

## Recent Development

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### JUDICIAL ENFORCEMENT OF THE WTO *HORMONES* RULING WITHIN THE EUROPEAN COMMUNITY: TOWARD EC LIABILITY FOR THE NON-IMPLEMENTATION OF WTO DISPUTE SETTLEMENT DECISIONS?

#### I. INTRODUCTION

On September 30, 2003, the European Court of Justice (ECJ) contemplated the possibility of holding the European Community<sup>1</sup> liable for the non-implementation of World Trade Organization (WTO) Dispute Settlement Body (DSB) decisions.<sup>2</sup> The implications of the ECJ's reasoning in these judgments could be revolutionary not only for the EC legal order, but also for the legal systems of all WTO members. To date, no court of a WTO member state has recognized a private party's right to rely on DSB rulings to initiate a claim of liability against a member state.<sup>3</sup> Since WTO rules lack direct effect,<sup>4</sup> member states typically prevent private parties from invoking DSB rulings before domestic courts.<sup>5</sup> Hence private business operators are barred from recovering the damages suffered from non-compliance with DSB rulings.

It is not surprising that these remarkable judgments were pronounced by a court of the European Community. While both the United States and Japan have systematically refused to acknowledge a private party's ability to rely on WTO law or DSB rulings as sources of individual rights,<sup>6</sup> the Euro-

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1. The European Economic Community (EEC), European Community (EC), and European Union (EU) are not identical entities. The European Economic Community was established in 1957 by the Treaty of Rome and became the European Community after the reforms of the Treaty of Maastricht in 1992. The Treaty of Maastricht also initiated a more ambitious supranational project, the European Union, based on three "pillars": the European Community, the Common Foreign and Security Policy, and Justice and Home Affairs. See JO SHAW, *LAW OF THE EUROPEAN UNION* 4–11 (3d ed. 2000); DENYS SIMON, *LE SYSTÈME JURIDIQUE COMMUNAUTAIRE* 15–33 (2d ed. 1998).

2. Case C-93/02 P, *Biret Int'l SA v. Council* (Sept. 30, 2003), at <http://europa.eu.int> (last visited May 2, 2004); Case C-94/02 P, *Établissements Biret et Cie SA v. Council* (Sept. 30, 2003), at <http://europa.eu.int> (last visited May 2, 2004).

3. See *infra* Part II.A. (discussing direct effect).

4. "Direct effect" refers to the possibility of a private party bringing a claim in the domestic courts of a WTO member state against another private party or member state for the violation of a WTO rule. See *infra* Part II.A.

5. As a result of the Uruguay Round, both the United States and the European Community barred the invocation of any WTO rule before domestic courts. See Uruguay Round Trade Agreements Act of 1994 § 102(a), 19 U.S.C. § 3512(c) (2000); Council Decision 94/800, 1994 O.J. (L 336) 1 (EU).

6. In the United States,

"There is virtually no Constitutional basis for individual challenges to trade policy measures . . . . The general tendency of federal statutes [sic] in the trade policy area is to provide the executive with extremely broad discretion, leaving little room for judicial review." Fred L. Morrison & Robert E. Hudec, *Judicial Protec-*

pean Community, through its Luxembourg-based courts, has always shown more judicial openness and receptiveness to such a possibility.<sup>7</sup>

The case at hand arose when a French meat trading company, Biret International, and its holding company, Etablissement Biret et Cie SA, filed actions before the Court of First Instance (CFI) of the European Communities seeking compensation for damages allegedly suffered as a result of the adoption and continuing enforcement of an EC ban on hormone-treated beef.<sup>8</sup> The ban had already been condemned by the WTO in the well-known *Beef Hormones* cases.<sup>9</sup> Biret, relying on WTO rulings in the *Beef Hormones* cases,<sup>10</sup> asked the court to hold the European Community liable for failing to implement the decision within the prescribed period of time.<sup>11</sup> In line with the ECJ's longstanding tradition of denying the direct effect of General Agreement on Tariffs and Trade (GATT) and WTO law,<sup>12</sup> the CFI rejected the claim on the ground that neither WTO agreements nor rulings could create rights for private individuals.<sup>13</sup> In an appeal of this judgment, the ECJ dis-

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*tion of Individual Rights under the Foreign Trade Laws of the United States, in NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW* 91, 132 (Meinhard Hilf & Ernst-Ulrich Petersmann eds., 1993). See also E.U. Petersmann, *The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System Since 1948*, 31 COMMON MKT. L. REV. 1157, 1243 (1994) (discussing the U.S. draft legislation for the implementation of the Uruguay Round Agreements). Japanese courts have adopted a prudent attitude toward General Agreement on Tariffs and Trade (GATT) and WTO rules and decisions. Although DSB rulings may be invoked in various situations as "aids in interpreting Japanese domestic trade laws, or as evidence supportive of a conclusion reached through the interpretation of the laws," they cannot be relied upon before courts. Yuji Iwasawa, *Implementation of International Trade Agreements in Japan, in NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC LAW, supra*, at 336, 343.

7. The European Community has clearly denied the direct applicability of WTO rules. Council Decision 94/800, *supra* note 5. However, triggered by European courts' increasing receptiveness to WTO law, both courts and legal scholars remain engaged in a lively debate about the legal effects of WTO law in the EC legal order. See, e.g., Jacques H.J. Bourgeois, *The European Court of Justice and the WTO: Problems and Challenges, in THE EU, THE WTO, AND NAFTA: TOWARDS A COMMON LAW OF INTERNATIONAL TRADE?* 71, 115 (J. H. H. Weiler ed., 2000); Thomas Cottier, *Dispute Settlement in the World Trade Organization: Characteristics and Structural Implications for the European Union*, 35 COMMON MKT. L. REV. 325, 367–78, (1998); Francis Snyder, *The Gatekeepers: The European Courts and WTO Law*, 40 COMMON MKT. L. REV. 313, 325–49 (2003). Under current EC case law, WTO agreements could serve as grounds for review when the Community intends to implement a particular obligation assumed in the WTO context or when a Community act expressly refers to specific provisions of WTO agreements. See Case C-69/89, *Nakajima All Precision Co. v. Council*, 1991 E.C.R. I-2069, 2277–78; Case C-70/87, *Fédération de l'industrie de l'huilerie de la CEE (Fediol) v. Commission*, 1989 E.C.R. 1781, 1830–32.

