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Treaty law and practice in The Netherlands

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1 Introduction

In 1813, when the Netherlands regained its independence after almost twenty years of French rule, little was left of the former confederal structure. It was a strong wish not to restore this weak form of government, in which the States-General, composed of the representatives of the provinces, were responsible for the foreign affairs. In 1814, the Dutch Constitution concentrated the treaty-making power in the hands of the Sovereign. It was the first time in history that the States-General were not a party to the treaty-making procedure. The one and only obligation for the King was to notify the States-General of treaties that had been concluded.

However, an expanding range of treaties was concluded. While in the eighteenth century, treaties generally had related to peace, political alliances, tariffs, commerce and navigation, in the mid-nineteenth century, they started to deal with more varied aspects of State activity. As a result, an accompanying tendency toward more democratic procedures in the treaty-making process developed.

In 1840, a decision of the Supreme Court, holding that the Treaty concerning Rhine navigation had to be considered as a formal source of law in the Netherlands, sounded the overture to redistributing the treaty-making power between the executive and the legislative branches. When the Constitution was revised in 1848, the States-General succeeded in including a provision guaranteeing them the right of prior approval of treaties involving "statutory rights."

It appeared, however, that the States-General, at that time already considered to be a parliament in the modern sense of the word, wanted to control the conclusion not only of law-making treaties, but also of political treaties in order to be involved in foreign policy decisions. The culmination of this strong desire was the requirement in the Constitution of 1953 of prior parliamentary approval for all treaties.

Since the 1953 revision, there were no substantial changes with

respect to the treaty-making power until the Kingdom Act of 1994 on the Approval and Publication of Treaties ("Kingdom Act"),¹ when the States General once more strengthened its position in the treaty-making process.² This Act was passed in response to a desire to remove, among other things, the provisions on approval of treaties from the Constitution.

2 Treaty-Making Law and Practice

2.1 The Treaty-Making Power

Today, the treaty-making power in the Kingdom of the Netherlands is a shared one: the Government, consisting of the King - the head of the state - and cabinet ministers, may bind the Kingdom of the Netherlands by a treaty, provided that Parliament has approved this action.

On the international plane it is the head of the state who, by virtue of the office, has the power to bind the Kingdom.³ By and large, however, the international representation of the state through the Crown is a fiction. Ever since the mid-nineteenth century, the King has acted only upon the instruction of the Minister for Foreign Affairs, who, in turn, is held politically responsible for these acts. The making of foreign policy and the execution thereof are the business of this cabinet minister, in cooperation with Parliament. Every action by the Crown in this field requires this minister's countersignature.⁴

A royal decree of March 6, 1950 permanently authorizes the Minister for Foreign Affairs to conclude treaties that do not require ratification by the King. This document also authorizes the Minister for Foreign Affairs to appoint a proxy - a Kingdom's ambassador or a Kingdom's delegate - to conclude treaties on his behalf. In the case of treaties that require ratification, the authorization is issued by the King on the recommendation of the Minister for Foreign Affairs. (*See* Annex F.1.)

Although, in recent years, the prime minister's political influence has been broadened - in particular, by his participation in the meetings of the Heads of Governments in the European Union -⁵ under Dutch constitutional law he still needs authorization to sign a treaty. In contrast, under international law the head of a government is *compet-*

ent ex officio to conclude treaties.⁶

Under internal law, the treaty-making process at the executive level is considered to be primarily a collective responsibility of the government. Article 45 of the Constitution states that the Council of Ministers, generally known as the Cabinet, shall consider and decide upon overall policy and shall promote the coherence thereof. According to the Standing Order for the Council of Ministers, the making of treaties is considered to be an element of general government policy, with a few minor exceptions.⁷

If the Cabinet decides that the Netherlands should become a party to a treaty, the treaty must be submitted to the States General, since Article 91 of the Constitution provides that the Kingdom shall not be bound without prior approval of the States General, although this approval may be tacit. The same Article contemplates that Parliament may specify by statute those cases in which approval is not required. (See Annex A.⁸)

2.2 The Treaty Concept

Under Dutch constitutional law, the precise meaning of the word "treaty" is crucial since an agreement that can in fact be qualified as a "treaty" must be submitted for parliamentary approval. In the current text of the Constitution of 1983, the term "treaties" (*verdragen*) replaces the term "international agreements", used in the Constitution since 1953. The change in terminology was not intended to have any material effect. According to the official definition in the Explanatory Memorandum on the Constitution of 1983, a treaty is still considered to be any agreement, irrespective its name or form, that binds the Kingdom of the Netherlands under public international law.⁹

The present constitutional term "treaties" is, in some respects, wider than the term "treaty" in Article 2 of the Vienna Convention on the Law of the Treaties ("Vienna Convention"),¹⁰ to which the Netherlands became a party on April 9, 1985. Dutch constitutional law proceeds on the assumption that both states and international organizations have the capacity to conclude treaties. In theory the concept also comprises oral agreements. In Dutch treaty-practice, however, the conclusion of treaties in oral form is extremely rare. On the occasion of the revision of the Constitution in 1983 the

government declared that it was against verbal agreements in order to obviate problems in establishing their existence and content.

On the other hand, the constitutional approach of the term "treaties" is narrower. Whereas the Vienna Convention speaks of "governed by international law", the constitutional concept requires a *consensus ad idem* to create or change obligations "binding under public international law." Consequently, according to international law non-binding agreements - like gentlemen's agreements and agreements on policy - fall outside the constitutional scope. This may also be the case with the so-called "administrative agreements." The position of the administrative agreements is, however, less evident and far more complicated.

The situation is clear with respect to those administrative agreements that necessarily represent the outcome and implementation of approved treaties between the Kingdom of the Netherlands and other states - for example numerous administrative agreements in the field of social security and Dutch aid to developing countries. These agreements, concluded pursuant to Article 7(b) of the Act on Approval and Publication of Treaties (*see* Annex C) by authorities that have express power to do so, undeniably constitute treaties and are binding under international law.

It is not clear that administrative agreements that are autonomously concluded by authorities not vested with express powers to do so (for example ministers, departments, government agencies and other public bodies) are binding under international law. They appear in different forms and qualities and generally stem from the desire to lay down international rules while avoiding the time consuming process of treaty making. Their contents vary widely.¹¹ They may contain rules governing the exercise of discretionary powers of administrative bodies in different countries for the purpose of coordinating internal policies, but they can also affect rules concerning joint action with regard to the execution of treaty provisions.

According to Sondaal,¹² the common feature of these agreements is that the authorities concerned do not *intend* to create binding obligations for the Kingdom under public international law and that, consequently, these are no "treaties" in the formal sense.¹³ The reach of these agreements must therefore be very limited: they cannot create

legal obligations.

Vierdag advocates a more differentiated approach. In each case, it must be decided whether a particular administrative agreement forms a treaty. In his opinion, some of these autonomously concluded administrative agreements do bind the Kingdom of the Netherlands positively under public international law.¹⁴ The fact is, however, that administrative agreements are never submitted to parliament for approval.

Private law contracts are distinctly outside the constitutional scope. Such contracts are for the greater part identifiable in that they specify the applicable municipal law. The same holds for purely unilateral acts. However, whether an act can be qualified as such depends on the legal consequences that it carries. Of course, a unilateral act is treated as if it were a treaty in cases where it establishes bilateral engagements.

The constitutional requirement of parliamentary approval does not apply to decisions of international organizations, or its agencies, which result from exercising their power to legislate, conferred on them by a treaty, in accordance with Article 92 of the Constitution. These decisions become binding on the Kingdom of the Netherlands automatically, that is without any further legal action of the Netherlands, provided that the international institution does not exceed its authorization. On the other hand, prior parliamentary approval is required for decisions of international organizations that amend treaties concluded under their auspices, if no such legislative power was conferred in the original treaty on this international institution.

2.3 The Municipal Procedure

2.3.1 Executive Authorization

The power to negotiate an international agreement is an executive prerogative. This must be so since the external representation of the state on the international plane is entrusted to the executive. Discussions in 1993 about the Bill on Approval and Publication of Treaties, however, clearly showed that parliament wanted a voice at an early point in time of the treaty-making process. For that reason the Kingdom Act confers on the Minister for Foreign Affairs the obligation to submit to Parliament a list of draft treaties on which negotiations are proceeding, in order to enable the States-General to discuss the contents of treaties at a stage in which the text has not yet been established as definitive.¹⁵ The initiation and conduct of negotiations with a view to concluding a treaty, however, is traditionally a matter of the Government.¹⁶

There is, in fact, at the executive level, a large measure of latitude to initiate negotiations on a treaty. In order to strike a balance between the political responsibility of the Minister for Foreign Affairs for the conclusion of an agreement and the political responsibility that other Ministers may have for the subject matter of an agreement the coordinating body for treaties - the Treaties Department of the Ministry for Foreign Affairs - has to be informed of any intention of the executive to conclude a treaty.

No detailed regulations and procedures exist in respect of the negotiations of treaties. Only now and then are written instructions on negotiations deemed necessary. In those cases, instructions are drawn up in consultations among the ministries concerned. Instructions on negotiations of any particular significance are submitted to the Council of Ministers for approval.

Once the text of an agreement has been finalized, it is submitted to the Council of Ministers for approval.¹⁷ After the cabinet has approved that the treaty will be signed, either with or without reservation as to ratification, acceptance or approval, depending on whether or not parliamentary approval is required.

2.3.2 The Council of State

According to Article 73 of the Constitution the Council of State - the Government's legislative advisor - shall be consulted on proposals for the approval of treaties by parliament. The Council's recommendations influence the decision whether to enter reservations or make declarations (as well as the content and formulation thereof) on becoming a party to the treaty, the type of parliamentary approval (tacit or explicit), and the need for implementing legislation, as well as its form and content.

2.3.3 Parliamentary Approval¹⁸

Article 91 of the Constitution provides that treaties without the prior approval of the States-General shall not bind the Kingdom, whether they are formal treaties subject to ratification or agreements entering into force upon signature.¹⁹ To prevent this requirement hindering rapid and efficient action by the Government in the international plane, the same provision stipulates that an Act of Parliament may exempt treaties for this rule. The Kingdom Act on Approval and Publication of Treaties indicates exemptions from the requirement of approval, as well as exceptions in the meaning of approval, once consent to bind the Kingdom has been expressed. The difference in the Kingdom Act is not always obvious. In these cases prior approval is not required, unless a treaty contains provisions which conflict with the Constitution or result in such a conflict.²⁰

a. Exemptions

The six cases wherein parliamentary approval is not required at all are summed up in Article 7 of the Kingdom Act. (*See Annex C.*) The oldest exemption - introduced into the Constitution of 1887 - is the category of treaties the conclusion of which is authorized by an Act of Parliament [art. 7(a)]. Only a very small percentage of treaties are concluded on this basis. In general parliament's opinion is that it should not grant this authorization too lightly.

