IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD IN MBABANE **CASE NO. 77/2022.**

In the matter between:

British American Tobacco Swaziland (Pty) Ltd	Appellant
And	
The Minister of Finance	1st Respondent
The Attorney General	2nd Respondent
The Commissioner General, Eswatini Revenue Authority	3rd Respondent

Neutral Citation: (British American Tobacco Swaziland (Pty) Ltd vs The Minister of Finance, & Two Others))[2022]SZSC 50. (30th November 2023)

Coram : SP Dlamini, MJ Dlamini, SJK Matsebula, JJA; MJ Manzini and LM Simelane AJJA

Heard : 11 May 2023

Delivered : 30 November 2023

International Agreements: Ratification of – How incorporated – Self-executing treaties - Exceptions to (a) WHO FCTC, (b) SADC Protocol (c) SACU – Allegedly incorporated by the Commerce and Excise Act 1971 and GATT Act 1948.

Constitutional Law: Section 19, 20 and 32 – Alcohol and Tobacco Levy Act, 2019, validity of – Act alleged to be in conflict with the Constitution and the international trade agreements – Act alleged to be irrational, arbitrary and unlawful.

Supremacy of municipal law over unincorporated international agreements -Appeal dismissed.

JUDGMENT

M. J. Dlamini JA

Introduction

[1] This appeal ensues from an application of the Appellant which was dismissed with costs by the High Court in a judgment delivered on 29 September 2022. The Appellant appeals from that judgement on five grounds covering some 22 pages and heads of argument covering over 80 pages. It is not proposed to deal with each ground of appeal. The five substantive grounds of appeal spread over several subdivisions as follows –

1. The Court erred in holding that the appellant does not have standing to seek relief based or founded on the breach of the international law agreements set out below and the Constitution.

2. The Court erred by not finding that there is conflict between the Act and Eswatini's international trade obligations and domestic legislation which renders the Act irrational, arbitrary and unlawful.

3. The Court erred in holding that the differentiation between importers and local manufacturers is rational on the basis that a country has the prerogative to 'encourage the setting up of local businesses'.

4. The court erred in holding that "*there is ... no suggestion or material before this Court to indicate that these [international agreements] became part of our domestic law before the provisions of Section 238 (4) of the Constitution came into effect in 2005.*" (Judgment, p.25 para 22).

5. The Court erred in finding that the international agreements relied upon by the Appellant were not incorporated into domestic law via the C & E Act and the GATT Act (Judgment, p.28 para 29).

6. The Court erred in (nevertheless) finding that 'the fact that the [C & E Act] adopts or incorporates only some specified aspects of the agreement' is a strong indication that 'Parliament did not, by this Act, intend to enact the whole SACU Agreement into our internal law' (Judgment, p30 para 25) because there 'is not a wholesale adoption or incorporation of the agreement[s]'.

7. The Court erred in holding that because the international agreements were not incorporated into domestic law (which is denied), they play no role in adjudicating the constitutionality of the Act.

8. The Court erred in holding that the Act falls within the exception in Article XVIII of the GATT (Judgment, p37 para 31).

9. The Court erred in accepting that the Government has free reign to apply charges in order to afford protection to domestic production.

10. The Court erred in holding that the differentiation between importers and local manufacturers is rational on the basis that a country has the prerogative to 'encourage the setting up of local business' (Judgment, p.36 para 31).

11. The Court erred in its reasoning and should have held as follows: "31.1 to 31.5" inclusive (p.19 of Notice of Appeal).

12. The Court erred in holding that the differentiation between imports and locally produced goods does not amount to discrimination because: '32.1 to 32.4' inclusive (p.20 of Notice of Appeal).

13. The Court erred in holding that the levy limits neither section 19 (1) nor 32 (1) because: '34.1 to 34.3' inclusive (p.21, Notice of Appeal).

[2] In his answering affidavit, the 1st Respondent states:

9, The World Health Organisation (WHO) to which we are a member is seriously concerned about the harmful effects of tobacco, developed a regulation strategy to address this harmful and addictive substance by formulating the **WHO Framework Convention on Tobacco Control**

10. According to the said treaty it is emphasised that the tobacco epidemic is a global problem with serious consequences for public health.

11. In terms of article 6 of the WHO Framework our country is obliged to impose price and tax measures to reduce tobacco consumption. The applicant cannot therefore argue that their right to have more profits is protected by section 19 of the Constitution when the very section makes exception to that right per section 19(2).

12. Article 8 of the WHO Framework Convention on Tobacco Control (infra), recognises that exposure that exposure to tobacco smoke causes death, disease and disability, and asks countries to adopt and implement legislation that provides protection from second-hand smoke.

13. Again, the Applicant cannot claim that its **section 32 (1)** constitutional right is being violated when one considers the effects of smoking which has a serious effect on the health budget of the country which budget has to be sustained by taxes. This is clearer when reading **section 59 (2) and (4)** and **section 60 (8)** of the Constitution coupled with the **Swaziland Revenue Authority of 2008 per section 4 (1) and (2) (a).**

14. The argument on **section 32(1)** of the Constitution must also be dealt with and understood in the context of **Article 18 (2) (a) and (d) and 25 (2)** of the **SACU Agreement** read with **Article XX** of the **General Agreement on Tariffs and Trade Agreement** (herein referred to as **GATT**).

19. Sin tax on tobacco (and alcohol) are non-distortionary which have a dual benefit of

    (i) Raising fiscal revenue,

    (ii) And reducing health hazard associated with tobacco (and alcohol) diseases.

"25. It must be specifically stated that in proposing the said Levy, the country was particularly concerned about the harmful effects of tobacco and wanted to curb the scourge of reliance on tobacco. This was the primary motivation and it went ahead to produce the Bills. The treaties were not the source of this concern but the WHO Convention (Annexure 'A') on smoking promulgated later than all the treaties the Applicant has referred to, fortified

our stand. The Applicant cannot choose one treaty over the other, but the matter must be dealt with holistically if there is a perceived conflict. The Regulatory Authorities of the treaties and conventions should be approached instead of coming to the High Court". (My emphasis)

"26. The process of levying tobacco products started around 2012 and in all the Bills that have been attached by the Applicant, they have been given an opportunity in having their objection heard in terms of the Constitution. The fact that their views were not upheld does not mean that Parliament acted irrationally." (My emphasis)

"29. After several Bills submitted by the 1st Respondent Minsters to Parliament, the levy Rate was settled at 7% for imports and 2% for locally manufactured tobacco products by Parliament. The Bill was debated by both Houses…The Houses took into account the recommendations of the Portfolio Committee that had received the objections and letters from the Applicant and employers' federation…The Applicant should have intervened before the Bill was presented to the House of Assembly after the portfolio committee finished taking submissions…" (My emphasis)

[3] From the outset in his answering affidavit First Respondent points squarely at WHO FCTC as the prime source of the Act. Any resulting revenue would be welcome:

"3. Smoking is incredibly harmful to the human body. Scientific evidence, which has been confirmed by the World Health Organisation (hereinafter called WHO) and accepted by the government shows that smoking is bad for your health. Smocking affects your lungs, heart and blood circulation. A smoker has increased chances of getting cancer. Further, it causes red eyes, bad breath and stained teeth coupled with being infected with gum deceases.

It can cause male impotence or woman infertility. If you are pregnant you are more likely to suffer miscarriage, still birth and illness.

4. The tobacco plant contains an addictive drug called nicotine which is found in cigarettes and tobacco products and its addictive nature is similar to that of heroin and cocaine.

5. Smoking harms every organ in a human body and it weakens the immune system. Smokers are at high risk of developing pneumonia and other airway infections like COVID–19.

6. Those staying with smokers are in a similar danger zone as the actual smokers. Second hand smoke (also called environmental tobacco smoke, involuntary smoking, and passive smoking) irritates the airways and has immediate harmful effects on a person's heart and blood vessels. Being exposed to second hand smoke slows the growth of children's lungs and can cause them to cough, wheeze, and feel breathless.

7. There is no proven health benefit to smoking. There is no safe tobacco product.

8. The country is faced with the COVID-19 pandemic and one of the human organ that it effects are the lungs, which tobacco products are targets. The country is to expand more revenue to buy ventilators to treat our citizens. It is scientifically proven the tobacco products do not cause COVID-19, but when it finds the lung damaged, the end result is fatal.

9. The World Health Organisation (WHO) to which we are a member is seriously concerned about the harmful effects of tobacco, developed a regulation strategy to address this harmful and addictive substance by formulating the WHO FRAMEWORK CONVENTION ON TOBACCO CONTROL, attached here as 'A'.

10. According to the said strategy it is emphasized that the tobacco epidemic is a global problem with serious consequences for public health".

[4] Third Respondent, in support, raised the following pertinent considerations:

"10 Is it unconstitutional and irrational (in relation to constitutionality) for Parliament to introduce a law aimed at controlling the consumption of *inter alia* cigarettes?

11. Is it unconstitutional and irrational (in relation to constitutionality) to impose a levy to assist the Government in its increased health care costs caused by the harmful effects of cigarettes?

12. These questions must be answered in the negative with specific reference to the Applicant's reliance on constitutional provisions.

13. When considering the constitutional provisions relied upon by the Applicant in support of its application regard must be had to the following:

13.1. Cigarettes are harmful to the health of humans. This is stated on the product itself. The Applicant therefore acknowledges that the product is harmful. The Applicant brings this product in its final form and sells it to emaSwati.

13.2. Government has committed to limiting and preventing the spread of tobacco usage among its people over a number of years.....It needs to take steps that those who had stopped smoking do not start smoking again.

13.3. Most importantly, Government seeks to protect and promote public health in eSwatini, which is of national concern.

13.4. These objectives remain the focus of Government and must be borne in mind when assessing the validity of the impugned provisions.

13.5. (Reference is made to McLachlin CJ in the Canadian case **Attorney General vs JTI –MacDonald Corp** 2007 SCC 30 at para 9:

> 'Tobacco is now irrefutably accepted as highly addictive and as imposing huge personal and social costs. We know that half of smokers will die of tobacco-related diseases and that costs to the public health system are enormous. We also know that tobacco is one of the hardest addictions to conquer and that many addicts try to quit time and time again, only to relapse'.

13.6. Eswatini as a country has over the years tried to deal with the effect of Applicant's product which has harmful effects like Tuberculosis (TB) and other lung diseases… Eswatini as a country has had to go through great extents taking care of the sick at the tax payers' cost to the extent that a TB Centre was built in Eswatini…

13.7. All these aspects have to be considered by the Eswatini Government when making its laws and policies. This law was no exception. It does not offend constitutional imperatives as shown above."

[5] On the question of the necessity for the Act, 3rd Respondent in his opposing affidavit observes:

> "13.2 Government has committed to limiting and preventing the spread of tobacco usage among its people over a number of years. This is in response to growing concerns not only in eSwatini, but around the World about the extremely harmful effects of tobacco on people who consume it and those exposed to secondary smoke. As such, Government needs to stem and prevent the growing incidence of tobacco

usage... It needs to take steps that those who had stopped smoking, do not start smoking again.

13.3. Most importantly, Government seeks to protect and promote public health in eSwatini, which is a national concern.

13.4. These objectives remain the focus of Government and must be borne in mind when assessing the validity of the impugned provisions.

13.5. I draw attention to a Canadian case ([1]). "The remarks of McLachlin CJ are apposite:

> 'Tobacco is now irrefutably accepted as highly addictive and as imposing huge personal and social costs. We now know that half of smokers will die of tobacco-related diseases and that the costs to the public health system are enormous. We also know that tobacco is one of the hardest addictions to conquer and that many addicts try to quit time and time again only to relapse'.

13.6 Eswatini, as a country, has over the years tried to deal with the effect of the Applicant's product which has harmful effects like Tuberculosis (T.B) and other lung diseases.

