

THREE-LEVEL GAMES: THOUGHTS ON *GLENISTER*, *SCAW* AND INTERNATIONAL LAW*

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[The Constitution's] approach to adjudication requires an acceptance of the politics of law. There is no longer place for assertions that the law can be kept isolated from politics. While they are not the same, they are inherently and necessarily linked.¹

1 Introduction

This case comment considers certain specific effects of courts' decisions on national politics and in international political arenas. As we shall see, the Constitutional Court in *Glenister v President of the Republic of South Africa*² upset the accepted separation of powers appletart in the domain of international political dynamics. Put pithily, the decision brought the courts more pervasively into a playing field ordinarily the domain of politicians and the political branches.

However, in the commentary below the focus is not upon whether this incursion is good or bad in normative terms. The objective here is descriptive in nature. I analyse certain consequences of *Glenister* in the context of existing dynamics between political negotiations and municipal law-making in South Africa in order to better understand what is at stake, strategically, when certain issues pertaining to international agreements are in play. I shall contend that the majority's approach in *Glenister* is a new development in regard to the way in which courts in South Africa approach the interpretive

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¹ Langa (2006) *Stell LR* 351 353.

² *Glenister v President of the Republic of South Africa and Others* 2011 3 SA 347 CC.

import and effect of international law. Whilst deferring analysis of certain questionable features of the judgment for another day, this comment emphasises the extent to which the courts in South Africa have emerged as strategic actors with respect to international political decision-making.

Two challenges exist for even this limited descriptive endeavour. First, given how recently the judgment was handed down, an empirical study of the extent of its real-world effect would be an inappropriate metric. Secondly, a purely legal analysis of the strategic effect of the majority decision would, understandably, be similarly inapposite. Given that the real impact of *Glenister* is still in its nascent stages, a meaningful discussion of the subject would require a theoretical tool that could account for dynamic strategic realignments across all three governmental functions. For this purpose, a more useful model is two-level game theory.³

Two-level game theory is a method of political modelling designed for the analysis of conflict resolution and other interactions between domestic domains and international planes. As normally deployed, however, the courts as political actors are left largely out of two-level game theory. *Glenister* suggests that this lacuna in the theory should be reconsidered. By comparing the reasoning applied in *Glenister* to a 'control sample' decision – *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*⁴ – I hope to illustrate the broad scope of courts' discretionary influence in the domestic-international political process. Once we have delineated the ambit of this influence, its effect will be discussed in the context of two-level game theory, which, in turn, will enable us to speculate upon *Glenister's* potential consequences with respect to decision-making in the other branches of government. I will then argue that the emerging role of the courts is sufficiently pervasive to justify the claim that they sit at a third and separate level through which they interact with players at the other two levels. In the final section of this paper, I will set out at least one hypothetical legal consequence of the majority's decision by transposing the reasoning applied in *Glenister* to the factual matrix presented in *Government of South Africa v Grootboom*. The results of this second comparison are both striking and illuminating.⁵

The comment is split into three parts. Part II begins by setting out the South African legal framework insofar as it concerns the application of international law on the domestic plane. Thereafter, it

³ RD Putnam 'Diplomacy and domestic politics: The logic of two-level games' (1988) 42 *International Organization Foundation* 427.

⁴ 2010 5 BCLR 457 (CC).

⁵ 2001 1 SA 46 (CC).

proceeds to examine the Court's holdings in both *Glenister* and *Scaw*. Part III explains the 'mechanics' of two-level game theory and describes some of its applications. In the light of conclusions drawn in Parts II and III, Part IV then examines the cogency of a three-level claim, as well as the potential import of such a claim for South African constitutional politics.

2 The Constitution and relevant case law

2.1 The South African legal system for international incorporation

The process of concluding an international agreement is fraught with many concerns and complexities, not least of which is a satisfactory understanding of the likelihood that the 'other side' will do as it says it will do. There is no point in expending the political capital required to propel a given country ('Country A') into negotiations, only to negotiate with another country ('Country B'), which lacks the inclination, or the power, to give effect to Country A's legitimate demands.

In an international negotiation, where the issue regarding the negotiator sitting across the table concerns her inclination to implement an agreement, the question is one of trust, which may be informed by the previous conduct of Country B's negotiator, or of the country that she represents (amongst other informative factors). But where the issue is whether one's negotiating counterpart has the power to give effect to an agreement (if one is reached), then the question becomes one of credibility, which may be informed by the legal mechanics of incorporation applicable to international agreements in Country B. As the section below will show, even the promises or assent of the most trustworthy negotiator, who herself has the best intentions, will lack credibility if domestic implementation of the agreement in that negotiator's country may subsequently be stymied by legal rules or political processes (depending in part upon whether Country B's legal system tends towards a 'monist' or a 'dualist' system of incorporation). When the potential political cost of failed negotiations is weighed against the potential benefits of a successfully implemented international agreement, clearly all countries must have an interest in understanding the municipal legal systems of their negotiating counterparts.

Understanding the municipal pitfalls to implementation in South Africa is no simple task. As John Dugard explains, the relationship between international and municipal (or 'domestic') law 'troubles

both theorists and courts'.⁶ Traditionally, there are two approaches to the incorporation of international agreements, the monist approach and the dualist approach.⁷ In reality, however, no country ever follows an approach that exemplifies a pure model of either.

On the dualist approach, a clear dividing line must be drawn between international law and domestic law. International covenants entered into by sovereign states are binding on those states in the international arena, but that they are not effective as municipal law without additional domestic legislative action. As an example, imagine that New Zealand (or some other nation, selected at random) enters into an international covenant,⁸ and one of the terms of the covenant is that New Zealand will incorporate certain obligations of that covenant into its domestic law. If New Zealand does *not* incorporate the terms of the covenant as promised, then the institutions in the country that ought to be required to act in accordance with the covenant will, in fact, not be bound by them. If New Zealand's domestic institutions fail to comply with the terms of the international covenant (due to a failure to incorporate the covenant, or for other reasons), New Zealand would be in breach, and the legal consequences of the breach would be brought to bear upon New Zealand on the international plane. The result: New Zealand would be excluded from the benefits of the covenant entirely. Take a simple illustrative example. If, in an international negotiation, New Zealand agreed with South Africa to the mutual lowering of agricultural trade barriers, but New Zealand ultimately *failed* to lower its trade barriers as a result of its inability to implement the negotiated agreement successfully, then the terms of the agreement might allow South Africa to withdraw future concessions and also to recover value for any concessions already provided.

Under the monist model, international law and domestic law are far less distinct. Take the aforementioned example. If New Zealand were a monist state, agreement to the same international covenant would *automatically* transform the terms of that agreement into binding obligations on the domestic plane. In other words, the

⁶ J Dugard *International law: a South African perspective* (2000) 43. For an examination of the debate see, *inter alia*, JG Starke 'Monism and dualism in the theory of international law' (1936) 17 *British Yearbook of International Law* 66; and C Roodt 'National Law and Treaties' (1987-8) 13 *South African Yearbook of International Law* 72.

⁷ Dugard (n 6 above) 47.

⁸ There are, of course, many different kinds of international agreements. Some agreements may constitute an obligation in principle only. Other agreements may take effect and command obedience immediately, as would a contract between individual persons. Yet other agreements may come into effect at a later date, or come into effect in parts over a period of time. For the sake of simplicity, this paper uses the term 'international agreement' as having immediate effect, subject to the qualifications imposed by the applicable international-municipal system, whether monist or dualist.

relevant institutions of New Zealand would be bound to act in accordance with the terms of the covenant from the moment that there was agreement upon the international plane, and without any act of municipal incorporation. The monist approach would allow New Zealand to avoid contravention of the trade agreement and, accordingly, no South African entitlement would arise.