The second case in which parliamentary approval is not required [art. 7 (b)], which occurs more frequently (about 20 percent of the

time), pertains to treaties solely concerned with the implementation of an approved treaty, unless the States-General express within thirty days of notification, a wish that the implementing treaty be submitted for approval.²¹ Two criteria are applied to determine whether a treaty fits this category. The first is whether the basic treaty entails a legal obligation to conclude an implementing treaty. The second is whether the basic treaty indicates clearly which matters require further regulation. Parliament, when approving the basic treaty, must be able to determine with precision of what may be agreed to in the future under the heading of implementation.²²

The third exemption [art. 7 (c)] concerns the treaties that involve no substantial financial obligations for the Kingdom and have been concluded for a period not exceeding one year.

Article 7(d) enumerates the exemption for secret or confidential treaties. This exemption, like the three aforementioned ones, was already in existence, but is now explicitly set forth in the Kingdom Act. Strictly speaking, article 7(d) is not an exemption, because Article 11 of the Kingdom Act states that such a treaty shall be submitted to parliament for approval *post factum* as soon as it no longer needs to remain secret or confidential. However, such a situation has never occurred.

The exemption mentioned under Article 7(e) represents an innovation. It exempts from parliamentary assent treaties extending treaties that are about to expire. In 1953 the Government suggested this type of exemptions, but the States-General rejected it, fearing the possibility of prolonging an earlier treaty without parliamentary approval. The reason put forward by parliament then was that circumstances might change fundamentally compared to those existing at the time of the initial conclusion of the treaty. To surmount this disadvantage, the States-General are now, pursuant to Article 9(2) of the 1994 Kingdom Act authorized to request that the prolongation treaty be submitted for approval within thirty days of the notification.

The last exemption, found in Article 7(f) is also a novelty: it exempts treaties the purpose of which are to amend an annex that is an integral part of an existing treaty and whose contents aim to implement the provision of the approved treaty of which it is an annex. This provision was the product of recent criticism emanating from the Council of State directed at the Government's practice of

regarding annexes to a treaty as implementing the treaty. As a result, amendments to existing annexes or subsequent new annexes came under the heading of implementing treaties and consequently, were not subject to parliamentary assent, even though the annexes form an integral part of the treaty and even though the basic treaty fails to specify clearly what any subsequent annexes or amendments to previous annexes will entail.

b. Approval Post Factum

A second category in the Kingdom Act on Treaties comprises treaties that are submitted to Parliament for approval once consents to be bound has been expressed. Article 10 regulates the "provisional entry into force" of treaties and provides that the Kingdom may be bound immediately if, in exceptional cases of a compelling nature it would be definitely prejudicial to the interests of the Kingdom if the treaty were not to enter into force before approval. In such cases, the treaty shall subsequently be submitted to the States-General for approval as soon as possible. Such a treaty shall be entered into with the reservation that it will be terminated should approval be withheld.²³

In Article 15 of the Kingdom Act the "provisional application" of treaties has been given an explicit legal basis. The conditions for the provisional entry into force are notably more stringent than those for the "provisional application" of treaties: "in case the interests of the Kingdom so require, a treaty may be applied provisionally pending its entry in force." At the same time, the provisional application is restricted to treaties that do not conflict with an Act of Parliament or result in such conflict, unless these treaties are in the category that does not require the approval of the States-General.²⁴

2.3.4 Notification of Treaties

The decision of whether or not a treaty requires prior parliamentary approval is taken at the executive level. Parliament is not consulted on this matter.²⁵ In order to assess whether a treaty has correctly not been submitted to the States-General, Parliament must be acquainted with these treaties. Accordingly, Article 13 of the

Kingdom Act on Treaties dictates that the States-General shall be notified as soon as possible of treaties by which the Kingdom is bound and which, pursuant to the provisions of Article 7, require no approval or, pursuant to Article 10, require no prior approval. Notification of treaties of a secret or confidential nature shall take place subject to conditions unless the interests of the Kingdom dictate that the notification shall not take place. In the event a treaty is to be provisionally applied, the States-General shall be notified of this without delay.²⁶

In the event that the States-General differ with the Government's view and consider that a notified treaty does need prior parliamentary approval, it may make use of a common political instrument: the right to interpellate pursuant to article 68 of the Constitution.²⁷ (*See Annex A.*)

In addition to the requirement of notification *post factum*, discussed above, the 1994 Kingdom Act on the Approval of Treaties obliges the Government to notify Parliament of two categories of treaties before expressing its consent to be bound. This obligation of prior notification applies (a) where the Government intends to conclude a treaty that solely concerns the implementation of an approved treaty, and (b) where the Government intends to extend a treaty which is about to expire.²⁸

A novelty is found in Article 13(4). It provides that the Government must inform the States-General immediately when a treaty is approved by the parliament, but the Government decides against the Kingdom being bound by that treaty. This provision again demonstrates the tendency in the 1994 Kingdom Act towards an upgrading of parliaments position in the process of treaty making.²⁹

2.3.5 The Parliamentary Approval Procedures

During the revision of the Constitution in 1983 the provisions on how approval of treaties should be granted, were deleted. To enhance flexibility and to enable changes to be made in the approval procedure, if so desired, Article 91(2) of the Constitution delegates this subject to the regular Legislature.

In the 1980s, when the contents of the Bill on the Approval of Treaties was discussed preliminarily in literature, some treaty-lawyers advocated the use of an Act of Parliament to express explicit approval of a treaty to be abandoned.³⁰ Strictly speaking this use of an Act of Parliament is improper. Legislation is the result of a joint act of Government and Parliament, whereas approving a treaty is, above all, the outcome of a unilateral statement of Parliament. Implicitly - it is not declared in so many words - an Act concerning approval of a treaty authorizes - possibly subject to conditions³¹ - the Government to express its consent to be bound by a treaty.³²

In the 1994 Kingdom Act however, the prevailing practice regarding the approval of treaties, which had grown over the years, has been perpetuated. Article 3 sets forth that approval may be tacit or express.³³ An Act of Parliament shall grant express approval and tacit approval is considered to have been given if, within thirty days of the submission of the treaty to both Houses of the States-General for approval, Parliament has not expressed its wish that the treaty will be subject to express approval.³⁴ If such a will is expressed, the Government introduces a Bill for approval as soon as possible.³⁵

Express and tacit approval is of absolute equal standing in the sense that the manner of approval does not create any difference in the legal effect of treaties. Taking into account that the purpose was to simplify the procedure, tacit approval is requested if there is no need to discuss the treaty with the Government, nor a necessity for implementing Acts. Otherwise, it is more efficient to deal with the Act concerning approval together with the Act concerning implementation.

Under Article 6 of the Kingdom Act, a treaty that contains provisions that conflict with the Constitution or could result in such conflict, the treaty must be submitted for express approval. Such a Bill shall state that approval is granted having regard to article 91

paragraph 3, which decrees that in the event a treaty contains any provisions that conflict with the Constitution, these provisions may be approved by the Chambers of the States-General only if at least two-thirds of the votes cast are in favor of approval.

Article 91 paragraph 3 contains no substantive criterion by which to decide whether a treaty-provision or its implementation is in conflict with the Constitution. The prevailing opinion is that there is a conflict with the Constitution when a treaty or the implementation thereof is incompatible with *specific* constitutional provisions. It is first and foremost the Government that decides whether a treaty-provision is incompatible with the Constitution, but, of course, Parliament may differ from the Government's view.³⁶

2.3.6 Denunciation of Treaties

According to Article 91 of the Constitution, parliamentary approval is required not only when the Government considers it desirable for the Kingdom to become party to a certain treaty, but also when the Government wishes to denounce a treaty. Again, the Constitution leaves it to the Legislator to regulate which treaties are exempted from the requirement of prior approval. According to Article 14 of the 1994 Kingdom Act, the provisions concerning approval and publication apply *mutatis mutandis* to plans to denounce treaties. Thus, for example, in the circumstances referred to in Article 7(a) and 7(b), the denunciation of the treaties is exempted from the requirement of parliamentary approval. On a similar basis, the Government is authorized to denounce a treaty without prior approval in exceptional circumstances of a compelling nature, within the meaning of Article 10.³⁷

2.4 Expressing Consent to Be Bound

Article 11 of the Vienna Convention, to which the Netherlands is party, recognizes a multiplicity of methods for expressing a State's consent to be bound by a treaty. Signature or exchange of instruments, however, cannot as a rule bind the Kingdom under Dutch law. The States-General must approve treaties, with a few very specific exceptions. Expressing willingness to be bound by a treaty is

permitted, once the Netherlands has notified the other contracting party that the constitutional procedures have been completed.³⁸

When expressing its consent to be bound by a treaty the Kingdom makes any declarations - interpretative or otherwise - and enters any reservations considered necessary and permissible in the light of Article 19 of the Vienna Convention.³⁹ Reservations are included in the instrument of ratification, acceptance, approval or accession, because they specify for which part of the treaty the Kingdom shall not bind itself. Declarations, on the other hand, are made in writing but separate from the instrument itself.⁴⁰

2.4.1 Registration of Treaties

As soon as a bilateral treaty has entered into force,⁴¹ the other party is asked whether it has the intention of registering the treaty with the United Nations in accordance with Article 102 United Nations Charter and, if not, whether the contracting party would have any objection to the Netherlands doing so. If no objection is raised, the Treaties Department asks the United Nations to register the treaty.

