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CHIEF JUSTICE OF ZIMBABWE,

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DOMESTICATION OF INTERNATIONAL TREATIES WITH PARTICULAR FOCUS ON THE COMESA TREATY AND THE AGREEMENT ESTABLISHING THE AFRICAN CONTINENTAL FREE TRADE AGREEMENT

Ladies and gentlemen, I feel greatly honoured by the invitation to address you on the subject of the domestication of international treaties with particular focus on the COMESA Treaty and the Agreement Establishing the African Continental Free Trade Agreement ("the AfCFTA"). As you already know, the COMESA Court of Justice ("the Court") was established under Article 7 of the Treaty Establishing the Common Market for Eastern and Southern Africa ("the Treaty") as one of the organs of the Common Market. It was established with the task of ensuring that the obligations and commitments undertaken by the Member States for the achievement of the aims and objectives of the Common Market set out in Article 3 of the Treaty are fulfilled through the adoption of measures which comply with or adhere to the principle of the rule of law.

The theory of international trade is based on the principle of comparative advantage. Accordingly, countries must specialise in the production of commodities in which

they are the least opportunity cost producers, and exchange those with high opportunity cost imports. Free trade will mutually benefit both trading partners.[1]

Trade policy and reform, and therefore the launch of economically beneficial arrangements, are justified by international trade theories, under their two dimensions of trade liberalisation (lowering trade barriers between two or more countries) and regional integration. In theory, trade liberalisation is welfare enhancing and has positive effects on economic growth.[2]

Regional economic integration is a process where barriers to trade are reduced or eliminated to facilitate trade between regions or nations. It is not only about trade in goods, but it also covers issues such as movement of services, capital and labour. Regional integration has long been seen in Africa as a means of achieving industrialisation and modernisation through encouraging trade and securing economies of scale and market access. Consequently, regional arrangements have sprung up all over Africa.

One such arrangement is the Common Market for Eastern and Southern Africa ("COMESA"). COMESA was initially established in 1981 as the Preferential Trade Area ("PTA") for Eastern and Southern Africa, within the framework of the

[1] Elbushra A.A. *et al The role of COMESA in promoting intra-regional agricultural trade: Case study of Sudan* Journal of the Saudi Society of Agricultural Sciences, Vol 10, Issue 2, June 2011
[2] *Ibid*

Organisation of African Unity's ("OAU") Lagos Plan of Action and the Final Act of Lagos. The PTA transformed into COMESA in 1994. The PTA was established to take advantage of a larger market size, to share the region's common heritage and destiny, and to allow for greater social and economic co-operation.[3]

COMESA was established "as an organisation of free independent sovereign States which have agreed to co-operate in developing their natural and human resources for the good of all their people". It has a wide-ranging series of objectives, which necessarily include in its priorities the promotion of peace and security in the region.[4]

However, due to COMESA's economic history and background, its main focus is on the formation of a large economic and trading unit that is capable of overcoming some of the barriers that are faced by Member States and individuals. COMESA's current strategy can thus be summed up in the phrase "economic prosperity through regional integration". With its twenty-one Member States, a population of over 520 million and global trade in goods worth US$235 billion, COMESA forms a major market place for both internal and external trading. Its area is impressive on the map of the African Continent covering a geographical area of 12 million sq. km.[5]

[3] https://www.comesa.int/wp-content/uploads/2019/02/COMESA-in-brief-FINAL-_web.pdf (Date accessed 25/6/19).
[4] See COMESA overview available at https://www.comesa.int/overview-of-comesa/ (Date accessed 26/06/19)
[5] *Ibid*

The purpose of the establishment of COMESA is outlined in Article 3 of the Treaty, which provides for a fully integrated, internationally competitive regional economic community with high standards of living for all its people, ready to merge into an African Economic Community. In simple terms, the direct beneficiaries of the integrated supranational community are the citizens of the Member States as opposed to the States themselves. The Common Market has as one of its objectives the co-operation between Member States in the creation of an enabling environment for foreign, cross-border and domestic investment. This is ensured through free movement of capital and investment, supported by the adoption of a common investment area aimed at creating a more favourable investment climate for the COMESA region.

Therefore, COMESA was created to serve as an organisation of free independent sovereign States that have agreed to cooperate in developing their natural and human resources for the good of all their people. In this context, the main focus of COMESA has been on the formation of a large economic and trading unit to overcome trade barriers faced by individual States.

The resounding economic success due to the creation of regional economic blocs made apparent the need to create a single continental market for goods and services, with free movement of business persons and investments, and thus pave the way for

accelerating the establishment of the Continental Customs Union and the African Customs Union.

In this regard, the Agreement Establishing the African Continental Free Trade Agreement ("AfCFTA") was established. The AfCFTA came into force on 30 May 2019 for the twenty-four countries that had deposited their instruments of ratification. This date marked thirty days after twenty-two countries had deposited their ratification instruments with the African Union Commission ("AUC") Chairperson – the designated depository for this purpose, as stipulated in Article 23 of the Agreement.[6]

The AfCFTA will bring together all fifty-five Member States of the African Union, covering a market of more than 1.2 billion people, and a combined gross domestic product ("GDP") of more than US$3.4 trillion. In terms of numbers of participating countries, the AfCFTA will be the world's largest free trade area since the formation of the World Trade Organisation. Estimates from the United Nations Economic Commission for Africa (UNECA) suggest that the AfCFTA has the potential both to boost intra-African trade by 52.3 percent by eliminating import duties, and to double this trade if non-tariff barriers are also reduced.[7]

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[6] "*AfCFTA Agreement enters into force*" available at https://www.tralac.org/resources/our-resources/6730-continental-free-trade-area-cfta.html (Date accessed 05/07/19)

[7] *Ibid*

In launching the African Continental Free Trade Area and making it work, Africa is overcoming the historic fragmentation and isolation of her economies by opening up huge commercial opportunities as well as improving transport and communication linkages among her countries. The aggregation and connectivity are means of accelerated growth and sustainable development of African countries, which will enable the African people to realise the vision of the African Union and Agenda 2063: "An integrated, prosperous and peaceful Africa, driven by its citizens, representing a dynamic force in the global arena".[8] This agreement provides a framework for trade liberalisation in goods and services and is expected to eventually cover all African countries.

