

OPINION OF ADVOCATE GENERAL
ALBER

delivered on 15 May 2003 ¹

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¹ — Original language: German.

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I — Introduction

1. The appeal — against the judgment dismissing an action for damages — turns essentially on the question whether the case-law of the Court, pursuant to which individuals cannot rely on WTO rules to challenge the legality of acts of Community law, also applies where those rules are embodied in a specific ruling handed down by the WTO Dispute Settlement Body (hereinafter ‘DSB’).² The appellant

expressly claims that the judgment should be set aside. As to fact, it alleges that it has suffered damage as a result of a Community prohibition on the importation of beef, which the DSB has found to be inconsistent with the WTO agreements.

II — Law and facts

2. Reference is made to paragraphs 1 to 18 of the contested judgment³ for an account

2 — Name given in the Agreement establishing the World Trade Organisation (WTO) (hereinafter ‘the WTO Agreement’), see Article IV(3) of the WTO Agreement (OJ 1994 L 336, p. 3).

3 — Judgment in Case T-210/00 *Etablissements Biret et Cie v Council* [2002] ECR II-17.

of the legal framework and the facts. They are recapitulated here in summary form, to avoid repetition.

3. As a result of the adoption of Council Directive 81/602/EEC of 31 July 1981 concerning the prohibition of certain substances having a hormonal action and of any substances having a thyrostatic action⁴ and Council Directive 88/146/EEC of 7 March 1988 prohibiting the use in livestock farming of certain substances having a hormonal action,⁵ the importation into the Community of meat and meat products treated with certain hormones was prohibited.

4. The appellant, Établissements Biret et Cie SA (hereinafter 'Biret et Cie'), hold 66% of the capital of Biret International SA, a company founded on 26 July 1990 and entered into the commercial register on 9 August 1990, which is the appellant in parallel proceedings in Case C-93/02 P. The object of Biret International SA, in accordance with its constitution, is trade in food-stuffs, particularly meat.

5. On 15 April 1994, the Community signed the Final Act concluding the Uruguay Round, the Agreement establishing

the World Trade Organisation (hereinafter 'the WTO') and all the agreements and understandings in Annexes 1 to 4 to the Agreement establishing the World Trade Organisation (hereinafter 'the WTO agreements'). The Council approved the conclusion of those agreements in Decision 94/800/EC of 22 December 1994.⁶ The agreements, which include the Agreement on the Application of Sanitary and Phytosanitary Measures⁷ (hereinafter 'the SPS Agreement') and the Understanding on Rules and Procedures Governing the Settlement of Disputes⁸ (the Dispute Settlement Understanding, hereinafter 'the DSU'),⁹ entered into force on 1 January 1995.

6. On 29 April 1996, the Council adopted Directive 96/22/EC concerning the prohibition on the use in stockfarming of certain substances having a hormonal or thyrostatic action and of β -agonists, and repealing Directives 81/602/EEC, 88/146/EEC and 88/299/EEC.¹⁰ It confirmed the prohibition on imports and added another substance to the five already prohibited.

7. In February 1998, the DSB found these Community measures to be inconsistent with the SPS Agreement. The Community had until 13 May 1999 to comply with the DSB's recommendations.

6 — Council 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 (1986-1994) (OJ 1994 L 336, p. 1).

7 — OJ 1994 L 336, p. 40.

8 — OJ 1994 L 336, p. 234.

9 — Name given in the WTO Agreement (cited in footnote 2), see Article III(3) of the Agreement.

10 — OJ 1996 L 125, p. 3.

4 — OJ 1981 L 222, p. 32.

5 — OJ 1988 L 70, p. 16.

8. On 10 August 2000, Biret et Cie brought an action under Article 235 EC in conjunction with the second paragraph of Article 288 EC against the Council for compensation for the damage it had suffered as a result of the judicial liquidation of Biret International SA following the prohibition imposed by the Community on the importation of meat and meat products treated with certain hormones. It calculates that damage at FRF 70 630 085.

III — The judgment of the Court of First Instance

9. In respect of the period before 10 August 1995, the Court of First Instance dismissed the action as inadmissible on the ground that it was time-barred.¹¹ In respect of the subsequent period, it should be noted that by judgment of 7 December 1995 the Tribunal de commerce (Commercial Court), Paris, opened judicial liquidation proceedings in respect of Biret International SA and provisionally set the date for cessation of payments at 28 February 1995. However, according to the Court of First Instance, that did not necessarily imply that Biret International SA was no longer able to engage in any commercial activities during the period from 28 June 1995 to 7 December 1995.

10. The Court of First Instance dismissed the action for damages on the grounds set out in paragraphs 71 to 82 of the judgment:

‘71 It is clear from case-law which is now firmly established that in view of their nature and structure the WTO Agreement and its annexes, in the same way as GATT 1947, do not in principle form part of the rules by which the Court of Justice and the Court of First Instance review the legality of acts adopted by Community institutions under the first paragraph of Article 173 of the EC Treaty (now, after amendment, the first paragraph of Article 230 EC), that individuals cannot rely on them before the courts and that any infringement of them will not give rise to non-contractual liability on the part of the Community...

72 The purpose of the WTO agreements is to govern relations between States or regional organisations for economic integration and not to protect individuals. As the Court of Justice stated in *Portugal v Council* [Case C-149/96 *Portugal v Council* [1999] ECR I-8395], the agreements are still founded on the principle of negotiations with a view to entering into reciprocal and mutually advantageous arrangements and thus differ from the agreements concluded between the Community and non-member countries whereby the obligations are not necessarily reciprocal. To have the task

¹¹ — Paragraphs 40 to 46 of the contested judgment.

- of ensuring that Community law is in conformity with those rules fall directly to the Community judicature would be to deprive the legislative or executive bodies of the Community of the discretion enjoyed by similar bodies of the Community's trading partners.
- 73 According to that judgment (*Portugal v Council*, paragraph 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 Community judicature to review the legality of the Community measure in question in the light of the WTO rules...
- 74 It is clear that the circumstances of this case clearly do not correspond to either of the two hypotheses set out in the preceding paragraph. Since Directives 81/602 and 88/146 were adopted on 1 January 1995, several years before the entry into force of the SPS Agreement, it is not logically possible for them either to give rise to a specific obligation entered into under that agreement or to refer expressly to some of its provisions.
- 75 In the circumstances, therefore, the applicant cannot rely on an infringement of the SPS Agreement.
- 76 The decision of the DSB of 13 February 1998 referred to above cannot alter that.
- 77 There is an inescapable and direct link between the decision and the plea alleging infringement of the SPS Agreement, and the decision could therefore only be taken into consideration if the Court had found that Agreement to have direct effect in the context of a plea alleging the invalidity of the directives in question...
- 78 The plea alleging infringement of the SPS Agreement must therefore be rejected as unfounded.
- 79 As the applicant has thus failed to establish that the conduct alleged against the defendant institution is unlawful, the action must in any event be dismissed as unfounded and it is unnecessary to consider the applicant's locus standi (see paragraph 29 above) or other conditions for non-contractual liability on the part of the Community....

80 In its reply, however, the applicant requests the Court of First Instance, in the alternative, to “develop its case-law” in the direction of a system of no-fault liability for the Community in respect of its normative acts. In support of that request, it relies in particular on the “defence of the rule of law”, the autonomous nature of an action for damages, the general principles common to the laws of the Member States and considerations of natural justice linked to application of the “pre-cautionary principle”.

EC and incorrect interpretation of Article 48 of the Rules of Procedure of the Court of First Instance.

A — *Incorrect interpretation of Article 300(7) EC*

81 That submission, which changes the very basis on which the Community could be held liable, must be regarded as constituting a new plea in law which cannot be introduced in the course of proceedings, as Article 48 of the Rules of Procedure of the Court of First Instance provides...

1. Effectiveness of Article 300(7) EC¹²

12. The appellant considers that the contested judgment is mistaken about the effect of Article 300(7) EC. In its view, it is inconsistent to maintain that the WTO agreements are an integral part of Community law but not to admit them as a criterion for determining the legality of acts of Community secondary legislation.

82 It is clear from all the foregoing that in so far as the action is not inadmissible it is in any event unfounded.’

13. In the judgment in *NV Nederlandse Spoorwegen*, the Court held that since, so far as fulfilment of the commitments provided for by GATT is concerned, the Community has replaced the Member States, the mandatory effect, in law, of

IV — The appeal

11. The appeal is based on two pleas: incorrect interpretation of Article 300(7)

¹² — Article 300(7) EC reads: ‘Agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States.’

these commitments must be determined by reference to the relevant provisions in the Community legal system,¹³ which include Article 300(7) EC.

