The supremacy of AU law over domestic law must be clear and upheld for economic integration to succeed in Africa

The African Continental Free Trade Area (AfCFTA) reflects Africa's commitment to position itself as an emerging partner in global trade. Through AfCFTA, Africa aims to build the world's largest single market, by allowing eventually for the free movement of people, goods and services across all 55 member states of the African Union.

The process towards deepening trade ties on the continent and integrating its economies towards attaining sustainable and inclusive development under the AU's Agenda 2063 is already on course. The AfCFTA promises to change both the narrative and reality for Africa by connecting nearly 1.4 billion people, including a growing middle class, with a combined gross domestic product of over US$3.4 trillion.

By 2035, a full implementation of the AfCFTA is expected to yield real income gains estimated conservatively at around US$450 billion, with an increase in the volume of total exports by nearly 30%. Intra-continental exports are also expected to increase by more than 81%, while exports to countries outside Africa are estimated to rise by 19%.

However, to fully achieve these gains and the above-mentioned objectives, the AfCFTA Agreement must be implemented in a very purposeful, determined, coordinated and efficient way to unblock the longstanding bottlenecks affecting trade, investment, and the free movement of people, goods, and services. There must be no ambiguity in allowing the rules and directives of AfCFTA to regulate economic activity across member states.

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A critical component of the legal framework of the AfCFTA that will drive its single-market agenda is the Dispute Settlement Mechanism, particularly, the enforceability and supremacy of the AfCFTA Agreement and AU law in general. This paper is a critique of the legal framework of the AfCFTA and other related AU laws for the purpose of establishing Africa's single market agenda.

It will conclude that the single market agenda may be greatly undermined unless the political leadership in Africa agrees to the supremacy of the AfCFTA Agreement over national laws and related legal interests. In short, we must be free to do business anywhere in Africa without legal obstacles imposed by any state law.

1. Dispute Settlement under the AfCFTA

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Article 20 of the AfCFTA Agreement establishes a Dispute Settlement Mechanism as a vehicle for the settlement of disputes between States Parties. The Dispute Settlement Mechanism is administered in accordance with the Protocol on Rules and Procedures on the Settlement of Disputes ('the Protocol').

The Protocol requires a State Party seeking to resolve a dispute arising under the Agreement to have recourse, in the first instance, to Consultations with a view to reaching an amicable settlement of the dispute. The Protocol also encourages the use of Good Offices, Conciliation, and Mediation in the resolution of disputes. Resort to these procedures, however, is without prejudice to the rights of States Parties in any other proceedings.

It is useful to note that although the above-mentioned procedures may achieve their purpose of enhancing amicable and expeditious settlement of disputes, the drawback is that the outcome of a settlement through any of these procedures does not establish precedents for the resolution of subsequent disputes. This procedure must be evaluated through the lens of the desirability of judicial precedents, which generally ensure predictability of the law to facilitate trade in goods and services across the continent.

In the event that a dispute is not successfully settled through consultations, the dispute is referred to the Dispute Settlement Board (DSB), and a request is made for the establishment of a Panel. The Panel is mandated to make an objective assessment of the matter before it, including an assessment of the facts of the case and the applicability of and conformity with the relevant provisions of the Agreement. These findings of the Panel are to assist the DSB in making its recommendations and rulings in the matter.

The Panel, after having considered rebuttal submissions and arguments by the State Parties to the dispute, issues a Draft Report to the Parties. Upon receipt of this Draft Report, the Parties may submit their comments to the Panel. The Panel then issues and circulates a Final Report to the Parties and the DSB.

The decisions of the DSB are made on a reverse consensus basis. For this reason, the Final Report submitted by the Panel will be considered, adopted and signed by the DSB, unless the DSB by consensus decides not to adopt the report. A State Party to the dispute also has the right to appeal on the Final Report of the Panel, and this will halt any decision-making process of the DSB on the Final Report.

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An appeal by a State Party on the Final Report is made to the Appellate Body established under the Protocol and limited to issues of law covered in the Final Report and legal interpretations developed by the Panel. The decisions of the DSB on a report or recommendation of the Panel or the Appellate Body, are final and binding on the disputing State Parties.

Under Article 6(6) of the Protocol, provision is also made for State Parties to mutually agree to submit their dispute to arbitration where they consider it expedient to do so. In the event that State Parties mutually agree to resort to arbitration, they will be precluded from simultaneously referring the same dispute to the DSB. The Agreement recognises the principle of party autonomy in arbitration proceedings.

