

27. The Netherlands (Kingdom of)

Communication transmitted to the Secretariat, 20 April 2016:

The decision to provisionally apply a treaty

With respect to the provisional application of treaties, the point of departure under the *Constitution of the Kingdom of the Netherlands* is that it shall not be bound by treaties without prior parliamentary approval (Article 91 of the Constitution).⁵⁹ The exceptions to this rule are stipulated in the *Kingdom Act on the Approval and Publication of Treaties* of 7 July 1994 (the Kingdom Act),⁶⁰ which recognises the provisional application of treaties as one such exception to the requirement of parliamentary approval. It should be noted that when no prior parliamentary approval is required for a treaty, due for instance to the nature or duration of the treaty, provisional application is possible and not subject to the rules described below, they only apply to provisional application of treaties that are in principle subject to prior parliamentary approval. In addition to the Kingdom Act, the explanatory memorandum to the bill approving the *Vienna Convention on the Law of Treaties* (VCLT), passed in 1985 (Explanatory Memorandum to the VCLT),⁶¹ provides further information on the implementation of the issue of provisional application of treaties in the Dutch legal order.

The Government may decide to apply a treaty provisionally in accordance with the terms of Section 15 of the Kingdom Act. Paragraph 1 of this Section contains the general rule that provisional application of treaties is permitted if the interests of the Kingdom so require and provided the treaty to be applied provisionally does not conflict with the Constitution or results in such conflict. Provisional application is thus subject to two conditions. First, the phrase “if the interests of the Kingdom so require” limits provisional application to situations in which the interests of the Kingdom in applying the treaty provisionally outweigh the interests of parliament in exercising its constitutional rights with respect to the prior approval of treaties. Under the applicable approval procedures, the Government is required to justify its decision to apply a treaty provisionally in the explanatory memorandum accompanying the bill approving a treaty. The practice of the Council of State, consultation of which is a mandatory phase for the approval of treaties by parliament, shows that this Council requires the Government to provide specific justification for its decision to deviate from the constitutional powers of parliament. Failing such justification, the Government will be requested to complete its explanatory memorandum accordingly.⁶² Secondly, provisional application of a treaty will be prohibited in case of conflict between the relevant treaty and the Dutch Constitution. This constitutes an absolute bar to the provisional application of a treaty.

Section 15, paragraph 2 of the Kingdom Act provides that provisional application is also not permitted for provisions contained in a treaty requiring the prior approval of parliament which conflict with statute law or result in such conflict.

⁵⁹ <https://www.government.nl/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008>.

⁶⁰ http://wetten.overheid.nl/BWBR0006799/geldigheidsdatum_27-01-2015.

⁶¹ Kamerstukken (Parliamentary Papers) II, 1982/83, 17798 (R 1227), nr. 3.

⁶² For example, Opinion of the Council of State in respect of the provisional application of the Air Transport Agreement between the United States of America, of the first part, the European Union and its Member States, of the second part, Iceland, of the third part, and the Kingdom of Norway, of the fourth part and the Ancillary Agreement to that Agreement.

In exercising its advisory functions in respect of the approval of treaties, the Council of State pays particular attention to the constitutional requirements concerning the provisional application of treaties and requires the Government to account for any omission in violation of the Constitution.⁶³ Thus, the Council of State requires the Government to abide strictly by the rule contained in Section 15, paragraph 4 of the Kingdom Act, which provides that if a treaty is to be applied provisionally, parliament⁶⁴ shall be notified of this without delay. The Council has indicated that it considers a period of almost two months between signature of a treaty and notification to parliament not in conformity with this requirement.⁶⁵ Similarly, the Government is required to submit to parliament without delay the bill approving the treaty concerned.

The termination of such provisional application

In the Explanatory Memorandum to the VCLT⁶⁶, the Government indicated that the provisional application of a treaty terminates when the treaty enters into force for the State concerned or when that State issues a notification that it will not become a party to the treaty.

In addition, the explanatory memorandum describes the situation in which the treaty concerned provides for possibility for States to declare, on an individual basis, to apply the treaty provisionally. In such a situation, it is the view of the Government that in addition to the grounds for termination mentioned above, the State concerned may also end the provisional application by withdrawing its declaration to that effect. However, it was also pointed out that (unconditional) withdrawal may not be possible under all circumstances, particularly in relation to third parties acting in good faith that would be adversely affected by such withdrawal. Obligations owed to third parties derived from the provisional application of the treaty before withdrawal of the declaration must be respected.⁶⁷ Recent practice of the Kingdom of the Netherlands has not revealed any situations giving rise to such issues.

