proper, was a nullity or not yet in force because of the absence of unanimous ratification.[350] It misconstrued the nature of international law (in fine, ratification) referred to in the Preamble of the 1946 Constitution and incorporated by reference in the 1958 Constitution. Should the Conseil find a conflict, no law authorising ratification, adoption or implementation may be promulgated until the Constitution has been amended accordingly. Of course, it goes without saying that such a situation also implies the ability of France not to proceed further with the international agreement and withdraw.

The Conseil Constitutionnel is in effect assessing the constitutional compatibility of the substance of a treaty, even though its jurisdiction is limited technically to a review of the statute authorising ratification or implementation of the treaty.[351] To the extent a treaty is contrary to the Constitution, so too is the law introducing it into the domestic constitutional and legal order.[352] The Conseil does not examine whether the law authorising or implementing the treaty, or government acts regarding same, conform in substance to what is contemplated by that treaty.[353] Nor, when it is seized under Article 61, will it review the law as against treaties in force within the domestic legal order.[354] In other words, it is the responsibility of the executive and legislative branches to ensure due compliance with treaty obligations. The Conseil's responsibility extends only to ensuring those branches of state power act within the limits and powers prescribed by the Constitution.

From the other perspective, that of the international accord in issue, the Conseil Constitutionnel will only considers engagements of an international character creating obligations binding on an international level. As to the international character, tax and monetary conventions between France and its overseas (Polynesian) territories are not treaties within the meaning of Article 53.[355] Inasmuch as their implementation obtains by statute, the Conseil nonetheless retains jurisdiction in respect of Article 34 (legislative jurisdiction of Parliament) and Article 72 (institutional jurisdiction of the overseas possessions of France). As to internationally binding obligations, the Conseil has considered an interpretative declaration appended to a treaty by the government as a unilateral act having no binding, normative force. Because it reviews only international obligations binding France, the Conseil discounted the declaration accordingly.[356] Where the issue addresses (laws implementing) amendments to a treaty by the parties, the Conseil

[350] °92–312 DC, 2 Sept. 1992.

[351] °76–71 DC, 30 Dec. 1976; °80–116, 17 July 1980.

[352] °2010–614 DC, 4 Nov. 2010.

[353] °89–268 DC, 29 Dec. 1989. Nonetheless, the Conseil Constitutionnel will take into account other treaty obligations already binding on and in France, when assessing a treaty's overall compliance with the French Constitution: °80–116 DC, 17 July 1980.

[354] °2006–535 DC, 30 March 2006 (here, ILO Convention No. 158 and European Social Charter).

[355] °83–160 DC, 19 July 1983. See also °93–318 DC, °93–319 DC, 30 June 1993 (id.).

[356] °94–412 DC, 15 June 1999 (1999 European Charter on Regional and Minority Languages in conflict with the Constitution).

applies the doctrine of *res judicata* and will decline jurisdiction.[357] For the Conseil to assume jurisdiction, the changes to the treaty must amount to a new treaty,[358] or the revisions to the Constitution must still present a conflict with the treaty, or new constitutional provision must create an incompatibility with an extant treaty.[359] But the Conseil will not accept grounds which tend to play one constitutional provision against another. Thus an amendment to Article 74 in relation to French Polynesian territory did not create an admissible claim that it generated a reviewable (or invalid) collateral amendment of Article 53.[360] Where, however, a treaty is amended according to the internal mechanisms prescribed by that treaty, the Conseil considers that no supplementary legislative approval is necessary prior to any implementing Acts, and its jurisdiction is limited to ensuring that the modifications obtained pursuant to those prescribed procedures.[361]

