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The Determination of the "Origin" of Products in South African and SADC Law

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Abstract. This article analyses the landmark case of *Commissioner: SARS v. Levi Strauss SA (Pty) Ltd* (hereinafter *Levi*), in which the Supreme Court of Appeal in South Africa decided on the issue of the "origin" of goods in international trade. In South Africa, this issue is regulated by the Customs and Excise Act 91 of 1964 (CEA). The origin of a product is easy to establish when a product is wholly produced in one country. But when the production of a good occurs across different countries, then the rule usually is that the origin of goods is determined based on the "last substantial transformation" of the product. However, in the *Levi* ruling, the court made this decision without any consideration of South Africa's international obligations under the Agreement on Rules of Origin and misinterpreted the origin test set out in the Protocol on Trade in the South African Development Community. Moreover, the court also failed to adequately contextualise its reasoning in relation to the default position on the determination of origin in South African law under the CEA. This paper critiques the court's approach in this regard and assesses its broader implications for origin determinations.

Keywords: origin; wholly obtained; last substantial transformation; Agreement on Rules of Origin; South Africa; Protocol on Trade in the South African Development Community; GATT 1994.

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Introduction

The matter of *Commissioner: SARS v. Levi Strauss SA (Pty) Ltd* (hereinafter *Levi*)[1] centred on the contentious issue of the "origin" of goods in international trade. In South African law, the "origin" of a product is regulated by the General Agreement on Tariffs and Trade 1994 (GATT), the Agreement on the Rules of Origin (ARO) and the Customs and Excise Act 91 of 1964 (CEA).[2] Article 1.1 of the ARO defines "Rules of Origin" (hereinafter the Origin Rules) as those statutes and administrative decisions of general application that are applied by any member to establish the country of origin of goods, provided such rules of origin are not related to contractual or autonomous trade regimes that lead to the granting of tariff preferences going beyond the application of Article 1.1 of the GATT. The origin of a product is easy to establish when a product is wholly produced or manufactured in one country. However, the determination of the origin of a product becomes complex when the manufacture of the product in question occurs in several countries, thereby potentially becoming a locus of contestation in international trade.[3] The general rule in this regard is that the origin of goods is accorded based on the "rules of origin," specifically, the criteria of "last substantial transformation" of a product. These rules of origin cover both non-preferential commercial policy instruments, (such as in the application of trade remedies in the form of anti-dumping, countervailing and safeguard duties and any

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1 *Commissioner: SARS v. Levi Strauss SA (Pty) Ltd* 2021 (4) SA 76 (SCA) (April 7, 2021).

2 *See* also, World Trade Organization. (2015, December 19). *Preferential rules of origin for least developed countries*. https://www.wto.org/english/thewto_e/minist_e/mc10_e/l917_e.htm

3 Lacey, S. (2012). Multilateral disciplines on rules of origin: How far are we from squaring the circle? *Global Trade and Customs Journal*, *7*(11/12), 473, 474.

discriminatory quotas) and preferential rules of origin in trade agreements.[4] The *Levi* case brings this issue of the origin of a product to the fore. Consequently, this paper analyses the *Levi* decision and SADC law as well as its implications in respect to the rules of origin in South African law, by examining relevant case law, legislation and international law.

1. Facts

The respondent, Levi Strauss South Africa (Pty) Ltd (Levi SA), had a dispute with the appellant, the Commissioner for the South African Revenue Services (SARS), over the import duties and value-added tax (VAT) payable to it in respect of clothing imports. SARS had made a determination on March 25, 2014 in which it established that the place of origin certificates issued in respect of imports from countries that were members of the South African Development Community (SADC) and that were used to import goods originating from such countries were invalid and thus did not entitle Levi SA to import these goods at a favourable rate of zero per cent duty under the Protocol on Trade in the Southern African Development Community (SADC) Region (hereinafter the Protocol). Levi SA then initiated an application by way of an appeal under section 49(7)(b) of the Customs and Excise Act 91 of 1964 (CEA) contesting the origin determination. The High Court set aside the origin determinations of SARS and replaced them with the terms proposed by Levi SA. The court then granted leave to appeal to the Supreme Court of Appeal (SCA).

Levi SA, a wholly owned subsidiary of Levi Strauss & Co. (LS & Co.) and one of the world's largest brand-name apparel marketers, is responsible for managing its trading operations in Southern Africa. Apart from its manufacturing activities, it also functions as a wholesale distributor of clothing on behalf of LS & Co. During the period from 2010 to 2014, the time period with which this appeal is concerned, Levi SA manufactured about forty per cent of the clothing that it sold. It imported the rest, the majority of which came from Mauritius and Madagascar, both members of the SADC. Until about 2011, this apparel was purchased directly from the producers in the SADC.[5] The arrangements with these producers to manufacture or assemble this clothing, in line with the prescribed requirements of LS & Co., were made by Levi

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[4] World Trade Organization. (n.d.). *Technical information on rules of origin*. https://www.wto.org/english/tratop_e/roi_e/roi_info_e.htm; Sibanda, O. (2015). WTO Appellate Body ruling in United States – Certain country of origin labelling requirements: Trading away consumer rights and protections or striking a balance between competition-based approach in trade and consumer interests? *De Jure*, *48*(1), 136–148; Erasmus, G. (2003). The incorporation of trade agreements and rules of origin: The extent of constitutional guidance. *South African Yearbook of International Law*, *28*, 157, 160; Saluste, M. (2017). Rules of origin and the anti-dumping agreement. *Global Trade and Customs Journal*, *12*(2), 54, 58; Silveira, M. (1997). Rules of origin in international trade treaties: Toward the FTAA. *Arizona Journal International and Comparative Law*, *14*(2), 411, 437.

[5] *Levi*, p. 5, para. 4.

Strauss Asia Pacific Division Pte Ltd (Levi APD), a company incorporated in Singapore. In 2011, this arrangement was changed, and the new goal was that rather than buying directly from the SADC producers, Levi SA would purchase their clothing from Levi Strauss Global Trading Company Limited (Levi GTC) incorporated in Hong Kong. In turn, Levi GTC would buy the clothing from the same contracted suppliers in SADC countries as before and sell them to Levi SA at a profit. The suppliers dispatched the garments directly to Levi SA, which was also referred to as the "Levi GTC regime." It was this transition to the Levi GTC regime that triggered the origin issue. This was the major issue in dispute, which is the sole focus of this discussion.

2. The Court's Findings and Ratio on the "Origin" Issue

According to the court, Article 2 of the Protocol states that "originating goods" qualify for favourable treatment in accordance with the provisions of Annex I to the Protocol. Rule 2.1 in Annex I to the Protocol is the applicable rule for the purpose of identifying originating goods. It provides that "goods shall be accepted as originating in a Member State if they are consigned directly from a Member State to a consignee in another Member State."

