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Opinion of Advocate General Siegbert Alber in Cases C-93/02 P and C-94/02 P

Biret International SA and Etablissements Biret et Cie. SA v Council of the European Union

THE ADVOCATE GENERAL DELIVERS AN OPINION IN FAVOUR OF RECOGNISING A CLAIM FOR DAMAGES BASED ON INFRINGEMENT OF WTO LAW, WHERE THE COMMUNITY HAS FAILED TO IMPLEMENT A BINDING AWARD OF THE WTO DISPUTE SETTLEMENT BODY WITHIN THE PRESCRIBED PERIOD.

In his view, WTO law is directly applicable if the WTO Dispute Settlement Body has found a Community measure to be incompatible with WTO law and the Community has failed to implement the recommendations or decisions within the reasonable period allowed by the WTO.

Biret is a French company, trading in foodstuffs, in particular meat.

Two Community directives in 1981 and 1988 prohibited the import into the Community of meat and meat products treated with particular hormones. On 1 January 1995 the Agreement Establishing the World Trade Organisation and, *inter alia*, the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement") and the Understanding on Rules and Procedures Governing the Settlement of Disputes by the WTO Dispute Settlement Body ("DSB") entered into force for the EU.

In April 1996 the Council adopted a new EC directive which maintained the abovementioned import ban and extended it to one other hormone. On 13 February 1998 the DSB declared the rules in that directive to be incompatible with the SPS Agreement. The Community was given until 13 May 1999 within which to implement the binding recommendations of the DSB. For that purpose, the Council has before it the Commission's proposal of 24 May 2000 to amend the 1996 directive, but it has not yet been adopted.

In June 2000 Biret brought an action against the Council of the EU before the Court of First Instance of the EC, seeking compensation for damage suffered as a result of the ban on the import into the EC of beef treated with certain hormones.

The Court of First Instance dismissed the application for damages and referred to the case-law of the Court of Justice, according to which the WTO Agreement and its annexes are part of Community law, but in view of their nature and structure they do not in principle form part of the rules by which the Court of Justice reviews the legality of acts adopted by the Community institutions; the WTO rules did not create any rights for individuals on which they could rely before the Court of First Instance. There is an exception to that principle only where the Community implements a specific obligation assumed in the context of the WTO or where the Community measure refers expressly to the precise provisions of the WTO Agreements. According to the Court of First Instance, neither of those alternatives applied in the present case.

Biret appealed to the Court of Justice of the EC.

Advocate General Alber has delivered his Opinion in the case today.

The Advocate General's view is not binding on the Court of Justice. His task is to propose to the Court, in complete independence, a legal solution to the cases before him.

The Advocate General points out first that, according to settled case-law, WTO law is not directly applicable and that neither of the exceptions recognised in the case-law (implementation of a particular obligation assumed in the context of the WTO; express reference to the precise provisions of the WTO Agreements) exists here.

The Advocate General observes that after the issue of the DSB recommendations of February 1998 it was still necessary to adopt a Community measure in order to implement them. He goes on to consider whether, exceptionally, Biret should nevertheless be able to rely on the DSB recommendation and therefore directly on WTO law because the period for implementing the recommendations has long since expired. The implementation period expired in May 1999. Although the Commission has submitted a proposal to amend Community law in June 2000, the legislative procedure is still not complete, so that since May 1999 there has been no change either in the situation under WTO law or under Community law. It must therefore be asked whether Biret must accept the situation without compensation or whether, in such circumstances, it should be possible to rely on a DSB recommendation which made a binding finding of the illegality of Community law, with the result that WTO law is to be regarded as directly applicable, opening the way for a possible damages claim by Biret.

The Advocate General states that this should be the case.

He observes that a feature of the **WTO dispute resolution mechanism** is , unlike under the GATT , **that once a DSB decision or recommendation has been made, it must be unconditionally implemented.** The parties can then no longer reach a settlement or agree on an exception from their obligations. They can only discuss the period within which the DSB award is to be implemented. In the present case this was fixed at 15 months and expired in May 1999.

According to the Advocate General, the recognition of a damages claim does not restrict the freedom of action of the Community's legislative and executive organs. After the issue of a DSB recommendation or decision, the WTO contracting parties no longer have any room for manoeuvre regarding the question *whether* they implement the recommendation or decision. They cannot escape their WTO obligations by negotiating a waiver. *How* the Community establishes the conformity of its measures with its obligations under the SPS Agreement is and remains a matter for the competent Community bodies. On the basis of new scientific discoveries, they may quite possibly re-establish an import ban, this time in conformity with the SPS Agreement. The recognition of direct applicability does not found a right of the individual to demand a particular course of action, such as the lifting of the import ban, but merely a right to monetary compensation.

In the Advocate General's view, the recognition of a damages claim in such cases is in line with the case-law on failure to fulfil obligations and the liability of the Member States for non-implementation of Community law (Case C-6/90 *Francovich*, judgment of 19 November 1991).

In addition he states that there is a **fundamental right to freedom of economic activity and that it is unfair to deny a citizen a damages claim where the Community legislature, through its inaction, has continued to maintain a state of affairs contrary to WTO law for a period of four years after the expiry of the period allowed for implementation of the DSB recommendation, and thereby further unlawfully restricted the fundamental rights of the citizen.**

The Advocate General concludes that WTO law is directly applicable where the incompatibility of a Community measure with WTO law has been found in DSB recommendations or decisions and the Community has failed to implement the recommendations or decisions within the reasonable period of time allowed by the WTO.

In addition, the Advocate General examines whether the purpose of the WTO rules is to *protect the individual*. He emphasises that in States organised on market economy principles trade is primarily conducted by private individuals and, consequently, restrictions of trade have an effect on the scope of their freedom of economic activity. It is clear from the case-law of the Court that the fact that a legal rule is for the protection of general interests (here: liberalisation of world trade) does not rule out the possibility that it is also for the protection of individuals. This is the case here.

The Council has therefore infringed a rule of Community law, on which an individual may rely.

The Advocate General proposes that the Court should set aside the judgment of the Court of First Instance and refer the dispute back to it so that it can examine the additional requirements for a damages claim (loss and causality).

Unofficial document for media use only; not binding on the Court of Justice.

This press release is available in all official languages.

For the full text of the Opinion, please consult our internet page
www.curia.eu.int
at approximately 3 pm today.

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