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Round Table – Table ronde – Runder Tisch

EFFECTS OF THE WTO ON THE CAP AND ON NATIONAL RURAL LAW, PARTICULARLY IN THE CONTEXT OF ORGANIC AGRICULTURE

REPERCUSSIONS DE L'OMC SUR LA PAC ET SUR LE DROIT RURAL NATIONAL, NOTAMMENT EN CE QUI CONCERNE L'AGRICULTURE BIOLOGIQUE

AUSWIRKUNGEN DER WTO AUF DIE GAP UND DAS NATIONALE AGRARRECHT, INSBESONDERE MIT BEZUG AUF DIE ÖKOLOGISCHE LANDWIRTSCHAFT

National Report – Rapport national – Landesbericht

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Impact of WTO rules

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In principle, the WTO rules affect the full range of agricultural products and foods in the Netherlands. Article II of the "Agreement Establishing the WTO" lays down that "The WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this agreement." The WTO rules therefore derive their relevance from the trade relations between countries. This applies not just to the trade in goods but also to the trade in services and to investments[1]. The Agreement on agriculture is also very broad in scope.[2]

In general it may be said that the new WTO rules affect certain sectors of agriculture more than others. In particular, the sectors subject to extensive EU market regulation, such as the dairy, cereals and sugar industries, are subject to greater influence than sectors in which there is already a comparatively liberal regime, such as ornamental plant cultivation.

Like the other 14 member states of the European Union, the Netherlands is a member of the WTO. The European Union is itself also a member of the WTO, in which regard the European Commission acts as spokesman for the European Union and its members in the WTO context. In relations between the EU and EU member states, the EU has exclusive authority in the field of trade policy. Agreements in the WTO context are reflected in European legislation – the EU directives and regulations – which in turn are (where necessary) implemented and applied by the EU member states. WTO rules are not therefore implemented directly by the Netherlands; their carry-over in the Dutch legal system takes place indirectly, via European legislation. The result is that the WTO and its rules are relatively unknown among Dutch policy-makers and legislation lawyers, or at least much less well-known than the European regulations in which the WTO the rules have been incorporated.

Similarly the role of the WTO rules is highly marginal in Dutch legal proceedings as they do not create any rights for private individuals that are capable of being directly invoked in court.[3]

Many agricultural products are subject to EU quality standards. These standards are laid down in order to protect the health of human beings, animals and plants, and – to a lesser extent – to promote fair trade. The European quality standards are enshrined in European legislation, which is then implemented and applied in Dutch legislation. In the procedure leading up to implementation the current situation under national law is examined and consideration given to

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1 See annex 1B to the Agreement: General Agreement on Trade in Services and Annexes, and annex 1A to the Agreement: Agreement on Trade-Related Investment Measures.

2 Compare article 2 of the Agreement in conjunction with Annex 1 for a summary of the products coming under the Agreement.

3 See Supreme Court 20 March 2001, case no. 00235/00, rechtspraak.nl: "The European Court of Justice has decided that given its nature and scope, the WTO Agreement does not in principle form part of the norms against which the Court tests the lawfulness of the Community institutions' actions and that the provisions of that agreement are not of such a nature as to create rights for private individuals that they can invoke under Community law (cf. Court of Justice EC 23 November 1999, Portugal/Council, C-149/96, Jur 1999 pp. I-8395 and 14 December 2000, C-300/98 and C-392/98, NJB 2001, p. 129 (Dior/Tuk consultancy and Assco Gerüste/Van Dijk). […] On the basis of these considerations there can be no reasonable doubt that the aforementioned provisions of the Further Agreement (i.e. the WTO agreement concerning sanitary and phytosanitary measures, ed.) do not lend themselves to direct application, so that they cannot be invoked by the accused in the sense that the relevant provisions of the PVV Regulation do not apply." In a comparable sense: CBB 29 August 2001, case no. 95/0867/112/999, rechtspraak.nl. See also Supreme Court 19 April 2002, case no. C97/291 16812, rechtspraak.nl.

the grounds for more far-reaching national quality standards, in so far as permitted under European law.

