



THE BIRET CASES: WHAT EFFECTS DO WTO DISPUTE SETTLEMENT RULINGS HAVE IN EU LAW?

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INDEX

1. Introduction	5
2. FACTS AND PROCEDURE	7
3. THE SEVINCE CASE	10
4. REASONS FOR REFUSING RELIANCE ON WTO LAW - PORTUGAL V. COUNCIL.....	11
5. FEDIOL AND NAKAJIMA – THE “IMPLEMENTATION EXCEPTIONS”	13
5.1. Express referral.....	14
5.2. Intention to implement a particular obligation.....	15
5.2.1. Intention to implement WTO rules by adhering to the WTO? 15	
5.2.2. The EU’s declaration to the WTO	16
5.2.3. Problems with the implementation exceptions	16
5.2.4. Non-implementation of DSB Report as an unlawful omission?	17
5.2.5. The implementation exceptions in their context.....	19
6. IMPLEMENTATION OF DSB RULINGS AS A NEW EXCEPTION?	20
6.1. Text of WTO law	20
6.1.1. Provisions of the DSU	22

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6.1.2. Provisions of other WTO agreements – waiver?	23
6.2. “Scope for manoeuvre” in practice	24
6.3. Interim conclusions	25
6.4. Policy reasons	25
7. CONCLUSIONS	27

1. INTRODUCTION

The creation of the European Union (hereinafter “EU” or “Community”) is, in part, a reaction of European nation-states to adapt to the process of globalisation¹. Powers have been transferred from the national to the supranational level, and strong central institutions have been built upon principles directly opposed to national sovereignty –such as the principle of supremacy of EU law over national law and the principle of direct effect of EU law. Given the thrust towards supranational integration within the EU itself, it seems surprising that the EU is still seeking its appropriate role in a global framework.

EU institutions have been reluctant to subject themselves unconditionally to legal rules of global validity –at least, as far as the GATT² and the World Trade Organization (hereinafter “WTO”) are concerned. The European Court of Justice (hereinafter “ECJ” or “Court of Justice”) has consistently held that GATT and WTO law cannot be relied on in the EU legal order³. It found that not only individuals but also EU Member States are barred from relying on WTO rules to challenge the conduct of EU institutions⁴. The EU’s second court⁵, the Court of First Instance (hereinafter “CFI”), ruled that this exclusion is equally valid for actions for damages brought under Article 288 of the EC Treaty⁶. The EU courts’ reasoning for refusing reliance on WTO law has been explained with the formula that the “nature and structure” of the GATT and WTO agreements prevent invocability in any form. The underlying reasons, expressed in more legal terms, have changed somewhat since the creation of the WTO⁷.

¹ See, for example, MANUEL CASTELLS, *End of Millennium (The Information Age: Economy, Society and Culture, vol. III)* 348-357 (2000).

² “GATT” stands for “General Agreement on Tariffs and Trade”, attached in Annex 1A the Agreement establishing the World Trade Organization (hereinafter “WTO Agreement” in capital letters).

³ Starting with the International Fruit case. Joined cases 21 to 24-72, *International Fruit Company v. Produktschap voor Groenten en Fruit*, [1972] ECR 1219.

⁴ Regarding the GATT, see case C-280/93, *Germany v. Council*, [1994] ECR I-4973; regarding the WTO, see case C-149/96, *Portugal v. Council*, [1999] ECR I-8395. Contra, regarding the Agreement on Trade-related Aspects of Intellectual Property Rights and the Agreement on Technical Barriers to Trade, see case C-377/98, *Netherlands v. European Parliament and Council*, [2001] ECR I-7079, at 53.

⁵ Case T-18/99, *Cordis Obst und Gemüse Grosshandel v. Commission*, [2001] ECR II-913; case T-30/99, *Bocchi Food Trade International v. Commission*, [2001] ECR II-943; case T-52/99, *T.Port v. Commission*, [2001] ECR II-981. Advocate General Lenz, however, did not exclude the possibility that non-compliance with GATT dispute settlements could give rise to liability for damages. Opinion of the Advocate General, case C-469/93, *Amministrazione delle Finanze dello Stato v. Chiquita Italia*, [1995] ECR I-4533, at 21.

⁶ Treaty establishing the European Community, consolidated version OJ 2002 C 325, pg. 33.

⁷ Beyond the WTO agreements, to the contrary, the EU courts have been much more flexible –even recognizing direct effect– in the case of asymmetrical economic international agreements –e.g., the Yaoundé Convention. Convention of Association between the EEC and the African States and Madagascar, OJ 1964 pg. 1430 and OJ 1970 L 282, pg. 1.

There are strong reasons for not allowing reliance on WTO rules by individuals – in particular for not conceding direct effect of such rules.⁸ Nonetheless, there are also legal and policy arguments in support of the view that it is to be preferred that WTO rules are capable of being relied on –at least to a certain extent⁹. In *Biret*, however, it was not necessary to address these fundamental questions about the relationship between WTO and EU law. In two ways, the effects of the *Biret* case were more limited.

First, the Court of Justice was not directly confronted with the question of the direct effect of WTO rules. The question at issue was whether *Biret* could claim payment for damages suffered as a result of EU measures' incompatibility with WTO law. This issue is distinct from the question of whether an individual can enforce a right conferred upon it by WTO law. It also differs from the direct challenge of EU provisions for reasons of incompatibility with WTO law in an action for annulment¹⁰. In an action for damages under Article 288 EC, the contested EU measure remains valid even after the finding of unlawfulness of the measure. These more limited consequences have led some commentators to argue that it is appropriate to allow reliance on WTO law in actions for damages but not in other, more directly challenging, actions¹¹.

Second, and more importantly, the *Biret* case featured the more limited problem of the effect of WTO dispute settlement rulings on EU law, not the whole body of WTO as such.

⁸ See, in particular, John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 A.J.I.L 310 (1992). See, also, John H. Jackson, *Sovereignty-Modern: A New Approach to an Outdated Concept*, 97 A.J.I.L 782 (2003).

⁹ See, in particular, Petersmann. For example, ERNST-ULLRICH PETERSMANN, "Justice as Conflict Resolution: Proliferation, Fragmentation and Decentralization of Dispute Settlement in International Trade", *EUI Working Paper Law No. 2004/10*, available at <http://www.iue.it/PUB/law04-10.pdf>. See also, for example, THOMAS COTTIER, "A Theory of Direct Effect in Global Law", in ARMIN VON BOGDANDY, PETROS C. MAVROIDIS AND YVES MÉNY), *European Integration and International Co-ordination (in honour of Claus-Dieter Ehlermann)*, at 112-113.

¹⁰ EC Treaty, art. 230.

¹¹ MERVI PERE, "Non-Implementation of WTO Dispute Settlement Decisions and Liability Actions", in *Nordic Journal of Commercial Law* No. 1 (2004), at 37, available at http://www.njcl.utu.fi/1_2004/article1.pdf. The EU courts, however, have so far refrained from distinguishing between the types of legal action involved when analysing WTO law's effect in the EU legal order. To the contrary, they have used similar reasoning in different types of actions. It may follow that, although the solutions proposed in this paper are, in principle, only tailored for the facts of the *Biret* case, i.e., for cases brought under Article 288 EC, they might also have wider applications.

2. FACTS AND PROCEDURE

Biret International SA (hereinafter “Biret”) was a company incorporated under French law, whose main business was trade in various agri-foodstuffs, in particular meat. Biret imported, among other things, meat and meat products from the United States in the EU. In December 1995, a French court opened judicial liquidation proceedings in respect of the company and provisionally set the date for cessation of payments on 28 February 1995. In June 2000, Biret brought an action under Article 235 EC and the second paragraph of Article 288 EC before the Court of First Instance for compensation for damages resulting from the EU institutions. It alleged that the EU was guilty of the wrongful adoption and maintenance of several Directives. The Directives in question, Directives 81/602¹², 88/146¹³ and 96/22¹⁴, prohibit the importation into the EU of meat and meat products from animals treated with certain hormones. As a result of the EU measures, Biret was prevented from importing certain meat products from the United States.

