IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT 67/18

In the application between:

LAW SOCIETY OF SOUTH AFRICA	First Applicant
LUKE MUNYANDU TEMBANI	Second Applicant
BENJAMIN JOHN FREETH	Third Applicant
RICHARD THOMAS ETHEREDGE	Fourth Applicant
CHRISTOPHER MELLISH JARRET	Fifth Applicant
TENGWE ESTATE (PVT) LTD	Sixth Applicant
FRANCE FARM (PVT) LTD	Seventh Applicant

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second Respondent
MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION	Third Respondent

and

SOUTHERN AFRICAN LITIGATION CENTRE	First *Amicus Curiae*
CENTRE FOR APPLIED LEGAL STUDIES	Second *Amicus Curiae*

SECOND AMICUS CURIAE'S WRITTEN SUBMISSIONS

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I INTRODUCTION

1. When South Africa signs a treaty, it undertakes a significant act on both the international and domestic planes. Internationally, it assumes legal obligations not to defeat the object and purpose of the treaty. It also determines whether ratification is required, and if so the terms on which ratification can be obtained. In some circumstances signature will bind South Africa to the treaty.

2. Domestically, if signature does not on its own bind the Republic, it triggers the process for Parliament to ratify the treaty. When it does so, Parliament's options will generally be limited to accepting the treaty as is, or rejecting it completely. It will seldom be possible to re-open treaty negotiations, particularly for multi-lateral treaties. At best, Parliament may sometimes be able to record reservations to the treaty.

3. Members of Parliament have repeatedly expressed their frustration at being unable to seek any amendments to a treaty at the ratification stage.[1] As they point out, the process of considering the treaty and soliciting public engagement is "*pointless*" because the terms of the treaty can no longer be altered.

4. CALS submits that there is a default obligation on the National Executive to consult the public prior to signing the treaty. That obligation flows from four sources: the participatory nature of our democracy, South Africa's international obligations, the requirement that all public conduct is procedurally rational, and the obligation in s 7(2) of the Constitution to "*respect, protect, promote and fulfil the rights in the Bill of Rights*". Read together, those constitutional edicts require that – absent a justification to the contrary –

[1] CALS FA at para 37.5: Vol 12 pp 1144-1145.

the executive must engage in reasonable public consultation.

5. This position is supported by a burgeoning practice in comparative jurisdictions. Kenya, Canada, Australia and New Zealand all require public consultation prior to signature. They do so because they recognise the value of consultation for both the executive to determine its negotiating position, and to ensure that law-making by the executive on the international plane is democratic and attracts the support of its citizens. Their practices demonstrate that public consultation prior to signature is not only possible, but beneficial.

6. CALS's argument is different from the one advanced by the Applicants. They argue that there should have been public consultation with specifically affected groups prior to the signing of the 2014 SADC Protocol on the SADC Tribunal (**the Protocol**) because it affected their vested rights. CALS's argument is broader: it applies to <u>all</u> international agreements, including the Protocol.

7. These written submissions are structured as follows:

   7.1. **Part II** sets out the reasons this Court should consider CALS' argument for making **<u>appropriate standards</u>** for the signature of treaties by the Executive.

   7.2. **Part III** summarises the **<u>effect of signature</u>** of an international treaty;

   7.3. **Part IV** considers **<u>comparative practice</u>** that requires pre-signature consultation;

   7.4. **Part V** demonstrates that the **<u>Constitution establishes a default obligation</u>** to consult the public prior to signing an international agreement; and

   7.5. **Part VI** deals with the appropriate **<u>remedy</u>**.

II THE EFFECT OF SIGNATURE

8. The act of signing an international agreement has real consequences for the Republic on the international and domestic plane. There are four types of consequences:

   8.1. In terms of s 231(3) of the Constitution, if the treaty is of a "*technical, administrative or executive nature*", or if the treaty itself "*does not require either ratification or accession*", then ratification is not a requirement.

   8.2. Even where ratification is a requirement, signature determines the terms for ratification.

   8.3. Under art 18 of the Vienna Convention on the Law of Treaties (**Vienna Convention**), signature imposes what is known as an "*interim obligation*" on states.[2] In the period between signature and ratification, states are "*obliged to refrain from acts which would defeat the object and purpose of a treaty*".

   8.4. Particularly in the context of multi-lateral treaties like the Protocol, it is virtually impossible for a state to modify the content of a treaty after it has been signed.

9. We consider each of these impacts in turn. We then briefly consider the Government's position that after signature it can still take a decision whether or not to refer the matter

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[2] See, for example *JS Charme* The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making Sense of an Enigma (1992) 25 *George Washington JIL & Economy* 71–114. South Africa is not a party to the Vienna Convention. But in *Glenister II*, this Court noted that *"[a]lthough South Africa has neither signed nor ratified this Convention, commentators observe that South Africa employs the Convention in formulating its practice regarding treaties*". *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC)(*Glenister II*) at para 187, fn 170, citing Schlemmer "Die Grondwetlike Hof en die Ooreenkoms ter Vestiging van die Wêreldhandelsorganisasie" (2010) 4 *TSAR* 749 at 753. Presumably because the government relies on the Vienna Convention, our courts regularly refer to it directly in interpreting and applying treaties that South Africa has ratified, including the SADC Treaty and Protocol. See, for example, *Glenister II* at paras 91 and fn 170; *S v Makwanyane and Another* [1995] ZACC 3; 1995 (6) BCLR 665 (CC); 1995 (3) SA 391 (CC) at fn 23; *National Commissioner of The South African Police Service v Southern African Human Rights Litigation Centre and Another* [2014] ZACC 30; 2015 (1) SA 315 (CC); 2014 (12) BCLR 1428 (CC) at fn 34; *Patel v National Director of Public Prosecutions: Johannesburg* [2016] ZASCA 191; 2017 (1) SACR 456 (SCA) at para 35; *Government of the Republic of Zimbabwe v Fick and Others* [2013] ZACC 22; 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC) at fn 44. Moreover, the interim obligation encapsulated in art 18 of the Vienna Convention is part of customary international law. See, for example, DS Jonas & TN Saunders 'The Object and Purpose of a Treaty: Three Interpretive Methods' (2010) 43 *Vanderbilt Journal for Transnational Law* 565 at 572; Charme at 77-78. In terms of s 232 of the Constitution, customary international law "*is law in the Republic*". In his seminal work on international law, Dugard writes that the Constitution is "*premised on the Vienna Convention*", and treats art 18 as applying to South Africa despite the fact that South Africa has not ratified the Vienna Convention. Dugard at 416. There can be little doubt that the interim obligation applies to South Africa.

to Parliament for ratification.

SIGNATURE CAN BE BINDING

10. The default position under s 231 of the Constitution is that international agreements only become binding on the Republic after they have been approved by resolution by both the National Assembly and the National Council of Provinces.[3] In addition to ratification by Parliament, before international agreements become incorporated into domestic law they must be enacted into law by national legislation.[4] Even under international law, signature of an international agreement is not automatically regarded as a manifestation of the consent to be bound – consent is normally manifested through a subsequent act of ratification. The requirement for ratification is normally set out in the treaty itself.[5]

11. However, under s 231(3) there are two situations where signature binds South Africa on the international plane.

12. First, if the treaty is of a "*technical, administrative or executive nature*". The Tembani Applicants argue that the Protocol is such a treaty and therefore bound South Africa on signature, while the Government contends the opposite. Whether that submission is correct or not, there is a class of treaties that do not require ratification. If a treaty is of a "*technical, administrative or executive nature*" and no public participation is required prior to signature, the public will have no say at all in South Africa's international obligations.

13. In *Earthlife*, the High Court held that agreements that can be tabled under s 231(2) must be a "*limited subset of run of the mill agreements (or as Professor Dugard puts it, agreements 'of a*

[3] Section 231(2) of the Constitution.
[4] Section 231(4) of the Constitution.
[5] J Dugard *International Law: A South African Perspective* (4 ed, 2011) at 416.

routine nature, flowing from daily activities of government departments') which would not generally engage or warrant the focussed attention or interest of Parliament".[6] It adopted that approach precisely because s 231(3) "*permits the executive to bind South Africa to an agreement without parliamentary approval or the public participation that often accompanies any such parliamentary approval process.*"[7] But even on that restrictive interpretation of s 231(3), there are still treaties that will have a significant impact on the public, or some section of the public.

14. Second, any treaty, no matter its content, will be binding on signature if that is what the treaty provides:

14.1. Section 231(3) of the Constitution states that any "*agreement which does not require either ratification or accession*" will bind the Republic once it is "*entered into by the national executive*" – that is, on signature.

14.2. Art 11 of the Vienna Convention provides that "*consent of a state to be bound by a treaty may be expressed*" by a range of methods, including signature. And art 12 explains that signature will bind a state when: "*(a) The treaty provides that signature shall have that effect; [or] (b) It is otherwise established that the negotiating States were agreed that signature should have that effect*".

15. This creates the power for the Executive to determine through negotiation with other states whether or not ratification will be required in order to bind South Africa on the international plane. While the general practice – particularly for multilateral treaties – is for states to be bound only on ratification, that is a function of practice not law. The Executive is free to enter into treaties that are binding only on signature.

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[6] *Earthlife Africa Johannesburg and Another v Minister of Energy and Others* [2017] ZAWCHC 50; [2017] 3 All SA 187 (WCC); 2017 (5) SA 227 (WCC) at para 11.
[7] Ibid.

16. It may do so for a range of reasons. It may seek to advance certain foreign policy or international trade goals that are not shared by Parliament. It may wish to avoid the delay of ratification. Or it may be pressured to do so during negotiations with the other state parties who want to avoid ratification for their own reasons.

17. Whatever the reason, signature will then bind the Republic. If there is no default requirement for public participation, then the Executive will be free to do so without any obligation to hear from any affected person, or from Parliament. That will be the case no matter the effect of the treaty, or the ease of facilitating reasonable public participation.

