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Promoting Treaties in Nigeria and Operationalising the Singapore Convention on Mediation

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Abstract

In Nigeria, the United Nations Convention on International Settlement Agreements Resulting from Mediation (2018) has entered into force. This Convention was incorporated or domesticated by referring to it in the Arbitration and Mediation Act (2023), but statutes are often dedicated to the domestication of treaties. There is no consensus on the most pragmatic way(s) to facilitate Nigerian treaty engagement. This article examines the Nigerian legal regime on treaties and explores the extent to which the regime can be maximised considering the Vienna Convention on the Law of Treaties (1969).

A case is made for a principled basis to underpin the domestication of treaties that facilitate international business, including dispute resolution treaties. This analytical basis should enable legislative flexibility already woven into the overarching legal regime. The article articulates how such flexibility can be used to promote the operationalisation of relevant treaties using the Arbitration and Mediation Act as a paradigm.

Keywords

treaties – international commercial mediation – Singapore Convention – good faith – Vienna Convention – legislative flexibility

1 Introduction

Nigeria has placed international commercial mediation at the forefront of its dispute resolution system. The Singapore Convention was signed on 7 August 2019, ratified on 27 November 2023, and entered into force on 27 May 2024.[1] The Nigerian Arbitration and Mediation Act 2023 (the AMA) which repealed the Arbitration and Conciliation Act (the ACA),[2] includes international commercial mediation and international settlement agreements resulting from mediation.[3] Where parties seek to enforce an international settlement agreement made in a State other than Nigeria, 'the Singapore Convention applies to that international settlement agreement' subject to two provisos.[4] The first proviso is that the State must be a Party to the Convention.[5] The second proviso is that the dispute in question must arise out of a legal relationship that is considered commercial under Nigerian law.[6]

This approach of directly incorporating the Singapore Convention into statute ('domestication' or 'incorporation by reference')[7] aims to fast-track international mediation, especially from the standpoint of facilitating commercial transactions alongside arbitration.[8] However, any form of domestication – that is enactment of a treaty into domestic law – potentially raises concerns of whether the global community's expectations are met vis-à-vis stipulated national procedure.[9] As a traditionally dualist country, Nigeria requires specific legislation to adopt a treaty after its ratification.[10] Although the question of how treaties are domesticated is a matter for national law, such processes

1 United Nations Convention on International Settlement Agreements Resulting from Mediation <https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status> accessed 7 March 2025.

2 Cap A18, Laws of the Federation of Nigeria, 2004.

3 AMA s 67(1).

4 ibid s 87.

5 ibid s 87(a).

6 ibid s 87(b).

7 Muhammed Tawfiq Ladan, 'National Practice on Domestication of Treaties in Nigeria (1960–2023)' in MT Ladan (ed), *Treaty Law and State Practice in Nigeria* (Nigerian Institute of Advanced Legal Studies, 2023) 1, 4.

8 AMA ss 81, 83 and 87.

9 DF Atidoga, 'Nigeria in Dualism and Monism-Theoretical Context: Comparative Lesson from Nigeria and Selected Jurisdictions' in Muhammed Tawfiq Ladan (ed), *Treaty Law and State Practice in Nigeria* (n 7) 137, 165.

10 ibid.

are critical to their proper functioning.[11] Also, treaty signatories have certain obligations regardless of domestic processes.[12]

Incorporating the Convention by reference in the AMA is not the most orthodox way of operationalising treaties in Nigeria. Statutes are often dedicated to the domestication of treaties. An example is the Avoidance of Double Taxation between Nigeria and Spain.[13] Another example is the United Nations Convention on Carriage of Goods by Sea Act and the Extradition Treaty between Nigeria and South Africa (Ratification and Enforcement) Act 2004.[14] The African Charter on Human and People's Rights was domesticated in this manner.

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) was domesticated through the ACA. But this was done in a manner like the AMA as the New York Convention was domesticated through section 54 of the now repealed ACA.[15] There is no consensus on whether such a domestication approach is ideal. For example, there is a view that the ACA was not only domesticated through section 54 of the ACA, but that the section did not even go far enough (as section 54b is restricted to contractual matters) and therefore in breach of treaty obligations.[16] Such concerns potentially have implications for incorporating the Singapore Convention by reference.[17] There is also no consensus on how Nigerian constitutional provisions combine with the Treaties Making Act.[18] Some leading cases have excluded the Act altogether from their judgments although the Act remains valid. This attitude has had some direct or indirect influence on scholars who

11 Richard Gardiner, *Treaties* (Oxford University Press, 2023) 106.

12 See Part 3 of this article on good faith.

13 See the Avoidance of Double Taxation Agreement between the Federal Republic of Nigeria and the Kingdom of Spain (Domestication and Enforcement) Act, 2018, including the long title and Explanatory Memorandum.