In order to prove the unlawfulness of the Directives, Biret alleged before the CFI, inter alia, that the measures had been adopted and maintained in breach of the Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter “SPS Agreement”). The SPS Agreement forms part of WTO law¹⁵. Biret presented the reports of two WTO panels and one of the Appellate Body in the Hormones case¹⁶ as evidence that the Directives in question were incompatible with the SPS Agreement. Those reports originated from two complaints brought by the United States and Canada before the WTO dispute settlement body (hereinafter “DSB”) in 1996. These complainants considered that the EU¹⁷ was in breach of its obligations under WTO law, because the Directives restricted exports to the Community of beef and veal treated with certain hormones. Both panels found the Directives to be inconsistent with provisions of the SPS Agreement¹⁸. On appeal, the Appellate Body largely confirmed the findings by the panels. The Appellate Body report required the EU to bring the Directives into conformity with its obligations under the SPS

¹² Council Directive 81/602/EEC concerning the prohibition of certain substances having a hormonal action and of any substances having a thyrostatic action of 31 July 1981, OJ 1981 L 222, pg. 32.

¹³ Council Directive 88/146/EEC prohibiting the use in livestock farming of certain substances having a hormonal action of 7 March 1988, OJ 1988 L 70, pg. 16.

¹⁴ Council Directive 96/22/EEC concerning the prohibition on the use in stockfarming of certain substances having a hormonal or thyrostatic action and of B-agonists, and repealing Directives 81/602/EEC, 88/146/EEC and 88/299/EEC of 29 April 1996, OJ 1996 L 125, pg. 3.

¹⁵ SPS Agreement is included in Annex 1A to the WTO Agreement.

¹⁶ EC – Measures Concerning Meat and Meat Products, Panel Report, WT/DS26/R/USA, 18 August 1997; EC – Measures Concerning Meat and Meat Products, Panel Report, WT/DS48/R/CAN, 18 August 1997; EC – Measures Concerning Meat and Meat Products, Appellate Body Report, WT/DS26/AB/R and WT/DS48/AB/R, 16 January 1998 (hereinafter “EC – Hormones”).

¹⁷ In this paper, for the sake of simplicity, “EU” refers equally to the European Union, the European Economic Communities (“EEC”) and the European Communities (“EC”).

¹⁸ EC – Hormones, Appellate Body Report, supra note 16, at 255.

Agreement. As the EU had stated that it intended to comply with its WTO obligations but that it needed a reasonable period of time within which to do so, it was granted a 15-month period under Article 21(3) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter "DSU")¹⁹. That period expired on 13 May 1999.

The Court of First Instance, in two judgments²⁰, dismissed Biret's action as unfounded²¹. According to traditional ECJ case law, it found that, WTO law could not, in principle, be invoked directly. In its assessment, the CFI briefly addressed the impact of the report of the Appellate Body only marginally in two paragraphs²². On appeal, the Court of Justice²³ found, however, that the CFI's analysis with regard to the effects of the Appellate Body decision was insufficient²⁴. Nonetheless, the ECJ did not rule on the issue but dismissed Biret's claim on a technicality. The Court of Justice found that "in the present case in the absence of any damage allegedly occurring after 13 May 1999, the Community cannot, on any view, have incurred liability."²⁵

The ECJ's circumvention of the substance of Biret's claim is not novel. The same question had been raised in Atlanta²⁶ and in OGT²⁷. In Atlanta, a WTO Appellate Body report had established the incompatibility of the EU's legislation on bananas with GATT and GATS²⁸ provisions²⁹. The applicant claimed that the Appellate Body decision allowed it to rely on WTO rules to challenge the EU measures at issue. The

¹⁹ The DSU is included as Annex 2 to the WTO Agreement.

²⁰ Case T-174/00, *Biret International v. Council*, [2002] ECR II-17, and Case T-210/00, *Établissement Biret v. Council*, [2002] ECR II-47. The two judgments are virtually identical. In this paper, where the Court of First Instance is quoted as "Biret", the quotation refers to the judgment in case T-174/00, *Biret International*. The same applies to the European Court of Justice's judgments. See *infra* note 24.

²¹ Case T-174/00, *Biret International v. Council*, [2002] ECR II-17, at 68.

²² *Id.* at 66 and 67.

²³ Case C-93/02 P, *Biret International v. Council*, *Biret International v. Council*, [2003] ECR I-10497, and case C-94/02 P, *Établissement Biret v. Council*, *Biret International v. Council*, [2003] ECR I-10565. As the CFI judgments, the two judgments by the European Court of Justice are virtually identical. In this paper, where the European Court of Justice is quoted as "Biret", the quotation refers to the judgment in case C-93/02 P, *Biret International*.

²⁴ Case C-93/02 P, *Biret International v. Council*, *Biret International v. Council*, [2003] ECR I-10497, at 56, at 57, and at 65.

²⁵ *Id.* at 64. To reach its conclusions, the Court reversed the standard order of analysis. Traditionally, in actions brought under Articles 235 EC and 288 EC, examination of whether the contested measure is unlawful is made before the analysis of whether the complainant suffered damages.

²⁶ Case C-104/97 P, *Atlanta v. European Community*, [1999] ECR I-6983.

²⁷ Case C-307/99, *OGT Fruchthandels-gesellschaft v. Hauptzollamt Hamburg*, [2001] ECR I-3159.

²⁸ "GATS" stands for "General Agreement on Trade in Services", and is attached as Annex 1B to the WTO Agreement.

²⁹ EC – Regime for the Importation, Sale and Distribution of Bananas, Appellate Body Report, WT/DS27/AB/R, 9 September 1997, at 255.

ECJ, however, dismissed that argument on procedural grounds³⁰. Similarly, at the time of the proceedings before the ECJ in the OGT case, a WTO panel established pursuant to Article 21(5) DSU, had found that the revised EU legislation on bananas continued to infringe the GATT provisions. The complainant had apparently alleged in the procedure before the national court that the adoption of the panel decision led to the EU measures being incompatible with WTO law³¹. In its request for a preliminary ruling under Article 234 EC, the national court asked one general question to the ECJ. The Court of Justice construed this question as not including the issue whether the panel decision altered the GATT's effect in EU law³². Nonetheless, in *Van Parys*, which on the facts is virtually identical to the OGT case –featuring the same Appellate Body report and contested EU measures– the Court of Justice is asked more directly to respond to this question³³.

The only statements on the substance of the impact of DSB decisions³⁴ on the question of invocability of the WTO agreements in EU law were made by the CFI in *Chemnitz*³⁵, in the *Bananas* cases of 20 March 2001³⁶ and in *Biret*. In addition, there are the Opinions of the Advocates General in *Atlanta*³⁷, in *Biret*³⁸ and, subsequently, in *Van Parys*³⁹. All statements, except those of Advocate General Alber in *Biret* and Tizzano in *Van Parys*, reject the idea that the adoption of a DSB report could change the effect of the WTO agreements in EU law⁴⁰.

The remainder of this paper is organised as follows. First, it will examine whether existing case law could apply, by analogy, to *Biret's* situation. As the CFI in *Biret* relied heavily on the *Portugal v. Council* judgment, this paper will then examine the Court's reasoning in that case. In the same case, the Court also recognized two exceptions to the rule of non-reliance –the *Nakajima* and *Fediol* exceptions– whose application to *Biret's* case will then be discussed. Finally, the analysis will focus on

³⁰ *Atlanta*, supra note 26, at 19-22.

³¹ *Fruchthandelsgesellschaft*, supra note 27, at 19.

³² *Id.* at 20.

³³ Case C-377/02, *Firma Leon Van Parys v. Belgisch Interventie- en Restitutiebureau*, pending.

³⁴ The concept of "DSB" ruling or decision includes, for the purposes of this paper, both panel and Appellate Body reports, provided that they constitute a definitive resolution of a dispute brought before the WTO adjudicators. See DSU, arts. 16(4) and 17(14).

³⁵ Case T-254/97, *Fruchthandelsgesellschaft Chemnitz v. Commission*, [1999] ECR II-2743.

³⁶ *Cordis Obst und Gemüse Grosshandel v. Commission*, supra note 5, at 59; *Bocchi Food Trade International v. Commission*, supra note 5, at 64; and *T.Port v. Commission*, supra note 5, at 59.

³⁷ Opinion of the Advocate General, case C-104/97 P, *Atlanta v. European Community*, [1999] ECR I-6983.