THE TERMS FOR RATIFICATION

18. Signature determines the terms on which states can ratify treaties. As the International Law Commission has put it, "*in signing a treaty, the signatory enjoys the right to exercise an important influence on some of the procedural clauses of the instruments.*"[8] That includes how the treaty becomes binding (through signature or ratification) by "*such matters as the right of accession, the admissibility of reservations, [and] the conditions of entry into force*".[9] Through signature the Executive gets the final say on those procedural questions, which limit the options available to the Legislature at the ratification stage. That can be seen in the particular way that the SADC Treaty deals with protocols.

19. There are two ways in which a state can, ordinarily, seek to alter the effect of a treaty post-signature. It can record reservations to the treaty that "*excludes or modifies the legal effect of certain provisions of the treaty in their application to that state*".[10] Or it can refuse to ratify but

[8] Charme at 92, citing Report by Mr. H. Lauterpacht, Special Rapporteur to the General Assembly [1953] 2 *Yearbook of the International Law Commission* 90, at 109, U.N. Doc. A/CN.4/SER.A/1953/Add.1.
[9] Ibid.
[10] Dugard at 417.

seek to re-open negotiations to amend certain provisions of the treaty. Neither of those options are available in the context of SADC protocols.

20. First, in terms of art 22(14) of the SADC Treaty: "*No reservation shall be made to any Protocol.*" Ordinarily, one of the ways that Parliament can influence the content of a treaty is by instructing the Executive to record reservations. While it is not able to engage in direct negotiations, it can decide which parts of the treaty will bind South Africa, and which parts will not. But it lacks that power with SADC protocols, or any other protocol where the Executive has agreed in negotiations to include such a limitation.

21. Second, arts 22(11) to 22(13) set out the procedure for amending protocols to the SADC Treaty.[11] The effect is that, once the text of a protocol has been signed and ratified by two-thirds of the member states, that protocol cannot be amended without the proper procedure for amendment being followed. It is not possible to re-negotiate a protocol prior to ratification.

22. The combined effect of the prohibition on reservations, and the procedure for amendment, is that it is not possible for a State to alter its obligations under a Protocol after signature. Parliament is bound to either accept or reject the entire Protocol.

23. But even more limited procedural issues may affect Parliament's work:

    23.1. The Executive could agree to a provision that ratification must be deposited within a certain time, placing pressure on Parliament to act.

    23.2. Even if the treaty permits reservations, under art 19 of the Vienna Convention,

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[11] SADC Treaty arts 22(11) to (13) read:
"*11. An amendment to any protocol that has entered into force shall be adopted by a decision of three-quarters of the Member States that are parties to the Protocol.*
12. A proposal for amendment of the Protocol shall be submitted to the Executive Secretary by any Member State that is party to the Protocol.
13. The Executive Secretary shall submit a proposal for amendment to the Protocol to Council after:
(a) all Member States that are parties to the Protocol have been notified of the proposal; and
(b) thirty days have elapsed since notification to the Member States that are parties to the Protocol."

South Africa can only make reservations that are consistent with the "*object and purpose*" of the treaty.[12]

THE INTERIM OBLIGATION

24. The interim obligation imposed by signature is codified in art 18 of the Vienna Convention, which reads:

> *"A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:*
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> *(a) It has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or*
>
> *(b) It has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed." (our emphasis)*

25. Traditionally, signature was the primary way that states bound themselves to treaties – ratification was largely a formality. However, states began to seek more leeway to reconsider treaties after signature and particularly to allow the legislative branch to have the final say on whether a state would bind itself to a treaty.[13]

26. The interim obligation seeks to find a "*middle ground*" between treaties becoming immediately binding on signature, and treaties having no application until ratification.[14] In doing so, it seeks to balance both domestic and international concerns:

26.1. Domestically, the interim obligation "*protects political accountability by accommodating domestic review of pending treaties.*"[15] It allows "*multi-branch review of a treaty*" to ensure

[12] That phrase is the same as the one used in art 18, discussed below, and has caused similar interpretive difficulties. See, for example, U Linderfalk 'On the Meaning of the Object and Purpose Criterion, in the Context of the Vienna Convention on the Law of Treaties, Article 19' (2003) 72 *Nordic Journal of International Law* 429.
[13] See, for example, Charme at 85-6.
[14] Jonas and Saunders at 595.
[15] Ibid.

that new international commitments are approved by "*a wider swath of political actors*".[16]

26.2. Internationally, the interim obligation facilitates cooperation between signatory states. It permits all parties the time to "*deliberate over the merits of a pending treaty, secure in the knowledge that all signatories are committed, at least temporarily, to a threshold level of cooperation.*"[17]

27. Precisely where that middle ground lies depends on the meaning given to the phrase "*acts which would defeat the object and purpose of a treaty*".[18] There appears to be no clarity in international law on the correct test to adopt. Jonas and Saunders identify four possible approaches:

27.1. <u>The essential elements test:</u> Under this test, states need not comply with the whole treaty, but "*must comply with the most important parts.*"[19] For example, a signatory state to a treaty banning landmines would violate its interim obligations if it continued to plant landmines prior to ratification, even if an obligation to remove existing landmines only kicked in after ratification.

27.2. <u>The impossible performance test:</u> This imposes a "*stringent*" standard where the interim obligation would only be violated "*if subsequent performance of the treaty becomes impossible or 'meaningless.'*"[20] If a treaty required a state to return certain artworks and, in the interim, it destroyed those artworks, performance would be impossible.

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[16] Ibid. See also CALS AA at para 15: Vol 12 p 1165.
[17] Ibid at 596.
[18] The same terms is used in multiple places in the Vienna Convention. In addition to art 18, it appears in the rule concerning permissible reservations (art 18); in the rule concerning acceptance of and objections to reservations (art 20); in the general rule of interpretation (art 31); in the rule regarding interpretation of treaties authenticated in two or more languages (art 34); in the rule concerning modifications of treaties (art 41); and in the rule concerning suspension of the operation of a multilateral treaty by agreement between certain parties only (art 58).
[19] Jonas and Saunders at 595, identifying Buffard and Zemanek as supporting this approach. See I Buffard & K Zemanek 'The "Object and Purpose" of a Treaty: An Enigma?' (1998) 3 *Austria Review of International and European Law* 311.
[20] Ibid at 598.

27.3. The bad faith or manifest intent test: This test – proposed by Jan Klabbers – is inspired by the difficulty of applying the impossible performance test to law-creating treaties like human rights covenants or the SADC Treaty (as opposed to contract-based treaties like a bilateral trade agreement).[21] A state will violate the interim obligation on this test if, based on its objective conduct, "*its behavior seems unwarranted and condemnable*".[22] The focus is on whether the offending state's conduct demonstrates an intent to undermine the agreement between the state parties.

27.4. The status quo test: Jonas and Saunders propose a test that focuses on whether the state has departed from the position that existed at the time of signature. They describe their test as comprised of two parts: "*First, has a signatory state transgressed one or more articles of the pending treaty? … Second, was the transgressing action new, or was it part of a pattern existing prior to signature? If the transgressing action is not new, there has been no violation.*"[23]

28. It is not necessary for this Court to determine which of these four tests applies. Whichever test applies, signature has real consequences for South Africa on the international and domestic planes. It can preclude South African from enacting laws or policies without breaching its international obligations to the other signatories. While Parliament may still choose to legislate contrary to South Africa's interim obligations, it might not do so precisely to avoid violating obligations created entirely by the Executive.

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[21] J Klabbers 'How to Defeat a Treaty's Object and Purpose Pending Entry into Force: Toward Manifest Intent' (2001) 34 *Vanderbilt Journal of Transnational Law* 283.
[22] Klabbers at 330. Klabbers draws this test, in particular, from *Opel Austria GmbH v Council* 1997 E.C.R. 11-39.
[23] Jonas & Saunders at 603.

PRACTICAL EFFECT OF SIGNATURE

29. In the *ICC Withdrawal* Case, the High Court held that Executive signature of a treaty "*is in effect exploratory work*".[24] CALS submits the Court understated the position. From a practical perspective, negotiation and signature is where the core decisions are made. Particularly for multi-lateral treaties, it will normally be impossible for Parliament to alter the terms of the treaty prior to ratification.

30. This has caused frustration for Members of Parliament considering whether to ratify treaties. A 2002 meeting of the Security and Constitutional Affairs Select Committee of the NCOP was considering whether to ratify the SADC Protocol against Corruption. Ms Kgoali of the ANC asked "*if the Committee had any power to amend the protocols*".[25] The Chairperson replied that it could not, that only the President could propose amendments and "*that such amendments were unlikely to happen*".[26] Several members then noted that they "*saw no point of endorsing treaties if it could not amend them*" and "*suggested that the Committee should be given a chance to have submissions **before** the State President could sign protocols and treaties.*"[27] They asked for a delay to consider the proper process to adopt protocols. The Chairperson disagreed and "*moved that the protocols be adopted because the delay would make no difference to the contents of the protocols.*"[28]

31. This incident demonstrates precisely the flaw in conducting public participation only after signature. The text of the treaty is a *fait accompli*; Parliament can only accept or reject it. This distinguishes treaty-signing from the work the Executive ordinarily does in drafting

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[24] *Democratic Alliance v Minister of International Relations and Cooperation and Others (Council for the Advancement of the South African Constitution Intervening)* [2017] ZAGPPHC 53; 2017 (3) SA 212 (GP); [2017] 2 All SA 123 (GP); 2017 (1) SACR 623 (GP)(ICC Withdrawal) at para 55.
[25] **CALS 2(b)** to CALS FA at 2.
[26] Ibid.
[27] Ibid (emphasis added).
[28] Ibid (emphasis added).

bills that are tabled in Parliament. Parliament is not limited to accepting or rejecting bills; it can also amend or rewrite them. It is therefore not necessary to have public participation in the bill-drafting process.

