

THE NETHERLANDS

1. SUBSTANTIVE ASPECTS

1.1. Distinction

1.1.1. Does your national legislation differentiate between different categories of treaties? If it does, how are they categorised?

Yes. Article 91 of the Constitution of the Kingdom of the Netherlands (hereinafter: Constitution) provides that the Kingdom shall not be bound by treaties without the prior approval of Parliament. Article 7 of the 1994 Kingdom Act on the Approval and Publication of Treaties (hereinafter: Kingdom Act) contains exemptions for certain categories of treaties from the constitutional requirement of approval.

Moreover, Article 92 of the Constitution stipulates that legislative, executive and judicial powers may be conferred on international institutions by or pursuant to a treaty.

1.1.2. What are the criteria for their classification into specific category (subject matter, scope, financial effects, etc.)? Does the form of the instrument lead to a different category of treaty?

The following categories of treaties are exempt from parliamentary approval:

- a. Treaties for which exemption from parliamentary approval was authorized by an Act of Parliament;*
- b. Treaties that solely concern the implementation of an approved treaty;*
- c. Treaties that contain no substantial financial obligations and are concluded for a period not exceeding one year;*
- d. Treaties that are confidential in the interests of the Kingdom due to exceptional circumstances of a compelling nature;*
- e. Treaties extending a treaty which is about to expire;*
- f. Treaties that amend an annex which is an integral part of an approved treaty.*

The treaties under categories b) and e) must be notified to Parliament prior to the conclusion of the treaty. Parliament may, within 30 days after the notification has been sent, require that the treaty be submitted for parliamentary approval.

1.1.3. What is the legal status of treaties not requiring parliamentary approval in the internal hierarchy of norms?

In the Kingdom of the Netherlands, treaty provisions that are binding on all persons have the same legal status as domestic law. The required procedures for approval do not create any differences between treaties in their legal effects.

1.2. Competence

1.2.1. Which authority is responsible for drafting the text of each category of treaty?

The line ministries that are competent for the subject matter can generally initiate negotiations for treaties. The process is supervised and assisted by the Ministry of Foreign Affairs which must also be informed by the competent ministry in an early stage of its intentions to conclude a treaty.

1.2.2. In the process of drafting a treaty, which authority is responsible for the assessment of the legal character and category of an agreement?

The Legal Affairs department of the Ministry of Foreign Affairs assesses whether an international agreement can be characterized as a treaty (i.e. it contains legally binding provisions and is governed by public international law) and whether parliamentary approval is required.

- 1.2.3. Which authority has the general responsibility for ratification/approval/confirmation procedures for treaties (is it generally the responsibility of the Parliament and only certain categories are confirmed by the government or vice versa)?

Once the text of an agreement has been finalized and/or the line ministry has decided that it would be desirable for the Kingdom to be bound by its provisions, it is submitted to the Council of Ministers, which decides on whether the treaty may be concluded or signed and/or approved by Parliament (Article 45 Constitution). Parliamentary approval may be tacit or express (Article 91 Constitution) and some categories of treaties may be exempt from parliamentary approval (Article 7 Kingdom Act). When parliamentary approval is required, the Council of State has to be consulted (Article 73 Constitution).

- 1.2.4. What are the responsibilities of the line ministries and the Ministry of Foreign Affairs throughout the procedure of conclusion and ratification of each category of treaty?

The line ministries are responsible for deciding whether negotiations are feasible from a policy perspective and the content of the treaty is enforceable in practice. The International Law division and the Treaties division of the Legal Affairs department of the Ministry of Foreign Affairs are involved in the drafting process and legally assess the text of the treaty. They mainly focus on the articles relating to territorial application, dispute settlement and entry into force. The Treaties division is also responsible for (verifying) translations of authentic texts of the treaty, for organising the signing ceremony (including preparing the text for signature and preparing a document of full powers), and for coordinating the procedures for parliamentary approval, ratification and entry into force of treaties.

- 1.2.5. What is the competence of autonomous regions/territories for the conclusion of a treaty?

The Kingdom of the Netherlands consists of four countries: the Netherlands, Aruba, Curaçao and Sint Maarten. Only the Kingdom has the international legal capacity to conclude treaties. Treaties may be concluded and/or ratified by the Kingdom for one or more of its constituent parts, in accordance with Article 29 Vienna Convention on the Law of Treaties. The responsibilities of each country are set out in the Charter for the Kingdom of the Netherlands. Article 41 of the Charter provides that all four countries represent their own interests autonomously. According to Article 3(1)(b) of the Charter, foreign relations are a Kingdom matter; a matter that concerns the entire Kingdom. Most treaties fall under this category.