The WTO does not itself lay down any quality standards. The WTO has simply drawn up rules by which countries are required to abide in regulating international trade. The WTO has therefore created conditions within which countries can lay down requirements in order to protect the health of human beings, plants and animals. In addition the WTO recognises standards laid down by the standard-setting bodies: the Codex Alimentarius Commission, the International Office of Epizootics (OIE) and the International Plant Protection Convention (IPPC).[4] If a country acts in accordance with these standards, it is also deemed to be acting in accordance with the WTO rules. In this way a close relationship has arisen between the WTO and the OIE, Codex and IPPC, generally known as the "three sisters". In the meantime similar international phytosanitary measures have been developed, for example within the IPPC 17. Numerous standards and norms have also been developed in the area of the Codex and the OIE. Given the nature of these international organisations, these standards and norms are not binding.

The implementation of EU regulations concerning the market for agricultural products and agrofoods is largely handled in the Netherlands by the Ministry of Agriculture, Nature and Food Quality and partly by the Ministry of Health, Welfare and Sport in so far as the regulations relate to the latter ministry's area of responsibility. To some extent implementation has taken the form of regulation by public-law industry associations, after the implementation of the EU rules had been assigned by the State government to the marketing boards, such as the Animal Feed Marketing Board in the case of animal feedstuffs.

There is no relationship in the Netherlands between the WTO rules and the regulations concerning agricultural land property and usage rights.

Concrete trade-related problems

As a trading nation the Netherlands naturally finds itself involved with the WTO rules, albeit via EU legislation, and in trade disputes.

In 2001/2002, for example, animal products (duck and rabbit meat) from China turned out to contain hazardous substances – chloramphenicol and furazolidon – and large batches of meat were refused entry into the EU, especially in the Netherlands (in accordance with the relevant EU regulations) and condemned for rendering[5]. China responded by introducing measures aimed at products imported from the Netherlands, which was at variance with the WTO rules. This relatively small-scale trade dispute could have been brought to court under the relevant WTO procedure, although the Netherlands and the EU decided instead to resolve the matter by means of bilateral consultations with China.

Actual and potential disputes also regularly occur in the field of trade in plants and plant products.

In the phytosanitary field the WTO agreement sometimes makes it more awkward to take measures, for example if a hazardous organism is found in an imported batch of plants. This is because the lack of specific standards for specific plants/plant products means that a risk analysis must be conducted before phytosanitary measures can be introduced. It can therefore sometimes be difficult for the Netherlands to take rapid action as an importing country.

On the other hand the Netherlands also experiences problems with exports in the phytosanitary area. Emergency measures are for example introduced rapidly by third countries as soon as it

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[4] Compare the Agreement on the application of sanitary and phytosanitary measures, article 3 (2), in conjunction with Annex A, under 3, under a, b and c.

[5] For a legal ruling on one of the refused parties: CBB 29 April 2002, nos. 02/645 and 02/646 (Coxon & Chatterton case).

becomes known under pest reporting obligations that a plant disease has occurred (or re-occurred) in the Netherlands. This often results in unjustified trade barriers.

Third countries also demand information from exporting countries in order to complete a (pest) risk analysis. In this way third countries evade the burden of proof for the measures to be taken. For an exporting country such as the Netherlands this involves a great deal of time and effort, while some countries threaten to or actually seal off their borders. If importing countries create trade barriers, packaged as phytosanitary measures, the IPPC phytosanitary standards can be used in order to unmask these. The duty to notify new trade-restricting measures to the WTO also proves useful in practice, as other countries that could be penalised by a measure are given the opportunity to respond. This happened a few years ago, when Australia announced that imported flower bulbs would undergo a treatment that would effectively destroy the plant material, thereby amounting in practice to an import ban. The Netherlands responded in good time, so that the introduction of this measure could be prevented, while Australia gave consideration to other treatment methods.