THE OBLIGATION TO SUBMIT TO PARLIAMENT

32. The Government takes the position that after it signs a s 231(2) treaty, it must still take a separate decision whether or not to submit it for ratification.[29] That cannot be correct. Signature has legal consequences for South Africa as a state on the international plane. It may create international sanctions for domestic, legislative action. The Constitution requires that Parliament have an opportunity to either ratify the treaty, or to instruct the Executive to withdraw South Africa's signature. Allowing the Executive to sign a treaty but then decide not to submit it for ratification would allow it to bind South Africa to interim obligations without ever affording Parliament an opportunity to get out of those interim obligations. South Africa would be left in a state of legal limbo.

33. Moreover, it is inconsistent with the approach to s 231(2) treaties. In *Earthlife* the High Court held that it is a jurisdictional requirement that 231(2) treaties are tabled within a reasonable time. It rejected the Government's alternative interpretation that because the purpose of tabling was merely to notify the Legislature, delay did not affect the validity of the agreement. Bozalek J reasoned that this interpretation

> "*would result in a situation where the executive can, as one arm of government, bind the State on the international plane whilst at the same time keeping another arm of government, the legislature, in the dark about such international agreements. Such an interpretation pays scant respect to the principles of openness and accountability which are enshrined in the Constitution.*"[30]

[29] See Respondents' Written Submissions at para 4.8.
[30] *Earthlife* at para 126.

34. That reasoning applies with even more force to treaties that demand ratification. Openness, transparency and the separation of powers demand that the Executive is obliged to permit the Legislature to decide whether or not to ratify treaties it has signed in South Africa's name.

CONCLUSION

35. In *ICC Withdrawal*, the High Court held that signature "*has no direct legal consequences*".[31] That statement needs to be read in the context in which it was made – comparing signature to withdrawal. Unlike withdrawal, signature does not bind or unbind South Africa to the terms of a s 231(2) treaty. In truth, signature does have the very real, legal and practical consequences identified above. It binds South Africa to s 231(3) treaties. It creates interim obligations enforceable at international law. And it determines the terms of the treaty that will be accepted or rejected by Parliament.

III COMPARATIVE PRACTICE[32]

36. In 2001, the Council of Europe's Committee of Legal Advisers on Public International Law prepared a report on how states express their consent to be bound by a treaty.[33] The Report recognised the following change in the nature and impact of international agreements:

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[31] *ICC Withdrawal* at para 47.

[32] Like any comparative exercise, this survey of comparative experience is incomplete. There are other countries that do not have similar, formalised requirements for participation. Moreover, the role of pre-signature consultation will differ depending on each country's own constitutional provisions for assigning powers to sign and ratify treaties between the executive and legislative branches. Notwithstanding the shortcomings of any comparative exercise, CALS submits that the practice of these countries demonstrates a movement towards mandatory public participation at the pre-signature stage in comparable constitutional democracies. Kenya, India and Canada in particular are regular comparators to South Africa. The survey therefore supports the arguments advanced in Part IV that flow directly from South Africa's existing constitutional framework and international obligations.

[33] Expression of Consent by States to be Bound by a Treaty: Analytical Report and Country Reports (2001), available at https://rm.coe.int/168004ad95.

> *"[A]lthough treaty-making is primarily conducted between States, modern developments in treaty-making also reflect the structural changes in international law. Not only does international law seek to regulate the relations between States but increasingly seeks to create rights and obligations for a wider range of persons including not only other "public" actors such as international organisations, but also "private" persons both natural and juridical.*
>
> *It is the combination of these factors, which lends the current study of treaty-making and its regulation at both the international and national levels, a pressing relevance. The expanding scope of international law, and, in particular, of treaties, which now can penetrate more widely and deeply into areas which were previously the preserve of national law, requires that attention should be focussed on the law-making process itself. In particular consideration must be given as to how the values protected in the domestic law-making process are also protected in the international law-making process."*[34]

37. There is persuasive evidence in comparative practice of a modern movement towards mandatory public participation prior to signature. In the case of Kenya, this obligation has been encapsulated in both statute and case law. In Canada, New Zealand and Australia, the obligation is one of policy and practice generally preceded by formal proposals for law reform. In India, the move has been adopted by the Law Commission, but does not appear to have been formally adopted.

38. The basic rationale for this approach is simple: Consultation is most useful to the Executive, to the Legislature and to the public if it occurs before signature.

NEW ZEALAND

39. In 1997, the New Zealand Law Commission (**NZLC**) issued a report titled "*The Treaty Making Process: Reform and the Role of Parliament*".[35] The Report's first recommendation was: "*That the value of notification and consultation with Parliament and interested or affected groups at the*

[34] Ibid at 11-12 (emphasis added).
[35] Report 45, available at http://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/R45-TreatyMaking.pdf.

negotiating stage of the treaty making process *be recognised, with the purpose of developing and formalising such practices.*"[36] The NZLC's explanation for this approach directly reflects the concerns that animate public participation under our Constitution.

39.1. Under the heading "*democratic deficit*" the NZLC noted an increasing concern that because "*[t]reaties can have a wide range of implications for a nation's legal and administrative systems, economy, and individual citizens[,] …. the practice whereby treaties are entered into by the executive, without significant parliamentary or public involvement, is undemocratic.*"[37]

39.2. The NZLC also expressly recognised the need for public participation before signature and during negotiations:

> "*[T]he critical stage for consultation will often be before the international text is settled. After the negotiation is complete it is highly unlikely that the text can be altered. Generally, the only courses then open will be to accept or reject the established text. In some cases there may not even be that choice since the international decision may become internationally binding without further action by the government. Even if the government does in law have a choice whether or not to accept, that choice might not be a real one if, for instance, the text is very widely supported and standing aside would cause real disadvantage to the national interest.*"[38]

39.3. The NZLC recognised that "*[s]ome negotiations have to be private*" and that consultation may not always be possible or desirable.[39] "*But,*" the NZLC reiterated, "*practice does show that consultation is sometimes possible and that in some cases, if consultation is to be effective, it has to occur at an early stage.*"[40] In particular, international processes leading to major multilateral treaties – such as the Protocol – "*are public, at least in part, and lengthy, allowing time for consultation.*"[41]

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[36] Ibid at para 7 (emphasis added).
[37] NZ Law Reform Commission at para 57.
[38] Ibid at para 105.
[39] Ibid at para 107.
[40] Ibid.
[41] Ibid.

40. Gobbi summarises the NZLC's view of public consultation as follows:

> *"Although time-consuming, consultation is seen to facilitate the negotiation process and assist in producing better treaties. In addition, practice demonstrates that consultation is possible, provides benefits such as enhancing the democratic character of New Zealand's negotiating position, and must occur early in the negotiation process to be effective. This is especially the case for small countries without the power or resources to reopen negotiations at a later date. Once the treaty text is settled, little opportunity exists for meaningful consultation since the treaty text is unlikely to be open for alteration."*[42]

41. The NZLC's recommendations have been adopted by the New Zealand Ministry of Foreign Affairs and Trade. In a document titled *International Treaty Making Guidance for Government Agencies*, the Ministry sets out the steps for New Zealand to conclude a treaty. Before the treaty is signed, the lead government department must prepare a National Interest Analysis (**NIA**) that is submitted to Cabinet for approval prior to signature. One of the issues the NIA must address is public consultation. It must "*set out in full the consultation process and the results*". While it is primarily "*for the government department leading the proposed treaty action to determine what consultation is required*", the nature and extent of consultation "*should be commensurate with the impact of the treaty on current policy and existing law.*"[43]

AUSTRALIA

42. In 1995, the Australian Senate's Standing Committee on Legal and Constitutional Affairs prepared a report titled *Trick or Treaty? Commonwealth Power to Make and Implement Treaties.*[44] The report addressed, amongst other issues, public consultation. The Committee

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[42] M Gobbi 'Enhancing Public Participation in the Treat-Making Process: An Assessment of New Zealand's Constitutional Response' (1998) 6 *Tulane Journal of International and Comparative Law* 57 at 85.

[43] New Zealand Ministry for Foreign Affairs and Trade International Treaty Making Guidance for government agencies on practice and procedures for concluding international treaties and arrangements (August 2017) at 27, available at www.treaties.mfat.govt.nz/download/3.

[44] Available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/pre1996/treaty/report/index

received evidence on the current state of consultation and concluded that: "*Depending on the subject matter of a treaty, there is a wide range of interested groups with whom the Government should properly consult in relation to entering into treaties. These groups include trade unions, industry, environmental groups, and many other non-government organisations.*"[45]

43. The Committee ultimately recommended: "*That the Government increase its efforts to identify and consult the groups which may be affected by a treaty which Australia proposes entering into, and groups with expertise on the subject matter of the treaty or its likely application in Australia.*" Accordingly, one of the goals following the reviews was "*greater consultation with interested parties before Australia becomes a party to a treaty*".[46]

44. That goal is reflected in the *Australia International Treaty Making Information Kit*, prepared by Australia's Department of Foreign Affairs and Trade.[47] It explains that, when the Australian government decides whether to conclude a treaty, it does so "*based on information obtained from all relevant sections of the community.*"[48] The purpose of consultation is not "*merely so that those with an interest feel included in the process, but more importantly because their views are an essential part of the judgement made by the Government as to whether a treaty is in the national interest.*"[49]

45. The *Information Kit* recognises that "*[w]ide-ranging consultations are the best means of ensuring broad community support for a multilateral treaty as well as specific support for a balanced outcome from those groups interested in the issues being negotiated.*" Consultation also provides information about the treaty and creates the possibility to "*develop a consensus within the Australian*

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[45] Ibid at para 12.1.
[46] Ibid.
[47] (2000), available at http://www.austlii.edu.au/au/other/dfat/reports/infokit.html. Unfortunately, the only version publicly available does not have page or paragraph numbers.
[48] Ibid.
[49] Ibid (our emphasis).

community."[50]

46. Australia has a range of both standing bodies and informal mechanisms to facilitate public consultation.[51] In addition, "*consultation with all relevant groups in the community takes place outside such standing bodies where proposed treaty action is of interest to such groups.*"[52] Of course, consultation – like public participation under the Constitution – "*does not mean that any single group consulted can determine Australia's negotiating position.*" Instead, the point of public consultations is "*to give decision-makers, ultimately Ministers, access to a wide range of information and to provide relevant groups with the opportunity to present their positions to the Government.*"[53]

CANADA

47. Writing in 2000, an internal memorandum prepared by the Law and Government Division of the Canadian Parliament wrote: "*There is growing evidence that the Canadian people no longer want their government to negotiate agreements in secret so that they are faced with a fait accompli. … They want their opinions to be heard, and a closed door government process provides limited opportunities for such input.*"[54]

48. In 2014, Global Affairs Canada (the equivalent of DIRCO) adopted a *Policy on Tabling of Treaties in Parliament.*[55] In a similar vein to the New Zealand approach, the policy requires the relevant department to submit a "Memorandum to Cabinet" in order to obtain a negotiating mandate. That department will be required to "*show that other government*

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[50] Ibid.

