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Direct reliance on the Aarhus Convention before Dutch administrative courts

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I. Introduction

A central theme in Prof. Jan Darpö's rich oeuvre is the complicated relationship between environmental justice, access to justice and the role of national courts.[1] This article, in his honor, is intended as a modest contribution to this discussion. In a number of recent judgments,[2] the Netherlands Council of State has adopted a curious position regarding the extent to which interested parties can rely on the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention) before Dutch administrative courts. The Aarhus Convention is a 'mixed agreement', one to which both the EU and its Member States are parties.[3] In the judgments in question, the Council of State observed:

> Both the Netherlands and the European Union are parties to the Aarhus Convention. From the judgment of the Court of Justice of the European Community of 11 September 2007 in Case C-431/05 *Merck Genéricos* […], it follows that in a case like that direct reliance on a rule from the Convention in proceedings before a national court *is*

[1] Cf. e.g. Jan Darpö, 'Environmental justice through environmental courts? Lessons learned from the Swedish experience', in *Environmental Law and Justice in Context*, edited by Jonas Ebbesson (Cambridge University Press 2009), pp. 176-194.
[2] Council of State 29 July 2011, LJN: BR4025; Council of State 17 November 2010, LJN: BO4217 and 19 January 2011, LJN BP1342.
[3] Decision 2005/370/EC, OJ 2005 L 124/1.

> *not permitted*, if that rule concerns a sphere in which the European Union has laid down rules.
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> Under Directive 2003/35/EEC, by way of implementation of the obligations arising under, *inter alia*, Article 9(2) of the Aarhus Convention, Directive 85/337/EEC [...] was amended by the insertion of Article 10a. Given that the European Union has laid down rules in this sphere, it is not possible in these proceedings to rely directly on Article 9(2), but it must be assessed whether national law is in conformity with the law laid down by the European Union in this respect.[4]

In other words, according to the Council of State a claimant cannot rely directly on a provision of a mixed agreement before the national courts, if the rule laid down by the convention concerns a sphere in which the Community lawmaker has already laid down rules. The position adopted here seems relevant not only as regards reliance on the Aarhus Convention, but possibly also for mixed agreements in general. Further analysis of this remarkable and restrictive position regarding reliance on mixed agreements is therefore called for.

II. The context of the decisions

On 31 March 2010, legislation – the Crisis and Recovery Act (*Crisis- en herstelwet*, Chw) – entered in force in the Netherlands, which, among other things, shortens the procedures required before construction projects can commence. It covers, for example, the construction of roads and business estates as well as houses and wind farms. Various provisions of this legislation concern Dutch administrative procedural law.[5] Section 1.4 of the Act, for example, provides that – contrary to the first paragraph of section 8:1 of the General Administrative Law Act (*Algemene wet bestuursrecht*, Awb) – a legal entity established pursuant to public law and not being part of the central government, or an administrative body not being part of the central government, may not appeal against a decision, if that decision is not addressed to that legal entity or to an organ of the legal entity, or to that administrative body or the legal entity of which that administrative body is part. What is more, section 1.6, paragraph 2, and section 1.6a of the Crisis and Recovery Act make it impossible to lodge a pro forma appeal: an appeal will be declared inadmissible if it does not state the grounds on which it is based. Interested parties have argued in a number of procedures before the Council of State that these provisions are contrary to Article 9(2) and (4), among others, of the Aarhus Convention.

In order to implement these provisions of the Convention, the European Union has adopted various directives, including Directive 2003/35.[6] The relevant provisions are more or less a

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[4] Italics added by the author.

[5] It is, incidentally, intended to incorporate a number of provisions of the Crisis and Recovery Act in the General Administrative Law Act so that they become generally applicable. See the legislative proposal *Wetsvoorstel aanpassing bestuursprocesrecht*, Kamerstukken 2009/10, 32450, nr. 1-4.

