Paul Usoro & Co
LEGAL PRACTITIONERS

NIGERIA: DOMESTICATION OF THE AFRICAN CONTINENTAL FREE TRADE AREA (AFCFTA) AGREEMENT by Mfon Ekong Usoro, Partner, Paul Usoro & Co, Lagos, Nigeria

1. Introduction

The African Continental Free Trade Area Agreement (AfCFTA) is a multilateral trade agreement negotiated and agreed by member States of the African Union and facilitated by the African Union Commission. The main objective of the Agreement is to boost intra-African trade through the creation of a single continental market for goods and services and a single customs union to facilitate free movement of goods, funds and temporary entry of business visitors. 54 of the 55 African countries have signed the AfCFTA. Eritrea is yet to join the AfCFTA regime. 36 African countries have signed and ratified the Agreement. Trading under the AfCFTA commenced in January 2021 and several State parties have submitted their initial offers and requests.

There have been concerns and debates in Nigeria around the issue of domestication of the AfCFTA. The process of domestication involves the enactment of the African Continental Free Trade Area Agreement as a domestic or national legislation by the National Assembly of Nigeria. Proponents of domestication of the AfCFTA Agreement argue that non-domestication will impede Nigeria's ability to take benefit of or implement the AfCFTA. This argument is hinged on the Nigerian jurisprudence derived from the constitutional provision requiring international treaties to be enacted into law if it is to have the force of law in Nigeria. Section 12 of the Nigerian Constitution stipulates that:

> *"No treaty between the Federation and any other country shall have the force of law except to the extent to which such treaty has been enacted into law by the National Assembly."*[1]

The promulgation of international conventions into law by the National Assembly is accomplished in two distinct formats. The convention may be incorporated as a schedule to an act or by a straightforward ratification and enforcement act that comprises solely of the reproduced international convention. An Act of the National Assembly converts the international treaty into an integral part of Nigeria's municipal laws with direct application and enforceability by the courts in Nigeria. In explaining the status of international treaties in Nigeria, OGUNDARE, JSC in *Abacha v Fawehinmi*[2] held that

> *"An International treaty entered into by the Government of Nigeria does not become binding until enacted into law by the National Assembly. Before its enactment into law by the National Assembly, it has no such force of law as to make its provisions justiciable in our Courts".*[3]

A treaty has the force of law when it confers rights directly to natural persons or juridical persons. Through the process of domestication, the treaty becomes enforceable and justiciable in court enabling individuals or companies to invoke or defend rights derived from the incorporating legislation and indeed compel the Nigerian government to comply with the provisions of the treaty where there is a violation or certain provisions are not implemented.

International conventions generally require legislative intervention to give effect to it and grant it the force of law in respective member States. Examples of international conventions promulgated into law by the National Assembly include

[1] Section 12(1), Constitution of the Federal Republic of Nigeria, 1999.
[2] Abacha v Fawehinmi (2000) 6 NWLR, Part 660, p. 288.
[3] Abacha v Fawehinmi (2000) 6 NWLR, Part 660, pp. 288.

the United Nations Convention on the Law of the Sea, International Convention for the Prevention of Pollution from Ships, 1973 and 1978 Protocol (Ratification and Enforcement) Act 2007, United Nations Convention on Carriage of Goods by Sea (Ratification and Enforcement) Act 2005, International Convention for the Safety of Life at Sea (Ratification and Enforcement) Act, 2004, and the Treaty to Establish the African Union (Ratification and Enforcement) Act 2003 to cite a few.

Is it mandatory that the National Assembly should make a wholesale enactment of the AfCFTA Agreement which comprises of both trade in goods and trade in services into our national laws for Nigeria to benefit or implement its obligations under the AfCFTA? Put differently, do we need an African Continental Free Trade Area Agreement (Ratification and Enforcement) Act? Is Nigeria prejudiced by not having such a legislation? The jury is still out.

2. Existing Models on Approach of State Parties to Multilateral Trade Agreement

By the provision of Article 2[4] of the Vienna Convention on the Law of Treaties, 1969, and the Nigerian Treaties Act, the AfCFTA Agreement is correctly referred to as an international treaty. Treaties are defined in Section 3(3) of the Treaties Act as

> *"... instruments whereby an obligation under international law is undertaken between the Federation and any other country and includes "conventions", "Act", general acts", "protocols", "agreements" and "modi-vivendi", whether they are bilateral or multi-lateral in nature".*[5]

However, trade agreements appear to be in a separate category and are treated differently from typical international conventions with respect to the need for incorporation into municipal laws.