[51] For example, the Department holds bi-annual consultations with NGOs interested in international human rights to discuss international instruments. There are other subject-specific standing committees.

[52] Ibid. Because it is not always clear which groups will be interested, the Australian Government maintains an online list of all treaties that are being negotiated and a contact person for those who wish to make comments. "*This provides greater transparency in the treaty making process and ensures that interested groups and individuals are in a position to contribute freely to Australia's negotiating position.*"

[53] Ibid.

[54] Daniel Dupras *International Treaties: Canadian Practice* (2000) available at publications.gc.ca/Collection-R/LoPBdP/BP/prb0004-e.htm.

[55] Available at http://www.treaty-accord.gc.ca/procedures.aspx.

departments, provinces and territories, aboriginal groups or NGOs and industry stakeholders have been consulted before granting a negotiating mandate."[56]

INDIA

49. In 2001, the National Law Commission of India prepared a report on India's treaty-making powers.[57] The Commission found that, at the time, treaty-making was conducted exclusively by the executive branch. It recommended that Parliament should adopt a law on the issue of entering into treaties to regulate that process and provide for its own role. One of the Commission's major concerns was that there was no accountability for the executive:

> "*In a democracy like ours, there is no room for non-accountability. The power of treaty-making is so important and has such far-reaching consequences to the people and to our polity that the element of accountability should be introduced into the process. Besides accountability, the exercise of power must be open and transparent (except where secrecy is called for in national interest) – what was called by President Wilson of USA, 'open covenants openly arrived at'.*"[58]

50. Linked to the concern of accountability, the Commission recommended that legislation "*must also provide for consultation with affected group of persons, organizations and stake-holders, in general. This would go to democratize further the process of treaty making.*"[59]

KENYA

51. While the countries discussed above have practices or recommendations that require public participation in the negotiation phase, Kenya has both legislation and case law that

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[56] Ibid (our emphasis).
[57] National Law Commission of India *A Constitution Paper on Treaty-Making Power under our Constitution* (2001), available at http://lawmin.nic.in/ncrwc/finalreport/v2b2-3.htm.
[58] Ibid at Part IV.
[59] Ibid.

mandates pre-signature public participation.[60]

52. The **legislation** is the Treaty Making and Ratification Act (**TMRA**),[61] which spells out the specific obligation for public participation in the process of concluding an international agreement. The TMRA directs that in "*negotiating treaties, the national executive or the relevant State department shall be bound by the values and principles of the Constitution*".[62] The values and principles of the Kenyan Constitution envisage public participation in governance.[63] Art 118 of the Constitution contains virtually identical language to s 59 of our Constitution.[64] In *Commission for the Implementation of the Constitution v Parliament of Kenya*[65] the High Court adopted the principles laid down by this Court in *Doctors for Life* concerning the need for public participation in the Legislature.[66]

53. Section 7 of the TMRA is categorical on public involvement. Where the government intends to ratify a treaty, the relevant Cabinet Secretary must submit a memorandum to Cabinet outlining a variety of issues including "*the views of the public on the ratification of the treaty.*"[67] This necessarily requires that the relevant department had engaged in public consultation in the lead-up to the presentation of the treaty for Cabinet approval – that

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[60] Before we discuss that, it is important to note that Kenya is a monist country – any treaty it ratifies forms part of its domestic law. Constitution of Kenya art 2(6). This obviously increases the impact of ratification. It does not, however, alter the impact of signature for the subsequent ratification process. As we show, public participation in Kenya is required at the negotiation stage.

[61] Act 45 of 2012.

[62] TMRA s 6.

[63] The preamble to the Kenyan Constitution, for instance, acknowledges the people's "*sovereign and inalienable right to determine the form of governance of our country*". Article 10 sets out national values and principles of governance to include "*inclusiveness*" and "*participation of the people.*" These national values and principles of governance bind the executive when negotiating or signing international agreements. In terms of art 10: "*State organs, State officers, public officers and all persons whenever any of them (a) applies or interprets this Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions.*" Art 129 provides that the executive, the organ of State that signs international agreements, exercises "*executive authority in accordance with the Constitution.*" It is implicit in the foregoing provisions that public consultation is a requirement for negotiating treaties. This is confirmed in the *Small Scale Farmers Case* discussed below.

[64] Art 118(1)(b) requires Parliament to "*facilitate public participation and involvement in the legislative and other business of Parliament and its committees.*"

[65] [2013] eKLR, petition No. 454 of 2012 at paras 72-77, available at http://kenyalaw.org/caselaw/cases/view/86523.

[66] *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC).

[67] TMRA s 7(m).

is, prior to signature. Cabinet approval of a treaty is a pre-requisite for approval by the National Assembly.

54. The National Assembly is also obliged to hold public consultations prior to approving a treaty for ratification. The relevant parliamentary committee considering the treaty is required to "*ensure public participation in the ratification process in accordance with laid down parliamentary procedures*", during its consideration of the treaty.[68] The TMRA is clear that a treaty can only be ratified after it has been considered and approved by the Cabinet and Parliament.[69] In short, the TMRA envisages public consultation as a core ingredient of the treaty making process, both for the legislature and the executive.

55. The relevant **case law** is even more supportive of pre-signature consultation. In *Kenya Small Scale Farmers Forum v Republic of Kenya*,[70] the petitioners challenged the operationalization of the Economic Partnership Agreement (EPA) between the European Union and Kenya, on the ground that the state was in breach of its obligation to involve them in the EPA negotiations.[71] The petition was instituted in 2007, before the promulgation of the Constitution of Kenya in 2010 and the TMRA in 2012. As the previous legal order did not impose a duty on the state to ensure public participation in the negotiation and ratification processes, the petitioners had relied on international law instruments as the source of this obligation.[72] The High Court declined to find that the international law instruments imposed an obligation on the Kenyan government to

[68] TMRA s 8(3).
[69] TMRA s 9.
[70] [2013] eKLR, available at http://kenyalaw.org/caselaw/cases/view/91805/.
[71] Ibid at paras 18 and 42.
[72] Ibid at paras 41-48.

ensure public participation in the treaty making process.[73]

56. However, since the EPA negotiations were still ongoing at the time the application was determined in 2013, the High Court deemed it necessary to pronounce itself on the legal position post-2010. It began by affirming that "*one of the golden threads running through the current constitutional regime is public participation in governance and the conduct of public affairs*".[74] It then highlighted the constitutional provisions identified earlier which embody public participation in governance.[75] The Court, citing *Doctors for Life*, observed that: "*the duty to facilitate public involvement in the legislative process is an aspect of the right to political participation recognized in affairs of State and enabled and anchored by other rights and fundamental freedoms such as the freedom of expression, association and freedom of access to information.*"[76]

57. More directly, the High Court held that, under the 2010 Constitution and the TMRA, the state has the duty to ensure public participation in the treaty negotiation and ratification process. The TMRA, it held, "*marked a departure from the past whereby treaty making processes were camouflaged in a shroud of mystery with the public having little or no knowledge on their existence or operation. Gladly, all that will be in the past.*"[77] The core of the High Court's reasoning appears in the following passage:

> "*In the circumstances of this particular case, we are of the view that it is still not too late in the day for the State to involve the public, including the Petitioners, in the negotiations leading to the agreement. As already seen, the [TMRA] stipulates a mechanism of appraisal before the same is ratified and there is therefore still room for participation as participation from the initial process was curtailed for various reasons, key among them being that there has in the past been no domestic legislative or constitutional*

[73] Ibid at para 52. Importantly for our argument based on s 7(2), that was not because it found international law did not contain such an obligation, but because under the prior constitutional regime international law did not bind the government in the domestic sphere.
[74] Ibid at para 57.
[75] Ibid. The Court also singled out art 35 of the Constitution, which entitles every citizen to information held by the State, and which requires the State to publish and publicise any important information affecting the nation.
[76] Ibid at para 58.
[77] Ibid at para 60.

framework requiring the State to employ direct public participation in public affairs."[78]

58. As the obligation had not existed prior to 2010 or 2012, the Court found no basis to declare the process up to that point invalid. Instead, the Court ordered the State "*in consultation with the Petitioners within Thirty days to establish a mechanism for involving stakeholders including the Petitioners in the on-going EPA negotiations.*"[79]

59. The Kenyan example is particularly instructive. It arises in a directly comparable constitutional framework that finds inspiration in our own Constitution and jurisprudence on accountability, openness and public participation. It is the only case we are aware of that has directly considered the obligation to engage in public consultation prior to signature. And it concluded that negotiations were necessary.

CONCLUSION

60. This comparative survey establishes that pre-signature public consultation is both practical – if Kenya is able to facilitate public consultation prior to signature, so can South Africa – and beneficial – if all these countries see the wisdom of pre-signature consultation so should South Africa.