14 'Domestication' is not mentioned in the UN Convention Act but it is an important term in Nigeria's treaty system.

15 Although the domestication of the New York Convention is revived through the AMA, the long title partly aims to 'make applicable' the New York Convention in Nigeria. See also the Second Schedule which contains the New York Convention.

16 Greg Chukwudi Nwakoby, 'Arbitration and Conciliation Act Cap A18 Laws of the Federation of Nigeria 2004 – Call for Amendment' (2010) Nnamdi Azikiwe University Journal of International Law and Jurisprudence 1, 5.

17 Akinbote referred to this approach as incorporation and domestication. See Akin Akinbote, 'Arbitration in Africa – the State of Arbitration in Nigeria (paper presented at the 2008 Colloquium of the Association for the Promotion of Arbitration in Africa' (2008) 1, 7 available at <https://www.ohada.com/uploads/actualite/261/the-state-of-arbitration-in-nigeria.pdf> accessed 7 July 2024.

18 Treaties (Making Procedure, etc.) Act 1993.

sometimes do not refer to the Act in their work on treaties in Nigeria,[19] while others do.[20]

This article argues that Nigeria's legislative approach in the AMA causes significant legal uncertainty. An overarching analytical enquiry concerns challenges posed by the approach of the AMA's domestication. The article asks whether treaties should be domesticated using *incorporation by reference* as the AMA did regarding the Convention. In answering this unexplored question, Part 2 of the article examines the grey areas of relevant statutory provisions. This requires a focus on the Nigerian Constitution and the Treaties Act, examining relevant overlaps and exploring whether there are gaps especially from the standpoint of statutory complementarity. Part 3 then assesses the implications of good faith obligations and how the roles of the executive and legislature affect these obligations. In building on Part 4's discussion of efficiency, Part 5 explores how a flexible judicial approach and proactive legislation can promote the operationalisation of treaties. Part 6 then demonstrates some contradictions with respect to the Singapore Convention. Further, it analyses these contradictions through the categories of enforceable settlement agreements, reciprocity, and the notion of 'mediation seat'. Part 7 concludes by responding to this question in the affirmative.

This article develops and suggests principled flexibility in treaty domestication as a means by which treaties can be incorporated by reference in a way that ensures legal certainty. This suggestion is based on a bifurcated approach to treaty domestication using incorporation by reference. In the first part of this approach, incorporation by reference provides scope for promoting efficiency in treaty domestication. The second part is that the statute which incorporates a treaty by reference can prevent legal uncertainty by carefully considering if there are provisions that contradict the treaty in question. Principled flexibility in treaty domestication optimises the flexibility that the legislator weaves into the overarching regime on treaties. This optimisation factors in good faith with respect to treaties, synergy between executive and legislative roles, reduction of cost, the proactive role of the legislature, and judicial regulation of treaty enforcement obligations. With proper implementation, principled flexibility could promote dispute resolution and facilitate international business.

19 See for example, Chilenye Nwapi, 'International Treaties in Nigerian and Canadian Courts' (2011) 19(1) African Journal of International and Comparative Law 38.

20 For an example, see CE Okeke and MI Anushiem, 'Implementation of Treaties in Nigeria: Challenges and the Way Forward' (2018) 9(2) Nnamdi Azikiwe University Journal of International Law and Jurisprudence 216.

Nigeria's meaningful engagement with treaties and effective international commercial dispute resolution mechanisms are critical for a sustainable inflow of much-needed foreign investment and economic growth. Arguably, effectiveness requires legal certainty. Effective treaty engagement has significant implications for Nigeria (the first African country to ratify), the African region and international trade partners. Parties to the Singapore Convention have a clear interest in understanding how Nigeria has approached the Convention. Also, other parties can draw lessons from the challenges that domestication approaches can pose to the successful implementation of treaty obligations, especially the Convention.