Despite the interposition of a law between a treaty and its internal legal force, the Conseil Constitutionnel is supervising primarily the Executive's law-making powers drawn through the latter's foreign affairs jurisdiction. As noted above, Parliament has little effective power in matters of treaties and international agreements, which is the prerogative of the President and the government. True, international commitments which bear upon the legislative jurisdiction of Parliament under Article 34 must be the subject of a law, duly passed, in order to have domestic effect.[362] Likewise, the Conseil has held that limitations applicable on the international plane, outside French territorial jurisdiction cannot restrict Parliament's legislative powers as conferred by Article 34. But the power concerning treaties is restricted to authorising or refusing authorisation of a treaty or like compact. The legislative obligation on the government to keep Parliament informed about treaties, reservations, declarations, and so on, apply only to those instruments already in existence at the time of submission to Parliament.[363] The Executive Branch is fully free and unfettered in being able subsequently to deposit reservations, not deposit reservations, and so on, approved by Parliament, or denounce treaties, all without further parliamentary intervention. The Conseil Constitutionnel has held Parliament to have no power to instruct or direct the government to enter negotiations, or pursue a particular course in them leading to an international compact. At its highest, any Parliamentary statement to that effect is merely

[357] See e.g, °97–394 DC, 31 Dec. 1997 (relating to °92–312 and °92–308 DC, 2 Sept. 1992) and °2007–560 DC, 20 Dec. 2007 (relating to 2004–505 DC, 19 Nov. 2004); all concerning fundamental changes to the EU treaties. See also °89–258 DC, 8 July 1989 (§18).

[358] Not the case regarding the Treaty of Lisbon and the Treaty establishing a Constitution for Europe: °2007–560 DC, 20 Dec. 2007. See also e.g., °78–93 DC, 29 April 1978 (amendments to IMF structure).

[359] See e.g., °92–312 DC, 2 Sept. 1992.

[360] °93–318 DC and °93–319 DC, 30 June 1993.

[361] °78–93 DC, 29 April 1978 (law authorising increase of French share in the IMF).

[362] °70–39 DC, 19 June 1970.

[363] °2009–509 DC, 9 April 2009.

advisory.[364] And while Parliament may in principle delegate powers of negotiation and conclusion of compacts to the officials of French Overseas Territories ("DOM–TOM"), the Conseil requires it nevertheless to observe the limits imposed by Articles 52 and 53, and to retain ultimate supervision and control.[365] Thus if substantive parliamentary control over the internal application of obligations created in international instruments is limited in this way to a vote "aye" or "nay", without any input into content or scope, then the constitutional review exercised by the Conseil over the content of treaties must be understood as addressed to the Executive. If a treaty does pose inconsistencies with the Constitution, the Conseil Constitutionnel may prevent an Act of approbation from passing, but the political and legal responsibility for coordinating treaty obligations with the current constitutional settlement rests clearly with the government as a whole.

When the Conseil Constitutionnel rules on the incompatibility of a treaty (and the Act approving it) with the Constitution, the form of order follows the wording of Article 54 which recommends a constitutional amendment in order to effectuate the treaty within the French legal order. At first glance, this peculiar wording might appear to presuppose that the Constitution is better or more easily amended than the treaty, rather than sending domestic officials back to the negotiating table duly admonished. In other words, it would seem to give a priority or immutability to treaties (and perhaps international law more generally), and a malleability or secondary stature to the French constitutional order. Rather than the inverse, as is the case with the US and UK as well. Appearances can be deceiving.

It is the Constitution of 1958 which is supreme: it is at the summit of the French legal hierarchy.[366] What the Constitution authorises is permissible; what it prohibits or does not authorise, is not.[367] It is impermissible to render the constitutional order and its concept of sovereignty infirm by a treaty arrangement conferring powers on an (international) institution not emanating from the French constitutional order, or denying France a power to oppose decisions or rules of an international organ, or by depriving France the power to act on its own initiative.[368] "Sovereignty" (as in Article 13) is a national sovereignty meaning the participation of the French people in electing representative and responsible institutions for the governance of the Republic.[369] And the Constitution does not authorise the transfer of all or any part of

[364] °82–142 DC, 27 July 1982.