61. The comparative examples also demonstrate the wide range of mechanisms that can be employed to facilitate public consultation. Standing mechanisms, ad hoc consultations, and website notifications are all effective options depending on the nature and content

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[78] Ibid at para 65 (emphasis added).

[79] Ibid at para. 73. The judgment is, with respect, not a model of clarity. There is a section where the learned judges write: "*We are also of the view that public participation need not be at the pre-legislative process. The Act as we have seen provides for various modes of approval even before the agreements can be ratified by the Parliament.*" Ibid at para 66. It is not clear what the court means by "*pre-legislative process*", or whether it means that public participation is not required at that stage, or is not limited to that stage. If it intended to state that public involvement was not necessary at the negotiation phase then the statement is inconsistent with its other statements in the judgment, and the order it granted which clearly required pre-signature consultation. The judgment needs to be interpreted consistently as a whole in light of the order. Read in that light, it cannot undermine the core tenant of the judgment – directing the executive to provide for public consultation during negotiations.

of the treaty. What is important is not the precise mechanism, but that the public have a meaningful opportunity to influence South Africa's negotiating position.

IV THE CONSTITUTIONAL OBLIGATION TO CONSULT THE PUBLIC

62. It is settled law that "*our democracy includes as one of its basic and fundamental principles, the principle of participatory democracy.*"[80] As a result, the Constitution contemplates a "*democratic government that is … partly representative and partly participatory, is accountable, responsive and transparent and makes provision for public participation in the law-making processes.*"[81] The only question for this Court is whether the signing of international agreements is part of the "law-making process". CALS submits that it is.

63. In this Part, we first lay out the constitutional sources of the obligation. We then summarise the content of the public participation obligation. Lastly, we counter the Government's responses to these arguments.

SOURCES OF THE OBLIGATION

64. CALS submits that the default obligation to facilitate public participation prior to signature arises from four sources:

64.1. The participatory nature of our democracy;

64.2. The requirement of procedural rationality;

64.3. The positive obligations in s 7(2) of the Constitution; and

64.4. The right to development.

65. Underlying all these operational elements of our Constitution are the founding values of

[80] *Doctors for Life* at para 116.
[81] Ibid.

openness, responsiveness and accountability.[82] Those values require a government that listens to its citizens before it acts – whether domestically or internationally.

Participatory Democracy

66. The Constitution imposes a duty on the national and provincial legislatures to "*facilitate public involvement*" in their "*legislative and other processes*".[83] In *Doctors for Life*, this Court held that creates an enforceable constitutional obligation. Failure to comply with it renders the resultant legislation unconstitutional and invalid. That precedent has been applied in multiple cases since *Doctors for Life*.[84]

67. CALS accepts that the constitutional provisions and the line of cases are not directly applicable to executive conduct. However, the cases are still central to the argument for two reasons:

    67.1. The substantive **justification** for the finding in *Doctors for Life* – our participatory democracy – applies equally to the signing of treaties; and

    67.2. The **content** of the obligation imposed on the Legislature is (with the necessary adjustments) appropriate for pre-signature consultation.

The Justification

68. In *Doctors for Life*, the Court did not rely solely on the specific constitutional provisions that impose a duty to facilitate public involvement. It also found support for its approach in the underlying democratic philosophy of *the Constitution*, the rights in *the Bill of Rights*

[82] Constitution s 1(d).
[83] Constitution ss 59, 72 and 118.
[84] See, most recently, *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others* [2016] ZACC 22; 2016 (5) SA 635 (CC); 2016 (10) BCLR 1277 (CC).

and *international law*.

The Constitution

69. In *Doctors for Life*, the Court stressed that our democracy is not purely representative; it is also a participatory democracy. In Justice Ngcobo's words:

> *"Commitment to principles of accountability, responsiveness and openness shows that our constitutional democracy is not only representative but also contains participatory elements. This is a defining feature of the democracy that is contemplated. It is apparent from the preamble of the Constitution that one of the basic objectives of our constitutional enterprise is the establishment of a democratic and open government in which the people shall participate to some degree in the law-making process."*[85]

70. The Court went on to recognise the specific value of participation in public affairs:

70.1. It has an institutional advantage because participation "*provides vitality to the functioning of representative democracy*" by encouraging citizens "*to be actively involved in public affairs, [and] identify themselves with the institutions of government*";[86]

70.2. Participation also has intrinsic or symbolic worth because it "*enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of.*"[87] That is particularly important to "*those who are relatively disempowered*".[88]

70.3. But participation also serves very practical and instrumental goals. It is "*calculated to produce laws that are likely to be widely accepted and effective in practice*", and "*because of its open and public character it acts as a counterweight to secret lobbying and influence peddling.*"[89]

Rights

71. *Doctors for Life* also held that the right to public involvement was not sourced solely in ss

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[85] *Doctors for Life* at para 111.
[86] Ibid at para 115.
[87] Ibid.
[88] Ibid.
[89] Ibid.

59, 72 and 118 of the Constitution. It is also an element of several rights in the Bill of Rights, particularly the right of access to information,[90] the right to freedom of expression,[91] the s 19 political rights,[92] and the rights to free assembly and association.[93] Public participation in government is vital for the full protection and enjoyment of these rights. That is equally true of executive treaty making, as it is of legislative law-making.

International law

72. Justice Ngcobo spent considerable time addressing South Africa's international obligations. He recognised that "*[t]he right to political participation is a fundamental human right, which is set out in a number of international and regional human rights instruments.*"[94] In particular, the International Covenant on Civil and Political Rights (**ICCPR**) "*guarantees not only the "right" but also the "opportunity" to take part in the conduct of public affairs. This imposes an obligation on states to take positive steps to ensure that their citizens have an opportunity to exercise their right to political participation.*"[95] That international right "*includes the duty to facilitate public participation in the conduct of public affairs by ensuring that citizens have the necessary information and effective opportunity to exercise the right to political participation.*"[96]

73. Vitally, under international law the term "*public affairs*" is not limited to legislative processes and extends to the negotiation and signature of international agreements. The Human Rights Committee, which is tasked with interpreting the ICCPR, has held:

> *"The conduct of public affairs, referred to in paragraph (a), is a broad concept which relates to the exercise of political power, in particular the exercise of legislative,* ***executive*** *and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy*

[90] Ibid at para 131.
[91] Ibid at paras 99, 106.
[92] Ibid at para 106.
[93] Ibid at para 99.
[94] Ibid at para 90.
[95] Ibid at para 91.
[96] Ibid at para 105.

*at **international**, national, regional and local levels."*[97]

Content

74. The appropriate standard to judge whether Parliament has facilitated public involvement is reasonableness. While the obligation "*may be fulfilled in different ways and is open to innovation*" the legislatures must "*provide citizens with a meaningful opportunity to be heard in the making of the laws that will govern them.*"[98] In *LAMOSA*, this Court repeated that what is reasonable "*depends on the peculiar circumstances and facts at issue*" and that "*some deference should be paid to what Parliament considered appropriate in the circumstances*".[99] The Court must consider "*time constraints and potential expense*", "*the importance of the legislation in question, and its impact on the public*", "*the rules Parliament has adopted for this purpose*" and "*any need for its urgent adoption.*"[100] The same factors – as well as the possible need for secrecy in negotiations – should guide the assessment of pre-signature consultation.

75. Centrally, in *Doctors for Life*, Ngcobo J emphasised that: "*Legislatures must facilitate participation **at a point in the legislative process where involvement by interested members of the public would be meaningful.***"[101] It held that the Northern Cape Provincial Legislature had not acted reasonably because it had "*conducted a hearing only after it had conferred a final mandate on its delegation, when the legislature's decision-making could no longer*

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[97] UN Human Rights Committee *General Comment 25* (1996) UN Doc CCPR/C/21/Rev.1/Add.7. at para 5. *Doctors for Life* relied directly on this General Comment in interpreting South Africa's international obligations under the ICCPR, and therefore in interpreting the obligation for legislative public participation.

[98] *Doctors for Life* at para 145 (our emphasis).

[99] *LAMOSA* at para 60.

[100] *LAMOSA* at para 61 (footnotes omitted). In applying this standard, the Court has drawn distinctions between different categories of legislation. In *Doctors for Life* it held that the failure to hold public hearings concerning legislation that affected abortions and traditional medicine was unreasonable, but it was reasonable to merely invite written comment for a law concerning dental technicians. In *Merafong* the Court made it clear that the right to participate did not include the right to have one's views prevail, or the right to be informed of the reasons for rejecting public submissions. *Merafong Demarcation Forum v President of the Republic of South Africa* [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC).

[101] *Doctors for Life* at para 171 (our emphasis).

be informed by the input of the public."[102] As the Court pointed out, it could not be "*reasonable to offer participation at a time or place that is tangential to the moments when significant legislative decisions are in fact about to be made*" because then the public will not be able to "*participate in a manner which may influence legislative decisions.*"[103]

76. The same must be true of participation in the making of treaties. It is not meaningful participation if one can only participate at the ratification stage where it is virtually impossible to alter the content of the treaty. That is why public participation only at the stage of ratification cannot satisfy the constitutional imperative. As the NCOP delegates quoted above recognised, it is too late at that stage to have any meaningful input on the content of the treaty.

Procedural Rationality

77. Both LAWSA and the Tembani Applicants argue that the President's decision to sign the Protocol was procedurally irrational because he did not consult interested and affected persons prior to the decision to sign the Protocol. CALS concurs, but its submission is wider. It argues that, as a default rule, public consultation is always required prior to the signature of a treaty. The nature of the consultation required will depend on the treaty at issue. And there may be situations where it is rational to sign without holding public consultations. But as a general rule, the executive must consult the public.

