2 October 2003

Biret loses the *Hormones* cases -- but could there be a glimmer of hope for the next case against the EU for not implementing a WTO ruling?

In its 30 September 2003 judgments in *Biret v. Council*, the European Court of Justice (ECJ) throws out a private party's claim for damages against the EU for failure to implement a WTO ruling.

That's no news, given the ECJ's longstanding position against the 'direct effect' of WTO agreements. What is remarkable about *Biret* is that the ECJ leaves open the possibility that a damages case for failure to implement a WTO ruling could be won in a case where conditions are right.

The *Biret* cases are a direct result of the WTO dispute between the EU and the US in the *Hormones* case. There, the WTO Appellate Body confirmed that EU legislation, originating in the '80s and prohibiting the importation of cattle and meat from cattle treated with five different hormones, was in violation of the WTO Agreement on Sanitary and Phytosanitary Measures. The Appellate Body report was adopted by the WTO in 1998 and a deadline for implementing it was set -- 13 May 1999. The EU did not meet the deadline, rather it maintained its import prohibition on hormone-treated beef without further justification.

Biret International, a French trader of meat, claimed it was affected by the EU import prohibition. In fact, it claimed that it went out of business in 1995 as a direct result of the EU's WTO-illegal ban. Its holding company Etablissement Biret et Cie SA and Biret's liquidator therefore sued the EU for damages in June 2000 before the European Court of First Instance (CFI).

The CFI rejected its case, relying on the standard case law of the higher court, the ECJ, that the WTO agreements lack 'direct effect' and do not create rights for private individuals. The applicants appealed, and there was some initial excitement back in May 2003 when Advocate-General Alber sided with them, and advised the ECJ to hold the EU liable for failing to implement the WTO ruling.

That excitement turned out to be premature; in these two cases of 30 September 2003, the ECJ declines to follow the advice of Mr. Alber, and instead throws out Biret's suits.

However, it is notable that the ECJ does not do so on the basis of the lack of 'direct effect' of WTO Agreements. On the contrary, the ECJ faults the CFI for having relied too heavily on this aspect of its case law. According to the ECJ, the CFI should have considered that a WTO dispute settlement ruling could provide grounds for judicial review of the legality of EU rules.

All this turns out to be cold comfort for Biret, however, since the ECJ ultimately rejects its claims because it went out of business in 1995, well before the date of the WTO Dispute Settlement Body (DSB) recommendations (13 February 1998) and the EU's deadline for implementing the WTO ruling (13 May 1999). The Court thus rejects Biret's damage claim on the ground that it could not hold the EU liable for damages that arose before the implementation period set by the WTO ended. It says that to do so would render meaningless the reasonable period of time granted by the WTO to the EU to bring its measures into compliance.

Strikingly, however, in doing so the ECJ explicitly leaves open the possibility of private claims based on EU measures that the WTO Dispute Settlement Body has found to be in violation of WTO law, if the damages arise subsequent to the period within which the EU should have implemented the WTO ruling. And the ECJ does this without insisting, as it has in the past, on reciprocity -- that is, without inquiring whether any other major EU trading partner would also allow such damage claims.

Perhaps, then, Advocate-General Alber's critical opinion has influenced the ECJ's thinking after all. Perhaps the ECJ would agree that obliging the EU to pay damages to private companies when it breaches its international obligations is acceptable and does not, or at least not unduly, deprive its institutions of the discretion enjoyed by the EU's trading partners.

In any event, this is the second time this year that the ECJ chastises the CFI for not taking WTO-related arguments of private litigants seriously enough (we attach our Bulletin on the *Petrotub*-judgment of February 2003).

This bulletin has been prepared by Marco Bronckers in Brussels and Christiane Schuchhardt in Washington DC. If you have any questions about the *Biret* judgments or any other trade law matter, please do not hesitate to contact them or any of the lawyers listed below.

