

The enforcement of WTO Agreements by the national courts of the Netherlands

1. Introduction

In the years after the Netherlands and the European Union have signed the WTO Agreements (1994), it was not clear which position these Agreements were going to have in Dutch national law-practice¹.

The Netherlands have a long history of interpreting law and international treaties, but still when it comes to a decision the Courts stay very reluctant to enforce the international agreements². So it was for the WTO Agreements, it was said they don't have direct effect for the citizens and several stipulations have been explained differently to safeguard the typical Dutch juridical system³.

The question that pops up all the time is the question whether the stipulations of an International Treaty is to be considered directly binding, so citizens can put a claim based on these International Stipulations⁴. Basically all these Treaties are agreements between states and not between their citizens or between states and their citizens^{5 6}.

The GATT and the WTO Agreements have given controversial jurisprudence which is analysed by G.A. Zonnekeyn⁷ and leaves the hot potatoes to be picked by the national judiciary systems. Nevertheless, it is very interesting to see that even these WTO Agreements did have their influence on the daily Dutch legal practice⁸.

In this paper I want to describe some of the decisions taken by several Dutch Courts, before and after the decisions of the European Court of Justice 1998 (Hermès International)⁹, 2000 (Dior/Tuk)¹⁰ and 2001 (Route 66)¹¹. These three decisions came as prejudicial questions from the Dutch national Courts (article 177 of the EC-Treaty, now article 234 EC-Treaty) when enforcing the TRIPS Agreement.

This paper doesn't want to give an exhausting overview, that is impossible in 2000 words, but just wants to show some aspects that play a role in enforcing the WTO Agreements¹².

¹ Only after January 1st, 1996, when the WTO Agreements became in effect, the first results could be spotted.

² See also ECJ 1963-2-5, nr 26/62, Van Gend en Loos

³ While the Netherlands Courts have a lot of freedom, simply because the Dutch constitution gives in article 94 the possibility to by-pass Dutch law and regulations in favour of the International Treaties, at least when the enforcement of these International Treaties is endangered by holding on national law.

⁴ See also ECJ 1972-12-12, nr. 21-24/72, International Fruit

⁵ See also S. Prechal, "Does Direct Effect Still Matter?", C.M.L. Rev., 2000, 1047

⁶ This political background, keeping the people the people and to safeguard the national sovereignty, keeps to be a red line in the evolution of the enforcement of all International Agreements, and the WTO Agreements are no exception.

⁷ Geert A. Zonnekeyn, De Directe Werking van de TRIPs Overeenkomst: Een stand van zaken, working paper nr. 28, augustus 2002, Instituut voor internationaal Recht, K.U Leuven.

⁸ Maybe because the Netherlands is also governed by EC-law and the European Court of Justice in Luxembourg, which did play some decisive role in interpreting the WTO Agreements, in particular the TRIPS Agreement.

⁹ ECJ, 1998-6-16, nr. C-53/96 published in NJ 1999/240 (NJ stands for Nederlandse Jurisprudentie)

¹⁰ ECJ, 2000-12-14, nr.C-300/98 en C-392/98 published in IER 2001/16 (IER stands for Intellectuele Eigendomsrechten)

¹¹ ECJ, 2001-9-13, nr. C-89/99 published in IER 2001/59

¹² It is more something for further research, research that is already undertaken by for example the Research-school "Ius Commune", of the Combined Universities of Maastricht, Leuven and Utrecht. More information can be found on www.rechten.unimaas.nl/ozic/

2. The first cases, the conflict arises

On February 14th, 1996¹³ one of the first decisions by a Dutch National Court, in a so-called “Kort Geding”, was taken on a topic relating the TRIPS-Treaty, as appendix C of the WTO Agreement, called the Agreement on Trade-Related Aspects of Intellectual Property Rights^{14 15}.

When interpreting the WTO Agreements, more in special the TRIPS-Treaty, article 50 (6), than the “Kort Geding” might to be emphasised as an interim measure by putting a certain time limit to its validity¹⁶. Dutch Courts considered the standard 20 working days or 31 calendar days as very short for doing so^{17 18}.