Accordingly, while the AfCFTA Agreement governs the substance of the dispute, the arbitration procedure is at the behest of the Parties and not controlled by the DSB. The Parties, therefore, are entitled to select the forum and procedural rules in relation to the dispute. The parties to the dispute are bound by the arbitral award and the DSB is to be notified of the award for enforcement purposes.

2. Is the AfCFTA Agreement Superior to the Domestic Laws of State Parties?

With the establishment of this legal framework and the dispute settlement mechanism by the AfCFTA Agreement, it is important to interrogate whether the Agreement takes precedence over the domestic laws of State Parties, and if so, the extent to which it does, taking into account the sociopolitical implications of multilateral free trade agreements.

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In the creation of a multilateral trade agreement, the State Parties are expected to enjoy the delivery of enhanced trade and investment benefits. However, these benefits inevitably come along with a set of obligations and a commitment by each signatory to act within the framework established by the agreement. This commitment, one way or another, has an impact on the exercise of sovereignty by each state and places the enforcement of its domestic laws within the context of some minimum requirements of international law.

In the case of the World Trade Organisation (WTO), not only does the WTO Agreement have a binding effect on all Member States, but also the legal framework requires each Member State to ensure the conformity of its laws and administrative procedures with its obligations as contained in the Agreement and the annexures. This obligation mandates every Member State

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to change, if necessary, domestic laws that have been held by the Dispute Settlement Body to be inconsistent with the WTO obligations of the Member State in question.

The Member State acting in non-conformity with its WTO obligations will therefore not be entitled to rely on a claim that the performance of those obligations is impossible by virtue of its domestic laws or decisions of its highest court.

These strict provisions in the WTO Agreement have gone a long way to ensure predictability in the implementation of WTO laws, and in particular the WTO dispute resolution mechanism, and contributed to enhancing multilateral trade under the WTO, notwithstanding the familiar intricacies of the entire WTO framework since its establishment.

The supremacy of community law over domestic or national laws is even more well-settled under the legal order of the European Union (EU). A cornerstone of the EU is the primacy of EU law, which is a principle to the effect that in case of a conflict between EU law and the law of a Member State, EU law prevails. This principle was espoused by the European Court of Justice (ECJ) in the landmark case of Flaminio Costa v ENEL .

The ECJ has proffered reasons for prioritising the supremacy of EU law, but the fundamental goal is to ensure a unified and effective application of EU law in all Member States. In the Costa v ENEL case, the ECJ stated that the executive force of community law cannot vary from one state to another in deference to subsequent domestic laws, without jeopardising the attainment of the objectives of the treaty, and giving rise to discrimination . In effect, there must be a uniform application of EU law across board to achieve the economic objectives of the regional organisation.

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The ECJ further emphasised that provisions which are intended to be binding and directly applicable in all Member States would be quite meaningless if a Member State could unilaterally nullify its effects by means of a legislative measure which could prevail over community law. By this statement, the ECJ gives clarity to the position that Member States of the EU have limited their sovereignty by conferring supremacy on EU law over domestic laws.

A clear case is the Constitution of Ireland which recognises EU law as superior to all national laws. It should be noted that the primacy of EU law only applies where Member States have

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ceded sovereignty to the EU in fields such as the single market, environment, and transport, etc., and not areas such as education, culture or tourism.

In the case of Africa, the relationship between the laws of the African Union (AU) and domestic laws is quite complex, with the supremacy of the AU laws being a subject of debate among legal experts. Over the years, one of the prevalent features of the various regional communities in Africa has been the protection of the sovereignty and independence of African nations.

The Charter of the Organisation of the African Union (OAU) (the predecessor to the African Union (AU)) demonstrated this by affirming the autonomy of the signatory states. This affirmation of the autonomy of Member States under the OAU arguably rendered the organisation incapable of intervening during crucial and sensitive times, such as in cases of human rights abuses as was seen in the Biafran War in Nigeria and the Rwanda genocide of 1994.

Currently, the AU's legal framework is based on the principle of subsidiarity, which means that the organization still upholds the sovereignty of its Member States and does not interfere in their domestic affairs as reflected in the Constitutive Act of the AU. There is no provision in the AU Constitutive Act that confers supremacy on AU law over the national laws of Member States. The provisions of other regional instruments such as The African Charter on Human and People's Rights (ACHPR) (also known as the Banjul Charter) do not emphatically resolve this issue of sovereignty.