8. See Case T-174/00, *Biret Int'l SA v. Council* (Jan. 11, 2002), available at <http://europa.eu.int> (last visited May 2, 2004); Case T-210/00, *Établissements Biret et Cie SA v. Council* (Jan. 11, 2002), available at <http://europa.eu.int> (last visited May 2, 2004).

9. See Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998) (adopted Feb. 13, 1998) [hereinafter *Hormones Appellate Body Report*]; Panel Report, *European Communities—Measures Concerning Meat and Meat Products*, WT/DS26/R/USA (Aug. 18, 1997) [hereinafter *Hormones Panel Report*].

10. See Case T-174/00, *Biret Int'l SA* ¶ 57; Case T-210/00, *Établissements Biret et Cie SA* ¶ 24.

11. See Case T-174/00, *Biret Int'l SA* ¶ 18; Case T-210/00, *Établissements Biret et Cie SA* ¶ 19.

12. See, e.g., Bourgeois, *supra* note 7, at 115; Snyder, *supra* note 7, at 365.

13. See Case T-174/00, *Biret Int'l SA* ¶¶ 60–68; Case T-210/00, *Établissements Biret et Cie SA* ¶¶ 70–78.

missed the action on factual grounds,<sup>14</sup> but did not rule that the plaintiff's claim was unfounded. In this way, the ECJ left open the possibility that a WTO dispute settlement ruling could provide grounds for imposing liability on the European Community.

Through these judgments, the ECJ introduced an innovative conceptual distinction between the direct effect of WTO rules and reliance on WTO rulings, thereby positioning a new fundamental premise on which to base more private-party involvement in the implementation of DSB decisions.<sup>15</sup> As a result of these decisions, virtually all private business operators, regardless of their place of incorporation, potentially could be permitted to invoke a WTO ruling condemning the European Community as a basis for claiming damages in a suit before the ECJ.

The objective of this Recent Development is to provide the reader with an analysis of the *Biret* judgments and their possible legal implications.<sup>16</sup> Part I provides the necessary framework to understand the legal context underlying the *Biret* judgments. The Part briefly discusses the direct effect of WTO law, the functioning of the WTO dispute settlement system, the (non-) role of private parties, and the historical background of the *Beef Hormones* cases. Part II examines the *Biret* judgments by the CFI and the ECJ, and also the opinion of Advocate General Alber.<sup>17</sup> Part III focuses on the legal implications of the *Biret* cases and their potential impact on the EC legal order and on other WTO member countries.

## II. LEGAL CONTEXT

The WTO, by providing rules addressed to both states and private parties, represents the most sophisticated legal framework ever conceived to govern global trade.<sup>18</sup> Unlike many other international organizations, the WTO has a dispute settlement system characterized by compulsory jurisdiction, strict time frames, and an automatic decision-making process.<sup>19</sup> The dispute set-

14. Case C-93/02, *Biret Int'l SA* ¶¶ 63–64; Case C-94/02, *Établissements Biret et Cie SA* ¶¶ 66–67.

15. See Case C-93/02, *Biret Int'l SA* ¶¶ 51–64; Case C-94/02, *Établissements Biret et Cie SA* ¶¶ 54–67.

16. For a broader analysis of private rights of action in international trade law, especially in WTO dispute settlement, see Joel P. Trachtman & Philip M. Moremen, *Costs and Benefits of Private Participation in WTO Dispute Settlement: Whose Right Is It Anyway?*, 44 HARV. INT'L L.J. 221 (2003).

17. The task of the Advocate General (AG) is to propose to the Court, in complete independence, a legal solution to the case in question. The opinion does not bind the ECJ. TREATY ESTABLISHING THE EUROPEAN COMMUNITY, arts. 166–67, Nov. 10, 1997, O.J. (C 340) [hereinafter EC TREATY].

18. For a general introduction to the WTO, see JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* (2d ed. 1997).

19. See Hyun Chong Kim, *The WTO Dispute Settlement Process: A Primer*, 2 J. INT'L ECON. L. 457, 457–58 (1999). The adoption of a report by the Dispute Settlement Body (DSB) may no longer be blocked by the losing party. The initial report by the dispute settlement panel is adopted within twenty to sixty days of the report's circulation among member states, unless it is decided by consensus not to adopt the report (i.e., only in the highly unlikely circumstance that the winning party agrees to reject the decision) or unless a party to the dispute notifies the DSB of an intention to appeal. Following the appeal, the DSB may decide not to adopt the Appellate Body's report, but again only by consensus. In other words, no single member can block the adoption of the report. See UNDERSTANDING ON RULES AND PROCEDURES

tlement system is based on a two-tier mechanism of panels of first instance and an Appellate Body.<sup>20</sup> The current dispute settlement system, which replaced an old and less rule-oriented settlement mechanism, is a “central element in providing security and predictability to the multilateral trading system.”<sup>21</sup>

#### A. *The Direct Effect of WTO Law*

The direct effect of WTO law<sup>22</sup> relates to the possibility of individuals relying on WTO rules to initiate claims in domestic courts against the state or other private parties.<sup>23</sup> Due to the lack of consensus within the WTO regarding how member states should incorporate WTO law into their national legal orders, WTO agreements have remained neutral on the issue of whether their rules should produce a direct effect. WTO panels and the Appellate Body have consistently maintained this position in their reports, stating that “[n]either the GATT nor the WTO has so far been interpreted by GATT/WTO institutions as a legal order producing direct effect. Following this approach, the GATT/WTO did *not* create a new legal order the subjects of which comprise contracting parties or Members and their nationals.”<sup>24</sup>

In principle, WTO members are free to decide whether WTO agreements may produce direct effect within their jurisdiction. Accordingly, as a result of the Uruguay Round, the European Community and the United States prevented the invocation of WTO rules before domestic courts by expressly denying any direct effect in their respective ratification acts.<sup>25</sup> Nevertheless, while both U.S. and EC courts are legally prevented from giving direct effect to WTO law, the ECJ has historically shown a more assertive attitude by debating whether to recognize the direct effect of such rules within the EC legal order.

