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TOWARDS A REBIRTH OF BENELUX?

Jan Wouters & Maarten Vidal



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ABSTRACT

Benelux, the framework for official and political cooperation between Belgium, The Netherlands and Luxembourg, will soon be celebrating the 50th anniversary of its founding Treaty. The anniversary presents a unique opportunity for not only the three countries but also for Belgium's regions and communities to shape the existing framework to meet contemporary needs and standards. This contribution will develop a legal analysis of how Benelux relates to the wider integration project constituted by the European Union. Subsequently, the institutional framework of Benelux and the subject matters currently addressed by it will be examined. Furthermore, how Benelux as a sub-regional grouping (or even alliance) of like-minded countries plays a role within the European Union will be explored. It has been frequently claimed that there is a need to increase the political profile of Benelux, in view of that, the contribution will conclude with recommendations on how its cooperative framework can be further strengthened.

KEY WORDS

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Towards a Rebirth of Benelux?*

Jan Wouters* and Maarten Vidal**

Table of contents

1. INTRODUCTION	3
2. AN ENABLING EU CLAUSE: ARTICLE 306 EC TREATY	5
3. THE BENELUX INSTITUTIONAL FRAMEWORK	7
3.1. DECISION-MAKING BODIES	7
3.2. BENELUX LAW-MAKING	10
3.2.1. No supranational powers	10
3.2.2. Benelux conventions.....	11
3.2.2. Decisions of the Committee of Ministers	12
3.2.3. Publicity of Benelux norms	13
3.3. BENELUX COURT OF JUSTICE	14
3.4. FEDERALIZATION OF BELGIUM AND ITS CONSEQUENCES FOR BENELUX	16
4. BENELUX SUBSTANTIVE COOPERATION: PAST AND PRESENT	18
4.1. AN ECONOMIC UNION	18
4.2. TRANSFRONTIER COOPERATION	20
4.3. A NEW AREA OF COOPERATION: POLICE AND SECURITY	22
5. THE BENELUX AS A SUBREGIONAL GROUPING WITHIN AND OUTSIDE THE EUROPEAN UNION	23
6. OUTLOOK	26
6.1. TRANSFORMATION OF BENELUX INTO A FLEXIBLE PROJECT ORGANIZATION	26
6.2. REVITALIZATION OF POLITICAL COOPERATION BETWEEN THE BENELUX PARTNERS	27
6.3. 'BENELUX PLUS'	28
7. CONCLUDING REMARKS	29

1. Introduction

1. Strange as it may seem, for the first time in a long while, the old lady called Benelux enjoys considerable attention nowadays. The Institutes for International Relations of Belgium, the Netherlands and Luxembourg organized joint conferences on Benelux in 2006 and in 2007¹, and the Advocate-General to the Belgian Supreme

* This article is partly based on a research project conducted for the Flemish Department of Foreign Affairs by the Institute for International Law (K.U.Leuven) and the Centre for Comparative Regional Integration Studies of the United Nations University (UNU-CRIS). An adapted version of the research report appeared as Jan WOUTERS, Luc VAN LANGENHOVE, Maarten VIDAL, Philippe DE LOMBAERDE & Wouter DE VRIENDT, *De Benelux. Tijd voor een wedergeboorte?*, Antwerp, Intersentia, 2007, 297 p.

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¹ The executive summaries "Benelux revisited" (Schengen, 24 and 25 March 2006) and "The Future of the Benelux Cooperation in a Changing Europe" (Bourglinster, 8 and 9 February 2007) can be found on the

Court (*Cour de Cassation*) dedicated his traditional speech at the beginning of the judicial year 2006-2007 to recent developments within the organization.² This amount of attention is rather unusual for an organization that has long been overshadowed by the European (Economic) Community and later the European Union. The reason for all this is the expiry of the Benelux constitutive treaty's original term of 50 years on 31 October 2010.³ The Governments of Belgium, the Netherlands and Luxembourg, as well as the Governments of the Belgian Regions and Communities – in particular the Government of Flanders – are currently determining their stance on the *how* and the *what* of Benelux after that date, even though such a reflection is not strictly necessary, as the Treaty stipulates that it will be automatically extended for a further ten years, as long as none of the partners explicitly opposes its prolongation.⁴ Nonetheless, the three countries have made it clear that this opportunity to adapt and freshen up the Benelux Treaty should not be allowed to slip by. In 50 years much has happened: both European integration and globalization have advanced at an ever increasing pace, the Kingdom of Belgium has been transformed into a federal State and the societies as well as the economies of the three countries have become ever more knowledge-based.

2. In order to understand the possibilities offered by Benelux to the three participating nations, it is necessary to grasp how the organization relates to the wider integration project constituted by the European Union (§ 2). We will then examine the institutional framework of the Benelux as an organization (§ 3) and the subject matters currently dealt with by the organization (§ 4) as well as the Benelux as a subregional grouping (or even alliance) of like-minded countries within the European Union (§ 5). We shall conclude by putting forward a number of perspectives for a future Benelux (§ 6).

website of the Luxembourg Institute for European and International Studies (www.ieis.lu – consulted on 1 December 2007).

² Jean.-François LECLERCQ, “Le droit Benelux sous un jour nouveau, droit inconnu?”, *Journal des Tribunaux* 2006, 613-624.

³ Treaty instituting the Benelux Economic Union (with annexed Convention containing the transitional provisions, and with Protocol of Application and Protocol of Signature), signed at The Hague, on 3 February 1958; came into force on 1 November 1960. *UNTS* nos. 5471 and 5472.

⁴ Art. 99, § 2, Treaty instituting the Benelux Economic Union.

2. An Enabling EU Clause: Article 306 EC Treaty

3. Community law grants a particular position to the cooperation between Belgium, the Netherlands and Luxembourg, by providing an “enabling clause” which is important for the conformity of Benelux with Community law. This provision ensures that farther-reaching cooperation within Benelux is not qualified as a prohibited discrimination vis-à-vis (nationals of) the other Member States of the European Union. Ex-Article 233 of the Rome Treaty, nowadays Article 306 EC Treaty⁵ enables integration between the three Benelux countries that surpasses the possibilities of integration within a European context.⁶ The text of this enabling clause is as follows: “*The provisions of this Treaty shall not preclude the existence or completion of regional unions between Belgium and Luxembourg, or between Belgium, Luxembourg and the Netherlands, to the extent that the objectives of these regional unions are not attained by application of this Treaty.*” The clause does not only enable Benelux to reach a further stage of integration, but makes it also possible for the subregional grouping to fulfil the role of a “laboratory or example for Europe”, as has been the case both with the creation of an internal market and the abolition of internal borders.⁷

4. For historical reasons – more particularly the fact that the Benelux countries stood at the cradle of the European Community – a similar provision for other subregional groupings within the (enlarged) European Union, such as the Visegrád countries or the Baltic countries (*infra*, para. 26), is lacking. Even more, the Lisbon Treaty, while maintaining the enabling clause for the Benelux as the future Article 306 of the Treaty on the Functioning of the European Union, did not extend it to these

⁵ Exactly the same wordings appear in Art. 202 EURATOM Treaty and in Art. IV-441 of the Treaty establishing a Constitution for Europe.

⁶ Rudolf GEIGER, *EUV/EGV: Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaft*, München, Beck, 2000, 935; Hans KRÜCK, “Art. 306 (ex-Art. 233) [Verhältnis zu Benelux-Staaten]”, in Jürgen SCHWARZE (ed.), *EU-Kommentar*, Baden-Baden, Nomos, 2000, 2391-2393; F. POCAR, *Commentario breve ai Trattati della Comunità e dell’Unione europea*, Padova, Cedam, 2001, 306-307; Kirsten SCHMALENBACH, “Art. 306 (ex-Art. 233)”, in Christian CALLIESS, *Kommentar des Vertrages über die Europäische Union und des Vertrages zur Gründung der Europäischen Gemeinschaft - EUV/EGV*, Neuwied, Luchterhand, 1999, 2179; Jacques VANDAMME, “Article 233”, in Vlad CONSTANTINESCO (ed.), *Traité instituant la CEE: commentaire article par article*, Paris, Economica, 1992, 1491-1495; Luc WEITZEL, “Article 306 (ex-article 233)”, in Philippe LEGER (ed.), *Commentaire article par article des traités UE et CE*, Basel, Helbing & Lichtenhahn, 2000, 1932-1937.