The AfCFTA stems, in part, from the realisation that regional integration is stultified and not equitably pursued amongst all African regional economic communities ("RECs"), and that intra-African trade is at critically low levels compared to African trade with outside partners. As such, the AfCFTA's role in improving intra-African trade levels will be important for enhanced continental growth, particularly as it will facilitate market access for COMESA, SADC and EAC countries to Central and Western African states. Important to note is that the AfCFTA builds on existing Tripartite FTA negotiations amongst three African RECs: the Southern African

[8] https://au.int/en/pressreleases/20190531/afcfta-one-year-later-road-travelled-and-road-towards-launch-operational (Last accessed 5/7/19)

Development Community (SADC), the Common Market for Eastern and Southern Africa (COMESA) and the East African Community (EAC).

The main objectives of the AfCFTA are to create a single continental market for goods and services, with free movement of business persons and investments, and thus pave the way for accelerating the establishment of the Customs Union. It will also expand intra-African trade through better harmonisation and coordination of trade liberalisation and facilitation across the RECs and across Africa in general. The AfCFTA is also expected to enhance competitiveness at the industry and enterprise level through exploitation of opportunities for scale production, continental market access and better reallocation of resources.[9]

A necessary condition for the effectiveness of the Treaty and the AfCFTA is the ability of citizens of the Member States to have access to remedies from their domestic courts or tribunals for the enforcement of the rights accruing from the two instruments and reparation in cases of their breach.

Two principles of international law relating to the domestic application of treaties symbolise this. First is Article 27 of the Vienna Convention on the Law of Treaties 1968, which prohibits States from invoking their domestic law as justification for

[9] *Ibid*

failure to perform treaty obligations. The second is Article 13 of the Draft Declaration on Rights and Duties of States 1949 which provides that:

> "Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty."

The Draft Declaration was prepared by the International Law Commission. The United Nations General Assembly commended it to members and jurists as a "notable and substantial contribution towards the progressive development of international law and its codification".[10] The "exhaustion of local remedies" rule, applied by international and regional human rights bodies alike, is further confirmation of the fact that, ideally, "international treaties should apply directly and immediately in the domestic legal order and allow individuals to seek and obtain remedies at the domestic level".[11]

In domestic law, on the other hand, the prevailing legal system, either civil law or common law, which usually translates to monism and dualism respectively, appears to be the decisive factor in the determination of the status and importance given to

[10] Resolution 375 (IV), G.A.O.R., 4th Session, Resolutions, p 66.
[11] Committee on Economic, Social and Cultural Rights, General Comment No. 9, U.N. DOC. E/C.12/1998/24 (1998), para 4.

international law in relation to domestic law. In most cases, this is embodied in constitutional provisions which prescribe the procedure for the ratification and enforcement of international treaties and, in some cases, the supremacy of domestic law or international law over the other in cases of conflict between the two.[12] As an issue for municipal law, States generally create their own internal mechanisms for expressing their acceptance to be bound. Commenting on the Vienna Convention on the Law of Treaties, the learned author Adede A O, "*Domestication of International Obligations*" Constitution of Kenya Review Commission, 15 September 2001, correctly observes that:

> "… limiting itself to the choices of means by which a State may accept international obligations arising from treaties, the 1968 Vienna Convention on the Law of Treaties does not address the question of how States may then bring about the implementation domestically of the treaties, which they have made applicable to them internationally. The Convention rightly leaves this question to be settled by each State, in accordance with its legal system. Thus,

[12] Ololade O. Shyllon "Monism/Dualism or Self Executory: The Application Of Human Rights Treaties By Domestic Courts In Africa" at pp 3-4 http://web.abo.fi/instut/imr/secret/kurser/Advanced09/Essays/Working-group4/Shyllon_Monism%20Dualism%20or%20Self%20Executory.pdf (Last accessed on 22/7/19).

'domestication' of treaties is a matter of national law and is not governed by international law." [13]

The domestication of international treaties into municipal law has been the subject of much doctrinal dispute between what is known as the "monist" school of thought, on the one hand, and the "dualist" school of thought, on the other hand.

The origin of monism is traceable to the medieval philosophical conception of the world as a single hierarchically organised legal system. This is evident in the ancient Greek and Roman philosophy of law, in which "law represented precepts of reason embedded in nature, the latter being created by God and organised harmoniously with laws that have universal validity".[14] The monists submit that the various national systems derive from the international legal system. Since international law can be seen as essentially part of the same legal order as municipal law, and as superior to it, it can be regarded as incorporated in municipal law. Consequently, there would be no difficulty in its application as international law within States.[15]

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[13] A O Adede, "*Domestication of International Obligations*" Constitution of Kenya Review Commission, 15 September 2001, available at http://www.commonlii.org/ke/other/KECKRC/ 2001/14.html (Last accessed 23/7/19)

[14] Friedrich, C.J. "*The Philosophy of Law in Historical Perspective*", 2nd Edition, Chicago University Law Press, 27.

[15] The Application of International Law into National Law, Policy and Practice: The WHO International Conference on Global Tobacco Control Law: Towards a WHO Framework Convention on Tobacco Control 7 to 9 January 2000, New Delhi, India https://www.who.int/tobacco/media/en/JUDY2000X.pdf?ua=1 (Last accessed 5/7/19)

The monist theory asserts that domestic and international law are two components of a single body of knowledge called "Law".[16]

Under the monist approach, traditionally a legal system of a State is considered to include treaties to which that State has given its consent to be bound.[17] Thus, certain treaties may become directly applicable in that State, domestically (self-executing) and do not rely on subsequent national legislation to give them the force of law once they have been ratified by the State. Where a treaty is thus considered to be "directly applicable", under this approach, it means that the domestic courts or tribunals as well as other governmental bodies would look to the language of the treaty itself as a source of law.

