

BETWEEN: THE GOVERNMENT OF THE REPUBLIC OF
VANUATU
First Applicant

AND: THE SPEAKER OF PARLIAMENT
Second Applicant

AND: THE PRESIDENT OF THE REPUBLIC OF
VANUATU
First Respondent

AND: THE REPUBLIC OF VANUATU
Second Respondent

Coram: Chief Justice V. Lunabek

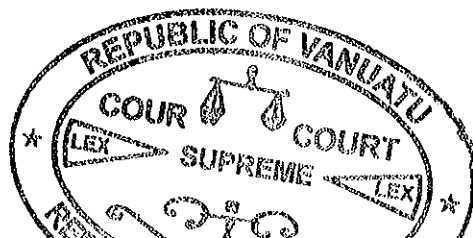
Counsel: Mrs Viran M. Trief, Solicitor General, for the First and Second Applicants
Mr Edward Nalyal for the First respondent
Mr John William Timakata for the Second Respondent

JUDGMENT

Before the Court is a Constitutional (Further Amended) Application filed by the Attorney-General on 23 March 2012 on behalf of the Government of the Republic (First Applicant) and the Speaker of Parliament (Second Applicant) challenging the failure or omission of the President of the Republic (First Respondent) to assent to the Bill for the Protocol on the Accession of Vanuatu (Ratification) Act No.19 of 2011 to the World Trade Organisation (W.T.O.) as constituting an infringement of Article 16(3) of the Constitution.

Brief background

Vanuatu applied for accession to the World Trade Organisation (W.T.O.) in June 1995. At its meeting on 11 July 1995, the General Council of the W.T.O. established a Working Party to examine the application of Vanuatu to accede to the World Trade Organisation under Article XII of the Marrakesh Agreement establishing the W.T.O. The Working Party met on 3 July 1996 and 29 October



2001. In addition, the Working Party held several informal sessions between the formal meetings to clarify positions and work on the Draft Report of the Working Party. Vanuatu, then, requested more time to consider its terms of accession and so there was no accession package forwarded to the relevant authority of the W.T.O. During 2008 and 2009, Vanuatu signalled an interest in resuming the process. The Working Party reconvened its meeting on the Accession of Vanuatu on 2 May 2011. After the successful completion of accession negotiations, on October 26, 2011 the General Council of the W.T.O. in Geneva, Switzerland agreed on the text of the protocol for Vanuatu's entry into the W.T.O. On December 1, 2011 Vanuatu Parliament passed the Bill for the Protocol on the Accession of Vanuatu (Ratification) Act No.19 of 2011. On 19 December 2011, the Clerk of Parliament caused four (4) copies of the Bill for the Protocol on the Accession of Vanuatu (Ratification) Act No.19 of 2011 to be presented to the President of the Republic of Vanuatu for assent. Since then, the President has not assented to the Bill for ratification of the Protocol on the Accession of Vanuatu to W.T.O. as required under Article 16(3) of the Constitution nor the President refers a Constitutional Referral for the opinion of the Supreme Court on such a Bill under Article 16(4) of the Constitution. As a consequence, the law-making process is left in a limbo. This is the rational for the present Constitutional Application of the Applicants before the Court.

The Application is brought before the Supreme Court under Article 53(1)(2) of the Constitution. The Application alleges that the President of the Republic of Vanuatu (First Respondent) fails or omits to assent to the Bill for the Protocol on the Accession of Vanuatu (Ratification) Act No.19 of 2011 within the 2 weeks of the Bill's presentation to him as required under Article 16(3) of the Constitution. The Applicants apply for the following Orders:

- A. That the failure or omission of the First Respondent to assent to the Bill for the Protocol on the Accession of Vanuatu (Ratification) Act No.19 of 2011 within 2 weeks of the Bill's presentation to him constitutes an infringement of Article 16(3) of the Constitution.
- B. That the First Respondent assent forthwith to the Bill for the Protocol on the Accession of Vanuatu (Ratification) Act No.19 of 2011 by signing the copies of the Bill.



The First Respondent filed a response to the Application and says:

1. He admits that on or about 1 December 2011, Parliament passed the Bill for the Protocol on the Accession of Vanuatu (Ratification) Act No.19 of 2011. He also admits that on or about 19 December 2011, the Clerk of Parliament caused four (4) Authenticated copies of the Bill for the Protocol on the Accession of Vanuatu (Ratification) Act No.19 of 2011 to be presented to the President for assent.
2. He further says, however, that:
 - (a) The Protocol on the Accession of Vanuatu (Ratification) Act No. of 2011 is a minute or presentation by Vanuatu to the WTO;
 - (b) The Bill is not a law as it does not have sections or subsections or that it is questionable whether Parliament has discharged his duty of making laws for the peace, order and good government of Vanuatu;
 - (c) The Bill refers to various requirements of General Agreement on Trade and Tariffs 1994 (GATT) and the Marrakesh Agreement without annexing either Agreement – making the Bill an incomplete document or Bill;

Below are the issues for Court determination:

1. Whether the Protocol on accession of Vanuatu to the World Trade Organisation (WTO) is a treaty or report?
2. Whether the Bill for the Protocol on accession of Vanuatu to the WTO is not a law as it does not have sections or subsections or an incomplete Bill?
3. Whether Parliament should consult before it enacts the Bill for the ratification of the W.T.O.?
4. Whether the failure or omission of the President of the Republic of Vanuatu to assent to the Bill for the Protocol on the Accession of Vanuatu (Ratification) Act No.19 of 2011 within 2 weeks of the Bill's presentation to him constitutes an infringement of Article 16(3) of the Constitution?

