JUDGMENT OF THE COURT (Full Court)

30 September 2003 *

In Case C-93/02 P,

Biret International SA, a company in judicial liquidation, established in Paris (France), represented by M. de Thoré, liquidator, represented in these proceedings by S. Rodrigues, avocat, with an address for service in Luxembourg,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (First Chamber) of 11 January 2002 in Case T-174/00 *Biret International* v *Council* [2002] ECR II-17, seeking to have that judgment set aside,

the other parties to the proceedings being:

Council of the European Union, represented by J. Carbery and F.P. Ruggeri Laderchi, acting as Agents,

defendant at first instance,

* Language of the case: French.

supported by

United Kingdom of Great Britain and Northern Ireland, represented by P.M. Ormond, acting as Agent, with an address for service in Luxembourg,

intervener in the appeal,

and

Commission of the European Communities, represented by T. Christoforou and A. Bordes, acting as Agents, with an address for service in Luxembourg,

intervener at first instance,

THE COURT (Full Court),

composed of: G.C. Rodríguez Iglesias, President, J.-P. Puissochet, M. Wathelet (Rapporteur), R. Schintgen and C.W.A. Timmermans (Presidents of Chambers), C. Gulmann, D.A.O. Edward, P. Jann, V. Skouris, F. Macken, N. Colneric, S. von Bahr and J.N. Cunha Rodrigues, Judges,

Advocate General: S. Alber,
Registrar: H.A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from Biret International SA, the Council and the Commission at the hearing on 25 March 2003,

after hearing the Opinion of the Advocate General at the sitting on 15 May 2003,

gives the following

Judgment

1 By application lodged at the Court Registry on 16 March 2002, Biret International SA, a company in liquidation, established in Paris (France), represented by M. de Thoré, liquidator ('the appellant'), brought an appeal under Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance in Case T-174/00 *Biret International* v *Council* [2002] ECR II-17 ('the contested judgment'), by which the Court of First Instance dismissed Biret International's action for damages under Article 178 of the EC Treaty (now Article 235 EC) and the second paragraph of Article 215 of the EC Treaty (now the second paragraph of Article 288 EC) for compensation for damage which it had allegedly suffered as a result of the prohibition on the importation into the Community of beef and veal from farm animals to which certain substances with hormonal action had been administered.

2 By order of the President of the Court of 19 August 2002, the United Kingdom of Great Britain and Northern Ireland was granted leave to intervene in support of the form of order sought by the Council of the European Union.

Legal background

Directives 81/602/EEC, 88/146/EEC and 96/22/EC

3 Article 2 of Council Directive 81/602/EEC of 31 July 1981 concerning the prohibition of certain substances having a hormonal action and of any substances having a thyrostatic action (OJ 1981 L 222, p. 32) provides that Member States are to ensure the prohibition of (i) the administering to a farm animal of substances having a thyrostatic action or substances having an oestrogenic, androgenic or gestagenic action and (ii) the placing on the market of farm animals to which those substances have been administered and meat from those animals.

4 By way of exception to that prohibition, Article 5 of Directive 81/602 provides that until such time as the Council has taken a decision on the administering to farm animals of oestradiol 17/ß, progesterone, testosterone, trenbolone and zeranol for fattening purposes, the national regulations in force and the arrangements made by Member States concerning these substances are to continue to apply while complying with the general provisions of the EC Treaty. The reason for that derogation was stated in the fourth recital of the preamble to Directive 81/602 as being the fact that whether the effects of the use of those five substances was harmful still had to be examined in detail.

5 On 31 December 1985, the Council adopted Directive 85/649/EEC prohibiting the use in livestock farming of certain substances having a hormonal action (OJ 1985 L 382, p. 228). As the directive was annulled by the Court of Justice in Case 68/86 *United Kingdom* v *Council* [1988] ECR 855 because it infringed essential procedural requirements, it was replaced by Council Directive

88/146/EEC of 7 March 1988 prohibiting the use in livestock farming of certain substances having a hormonal action (OJ 1988 L 70, p. 16).