Rule 2.1 also requires that the goods must have been wholly produced or sufficiently worked (or processed) in a member state, but compliance with these local-production rules was not in dispute. Levi SA asserted that the goods were produced in SADC countries and were sent or consigned directly to their destination in South Africa, also a SADC country, and thus qualified as originating goods.[6] SARS accepted that this aligned with the language stated in Rule 2.1;[7] however, it argued that there was a further requirement that the commercial relationship underlying the consignment had to be between parties in two SADC countries.[8] Levi SA disagreed with SARS' construal of the provision.[9]

In response, the court explained that according to the wording of Rule 2.1, goods shall be accepted as originating in a member state if they are consigned directly from that state to another member state. This is what occurred with the goods in this case in that they were produced or sufficiently "worked on" in Mauritius and Madagascar and were sent either by air or sea directly from there to South Africa. Both the air waybills and the bills of lading identified Levi SA as the consignee and the producer in either Mauritius or Madagascar as the consignor.[10] Each shipment

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6 *Levi*, p. 9, para. 11.

7 *Id*.

8 *Id*.

9 *Id*.

10 *Id.*, p. 10, para. 12.

constituted a consignment as defined in Rule 1 of the Annex as having been sent "from one exporter to one consignee."[11] In this context, the producer of the clothing was correctly identified as the exporter.

The court further emphasised that this interpretation complied with the structure of the CEA, which is primarily concerned with the movement of goods in and out of South Africa rather than the commercial transactions underlying such movements. Thus, there may be no commercial transaction, yet the movement of the goods may attract duty.[12] A "customs duty" is a tax paid on goods imported into South Africa irrespective of the commercial basis.[13] An importer, such as Levi SA, is simply an entity that brings goods into the Republic.[14] The goods were deemed to be imported under the circumstances set out in section 10 of the CEA, but nothing in that section requires consideration to be given to anything other than the physical movement of the goods.[15] The commercial relationship behind that movement is irrelevant.

Similarly, the Protocol regulates the physical origin of the goods in a member state of the SADC, not their commercial origins.[16] This approach also corresponds with the World Customs Organisation, of which South Africa and the majority of SADC countries are members, which defines "exportation" and "importation" as the "bringing in" or "taking out" from the customs territory, respectively.[17] The focus is on the physical situation and transport of goods and not the commercial dealings giving rise to them.[18]

In its determination, SARS argued that Levi GTC was the exporter because it placed the orders with the producers, paid for the goods, bore the risks associated with them, and sold them to Levi SA. SARS relied primarily on the definition of "exporter" in section 1 of the CEA, which in relation to imported goods, includes the manufacturer, supplier or shipper of such goods or any person inside or outside South Africa representing or acting on behalf of such manufacturer, supplier or shipper. However, SARS did not specify the portion of the definition on which it was based. According to the court, the term exporter in the context of imported goods includes any person who would ordinarily be regarded as the exporter, as well as the manufacturer, supplier or shipper of the goods. This interpretation, the court noted, is consistent with standard legal practice.

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[11] *Levi*, p. 10, para. 12.

[12] *Id.*, p. 10, para. 13.

[13] *Id*.

[14] *Id*.

[15] *Id*.

[16] *Id*.

[17] *Id.*, p. 11, para. 14.

[18] *Id*.

The court further explained that the CEA statute is deliberately drafted in broad terms to ensure that duties are paid and collected effectively. Whether or not Levi GTC falls within the general understanding of an exporter, as the party facilitating the exportation of the goods to South Africa, is irrelevant. The producers in Mauritius and Madagascar were the manufacturers, suppliers and shippers of the goods in question. By definition, they were the exporters of those Levi goods. Therefore, SARS's determination that they were not regarded as exporters to South Africa was incorrect.

The court also noted that exporters are permitted to provide certificates of origin under Rule 9 of the Origin Criteria. This eliminates the need for them to provide a separate certificate as producers of the goods under the terms of Appendix III of Annex I to the Protocol. SARS also relied on certain provisions of Rule 49B.10(9) of the Rules promulgated under the Act in making its determination, but the court found this reliance to be misconceived and misapplied. When it comes to exporters the rule concerns South African persons and entities that export goods to other SADC member states, and was thus irrelevant to the matter at hand.

SARS essentially focused on the twelve per cent mark-up paid by Levi SA to Levi GTC.[19] It contended that the "economic benefits" flowing from the purchase of imported apparel from Levi GTC did not accrue to the countries from which the goods were shipped to South Africa.[20] According to the court, this was incorrect, as became apparent from comparing the purchasing of goods under the Levi APD regime with purchasing the same goods under the Levi GTC regime.[21] In each case, the goods were procured from the same producers in the same countries and shipped to Levi SA in South Africa.[22]

Under the former arrangement, Levi SA paid twelve per cent of the producer's price to Levi APD, and in the latter, it paid Levi GTC a mark-up of twelve per cent on that price.[23] The overall cost was the same and the cash flows were identical, save that the additional twelve per cent accrued to a different Levi Strauss Group company outside the SADC. Commercially, the situations were indistinguishable.[24] The economic benefits to the producing countries were unchanged, as were the economic benefits to Levi SA and South African consumers.[25] Yet SARS correctly conceded that in the case of the Levi APD regime, the Origin Rules were satisfied,

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19 *Levi*, p. 14, para. 20.

20 *Id*.

21 *Id*.

22 *Id*.

23 *Id*.

24 *Id*.

25 *Id*.

while contending that under the Levi GTC regime, they were not.[26] There was nothing in the evidence to show that any portion of the economic benefit which the SADC manufacturers could commercially have expected to receive for their input was diverted.[27] The twelve per cent buying commission in the Levi APD regime and the twelve per cent mark-up in the Levi GTC regime were compensation for services unrelated to anything done by the SADC manufacturers.[28]

The court then explained that if Levi GTC bought the clothes from the producer, another Levi Strauss Group subsidiary in, say, Mauritius, it did so at the same price and thereafter sold the clothes to Levi SA.[29] SARS accepted that this would satisfy the Origin Rules stipulated in the Protocol but could not identify the economic advantage accruing to Mauritius in that situation.[30] Twelve per cent of the earnings accruing to the Mauritian entity would, after deducting any local expenses, still be remitted to Levi GTC to cover the latter's costs.[31]

Thus, the SARS argument misconceived both the concept of trade in this context and the effect of the relevant commercial relationships. For all those reasons, there was no merit in the origin argument advanced on behalf of SARS.[32] The words "consigned directly from a Member State to a consignee in another Member State" refer to the physical transport of the goods from one member state to another and not to the underlying commercial transactions giving rise to that transport.[33] The SARS determination that the certificates of origin presented by Levi SA in support of its entry of goods from Mauritius and Madagascar were invalid was incorrect, and this determination was rightly set aside by the High Court.[34]

In the alternative, SARS also argued that despite the change from the Levi APD regime to the Levi GTC regime, some producers had continued to send invoices to Levi SA as well as to Levi GTC and, in some instances, these had been used when entering the goods, instead of the invoices rendered by Levi GTC. SARS contended that this data showed that the SADC certificates of origin were fraudulently issued, and that the goods did not qualify for SADC preferential rates. The court held that this argument was unavailable to SARS based on the documents that were presented. An appeal under section 49(7)(b) of the CEA constitutes an appeal against the

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26 *Levi*, p. 14, para. 20.