In the case of potential trade barriers the initiative is generally taken by the Dutch phytosanitary authorities to find a bilateral solution. The experience gained with export certification and from consultations with the inspectors, growers and exporters means that a good picture has been built up of potential trade barriers and possible solutions. The knowledge of the Plant Protection Service in the field of plant diseases and their treatment in turn provide the basis for direct consultations with the phytosanitary authorities in the importing country. Visits in both directions may be required in order to rebuild confidence. Such processes can take many years, thereby gradually creating greater openness. In the absence of any opening, questions may be posed in the context of the Agreement on the application of sanitary and phytosanitary measures. Another possibility sometimes applied by the Netherlands is to place a trade dispute on the agenda of the SPS committee as a “specific trade concern”. In addition bilateral consultations between WTO members concerning specific trade problems are frequently held on the margins of SPS committee meetings. What is important in all cases is that a good file is built up by the industry itself and the Dutch phytosanitary authorities.

The official control with respect to the Agreement concerning the application of sanitary and phytosanitary measures (SPS).

The Agreement on the application of sanitary and phytosanitary measures contains a duty of notification if an affiliated country introduces a sanitary or phytosanitary measure.[6] In this regard the other WTO members must be offered a reasonable period at an early stage to submit written comments.[7] In addition there is a standstill period before the measure can come into force.[8]

Under Article 8 of the Agreement on the application of sanitary and phytosanitary measures “members shall observe the provisions of Annex C in the operation of control, inspection and approval procedures, including national systems for approving the use of additives or for establishing tolerances for contaminants in foods, beverages or feedstuffs, and otherwise ensure that their procedures are not inconsistent with the provisions of this Agreement.” A large number of conditions are summarised in Annex C with which control, inspection and approval procedures must comply. These procedures have been included in the relevant European legislation, in which regard the WTO conditions are taken into consideration. The controls regulated by the Agreement largely take place on the outer borders of the European Union. In

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6 Agreement on the application of sanitary and phytosanitary measures, article 7 in conjunction with Annex B.

7 Annex B, point 5.

8 Annex B, point 2: “Except in urgent circumstances, Members shall allow a reasonable interval between the publication of a sanitary or phytosanitary regulation and its entry into force in order to allow time for producers in exporting Members, and particularly in developing country Members, to adapt their products and methods of production to the requirements of the importing Member.”

the Netherlands, for example, veterinary and phytosanitary import inspections and controls on animal feed are performed at Schiphol Airport and in the Port of Rotterdam by the National Inspection Service for Livestock and Meat (RVV) and the Plant Protection Service (PD). Checks on foods of non-animal origin are not conducted systematically (apart from on fruit and vegetables) and also only in a few cases at the EU's external borders.

There follows an outline of the statutory basis, organisation and method of inspections in the Netherlands and the responsible agencies in a selected number of agricultural fields.

1. Imports and exports of agricultural commodities

The Import and Export Act (IUW) dating from 1962 relates to the imports and exports of goods in general. Rules specifically intended for agricultural commodities are laid down in the Agricultural Commodities Imports and Exports Decree 1980 and the Agricultural Commodities Import and Export Regulations based on the act.

The Agricultural Commodities Import and Export Regulations (RIUL) lay down a number of general rules with regard to imports and exports of certain agricultural commodities. General rules are for example laid down concerning import and export certificates and concerning the import and export licences issued by the relevant marketing board. In addition a number of specific provisions have been included in relation to certain goods (including hemp, olive oil, olives, pedigree breeding animals, wine and hops).

Under Section 19 of the IUW, officials from the General Inspectorate(AID)[9], the Tax and Customs Administration[10], the LASER service and the Ministry of Agriculture, Nature and Food Safety audit department[11] have been designated as officers with responsibility for supervising compliance.

The AID has authority to investigate individual cases, take samples and open packaging. In relation to supervisory tasks that authority is based on Chapter 5 of the General Administrative Law Act. In relation to investigative tasks (where there is a reasonable suspicion that a criminal offence is being committed) that authority is based among other things on the Economic Offences Act[12].

The Customs Department is responsible for the verification of the declarations, documents, permits and other forms as prescribed in these regulations, and for further investigation of these documents, the thorough recording of the goods and the estimation of data, unless specifically determined otherwise.[13] The provisions under or pursuant to the Customs Act concerning the thorough recording of goods, verification of goods, sampling (S.16 Customs Act), sealing or guarding of goods and the cooperation to be provided by interested parties apply *mutatis mutandis*, unless the opposite is evident from the RIUL.[14]

The Customs Department cannot possibly check all imports and exports of agricultural commodities. It therefore conducts the checks (both physical and administrative) on the basis of a risk analysis. The more than 20,000 samples taken each year are analysed in the Customs Department laboratory.

