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PARLIAMENTARY PARTICIPATION IN THE TREATY- MAKING PROCESS OF THE NETHERLANDS

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I. INTRODUCTION

The question as to how far the treaty-making power of the executive (generally vested in the Head of the State), should and can in fact be put under the control of parliament is a problem of a general character; this problem has been known in all democratic countries for a long time.¹

It should be pointed out from the outset that the Netherlands form part of the Kingdom of the Netherlands. Besides the Netherlands (the territory in Europe), the Kingdom presently comprises the Netherlands Antilles and Aruba (the territories in the Caribbean).² Only the Kingdom of the Netherlands has legal capacity under international law and, consequently, only the Kingdom has the power to conclude treaties. This entails that treaties are negotiated by the Kingdom and it is the Kingdom that becomes party to any treaty.

The separate parts of the Kingdom of the Netherlands are united on the legal basis of the Charter of the Kingdom ("Charter").³ The Charter is the highest national legal instrument in the Kingdom and the Constitution of the Netherlands ("Constitution") is subordinate to it. By virtue of the Charter, however, the provisions of the Constitution often apply to matters that are of concern to the Kingdom as a whole and not just to the Netherlands. The Charter determines which matters are of concern to the Kingdom as a whole.⁴ These include, *inter alia*, foreign relations

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1. Haro F. van Panhuys, *The Netherlands Constitution and International Law*, 47 AM. J. INT'L L. 537, 543 (1953).

2. On January 1, 1986, the island of Aruba, which used to be part of the Netherlands Antilles, attained internal autonomy within the Kingdom of the Netherlands.

3. For the most recent text of the Charter, see *Staatsblad van het Koninkrijk der Nederlanden* [Bulletin of Acts, Orders & Decrees] No. 453 (1985) [hereinafter *Stb.*]. See generally W. VAN HELSDINGEN, *HET STATUUT VOOR HET KONINKRIJK DER NEDERLANDEN: WORDINGSGESCHIEDENIS, COMMENTAAR EN PRAKTIJK* [THE CHARTER FOR THE KINGDOM OF THE NETHERLANDS: GENESIS, COMMENTARY & PRACTICE] (1957).

4. Charter, *supra* note 3, art. 3.

(Article 3(1)(b) of the Charter).⁵

According to Article 25(1) of the Charter, the Netherlands Antilles and Aruba cannot against their will be bound by a treaty of an economic or financial nature. Article 25(2) of the Charter provides that existing treaties in those fields cannot be denounced without their consent. When the Netherlands Antilles or Aruba wish to enter into economic or financial treaties, they need the co-operation of the Government of the Kingdom in concluding such treaties. Practice has shown that there is considerable latitude in the application of this provision. Thus, co-operation is given for any kind of treaty the Netherlands Antilles or Aruba wish to conclude.

Article 24(1) *juncto* Article 27 of the Charter furthermore stipulates that the Netherlands Antilles and Aruba must be involved in the negotiation and implementation of treaties which are deemed to affect them within the meaning of the Charter. In order to avoid disputes over whether or not a treaty will affect the Netherlands Antilles and/or Aruba, the Government of the country concerned is informed about any intention to negotiate and conclude a treaty. It is then left to that country's Government to decide whether it wishes a treaty to apply to its territory. Simultaneously with the submission of treaties to the Netherlands Parliament, treaties are forwarded to the Representative Bodies of the Netherlands Antilles and Aruba. In the case a treaty is submitted for tacit approval to the Parliament (Article 24(2) of the Charter), the Ministers Plenipotentiary of the Netherlands Antilles and Aruba representing their country in The Hague have the right to express the wish that the treaty be subject to express approval. In the case a treaty is submitted for express approval to the Parliament, the Ministers Plenipotentiary of the Netherlands Antilles and Aruba may present a report on the treaty. During the debate on the treaty in the Netherlands Parliament, the respective representative bodies mentioned are entitled to attend and to furnish any information they consider desirable. In addition, the Ministers Plenipotentiary of the Netherlands Antilles and Aruba may designate one or more special delegates to participate in the debates.⁶

This paper is confined to the Kingdom's territory in Europe — the Netherlands. One must, however, keep in mind that the Netherlands independently does not have a separate treaty-making power and that this power rests with the Kingdom.

5. See also Charter, *supra* note 3, art. 11(3).

6. For an elaborate discussion on treaties with the Netherlands Antilles and Aruba, see Henricus Sondaal, *Some Features of Dutch Treaty Practice*, 19 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 179, 229-37 (1988).

Section II is devoted to the domestic status of treaties in the Dutch legal order. It discusses the internal and direct effect of treaties within the Dutch legal order and their precedence over Dutch law, including the Constitution. Section II further describes the fact that the Dutch courts may and must review applicable law, including the Constitution, for its conformity with the (self-executing) provisions of treaties. Section III deals with the process of treaty-making in the Dutch constitutional democracy. It discusses the power to conclude treaties, the procedures concerning the approval of treaties, the provisional application of treaties, and the ratification of treaties. Section IV specifically addresses the qualifications which may be added to treaties at the national level and Section V contains some concluding observations.

II. THE DOMESTIC STATUS OF TREATIES IN THE DUTCH LEGAL ORDER⁷

The relation between international law and municipal law is a subject with which many generations of lawyers have wrestled, are wrestling and will continue to wrestle.⁸

When discussing the treaty-making process in the Netherlands, it is important to keep in mind the domestic status of treaties⁹ in the internal legal order of the Netherlands since this status differs from that in most countries. To clarify the picture, one has to distinguish and define the following concepts:

- A. the legal force of treaties;
- B. the internal effect of treaties;
- C. the direct effect of treaties; and
- D. the precedence of treaties.

7. This Section is based on Pieter van Dijk, *Domestic Status of Human-Rights Treaties and the Attitude of the Judiciary: The Dutch Case*, in PROGRESS IN THE SPIRITS OF HUMAN RIGHTS 631, 633-39 (Festschrift für Felix Ermacora) (Manfred Nowak et al. eds., 1988).

8. Lambertus Erades, *International Law and the Netherlands Legal Order*, in 3 INTERNATIONAL LAW IN THE NETHERLANDS 375, 376 (Haro F. van Panhuys et al. eds., 1980). For the main theories as to the relationship between international law and municipal law, see, e.g., Erica-Irene A. Daes, *Status of the Individual and Contemporary International Law*, U.N. Doc. E/CN.4/Sub.2/1989/40 (1989) at 4-22.

9. The term "treaty" is used here in a broader sense than defined and described in the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, reprinted in 8 I.L.M. 679 (1969) [hereinafter Vienna Convention]. Sondaal has defined the term "treaty" (*verdrag*) within the Dutch legal order as follows: [I]n practice the Netherlands regards an instrument as a treaty, irrespective of nomenclature or form, if the Kingdom has reached a *consensus ad idem* with one or more States or international organizations — or entities with limited international legal personality and the power to conclude treaties (of certain types) — with the object of bringing about (or changing) an obligation under international law." Sondaal, *supra* note 6, at 184. See also HENRICUS SONDAAL, *DE NEDERLANDSE VERDRAGSPRAKTIJK [DUTCH TREATY PRACTICE]* ch. 1 (1986). It must be stressed, however, that unwritten treaties are avoided in practice to obviate problems in establishing their existence and content.

