OPINION OF MR TIZZANO — CASE C-377/02

OPINION OF ADVOCATE GENERAL

TIZZANO

delivered on 18 November 2004

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(a) Introduction

I — Original language: Italian.
1. In the present case, the Belgian Raad van State (Council of State) is seeking a further ruling from the Court on the compatibility of the Community provisions on the importation of bananas with the Community's obligations as a member of the World Trade Organisation (hereinafter the 'WTO'). The peculiar feature of the present case is that the Community provisions in question, introduced after the WTO Dispute Settlement Body (hereinafter the 'DSB') had found that the previous regime was inconsistent with the WTO rules, were themselves declared to be inconsistent with those rules by the same body.

2. The first legal instrument to be considered for the purposes of the present case is the General Agreement on Tariffs and Trade (hereinafter 'GATT'). It comprises Annex 1A to the Agreement establishing the WTO, which was approved on behalf of the Community with regard to that portion which falls within its competence by Council Decision 94/800/EC of 22 December 1994. 2

3. Article I:1 of GATT establishes the principle of general most-favoured-nation treatment. It provides in particular that '[w]ith respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, ... any advantage, favour, privilege or immunity, granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined

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for the territories of all other contracting parties ...'.

4. Article XIII on the non-discriminatory administration of quantitative restrictions establishes that:

1. No prohibition or restriction shall be applied by any contracting party on the importation of any product into or of the territory of any other contracting party ... unless the importation of the like product of all third countries ... is similarly prohibited or restricted.

2. In applying import restrictions to any product, contracting parties shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of such restrictions and to this end shall observe the following provisions:

   (a) wherever practicable, quotas representing the total amount of permitted imports (whether allocated among supplying countries or not) shall be fixed ...;

   (b) in cases where quotas are not practicable, the restrictions may be applied by means of import licences or permits without a quota;

   (c) contracting parties shall not, except for purposes of operating quotas allocated in accordance with subparagraph (d) of this paragraph, require that import licences or permits be utilised for the importation of the product concerned from a particular country or source;

   (d) in cases in which a quota is allocated among supplying countries, the contracting party applying the restrictions may seek agreement with respect to the allocation of shares in the quota with all other contracting parties having a substantial interest in supplying the product concerned. In cases in which this method is not reasonably practicable, the contracting party concerned shall allot to contracting parties having a substantial interest in supplying the product shares based upon the proportions, supplied by such contracting parties during a previous representative period, of the total quantity or value of imports of the product, due account being taken of any special factors which may have affected or may be affecting the trade in the product ... .
5. The provisions of this Article shall apply to any tariff quota instituted or maintained by any contracting party ... 4

Both Parties reaffirm their will to conduct trade with each other in accordance with that Agreement.

5. In addition to GATT, mention should also be made of the Framework Agreement on Cooperation between the European Economic Community and the Cartagena Group and its member countries 5, signed at Copenhagen on 23 April 1993 (hereinafter the 'EEC-Andean Pact Agreement') and approved on behalf of the Community by Council Decision 98/278/EC of 7 April 1998. 6

7. As we shall see, the Understanding on Rules and Procedures Governing the Settlement of Disputes (the Dispute Settlement Understanding, hereinafter the 'DSU'), 7 is also relevant for present purposes and I shall return to this later (see point 46 et seq. below).

B — The relevant Community provisions

6. The provision that is relevant to the present case is contained in Article 4 of that agreement, which reads:

'The Contracting Parties hereby grant each other most-favoured-nation treatment in trade, in accordance with the General Agreement on Tariffs and Trade (GATT).

8. Turning to the Community provisions, I note first that by Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organisation of the market in bananas 8 (hereinafter 'Regulation No 404/93'), the Community established a common regime for trade with third countries which replaced the various preceding national regimes. That regime was the subject of dispute settlement proceedings in the context of the WTO after complaints had been lodged by some third countries. By decision of 25 September 1997, the DSB adopted a report of the WTO Appellate Body which found that the regime was

4 — [NOT APPLICABLE IN THE ENGLISH TEXT]
5 — Namely the Republic of Bolivia, the Republic of Colombia, the Republic of Ecuador, the Republic of Peru and the Republic of Venezuela.
inconsistent with Article I:1 and Article XIII of GATT.  


10. Regulation No 404/93 as amended preserved the distinction made in the preceding regime between three different categories of banana for import purposes. In particular, Article 16 provides that:

(1) “traditional imports from ACP States” means imports into the Community of bananas originating in the States listed in the Annex hereto up to a limit of 857 700 tonnes (net weight) per year; these are termed “traditional ACP bananas”;

(2) “non-traditional imports from ACP States” means imports into the Community of bananas originating in ACP States but not covered by definition (1); these are termed “non-traditional ACP bananas”;

(3) “imports from non-ACP third States” means bananas imported into the Community originating in third States other than ACP States; these are termed “third State bananas”.

11. Article 17 provides that “[a]ll importation of bananas into the Community shall be subject to submission of an import licence issued by Member States to any interested party ... without prejudice to specific provisions adopted for the application of Articles 18 and 19”.

12. Article 18(1) to (3) provides that a tariff quota of 2 200 000 tonnes (net weight) and an additional tariff quota of 353 000 tonnes (net weight) shall be opened for imports of third State and of non-traditional ACP bananas. Imports of third State bananas under those tariff quotas shall be subject to duty of ECU 75 per tonne, while imports of non-traditional ACP bananas shall be free of...
duty. And no duty shall be payable on imports of traditional ACP bananas.

13. Article 18(4) adds that, should there be no reasonable possibility of securing agreement of all WTO contracting parties with a substantial interest in the supply of bananas, the Commission may allocate the above-mentioned tariff quotas and the traditional ACP quantity between those States with a substantial interest in the supply.

14. Article 19 provides that imports shall be managed in accordance with 'the method based on taking account of traditional trade flows ("traditionals/newcomers")'.


16. In accordance with Article 19 of Regulation No 404/93 as amended, Regulation No 2362/98 provides for importers to be divided into 'traditional operators' and 'newcomers' on the basis inter alia of whether or not a minimum quantity of bananas is imported into the Community during a reference period.

17. In particular, Article 4 provides that each traditional operator shall receive, 'for each year and for all the origins listed in Annex I, a single reference quantity based on the quantities of bananas actually imported during the reference period. ... For imports carried out in 1999 under the tariff quotas or as traditional ACP bananas, the reference period shall be made up of the years 1994, 1995 and 1996'.