6 Apart from the use of oestradiol 17/ß, progesterone and testosterone for therapeutic treatment, which may be permitted, Directive 88/146 removes the possibility of derogation provided for in Article 5 of Directive 81/602 with regard to the five substances referred to in paragraph 4 of this judgment.

7 Article 6 of Directive 88/146 provides that Member States are to prohibit importation from third countries of (i) farm animals to which substances with a thyrostatic, oestrogenic, androgenic or gestagenic action have been administered in any way whatsoever, and (ii) meat from such animals.

8 Directive 88/146 was to be transposed by 1 January 1988, but its entry into force was postponed until 1 January 1989. The result was that from that date importation into the Community from non-member countries of meat and meat products from animals treated with certain hormones was prohibited under Council Directive 72/462/EEC of 12 December 1972 on health and veterinary inspection problems upon importation of bovine animals and swine and fresh meat from third countries (OJ, English Special Edition 1972 (31 December), p. 7).

9 On 29 April 1996 the Council adopted Directive 96/22/EC concerning the prohibition on the use in stockfarming of certain substances having a hormonal or thyrostatic action and of ß-agonists, and repealing Directives 81/602/EEC, 88/146/EEC and 88/299/EEC (OJ 1996 L 125, p. 3). That directive maintains in force the prohibition imposed by Directive 81/602 in conjunction with Directive 88/146.

The Agreement on the Application of Sanitary and Phytosanitary Measures

10 On 15 April 1994, at the Marrakesh meeting in Morocco, the President of the Council and the Member of the Commission responsible for external relations signed the Final Act concluding the multilateral trade agreements of the Uruguay Round, the Agreement establishing the World Trade Organisation ('the WTO') and all the agreements and memoranda in Annexes 1 to 4 to the Agreement establishing the WTO ('the WTO agreements') on behalf of the European Union, subject to ratification.

11 Following signature of those documents, the Council adopted Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1).

12 The WTO agreements, which include at Annex 1A the Agreement on the Application of Sanitary and Phytosanitary Measures (OJ 1994 L 336, p. 40, 'the SPS Agreement'), entered into force on 1 January 1995.

13 Article 3(3) of the SPS Agreement provides that 'Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5'.

14 Article 5(1) of the SPS Agreement provides that 'Members shall ensure that their sanitary or phytosanitary measures are based on an assessment, as appropriate to the circumstances, of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by the relevant international organisations'.

The Understanding on Rules and Procedures Governing the Settlement of Disputes

15 Article 3(5) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (OJ 1994 L 336, p. 324; 'the Understanding'), which forms Annex 2 to the WTO Agreement, provides that:

'All solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, 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.'

16 Article 3(7) adds:

'Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful. The aim of the dispute

settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement. The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorisation by the DSB of such measures.'

17 Article 21 of the Understanding which concerns 'Surveillance of Implementation of Recommendations and Rulings' of the Dispute Settlement Body ('DSB') provides that:

'1. Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.

2. ...

3. At a DSB meeting held within 30 days [1] after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so. The reasonable period of time shall be:

(a) the period of time proposed by the Member concerned, provided that such period is approved by the DSB; or, in the absence of such approval,

(b) a period of time mutually agreed by the parties to the dispute within 45 days after the date of adoption of the recommendations and rulings; or, in the absence of such agreement,

(c) a period of time determined through binding arbitration within 90 days after the date of adoption of the recommendations and rulings. [2] In such arbitration, a guideline for the arbitrator [3] should be that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of a panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances.'

1 If a meeting of the DSB is not scheduled during this period, such a meeting of the DSB shall be held for this purpose.

2 If the parties cannot agree on an arbitrator within ten days after referring the matter to arbitration, the arbitrator shall be appointed by the Director-General within ten days, after consulting the parties.

3 The expression "arbitrator" shall be interpreted as referring either to an individual or a group.

18 Finally, paragraphs (1), (2) and (8) of Article 22 of the Understanding provides that:

'1. Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements.