⁷ Frans BOEKEMA, Henk VAN HOUTUM & Karel VERAGHTERT, “Inleiding”, in Frans BOEKEMA, Henk VAN HOUTUM & Karel VERAGHTERT (eds), *Benelux, Quo Vadis? Institutioneel-economische beschouwingen over de plaats en toekomst van de Benelux naar aanleiding van haar vijftigjarig jubileum*, Groningen, Wolters-Noordhoff, 1994, 19.

other groupings.⁸ Both Benelux and the Belgian-Luxembourg Economic Union (BLEU)⁹ have a supplementary character from the European point of view: they maintain their relevance as long as they enable a further-reaching realization of the objectives shared by these (sub)regional unions and the European integration project. Furthermore, article 306 EC Treaty can only be invoked against the application of rules of Community law if the disputed Benelux measure concerns “*one of the indispensable conditions for the existence and functioning of the [subregional unions] which may not be prejudiced by the [EC] Treaty*”.¹⁰ By virtue of this article, derogations of Community law are not excluded, as long as this is beneficial to the more profound integration between the latter countries.¹¹ Yet, Benelux has only to a limited extent made use of the possibilities for deeper integration offered by the EC Treaty to the three countries. This was partly caused by the ups and downs of the political relations, including diverging visions on European policies, primarily between Belgium and the Netherlands, Luxembourg being the junior partner in the cooperation.¹²

5. In principle, Community law has primacy over Benelux and BLEU regulation. The latter rules are automatically replaced by Community rules of the same tenor and content. The achievements of the subregional unions are therefore by definition conditional¹³, since Community law replaces them as soon as it has reached or crossed their level of integration.¹⁴ As long as this is not the case, the rules of the subregional unions remain applicable. The European Court of Justice stated that “[*the aim of [Article 306 EC Treaty] is to prevent the application of Community law from causing the disintegration of the regional union established between those three*”

⁸ The same holds true for the defunct Treaty establishing a Constitution for Europe: Jan WOUTERS & Maarten VIDAL “Article IV-441”, in Laurence BURGORGE-LARSEN, Anne LEVADE & Fabrice PICOD (eds.), *Traité établissant une Constitution pour l’Europe. Commentaire article par article*, volume 1, Brussels, Bruylant, 2007, 782-790.

⁹ Convention between the Kingdom of Belgium and the Grand Duchy of Luxembourg for the establishment of an Economic Union between the two countries, signed at Brussels on 25 July 1921; came into force on 25 July 1921. *LNTS* no. 256. Pierre PESCATORE, “L’Union économique belgo-luxembourgeoise: expériences et perspectives d’avenir”, *Chronique de politique étrangère* 1965, 367-464; Panayotis SOLDATOS, “L’Union économique belgo-luxembourgeoise au lendemain de sa reconduction”, *Studia Diplomatica* 1984, p. 592-593.

¹⁰ ECJ, *Elz/Commission*, judgment of 24 June 1976, 56/75, *E.C.J. Rep.* 1976, 1097, paras. 21-22 (concerning the BLEU); ECJ, *Roders et al.*, judgment of 11 August 1995, C-367/93-C-377/93, *E.C.J. Rep.* 1995, I-2229, paras. 18-25 (concerning Benelux).

¹¹ Luc WEITZEL, *loc. cit.* footnote 6, 1935.

¹² Jan Willem BROUWER, “Nederlands-Belgische samenwerking in Benelux en Europa”, *Internationale Spectator* 2003, 466-471.

¹³ Rita HAMERLYNCK & Marc COGEN, *26 Europese organisaties: samenwerking in het Europa van de Oeral tot de Atlantische Oceaan*, Antwerp, Kluwer, 1990, 114.

¹⁴ In line with the customary rule codified in art. 30, para. 3, Vienna Convention on the Law of Treaties of 23 May 1969, the provisions that are not compatible with Community law will become non-applicable.

*Member States or from hindering its development. It therefore enables the three Member States concerned to apply, in derogation from the Community rules, the rules in force within their union in so far as it is further advanced than the common market.”*¹⁵ Art. 306 EC Treaty can therefore not be invoked as a justification for the infringement of Community law when the latter is further advanced than Benelux or BLEU law.¹⁶

6. Because of the principle of restrictive interpretation of exceptions in Community law¹⁷, we may safely conclude that the enabling clause is limited to Benelux and BLEU, and hence does not extend to subregional economic unions consisting solely of Belgium and the Netherlands or, as has been advocated by some¹⁸, to a broad cooperation structure between the Netherlands and Flanders, *i.e.* the Dutch-speaking federated entity within Belgium (as far as this would be possible within the Belgian constitutional framework in the first place). Nor does the enabling clause extend to an “enlarged Benelux”, or “Benelux plus”, which is an envisaged close association to Benelux of neighbouring regions (*infra*, para. 28). These considerations plead for the maintenance of Benelux cooperation – and of its institutional setup – as a forum to make use of the possibilities (or should we even say “privileges”) offered by Community law to the three constituting countries. This forum is primarily provided for by the Committee of Ministers and the Secretariat-General of the Benelux Economic Union, which are the main – but not the only – bodies of a rather complicated organization whose institutional structure will be the focus of our next section.

3. The Benelux Institutional Framework

3.1. Decision-making Bodies

7. The Benelux Economic Union is in fact the successor of an earlier Benelux Customs Union, founded by the three governments in exile in September 1944,

¹⁵ ECJ, *Pakvries*, judgment of 16 May 1984, 105/83, *E.C.J. Rep.* 1984, 2101, para. 11.

¹⁶ ECJ, *Commission/Luxembourg*, judgment of 2 July 1996, C-473/93, *E.C.J. Rep.* 1996, I-3207, paras. 41-43.

¹⁷ Conclusion of advocate-general FENNELLY of 12 September 2000 in the cases *Metallgesellschaft Ltd and others (C-397/98)*, *Hoechst AG and Hoechst (UK) Ltd (C-410/98)* against Commissioners of Inland Revenue and HM Attorney General, *E.C.J. Rep.* 2001, I-1727, para. 56.

¹⁸ Jan HENDRICKX, “De toekomst van het Beneluxverdrag: een Vlaamse bijdrage”, *Internationale Spectator* 2004, 506-509; Theo LANSLOOT, “Benelux nog een meerwaarde voor Vlaanderen?”, *Internationale Spectator* 2005, 259-262. Leo KLINKERS & Axel BUYSE, “Vlaanderen en Nederland samen?”, *Openbaar Bestuur* 2006, nr. 9, 15-17.

exactly at the time that allied forces were liberating their countries from Nazi occupation.¹⁹ Its decision-making bodies are a continuation of the pre-existing bodies that were instituted by the customs treaty or by subsequent agreements in the decade preceding the conclusion of the current constitutive treaty. The main political body of Benelux is its Council of Ministers, which meets only very rarely²⁰ and hence does not abide by the frequency of meetings enshrined in the Benelux Treaty.²¹ The Council of Ministers may delegate decision-making power to ministerial working groups.²² Decisions of the Committee or of the ministerial working groups are prepared in “commissions” or “special commissions” (the difference is not very clear) attended by civil servants. A “Council of the Economic Union”, composed of high officials (but with an equally low frequency of meetings) has a coordinating function vis-à-vis those different commissions.²³ There is also a consultative Benelux Parliament²⁴, composed of members of the Member States’ parliaments (including members of the parliaments of the Belgian Communities and Regions, *infra*, para. 16) but it does not play any role in the decision-making process.²⁵ The Benelux Parliament issues recommendations to the Committee of Ministers which may trigger future regulatory initiatives. This multitude of organs is however not a guarantee for success. Many respondents who were interviewed during the research on which this contribution is partly based, considered the lack of political guidance to be Benelux’s most important problem. Some recent successes of the organization, such as the cooperation in the battle against fiscal fraud or police cooperation (*infra*, paras. 21-22), were, however, made possible by the willingness at the highest political level to make progress.

8. The polyvalent character of the Benelux Secretariat-General²⁶, led by the Secretary-General who is always of Dutch nationality²⁷, gives an added value to

¹⁹ Customs agreement between Belgium, Luxembourg and the Netherlands, signed in London, on 5 September 1944; came into force on 1 January 1948.

²⁰ In practice, the Committee does not even meet once a year. An audit report by KPMG of 2001 indicates that the Committee in the preceding decade on average only met every two years, but decisions are often made in a written procedure or in the margin of meetings of the Council of the European Union.

²¹ Art. 20, § 1, Benelux Treaty, provides that the Council of Ministers meets *at least* once every three months.

²² Art. 21 Benelux Treaty.

²³ Art. 25 Benelux Treaty.

²⁴ Benelux Parliament, c/o Palais de la Nation, B - 1008 Brussels, Belgium. www.benelux-parl.org – consulted on 1 December 2007.

²⁵ Agreement setting up a Benelux Inter-Parliamentary Advisory Council, signed at Brussels, on 5 November 1955; came into force on 9 September 1956. *UNTS* no. 3524.

²⁶ Secretariat-General of the Benelux Economic Union, Regentschapsstraat 39, B-1000 Brussels, Belgium. www.benelux.be – consulted on 1 December 2007.

Benelux cooperation over mere bilateral understandings. The way the Secretariat-General, throughout its existence, has been able to adapt to the changing circumstances in which it operates – witness the period in which it provided the secretariat for the Schengen agreements – pleads for the maintenance of this instrument, which works with a fairly limited budget²⁸, in order to keep a structure for future cooperation. An important advantage of the Secretariat-General is its extensive network of contact persons at national, regional, provincial and even local level in the three countries. This shows how the role of the Secretariat-General is mainly a facilitating one. It guides civil servants to the most appropriate partners on the other side of the border, promotes bilateral and trilateral contacts, and fulfils the role of a neutral reporter at meetings between national administrations, while at the same time trying to stimulate the search for a consensus. The Secretariat-General describes its mission as follows: “*It contributes on a daily basis to the realization of the common interests that the three partners aim to achieve within the formal cooperation structure of Benelux. It does so through the support of the various commissions and working groups entrusted with the development of concrete actions by means of offering valuable intellectual, administrative and logistic services on the basis of a neutral position towards the standpoints of the partners.*”²⁹ (translation and emphasis by the authors)

9. Of particular relevance for legal practitioners in the three Benelux countries is the Benelux Office for Intellectual Property³⁰, which succeeded, on 1 September 2006³¹, to the existing Benelux Trademarks Office and Benelux Designs Office.³² The Office is an example of concrete operational cooperation (or of a “Joint Service” as it is called in the terms of Art. 40 Benelux Treaty, yet of a particular nature since it finds its legal basis in a separate treaty and was not set up by a decision of the

²⁷ Art. 34, § 1, Benelux Treaty. Already at the time of the Benelux Customs Union, the office of Secretary-General was reserved for a Dutch national, to compensate for the location of the seat of the organization in the Belgian capital of Brussels.