14. On this principle, the Court has already on several occasions reviewed the legality of acts of Community law in the light of international agreements but has never found the international measure in question to have direct effect.¹⁴

15. Biret et Cie also cites Advocate General Saggio's Opinion in *Portugal v Council*, in which he objected that it would reduce the scope of Article 300(7) EC. The application of rules of an international agreement cannot, he said, depend on prior incorporation of the agreement in the Community legal order by means of a transposing or enabling act. In any case, internal review of the rules of agreements by the Community institutions and the Member States cannot fail to offer a stronger guarantee of the fulfilment of the obligations undertaken at international level and is therefore in keeping with the objectives of the NTO Agreement.¹⁵

16. Biret et Cie further considers that the Court of First Instance did not pay sufficient attention to the DSB's decision, which clearly established the illegality of the Community acts. The Court of First Instance ruled that the direct effect of that decision depended on the direct effect of the SPS Agreement. But this was contrary to the interpretation of Community law, according to which the Court of Justice had never judged the direct applicability of the provisions of a directive by the direct applicability of the treaties. The appellant considers that the judgment in *Atlanta*,¹⁶ cited by the Court of First Instance in this connection, is irrelevant as that case concerned admissibility whereas the present one turns on a question of substance.

17. Biret et Cie claims that Article 300(7) EC should be interpreted as meaning that the obligation of the Community institutions to comply with an international rule depends only on whether that rule forms an integral part of the Community legal order. That is undoubtedly so in the case of the WTO agreements.

18. It also claims that the contested judgment does not address the argument that, in acceding to the WTO dispute settlement system, the Community undertook to recognise the DSB's decisions. In so doing, the Community intended to implement a particular obligation assumed in the context of the WTO.

13 — Judgment in Case 38/75 *NV Nederlandse Spoorwegen* [1975] ECR 1439, paragraph 16.

14 — In the case of GATT, the appellant refers to the judgments in Case 38/75 *NV Nederlandse Spoorwegen*, cited in footnote 13, and Case 112/80 *Dürbeck* [1981] ECR 1095.

15 — Biret et Cie refers to the statements contained in points 18 and 24 [properly 23] of Advocate General Saggio's Opinion in Case C-149/96 *Portugal v Council* [1999] ECR I-8395, I-8397.

16 — Judgment in Case C-104/97 *P Atlanta and Others v Commission and Council* [1999] ECR I-6983.

2. Recognition of direct effect of WTO agreements

19. Should the Court reject this interpretation of Article 300(7) EC, *Biret et Cie* claims that it should develop the case-law on the effect of the WTO agreements in the Community legal order. First, it claims that the previous case-law is not convincing. Thus, in the contested judgment the Court of First Instance relied on the argument repeatedly adduced in the previous case-law that the Community's legislative and executive bodies have a certain discretion under WTO law, which is based on the reciprocal nature of the obligations assumed in that context and is consequently inalienable. In the present case, however, *Biret et Cie* considers that, as a result of the DSB's decision of 13 February 1998, the Community institutions no longer have any discretion in the matter. On that ground alone, the previous case-law does not apply.

20. Moreover, automatic reliance on the discretion accorded to the legislative and executive bodies would suggest that the WTO dispute settlement mechanism was more tolerant of persistent infringements than other systems. But that is not the case. On the contrary, the WTO agreements are much more developed than other comparable international agreements.

21. Also, the WTO agreements are not essentially different from other agreements, which the Court has held to have direct effect. *Biret et Cie* cites the EEC/Portugal free-trade Agreement and the EEC/Yugoslavia Cooperation Agreement, and the case-law in that connection.¹⁷

22. It adds that the fact that the parties are contemplating dispute settlement proceedings does not preclude them from holding the domestic measures to be inconsistent with WTO law. The Court itself drew attention to this point in its judgment in *Atlanta*.¹⁸

23. The fact remains, according to the appellant, that a legal rule that forms an integral part of Community law has been infringed. The Community Courts are therefore required to punish that infringement. Even if damages and other compensation might be payable under the WTO system in the event of an infringement of the agreements, the fact that under Community law Article 228 EC provides for

17 — Judgments in Case 104/81 *Kupferberg* [1982] ECR 3641, paragraph 20, and Case C-162/96 *Racke* [1998] ECR I-3655, paragraph 6.

18 — *Biret et Cie* refers to paragraph 21 of the judgment in Case C-104/97 P *Atlanta*, cited in footnote 16.

payment of a lump sum or penalty payment does not alter the fact that the infringement may persist.

24. An argument for admitting the direct applicability of the WTO agreements is that more and more provisions of the agreements affect the relations between citizens and the States parties to those agreements. Biret et Cie cites, in particular, the provisions on public contracts, protection of intellectual property and food safety regulations.

25. Biret et Cie also considers that it is only right, in common justice, that individuals should be able to rely on certain provisions of the WTO agreements, since they are liable to retaliation ('penalties') under WTO law.

26. Lastly, Biret et Cie raises the question of consistency in Community law. It follows from Article 300(7) EC that the WTO agreements form an integral part of Community law. The Court has frequently ruled that citizens as well as States are subject to Community law. Citizens must therefore be able to rely on provisions, such as the WTO agreements, that form an integral part of Community law.

B — *Incorrect interpretation of Article 48 of the Rules of Procedure of the Court of First Instance*¹⁹

27. Biret et Cie considers that the contested judgment was wrong to reject its submission regarding a system of no-fault liability on the ground that it was out of time. In the first place, the reference to the judgment in *Atlanta* was inappropriate because that case concerned responsibility for a lawful act. But the present case concerns liability for illegal acts of Community law on the ground that the Directives at issue infringe WTO law, which is an integral part of Community law.

28. Moreover, its claim for damages under Article 235 and the second paragraph of Article 288 EC makes frequent mention of the possibility of no-fault liability for damage. First, in connection with its argument that the Community's international obligations are separate from the direct applicability of the rules that gave rise to those obligations.²⁰ Second, in connection with the reference to the general principles of law common to the legal orders of the Member States, including obligations under international agreements,²¹ and lastly in

19 — Article 48 of the Rules of Procedure of the Court of First Instance reads as follows:

'§ 1

In reply or rejoinder a party may offer further evidence. The party must, however, give reasons for the delay in offering it.

'§ 2

No new plea in law may be introduced in the course of the proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.'

20 — The appellant is referring to points 33 to 36 of the application.

21 — The appellant is referring to points 37 to 39 of the application. It refers in particular to the relevant French and Belgian case-law.

connection with the description of the damage suffered by Biret et Cie as being specific and unusual.²² According to the case-law, a submission may not be rejected on the ground that it is a new plea in law and therefore out of time if it merely develops submissions made in the application by invoking a number of arguments some of which were adduced for the first time in the reply.²³ Also, it had simply been replying to the objections raised by the Council in its defence.

30. As regards the interpretation of Article 300(7) EC, the Council cites the Opinion in *Germany v Council*, in which Advocate General Gulmann stated that the Court has consistently stressed that the effects of an international agreement in the Community legal order must be determined by reference to the nature and objectives of the agreement in question.²⁴ It adds that in the judgment in *Demirel* the Court imposed the further condition that the provision in question must contain a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.²⁵

V — The Council's position

29. The Council points out that the Court of First Instance had not ruled on the admissibility of the application with respect to the period between 28 June and 7 December 1995. Should the Court of Justice uphold the appeal, it would therefore have to refer the case back to the Court of First Instance for further examination. It further argues that the Court must also examine to what extent Biret et Cie has demonstrated an interest in bringing proceedings.

31. It contends that the purpose of the WTO agreements is not to establish rights for individuals but merely to govern relations between States and regional economic organisations on the basis of negotiations based on the principle of reciprocity. Consequently, it claims that the Court of First Instance described the SPS Agreement and applied Article 300(7) correctly in the contested judgment.

32. As regards the effect of the DSB's decision, the Council considers that it was reasonable for the Court of First Instance to cite the judgment in *Atlanta* to show that the existence of such a decision could not

22 — The appellant is referring to point 58 et seq. of the application.

23 — Biret et Cie cites the judgment in Case 2/57 *Hauts Fourneaux de Chasse v High Authority* [1957-1958] ECR 199.

24 — The Council is referring to point 127 of Advocate General Gulmann's Opinion in Case C-280/93 *Germany v Council* [1994] ECR I-4973, I-4980.

25 — The Council cites the judgment in Case 12/86 *Demirel* [1987] ECR 3719, paragraph 12 [properly paragraph 14].

affect the right of Biret et Cie to rely on the SPS Agreement. The statements in the judgment in *Atlanta* were general, even if they were made in the context of determining admissibility.

Court of First Instance was therefore quite right to take account of the discretion accorded to the legislative and executive bodies.

33. The Council cannot understand how, merely by acceding to the WTO, the Community can be deemed to have intended to implement certain obligations assumed in that context. The appellant has yet to explain what is meant by that notion, which is completely contrary to the philosophy of the WTO agreements. Nor does the appellant specify the act by which the Community is supposed to have intended to implement the DSB's decision.