23. The WHO FCTC reaffirms the right of all people to the highest standards of health. The WHO FCTC represents a paradigm shift in developing a regulatory strategy to address addictive substances, in contrast to previous drug control treaties. The WHO FCTC asserts the importance of demand reduction strategies as well as supply issues.

24. The WHO FCTC was developed in response to the globalization of the tobacco epidemic. The spread of the tobacco epidemic is facilitated through a variety of

[1] **Attorney – General v JTI – McDonald Corporation** 2007 SCC 30 para 9.

complex factors with cross-border effects, including trade liberalization and direct foreign investment.... The core demand reduction provisions in the WHO FCTC are contained in articles 6 – 14.

29.2 The tobacco levy is on point. It is not arbitrary, nor does it 'unjustifiably discriminate'. In the event the law discriminates, then the reason for such discrimination is justifiable." (My underlining).

[6] In the result, 3rd Respondent submits that the application founded on breach of international agreements is without merit. *"There has been no such complaint by any of the co-signatories of the Agreements. For the record: all the member states of SACU are aware that eSwatini has enacted the Tobacco Bill."* In the absence of any satisfactory explanation why the co-signatories have not complained, there may well be a reasonable conclusion that the Appellant's complaint based on breach of the trade agreements is indeed without merit.

[7] In the Constitutional Court of Uganda case, Constitutional Petition No. 46 of 2016,[2] a petition brought by "a renowned company dealing in tobacco products," challenging the Tobacco Control Act No. 22 of 2015 of Uganda, Justice Kenneth Karuru stated as follows:

> "Dr. Scheilla Ndyanabangi annexed to her affidavit in support of the respondents' reply to the petition a report authored by WHO titled WHO *Global Report Mortality Attributable to Tobacco,* at page 4 of that Report, it sets out in summary the burden of tobacco as follows:-
>
> > 'Tobacco is the only legal drug that kills many of its users when used exactly as intended by manufacturers. Direct tobacco smoking is currently responsible for the death of about 5 million people across the world each year with many of these deaths occurring prematurely. An additional 600,000 people are estimated to die from effects of second-hand smoke. Tobacco kills more than tuberculosis, human immunodeficiency virus/acquired immuno-deficiency syndrome (HIV/AIDS) and malaria combined. In the next two

[2] **British American Tobacco Ltd** *(Petitioner)* vs. **Attorney General, Center for Health, Human Rights and Development** *(Respondents)* dated 28 May 2019, at p. 47

> decades, the annual death toll from tobacco is expected to rise to over 8 million, with more than 80% of those deaths projected to occur in low and middle-income countries. If effective measures are not urgently taken, tobacco could, in the 21st centenary, kill over I billion people.'"

[8] In Petition No. 143 of 2015, in the Constitutional and Human Rights Division, the Petitioner, **British American Tobacco Kenya Ltd** sued the Respondents, **Cabinet Secretary, Tobacco Control Board and Attorney General** challenging the constitutionality of Tobacco Control Regulations, under Legal Notice 169 of 2014 of Kenya. In that case the Petitioner *"alleged that substantially all of the Regulations . . . as well as section 7 of the Tobacco Control Act, violate its constitutional rights to,* ***inter alia****, nondiscrimination and the right to property."* The suit was unsuccessful as was the result in the Ugandan case mentioned above. In para. 145 of the Petition No. 143 case, the Court cited from **State of Kesata and Another vs N.M. Thomas and Others,** 1976 AIR 490, 1976 SCR (1706), the following excerpt:

> "The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position and the varying needs of different classes of persons require special treatment. The Legislature understands and appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based upon adequate grounds. The rule of classification is not a natural and logical corollary of the rule of equality. Equality means parity of treatment under parity of conditions. Equality does not connote absolute equality. A classification in order to be constitutional must rest upon distinctions that are substantial and not merely illusory. The test is whether it has a reasonable basis free from artificiality and arbitrariness embracing all and omitting none naturally falling into that category."

[9] The **Record**, pp 738 – 753, shows that on 16 May 2019, the Alcohol and Tobacco Levy Bill No. 6 of 2019 was presented at Senate as a 'money bill' and thoroughly debated by Senators. Unfortunately, the larger part of the submissions is in the vernacular. Even the English part is not without some challenges. In introducing the Bill, the Minister of Finance (the 1st Respondent) stated as follows:

> "In April 2012, the Government of eSwatini introduced value added tax in the place of sales tax. This resulted in one standard rate of 14% . . . 15% applied in all goods and tobacco products. The Sales Tax Act of 1983, as amended, . . . the rate of 20% and 30% on locally produced and imported alcohol and tobacco products respectively. The Ministry realized that there would be a revenue loss to Government from the promulgation of the VAT Act of 2011, and prepared the Alcohol and Tobacco Levy Bill to . . . the revenue loss. The Bill was submitted to Cabinet in 2012. However, when the Bill was debated in Parliament it was not approved on the basis that the stakeholders argued that VAT is collected a multiple stages, hence the revenue loss was not going to be realized. However, after an assessment by the Ministry it is reflected that there has been a loss of revenue for the Government as a result of lower VAT rates on this products. The Ministry proposes a rate of 7% on imported alcohol and tobacco and 2% on locally produced alcohol. The proposed rates on the levy are much lower than the differential between the 13% rate and the sales taxes in the current 15% VAT rates. So importers will effectively pay 25% … instead of 30%. . . ."

[10] On the face of the foregoing account, the impression may indeed be created that the primary purpose of the Bill was revenue generation, which cannot be entirely discounted. But there were other equally important reasons for the Bill. Some revenue would be generated and spent in supporting the public health sector as the Ministry explained:

> "Imposition on the lower tax and the products resulted in living [?] a loss to government, while companies increased their profits. As a way of recruiting (recouping?) the lost revenue due to the rate difference between general sales tax and VAT, the Ministry proposes to introduce this levy. This levy would also form as an act to discourage the consumption of the same products to the battlement (?) of the country's health position. There is a number of source economic costs, source to the use of these products that will increase health costs, loss of productivity due to absenteeism, domestic violence and road accidents. This cause an additional strain on Government spending and health care. By introducing the levy, Government will generate revenue that would contribute to its financing of this health care. Government is cognizant of the effect the levy would have on the price of products which might result in an increase of smuggling."

[11] Among the Senators who contributed to the discussion was the then Deputy Prime Minister [Senator Themba Masuku] who presented in siSwati stating that he fully

supported the Bill as he had participated in the development of the Convention (on the Tobacco Control) when he worked for the United Nations. He said that his participation in the Convention opened his mind on the diseases associated with tobacco consumption. He would be happy if the 7% levy was raised.

International Agreements

[12] Brownlie writes: *"Ratification involves two distinct procedural acts: the first is the act of the appropriate organ of the state which is the Crown in the United Kingdom, and may be called ratification in the constitutional sense; the second is the international procedure which brings a treaty into force by a formal exchange or deposit of the instruments of ratification. Ratification in the latter sense is an important act involving consent to be bound."*[3] And *"The provisions of a treaty determine the manner in which and the date on which the treaty enters into force. Where the treaty does not specify a date, there is a presumption that the treaty is intended to come into force as soon as all the negotiating states have consented to be bound by the treaty".*

[13] Okoye writes of the British system:

> *"At least four rules are to be found for the implementation of international agreements, in the United Kingdom and the Commonwealth countries which are monarchies.*
>
> *(1) The negotiation and conclusion of international agreements is an exclusive prerogative function of the Queen and her Ministers.*
>
> *(2) The Crown may have, either under the prerogative or under statute, an existing power to implement all the provisions of a treaty or international agreement, which has been concluded; but failing such power, legislative action by Parliament is necessary to the implementation of the agreement. In*

[3] Ian Brownlie, **Principles of Public International Law**, Second Edition (1973) p 586, 590

most Commonwealth countries such legislation is necessary where implementation requires a change in the existing law, or an extension of the powers of the Crown beyond those already possessed by it, or creates a direct or financial obligation upon the country.

(3) . . . . .

(4) *Legislative sanction or approval by Parliament of a treaty or international agreement does not constitute ratification in the technical sense, even though the term 'ratify' may be used per incuriam in the Act. Ratification of a treaty is an exclusive function of the Queen.*"[4]

[14] Starke writes: [5]

"The effect of signature of a treaty depends on whether or not the treaty is subject to ratification. If the treaty is subject to ratification, signature means no more than that the delegates have agreed upon a text and are willing to accept it and refer it to their Governments for such action as those Governments may choose to take in regard to the acceptance or rejection of the treaty... Where a treaty is subject to ratification, it is sometimes expressly stated in the treaty or in some related exchange of notes that, pending ratification, the instrument is to operate on a provisional basis as from the date of signature as with the Japan-Australia Trade Treaty of July 6, 1957. On the other hand, it is thought that signatory States are under an obligation of good faith to refrain from acts calculated to frustrate the object of the treaty. . . . The final stage of the treaty-making process is the actual incorporation, where necessary, of the treaty provisions in the municipal law of the States parties, and the application by such States of these provisions, and, also, any required administration and supervision by international organs." (My underlining)

[15] Dugard: [6]

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[4] Felix Chucks Okoye, **International Law and the New African States, (1972)** pp 31-32,
[5] JG Starke, **Introduction to International Law,** 6th Edition (1967), pp. 352 – 354, 362
[6] John Dugard, **International Law,** A South African Perspective 3rd Edition,(2005) p. 62

"The proviso to s 231 (4) is bound to create problems as it introduces the concept of self-executing treaties into South African law. The provisions of a treaty approved by Parliament, but not incorporated into municipal law by Act of Parliament, that are 'self-executing' become part of municipal law unless inconsistent with the Constitution or an Act of Parliament. Whether the provisions of a treaty are self-executing or not has troubled the courts of the United States for many years. Now, South African courts will be required to decide whether a treaty is self-executing in the sense that existing law is adequate to enable the Republic to carry out its international obligations without legislative incorporation of the treaty or whether it is non-self-executing in which case further legislation is required. No general guideline can be given in this matter."

Self-executing treaties

[16] On this topic, Henkin *et al* observe [7] with reference to **Aerovias Interamericanas de Panama S.A. vs. Board of County Commissioners of Dade County, Florida,** 197 F. Supp. 230 (1961) that in rejecting defendant's argument that the Convention was not self-executing and therefore not enforceable in the absence of implementing legislation by Congress, the District Court (Lieb, D. J.) stated (197 F. Supp. at 245 - 48):

'Whether a given treaty is 'self-executing' or requires special implementing legislation in order to give force and effect to its provisions, through the aid of the Courts, presents primarily a domestic question of construction for the Courts, but it is difficult to extract any clear principle for judicial guidance from the cases discussing this subject.

'A careful study of the decisions dealing with this problem indicates, however, certain recurring factors which were considered by the Courts to be controlling in the ultimate solution of this problem.

'Where a treaty is incomplete either because it expressly calls for implementing legislation or because it calls for the performance of a particular affirmative act by

[7] L. Henkin, RC Pugh, O Schachter and H Smit, **INTERNATIONAL LAW, Cases and Materials** (1982), 160-1

the contracting sovereigns, which act or acts can only be performed through a legislative act, such a treaty is for obvious reasons not self-executing and subsequent legislation must be enacted before such treaty is enforceable by the courts,...

'Inasmuch as treaties calling for expenditure of funds are ineffective without an accompanying appropriation, they are uniformly considered to be not self-executing.

'On the other hand, where a treaty is full and complete, it is generally considered to be self-executing by the courts, especially when the treaty is concerned with granting equal treatment to aliens in the field of commerce and trade between the signatory powers to such treaties. . . .

'A treaty, providing that *no higher or other duties shall be levied* upon goods imported in the vessels of one party to the treaty than upon those imported by the other party, was considered by the Court of Customs Appeals... The Court held said provisions to be self-executing and did not require implementing legislation in order to give them effect...