²⁸ The 2006 budget amounted to 6,484,020 euro. Approximately one quarter of expenses goes to costs from the past, such as pensions.

²⁹ Benelux Secretariat-General, Budget and planning 2006, document SG/INT (2005) 157 revised, 30 November 2005, p. 1.

³⁰ Benelux Office for Intellectual Property, Bordewijklaan 15, NL-2591 XR The Hague, The Netherlands. www.boip.int – consulted on 1 December 2007.

³¹ Benelux Convention on intellectual property (trademarks and designs), signed at The Hague on 25 February 2005; came into force on 1 September 2006.

³² Hendrik VANHEES, “Afscheid van de Benelux merken- en modellenwet. Het nieuwe Benelux-verdrag inzake intellectuele rechten”, *Rechtskundig Weekblad* 2006-07, 202-208.

Committee of Ministers³³) between the three countries, be it in a clear niche. The Benelux Convention on intellectual property fulfils the role of a joint legal framework in the field of trademarks and designs for Belgium, the Netherlands and Luxembourg. As this joint enterprise deals with a field of law which is in constant change both on the European and on the international (TRIPs, WIPO) level, the Convention provides for a simplified amendment procedure by the Committee of Ministers, whereas other decision-making powers have been entrusted to the director and the board of the Office.³⁴ This enables more flexibility in adapting internal procedures and in keeping pace with broader international evolutions.

3.2. *Benelux Law-making*

3.2.1. No supranational powers

10. The Benelux Treaty created an international entity with its own legal order for which the Treaty only constitutes the skeleton, and whose “flesh and bones” are formed by a set of legal instruments adopted by virtue of the Treaty.³⁵ At the time of the signature of the Benelux Treaty, the Rome Treaty had already entered into force, but nevertheless, its drafters did not choose the same institutional and decisional path. There is no transferral of (the exercise of) sovereign powers in a supranational sense. Measures directly binding citizens can only be taken either by way of treaties (Benelux conventions), which moreover need to undergo the approval and ratification procedures that are constitutionally required in the three countries, or by way of the adoption of uniform laws that have then to be transposed into domestic legislation. The limited membership of the organization is an argument that pleaded, and continues to plead, against the introduction of supranational decision-making procedures. The treaty method and the transformation of decisions into domestic law ensure the democratic control of national parliaments, whilst at the same time providing for a better embedment of Benelux regulation in the three national legal orders.

³³ A more conventional Benelux Joint Service for the Registration of Medicines was set up by Decision of the Committee of Ministers (M(72)22) of 18 October 1972, *Benelux Bulletin*, 6/I, p. 1589, but after a decade abolished by Decision of the Committee of Ministers (M(82)16) of 17 December 1972, *Benelux Bulletin*, 6/III, p. 2546, due to the convergence in this field within the European Economic Community.

³⁴ Art. 1.7 and Art. 1.9 Benelux Convention on intellectual property.

³⁵ Henry G. SCHERMERS & Niels M. BLOKKER, *International Institutional Law*, Leiden, Martinus Nijhoff Publishers, 2003, § 1139.

3.2.2. *Benelux conventions*

11. Since each new Benelux convention is approved according to national constitutional procedures in its own respect, the legal basis for it in the constitutive Benelux Treaty does not have a lot of importance. The conventions do not obtain their legally binding character by virtue of the Benelux Treaty but by virtue of the duly performed expression by the three States of their consent to be bound. Their application can therefore not be affected by any alleged inconformity with the Benelux Treaty. In fact, there are many Benelux conventions that have no formal link with the Benelux Economic Union at all. As early as 1948 – *i.e.* before the creation of the Benelux Economic Union – Belgium, Luxembourg and the Netherlands instituted a “Commission for the Study of the Unification of the Law”³⁶, composed of distinguished lawyers from the three countries. The Commission, an advisory body, had to compare the national legislations in different fields and ensure conformity in the legal solutions. The Commission³⁷, which remained in existence as an independent institution even after the founding of the Benelux Economic Union, drafted a number of conventions, primarily in the period before 1975, many of which never entered into force due to the lack of approval by the national parliaments of (one or two of) the Member States. Nevertheless, some of the conventions that remained unratified eventually led to the adaptation of the legislation in one or two Benelux States.³⁸ In the course of the 1980s, the Commission slipped into oblivion, mainly due to the slow pace of the unification process, frustration about the fact that many projects disappeared in drawers at national administrations (and were hence never even submitted to parliament), and the loss of political attention for unification.³⁹ Nevertheless, the Belgian speaker of parliament declared himself favourable of this form of unification, when he stated in 2005 that “*when Belgian lawyers together with their Dutch colleagues can create a common regulation, this*

³⁶ Protocol establishing a Belgian-Dutch-Luxembourgian Study Commission for the Unification of the Law, signed in Brussels on 18 April 1948 (*Tractatenblad* 1955, 16); came into force on 17 April 1948.

³⁷ Frédéric DUMON, “Le Benelux et l’harmonisation du droit”, *J.T.* 1982, 118-121; O. HANSEN, “Trente années de tentatives d’unification du droit dans les pays du Benelux, une expérience”, *R.D.I.D.C.* 1980, 60-82.

³⁸ Anton W. JONGBLOED, “Requiem voor de unificatie van het recht in Benelux-verband”, *Rechtskundig Weekblad* 1985-86, 575-586; Anton.W. JONGBLOED, “Le Benelux: champ d’expérimentation pour l’harmonisation du droit ?!”, in Andries POSTMA et al. (eds.), *Regards sur le Benelux. 50 ans de coopération*, Brussels, Racine, 1994, 201-208.

³⁹ E.D.J. KRUIJBOSCH, “Werking van de Benelux Economische Unie”, *S.E.W.* 1982, 519.

can constitute a powerful impulse for later regulation, for example within the EU.”⁴⁰ Benelux conventions may stipulate that the Benelux Court of Justice is competent to ensure their uniform interpretation (*infra*, paras. 14-15).⁴¹ As this competence may also be attributed to the Court in a later convention, in an additional protocol, or in a decision of the Committee of Ministers, it is not always immediately clear whether or not the Court has jurisdiction.

3.2.2. Decisions of the Committee of Ministers

12. Furthermore, the Committee of Ministers “may make decisions setting forth the manner in which the provisions of this Treaty are to be put into effect in accordance with the conditions laid down in the Treaty. These decisions of the Committee shall commit the High Contracting Parties”.⁴² Such decisions have to be transposed into national legislations in order to be binding for individuals. If the three Member States wish to do so, the uniformity of the interpretation of those decisions and their implementing legislation may be guaranteed by the Benelux Court of Justice, as is the case with Benelux Conventions (*infra*, paras. 14-15).⁴³ Although individuals are normally only confronted with the transposed legislation and not with the decisions themselves, the Belgian Council of State has annulled a governmental decree because of a violation of a Benelux decision⁴⁴, *i.e.* an international norm without direct effect.⁴⁵ This means that decisions have a greater potential meaning for private individuals than originally intended, even though long-standing and continuing problems concerning their being made public qualify their relevance in practice. There is similar case law at the Dutch Supreme Court.⁴⁶

⁴⁰ Benelux Parliament, doc 726/1 of 8 February 2005, “Activity report 2004”, p. 8: “Si des juristes belges et néerlandais étaient en mesure de définir ensemble des réglementations, ils pourraient donner une impulsion substantielle à la mise en place d’une réglementation, dans le cadre de l’UE par exemple.”

⁴¹ Art. 1, § 2, Statute of the Benelux Court of Justice

⁴² Art. 19, a, Benelux Treaty

⁴³ Art. 1, § 2, Statute of the Benelux Court of Justice

⁴⁴ Council of State, *K.B.V.B.V.* no. 85699, 29 February 2000, at www.raadvst-consetat.be – consulted on 1 December 2007.

⁴⁵ A more detailed discussion of the case can be found in Dries VAN EECKHOUTTE & Geert VAN CALSTER, “De doorwerking van het internationale milieurecht in de Belgische rechtsorde”, *Rechtskundig Weekblad* 2005, 361-381. The decision of the Council of State may also have been influenced by the existence of a supranational body, the Benelux Court of Justice, which had interpreted the decision in a preliminary proceeding.

⁴⁶ Hoge Raad, 11 June 1993, *A.B.* 1994, 10.