18. Article 5(2) adds that '[f]or the purposes of determining their reference quantity, each [traditional] operator shall send to the competent authority by 1 July each year ... a figure for the total quantity of bananas from the origins listed in Annex I actually imported during each of the years making up the reference period' together with the necessary supporting documents.
19. With regard to the detailed rules for the issue of import licences, Article 17 provides that:

'Where, for a given quarter and for any one or more of the origins listed in Annex I, the quantities applied for appreciably exceed any indicative quantity fixed under Article 14, or exceed the quantities available, a percentage reduction to be applied to the amounts requested shall be fixed'.

20. Article 18(1) provides that 'where a percentage reduction has been fixed for one or more given origins under Article 17, operators who have applied for import licences for the origin(s) concerned' may 'submit one or more fresh licence applications for the origins for which available quantities have been published by the Commission, up to an amount equal to or smaller than the quantity applied for but not covered by the original licence issued'. The Commission is required under Article 18(2) to determine 'immediately the quantities for which licences can be issued for each of the origins concerned'.

22. In accordance with that provision, Article 1 of Commission Regulation (EC) No 2806/98 of 23 December 1998 on the issuing of import licences for bananas under the tariff quotas and for traditional ACP bananas for the first quarter of 1999 and on the submission of new applications lays down the reduction coefficients for applications concerning bananas originating in Colombia, Costa Rica and Ecuador.

23. Regulation No 2806/98 also laid down, in accordance with Article 18(2) of Regulation No 2362/98, the quantities for which licence applications might still be lodged in respect of the first quarter of 1999. Those applications are the subject of Commission Regulation (EC) No 102/1999 of 15 January 1999 on the issuing of import licences for bananas under the tariff quotas and for traditional ACP bananas for the first quarter of 1999 (second period) (hereinafter 'Regulation No 102/1999'), which lays down reduction coefficients for certain countries of origin.

24. The rules governing applications for the second quarter of 1999 are contained in Commission Regulation (EC) No 608/1999 of 19 March 1999 on the issuing of import licences for bananas under the tariff quotas and for traditional ACP bananas for the second quarter of 1999 and on the submission of new applications (hereinafter 'Regulation No 608/1999'), which lays down reduction coefficients for certain countries of origin.

25. Dissatisfied with the new arrangements, Ecuador appealed once again to the WTO, which appointed a panel to investigate the case within the framework of its dispute settlement system.

26. The panel found on examination that the new regime established by Regulation No 409/93 was still in breach of Article I:1 and Article XIII of GATT. The DSB adopted the report on 6 May 1999. The Community regime was consequently amended again by the adoption of Council Regulation (EC) No 216/2001 of 29 January 2001 amending Regulation (EEC) No 404/93 on the common organisation of the market in bananas. I note however that that regulation is irrelevant ratione temporis for the purposes of the present case.

27. NV Firma Leon Van Parys (hereinafter 'Van Parys'), established in Belgium, has been importing bananas from Ecuador into the Community for more than 20 years.

28. On 14 December 1998 Van Parys applied to the competent Belgian authority, the Belgisch Interventie- en Restitutiebureau (Belgian Intervention and Refund Bureau, hereinafter the 'BIRB'), for import licences for the importation of 26 685 935 kg of bananas from Ecuador in the first quarter of 1999. The BIRB issued licences for the amount obtained by applying to the quantity applied for the reduction coefficient of 0.7080 laid down in Regulation No 2806/98.

29. On 8 January 1999 Van Parys submitted three new applications in accordance with Regulation No 2362/98 (see point 20 above) for import licences for the importation of bananas from Panama and other countries to a total weight not exceeding the difference between the amount previously applied for and the amount actually obtained after the reduction. The reduction coefficients laid down in the abovementioned Community regulations, in particular Regulation No 102/1999, were also applied to the new applications.

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30. Lastly, on 5 March 1999 Van Parys submitted a new application for import licences for the importation of 35,224,757 kg of bananas from Ecuador. The BIRB applied the reduction coefficient of 0.5934 laid down in Regulation No 608/1999 and issued licences only for the amount calculated in this way.

31. On 23 February and 21 May 1999, Van Parys brought two actions before the Raad van State against the BIRB's decisions not to issue import licences for the quantities applied for. In those actions, it claimed that the contested acts were invalid because the regulations governing imports into the Community on which the contested decisions were based were unlawful for breach of WTO rules.

32. Considering that the dispute called into question the validity of Community acts, the Raad van State, by Order of 7 October 2002, decided to stay the proceedings and refer the following four questions to the Court for a preliminary ruling:


... introduce to the benefit of twelve countries named in the annex to Regulation No 1637/98 a joint quota of a maximum of 857,700 kg [sic] of bananas ("traditional ACP bananas") and, moreover, in that that quota does not accord with a distribution of trade that approaches trade without restrictions in so far as it is included in the system introduced by Regulation...
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No 1637/98, the import of bananas being regulated solely on the basis of a tariff quota;

— introduce a tariff quota for a total quantity of 2 535 000 tonnes for third countries and for non-traditional ACP bananas and then allocate that tariff quota in percentage terms on the basis of a non-representative period, since the import of bananas in the period from 1994 to 1996 was already subject to restrictive conditions?

2. Do the regulations referred to in paragraph 1 infringe Article 4 of the Framework Agreement of 23 April 1993 between the European Economic Community and the Cartagena Group and its member countries inasmuch as by that agreement, the European Community undertook to have its relations with Ecuador governed by the provisions of GATT and to grant that country most-favoured-nation treatment?

3. Do the Commission regulations referred to in paragraph 1 infringe the principle of the protection of legitimate expectations and the principle of good faith in international public law and international customary law, inasmuch as the Commission has not fulfilled the obligations arising for the Community from GATT 1994, has misused legal procedures and has not taken account of judicial proceedings and of the outcome of an international dispute settlement procedure inasmuch as, despite declarations made at the time of the adoption of Regulation No 1637/98, it has not established a system under which import licences for bananas are issued to "genuine importers"?

4. Has the Commission exceeded the authority given to it by Council Regulation No 404/93, as amended by Regulation No 1637/98, by adopting the tariff quota for the import of bananas while disregarding the obligations which arise for the Community from GATT 1994 and GATS or which must, where appropriate, be taken into account, because of its avowed intention to adapt the regime for the import of bananas into the Community to the applicable WTO agreements, as a positive rule of law to be integrated into Community law?