2. If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request authorisation from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.

...

8. The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with

a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached. In accordance with paragraph 6 of Article 21, the DSB shall continue to keep under surveillance the implementation of adopted recommendations or rulings, including those cases where compensation has been provided or concessions or other obligations have been suspended but the recommendations to bring a measure into conformity with the covered agreements have not been implemented.'

The dispute settlement procedure instigated by the United States of America and Canada (the hormones case)

19 In May and November 1996 respectively the United States and Canada, considering that Community legislation was restricting their exports to the Community of beef and veal treated with certain hormones, in breach of the obligations which the Community had entered into within the framework of the WTO, each instigated a procedure for dispute settlement before the competent WTO bodies.

20 On 18 August 1997 each of the two Panels set up in respect of those proceedings lodged a report (No WT/DS26/R/USA and No WT/DS48/R/CAN respectively) finding that the Community was in breach of various provisions of the SPS Agreement.

21 In response to an appeal lodged by the Community the Appellate Body delivered a report on 16 January 1998 (No WT/DS26/AB/R WT/DS48/AB/R) amending certain aspects of the reports of the two Panels, but finding none the less that the

Community was in breach of Article 3(3) and Article 5(1) of the SPS Agreement, essentially on the ground that there had not been a sufficiently specific scientific analysis of the cancer risks associated with the use of certain hormones as growth hormones. The Appellate Body recommended that 'the Dispute Settlement Body request the European Communities to bring the SPS measures found... to be inconsistent with the SPS Agreement into conformity with the obligations of the European Communities under that Agreement'.

22 On 13 February 1998 the DSB adopted the report of the Appellate Body and the reports of the Panels, as amended by the Appellate Body.

23 As the Community had stated that it intended to comply with its WTO obligations but that it needed a reasonable time within which to do so, under Article 21(3) of the Understanding it was granted a 15-month period for that purpose, which expired on 13 May 1999.

24 On the basis of the results of further analysis of the risks associated with the use of oestradiol 17/ß, progesterone, testosterone, trenbolone, zeranol and melengestrol acetate, the administration of which with a view to stimulating growth in animals is prohibited by Directive 96/22, the Commission submitted to the Parliament and the Council on 3 July 2000, its proposal 2000/C 337 E/25 for a Directive of the European Parliament and of the Council amending Directive 96/22 (OJ 2000 C 337 E, p. 163), which seeks in particular to maintain the permanent prohibition on the use of oestradiol 17/ß and to retain, pending further scientific reports, the temporary prohibition on the use of the five other substances in question. The Community legislature has not yet adopted that proposal.

Background to the action and procedure before the Court of First Instance

25 It is apparent from the contested judgment that the appellant was incorporated on 26 July 1990 and was recorded in the register of companies of the Tribunal de commerce de Paris (Commercial Court, Paris, France) on 9 August 1990; its objects as set out in its articles of association were to trade in various agri-foodstuffs, in particular meat.

26 By judgment of 7 December 1995, the Tribunal de commerce de Paris opened judicial liquidation proceedings in respect of the appellant and provisionally set the date for cessation of payments at 28 February 1995.

27 On 28 June 2000, the appellant brought an action under Article 178 in conjunction with the second paragraph of Article 215 of the Treaty for compensation for the damage which it claimed to have suffered as a result of the adoption and maintenance in force of Directives 81/602, 88/146 and 96/22, which prohibited the importation into the Community from the United States of America of meat and meat products from animals treated with certain hormones.

The contested judgment

Admissibility

28 The Court of First Instance first dismissed, in paragraphs 31 to 36 of the contested judgment, the Council's first two objections of inadmissibility

contending respectively that there was a formal defect in the application and that national remedies had not been exhausted, and then examined, in paragraphs 37 to 44 of the contested judgment, the third plea of inadmissibility, namely the contention that the action was time-barred.