3.2.3. Publication of Benelux norms

13. As mentioned in the preceding paragraph, a continuing problem of the “derived norms” adopted within the framework of Benelux remains their low degree of publicity. Apart from Benelux decisions, this also concerns Benelux recommendations⁴⁷, Benelux directives⁴⁸, norms of the Benelux Office for Intellectual Property and the non-binding recommendations of the Benelux Parliament (*supra*, nr. 7) . The Benelux Treaty did not provide in any form of publication for Benelux norms, because this was considered to be superfluous as the decisions of the Committee of Ministers had no direct effect.⁴⁹ After some time, a number of norms explicitly started to require some form of publication, leading to a disparate set of rules for this issue. The publication of decisions and recommendations of the Committee of Ministers depends now on whether or not the Benelux Court of Justice has jurisdiction to ensure the uniformity of their interpretation. Strangely enough, Benelux law originally only provided for a form of publication for decisions in which the interpretative role for the Court was excluded: such decisions had to be published in the national official journals of the three countries.⁵⁰ The form of publication for decisions and recommendations in which the Court’s jurisdiction was not excluded but, to the contrary, explicitly established, was only stipulated in a subsequent protocol of 1980 which created the *Benelux Bulletin*.⁵¹ A new protocol, signed in 1991⁵², which was aimed at ending this needlessly complex situation by prescribing the publication of all norms in this Bulletin, could not yet enter into force due to the lack of approval of this protocol by the Belgian parliament.⁵³ Nevertheless, in practice most of the norms are published in the Bulletin, be it with considerable delays.

⁴⁷ According to Art. 19, c, Benelux Treaty, the Committee of Ministers “may make recommendations for the functioning of the Union. These recommendations of the Committee do not commit the High Contracting Parties”.

⁴⁸ Art. 19, d, Benelux Treaty states that the Committee of Ministers “may issue directives to the Council of the Economic Union, the Committees and Special Committees, the Secretariat-General and to the Joint Services”.

⁴⁹ Jacques KARELLE & Fritz DE KEMMETER, *Le Benelux commenté*, Brussels, Bruylant, 1961, 85.

⁵⁰ Art. 1, § 5, Statute of the Benelux Court of Justice

⁵¹ Protocol relating to the publication in the Benelux Bulletin of certain common rules of law which the Benelux Court of Justice is competent to interpret, signed at Brussels on 6 February 1980; came into force on 1 June 1982. *UNTS* no. 13176.

⁵² Protocol amending article 1 of Protocol relating to the publication in the Benelux Bulletin of certain common rules of law which the Benelux Court of Justice is competent to interpret, signed at Brussels on 25 March 1991 (text in the Luxembourgian *Mémorial A* 031/1992, 21 May 1992); did not enter into force.

⁵³ This once again shows the low level of commitment sometimes shown by the three countries for Benelux initiatives.

3.3. *Benelux Court of Justice*

14. The aforementioned Benelux Court of Justice⁵⁴, is a body originally not provided for in the Benelux Treaty⁵⁵, but instituted in 1965 by a separate agreement.⁵⁶ Thereby a supranational element was introduced into an organization with a highly intergovernmental character, since the Court plays a concrete role in disputes between individuals. The composition of the Benelux Court of Justice contributes to the unification of the law for it does not have its own, full-time Benelux judges, but is composed of the judges of the highest courts of each of the countries.⁵⁷ Judges cease to be on the bench as soon as they no longer fulfil this criterion.⁵⁸ This composition ensures that judgments are almost always based on comparative research into the domestic legal systems of the three countries.⁵⁹ The main task of the Court is to guarantee the uniform interpretation of common rules, according to a procedure similar to Article 234 EC Treaty. Domestic judges refer issues for interpretation to the Benelux Court of Judges, which thus plays a role in disputes between private individuals.⁶⁰ In practice, as was said before, it is not always easy to discern which rules fall under the interpretative jurisdiction of the Court: many of the provisions for which this is the case are listed in two protocols⁶¹, but the Court's jurisdiction can also follow from a Benelux convention itself, from a later protocol to such a convention or from a Benelux decision or recommendation, which is in that case published in the *Benelux Bulletin* (*supra*, para. 13). Owing to the complexity of this system, the Court has posted an unofficial list on its website with the provisions for which it deems itself competent to guarantee the uniform interpretation.⁶² It has to be stressed that the Court's role corresponds to the classical role of a continental judge.

⁵⁴ Benelux Court of Justice, Regentschapsstraat 39, B-1000 Brussels, Belgium. www.courbeneluxhof.info – consulted on 1 December 2007.

⁵⁵ The treaty did, however, provide for a “College of Arbitrators” (Art. 41-53) to which no case was ever submitted and which has remained dormant throughout the existence of the organization.

⁵⁶ Treaty between Belgium, Luxembourg and the Netherlands concerning the establishment and the statute of a Benelux Court of Justice, signed at Brussels on 31 March 1965; came into force on 1 January 1974. *UNTS* no. 13176.

⁵⁷ Art. 3, § 1, Statute of the Benelux Court of Justice.

⁵⁸ Benelux Court of Justice, 26 March 1993, no. D 93/1, *De Baets*.

⁵⁹ Ernest KRINGS, “Eenvormige wetten in de Benelux-landen en de werking van het Benelux-Gerechtshof”, in Jan RONSE, *Liber Amicorum Jan Ronse*, Brussels, Story-Scientia, 1986, 673.

⁶⁰ Art. 1, § 1, Statute of the Benelux Court of Justice.

⁶¹ Protocol concluded in application of article 1, paragraph 2, of the Treaty concerning the establishment and the statute of a Benelux Court of Justice, signed at The Hague on 29 April 1969; came into force on 1 January 1974. Second Protocol concluded in application of article 1, paragraph 2, of the above-mentioned Treaty (with annexes), signed at Brussels on 11 May 1974; came into force on 1 August 1982. *UNTS* no. 13176.

⁶² Liste des règles juridiques communes en vigueur dans le Benelux, au sens de l'article 1er, alinéa 2 du Traité du 31 mars 1965 instituant la Cour de Justice Benelux (10 June 2003), available at www.courbeneluxhof.be/fr/textes/liste.htm – consulted on 1 December 2007.

Hence it interprets common rules that have been enacted following the appropriate procedures, but it does not create new common rules for Benelux. The Benelux legal order is indeed an incomplete one, in which there can be – and most certainly are – lacunae. Secondly, the Court functions as an international administrative tribunal for the civil servants of the Benelux institutions.⁶³ A third competence of the Court is its advisory jurisdiction, on the request of the Government of a Member State, but limited to the rules for which it is also competent to guarantee the uniform interpretation in preliminary rulings.⁶⁴ Only one advisory opinion has been rendered by the Court.⁶⁵ A total of 258 cases have been registered with the Court, which has led to 179 judgments, most of which have been rendered within a period of two years.

	1974 1979	1980 1989	1990 1999	2000 2007	Total
Preliminary ruling – trademarks	8	24	24	13	69
Preliminary ruling – penalty fee	1	9	11	8	29
Preliminary ruling – liability for vehicles	1	23	10	2	36
Preliminary ruling – designs	0	2	1	1	4
Preliminary ruling – free movement	0	1	1	0	2
Preliminary ruling – tax debts	0	0	1	0	1
Preliminary ruling – bird protection	0	0	0	2	2
Preliminary ruling – fiscal treatment	0	0	0	1	1
International administrative proceedings	4	85	16	7	112
Advisory opinions	0	1	0	0	1
Internal order of the Court	0	0	1	0	1
Total	14	145	65	34	258

15. Some of the matters for which the Court guarantees uniform interpretation, such as trademarks, have in the meanwhile also been subject to legislation by the European Community. The European Court of Justice has equated the Benelux Court of Justice with domestic courts for the purpose of making a reference to the ECJ,

⁶³ Additional Protocol to the Treaty concerning the establishment and the statute of a Benelux Court of Justice relating to the jurisdictional protection of persons in the service of the Benelux Economic Union, signed at The Hague on 29 April 1969; came into force on 1 January 1974. *UNTS* no. 13176.

⁶⁴ Art. 10 Statute of the Benelux Court of Justice.

⁶⁵ Benelux Court of Justice, advisory opinion of 20 December 1988, no. C 87/1, *Netherlands: free movement of persons*.

since “in so far as no appeal lies against decisions of a court such as the Benelux Court, which gives definitive rulings on questions of interpretation of uniform Benelux law, such a court may be obliged to make a reference to this Court under the third paragraph of Article [234] where a question relating to the interpretation of [Community law] is raised before it”.⁶⁶ This may lead to a situation of “double preliminary proceedings”, which do not necessarily serve the interests of the parties in the main proceedings.⁶⁷ This prompted the president of the Benelux Court of Justice, Mr. Ivan VEROUGSTRAETE, to plead for the transformation in the long run of the Court into a regional division of the Court of First Instance, in order to avoid the duplication of proceedings.⁶⁸ This was endorsed by a recommendation of the Benelux Parliament in 2005, which also called, among others, for an extension of the jurisdiction of the Court to guarantee the uniform interpretation of all international agreements, even the bilateral ones, that are in force between the parties.⁶⁹ As we will discuss in the next paragraph, this now also includes agreements concluded between the Netherlands or Luxembourg and the federated entities of Belgium.