Prior ECJ case law denying the direct effect of GATT rules was based mainly on two arguments: (1) the GATT had to be conceived as a trade/diplomatic tool, rather than a judicial one; and (2) the flexible and imprecise agreement is incapable of conferring community rights that citizens can invoke in do-

GOVERNING THE SETTLEMENT OF DISPUTES, arts. 16, 17.14, Apr. 15, 1994, MARRAKESH AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION, ANNEX 2, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, 33 I.L.M. 112 (1994) [hereinafter DSU].

20. *Id.* arts. 6, 16, 17.

21. *Id.* art. 3.2.

22. For a canonical overview of direct effect in international law, see John H. Jackson, *Status of Treaties in Domestic Legal Systems: A Policy Analysis*, 86 AM. J. INT'L L. 310 (1992). For a U.S. perspective against direct effect, see Joel P. Trachtman, *Bananas, Direct Effect and Compliance*, 10 EUR. J. INT'L L. 655, 677 (1999). For a European perspective, see Piet Eeckhout, *Judicial Enforcement of WTO Law in the European Union—Some Further Reflections*, J. INT'L ECON. L. 91 (2002). For a position favoring the development of a new theory of direct effect, see Thomas Cottier, *A Theory of Direct Effect in Global Law*, in EUROPEAN INTEGRATION AND INTERNATIONAL CO-ORDINATION: STUDIES IN TRANSNATIONAL ECONOMIC LAW IN HONOUR OF CLAUS-DIETER EHLERMANN (Armin Von Bogdandy et al. eds., 2002).

23. The issue of direct effect was hotly debated even under the GATT. See generally Giorgio Sacerdoti, *Application of G.A.T.T. by Domestic Courts: European and Italian Case Law*, 2 ITA. Y.B. INT'L L. 224 (1976).

24. Panel Report, *United States—Sections 301–310 of the Trade Act of 1974* ¶ 7.72, WT/DS152/R (Dec. 22, 1999) [hereinafter Section 301 Panel Report].

25. See *supra* note 5; Council Decision 94/800, *supra* note 5.

mestic courts.<sup>26</sup> After the WTO was established, the ECJ needed to reevaluate its prior arguments in light of the newer, more rule-oriented organization. However, the ECJ relied on concerns over the lack of reciprocity and upheld its prior case law denying direct effect.<sup>27</sup> Although more *realpolitik* than legal, the reciprocity argument is a powerful reason to reject the direct effect of WTO law. Indeed, recognizing direct effect or the existence of rights for private parties is generally believed to hamper the ability of WTO members to defend domestic interests by undermining the flexibility that underpins the whole multilateral trade system. Therefore, at least within the EC legal order, the complexities of the relationship between WTO law and domestic law cannot be considered settled.<sup>28</sup>

### B. *The Role of Private Parties in the WTO Dispute Settlement System*

Despite the progressive judicialization of the dispute procedure within the WTO,<sup>29</sup> private parties do not have direct access to any of the WTO's Geneva-based bodies to complain about government practices that allegedly violate WTO agreements.<sup>30</sup> Nor can private parties rely on rights granted by WTO laws in domestic courts, as such laws lack direct effect.<sup>31</sup> Accordingly,

26. Case C-21/72, *Int'l Fruit Co. v. Produktschap voor Groenten en Fruit*, 1972 E.C.R. 1219, 1224. See Jan Klabbbers, *International Law in Community Law: The Law and Politics of Direct Effect*, 21 Y.B. EUR. L. 263, 274–75 (2002).

27. See Case C-149/96, *Portuguese Republic v. Council*, 1999 E.C.R. I-8395; Stefan Griller, *Judicial Enforceability of WTO Law in the European Union: Annotation to Case C-149/96, Portugal v. Council*, 3 J. INT'L ECON. L. 441 (2000); Allan Rosas, Case Law, *Case C-149/96, Portugal v. Council*, 37 COMMON MKT. L. REV. 797 (2000).

28. See Cottier, *supra* note 22, at 101.

29. On the evolution of the dispute settlement from a "power-oriented" to a more "rule-oriented" mechanism, see JACKSON, *supra* note 18, at 109–11; E.U. PETERSMANN, *THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS, AND DISPUTE SETTLEMENT* 188 (1997); William J. Davey, *WTO Dispute Settlement: Segregating the Useful Political Aspects and Avoiding "Over-Legalization,"* in *NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: ESSAYS IN HONOR OF JOHN JACKSON* 291 (Marco Bronckers & Reinhard Quick eds., 2000); Hyun Chong Kim, *The WTO Dispute Settlement Process: A Primer*, 2 J. INT'L ECON. L. 457 (1999). The most significant element of the reform is the introduction of the "automaticity principle," according to which the formation of panels, adoption of reports, and retaliation (if a DSB ruling is not complied with) are all automatic. See Kim, *supra*, at 458.

30. Lawrence D. Roberts, *Beyond Notions of Diplomacy and Legalism: Building a Just Mechanism for WTO Dispute Resolution*, 40 AM. BUS. L.J. 511, 537–38 (2003). See also Robin Nordblad, *Dispute Settlement in the WTO—Towards Rule Integrity*, TIDSKRIFT, UTGIVEN AV JURIDISKA FÖRENINGEN I FINLAND 85, 90–96 (2003). Several reasons explain why private parties are not allowed direct access to the dispute settlement system: most members do not want the organization to lose its intergovernmental nature; member states want to maintain their monopoly in deciding which cases to bring before the DSB; and the WTO lacks adequate structure and resources. See Kees Jan Van Kuilwijk, *THE EUROPEAN COURT OF JUSTICE AND THE GATT DILEMMA: PUBLIC INTEREST VERSUS INDIVIDUAL RIGHTS?* (1996). For a proposal in favor of private parties' direct access to WTO panels on a selective basis, see Sung-joon Cho, *GATT Non-Violation Issues in the WTO Framework: Are They the Achilles' Heel of the Dispute Settlement Process?*, 39 HARV. INT'L L.J. 311, 348 (1998).