A. *The Legal Force of Treaties*

The legal force of a treaty *vis-à-vis* a State depends on whether the treaty has entered into force, both in general and for that particular State. Both are determined by ratification. Sometimes a distinction is made between ratification by the original signatory States and accession by other States.¹⁰ This distinction, however, has no practical meaning.

The fact that a treaty has entered into force for a particular State means that this State is bound by its provisions. The character and scope of the legal obligations ensuing for the State from such a legally binding treaty, however, may vary quite substantially from treaty to treaty, and even within one and the same treaty. This character and this scope are determined by the individual provisions of the treaty as interpreted according to the general principles of treaty interpretation.¹¹ Some treaty provisions only determine a certain result which the Contracting States must ensure,¹² while others also indicate certain ways and means to bring about this result.¹³ In some cases the treaty obligations have to be fulfilled completely at the moment of the entry into force of the treaty,¹⁴ while in other cases the States are required to do so only progressively.¹⁵ This character and this scope, in their turn, determine the character and the scope of the State's discretionary powers concerning these obligations.

10. See, e.g., International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 48, 52, 999 U.N.T.S. 171; General Agreement on Tariffs and Trade, Oct. 30, 1947, arts. XXXIII, XXVI(5)(c), 55 U.N.T.S. 187 (article XXXIII, the "normal" procedure for membership) (article XXVI(5)(c), "sponsorship"); the current version is contained in GENERAL AGREEMENT ON TARIFFS & TRADE, 4 BASIC INSTRUMENTS & SELECTED DOCUMENTS (1969) ("GATT") which specifies the two basic ways for a country to become a Contracting Party to GATT other than as an original signatory to the Protocol of Provisional Application for GATT.

11. See Vienna Convention, *supra* note 9, arts. 31-33.

12. See, e.g., the prohibition of torture in Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, Europ. T.S. No. 5. [hereinafter European Convention on Human Rights].

13. Thus, be it in rather vague terms, Article 2 of the International Covenant on Civil and Political Rights prescribes the adoption of "such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant." But see, e.g. the very detailed means summed up in Article 10 of the European Social Charter, Oct. 18, 1961, Europ. T.S. 35, concerning the right to vocational training.

14. This is, for instance, the case for all the obligations laid down in the European Convention on Human Rights. Article 1 provides that the States "shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

15. See, e.g., the International Covenant on Economic, Social and Cultural Rights, Dec. 19, 1966, art. 2(1), 993 U.N.T.S. 3, which contains an obligation for each of the States Parties "to take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant . . ."

B. *The Internal Effect of Treaties*

The internal effect of a treaty relates to the effect given to the treaty in the domestic¹⁶ legal order of the State. The implementation of most treaties has certain internal implications. These treaties embody the obligation on the part of the States Parties to ensure their internal effect in the domestic legal order.¹⁷ As a rule, and unless provided otherwise in the treaty itself, this is merely an obligation of result, while it is left to the State in question to choose the ways and means. International law has not (yet) developed any rules on this matter.¹⁸

There are three principal ways of giving internal effect to an international treaty, *viz.*, adoption, incorporation, and transformation. In a system of *adoption*, the treaty provisions have legal effect *as such* in the domestic legal order. These provisions maintain their international character within the national legal order in which they are applied. At the basis of this system is the monist view.¹⁹ According to the monist view, international law and municipal law are concomitant aspects of a single legal order, *i.e.*, law in general.²⁰ In the case of *incorporation*, treaty obligations are incorporated into domestic law and are applied as national law, while *transformation* means that the treaty provisions are transformed into domestic law by means of legislation amending or supplementing existing domestic law. Both incorporation and transformation are based upon the dualist (or pluralist) view. According to the dualist view, international law and municipal law are two separate legal systems which operate on different levels.²¹ In a mitigated dualist system, the national statute approving the treaty and authorizing its ratification simultaneously incorporates the treaty in the domestic legal system.²² As

16. The terms "municipal law," "national law," "domestic law," and "internal law" will be used interchangeably in this article and are meant to contrast with international law.

17. Advisory Opinion No. 10, Exchange of Greek and Turkish Populations, 1921 P.C.I.J. (ser. B) No. 10, at 21 (Feb. 21).

18. See, e.g., Max Sorensen, *Obligations d'un état partie à un traité sur le plan de son droit interne*, in LES DROITS DE L'HOMME EN DROIT INTERNE ET DROIT INTERNATIONAL 35, 44 (1968) (Proceedings of the Second International Colloquy on the European Convention on Human Rights, Vienna, Oct. 18-20, 1965).

19. For monism and dualism, see generally Daes, *supra* note 8, at 4-7; HENRY SCHERMERS & DENIS WAELBROECK, JUDICIAL PROTECTION IN THE EUROPEAN COMMUNITIES 105-10 (4th ed. 1987); Henry Schermers, in *Netherlands*, 7 UNITED KINGDOM NATIONAL COMMITTEE OF COMPARATIVE LAW; THE EFFECT OF TREATIES IN DOMESTIC LAW (Francis G. Jacobs & Shelley Roberts eds., 1987) [hereinafter *Netherlands*]; LUZIUS WILDHABER, TREATY-MAKING POWER AND CONSTITUTION: AN INTERNATIONAL AND COMPARATIVE STUDY 3-5, 152-53, 222-26 (1971); IAN BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW ch. 2 (4th ed. 1990).

20. See Hans Kelsen, *Die Einheit von Völkerrecht und staatlichem Recht*, 19 ZaöRV 234 (1958).

21. See, already almost a century ago, HERMANN TRIEPEL, VÖLKERRECHT UND LANDESRECHT 19-20 (1899).

22. There is no consensus on the question whether the treaty then becomes part of domestic

long as the incorporation or transformation has not taken place or has not been completed, the treaty may have internal effect only in virtue of the so-called "rule of presumption," according to which the municipal courts, when interpreting and applying domestic law, start from the presumption that the legislature did not intend to enact or maintain law contrary to the State's treaty obligations.²³

Which of the systems is followed in a particular State is determined by that State's constitutional law and practice. States may, of course, commit themselves internationally to a certain method of incorporation with respect to one particular treaty or a particular system of international law. For instance, according to the case law of the Court of Justice of the European Communities, the Member States have done so in relation to Community law when they established or acceded to the Communities. The Court views the legal order of the European Communities to be of a *sui generis* character. The relationship between Community law and the domestic legal orders of the Member States is, according to the Court, based on the monist theory.²⁴

The internal effect of treaties in the legal order of the Netherlands has been expressly regulated in a monist way since the 1953 revision of the Netherlands Constitution.²⁵ Before that time, the same applied in virtue of a well-established rule of customary law which had already found recognition in scattered legislative provisions.²⁶ Thus, a treaty which for the Netherlands has entered into force automatically becomes part of Dutch law after it has been published, without any separate act of incorporation or transformation being required. Schermers describes what influence the monist system has in practice on Dutch negotiators of treaties in the following way:

Dutch negotiators of treaties sometimes feel it as a burden that the treaty which they conclude becomes part of domestic law. Negotiators from other countries may lightheartedly accept all sorts of treaty obligations which are not subsequently incorporated into their domestic

law; CHRISTOPH SCHREUER, DECISIONS OF INTERNATIONAL INSTITUTIONS BEFORE DOMESTIC COURTS 163 (1981). On "mitigated dualism", see SCHERMERS & WAELBROECK, *supra* note 19, at 107-08.