Obviously, this obligation in the United Nations Charter poses a problem with respect to secret and confidential treaties. They cannot, by their nature, be required to be registered. In reply to questions of the States-General (Lower House), the Government merely stated that Article 102 of the United Nations Charter does not cast doubts on the validity of unregistered treaties, but only provides that a party to any such treaty may not invoke an unregistered treaty before an organ of the United Nations. Considering the aim of Article 102 - to prevent States entering into secret treaties without the knowledge of their nationals, and without the knowledge of other States, whose interests might be affected by such a treaty - this answer is rather unsatisfactory.⁴²

2.5 The Position of the Netherlands Antilles and Aruba

The treaty-making power is exercised on behalf of the Kingdom of the Netherlands. The Kingdom has the exclusive authority to act under international law. The constituent parts of the Kingdom of the Netherlands - the Netherlands (at times referred to as the "Kingdom of the Netherlands in Europe"), the Netherlands Antilles, and Aruba - do not possess the power to conclude treaties.⁴³ The countries individually have no such power.⁴⁴

The quasi-federal structure of the Kingdom, in which each of the three entities has its own Constitution, is set out in the Charter for the Kingdom of the Netherlands of 1954. (*See* Annex B.) The Netherlands Constitution is subordinate to this Charter. By virtue of the Charter, however, the provisions of the Netherlands Constitution often apply to matters that are of concern to the entire Kingdom. Kingdom matters are to be dealt with by special organs, as a rule the Netherlands organs, together with representatives from the overseas countries.⁴⁵ These Kingdom matters include foreign relations, of which the conclusion of treaties is a major part.⁴⁶

Pursuant to Article 27 of the Charter, the overseas countries must be involved in the negotiation and implementation of any agreement that are deemed to affect them. The Governments of the overseas countries are informed of any intention to negotiate and conclude a treaty so as to avoid any dispute as to whether a treaty will affect the Netherlands Antilles and Aruba.

The three countries of the Kingdom decide individually on the desirability of a treaty. In case the overseas countries want to enter exclusively into a treaty, they need the co-operation of the Kingdom Government, since they do not have the international legal capacity to conclude treaties. With regard to economic or financial treaties, the Government of the Kingdom, must pursuant to Article 26 of the Charter, co-operate in concluding such a treaty. According to Sondaal there is considerable latitude in the application of this provision. Co-operation is given with respect to every kind of treaty the overseas countries wish to conclude.⁴⁷ If they wish, the Netherlands Antilles or Aruba can become a member of international organizations on the basis of treaties entered into by the Kingdom.⁴⁸

In principle, the influence of the overseas countries in the

decision-making process is very limited. The Council of Ministers may decide to enter into negotiations for a treaty against the wishes of the overseas countries and may apply this treaty in these countries as well as in the Netherlands. There is, however, one type of international treaties to which the Netherlands Antilles and Aruba cannot be bound without their consent, and which cannot be denounced without their consent when in force. In the matter of economic and financial treaties affecting them, an absolute veto has been granted to the overseas countries.⁴⁹

The Charter imposes special procedures with regard to the notification and approval of treaties that affect the overseas countries. When a treaty is submitted to the Netherlands Parliament, it is simultaneously sent to the parliamentary bodies of the Netherlands Antilles and Aruba. In the case of a treaty submitted for tacit approval, the Ministers Plenipotentiary of the Netherlands Antilles and Aruba have the right to request that the treaty be subject to express approval.⁵⁰ These provisions apply *mutadis mutandis* in the case of denunciation.⁵¹

In the case of a treaty submitted for express approval, the parliamentary bodies of the Netherlands Antilles and Aruba have the right to submit a report on the treaty after deliberation. During the debate on this treaty in the Netherlands Parliament, the Ministers Plenipotentiary of the overseas countries are entitled to attend and to furnish any information they consider desirable. In addition, these parliamentary bodies may designate one or more special delegates to participate in the debate.

If a treaty is intended to bind not only the Netherlands, but also the Netherlands Antilles and/or Aruba, then express approval must be effected by an Act of the Kingdom. When the treaty is not intended to bind one of the overseas countries, a common Act (i.e., an act of the regular Dutch legislature) will suffice.⁵²

2.6 Treaty Law and Municipal Law

2.6.1 Preliminary Remarks

The relationship between municipal law and treaty law is a very complex one, with which many generations of lawyers have wrestled. Historically, there have been various ways of approaching this fundamental problem. A very common method in the Dutch legal literature is to analyze this relationship from the angle of the courts. However, this must lead to an unacceptable narrowing of the complexity of the question at issue. The courts are not the only authorities involved in applying treaty law: administrative and legislative organs must also respect the international undertakings.

In order to obtain a reliable analysis of the interrelation between treaty law and municipal law, it makes sense to identify five different aspects: (a) the hierarchical position of treaty law; (b) the legal duty of States to ensure that municipal law conforms to accepted international obligations; (c) the implementation system; (d) the internal position of treaty law in the municipal system of laws; (e) the power of the judiciary to review laws incompatible with treaty provisions.

2.6.2 The Hierarchical Position of Treaty law

Over the past two centuries the priority of treaty law over municipal law has never been seriously contested in the Dutch legal literature. Unmistakably, a partial explanation for this may be found in the fact that the Kingdom of the Netherlands owes its formal existence to a treaty: the Vienna Convention of 1815. It was not accidental that at the turn of the century, when a theory of sovereignty emanating from Germany threatened to destroy international law altogether, the international lawyer, Hamaker, advocated that the municipal legal order should derive its legal force from the community of States. In his vision of the laws of mankind, all law constitutes a hierarchical system in which municipal law is by definition subordinated to international law.⁵³

Van Vollenhove also rejected the old dogmas about sovereignty and the inherent rights of states, but he founded the priority of treaty law upon a voluntary basis. It is true, he argued, that each state is in

principle equal and sovereign, but the word "sovereignty" does not signify an independent, unlimited and supreme power. A state is independent in the sense that it cannot be forced by another state to do something against its will. However, once it has agreed voluntarily to bind itself, then it is compelled to comply with the ensuing obligations. Entry into official relations with other countries presupposes that a State must accept the principles and rules of international law that together form the basis of relations between States.⁵⁴

Jitta presented a synthesis of the two theories, arguing, by analogy with the development of a federal State, that the voluntary character of the international legal order would, in the course of time, give way to a mandatory order.⁵⁵

Krabbe based the priority of treaty law on a different theoretical assumption. In his view, a larger worldwide society has by its nature a greater value than a smaller regional society; consequently, rules stemming from the larger society, such as rules essential for the preservation of mankind, prevail as a matter of law over rules originating from the smaller entity.⁵⁶

The common purpose of these theoreticians was to provide a solid foundation for the supremacy of international law. They were rather successful; the concept of the superiority of treaty law became a keynote in the Dutch legal theory. Of great importance, of course, was that the Permanent Court of International Justice plainly confirmed this supremacy in its jurisprudence. In its advisory opinion of 1930 it held that "it is a generally accepted principle of international law in the relations between powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty."⁵⁷

Since its fundamental revision in 1953, the starting-point of the Constitution is the superiority of international law over municipal law. This supremacy, however, is not explicitly stated, but it underlies the Constitution.⁵⁸ Before the 1953 revision, the power to conclude treaties was a duplicate of that to make laws. Pursuant to the principle that all legislation must be hierarchically related - in the sense that lower legislation may not conflict with higher - the treaty-making organs were not authorized to conclude treaties that conflict with the Constitution, just as it is not permissible for the legislator to enact a

Bill which deviates from the Constitution. In the Constitution of 1953, the assumed superiority of treaty law led to an extension of the treaty-making power. Article 91(3) now empowers the treaty-making organs to conclude treaties which conflict with the Constitution, provided that two-thirds of the votes in Parliament are cast in favor of such a treaty.

2.6.3 The Legal Duty to Comply with Treaty Law

As a consequence of the precedence of international law, states are compelled to comply with treaty obligations. When states ratify a treaty, they in effect, exchange mutual undertakings to observe the terms agreed therein, and this of course implies an obligation undertaken towards some other party or parties. If this instrument relates to matters that concern the domestic legal order, the State that has contracted valid international obligations is bound to add or to modify its domestic law as may be necessary to ensure that its national law is in harmony with international obligations that it has accepted.⁵⁹ This principle is applicable not only for legislation in the limited sense of the term, but also to the municipal law in its widest connotation. A State cannot justify its noncompliance with treaty obligations because of any provisions of, or deficiencies in, its municipal law, or because of any special feature of its governmental organization.⁶⁰

2.6.4 The Implementation System

International law grants sovereign states a wide choice of methods of incorporating treaties into national legal systems without attributing any absolute value to one or another doctrine. States are considered to be free to secure the conformity of their domestic law with treaty law in the way that seems to them most appropriate. International law imposes an obligation not of method but of result.⁶¹

Basically there are two different systems to perform treaty law: a system based on the doctrine of incorporation and another one founded on the doctrine of transformation. Since 1953, the Dutch constitution adheres to the doctrine of incorporation. On the occasion of the revision of the Constitution, the treaty-making power was

democratically legitimized by providing that treaties can only bind the Kingdom after parliamentary approval. With that constitutional revision, a main obstacle for giving direct effect to international treaties in the domestic legal order was removed.

Therefore, since 1953, treaty provisions binding the Kingdom are an integral part of the law of the land without any alteration or revision of the text, *provided* that they have been published.⁶² As a rule, treaties are published in the Treaty Series of the Kingdom of the Netherlands (*Tractatenblad*). In exceptional cases, however, notification to certain persons of a treaty by the Minister for Foreign Affairs shall, for them, be the equivalent of publication.⁶³

Once a treaty has come into force in international law, legislative, administrative and judicial authorities must accept the newly created legal situation as lawful and must take it into consideration when making their decisions. They must do all that is possible to apply the terms of the treaty considering their constitutional position in the State organization.

For the courts, the switch to a system of incorporation has had a consequence. Since the changeover, Article 120 of the Constitution has prohibited the courts from pronouncing on the constitutionality of treaties; that is to say, the courts are not authorized to verify whether treaties have been concluded in accordance with the formal procedures of the Constitution, as worked out in 1994 in the Kingdom Act on the Approval of Treaties. The validity of a treaty, which has domestic effect as a norm of international origin, depends only on international requirements.⁶⁴ Neither Article 120 of the Constitution, nor any other rule of Dutch Law forbids courts to test whether an approved and internationally binding treaty violates another treaty or any other rule of international law.⁶⁵

2.6.5 Treaty Law within the Domestic Order

The constitutional choice for the method of incorporation has an enormous impact on a municipal legal system. In a transformation system, for example, the treaty rules may be substituted at any level in the hierarchy of internal laws and regulations - either at a constitutional level (if there is a written constitution superior to the other laws), or at a level of an Act of Parliament. By contrast, in an

incorporation system, treaty law is in the nature of things the superior law of the land. It is, after all, the international, prevailing norm that operates in the municipal system.