³⁸ Opinion of the Advocate General, case C-93/02 P, *Biret International v. Council*, [2003] ECR I-10497, at 51.

³⁹ Opinion of the Advocate General, case C-377/02, *Firma Leon Van Parys v. Belgisch Interventie- en Restitutiebureau*, [2004] not yet published.

⁴⁰ Advocate General Lenz also briefly touched upon the topic of non-compliance with GATT dispute settlement resolutions. *Chiquita Italia*, Opinion of the Advocate General, supra note 5, at 21.

the question of whether an additional exception to the general rule of non-reliance on WTO law would be warranted.

3. THE SEVINCE CASE⁴¹

A finding that WTO provisions interpreted in DSB rulings can be relied upon in EU law appears to receive some support in the case law of the ECJ. In *Sevince*⁴², the Court of Justice was confronted with the question of whether an act of implementation of a body set up by an international agreement, to which the EU is a party, may be relied on before EU courts, even where the provisions of that agreement could not be relied on.

The case in *Sevince* concerned the Association Agreement between the Community and Turkey⁴³. This agreement established a Council of Association upon which decision-making powers were conferred to implement provisions of the agreement⁴⁴. The question before the Court was whether two decisions by the Council of Association could be directly invoked by individuals before Community courts. The Council of Association adopted these decisions in implementation of two articles of the agreement and its additional protocol⁴⁵. The critical issue underlying the dispute was that the ECJ had previously found in *Demirel*⁴⁶ that the two articles “serve to set out a programme and are not sufficiently precise and unconditional to be capable of governing directly the moment of workers”⁴⁷ and, as a result, “do not constitute rules of Community law which are directly applicable in the internal order of the member States.”⁴⁸ It follows that what the Court essentially held in *Sevince* was that implementing acts of a body established by an international agreement renders its provisions, which were not directly invocable by themselves, directly effective. This reasoning could be transposed, by analogy, to *Biret*’s case. However, there are certain factors which may speak against an analogous application of the *Sevince* rule.

⁴¹ Several other cases before the ECJ have examined direct effectiveness of the EEC-Turkey Agreement and implementing decisions by the Council of Association. See, for example, case C-262/96, *Sürül v. Bundesanstalt für Arbeit*, [1999] ECR I-2685.

⁴² Case C-192/89, *Sevince v. Staatssecretaris van Justitie*, [1990] ECR I-3461

⁴³ Agreement establishing an Association between the European Economic Community and Turkey, concluded on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963, OJ 1973 C 113, pg. 1.

⁴⁴ EEC-Turkey Association Agreement, art. 22. *Id.*

⁴⁵ *Sevince*, *supra* note 42, at 21.

⁴⁶ Case 12/86, *Demirel v. Stadt Schwabisch Gmund*, [1987] ECR 3719.

⁴⁷ *Id.* at 23.

⁴⁸ *Id.* at 25.

First, it may well be that in the *Sevince* case only the two provisions at issue were not directly effective, while the EEC-Turkey Agreement as a whole may have been of such nature as to allow, in principle, invocability by individuals⁴⁹. Unlike its statements on the GATT and WTO agreements, the ECJ did not explicitly find that this agreement could not be relied upon⁵⁰. The nature and structure of the WTO system, however, was found to preclude reliance on individual provisions of WTO law⁵¹.

Second, the implementing acts in *Sevince* consisted of decisions taken by a political organ laying down more detailed conditions for the rights and obligations contained as programmatic ideas in the Association Agreement. In *Biret*, however, the “implementing” act was a (quasi-)judicial decision, which did not implement the provisions of the SPS Agreement in greater detail but simply enforced them. The Appellate Body report is thus merely declaratory in nature. For these reasons, the *Sevince* judgment can only be of limited guidance to the present case⁵².

4. REASONS FOR REFUSING RELIANCE ON WTO LAW - PORTUGAL V. COUNCIL

The Court of Justice may take into consideration several underlying concerns when refusing to examine the lawfulness of EU measures in the light of WTO law. This paper, however, will only examine the legal reasons actually stated by the Court of Justice.

In *Portugal v. Council*, the complainant claimed that the Community’s decision approving two Memoranda of Understanding on market access for textile products originating in the Community and Pakistan or India was adopted in breach of certain rules and principles of the WTO. The Court of Justice, however, rejected the claim that Portugal could rely on WTO law to challenge the validity of the Council decision.

Granting reliance on WTO law, it can be assumed, would lead to private suits, as a result of which measures contrary to WTO law would be likely to be annulled or, in

⁴⁹ *Sevince*, supra note 42, at 20, and *Demirel*, supra note 46, at 15.

⁵⁰ The Advocate General in *Sevince* addressed this issue somewhat more directly and found that the object and structure of the EEC-Turkey Agreement did not prevent reliance on certain of its provisions after implementation by the Council of Association. Opinion of the Advocate General, case C-192/89, *Sevince v. Staatssecretaris van Justitie*, [1990] ECR I-3461, at 49.

⁵¹ The main difference between the EEC-Turkey Agreement and the WTO system would be that the latter as a whole is more flexible. In this sense, regarding the GATT, see *Sevince*, Advocate General, supra note 50, at 45-47.

⁵² Contra: NIKOLAOS LAVRANOS, *Die Rechtswirkung von WTO panel reports im Europäischen Gemeinschaftsrecht sowie im deutschen Verfassungsrecht*, *Europarecht* (1999), at 297 and 298.

actions under Article 288 EC, lead to serious financial consequences⁵³. In other words, the EU would be judicially forced in EU and national, courts to implement its WTO commitments –amending its legislation to conform with WTO law almost immediately⁵⁴. However, what the Court really objected to in *Portugal v. Council* was not the pressure upon the EU institutions to modify WTO-inconsistent measures but that other WTO members are under no equivalent obligations. If the EU's major trading partners, at the same time, do not provide for the possibility to rely on WTO rules before municipal courts, their legislation can be maintained –even if flagrantly incompatible with WTO law. Hence, the Court noted that “the lack of reciprocity in that regard on the part of the Community's trading partners ... may lead to disuniform application of the WTO rules.”⁵⁵

Implementation of WTO commitments is a legal obligation under public international law⁵⁶. However, upon intervention of the WTO adjudicatory system, only responsibility under international law is incurred⁵⁷. Not surprisingly, WTO members in practice negotiate the implementation of existing WTO commitments. They may occasionally use the threat of non-implementation to extract further concessions in negotiations on future WTO agreements, where negotiation is simultaneous to the implementation process. The Court in *Portugal v. Council* found that “the system resulting from those [WTO] agreements nevertheless accords considerable importance to negotiation between the parties.”⁵⁸

In order to avoid a “lack of reciprocity”, i.e., dissimilar degrees of compliance with WTO law, the Court of Justice grants the EU's political authorities the necessary freedom to bargain the implementation of WTO commitments with other WTO members:

“To accept that the role of ensuring that those rules comply with Community law devolves directly on the Community judicature would deprive the legislative or executive organs of the Community of the scope for manoeuvre enjoyed by their counterparts in the Community's trading partners.”⁵⁹

⁵³ The possibility of being held liable, coupled with the threat of having to pay damages, could be expected to lead the EU legislator to modify its measures quite rapidly.

⁵⁴ Private suits before European courts can be expected to be brought in larger numbers than complaints by WTO members under the WTO dispute settlement system.

⁵⁵ *Portugal v. Council*, supra note 4, at 45 (emphasis added).

⁵⁶ In this sense, STEFAN GRILLER, “Enforcement and Implementation of WTO Law in the European Union”, in FRITZ BREUSS, STEFAN GRILLER AND ERICH VRANES (EDS.), *The Banana Dispute - an Economic and Legal Analysis* (2003), at 282.

⁵⁷ Unlike the situation under Article 288 EC, where eventual payment of damages for its extra-contractual liability is imposed on the Community itself, the financial burden resulting from “retaliation” under WTO law is suffered by EU operators.

⁵⁸ *Portugal v. Council*, supra note 4, at 36.

⁵⁹ *Id.* at 46.