3.4. Federalization of Belgium and Its Consequences for Benelux

16. Since the 1970s, Belgium has undergone an extensive process of federalization, in which many state powers have been devolved to its Communities and Regions. One of the peculiarities of Belgian federalism is the strict adherence to the principle of *in foro interno, in foro externo*⁷⁰, according to which the federated entities also determine the external aspects of the policy domains for which they are internally competent. This has resulted in a large number of intra-federal “cooperation agreements” in order to guarantee the coherence of Belgian foreign policy, among

⁶⁶ ECJ, *Parfums Christian Dior*, judgment of 4 November 1997, C-337/95, *E.C.J. Rep.* 1997, I-6013, para. 17-31.

⁶⁷ Even a combination of three preliminary proceedings is theoretically possible if a Belgian judge refers a question for a preliminary ruling to the Belgian Constitutional Court (the former Court of Arbitration), which then – as it has done before – refers the question for a preliminary ruling to the Benelux Court of Justice, which finally refers the question for a third preliminary proceeding to the European Court of Justice. Interesting as this may be from a scholarly point of view, it is clear that such a situation may lead to abuse for dilatory reasons. See Jean SPREUTELS & Jean-Thierry DEBRY, “Le concours de questions préjudicielles (Cour d’arbitrage, Cour de justice des Communautés européennes et Cour de justice Benelux”, in Alex ARTS, Ivan VEROUGSTRAETE et al (eds.), *Les rapports entre la Cour d’arbitrage, le Pouvoir judiciaire et le Conseil d’Etat*, Brussels, La Charte, 2006, 297-342.

⁶⁸ Ivan VEROUGSTRAETE, “Een toekomst voor het Benelux-Gerechtshof”, *B.M.M.* 2005, 2-6.

⁶⁹ Benelux Parliament, doc. 733/2 of 18 June 2005, “Recommendation concerning the revision of the Treaty of 31 March 1965 concerning the establishment and the statute of a Benelux Court of Justice”.

⁷⁰ Art. 167 of the Belgian Constitution.

which the cooperation agreement on international organizations⁷¹ is particularly relevant since it creates a permanent consultation structure where Belgium's positions to be defended in international organizations are prepared. Yet, the limited size of Benelux and the experience of bilateral contacts between regional authorities and Dutch and Luxembourg administrations, has rendered it possible that the Belgian federated entities participate to a very large extent and rather autonomously in the functioning of Benelux, without preliminary intra-Belgian consultation. Regional civil servants attend Benelux meetings for which they are the technical experts (e.g. on spatial planning), and the Benelux Parliament includes members of the regional and community parliaments. Furthermore, the Region of Flanders in particular has engaged in extensive bilateral cooperation with the Netherlands in fields related to Benelux activities, which has even been formalized in a number of treaties. The general opinion at the Flemish regional level is therefore that Benelux allows for a more thorough involvement of the Regions (and the Communities, whose competences are to a lesser extent affected by Benelux cooperation) than other international organizations (in particular organizations of a global nature). In the view of some regional policy-makers, this should be taken into account when amending the Benelux Treaty. It is therefore no surprise that the Government of Flanders has spent a great deal of effort in elaborating its own vision on the future of Benelux⁷², to an extent not equated by the other federated entities.⁷³ Since the Belgian delegation in the negotiation process includes representatives of the Regions and the Communities, and their parliaments will have to assent to any new constitutive treaty, it is likely that such a new Benelux Treaty will (have to) reflect to at least some extent the changed constitutional setting within Belgium. Nevertheless, the Dutch and Luxembourg partners may be wary of exporting Belgium's internal institutional difficulties to an international forum.⁷⁴

⁷¹ Framework agreement for co-operation between the Federal State, the Communities and the Regions on the representation of the Kingdom of Belgium to the international organisations whose activities concern "mixed" competences, concluded on 30 June 1994, *Belgian Official Gazette*, 19 November 1994. An unofficial English translation can be found at www.law.kuleuven.be/iir/nl/verdragen/samenwerkingsakkoord.html – consulted on 1 December 2007.

⁷² The position of the Government of Flanders was based in part on a research report drafted by the authors of this contribution in cooperation with the centre for Comparative Regional Integration Studies of the United Nations University, which apart from legal research included interviews with over 100 experts on Benelux-related issues (*supra* note 1).

⁷³ The official websites of the Walloon Government, the Government of the Brussels Capital Region and the Governments of the French-speaking and German-speaking Communities do not contain any policy document on the future of Benelux.

⁷⁴ Yet there are examples of direct participation of the Belgian Regions in e.g. the International Commissions set up by the Scheldt and Meuse Treaties, signed in Ghent on 3 December 2002.

4. Benelux Substantive Cooperation: Past and Present

4.1. An Economic Union

17. Initially, Benelux was aimed at establishing an economic union, entailing free movement of persons, goods, capital and services, as well as the co-ordination of economic, financial and social policies and the pursuit of a joint policy in economic relations with third countries and regarding payments related thereto.⁷⁵ The foundations for an economic union had been laid by the aforementioned Benelux Customs Union (*supra*, para. 7), which had been agreed upon in September 1944 but could only enter into force in January 1948, due to post-war difficulties. Even though the Single European Act has rendered most of the Benelux achievements in this field obsolete, for a period of over 25 years the economic union constituted the core of the cooperation between the three countries, which were furthermore implicitly treated as a single economic entity by ex-Article 19 of the Treaty of Rome. Nowadays, the aforementioned operational cooperation in the field of intellectual property protection (*supra*, para. 9) still fits with this desire to create a deeper economic union between the three countries. Joint action against tax fraud⁷⁶ and cooperation in the field of energy are other examples of current economic Benelux cooperation. Most of the original socio-economic commissions set up by the Benelux Treaty, however, were discontinued following the 1994 report of a “committee of wise men”, entitled “Benelux seen afresh” (*Benelux opnieuw bezien*), which was subsequently endorsed by the Benelux Committee of Ministers.⁷⁷ At the same time, the “wise men” recommended a shift of Benelux’s focus towards transfrontier cooperation (*infra*, paras. 20-21). These recommendations were implemented by the Benelux bodies, but the Benelux Treaty itself was never formally amended. Most of the experts that we interviewed were rather sceptical about the prospects of an important future role for Benelux in the field of the internal market and economic cooperation, but they did not completely exclude its relevance for occasional domains of cooperation.⁷⁸ The

⁷⁵ Art. 1 Benelux Treaty

⁷⁶ This culminated in the Protocol, signed at Brussels on 17 April 2007, amending the Additional Protocol establishing special provisions with respect to taxation to the Convention concerning administrative and judicial cooperation in respect of laws and regulations pertaining to the realization of the aims of the Benelux Economic Union, signed at The Hague on 29 April 1969.

⁷⁷ Benelux documents R(95)4 & R(96)1.

⁷⁸ Jan WOUTERS, Luc VAN LANGENHOVE, Maarten VIDAL et al., *op. cit.* footnote 72, 149-166.

Advisory Council on International Affairs (AIV) of the Netherlands came to a similar view in its advice for the Dutch Government.⁷⁹

18. Almost simultaneously with the birth of the Benelux Economic Union, an important step towards further integration between the countries in the minds of the people was taken by transferring the control of persons to the external frontiers of the Benelux.⁸⁰ Indirectly, this move led to several other regulatory initiatives aimed at the unification of the customs area, at administrative and judicial cooperation in respect of related laws and regulations and at the further abolition of controls and formalities at the internal frontiers of Benelux and the removal of restrictions on free movement.⁸¹ In a way, it foreshadowed the current cooperation in the field of police and justice (*infra*, paras. 22-23). It also explains why the Benelux Secretariat-General in a later stage functioned for over a decade as the Schengen secretariat, when the three countries had joined a larger borderless area including (initially) France and Germany.⁸²

19. The second element enshrined in Article 1 Benelux Treaty, *i.e.* the objective of a common external economic policy, was surpassed at an early stage, especially in the 1970s, by the European Community's common trade policy. In fact, Benelux could have shown more activity in this field, as of the total of 24 trade treaties concluded jointly by the three countries with third parties, 20 had already been concluded during the existence of the customs union, *i.e.* before the entry into force of the Benelux Treaty.⁸³ But also in fields of external economic policy that even now do not yet fall under the exclusive Community competences, Benelux has not lived up to its full potential. Bilateral investment agreements for instance are still concluded either by the Netherlands or by Belgium on behalf of the BLEU, but never for Benelux as a whole.

⁷⁹ AIV, *The Benelux: the benefits and necessity of enhanced cooperation*, advice no. 53, February 2007, p. 18, available at www.aiv-advice.nl – consulted on 1 December 2007.

⁸⁰ Convention on the transfer of control of persons to the external frontiers of Benelux territory, signed at Brussels, on 11 April 1960; came into force on 1 July 1960. *UNTS* no. 5323.

⁸¹ Convention concerning administrative and judicial cooperation in respect of laws and regulations pertaining to the realization of the aims of the Benelux Economic Union (with additional protocols), signed at The Hague on 29 April 1969; came into force on 1 February 1971. *UNTS* no. 11096. Convention on the unification of the Benelux Customs Area, signed at The Hague on 29 April 1969; came into force on 1 February 1971. *UNTS* no. 11097.

⁸² The Schengen secretariat was only integrated into the European Community by Decision 1999/307/EC of the Council of 1 May 1999, *O.J.* 1999, L 119/49.