29 In that regard, the Court of First Instance held, first, that the action relating to liability was time-barred in so far as it sought compensation for damage allegedly suffered prior to the five-year period before the action was brought, that is to say, prior to 28 June 1995. To that extent it dismissed the action as inadmissible.

30 As for the period commencing on 28 June 1995, the Court of First Instance held, at paragraph 44 of the contested judgment:

'For the rest, it cannot be excluded at this stage in the assessment of the admissibility of the action that the applicant suffered damage, as a consequence of the retention of the embargo, during the period from 28 June 1995 to 7 December 1995. The fact that the Tribunal de commerce de Paris, in its judgment of 7 December 1995, provisionally set the date for the cessation of payments at 28 February 1995 does not necessarily imply that the applicant was no longer able to engage in any commercial activities during that period. The action cannot therefore be dismissed outright as inadmissible in its entirety on the grounds that it was time-barred.'

Substance

31 In its application, the appellant submitted that by adopting and retaining in force Directives 81/602, 88/146 and 96/22 the Council had been in breach of two legal

rules designed to confer rights on individuals: first, the principle of the protection of legitimate expectations, and second, the SPS Agreement.

32 The Court of First Instance, at paragraphs 50 to 56 and 60 to 71 of the contested judgment, rejected those two pleas as unfounded. As regards more specifically the alleged breach of the SPS Agreement, the Court held as follows:

'60 Although under Article 228(7) of the [EC] Treaty [(now, after amendment, Article 300(7) EC)] agreements concluded between the Community and non-member States are binding on the institutions of the Community and on Member States and, as the Court of Justice held in particular in [Case 181/73] *Haegeman* [[1974] ECR 449] and [Case 12/86] *Demirel* [[1987] ECR 3719], the provisions of such agreements form an integral part of the Community legal order, the Court of Justice has repeatedly emphasised that the effects of such agreements in the Community legal order must be determined in the light of the nature and purpose of the agreement in question. Thus, in Case 104/81 *Kupferberg* [1982] ECR 3641, paragraph 17, the Court held that the effects within the Community of the provisions of an international agreement may not be determined without taking account of the international origin of the provisions in question and that in conformity with the principles of international law the contracting parties are free to agree what effect the provisions of the agreement are to have in their internal legal order (see also Opinion of Advocate General Gulmann in Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, at I-4980, paragraph 127). In particular, in *Demirel*, the Court held at paragraph 14 that a provision in an agreement concluded by the Community with non-member countries must be regarded as being directly applicable when, regard being had to its terms and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, as regards its implementation or effects, to the adoption of any subsequent measure. The question whether such a stipulation is unconditional and sufficiently precise to have direct effect must be considered in the context of the agreement of which it forms part (*Kupferberg*, cited above, paragraph 23).

61 It is clear from case-law which is now firmly established that in view of their nature and structure the WTO Agreement and its annexes, in the same way as [the General Agreement on Tariffs and Trade (GATT)] 1947, do not in principle form part of the rules by which the Court of Justice and the Court of First Instance review the legality of acts adopted by Community institutions under the first paragraph of Article 173 of the EC Treaty (now, after amendment, the first paragraph of Article 230 EC), that individuals cannot rely on them before the courts and that any infringement of them will not give rise to non-contractual liability on the part of the Community (judgments of the Court of Justice in [Case C-149/96] *Portugal* v *Council* [[1999] ECR I-8395], Joined Cases C-300/98 and C-392/98 *Dior and Others* [2000] ECR I-11307, and Case C-377/98 *Netherlands* v *Parliament and Council* [2001] ECR I-7079; order in Case C-307/99 *OGT Fruchthandelsgesellschaft* [2001] ECR I-3159; judgments of the Court of First Instance in Case T-18/99 *Cordis* 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, Case T-2/99 *T. Port* v *Council* [2001] ECR II-2093, and Case T-3/99 *Bananatrading* v *Council* [2001] ECR II-2123).