The “scope for manoeuvre” seems thus to be instrumental to obtaining reciprocal and balanced implementation of WTO commitments⁶⁰. The relative freedom enjoyed by the Community’s executive and legislative bodies would be used as leverage to negotiate with other WTO members to bring their legislation into WTO conformity⁶¹. In the absence of a scope for manoeuvre, the EU’s political organs would forego “the possibility afforded by Article 22 of that [DSU] memorandum of entering into negotiated arrangements even on a temporary basis.”⁶²

However, while the Court held that the EU’s political organs should be granted sufficient room to negotiate effectively with other WTO member to ensure that one goal of the WTO agreements –a certain reciprocity in implementation– was guaranteed, the Court also recognized the existence of exceptions to the principle that individuals cannot rely on provisions of WTO law before EU courts.

5. FEDIOL AND NAKAJIMA – THE “IMPLEMENTATION EXCEPTIONS”⁶³

In *Portugal v. Council*, the Court stated that “only where the Community intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the precise provisions of the WTO agreements, that it is for the Court to review the legality of the Community measure in question in the light of the WTO rules”⁶⁴ and referred to the *Fediol* and *Nakajima* cases.

In *Fediol*⁶⁵, an action for annulment was brought against a decision by the European Commission (hereinafter “Commission”) adopted pursuant to Regulation 2641/84⁶⁶. Under that Regulation, the Commission was required to examine whether the conduct of certain non-Member states amounted to “illicit commercial practices”. Article 2(1) of Regulation 2641/84 defined illicit commercial practices as “any international trade practices attributable to third countries which are

⁶⁰ In spite of the wording of paragraph 46, which could be interpreted in a different sense, as it does not clearly state that the “scope for manoeuvre” is necessarily a bargaining chip.

⁶¹ See, for example, ANTONIS ANTONIADIS, *WTO law and the EU: a nexus of reactive, coactive and proactive approaches*, Paper presented in Bologna (2004), available at www.jhubc.it/ecpr-bologna/docs/423.pdf, at 27.

⁶² *Id.* at 40.

⁶³ The term “implementation exceptions” was launched by Eeckhout. See PIET EECKHOUT, “Judicial Enforcement of WTO Law in the European Union - Some Further Reflections” in *Journal of International Economic Law* 91, 104 (2002).

⁶⁴ *Portugal v. Council*, *supra* note 4, at 49.

⁶⁵ 70/87, *Fediol v. Commission*, [1989] ECR 1781.

⁶⁶ Council Regulation 2641/84 on the strengthening of the common commercial policy with regard in particular to protection against illicit commercial practices of 17 September 1984, OJ 1984 L 252, pg. 1.

incompatible with international law or with generally accepted rules.”⁶⁷ The ECJ found that GATT could be relied on in that case, in principle because of the reference to “international law” –a category in which GATT provisions were included.⁶⁸

In *Nakajima*⁶⁹, the applicant challenged a Regulation adopted in an anti-dumping case⁷⁰ on the ground that a provision of the basic Regulation governing the procedure of anti-dumping cases⁷¹ was not consistent with an article in the WTO Anti-Dumping Code⁷². The Court of Justice found that the basic procedural Regulation had been adopted to comply with the EU’s international obligations. Therefore, the Court examined the Regulation’s compatibility with the WTO provisions at issue⁷³.

In *Biret*, the CFI rejected the claim that the *Fediol* and *Nakajima* exceptions were applicable. It did so by referring only to the provisions of the SPS Agreement itself:

“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 [*Fediol* and *Nakajima*]. 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.”⁷⁴

This finding, however, does not examine how the Appellate Body report relates to the above-mentioned exceptions.

5.1. EXPRESS REFERRAL

Under the *Fediol* exception, an EU measure implementing WTO law can only be challenged if it refers expressly to the WTO provisions or ruling⁷⁵. Moreover, the

⁶⁷ *Fediol*, supra note 65, at 2 (emphasis added).

⁶⁸ *Id.* at 19.

⁶⁹ Case C-69/89, *Nakajima All Precision v. Council*, [1991] ECR I-2069.

⁷⁰ Council Regulation (EEC) No 3651/88 imposing a definitive anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan of 23 November 1988, OJ 1988 L 317, pg. 33.

⁷¹ Council Regulation on protection against dumped or subsidized imports from countries not member of the European Economic Community of 11 July 1988, OJ 1988 L 209, pg. 1.

⁷² Agreement of Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, attached in Annex 1A to the WTO Agreement.

⁷³ *Nakajima*, supra note 69, at 30-32.

⁷⁴ *Biret*, Court of First Instance, supra note 21, at 64.

⁷⁵ *OGT Fruchthandelsgesellschaft*, supra note 27, at 28; *Bocchi Food Trade International*, supra note 5, at 64.

Court of Justice not only states that the reference must be express, but it also requires that the expression be contained in the Community measure itself⁷⁶.

As the CFI pointed out, the fact that the EU measures in question were adopted before the DSB report was issued and, even, before the SPS agreement entered into force, makes it impossible for the measures to refer expressly to the relevant WTO law⁷⁷.

5.2. INTENTION TO IMPLEMENT A PARTICULAR OBLIGATION

5.2.1. Intention to implement WTO rules by adhering to the WTO?

While WTO members are under a general obligation to implement their WTO commitments⁷⁸, the requirement to comply with adopted DSB reports could be interpreted as an additional, distinguishable obligation resting upon WTO members. In this sense, it would seem possible to qualify it as “a particular obligation assumed in the context of the WTO.”⁷⁹

To prove the EU’s intention to implement this particular obligation, the centrality of the dispute settlement mechanism to the working of the WTO system should be highlighted. It may be argued that this mechanism is of such importance to the whole WTO system that the EU, by the very act of adhering to the WTO, has accepted the obligation of compliance with DSB rulings⁸⁰. In other words, by signing the DSU the EU expressed its intention to honour a particular obligation, i.e., the obligation to comply with DSB reports. In addition, it could be argued that the EU’s practice, since the establishment of the WTO dispute settlement system, of frequently using the dispute system⁸¹, is evidence of its intention to implement this particular obligation.

⁷⁶ Portugal v. Council, supra note 4, at 49.

⁷⁷ Interestingly, the CFI does not mention Directive 96/22, which was adopted before the Hormones report of the Appellate Body but after the entry into force of the WTO agreements, finding that the damages eventually suffered by Biret would, in any case, only extend to 7 December 1995.

⁷⁸ Article XVI (4) of the WTO Agreement.

⁷⁹ Portugal v. Council, supra note 4, at 49 (emphasis added). Nonetheless, it would also seem possible to argue that the “particular obligation” refers not to the generic obligation to implement DSB reports but to the specific recommendations of each DSB report individually. Under such an interpretation, proving the EU’s intention to implement the recommendations of the Hormones report, i.e., to bring Directives 81/602, 88/146 and 96/22 in conformity with the WTO provisions in question would be much more difficult.

⁸⁰ Biret in fact made this argument. Biret, European Court of Justice, supra note 24, at 41, and, more clearly, in Biret, Advocate General, supra note 38, at 18.

⁸¹ KARIN LEITNER AND SIMON LESTER, “WTO Dispute Settlement 1995-2002: A Statistical Analysis”, *Journal of International Economic Law* 251 (2003).

5.2.2. The EU's declaration to the WTO

In the *Hormones* case, the EU made a declaration to the WTO informing that it would comply with the findings of the Appellate Body report. Advocate General Alber rejected the contention that such a declaration could be binding in EU law. In his view, such a declaration would only have effects on the international plane, as it was addressed to the WTO and as its purpose was to confirm that the EU intended to honour its international obligations under WTO law⁸². Thus, the declaration would have no impact on EU law itself⁸³. This conception, however, fails to take into account that, while the declaration would not impose obligations under EU law, it could still be seen as constituting proof of the EU's intention "to implement a particular obligation assumed in the context of the WTO." To inquire about the intention to implement obligations assumed in WTO law is an examination imposed by EU law, not international law.

5.2.3. Problems with the implementation exceptions

It is likely that the Court of Justice would refuse to accept evidence of the EU's intention to implement obtained from sources outside the sphere of EU law⁸⁴. Although the EU's decision to adhere to the WTO was incorporated into EU law by virtue of Decision 94/800/EC⁸⁵, it could be argued that the assumption of the particular obligation to comply with DSB reports is derived from the WTO system, not directly from EU law. Similarly, examining how the EU reacted to the adoption of DSB rulings in practice also concerns the implementation of WTO law. Finally, the EU declaration to the WTO may, as argued by Advocate General Alber, be interpreted as remaining within the sphere of WTO law⁸⁶.

