

# **Invocation of International Trade Agreements by Private Parties before Domestic Courts: A Namibian Perspective**

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**ABSTRACT**

This dissertation discusses research undertaken on the topic of whether private parties have *locus standi* to invoke international trade agreements through Namibian courts. The study investigates how effective domestic courts are in adjudicating on matters pertaining to international trade law in Namibia and within other jurisdictions such as regional economic communities.

There are two main objectives for this dissertation. Firstly, the capacity of Namibian courts to adjudicate on matters involving international trade law will be assessed. Secondly, the domestic courts' provision of effective redress to private parties in the event of violations of international trade agreements by Member States (in the absence of regional tribunals that grant private parties legal standing alongside Member States) will be assessed.

The research has revealed that since Namibia became independent in 1990, there has been very little research undertaken on the effectiveness of the Namibian courts in adjudicating on disputes relating to international trade law. Human rights matters, on the other hand, have come before local courts. These cases will be examined but the different nature of trade issues has to be recognized.

This study has further revealed that although Namibia and other States in Southern Africa grant *locus standi* to private parties to invoke international trade agreements before domestic courts, the adjudication by domestic courts of such issues depends on the constitutional structure of the States involved. The study identified the advantages and disadvantages in allowing domestic courts to play an active role in matters of international trade law. In dealing with the challenges associated with domestic courts adjudicating on such matters, regional and global issues have to be taken into account. This type of jurisprudence is still in its infancy.

In respect of Article 144 of the Namibian Constitution, the qualitative research methodology undertaken revealed that the Namibian legal order is not monistic but rather a mixture of monism and dualism. This is evident in the manner in which judges interpret and deliver their judgments. The study further revealed that private parties as litigants have instituted legal proceedings in a particular court or jurisdiction where he or she feels he will receive the most favourable judgment or verdict. This is attributed to the fact that the requirement to exhaust local remedies in some domestic courts is marred by a disregard for the rule of the law and further undermined by an overlap in regional integration.

On the other hand, some positive outcomes were identified where domestic courts have enforced the rulings of foreign courts; which is attributed to a legal system which is rules-based, predictable and brings about a measure of certainty for private parties.

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#### **LIST OF ABBREVIATIONS**

COMESA	Common Market for Eastern and Southern Africa
DPA	Dairy Producers Association of Namibia
DRC	Democratic Republic of the Congo
ESL	Extended Shelf Life
IIP	Infant Industry Protection
NDP4	Namibia Development Plan No. 4
RECs	Regional Economic Communities
SACU	Southern Africa Customs Union
SACU Agreement	Southern African Customs Agreement, 2002
SADC	Southern African Development Community
SAPA	Southern African Poultry Association
Tralac	Trade Law Centre
UHT	Ultra-High Temperature
WTO	World Trade Organisation
DSB	World Trade Organisation (WTO) Dispute Settlement Body

## CHAPTER 1: INTRODUCTION

### 1.1. Research Background

On 16 May 2014, the High Court of Namibia delivered a judgment in the matter of *Matador Enterprises (Pty) Limited v Minister of Trade and Industry and Others, in Re: Clover Dairy Namibia (Pty) Ltd and Another v Minister of Trade and Industry and Others*.<sup>1</sup> This case was instituted by private parties, namely, Matador (Pty) Ltd, Clover Dairy Namibia (Pty) Ltd and Parmalat SA (Pty) Ltd (“Clover and Parmalat”)<sup>2</sup> to review a decision of the Minister of Trade and Industry. The application before the High Court of Namibia was in respect of the Government Notice No. 245 of 2013, which was issued by the Minister of Trade and Industry (“the Minister”), entitled “Prohibition on Importation of Dairy Products Into Namibia: Import and Export Control Act, 1994”.

In terms of the Government Notice No. 245 of 2013, the Minister invoked a provision of domestic legislation, namely, section 2(1)(b) of the Import and Export Control Act, 1994 (Act No. 30 of 1994), and placed restrictions on the import of certain dairy products such as fresh milk, extended shelf life milk and ultra-high temperature (UHT) treated milk into Namibia.<sup>3</sup>

The Applicant in the matter, Matador Enterprises (Pty) Ltd (“Matador”), in its main relief application challenged Notice No. 245 of 2013 authorising the Minister to restrict the importation of dairy products such as fresh milk, extended shelf life milk and UHT milk into Namibia and the constitutionality of sections 2 and 3 of Act No. 30 of 1994 in so far as it relates to Article 21(1) (j), Article 18 and 25(2) respectively.

The Applicants in this case further contended that the decision embodied in Government Notice No. 245 of 2013 was in conflict with Namibia’s international agreements such as the SACU Customs Agreement, 2002, as there had been no agreement with other Member States to impose restrictions as required by section 25(4) of the SACU Agreement, 2002.

In delivering judgment in the Matador matter, Smuts, J, upheld the application by the Applicants to set aside Government Notice No. 245 of 2013 on Administrative Law grounds and thus ruled that it was not necessary to traverse the further review grounds raised in both applications, including the reliance upon the SACU Agreement. (*Supra* p. 45).

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<sup>1</sup> *Matador Enterprises (Pty) Limited v Minister of Trade and Industry and Others; in Re: Clover Dairy Namibia (Pty) Ltd and Another v Minister of Trade and Industry and Others (A 352/2013, A 386/2013) [2014] NAHCMD 156 (16 May 2014)*.

<sup>2</sup> Clover and Parmalat brought an application before the High Court which formed the subject matter of two applications. In Clover’s application, the relief sought was to review the decision embodied in Notice No. 245 and strike down s2 and 3 the Import and Export Control Act, 1994 (Act No. 30 of 1994) unconstitutional.

<sup>3</sup> *Ibid.*

On 18 August 2014, as legal challenges of an economic nature were unfolding in Namibia, the Southern African Development Community (SADC) Heads of States Summit (the highest decision-making body of the SADC) met at Victoria Falls, Zimbabwe, and adopted the new Protocol on the SADC Tribunal, which, *inter alia*, bars individuals from accessing the SADC Tribunal. The effect is that the jurisdiction of the SADC Tribunal shall be restricted to disputes between Member States only.<sup>4</sup> Article 33, as amended, provides that, “The Tribunal shall have jurisdictions on the interpretation of the SADC Treaty and Protocols relating to disputes between Member States”; thus effectively limiting access to the Tribunal to States only.<sup>5</sup> This resolution reaffirmed the traditional principle of public international law, that only Member States have a legal standing before regional tribunals.<sup>6</sup>

The consequence of the SADC Summit resolution is that private parties in the SADC have to resort to their domestic courts to invoke their rights over a breach of international agreements by Member States of the regional economic communities, and possibly the World Trade Organization (WTO). This may result in the domestic courts of Southern African countries becoming inundated with litigation.

In the context of this dissertation, the use of certain terminology merits a brief explanation. The term “private parties” refers to non-state entities such as natural and legal persons that are involved in transnational trade or commerce within RECs. “*Locus standi*” refers to the legal standing or the capacity of private parties to bring legal disputes before any jurisdiction. The terms “national law”, “municipal law” and “domestic law” shall be used interchangeably. The terms “incorporation” and “domestication” refer to a procedure in terms of which international law is made part of the law of the land.

In light of the above, this dissertation attempts to address the following question: Are domestic courts (in the absence of regional tribunals that grant private parties legal standing alongside Member States) able and willing to provide effective redress to private parties in the event of violations of international trade agreements? Furthermore, in light of the new Protocol on the SADC Tribunal excluding private parties, are the domestic courts within the SADC in a position to effectively provide the necessary judicial recourse to the aggrieved parties? These questions are pertinent in light of the criticism that, unlike the WTO’s multilateral dispute settlement mechanism, domestic courts lack the expertise, manpower and time to deal with complex

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<sup>4</sup> See the revised Protocol on the Tribunal in SADC, as amended.

<sup>5</sup> The Protocol on the Tribunal in SADC.

<sup>6</sup> For prominent examples of tribunals in which only states may be parties to contentious disputes, see United Nations, Statute of the International Court of Justice, 18 Apr. 1946, 1 UNTS XVI article 34 and United Nations Convention on the Law of the Sea (“Law of the Sea Convention”), 10 Dec. 1982, 1833 UNTS 39, Annex VI, article 20(1) (explaining the general rule jurisdiction of the International Tribunal of the Law of the Sea).

matters of international trade law and thus the overall attitude of domestic courts towards international law is ambivalent and frequently inconsistent.<sup>7</sup>

This dissertation investigates some of these implications and attempts to clarify the position of trade agreements in Namibia by relying on the Constitution, domestic statutes and case law. The Constitution as the supreme law of Namibia contains a unique provision which brings into effect international agreements within the domestic legal sphere which private parties may invoke before domestic courts; as was evidenced in the Matador matter.

In addition, this dissertation shall provide empirical evidence by analysing case law from the SADC Tribunal, Common Market for Eastern and Southern Africa (COMESA) Court of Justice and domestic jurisprudence from the Southern Africa Customs Union (SACU) Member States that have adjudicated on disputes relating to international trade agreements. It must be noted that the main focus of this dissertation will be on Namibian jurisprudence on the topic.

## 1.2 Problem Statement

Namibia is party to multilateral, regional and bilateral agreements. This reflects the ultimate objective of promoting free trade and competition among the private actors, thereby stimulating economic growth within the country.<sup>8</sup> Although the immediate beneficiaries of trade agreements are the private parties, more often than not access by private parties to the dispute settlement bodies such as Tribunals is restricted or non-existent. As private parties are not granted legal standing within the dispute settlement mechanisms relating to international trade agreements, it is more difficult for them to challenge policies and laws which are in violation of binding international trade agreements. Examples of such dispute settlement mechanisms include the World Trade Organisation (WTO) Dispute Settlement Body (the DSB), the SADC Tribunal and the SACU *ad hoc* Tribunal.

In some countries such as Namibia, domestic courts play an important role in providing redress to private parties through the enforcement of compliance with international obligations by States. This matter has become increasingly relevant as the rules-based nature of the RECs is being questioned and as concerns about non-compliance by governments and the absence of remedies for private sector firms and traders are raised.<sup>9</sup>

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<sup>7</sup> Peters, S. (2009). Supremacy lost: International law meets domestic constitutional law. *Vienna Online Journal on International Constitutional Law*, 3, 170-198.

<sup>8</sup> Namibia is a Member State of the WTO, SADC and SACU.

<sup>9</sup> Erasmus, G. (2014a). Trade Agreements as Part of the Law of the Land: The Example of Namibia. Tralac: Stellenbosch, South Africa.

However, in as much as this may be plausible, domestic courts are faced with their own shortcomings in the interpretation and application of international treaties. Recourse to domestic courts by private parties has in some cases not yielded the desired outcome. In this respect, Namibia provides a useful perspective for investigating these issues.

### **1.3 Research Goals**

This dissertation will assess whether the Namibian courts have the capacity to adjudicate on matters involving international trade agreements of which Namibia is a signatory State; through Article 144 of the Constitution.

Primarily, the discussion to follow strives to answer the pertinent question of whether domestic courts are able and willing to provide effective redress to private parties in the event of violations of international trade agreements.

In undertaking this dissertation, the author will endeavour to develop a better understanding of how the Namibian courts adjudicate on applications lodged by private parties; by invoking the Constitution. These applications come about when a private party seeks redress as a result of non-compliance with the obligations imposed upon public bodies through common law, treaties and the Constitution.

For comparative purposes, this dissertation will discuss the current status of private parties' access to international or multilateral dispute settlement bodies in the WTO and the regional economic bodies such as the SACU, SADC and COMESA. In narrowing the research to Namibia, the author aims to provide a perspective on how the Namibian courts have referenced administrative and constitutional law principles to allow private parties legal standing as laid down in the Namibian Constitution

At the multilateral level, access to the dispute settlement process of the WTO is limited to the Member States of the WTO. The WTO regime creates an institutional forum for international trade disputes limited to States. Should a private party of a Member State be aggrieved by another WTO Member State's national actions, the State of the aggrieved private party may act on its behalf and lodge a complaint with the DSB of the WTO.

At the regional level, private parties engaged in transnational trade within the SADC region could, under the previous SADC Protocol on the Tribunal, bring applications in terms of Article 15(1) of that Protocol. Article 15(1) has, however, mainly been utilised in matters of human rights violations. This right is however no longer available. Instead, the jurisdiction of the Tribunal is limited to Member States, as per Article 33 of the SADC Protocol on the Tribunal. Chapter 2 of this dissertation will discuss the present position of the SADC Tribunal.

Unlike the SADC Protocol on the Tribunal, the COMESA Treaty recognises the right of private parties to seek redress before the COMESA Court of Justice although there is a caveat – the private party must demonstrate that local remedies have been exhausted. The exhaustion of local remedies would require the private party to lodge a case before the domestic courts of the Member State of COMESA where the purported trade violation occurred. In particular, Article 26 of the COMESA Treaty, which provides legal standing before the COMESA

Court of Justice, was tested in the case of the *Republic of Mauritius v Polytol Paint & Adhesive Manufacturing Co. Ltd.*<sup>10</sup> In this case, Polytol, a private party incorporated in terms of the laws of Mauritius, approached the COMESA Court of Justice to decide whether Mauritius was in violation of the COMESA Treaty. The COMESA Court of Justice ruled in Polytol's favour; which led to the Government of Mauritius appealing against that judgement. This case shall be dealt with in depth in Chapter 2 of this dissertation.

The SACU dispute settlement mechanism, as per Article 13 of the SACU Agreement,<sup>11</sup> only recognises Member States' legal standing in settling disputes pertaining to the interpretation or application of the Treaty through an *ad hoc* Tribunal. This approach reaffirms the traditional view that only States are subjects of public international law and access to dispute settlement bodies is thus limited to sovereign States. It has to be noted though that the SACU Tribunal, although provided for in the SACU Agreement, has not been made operational. At present SACU has no dispute settlement institution of its own.

Against this background, the outcome of the dissertation will be of significance in informing the various stakeholders (such as importers and exporters, relevant government departments and foreign investors as well as the judiciary) on the role of domestic courts in adjudicating disputes involving international law and, in particular, international trade agreements. The dissertation will furthermore refer to theoretical issues pertaining to the relationship between international and national law and will seek guidance from the Namibian Constitution in establishing the domestic status of such treaties. For the purposes of comparative analysis, reference will be made to international trade agreements such as the SACU Agreement, the SADC Protocol on the Tribunal and the COMESA Treaty.

#### **1.4 Research Questions and Scope**

This dissertation aims to address the following research questions:

- 1) What is the status of international law under the Namibian Constitution?
- 2) Is the Namibian legal system of a monist or dualist nature or does it have elements of both?
- 3) What is the extent and application of international treaties by Namibian domestic courts?
- 4) How is Article 144 of the Constitution interpreted and applied by domestic courts?

The scope of this research includes questionnaires as responded to by selected stakeholders from the private and public sector. Specifically, information obtained through questionnaires from officials of the Ministry of Trade and Industry, the Office of the Government Attorney, the High Court of Namibia and legal practitioners in private practice will be discussed. Apart from the aforementioned stakeholders, the author further

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<sup>10</sup> Preliminary Application No. 1 of 2012, COMESA, Court of Justice.

<sup>11</sup> SACU Agreement, 2002.

consulted leading academics' works and reviewed existing literature and other sources for comprehensive background information.

### 1.5 Overview of the Methodology

This dissertation shall be confined to qualitative research (case studies). The author chose the methodology of qualitative research design because in legal studies like this one, quantitative research doesn't work as it would be no use asking random people about this topic and then quantifying that data in percentages and graphs. Random people wouldn't contribute anything truly meaningful because the topic is very deep and complex.

That said, Creswell (2003) defines qualitative research as an inquiry process in order to understand knowledge or claims based on constructive perspectives. This involves having to analyse all the materials and data that are at the disposal of the author and thereby formulating a research question which may be related to a new topic or a topic that has never been addressed within a particular environment. Baxter (2008) states that qualitative research ensures that the issues the author is researching are not only confined to the author's lens but rather through a variety of lenses which allow for multiple facets of the phenomenon to be revealed and understood. Stakes (1995, as cited by Baxter et al., 2008), states that qualitative research seeks to explore a topic of interest based on constructive claims. This paradigm recognises the importance of the subjective human creation of meaning, but does not reject some notions of objectivity outrightly.<sup>12</sup> In this regard, a qualitative research study has been undertaken by the author. According to Yin (2003), a qualitative case study is undertaken to explore situations in which the intervention being evaluated has no clear, single set of outcomes.