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We also take this opportunity to inform you of a seminar on **'"Efficiencies and Competitive Effects: Evaluating and Arguing Efficiencies in Merger Control".** The seminar, hosted by our firm, will be held in Brussels on 18 November 2003 at the Meridien hotel. The program is attached to present e-mail.

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On the eve of DSU reform, EU court leads the way to further compliance with WTO law

On 9 January 2003, the European Court of Justice handed down an important judgment confirming a key opening in EU jurisprudence through which private parties can invoke WTO law to test the legality of EU legislative measures (known as the *Nakajima* principle).

The judgment in question is *Petrotub v. Council*. Here, in the face of a Court of First Instance rejection of a private plea based on WTO law, the European Court of Justice strengthened the *Nakajima* principle and struck down an EU anti-dumping measure for its inconsistency with WTO law. In concrete terms, the Court judgment put more meat on the bones of Nakajima, because it said that the corresponding WTO provisions must be taken into account in interpreting the EU provisions. This meant that the EU institutions were required to provide a statement of reasons that was not explicitly called for under the EU rules.

Given the Court's general reluctance to hear claims based on WTO law from private parties and even EU Member States, the *Nakajima* principle stands as an important inroad for WTO law in EU jurisprudence. This re-confirmation comes at a fortuitous moment. The judgment illustrates how pressure can be released from the WTO dispute settlement system, currently under stress and subject to review.

A major problem perceived by WTO members is the non-implementation by WTO members of contrary WTO rulings. The finger has frequently been pointed at the EU, with its notorious reluctance to implement the WTO *Bananas* and *Hormones* rulings. Recently, attention has shifted to the United States, which has dragged its feet in implementing a number of WTO rulings (*FSC*, the *Homestyle Exemption* to copyright rules, the *Havana Club* ruling, as well as various trade remedies rulings). This has led to troubling questions: is the legalization of the WTO dispute settlement system really working; would we not be better off with a return to diplomacy?

These questions merit multiple responses. In particular the effect on developing countries, when major WTO members like the US and the EU persist in non-compliance, is of considerable concern. At the same time, this European Court judgment sends an encouraging message. This can be illustrated in concrete terms by the *Hormones* case. Here the EU was not quick to implement the 1998 WTO ruling, which declared the EU-ban incompatible with WTO obligations, and the EU is still bearing the United States' retaliatory measures. Yet the EU is now close to issuing a new *Hormones* directive (the Council of Ministers issued a Common Position on 22 January 2003). According to this new directive, most of the restrictions on hormones will remain in place, though according to the EU authorities this is now justified and WTO-compatible, because of newly compiled scientific evidence. The draft directive refers

explicitly to the WTO ruling, but clearly, not everyone would agree that the EU acts in conformity with it here. In particular the US government has voiced its opposition to the continuing restrictions on hormone-treated beef, which it argues would still be WTO-illegal.

This question could go back the WTO, raising the spectre of a continuing stalemate and non-compliance in the event the new EU rules are again found to be WTO-incompatible by the WTO Dispute Settlement Body. However, in view of the European Court's judgment of January 2003, confirming the *Nakajima*-principle, the European Courts will be able to review the WTO-compatibility of the new EU hormones directive. And in the event the European Court then decides that the new rules are incompatible with WTO (or, for that matter, EU) law, the effect would be invalidity. Contrary to a WTO ruling, rulings of the EU courts are immediately effective in the EU legal order.

In short, the European Court points the way for private parties to rely on WTO law when testing domestic measures. The opening is limited, and depends on express legislative intent recognizing the relevance of WTO law -- but the opening is there. If other WTO members are serious about finding a solution to implementation of WTO rulings, they should consider adopting a similar solution within their own jurisdictions.

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This bulletin has been prepared by Marco Bronckers, Natalie McNelis and Axel Desmedt. If you have any questions about WTO law, EU trade law, or any other EU law matter, please do not hesitate to contact any of the lawyers listed below:

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