instrument for Nuclear Safety) is due to be jointly ensured by the Commission and the EEAS, the role of the latter specifically being early on in the programming (the writing multi-annual programmes per country and region), but working under the responsibility of the competent commissioners (neighbourhood and development).

The CFSP budget and the stability tool are managed as part of the EEAS whilst the Commission will retain exclusive control of the pre-accession instrument (due to its competences with regard to enlargement) and humanitarian aid. From a formal point of view this “operational” expenditure (in comparison with “administrative” [13] expenditure) continues to feature in the European Commission’s budget the execution of which is controlled by the European Parliament via the budgetary discharge procedure.

In addition to this Parliament achieved a “declaration with regard to her political responsibility” on the part of Catherine Ashton whereby she promises to inform and consult the Parliament over the basic choices of the CFSP (in line with article 36 of the TEU). The High Representative will be personally obliged to attend plenary sessions or to be represented by politicians (Commissioner or Minister from the rotating presidency accordingly). The Service’s civil servants are invited to speak before the Parliament’s committees and sub-committees. Parliament will have the right audition the heads of delegation and special representatives after their appointment. And it will continue to be informed of the CSDP mission in line with the inter-institutional agreement of 2002.

CONCLUSION: POLITICAL CONSERVATISM OR INSTITUTIONAL INNOVATION?

Will the establishment of the EEAS lead to a common European diplomacy with greater coordination with national diplomacies? Will the new Service be circumscribed by the Member States’ external competence which the Lisbon Treaty has not fundamentally affected [14]? This question is vital and we might attempt a three-tiered answer to this.

From a point of view of the interweaving of the ‘Communautarian’ and intergovernmental aspects of the CFSP the EEAS should lead to progress. Rue de la Loi will not have two sides – since the Service, housed in a new building in the Schuman quarter, is due to create a diplomatic culture common to the European Union under the authority of the High Representative. Yet risks of cacophony between the Service and the Commission, between Lady Ashton and the other commissioners between Msrs Barroso and Van Rompuy, and between the latter and Catherine Ashton should not be underestimated [15].

An invisible separation will probably split the EEAS into two: on the one hand there will be a more “Communautarian” culture inherited from the DG Relex which will be numerically dominant and will influence the geo-
graphic and thematic DG’s as well as the delegations; and an intergovernmental culture inherited from the Council’s policy unit and crisis management structures deemed to retain a certain amount of autonomy within the Service. And although the EEAS is close to the CFSP and the Community’s external relations, whilst retaining a close link with the Commission with regard to the programming of the financial instruments, the unity of the Community external policy is nevertheless broken: since all community policies include an external aspect (trade, enlargement, visas, energy, environment, humanitarian aid etc…) these will continue to be managed by the Commission, and the EEAS in principle has no technical competence in these areas. Just as an example a certain amount of competition set in between the High Representative and the Commissioner for Humanitarian Aid when it came to deciding then announcing aid for Haiti and then Pakistan.

From the point of view Member States working with each other matters are even more complicated. With regard to a number of vital issues that concern the membership of certain “clubs” of power (the P5, comprising permanent members of the UN Security Council who are also acknowledged nuclear powers; the G8 and the G20) or the role played by the Member States in certain specific crises (for example the “contact group” on the Balkans or the Paris-Berlin-London trio in the Iranian nuclear crisis), the Member States’ capitals and in particular the big States will continue to play an inevitable role – as openly acknowledged by a political leader as well informed as Alexander Stubb, the Finnish Foreign Minister. Good cooperation between the EEAS and the capitals, either by means of the institutions in Brussels (PSC, COREPER, working groups) or by way of EEAS relay staff and in the cabinets in Brussels will remain vital. But this will not be enough to halt national determination when these emerge and it will always come down to an adjustment between Paris-Berlin-London – at least.

But this where the third detail of our assessment comes into play; the entry into force of the Lisbon Treaty and the establishment of the EEAS are occurring at a time when European States are under the constraint of budgetary restrictions and appear to be on the periphery of the international stage in the face of an American administration whose interest in Europe is declining and which casually cancels summits that have been planned with the European Union and also in the face of emerging powers that claim “their place in the sun”.

But Europe can attempt to compensate for this relative decline by showing greater unity and coherence, on condition that the nations of Europe work together collectively and demonstrate their ability both to define common interests and assert their joint will. From this point of view the new institutions offer a real opportunity, since they notably enable a rotation of diplomats between the EEAS and the national ministries. This is possibly the starting point of a more integrated European diplomacy.

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Lecture II
Tuesday, 11th December 2012

EU climate change policy
COUNCIL OF THE EUROPEAN UNION

Brussels, 12 March 2012

7514/12

ENV 198
DEVGEN 62
RELEX 211
ONU 32
ECOFIN 240

INFORMATION NOTE

from: General Secretariat
to: Delegations
Subject: Rio + 20: Pathways to a sustainable future
- Council conclusions

Delegations will find in Annex the conclusions on the above as adopted by the Council (Environment) on 9 March 2012.
CONVINCED that the UN Conference on Sustainable Development (Rio+20) offers a unique opportunity to secure renewed political commitment in order to move forward the sustainable development agenda in a comprehensive way also in respect of previous commitments and building on the Rio principles, Agenda 21 and the Johannesburg Plan of Implementation and BELIEVING that Rio+20 should inject significant impetus into the worldwide and just transition towards a green economy in the context of sustainable development and poverty eradication,

STRESSING that the world is facing multiple crises and challenges that are mutually interlinked and that Rio+20 in this broader context provides a unique opportunity to rethink the current perception of growth and consumption, inclusion and how we utilize our limited resources, thereby safeguarding the needs of future generations,

UNDERSCORING a key answer to resolve these crises and challenges is enhanced resource efficiency as a core element in the transition to an inclusive, green economy within a significantly improved institutional framework for sustainable development (IFSD) leading to higher environmental protection, sustainable energy for all and a low carbon transition, increased and sustainable productivity, green and decent jobs and poverty eradication to the benefit of human health and well-being, the environment and economic development,

STRESSING that sustainable development cannot be achieved without respecting and promoting democracy, human rights, the rule of law, good governance, education, the role of youth and gender equality,

WELCOMING the zero draft of the outcome document "The Future We Want" as a good basis for further negotiations and UNDERLINING our determination to work for a focused and forward-looking political declaration from the Conference that should set out a shared vision for change, as well as goals and actions at international level to be achieved within agreed time frames,
RECALLING the Council conclusions of 10 October 2011 on Rio+20 \(^1\), the Council conclusions of 15 December 2011 on a Roadmap to a Resource-Efficient Europe \(^2\), the joint contribution by the EU and its Member States submitted to UN DESA by 1 November 2011 \(^3\) and the European Council Conclusions of 1-2 March 2012 \(^4\),

UNDERLINING the overarching challenge of climate change and RECALLING the Council Conclusions of 9 March 2012 on the follow-up to the 17th session of the Conference of the Parties (COP 17) to the United Nations Framework Convention on Climate Change (UNFCCC) and the 7th session of the Meeting of the Parties to the Kyoto Protocol (CMP 7) (Durban, South Africa, 28 November - 9 December 2011) \(^5\),

THE COUNCIL OF THE EUROPEAN UNION

1. REAFFIRMS the European Union and its Member States' commitment to play an active and constructive role in the ongoing negotiations with a view to contributing to an ambitious outcome of the Conference including concrete and timely follow-up actions and WILL CONTINUE to be closely engaged in the developments of the negotiations in the run up to the Rio+20 Conference in June 2012 and to further develop its views in that light, as appropriate;

2. REAFFIRMS its support to an open and inclusive process allowing the full and active participation of all relevant stakeholders during the negotiations and at the Conference itself, and UNDERLINES the importance of a strong involvement of local governments, the private sector, trade unions and civil society as a whole in the follow-up of Rio+20 and the implementation of the commitments made;

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1. Doc. 15388/11.
2. Doc. 18346/11.
3. Doc. 15841/11.
5. Doc. 7517/12.
3. Recognizes that population dynamics are strongly and inseparably linked to our efforts to promote sustainable development and protect the environment as well as to further improve human well-being, reduce poverty and hunger, promote decent employment and ensure food, water and energy security, which require higher economic performance and emphasizes that population dynamics need to be addressed through human rights based policies;

4. Stresses the importance of gender equality and the vital role that women’s equal economic and political participation has for achieving sustainable development and underlines that education is essential to build skills and competences;

5. Acknowledges the alarming trends of natural and man-made disasters and the detrimental impacts on sustainable development and emphasizes the need to address in an integrated manner all stages of disaster management;

6. Welcomes the report of the UNSG High-Level Panel on Global Sustainability as well as the UNSG Sustainable Energy for All initiative as valuable inputs to the Rio+20 outcome;

7. Welcomes the number of important meetings that are taking place in different fora in the run-up to Rio+20 as useful inputs to the Conference outcome, such as the Sixth World Water Forum;
8. CONSIDERS an inclusive, green economy as a means to achieve sustainable development globally; UNDERLINES that greening the economy is essential to promote long term equitable growth, green and decent jobs, resource efficiency and sustainable consumption and production, human health and well being and hence eradicate poverty, providing benefits for all citizens and offering win-win opportunities to all countries, regardless of the structure of their economy and their level of development; EMPHASIZES that an inclusive, green economy offers an opportunity to create a positive, inspiring new global model of growth that not only reverses negative, environmental trends but drives future development and job creation; and RECOGNISES in this context the need to consider the concept of the "blue economy", which extends the principles of the green economy *inter alia* to the conservation and sustainable use of marine resources;

9. REITERATES that one of the main operational outcomes of Rio+20 should be the adoption of a green economy roadmap with timetables for specific goals, objectives and actions at the international level as a significant contribution to sustainable development, with emphasis on poverty eradication;

10. SUPPORTS the establishment of a Capacity Development Scheme including an international knowledge sharing platform, based on and making better use of existing initiatives such as the Green Growth Knowledge Platform in order to facilitate and provide country specific and where appropriate region and sector-specific advice to all interested countries regarding the transition to a green economy based on the principle of ownership and national differences;
11. RECOGNIZES that climate change, loss of biodiversity and land degradation as well as water scarcity are serious threats to human societies, ecosystems and peace and stability and therefore WELCOMES

- the outcome of global negotiations on climate at the Durban Conference, which needs to be urgently followed up to operationalise the objective of staying below 2°C through a decision on a time frame for peaking of global emissions and a global emission reduction goal,
- the results on biodiversity at the Nagoya Conference, including the agreed Strategic Plan for Biodiversity for the period 2011-2020, its associated targets and the Protocol on Access and Benefit Sharing,
- the results on desertification at the Changwon Conference which provide a global policy and monitoring framework and promote partnerships for the safeguard of soil resources;

12. UNDERLINES that, although these negotiations remain separate processes, Rio+20 should build on and promote potential synergies with these complementary and mutually reinforcing processes;

13. NOTES that the increasing demand for natural resources makes action on decoupling resource use from economic growth, as well as innovation, a key element towards a more sustainable global, green economy and STRESSES the importance of promoting the valuation of biodiversity and ecosystem services and the integration of these valuations into policies, decision-making and economic processes;

14. RECALLS that gross domestic product (GDP) is mostly a measure of production and does not reflect issues such as environmental sustainability, the use of natural and human capital, resource efficiency and social inclusion and STRESSES the need to use, and where necessary develop and agree on, indicators that complement GDP and contribute to a more accurate picture of the inter-linkages between the environmental, economic and social aspects of wealth, welfare and well-being;
15. CALLS FOR the adoption, at the Rio+20 Conference, of the 10-Year Framework of Programmes on sustainable consumption and production as elaborated at the nineteenth session of the Commission on Sustainable Development (CSD);

Framework for action and follow-up

16. HIGHLIGHTS that GESDPE and the green economy roadmap are closely linked to the priority issues in the Framework for action and follow-up of the zero draft in terms of promoting and further developing concrete actions in specific sectors; WELCOMES progress on initiatives outlined in the zero draft as building blocks for decisions at the Rio+20 Conference, and CALLS for more ambitious policies and actions at the international level as well as at national, regional and local levels than those currently reflected in the zero draft;

17. INVITES the Commission, based on the Conclusions of the European Council of 1-2 March 2012, as a matter of urgency to present proposals for clear operational targets and concrete actions with agreed timeframes in areas directly related to the transition towards an inclusive green economy in the context of sustainable development and poverty eradication, such as sustainable energy, water, sustainable land management and ecosystems, oceans and resource efficiency, in particular waste, to be proposed by the EU and its Member States in the Rio negotiations with a view to an ambitious and focused outcome;

18. IS COMMITTED to negotiate with international partners to ensure an ambitious, action oriented outcome of the conference for all issues regarding the framework for action and follow up drawing from the EU and its Member States’ submission to UN DESA on 1 November 2011, including the above mentioned areas as well as food, nutrition, sustainable agriculture, fisheries, forestry, sustainable cities and chemicals, as well as in areas related to the sustainable management and restoration of natural resources;
Institutional framework for sustainable development (IFSD)

19. UNDERSCORES that the IFSD in all three dimensions of sustainable development needs to be reformed, strengthened, better coordinated and made more coherent at global, regional, national, sub-national and local level and RECOGNISES that the current IFSD arrangements are not effectively responding to the challenges before us;

20. CALLS FOR an institutional architecture that achieves the main objective of putting in place a strong global governance structure for sustainable development that also addresses the shortcomings of the current system and EMPHASIZES that a strengthened IFSD needs to provide for political leadership, including at the highest levels, coherence and coordination, stronger science policy interface, effectiveness and efficiency in implementation, progress monitoring and review, transparency, accountability as well as wider participation and effective association of major groups and non-state actors, starting already in the reform process;

21. HOLDS that IFSD reforms should be decided on the basis of a clear identification of the specific functions required and should take into account financial, structural and legal implications; UNDERLINES that reforms should promote synergies between existing processes, seek to avoid duplication, eliminate unnecessary overlaps, maximize effective use of financial resources and reduce administrative burdens and build on existing arrangements; and CONFIRMS its readiness to engage in discussions on significant structural reform options;

22. REITERATES its strong resolve to strengthen the environmental dimension of the IFSD and in this regard to upgrade UNEP into a specialized UN agency for the environment based in Nairobi with a revised and strengthened mandate and universal membership, supported by stable, adequate and predictable financial contributions and operating on an equal footing with other UN specialized agencies; CALLS FOR Rio+20 to decide on the process for taking forward the reform option agreed, including timeframes; and STRESSES the need for further efforts to enhance synergies between the Multilateral Environmental Agreements;
23. RESOLVES to promote enhanced access to information, public participation in decision making and access to justice in environmental matters, including by considering legally binding frameworks at the most appropriate level;

**Sustainable development goals (SDGs)**

24. WELCOMES the proposals on SDGs as a valuable contribution to Rio+20 that could contribute to a more focused and coherent action towards sustainable development; EMPHASIZES that SDGs as well as an inclusive GESDPE and an enhanced IFSD could be important elements for progress; taken together, they would encompass goals as well as means, increasing the potential for truly changing the pathways towards sustainable development;

25. CONSIDERS that any such goals should fully encompass all three dimensions of sustainable development in a balanced and synergistic way; be universal, while taking into account the need to apply different approaches in different countries in the efforts to achieve them; be limited in number; be linked to possible concrete targets and indicators and easily communicable; CONFIRMS that the EU and its Member States are ready to engage in discussions on such goals;

26. CONSIDERS that work on SDGs should be coordinated and coherent with the Millennium Development Goals (MDGs) review process, without deviating efforts from the achievement of the MDGs by 2015; further CONSIDERS that it would be important to have an overarching framework for post 2015 that encompasses the three dimensions of sustainable development with goals that address key challenges in a holistic and coherent way to ensure the optimal mix of measures for attaining lasting solutions;
Means of implementation

27. STRESSES the importance of adequate means of implementation for the goals and actions to be agreed at Rio+20; HIGHLIGHTS that funding for the implementation of sustainable development policies and actions will have to come from a variety of sources, both public and private;

28. CALLS for a more effective use of existing resources, as well as the mobilization of available sources of finance as well as identification of innovative sources. In light of the economic situation, UNDERSCORES that mobilization of funding must be undertaken in a way that is consistent with the objectives of global economic recovery and further UNDERLINES the important role of International Financial Institutions and the Global Environment Facility as important sources of finance, advice and capacity building for sustainable development;

29. NOTES that a number of emerging economies are becoming key partners of developing countries and RECOGNISES the role of South-South and triangular cooperation as highlighted in the outcome document of the 4th High-Level Forum on Aid Effectiveness in Busan;

30. UNDERSCORES the importance of the private sector and of partnerships between the private and the public sector in promoting investment, trade and innovation, including in delivering a global GESDPE and REAFFIRMS the need to implement worldwide sound corporate governance as well as international principles and standards on corporate social responsibility; STRESSES that governments should make better use of the business sector’s expertise, resources and innovative power; and RESOLVES to actively remove major barriers that hinder investments and market potential for the transition to a green economy;
31. HIGHLIGHTS the importance, in a green economy, of prices that reflect actual environmental and social costs as well as the gradual elimination of environmentally harmful subsidies that are incompatible with sustainable development, and CONSIDERS that a gradual removal of these subsidies would help market prices to better reflect those costs and contribute to a more open and non-discriminatory trading system;

32. STRESSES the need for improved access, reduced costs and enhanced participation in green trade by facilitating trade in environmentally friendly goods, technologies and services, through the reduction or elimination of tariffs and efforts to remove or overcome non-tariff barriers and by enhanced active participation by developing countries in international standardization processes, inter alia through capacity building and technical assistance;

33. UNDERLINES the important role played by cooperation on technology, research and innovation, education and training programmes and EMPHASISES the need to improve mechanisms for international research cooperation and for the development of information and communications technology on major sustainable development challenges;

34. STRESSES also the importance of regulation as part of the toolbox for a conducive environment for green investments as well as sustainable procurement and for discouraging production practices that are resource inefficient and damaging to the environment and human health, thereby also promoting decent and green jobs;

35. RECOGNISES the continuing relevance of Official Development Assistance (ODA) as an important source of finance for development particularly in the least developed countries (LDCs) and as a catalyst for leveraging funding from other sources, including through triangular cooperation; REAFFIRMS the commitment of the EU and its Member States to achieve their collective ODA target by 2015; ENCOURAGES all other traditional and emerging donors to contribute to the global development efforts in accordance with evolving realities and STRESSES the need to further improve aid and development effectiveness in line with the principles and commitments of the Rome/Paris/Accra/Busan agenda.
Joint Declaration on Climate Change between China and the European Union

1. We underline our commitment to the objectives and principles of the UN Framework Convention on Climate Change and the Kyoto Protocol and in this context agree to set up a partnership on climate change. This partnership will strengthen cooperation and dialogue on climate change including clean energy, and promote sustainable development. Follow-up of the partnership will be carried out regularly at a suitably high level through a bilateral consultation mechanism, including in the context of the China - EU Summits.