62 The purpose of the WTO agreements is to govern relations between States or regional organisations for economic integration and not to protect individuals. As the Court of Justice stated in *Portugal* v *Council*, cited above, the agreements are still founded on the principle of negotiations with a view to entering into reciprocal and mutually advantageous arrangements and thus differ from the agreements concluded between the Community and non-member countries whereby the obligations are not necessarily reciprocal. To have the task of ensuring that Community law is in conformity with those rules fall directly to the Community judicature would be to deprive the legislative or executive bodies of the Community of the discretion enjoyed by similar bodies of the Community's trading partners.

63 According to that judgment (*Portugal* v *Council*, paragraph 49) it is only where the Community intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure

refers expressly to the precise provisions of the WTO agreements, that it is for the Community judicature to review the legality of the Community measure in question in the light of the WTO rules (see, as regards GATT 1947, Case 70/87 *Fediol* v *Commission* [1989] ECR 1781, paragraphs 19 to 22, and Case C-69/89 *Nakajima* v *Council* [1991] ECR I-2069, paragraph 31).

64 It is clear that the circumstances of this case clearly do not correspond to either of the two hypotheses set out in the preceding paragraph. Since Directives 81/602 and 88/146 were adopted on 1 January 1995, several years before the entry into force of the SPS Agreement, it is not logically possible for them either to give rise to a specific obligation entered into under that agreement or to refer expressly to some of its provisions.

65 In the circumstances, therefore, the applicant cannot rely on an infringement of the SPS Agreement.

66 The decision of the DSB of 13 February 1998 referred to above cannot alter that.

67 There is an inescapable and direct link between the decision and the plea alleging infringement of the SPS Agreement, and the decision could therefore only be taken into consideration if the Court had found that Agreement to have direct effect in the context of a plea alleging the invalidity of the directives in question (see, with regard to a decision of the DSB finding that certain provisions of Community law were incompatible with GATT 1994, Case C-104/97 P *Atlanta* v *European Community* [1999] ECR I-6983, paragraphs 19 and 20).

68 The plea alleging infringement of the SPS Agreement must therefore be rejected as unfounded.

69 As the applicant has thus failed to establish that the conduct alleged against the defendant institution is unlawful, the action must at any event be dismissed as unfounded and it is unnecessary to consider the other conditions for non-contractual liability on the part of the Community (see, for example, *Atlanta* v *European Community*, cited above, paragraph 65).

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

71 That submission, which changes the very basis on which the Community could be held liable, must be regarded as constituting a new plea in law which cannot be introduced in the course of proceedings, as Article 48 of the Rules of Procedure of the Court of First Instance provides (*Atlanta* v *European Community*, cited above, paragraphs 27 to 29).'

33 In conclusion, the Court of First Instance, in paragraph 72 of the contested judgment, dismissed the action, in so far as it was not inadmissible, as being in any event unfounded.

The appeal

34 In its appeal the appellant claims that the Court should:

— set aside the contested judgment;

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

— order the Council to pay the entirety of the costs.

35 The Council contends that the Court should dismiss the appeal and order the appellant to pay the costs.

36 The United Kingdom has not submitted any written pleadings and did not enter an appearance at the hearing. The Commission did not submit any written observations either but at the hearing supported the form of order sought by the Council.

37 In support of its appeal, the appellant relies on two pleas in law: first, infringement of Article 288(7) of the Treaty and, second, infringement of Article 48 of the Rules of Procedure of the Court of First Instance.

First plea in law

Arguments of the parties

38 By its first plea in law, the appellant claims that the Court of First Instance, primarily, misconstrued Article 228(7) of the Treaty.

39 In so doing, the Court of First Instance negated the effectiveness of Article 228(7) of the Treaty, as it failed to separate the application of the provision from any condition relating to its direct effect in accordance with the monist approach to the Community legal order. It is contradictory to hold that the WTO Agreements form an integral part of that legal order but at the same time to deny that they provide a basis for judicial review of subordinate Community legislation. The Court has, on several occasions (Case 40/72 *Schröder* [1973] ECR 125 and Case 112/80 *Dürbeck* [1981] ECR 1095), reviewed the legality of Community measures in the light of international agreements without first having ascertained whether the international provision in question has direct effect.