The relevant provisions of the Constitution are set out for ease of reference.

“CHAPTER 1 - THE STATE AND SOVEREIGNTY

1. REPUBLIC OF VANUATU

The Republic of Vanuatu is a sovereign democratic state.

2. CONSTITUTION SUPREME LAW

The Constitution is the supreme law of the Republic of Vanuatu.



4. **NATIONAL SOVEREIGN, THE ELECTORAL FRANCHISE AND POLITICAL PARTIES**
- (1) National sovereignty belongs to the people of Vanuatu which they exercise through their elected representatives.
 - (2) The franchise is universal, equal and secret. Subject to such conditions or restrictions as may be prescribed by Parliament, every citizen of Vanuatu who is at least 18 years of age shall be entitled to vote.
 - (3) Political parties may be formed freely and may contest elections. They shall respect the Constitution and the principles of democracy."

"CHAPTER 2 - FUNDAMENTAL RIGHTS AND DUTIES

PART I - Fundamental Rights

5. **FUNDAMENTAL RIGHTS AND FREEDOM OF THE INDIVIDUAL**

- (1) The Republic of Vanuatu recognizes, that, subject to any restrictions imposed by law on non-citizens, all persons are entitled to the following fundamental rights and freedoms of individual without discrimination on the grounds of race, place of origin, religious or traditional beliefs, political opinions, language or sex but subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health-"

PART II – Fundamental Duties

7. **FUNDAMENTAL DUTIES**

Every person has the following fundamental duties to himself and his descendants and to others-

- (a) to respect and to act in the spirit of the Constitution."

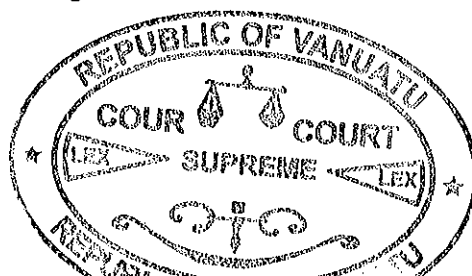
"8. FUNDAMENTAL DUTIES NON-JUSTICIABLE BUT PUBLIC AUTHORITIES TO ENCOURAGE COMPLIANCE

Except as provided by law, the fundamental duties are non-justiciable. Nevertheless it is the duty of all public authorities to encourage compliance with them so far as lies within their respective powers."

"CHAPTER 4 – PARLIAMENT

15. **PARLIAMENT**

The legislature shall consist of a single chamber which shall be known as Parliament.



16. POWERS TO MAKE LAWS

- (1) *Parliament may make laws for the peace, order and good government of Vanuatu.*
- (2) *Parliament shall make laws by passing bills introduced either by one or more members or by the Prime Minister or a Minister.*
- (3) *When a bill has been passed by Parliament it shall be presented to the President of the Republic who shall assent to it within 2 weeks.*
- (4) *If the President considers that the Bill is inconsistent with a provision of the Constitution he shall refer it to the Supreme Court for its opinion. The bill shall not be promulgated if the Supreme Court considers it inconsistent with a provision of the Constitution."*

"21. PROCEDURE OF PARLIAMENT

...

- (3) *Unless otherwise provided in the Constitution, Parliament shall make its decisions by public vote by a simple majority of the members voting."*

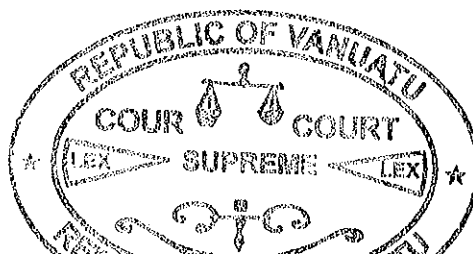
"26. RATIFICATION OF TREATIES

Treaties negotiated by the Government shall be presented to Parliament for ratification when they-

- (a) *concern international organisations, peace or trade;*
- (b) *commit the expenditure of public funds;*
- (c) *affect the status of people;*
- (d) *require amendment of the laws of the Republic of Vanuatu; or*
- (e) *provide for the transfer, exchange or annexing of territory."*

"28. LIFE OF PARLIAMENT

- (1) *Parliament, unless sooner dissolved under paragraph (2) or (3), shall continue for 4 years from the date of its election.*
- (2) *Parliament may at any time decide, by resolution supported by the votes of an absolute majority of the members at a special sitting when at least three-fourths of the members are present, to dissolve Parliament. At least 1 week's notice of such a motion shall be given to the Speaker before the debate and the vote on it.*



- (3) *The President of the Republic may, on the advice of the Council of Ministers, dissolve Parliament.*"

CHAPTER 6 – HEAD OF STATE

33. PRESIDENT OF THE REPUBLIC

The head of the Republic shall be known as the President and shall symbolise the unity of the nation."

"34. ELECTION OF THE PRESIDENT

The President of the Republic shall be elected, in accordance with Schedule 1, by secret ballot by an electoral college consisting of Parliament and the chairman of Local Government Councils."