2. We will strengthen our dialogue on climate change policies and exchange views on key issues in the climate change negotiations.

3. We will co-operate to realize our respective goals of significantly improving the energy intensity of our economies.

4. We will strengthen our practical co-operation on the development, deployment and transfer of low carbon technology, to enhance energy efficiency and promote the low carbon economy.
5. We agree on the following key areas for technical co-operation:

- Energy efficiency, energy conservation, and new and renewable energy;
- Clean coal;
- Methane recovery and use;
- Carbon capture and storage;
- Hydrogen and fuel cells;
- Power generation and transmission.

6. We will take strong measures to encourage low carbon technology development, deployment and dissemination and will work jointly to ensure that the technologies become affordable energy options. We will explore financing issues including the role of the private sector, joint ventures, public private partnerships, and the potential role of carbon finance and export credits. We will co-operate to address barriers to the development, deployment and transfer of technology.

7. We will aim to achieve the following co-operation goals by 2020:

- To develop and demonstrate in China and the EU advanced, near-zero emissions coal technology through carbon capture and storage;
- To reduce significantly the cost of key energy technologies and promote their deployment and dissemination.

8. We will enhance our existing co-operation and we welcome the following recent initiatives:

- The China-EU Action Plan on Clean Coal to promote collaboration in the development of clean coal technologies in China;
9. We will co-operate to strengthen the implementation of the Clean Development Mechanism (CDM), exchange information on CDM projects and encourage our companies to engage in CDM projects co-operation. We will engage in dialogue on improving and further developing the CDM. We will facilitate the exchange of information and experience on the design and practical implementation of other market-based instruments such as emissions trading and on assessing the costs and benefits of their use.

10. We will strengthen co-operation on adaptation to the impacts of climate change through:

- Research and analysis on adverse effects of and vulnerabilities to climate change;
- Research and analysis on assessing the socio-economic impacts and costs of climate change;
- Enhancing the scientific, technical and institutional capacity to predict climate change and its impacts;
- Research and development on technologies and measures to adapt to climate change;
- Raising awareness of integrating vulnerability reduction and adaptation needs into sustainable development strategies and their implementation.

11. We will enhance our co-operation in capacity building and strengthening institutions, including through raising public awareness, exchange of personnel and training.

Beijing, 5 September 2005
Joint Press Communiqué
15th EU-China Summit

Towards a stronger EU-China Comprehensive Strategic Partnership

1. The 15th EU-China Summit was held in Brussels on 20 September 2012. The EU was represented by Mr. Herman Van Rompuy, President of the European Council and Mr. José Manuel Barroso, President of the European Commission, assisted by the High- Representative for Foreign Affairs and Security Policy, Baroness Catherine Ashton. Premier Wen Jiabao of the State Council of the People's Republic of China attended on behalf of China.

The EU-China Comprehensive Strategic Partnership
Summit leaders:

2. Reviewed bilateral relations, in particular the important progress since the establishment of EU-China Comprehensive Strategic Partnership in 2003. They noted with satisfaction that the EU-China Comprehensive Strategic Partnership had matured and become increasingly rich and multi-dimensional, and was now embodied in wide-ranging cooperation initiatives forged between the two sides. Both sides were determined to continue to develop the Partnership in the future to further increase its strategic dimension and bring EU-China cooperation to a higher level.

3. Exchanged views on major global and international issues and recognized the growing interaction and interdependence between China and the EU. They welcomed the fact that relations had progressed beyond the bilateral framework and taken on a global dimension. China and the EU, influential in the world scene of the 21st century, were crucial actors in advancing peace, prosperity and stability. Both sides emphasized multilateralism and the central role of the United Nations in international affairs. China and the EU would redouble their joint efforts to tackle global challenges such as the international financial and economic crisis, sustainable development, environmental protection, climate change, food and water security, energy security and nuclear safety.
4. Re-confirmed the key role of the annual EU-China summit in providing strategic guidance to bilateral relations, affirmed the important role played by the EU-China High Level Strategic Dialogue, High Level Economic and Trade Dialogue and High Level People-to-people Dialogue, in advancing EU-China relations. They committed further to improve and strengthen these regular mechanisms.

5. Emphasized the importance of taking a positive view of each other's development and rendering mutual support. The Chinese side reaffirmed its continued support for the European integration process, and expressed confidence that appropriate steps were being taken to tackle the euro area sovereign debt crisis. The EU reaffirmed its support for China's peaceful development and its respect for China's sovereignty and territorial integrity and expressed its confidence in China's efforts to maintain sustainable, steady and rapid economic growth.

6. Emphasized the importance of accommodating each other's concerns for furthering the overall relationship taking a strategic perspective. They agreed that, where differences remained, these should be discussed and handled in a spirit of mutual respect and equality.

7. Emphasized the importance of promotion and protection of human rights and the rule of law. Both sides looked forward to the strengthening of the EU-China Dialogue and cooperation on human rights based on equality and mutual respect and announced their intention to hold the next round in China. They expressed their readiness to work together for constant progress on the ground. They agreed to hold the next legal seminar in Ireland in October. Both sides confirmed their commitment to cooperate with UN human rights mechanisms.

8. Expressed that efforts should be made actively to seek synergies between China's Twelfth Five Year Plan and the Europe 2020 Strategy with a view to expanding and deepening pragmatic cooperation in various fields.

9. Highlighted their commitment to further tap the potential for EU-China cooperation and agreed to work together to formulate a forward-looking and ambitious EU-China Cooperation Package to provide strategic guidance for an enhanced EU-China comprehensive strategic partnership.

**Economy, Trade and Investment**

Summit Leaders:

10. Reconfirmed both sides’ commitment to launching negotiations of an EU-China Investment Agreement as soon as possible to promote and facilitate investment in both directions, thus resulting in an additional source of growth and employment. Negotiations towards this agreement would include all issues of interest to either side, without prejudice to the final outcome. They agreed to intensify discussions at a technical level in preparation for future negotiations.

11. Stressed that particular importance should be given to working for the resolution of the Market Economy Status (MES) issue in a swift and comprehensive way.

12. Expressed satisfaction with EU-China cooperation in the field of competition policy and welcomed the signing of the Memorandum of Understanding on Cooperation in the area of anti-monopoly law enforcement.

13. Reaffirmed the importance of trade openness to sustainable economic growth and development. They affirmed the importance of an effective Intellectual Property (IP) system and trade openness to innovation.
14. Recognized the importance of open and non-discriminatory government procurement policies and agreed to increase exchanges in this field. The EU expressed support to China's accession to the WTO Government Procurement Agreement and encouraged China to accelerate its efforts.

15. Recalled the conclusions of the 14th EU-China Summit on export credits and looked forward to continued discussions in the international working group of major providers of export finance.

16. Welcomed the exchanges of views on intellectual property rights during their annual IP dialogue (18 September, Brussels) and recognized the importance of strengthening cooperation on IP protection and IPR enforcement.

17. Agreed to make joint efforts to conclude an ambitious bilateral agreement on the protection of geographical indications. They noted progress achieved during the latest round of negotiations (13-14 September, Brussels) and would step up EU-China cooperation on counterfeiting in alcoholic beverages.

18. Recognized and welcomed the progress in their cooperation in the non-food consumer product safety area. They emphasized the need to continue this good cooperation in the future.

19. Recognized that customs cooperation plays a significant role in facilitating and securing trade. They called for further intensification of joint efforts on IPR border enforcement, supply chain security, trade facilitation, external trade statistics and the fight against fraud.

20. The Chinese side welcomed the plan of the European Investment Bank to set up an office in China.

**Bilateral Cooperation**

Summit Leaders:

21. Recognized the mutual benefit of EU-China cooperation in research and innovation and agreed to establish an annual comprehensive Innovation Cooperation Dialogue. They welcomed the signing of a joint declaration outlining the goals and objectives of this new Dialogue. An EU-China Innovation Cooperation Seminar was to be held in November 2012, and the first meeting of the Dialogue was to be held before the 2013 EU-China Summit.

22. Welcomed the inaugural meeting of the EU-China/ESA Dialogue on Space Technology Co-operation and the agreement reached on its terms of reference. They expressed common willingness to enhance cooperation in the field of space technology, and on the civil aspects of their respective Global Navigation Satellite Systems (GNSS) on the basis of the existing framework. In this context they welcomed the signature of the Joint Statement calling for the future establishment of a roadmap identifying cooperation projects and actions of mutual interest.

23. Confirmed the official launch and welcomed the result of the first meeting of the EU-China Cyber Task-Force, and decided to continue exchanges on cyber issues of concern to either side to increase mutual trust and understanding.
24. Underlined the development of the Urbanization Partnership, and welcomed the first Mayors' Forum held on 19-20 September in Brussels. They stressed the need to steer and support peer-to-peer cooperation to promote the development of the EU-China Partnership on Urbanization, in line with its Joint Declaration. Both sides welcomed the EU-China Urbanization Leadership Training Programme to be led by the China Academy of Governance.

25. Welcomed the first High Level Meeting on Energy (HLME) held on 3 May which gathered all institutional stakeholders and deepened the EU-China strategic energy dialogue, covering mutually beneficial cooperation inter alia on energy security and electricity markets and looked forward to its follow-up. The two sides affirmed the importance of all countries playing an active role in international energy governance.

26. Welcomed the opening of discussions in view of a possible EURATOM-China General Agreement.

27. Highlighted the success of the first round of the EU-China High Level People-to-People Dialogue (HPPD), expressed satisfaction with the progress and achievements of "EU-China Year of Intercultural Dialogue" and agreed on a series of follow-up actions in various areas of education, culture, multilingualism and youth.

28. Called for the launch of a comprehensive EU-China Dialogue on Mobility and Migration at appropriate level. Both sides reaffirmed to continue to explore ways of facilitating exchanges for Chinese and EU citizens, including mutual visa exemption for holders of diplomatic passports while strengthening cooperation on illegal migration.

29. Highlighted the EU-China Cooperation Plan in Agriculture and Rural Development agreed in June. Leaders underlined the need to continue efforts to develop relations in key sectors of common interest, such as mutual recognition arrangements for organic agriculture. The two sides emphasized the need to continue taking full advantage of the EU-China Dialogue Mechanism on Agriculture and Rural Development, and enhance and expand pragmatic cooperation in such fields as dairy industry, wine, processing and quality systems.

30. Expressed satisfaction with EU-China cooperation in the field of employment and social affairs, in particular exchanges of policy experience in social security, occupational safety and health, youth employment, inclusive growth models and labour relations. Both sides supported the promotion of the decent work agenda within the framework of ILO. They welcomed the establishment of a cooperation project on occupational safety and health in high risk sectors and continued cooperation on social security, pensions and social inclusion.

31. Noted the joint benefit of further strengthening their cooperation in the field of governance and public administration reform.

32. Highlighted progress in the field of disaster management cooperation and welcomed the launch of the EU-China Disaster Risk Management project underpinned by the creation of the EU-China Institute of Emergency Management. They agreed to intensify their co-operation with a view to promoting and facilitating the delivery of humanitarian aid solely based on the needs of people affected by disasters or crisis, and in accordance with humanitarian principles.
33. Recognized that their dialogue and co-operation on transport policy should become more strategic and expand to new areas. Leaders agreed that EU-China co-operation, including joint projects, should cover five key areas: aviation; railways; new maritime routes; urban mobility and logistics with a view to strengthening cooperation in these areas.

34. Agreed continuously to enhance cooperation in ocean policy based on the Memorandum of Understanding on establishing a High Level Dialogue on an Integrated Approach to Ocean Affairs. To this end, the next High Level Dialogue on an integrated approach to Ocean management which would address areas of common interest, such as ocean spatial planning, marine knowledge, ocean energy and ocean satellite data application and exchange, would be organised before the next EU-China Summit.

35. Took note that EU-China development cooperation has evolved over the past decade, agreed to launch a dialogue to explore new patterns of mutually beneficial cooperation through agreed projects and programmes.

**Peace and Security**

Summit Leaders:

36. Shared the view that China and the EU should enhance their cooperation in order to promote peace and security, and emphasized the fruitful discussions held in the third Strategic Dialogue on 9 and 10 July. They decided to intensify foreign and security policy dialogue on global and regional issues at all levels. They encouraged regular contacts between special representatives and special envoys. Both sides committed to holding a regular dialogue on defence and security policy, increasing training exchanges and organising a High Level Seminar on Defence and Security in 2013. They affirmed and highlighted the continued good cooperation in the field of crisis management, counter-piracy and maritime security.

37. Discussed international and regional issues as well as recent developments of mutual concern such as the crisis in Syria, the Iranian nuclear issue and the nuclear issue on the Korean Peninsula, Afghanistan, Burma/Myanmar, Sudan and South Sudan, and the situation in their respective neighbourhoods. Both sides looked forward to a successful ASEM Summit in November. They agreed that, in view of the fast changes taking place in today's world, China and the EU should work in closer cooperation regarding regional and global issues.

38. Reaffirmed their commitment to global disarmament, to a robust nuclear non-proliferation regime and to preventing the proliferation of weapons of mass destruction and their delivery systems. They insisted on an early start of negotiations in the Conference on Disarmament, the early entry into force of the Comprehensive Nuclear Test-Ban Treaty, continued cooperation in the field of export controls and prevention of illicit arms trade. They supported an early conclusion of an Arms Trade Treaty within the UN framework.
**Global Issues**

Summit Leaders:

39. Supported the G20, as the premier forum for international economic cooperation, in playing a greater role in global economic governance. Both sides believed that the G20 members needed to better coordinate their macroeconomic policies to ensure strong, sustainable and balanced growth. In the coming months, the priority should continue to be to restore consumer and investor confidence, promote economic recovery, maintain financial stability, reform international financial institutions and promote employment, especially youth employment. Both sides agreed to intensify communication and coordination and make joint efforts to implement the agreements of the G20 Los Cabos Summit, including the Growth and Jobs Action plan.

40. Agreed to intensify cooperation and coordination with a view to restoring market confidence and fostering financial stability. The two sides stressed their willingness to work together within the G20, IMF and World Bank to improve global economic governance. They reaffirmed their determination to implement all their G20 commitments as scheduled, including in the areas of the global economy, financial regulatory reform, the increase of the IMF resources and the reform on the quota and governance of the IMF. They supported the Financial Stability Board’s work on financial regulatory reforms.

41. Agreed that an open trade and investment environment and resistance of all forms of protectionism were necessary to enable sustainable economic recovery. They welcomed the G20's reaffirmation to refrain from and rectify protectionist measures and supported continuous monitoring by the World Trade Organisation (WTO) and the United Nations Conference on Trade and Development (UNCTAD).

42. Underlined the importance of an open, predictable, rules-based, transparent multilateral trading system and committed to ensuring the centrality of the WTO. They reiterated the importance of achieving a successful multilateral conclusion of the Doha Development Agenda in accordance with its mandate and seeking early outcomes on trade facilitation and other issues of concern to developing countries.

43. Highlighted the importance of the outcome of the Rio + 20 conference and emphasized the need to implement the decisions taken without delay, including establishing an Inter-governmental Process on Sustainable Development Goals. They recalled the importance of implementing the green economy policy.

44. Underlined the importance of water, food and nutrition security as a common interest in our environmental and agricultural relations and major global issues. They took note of the interdependence of food and water security issues. Leaders committed to continue bilateral and multilateral efforts to address food and nutrition and water security concerns and welcomed the establishment of the EU-China Water Platform as a sound mechanism for future cooperation on integrated water resources management.

45. They welcomed the progress made in the EU-China environmental dialogue as well as the dialogue on Forest Law Enforcement and Governance, and agreed to step up bilateral cooperation including through cooperation on water pollution, waste policy and heavy metal pollution.
46. Underlined the need for international cooperation in tackling climate change and confirmed their commitment to continue to strengthen the cooperation for the full, effective and sustained implementation of the United Nations Framework Convention on Climate Change (UNFCCC), its Kyoto Protocol and the relevant decisions of the Conferences of the Parties to the UNFCCC and Meetings of the Parties to the Kyoto Protocol including to all the decisions agreed upon in Durban last year, and looked forward to ensure a successful outcome in Doha.

47. Stressed the importance of tackling international civil aviation emissions, and agreed to cooperate to take action forward in multilateral fora, including the UNFCCC and the International Civil Aviation Organisation (ICAO).

48. Agreed further to deepen policy dialogue and pragmatic cooperation on tackling climate change as well as promoting low-carbon development under the EU-China Climate Change Partnership. They agreed to enhance practical cooperation on Emission Trading System building on the concrete cooperation initiatives agreed in this area.