In addition to the qualitative research method, an intrinsic research method was relied upon by the author because the research centres on a particular issue of interest.<sup>13</sup>

This study shall thus rely on the qualitative empirical research methodology of primary and secondary information in order to find an answer to the pertinent question of whether the domestic courts (in the absence of regional tribunals that grant private parties legal standing alongside Member States) provide effective redress to private parties in the event of violations of international trade agreements. For purposes of empirical evidence, the author reviewed treaties, statutes and case law. As for the information pertaining to case law, the author examined Southern African cases pertaining to the issue of *locus standi* for private parties within RECs and domestic courts. Sampling of the documents through the convenience sampling method was relied upon.

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<sup>12</sup> Baxter, P. and Jack, S. (2008). *Qualitative Case Study Methodology: Study Design and Implementation for Novice Researcher*. McMaster University: West Hamilton, Ontario, Canada.

<sup>13</sup> Yin, K.R. (2003). *Case Study Research Design and Methods (Third Edition)*. Sage: Thousand Oaks, C..

In keeping with the University of Cape Town's ethical standards, ethical clearance was sought which was granted to the author on 9 October 2014 by the Director of Research. In line with this policy, the data collected had to be sieved in order to eliminate confidential material from non-confidential material. Confidential material is not disclosed in this dissertation. However, non-confidential information which is in the public domain is extensively relied upon and replicated in some instances.

Further to this process, interviews and questionnaires were sent out to selected, qualified and experienced individuals. It comes down to the type of data one needs to solicit the respondent's views on the effectiveness of the domestic courts and the application of international trade law and to possibly suggest recommendations in this regard. The questionnaire is included as Annexure A.

### **1.6. Research Assumptions**

Leedy and Omrod (2010, as cited by Simon, 2011), posit that, "assumptions are so basic that, without them, the research problem itself could not exist."<sup>14</sup> Accordingly, this research shall make two assumptions. First, is the assumption that there is a willingness on the part of the stakeholders, such as the importers, academia and government, to understand the role that domestic courts play in the interpretation of international agreements that Namibia has ratified and to what extent the domestic courts may do so in light of on-going economic litigations. Second, is the assumption that there is a need for domestic courts to adjudicate the matters under discussion. This will bring legal clarity and protect the rights of the relevant parties. Without this assumption, the author would not be able to answer the research questions.

### **1.7 Delimitation of the Study**

Simon (2011) defines delimitations as those characteristics that limit the scope and define the boundaries of research dissertations. Delimitations are in the author's control. In this regard, the author chose to confine the research to the Namibian domestic courts and conduct a comparative analysis of the multilateral and regional tribunals and case law from the domestic courts of RECs such as the SADC, COMESA and SACU.

### **1.8 Research Ethics**

In undertaking research for this dissertation, the author had to take into consideration the ethical problems that may arise during the research process. To mitigate against unethical conduct, the author made use of the University of Cape Town's ethical research guidelines and sought permission from the University to conduct

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<sup>14</sup> Simon, M.K. (2011). *Dissertation and Scholarly Research: Recipe for Success*. Create Space Independent Publishing: Seattle, WA, US.

the research. The author also requested permission from her place of employment to access and use public information for the dissertation and permission was granted.

In keeping with the duty of data confidentiality, the author applied Soltis' (p. 129) advice to observe the "non-negotiable" values of "honesty, fairness, respect for worse conditions, protecting the interviewee's identity in disseminating information (through, for example, the use of pseudonyms), obtaining permissions to view and film activities, record interviews, and to use documents owned by others."<sup>15</sup>

Thus, at the beginning of the interviewing process, the author informed the interviewees of their rights, that utmost confidentiality will be adhered to by the author and that the interviewee reserves the right not to answer any questions and this decision will be respected.

The author also guarded against plagiarism, ensuring that all statements were referenced wherever necessary and made use of the Turnitin software.

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<sup>15</sup> Soltis, J.F. (1989). The ethics of qualitative research. *International Journal of Qualitative Studies in Education*, 2(2), 123-130.

## CHAPTER 2: LITERATURE REVIEW

### 2.1 Introduction

Shaheed (2006) recognises that the extent to which international law can be used by domestic courts depends on the legal order of the state in question, whether treaties and customary international rules are part of the law of the land and, if so, under what conditions the domestic courts may apply them.<sup>16</sup> This investigation of the domestic courts' authority to interpret and apply international rules in judgments depends on whether, *inter alia*, (1) international law is *ipso facto* part of the law of the land, thereby giving rise to monism where both the national and international legal rules coexist or (2) whether the legal system is of a dualist nature where the incorporation of the international rules in a statute is a necessary prerequisite for the domestic application of international rules by domestic courts. Even though Shaheed's (2006) understanding is the accepted interpretation in the international law discourse, the topic has stimulated academic debates focusing on what should be the most appropriate role of domestic courts vis-à-vis the interpretation of international laws. It has also been observed that the actual practice is often of a mixed nature and that the practice of many states cannot be classified as either purely monist or dualist.

De Santa Cruz Oliveira (2014)<sup>17</sup> has identified two major views on trade practice. The first and most widely accepted view promotes domestic courts as enforcers of international law. This, according to this author, is premised on George Scelle's role splitting theory which considers that domestic judges, by applying international law, compensate for the lack of proper mechanisms available at the international level for the enforcement of international rules.<sup>18</sup> The second view, according to the same author, considers the enforcement of international law by domestic courts as possibly counterproductive in ensuring the efficacy of international rules. This is premised on the rational choice theory which is grounded on the political science approach as defined by Raustiala (2006).<sup>19</sup> Raustiala's definition is explained by De Santa Cruz Oliveira (2014)<sup>20</sup> as "rational-functionalism", whereby "legal rules and institutions are explained as a result of the *ex-ante* choices of rational agents who seek functional benefits *ex post*." The rational choice theorist believes that greater judicial involvement at the domestic level will retard rather than advance international law and thus judges have no role to play in implementing international law.

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<sup>16</sup> Shaheed, F. (2006). *Using International Law in Domestic Courts*. Hart Publishing: Oxford, UK.

<sup>17</sup> De Santa Cruz Oliveira, M.A.J. (2014). *International Trade Agreements before Domestic Courts: Lessons from the Brazilian Experience*. Society of International Economic Law Working Paper No. 2014/04.

<sup>18</sup> Dupuy, P.M. (2007). The unity of application of international law at the global level and the responsibility of judges. *European Journal of Legal Studies*, 1(2).

<sup>19</sup> Raustiala, K. (2006). Refining the Limits of International Law. *Georgia Journal of International and Comparative Law*, 34(2).

<sup>20</sup> *Supra*.

The two schools of thought on the domestic courts' role in the application and implementation of international rules have stimulated discussions on the advantages and disadvantages thereof. This chapter thus includes a review of the debates on the subject as well as the literature on trade practices and highlights lessons relevant to the research question. This chapter further highlights how monism and dualism have influenced the legal system of other jurisdictions, and highlights the role that the domestic courts have to play in this regard.

## 2.2 Theoretical Arguments on the Interpretation of International Law by Domestic Courts

According to Tzanakopoulos (2012)<sup>21</sup>, globalisation has augmented the permeability of domestic legal orders, while also leading to a considerable increase in international regulations. The role of domestic courts is of a reactionary nature as they are called upon to check that the Executive is acting in compliance with signed and ratified international laws. As a result of such a relationship, private parties may derive certain rights from the international obligations assumed by the State. This right is the basis upon which the private party may challenge actions of the Executive related to non-compliance with international obligations before a domestic court.

Tzanakopoulos (2012) provides three reasons why domestic courts may be better placed to apply international law. He firstly explains that domestic courts are institutions of the last instance within the State that can uphold international law and in that way avoid violations by the State and the concomitant engagement of the State's international obligations. Secondly, in interpreting and applying international law, domestic courts establish *opinio juris* and are therefore capable of creating or contributing to the creation of customary international norms. Thirdly, to avoid conflicts between international rules and national law, domestic courts may decide to ignore the existence of international norms and proceed with the interpretation of the domestic act which has been invoked by the private party.

In response to domestic courts' approach to selecting national rules over international law when a conflict arises, Dupuy (2007) states that in countries that have adopted monism in their Constitutions, the natural tendency of the judge is to apply international law only when there exists an equivalent or compatible rule in their own legislation. This is explained by the fact that judges are trained to apply and respect national laws in a technical, psychological and ideological sense. To address this conundrum, Dupuy (2007) suggests that national judges increasingly broaden their horizons in order to take into account the impact of international law and the inevitable phenomenon of globalisation.

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<sup>21</sup> Tzanakopoulos, A. (2012). Principles on the Engagement of Domestic Courts with International Law. International Law Association.

Falk (1964), in support of domestic courts being a national institution and an agent of the international legal order, states that domestic courts are in a position to develop international law and to demonstrate that normal standards of judicial independence are just as operative in an international law case as in a domestic case. The usefulness of domestic courts as international institutions, that is, as institutions responsible for upholding international law and for displaying it as a common system of law peculiar to no single state, depends on the capacity of these courts to withstand internal political influences when confronted with an issue of international law.<sup>22</sup>

Oppong (2011), in support of the significance of domestic courts in the enforcement of international judgments, states that domestic courts are potentially the most effective means of securing compliance with the decisions of international courts, which leads to the effectiveness of international adjudication.<sup>23</sup> Oppong (2011) further explains that the provisions which seek to adopt national rules for enforcing foreign judgments, in order to enforce the judgement of community courts, provide a means of linking community and national legal systems. As for private parties, the enforcement through national courts is rule-oriented, as opposed to the highly politicised international courts.<sup>24</sup>

These arguments reaffirm the view that domestic courts may serve as an important forum where private parties may seek redress for violations of international treaties. The above-cited scholars (Tzanakopoulos, 2012; Dupuy, 2007; Falk, 1964; Oppong, 2011) agree that the rules of international law and the rights and obligations they give rise to, are enforceable under the domestic law of the state, only if the states to which they apply, or against which they apply, or by which they are invoked, are willing and able to give effect to such treaties.

Whether or not a state or private investor or trader can enforce a right or an obligation which is sourced in international rules within a national legal system will depend upon the constitutional framework which defines state powers – be it legislative, executive or judicial. A judge in a domestic court may further be tasked with a duty to interpret and apply international rules, depending on the constitutional provisions that determine the status of international rules in the domestic arena. In such a case, a judge has to be mindful of the effects of globalisation and the need for one to acquire the necessary skills in rendering the desired services.

The belief that domestic courts should apply international law has long been held by international law scholars such as Tzanakopoulos (2012); Dupuy (2007); Falk (1964); and Oppong (2011) as important, more so in light of

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<sup>22</sup> Falk, R.A. (1964). The Role of Domestic Courts in International Legal Order. *Indiana Law Journal*, 39(3).

<sup>23</sup> Oppong, R.F. (2011). Enforcing judgments of the SADC Tribunal in the domestic courts of member states. *Monitoring Regional Integration in Southern Africa*, the Konrad-Adenauer-Stiftung.

<sup>24</sup> *Ibid.*

the fact that the majority of international tribunals are not keen on providing standing to private parties alongside member states.

However, the subject is also controversial. Scholars such as, De Santa Cruz Oliveira (2014)<sup>25</sup> have provided an analysis about how countries that have given WTO and REC treaties direct effect in their domestic legal systems have experienced difficulties. These difficulties have created conflicts between judges in domestic courts who have to decide between what is legitimately a government trade policy aimed at creating socio-economic benefits for all, on one hand, and, on the other hand, upholding international obligations in treaties and international rules that the Executive has signed and ratified. The same author warns that domestic courts should not admit the private invocability of WTO agreements for two main reasons. Firstly, the function and objective of international trade agreements is to make government-to-government concessions in order to increase market access. This difference between international trade agreements and other treaties is critical because the reduction of trade barriers achieved through international trade agreements is only accorded in return for the concessions of other signatory countries.<sup>26</sup> Secondly, the principle of popular sovereignty and democratic self-government in choosing how international trade obligations are complied with does not allow corporations to circumvent the local political branches and interfere with public policies based on international agreements through the domestic judiciary.

Oppong (2011)<sup>27</sup> has highlighted, *inter alia*, the challenges in utilising domestic courts to enforce community judgment and some important questions that arise as a result. These questions are:

1. Can the existing national common law and statutory law regimes for the enforcement of foreign judgments be suitably adapted for the purpose of enforcing community judgments?
2. If they can be suitably adapted, can national courts review community judgments?
3. Will the use of civil procedure rules, which differ from country to country, afford equal or adequate protection to individual judgment creditors?

Oppong (2011) is of the opinion that if these challenges are not addressed by critically answering the aforementioned questions, private parties may be denied the benefits of the judgement and this could undermine the relations between domestic and community courts.

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<sup>25</sup> De Santa Cruz Oliveira, M.A.J. (2014). International Trade Agreements before Domestic Courts: Lessons from the Brazilian Experience. Society of International Economic Law Working Paper No. 2014/04.

<sup>26</sup> Sykes, A. (2005). Public versus private enforcement of international economic law: Of standing and remedy. *Journal of Legal Studies*, 34, 631.

<sup>27</sup> *Supra*.

Slaughter and Burke-White (2006)<sup>28</sup> offer solutions to these challenges that focus on domestic politics rather than domestic law because political factors determine whether the state will adhere to international treaties or not. Slaughter and Burke-White (2006) contend that the future of private parties in the international community is not only related to enforcing rights. Private parties should be able to intervene in and influence what were once the exclusive jurisdiction and political processes of national governments. By strengthening, backstopping and compelling action at the national level, the international legal system has powerful tools at its disposal to alter domestic political outcomes.

Furthermore, Fairey (1998) contends that domestic statutes will increasingly have international law ramifications. Thus the Executive must understand the consequences of enacting legislation that impinges on international legal obligations.<sup>29</sup> Slaughter and Burke-White (2006) thus propose that there be a check and balance between international law and domestic policies through the process of strengthening, backstopping and compelling action at the domestic level.

### 2.3 Namibian Case Studies

In the absence of multilateral and regional tribunals granting *locus standi* to private parties alongside Member States, the Namibian courts have provided access to private parties seeking redress of an economic nature. Private parties, such as *Matador Enterprises (Pty) Limited v Minister of Trade and Industry and Others*<sup>30</sup>, *Clover Dairy Namibia (Pty) Limited and Another v Minister of Trade and Industry and Others*<sup>31</sup> and the *Southern Africa Poultry Association (SAPA) and Others v Minister of Trade and Industry and Others*<sup>32</sup>, are seeking remedies for violations of international trade agreements by Namibia. These three cases will be discussed in section 2.3.2 below.

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<sup>28</sup> Slaughter, A.M. and Burke-White, W. (2006). The future of international law is domestic (or the European way of law). *Harvard International Law Journal*, 47(2), 327-358.

<sup>29</sup> Fairey, F.W. (1998). *The Effect of International Law on Domestic Implementation*. Washington College of Law, American University: MA, USA.

<sup>30</sup> *Matador Enterprises (Pty) Limited v Minister of Trade and Industry and Others; in Re: Clover Dairy Namibia (Pty) Ltd and Another v Minister of Trade and Industry and Others (A 352/2013, A 386/2013) [2014] NAHCMD 156 (16 May 2014)*.

<sup>31</sup> *Clover Dairy Namibia (Pty) Ltd and Another v Minister of Trade and Industry and Others (A 386/2013) [2014] NAHCMD 245 (15 August 2014)*.

<sup>32</sup> *South African Poultry Association and Others v Ministry of Trade and Industry and Others (A 94/2014) [2014] NAHCMD 331 (7 November 2014)*.

In order to understand the manner in which Namibian courts presided over the aforementioned cases, specifically litigations concerned with international agreements or treaty litigations, an overview of the place of international law within the Namibian legal system must first be provided. This is discussed in the next section.

