

Topic 3 External relations of the EU and the Member States

Report for the Netherlands

National Rapporteur: Dr. Nikolaos Lavranos, LL.M., University of Amsterdam, Faculty of Law, Department of European Law, N.Lavranos@uva.nl

Executive summary

The questionnaire of the General rapporteur is subdivided into three chapters, (chapter 1 – competence, chapter 2 – mixed agreements and international responsibility and chapter 3 – legal effects of international law). This report follows that structure by first stating the question, which is followed by the answer. Unfortunately, I was not yet able to research a number of questions, but I hope I will be able to do so at a later stage. In summary, it can be stated that the most interesting aspects of EU external relations and the domestic law of the Netherlands relates to the exclusive jurisdiction of the ECJ based on Art. 292 EC in regard to the IJzeren Rijn dispute. Moreover, the direct effect of provisions of several Association, Co-operation and Europe Agreements allowing prostitutes to establish themselves in the Netherlands has been quite controversial. Finally, also the application of TRIPS provisions by Dutch courts illustrates that in this field the strict case-law of the ECJ rejecting any direct effect of WTO law is mitigated by the fact that Member States have still some competence regarding TRIPS.

1. Chapter 1 – competence

1. Under the *AETR* doctrine the European Community has exclusive competence to enter into an international agreement where the agreement affects EC rules. As EC legislation expands in an ever increasing number of areas, many of which are (relatively) new (e.g. immigration, asylum, conflict-of-laws, anti-discrimination law), which are the practical examples of the *AETR*-effect? In which cases has EC participation in a negotiation, resulting from the *AETR* rule, been discussed? Is there a national or European mechanism for checking *AETR*-effects, when Member States enter into a new negotiation, or when an agreement is amended or renegotiated? Which political, legal, and practical problems were raised?

I don't think there is any special mechanism in the Dutch legal order, but I am not sure.

2. Thinking outside the box: Is not the *AETR*-principle too strong in some cases, in the sense of requiring EC participation in an international negotiation and in the conclusion of an agreement whenever some EC-law provisions are affected? Could EC interests be protected through mechanisms other than full participation? Are there any examples of this?

DRAFT TEXT

The new Lugano Convention and the use of so-called disconnection clauses is – potentially – an interesting tool of ensuring that the uniform and consistent application of Community law could be protected. The Council recently requested from the ECJ an Opinion on the new Lugano Convention. In Opinion 1/03 delivered on 7 February 2006¹, the ECJ argued that the mere existence of a disconnection clause in an international agreement is an indication that the uniform and consistent application of Community law is potentially affected rather than that such a clause would actually protect Community law.² In this sense, the ECJ clearly rejected the use of disconnection clauses in mixed agreements, arguing that if the EC has exclusive external competence than that cannot be mitigated by using a disconnection clause which would bring Member States back to the ratification table. However, in my view, disconnection clauses can be a useful mechanism for protecting EC interests while preserving the participation of the Member States.

3. Are there any examples of EC exclusive competence being exercised on the basis of the concept of “necessity” as developed by the Court of Justice in Opinion 1/76, Opinion 1/94 and the Air Transport Cases?

Reference to Opinion 1/76 and the concept of necessity was made by the Council and the Member States in their submissions regarding the new Lugano Convention in Opinion 1/03:

‘ Existence of implied external competence

35. The Council, all the Member States which submitted observations to the Court, the Parliament and the Commission maintain that in order to determine whether there is implied external competence reference should be made to Opinion 1/76 [1977] ECR 741, as clarified in Opinion 1/94 [1994] ECR I-5267: [...]

36. They state that, according to the [necessity] principle established in Opinion 1/76, implied external competence exists not only whenever internal competence has already been used in order to adopt measures to implement common policies, but also where internal Community measures are adopted only on the occasion of the conclusion and implementation of the international agreement. Thus, competence to bind the Community in relation to non-member countries may arise by implication from the Treaty provisions establishing internal competence, provided that participation of the Community in the international agreement is necessary in order to attain one of the Community's objectives (see Opinion 1/76, paragraphs 3 and 4, and the Open Skies judgments, in particular Commission v Denmark, paragraph 56).