27 *Id*.

28 *Id*.

29 *Id*., p. 15, para. 21.

30 *Id*.

31 *Id*.

32 *Id*., p. 16, para. 23.

33 *Id*.

34 *Id*.

determination. While the court accepted that SARS could defend its determination on any legitimate ground, it held that it could not use this appeal as an opportunity to make a wholly different determination, albeit one with a similar effect.

The determination in issue in this appeal was that the SADC certificates of origin used for the importation of goods were invalid because GTC was not an exporter to South Africa from a country within the SADC but rather an exporter from outside the SADC region. The court clarified that the purpose of the preferential rules of origin is to achieve genuine trade between businesses in the member states, where the economic benefits of that trade accrue to the relevant member states. The inclusion of non-member state entities between the manufacturer and the importer was viewed as a tactic aimed at defeating the very objective of the Protocol by diverting the economic benefits of the transaction from the member states to a non-member state, to the detriment of the member states. In such cases, the exporting state derives significantly fewer economic benefits from the transactions, while higher profits are diverted, and the importing state suffers a loss on import duties. In any event, these certificates had never been queried by SARS, who had accepted the payment of duties and taxes in accordance with those vouchers. There was nothing to indicate that an inadvertently incorrect reference to the invoice number invalidated the certificate or that a reference to the invoice issued to Levi GTC would have resulted in a certificate being withheld. Furthermore, the certificates categorically proved that the goods originated and were consigned from the state issuing the certificate after being produced or undergoing sufficient working or processing there and were subsequently consigned to the state seeking verification. Finally, it was not apparent that all the cases in question involved imports from SADC countries. As a result, SARS's case was implausible and reinforced the point that its determination had nothing to do with this issue, and thus, this argument was rejected.

3. Evaluation of the Reasoning in *Levi* on the "Origin" Issue

3.1. The International Law Question

It is apposite to commence this analysis of the *Levi* approach to South Africa's international trade law obligations on the "origin" issue by first explaining the relationship between international law and municipal law as espoused by the Constitution of the Republic of South Africa, 1996 (Constitution). This approach is cogent in that the SCA did not address the WTO legal framework, which should legally have been the normative and contextual genesis of the solution to the legal problem posed by the case before the court.[35] The contextual approach requires that the purpose of a statutory provision be construed in light of its context.

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[35] *Airports Company South Africa v. Big Five Duty Free (Pty) Limited and Others* [2018] ZACC 33; *Natal Joint Municipal Pension Fund v. Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA), pp. 14–17, paras. 18–20.

Furthermore, section 39(1)(b) of the Constitution states that the courts must consider international law when interpreting any right in the Bill of Rights. Building on this, section 231 states that a treaty binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces (collectively referred to as Parliament) unless it is an agreement of a "technical, administrative or executive nature" or an agreement.[36] Agreements of a "technical, administrative or executive nature" are entered into by the national executive and do not require either ratification or accession, but they bind the Republic without approval by Parliament. However, they must be tabled in Parliament within a reasonable time. Esteemed law professor and expert J. Dugard has clarified, and the Constitutional Court has endorsed with approval, that treaties of a "technical, administrative or executive nature" are treaties of a "routine nature" emanating from the "daily activities" of government entities.[37] Research economist N. Botha, opines that these terms are "interchangeable," and that they both refer to treaties that have no political and financial significance, nor do they affect municipal law.[38] The power to decide whether a treaty falls under this category is vested in the relevant minister within whose scope of mandate the treaty falls.[39]

Section 231(4) also states that a treaty becomes law in the Republic when it is enacted into law by national legislation. However, a "self-executing" provision of an agreement that has been approved by Parliament is considered law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.[40] Furthermore, section 233 explains that when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

Against this backdrop, the status of South Africa's WTO obligations in South African law has been the subject of litigation and academic debate. First, in the case of *Progress Office Machines v. SARS*, the Supreme Court of Appeal (SCA) clarified that the WTO Agreement, which comprises the ARO, among other things, was approved by

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[36] On treaties of an "administrative" nature, *see*, *S v. Basson* (2000) 3 All SA 393 (T), though the case takes this as a self-explanatory term and thus, does not shed more light in this regard.

[37] Dugard, J. (1997). International law and the South African Constitution. *European Journal of International Law*, *1*, 77, 82; *Earthlife Africa Johannesburg and Another v. Minister of Energy and Others* 2017 (5) SA 227 (WCC) (April 26, 2017) (*Earthlife*), p. 44, para. 113.

[38] Botha, N. (2000). Treaty making in South Africa: A reassessment. *South African Yearbook of International Law*, *25*, 69, 76.

[39] *Id.*, p. 77. This approach was endorsed by the court in *Earthlife*, p. 44, para. 113.

[40] For a discussion on "self-executing" treaties, *see*, *Quagliani v. President of the Republic of South Africa and Others, Van Rooyen v. President of the Republic of South Africa* (959/2004, 28214/06) (2008) ZAGPHC 98 (March 6, 2008); *Goodwin v. Director-General Department of Justice and Constitutional Development* (21142/08) (2008) ZAGPHC 220 (June 23, 2008); Dugard, 1997, p. 81, states that a self-executing treaty is one which "automatically becomes part of municipal law, without any act of legislative incorporation."