[6] Directive 2003/35/EC, OJ 2003 L 156/17.

literal copy-and-paste adoption of the wording of Article 9(2) and (4) of the Convention.[7] However, my concern in this article is not whether Dutch law is or is not in accordance with the Aarhus Convention and/or European Union measures intended to implement the obligations arising from the Convention. My concern here is solely whether individuals are entitled to rely on mixed agreements before the Dutch administrative courts.

III. Mixed agreements in the Community legal system

Under Article 216(2) of the Treaty on the Functioning of the European Union (TFEU), agreements concluded by the EU are binding on the institutions of the Union and on its Member States. Provisions of EU law must as far as possible be interpreted in a manner that is consistent with international agreements concluded by the Union.[8] At the same time, national courts are required to interpret national procedural rules as far as possible in the light of the international commitments of the Union.[9] Where the subject matter of an agreement concerns partly the competence of the Union and partly that of the Member States, it is essential to ensure close cooperation between the Member States and the Union, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into.[10] In addition, Member States must refrain from measures – unilateral or otherwise – which could jeopardize the attainment of the Union's objectives.

As is clear from Article 4 TFEU, environmental policy is a 'shared' competence. Neither the Union nor its Member States have exclusive competence in this area. This is also reflected, for example in Article 191(4) TFEU, in the field of external relations. Multilateral environmental conventions will, as a rule, fall partly under the competence of the Union and partly under the competence of the Member States. It is therefore not surprising that virtually all important environmental conventions have been concluded as mixed agreements.[11]

One of the problems with mixed agreements is that it is often difficult to determine the exact limits of the respective competences. The declarations of competence often issued when such agreements are concluded are generally open to multiple interpretations. So, too, the declaration issued by the Council on the conclusion of the Aarhus Convention.[12] In the *Slovak Bears* case,[13] at the request of a Slovak administrative court that wanted to know whether and

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[7] As regards the implementation of Art. 9(3) Aarhus Convention, I refer to the judgment of 8 March 2011 in Case C-240/09 *Lesoochranárske zoskupenie*. On this judgment, see J.H. Jans, 'Who is the referee? Access to Justice in a Globalised Legal Order. A Case Analysis of ECJ Judgment C-240/09 Lesoochranárske zoskupenie of 8 March 2011'. In: *REALaw* 2011/1, pp. 85-97.

[8] Cf. Case C-284/95 *Safety Hi-Tech* [1998] ECR I-4301, paragraph 22, and as regards the Aarhus Convention in particular, Case C-240/09 *Lesoochranárske zoskupenie*, judgment of 8 March 2011, especially paragraphs 50-51.

[9] Cf. Case C-53/96 *Hermès International* [1998] ECR I-3603, paragraph 28.

[10] See, for example, in the field of environmental law Case C-246/07 *Commission v Sweden* [2010] ECR I-3317.

[11] Cf. J.H. Jans & H.H.B. Vedder, *European Environmental Law*, chapter 2 (fourth edition, Groningen 2012).

[12] See the Annex to Decision 2005/370/EC, OJ 2005 L 124/1.

[13] Case C-240/09 *Lesoochranárske zoskupenie*, judgment of 8 March 2011.

how a particular aspect of Slovak administrative procedural law was affected by Article 9(3) of the Convention, the Court of Justice gave an interesting judgment on the possible direct effect of the provision. The relevant observations follow:

> 30. The Aarhus Convention was signed by the Community and subsequently approved by Decision 2005/370. Therefore, according to settled case-law, the provisions of that convention now form an integral part of the legal order of the European Union (see, by analogy, Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 36, and Case C-459/03 *Commission v Ireland* [2006] ECR I-4635, paragraph 82). Within the framework of that legal order the Court therefore has jurisdiction to give preliminary rulings concerning the interpretation of such an agreement (see, inter alia, Case 181/73 *Haegeman* [1974] ECR 449, paragraphs 4 to 6, and Case 12/86 *Demirel* [1987] ECR 3719, paragraph 7).
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> 31. Since the Aarhus Convention was concluded by the Community and all the Member States on the basis of joint competence, it follows that where a case is brought before the Court in accordance with the provisions of the EC Treaty, in particular Article 234 EC thereof, the Court has jurisdiction to define the obligations which the Community has assumed and those which remain the sole responsibility of the Member States in order to interpret the Aarhus Convention (see, by analogy, Joined Cases C-300/98 and C-392/98 *Dior and Others* [2000] ECR I-11307, paragraph 33, and Case C-431/05 *Merck Genéricos – Produtos Farmacêuticos* [2007] ECR I-7001, paragraph 33).
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> 32. Next, it must be determined whether, in the field covered by Article 9(3) of the Aarhus Convention, the European Union has exercised its powers and adopted provisions to implement the obligations which derive from it. If that were not the case, the obligations deriving from Article 9(3) of the Aarhus Convention would continue to be covered by the national law of the Member States. In those circumstances, it would be for the courts of those Member States to determine, on the basis of national law, whether individuals could rely directly on the rules of that international agreement relevant to that field or whether the courts must apply those rules of their own motion. In that case, EU law does not require or forbid the legal order of a Member State to accord to individuals the right to rely directly on a rule laid down in the Aarhus Convention or to oblige the courts to apply that rule of their own motion (see, by analogy, *Dior and Others*, paragraph 48 and *Merck Genéricos – Produtos Farmacêuticos*, paragraph 34).
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> 33. However, if it were to be held that the European Union has exercised its powers and adopted provisions in the field covered by Article 9(3) of the Aarhus Convention, EU law would apply and it would be for the Court of Justice to determine whether the provision of the international agreement in question has direct effect.

The Court went on to conclude that the Union had indeed exercised its powers under Article 9(3), but that the provision did not contain a clear and precise obligation and was therefore not capable of having direct effect. What is also clear, from paragraph 32 of the judgment, is that Member States are free to accord, on the basis of national law, direct effect to the provision, at any rate as far as Article 9(3) of the Convention falls within their powers.

While there might have been reasonable doubt as to whether, and to what extent, Article 9(3) fell within the competence of the Union,[14] there can be no doubt at all concerning Article 9(2) and (4). Directive 2003/35 is explicitly intended to implement these obligations and it is crystal clear that the Court of Justice is competent to determine whether the provision has direct effect under Union law.[15] As is the case with every provision of Union law, I should add. To be quite clear on the matter: this does not mean that an interested party can only rely on a directly effective treaty provision *after* the Court of Justice has determined its direct effect. The case law of the Court of Justice gives no support at all to the suggestion that national courts, where confronted with a possibly directly effective provision of a mixed agreement, are obliged first to obtain clarity from the Court of Justice by means of a preliminary ruling.

While it is true that there is no explicit decision of the Court of Justice on the extent to which Article 9(2) is directly effective, there is an important indication to be found in the recent *Trianel* case that, in contrast with Article 9(3), at least part of the provision is directly effective.[16] The case concerned German administrative procedural law. The core of the problem was that under German administrative court rules an action by an environmental organization is admissible only if the organization asserts that it has rights that have been impaired by the administrative measure in question and that the rights can be regarded as individual public law rights. This means that environmental protection organizations cannot bring an action against an infringement of a rule intended to protect the environment where the rule protects only the interests of the general public and not those of individuals. According to the Court of Justice, this conclusion is precluded by Article 10a of Directive 85/337, as amended by Directive 2003/35, as the last two sentences of the third paragraph of the directive are directly effective and environmental protection organizations must therefore be able to rely on them before the national courts. These directly effective provisions have been literally copied from Article 9(2) of the Aarhus Convention. It may therefore be assumed, for the time being,[17] that in any event the last two sentences of the third paragraph of Article 9 fulfil the requirements of direct effect. Note that, even if the provisions of Article 9(2) and/or (4) were not directly effective, the national court would still be required to interpret national administrative procedural rules in the light of the provisions, by analogy with the *Slovak Bears* case.[18]

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[14] I have to confess that I do not find the Court of Justice's reasoning on this point very convincing: see my article in *REALaw*, referred to in footnote 7 above.