2 The Nigerian Treaties Regime

In Nigeria, treaties are not self-executing or self-enforcing,[21] unlike the United States where the President may in some cases make treaties alone or with the consent of the legislature.[22] Domestication of treaties is constitutionally required, although neither the Constitution nor treaties-enabling laws refers to 'domestication'. However, 'domestication' has been used to connote the domestication of federal statute by individual states.[23]

The federal legislature (the National Assembly) has a central constitutional role in the domestication of treaties. Section 12(1) of the Nigerian Constitution provides: 'No treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly.'[24] Although this provision is not clearly worded, it has been interpreted to mean that treaties neither have force of law nor justiciability until the federal legislature enacts them into law.[25] In *Abacha v Fawehinmi*, the Supreme Court observed that 'where, however, the treaty is enacted into law by the National Assembly … it becomes binding and our courts must give effect to it like all other laws falling within the judicial powers

21 Muyiwa Adigun, 'The Process of Giving Domestic Effect to Treaties in Nigeria and the United States' (2019) 6(1) Journal of Comparative Law in Africa 85.

22 Benjamin Obi Nwabueze, *Federalism in Nigeria Under the Presidential Constitution* (Sweet & Maxwell 1983) 261.

23 In an armed robbery case, Abiru JCA referred to federal enactments and noted that 'the Robbery and Firearms Act was impliedly domesticated.' See Abiru JCA's dissent in *Peter v State* (2022) LPELR-58260 (CA)135.

24 The Constitution s 12.

25 *Abacha v Fawehinmi* (2001) AHRLR 172 para 12.

of the courts.'[26] Also, the National Assembly has the competence to make laws concerning 'matters not included in the Executive List for the purpose of implementing a treaty.'[27]

There are at least three ways by which treaties have been made applicable in Nigeria.[28] The first is treaties that the British government extended to Nigeria during the colonial era.[29] The second is treaty provisions enacted into Nigerian law without any direct reference to the treaty in question.[30] The third are treaties made applicable to Nigeria through an enabling Act.[31] While the third way makes it clearest that a treaty has become applicable, there is no gain in assessing whether the methods produce different effects in Nigeria.[32] Considering applicable statutes in the round, the legislator contemplated that there would be a multi-dimensional approach to making treaties applicable in Nigeria. The Treaties Act specifies three categories of treaties: the first concerns domestication, while the second and third concern ratification.

In the first category, 'law-making-treaties, being agreements constituting rules which govern inter-state relationship and cooperation in any area of endeavour, and which have the effect of altering or modifying existing legislation or which affects the legislative powers of the National Assembly'[33] must be 'enacted into law'.[34] In the second category, agreements that concern mutual exchange of cultural and educational facilities[35] 'may not need to be ratified.'[36] In the third category, agreements that 'impose financial, political and social obligations on Nigeria or which are of scientific or technological import'[37] must be ratified.[38] These second and third categories of treaties provide at least a dichotomy in ratification of treaties as some may not need to be ratified and others need to be ratified. This dichotomy raises concerns

26 *Abacha* ibid para 14.
27 The Constitution s 12(2).
28 AO Enabulele, 'Implementation of Treaties in Nigeria and the Status Question: Whither Nigerian Courts?' (2009) African Journal of International and Comparative Law 326, 332.
29 E.g., the Warsaw Convention was made applicable to Nigeria by the Carriage by Air (Colonies, Protectorates and Trust Territories) Order, 1953.
30 E.g. Carriage of Goods by Sea Act.
31 An example is the African Charter. Ladan described this as 'wholesale adoption'. See Ladan (n 7) 3–5.
32 Enabulele (n 28) 332.
33 The Treaties Act s 3(1)(a).
34 ibid s 3(2)(a).
35 ibid s 3(1)(c).
36 ibid s 3(2)(c).
37 ibid s 3(1)(b).
38 ibid s 3(2)(b).

considering the provision of section 12(1) of the Constitution. Since ratification is not domestication (as the former may not necessarily lead to the latter), there seems to be some complication as to what standing treaties that 'may not need to be ratified' would have. Although the provisions of section 3 of the Treaties Act were rightly described as representing 'a tendency towards some form of a hybrid model',[39] the courts and several scholars have not clearly factored in this hybridity.[40] Such a deduction would have its logical appeal – the legislator expressly created a category for those that must be domesticated (implying that some may not be domesticated after ratification). A narrow interpretation is that the National Assembly would nonetheless domesticate relevant treaties even if they were not ratified – in compliance with section 12 of the Constitution. However, this approach arguably defeats the efficiency that would be otherwise obtainable, and it interrogates the role of the Act vis-à-vis the Constitution.