37. In subsequent cases, the Court stated that with regard to the existence of implied exclusive competence, in particular, the situation envisaged in Opinion 1/76 is that where internal competence may be effectively exercised only at the same time as external competence (Opinion 1/94, paragraph 89), the conclusion of the international agreement thus being necessary in order to attain objectives of the Treaty that cannot be attained by establishing autonomous rules (the wording adopted in the Open Skies judgments, in particular Commission v Denmark, paragraph 57). In the words used by the Court in paragraph 86 of Opinion 1/94, attainment of the Community objective should be inextricably linked' to the conclusion of the international agreement.

38. The Council points out that the Community has already adopted internal rules in respect of jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which shows that it must have implied competence to conclude the agreement envisaged. It cites in that regard Regulation No 44/2001, but also, by way of example, Title X of Regulation No 40/94 and Article 6 of Directive 96/71.

39. It observes that neither the Member States nor the Commission claimed that the agreement envisaged was necessary. The Parliament considers that it is not, since the judicial cooperation in civil matters referred to in Article 65 EC can very easily be limited to measures addressed to the courts and authorities of the Member States alone, without

¹ ECJ Opinion 1/03 (Lugano Convention), available at: <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=1%2F03&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100>.

² See for details: Lavranos, case-note on Opinion 1/03, to be published in: Common Market Law Review 2006, August issue.

DRAFT TEXT

those measures concerning relations with non-member countries, as the wording of that article makes plain that the measures envisaged are to be adopted insofar as necessary for the proper functioning of the internal market'.

40. In the German Government's submission such necessity is in any event precluded since the internal legislation does not require the simultaneous participation of non-member countries. [...] ³

Moreover, in the proceedings against several Member States regarding the open-skies agreements, the Commission relied on the necessity concept of Opinion 1/76 in order to support its argument for claiming exclusive competence in all the areas covered by the open-skies agreements. However, that argument was not accepted by the Court in its rulings in the open-skies cases:

‘42 The Commission charges the Kingdom of Sweden with having infringed the external competence of the Community by entering into the disputed commitments. It maintains in that respect that that competence arises, first, from the necessity, within the meaning of Opinion 1/76 of 26 April 1977 ([1977] ECR 741), of concluding an agreement containing such commitments at Community level, and, second, from the fact that the disputed commitments affect, within the meaning of the judgment in Case 22/70 Commission v Council [1971] ECR 263 (the ‘AETR’ judgment), the rules adopted by the Community in the field of air transport.

The alleged existence of an external competence of the Community within the meaning of Opinion 1/76

Arguments of the parties

43 The Commission submits that, according to Opinion 1/76, subsequently clarified by Opinion 1/94 of 15 November 1994 ([1994] ECR I-5267) and Opinion 2/92 of 24 March 1995 ([1995] ECR I-521), the Community has exclusive competence to conclude an international agreement, even in the absence of Community provisions in the area concerned, where the conclusion of such an agreement is necessary in order to attain the objectives of the Treaty in that area, such objectives being incapable of being attained merely by introducing autonomous common rules.

[...]

47 The necessity for Community action in relation to non-member countries is easy to establish, having regard to the provisions of the Treaty on transport. Even if Article 84(2) of the Treaty does not define in advance the specific content of the provisions to be laid down for air transport, it specifically declares the procedural provisions of Article 75(3) of the EC Treaty (now, after amendment, Article 71(2) EC) to be applicable. The fact that Article 84(2) of the Treaty clearly gives the Community the power to conclude air transport agreements with non-member countries has, moreover, been demonstrated by its use as a legal basis for concluding such an agreement with the Kingdom of Norway and the Kingdom of Sweden in 1992.

48 The Swedish Government denies the existence of an exclusive competence of the Community, within the meaning of Opinion 1/76, to conclude agreements in the field of air transport.