### 2.3.1 The Status of International Law under the Namibian Constitution

The principle attraction of international law for a Namibian judge, as stipulated in Schedule 1 of the Constitution, is with regard to fulfilling his or her oath to defend and uphold the Namibian Constitution and the laws of Namibia, which encompass international law.<sup>33</sup> Article 144 of the Namibian Constitution contains a provision which incorporates public international law into municipal law.<sup>34</sup> Article 144 states:

Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.

Article 144 recognises international law, its role and functions in Namibia's municipal law and it accords both the general rules of public international law and international law direct and automatic application in Namibian municipal law, subject to two main qualifications, as provided by Tshosa (2010).<sup>35</sup> According to this author, Article 144 lays down two main qualifications. Firstly, the general rule of international law and international agreements may be excluded from applying directly in municipal law by the Namibian Constitution itself. Secondly, they may be excluded by an Act of Parliament.

The significance of the aforementioned two qualifications is that general rules of international law are directly incorporated into Namibian municipal law and thus are directly enforceable in courts of law and private parties may likewise directly invoke and rely on these rules in legal proceedings.<sup>36</sup>

However, before an international agreement may be incorporated into domestic law, regard shall be had to the Vienna Convention on the Law of Treaties, 1969, and other provisions of the Namibian Constitution.

Article 16 of the Vienna Convention on the Law of Treaties, 1969, provides that:

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<sup>33</sup> Zongwe, D.P. (2010). Equality has no mother but sisters: The preference for comparative law over international law in the equality jurisprudence in Namibia. International law and domestic human rights litigation. Pretoria University Law Press (PULP): Pretoria, South Africa.

<sup>34</sup> Erasmus, G. (2014a). Trade Agreements as Part of the Law of the Land: The Example of Namibia. Associate. Tralac: Stellenbosch, South Africa.

<sup>35</sup> Tshosa, O. (2010). The status of international law in Namibian national law: A critical appraisal of the constitutional strategy. *Namibian Law Journal*, 2(1), 3-30.

<sup>36</sup> *Ibid.*

Unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of a State to be bound by a treaty upon:

- (a) Their exchange between the contracting States;
- (b) Their deposit with the depository; or
- (c) Their notification to the contracting States or to the depository, if so agreed.<sup>37</sup>

Following the principle laid down in Article 16 of the Vienna Convention on the law of treaties<sup>38</sup>, the Namibian Constitution lays down certain provisions that must be followed in order for the general rules of public international law and international agreements to bind Namibia.

Article 32(3) (e) of the Constitution states that the President has the power to sign and negotiate international agreements and to delegate such powers to a member of cabinet.<sup>39</sup> Article 40(i)<sup>40</sup> states that members of the Cabinet have, among others, the function to assist the President in determining what international agreements are to be concluded, acceded to or succeeded to and to inform the National Assembly thereof. Furthermore, in terms of Article 63(2) (e),<sup>41</sup> the National Assembly has the powers and functions, subject to the Constitution, to agree to the ratification and accession of international agreements which have been negotiated and signed in terms of Article 32(3) (e)<sup>42</sup>.

Thus, treaties that have been negotiated and signed by the President or his or her delegate or representative in terms of Article 32(3)(e) require parliamentary approval in order for such treaties to become binding on Namibia.<sup>43</sup> However, for those treaties which merely require the signature of the President, according to Article 144 of the Constitution, such treaties would require an enabling statute for it to become part of Namibia's domestic law.

In order to understand the connection between treaties and domestic law in the Namibian legal system, the concepts of "monism" and "dualism" must be explained. These concepts relate to the legal orders' influence on how treaty law is incorporated into the municipal legal system, and this in turn affects the manner in which domestic courts interpret international law.

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<sup>37</sup> Vienna Convention on the law of treaties (with annex). Concluded in Vienna on 23 May 1969.

<sup>38</sup> *Supra*.

<sup>39</sup> Article 32(3) (e): Without derogating from the generality of the functions and powers contemplated by Sub-article (1) hereof, the President shall preside over meetings of the Cabinet and shall have the power, subject to this Constitution to: (e) negotiate and sign international agreements, and to delegate such powers.

<sup>40</sup> The Namibian Constitution, 1990, as amended.

<sup>41</sup> *Supra*.

<sup>42</sup> *Ibid*.

<sup>43</sup> Erasmus (1989/1990:103); Mtopa (1990/1991:109-110).

Monism assumes that the internal and international legal systems form a unit wherein international law does not need to be translated into national law. The act of ratifying international law immediately incorporates international law into national law. International law may be directly applied by a national judge and directly invoked by private parties.<sup>44</sup> The monist schools argue that not only do international legal rules and various national legal orders constitute a single universal system, but, in cases of conflicts, national legal orders take a subordinate position.<sup>45</sup>

On the other hand, dualist legal systems perceive international law and national law as two distinct and independent legal orders, each having intrinsically and structurally distinct characters.<sup>46</sup> In countries such as South Africa, Botswana, Swaziland and Lesotho, international law does not exist as law within the State. Instead, national judges apply international law only to the extent that it has been incorporated into domestic law. Translations in this regard occur most commonly by the legislature enacting statutes incorporating a treaty into domestic law.<sup>47</sup>

Courts in dualist legal systems presume the conformity of domestic legislation with international treaties. Consequently, private parties seeking to enforce treaty-based rights may obtain a domestic legal remedy, even though courts do not apply treaties directly.<sup>48</sup>

This could be as a result of the nature of the treaty, whether it is self-executing or not. A self-executing treaty does not require any enactment of a statute to create private rights of action. An example of this treaty would be the African Charter on Human Rights. Thus private parties may invoke provisions of such a treaty for purposes of domestic litigation purposes. On the other hand, treaties which are not self-executing require an enactment of statutes to make them enforceable by private parties, and thus it does not create private rights of action. Unless the necessary processes of ratification have been met, an enabling legislation is effected to give rise to the rights and obligations emanating from such a treaty. An example of this type of treaty would be the Vienna Convention on Diplomatic Relations, 1961; principles of which are embedded in the Diplomatic Privileges and Immunities Act No. 36 of 1968 (Act No. 36 of 1968) and the Consular Privileges and Immunities Act No. 11 of 1971 (Act No. 11 of 1971).

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<sup>44</sup> Sloss, D. (2009). The role of domestic courts in treaty enforcement. A comparative study. Institute of European Law, University of Göttingen: Göttingen, Germany.

<sup>45</sup> Shaw, M.N. (2008). Sources. International Law (Fifth Edition). Cambridge University Press.

<sup>46</sup> Tshosa, O. (2010). The status of international law in Namibian national law: A critical appraisal of the constitutional strategy. *Namibian Law Journal*, 2(1), 3-30.

<sup>47</sup> Sloss, D. (2009). The role of domestic courts in treaty enforcement. A comparative study. Institute of European Law, University of Göttingen: Göttingen, Germany.

<sup>48</sup> *Ibid.*

### 2.3.2 Invocation of International Law in the Namibian Courts

Notwithstanding the aforementioned distinctions between dualism and monism, the matter that this dissertation wishes to investigate is the invocation of international agreements before the Namibian domestic courts. The conclusion that one can draw from the above interpretation is that the rules of international law and treaties in Namibia are, in principle, part of the law of Namibia, and private parties may invoke and rely upon them in domestic litigations.

Accordingly, Tshosa (2010) explains that the general rules of public international law and international agreements are part of municipal law, that is, they have direct and automatic application in Namibian domestic law. Thus, the Namibian courts are obliged to take judicial notice of them as a source of law. Tshosa (2010) is of the opinion that the Namibian Constitution has adopted a monist approach regarding the relationship between international and Namibian national law. However, if one is to rely on the various authors' understanding of monism, that is, in cases of conflicts, national legal orders take a subordinate position. The number of cases that the Namibian Courts have adjudicated upon, more so in light of the interpretation of Article 144, throws doubt on Tshosa's (2010) position on whether the legal system of Namibia is indeed monistic in nature.

An analysis of the following cases, in which Namibian courts interpret Article 144 in relation to international laws, shows a trend towards a more nuanced approach, even though the wording of Article 144 suggests a monist approach. Article 144 was discussed in the case of *Kauesa v Minister of Home Affairs*<sup>49</sup> insofar as it makes international agreements part of the domestic law of Namibia (even though it is a case involving issues of human rights).<sup>50</sup>

In the *Kauesa* matter, the High Court had to examine whether the applicant, a junior police officer was free to accuse colleagues and superiors in the police force of irregularities. *Kauesa* during the television program "spotlight" said that the leadership positions in the Police administration were occupied by white people, who managed this task without any interruption, in this way preventing any change in the management and fostering, according to *Kauesa's* point of view, corruption and abuse of power. These statements were perceived as defamatory by the people against whom they were addressed and *Kauesa* was charged by violating section 32(58) of the Regulations of the Police Act No. 19 of 1990, ("section 32 (58)") published under Government Notice R 203, Government Gazette 791 of 14 February 1964. The Applicant in the High Court challenged the constitutionality of section 32 (58) prohibiting him to publicly criticize senior officers. This provision states the ban on negative comments publicly expressed against the military administration or any other state administration.

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<sup>49</sup> *Kauesa v Minister of Home Affairs (SA 5/94) [1995] NASC 3; 1995 (11) BCLR 1540 (Nms) (11 October 1995).*

<sup>50</sup> *Supra.*

The High Court however ruled that freedom of speech can be limited by the fundamental rights relating to dignity, equality and non-discrimination and legislation enacted in accordance with the Constitution, namely, the Racial Discrimination Prohibition Amendment Act<sup>51</sup>, and that a corollary to these was a prohibition on 'hate' or racist' speech, which the Court defined as speech inciting hatred and prejudice on the ground of race, colour, ethnic origin, creed or religion.

In reviving its decision, the High Court relying on the judgment of the European Court of Human Rights in *Engel v The Netherlands*,<sup>52</sup> found that restrictions could reasonably be imposed on the applicant who as a police officer did not have an unlimited right to impugn the integrity of his colleagues and superiors. The maintenance of loyalty and discipline in the police force meant that penalties could be imposed on the abusive exercise of the freedom of speech. The appellant aggrieved by the decision of the High Court appealed this matter in the Supreme Court. Various arguments were heard; however of notable importance was that the Appellant relied on the African Charter on Human and People's Rights, due to its applicability in Namibia. The Supreme Court in commenting about the status of the African Charter on Human and People's Rights, 1981, noted the following:

The Namibian Government has, as far as can be formally established [,] recognised the African Charter in accordance with Article 143 read with Article 63(2)(d) of the Namibian Constitution. The provisions of the Charter have therefore become binding on Namibia and form part of the law of Namibia in accordance with article 143, as read with Article 144 of the Namibian Constitution.<sup>53</sup>

According to the Supreme Court in this matter, the Charter was self-executing and thus applicable in Namibia and could thus be invoked by a private party before the domestic court. As a result of the above understanding, the Court declared Regulation 58(32) of the Police Act<sup>54</sup>, which inhibited members of the police force from "commenting unfavourably in public upon the administration of the force", unconstitutional in that it was inconsistent with Article 21(1) and (2) of the Constitution.

The Supreme Court did not analyse foreign case law on this point in any detail, presumably because the Namibian Bill of Rights in any case provides for comprehensive protection of basic human rights. If the Supreme Court had allocated time to deal with jurisprudence of international treaties dealing with human rights matters, international treaties would not be merely viewed as a source from which domestic courts derive assistance in interpreting matters before it. This argument touches on the issue of whether the legal

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<sup>51</sup> Racial Discrimination Prohibition Act. No. 26 of 1991. (Act N. 26 of 1991).

<sup>52</sup> Ser A, vol 22. 1976.

<sup>53</sup> *Ibid.*

<sup>54</sup> Act No. 19 of 1990, published under Government Notice R 203, Government Gazette 791 of 14 February 1964.

system is of a monist nature or not, considering that when there are conflicting provisions before the domestic law and international law, the domestic law becomes superior.

Article 144 was also discussed in *S v Mushwena & Others*<sup>55</sup>, a case involving the apprehension, abduction and deportation of 13 Respondents from Botswana and Zambia by security and immigration officials from those countries to Namibia where they were charged, inter alia, with treason and murder allegedly committed in Namibia. Reference was made to international agreements such as the International Covenant on Civil and Political Rights, 1951; the Convention Relating to the Status of Refugees, 1951; and the 1967 Protocol Relating to the Status of Refugees, and to Article 144 of the Namibian Constitution.<sup>56</sup> Mtambanengwe A.J.A stated that:

[A]s a matter of fact, as I have shown....the [International Convention on Civil and Political Rights] and the UN Covenant and the Protocol Relating to Refugees, have become part of Public international law and by virtue of art. 144, has become part of the law of Namibia.<sup>57</sup>

The aforementioned cases highlight the judiciary's position with regards to the effect of Article 144 of the Constitution in the Namibian legal order. Importantly, the aforementioned cases highlighted the pivotal role that domestic courts play in developing the jurisprudence around Article 144. This reaffirms Tzanakopoulos's (2012) understanding that: domestic courts establish *opinio juris* and are thus capable of creating and contributing to the development of customary international law.

Having provided the above outline on the manner in which the domestic courts incorporate international public law and international law rules into the Namibian legal system, the next section will elaborate on the cases that were recently adjudicated upon by the Namibian courts on matters relating to protectionist governmental measures or trade policy issues.

The private parties in the following cases have claimed, among other grievances, that Namibia has failed its obligations as per the WTO Agreement, SACU Agreement and SADC Protocol on Trade. These cases shed more direct light on the main research question.

**a) *Matador Enterprises (Pty) Limited v Minister of Trade and Industry and Others; in Re: Clover Dairy Namibia (Pty) Ltd and Another v Minister of Trade and Industry and Others (A 352/2013, A 386/2013) [2014] NAHCMD 156 (16 May 2014)***<sup>58</sup>

<sup>55</sup> *S v Mushwena and Others (SA4/04, SA4/04) [2004] NASC 2 (21 July 2004)*.

<sup>56</sup> Tshosa, O. (2010). The status of international law in Namibian national law: A critical appraisal of the constitutional strategy. *Namibian Law Journal*, 2(2), 3-30.

<sup>57</sup> *S v Mushwena and Others (SA4/04, SA4/04) [2004] NASC 2 (21 July 2004) p. 207*.

<sup>58</sup> *Matador Enterprises (Pty) Limited v Minister of Trade and Industry and Others; In Re: Clover Dairy Namibia (Pty) Ltd and Another v Minister of Trade and Industry and Others (A 352/2013, A 386/2013) [2014] NAHCMD 156 (16 May 2014)*.

Since the end of 2013, the Namibian dairy industry enjoyed government support through qualitative import measures gazetted on 16 September 2013 in Government Notice No. 245 of 2013 under the Import and Export Control Act, 1994 (Act No. 30 of 1994). Prior to this protective measure, Government Notice No. 187 of 2000 was published. It imposed a levy of 4.25 cents per litre on UHT milk imported into Namibia in order to protect the Namibian dairy industry.

The Minister of Trade and Industry, in gazetting Government Notice No. 245 of 2013, referred to the SACU Agreement of 2002, specifically Article 25, which deals with Import and Export Prohibitions and Restrictions. Article 25 of the said Agreement states:

#### Import and Export Prohibition and Restrictions

1. Member States recognize the right of each Member State to prohibit or restrict the importation into or exportation from its area of any goods for economic, social, cultural or other reasons as may be agreed upon by the Council.
2. Except in so far as may be agreed upon between the Member States from time to time, the provisions of this Agreement shall not be deemed to suspend or supersede the provisions of any law within any part of the Common Customs Area which prohibits or restricts the importation or exportation of goods.
3. The provisions of paragraphs 1 and 2 shall not be so construed as to permit the prohibition or restriction of the importation by any Member State into its area of goods grown, produced or manufactured in other areas of the Common Customs Area for the purpose of protecting its own industries producing such goods.
4. A Member State shall upon request by any other Member State take such steps as may be agreed upon between the Member States concerned (including action to make such steps legally enforceable within its area) to prevent the exportation or unrestricted exportation from its area to the area of such other Member State of such prohibited or restricted goods imported from outside the Common Customs Area or grown, produced or manufactured in its area or to prevent the exportation or unrestricted exportation from its area to a State outside the Common Customs Area of such prohibited or restricted goods imported from the area of such other Member State. The expression "prohibited or restricted goods" includes second hand goods imported from outside the Common Customs Area.
5. Member States shall co-operate in the application of import restrictions with a view to ensuring that the economic objectives of any import control legislation in any State in the Common Customs Area are attained.