The Constitution of the Republic of South Africa, 1996 ('the Constitution') tends toward dualism (albeit a harmonised form of dualism, which requires a certain degree of consistency between domestic law and international law).⁹ As a general matter, international obligations are treated as agreements entered into by sovereign states, and the obligations to which those agreements give rise are owed to the parties thereto – that is, the sovereign states – and no one else. Disputes regarding the interpretation of these agreements are either resolved by diplomatic means or, otherwise, by an appropriately mandated international tribunal. In turn, obligations which are binding at the domestic level will be those enacted by Parliament, as supplemented by the common law. When individuals break the municipal laws, they are beholden to the state.

Section 231 of the Constitution specifically engages international negotiation and the incorporation of international agreements.¹⁰ The national executive is vested with the responsibility to negotiate and enter into international agreements. International agreements that are not of a 'technical, administrative or executory nature' only become binding upon the Republic on the international plane once

⁹ One example of this 'harmonised' or 'mixed' legal regime in South Africa is the fact that, pursuant to section 232 of the Constitution, 'South African common law treats international law as part of [domestic] law' (see Dugard (n 6 above) 51). Moreover, section 232 of the Constitution provides as follows: '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.'

¹⁰ Section 231 of the Constitution provides as follows:

- (1) The negotiating and signing of all international agreements is the responsibility of the national executive.
- (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
- (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.
- (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation, but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
- (5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

they have been approved by resolution in both houses of Parliament.¹¹ For an international agreement to have *domestic* effect it must be enacted as legislation. It is for this reason that it is said that an act of incorporation by Parliament is required for any agreement to ‘transform’ from an agreement between states into a law that regulates people.¹² Failure to incorporate an international agreement does not render that agreement irrelevant to a court’s decision. However its influence, if unincorporated, is certainly somewhat less direct.¹³

When interpreting the Bill of Rights, a court, tribunal or forum ... *must consider* international law ... [and] [w]hen 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.

Under the Constitution, the executive wears more than one hat. Aside from being responsible for the negotiation and execution of international agreements, it is also vested with the authority to develop and to implement domestic policy and is responsible for the preparation, initiation and implementation of national legislation.¹⁴ The Constitution thereby makes provision for executive-inflected influence on both the domestic level and the international level. On a dualist approach, then, the executive straddles the divide that dualism itself creates between domestic and international affairs. But the executive’s power is limited. In order to give effect to the agreements that the executive negotiates with its international

¹¹ This excludes international agreements which are held to be ‘self-executing’. See section 231(4) of the Constitution (see n 10 above). This term that has not yet been given clear content by the courts. See *President of the Republic of South Africa v Quaglini*; *President of the Republic of South African v Van Rooyen*; *Goodwin v Director-General, Department of Justice and Constitutional Development* 2009 8 BCLR 785 (CC). The Court did not reach the issue of deciding whether certain terms of an international covenant were ‘self-executing’ as contemplated in section 231 of the Constitution, as the outcome was identical on either of competing interpretations on offer.

¹² For a discussion of the adoption and transformation theories see F Morgenstern ‘Judicial practice and the supremacy of international law’ (1950) 27 *British Yearbook of International Law* 42.

¹³ See Sections 39(1)(b) and 232 of the Constitution.

¹⁴ Section 85(2) of the Constitution. Section 85 of the Constitution provides as follows:

- (1) The executive authority of the Republic is vested in the President.
- (2) The President exercises the executive authority, together with the other members of the Cabinet, by:
 - (a) implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;
 - (b) developing and implementing national policy;
 - (c) co-ordinating the functions of state departments and administrations;
 - (d) preparing and initiating legislation; and
 - (e) performing any other executive function provided for in the Constitution or in national legislation.

counterparts, it must have the ‘buy-in’ of the electorate, in one manner (such as an act of incorporation by Parliament through the promulgation of legislation) or another (through the absence of a critical mass of collective protest by affected interest groups, or, impliedly, through the operation of a self-executing provision.)¹⁵

If the executive in a dualist system negotiates an international agreement, and the terms of that agreement anticipate domestic application, but the legislature fails to enact that agreement into law, then, in theory, the executive will lose political traction on both planes. How so? An executive that over-promises and under-delivers may lose credibility on the international plane in future negotiations as well as political or popular support domestically. On the other hand, if ratification is successful, the executive may gain on both planes. If the executive is wise (or simply strategically savvy), it will avoid accession to international covenants unless, in its judgment, they are likely to pass muster back home.

On a monist approach, by contrast, the political calculations will be significantly different. In a monist system, executive agreement on the international plane is effectively a domestic law-making function. The downside here is that the executive has no option but to take full political responsibility for an unpopular agreement. It will not have the ratification of the legislature to buttress its decision.¹⁶ The upside is that all the credit will redound to the executive. If it enters into an international agreement which is celebrated in its home country, then it will not need to share the resulting political spoils with its coequal branches of government. Accordingly, in a monist system, one might say that the political stakes of international negotiation are often higher.

Within the South African framework (and in other jurisdictions with relevant similarities) the relationship between the executive and legislature is, at first blush, and to the extent that both branches of government act in accordance with the law, an issue of purely political interest. *To leave out the third branch of government would be a mistake.* Whilst our courts do not, themselves, enter into international negotiations or promulgate laws, they are called upon to *interpret* the international agreements that are entered into and the

¹⁵ Section 231(4) (see n 10 above).

¹⁶ Nor will the executive be in a position to ‘hide behind’ the legislature – there may be times when it would be politically advantageous for the executive to agree in principle to terms on the international plane, knowing full well that the legislature will not pass the agreement. If the subject matter of the agreement is of sufficient political interest and the terms of the agreement were popular amongst a significant proportion of the electorate, the executive may gain political ‘kudos’ for its attempt, and the legislature, or the political parties which it comprises may shoulder the blame for failing to pass that law.

legislation that is subsequently enacted. When courts do so, their decisions may affect decisions made by the other branches. To the extent that they do have such an influence, they act, at least, as shadow players on the domestic and international levels. It will invariably be the case that the influence of the courts is not particularly obvious when court's decisions align with the state's expectations. *Scaw* is an example of an invisible court, a court whose decision reinforces the judgment of the executive (in entering into the relevant agreement) and the legislature (in enacting the relevant laws). *Glenister* exemplifies the opposite proposition: the Court calls out the executive for its failure to abide by international agreements and the provisions of our own basic law. Whilst *Scaw* and *Glenister* engage very different subject matter, an analysis of the reasons for the success of the state's argument for the enforcement of ratified international obligations in the one case, measured against the reasons for the failure of the state's argument against the application of an un-ratified international covenant in the other should conveniently delineate the ambit of the courts' influence. To this end, the two cases are discussed in greater detail below.

2.2 The cases: *Scaw* and *Glenister*

Scaw was concerned with the operation and duration of international trade remedies. (The case was, however, ultimately decided on the principle of the separation of powers.) At issue were certain anti-dumping duties provided for in terms of national legislation and enacted pursuant to international agreement. The question before the Court was whether it was appropriate for a company to interdict an appropriately authorised executive officer from making a recommendation about whether or not continued anti-dumping duties were commercially justified.

Pursuant to South Africa's accession to the General Agreement on Tariffs and Trade (the 'GATT') and the subsequent World Trade Organization Agreement (the 'WTO agreement'),¹⁷ the government is permitted, in defined circumstances, to take measures to protect its domestic producers by preventing foreign commercial entities from 'dumping' goods onto the domestic market. This is achieved through

¹⁷ This agreement was approved by the South African Parliament through the Geneva General Agreement on Tariffs and Trade Act 29 of 1948. South Africa acceded to the subsequent World Trade Organisation Agreement on 1 January 1995. The international rules relating to dumping are contained in Article VI of the GATT and the Anti-Dumping Agreement. See *Scaw* (n 4 above) para 25.

the imposition of anti-dumping duties.¹⁸ Anti-dumping duties are therefore a legitimate means, in terms of the GATT and the WTO agreement, for a state to protect against the harm that could be caused to domestic suppliers by the introduction of goods from foreign suppliers at a fraction of the price at the former are able to produce the same goods. In essence, then, anti-dumping duties provide a temporary 'safe haven' for domestic producers from foreign competition.