"36. TERMS OF OFFICE

- (1) *The term of office of the President of the Republic shall be 5 years."*

"38. PRESIDENTIAL POWERS OF PARDON, COMMUTATION AND REDUCTION OF SENTENCES

The President of the Republic may pardon, commute or reduce a sentence imposed on a person convicted of an offence. Parliament may provide for a committee to advise the President in the exercise of this function."

"CHAPTER 7 - THE EXECUTIVE

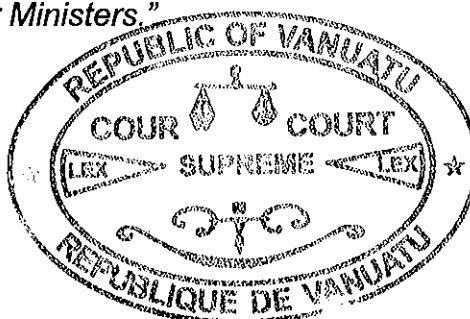
39. EXECUTIVE POWER

- (1) *The executive power of the people of the Republic of Vanuatu is vested in the Prime Minister and Council of Ministers and shall be exercised as provided by the Constitution or a law.*
- (2) *The Prime Minister shall keep the President of the Republic fully informed concerning the general conduct of the government of the Republic.*
- (3) *The President of the Republic may refer to the Supreme Court any regulation which he considers to be inconsistent with the Constitution."*

"40. COUNCIL OF MINISTERS

- (1) *There shall be a Council of Ministers which shall consist of the Prime Minister and other Ministers "*

"41. ELECTION OF PRIME MINISTER



The Prime Minister shall be elected by Parliament from among its members by secret ballot in accordance with the roles in Schedule 2.

"43. COLLECTIVE RESPONSIBILITY OF MINISTERS AND VOTES OF NO CONFIDENCE

(1) *The Council of Ministers shall be collectively responsible to Parliament.*

(2) *Parliament may pass a motion of no confidence in the Prime Minister. At least 1 week's notice of such a motion shall be given to the Speaker and the motion must be signed by one-sixth of the members of Parliament. If it is supported by an absolute majority of the members of Parliament, the Prime Minister and other Ministers shall cease to hold office forthwith but shall continue to exercise their functions until a new Prime Minister is elected."*

"46. MINISTERS TO REMAIN MEMBERS OF PARLIAMENT

Members of Parliament who are appointed Ministers shall retain their membership of Parliament.

"CHAPTER 8 - JUSTICE

47. THE JUDICIARY

(1) *The administration of justice is vested in the Judiciary, who are subject only to the Constitution and the law. The function of the judiciary is to resolve proceedings according to law. If there is no rule of law applicable to a matter before it, a court shall determine the matter according to substantial justice and whenever possible in conformity with custom."*

"49. THE SUPREME COURT

(1) *The Supreme Court has unlimited jurisdiction to hear and determine any civil or criminal proceedings, and such other jurisdiction and powers as may be conferred on it by the Constitution or by law."*

"50. APPEALS FROM THE SUPREME COURT TO COURT OF APPEAL

Parliament shall provide for appeals from original jurisdiction of the Supreme Court and may provide for appeals from such appellate jurisdiction as it may have to a Court of Appeal which shall be constituted by two or more judges of the Supreme Court sitting together."



"53. APPLICATION TO SUPREME COURT REGARDING INFRINGEMENTS OF CONSTITUTION

(1) Anyone who considers that a provision of the Constitution has been infringed in relation to him may, without prejudice to any other legal remedy available to him, apply to the Supreme Court for redress.

(2) The Supreme Court has jurisdiction to determine the matter and to make such order as it considers appropriate to enforce the provisions of the Constitution.

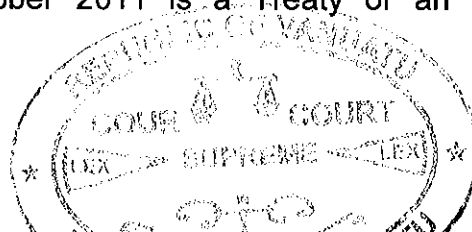
(3) When a question concerning the interpretation of the Constitution arises before a subordinate court, and the court considers that the question concerns a fundamental point of law, the court shall submit the question to the Supreme Court for its determination."

I now deal with each of the issues referred to above in turn. I start with the first issue.

1. Whether the Protocol on accession of Vanuatu to the World Trade Organisation (WTO) signed by WTO and Vanuatu on 26 October 2011 is a treaty or report?

The President in response to the Application says that the Protocol on the Accession of Vanuatu to the W.T.O. is a minute or a presentation by Vanuatu to the W.T.O. In his submissions on behalf of the President, Mr Nalyal submits that the said Protocol on the Accession of Vanuatu to W.T.O. is a report. Mr Nalyal refers to Article 26 of the Constitution and says that it deals with ratification of treaties. He says the Protocol is not a treaty and Parliament enacted a Bill containing a Protocol which he says is a report that the government of Vanuatu presented to the W.T.O. which set out access package of Vanuatu to W.T.O. Accordingly, he says that such a Protocol of the Accession of Vanuatu dated 26 October 2011 is not a treaty nor an international agreement signed by the Government of Vanuatu but a report.