[4] "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".
[5] Treaties (Making Procedure, etc) Act, Cap T20, LFN 2004

Proponents of the view that by virtue of Section 12 of the Constitution and the precedent set in the case of other international conventions that have the force of law in Nigeria, the AfCFTA Agreement should be enacted into law by the National Assembly and are quick to cite as examples international conventions that the National Assembly has domesticated. With respect, the argument fails to appreciate the difference between a trade agreement and the traditional international conventions. For a balanced view, a review of global models on the status of international trade agreements vis-à-vis domestication, compliance and implementation provides a useful guide. The closest model to the AfCFTA Agreement is the WTO Agreements - General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS). The AfCFTA is actually closely fashioned after the WTO Agreements in content and procedures. If a comparison need be made, the approach of member States of the WTO to the GATTS and GATS should serve as the best guide on whether the AfCFTA should be promulgated as national legislation by State parties. It will greatly help to identify the member States of the WTO if any that has incorporated the entirety of the WTO Agreements into their municipal laws thereby granting the GATT and GATS the force of law and enforceability in the courts of such countries. One would be hard put to point to any of the major trading nations that has domesticated the entirety of the WTO Agreements, that is, including the agreements on trade in goods and trade in services. There is a congruence of thoughts that the WTO Agreement does not and was not intended to have direct applicability or to be self-executing in the domestic affairs of member States of the WTO. Literature abounds in support of that conclusion and need not be canvassed in this paper.

The dynamics in trade agreements are different from the typical international convention where compliance is at the same level across board for every contracting State of the convention, exception being only in cases of permitted reservations. Trade agreements on the other hand operates around mutual

benefits and consequently accommodate inbuilt and acceptable avenues for infractions and violations and uneven levels of implementation. AfCFTA Agreement, like the WTO Agreements permit State parties to derogate from trade commitments made through the mechanism of the Most Favoured Nation (MFN) exemptions, limitations to market access and national treatment etc. and has its negotiated and agreed mechanism for dealing with violations by State parties. The same is not the case with the implementation and enforcement of the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78) and its Annexes or the Geneva Convention Relative to the Treatment of Prisoners of War 1949, or the Hague-Visby International Convention for the Unification of Certain Rules Relating to Bills of Lading (1924/1968), for example, which implementation are uniform to all contracting States.

A. Becoming a State Party

What actions are required of countries that are parties to multilateral trade agreements to be entitled to full participation in the trade regime? The eligibility criteria for attaining the status of a State party and taking benefit of a multilateral trade regime is usually specified in the agreement. The AfCFTA Agreement, for example, in Art. 23 requires *"signature and ratification or accession by Member States .... in accordance with their national laws."* Art. 1 of the AfCFTA defines a State Party as a member State that has ratified or acceded to the AfCFTA Agreement. To become a signatory, a member State signs the treaty when it is opened for signature at the venue of the diplomatic conference where the agreement was adopted and if subsequent to the adoption, signs at the depository which in the case of the AfCFTA, is the African Union Commission. Signing a treaty signifies the country's commitment to take steps to conclude the process of

becoming a State party. Obligation to refrain from actions that will derogate from or defeat the objectives of the treaty attaches upon signature[6].

To become a State party, the AfCFTA requires member States to take a second step after signature. Art. 23 identifies the two steps: signature plus ratification or signature plus accession. Upon ratification or accession, a member State is required to deposit the instrument of ratification or instrument of accession with the African Union Commission (AUC) being the repository. Accession and ratification are often used interchangeably but there is a subtle difference between the two terminologies. Accession occurs when:

> *"a state accepts the offer or the opportunity to become a party to a treaty already negotiated and signed by other states. It has the same legal effect as ratification. Accession usually occurs after the treaty has entered into force."* - United Nations Glossary of Terms Relating to Treaty Actions[7]

Art. 24 of the AfCFTA stipulates 22 ratifications by member States for the Agreement to enter into force. Whereas the AfCFTA entered into force on 30 May 2019 after attaining the minimum threshold of 22 ratifications from member States of the African Union, Nigeria signed the Agreement on 7 July 2019 after the AFCFTA had entered into force. Nigeria's Instrument of Ratification was deposited on 5 December 2020 at the AUC, so technically, Nigeria acceded to the AfCFTA Agreement. The process for "ratification" or "accession" usually performed by a competent authority varies from country to country. In Nigeria, the procedure for obtaining "approval" or "ratification" or "accession" is performed by the executive arm of government while the procedure for applicability or enforceability of the agreement is through the promulgation of an Act by the National Assembly

[6] Article 18, Vienna Convention on the Law of Treaties, 1969
[7] United Nations Glossary of Terms relation the Treaty Actions. https://treaties.un.org/pages/overview.aspx?path=overview/glossary/page1_en.xml#accession accessed on 27 May 2021; Art 15, Vienna Convention on the Law of Treaties, 1969

incorporating the agreement or specified aspects of the agreement into our domestic laws.

