

IN THE CONSTITUTIONAL COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Constitutional Jurisdiction)



IN THE MATTER OF: ARTICLE 1, 2, 4(1), 5(1), 8, 9, 63(2), 90, 91(2), 92, 118, 128(1) AND (3) AND 267 OF THE CONSTITUTION OF ZAMBIA (1991 AS AMENDED IN 2016)

IN THE MATTER OF: THE RATIFICATION OF INTERNATIONAL AGREEMENTS ACT NO. 34 OF 2016

IN THE MATTER OF: THE ALLEGED FAILURE BY THE EXECUTIVE TO SUBMIT THE ZAMBIA-UNITED STATES OF AMERICA HEALTH AID MEMORANDUM OF UNDERSTANDING AND ASSOCIATED BILATERAL COMPACT AGREEMENT TO THE NATIONAL ASSEMBLY FOR SCRUTINY AND APPROVAL PURSUANT TO ARTICLE 63(2) OF THE CONSTITUTION

IN THE MATTER OF: THE ALLEGED VIOLATION OF THE CONSTITUTIONAL RIGHTS OF THE PEOPLE OF ZAMBIA TO TRANSPARENCY, PUBLIC PARTICIPATION, PRIVACY, SOVEREIGNTY OVER NATURAL RESOURCES AND THE RULE OF LAW IN THE NEGOTIATION CONCLUSION AND IMPLEMENTATION OF INTERNATIONAL AGREEMENTS

IN THE MATTER OF: THE FAILURE OF THE NATIONAL ASSEMBLY TO EXERCISE ITS CONSTITUTIONAL OVERSIGHT MANDATE IN RELATION TO THE SAID AGREEMENTS

LCK FREEDOM FOUNDATION LIMITED

1st PETITIONER

CHAPTER ONE FOUNDATION LIMITED

2nd PETITIONER

AND

THE ATTORNEY GENERAL

RESPONDENT

CORAM: Munalula PC, Shilimi DPC, Chisunka, Mulongoti, Mwandenga Kawimbe and Mulife JJC, on 10th June and 22nd July, 2026.

For the Petitioners: Ms. L.C Kasonde of LCK Chambers and Mr. J. Kalala of COF Chambers

For the Respondent: Mr. M. Muchende, SC - Solicitor General, assisted by Mr. C. Mulonda – Deputy Chief State Advocate, Mr. N. Mwiya –

Principal State Advocate, Mrs. N. Nkhazi – Principal State Advocate and Ms. A. Chisenda – State Advocate

JUDGMENT

Kawimbe JC, delivered the Judgment of the Court

Cases referred to:

1. Consumers Federation of Kenya (COFEK) v Cabinet Secretary, Ministry of Foreign Affairs and Others Case No. HCCHRPET/E809/2025
2. Webby Mulubisha v Attorney General 2018/CCZ/0013
3. George Muhali Imbuwa v Electoral Commission of Zambia 2021/CCZ/A001
4. Zambia Civil Liberties Union v Commissioner for Refugees, Chief Registrar of Department of National Registration, Passport and Civil Registration, Chief Passports and Citizenship Officer at the Citizenship of Zambia Board and Attorney General 2025/CCZ/003
5. Glenister v President of the Republic of South Africa and Others (CCT 41/08) [2008] ZACC 19
6. Benjamin Mwelwa v The Attorney General 2020/CCZ/007
7. The Attorney General and Others v David Ndii & 73 Others Petition No. 12 of 2021
8. Munir Zulu and Celestine Mukandila v The Attorney General 2025/CCZ/009.

Legislation referred to:

The Constitution of Zambia, Chapter 1 of the Laws of Zambia, as amended by Act No. 2 of 2016

Ratification of International Agreements Act No. 34 of 2016

Access to Information Act No. 24 of 2023

Other works referred to:

Vienna Convention on the Law of Treaties, adopted on 23rd May, 1969

Black's Law Dictionary by Bryan A. Garner, 11th Edition, Thomson Reuters, USA, 2019

An Introduction to Public International Law by Cecily Rose, Niels Blokker, Daniella Dam-de Jong, Simone van den Driest, Robert Heinsch, Erik Koppe, Nico Schrijver, Cambridge University Press Publishers, UK, 2022

The Law of Treaties: An Introduction to Principles of International Law by Robert Kolb, 2nd Edition, Edward Elga Publishing Limited, The Lypiatts, Cheltenham, UK, 2023

Theory of Obligations in International Law by Cezary Mik, Taylor & Francis Publishers, UK, 2024

INTRODUCTION

- [1] Two civil society organisations (CSOs), LCK Freedom Foundation Limited (the 1st petitioner) and Chapter One Foundation Limited (the 2nd petitioner) (together “the petitioners”) instituted this petition on 10th April, 2026 against the Attorney General (the respondent). The petitioners describe themselves as being dedicated to the advancement of constitutionalism, the rule of law, democratic governance, human rights, the promotion of constitutional rights, transparency and accountability, as well as access to information.