31. However, in the event a private company believes a member state is violating WTO rules, the company may petition its government to use the dispute settlement system to enforce compliance. This indirect means of private party access to the WTO dispute settlement system is "a tortuous political procedure" generally called "championing." Cho, *supra* note 30, at 341. Both the United States and the European Community have created trade remedy mechanisms that allow private parties to complain about illegal prac-

who has judicial standing when a violation of a WTO agreement has been sanctioned by a panel and/or the Appellate Body? May private business operators invoke the DSB's rulings in the courts of the losing member state? Are private parties entitled to recover compensation for damages suffered from non-compliance? Although direct effect is mostly debated in pathological situations of non-compliance, it is still extremely relevant for any private company that might be affected by the non-implementation of DSB rulings. Direct effect is also significant because the legal status of panel and Appellate Body reports measures, to some extent, the effectiveness of the new dispute settlement system in promoting security and predictability for all actors, especially for private companies.

On one hand, the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) requires compliance with DSB rulings.<sup>32</sup> On the other hand, under the DSU, rulings can only be enforced through economic and political pressure on members to withdraw or amend their WTO-illegal measures.<sup>33</sup> Consequently, when it is impracticable to withdraw the measure within a reasonable period of time, the losing party may offer to compensate the winning party.<sup>34</sup> Should the losing party fail to agree with the winning party on a "mutually acceptable compensation," it can face retaliation in the form of surcharge tariffs.<sup>35</sup> Retaliation does not necessarily result in the withdrawal of the WTO-illegal measures, and can in fact raise trade barriers between member states.<sup>36</sup> Therefore, whenever these alternative measures are taken, often as a "traditional option of *realpolitik*" by governments,<sup>37</sup> the costs of non-compliance are borne mainly by private companies.<sup>38</sup> It is against this

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tices of third countries and to request that their trade authorities—the U.S. Trade Representative and the EC Commission—bring cases before the WTO. For the U.S. trade mechanism, see Morrison & Hudec, *supra* note 6, at 130. For the EC trade mechanism, see Marco Bronckers & Natalie McNelis, *The EU Trade Barriers Regulation Comes of Age*, 35 J. WORLD TRADE 427 (2001). For a comparative study of the two mechanisms, see Petros C. Mavroidis & Werner Zduoc, *Legal Means to Protect Private Parties' Interests in the WTO: The Case of the EC New Trade Barrier Regulation*, 1 J. INT'L ECON. L. 407, 407–32 (1998).

32. See DSU arts. 19.1, 21.1.

33. There are two "temporary measures" that a successful complainant may seek: it may ask either for compensation or for suspension of concessions under the scheme provided by the DSU. *Id.* arts. 22.1, 22.2.

34. *Id.* art. 22.2

35. *Id.* See also *id.* art. 22.1.

36. See Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules are Rules—Towards a More Collective Approach*, 94 AM. J. INT'L L. 335, 337 (2000). Several scholars have expressed doubts as to the effectiveness of retaliation as a temporary remedy for the breach of WTO law. See, e.g., ABRAM CHAYES & ANTONIA H. CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 109–11 (1995); Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 95 AM. J. INT'L L., 792, 792–832 (2001); Pauwelyn, *supra*, at 338.

37. Cottier, *supra* note 7, at 364.

38. See Charnovitz, *supra* note 36, at 810–11 (arguing that WTO sanctions hurt "innocent economic actors" and violate the "basic human right [to] voluntary commercial intercourse"); Edwini Kessie, *Enhancing Security and Predictability for Private Business Operators under the Dispute Settlement System of the WTO*, 34 J. WORLD TRADE 1, 17 (2000) ("although private business operators do not have access to the dispute settlement system of the WTO, they are the ones who are most likely to be affected by the inefficiencies in the system.")

legal setting that EC courts have had to address private parties' interests within the dispute settlement system without reducing their own discretion in implementing DSB rulings.

### C. *The Beef Hormones Cases*

In the *Beef Hormones* cases,<sup>39</sup> both the panel and the Appellate Body found that EC legislation restricting the imports of hormone-treated beef violated the Agreement on the Application of Sanitary and Phytosanitary Measures ("SPS Agreement").<sup>40</sup> The panel and Appellate Body findings were essentially made on the ground that the legislation was not based on a complete assessment of the cancer risks associated with the use of certain growth hormones in cattle.<sup>41</sup> Because the European Community failed to meet the deadline to comply with the report, the complaining parties (the United States and Canada) were authorized by the DSB to impose punitive tariffs on certain EC exports.<sup>42</sup> The United States and Canada retaliated against the European Community<sup>43</sup> with economic sanctions affecting European exporters of luxury products, ranging from cheese producers to handbag manufacturers.<sup>44</sup>

Although these sanctions were meant to restore the balance of concessions that was established during the Uruguay Round, they have raised trade barriers, damaging not only the companies that receive the benefits from the WTO agreement, but also those not directly related to the original complaint. In addition, several months after the U.S. Trade Representative imposed tariffs on the European Community, the U.S. Congress, by enacting Section 407 of the Trade and Development Act of 2000 (the "Carousel Legislation Act"), required U.S. trade authorities to revise periodically the list of products subject to retaliation.<sup>45</sup> The legislation attempts to pressure foreign gov-

39. See *Hormones Appellate Body Report*, *supra* note 9; *Hormones Panel Report*, *supra* note 9. For a detailed reconstruction and insightful analysis of the dispute, see Daniel Wüger, *The Never Ending Story: The Implementation Phase in the Dispute Between the EC and the United States on Hormone-Treated Beef*, 33 *LAW & POLY INT'L BUS.* 777 (2002).

40. AGREEMENT ON THE APPLICATION OF SANITARY AND PHYTOSANITARY MEASURES, in ANNEX 1A TO THE AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION, Apr. 15, 1994, FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, art. 2(2), Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 *I.L.M.* 1125 (1994) reprinted in *WORLD TRADE ORGANIZATION, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS* 161 (1994).

41. See *Hormones Appellate Body Report*, *supra* note 9, ¶ 253(l); *Hormones Panel Report*, *supra* note 9, ¶ 9.1(i).

42. See Decision by the Arbitrators, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/ARB (July 12, 1999); Wüger, *supra* note 39, at 795.