It may be observed that, under the monist approach, the treaty-making process always involves a "democratic participation", such as parliamentary approval of treaties before the State may express its consent to be bound. Thus, a treaty would become directly applicable, both at the international plane and at the domestic level, on the date of its entry into force for that State. This happens after the ratification, acceptance, approval or accession by the States, in accordance with the relevant final clause of the treaty in question.[18]

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[16] Dixon, M. "*Textbook on International Law*", 1996, Clarendon Press, New York, 65.
[17] Aust, Anthony. "*Modern Treaty Law and Practice*". Cambridge University Press. p 147.
[18] *http://www.commonlii.org/ke/other/KECKRC/2001/14.html*

Thus the main features of this theory are the unity of the international and domestic law, the automatic incorporation of international law into domestic law, and the supremacy of international law over domestic law in cases of conflict between the two. Generally, it is the Constitutions of individual States that prescribe the manner in which the international law is automatically incorporated into the domestic law and for the primacy of international law over domestic law.

A perfect example of a monist State is the United States of America. Article VI of the United States Constitution, generally known as the supremacy clause (Article VI), declared treaties to be "the supreme Law of the Land" and directed the courts to give them effect without awaiting action by the legislatures of either the states or the federal Government. It effectuated a wholesale incorporation of United States' treaties into domestic law, dispensing with the need for retail transformation of treaties into domestic law by Congress. Kenya (a COMESA Member State) is also a monist State, as shown by its 2010 Constitution which provides in Article 2(6) that "any treaty or convention ratified by Kenya shall form part of the law of Kenya". The meaning of this is that ratification not only creates legal relations between Kenya and other States Parties to both the Treaty and the AfCFTA, but it also, and more significantly so, binds the State at the domestic level.

Dualism, on the other hand, is historically rooted in the doctrine of separation of powers and in the English positivist school of the seventeenth and eighteenth

century, which rejected the monist belief in the unity of domestic and international law in favour of a distinction of domestic from international law on the basis of the sovereignty of nations.[19] Dualist models of the relationship between international law and domestic law propose that a treaty takes effect internationally after being signed by the Head of State, but in order for it to have sway over domestic legal affairs, the treaty's text must be adopted through a law of Parliament.[20] The result of this is that the international norms in the Treaty and the AfCFTA, ratified by dualist States, are not enforceable until they have been incorporated or transformed into domestic law. The upshot is that, under the dualist approach, a State can indeed express its consent to be bound by a treaty first (ratification) without involving the legislature, thus making the treaty applicable to it internationally, then subsequently involve the legislature when transforming the treaty to make it enforceable domestically.

The United States Supreme Court in ***Foster* v *Neilson* 27 U.S. (2 Pet.) 253 (1829)** at para 314 described the effect of treaties in countries that employ the dualist system as follows:

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[19] Walters, M. "*Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*". 2007 Columbia Law Review VOL 107, 628-705.

[20] R. Balkin, "*International Law and Domestic Law, in Public International Law: An Australian Perspective*" 119 (Sam Blay *et al* eds., 1997); MALANCZUK, *supra* note 3, at 45; Gib van Ert, "*Dubious Dualism: The Reception of International Law in Canada*", 44 VAL.U.L.REV. 927 (2010).

> "A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument."

In line with the most common practice of incorporation among States within the Commonwealth, the dualist system has been the predominant norm in most African countries.

Zimbabwe is one such example of a dualist State, as evidenced by section 327 of the 2013 Constitution, which provides that international law does not form part of Zimbabwean law unless it has been incorporated into law by an Act of Parliament. The Constitutional Court of Zimbabwe confirmed this position in ***Shumba and Ors*** **v** ***Minister of Justice, Legal and Parliamentary Affairs and Ors*** **CCZ 4/18** where the following was held at pages 25-27 of the cyclostyled judgment:

> "Zimbabwe is a dualist state as evidenced by ss 327(2) and 34 of the Constitution which exhort the State to ensure incorporation into our domestic law of all international conventions and treaties to which Zimbabwe is a party … In the result, I find that the international treaty cited by the applicants, not having been appropriately incorporated into our domestic legislation, has no binding effect in the determination of the dispute in this matter."

Important to note, however, is the fact that section 34 of the Constitution of Zimbabwe mandates the State to ensure that all international conventions, treaties and agreements to which Zimbabwe is a party are incorporated into domestic law. Incorporation or domestication of treaties is important to constitutionalism because it ensures how a country is committed to complying with international law. The Constitution is a sovereign in its own right. Swaziland, another member of the COMESA bloc, belongs to the same dualist tradition, as demonstrated by section 238 of its Constitution which provides that unless an international agreement is self-executing it will not become law in Swaziland unless enacted into law by Parliament.

Therefore, the domestication of the Treaty and the AfCFTA is highly dependent on the individual States and their constitutional provisions. In light of the two schools of thought on the domestication of international treaties, this presentation will show that there are essentially three main methods by which the Treaty and the AfCFTA may be implemented by the Member States to have force of law. These are associated with the monist and dualist theories. The methods are: adoption, incorporation and transformation.

In accordance with the monist theory, adoption, or "automatic incorporation" of international law as part of domestic law, renders a treaty automatically applicable in domestic law. Incorporation, as effected by dualist States, entails enacting implementing legislation and appending to the text of the Act, or its accompanying

schedule, the relevant treaty. Once incorporated, international treaties are accorded a higher status than domestic law, superseded only by respective Constitutions. In ***Abacha* v *Fawehinmi* (2000) 6 NWLR** part 660, the Supreme Court of Nigeria held that where there is a conflict between the African Charter and any other statute, the Charter will prevail, because it is presumed that the legislature did not intend to breach an international obligation. The court held further that the African Charter "possesses a greater vigour and strength than any other domestic statute".