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It is therefore difficult to resolve any conflict or inconsistencies between AU laws, treaties, charters, regional agreements, etc., and the national laws of Member States. This problem has over the years generally led to the prioritisation of national agendas over the collective objectives of the AU and the various regional communities across the continent. This longstanding challenge of the African continent is clearly reflected in the disbandment of the Southern African Development Community (SADC) Tribunal.

It has been argued that the ruling of the SADC Tribunal against Zimbabwe and its connection with the Tribunal's disbandment was because the ruling posed a radical challenge to state sovereignty, rejecting the validity of a constitutional provision approved by the parliament of Zimbabwe.

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Another case that can be cited in relation to the complexity of the relationship between community law and national law is the Ghanaian case of The Republic v. High Court (Comm. Div.) Accra Ex Parte; Attorney General (NML Capital & Republic of Argentina – Interested Parties) The Supreme Court of Ghana in this case affirmed as follows "the mere fact that a treaty has been ratified by Parliament…does not, of itself, mean that it is incorporated into Ghanaian law. A treaty may come into force and regulate the rights and obligations of the State on the international plane, without changing rights and obligations under municipal law."

The question, therefore, remains, as to whether State Parties of the AfCFTA are able and willing to move away from decades of non-interference and state sovereignty in matters involving international dynamics, and in this case, trade-related matters and the establishment of the single continental market. Unlike the WTO Agreement and EU law as discussed above, the AfCFTA Agreement does not contain a strictly worded provision recognising the AfCFTA Agreement as superior to national law.

It may be argued that in the absence of an emphatic provision on the precedence of the AfCFTA and how inconsistencies with domestic laws should be resolved, the journey has only been lengthened, and it is unclear whether this was a deliberate approach by the drafters.

Notwithstanding the above, the entire reading of the provisions of the AfCFTA Agreement gives a clear indication of the intention of the drafters to create an Agreement, which was fair and equally binding on all its signatories, without any single signatory being entitled to reject compliance with an AfCFTA obligation on the basis of national sovereignty.

The establishment of the Dispute Settlement Body (DSB) to resolve disputes related to the implementation of the AfCFTA and its power to make binding and enforceable decisions gives credence to the superiority of the AfCFTA Agreement over domestic laws.

This is well captured in Articles 6(5), 19(4), and 24(1) of the Protocol on Rules and Procedures on the Settlement of Disputes as discussed above. Additionally, the provisions of the Agreement on the surveillance, implementation, and enforcement of the decisions of the DSB reinforce the superiority of the AfCFTA Agreement over domestic laws. In accordance with Articles 24 and 25 of the Protocol, State Parties have a legal duty to fully implement the recommendations and rulings of the DSB.

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The State Party affected by the decision of the DSB is required by law to inform the DSB of its intentions in respect of the implementation of the decision. If the State Party concerned finds it impracticable to immediately comply with the decision, of the DSB, it must seek the approval of the DSB to comply with the decision within a reasonable time.

The compliance period may be such a period as approved by the DSB, as may be mutually agreed upon by the disputing State Parties, or as may be determined through arbitration. The DSB is also required to keep under surveillance the implementation of its decisions.

Compensation and the suspension of concessions or other obligations are temporary measures available to an aggrieved Party in the event that the decisions of the DSB are not implemented as required. The suspension of concessions or other obligations should be done taking into account the sector in which the breach of the AfCFTA Agreement occurred. If a dispute arises as to the level of suspension imposed by a State Party, the Agreement permits the resolution of such dispute through final and binding arbitration.

The essence of the surveillance, enforcement, and implementation mechanism under the Agreement is that once the DSB decides on a dispute, the State Parties to the dispute are required to fully comply with and implement the decision, irrespective of the position of their domestic laws. The protracted nature of the dispute settlement and enforcement procedure is, however, one issue worthy of discussion as that may impede the realisation of the entire single market objective.

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The role of the legislature of the various State Parties will be significant to the recognition and preservation of the superiority of the AfCFTA Agreement over their domestic laws. The legislature and relevant government institutions must take the initiative to revise their laws for conformity with the AfCFTA provisions if there is truly the will to see to the success of the single market agenda.