40 Both the spirit and the letter of Article 228(7) of the Treaty should be interpreted in such a way that the Community institutions' compliance with a rule of international law may be subject only to the condition that the rule has become an integral part of the Community legal order, something which cannot be, and has not been, challenged as regards the WTO agreements and the decisions adopted by the dispute settlement bodies set up by those agreements — decisions which moreover have the force of *res judicata*.

41 In that regard, the contested judgment does not address the argument that the Community, in acceding to the dispute settlement system set up by the WTO agreements, undertook to observe the procedure and the authority of DSB decisions.

42 In the alternative, the appellant complains that the Court of First Instance failed to develop the Court of Justice's case-law so as to acknowledge that all or part of the WTO agreements have direct effect and it asks the Court of Justice to take steps to do so.

43 In particular, it is irrelevant in this case to mention, as the Court of First Instance did in paragraph 62 of the contested judgment, that the Community's legislative and executive bodies should enjoy the same 'discretion' as similar bodies of the Community's trading partners, since, in view of the DSB decision of 13 February 1998, no such discretion exists.

44 The appellant also challenges the argument that WTO law allows for solutions other than withdrawal of unlawful measures such as settlement, payment of compensation or suspension of concessions (see Joined Cases C-27/00 and C-122/00 *Omega Air and Others* [2002] ECR I-2569). Such an argument gives rise to uncertainty as regards both the text of the WTO agreements and the objective nature of a breach of a legal rule.

45 The appellant submits in that connection that it is apparent from Article 22(1) of the Understanding that compensation is a temporary measure and must in any event be compatible with the WTO agreements. Furthermore, compensation does not alter the fact that there has been a breach of a legal rule forming an integral part of the Community legal order, which must be found by the court regardless of any political considerations.

46 Conversely, the appellant mentions various reasons which, in its submission, militate in favour of recognition of the direct effect of all or part of the WTO agreements and of the Court's power to review whether Community law complies with them:

— first, reasons connected with the subject-matter of the WTO agreements and their foreseeable development: a growing number of those provisions — such as those concerning public procurement, intellectual property or particularly food safety — have an immediate impact not only on legal relations between States and their nationals but also between individuals themselves;

— second, reasons relating to fairness as to the effect of the WTO dispute settlement system: it is inconsistent not to allow individuals to rely on certain provisions of the WTO agreements where, by contrast, commercial retaliation undertaken on the basis of other provisions of those agreements adversely affects undertakings in the European Union;

— third, the need for consistency within the Community legal order, in which legal persons comprise not only the Member States but also their nationals (see Case 26/62 *Van Gend en Loos* [1963] ECR 1).

47 The Council contends that the first plea is inadmissible in part and unfounded in part.

48 First, the contested judgment is consistent with the Court of Justice's case-law on the effects of international agreements in general: by virtue of that case-law the effect of a provision of an international agreement is determined by its nature and objectives (see point 127 of Advocate General Gulmann's Opinion in *Germany* v *Council*). The objective of the WTO agreements is not to create rights for individuals but merely to govern relations between States and regional economic organisations on the basis of negotiations based on the principle of reciprocity.

49 The Court of First Instance was right in referring, in paragraph 67 of the contested judgment, to paragraphs 19 and 20 of the judgment in *Atlanta* v *European Community*, which are of general application, notwithstanding the fact that they concern the admissibility of an appeal. The appellant also fails to explain where and when the Community undertook to implement all the obligations flowing from a DSB decision, a step which would run counter to the basic philosophy of the agreements in question. Nor does it state by which specific measure the Community intended to give effect to the DSB's decision of 13 February 1998 relating to imports of meat containing hormones. In any event, no provision of the SPS Agreement or of the DSB decision of 13 February 1998 required the Community to import meat containing hormones. It is quite possible to comply with the SPS Agreement without, however, authorising imports whose prohibition is at the root of the damage which the appellant claims it has suffered.