43. See Decision by the Arbitrators, *supra* note 42, ¶¶ 83–84; Wüger, *supra* note 39, at 809–10.

44. See Decision by the Arbitrators, *supra* note 42, Annex II. See also Wüger, *supra* note 39, at 804.

45. See Trade and Development Act of 2000 § 407(2), 19 U.S.C. § 2416(b)(2)(B) (2000). The European Community immediately requested consultations under Article 4 of the DSU, arguing that the "Carousel Legislation" violated the DSU as it allowed the United States to suspend concessions unilaterally, without DSB authorization. See EU Requests Consultations on U.S. Carousel Retaliation Provision, *INSIDE U.S. TRADE*, June 9, 2000, at 8; EU Paper on US–EU Trade Dispute, *INSIDE U.S. TRADE*, Apr. 27, 2000, at 10, 12. However, the European Community suspended the proceedings after an agree-

ernments, through their domestic exporters, to bring their policies into conformity with the WTO agreements.<sup>46</sup> Thus, an increasing number of economic operators are likely affected by the European Community's non-compliance with the WTO ruling.

Lastly, the European Community has issued a new directive that has, in essence, upheld the WTO-illegal restrictions on the imports of hormone-treated beef.<sup>47</sup> Although the European Community claims that this legislation is now compatible with the WTO decision as it is based on new scientific evidence,<sup>48</sup> the United States has not yet accepted this assertion.<sup>49</sup> Therefore it is highly probable that the directive's compliance with the WTO will be addressed by the WTO in the coming months.<sup>50</sup>

#### D. Relevant Case Law

The *Biret* case highlights the current tensions between WTO member states and individual business operators regarding the dispute settlement system's implementation process. The ECJ and the CFI have been confronted only twice with private actions based on DSB rulings against the European Community. In both cases, the applicants relied on the WTO panel report in the *Bananas* case to claim damages incurred as a result of the non-implementation of DSB rulings.<sup>51</sup> In the first case, the ECJ dismissed the claim on procedural grounds.<sup>52</sup> In the second case, the CFI rejected the claim as unfounded, re-

ment was reached in the *Bananas* case. See Wüger, *supra* note 39, at 804–06. See generally Rosemary A. Ford, note, *The Beef Hormone Dispute and Carousel Sanctions: A Roundabout Way of Forcing Compliance with World Trade Organization Decisions*, 27 BROOK. J. INT'L L. 543, 560–69 (2002); *infra* Part II.D.

46. On the "Carousel Legislation," see Alberto Alemanno & Carine Mocquart, *La loi carrousel: dernier développement du conflit entre l'Union européenne et les Etats-Unis*, 3 LETTRE DU DROIT DU COMMERCE INTERNATIONAL 3 (2000); Wüger, *supra* note 39, at 805.

47. See Council Directive 2003/74, 2003 O.J. (L 262) (EC). EC Member States must implement the directive within twelve months of October 14, 2003, the date of entry into force. See generally Wüger, *supra* note 39, at 799.

48. See Press Release, European Union Commission, *EU Complies With WTO Ruling on Hormone Beef* (Oct. 15, 2003), available at [http://europa.eu.int/comm/trade/issues/respectrules/dispute/pr151003\\_en.htm](http://europa.eu.int/comm/trade/issues/respectrules/dispute/pr151003_en.htm) (last visited May 2, 2004); Communication from the European Communities, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/22, WT/DS48/20 (Oct. 28, 2003).

49. See Press Release, WTO Dispute Settlement Body, *EC, Canada and US to Discuss Next Move in Hormone-Treated Beef Case* (Dec. 1, 2003), available at [http://www.wto.org/english/news\\_e/news03\\_e/dsb\\_1dec03\\_e.htm](http://www.wto.org/english/news_e/news03_e/dsb_1dec03_e.htm) (last visited May 2, 2004).

50. For possible outcomes of the *Hormones* dispute, see Wüger, *supra* note 39, at 813. On December 1, 2003, the European Community asked Canada and the United States to initiate a compliance procedure to assess the consistency of the European Community's new hormone-treated beef measures with WTO regulations. Canada and the United States responded that they would rather hold further discussions. See Press Release, WTO Dispute Settlement Body, *supra* note 49.

51. Case C-104/97 P, *Atlanta AG v. Commission*, 1999 E.C.R. I-6983, 7024; Case T-254/97, *Fruchtandelsgesellschaft mbH Chemnitz v. Commission*, 1999 E.C.R. II-2743, 2755. See also Panel Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/RW/EEC (Apr. 12, 1999).

52. Case C-104/97 P, *Atlanta AG*, at I-7024–25. For a comment on this case, see Norio Komuro, *The EC Banana Regime and Judicial Control*, 34 J. WORLD TRADE 1, 63–64 (2000). See also A. Reinisch, *Entschädigung für die unbeteiligten "Opfer" des Hormon und Bananenstreites nach Art. 288 II EGV*, 11 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT, 42–51 (2000); David Blanchard, *Les effets des rapports de l'organe de règlement des différends de l'OMC, À la lumière du règlement (CE) 1515/2001 du Conseil de*

lying on the fact that the European Community had already amended its regulation, bringing it into compliance with the DSB ruling.<sup>53</sup>

### III. THE *BIRET INTERNATIONAL* CASE

#### A. *Factual Background and the Judgment of the CFI*

In June 2000, Biret International, a French meat trading company, asked the CFI to hold the European Community liable for the non-implementation of the *Beef Hormones* decision under Article 288, paragraph 2 of the EC Treaty.<sup>54</sup> Biret based its action on two arguments. First, it contended that since January 1, 1995, when WTO agreements entered into force, the European hormones regime has conflicted with WTO agreements, particularly with the SPS Agreement.<sup>55</sup> Second, it stated that this case would fall beyond the scope of the classic case law denying direct effect to WTO agreements as the violation was the “subject of express criticism on the part of the DSB” and was permanent since “the Community had expressed its intention to maintain the embargo despite the current state of scientific research.”<sup>56</sup> In other words, the plaintiff asked the court to examine the invocability of DSB rulings irrespective of the direct applicability of the WTO Agreements.

The CFI dismissed the action for damages by stating that under “case-law which is now firmly established” individuals cannot rely on WTO rules before the European courts.<sup>57</sup> It then added that the “decision of the DSB of 13 February 1998 . . . cannot alter” this conclusion since

[t]here 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.<sup>58</sup>

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*l'Union Européenne*, in 464 REVUE DU MARCHÉ COMMUN ET DE L'UNION EUROPÉENNE 37 (2003).

53. Case T-254/97, *Fruchtandelsgesellschaft mbH Chemnitz*, at II-2756. See also Geert A. Zonnekeyn, *The Status of Adopted Panel and Appellate Body Reports in the European Court of Justice and the European Court of First Instance*, 34 J. WORLD TRADE 93, 103 (2000).