35. As regards the plea concerning the incorrect interpretation of Article 48 of the Rules of Procedure, the Council considers this to be inadmissible. It relates not to a point of law but to the actual content of the application. In any case, scrutiny of the application suffices to show that it contains no mention of no-fault liability on the part of the Community.

VI — Forms of order sought

34. The Council rejects the suggestion that the case-law on the direct applicability of the WTO agreements should be developed and refers to the previous case-law, confirmed by the judgment in *Omega Air* among others.²⁶ The Council also rejects the objection regarding the discretion enjoyed by the legislative and executive bodies. In its view, the objection is mistaken about the ways in which the SPS Agreement can be implemented. The States parties to that agreement may be guided either by international standards or by some other scientific assessment of the risks or by the precautionary principle. The

36. Biret et Cie claims that the Court should:

— set aside the judgment delivered by the Court of First Instance on 11 January 2002 in Case T-210/00,

— uphold the form of order sought by it at first instance, and

²⁶ — Judgment in Joined Cases C-27/00 and C-122/00 *Omega Air* [2002] ECR I-2569.

— order the Council to pay the costs.

the measure giving rise to the illegal conduct on the part of the Community must be intended to protect the injured party.²⁸

37. The Council claims that the Court should:

— dismiss the appeal, and

— order the appellant to pay the costs.

VII — Assessment

A — *Conditions for a claim for damages*

38. A claim for damages based on non-contractual liability on the part of the Community presupposes illegal conduct on the part of the Community, actual damage, and the existence of a causal link between the illegal conduct and the alleged damage.²⁷ The case-law also requires that

39. The present appeal turns primarily on the question whether a rule of law that is intended to confer rights on individuals has been infringed. Is the infringement of the SPS Agreement committed by the Community legislature in adopting Directives 81/602, 88/146 and 96/22 prohibiting imports, as found in the DSB's recommendations of 13 February 1998, and failing to annul those measures within the period granted to comply with the DSB's recommendations such as to justify a claim by Biret et Cie against the Community? The Court has not so far been called upon to rule on a claim for damages resulting from failure to comply with a DSB recommendation within the prescribed period. The facts in *Portugal v Commission*²⁹ did not involve any DSB recommendation or decision. In *Atlanta*,³⁰ the appellant referred for the first time in its reply to a DSB decision delivered in the interim. Its plea was consequently dismissed by the Court on the ground that the submission was out of time.³¹ In the present case, the

27 — See judgments in Case C-104/97 P *Atlanta*, cited in footnote 16, paragraph 65, and Case C-352/98 P *Bergaderm and Goupil v Commission* [2000] ECR I-5291, paragraph 42.

28 — Judgments in Joined Cases 5/66, 7/66 and 13/66 to 24/66 *Kampffmeyer and Others v Commission* [1967] ECR 245, 262, Case 5/71 *Schöppenstedt v Council* [1971] 975, paragraph 11, and Case C-282/90 *Vreugdenhil v Commission* [1992] ECR I-1937, paragraph 19.

29 — Judgment in Case C-149/96 *Portugal v Council* [1999] ECR I-8395.

30 — Cited in footnote 16.

31 — Judgment in Case C-104/97 P *Atlanta*, cited in footnote 16, paragraph 22 et seq.

question of the effects of DSB recommendations in the Community legal order is expressly raised.

the hearing that a claim for damages in respect of measures adopted during the 1980s is inadmissible because the SPS Agreement did not enter into force until 1995 must therefore be dismissed.

B — *The illegal conduct of the Council*

40. Liability of the Council under the second paragraph of Article 288 EC presupposes illegal conduct. The conduct in this case consists of adopting Directives 81/602, 88/146 and 96/22 prohibiting the importation of meat treated with hormones and failing to annul them after the DSB made its recommendations on 13 February 1998. The illegality of the conduct arises from the fact that the directives in question are inconsistent with the SPS Agreement.

41. According to the DSB's findings, the SPS Agreement is applicable to Directives 81/602 and 88/146. It is true that the agreement did not enter into force until 1 January 1995 but, according to the DSB, it contains no limitation on its temporal scope. It therefore also applies to measures that were adopted before it entered into force but were still in force on 1 January 1995.³² The Council's contention during

42. International agreements concluded by the Community take precedence over secondary legislation.³³ The Community concluded the WTO agreements and approved them by Council Decision 94/800. The SPS Agreement therefore takes precedence over the relevant provisions of the Directives in question. The infringement of WTO law was confirmed by the DSB on 13 February 1998.

43. Liability in respect of failure to act falls to be considered only where there is a legal obligation to act. In this case, the legal obligation to act arises from the duty to bring Community law into line with the obligations arising from the SPS Agreement, as provided in the DSB recommendations of 13 February 1998. The Community was granted a period of 15 months for that purpose, which expired on 13 May 1999.

44. Although this evidence suggests that the Council's conduct was illegal, the Court of First Instance in the contested judgment rejected the claim of Biret et Cie for

32 — Point 128 of the Appellate Body's report of 16 January 1998 (WT/DS26/AB/R, WT/DS48/AB/R), adopted by the DSB on 13 February 1998. All WTO documents cited in this Opinion are to be found on the WTO website (www.wto.org) under the heading 'Trade Topics', 'Dispute Settlement'.

33 — Judgments in Joined Cases 21/72 to 24/72 *International Fruit Company* [1972] ECR 1219, paragraphs 7 to 9 and 28, and Case C-280/93 *Germany v Council* [1994] ECR I-5039, paragraph 105.

damages. This decision was based on settled case-law to the effect that, having regard to their nature and structure, the WTO Agreement and the agreements and understandings annexed to it, including the SPS Agreement, 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.³⁴ However, 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 agreements and understandings contained in the annexes to the WTO Agreement, it is for the Court to review the legality of the Community measure in question in the light of the WTO rules.³⁵

45. The appellant contends that the case-law cited is mistaken about the effect of Article 300(7) EC. It also considers that the DSB's decision establishes the conditions for the first exception recognised by the Court to the principle that WTO rules are not directly applicable. In the alternative, it suggests that the case-law should be developed.

46. Biret et Cie's claim for damages presupposes that it can rely on provisions of WTO law. In that case, the provisions would have to be directly applicable and be intended to protect individuals.

1. The direct applicability of WTO law

(a) Incorrect interpretation of Article 300(7) EC

47. The appellant alleges that there is a contradiction between the assertion that the WTO agreements form part of Community law and the contention that individuals cannot rely on them to challenge the legality in Community law of acts of secondary legislation that are contrary to WTO law.

48. It must first be pointed out that the Court holds that international agreements concluded by the Community form 'part of Community law'.³⁶ Contrary to the view of Biret et Cie, it is unnecessary to decide

34 — Judgment in Case C-149/96 *Portugal v Council*, cited in footnote 29, paragraph 47, Order of the Court in Case C-307/99 *OGT Fruchthandels-gesellschaft* [2001] ECR I-3159, paragraph 24, and judgments in Case C-307/99 *Omega Air*, cited in footnote 26, paragraph 93, and Case C-76/00 *P Petrotub* [2003] ECR I-79, paragraph 53.

35 — Judgments in Case C-149/96 *Portugal v Council*, cited in footnote 29, paragraph 49, Case C-307/99 *Omega Air*, cited in footnote 26, paragraph 94, and Case C-76/00 *P Petrotub*, cited in footnote 34, paragraph 54.

36 — Judgments in Case 181/73 *Haegeman* [1974] ECR 449, paragraphs 2 to 6, Case 104/81 *Kupferberg*, cited in footnote 17, paragraphs 2 to 6, and Order of the Court of First Instance in Case T-115/94 *Opel Austria v Council* [1997] ECR II-39, paragraph 101. The Court even held that this applies to the AETR Agreement, which has been ratified by the Member States but not by the Community itself (judgment of 16 January 2003 in Case C-439/01 *Libor Cipra* [2003] ECR I-745, paragraph 24).

whether the relationship between Community law and international law is to be understood in a monist sense. On the contrary, the mere fact that international treaty law is classified as Community law is sufficient to establish the Court's jurisdiction to interpret and apply the provisions of international agreements.³⁷

49. A distinction must however be made between the question whether a provision forms part of Community law and the question whether individuals may challenge an infringement of that provision. The possibility of bringing an action for infringement depends on two conditions. As to formal scope, the action must be admissible and as to material scope, the provision at issue must be directly applicable.