Scholars usually refer to the Constitution and the Treaties Act but hardly juxtapose both from the perspective of (in)compatibility.[41] Crucially, section 2 of the Act states that the classification of treaties is 'without prejudice to the generality of the provisions of the Constitution of the Federal Republic of Nigeria 1999.' Any argument that the Act was made without regard to the Constitution needs to factor in the Act's provision itself, and the fact that section 12 of the Constitution replicates section 12 of the 1979 Constitution. The Treaties (Making Procedure, Etc.) Decree 1993 referred to the 1979 Constitution. This is the only material difference between section 1 of the Treaties Decree and the Treaties Act.[42] The amendment of 1979 to 1999 was done to ensure that the statute was relevant in the constitutional era from 1999.[43]

Case law underscores overlap in the relationship between constitutional treaty regimes before and after 1999. In *Attorney-General of the Federation v*

39 Babalola Abegunde, 'Issues in the Application and Enforcement of International Treaties before a National Court: Nigeria and Selected Jurisdictions in Perspective' (2019) 2(3) Journal of Law and Judicial System 34, 38.

40 Omeregie argued that some treaties do not need domestication considering the Treaties Act. See Edoba B Omoregie, 'Roles of the Executive and the Legislature in Treaty Making …' in Ladan (n 7) 26, 39. Also, Akper did not see any inconsistency between the Treaties Act and s 12 of the Constitution. He suggested that any constitutional amendment should accommodate s 3(2) of the Treaties Act. See PT Akper, 'Legislative and Institutional Measures for Domestic Implementation of Treaties' in Ladan (n 7) 73, 78–91.

41 E.g., Okeke and Anushiem (n 20) 216–217. But cf Akper ibid.

42 The Decree and the Act are essentially the same.

43 See the table of Acts in the LFN 2004 which retained the Treaties Act by updating 1979 to read 1999 (since the 1979 Constitution was suspended under military rule).

Anuebunwa,[44] the Supreme Court decided that there was no need to domesticate the 1931 Extradition Treaty (between the United States and Great Britain) within the ambit of section 12 of the Constitution as it was already in existence before 1999.[45] Nweze JSC's opinion is also important because it carefully unpacked the effect of section 315 of the Constitution. In short, an existing law shall have effect with such modification as may be necessary to bring it into conformity with the provisions of the Constitution.[46] Such an Act would be deemed to be one that the National Assembly has made if it is a statute within the constitutional jurisdiction of the National Assembly.[47] The Constitution also provides that 'the appropriate authority may at any time by order make such modifications in the text of any existing law as the appropriate authority considers necessary or expedient to bring that law into conformity with the provisions of this Constitution.'[48] 'Appropriate authority' is either the President[49] or 'any person appointed by any law to revise or rewrite the laws of the Federation or of a State'.[50] In this case, the Supreme Court confirmed the flexibility inherent in section 315.[51]

The core significance of section 315 and the fact that the Treaties Act cannot be discounted can be supported by case law. In *African Reinsurance Corporation v Industrial Training Fund*,[52] the Industrial Training Fund claimed that the appellant should have made contributions.[53] One issue before the Court of Appeal was whether the appellant ('as an International Organization with the status of a diplomatic mission enjoying diplomatic immunities and exemptions') was exempt from all direct or indirect taxation.[54] The court determined that the 1976 Establishment Agreement executed by member states of the

44 *Anuebunwa* (2022) LPELR-57750 (SC).

45 See *Anuebunwa* ibid 15–18 (Ogunwumiju JSC); See at 76–77 and consider s 315 of the Constitution.

46 The Constitution s 315(1).

47 ibid s 315 (1)(a).

48 ibid s 315(2).

49 ibid s 315(4)(a)(i).

50 ibid s 315(4)(a)(iii). The provision refers to a component state of Nigeria regardless of a capitalised 'S' in 'State'.

51 *Anuebunwa* (n 44) 18(per Ogunwumiju JSC) where it was decided that the Extradition Decree of 1967 and the Extradition Act 2004 satisfied the requirements of Section 315(4) b of the 1999 Constitution.

52 [2019] LPELR-46891 (CA).