Parliament on 6 April 1995 and is therefore binding on the Republic in international law. However, it has not been enacted into municipal law[41] nor has the ARO been made part of the municipal law of South Africa. As a result, no rights can be derived from the ARO. Thus, the text to be interpreted remains the relevant South African legislation, and its construction must conform to section 233 of the Constitution.[42] This dictum was also endorsed in the *Association of Meat Importers and Exporters v. International Trade Administration Commission* 2014 (*AMIE*) case.[43]

However, the SCA then explained that the passing of the International Trade Administration Act 71 of 2002 (ITAA) and its regulations are "indicative" of an intention to give effect to the provisions of the treaties binding on South Africa in international law.[44] The Constitutional Court confirmed in *International Trade Administration Commission v. SCAW South Africa (Pty) Ltd* (hereinafter *SCAW*) that South Africa's international obligations on trade arise from the WTO Agreement.[45] It was held that these obligations are "honoured" through domestic legislation such as the ITAA and the CEA that govern the imposition of trade remedies.[46] This construal is augmented by the approach that the same court chose to take in the *Glenister v. President of the Republic of South Africa and Others* case of 2011 (hereinafter *Glenister*).

In *Glenister*, it was held that under section 231, the approval of an agreement by Parliament does not, by itself, make it a law in South Africa. Only a self-executing agreement that has been approved by Parliament becomes law in the country upon such approval unless it is inconsistent with the Constitution or an Act of Parliament.[47] In this regard, a treaty becomes law in South Africa when it is promulgated into law by national legislation.[48] The approval of a treaty under section 231(2) of the Constitution demonstrates South Africa's intention, in its capacity as a sovereign state, to be bound at the international level by the provisions of the agreement.[49] Thus, the approval of a treaty under section 231(2) constitutes an undertaking at the international level as between South Africa and other countries to take steps to

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41 *Progress Office Machines v. SARS* [2007] SCA 118 (RSA), p. 6, para. 6.

42 *Id*.

43 *Association of Meat Importers and Exporters v. International Trade Administration Commission* 2014 (4) BCLR 439 (SCA) (September 13, 2013), pp. 22–23, paras. 58–60.

44 *Progress Office Machines v. SARS*, p. 6, para. 6.

45 *International Trade Administration Commission v. SCAW South Africa (Pty) Ltd* 2012 4 SA 618 (CC) (*SCAW*), p. 2, para. 2.

46 *Id.*

47 *Glenister v. President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) (*Glenister*), p. 43, para. 90; *Azanian People's Organization (AZAPO) v. President of the Republic of South Africa* 1996 (4) SA 672 (*AZAPO*), pp. 2–3, para. 26.

48 *Glenister*, p. 43, para. 90.

49 *Id.*, p. 44, para. 91.

comply with the substance of the treaty.[50] It is thus not "inconsequential" and has a significant impact.[51] This obligation is typically given effect by either incorporating the treaty into South African law or taking other steps to bring our laws in line with the treaty to the extent they do not already comply.[52] A treaty that has been ratified by a resolution of Parliament is binding on South Africa on the international plane. A failure to comply with the provisions of this treaty may result in South Africa incurring obligations towards other signatory states.[53] A treaty that has been ratified by Parliament under section 231(2), however, does not become part of South African law until and unless it has been incorporated into South African law. Thus, as held by the SCA in *Progress Office Machines v. AMIE*, a treaty that has not been incorporated into South African law cannot be a source of rights and obligations.[54] This rigid approach is criticised by Dugard, who deems it unpragmatic in light of the bureaucratic nature of the processes of government and frustrates the noble goal of harmonising international law and domestic law.[55]

Furthermore, the court in *Glenister* explained that under the Constitution, the actions of the executive in negotiating and signing a treaty do not result in a binding agreement.[56] Legislative action is required before a treaty can bind the Republic.[57] Significantly, the court in *Glenister* then held that this does not mean that a treaty enacted by a resolution of Parliament is a "merely platitudinous or ineffectual act."[58] The ratification of a treaty by Parliament constitutes a "positive statement" to the signatories of that treaty that Parliament, subject to the provisions of the Constitution, will act "in accordance" with the ratified treaty.[59]

Treaties, both those that are binding and those that are not, have an important place in our law.[60] While those that are not binding do not create rights and obligations in municipal law, they may be used as "interpretive tools" to assess and understand

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50 *Glenister*, p. 44, para. 91.

51 *Law Society of South Africa v. The President of the Republic of South Africa* 2019 (3) SA 30 (CC) (*LSSA*), pp. 14–15, paras. 30–32.

52 *Glenister*, p. 44, para. 91.

53 *Id.*, pp. 44–45, para. 92.

54 *Id*.

55 Dugard, J., & Coutsoudis, A. (2019). The place of international law in South African municipal law. In J. Dugard et al. (Eds.), *Dugard's international law: A South African perspective* (pp. 58, 73). Juta.

56 *Glenister*, p. 46, para. 95.

57 *Id*.

58 *Id.*, pp. 46–47, para. 96.

59 *Id.*

60 *Id.*

the Bill of Rights.[61] Therefore, the Constitution reveals a clear determination to ensure that the Constitution and South African law are interpreted to comply with international law, as shown by sections 39(1)(b) and 37(4)(b)(i).[62] Thus international law has a special place in our law which is carefully defined by the Constitution.[63]

At the same time, however, treating treaties as interpretive aids does not entail giving them the status of domestic law in the Republic.[64] To regard them as a source of domestic rights essentially constitutes incorporating the provisions of the unincorporated convention into our domestic law by the "back door."[65] The incorporation of treaties into domestic law under section 231(4) requires, in addition to the resolution of Parliament approving the treaty, further national legislation that incorporates it into domestic legislation.[66] Once incorporated into domestic legislation, a treaty constitutes law in South Africa and enjoys the same legal status as any other legislation.[67,68]

The following are some of the implications of the decisions in *SCAW* and *Glenister*: first, ratification of a treaty does not mean it is part of domestic law – it still requires incorporation into legislation. However, ratification signals that South Africa will comply with its putative treaty obligations pending incorporation into municipal law. Secondly, treaties, whether binding or not, occupy an important place in our law. These treaties, whether binding or not, must be employed as "interpretive tools," thus making them an integral part of the context of our law. This means that the treaties must be regarded as part of the external context of a statute that must be taken into consideration in its construal and application. We meant to "honour" our obligations under the WTO Agreement by promulgating the CEA. Thus, *Glenister* and *SCAW* confirm the proposition that treaties that have not been incorporated into our law are not mere "platitudes" of no consequence, but they must be "honoured" by acting "in accordance" with them. This is a constitutional obligation arising from sections 39(1)(b) and 233 of the Constitution.

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61 *Glenister*, pp. 46–47, para. 96. *See* also, more recently, *Arena Holdings (Pty) Ltd t/a Financial Mail and Others v. South African Revenue Service and Others* [2023] ZACC 13, pp. 38–39, para. 92. The majority decision (p. 71, para. 188), is silent on international law obligations cited in the minority judgement, despite the constitutional mandate to consider it.

62 *Glenister*, para. 97.