23. See Oscar Schachter, *The Obligation to Implement the Covenant in Domestic Law*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL & POLITICAL RIGHTS 311, 318-19 (Louis Henkin ed., 1981).

24. See, e.g., Case 26/62, *Van Gend v. Loos*, E.C.R. 12 (Feb. 5, 1963); reprinted in 1 COMMON MKT. L. REV. 82 (1963). The Court's conclusion is not based on the express intention of the States, but is drawn from the objective of the Community as confirmed in several treaty provisions.

25. For the importance of this revision on the treaty-making power and the effect of treaties, see van Panhuys, *supra* note 1, at 537 (et seq.). See also Haro F. van Panhuys, *The Netherlands Constitution and International Law: A Decade of Experience*, 58 AM. J. INT'L L. 88 (1964).

26. See Erades, *supra* note 8, at 385.

legal systems and therefore become dead letters, whilst a Dutch negotiator always has to take into account that treaty obligations may be invoked in court. Legally, this argument is irrelevant as all treaty partners are bound by the text of the treaty, but in practice it carries some weight.²⁷

Article 93 of the present — the 1983 version — Netherlands Constitution²⁸ provides that provisions of treaties and of decisions of international organizations which, according to their contents, may be binding on everyone, shall have that binding effect as from the time of their publication.²⁹ The words “which, according to their contents, may be binding on everyone” (*die naar hun inhoud een ieder kunnen verbinden*) are generally understood to refer to the self-executing character which is required for their application by Dutch courts (“direct effect”; see section II(C)).³⁰ This does not mean, of course, that non-self-executing provisions have no internal effect in the Netherlands. They are binding, as such, upon all branches of the central and local legislative and executive authorities, which also have to enforce the resulting obligations within the scope of their powers.³¹

C. *The Direct Effect of Treaties*

The direct effect of a treaty relates to its applicability by domestic courts without the necessity of any further implementation or execution by an international or national authority.³² A provision of a treaty which has this character is often called “self-executing.”³³

27. See Schermers, *Netherlands*, *supra* note 19, at 112.

28. For the English translation of the Netherlands Constitution as a whole (albeit with several shortcomings), see 11 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert A. Blaustein & Gisbert H. Flanz eds., 1990).

29. Since 1951, the text of all treaties signed by the Kingdom of the Netherlands and of treaties to which the Kingdom intends to accede, and the translation of the treaties into Dutch are officially published in the Treaty Series of the Kingdom of the Netherlands (*Tractatenblad van het Koninkrijk der Nederlanden* [hereinafter *Tractatenblad*]). This official publication of the Government also presents information about the dates on which other States have become parties and on when the treaty has entered into force.

30. On the meaning of this phrase, see Erades, *supra* note 8, at 406-14. See also Judgment of Nov. 28, 1961, Public Prosecutor v. G.J.C.C., Hoge Raad der Nederlanden [HR] [Dutch Supreme Court], 1962 *Nederlandse Jurisprudentie* [N.J.], No. 90; 11 *NETH. INT'L L. REV.* 83, 85 (1964), where the Supreme Court held as follows: “According to their nature these treaty provisions are apt to be directly applied. Therefore they are ‘provisions of agreements binding upon everyone’”

31. See Erades, *supra* note 8, at 403, who also indicates in what respects the courts may nevertheless have to pay attention to certain of these provisions. On the latter issue, see also Evert A. Alkema, *The Application of Internationally Guaranteed Human Rights in the Municipal Legal Order*, in *ESSAYS ON THE DEVELOPMENT OF THE INTERNATIONAL LEGAL ORDER* 181, 182-83 (Fritz Kalshoven et al. eds., 1980).

32. For this and other possible definitions, see Albert Bleckmann, *L'applicabilité directe du droit communautaire*, in *LES RECOURS DES INDIVIDUS DEVANT LES INSTANCES NATIONALES EN CAS DE VIOLATION DU DROIT EUROPÉEN* 84, 87-90 (Albert Bleckmann et al. eds., 1978).

33. On — the sometimes rather confusing — terminology, see J.A. Winter, *Direct Applicability*

As a rule it is for the domestic court to decide whether a treaty provision is self-executing or not. It may well be, however, that the treaty itself contains prescriptions to that effect. Thus, Article 189 of the EEC Treaty provides that a regulation made by the Council or Commission "shall be binding in its entirety and directly applicable in all Member States." This is, however, rather exceptional. Generally, the Contracting Parties are not willing to bind themselves — and their courts — beforehand. The law of the European Communities constitutes an exception also in this respect that in the final resort it is not the domestic court, but the Court of Justice of the European Communities which determines whether a certain provision is directly applicable or not. This is due to the preliminary ruling procedure of Article 177 of the EEC Treaty.³⁴ Other international courts are not faced with the issue, because they are merely called upon to review the final result which has been reached at national level — be it through the direct application of the treaty provision concerned by the domestic courts or not — for its conformity with the treaty.

As has been indicated earlier, Article 93 of the Netherlands Constitution refers to the self-executing character of treaty provisions as a requirement for their application by Dutch courts.³⁵ The question of whether a treaty provision is self-executing or not is left to the municipal courts. As the Netherlands Government puts it in its Memorandum of Reply (*memorie van antwoord*) to the First Chamber concerning the comparable Article 65 of the 1953 version of the Netherlands Constitution:

Finally this is a question to be determined by the courts, since, according to Article 65, the courts and not the legislature are charged with interpreting international agreements in a binding way.³⁶

In 1962, the *Hoge Raad* (Dutch Supreme Court) ruled that the question whether a treaty provision is directly applicable or not is a question of treaty-law rather than a question of Netherlands law.³⁷ The Dutch courts may answer this question only when the treaty does not include

and Direct Effect: Two Distinct and Different Concepts in Community Law, in 9 COMMON MKT. L. REV. 425 (1972).

34. And of the identical Article 50 of the European Atomic Energy Community Treaty. Comparable Article 41 of the European Coal and Steel Community Treaty is of a more limited scope.

