DEVELOPMENTS

The Effect of WTO Dispute Settlement Rulings in the EC Legal Order: Reviewing *Van Parys* v *Belgische Interventie- en Restitutiebureau* (C-377/02)

By Delphine De Mey[*]

A. Introduction

On 1 March 2005, the European Court of Justice (hereinafter 'ECJ' or 'the Court') got another opportunity to rule on the effect of recommendations and decisions of the WTO Dispute Settlement Body (hereinafter 'DSB') in the Community legal order.[1] The ECJ concluded that an individual does not have the right to challenge, before a national court, the incompatibility of Community measures with WTO rules, even if the DSB had previously declared the Community legislation to be incompatible with those rules.

B. Facts

In 1997, after a complaint instituted by several third countries, the WTO DSB had found the Community regime for the import of bananas, based on the Regulation N°404/93[2], to be inconsistent with WTO rules, in particular with Articles I:1 and XIII of GATT.[3] In response to this decision, the Community adopted Regulation N°1637/98[4] amending Regulation N°404/93, to conform with its WTO obligations.

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[1] Case C-377/02 *Van Parys v Belgische Interventie- en Restitutiebureau*, Judgment of 1 March 2005, nyr.

[2] Council Regulation (EEC) N° 404/93 of 13 February 1993 on the common organisation of the market in bananas, OJ 1993, L 47/1.

[3] Articles I and XIII of GATT 1994 are an articulation of the most favourite nation principle and the principle of non-discriminatory administration of quantitative restrictions.

[4] Council Regulation (EC) N°1637/98 of 20 July 1998 amending Regulation N°404/93, OJ 1998, L 210/28.

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Different regulations were adopted to further implement the amended Regulation.[5] However, Ecuador still had doubts about the conformity of the new amended Community regime and brought the issue before the dispute settlement system of the WTO. The DSB in 1999 came to the conclusion that the 'amended' Community system was still in breach of Articles I:1 and XIII of GATT.[6]

In 1998 and 1999, NV Firma Léon Van Parys (hereinafter 'Van Parys'), a Belgian importer of bananas from Ecuador into the Community for more than 20 years, applied on several occasions for import licences for certain amounts of bananas. The competent authority, the Belgian Intervention and Refund Bureau (hereinafter 'BIRB') refused to issue import licences for the full quantity applied for. In 1999, Van Parys challenged the decisions of the BIRB before the Raad van State, the Supreme Administrative Court of Belgium. According to the company, the decisions of the BIRB were unlawful as they were based on the Community regulations[7] establishing the Community regime for the import of bananas from third countries, considered by the DSB to be in violation with WTO rules. The Raad van State referred the case to the ECJ for a preliminary ruling.

C. Legal Analysis

The questions referred by the Raad van State concerned in essence the validity of the Community Regulations vis-à-vis Articles I and XIII of GATT 1994.

As a starting point, the ECJ referred to its case law on the possibility for Community nationals to rely on the WTO agreements in legal proceedings in order to challenge the validity of Community legislation. The case at hand dealt with the specific problem whether or not a plaintiff can rely on DSB decisions and recommendations.

According to the case law of the ECJ, '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'.[8] However,

[5] Commission Regulations N°2362/98 (OJ 1998 L 293/32), N°2806/98 (OJ 1998 L 349/32), N°102/1999 (OJ 1999 L 11/16) and N°608/1999 (OJ 1999 L 75/18).

[6] After this decision of the DSB, the Community amended its regime again. However this last amendment is ratione temporis not relevant for the present case.

[7] Regulation N°404/93, as amended, and regulations N°2362/98, 2806/98, 102/1999 and 608/1999.