50. In the case of many Treaty provisions, individuals or institutions may not challenge possible infringements by the Community legislature. Under the fourth paragraph of Article 230 EC, a natural or legal person may institute proceedings only if the contested act is of direct and individual concern to it. An individual cannot, for example, bring an action in the abstract for infringement of the limits set in a provision defining powers such as Article 95 EC, even though that provision is part of Commu-

nity law. Until the Treaty of Nice entered into force, even an action for annulment brought by the European Parliament was admissible only if the purpose of the action was to protect its prerogatives and not 'merely' to challenge an infringement of a Treaty provision; see the third paragraph of Article 230 EC in the version contained in the Treaty of Amsterdam. The Parliament could not, for example, bring an action for annulment on the ground that an act of the Commission or of the Council was in breach of the prohibition on discrimination contained in Article 12 EC, although that provision undoubtedly forms part of Community law.

51. In addition to this requirement as to admissibility, there is a further requirement as to material scope: the provision on which an individual relies must be directly applicable. The Court has recognised that some provisions of the EC Treaty are directly applicable. For example Articles 25,³⁸ 49,³⁹ 90⁴⁰ and 141 EC.⁴¹ But many others are not, for example Article 293 EC.⁴² All these provisions indubitably form part of Community primary law. Nevertheless, natural or legal persons may bring an action for infringement of those provisions only in the context of questions raised in an incidental manner under Article 241 EC.

37 — Judgments in Case 181/73 *Haegeman*, cited in footnote 36, paragraphs 2 to 6, Case C-53/96 *Hermès International* [1998] ECR I-3603, paragraph 29, Joined Cases C-300/98 and C-392/98 *Parfums Christian Dior* [2000] ECR I-11307, paragraph 40, and Case C-439/01 *Labor Cipra*, cited in footnote 36, paragraph 26.

38 — Judgment in Case 26/62 *Van Gend & Loos* [1963] ECR I, 16.

39 — Judgment in Case C-224/97 *Ciola* [1999] ECR I-2517, paragraph 27.

40 — Judgment in Case C-159/89 *Commission v Greece* [1991] ECR I-691, paragraph 6.

41 — Judgment in Case 43/75 *Defrenne II* [1976] ECR 455, paragraphs 21 to 24.

42 — Judgment in Case C-336/96 *Gilly* [1998] ECR I-2793, paragraph 17.

52. It is clear from these rulings that the question whether or not WTO law forms part of Community law has no bearing on the question whether individuals may challenge an infringement of that law. It follows that the case-law on WTO law and the fact that individuals may not rely on it to challenge acts of Community secondary legislation is based not on a mistake as to the effects of Article 300(7) EC but on the system of rules on the admissibility and validity of actions against acts of secondary legislation of the Community institutions. The appellant's first plea must accordingly be rejected.

nity 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.⁴³

55. As far as I know, the Court has so far allowed an individual to rely on provisions of GATT or WTO law to challenge the legality of Community acts in only three cases.

(b) Exceptions

53. Biret et Cie also claims, that in acceding to the WTO dispute settlement system, the Community undertook to recognise the DSB's decisions. The present case consequently concerns the implementation of a particular obligation assumed in the context of the WTO.

56. In *Fediol*, the issue was the legality of a decision rejecting Fediol's application under Article 3 of Regulation (EEC) No 2641/84⁴⁴ for the adoption of appropriate commercial policy measures to deal with illicit commercial practices on the part of Argentina (charges on exports of soya products and quantitative restrictions on the exportation of soya beans). Fediol claimed that these practices were contrary to Articles III, XI, XX and XXIII of GATT.

57. The Commission maintained that the application was inadmissible on the ground

54. The Court has admitted two exceptions to the rule that WTO agreements are not directly applicable. The Court may review the legality of Community measures in the light of the WTO rules where the Commu-

43 — Judgment in Case C-149/96 *Portugal v Council*, cited in footnote 29, paragraph 49.

44 — Council Regulation (EEC) No 2641/84 of 17 September 1984 on the strengthening of the common commercial policy with regard in particular to protection against illicit commercial practices, OJ 1984 L 252, p. 1.

that the GATT rules are not sufficiently precise to give rise to such rights on the part of individuals. The Court did not agree with that view. The Court has certainly held, on several occasions, that various GATT provisions were not capable of conferring on citizens of the Community rights which they can invoke before the courts. Nevertheless, it cannot be inferred from those judgments that citizens may not, in proceedings before the Court, rely on the provisions of GATT in order to obtain a ruling on whether conduct criticised in a complaint lodged under Article 3 of Regulation No 2641/84 constitutes an illicit commercial practice within the meaning of that regulation. The GATT provisions form part of the rules of international law to which Article 2(1) of that regulation refers, as is borne out by the second and fourth recitals in its preamble, read together.⁴⁵ It follows, according to the Court, that, since Regulation No 2641/84 entitles the economic agents concerned to rely on the GATT provisions in the complaint which they lodge with the Commission in order to establish the illicit nature of the commercial practices which they consider to have harmed them, those same economic agents are entitled to request the Court to exercise its powers of review over the legality of the Commission's decision applying those provisions.⁴⁶

58. The Court's ruling was based on the authorisation contained in Article 3(1) of Regulation No 2641/84, according to which 'any natural or legal person, or any

association not having legal personality, acting on behalf of a Community industry which considers that it has suffered injury as a result of illicit commercial practices, may lodge a written complaint'. Illicit commercial practices for the purposes of that provision are defined in Article 2(1) of the regulation as 'any international trade practices... which are incompatible with *international law* or with the generally accepted rules' (my emphasis). That judgment is consequently an example of the second type of exception (express reference to the precise provisions of the WTO agreements).

59. An example of the first type of exception (intention to implement a particular obligation assumed in the context of the WTO) is afforded by the judgment in *Nakajima*.⁴⁷ In that case, the issue was the legality of a regulation imposing an anti-dumping duty. The proceeding was initiated at the request of the Committee of European Printer Manufacturers (Europrint) on the basis of Regulation (EEC) No 2176/84.⁴⁸ *Nakajima* claimed inter alia that Regulation (EEC) No 2423/88,⁴⁹ which replaced the contested regulation, was at variance with a number of the

45 — Judgment in Case 70/87 *Fedtol v Commission* [1989] ECR 1781, paragraph 19.

46 — Judgment in Case 70/87 *Fedtol*, cited in footnote 45, paragraph 22.

47 — Judgment in Case C-69/89 *Nakajima v Council* [1991] ECR I-2069.

48 — Council Regulation (EEC) No 2176/84 of 23 July 1984 on protection against dumped or subsidised imports from countries not members of the European Economic Community, OJ 1984 L 201, p. 1.

49 — Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidised imports from countries not members of the European Economic Community, OJ 1988 L 209, p. 1.

provisions in the GATT Anti-Dumping Code. The Council considered that claim to be inadmissible because, as is the case with the General Agreement, the Anti-Dumping Code does not confer on individuals rights which may be relied on before the Court, its provisions being not directly applicable.⁵⁰

60. The Court rejected that view. It pointed out, first, that Nakajima was not relying on the direct effect of the provisions of the GATT Anti-Dumping Code. It was in fact questioning, in an incidental manner under Article 241 EC, the applicability of Regulation No 2423/88. Citing the judgment in *Kupferberg*,⁵¹ the Court added that Regulation No 2423/88 had been adopted in order to comply with the international obligations of the Community under the General Agreement and the Anti-Dumping Code. It was therefore incumbent on the Community to ensure compliance with the obligations arising from such agreements.⁵²

61. Again in connection with an action for the annulment of a regulation imposing definitive anti-dumping duties, the Court held in Case C-76/00 P *Petrotub and Republica v Council* that the purpose of Regulation No 384/96 as amended by Regulation No 2331/96 is to transpose into

Community law as far as possible the new and detailed rules contained in the WTO Anti-Dumping Code. It followed that the Community adopted those regulations and in particular Article 2(11) in order to satisfy its obligations arising from the Anti-Dumping Code and in particular from Article 2.4.2 of that code. It was therefore for the Court to review the legality of the contested regulation imposing anti-dumping duties in the light of Article 2.4.2 of the Anti-Dumping Code.⁵³ This too is an example of the first type of exception (intention to implement a particular obligation assumed in the context of the WTO).

62. The question is whether in the present case there was an intention to implement a particular obligation assumed in the context of the WTO or an express reference to the precise provisions of the WTO agreements.

63. The Court of First Instance considered that the present case did not constitute an exception. It held that, since Directives 81/602 and 88/146 were adopted several years before the entry into force of the SPS Agreement on 1 January 1995, it is not

50 — Judgment in Case C-69/89 *Nakajima*, cited in footnote 47, paragraph 27.

51 — Cited in footnote 17.

52 — Judgment in Case C-69/89 *Nakajima*, cited in footnote 47, paragraphs 28 to 31.