In this particular case, the Judge doubted whether article 50 (6) should be considered directly binding, but for safeguarding any possibility, he decided to put a five years term to the validity of this measurement, in which term any further action had to be taken. They still hoped that the “Kort Geding” could keep its strength as conflict-resolver¹⁹.

One case later²⁰ with the same arguments the validity term has been limited to one year²¹. It was again emphasised that a “Kort Geding” in its nature wasn’t a provisional measure but more a procedure leading to a decision on the merits of the case.

The Court also emphasised that with treating the “Kort Geding” as a provisional measure, the risk of putting an unsolicited barrier as mentioned in article 41 (2) TRIPS, to the protection of the rights involved might be at hand in the Netherlands, where it is common practice to settle the case after the decision in “Kort Geding”^{22 23}.

¹³ President Court The Hague, 1996-2-14, IER 1996/8

¹⁴ The case is rather simple. Gillette is the biggest producer of razors and razorblades. Hermans, a dutch trader had produced razorblades which he claimed that would fit on the so-called sensor type. Gillette didn’t like that and asked in a so-called “Kort Geding” to ban these razorblades of Hermans. The Court concluded that there was a breach of the exclusive rights of Gillette and that some measures had to be taken.

¹⁵ As from January 1st of that year the WTO Agreements became effective and therefor had to be checked

¹⁶ While doing so, the Dutch Courts also made an error in interpreting this article 50 (6), by using the Dutch translation and by focusing to much on this limitation. Therefor they also missed that the validity stands till the defendant asks to lift or revoke the interim measure. So only after action of the defendant there might have been a need to put a certain time frame in which the procedure has to be continued.

¹⁷ See also commentary note 1 in NJ 1999/240 on ECJ C-53/96

¹⁸ See also paragraph 58 of ECJ C-89/99 published in IER 2001/59

¹⁹ Because Dutch Law has a practice that 95% of all “Kort Geding”-cases are not followed by a non-provisional procedure (see also commentary note 3 in NJ 1999/240 on ECJ C-53/96), the “Kort Geding”, although in its nature and origin is a provisional measure, has been lifted to a status of an ideal form of conflict-resolution. It goes quick, it is relatively cheap and not to complex. So very easy to settle the more clear cases. In practice 95% of all these cases have not been continued in Court. This also leaves the Courts more time to do their other work. So this makes understandable why the Dutch Court doesn’t want to give up that practice.

²⁰ President Court The Hague, 1996-6-28, published in IER 1996/25

²¹ Here a the company Unilever claimed to have full rights on the product-name “Chicken tonight” and wanted a ban on the product-name “Chicken Classic” produced by the Cooking Sauce Company.

²² The judge is clearly seen as an arbiter who with a provisional measure gives a first shot at the case and which is most of the time the only shot warning both sides which possibilities they have or not have

²³ See also President Court The Hague, 1996-9-16, published in KG 1996/383 (KG stands for “Kort Geding”)

Also later these points of view remain the same. On August 14th, 1996 The Court of The Hague²⁴ again decides, but now with a timeframe of 18 months^{25 26}. What makes this case typical is that instead of only stipulating that a main-procedure has to be started within the mentioned timeframe, here is added that Black & Decker has if necessary to start a procedure in reconvention to ask for a final dispute resolution on this matter²⁷.

A more conservative point of view comes from the Court of Appeal in 's-Hertogenbosch²⁸ on October 30th, 1996, stating that the "Kort Geding" can not be considered a provisional measure as meant in TRIPS article 50 (1 and 6)²⁹.

In a later decision of February 7th, 1997 the Court of The Hague³⁰ creates a new construction. With a partial decision, leaving one party the obligation to interrogate witnesses on February 21st, the 18 months period will only start after a final decision has been made, whenever that will be. Here the special character of the Dutch "Kort Geding" again comes around the corner and shows exactly what is the problem when the "Kort Geding" is to be considered a provisional measure.