The Solicitor-General, Mrs Viran Trief on behalf of the Government of the Republic of Vanuatu and the Speaker of Parliament of Vanuatu (the First and Second Applicants) and Mr J.W. Timakata for the Republic of Vanuatu (Second Respondent) submit both to the contrary, that the Protocol on the Accession of Vanuatu to W.T.O. dated 26 October 2011 is a Treaty or an International



Agreement negotiated by the Vanuatu Government with the W.T.O. which will bound Vanuatu in the terms negotiated by Vanuatu with W.T.O. once the law-making process is completed in accordance with the Constitution and the law.

There is no difficulty in accepting the submissions of the Solicitor-General and Mr Timakata that the Protocol on Accession of Vanuatu to W.T.O. dated 26 October 2011 is a treaty or an international agreement that will bound Vanuatu as a sovereign State and which Vanuatu consents to be bound by its terms as negotiated by Vanuatu Government and the W.T.O. The terms and conditions are culminated in the Protocol of the Accession of Vanuatu to W.T.O. dated 26 October 2011.

“Accession” means the international Act, so named, whereby a state establishes on the international plane its consent to be bound by a treaty. Accession occurs when a state which did not sign a treaty, already signed by other states, formally accepts its provisions. Treaties are a principal source of obligations in international law. The term “treaty” is used generally to cover the binding agreements between subjects of international law that are governed by international law.

In addition to the term ‘treaty’, a number of other appellations are used to apply to international agreements. Hence a Protocol of Accession to the W.T.O. is such an international agreement. It is a binding document as a treaty once an acceding country ratifies it. The power to accept the treaty is significant in determining whether a nation is bound by a treaty as a matter of international law. A treaty that is valid and binding under international law may nevertheless be invalid under the constitutional law of the participants.

With respect to Vanuatu’s accession to the W.T.O., the Protocol of Accession is finally made ready by the Working Party on October 26, 2011. The remaining final stage of the accession process is for the President of the Republic to assent to the Bill for the Protocol on the Accession of Vanuatu (Ratification) Act No.19 of 2011 so that the law-making process is complete.

It is the responsibility of the Government of the Republic of Vanuatu to negotiate and secure international treaties or international agreements on behalf of



Vanuatu. If such treaties or international agreements concern matters covered under Article 26 of the Constitution, they have to be ratified by Parliament.

The Bill for the Protocol on the Accession of Vanuatu (Ratification) Act No.19 of 2011 is for the ratification of the treaty called the "Protocol on the Accession of Vanuatu". This treaty sets out the terms and conditions agreed to by the World Trade Organization ("WTO") and Vanuatu for Vanuatu's accession to the Marrakesh Agreement Establishing the World Trade Organization the "WTO Agreement").

The Protocol on the Accession of Vanuatu to the W.T.O. was attached to the Bill for the Protocol on the Accession of Vanuatu (Ratification) Act No.19 of 2011 and presented to the President for his assent which is Attachment "IJK1" of the sworn statement of H.E. Iolu Johnson Abbil filed the 16th May 2012.

The terms of the Preamble to the Protocol and its paragraphs 1 and 8 provide:

"Preamble

The World Trade Organization (hereinafter referred to as the "WTO"), pursuant to the approval of the General Council of the WTO accorded under Article XII of the Marrakesh Agreement Establishing the World Trade Organization (hereinafter referred to as the "WTO Agreement"), and Vanuatu,

Taking note of the Report of the Working Party on the Accession of Vanuatu to the WTO Agreement reproduced in document WT/ACC/VUT/17, dated 11 May 2011 (hereinafter referred to as the "Working Party Report"),

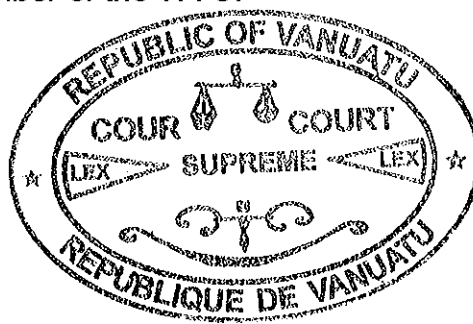
Having regard to the results of the negotiations on the accession of Vanuatu to the WTO Agreement,

Agree as follows:

PART 1 – GENERAL

- 1. Upon entry into force of this Protocol pursuant to paragraph 8, Vanuatu accedes to the WTO Agreement pursuant to Article XII of that Agreement and thereby becomes a Member of the WTO.***

...



8. ***This Protocol shall enter into force on the thirtieth day following the day upon which it shall have been accepted by Vanuatu.*** [Emphasis added]

This Protocol was negotiated by the Government and concerns Vanuatu's accession to the World Trade Organization ("WTO") therefore it must be ratified by Parliament pursuant to Article 26 of the Constitution.

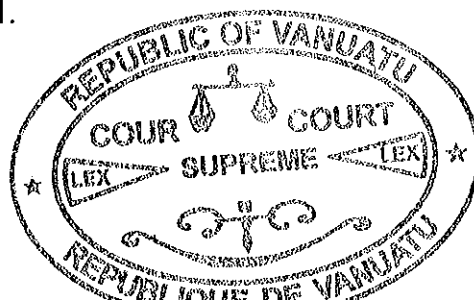
The first sentence of the Preamble states that the WTO is acting pursuant to the approval of its General Council under Article XII of the WTO Agreement. That approval of the General Council of the WTO was made by its decision on 26 October 2011 in relation to the Accession of Vanuatu. (*Attachment "AGS8", affirmed statement of Angelyne Glenda Saul*).