53 — Judgment in Case C-76/00 P *Petrotub*, cited in footnote 34, paragraph 55 et seq.

logically possible for them either to give rise to a specific obligation entered into under that agreement or to refer expressly to some of its provisions.⁵⁴

64. The Court of First Instance also found in the contested judgment, with reference to the judgment in *Atlanta*,⁵⁵ that the decision of the DSB of 13 February 1998 did not mean that Biret could rely on an infringement of the SPS Agreement. It held that there is an inescapable and direct link between the decision and the plea alleging infringement of the SPS Agreement, and the decision could therefore only be taken into consideration if the Court had found that agreement to have direct effect in the context of a plea alleging the invalidity of the directives in question.⁵⁶

65. The point about the respective dates on which Directives 81/602 and 88/146 and the SPS Agreement were adopted must be accepted. The Court of First Instance held that Directive 96/22 had no bearing on the case as, in its view, a claim for damages could in any case only be considered for the period prior to 7 December 1995.

66. However, the question arises whether the legal assessment of the DSB decision

will stand re-examination. The Court of First Instance pointed out in paragraph 14 of the contested judgment that the Community had informed the WTO that it intended to comply with its WTO obligations but that it needed a reasonable time to do so. It was then granted a period of 15 months, expiring on 13 May 1999, to comply with its obligations under the SPS Agreement.

67. It remains to be seen how far that statement by the Community, in this instance the Commission, can be regarded as a Community measure intended to implement a particular obligation assumed in the context of the WTO (the first type of exception).

68. The first objection to such an interpretation is that the statement in question was made in the context of international law. It was made to the WTO. A statement to the WTO cannot produce legal effects within the Community that are comparable with the regulations at issue in *Nakajima* and *Petrotub*, transposing the Anti-Dumping Code into Community law.

69. Moreover, it is not clear that this statement to the WTO by the Community's executive body was intended to have any legal consequences within the Community. The DSB recommendations of 13 February 1998 are to be transposed into Community law by the adoption of the Commission

54 — Paragraph 74 of the contested judgment, cited in footnote 3.

55 — Cited in footnote 16.

56 — Paragraph 76 et seq. of the contested judgment cited in footnote 3.

proposal of 24 May 2000 for a directive amending Directive 96/22. This is confirmed in the second recital in the preamble to the proposal.⁵⁷ It cannot therefore be accepted that the statement by the Community to the WTO was intended to transpose a WTO obligation into Community law. Consequently, neither of the exceptions recognised in the case-law applies in the present case.

in the context of a plea alleging the invalidity of the directives in question.⁵⁸

(c) The direct applicability of WTO law resulting from DSB recommendations

70. *Biret et Cie* argues that, in acceding to the WTO dispute settlement system, the Community undertook to recognise the DSB's decisions and recommendations. In this connection, the Court of First Instance found in the contested judgment that the decision of the DSB of 13 February 1998 did not mean that *Biret et Cie* could rely on an infringement of the SPS Agreement. It held that there is an inescapable and direct link between the decision and the plea alleging infringement of the SPS Agreement, and the decision could therefore only be taken into consideration if the Court had found that agreement to have direct effect

71. It remains to be seen what legal significance DSB decisions have in Community law and in particular whether they imply that WTO law is directly applicable in the sense that individuals may rely on the findings of the DSB to support a claim for damages.

72. For the sake of clarity, it must be observed once again that the Court has not so far ruled on this point of law. In *Portugal v Commission* there was no DSB recommendation or decision to be taken into account. In *Atlanta*, the appellant referred for the first time in its reply to a DSB decision delivered in the interim. Its submission was consequently out of time and was held by the Court to be inadmissible.

73. The judgment in *Atlanta* is of interest inasmuch as the Court stated in that judgment that the appellant could have maintained its plea alleging the illegality of the Community regulation 'and adduced in particular the dispute settlement mechanism set up within the WTO in 1995 in

⁵⁷ — Proposal for a directive of the European Parliament and the Council amending Council Directive 96/22/EC concerning the prohibition on the use in stockfarming of certain substances having a hormonal or thyrostatic action and of β -agonists, COM(2000)320 final of 24 May 2000, in particular the second paragraph on p. 2 and the last paragraph on p. 3.

⁵⁸ — Paragraph 76 et seq. of the contested judgment cited in footnote 3.

support of its argument that the provisions of GATT were of direct effect'.⁵⁹ Thus the Court expressly mentioned in that judgment the possibility that an award of the new dispute settlement mechanism may alter the effect of WTO law in the Community legal order.

of recognised authority with demonstrated expertise (Article 17 of the DSU). This change gives a considerable legal twist to the dispute settlement procedure under GATT 1947, which is more concerned with commercial policy.⁶¹

(i) The Understanding on Rules and Procedures Governing the Settlement of Disputes

74. As the Court has already noted in the judgment in *Portugal v Council*, the new WTO dispute settlement mechanism differs significantly from the provisions of GATT 1947.⁶⁰ In the context of GATT 1947, panel decisions could be accepted only by consensus of the parties to the agreement. The DSU agreed in 1994 reversed that rule and now provides that decisions of the DSB must be accepted unless they are rejected by consensus of the parties to the agreement (see Article 17(14) of the DSU). The consensus required under GATT 1947 was replaced by the introduction of an interim review by the panel (Article 15 of the DSU) and the establishment of a standing Appellate Body comprising independent persons

75. It is true that, under the new mechanism, a solution that is mutually acceptable to the parties to a dispute is clearly to be preferred (see the first sentence of Article 3(7) of the DSU), as the Court has already pointed out in *Portugal v Council*.⁶² However, that applies only while the procedure before the panel or the Appellate Body is still going on (see Article 5(5) of the DSU). An example of such an agreed solution under Article 3(6) of the DSU being reached by the parties to a dispute after the commencement but before the conclusion of the dispute settlement procedure is the agreement between the EC and New Zealand on the importation of butter.⁶³ The panel procedure was suspended, the parties reached agreement, the EC amended its legislation and the dispute settlement procedure was concluded without a DSB recommendation or ruling. However, once a DSB recommendation or ruling has been adopted, it must be 'uncon-

59 — Judgment in Case C-104/76 P *Atlanta*, cited in footnote 16, paragraph 21.

60 — Judgment in Case C-149/96 *Portugal v Council*, cited in footnote 29, paragraph 36.

61 — Ernst-Ulrich Petersmann, *The GATT/WTO Dispute Settlement System. International Law, International Organizations and Dispute Settlement*, London — The Hague — Boston 1997, p. 188.

62 — Judgment in Case C-149/96 *Portugal v Council*, cited in footnote 29, paragraph 36.

63 — WT/DS72/7 of 18 November 1999.

ditionally' accepted (Article 17(14) of the DSU). The parties are no longer free to reach a settlement and may only agree on the period of time within which to comply with the DSB ruling (Article 21(3)(b) of the DSU) or the terms of a mutually satisfactory solution (Article 22(8) of the DSU). Mutually agreed solutions must be consistent with the WTO agreements (Article 3(5) of the DSU).

set at 15 months in an arbitration procedure initiated at the Community's request.⁶⁵ The period expired on 13 May 1999. The period granted for compliance is in keeping with Article 21(3)(c) of the DSU which provides that the period must not normally exceed 15 months. The new dispute settlement mechanism is binding on the parties to the agreement and claims exclusive jurisdiction (Article 23(1) of the DSU).

76. According to the DSU, 'prompt' compliance with recommendations or rulings of the DSB is 'essential' to ensure effective resolution of disputes (Article 21(1) of the DSU). If it is impracticable to comply 'immediately',⁶⁴ the Member concerned must have a 'reasonable period of time' in which to do so (Article 21(3) of the DSU). The period is to be proposed by the Member in question and approved by the DSB. Or it may where appropriate be mutually agreed by the parties to the dispute. If neither course produces a result, the period is to be determined through 'binding' arbitration (Article 21(3) of the DSU).

77. In the DSB procedure at issue in the present case, the period for compliance was

78. As already mentioned, DSB recommendations and rulings must be 'unconditionally' accepted by the parties (Article 17(14) of the DSU). Should they fail to do so within the 'reasonable period of time', compensation and the suspension of concessions are available. These are described in the DSU as 'temporary measures' (Article 22(1) of the DSU). They are to be resorted to only as a temporary measure pending the withdrawal of the measure which is inconsistent with WTO law (Article 3(7) of the DSU). Neither compensation nor suspension of concessions, described as a 'last resort' (see the fifth sentence of Article 3(7) of the DSU), is preferred to full implementation of a recommendation to bring a measure into conformity with WTO law (Article 22(1) of the DSU).

64 — The German version of OJ 1994 L 336 contains a translation error. The term 'impracticable' in the English version should have been rendered as 'nicht möglich', not 'möglich'.

65 — See report of arbitration judge Julio Lacarte-Muró of 29 May 1998, WT/DS26/15 and WT/DS48/13, point 2.