'Finally, treaties which contain the so-called *most favoured nation* clause are uniformly held to be self-executing'. (Underlining added)

[17] Dugard writes: [8] *"Where an agreement is of 'a technical, administrative or executive nature' it binds the Republic on signature without parliamentary approval, but must be tabled in the National Assembly and the National Council of Provinces within a reasonable time . . . . While it is not difficult to identify an international agreement subject to ratification or accession, in practice, it may prove difficult to identify an agreement of a technical, administrative or executive nature which comes into force on signature alone."* These agreements are generally considered as self-executing.

[18] Section 238 does not tell us what treaty is to be understood as self-executing. I understand subsection (3) to be providing that the intervention of Parliament is not necessary for the treaty to be enforceable at local level where the treaty is of a 'technical' nature. The determination is therefore left to judicial interpretation in the light of persuasive authorities from related and congenial jurisdictions such as the Commonwealth, including the United States. The core problem is when does a treaty not require legislation for its

[8] Dugard pp. 408, 409

domestic enforcement? Treaties rarely carry an express provision to this end. It is the terms of the treaty which must be considered and not just what the executive says was intended by the provisions of the treaty in the absence of definitive legislation.[9] Of the United States, it is said:

> "A treaty is primarily a contract between two or more independent nations, and is so regarded by writers on public law. For the infraction of its provisions a remedy must be sought by the injured party through reclamations upon the other. When the stipulations are not self-executing, they can only be enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by congress as legislation upon other subject. If the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent, they have the force and effect of a legislative enactment. Congress may modify such provision, so far as they bind the United States, or supersede them altogether". [10] (My underlining)

Incorporation

[19] The domestication of an international agreement is by no means a simple, uniform process. The Diplomatic Privileges Act 1968 is one example of a domesticated international treaty/convention. It is not a wholesale incorporation, but specific sections/articles or provisions of the original treaty have been enacted into law for the Kingdom. It is true that section 238 (4) does not elaborate how the domestication must occur. Appellant submits that incorporation of a treaty, such as SACU, into domestic law needs not be of the entire original treaty: it is enough, so Appellant argues, that "the customs and excise duties prescribed in terms of the SACU agreement form part of Eswatini domestic law because they are enacted into law in the C & E Act, 1971 particularly in the schedules to that Act, by virtue of section 47 (1): The section reads:

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[9] Okoye (p37) adds that some inter-governmental agreements or conventions of a technical or administrative character usually do not require implementation by legislation. Those agreements tend to be self-executing: "In theory, ratification is the approval by Head of State or Government of the signature appended to the treaty by the duly appointed plenipotentiaries". Starke (p. 353) says "Some treaties make signature subject to 'acceptance' or 'approval', a simplified form of ratification." Starke p356.

[10] L. Henkin *et al,* **International Law**, Cases and Materials (1980), 163

"47. (1) Notwithstanding the date of commencement of this Act the Schedules to the Customs and Excise Act, No. 91 of 1964 of the Republic as amended from time to time, published in English prior to the commencement of this Act shall *mutatis mutandis* be deemed to be the correspondingly numbered Schedules to this Act, and the provisions thereof shall be deemed to have come into force respectively on the dates on which they came into force in the Republic, and any assessment or payment made prior to the commencement of this Act shall be deemed to have been lawfully made if it would have been authorized by this Act had this Act been in force on the date it was made.

(2) Without prejudice to the generality of subsection (1), a reference to the Republic in any such Schedule shall be construed as a reference to Eswatini and a reference therein to a provision of the Customs and Excise Act, No 91 of 1964 of the Republic shall *mutatis mutandis* be construed as a reference to a corresponding provision of this Act.

(3) The Minister may amend the Schedules in their application to Eswatini by notice in the Gazette."

[20] Generally speaking, it is true that the entire Vienna Convention on Diplomatic Relations, 1961, could have been adopted into law in eSwatini in 1968. But what actually happened in the Diplomatic Privileges Act 1968 provides a lesson not to be taken for granted. The Vienna Convention was not wholly adopted, instead only about twenty articles of the Convention were adopted and made law in eSwatini. Section 3 of the 1968 Act reads: *"Subject to this Act, articles 1, 22, 23, 24, and 27 to 40 of the Vienna Convention shall have the force of law in Eswatini and references therein to the receiving state shall be construed as references to the Government of Eswatini." The Vienna Convention on Diplomatic Relations, 1961* is annexed as First Schedule. The Convention has 53 articles. In my view, if the Convention was not incorporated in its entirety, then it was incorporated to the extent of section 3 of the 1968 Act. In 1968 Parliament was specific on what it wanted to achieve; to that end an 'Act' was passed.

[21] One would then wish to know whether the section 47 (1) referred to by the Appellant could be equated to an 'Act'. Appellant would say the Diplomatic Privileges

Act 1968 provides one way or mode of domesticating a treaty; it is by no means the only mode of doing so. It is enough if the treaty or part of it or reference to it, is contained in an Act of Parliament – even an Act dealing with something very different or even unrelated to the treaty in question. In this regard, Appellant's counsel states in the *Note*:

> "7. BATS need not establish that the entire SACU agreement has been enacted into domestic law. BATS' case is simply that the customs and excise duties prescribed in terms of the SACU agreement form part of Eswatini domestic law because they are enacted into the C&E Act, particularly in the schedules to that Act by virtue of section 47(1). The schedules to the C&E Act are effectively the end product of the international agreements in issue and bind Eswatini to the tariff commitments made under those international agreements at the domestic level. The C&E Act and the schedules are domestic legislation. The schedules determine, among other things, what customs and excise duties Eswatini is permitted to charge on goods imported into or manufactured within Eswatini. As appears from the schedules that applied at the time of BATS' replying affidavit, the schedules to the C&E Act reflect a *'free'* rate of customs duty if goods originate within the SADC and impose uniform excise duties in the common area."

[22] Section 47 (1) of the C & E Act adopts and makes part of the law of eSwatini certain South African law schedules. The section provides in part that the schedules sought to be domesticated "....shall *mutatis mutandis* be deemed to be the correspondingly numbered Schedules to the [C & E] Act." I agree with BATS' argument above that what matters here is not the entire South African Act but what of that Act has been made part of eSwatini law. Appellant asserts under footnote 5 at p.4 of their Note for Argument: *"The Schedules maintained by South Africa contain the tariffs by which the Member States under the GATT and the SACU agreement have bound themselves"*. Appellant continues in the said *Note*:

> "8. These schedules are living documents and are amended to reflect the position under the international trade agreements that pertain at any particular time. **Whenever excise duties prescribed under the SACU agreement are adjusted, those adjustments are reflected in the schedules to the C & E Act.** If the *'free'* rate of customs duty for SACU Member States under Article 18 of the SACU agreement were ever to change, this would be reflected in

> the schedules. The most recent schedules that apply to customs and excise duty on tobacco are attached as **A** and **B**. . . . . The increase in excise duty was reflected in the schedule to the SA C&E Act, which is deemed to be the corresponding schedules under the Eswatini C & E Act." (My emphasis)

[23] It is Appellant's argument then that it is not so much the application of the international agreements as such but the extent to which the international agreement relied upon (by the Appellant) "forms part of our domestic law". The relevant extent is the extent to which domestication has taken place. In the result Appellant is not relying for its claim on a treaty law as such but only the extent to which the treaty has been domesticated.[11] In my opinion, section 47(1) could domesticate the schedules of the South African Act of 1964 and with the schedules the part of SACU that is referred to by Appellant. But there are 'terms and conditions:' that is *". . . . if it would have been authorized by this Act had this Act been in force on the date it was made,"* concludes section 47(1). I am not aware of the information regarding this conditionality.

Exceptions under the three trade agreements.

[24] The 'international law agreements' in issue in this matter are (a) the General Agreement on Tariffs and Trade (the GATT), 1947, (b) the Southern African Customs Union Agreement, (SACU) and (c) the Southern African Development Community Protocol on Trade (the Protocol). In paragraph 156 of its heads of argument, the Appellant states: *"All the international trade agreements in issue provide an exception if a measure is implemented to protect public health or morals. This is the primary exception invoked by the Minister and Commissioner."* In support of this assertion, there is referred under foot notes 197 and 198 to

a. **GATT**, Article **XX**, *General Exceptions,* which reads:

> "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination

[11] **The schedules to the South African Customs and Excise Act 1964 which are deemed to be part of the Customs and Excise Act 1971 are a part of our law and as such enforceable in the courts of eSwatini.**

between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any party of measures:

(a) necessary to protect **public health;**
(b) necessary to protect **human,** animal or plant **life or health;**
(c) to (j).

b. SACU Agreement, Article **18.2** *Free Movement of Domestic Products*:

1. Goods grown, produced or manufactured in the Common Customs Area, on importation from the area of one Member State, shall be free of customs duties and quantitative restrictions, except as provided elsewhere in this Agreement;

2. Notwithstanding the provisions of paragraph 1 above, Member States shall have the right to impose restrictions on imports or exports in accordance with national laws and regulations for the protection of –

(a) **health of humans, animals or plants;**

(b) ... ;

(c) . . . ;

(d) **public morals;**

(e) to (g).

c. **SADC Protocol on Trade**, Article **9**, *General Exceptions*

"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Member States, or a disguised restriction on intra-SADC trade, nothing in Article 7 and 8 of this Protocol shall be construed as to prevent the adoption or enforcement of any measures by a Member State:

a) Necessary to protect public morals or to maintain public order;
b) Necessary to protect human, animal or plant life or health;
c) to j).

[25] A subheading of the second ground of appeal reads *"The levy does not qualify as an exception,"* and states: *"19. The court ought to have concluded that none of the exceptions under international agreements has been triggered."* In support of its contention, Appellant alleges that the alleged exception does not qualify in terms of Article XVIII of GATT which permits deviation from the GATT *"in order to promote the establishment of a particular industry with a view to raising the general standard of living of its people"*. Appellant is however aware that *"neither the Minister nor the Commissioner contend that the purpose of the levy is to protect or promote the domestic tobacco industry in Eswatini"*. This is of course correct as article XVIII of GATT is not the basis for the impugned Act. The Respondents expressly state that currently there is no local tobacco industry to be protected and that even the 2% for home manufacturers is fictional in the circumstances. Thus even Article III of the GATT does not apply.

[26] Appellant further contends that *"Government cannot rely on the exemption allowing measures implemented to protect public health or morals"*. According to the Appellant the applicable international agreement requires Government to bear the *onus* of establishing that the measure – that is, the levy - falls within the scope of an exception, that the measure is invoked appropriately under the relevant principles of international law and for a measure falling under the public health exception international law requires that the policy must be *"one designed to achieve that health policy objective"*, and *"the measure must be necessary to achieve that objective"*, and *"must meet the requirements in the 'chapeau' of article XX, and not constitute a means of arbitrary or unjustifiable discrimination"*. Appellant asserts, as matter of fact: *"The objective of the levy has always been to raise revenue. The levy does not have a public health or morals objective. It is designed to achieve such objectives and is 'merely a* ***post hoc*** *rationalization developed for the purposes of this dispute'"*. And *"[e]ven if the levy does have a public health or morals objective, it is not necessary to achieve that objective"* says Appellant.

[27] What needs to be kept in mind throughout the arguments in this matter is that the claim arises essentially from an alleged breach of international trade agreements to which

eSwatini is a party. Any intervening breach of the Constitution is subordinate to the breach of the international agreements, which is a matter of contract. In my opinion the non-intervention of the other SACU members in this dispute poses a serious blow to the claim of the Appellant. What this non-intervention of the other SACU members – the contributors to the revenue common pool – says is that there has been no violation of the relevant international trade agreements, the basis of Appellant's claim. It is true that the preamble or long title to the Act says nothing about the public health purpose of the Act. Above we stated that there was once a Tobacco Products Control Bill 1909 which culminated to the Tobacco Products Control Act, 1913. The long title to that Act reads: *"An Act to give effect to the World Health Organisation's Framework Convention on Tobacco Control..."* The Respondents have always been aware of this Ministry of Health law. The Act here was not an overnight dream of 1st Respondent. The Act had been in the oven long before 1st Respondent came to the scene (as Cabinet Minister). The Act had been cooking for over ten years. It was not necessary to disparage the 1913 Act that it did not have the necessary sting in the fight against the deadly effects of tobacco and its products, hence the Act and its apparent silence on its primary objective. The objective in part had already been made public in the 2013 Act of the Ministry of Health. What Appellant alleges under paragraph 25.5 is therefore not correct, in particular that the exception – basis of the Act is *"merely a **post hoc** rationalization developed solely for the purposes of this dispute"*. The Appellant had been engaged in the build-up to the Act. Respondents must have been aware of Appellant's objections to the Act, but somehow underestimated Appellant's determination to kill the Act. Respondents were thus forewarned and must have prepared for the battle that ensued.