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9 Stcrt. 1989, no. 106

10 Stcrt. 1988, no. 228

11 Stcrt. 1998, no. 24

12 Economic Offences Act, Section 21.

13 Imports and Exports of Agricultural Commodities Regulations, article 3.

14 Imports and Exports of Agricultural Commodities Regulations, article 2.

The Imports and Exports Act is enforced under criminal law; violations of regulations laid down by or pursuant to the Imports and Exports Act are economic offences.[15]

Also of relevance is the Sanctions Act. This creates a statutory framework for the implementation in the Netherlands of treaties and international decisions, recommendations and agreements in relation to the introduction of sanctions in order (for example) to promote the international legal order and combat terrorism. The Imports and Exports Act and the Sanctions Act may serve as instruments for the application of sanctions against third countries in the trade field.

2. Seeds and Planting Materials

The Seeds and Planting Materials Act dating from 1967 provides the statutory framework for the development of plant varieties and the multiplication and handling of propagating material (such as sowing seed, cuttings and other plant elements intended for propagation).

In order to ensure that reliable propagating material only is traded, two inspection services are responsible for the certification of breeding material that is introduced into the trade. These are the General Netherlands Inspectorate Service for Field Seeds and Seed Potatoes (hereinafter: NAK) and the Netherlands Inspection Service for Horticulture (hereinafter: Naktuinbouw). Both inspection services have the status of an independent administrative body. Upon the introduction of the Seeds and Planting Materials Act it was decided to continue with the existing practice of engaging private-law inspection agencies and to provide these with a statutory basis.[16] To this end the Act provides for a duty of affiliation: trade in propagating material is permitted only by parties affiliated to an inspection agency designated by law. Under the Act the inspection agencies have the powers to remove unsound propagating material from the trade. In addition the inspection agencies have the power in respect of the firms affiliated to them to lay down generally binding regulations on such matters as the health, purity and quality of the propagating material.

Under the Seeds and Planting Materials Act rules are drawn up concerning the required standard of propagating material for various types of crops (ranging from potatoes and string beans to grains and grasses and from tulips to trees and shrubs) before they can be introduced into the trade. These rules are based on European regulations and regulate the internal market.

These concern rules on such matters as the health, trueness-to-type, purity, vigour and dimensions of propagating material. In other words, is a batch of potatoes free of diseases, do the potatoes in fact look like potatoes, and do they not differ unduly from one another in terms of size or shape, etc. In addition there are various quality categories: there is for example base material and certified material. The point of departure is that material may not be introduced into the trade uncertified.

The inspection agencies may refuse admission into the trade and may prohibit the further treatment of propagating material. These are measures taken under administrative law.[17] Firms affiliated to an inspection agency are subject to disciplinary rules with potential penalties such as reprimands, fines of up to 10,000 guilders, tightened controls, publication of disciplinary measures and suspension for a maximum of three years.[18] Finally criminal law applies to infringements of plant breeders' rights and action at variance with the provisions concerning the trade in propagating material.[19]

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15 Economic Offences Act, Section 1, under 1 and 2.

16 Parliamentary Proceedings II 1958/59, 5332, no. 3, pp. 32-33.

17 Seeds and Planting Materials Act Section 92.

18 Seeds and Planting Materials Act Section 88, part 2, under d.

19 Economic Offences Act Section 1, under 3, and Seeds and Planting Materials Act Section 96.

3. Animal feed

The importation of animal feed and related products is subject to the Animal Feed Import and Export Controls Regulations based on the Agricultural Act. Under Article 4 these regulations apply to products of animal origin coming directly from a third country and landed at the port of Rotterdam, the port of Flushing, Amsterdam Airport or Maastricht Airport and to other products landed at the port of Amsterdam, the port of Rotterdam or Amsterdam Airport. Under Article 5, when a consignment is cleared notification must be provided to an officer of the National Inspection Service for Livestock and Meat (RVV) by means of a form in quadruplicate. The RVV is a service of the Ministry of Agriculture, Nature and Food Quality and forms part of the Dutch Food and Consumer Goods Authority (VWA). The products are also submitted to this officer for document, conformity and physical controls (the latter controls are conducted only in so far as the products are released in the Netherlands for free circulation). Upon completion of the controls a document is drawn up which accompanies the product to its first destination in free circulation.