When a treaty concerns a Kingdom matter and affects a country in accordance with Article 11 of the Charter, that country must be consulted during the preparation and implementation of a treaty (Article 27(1) of the Charter) and the treaty must be submitted to the Parliaments of the individual countries (Article 24 of the Charter).

Aruba, Curaçao and Sint Maarten will not be bound by a treaty with respect to economic and financial matters if their Governments decide that this would be detrimental to the country (Article 25 of the Charter). If the Governments of Aruba, Curaçao or Sint Maarten decide that they wish to sign a treaty of an economic or financial nature which applies exclusively to its country, the Kingdom will co-operate in the conclusion of such a treaty, unless this would be inconsistent with the partnership of the country in the Kingdom (Article 26 of the Charter). The countries may also individually decide to accede to membership of an

international organization in accordance with international agreements entered into by the Kingdom (Article 28 of the Charter).

If there is an absence of national regulations or other measures necessary for the implementation of a treaty which affects the Kingdom and this absence obstructs the ratification of a treaty, the Kingdom may provide for regulations to implement the treaty (Article 27(3) of the Charter). Furthermore, Article 43 of the Charter states that while fundamental human rights are a matter of the individual countries, the Kingdom must safeguard these fundamental human rights.

- 1.2.6. Does the Ministry of Foreign Affairs have delegated competence to conclude less significant treaties on its own, by producing full powers signed by the Minister of Foreign Affairs? If it does, what typically characterises these agreements?

The Ministry of Foreign Affairs has a coordinating role in the conclusion of treaties. In specific cases, the Ministry of Foreign Affairs may have delegated competence to conclude less significant treaties. Whether this competence may be used is decided on a case-by-case basis, in accordance with the relevant legislation.

2. PROCEDURAL ASPECTS

2.1. Procedure before conclusion/signature

- 2.1.1. What are the procedures required for the conclusion of different categories of treaties? Can a treaty be concluded through a simplified procedure? If yes, please provide a detailed presentation of the circumstances in which such procedures can be applied and describe the procedures.

Parliament must be periodically notified of the treaties that are being negotiated (Article 1 of the Kingdom Act).

Before a treaty can be concluded, the countries of Aruba, Curaçao and Sint Maarten need to be consulted on whether they wish for the treaty to be applied to them, in accordance with Articles 11 and 27 of the Charter (see 1.2.5).

Finally, the conclusion of a treaty needs approval by the Council of Ministers. The Council of Ministers decides on, inter alia, treaties that are to be approved by Parliament and on binding international agreements (Article 4, paragraph 2, Rules of Procedure of the Council of Ministers).

- 2.1.2. Do you have a procedure to review the harmonization and compliance of treaties not requiring parliamentary approval with existing national laws? What authority does the review and when?

The line ministries are responsible for assessing whether a treaty requires amendment of existing national legislation or whether new legislation is required. Instruction 8.4 of the legislative drafting instructions requires that in preparing and negotiating a treaty, negotiators will pay attention to the consequences the treaty will have for national legislation, involve the legal sections of the line ministries at an early stage of the negotiations and report on all issues that are relevant for the implementation and parliamentary approval of the treaty.

- 2.1.3. Do these procedures have one or two phases (before and/or after signature)? Can a treaty enter into force upon signature?

As was pointed out in 1.2.3, approval by the Council of Ministers is usually asked for the conclusion of a treaty as well as for starting the parliamentary approval procedure. In exceptional circumstances, for instance when a signing ceremony has a fixed date in the near future, the two approval procedures before the Council of Ministers may be separated. When

the Council of Ministers is asked to approve conclusion as well as parliamentary approval of a treaty, the assessment must be made before a treaty is signed. When the two questions are separately submitted to the Council of Ministers, the assessment must be carried out before the treaty is submitted to the Council of Ministers for parliamentary approval.

A treaty that falls under one of the categories mentioned in Article 7 of the Kingdom Act may enter into force upon signature.

2.1.4. Are there any differences in the procedures when considering multilateral vs bilateral treaties?

No.