49. Recognized the growing importance of the Arctic, notably in the aspects of climate change, scientific research, environmental protection, sustainable development and maritime transport, and agreed to exchange views on Arctic matters.
SELECTED CASE LAW ON EU ETS VALIDITY

Scope of EU ETS and lawfulness of the step-by-step approach in introducing ETS under the principle of equal treatment: the exclusion of plastics and aluminium sectors from Directive 2003/87 establishing ETS amounts to unjustifiable different treatment to comparable situations with reference to steel sector?


57 The Court acknowledges that in the exercise of the powers conferred on it the Community legislature has a broad discretion where its action involves political, economic and social choices and where it is called on to undertake complex assessments and evaluations (see Case C-344/04 IATA and ELFAA [2006] ECR I–403, paragraph 80). In addition, where it is called on to restructure or establish a complex system, it is entitled to have recourse to a step-by-step approach (see, to that effect, Case 37/83 Rewe-Zentrale [1984] ECR 1229, paragraph 20; Case C-63/89 Assurances du crédit v Council and Commission [1991] ECR I–1799, paragraph 11; and Case C-233/94 Germany v Parliament and Council [1997] ECR I–2405, paragraph 43) and to proceed in the light of the experience gained.

58 However, even where it has such a discretion, the Community legislature is obliged to base its choice on objective criteria appropriate to the aim pursued by the legislation in question (see, to that effect, Case 106/81 Kind v EEC [1982] ECR 2885, paragraphs 22 and 23, and Sermide, paragraph 28), taking into account all the facts and the technical and scientific data available at the time of adoption of the act in question (see, to that effect, Case C-284/95 Safety Hi-Tech [1998] ECR I–4301, paragraph 51).

59 When exercising its discretion, the Community legislature must, in addition to the principal objective of protecting the environment, fully take into account all the interests involved (see, concerning measures relating to agriculture, Joined Cases C-96/03 and C-97/03 Tempelman and van Schaijk [2005] ECR I–1895, paragraph 48, and Case C-504/04 Agrarproduktion Staebelow [2006] ECR I–679, paragraph 37). In examining the burdens associated with various possible measures, it must be considered that, even if the importance of the objectives pursued is such as to justify even substantial negative economic consequences for certain operators (see, to that effect, Case C-331/88 Fedesa and Others [1990] ECR I–4023, paragraphs 15 to 17, and Case C-86/03 Greece v Commission [2005] ECR I–10979, paragraph 96), the Community legislature’s exercise of its discretion must not produce results that are manifestly less appropriate than those that would be produced by other measures that were also suitable for those objectives.

60 In the present case, it is common ground, first, that the allowance trading scheme introduced by Directive 2003/87 is a novel and complex scheme whose implementation and functioning could have been disturbed by the involvement of too great a number of participants, and, second, that the original definition of the scope of the directive was dictated by the objective of attaining the critical mass of participants necessary for the scheme to be set up.

61 In view of the novelty and complexity of the scheme, the original definition of the scope of Directive 2003/87 and the step-by-step approach taken, based in particular on the experience gained during the first stage of its implementation, in order not to disturb the establishment of the system were within the discretion enjoyed by the Community legislature.
62 It should be observed here that, while the legislature could lawfully make use of such a step-by-step approach for the introduction of the allowance trading scheme, it is obliged, in particular in view of the objectives of Directive 2003/87 and of Community policy in the field of the environment, to review the measures adopted, inter alia as regards the sectors covered by Directive 2003/87, at reasonable intervals, as is moreover provided for in Article 30 of the directive.

63 However, as the Advocate General notes inter alia in point 48 of his Opinion, the Community legislature’s discretion as regards a step-by-step approach could not, in the light of the principle of equal treatment, dispense it from having recourse, for determining the sectors it thought suitable for inclusion in the scope of Directive 2003/87 from the outset, to objective criteria based on the technical and scientific information available at the time of adoption of the directive.

64 As regards, first, the chemical sector, it may be seen from the history of Directive 2003/87 that that sector has an especially large number of installations, of the order of 34 000, not only in terms of the emissions they produce but also in relation to the number of installations currently included in the scope of the directive, which is of the order of 10 000.

65 The inclusion of that sector in the scope of Directive 2003/87 would therefore have made the management of the allowance trading scheme more difficult and increased the administrative burden, so that the possibility that the functioning of the scheme would have been disturbed at the time of its implementation as a result of that inclusion cannot be excluded. Moreover, the Community legislature was able to take the view that the advantages of excluding the whole sector at the start of the implementation of the allowance trading scheme outweighed the advantages of including it for attaining the objective of Directive 2003/87. It follows that the Community legislature has shown to the requisite legal standard that it made use of objective criteria to exclude the entire chemical sector from the scope of Directive 2003/87 in the first stage of implementation of the allowance trading scheme.

69 In the light of the foregoing and having regard to the step-by-step approach on which Directive 2003/87 is based, in the first stage of implementation of the allowance trading scheme, the difference in treatment between the chemical sector and the steel sector may be regarded as justified.

71 In view of its intention of defining the scope of Directive 2003/87 in such a way as not to upset the administrative feasibility of the allowance trading scheme in its initial stage by involving too many participants, the Community legislature was not required to have recourse solely to the method of introducing, for each sector of the economy that emitted CO₂, a threshold for emissions in order to attain its objective. Thus, in circumstances such as those in which Directive 2003/87 was adopted, it could when introducing the scheme legitimately delimit its scope by means of a sectoral approach without exceeding the bounds of its discretion.

74 In the light of all the above considerations, the answer to the national court’s question must be that consideration of Directive 2003/87 from the point of view of the principle of equal treatment has disclosed nothing to affect its validity in so far as it makes the greenhouse gas emission allowance trading scheme applicable to the steel sector without including the chemical and non-ferrous metal sectors in its scope.


1. The question which forms the subject of this reference for a preliminary ruling relates to the compatibility with the principle of equal treatment of the scheme for
greenhouse gas emission allowance trading introduced by a Community directive and involves the performance of complex assessments of fact. It may seem paradoxical that such a technical question should arise from a judgment with a major bearing on the relationship between national constitutional law and Community law. Some 20 years after the same referring court gave judgment in *Nicolo*, (2) which settled the question of the primacy of Community law over national legislation, the judgment in *Arcelor* given by the Judicial Assembly of the Conseil d’État on 8 February 2007 sets out, in terms of principle, the relationship between the French Constitution and Community law and the procedures for cooperation between the Court of Justice and the French administrative courts where the latter are faced with a challenge to the constitutionality of a Community directive. The apparent paradox therefore lies in the fact that, as will be seen, the challenge to the validity of the directive in the light of the Community principle of equal treatment has arisen from a challenge to the constitutionality of the directive. This case therefore provides an opportunity for the Court itself to specify the nature of the relationship between national constitutions and Community law. It will thus be able to dispel certain fears of a possible conflict which, as will be seen, are wholly unjustified given the common constitutional foundations on which the national and Community legal orders are based.

2. The question referred is in itself not without significance either. It calls into question the legality of legislation which is one of the cornerstones of Community environmental protection policy. It asks the Court to give a ruling on the relationship, by nature dialectic, between the practice of experimental legislation and the legislative requirements of equal treatment.

40. It should be recalled that the question raised by the French Conseil d’État relates to ‘the validity of Directive 2003/87/EC in the light of the principle of equal treatment, in so far as it makes the greenhouse gas emission allowance trading scheme applicable to installations in the steel sector without including in its scope the aluminium and plastic industries’. It follows from the grounds of the order of the national court that the doubts underlying the reference for a preliminary ruling have to do with whether there is an objective justification for the difference in treatment introduced by the contested directive between the steel sector on the one hand and the plastic and aluminium sectors on the other, even though those sectors are in comparable situations.

44. The fact remains, however, that the objective pursued, to reduce greenhouse gas emissions, would *a priori* dictate that all industrial sectors which emit greenhouse gases should be subject to the Directive, including, therefore, both the non-ferrous metals sector and the chemical industry. However, the establishment by the Community of a greenhouse gas emission allowance trading scheme forms part of a ‘step-by-step’ approach, also known as ‘learning by doing’. As all the intervening institutions have pointed out, the scheme introduced by the Directive was the first of its kind in the world. It was intended to serve as an example not only to the relevant players in the Community but also to non-member countries and, to that end, it was imperative that it should demonstrate its effectiveness. The fact that the scheme was new and the complexity of the mechanism for monitoring, notifying and verifying emissions which it required called for a degree of caution. It was important not to introduce a scheme which covered most industrial sectors and most greenhouse gases from the start. Overambition could have led to failure, as popular wisdom reminds us in the saying ‘don’t bite off more than you can chew’.

46. It is, then, in the very nature of legislative experimentation that tension with the principle of equal treatment should arise. The very idea of ‘learning by doing’ requires that the new policy be applied to only a limited number of its potential subjects to begin with. As a result, the scope of the policy is artificially circumscribed so that its consequences can be tested before its rules are extended, if appropriate, to all operators who might, in the light of its objectives, be subject to it. That said, recognition of the legitimacy of legislative experimentation cannot invalidate any criticism that might be
levelled against it from the point of view of the principle of equal treatment. The discrimination which experimental legislation inevitably entails is compatible with the principle of equal treatment only if certain conditions are satisfied.

47. The experimental measures must first of all be transitory. That is indeed the case with the Directive. Article 30 provides for a review of the Directive on the basis of ‘experience’ and ‘progress achieved in the monitoring of emissions of greenhouse gases’ with a view to including other industrial sectors and emissions of other greenhouse gases in the greenhouse gas emission allowance trading scheme. In application of that provision, the Commission proposed the inclusion of aviation activities. (51) In particular, with a view to reducing greenhouse gas emissions by at least 20% as compared with their 1990 levels, it proposed that the Community greenhouse gas emission allowance trading scheme be extended, on the one hand, to CO$_2$ emissions from petrochemicals, ammonia and aluminium and, on the other hand, to N$_2$O emissions from nitric, adipic and glyoxalic acid production and PFC emissions from the aluminium sector. (52)

48. Second, the scope of the trial measure must be defined in accordance with certain objective criteria. In this case, exclusion from or inclusion in the greenhouse gas emission allowance trading scheme must therefore be based on considerations relating to the objectives pursued by the Directive. As I have already said, the Directive aims to reduce greenhouse gas emissions in a cost-effective manner, that is to say with the least possible diminution of economic development and employment. (53) To that end, the Community legislature decided to apply the greenhouse gas emission allowance trading scheme as a priority to carbon dioxide emissions since, in 1999, CO$_2$ accounted for over 80% of Community greenhouse gas emissions and carbon dioxide emissions were capable of generating good quality monitoring data on a consistent basis, whereas the monitoring of emissions of other greenhouse gases still posed too many problems. (54) In addition, it made only those industrial sectors with the highest CO$_2$ emissions subject to the Directive, on the ground that the higher the quantities of emissions from an industrial sector, the less the burden of the fixed costs (accounting for and declaring emissions, verification of emissions by an independent body, training and employment of the necessary personnel to manage emission trading) generated by applying the allowance trading scheme, which must be borne by all operators participating in the scheme, would make itself felt; in the case of small-scale emitters with only a limited volume of allowances capable of being traded, on the other hand, any benefits they might derive from an allowance trading scheme are necessarily less substantial than those potentially available to major emitters.

49. Targeting the gas chiefly ‘responsible’ for the greenhouse effect and using the quantities of that gas emitted by each industrial sector as a benchmark are certainly objective criteria. […]

53. It is true that the steel sector also faces very brisk international competition and there is a risk of relocation to countries with no Kyoto objectives. However, CO$_2$ emissions from that sector are not on the same scale as those from the aluminium sector, being over 10 times higher, and therefore justified its inclusion in the allowance trading scheme from the start.

54. It therefore follows from the foregoing considerations that, even though some of the criticisms made by the applicants in the main proceedings in relation to the principle of equal treatment are not wholly without relevance, and even though they have, rightly, raised doubts in the mind of the national court as to the validity of the Directive which prompted the present reference, it does not appear, as has been demonstrated above, that, for the purposes of implementing the principle of equal treatment, the choice of criteria and the balance struck between them were unreasonable, particularly within the context of experimental legislation. The arguments put forward by the intervening institutions to defend the legislative measure adopted appear defensible. Other options could no doubt have been considered; there may even have been a better solution. This is not, however, for the court to say. Where a number of opinions may be equidistant from
the absolute and objective truth, which court can take upon itself the task of eliminating one of them? If it were to go down that path, the Court would divest the review of lawfulness of its objectivity and would have to substitute its assessment of economic policy for that of the Community legislature, (59) thus usurping the political responsibilities of the latter in breach of the separation of powers. For all the above reasons, the Directive does not appear to be vitiating by an infringement of the principle of equal treatment.
Lecture III
Thursday, 13\textsuperscript{th} December 2012

EU & International customary law
CASE C-366/10 AIR TRANSPORT ASSOCIATION OF AMERICA (ATAA)

Judgment of the Court (Grand Chamber) of 21 December 2011


Case C-366/10
(not yet reported)

Reference for a preliminary ruling under Article 267 TFEU from the High Court of Justice of England and Wales, Queen’s Bench Division (Administrative Court), made by decision of 8 July 2010, received at the Court on 22 July 2010, in the proceedings

Air Transport Association of America, American Airlines Inc., Continental Airlines Inc., United Airlines Inc. v Secretary of State for Energy and Climate Change,

Subject of the case

1 This reference for a preliminary ruling concerns, first, the circumstances in which principles of customary international law and provisions of international treaties may be relied upon in the context of a reference for a preliminary ruling on the validity of a measure and, secondly, the validity, in the light of international treaty law and customary international law, of Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community (OJ 2009 L 8, p. 3).

2 The reference has been made in proceedings brought by the Air Transport Association of America, American Airlines Inc., Continental Airlines Inc. and United Airlines Inc. (collectively ‘ATA and others’) against the Secretary of State for Energy and Climate Change concerning the validity of the measures implementing Directive 2008/101 that have been adopted by the United Kingdom of Great Britain and Northern Ireland.

Legal context

A) International law

1. The Chicago Convention

3 The Convention on International Civil Aviation, signed in Chicago (United States) on 7 December 1944 (‘the Chicago Convention’), has been ratified by all the Member States of the European Union, but the European Union is not itself a party to it. The Chicago Convention established the International Civil Aviation Organisation (ICAO), which, as provided in Article 44, has the objective of developing the principles and techniques of international air navigation and of fostering the establishment and stimulating the development of international air transport.

4 Article 1 of the Chicago Convention provides: ‘The contracting States recognise that every State has complete and exclusive sovereignty over the airspace above its territory.’

5 Article 11 of the Chicago Convention, headed ‘Applicability of air regulations’, provides: ‘Subject to the provisions of this Convention, the laws and regulations of a contracting State relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, shall be applied to the aircraft of all contracting States without distinction as to nationality, and shall
be complied with by such aircraft upon entering or departing from or while within the territory of that State.’

6 Article 12 of the Chicago Convention, headed ‘Rules of the air’, provides:
‘Each contracting State undertakes to adopt measures to insure that every aircraft flying over or maneuvering within its territory and that every aircraft carrying its nationality mark, wherever such aircraft may be, shall comply with the rules and regulations relating to the flight and maneuver of aircraft there in force. Each contracting State undertakes to keep its own regulations in these respects uniform, to the greatest possible extent, with those established from time to time under this Convention. Over the high seas, the rules in force shall be those established under this Convention. Each contracting State undertakes to insure the prosecution of all persons violating the regulations applicable.’

7 Article 15 of the Chicago Convention, headed ‘Airport and similar charges’, states:
‘Every airport in a contracting State which is open to public use by its national aircraft shall likewise ... be open under uniform conditions to the aircraft of all the other contracting States. ... Any charges that may be imposed or permitted to be imposed by a contracting State for the use of such airports and air navigation facilities by the aircraft of any other contracting State shall not be higher,

(b) as to aircraft engaged in scheduled international air services, than those that would be paid by its national aircraft engaged in similar international air services.

All such charges shall be published and communicated to the [ICAO], provided that, upon representation by an interested contracting State, the charges imposed for the use of airports and other facilities shall be subject to review by the Council, which shall report and make recommendations thereon for the consideration of the State or States concerned. No fees, dues or other charges shall be imposed by any contracting State in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a contracting State or persons or property thereon.’

8 Article 17 of the Chicago Convention provides that ‘aircraft have the nationality of the State in which they are registered’.

9 Article 24(a) of the Chicago Convention is worded as follows:
‘Aircraft on a flight to, from, or across the territory of another contracting State shall be admitted temporarily free of duty, subject to the customs regulations of the State. Fuel, lubricating oils, spare parts, regular equipment and aircraft stores on board an aircraft of a contracting State, on arrival in the territory of another contracting State and retained on board on leaving the territory of that State shall be exempt from customs duty, inspection fees or similar national or local duties and charges. ...’

2. The Kyoto Protocol

10 The United Nations Framework Convention on Climate Change, adopted in New York on 9 May 1992 (‘the Framework Convention’), has the ultimate objective of achieving stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. On 11 December 1997 the parties to the Framework Convention adopted, pursuant thereto, the Kyoto Protocol to the United Nations Framework Convention on Climate Change (‘the Kyoto Protocol’), which entered into force on 16 February 2005. The European Union is a party to both those instruments.

11 The purpose of the Kyoto Protocol is to reduce, during the period 2008 to 2012, overall emissions of six greenhouse gases, including carbon dioxide (‘CO₂’), to at least 5% below 1990 levels. The parties included in Annex I to the Framework Convention commit themselves to ensuring that their greenhouse gas emissions do not exceed the percentages assigned to them by the Kyoto Protocol; they can fulfil their obligations jointly. The overall commitment entered into by the European Union and its Member States under the Kyoto Protocol relates to a total
all import restrictions, property taxes and capital levies, customs duties, excise taxes, and similar fees and charges that are (a) imposed by the national authorities or the European Community, and (b) not based on the cost of services provided, provided that such equipment and supplies remain on board the aircraft.