53 S 6 of the 2011 ITF Act required relevant employers to contribute 1% of annual payroll to the Fund.

54 *Industrial Training Fund* (*ITF*) (n 52) 28.

(O)AU[55] qualified as a treaty in Nigeria considering the Vienna Convention.[56] Coincidentally, but in a much earlier case concerning the African Reinsurance Corporation,[57] there was no doubt that the head of the Federal Military Government of Nigeria signed a headquarters agreement with the African Reinsurance Corporation.[58] This observation is important because an unsystematic approach causes legal uncertainty. Therefore, unless expressly stipulated, Nigerian judgments cannot be interpreted to discount validly enacted statutes such as the Treaties Act.

Regardless of the period in which the Treaties Act took effect (i.e. under the military), there is no debate about its validity.[59] There have been attempts to amend the Act over the years.[60] This analytical foundation is critical to ensuring a systematic approach to treaty domestication. However, a systematic approach should consider practical factors such as good faith and conflict resolution roles, to which this article now turns.

3 Good Faith and Conflict Roles

Principled flexibility in treaty domestication should be anchored on the legitimate expectations of treaty ratifying countries. For applicable treaties, 'mere failure to comply with domestic requirements concerning publicity does not invalidate the treaty or state's consent to be bound by it.'[61] The rest of the world cannot track the internal politics of contracting states. Apart from the international regime on treaties – notably, the Vienna Convention – laws that govern the issues at hand are essentially domestic. Since signing a treaty indicates an

55 (Considering relevant provisions including arts 3 and 51) Pursuant to which the Headquarters Agreement of 1977 (with special reliance on art 14) was executed. *ITF*(n 52) 32.

56 The 1969 Vienna Convention on the Law of Treaties art 2. See *ITF*(n 52)33 and 45.

57 *African Re-Insurance Corp. v Fantaye* 3PLR/1985/9 (SC).

58 See Eso JSC's references to Kutigi JCA's judgment. Although the Supreme Court reversed the Court of Appeal's decision, there was no contention about whether the headquarters agreement had been validly ratified.

59 Available at <https://www.thisdaylive.com/index.php/2021/03/02/gbajabiamila-repealing-treaties-act-of-1993-long-overdue> last accessed 7 July 2024.

60 Okeke and Anushiem(n 20)216, 226; Emmanuel E Okon, Laura Ani and Joke Adediran, 'Tabular Analysis of the Status of Ratification and Domestication of Treaties in Force in Nigeria: 1960–2023 – Focus on Human Rights, International Criminal Law, and Peace and Security' 166, 221 in Ladan (n 7).

61 Danae Azaria, 'Secret Treaties in International Law and the Faith of States in Decentralized Enforcement' (2018) American Journal of International Law 469.

intention to take further steps regarding bindingness, signatories should in good faith desist from conducts that would undermine the aims of the treaty.[62] Upon signing, therefore, a country should not be in a worse position than when it signed and court decisions should factor in good faith obligations although the courts are not yet bound by the treaties in question.

If the Vienna Convention requirement of good faith regarding treaties is to make any practical sense, then what governments represent to other states should be accorded full faith and credit. In the extradition case of *Kanu v Federal Republic of Nigeria*,[63] the Court of Appeal unanimously allowed the appeal because there was no compliance with international and domestic laws. In concurring with the leading judgment of Adefope-Okojie, Ebiowei Tobi JCA conceded that domestication is usually required and 'a country who is a signatory to a treaty should comply with the treaty' terms.[64] This reasoning supports the need to demonstrate good faith, especially if it is agreed that good-faith issues arise upon signing, rather than just during treaty interpretation in the courts.[65] Therefore, while the Singapore Convention had to be domesticated, it stands to reason that the legislator explored flexibility in domestication.

Furthermore, it makes sense to act on instruments of ratification and notifications of entries into force in many cases. However, treaties that suffer from a lack of publicity can cause problems if they impose financial obligations on the State in question.[66] Again, the literature seldom completes the cycle of executive-legislative partnership even according to constitutional standards. The domestication process is concluded upon presidential assent.[67] A *volte face* would be untenable in international law and Nigeria could become a

62 <https://treaties.un.org/doc/source/events/2010/press_kit/fact_sheet_5_english.pdf> (accessed 7 July 2024).

63 *Kanu v Federal Republic of Nigeria* (2022) LPELR-58768 (CA).

64 *Kanu* ibid 132–133.