The deposit of its instrument of ratification as provided in the AfCFTA Agreement completed the eligibility criteria to attain the status of a State party and having complied with the requirement stipulated by the AfCFTA to become a full member, Nigeria became a State party in December 2020. A State party is entitled to take benefit of and participate fully in the trading system under AfCFTA through the submission of its schedule of tariff concessions in the case of trade in goods and schedule of specific commitments in the case of trade in services and participation in the negotiations facilitated by the AfCFTA secretariat. The concerns of persons who fear that "Nigeria will be left behind" appears to be unfounded because having fulfilled the eligibility criteria for a State party, Nigeria is indeed participating fully in the on-going negotiations. Nigeria's schedule of commitments form part of the initial combined offers submitted by ECOWAS as permitted by the AfCFTA. AfCFTA requires State parties to make commitments to liberalize markets in specified sectors. The commitments are published in schedules that lists the sectors opened, the extent of market access granted and the terms, limitations, and conditions to the market access. The scheduled commitments guarantee access to the country's market in the listed sectors, and they spell out any limitations on market access and national treatment. The point here is that a wholesale domestication of AfCFTA in the manner the National Assembly domesticates international conventions generally is not required for Nigeria to participate in or benefit from the AfCFTA trading system.

Nigeria is a member State of the WTO, it scheduled its commitment on tariff concessions and commitments on services sectors designated for liberalization together with limitations on market access or national treatment on specified sectors as did other members of the WTO. Nigeria having met the membership

requirement of the WTO is bound by the obligations imposed by the WTO Agreement on contracting States. Like several other trading nations of the WTO regime, the National Assembly has not domesticated the WTO Agreements and Nigeria's interest has not been jeopardized howsoever by the non-domestication through an omnibus "ratification and enforcement" legislation for the WTO Agreements.

B. Multilateral/Bilateral Trade Agreements as "Executive Agreements"

The response to the question regarding the legal status of the AfCFTA is simply that the AfCFTA is a validly entered agreement by Nigeria. It creates rights and obligations for Nigeria as it does for other State parties irrespective of the fact that it has not become a national or domestic law. This paper posits that the act of signature and deposit of the instrument of ratification by the competent authority, in this case, the President of the Federal Republic of Nigeria representing the executive arm of government completes the steps required to clothe the AfCFTA Agreement as a valid and subsisting agreement that is binding on Nigeria.

Trade policies and agreement whether multilateral or bilateral fall under the category of "executive agreements". Trade agreements rest on the President's express and inherent constitutional powers in the "foreign affairs" arena. S.148 of the 1999 Constitution expressly vests in the President the right of "determining the general direction of domestic and foreign policies of the Government of the Federation." Trade policies expressed in agreements with other countries is "foreign trade policy". Under the constitutional powers to negotiate and execute international trade agreements with foreign countries, Nigeria has negotiated and signed several trade agreements with several countries, both multilateral and bilateral agreements. That the AfCFTA is multilateral, on its own, does not make it require an Act of the National Assembly any more than the several bilateral

agreements in existence did not require enactments by the National Assembly for them to be binding and operational.

"Executive agreements" like the AfCFTA Agreement fits into the classification of treaties contemplated in the Treaties (Making Procedure, etc) Act, Cap T20, LFN 2004. Section 3 of the Treaties Act identify three categories of treaties and stipulates the category that promulgation into law is mandatory and those that require only ratification. The section requires "Law-making treaties" referring to treaties intended to have direct applicability or constitutes alteration of existing laws or impacts on the legislative powers of the National Assembly to be enacted into law. The AfCFTA Agreement is not such an agreement. Subsection 3(2) stipulates ratification for the remaining categories of international agreements except for agreements on mutual exchange of cultural and educational facilities where ratification is optional.

The practice in the United States of America regarding the authority of the executive arm of government to enter into binding international treaties making is quite informative. A study published in a briefing paper by the European Parliamentary Research Service confirmed that *"In the United States, the term "international agreement' pools two major types of agreements: international treaties and executive agreements."*[8] The Congress (legislature) and the President (executive) have the legal authority to make binding treaties. The Executive can negotiate, conclude and sign international trade agreements. However, such agreement can have the force of law in the United States only when it is ratified by the Congress and the promulgation of a domestic law to enforce and implement the

[8] Micaela Del Monte and Elena Lazarou, How Congress and President Shape US Foreign Policy, European Parliamentary Research Service, March 2017, p.3.
https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/599381/EPRS_BRI(2017)599381_EN.pdf accessed 26.05.21

agreement. Ratification of an international treaty by two-third majority in the Senate makes the treaty part of the US domestic laws.