79. Compensation is voluntary (Article 22(1) of the DSU). Suspension of concessions is subject to prior authorisation from the DSB (Articles 2(1) and 22(2) of the DSU). It may not therefore be imposed unilaterally, as it could be under GATT 1947.⁶⁶ Furthermore, concessions may only be suspended until such time as the DSB recommendations or rulings are implemented or the Member provides a solution to the nullification or impairment of benefits or a mutually satisfactory solution is reached (Article 22(8) of the DSU).

is ultimately no alternative but to implement the recommendations or rulings of the DSB. In particular, they cannot be circumvented by negotiation between the parties.

(ii) Reduction in the discretion enjoyed by the EC legislative and executive bodies

80. In any event, the DSB must continue to keep under surveillance the implementation of adopted recommendations or rulings (Article 22(8) of the DSU). This means that, even where compensation has been paid or concessions have been suspended, there is still a duty to comply with the DSB recommendations or rulings. Payment of compensation or acceptance of the suspension of concessions do not therefore constitute a waiver, conferring exemption from the duty to fulfil the obligations assumed under the WTO agreements.

— Power to agree a waiver

82. One argument against recognising the direct applicability of WTO provisions is that WTO Members are accorded some discretion in complying with DSB recommendations and rulings. In particular, it is suggested that they may pay compensation or accept the suspension of concessions ('penalties', as it were, imposed by the other Members) instead of withdrawing a measure adopted for the purpose of health and consumer protection. To recognise the direct applicability of WTO rules would reduce the discretion enjoyed by the Community's legislative and executive bodies.⁶⁷ The Council expressly referred during the hearing to the possibility of negotiating a waiver.

81. In the light of the foregoing findings as to the structure of the dispute settlement procedure, it must be concluded that there

66 — Petersmann, cited in footnote 61, p. 182.

67 — Judgment in Case C-149/96 *Portugal v Council*, cited in footnote 29, paragraphs 39 to 41.

83. However — as explained above — the option, available under Article XXIII of GATT 1947, of accepting counter-measures as the price for maintaining measures that are inconsistent with WTO law is precluded under the new dispute settlement mechanism. Once a DSB recommendation or ruling has been adopted, the parties to the WTO Agreement no longer have any discretion as to whether to comply with it. They must do so ‘unconditionally’ and ‘immediately’. Ultimately, a Member cannot decline to fulfil its obligations under the WTO agreements.

84. Contrary to the assertions made by the Council representative at the hearing, even a waiver is ruled out. In the DSU dispute settlement procedure, the parties to a dispute may no longer agree a waiver, that is to say exemption from the obligations incurred under the WTO agreements. In the first place, the temporary suspension of concessions (‘penalty’) requires prior authorisation from the DSB (Article 22(2) of the DSU) and can no longer be agreed by the parties to a dispute. In the second place, all agreements between the parties to a dispute, including ‘a mutually satisfactory solution’, must be consistent with the WTO agreements (Article 3(5) to (7) of

the DSU). A waiver agreed between the parties to a dispute would not meet these requirements inasmuch as it would grant exemption from the obligations incurred under the WTO agreements.

85. The only waiver recognised under WTO law is that granted under Article XXV(5) of GATT 1947 which has very rarely been invoked. Pursuant to point 1(a) of GATT 1994, GATT 1947 forms part of that agreement and consequently also of WTO law. The waiver in question, under the heading of joint action by the contracting parties, must be approved by a double majority (more than half the contracting parties and a two thirds majority of the votes cast). An agreement between two parties to a dispute does not meet that requirement. Nor has a waiver within the meaning of Article XXV GATT 1947 been approved in the dispute settlement procedure at issue in the present case. However, according to the judgment in *Kupferberg*,⁶⁸ the mere fact that a waiver may be granted does not exclude the direct application of WTO rules.⁶⁹

86. Non-compliance with a DSB recommendation or ruling may be a commercial policy option. However, it is clear from the

68 — Judgment in Case 104/81 *Kupferberg*, cited in footnote 17, paragraph 20 et seq.

69 — See Ernst-Ulrich Petersmann, ‘GATT/WTO-Recht: Duplik’, in EuZW 1997, p. 652.

above account of the DSU that it is not a lawful option. Consequently, under WTO law and in particular the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), the legislative and executive bodies no longer have any discretion that could be reduced by recognising WTO law to be directly applicable.

Treaty entered into force. Only with the introduction of Article 228(2) EC did it become possible for the first time to require Member States to make lump sum or penalty payments for failure to comply with decisions. The fact that DSB recommendations and rulings are unenforceable is consequently no reason for the Court to disregard them.

87. In my view, the answer to the question whether the Court should favour the commercial policy option, which — as it found in *Portugal v Council* — is in any event only temporary, by counselling judicial self-restraint, or whether it should support the principle of legality by recognising that DSB recommendations and rulings are binding and that an individual may rely on them in an action for damages must be that it should support the principle of legality after the expiry of the reasonable period of time allowed to comply with the DSB recommendation or ruling.

— Implementation of DSB recommendations

88. Non-compliance with a DSB recommendation or ruling is a commercial policy option only because there is no means of enforcing such recommendations or rulings. They can only be supported by the traditional retaliation measures (suspension of concessions). This is bound up with their nature as instruments of international law. There is in principle no way of enforcing international law. This was also true of Community law before the Maastricht

89. There may at most be a reduction in the discretion enjoyed by the legislative and executive bodies when it comes to implementing DSB recommendations. It is apparent from paragraphs 12 and 13 of the contested judgment that the report adopted by the DSB on 13 February 1998 required the European Communities 'to bring the SPS measures found... to be inconsistent with the SPS Agreement into conformity with the obligations of the European Communities under that Agreement'. The wording of that injunction means that a further legal act is required to implement the recommendations. This interpretation is confirmed by the fourth sentence of Article 3(7) of the DSU according to which, 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 agreements covered by the DSU. According to the DSB ruling, Directive 96/22 should therefore have been repealed. Directives 81/602 and 88/146 had already been repealed by Directive 96/22. This is in line with Commission proposal COM(2000)320 of May 2000 for a directive amending Directive 96/22.

90. Consequently, although it must in principle be admitted that the DSB recommendations adopted in February 1998 required an act of Community legislation to be adopted subsequently, the question arises whether Biret et Cie may not even so be entitled to rely on the DSB ruling. That view is supported by the fact that the period of time granted for bringing Community law into line with the obligations under the SPS Agreement expired long ago. At the Community's request, it was given 15 months to comply with the ruling. That period expired on 13 May 1999.

91. More than four years have now passed since May 1999 without any change in the law, be it WTO law or Community law. The question therefore arises whether Biret et Cie must accept this state of affairs without compensation or whether in these circumstances it may rely on a binding DSB

ruling establishing the illegality of the Community legislation, with the result that WTO law will be deemed to be directly applicable and the way will be opened for Biret et Cie to bring an action for damages.

92. The Court has recognised freedom of trade⁷⁰ as a fundamental right or, as it is expressed in more recent judgments, freedom to pursue an economic activity⁷¹ as a general principle of Community law. It seems unfair to deny a citizen a right to claim damages where the Community legislature, by failing to act, maintains a state of affairs that is contrary to WTO law more than four years after the expiry of the period allowed to comply with the DSB recommendations and continues unlawfully to reduce the citizen's fundamental rights.

93. Recognising the direct applicability of WTO law as a basis for a claim for damages does not reduce the discretion of the legislative and executive bodies in deciding how to implement a DSB recommendation. How the Community establishes the conformity of its measures with

70 — Judgment in Case 240/83 *ADBHU* [1985] ECR 531, paragraph 9.

71 — Judgment in Case C-104/97 P *Atlanta*, cited in footnote 16, paragraph 47, and Order of the President of the Court in Case C-317/00 P (R) '*Invest*' *Import und Export and Invest Commerce v Commission* [2000] ECR I-9541, paragraph 57.

its obligations under the SPS Agreement is and remains a matter for the competent Community bodies. Thus, on the basis of new scientific information or in the form of temporary protective measures, the Community could well impose an import ban again, this time in conformity with the SPS Agreement. The way opened by proposal COM(2000)320 remains open even if the SPS Agreement is held to be directly applicable on the basis of the DSB recommendation of 13 February 1998. Recognition of the direct applicability of WTO law embodied in a DSB ruling does not mean that an individual has a right to require the Community bodies to take a particular course of action. Biret et Cie is merely entitled to seek monetary compensation from the Community provided that the other conditions are met.