54. “In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.” EC TREATY, *supra* note 17, art. 288. The European Community may be held non-contractually liable if an EC institution committed an unlawful act, there was real and certain damage, and there was a causal link between the conduct of the institution and the alleged damage. See, e.g., Case T-54/96, *Oleifici Italiani SpA v. Commission*, 1998 E.C.R. II-3377, 3404. In the present claim, the central question is whether the European Community’s attitude vis-à-vis the *Beef Hormones* decision satisfies, in light of the ECJ’s case law, the unlawfulness requirement.

55. See Case T-174/00, *Biret Int’l SA v. Council* ¶ 57 (Jan. 11, 2002), available at <http://europa.eu.int> (last visited May 2, 2004); Case T-210/00, *Établissements Biret et Cie SA v. Council* ¶ 64 (Jan. 11, 2002), available at <http://europa.eu.int> (last visited May 2, 2004).

56. See Case T-174/00, *Biret Int’l SA* ¶ 58; Case T-210/00, *Établissements Biret et Cie SA* ¶ 65.

57. See Case T-174/00, *Biret Int’l SA* ¶ 61; Case T-210/00, *Établissements Biret et Cie SA* ¶ 71.

58. See Case T-174/00, *Biret Int’l SA* ¶ 67; Case T-210/00, *Établissements Biret et Cie SA* ¶ 77.

The court, in line with its traditional case law, treated the invocability issue as strictly related to the question of the direct effect of WTO rules, despite the applicant's suggestion that the two issues be treated separately.<sup>59</sup> The court emphasized *ad colorandum* that "the purpose of the WTO Agreements is to govern relations between States or regional organizations for economic integration and not to protect individuals."<sup>60</sup>

### B. *The Opinion of the Advocate General*

Biret appealed the CFI's judgment, thus giving the Advocate General (AG) the opportunity to provide an opinion on the case. Surprisingly, the AG sided with the applicant and advised the ECJ to recognize the possibility that individuals could invoke DSB rulings and, accordingly, hold the EC liable for failure to implement the *Beef Hormones* decisions.<sup>61</sup> How did the AG arrive at this revolutionary conclusion?<sup>62</sup> Relying on Article 22 of the DSU, the AG adopted the position that WTO members have no legal choice but to comply with DSB rulings.<sup>63</sup> According to the AG, the recognition of the "direct effect" of a panel and/or Appellate Body ruling would not reduce the margin of discretion that WTO members enjoy in the implementation process, because once the DSB has issued a ruling, there is no more room for negotiation—the DSB recommendations must be implemented.<sup>64</sup>

The AG considered two possible outcomes: Biret could be entitled to invoke the *Beef Hormones* decisions establishing the WTO illegality of the ban or be denied the possibility of compensation for the continued existence of the ban.<sup>65</sup> The AG embraced the former by relying on the existence of a fundamental right of free trade within the EC legal order.<sup>66</sup> Not only would

59. See Case T-174/00, *Biret Int'l SA* ¶ 63–66; Case T-210/00, *Établissements Biret et Cie SA* ¶ 73–76.

60. See Case T-174/00, *Biret Int'l SA* ¶ 62; Case T-210/00, *Établissements Biret et Cie SA* ¶ 72.

61. See Opinion of Advocate General Alber, Case C-93/02, *Biret Int'l SA v. Council* (delivered May 15, 2003), at <http://europa.eu.int> (last visited May 2, 2004) [hereinafter Opinion of Advocate General, *Biret Int'l SA*]; Opinion of Advocate General Alber, Case C-94/02 P, *Établissements Biret et Cie SA v. Council* (delivered May 15, 2003), at <http://europa.eu.int> (last visited May 2, 2004) [hereinafter Opinion of Advocate General, *Établissements Biret*]. See also *supra* note 17 (describing the role of the Advocate General).

62. See Geert Zonnekeyn, *EC Liability for the Non-Implementation of WTO Dispute Settlement Decisions—Advocate General Alber Proposes a 'Copernican Innovation' in the Case Law of the ECJ*, 6 J. INT'L ECON. L. 761, 761–69 (2003).

63. See Opinion of Advocate General, *Biret Int'l SA*, *supra* note 61, ¶ 86; Opinion of Advocate General, *Établissements Biret*, *supra* note 61, ¶ 86.

64. See Opinion of Advocate General, *Biret Int'l SA*, *supra* note 61, ¶ 86; Opinion of Advocate General, *Établissements Biret*, *supra* note 61, ¶ 86.

65. See Opinion of Advocate General, *Biret Int'l SA*, *supra* note 61, ¶¶ 90–91; Opinion of Advocate General, *Établissements Biret*, *supra* note 61, ¶¶ 90–91.

66. See Opinion of Advocate General, *Biret Int'l SA*, *supra* note 61, ¶ 92; Opinion of Advocate General, *Établissements Biret*, *supra* note 61, ¶ 92. See also E.U. PETERSMANN, CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW (1991) (extending the most coherent formulation of the theory of a fundamental right of free trade within the EC legal order). For a more recent perspective, see E.U. Petersmann, *Constitutionalism and International Organizations*, 17 NW. J. INT'L L. & BUS. 398, 421 (1996–97). For a contrast of Petersmann's Lockean, natural rights-based view of the WTO law, see Trachtman & Moremen, *supra* note 16, at 229 (rejecting a normative perspective on

it be unfair to refuse to compensate for damages suffered by an individual as a result of non-compliance with a DSB ruling, but such a refusal would also amount to a violation of fundamental rights.<sup>67</sup> In addition, the recognition of a private party's right to invoke WTO reports in courts does not per se imply a private party's right to compliance.<sup>68</sup> This suggests that private operators would be unable to compel the European Community to implement the decision in a particular way, but would simply be allowed to claim damages suffered as a result of non-compliance. Therefore, relying on DSB rulings would not necessarily limit the European Community's discretion in the implementation of WTO rules.

Finally, the AG clearly stated that WTO law is directly applicable where a DSB ruling establishes a WTO violation and where the European Community does not comply with the report within the reasonable period of time granted for implementation.<sup>69</sup>

### C. The ECJ's Judgment

The ECJ caused no surprise when it rejected the appeal in its entirety.<sup>70</sup> However, a careful reading of the ECJ's judgment shows the will of the ECJ to move its case law further toward the recognition of some role for individuals in enforcing compliance with DSB rulings.