50 Second, by calling on the Court to develop its case-law, the appellant is merely criticising that Court without putting forward any real arguments. The appellant's contention that the institutions allegedly lose any discretion if they comply with their obligations in the SPS Agreement fails to take any account whatsoever of the contents of the agreement or of the fact that there are various ways in which to comply with the agreement. WTO Members may choose whether to base their veterinary measures on international standards or on another scientific evaluation of the risk or the precautionary principle. Paragraph 62 of the contested judgment is thus well founded.

Findings of the Court

51 According to settled case-law (see, *inter alia*, *Atlanta* v *European Community*, paragraph 65), non-contractual liability on the part of the Community under the second paragraph of Article 215 of the Treaty is subject to a number of conditions relating to the illegality of the conduct alleged against the Community institutions, actual damage and the existence of a causal link between the conduct of the institution and the damage complained of.

52 As the Court of First Instance observed in paragraph 61 of the contested judgment, given 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 (see *Portugal* v *Council*, paragraph 47; the order in *OGT Fruchthandelsgesellschaft*, paragraph 24; and the judgments in *Omega Air and Others*, paragraph 93, and Case C-76/00 P *Petrotub* and *Republica* v *Council* [2003] ECR I-79, paragraph 53).

53 It is only where the Community has 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 (see, as regards GATT 1947, *Fediol* v *Commission*, paragraphs 19 to 22, and *Nakajima* v *Council*, paragraph 31, and, as regards the WTO agreements, *Portugal* v *Council*, paragraph 49).

54 In that regard, the Court of First Instance found, in paragraph 64 of the contested judgment, that the circumstances of this case clearly did not correspond to either of the two hypotheses set out in the preceding paragraph. In its view, 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 was 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.

55 The Court of First Instance added, in paragraph 67 of the contested judgment, that since the decision of the DSB of 13 February 1998 was inescapably and directly linked to the plea alleging infringement of the SPS Agreement, it could be taken into consideration only 'if the Court had found that Agreement to have direct effect in the context of a plea alleging the invalidity of the directives in question'.

56 Such reasoning does not suffice, however, to deal with the plea put forward by the applicant at first instance concerning infringement of the SPS Agreement.

57 It further fell to the Court of First Instance to address the argument that the legal effects 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 in the action for damages brought by the then applicant.

58 That question was central to the arguments relating to the scope of Article 228(7) of the Treaty which the appellant advanced before the Court of First Instance, as it is before the Court of Justice at the appeal stage.

59 Furthermore, the judgment in *Atlanta* v *European Community*, to which the Court of First Instance also referred, in paragraph 67 of the contested judgment,

is irrelevant in this connection. In paragraph 19 of the judgment in *Atlanta* v *European Community* the Court of Justice found that the DSB decision, taken after the appeal had been brought and which establishes the incompatibility of the Community measure in question with WTO law, was inescapably and directly linked to the plea of infringement of the provisions of GATT, which had been raised by the appellant before the Court of First Instance but had not been repeated by it in its pleas on appeal. Consequently, the Court of Justice rejected as inadmissible, on account of the late stage at which it had been invoked, the plea based on the DSB's decision, raised before the Court of Justice for the first time in the reply, and the Court did not examine the substance of the plea.

60 However, the errors of law thus made by the Court of First Instance as regards the duty to state reasons and the scope of the judgment in *Atlanta* v *European Community* do not invalidate the contested judgment, if the operative part thereof and in particular the rejection of the plea at first instance concerning the SPS Agreement, appears founded on other legal grounds (see to that effect Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 47).

61 In that regard, the dispute settlement procedure which culminated in the DSB decision of 13 February 1998 was instigated in 1996. 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 Understanding it was granted a period of 15 months for that purpose, which expired on 13 May 1999.