PETITIONERS' CASE

- [2] The petitioners' case is that on or about 17th November, 2025, it was announced that the Zambian and the United States of America (USA) Governments intended to enter into a Health Aid Memorandum of Understanding (“**the MoU**”) and the Associated Bilateral Compact

Agreement (“**the Compact**”) – collectively referred to as “**the agreements**”.

- [3] That on 11th December, 2025, the anticipated signing of the MoU was suspended following a visit by a U.S State Department official, Caleb Orr, who met with President Hakainde Hichilema and publicly indicated that economic cooperation, especially relating to critical minerals would be a prerequisite for the provision of health funding. The petitioners’ belief is that in essence the agreements purport to grant the USA Government access to Zambia’s rare earth and mineral resources as well as access to the personal health data of its citizens without their consent.
- [4] It is further stated that on 19th March, 2026, the USA Department of State issued a further policy statement articulating an “America First” transactional foreign policy approach toward Africa, including Zambia, which emphasises a more transactional framework for cooperation. Ultimately, that the linkage between health aid and mineral access became a significant concern for the petitioners, as it raises issues of transparency, accountability and the lawful conduct of international agreements affecting public health, national sovereignty and the rights and welfare of the people of Zambia.

[5] The petitioners' case is supported by an affidavit dated 10th April, 2026, deposed to by Linda Chishimba Kasonde and Josiah Kalala, the Executive Directors in the 1st petitioner and 2nd petitioner respectively. In further support of their case, the petitioners filed a reply and replying submissions dated 14th May, 2026. The petitioners allege therein, that public statements, press reports, and information available to them indicate that the agreements contain provisions of profound constitutional significance, including those that:

- a) grant or purport to grant access to Zambia's rare earth and mineral resources to the USA and/or its designated entities under the compact;
- b) grant or purport to grant access to the personal health data, biological specimens and medical records of Zambian citizens who access public health facilities, without their informed consent;
- c) impose conditionalities on health aid that appear to exploit Zambia's dependence on donor support rather than serve the health needs of ordinary Zambians; and
- d) have implications for national sovereignty, citizen privacy, and the long-term management of Zambia's natural resources.

- [6] That the petitioners concern calls for judicial intervention because the implementation of a comparable agreement in Kenya was suspended by the Court on the grounds of lack of legislative oversight and violation of constitutional rights. The Kenyan case in reference being **Consumers Federation of Kenya (COFEK) v Cabinet Secretary, Ministry of Foreign Affairs and Others Case No. HCCHRPET/E809/2025¹**.
- [7] The petitioners aver that in pursuing this matter, they, on 19th February, 2026, issued a joint public statement calling upon the Government of the Republic of Zambia (GRZ) to immediately publish the full text of the agreements, and to engage in meaningful consultation with CSOs and health professionals. They also called on the GRZ to ensure that any health aid agreements must respect the Constitution, protect the privacy and dignity of citizens, and prioritise the health and welfare of the people of Zambia.
- [8] That, in this regard, and pursuant to the Access to Information Act No. 24 of 2023, the petitioners formally wrote to the Ministries of Health and Foreign Affairs and International Cooperation requesting for copies of the MoU and the Compact. The statutory period of seven (7) days, prescribed by the Access to Information Act for seeking information, elapsed without either Ministry furnishing the same.

[9] It is further averred that even though the respondent held a stakeholders' meeting on 15th April, 2026 in relation to the MoU and associated sharing agreements, it did not include the Compact, which forms an integral part of their grievance. That left with no choice, the petitioners filed an appeal with the Human Rights Commission on 2nd March, 2026.

[10] The petitioners aver that even though the agreements have not been concluded, they have not been submitted to the National Assembly for scrutiny and approval as required by Article 63(2)(e) of the Constitution of Zambia, Chapter 1 of the Laws of Zambia as amended by Act No. 2 of 2016 (the Constitution). That this represents an unconstitutional breach by the Executive and failure by the National Assembly to exercise its oversight function on the Executive. The petitioners also allege that Article 63(2)(e) of the Constitution has been further breached in that bilateral agreements such as the ones under consideration are excluded from National Assembly scrutiny by the Ratification of International Agreements Act No. 34 of 2016.