⁸³ Jan SCHOTTE, “Le Benelux: une entité économique?” , in Andries POSTMA et al. (eds.), *Regards sur le Benelux. 50 ans de coopération*, Brussels, Racine, 1994, 269-270.

4.2. Transfrontier Cooperation

20. Benelux was also a forerunner with regard to intensive transfrontier cooperation, especially at the border between Flanders and the Netherlands. Having realized that the 1980 Outline Convention of the Council of Europe on local transfrontier cooperation⁸⁴ did not provide an adequate solution and a clear legal basis for elaborate structures set up by local authorities on both sides of a border, the Benelux countries concluded their own legal framework.⁸⁵ This retains its interest even in the presence of the 2006 Regulation of the European Community⁸⁶, since it allows local authorities to delegate regulatory powers to a transfrontier public body. Apart from the promotion of local initiatives by the creation of the aforementioned legal framework, territorial cooperation at the central (and in Belgium regional) level has also resulted in a number of environmental and wildlife conventions on the one hand⁸⁷ and on regular meetings of the ministers for territorial planning on the other hand. Benelux has also set up five boundary commissions aimed at a comprehensive spatial governance of border regions.⁸⁸ Yet, according to our interviewees, there seems to be a “missing link” between these boundary commissions and the “Euregions”, *i.e.* the transnational cooperation structure involving local authorities and other actors on both sides of the border that have more or less spontaneously arisen to take advantage of the various financial incentives offered by the European Community.⁸⁹ It is therefore imperative that Benelux tightens the bonds with such structures. As the various border regions suffer from similar problems, the Benelux Secretariat-General could fulfil the role of a clearing house for transfrontier cooperation, in the way the *Mission Opérationnelle Transfrontalière* does in France.⁹⁰

⁸⁴ European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities, adopted at Madrid on 21 May 1980; came into force on 22 December 1981, *UNTS* nr. 20967 and *ETS* no. 106.

⁸⁵ Benelux Convention on transfrontier cooperation between territorial groupings or authorities, signed at Brussels on 12 December 1986; came into force 1 April 1991. The French and Dutch texts can be found in the *Belgian State Gazette*, 30 March 1991.

⁸⁶ Regulation (EC) No. 1082/2006 of the European Parliament and of the Council of 5 July 2006 on a European grouping of territorial cooperation (EGTC), *O.J.* 2006, L 210/19.

⁸⁷ Benelux Convention concerning hunting and the protection of birds, signed at Brussels on 10 June 1970; came into force on 1 July 1972. *UNTS* no. 12141. Benelux Convention concerning nature preservation and landscape protection, signed at Brussels on 8 June 1982; came into force on 1 October 1983. The French and Dutch texts can be found in the *Belgian State Gazette*, 20 October 1983.

⁸⁸ Decision of the Committee of Ministers (M(74)12) of 13 May 1974, concerning the coordination of territorial planning, *Benelux Bulletin*, 6/II, p. 1897.

⁸⁹ Jan WOUTERS, Luc VAN LANGENHOVE, Maarten VIDAL et al., *op. cit.* footnote 72, 190-202.

⁹⁰ www.espaces-transfrontaliers.eu – consulted on 1 December 2007.

The Euregions focus more on project-based cooperation within a specific transfrontier context, whereas Benelux could add a wider, comparative view.

21. The involvement of Benelux with transfrontier cooperation does not alter the fact that Belgium and the Netherlands have been quarrelling for years about three major cross-border transport issues, *viz.* the so-called Iron Rhine, *i.e.* a railway shortcut between the port of Antwerp and the Ruhr area in Germany through the Dutch province of Limburg⁹¹, the high-speed railway link between Brussels and Amsterdam and the deepening of the mouth of the river Scheldt, which constitutes the connection between the port of Antwerp and the North Sea.⁹² The involvement of Benelux in those disputes varied considerably. In fact, only in the issue of the deepening of the river Scheldt has the Benelux, in the person of Belgian deputy Secretary-General BALDEWIJNS, played the role of broker, leading to the signature of a number of treaties between the Kingdom of the Netherlands and the Region of Flanders in December 2005.⁹³ It has been suggested that the involvement of Benelux, and its knowledge of the local actors on both sides of the border, rendered a negotiated solution possible instead of the third-party dispute settlement by an arbitral tribunal which was needed in the case of the Iron Rhine. A further, and more recent, point of contention was the unilateral decision in 2006 of the Belgian Regions to institute a road tax sticker, which would have significantly affected Dutch families and transporters travelling through Belgium to southern Europe. Eventually, the minister-president of the Flemish Region, Yves LETERME, expressed his intent to only pursue the path of a sticker in consultation with the Netherlands. During its session of

⁹¹ Even though this dispute has been settled by the Permanent Court of Arbitration, the Belgian and Dutch governments remain divided about the concrete implementation of Belgium's right of way. See Ineke VAN BLADEL, "The Iron Rhine Arbitration Case: on the Right Legal Track? An Analysis of the Award and of its Relation to the Law of the European Community", *Hague Yb. Int. L.* 2006, 3-22; Virginie BARRAL, "La sentence du Rhin de fer, une nouvelle étape dans la prise en compte du droit de l'environnement par la justice internationale", *R.G.D.I.P.* 2006, 647-668; Nikolaos LAVRANOS, "The MOX Plant and IJzeren Rijn Disputes: which Court is the Supreme Arbiter?", *Leiden J. Int. L.* 2006, 223-246.

⁹² See, for a historical perspective on the issue, Sander V. MEIJERINK, *Conflict and cooperation on the Scheldt River Basin: a case study of decision making on international Scheldt issues between 1967 and 1997*, Dordrecht, Kluwer, 1999, xiv + 357 pp.

⁹³ Treaty between the Kingdom of the Netherlands and the Flemish Region concerning the execution of the development sketch 2010 for the Scheldt estuary, signed at Middelburg on 21 December 2005 (*Tractatenblad* 2005, 310); Treaty between the Kingdom of the Netherlands and the Flemish Region concerning the joint nautical control in the Scheldt area, signed at Middelburg on 21 December 2005 (*Tractatenblad* 2005, 312); Treaty between the Kingdom of the Netherlands, on the one hand, and the Flemish Community and the Flemish Region, on the other hand, concerning cooperation in the field of policy and management of the Scheldt estuary, signed at Middelburg on 21 December 2005 (*Tractatenblad* 2005, 316); Treaty between the Kingdom of the Netherlands and the Flemish Region concerning the termination of the mutual linking of pilotage charges, signed at Middelburg on 21 December 2005 (*Tractatenblad* 2005, 328).

March 2007, the Benelux Parliament asked the Governments to investigate the possibilities of a Benelux cooperation for such a sticker.⁹⁴

4.3. A New Area of Cooperation: Police and Security

22. The third set of Benelux activities is constituted by the so-called political agreements of Senningen⁹⁵ in the field of police, justice and security, which have recently led to a legally binding Benelux treaty on police cooperation⁹⁶, creating a sound legal basis for cross-border interventions by police forces on the territory of other Benelux countries. As has been said before, cooperation in justice affairs is not a new Benelux activity: until the creation of the European arrest warrant, the three countries had a simplified extradition procedure⁹⁷ and also the transferral of border controls to the external frontiers, both before and after the Schengen agreements, implied extensive contact between national police services. A new element in the 2004 Treaty, also in comparison with Europol, is the fact that the new Benelux police cooperation is clearly more operational in character and therefore another example of the organization's "laboratory function". The knowledge management for this new Benelux activity has been entrusted to the Secretariat-General, whose internal structures were therefore reshuffled by creating a specific division for "Security and External Relations".

23. The 2004 Treaty deals with assistance of foreign police troops on request (Art. 4-6), for instance on the occasion of sports events such as motor racing at Francorchamps, as well as with interventions on their own initiative in emergencies (Art. 7-8). During cross-border police intervention, the law and procedures of the host state are applicable (Art. 28). The Treaty also provides for the supply of means and material by one Benelux country to another and for the exchange of personal data. In

⁹⁴ Benelux Parliament, doc. 765/1 of 24 March 2007, "Recommendation concerning a road tax sticker".

⁹⁵ Memorandum of understanding concerning the cooperation in the field of police, justice and immigration between the Ministers of Justice of Belgium, the Netherlands and Luxembourg, the Ministers of the Interior of Belgium and the Netherlands, and the Minister of the *Force Publique* of Luxembourg, signed at Senningen on 4 June 1996.

⁹⁶ Treaty between the Kingdom of Belgium, the Kingdom of the Netherlands and the Grand Duchy of Luxembourg concerning cross-border police interventions, signed at Luxembourg on 8 June 2004; came into force on 1 June 2006. An English translation is available at www.benelux.be/en/pdf/rgm/rgm_Politieverdrag2004_en.pdf – consulted on 1 December 2007. An extensive discussion of this new treaty can be found in Jean-François LECLERCQ, *loc. cit.* footnote 2.