49 It argues that although, when Community law has conferred upon the Community a competence in the internal sphere with a view to attaining a given objective, the Community has the competence to enter into the international commitments necessary to attain that objective where it has previously used its internal competence or where it simultaneously uses that internal competence and its external competence with a view to adopting measures forming part of the realisation of a common policy, that does not mean that that external competence thus automatically becomes exclusive. According to what has been held by the Court of Justice, as set out in Opinion 1/94, exclusive external competence of the Community does not follow ipso facto from its power to lay down rules in the internal sphere. It also follows from that Opinion, so the Swedish Government argues, that Opinion 1/76 deals with the case where the conclusion of an international agreement is necessary to attain an objective of the Treaty which cannot be attained by means of autonomous internal rules. In such a case, the Community has an external competence without there being any need for it previously to have adopted internal rules. Nevertheless, for that external competence of the Community to become exclusive, the Community would have to have made use of it.

Findings of the Court

[...]

53 It is true that the Court has held that the Community's competence to enter into international commitments may arise not only from express conferment by the Treaty but also by implication from provisions of the Treaty. Such implied external competence exists not only whenever the internal competence has already been used in order to adopt measures for implementing common policies, but also if the internal Community measures are adopted only on the occasion of the conclusion and implementation of the international agreement. Thus, the competence to bind the Community in relation to non-member countries may arise by implication from the Treaty provisions establishing internal competence, provided that participation of the Community in the international agreement is necessary for attaining one of the Community's objectives (see Opinion 1/76, paragraphs 3 and 4).

54 In a subsequent opinion, the Court stated that the hypothesis envisaged in Opinion 1/76 is that where the internal competence may be effectively exercised only at the same time as the external competence (Opinion 1/94, paragraph

³ ECJ Opinion 1/03 (Lugano Convention).

DRAFT TEXT

89), the conclusion of the international agreement thus being necessary in order to attain objectives of the Treaty that cannot be attained by establishing autonomous rules.

55 That is not the case here.⁴

Also, in Opinion 2/92 regarding the OECD decision on national treatment, the Commission unsuccessfully relied on the necessity concept.⁵ It appears from these examples that the necessity concept has not been invoked very successfully in the past.

4. What has been the practice over the last ten years in WTO negotiations on services (GATS)? Have the Member States been involved in an individual capacity? Have any of them produced their own proposals or submissions? Have any of them claimed an independent role? Has the practice been affected by the entry into force of the Treaty of Nice (new Article 133 EC)? Has it been affected by the Treaty establishing a Constitution for Europe? Same questions for WTO negotiations on intellectual property (TRIPs).

Not yet researched.

5. What views are there on external EC competence in the field of human rights? To what extent is Opinion 2/94 still relevant, in light of the subsequent Treaty amendments? What positions are there in Member States on accession to the European Convention on Human Rights? How does the non-ratification of the Constitution for Europe affect those positions?

In general, the accession to the ECHR by the EC is supported by legal scholars.⁶ It seems to me that most Dutch legal scholars would have preferred the ratification of the European Constitution and thus quick accession of the EU to the ECHR (although of course the Treaty establishing the Council of Europe and the ECHR would have to be amended so as to allow a supranational organization to become contracting party). Currently, there is mainly critique by some legal scholars regarding the failure of the CFI to actually apply and protect fundamental human rights (i.e. ECHR) to the UN sanctions regime and the unavailable judicial review against UN sanctions (see below).

6. Concerning mixed agreements in general, especially those with an institutional dimension: Are there any examples of specific competence problems, in terms of new negotiations, or of participation in the work of the institutions/organisation as set up by the mixed agreement? What mechanisms exist to give effect to the duty of cooperation between the EC and the Member States?

Not yet researched.

⁴ Case C-468/98 (Commission v. Sweden, open skies) [2002] ECR I-9575.

⁵ ECJ Opinion 2/92 (Third Revised Decision of the OECD on national treatment) [1995] ECR I-521.

⁶ R. Lawson, Over laserguns, rode sterren en een ontluikende liefde tussen twee dames op leeftijd: kroniek van de relaties Straatsburg-Luxemburg 2000-2005, NJCM 2006, pp. 146-162.