The executive in the United States is empowered to enter into binding international trade agreements though the use of "executive agreements" without the two-third congressional approval required for traditional treaties. Scholars assert that "the most common use of these type of agreements is in international trade"[9]. Pragmatism seems to be a very important consideration in the decision on whether to have a treaty executive agreement where the legislature is not involved or with limited involvement requiring information and consultation with the Congress or to go through the congressional process of passing a domestic legislation. Approval by the Senate could be signaled by a resolution where an implementing legislation is not required. An informed decision is made by the executive who has the sole authority to initiate and negotiate international trade agreements after due consideration is given to the following criteria:

- *"the commitments and risks involved into the agreement;*
- *possible effects on state law;*
- *past practice in similar cases;*
- *necessity to enact law to give effect to the agreement;*
- *Congress preferences;*
- *proposed duration, and the degree of urgency required to conclude"*[10]

Even though executive agreements enter into force when signed by the president, the executive derives its authority to bind the country from a statutory grant of that power by the Congress or from the president's inherent powers on foreign affairs. U.S. legislation like the Trade Act of 1974 and the Omnibus Trade and

[9] Ibid, p.4.
International Agreements without Senate Approval, https://www.law.cornell.edu/constitution-conan/article-2/section-2/clause-2/international-agreements-without-senate-approval
[10] Ibid, p.5

Competitiveness Act 1988 and subsequent extensions authorizes the President to negotiate and enter into multilateral trade agreements within specified periods. Where there is notification and consultation with congress on the proposed international agreement and approval of the Senate by way of a resolution (not ratification) is obtained the agreement is referred to as congressional executive agreement and has a binding effect. The North American Free Trade Agreement (NAFTA) and the WTO General Agreement on Tariffs and Trade (GATT), other free trade agreements are examples of congressional executive agreements. There are a limited number of executive agreements negotiated, concluded and proclaimed solely by the president relying on its express and inherent constitutional powers without any form of congressional involvements.

C. Compliance with Treaty Obligations through Domestic Laws

Membership of AfCFTA imposes binding obligations on Nigeria irrespective of the fact that the agreement does not have the force of law in the limited sense that it does not create rights for individuals capable of being enforced in our courts. Several provisions and obligations under the AfCFTA Agreements require implementing domestic laws for them to be operational if such laws are not already in existence. For example, to operationalize some of the provisions and obligation on liberalization of market access and the most favoured nation principle, a State party with restrictive practices on competition and market access like quotas or nationality requirement for foreign service providers will need to enact a law or amend its laws to remove such restrictions. Same applies to customs regulations, tariffs, and non-tariff barriers to trade. The enactment of national laws on specific trade related issues to facilitate the implementation of a country's obligation under the AfCFTA is different from a wholesale enactment of the AfCFTA Agreement as a domestic law.

Obligations from trade agreements like the AfCFTA Agreement may necessitate adjustments in domestic policies and practices particularly in the legal regulatory ecosystem. It may involve amendments or promulgation of new laws to eliminate certain forms of customs processes and valuation, duties, dumping or subsidies, creation of a designated authority with powers to monitor and regulate service providers in compliance with the AfCFTA obligations. Rules and mandatory standards around non-tariff barriers like technical standards and qualifications, sanitary and phytosanitary requirements require enactment of laws to fulfill the obligations of transparency and for use in monitoring and enforcing compliance of products and services standards of trading partners that enter the market.

To adequately equip itself to give effect to obligations under the trade agreements, State parties incorporate the substance or key obligations of a trade agreement which compliance require legislative interventions. This is achieved by the enactment of independent implementing national laws that incorporate the specific obligation or obligations. The enactment could be a consequential amendment to existing laws or newly promulgated laws to give effect to a country's trade obligations. Most member States in multilateral trade regimes including the WTO Agreements which remains the best precedent to compare with the AfCFTA Agreement adopt this approach.

i) Nigeria

Nigeria, like most member States of the WTO regime did not domesticate either the General Agreement on Tariffs and Trade or the General Agreement on Trade in Services but enacted and amended a few national legislation necessary for the implementation of specific obligations under the WTO. Nigeria, for example, made consequential amendments to the Customs and Excise Management Act Cap C45 LFN 2002 (CEMA) pursuant to its WTO GATT obligations. Section 14 of the First

Schedule to CEMA titled Application of GATT 1994 incorporated GATT in the following manner:

> *"For purposes of the Interpretation of Customs valuation under this Act, the provisions of Article VII of the General Agreement on Tariffs and Trade 1994 as contained in the Agreement on the of Art VII, together with all the notes to the Articles, and all the Annexes to these Articles, shall apply."*
>
> In addition, the Customs, Excise Tariff etc (Consolidation) Act, Cap C49, LFN 2004 and the Pre-shipment Inspection of Import Act, Cap P26, LFN 2004 were enacted to incorporate certain key provisions/obligations of the WTO relating to trade in goods that required extant laws to facilitate implementation.

ii) European Union

Similarly, countries of the European Union have not made holistic promulgation of the WTO Agreement as part of their respective municipal laws or incorporated the Agreement as European Union laws. Rather, the EU incorporated several specific WTO GATT provisions in their secondary legislation including:

- European customs procedures and valuation are influenced in part by the WTO Agreement on Art. VII of GATT 1994 relating to customs valuation provisions and definitions. The implementing regulation is contained in Regulation (EEC) No. 2454/93, 2 July 1993.[11]
- Common rules for imports incorporating provisions of the Agreement on Import Licensing Procedures including safeguard clauses to protect agricultural products etc, Council Regulation (EEC) no. 288/82 of 5 February 1982 on common rules for imports.[12]

[11] European Communities: Trade Policies and Practices by Measure, WT/TPR/S/136 @ p.38
[12] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31982R0288;,accessed on 18.05.2021;

- the regulation, on protection against dumped or subsidized imports - the latest update is Council Regulation (EEC) No. 2423/88 of 11 July 1988[13];

iii) United States of America

The Congress of the United States of America did not and have not promulgated a wholesale WTO GATT or GATS legislation but is a major trading State in the WTO ecosystem. What obtains is that Congress would pass implementing legislation considered *"necessary or appropriate to implement such trade agreement or agreements …. either repealing or amending existing laws or providing new statutory authority."*[14] In the case of the WTO GATT, The US Congress passed the Uruguay Round Agreements Act 1994 (URAA 1994) to approve and implement specific GATTS provisions such as the protection of intellectual property rights under the GATT Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), Antidumping and Countervailing Duty Provisions, Tariff modifications etc. The US URAA in relation to the implementation and enforcement of TRIPs introduced criminal penalties in the form of fines and imprisonment for trademark counterfeits and piracy in intellectual property rights. The URAA provisions are very elaborate and extends to matters like the Africa Trade and Development policy. The point here is that the US Congress did not merely schedule the entirely of the Marrakesh Agreement to the Act but passed a domestic legislation that provided for detailed implementation and enforcement processes of the priority areas of its commitments on WTO GATTS.

Selma Lussenburg, New EEC Safeguard Measures: Regulation 288/82, 1984, https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1780&context=jil accessed on 18.05.2021

[13] EEC – Regulation on Imports of Part and Components https://www.wto.org/english/tratop_e/dispu_e/gatt_e/88scrdvr.pdf , accessed on 18.05.2021

[14] Jane Smith & Daniel Shedd, Why Certain Trade Agreements are Approved as Congressional-Executive Agreements rather than Treaties. Congressional Research Service, April 2013. https://fas.org/sgp/crs/misc/97-896.pdf accessed 30 May 2021, p.1

3. Is it desirable for the AfCFTA to have force of law in Nigeria?

It has been explained in previous sections of this paper that force of law relative to international agreement is when the agreement confers rights directly to natural persons or juridical persons and is enforceable and justiciable in court enabling individuals or companies to exercise or defend the rights derived from the incorporating legislation and indeed compel the country to comply with the provisions of the treaty where there is a violation or certain provisions are not implemented. Enactment of the AfCFTA as a municipal law by the National Assembly means AfCFTA Agreement will have direct applicability in Nigeria, create rights for individuals and companies. Private persons can enforce the commitments in courts against the Nigerian government.

This paper has demonstrated with examples that member States of multilateral trade agreements like the WTO Agreements do not generally have a wholesale enactment of the entirety of trade agreements into their national laws as obtains in the case of typical international conventions. Comparisons on the jurisprudence of domestication of international treaties should be on a like for like basis. Consequently, in discussing the legal status of the AfCFTA in Nigeria and the requirement or otherwise of domestication, one should look to the WTO Agreements not to the Geneva Convention, MARPOL or other similar international conventions for guidance. The paper has further demonstrated that Nigeria has complied with all the criteria set down in the AfCFTA for full membership and is a State Party with equal rights enjoyed by all other State parties to the Agreement.

The AfCFTA Agreement is a voluntary contract entered into amongst governments not a contract between governments and persons or companies. Individuals and juridical persons would have rights under the AfCFTA only if the Agreement became law in Nigeria or only to the extent provided by the implementing legislation such as the examples cited above. If incorporated into national laws,

individuals will be able to enforce such rights through the court system and a natural person, or company including a foreign company would have the right to sue the Federal Government for alleged violation of AfCFTA Agreement obligations. The enforcement of compliance with AfCFTA rules is substantially the responsibility of governments. The individual in its personal capacity does not contribute to the enforcement of the rules of AfCFTA through court processes aimed at the protection of its rights unless the Agreement is clothed with the status of a national law.

i) European Union Example

A useful illustration is the pronouncement of the European Court of Justice on the justiciability and enforcement of rights by individuals in the *International Fruit Company NV v Produktschap voor Groenten en Fruit* 1972 E.C.R 1-1219.