35. See *supra* section II(B).

36. Quoted by Erades, *supra* note 8, at 407.

37. See Judgment of May 18, 1962, *Bosch G.m.b.H. N.V. v. de Geus en Uitenbogerd*, HR, 1965 N.J. No. 115; 12 NETH. INT'L L. REV. 318, 318-22 (1965). See also Judgment of Nov. 28, 1961, *Pub. Prosecutor v. G.J.C.C.*, HR, 1962 N.J. No. 90; 11 NETH. INT'L L. REV. 83 (1964); Judgment of May 4, 1954, *Pub. Prosecutor v. J. de B.*, HR, 1954 N.J. No. 382; 2 NETH. INT'L L. REV. 94 (1955).

one or more provisions for its interpretation.³⁸ The issue is of great importance since it determines the scope of judicial review of Netherlands law and administrative action for their conformity with treaty provisions. There are no indications that the Dutch courts are particularly restrictive or particularly liberal with respect to accepting the direct effect of treaties.³⁹

D. *The Precedence of Treaties*

When a treaty provision is considered to be directly applicable as international law, the question arises of its legal status in relation to provisions of domestic law which are not in conformity therewith. In a dualist system, a treaty provision which has been incorporated or transformed into the internal legal order as a rule receives the same status as other national law provisions of the same kind, and the rule *lex posterior derogat legi priori* will apply. In the case of a provision which applies as international law, the status is not so self-evident and needs determination by international or national law and/or practice.

In both a monist and a dualist system, however, it is clear that provisions of a treaty can be effective only if these ultimately take precedence over municipal law in the event of conflict. Therefore, no matter what its domestic law provides in that respect, a State is internationally responsible if the application of its domestic law results in a violation of a treaty. At the international plane, the State cannot invoke its internal law as justification for this violation.⁴⁰ With respect to Community law the Court of Justice of the European Communities has established that

[t]he integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity.⁴¹

It is indeed logical that, where two or more parties conclude an agreement, one of them cannot unilaterally modify its conditions or frustrate its implementation. Therefore, what the EC Court held for Com-

38. As was indicated above, all questions of direct applicability of EC law are to be referred to the EC Court via the preliminary ruling procedure of article 177 of the EEC Treaty.

39. For a list of some "direct effect" cases and for further details, see Schermers, *Netherlands*, *supra* note 19, at 114-16; Henry Schermers, *Some Recent Cases Delaying the Direct Effect of International Treaties in Dutch Law*, 10 MICH. J. INT'L L. 266 (1989).

40. Vienna Convention, *supra* note 9, art. 27.

41. Case 6/64, *Costa v. E.N.E.L.*, E.C.R. 593, 594 (July 15, 1964), 2 COMMON MKT. L. REV. 197 (1964).

munity law, is the general situation under international law. As the Permanent Court of International Justice stated in 1930:

[I]t is a generally accepted principle of international law that in relations between Powers who are Contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty.⁴²

In the Dutch legal system, as to the issue of precedence, Article 94 of the Netherlands Constitution provides that legislation in force within the Kingdom shall not apply if this application would be incompatible with provisions of treaties which are binding on everyone⁴³ or of provisions of decisions by international organizations of that same self-executing character.⁴⁴ The impact of this provision is far-reaching and demonstrates the importance the Netherlands attaches to international law: the Dutch courts have to accord precedence to self-executing treaty provisions over all national legal provisions which are not in conformity therewith, be it antecedent or posterior domestic law and be it statutory law, law enacted by executive or local authorities, or even constitutional law.⁴⁵ In this matter, too, the express provision in the Netherlands Constitution since 1953 was a codification of a rule that was already established by case law, though not with all clarity as far as the precedence over posterior domestic law was concerned.⁴⁶

By according precedence to the treaty provision over a conflicting provision of national law the court is not nullifying, repealing or amending the latter.⁴⁷ The court only refrains from applying it. The provision remains in force, though the Netherlands are, of course, internationally duty-bound to remedy the situation through the appropriate procedure.

III. THE PROCESS OF TREATY-MAKING IN THE DUTCH LEGAL ORDER

[E]xcept in certain specified cases, consent for the Kingdom of the Netherlands to be bound by a treaty cannot be given unless the treaty

42. Advisory Opinion No. 17, Interpretation of the Convention between Greece and Bulgaria Respecting Reciprocal Emigration, 1930 P.C.I.J. (ser. B) No. 17, at 32 (July 31).

43. If municipal legislation is incompatible with treaty provisions which are not "binding on everyone" (self-executing), the former must be applied, although it must, of course, be withdrawn or amended as soon as possible by the competent organ(s).

44. It is considered a highly exceptional feature of Dutch constitutional law that it extends the precedence accorded to treaties over municipal law to international decisions as well. *Daes, supra* note 8, at 6. It goes without saying that this applies only to legally binding decisions.

45. That this was indeed meant to be the case is clear from the legal history of the comparable Article 65 of the 1953 version of the Netherlands Constitution; *see Erades, supra* note 8, at 426.

46. *See Erades, supra* note 8, at 421-24.

47. For examples of cases where the Dutch courts have given priority to treaties which conflicted with domestic Statutes both of earlier and of later dates, *see, Schermers, Netherlands, supra* note 19, at 114.

has been approved by Parliament. In practice the rule is interpreted in such a way as to strike a balance between the Government's need to conduct an efficient and effective foreign policy and Parliament's need to exercise proper supervision over that policy.⁴⁸

A. *The Power to Conclude Treaties*

The Netherlands Constitution does not contain an explicit provision on the treaty-making power in the Kingdom. Article 90 of the Constitution states that the Government shall promote the development of the international legal order. It is a constitutional principle that all policy, foreign and otherwise, is considered to be the collective responsibility of the Government in conjunction with the Parliament. According to Article 45(3) of the Constitution, the Council of Ministers (*Ministerraad*) shall consider and decide upon overall government policy and shall promote the coherence thereof. Foreign policy forms part of overall government policy.

In the Netherlands, treaties are concluded by or with the authority of the Crown (*i.e.*, the King/Queen together with the responsible Minister, in this case the Minister for Foreign Affairs). A Royal Decree has conferred a general authorization on the Minister for Foreign Affairs to conclude those treaties (*i.e.*, signing a treaty and expressing consent to be bound by a treaty) that do not require formal ratification, or to appoint a proxy to do this on the Minister's behalf.⁴⁹ In practice, however, any member of the Council of Ministers in consultation with the Minister of Foreign Affairs may initiate negotiations. As to the application of the constitutional information procedure⁵⁰ with regard to politically important treaties, the Government has recently expressed its intention to inform Parliament in the future at the beginning of negotiations and not at a later stage (albeit with reserving a certain degree of discretion in view of its obligations *vis-à-vis* its treaty parties).⁵¹

When Parliament has approved the treaty, the consent to be bound by the treaty will be expressed, in the case of ratification, by the Head of State and in all other cases by the Minister for Foreign Affairs or some-

48. Sondaal, *supra* note 6, at 180.

49. Royal Decree No. 53 (Mar. 6, 1950), Bijlage bij de Handelingen van de Tweede Kamer [Appendix to the Proceedings of the Second Chamber] 1979/80, 15 049 (R 1100), No. 7, at 4 & No. 10, at 2.

50. Embodied in Article 68 of the Constitution, which reads as follows: 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.

51. See Handelingen van de Tweede Kamer [Proceedings of the Second Chamber] [hereinafter HTK], 1991/92, 21 214 (R 1375), No. 10, at 1-2.

one authorized by the latter. Especially in light of the ever increasing interdependence of more and more questions, other ministers have gradually become more involved in foreign affairs which directly affect their ministries. In practice, the central co-ordinating role of the Minister for Foreign Affairs in respect of foreign policy has, therefore, boosted considerably.

