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European Court rejects damages claim from innocent bystanders in the EU-US "Banana War"

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Introduction

On September 9, 2008, in Joined Cases C-120/06 P and C-121/06 P FIAMM and Giorgio Fedon & Figli v Council and Commission, the European Court of Justice (ECJ) dismissed appeals by two Italian companies seeking compensation for damages caused after the WTO Dispute Settlement Body (DSB) authorized the United States to suspend tariff concessions against the European Community (EC) as a sanction against the EC's banana import regime. The ECJ held that the EC cannot be called upon to compensate damages resulting from a failure of its institutions to comply with WTO rulings – neither based on liability for unlawful conduct, nor based on liability for a lawful act. In so doing, the ECJ seems to have definitely closed the door, at least for now, to all attempts by traders hit by retaliatory measures to obtain some form of compensation from the Community.

Background

In 1997, the WTO determined that the EC import regime for bananas violated WTO nondiscrimination rules.[1] After the Community failed to bring its measures into compliance, in 1999 the DSB authorized the U.S. to suspend tariff concessions on up to $191.4 million per year in imports of EC products. The U.S. chose to levy 100% ad valorem customs duties on imports of various EC-origin goods, such as batteries, spectacle cases, bed linen, paper boxes and bath products.[2] After the EC and US reached a settlement in 2001, the increased duties were revoked prospectively.

Six EC companies brought proceedings before the Court of First Instance of the European Communities (CFI) claiming compensation for damages allegedly caused by the increased duties on their exports to the United States. The CFI dismissed these compensation claims in judgments issued on December 14, 2005.[3] Two of the plaintiffs, the Italian companies FIAMM and Fedon, then appealed.

The CFI judgments

Relying on its settled case-law denying direct effect to the WTO Agreement[4] and to DSB rulings,[5] the CFI rejected the applicants' main claim for compensation by refusing to identify an "unlawful act" for which the EC could be held liable.

The plaintiffs also claimed a right to compensation for damages even if conduct attributed to Community institutions was lawful – and for the first time ever, the CFI recognized such a right for undertakings that bear a disproportionate part of the burden resulting from the EC institutions' conduct,[6] if the plaintiffs show that the damage they suffered is "unusual and special."[7] Pointing to previous judgments,[8] the CFI found that damage is "unusual" when it exceeds the limits of the economic risk inherent in operating in the sector concerned, and "special" when it affects a particular circle of economic operators in a disproportionate manner by comparison with other operators.[9]

The CFI found that the possibility that the WTO might authorize suspension of tariff concessions is "among the vicissitudes inherent in the current system of international trade."[10] It concluded that the damage sustained by the applicants, though "actual and certain," could not be considered "unusual."[11] Under this reasoning, any EC operator who exports to a WTO member's market is deemed to assume the risk that WTO-inconsistent conduct by the Community institutions will lead the WTO to authorize the importing country to suspend concessions.[12]

Since this finding was "sufficient to preclude any entitlement to compensation on this basis", the CFI declined to rule whether the damage was "special." The CFI dismissed the applicant's claim for compensation founded on an EC liability regime for lawful acts.[13]

Judgment by the ECJ on appeal

FIAMM and Fedon, producers of batteries and spectacle cases respectively, had sought EUR 10.8 million and EUR 2.3 million in compensation for damage caused by the U.S. duties. They requested that the ECJ set aside the CFI's judgments, alleging two errors in law by the CFI: first, regarding the circumstances in which liability for unlawful conduct of the Community can provide the basis for an action, and second, in the CFI's reasoning leading to its conclusion that the damage to them was not "unusual." The Commission and Council cross-appealed against the CFI's finding that the EC could be held liable in the absence of illegality when it acts in its legislative capacity.

ECJ closes the door on direct effect for the WTO Agreement

The ECJ began its analysis of the applicants' claims by recalling that, according to its consistent interpretation of Article 288 (2) of the EC Treaty, a claimant asserting non-contractual liability of the Community must demonstrate that a number of conditions are satisfied relating to the unlawfulness of the institutions' alleged conduct, damages to the claimant, and a causal link between that conduct and the damages.[14]

The ECJ rejected the applicants' claim that the EC institutions acted unlawfully because they had failed to bring the EC legislation into conformity with WTO law by the deadline established under the WTO Agreement.[15] The Court agreed with the CFI that even in this situation, EC courts cannot review the legality of the EC institutions' conduct under the WTO Agreement. The ECJ recalled its settled case-law[16] that "given their nature and structure", 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 Community institutions".[17] Even though in this case, the WTO had already established that the EC had breached its WTO obligations, and the implementation period had already expired, a different approach was not justified.[18] The Court went on to find that "[a] DSB decision, which has no object other than to rule on whether a WTO member's conduct is consistent with [WTO obligations], cannot in principle be fundamentally distinguished from the substantive rules which convey such obligations [...]."[19]

As in earlier cases, the Court pointed to the fact that EC trading partners have blocked their courts from reviewing the legality of domestic legal rules under the WTO Agreement. It found that if the EC courts were to have the direct responsibility for ensuring that EC law complies with the WTO rules, this would effectively deprive the EC's legislative or executive organs of the scope of manoeuvre enjoyed by their other trading partners. According to the Court, "such lack of reciprocity [...] would risk introducing an imbalance in the application of the WTO rules."[20]

ECJ rejects Community liability for legislative activities in the absence of unlawful acts