In an incorporation system, a duly ratified and approved treaty enters into force municipally at the same time as it does internationally. As a consequence, the Legislature is obliged to enact the implementing legislation required to make the treaty applicable, to repeal incompatible municipal law or to appropriate the funds necessary to execute the treaty obligations by the time the treaty enters into force for the Kingdom. The same holds for the executive. Executive organs are compelled to bring administrative regulations into line and to execute the municipal law in conformity with international obligations, provided that the requirement of publication, pursuant to article 93 of the Constitution, has been fulfilled.⁶⁶

In principle, the courts must also apply a treaty, provided that it is published and binding on the Kingdom and on the condition that the application of the treaty does not conflict with the judiciary's constitutional task. The Supreme Court considers interpreting treaty implementing legislation in harmony with this international obligation, to fall within its constitutional task.⁶⁷

2.6.6 Judicial Review

In the recent past, there has been much debate about the contents and the bounds of the judiciary's task. Its main bone of contention is the introduction in 1956 of the concept of self-executing treaty provision in Article 94 of the Constitution. This provision was intended to settle the power of the courts in case of a conflict between the applications of statutory rule - in particular an Act of Parliament - and a treaty provision.

A major consequence of the 1953 revision of the Constitution was that from then on, the international and prevailing norm, established by a treaty, has been part of the municipal system. Significance was given to this supremacy in Article 94 by stating that courts may not apply municipal law that conflicts with provisions of treaties in general.⁶⁸ However, on the occasion of the 1956 revision of the Constitution, this provision was amended. The power of the courts in

Article 94 became restricted to provisions of treaties that are self-executing: "statutory regulations may not be applied if such application is in conflict with provisions that are binding on all persons."⁶⁹

The Supreme Court regards treaty-law self-executing if the relevant treaty provision does not require additional legislation to make it legally effective in the municipal order.⁷⁰ To determine whether any legislative action is necessary, the court declares only examining the terms of the treaty provision and the parties' explicit intentions.⁷¹ The Supreme Court has never required the provision explicitly to address itself to individuals. In the Cognac-case, the Supreme Court determined that the treaty provision's orientation was only an important indication of its self-executing character.⁷² If, at first sight, a treaty provision is meant to bind only the contracting parties, neither the Supreme Court, nor other courts regard this wording as an impediment to the application of this treaty provision.⁷³ During the last ten years, courts apply treaty provisions, which have nothing to do with the rights of individuals.⁷⁴

The answer to the question whether any action of the legislature is necessary to make a treaty provision effective in the municipal order, is heavily dependent on what remedies a court has at its disposal. In order to ascertain the range of the court's power to apply treaty law, we have to return to the 1956 revision of Article 94, *id est* the amendment's background.

Where municipal law is in conflict with treaty law, a court may be confronted with two different options. A court can either (1) settle the conflict by setting aside a conflicting rule and applying the substituting treaty-provision or, where this offers no solution, (2) render an interpretation of the incompatible domestic rule in harmony with the treaty obligations. This method of interpretive transformation can have such far-reaching effects, that in fact a court creates a complete new rule.

Concern about the reach of the latter method resulted in an amendment of Article 94 in 1956. In fact, the wish to sharpen this provision has its source in the separation of powers doctrine. The constitutional revisers thought that courts should be more reserved in modifying conflicting provisions of acts of Parliament in those cases in which the implementation of treaty law requires a decision to be

made by the legislative and executive branches.

That is why courts narrowly interpreted "self-executing" for almost two decades thereafter. In case the application of an act of Parliament conflicted with a treaty provision the Supreme Court only considered a relevant treaty provision to be self-executing when setting aside the domestic rule and applying the substituting treaty provision could realize its enforcement.

However, courts gradually gave a broader interpretation of the notion of self-executing treaty. In 1972, the Supreme Court considered Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ECHR), which unmistakably contain an individual right, self-executing, although the treaty provision in this particular case was applicable only by adding a new rule to Articles 14 through 16 of the Law of Criminal Procedure.⁷⁵

In 1980, the Supreme Court modified by interpreting the statutory term "relative" in Article 959 of the Law of Civil Procedure in harmony with international obligations undertaken in Article 8 and Article 14 of the ECHR.⁷⁶

Taking one thing with another, the Supreme Court was back in the constitutional situation that it was in before the 1956 revision. Consequently, new bounds had to be found. In the 1980 decision, the Supreme Court stated *obiter dictis* that if the enforcement of Article 8 ECHR by the court, in future would be against the principle of legal certainty, it would be obliged to refuse the application. Since 1982, the Supreme Court has employed a more general formula: if the enforcement of a treaty provision, which in another case was determined to be self-executing, requires a legislative decision, the Court, as a result, has not been able to apply the treaty provision.⁷⁷ Examining the Court's case law, one may say that such will be the case if there is a lack of judicially manageable standards for resolving the question,⁷⁸ or when the issue involved ought to be resolved by the legislator.⁷⁹

The Court's standard exactly fits the legislative intent which underlay the introduction of the concept: "provisions that are binding on all persons." For that reason, in my view and also of other authors,⁸⁰ the Supreme Court decides no more and no less than that the treaty provision in that particular case has a non-self-executing

character. However, it should be admitted that the Supreme Court has never explicitly drawn this conclusion. That is why, some authors argue that the Supreme Court's method of determining whether a treaty provision is self-executing or not, still consists of an isolated approach to the international qualities of the treaty provision.⁸¹

Other courts have clearly and openly worked with the integrated approach of determining whether a treaty provision is self-executing.⁸² With this method courts no longer exclusively examine the treaty terms, but also the domestic statutory context in which the court is requested to give effect to the treaty provision.⁸³ If in its domestic legal context the treaty provision is unequivocal, and if its application does not compel the court to overstep its constitutional competence, it will be enforced.

As a consequence of this approach, the courts can enforce the very same treaty provision in some cases and not in others. Or, to put it differently, the self-executing character of a treaty provision may vary with the domestic situation.⁸⁴

3 Basic Data and Documentation

Annex A	Relevant provisions of the Netherlands Constitution
Annex B	Relevant provisions of the Charter for the Kingdom of the Netherlands
Annex C	Kingdom Act on the Approval and Publication of Treaties
Annex D	Example of an Act concerning the Approval of a Treaty
Annex E	Examples of full powers given by the Queen and the Minister for Foreign Affairs <ol style="list-style-type: none">1. Royal Credentials2. Ministerial Credentials3. Royal Full Powers4. Ministerial Full Powers
Annex F	Examples of instruments of ratification, Acceptance/Approval, Accession, and Denunciation <ol style="list-style-type: none">1. Instrument of Ratification (Royal)2. Instrument of Acceptance/Approval (Ministerial)3. Instrument of Accession (Ministerial)4. Instrument of Denunciation (Ministerial)5. Official Report of the Exchange of Instrument of Ratification
Annex G	Depositary Procedures
Annex H	Example of Procès-Verbal of Deposit of Instruments of Ratification, Acceptance, Approval, and Accession

Annex A

RELEVANT PROVISIONS OF THE NETHERLANDS CONSTITUTION

[Translation by the Dutch Ministry of Home Affairs]

Article 68

Ministers and State Secretaries shall provide, orally or in writing, the Chambers, either separately or in joint session, with any information requested by one or more members, provided that the provision of such information does not conflict with the interests of the State.

* * *

Article 90

The Government shall promote the development of the international rule of law.

Article 91

1. The Kingdom shall not be bound by treaties, nor shall such treaties be denounced without the prior approval of the States General. The cases in which approval is not required shall be specified by Act of Parliament.
2. The manner in which approval shall be granted will be laid down by Act of Parliament, which may provide for the possibility of tacit approval.
3. Any provisions of a treaty that conflict with the Constitution or which lead to conflicts with it may be approved by the Chambers of the States General only if at least two-thirds of the votes cast are in favour.

Article 92

Legislative, executive and judicial powers may be conferred on international institutions by or pursuant to a treaty, subject, where necessary, to the provisions of Article 91 paragraph 3.

Article 93

Provisions of treaties and of resolutions by international institutions, which may be binding on all persons by virtue of their contents shall become binding after they have been published.

Article 94

Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions.

Article 95

Rules regarding the publication of treaties and decisions by international institutions shall be laid down by Act of Parliament.

* * *

Article 120

The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts.

Annex B

RELEVANT PROVISIONS OF THE CHARTER OF THE KINGDOM OF THE NETHERLANDS

[As amended December 15, 1994]

[Translation by the Dutch Ministry of Foreign Affairs]

Article 24

1. Agreements with other Powers and with international organizations which affect the Netherlands Antilles or Aruba shall be submitted to the Representative Body of the Netherlands Antilles or Aruba simultaneously with their submission to the States-General.
2. If an agreement has been submitted for the tacit approval of the States-General, the Ministers Plenipotentiary may, within the period of time laid down for this purpose for the Chambers of the States General, notify their wish that the agreement shall be subject to the express approval of the States General.
3. The preceding paragraphs shall apply mutatis mutandis in respect of the denunciation of international agreements, with the proviso in the case of the first paragraph that the intention to denounce them shall be communicated to the Representative Body of the Netherlands Antilles or of Aruba.

Article 25.

1. The King shall not bind the Netherlands Antilles or Aruba to international economic and financial agreements if the Government of the Country, setting forth the reasons for considering that this would be detrimental to the Country, has declared that the Country should not be bound by them.
2. The King shall not denounce international economic and

financial agreements in so far as the Netherlands Antilles or Aruba are concerned if the Government of the Country, setting forth the reasons for considering that a denunciation would be detrimental to the Country, has declared that denunciation should not take place with respect to that Country. Denunciation may nevertheless be effected if exclusion of the country concerned from the denunciation is incompatible with the provisions of the agreement.

Article 26

If the Government of the Netherlands Antilles or of Aruba notifies its wish that an international economic or financial agreement should be concluded which applies exclusively to the Country concerned, the Government of the Kingdom shall co-operate in concluding such an agreement, unless this would be inconsistent with the partnership of the Country in the Kingdom.

Article 27

The Netherlands Antilles or Aruba shall be consulted in the preparation of agreements with other Powers which affect either of them in accordance with Article 11. They shall also be consulted in the performance of agreements which affect them and are binding on them.

Article 28

In accordance with international agreements entered into by the Kingdom, the Netherlands Antilles or Aruba may, if they so desire, accede to membership of international organizations.