Even if evidence on the EU's intention to implement the DSB ruling could successfully be presented, the plaintiff would be required to prove that the Community measure in question infringes the WTO rule of law⁸⁷. The problem in the

⁸² *Biret*, Advocate General, *supra* note 38, at 68; *Van Parys*, Advocate General, *supra* note 39, at 102

⁸³ *Biret*, Advocate General, *supra* note 38, at 69.

⁸⁴ Quite possibly, the ECJ might require that, if not contained in the measure at issue itself, the expression of intention be at least contained in an EU legal instrument. The reason would presumably be that the *Nakajima* analysis aims at ensuring the internal coherence (i.e., consistency between intention and actual implementation) of an EU measure.

⁸⁵ Council Decision 94/800/EC 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 of 22 December 1994, OJ 1994 L 336, pg. 1.

⁸⁶ Arguably, a reply by a European Commissioner to a question of the European Parliament, as occurred in the *Van Parys* case, would be within the sphere of EU law. *Van Parys*, Advocate General, *supra* note 39, at 101-102. A different question would be, however, whether a single Commissioner could validly express the Community's intention to implement.

⁸⁷ By analogy, case C-352/98 P, *Bergaderm v. Commission*, [2000] ECR I-5291, at 42.

Biret case, however, was that the EU had not yet adopted an implementing measure of the Hormones report. Nonetheless, the fact that the EU had not adopted a replacing measure does not necessarily exclude the application of the implementation exceptions. It may be argued that the intention to implement refers retroactively to the Directives held incompatible with WTO law. The term “intention to implement” could be interpreted in the sense that the expression of intention is independent of the act of implementation itself. The Court of Justice found that “only where the Community intended to implement a particular obligation assumed in the context of the WTO (...) it is for the Court to review the legality of the Community measure in question in the light of the WTO rules.”⁸⁸ From a purely textual perspective, as the Court merely speaks of “the measure in question”, it is thus not necessary that the expression of the intention be prior or contemporary to the adoption of the Community measure. Therefore, it could be argued that the intention to implement refers to whatever measure is in force after the expiry of the deadline set for implementation of the DSB ruling in the subject matter of that ruling. If no new measure has been adopted, the analysis would revert to the pre-existing measure⁸⁹. However, the ECJ is not likely to accept such reasoning. The Court seems to assess the internal cohesion of the EU measure, by examining whether the measure’s text conforms to the objective stated in the EU institution’s expression of intention in the measure itself or issued during the process of adoption of that measure. As a result, a measure adopted prior to a DSB report would not be assessed in the light of a subsequently issued report.

The absence of an implementing act raises a novel issue –whether by failing to implement the DSB ruling, the EU engaged in an unlawful inaction.

5.2.4. Non-implementation of DSB Report as an unlawful omission?

Biret attempted to obtain damages as a consequence of the Community’s unlawful action –i.e., the adoption and maintenance of the Directives. However, it might also be possible to argue that the Community’s inaction was unlawful. One of the ways in which EU institutions can “infringe a rule of law” is by failing to comply with an obligation to act⁹⁰. In Adams, the ECJ seemed to accept that the Community’s failure to act could give rise to damages under Article 288 EC. Earlier on in Lütticke, the ECJ had examined whether the Commission’s failure to act infringed Article 288 EC⁹¹. However, after a relatively lengthy analysis, it reached the

⁸⁸ Portugal v. Council, supra note 4, at 49.

⁸⁹ In other words, when expressing its intention, the Community would not only commit to adopting a WTO-compatible measure but also, implicitly, accept that at the expiry of the deadline the then existing measure within the same field of law as that contained in the DSB report is examined in the light of WTO law - whether adopted before or after that report.

⁹⁰ The case law on actions for damages as a result of the Community’s failure to act is relatively sparse.

⁹¹ Case 145/83, Adams v. Commission, [1985] ECR 3538. However, the judgment in Adams contains a certain ambiguity. While the ECJ in paragraph 44 clearly stated that the Commission had

conclusion that the Commission had not breached its obligation to act⁹². More clearly, the CFI found in *CEVA Santé Animale* that the Community's inaction rendered it liable under Article 288 EC⁹³. Furthermore, the parallelism of the case law on state liability may serve to illustrate that a failure to act can be a ground for a finding of unlawfulness in an action under Article 288 EC⁹⁴.

In the *Biret* case, the biggest obstacle to invoking an unlawful failure to act is likely to be the requirement that, under Article 288 EC, Community law must have been infringed⁹⁵. In *Biret*, strictly speaking, the obligation to act emanates from WTO law and was issued by the DSB –a WTO institution. Against this stance, two lines of argumentation are possible. First, it could be argued that WTO law has been incorporated into EU law by virtue of Decision 94/800/EC⁹⁶. The WTO agreements form part of the EU legal order and are binding upon EU institutions⁹⁷. By extension, a DSB ruling, being itself an “executing” act of the WTO agreements, forms part of the EU legal order⁹⁸. Second, although *Biret*'s plea is based on an autonomous action under Article 288 EC⁹⁹, the comparison to the Court's case law under Article 232 EC may be illustrative. In principle, Article 232 EC is even more stringent by requiring that an “infringement of the [EC] Treaty” must be present –a wording which, according to Schermers and Waelbroeck, “appear[s] to restrict the action against failure to act to the non-fulfillment of only those obligations which are enumerated in the Treaties. But in practice, any obligation incumbent upon the Community institutions can be based on the Treaties so that there is virtually no restriction engendered by these formulations.”¹⁰⁰ In line with these authors'

failed to perform a duty imposed on it, in the operative part of the judgment (and in paragraph 53) the Court did not state whether the Commission's action or omission was wrongful.

⁹² Case 4/69, *Lütticke v. Commission*, [1971] ECR 325.

⁹³ In the operative part of the judgment, the CFI held that “[t]he Commission's inaction between 1 January and 25 July 2001 is such as to render the Community liable.” Joined cases T-344/00 and T-345/00, *CEVA Santé Animale v. Commission*, [2003] ECR II-229. Also, in paragraph 103 of the judgment, the Court spoke of the Commission's inaction constituting a breach of law. *Id.* at 103.

⁹⁴ In this sense, the ECJ in *Brasserie du Pêcheur* noted that “Community law may impose upon [the national legislature or Community institution] obligations to achieve a particular result or obligations to act or refrain from acting which reduce its margin of discretion, sometimes to a considerable degree.” Joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur v. Germany/The Queen v. Secretary of State for Transport, ex parte Factortame*, [1996] ECR I-102, at 46 (emphasis added). See also joined cases C-6/90 and C-9/90, *Francovich v. Italy*, [1991] ECR I-5357.

⁹⁵ *Bergaderm*, *supra* note 87, at 43 and 44.

⁹⁶ Council Decision 94/800/EC, *supra* note 85.

⁹⁷ EC Treaty, art. 300(7). As regards the GATT, see, for example, case 181-73, *Haegeman v. Belgium*, [1974] ECR 449, at 5; *Demirel*, *supra* note 46, at 7.

⁹⁸ Case C-1/91, *Opinion 1/91*, [1991] ECR I-6084, at 37. See also, by analogy, case 30/88, *Greece v. Commission*, [1989] ECR 3711, at 13; and *Sevince*, *supra* note 42.

⁹⁹ See, for example, Case 5-71, *Schöppenstedt v. Council*, [1971] ECR 975, at 3; *Lütticke v. Commission*, *supra* note 92, at 6.

¹⁰⁰ HENRY G. SCHERMERS AND DENIS F. WAELBROECK, *Judicial Protection in the European Union*, 476-477 (2001).

suggestions, it would have been possible to argue that by failing to act, the Community institutions infringed Article 300(7) EC –a Treaty provision. In any event, as the ECJ seems to interpret the condition of “infringement of the Treaty” under Article 232 EC rather generously¹⁰¹, this would seem to make it more likely that a successful action, under Article 288 EC, for damages suffered as a result of the Community’s unlawful failure to act could be brought¹⁰².