78. It is now settled law that all public conduct must be rational and comply with the principle of legality.[104] In *ICC Withdrawal* the High Court held that "*the conduct of international relations*

[102] Ibid (our emphasis).
[103] Ibid.
[104] *Pharmaceutical Manufactures: In re Ex parte Application of the President of the Republic of South Africa* 2000 (2) SA 674 (CC) at para 85.

and treaty-making … still remained an exercise in public power, which must comply with the principle of legality and is subject to constitutional control."[105]

79. It is also well-established that rationality includes procedural rationality. As Yacoob J put it in *Simelane*: "*both the process by which the decision is made and the decision itself must be rational.*"[106] The Court went on to explain that the process must be considered holistically:

> "*We must look at the process as a whole and determine whether the steps in the process were rationally related to the end sought to be achieved and, if not, whether the absence of a connection between a particular step (part of the means) is so unrelated to the end as to taint the whole process with irrationality.*"[107]

80. In *Scalabrini*, the Supreme Court of Appeal explained that consultation may not always be necessary. It held, instead, that the "*duty will arise only in circumstances where it would be irrational to take the decision without such consultation, because of the special knowledge of the person or organisation to be consulted, of which the decision-maker is aware.*"[108] In that case, it concluded that a decision to close a refugee reception office was irrational unless there was prior public consultation. It is difficult to think of an international treaty that would not also require public consultation in order to be rational.

81. CALS submits that – as a general proposition – it is irrational to sign treaties without any public consultation. That flows because in light of the **purpose of the power**, and the **consequences of signature**, it would be irrational not to facilitate public involvement.

Purpose of the Power

82. The power at stake is the power to sign international agreements. The purpose of that

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[105] *ICC Withdrawal* at para 44.
[106] *Democratic Alliance v President of South Africa and Others* [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC) at para 34 (our emphasis). See also *ICC Withdrawal* at para 64.
[107] *Simelane* at para 37.
[108] *Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others* [2013] ZASCA 134; 2013 (6) SA 421 (SCA) at para 72.

power must be to act in the interest of the Republic. The National Executive can only lawfully sign international agreements that it believes are in the national interest. But the Executive cannot confidently determine what is in the national interest without public engagement. The Executive will have its own policy goals, both domestically and in the conduct of foreign affairs. It is entitled to pursue those goals. But it must understand what interests will be affected by its conduct in order to develop a sensible negotiating position. It can only do that through consultation with other affected groups.

83. It is necessary to stress that negotiating and signing a treaty is part of a "*law-making process*". In the case of s 231(3) treaties, it creates international obligations. For 231(2) treaties, signature also creates interim, international-law obligations, and places an obligation on Parliament to either ratify the treaty or not. That is part of the law-making process because the treaty will create not only international law obligations on the Republic, but may also mandate the passage of domestic legislation. *Doctors for Life* rightly focuses on the "law-making process" as the core activity that requires public participation:

> "*It is implicit, if not explicit, from the duty to facilitate public participation in the law-making process that the Constitution values public participation in the law-making process. The duty to facilitate public participation in the law-making process would be meaningless unless it sought to ensure that the public participates in that process. The very purpose in facilitating public participation in legislative and other processes is to ensure that the public participates in the law-making process consistent with our democracy. Indeed, it is apparent from the powers and duties of the legislative organs of state that the Constitution contemplates that the public will participate in the law-making process.*"[109]

84. Signature is inherently part of a law-making process. It should have similar public participation obligations.

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[109] *Doctors for Life* at para 135 (emphasis added).

Consequences of Signature

85. As set out in Part II, signature has serious consequences. If the agreement is a s 231(3) agreement, it will bind South Africa. And the executive can influence whether an agreement requires ratification or not. Even if it is a s 231(2) agreement that requires ratification, signature has serious consequences. It provides a text that will often not be open to re-negotiation. It will determine whether or not South Africa is able to place reservations or not. And it imposes interim obligations that limit what Parliament can do without violating international law.

86. Probably the most important reason for public consultation at the negotiation stage is that is the only time it is likely to be effective. As the Court held in *Doctors for Life*: "*Interested parties are entitled to a reasonable opportunity to participate in a manner which may influence legislative decisions.*"[110] It would not constitute reasonable public participation in the legislative context for Parliament to delay public hearings at a stage where it would be virtually impossible to make any amendments. Similarly, it is not rational to limit public participation to the ratification stage where it is almost impossible to influence the content of the treaty. That would inevitably "*taint the whole process*" with irrationality.

87. This position is reflected in a trio of judgments: *New Clicks*, *Earthlife* and *ICC Withdrawal.*

88. First, in his separate judgment in *New Clicks*, Sachs J held that the making of regulations was governed not by PAJA, but by the principle of legality.[111] However, he held that the nature of our democracy still required that there be public consultation prior to the adoption of regulations. As he explained:

> "*It would be strange indeed if the principles of participatory democracy and consultation operated when*

[110] *Doctors for Life* at para 171.
[111] *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* [2005] ZACC 14; 2006 (2) SA 311 (CC) at fn 17.

> *the chain of public power began with the enactment of the original legislation, then vanished at the crucial stage when the general principles of the original statute were being converted into operational standards and procedures, only to re-surface at the stage of the implementation of provisions impacting on specific individuals. The principle at stake at the intermediate regulation-making process would relate not so much to securing fair procedures, as to ensuring openness, responsiveness and accountability. The need to secure fairness would, however, increase in intensity to the degree that the interests of individuals came directly to be affected.*"[112]

89. It would be equally strange if the Constitution required public participation only for ratification, but not at the "*crucial stage*" prior to signature where public participation will have the most relevance. It would mean the public could only attempt to influence the process at the stage where they would be least likely to affect the content of the treaty. It is telling that, in *LAMOSA*, Madlanga J referred directly to Sachs J's statement regarding public participation in an executive law-making process to support its conclusions regarding legislative law-making.[113]

90. Second, in *Earthlife* the Western Cape High Court had to consider whether an agreement with Russia for the construction of nuclear power stations constituted an agreement in terms of s 231(3) of the Constitution. It held that it did not:

> "*The tabling of an IGA under sec 231(3) permits the executive to bind South Africa to an agreement without parliamentary approval or the public participation that often accompanies any such parliamentary approval process. Limiting those international agreements which may be tabled under sec 231(3) to a limited subset of run of the mill agreements (or as Professor Dugard puts it, agreements 'of a routine nature, flowing from daily activities of government departments') which would not generally engage or warrant the focussed attention or interest of Parliament would give optimal effect to the fundamental constitutional principles of the separation of powers, open and accountable government, and*

[112] Ibid at para 626 (Sachs J).
[113] *LAMOSA* at para 59, quoting *New Clicks* at para 630, where Sachs J wrote: "*The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say.*"

participatory democracy."[114]

91. The *Earthlife* Court was not asked to consider the argument raised here – that for all international agreements the Executive must engage in public consultation. But by interpreting s 231(3) in a restrictive fashion Bozalek J was directly seeking to promote public participation in the conclusion of international agreements. In doing so, he was advancing not only participatory democracy, but the founding values of openness, accountability and responsiveness.

92. *Earthlife* raised another relevant issue – whether the National Energy Regulator of South Africa (**NERSA**) was obliged to consult the public when taking a decision to determine new energy generation capacity. The Court held that the failure to consult any member of the public was irrational. "*NERSA*", it held, "*must have been aware that there were sectors of the public with either special expertise or a special interest regarding the issue*". In that context, NERSA had "*failed to explain, for one, how it acted in the public interest without taking any steps to ascertain the views of the public or any interested or affected party. For these reasons I consider that NERSA's decision fails to satisfy the test for rationality based on procedural grounds alone.*"[115] *Earthlife* makes clear that where the power must be exercised in the public interest, it is irrational not to take "*any steps to ascertain the views of the public or any interested or affected party*". As treaties must be negotiated and signed in the national interest, and bind the Republic as a whole, it will always be irrational not to ascertain the public's views.

93. Third, in the *ICC Withdrawal* case the High Court held that the Executive branch did not have the constitutional power to unilaterally withdraw from the Rome Statute creating

[114] *Earthlife* at para 114.
[115] Ibid at para 50.

the International Criminal Court.[116] One reason was that the failure to consult Parliament prior to filing the notice of withdrawal was procedurally irrational. It was irrational even though the notice would not take effect for one year, which would afford Parliament an opportunity to accept or reject the proposal. As the Court pointed out, "*Parliament should … not be dictated to by the national executive to rush through the repeal bill in order to meet the national executive-created deadlines*"[117] where there was no reason for urgency.[118]

94. Yet that is a potential consequence of signature. It is common practice for states to include a provision that a treaty will lapse if it is not ratified by a certain number of countries within a certain time. The Paris Agreement on climate change, for example, was open for ratification for only one year. That timetable was determined solely by signature. It "*dictates*" to Parliament to "*rush through*" ratification "*in order to meet national executive-created deadlines.*"

Section 7(2)

95. Public consultation is also required by section 7(2) of the Constitution which obliges all organs of state to "*respect, protect, promote and fulfil the rights in the Bill of Rights*". *Glenister II* held that s 7(2) required the state to take "*reasonable steps*" to promote and fulfil constitutional rights.[119] That included a duty to establish an independent corruption-fighting body. That obligation was drawn from two sources:

95.1. The impact of corruption on a wide range of constitutional rights and other

[116] *ICC Withdrawal* at paras 57-63. The Court did not consider a related argument that, by withdrawing without prior parliamentary approval, the Executive had unconstitutionally circumvented the requirement for public participation.
[117] Ibid at para 67.
[118] Ibid at para 70.
[119] *Glenister II* at para 194.

structural constitutional provisions;[120] and

95.2. The fact that South Africa "*is bound under international law to create an anti-corruption unit with appropriate independence*".[121]

96. A similar analysis applies in this case:

96.1. As noted above, public participation is deeply engrained in our constitutional fabric and is vital to protect a number of rights including the rights to expression, information, association, and political participation. It is specifically protected in a number of structural provisions of the Constitution. It is often a requirement for rational executive conduct. Moreover, the content of many treaties – including the Protocol – themselves affect the enjoyment of constitutional rights.