Reproduced hereunder is an excerpt that throws light on the jurisprudence of the EU and the ECJ[15] regarding the applicability of multilateral trade agreement to rights of the individual

> *"Dispute surrounding the effect of international law generally and the GATT in particular (predecessor to the WTO) within the European Union is nearly as old as the EU itself. In International Fruit, the first case before the ECJ dealing with the effect of GATT law within the EU, the plaintiffs argued that certain EU regulations restricting the importation of apples from third countries were invalid because they were contrary to Article XI of the GATT. The plaintiffs initiated their action in the Netherlands, and the Netherlands referred the treaty-interpretation question to the ECJ under then-Article 177 of the EU Treaty (now Article 267 (ex-Article 234, TEC).*

[15] John Errico: The WTO in the EU: Unwinding the Knot, Cornell International Law Journal, Vol. 44.p. 183, 184. https://ww3.lawschool.cornell.edu/research/ILJ/upload/Errico-final.pdf accessed on 17.05.2021

The ECJ stated that the international law relied upon could invalidate Community law only if it satisfied two conditions: first, the provision of international law must bind the Community; second, the provision must be "capable of conferring rights on citizens of the Community which they can invoke before the courts." The ECJ determined that the GATT did bind the Community, satisfying the first condition; however, it also determined that the GATT did not satisfy the second condition because individuals were unable to rely upon the provision before the courts. The ECJ suggested that the GATT was based on the principle of negotiation taken "on the basis of 'reciprocal and mutually advantageous arrangements' [and was] characterized by the great flexibility of its provisions, in particular those [concerning] the possibility of derogation." Accordingly, the ECJ determined that it was impossible to rely upon GATT provisions before Community or national courts to invalidate Community acts or legislation."

ii) United States Example

The U.S. Uruguay Round Agreements Act, 1994 codifies the jurisprudence of the U.S. on the relationship between international trade agreements like the WTO and its domestic laws and the rights of individuals to enforce the provisions of the GATT. Section 102 on the Relationship of the Agreements to United States Law and State Law stipulates that

102(a)

"(1) UNITED STATES LAW TO PREVAIL IN CONFLICT. - No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect.

(2) CONSTRUCTION.—Nothing in this Act shall be construed—

(A) to amend or modify any law of the United States, including any law relating to—

(i) the protection of human, animal, or plant life or health,
(ii) the protection of the environment, or (iii) worker safety, or

(B) to limit any authority conferred under any law of the United States, including section 301 of the Trade Act of 1974,

unless specifically provided for in this Act."

102 (c)

EFFECT OF AGREEMENT WITH RESPECT TO PRIVATE REMEDIES.—

(1) LIMITATIONS.—No person other than the United States—

(A) shall have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement, or

(B) may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, any State, or any political subdivision of a State on the ground that such action or inaction is inconsistent with such agreement.

Section 102(c) leaves no ambiguity on whether individuals can take institute an action on a right derived from the GATT. It remains the prerogative of the State.

A 1975 decision of the United States Court of Customs and Patent Appeals in *United States -v- Yoshida International Inc.*[16], illustrate the attitude of countries in the protection of sovereign rights to derogate from treaty obligations where to do so serves their national interests. In that case, a U.S. importer of zippers from Japanese sellers challenged the legality of a 1971 proclamation in which the American President imposed a 10% surcharge on imports. The surcharge had been one of several emergency measures taken in connection with a balance of payments crisis alleging a contravention of GATT. In 1971, the United States faced an economic crisis arising from severe deficit in balance of payment. It was believed that the country's major trading partners manipulated the exchange rate

[16] 526 F.2D 560 (C.C.P.A. 1975); https://casetext.com/case/united-states-v-yoshida-intern-inc accessed 14.05.2021

to overvalue the dollar. This action stimulated imports and constricted U.S. exports which resulted in the balance of payment deficit. The import surcharge introduced by the government was intended to protect its competitive position in international market and arrest the deficit in its balance of payment. The court disposed of the claimed GATT violation. The Customs court acknowledged that the 10% surcharge was a violation of GATT, because GATT does not allow governments to increase in-bound tariffs as a method of dealing with balance of payments crisis, but the court proceeded to dismiss the relevance of the violation, stating that GATT had never been ratified by the US Congress.

4. Application of the MFN Principle

Another example that calls into question the desirability of a mechanism for the enforceability of the AfCFTA Agreement through national legislation is the operationalization of the most-favoured-nation (MFN) principle. Application of the MFN principle means that where a country lifts trade barrier or opens a market for a particular member State in a specific sector, it is obliged to extend that access equally for all the trading partners in the AfCFTA regime without discrimination regarding the sector in question. If a country undertakes a national treatment or market access commitment in a sector it must accord the treatment specified in its schedule to all other members. Consequently, all State parties in AfCFTA are equal and are all equally granted the MFN status. (Part II, Art 4 for Protocol on Trade in Goods and Part IV, Art 4 for protocol on Trade in Services).