However, the remaining obstacle to the possibility of challenging the Community’s inaction is that ECJ case law holds that the WTO agreements’ “nature and structure” prevent reliance on WTO law. In order to meet this objection, it would be necessary to prove that adopted DSB reports are not subject to this limitation. This would constitute a new exception to the general of non-reliance on WTO law¹⁰³.

5.2.5. The implementation exceptions in their context

Some commentators question the compatibility of the two implementation exceptions with the ECJ’s reasoning for refusing reliance on WTO law as a general rule. It is argued that these exceptions may not be directly linked to the issue of whether the Community institutions enjoy a scope for manoeuvre or whether the principle of reciprocity is maintained¹⁰⁴. However, this paper finds that the link between the general rule and the exceptions in *Portugal v. Council* is crucial to understanding the situation in *Biret*. A possible interpretation of this link would be the following. Once the Community has expressed its intention to implement particular WTO obligations, it unilaterally commits to adopt WTO-conform measures – irrespective of its motives, i.e., irrespective of whether it acted altruistically or after previously having obtained concessions from another trading partner. As a result, a margin for manoeuvre is no longer necessary, because the Community has already decided to implement. The EU can no longer use the option of non-implementation as leverage to force other WTO members to implement particular obligations.

If this were indeed the underlying rationale in the Court’s case law, it would seem possible to apply similar reasoning to the *Biret* case. After the expiry of the deadline to implement a definitive DSB ruling, the Community institutions’ room for manoeuvre would be similarly reduced. The main difference would be that while under the implementation exceptions the EU voluntarily cedes its scope for

¹⁰¹ Case law illustrates that the obligation to act need not be stipulated in the Treaty itself, but may be contained in other legal documents forming part of the EU legal order. In *Camar*, for example, the obligation to act arose from a provision in a Council Regulation. Case C-312/00 P, *Commission v. Camar*, [2002] ECR I-11355.

¹⁰² As in the case of wrongful action, additional conditions for establishing Community liability must be fulfilled. The analysis of these conditions is, however, beyond the scope of this paper.

¹⁰³ See below, under 6.

¹⁰⁴ See GRILLER, *supra* note 56, at 263. See, also, PERE, *supra* note 11, at 38 and EECKHOUT, *supra* note 63, at 105.

manoeuvre, in the Biret situation the scope is narrowed by an event beyond its own will¹⁰⁵, i.e., by the issuance of a DSB report.

6. IMPLEMENTATION OF DSB RULINGS AS A NEW EXCEPTION?

The ECJ in Biret clearly stated that the CFI had erred in law by failing to assess whether the DSB ruling had an impact on the question of the SPS Agreement's effect in the EU legal order¹⁰⁶. The Court of Justice's finding does not prevent an interpretation that the issuance of a DSB ruling, after the expiry of the deadline to implement its recommendation, constitutes a third exception to the general rule precluding reliance on WTO law¹⁰⁷. Simply, the ECJ left the question open.

The main analysis of whether there should be a third exception to the general rule of non-invokability of WTO rules must turn on a close examination of the factors the Court relies on when denying invokability of WTO provisions. As stated above¹⁰⁸, the Court found it necessary to leave the EU's political actors a "scope for manoeuvre" to ensure "reciprocity" among trading partners. The Court held that WTO law allows for this room for manoeuvre¹⁰⁹. In the Portugal v. Council judgment, the Court found support for its finding in the provisions of the DSU. Therefore, it will first be analysed whether the text of the DSU, and other WTO provisions, support a finding that this scope for manoeuvre persists after the expiry of the deadline for implementing a DSB report. Second, beyond the legal analysis of the WTO provisions, it will be examined whether –irrespective of the legal mandates– there is still room for manoeuvre in practice. Third, policy reasons will be presented for the conclusion that this room for manoeuvre is significantly reduced after the expiry of the implementing deadline of a definitive panel or Appellate Body report.

6.1. TEXT OF WTO LAW

The question at issue is whether after the expiry of the deadline set for implementation of a DSB report, a WTO member has any legal alternatives to full compliance with the report's recommendations. At first sight, the ECJ seems already to have responded to this question in the Portugal v. Council and the Omega Air

¹⁰⁵ Insofar as the EU's adherence to the dispute settlement system itself does not constitute a conscious acceptance of the reduction of its scope for manoeuvre. See above, under 5.2.1.

¹⁰⁶ Biret, European Court of Justice, *supra* note 24, in particular at 60 and 65.

¹⁰⁷ Advocate General Tizzano dwells in considerable length on the interpretation of the Court's censoring of the CFI. Van Parys, Advocate General, *supra* note 39, at 74-78.

¹⁰⁸ See above, under 4.

¹⁰⁹ Portugal v. Council, *supra* note 7; and Joined cases C-27/00 and C-122/00, Omega Air v. Secretary of State for the Environment and Omega Air v. Irish Aviation Authority, [2002] ECR I-2569, at 89-97.

judgments. The Court appears to believe that the DSU confers legal alternatives. In *Portugal v. Council*, the Court –relying heavily on Article 22 DSU– reached this conclusion¹¹⁰. The Court’s view was repeated in the *Omega Air* case, where it found that:

“The decisive factor here is that the resolution of disputes concerning WTO law is based, in part, on negotiations between the contracting parties. Withdrawal of unlawful measures is indeed the solution recommended by WTO law, but other solutions are also authorised, for example settlement, payment of compensation or suspension of concessions.”¹¹¹

The term “authorised” indicates that the ECJ assumes that, under WTO law, a WTO member has legal alternatives to full compliance with a DSB report.

Nonetheless, it does not appear that the Court conclusively resolved the issue. In *Portugal v. Council*, on the one hand, the Court merely contemplated the possibility of entering negotiations after the expiry of the deadline to achieve agreement on the payment of concessions¹¹². The Court, however, did not explicitly envisage the situation after the expiry of the deadline without resolution of the conflict¹¹³. In *Omega Air*, on the other hand, the ECJ explicitly mentioned the possibility of suspension of concessions¹¹⁴. At this stage, a WTO member is no longer empowered to negotiate¹¹⁵. Nonetheless, the Court again used the language of *Portugal v. Council* in the case of *Omega Air* where it accepted that reliance on WTO law “would have the consequence of depriving the legislative or executive organs of the contracting parties of the possibility afforded by Article 22 of that memorandum of entering into negotiated arrangements even on a temporary basis.”¹¹⁶ Therefore, the question of whether the EU has a legal alternative beyond the temporary solutions, and under what circumstances such an alternative would exist, does not appear to be settled case law¹¹⁷. It is thus necessary to scrutinize in more detail the text of the WTO agreements to examine whether legal alternatives exist in such a situation.

¹¹⁰ *Portugal v. Council*, supra note 4, at 39 and 40.

¹¹¹ *Omega Air*, supra note 109, at 89 (emphasis added).

¹¹² *Portugal v. Council*, supra note 4, at 37-39.

¹¹³ In fact, the Court’s cautious wording, saying “even on a temporary basis”, would support this finding. *Id.* at 40.

¹¹⁴ *Omega Air*, supra note 109, at 89.

¹¹⁵ DSU, art. 22(2).

¹¹⁶ *Omega Air*, supra note 109, at 89 (emphasis added).

¹¹⁷ Advocate General Mischo in *Atlanta* somewhat more explicitly found that WTO law, namely Article 22 DSU, indeed offers a WTO member alternative options to withdrawing the inconsistent measure – even beyond the temporary basis. *Atlanta*, Advocate General, supra note 37, at 29.

6.1.1. Provisions of the DSU

The analysis of whether the text of the DSU offers a WTO member legal alternatives to full compliance focuses on the possible options of “settlement, payment of compensation or suspension of concessions”¹¹⁸ and on the possibility of obtaining a waiver.

(i) Settlements

Arguably, WTO members can always negotiate and agree on a settlement – satisfying both the complaining and the defendant member. However, all WTO members are bound by the general obligation to comply with WTO law. Furthermore, within the area of dispute settlement, WTO law –in particular Article 3(5) DSU– precludes members from reaching a negotiated solution inconsistent with provisions of the WTO agreements¹¹⁹. Therefore, the possibility of negotiating cannot materially affect the EU’s obligation to bring its legislation into conformity with WTO law. Moreover, WTO members not implicated in the settlement would still be entitled to bring actions against the EU.