Another way to ensure the supremacy of the AfCFTA and its enforcement domestically, would be to create a system of incentives for State Parties to ensure the conformity of their national laws with the AfCFTA Agreement. Consideration can also be given to creating a mechanism for AfCFTA-related laws to have direct and automatic effect domestically and avert the need for potentially bureaucratic processes to make those laws part of the domestic laws of State Parties.

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As demonstrated above, the reluctance of African countries, in the past, to permit any limitations on their sovereignty in instances where domestic law clashes with international treaties, which they have willingly executed, has far-reaching consequences on the effectiveness of these treaties and international agreements, and if this is not addressed by the AfCFTA, the aspirations of the 54 State Parties will suffer the same fate.

If States Parties on the basis of 'state sovereignty' decide to capriciously determine when the AfCFTA Agreement gains the force of domestic law in their countries, there will be the inevitable result of an uneven application of the Agreement, across the continent, which will in turn lead to unfairness and undermine confidence and trust in the AfCFTA regime. It is imperative that State Parties to the AfCFTA put the single market agenda over nationalism to ensure the success of the AfCFTA and prove all doubters wrong.

3. Harmonisation of Regional Agreements with the AfCFTA

With regard to the relationship between the AfCFTA Agreement and instruments of Regional Economic Communities, the Agreement clarifies how conflicts and inconsistencies between the various regional agreements and the AfCFTA should be resolved.

Article 19 of the AfCFTA Agreement provides that "in the event of any conflict and inconsistency between this Agreement and any regional agreement, this Agreement shall prevail to the extent of the specific inconsistency, except as otherwise provided in this Agreement". This provision clearly confirms the superiority of the AfCFTA vis-a-vis other regional agreements affecting State Parties.

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This notwithstanding, the intention of the drafters to preserve higher levels of integration that may have been achieved by State Parties under their various regional economic communities is well captured under article 19. It provides that "notwithstanding the provisions of Paragraph 1 of this Article, State Parties that are members of other regional economic communities, regional trading arrangements and custom unions, which have attained among themselves higher levels of regional integration than under this Agreement, shall maintain such higher levels among themselves."

This provision is in pursuance of the preservation of the acquis and the recognition that the existing regional economic communities are building blocks for the AfCFTA, which is one of the governing principles of the AfCFTA. It is also in recognition of the fact that given the

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relatively extended horizon of the AfCFTA, it will be reasonable to allow the various regional economic communities to pursue deeper integration and trade facilitation with the overarching goal of a single-continental market in mind.

This approach of parallelism and harmonisation adopted under article 19 to preserve higher levels of regional integration while promoting an AfCFTA-wide integration is crucial to the success of building the single continental market. The commitment to preserve these higher levels of integration, however, should not be seen as derogating from the supremacy of the AfCFTA as far as its relationship with regional agreements is concerned.

To ensure the continuing supremacy of the AfCFTA over these regional agreements, it will be important for the regional economic communities to streamline their activities, henceforth, to come into conformity with the laid down requirements of the AfCFTA. The respective Parliaments of the regional economic communities can be proactive in this regard by examining their existing laws and making the right modifications where necessary in accordance with the legal order of the AfCFTA.

This proactive measure will significantly reduce the number of disputes that could arise upon a full roll-out of the AfCFTA as far as inconsistencies and conflicts with the regional agreements are concerned. It will also help to achieve the objective of the AfCFTA to resolve the challenges of multiple and overlapping memberships which has been a constraint to intra-continental trade in Africa over the years.

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It must be admitted that this harmonisation objective will not be an easy one against the background of the existence of a plethora of regional trade agreements and economic communities across the continent, with differing approaches and degrees of integration. As mentioned earlier, the institutions of the RECs, including their Parliaments, have a huge role to play in this venture, particularly on matters of trade, free movement of goods and services, etc.

3. Capacity to Initiate Dispute Settlement Proceedings

One major drawback, of the legal framework of the AfCFTA which could potentially act as a barrier to the realisation of the single-market agenda is the State-to-State dispute resolution system. Under Article 3 of the AfCFTA Agreement, the scope of application of the Protocol

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on Rules and Procedures on the Settlement of Disputes is limited to disputes between State Parties with regard to their rights and obligations under the Agreement.

The effect of this is that stakeholders of the private sector (involving natural and artificial persons) have no locus to invoke the dispute mechanism process under the AfCFTA, as they may do in the Courts of Justice established in the various regional blocs across the continent.