Because the cross-appeal had argued that there was no basis for liability in the absence of unlawful conduct, the ECJ began by analyzing whether such a regime could exist within the Community legal order. It observed that, while the principle of Community liability for unlawful acts of the institutions is well-established, liability in the absence of unlawful conduct is not,[21] and that the Court had pointed out long ago 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."[22]

The Court pointed to two considerations behind its narrow approach to EC liability: "First, even where the legality of a measure 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 EC cannot incur liability unless the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers."[23]

The ECJ then concluded that Community law, "as it currently stands", does not provide for a regime under which the EC can incur liability for its legislative conduct in a situation where any failure of such conduct to comply with WTO law cannot be relied upon before the EC courts.[24] As a result, it found that the CFI erred in law in affirming, in the judgments under appeal, the existence of a regime providing for EC non-contractual liability on account of the lawful pursuit by it of legislative activities.

The Court added a caveat. It explained that a Community legislative measure whose application leads

to restrictions of the right to property or the freedom to pursue a trade or profession could give rise to non-contractual liability on the part of the Community, where these restrictions "impair the very substance of these rights in a disproportionate and intolerable manner, perhaps precisely because no provision has been made for compensation calculated to avoid or remedy that impairment."[25]

But even that right to compensation is limited. As the Court points out, on the basis of its own earlier case-law, "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."[26] As a result, an economic operator whose business consists in exporting goods to a non-EC market must therefore be aware that its business may be affected by various circumstances, including the possibility that the export destination may suspend tariff concessions as authorized by the DSB, and select in its discretion the goods to be targeted by sanctions.[27]

Conclusion

The judgment in the FIAMM/Fedon case appears to definitively rule out the possibility that Community institutions could be held liable for damages stemming from EC non-compliance with WTO law. This outcome seems to be particularly controversial when the applicants, facing foreign sanctions imposed as a consequence of EC non-compliance (with regard to the EC banana regime), are innocent bystanders in a different sector (which did not benefit from the banana regime in any way). Due to this equity concern, the CFI had made an attempt at creating a new route for holding the EC liable for compensation: a liability regime for lawful EC acts. As argued by the Advocate General Maduro in his opinion[28], this innovative regime would have enabled the parties to circumvent the major obstacle to Community non-contractual liability—the lack of direct effect of WTO rules. But at the same time, by allowing private operators to demand compensation for non-compliance with WTO rules, it would have inevitably reduced that margin of discretion that the EC wants to enjoy, like any other of its trading partners, when implementing its trade policy.

About the Author

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Endnotes

[1] On September 1997 the DSB adopted both the Appellate Body report of 9 September 1997 (WT/DS27/AB/R) and the panel reports, as modified by the AB, of May 1997 (WT/DS27/R/USA) following complaints by Ecuador, Guatemala, Honduras, Mexico and the United States.
[2] The US obtained authorisation from the DSB to suspend tariff concessions and related GATT obligations with respect to imports from the EC up to $191.4 million per year (WT/DS/27/49, 9 April 1999;WT/DSB/M/59, 3 June 1999).
[3] See the judgments of 14 December 2005 in Case T-69/00, FIAMM v. Council and Commission, [2005] ECR, II-5393; Case T-135/01, Giorgio Fedon & Figli v. Council and Commission, [2005] ECR, II-29; Case T-151/00, Laboratoire du Bain v Council and Commission [2005] ECR, II-23; Case T-301/00, Groupe Fremaux SA v Council and Commission [2005] ECR, II-25; Case T-320/00, CD Cartondruck AG v Council and Commission, [2005] ECR, II-27 ; and Case T-383/00, Beamglow Ltd v. European Parliament, Council and Commission, [2005] ECR, II-5459.
[4] Case C-149/96 Portugal v Council [1999] ECR 8395, para. 47.
[5] C-377/02 Léon Van Parys ECR [2005] ECR I-1465, para. 51.
[6] Fiamm, para. 157 referring, "to this effect" to Case 81/86 De Boer Buizen v Council and

Commission [1987] ECR 3677, para. 17.
[7] Ibid., para. 160.
[8] C-237/98 P, Dorsch Consult v Council [2000] ECR 4549, paras. 18 and 53.
[9] Fiamm, para. 202.
[10] Ibid., para. 205.
[11] Ibid., para 211.
[12] Ibid., para. 205.
[13] Ibid., paras. 212-214.
[14] Ibid., para. 106 referring to Case 26/81, Oleifici Mediterranei v EEC [1982] ECR 3057 para. 16.
[15] Ibid., para. 133.
[16] Portugal v Council, para. 47 and Case C-93/02 P Biret [2003] ECR I-10565, para. 52.
[17] Fiamm, para. 111.
[18] Ibid., paras. 117 and 125, referring to Van Parys, para. 51.
[19] Ibid., para. 128.
[20] Ibid., para. 119, referring to Van Parys, para. 53.
[21] Ibid., para. 175. To know more on this point see Opinion of AG Poiares Maduro, Case C-121/06 P, Fiamm and Fiamm Technologies v Council and Others, 20 February 2008, nyr, paras. 54-70.
[22] Ibid., para. 171
[23] Ibid., para. 174.
[24] Ibid., para. 177.
[25] Ibid., para. 184.
[26] Ibid., para. 185 referring to Case C 280/93 Germany v Council [1994] ECR I 4973, para. 79.
[27] Ibid., para. 186.
[28] Opinion of Advocate General M. Poiares Maduro, paras.57-63.