[365] °2000–435 DC, 7 Dec. 2000 (delegation by Parliament *ultra vires*).

[366] °2007–560 DC, 20 Dec. 2007 (regarding the Treaty of Lisbon, the constitutional substructure to the EU), and see °98–408 DC, 22 Jan. 1989.

[367] °98–408 DC (including the Preamble to the Constitution, and the domestic instruments referred to therein), and see °76–75 DC, 12 Jan. 1977.

[368] °2007–560 DC, 20 Dec. 2007. This reasoning can create a double standard between EU treaty instruments and those of general international cover: compare 85–188 DC, 22 May 1985 and °91–294 DC, 25 July 1994 (EConvHR not incompatible with the Constitution for lack of an explicit denunciation or withdrawal clause) and °2005–542 and –525 DC, 13 Oct. 2005 (ICCPR incompatible because of a lack of such an explicit clause).

[369] °76–71 DC, 30 Dec. 1976.

French sovereignty or its sovereign powers, without more.[370] Under the current constitutional settlement and subject to any change thereto, any transfer of government power and of sovereignty must be a delegation, and allow it ultimately to revert back to the Republic.[371] That is, it is for the Republic to decide who shall make rules for it and decide for it, how, and in what circumstances. Put in terms of theory, the core, the heart of normativity, lies within the national polity. And it can even be argued that inasmuch as that polity might assign away some of that sovereignty to a wider, international or transnational community, the logic of that assignment still situates the residue of power in the national polity.

Hence the Conseil Constitutionnel functions as a check and balance to the executive law-making power via international commitments. Its task extends past the merely formalistic, such as meeting publication requirements or having parliamentary approval. The Conseil assumes, after a fashion, that the government observes constitutional limits to its law-making powers. Those limits, and the power itself, arise from how social power is structured in the Constitution, and how far it is there allowed to operate on individuals. Laws which in effect change the structure or outer/inner limits of power represent a constitutional change implying the need for the consent of the governed. The Conseil Constitutionnel thus ensures that responsibility for seeking consent to any change to those limits, and the actual change to those limits, rest squarely with the political branches.

3.6 The Netherlands

On the face of the matter, a treaty or international engagement obtains legal force within the Netherlands legal system upon the assent of the Estates General. Article 91 of the Constitution provides that the (Kingdom of the) Netherlands may not be bound to treaties without that prior consent. Nor may it terminate or withdraw from an approved treaty without further parliamentary assent. That assent may be either explicit or tacit, as prescribed by statute. That legislation is the *Act of 7 July 1994 on Assent and Publication*.[372] The assent provisions were first introduced into the Constitution with the 1953 amendments. In the 1983 round of amendments, these

[370] °76–71 DC.

[371] °92–308 DC, 9 April 1992; °85–188 DC, 22 May 1988; °76–71 DC, and °70–39 DC, 19 June 1970. Hence, e.g., Constitution Arts 53–1 (international commitments on asylum and human rights), 52–2 (ICC jurisdiction); and 88–1 to 88–7 (institutions of the EU).

[372] *Rijkswet van 7 juli 1994 houdende regeling betreffende de goedkeuring en bekendmaking van verdragen en bekendmaking van besluiten van volkenrechtelijke organisaties* (1994 Stb 542) (fully, the "Imperial Act of 7 July 1994 on the asssent to and publication of treaties and the publication of decrees of international organisations"); on which see, e.g., Klabbers 1995; Brouwer 2005; van Dijk 1995, p. 349ff.

provisions were "deconstitutionalised", in the words of Klabbers, but transitional provisions maintained the procedural status quo until the new statute was passed.[373] That legal effect translates more specifically into direct applicability and supremacy. Upon publication in the relevant official Treaty Journal ("*Tractatenblad*") treaty provisions (and the regulations and orders of international organisations) are directly applicable, self-executing, according to their terms (Article 93). Treaty provisions (and the regulations and orders of international organisations) are paramount to all domestic law insofar as the two conflict (Article 94). All these provisions have their origin in the 1953 round of constitutional amendments.