⁹⁷ Treaty between the Kingdom of Belgium, the Kingdom of the Netherlands and the Grand Duchy of Luxembourg concerning extradition and mutual assistance in criminal matters, signed at Brussels on 27 June 1962; came into force on 11 December 1967. *UNTS* no. 8893.

this respect, the countries have direct access to each other's vehicle registration registers (Art. 15). Liaison officers provide permanent mutual contact. The Treaty extends the provisions of Article 41 of the Convention implementing the Schengen agreement in respect of cross-border pursuit, by eliminating the restrictions in time and distance and by permitting pursuit in air space and on seaways and waterways (Art. 18). Other provisions deal with protection of persons (e.g. foreign officials), joint patrols, joint police centres and cooperation in the field of training and the acquisition of means and material. The experts on police cooperation interviewed during our research praised recent developments within Benelux and its added value vis-à-vis Europol.⁹⁸ Furthermore, the three countries have the intention of creating a legal framework for cross-border disaster relief and transportation by ambulance, issues which have been discussed extensively by the Benelux Parliament⁹⁹ and which also attracted considerable support from among the experts, but so far, this has not yet led to a Benelux convention.

5. The Benelux as a Subregional Grouping within and outside the European Union

24. Most people will, however, not know Benelux for the achievements of the Benelux Economic Union, for its joint office for intellectual property or for the intense cooperation between its national police services, but for the external political cooperation the three countries have maintained both within and outside the European Union. It has been stated that the countries have "*many things in common, and it is no accident that they cooperate with each other more closely than any other nations in the world*".¹⁰⁰ Their external political cooperation is most clearly visible in the form of the so-called Benelux memoranda. Through these memoranda, most notably on the occasion of intergovernmental conferences, the three countries present themselves as a coalition with a common view with regard to the major issues on the European agenda.¹⁰¹ The well-known Benelux memorandum issued in the period leading up to the 1955 Messina meeting paved the way for ending the stalemate on European

⁹⁸ Jan WOUTERS, Luc VAN LANGENHOVE, Maarten VIDAL et al., *op. cit.* footnote 72, 215-217.

⁹⁹ Benelux Parliament, doc. 721/1 of 4 December 2004, "Recommendation concerning transfrontier transportation by ambulance", and doc. 727/1 of 19 March 2005, "Recommendation concerning contingency plans".

¹⁰⁰ Wayne C. THOMPSON, *Western Europe*, Harpers Ferry, Strykers-Post Publications, 2003, 231.

¹⁰¹ Danielle BOSSAERT & Sophie VANHOONACKER, "Relaunch of the Benelux?", in Alfred PIJPERS, *On cores and coalitions in the EU: the position of some smaller Member States*, The Hague, Clingendael, 2000, 157.

integration. Yet, throughout the years, the intensity of this coalition building has differed significantly¹⁰², mainly because the three countries do not only have “many things in common” but at the same time also differ on quite substantial issues of European integration. The Netherlands tend to be more liberal on economic issues and more Atlanticist concerning foreign policy, whereas Belgium – and junior partner Luxembourg – are less liberal on economic issues and subscribe to a Europeanist view of foreign policy. The 1990s saw a resurgence of the use of Benelux as a forum for political cooperation in the European Union, which can be explained by various motives, such as the prospect of a Europe of 27 and the need to adapt the European institutional machinery to it, the counterbalancing of the entry of the rather Eurosceptic liberals in the Dutch government by their coalition partners, and the good interpersonal chemistry between key political actors.¹⁰³ Driven by common concerns about the rise of intergovernmentalism and the position of the European Commission, the place of smaller countries in an enlarged EU – especially in the field of the Common Foreign and Security Policy – and the relaxation of the conditions for “closer cooperation”, the three countries published numerous joint memoranda on the further development of the EU in the era of the conclusion of the Amsterdam and Nice treaties.¹⁰⁴ However, the negotiations for the Lisbon Treaty once more showed the clear divisions between Belgium and Luxembourg on the one side and the Netherlands on the other side concerning Europe’s future, the Dutch government being under pressure of a more critical public opinion after the negative result of the referendum on the Treaty establishing a Constitution for Europe in June 2005.

25. Yet, in this type of cooperation, Benelux does not act as an international organization – the Secretariat-General is not even involved in the process – but merely as a group of like-minded countries that consult one another directly at the level of politicians – prime ministers and ministers of foreign affairs – and high-ranking civil servants. The cooperation is not very little institutionalized in comparison with the Franco-German political cooperation, which is supported by an impressive administrative structure based on permanent committees and regularly meeting working groups.¹⁰⁵ This does not mean, however, that the existence of

¹⁰² Irene G.C. JANSSEN, *Benelux: Closer Cooperation within the European Union?*, Maastricht, Shaker Publishing, 33-40.

¹⁰³ Sophie VANHOONACKER, “A Revival of the Benelux?”, *Ö.Z.P.* 2003, 10-11.

¹⁰⁴ Danielle BOSSAERT & Sophie VANHOONACKER, *loc. cit.* footnote 101, 160-166.

¹⁰⁵ Danielle BOSSAERT & Sophie VANHOONACKER, *loc. cit.* footnote 101, 162.

Benelux as an organization does not influence the leverage of the countries as a subregional grouping. It has been submitted that the initial creation of Benelux itself was more inspired by political and diplomatic motives than by a real desire for economic integration.¹⁰⁶ The countries are said to have wanted to strengthen their image as a solid coalition both at the time of the Bretton Woods negotiations and in the first years of European integration. Furthermore, Benelux has effectively functioned as a laboratory for initiatives that were later on transposed to the European level. The completion of the internal market and the abolition of border controls are the most evident examples. This may increase the three countries' credibility and stature as a coherent entity within Europe.¹⁰⁷ Nevertheless, there is no proof of a desire among policy makers to entrust the Benelux bodies themselves with any role in the political cooperation. To the contrary, our interviews showed that the vast majority of actors opposes the institutionalization of political cooperation and the involvement of the Secretariat-General in its preparation.¹⁰⁸ Even soft forms of institutionalization are not greeted with enthusiasm by the Belgian and Dutch governments, and the Dutch Advisory Council on International Affairs opposes any role for the Secretariat-General, even though it proposes that it would pay more systematic attention to the possibilities offered by Article 306 EC Treaty.¹⁰⁹ We shall return to the revitalization of political cooperation within the EU at the end of this contribution (*infra*, para. 29).

26. The countries' image as a subregional grouping also plays a role outside the context of the European Union. It gives them for instance a common identity within the Western European and Others Group in the United Nations system, where their chances of being elected as members of restricted bodies are sometimes enhanced by presenting the candidature of one of the three countries as a Benelux candidature. Furthermore, there have been suggestions to set up common embassies and consulates, both in literature¹¹⁰ and in the Benelux Parliament¹¹¹, but until now this

¹⁰⁶ Thierry GROSBOIS, "La Belgique et le Benelux: de l'universalisme au régionalisme", in Michel DUMOULIN, Geneviève DUCHENNE & Arthe VAN LAER (eds.), *La Belgique, les petits États et la construction européenne*, Brussels, P.I.E., 2003, 130; Albert E. KERSTEN, *Maken drie kleinen een grote? De politieke invloed van de Benelux 1945-1955*, Bussum, 1982, 12; Jan Willem BROUWER, "Nederlands-Belgische samenwerking in Benelux en Europa", *Int. Spect.* 2003, 468.

¹⁰⁷ Jan ROOD, "Heeft de Benelux zichzelf overleefd?", *Openbaar Bestuur* 2007, nr. 11, 21.

¹⁰⁸ Jan WOUTERS, Luc VAN LANGENHOVE, Maarten VIDAL et al., *op. cit.* footnote 72, 92-96.

¹⁰⁹ AIV, *loc. cit.* footnote 79, p. 38.

¹¹⁰ Jan WOUTERS & Maarten VIDAL, "De Benelux: forum voor externe samenwerking", *Internationale Spectator* 2007, 146-149.

suggestion has not met the approval of the three ministries of foreign affairs.¹¹² Finally, the Benelux institutions – both the Secretariat-General and the Benelux Parliament – maintain contacts with similar institutions throughout Europe, such as the Nordic Council, the Visegrád Group and the Baltic Assembly. Although such contacts could play a role in improving the mutual understanding within Europe, one should not expect too much of these inter-group relationships, not only because they tend to remain at the level of civil servants and parliamentarians, rather than at the ministerial level, but also because there are huge differences in both the positioning¹¹³ and the interests of the four subregional groupings. Only a few experts therefore consider these contacts to have a real added value.¹¹⁴

6. Outlook

6.1. Transformation of Benelux into a Flexible Project Organization

27. The Benelux institutions have to a large extent outlived the original objectives of the Benelux Economic Union. It is clear that, within a Benelux Union that goes beyond the original socio-economic objectives, the focus should be on bestowing on Benelux a flexible organizational structure. In the course of its history, the organization has shown a great deal of flexibility in adapting itself to changing circumstances. The renewal of the Benelux Treaty offers an opportunity to get rid of obsolete provisions (*e.g.* the overly detailed enumeration of “commissions” and “special commissions” in Article 28 and 29) and to create the legal basis for both secondment of national civil servants and for the logistic support by the Secretariat-General to wider forms of cooperation, such as its past functioning as the Schengen secretariat and its current services for Euro Contrôle Route.¹¹⁵ A headquarters agreement, preferably along the same lines as the one concluded between the

¹¹¹ Benelux Parliament, doc. 674/1 of 9 July 2002, “Recommendation concerning the establishment of common embassies and common consulates-general for all States of the Benelux”.