94. According to the case-law, the end of an action for damages is not the abolition of a particular measure but compensation for damage caused by a Community institution.⁷² The recognition that WTO law has direct effect does not therefore open the way for Biret et Cie to demand a particular form of conduct on the part of the Community. Thus, Biret et Cie cannot call for the ban on the importation of meat treated with hormones to be lifted, thereby ending the Community legislature's task of health and consumer protection. The issue is the

basis for a possible claim for monetary damages against the Community or the competent Community bodies which have failed to implement the DSB recommendation or ruling within the period of time prescribed by the WTO. Recognition of the direct applicability of WTO law embodied in DSB recommendations or rulings does not therefore mean that meat treated with hormones can be imported into the Community.

95. It must consequently be concluded that the Court will not reduce the discretion enjoyed by the legislative and executive bodies of the Community in implementing DSB recommendations if, in the case at issue, it holds that WTO law should apply after the expiry of the period of time allowed to comply with the DSB recommendations of 13 February 1998.

96. In the light of these findings, it must therefore be concluded that recognition of the direct applicability of WTO law as the basis for a possible claim for damages is not invalidated on the ground that it might reduce the discretion enjoyed by the legislative and executive bodies of the Community.

72 — Judgment in Case 5/71 *Schöppenstedt v Council* [1971] ECR 975, paragraph 3.

(iii) The principle of reciprocity

97. Another argument against recognising the direct applicability of WTO law is that it would be contrary to the principle of reciprocity, which is a strong feature of WTO relations. It is argued that the WTO rules would acquire an effect not accorded to them in the legal orders of the Community's trading partners. This would considerably weaken the Community's negotiating position in the WTO.⁷³

98. Proponents of this argument are thinking primarily of the United States of America. The US legislation on the implementation of the WTO agreements precludes any claim by a private person against the American authorities.⁷⁴ Similarly, the Community legislature too sought to limit the legal effects of implementing WTO law within the Community. The 11th recital in the preamble to Decision 94/800 states that '... 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.'

99. Such unilateral restrictions on the legal effects of an international agreement are effective only within the limits of international law. They are governed, in particular, by the rules of international customary law on reservations laid down in Articles 19 to 23 of the Vienna Convention on the Law of Treaties (hereinafter the 'VCLT'). As the reservation contained in Decision 94/800 has not been formulated in writing by the Community and communicated to its WTO trading partners, the first condition required by international law for this restriction to be effective (Article 23(1) of the VCLT) has not been met.⁷⁵

100. The reservation contained in Decision 94/800 is open to objection even under Community law. The Court is required under Article 220 EC to ensure that the law is observed in the interpretation and application of the Treaty. Moreover, the WTO agreements are binding on the Court, as on all the other institutions of the Community, under Article 300(7) EC. The scope of these rules of primary legislation cannot be reduced by an act of secondary legislation in the form of a Council decision.

101. It is true that the Court, in its case-law on GATT and WTO law has repeatedly

73 — Judgment in Case C-149/96 *Portugal v Council*, cited in footnote 29, paragraphs 43 and 45.

74 — See paper by Ernst-Ulrich Petersmann, 'The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System since 1948', in CMLR 1994, pp. 1157, 1243.

75 — See also Advocate General Saggio's remarks in his Opinion in Case C-149/96, cited in footnote 15, point 20 et seq.

observed that these agreements are based on the principle of reciprocity.⁷⁶ However, it ruled in its judgment in *Kupferberg* that the fact that the courts of one of the parties consider that certain of the stipulations in the agreement are directly applicable is not of itself such as to constitute a lack of reciprocity between the parties.⁷⁷ Advocate General Gulmann expressed the same view in Case C-280/93 *Germany v Council*.⁷⁸

agree as to the continued existence of rules that are contrary to WTO law. However — as already explained — that is not the case.

103. The Court applies the principle of legality only in so far as it recognises that the DSB recommendation of 13 February 1998 has legal effect within the Community after the period of time allowed for implementation expired on 13 May 1999 inasmuch as citizens of the Community may rely on the Community's conduct in breach of WTO law as a basis for a claim for damages.

102. It should also be pointed out that reciprocity is really a commercial policy issue, decked out in the legal trappings of a 'principle of reciprocity'. There appears to be considerable doubt as to whether the Community's trading position might be weakened at all by recognising the direct applicability of WTO law as a basis for a claim for damages. If the Community has infringed WTO rules, it is — as already explained — required to comply with any DSB recommendations or rulings. If another Member has infringed WTO rules, the Community may initiate a dispute settlement procedure and demand that it comply with the DSB ruling. The possibility of negotiation arises only where it is assumed that the parties to the dispute

(iv) Comparison with situations within the Community

104. Recognition that conduct contrary to WTO law on the part of Community bodies may establish the basis for a claim to damages arising from non-contractual liability is consistent with the Court's case-law on comparable situations within the Community. This applies both to the case-law on the significance of actions for infringement of the Treaty and to Member States' liability for failure to implement directives within the prescribed period.

76 — See, for example, the judgment in Case C-149/96 *Portugal v Council*, cited in footnote 29, paragraphs 42 to 46.

77 — Judgment in *Kupferberg*, cited in footnote 17, paragraph 18.

78 — Opinion in Case C-280/93 *Germany v Council*, cited in footnote 24, point 142.

— Actions for infringement of the Treaty

105. In the context of penalising conduct contrary to the Treaty on the part of Member States, the Court regards recognition of a citizen's claim for damages against the defaulting Member State as an appropriate means of applying the principle of legality. Thus the Court found France to be in breach of the Treaty when it continued to prohibit the importation of certain beef products from the United Kingdom after the expiry of the Community export ban on British beef imposed to protect against BSE and the introduction of a date-based export scheme.⁷⁹ It is settled case-law that there is an interest in pursuing actions for infringement of the Treaty in order to establish the basis of liability which a Member State may incur as a result of its default towards other Member States, the Community or private parties.⁸⁰

— Liability arising from failure to implement directives

106. Similarly, the case-law on Member States' liability towards citizens of the

Community in the event of failure to implement directives serves to ensure that Member States comply with Community law and implement directives within the prescribed time-limit. Attention is drawn to the judgments in *Francovich*⁸¹ and *Dillenkofer*⁸² in this connection. A Member State ought not to profit from the fact that it is in default and the citizen ought not to be obliged to suffer as a result of the unlawful conduct of the Member State. Here too, establishing the basis of the Member State's liability serves to exert pressure on the defaulting Member State to bring the situation into line with the Treaty.

107. In the judgment in *Francovich*, the Court stated that the full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible.⁸³ The possibility of obtaining redress from the Member State is particularly indispensable where the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before

79 — Judgment in Case C-1/00 *Commission v France* [2001] ECR I-9989.

80 — See, for example, judgments in Case C-361/88 *Commission v Germany* [1991] ECR I-2567, paragraph 31, Case C-365/97 *Commission v Italy* [1999] ECR I-7773, paragraph 45, and Case C-207/00 *Commission v Italy* [2001] ECR I-4571, paragraph 28 with further references.

81 — Judgment in Joined Cases C-6/90 and C-9/90 *Francovich and Others v Italy* [1991] ECR I-5357.

82 — Judgment in Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Erich Dillenkofer and Others v Germany* [1996] ECR I-4845.

83 — Judgment in *Francovich*, cited in footnote 81, paragraph 33. See also the judgment in Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 20.

the national courts the rights conferred upon them by Community law.⁸⁴

(v) The fundamental right of freedom to pursue an economic activity

108. This situation appears to be comparable with the situation in which *Biret et Cie* finds itself. By binding DSB recommendation of 13 February 1998, an act of Community legislation was found to be inconsistent with WTO law. Its subsidiary company, *Biret International*, is prevented by the Community's failure to act from importing meat treated with certain hormones into the Community. Its freedom to pursue an economic activity is reduced.

109. The Court helps to assert the principle of legality in those cases by recognising the direct applicability of provisions which usually have no such effect. It is clear from the third paragraph of Article 249 EC that the provisions of directives do not in principle establish rights on which individuals may rely. Directives are only binding, as to the result to be achieved, upon the Member States to which they are addressed and do not as a rule establish rights for individuals. Similarly, in the circumstances described in this case, WTO law should be recognised exceptionally as being directly applicable and thereby opening the way to a claim for damages.

110. Lastly, from the point of view of Community law, another argument for recognising the direct effect of DSB recommendations and rulings after the expiry of the period of time allowed to comply with them is the fundamental right of freedom to pursue an economic activity. As already explained, that fundamental right is unfairly reduced if a citizen is obliged to accept without compensation the Community bodies' failure to implement the DSB ruling or recommendation for a period of four years.

111. This appears to be even less acceptable in that, as the contested judgment confirms, the Community has expressly assured the WTO that it is prepared to fulfil its obligations. There is thus not only a binding ruling or recommendation of the DSB but also an act of a Community body expressly referring to that ruling or recommendation.