In terms of this Article, Member States of SACU may prohibit or restrict the importation into or exportation from its area any goods for economic, social, cultural or other reasons as may be agreed upon by Council.<sup>59</sup>

Prior to the Government Gazette Notice No. 245 of 2013, the Namibian government, through the Minister of Trade and Industry, utilised the provisions of Article 26 of the SACU Agreement, 2002, to protect the dairy industry through Government Notice No. 61 of 2007. Article 26 states as follows:

#### Protection of Infant Industries

1. The Government of Botswana, Lesotho, Namibia or Swaziland may as a temporary measure levy additional duties on goods imported into its area to enable infant industries in its area to meet competition from other producers or manufacturers in the Common Customs Area, provided that such duties are levied equally on goods grown, produced or manufactured in other parts of the Common Customs Area and like products imported from outside that area, irrespective of whether the latter goods are imported directly or from the area of another Member State and subject to payment of the customs duties applicable to such goods on importation into the Common Customs Area.
2. Infant industry means an industry which has been established in the area of a Member State for not more than eight (8) years.
3. Protection afforded to an infant industry in terms of paragraph 1 shall be for a period of eight (8) years unless otherwise determined by the Council.
4. The Council may impose such further terms and conditions as it may deem appropriate.

The difference between Article 25 and 26 of the SACU Agreement is that, the latter Article provides for Member States of SACU excluding South Africa to utilize IIP in order to protect infant industries from lower priced imported products of already established enterprises. Whereas the former provides for Member States of SACU permissible deviation from the provisions of the SACU Agreement to prohibit or restrict imports into or exports from its area for purposes of economic, social, cultural or other reasons as may be agreed upon by the SACU Council of Ministers. Thus Member States of SACU are permitted to invoke their domestic laws to impose quantitative restrictions provided procedures of consultation with other SACU member states as required by the SACU agreement of 2002 are upheld.

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<sup>59</sup> The Council refers to the Council of Ministers as per article 8 of the SACU Agreement 2002. The Council is responsible for the overall policy direction and functioning of SACU institutions, including the formulation of policy mandates, procedures and guidelines for the SACU institutions. The Council has the authority to approve customs tariffs, rebates, refunds or drawbacks and trade related remedies.

The consequence of Notice No. 61 of 2007 was that the Namibian dairy industry would enjoy Infant Industry Protection (IIP) for a period of eight (8) years, as provided for by Sub-Article 26(2) of the SACU Agreement, 2002. However, the protective tariffs in Notice No. 61 of 2007 continued until January 2012 when IIP expired. This meant that Namibian Dairies, as the only domestic industry player, had to compete with imported dairy products from South Africa which were no longer subject to the levies under Notice No. 61 of 2007. It was however unable to compete with the lower prices of imported South African dairy products. In an act to rescue the dairy industry from lower priced imported dairy products from South Africa, the Dairy Producers Association of Namibia (DPA) directed its application to the Minister of Trade and Industry in April 2013, seeking urgent interim measures to secure the continuation of the Namibian domestic dairy industry until the Meat Industry Act of 1981<sup>60</sup> could be amended to include dairy products.

It is worth pointing out that, in lodging its application with the Minister of Trade and Industry, there were no guidelines or procedures on how the application was to be presented and its content or information on how the Minister will deal with the application and the timeline in which a decision is to be made. Instead, the dairy industry relied on the Import and Export Control Act, 1994 (Act No. 30 of 1994), which will be dealt with in the ensuing paragraphs.

In its application, the DPA and Namibia Dairies (Pty) Ltd argued that the imposition of measures limiting the quantity of importation of dairy products into Namibia would increase raw milk production for local value-addition while still allowing for competition in the market through limited imports. According to the DPA, these measures would not only lead to increased milk production within the value chain but, more importantly, the measure would be in line with government policies such as the Namibian Agricultural Marketing and Trade Policy Strategy, the Growth at Home Strategy and the Fourth Development Plan (NDP4) that identified agriculture as one of the strategic economic sectors for growth.

Following receipt of this application, the Ministry, in an advertisement taken out in the local media, issued a notice entitled "Public notice on an application received from the Namibia Dairy Industry to implement restrictions on importation of dairy products into Namibia." The notice referred to the application received from the dairy industry requesting the limitation of importation of dairy products such as fresh milk, ESL and UHT imported into Namibia. The notice then proceeded as follows:

'All interested parties / importers are hereby requested to submit written comments if they are in support or have any objection to this application.'

A copy of the application could be obtained from the Ministry and comments were to be provided by no later than noon on 24 May 2013. The notice was published in the media on 14 May 2013. Clover responded to the advertisement on 21 May 2013, objecting to the proposed restriction. Following the written submissions made by Clover and Matador, the Ministry issued another public invitation in the media by way of public notice

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<sup>60</sup> Meat Industry Act, 1981 (Act No. 21 of 1981).

which had as its heading “Invitation to a public consultation on quantitative restrictions on the importation of dairy products into Namibia”. The invitation referred to the application received for the imposition of quantitative restrictions on the importation into Namibia of ESL and UHT milk, buttermilk, curdled, yoghurt and other fermented milk under the provisions of the Act. It further stated:

‘The Ministry of Trade and Industry will hold a public consultation on the application and hereby invites any interested parties to attend and provide their views on the subject matter.’

Interested parties were then invited to a consultative meeting which was held on 18 July 2013. Representatives of Matador and Clover attended and participated in that meeting and provided detailed written representation setting out their respective positions in advance of the meeting.

After this public consultation, the Minister signed a memorandum to Cabinet on 27 June 2013 under the heading “Imposition of quantitative restrictions on imports of dairy products into Namibia”. The purpose of the memorandum was:

1. To inform Cabinet of the serious challenges being faced by the Namibian dairy industry due to imports of dairy products into the country;
2. To seek and obtain the approval of Cabinet for the Ministry of Trade and Industry to institute restrictions on the quantities of fresh, Extended Shelf Life, Ultra High Temperature milk, buttermilk, curdled, yoghurt and other fermented milk that are being imported into the country as an interim measure in terms of the relevant provisions of the Import and Export Act, 1994 (Act No. 30 of 1994) pending the introduction of relevant long term measures (Meat Industry Act No 12 of 1981) and
3. To seek Cabinet approval for the imposition of import permit requirements for the imports of fresh, Extended Shelf Life (ESL), Ultra High Temperature (UHT) milk, buttermilk, curdled, yoghurt and other fermented milk which system will be administered by the Meat Board of Namibia.’

Cabinet, in its decision of 2 July 2013 under the heading “Imposition of quantitative restrictions on imports of dairy products into Namibia”, resolved the memorandum from the Ministry as follows:

‘RESOLVED

1. The Cabinet directs the Ministry of Trade and Industry to institute interim quantitative restrictions on imports of fresh, extended shelf life (ESL), ultra-high temperature (UHT) milk, buttermilk, curdled, yoghurt and other fermented milk through the introduction of an import permit system to be administered by the Meat Board of Namibia; and
2. The Cabinet approved the implementation of quantitative restrictions measures referred to above to be preceded by consultations with stakeholders. ‘As per the directive of Cabinet, the Ministry held

public consultations with the interested stakeholders, decided to impose quantitative restrictions, namely, through the *Government Notice on the Prohibition on importation of dairy products into Namibia: Import and Export Control Act, 1994*.

However, after several months of implementation, two separate court applications were heard together. These were instituted by Matador Enterprise (Pty) Limited<sup>61</sup> and Clover Dairy Namibia (Pty) Limited<sup>62</sup> (both private parties are involved in the business of importing South African dairy products into Namibia) in the Namibian High Court.

The rights of the private parties, namely, Matador (Pty) Limited & Others and Clover Dairy Namibia (Pty) Ltd, stems from Article 25(2) of the Namibian Constitution which states that aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent court to enforce or protect such rights. In particular, Matador (Pty) Limited sought relief to strike down section 2 and 3 of the Import and Export Control Act, 1994 (Act No. 30 of 1994) as unconstitutional.

For the purposes of this dissertation, it is necessary to discuss the relevant provisions of the Import and Export Control Act, 1994 (Act No. 30 of 1994). The Import and Export Control Act, 1994 is an Act of parliament which sets out the powers of the Minister in relation to the import and export of goods. Specifically sections 2 and 3 provides as follows:

## **2 Powers of Minister in relation to import and export of goods**

(1) The Minister may, whenever it is necessary or expedient in the public interest, by notice in the Gazette prohibit -

- (a) the import into or the export from Namibia; or
- (b) the import into or the export from Namibia, except under the authority of and in accordance with the conditions stated in a permit issued by the Minister or by a person authorised by him or her,

of any goods of a class or kind specified in such notice or of any goods other than goods of a class or kind specified in such notice.

(2) For the purposes of subsection (1) goods may be classified also according to the source or origin or the intermediate or final destination thereof or according to the channels along which or manner in which they are imported or exported or according to the purposes for which they are intended to be used.

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<sup>61</sup> *Matador Enterprises (Pty) Limited v Minister of Trade and Industry and Others; In Re: Clover Dairy Namibia (Pty) Ltd and Another v Minister of Trade and Industry and Others (A 352/2013, A 386/2013) [2014] NAHCMD.*

<sup>62</sup> *Clover Dairy Namibia (Pty) Ltd and Another v Minister of Trade and Industry and Others (A 386/2013) [2014] NAHCMD 245 (15 August 2014) Case No. A 386 /2013.*

- (3) A permit issued under subsection (1) may prescribe the quantity or value of goods which may be imported or exported thereunder, the price at which, the period within which, the port through or from which, the country or territory from or to which and the manner in which the goods may be imported or exported, and such other conditions as the Minister may direct, including any condition relating to the possession, ownership or disposal of goods after the import thereof or to the use to which they may be put.
- (4) The Minister or any person authorized by him or her, may cancel, amend or suspend any permit issued under subsection (1), if the Minister is satisfied that any condition of the permit has not been complied with, or if the holder of the permit has been convicted of an offence under this Act, or if it is necessary or expedient in the public interest.
- (5) The Minister may by like notice withdraw or amend any notice issued under subsection (1).

### 3 **Furnishing of information to Minister**

The Minister or any person authorized by him or her, may in writing direct any person who imports, exports or manufactures any goods or trades in any goods or in the course of his or her business or trade handles or has under his or her control any goods, to furnish the Minister within a period specified in the direction with any information at his or her disposal in relation to the import, export, manufacture, supply or storage of the goods concerned.'

The effect of sub-section 2 (1) (a) of the Import and Export Control Act, 1994, is that the Minister of Trade and Industry is granted the discretionary power to prohibit the import and export of goods into and out of Namibia. The prohibition of such goods must be gazetted in the Government Gazette.

Sub-section 2(1) (b) of the same legislation further empowers the Minister or a person authorised by the Minister to grant permits for the import or export of goods in accordance with the conditions as set out in the permit.

Furthermore, section 3,<sup>63</sup> grants the Minister discretionary powers to direct in writing any person authorised by him or her who imports, exports or manufactures any goods or trades in any goods or in the course of his or her business or trade, to furnish the Minister with information pertaining to such transactions. In maintaining the constitutional principle of natural justice, such as the *audi alteram partem*, although not explicitly stated, a holder of a permit is afforded the opportunity to be heard before a permit may be cancelled, amended or suspended, as provided for in terms of sub-subsection 2 (4) of the Import and Export Control Act, 1994.<sup>64</sup>

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<sup>63</sup> Import and Export Control Act, 1994 (Act No. 30 of 1994).

<sup>64</sup> *Supra*.

It is in respect of section 2 and 3 of the Import and Export Control Act, 1994, and Article 25 of the SACU Agreement, 2002, that the Minister, after discussions with the DPA, decided to consult with Cabinet and obtain an “in principle approval” to impose quantitative restrictions on dairy products imported into the commerce of Namibia. After Cabinet gave an “in principle approval” on the quantitative restrictions, the Ministry of Trade and Industry, with the Permanent Secretary as Chairperson, held a public consultation to give the private parties an opportunity to be heard without disclosing the outcome of the Cabinet decision.

The Ministry, in taking into consideration the proposals from the private parties namely the importers, the Namibian dairy industry and the Cabinet Decision, by way of Government Gazette Notice No. 245 of 2013 imposed quantitative restrictions on dairy and dairy products that are imported into the commerce of Namibia.

In the *Matador (Pty) Limited and Others*<sup>65</sup> application, various constitutional arguments were raised and eventually used as grounds for the Court’s decision. The most relevant points for the purposes of this dissertation are:

- (1) The applicants in this matter viewed the imposition of the quantitative restriction as contrary to Article 18 of the Namibian Constitution; which states that administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation. Any person aggrieved by the exercise of such action shall have the right to seek redress before a competent Court or Tribunal.
- (2) The quantitative restriction of dairy products is a violation of the constitutional freedom of commerce and free competition.
- (3) A violation of the equality principle founded in the WTO multilateral system that equal treatment should be accorded to all WTO Members has occurred.
- (4) The decision embodied in the notice was in conflict with the SACU agreement as there had been no agreement with other member states to impose restrictions, required by the 2002 SACU agreement.

The Applicants requested the domestic court to review Government Notice No. 245 of 2013 and to challenge the constitutionality of section 2 and section 3 of the Import and Export Control Act, 1994. It transpired from the arguments presented by the legal counsel of the Applicants that the Minister of Trade and Industry used a wrong act to carry out his administrative duty of issuing a Notice (No. 245 of 2013) in the Gazette to restrict imports of dairy products. According to the Applicants, Notice No. 245 of 2013 should have been issued under the Control of the Importation and Exportation of Dairy Products and Dairy Substitutes, 1986 Act (Act No. 5 of 1986), and not under the Import and Export Control Act, 1994.

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<sup>65</sup> Ibid.

The Court held that the Control of the Importation and Exportation of Dairy Products and Dairy Substitutes Act, 1986 (Act. No. 5 of 1986) was the relevant Act. Thus the Minister had erred when he used the Import and Export Control Act, 1994. Even if the Import and Export Control Act, 1994, was applicable, the Court found that the Minister failed to take into account relevant matters including his powers under the enabling provisions of the Import and Export Control Act, 1994.

Furthermore, the decision by the Minister did not comply with just administrative action for the purposes of Article 18 of the Constitution and the Minister had failed to inform the parties of the outcome of the decision by Cabinet. In this regard, the Court held that “Article 18 of the Constitution of Namibia pertaining to administrative justice requires not only reasonable and fair decisions based on reasonable grounds, but inherent in that requirement, is fair procedures which are transparent.”<sup>66</sup> The Court further stressed that:

Effective judicial review must in many cases depend on the Court being properly informed as to what moved the administrative body to decide as it did. It seems to me that a body which is required to act “fairly and reasonably” can in most instances only do so if those affected by its decisions are appraised in a rational manner as to why that body has made the decision in question.<sup>67</sup>

That said, Smuts, J. did not deem it necessary to discuss Article 144; his decision was purely based on Administrative law grounds such as the fact that the Minister in arriving at a decision had invoked the wrong enabling act and had failed to provide reasons. Unfortunately at this stage, this judgment could not be regarded as authority for the application of International trade agreements under Article 144. However the Ministry of Trade and Industry has appealed and there might be further developments on the application of international trade agreements under Article 144.

***b) Clover Dairy Namibia (Pty) Ltd and Another v Minister of Trade and Industry and Others (A 386/2013)***  
***[2014] NAHCMD 245 (15 August 2014) Case No. A 386 /2013.***

The Matador matter had a spill-over effect which led to more private parties challenging the regulations and trade policies instituted by the government of Namibia to protect local industries from importers of foreign products.

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<sup>66</sup> *Aonin Fishing (Pty) Ltd and another v Minister of Fisheries and Marine Resources* 1998 NR 147 (HC) at 150 F-H; cited with approval by the Supreme Court in *Government of Namibia v Sikunda* 2002 NR 203 and by Strydom, CJ, (diss) in *Chairperson of the Immigration Selection Board v Frank and Another* 2001 NR 107 (SC) at 170-171.