Transformation, on the other hand, involves amending or supplementing existing legislation without necessarily referring to the Treaty. A perusal of Article 5(2) of the Treaty is reflective of the fact that the Treaty contemplates its implementation and/or domestication through the "incorporation and transformation" methods. The following is stated in this regard:

> "Each Member State shall take steps to secure the enactment of or continuation of such legislation to give effect to this Treaty and in particular:
>
> (a) To confer upon the Common Market legal capacity and personality required for the performance of its function; and
>
> (b) To confer upon the regulations of the Council the force of law and the necessary legal effect within its territory."

Another fundamental manner in terms of which the Treaty and the AfCFTA may be domesticated is through the local courts or tribunals and the employment of judicial activism.

In evaluating the role of domestic courts or tribunals, it is helpful to distinguish between three types of treaty provisions. "Horizontal" treaty provisions regulate relations between States; "vertical" provisions regulate relations between States and private parties; and "transnational" provisions regulate relations among private parties that cut across national boundaries. Domestic courts or tribunals are rarely invited to apply horizontal treaty provisions. However, private parties frequently seek access to domestic courts or tribunals to vindicate rights that arise from vertical and/or transnational treaty provisions. The Treaty is one such treaty which entitles individuals to enforce its provisions, as held in ***Polytol Paints and Adhesives Manufacturers Company Limited* v *The Republic of Mauritius Ref. No.1 of 2012***.

The use of treaties to regulate vertical and transnational relationships is not a new phenomenon. Two centuries ago, Chief Justice Marshall, writing for the United States Supreme Court in ***Owings* v *Norwood's Lessee*, 9 U.S. (5 Cranch) 344, 348 (1809)**, held that:

> "Each treaty stipulates something respecting the citizens of the two nations, and gives them rights. Whenever a right grows out of, or is protected by, a

treaty, it is sanctioned against all the laws and judicial decisions of the states; and whoever may have this right, it is to be protected."

Although States have used treaties to regulate transnational and vertical relationships for centuries, there has been an exponential growth in treaty-making in this area over the past few decades. The rapidly growing number of treaties that involve transnational and vertical relationships is one reason why it is important to understand the role of domestic courts and tribunals in treaty enforcement and/or domestication. Domestic adjudication is not the only mechanism for private parties to vindicate their treaty-based rights, but it is an important mechanism.

In Zimbabwe, courts of law, as part of the three pillars of the State, are constitutionally obliged to take into account international law and all treaties and conventions to which Zimbabwe is a party. This obligation is encapsulated in section 46 of the Constitution. Therefore, it can be seen that domestic courts or tribunals play a crucial role in the domestication of international norms.

The concept of judicial activism in the enforcement of treaties should thus be understood from the background of Judges furthering the abovementioned purposes of treaties within the bounds of the law.

Like any catchword, judicial activism acquires its real meaning when construed from context. This is because definitions of a concept are usually products of individual

idiosyncrasies and they are often influenced by the individual's perception or world view. A combination of various definitions gives a description of the concept.[21] It is therefore instructive to note from the outset that judicial activism is not a monolithic concept. Rather it can represent a distinct jurisprudential idea worthy of further investigation. There is a plethora of definitions for the concept of judicial activism.

This presentation posits that judicial activism can only acquire its real meaning when construed in context. This depends upon the user's theoretical conception of the role of courts or tribunals in a democracy. More importantly, the effect is that judicial activism is a conception of the court's or tribunal's role as transcending the mere application of law. Judicial activism supports the notion that courts or tribunals cannot ignore the law enacted by the legislature. They can expound and develop the law within their functions.[22]

Judicial activism refers to the use of judicial power to articulate and enforce what is beneficial for society in general and the people at large. Therefore, with the power of judicial review, courts and tribunals act as custodians of fundamental rights, among other principles.

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[21] Ibrahim I. *et al* (2011) "*Judicial Activism and Intervention in the Doctrine of Political Questions in Nigeria: An Analytical Exposition*", African Journal of Criminology at pp 1-4).

[22] Ibrahim I "*Rethinking Judicial Activism Ideology: The Nigerian Experience of the Extent and Limits of Legislative-Judicial Interactions*", International Journal of African and Asian Studies - An Open Access International Journal Vol.4 2014 at p 101.

According to Mr Justice A. H. Ahmadi, the former Chief Justice of India, judicial activism is a necessary adjunct of the judicial function because the protection of public interest, as opposed to private interest, is the main concern.[23]

In this regard, the law must have a purpose. In a free society each person has a recognised private sphere, a protected realm which government authority cannot encroach upon. Therefore, the purpose of law is to preserve freedom and moral agency.

With the growing functions of the modern State, commercially or otherwise, judicial intervention in the field of commerce and trade has also increased. In addition, judicial activism, keeping in view the ideals of democracy, is in fact necessary to ensure that unheard voices are not buried by influential voices.

Therefore, judicial activism in the enforcement of International Competition Law would be characterised by a purposive and progressive interpretation of both the Treaty and the AfCFTA in order to realise their objectives.

[23] A.M. Ahmadi, "*Judicial Process: Social Legitimacy and Institutional Viability*", 4 S.C.C. J. v.1, 1-10 (1996) quoted in S. P. Sathe, "*Judicial Activism: The Indian Experience*", 6 Wash. U. J. L. & Poly 029 (2001), http://openscholarship.wustl.edu/law_journal_law_policy/vol6/iss1/3

The main justification for this creative role is the necessity for the reconciliation of the rules with the wider objectives of justice. The Honourable Oputa, Judge of the Supreme Court of Nigeria, remarked as follows:

> "The law will have little relevance if it refuses to address the social issues of the day. Legislators make laws in the abstract but the court deals with the day to day problems of litigants and attempts to use the laws to solve these problems in such way as to produce justice."[24]

Hence, when Judges are seized with a dispute that requires the enforcement of international and regional laws, sight must not be lost of the need to interpret competition law as being remedial and requiring a fair, large, and liberal interpretation that best ensures the attainment of its objectives. Judicial activism should be understood within this context. It is closely connected to the dynamic, creative and objective reading of the supreme text by the courts or tribunals. The principal supreme text is the Treaty when one is dealing with competition law.