[11] The petitioners list the following constitutional violations:

- (i) Violation of Article 63(2)(e) of the Constitution by the Executive failing to obtain National Assembly approval, which the petitioners describe as mandatory and non-

derogable before any international agreement negotiated by that branch becomes binding on the Republic;

- (ii) Violation of Article 1(2) of the Constitution on constitutional supremacy and the doctrine of legality, where the petitioners allege that the Executive has no constitutional authority to bind the Republic to international agreements without the approval of the National Assembly;
- (iii) Violation of Articles 5(1) and 4(1) of the Constitution on sovereignty of the people and democracy, where the petitioners allege that the Executive, as trustee of the people, cannot negotiate away their health data, natural resources, or sovereign rights without democratic sanction;
- (iv) Violation of Articles 8 and 9 of the Constitution on national values and principles to the extent that the law imposes binding obligations on the Executive in all governmental conduct, including the negotiation of international agreements;
- (v) Violation of Articles 90, 91(2), 91(3) and 92 of the Constitution by the Executive on its failure to account to the

Legislature on its intended commitment of the Republic to significant international obligations without National Assembly approval; and

- (vi) Violation of Article 267 of the Constitution on the duty to give effect to the Constitution which binds the Executive and the National Assembly to ensure that all provisions of the Constitution are given full effect, a duty that the petitioners allege that the Executive and Legislature have violated.

[12] The petitioners seek the following relief:

- (a) A declaration that Article 63(2) of the Constitution requires the approval of the National Assembly before any international agreement negotiated by the Executive becomes binding on the Republic of Zambia;
- (b) A declaration that by excluding bilateral agreements from National Assembly scrutiny, the Ratification of International Agreements Act No. 34 of 2016 is ultra vires Article 63(2) of the Constitution and is therefore unconstitutional, null and void;
- (c) A declaration that the MoU and the Bilateral Compact Agreement (collectively, the agreements) are international agreements for the purposes of Article 63(2) of the Constitution and that it would be unconstitutional, null and void to the extent that they were concluded and/or are being implemented without the approval of the National Assembly as required by Article 63(2) of the Constitution;

- (d) A declaration that the conclusion and implementation of the agreements without the approval of the National Assembly violates Articles 1, 2, 4(1), 5(1), 8, 9, 63(2), 90, 91(2), 91(3), 92, 118 and 267 of the Constitution;
- (e) A declaration that the failure of the National Assembly to demand and scrutinise the agreements and to require their submission for parliamentary approval constitutes a breach of the National Assembly's constitutional mandate under Article 63(2) and a violation of Article 267 of the Constitution;
- (f) An order suspending the signing of the agreements forthwith, pending their submission to and approval by the National Assembly;
- (g) An order of mandamus directing the Executive to lay the full and unredacted text of the MoU and the Bilateral Compact agreement before the National Assembly within fourteen (14) days of the date of this order, for scrutiny and approval in accordance with Article 63(2) of the Constitution;
- (h) An order of mandamus directing the Government to publish the full text of the agreements on the Gazette and on a publicly accessible platform within seven (7) days of the date of this order;
- (i) An order of mandamus directing the National Assembly to convene a dedicated session to scrutinise the agreements upon their submission by the Executive; and
- (j) Any further or alternative relief that this Court deems just and equitable in the circumstances.

- [13] In their submissions, the petitioners aver that the obligation under Article 63(2) of the Constitution is prospective in nature and the Executive is constitutionally required to submit the said agreements to the National Assembly before they are signed, because after signature, Article 63(2) is rendered nugatory.
- [14] The petitioners further submit that the official statement of the Minister of Foreign Affairs and International Cooperation, dated 4th May, 2026 constitutes formal admission by the Government on the existence of the agreements. That two distinct constitutional claims arise under Article 63(2) of the Constitution: firstly, that the Ratification of International Agreements Act No. 34 of 2016 is unconstitutional insofar as section 2 of that Act excludes bilateral agreements from the definition of “international agreement” and the requirement of parliamentary scrutiny and approval.
- [15] Secondly, that under Article 63(2)(e) of the Constitution, the respondent is constitutionally obligated to submit the MoU and the Compact to the National Assembly for scrutiny and approval before the agreements are signed and become binding on the Republic. The petitioners term this as a prospective constitutional obligation that is operative before the agreements are signed.

- [16] The petitioners further submit that the obligation imposed by Article 63(2) of the Constitution is non-derogable and the Executive is bound by it. In concluding, the petitioners pray that the relief sought be granted.