[28] That the 'objective of the levy has always been to raise revenue' and that it *"has no public health objective"* have not been demonstrated by the Appellant. The revenue aspect of the levy is only secondary, and may be unavoidable. 1st Respondent deposes: *"In terms of Article 6 [of the FCTC] our country is obliged to impose price and tax measures to reduce tobacco consumption"*. Clearly therefore any revenue raise in the process cannot

be said to be the objective or the sole objective of the Act. Parties to the Framework Convention understood and accepted that 'price and tax measures to reduce the demand for tobacco' could not be avoided as these were *"effective and important means of reducing tobacco consumption by various segments of the population in particular young persons"*.

[29] Appellant further argues that the levy is not necessary to achieve the purported objective: *"Of note, such an objective can be achieved through less restrictive means"*. That kind of argument is to be expected from the Appellant. But as already observed above, the 2013 Act may not have been sufficiently stringent in its control. Respondents therefore could not have wanted a "less restrictive means" of control. For the Respondents, the tougher the means of the tobacco control, the better for the effort, so long as the SACU and the other agreements were not infringed. There is no basis here to suspect any 'disguised restriction on international trade' since there is no local industry affected by the import, nor any 'infant industry' to be protected as envisioned under Article 26 of the SACU agreement. The levy is obviously not pursuant to section 48(1) of the C & E Act.

[30] Article XX (a) and (b) of the GATT provides for General Exceptions and is similar to Article 18 (2) (a) and (d) of the SACU agreement and SADC Protocol on Trade article 9(a) and (b). The permitted exceptions are to be *"not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Member States or a disguised restriction on intra SADC trade..."* In paragraph 156 of its heads of argument, the Appellant states:

> *"All the international trade agreements in issue provide an exception if a measure is implemented to protect public health or morals. This is the primary exception invoked by the Minister and Commissioner."* (See para 14 or p348) or 204 or p382.

[31] The Appellant asserts that under international law, a measure (such as a levy) must satisfy three requirements to succeed as a lawful 'public health' exception. These requirements are that: "158.1 First, the policy must be 'one designed to achieve that health policy objective'; 158.2 Second, the measure must be necessary to achieve that objective;

158.3 Last, the measure must meet the requirement in the 'chapeau' of Article XX, and not constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail." In my opinion, these requirements are met by the Act.

[32] 1st Respondent also dismisses Appellant's argument based on section 32 (1) of the Constitution by reference to the exceptions provided by the trade agreements. I need only point out that section 32 (1) is not absolute. Article 25 (2) of the SACU Agreement provides that provisions of the Agreement shall not be deemed to suspend or supersede the provisions of any law within the Common Customs area which prohibits or restricts the importation or exportation of goods. In my view this provision allows Member States to pass whatever legislation may be considered necessary in this area of importation/exportation of goods so long as that law is internally sustainable and finds protection under the relevant exceptions to the international agreements. The 1st Respondent also points out that other SACU member states such as Botswana, Lesotho and South Africa have developed or are in the process of developing national legislation to cater for felt public needs, the revenue from which is not part of the shared common pool. Accordingly, the Act is not in conflict with eSwatini's international trade obligations.

SACU Agreement (2002)

[33] (a) The SACU Agreement provides for its own signature and ratification, among other things. It comes into force 30 days after the last of its signatory members (who have signed the Agreement) deposits its instrument of ratification with the Executive Secretary in Namibia. Article 45 states that ratification shall be "in accordance with the [signatory State's] constitutional procedures". For eSwatini this procedure is set our under section 238 (2) of the Constitution. Subsection (4) of that section enjoins that: "Unless it is self-executing, an international agreement becomes law in Swaziland only when enacted into law by Parliament". The above subsection (2) provides that an international agreement is subject to ratification, but does not say how that process occurs. It may then be presumed that it will be in accordance with the Agreement itself, or in accordance with the signatory

state's law. The subsection further tells that the ratified agreement shall become binding to the government by (a) an Act of Parliament, or (b) a resolution of at least two-thirds of the members of Parliament at a joint sitting. ESwatini ratified the Agreement in February 2004. Subject to certain provisions found in the Customs and Excise Act, 1971, there is no specific law incorporating the Agreement, as part of the municipal law of ESwatini;

(b) The General Agreement on Tariffs and Trade concluded in Geneva in October 1947 was approved by the Geneva General Agreement on Tariffs and Trade Act No. 75 of 1948 which Act simultaneously provided for the enforcement of its provisions in eSwatini. Is the Agreement part of eSwatini municipal law? Opinion seems divided.

(c) The Southern African Development Community Protocol on Trade (the Protocol) was adopted and signed in Maseru, Lesotho in August 1996. Article 9 reads:

> "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Member States, or a disguised restriction on intra-SADC trade, nothing in Article 7 and 8 of this Protocol shall be construed as to prevent the adoption or enforcement of any measures by a Member State:
>
> a) necessary to protect public morals or to maintain public order;
> b) necessary to protect human, animal or plant life or health."

[34] Appellant alleges that the Act is a 'money bill' because it imposes a tax. The Appellant is however not sure how the Act as a bill passed through Parliament. The Court *a quo* felt that the complaint in this regard is not properly supported and is 'deficient or wanting in specifics or factual assertions and was eventually not persisted in argument by Counsel'. Before this Court in its heads of argument Appellant asserts that 'The Act provides for "the imposition and collection of levy on alcoholic drinks and tobacco products (the levy)". Appellant goes on to state: "The levy is defined as a tax and is levied and charged on alcohol and tobacco products manufactured in and imported into Eswatini. The levy is 2% of the 'taxable value' for alcohol and tobacco products manufactured in Eswatini. The levy is 7% of the 'taxable value' for alcohol and tobacco products imported

into Eswatini". Appellant further avers: *"4. From inception, the purpose of the Act was to raise revenue for the country. In these proceedings, the Respondents claimed, for the first time and without contemporaneous evidence, that the levy is a public health measure and not a revenue raising tax".*

[35] Appellant also states as follows:

> "5. Throughout the law-making process, the Appellant, the British American Tobacco Swaziland (Pty) Ltd (BATS) opposed the introduction of the levy on various grounds, including that the levy would amount to an additional duty or charge on goods in contravention of the Government's obligations under binding international trade agreements, in particular the General Agreement on Tariffs and Trade (the GATT), the SACU agreement, and the Southern African Development Community Protocol on Trade (the Protocol) (together 'the international [trade] agreements). In the end BATS' pleas were ignored, and the levy was implemented."
>
> "6. This led BATS to bring proceedings in the High Court challenging the constitutionality of the Act on two broad grounds:
>
> 6.1. First, the Act and levy are unlawful, arbitrary and irrational to the extent that....
>
> 6.2. Second, the Act and levy unjustifiably infringe BATS' fundamental rights to equality, to trade freely and its right to property".

[36] In the result, BATS sought in its application:

> "7.1. As its primary relief, that the entire Act be declared inconsistent with the Constitution and invalid – retrospective to its commencement date – and that the Commissioner repay the levies paid by [BATS] to date of the order. This would place all parties in position in which they would have been but for the

adoption of an unlawful Act in contravention of binding international law and domestic constitutional obligations,

7.2. As its alternative relief, that (i) the Schedule [to the Act] be declared inconsistent with the Constitution and invalid retrospective to the commencement date, (ii) the declaration of invalidity be suspended for 12 to allow Parliament to pass legislation to correct the invalidity, (iii) during the 12 months, the Schedule be amended to impose the levy uniformly at a rate of 2% on both manufacturers and importers, and (iv) the Commissioner repay the difference between the actual levies paid by BATS and the amount of these levies calculated at a rate of 2% instead of 7%. This would afford the legislature the opportunity to consider the executive's objectives and craft a solution to achieve those objectives that would not be unlawful".

[37] Appellant also contends that the Act and the levy are invalid as they infringe its fundamental rights to equality, free trade and property (being sections 20, 32 and 19 of the Constitution). On the constitutional invalidity the Appellant argues that the Act and levy are unlawful, arbitrary and irrational in that they conflict with the 'international agreements' and the Customs and Excise Act (C & E Act) 1971and unduly differentiate between local producers (manufacturers) and importers and this would lead to increased illicit trade in cigarettes than currently.

[38] Appellant asserts that the Act is in effect a 'money bill' in terms of section 113 of the Constitution and as such ought to have carried the certificate of the Speaker when transmitting the Bill as passed by the House of Assembly to the Senate, stating that it is a 'money bill', (other than an appropriation bill). Appellant is unhappy about the silence of the Respondents in revealing whether the Act as it passed the Houses of Parliament it was dealt with as a 'money bill' or not. On the face of it, the Act appears to be a 'money bill' as defined under section 120 (1) of the Constitution as, *inter alia,* "(a) the imposition, repeal, remission, alteration or regulation of taxation". With respect, any failure to comply

with the provisions of section 113 does not seem to bear on the validity of the Act. The primary purpose of the section seems to be the 'limitation' of the usual power or privilege of the Senate on the time it takes in considering a bill. Regarding the Act, if the Speaker did not attach the relevant certificate then the Senate had 'unlimited' time to consider the bill. I guess, this would be an advantage rather than a disadvantage to the Appellant. But now we know that in fact a certificate of the Speaker did accompany the Bill as it passed to the Senate, and that certificate clearly certified the bill as a "Money Bill." See pp 427/8. Any argument seeking to undermine the Act based on the suspected failure to follow the procedure for the promulgation of money bills is misguided and without merit.

[39] Appellant also complains about the Respondent's failure to clearly characterize the levy from the outset, that is, whether a public health measure or a revenue-raising tax. Section 2 of the Act as a bill reads, in part: 'tax' means 'the alcohol and tobacco levy chargeable under this Act'. But the 'Objects and Reasons' do not say much other than that the Bill seeks "to provide for the imposition of a levy on alcoholic drinks and tobacco products". It says nothing about public health issues. Appellant had objected to the Bill from an early stage of its inception. Appellant refers to a draft Bill in this regard as early as 2012 (para 33 of founding affidavit). One may, however, point out that as early as 2010 the Minister responsible for Health had tabled "*The Tobacco Products Control Bill* No.22 of 2010". The long title of the Bill read: ***"An Act to give effect to the World Health Organisation's Framework Convention on Tobacco Control and other matters incidental thereto"***. Although a levy was not proposed, the Bill took a very strong stand against the use of tobacco products in public and in closed places in the battle to reduce the health hazards associated with tobacco. Thus, it may fairly be concluded that the public health aspect of the tobacco Act had been quietly trending in executive circles for quite some time before 2019.

[40] Did the Court a quo err in holding that the appellant does not have standing to seek relief based or founded on the breach of the international law agreements set out below and the Constitution? As far as the legal standing to bring this application is concerned, the

Appellant avers that its standing is established by the fact that "it is an Eswatini firm enforcing its rights under Eswatini law and the Constitution". The Appellant's rights are to be elicited from the international agreements already referred to. Appellant argues that these trade agreements have been domesticated in eSwatini. The Appellant accordingly claims to be an eSwatini corporate citizen and entitled to be protected by the law as any other citizen. To this end, in terms of section 35 (1) Appellant says that it is entitled to apply to the High Court for redress as a result of an alleged breach of its rights by the impugned Act. Evidently, Appellant cannot apply anywhere else other than eSwatini for the order to set aside the Act as invalid. The claims against the Act are all allegedly in violation of Chapter III rights, being ss 19, 20 and 32. The Court *a quo* correctly dealt with this point of standing raised by the Respondents as a point *in limine.* I agree with the holding of the Court *a quo,* in paragraph [16.2] of the judgment, where the Court states that Appellant has the requisite standing to file the application, without prejudice on the merits of the matter.