The application of the MFN principle is intrinsic to the functioning and survival of multilateral trading regimes. AfCFTA Agreement as a national law would compel compliance and MFN could be enforced through the court system. The reality is that multilateral trade regimes operate on the principle of mutual benefits. To illustrate, take a scenario where Nigeria enjoys a mutually beneficial trade relationship with country A but not with country B and does not wish to extend

similar market access to country B. Is it desirable for a company in country B to have the right to institute an action against Nigeria in a Nigerian court to enforce the MFN principle routed in the erroneously proposed "AfCFTA Nigerian law" and grant to country B even in the absence of mutual benefits, the trade privileges it extends to country A? Non-extension of equal market access and privileges to country B will clearly be a violation of the AfCFTA or WTO MFN rules but trading partners nevertheless exercise flexibility and introduce protectionist trade policies in response to domestic pressures. State parties occasionally issue regulations on border closures or enact laws intended to benefit selected domestic industries that are tariff related or non-tariff legislation that has the effect of restricting imports of goods or services with the knowledge that the measures violate obligations created by the trade agreements that they are parties to. Where that happens, States parties are content that the negotiated mechanism for dealing with infractions and violations stipulated in the AfCFTA will be followed rather than adjudication through the court system. The AfCFTA promotes resolution of violations through bilateral or multilateral negotiations, the dispute resolution mechanism and imposition of countervailing measures which is completely different from the right to institute court actions and obtain judgement against the offending government.

5. Consultation, Consensus not Prescriptive

The AfCFTA Protocol on Rules and procedures on the Settlement of Disputes; Part V, Art 29 and Pt VI, Art 25 respectively on Protocol for Trade in Goods; and Protocol for Trade in Services contain elaborate rules on how to deal with contraventions by State parties. The emphasis in on consultations, conciliations and consensus including the consensus of the offending party followed by recommendations, not penalties. Parties in a dispute are encouraged to *"enter into negotiations … with a view to developing mutually acceptable compensation"* and permitted to suspend compensations where the negotiation fails – Art 25, Protocol

on Dispute Settlement. The appellate Body recommends to the offending party to *"bring measures into conformity with the Agreement"* without any specificity. A clear standard for compensatory measures or suspension of concessions are not established, rather, member States are given wide discretionary powers in formulation of solutions to deliberate violations. The wide flexibility, uncertainties and insufficient clarity for resolution of disputes, permission for negotiations and politically motivated actions, the structure and language in the AfCFTA which is to a significant extent not prescriptive, it has been argued does not lend itself to the conferment of rights to individuals which rights can be invoked in the court of law for enforcement.

Triggered by pragmatic and sometimes domestic economic, social and political pressure, contracting States to multilateral trade agreements are keen to reserve the rights and flexibility to adjust or withdraw its commitments under trade agreements for the protection of its strategic domestic interest without the prospects, risks or threat of being sued in its court system for violation of its own national laws. Subsidy for domestic producers is one area where trading partners sometimes deliberately undertake non-competitive discriminatory acts that constitute clear violation of the core principle obligations under the WTO Agreement and under AfCFTA Agreement. The WTO and the AfCFTA stipulate remedies to member States (not individuals) where a country feels aggrieved by subsidy that is granted to domestic producers of a contracting State.

Where the State parties concerned fail to reach a consensus in the case of anti-competitive practices like subsidies or import quotas and discriminatory application of import duties, the AfCFTA Agreement allows contracting governments to protect national producers against subsidized imports and any other anti-competitive practices. Like the WTO, AfCFTA does not impose sanctions on the offending trading partner, it merely authorizes governments to "take

appropriate countermeasures" a diplomatic language for retaliation which may be in the form of anti-dumping or countervailing measures (Art 16, Protocol on Trade in Goods). This negotiated and agreed conflict resolution mechanism does not accommodate resort to court action where damages may be imposed against the offending party. Part V of the AfCFTA Agreement on Trade Remedies entitles State parties to unilaterally impose retaliatory measures where domestic producers are threatened by influx of foreign products at significantly lower prices in their markets. The AfCFTA incorporates safeguard measures that are similar to the measures provided in the WTO. Article 17 of the AfCFTA Agreement expressly states that:

> *"The implementation of this Article shall be in accordance with Annex 9 on Trade Remedies and Guidelines on Implementation of Trade Remedies, Article XIX of GATT 1994 and the WTO Agreement on Safeguards."*

6. Conclusion

Countries jealously guard their freedom to comply with or suspend compliance with obligations arising from international trade treaties such that the decision on what to implement and enforce is guided always by identified strategic national interests. Flexibility in foreign trade policy will not avail governments if such actions were to contravene its national laws and open the sesame for court actions to compel governments not to violate trade agreement obligations. Anything to the contrary will entitle individuals or companies to enforce the AfCFTA rules on reluctant governments whose reluctance to comply may be motivated by legitimate domestic economic and political concerns. Prominence is given to diplomacy, consultations, and consensus in resolving disputes to accommodate the divergent interests and levels of developments of State parties rather than dispute resolution through the courts and the attendant unpredictable penalties for violations by way of court judgements.