RESPONDENT'S CASE

- [17] The respondent filed an answer, affidavit in opposition and skeleton arguments dated 11th May, 2026, where it principally avers that there are no agreements which have been concluded between the Zambian and USA Governments. That what the petitioners refer to is a process of negotiations, which is not yet finalised, with no documents in existence in a form suitable for disclosure. For this assertion, the respondent relies on the doctrine of ripeness that even if there is a requirement to place bilateral agreements before the National Assembly for approval (which they are not), a matter would have to crystallise to demonstrate any impugned failure.

- [18] The respondent avers that in the circumstances the petitioners' action is pre-emptive and may undermine balanced ongoing diplomatic or bilateral engagements, which are mutually beneficial to the parties. That while international agreements are defined in the Constitution for the purpose of Article 63(2) thereof, the attacked agreements are

bilateral and outside constitutional scope. The consequence is that the Ratification of International Agreements Act is constitutional contrary to the petitioners allegations.

[19] The respondent further avers that the right to request for information is not absolute and disclosure of information has limitations. As such, that it can be refused where it would prejudice protected interests of the State and the interest of the nation as a whole.

[20] The affiant of the respondent's affidavit, Dr. Kenny Lishimpi, Permanent Secretary, Technical Services, Ministry of Health deposes that the Ministry held a stakeholder engagement meeting on 15th April, 2026 in Lusaka. That the Law Association of Zambia and other organisations including the 2nd petitioner attended the meeting whose purpose was to receive views on the proposed health aid agreement. That inspite of the ongoing negotiations, no agreement exists between the Governments of Zambia and USA. That as a result thereof, the petitioners action is improperly before Court.

[21] In the skeleton arguments, the respondent submits that the term "international agreement" is not defined in the Constitution, but in section 2 of the Ratification of International Agreements Act. That the definition of international agreement excludes a bilateral agreement

and therefore not covered by Article 63(2) of the Constitution. It is also argued that an MoU is not covered by Articles 92(2)(c) of the Constitution (in so far as it relates to the approval of the National Assembly to ratify or accede to international agreements and treaties), Articles 114(1)(d) and 63(2)(e) of the Constitution and by extension, the Ratification of International Agreements Act.

[22] That in consequence, Article 63(2)(e) of the Constitution has not been breached by the Ratification of International Agreements Act. Hence, there is no basis for the Court to declare the Act void according to the cases of **Webby Mulubisha v Attorney General**² and **George Muhali Imbuwa v Electoral Commission of Zambia**³ where the Court opined that before a provision in a statute is declared null and void for unconstitutionality, the impugned provision must be laid side by side with the provisions of the Constitution.

[23] The respondent cites the case of **Zambia Civil Liberties Union v Commissioner for Refugees, Chief Registrar of Department of National Registration, Passport and Civil Registration, Chief Passports and Citizenship Officer at the Citizenship of Zambia Board and Attorney General**⁴ to illustrate the principle of constitutional supremacy and where the Court reiterated that statutory

provisions or regulations cannot be used to expand, restrict, or contradict clear terms of the Constitution.

[24] The respondent argues that by the petitioners' failure to demonstrate a breach of Article 63(2) of the Constitution, the petition is prematurely before this Court. To fortify the argument the respondent calls in aid the South African case of **Glenister v President of the Republic of South Africa and Others**⁵ where the Constitutional Court in that country held that judicial intervention must be avoided on matters that have not crystallised into enforceable acts or rights, absent clear evidence of irreversible harm.

[25] The respondent also posits that this petition is speculative, baseless and unmeritorious citing the case of **Benjamin Mwelwa v The Attorney General**⁶ where the Court stated that:

We hold the firm view that it is not sufficient to allege a breach of a statutory or constitutional provision without setting out the facts in sufficient detail, which are the basis of the claim against the respondent and entitle the petitioner to the reliefs sought.

[26] It is finally submitted that in the absence of evidence showing breach of the Constitution by the respondent, the Court should dismiss the petition for being a mere academic exercise and amounting to a waste of judicial resources.

HEARING

[27] The matter came up for hearing on 10th June, 2026.

[28] The parties relied on the documents filed in support of their respective cases. Ms. Kasonde augmented the petitioners' case by reiterating that all bilateral and international agreements are subject to National Assembly approval under Article 63(2) of the Constitution. Further, that section 2 of the Ratification of International Agreements Act is *ultra vires* the Constitution, null and void because it omits bilateral agreements. She cites the cases of **Zambia Civil Liberties Union**⁴ and **Benjamin Mwelwa**⁶ to fortify her submission.