[15] See also paragraph 33 in Case C-240/09 *Lesoochranárske zoskupenie*, judgment of 8 March 2011.

[16] Case C-115/09 *Trianel Kohlekraftwerk Lünen*, judgment of 12 May 2011.

[17] It is clear from *Kupferberg*, see also below, that the conditions for direct effect of Treaty provisions are not essentially different from those where internal Union law is concerned, though of course the 'international origin' of the provision must be taken into account (*Kupferberg*, paragraph 17). However, in *Kupferberg* the Court dismissed the contention by a number of Member States that 'generally recognised criteria for determining the effects of provisions of a purely Community origin may not be applied […]'.

[18] Case C-240/09 *Lesoochranárske zoskupenie*, judgment of 8 March 2011, paragraph 50. In relation to WTO rules see also below: the existence of European rules does not relieve the national courts from their obligation to interpret national law in a manner that is consistent with WTO rules; see Case C-431/05 *Merck Genéricos* [2007] ECR I-7001, paragraph 35. In my view this would apply *a fortiori* in the case of the Aarhus Convention.

Nor is there any support in the case law for the argument that this requirement is also confined to situations in which no European rules have been adopted. In that case the national courts would certainly be unable to hide behind Directive 2003/35.

IV. Direct reliance on Article 9(2) (and/or (4)) of the Aarhus Convention before the national courts

If, however, we assume that at any rate part of Article 9(2) of the Convention is directly effective, what then are the consequences for the national courts? As the quote from the judgment given in the introductory section clearly shows, the Dutch Council of State takes the view that claimants cannot rely directly, before the national courts, on a provision of a convention concluded by the Netherlands and the EU, if the provision in question concerns a sphere in which the Union lawmaker has laid down rules. In such a case, the claimant must content himself with an assessment of national law in the light of the measures taken by the Union to implement its treaty obligations. In doing this, the Council of State refers in general terms, without becoming specific, to the decision of the Court of Justice in *Merck Genéricos*.[19] Evidently the Council of State is referring to paragraph 35 of the judgment, which concerns Article 33 of the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs Agreement), an agreement which forms part of the Agreement establishing the World Trade Organisation (WTO), also a mixed agreement. Paragraph 35 states:

> On the other hand, if it should be found that there are Community rules in the sphere in question, Community law will apply, which will mean that it is necessary, as far as may be possible, to supply an interpretation in keeping with the TRIPs Agreement (see, to that effect, *Dior and Others*, paragraph 47), although no direct effect may be given to the provision of that agreement at issue (*Dior and Others*, paragraph 44).

As can be seen, this refers back to another judgment of the Court of Justice, *Dior*,[20] which also concerned the TRIPs Agreement. In paragraph 44 of that judgment the Court of Justice concluded:

> For the same reasons as those set out by the Court in paragraphs 42 to 46 of the judgment in *Portugal v Council*, the provisions of TRIPs, an annex to the WTO Agreement, are not such as to create rights upon which individuals may rely directly before the courts by virtue of Community law.

To stave this position, the Court of Justice referred to yet another of its judgments, this time the judgment in *Portugal v Council*.[21] The relevant paragraphs are as follows:

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[19] Case C-431/05 *Merck Genéricos* [2007] ECR I-7001.
[20] Joined Cases C-300/98 and C-392/98 *Dior and Others* [2000] ECR I-11307.
[21] Case C-149/96 *Portugal v Council* [1999] ECR I-8395.