63 *Id.*

64 *Id.*, para. 98.

65 *Id.*

66 *Id.*, p. 48, para. 99.

67 *Id.*, pp. 48–49, para. 100.

68 *Id.*

At the very least, the *SCAW* and *Glenister* decisions establish that the WTO Agreement and its covered agreements, which include the ARO, must be employed as "interpretive tools" in the construal of our legislation. This is the approach that was employed by the same court in *Makwanyane v. Grootboom*.[69] Sucker adds that the court in *Glenister* identified an obligation of international law that was not incorporated in domestic law as binding both in international law and in municipal law if such obligation is intrinsic to our law or, as the Constitutional Court put it, "[o]ur Constitution appropriates the obligation for itself and draws it deeply into its heart."[70] To Sucker, this doctrine of intrinsicity does not "translate" such "obligation" into a "justiciable substantive right."[71] I agree with the Constitutional Court's simple construal that if the duty now exists in our Constitution, then it is binding both in domestic and international law. Consequently, it is unequivocally clear that treaties must be employed as interpretative tools, especially where we have "appropriated" this obligation "deeply into the heart" of our trade remedies architecture in the CEA.

However, this optimism is not shared by Stubbs, who argues that the decision in *Glenister* creates uncertainty, while *SCAW* is in accordance with the Constitution.[72] Sucker argues that, in practice, treaties are approved and ratified but not incorporated into municipal law unless domestic implementation is explicitly required for compliance with South Africa's international obligations.[73] Research scholar Sucker explains that this current practice means that South Africa routinely becomes a party to treaties without incorporating them into domestic law.[74]

Phooko, however, asserts that the decisions in *Louis Karel Fick v. Government of the Republic of Zimbabwe* (hereinafter *Fick*)[75] and *Law Society of South Africa and Others v. President of the Republic of South Africa and Others* (hereinafter *LSSA*)[76] support a monist approach to international law that bypasses the constitutionally prescribed process of incorporation of treaties into municipal law (i.e. dualism) unless it is

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69 *S v. Makwanyane and Another* 1995 (3) SA 391 (CC), p. 24, para. 35; *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19, 2001 (1) SA 46 (CC), p. 22, para. 26; Sucker, F. (2013). Approval of an international treaty in Parliament: How does section 231(2) 'Bind the Republic'? *Constitutional Court Review*, *5*, 417, 428.

70 *Glenister*, pp. 100–101, para. 189; Sucker, 2013, p. 432.

71 Sucker, 2013, p. 432.

72 Stubbs, M. (2011). Three-level games: thoughts on Glenister, SCAW and international law. *Constitutional Court Review*, *4*(1), 137, 165.

73 Sucker, 2013, p. 427.

74 *Id.*

75 *Louis Karel Fick v. Government of the Republic of Zimbabwe* 2013 (5) SA 325 (CC), pp. 15 and 30, paras. 31, 59.

76 *Law Society of South Africa and Others v. President of the Republic of South Africa and Others* 2019 (3) SA 30 (CC), p. 23, para. 53.

a self-executing treaty in light of the separation of powers doctrine.[77] Tladi concurs, maintaining that the decision in *Fick* "directly" applied international law, rather than merely using it as a tool for interpretation.[78] Similarly, Schlemmer contends that the WTO Agreement and its covered agreements, including the ARO, despite being signed and ratified, have never been incorporated into South African law and, thus, "cannot be a source of any rights for South African legal subjects."[79]

Thus, there is contradictory jurisprudence emerging from the Constitutional Court, the apex court in South Africa, regarding whether international law can either be applied directly in the monist tradition or only through incorporation in legislation as required by dualism, which in turn suggests that South Africa follows a "hybrid approach."[80] Nonetheless, international law obligations cannot be entirely disregarded. As put by this court in *SCAW*, the obligations under the WTO Agreement, including the ARO, must be "honoured." At the very least, the decisions in *Makwanyane*, *Grootboom*, *Fick*, *LSSA* and *Glenister* establish that South Africa's international obligations under the ARO are employed as interpretive aids. ITAC, the body charged with trade remedy investigations in South Africa, certainly conducts itself as if the WTO obligations under the GATT apply to its investigations.[81] This is the approach that should have been followed by the SCA in *Levi*.

Against this backdrop, as stated earlier, Article 1.2 of the ARO states that the Rules of Origin includes all rules used to determine the country of origin of a product used in non-preferential commercial policy instruments, such as in the application of most-favoured-nation treatment, anti-dumping and countervailing duties, safeguard measures under Article XIX of GATT and any discriminatory quotas.[82] Within this framework, there are two types of rules of origin, preferential and non-preferential. "Preferential rules of origin" are used to stipulate whether a product is deemed to originate in a regional trade agreement partner country and thus, qualify

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77 Phooko, M. (2021). Revisiting the monism and dualism dichotomy: What does the South African Constitution of 1996 and the practice by the courts tell us about the reception of SADC community law (treaty law) in South Africa? *African Journal of International and Comparative Law*, *29*(1), 168, 179–181.

78 Tladi, D. (2018). The interpretation and identification of international law in South African courts. *South African Law Journal*, *135*(4), 708, 733.

79 Schlemmer, E. (2020). International trade law. In H. Strydom (Ed.), *International law* (pp. 491–515). Oxford University Press.

80 Tladi, 2018, p. 180; Ferreira, G., & Ferreira-Snyman, A. (2014). The incorporation of public international law into municipal law and regional law against the background of the dichotomy between monism and dualism. *Potchefstroom Electronic Law Journal*, *17*(4), 1471, 1473.

81 Khanderia, S. (2017). The compatibility of South African anti-dumping laws with WTO disciplines. *African Journal of International and Comparative Law*, *25*(3), 347, 352, footnote 36; Vinti, C. (2016). A spring without water: The conundrum of anti-dumping duties in South African law. *Potchefstroom Electronic Law Journal*, *19*, 1, 21.

82 *See further*, Molodyko, K. (2024). Economic sanctions: How to make international trade a legal right instead of a privilege. *BRICS Law Journal*, *11*(4), 34, 53.

for preferential treatment.[83] The second category comprises "non-preferential rules of origin," which are those laws and administrative determinations of general application applied by any member state to determine the country of origin of goods, provided such rules of origin are not related to contractual or autonomous trade regimes leading to the granting of tariff preferences that exceed the application of paragraph 1 of Article I of GATT 1994.[84] They are also used for other well-known objectives, such as the application of trade remedies like anti-dumping and safeguard duties.[85] The *Levi* decision, in particular, turned on the construal of "preferential rules of origin" in the SADC region.