Thus since 1953, the dynamics between the government and the Estates General regarding the executive's law-making power via foreign relations have been largely settled.[374] Up to that point, the interrelationships and powers of both branches in this domain were articulated primarily through constitutional convention and practice.[375] That convention and practice reflected an ongoing academic and political debate with leading schools of thought informing the position of the day.[376] Since the 1848 constitutional amendments, there had always been a constitutional requirement for parliamentary approval of certain types of treaties.[377] The question was the nature and effect of this parliamentary assent upon the legal character of treaty provisions. Opinion moved, as it might be expected, between the two poles of a parliamentary investiture of legal status, and a mere formal recognition of extant legal stature.[378] Out of this, it was for the courts to articulate and reflect the governing doctrine regarding the interplay of international law and national law. Although technically a passive player in the Netherlands constitutional construct, bound by a strict reading of the separation of powers, the judicial branch served an important function of crystallising out of the mix of policy and opinion more or less firm statements of legal position from which further development or reform could issue.[379] In particular, the courts traced out

---

[373] Klabbers 1995, p. 637. On the prior regime, see, e.g., van Dijk and Tahzib 1991, and Sondaal 1988.

[374] On the history and development of the various positions and relations, see, e.g., Brouwer 1992; Erades 1949, and Fleuren 2004.

[375] See generally, e.g., Brouwer 1992; Erades 1949; and see Erades and Gould 1961.

[376] Brouwer 1992 provides the most comprehensive and a detailed overview of the evolution to political (and legal) opinion and practice.

[377] Article 57 (1848 version): cession or exchange of territory, creating rights and obligations ("*wettelijk regten*"); Article 59 (1887 version) (id, no assent required if the law reserved to the Crown the power to ratify); Article 58 (1922 version) (all treaties, but not "other agreements" or where ratification power was likewise reserved).

[378] See Erades 1949, pp. 52–58, 60–1; 78–91 (and the cases cited therein); Brouwer 1992, pp. 45–51; 60–64; 68–80 (and cases cited therein). See, e.g., HR 18 Nov. 1901 (no domestic legal effect for an extradition treaty with Austria absent parliamentary approval) becoming HR *Wiercx* 25 May 1906, W 1908 8383, and *Grenstractaat Aken* 6 Nov. 1919, NJ 1919 371.

[379] Not considered herein is the important contribution of the Legislation Division of the Raad van State (*Conseil d'Etat*, or Council of State) which serves as the highest advisory body to the government regarding legal and constitutional issues of proposed legislation including Acts of

the defining legal features of treaty provisions within the domestic legal systems—perhaps with the additional fillip of "in spite of the constitutional debates and separation of powers".

3.6.1 Pillars of the Establishment

The Hoge Raad erected early in the first decades of the twentieth century the two central pillars of the present constitutional construct for the effects of international law—treaty provisions in particular—within the municipal legal order. The first pillar upholds the proposition that the government may create law binding on its citizens in the exercise of its treaty-making powers. In short, the foreign affairs power is a source of legislative jurisdiction, coordinate with the general legislative jurisdiction of the Estates General in Article 81, and other specific constitutional grants, such as Articles 91(2), 106 and 107. In the 1906 *Wiercx* decision setting forth that proposition, the Hoge Raad rejected arguments disputing the legal enforceability of an 1896 treaty with Germany on the reciprocal enforcement of judgments and orders because its provisions had not been specifically implemented by separate Act according to then Articles 109 and 150.[380] To require yet a further statute implementing such treaty rights notwithstanding an Act of Assent would leave Article 59 (now taken up into Articles 90 and 91) without meaning. As Brouwer notes, this recalled the pre-1848 state of constitutional affairs where the Crown exercised a far more direct and immediate power of governance.[381]