> 42. As regards, more particularly, the application of the WTO agreements in the Community legal order, it must be noted that, according to its preamble, the agreement establishing the WTO, including the annexes, is still founded, like GATT 1947, on the principle of negotiations with a view to 'entering into reciprocal and mutually advantageous arrangements' and is thus distinguished, from the viewpoint of the Community, from the agreements concluded between the Community and non-member countries which introduce a certain asymmetry of obligations, or create special relations of integration with the Community, such as the agreement which the Court was required to interpret in *Kupferberg*.
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> 43. It is common ground, moreover, that some of the contracting parties, which are among the most important commercial partners of the Community, have concluded from the subject-matter and purpose of the WTO agreements that they are not among the rules applicable by their judicial organs when reviewing the legality of their rules of domestic law.
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> 44. Admittedly, the fact that the courts of one of the parties consider that some of the provisions of the agreement concluded by the Community are of direct application whereas the courts of the other party do not recognise such direct application is not in itself such as to constitute a lack of reciprocity in the implementation of the agreement (*Kupferberg*, paragraph 18).
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> 45. However, the lack of reciprocity in that regard on the part of the Community's trading partners, in relation to the WTO agreements which are based on 'reciprocal and mutually advantageous arrangements' and which must ipso facto be distinguished from agreements concluded by the Community, referred to in paragraph 42 of the present judgment, may lead to disuniform application of the WTO rules.
>
> 46. To accept that the role of ensuring that those rules comply with Community law devolves directly on the Community judicature would deprive the legislative or executive organs of the Community of the scope for manoeuvre enjoyed by their counterparts in the Community's trading partners.

This clearly shows the special nature of the WTO agreements and its predecessor GATT, and the rules applying to them. Basically, the Court of Justice has denied direct effect to WTO rules in order to avoid an imbalance arising in relations between the EU and countries (including a number of important trading partners) where the rules do not have direct effect. At the same time, it would diminish the role of the Union lawmaker in determining how the EU should respond to possible infringements of WTO rules. It is clear that the case law of the Court of Justice regarding the direct effect of WTO rules differs from the 'normal' regime of direct effect of international agreements concluded by the EU. *Kupferberg* remains the leading judgment for these 'normal cases'.[22] The criteria for attributing direct effect to treaty provisions are largely the same as those for direct effect of other provisions of Union law: they

[22] Case 104/81 *Kupferberg* [1982] ECR 3659.

must be clear, unconditional and need no further implementation; in short, it must be possible to rely on them and apply them before the national courts.[23]

To return to the Council of State. In my view, it wrongly applies *Merck Genéricos* out of its WTO context. The Court of Justice did not decide, as a general rule, that it was not possible to rely on provisions of international agreements concluded by the EU in cases where the Union had itself adopted rules. The clause 'although no direct effect may be given to the provision of that agreement at issue' occurs only in judgments of the Court of Justice concerning the direct effect of WTO rules.[24]

In paragraph 35 of its judgment in *Merck Genéricos*, the Court of Justice was not making a general pronouncement on the direct effect of mixed agreements, but only in regard to WTO rules. The clause in question must be read against the background of the particular case law of the Court of Justice on the lack of direct effect of WTO rules in the Union legal order. If national courts were to recognize direct effect in respect of WTO rules, this would undermine the reciprocal basis of trade relations between the Union and its partners.[25] Certainly, national courts must interpret Union law in a manner that is consistent with the WTO (the same paragraph 35 of *Merck Genéricos*), but further than this – in the sense of according, of their own initiative, direct effect on the basis of national law – they may not go.

However, in fields other than the WTO different rules apply. Lack of reciprocity with other contracting parties regarding direct effect, so crucial in the determination of direct effect of WTO rules, is indeed not generally regarded by the Court of Justice as a valid reason for not considering provisions directly applicable.[26]

In summary, it must be concluded that direct effect of the Aarhus Convention in the national legal order must be assessed not with the aid of the 'special' case law concerning WTO rules, but according to the 'normal' regime of *Kupferberg*. And, as said, that case law does not contain a single instance supporting the view that direct reliance on a rule of the Convention in proceedings before a national court is not allowed, if the rule concerned involves a sphere in which the European Union has laid down rules.[27] Moreover, it is more than likely that Article 9(2) of the Aarhus Convention (or at least part of it) does indeed have direct effect. In this sense, too, it is hard to understand the Council of State's reference to *Merck Genéricos*.