[8] C-377/02 *Van Parys v Belgische Interventie- en Restitutiebureau*, footnote 1, para. 39. See also Case C-149/96 *Portugal v Council* [1999] ECR I-8395; Order of 2 May 2001 in C-307/99 *OGT Fruchthandelsgesellschaft* [2001] ECR I-3159; Joined cases C-27/00 and C-122/00 *Omega Air* and Others [2002] ECR I-2569, Case C-76/00 P *Petrotub and Republica v Council* [2003] ECR I-79 and Case C-93/02 *P*

the ECJ has allowed two exceptions to the general rule. The legality of Community measures can be reviewed in the light of WTO rules when the Community measure at stake 'intended to implement a particular obligation' assumed in the framework of the WTO or when the Community measure 'refers expressly to the precise provisions of the WTO agreements'.[9]

In the case at hand the ECJ examined the first exception and concluded that it did not apply, contrary to the position taken on this point by AG Tizzano. The ECJ stressed that the dispute settlement accords considerable importance to negotiation between the parties, even when a decision of the DSB declares measures adopted by a WTO member to be incompatible with WTO rules.[10] According to the ECJ, the purpose of the dispute settlement system is to secure the withdrawal of the measures found to be incompatible with WTO rules. Therefore, a member should enforce the DSB recommendations and decisions within a reasonable period of time. Should a member fail to do so, it can enter into negotiations with the party that brought the matter before the DSB, with a view to agree on compensation. In case no agreement on compensation can be reached, the complainant can ask authorisation to the DSB to suspend the application of concessions or other obligations under the WTO agreements.[11] According to the ECJ, obliging courts to set aside rules of domestic law when they are found to be incompatible with WTO rules would hinder the possibility of reaching a negotiated solution. Moreover, requiring the Community courts to review the legality of Community measures in the light of the WTO rules, on the sole ground that the time-limit for implementation of the DSB decision has expired, could undermine the Community's position in trying to reach a mutually acceptable and WTO conforming solution to the dispute.[12]

Biret International v Council [2003] ECR I-10497. On this point, it is useful to already mention the dissenting view expressed by AG Tizzano in his Opinion, delivered on 18 November 2004, in C-377/02 *Van Parys v Belgische Interventie- en Restitutiebureau*, footnote 1. According to him, DSB decisions, as those at stake in the present case, must be considered as a criterion of the legality of Community measures (see also infra).

[9] Ibid., para. 40. See also, as regards GATT 1947, Case C-69/89 *Nakajima v Council* [1991] ECR I-2069 and Case 70/87 *Fediol v Commission* [1989] ECR 1781. The same exceptions have also been recognized under the WTO, see C-149/96 *Portugal v Council*, footnote 8 and C-93/02 P *Biret International v Council*, footnote 8.

[10] Ibid., para. 42. See also C-149/96 *Portugal v Council*, footnote 8.

[11] Ibid., paras. 43-45. Compensation and suspension are considered to be temporary measures.

[12] Ibid., para. 51.

In the present case the Community had changed its regulations after the first DSB decision. However, according to the DSB in 1999, the regime continued to infringe the WTO rules. Moreover the Community had been negotiating agreements with the United States of America and with Ecuador, in order to come to an acceptable solution. Hence, the ECJ concluded that the Community regulations could not be seen 'as measures intended to ensure the enforcement within the Community legal order of a particular obligation assumed in the context of the WTO'.[13] Moreover, without a separate analysis of the second exception, the Court added that the Community measures did not 'expressly refer to specific provisions of the WTO agreements'.[14]

The ECJ found another argument to support its view that no direct effect should be granted to DSB decisions. Obliging the Community courts to ensure the compliance of Community law with WTO rules 'would deprive the Community's legislative or executive bodies of the discretion which the equivalent bodies of the Community's commercial parties [do] enjoy'.[15] More specifically, it is known that some important commercial partners of the Community have not recognized the WTO rules as rules applicable before their courts when reviewing the legality of their rules of domestic law. The lack of reciprocity which results from this different point of view entails the risk of introducing an 'anomaly' in the application of WTO rules.[16]

It is interesting to observe that AG Tizzano had rejected the argument of reciprocity, by reference to the Opinion of AG Alber in the *Biret* case,[17] recognising the binding effect of DSB decisions after the expiry of the period granted for complying with them.[18] According to AG Alber, the position of the Community would not be weakened by recognizing the direct effect of DSB decisions since its retains the possibility to initiate dispute settlement proceedings against other trading partners which continue to infringe WTO rules, and the possibility to require them to comply with these DSB decisions, including the use of compensation or retaliation measures. Moreover, the discretion of the Community as to the means to implement the DSB decisions would not be limited by

[13] Ibid., para. 52.