B. Procedures at the National Level

1. The Council of Ministers

The Council of Ministers decides as a rule on the desirability of becoming a party to a treaty and whether parliamentary approval will be sought expressly or tacitly.⁵² If signing the treaty is necessary, this is done with authorization of the Head of State or the Minister for Foreign Affairs. After the text of the treaty has been adopted and, when necessary, the treaty has been signed, the Head of State consults the Council of State concerning the submission of the treaty to Parliament for approval.

2. The Council of State

The Council of State (*Raad van State*) is the general and highest advisory body to the Government.⁵³ Article 73(1) of the Constitution states that the Council of State shall be consulted on proposals for the approval of treaties before these proposals are submitted to Parliament.⁵⁴ The Council of State is the "final" adviser before the Government makes its decision about whether or not to submit the treaty to Parliament for approval. Thus, the Council of State advises after any other advisory body which the Government must or chooses to consult has presented its recommendations, so that it can take these other recommendations into account in its report. The Council of State's role is limited in that it is not feasible for it to propose any amendment to the treaty's text, since this text has already been fixed by the time its opinion is sought. Sondaal elucidates the Council of State's role as follows:

The Council also has an influence on the type of parliamentary approval (tacit or explicit), the Explanatory Memorandum or Note published with the treaty, the approving Act and the implementing

52. Treaties which do not require parliamentary approval and do not relate to vital matters of foreign policy may be concluded without being considered and decided upon by the Council of Ministers. Sondaal, *supra* note 6, at 194.

53. Under Chapter 4 of the Constitution the Council of State is entrusted with important advisory and judicial tasks. Under Article 13 of the Charter for the Kingdom of the Netherlands, the Council also acts as Council of State for the Kingdom if and when the need arises. See generally RAAD VAN STATE: 450 JAAR [COUNCIL OF STATE: 450 YEARS] (1981).

54. See also Council of State Act, sec. 15.

legislation. As far as the Act is concerned it could, for example, influence the decision whether to enter reservations or make declarations on becoming party to the treaty and the content and formulation of such reservations or declarations. It is in the area of implementing legislation (the need for it and its form and content) that the Council is able to do full justice to its role as legislative advisor. In general the Council's recommendations show that it examines proposals to Parliament in the light of the Constitution, existing Acts of Parliament, general principles of law and aspects of public interest. The Council does not attempt to exercise any political influence.⁵⁵

Once the report of the Council of State has been commented upon by Government—and if, in the very exceptional case that the Council of State recommends the King/Queen not to submit the treaty to Parliament for approval, the Government decides not to follow the Council's report⁵⁶—the Head of State submits the treaty to Parliament for express approval or authorizes the Minister for Foreign Affairs to submit the treaty to Parliament for tacit approval.

3. Procedures for Obtaining Parliamentary Approval

General

The Netherlands Parliament is named the "States-General" (*Staten-Generaal*).⁵⁷ It is composed of two chambers, *viz.*, the Second Chamber (Lower House) with 150 members elected by universal suffrage by all citizens over the age of eighteen, and the First Chamber (Upper House or Senate) with 75 members, elected by the directly elected members of the Provincial Councils. The First Chamber may adopt or reject proposals which have passed the Second Chamber, but has no right of amendment.

Once the Council of State has made its final recommendations, the treaty is submitted to Parliament for approval unless the Council of State advises the King/Queen not to do so and this advice is followed by the Government. The Government has described the nature and effect of the approval of treaties by the States-General as follows:

Legally the States-General are free to withhold their approval from a treaty; according to Dutch constitutional practice they can also postpone their decision on the proposal for approval presented by the Government. As long as the approval prescribed by Article 60 para 2 of the Constitution has not taken place, the Crown has no right to ratify the treaty. However, as soon as the approval has been given by the States-General, the Crown has the constitutional freedom — but not the obligation — to proceed to ratification. This is the essence of the

55. Sondaal, *supra* note 6, at 196.

56. See, e.g., the report of the Council of State and the Supplementary Report of the Government on the 1990 Schengen Agreement, HTK 1990/91, 22 140, B.

57. The terms "States-General" and "Parliament" are used interchangeably in this article.

approval.⁵⁸

Until 1953, the Constitution did not prescribe a specific procedure for the approval of treaties.⁵⁹ As from 1953, the Constitution indicates two procedures for the parliamentary approval of treaties, *i.e.*, express approval and tacit approval.⁶⁰

The 1983 revision of the Constitution decreased the number of provisions dealing with the procedure of approval. The only provision dealing with this matter left is 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 Statute.
2. The manner in which approval shall be granted shall be laid down by Statute, 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 91 delegates to the legislature the regulation of cases where parliamentary approval is not required, and how approval is to be granted. A Bill concerning approval and publication of treaties has been submitted to the States-General to this end.⁶¹ Consequently, the rules on treaty-making are in a transitory stage. Until then, under Additional Article XXI of the Constitution, the relevant constitutional provisions of the 1972 Constitution will remain in force. These are Article 61 on tacit approval⁶² and Article 62 on cases where approval is not required.⁶³

The constitutional provisions which presently deal with the approval of treaties may be summarized as follows:

- a. The general requirement of prior parliamentary approval:
 - Article 91(1) of the Constitution;

58. See Bijlage bij de Handelingen van de Tweede Kamer [Annex to the Proceedings of the Second Chamber] 1965/66, 8380 (R 506), No. 6, at 6, *translation in* Johan G. Lammers, *Municipal Aspects of Treaty-Making by the Kingdom of the Netherlands*, in 1 INTERNATIONAL LAW IN THE NETHERLANDS 333, 344 (Haro van Panhuys et al. eds., 1978).

59. Since 1922, the Constitution, Article 58(3), required, however, a Statute for accession to and renunciation of treaties.

60. Art. 61 of the 1953 Constitution. See van Panhuys, *supra* note 1, at 547-49; see also van Panhuys, *supra* note 25, at 96-97.

61. HTK, 1988/91, 21 214 (R 1375). The Bill will not bring about any substantial changes in the approval procedure. See J.G.E. van den Brandhof, *Wetsontwerp inzake de goedkeuring en bekendmaking van verdragen* [Bill Concerning Approval and Publication of Treaties], 16 TJD-SCHRIFT VOOR OPENBAAR BESTUUR 264 (1990).

62. Even though Article 61 deals with tacit approval, the Government has pointed out that this provision will also be applied in the case of express approval. Sondaal, *supra* note 6, at 197-96.

63. See generally *Municipal Aspect of Treaty-Making by the Kingdom of the Netherlands*, *supra* note 58, at 341-44.

- b. The exemption from this rule:
 - Article 91(1) and Additional Article XXI(1) of the Constitution *juncto* Article 62 of the 1972 Constitution;
- c. The form in which approval is granted:
 - Article 91(2) and Additional Article XXI(1) of the Constitution *juncto* Article 61 of the 1972 Constitution;
- d. The approval of treaties which conflict with the Constitution:
 - Article 91(3) and Additional Article XXI of the Constitution *juncto* Article 61 of the 1972 Constitution.