62 Accordingly, for the period prior to 13 May 1999, the Community Courts cannot, in any event, carry out a review of the legality of the Community measures in question, particularly not in the context of an action for damages under Article 178 of the Treaty, without rendering ineffective the grant of a reasonable period for compliance with the DSB recommendations or rulings, as

provided for in the dispute settlement system put in place by the WTO agreements.

63 It is appropriate to add that it is apparent from the contested judgment that the Tribunal de commerce de Paris, by judgment of 7 December 1995, opened judicial liquidation proceedings in respect of the appellant and provisionally set the date for cessation of payments at 28 February 1995. As a result, it cannot be accepted that any damage to the appellant allegedly arising from the maintenance in force, after 1 January 1995, of Directives 81/602 and 88/146 and from the adoption on 29 April 1996 of Directive 96/22 could have been sustained during the period after 13 February 1998, the date on which the DSB decision relating to imports of meat containing hormones was adopted, and a fortiori after 13 May 1999, when the 15-month period granted to the Community for the purpose of complying with its obligations under the WTO rules expired.

64 In those circumstances and without it being necessary to consider what damage might be suffered by individuals as a result of the Community's failure to implement a DSB decision finding a Community measure incompatible with the WTO rules, the Court finds 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.

65 In the light of those considerations, it must be held that, despite the shortcomings of the reasoning of the contested judgment on this point, the Court of First Instance was right in finding that the plea concerning infringement of the SPS Agreement was unfounded.

66 The first plea must therefore be rejected as being ineffective in part and unfounded in part.

Second plea

67 By its second plea, the appellant submits that the Court of First Instance, by holding, in paragraph 71 of the contested judgment, that its argument concerning a system of no-fault liability for the Community was a new plea in law which could not be introduced in the course of proceedings, infringed Article 48 of its Rules of Procedure. In its submission, the issue of possible no-fault liability on the part of the Community was raised in its application before the Court of First Instance, although the arguments were developed in the reply.

68 It is sufficient on this point to state that a mere reading of the application at first instance shows that no mention was made there of no-fault liability on the part of the Community. In particular, the part of the application dealing with the compatibility of the directives at issue with the WTO rules was specifically entitled 'Community's unlawful conduct resulting in it being at fault'.

69 The Court of First Instance was thus right in holding, in paragraph 71 of the contested judgment, that the argument concerning the Community's alleged no-fault liability, was submitted too late and could not be considered, in accordance with Article 48 of the Rules of Procedure of the Court of First Instance.

70 The second plea must therefore be rejected as unfounded.

71 In light of all of the foregoing considerations, the appeal must be dismissed in its entirety.

Costs

72 Under the first paragraph of Article 122 of the Rules of Procedure of the Court of Justice, where the appeal is unfounded the Court is to make a decision as to costs. Article 69(2) of the Rules of Procedure, which is applicable to appeals by virtue of Article 118, provides that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, under Article 69(3), the Court may, where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, order that the costs be shared. The Council has applied for costs against the appellant but the appellant has been partially successful in relation to its first plea. Therefore the appellant must be ordered to bear its own costs and to pay two thirds of those of the Council.

73 The United Kingdom and the Commission are to bear their own costs in accordance with Article 69(4) of the Rules of Procedure, under which Member States and institutions which intervene in the proceedings are to bear their own costs.

On those grounds,

THE COURT (Full Court)

hereby:

1. **Dismisses the appeal;**

2. **Orders Biret International SA to bear its own costs and to pay two thirds of the costs of the Council of the European Union;**

3. **Orders the Council of the European Union to bear one third of its own costs;**

4. **Orders the United Kingdom of Great Britain and Northern Ireland and the Commission of the European Communities to bear their own costs.**

Rodríguez Iglesias	Puissochet	Wathelet
Schintgen	Timmermans	Gulmann
Edward	Jann	Skouris
Macken	Colneric	von Bahr
	Cunha Rodrigues	

Delivered in open court in Luxembourg on 30 September 2003.

R. Grass — Registrar

G.C. Rodríguez Iglesias — President