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[23] Today the test is formulated as follows: 'a provision in an agreement concluded by the European Union with a non-member country must be regarded as being directly applicable when, regard being had to its wording and to the purpose and nature of the agreement, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure', see paragraph 44 of *Slovak Bears*.

[24] See, apart from the *Dior* judgment referred to above, Case C-428/08 *Monsanto*, judgment of 6 July 2010, which also concerns the TRIPs agreement.

[25] See paragraph 45, given above, of Case C-149/96 *Portugal v Council* [1999] ECR I-8395.

[26] See also paragraph 44, given above, of Case C-149/96 *Portugal v Council* [1999] ECR I-8395.

[27] By extension, it is also not reasonable to assume that the principle of loyal cooperation (see my remarks above further to C-246/07 *Commission v Sweden* [2010] ECR I-3317) would oppose independent review by the national courts.

V. Interpretation in the light of Aarhus Convention or Directive 2003/35: does it make any difference?

It could be argued that in this case, because Article 9(2) of Directive 2003/35 has been virtually literally copied from the Aarhus Convention, the view that national law is in keeping with the directive must of necessity imply that national law is also in keeping with the Convention. However, I would like to say the following about this. It is true that the 'risk' of infringement of the agreement concluded by the EU is not so very great in this case. And it is certainly true that independent assessment by the national court in the light of an international agreement becomes more important where the Union measures to implement the agreement do differ in substance, text and form from the agreement. The approach adopted by the Council of State precludes contesting the legality of the Union measure itself before the national courts in the light of a possibly directly effective agreement.[28] Nevertheless, the importance of independent review of whether national rules are consistent with Article 9(2) of the Aarhus Convention, given that the text of the Union measure is virtually identical to the treaty provision it aims to implement, should not be underestimated. This becomes clear if we examine more closely the manner in which the Council of State considers whether the restrictions the Crisis and Recovery Act imposes on, for example, the right of local and regional authorities to appeal against the decisions of higher public authorities are consistent with Directive 2003/35. The paragraph in question reads as follows:

> The Council of State furthermore observes, with reference to the judgment of the Court of Justice of 16 December 1976 in Case 33/76 *Rewe* […], that in the absence of Community rules on the subject, it is for the domestic legal system of the Netherlands to determine the procedural conditions, such as designation of the courts having jurisdiction. As the Court stated, such conditions cannot be less favourable than those relating to similar actions of a domestic nature. It follows from the Judgment in Case C-312/93 *Peterbroeck* […] that application of such procedural rules is precluded only if, in the light of the procedure as a whole, they would make it impossible in practice to exercise the rights which the national courts are obliged to protect. The national procedural rules, including section 1.4 of the Crisis and Recovery Act, apply to every appeal to which division 2 of Part 1 of the Act is applicable. These procedural rules are therefore not less favourable than those relating to similar actions of a domestic nature, as is required by the judgment in *Rewe*, as they apply irrespective of whether the grounds for appeal are based on domestic law or Union law. Furthermore, section 1.4 of the Act does not, in practice, make it impossible for Kerkrade to have access to a review procedure before a court of law within the meaning of Article 10a of the EIA Directive, because it still has access to the civil courts. Furthermore, it does not follow from the Union law principle of effective judicial protection that review of compliance with the obligations arising under European law must be provided by the administrative courts. The Council of State refers in this connection, by analogy, to the judgment of the Court of Justice of 13 March 2007, C-432/05 *Unibet*, at paragraph 65 […], where the Court of Justice observes that the principle of effective judicial protection of an individual's rights under Union law must be interpreted as meaning

[28] If necessary by means of a reference for a preliminary ruling.

> that it does not require the national legal order of a Member State to provide for a free-standing action for an examination of whether national provisions are compatible with Union law, provided that other effective legal remedies, which are no less favourable than those governing similar actions, make it possible for such a question of compatibility to be determined as a preliminary issue.