DRAFT TEXT

7. Concerning the Third-Pillar agreements (Article 24 TEU) with the United States on extradition and mutual legal assistance (OJ 2003 L 181/27 and L/181/34): What is the current status of ratification in the Member States? What national procedures are being followed? Are there any official statements on the nature of those procedures and of the agreements themselves? Are the agreements considered to be EU agreements or Member State agreements?

The Dutch Parliament (Staten-Generaal) has not yet ratify the agreement.⁷

8. Concerning the bridge between the Common Foreign and Security Policy and the EC Treaty in Articles 301 and 60 EC: What views and positions are there on what the Court of First Instance decided in *Yusuf* and *Kadi*? Are there any concerns about the extension of EC competence to sanctions against individuals? Is it appropriate for Article 308 EC to be used for the pursuit of CFSP objectives?

In general, it can be said that the academic community is not very happy with the Yusuf/Kadi rulings of the CFI. Van Ooik/Wessel doubt the appropriateness of use of Art. 308 EC for targeting individuals by the use of sanctions.⁸ Moreover, there is critique on the refusal of the CFI to offer any legal remedies.⁹ The case is now pending in appeal before the ECJ and it remains to be seen what the outcome will be.¹⁰

2. Chapter 2 - Mixed agreements and international responsibility

9. The *Mox Plant* case is an example of two Member States engaging in international litigation under a mixed agreement (in casu the Convention on the Law of the Sea). Are there any other such cases, which have either materialised in actual litigation or where litigation was contemplated? If so, please provide details about any official national or EC positions; about whether the EC was notified; about any official discussions which took place; about any relevant outcomes of the litigation.

The IJzeren Rijn dispute between the Netherlands and Belgium took place around the same time as the MOX plant case.¹¹ The official position of the Netherlands (and Belgium) in that case regarding Art. 292 EC can be found in their pleadings: both Member States argued that the ECJ is not

⁷ The agreement has been published in the official Dutch gazette 'Tractatenblad' 2004, No. 297. Also a separate agreement between the Netherlands and the US regarding the application of the extradition treaty of 1980 in relation to the EU-US extradition treaty has been published in the Tractatenblad 2004, No. 299.

⁸ R.van Ooik/R. Wessel, De Yusuf en Kadi-uitspraken in perspectief. Nieuwe verhoudingen in de interne en externe bevoegdheden van de EU, SEW 2006, pp. 231-242.

⁹ N. Lavranos, Nationale constitutionele implicaties van de Bosphorus en Yusuf/Kadi zaken, Staatsrechtsconferentie december 2005, to be published by Kluwer in 2006. *Ibid.*, Interface between EU law and national procedural law: Sanctions and judicial review, conference paper, Amsterdam, 23 June 2006, [available now at: ww.jur.uva.nl/interface under conference documents]. The conference proceedings will be published by Europa Law Publishing.

¹⁰ The case is listed as C-415/05 P, OJ [2006], C 48/11.

¹¹ See for details: N. Lavranos, The MOX Plant and IJzeren Rijn disputes: Which Court is the supreme arbiter?, Leiden Journal of International Law 2006, pp. 223-246.

DRAFT TEXT

competent. The arbitral tribunal followed that line of argument and rendered its award.¹² Although it examined whether EC law is relevant in this case, it concluded that this is not the case since it could decide the dispute on the basis of treaties signed by the Netherlands and Belgium in the 19th century. However, it should be noted that the parties had notified the Secretary-General of the EC Commission stating that:

‘Should the eventuality of an application or interpretation of Community law arise in the course of the procedure, the Kingdom of Belgium and the Kingdom of the Netherlands commit themselves to take all necessary measures in order to comply with all the obligations resting with them under the EC Treaty, and in particular Art. 292 thereof.’ Moreover, the parties explicitly stated in the compromise for the arbitral tribunal that the arbitral tribunal should: ‘render its decision on the basis of international law, including European law if necessary, while taking into account the Parties’ obligations under Article 292 EC Treaty.’¹³

So the parties were aware that Community law was potentially applicable thereby triggering the exclusive jurisdiction of the ECJ in this dispute. But in their pleadings the parties – successfully – reduced that eventuality as much as possible.