<sup>67</sup> *Kersten t/a Witvlei Transport v National Transport Commission* 1991 NR 234 (HC).

In the *Clover Dairy Namibia (Pty) Ltd and Another v Minister of Trade and Industry and Others*<sup>68</sup> case, Clover and Others, importers acting as subsidiaries to companies incorporated in terms of the laws of South Africa, approached the High Court with a interlocutory application, seeking the execution of the judgment of the High Court given on 16 May 2014<sup>69</sup>, pending an appeal to the Supreme Court against that judgment. The High Court in its 16 May 2014 judgment set aside Government Notice No. 245 of 2013 providing for quantitative restrictions on the importation of certain dairy products published in Government Notice No. 245 of 2013 in terms of s2(1)(b) of the Import and Export Control Act, 1994, by the Minister of Trade and Industry, cited as the first Respondent in that application. The Minister and the Attorney-General, cited as the fifth Respondent in that application, have appealed against the judgment and order of the High Court.<sup>70</sup> The Applicants also challenged the constitutionality of section 2(1) (b) of the Import and Export Control Act, 1994. The Applicants both sought the execution of the judgment.

Clover, in its application, set out the difficulties it had encountered with the implementation of the restrictions as a result of the Government Notice No. 245, particularly regarding the manner in which applications for permits are made, dealt with and approved and then how the importation occurs. Clover, among other issues, pointed out that its business has decreased considerably as a consequence of Government Notice No. 245 of 2013.

On the other hand, the Minister of Trade and Industry argued that the setting aside of Government Notice No. 245 of 2013 will frustrate the government's objective in implementing an important economic Governmental policy which underpins Government Notice No. 245 of 2013. The Minister further pointed out that the prejudice is irreversible because the continued importation of affected dairy products would undermine the domestic dairy producers and that the public interest, which is the criterion for the exercise of his powers in section 2 of the Import and Export Control Act, 1994, would as a consequence be undermined.

In having heard the arguments from the concerned parties, Smuts, J, delivered the judgement on 15 August 2014, against the protectionist measures imposed by the Minister of Trade and Industry through Government Notice No. 245 of 2013. The Government Notice No. 245 was declared null and void with immediate effect, pending the outcome of the appeal noted by the Minister of Trade and Industry on the judgement of the Matador matter.

The relevance of this judgement although not providing a solution to the interpretation of Article 144, contributes to the findings of the research question of whether domestic courts are able and willing to provide effective redress to private parties in the event of violations of international trade agreements. The domestic

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<sup>68</sup> A 386/2013) [2014] NAHCMD 245 (15 August 2014) Case No. A 386 /2013.

<sup>69</sup> *Matador Enterprises (Pty) Limited v Minister of Trade and Industry and Others; In Re: Clover Dairy Namibia (Pty) Ltd and Another v Minister of Trade and Industry and Others* (A 352/2013, A 386/2013) [2014] NAHCMD

<sup>70</sup> SAFLII 2014 (HC).

courts have provided the Applicant in this matter the right to be heard and to state its case ruling of which was favourable to the Applicant.

**c) *South African Poultry Association and Others v Ministry of Trade and Industry and Others (A 94/2014) [2014] NAHCMD 331 (7 November 2014)*<sup>71</sup>**

The South African Poultry Association (SAPA) and Others<sup>72</sup> lodged an application in the High Court of Namibia to seek a review and setting aside of Government Notice No. 81 of 2013: Restrictions on importation of poultry products into Namibia: Import and Export Control Act, 1994, in the Government Gazette. The purpose of Government Notice No. 81 of 2013 was to impose quantitative restrictions on the importation of poultry and poultry products into the commerce of Namibia.

The SAPA, through its application to the High Court, alleged that the import quota and the associated permits, as per the Import and Export Control Act, 1994, had caused direct, persistent and on-going harm to SAPA members.

The SAPA contended, firstly, that the Minister imposed the import quotas in a manner that was procedurally unfair and in violation of both Article 18 of the Namibian Constitution and common law and, secondly, that the imposition of import quotas is unlawful and *ultra vires* the Import and Export Control Act, 1994, and contravenes several of Namibia's international treaty obligations, which, pursuant to Article 144 of the Constitution, are part of Namibian Law.

Thirdly, the SAPA indicated that the imposition of the import quotas is substantively unfair and unreasonable and in violation of "any relevant legislation", as contemplated in Article 18 of the Constitution. Fourthly, the imposition of the import quotas amounts to an unconstitutional infringement of the right to carry on a trade or business entrenched in Article 21(1) (j) of the Constitution.

Finally, the SAPA contended that the import quotas are in violation of the doctrine of legality which is a component of the rule of law and a foundational tenet of the Namibian Constitution under Article 1(1).

At the time of writing this dissertation, the SAPA matter is before the domestic Court and a hearing date is yet to be set by the Registrar of the High Court to argue the merits of this case. It will be interesting to see what the judgment might be, considering that a precedent of an Administrative Law principle has already been set in the Matador and Clover matter which saw the High Court setting aside Government Notice No. 245 of 2013.

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<sup>71</sup> *South African Poultry Association and Others v Ministry of Trade and Industry and Others (A 94/2014) [2014] NAHCMD 331 (7 November 2014).*

<sup>72</sup> Applicants: South African Poultry Association; Astral Foods Limited; Supreme Poultry (Pty) Ltd; Crown Chickens (Pty)Ltd; Sovereign Foods; Agri Poultry (Pty) Ltd; and Rainbow Farms (Pty) Ltd.

Furthermore, it is worth mentioning that on matters involving administrative law, domestic courts will always follow the approach taken in the Matador matter; if they have a choice to avoid discussion of International Agreements. The Namibian Courts are thus not unique in this regard. It would be unrealistic to expect them to ignore national law dealing with the matter before them and to base their decisions on treaties. Other more difficult issues (separation of powers arguments and political question doctrine complications) will then arise.

The aforementioned cases, namely, *S v Mushwena & Others*; *Kauesa v Minister of Home Affairs*; *Matador Enterprises (Pty) Limited v Minister of Trade and Industry and Others* and *South African Poultry Association and Others v Ministry of Trade and Industry and Others* are a clear indication that, in the absence of international tribunals that allow private parties standing before it alongside Member States, domestic courts are the obvious port of call, especially in matters dealing with the tenets of just administrative action. The *S v Mushwena & Other* and the *Kauesa v Minister of Home Affairs* which dealt with human rights issues provide indications that the local courts are prepared to refer to international agreements binding upon Namibia in support of decisions to afford applicants protection against human rights violations by the State. Those judgments used these international agreements as additional, not exclusive, grounds for their decisions. The Namibian Bill of Rights provided similar protection.

However in the recent cases involving quantitative restrictions (*Matador Enterprises (Pty) Limited v Minister of Trade and Industry and Others*; *South African Poultry Association and Others v Ministry of Trade and Industry and Others* and *Clover Dairy Namibia (Pty) Ltd and Another v Minister of Trade and Industry and Others*) we do not yet see any active use of regional trade agreements. It was simply not necessary for the Justices to rely on them when reaching their decisions. What is noteworthy though, is the fact that Applicants are starting to invoke the relevant trade agreements before domestic courts. There is a growing awareness that they might be relevant and that Article 144 of the Constitution is the potential anchor supporting such strategies. It is too early to tell whether these Courts will give a direct effect to such treaties; there is no evidence yet of any such development.

#### **2.4 Overview of Case Law – A Comparative Study**

This section shall aim to explore the legal standing of private parties in the SACU, COMESA, SADC and domestically in Namibia, with reference to the aforementioned cases and the literature on the legal standing of private parties in other jurisdictions as well as the views of various authoritative authors. This section will further highlight the interpretation by various domestic courts of disputes that are lodged by private parties in respect of violations of international obligations by Member States. Furthermore, the legal orders of the four SACU Member States, namely, Botswana, South Africa, Lesotho and Swaziland, which are of a dualist nature, which requires international instruments such as the SACU Agreement to be incorporated into domestic law through acts of parliament would be examined through case law. This section of chapter 2 is very important to this study for two main reasons: first, through case law, it aims to demonstrate how domestic courts in other jurisdictions have dealt with matters of policy which are believed to have violated the rights of private parties.

Secondly, to determine whether the domestic courts have found their governments to be in breach of constitutional provisions and trade agreements that they signed.

#### **2.4.1 SACU: *Southern Trading Company v Minister of Agriculture & Cooperatives*<sup>73</sup>**

On 28 March 2011, and by Legal Notice No. 44 of 2011, the Minister for Agriculture and Cooperatives of the Kingdom of Swaziland, acting in terms of section 15 of the National Agricultural Marketing Board Act No. 13 of 1985 ("The Act"), issued a regulation amending the Scheduled Products Regulations ("The Regulations") by adding in Regulation (h) a new product, namely, edible and crude oil from soya beans. The then existing list in terms of a previous amendment to the Regulations, namely Legal Notice No. 175 of 2010, was as follows: Sunflower, groundnuts and cotton.

The effect of Legal Notice No. 44 of 2011 was that it would enable the National Agricultural Marketing Board to impose a 15% levy on the importation of edible oil. This news affected private parties such as the Appellant in this matter namely, Southern Trading Company (the Appellant), a private entity incorporated and trading in terms of the laws of Swaziland, which conducts business as an importer and distributor of consumer goods including edible oils. In the wake of the import 15% levy imposed on edible oils, the Appellant launched review proceedings in the High Court of Swaziland against the Minister for Agriculture and Cooperatives (the first Respondent) and Others. It sought an order in the following terms:-

- "1. The first respondent's decision to amend the Schedule Product Regulations promulgated in terms of section 15 of the National Agricultural Marketing Board Act 13 of 1985 by the addition thereto of the words '(h) All edible oil and crude oil from the following crops - sunflower, groundnuts, cotton and soya beans' is reviewed and set aside.*
- 2. Legal Notice 44 of 2011 published in Government Gazette No. 30 on 28th March 2011 is declared to be of no force and effect, and is set aside.*
- 3. The second respondent's decision to impose an import levy of 15% on 'edible oil and products' is reviewed and set aside.*
- 4. The notice of the second respondent's said decision published in The Times of Swaziland on 28 April 2011 is declared to be of no force and effect, and is set aside.*

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<sup>73</sup> Southern Trading Company v Minister for Agriculture & Cooperatives [2012] SZSC 17.

5. *The first and second respondents are ordered to pay the costs of this application including costs of counsel as certified in terms of High Court Rules 68 (2) save in the event of opposition by the fourth and fifth respondents, in which the event the party opposing is to pay the costs occasioned by its opposition.*
  
6. *Further or alternative relief.”*

After hearing submissions, the High Court dismissed Southern Trading’s application with costs including costs of counsel as certified in terms of the High Court Rules 68 (2). The appellant was aggrieved by the decision of the High Court and thus appealed this matter in the Supreme Court and relied on four grounds of appeal, namely:-

- (1) That the amendment of the relevant Regulations is unlawful because it contravenes binding international law obligations of the Kingdom of Swaziland under Article 25 (3) of the Southern African Customs Union (“SACU”) Agreement of 2002.
  
- (2) That the decision was taken without complying with the requirement of procedural fairness including the requirement that the decision-maker must apply his/her mind properly to the matter. In elaboration, the appellant complained that the court *a quo* erred in finding that the first respondent had observed the rules of natural justice and in particular the *audi alteram partem* rule.
  
- (3) That the decision was taken for an impermissible and ulterior purpose, namely, to benefit one supplier, namely the fourth respondent at the expense of other suppliers such as the appellant.
  
- (4) That the decision was not rationally justifiable, having regard to the purpose for which the Act was enacted.<sup>74</sup>

In response to the first relief ground, Ramodibedi, CJ, stated that section 61(1)(c) of the Constitution expressly provides that, in its dealing with other nations, the Government shall “promote respect for international law, treaty obligations and the settlement of international disputes by peaceful means.” However, in the event of there being a conflict between the domestic law and the international law, Cockram (1987)<sup>75</sup> states that the

<sup>74</sup> *Southern Trading Company v Minister for Agriculture & Cooperatives* [2012] SZSC 17.

<sup>75</sup> Cockram, G.M. (1987). *Interpretation of Statutes* (Third Edition). Juta & Co. Ltd: Pretoria, South Africa.

court will endeavour to adopt a construction that will avoid a conflict between municipal and international law.

In response, the Respondent Minister relied on Article 25(1) and 26 of the SACU Agreement, 2002, of which the former contains an exception which gives the Member States the superior right, as may be agreed between themselves, to pass municipal laws prohibiting or restricting the importation or exportation of goods for economic, social, cultural or other reasons, as may be necessary in the public interest of their countries. Article 25 of the SACU Agreement reads as follows:

1. Member states recognise the right of each Member State to prohibit or restrict the importation into or exportation from its area of any goods for economic, social, cultural or other reasons as may be agreed upon by Council.
2. Except in so far as may be agreed upon between the Member States from time to time, the provisions of this Agreement shall not be deemed to suspend or supersede the provisions of any law within any part of the Common Customs Area which prohibits or restricts the importation or exportation of goods.
3. The provisions of paragraph 1 and 2 shall not be so construed as to permit the prohibition or restriction of the importation by any Member States in its area of goods grown, produced or manufactured in other areas of the Common Customs Area for the purpose of protecting its own industries producing such goods.

The Minister argued that Article 26 of the SACU Agreement, 2002, allows the four SACU Member States, namely, Botswana, Lesotho, Namibia and Swaziland, excluding South Africa, to temporarily impose additional duties on goods imported into its area to enable infant industries to meet competition from other producers or manufacturers in the Common Customs Area. Furthermore, in support of Article 26, Article 18 of the same Agreement contains an exception to the free movement of domestic products in the common customs area in so far as customs duties and quantitative resolutions are concerned. More importantly, Article 18(2) expressly empowers Member States to impose restrictions on imports or exports in accordance with national or municipal laws for, among others, the health of humans.

According to Ramodibedi, CJ, Article 18 and 25(2) and (3) of the SACU Agreement seems to seek to elevate the municipal law above the SACU Agreement in order to safeguard national interests. However, this depends on whether Swaziland has promulgated an act of Parliament in order for the SACU Agreement to become law in Swaziland, with the exception of the treaty being self-executing. In particular, section 238 of Swaziland's Constitution, so far as material provides as follows:

- (1) The Government may execute or cause to be executed an international agreement in the name of the Crown.
- (2) An international agreement executed by or under the authority of the Government shall be subject to ratification and become binding on the government by:
  - (a) an Act of Parliament; or
  - (b) a resolution of at least two-thirds of the members at a joint sitting of the two Chambers of Parliament.
- (3) .....
- (4) Unless it is self-executing, an international agreement becomes law in Swaziland only when enacted into law by Parliament.
- (5) .....
- (6) For the purposes of this section, “international agreement” includes a treaty, convention, protocol, international agreement or arrangement.

For the purposes of this dissertation, sub-section 238(4) of the Constitution of Swaziland expressly provides that, unless it is self-executing, an international agreement, such as the SACU Agreement, becomes law if it is enacted by Parliament. In this regard, the Supreme Court held that the SACU Agreement is not a cause of action before the domestic courts of Swaziland.

Accordingly, Ramodibedi, CJ, further held that the decision by the Minister to effect an amendment on the Regulation did not require consultation because it did not amount to an administrative decision. On the issue of the Minister having acted in a *mala fide* manner or for ulterior purposes, the Supreme Court found that there was no illegality, nor was there an element of irrationality or improperly committed procedure by the Minister in the promulgation of the impugned Regulations. Based on the aforementioned reasons, the Supreme Court of Swaziland, on 31 May 2012, dismissed Southern Trading’s appeal with costs. The conclusion that one can draw from this case is that, private parties in Swaziland can institute proceedings against matters of government policies before the domestic court. This case further revealed that where matters of policies are concerned, the first port of call for domestic courts is the Constitution and the enabling legislation upon which an administrative official based his or her decision. Depending on the findings, namely that the public official acted within his powers, matters of administrative law principles and international trade agreements become irrelevant. Furthermore, with respect to the SACU Agreement, the domestic court ruled that it had not been promulgated into an act of Parliament and thus it could not be invoked in the domestic court.