33. In the proceedings thus instituted, written observations have been submitted by the plaintiff and the defendant in the main proceedings and by the Council and the Commission. The same parties, with the exception of the BIRB, also made oral statements at the hearing held on 21 September 2004.
III — Legal analysis

A — The first, third and fourth questions

1. Introduction

34. I consider that the first, third and fourth questions should be examined together since they are closely interconnected as a result of the circumstances in the present case. The question of an infringement of the WTO rules cannot be assessed without reference to the fact that the competent bodies of that organisation have adopted two decisions on the subject and the Community legislature has acted on the first of those decisions. Moreover, the point at issue in the present case is whether the Community regime for the import of bananas in which it has an interest is compatible with the WTO rules, irrespective of which institution is actually responsible for provisions of that regime which may be incompatible with those rules.

35. I therefore propose to combine the first, third and fourth questions and to reformulate them in the following terms:

Must measures adopted by the Council and by the Commission of the EU in accordance with their respective competences be held to be unlawful from the point of view of Community law in a case where a DSB decision found that a previous Community regime for the import of bananas was inconsistent with the WTO rules, the Community adopted new legislation in order to comply with the DSB decision, and the DSB found that the new regime too was inconsistent with those rules?

2. The Community case-law on the effect of the WTO rules

36. As is well known, the Court has frequently had occasion to rule on the effect to be given to the WTO/GATT rules within the Community legal order. According to the Commission, the Council and the BIRB, it is clear from that case-law that the answer to the questions in this case should be in the negative. Van Parys considers on the contrary that in view of the circumstances in the present case the answer to the questions should be in the affirmative.

37. It therefore seems to me advisable to start by giving a short account of that case-law and the findings and then to consider their possible implications with regard to the undoubted peculiarities of the present case.
(a) The judgment in *Portugal v Council*

38. I propose not to consider judgments handed down before the WTO was established but to begin by recalling the well-known judgment in *Portugal v Council*, in which the Court defined its position on the effect of WTO law in the Community legal order.

39. In that case, as is well known, Portugal brought an action before the Court seeking the annulment of a Council decision concerning the conclusion of Memoranda of Understanding between the Community and Pakistan and between the Community and India on market access for textile products. The pleas submitted by the Portuguese Government included, for the purposes of the present case, the fact that the decision was inconsistent with the WTO rules. The Court was thus asked to determine the legality of an act of Community secondary legislation in the light of the WTO rules.

40. In its judgment, the Court made the following points:

— 'in conformity with the principles of public international law', it is for the courts of the contracting parties, 'and in particular ... the Court of Justice within the framework of its jurisdiction under the [EC] Treaty', to decide what effect the provisions of an agreement are to have in the internal legal order of the contracting parties if that question has not been settled by the agreement;  

— according to international law there must be 'bona fide performance of every agreement' and each contracting party must 'determine the legal means appropriate for attaining that end in its legal system, unless the agreement, interpreted in the light of its subject-matter and purpose, itself specifies those means';  

— the WTO agreements do not determine those means inasmuch as, while the mechanism for resolving disputes is stronger than the mechanism provided under the previous system, GATT 1947, the system resulting from those agreements nevertheless accords 'considerable importance to negotiation between the parties'. In fact, according to the [DSU (see point 7 above)], although the main purpose of the mechanism for resolving disputes is to secure the with-
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drawal of measures that are inconsistent with the WTO rules (Article 3(7) of the DSU), compensation may be granted on an interim basis pending the withdrawal of the inconsistent measure; 24

— 'to require the judicial organs to refrain from applying rules of domestic law which are inconsistent with the WTO agreements would have the consequence of depriving the legislative or executive organs of the contracting parties of the possibility afforded by Article 22 of the [DSU] of finding negotiated solutions, even on a temporary basis'; 25

— the WTO agreements are still founded, like GATT 1947, 'on the principle of negotiations with a view to entering into reciprocal and mutually advantageous arrangements and [are] thus distinguished, from the viewpoint of the Community, from the agreements concluded between the Community and non-member countries which introduce a certain imbalance of obligations'; 26

— moreover, the most important commercial partners of the Community have concluded that the WTO agreements are not among the rules applicable when reviewing the legality of their rules of domestic law. 27 The Community legal order must follow the same course because 'the lack of reciprocity in that regard ..., in relation to the WTO agreements ... may lead to disuniform application of the WTO rules'. It would in fact deprive 'the legislative or executive organs of the Community of the scope for manoeuvre enjoyed by their counterparts in the Community's trading partners'; 28

— it follows that, 'having regard to their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions'; 29

— moreover, certain particular situations, already identified in relation to GATT 1947, constitute exceptions to the rule just stated. These are cases where 'the Community intended to implement a particular obligation assumed in the context of the WTO, or where the

24 — Judgment in Case C-149/96 Portugal v Council, cited above, paragraph 37. My emphasis.
25 — Judgment in Case C-149/96 Portugal v Council, cited above, paragraph 40. My emphasis.
26 — Judgment in Case C-149/96 Portugal v Council, cited above, paragraph 42.
27 — Judgment in Case C-149/96 Portugal v Council, cited above, paragraph 43.
28 — Judgment in Case C-149/96 Portugal v Council, cited above, paragraphs 45 and 46.
29 — Judgment in Case C-149/96 Portugal v Council, cited above, paragraph 47.
Community measure refers expressly to the precise provisions of the WTO agreements.  

(b) The judgment in Netherlands v Parliament and Council

41. As is well known, the judgment in Portugal v Council provoked a wide variety of responses and sometimes even strong dissent among legal writers, some being decidedly of the opinion that the WTO rules may be considered as a criterion of the legality of Community measures.  

42. I shall not attempt to deal here with the criticisms of the judgment in that case but I note that they did not cause the Court to review its position. On the contrary, that position was strongly confirmed later in the judgment in Netherlands v Parliament and Council.  

43. In that case, the applicant government claimed, with regard to the point at issue in the present case, that Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions (hereinafter ‘Directive 98/44’) created obligations for the Member States that were incompatible with those resulting from their international undertakings and in particular with the WTO Agreement and the Convention on Biological Diversity (hereinafter the ‘CBD’).  