The salient facts of the case are as follows. SCAW South Africa (Pty) Ltd ('SCAW') approached the High Court for an interim interdict restraining the Minister of Trade and Industry from accepting a recommendation by the International Trade Commission ('ITAC') concerning the continued operation of anti-dumping duties against one of SCAW's major commercial competitors. That application was successful. The effect of the High Court interdict was to restrain the Minister of Finance from terminating the existing anti-dumping duty, as per ITAC's recommendation, pending the final determination of an application to be instituted by SCAW to review and to set the recommendation aside. ITAC took the High Court decision on appeal that ultimately found its way to the Constitutional Court.

What is important to note about the *Scaw* appeal for present purposes is the Court's affirmation of the domestic applicability of South Africa's international obligations was explicitly predicated on the fact that the GATT and the WTO agreement had been incorporated into domestic law:¹⁹

[South Africa's international] obligations are honoured through domestic legislation that governs the imposition of anti-dumping duties and other trade remedies. In the main the legislation consists of the International Trade Administration Act, 2002 ...; the Anti-Dumping Regulations ... The [International Trade Administration] Act is the primary domestic legislation for controlling anti-dumping duties and other harmful trade practices associated with international trade.

The express object of the International Trade Administration Act 71 of 2002 ('ITA Act') is to establish 'an efficient and effective system for the administration of international trade.'²⁰ Regulation 53 of the

¹⁸ See *Scaw* (n 4 above) para 1. The term 'normal value' is, itself, malleable – but the question as to whether or not the relevant goods were indeed priced at 'normal value' is beyond the scope of this note. 'Dumping' occurs when goods are introduced into a country 'or its common customs area at an export price less than the normal value of those goods.'

¹⁹ See *Scaw* (n 4 above) paras 2 & 31.

²⁰ See *Scaw* (n 4 above) para 31.

Anti-Dumping Regulations provides for the subsistence of anti-dumping duties for a maximum of five years.²¹ In addition, Regulation 20 provides that '[a]ll investigations and reviews shall be finalised within 18 months after initiation.'

Taking the above into account, the Court held that the 'setting, changing or removal of an anti-dumping duty ... is a patently executive function'.²² It followed, on the Court's reasoning, that allowing the frustration of the expiration of an anti-dumping period by sustaining that period throughout the inevitable delays of the litigation process would be tantamount to allowing for an 'indefinitely elastic term of duties'.²³ When viewed in this light, allowing the courts to frustrate what is properly an executive policy function would be a breach of the doctrine of the separation of powers, as the delays through the courts would have the effect of tampering with a 'power [that properly] resides in the kraal of the national executive authority'.²⁴ The interdict was thus unanimously set aside.

The decision in *Glenister* was not unanimous and the Court split by a five to four margin. Mr Glenister argued that the planned disbandment of the Directorate of Special Operations (popularly known as the 'Scorpions'), which was located within the National Prosecuting Authority ('NPA'), and its replacement with the Directorate for Priority Crime Investigation (popularly known as the 'Hawks'), located within the South African Police Services, was unconstitutional. The Court was required to decide, first, whether the state, through, *inter alia*,²⁵ the effect of the United Nations Convention against Corruption,²⁶ had a positive duty to create an 'independent anti-corruption unit' and, secondly, whether the

²¹ Regulation 53 of the Anti-Dumping Regulations to the International Trade Administration Act provides as follows:

53.1 Anti-dumping duties shall remain in place for a period not exceeding 5 years from the imposition or the last review thereof.

53.2 If a sunset review has been initiated prior to the lapse of an anti-dumping duty, such anti-dumping duty shall remain in force until the sunset review has been finalised.

²² *Scaw* (n 4 above) para 102.

²³ *Scaw* (n 4 above) para 80.

²⁴ *Scaw* (n 4 above) para 80.

²⁵ The majority also referred to the Prevention and Combating of Corrupt Activities Act 12 of 2004, citing that Act as 'the fullest recital of the insidious scourge of corruption on society and the need to prevent and eliminate it'. However, the Court dismissed the question of domestic incorporation as irrelevant as, in its view, the enactment of the United Nations Convention into domestic legislation could not, in any event, give rise to constitutional obligations (See *Glenister* (n 2 above) para 3). In this sense, this observation is irrelevant to the question of incorporation and, for that reason, is not discussed in further detail here.

²⁶ See http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf (accessed 14 February 2012). The UN Convention was adopted on 31 October 2003 and entered into force on 14 December 2005. South Africa signed the Convention on 9 December 2003 and ratified it on 22 November 2004.

creation of the Hawks as the extant anti-corruption unit, and its substitution for the Scorpions, constituted the fulfilment of that duty.²⁷

The minority decision, written by Ngcobo CJ, would have dismissed the applicant's challenge (largely) on the following grounds:²⁸

The Constitution is not prescriptive ... as to specific mechanisms through which corruption must be rooted out, and does not explicitly require the establishment of an independent anti-corruption unit ... Lest I be misunderstood, while I am prepared to hold that there is a constitutional obligation for the state to take effective measures to fight corruption, I am not prepared to narrowly construe the options available to the state in discharging that obligation.

As this passage shows, the Chief Justice was indeed cognisant of the fact that relevant international covenants had indeed been entered into by the executive.²⁹ He wrote, as a general proposition, that, when viewed in the light of sections 233,³⁰ 39(1)(b)³¹ and 37(4)(b)(i),³² international agreements, and especially those concerning human rights, are of significant interpretive value in the resolution of disputes. However, Ngcobo CJ emphasised that this did not mean that such agreements could 'create rights and obligations in the domestic legal space'.³³ Whilst it was true that international agreements were not meant to be 'merely platitudinous or ineffectual',³⁴ to allow such unincorporated agreements to create domestic rights and obligations would be 'tantamount to incorporat[ing] the provisions of the unincorporated convention into our municipal law by the back door'.³⁵ Accordingly, in the absence of

²⁷ *Scaw* (n 4 above) para 84.

²⁸ *Scaw* (n 4 above) para 84.

²⁹ *Scaw* (n 4 above) para 95.

³⁰ Section 233 of the Constitution provides as follows:

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.

³¹ Section 39(1)(b) of the Constitution provides as follows:

(1) When interpreting the Bill of Rights, a court, tribunal or forum:

...

(b) must consider international law.

³² Section 37(4)(b)(i) of the Constitution provides as follows:

(4) Any legislation enacted in consequence of a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that:

... (b) the legislation:

(i) is consistent with the Republic's obligations under international law applicable to states of emergency.

³³ *Scaw* (n 4 above) para 96.

³⁴ *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) HCA 20; 1995 [183] CLR 273 291.

³⁵ n 34 above, para 98. Also see *Minister of State for Immigration and Ethnic Affairs v Teoh* [1995] 183 CLR 273 286-287.

a directly applicable international standard, the minority would have held that the impugned state action was constitutionally permissible.

The majority of the Court disagreed. It held that, in the absence of an explicit domestic-law definition, the standard of ‘necessary independence’ from the executive, which was the majority’s yardstick for the constitutionality of the legislation, found its source both in international law and in the Constitution.³⁶ The majority opined that the international standard was relevant because the Constitution demanded as much: ‘necessary independence’ was drawn ‘into the very heart’ of the Constitution,³⁷ and, in this way, became the ‘[domestic] measure of the state’s conduct in fulfilling its obligations in relation to the Bill of Rights’.³⁸ The Court thus held that it was the Constitution (and not international law) that created a positive obligation on the state to establish and to maintain an independent body to combat corruption and organised crime. Moreover, in the view of the majority, the Hawks lacked the ‘necessary independence’³⁹ to discharge that obligation effectively and, accordingly, their substitution for the Scorpions was held to be unconstitutional.

The success of Mr Glenister’s appeal reflects an unusually influential role for unincorporated international law in the domestic legal space. The Court created a third way whereby international obligations could have overriding domestic legal effect through, *inter alia*, the interpretive injunction in section 39(1)(b) and its concomitant effect on section 7(2) of the Constitution, the latter of which concerns the positive obligations of the state. Ostensibly, the state was held to a constitutional standard, but the standard was, in reality, no different to than the international benchmark.