Until the Animal Feed Framework Act comes into force, the Animal Feed Marketing Board will be responsible for supervising compliance with the animal feed regulations, since the latter are to a large extent implemented in the PDV Animal Feed Regulations 2003 of this marketing board.[20] Under the PDV Animal Feed Control Regulations 2003, officers of the RVV, the Animal Feed Inspection Service (KDD) and other inspection agencies designated by the marketing board have been appointed as inspectors. In practice this amounts to the fact that until the Animal Feed Framework Act comes into force, the Animal Feed Marketing Board will conduct checks through inspection agencies on firms with Integrated Mediterranean Programme (IMP) accreditation (i.e. supralegal accreditation by the PDV) and the RVV on the rest. When the Animal Feed Framework Act comes into force (probably in mid 2004) the RVV will be responsible for supervising all the animal feed regulations in the Netherlands. Import and export controls will also be performed by RVV officials from that point on.

In the case of the animal feed regulations of the Animal Feed Marketing Board, the inspectors will, in addition to their regular powers as supervisors, be able to impose a surrender requirement if it is suspected or has been established that a product does not comply with the rules.[21] Criminal law also applies, as the offences liable to punishment under the marketing board's regulations are economic offences.[22] The same applies to the rules included in the regulations based on the Agricultural Act.[23]

4. Plant diseases

The Plant Diseases Act of 1951 provides a statutory framework for measures to prevent the importation of plant diseases and organisms harmful to plants, while control measures can also be laid down under the Act in the event of outbreaks of diseases and plagues in the Netherlands. Under Section 2 of the Plant Diseases Act rules have been introduced under the Import, Export and Trade of Plants Regulations concerning such matters as the imports and exports of plants and vegetable products from and to third countries. These regulations are based on Directive 2000/29/EG.[24]

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[20] See also the PDV Animal Feed Inspection Regulations 2003, the PDV Medicated Feed Regulations 2003, the PDV Feed Fats Regulations 2003 and the PDV Animal Feed Sector MINAS Accreditation Regulations 2003.

[21] PDV Animal Feed Sector Inspection Regulations 2003 Article 5.

[22] Economic Offences Act Section 1(4) and the Industrial Organisation Act Section 93, and Arable Farming Marketing Boards Establishment Regulations 1997.

[23] Economic Offences Act Section 1(1).

[24] This directive has since been revised by Directive 2002/89/EC, which must be implemented by 1 January 2005.

The Plant Diseases Service has prime responsibility for implementing the Plant Diseases Act and related regulations.[25] In addition agreements have been reached with four other institutions under which the latter share responsibility for the implementation of the plant diseases regulations:

- NAK (Netherlands Inspection Service for Field Seeds and Seed Potatoes)
- NAKtuinbouw (Netherlands Inspection Service for Horticulture)
- BKD (Flower Bulbs Inspection Service)
- KCB (Fruit and Vegetables Inspection Agency)

Officials of the Plant Diseases Service and the General Inspectorate have been charged by the Minister of Agriculture, Nature and Food Quality with supervising compliance with the provisions under and pursuant to the Plant Diseases Act.[26] Their powers are regulated in Sections 5:13 and 5:15 - 5:20 of the General Administrative Law Act. Section 12 of the Plant Diseases Act gives the minister the powers to apply administrative coercion in order to enforce the obligation to cooperate with an inspector.

5. Veterinary

The veterinary regulations at both EU and national level are highly detailed. The legislation and regulations concern both the animal disease conditions and the food safety conditions under which animal products, living animals and living products may be handled and imported. In addition there are animal disease protection legislation and regulations, but these are of less interest for international trade. Apart from so-called vertical product directives, the EU also has horizontal inspection directives laying down regulations concerning the nature and method of inspections, both for intracommunity movements and for imports from third countries. Among other things this covers living animals, meat and products of animal origin (both living and non-living).