[29] Counsel dismissed the respondent's argument that the petition is premature, asserting that the constitutional violation raised in it is not contingent on any future determination. Instead, that, it results from the ongoing conduct of negotiations and imminent conclusion thereof by the Executive of agreements without recourse to the National Assembly, which will irreparably harm the people of Zambia.

[30] Mr. Kalala, also on behalf of the petitioners, further augmented that National Assembly approval under Article 63(2)(e) of the Constitution offers a pathway for public accountability. Hence, section 2 of the Ratification of Agreements Act on the definition of international agreement is unconstitutional.

[31] On behalf of the respondent, the Solicitor General, Mr. Muchende SC, argued that this petition is prematurely before Court as there is no agreement to be examined. He however, submitted that an opportunity has arisen for the Court to interpret Article 63(2)(e) of the Constitution and what amounts to an international agreement, ratification or accession.

[32] Relying on Article 2 of the **Vienna Convention on the Law of Treaties, (VCLT) adopted on 23rd May, 1969**, the Solicitor General submitted that the definition of “international agreements” excludes “bilateral agreements”. That if Article 63(2)(e) of the Constitution and the assailed section 2 are considered alongside Articles 14 and 15 of the VCLT (defining the terms ratification and accession, respectively) it would be found that bilateral agreements are not international agreements. Thereby, that, no violation of Article 63(2)(e) of the Constitution has been established.

[33] The Solicitor General further submitted that a bilateral agreement is complete by signature and not subject to ratification or accession. Consequently, that a broad brush of Article 63(2)(e) of the Constitution should not be taken to include bilateral agreements which fall outside the realm of international law. That if the Court attempts to do so, it will

be expanding the Constitution beyond what the framers intended when it has no legislative authority to do so.

- [34] The Solicitor General went on to argue that the Constitution does not provide for public participation. He distinguished Articles 8 and 9 of our Constitution from Article 10(2)(a) of the Constitution of Kenya, 2010, on national values and principles, by asserting that a combined reading of Article 5 and Article 91(2) of our Constitution on the functions conferred on the President by the Zambian people reveals that he has power under Article 92(2)(c) of the Constitution to negotiate international agreements subject to National Assembly approval. Consequently, that there is nowhere in Zambia's constitutional imperative which compels the Executive to consult the people on every transaction that it engages in as this would make its work inefficient.
- [35] As far as the Solicitor General is concerned, the Government means well for the people of Zambia and this is confirmed in the erstwhile Minister of Foreign Affairs' statement and the holding of the stakeholders meeting on the health aid MoU, which the 2nd petitioner participated in. The Solicitor General concluded by urging the Court to dismiss the petition.
- [36] In further supplementing the respondent's case, Mr. Mulonda argued that a combined reading of Articles 62(3)(e), 92(2)(c) and 114(1)(d) of

the Constitution shows that only agreements which are capable of being ratified or acceded to are subject to National Assembly approval. That bilateral agreements are expressly excluded because they do not fall in the category of international agreements.

- [37] Mr. Mwiya also on behalf of the respondent further argued that the petition is not ripe for determination and relied on the Kenyan case of **The Attorney General and Others v David Ndii and 73 Others**⁷. That, in that case, the doctrine of ripeness of constitutional issues espouses that anticipatory or hypothetical disputes are premature. In consequence, that a constitutional issue is only ripe for judicial determination when it involves a crystallised cause of action. That the petition herein falls far short of that standard.

- [38] In reply, Ms Kasonde argued that the **VCLT** cannot be relied on in interpreting the Constitution. That only an ordinary meaning is required and the Black's Law Dictionary offers the needed resource. She asserted that public participation is a standard in our constitutional discourse as recognised by the Court in the case of **Munir Zulu v Celestine Mukandila v The Attorney General**⁷. She concluded by urging the Court to grant the petitioners' prayer.

CONSIDERATION AND DETERMINATION

[39] The petition turns on two questions:

- a) **Whether the respondent is constitutionally obligated, as a prospective matter, to submit the MoU and Compact to the National Assembly for scrutiny and approval before those agreements are signed? and**
- b) **Whether the Ratification of International Agreements Act No. 34 of 2016 is ultra vires Article 63(2)(e) of the Constitution by excluding bilateral agreements from the requirement of National Assembly scrutiny and approval?**

[40] We shall consider each of these issues in turn.

[41] We begin by stating that Article 128 (1)(a) and (b) of the Constitution confer upon this Court original and final jurisdiction to adjudicate constitutional matters. This is in consonance with Article 1(5) of the Constitution, which provides that a matter relating to this Constitution shall be heard by this Court. In terms of our interpretative approach, Article 267(1) of the Constitution provides that interpretation must be done in accordance with the Bill of Rights and in a manner that promotes its purposes, values and principles, permits the development of the law and contributes to good governance.