96.2. South Africa has an international law "*duty to facilitate public participation in the conduct of public affairs by ensuring that citizens have the necessary information and effective opportunity to exercise the right to political participation*".[122] The term "public affairs" includes executive conduct on the international plane.

97. Accordingly, s 7(2) of the Constitution imposes an obligation on the Executive to take reasonable steps to ensure public participation in the conclusion of treaties. Because public participation can only affect the content of a treaty if it occurs prior to signature, the Executive must, as a default rule, facilitate public involvement at that stage.

The Right to Development

98. The right to development also demands participation. It operates generally to support

[120] Ibid at paras 174-177.
[121] Ibid at para 194.
[122] *Doctors for Life* at para 92.

the default obligation of public participation. And it has a specific resonance in this context because the right is central to the SADC framework.

99. South Africa is bound to respect the right to development by multiple treaties including the UN Declaration on the Right to Development,[123] art 22 the African Charter on Human and People's Rights,[124] and various provisions of the SADC Treaty.[125] Indeed, South Africa's first periodic report to the African Commission confirmed that in the Government's view: "*Although the Constitution did not provide for the right to development, it was implied as the Constitution provides for social, economic and cultural rights, including political rights.*"[126] In *Fuel Retailers*, this Court held that "*[e]conomic and social development is essential to the well-being of human beings*", and cited art 1 of the UN Declaration which provides: "*[t]he right to development is an inalienable human right*".[127]

100. The right has both a substantive and a procedural or participatory element.[128] Substantively, it calls for "*economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized*".[129] But it is the participatory element that is vital here. The UN Declaration defines the right to development as "*an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, [and] contribute to*" their own development.[130] Article 2(1) stresses that: "*The human person is the central subject*

[123] A/RES/41/128 (4 December 1986), available at http://www.un.org/documents/ga/res/41/a41r128.htm.

[124] Article 22 reads: "*(1) All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. (2) States shall have the duty, individually or collectively, to ensure the exercise of the right to development.*"

[125] We set these out below.

[126] South Africa's First Periodic Report to the African Commission 38th Ordinary Session (2005) at para 325, quoted in S Kamga *The Right to Development in the African Human Rights System* (2018) at para 4.4.6.

[127] *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* [2007] ZACC 13; 2007 (6) SA 4 (CC) at para 44 and fn 38.

[128] See generally, M Tadeg 'Reflections on the Right to Development: Challenges and Prospects' (2010) *African Human Rights Law Journal* 325.

[129] UN Declaration art 1(1).

[130] Ibid.

of development and should be the active participant and beneficiary of the right to development." In terms of art 2(3), states are obliged to "*formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.*" Lastly, and most relevantly, art 8(2) of the Declaration provides: "*States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights.*"

101. Participation as an element of the right to development also appears in the jurisprudence of the African Commission on Human and Peoples' Rights. In the *Endorois* decision, it held that the right to development comprises two parts: constitutive/substantive and instrumental/procedural.[131] A violation of either the procedural (process or means) or substantive (outcome or ends) element constitutes a violation of the right to development. The case concerned the removal of the Endorois community from the land because of the creation of a game reserve. The Commission held that Kenya's failure to involve the community in the development process was a violation of the right to development. With clear relevance to the present debate, the Commission held that the consultation was not *"in a form appropriate to the circumstances*" because "*community members were informed of the impending project as a fait accompli, and not given an opportunity to shape the policies or their role in the game reserve.*"[132]

102. The SADC Treaty itself envisages public participation. The stated objectives of SADC are to promote sustainable and equitable economic growth and socio-economic

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[131] *Centre for Minority Rights Development (Kenya) and another on behalf of the Endorois Welfare Council v Kenya* 276/03, decided at the 46th Ordinary Session (2009), available at http://www.achpr.org/files/sessions/46th/comunications/276.03/achpr46_276_03_eng.pdf

[132] Ibid at para 281.

development. In essence, this is aimed at the fulfilment of the right to development, as provided for in international and regional instruments. And as we have noted, participation is at the core of the right to development. But the SADC Treaty is even more explicit:

102.1. The preamble records that the state parties were "*Mindful of the need to involve the people of the Region centrally in the process of development and integration, particularly through the guarantee of democratic rights, observance of human rights and the rule of law*";

102.2. One of the Treaty's objects is to "*encourage the people of the Region and their institutions to take initiatives to develop economic, social and cultural ties across the Region, and to participate fully in the implementation of the programmes and projects of SADC*".[133]

102.3. It stipulates that in pursuance of its objectives, SADC "*shall seek to involve fully the people of the region and key stakeholders in the process of regional integration.*"[134]

103. Being an AU recognised regional body, the SADC's developmental objectives are also aimed at fulfilling article 22 of the African Charter on Human and Peoples' Rights, which was the first binding international human rights instrument to provide for the right to development. In terms of the African Charter the state is no longer the mere intermediary between people and the international community, 'peoples' are the holder of the right to development.

104. The right to development generally supports the proposition that participation in affairs that affect us as people and citizens is an inalienable human right. But it has a more specific bite in this case. The President's signature to the Protocol sought to amend the

[133] SADC Treaty art 5(2)(b).
[134] SADC Treaty art 23(1).

Treaty – a treaty that is deeply committed to participation – without any participation. That is contrary not only to the Executive's default obligation of public consultation, but to the terms of the Treaty itself.

Conclusion

105. For all these reasons, public consultation is vital in order for the Executive to rationally exercise its power to negotiate and conclude international treaties. The Respondents have not suggested any advantage that is gained from refusing, as a matter of principle, to engage in public consultations. They argue only that it may be difficult in certain circumstances. But that argument goes to the content of the obligation and the degree of flexibility with which courts should evaluate the Executive's conduct. It does not affect the existence of an obligation to consult the public where there is no need for secrecy or urgency.

CONTENT

106. In this section we summarise the content of the obligation to consult the public prior to the signature of an international treaty. CALS submits that the general standard of reasonableness adopted in *Doctors for Life* should also apply in this context. In *Electronic Media Network* the Constitutional Court stressed that the bedrock requirement for constitutional consultation is uniform. As the Chief Justice explained:

> *"We have but only one standard for consultation in our jurisprudence. And that is the standard that insists on a genuine and meaningful consultative process that passes constitutional muster, regardless of which legislation or legal framework regulates that process."*[135]

[135] *Electronic Media Network Limited and Others v e.tv (Pty) Limited and Others* [2017] ZACC 17; 2017 (9) BCLR 1108 (CC) at para 66.

107. This is the same basic standard employed in *Doctors for Life* – a meaningful opportunity to be heard. Reasonableness is also the same standard that flows from s 7(2) of the Constitution. While it may seem to heighten the obligation imposed by the requirement of rationality, it does not. Procedural rationality determines when the duty to consult is triggered. Once that duty is triggered, there can be no doubt that the consultation must be meaningful. It would not be rational to consult in a way that denied the participants a reasonable opportunity to be heard. That is precisely what *Electronic Media Network* holds.

108. Accordingly, the obligation to ensure public consultation can be summarised as follows:

108.1. As a default rule, the executive is obliged to consult the public prior to signature and at a stage where it is still able to take account of public submissions in determining its negotiation position.

108.2. The nature and extent of consultation is primarily a matter for the executive to determine. It can take a wide variety of forms including basic invitations for written comment, the establishment of standing bodies for public consultation, or public hearings.

108.3. What is required will depend on the nature of the treaty, and the nature of the interests it will affect. The wider and more intense the impact, the more extensive the public consultation must be. If a treaty will affect a discrete group, the executive should invite that group to make representations.

108.4. The executive need not consult the public where there are justifiable reasons not to, including the need for secrecy in negotiations or the real (and not self-created) urgency of concluding the treaty.

108.5. A lack of resources is not a justifiable reason not to consult the public at all,

although it may be relevant to the nature and extent of consultation.

108.6. The executive could and should develop a policy for how and when pre-signature consultations should occur.[136] It is primarily the role of the executive – not the judiciary – to decide on what form of consultation will be most appropriate.

109. This obligation is consistent with the participatory nature of our democracy, and flows directly from the obligations to act rationally and to take reasonable steps to promote and fulfil the rights in the Bill of Rights. It is also consistent with a growing trend in comparative jurisdictions which increasingly require the executive to engage in public consultation during the negotiation phase of a treaty. [137]

GOVERNMENT'S OPPOSITION

110. The Government argues that there is "*no requirement for public participation*" prior to signature. There seem to be two primary reasons for this position: textual and practical.

Textual

111. The Government seems to argue that because there is no express textual obligation for public consultation in the Constitution, it is not required to consult.[138] This is no answer at all. The question is whether the Constitution, read purposively and contextually, requires the obligation for which CALS contends, not whether there is a section that

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[136] The Government admits that no such policy exists. CALS AA at para 43; Vol 12 p1175.

[137] We make a final note on the nature of this obligation. The focus in this case has been the failure to consult the public. However, there is a strong argument that any reasonable consultation would also have to involve consultation with the other branches of government, including the Legislature. There is a strong movement in the jurisdictions identified earlier for consultation between the Legislature and the Executive prior to signature. This ensures that the Legislature can influence the negotiations (without obstructing them) and makes it less likely the Legislature will refuse to ratify a treaty. As the issue has not been argued here, and Parliament has not been joined, we do not pursue this submission any further than to note that consultation may also extend to consultation with other government organs.

[138] CALS AA at para 19: Vol 12 p 1166.

reads: "The National Executive must consult the public prior to signing an international agreement".

112. Constitutional obligations do not only flow from the clear text of the Constitution. The Constitution must be interpreted purposively, and to give effect to its founding values. This Court has regularly found constitutional rights and obligations without an explicit textual source:

112.1. There is no constitutional provision requiring an independent corruption-fighting body. Yet in *Glenister II* this Court held that obligation flows from s 7(2), and various structural provisions of the Constitution, read with our international obligations.[139]

112.2. There is no express statement of the principle of the separation of powers in the Constitution. Yet this Court has deduced an especially South African principle of separation of powers from the structural provisions of the Constitution.[140]

112.3. There is no constitutional provision demanding procedural rationality for executive action. Yet this Court held in *Albutt*[141] and *Simelane* that such a rule must exist to give effect to the rule of law, the principle of legality (which is also not mentioned in the Constitution) and the value of accountability.