#### 2.4.2 COMESA: *The Republic of Mauritius v Polytol Paint and Adhesive Manufacturing Co. Ltd*<sup>76</sup>

The *Republic of Mauritius v Polytol Paint and Adhesive Manufacturing Co. Ltd* (herein the Polytol case) highlights that the COMESA Treaty (herein the Treaty) does provide legal standing for private parties in its dispute settlement mechanism alongside Member States, albeit with the qualification of having to exhaust local remedies. This case involves Polytol Paint and Adhesive Manufacturing Co. Ltd, a company incorporated in Mauritius, as the Applicant and the Government of Mauritius as the Respondent.<sup>77</sup>

The issues of contention were, *inter alia*, the interpretation of Article 46 and 26 of the Treaty. The relevant provisions of Article 46 of the COMESA Treaty provide that:

1. The Member States shall reduce and ultimately eliminate by the year 2000, in accordance with the programme adopted by PTA Authority, customs duties and other charges of equivalent effect imposed on or in connection with the importation of goods which are eligible for Common Market tariff treatment.
2. ....
3. Within the period specified in paragraph 1 of this Article, the Member State shall not impose any new duties and taxes or increase existing ones in respect of products traded within the Common Market and shall transmit to the Secretariat all information on import duties for dissemination by the relevant institutions of the Common Market.

In complying with the above provisions, Mauritius eliminated the import duties within the prescribed period of the year 2000. In 2001, Mauritius introduced a 40% levy on KAPCI Coatings products. In April 2008, Polytol sought a remedy against Mauritius before the National Court of Mauritius for alleged infringement of the Treaty and brought an action before the Supreme Court of Mauritius for leave to apply for judicial review of the Respondent's decision to levy KAPCI products.

The Mauritian Supreme Court heard Polytol's application seeking judicial review and ruled as follows. Firstly, the Court found that the application for leave to apply for judicial review was well outside the required time limit as the duty has been reintroduced in 2001. Secondly, the Court found that it could only take cognisance of the provisions of the COMESA Treaty to the extent that they have been incorporated into municipal law.

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<sup>76</sup> *Polytol Paints & Adhesive Manufacturing Co. Ltd v The Republic of Mauritius, COMESA Case Ref No1 of 2012, Judgment of Court of First Instance 31 August 2013.*

<sup>77</sup> Mwanza, W. (2014). Community law in COMESA and the right of private parties: Polytol case. Tralac: Stellenbosch, Cape Town.

The Supreme Court further held that it can only consider the validity of the regulations against the backdrop of the Customs Tariff Act, 1969 (Act No. 59 of 1969), and the Mauritian Constitution. Therefore, in the absence of any such legislation to that effect, the non-fulfillment by Mauritius of its obligations, if any, under the COMESA Treaty is not enforceable by domestic courts. Although Mauritius did eventually remove the duty on KAPCI products on 20 November 2010, Polytol sought to recover a refund of the duty and did so before the COMESA Court under Article 26 of the Treaty, alleging violations of the Treaty and sought remedy for the earlier judgement by the Supreme Court of Mauritius.

Article 26 of the COMESA Treaty provides:

Any person who is resident in a Member State may refer for determination by the Court the legality of any act, regulation, directive or decision of the Council or of a Member State on the grounds that such act, directive, decision or regulation is unlawful and an infringement of the provision of this Treaty: Provided that where the matter for determination related to any act, regulation, directive, or decision by the Member State, such person shall not refer the matter for determination under this Article unless he has first exhausted local remedies in the domestic courts of the Member State.

#### ARTICLE 27

In a counter application, the Respondent sought to set aside Polytol's application on the following grounds:

- (1) That the Applicant had no legal standing to file the Reference in matters relating to the implementation of the obligation;
- (2) That the Applicant had not established a valid basis upon which it was invoking the jurisdiction of the COMESA Court of Justice; and
- (3) That the Applicant was not an aggrieved party as there was no regulation in violation of the Treaty at the date of the Reference.

After hearing arguments by both parties, the Court held that the Applicant had *locus standi* and the Court had jurisdiction to hear the matter in terms of Article 23 and 26 of the Treaty. In considering the issue whether a private party may bring a matter before the Court on the grounds that a Member State has failed to implement the Treaty within its domestic legal system, the Court held that private parties are not allowed to challenge the nonfulfillment of obligations by Member States. This right is vested in Member States only and therefore the COMESA Court could not entertain the issue of the non-fulfillment of obligations. The Court did, however, rule that Mauritius violated Article 46 of the Treaty by reintroducing the levy on KAPCI products. In the wake of this judgement, the Government of Mauritius appealed against the ruling and subsequently withdrew its motion of appeal. This judgment now stands as COMESA community Law.

This ruling provides important lessons as a precedent in the community law of Africa, in particular the SADC and SACU. Firstly, unlike in the *Southern Trading Company v Minister of Agriculture & Cooperatives* case (*supra*) wherein the Supreme Court of Swaziland ruled that the SACU Treaty had not been promulgated into an act of Parliament and thus it could not be invoked in the domestic court, the COMESA Court ruled that Member States have to fulfil their obligations under the Treaty and failure to do so is a violation of the Treaty. This ruling demonstrates that where domestic courts fail in providing the redress needed by private parties, the Community Court will step in to adjudicate on such matters, provided the local remedies have been exhausted. Furthermore, these judgments are important in that we have two Countries both with dualist traditions seemingly going in different directions. Swaziland is linked to COMESA through annual derogations (not a full Party). Could this mean that in the wake of the Polytol ruling, Swazi companies can now go to the COMESA Court to protect their rights; provided they can invoke COMESA legal instruments? This remains to be seen.

**2.4.3 SADC: *Bach's Transport (Pty) Ltd v Democratic Republic of Congo (SADC (T) 14/2008) [2010]*  
SADCT 6 (11 June 2010)**

Bach Transport (Pty) Ltd, a juristic Applicant incorporated in terms of the laws of Botswana and involved in cross-border commerce, requested for an action of damages against the Democratic Republic of Congo (herein the Respondent). The damages arose from the unlawful seizure and sale by auction of the Applicant's truck and trailer by the Respondent's Control Officers in Lubumbashi in the Democratic Republic of the Congo (DRC). The Applicant brought the application for damages in the sum of US\$ 1,988,079.49 before the SADC Tribunal in terms of Article 25 of the SADC Protocol read with Rule 68 of the Rules of Procedure of the SADC Tribunal.

The Applicant sought an order as follows:

That the Government of the DRC be ordered to pay:

1. Damages to the Applicant in the sum of US\$ 1,988,079.49 as per annexure BT19
2. Cost of the suit at Attorney: Client scale
3. 10% interest from October 2006 to May 2007
4. Further and/or any alternative relief.

The parties made their submissions and the Respondent raised three preliminary points. Firstly, they argued that the Applicant is not a legal person capable of bringing an application before the Tribunal as provided for in the SADC Trade Protocol. Secondly, the Applicant had not exhausted local remedies either in the DRC or Botswana. Thirdly, the Respondent challenged the amount of US\$ 1,988,079.49 claimed by the Applicant, by arguing that the amount is exaggerated and not commensurate with the damages caused to the Applicant. Before dealing with the merits of the case, the Court had to firstly deal with the matter of jurisdiction, as provided for under Article 15(1), 25 and 68 of the SADC Protocol.

Article 15(1) establishes the jurisdiction of the tribunal in hearing matters between Member States, and between natural and legal persons and Member States. Article 25 of the Protocol provides that:

1. The Tribunal may give a decision in default.
2. Before giving such a decision the Tribunal shall satisfy itself that it has jurisdiction over the dispute and that the claim is well founded in fact and law.
3. A party against whom a default decision is made may appeal to the Tribunal for the rescission of such decision. The Applicant shall set out the ground for such application.

Article 68 of the Rules provides as follows:

1. Where a respondent on whom an application initiating Proceedings has been duly served fails to file a defense to the application in the proper form within the time prescribed in the Rules, the applicant may appeal for a decision in default;
2. The application shall be served on the respondent and the President shall fix the date for hearing of the application.
3. (a) Before granting the application, the Tribunal must be satisfied that the application initiating proceedings is properly before it, discloses a cause of action and that appropriate formalities have been complied with.

After the Court confirmed that it had jurisdiction to hear the matter in terms of Article 15(1) of the SADC Protocol, the SADC Tribunal ruled as follows:

1. That the Applicant is not a legal person capable of bringing an application before the SADC Tribunal. The Applicant is not a natural but a legal person incorporated in terms of the laws of Botswana who brought an application against the Respondent, which is a Member State of SADC. The application therefore concerns a legal person and a Member State and thus the application falls within the ambit of Article 15(1) of the Protocol.
2. With regard to the exhaustion of local remedies, the Applicant had not done so either in the DRC or Botswana. Article 15(2) of the SADC Trade Protocol states as follows: "No natural or legal person shall bring an action against a Member State unless he or she has exhausted all available remedies or is unable to proceed under the domestic jurisdiction." The SADC Tribunal held that the Applicant had exhausted all internal remedies in the DRC and Botswana to have its truck and trailer released but was unsuccessful. Diplomatic channels were also utilised to no avail and, in rendering its judgment, the Court relied on its

earlier decision in the famous case of *Mike Campbell (PVT) Ltd v The Republic of Zimbabwe*,<sup>78</sup> stating in the concluding remarks:

However, where the municipal law does not offer any remedy or the remedy that is offered is ineffective, the individual is not required to exhaust the local remedies.... These are the circumstances that make the requirement of exhaustion of local remedies meaningless, in which case the individual can lodge a case with the international tribunal." The Court held that, the applicant had exhausted all local remedies in the municipal legal system of DRC and Botswana to no success and thus the applicant has *locus standi* to bring the matter before the Tribunal and therefore the Tribunal has jurisdiction to adjudicate on the application.

3. The Respondent challenged the amount of US\$ 1,988,079.49 claimed by the Applicant. The Tribunal ruled that the Respondent did not adduce any evidence to substantiate the argument of Counsel that the Applicant's claim was exaggerated or to indicate the value of the truck and trailer at the time they were impounded by the Control Officers in Lubumbashi. In these circumstances, the Tribunal held that the Applicant was entitled to a default decision in terms of Article 25 of the Protocol and rule 68 of the Rules. The Respondent was asked to pay damages to the Applicant in respect of its truck and trailer.

**2.4.4 *Government of the Republic of Zimbabwe v Fick and Others (CCT 101/12) [2013] ZACC 22; 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC) (27 June 2013) The Government of Zimbabwe v Louis Karel Fick 2013 ZASCA 122***

The Fick case, although not a matter involving international trade, offers some important principles, more so in light of the manner in which the South African Constitutional Court pronounced itself on the status of a binding international decision within the domestic legal order.<sup>79</sup> The Respondent farmers (herein Fick) brought their land dispossession dispute with the Applicant, the Government of the Republic of Zimbabwe, for determination.

This was in response to the expropriation of their farms by the Zimbabwean government in terms of its Constitution which denies them compensation for their land and legal recourse. The SADC Tribunal ruled in favour of Fick; however, Zimbabwe refused to comply with the order and Fick once again approached the SADC Tribunal. The matter was escalated to the Summit of Heads of States, the highest decision-making body of the SADC. The Zimbabwean court, however, once again failed to honour the order and this led to Fick applying successfully to the North Gauteng High Court, Pretoria (High Court), for registration and enforcement

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<sup>78</sup> SADC (T) 2/2007.

<sup>79</sup> <http://www.saflii.org/za/journals/PER/2014/9.html>.

of the cost order to facilitate execution against Zimbabwe's property in South Africa. Registration of the cost order led to an unsuccessful appeal to the Supreme Court of Zimbabwe. Aggrieved by the dismissal of the appeal, Zimbabwe approached the South African Constitutional Court with an application for leave to appeal.

The Constitutional Court had to decide whether, *inter alia*:

- (1) the High Court had jurisdiction to enforce the cost order made by the Tribunal; and
- (2) the South African Statutory rules of civil procedure for the enforcement of foreign judgments also covered judgments of international courts and tribunals, as anticipated by Article 32(1) of the Protocol.

In response to the above questions, the Constitutional Court confirmed that the Enforcement of Foreign Civil Judgment Act No. 32 of 1988 was the appropriate vehicle for enforcing international judgments, as it applied to magistrate courts only. As a result, common law remained the only possible avenue through which the SADC Tribunal's decision could be enforced in South Africa.<sup>80</sup> Under the South African common law, a "foreign judgment" had to meet certain conditions in order to be enforced. These include that the court which pronounced the judgment had jurisdiction to entertain the case, that this judgment was final and conclusive, that enforcement would not be contrary to public policy, that the judgment was not obtained by fraudulent means, that the judgment did not involve the enforcement of a penal or revenue law of the foreign state and that enforcement of the judgment was precluded by the provisions of the Protection of Business Act No. 99 of 1978.<sup>81</sup>

The SADC Tribunal met the above criteria. However, the Constitutional Court had to deal with the issue of whether or not the SADC Tribunal's ruling amounted to a "foreign judgment", as recognised by South African common law. Thus far, common law on the enforcement of foreign judgment has only developed to a point where it recognises judgments of other domestic courts of foreign states such as those of Namibia and not those of the SADC Tribunal.<sup>82</sup>

In response to the question of whether or not the SADC Tribunal ruling amounted to a foreign judgment, the Constitutional Court developed common law in order to enforce judgments and orders of international courts or tribunals, based on international agreements that are binding on South Africa and the rule of law. It did so by relying on those clauses in the Constitution that committed South Africa to its obligations under international law and to an international law-friendly interpretation of domestic courts. In this respect, the Constitutional Court, in accordance with section 231 (which regulates the ratification of treaties), had become

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<sup>80</sup> *Government of the Republic of Zimbabwe v Louis Karel Fick* 2013 ZACC 22 35-37.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Government of the Republic of Zimbabwe v Louis Karel Fick* 2013 ZACC 22 47-50.

a party to those SADC instruments which obliged the country to give effect to the decisions of the SADC Tribunal.

Thus the Fick case has introduced an interesting new phase in relation to South Africa's greater openness towards public international law.<sup>83</sup>

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<sup>83</sup> De Wet, E. (2014). The Case of Government of The Republic of Zimbabwe v Louis Karel Fick: A First Step towards Developing a Doctrine on the Status of International Judgments within the Domestic Legal Order. SAFLII. *Potchefstroom Electronic Law Journal*.

## CHAPTER 3: RESULTS OF THE RESEARCH

### 3.1 Introduction

This chapter presents the findings from the literature review namely; trade agreements, case law, and common law. As an addition to this study, the author developed questionnaires which were disseminated to various experts within the legal fraternity as well as private parties who are in the business of importing and exporting products into Namibia. The experts within the legal fraternity were consulted due to the fact that this study is of a complex nature and only they will be able to provide answers to the pertinent question of whether in the absence of a regional tribunal that grants *locus standi* to private parties alongside their Member States, can domestic courts adjudicate on matters of violations of international trade agreements or treaties. With respect to private parties, they are in the business of conducting across the border business and in so doing, they rely on lawyers to advise and represent them accordingly in terms of Article 25 and 144 of the Namibian Constitution. Thus only they will be able to offer insight whether the domestic courts provide them with the necessary redress.

In interpreting the data gathered from the trade agreements, case law, common law and the questionnaire, the results of the data analysis will be translated into integrated conclusions relevant to the objective of this dissertation. The *a priori* arguments from the research questions, problem statement and conceptual framework have been organised under the following headings: The Interpretation of Article 144 of the Constitution, Namibia's legal order: Does it embody elements of Monism or Dualism or a mixture of both legal orders?, The legal standing of private parties in international trade agreement disputes before domestic courts in southern Africa.

Furthermore, the following issues which are important to this study were identified from the respondents' answers:

- 1) Purpose of Article 144
- 2) Namibia's legal order: Does it embody elements of Monism or Dualism or a mixture of both legal orders?
- 3) The legal standing of private parties in international trade agreement disputes before domestic courts in southern Africa.

#### 3.1 The findings obtained from the trade agreements, case law, and common law

The literature reviewed namely that of Tzanakopoulos (2012); Dupuy (2007); Falk (1964) and Oppong (2011), reaffirmed the view that domestic courts may serve as an important forum where private parties may seek redress for violations of international treaties. The above-cited scholars agree that the rules of

international law and the rights and obligations they give rise to are enforceable under the domestic law of the state only if the state is willing and able to give effect to such treaties.