The ECJ first criticized the CFI for having reduced the issue of the invocability of the DSB ruling to the direct effect of WTO rules, stating that, "[s]uch reasoning does not suffice . . . to deal with the plea put forward by the applicant at first instance concerning infringement of the SPS Agreement."<sup>71</sup> The ECJ also faulted the CFI for not considering the EC ban in light of the *Beef Hormones* ruling, since DSB rulings provide grounds for a review by EC courts on the legality of EC law.<sup>72</sup>

In its judgment, the ECJ was unexpectedly receptive to the possibility of EC rules being controlled by the DSB's findings.<sup>73</sup> However, it ultimately rejected the action since Biret did not suffer any damages after the expiration

private rights of action in the WTO based on natural law or stakeholder arguments). For another criticism of Petersmann's position, see R.L. Howse & K. Nicolaidis, *Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step Too Far?* in EFFICIENCY, EQUITY AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM 236–39 (R. Porter et al. eds., 2001).

67. See Opinion of Advocate General, *Biret Int'l SA*, *supra* note 61, ¶ 92; Opinion of Advocate General, *Établissements Biret*, *supra* note 61, ¶ 92.

68. See Opinion of Advocate General, *Biret Int'l SA*, *supra* note 61, ¶ 94; Opinion of Advocate General, *Établissements Biret*, *supra* note 61, ¶ 94.

69. See Opinion of Advocate General, *Biret Int'l SA*, *supra* note 61, ¶ 114; Opinion of Advocate General, *Établissements Biret*, *supra* note 61, ¶ 114.

70. For some of the first reviews of this judgment, see A. Alemanno et al., *La jurisprudence de la Cour de Justice et du Tribunal de première instance, Contentieux: Arrêt "Biret International,"* 3 REVUE DU DROIT DE L'UNION EUROPÉENNE 755, 759–63 (2003); Zonnekyn, *supra* note 62, at 769.

71. See Case C-93/02 P, *Biret Int'l SA* ¶ 56; Case C-94/02 P, *Établissements Biret et Cie SA* ¶ 59.

72. See Case C-93/02 P, *Biret Int'l SA* ¶ 57; Case C-94/02 P, *Établissements Biret et Cie SA* ¶ 60.

73. See Case C-93/02 P, *Biret Int'l SA* ¶¶ 52–62; Case C-94/02 P, *Établissements Biret et Cie SA* ¶¶ 55–65.

of the reasonable time period to comply with the ruling.<sup>74</sup> Biret went out of business in 1995, while the fifteen-month implementation period ended in May 1999.<sup>75</sup>

According to the ECJ, recognizing a right to recover damages suffered before the end of this deadline would render ineffective the grant of a reasonable time period for compliance with the DSB ruling.<sup>76</sup> On the basis of these arguments, the ECJ rejected the appeal in its entirety. However, in the same judgment, it seems to leave open the possibility of individuals relying on DSB rulings to recover damages suffered if the European Community fails to comply within a reasonable time period.

In reaching this result, the ECJ indicated that evaluating the status of DSB rulings exclusively through the lens of direct effect might be misleading.<sup>77</sup> The court explained that the invocability of a DSB ruling is a conceptually separate problem from that of direct effect. The arguments generally put forward to deny direct effect of WTO rules do not necessarily prevent the recognition of some status of the WTO dispute settlement decisions in domestic law.<sup>78</sup> Finally, the ECJ conceded that providing private parties the right to recover damages does not amount to the recognition of direct effect, but rather is a matter of recognizing decisions made by and through the WTO system.<sup>79</sup>

#### IV. LEGAL ANALYSIS AND IMPLICATIONS

##### A. *The Legal Status of DSB Decisions*<sup>80</sup>

By highlighting what may be perceived as a limitation to the current WTO dispute settlement system, the *Biret* cases illustrate the tensions within the system between private operators and WTO member states. Since WTO agreements fail to supply any answer to the question of private parties' involvement in the implementation of DSB decisions, the issue is fundamen-

74. See Case C-93/02 P, *Biret Int'l SA* ¶ 64; Case C-94/02 P, *Établissements Biret et Cie SA* ¶ 67.

75. See Case C-93/02 P, *Biret Int'l SA* ¶ 61; Case C-94/02 P, *Établissements Biret et Cie SA* ¶ 64.

76. See Case C-93/02 P, *Biret Int'l SA* ¶ 62; Case C-94/02 P, *Établissements Biret et Cie SA* ¶ 65.

77. See Case C-93/02 P, *Biret Int'l SA* ¶ 53; Case C-94/02 P, *Établissements Biret et Cie SA* ¶ 56.

78. See generally Thomas Cottier, *The Impact of the TRIPs Agreement on Private Practice and Litigation, in DISPUTE RESOLUTION IN THE WTO* 126 (James Cameron & Karen Campbell eds., 1998) (stating that the invocability of DSB decisions "is a matter entirely different from the issue of direct effect").

79. See Case C-93/02 P, *Biret Int'l SA* ¶ 64; Case C-94/02 P, *Établissements Biret et Cie SA* ¶ 67.

80. During the last decade, there has been much debate over whether panel and Appellate Body reports, once adopted by the DSB, are binding upon WTO members. There seems to be a consensus among scholars that after a reasonable period, DSB rulings could constitute international legal obligations. Parties have no other choice than to comply with DSB rulings. See, e.g., JEFF WAICYMER, *WTO LITIGATION: PROCEDURAL ASPECTS OF FORMAL DISPUTE SETTLEMENT* §§ 9.7–9.8 (2002). See also John H. Jackson, *International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to "Buy Out"?*, 98 AM. J. INT'L L. 109, 123 (2004) (predicting that "if the issue of the obligation to comply with dispute settlement reports explicitly comes before the WTO DS system, the Appellate Body (or the panel if its report is not appealed) will likely rule that an international law obligation to carry out those reports does exist"); Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AM. J. INT'L L. 535, 538 (2001).

tally a matter of interpretation for domestic courts. The panels and the Appellate Body have discussed the status of their reports on only one occasion by stating in *obiter dictum* that:

[w]hether there are circumstances where obligations in any of the WTO agreements addressed to Members would create rights for individuals which national courts must protect, remains an open question, in particular in respect of obligations following the exhaustion of DSU procedures in a specific dispute.<sup>81</sup>

To my knowledge, no national or regional court has ever recognized a right to damages by private parties.