To this end, the GATT and ARO are an "inseparable" and "cumulative" package of rights under the WTO Agreement.[86] Building on the GATT, the ARO seeks to harmonise and clarify the rules of origin. The ARO focuses primarily on non-preferential rules of origin, except for its Annex II: Common Declaration with regard to Preferential Rules of Origin (hereinafter the Common Declaration), which deals with international standards regulating preferential rules of origin.[87] The ARO excluded preferential rules of origin from the harmonisation effort because they accepted that governments wanted the flexibility to use the rules as commercial policy instruments.[88] The principles that bind the non-preferential rules of origin are mostly located in the Common Declaration.

In general, according to Preamble of the ARO, rules of origin must not be a hindrance to trade nor impair rights under the GATT. It is also required that they are drafted and implemented in an impartial, transparent, predictable, consistent and neutral manner. Building on the Preamble, Article 3(b) of the Common Declaration states that the preferential rules of origin of members must be based on a positive standard. However, preferential rules of origin that state what does not confer preferential origin, i.e. a negative standard, are permissible as part of an explanation of a positive standard or in specific cases where a positive determination of preferential origin is required. The laws, judicial findings and administrative rulings of general application relating to preferential rules of origin must be promulgated in line with Article X.1 of GATT 1994.[89] Furthermore, upon request of an interested person, an issuing authority must conduct the assessment

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83 Mabrouk, H. (2010). Rules of origin as international trade hindrances. *Entrepreneurial Business Law Journal*, *5*(1), 97, 102.

84 Arts. 1.1 and 1.2 of the ARO; Mabrouk, 2010, p. 102.

85 Arts. 1.1 and 1.2 of the ARO; Saluste, 2017, p. 55.

86 WTO Appellate Body Report. (1999, December 14). *Argentina – Safeguard measures on imports of footwear* (p. 27, para. 81). https://www.worldtradelaw.net/document.php?id=reports/wtoab/argentina-footwearsafeguards(ab).pdf

87 Silveira, 1997, p. 438.

88 Kim, J. B., & Kim, J. (2009). RTAS for development: Utilizing territoriality principle exemptions under preferential rules of origin. *Journal of World Trade*, *43*(1), 153, 171.

89 Art. 3(c) of the Common Declaration.

of the preferential origin of a product as soon as possible but no later than 150 days after receiving a request for such an assessment as long as all necessary factors have been submitted.[90] Amendments to preferential rules of origin or new preferential rules of origin must not be implemented retroactively.[91] All administrative actions taken by members in respect of the determination of preferential origin are subject to judicial review, which must be independent of the authority issuing the determination.[92] Members must also promptly submit to the Secretariat their preferential rules of origin or any amendments thereto.[93]

The Common Declaration framework for preferential rules of origin is augmented by the Ministerial Decisions, which are binding based on Article IX of the WTO Agreement. Notably, the Hong Kong and Bali Ministerial Decisions require member states to ensure that preferential rules of origin applicable to imports from Least Developed Countries (LDCs) are not only transparent, simple, and objective but also contribute to facilitating market access.[94] The Bali Ministerial Decision acknowledges that other than wholly obtained products, origin may also be conferred through "substantial or sufficient transformation", which can be ascertained using various criteria, including through the *ad valorem* percentage criterion (value-added test); a change in tariff classification; and a specific manufacturing or processing operation.[95] In simple terms, this means that the rules of origin should provide that the country to be established as the origin of a specific product must be the country from where the good has been "wholly obtained."[96] "Wholly obtained" goods refer to natural products and goods made from natural products which are entirely sourced or produced in one country or area.[97] However, if more than one country is involved in the production of the product, the country where the "last substantial transformation" has been carried out is the country of origin.[98] This principle

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90 Art. 3(d) of the Common Declaration.

91 Art. 3(e) of the Common Declaration.

92 Art. 3(f) of the Common Declaration.

93 Art. 4 of the Common Declaration.

94 World Trade Organization. (2003). *Hong Kong Ministerial Declaration*. https://www.wto.org/english/thewto_e/minist_e/min05_e/final_text_e.htm; World Trade Organization. (2013). *Bali Ministerial Decision on preferential rules of origin for least-developed countries* (para. 1.2). https://www.wto.org/english/thewto_e/minist_e/mc9_e/mc9_e.htm

95 World Trade Organization. (2013). *Bali Ministerial Decision on preferential rules of origin for least-developed countries* (para. 1.2).

96 Art. 9.1(b) read with Art. 3(b) of the ARO; Asakura, H. (1993). The harmonized systems and rules of origin. *Journal of World Trade*, *27*(4), 5, 18. *See* also, Hirsch, M. (2002). International trade law, political economy and rules of origin. *Journal of World Trade*, *36*(2), 171–189.

97 World Customs Organization. (2015). *Rules of origin handbook* (p. 9). https://www.wcoomd.org/-/media/wco/public/global/pdf/topics/origin/overview/origin-handbook/rules-of-origin-handbook.pdf

98 Silveira, 1997, p. 415.

was further clarified by the decision in *United States v. Murray*, where the term "substantial transformation" was defined to mean:

> ... [It]means a fundamental change in the form, appearance, nature, or character of an article which adds to the value of the article an amount or percentage which is significant in comparison with the value which the article had when exported from the country in which it was first manufactured, produced, or grown.[99]

Indicators of substantial transformation may thus include:

- a change in the name of a product;
- a change in the character of a product;
- a change in use of a product;
- a change in the tariff classification of a product;
- the value added as a consequence of the processing.[100]

Although these criteria were primarily developed in respect of LDCs, Mavroidis contends, and I agree, that this applies in general to all preferential rules of origin.[101] This means that for preferential rules of origin under the ARO, origin can be conferred on the basis of two tests, namely the "wholly obtained" test for goods produced in one country and the "last substantial transformation" test for goods produced in more than one country.

For a comparative perspective, India provides for both the "wholly obtained" and "substantial transformation" tests, with the latter based on a change in tariff classification and minimum value-added thresholds; however, these have not been interpreted coherently, often breeding confusion and disputes.[102] Similarly, the People's Republic of China employs the wholly obtained and the last substantial transformation tests.[103] Brazil, in the same vein, uses the wholly obtained or produced and tariff-shift criteria.[104]

To this end, Article 12 of the Protocol states that the determination of the rules of origin for SADC must be established in accordance with its Annex I: Concerning the Rules of Origin for Products to be traded between the Southern African Development

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99 621 F.2d 1163 (1st Cir. 1980); Silveira, 1997, p. 415.

100 World Customs Organization, 2015, pp. 9–10; Silveira, 1997, pp. 414–418; Kim, J. B., & Kim, J. (2011). The role of rules of origin to provide discipline to the GATT Article XXIV exception. *Journal of International Economic Law*, *14*(3), 613, 626; Art. 9(2)(c)(iii) of the ARO.