44. In its judgment in that case, the Court explicitly stated that ‘the lawfulness of a Community instrument ... [cannot] be assessed in the light of ... [the WTO agreements] ... having regard to their nature and structure’. However, in order to clarify and substantiate its view, it added that ‘such an exclusion cannot be applied to the CBD, which, unlike the WTO agreement, is not strictly based on reciprocal and mutually advantageous arrangements ... . Even if ... the CBD contains provisions which do not 


31 — I note that Advocate General Saggio, after a full analysis, expressed the same view in his Opinion in that case. He held that the WTO agreements, by virtue of their status as international agreements, are binding on all the institutions (under Article 300(7) EC) and therefore constitute a source of Community law. The Court of Justice therefore has an obligation to ensure that the agreements are respected ... by the Community institutions’ (point 20) especially as ‘many provisions of the [WTO] agreements give rise to obligations and prohibitions that are unconditional and include specific undertakings by the contracting parties in the context of their reciprocal relations’ (point 19). In order to avoid the fears that conclusion might cause with respect to the interests of the Community, the Advocate General is concerned to ‘separate’ the question of the effect of the WTO rules in the Community legal order from the question of the direct applicability of those rules and whether they may confer ‘on individuals rights on which they may rely in actions before the courts’. In his view, indeed, recognition that the WTO rules may have such an effect does not necessarily mean that they may be invoked before the courts. ‘For this result to be achieved ... it must be implicit in the general context of the agreement that its provisions may be invoked before the courts. Consequently, a provision of an agreement may be held not to have direct effect but that does not justify failing to recognise it as binding on the Community institutions and hence excluding it as a criterion of legality (for the Community)’ (point 18).  


have direct effect, in the sense that they do not create rights which individuals can rely on directly before the courts, that fact does not preclude review by the courts of compliance with the obligations incumbent on the Community as a party to that agreement (Case C-162/96 Racke [1998] ECR I-3655, paragraphs 45, 47 and 51). 35

45. Thus, according to the Court, the provisions of agreements that are not based on reciprocal and mutually advantageous arrangements may be considered as a criterion of legality even if they do not create rights for individuals. Conversely, the provisions of agreements which, like the WTO agreements, are based on reciprocal and mutually advantageous arrangements, are not directly applicable nor can they, in principle, be considered as a criterion of the legality of Community measures. 36

3. The problem of the effect of DSB decisions

(a) The DSU system

46. That being said with reference to the WTO rules as such, the question now arises whether the same conclusion applies where, as in the present case, a DSB ruling or recommendation finds that certain Community measures are inconsistent with those rules.

47. However, before considering that question, it is advisable to give a short account of the principal characteristics of the system established by the DSU for the settlement of disputes within the WTO in so far as those characteristics are relevant to the present case.

48. I note first that, as the Court recognised in its judgment in Portugal v Council, that system differs from the provisions of the GATT 'by reason of the strengthening of the system of safeguards and the mechanism for resolving disputes' (paragraph 36) for the purpose of 'providing security and predictability to the multilateral trading system' (Article 3(2) DSU).

49. That result is achieved essentially either because the system is designed so as to preclude other mechanisms for resolving disputes and to be binding on the parties (which undertake not to take unilateral action against measures adopted by other members which they consider to be incom-
patible with the WTO agreements and to 'have recourse to, and abide by, the rules and procedures of this Understanding' (Article 23 (1) DSU)); or because it is much more structured and effective (suffice it to say that panel reports no longer have to be adopted unanimously by all the contracting parties, as was the case under the GATT, but are adopted by a system of negative consensus whereby a unanimous vote against by all the members of the WTO, including the appellant, is required to prevent the adoption by the DSB of a panel or Appellate Body report (Article 16(4) and Article 17(14) DSU)); or because the procedures are more rigorous and the effects of decisions more clearly defined.

50. On this last point, in particular, I note that a member which considers that any benefits accruing to it directly or indirectly under the WTO agreements are being impaired by measures taken by another member must first make every effort to agree a solution with the other party, directly or with the assistance of the Director-General of the WTO (Articles 3-5 DSU). In the absence of a mutually agreed solution, it may ask the DSB to refer the matter to a panel. The panel will then submit a report to the DSB, which may adopt it, unless a party to the dispute decides to appeal to the standing Appellate Body established for that purpose within the WTO (Article 16 (4) DSU). In that case, the Appellate Body too has to submit a report to the DSB.

51. If the panel or Appellate Body report is adopted, the DSB decision is binding on the parties, which must accept it 'unconditionally' (Article 17(14) DSU) because, under the DSU, 'prompt' compliance with DSB decisions is deemed to be 'essential' in order to ensure effective resolution of disputes (Article 21(1) DSU). Only if it is impracticable to comply with them 'immediately' is the WTO member concerned to have a 'reasonable period of time' in which to amend its legislation. That period of time, which must not exceed 15 months, is to be proposed by the member concerned and approved by the DSB or mutually agreed by the parties or, in the absence of such agreement, determined through 'binding' arbitration (Article 21(3) DSU).

52. Similarly, where there is disagreement as to the adequacy of the measures taken by the member to which the decision is addressed or their consistency with the WTO agreements, the DSU provides for further recourse to the dispute settlement procedures described above, including, where possible, resort to the original panel (Article 21(5) DSU).
53. If the member to which the DSB decision is addressed fails to comply within the 'reasonable period of time' mentioned above, compensation and countermeasures may be available but such measures are not to be 'preferred to full implementation of a recommendation' (Article 22(1) DSU).

54. Moreover, such measures are temporary and are to apply only until: (i) the measure found to be inconsistent has been removed; or (ii) the member required to implement the decision provides a solution to the impairment of the other party's benefits; or (iii) a mutually satisfactory solution is reached (Article 22(8) DSU).

55. In any event, the DSB continues to keep under surveillance the implementation of decisions it has adopted (Article 22(8) DSU) because the solution chosen must in any case be compatible with those decisions and with the WTO rules in general.37

56. Lastly, as the Court observed in its judgment in Portugal v Council, the new system nevertheless 'accords considerable importance to negotiation between the parties' (paragraph 36) and such negotiation may even continue after the DSB decision, with a view to finding mutually acceptable compensation (paragraph 39). I should add that in that case (although this has not happened in the present case) it would — theoretically at least — be possible to reach a solution that restored compliance with the WTO rules without removing the contested measure.