This is, of course, a finely drafted and detailed paragraph, in which the Council of State very precisely applies the principles of equivalence and effectiveness laid down in *Rewe* and *Comet* and the principle of judicial protection.[29] But if the interested party in the case were to rely on the direct effect of Article 9(2) of the Aarhus Convention, they would naturally want to know whether the discretion that is normally available to Member States also exists where legal relations are to some extent governed by the Convention. In *Slovak Bears*, that discretion proved far less than many had imagined. There, the principle of effective judicial protection was fleshed out with Article 9(3) of the Aarhus Convention, and in paragraph 51 of the judgment the Court of Justice concluded that:

> […] it is for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of the Aarhus Convention and the objective of effective judicial protection of the rights conferred by EU law, so as to enable an environmental protection organisation, […], to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law […]

According to the Court of Justice, the requirement that the referring court interpret the procedural rules in accordance with the Convention should, if possible, have resulted in the Slovak environmental protection organization having access to the Slovak administrative courts. It is very much open to question whether the Court of Justice could have arrived at this conclusion if it had based it only on the principles of effectiveness and effective judicial protection and without involving the Convention in its observations.

In my view, national courts are required not only to interpret national procedural rules in accordance with the Aarhus Convention, they must also interpret Directive 2003/35 in a manner that is consistent with the Convention.[30] The Council of State's approach does insufficient justice to these requirements.

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[29] See for the latest developments concerning the relationship between the principle of procedural autonomy (including the principles of equivalence and effectiveness), on the one hand, and the principle of effective judicial protection, on the other, Sacha Prechal and Rob Widdershoven, 'Redefining the relationship between "Rewe-effectiveness" and effective judicial protection', *REALaw* 2011/2, pp. 31-50 and Johanna Engström, 'The principle of effective judicial protection after the Lisbon Treaty; Reflection in the light of case C-279/09 DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH', *REALaw* 2011/2, pp. 53-68.

[30] See also Case C-115/09 *Trianel Kohlekraftwerk Lünen*, judgment of 12 May 2011, paragraph 41: 'Those various provisions must be interpreted in the light of, and having regard to, the objectives of the Aarhus Convention'.

VI. Summary and conclusions

According to the Council of State, it is not possible to rely directly before the national courts on a provision from a mixed agreement if the rule from the agreement concerns a sphere in which the European Union has laid down rules. In its view, all that remains for the national court in this kind of case is to examine whether national law is consistent with the implementing legislation of the Union. The Council of State bases this position on the judgment in *Merck Genéricos*. It is my conviction that this cannot be implied from that or any other judgment of the Court of Justice. On the contrary, Member States have an independent duty in law to ensure they do not act in contravention of international obligations entered into by the Union.

When faced with the question whether a number of provisions of Dutch administrative procedural law conflict with Article 9(2) and (4) of the Aarhus Convention, among others, the Council of State should not have hidden behind Directive 2003/35. After all, under Article 216(2) TFEU, agreements concluded by the EU are binding on the institutions of the Union *and* on its Member States; this means that Member States have a responsibility of their own to ensure they do not act in contravention of international obligations entered into by the Union.[31] By merely examining whether national law was consistent with Directive 2003/35, the Council of State was basically sidelining the Aarhus Convention and rendering it ineffective. And, if the Council of State had any doubts concerning the direct effect or otherwise of Article 9(2) of the Convention, or the consequences entailed by the requirement to interpret in a manner which is consistent with the Convention, it should, as the highest national court in this area, have referred the matter to the Court of Justice for a preliminary ruling in accordance with Article 267 TFEU.

[31] The parallel can be drawn with the *Costanzo* doctrine, in the way local and regional authorities cannot hide behind conflicting national legislation to implement Union measures. See for a detailed consideration M.J.M. Verhoeven, *The Costanzo Obligation. The obligation of national administrative authorities in case of incompatibility between national law and European Law*, Antwerp: Intersentia 2011.