On June 3rd, 1997 the Court in Arnhem³¹ decides that within a timeframe of three months the main-procedure has to be started, or after that the provisional measure ceases to exist after the defendant has asked for that. Again the accent comes more on the provisional character of the measurement and it also shifts to the now common practice with the new and adapted Dutch Civil Procedure Law³².

On June 7th, 1999 the Court in Arnhem³³ clearly assumes that TRIPS has direct effect, based on and with reference to the 1998 decision of the European Court of Justice (footnote 1). Also on February 18th, 2000 the Court in Alkmaar³⁴ decides on the same base and refers to the 1998 decision and states that it is now accepted in Dutch Jurisprudence that TRIPS article 50 (6) has direct effect for Dutch practice.

²⁴ President Court The Hague, 1996-8-14 published in BIE 1997/81 (BIE stands for Bijblad Industriële Eigendom)

²⁵ 18 months also in President Court The Hague, 1997-5-22, published in BIE 1999/39

²⁶ What makes the difference for choosing between five years and one year, is not clear

²⁷ This one case is about a type of hand-held lantern, where Black & Decker wants Kinzo to stop its production and distribution.

²⁸ Court of Appeal 's-Hertogenbosch, 1996-10-30, nr. KG198/96/BR published in KG 1996/367

²⁹ Under Dutch lawyers the formal and conservative role of this Court is well known and it is not surprisingly that they still went the other way.

³⁰ President Court The Hague, 1997-2-7 published in IER 1997/11

³¹ President Court Arnhem, 1997-6-3 published in IER 1997/41

³² In the current law the term "Kort Geding" is almost gone, only out of respect they have kept its name, but officially the procedure now is called a provisional measurement procedure.

³³ President Court Arnhem, 1999-6-7 nr. KG1999/229 published in KG 1999/163

³⁴ President Court Alkmaar, 2000-2-18 nr. KG45/2000JJ published in KG 2000/87

3. A few other examples of direct effect, or how it was dealt with

On December 19th, 1997 an interesting decision is made by the Court of Utrecht in *V. versus the Dutch Ministry of Defence*³⁵ about the direct effects of the Agreement on Government Procurement. In an administrative procedure, so not a “Kort Geding” the Presiding Judge decides that because of the national law that gives more protection than the EC-directive, there is little objection to anticipate on a change of that EC-directive conform the criteria laid out by the GPA³⁶.

On March 20th, 1998 the Court in The Hague in *Vermande versus Bojkovski*³⁷ decides that based on article 10 (2) TRIPS databanks that need copy-right protection fall under these stipulations³⁸. The Court didn't decide that TRIPS has direct effect, but by using its definitions the Court comes to a conclusion to base the decision on.

In a decision pushing both parties to the negotiation table with a so-called “comparitie” the Court in The Hague³⁹ states on April 1st, 1998 very clearly that article 45 (1) has direct effect. This makes that the criteria to get financial compensation is not anymore the more strict Dutch legislation demanding a knowingly breach of the intellectual property rights, but the knowing that it was a breach or that it could have been known to be a breach⁴⁰.

³⁵ President Administrative Court Utrecht, 1997-12-19 (AWB 97/2927 VV) published in KG 1998/86

³⁶ This is the first clear step to use the WTO Agreements for anticipating on a better EC-regulation, and therefore a better regulation that can be appealed on by Dutch citizens. With this ruling V. got the right to get more information than he would have got without it. He needed this information to find out if he was not selected for an assignment on correct grounds or not, without that information he couldn't compare his own offer with that of his opponents.

³⁷ President Court The Hague, 1998-3-20 published in BIE 1998/82

³⁸ In this particular case he nevertheless concludes that the database in dispute does not need this kind of copy-right protection because it is not a creation of the mind, by for example organising or selecting the collected data. In this case it is simply the published law text, that even for finalising costs quite some energy, but the final result is not created by the mind itself. This way the student Bojkovski didn't breach the copy-rights of Vermande by putting the plain law-texts on internet, although it was admitted that they were copied from the CDROM of Vermande.

³⁹ Court The Hague, 1998-4-1 published in BIE 2001/19

⁴⁰ After this decision the case has been settled.