Article XII of the WTO Agreement provides:

"Article XII
Accession

1. *Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreement annexed thereto.*
2. *Decisions on accession shall be taken by the Ministerial Conference. The Ministerial Conference shall approve the agreement on the terms of accession by a two-thirds majority of the Members of the WTO.*
3. *Accession to a Plurilateral Trade Agreement shall be governed by the provisions of that Agreement."*

Under Article XII(1), any State may accede to the WTO Agreement on terms to be agreed between it and the WTO. Those terms agreed to by Vanuatu and the WTO are set out in the Protocol on the Accession of Vanuatu that is annexed to the General Council's Decision and was subsequently the treaty or international agreement subject to ratification of the Bill for the Protocol on the Accession of Vanuatu (Ratification) Act No.19 of 2011.



Article XII(2) provides that the Ministerial Conference of the WTO shall approve the agreement on the terms of accession by a two-thirds majority of the Members of the WTO. In the intervals between meetings of the Ministerial Conference, its functions shall be conducted by the General Council, as provided in Article IV(2) of the WTO Agreement:

“Article IV

Structure of the WTO

- 1. There shall be a Ministerial Conference composed of representatives of all Members, which shall meet at least once every two years. The Ministerial Conference shall carry out the functions of the WTO and take actions necessary to this effect. The Ministerial Conference shall have the authority to take decisions on all matters under any of the Multilateral Trade Agreements, if so requested by a Member, in accordance with the specific requirements for decision-making in this Agreement and in the relevant Multilateral Trade Agreement.*
- 2. There shall be a General Council composed of representatives of all the Members, which shall meet as appropriate. In the intervals between meetings of the Ministerial Conference, its functions shall be conducted by the General Council. The General Council shall also carry out the functions assigned to it by this Agreement. The General Council shall establish its rules of procedures and approve the rules of procedure for the Committees provided for in paragraph 7.”*

The General Council of the WTO having approved the Protocol on the Accession of Vanuatu, it remains only for Vanuatu to accept it through ratification which it is required to do pursuant to Article 26 of the Constitution.

Once ratified, pursuant to para 8 of the Protocol, it shall enter into force on the 30th day following its acceptance (being ratification) by Vanuatu. I now consider the second issue.

2. Whether the Bill for ratification of the Protocol on the Accession of Vanuatu to W.T.O. is not a (proposed) law or is an incomplete Bill (proposed law).

The President of the Republic of Vanuatu says that the Bill for the Protocol on the Accession of Vanuatu (Ratification) Act No.19 of 2011 is not a law as it does not



have sections or subsections. Mr Nalyal submits to the same effect on behalf of the President.

The Solicitor-General submits to the contrary that the First Respondent's assertion that the Bill for the Protocol on the Accession of Vanuatu (Ratification) Act No.19 of 2011 is not a law as it does not have sections or subsections has no basis in law. The Solicitor-General is right and the Court accepts her submissions on this issue for the following reasons:

The Acts of Parliament [CAP.116] is the legislation that provides for the form and commencement of Acts of Parliament as stated in its long title:

'To provide for the form and commencement of Acts of Parliament for the procedure following the passing of Bills and for other purposes therewith.'

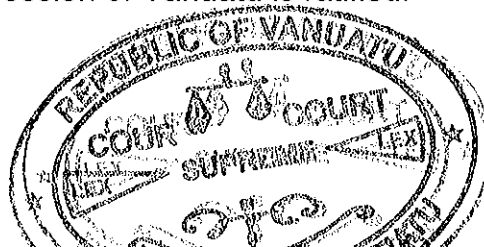
Sections 1-3 of the Acts of Parliament Act provide:

- "1. This Act shall apply with respect to the form of Acts of Parliament and the forms of Bills shall correspond therewith.'
- 2.(1) Every Act shall bear at its head a short title which shall include its number and the year in which it is enacted.
 - (2) The short title shall be followed by a long title describing the main provisions of the Act.
 - (3) Every Act may be cited by its short title and number without a statement to that effect in that Act.
- 3.(1) The provisions of every Act shall be prefaced by the words of enactment set out in Schedule 1.
 - (2) The words of enactment shall extend to all sections of the Act and to any Schedules and other provisions contained therein.

It is clear from the above sections of the Acts of Parliament Act [CAP.116] that section 1 provides that the Acts of Parliament Act shall apply with respect to the form of Acts of Parliament and the form of Bill shall correspond therewith. Section 2 provides for the title of an Act and Section 3 for the words of enactment.

In the present case, the Bill for the Protocol on the Accession of Vanuatu (Ratification) Act No.19 of 2011 does have 2 sections, being ss.1 and 2:

1. The Protocol on the Accession of Vanuatu is ratified.



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A copy of the Protocol is attached.

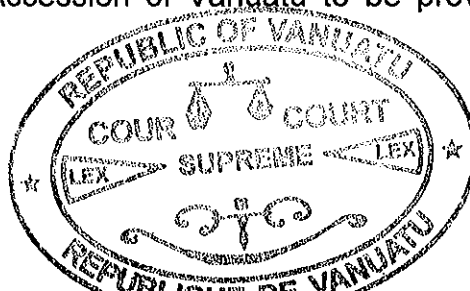
2. This Act commences on the day on which it is published in the Gazette.