So we might say that, in *Scaw*, the executive was ‘freed up’, and, in *Glenister*, it was ‘beat up’. How to explain this difference in outcome? In *Scaw*, the relevant duty of the executive was the regulation of economic policy, and the relevant range of permissible state conduct was the discretion to impose or to eliminate anti-dumping duties at its reasonable discretion, were aligned. So the executive achieved a ‘win’. In *Glenister*, on the other hand, the state lost because its conduct was held to fall short of an internationally-informed constitutional standard. If we presume that the state would have preferred to avoid the time and the cost inevitably incurred in

³⁶ The Court relied upon its prior holding in *S v Makwanyane* 1995 3 SA 391 (CC) paras 34 - 35. It had concluded in *Makwanyane*, and now reaffirmed, that it was entitled to ‘consider both binding and *non-binding* instruments of international law’.

³⁷ n 2 above, para 178.

³⁸ As above.

³⁹ As above.

bringing its anti-corruption measures within the prescribed standard of independence. In other words, if we can presume that the state would have an interest in 'winning' in future, then we might speculate as to how it might best go about doing so. But to do so in an informed manner would first require a better understanding of the overall strategic framework within which the state operates. This framework is the subject of Part III below.

3 Putnam's two-level game theory

3.1 A metaphorical framework

As a matter of law, an examination of the effect of a judgment or a decision in the arena of international negotiations is not relevant to the adjudication of a dispute, even if the dispute has international implications. A judge may not, for example, shrink away from finding against a company incorporated in a sovereign state which is a potential trade partner with the state of that judge on the basis of an apprehension, however well-founded, that her adverse finding would be harmful to the prospects of the conclusion of a bilateral investment treaty with that state in future.

However, whilst courts should not be partial to government litigants in interpreting the law, the executive and the legislature remain the organs of state who, for the most part, make the law that the courts interpret. If effective law-making is a legitimate component of effective governance, then the non-adjudicative branches of government, namely the executive and the legislature, will obtain more efficient outcomes if they play the political game 'within the white lines'. For when a court overrules government action which has been taken in misapprehension of the law, the executive and legislature are sent back to the drawing board, and all of the time and the resources spent by both branches of government go to waste.

Given the courts' duty of qualified disinterest in regard to the practical effect of their judgments in the political arena, a purely legal analysis of this effect would be of limited utility. A more useful model would set out a theoretical framework by which the practical effect of these decisions, once made, may be measured.

Game theory is well-suited for this purpose. It involves 'the study of mathematical models of conflict and cooperation between intelligent rational decision-makers',⁴⁰ or, in other words, the study

⁴⁰ R Myerson *Game theory: Analysis of conflict* (1991) 1.

of hypothetical games. In any given game, the theory postulates a defined number of players, a number of moves that may be made by those players, payoffs that flow from certain outcomes which themselves are often influenced by the independent choices made by other players in the game.

There are *zero-sum games* and *non-zero-sum games*. Take the example of a game of chess, where one player pits her wits against another. Both players will be aim to win the game, and for one of the players to win, the other player will inevitably have to lose. (Let's bracket, for argument's sake, the possibility of a draw.) These conditions obtain even if a third party ('party C') provides prize money (say R100) is brought into the example. Neither advantage nor opportunity for cooperation exists that would improve the outcomes for both players, so the match is a *zero-sum game*. It is 'winner takes all'. (So even where draws are permitted in a championship (and each player is awarded a half-point), both players still aim to win the minimum number of games necessary to become the champion.) Suppose now, instead, that the chess players were playing for prize money of R100 to be given by party C and, in addition, party C acted as a bookie, taking bets on the result. Suppose that party C 'fixed' the game and bribed both chess-players to play to a stalemate, promising to pay them each R150 for the tied result. Both chess-players will have more to gain from playing to a draw (which would earn them R150 each, plus half of the prize money for a total of R200) than they could gain from winning (the winner would take home R100) or, obviously, from losing. In addition, party C will enjoy the benefit of taking bets on odds that are favourable to what he knows to be a predetermined result, thereby maximising his own profits. The game has now become a *non-zero-sum game* because if the chess-players to cooperate with party C, then they will achieve an outcome that is better for all of them in the aggregate. In short, and because the game is non-zero-sum, they can achieve more together than they would alone.

Two-level game theory,⁴¹ which is derived from game theory, is a political model for international conflict resolution. If we use the chess-player analogy above, then two-level game theory can be said to concern games that involve interactions and potential synergies between players across two game-boards, instead of one. The game-boards in the metaphor represent the national and international levels of political interplay. Given the contrasting dynamics between international negotiations and domestic politics, the type of game

⁴¹ See Putnam (n 3 above). For the purposes of this hypothetical it is assumed that negotiations involve only one issue, as opposed to being a multi-issue negotiation.

being played at each board will be different.⁴² As Putnam explains:⁴³

At the national level, domestic groups pursue their interests by pressuring the government to adopt favourable policies, and politicians seek power by constructing coalitions among those groups. At the international level, national governments seek to maximise their own ability to satisfy domestic pressures, while minimising the adverse consequences of foreign developments. Neither of the two games can be ignored by central decision-makers, so long as their countries remain interdependent, yet sovereign.

Consider the following hypothetical scenario as an example ('the original hypothetical').⁴⁴ When the Presidents of South Africa and Brazil (collectively, 'the Presidents') meet in order to negotiate an international agreement, they are both subject to the constraint that any agreement that they reach will have to be ratified by their respective constituents (for the sake of this example, we also assume that Brazil, like South Africa, follows a dualist approach to international law).⁴⁵ If we assume further that the Presidents themselves have no independent policy preferences other than to achieve a 'ratifiable' agreement (as that term is defined by Putnam),⁴⁶ then the Presidents' negotiations can be separated into two stages: (a) the bargaining between the Presidents which might lead to a tentative agreement at the international level ('Level 1');

⁴² Putnam (n 3 above) 435. Putnam phrases his argument in terms of two levels for the sake of 'simplicity of exposition' (449). He recognises that 'many institutional arrangements require several levels of ratification, thus multiplying the complexity of ... analysis'.

⁴³ Putnam (n 3 above) 434.

⁴⁴ This scenario is an adaptation of an example expounded in greater detail by Putnam himself, (n 3 above, 435). Only the names have been changed for the purposes of this paper.

⁴⁵ This hypothetical assumes, for the sake of simplicity, that the Presidents are the sole negotiators of any international agreement that might result.

⁴⁶ 'Ratification', for the purposes of Putnam's theory, may include a formal voting procedure at Level 2, such as an act of incorporation envisioned in section 231 of the Constitution. But it may also include any other decision-process at Level 2 that is required for the implementation of a Level 1 agreement, whether formally or informally. So, trade unions may 'ratify' an agreement if they cooperate as agreed at Level 1, and 'ratification' may be said to have failed where such cooperation is withheld. The process of ratification need not even be democratic on Putnam's theory, and it is used generically here. See Putnam (n 3 above) 436. There is one formal constraint on the ratification process: '... since the identical agreement must be ratified by both sides, a preliminary [Level 1] agreement cannot be amended at Level 2 without reopening the Level 1 negotiations. In other words, final ratification must be simply 'voted' up or down; any modification to the Level 1 agreement counts as a rejection.' (437). Putnam also discusses credibility-related strategic implications at Level 1 to what he calls 'voluntary' as against that produce a given product (say titanium, for example) 'involuntary defection' at Level 2 (438), especially where negotiators are engaged in a repeated game (ie, they will negotiate again in future). These implications are, however, beyond the scope of this note and are not discussed here.

and (b) the process of engagement and ratification at the domestic level ('Level 2').