¹¹² Benelux Parliament, doc. 674/2 of 30 August 2008, “Answer of the Committee of Ministers to the recommendation concerning the establishment of common embassies and common consulates-general for all States of the Benelux”.

¹¹³ The complicated relationship between the members of the Nordic Council and both NATO and the EU illustrates the difference with the – in that respect – more heterogeneous Benelux countries: G. Herolf, “Inside and Outside Nordic Cooperation”, in A. PIPERS, *On cores and coalitions in the EU: the position of some smaller Member States*, The Hague, Clingendael, 2000, 131-151.

¹¹⁴ Jan WOUTERS, Luc VAN LANGENHOVE, Maarten VIDAL et al., *op. cit.* footnote 72, 100-101.

¹¹⁵ According to its website, “Euro Contrôle Route grew out of the Benelux Control Working Group set up in 1994, which since 1998 has engaged in structural cooperation with France. This cooperation was officially ratified on 5 October 1999 by the signing of an Administrative Arrangement with respect to the control cooperation by the four ministers involved. This date signified the official start of Euro Contrôle Route.” www.euro-contrôle-route.eu – consulted on 1 December 2007.

Netherlands and the Benelux Office for Intellectual Property¹¹⁶, could end the taxation of the secretariat's personnel in Belgium and make work more attractive to Dutch and Luxembourg nationals, thereby ending the large preponderance of Belgian staff members.¹¹⁷ At the same time, the relationship between the various bodies should be revised: the political guidance of the Committee of Ministers should be restored by establishing a politically approved annual or biannual plan of action and by giving the Secretariat-General a limited right of initiative which would allow it to screen the different fields of cooperation and formulate proposals for further integration (possibly building on European directives which leave some leeway and could be transposed in an identical way). This should enable Benelux to achieve progress in a number of clearly defined cooperation areas, which means that the organization should focus its limited resources on its core business (currently territorial and police transfrontier cooperation as well as a limited number of areas related with the internal market) while at the same time terminating peripheral initiatives that do not fit into the main priorities. These peripheral issues can be dealt with in a better way through bilateral or trilateral contacts between national administrations, without requiring additional expertise at the Benelux Secretariat-General. Finally, the "satellite institutions" of Benelux (*i.e.* the Benelux Court of Justice, the Benelux Parliament and the Benelux Office for Intellectual Property) should also be linked in a clearer way with the organization, not in the least in order to enhance its transparency in the eyes of the public.¹¹⁸

6.2. Revitalization of Political Cooperation between the Benelux Partners

28. Although there is not much enthusiasm to include external political cooperation within the mandate of Benelux as an organization, the renewal of the Benelux Treaty can be used to issue a formal political declaration of the three countries in which they reaffirm the bonds that unite them and pledge to achieve common understandings to the largest possible extent. Such a declaration will reinforce Benelux's image abroad as well as give a new dynamic to the cooperation. Furthermore, there should be a larger involvement of civil servants at different levels

¹¹⁶ Accord de Siège pour l'Organisation Benelux en matière de Propriété intellectuelle (marques et dessins ou modèles), fait à La Haye, le 10 octobre 2007 (*Tractatenblad* 2007, 202).

¹¹⁷ This is in fact a Dutch request at the negotiation table, which would require the attribution of a limited legal personality to the Benelux in the new treaty, enabling it to conclude such a headquarters agreement.

¹¹⁸ A communications strategy as well as a unified website would also remedy the current opaqueness of the organization.

in finding consensus on European issues. Today's cooperation remains rather limited to the ministers of foreign affairs and their direct entourage. Mutual secondment of civil servants could contribute to better knowledge of each other's points of view. Benelux countries should invest in their external political cooperation, since the proactive approach of the Benelux memoranda has the possibility of greatly influencing the subsequent decision-making process. By making mutual consultation a natural step in the path to the definition of a position in European policy issues, or by even granting each other a "right of first refusal", the Benelux countries can continue to influence the European agenda beyond their actual weight in the EU.

6.3. 'Benelux Plus'

29. Several Benelux leaders have expressed their interest in a more intense involvement of neighbouring territories in Benelux. The German Land of North Rhine-Westphalia, which both in terms of population and of regional GNP represents over two thirds of Benelux, is in that respect the focus of their attention. Moreover, there appears to be some sort of mutual attraction between them.¹¹⁹ The prime minister of Luxembourg has in that respect stated that he is not only in favour of "*étendre sporadiquement, et dans des domaines précis, la coopération Benelux à d'autres régions limitrophes aux trois pays*"¹²⁰ but also that a new Benelux Treaty should include "a bridge towards North Rhine-Westphalia" in particular.¹²¹ Such an extension would furthermore, in the view of one academic expert in spatial planning and economy, bring Benelux's approach of transfrontier cooperation in line with economic reality.¹²² Yet, the restrictive interpretation of the "Benelux enabling clause" contained in Article 306 EC Treaty (*supra*, para. 8) makes full membership of neighbouring regions in the institutional setup of Benelux an unrealistic option, since it would preclude Benelux from being a forerunner for more profound integration.

¹¹⁹ The Belgian German-speaking newspaper *Grenz-Echo* devoted an article in its edition of 29 December 2007 to this question, entitled "Nordrhein-Westfalen verhandelt über enge Anbindung an Benelux", in which it quoted the regional minister of European affairs of North Rhine-Westphalia, Andreas KRAUTSCHEID, who called the initiative "a novelty in international law, but one which makes sense". He also announced his intention to coordinate the Land's steps towards the Benelux with the federal Ministry of Foreign Affairs in Berlin.

¹²⁰ "Entrevue du Premier ministre Juncker avec le Ministre-président de la région flamande, Yves Leterme", press announcement of the Government of Luxembourg (www.gouvernement.lu – consulted on 1 December 2007) of 20 March 2006.

¹²¹ "*Im Benelux-Vertrag muß dann eine Brücke nach Nordrhein-Westfalen geschlagen werden, so daß für Nordrhein-Westfalen mehr als eine privilegierte Partnerschaft entsteht.*", press announcement of the Government of North Rhine-Westphalia (www.presseservice.NRW.de – consulted on 1 December 2007) of 18 January 2007.

¹²² Jan WOUTERS, Luc VAN LANGENHOVE, Maarten VIDAL et al., *op. cit.* footnote 72, 202-204.

This does not exclude a form of partial membership¹²³ of North Rhine-Westphalia – which under German constitutional law has the power to engage in “neighbourliness relationships”¹²⁴ – in bodies such as the boundary commissions (*supra*, para. 20). This would require an adaptation of the Benelux Treaty in order to allow the formalization of such forms of partnerships.

7. Concluding Remarks

30. Since the foundation of the Benelux Customs Union in 1944 and its transformation into the Benelux Economic Union in 1958, Europe and the world have changed tremendously. Yet, historical and geographic bonds and the striking similarities between the three countries plead for a continuation of their cooperation, which is furthermore privileged in respect of other subregional groupings due to the existence of the “Benelux enabling clause” in Article 306 EC Treaty. Future cooperation should not be limited to socio-economic issues, but should have an open-ended character and encompass whatever domain in which deepened integration is possible and where Benelux can fulfil its role as a laboratory for future pan-European initiatives. In parallel with the streamlining of Benelux as an organization, Belgium, the Netherlands and Luxembourg should invest in their external political cooperation, in particular in the EU, since the method of the Benelux memoranda enables them to punch beyond their weight. The renewal of the Benelux Treaty in 2010 offers ample opportunity to rethink the organization.

¹²³ Defined as “a form of participation in international organizations, pursuant to which states are full members of certain organ(s) while they are not full members of the organization as such” in Henry G. SCHERMERS & Niels M. BLOKKER, *International Institutional Law*, Leiden, Martinus Nijhoff Publishers, 2003, § 169.

¹²⁴ Ulrich BEYERLIN, “Zur Übertragung von Hoheitsrechten im Kontext dezentraler grenzüberschreitender Zusammenarbeit. Ein Beitrag zu Art. 24 Abs. 1 a Grundgesetz”, *Z.a.ö.R.V.* 1994, 590-591; Hans D. JARASS, “Art. 24 [Beitritt zu internationale Einrichtungen]”, in Hans D. JARASS & Bodo PIEROTH, *Grundgesetz für die Bundesrepublik Deutschland: Kommentar*, München, Beck, 2000, 558-571, no. 16; Ingolf PERNICE, “Artikel 24 [Übertragung und Einschränkung von Hoheitsrechten]”, in Horst DREIER (ed.), *Grundgesetz: Kommentar*, Tübingen, Mohr Siebeck, 2006, pp. 501-531, no. 48. Such an involvement would widen the scope of the current important transfrontier spatial planning between North Rhine-Westphalia and the Netherlands to include Belgium, and would enable an encompassing territorial approach of one of the most important economic areas of Europe. See Thomas SPIEGELS, “Grenzüberschreitende Regionalplanung zwischen Nordrhein-Westfalen und den Niederlanden”, *Z.a.ö.R.V.* 2001, 661-680; Susan GROTEFELS, *Gemeinsame grenzüberschreitende Regionalplanung zwischen den Niederlanden und Nordrhein-Westfalen*, Münster, Institut für Siedlungs- und Wohnungswesen, 1992, xiv + 84 pp.

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