57. That would still be a way, a singular but nevertheless legitimate way, of implementing the DSB decision. That is to say, even in that case the decision would eventually produce its effect, if only by setting a limit to the parties' freedom to seek alternative negotiated solutions; because, I repeat, such solutions too must remain with the framework of the WTO rules and consequently of the DSB decision. In that sense, Advocate General Alber is right when he says that 'there is no alternative but to implement the recommendations or rulings of the DSB' and that they 'cannot be circumvented by negotiation between the parties'.38

37 — Under Article 3(5) DSU: 'All solutions to matters formally raised under the consultation and dispute settlement provisions of the [WTO] agreements ... shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements' (my emphasis).

(b) The *Biret* case. Introduction

58. That being said, it should be noted that the Court has of course frequently taken a position on the effect of DSB decisions but its statements on that subject are less clear and precise than the statements it has made about the problem of the effect of the WTO rules, examined above.

59. The *Biret* case,\(^{39}\) in which this question was expressly brought to the Court's attention, is particularly relevant in this connection.

60. It is common knowledge that, despite the entry into force of the WTO agreements and in particular the Agreement on the application of sanitary and phytosanitary measures (hereinafter the 'SPS Agreement'),\(^{40}\) the existing Community law prohibiting the importation of meat and meat products treated with certain hormones\(^{41}\) was not merely maintained but was even strengthened with the adoption of Directive 96/22/EC.\(^{42}\) The question was referred to the DSB and on 13 February 1998 it adopted a report finding that the prohibition was incompatible with the SPS Agreement\(^ {43}\) and giving the Community until 13 May 1999 to comply with the DSB recommendations.

61. *Biret International SA* (hereinafter 'Biret') brought an action before the Court of First Instance under Article 235 and Article 288 EC seeking compensation for the damage it claimed to have suffered as a result of the contested Community measures. The applicant contended in particular that the Community measures in question were unlawful in that they were in breach of the DSB decision cited above.

62. The Court of First Instance dismissed the action on the ground that '[t]here [was] 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'.\(^{44}\) However, the Court concluded, with explicit reference to the precedents

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\(^{39}\) — Judgment in Case C-93/02 P *Biret International v Council*, cited above. The same situation was also the subject of Case C-94/02 P *Biret et Cie v Council* on which the Court ruled on the same day. My observations will refer only to the judgment in Case C-93/02 P *Biret International v Council*.


\(^{44}\) — Judgment of the Court of First Instance in Case T-174/00 *Biret International v Council* [2002] ECR II-17, paragraph 67.
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mentioned earlier, that '[i]t is clear from case-law which is now firmly established'\(^{45}\) that the WTO agreements do not have direct effect and that the applicant could not therefore rely on an infringement of the SPS Agreement.

(c) Advocate General Alber's Opinion

63. A completely different line was taken, in the context of the appeal against the judgment of the Court of First Instance, by Advocate General Alber, who presented full and reasoned arguments on the subject from which I shall merely recall the key passages here.

64. After summarising the system for the settlement of disputes within the WTO in the terms set out above (see point 48 et seq. above), he emphasises that DSB decisions are binding, at least in the sense that, as already said, they cannot be circumvented by negotiation between the parties. There may be cases where non-compliance with such decisions is a commercial policy option. But that ultimately depends solely on the fact that such decisions are unenforceable because they pertain to international law which in principle does not admit coercive measures. The fact that DSB decisions are unenforceable is therefore not a valid reason for the Court not to comply with them, since non-compliance 'is not a lawful option'.\(^{46}\)

65. Rather than endorsing a feasible but unlawful commercial policy option, the Court should on the contrary support the principle of legality and recognise that DSB decisions are binding when the period allowed for complying with them expires, at the latest.\(^{47}\)

66. Advocate General Alber is aware that this solution is open to criticism on the principle of 'reciprocity' since it would mean that one party (in this case the Community) attributed to the WTO rules an effect not accorded to them in the legal orders of its trading partners, thus weakening its own trading position in the WTO. He notes, however, that the Court held in its judgment in \textit{Kupferberg\(^{48}\)} that the fact that the courts of one of the parties consider that certain of the stipulations in [an international] agreement are of direct application is not in itself such as to constitute a lack of reciprocity between the parties.

\(^{45}\) — Ibid., paragraph 61.

\(^{46}\) — Opinion in Case C-93/02 P \textit{Biret}, cited above, point 86.

\(^{47}\) — Opinion in Case C-93/02 P \textit{Biret}, cited above, points 85-88.

\(^{48}\) — Judgment in Case 104/81 \textit{Kupferberg}, cited above, paragraph 18.
67. He adds that this 'is really a commercial policy issue, decked out in the legal trappings of a "principle of reciprocity", if not, to put it more strongly, a mere pretext for not complying with an obligation formally confirmed by the competent body.

68. In fact, the Community's trading position would not be weakened by the proposed solution because, in the event of other members infringing WTO agreements, the Community could initiate a dispute settlement procedure and demand that they comply with the DSB ruling. Just as any imbalances that might arise, in the event of one party complying with the DSB decision and the other party failing to do so, could be overcome by recourse to the compensation and retaliation measures laid down in international law and particularly in the WTO rules.

69. Similarly, the Advocate General observes, the proposed solution does not limit the discretion accorded to the Community institutions as to the particular means employed to implement DSB decisions, since the means remain entirely at the discretion of the institutions in question provided, of course, that they are intended to result in measures that are consistent with the obligations arising from the WTO rules.

70. Finally, 'the possibility of damage to the trading position arises only where it is assumed that the parties to the dispute may agree to maintain rules that are contrary to WTO law. However, as already explained, that is not the case'.

71. It follows, according to the Advocate General, that the Court applies the principle of legality only if it recognises that DSB decisions and recommendations may be considered as a criterion of the legality of the Community's conduct once the period allowed for complying with them has expired.

72. Thus, as we see, the Advocate General, unlike the Court of First Instance, does not draw from the positions on the WTO rules expressed by the Court and recorded above the automatic conclusion that, even where the DSB has taken a decision, such decisions may not be considered as a criterion of the legality of Community measures. On the contrary, he considers that a decisive argument in favour of the opposite conclusion is the fact that, in such cases, the mechanisms for determining the obligations of members of the WTO come into play, with the relevant consequences as to the specification

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49 - Opinion in Case C-93/02 Biret, cited above, points 97-102 (the passage quoted occurs in point 102).
50 - Point 103. In that case, the conclusion led the Advocate General to propose that Biret's action for damages against the Community be declared admissible on the ground that the Community's conduct was unlawful in that it was in breach of WTO law.
of such obligations in the particular case and the duty incumbent on the parties in question to comply with DSB decisions, if only in the specific forms described above.