Annex C

**KINGDOM ACT ON THE APPROVAL AND PUBLICATION
OF TREATIES**

(August 20, 1994)

[Translation by the Dutch Ministry of Foreign Affairs]

We, Beatrix, by the grace of God Queen of the Netherlands,
Princess of Orange-Nassau, etc., etc., etc.

Greetings to all those who shall see or hear these presents! Be it
known:

Whereas we have considered that in accordance with Article 91,
paragraphs 1 and 2 of the Constitution, the cases in which approval of
treaties or of the intention to denounce them is not required, and the
manner in which approval shall be granted, shall be laid down by Act
of Parliament, and that furthermore, amendment of the rules regarding
the publication of treaties and decisions of international organisations
as referred to in Article 95 of the Constitution is desirable, *inter alia*
because of amendments to the Constitution and to the Charter of the
Kingdom of the Netherlands;

We, therefore, having heard the Council of State of the Kingdom
of the Netherlands, and in consultation with the States General, and
having taken into account the provisions of the Charter of the
Kingdom, have approved and decreed as we hereby approve and
decree:

Article 1

1. Our Minister for Foreign Affairs shall periodically submit to the States General and to the Parliaments of the Netherlands Antilles and of Aruba a list of draft treaties on whose conclusion negotiations are proceeding on behalf of the Kingdom.
2. The list referred to in the preceding paragraph shall contain for each draft treaty:
 - a. the purport of the treaty;
 - b. the future contracting parties who are involved in negotiations;
 - c. where necessary, the international organisation under whose auspices the negotiations are being conducted;
 - d. the ministries concerned.
3. The list referred to in paragraph 1 shall not include draft treaties in respect of which the interests of the Kingdom dictate that the fact that negotiations are proceeding may not be made public.

Article 2

1. Treaties by which the government considers it desirable for the Kingdom to be bound shall be submitted as soon as possible to the States General for approval.
2. They shall at the same time be submitted to the Parliament of the Netherlands Antilles or Aruba, if the treaties concerned relate to the Netherlands Antilles or Aruba respectively.

Article 3

Approval may be tacit or express.

Article 4

Express approval shall be granted by Act of Parliament.

Article 5

1. Tacit approval shall be granted, if within thirty days of the treaty in question being submitted to the States General, the wish has not been expressed by or on behalf of one of the Houses or at least a fifth of the number of members laid down in the Constitution of one of the Houses that the treaty be subject to express approval.
2. The Minister Plenipotentiary for the Netherlands Antilles or Aruba respectively may express the same wish within the same time-limit if the treaty concerns the Netherlands Antilles or Aruba.
3. If the wish referred to in paragraph 1 or 2 is expressed, a Bill for approval shall be introduced as soon as possible.

Article 6

1. If a treaty contains provisions which conflict with the Constitution or result in such conflict, it shall be submitted for express approval.
2. A Bill for approval of such a treaty shall state that approval is granted having regard to the provisions of Article 91, paragraph 3 of the Constitution.

Article 7

Unless a treaty contains provisions which conflict with the Constitution or result in such conflict, approval shall not be required:

- a. if this is laid down by Act of Parliament for such treaties;
- b. if the treaty is solely concerned with the implementation of an approved treaty, without prejudice to the provisions of Article 8, paragraph 2;
- c. if the treaty involves no substantial financial obligations for the Kingdom and has been concluded for a period not exceeding one year;
- d. if in exceptional circumstances of a compelling nature the interests of the Kingdom dictate that the treaty should remain secret or confidential;

- e. if the purpose of the treaty is to extend a treaty which is about to expire, without prejudice to the provisions of Article 9, paragraph 2;
- f. if the purpose of the treaty is to amend an annex which is an integral part of an approved treaty and whose contents aim to implement the provisions of the approved treaty of which it is an annex, unless a reservation on this subject has been made in the Act of Parliament approving the treaty.

Article 8

1. If the government proposes to conclude a treaty which solely concerns the implementation of an approved treaty, it shall notify the States General of this in writing, and, if the implementing treaty is to apply to the Netherlands Antilles or Aruba, shall notify the Parliament of the Netherlands Antilles or Aruba respectively.
2. If within thirty days of the notification referred to in paragraph 1 the wish that the implementing treaty be submitted for the approval of the States General is expressed by or on behalf of one of the Houses or at least one fifth of the number of members laid down by the Constitution of one of the Houses, or by the Minister Plenipotentiary for the Netherlands Antilles or Aruba respectively, the approval of the States General shall be required, notwithstanding the provisions of Article 7b.

Article 9

1. If the government proposes to extend a treaty which is about to expire, it shall notify the States General of this in writing, and, if the treaty applies to the Netherlands Antilles or Aruba, shall notify the Parliament of the Netherlands Antilles or Aruba respectively.
2. If within thirty days of the notification referred to in paragraph 1 the wish that the treaty extending the approved treaty be submitted for the approval of the States General is expressed by one of the Houses or one fifth of the number of members laid down by the Constitution of one of the Houses, or by the Minister Plenipotentiary for the Netherlands Antilles or Aruba respectively, the approval of the States General shall be required, notwithstanding the provisions of Article 7e.
3. If the government proposes not to extend a treaty which is about to expire although one or more of the parties to the treaty so desire, it shall notify the States General of this in writing, and if the treaty applies to the Netherlands Antilles or Aruba, it shall notify the Parliament of the Netherlands Antilles or Aruba respectively.

Article 10

1. A treaty that does not contain provisions which conflict with the Constitution or result in such conflict may become immediately binding if in exceptional circumstances of a compelling nature the interests of the Kingdom dictate that the Kingdom be bound by that treaty before it is submitted to the States General for approval. In such cases, the treaty shall subsequently be submitted to the States General for approval as soon as possible.
2. Such a treaty shall be entered into with the reservation that it will be terminated should approval be withheld.

Article 11

1. If pursuant to Article 7d the Kingdom becomes bound by a treaty without the approval of the States General, such a treaty shall be submitted to the States General for approval as soon as it no longer has to remain secret or confidential.
2. Such a treaty shall be concluded only if it contains a provision which allows for termination by the Kingdom within a reasonable period of time, unless the interests of the Kingdom expressly conflict with this.

Article 12

If in the cases referred to in Articles 10 and 11 approval is withheld, the treaty shall be terminated as soon as is legally possible.

Article 13

1. The States General shall be notified as soon as possible of treaties which, pursuant to the provisions of Article 7, require no approval and by which the Kingdom is bound, and treaties by which, pursuant to the provisions of Article 10, paragraph 1, the Kingdom is bound before they have been approved by the States General.
2. At the same time, the Parliament of the Netherlands Antilles or Aruba shall be notified, if the treaties concern the Netherlands Antilles or Aruba respectively.
3. Notification of treaties of a secret or confidential nature shall take place subject to conditions of secrecy unless the interests of the Kingdom dictate that notification shall not take place.
4. If a treaty is approved by the States General and the government decides against the Kingdom being bound by that treaty, the government shall inform the States General if its decision immediately; at the same time it shall inform the Parliament of the Netherlands Antilles or Aruba if the treaty concerns the Netherlands Antilles or Aruba respectively.

Article 14

1. The provisions of Articles 2, 3, 4, 5, 6, 7a and 7b, 10, paragraph 1 and 13 shall apply *mutatis mutandis* to plans to denounce treaties.
2. If pursuant to Article 10, paragraph 1, a treaty has been denounced without the prior approval of the States General, and the States General subsequently withhold their approval, the denunciation or the consequences thereof, shall be reversed as soon as legally possible.

Article 15

1. Except in the case of a treaty which conflicts with the Constitution or results in such conflict, the government may, if the interests of the Kingdom so require, have the treaty apply provisionally to the Kingdom pending its entry into force.
2. If a treaty requiring the approval of the States General before it can enter into force contains provisions which conflict with an Act of Parliament or result in such conflict, such provisions may not be applied provisionally.
3. If a treaty contains provisions whose content in the opinion of the government may be binding on all persons, and the government wishes to have the said provisions provisionally applied, the text of the treaty and the fact that it is to be provisionally applied shall be published before the provisional application takes effect.
4. If a treaty is to be provisionally applied, the States General shall be notified of this without delay. At the same time, the Parliament of the Netherlands Antilles or Aruba shall be informed if the treaty concerns the Netherlands Antilles or Aruba respectively.

Article 16

1. Treaties and decisions of international organisations shall be published in the Treaty Series of the Kingdom of the Netherlands.
2. Our Minister for Foreign Affairs shall be responsible for the publication of the Treaty Series.

Article 17

The Treaty Series shall publish:

- a. the text of the treaty or decision in one or more languages;
- b. the date of its entry into force, either for the Kingdom as a whole, or for one or more of the countries that make up the Kingdom;
- c. the date of its expiry, either for the Kingdom as a whole, or for one or more of the countries that make up the Kingdom;
- d. whether the treaty is to be provisionally applied as referred to in Article 15.

Article 18

The Treaty Series may also contain:

- a. a Dutch translation of the treaty or decision;
- b. information concerning parliamentary approval;
- c. information concerning the date of its entry into force for other states or for international organisations;
- d. information concerning the date of its expiry for other states or for international organisations;
- e. other particulars.

Article 19

1. Treaties and decisions of international organisations shall be deemed to have been published in the entire Kingdom as of the first day of the second calendar month after the date of publication of the issue of the Treaty Series in which they appear.
2. Our Minister for Foreign Affairs may in certain cases amend this time-limit, either for the Kingdom as a whole or for one or more of the countries making up the Kingdom, by publishing a statement to that effect in the Treaty Series.

Article 20

1. Notification of treaties or decisions of international organisations by Our Minister for Foreign Affairs to certain persons shall for them be the equivalent of publication, provided a statement to that effect accompanies the notification.
2. Articles 16, paragraph 1, 17a, b, and c, and 19 of this Act shall not apply to treaties and decisions of international organisations whose publication is regulated in or pursuant to a treaty published in the Treaty Series.
3. In exceptional cases Our Minister for Foreign Affairs may determine that annexes to a treaty or decisions of international organisations shall be published by being made available for public inspection rather than in the Treaty Series. A statement to this effect shall be published in the Treaty Series.

Article 21

The Kingdom Act of 22 June 1961 (Bulletin of Acts and Decrees 207) containing regulations relating to the publication of international agreements and of decisions of international organisations is hereby repealed.

Article 22

This Act shall enter into force on the thirtieth day after the date of its publication in the Bulletin of Acts and Decrees.