2. There shall also be exempt, on the basis of reciprocity, from the taxes, levies, duties, fees and charges referred to in paragraph 1 of this Article, with the exception of charges based on the cost of the service provided:

... (c) fuel, lubricants and consumable technical supplies introduced into or supplied in the territory of a Party for use in an aircraft of an airline of the other Party engaged in international air transportation, even when these supplies are to be used on a part of the journey performed over the territory of the Party in which they are taken on board;

...’

22 Article 15 of the Open Skies Agreement, headed ‘Environment’, is worded as follows:

‘1. The Parties recognise the importance of protecting the environment when developing and implementing international aviation policy, carefully weighing the costs and benefits of measures to protect the environment in developing such policy, and, where appropriate, jointly advancing effective global solutions. Accordingly, the Parties intend to work together to limit or reduce, in an economically reasonable manner, the impact of international aviation on the environment.

2. When a Party is considering proposed environmental measures at the regional, national, or local level, it should evaluate possible adverse effects on the exercise of rights contained in this Agreement, and, if such measures are adopted, it should take appropriate steps to mitigate any such adverse effects. At the request of a Party, the other Party shall provide a description of such evaluation and mitigating steps.

3. When environmental measures are established, the aviation environmental standards adopted by the [ICAO] in annexes to the [Chicago] Convention shall be followed except where differences have been filed. The Parties shall apply any environmental measures affecting air services under this Agreement in accordance with Article 2 and Article 3(4) of this Agreement.

4. The Parties reaffirm the commitment of Member States and the United States to apply the balanced approach principle.

... 6. The Parties endorse and shall encourage the exchange of information and regular dialogue among experts, in particular through existing communication channels, to enhance cooperation, consistent with applicable laws and regulations, on addressing international aviation environmental impacts and mitigation solutions, including:

... (e) exchange of views on issues and options in international fora dealing with the environmental effects of aviation, including the coordination of positions, where appropriate.

7. If so requested by the Parties, the Joint Committee, with the assistance of experts, shall work to develop recommendations that address issues of possible overlap between and consistency among market-based measures regarding aviation emissions implemented by the Parties with a view to avoiding duplication of measures and costs and reducing to the extent possible the administrative burden on airlines. Implementation of such recommendations shall be subject to such internal approval or ratification as may be required by each Party.

8. If one Party believes that a matter involving aviation environmental protection, including proposed new measures, raises concerns for the application or implementation of this Agreement, it may request a meeting of the Joint Committee, as provided in Article 18, to consider the issue and develop appropriate responses to concerns found to be legitimate.’

23 By virtue of Article 19(1) of the Open Skies Agreement, any dispute relating to the application or interpretation of that agreement may, under certain conditions and where it is not resolved by a meeting of the Joint Committee, be referred to a person or body for decision by agreement of the parties. If the parties do not so agree, the dispute is, at the request of either
party, to be submitted to arbitration in accordance with the
detailed rules set out in Article 19.

**B) European Union law**

24 The Council has adopted Decision 94/69/EC of 15 December 1993 concerning the conclusion of the United Nations Framework Convention on Climate Change (OJ 1994 L 33, p. 1) and Decision 2002/358/EC of 25 April 2002 concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder (OJ 2002 L 130, p. 1). In accordance with the first paragraph of Article 2 of the latter decision, the European Union and its Member States are to fulfil their commitments under the Kyoto Protocol jointly.

25 Since the Commission considered that greenhouse gas emission allowance trading would, with other measures, be an integral and major part of the Community’s strategy in combating climate change, it presented, on 8 March 2000, a Green Paper on greenhouse gas emissions trading within the European Union (COM(2000) 87 final).


27 According to recital 5 in its preamble, that directive has the aim of contributing to more effective fulfilment of the commitments of the European Union and its Member States to reduce anthropogenic greenhouse gas emissions which have been entered into under the Kyoto Protocol in accordance with Decision 2002/358, through an efficient European market in greenhouse gas emission allowances (‘allowances’), with the least possible diminution of economic development and employment.

28 According to recital 23 in the preamble to that directive, allowance trading should ‘form part of a comprehensive and coherent package of policies and measures implemented at Member State and Community level’. As stated in the first sentence of recital 25 in its preamble, ‘policies and measures should be implemented at Member State and Community level across all sectors of the European Union economy, and not only within the industry and energy sectors, in order to generate substantial emissions reductions’.

29 Article 1 of Directive 2003/87 defines its subject-matter as follows: ‘This Directive establishes a scheme for ... allowance trading within the Community ... in order to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner.’

30 Directive 2003/87 applies, in accordance with Article 2(1), to emissions from the activities listed in Annex I and to the six greenhouse gases listed in Annex II, one of which is CO₂.


31 Under Article 30(2) of Directive 2003/87, the Commission, on the basis of experience of the application of that directive, was to draw up by 30 June 2006 a report, accompanied by proposals as appropriate, on the directive’s application, considering in particular ‘how and whether Annex I should be amended to include other relevant sectors, inter alia the chemicals, aluminium and transport sectors, activities and emissions of other greenhouse gases listed in Annex II, with a view to further improving the economic efficiency of the scheme’.

32 In this connection, the European Union legislature adopted Directive 2008/101, which amends Directive 2003/87 by including aviation in the allowance trading scheme.

33 Recitals 8 to 11, 14, 17 and 21 in the preamble to Directive 2008/101 are worded as follows:
which is worded as follows:
‘Administering Member States shall ensure that, by 30 April each year, each aircraft operator surrenders a number of allowances equal to the total emissions during the preceding calendar year from aviation activities listed in Annex I for which it is the aircraft operator, as verified in accordance with Article 15. Member States shall ensure that allowances surrendered in accordance with this paragraph are subsequently cancelled.’

36 Under Article 1(14)(b) of Directive 2008/101, Article 16(2) and (3) of Directive 2003/87 are replaced by the following:
‘2. Member States shall ensure publication of the names of operators and aircraft operators who are in breach of requirements to surrender sufficient allowances under this Directive.

3. Member States shall ensure that any operator or aircraft operator who does not surrender sufficient allowances by 30 April of each year to cover its emissions during the preceding year shall be held liable for the payment of an excess emissions penalty. The excess emissions penalty shall be EUR 100 for each tonne of carbon dioxide equivalent emitted for which the operator or aircraft operator has not surrendered allowances. Payment of the excess emissions penalty shall not release the operator or aircraft operator from the obligation to surrender an amount of allowances equal to those excess emissions when surrendering allowances in relation to the following calendar year.’

37 Also, Article 1(14)(c) of Directive 2008/101 provides inter alia for the addition to Article 16 of Directive 2003/87 of paragraph 5, which is worded as follows:
‘In the event that an aircraft operator fails to comply with the requirements of this Directive and where other enforcement measures have failed to ensure compliance, its administering Member State may request the Commission to decide on the imposition of an operating ban on the aircraft operator concerned.’

38 Under Article 1(18) of Directive 2008/101, Article 25a, headed ‘Third country measures to reduce the climate change impact of aviation’, is inserted in Directive 2003/87, providing as follows:
‘1. Where a third country adopts measures for reducing the climate change impact of flights departing from that country which land in the Community, the Commission, after consulting with that third country, and with Member States within the Committee referred to in Article 23(1), shall consider options available in order to provide for optimal interaction between the Community scheme and that country’s measures.

Where necessary, the Commission may adopt amendments to provide for flights arriving from the third country concerned to be excluded from the aviation activities listed in Annex I or to provide for any other amendments to the aviation activities listed in Annex I which are required by an agreement pursuant to the fourth subparagraph. Those measures, designed to amend non-essential elements of this Directive, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(3).

The Commission may propose to the European Parliament and the Council any other amendments to this Directive. The Commission may also, where appropriate, make recommendations to the Council in accordance with Article 300(1) of the Treaty to open negotiations with a view to concluding an agreement with the third country concerned.

2. The Community and its Member States shall continue to seek an agreement on global measures to reduce greenhouse gas emissions from aviation. In the light of any such agreement, the Commission shall consider whether amendments to this Directive as it applies to aircraft operators are necessary.’

39 As provided in the annex to Directive 2008/101, the title of Annex I to Directive 2003/87 is now ‘Categories of activities to which this Directive applies’ and paragraph 2 of the introduction preceding the table set out in Annex I to Directive 2003/87 has the following subparagraph added to it:
‘From 1 January 2012 all flights which arrive at or depart from an aerodrome situated in the territory of a Member State to which
the Treaty applies shall be included.’

40 The annex to Directive 2008/101 also amends Annex IV to Directive 2003/87, by adding thereto Part B which is entitled ‘Monitoring and reporting of emissions from aviation activities’ and provides:

‘Monitoring of carbon dioxide emissions
Emissions shall be monitored by calculation. Emissions shall be calculated using the formula:
Fuel consumption × emission factor
Fuel consumption shall include fuel consumed by the auxiliary power unit. Actual fuel consumption for each flight shall be used wherever possible and shall be calculated using the formula:
Amount of fuel contained in aircraft tanks once fuel uplift for the flight is complete - amount of fuel contained in aircraft tanks once fuel uplift for subsequent flight is complete + fuel uplift for that subsequent flight.

... A separate calculation shall be made for each flight and for each fuel.

Reporting of emissions
Each aircraft operator shall include the following information in its report under Article 14(3):
A. Data identifying the aircraft operator, including:
- name of the aircraft operator,
- its administering Member State,
...
B. For each type of fuel for which emissions are calculated:
- fuel consumption,
- emission factor,
- total aggregated emissions from all flights performed during the period covered by the report which fall within the aviation activities listed in Annex I for which it is the aircraft operator,
- aggregated emissions from:
  - all flights performed during the period covered by the report which fall within the aviation activities listed in Annex I for which it is the aircraft operator and which departed from each Member State, and
  - all other flights performed during the period covered by the report which fall within the aviation activities listed in Annex I for which it is the aircraft operator,
  - aggregated emissions from all flights performed during the period covered by the report which fall within the aviation activities listed in Annex I for which it is the aircraft operator and which:
    - departed from each Member State, and
    - arrived in each Member State from a third country,
    - uncertainty.

Monitoring of tonne-kilometre data for the purpose of Articles 3e and 3f
For the purpose of applying for an allocation of allowances in accordance with Article 3e(1) or Article 3f(2), the amount of aviation activity shall be calculated in tonne-kilometres using the following formula:

\[ \text{tonne-kilometres} = \text{distance} \times \text{payload} \]

where:
“distance” means the great circle distance between the aerodrome of departure and the aerodrome of arrival plus an additional fixed factor of 95 km; and
“payload” means the total mass of freight, mail and passengers carried.

...’

C) National law
41 In the United Kingdom, Directive 2008/101 has been transposed by the Aviation Greenhouse Gas Emissions Trading Scheme Regulations 2009 (SI 2009 No 2301), and by other provisions envisaged to be adopted in 2010.

The facts in the main proceedings and the questions referred for a preliminary ruling
42 According to the information provided by the referring court, the Air Transport Association of America, a non-profit-
First, the European Union must be bound by those rules (see Joined Cases 21/72 to 24/72 International Fruit Company and Others [1972] ECR 1219, paragraph 7, and Intertanko and Others, paragraph 44).

Second, the Court can examine the validity of an act of European Union law in the light of an international treaty only where the nature and the broad logic of the latter do not preclude this (see Joined Cases C-120/06 P and C-121/06 P FIAMM and Others v Council and Commission [2008] ECR I-6513, paragraph 110).

Finally, where the nature and the broad logic of the treaty in question permit the validity of the act of European Union law to be reviewed in the light of the provisions of that treaty, it is also necessary that the provisions of that treaty which are relied upon for the purpose of examining the validity of the act of European Union law appear, as regards their content, to be unconditional and sufficiently precise (see IATA and ELFAA, paragraph 39, and Intertanko and Others, paragraph 45).

Such a condition is fulfilled where the provision relied upon contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure (see Case 12/86 Demirel [1987] ECR 3719, paragraph 14; Case C-213/03 Pêcheurs de l’étang de Berre [2004] ECR I-7357, paragraph 39; and Case C-240/09 Lesoochranarske zoskupenie [2011] ECR I-0000, paragraph 44 and the case-law cited).

It must accordingly be ascertained in the case of the provisions of the treaties mentioned by the referring court whether the conditions as recalled in paragraphs 52 to 54 of the present judgment are in fact met.

a) The Chicago Convention

As is apparent from the third recital in its preamble, the Chicago Convention lays down ‘certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically’.

The Chicago Convention has a wide field of application in that it governs, inter alia, the rights of aircraft not engaged in scheduled services, including in relation to flying over the contracting States’ territory, the principles applicable to air cabotage, the circumstances in which an aircraft capable of being flown without a pilot may be so flown over the territory of a contracting State, the definition by the contracting States of areas which are prohibited from being flown over for reasons of military necessity or public safety, the landing of aircraft at a customs airport, the applicability of air regulations, the rules of the air, the imposition of airport and similar charges, the nationality of aircraft, and measures to facilitate air navigation, such as the facilitation of formalities, the establishment of customs and immigration procedures, air navigation facilities and standard systems.

The Chicago Convention also lays down the conditions to be fulfilled with respect to aircraft, including conditions relating to the documents that must be carried, to aircraft radio equipment, to certificates of airworthiness, to the recognition of certificates and licences, and to cargo restrictions. Furthermore, the convention provides for the adoption by the ICAO of international standards and recommended practices.

As has been stated in paragraph 3 of the present judgment, it is undisputed that the European Union is not a party to the Chicago Convention while, on the other hand, all of its Member States are contracting parties.

Although the first paragraph of Article 351 TFEU implies a duty on the part of the institutions of the European Union not to impede the performance of the obligations of Member States
which stem from an agreement prior to 1 January 1958, such as
the Chicago Convention, it is, however, to be noted that that duty
of the institutions is designed to permit the Member States
concerned to perform their obligations under a prior agreement
and does not bind the European Union as regards the third States
party to that agreement (see, to this effect, Case 812/79 Burgoa

62 Consequently, in the main proceedings, it is only if and in so
far as, pursuant to the EU and FEU Treaties, the European Union
has assumed the powers previously exercised by its Member States
in the field, as set out in paragraphs 57 to 59 of the present
judgment, to which that international convention applies that the
 convention’s provisions would have the effect of binding the
European Union (see, to this effect, International Fruit Company
and Others, paragraph 18; Case C-379/92 Peralta [1994]
ECR I-3453, paragraph 16; and Case C-301/08 Bogiatzi [2009]
ECR I-10185, paragraph 25).

63 Indeed, in order for the European Union to be capable of
being bound, it must have assumed, and thus had transferred to
it, all the powers previously exercised by the Member States that
fall within the convention in question (see, to this effect, Intertanko and Others, paragraph 49, and Bogiatzi, paragraph 33).
Therefore, the fact that one or more acts of European Union law
may have the object or effect of incorporating into European
Union law certain provisions that are set out in an international
agreement which the European Union has not itself approved is
not sufficient for it to be incumbent upon the Court to review the
legality of the act or acts of European Union law in the light of
that agreement (see, to this effect, Intertanko and Others, paragraph 50).

64 As the Swedish Government has essentially pointed out in
its written observations, both Article 80(2) EC and Article 100(2)
TFEU provide that the European Union is able to adopt
appropriate provisions concerning air transport.

65 Certain matters falling within the Chicago Convention have
been covered by legislation adopted at European Union level, in
particular on the basis of Article 80(2) EC. As regards air
transport, as the Court has already had occasion to point out in
Case C-382/08 Neukirchinger [2011] ECR I-0000, paragraph 23,
that is true, for example, of Regulation (EC) No 1592/2002 of the
European Parliament and of the Council of 15 July 2002 on
common rules in the field of civil aviation and establishing a
European Aviation Safety Agency (OJ 2002 L 240, p. 1) and of
Council Regulation (EEC) No 3922/91 of 16 December 1991 on the
harmonisation of technical requirements and administrative
procedures in the field of civil aviation (OJ 1991 L 373, p. 4), as
amended by Regulation (EC) No 1900/2006 of the European
L 377, p. 176).

66 The European Union legislature has likewise adopted
Council of 12 December 2006 on the regulation of the operation of
aeroplanes covered by Part II, Chapter 3, Volume 1 of Annex 16 to
the Convention on International Civil Aviation, second edition

67 As regards the issue of taxation of the fuel load, the Council
has also adopted Directive 2003/96/EC of 27 October 2003
restructuring the Community framework for the taxation of energy
products and electricity (OJ 2003 L 283, p. 51) which, in Article
14(1)(b), lays down a tax exemption for energy products supplied
for use as fuel for the purpose of air navigation other than in
private pleasure-flying, in order that, as is apparent from recital
23 in the preamble to that directive, the European Union complies
in particular with certain international obligations, including those
connected with the tax exemptions on energy products intended
for civil aviation which are granted to airlines on the basis of the
Chicago Convention and of international bilateral air service
agreements concluded by the European Union and/or the Member
States with certain third States (see Case C-79/10 Systeme
applying to aircraft utilised by the airlines of the parties to that agreement. Under Article 7, when these aircraft engaged in international air navigation enter, depart from or are within the territory of one of the contracting parties, they are to be subject to and must observe the laws and regulations of that party, be they provisions relating to the admission or departure of aircraft on that party’s territory or those relating to the operation and navigation of aircraft.

87 Consequently, Article 7 of the Open Skies Agreement may be relied upon by airlines in the context of the present reference for a preliminary ruling for the purpose of assessing the validity of Directive 2008/101.

ii) Article 11 of the Open Skies Agreement

88 In circumstances such as those of the main proceedings, it is apparent that, of the products referred to in Article 11(1) and (2) of the Open Skies Agreement, only fuel as such proves relevant and that, moreover, the through-put charges for such a product within the meaning of Article 11(7) are not at issue.