10. In the context of litigation under mixed agreements, what views are there on the scope and meaning of Article 292 EC, the Treaty provision that establishes the exclusive jurisdiction of the Court of Justice?

The Netherlands construes Art. 292 EC narrowly. Van Nuffel essentially agrees with the award of the arbitral tribunal in the *IJzeren Rijn* case, although he has doubts on some points of the line of argument taken by the arbitral tribunal.¹⁴ On the Belgium side, D’Argent is fully in line with the arbitral tribunal’s decision.¹⁵ In contrast, Lavranos completely disagrees with the *IJzeren Rijn* arbitral tribunal.¹⁶ He argues that Art. 292 EC should be interpreted broadly, that is, whenever EC law is potentially at issue in a dispute between two EC Member States, the dispute should first be brought before the ECJ. Only after the ECJ has ruled that it has no jurisdiction in that case, would it be appropriate to bring the case before another international dispute settlement body. In the *MOX* plant case, AG Maduro also argued for a broad interpretation of Art. 292 EC in order to ensure and protect the exclusive jurisdiction of the ECJ.¹⁷ In this context, AG Maduro emphasized this point as follows:

‘41. I do not share the view that the UNCLOS dispute settlement regime has become incorporated into, and has thus altered, the Community’s own judicial system. Article 292 EC stands in the way of a conferral of the Court’s exclusive jurisdiction, by way of international agreement, to another court or tribunal. It is not possible therefore, that the conclusion of UNCLOS has resulted in a transfer of the Court’s jurisdiction to settle disputes

¹² See for the documents of the award in the *IJzeren Rijn* dispute: <http://www.pca-cpa.org/ENGLISH/RPC/#Belgium/Netherlands>.

¹³ *Ibid.*

¹⁴ Van Nuffel, case-note on the *IJzeren Rijn* dispute, *SEW* 2006, pp. 129-132.

¹⁵ Pierre d’Argent, *De la fragmentation à la cohésion systémique: la sentence arbitrale du 24 mai 2005 relative au « Rhin de fer » (Ijzeren Rijn)*, to be published in the *Festschrift (Mélanges)* for Jean Salmon, due in 2006.

¹⁶ N. Lavranos, *The MOX Plant and IJzeren Rijn disputes: Which Court is the supreme arbiter?*, *Leiden Journal of International Law* 2006, pp. 223-246.

¹⁷ Opinion of AG Maduro in case C-459/03 (*Commission v. Ireland*), opinion of 18.1.2006.

DRAFT TEXT

between the Community's Member States concerning the interpretation or application of Community law to a jurisdiction established under UNCLOS.

42. For these reasons, I propose that the Court declare that, by submitting the dispute with the United Kingdom concerning a MOX Plant before an Arbitral Tribunal established under Annex VII of UNCLOS, Ireland has failed to fulfil its obligations under Article 292 EC.¹⁸

In its ruling in the *MOX plant* case, the ECJ strongly emphasized its exclusive jurisdiction when it stated:

'123 The Court has already pointed out that an international agreement cannot affect the allocation of responsibilities defined in the Treaties and, consequently, the autonomy of the Community legal system, compliance with which the Court ensures under Article 220 EC. That exclusive jurisdiction of the Court is confirmed by Article 292 EC, by which Member States undertake not to submit a dispute concerning the interpretation or application of the EC Treaty to any method of settlement other than those provided for therein (see, to that effect, Opinion 1/91 [1991] ECR I-6079, paragraph 35, and Opinion 1/00 [2002] ECR I-3493, paragraphs 11 and 12).

[...]

132 As has been pointed out in paragraph 123 of the present judgment, an international agreement such as the Convention cannot affect the exclusive jurisdiction of the Court in regard to the resolution of disputes between Member States concerning the interpretation and application of Community law. Furthermore, as indicated in paragraphs 124 and 125 of the present judgment, Article 282 of the Convention precisely makes it possible to avoid such a breach occurring, in such a way as to preserve the autonomy of the Community legal system.