Judges must therefore adopt an approach which requires the continual updating of the constitutional framework of the Treaty in line with its perceived objectives. As

[24] Oputa C, "*Toward Greater Efficiency in the Dispensation of Justice in Nigeria*", in LAW JUSTICE AND STABILITY IN NIGERIA, ESSAY IN HONOUR OF JUSTICE KAYODE ESO, George Y. A. (ed), (JSMB, Ibaddan, 1993) at p 37.

rightly observed by Lord Wright in the Australian case of ***James* v *Commonwealth of Australia***:

> "It is true that a Constitution must not be construed in any narrow and pedantic sense. The words used are necessarily general, and their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of the words changes, but the changing circumstances illustrate and illuminate the full import of that meaning."[25]

In simple terms, the courts and tribunals should take a robust and purposive approach in the determination of competition disputes with a view to continuous realisation of the meaning of the Treaty and the notions of a contemporary economic bloc. This should not, however, be construed as defining judicial activism in the context of international competition law as implying the power to legislate on the bench.

A perfect example of a purposive and progressive interpretation of the Treaty can be found in ***Polytol Paints and Adhesives Manufacturers Company Limited* v *The Republic of Mauritius Ref. No.1 of 2012***, where the Court commented on Article 26 of the Treaty as empowering individuals or residents of the Member States to challenge the legality of any act, regulation, directive or decision of a Member State

[25] [1936] AC 578, at 614.

on the grounds that it is unlawful or infringes the provisions of the Treaty. In the ***Polytol*** case *supra* the Court ruled that the mere fact that Mauritius did not promulgate an act of Parliament to give effect to the Treaty does not exonerate the Member State from honouring obligations emanating from the Treaty.

Hence, individuals have a direct remedy to enforce the provisions of the Treaty. They can approach the local courts or tribunals, alleging that the conduct of a particular Member State has violated the provisions of the Treaty. This is a shift from the traditional approach where international law is mainly concerned with governing the relationship between States. This is supported by the generally accepted definition of international law, as expounded by Dugard J in the book "*International Law: A South African Perspective*" where the learned author defines it as a body of rules and principles which are binding upon the States in their relations with one another.[26]

Therefore, a form of judicial activism is apparent in the decision of the Court in the ***Polytol*** case *supra,* as one can see a purposive interpretation of the Treaty in a manner that gives life to the spirit and purport of the founding document. *Locus standi* to enforce the provisions of the Treaty is extended to the residents of the Common Market. There is a substantive right accruing to the individual to approach the Court and/or local courts or tribunals directly seeking to enforce the Treaty

[26] Dugard J "*International Law: A South African Perspective*" 4 ed (Juta & Co Ltd 2011) at p 1.

without going through the Member State. The purposive interpretation adopted takes cognisance of the object of the Treaty, which is to improve the lives of the citizens and to integrate the regional economies, by involving the individual in the integration process.

The Court was established to enforce a supranational legal order, which upon incorporation by local legislation enacted for the purpose by Member States in terms of the obligation imposed on them by Article 5(2) of the Treaty becomes part of municipal law with direct effect in the territorial areas of Member States.

As mentioned earlier, the Treaty is not an instrument for regulating inter-State relations only. It encourages nationals of Member States to establish and carry on business in any of the Member States without being subjected to discriminatory treatment on grounds of nationality. The Treaty therefore gives rights to private persons. That means that the supranational legal order, comprising the provisions of the Treaty, regulations, directives and decisions adopted by Common Market institutions to give effect to them as well as acts, regulations, directives and decisions adopted by Member States for the implementation of the provisions of the Treaty and measures issued by the Common Market institutions, creates relations of rights and obligations which can be enforced by individuals in both the Court and national courts or tribunals. The only difference between the Treaty and municipal law is

that, whilst the latter is confined in its application to the territorial area of a Member State, the former covers the territorial areas of all Member States.

In the case of ***Polytol supra***, while commenting on the content and scope of Article 26 of the Treaty, the Court held that residents of COMESA Member States have an enforceable right before the Court whenever they establish that they have been prejudiced by an act of the Council or of a Member State which contravenes the Treaty. The Court said:

> "The content of this rule shows the extent the signatories of the COMESA Treaty have committed themselves to give some space in the COMESA territory not only for the Member States but also for individuals. By giving the residents of Member States the right to challenge the acts thereof on grounds of unlawfulness or infringement of the Treaty, the Member States have in some areas limited their Sovereignty. The proper functioning of the Common Market is, therefore, not only a concern of the Member States but also that of the residents. The Treaty is more than an agreement which merely creates obligations between the Member States. It also gives enforceable rights to citizens residing in the Member States."

The Treaty contains a rule which gives the Court ultimate power to determine questions of the application and interpretation of its provisions, or the validity of the

regulations, directives or decisions adopted by the Common Market institutions to give effect to them. Article 29(2) of the Treaty expressly provides that the decisions of the Court on the interpretation of the provisions of the Treaty shall have precedence over decisions of national courts or tribunals. The decisions of the Court on questions of the measures adopted by the Common Market institutions have a binding effect on all national courts or tribunals and administrative authorities of Member States.

National courts or tribunals have jurisdiction to hear and determine disputes arising from alleged violations of rights conferred by the provisions of the Treaty and measures adopted by institutions of the Common Market, even if a Member State is a party to the dispute. Under an obligation to apply Common Market law when it is applicable in the determination of rights and obligations, national courts or tribunals have the power to decide whether that law is applicable to the case or not, subject to determination by the Court.