2.1.5. Are there certain denominations of treaties, which, according to your domestic law, always imply a treaty in simplified form? (for example, "Memorandum of Understanding", "Minutes" etc.)

No; Dutch domestic legislation does not refer to treaties in simplified form. In our legislation, the term 'treaty' refers to legally binding instruments governed by international law, whatever their designation. The term 'Memorandum of Understanding' is not used in legislation, but the term is used in the legislative drafting instructions when referring to international policy arrangements that are non-legally binding and not governed by international law.

2.1.6. Is the procedure for obtaining the mandate for negotiations differentiated according to different categories of treaties? If yes, how?

No; the same procedure applies for all line ministries. The substantively primary responsible minister may mandate officials to negotiate treaties.

2.1.7. Are the signatories of all categories of treaties required to produce full powers upon signature or just some of them?

Full powers are required for the signature of most categories of treaties. There is an exception for treaties that fall under one of the categories of Article 7 of the Kingdom Act (see 1.1.2) and are concluded through the exchange of notes or letters.

2.1.8. Do you allow for electronic signature of treaties? If so, are there certain requirements concerning what type of electronic signature is acceptable? Do you accept the electronic transmission of treaties instead of the exchange of physical copies? What is the procedure?

For bilateral treaties, the Kingdom of the Netherlands currently does not allow for electronic signature or electronic transmission. The Treaties division requires a 'wet signature' and a physical copy original of each bilateral treaty, for safekeeping in its treaty vault.

For multilateral treaties of which the Kingdom of the Netherlands is not the depositary, a digital certified true copy of the treaty provided by the depositary is acceptable.

The Kingdom of the Netherlands does not allow for electronic signature of the multilateral treaties of which it is the depositary. The Netherlands keeps the original paper copies of these treaties in its treaty vault and provides digital certified true copies of these treaties via its online Treaty Database. Certified true copies in paper form are provided to parties upon request.

2.2. Procedure after conclusion

2.2.1. Does the internal procedure for expressing consent to be bound change based on different categories of treaties (i.e., ratification, approval, acceptance, etc.)? If so, please explain.

Yes, the Constitution and the Kingdom Act provide different procedures for different categories of treaties.

When parliamentary approval is required, the text of the treaty and an explanatory report on the treaty are sent to the Council of State for its advice. The report has to be presented to the Head of State and is consequently sent to Parliament for approval. Parliamentary approval may be given tacitly or expressly (Article 91 Constitution). The tacit procedure requires that for a period of 30 days after sending the treaty to Parliament, no express procedure has been requested by at least one fifth of one of the Chambers of Parliament or by the Minister Plenipotentiary of Aruba, Curaçao or Sint Maarten, if the treaty concerns Aruba, Curaçao or Sint Maarten.

The tacit procedure is used, unless:

- a treaty contains provisions that (could lead to) conflict with the Constitution, as this category of treaties must be approved by two-thirds of Parliament (Article 91, Paragraph 3 Constitution);
- a treaty requires implementing legislation; or
- the Government anticipates parliamentary discussion (for example, when a reservation is made by the Kingdom of the Netherlands with regard to a treaty).

Express approval requires an Act of Parliament to be adopted by both Chambers of Parliament.

Some categories of treaties may be exempt from parliamentary approval (Article 7 Kingdom Act). Within the categories of Article 7 (see 1.1.2), categories b) (a treaty implementing an approved treaty) and e) (a treaty extending a treaty) require prior notification to Parliament. At least a fifth of the Members of Parliament may, within 30 days of the notification, request Parliamentary approval.

2.2.2. Is entry into force of a treaty possible on the date of the signature? If yes, what are the procedural requirements that enable such entry into force?

Entry into force of a treaty on the date of the signature is only possible if the treaty does not require parliamentary approval and if the treaty does not require implementing legislation. There are no additional domestic procedural requirements for such entry into force.

2.2.3. If entry into force is not possible on the date of the signature, is it possible to use provisional application for an earlier application of such treaty?

According to Article 15 of the Kingdom Act, provisional application is possible, provided that:

- 1) the provisional application is in the interest of the Kingdom due to exceptional circumstances of a compelling nature;
- 2) the treaty does not contain provisions which are or may result in conflict with the Constitution;
- 3) the provisions that are provisionally applied are not or may not result in conflict with national legislation; and

the treaty is submitted to Parliament for approval as soon as possible.