Treaties which conflict with the Constitution can only be approved by a two-thirds majority of the votes cast (Article 91(3)). It is within the exclusive competence of Parliament to decide whether a treaty contains such a conflict, but the Government and the Council of State may, of course, express their opinions on the issue. Thus far, the States-General has only twice decided that a treaty was in conflict with the Constitution. The first occasion was in connection with the approval of the Treaty of May 27, 1952, establishing the European Defence Community.⁶⁴ The second was in 1962 when a part of the Kingdom (Netherlands New Guinea) was transferred to Indonesia.⁶⁵

Express Approval

The States-General can lay down their express approval of the treaty and the reservations (if any) only in a Statute. The King/Queen sends a Royal Message to the Second Chamber containing the Bill concerning approval, accompanied by a document called the Explanatory Memorandum (*memorie van toelichting*) explaining the treaty and the reservations to be made (if any), and stating the Government's reasons why the Netherlands should become a party to it. At that moment the report of the Council of State is made public. From this moment on the normal legislative procedure applies.

Tacit Approval

The possibility of tacit approval was introduced in the 1953 Constitution.⁶⁶ The underlying reason was that it was considered to be too heavy a burden for the States-General to deal with an average of about 200 treaties per year. In practice, the procedure of tacit approval is more frequently used than that of express approval.

Since 1983, the details on the system of tacit approval are no longer

64. See Act of Jan. 22, 1954, Stb. No. 25, art. 6.

65. Act of Sept. 14, 1962, Stb. No. 363, art. 2.

66. Article 61.

contained in the Constitution. These will be incorporated in the above-mentioned Act on approval and publication of treaties. A treaty is submitted for tacit approval by a letter of the Minister for Foreign Affairs to the Chairpersons of both Chambers of the States-General. Appended to the letter is an Explanatory Note (*toelichtende nota*) setting forth the substance of the treaty, the reservations (if any), and the Government's reasons for adhering to the treaty. In this case, too, the report of the Council of State is made public. Tacit approval is considered to have been given, unless, within thirty days after a submission of the treaty to both Chambers of the States-General for approval, a statement has been made by or on behalf of either Chamber, or by at least one-fifth of the constitutional membership of either Chamber, expressing the wish that the treaty should be subjected to express approval. The period of thirty days begins on the day following the receipt of the letter. Intervention by or on behalf of either Chamber in the procedure of tacit approval leads to the procedure of express approval.⁶⁷

Concluding Remarks

The procedures of tacit and express approval are of equal value. It is for the Government in the first place to decide whether or not it will submit a treaty for tacit approval. Lammers describes the Government's choice of procedure for approval as follows:

The Government, however, will not make this choice arbitrarily. For precious time may be lost and much extra effort involved if the States-General decide than an agreement submitted for tacit approval must be subjected to express approval. In order to prevent such incidents as far as possible the Government will initiate the procedure of express approval when it foresees that the States-General may wish to discuss an agreement on account of its political importance and/or its controversial nature. Express approval is, moreover, the rule when new legislation has to be enacted or existing provisions adjusted in order to implement the agreement. In such cases the bill for the implementation of the agreement is presented to the States-General either before or together with the Bill of Approval.⁶⁸

4. Exemptions from the Requirement of Parliamentary Approval

During the preparatory stage of the 1953 revision of the Constitution, the question was raised how to cope with treaties which are either so unimportant or so urgent or secret that parliamentary discussions seem undesirable. The 1953 Constitution enumerated four well-defined

67. Article 91 and Additional Article XXI of the Constitution *juncto* Article 61 of the 1972 Constitution.

68. Lammers, *supra* note 58, at 347.

categories of treaties which could be ratified by the Government without parliamentary approval.⁶⁹ The 1983 Constitution no longer contains an enumeration of categories of treaties which do not require parliamentary approval. Such an enumeration will be included in the earlier mentioned Act on approval and publication of treaties. The exemptions laid down in Article 62 of the 1972 Constitution are still applicable in virtue of Additional Article XXI of the Constitution. These are the following four:

- (a) if the agreement is one with respect to which this has been provided by Statute;
- (b) if the agreement is exclusively concerned with the implementation of an approved agreement, provided the Act of Approval of the latter agreement did not stipulate otherwise;
- (c) if the agreement does not impose considerable financial obligations on the Kingdom and is concluded for a period not exceeding one year;
- (d) if in exceptional cases of a cogent nature it would be clearly detrimental to the interests of the Kingdom that the agreement shall not enter into force until approval has been given.⁷⁰

An agreement as referred to under (d) shall, however, be submitted as soon as possible to parliamentary approval *post factum*. If approval of the agreement is withheld, the agreement shall be terminated as soon as legally possible. Unless it would manifestly conflict with the interests of the Kingdom, the agreement shall only be entered into under the reservation that it will be terminated in case approval is withheld. Wildhaber considers this to be "a felicitous amalgamation of expediency and celerity on the one hand, democracy and representative government on the other."⁷¹

Decisions of international organizations are not treated the same way as treaties under the Dutch Constitution. If by, or in accordance with, the treaty establishing the organization one or more of its organs have been given the power to take binding decisions, these decisions do not need parliamentary approval in order to have binding force in the Netherlands. Article 92 of the Constitution provides that, with due observance, if necessary, of Article 91(3)—two-thirds majority requirement in the case of a treaty which conflicts with the Constitution—legislative, administrative and judicial powers may be conferred on international or-

69. Article 62.

70. For more details on each exemption, see Lammers, *supra* note 58, at 348-53.

71. WILDHABER, *supra* note 19, at 146.

ganizations by, or in virtue of, a treaty. Thus only the treaty itself requires parliamentary approval.

There are also cases in which a treaty creates a procedure by which the representatives of the Contracting Parties may make binding decisions to implement or specify provisions of the treaty. Thus, in a recent case, Article 131 of the Convention of June 19, 1990, Implementing the Agreement on the Gradual Abolition of Controls at the Common Borders Concluded Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic at Schengen on June 14, 1985 ("1990 Schengen Agreement")⁷² provides for the establishment of an Executive Committee, consisting of representatives of the Contracting Parties. The Executive Committee has *inter alia* the power to make binding decisions implementing the 1990 Agreement. In its report on the Bill concerning approval of the 1990 Schengen Agreement, the Council of State raised the question whether this decision-making power, which does not leave sufficient room for parliamentary approval,⁷³ would be in conformity with the Dutch Constitution, since the Committee could not be considered an international organization.⁷⁴ In its reaction the Netherlands Government took the position that indeed the Committee was not an international organization, but that its decisions, by analogy, could be treated as decisions of international organizations in the sense of Article 92 of the Constitution.⁷⁵ In view of the legal history of Article 92, which shows that the drafters were of the opinion that Article 92 should be applied restrictively, the correctness of the Government's position would seem not to be beyond discussion. A more correct point of view would seem to be that the decisions concerned are international agreements to implement the 1985 Schengen Agreement. But then the Netherlands Parliament should be able to stipulate in the Act of Approval that it reserves for itself the power of approval. It is not clear yet what the position of Parliament will be in this case.