[42] When resolving any constitutional contravention, we are invariably required to interpret and examine the Constitution holistically by taking

into account historical context, the prevailing circumstances and societal needs.

- [43] With respect to the first issue, the procedure by which the Executive exercises its power to negotiate and sign international agreements is provided in Article 92(2)(c) of the Constitution as follows:

92.(2) Without limiting the other provisions of this Constitution, the President shall -

(c) negotiate and sign international agreements and treaties and, subject to the approval of the National Assembly, ratify or accede to international agreements and treaties; ...

- [44] This means that Article 92(2)(c) of the Constitution bestows on the President power to negotiate and sign international agreements and treaties. This power, however, is cardinally subject to National Assembly approval before ratification or accession of such agreements /treaties.

- [45] The power vested in the Executive under Article 92(2)(c) of the Constitution, is predicated by Article 114(1)(d) of the Constitution, which arrogates to the Cabinet as one of its functions, the responsibility to “recommend the accession and ratification of international agreements and treaties to the National Assembly”.

[46] Once this duty is performed, Article 63(2)(e) of the Constitution mandates the National Assembly to perform its oversight function on the Executive as follows:

63.(2) The National Assembly shall oversee the performance of executive functions by -

(e) approving international agreements and treaties before these are acceded to or ratified.

[47] Having established the legal framework, it bears on us to examine whether the agreements allegedly entered into by the Executive, are indeed subject to National Assembly approval as alleged by the petitioners. From the Constitution, the terms “Memorandum of Understanding” (MoU) or “international agreement” are not defined. The terms “international agreement” and “bilateral agreement” are, however, defined in section 2 of the Ratification of International Agreements Act.

[48] Authoritative texts and international conventions which we approve of provide useful context on the definition of the subject terms and are discussed here below.

[49] The **Black’s Law Dictionary by Bryan A. Garner, 11th Edition, Thomson Reuters, USA, 2019** at page 1180 elucidates the term Memorandum of Understanding under letter of intent as:

A written statement detailing the preliminary understanding of parties who plan to enter into a contract or some other agreement, a non-committal writing preliminary to a contract. A letter of intent is not meant to be binding and does not hinder the parties from bargaining with a third party. Business people typically mean not to be bound by a letter of intent and courts ordinarily do not enforce one, but courts occasionally find that commitment has been made.

[50] Accordingly, it can be said that an MoU is preliminary to a contract or agreement between parties. It can lead to a binding relationship between them but is characterised as non-binding because it is not intended to create any contractual obligations on either party enforceable at law.

[51] As will be demonstrated in the succeeding paragraphs, the definition of 'international agreement' lends itself to broader discourse beginning with the **VCLT**, which the State of Zambia is party to. Article 2(a) thereof defines international agreement in the following terms:

"treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

[52] The learned authors of **An Introduction to Public International Law**, Cecily Rose, Niels Blokker, Daniella Dam-de Jong, Simone van den Driest, Robert Heinsch, Erik Koppe, and Nico Schrijver, Cambridge University Press Publishers, UK, 2022 provide context

on the definition in Article 2(a) of the **VCLT** when they state at page 17 that:

Treaty law is the main method for creating, modifying, and annulling public international law. Treaties are written agreements between states, between states and international organisations, or between international organisations, which are governed by public international law ... and there are many other equivalent terms for treaties, including convention, protocol, agreement, charter, joint communiqué and pact.

[53] The learned authors articulate at page 18 that:

Treaties are a source of public international law in both senses of the term, as they represent a process for creating and changing the law, as well as a place (a written document) where the law may be located.

[54] By this expansion, treaties represent a process for creating or changing law unlike other agreements which would conclude at signature and without having recourse to the rigorous process of law reform.

[55] It is also stated at page 18 that:

The process of treaty-making consists of a number of phases, the first being the negotiation and conclusion of a text that is formally adopted. Treaties are typically negotiated by delegations from states, but international organisations, non-governmental organisations, and individuals may also be involved in this phase. The second stage involves states expressing their consent to be bound by the treaty. When states express their consent to be bound, they usually seek some form of approval at the domestic level, often from the legislative

branch. Once treaties enter into force they are binding on the parties to them and must be performed by them in good faith, as captured by the maxim *pacta sunt servanda* ('agreements must be kept'). Treaties that have entered into force are not, however, binding on any third parties that have not consented to be bound. In the fourth stage, treaties become living instruments, which may be interpreted, amended or modified, and implemented by states at the domestic level through changes to domestic law, if this is necessary...Each of these stages is governed by public international law concerning treaties, which takes the form of both the VCLT and customary international law.