The second pillar upholds the proposition that the binding legal force of treaties within the Netherlands legal system springs from the treaties themselves as instruments of international law, and not by virtue of any domestic Act (of approval). In other words, they have an innate character of law, standing apart from and independent of the law character of domestic statutes. In its 1908 *Berne Railways Convention* decision, the Hoge Raad described the approved and ratified Convention as having legislative force, binding force, but without equating or identifying the treaty as municipal law.[382] This differentiation obtained further confirmation in the 1919 *Grenstractaat Aken* decision, where the Hoge Raad spoke of the treaty as having a dual legal effect, binding the Netherlands to Prussia as well as conferring enforceable rights and obligations on individuals.[383] The lower courts having failed to take an 1816 export-import treaty with Prussia into account

(Footnote 379 continued)
Assent and their underlying treaties: Article 73 Constitution; and see Sondaal 1988, p. 228ff, and see Sondaal 1986 and Stroink 1995, p. 299ff.

[380] HR *Wiercx* 25 May 1906; see also Erades 1949, p. 83ff, and Erades 1993, pp. 930–932.

[381] Brouwer 1992, p. 77 (referring to 33ff); also Erades 1993, p. 931.

[382] HR *Berner spoorwegovereenkomst* 1 June 1908, W 1908 8721 (see also Erades 1993, pp. 932–933).

[383] HR *Grenstractaat Aken,* 6 Nov. 1919, NJ 1919 371.

when considering a later statutory prohibition on exporting grain, their decision was quashed and remanded for reconsideration. This "dual effect", with the internationally created rights and obligations conferring a directly enforceable legal standing (to be reconciled with domestic legislation), was reiterated again in two coordinate 1934 decisions invoking the Rhine Shipping Treaty.[384]

This pillar is not, however, without its untidy complexities. First, for some time after the 1919 *Grenstractaat Aken* decision, the courts were not entirely clear whether treaty provisions were part of Netherlands law as such, or whether they had parallel force of law within the legal system.[385] Indeed, the question apparently remained live in 1937, given the focus on it by the national conference of Netherlands legal academics that year.[386] Whether or not this bewilderment can be traced, as Erades remarks, merely to semantics, the differentiation originates in the perception of what legal effect of the Act of Assent achieves.[387] On the one hand, it was arguable that parliamentary assent converted treaty provisions into domestic statutes, subject to domestic rules on normative hierarchy and statutory interpretation.[388] On the other hand, it was arguable that, because the legal effect of treaty terms originated in international law and upon ratification—not the act of Assent—their legal character was coextensive but apart from domestic legislation.[389] Judicial housekeeping in 1941 appeared to confirm the Verzijl interpretation of co-extensive domestic legal effect for international law, when the Hoge Raad refused to apply the 1905 Civil Procedure Convention to a German national because the war had terminated it according to customary international law.[390] The continued enforceability of the treaty depended upon international law, and not upon any domestic statute dealing with the treaty or the general legal consequences of war—of which there were none in any case. If treaties were part of municipal Netherlands law, such a statute would have been necessary.[391]

Second, underlying all this was the more pressing, more significant legal question of how to resolve inconsistencies between international law and municipal law within the limits of the separation of powers imposed upon the judiciary. More precisely, when normal interpretative devices failed to reconcile international and national legal rules, the courts could not apply the one without

---

[384] HR *Rijnvaartacte van Mannheim* 17 Dec 1934, NJ 1935 5.

[385] Erades 1993, pp. 933–935 (and the cases cited there).

[386] Thus Telders and Verzijl 1937.

[387] Erades 1993, p. 934.

[388] The position of Telders in Telders and Verzijl 1937. It would obviously entail little effort to convert that position into a more distinctly "dualist" model.

[389] The position of Verzijl in Telders and Verzijl 1937. Both the weight of opinion at the 1937 Conference and the historical evolution to the constitutional situation favoured Verzijl's position.