72. The 1990 Schengen Agreement is a comprehensive treaty of 142 articles. The German, French, and Dutch texts of the treaty are equally authentic and have been published in 1990 Tractatenblad No. 145. See also 30 I.L.M. 68 (1991).

73. Article 132(3) only provides that at the request of a Contracting Party, the final decision of the Executive Committee may be postponed for no more than two months after the submission of the draft, but this period is not sufficient for a procedure of express approval, where also time has to be reserved for the report of the Council of State.

74. For the report of the Council of State on the 1990 Schengen Agreement, see HTK 1990/91, 22 140, B.

75. For the Government's Supplementary Report (*nader rapport*), see *id.*

C. *Provisional Application*

The preparation of Bills concerning approval and the procedure of approval itself are time-consuming. In order to cope with situations where this could be a major problem, the system of provisional application of a treaty pending its approval by Parliament and its ratification and entry into force has been introduced.⁷⁶ The provisional application of a treaty before its entry into force is allowed in the Dutch system insofar as the obligations the Government has to fulfil under the provisional application are within its competence and do not require the cooperation of Parliament.⁷⁷

D. *Ratification*

The Government has the constitutional right to decide whether it will proceed to ratification or not. The power to ratify a treaty may not be delegated to other State organs. The Parliament may control the ratification of treaties as follows:

While from a legal point of view the King has the right to ratify or not to ratify an agreement which has been approved by Parliament, this does not mean that Parliament is not allowed to exercise *political* control. Thus, it will still be possible for the States-General to invite the Government to account for a ratification which has taken place in spite of an important change of circumstances, or for any omission or delay in the ratification of an agreement.⁷⁸

It is Dutch practice to insert the text of ratification and clauses concerning the territorial validity of the treaty in the document of ratification.

IV. QUALIFICATIONS ADDED TO TREATIES

A. *General*

When expressing its willingness to be bound by a treaty, the Kingdom may make declarations (interpretative or otherwise) and enter reservations; the latter of course only to the extent allowed by the treaty

76. Sondaal distinguishes three types of provisional application. The first type of provisional application, provided for by the treaty itself, results from the issue by each individual State of a declaration to this effect. The second type occurs when States bind one another to apply a treaty provisionally by a separate treaty. The third type occurs when the treaty itself contains a clause stating that it is to be applied provisionally from a certain date. See Sondaal, *supra* note 6, at 226-29.

77. See generally E.W. VIERDAG & G.W. MAAS GEESTERANUS, SPANNINGEN TUSSEN RECHT & PRAKTIJK IN HET VERDRAGENRECHT — RECHTEN PRAKTIJK IN HET VERDRAGENRECHT: PREADVIEZEN VOOR DE NEDERLANDSE VERENIGING VOOR INTERNATIONAAL RECHT [THE TENSIONS BETWEEN LAW & PRACTICE IN LAW OF TREATIES — LAW & PRACTICE IN THE LAW OF TREATIES: REPORTS TO THE DUTCH ASSOCIATION OF INTERNATIONAL LAW] 7-35 (1989).

78. Lammers, *supra* note 58, at 345.

concerned and by general international law.⁷⁹ The Council of State, through its advisory report, may influence the decision whether to enter reservations or make declarations on adhering to the treaty and the content and formulation of such reservations or declarations.

According to Dutch legislative tradition, the text of reservations to-be-made are included in the Bill concerning approval of the treaty in the case of express approval, while in the case of tacit approval they are referred to in the Explanatory Note. Declarations are always set out in the Explanatory Memorandum or Note.

B. Reservations

In general, the Government decides whether reservations should be made. The Government submits the proposed reservations to Parliament for approval. Since in the case of express approval the proposed reservations are included in the Bill concerning approval, first of all the Council of State may propose to delete or amend the proposed reservations, or to include additional reservations. Next, during the procedure of parliamentary approval, Parliament has the power, directly or indirectly, to achieve that certain reservations are made by the Government or that proposed reservations are deleted or phrased differently. According to Article 84(1) of the Constitution, a Bill, presented by or on behalf of the Government that has not yet been passed by the Second Chamber or by a joint session of the States-General may be amended by the Second Chamber or the joint session, as the case may be, on the proposal of one or more members, or by the Government. Thus, the Second Chamber or the joint session of the States-General may formulate reservations. The First Chamber does not have this right of amendment. It may only adopt or reject legislation that has passed the Second Chamber, but has no right of amendment (Article 85 of the Constitution).⁸⁰ Consequently, in respect of the Bill concerning approval of the treaty the Second Chamber may amend the reservations proposed by the Government,⁸¹ may

79. See Vienna Convention, *supra* note 9, arts. 19-23. See also Advisory Opinion, Reservations to the Convention on Genocide, 1951 I.C.J. 15.

80. The First Chamber, for instance, rejected the Bill concerning the approval of the Agreement Establishing a European Foundation (the Dutch text of the treaty is published in 1982 Tractatenblad No. 92). The First Chamber advised the Government to renegotiate the treaty. See HTK 1982/84, 17 852; Handelingen van de Eerste Kamer [Proceedings of the First Chamber] [HEK], 1984/86, 17 852; HTK 1986/87, 19 700, ch. 5, No. 113.

81. For instance, the Government submitted a proposed reservation to Parliament for approval with regard to article 13(1) of the European Convention on the Suppression of Terrorism, Jan. 27, 1977, 1137 U.N.T.S. 93; 1977 Tractatenblad No. 63; 1985 Tractatenblad No. 66. The Second Chamber amended the Government's proposed reservation by making it more absolute. Compare 1985 Tractatenblad No. 116 with HTK 1979/80, 15 971 (R 1132), Nos. 1-4.

strike them off the Bill,⁸² and may include new ones,⁸³ while the First Chamber may reject the Bill if it does not agree with the reservations as proposed therein or is of the opinion that certain reservations should be made. If the Government does not agree with the changes introduced by the Second Chamber and/or proposed by the First Chamber, it may still decide not to ratify the treaty.

Over the last twenty years, the Netherlands has attached reservations to the following twelve treaties:

1. the European Convention on the International Validity of Criminal Judgments of May 28, 1970;⁸⁴
2. the Convention on the Legitimation of Marriage of September 10, 1970;⁸⁵
3. the Convention on the Reduction of the Number of Cases of Statelessness of September 13, 1973;⁸⁶
4. the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents of December 14, 1973;⁸⁷
5. the Convention on the Law Applicable to Maintenance Obligations of October 2, 1973;⁸⁸
6. the European Convention on the Suppression of Terrorism of January 27, 1977;
7. the Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations of October 2, 1973;⁸⁹
8. the Convention on a Code of Conduct for Liner Conferences of April 6, 1974;⁹⁰

82. *See, e.g.*, the Government's proposed reservation to the Protocol Amending the Single Convention on Narcotic Drugs, 1961, Mar. 25, 1972, 1980 Tractatenblad No. 184. *Compare* 1986 Tractatenblad No. 720 with HTK 1981/82, 17 360 (R 1202), Nos. 1-3. *See also, e.g.*, certain proposed reservations to the European Convention on the Legal Status of Migrant Workers, Nov. 24, 1977, 1978 Tractatenblad No. 70; 1983 Tractatenblad No. 45. *Compare* 1983 Tractatenblad No. 45 with HTK 1979/80, 16 075 (R 1142), Nos. 1-3.