73. I have nothing to add to the Advocate General's ample arguments except to say that I agree with them. I too take the view, on the basis of the considerations thus far adduced, that in a 'Community governed by law' DSB decisions must be considered as a criterion of the legality of Community measures and that the Court consequently should not, on grounds of doubtful legal merit, give clear approval to legal arguments that would lead to the opposite conclusion.

(d) The judgment of the Court

74. In my view, that conclusion is supported indirectly, or at least not precluded in principle, by the Court's subsequent judgment in Biret which offers interesting, if not encouraging, scope for the position taken here. 51

75. It is true that the Court finally dismissed Biret's appeal for what might be described as temporary reasons connected with that particular case and that it was consequentially not required to rule expressly on the question of the effect of DSB decisions. 52 It is therefore significant that, in the key passages in the grounds of the judgment, the Court took exception to the fact that the Court of First Instance, having been asked to rule specifically on that question, refrained from doing so and confined itself instead to mechanically applying to the DSB decisions the principles laid down in the judgment in Portugal v Council on the subject of the WTO rules.

76. The Court found that such reasoning did not suffice to deal with the plea concerning infringement of the SPS Agreement. In its words, '[i]t further fell to the Court of First Instance to address the argument that the legal effect of the DSB decision of 13 February 1998 vis-à-vis the European Community called into question the Court's finding that the WTO rules did not have direct effect and provided grounds for a review by the Community Courts of the legality of Directives 81/602, 88/146 and 96/22 in the light of those rules'. 53

51 — As indeed had, in a sense, the judgment in Case C-104/97 P Atlanta v Commission and Council [1999] ECR I-6983, particularly paragraphs 19-22. However, completely different indications are given in the Order in OGT on which I shall have more to say later (see point 93 et seq. below).

52 — The Court in fact found that, since the Community had stated that it intended to comply with its WTO obligations but that it needed a reasonable time to do so, under Article 21(3) of the DSU it was granted a period of 15 months for that purpose, which expired on 13 May 1999. The Court therefore concluded that 'for the period prior to 13 May 1999 the Community Courts could not, in any event, carry out a review of the Community measures in question ... without rendering ineffective the grant of [that period]' (paragraph 62, my emphasis).

53 — Paragraph 57, my emphasis.
77. In other words, the Court criticised the Court of First Instance for failing to identify the question of the effect of DSB decisions and the compatibility of the contested Community measures with those decisions as a distinct and separate problem — and consequently failing to deal specifically with it.

78. Without wishing to engage in a guessing game about the Court's intentions, I must point out that, had the Community Courts held that the application of the case-law on the WTO rules must be extended automatically to cover DSB decisions, there would have been no reason to criticise the Court of First Instance for extending the case-law in precisely that way. Moreover, if the two situations are not identical, as that criticism makes quite clear, it is reasonable to suppose that the difference must support recognition that DSB decisions have effects which earlier case-law denied to the WTO rules.

(e) Application to the present case

79. Whether or not the Court's intentions are to be interpreted in that way, what seems to me to be important for present purposes is that the judgment in Biret did not, in any event, reject Advocate General Alber's view. Since, as I have said, I consider that that view ought to be accepted, I take the liberty of advancing it again in this context and applying it to the present case.

80. That means, in particular, that it must be determined whether in the present case a DSB decision was taken and whether the reasonable period granted to the party to which the decision was addressed (in this case, the Community) to bring its own legislation into conformity with the WTO rules elapsed without appropriate action being taken, on the understanding that in that case the DSB decision will be considered as a criterion of the legality of the Community measures in question.

81. In the present case, as I have already explained, a DSB decision of 25 September 1997 found that the Community regime introduced by Regulation No 404/93 was inconsistent with the WTO rules and gave the Community a period of 15 months and one week which expired on 1 January 1999 to comply with the decision. During that period, the Council amended Regulation No 404/93 by adopting Regulation No 1637/98 and the Commission defined the consequent amendments to the detailed rules for implementation in Regulation No 2362/98 and a number of subsequent regulations. Within the WTO, however,

Ecuador contended that those measures did not suffice to ensure compliance with the DSB decision and requested that the new regime for the import of bananas should also be examined by a panel. The procedure thus initiated concluded with a DSB decision of 6 May 1999, which found that the Community legislation was still inconsistent with the WTO rules.

82. It is therefore clear that when the period granted to the Community expired the regime for the import of bananas, despite the amendments, was still inconsistent with the WTO rules, as the first DSB decision had found in this particular case. It follows, in view of the points made earlier, that all the regulations in question must be deemed to be unlawful.

83. In the light of the foregoing considerations, I therefore propose that the Court should reply to the first, third and fourth questions, as reformulated, to the effect that the Community regime for the import of bananas based on Regulation No 404/93 as amended and on the regulations adopted to implement that regulation is invalid inasmuch as it is inconsistent with the WTO rules as established by the DSB on 25 September 1997 and confirmed by the same body on 6 May 1999.

4. The question of 'particular situations'. The 'plea of particular obligation'

(a) Introduction

84. Should the Court decide not to accept that conclusion, it is also necessary to consider whether the situation in this case may, as a result of its peculiarities, present features that call into question the legality of the Community measures at issue.

85. That is to say whether, in the alternative, because of these peculiarities, the situation in this case may be one of the two particular situations in which the Court holds that, contrary to the general rule, the legality of acts of the Community may be determined in the light of the GATT/WTO rules. As already mentioned (see point 40 above), such particular situations arise where, to quote the judgment in Portugal v Council, 'the Community intended to implement a particular obligation assumed in the context of the WTO [hereinafter the 'plea of particular obligation'] or where the Community measure refers expressly to the precise provisions of the WTO agreements'.

55 — Judgment in Case C-149/96 Portugal v Council, cited above, paragraph 49. See also the judgment in Case C-69/89 Nakajima, cited above, paragraph 31.
86. So, to be precise, the question arises whether the Community regime for the import of bananas, on which the Court is now required to rule as to its validity, may be covered by the first of those exceptions in the sense that it does indeed implement a particular obligation.

(b) The precedents

87. Before discussing this point, I think it is advisable to see how the Court has defined the scope of that exception by examining the line of case-law which started with the judgment in Nakajima.