[41] The Respondents' contention regarding the standing of the Appellant is that as the three international trade agreements have not been domesticated the Appellant cannot claim any rights under these agreements in the courts of eSwatini. It is also contended that Appellant is not a party to the agreements. Respondents' contention is that without requisite standing Appellant cannot pursue any interest in the courts of eSwatini. Without incorporation the international trade agreements are alien to the municipal courts of eSwatini. The courts of eSwatini have no competence to entertain the alleged breach as it is regulated by a legal regime outside the jurisdiction of municipal courts. Appellant, however, argues that the three agreements were incorporated into domestic law and therefore as a corporate citizen has a legal standing to sue in the courts of eSwatini. It is Appellant's further contention under this ground that "a litigant has standing to enforce the Constitution and challenge the constitutionality of legislation with reference to international law agreements that are binding internationally but which have not been incorporated into domestic law". Standing will therefore be specific to the right in issue.

[42] The Act imposes a levy of 2% on producers and 7% on import traders like the Appellant allegedly contrary to the terms of the international trade agreements. The question is whether the Act is a lawful piece of legislation. Appellant argues that the Act is not valid because the levy it imposes conflicts with the Constitution in section 19(1), 20(1) and 32. The cause of the complaint is that the levy of 2% and 7% is discriminatory as between manufacturers and importers of tobacco. That this differential treatment has prejudicial impact on Appellant as a citizen and importer entitled to equal treatment and protection from unlawful deprivation of property under the Constitution and the international trade agreements which bind eSwatini Government and are enforceable at municipal level. It is the understanding that if the Act is invalid so will be the levy. In my opinion, Appellant has the relevant standing in this matter to the extent that the Appellant alleges the Act breaches its rights to property, equal treatment and to lawful trade, if these rights are cognizable at municipal law. There are therefore two aspects to the question for determination, namely (a) at the level of the Constitution and (b) at the level of the international trade agreements admittedly binding on Government but not so admittedly binding at municipal level.

[43] Respondents' first line of defence is that the claim is founded on international agreements not incorporated into the law of eSwatini and this negatively affects the Appellant's standing in the matter. Closely connected here is that Appellant is not a party to the Agreements. However, Appellant insists that these agreements are part of the law of eSwatini by incorporation. The Respondent argues that there is no law in eSwatini which is violated by the Act. Appellant contends that the international trade agreements are law in eSwatini and are violated by the Act. Even without the trade agreements, the Act still breaches its rights under section 19, 20 and 32 as a local importer of tobacco.

Respondents' case

[44] In his answering affidavit 1st Respondent explains how the 2% and 7% customs excise duties for local producers and importers respectively came about. Importantly, the

Appellant was engaged and consulted in the various stages of the Bills that preceded the Alcohol and Tobacco Levy Act, 2019.

[45] 1st Respondent presents a general defence and points out that 'there is no proven health benefit to smoking' and 'no safe tobacco product' and 'those staying with smokers are in a similar danger zone as the actual smokers'. 1st Respondent reminds all and sundry that WHO, to which eSwatini is a member, "is seriously concerned about the harmful effects of tobacco", and to that end WHO has developed a regulatory strategy to address this harmful and addictive substance by formulating the WHO Framework Convention on Tobacco Control (WHO FCTC) which entered into force on 27 February 2005. The first and second preambular paragraphs record that the States Parties:-

> *"Determined to give priority to their right to protect* public health.
>
> *Recognizing that the spread of the tobacco epidemic is a global problem with serious consequences for* public health *that calls for the widest possible cooperation and the participation of all countries in an effective, appropriate and comprehensive international response".*

[46] *Part II,* on the *Objective, Guiding Principles and General Obligations*, of the Convention is very specific on the concerns that the States Parties had in developing the FCTC. Articles 3 and 5 read:

> "3. The objective of this Convention and its protocols is to protect present and future generations from the devastating health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke by providing a framework for tobacco control measures to be implemented by the Parties at the national, regional and international levels in order to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke.
>
> 5.1 Each Party shall develop, implement, periodically update and review comprehensive multisectoral national tobacco control strategies, plans and

programmes in accordance with this Convention and the protocols to which it is a Party.

5.2. Towards this end, each Party shall, in accordance with its capabilities:

(a) establish or reinforce and finance a national coordinating mechanism or focal points for tobacco control; and

(b) adopt and implement effective legislative, executive, administrative and/or other measures and cooperate, as appropriate, with other Parties in developing appropriate policies for preventing and reducing tobacco consumption, nicotine addiction and exposure to tobacco smoke."

[47] As evidence that eSwatini had for quite some time before 2019 been nursing the idea of controlling the use and availability of tobacco and its products, Regulation 5 of Legal Notice No. 151 of 2009, entitled "Importation and Exportation of Cigarettes Regulations, 2009, entitled "Importation and Exportation of Cigarettes Regulations, 2009, No 21 of 1971 (4)", prescribes that as from 1st October 2009 *"a person who intends to import cigarettes into eSwatini shall pay the full applicable customs duties and sales tax on the cigarettes at the point of entry even if that person intends to export the cigarettes"*. The regulation is made under section 121(1) (e) of Act 21 of 1971. This is a clear precursor of the impugned Act. The following year in 2010 The Tobacco Products Control Bill No.22 of 2010 was published in the Gazette passing as an Act in 2013. The object of the Bill was for "An Act to give effect to the World Health Organization's Framework Convention on Tobacco Control" and matters incidental to the Act. As the Respondent avers, eSwatini is party to the WHO Convention. As the Appellant says, a number of bills preceded the impugned Act (of 2019). That is not denied by the Respondent.

[48] Because the WHO Convention is so heavily public health oriented, 1st Respondent summarily dismisses Appellant's argument based on section 19 (2) of the Constitution. Respondent points to the exception permitted by section 19 (2) (a), that is, the taking of possession of the property because it is "in the interest of public health" to do so.

Considering that the *"tobacco epidemic is a global problem with serious consequences for public health"* the need for some deprivation of property as alleged cannot be gainsaid. And States Parties are obligated to take tangible counter measures according to their means. To this end: "18. Our country has imposed a very low levy of 7% for importers and 2% for local manufacturers", says 1st Respondent. The 1st Respondent points out that presently there are no local manufacturers qualifying under the 2% levy. The 7% levy is considered appropriate to discourage the importation of tobacco products into eSwatini.

[49] On the face of the provision, the 2% and 7% may appear discriminatory considering that the tobacco products are imported from the Customs Area. But in reality it is not so; if it is so, then it is not arbitrary or unjustifiable.

[50] Section 61 is one of the *directive principles of state policy*. Strictly, it is not enforceable, but it is not in the Constitution for nothing. It is a policy principle which guides the Government in its dealings with other nations /governments. Leading in this regard is the principle that the Government must as far as it is reasonably possible "promote and protect the interests" of its people, "promote respect for international law, treaty obligations and the settlement of international disputes by peaceful means." Accordingly, short of a total ban of trade in tobacco products, 1`st Respondent seeks ways and means to uphold the WHO FCTC in the promotion of the health and survivorship of the people of eSwatini. The underlying motivating principle is clear: unless there is a definite rule stopping or restricting the Government from so acting it must do everything in its power to stem the deaths and promote the public health of is people. No sensible person can seriously fault the Government in this endeavor by means of the impugned Act.

[51] I cannot see how article XX of the GATT agreement can be used to fault the Act. Article XX is not absolute, it allows differential treatment between countries so long as this is not arbitrary or unjustifiable. Given the extreme dangers inherent in the use of tobacco products I cannot say that the Act is arbitrary or unjustifiable in its prescription. Importantly, article XX provides an exception to its observation. In this regard, reference

is made to paragraphs (a) and (b) of the article. And this article is virtually the same as article 18 (2) of SACU agreement, paragraphs (a) and (d) thereof. Both articles in the exceptions cited are in support of the WHO FCTC effort in controlling the deadly effects associated with the consumption of tobacco and its products, directly and indirectly. That Botswana has the levy at 30% for home manufacturers and importers does not mean the position might not have been different. Botswana might have considered circumstances peculiar to that country. For our purposes it is enough that the levy collection is not part of the SACU Revenue pool. And so also we understand of South Africa in respect of certain taxes and levies.

[52] As to the alleged deprivation of property, it is noted that section 19 (1) of the Constitution is not without derogation. Subsection (2) (a) permits compulsory deprivation of property where the purported taking is "necessary for the public use or in the interest of...public health". What seems to be Appellant's concern here is the profit from trade in tobacco that is taken by means of the levy. The levy collected could then be employed in support of the public health to control the pernicious use of certain products such as tobacco. In my view the alleged taking of Applicant's property in the circumstances described by 1st Respondent is reasonably justifiable in the interest of public health and cannot be impugned. Respondent cannot just fold arms and watch while the people die as a result of something that could be restricted if not entirely controlled.

[53] A similar position as above may be taken against the alleged breach of section 32 (1) of the Constitution which provides that: *"A person has the right to practice a profession and carry on any lawful occupation, trade or business."* The section is not without limitation. Virtually all trades and professions are subject to some limitation. Virtually all trades and professions bear a negative – even dangerous – aspect to their operation. That is why it is the duty of every responsible government to enact laws for the protection of its citizens from dangerous and unsafe trades or professions or businesses. The Act in issue imposes some reasonable control on the freedom to trade or conduct business in goods such as tobacco products. The interference is justified and reasonable. But, importantly, section

14 (3) of the Constitution provides, in part, as follows: *"A person of whatever gender, race, place of origin . . . shall be entitled to the fundamental rights and freedoms of the individual contained in this Chapter but subject to respect for the rights of others and for the public interest."* Public health is undoubtedly a matter of public interest. The right under subsection (1) may accordingly be derogated in the public interest. What is more, the right in question has not been abrogated by the levy or the Act.

[54] The Appellant, being an importer and as such in terms of the Act assessable to 7% levy, cries foul, sees unequal treatment allegedly contrary to section 20 of the Constitution and trade agreements, charges: *"No statute that contravenes the international agreements [which are binding on the Government] could be lawfully or rationally adopted by the Government, regardless of whether the international agreements are incorporated into domestic law or not."* Appellant reminds of eSwatini's 'fidelity to international obligations', agreements which were freely adopted in exercise of the country's sovereign authority, "that prohibit discrimination between imported and locally manufactured products", and contends that eSwatini:

> *"... [It] made the sovereign choice to join a single customs territory with a common external tariff and common revenue pool allocation that results in appropriately half of eSwatini's annual revenue. The international agreements, and the restrictions they place on discriminatory treatment between imported and local products, are thus an expression of Eswatini sovereignty, not a limitation of it".*

[55] To begin with, section 20 which embodies the principle of equality before the law, in general, does not permit discrimination or derogation. The issue then is whether the Act discriminates, and if it does, whether the discrimination is arbitrary or unjustifiable. As Appellant would admit, what is alleged to be discrimination *in casu* derives from the international trade agreements to which eSwatini is said to be a member. At this juncture it is worth pointing out that at international level the Crown / Executive is sovereign but at the municipal level Parliament is sovereign. Parliament includes the Executive but the

Executive does not include Parliament. Until the trade agreements are domesticated, the Act will remain the sovereign will of Parliament enforceable by the courts of eSwatini. If on the other hand, the trade agreements have been domesticated, which is denied by Respondents, then the viability of the claim will depend on the success or failure of the exceptions pleaded by the Respondents. As things are, short of domestication, the Act and the SACU agreement are worlds apart; the two have no meeting point. In the result, the SACU agreement cannot be used to judge or condemn an activity otherwise cognizable at municipal level: it has no jurisdiction, so to speak. Even the section 261 will not assist here. Furthermore, it is the same trade agreements that have permitted exceptions in situations such as at the centre of this matter. The exception under the SACU cannot be questioned on the basis of section 20 of the Constitution. The application of section 20 in this matter will depend on the meaning of "equality before the law" or 'discrimination'.