The combined effect of the rule giving the Court ultimate power in the determination of questions of the application and interpretation of the provisions of the Treaty and the validity of measures adopted by the institutions of the Common Market, and that giving binding effect and precedence to decisions of the Court over decisions of national courts or tribunals on these matters, is that there has to be compatibility between the Common Market legal order and the legal systems of the Member

States. In the absence of a mechanism whereby national courts or tribunals would have the matters falling within the competence of the Court decided in proceedings before them, they would be disabled from giving judgments.

Article 30 of the Treaty makes provision for the participation of the Court in proceedings before a national court or tribunal by providing the national court or tribunal with the power to decide what to do with matters over which the Court has exclusive jurisdiction. The Article reads:

> "Where a question is raised before any court or tribunal of a Member State concerning the application or interpretation of this Treaty or the validity of the regulations, directives and decisions of the Common Market, such court or tribunal shall, if it considers that a ruling on the questions is necessary to enable it to give judgment, request the Court to give a preliminary ruling thereon. Where any question as that referred to in paragraph 1 of this Article is raised in a case pending before a court or a tribunal of a Member State against whose judgment there is no judicial remedy under the national law of that Member State, that court or tribunal shall refer the matter to the Court."

The obligation of the national court or tribunal to refer the question raised in respect of matters specified under Article 30 of the Treaty is established with a view to ensuring the proper application and uniform interpretation of Common Market law

in all the Member States. The interaction between the Court and a national court or tribunal in accordance with the provisions of Article 30 is one of co-operation. The scope of that obligation must therefore be ascertained by reference to the power given to the national court or tribunal on the one hand and those of the Court on the other.

Within the limits established under Article 30 of the Treaty, it is for the national court or tribunal to decide on the principle and purpose of a preliminary ruling. It is important to note that the question raised must relate to matters over which it is necessary that the Court exercise its jurisdiction. In other words, the decision of the Court must be inextricably linked to the disposition of the controversy between the parties and the success or failure of the relief sought in the national court or tribunal.

If the judgment of the national court or tribunal is subject to a judicial remedy under the national law of the Member State, the court or tribunal must be satisfied, upon consideration of the facts of the case, that the preliminary ruling by the Court on the matters raised by the question is necessary to enable it to give judgment on the subject matter of the proceedings. A question must be raised within the meaning of Article 30 of the Treaty. The national court or tribunal concerned may decline to request a preliminary ruling, if it considers that the decision of the Court is not necessary to enable it to give judgment. The national court or tribunal alone has direct knowledge of the proceedings, facts of the case and arguments put forward by

the parties. It, therefore, has the responsibility to make the decision after a careful assessment of the relevance of the question raised and the necessity of having the matter determined by the Court.

Although the part of the provisions of Article 30 of the Treaty relating to the obligation on the national court or tribunal against whose judgment there is no judicial remedy may be taken to mean that such a court or tribunal must refer the question to the Court once it is raised, that should not be the case. That court or tribunal also has to be satisfied that the question has been raised within the meaning of Article 30 of the Treaty.

The mere fact that a party contends that a case raises a question of the application or interpretation of provisions of the Treaty does not compel the court or tribunal to accept that a question has been raised within the meaning of Article 30. A national court or tribunal against whose judgment there is no judicial remedy is not under an obligation to refer to the Court an irrelevant question. A question is not relevant in the determination of a dispute if the answer to that question can in no way affect the outcome of the case. The authority, for example, of an interpretation already given by the Court may deprive the obligation of its purpose. That may be so, if the question raised is materially the same as a question which has already been the subject of a preliminary ruling in a similar case. The purpose of the exercise of the

jurisdiction of the national court or tribunal is to protect the process of the Court against frivolous or vexatious litigation.

In the context of investor-State arbitration cases, the need for new procedures allowing courts or tribunals to dispose of frivolous claims on an expedited basis was perceived as crucial, considering the upsurge of investor-State cases in the last decades before the International Centre for Settlement of Investment Disputes ("ICSID") and other fora.[27] The latest amendments in 2006 of the ICSID Arbitration Rules have taken those concerns into consideration: A new provision inserted within the ICSID Arbitration Rules, Rule 41(5), designs a specific procedure, pursuant to which a party may raise, *in limine litis*, an objection that a claim is "manifestly without legal merit".

Though said in the context of international arbitration, the above sentiments are eminently apposite to the instant circumstances to the extent that they apply to the disposal of frivolous or vexatious questions by national courts or tribunals, as opposed to referring them to the Court without first determining the question's relevance in the context of Article 30 of the Treaty.

Among international courts or tribunals, the European Court of Human Rights stands out as perhaps the most successful example for the use of the filtering mechanism

[27] *Ibid*

provided by its constituent treaty to strike out unmeritorious claims.[28] The European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") sets forth, in its Article 35.3, that:

> "The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:
>
> (a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded or an abuse of the right of individual application."

The part of the provisions of Article 30 of the Treaty relating to a national court or tribunal against whose judgment there is no judicial remedy must be interpreted as meaning that such a court or tribunal is required to comply with its obligation to bring the question raised to the Court, unless it has established that the correct application of the Common Market law to the facts of the case is so obvious as to leave no scope for a reasonable doubt. No necessary or appropriate measure for the implementation of the provisions of the Treaty ought to contradict the requirements of the essential rules intended to give concrete shape to the fundamental principles of the Common Market. The rule serves to avoid the occurrence of a situation where a valid question on the application or interpretation of a provision of the Treaty or

[28] See note 12 above

the validity of a measure adopted by a Common Market institution remains undetermined at the end of the proceedings in which it was raised, giving rise to a sense of legal uncertainty.