88. In that case, the Court was asked to rule on the legality of 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 (hereinafter 'Regulation No 2423/88').56 According to the applicant, one of the provisions of the regulation could not be applied inasmuch as it was incompatible with a provision of the Anti-Dumping Code adopted as part of the system of GATT 1947.57

89. In its judgment, the Court, on the premiss that the provisions of the Anti-Dumping Code, like the provisions of GATT, have the effect of binding the Community, held that it had jurisdiction to rule on the applicant's claims since '[a]ccording to the second and third recitals in the preamble to the [abovementioned] regulation, it was adopted in accordance with existing international obligations ... . It follows that the new basic regulation, which the applicant has called in question, was adopted in order to comply with the international obligations of the Community, which, as the Court has consistently held, is therefore under an obligation to ensure compliance with the General Agreement and its implementing measures'.58

90. The Court recently reaffirmed the same principle in the judgment in Case C-352/96

57 — Agreement on implementation of Article VI of the General Agreement on Tariffs and Trade, approved on behalf of the Community by Council Decision 80/271/EEC of 10 December 1979 concerning the conclusion of the Multilateral Agreements resulting from the 1973 to 1979 trade negotiations (OJ 1980 L 71, p. 1). I note that, according to the second recital in the preamble to Regulation No 2423/88, the Community anti-dumping rules were adopted in accordance with existing international obligations, in particular those arising from Article VI of the '... GATT, from the ... Anti-Dumping Code, ... and from the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the GATT (Code on Subsidies and Countervailing Duties)'. The third recital adds that 'in applying these rules it is essential, in order to maintain the balance of rights and obligations which these Agreements sought to establish, that the Community take account of their interpretation by the Community's major trading partners, as reflected in legislation or established practice'.

**OPINION OF MR TIZZANO — CASE C-377/02**

Italy v Council,\(^5^9\) in which it examined the legality of certain articles of a Community regulation on tariff quotas for imports of rice,\(^6^0\) adopted to implement Agreements concluded between the Community, Australia and Thailand following negotiations undertaken in accordance with Article XXIV(6) of GATT in order to agree with those countries upon certain compensatory adjustments required as a result of the accession of Austria, Finland and Sweden to the Community.

91. The preamble to the regulation at issue in that case referred explicitly to the fact that the decision to open the import quotas was agreed under the negotiations conducted pursuant to the abovementioned article of GATT (first recital) and that the Council recognises 'its obligations under international agreements' (eighth recital).

92. In its judgment the Court held that, contrary to the Council's contention, 'if the Community intended to implement a particular obligation entered into within the framework of GATT ... the Court must review the lawfulness of the Community act in question from the point of view of the GATT rules'. In that particular case, it was clear that by adopting the regulation in question pursuant to the abovementioned agreements 'the Community [had] sought to implement a particular obligation entered into within the framework of GATT' and it followed that the Court 'must review the legality of the Regulation in the light of the GATT rules which the applicant allege[d] [had] been infringed'.\(^6^1\)

(c) The order in OGT

93. On the other hand, the Court considered that that was not the case in its recent order in OGT Fruchthandelsgesellschaft,\(^6^2\) in which the Court, asked for a preliminary ruling on the validity of the same Community regime for the import of bananas that is at issue in the present case, not only took no account of the fact that the DSB had adopted a decision on the subject but also held that the plea of particular obligation, which we are now discussing, did not apply.

94. I recall that in that case a traditional importer of bananas from third countries brought an action against the German

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61 — Judgment in Case C-352/96 Italy v Council, paragraphs 19-21.
customs authorities concerning the levying of customs duties, in accordance with Article 18 of Regulation No 404/93 as amended, on the importation of bananas from Ecuador. The national court before which the case was brought, having noted that the DSB had found that the new Community regime was inconsistent with the WTO rules, asked the Court whether Articles I and XIII of GATT 1994 were such as to create rights which individuals might rely on directly before a national court in order to oppose the application of Article 18(1) of Regulation No 404/93 as amended.

95. As, in its view, the answer to that question could be clearly deduced from the judgment in Portugal v Council, the Court considered that it was appropriate, in accordance with Article 104(3) of the Rules of Procedure, to give its decision by reasoned order. In particular, it held that there was no reason to deviate from that judgment and that, contrary to the assertions of the plaintiff in the main proceedings, no such exceptional situation existed in that case. It merely stated, in that connection, somewhat apodictically, that ‘[t]he common organisation of the market in bananas, as introduced by Regulation No 404/93 and subsequently amended, is not designed to ensure the implementation in the Community legal order of a particular obligation assumed in the context of GATT, nor does it refer expressly to specific provisions of GATT’. 63

(d) Critical observations

96. I must say that, on further reflection, I find it impossible to agree with the Court’s answer on that occasion. 64 In my view, the features of the case called, on the one hand, for specific analysis rather than a mechanical repetition of case-law established in a different context (where there had been no DSB decision) and, on the other, for more detailed consideration of the intentions of the Community legislature in that case and the measures it took to comply with its international obligations.

97. On the first point, I find support for my view, as I have already said, in the fact that the subsequent judgment in Biret responded

63 — Ibid., paragraph 28.
64 — Most legal writers are also critical of the answer in question. See inter alia S. Peers, ‘WTO dispute settlement and Community law’ in the European Law Review, 2001, p. 605 et seq. (‘If the 1998 Regulations are not an example of the Community’s intention to implement a WTO obligation, it is hard to see what is’) (p. 615); P. Eeckhout, ‘Judicial Enforcement of WTO Law in the European Union’, in the Journal of International Economic Law, 2001, p. 91 et seq. (‘That statement, with respect, is difficult to understand and accept’) (p. 107).
very differently to the proposal that the findings in *Portugal v Council* should apply automatically to DSB decisions (see point 74 et seq. above).

98. As to the question whether the plea of particular obligation was applicable in that case, here too I consider that the dates and the detailed arrangements for amending the Community regime for the importation of bananas ought to have led the Court to reach the same conclusion in that case as it did in the precedents cited earlier (see point 87 et seq. above). Indeed there are many indications to that effect which might have justified the conclusion that in adopting the new regime the Community legislature intended to 'implement a particular obligation assumed in the context of the WTO'.

99. I note in particular that that regime had been amended by the end of the period granted to the Community to comply with the DSB decision of 25 September 1997. And, most significantly, Article 2 of Regulation No 1637/98 provided that it was to apply from 1 January 1999, the precise date on which the period of 15 months and one week, granted by the DSB for the Community to comply with that decision, expired.  