The form of the Bill is in accordance with the standard form for each ratification Act in that it contains two sections. Section 1 of the Act states which treaty of protocol is ratified and that a copy of the treaty is attached. Further, the form and wording of the Bill for the Protocol on the Accession of Vanuatu (Ratification) Act No.19 of 2011 is the same as for other Acts for the ratification of treaties or protocols that Parliament has passed previously as mentioned at paragraphs 5-8 and attachments "AGS1" - "AGS6" of the Affirmed Statement of Angelyne Glenda Saul, Parliamentary Counsel, filed 18 May 2012.

It is also argued on behalf of the President that the Bill for the Protocol on the Accession of Vanuatu (Ratification) Act No.19 of 2011 not only does not have sections or subsections but also that the General Agreements on Trade and Tariffs (GATT) 1994 and the Agreement Establishing the World Trade Organization ("WTO Agreement") referred to in the Protocol on the Accession of Vanuatu are not attached to the Bill for the Protocol on the Accession of Vanuatu (Ratification) Act No.19 of 2011 which was presented to the President for assent on 19 December 2011 making the Bill for the Ratification of the Protocol an incomplete Bill which is inconsistent with Article 26 of the Constitution.

This submission cannot be sustained for the reasons set out below. As it is said earlier, the Bill for the Protocol on the Accession of Vanuatu (Ratification) Act No.19 of 2011 is for the ratification of the treaty or international agreement called the "Protocol on the Accession of Vanuatu" which sets out the terms agreed to by the World Trade Organization (WTO) and Vanuatu for Vanuatu's accession to the Marrakesh Agreement Establishing the World Trade Organization (the WTO Agreement).

At the conferences and submissions hearings the Court enquired as to whether there was a request by the President of the Republic of the need for advice from the Attorney-General on the Bill in question or a request by the President for the GATT 1994 and the Agreement Establishing the World Trade Organization referred to in the Protocol on the Accession of Vanuatu to be provided to the



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President as Mr Nalyal informed the Court that the President of the Republic was absent from his office(for Medical Reasons) at the relevant period.

Mr Nalyal informed and confirmed to the Court that there was not a request from the President of the need for advice or the provision of the Annexed Documents referred to in the Protocol on the Accession of Vanuatu to be given to the President. Before the Court heard submissions of counsel, the Court peruse the Affirmed Statement of Angelyne G. Saul, the Parliamentary Counsel in which a copy of the W.T.O. Agreements was attached and the Court directed Mr Edward Nalyal to advise the President as to his position. Mr Nalyal informed the Court that the President wants the Court to deal with the Constitutional Application which is now before it.

In the present case, it is not necessary that the General Agreement on Trade and Tariffs 1994 (GATT) or the WTO Agreement or any other treaty referred to in the Protocol be annexed to the Bill for the Protocol on the Accession of Vanuatu (Ratification) Act No.19 of 2011 as it is not any of those treaties or International Agreements that are being ratified by the Parliament of the Republic of Vanuatu but necessarily only the Protocol on the Accession of Vanuatu.

The role of the President in such a circumstance is to check the constitutional validity of the process of the ratification bill for the Protocol on the Accession of Vanuatu by Parliament and to refer any question on the process of ratification Bill that he considers inconsistent with a provision of the Constitution for the opinion of the Supreme Court. In the present case, the fact is that the President does not assent to the said Bill nor does he refer a case in accordance with Article 16(3) and (4) of the Constitution to the Supreme Court.

For completeness, the circumstance of this case and the responses from the President (First Respondent) to the present Constitutional Application pose the question of whether the provisions of the Protocol on the Accession of Vanuatu to W.T.O. and the W.T.O. Agreement have direct application and are invocable before the courts of Vanuatu.

There is not any provision in the laws of Vanuatu about the invocability of the provisions of a treaty or an international agreement in the Vanuatu laws. The



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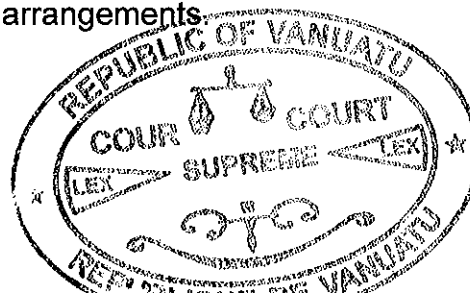
W.T.O. Agreements do not expressly state that the provisions of the W.T.O. Agreements shall have statute like effect and be invocable before the Courts of Vanuatu as a Member State. Although W.T.O. Agreements are created by Sovereign Member States (including Vanuatu) they do not have the nature of supranational law like European Union law. There is a major distinction between treaty and statutory law. A treaty is a contract between states whereas a statute is enacted by a state legislature. Moreover, generally a statute shall be effective indefinitely until it is modified or repealed. The major distinction between a treaty and statute is that statutes intend to regulate society while treaties affect primarily international relationships.

In her Book, *The Treaty as an instrument of legislation* 3-5 (1952), Florence Ellin Wood Allen, summarises the position in this way:

"The essence of the legislative authority is to enact laws, in other words, to prescribe rules for the regulation of the society. The objects of treaties are contracts with foreign nations, which have the force of law, derived from the obligations of good faith. They are not rules prescribed by the sovereign to the subject but the agreement between Sovereign."