[...]

136 As the jurisdiction of the Court is exclusive and binding on the Member States, the arguments put forward by Ireland concerning the advantages which arbitration proceedings under Annex VII to the Convention would present in comparison with an action brought before the Court under Article 227 EC cannot be accepted.

137 Even if they were assumed to have been demonstrated, such advantages could not in any event justify a Member State in avoiding its Treaty obligations with regard to judicial proceedings intended to rectify an alleged breach of Community law by another Member State (see, to that effect, Case 232/78 *Commission v France* [1979] ECR 2729, paragraph 9).

[...]

154 It must also be pointed out that the institution and pursuit of proceedings before the Arbitral Tribunal, in the circumstances indicated in paragraphs 146 to 150 of the present judgment, involve a manifest risk that the jurisdictional order laid down in the Treaties and, consequently, the autonomy of the Community legal system may be adversely affected.'¹⁹

In short, the ECJ interprets Art. 292 EC broadly and thus in contrast to the views of the Netherlands and Belgium regarding the IJzeren Rijn case. Indeed, I would submit that there is no difference on this point between the MOX plant case and the IJzeren Rijn case. Consequently, also the IJzeren Rijn case should have been brought exclusively before the ECJ.

11. Are there any cases of Member States having engaged in international litigation against a non-Member State under a mixed agreement? If so, was the EC notified? Were there any official discussions? Idem regarding litigation by the EC under a mixed agreement. Were any of the Member States involved in an individual capacity?

Not that I am aware of.

¹⁸ Ibid.

¹⁹ Case C-459/03 (*Commission v. Ireland*) judgment of the Court of 30.5.2006, available at:

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=c-459%2F03&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100>.

DRAFT TEXT

12. Within the WTO: Which cases have been brought against Member States (including cases which did not (yet) go beyond the level of consultation)? What was the EC's reaction? What was the reaction of the Member State(s) concerned?

I am not aware of a case that involved the Netherlands.

13. How do Member States react to the *Bosphorus* judgment of the European Court of Human Rights? How do they react to the fact that the Court may hold them responsible for violations of the Convention resulting from EC acts?

Since the *Matthews*-judgment of the ECtHR it has been established that EC Member States can be held responsible also for acts involving Community law.²⁰ The *Bosphorus*-ruling did not add anything new on that point.²¹ In general, it seems that for this is not a problem for the Dutch.²² [But I am not aware of any official position of the Dutch government on that.]

14. The International Law Commission is studying issues of international responsibility of international organizations, including questions of responsibility in the case of EC mixed agreements. What are the national and EC positions? Are they coordinated?

Not yet researched.

²⁰ ECtHR, *Matthews v. UK*, judgment of 18.2.1999, para.: '32. The Court observes that acts of the EC as such cannot be challenged before the Court because the EC is not a Contracting Party. The Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be "secured". Member States' responsibility therefore continues even after such a transfer.'

²¹ ECtHR, *Bosphorus v. Ireland*, judgment of 30.6.2005, para.: '152. The Convention does not, on the one hand, prohibit Contracting Parties from transferring sovereign power to an international (including a supranational) organisation in order to pursue co-operation in certain fields of activity (the *M. & Co.* decision, at p. 144 and *Matthews* at § 32, both cited above). Moreover, even as the holder of such transferred sovereign power, that organisation is not itself held responsible under the Convention for proceedings before, or decisions of, its organs as long as it is not a Contracting Party (see *CFDT v. European Communities*, no. 8030/77, Commission decision of 10 July 1978, DR 13, p. 231; *Dufay v. European Communities*, no. 13539/88, Commission decision of 19 January 1989; the above-cited *M. & Co.* case, at p. 144 and the above-cited *Matthews* judgment, at § 32).

153. On the other hand, it has also been accepted that a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. Article 1 makes no distinction as to the type of rule or measure concerned and does not exclude any part of a Contracting Party's "jurisdiction" from scrutiny under the Convention (*United Communist Party of Turkey and Others v. Turkey* judgment of 30 January 1998, Reports, 1998-I, § 29).'