In recent years, the Kingdom of the Netherlands has terminated provisional application of a number of bilateral social security agreements following the introduction of new legislation policies in the field of social security in 2011. This concerned, amongst others, its bilateral agreements with Botswana, Brazil and Mali, respectively. With respect to Botswana the agreement had already been ratified by the Kingdom of the Netherlands (but not yet by Botswana) and Botswana was therefore informed of the withdrawal of the ratification of the agreement by the Kingdom of the Netherlands, thus terminating provisional application of Article 5 of the agreement.⁶⁸ In the case of Brazil, neither party had ratified the agreement and the Brazilian authorities were therefore informed of the termination of provisional application in accordance with the terms of Article 25, paragraph 2, of the VCLT.⁶⁹ In respect of Mali, the agreement had already been ratified by Mali, but not by the Netherlands which informed Mali of the termination of provisional application in accordance with the terms of Article 25, paragraph 2, of the VCLT as the Netherlands no longer intended to ratify the agreement and, consequently.⁷⁰

⁶³ *Idem*.

⁶⁴ Parliament meaning the respective parliaments of the four countries making up the Kingdom of the Netherlands, *i.e.* the parliaments of the Netherlands (States General), Aruba, Curaçao and Sint Maarten.

⁶⁵ See footnote 60.

⁶⁶ Kamerstukken (Parliamentary Papers) II, 1982/83, 17798 (R 1227), nr. 3.

⁶⁷ *Idem*.

⁶⁸ Trb. (Tractatenblad; Netherlands Treaty Series) 2011, 260.

⁶⁹ Trb. (Tractatenblad; Netherlands Treaty Series) 2012, 32.

⁷⁰ Trb. (Tractatenblad, Netherlands Treaty Series) 2011, 249.

The legal effect of provisional application

According to the Netherlands, a distinction must be made between the international and the national level as regards the legal effects of provisional application of treaties. Provisional application of a treaty has legal effects under international law. In its Explanatory Memorandum to the VCLT,⁷¹ the Government indicated that the provisional application of a treaty gives rise to an (international) obligation to perform all treaty provisions, unless it is expressly stated that limitations apply. It added that this is a provisional obligation which ceases to exist upon termination of provisional application.

At the national level reference must be made to Section 15, paragraph 3 of the Kingdom Act. This section deals with the specific situation in which the Government wishes to apply provisions of a treaty which it considers binding on all persons (self-executing treaty provisions) provisionally. The section is based on Article 93 of the Dutch Constitution providing that “Provisions of treaties ... which may be binding on all persons by virtue of their contents shall become binding after they have been published.” In such instances, both the text of the treaty and the fact that it is to be applied provisionally must be published in the Netherlands Treaty Series before the provisional application may take effect. In accordance with the terms of Section 19, paragraph 1, of the Kingdom Act, provisional application of provisions “binding on all persons” would only be possible on the first day of the second month following publication of the treaty in the Netherlands Treaty Series but the Minister of Foreign Affairs (responsible under the Kingdom Act for the publication of treaties) may decide, in accordance with Section 19, paragraph 2 of the Kingdom Act, to shorten that period to the (one) day after publication in the Netherlands Treaty Series. Timely publication of the treaty in the Netherlands Treaty Series is also an aspect taken into account by the Council of State in reviewing the constitutionality of the provisional application of a treaty.

During the parliamentary examination of the bill approving the VCLT the situation in which the notification of provisional application of (provisions of) a treaty at the international level had been given in violation of the required constitutional procedures was also discussed. With reference to Article 46 of the VCLT, the Government stated that failure to comply with constitutional procedures could not be invoked as a ground invalidating the State’s entering into a legal obligation at the international level.⁷²

[Reference to the practice of the European Union:]

[A]s a Member State of the European Union (EU), the Kingdom of the Netherlands participates in the so-called “mixed agreements” concluded by the EU and its Member States and another (third) State. Such agreements may also provide for provisional application by the EU (and the third State) pending completion of the national approval procedures in each individual Member State, which may take considerable time. Provisional application of mixed agreements by the EU is necessarily limited to the topics falling under EU competence.⁷³ Such provisional application by the EU also binds the Kingdom of the Netherlands as a Member State of the European Union, which takes effect upon notification by the EU of the completion of its internal procedures (relevant EU Council Decisions allowing for provisional application), indicating the parts of the agreement that will be provisionally applied and the deposit of the instrument of ratification by the other (third) State.

⁷¹ Kamerstukken (Parliamentary Papers) II, 1982/83, 17798 (R 1227), nr. 3.

⁷² Kamerstukken (Parliamentary Papers) I, 1983/84, 17798 (R 1227), nr. 44a, p. 5.

⁷³ Since mixed agreements largely cover subject matter falling under EU competence, in practice this means that a vast majority of its provisions are applied provisionally.