Article 23

This Act may be cited as the Kingdom Act on the Approval and Publication of Treaties.

We order and command that this Act shall be published in the Bulletin of Acts and Decrees of the Netherlands, in the Official Bulletin of the Netherlands and in that of Aruba, and that all ministerial departments, authorities, bodies and officials whom it may concern shall diligently implement it.

Done

The Minister for Foreign Affairs

The Minister of the Interior

The Minister for Netherlands Antilles and Aruban Affairs

Annex D

EXAMPLE OF [KINGDOM] ACT¹ CONCERNING THE APPROVAL OF [TITLE OF THE TREATY], CONCLUDED AT [PLACE AND DATE OF CONCLUSION OF THE TREATY]

[Author's Translation]

We, Beatrix, by the grace of God Queen of the Netherlands,
Princess of Orange Nassau, etc., etc.

Greeting to all those who shall see or hear these presents! Be it
known:

Whereas we have considered that the Treaty concluded [Date of
conclusion of the Treaty] and relating to [Subject of the Treaty],
requires the approval of the States-General;

We therefore, having heard the Council of State of the Kingdom
of the Netherlands, and in consultation with the States-General, and
having taken into account the provisions of the Charter of the
Kingdom, have approved and decreed as we hereby approve and
decree:

Article 1

The treaty of [Date of conclusion of the Treaty], relating to
[Subject of the Treaty], of which a translation is published in the
Netherlands Treaty Series, has been approved for the entire Kingdom.

Article 2

Having been approved that [Reservations if any]

Article 3

¹. Whether it has the form of a Kingdom Act or a common Act of Parliament depends on
whether the intention is to bind the entire Kingdom or just one or more of the countries.

This Kingdom Act shall enter into force [The Date of the entry into force of the present Kingdom Act concerning the Approval of the Treaty]

Annex E

EXAMPLES OF FULL POWERS GIVEN BY THE QUEEN AND THE MINISTER FOR FOREIGN AFFAIRS

[Translation by the Dutch Ministry of Foreign Affairs]

1. ROYAL CREDENTIALS

WE BEATRIX,

by the grace of God
Queen of the Netherlands,
Princess of Orange-Nassau,
etc., etc., etc.,

To all to whom these presents
shall come, Greetings!

Desiring that the Kingdom of the Netherlands be represented at
[The name of conference and where and when held].

Therefore by these presents We have appointed to represent the Kingdom of the Netherlands ..., [Name and capacity of representative(s)] as Head of Delegation, ..., [Name and capacity of representative(s)] as Deputy Head of Delegation, and ... [Name and capacity of representative(s)] as Delegates, while conferring upon the Head of Delegation the right to vote as well as upon the Deputy Head of Delegation and the Delegates, (and upon the Head of Delegation, or, in case of his absence, upon the Deputy Head of Delegation, the right to sign, subject to Our ratification, the instruments which will be adopted by the Conference). [This text is used only in case the delegation is entitled to sign the treaty the conference is to adopt.]

In witness whereof We have signed these presents with Our hand,
and have caused Our Royal Seal to be affixed hereto.

The Hague, ...[Date]

2. MINISTERIAL CREDENTIALS

THE MINISTER FOR FOREIGN AFFAIRS OF THE KINGDOM OF THE NETHERLANDS

Considering that it is desirable that the Government of the Kingdom of the Netherlands be represented at [Name of conference and where and when held]

HAS DECIDED

to form a delegation which shall participate in the said Conference and to designate as Head of Delegation: ...[Name and capacity of representative(s)].

Deputy Head of Delegation: ...[Name and capacity of representative(s)].

Delegates: ... ,[Name and capacity of representative(s)] and to confer upon the Head and the Deputy Head of Delegation as well as upon the Delegates the right to vote (and upon the Head of Delegation, or, in case of his absence, the Deputy Head, the right to sign, subject to acceptance/approval, [Depending on the draft of the treaty one of these possibilities is chosen] the instruments which will be adopted by the Conference). [This text is used only when the delegation is entitled to sign the treaty the conference is to adopt].

Signed and sealed at The Hague, ...[Date]

3. ROYAL FULL POWERS

WE BEATRIX,

by the grace of God
Queen of the Netherlands,
Princess of Orange-Nassau,
etc., etc., etc.,

To all to whom these presents
shall come, Greetings!

Wishing to consult with ..¹ with respect to the conclusion of ...[The title of the treaty]. Therefore by these presents We confer upon ...[Name and capacity of plenipotentiaries] or, in case of his absence, upon[Name and capacity of plenipotentiaries] full power to sign together with the plenipotentiary of ...² the aforesaid Treaty, [Subject to Our ratification].³

In witness whereof we have signed these presents with Our hand.
and have caused Our Royal Seal to be affixed hereto.

The Hague, ...[Date]

¹ In the case of a bilateral treaty the Head of State of the other party is referred to here; in the case of a multilateral treaty the text here reads as follows: 'The other High Contracting Parties'.

² In the case of a bilateral treaty the Head of State of the other party is referred to; in the case where a multilateral treaty is simultaneously signed for all parties the text here reads: `... the plenipotentiaries of the other High Contracting Parties'; where signature does not take place simultaneously this part of the text is not used.

³ This text is used where the treaty does not itself contain the requirement of ratification.

4. MINISTERIAL FULL POWERS

THE MINISTER FOR FOREIGN AFFAIRS OF THE KINGDOM OF THE NETHERLANDS

Considering that it is desirable that a Treaty be concluded between the Kingdom of the Netherlands and ...[Name of the State] relating to ...;¹

HAS DECIDED

to designate as plenipotentiary of the Government of the Kingdom of the Netherlands ...[Name and capacity of plenipotentiaries] or, in case of his absence ...[Name and capacity of plenipotentiaries] with a view to signing the said Treaty [Subject to acceptance/approval]²

[AND DECLARES

that the provisions so agreed upon are accepted by the Kingdom of the Netherlands for [the Kingdom as a whole] [the Kingdom in Europe] [the Netherlands Antilles] [Aruba]³ and shall be observed [in their entirety]⁴ [subject to the following reservation ...]⁵.⁶

Signed and sealed at The Hague, ...[Date]

¹ Object of the treaty. Re 1 and 2: this text is used only for bilateral treaties; in case of multilateral treaties this part of the text reads: 'Considering that it is desirable that the treaty relating to ... (concluded at ... on ...) be signed for the Kingdom of the Netherlands'

² This text is used only when the treaty does not itself contain the requirement of acceptance or approval.

³ Dependent upon the actual situation within the Kingdom

⁴ In case no reservations are made.

⁵ Here follows the text of the reservation(s) the Kingdom wishes to make.

⁶ This text is used only where signature already binds the Kingdom at this date.

Annex F

EXAMPLES OF INSTRUMENTS OF RATIFICATION, ACCEPTANCE/APPROVAL, ACCESSION, AND DENUNCIATION

[Translation by the Dutch Ministry of Foreign Affairs]

1. INSTRUMENT OF RATIFICATION (ROYAL)

WE BEATRIX,

by the grace of God
Queen of the Netherlands,
Princess of Orange-Nassau,
etc., etc., etc.,

To all to whom these presents
shall come, Greetings!

Having seen and examined the ...[The title of the Treaty], concluded at ... on ...[Place and date] (and the text of which has been deposited with ...[Name of depositary])¹; approve by these presents for [the Kingdom as a whole] [the Kingdom in Europe] [the Netherlands Antilles] (Aruba),² the above Treaty, declare that it is accepted and ratified and promise that it shall be observed [in its entirety]³ [subject to the following reservation ...].⁴

In witness whereof We have signed these presents with our Hand, and have caused Our Royal Seal to be affixed hereto.

The Hague, ...[Date]

¹ This text is used only when just one original remains with the depositary.

² Dependent upon the actual situation within the Kingdom.

³ In case no reservations are made.

⁴ Here follows the text of the reservation(s) the Kingdom wishes to make.

2. INSTRUMENT OF ACCEPTANCE/APPROVAL (MINISTERIAL)

THE MINISTER FOR FOREIGN AFFAIRS
OF THE KINGDOM OF THE NETHERLANDS,

DECLARES, in conformity with Article ...[Relevant treaty provision] of ...[Title of the treaty] concluded at ... on ...[Place and date] that the Kingdom of the Netherlands ACCEPTS/APPROVES the said Treaty for [the Kingdom as a whole] [the Kingdom in Europe] [the Netherlands Antilles] [Aruba]¹ and that the Treaty so accepted/approved shall be observed [in its entirety]² [subject to the following reservation ...].³

Signed and sealed at The Hague, ...[Date]

¹ Dependent upon the choice of instrument and on the actual situation within the Kingdom

² In case no reservations are made.

³ Here follows the text of the reservation(s) the Kingdom wishes to make.

3. INSTRUMENT OF ACCESSION (MINISTERIAL)

THE MINISTER FOR FOREIGN AFFAIRS OF THE KINGDOM OF THE NETHERLANDS,

Considering that it is desirable that the Kingdom of the Netherlands becomes a Party to... [Title of the treaty] concluded at ... on ...[Place and date] (and entered into force for the States Parties to the Treaty on ...[Date of entry into force]);¹

DECLARES that the Kingdom of the Netherlands accedes to the said Treaty in conformity with its article ...[Relevant treaty provision], that the treaty will apply to [the Kingdom as a whole] [the Kingdom in Europe] [the Netherlands Antilles] [Aruba]² and that it shall be observed [in its entirety]³ [subject to the following reservation ...].⁴

Signed and sealed at The Hague, ...[Date]

¹ This text is used only when the treaty has already entered into force.

² Dependent upon the actual situation in the Kingdom.

³ In case no reservations are made.

⁴ Here follows the text of the reservation(s) the Kingdom wishes to make.

4. INSTRUMENT OF DENUNCIATION (MINISTERIAL)

THE MINISTER FOR FOREIGN AFFAIRS
OF THE KINGDOM OF THE NETHERLANDS,

DECLARES, in conformity with article ...[Treaty provision on denunciation] of ...[Title of treaty] done at ... on ...[Date and place] that the Kingdom of the Netherlands DENOUNCES the said Treaty for [the Kingdom as a whole] [the Kingdom in Europe] [the Netherlands Antilles] [Aruba].¹ [The Treaty therefore remains in force with regard to ...].²

Signed and sealed at The Hague, ...[Date]

¹ Dependent upon the actual situation within the Kingdom.

² Where denunciation takes place for only one or two of the constituent parts of the Kingdom.