65 Eric De Brabandere and Isabelle van Damme, 'Good Faith in Treaty Interpretation' in Andrew D Mitchel, M Sornarajah and Tania Voon (eds), *Good Faith and International Economic Law* (2015, Oxford University Press) 37, 59.

66 An example is the Agreement Between the Government of the People's Republic of China and the Government of the Federal Republic of Nigeria for the Reciprocal Promotion and Protection of Investments <https://www.italaw.com/sites/default/files/laws/italaw170107.pdf> accessed 7 July 2024.

67 In a longitudinal study, Ngara observed that 'although 17 and 23 Treaty Bills were passed by the Senate and the House of Representatives respectively between 1999 and 2007, however, only 11 of these treaties were signed into law by the President.' See Christopher Ochanja Ngara (2017) 2(2) Socialscientia Journal of the Social Sciences and Humanities 57, 65.

pariah. Litigants cannot attend Nigerian Federal Executive Council meetings to keep abreast of internal happenings. This is compounded by the fact that there is no reliable register for treaties.[68]

Although the signing of a treaty should not be 'shrouded in secrecy',[69] the suggestion that the legislature should be informed prior to signing does not necessarily offer a way out.[70] It was also argued that the executive should 'carry along the legislature during treaty negotiations such that international treaties validly approved would quickly be implemented by the National Assembly before they are ratified by the executive arm of the government.'[71] This may seem like a workable compromise, but it is unrealistic to expect any real difference. There are several cases where it would be expedient to deal with pressing issues that are driven by the executive. There is no guarantee of efficiency or less corruption just because a commercial treaty is concerned. The suggestion that a statutory amendment of the Treaties Act should make it compulsory to bring to the floor of the National Assembly any ratified treaty within 30 days seems pragmatic, but it is predicated on the philosophy that all treaties should go through the full legislative process of domestication.[72] A less contentious premise should be mandating the executive to inform the legislature and possibly the general public of treaties signed or ratified.

A real issue is that of conflict between the roles of the executive and legislature. The argument that role conflicts adversely affect treaty obligations underscores the importance of focusing on the roles of key actors than adopting a selective approach to the legal regime on treaties.[73] The need for appropriate cooperation has been discussed in the context of domestication.

68 Agom conducted a search at the Ministry of Justice. See Augustine Robert Agom, *Legal Framework for Treaty Making and Management in Nigeria* available at <https://ir.nilds.gov.ng/bitstream/handle/123456789/408/LEGAL%20FRAMEWORK%20FOR%20TREATY%20MAKING%20AND.pdf?sequence=1&isAllowed=y> accessed 7 July 2024, 29.

69 Flora Alohan Onomrerhinor, 'A Re-examination of the requirement of domestication of treaties in Nigeria' (2016) Nnamdi Azikiwe University Journal of International Law and Jurisprudence 17, 25.

70 ibid 25.

71 Chinenyendo Nriezedi-Anejionu, 'Could the non-domestication of Nigerian treaties affect international energy investment attraction into the country?' (2020) 28(1) AJICL 122, 144.

72 Okeke and Anushiem (n 20) 229.

73 See Ebere R Adigbuo, 'Role Conflicts in Foreign Policy: Nigeria's dilemma Over Bakassi Peninsula' (2019) 37(4) Journal of Contemporary African Studies 404, 411 (arguing that 'respect for treaty obligations, as constitutionally prescribed, is fraught with role conflicts').

Nevertheless, there is a school of thought that the Act complicated the unclarity over the authority responsible for contracting treaties by 'opening a floodgate of persons'.[74] This is because section 1(2) of the Act provides:

> All treaties to be negotiated and entered into for and on behalf of the Federation by any Ministry, governmental agency, body or person, shall be made in accordance with the procedure specified in this Act or as may be modified, varied or amended by an Act of the National Assembly.

Ordinarily, this section should not have implications for ratification or domestication. However, as earlier observed, the dichotomous approach to treaties that may (not) need ratification must be first sorted. Whether the executive role concerning treaty-making is regarded expressly[75] or impliedly,[76] the President has considerable powers and competence to delegate presidential powers.[77] Contrary to the argument that the omission of the President in the Act fails to appreciate presidential powers to contract treaties, the legislator arguably considered the scope and depth of presidential powers.[78] In any case, executive and legislative roles have implications for cost.