112. It is true that the assurance in question was given in the context of international law and, as already explained, produces no direct effects in the Community legal order. It must nevertheless be borne in mind that the Commission makes such statements to the WTO after first informing the competent Council committee of the outcome of

⁸⁴ — Judgment in *Francovich*, cited in footnote 81, paragraph 34.

the dispute settlement procedure. Both Community bodies therefore acknowledge that Community law is contrary to WTO law and must accordingly be amended to comply with the DSB recommendations. If it is not amended within the prescribed period, that means that the Commission and the Council are going back on their own position. This is another argument for recognising the possibility of claiming damages.

(vii) Interim conclusion

114. It must consequently be concluded that WTO law is directly applicable where DSB recommendations or rulings have found a Community measure to be inconsistent with WTO law and the Community has failed to implement the recommendations or rulings within the prescribed period.

(vi) Sufficiently precise rules

2. Infringement of a protective measure

113. Under the new WTO dispute settlement mechanism, DSB recommendations and rulings must be implemented ‘unconditionally’ and ‘immediately’. The parties to a dispute cannot escape their obligations under the WTO agreements by negotiating a waiver. In the light of this feature of the dispute settlement mechanism, it seems reasonable to suppose that after a DSB recommendation or ruling has been adopted and the period of time allowed to comply with it has expired, there is an ‘unconditional and sufficiently precise obligation’ within the meaning of the case-law on directly applicable provisions of international agreements.⁸⁵

115. As explained at the outset, it is not sufficient that the infringed measure be directly applicable. It must also be intended to protect individuals. It is settled case-law that this is not so in the case of WTO law. The purpose of the WTO agreements is to govern relations between WTO Members and they are not by their nature such as to establish rights of individuals.⁸⁶

116. The WTO agreements are primarily concerned with customs duties and inter-

⁸⁵ — Judgments in Case 45/75 *REWE v Hauptzollamt Landau* [1976] ECR 181, paragraph 24, and Case C-76/91 *Caves Neto Costa* [1993] ECR I-117, paragraphs 7 and 9.

⁸⁶ — See paragraph 72 of the contested judgment.

national trade. However, it is clear from the judgment in *Van Gend en Loos* that basic provisions on customs duties may be directly applicable. In that judgment, the Court recognised that Article 12 of the EEC Treaty (now, after amendment, Article 25 EC) was directly applicable.⁸⁷ That provision imposes a general prohibition on customs duties on imports and exports and customs duties of a fiscal nature and it is addressed only to States, not to citizens. In that respect it is entirely comparable with the rules of WTO law and in particular the rules of GATT 1947 and GATT 1994.

117. Moreover, the WTO agreements also guarantee freedom and prohibit discrimination. Regulations concerning trade affect the citizen's freedom to pursue an economic activity. Trade in States organised on market economy principles is conducted primarily by private individuals. In particular, provisions on sanitary and phytosanitary measures such as those contained in the SPS Agreement are of considerable importance to citizens engaged in trade. It is apparent from the first recital in the preamble to the SPS Agreement and from Article 2(3) that the agreement is intended to prevent a disguised restriction on international trade. Restrictions on trade through the adoption of sanitary and phytosanitary measures are in principle likely to result in discrimination between domestic and imported goods and those

engaged in the trade in such goods. Restrictions on trade therefore affect the citizen's freedom to pursue an economic activity.

118. Moreover, the fact that a rule is intended to protect interests of a general nature — in this case the liberalisation of international trade through the WTO agreements — does not preclude the possibility that it is also intended to protect individual interests. In *Kampffmeyer*, the Court held, with regard to Regulation No 19 of the Council on the progressive establishment of a common organisation of the markets in grain,⁸⁸ that the regulation was directed to ensuring appropriate support for the agricultural markets of the Member States during the transitional period on the one hand and to allowing the progressive establishment of a single market by making possible the development of the free movement of goods within the Community on the other. The fact that the interests the regulation was intended to protect are of a general nature did not prevent their including the interests of individual undertakings which are engaged in intra-Community trade.⁸⁹ Similarly, it must also be accepted that the rules on liberalisation contained in the WTO agreements and the provisions of the SPS Agreement in particular are intended to protect individuals.

119. Consequently the second condition for establishing a claim to damages is also

⁸⁸ — OJ 1962 30, p. 933, not available in English.

⁸⁹ — Judgment in *Kampffmeyer*, cited in footnote 28, p. 262 et seq.

⁸⁷ — Judgment in *Van Gend & Loos*, cited in footnote 38, p. 16.

met. The SPS Agreement is also intended to protect individual traders.

referred back to the Court of First Instance for further examination in accordance with the first paragraph of Article 61 of the Statute of the Court of Justice.

3. Conclusion as to the illegality of the Council's conduct

120. In the light of the foregoing considerations, it must be concluded that Articles 3 and 5 of the SPS Agreement embodied in the DSB recommendations of 13 February 1998 are directly applicable since those recommendations were not implemented within the prescribed period which expired on 13 May 1999. It follows that Biret et Cie may rely on a rule that is intended to protect it. Thus, contrary to the findings of the contested judgment, there is a serious infringement of the law.

122. It should merely be added in this connection that the existence of actual damage or a causal link cannot be excluded on the ground that the importation of meat treated with hormones could have been prohibited by measures consistent with the WTO, particularly if further scientific evidence of the harmful effect of the substances had been produced or the import ban had been adopted as a preventive measure. Such an argument is suggested by the approach adopted in the Commission proposal of 24 May 2000. The prohibition on one of the hormones in question is based on new scientific information. As regards the five other hormones, the provisional prohibition applies until more scientific information is made available.⁹¹

C — *Damage and the causal link*

121. In the contested judgment, the Court of First Instance did not address the factual aspects of a claim of liability, namely actual damage and the existence of a causal link between the damage and the illegal conduct and also left open the question whether Biret et Cie has an interest in bringing proceedings.⁹⁰ The case must therefore be

123. Such an argument does not preclude actual damage or the existence of a causal link. The new scientific information was not yet available in the crucial period when the illegality of the Community measure was established in February 1998. It was not even available when the period of time granted to comply with the DSB recom-

⁹⁰ — See paragraph 79 of the contested judgment.

⁹¹ — See preamble to the Commission proposal, cited in footnote 57, p. 2 *in fine*.

mendations — which must in principle be considered in a claim for damages — expired in May 1999. Scientific information produced later to justify such a prohibition cannot diminish illegal conduct on the part of the Community. Otherwise, a claim for damages would always be precluded in cases where non-compliance with WTO law was attributed to a lack of scientific evidence. Scientific information is constantly increasing.

124. As regards the provisional prohibition proposed in the case of the other five hormones, it should be pointed out that this represents a change in the legal basis of the measure. The illegal measure referred to in the DSB ruling of February 1998 was not adopted as a temporary measure until the necessary scientific information became available. It seems unfair for the citizen to be obliged to accept without compensation a restriction of his fundamental right to freedom to pursue an economic activity when the Community legislature proposed a new legal ground for its own conduct.

125. It must consequently be concluded that the contested judgment should be set aside and the case referred back to the Court of First Instance for further examination.

D — Incorrect interpretation of Article 48 of the Rules of Procedure of the Court of First Instance

126. In the alternative only, the second plea remains to be considered briefly in case the Court does not follow the course suggested above. Biret et Cie contends that it raised the question of no-fault liability in its application and its submission should therefore not have been rejected as out of time.

127. The question whether this objection was raised in the application is a matter of fact which cannot be reviewed in the appeal procedure. In view of the statement in the contested judgment that in its reply Biret et Cie requested the Court of First Instance to develop its case-law in the direction of a system of no-fault liability,⁹² it is advisable to refer to the judgment in *Atlanta*. In that judgment the Court held that a submission which changes the very basis on which the Community could be held liable, that is from liability for an unlawful act to liability for a lawful act, must be regarded as constituting a new plea in law which is inadmissible.⁹³ Pursuant to Article 42(2) of the Rules of Procedure of the Court and Article 48(2) of the Rules of Procedure of the Court of First Instance no new plea in law may be introduced in the course of the proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

⁹² — Paragraph 80 of the contested judgment.

⁹³ — Judgment in Case C-104/97 P *Atlanta*, cited in footnote 16, paragraph 27.

VIII — Costs

128. Under Article 118 in conjunction with Article 69(2) of the Rules of Procedure of

the Court, the unsuccessful party is to be ordered to pay the costs. Since the Council has been unsuccessful and Biret et Cie has applied for them, the Council must be ordered to pay the costs.

IX — Conclusion

129. In the light of the foregoing considerations it is proposed that the Court:

- (1) Set aside the judgment delivered by the Court of First Instance on 11 January 2002 in Case T-210/00 *Etablissements Biret et Cie v Council* and refer the dispute back to the Court of First of Instance.
- (2) Order the Council to bear the costs.
- (3) Order the Commission to bear its own costs.