5. OFFICIAL REPORT OF THE EXCHANGE OF INSTRUMENTS OF RATIFICATION

The undersigned, ...[Name and capacity of the two representatives] have met today in order to proceed to the exchange of instruments of ratification of ...[Title of treaty]. The instruments of ratification have been produced and compared and, having been found in good and due form, the exchange has been carried out in such a way that the Treaty, in accordance with article ...[Reference to the treaty provision dealing with the entry into force] will enter into force on ...[Date on which the treaty enters into force].

In witness whereof the undersigned have signed the present Procès-verbal.

Done at The Hague, in duplicate, ...[Date]

Annex G

DEPOSITARY PROCEDURES (MULTILATERAL TREATIES DEPOSITED WITH THE GOVERNMENT OF THE KINGDOM OF THE NETHERLANDS)

[Translation by the Dutch Ministry of Foreign Affairs]

A. Ceremonies for the signing of Treaties and depositing of instruments

1. Arrangements

Arrangements should be made with the Treaties Publication Section of the Treaties Department (Ministry of Foreign Affairs).

2. Ceremonies

Ceremonies will be held at the Treaties Department in the presence of the Director of Treaties or an official replacing him.

3. Simplified deposit

As regards the deposit of instruments or ratification, accession, etc., it is up to the embassy concerned to choose between the possibility of a formal ceremony and that of remitting the instrument to the Treaties Publication Section.

4. Remitting the instrument to the Treaties Publication Section

Should they choose the second possibility mentioned in paragraph 3 above, embassies are requested to have the instrument directly handed to an official at the Treaties Publication Section instead of forwarding it through external or internal mail, since, apart from the risk of loss, a document forwarded through those channels may not reach the Treaties Publication Section on the same day.

B. Depositary practice

5. Authorities entitled to effect formalities

Under the international practice adhered to by the Kingdom of the Netherlands, which has been codified to a large extent in the Vienna Convention on the Law of Treaties, formalities effected on behalf of a State in respect of treaties should emanate from the Head of State, the Head of Government or the Minister of Foreign Affairs, or from a person designated in full powers issued by one of the three above-mentioned authorities.

6. Formalities for the purpose of paragraph 5

The practice described above is applicable to signatures, ratifications, approvals, acceptances, accessions and denunciations. The formulation and withdrawals of reservations, notifications of provisional application or territorial application, designations of authorities and any other act that purports to implement the treaty concerned or to modify rights and obligations thereunder may be effected by a Letter or Note from the (Head of the) Embassy. All instruments should be worded in English or French, or should be accompanied by an official translation in English or French.

7. Authorization of deposit

It will be noted that when an instrument of ratification, accession, etc., is issued under the signature of the Head of State, Head of Government or Minister for Foreign Affairs, and to the extent that the instrument clearly expresses the willingness of the State to be bound by the treaty concerned, an additional document authorizing a plenipotentiary to effect the deposit is not necessary.

8. *Cables and telexes (emergencies)*

In emergencies, it has been the practice of the Director of Treaties to accept cables or telexes in lieu of regular full powers or instruments, on the following conditions:

- a. in case the signature is subject to ratification, acceptance or approval;
- b. the cable or telex should emanate from one of the three authorities customarily considered as authorized to bind the State on the international plane (see paragraph 5 above), it should bear the name of that authority and the wording should be in English or French;
- c. the original itself of the cable or telex should be deposited with the Director of Treaties (a copy, transcription or translation is not sufficient);
- d. the cable or telex is received subject to regularization, meaning that the document in due form should be forwarded at the earliest possible time.

Annex H

PROCES-VERBAL OF DEPOSIT OF INSTRUMENTS OF RATIFICATION, ACCEPTANCE, APPROVAL, AND ACCESSION

[Translation by the Dutch Ministry of Foreign Affairs]

The first undersigned, ...[Name and capacity of representative(s)] declares that he has transmitted, and the second undersigned, ...[Name and capacity of representative(s)] declares that he has received, for deposit with the Government of the Kingdom of the Netherlands¹ the instrument of ratification/acceptance/approval/ accession² by ...[Name of the State] of/to ...[Title of the treaty].

In witness whereof this Procès-verbal has been drawn up.

Done at The Hague, in duplicate, ...[Date]

¹ This text may also read: 'for deposit in the archives of the Ministry of Foreign Affairs of the Kingdom of the Netherlands'.

² Dependent upon the actual nature of the instrument.

4 Bibliography

ABBREVIATIONS

AB	Administratiefrechtelijke Beslissingen (Administrative Case Law)
AJIL	American Journal of International Law, Washington, D.C.
CRVB	Centrale Raad van Beroep (Court of Appeal)
HR	Hoge Raad der Nederlanden (Supreme Court)
NILR	Netherlands International Law Review, The Hague
NJ	Nederlandse Jurisprudentie (Netherlands Case Law)
NJB	Nederlands Juristen Blad (Netherlands Law Review), The Hague
NJCM-B	Nederlands Juristen Comité Mensenrechten-Bulletin (Netherlands Law Review on Human Rights), Leyden
NJV	Nederlandse Juristen Vereniging (Netherlands Lawyers Society)
NTIR	Nederlands Tijdschrift voor Internationaal Recht (Netherlands Journal of International Law), The Hague
NVIR	Nederlandse Vereniging voor Internationaal Recht (Netherlands Society of International Law), The Hague
NYIL	Netherlands Yearbook of International Law, The Hague
PCIJ	Permanent Court of International Justice
RvdW	Rechtspraak van de Week (Belgium Law Weekly)
RMT	Rechtsgeleerdheid Magazijn Themis (Law Magazine Themis), Zwolle
TBP	Tijdschrift voor Bestuurswetenschappen en Publiekrecht (Journal of Administrative and Constitutional Law), Wemmel, Belgium
TvO	Tijdschrift voor Openbaar Bestuur (Journal for the Public Administration), Alphen aan de Rijn
SEW	Sociaal Economische Wetgeving (Social and Economic Legislation), Zwolle
WPNR	Weekblad voor Privaatrecht, Notaris-ambt en Registratie (Private Law Weekly for Notaries)
TMA	Tijdschrift voor Milieuaansprakelijkheid (Environmental Liability Law Review)

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5 Notes

1. Whether a Kingdom Act or a common Act of Parliament is required, depends on whether its subject is Kingdom matter or not. The conclusion of treaties is considered to be a Kingdom matter. The parliamentary bodies of the Netherlands Antilles and Aruba inform the Netherlands Parliament with respect to their opinion as regards bills on Kingdom matters.
2. Rijkswet goedkeuring en bekendmaking van verdragen en bekendmaking van besluiten van volkenrechtelijke organisaties (Kingdom Act on the Approval and Publication of Treaties), *Annexes to the Proceedings of the States General*, 1988-1989, 21214 (R 1375) [hereinafter: *Kamerstukken II*].
3. The present Constitution no longer explicitly stipulates this; on the occasion of the revision of the Constitution in 1983 a provision stating this was deleted. In some cases the Kingdom of the Netherlands no longer possesses the international capacity to conclude treaties. *See* H.G. Schermers, *The Internal Effect of Community Treaty-Making*, in *ESSAYS IN EUROPEAN LAW AND INTEGRATION*, 167-173 (1982).
4. NETH. CONST. art. 42.
5. *See* L.F.M. Besselink, *De Minister-President en de Minister van Buitenlandse Zaken* (The Prime Minister and the Minister for Foreign Affairs), *TBP* 801 (1992).
6. *See* Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/Conf. 39/27, art. 7(2)(a), 8 I.L.M. 678 [hereinafter Vienna Convention]. The Netherlands became a party to the Vienna Convention on April 9, 1985.
7. Treaties, which do not require parliamentary approval and do not relate to important matters of foreign policy - for example a treaty with an international organization concerning a symposium hosted by the Dutch Government -, may be concluded without being considered and decided upon by the Cabinet.
8. The total number of treaties concluded is approximately 8,000. This figure, however, is an estimate and cannot be accurately checked, since the data are not computerized. For the same reason, it is difficult to say how many of these agreements are still in force, and how many are inoperative. At present about 100 treaties a year are entered into.
9. *Kamerstukken II*, 1979-1980, 15049 (R 1100), No. 3, at 6.
10. Vienna Convention, *supra* note 6, at art. 2(a).
11. *See* M. Bothe, *Legal and Non-Legal Norms: A Meaningful Distinction in International Relations*, 1980 NETH. Y.B. Int'l L. 70-75.
12. H.H.M. Sondaal, *Dutch Treaty Practice*, 1988 NETH. Y.B. Int'l L. 179, 184.

13. *See* Vienna Convention, *supra* note 6, at art. 7(1).
14. E.W. Vierdag, *Spanningen tussen recht en praktijk in het verdragenrecht, Mededelingen NVIR, Preadvies*, (Report submitted to the International Society of International Law), NVIR 1989 NVIR 36-73.
15. *See* Kingdom Act, at art. 1; *compare* United States Department of State Circular No. 175, Purpose 1.2 (Dec. 13, 1955).
16. Twice a year, the Minister for Foreign Affairs submits a list of draft treaties on which negotiations are proceeding on behalf of the Kingdom. On this list the minister indicates draft treaties of significant political weight. *See* Kingdom Act on the Approval and Publication of Treaties, (1994) (Neth.) [hereinafter Kingdom Act], at art. 1.
17. In rare cases, treaties are signed without the prior approval of the Council of Ministers. *See supra* note 7.
18. Under Dutch Constitutional law, there is no possibility of submitting treaties to a referendum vote.
19. Article 91 also applies to decisions of international organizations which require further legal action to become binding.
20. *See* Kingdom Act, *supra* note 16, arts 10(1), and 15(1).
21. *See id.* at art. 8.
22. The decisions within the North Atlantic Treaty Organization about the modernization of tactical nuclear weapons - in particular the deployment of cruise missiles armed with nuclear warheads on Dutch territory - could have been formally looked upon as mere implementation of the Mutual Defense Assistance Agreement of 1951, concluded with the United States. Because of considerable opposition in the Lower House, however, the exchange of letters concerning this decision was submitted for express approval. (*Kamerstukken II*, 1977-1978, 15049 (R 1100), No. 9, at 5.)
23. Article 12 of the Kingdom Act states that if approval is withheld, the treaty shall be terminated as soon as this is legally possible.
24. *See* Kingdom Act, *supra* note 16, at art. 15(2).
25. The opinion of the Treaties Department in this regard is predominant.
26. *See* Kingdom Act, *supra* note 16, at art. 15(4).
27. *Kamerstukken II*, 1979-1980, 15049 (R 1100), No. 10, at 6.