Under national law there is a large number of relevant acts, including the Animal Health and Welfare Act, the Rendering Act, the Livestock Act, the Bird Diseases Act and the Agricultural Act. Legislation coming under the responsibility of the Ministry of Health, especially the Commodities Act and the Meat Inspection Act, is also relevant in this regard.

The National Inspection Service for Livestock and Meat (RVV), forming part of the Dutch Food and Consumer Goods Authority (VWA), is authorised to exercise supervision and, among other things, to conduct inspections. In compliance with the relevant EU regulations, inspection powers have also been assigned to (official) veterinary surgeons employed by the RVV.

The RVV is also authorised to perform inspections on request, including inspections to establish whether the requirements imposed by an importing third country on animals or products from the Netherlands have been met. The inspection may also cover the production process in the Netherlands; the RVV for example keeps a list of slaughterhouses that comply with the applicable requirements in the US permitting a slaughterhouse to export meat to that country.

6. Trade in organic products

6.1) Current import controls

The Dutch control system for the importation of organic products is as follows.

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[25] Compare in this context also Section 2(3) and (4) of the Plant Diseases Act.

[26] Regulation of 17 January 1992, Stcrt. 16.

Each EU member state is required to designate an authorised authority under regulation (EC) no. 1788/2001 laying down detailed rules for implementing the provisions concerning the certificate of inspection for imports from third countries under Article 11 of Council Regulation (EEC) no. 2092/91 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs.

The Dutch government has appointed the Customs Department. This means that the latter checks the enclosed certificate of inspection and admits the products into free circulation. The Customs Department does not check the contents of the product or whether they comply with Regulation 2092/91, but checks the administrative conditions under Regulation 1788/2001.

In addition Skal, the inspection body for organic production, supervises compliance with Regulation 2092/91. Skal has been designated as the inspection body under Regulation 2092/91 and the Organic Production Method Agricultural Quality Decree. Under the regulation Skal is authorised to remove indications on consignments where these do not comply with Regulation 2092/91.

6.2) Exports of organic products

The International Plant Protection Convention (IPPC) lays down a standard for organic pesticides that are recognised under the WTO agreement. The standard is voluntary (in the sense of being a code of conduct), but various countries have taken measures on this basis and screen out or reject organically grown products on account of the risk or interception of organic pesticides. In this respect the WTO agreement is therefore detrimental for the export of organic products.

6.3) Possible measures in respect of organic products

The question also sometimes arises in the Netherlands as to whether a country may take measures in order to promote exports and imports of organic products from third countries, as does the question as to whether foreign animal-unfriendly products can be kept out of the domestic market. The answer to this question under the WTO Agreement is however by no means so clear.

6.3.1) WTO regulations / jurisprudence

a) Article III

The question as to whether trade measures based on the production method used are admissible touches on one of the most important principles of the GATT Agreement, namely the ban on discriminating between products of national origin and equivalent products from third countries, or what is referred to in Article III of the GATT Agreement as “like products”.

The question also arises as to what should be understood by “like products”. Does this just mean that a distinction may only be drawn on the basis of the qualitative properties of the product or may a distinction also be made on the basis of the production methods used (i.e. environmentally-friendly or animal-friendly)? The WTO/GATT agreements and the jurisprudence do not provide a clearcut answer to this question.

Many trade policy specialists work on the assumption that Article III of the GATT is interpreted highly restrictively by WTO panels. This has its origins in the *Tuna-Dolphin case (1991)*. In this case the highest body of the WTO disputes resolution mechanism (the Appellate Body) laid down that the measures introduced by the US based on catch methods were at variance with the principle of non-discrimination between like products. On the basis of this ruling it is assumed that a distinction on the basis of production methods is not admissible.

In the *Asbestos case (2001)* the Appellate Body determined however that apart from tariff classification, physical characteristics and end-use, “consumer tastes and habits” in relation to

products should also be taken into consideration in determining whether or not there were “like products” and that in addition all other relevant criteria should be taken into consideration. This ruling and in particular the final addition provides room for a broader interpretation of the concept of “like products”, thereby also appearing to create more room for distinguishing products on the basis of production methods and not just on the basis of visible product characteristics.

b) Article XX

Article III of the GATT is confined to internal measures such as tax measures and labelling requirements. This means that measures affecting the imports of products are not covered.