83. *See, e.g.*, the added reservation to the European Charter of Local Self-Government, Oct. 15, 1985, 1987 Tractatenblad No. 63; 1991 Tractatenblad No. 61. *Compare* 1991 Tractatenblad No. 61 with HTK 1988/89, 20 586, Nos. 5-6.

84. 973 U.N.T.S. 57; 1971 Tractatenblad No. 137; 1972 Tractatenblad No. 15; 1987 Tractatenblad No. 162.

85. 1081 U.N.T.S. 247; 1972 Tractatenblad No. 61; 1977 Tractatenblad No. 114.

86. 1081 U.N.T.S. 283; 1974 Tractatenblad No. 32; 1985 Tractatenblad No. 70.

87. 1035 U.N.T.S. 167; 1981 Tractatenblad No. 69; 1988 Tractatenblad No. 166.

88. 1056 U.N.T.S. 199; 1974 Tractatenblad No. 86; 1977 Tractatenblad No. 179; 1981 Tractatenblad No. 20; 1984 Tractatenblad No. 148.

89. 1021 U.N.T.S. 209; 1974 Tractatenblad No. 85; 1981 Tractatenblad No. 21; 1984 Tractatenblad No. 149.

90. 1979 Tractatenblad No. 177; 1980 Tractatenblad No. 165; 1983 Tractatenblad No. 100; 1987 Tractatenblad No. 130.

9. the European Convention on the Legal Status of Migrant Workers of November 24, 1977;
10. the Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters of March 17, 1978;⁹¹
11. the Convention on the Civil Aspects of International Child Abduction of October 25, 1980;⁹²
12. the European Charter of Local Self-Government of October 15, 1985.

Reservations are included in the instrument of ratification, acceptance, approval or accession because, in conjunction with that instrument, they specify precisely to what the Kingdom considers itself bound.

The Government decides whether reservations should be withdrawn. The Government submits the withdrawal of reservations to Parliament for approval.

C. Declarations (Interpretational or Otherwise)

Declarations are made in writing, but separate from the instrument itself. Declarations have no effect on the nature and scope of the obligations under the treaty and remain, therefore, distinct from the Act whereby the Kingdom declares itself bound. The declarations are not proposed in the Bill concerning approval of the treaty but in the Explanatory Memorandum or Note accompanying the Bill. Here again, first of all the Council of State may propose to delete or change the declarations proposed in the Explanatory Memorandum or Note, or to include new ones. The Second Chamber cannot itself amend the Explanatory Memorandum or Note, but it and also the First Chamber may propose deletions, amendments and inclusions, and may adopt motions to that effect. If the Government refuses to follow these recommendations, the Parliament can reject the Bill concerning approval.

In case of doubt whether a certain point of interpretation can be made in a declaration or amounts to a reservation, it is practice in the Netherlands to phrase it as a reservation and to include it in the Act of Approval. The fact that the Netherlands attached the following explanation of its reservations to the International Covenant on Civil and Political Rights may serve as an illustration:

Clarify that although the reservations [. . .] are partly of an interpretational nature, the Kingdom of the Netherlands has preferred reservations to interpretational declarations in all cases, since if the latter

91. 1979 Tractatenblad No. 121; 1982 Tractatenblad No. 11; 1990 Tractatenblad No. 118.

92. 1987 Tractatenblad No. 139; 1990 Tractatenblad No. 96.

form were used doubt might arise concerning whether the text of the Covenant allows for the interpretation put upon it. By using the reservation-form the Kingdom of the Netherlands wishes to ensure in all cases that the relevant obligations arising out of the Covenant will not apply to the Kingdom, or will apply only in the way indicated.⁹³

D. *Acceptance of and Objections to Reservations*

The Government decides whether objections should be presented to reservations entered by other States which are deemed unacceptable. Objections are made in writing but separate from the instrument of ratification. The Government informs Parliament about the objections it intends to make to reservations made by other States *en marge* of the approval procedure.

During the parliamentary debates concerning the Vienna Convention on the Law of Treaties in the Netherlands, the Government was asked whether it would submit for parliamentary approval any acceptance of and/or objections to reservations made by other parties (as indicated in Article 21 of the Convention) made after the Parliament has approved the treaty for the Netherlands.⁹⁴ The Minister of Foreign Affairs stated that with regard to reservations by other parties made after parliamentary approval of the treaty for the Netherlands, the Government decides about possible steps without prior consultation of Parliament. The Government's decision is subsequently published in the *Tractatenblad*. The Minister pointed out that the period for acceptance of or objection to reservations made by other parties is too short⁹⁵ to submit these for parliamentary approval.⁹⁶ Therefore, the Minister recommended the States-General to take an active stance in this matter and to closely monitor such reservations made, particularly by asking the Government for an explanation of its intentions whenever it is informed of reservations by other parties which the Parliament does not consider *prima facie* legally or politically correct. In the Minister's view, the Monthly Report (*Maandbericht*) of the *Tractatenblad* would offer Parliament a possibility to keep track of these reservations.

V. CONCLUDING OBSERVATIONS

Can it be said that the Government's application of the principle

93. 1978 *Tractatenblad* No. 177, at 37; UNITED NATIONS CENTER FOR HUMAN RIGHTS, HUMAN RIGHTS: STATUS OF INTERNATIONAL INSTRUMENTS, U.N. Doc. ST/HR/5, at 42-43 (1987).

94. HTK 1982/83, 17 798 (R 1227), No. 39, at 5422-23.

95. See Vienna Convention, *supra* note 9, art. 20.

96. HTK 1982/83, 17 798 (R 1227), No. 39, at 5424.

that, with a few exceptions, treaties must receive parliamentary approval before they can bind the Kingdom, is satisfactory? Is Parliament actually involved in the decision-making as intended? In my opinion, the answer to both these questions is a resounding 'yes.' . . . Has a balance been achieved, as the constitutional provisions intended, between parliamentary involvement and efficiency of government action? Has the balance not swung towards Parliament? The answers to these questions, in my opinion, must clearly be 'yes' to the first and 'no' to the second.⁹⁷

Since the 1953 revision of the Constitution, the division of powers between Government and Parliament regarding treaties has at last clearly been established. The treaty-making power has been put more under the control of the States-General.⁹⁸ This control not only concerns the approval of a treaty but also the reservations or declarations, if any, accompanying the ratification. Thus, a fair balance is achieved between the primary duty of the Government to promote the international legal order and Parliament's control over the way this duty is exercised.

97. Sondaal, *supra* note 6, at 217.

98. 1953 Constitution, arts. 60 and 62. See van Panhuys, *supra* note 1, at 543-47; see also van Panhuys, *supra* note 25, at 91-96.