There are however scholars such as De Santa Cruz Oliveira (2014) who are of the opinion that countries that provide WTO and REC treaties direct effect in their domestic legal systems have experienced difficulties. These difficulties have created conflicts between judges in domestic courts who have to decide between what is legitimately a government trade policy aimed at creating socio-economic benefits for all and, on the other hand, upholding international obligations in treaties and international rules that the Executive has signed and ratified.

In the midst of the aforementioned criticisms, private parties in the absence of a tribunal or dispute settlement body which allows private parties to institute legal proceedings alongside their member states have instituted legal proceedings within domestic courts where they feel that a more favourable judgment would be obtained. The Namibian case law reviewed i.e. in the case of *Matador Enterprises (Pty) Limited v Minister of Trade and Industry and Others*; *South African Poultry Association and Others v Ministry of Trade and Industry and Others* and *Clover Dairy Namibia (Pty) Ltd and Another v Minister of Trade and Industry and Others* revealed that there had not been an active testing of regional trade agreements in domestic courts. It was simply not necessary for the Justices to rely on them when reaching their decisions due to the nature of the proceedings before them.

This could be attributed to the fact that the issues at hand were purely of an administrative law nature and thus did not warrant further discussion of whether Namibia violated the international obligations that it has signed and ratified. What is however noteworthy though, is the fact that private parties are starting to invoke the relevant trade agreements before domestic courts. There is a growing awareness that Article 144 of the Constitution is the potential anchor supporting such strategies. It is however too early to tell whether the Namibian courts will give direct effect to such treaties; there is no evidence yet of any such development. Unfortunately at this stage, aforementioned cases cannot be regarded as authority for the application of International trade agreements under Article 144.

### **The legal standing of private parties in international trade agreement disputes before domestic courts in Southern Africa.**

The research study further revealed that Southern Africa domestic courts have dealt with matters of violation of international agreements in a different manner. These Courts, specifically in the matters of *Polytol and Southern Trading Company v Minister of Agriculture & Cooperatives* cases demonstrated the unwillingness of a domestic court to grant legal standing to private parties on the grounds that Mauritius did not incorporate the COMESA Treaty into domestic law. This case further revealed that where matters of policies are concerned, the first port of call for domestic courts is the Constitution and the enabling

legislation upon which an administrative official based his or her decision. In the case of *Southern Trading Company v Minister of Agriculture & Cooperatives case*, Ramodibedi, CJ, in determining whether Swaziland violated obligations under the SACU Treaty, ruled that it all depends on whether Swaziland has promulgated an act of Parliament in order for the SACU Agreement to become law in Swaziland, with the exception of the treaty being self-executing. In that case, it was found that the SACU Agreement had not been incorporated into legislation, thus the private party could not invoke the violation of the SACU Agreement.

The case law further revealed that the current amendments to the Protocol on the SADC Tribunal that only recognise Member States as having *locus standi* before the SADC Tribunal, may pose a major threat to the enforcement of obligations in the regional and domestic courts of the SADC. Case in point is *Bach's Transport (Pty) Ltd v The Democratic Republic of Congo SADC (T) 14/2008*, where the private party could not institute its claim in the DRC because it was evidenced that it could not exhaust the local remedies due to the fact that officials had requested bribes from them. The fact that the legal system of DRC was not transparent or predictable, led to the private parties in the Bach Transport matter to engage in forum shopping – that is to have their action heard in a particular court or jurisdiction where they felt they would receive the most favourable judgment.

The relevance of the aforementioned judgments, although not providing a solution to the interpretation of Article 144, contribute to the findings of the research question of whether domestic courts are able and willing to provide effective redress to private parties in the event of violations of international trade agreements.

### **3.3 Findings obtained from questionnaires and interviews**

#### **3.2.1 Interpretation of Article 144 of the Namibian Constitution**

Through the questionnaire and interviews, the respondents all indicated that Article 144 of the Namibian Constitution accords international law the same status as national law. All respondents except the traders indicated that Article 144 provides that customary international law is automatically part of Namibian law while conventional law, that is, duly ratified law, treaties or agreements will form part of Namibian law only if they are not in conflict with the Namibian Constitution or any statutes. The respondents were further asked if they knew whether the Namibian legal order is founded on dualism, monism or a mixture of both. The respondents, more specifically the lawyers, all agreed that the manner in which Article 144 is drafted provides evidence that the Namibian court's approach vis-à-vis international law is neither monist nor dualist. It is rather a mixture of the two legal orders. This they believe is further evidenced by the fact that if there is any conflict between the Namibian law and conventional international law, the Namibian law prevails and is thus superior. The private sector, i.e. the importers, rely on lawyers to guide them on this matter. The government

officials responsible for trade policy stated that they are unsure; however, their work is informed by domestic legislation and treaties.

### 3.3.2 The Legal Standing of Private Parties in International Trade Agreement Disputes

In response to the question of whether international and regional tribunals should grant *locus standi* to private parties, the respondents were all in agreement with the fact that the subjects of international law are States. Aust (2005) classifies this principle in the following words:

Although international law increasingly gives rights, and imposes obligations on persons, the notion that they therefore enjoy rights under international law goes too far. Such rights can be enforced by or against persons only through action by states. A person with a claim against a foreign state cannot himself take his claim to an international court or tribunal. Either his state has to do it for him, or there must be some mechanism established by the two states (usually by treaty) under which he can bring his claim directly before an international tribunal.<sup>84</sup>

There were, however, divergent views with regards to the above quote. Some respondents stated that it is not practical for private parties to be granted *locus standi* in an arena (tribunal) that has always been the exclusive jurisdiction of sovereign states. The exception to this principle would be invoked if and when a domestic court cannot adjudicate on violations of international rules by a Member State, as was evidenced in the Polytol case. Only then may an international tribunal be the port of call for redress. The government attorneys and government officials' response with regards to this question is that international tribunals should be for state-to-state issues solely and not issues between private parties and a member state of a treaty. They indicated that, should a private party feel aggrieved by a decision of a public official on the grounds of illegality or an act that infringes upon any provision of the Namibian Constitution, there are sufficient grounds in domestic law to deal with problems that arise within the domestic arena.

### 3.3 Conclusion

This study shows that, in the absence of forums where private parties and member states may have equal *locus standi* before such tribunals, domestic courts play an important role in adjudicating matters pertaining to the violation of international obligations by member states of multilateral, bilateral and regional treaties. The review of case law also revealed that when national constitutions or Administrative law remedies are available, these courts will not find it necessary to invoke international agreements dealing with the same matter.

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<sup>84</sup> Aust, A. (2005). *Handbook of International Law*. University of Cambridge Press: Cambridge, UK.

Private parties may access the domestic courts of Namibia to challenge the effects of government policies because their rights have been violated. This however does not mean that, in the event of the private parties obtaining relief, it will not result in the particular policy being declared null and void; it will only mean that the specific measure against the applicant will have to be withdrawn because these policies are in any case contained in national legislation.

Furthermore, notable in these cases is the fact that the domestic courts gave standing to private parties with the exception of demonstrating that private parties have exhausted the local remedies before approaching international tribunals. However, the *Polytol* and *Southern Trading Company v Minister of Agriculture & Cooperatives* cases demonstrated the unwillingness of domestic courts to grant legal standing to private parties on the grounds that the State did not incorporate the international treaties into domestic law.

In light of the current amendments to the Protocol on the SADC Tribunal that only recognise Member States as having *locus standi* before the SADC Tribunal, major legal implications arise for private parties such as Bach Transport in enforcing its rights in the regional and domestic courts of the SADC. The major legal implications that Bach Transport will encounter are, firstly, that they will not be able to institute their claim in the DRC because it was evidenced that it was impossible for this company to meet the requirement of the exhaustion of local remedies because officials had requested bribes from them. Secondly, Bach Transport may be forced to engage in forum shopping within the Member States of the SADC. According to the Black Law Dictionary<sup>85</sup>, forum shopping is defined as “a litigant’s attempt to have his action tried in a particular court or jurisdiction where he has *locus standi* and feels he will receive the most favourable judgment or verdict.” Thus the Complainants prefer to file with whichever “court” is most likely to come closest to its ideal ruling, setting an informal precedent for use in future disputes.

However, the Bach Transport’s success in forum shopping is dependent on the Constitution or common law providing for such redress of enforcing foreign civil judgments. For example, the domestic court of Namibia may adjudicate on matters such as the Bach Transport case, provided Bach Transport applies to the High Court for recognition and enforcement of the foreign judgment according to common law. There are, however, certain requirements that the domestic court has to be satisfied with. If Bach Transport were to lodge the application at the domestic court of Namibia, Enforcement of Foreign Civil Judgment Act No. 28 of 1994, would be the first port of call for the judge. This may lead to repercussions for regional integration within Southern Africa and possibly decay in a legal system that is supposed to create certainty, predictability and absolute respect for the rule of law.

The Bach Transport case revealed the effect that the disbanding of the SADC Tribunal has had on private parties and the *Fick* and *Bach Transport* cases evidently revealed that private parties are engaging in forum shopping. Forum shopping has its own challenges due to the fact that the political landscape of Southern

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<sup>85</sup> Black Law Dictionary, 8<sup>th</sup> Edition. 2004. pp 1312.

Africa is marred by partial constitutionalism in most of the countries and, simply put, African countries do not litigate against each other except in matters of national borders.<sup>86</sup> Thus, with the revised SADC Protocol on the Tribunal, the SADC Tribunal is likely to become a white elephant and the domestic courts shall be the port of call for alleged cases of breach of international agreements by States. This study indicates the direction which such litigation may take and how domestic courts may deal with the matters before them; at least in the countries discussed here.

One of the most important points to be made is that the *Polytol* case shows a different development in COMESA; compared to SADC. In the *Polytol* case, a private claimant was granted standing by the COMESA Court of Justice. This complainant was eventually successful in arguing that a COMESA legal instrument had been violated by a Member State; and the relevant Member State accepted the outcome. As a result of overlapping membership issues it may now happen that private parties of a particular state, which belongs to both COMESA as well as SADC, may face entirely different litigation challenges with respect to essentially the same types of disputes. In SADC there will be no regional Tribunal to hear their applications; in COMESA the opposite will happen. This is a highly undesirable state of affairs. The fragmented nature of regional integration endeavours in Southern Africa is to be blamed.

In answering the research questions, this study showed that domestic courts in Namibia and Southern Africa with the exception of Swaziland do generally provide the necessary redress needed by private parties to enforce their rights. The cases employed further revealed that, international trade agreements and/ or treaties are not always relied upon by the judges. For judges to determine whether a public official's decision is a violation of a particular trade agreement and/ or treaty, the port of call for the judge is the Constitution and the enabling legislation upon which the public official derives his or her power. These instruments inform the Judge on whether matters of violation of trade agreements and/ or treaties would be entertained.

Regarding Article 144 of the Namibian Constitution, the qualitative analysis, specifically the case law (albeit most of them relate to human rights matters) discussed in Chapter 2, indicated that an Act of Parliament may also exclude the rules of international law and international agreements. The effect of these two qualifications is that international law and international agreements are directly enforceable in domestic courts and private parties may invoke the provisions of such rules in domestic courts.

With respect to whether or not Namibia's legal order is monism or dualism or a mixture of both, the respondents were of the opinion that Namibia's legal order is founded on monism but has elements of dualism as well. This response is contrary to the general understanding that Namibia's legal system is of a monistic nature and that, in states with a monist system, international law does not need to be translated into national law. The act of ratifying an international treaty immediately incorporates that international law into national

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<sup>86</sup> The cases of *Kasikili/Sedudu Island, Botswana v Namibia, Judgment, Merits, [1999] ICJ Rep 1045, ICGJ 57 (ICJ 1999)*, 13th December 1999, *International Court of Justice [ICJ]*; The Malawi – Tanzania Border Dispute and the Orange River Boundary Dispute between Namibia and South Africa are empirical evidence in this regard.

law. However, the Namibian constitution requires two qualifications to be met: the general rules of international law and international agreements may be excluded by the Constitution or by an Act of Parliament.

Therefore, the interviewed respondents understand that the Namibian domestic courts, in the absence of a regional tribunal, offer recourse to private parties engaged in intrastate commerce of goods and services through its legal system. Nonetheless, there are certain challenges such as the training of judges that warrant a solution in order for the domestic courts to effectively deal with international trade disputes.

## CHAPTER 4: DISCUSSION AND CONCLUSION

### 4.1 Introduction

This chapter will first deal with the discussions and conclusions derived from the literature review and the questionnaires. The ensuing paragraphs will deal with possible recommendations that may in the long run contribute to the effective invocation of international trade agreements before the Namibian domestic court by private parties. The recommendations were influenced by the literature review and research findings.

### 4.2 Discussion and Conclusion

Although the domestic courts have and continue to contribute to the jurisprudence of international human rights law vis-à-vis the domestic law, the same cannot be said about international trade law. In fact, there has not been comprehensive research undertaken on the debate surrounding the application and interpretation of international trade law by domestic courts. It is in respect of the aforementioned limited research that this dissertation, through the methodology of qualitative analysis, provides an analysis of the invocation of international trade agreements in the domestic courts by private parties and the possible lessons that may be of value to government officials, academics, lawyers and judges.

The decision to embark on this dissertation was as a result of the Namibian High Court's adjudication in the *Matador Enterprises (Pty) Limited v Minister of Trade and Industry and Others; in Re: Clover Dairy Namibia (Pty) Ltd and Another v Minister of Trade and Industry and Others*<sup>87</sup> and *Clover Dairy Namibia (Pty) Ltd and Another v Minister of Trade and Industry and Others*<sup>88</sup> case. In delivering the judgments, the High Court pronounced itself on the domestic law, specifically the administrative and constitutional remedies. The High Court, however, failed to pronounce itself on the merits of whether or not the domestic regulations and trade policies that the Namibian government enforces, as per the Import and Export Control Act, 1994, are contrary to international treaties such as the SACU Agreement that Namibia has signed and ratified.

The reasoning provided by Smuts, J, for the conclusion he reached in *Matador Enterprises (Pty) Limited v Minister of Trade and Industry and Others; in Re: Clover Dairy Namibia (Pty) Ltd and Another v Minister of Trade and Industry and Others*, was that it is unnecessary to further traverse the review grounds raised in both applications, including the reliance upon the SACU Agreement 2002. Given the nature of the case, Smuts, J, felt the review grounds before him were sufficient to deliver a judgment, which he respectfully delivered.

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<sup>87</sup> *Matador Enterprises (Pty) Limited v Minister of Trade and Industry and Others; In Re: Clover Dairy Namibia (Pty) Ltd and Another v Minister of Trade and Industry and Others (A 352/2013, A 386/2013) [2014] NAHCMD 156 (16 May 2014).*

<sup>88</sup> (A 386/2013) [2014] NAHCMD 245 (15 August 2014) Case No. A 386 /2013.

Although this may not have been the intention of Smuts, J, his reasoning holds true to what was stated by Tzanakopoulos (2012), that there would be situations where domestic courts, in the hope of avoiding conflicts between international rules and domestic law, may decide to ignore the existence of international norms and proceed with the interpretation of the domestic act which has been invoked by private parties.

Had Smuts, J, pronounced himself on the effect of Article 144 in his judgment, more so in light of Namibia being bound by the principle of *pacta sunt servanda* in having ratified the SACU Agreement, his ruling would have shed more light on whether Namibia had indeed contravened its obligations in the SACU Agreement, 2002.

The case laws reviewed from Namibia, COMESA and the SACU revealed that the domestic courts have been playing a role in providing the necessary platform for private parties to challenge government policies which are contrary to international laws and international agreements. Theoretical arguments support the need for domestic courts to be active participants and adjudicators in litigations involving the interpretation and application of international law.

Others criticise such an arrangement, citing the ineffectiveness of domestic courts in thoroughly adjudicating on such matters due to the highly specialised nature of international trade law. This casts a level of uncertainty on whether domestic courts are best suited to adjudicate on disputes of international trade law. The Polytol case provides empirical evidence, revealing that domestic courts may sometimes not adjudicate on matters involving a breach of international agreements or international rules on the grounds that such rules have not been incorporated into the domestic law.