²² See generally: N. Lavranos, *Das So-Lange-Prinzip Model im Verhältnis EGMR und EuGH*, *Europarecht* 2006, pp. 79-92; R. Lawson, *Nationale rechter ontsnapt aan Luxemburgs/Straatsburgse sandwich*, *NJCM-Bulletin* 2005, pp. 969-991.

3. Chapter 3 – Legal effect of international law

15. Is there national case-law on mixed agreements which did not result in a reference to the Court of Justice? Is there national case-law on GATS or on TRIPS? Is there national case-law on pure EC agreements which did not result in a reference to the Court of Justice? If yes, please give a short summary.

As discussed below there are quite some cases in which Dutch courts apply TRIPS without requesting preliminary rulings from the ECJ. However, there are much fewer Dutch cases involving GATS.

16. Are there currently enforcement actions by the Commission against Member States (Article 226 EC) for failure to comply with international agreements binding on the EC?

Not for failure to comply with international agreements binding on the EC, but for failure to comply with EC law.

17. Is there national case-law on the domestic legal effect of WTO law in areas which are within national competence (see *Christian Dior*)? What views are there on the Court's jurisdiction to deal with questions of interpretation of WTO law (*Hermès, Christian Dior, Schieving-Nijstad*)? What views are there on the impossibility for Member States to rely on WTO law in an action for annulment (*Portugal v Council*)? What views are there on the recent case-law concerning the effect of WTO law (*Van Parrys, Chiquita, xxx*)?

It should be remembered that Dutch courts – through their requests of preliminary rulings from the ECJ in the *Hermès, Dior* and *Schieving-Nijstad* cases – basically pushed the ECJ in explicitly stating that direct effect to TRIPS can be granted by national courts if that issue falls outside the competence of the Community.²³ The main reason for the Dutch courts to push towards this jurisprudence is the open attitude of Articles 93, 94 of the Dutch constitution that allows to grant direct effect to provisions of international treaties if certain conditions are fulfilled. In this way, Dutch courts obtained some room for manoeuvre from the ECJ to decide for themselves whether in a certain case direct effect to a TRIPS provision should be granted, thereby deviating from the non-direct effect of WTO law jurisprudence of the ECJ.

A search in the database www.rechtspraak.nl resulted in 67 hits for the term 'TRIPS'. The TRIPS is applied by Dutch courts of all levels and in most cases without requesting a preliminary ruling from the ECJ. In contrast to that, the search for the term 'GATS' resulted only in two hits. So in general, Dutch courts have become accustomed in applying the TRIPS agreement as far as they consider that an issue falls within the competence of the Member States.

²³ See: N. Lavranos, case-note on *Schieving-Nijstad*, *Legal Issues of Economic Integration* 2002, pp. 323-333.

DRAFT TEXT

The views in the academic community on the jurisprudence of the ECJ on WTO law are mixed. For example, Bronckers/Kuijper who wrote a report (preadvies) for the Dutch Association of European Law have supported the jurisprudence of the ECJ²⁴, while Lavranos has been heavily criticising it.²⁵ However, it seems that with the *Van Parys* and *Chiquita* rulings the hopes of *Biret* have been crushed for good, so there is a feeling that the whole debate on a possible direct effect of WTO law and in particular WTO dispute settlement reports has become useless or *passé*.

18. What views are there on the recent case-law by the Court of Justice on the direct effect of association and cooperation agreements (e.g. *Simutenkov*, *Panayotova*, *Deutscher Handballbund*, *Kondova*)? Have these cases given rise to any specific issues or problems at national or Community level?