I should add that, according to the arbitration award in the case, the Community made it clear in the course of the procedure that the reasonable period of time it requested was for the purpose of 'implementing all the recommendations and rulings' of the DSB.

100. The Community measures in question also contain even more explicit statements than those which had led the Court to conclude, in the precedents examined above (see, for example the statements cited in point 91), that the Community intended to implement its obligations. In particular, as Van Parys too points out, the second recital in the preamble to Regulation No 1637/98 states clearly that 'the Community’s international commitments under the [WTO] ... should be met'. And in the same regulation, Article 20 of Regulation No 404/93 is amended to include, inter alia, a provision requiring the Commission to 'adopt measures needed to ensure respect for obligations stemming from agreements concluded by the Community under Article 228 of the Treaty' (subparagraph (e)).

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66 — Ibid., paragraph 12. My emphasis.
Lastly I should point out, as Van Parys did at the hearing, that Sir Leon Brittan, speaking on behalf of the Commission, stated in answer to a Parliamentary question that by adopting Regulation No 1637/98 and Regulation No 2362/98, '[t]he Community implemented the recommendations of the World Trade Organisation (WTO) dispute settlement body of 25 September 1997 in the bananas case by taking the necessary measures to bring the Community banana regime into conformity with WTO rules'.

It is true that neither the statements made by the Community in the course of the WTO proceedings (see paragraph 99 above) nor Sir Leon Brittan's answer to the parliamentary question are decisive in themselves for the purpose of determining whether or not the Community measures in question were intended to implement a 'particular obligation' assumed in the context of the WTO. However, in my view they give a clear indication of what is already clear from the sequence of events and the provisions cited above, namely that the aim of the Community legislature in amending the regime for the importation of bananas was precisely to bring that regime into conformity with the WTO rules as interpreted in the DSB decision.

The fact that the Community's intention was explicitly stated only in the Council regulation and not in the Commission regulations is not, in my view, decisive for present purposes, since the determining factors in this connection are the basic regulation governing the Community regime and the fact that, according to settled case-law, 'the Commission is authorised to adopt, in particular with regard to agriculture, all the measures which are necessary or appropriate for the implementation of the basic legislation, provided that they are not contrary to such legislation or to the implementing legislation adopted by the Council'.

It may therefore be inferred from these observations that, in amending the regime

67 — Written question P-4069/98 by Yvonne Sandberg-Fries to the Commission. 'Consequences of trade dispute between the USA and the European Union' (CJ 1999 E-182, p.137).


69 — Article 20(e) of Regulation No 404/93 as amended.
for the importation of bananas in question, the Community legislature intended to implement a particular obligation assumed in the context of the WTO.

106. I therefore conclude that the conditions which the Court requires in order to determine the legality of that regime in respect of its compatibility with the WTO rules were met in the OGT case and are met in the present case. And, since the DSB decision of 6 May 1999 found that the regime was not consistent with those rules, it follows that the Court, which is required to determine the matter, has no alternative but to reach a negative conclusion, that is to say to declare that the acts on which the regime in question is based are invalid.

107. In the light of the foregoing considerations, I therefore propose that in the alternative the Court should reply to the first, third and fourth questions, as reformulated, to the effect that the Community regime for the import of bananas based on Regulation No 404/93 as amended and on the regulations adopted to implement that regulation was intended to implement a particular obligation assumed by the Community in the context of the WTO. However, as the DSB decision of 6 May 1999 found, it did not remove the inconsistency with the WTO rules established by the DSB decision of 25 September 1997 and it is therefore invalid in respect of that part which is inconsistent with those rules.

B — The second question

108. By the second question, the national court is essentially seeking to ascertain whether the Community regime for the import of bananas infringes Article 4 of the EEC-Andean Pact Agreement under which the parties undertook to grant each other most-favoured-nation treatment in accordance with the provisions of Article I of GATT (see point 5 above).

109. I should point out however that, strictly speaking, there was no reason to raise that question separately, since the provision to which it refers, as I shall shortly show, does not add in any way to the obligations already incumbent on the parties under the WTO/GATT rules. Consequently the answers which the Court decides to give to the questions already examined apply equally to this one since, whether or not it takes the view that the Community regime in question is unlawful for inconsistency with those rules, there is no need to carry out the same investigation again with respect to the EEC-Andean Pact Agreement, which does not depart from those rules.

110. I note in this connection, as the Commission has, that Article 4 of that agreement was introduced in order to enable most-favoured-nation treatment to apply to States which, at the time, were parties to the
Andean Pact but not yet members of the GATT. It therefore merely extended the ambit of the GATT system *ratione personae* but did not alter the scope or nature of the obligations arising from that system.

111. Indeed, as the Commission and the Council show, the parties to the EEC-Andean Pact Agreement had no intention of contracting obligations under that agreement beyond the obligations laid down in GATT. On the contrary, they state in the preamble to the agreement that they are 'convinced of the importance of the principles of GATT'; and in Article 4 they 'reaffirm their will to conduct trade with each other in accordance with that Agreement'.

112. For these reasons, I consider that that provision cannot constitute a separate criterion of the legality of Community measures and that the answers which the Court decides to give to the questions already examined therefore apply equally to this one.

**IV — Conclusion**

In the light of the foregoing considerations, I therefore propose that the Court give the following answer to the Raad van State:

(1) The Community regime for the import of bananas based on Regulation No 404/93 of 13 February 1993 on the common organisation of the market in bananas as amended by Regulation (EC) No 1637/98 of 20 July 1998 and on the regulations adopted to implement that regulation is invalid inasmuch as it is
inconsistent with the WTO rules as established by the DSB on 25 September 1997 and confirmed by the same body on 6 May 1999.

In the alternative:

The Community regime for the import of bananas based on Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organisation of the market in bananas as amended by Regulation (EC) No 1637/98 of 20 July 1998 and on the regulations adopted to implement that regulation was intended to implement a particular obligation assumed by the Community in the context of the WTO. However, as the DSB decision of 6 May 1999 found, it did not remove the inconsistency with the WTO rules established by the DSB decision of 25 September 1997 and it is therefore invalid in respect of that part which is inconsistent with those rules.

(2) The same answers apply with respect to the compatibility of the aforesaid regime with Article 4 of the EEC-Andean Pact Agreement.