3.2 'Win sets'

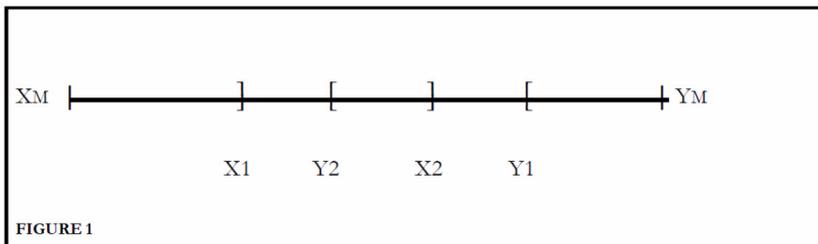
Where there is successful agreement at Level 1, that agreement can be called a '*win*'. The same will apply for successful ratification at Level 2. A '*win-set*' can thus be said to occur where there is a win at both Levels. If we imagine Level 1 and Level 2 as game-boards, we can surmise that the Presidents will both appear at each other's game-boards (at Level 1), and also that they will interact directly with their respective domestic constituents at Level 2. For this reason, when the Presidents negotiate, their decisions will be steered by their perception of the preferences of relevant domestic interest groups. Suppose, in the original hypothetical, that the President of South Africa wants to enter into a free trade agreement concerning titanium and aircraft manufacture with the President of Brazil. At the Level 1 game-board, such an agreement might be a rational move for the Presidents to make. Brazil will have an interest in the lowering of trade barriers, as its industries, which could form a powerful domestic interest group in themselves, will gain access to foreign markets and Brazil's economy might benefit through the consequent creation of jobs. Furthermore, this agreement could result in a political gain for the President of Brazil in an upcoming political campaign for re-election to office. The President of South Africa would expect reciprocal benefits of some sort – the lowering of barriers in agriculture, or perhaps skills-transfer programmes in aircraft design or manufacture. In order to reach agreement, however, the Presidents will need to make trade-offs as well. For South Africa, one trade-off might be the entry into the South African market of Brazilian companies with better economies of scale than some of South Africa's incumbent producers of the same product. The market presence of these Brazilian companies would constitute a commercial threat, as well as a threat to the employees of those incumbent producers. If these 'threatened' employees were unionised, and their respective trade unions comprised a powerful domestic interest group, collectively, then the President of South Africa would be faced with a far more complex choice. Indeed:

[t]he political complexities for the player in [a] two-level game are staggering. Any key player at the international table who is dissatisfied with the outcome may upset the game board, and conversely, any leader who fails to satisfy his fellow players at the domestic table risks being evicted from his seat.⁴⁷

⁴⁷ Putnam (n 3 above) 434.

So, in the original hypothetical, it would follow that the more powerful the trade unions (all other things being equal),⁴⁸ the more constrained the discretion of the President of South Africa will be on the international plane. Where the trade unions are powerful, the President will be averse to upsetting the trade unions for fear of the political consequences (we might refer to this outcome as the ‘result of the original hypothetical’). Conversely, if the agreement at Level 1 pertains to something else entirely, say, for example, the importing or the exporting of wine, and if the winemakers and their employees are *not* a powerful domestic interest group, then the number of available win-sets for the President of South Africa will be larger than it would have been in the original hypothetical. Larger win-sets at Level 2 therefore make Level 1 agreement more likely. A large range of Level-2 wins will augur very well for international cooperation.

In the same vein, it can also be said that the relative size of ratifiable Level 2 win-sets (or, alternatively, the President of Brazil’s *perception* thereof) will affect the *distribution* of the joint gains available from the international bargain.⁴⁹ As a corollary to the flexibility allowed by the absence of resistance at Level 2, the greater the number of win-sets for a given negotiator at game-board Level 1, the more easily that negotiator may be ‘pushed around’.⁵⁰ So while it is true that a large number of potential win-sets will make international cooperation more likely, it is equally true that if these win-sets are unevenly distributed – that is, if one negotiator holds more win-sets than the other – the negotiator with the greater number of win-sets in hand will have the weaker bargaining power. Putnam illustrates this in the following way:



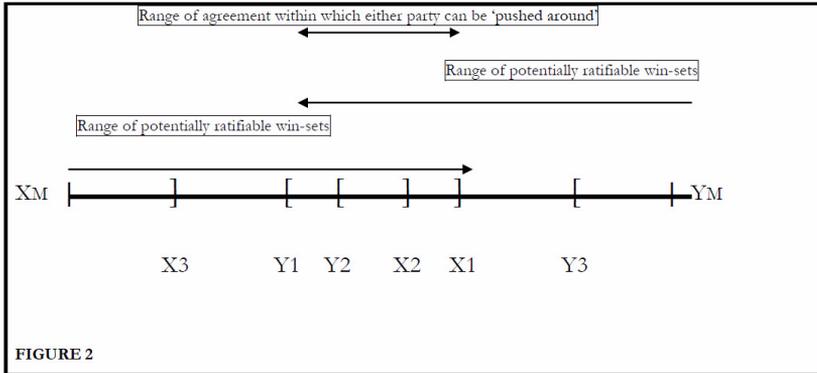
In a simple zero-sum game, and on the facts of the original hypothetical, let us imagine that X represents South African interests, and Y represents Brazilian interests. X_m and Y_m in Figure 1 will then represent the best outcomes for each set of interests, and X_1 and Y_1

⁴⁸ To prevent repetition, the phrase ‘all other things being equal’, or *ceteris paribus*, will not be repeated for each proposition that follows.

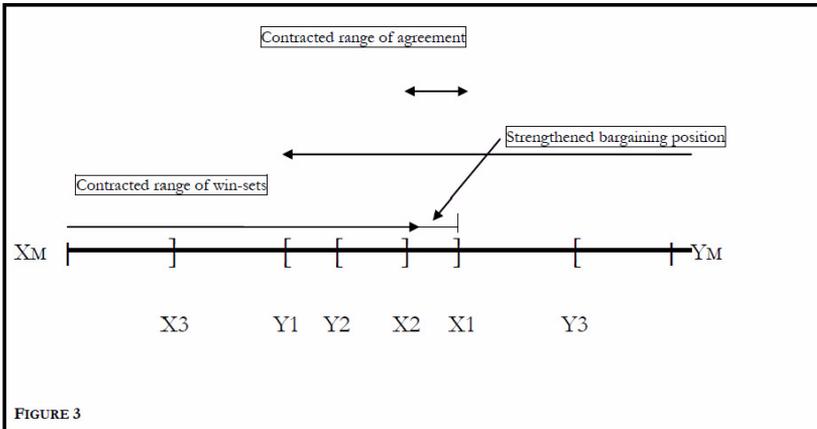
⁴⁹ This proposition assumes, for the purposes of this paper, that there is perfect information as between negotiators.

⁵⁰ Putnam (n 3 above) 440.

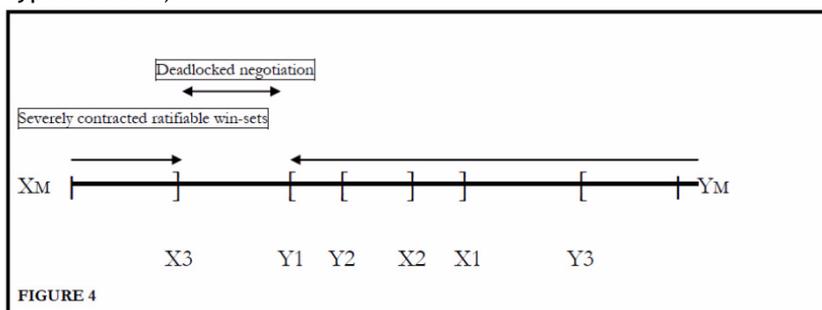
will represent the countries' respective bottom lines: the point beyond which any agreement will be un-ratifiable at Level 2. Accordingly, the distance between X_m and X_1 and Y_m and Y_1 will represent the spectrum of ratifiable win-sets available to each negotiator:



Recall the result of the original hypothetical, which was a vociferous and negative reaction from the trade unions of South Africa (country X) to the news of negotiations with the President of Brazil (country Y). As a result of this reaction, South Africa's overall inclination at Level 2 to enter into an agreement might feed through to Level 1 and cause the contraction of the range of ratifiable win-sets from X_1 to, say, X_2 . Accordingly, agreement upon the subject-matter represented by the space between the two points would no longer be feasible. And this contraction would simultaneously strengthen X's bargaining position:



Now suppose that instead of attempting to pass through an agreement pertaining to titanium and aircraft manufacture, as we did in the original hypothetical, the President of South Africa changed tack at Level 1 and negotiated terms that made trade-offs in an even more politically and economically volatile zone at Level 2 in South Africa, such as gold production. Because of the political strength in that area of the mining sector, the range of ratifiable win-sets for X might be even more severely contracted than it was in Figure 2. If the scope of agreement is reduced to, say, X3, then the negotiations are deadlocked, and no agreement is possible ('the second hypothetical'):



As depicted in Figure 4 above, the President of South Africa is therefore constrained from assenting at Level 1, because it would be impossible to ratify at Level 2. This outcome explains (or supports) Putnam's assertion that 'the stronger a state is in terms of autonomy from domestic pressures, the weaker its relative bargaining position internationally.'⁵¹

'Autonomy', in the sense used by Putnam, is a descriptive term which quantifies the executive's independence from the parochial interests of its domestic constituents. Often, if not in the majority of cases, the executive will not be particularly independent. But this is not, in principle, a bad thing. It only means that the political party whom the given President represents is not so firmly entrenched that his political mistakes will not have consequences at the ballot box. A state's 'bargaining position' and its 'autonomy' are thus interrelated. And, as we have seen, the more autonomy or independence a state enjoys from domestic pressures, the more easily it will be pushed around at Level 1. Accordingly, albeit somewhat perverse, although negotiators at Level 1 will have a strong interest in the popularity of their fellow negotiators, the more autonomous the President of South Africa is (in the sense that he is free of domestic pressure), the more likely Brazil is to reach an agreement on more favourable terms

⁵¹ Putnam (n 3 above) 449.

(because this lack of domestic pressure will weaken the President of South Africa's bargaining position).⁵²

Furthermore, and as if the decision-making terrain were not complex enough already, the entanglements between Level 1 and 2 may have bilateral feedback effects as well. Moves at the international game-board might trigger domestic realignments and *vice versa*. For the state, in some cases, this effect may be manipulated to achieve domestic gains which would be impossible had it been acting at Level 2 alone.⁵³ So if a state is clever, then it will exploit these synergies:⁵⁴

Economic interdependence multiplies the opportunities for altering domestic coalitions (and thus policy outcomes) by expanding the set of feasible alternatives in this way – in effect, creating political entanglements across national boundaries. Thus, we should expect synergistic linkage (which is, by definition, explicable only in terms of two-level analysis) to become more frequent as interdependence grows.

Glenister suggests that the increased frequency of synergistic linkage is not all that we should expect. In *Glenister*, the Court assumed a Level 2 role over and above its ordinary adjudicative function. It acted as the ratifying link through which an international agreement gained legal influence and effect in South Africa's domestic policy space. On a purist's dualist approach, this outcome does not reflect the natural order of things. This result strongly suggests that there is a further layer of complexity unaccounted for by two-level analysis. If we consider this anomaly against Putnam's theory, it would seem that the courts are emerging at a level of their own. This potential development is discussed in further detail below.⁵⁵

⁵² Putnam (n 3 above) 451.

⁵³ If, for example, the President of South Africa's initial negotiations had been on gold instead of titanium, and word of these first negotiations were leaked to the public, we would expect that, as shown above in Figure 4, there would be no possibility of international agreement. If the President of South Africa had then consequently changed tack and negotiated on titanium, the public might be more inclined to accept the agreement. If he then proceeded to sign an agreement on titanium, he will have achieved the benefits flowing from increased titanium exports at very little political cost.

⁵⁴ Putnam (n 3 above) 447, 448.

⁵⁵ One concerning recent example of the interdependence of economies is the series of events that have come to be known as the European sovereign debt crisis. The result of a complex combination of factors, including the globalisation of finance, high-risk lending and borrowing practices and the subsequent assumption of private debt burdens (such as bank bail-outs, for example), the crisis has grown to become, according to the Organization for Economic Development and Cooperation, a 'key risk to the world economy'. See L Alderman & S Castle 'Dire warnings are building on European debt crisis' by http://www.nytimes.com/2011/11/29/business/global/moodys-warns-of-escalating-dangers-from-europes-debt-crisis.html?_r=1&pagewanted=all (accessed 27 February 2012).

4 Three-level games

4.1 The courts as third-level players

So what is the *QED* for a third level? What would be required to show that the court *is* in fact participating, albeit as a shadow player, in the domestic-international arena? (Let's call this question the 'First Issue'.) And how might one reliably distinguish between a fully-fledged third level and something closer to a subtle influence on the dynamics at the first or second? (Let's call this question the 'Second Issue'.) For obvious reasons, Putnam was not explicit about what a third level would look like. But insofar as he delineates the essential characteristics of Levels 1 and 2, he proffers an implicit idea of what it is *not*. I propose that the courts possess at least three sufficiently distinguishable characteristics that demonstrate the existence of the First Issue and the Second Issue identified above.

The first two characteristics pertain to the First Issue. To begin, then, for a court to be deemed to sit at its own game-board, it must at least be capable of acting independently of the judgment, the wishes or the interests of the players at the other two game-boards. So the first essential characteristic is whether the courts can be called 'rational agents'. Put slightly differently, this question requires one to assess the extent to which a court is capable of acting independently and in a goal-directed manner. Expressed in yet another way, the issue is whether a court can, in law, come to a conclusion (regarding the effectiveness of an international agreement) based on its own idiosyncratic preferences (which preferences might be, amongst other things, that the cases that are brought to it are resolved, and also that they are resolved with a view to doing justice in accordance with the Constitution and the rule of law).

The second characteristic is that the imprimatur of a court must be a necessary condition for the effectiveness of an international agreement. The significance of this characteristic is that it shows that the courts play a meaningful role not only in adjudication, but also in the incorporative process, or the 'game', that is played between Level 1 and Level 2 in the transformation from tentative agreement into law. Because if a court is not required to take a view before a ratified tentative agreement becomes unequivocally effective, then the court is not important to the process of making that law unequivocally effective. In short, the courts will not be players if they cannot affect the result.

The third distinguishing characteristic, which pertains to the Second Issue, is as follows. On Putnam's account, Level 1 is the arena

for the international negotiation of a tentative agreement. Once agreement is successfully reached, the reason that it is tentative is because it will only be of real domestic force and effect once it is ratified, whether formally (through the promulgation and enactment of a law) or informally (via the absence of meaningful domestic pressure from powerful interest groups).⁵⁶ If an agreement at Level 1 is *not* subsequently ratified, then there are two possible consequences – the agreement must either be abandoned at Level 1, or negotiations must be re-opened at the same level. So Level 1 negotiates, and Level 2 confirms ‘up or down’ (by which it is meant that there is no subsequent amendment that is made at Level 2 – the function at that level is to ‘take [the agreement] or leave it’). For one to assert that the courts sit at a third game-board, they will have to do something different, or at least do something in a different way, than what occurs at Levels 1 and 2.

It might be salutary to raise a flag at this point to acknowledge, for the purposes of clarity, that the First and Second Issues are separate and distinct, in that they can be resolved independently of one another. To elucidate, if courts can be said to possess the first two characteristics listed above, then the First Issue will be resolved, while the Second Issue may be resolved, *inter alia*, by possession of the third characteristic. But courts need not possess either of the first two characteristics in order to resolve the Second Issue, and, similarly, the presence of the third characteristic is irrelevant to the resolution of the First Issue. The two Issues are accommodated together in this paper deliberately: both are relevant for the purposes of a three-level claim, and both arguments sit comfortably side by side. To explain further, if courts are rational agents and are legitimately involved in the process of bringing international agreements into effect, but simultaneously constrained to the same options as Level 2 players (that is, they have the power only to vote ‘up or down’ and are devoid of their ordinary power to determine the meaning and legitimacy of any single given provision of an international agreement), then the process will be indistinguishable from the process of ratification as defined by Putnam. The concern which is mitigated by the grouping of the two Issues is that the independent existence of the courts as players in the game-metaphor used here will have been established by the presence of the first two characteristics, however the work done by the courts, in the absence of the third characteristic, will be more appropriately ascribed to Level 2 activity, as opposed to activity on a level of its own.