[14] Ibid., para. 52.

[15] Ibid., para. 53

[16] Ibid., para. 53.

[17] AG Tizzano, footnote 8 para. 63; AG Alber, Opinion delivered on 15 May 2003, in C-93/02 P *Biret International v Council*, footnote 8.

[18] AG Alber, footnote 17, paras. 85-88.

recognising the binding effect of DSB decisions, as those means remain entirely at the discretion of the Community institutions, on the condition that they intend to result in measures compatible with the obligations arising from the WTO rules. Finally, AG Alber considered that granting binding effect to decisions of DSB cannot weaken the trading position of the Community, as Members of the WTO cannot decide to maintain rules contrary to WTO law. On the basis of these arguments, AG Tizzano concluded that DSB decisions must be considered as a criterion of the legality of Community measures.[19]

In the present case, the period granted to the Community to bring its own legislation into conformity with the WTO rules had expired and the Community regime was still found to be inconsistent with WTO rules. The AG considered the Community regulations at stake to be unlawful.

However, anticipating the ECJ's disapproval, the AG had proposed an alternative solution. He recalled the exception provided for in the *Nakajima* judgment, as confirmed in the *Italy v Council* case.[20] According to him, the Community regime had been amended after the first decision of the DSB, with a view to comply with the decision. For the AG it was therefore beyond doubt that the Community legislation in question clearly intended to implement a particular obligation assumed in the context of the WTO. To support this view, the AG pointed inter alia to the second recital in the preamble of Regulation N°1637/98, amending Regulation N°404/93, which states that 'the Community's international commitments under the [WTO] … should be met'.[21] According to the AG, the aim of the Community measure clearly existed in bringing the Community legislature in conformity with the WTO rules as interpreted by the DSB.[22]

However, the ECJ came to the opposite conclusion: Van Parys did not have the possibility to invoke, before a national court, the incompatibility of Community

[19] AG Tizzano, footnote 8, paras. 68-73; AG Alber, footnote 17, paras. 97-103.

[20] C-69/89 *Nakajima v Council*, footnote 9; Case C-352/96 *Italy v Council* [1998] ECR I-6937. The AG also made reference to the more recent *OGT Fruchthandelsgesellschaft* order (see footnote 8), in which the ECJ was reluctant to apply the *Nakajima* exception. In that order, concerning a preliminary ruling on the validity of the same Community regime as the one at stake in the present case, the ECJ did not even take into account the existence of a decision adopted by the DSB. It simply inferred the answer from the judgment in *Portugal v Council* where no DSB decision was at stake.

[21] AG Tizzano, footnote 8, para. 100.

[22] Ibid., para. 102. See other arguments used by AG Tizzano: paras. 99-102.

measures with certain WTO rules, even though the DSB had declared the Community legislation to be incompatible with those rules.[23]

D. Comments

This case is part of a series of cases in which the ECJ remained reluctant to grant direct effect to WTO rules and DSB decisions.[24] Several Advocate Generals have adopted a less restrictive stance[25], but the ECJ did not seem willing to follow it. In *Biret*, the ECJ had been able to avoid giving a ruling on the question of direct effect of DSB decisions by invoking temporal reasons linked to the facts of the case.[26] The present case did not provide for the same "loophole". However, it should be stressed that in the *Biret* judgment the ECJ did not exclude the possible direct effect of DSB decisions.

According to AG Tizzano there was no reason to keep on denying the impossibility to review the compatibility of Community legislation in the light of the WTO rules. He came to the conclusion that the Community regime in question, after the expiry of the period granted to the Community to bring its own legislation into conformity with the WTO rules, was invalid because of its inconsistency with WTO rules. In the alternative, he argued that the case at hand was a clear example of how the Community 'intended to implement' a particular WTO obligation.[27]

A closer look to the *Nakajima* principle shows however that the ECJ and the Court of First Instance hereinafter 'CFI') have almost exclusively applied this exception in the context of reviewing the compatibility of EC Anti-Dumping Regulations with the provisions of the Anti-Dumping Codes, adopted as a part of the GATT. This

[23] Due to its minor importance for the outcome of the case, the question concerning the Framework agreement of 23 April 1993 between the EEC and the Cartagena Group will not be discussed.