The above is depite the fact that the private sector has been acknowledged as the main driver of the AfCFTA. According to the UN Economic Commission for Africa, the private sector in Africa accounts for over 80% of total production, about 70% and 75% of total investment and lending respectively, and generates more than 90% of employment in developing economies.

Participants at the 2018 Africa Trade Forum in Nigeria also agreed that while it is the responsibility of various governments in Africa to ensure that there is a conducive economic and socio-political environment in their respective countries for a successful implementation of the objectives of the AfCFTA, the private sector is the principal driver of the AfCFTA and its single market agenda.

Without a doubt, the private players largely constitute the powerhouse and backbone of the African economy, and it is crucial that their interests are safeguarded through an inclusive and transparent legal framework.

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Under the legal framework established for the AfCFTA, private business persons seeking to initiate dispute settlement proceedings must necessarily do so through their home countries. Beyond obvious political considerations, the long-standing disinclination of African countries to engage in contentious trade dispute resolution poses a great threat to the success of the dispute settlement framework as it exists under the AfCFTA in relation to the interests and protection of the private sector.

One way to avert this situation is for State Parties of the AfCFTA to make efficient use of the dispute settlement framework on trade-related issues to ensure, ultimately, predictability and security in the way of doing business across Africa. Additionally, there could also be a focus on the role the domestic courts can play in adjudicating AfCFTA-related disputes between private persons.

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It may be useful for Member States to create domestic courts specifically for AfCFTA-related matters and/or to engage in capacity-building initiatives for already existing domestic commercial courts and national arbitration centres to adjudicate trade-related disputes between private business persons operating within the ambit of the AfCFTA.

This state-to-state dispute resolution system is in sharp contrast with the legal framework established under the European Union (EU) Law. There are different sources of EU law which may be applied directly or may have direct effect in Member States. The Direct Effect principle confers legal rights on private persons under EU law and enables them to invoke those legal rights enshrined under EU law in their domestic courts.

This mechanism over the years has paved the way for a more harmonious and comprehensive European integration and it may be useful to interrogate how such a system may be beneficial to our peculiar situation in Africa as far as the single market agenda is concerned.

With particular reference to the area of investment, discussions are ongoing under the Protocol on Investment which is still being negotiated, for the establishment of an Investor-State Dispute Settlement (ISDS) mechanism, well suited to the needs of Africa and the AfCFTA. This move when concluded will also go a long way to enhance the confidence of foreign investors and encourage FDI in Africa as this mechanism would reduce the risks associated with investing in foreign countries.

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The ISDS is an existing mechanism which is being patronised in other jurisdictions. For example, Philip Morris Asia Limited explored its options under Article 10 of the Agreement between the Government of Hong Kong and the Government of Australia which was centered around the Promotion and Protection of Investments (executed on 15th September 1996).

It has been proposed that States Parties to the AfCFTA should be encouraged or required to select an arbitration forum within the African continent when resorting to arbitration. State Parties can make use of national arbitration centres, or private arbitration centres domestically.

This proposal has been made against the backdrop of the inclination of African countries to resort to non-African arbitration forums for the resolution of their disputes. It has been recognised that there is the need for the AfCFTA Secretariat to ensure capacity building for

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these arbitration centres within States Parties in relation to the resolution of multilateral trade, investment, e-commerce, and other forms of international disputes, through arbitration.

Conclusion

The success or otherwise of the AfCFTA will be greatly impacted by the willingness of State Parties to uphold the precedence of the AfCFTA Agreement over their respective domestic laws, and in pursuance of that, taking the necessary measures domestically to ensure harmonisation and conformity of such domestic laws with the AfCFTA Agreement and related protocols. The harmonisation of already existing laws will also be required at the regional community level and the legislative stakeholders must lead in this initiative.

This will require strong will of the political class in the region to put the interest of the whole before the parts and to ensure that any resulting negative impact therefrom can be mitigated reasonably and fairly.

This may be the moment when history pivots, and the nations of Africa must deliberately collaborate and leverage the AfCFTA toward the collective goal of building an integrated and prosperous Africa, driven by Africans, to place the continent on the highest pedestal in the global arena. But, for the true concept of a single market to work in Africa, AU law must be supreme. There should be no doubt over the supremacy of the application of AU law above domestic law, at least in regulating economic activity.

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