- [56] The stages identified by learned authors above, stand out in the conclusion of treaties or international agreements, which terms are used interchangeably. The stages begin with the negotiation of a treaty conducted by the Executive branch of a Government, through negotiations by their delegates at international conferences. That after a State expresses its consent to be bound by a treaty, it will seek approval at the domestic level, which is often from the Legislative branch of Government. The eventual intention of a state to be bound to an international agreement and the processes that follow are thereafter governed by public international law.
- [57] On the concepts of expression to be bound by a treaty, ratification and accession at international law, the **VCLT** provides as follows:

Article 11 - Means of expressing consent to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.

Article 12 - Consent to be bound by a treaty expressed by signature at the time that the treaty is concluded and is followed under Article 14 by ratification, acceptance or approval.

Article 15 - Consent to be bound by a treaty expressed by accession where a State which was not an original signatory to a treaty has given consent to be bound.

[58] The learned author of **The Law of Treaties: An Introduction to Principles of International Law, Robert Kolb, 2nd Edition, Edward Elga Publishing Limited, The Lypiatts, Cheltenham, UK, 2023,** provides more perspective on the concepts of ratification as elaborated in the **VCLT** at pages 50, 51 and 52 as follows:

Ratification is regulated in Articles 11ff VCLT1969. The term designates the consent to be bound, given by a signatory state. It consists in a letter written by the Executive branch (some member of the Foreign Ministry, with the authority of one of the 'Big Three', that is the Head of State, Head of Government, Minister of Foreign Affairs) to be the depository, in which it is set out that the State consents to be bound by the treaty. Only states that having signed the treaty may ratify it. Thus, signature remains necessary before ratification becomes possible. Ratification and signature can, however, be performed

through the same instrument...What are the reasons for a ratification procedure separate from signature? This reason lies in most cases in the democratic structure of a series of States. The treaty is negotiated by the executive branch and its ratification is again performed by the executive. If there were no consultation of parliament, the executive branch could undertake obligations of the greatest reach for a State such as the cession of some of its territory, without the democratically legitimised organ having had control or a say. For democratic States, it is therefore necessary to have a time for reflection and for consulting Parliament or people. This is the main reason why ratification is postponed. (emphasis added)

[59] At pages 53, 54 and 55, the learned author states on accession as contemplated in the **VCLT** that:

From the point of its effect, accession corresponds to ratification. It differs from ratification on account of the entitlement to become a party to the treaty. Ratification is performed by the States having participated in the negotiation of the treaty and then having signed it...Accession is not a subjective right of the third State. It will be able to accede only if and under the conditions allowed by the parties to the treaty.

...

Once performed, accession is treated in wholly the same way as ratification. Notice that the law of treaties knows of no distinction in status between States having ratified and those having acceded. Both are treated as treaty parties with exactly the same rights and obligations. (emphasis added)

[60] It follows, that, only states that have signed a treaty may ratify it. States that have not ratified a treaty and wish to be bound by it may accede

to it. Approval by Parliament differs from ratification and this is why after a state signs a treaty, the act of ratification will be postponed to allow time for national reflection before conclusion.

- [61] The key distinction stated above and worth noting is further amplified by the learned author of **The Law of Treaties: An Introduction to Principles of International Law** at page 53 as follows:

Frequently, the term 'ratification' is understood as referring to what Parliament does when it considers favourably the treaty laid before it by the Executive branch. This is also common vocabulary in constitutional law, where the affirmative act of Parliament is called 'ratification'. This is not the sense of the word in international law. In the latter, ratification is performed by the Executive, in most cases through a letter sent to the depository. The act of Parliament is called 'authorization': Parliament authorizes the executive to ratify. In other words, the action of parliament is purely a domestic matter, having almost no impact on international law. International law limits itself to allowing States to follow such a procedure if they so desire or are so bound by their internal law...As long as the ratification instrument has not been received by the depository or the other States parties, the consent to be bound has not been given...In short, the signature constitutes the last international law action before the municipal law intermezzo, when there is one. Once Parliament has authorized ratification, ratification may take place. When it is performed, we are back on the scene of international law. (emphasis added)

- [62] The striking insight is that Parliament must authorise the Executive to ratify or accede to an international agreement or treaty.