2.3. Form

2.3.1. Do different categories of treaties require specific form when the text is prepared for signature (i.e., printing on treaty paper, sealing, treaty folder)?

Treaties are generally printed on treaty paper, put in a treaty folder and sealed after the signing ceremony. Treaties concluded through the exchange of notes/letters may differ in form.

2.3.2. Who prepares the text of different categories of treaties for signature?

The text of treaties is prepared by the Treaties division of the Legal Affairs department of the Ministry of Foreign Affairs. After a legal scrub and before the signing ceremony, the text alternates of the parties to the treaty are compared in order to prevent any substantive differences.

2.4. Implementation

How are treaties not requiring parliamentary approval implemented in national legislation in order to ensure respect of the principle of *pacta sunt servanda* in accordance with Article 26 of the VCLT?

The national legal order of the Kingdom of the Netherlands is moderately monist. Article 93 of the Constitution states that treaty provisions which may be binding on all persons by virtue of their contents shall become binding after they have been published. This means those provisions can be invoked before a domestic court without needing to be incorporated into national legislation. According to 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. Therefore, treaty provisions have direct effect and are supreme in the national legal order, provided that they are "binding on all persons".

In accordance with Article 93 and 94 of the Constitution, treaty provisions do not require implementation unless they are in conflict with national legislation or unless further implementation is necessary for the execution of the treaty. The line ministry responsible for the implementation of the treaty assesses whether implementation is required before the treaty enters into force.

2.5. Publication, Registration and Depository

2.5.1. Do all categories of treaties have to be published?

According to Article 95 of the Constitution, rules regarding the publication of treaties shall be laid down by Act of Parliament. The Kingdom Act provides those rules. All treaties have to be published, except treaties of a secret or confidential nature (Article 7, paragraph d Kingdom Act). In accordance with Article 93 of the Constitution, treaty provisions which may be binding on all persons by virtue of their contents shall become binding after they have been published.

2.5.2. If not, which categories do not need to be published and made available to the general public? Is there room for discretion?

When the treaty partners have decided and included a provision in the treaty stating that the treaty is of a secret or confidential nature, the treaty will not be published. Article 13 of the Kingdom Act provides that notification to Parliament of treaties of a secret or confidential nature shall take place subject to secrecy, unless it is in the interests of the Kingdom for notification not to take place.

2.5.3. Which authority decides whether a treaty should not be published?

During the negotiations the line ministry, in consultation with the Ministry of Foreign Affairs decides with the treaty partner if the treaty is of a secret or confidential nature. In that case the treaty will not be published and is exempt from parliamentary approval pursuant to article 7, category d, of the Kingdom act.

2.5.4. Where is each category of treaty published (Official Gazette, website, database, etc.)?

Article 16 of the Kingdom Act provides that treaties and decisions of international organisations shall be published in the Dutch Treaty Series (Tractatenblad) and that the Minister of Foreign Affairs is responsible for the publication of the Treaty Series. According to Articles 17 and 18 of the Kingdom Act, the following categories of information may be published:

- 1. The text of the treaty;*
- 2. The date of its entry into force;*

3. *The date of its expiry;*
4. *Whether the treaty is to be provisionally applied;*
5. *A Dutch translation of the treaty;*
6. *Information concerning parliamentary approval; or*
7. *Other details.*

Publishing of the first four categories in the Treaty Series is mandatory. All above categories, except for the text and translation of the treaty, are also published in the Treaty Database (<https://verdragenbank.overheid.nl/en>). Information in the Treaty Database has an official character, in accordance with the Kingdom Act.

As treaty provisions which may be binding on all persons by virtue of their contents shall become binding after they have been published (Article 93 Constitution), all treaties are published in the Treaty Series, and as a public service also in the database for national legislation (<https://wetten.overheid.nl>). Details about treaties to which the Kingdom of the Netherlands is a party are published in the treaty database.

2.5.5. Which categories of treaties are registered with the UN Secretariat?

The Treaties division of the Legal Affairs department submits bilateral treaties and multilateral treaties of which it is the depositary to the UN for registration in accordance with Article 102 of the United Nations Charter, unless the treaty is secret or confidential.

2.5.6. Where are the originals (or certified true copies) of different categories of treaties kept (e.g., MFA, authority responsible for their implementation, state archives)?

The originals of treaties from 1945 onwards are kept in a vault designated for treaties at the Ministry of Foreign Affairs. Older treaties are kept in the state archives.