89 Article 11(1) and (2)(c) of the Open Skies Agreement exempt from taxes, duties, fees and charges, on the basis of reciprocity, inter alia fuel introduced into or supplied in the territory of the European Union for use in an aircraft of an airline established in the United States engaged in international air transportation, even when the fuel is to be used on a part of the journey performed over the territory of the European Union.

90 So far as concerns the fuel load for international flights, it is to be noted that the European Union has expressly laid down an exemption from taxation for energy products supplied for use as fuel for the purpose of air navigation, in order in particular to comply with existing international obligations resulting from the Chicago Convention and with those owed by it under international bilateral air service agreements which it has concluded with certain third States and which prove, in this respect, to be of the same nature as the Open Skies Agreement (see Systeme Helmholz, paragraphs 24 and 25).

91 It is also undisputed that, so far as concerns international commercial flights, that exemption existed before Directive 2003/96 was adopted (see, in this regard, Systeme Helmholz, paragraph 22) and that in laying down in Article 11(1) and (2)(c) of the Open Skies Agreement an obligation to exempt the fuel load from taxation, the parties to that agreement, both the European Union and the Member States and the United States, merely reiterated, in the case of the fuel load, an obligation derived from international treaties, in particular the Chicago Convention.

92 Finally, it has not in any way been alleged, by either the Member States or the institutions of the European Union which have submitted observations, that within the framework of the Open Skies Agreement the European Union’s trading partner has not exempted the fuel load of the aircraft of airlines established in a Member State.

93 It follows that, as regards fuel specifically, the condition of reciprocity in Article 11(1) and (2)(c) of the Open Skies Agreement does not constitute, in particular in circumstances such as those of the present case, in which the contracting parties have reciprocally performed the obligation in question, an obstacle preventing the obligation, laid down in that provision, to exempt the fuel load from taxes, duties, fees and charges from being relied upon directly for the purpose of reviewing the validity of Directive 2008/101.

94 In the light of the foregoing, it must be accepted that Article 11(1) and (2)(c) of the Open Skies Agreement, so far as concerns the obligation to exempt the fuel load of aircraft engaged in international air services between the European Union and the United States from taxes, duties, fees and charges, with the exception of charges based on the cost of the service provided, may be relied upon in the context of the present reference for a preliminary ruling for the purpose of assessing the validity of Directive 2008/101 in the light of that provision.
iii) Article 15(3) of the Open Skies Agreement, read in conjunction with Articles 2 and 3(4) thereof

95 The first sentence of Article 15(3) of the Open Skies Agreement is intended to impose upon the contracting parties the obligation to follow the aviation environmental standards set out in annexes to the Chicago Convention, except where differences have been filed. This last point is not an element defining the obligation on the European Union to follow those standards, but constitutes a possibility of derogating from that obligation.

96 That sentence thus appears unconditional and sufficiently precise for the Court to be able to assess the validity of Directive 2008/101 in the light thereof (see, with regard to compliance with environmental norms derived from a convention, Pêcheurs de l’étag de Berre, paragraph 47).

97 The second sentence of Article 15(3) provides that any environmental measures affecting air services under the Open Skies Agreement must be applied by the parties in accordance with Articles 2 and 3(4) of that agreement.

98 Thus, whilst the European Union may, in the context of application of its environmental measures, adopt certain measures which have the effect of unilaterally limiting the volume of traffic or frequency or regularity of service within the meaning of Article 3(4) of the Open Skies Agreement, it must, however, apply such measures under uniform conditions that are consistent with Article 15 of the Chicago Convention, which provides, in essence, that airport charges which are or may be imposed on aircraft engaged in scheduled international air services are not to be higher than those that would be paid by national aircraft engaged in similar international air services.

99 It follows that, having regard to Article 2 of the Open Skies Agreement, which provides that each party is to allow a fair and equal opportunity for the airlines of both parties to compete in providing international air transportation, Article 15(3) of that agreement, read in conjunction with Articles 2 and 3(4) thereof, must be interpreted as meaning that, if the European Union adopts environmental measures in the form of airport charges which have the effect of limiting the volume of traffic or the frequency or regularity of transatlantic air services, such charges imposed on airlines established in the United States are not to be higher than those payable by European Union airlines and in so doing, from the viewpoint of any liability on their part to such charges, the European Union must allow a fair and equal opportunity for those two categories of airline to compete.

100 Article 15(3) of the Open Skies Agreement, read in conjunction with Articles 2 and 3(4) thereof, therefore contains an unconditional and sufficiently precise obligation that may be relied upon for the purpose of assessing the validity of Directive 2008/101 in the light of that provision.

2. Customary international law

101 Under Article 3(5) TEU, the European Union is to contribute to the strict observance and the development of international law. Consequently, when it adopts an act, it is bound to observe international law in its entirety, including customary international law, which is binding upon the institutions of the European Union (see, to this effect, Case C-286/90 Poulsen and Diva Navigation [1992] ECR I-6019, paragraphs 9 and 10, and Case C-162/96 Racke [1998] ECR I-3655, paragraphs 45 and 46).

102 Thus, it should be examined first whether the principles to which the referring court makes reference are recognised as forming part of customary international law. If they are, it should, secondly, then be determined whether and to what extent they may be relied upon by individuals to call into question the validity of an act of the European Union, such as Directive 2008/101, in a situation such as that in the main proceedings.

117 Thus, that directive is not intended to apply as such to international flights flying over the territory of the Member States of the European Union or of third States when such flights do not arrive at or depart from an aerodrome situated in the territory of a Member State.

118 On the other hand, where a flight that departs from an aerodrome situated in the territory of a third State does arrive at an aerodrome situated in the territory of one of the Member States of the European Union, or where the destination of a flight departing from such an aerodrome is an aerodrome situated in a third State, it is clear from Part B of Annex IV to Directive 2003/87, as amended by Directive 2008/101, that the aircraft operators performing such flights must report their emissions, for the purpose of determining, in accordance with Article 12(2a) of Directive 2003/87, as inserted by Directive 2008/101, the number of allowances that they must surrender for the preceding calendar year, a number which corresponds to the verified emissions, which are calculated from data relating to all of those flights.

119 In particular, in order to calculate the ‘tonne-kilometres’, account is taken of fuel consumption, which is determined by means of a calculation formula intended to establish, wherever possible, the actual fuel consumption for flights falling within Directive 2008/101.

120 It is in the light of this aspect related to the taking into account of fuel consumption for all international flights which arrive at or depart from aerodromes situated in the territory of the Member States that the validity of Directive 2008/101 should be examined in the context of the main proceedings.

2. The competence of the European Union, in the light of the rules of customary international law capable of being relied upon in the context of the main proceedings, to adopt Directive 2008/101

121 As has been noted in paragraph 108 of the present judgment, the three principles of customary international law capable of being relied upon in the present case for the purposes of the Court’s assessment of the validity of Directive 2008/101 are, to a large extent, connected with the territorial scope of Directive 2003/87 as amended by Directive 2008/101.

122 It is to be noted at the outset that European Union law and, in particular, Directive 2008/101 cannot render Directive 2003/87 applicable as such to aircraft registered in third States that are flying over third States or the high seas.

123 The European Union must respect international law in the exercise of its powers, and therefore Directive 2008/101 must be interpreted, and its scope delimited, in the light of the relevant rules of the international law of the sea and international law of the air (see, to this effect, Poulsen and Diva Navigation, paragraph 9).

124 On the other hand, European Union legislation may be applied to an aircraft operator when its aircraft is in the territory of one of the Member States and, more specifically, on an aerodrome situated in such territory, since, in such a case, that aircraft is subject to the unlimited jurisdiction of that Member State and the European Union (see, by analogy, Poulsen and Diva Navigation, paragraph 28).

125 In laying down a criterion for Directive 2008/101 to be applicable to operators of aircraft registered in a Member State or in a third State that is founded on the fact that those aircraft perform a flight which departs from or arrives at an aerodrome situated in the territory of one of the Member States, Directive 2008/101, inasmuch as it extends application of the scheme laid down by Directive 2003/87 to aviation, does not infringe the
principle of territoriality or the sovereignty which the third States from or to which such flights are performed have over the airspace above their territory, since those aircraft are physically in the territory of one of the Member States of the European Union and are thus subject on that basis to the unlimited jurisdiction of the European Union.

126 Nor can such application of European Union law affect the principle of freedom to fly over the high seas since an aircraft flying over the high seas is not subject, in so far as it does so, to the allowance trading scheme. Moreover, such an aircraft can, in certain circumstances, cross the airspace of one of the Member States without its operator thereby being subject to that scheme.

127 It is only if the operator of such an aircraft has chosen to operate a commercial air route arriving at or departing from an aerodrome situated in the territory of a Member State that the operator, because its aircraft is in the territory of that Member State, will be subject to the allowance trading scheme.

128 As for the fact that the operator of an aircraft in such a situation is required to surrender allowances calculated in the light of the whole of the international flight that its aircraft has performed or is going to perform from or to such an aerodrome, it must be pointed out that, as European Union policy on the environment seeks to ensure a high level of protection in accordance with Article 191(2) TFEU, the European Union legislature may in principle choose to permit a commercial activity, in this instance air transport, to be carried out in the territory of the European Union only on condition that operators comply with the criteria that have been established by the European Union and are designed to fulfil the environmental protection objectives which it has set for itself, in particular where those objectives follow on from an international agreement to which the European Union is a signatory, such as the Framework Convention and the Kyoto Protocol.

129 Furthermore, the fact that, in the context of applying European Union environmental legislation, certain matters contributing to the pollution of the air, sea or land territory of the Member States originate in an event which occurs partly outside that territory is not such as to call into question, in the light of the principles of customary international law capable of being relied upon in the main proceedings, the full applicability of European Union law in that territory (see to this effect, with regard to the application of competition law, Ahlström Osakeyhtiö and Others v Commission, paragraphs 15 to 18, and, with regard to hydrocarbons accidentally spilled beyond a Member State’s territorial sea, Case C-188/07 Commune de Mesquer [2008] ECR I-4501, paragraphs 60 to 62).

130 It follows that the European Union had competence, in the light of the principles of customary international law capable of being relied upon in the context of the main proceedings, to adopt Directive 2008/101, in so far as the latter extends the allowance trading scheme laid down by Directive 2003/87 to all flights which arrive at or depart from an aerodrome situated in the territory of a Member State.


131 ATA and others contend, in essence, that Directive 2008/101 infringes Article 7 of the Open Skies Agreement since, so far as it concerns them, Article 7 requires aircraft engaged in international navigation to comply with the laws and regulations of the European Union only when the aircraft enter or depart from the territory of the Member States or, in the case of its laws and regulations relating to the operation and navigation of such aircraft, when their aircraft are within that territory. They maintain that Directive 2008/101 seeks to apply the allowance trading scheme laid down by Directive 2003/87 not only upon the entry of aircraft into the territory of the Member States or on their departure from that territory, but also to those parts of
c) The validity of Directive 2008/101 in the light of Article 15(3) of the Open Skies Agreement read in conjunction with Articles 2 and 3(4) thereof

148 ATA and others submit in essence that application of Directive 2003/87 to airlines established in the United States infringes Article 15(3) of the Open Skies Agreement, since such an environmental measure is incompatible with the relevant ICAO standards. Furthermore, in rendering the scheme laid down by Directive 2003/87 applicable to aviation, Directive 2008/101 constitutes a measure limiting in particular the volume of traffic and frequency of service, in breach of Article 3(4) of that agreement. Finally, application of such a scheme amounts to a charge incompatible with Article 15 of the Chicago Convention, a provision which the parties to the Open Skies Agreement undertook to comply with pursuant to Article 3(4) of that agreement.

149 First of all, it should be noted that, in any event, neither the referring court nor ATA and others have provided material indicating that the European Union, in adopting Directive 2008/101 which renders Directive 2003/87 applicable to aviation, infringed an aviation environmental standard adopted by the ICAO within the meaning of Article 15(3) of the Open Skies Agreement. Furthermore, inasmuch as ICAO Resolution A37-19 lays down in its annex guiding principles for the design and implementation of market-based measures ('MBMs'), it does not indicate that MBMs, such as the European Union allowance trading scheme, would be contrary to the aviation environmental standards adopted by the ICAO.

150 That annex states, in points (b) and (f) respectively, that such MBMs should support the mitigation of greenhouse gas emissions from international aviation and that MBMs should not be duplicative, so that international aviation CO₂ emissions are accounted for only once under such schemes.

151 That corresponds precisely to the objective formulated in Article 25a of Directive 2003/87, as amended by Directive 2008/101, which seeks to ensure optimal interaction between the European Union allowance trading scheme and MBMs that may be adopted by third States, so that those schemes are not applied twice to aircraft operating on international routes, be they registered in a Member State or in a third State. Such an objective corresponds, moreover, to the objective underlying Article 15(7) of the Open Skies Agreement.

152 As regards the validity of Directive 2008/101 in the light of the second sentence of Article 15(3) of the Open Skies Agreement, it must be stated that that provision, read in conjunction with Article 3(4) of the agreement, does not prevent the parties thereto from adopting measures that would limit the volume of traffic, frequency or regularity of service, or the aircraft type operated by the airlines established in the territory of those parties, when such measures are linked to protection of the environment.

153 Article 3(4) of the Open Skies Agreement expressly provides that neither of the parties to the agreement may impose such limitations 'except as may be required for ... environmental ... reasons'. Furthermore, it is to be noted that in any event, the allowance trading scheme does not set any limit on the emissions of aircraft which depart from or arrive at an aerodrome situated in the territory of a Member State and also does not limit frequency or regularity of service, as the fundamental obligation owed by aircraft operators is solely to surrender allowances corresponding to their actual emissions. Nor, for the reasons set out in paragraphs 141 to 147 of the present judgment, can such an obligation be regarded as an airport charge.

154 Article 15(3) of the Open Skies Agreement, read in conjunction with Articles 2 and 3(4) thereof, provides however that, when the parties to the Open Skies Agreement adopt such environmental measures, they must, as is apparent from paragraph 99 of the present judgment, be applied in a non-discriminatory manner to the airlines concerned.
In that regard, it must be stated that, as is indeed apparent from the express terms of recital 21 in the preamble to Directive 2008/101, the European Union has expressly provided for uniform application of the allowance trading scheme to all aircraft operators on routes which depart from or arrive at an aerodrome situated in the territory of a Member State and, in particular, it has sought to comply strictly with the non-discrimination provisions of bilateral air service agreements with third States, like the provisions in Articles 2 and 3(4) of the Open Skies Agreement.

Therefore, Directive 2008/101, inasmuch as it provides in particular for application of the allowance trading scheme in a non-discriminatory manner to aircraft operators established both in the European Union and in third States, is not invalid in the light of Article 15(3) of the Open Skies Agreement, read in conjunction with Articles 2 and 3(4) thereof.

Having regard to all of the foregoing, it must be concluded that examination of Directive 2008/101 has disclosed no factor of such a kind as to affect its validity.

**Costs**

Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

**Operative part**

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

1. The only principles and provisions of international law, from among those mentioned by the referring court, that can be relied upon, in circumstances such as those of the main proceedings and for the purpose of assessing the validity of Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, are:
   - first, within the limits of review as to a manifest error of assessment attributable to the European Union regarding its competence, in the light of those principles, to adopt that directive:
     - the principle that each State has complete and exclusive sovereignty over its airspace,
     - the principle that no State may validly purport to subject any part of the high seas to its sovereignty, and
     - the principle which guarantees freedom to fly over the high seas,
   - and second:
     - Articles 7 and 11(1) and (2)(c) of the Air Transport Agreement concluded on 25 and 30 April 2007 between the United States of America, of the one part, and the European Community and its Member States, of the other part, as amended by the Protocol, and
     - Article 15(3) of that agreement, read in conjunction with Articles 2 and 3(4) thereof.

2. Examination of Directive 2008/101 has disclosed no factor of such a kind as to affect its validity.
1. Principle: Under Article 3(5) TEU, the European Union is to contribute to the strict observance and the development of international law. Consequently, when it adopts an act, it is bound to observe international law in its entirety, including customary international law, which is binding upon the institutions of the European Union

9. As a preliminary point, it must be observed, first, that the European Community must respect international law in the exercise of its powers and that, consequently, Article 6 abovementioned must be interpreted, and its scope limited, in the light of the relevant rules of the international law of the sea.


45. It should be noted in that respect that, as is demonstrated by the Court's judgment in Case C-286/90 Poulsen and Diva Navigation [1992] ECR I-6019, paragraph 9, the European Community must respect international law in the exercise of its powers. It is therefore required to comply with the rules of customary international law when adopting a regulation suspending the trade concessions granted by, or by virtue of, an agreement which it has concluded with a non-member country.
46. It follows that the rules of customary international law concerning the termination and the suspension of treaty relations by reason of a fundamental change of circumstances are binding upon the Community institutions and form part of the Community legal order.

2. Whether and under what circumstances the principles of customary international law may be relied upon

a) conditions:

I. principles are capable of calling into question the competence of the European Union to adopt that act:

Judgment of the Court of 27 September 1988, A. Ahlström Osakeyhtiö and others v Commission of the European Communities, Joined cases 89, 104, 114, 116, 117 and 125 to 129/85, Reports, 1988, p. 05193;
15. The applicants have submitted that the decision is incompatible with public international law on the grounds that the application of the competition rules in this case was founded exclusively on the economic repercussions within the common market of conduct restricting competition which was adopted outside the Community.