[390] HR *Hecht* 3 March 1941, NJ 1942 20. See also the clear statement to this end by the Rotterdam Court of Appeal, 21 May 1953 (1955) 2 NILR 94, and noted in Erades 1993, p. 935.

[391] The current requirement under Article 14 *1994 Treaty Assent and Publication Act* for parliamentary assent to termination does not alter this argument, applying only to the unilateral denunciation, withdrawal from, or suspension of treaty commitments by the Netherlands.

discounting or setting aside the other. But the courts had the duty to apply primary legislation[392] and had no jurisdiction to invalidate it. Little wonder then that until the 1953 amendments, this rule of recognition for international law exercised the courts' ability to seek a practicable level of (interpretative) reconciliation between treaty provisions and municipal rules. Where this appeared impossible, the two pillars would combine to give priority to the propositions of international law in question, being a limitation on national sovereignty consented to by an organ with law-making power and possessing direct normative effect.[393] This, in turn, led to the subsequent formal recognition of a third pillar, that of the supremacy of international law over national law.

Admittedly, it would be exceedingly difficult to parse the weight of the individual contributions of the courts, academics, and the political branch to this constitutional outcome. Nevertheless upon reflection, the judiciary's particular setting of these two pillars—and thereafter, the third of supremacy—seems an irresistible, foregone conclusion. It is a conclusion which follows from the separation of powers in the Netherlands. The continuing powers of the Executive Branch (the government, however, not the Crown any longer) over primary law-making—albeit through the foreign affairs domain—derives not from the international sphere, but from the particular constitutional settlement of the Netherlands. The Executive Branch stood as a legislator coordinate with Parliament. The separation of powers in the Netherlands further prevented the courts from controlling whether a parliamentary transliteration into the domestic legal system is required. The courts could not consider whether the necessary constitutional foundations were met to produce valid law, save perhaps at a very formalistic and superficial level. Insofar as any question remained on the balancing of law-making powers, it was duly left to the political organs, the government and Parliament, to sort out, as required by the separation of powers. Contrast this with the UK separation of powers, where the legislative-executive axis in the constitutional settlement had clearly and certainly sited law-making power exclusively in Parliament, whatever the international commitments and engagements of the government.

When the courts accepted the undifferentiated, coextensive law-making power of the Executive Branch on the international plane, they invited the problem of inconsistency between domestic and international rules, and thereby laid the groundwork for an amalgamation of the legal systems. (The courts were of course working without a tradition of resolute constitutional dualism inspired by parliamentary supremacy as in the UK, or clear constitutional guidance as in the US.) Unless the Estates General had a full and final say on the content of treaty obligations *qua* municipal law (whatever their status and nature in the international

[392] Articles 11 (judgments based on the law as it stands), 12 (no general legal effect of judgments), 13 (duty to deliver judgment), *Act of 15 May 1829 providing for the general terms of law in the Kingdom* (Stb 28, as amd.) ("*Wet Algemenen Bepalingen*").

[393] See, e.g., Bijz. R v C *Rauter* 19 Jan. 1949, NJ 1949 87, and *Röhrig*, 15 May 1950, NJ 1950 504. See also HR *Stop te Lobith* 25 Jan 1952, NJ 1952 125 (ministerial regulation), and CA The Hague *Van Woudenberg* 5 Jan 1951, NJ 1951 69.