⁵⁶ Putnam (n 3 above) 436.

If the reasoning above has merit, the conditions which must be satisfied by the courts to justify a three-level claim may be summarised as follows. The Court:

- (i) must be a rational agent;
- (ii) must play a necessary role in the effective implementation of any international agreement;⁵⁷ and
- (iii) must have an affect, in the overall game, which is sufficiently distinguishable from that of the others.⁵⁸

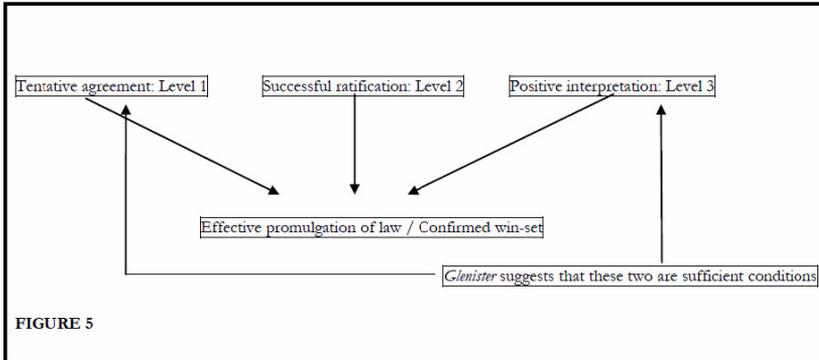
In regard to condition (i) above, compare the result in *Glenister* with the conclusion in *Scaw*. In the latter case, the Court's independence was less visible, as it was the state that had an interest in the enforcement of an international covenant which had subsequently been transformed into a domestic obligation. As set out above, the Court and the state were aligned in that case, and the state won. In the former case, however, the state argued, implicitly, *against* allowing an international covenant to have a bearing on the content of the state's municipal legal obligations, and it did so, *inter alia*, on the basis that the agreement had *not* been incorporated at Level 2. In *Glenister*, notwithstanding South Africa's dualist approach, the Court held against the state. This result constitutes a credible demonstration of the Court's independent discretion.

Condition (ii) is satisfied because, whilst courts might not negotiate or enact law, if a law resulting from an international agreement is held to be constitutionally invalid, then the effect of the international agreement disappears. In this sense, the court, 'rejects' the agreement, albeit after the fact. Now, on a narrow view, the courts are not players, because a ratified international agreement can be (and usually is) validly entered into without them. But on a broader view, which is the preferred or more desirable view, an agreement (or a given provision thereof) which is ratified is still tentative until it is confirmed by the courts. Moreover, it would seem that courts' assent, on the facts of *Glenister*, might be of even greater strategic value to the state than the more generalised ratification function at Level 2. For on a dualist approach, whilst ratification from Parliament is, indeed, a necessary condition for general domestic legal validity (in the sense that the given agreement may broadly be said to have been incorporated into South African law), the affirmation of the courts alone, on the basis of *Glenister*, at least, may be sufficient for effective application at Level 2 (via the confirmation or

⁵⁷ Satisfaction of the conditions (i) and (ii) resolves the First Issue, as explained above.

⁵⁸ Satisfaction of condition (iii) resolves the Second Issue, as explained above, and, together with affirmative resolution of the First Issue, the courts will be legitimate third-Level players.

interpretation of a single provision, or group of provisions, as the case may be). On the majority holding in *Glenister*, then, there may be some instances in which the courts may act both independently, on Level 3, and as a contemporaneous substitute for the ratification function at Level 2. Thus, on a dualist approach, and in the context of *Glenister*, the three-level game may be represented as follows in Figure 5:



The final condition, condition (iii), is the distinguishability of the courts' function from the functions ascribed to actors at the other two Levels. The courts satisfy this condition as well. They are different because they play a distinctly interpretive role when they give effect to the international agreements placed before them. What's more, they do not negotiate agreements, and they are not forced to 'take [an agreement] or leave it', as players at Level 2 must do. They are, rather, imbued with the power to give meaning to any single provision or, alternatively, to interpret the effect of the entire agreement, depending only upon the relevance of that interpretive exercise to the effective resolution of the case that is before the court at that time.⁵⁹

The three conditions set out earlier are accordingly fulfilled, and the First and Second Issues are thereby resolved. The satisfaction of these conditions indicates the unique influence of the courts at an independent level of game-play, and so it follows that courts *can* be

⁵⁹ Moreover, though not relevant to the question concerning the nature of the courts' function, the courts are actuated by motives that are wholly distinct from those that drive Levels 1 and 2, in that courts (unlike Parliament at Level 2) have no 'political indifference curve', because they do not have a range of interests against which to trade-off: an agreement is either legally compliant or it is not. And, unlike the executive at Level 1, their decisions are not subject to the Damoclean sword of ratification (or at least not in the same sense) – they are 'accountable only to the Constitution' and fulfill their duty 'without fear, favour or prejudice' (see section 165 of the Constitution and *De Lange v Smuts NO 1998 3 SA 785 (CC)* para 178).

said to be legitimate third-level players. Accordingly what remains is to examine some of the courts' potential Level-3 effects through an analysis of relevant and recent South African case law.

4.2 The three-level effect

Scaw was a win for the state because it held a win-set. It had tentative agreement to, and ratification of, the GATT and the WTO agreement, coupled with full domestic ratification in the form of the ITA Act. In that case, the Court held that the state's conduct fell within the proper purview of its authority in terms of the Constitution. So the state won at Level 3 because it had already won at Levels 1 and 2. If the effect of *Scaw* were an example of the only manner in which an international agreement could gain domestic effect, then we could say the following about the state:

- (a) if the state is inclined to conduct itself in a manner which is beneficial to its interests; and
- (b) if the state tends to benefit from entering into international agreements (based on its experience in *Scaw*);
then
- (c) the state will tend to be inclined to enter into international agreements.

If the state is indeed so inclined, then there will be a corresponding increase in the range of ratifiable win-sets, coupled with a decrease in the state's bargaining power on the international plane. Provided that there is no negative feedback from the electorate at Level 2, *Scaw* will be facilitative of international cooperation. We can represent this increased inclination in the following manner:

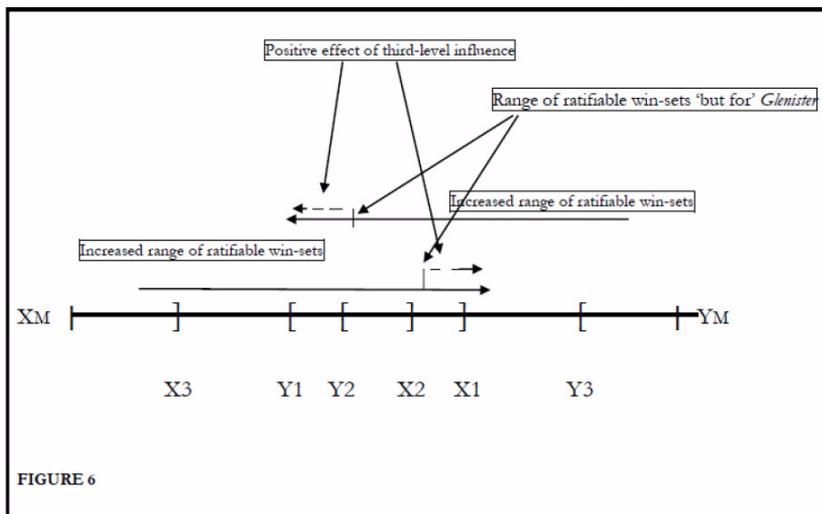
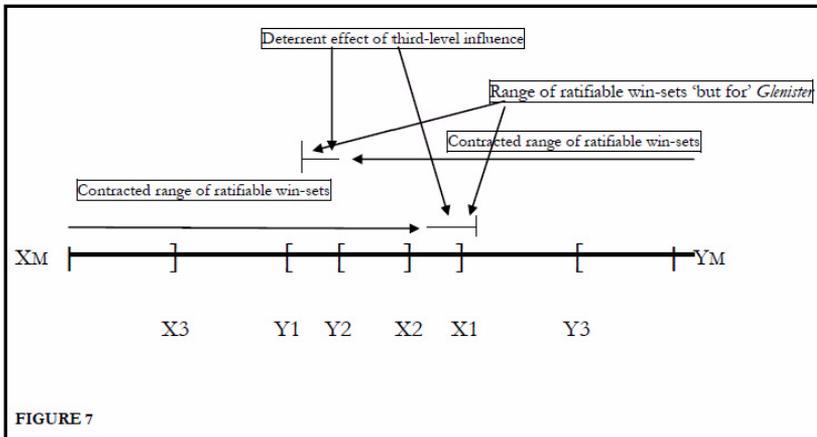