### B. Comments

While WTO member states are aware of the importance of protecting private parties, they also pursue other important interests in the dispute settlement system that may not necessarily coincide with those of private parties. This explains why the WTO, and notably its dispute settlement system, has been conceived as a flexible system that allows member states to deviate from the rules whenever they think it necessary.

However, there is increasing pressure for more direct involvement of private parties in the dispute settlement system.<sup>82</sup> The *Biret* judgments, after assuming that arbitrary non-compliance should not be judicially protected by the dispute settlement system, seem to develop a solution capable of addressing private parties' interests within the dispute settlement system's implementation process. The ECJ welcomed the distinction, argued by *Biret*, between the direct effect of WTO rules and the invocability of WTO reports, thus refuting the theory that the invocability of DSB rulings is prevented by the lack of direct effect.<sup>83</sup> Moreover, the ECJ did not make any reference to the reciprocity argument usually invoked to deny the recognition of direct effect of WTO rules. In short, it did not inquire whether any other WTO member would also allow such a claim. In other words, the ECJ's reasoning indicates that it may be willing to embrace the opinion that "[w]here a violation is established the binding character of the agreement and the principle of legality should . . . trump any lack of direct effect."<sup>84</sup>

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81. Section 301 Panel Report, *supra* note 24, ¶ 7.72 n.661.

82. Apart from the numerous scholarly arguments in favor of granting individuals access to the WTO dispute settlement proceedings, the debate over whether private parties should be allowed to submit *amicus curiae* briefs before the panels and Appellate Body clearly demonstrates the existence of this trend. See Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products* ¶¶ 79–91, WT/DS58/AB/R (Oct. 12, 1998). For the role of private parties in the WTO dispute settlement system, see Trachtman & Moremen, *supra* note 16, at 221.

83. See Case C-93/02 P, *Biret Int'l* ¶¶ 38–66; Case C-94/02 P, *Établissements Biret et Cie SA* ¶¶ 41–69.

84. Piet Eeckhout, *The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems*, 34 COMMON MKT. L. REV. 11, 53 (1997).

This opinion should be welcomed for several reasons. Allowing individuals to rely on WTO rulings to seek compensation for damages deriving from non-compliance may strike a better balance between the interests of member states and their private business operators. Thus the invocability of DSB rulings could improve the relationship between private operators and the multilateral trading system without modifying its flexible nature.

Furthermore, the WTO dispute settlement system would likely gain both legitimacy and efficiency if panel and Appellate Body reports could be invoked before the courts of member states who ignore DSB decisions. This solution would provide an adequate incentive for members to comply with their obligations under WTO rules without depriving them of the discretion they enjoy in the implementation process. The invocability of DSB rulings as a basis for recovering damages would not prevent a losing member from refusing to conform, as long as the member provided compensation. Invocability would protect private operators from a situation of possible denial of justice, and at the same time give teeth to the dispute settlement system.

The *Biret* judgment indicates that such an approach, at least within the European Community, may gain the favor of the courts, even those of large trading powers.<sup>85</sup> If the courts of one WTO member state open their doors to private parties' claims that rely on DSB rulings, other member states may be persuaded to do the same. This opening could positively impact the entire dispute settlement system by giving incentives to the losing member to comply with DSB rulings. All economic operators affected by non-compliance with a DSB decision should be entitled to seek compensation before the courts of the losing member state that consciously and persistently chooses not to give effect to the decision. As a result, both the private parties directly affected by the WTO violation and those affected by the sanctions imposed as a result of the non-compliance would be allowed to claim damages before the courts of the losing WTO member state. This solution would not reduce the margin of discretion that members enjoy in the implementation process nor would it force them to comply with the reports, yet it may increase incentives for such compliance.

Finally, it is still ambiguous how private parties' claims are to be addressed within the current WTO institutional framework. Private party claims may either be left to the domestic discretion of each WTO member state or may be addressed through an agreed multilateral framework. The progressive judicialization of the dispute settlement system suggests that WTO member states could seek multilateral agreement on policies governing the domestic effect of DSB rulings in future negotiations.<sup>86</sup> The current rule-oriented nature

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85. For a discussion on the unilateral implementation of DSB decisions in specific and adjudicated cases by large trading powers, see Thomas Cottier & Krista Nadakavukaren Schefer, *The Relationship Between World Trade Organization Law, National and Regional Law*, 1 J. INT'L ECON. L. 83, 117 (1998).

86. Negotiations to reform the WTO dispute settlement system are currently in progress and have not yet led to an amendment of the DSU. See, e.g., Communication from the Appellate Body, *Proposed Amendments to the Working Procedures for Appellate Review*, WT/AB/WP/8 (Apr. 8, 2004); Nikolaos Lavra-

of the dispute settlement system justifies the introduction of some enforcement remedies capable of strengthening its implementation process. WTO member liability for non-implementation of a ruling would likely improve the overall effectiveness of the dispute settlement system by moving the system closer to the objective of full compliance.<sup>87</sup> If the main weakness of the dispute settlement system is that it does not provide incentives for members to comply with their WTO obligations, then the ability of private parties to rely on DSB rulings before the losing member's courts could help overcome this weakness. Invocability would reinforce the legitimacy of panel and Appellate Body reports, further strengthening the dispute settlement system. By demonstrating the opportunity to introduce a minimal standard of direct effect into the world trading system, the recognition of the invocability of WTO rulings, embryonically developed by the ECJ in the *Biret* case, may lay the groundwork for a new role for private parties in the dispute settlement system.

—Alberto Alemanno\*

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nos, *Some Proposals for a Fundamental DSU Reform*, 29 LEGAL ISSUES EUR. INTEGRATION 73 (2002).

87. Jackson refers to the same idea as a "rule of integrity." JACKSON, *supra* note 18, at 113.

\* LL.M., Harvard Law School, 2004; Ph.D. Candidate, Bocconi University, Milan. The author wishes to thank Professor Andrew Guzman and John Morijn for their thoughtful comments, as well as Chamsai Menasveta and Désirée van Schagen for their invaluable assistance in the revision process.