101 Van den Bossche, P., & Zdouc, W. (2018). *The law and policy of the World Trade Organization: Text, cases and materials* (5th ed., p. 460). Cambridge University Press.

102 Lakshmikumaran, S. (2020). Rules of Origin and the FTAs: Major issues in India. *Global Trade and Customs Journal*, *15*(3/4), 146, 147.

103 Art. 3 of the [No. 416]. Decree of the State Council of the People's Republic of China No. 416: Regulations of the People's Republic of China on the Origin of Import and Export Goods. These regulations apply only to non-preferential trade measures.

104 Balassiano, A. W. (2020). Rules of Origin in Brazil. *Global Trade and Customs Journal*, *15*(3/4), 202, 202.

Community ("Annex I"). The Protocol has been incorporated into Schedule 10, Part 2, of the CEA. This means that it is binding on South African law, thereby creating enforceable rights.

Rule 2 of Annex 1 encompasses the "origin criteria" by providing that goods will be deemed to be originating in a member state if they satisfy the following requirements:

i. if they are "consigned directly from a member state to a consignee in another member state" *and*

ii. if they have been either "wholly produced" as provided in Rule 4 of this Annex[105] or they have been produced in the member states wholly or partially from materials imported from outside the member states or of undetermined origin by a process of production which results in a "substantial transformation" of those materials. This transformation must be such that the c.i.f. (cost, insurance and freight) value of those materials does not exceed 60% of the total cost of the materials used in the production. However, certain minimal operations, such as dilution of the goods, repackaging and breaking up or assembly of components or operations undertaken solely to ensure the preservation of merchandise in good conditions during transportation and storage, such as ventilation, "do not count towards satisfying the test."

This, to be precise, constitutes the "substantial transformation" test of Rule 2.

Thus, in respect of origin criteria, Rule 2 of Annex I replicates the ARO framework. Considering the interpretative approach employed in *Glenister*, *Fick*, *LSSA* and *SCAW*, the test for the origin of goods must be construed in accordance with the ARO, read together with the Protocol and Annex I. The ARO is thus an "interpretive tool" for the interpretation of Annex 1 and the CEA. This is the import of sections 39(1), 231 and 233 of the Constitution. Such contextualisation and elucidation would have enabled the court in *Levi* to resolve the issue coherently. However, the court in *Levi* did not expressly mention nor explain the "wholly produced" test as conceived by the ARO framework, as required by the Constitution. In fact, in *Levi,* the goods were "produced or sufficiently worked in Mauritius and Madagascar and were sent either by air or sea directly from there to South Africa" *and* "wholly produced" in Mauritius and Madagascar, which are SADC countries, and thus, as stipulated by Rule 2.1(a), they derive their origin from a SADC country. Therefore, these goods were eligible for duty-free treatment under the Protocol. Even though the court's finding on the origin of the goods in question is ultimately correct in law, the SCA should have coherently and logically explained the origin criteria beginning with the ARO framework and then Rule 2 of the Annex, which would have clearly elucidated the two distinct criteria of the origin tests. This approach would have perhaps addressed the court's apparent undue fixation with the first criterion of the origin test in Rule 2 of Annex 1.

In particular, the court in *Levi* at paragraph 12 held:

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[105] Rule 4 then lists the products which will be regarded as "wholly produced" in the member states as including, amongst others, minerals and vegetables.

> [12] Starting with the language of Rule 2.1 it says that goods shall be accepted as originating in a Member State *if they are consigned directly from that state to another Member State. In ordinary parlance, that is what occurred with the goods in this case*. They were *produced or sufficiently worked* [emphasis added] in Mauritius and Madagascar and were sent either by air or sea directly from there to South Africa. Both the air waybills and the bills of lading identify Levi SA as the consignee and the producer in either Mauritius or Madagascar as the consignor. Each shipment constituted a consignment as defined in Rule 1 of the Annex as having been sent 'from one exporter to one consignee'. Each was accompanied by a declaration of origin given under Rule 9.1 in the form of Appendix II to Annex I. The two examples in the record, which I assume were typical, reflect the producer of the clothing as the exporter.

The dictum followed here is problematic. The test, as articulated by the SCA, is that origin depends on the consignment being sent from one member state to another member state.[106] This interpretation places undue emphasis on the "movement of goods in and out of South Africa" as reflected in paragraphs 13–14 and 23. Such a focus, however, fails to adequately represent the two distinct criteria of the "wholly obtained" origin test of Rule 2.1(a) of Annex 1, as previously acknowledged by the same court in *Levi*.[107]

The confusing nature of the court's dictum in *Levi* is further compounded by its statement that the goods were "produced or sufficiently worked in Mauritius and Madagascar."[108] It is unclear what this statement means. It is evocative of both the "last substantial transformation" test in Rule 2.1(b) of Annex 1 by referring to "sufficiently worked" and the "wholly obtained" test in Rule 2.1(a) of Annex 1 by stating the goods were "produced." As explained by the context of the ARO and Annex 1 itself, a product can either be wholly obtained or substantially transformed. It cannot be both, as is suggested by this dictum. By not fully articulating the two criteria of either test for origin in Rule 2.1(a) – the wholly produced test *or* Rule 2.1(b) – the last substantial transformation test, the court seems to confuse the origin tests. Even when the court then attempts to complete the origin analysis by referring to the seminal issues of "wholly produced" or "last substantial transformation" tests, the two are lumped together without highlighting the significance of their difference.[109] Engaging with international law by referencing legal instruments, such as the ARO, for instance, could have addressed this issue with the dictum of the court. In the absence of applying such a contextual and constitutionally prescribed approach, it remains unclear how the goods in question complied with the origin test or criteria outlined in Rule 2.1.

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106 *Levi*, p. 9, para. 1.

107 *Id.*, p. 9, footnote 5.

108 *Id.*, p. 10, para. 12.

109 *Id.*, p. 9; *see* also, footnote 5.