[56] We have considered the exceptions permitted by article XX of GATT, Article 18.2 of SACU and Article 9 of SADC Protocol on Trade. We have come to the conclusion that the permitted exceptions are not violated by the Act in all the circumstances of this matter. In the result, I need not go into the elusive nature of 'equality before the law'. In brief I see no equality between local producers and local importers of tobacco products in eSwatini. If these entrepreneurs are equal in this business, it has not been shown. Being merely equal in theory and not in practice would not help.

Domestication of the trade agreements?

[57] With reference to section 49 and 50 of the C & E Act in para [25] of the judgment learned Mamba J. (as he then was) says that "...there is no evidence or material upon which this Court may conclude that the Act incorporated the SACU agreement into domestic or internal law of eSwatini. The cited provision refers to specific and isolated aspects of the SACU agreement. It is not a wholesale adoption or incorporation of the agreement. This is also true of the GATT agreement". The learned Judge seems to be talking only about section 47 of the C & E Act which incorporates the Schedules found under the South

African C & E Act, 1964. It is in that respect that he speaks of there being no 'wholesale incorporation'. To that extent the learned Judge is correct. But in my view, the two sections Mamba J. had just cited, that is, sections 49 and 50 incorporate no particular schedule as does section 47. Worth noting is that the two sections begin as follows: "Subject to the customs union agreement, the Government may conclude an agreement with the government..." (My underlining).

[58] To the extent then that section 47 "adopts or incorporates only some specified aspects of the agreement" the learned Mamba J. says the section strongly indicates . . . that Parliament did not, by this Act, intend to enact the whole SACU agreement into our internal law". As I have already observed, I agree with that view. Sections 49 and 50 speak to the entire 'customs union agreement'. How are these words to be understood? True enough, the agreements that the sections allow the Government to enter into are with foreign state powers. The C & E Act, empowers or authorizes the Government to conduct international agreements but in doing so bear in mind the SACU agreement; that is, not act in conflict with the SACU agreement. This in my view is only a friendly advice. In my view, however, whether only an aspect or the whole of the SACU agreement has been domesticated is not determinative of Appellant's claim. I am not entirely averse to incorporation by reference or piecemeal where only some provisions of the treaty are incorporated at a time. Whether the whole or a part of the treaty is incorporated should be a matter of interpretation and not policy. Parliament is free to act as it deems fit regarding a treaty, whether or not the treaty is binding on the Government. Section 48, however, would seem to support the view that incorporation has occurred since the Minister (of Commerce) is authorized to amend the schedules by notice in the Gazette *"so as to levy a new, increased or additional duty on any goods (a) imported into eSwatini for the purpose of. . . ."*

[59] The above problem however, does not end by accepting wholesale or piecemeal incorporation as suggested above. Maybe part of the problem is in the words we use here: 'incorporation or domestication of a treaty or international agreement'. What do these words mean in relation to the subject matter here? What, for instance, section 47(1) does

is simply to enact the South African schedules as eSwatini schedules. Why then speak of domestication or incorporation (of SACU)? If the situation is that each time South Africa amends the schedules eSwatini does likewise, then eSwatini does not 'own' the schedules said to be incorporated into our C & E Act. They remain part of the South African Act only borrowed by eSwatini for the time being. That apparently is what happens in the so-called incorporation/domestication of a treaty. The treaty remains as such and is not swallowed up by the incorporation. The treaty may be amended and so will it be enforced at municipal level. A State Member in its sovereign right may pick and choose what of a treaty it wants to 'incorporate' or enforce at municipal level. This is what the Diplomatic Privileges Act, 1968 and the Geneva General Agreement on Tariffs and Trade, 1948 do. By the two Acts, eSwatini has decided how it wants to enforce the treaties at municipal level.

[60] The Customs and Excise Act 1971 is the Act of Parliament that Appellant has forcefully argued brought the SACU and GATT agreements into the domestic law of eSwatini. The Act makes a number of references to the two agreements, but according to the Respondents that does not amount to incorporation of the agreements into municipal law of eSwatini. The Court *a quo* agreed. The rationale was that there is no 'Act of Parliament' *qua* Act which formally or expressly enacts the incorporation of the agreements. Learned Mamba J. observed that *"there is no evidence or material upon which this court may conclude that the Act incorporated the SACU agreement into the domestic law of eSwatini."* It is however not clear what kind of evidence or material the learned Judge wanted for the conclusion urged by Appellant. Without deciding the issue, I am persuaded by Appellant's argument that there is no prescribed formula for incorporating international agreements into national law to which eSwatini is a party. Section 238 only speaks of an 'Act of Parliament'. So, absent an 'Act of Parliament' no 'incorporation' may occur. Surely, a statutory provision may, in a manner of speaking, be said to be or represent an 'Act of Parliament', for instance, Starke (at p. 86) writes of "legislative approval of treaty provisions" regarding the 'application of treaties' in municipal law. It is the provisions of the treaty that are incorporated. We have seen that the Diplomatic Privileges

Act, 1968, in section 3 provides: *"Subject to this Act, articles 1, 22, 23, 24 and 27 to 40 of the Vienna Convention shall have the force of law in eSwatini..."* It is clear that Parliament is free to choose how much of an international agreement it would be happy to enforce.

[61] The Geneva General Agreement on Tariffs and Trade Act No.75 of 1948 is "An Act to approve of the General Agreement on tariffs and trade concluded at Geneva on 30 October 1947," whose object is "to make provision for the carrying out of such agreement". The question here is whether by the 'approval' the Agreement was incorporated into the law of eSwatini. It does not appear that the Agreement was by a schedule to the Act or otherwise annexed (for general information). If the Agreement was by the 1948 Act made law of eSwatini, the Agreement would have been 'downloaded' in the laws of eSwatini. This did not happen, which means that the Agreement binds the Government only and remains to be applied to the extent provided in the 1948 Act. Section 3 of the 1948 Act provides, in part: *"The general agreement on tariffs and trade concluded at Geneva on the thirteenth day of October, 1947 by the Governments of ...is hereby approved"*. Starke (p.362) and some writers, say that 'approval' is equivalent to acceptance or accession, another form of 'ratification'. By the High Commissioner's Notice (HCN) No 267 of 1948 the Agreement was applied to the United Kingdom and her Colonies and Protectorates (of which eSwatini was one). The GATT agreement seems to have been subject to a provisional and definitive application. According to Starke (at p. 360) 'provisional' is *"de facto* entry into force, pending the *de jure* coming into operation of the treaty." It would appear then that the Agreement was made applicable to the United Kingdom and her colonies by the HCN of 27 August 1948. If in 1993 eSwatini signed the GATT "in its own right", as Appellant states in its heads of argument (para 35), it is not clear what the purpose was. If the GATT Agreement had already been 'approved' and 'applied', I would have thought the 1948 Act would have domesticated it. It would be strange that in 1948 an Act of Parliament would have been used only to 'approve' without incorporating. In my opinion, the GATT Agreement (1947) was incorporated to the extent of the 1948 Act.

[62] Again section 2 of *The Arbitration (International Investment Disputes) Act*, 1967, reads: *"Subject to the adaptation and modifications specified in the Schedule to this Act, the provisions of the Arbitration (International Investment Disputes) Act, 1966 of the United Kingdom, except sections 5, 6, 7 and 8 thereof shall apply to Swaziland"*. The adapted U.K. Act is then annexed as a Schedule. In the result, except for the excluded sections, the UK Act applies in eSwatini. This is the reverse of the Diplomatic Privileges Act. It shows that there is no one approach for dealing with treaties at domestic level.

[63] Of the South African situation which like eSwatini follows, the dualist doctrine, Dugard says that, in most instances, trade, economic and financial agreements to which South Africa is a party have not been enacted into municipal law *"save that particular provisions may in due course be construed by the courts to be self-executing, ... The WTO Agreement, for example, while approved by Parliament on 6 April 1995, has not been enacted into municipal law"*.[12] Professor Dugard continues:[13]

> "In practice, however, the matter may not be so clear cut. Thus, while the WTO Agreement as a whole has not been enacted into municipal law, *a number of its substantive provisions are reflected in legislation,* although frequently without reference to the underlying international measure. This is notably the case in respect of legislation in the field of intellectual property which appears to have been drafted with the WTO Agreement on Trade-related Aspects of Intellectual Property Rights (the TRIPS Agreement) in mind. Valuation and other customs-related provisions of municipal legislation reflected in such measures as the Customs and Excise Act, 1964, as amended....are also likely to have been enacted with South Africa's international obligations in mind".[14] (My emphasis)

[64] Apparently, the parties hold divergent views on the issue of incorporation /domestication of international agreements. When they speak of incorporation the Respondents seem to think of the entire international agreement being taken holus-bolus

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[12] John Dugard, **International Law:** *A South African Perspective,* 3rd ed. (2005) p53

[13] Ibid, p. 434

[14] **The Children's Protection and Welfare Act** 2012 was no doubt drafted with **The United Nations Convention on the Rights of the Child** in mind of which eSwatini is signatory.

by means of an Act of Parliament to be part of the law of the incorporating state. The Appellant on the other hand accepts incorporation of the entire treaty but does not end there, since a part of a treaty such as an article or articles may also be incorporated by a schedule or section of an Act of Parliament. I share in the latter view. In fact only the provisions of a treaty are incorporated; not the treaty itself, which must remain as such.

General case Analysis

[65] In para 29 of its heads of argument, Appellant asserts that on the GATT being approved in 1948, eSwatini became bound "to apply the tariffs agreed between the GATT Member States" as provided under section 8(1) of the GATT Act. What those tariffs are is not clear. The said section 8(1) provides: *"If the rate of duty specified in the relevant Schedules to the Customs and Excise Act, No. 21 of 1971 is, in respect of any goods, in excess of the rate of duty specified in respect of those goods in Schedule XVIII to the agreement, the rate specified in such Schedule to the agreement shall, in the application of the Customs and Excise Act to goods which were produced or manufactured in any territory in relation to which the agreement is being applied and which are imported into eSwatini, but subject to the provisions of any notice issued under section 5 or section 7, apply instead to the rate of duty specified in the relevant Schedules to the Customs and Excise Act."* It is only under para 7 of its 'Note for Argument' that Appellant contends:

> *"BATS case is simply that the customs and excise duties prescribed in terms of the SACU agreement form part of eSwatini domestic law because they are enacted into law in the C & E Act, particularly in the schedules to that Act by virtue of section 47 (1). The schedules to the C & E Act are effectively the end product of the international agreements in issue and bind eSwatini to the tariff commitments made under those international agreements at the domestic level. The C & E Act and the schedules are domestic legislation. The schedules determine, among other things, what customs and excise duties eSwatini is permitted to charge on goods imported into or manufactured within eSwatini. As appears from the schedules that applied at the time of BATS' replying affidavit, the schedules to the C & E Act reflect a 'free' rate of customs duty if the goods originate within the SADC and impose uniform excise duties in [customs] common area".*

[66] Assuming Appellant to be correct in the foregoing contention, the response of the Respondent would be that the 'goods' at the centre of the dispute here are 'tobacco products' which must be seen in their devastating impact on public health. In their wisdom and enduring concern to the good health of their peoples, the contracting parties to the international trade agreements deemed is proper that there be exceptions to the agreements *inter alia* in the interest of public health. Had the Respondents been at fault in the Act, the other Member States would have expressed concern and the matter would probably be elsewhere and not before the courts of eSwatini. Indeed, the fact that the other Member States have not taken up the matter may very well support the argument that the matter is an eSwatini domestic affair. That being the case, however true and correct Appellant may be, its argument does not pass. The long title to the C & E Act does not alter the position of the Respondents. The WHO by its FCTC has sounded a siren call to all its members to take up arms against this public menace of tobacco and its products.