It follows then that a treaty or an international agreement cannot automatically give direct effect (statute-like) to the law of its parties. However, the parties of the treaty have responsibility to fulfil its obligations. A party to a treaty (such as Vanuatu) may fulfil its obligation in many ways. One such way is the 'act of transformation' of treaty provisions into domestic law. In this case, treaty provisions are incorporated into domestic law through amendments or enactment of law by a law-making body of the party State and are invocable before domestic court as domestic law. Are the W.T.O. Agreements directly applicable and invocable before the Courts of Vanuatu? The answer to this question is in the negative.

The context, object and purpose of the W.T.O. Agreements do not give the meaning of direct application in national law and invocability before the national court of a State Member, because they do not create absolute binding obligations but that they are founded on the principle of negotiations with a view to entering into reciprocal and mutually advantageous arrangements.



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The European Court of Justice, In the Portuguese Republic case, has stated that:

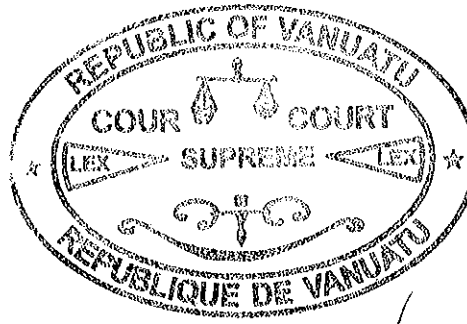
"...The agreement establishing the WTO, including the annexes, is still founded, like GATT, on the principle of negotiations with a view to entering into reciprocal and mutually advantageous arrangements... some of the contracting parties have concluded from the subject-matter and purpose of the WTO Agreements that they are not among the rules applicable by their judicial organs when reviewing the legality of their rules of domestic law... having regard to their nature and structure, the WTO Agreements are not in principle among the rules in the light of which the court is to review the legality of measures adopted by the community institutions" (see Portuguese Republic v. Council, Case C- [1998] ECR 1-7379, paras. 36-48).

On the basis of the above persuasive authority, it is right for Vanuatu as a sovereign State to hold that the terms of the W.T.O. Agreements as agreed to between the W.T.O. and Vanuatu do not have direct application as national laws of Vanuatu and accordingly they are not invocable before the Courts of Vanuatu. This means that no person, company or any foreigner can invoke any provision of the W.T.O. Agreements before the Courts of Vanuatu.

However, in the future, if Parliament of Vanuatu passes an implementing law that provides for the invocability of W.T.O. Agreements before the Courts of Vanuatu, the W.T.O. Agreements may be invoked before the Courts of Vanuatu. That is not the current position. I now move on to consider issue 3.

3. Whether Parliament should consult before it enacted the Bill for the Protocol on the Accession of Vanuatu (Ratification) Act No.19 of 2011.

In his response to the Constitutional Application, the President notes that the Constitution at Article 16(1) provides power to Parliament to make laws for the peace, order and good government of Vanuatu, and the President questions whether Parliament has discharged his duty by passing the Bill. Also the President says he is concerned about the considerable lack of consultation, as expressed by the public before the Bill was passed by Parliament.



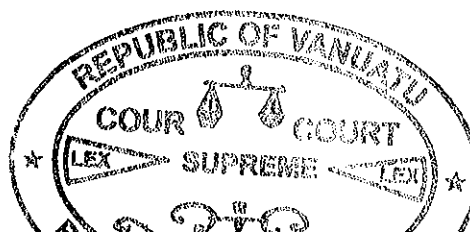
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The question that is posed in such a circumstance is whether or not the President can refuse to assent to a Bill. I note that this is one of the prerogatives of the British Sovereign. However, in the Republic of Vanuatu, the Constitution is the supreme law (Article 2 of the Constitution) and the powers of the President must be determined by a consideration of the Constitution itself.

I agree that the answer to the question is contained in the following passage for the Judgment of Sir Harry Gibbs in **Attorney General v. the President of the Republic of Vanuatu** [1994] VUSC2 (Civil Case No.124 of 1994) cited with approval by the Court of Appeal in **Sope Maautamate v. Speaker of Parliament** [2003] VUCA 5; Civil Appeal Case no.04 of 2003 (9 May 2003):

"It is impossible to contend that the President succeeded to the position of the British Sovereign, or that his powers are to be assumed to have the same characteristics as those of the British Sovereign, The New Hebrides was ruled as a Condominium and the Constitution of Vanuatu came into being as a result of the agreement and approval of a Constitutional Committee and of a subsequent agreement between the Governments of Great Britain and France. Article 95 (2) of the Constitution continues, until the Parliament otherwise provides, the British and French laws in force or applied in Vanuatu immediately before the day of Independence to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu. This provision does not mean that the position of the President of Vanuatu is governed by the Constitutional laws of either Britain or France, since the Constitutional position of the Heads of States of those two countries is very different one from the other. The nature of the powers and position of the President of Vanuatu can be determined only by a Consideration of the Constitution itself. No doctrine of immunity based on the position of the British Crown can be imported into the Constitution of Vanuatu. Further, the courts of Vanuatu are not the President's Courts; they are set up by the Constitution."

Article 33 of the Constitution provides that the Head of the Republic shall be known as the President and shall symbolise the unity of the nation. The President's role is essentially a symbolic one, and the extent to which he may exert influence or control over the Government is very limited. One of the personal



powers (apart from Article 38 of the Constitution) afforded to the President is that the assent of the President is required for any Bill before it can become a law. The President is required to grant that assent unless he considers the Bill to be unconstitutional in which case he must refer it to the Supreme Court for its opinion, as set out in Articles 16(3) and (4).