[24] Keeping in mind the two exceptions recognized by the ECJ, footnote 9.

[25] See i.e. AG Alber, footnote 17; AG Tizzano in the case at hand, footnote 8.

[26] According to the ECJ no damage could have been suffered after the expiry of the implementing period (1999) granted by the DSB, since Biret had already ceased business activities in 1995. See A. THIES, 'Biret and beyond: The status of WTO rulings in EC law', CMLRev. 41 [2004] 1661-1682.

[27] One has to stress however that in the *Nakajima* and the *Italy v Council* case, the Community measure in question intended to implement a particular obligation entered into within the framework of GATT. These cases did not deal with the implementation of decisions of the DSB. However in *Biret* the implementation of DSB decision was at stake but the ECJ could avoid giving a ruling on that issue.

was confirmed by the CFI in its recent *Chiquita Brands International* case.[28] This judgment stressed the fact that in the anti-dumping area, the relevant GATT and WTO agreements imposed a direct obligation on each of the contracting parties to adapt their national legislation so as to reflect the content of those agreements.[29] In the *Chiquita Brands International* case, the CFI did not exclude the applicability of the *Nakajima* exception to other areas, on the condition that the agreements and the Community provisions in question are comparable in nature and content to those of the Anti-Dumping Codes of the GATT and the Anti-Dumping Regulations, which transpose them into Community law.[30] Finally the CFI did not accept the application of the *Nakajima* exception. It looked at the nature and content of the applicable provisions of GATT and GATS[31], and the applicable Community regulations concerning the common organisation of the market in bananas. The CFI concluded that those provisions clearly differed from the Anti-Dumping Codes and regulations, as the wording, nature and scope of the GATT and GATS provisions and the Community banana regime was being far more general in character. The CFI gave other arguments supporting the non-applicability of the *Nakajima* exception, such as the reference to the possibility offered by the DSU to negotiate a solution, to agree on compensation, etc.[32]

In the *Van Parys* case, AG Tizzano seemed to argue for a widening of the *Nakajima* exception and to include other situations than the one at stake when the ECJ created the exception. The AG generalized the exception, without referring to the difference in wording, nature and scope between the Anti-Dumping Codes and regulations on the one hand and the general Articles I and XIII GATT and the Community regime on the import of bananas on the other. The case at hand raised the question of the applicability of the *Nakajima* exception to DSB rulings. As elaborated above, the AG is convinced that the Community legislation clearly intended to implement a WTO obligation.

However the ECJ came to another conclusion. Notwithstanding that the DSB held the measures adopted by the EC to be incompatible with WTO rules, the Court claimed that the Community regulations, adopted pursuant to the DSB ruling, could not be interpreted as measures which intended to comply with a particular

[28] Case T-19/01 *Chiquita Brands International and others v Commission*, Judgment of 3 February 2005, nyr., para. 118.

[29] Ibid., para. 121.

[30] Ibid., para. 124.

[31] Article XIII GATT and Articles II and XVII GATS.

[32] T-19/01 *Chiquita Brands International*, footnote 28, paras. 159-170.

obligation in the context of WTO. How can one explain this position? It seems that whenever there is a possibility for negotiation, as there is even after a DSB ruling as the Court explained, the ECJ is unwilling to accept the review of the legality of Community measures in the light of WTO rules. Even though the situation in *Van Parys* seemed at first sight to warrant a clear application of the *Nakajima* principle, the ECJ found a way out by referring to the possibility for WTO members to come to a negotiated solution. As a consequence, one can ask what the future relevance of the *Nakajima* exception will be. Does this judgment not render the exception unworkable? Every Community measure, amended after a DSB ruling, but still infringing the WTO rules, would seem to be able to escape from the *Nakajima* exception. This judgment clearly shows that the ECJ does not want to weaken by judicial means the EC's negotiating position in international fora.

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