The Court determines questions of law. It does not involve itself in the making of findings of fact. Nor does it have to inquire into whether the question was properly raised in terms of the rules governing the organisation of the business of the national court or tribunal. Its duty under Article 30 of the Treaty is not one of rendering advisory opinions to national courts or tribunals on general or hypothetical questions. The duty is one of assisting in the administration of justice in the Member States. The national courts or tribunals must, therefore, ensure that the procedure for preliminary rulings is not used for purposes for which it was not intended to be employed. It must not be forgotten that the conditions in which the Court exercises its functions under the Treaty are independent of the nature of the proceedings brought before national courts or tribunals, although the results thereof have direct impact on the outcome of the proceedings before those courts or tribunals.

Considering all the features of the mechanism for interaction between national courts or tribunals and the Court provided for under Article 30 of the Treaty, it is clear that the relationship is one based on co-operation and not conflict or competition. The interaction is an expression of the exercise of judicial functions jointly assigned to the national courts or tribunals and the Court to ensure that, in the interpretation and

application of the provisions of the Treaty or the validity of the regulations, directives and decisions adopted by institutions of the Common Market, law is observed. The interaction is a direct consequence of the connection between the Common Market legal order and the legal systems of Member States established upon incorporation of the supranational legal order as part of municipal law.

The objectives of the Treaty include the promotion of uniformity in the interpretation and application of its provisions. The requirement that national courts or tribunals may themselves not declare the regulations, directives and decisions of institutions of the Common Market invalid ensures that the law is applied uniformly in all the Member States. Divergences of decisions between national courts or tribunals of the Member States on the application and interpretation of the provisions of the Treaty and the validity of Common Market measures would poison the very unity of the Common Market and detract from the fundamental requirements of legal certainty. The coherence of the system of judicial protection required by the Treaty would not be achieved. In sharing its jurisdiction with the national courts or tribunals in the proceedings before them, the Court ensures proper functioning of the Common Market whilst taking part in the administration of justice in the Member States. It is clear that where the Article 30 procedure applies, a preliminary ruling by the Court is made an essential condition for the legality of the decision by a national court or tribunal.

This discussion would not be complete without there being a reference to the provisions of Article 26 of the Treaty. This is because questions as to the interpretation or application of the provisions of the Treaty may be raised in proceedings commenced under Article 26 of the Treaty. A litigant only has to plead in those proceedings that the act, regulation, directive or decision of a Member State should not be applied to him or her because it violates a provision of the Treaty. Article 26 of the Treaty is also relevant because its provisions enforce co-operation between national courts or tribunals and the Court in the exercise of their respective judicial functions. The Article provides as follows:

> "Any person who is resident in a Member State may refer for determination by the Court the legality of any act, regulation, directive or decision of the council or a Member State on the grounds that such act, directive, decision or regulation is unlawful or an infringement of the provisions of the Treaty. Provided that where the matter for determination relates to any act, regulation, direction or decision by a Member State, such person shall not refer the matter for determination under the Article unless he has first exhausted local remedies in the national courts or tribunals of the Member State."

The exhaustion of local remedies rule requires that an individual allegedly harmed by a Member State must first seek to redress the alleged harm before the administrative and judicial system of that Member State until a final decision has

been rendered, before initiating international proceedings directly against the Member State. It serves the purpose of giving the Member State where the violation occurred an opportunity to redress it by its own means, within the framework of its own domestic system before its international responsibility can be called into question.

National remedies are viewed as more effective than international remedies because they are easier to access. They may be pursued expeditiously and they require fewer resources as opposed to making a claim before an international body. Access to international enforcement mechanisms is seen as a last resort, after the Member State has failed to correct the violation or to carry out justice.

However, in the context of the Treaty, it ought to be noted that the requirement that a litigant challenging the validity of a measure adopted by a Member State, on the ground that its provisions breach the Treaty, should first exhaust domestic remedies is not cast in stone. The structure of the provisions of Article 26 of the Treaty reveals a clear intention to give priority to the exercise of jurisdiction by national courts or tribunals. After all, the measures, the validity of which would be the subject matter of the proceedings, would have been adopted at the local level by a Member State. They would not be measures adopted by an institution of the Common Market. Under Article 26, the national courts or tribunals have power to declare invalid an

act, directive, decision or regulation of a Member State the legality of which is impugned on the ground of inconsistency with a provision of the Treaty.

Article 26 of the Treaty gives precedence to the exercise of jurisdiction by national courts or tribunals of Member States unless certain conditions are not met by the local remedies. An individual must not be overburdened with determining the most effective way of realising his or her rights. One of the principles of the Treaty is that the remedies under municipal law for the enforcement of rights or obligations under the Treaty have to be accessible and understandable. It is the duty of a Member State to organise its legal system so as to allow the courts or tribunals to comply with the requirements of the provisions of Article 26 of the Treaty. The Treaty, has, therefore, to be interpreted as requiring a guarantee of effective remedy in a national court or tribunal to anyone who claims that his or her rights under the Treaty have been violated. There has to be demonstrable compatibility between the remedies provided under municipal law and those under the Common Market legal order for national courts or tribunals to enjoy the precedent right to hear and determine questions on the matters of dispute raised by a person referred to under Article 26 of the Treaty.

The point was emphasised by the Court in its judgment in the case of ***Intersolmac* v *Rwanda Civil Aviation Authority*** **Ref. No. 1 of 2009** where at pages 9 to 10 it was stated:

> "There is no doubt that the exhaustion of local remedies requirement prescribed under Article 26 of the Treaty is an important principle of customary international law. The purpose of the rule is to ensure that the State accused of violation of the law should have an opportunity to redress the alleged wrong by its own means within the framework of its own domestic legal system. It is based on the principle that claims for local wrongs must seek local remedies before international remedies are sought for the same local wrongs. So, where both local and international remedies are available, effective and adequate for the determination of the same measure alleged, the local remedies must take precedence over international remedies unless there has been a denial of justice or a refusal to permit access to local courts or tribunals. Local courts provide fora for development and exploration of the factual issues behind the dispute as well as the crystallization of the domestic legal claims."