The paper has demonstrated that courts in major trading nations in the WTO regime have consistently denied the rights of individuals and juridical persons to invoke WTO provisions aimed at award of damages even where the courts have admitted that the applicable government issued regulations are inconsistent with the country's WTO obligations. The wholesale incorporation of the AfCFTA Agreement into Nigerian municipal laws will lead to the opposite outcome with the result that the executive will be stripped of that well protected power to intervene in foreign and trade policies as appropriate.

The AfCFTA Agreement has full legal status in Nigeria. Nigeria has binding obligations under the Agreement, it being a validly entered executive agreement and having fulfilled all the eligibility criteria stipulated in the AfCFTA Agreement. Where the implementation and enforcement of certain AfCFTA commitments require legislative intervention, Nigeria can (as it did with respect to WTO GATT obligations) through the National Assembly enact implementing legislation as new laws or make consequential amendments to existing laws that incorporates the key and specified commitments in the AfCFTA to facilitate implementation and enforcement. This is the approach adopted by Nigeria and indeed other WTO member States. An omnibus "AFCFTA ratification and enforcement bill" that schedules the entirety of the AFCFTA Agreement lacks precedence in the context of multilateral trade agreements neither is it required nor desirable for Nigeria. Nigeria is entitled to full participation in and evolution as a major trading nation in the AfCFTA Agreement regime.

There is the argument that since the AfCFTA does not accommodate reservations by State parties, a wholesale domestication of the AfCFTA Agreement is justified. The premise presupposes that the promulgation of implementing legislation on individual State parties' priority areas equates a rejection of other parts of the AfCFTA Agreement. This is far from correct. First, it has been highlighted that

compliance with certain trade obligations, particularly in relation to trade in goods necessitates implementing legislation where none exists and where existing legislations has to be amended for compliance with the trading regime. Second, the AfCFTA recognizing the disparate levels of development permits State parties to liberalize markets in line with their domestic capacities. Considerations ranging from domestic pressures, sovereignty, economic needs, national interests, national security and level of development influences the commitments scheduled by State parties and their preparedness to implement the obligations attached thereto. Prioritization on areas for immediate implementation, sectors or subsectors to open up, conditions for opening and promulgation of implementing legislation only on the selected priority areas has no relationship with reservation or no reservation. It merely takes advantage of the flexibility allowed in the AfCFTA principle and rules on right to regulate and on progressive liberalization that permeates the Agreement etc. Article 8 stipulates that

> *"Each State Party may regulate and introduce new regulations on services and services suppliers within its territory in order to meet national policy objectives, in so far as such regulations do not impair any rights and obligations arising under this Protocol."*[17]

It should be noted that the examples cited in this paper on domestic laws promulgated to implement WTO Agreements are limited the GATT. The more sensitive area of trade in services are not toyed with in the least. It is important to bear in mind that a wholesale domestication of AfCFTA Agreement would include the Protocol on Trade in Services which is a tricky and sensitive terrain to navigate.

The position canvassed in this paper does not in any way promote the usurpation of legislative powers by the executive. The Nigerian Constitution vests the power to make laws on trade and commerce between Nigeria and other countries (import,

[17] Art 8, AfCFTA Protocol on Trade in Services

export, tariff, standard and quality of agricultural products etc are specifically listed) in the National Assembly.[18] A combination of the 2nd Schedule and Section S.148 of the Constitution grants the executive and the legislature shared powers over foreign trade policies. In the interest of separation of powers and the need for check and balances on the shared constitutional powers of both the legislature and the executive in treaty making, it is wise for the executive to adopt the United States model. It requires formal transmission of information and consultation with the relevant committee in the Senate regarding the intention of the executive to ratify any international trade agreement.

Apart from considerations around the separation of powers, even where the international agreement is in the category of "executive agreements" there is always the likelihood that international trade treaties may require implementing legislation for domestic enforcement and implementation particularly where regulatory issues like product standards, subsidies, imports and exports are involved as is often the case. The act of consultation prior to ratification by the executive will ease and shorten the often long and complicated process of law making by the National Assembly. The concern of the executive has for good cause been the delays in the legislative process of passing bills. It is suggested that the National Assembly consider the institutionalization of a fast-track legislative process within a specified timeline for the consideration and passage of the implementing legislation for international trade agreements.

Mfon Ekong Usoro
Partner, Paul Usoro & Co, Lagos, Nigeria

[18] Part 1, Second Schedule, Constitution of the Federal Republic of Nigeria, 1999