(ii) Payment of compensation and suspension of concessions

There is an ongoing debate in the international legal community on the question of whether under WTO law payment of compensation and suspension of concessions are legal alternatives to full compliance with DSB reports¹²⁰. This paper does not intend to contribute to this debate¹²¹. This paper takes the view that the text of the DSU in itself is ambiguous.¹²² Nonetheless, the DSU requires interpretation to be

¹¹⁸ Omega Air, supra note 109, at 89.

¹¹⁹ DSU, art. 3(5). See also, Article 22(1) DSU, last sentence, and Article 17(14) DSU. For example, voluntary export restraints –so-called “orderly market agreements”– would be prohibited.

¹²⁰ While this discussion is taking place from the perspective of public international law, the ECJ’s reliance on this line of arguments makes it equally relevant for the present analysis under EU law.

¹²¹ Pro: Most prominently, JOHN H. JACKSON, “The WTO Dispute Settlement Understanding– Misunderstandings on the Nature of Legal Obligation” in 91 *A.J.I.L.* 60 (1997); JOHN H. JACKSON, “International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to “Buy Out?” in 98 *A.J.I.L.* 109 (2004). Contra: JUDITH HIPPLER BELLO, “The WTO Dispute Settlement Understanding: Less Is More” in 90 *A.J.I.L.* 416 (1996).

¹²² See, also, PERE, supra note 11, at 16-17. In any case, to this author, it seems clear that the options provided by Article 22(1) DSU would be available only temporarily. In other words, after a certain period of time the options in Article 22(1) DSU would elapse. Schwartz and Sykes’ contrary assertions that a WTO member is entitled not to comply in perpetuity is not supported by the text of Article 22(1) DSU, and their allegation that this was the purpose of the drafters of the WTO agreement lacks sufficient proof. WARREN F. SCHWARTZ AND ALAN O. SYKES, “The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization” in 31 *J. Legal Stud.* S179, at pg. 7.

made in accordance with the rules of interpretation in international law¹²³. Articles 31 and 32 of the Vienna Convention¹²⁴ mandate taking into account the “object and purpose” of the international agreement. Taking into consideration the purpose of the main provisions of the DSU, of the DSU as such and of the WTO agreements as a whole, should lead to the conclusion that full compliance with DSB reports is compulsory under WTO law.

The purpose of Article 22(1) DSU might be to avoid a situation where a failure to comply with a DSB report does not entail any consequences for the defendant. From this perspective, the options in Article 22(1) DSU would contain remedies available to complainants, not alternatives for defiant WTO members. One of the main purpose of the DSU as a whole was to establish a dispute settlement system based on the rule of law –to the detriment of negotiated solutions¹²⁵. As an illustration of the increasing importance of legal rules, the WTO panel in Sections 301-310 found that “[p]roviding security and predictability to the multilateral trading system is another central object and purpose of the [WTO] system” as a whole¹²⁶. If the rule of law and the principles of legal certainty and predictability were considered important features of the WTO system, strict implementation of DSB rulings would seem essential¹²⁷.

6.1.2. Provisions of other WTO agreements – waiver?

The EU may, as argued by the Council in the *Biret* case, succeed in obtaining a waiver –according to Article XXV:5 GATT or Articles IX:3 and IX:4 of the WTO Agreement– to escape the obligation to fully comply with a DSB report. Advocate General Alber found in *Biret* that the possibility of being granted a waiver under Article XXV GATT was precluded after the adoption of a DSB report¹²⁸. However, the adoption of a waiver by the Ministerial Conference may be seen as a modification of a member’s obligations under WTO law. Arguably, while a DSB ruling declares that WTO law has been infringed at the moment of bringing an

¹²³ Article 3(2) DSU refers to “customary rules of interpretation of public international law”. DSU, art. 3(2). Articles 31 and 32 of the Vienna Convention on the Law of Treaties (hereinafter “Vienna Convention”) have been recognized as part of customary international law. See, for example, Japan – Taxes on Alcoholic Beverages, Appellate Body Report, WT/DS8/AB/R, 4 October 1996, at page 6 (footnotes omitted), and International Court of Justice, Case Concerning Kasikili/Sedudu Island (Botswana v. Namibia), 1999 I.C.J., at 18.

¹²⁴ Convention of the Law of Treaties, 8 I.L.M. 679 (1969).

¹²⁵ See JOHN J. JACKSON, WILLIAM J. DAVEY AND ALAN SYKES, *Legal Problems of International Economic Relations*, West (2002), at 247-256.

¹²⁶ United States – Sections 301-310 of the Trade Act of 1974, Panel Report, WT/DS152/R, 22 December 1999, at 7.75. Although the panel in Sections 301-310 did not use the term “rule of law”, its underlying rationale seems nonetheless implicit in the panel’s reasoning.

¹²⁷ In that regard, Article 21(1) DSU indicates that “[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.” DSU, art. 21(1).

¹²⁸ *Biret*, Advocate General, supra note 38, mainly at 84.

action, the unlawfulness would be removed with the “amendment” of the WTO obligations by the adoption of a waiver. The Advocate General’s argument does not appear to find support in the text of Article XXV GATT or Articles IX:3 and IX:4 of the WTO Agreement¹²⁹. Furthermore, his reasoning seems to be contradicted by practice. In the Bananas cases, the EU’s bananas regime was held to be inconsistent with WTO law by a panel, the Appellate Body and an arbitrator under Article 22(6) DSU respectively¹³⁰. The EU entered into negotiations with Ecuador and the United States, but did not reach a mutually satisfactory solution¹³¹. Subsequently, however, the WTO Ministerial Conference granted two waivers to the EU, exempting part of its bananas regime from GATT obligations¹³².

Therefore, a waiver would provide a legal solution, resulting in the extinction of the EU’s obligation to bring its inconsistent legislation into conformity with a DSB ruling. It would allow the EU to “shield” its legislation from challenges under WTO law. However, the likelihood of obtaining a waiver is in practice very low¹³³.

6.2. “SCOPE FOR MANOEUVRE” IN PRACTICE

To complete the analysis of how a DSB report restricts the EU’s room for manoeuvre, this paper will examine whether the proposed alternatives –irrespective of their legal justification– persist in the same degree in practice after the expiry of the deadline granted for implementation of the DSB report.

It must be acknowledged that bilaterally negotiated solutions may in practice lead to the result that EU measures would not be challenged¹³⁴ –at least for a longer

¹²⁹ Similarly, see Understanding in Respect of Waivers of Obligations Under the General Agreement on Tariffs and Trade 1994, attached in Annex 1A to the WTO Agreement.

¹³⁰ EC – Regime for the Importation, Sale and Distribution of Bananas, Panel Reports, WT/DS27/R/ECU, WT/DS27/R/GTM, WT/DS27/R/HND, WT/DS27/R/MEX, WT/DS27/R/USA, of 22 May 1997; EC – Regime for the Importation, Sale and Distribution of Bananas, Appellate Body Report, WT/DS27/AB/R, 9 September 1997; EC – Regime for the Importation, Sale and Distribution of Bananas, Report by Arbitrator pursuant to Article 22(6) DSU, WT/DS27/ARB/ECU, 24 March 2000.

¹³¹ See EC – Regime for the Importation, Sale and Distribution of Bananas, Report by Panel pursuant to Article 21(5) DSU, WT/DS27/RW/ECU, 12 April 1999, at 1.1.

¹³² EC – Transitional Regime for the EC Autonomous Tariff Rate Quotas on Imports of Bananas, Ministerial Conference Decision, WT/MIN(01)/15 and 16, 14 November 2001.

¹³³ The waiver procedure is a lengthy and cumbersome process. Bhala notes that both under Article IX:3 of the WTO Agreement and Article XXV:5 GATT, a waiver can be granted (1) only in exceptional circumstances, and (2) only upon the approval by a supermajority of the WTO Members. RAJ BHALA, *International Trade Law: Theory and Practice* (2001), at 580-582. According to the WTO, the EU has obtained only four waivers since the establishment of the WTO in 1995. “World Trade Organization”, *WTO Analytical Index – Guide to WTO Law and Practice*, vol. 1 80-87 (2003).