domain) a collision was inevitable. Resolving that collision would require a choice of the one rule over the other. On the one hand, the logic of the situation might suggest an interpretation route, where the later rule overrides the earlier; or the more particular rule, the general. Underpinning this would be a recognition of the coherence and normative equality between the two sets of legal rules, national and international. It carried the risk however (as played out in the US) that the optic of equality would focus on the national level only. On the other hand (and for reasons which appear extremely difficult, if not impossible, to locate in the cases), the courts seemed to prefer an institutional route, which accorded primacy to internationally generated rules. Ironically, underpinning this is less a systemic unity between national and international legal systems, and more an inherent, innate dualism between the two. It supposed two legal orders with accordingly their own validity and legitimacy criteria, and thus requiring thus an institutional rule of primacy. Moreover, it would appear that the origins of the supremacy rule owe more in actuality to the persistence of *ancient regime* ideas of overarching monarchical (and thus executive) powers and status in the domestic sphere.[394] That most attention fixated upon the relation of powers between Estates General and the Executive (led by the Crown) left the issue of status of executive powers less well attended.[395] The matter of status, of place in the normative hierarchy, thus tagged along to be reconstrued and reiterated through the dominant optic and ideals of the moment. All the while, its conceptual foundations in the constitutional order grew thereby much less distinct under the encrustation of long-standing, habitual practice. Nevertheless the separation of powers, primarily along the Legislative-Executive axis (and then by extension, along the Legislative-Judicial axis) would appear to have determined or guided the development of the monistic outlook of the Netherlands legal system.

3.6.2 Parliamentary Approval

With the 1953 amendments, as carried forward into 1983 version of the Constitution, and its present status, Brouwer's conclusion is hardly disputable that there existed at last a truly formal, constitutional, recognition and confirmation of treaties as a coextensive, official source of law applicable in the Netherlands.[396] No further reason or need remained to particularise or justify the former's law-bearing character. The debates arising out the Constitution's prior stipulations for parliamentary approval were thus taken to be largely settled. The requirement for

[394] Drawing out the observations of Erades 1949 on the history of defining an equilibrium of powers on the Legislative-Executive axis in relation to treaties and foreign affairs; see, e.g., Erades 1949, pp. 10–13; 29–33; 40, 47.

[395] Hence HR *Meerenberg* 13 Jan. 1879, W 1879, 4330 speaks to grounding executive law-making powers, and thus to relations between Legislative and Executive, rather than directly to status or hierarchy.

[396] Brouwer 1992, pp. 138–139.

that approval, at first taken up into the Constitution in 1953 and later in 1983 relegated into ordinary legislation, presents that assent as a formality which confers no (additional) substantive, normative character upon treaty obligations. In effect, the Estates General functions as a gatekeeper, admitting international law into the internal legal order, but without affecting its inherent normative character. Accordingly, the Netherlands is generally considered among the most monist of constitutional systems, if not at the apex of that category.

This is not to discount entirely the Estates General in the otherwise exclusively governmental process of framing international law for application within the domestic legal order.[397] The Estates General must be regularly apprised of ongoing treaty negotiations.[398] This obligation does not extend so far as to require a disclosure of content and substance, although the government may choose to disclose to the Estates General much more for reasons of political expediency. Likewise, political expediency and the political climate may recommend that the government involve the Estates General more closely and concretely during the negotiation phase in order to ensure a smoother passage of the eventual Act of Assent with minimal public friction. In any event, being informed of treaties allows the Estates General to question the government and so exercise some control over government policy.[399] Moreover, and with more concrete effect, the Second Chamber of the Estates General may specify reservations or interpretative declarations for the treaty as part of the Act of Assent which the government will then add to the instruments of ratification.[400]

The legal effect of parliamentary assent, revealed in Articles 93 and 94, is to open treaty provisions for direct and paramount application, according to their terms, in the domestic legal system. Parliamentary assent authorises (but does not mandate) the government to ratify a treaty and thereby make it binding upon the Netherlands, pursuant to Article 91 of the Constitution. Article 93 provides that treaty provisions and the orders and regulations of international organisations which have general binding effect (are directly applicable, self-executing) are effective as such upon official publication. Article 94, the supremacy clause, provides that municipal law inconsistent with directly applicable treaty provisions and the orders and regulations of international organisations is not to be applied. The assent of the Estates General may be either explicit or tacit (Article 91(2)) as further specified in the 1994 *Treaty Assent and Publication Act*.[401] Article 7 of that Act also exempts certain kinds of treaties from the approval requirement. Briefly,

---

[397] For more on Netherlands treaty practice, see further Sondaal 1986, Besselink 1995, Besselink 1996, pp. 11–27, and Brouwer 2005.