112.4. There is no constitutional provision expressly dictating the manner in which impeachment processes must be conducted. Yet this Court in *Economic Freedom Fighters II* held that the Constitution imposed specific obligations in that regard on

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[139] *Glenister II*.
[140] See, for example, *South African Association of Personal Injury Lawyers v Heath and Others* [2000] ZACC 22; 2001 (1) SA 883 (CC).
[141] *Albutt v Centre for the Study of Violence and Reconciliation and Others* [2010] ZACC 4; 2010 (3) SA 293 (CC).

the National Assembly.[142]

113. The point is not that constitutional obligations need not have support in the text of the Constitution. They must. But they need not be stated in express and precise terms. They can arise from the values, structure and rights contained in the Constitution, read with our international obligations. If the recognition of a rule, right or obligation is the only way to give effect to the purpose and design of the Constitution, then it can be (and has been) interpreted to contain such a rule, right or obligation. The default obligation CALS argues for is no different from other similar obligations this Court has identified in the Constitution without a direct and precise textual command.

Practical

114. The Government's more serious objection is one of practicality. It argues that negotiations are "*a dynamic process … with compromises being made by participating delegations.*"[143] Because it is not possible to "*foresee*" the outcomes of this process, "*it will often be a relatively ineffective process to consult with the public … before negotiations start*".[144] In addition, as negotiations may occur at several meetings, it would be "*impractical to have public consultations at each stage.*"[145] Lastly the Government raises the concern of confidentiality in the negotiation process.[146] It therefore argues that public consultation will only be "*advantageous*"[147] and "*appropriate*"[148] after adoption and signature once there is a finally negotiated document.

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[142] *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* [2017] ZACC 47; 2018 (3) BCLR 259 (CC); 2018 (2) SA 571 (CC).
[143] CALS AA at para 20: Vol 12 p 1165.
[144] Ibid at para 21: Vol 12 p 1166.
[145] Ibid at para 22: Vol 12 p 1167.
[146] Ibid at para 26: Vol 12 p 1167-8.
[147] Ibid at para 25: Vol 12 p 1167.
[148] Ibid at para 27: Vol 12 p 1168.

115. This argument must fail for five reasons.

116. First, CALS proposes a default rule, not an absolute rule. It accepts that, just as there are occasions where Parliament need not facilitate public involvement, there are instances where the Executive need not engage in any public consultation. Where confidentiality about the terms of the negotiations (or even the existence of the negotiations) are important in order to achieve the object of a treaty, public consultation is not necessary. Urgency or other practical concerns may also justify departure from the default rule. But those cases must be the exception not the rule. It was certainly not the case with the SADC Protocol at issue in this matter.

117. Second, the nature and extent of the consultation will vary depending on the nature of the negotiation process. In some situations it may be necessary only to make a request for written reasons. In others, a single round of public hearings will suffice. In very important matters with a drawn-out negotiation process, multiple stages of consultation may be necessary. What is appropriate is primarily a matter for the executive to determine. The governing standard is reasonableness. It is difficult to understand how it can be impractical to require the Executive to do what is reasonable.

118. Third, comparative practice demonstrates that public consultation prior to signature is not only possible, but also desirable. New Zealand, Kenya, Canada and Australia are able to ensure public consultation prior to signature without undermining their ability to negotiate effectively. Indeed, they rightly see consultation as enhancing their ability to negotiate in the interests of their countries because it provides the government with vital information it may not have, and it makes it more likely the outcome of the negotiation process will receive public support, and ultimately legislative support.

119. Fourth, South Africa's own practice demonstrates that public consultation is possible. While it is certainly not the norm, even the Government concedes that there are instances where it has engaged in public consultation prior to signature.[149] These include:

119.1. SADC-sponsored consultations with NGOs prior to the adoption of the SADC Protocol against Corruption in 2001.[150]

119.2. The Department of Environmental Affairs admits that it will "*conduct consultations at the request of the relevant treaty bodies or due to obligations arising from the relevant international agreement, and in order to obtain support from local stakeholders.*"[151]

119.3. The Department of Science and Technology consulted prior to signing the SADC Protocol on Science, Technology and Innovation.[152]

119.4. It is not denied that the Department of Health shared a draft of the Protocol on Health with stakeholders before signature as part of a SADC-initiated process.[153]

119.5. There was SADC-initiated public consultation prior to the negotiation of the Protocol on Fisheries.[154]

119.6. The Protocol on Gender and Development of 2008 was "*developed through consultation with civil society organisations in all member states, followed by regional consultations.*"[155]

119.7. The Department of Environmental Affairs undertook long-running public consultations in the lead up to the Paris Conference to draft a treaty to address climate change. As the Government expressly acknowledges, this consultation was

[149] CALS AA at para 43: Vol 12 p 1175.
[150] CALS AA at para 52.4: Vol 12 p 1180-81.
[151] CALS AA at para 52.5: Vol 12 p 1181.
[152] CALS AA at para 52.8: Vol 12 p 1182.
[153] CALS AA at para 53.2: Vol 12 p 1183.
[154] CALS AA at paras 53.6: Vol 12 p 1184.
[155] CALS FA at para 37.3.3: Vol 12 p 1144. This is not denied by the Respondents.

vital "*in ensuring that climate changes (sic) commitments are met*",[156] and was "*underpinned by the importance of participation of all citizens in environmental issues*".[157]

120. The Government seeks to distinguish many of these consultations on the basis that they were required or initiated by SADC. But that distinction does not assist their case. The primary argument against consultation is that it is not practical. The reason why consultation was undertaken does not affect its practicality. If consultation can be practical when required by SADC, it can be practical when required by the Constitution.

121. Fifth, CALS does not suggest that the negotiation process must stop each time a decision must be made so that the government delegation can return to South Africa and hold a public hearing. That would plainly be unworkable. It must consult reasonably, depending on the nature of the treaty, and the process being followed for its negotiation.

Conclusion

122. It is noteworthy that the Government advances no principled objection to pre-signature consultation. It does not argue that it would infringe the separation of powers, or improperly limit executive discretion. Nor could it. Consultation can only benefit the Executive by providing additional knowledge and insight to be employed during negotiations. The Executive is free to disagree with public submissions. It is not free to close its ears to those submissions. The Constitution demands that it listen.

123. To repeat, CALS acknowledges that the form of the consultation will be affected by the peculiar nature of a negotiation process. But the evidence clearly establishes that, as a general rule, it is possible and advantageous to have reasonable consultation prior to

[156] CALS AA at para 72: Vol 12 p 1190.
[157] CALS AA at para 74: Vol 12 p 1190-91.

signature, and that it is only possible to have meaningful consultation prior to signature.

THE OBLIGATION WAS NOT FULFILLED

124. In sum, there is a default duty on the executive to ensure reasonable public consultation prior to signing any international treaty. It is common cause that there was no public consultation prior to the signature of the Protocol.

125. The Government has not pointed to any specific reasons why public consultation was not possible. The negotiations were not secret. The negotiations were not urgent. There was clearly sufficient time to conduct some form of public consultation.[158] Given the impact of the Protocol on vested, constitutional rights, significant consultation with the public at large, and those specifically affected (including the LSSA and the Tembani Applicants) was required for the consultation process to be reasonable.

126. But nothing occurred. This is not a situation where deference should be shown to the Executive's determination of what was required. *Something* was required, and *nothing* was done. That is unreasonable.

V REMEDY

127. Given the failure to comply with the default obligation, the signature to the Protocol must be declared invalid and unlawful. This flows automatically from s 172(1)(a) of the Constitution. It is also the automatic remedy adopted in *Doctors for Life* for failures to facilitate public involvement in the Legislature.[159]

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[158] CALS FA at para 29.2: Vol 12 pp 1139-1140.
[159] *Doctors for Life* at para 211.

128. However, a further consideration arises. If the signature is declared invalid as a matter of domestic South African law, what is the consequence as a matter of international law? In the *ICC Withdrawal* case the Court could order the Executive to retract the instrument of withdrawal. Is it possible to "unsign" a treaty?

129. Yes. While '*unsigning' "is not a legal term*",[160] it has been used to describe a state's decision to indicate that it no longer intends to be bound by the terms of the treaty, and wishes to release itself from the interim obligation. For example, the United States signed the Rome Statute establishing the ICC in 2000 under the Clinton administration. However, in 2002, the Bush administration "*authorized the 'unsigning' of the treaty*".[161] In effect, the US demonstrated to the other signatories "*that it no longer desired to become a party to the treaty*". That possibility is expressly recognised in article 18 of the Vienna Convention. Similar relief was granted by the High Court in *ICC Withdrawal*. The Court ordered the Executive to "*forthwith revoke the notice of withdrawal*".[162]

130. Accordingly, CALS agrees with the Tembani Applicants that it would be appropriate to order the President to communicate to SADC that its signature was improperly made and that South Africa no longer considers itself a signatory to the Protocol. In addition to the order granted by the High Court, this Court should add the following prayer: "*The First to Third Respondents are directed to forthwith revoke the Republic of South Africa's signature to the Protocol*". The consequences of that act on the international plane – including whether it would affect the validity of the adoption of the Protocol – fall beyond this court's remit.

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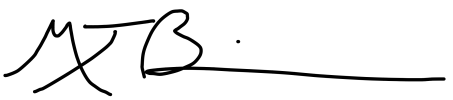
[160] Jonas & Saunders at fn 13. See also E Swaine 'Unsigning' (2003) 55 *Stanford Law Review* 2061.
[161] Ibid at 568.
[162] *ICC Withdrawal* at paras 80-81 and order para 3.



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