28. *See* Kingdom Act, *supra* note 16, at arts. 8(1) and 9(1).
29. *See id.* at art. 13(4); *see also id.*, at art. 9(3).
30. J.J.E. Schutte, *Goedkeuring en uitvoering van verdragen*, (Approval and Implementation of Treaties), in *KRACHT VAN WET*, (W.J. van Eijkernbundel), 246 (Deventer, 1984).
31. The States General must, of course, also accept reservations to a treaty that requires parliamentary approval.
32. An act concerning approval of a treaty does not oblige the Government to become a party to a treaty once approved. The decision to bind the Kingdom by a treaty is a governmental power, over which the Parliament can exercise its customary supervision. However, if the Government decides not to become party to an approved treaty, it must, pursuant to Article 13(4) of the 1994 Kingdom Act inform Parliament of its decision immediately.
33. Approximately two-thirds of the treaties are submitted for tacit approval.
34. Article 5 of the Kingdom Act prescribes that the wish must be expressed by or on behalf of one of the Houses or at least a fifth of the number of members.
35. *See* Kingdom Act, *supra* note 16, at art. 5(3).
36. Profound differences of opinion have existed about the constitutionality of the Treaty concerning the Deployment of Cruise Missiles, *Kamerstukken II*, 1985-1986, 19290, No. 1 and the Treaty concerning the European Union (Maastricht-Treaty) of 1992. *See* N.H.M. Roos, *GRONDWET EN KRUISVLUCHTWAPENS* (Constitution and Cruise Missiles) (1986); A.W. Heringa, *De verdragen van Maastricht in strijd met de Grondwet* (Maastricht-Treaties in Conflict with the Constitution), 1992 NJB 749-52; M.C. Burkens et al., *Reactie* (Reaction) 1992 NJB 861-66; J.G. Brouwer, *Wijkt het Unie-Verdrag van Maastricht af van de Grondwet of het Statuut* (A Conflict between the Maastricht Treaties, the Constitution and/or the Charter of the Kingdom?), 1992 NJB 1045-1049.
37. *See* Kingdom Act, *supra* note 16, at arts. 10, 14(2).
38. Before treaties are entered into, the question of whether or not existing legislation needs to be modified and whether enabling legislation required is thoroughly examined by the departments concerned, often at the instigation of the Treaties Department.
39. It is standing practice to enter reservations only in the case of multilateral treaties.
40. Sondaal, *supra* note 12, at 186.
41. The registration of multilateral treaties is not usually dealt with in the treaty itself.

42. J.G. Brouwer, *Het parlementaire lek in de goedkeuringsregeling verdragen*, (The Democratic Leak in the Kingdom Act on the Approval and Publication of Treaties) in: PARLEMENT EN BUITENLANDS BELEID, (Parliament and Foreign Policy) *Preadvies* (Report submitted to the Society of Constitutional Law), 33 (1993).
43. Aruba is one of the six Caribbean islands originally constituting the Netherlands Antilles, but in 1986 it "seceded" from the other islands.
44. See H.F. vanPanhuys, *The International Aspects of the Reconstruction of the Kingdom of the Netherlands*, 11 5 NTIR 1-31 (1958).
45. The Kingdom's Government consists of the Netherlands Government enlarged with the Ministers Plenipotentiary of the Netherlands Antilles and Aruba. The latter are entitled to participate in meetings of the Netherlands cabinet and the Houses of Parliament in the event these organs are dealing with Kingdom affairs.
46. See CHARTER FOR THE KINGDOM OF THE NETHERLANDS OF 1954 arts. 24-27 [hereinafter CHARTER].
47. Sondaal, *supra* note 12, at 229.
48. See CHARTER, *supra* note 46, at art. 28.
49. See *id.* at art. 25.
50. See *id.* at art. 24(2); Kingdom Act, *supra* note 16, at art. 5(2).
51. See CHARTER, *supra* note 46, at art. 24(3).
52. J.G. Lammers, *Municipal Aspects of Treaty-Making by the Kingdom of the Netherlands*, in 1 INTERNATIONAL LAW IN THE NETHERLANDS, 368 (1978).
53. H.J. Hamaker, *De jongste geschiedenis van het internationale privaatrecht* (Recent History of International Private Law), 1903 WPNR 1723.
54. C. van Vollenhove, OMTREK EN INHOUD VAN HET INTERNATIONALE RECHT (Scope and Content of International Law 71-72 (1898).
55. J. Josephus Jitta, *Over de aard van het aard en plaats van het internationale recht* (About the Character of the International Order) 1899 RECHTSGELEERD MAGAZIJN, 99; 1900 RECHTSGELEERD MAGAZIJN 155.
56. H. Krabbe, DE MODERNE STAATSIDEE (A Modern Concept of State), 185 (1915).

57. Advisory Opinion No. 17, Interpretation of the Convention between Greece and Bulgaria Respecting Reciprocal Emigration, 1930 P.C.I.J. (ser. B), at 32.

58. *See, e.g.*, NETH CONST. art. 91(3), art. 94.

59. However, this is not to say that the mere existence of a measure in domestic law could *ipso facto* constitute an infringement of a treaty obligation in question; it is generally recognized that there is no breach of an international obligation unless and until the measure in question is actually applied and the practice violates or threatens to violate provisions guaranteed in the treaty.

60. The Vienna Convention on the Law of Treaties reiterates this principle in art. 27: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. The only exception to this rule is article 46 of the Vienna Convention which deals with the situation in which there is a manifest defect in the consent to be bound by a treaty.

61. The principle of domestic jurisdiction, which is to determine by which means the compliance with international obligations is to be achieved by a State, has one clear exception. In a series of decisions, beginning with a famous case, *Costa v. Enel*, the Court of Justice in Luxembourg ruled that treaties creating the European Community operate as such within the national legal jurisdiction by their own nature and quality regardless the constitutional system of a member State. European constitutional community law simply bypasses the national constitutional provisions. It compels members to accept the doctrine of incorporation.

62. *See* NETH.CONST. art. 93.

63. *See* 1994 Kingdom Act, *supra* note 16, at art. 20.

64. HR (Supreme Court) 1973 NJ, No. 4. (August 31, 1972).

65. HR (Supreme Court), 1991 NJ No. 4 (Nov. 10, 1989).

66. Royal Decree, 1993 AB No. 385 (Feb. 19, 1993).

67. HR (Supreme Court) 1919 NJ 371-374 (March 3, 1919); HR 1935 NJ p. 5-8 (Dec. 17, 1934); HR 1976 NJ No. 551 (June, 15, 1976); HR 1992 NJ No. 107 (Nov. 16, 1990).

68. J.G. Brouwer, VERDRAGSRECHT IN NEDERLAND (Treaty Law in the Netherlands: A study of the Relationship between International Law and Municipal Law in a Historical Context), 142-145 (1992).

69. The term self-executing treaty provision was considered to be a synonym: *Kamerstukken II*, 1955-1956 4133 (R 19), No. 3, 5.

70. HR (Supreme Court) 1960 NJ No. 483 (Feb. 24, 1960); HR 1998 NJ No. 724 (Jan. 19, 1998).

71. HR 1986 NJ No. 688 (May 30, 1986).

72. HR (Supreme Court) 1958 NJ (June 1, 1956).

73. HR (Supreme Court), 1991 NJ No. 4 (Nov. 10, 1989) HR, 1984 NJ No. 96 (Sept. 27, 1983) and CRvB (Central Court of Appeal), 1996 AB No. 501 (May 29, 1996).

74. Nollkaemper, P.A., "Toepassing van verdragsrecht door de Nederlandse rechter en het vereiste van een rechtsbelang" (The Application of Treaty Law by Dutch Courts and the Requirement of a Legal Interest), in *ONGEBOGEN RECHT* (Straight Law), Meijers-bundel 107-117 (The Hague, 1998). See e.g. Administrative Law Division (Conciliation Department) of the Council of State 1995 AB 24 (Dec. 30, 1994).

75. HR (Supreme Court), 1974 NJ No. 272 (April 23, 1974).

76. HR (Supreme Court), 1980 NJ No. 463 (Jan. 18, 1980). Article 8 ECHR reads: "Everyone has the right to family life ..."; Article 14 reads: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground ..."

77. HR (Supreme Court) 1985 NJ No. 230 (Oct. 12 1984).

78. HR (Supreme Court), 1989 NJ No. 740 (Sept. 28, 1988); HR, 1990 NJ No. 449 (Sept. 27, 1989).

79. HR (Supreme Court) 1985 NJ No. 230 (Oct. 12, 1984), HR, 1995 NJ No. 619 (April 18, 1995).

80. H.R.B.M. Kummeling, "Internationaal recht in the Nederlandse rechtsorde" (International Law in the Dutch Municipal Order) in: *DE GRONDWET ALS VOORWERP VAN AANHOUDENDE ZORG* (The Constitution as an Object of Constant Care; Burkensbundel 369-385(Zwolle, 1995); F.M.C. Vlemminx, "Een ieder verbindend verdragsrecht en de bevoegdheden van de bestuursrechter" (Self-Executing Treaty Law and the Powers of the [Administrative] Courts, 1999 NJB 949-955.

81. Fleuren, J.W.A. & Viering, M.L.W.M., "Rechtstreekse werking en een ieder verbindende kracht: Europese inspiratie voor de nationale rechter (Direct effect and self-executing force: European Inspiration for Municipal Courts) in: *GRENSVERLEGGEND STAATSRECHT*, (Opening New Constitutional Horizons), C.A.J.M. Kortmannbundel 101-139 (Deventer, 2001).

82. CRvB (Central Court of Appeal), 1986 AB No. 299 (July 3, 1986); CRvB, 1989 NJB No. 6 (Feb. 16, 1989); CRvB, 1987 AB No. 543 (May 14, 1987); CRvB, 1988 AB No. 253 (Jan. 5, 1988).

83. Provided that the constitutional system of incorporation is not thwarted by a treaty provision or a reservation; *see* HR 1969 NJ, No. 10 (Nov. 8, 1968).

84. P.J. Boon, J.G. Brouwer and A.E. Schilder, *REGELGEVING IN NEDERLAND* (Legislation in the Netherlands) 180-184 (Deventer, 1999).