- [63] We must also point out that, beyond the international scene other conditions predicate the process for which an international agreement or treaty may be implemented at the national level, whether ratified or acceded to. For states that follow a monist approach, international treaties may be self-executing, that is not requiring additional national legislation in order to be enforced. In the case of Zambia, however, which follows a dualist approach, the implementation of treaties or international agreements requires a process of domestication into national legislation before they can take effect.
- [64] We are in no doubt that the ratification or accession of international agreements imposes a solemn constitutional obligation on the Government. It is for this reason that the Constitution in Article 63(2)(e) of the Constitution requires the President before engaging in such international conduct to subject international agreements or treaties to the National Assembly for approval. The conclusion is inescapable; that the Executive when concluding international agreements on behalf of the people, must receive the requisite domestic approval prescribed in the Constitution.
- [65] We must state categorically that the approval envisaged in Article 63(2)(e) of the Constitution, relates to the National Assembly's role in the Executive securing domestic approval before the act of accession

or ratification, and not at negotiation stage of treaties as erroneously contended by the petitioners.

[66] In concluding this issue, we hold that the respondent is not constitutionally obligated to submit prospective agreements to the National Assembly for approval. In this case, the petitioners have failed to prove that the Zambian and USA Governments have concluded any agreement as the evidence presented shows that the negotiations have stalled. That there is therefore nothing to submit to the National Assembly for approval.

[67] This brings us to the issue, whether the Ratification of International Agreements Act No. 34 of 2016 is ultra vires Article 63(2)(e) of the Constitution by excluding the term bilateral agreement?

[68] Section 2 of the Ratification of International Agreements Act defines 'bilateral agreement' as:

an agreement concluded between Zambia and any other State or between Zambia and an international organisation that does not require the ratification of the State; ...

[69] Put differently, the Ratification of International Agreement Act elaborates a bilateral agreement as a formal arrangement entered into between two states on mutually agreed obligations and commitments towards each other.

- [70] The learned author **Cezary Mik**, in **Chapter 4 of Theory of Obligations in International Law**, Taylor & Francis Publishers, UK, 2024, posits that:

The differences between bilateral and multilateral treaties concern the manner in which they are negotiated (bilateral treaties in direct negotiations, multilateral treaties at international conferences or within the framework of international organisations, much less frequently in direct negotiations), ... interpretation (differences in this respect appear particularly in judicial practice: bilateral treaties are interpreted by the parties themselves, sometimes by special body established on the basis of a bilateral agreement, and less expansively than multilateral ones, placing greater emphasis on the intention of the parties; the interpretation of multilateral treaties refers more frequently to the object and purpose of those treaties ... International law contains a legal definition of a treaty. However, there is no definition of 'bilateral treaty' or 'multilateral treaty'. The answer would *prima facie* seem simple: a bilateral treaty is a treaty between two parties, while a multilateral treaty is between more than two parties.

- [71] From the authority a number of differences lie between a bilateral agreement and an international one. These range from the number of parties to the agreement, manner of negotiation, scope and conclusion.
- [72] It is, however, worth stating that a treaty can also take the form of a bilateral agreement, for instance, an extradition treaty entered into between two states and may require more than signature of the parties.

- [73] Caution must be exercised to avoid a blanket endorsement that bilateral agreements are excluded for consideration under Article 63(2)(e) of the Constitution. Such agreements would have to be analysed on a case by case basis to determine whether they are captured under the constitutional provision because some agreements may raise sovereignty or other problematic issues requiring Parliamentary oversight.
- [74] Be that as it may, it remains that in the circumstances of this matter, there is no conclusive agreement upon which Parliament is called upon to exercise its oversight function as the petition is premature and for that reason has no merit.
- [75] It is accordingly dismissed.
- [76] We order the parties to bear their own costs.



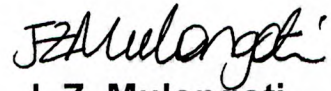
M. M. Munalula (JSD)
President, Constitutional Court



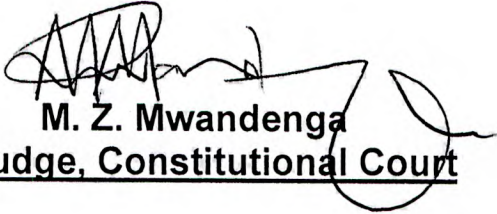
A. M. Shilimi
Deputy President, Constitutional Court



M. K. Chisunka
Judge, Constitutional Court



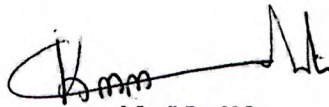
J. Z. Mulongoti
Judge, Constitutional Court



M. Z. Mwandenga
Judge, Constitutional Court



M. Mapani-Kawimbe
Judge, Constitutional Court



K. Mulife
Judge, Constitutional Court