If it should be established that discrimination cannot to be justified on the basis of the animal-unfriendliness of the production method, "like products" may nevertheless be discriminated between under GATT Article XX

- to protect public morals
- to protect human or animal life, and
- to protect non-renewable natural resources.

Measures in connection with the production method used appear to be justifiable on these grounds.

6.3.2) International standards

Although it may be deduced from the above that there is no WTO ban on the exclusion of products on the basis of the production method used and that the jurisprudence appears to be heading in the direction of admissibility, this should not be taken as a licence to introduce import bans. An important obstacle in this regard is the lack of international norms.

The above means that in the absence of internationally agreed norms, products manufactured in an animal-unfriendly way cannot be turned back at the border unless the exceptions of GATT Article XX can be invoked. The trend in the jurisprudence (on the basis of GATT Art. III) is however to provide greater scope for internal tax measures in a country. Examples would include a higher VAT rate for non-organically produced goods applying to both products of national origin and imported products.

6.3.3) Labelling

Compulsory labelling as a measure with a limited trade-distorting effect may provide a way out for the situation in which international standards are lacking and generally stands the best chance of passing the test of WTO conformity as no borders are closed off but it is left to the consumer to decide which product to buy. Here too the question arises as to whether compulsory labelling requirements can be imposed on account of production methods (GATT Article III) or whether such discrimination is permissible on the basis of the exceptions listed in GATT Article XX, despite the equivalence of the products.

Dutch jurisprudence concerning the precautionary principle

The precautionary principle is enshrined in Dutch legislation in Section 16 of the Nature Protection Act 1998. Section 3 of the Pesticides Act may also be regarded as a precautionary provision.[27] In addition the principle is included in Section 38 of the Animal Feed Framework Bill that is currently still under deliberation. It is also included in the Wadden Sea Key Planning Decision, the Third and Fourth Water Management Policy Documents and the Food and Nature Vision Policy Document.

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[27] See CBB 30 March 2001, AB 2001, 200: “The appellants’ grievance that the precautionary principle, as also defined in Article 174(2) of the Treaty on European Union, has been incorrectly applied does not stand up in view of the norm laid down in the aforementioned Section 3.”

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In the first place the Dutch courts do not take the precautionary principle into consideration if that principle has not been codified in the relevant legislation.[28] This only differs if the precautionary principle has been included in the government's assessment rules, as in the case of the aforementioned Wadden Sea Key Planning Decision.[29] If the administrative body tests in terms of the precautionary principle within the limits of its assessment powers, the courts are also required to take the precautionary principle into account when assessing the decision taken by that body. The courts therefore act with restraint when it comes to the precautionary principle: if neither the legislature nor the executive have introduced the principle into the decision-making process, the court will not do so independently.

Nevertheless the courts sometimes turn out to apply the precautionary principle de facto, basing their rulings on Section 3:2 of the General Administrative Law Act, which lays down that in preparing a decision an administrative body will assemble the necessary knowledge concerning the relevant facts and interests to be taken into account.[30]

By way of logical extension the courts do not apply their own interpretation to the precautionary principle concept. The courts instead abide by the wording and purport of the principle as laid down in the relevant act or assessment rules. The courts will test whether that wording and purport are in accordance with EU law. In the Wadden Sea Key Planning Decision, the principle is for example laid down that in the event of "clear doubt" about the absence of potentially important negative consequences there are grounds to refuse licences under the precautionary principle. The Administrative Law Division of the Council of State has posed preliminary questions on this subject to the European Court of Justice.[31] In the first place the questions to the Court ask whether certain concepts in the Habitat Directive have an independent significance or whether account also needs to be taken of Article 174 (2) of the EC Treaty,

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28 See AB RvS 15 May 2000, M and R 2000, No. 93

29 See for example:

Pres. Leeuwarden Court 28 April 1997, JM 1997, No. 1 (gas drillings, testing against precautionary principle, precautionary principle in Wadden Sea Key Planning Decision)

Pres. AB RvS 21 December 1999, JM 2000, No. 45 (mussel harvesting; testing against Wadden Sea Key Planning Decision precautionary principle)

AB RvS 9 June 2000, AB 2000, No. 367 (placement of shortwave transmitters; testing against precautionary principle in extra legal guideline for radio frequency radiation issued by transmitting facilities)

AB RvS 16 November 2000, M and R 2001, No. 91 (discharges into surface waters; testing against precautionary principle in Third Water Management Policy Document).