[398] Article 1, *1994 Treaty Assent and Publication Act.*

[399] See generally, van Dijk and Tahzib 1991, p. 423, and Sondaal 1988 and Brouwer 2005.

[400] Nollkaemper 2009, pp. 328, 330 gives the examples of the 1999 Convention on the Suppression of the Financing of Terrorism (Hand.TK 2000–1 27 509 R1671°7) and the 1992 Treaty of Maastricht (in the EU context); van Dijk and Tahzib 1991, pp. 432–435 provide a number of others.

[401] Article 5, *1994 Treaty Assent and Publication Act.*

these are 6-fold: (i) a treaty already provided for by law; (ii) a treaty implementing and executing an approved treaty; (iii) a treaty for 1 year or less and imposing no significant financial obligations; (iv) a treaty required in urgent and compelling circumstances to remain secret; (v) a treaty extending an expiring treaty; and (vi) a treaty amending integral execution annexes to approved treaties.[402] Express parliamentary approval is nevertheless required for all treaties, without exception, which do or may contain provisions inconsistent with the Constitution.[403] A 2/3 majority is required to pass the Act assenting to such a treaty.[404]

The absence of parliamentary assent does not necessarily prevent the application of a treaty terms in court. This is aside from those types treaties made exempt from approval. In the first place, the *Treaty Assent and Publication Act* allows for two situations in which treaties may have domestic effect prior to passage of an Act of Assent. The first, under Article 10, covers those extraordinary circumstances of urgency when it is in the interests of the state to be bound prior to, and subject to, assent. The second, under Article 15, permits the provisional application of treaties in the interests of the Netherlands.[405] Neither option is available for treaties which may or do contain rights and obligations inconsistent with the Constitution. Moreover, provisional application does not extend to treaty provisions which do or may conflict with current municipal laws. Yet the Administrative High Court ("*Centraal Raad van Beroep*", CRvB) gave serious consideration to permitting a pension treaty with New Zealand to have internal legal effect even though the procedures of Art 15 *Treaty Assent and Publication Act* were not complied with.[406] In its view, the legal force of treaties could not be avoided for lack of compliance with domestic legislative requirements. Pursuant to Article 46 VCLT, internal constitutional rules cannot be used to avoid the bindingness of treaties. Nevertheless—and perhaps fortunately—the Court's decision did not rest on this rather extreme example of the monist, presumptive strategy and a questionable conflation of internal legal effect with international legal effect: it found no contradiction between the treaty provisions and extant Netherlands law, triggering the assent requirements.

In the second place, it would appear that the courts may be willing apply a form of the doctrine of "legitimate expectation" to give legal effect to treaties awaiting parliamentary assent. In its 1992 *BOA* decision, the Hoge Raad was prepared to give effect to the 1980 Rome Contracts Convention (EU) on the basis that the Bill assenting to the treaty was before the Lower House, and no reason was evidenced

---

[402] See further, Klabbers 1995, pp. 631–635, and Besselink 1996, pp. 19–27, also referring to additional qualifications in Articles 8, 9, 11, and 13 *1994 Treaty Assent and Publication Act.*

[403] Article 91(3) Constitution, and Articles 6, 7, 10, and 15 *1994 Treaty Assent and Publication Act.*

[404] See the examples referred to in van Dijk and Tahzib 1991, p. 427 and Nollkaemper 2009, p. 329.

[405] And for directly applicable provisions, subject to publication in the *Tractatenblad*: Articles 15(3), 17(d) *1994 Treaty Assent and Publication Act.* See also Article 25 VCLT.

[406] CRvB 27 Jan. 2006 LJN AV0802.