[67] In the supporting affidavit of Prof. Emeritus MG Erasmus, paragraphs 20 to 49, we are told that the preamble or long title to the Act does not say much about what the purpose of the Act is: this is patently so and admitted by Respondents. And that "the Act contains no indications of efforts to ensure compliance with the SACU agreement or other international agreements". The Act provides for a "specific tax in the form of the levy", 2% and 7% for products respectively "manufactured in" and "imported into" eSwatini. Appellants are unsure whether the levy is "an additional customs duty" or "an additional excise duty or equivalent charge". The deponent concludes: "Either characterization results in a breach of the SACU agreement". That "no import duties are levied on goods traded among the SACU member states", in which case the Act is in breach of the SACU common external tariff. That the Act is of "a discriminatory nature and draws no distinction between goods originating within Common Customs Area of SACU – (...) – and those imported from outside the Common Customs Area..." The Act "discriminates between local manufacturers of... and importers of such products, thus offending the national treatment rule as well as the Constitution of eSwatini." And "to the extent that the

levy imposes an excise duty" it violates the SACU agreement since "excise duties levied in SACU must be jointly agreed and uniformly applied". The said excise duty is not paid into the SACU Common Revenue Pool, but is paid to the 3rd Respondent.

[68] In light of the foregoing accusations, if true, Respondents have brazenly disregarded every binding norm of the trade agreements in enacting the levy. But why is it that none of the Member States have raised even a figure in protest to this open defiance of the agreements? Any reasonable person informed of the allegations must begin to doubt their legal validity and factual truthfulness. It also seems that there is no common characterization of the levy. The Appellants themselves do not seem to be sure of the true character of the levy. This challenges the wisdom of the application before Court. It cannot be that eSwatini has flouted all the three agreements but none of the Members States is protesting.

[69] If we accept the piecemeal approach to incorporation pursued by the Appellant, Appellant must then address the specific aspect or part of the treaty said to be adopted and show to the Court how that aspect supports its case. It is not enough to allege that schedules of the particular agreement were adopted. Appellant must show how the Schedules or part of the schedule support its cause. I do not think that Appellant has taken the Court sufficiently far enough to dispel doubts about the purported incorporation in whole or in part. In general I am persuaded that incorporation need not be that of the entire agreement; an article or articles or schedule may be incorporated. Similarly, the C & E Act does not incorporate the entire SACU Agreement, only a part of the agreement seems to have been incorporated. Since the incorporation theory is opposed, the party relying on incorporation must clearly articulate in what manner and by which article or provision of the Agreement or the section or schedule of the C&E Act its cause is supported. Otherwise the assertions of incorporation even if accepted in principle only trend at a general level which does not help in deciding the dispute before Court. Be it noted in passing that incorporation alone may not be sufficient for another reason, to wit, the exceptions to the agreements. This is in fact Respondents' core reason for rejecting the Appellant's claim.

[70] Under footnote 98 at p.31 of Appellant's heads of argument, we are told that "the SACU agreement and the GATT are indisputably part of South African law" and that "South Africa also passed a similar Geneva General Agreement on Tariffs and Trade Act, 1948 (the SA GATT Act)". To the extent of Act 75 of 1948, GATT is law in eSwatini. I cannot say that the entire SACU agreement is law in eSwatini in the absence of a clear provision to that effect.

[71] SACU Article 18, in paragraph 1, provides that goods grown, produced or manufactured in the Common Customs Area shall be imported free of customs duties into member states "*except as provided elsewhere in this Agreement*". I take it that this means that there are other articles in the Agreement providing for different treatment of *intra* SACU imports. Thus in paragraph 2, the Article provides that *"Notwithstanding the provisions of paragraph 1 above"* member states may impose *"restrictions on imports or exports in accordance with national laws and regulations for the protection of (a) health of humans, . . . "* And Article XX of the GATT agreement reads:

> "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the name conditions prevail or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measurers –
>
> (a) necessary to protect public morals,
>
> (b) necessary to protect human, animal or plant life or health." (My emphasis).

[72] In my view, it is really not necessary to decide what the C & E Act and the GATT Act provide as set out in paragraph 92 of Appellant's heads of argument or whether "the tariffs agreed to in the international agreements for both customs and excise duty form part of domestic law" of eSwatini by reason of their "being expressly incorporated into the C & E Act" as Appellant states in paragraph 94 of its heads. It is my considered opinion that ultimately the requirements of the international agreements as systematically argued in

support of Appellant's claim must overcome the one and singular exception set out in Article 18 of SACU read with article XX of GATT. The exception makes it patently clear that "notwithstanding" the binding obligations in terms of the cited agreements and protocol a member state is permitted to digress from the agreements in the interest of public health so long as certain conditions are observed.

[73] I say it is not necessary to decide the point of applicability of the alleged agreements because the Respondents have hitherto not had any difficulty observing same. The Respondents' defence to the claim is that those obligations as contended for by appellant do not prevent the enactment of the Act for reasons so elaborately stated by the Respondents and supported by the international agreements of which the SACU member states are also parties. The WHO FCTC in particular refers here as well as the GATT. In para 30 of his affidavit, 1st Respondent avers: "…., *it is clear that the allegations and/or contention that Eswatini is breaking international agreements is without merit. There has been no complaint by any of the co-signatories of the Agreements. For the record, all the member states of SACU are aware that Eswatini has enacted the Tobacco Bill".*

[74] In paragraph 94 of its heads of argument, Appellant asserts: *"By virtue of being expressly incorporated into the C & E Act, the tariffs agreed to in the international agreements for both customs and excise duty form part of domestic law".* One may ask, specifically in what section or which schedule of the C & E Act are these tariffs to be found. For if these tariffs are part of domestic law they ought to be found in some gazetted domestic law. Appellant is not referring the Court to any such section or part of the law. Appellant continues: *"Likewise, core facets of the international agreements, such as the articles 18 and 21 of the SACU Agreement – which provide for a 'free' rate of customs duty and uniform imposition of excise duties in the common [customs] area, respectively, have been operationalised and are binding domestically via the C & E Act".* Once more, the chapter and verse of the C & E Act is not cited. It has not been shown that the whole SACU agreement has been domesticated. By which section of the C & E Act have the articles 18 and 21 been operationalized? If this Court must find in favour of the Appellant

it must be in respect of breach of specific provision(s) of eSwatini law, such as the cited sections of the Constitution, to which we shall return.

[75] I agree with the Court *a quo* that the SACU agreement as such, save may be some parts of it, has not been incorporated into the domestic law of eSwatini. I agree also that an international agreement may be incorporated in its entirety or only in part or parts as the Diplomatic Privileges Act 1968 provides. I agree further the 2002 SACU agreement having been ratified by eSwatini in 2004 and the 1969 SACU Agreement having been terminated by the 2002 agreement, the 2002 SACU Agreement need a law to incorporate it as a law of eSwatini. The C&E Act, 1971, did not incorporate the 1969 SACU and could not without more, incorporate the 2002 SACU. As I have said somewhere above, in my opinion, the C & E Act only adopted the specified schedules of the C&E Act 1964 of South Africa. It is correct however that the C&E Act, such as sections 49 and 50, refers to the 'customs union agreement' and that Agreement is made the first schedule to that Act; whether the 1969 SACU agreement was thereby incorporated, I express no firm opinion.

[76] As for the 2002 SACU Agreement, there is need for a law to incorporate it, unless of course it can be shown that the references in section 49 and 50 of the C&E Act have done the incorporation. That the C&E Act "extensively refers to and implements the operative provisions of the SACU Agreement" does not amount to incorporation of the SACU agreement. In fact, it seems, sections 49 and 50 only warn the Government to ensure that if it should enter into an agreement with another country outside SACU, the Government should make sure that in so doing it does not violate the SACU Agreement. Section 47 of C&E Act allows the Minister responsible to amend the schedules adopted from the South African Act. This shows that the schedules are part of eSwatini law, in my opinion.

[77] I must add: if the C&E Act "implements the substance of the SACU Agreement into domestic law" I would not consider this as domestication of the SACU Agreement. Incorporation must be clear and unambiguous. The Tobacco Products Control Act 2013

purports to give effect to the WHO FCTC. It gives effect to the substance of the Convention without incorporating it. Steyn CJ in **Pan American World Airways Incorporated**[15] said that –

> "It is common cause and trite law, I think, that in this country the conclusion of a treaty, convention or agreement by the South African government with any other government is an executive and not a legislative act. As a general rule, the provisions of an international instrument so concluded, are not embodied in our law except by legislative process…In the absence of any enactment giving [its] relevant provisions the force of law, [it] cannot affect the rights of the subject".

[78] Even if the C&E Act incorporates the obligation on the Government for customs duty to be 'free', in terms of Article 18 (1), this does not exclude or nullify article 18 (2) which is the exception relied upon by the Respondents. This exception applies "notwithstanding" the provisions of article 18 (1). In other words, all being equal, Article 18 (2) trumps Article 18(1). Of the 1969 SACU, Appellant says in paragraph 95.1: "*...The C&E Act (....) extensively refers to and implements the operative provisions of the SACU Agreement. . . .*" Appellant does not say the C & E Act incorporates the SACU agreement. In paragraph 95.2 of its heads, Appellant continues: "*. . . The C&E Act specifically and unambiguously implements the substance of the SACU agreement into domestic law.*" I agree that "*incorporation does not require an incantation.*" But where does the 'substance' of an agreement begin and end. What provisions of the agreement constitute the 'substance' of the agreement? That is my problem. The proposition is very ambiguous and uncertain. Incorporation must be by inclusion or exclusion of the provisions of the treaty. That is why it cannot be said that the Tobacco Products Control Act, 2013 incorporates WHO FCTC.

[79] With regard to treaties that have not been incorporated but only signed, Starke says "….it is thought that signatory States are under an obligation of good faith to refrain from

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[15] **Pan American World Airways Incorporated v. South African Fire and Accident Insurance Co. Ltd** 1965 (3) SA 150 (A), 161C-D.

acts calculated to frustrate the object of the treaty."[16] It follows that if the treaty has been ratified, it only binds on the international plane and not at municipal level if not incorporated. Accordingly, no private right can arise at the domestic level from a treaty that has not been domesticated. Acting in good faith is a good thing, but acting in bad faith is not a crime. A municipal judge cannot be faulted for not paying attention to an un-incorporated treaty. In assertion of the dualist doctrine, O'Connell writes: *"[I]f the constitution of the State provides for the supremacy of municipal law...the municipal judge is obliged to apply municipal law even if international law is thereby violated, because this is his mandate as an officer of a national legal system."*[17] O'Connell further states:

> *"A treaty is a contract, not law. It lays down rules for the parties, and these should be promulgated to the individual before he should be bound by them. Hence, many countries have a rule that treaties must be legislated upon to be internally operative. Even when they have no such rules their courts can only apply the treaty as law when it was the intention of the signatories that it should be internally operative. A distinction is drawn between treaties which are self-executing i.e. intended to bind states internally, and those which are non-self-executing i.e. intended to bind them externally. Whichever is the case is to be ascertained from the language of the treaty.*[18]

[80] O'Connell also states: *"...Each individual rule of international law must be consciously incorporated **[in it]** by legislative act, promulgation of treaty, or some other appropriate constitutional gesture. The transformation doctrine is a generalization from the particular problem of securing execution of treaties through the processes of municipal law. Usually these must be promulgated by the sovereign in the manner of legislation. . ."*[19]

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[16] JG Starke, p352
[17] DP O'Connell, **International Law for Students** (1971) p16.
[18] Ibid, p21
[19] Ibid p18.