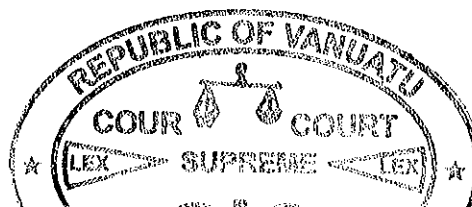
"16

- (3) *When a Bill has been passed by Parliament it shall be presented to the President of the Republic who shall assent to it within 2 weeks.*
- (4) *If the President considers that the Bill is inconsistent with a provision of the Constitution he shall not be promulgated if the Supreme Court considers it inconsistent with a provision of the Constitution."*

The President's power under Article 16(3) of the Constitution is conditioned by the time frame for the President to utilize that power. The Constitution clearly and unambiguously provides that the President has 2 weeks to assent to a Bill presented to him. The 2 weeks have passed since the Bill was presented for the President's assent on 19th December 2011. There was no constitutional referral before the Supreme Court within the 2 weeks or after the 2 weeks. It is of essence that the law-making process is carried out by the authorities entrusted by the Constitution and in the manner as set out under the Constitution. Vanuatu Constitution sets up a parliamentary democratic system of government on the basis of which a government is collectively responsible to Parliament and ultimately before the people of the Republic of Vanuatu, through the democratic process of franchise.

The Constitution also sets up a check and balance control in the law-making process through the President of the Republic. (Articles 16(3) (4), 28 (3) and 39 (3) of the Constitution.

It is to be noted that the corollary of the collective responsibility of the Government to Parliament is the power to dissolve Parliament by the President under Article 28(3) of the Constitution. However, under Vanuatu Constitution that power is subject to the advice of the Council of Ministers. This is another confirmation that the powers of the President of Vanuatu are not to be assumed to have the same



characteristics as those of the British Sovereign and no doctrine of immunity based on the position of the British Crown can be imported into the Constitution of Vanuatu as the powers of the President are as set up by the Constitution of Vanuatu.

Finally, under the Constitution, there is no duty or requirement for Parliament to consult before it enacts a bill, as it is held in *President v. Speaker* [2009] VUSC 25, Constitutional Case 01 of 2009 (19 May 2009) in this way:

“By perusing the language of Article 16(1) of the Constitution, I fail to see a requirement for Parliament to consult before it enacted a bill.

... This does not mean that by implication, in its discretion to make laws for the peace, order and good government of Vanuatu, Parliament must consult.”

Mr Nalyal in his submissions, concedes to this effect as submitted by the Solicitor General. I now consider issue 4.

4. Whether the failure or omission of the President of the Republic of Vanuatu to assent to the Bill for the Protocol on Accession of Vanuatu (Ratification) Act No.19 of 2011 within 2 weeks of the Bill's presentation to him constitutes an infringement of Article 16(3) of the Constitution.

Article 16(3) provides:

“When a bill has been passed by Parliament it shall be presented to the President of the Republic who shall assent to it within 2 weeks.”

The meaning of Article 16(3) is clear. There is no ambiguity with its meaning.

The President does not assent to the Bill for the Protocol on Accession of Vanuatu (Ratification) Act No.19 of 2011 within 2 weeks from the presentation of that Bill to him on 19 December 2011.

The President does not refer a constitutional question before the Supreme Court on the said Bill within the 2 weeks or after the 2 weeks of the Presentation of the said Bill before him for his assent. This unfortunate situation amounts to a failure or omission. That failure or omission constitutes an infringement of Article 16(3) of the Constitution.



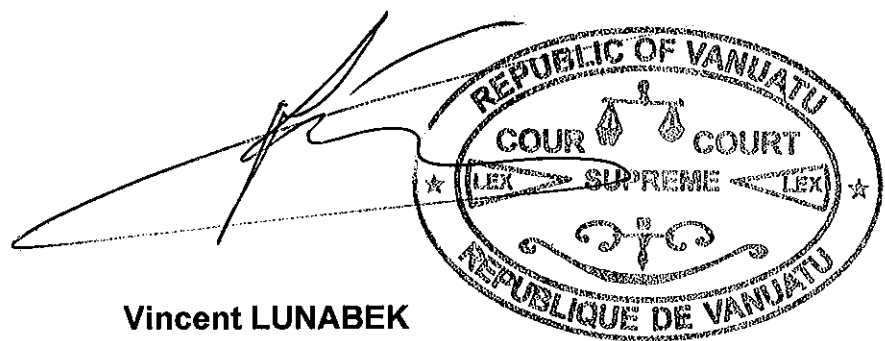
In such circumstances, the First and Second Applicants are entitled to the remedies they seek in the Constitutional Application in order to ensure that the law-making process is complete.

In conclusion, the Court makes the following Orders:

1. That the failure or omission of the First Respondent to assent to the Bill for the Protocol on Accession of Vanuatu (Ratification) Act No.19 of 2011 within 2 weeks of the Bill's presentation to him constitutes an infringement of Article 16(3) of the Constitution.
2. That the President (First Respondent) is invited to assent to the Bill for the Protocol on the Accession of Vanuatu (Ratification) Act No.19 of 2011 by signing the copies of the Bill.
3. There is no order as to costs.

DATED at Port-Vila this 8th day of June 2012

BY THE COURT



**Vincent LUNABEK
Chief Justice**