AB RvS 26 April 2001, M and R 2001, No. 92 (earth removal for shell extraction purposes; testing against precautionary principle in Wadden Sea Key Planning Decision)

AB RvS 20 March 2002, Case No. 200103596, rechtspraak.nl (mechanical worming; testing against precautionary principle in Wadden Sea Key Planning Decision)

AB RvS 14 May 2003, Case No. 200202993, rechtspraak.nl (Nature Protection Act licence for fishing up seed mussels; testing against Wadden Sea Key Planning Decision)

30 AB RvS 28 January 1999, AB 1999, 117: "In view of the above the respondents have granted the licence without having insight into the consequences of the facility for the natural and ecological values in the locality. The contested decision is in so far at variance with Section 3:2 of the General Administrative Law Act […]". And AB RvS 23 July 1999, M and R 2000, No. 1: "In this regard it is important that the available knowledge makes the seriousness of the potentially adverse consequences for the environment sufficiently clear, so that it is not possible to maintain that a licence may be issued as long as there is no scientific insight." See also Middelburg Court 9 October 2001, No. 00/469, rechtspraak.nl: "The court agrees with the respondent that if the sowing desired by the appellant were indeed to have harmful consequences, an irreversible situation would arise. In order to prevent such a situation the respondent has accordingly been able to take the reasonable position that relatively radical measures are required for a further period in anticipation.until the relevant knowledge is available."

31 AB RvS 27 March 2002, AB 2002, No. 419

noting in particular the precautionary principle referred to in that clause. The question is then posed: “If account needs to be taken of the precautionary principle referred to in Article 174 (2) of the EC Treaty, does this mean that a particular activity, such as the cockle fishing in question, may be permitted if there is **no clear doubt** about the absence of potentially significant consequences or is this only permitted if there is **no doubt** concerning the absence of such consequences or if that absence can be determined **with certainty**?” (author’s emphasis) The Dutch courts therefore desire clarity concerning the extent of doubt that can provide a reason for not permitting a particular activity.

An interesting point in the jurisprudence concerns the division of the burden of proof: who is obliged to assemble the necessary knowledge? The government, those who intend to conduct a potentially harmful activity or the interested party seeking to prevent that activity? Here again the Administrative Law Division of the Council of State appears to have swung round. In a ruling of May 2000 this court appears to impose the burden of proof on the interested party: “The question as to whether effects that are the result of the phenomena in respect of which the Environmental Impact Statement Committee has noted gaps in knowledge are such that those gaps prevent the issuing of a licence has been contested by the respondent. Appellant under 1 has not demonstrated sufficiently clearly that the respondent’s position is incorrect.”[32] In a ruling of April 2001 concerning the extraction of shells, however, the court takes a different tack: the gaps in knowledge must result in further research being carried out until it has been shown that the licences will not result in the depletion of the fossil stocks of cockles.[33] This reverses the burden of proof: the administrative body or party wishing to perform the potentially harmful activity must demonstrate that no harm will be caused or at any event make it clear what the harm is likely to be in the light of the most recent scientific insights.

On the other hand an administrative body is unable to take excessive refuge behind the precautionary principle in refusing a potentially harmful activity in order to prevent the need for more detailed research.[34]

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[32] AB RvS 12 May 2000, M and R 2000, No. 94

[33] AB RvS 26 April 2001, M and R 2001, No. 92

[34] AB RvS 26 February 2003, case no. 200105644, rechtspraak.nl: “The department considers that in invoking the generally formulated interests that the ban is said to serve and with the also very generally formulated reference to the precautionary principle, the State Secretary has not taken sufficient account of the aforementioned conditions under which such a ground for justification could be accepted. The State Secretary has not been able to submit any results in this respect apart from the conclusions of the aforementioned workshop. Further research, although indicated, has not been carried out.”