¹³⁴ See, for example, PETERSMANN’S example concerning a joint mediation request by Thailand, the Philippines and the EU regarding the Community’s preferential treatment to canned tuna originating from ACP countries. Petersmann, *supra* note 9, at 41. The issue of the validity of the Regulation

period of time. Prior to issuing a DSB ruling, the law has not yet been declared¹³⁵. It might not be entirely clear whether or not, and which aspect of, the contested measure is inconsistent with WTO law. Accordingly, the Community might be in a stronger position to argue that its measure is not inconsistent –which would give it leverage in negotiations with other WTO members. Community representatives would thus enjoy a broader scope for manoeuvre to negotiate with complainants.

However, the EU's chances of "getting away with" maintaining an inconsistent measure by means of a negotiated settlement would be more limited once a DSB has been issued. The infringement would be established. Although complainants might be "appeased" with concessions –e.g., receiving compensation payments– other WTO members would have a much higher incentive to bring an action before the DSB knowing that their action would almost certainly succeed. Arguably, WTO members might even be less likely to grant a waiver if the measure in question has been declared unlawful in a DSB report.

6.3. INTERIM CONCLUSIONS

Except for the possibility of obtaining a waiver, this paper finds that other legal alternatives –settlements, compensation and suspension of concessions– are no longer available to the Community once the deadline set to implement the DSB ruling has expired. The possibility of being granted a waiver prevents this paper from reaching an entirely unambiguous conclusion. Nonetheless, waivers are very rare in practice. Furthermore, negotiated settlements which are unlawful under WTO law are less likely to be maintained in practice after the adoption of a DSB report. Therefore, the EU's options –the EU's political institutions' room for negotiation– would already be diminished. As a result, the possibility for individuals to rely on WTO law would not significantly decrease the EU's scope for manoeuvre. There would be a certain parallelism between the Nakajima/Fediol exceptions and this new exception after the issuance of a definitive DSB ruling. In both cases, the scope for manoeuvre would be reduced –either after the Community's unilateral decision¹³⁶ or after the dispute settlement body's intervention¹³⁷.

6.4. POLICY REASONS

These legal arguments apart, policy reasons support a reading that DSB rulings should be compulsory for WTO members –in particular for the EU. First, the EU's

implementing the agreement between the Community and these Asian states is currently before the Court of Justice. Case C-342/03, *Spain v. Council*, pending.

¹³⁵ See, also, EECKHOUT, *supra* note 63, at 97.

¹³⁶ Nonetheless, it is also possible that the EU would decide "unilaterally" only after first obtaining an equivalent commitment from another WTO member. See above, under 5.2.5.

¹³⁷ To a certain extent, this could also be perceived as a reduction of its margin of action which the EU has voluntarily consented to –by signing the DSU. See above, under 5.2.1.

interest in preserving the efficacy and credibility of the dispute settlement system should prevail over narrower short-term interests in the outcome of a particular case. The Community, as one of its most frequent users¹³⁸, should promote, not undermine, the adjudicatory system¹³⁹. Second, maintaining a bargaining chip in negotiations regarding reciprocal implementation of existing commitments may be important, and, as a result, the Community's political institutions may be given a certain freedom of action. While it may grant deference to the EU's political actors in their relations with counterparts of other WTO members, the Court should, however, not disrespect (quasi-)judicial decisions of the WTO organs. The Court's reasoning in Opinion 1/91 seems to confirm that decisions of judicial organs set up by an international agreement are binding upon the Court of Justice¹⁴⁰. The ECJ's task more generally –going beyond the articles of the EC Treaty– is to uphold legality¹⁴¹. Third, to the extent that the DSB seeks cooperation from institutions in WTO member states –including courts– to ensure implementation of DSB rulings, the ECJ should be more responsive, as the Court itself relies on a system of cooperation between Community and national courts¹⁴². Some commentators argue that interpretation of WTO law by municipal courts would, without a formalized cooperation mechanism between the DSB and municipal courts, lead to disuniform application of the WTO rules¹⁴³. However, while this argument might be relevant in the case of municipal courts directly interpreting WTO provisions, it certainly does not hold for situations like in *Biret*, where the WTO (quasi-)judicial organs had previously interpreted the relevant WTO provisions.

¹³⁸ LEITNER AND LESTER, *supra* note 81, at 252.

¹³⁹ In this sense, RONALD A. BRAND, "Institutions for International Economic Integration: Direct Effect of International Economic Law in the United States and the European Union" in *17 NW. J. Int'l L. & Bus.* 556, 603 (1996).

¹⁴⁰ Opinion 1/91, *supra* note 98, at 39. See GEERT A. ZONNEKEYN, "The Legal Status of WTO Panel Reports in the EC Legal Order - Some Reflections on the Opinion of Advocate General Mischo in the Atlanta Case" in *Journal of International Economic Law* 713, 718 (1999); JOSÉ MARÍA BENEYTO, "The EU and the WTO - Direct Effect of the New Dispute Settlement System?" in *EuZW* 295, 299 (1996).

¹⁴¹ Both Advocates General Alber and Tizzano attach significant importance to the principle of legality. *Biret*, Advocate General, *supra* note 38, at 87, 103; Van Parys, Advocate General, *supra* note 39, at 73.

¹⁴² Article 234 EC is a major expression of this cooperation. See SCHERMERS AND WAELBROECK, *supra* note 100, at 113-114. However, it is also possible that the ECJ is reluctant to cooperate because by admitting that DSB decisions are binding upon the EU, the ECJ itself would be bound by the precedents of the DSB, whereas it could traditionally derogate from DSB decisions. In this sense, FERNANDO CASTILLO DE LA TORRE, "The Status of GATT in EC Law, Revisited: The Consequences of the Judgment on the Banana Import Regime for the Enforcement of the Uruguay Round Agreements", *29 J. World Trade* 53, 64 (1995).

¹⁴³ In this sense, EECKHOUT, *supra* note 63, at 97 and 99; MIQUEL MONTAÑA I MORA, "A Rediscovered Basis for the Court of Justice of the European Communities to Refuse Direct Effect to the Uruguay Round Agreements?" in *Journal of World Trade No. 5* (1996), at 50-51.

7. CONCLUSIONS

The Court of First Instance dismissed Biret's claim for damages by referring to the traditional case law which holds that, as a general rule, WTO law cannot be relied on. Contrary to the CFI's view, this paper suggests that it is not impossible that the Community's conduct vis-à-vis the WTO would trigger the Nakajima exception to the general rule of non-reliance. However, the fact that the EU had not yet adopted a measure replacing the challenged Directives makes application of the exception more difficult. In that regard, challenging the Community's failure to act –to implement the DSB ruling– rather than its actions, i.e., the adoption and maintenance of the Directives, appears to be precluded, again, by the general rule of non-reliance on WTO law.

After analysing the underlying reasons for the general rule of non-reliance, this paper found that the expiry of the deadline established for implementation of a DSB ruling substantially modifies the situation. After that moment, the Community institutions do no longer enjoy the scope for manoeuvre necessary to guarantee reciprocity in implementation among WTO members. With the exception of the possibility of obtaining a waiver –which is very rare in practice– the Community's legal alternatives to full compliance with the DSB report disappear. In practice too, the EU's options are significantly reduced. This paper, therefore, concludes that it would be advisable for the Court of Justice to establish a third exception to the general rule of non-reliance on WTO law where the deadline for implementing a DSB ruling has expired.

This approach would have the advantage that the EU courts would give preference to the principle of legality over other considerations, such as judicial self-restraint or issues regarding the internal balance of power between EU institutions. By attaching increased importance to DSB rulings, at least after the expiry of the deadline for implementing them, the ECJ would also contribute to strengthening the principle of legality in the international legal order. This would be a crucial move towards increased recognition by the EU of the importance of the WTO's global legal system. Extending the possibility of relying on WTO law to subjects other than WTO member states, albeit in a limited way, would bring the ECJ closer to the widely accepted view that the actors of present-day international law cannot be exclusively reduced to traditional actors such as nation-states or international organizations. It would entail recognition of the importance of individuals in the sphere of international law, and –within the WTO legal order– it would mean acceptance that "it would be entirely wrong to consider that the position of individuals is of no relevance to the GATT/WTO legal matrix."¹⁴⁴

¹⁴⁴ United States – Sections 301-310, *supra* note 126, at 7.73.

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