4 Reduction of Cost

As noted in the introduction, promoting efficiency is necessary in the light of economic austerity and the relatively high cost of governance in Nigeria. The need for efficiency should drive principled flexibility in treaty domestication. It is often easy to limit the cost of treaty domestication to transactional cost such as financial cost and delegate expenses. This would be to miss the point.

74 Anyog and Iworie then conceded that 'the President being the alter ego of the Federal Government can make and negotiate treaties on behalf of the Federal Government.' Felicia A Anyogu and Collins Iwuorie, 'Treaty Making and its Application in International Law: Nigeria and South Africa as Case Study' (2023) 4(2) Law and Social Justice Review 58, 60.

75 On treaty making, see Nwabueze (n 22) 255–256.

76 Mary Rumsey, 'Nigeria' in Ralph Gaebler and Alison Shea, *Sources of State Practice in International Law* (2nd edn, Brill 2014) 389, 390.

77 The Constitution ss 170, 216, 218, 302 and 147. For the vastness of presidential powers, see Nwabueze (n 22) 254.

78 On the exclusive powers of the federal government to enter into bilateral and multilateral treaties, see *Attorney General of the Federation v AG of Abia* (2002) FWLR (Pt 102) 92–93.

A more fundamental and practical way to consider cost is to factor in the panoply of expenses involved in treaty ratification. These include support for relevant litigants, accommodating differing international practices, and reforming domestic jurisprudence.[79]

As stated earlier, the presidential system is a relatively expensive form of government.[80] It was persuasively argued that 'the less a country's practices diverge from the requirements of treaty, the lower the cost of compliance with the terms of the treaty and the greater the likelihood that a country will join.'[81] There should be more flexibility where the treaty being domesticated does not radically change national jurisprudence or introduce legal requirements and practices that would not be easily accommodated.

It is also easier to facilitate the incorporation of treaties into Nigerian law when there is a clear basis and genuine need for cooperation. Such cooperation poses complex challenges which are not obvious.[82] Different types of disputes require different approaches to resolution as they are not necessarily on the same level of cooperation requirements. For example, the cooperation needed to facilitate the enforcement of mediation agreements is potentially less disruptive than the cooperation that underlies more traditional forms of dispute resolution such as foreign judgments or arbitration. Mediation is typically less invasive in terms of international relations as many cultures, especially in the global south, readily accommodate that form of dispute resolution.[83] Empirical evidence for this is evident in the trend of signing and ratification. From August 2019 to April 2024, there were 57 signatories, with 51 in 2019.[84] The spread and trend of global south interest is clear, with more than 20% comprising African countries, including Nigeria. 17 countries ratified, acceded or approved from February 2020 to February 2025, with about 60% global south countries including Nigeria. It is not just the mere fact of ratification

79 On how signing or ratifying a treaty should influence governments and courts 'even if the treaty has not yet been domesticated or enacted by the Parliament', see Abegunde (n 39) 43, 45.

80 On arguments regarding 'opting out of presidential system because of the high cost of running it', see Ebenezer Oni and Olumuyiwa Faluyi, 'Federalism, Military Legacies and the Restructuring Debate in Contemporary Nigeria' (2018) 7(2) African Journal of Governance and Development 5, 17.

81 Oona A Hathaway, 'The Cost of Commitment' (2003) 55(5) Stanford Law Review 1821, 1833.

82 José Guilherme Moreno Caiado, 'Contractual Aspects of Treaties' in Commitments and Flexibilities in the WTO Agreement on Subsidies and Countervailing Measures (CUP 2019) 17.

83 Cf *Okpuruwu v Okpokam* (1998) 4 NWLR (Pt 90) 554, 586 (CA).

84 United Nations Commission on International Trade Law <https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status> accessed 16 February 2025.

that makes these countries significant, but also their cultural preference for mediation.[85]

Furthermore, an efficient approach to treaty ratification requires a consideration of the peculiar challenges that a country faces. In Nigeria, these issues, including legislative inefficiency, are complicated by not only the cost of paying federal legislators but also costs related to legislative productivity. Nigerian legislators need to have their performances evaluated in the context of their productivity, a major benchmark of which is the bills that such lawmakers have sponsored.[86] Somewhat anecdotally, Nigerian legislators are one of the highest paid federal legislators in the world.[87] This claim is compounded by the high cost of running the entire architecture of federal lawmaking and the implications for legislative bill processes. In a report covering 1999–2003, it was observed that 'if the N2.618 trillion allocated to the National Assembly since 1999 is accounted for by the number of bills that became laws, it means a bill costs N3.232 billion.'[88] The National Assembly is often embroiled in financial scandals that diminish time for core legislative business relating to treaties.[89]

The foregoing issues further necessitate principled flexibility in treaty domestication in a manner that strikes a balance between genuine engagement with treaties and international obligations. As shown below, the courts play a pivotal role in striking this balance.