4. The European Court is asked for assistance

Already on February 1st, 1996 the Court in Amsterdam asked the European Court of Justice to intervene on basis of prejudicial questions raised through article 177 of the EC-Treaty. These questions will lead to the Hermès case as mentioned in footnote nine⁴¹.

First the European Court decides that it is within its jurisdiction to interpret the TRIPS Agreement. It is the responsibility of the national Court in question to raise the questions and to ask for assistance of the European Court of Justice. Because the stipulation involved not only covers national but also EC-law, the European Court of Justice has a role to play to prevent differentiation of the interpretation used in the member-states, it in fact welcomes this kind of questions⁴².

After that the Court reminds that even when in Court it has been disputed that TRIPS has direct effect, the question asked is of a different category. It is a matter of procedures and to make the national Court to be able to apply these definitions when making its ruling. Considering the nature of a “Kort Geding” it has to be seen as a provisional measure as meant in article 50 (6). A provisional measure is any measure that is supposed to end the alleged violation of one’s intellectual property and which has certain typical aspects⁴³.

In two other cases, one lead in by the Court in The Hague on June 25th, 1998 and one by the Dutch Supreme Court (“Hoge Raad”) on October 30th, 1998 some more specific answers were asked about the position of the WTO Agreements and TRIPS article 50 (6) in particular. They came in one decision of the European Court of Justice on December 14th, 2000, leaving all space to national Courts to follow their way⁴⁴. The European Court gives some criteria, referring to the Demirel-case⁴⁵ of September 30th, 1987. Direct effect can only be the case if the words make clear that the purpose and the type of Agreement constitutes a clear and sharp edged unconditional obligation, for which no further act is necessary to be executed and effective⁴⁶.

Nevertheless the Court goes one step further and stipulates that for cases in which field there has already been made some EC-regulations, these regulations have to be interpreted as much in line with the words and purpose of article 50 TRIPS as possible⁴⁷. This means that for many fields there is no direct effect, but when certain stipulations in the law have more possibilities for interpretation available, than the WTO Agreements can be a useful guideline⁴⁸.

If the field in question has not yet been covered by any EC-regulations⁴⁹, than it is up to the national Courts to decide whether they decide to give citizens the right to make an appeal on the TRIPS Agreement or if they want to apply TRIPS themselves. EC-law does not forbid any of these actions⁵⁰.

⁴¹ The case is about ties that are being produced by Hermes and on a certain moment FHT Marketing Choice seems to distribute also ties which are very much alike. Typical for this case is that Hermes asked the Court to give them a time frame of 14 days to start the main-procedure in Court. This confuses the Court and they clearly assume that TRIPS has direct effect, they only ask the European Court to give answer to the question if the “Kort Geding” is a provisional measure as mentioned in article 50 (6) or not.

⁴² See also G.A. Zonnekeyn, already quoted work, page 9 and 20 (WORD-version)

⁴³ See also paragraph 45 of ECJ C-53/96 published in NJ 1999/240

⁴⁴ See also paragraph 43 of ECJ C-300/198 and C-392/98, saying no direct appeal is possible, but 42 it also depends on the text itself

⁴⁵ See also Zonnekeyn page 6 under nr. 2A and page 7 in the middle

⁴⁶ See for an analysis Zonnekeyn page 13 for the GATT and page 14-17 for the WTO Agreements

⁴⁷ See also paragraph 47 of ECJ C-300/198 and C-392/98 published in IER 2001/16 and Zonnekeyn page 17 nr. 4A and page 20 in the middle

⁴⁸ See also Zonnekeyn page 19

⁴⁹ See also Zonnekeyn page 19

In the third case of the European Court of Justice of September 13th 2001 the matter is only about the question what will happen if there is no term set for starting the main-procedure. The Court simply refers to the original texts of the Agreement and concludes that first of all a request of the defendant is necessary to revoke the provisional measure⁵¹ and secondly that if no term has been set, the term mentioned in article 50 (6) is to be applied⁵². In the case in question, no party had asked to fix a term as mentioned in article 50 (6) TRIPS and the Court had not decided to fix a term for starting the main procedure either^{53 54}.