The same problem manifested in the earlier SCA decision in *A M Moolla Group Limited and Others v. Commissioner for SARS and Others*, which dealt with the interpretation of section 46 of the CEA regarding a trade agreement between South Africa and Malawi.[110] The key issue before the court was whether section 46 of the CEA, read with Rule 46 (issued under the CEA) applied in relation to the goods imported into South Africa. This court subsequently held that any conflict between the bilateral agreement with Malawi and the CEA would be resolved in favour of the CEA.[111] This is because the court believed that in the event of a conflict between the CEA and an international agreement that has been promulgated, the Act must take precedence since once the agreement is promulgated and it forms part of the Act.[112] This means that it must follow the meaning of the terms as defined in the Act unless the context indicates otherwise.[113] G. Erasmus rightly criticises this judgement that was interpreted without any resort to section 233 of the Constitution, which mandates an interpretation in line with a "reasonable interpretation" of international law and section 49 of the CEA, which requires compliance with a trade agreement.[114] Even more troubling is the court's finding that the statutory definition overrides the bilateral definitions.[115] The court should have adhered to an interpretation that honours South Africa's international obligations.[116] This is the same flaw that is evident in the *Levi* case, where the court similarly disregarded South Africa's international obligations, in direct conflict with sections 39(1)(b), 231 and 233 of the Constitution.

The international law question also raises the incidental yet fundamental issue of the place of regional trade agreements within the WTO framework. It is common cause that these RTAs are a type of regional law emanating from Article XXIV of the GATT read together with the Understanding on the Interpretation of Article XXIV of the GATT. This issue is especially pertinent here because of the arbitration between the Southern African Customs Union and the European Union concerning the validity of safeguard measures imposed by the former on chicken products from the latter. In this regard, the Arbitration Panel held that RTAs are agreements that exist "outside of the WTO context."[117] It appears that the Dispute Settlement Body (DSB) shares the

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110 *A M Moolla Group Limited and Others v. Commissioner for SARS and Others* (139/2002) (2003) ZASCA 18 (March 26, 2003) (*Moolla*).

111 *Id.*, p. 9, para. 15.

112 *Id.*

113 *Id*.

114 Erasmus, 2003, p. 180.

115 *Id*.

116 *Id.*, p. 174.

117 WTO Arbitration Panel. (2022, January 24). *Southern African Customs Union – Safeguard measure imposed on frozen bone-in chicken cuts from the European Union* (*SACU v. EU*) (p. 90, para. 232). https://www.sacu.int/uploads/documents/b61ef5f6d0d8d486451e25ae262ad985cd54190e.pdf

same view and regards these bodies as "non-WTO."[118] However, the WTO law is seen as persuasive authority.[119] The Panel further explained that RTAs "do not emerge from a vacuum but only to deepen and qualify their common relationship in light of Article XXIV GATT."[120] In accordance with the principle of harmonious interpretation, the Panel used examples and findings of earlier decisions by international trade panels.[121] In this context, the Arbitration Panel's recognition held that international trade rules do not "emerge from a vacuum" serves as a critical interpretative benchmark. The decision in *Levi* falls notably short when measured against this seminal yardstick.

3.2. Section 46 of the CEA Issue

The court in *Levi* did not consider section 46 of the CEA, which contains the default rules of origin for goods imported into South Africa. In particular, section 46(1) of the CEA states that:

For the purposes of this Act, except where any agreement contemplated in sections 49 or 51 otherwise provides, goods shall not be regarded as having been produced or manufactured in any particular territory unless –

(a) at least twenty-five per cent (or such other percentage as may be determined under subsection (2), (3) or (4)), of the production cost of those goods, determined in accordance with the rules, is represented by materials produced and labour performed in that territory;

(b) the last process in the production or manufacture of those goods has taken place in that territory; and

(c) any other such processes as the Commissioner may, at the request of the Board on Tariffs and Trade by rule prescribe in respect of any class or kind of goods, have taken place in the production or manufacture of goods of such class or kind in that territory.[122]

Thus, section 46 serves as the default rule governing non-preferential rules of origin for goods entering South Africa except in the instances specified by sections 49 and 51. This cumulative test also reflects the "last substantial transformation test." Since section 51 deals with trade agreements with African countries providing for duty-free or special rates of duty, it does not merit further discussion here, as it has no bearing on the present analysis.

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[118] WTO Dispute Settlement Body Report. (2003, April 22). *Argentina – Definitive anti-dumping duties on poultry from Brazil* (pp. 22–23, para. 7.41). https://www.worldtradelaw.net/document.php?id=reports/wtopanels/argentina-poultry(panel).pdf

[119] *SACU v. EU*, p. 90, para. 231.

[120] *Id.*, pp. 90–91, para. 233.

[121] *Id*.

[122] This test is complemented by Rule 46 of the GNR.1874 of December 8, 1995: Rules (Government Gazette No. 16860) to the CEA, which specifies the calculation, for the purposes of sec. 46.

Section 49, on the other hand, embodies the preferential rules of origin. It provides that whenever a treaty which binds the Republic as outlined in section 231 of the Constitution is an agreement which includes provisions for the granting of preferential tariff treatment of goods and provisions of origin governing such treatment or a customs union agreement with the government of an African country, such an agreement is enacted into law as part of the CEA when published by notice in the Gazette. Against this backdrop, the Protocol has been incorporated into Schedule 10 Part 2 of the CEA, as required by section 231 of the Constitution.

The Protocol grants preferences that give duty-free treatment to goods originating in SADC. This means that the Protocol qualifies as an agreement under section 231 of the Constitution that supersedes the default origin requirements of section 46 of the CEA. This is confirmed by section 49(3) of the CEA. Thus, in short, any trade Protocol that is part of South African law trumps the rule of origin in section 46 of the CEA and Rule 46. Therefore, while the court in *Levi* correctly used section 49 of the CEA as the applicable law, it should have framed its reasoning by first engaging with section 46 as its point of departure, as was done by the court in *Henbase 3392 (Pty) Limited v. Commissioner, South African Revenue Service*, in line with the contextual approach. This omission appears to be a recurring blind spot in the court's reasoning.[123]

Conclusion

In *Levi*, the Supreme Court of Appeal had an opportunity to explicitly outline the regulatory regime for the rules of origin, which are a contentious issue in international trade law. Under this regime, the determination of the rules of origin employs the "wholly obtained" test in matters in which the good was produced in one country, and if more than one country is involved in the manufacture of the good, then it uses the "last substantial transformation test." The court in *Levi*, however, made its decision on the origin rules without considering the international context of the CEA as derived from the ARO in accordance with the Constitution. It is prudent to note that while the court's overall finding was correct, the dictum of the decision is confusing and may have inadvertently conflated the different tests for origin. This confusion may have likely been prompted by the fact that the issue before the court primarily pertained to the first criteria of the origin test in Rule 2.1 of Annex 1. Unfortunately, one is left unsure as to whether the goods are deemed "wholly obtained" or "substantially transformed" in a SADC country. It could be said that these remarks constitute *obiter dicta* since they pertain to an issue that was not before the court and are thus not binding; they are, nonetheless, embedded in the court's dictum and colour the reading and construal of the decision in *Levi*.

[123] JOL 8330 (2001) (SCA).

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