16. It should be observed that an infringement of Article 85, such as the conclusion of an agreement which has had the effect of restricting competition within the common market, consists of conduct made up of two elements, the formation of the agreement, decision or concerted practice and the implementation thereof. If the applicability of prohibitions laid down under competition law were made to depend on the place where the agreement, decision or concerted practice was formed, the result would obviously be to give undertakings an easy means of evading those prohibitions. The decisive factor is therefore the place where it is implemented.

17. The producers in this case implemented their pricing agreement within the common market. It is immaterial in that respect whether or not they had recourse to subsidiaries, agents, sub-agents, or branches within the Community in order to make their contacts with purchasers within the Community.

18. Accordingly the Community’s jurisdiction to apply its competition rules to such conduct is covered by the territoriality principle as universally recognized in public international law.

Judgment of the Court (Sixth Chamber) of 24 November 1993, Etablissements Armand Mondiet SA v Armement Islais SARL, Case C-405/92, Reports, 1993, p. I-06133 (by analogy)

12. For the purpose of answering Question 1.1., it should be noted that the Court has consistently held that, with regard to the high seas, the Community has the same rule-making authority in matters within its jurisdiction as that conferred under international law on the State whose flag the vessel is flying or in which it is registered (Joined Cases 3/76, 4/76 and 6/76 Kramer [1976] ECR 1279, Case 61/77 Commission v Ireland [1978] ECR 417, Case C-258/89 Commission v Spain [1991] ECR I-3977 and Case C-286/90 Poulisen and Diva Navigation [1992] ECR I-6019).


14. Article 6 of the Geneva Convention of 29 April 1958 recognizes the interests of coastal States in the living resources in any area of the high seas adjacent to their territorial sea. In addition, Articles 117 and 118 of the United Nations Convention on the Law of the Sea impose a duty on all members of the international community to cooperate in the conservation and management of the living resources of the high seas (Poulisen and Diva Navigation, cited above, paragraph 11).

15. It follows from the foregoing considerations that the Community has competence to adopt, for vessels flying the flag of a Member State or registered in a Member State, measures for the conservation of the fishery resources of the high seas.

II. act in question is liable to affect rights which the individual derives from European Union law or to create obligations under European Union law in his regard.
b) restrictions in judicial review:


52. However, because of the complexity of the rules in question and the imprecision of some of the concepts to which they refer, judicial review must necessarily, and in particular in the context of a preliminary reference for an assessment of validity, be limited to the question whether, by adopting the suspending regulation, the Council made manifest errors of assessment concerning the conditions for applying those rules.
Lecture IV
Friday, 14\textsuperscript{th} December 2012

International trade law in the EU legal order
CASE C-149/96, PORTUGUESE REPUBLIC V COUNCIL OF THE EUROPEAN UNION

Judgment of the Court of 23 November 1999

(Commercial policy - Access to the market in textile products - Products originating in India and Pakistan)

Case C-149/96
(European Court reports 1999 I-08395)


Portuguese Republic v
Council of the European Union,
supported by French Republic and Commission of the European Communities,

Subject of the case

1 By application lodged at the Court Registry on 3 May 1996, the Portuguese Republic brought an action under the first paragraph of Article 173 of the EC Treaty (now, after amendment, the first paragraph of Article 230 EC) for the annulment of Council Decision 96/386/EC of 26 February 1996 concerning the conclusion of Memoranda of Understanding between the European Community and the Islamic Republic of Pakistan and between the European Community and the Republic of India on arrangements in the area of market access for textile products (OJ 1996 L 153, p. 47, `the contested decision').

Legal and factual background

A) International multilateral agreements in the Uruguay Round

2 On 15 December 1993 the Council unanimously approved the terms of the global commitment on the basis of which the Community and the Member States agreed to end the multilateral trade agreements of the Uruguay Round (`the agreement of principle').

3 On the same day, the Director General of the General Agreement on Tariffs and Trade (`GATT'), Mr Sutherland, announced in Geneva to the committee for multilateral negotiations the closure of the negotiations of the Uruguay Round. In doing so he invited some of the participants to pursue their negotiations on access to the market, with a view to reaching a more complete and better balanced `market access' package.

4 Following the closure of those negotiations the negotiations on market access for textile and clothing products (`textile products') with, inter alia, the Republic of India and the Islamic Republic of Pakistan were pursued by the Commission, with the assistance of the `textile committee' designated by the Council (`the textile committee') to represent it in matters concerning the common commercial policy of the Community in the textile sector.

5 On 15 April 1994, at the Marrakesh meeting in Morocco, although the negotiations on access to the market in textiles had not yet been completed with Pakistan and India, the President of the Council and the Member of the Commission responsible for external relations signed the Final Act concluding the multilateral trade agreements of the Uruguay Round (`the Final Act'), the Agreement establishing the World Trade Organisation
Among those agreements, included in Annex 1 A to the agreement establishing the WTO, are the Agreement on Textiles and Clothing (‘the ATC’) and the Agreement on Import Licensing Procedures.


The agreements concluded with Pakistan and India

8 Following the signature of the WTO agreements negotiations with India and Pakistan continued; they were conducted by the Commission with the assistance of the textiles committee.

9 On 15 October and 31 December 1994 the Commission, and India and Pakistan respectively, signed two ‘Memoranda of Understanding’ between the European Community and India and Pakistan on arrangements in the area of market access for textile products.

10 The Memorandum of Understanding with Pakistan contains a number of commitments on the part of both the Community and Pakistan. In particular, Pakistan undertakes to eliminate all quantitative restrictions applicable to a series of textile products listed specifically in Annex II to the Memorandum of Understanding. The Commission undertakes to give favourable consideration to requests which the Government of Pakistan might introduce in respect of the management of existing [tariff] restrictions for exceptional flexibility (including carry-over, carry-forward and inter-category transfers)’ (point 6) and to initiate immediately the necessary internal procedures in order to ensure ‘that all restrictions currently affecting the importation of products of the handloom and cottage industries of Pakistan are removed before entry into force of the WTO’ (point 7).

11 The Memorandum of Understanding with India provides that the Indian Government is to bind the tariffs which it applies to the textiles and clothing items expressly listed in the Attachment to the Memorandum of Understanding and that ‘[t]hese rates will be notified to the WTO Secretariat within 60 days of the date of entry into force of the WTO’. It is also provided that the Indian Government may ‘introduce alternative specific duties for particular products’ and that these duties will be indicated ‘as a percentage ad valorem or an amount in Rs per item/square metre/kg, whichever is higher’ (point 2). The European Community agrees to ‘remove with effect from 1 January 1995 all restrictions currently applicable to India’s exports of handloom products and cottage industry products as referred to in Article 5 of the EC-India agreement on trade in textile products’ (point 5). The Community undertakes to give favourable consideration to ‘exceptional flexibilities, in addition to the flexibilities applicable under the bilateral textiles agreement, for any or all of the categories under restraint’, up to the amounts for each quota year indicated in the Memorandum of Understanding for 1995 to 2004 (point 6).

12 On a proposal from the Commission dated 7 December 1995, the Council adopted on 26 February 1996 the contested decision, which was approved by a qualified majority; the Kingdom of Spain, the Hellenic Republic and the Portuguese Republic voted against it.

13 The understandings with India and Pakistan were signed on 8 and 27 March 1996 respectively.
14 The contested decision was published in the Official Journal of the European Communities on 27 June 1996.

B) Community legislation

15 Council Regulation (EEC) No 3030/93 of 12 October 1993 on common rules for imports of certain textile products from third countries (OJ 1993 L 275, p. 1), as amended by Council Regulation (EC) No 3289/94 of 22 December 1994 (OJ 1994 L 349, p. 85), lays down rules governing imports into the Community of textile products originating in third countries which are linked to the Community by agreements, protocols or arrangements, or which are members of the WTO.

16 Thus, according to Article 1(1) thereof, the regulation applies to imports of textile products listed in Annex I originating in third countries with which the Community has concluded bilateral agreements, protocols or other arrangements as listed in Annex II.

17 Article 2(1) of the regulation provides that the importation into the Community of the textile products listed in Annex V originating in one of the supplier countries listed in that annex is to be subject to the annual quantitative limits laid down in that annex. Under Article 2(2), the release into free circulation in the Community of imports subject to the quantitative limits referred to in Annex V is to be subject to the presentation of an import authorisation issued by the Member States' authorities in accordance with Article 12.

18 Article 3(1) provides that the quantitative limits referred to in Annex V are not to apply to the cottage industry and folklore products specified in Annexes VI and VIa which are accompanied on importation by a certificate issued in accordance with the provisions of Annexes VI and VIa and which fulfil the other conditions laid down therein.

19 On 10 April 1995, pursuant to what had been agreed in the agreement of principle (paragraph 2 of this judgment) the Council, on a proposal from the Commission, adopted Regulation (EC) No 852/95 on the grant of financial assistance to Portugal for a specific programme for the modernisation of the Portuguese textile and clothing industry (OJ 1995 L 86, p. 10).


According to the 14th and 16th recitals in the preamble to that regulation, the fact that the arrangement with India as regards access to the market envisaged the abolition of quantitative restrictions on the importation of certain folklore and cottage industry products originating in India was one of the factors which led to the amendment of those annexes as from 1 January 1995.

21 The fifth and sixth indents of Article 1 of Regulation No 3053/95 replace Annex VI to Regulation No 3030/93 by a new Annex V to Regulation No 3053/95, and repeal Annex VIa to that regulation as from 1 January 1995.

22 As Regulation No 3053/95 was vitiated by a procedural defect, the fifth and sixth indents of Article 1 were withdrawn with retroactive effect from 1 January 1995 by Commission Regulation (EC) No 1410/96 of 19 July 1996 concerning the partial withdrawal of Regulation No 3053/95 (OJ 1996 L 181, p. 15, hereinafter 'the withdrawal regulation'). According to the first recital in the preamble to the withdrawal regulation, the amendments provided for in the fifth and sixth indents of Article 1 of Regulation No 3053/95 had been adopted at a time when, by virtue of Article 19 of Regulation No 3030/93, the Commission was not yet entitled to adopt them, the Council not yet having decided to conclude or apply provisionally the arrangements negotiated by the Commission with India and Pakistan concerning access to the market in textile products.

Grounds of decision
24. In support of its application, the Portuguese Republic relies, first, on breach of certain rules and fundamental principles of the WTO and, second, on breach of certain rules and fundamental principles of the Community legal order.

Breach of rules and fundamental principles of the WTO
25. The Portuguese Government claims that the contested decision constitutes a breach of certain rules and fundamental principles of the WTO, in particular those of GATT 1994, the ATC and the Agreement on Import Licensing Procedures.

26. It claims that according to case-law it is entitled to rely on those rules and fundamental principles before the Court.

27. Although the Court held in Case C-280/93 Germany v Council [1994] ECR I-4973, paragraphs 103 to 112, that the GATT rules do not have direct effect and that individuals cannot rely on them before the courts, it held in the same judgment that that does not apply where the adoption of the measures implementing obligations assumed within the context of the GATT is in issue or where a Community measure refers expressly to specific provisions of the general agreement. In such cases, as the Court held in paragraph 111 of that judgment, the Court must review the legality of the Community measure in the light of the GATT rules.

28. The Portuguese Government claims that that is precisely the position in this case, which concerns the adoption of a measure - the contested decision - approving the Memoranda of Understanding negotiated with India and Pakistan following the conclusion of the Uruguay Round for the specific purpose of applying the rules in GATT 1994 and the ATC.

29. The Council, supported by the French Government and by the Commission, relies rather on the special characteristics of the WTO agreements, which in their view provide grounds for applying to those agreements the decisions in which the Court held that the provisions of GATT 1947 do not have direct effect and cannot be relied upon.

30. They claim that the contested decision is of a special kind and is thus not comparable to the regulations at issue in Case 70/87 Fediol v Commission [1989] ECR 1781 and Case C-69/89 Nakajima All Precision v Council [1991] ECR I-2069. The decision is not a Community measure intended to ‘transpose’ certain provisions of the ATC into Community law.

31. The Portuguese Government replies that it is not GATT 1947 that is in issue in the present case but the WTO agreements, which include GATT 1994, the ATC and the Agreement on Import Licensing Procedures. The WTO agreements are significantly different from GATT 1947, in particular in so far as they radically alter the dispute settlement procedure.

32. Nor, according to the Portuguese Government, does the case raise the problem of direct effect: it concerns the circumstances in which a Member State may rely on the WTO agreements before the Court for the purpose of reviewing the legality of a Council measure.

33. The Portuguese Government maintains that such a review is justified in the case of measures such as the contested decision which approve bilateral agreements governing, in relations between the Community and non-member countries, matters to which the WTO rules apply.
34 It should be noted at the outset that 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. Only if that question has not been settled by the agreement does it fall to be decided by the courts having jurisdiction in the matter, and in particular by the Court of Justice within the framework of its jurisdiction under the EC Treaty, in the same manner as any question of interpretation relating to the application of the agreement in the Community (see Case 104/81 Hauptzollamt Mainz v Kupferberg [1982] ECR 3641, paragraph 17).

35 It should also be remembered that according to the general rules of international law there must be bona fide performance of every agreement. Although each contracting party is responsible for executing fully the commitments which it has undertaken it is nevertheless free to determine the legal means appropriate for attaining that end in its legal system, unless the agreement, interpreted in the light of its subject-matter and purpose, itself specifies those means (Kupferberg, paragraph 18).

36 While it is true that the WTO agreements, as the Portuguese Government observes, differ significantly from the provisions of GATT 1947, in particular by reason of the strengthening of the system of safeguards and the mechanism for resolving disputes, the system resulting from those agreements nevertheless accords considerable importance to negotiation between the parties.

37 Although the main purpose of the mechanism for resolving disputes is in principle, according to Article 3(7) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (Annex 2 to the WTO), to secure the withdrawal of the measures in question if they are found to be inconsistent with the WTO rules, that understanding provides that where the immediate withdrawal of the measures is impracticable compensation may be granted on an interim basis pending the withdrawal of the inconsistent measure.

38 According to Article 22(1) of that Understanding, compensation is a temporary measure available in the event that the recommendations and rulings of the dispute settlement body provided for in Article 2(1) of that Understanding are not implemented within a reasonable period of time, and Article 22(1) shows a preference for full implementation of a recommendation to bring a measure into conformity with the WTO agreements in question.

39 However, Article 22(2) provides that if the member concerned fails to fulfill its obligation to implement the said recommendations and rulings within a reasonable period of time, it is, if so requested, and on the expiry of a reasonable period at the latest, to enter into negotiations with any party having invoked the dispute settlement procedures, with a view to finding mutually acceptable compensation.

40 Consequently, to require the judicial organs to refrain from applying the rules of domestic law which are inconsistent with the WTO agreements would have the consequence of depriving the legislative or executive organs of the contracting parties of the possibility afforded by Article 22 of that memorandum of entering into negotiated arrangements even on a temporary basis.

41 It follows that the WTO agreements, interpreted in the light of their subject-matter and purpose, do not determine the appropriate legal means of ensuring that they are applied in good faith in the legal order of the contracting parties.

42 As regards, more particularly, the application of the WTO agreements in the Community legal order, it must be noted that, according to its preamble, the agreement establishing the WTO, including the annexes, is still founded, like GATT 1947, on the
principle of negotiations with a view to `entering into reciprocal and mutually advantageous arrangements' and is thus distinguished, from the viewpoint of the Community, from the agreements concluded between the Community and non-member countries which introduce a certain asymmetry of obligations, or create special relations of integration with the Community, such as the agreement which the Court was required to interpret in Kupferberg.

43 It is common ground, moreover, that some of the contracting parties, which are among the most important commercial partners of the Community, have concluded from the subject-matter and purpose of the WTO agreements that they are not among the rules applicable by their judicial organs when reviewing the legality of their rules of domestic law.

44 Admittedly, the fact that the courts of one of the parties consider that some of the provisions of the agreement concluded by the Community are of direct application whereas the courts of the other party do not recognise such direct application is not in itself such as to constitute a lack of reciprocity in the implementation of the agreement (Kupferberg, paragraph 18).

45 However, the lack of reciprocity in that regard on the part of the Community's trading partners, in relation to the WTO agreements which are based on `reciprocal and mutually advantageous arrangements' and which must ipso facto be distinguished from agreements concluded by the Community, referred to in paragraph 42 of the present judgment, may lead to disuniform application of the WTO rules.

46 To accept that the role of ensuring that Community law complies with those rules devolves directly on the Community judicature would deprive the legislative or executive organs of the Community of the scope for manoeuvre enjoyed by their counterparts in the Community's trading partners.

47 It follows from all those considerations that, having regard to their nature and structure, 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.

48 That interpretation corresponds, moreover, to what is stated in the final recital in the preamble to Decision 94/800, according to which `by its nature, the Agreement establishing the World Trade Organisation, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member State courts'.

49 It is only where the Community intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the WTO agreements, that it is for the Court to review the legality of the Community measure in question in the light of the WTO rules (see, as regards GATT 1947, Fediol, paragraphs 19 to 22, and Nakajima, paragraph 31).

50 It is therefore necessary to examine whether, as the Portuguese Government claims, that is so in the present case.

51 The answer must be in the negative. The contested decision is not designed to ensure the implementation in the Community legal order of a particular obligation assumed in the context of the WTO, nor does it make express reference to any specific provisions of the WTO agreements. Its purpose is merely to approve the Memoranda of Understanding negotiated by the Community with Pakistan and India.

52 It follows from all the foregoing that the claim of the Portuguese Republic that the contested decision was adopted in breach of certain rules and fundamental principles of the WTO is unfounded.
A) Breach of rules and fundamental principles of the Community legal order

1. Breach of the principle of publication of Community legislation

53 The Portuguese Government claims that this principle has been breached because the contested decision and the Memoranda of Understanding which it approves were not published in the Official Journal of the European Communities. In its reply, it merely states that the validity of its argument has been recognised, since the contested decision was published after it lodged its application.