[81] The rule of law is essentially a domestic affair. As long as the international agreement does not bind internally, the rule of law cannot be affected by the legislature's failure to respect a binding international agreement. Foreign affairs is primarily domain for the executive, not the legislature. In a dualist system, the dichotomy is inevitable. A 'treaty is a contract not law'. Strictly speaking, violating an undomesticated treaty has no bearing on the rule of law. In my view, the decision in **Glenister II**[20] is not definitive but only tentative on the rule of law. Otherwise, the answer is going monist. The position as commented in **Whelpton** [21]may appear absurd, but that is the law. An attempt to neutralize and dissolve the dichotomy can only lead to further doctrinal complications short of legislative intervention. The current monist/dualist premise assists in letting one know where to begin the journey in the decision-making process involving treaties. If it is desired that rights generated by a treaty should flow down to the individual at municipal level, then simply domesticate the treaty. There is no short cut to it, least of all a short cut concocted by the Courts. Ratification is definitely not 'an instrument of transferring the rights and obligations of a treaty to the citizen to claim and enjoy those rights and obligations.' The international forum is for States not individuals.

[82] The Act here concerned does not undermine international law and treaty obligations or SADC ideals. The Act is very much in line with eSwatini's international commitments led by WHO FCTC. For the rationality and legality of the Act, Respondents will stand or fall by the terms of Article 18 (2) SACU read with Article XX GATT and Article 9 SACU Protocol, justified by WHO FCTC.

[83] Appellant argues that "*an Act which contravenes binding international law commitments is unlawful and offensive to the rule of law. This is regardless of whether the international agreement in question has been incorporated into domestic law. All that is required is ratification of the international agreement.*" With respect, I do not agree with that proposition. It is not the business of this Court to assume the legislative mantle and

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[20] **Glenister v President of the Republic of South Africa & Others** 2011 (3) SA 247 (CG) [49]
[21] **The DPP v Francis Pieter Van Ravensway Whelpton and On Another** [2022] SZSC 65 at [27]

dictate domestic enforcement of international agreements which the executive has not deemed proper to move for their incorporation. An international agreement which is non-self-executing has to be incorporated for its municipal enforcement. It is true that a ratified treaty is binding on the State, but it is another solemn process to have the treaty enforced at municipal level. Not executing the treaty at municipal level does not absolve the State from executing the treaty at international level. The Vienna Convention on the Law of Treaties, 1969, states in article 27 that subject to article 46, a State may not invoke an internal law to justify its failure to perform a treaty. Article 46 is however conditional on the internal law being not a rule of fundamental importance. Article 46 is accordingly not absolute. Without necessarily subscribing to the opinion expressed in paras [27] and [28] of the **Whelpton** judgment, as the matter here would qualify under article 46. I am not convinced that the Act here violates any binding international agreement; but if does, then the violation is justifiable, not arbitrary or irrational.

[84] Appellant's contentions based on the directive principles of state policy do not advance Appellant's cause in any significant manner. The directive principles are a matter of state policy and may assist in interpreting enforceable provisions of the Constitution, but of not much help beyond that. Considering and taking into account relevant directive principles in interpreting the Constitution and promoting respect for international agreements is sufficient compliance to the policy directives. Nothing binding.

Conclusion

[85] It is true that the Alcohol and Tobacco Bill 2019 says very little if anything about its own objective. All it says is imposing and collecting a levy on tobacco products and alcoholic drinks. But why on tobacco and alcohol? If true, it is very surprising that in all the years from 2012 till a bill passed in 2019, nothing was said about the need to fight and stem the deadly effects of tobacco in light of the WHO FCTC call to all its members to urgently do something to curb the human waste flowing from tobacco use and its products, notwithstanding the passage of the Tobacco Products Control Act in 2013. That the lone

voice touching on WHO FCTC was that of the Deputy Prime Minister. This is puzzling when on its face the 2019 Act seems a clear and natural extension of the 2013 Act. One therefore cannot entirely blame the Appellant for seeing the 2019 Act as simply a levy to raise revenue. But that does not mean Appellant is correct.

[86] With reference to the First Respondent's Complementing SACU Receipts speech of 3 July 2015, it seems that the main concern of that speech was to find new 'domestic revenue enhancing' methods, in addition to SACU receipts, to raise revenue sufficient to deal with all the costs to the national revenue; these costs include cost to the public health as a result of the tobacco and alcoholic products. The Minister did not point to any sector that may have been in his mind as he sought for ways and means of raising national revenue. And in any case, as Appellant also points out, Second Respondent in his opposing affidavit, paragraph 84, points out that Appellant's deponent got it all 'out of context'. It is incumbent upon every government at all times to take measures to increase national revenue. This is particularly so among developing countries. The Tobacco Control Fund under the Tobacco Products Control Act, 2013 is funded, *inter alia,* by Parliament, naturally from the consolidated Fund. And the use of the Tobacco Fund is stated in the Act as (a) research, documentation and dissemination of information on tobacco and tobacco products; (b) promoting national cessation and rehabilitation programs and other matters incidental to (a) and (b). That the Act does not mention the Tobacco Products Control Act does not mean that the Tobacco Control Fund may not be one of the intended beneficiaries of the Act. The tobacco levy was seen as one way to ease the financial stranglehold arising from the use of tobacco.

[87] Any reference to protecting domestic industry by the levy was in my view in all the circumstances, a wishful thinking on the part of the Respondents, no doubt due to the fact that tobacco however ill-advised still makes some considerable profit. And, of course, the fact that Appellant has set up local production in some SACU member states but none in eSwatini. What the tobacco levy is, should not be a matter of guesswork – customs duty or excise duty. What the levy 'most closely resembles' is not going to help the application.

What we know is that if the levy falls within any of the known 'taxes' under SACU then that is a matter for member states, not the Appellant. The members themselves must be presumed to know about the levy in issue. If it falls as a part of SACU revenue pool that would have been taken care by now. We have not been informed of any intended action in that regard. As has been said, the compliance of the levy with international obligations of the Government is not for this Court. And the position of local production is also not an issue in his case. The position of the Respondents is that the levy is a public-health exception in terms of the country's domestic and international obligations under SACU, GATT, SADC and WHO. I find nothing concrete other than alleged resemblances that the levy falls under Article 18 of SACU Agreement whether or not incorporated by the C & E Act. The levy accordingly does not go into the Common Revenue Pool. There being no local industry to protect or promote the Respondents have no business to rely on Article XVIII: Section C of the GATT in this matter.

[88] Appellant's argument based on the breach of the rule of law by the Government does not succeed. The record of proceedings is replete with references of Appellant and Respondents of engagement between the Respondents and the EBA including Appellant. There is also evidence of written correspondence between Appellant and Respondents about the Act in Bill form. This includes earlier Bills that were not enacted into law. The real issue here in a matter of a simple imposition of levy on alcohol and tobacco products at a levy of 7% for importers and 2% for manufacturers is not so much the levy but the differential between the importers and the manufactures, since the Appellant would seem to be happy with a rate of 2% instead of 7%. The rational relationship between the scheme which the Act adopts and the achievement of the governmental purpose may look rather obscure on the face of the Act, but once the WHO FCTC is embraced the rational relationship brightens up. The Act is not capricious or arbitrary. In para 140 of his answering affidavit First Respondent states as follows:

> "140 I submit that a 5% difference was taken in consideration of amongst other factors that should a tobacco company set up in the country then custom

duties and excise tax would be effected thus increasing the price of tax in order to be competitive amongst the SADC countries. At present there is no value for tobacco custom duty and excise tax. Once promulgated the custom duties and excise tax will be deposited in the common revenue pool of SACU".

[89] Accordingly, First Respondent submits at para 144: *"The Act bears a relationship with the purpose stated and is not in conflict with the rule of law rationality."* Based on the allowable exceptions, the Second Respondent also states that the tobacco levy is not arbitrary nor does it 'unjustifiably discriminate? In the event that the law discriminates, then the reason for such discrimination is justifiable", since the "purpose for the Act is to protect the citizens of Eswatini" and the correct procedure of enactment was followed in particular that the Act was a 'money' Bill as required by the Constitution. The Appellant was invited and it made representations at committee stage in Parliament. And there is no prescribed procedure in the implementation. The Tobacco Products Control Act may only guide where necessary. The Appellant's argument founded on a conflict with international laws and the C & E Act is premised on its non-acceptance that the Act is based on the exception under the agreements binding the Government. But Respondents have submitted and argued based on the exception which I accept. The Appellant's argument based as alleged accordingly does not pass, and no more needs be said about it.

[90] In my view, the argument based on the purported, but obviously false, differentiation between importers and manufacturers cannot seriously be pursued: for the simple reason known to both parties that there are no local manufacturers. The comparison is based on a patent falsehood. There is only one player in the field, and that is the Appellant. In the result there is no real differentiation between importers and local producers to compare. Any argument based on these assumed but false premises can only lead to false and unsustainable results. In the result nothing turns on the alleged differential.

[91] On the alleged unfair differentiation between importers and local producers, Respondents argue that the differentiation is not unfair. If anything, this is a case of 'mere differentiation' in terms of **Prinsloo**[22] case:

> *"[25].....In regard to mere differentiation the constitutional State is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional State. The purpose of this aspect of equality is, therefore, to ensure that the State is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and 'integrity of legislation..."*

[92] In the presence of local producers, the Act would be seen as governmental action relative to a defensible vision of the public good, that is, legislation in favour of local producers, as a secondary effect. Primarily, however, the Act being aimed at thwarting the use of tobacco and its products, the Act serves a legitimate governmental purpose. The levy is accordingly lawful, permitted, justified and rational. In my view, the Act is not unconstitutional or in any way inconsistent with any provision of the Constitution. As to the argument that the Act is in conflict with the C & E Act, it seems to me that the contention is based on a rejection of the exception-based argument that the Respondents have pleaded. What the Appellant's contention amounts to, if we accept the exception, is that the Legislature acting in terms of the exception still has no room for free movement since what it has done must still be justified by reference to the same rules from which the Act was excepted. That cannot be.

[93] We have said that the Act is the product of an exception to the treaties for a purpose. That being the case, it is baffling how the Act can be said to be in conflict with legislation and international agreements, whether domesticated or not. Only the Constitution could be raised against the Act, to which we have already answered. As to alleged dichotomy

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[22] **Prinsloo v Van der Linde and Another** 1977 (3) SA 1012 (CC)

between international and domestic action of the country, it may look somewhat irrational and contrary to the rule of law, but international law itself accepts that kind of divide; it is not something that can be changed by the Courts and it is based on a sound principle, the manner of making laws in a country. It is true that if public power is used or action taken for no reason or justifiable reason that action would be arbitrary. But when and how often does that happen. Be that as it may, that is not what happened regarding the Act. I find it hard to accept that after several attempts over a couple of years to pass the Act, the Act could still be said to be irrational, arbitrary and in conflict with any national or for that matter international law.

[94] The alleged deprivation of property contrary to section 19 (1) is answered by reference to section 19 (2) (b)(ii) of the Constitution, and until the Act is declared null and set aside, no claim is available to Appellant. A similar answer may be extended to the Appellant's complaint based on section 32 (1) of the Constitution. The world of professions, occupations, trades and business is subject to various laws, agreements and conventions of a diverse kind. The Act in issue is just one of those laws. There will always be differentiation between persons just as there is between importers and the (nominal) local producers in the tobacco industry/trade in this country. The only consideration in terms of section 20 of the Constitution is whether the differentiation is not unfair. I have not found the differentiation complained about in this matter to be unfair.

[95] In the result and for the foregoing considerations –

(1) The appeal fails.

(2) Normally costs follow the course but in this case, No order as to costs is made.

M. J. Dlamini, JA

I Agree

S. P. Dlamini, JA

I Agree

S. J. K. Matsebula, JA

I Agree

M. J. Manzini, AJA

I Agree

L. M. Simelane, AJA