A lot of cases have arisen in the Netherlands regarding prostitutes coming from a number of Eastern and Central European countries, that are now members of the EU, who wish to establish themselves as self-employed. The Dutch authorities suspect that in most cases these prostitutes are not self-employed but workers and thus could not rely on the relevant directly applicable provisions of the Europe Agreements that were signed between the EC and those states.²⁶

For instance, the *Jany* and *Panayotova et. al.* cases were referred to the ECJ by Dutch courts.²⁷

In practice, it appears that several cases have come before Dutch courts regarding the conditions for the requirement to obtain a permission to enter the Netherlands in order to be allowed to establish in the Netherlands as self-employed for the purpose of providing services in the area of prostitution. In some of the cases the prostitutes successfully relied on the directly applicable provisions of the Europe or Association Agreements in order to challenge the decision of the Dutch authorities, while in other cases it was not successful.²⁸

Moreover, also Turkish workers still have problems relating to the restrictions that have been recently imposed by the Dutch government on immigration. In several cases, Turkish citizens relied on the directly applicable provisions of Association Agreement EEC-Turkey and Association

²⁴ M. Bronckers/P.-J. Kuijper, *De WTO voor de Europese rechter*, SEW 2004, pp. 450-466, English version, WTO law in the European Court of Justice, CML Rev. 2005, pp. 1313-1355, with further references.

²⁵ N. Lavranos, *Enkele kanttekeningen bij het preadvies 'De WTO voor de Europese rechter'*, SEW 2005, pp. 128-130; *idem*, *The Communitarization of WTO Dispute Settlement Reports: An exception to the Rule of Law*, EFA Rev 2005, pp. 313-338, with further references.

²⁶ R. van Ooik, *Vrije vestiging van Oost-Europese prostitutie in Nederland*, NTER 1997, pp. 245-248; *idem*, *Een activiteit waarbij onder bezwaarde titel een dienst wordt verricht ten behoeve van den ontvanger, zonder dat materiële goederen worden geproduceerd of overgedragen – Over de Jany-uitspraak en prostitutie als economische activiteit*, NTER 2002, pp. 1-7.

²⁷ Case C-268/99 (*Jany et.al.*) [2001] ECR I-8615, reference for a preliminary ruling from the Arrondissementsrechtbank te 's-Gravenhage; C-327/02 (*Panayotova et.al.*) [2004] ECR I-11055, reference for a preliminary ruling from the Rechtbank te 's-Gravenhage.

²⁸ See eg: Rechtbank 's-Gravenhage (AWB 05/47232) of 10.1.2006; Rechtbank 's-Gravenhage (AWB 04/48199) of 27.1.2005; Rechtbank 's-Gravenhage (AWB 02/72367) of 22.8.2003, all available at: www.rechtspraak.nl.

DRAFT TEXT

Council Decisions, in particular they relied on the standstill concept which the ECJ has developed.²⁹ According to that standstill concept³⁰, Member States are not allowed to restrict the rights of Turkish workers and their family members that they have been granted through the Association Agreement as interpreted by the ECJ.³¹

In general, it seems that Dutch courts are well aware of the jurisprudence of the ECJ regarding the direct effect of provisions of Association/Co-operation/Europe agreements and are ready to apply them to the benefit of the individuals who rely on those provisions.

19. In *Yusuf and Kádi* the Court of First Instance declined to review an EC Regulation based on a UN Security Council Resolution, because of the binding nature of UN law. Is there national case-law on the domestic legal effect of Security Council Resolutions? What views are there on these judgments?

Not yet researched.

20. What are considered to be the legal effects of the extradition and mutual legal assistance agreements with the US? Are the Member States (re)negotiating bilateral agreements? How do such negotiations or agreements relate to the EU-US agreements?

Not yet researched.

²⁹ See eg: Rechtbank 's-Gravenhage (AWB04/45792) of 30.5.2005; Rechtbank 's-Gravenhage (AWB 04/7153), all available at: www.rechtspraak.nl.

³⁰ See eg: Case C-89/96 (*Ertarnir v. Land Hessen*) [1997] ECR I-5179; C-36/96 (*Günaydin v. Freistaat Bayern*) [1997] ECR I-5143; C-329/97 (*Ergat*) [2000] ECR I-1487; C-37/98 (*Savas*) [2000] ECR I-2927.

³¹ See extensively: N. Lavranos, *Decisions of International Organizations in the European and Domestic Legal Orders of Selected EU Member States*, chapter 3, section 4, Groningen 2004.