54 In that regard, it is sufficient to observe that the belated publication of a Community measure in the Official Journal of the European Communities does not affect the validity of that measure.

2. Breach of the principle of transparency

55 The Portuguese Government contends that this principle has been breached because the contested decision approves Memoranda of Understanding which are not adequately structured and are drafted in obscure terms which prevent a normal reader from immediately grasping all their implications, in particular as regards their retroactive application. In support of this plea it relies on the Council Resolution of 8 June 1993 on the quality of drafting of Community legislation (OJ 1993 C 166, p. 1).

56 It should be noted that, as the Council has observed, that resolution has no binding effect and places no obligation on the institutions to follow any particular rules in drafting legislative measures.

57 Furthermore, as the Advocate General observes in point 12 of his Opinion, the decision appears to be clear in every aspect, as regards both the wording of its provisions relating to the conclusion of the two international agreements and as regards the rules contained in the two Memoranda of Understanding, which provide for a series of reciprocal undertakings by the contracting parties with a view to the gradual liberalisation of the market in textile products. Furthermore, the Portuguese Government’s complaint that the contested decision fails to indicate precisely what provisions of the earlier measures it amends or repeals is not of such a kind as to vitiate that decision, since such an omission does not constitute a breach of an essential procedural requirement with which an institution must comply if the measure in question is not to be void.

58 The Portuguese Government’s claim that the contested decision was adopted in breach of the principle of transparency is therefore unfounded.

3. Breach of the principle of cooperation in good faith in relations between the Community institutions and the Member States

59 The Portuguese Government maintains that the bilateral agreements with India and Pakistan were concluded without regard for its position concerning the negotiations with those two countries, which it had clearly stated throughout the negotiating procedure, in particular at the meeting of the Council on 15 December 1993 at which it was decided to accede to the WTO agreements and in a letter of 7 April 1994 from the Portuguese Minister for Foreign Affairs to the Council.

60 It consented to the signature of the Final Act of the WTO and the annexes thereto on condition that, inter alia, the obligation imposed on India and Pakistan to open up their markets could not give rise, in the negotiations with those countries, to reciprocal concessions on the part of the Member States other than those provided for in the ATC.
In approving the Memoranda of Understanding, which provide for an accelerated process for opening the market in textile products in comparison with the ATC and, consequently, the dismantling of the Community tariff quotas for those products, the contested decision was adopted in breach of the principle of cooperation in good faith in relations between the Community and the Member States as inferred from the wording of Article 5 of the EC Treaty (now Article 10 EC), and should therefore be annulled on that ground.

The Portuguese Government also claims that the signature of the Final Act required the consent of all the Member States and not of a qualified majority of the members of the Council. Any change in the equilibrium on the basis of which the Final Act was signed required fresh deliberations in the same voting conditions, that is, with unanimity.

The Council considers that the position expressed by the Portuguese Government, in particular in the letter of 7 April 1994 from the Minister for Foreign Affairs, is of a political nature and that, furthermore, it was taken into consideration in so far as it led to the adoption of Regulation No 852/95, whereby the Council granted a series of subsidies to the Portuguese textile industry.

The Council also refutes the Portuguese Government's argument that approval of the two Memoranda of Understanding should have been decided unanimously. It claims that since the contested decision constitutes a commercial policy measure it could be adopted by a qualified majority of the members of the Council on the basis of Article 113(4) of the EC Treaty (now, after amendment, Article 133(4) EC). The adoption of both memoranda complied fully with the provisions of the Treaty, moreover, in particular Article 113.

The Commission supports the Council's argument and further contends that, even if the Portuguese Republic expressed reservations in concluding the final agreement, the Council's failure to act in accordance with that agreement could not constitute a ground for annulling the contested decision.

The Court observes, first, that the contested decision is a measure of commercial policy, to be adopted by a qualified majority pursuant to Article 113(4) of the Treaty. Accordingly, since it is common ground that the contested decision was adopted in accordance with that provision, the fact that a minority of Member States, including the Portuguese Republic, were opposed to its adoption is not of such a kind as to vitiate that decision and entail its annulment.

Second, the Court observes, as did the Advocate General at point 32 of his Opinion, that the principle of cooperation in good faith between the Community institutions and the Member States has no effect on the choice of the legal basis of Community legal measures and, consequently, on the legislative procedure to be followed when adopting them.

Accordingly, the Portuguese Republic's claim that the contested decision failed to comply with that principle is unfounded.

4. Breach of the principle of legitimate expectations

The Portuguese Government claims that in adopting the contested decision the Council breached the principle of legitimate expectations as regards economic operators in the Portuguese textile industry.

It maintains that the latter were entitled to expect that the Council would not substantially alter the timetable and rate of the opening of the Community market in textile products to international competition, as fixed in the WTO agreements, in particular the ATC, and in the applicable Community legislation, in particular Regulation No 3030/93, as amended by Regulation No 3289/94, which transposed the rules set out in the ATC into Community law.
The adoption of the contested decision entailed a significant acceleration of the process of liberalising the Community market and therefore altered the legislative framework established by the ATC by making it significantly tougher. That significant and unforeseeable alteration of the conditions of competition in the Community market in textile products changed the framework in which the Portuguese economic operators implemented the restructuring measures which the Council itself, in adopting Regulation No 852/95, deemed indispensable, rendering those measures less effective and causing serious harm to the operators concerned.

The Council contends, first, that Portuguese operators in the textiles sector could not rely on a legitimate expectation that a situation which was still the subject of negotiation would be maintained. Although they assumed that the markets in India and Pakistan would be opened up without any reciprocal concessions, that expectation was not such as to found a legitimate expectation, having regard to the fact that it did not result from any legal commitment given by the Council.

Second, the Council contends that the approval of the two Memoranda of Understanding does not call in question the outcome of the Uruguay Round. The memoranda do not contain any provision modifying the level of restrictions in force or the rate of expansion provided for in the bilateral agreements concluded with India and Pakistan. The Memoranda of Understanding provide only that the Commission is prepared to give favourable consideration to requests for exceptional flexibilities (including carry-over, carry-forward and inter-category transfers) introduced by Pakistan or India, within the framework of the existing restrictions and not exceeding, for each quota year, the amounts fixed in each memorandum. Those exceptional flexibilities, and in particular the possibility of carrying them forward, do not modify the restrictions in force and, in particular, do not have the effect of altering the timetable for integration of the categories concerned into GATT 1994.

The Commission maintains that the Portuguese Republic cannot rely on breach of the principle of legitimate expectations of the economic operators because, first, it does not have a direct and personal interest in the protection of their legitimate interests and, second, it failed to forewarn those economic operators, although the information in its possession showed clearly and adequately that in order to reach an agreement the Community would probably have to grant additional concessions.

In that regard, it should be noted that it is settled law that the principle of respect for legitimate expectations cannot be used to make a regulation unalterable, in particular in sectors such as that of textile imports - where continuous adjustment of the rules to changes in the economic situation is necessary and therefore reasonably foreseeable (see to that effect Case C-315/96 Lopex Export [1998] ECR I-317, paragraphs 28 to 30).

Furthermore, for the reasons stated by the Advocate General at point 33 of his Opinion, no appreciable differences in treatment were established between Indian and Pakistani producers, on the one hand, and those from other States which have acceded to the WTO, on the other hand; in any event, if such differences exist they are not of such a kind as to prejudice the expectations of the operators concerned.

It follows that the Portuguese Republic's claim that the contested decision was adopted in breach of the principle of legitimate expectations is unfounded.

5. Breach of the principle of the non-retroactivity of legal rules

The Portuguese Government claims that the principle of the non-retroactivity of legal rules has been breached, since the arrangements introduced by the Memoranda of Understanding approved in the contested decision have retroactive effect and
apply to past situations without any reasons being stated for the need to derogate from the principle that legal rules apply only for the future.

79 Although they were signed on 15 October and 31 December 1994 respectively, and only approved by the Council on 26 February 1996, the Memoranda of Understanding concluded with Pakistan and India ratify the application of a system of exceptional flexibilities which took effect, pursuant to paragraph 6 of each memorandum, as from 1994 in the case of Pakistan and 1995 in the case of India.

80 In that regard, it is sufficient to point out that the implementation of these international commitments in Community law was to be effected by the Commission, pursuant to Article 19 of Regulation No 3030/93, by the adoption of measures amending the annexes thereto.

81 Accordingly, it is only in the context of an action against the adoption of such measures that their retroactive effect may be challenged.

82 It follows that the Portuguese Republic cannot rely on the claim that the contested decision failed to observe the principle of the non-retroactivity of legal measures.

6. Breach of the principle of economic and social cohesion

83 The Portuguese Government maintains that the contested decision was adopted in breach of the principle of economic and social cohesion set out in Articles 2 and 3(j) of the EC Treaty (now, after amendment, Articles 2 EC and 3(1)(k) EC), and also of Articles 130a of the EC Treaty (now, after amendment, Article 158 EC), 130b and 130c of the EC Treaty (now Articles 159 EC and 160 EC), and 130d and 130e of the EC Treaty (now, after amendment, Articles 161 EC and 162 EC). The Council itself referred to such a principle in the recitals in the preamble to Regulation No 852/95, when it stated that the adoption of that regulation had become necessary owing to the adoption of legal arrangements which aggravated inequalities and jeopardised the economic and social cohesion of the Community.

84 The Council maintains that the Community adopted Regulation No 852/95 in favour of the Portuguese industry in order to strengthen economic and social cohesion. It also observes that the Community's obligation to integrate textile products and clothing within the framework of GATT 1994 in accordance with the provisions of the ATC and Regulation No 3289/94 amending Regulation No 3030/93, was not affected by the commitments contained in the two Memoranda of Understanding.

85 The Commission maintains that, contrary to what the Portuguese Republic claims, the EC Treaty does not set up economic and social cohesion as a fundamental principle of the Community legal order, compliance with which is absolutely binding on the institutions to the extent that any measure capable of having a negative impact on certain less-favoured areas of the Community is automatically void.

86 The Court would observe that although it follows from Articles 2 and 3 of the Treaty, and also from Articles 130a and 130e, that the strengthening of economic and social cohesion is one of the objectives of the Community and, consequently, constitutes an important factor, in particular for the interpretation of Community law in the economic and social sphere, the provisions in question merely lay down a programme, so that the implementation of the objective of economic and social cohesion must be the result of the policies and actions of the Community and also of the Member States.

87 Consequently, the Portuguese Government's claim that the contested decision was adopted in breach of the principle of economic and social cohesion is unfounded.
7. Breach of the principle of equality between economic operators

88 The Portuguese Government claims that the contested decision favours woollen products over cotton products, since the measures opening the markets of India and Pakistan established by the Memoranda of Understanding benefit virtually exclusively Community producers of wool products. Producers in the cotton sector - in which the essential part of the export capacity of the Portuguese industry is concentrated - are thus doubly penalised.

89 The Council replies that the purpose of the negotiations with India and Pakistan was to improve access to the Indian and Pakistani markets. If the products supplied by those two countries tended to suit a particular category of economic operator, in this case those in the wool sector, that cannot constitute a breach of the principle of equality between economic operators, since the memoranda were not in any way intended to discriminate between them.

90 The Commission maintains that the fact that India and Pakistan offered more favourable treatment for wool products than for cotton products (an allegation which has not been proven by the Portuguese Republic) and thereby established a certain inequality of treatment between different categories of operators in the textile industry cannot be attributed to the Council as discrimination on its part. Even if it could, the discrimination would be justified by the nature of the measure in question and the objective which the Council pursued in approving the Memoranda of Understanding, namely to improve, in the common interest, access to the Indian and Pakistani markets for all products of Community origin.

91 The principle of non-discrimination requires that 'comparable situations should not be treated in a different manner unless the difference in treatment is objectively justified' (see, in particular, Germany v Commission, cited above, paragraph 67).

92 In the present case, as the Advocate General observes at point 35 of his Opinion, operators in the textile sector are active in two separate markets, the market in wool and the market in cotton, and, consequently, any economic prejudice suffered by one of those two categories of producers does not imply a breach of the principle of non-discrimination.

93 Consequently, the Portuguese Republic's claim that the contested decision was adopted in breach of the principle of equality between economic operators is also unfounded.

94 It follows that its claim that the contested decision was adopted in breach of certain rules and fundamental principles of the Community legal order is unfounded; accordingly, the application must be dismissed in its entirety.

Costs and operative part

On those grounds, THE COURT hereby:

1. Dismisses the application;
2. Orders the Portuguese Republic to pay the costs;
3. Orders the French Republic and the Commission of the European Communities to bear their own costs.
Judgement of the Court (Grand Chamber) of 9 September 2008

(Appeals - Recommendations and rulings of the World Trade Organisation (WTO) Dispute Settlement Body - Determination of the Dispute Settlement Body that the Community regime governing the import of bananas was incompatible with WTO rules - Imposition by the United States of America of retaliatory measures in the form of increased customs duty levied on imports of certain products from various Member States - Retaliatory measures authorised by the WTO - No non-contractual Community liability - Duration of the proceedings before the Court of First Instance - Reasonable period - Claim for fair compensation)

Joined Cases C-120/06 P and C-121/06 P
(European Court reports 2008 I-06513)

Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM), Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC, Giorgio Fedon & Figli SpA & Fedon America, Inc., v Council of the European Union and Commission of the European Communities, supported by Kingdom of Spain,

Subject of the cases

1 By their appeals, Fabbrica italiana accumulatori motocarri Montecchio SpA and Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC (together referred to as ‘FIAMM’) and Giorgio Fedon & Figli SpA and Fedon America, Inc. (together referred to as ‘Fedon’) respectively request the Court to set aside the judgment of the Court of First Instance of the European

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

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

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

Legal context

A) The WTO agreements

4 By Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-94) (OJ 1994 L 336, p. 1), the Council approved the Agreement establishing the WTO and the agreements in Annexes 1 to 4 to that agreement (‘the WTO agreements’).
5 Article 3(2) and (7) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (‘the DSU’), which forms Annex 2 to the Agreement establishing the WTO, provides:

‘2. The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognise that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

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

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

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

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

9 Article 17(14) of the DSU provides:

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

10 Article 19(1) of the DSU states:

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

11 Article 21 of the DSU, which is headed ‘Surveillance of Implementation of Recommendations and Rulings’, provides:
‘1. Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.

... 

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

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

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

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

... 

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

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

...’

12. Article 22 of the DSU, headed ‘Compensation and the Suspension of Concessions’, provides:

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

2. If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorisation from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.

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

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

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

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

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

(i) with respect to goods, all goods;

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

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

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

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

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


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

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

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

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

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


20 Since the United States of America took the view that the new Community regime governing the import of bananas that had thereby been established preserved the unlawful elements of the previous regime, in breach of the WTO agreements and the DSB’s decision of 25 September 1997, on 14 January 1999 it requested the DSB, pursuant to Article 22(2) of the DSU, to authorise suspension of the application to the Community and its Member States of tariff concessions and related obligations under the General Agreement on Tariffs and Trade (GATT) 1994 and the General Agreement on Trade in Services (GATS), in respect of trade amounting to USD 520 million.

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

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

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

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


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

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

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

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

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

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

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

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

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

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

A) The actions

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

30 Since FIAMM and Fedon considered the Community to be liable for the damage which they claimed to have suffered as a result of the fact that these products were among those subject to the increased customs duty imposed by the United States authorities between 19 April 1999 and 30 June 2001, they brought before the Court of First Instance actions for compensation, founded on Article 235 EC in conjunction with the second
The principal claim advanced by FIAMM and Fedon was that the Community had incurred non-contractual liability by reason of the unlawful conduct of its institutions. As is apparent from paragraphs 69 and 92 to 95 of the FIAMM judgment and paragraphs 63 and 85 to 88 of the Fedon judgment, they contended more specifically, as regards the unlawful conduct alleged, that the failure of the Council and the Commission to adopt amendments to the Community regime governing the import of bananas such as to bring it into conformity with the obligations entered into by the Community under the WTO agreements within the time-limit laid down by the DSB infringed the principle pacta sunt servanda, the principles of the protection of legitimate expectations and of legal certainty, their rights to property and pursuit of an economic activity and, finally, the principle of proper administration.

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

B) Proceedings before the Court of First Instance

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

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

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

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

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

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

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

The hearing was held on 26 May 2004.

C) The judgments under appeal

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

The Court first dismissed, in paragraphs 84 to 150 of the FIAMM judgment and paragraphs 77 to 143 of the Fedon judgment, those applicants’ actions for compensation in so far as they were founded on the regime governing non-contractual liability for unlawful conduct of the Community institutions.
Paragraph 100 of the FIAMM judgment is worded as follows:

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

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

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

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

'Before examining the legality of the conduct of the Community institutions, it is necessary to decide whether the WTO agreements give rise, for persons subject to Community law, to the right to rely on those agreements when contesting the validity of Community legislation if the DSB has declared that both that legislation and the subsequent legislation adopted by the Community in order to comply with the WTO rules in question are incompatible with those rules.'

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

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

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

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


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

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

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

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

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

...  

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

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

...  

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

126  [119] Article 22(8) of the DSU thus makes it clear that the suspension of concessions or other obligations is temporary in nature and states that the suspension is only to be applied “until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached”.
[120] Article 22(8) further provides that, in accordance with Article 21(6), the DSB is to continue to keep the implementation of adopted recommendations or rulings under surveillance.

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

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

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

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

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

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

[127] It was, ultimately, in return for the Community’s undertaking to establish a tariff-only regime for imports of bananas before 1 January 2006 that the United States of America agreed, as set out in the memorandum of understanding concluded on 11 April 2001, to suspend provisionally the imposition of the increased customs duty.