⁵⁰ Here the ball is back in the camp of the national Courts and Judges.

⁵¹ Zonnekeyn seems to overlook this one criterium (page 4, line 14-15)

⁵² See also paragraph 46 and 66 of ECJ C-89/99 published in IER 2001/59

⁵³ Schieving-Nijstad was ordered by the Court in Assen on January 9, 1996, on request of Groeneveld to stop using the Route 66 signs and symbols. The Court of Appeal in Leeuwarden rejected the appeal of Schieving-Nijstad, after which Schieving-Nijstad directed their search for justice to the Supreme Court. Their request was to declare that TRIPS has direct effect and that article 50 (6) makes that the provisional measures have automatically seized to exist, because Groeneveld didn't start any main-procedure after the decision of the Court in Assen. The final result was that the Supreme Court decided that a period of three months had to given to Groeneveld to start the main-procedure, after which the provisional measures would seize to exist.

⁵⁴ Supreme Court (HR) 2002-4-19, nr. 16182 (C97/291HR), published in NJ 2002/298

5. The day after

Typical to see that after a few decisions of the European Court of Justice it becomes relatively quite.

In a decision of the Court of Appeal of October 26th, 2000 in The Hague⁵⁵ it is confirmed that the WTO Agreements have no direct effect, that article 45 should not have been applied, but this didn't help the defendant. The fact that this Court of Appeal gives this extra and not needed motivation with reference to another case of the European Court of Justice of November 23rd, 1999 in the case of Portugal / Council of the European Union, seems to pave the way for the future approach that later even is confirmed by the European Court of Justice, but then leaving a little bit more space for some exceptions for the Judges.

On March 20th, 2001 the Supreme Court⁵⁶ very clearly confirms that WTO Agreements have no direct effect, citizens can not do any appeal on this stipulations⁵⁷. This will close the door for a while.

⁵⁵ Court of Appeal, 2000-10-26 published in BIE 2003/72

⁵⁶ Supreme Court (HR) 2001-3-20, nr. 00235/00^E published in NJ 2001/411

⁵⁷ This was when someone was facing criminal charges because of trade in Clenbuterol, a substance that is forbidden by an EC-directive to administer to cattle. In a national legislation for certain purposes it was still allowed to administer it to cattle not older than 14 weeks. The accused claimed that these limitations for administering clenbuterol was not scientifically proven wrong, so therefor a total ban was not allowed. He therefor referred to the WTO, article XVI, part 4, of the Agreement of Marrakesh.

6. Conclusion

A careful conclusion can be made. Still it is up to the Judges to define what they want to do with the stipulations in the WTO Agreements. The results booked, are focused on matters that could already have been solved by carefully reading the text of the Agreements^{58 59}.

It is a pity that the space set out by the European Court of Justice, for the Judges to use and for the citizens to ask for, seems not really to have been taken⁶⁰. A more refined method of asking Judges to use a different interpretation method⁶¹, not only looking to the law itself, but also to treaties that have been agreed upon and therefor gives some extra filling and explanation to unclear laws, or even unfair regulations so they can be bend to better situations for citizens.

⁵⁸ The so-called “Kort Geding” has already lost its position in the Dutch legal civil procedures. In an attempt to unify the different law fields, the civil procedure law now more looks like the administrative law, leaving some more space, but nevertheless loosing some of its strong appeal as effective remedy. TRIPS was of no influence on this evolution. The incorporation of the renewed civil procedure law was just a matter of time.

⁵⁹ So communicational skills seem to be more important than legal skills and the willingness to set the first steps on the terra incognita

⁶⁰ Dutch Courts seem not to like international treaties, nor the WTO Agreements. Nevertheless, when some clever guy stands up and faces the Courts with certain constructions, they are willing to co-operate, although at the end, not much has been achieved.

⁶¹ See also Zonnekeyn, page 17 for the so-called TRIPS-conformity explanation method, see also page 22, nr, 5