As a remedial measure, the tribunals such as the COMESA Court of Justice allow private parties to directly invoke and rely on the Tribunal to adjudicate where the domestic court has failed. In the Bach Transport case, the SADC Tribunal came to the rescue of the private party where the domestic court of the DRC failed to provide the necessary redress to the private party, thus moving away from the public international law principle that international tribunals are avenues for state-to-state disputes and not private parties' disputes against a state.

The case law employed in the literature review revealed that there have been instances within Southern Africa where domestic courts have given redress to private parties in the absence of regional tribunals. The domestic courts have adjudicated on such litigations and, in some instances, implemented the decisions of foreign judges. However, not every domestic court is keen on enforcing foreign judgments, with the exception of South Africa as was evident in the Fick case.

The reluctance of the domestic courts to enforce foreign judgments may be attributed to conflicting provisions within national laws. To implement such decisions may also expose the legal deficiencies found in so many domestic courts. Further to this, some African States observe respect for other sovereign States and the comradeship that exists between these States leads them to refuse to enforce decisions of foreign courts.

Thus, only a few States, through their domestic courts, would allow cross-border litigations and enforce foreign judgments and thus create legal certainty for the private parties.

The case law reviewed further highlights the effect that a domestic legal system may have on the implementation of international agreements such as the SACU Agreement and the SADC Trade Protocol. For example, in the case of *Southern Trading Company v Minister for Agriculture & Cooperatives [2012] SZSC 17* Ramodibedi, CJ, ruled that the SACU Agreement had not been promulgated as an act of parliament and thus the Kingdom of Swaziland had not violated its legal commitments. On the other hand, in the *Polytol* case, the COMESA Court of Justice ruled that the mere fact that Mauritius did not promulgate an act of parliament to give effect to the COMESA Treaty does not exonerate the Member State from honouring obligations emanating from the Treaty.

The *Bach Transport* case revealed that, in an effort to enforce remedies, private parties may be confronted with situations of bribery, corruption and other factors that erode good governance and respect for the rule of law or, as Erasmus (2014a) states:

The long term negative consequences are about uncertainty and bad governance. Firms will continue to do business but will be forced to find alternative ways around the rules, such as bribing officials. Customers will bear the brunt and investors will put a premium on investments. National development plans will suffer; inter alia because of other negative effects such as massive amounts lost to national fiscus through the unlawful expatriation of profits and loopholes in tax collection systems.

The researcher identified that domestic courts may be presented with situations of enforcement because of constitutional provisions. For example, within the four SACU Member States, namely, Botswana, Lesotho, South Africa and Swaziland, private parties residing in those jurisdictions with a dualist legal order, before lodging disputes of violations of international treaties by Member States, must satisfy the constitutional requirement that the treaty has been incorporated into domestic law through an act of parliament or that it is self-executing. Such a ruling may affect the enforcement of other rulings on the COMESA Treaty, specifically Council decisions emanating from Article 8 of the SACU Agreement.

The qualitative research revealed a general consensus among the interviewed respondents: domestic courts may serve as a point of call for litigations involving international trade rules at the domestic level.

### **What is the status of the application and interpretation of international law under the Namibian Constitution?**

Article 144 of the Namibian Constitution of 1990, as amended, accords general rules of public international law and international agreements direct and automatic applications in Namibia's municipal law, thus setting domestic laws on an equal footing with international law when disputes of application and interpretation of treaties and statutes are adjudicated upon. It recognises that the general rules of public international law and

international law have direct application in the Namibian municipal law, subject to two main qualifications. Firstly, the general rules of international law and international agreements may be excluded from applying directly in municipal law by the Namibian Constitution. Secondly, they may be excluded by an Act of Parliament. The importance of such a provision in the Namibian Constitution is that the rules of public international law and international agreements may be enforced by courts of law and likewise private parties may invoke these rules during legal proceedings.

Article 144 was reinforced in the cases of *Kauesa v Minister of Home Affairs* and *S v Mushwena and Others* where the judiciary held that the international treaties that Namibia has ratified by virtue of Article 144 of the Constitution have become part of the laws of Namibia.

On the issue of whether the Namibian legal system is founded on monism or dualism, the literature review revealed that the Namibian legal order is founded on monism but has elements of dualism. This is evidenced by the manner in which courts interpret the provisions of Article 144 and in light of the two qualifications that must be met (the general rules of international law and international agreements may be excluded by the Constitution or by an Act of Parliament). Thus, if an Act of Parliament excludes the binding effect of such a treaty, even if it has been ratified, the domestic court may decide to examine the laws internally, thus assigning the national law a superior status which speaks to a dualistic legal order. It is thus the author's conclusion that Namibia's legal order is neither monist nor dualist but a mixture of the two schools of thought.

#### 4.3 Recommendations

This section provides recommendations that may contribute towards the effective invocation of international trade agreements before domestic courts in Namibia, in the absence of a tribunal that provides *locus standi* to private parties alongside Member States.

The literature reviewed revealed that although the domestic courts have been interpreting Article 144 as giving rise to monism in Namibia's legal order, the Namibian legal order may possibly be a mixture of monism and dualism. However, to arrive at a concrete answer further research has to be conducted. It is thus recommended that, for judges to contribute to the jurisprudence of national and international law, the judiciary should undertake a critical analysis on the extent to which Article 144 may be invoked in international cases.

The private sector respondents indicated that they are not aware of which international treaties apply to their line of trade, except for the national law. There is thus also a need to raise awareness among private parties on the relevant legal and regulatory frameworks which will help private parties gain a better understanding of international trade law vis-à-vis national law.

#### 5.4 Future Research Possibilities

This research was undertaken at an opportune time when it was decided by the Heads of States at the SADC Summit, held on 17 and 18 August 2014 at Victoria Falls in Zimbabwe, that the Protocol on the Tribunal shall be amended to bar private parties from accessing the regional court. Article 33 of the Protocol on the Tribunal in the SADC, which has replaced Article 15 of the revised Protocol, states: "The Tribunal shall have jurisdiction on the interpretation of the SADC Treaty and Protocols relating to disputes between Member States."

In future, only interstate disputes will be heard by the Tribunal but only if the States agree to adjudication as the means for solving disputes among each other. This development is a major setback to enforcing the rights of private parties as they can no longer seek redress before the Tribunal and private parties are now at the mercy of their domestic courts. Case law, such as the Fick, Bach Transport and the Polytol cases, have proven that domestic courts are not effective as a final port of call for private parties, due to the partial constitutionalism of some of the Member States in Southern Africa.

In view of this development, and because there is no other recourse for private parties, albeit the domestic courts, there is a need more than ever for domestic courts to adapt to the changing phenomenon of globalisation in international law. These courts should be ready to fill the void left by the now defunct regional tribunals and must develop the attributes of a functioning legal system founded on the rule of law in order to bring about legal certainty, predictability and the development of jurisprudence for both national and international law. Domestic courts in Southern Africa need to develop common law to enforce foreign court judgments as per the Treaty and allow private parties to pursue their right to a fair hearing.

However, this may not necessarily provide the remedies needed by private parties engaged in commerce across borders and this means that further research has to be commissioned on whether Annex VI of the SADC Protocol on Trade provides the much needed mechanism for private parties to request their national governments to litigate on their behalf. The Panel procedure of Annex VI may possibly shed light on dealing with trade disputes in RECs.

For Namibian courts, there is a need to measure the domestic application of international trade agreements against the yardstick of Article 144, more so in light of its commitments in terms of treaties that the Executive has signed and ratified through the constitutional process. International trade agreements and other treaties are critical for the development of any state because a reduction in trade barriers achieved through international trade agreements is only accorded in return for concessions of other signatory states. In light of the development in the SADC, the domestic courts may be forced to provide the necessary interpretation and application of international trade agreements within their own jurisdiction, as stipulated in national constitutions. If these challenges are not addressed through the necessary advocacy of training and the development of *opinio juris*, which touches on whether a state is contravening its international obligations, private parties may be denied the benefits of the judgment and this could undermine the relations between

domestic and community courts. Furthermore, there is a need for further research to be undertaken on the interpretation and application of Article 144 of the Namibian Constitution.

## REFERENCES

### TREATIES AND NATIONAL CONSTITUTIONS

Common Market for Eastern and Southern Africa (COMESA) Treaty

Southern Africa Customs Union (SACU) Agreement, 2002

Southern Africa Development Community (SADC) Protocol on Tribunal and Rules of Procedure

The Constitution of Swaziland, 2006

The Constitution of Namibia, 1990

### AUTHORS

Brownlie, I. (1990). *Principle of Public International Law (Fourth Edition)*. Clarendon Press, Oxford, UK.

Shaw, M. N. (2008). *Sources. International Law (Fifth Edition)*. Cambridge University Press: Cambridge, UK.

Aust, A. (2005). *Handbook of International Law*. University of Cambridge Press: Cambridge, UK.

Baxter, P. and Jack, S. (2008). *Qualitative Case Study Methodology: Study Design and Implementation for the Novice Author*. McMaster University: West Hamilton, Ontario, Canada.

Cockram, G. M. (1987). *Interpretation of Statutes (Third Edition)*. Juta & Co: Pretoria, South Africa.

De Santa Cruz Oliveira, M. A. J. (2014). *International Trade Agreements before Domestic Courts: Lessons from the Brazilian Experience*. Society of International Economic Law Working Paper No. 2014/04.

De Wet, E. (2014). *The Case of Government of The Republic of Zimbabwe v Louis Karel Fick: A First Step towards Developing a Doctrine on the Status of International Judgments within the Domestic Legal Order*. SAFLII. *Potchefstroom Electronic Law Journal*.

Dupuy, P. M. (2007). *The unity of application of international law at the global level and the responsibility of judges*. *European Journal of Legal Studies*, 1(2).

Erasmus, G. (2014a). *Trade Agreements as Part of the Law of the Land: The Example of Namibia*. Associate. Tralac: Stellenbosch, South Africa.

Erasmus, G. (2014b). The settlement of trade disputes through the application of legal Instruments. Tralac Annual Conference. Stellenbosch, South Africa. 15-16 April.

Fairey, F.W. (1998). The Effect of International Law on Domestic Implementation. Washington College of Law, American University: MA, USA.

Falk, R.A. (1964). The Role of Domestic Courts in International Legal Order. *Indiana Law Journal*, 39(3).

Mwanza, W. (2014). Community law in COMESA and the right of private parties: Polytol case. Tralac: Stellenbosch, Cape Town.

Oppong, R. F. (2011). Enforcing judgments of the SADC Tribunal in the domestic courts of member states. Monitoring Regional Integration in Southern Africa, the Konrad-Adenauer-Stiftung.

Peters, S. (2009). Supremacy lost: International law meets domestic constitutional law. *Vienna Online Journal on International Constitutional Law*, 3, 170-198.

Raustiala, K. (2006). Refining the Limits of International Law. *Georgia Journal of International and Comparative Law*, 34(2).

Schaefer, M. (1997). Are private remedies in domestic courts essential for international trade agreements to perform constitutional functions with respect to su-federal governments? *North-western Journal of International Law & Business*, 17(1), 609.

Shaheed, F. (2006). Using International Law in Domestic Courts. Hart Publishing: Oxford, UK.

Simon, M. K. (2011). Dissertation and Scholarly Research: Recipe for Success. Independent Publishing: Seattle, WA, US.

Slaughter. A. M. and Burke-White, W. (2006). The future of international law is domestic (or the European way of law). *Harvard International Law Journal*, 47(2), 327-358.

Sloss, D. (2009). The role of domestic courts in treaty enforcement. A comparative study. Institute of European Law, University of Göttingen, Germany.

Soltis, J. F. (1989). The ethics of qualitative research. *International Journal of Qualitative Studies in Education*, 2(2), 123-130.

Sykes, A. (2005). Public versus private enforcement of international economic law: Of standing and remedy. *Journal of Legal Studies*. 34, 631.

Tshosa, O. (2010). The status of international law in Namibian national law: A critical appraisal of the constitutional strategy. *Namibian Law Journal*, 2(1), 3-30.

Tzanakopoulos, A. (2012). Principles on the Engagement of Domestic Courts with International Law. International Law Association.

World Trade Organisation, The. (1999). The Legal Texts: The Result of the Uruguay Round of Multilateral Trade Negotiation. University of Cambridge Press: Cambridge, UK.

Yin, R. K. (2003). Case Study Research: Design and Methods (Third Edition). Sage: Thousand Oaks, CA, USA.

Zongwe, D. P. (2010). Equality has no mother but sisters: The preference for comparative law over international law in the equality jurisprudence in Namibia. International law and domestic human rights litigation. Pretoria University Law Press (PULP): Pretoria, South Africa.

## LINKS

<http://www.saflii.org/za/journals/PER/2014/9.html>.

## CASE LAW

*Bach's Transport (Pty) Ltd v The Democratic Republic of Congo SADC (T) 14/2008.*

*Clement Kanyama v SADC Secretariat SADC (T) 05/2009.*

*Clover Dairy Namibia (Pty) Ltd and Another v Minister of Trade and Industry and Others (A 386/2013) [2014] NAHCMD 245 (15 August 2014) Case No. A 386 /2013.*

*Kauesa v Minister of Home Affairs (SA 5/94) [1995] NASC 3; 1995 (11) BCLR 1540 (NmS) (11 October 1995)1995 (1) SA 51 (Nm SC).*

*Matador Enterprises (Pty) Limited v Minister of Trade and Industry and Others; in Re: Clover Dairy Namibia (Pty) Ltd and Another v Minister of Trade and Industry and Others (A 352/2013, A 386/2013) [2014] NAHCMD 156 (16 May 2014).*

*S v Mushwena and Others (SA4/04 SA4/04) [2004] NASC 2 (21 July 2004).*

*The Southern Africa Poultry Association and Others v The Ministry of Trade and Industry Case No. A94/14 (unreported). South African Poultry Association and Others v Ministry of Trade and Industry and Others (A 94/2014) [2014] NAHCMD 331 (7 November 2014).*

*The Government of Zimbabwe v Louis Karel Fick 2013 ZASCA 122.*

*The Republic of Mauritius v Polytol Paint and Adhesive Manufacturing Co. Ltd Reference No. 1 of 2012.*

**ANNEXURE A: LETTER REQUESTING APPROVAL FOR INTERVIEW**

**TO WHOM IT MAY CONCERN**

Dear Sir/Madam,

**RE: Masters of Commerce in Management Practice Specialising in Trade Law and Policy Research  
Dissertation “Invocation of International Trade Agreements such as the SACU Agreement by private parties  
before Domestic Courts: Lessons from the Namibian Experience”**

The above matter bears reference.

The primary aim of this research paper is to assess the **“Invocation of International Trade Agreements such as the SACU Agreement by private parties before Domestic Courts: Lessons from the Namibian Experience.**

In an effort to finding an answer to the research topic, this research study will analyse what the current status of international law under the Namibian Constitution is. Second, establish to what extent the domestic courts interpret international treaties. Lastly, I will use existing international instruments and comparative analysis of other jurisdiction’s domestic courts adjudication on breach of international treaty obligations in order to diagnose deficiencies thereof and to inform recommendations to be made through this research.

In this regard, I am seeking permission to conduct the research with you and/or your department as a subject of this research study through the questionnaire which is attached hereto for your convenience.

Kindly take note that all the data gathered herein will be treated with utmost confidentiality and for academic purposes only.

Thank you for your time.

Yours sincerely,

Signed by candidate

Signature Removed

**Lydia Nalishe Hakweenda**

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## ANNEXURE B: INTERVIEW QUESTIONS

1. Which Ministry, Agency or Office do you work for and what is your position?
2. What are your functions and responsibility?
3. From your experience, do you think the Namibian Courts are well equipped to adjudicate on with international trade matters brought before it by private parties?
4. Do you think Article 144 of the Namibian Constitution provides private parties such as Clover (Pty) Ltd with enough legal recourse to hold the Namibian Government accountable for breach of international treaties that they have signed and ratified?
5. In the absence of a regional tribunal that grants *locus standi* to private parties alongside their Member States, can the domestic court adjudicate on such matters? Please substantiate your answer.