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

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

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

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

49 The Court thus concluded, in paragraphs 144 and 145 of the FIAMM judgment and paragraphs 137 and 138 of the Fedon judgment, that ‘notwithstanding a finding of incompatibility made by the DSB, the WTO rules do not in the present case, whether because of particular obligations which the Community intended to implement or because of an express reference to specific provisions, amount to rules of law by reference to which the legality of the institutions’ conduct may be assessed’ and that ‘the applicants are not entitled to argue, for the purposes of their claim for compensation, that the conduct of which the Council and the Commission are accused is contrary to WTO rules’.

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

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

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

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

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

159 [152] National laws on non-contractual liability allow individuals, albeit to varying degrees, in specific fields and in accordance with differing rules, to obtain compensation in legal proceedings for certain kinds of damage, even in the absence of unlawful action by the perpetrator of the damage.
When damage is caused by conduct of the Community institution not shown to be unlawful, the Community can incur non-contractual liability if the conditions as to sustaining actual damage, to the causal link between that damage and the conduct of the Community institution and to the unusual and special nature of the damage in question are all met (Case C-237/98 P Dorsch Consult v Council and Commission [[2000] ECR I-4549], paragraph 19).

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

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

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

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

‘205 [194] ... the possibility, which has come about in the present case, of tariff concessions being suspended as provided for by the WTO agreements is among the vicissitudes inherent in the current system of international trade. Accordingly, the risk of this vicissitude has to be borne by every operator who decides to sell his products on the market of one of the WTO members.

...’

207 [196] In addition, it is clear from Article 22(3)(b) and (c) of the DSU, an international instrument which was publicised appropriately so as to ensure that Community operators were aware of it, that the complaining member of the WTO may seek to suspend concessions or other obligations in sectors other than that in which the panel or Appellate Body has found a violation by the member concerned, whether under the same agreement or another WTO agreement.’

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

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

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

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

They each further claim that the Court should:

- give a substantive ruling confirming their entitlement to compensation arising out of the defendants’ liability for an unlawful act or for a lawful act;
- in any event, order the defendants to pay the costs both of the appeal proceedings and of the proceedings at first instance.

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

62 The Council contends that the Court should:

- replace certain of the Court of First Instance’s grounds or partially set aside the judgments under appeal, declaring that non-contractual liability of the Community in the absence of an unlawful act is inapplicable in respect of a failure to take legislative action or, in the alternative, declaring that the factors required for such liability are not present;
- dismiss the appeals as unfounded;
- order the appellants to pay the costs.

63 The Commission contends that the Court should:

- dismiss the appeals, altering, in so far as is necessary, the grounds of the judgments under appeal;
- in the alternative, dismiss the claims put forward at first instance seeking compensation for damage;
- in the further alternative, refer the cases back to the Court of First Instance in order for the proceedings to be resumed and the damage for which compensation may be awarded to be quantified, in accordance with Article 61 of the Statute of the Court of Justice;
- order the appellants to pay the costs.

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

- dismiss the appeal in so far as it relates to liability for an unlawful act of the defendant institutions;
- partially set aside the judgment under appeal and find that liability for a lawful act does not exist in Community law or, in the alternative, dismiss the appeal in so far as it relates to the liability of the defendant institutions for a lawful act or, in the further alternative, dismiss the appellants’ claim for compensation for a lawful act;
- declare the claim for compensation based on the unreasonable duration of the proceedings before the Court of First Instance to be inadmissible;
- order the appellants to pay the costs.

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

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

67 In Case C-121/06 P, Fedon lodged neither a reply nor a response to the Council’s cross-appeal. Fedon and the Commission lodged observations on the statement in intervention of the Kingdom of Spain.
Consideration of the please referred
A) The first plea in the main appeals

1. Arguments of the parties

68 By their first plea, FIAMM and Fedon submit that the judgments under appeal lack reasoning and are unfounded as regards one of the main arguments put forward in support of their respective applications for damages in respect of unlawful conduct of the Community.

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

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

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

72 In so doing, the Court of First Instance did not take appropriate account of the arguments of FIAMM and Fedon to the effect that, after the expiry of the reasonable period of time allowed for implementing the DSB’s decision of 25 September 1997, the Community then had just two options, namely to comply or not to comply with that decision. The flexibility of the WTO dispute settlement system, a feature which in particular enables the parties to pursue negotiated solutions and upon which the case-law recalled in paragraph 112 of the FIAMM judgment and paragraph 105 of the Fedon judgment, establishing that it is not possible to review the legality of Community legislation in the light of the WTO agreements, is founded, is accordingly lacking here. In those circumstances there is nothing to preclude direct effect being accorded to a decision of the DSB.

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

74 Nor did the Court of First Instance take appropriate account of the arguments of FIAMM and Fedon that, unlike an application for annulment or a reference for a preliminary ruling on the validity of a measure, an action for compensation cannot result in the Community measure concerned being eliminated or rendered inapplicable or, therefore, in the responsible bodies of the parties to the WTO agreements being denied the possibility of entering into negotiated arrangements. That line of argument is particularly apposite because in the present instance the application for compensation is being examined after the conclusion of the dispute.
The same considerations provide grounds for rejecting the argument, recalled in paragraph 111 of the FIAMM judgment and paragraph 104 of the Fedon judgment, regarding the fact that the WTO agreements are founded on reciprocal and mutually advantageous arrangements.

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

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

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

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

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

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

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

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

The question whether the WTO agreements may be relied upon by individuals who have suffered damage in order to contest the validity of Community legislation, in a situation where a DSB decision has found that legislation to be incompatible with the WTO agreements and the reasonable period of time granted for complying with the DSB decision has expired, was decided by the Court in the negative in Case C-377/02 Van Parys [2005] ECR I-1465.
Any distinction between review of the legality of Community action with a view to a finding of invalidity and such review with a view to the award of compensation is, in this regard, irrelevant. Furthermore, to compensate the industry affected by measures providing for suspension which are consistent with the WTO agreements would prejudice the rebalancing of concessions to which those measures contribute and would therefore prejudice reciprocity.

The Kingdom of Spain also takes the view that the judgments under appeal satisfy the obligation to state reasons. The Court of First Instance referred, in paragraph 100 of the FIAMM judgment and paragraph 93 of the Fedon judgment, to the proposition advanced by FIAMM and Fedon regarding the direct effect of a DSB decision and, in paragraphs 116 to 150 of the FIAMM judgment and paragraphs 109 to 143 of the Fedon judgment, it refuted that proposition in examining the question whether the existence of such a decision enables the Community courts to review the legality of the conduct of the Community institutions in the light of WTO rules.

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

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

2. Findings of the Court

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

a) First part of the plea

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

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

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

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

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

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

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

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

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

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

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

101 Thus, it is apparent in particular from paragraphs 129 to 131 of the FIAMM judgment and paragraphs 122 to 124 of the Fedon judgment that the Court of First Instance held, after an examination of the relevant provisions of the DSU, that the expiry of the period of time allowed for the Community to bring its banana import regime into conformity with the DSB’s decision of 25 September 1997 had not resulted in exhaustion of the methods for settling disputes made available by the DSU. The Court also stated in this connection that review of the legality of the conduct of the defendant institutions could have the effect of weakening the position of the Community negotiators in the search for a mutually acceptable solution to the dispute consistent with WTO rules and, in some cases, of depriving the legislative or executive organs of a contracting party of the possibility afforded in particular in Article 22 of the DSU of entering into a negotiated arrangement even on a temporary basis.

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

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

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

b) Second part of the plea

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

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

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

108 It is to be observed in that regard that the effects within the Community of provisions of an agreement concluded by the Community with non-member States may not be determined without taking account of the international origin of the provisions in question. In conformity with the principles of public international law, Community institutions which have power to negotiate and conclude such an agreement are free to agree with the non-member States concerned what effect the provisions of the agreement are to have in the internal legal order of the contracting parties. If that question has not been expressly dealt with in the agreement, it is the courts having jurisdiction in the matter and in particular the Court of Justice within the framework of its jurisdiction under the EC Treaty that have the task of deciding it, in the same manner as any other question of interpretation relating to the application of the agreement in question in the Community (see, in particular, Case 104/81 Kupferberg [1982] ECR 3641, paragraph 17, and Portugal v Council, paragraph 34), on the basis in particular of the agreement's spirit, general scheme or terms (see, to this effect, Case C-280/93 Germany v Council [1994] ECR I-4973, paragraph 110).

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

110 As is apparent from its case-law, the Court considers that it can examine the validity of secondary Community legislation in the light of an international treaty only where the nature and the broad logic of the latter do not preclude this and, in addition, the treaty's provisions appear, as regards their content, to be unconditional and sufficiently precise (see, in particular, Case C-308/06 Intertanko and Others [2008] ECR I-0000, paragraph 45 and the case-law cited).

111 As regards, more specifically, the WTO agreements, it is settled case-law that, given their nature and structure, those agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions (see, in particular, Portugal v Council, paragraph 47; Biret International v Council, paragraph 52; and VanParys, paragraph 39).  

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

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

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

115 The Court also held in that judgment that, by undertaking after the adoption of the DSB’s decision of 25 September 1997 to comply with the WTO rules and, in particular, with Articles 17(1)
and XIII of the GATT 1994, the Community did not intend to assume a particular obligation in the context of the WTO, capable of justifying an exception to the principle that WTO rules cannot be relied upon before the Community courts and enabling the Community courts to review the legality of Regulation No 1637/98 and the regulations adopted to implement it in the light of those rules (see, to this effect, Van Parys, paragraphs 41 and 52).

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

117 The Court thus held in Van Parys, paragraph 51, that the expiry of the period granted by the DSB for implementation of its decision of 25 September 1997 does not imply that the Community had exhausted the possibilities under the DSU of finding a solution to the dispute between it and the other parties. In those circumstances, to require the Community courts, merely on the basis that that period has expired, to review the legality of the Community measures concerned in the light of the WTO rules could have the effect of undermining the Community’s position in its attempt to reach a mutually acceptable solution to the dispute in conformity with those rules.

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

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

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

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

122 Second, any determination by the Community courts that a Community measure is unlawful, even when not made in the exercise of their jurisdiction under Article 230 EC to annul measures, is inherently liable to have repercussions on the conduct required of the institution that adopted the measure in question.
Thus, in particular, it is settled case-law that when the Court rules, in proceedings under Article 234 EC, that a measure adopted by a Community authority is invalid, its decision has the legal effect of requiring the competent Community institutions to take the necessary measures to remedy that illegality, as the obligation laid down in Article 233 EC in the case of a judgment annulling a measure applies in such a situation by analogy (see, in particular, the order of 8 November 2007 in Case C-421/06 Fratelli Martini and Cargill, paragraph 52 and the case-law cited).

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

The distinction which the appellants seek to draw between the ‘direct effect’ of the WTO rules imposing substantive obligations and the ‘direct effect’ of a decision of the DSB, asserting that it should be open to individuals to have the legality of the conduct of the Community institutions reviewed by the Community courts in the light of those rules, the Court has necessarily excluded such a review in the light of the DSB decision itself.

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

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

First, as is apparent from paragraphs 113 to 124 of the present judgment, the considerations linked to the nature of the WTO agreements and to the reciprocity and flexibility characterising them continue to obtain after such a ruling or recommendation has been adopted and after the reasonable period of time allowed for its implementation has expired. The Community institutions continue in particular to have an element of discretion and scope for negotiation vis-à-vis their trading partners with a view to the adoption of measures intended to respond to the ruling or recommendation, and such leeway must be preserved.
131 Second, as is apparent from Article 3(2) of the DSU, recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the agreements concerned. It follows in particular that a decision of the DSB finding an infringement of such an obligation cannot have the effect of requiring a party to the WTO agreements to accord individuals a right which they do not hold by virtue of those agreements in the absence of such a decision.

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

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

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

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

1. Arguments of the parties

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

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

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

138 The Court of First Instance’s reasoning that, as Article 22(3) of the DSU authorises the adoption of retaliatory measures, the damage incurred is not unusual is contradictory. To take the view that damage is usual because it is the consequence of an act permitted by the applicable law is tantamount to denying that damage caused by a lawful act can give rise to liability, but this possibility is accepted by the judgments under appeal.

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

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

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

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

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

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

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

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

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

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

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

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

148 This principle has never been accepted by the case-law, which has systematically left the question to one side, merely setting out a purely hypothetical reference framework in this regard without in any way laying down the conditions under which and fields and situations in which such liability could where appropriate be incurred.
Furthermore, by setting out in paragraph 160 of the FIAMM judgment and paragraph 153 of the Fedon judgment the conditions to which liability is subject, the Court of First Instance implicitly but necessarily held that this principle applies in the type of situation covered by the present case, without establishing, however, whether such a conclusion is justified in the light of principles common to the legal systems of the Member States.

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

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

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

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

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

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

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

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

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

159 Since the second paragraph of Article 288 EC is intended to safeguard the fundamental principle of a State based on the rule of law that protects individuals and, in particular, their rights to property and pursuit of an economic activity, it must, having regard to the liberal orientation of the Community legal system, be interpreted in such a way as to favour the most liberal principles characterising the legal systems of the Member States. In addition, in a Union composed of 25 Member States this provision must be interpreted flexibly if it is not to be rendered inapplicable. In the case in point, the legal systems of the new Member States should nevertheless not be taken into account, since the relevant enlargement occurred after the material time.

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

3. Findings of the Court

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

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

163 Indeed, if the error of law pleaded were proved, there would no longer be any need to rule on the second plea in the main appeals, concerning the unusual nature of the damage incurred, or on the other two pleas in the cross-appeals, respectively concerning the lack of certainty of the damage and the lack of a causal link, as the liability regime to which those three conditions are supposed to relate would not exist or not be applicable.

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

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

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

166 The Court has accordingly held that, where the Community courts find that there is no act or omission by an institution of an unlawful nature, so that the first condition for non-contractual Community liability under the second paragraph of Article 288 EC is not satisfied, they may dismiss the application in its entirety without it being necessary for them to examine the other preconditions for such liability, namely the fact of damage and the existence of a causal link between the conduct of the institutions and the damage complained of (see, in particular, KYDEP v Council and Commission, paragraphs 80 and 81).

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

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

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

170 Secondly, as regards the liability regime recognised in Community law, the Court, while noting that it is to the general principles common to the laws of the Member States that the second paragraph of Article 288 EC refers as the basis of the non-contractual liability of the Community for damage caused by its institutions or by its servants in the performance of their duties, has held that the principle of the non-contractual liability of the Community expressly laid down in that article is simply an expression of the general principle familiar to the legal systems of the Member States that an unlawful act or omission gives rise to an obligation to make good the damage caused (Brasserie du pêcheur and Factortame, paragraphs 28 and 29).

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

172 The Court has therefore held in particular that, in view of the second paragraph of Article 288 EC, the Community does not incur liability on account of a legislative measure which involves choices of economic policy unless a sufficiently serious breach of a superior rule of law for the protection of the individual has occurred (see, inter alia, Joined Cases 9/71 and 11/71 Compagnie d’approvisionnement, de transport et de crédit and Grands
173 It has further pointed out, in this connection, that the rule of law the breach of which must be found has to be intended to confer rights on individuals (see to this effect, inter alia, Case C-352/98 P Bergaderm and Goupil v Commission[2000] ECR I-5291, paragraphs 41 and 42, and Case C-282/05 P Holcim (Deutschland) v Commission [2007] ECR I-2941, paragraph 47).

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

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

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

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

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

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

180 However, two further points should be made.

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

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

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

184 It follows that a Community legislative measure whose application leads to restrictions of the right to property and the freedom to pursue a trade or profession that impair the very substance of those rights in a disproportionate and intolerable manner, perhaps precisely because no provision has been made for compensation calculated to avoid or remedy that impairment, could give rise to non-contractual liability on the part of the Community.

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

186 An economic operator whose business consists in particular in exporting goods to the markets of non-member States must therefore be aware that the commercial position which he has at a given time may be affected and altered by various circumstances and that those circumstances include the possibility, which is moreover expressly envisaged and governed by Article 22 of the DSU, that one of the non-member States will adopt measures suspending concessions in reaction to the stance taken by its trading partners within the framework of the WTO and will for this purpose select in its discretion, as follows from Article 22(3)(a) and (f) of the DSU, the goods to be subject to those measures.

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

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

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

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

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

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

1. Arguments of the parties

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

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

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

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

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

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

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

198 Finally, the length of the proceedings before the Court of First Instance is in any event explained by the complexity of the cases, by the procedural hazards linked to the joinder of a
multiplicity of cases brought in five different languages and involving three institutions and an intervener, by the reassignment of those cases to a larger chamber and by the fact that Van Parys, a case raising similar questions of principle, was pending before the Court of Justice.

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

2. Findings of the Court

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

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

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

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

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

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

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

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

208 After holding that such a period had, in the case in point, been exceeded by the Court of First Instance, the Court of Justice decided, for reasons of economy of procedure and in order to ensure an immediate and effective remedy regarding a procedural irregularity of that kind, that in the circumstances the requisite reasonable satisfaction could be granted by setting aside and varying, solely in relation to determination of the amount of the fine, the judgment of the Court of First Instance (Baustahlgewebe v Commission, paragraphs 47, 48 and 141).
By contrast, the present appeal challenges a judgment of the Court of First Instance dismissing an action for compensation brought on the basis of the second paragraph of Article 288 EC.

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

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

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

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

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

Operative part

On those grounds, the Court (Grand Chamber) hereby:
1. Dismisses the main appeals;
2. Dismisses the cross-appeals;
3. Orders Fabbrica italiana accumulatori motocarri Montecchio SpA, Fabbrica italiana accumulatori motocarri Montecchio Technologies LLC, Giorgio Fedon & Figli SpA and Fedon America, Inc. to bear the costs incurred by the Council of the European Union and the Commission of the European Communities;
4. Orders the Kingdom of Spain to bear its own costs.