FIGURE 6

The counterexample is, of course, *Glenister*, where the state lost. Notwithstanding South Africa’s dualist approach, and the fact that there was no ratified agreement in place, the Court held that the state should have done more. Justifiable intentions were not sufficient – the state’s conduct still had to meet the appropriate constitutional standard, whose substantive content was informed by international law. This finding was, for the state, a costly mistake. If the effect of *Glenister* were taken as a legitimate signal of the courts’ stance on international agreements in future, as we did with *Scaw* above, then the state might *be less* inclined to enter into international agreements at Level 1. In other words:

- (a) if the state is inclined to conduct itself in a manner that is beneficial to its interests;
- and
- (b) if entering into international agreements tends to be an overall cost the state;
- then
- (c) the state will not be inclined to enter into international agreements.

And the narrower the range of win-sets that can be ratified at Level 2, the more intransigent the negotiators at Level 1 will be. With contracted negotiation-flexibility, they will be less likely to compromise and come to terms:



In the *Scaw* analysis captured above in Figure 6, after showing that there was a positive effect on the range of ratifiable win-sets at Level 1, we *presumed* that there was a similar effect at Level 2 and concluded, on that presumed basis, that there would be an overall positive effect on international cooperation. If we were to relax this presumption for *Glenister*, then the state’s task of optimising synergistic linkages at Levels 2 and 3 becomes even more complex.

So, instead of presuming that *Glenister's* effect at Level 2 is negative, as it is at Level 1, suppose that Level 2 reacts positively and welcomes the decision. There will be a contraction of political will at Level 1 (resulting from the state's failure to win), coupled with an enlargement of the range of ratifiable agreements at Level 2. The consequence is a conflict of interest at Level 1. The executive will have to elect either to avoid further international negotiations, or to give in to pressure from Level 2, with the former option having the advantage of averting further adverse interpretations at Level 3, and the latter having the advantage of a measure of political *quid pro quo* from the electorate at Level 2 in the medium to long term. Under these circumstances, decisions at Level 1 are more likely to be *ad hoc* short-term manoeuvres than principled decisions for maximal benefit in the long term. This conclusion is not meant as a cynical statement about politics and politicians, but merely recognises the fact that exigent circumstances produce exigent decisions.

4.3 The import of the decisions in *Glenister* and *Scaw*

International relations are a non-zero-sum game. Players at all levels have more to gain from exploiting synergies in a symbiotic manner than to operate in ignorance of them. But each player at each Level will be situated differently and will, accordingly, have different interests. As with almost any court decision, *Glenister* and *Scaw* would have effects that were good for some, and not so good for others. So, if one had to decide which decision were preferable, one could only answer that 'it depends'.

At least one thing that 'it depends' upon is the Level from which the question is answered. *Glenister* may have been a difficult decision for the state to swallow, but it may also have had a very positive effect at Level 2. *Scaw* might even have had a negative effect at Level 2, despite the positive effect that it had at Level 1. But if we leave the issue of perspective aside for a moment, and instead, assess the two by virtue of their utility for legal certainty, the answer is different. Legal certainty is a more important measure for present purposes, as it is an end in which all Levels have an overlapping interest. The executive, at Level 1, can be far more certain of what it is and is not allowed to do. The 'people' at Level 2, will, in turn, benefit from a more acute and corresponding awareness of the line beyond which the state will have overstepped its bounds. And the credibility of the courts at Level 3 will consequently be reinforced: the other players can take some comfort in courts 'doing what they're supposed to do'.

From the perspective of legal certainty, *Scaw*, with respect, outshines *Glenister*. The former case follows the dualist approach to

the letter: it interprets a national enactment of an international agreement in a manner which is consistent with the purport of both the international and the consequent domestic obligations arising from laws at each Level. For its part, the latter case also reaches an outcome which is consistent with international law, but it does so through a more complicated hermeneutic process. Notwithstanding South Africa's dualist tendency, the Court, in *Glenister*, held the state to an obligation at Level 2 which had not been ratified. Considering the fact that the decision in *Glenister* is, as a matter of law, unusual, it is submitted that it would be reasonable to assume that the result was an unexpected one for the state.

To illustrate the interpretive difficulty further, if one were to transpose the approach followed in *Glenister*, and to apply the reasoning of the majority to the facts of *Grootboom*, which was the Court's famous judgment concerning the state's positive obligations in regard to the right of access to adequate housing, then the outcome of the former case might very well have been different. In the original *Grootboom* (that is, *Grootboom* without *Glenister's* reasoning), the Court required the state to be take reasonable steps to 'meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing'.⁶⁰ This standard was less onerous than the 'minimum core' obligations found in international agreements ratified by the state.⁶¹ In *Grootboom*, the court held that the 'minimum core' international obligations were distinguishable from the constitutional desiderata and that adherence to the former standard was thus unnecessary. But if the Court had opted for a *Glenister*-styled approach, or, in other words, if 'minimum core' were a standard that the Constitution took up for itself and imposed upon the state, then, presumably, the state *would* have been required to provide Mrs. Grootboom and the others with immediate housing. The problem here is not that such a decision would have been a bad thing. The difficulty is that *Glenister*, despite its similar international-

⁶⁰ n 4 above, para 24.

⁶¹ Article 11(1) of the United Nations' International Covenant on Economic, Social and Cultural Rights (which entered into force on 3 January 1976) provides as follows:

The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and o the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realisation of this right, recognising to this effect the essential importance of international co-operation based on free consent.

This Article must be read with Article 2.1 (see *Grootboom* (n 5 above) para 27), which provides as follows:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

agreement subject matter, does not explain how to justify the difference in outcome. If the reasons for the outcome are not clearly understood by the state, then playing at Level 1 becomes more of an unknown quantity, and thus a less justifiable risk.

As set out above, however, this paper does not presume to take a normative position on whether the reasoning in any of *Scaw*, *Glenister* or *Grootboom* should be preferred for one reason or another. The upshot is, instead, that the effect of the incorporation of international law in *Scaw* and *Glenister* is noticeably different and that the conclusions in *Glenister* and *Grootboom* appear, with respect, to be mutually exclusive of one another, which the majority decision in *Glenister* does not comprehensively explain. The discussion set out above suggests that at least two important consequences attach to this analysis. The first consequence is that, as a legal matter, the principles concerning incorporation are somewhat less clear. The second is that, as a matter of strategy, the uncertainty created by *Glenister* (when viewed in the light of previous jurisprudence and particularly of South Africa's dualist approach) is likely to have the unfortunate effect of rendering consequent inter-level realignments more tentative and temporary.

So it would seem that *Glenister*, relative to the decision in *Scaw*, poses a challenge for future international interaction at two levels of government. The challenge for the state, in the short term, will be to formulate a strategic response at the international level that takes account of the current uncertainty and delivers the most efficient and effective result possible. The challenge for the courts, in the longer-term, will be to develop a clear and principled approach to international incorporation in this still-nascent constitutional area of overlapping state functions.