Taking into account the principle of co-operation, as well as the fact that national courts or tribunals have the power to determine questions of the validity of acts, regulations, directives and decisions issued by Member States, the Court should defer to the exercise of jurisdiction by national courts or tribunals when cases are sought to be brought to it directly under Article 26 of the Treaty. This is particularly

so where the available local remedies are as adequate and effective as those provided in the Common Market legal order.

That approach by the Court would be in conformity with the policy of the Treaty, which is that, in the absence of the special cases expressly mentioned in the Treaty which require the exercise of original jurisdiction by the Court, national courts or tribunals should, on the basis of the principle of transfer of part of their competences under municipal law, hear and determine proceedings involving alleged violations of rights under the provisions of the Treaty and measures adopted to give effect to them.

In conclusion I would like to observe that in voluntarily assuming the obligation to adhere to the rule of law in the implementation of the provisions of the Treaty and adoption of acts, regulations, directives and decisions to give effect to them, Member States thrust Judges and lawyers into the depths of the task of finding solutions to some of the problems relating to the integration process. It is clear that the achievement of the aims and objectives of the Common Market takes into account the central role of the Court and the co-operation of national courts or tribunals of Member States in enforcing the principle of the rule of law.

This is informed not only by the overlapping membership of States to the RECs and similarities in the treaties, but, more importantly, the need for the Judiciary at both

levels to complement each other in providing a pillar of confidence to investors and other actors in the theatre of regional integration.[29]

As such, the veneration of the rule of law is central to the effective interaction between national and international laws, insofar as competition law is concerned. The courts or tribunals must, therefore, always take the lead in upholding the rule of law. Put simply, the courts or tribunals are the *sine qua non* of the concept of the rule of law. As such, the rule of law is sacrosanct and ought to be protected at all costs.

It should be noted that in modern Africa and the rest of the world the conception of what is considered to form part of the rule of law has evolved from the basic elements reflected in the Diceyean formulation. What is now widely accepted as a modern conceptualisation of the rule of law was formulated by the United Nations Secretary-General in 2004. He defined the rule of law as:

> "… a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It

[29] Mwangi Gakunga (2019) "*Close ties between regional and national courts critical to fortify regional integration*" available at https://www.comesa.int/2019/03/29/close-ties-between-regional-and-national-courts-critical-to-fortify-regional-integration/ (Last accessed 05/07/19)

> requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."[30]

With the rapid advent of globalisation, international law has expanded into new areas which had traditionally been under the exclusive domain of municipal law. As a result, problems concerning interaction between the international and domestic legal orders have become increasingly common. More specifically, difficulties have arisen concerning the implementation of international law decisions into the domestic legal order.

This presentation advances recommendations that ought to be considered in the effective interaction between international and national laws. The point of departure is the general rule that a State which has broken a rule of international law cannot justify itself by referring to its municipal law; otherwise international law would be evaded by passing appropriate domestic legislation. Article 27 of the Vienna Convention on the Law of Treaties, 1969, is very clear regarding this aspect. Under

[30] See Report of the Secretary-General, "The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies" https://www.un.org/en/ga/search/view_doc.asp?symbol=S/2004/616 (Last accessed in April 2019).

the principle of *pacta sunt servanda*, a State is under the duty to honour its international obligations even if it means changing its municipal law. This view has been applied in various cases. The British Government in the ***Alabama Claims Arbitration*** **(1872) 1 Int. Arb. 495** sought to rely on a lack of domestic legislation to avoid liability. Its defence was struck down on the ground that the British Government could not justify itself for a failure in due diligence on the plea of insufficiency of the legal means of action it possessed.

There is a general duty to bring municipal law into conformity with obligations under international law. Article 5(1) of the Treaty mandates every Member State to take steps that secure the enactment of legislation to give effect to the Treaty. The Permanent Court of International Justice in ***Exchange of Greek and Turkish Population*** **1925 P.C.I.J. (ser. B) No. 10 (Feb. 21)**, whilst interpreting a similar provision in the Lausanne Convention, held at para [52] that a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken. If it does not do so, a State cannot rely on its own legislation to limit the scope of its international obligations.[31] It is a generally accepted principle of

[31] **The Free Zones Case,** 1932 P.C.I.J. series A/B No. 46.

international law that, in relations between States which are contracting parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty.[32]

Likewise, a State, once it has ratified a treaty, cannot successfully amend its domestic legislation with a view to evading obligations incumbent upon it under international law. In such a situation, international law prevails over municipal law. As stated in the United Nations Headquarters opinion, on the international legal plane national law cannot derogate from international law.[33]

Hence, it cannot be gainsaid that national laws of Member States ought to be in accordance with the provisions of the Treaty, which provisions occupy a superior position as compared to domestic laws. Any domestic law which violates the provisions of the Treaty can thus be successfully challenged to the extent of the inconsistency with the international laws that regulate competition law in the region, in this case the Treaty and the AfCFTA. Accordingly, domestic laws ought to be crafted in line with the supreme text governing the Common Market and international obligations.

[32] **The Greco-Bulgarian Communities Case** (1930) P.C.I.J. series B. No.17.
[33] Report of the International Court of Justice: 1 August 1988-31 July 1989, United Nations 1989 https://www.icj-cij.org/files/annual-reports/1988-1989-en.pdf (last accessed 5/7/19)

After everything is said and done ladies and gentlemen, the question is: *Are all Judges and lawyers of the Member States prepared to uphold the fundamental principle which views Common Market law as if it were the supreme law of the land?*

I leave you that question to ponder.

REFERENCES

1. *Lanificio di Gavardo Spa v. Ministry of Health* ECJ-1982-C-001

2. La Pergola, A., (1993) "*The Relationship between International and Domestic Law: Traditional Problems and New Trends*". *Science and Technique of Democratie*. No. 5 pp 3-105

3. Shaw, M.N., (1986). "International Law". 2nd ed Grotius Publications Ltd. Cambridge

4. The Treaty Establishing the Common Market for Eastern and Southern Africa (2004 edition)