5 Judicial Regulation and the Scope for Flexibility

Nigerian courts are responsible for interpreting laws and the extent of their application. This section demonstrates that flexibility regarding treaties

85 Funmi Roberts, 'Cultural Nuances in Mediating Commercial Disputes in Nigeria' (2010) 76(3) Arbitration 488.

86 Although this study was conducted about a decade ago, the challenges remain very familiar. See Maxwell Ekor, Maxwell, Menachem Katz, and Ola Iweala, 'Estimating Legislative Effectiveness in Nigeria' (2014) 4(3) Developing Country Studies 69, 76.

87 Tope Omogbolagun 'Unending controversies surround lawmakers' jumbo pay' *Punch Newspaper* 17 August 2024 <https://punchng.com/unending-controversies-surround-lawmakers-jumbo-pay/> accessed 6 March 2025.

88 This was worked out on the basis that 'the National Assembly passed 810 bills that were signed into law by various presidents.' Clifford Ndujihe, 'Nigeria spends N2.618trn on NASS in 25 years' *Vanguard* <https://www.vanguardngr.com/2023/06/nigeria-spends-n2-618trn-on-nass-in-25-years/> accessed 11 July 2024. For the figure worked out using 816 bills, available at <https://www.vanguardngr.com/2024/01/outrage-as-nigeria-spends-n3-132-trn-on-nass-in-25-years/> accessed 11 July 2024.

89 L Demarest, 'From budget padding to budget scrutiny? National Assembly-executive relations in the legislative process' (2023) 10(1) Nigerian Journal of Legislative Affairs 1.

should not be exclusive to the courts. Principled flexibility in treaty domestication involves a consideration of executive and legislative powers, with a view to ensuring that flexibility is ingrained in the domestication process without violating the Constitution.

5.1 *The Role of the Judiciary*

The Nigerian Constitution is the supreme law for ensuring judicial control over national attitudes to the force of treaty law in Nigeria. The Court of Appeal observed that 'no person or group of persons by their own private treaty or arrangements can agree to oust the jurisdiction and provisions vested in the courts by the Constitution.'[90] As the use of 'private treaty' in the context does not lend itself to easy understanding or application, 'treaty' is better understood in the wider context of the case concerning choice of foreign forum.[91]

Nigerian courts will not unduly expand the rights of citizens or permit a fundamentally wrong procedure *merely* because a treaty has been ratified or even domesticated. This point is illustrated through *Edem v University of Agriculture Makurdi*,[92] where the appellant relied on the African Charter and the Nigerian Constitution in characterising his expulsion from the university (due to exam misconduct) as a denial of the right to education.[93] The Court of Appeal rejected this argument.[94] Having established that the real issue was whether the expulsion followed due process as prescribed by the relevant statute, the court answered the question in the affirmative and dismissed the appeal.[95] This approach underscores the argument that there is no solid justification for a generic or wholesale opposition to the flexibility that the *corpus juris* on treaties allows.

Another illustration of judicial regulation and awareness can be seen in the judicial approach to the Montreal Convention.[96] Nigerian courts have consistently delimited the scope of the Convention by holding that punitive,

90 *A.B.U. v VTLS Inc* (2020) LPELR (52142) CA 16.

91 See also *Sonnar Ltd v Nordwind* (1987) 4NWLR (Pt 660) 520, 576; *LAC v AAN Ltd* (2006) 2NWLR (Pt 963) 40 – the court relied on these in *A.B.U.* (n 90) 104,14–16. Further analysis is beyond the aims of this article.

92 (2023) LPELR-60482 (CA).

93 Duly ratified and domesticated: Art 17 of the African Charter on Human and People's Rights (Ratification and Enforcement) Act Cap A9 LFN 2004; Chapter IV of the Nigerian Constitution; Order II Rule 1 of the Fundamental Rights Enforcement Procedure Rules, 2009. In a similar context, see *NSCDC v Nnadi* (2017) LPELR-43045 (CA) 19–20.

94 ibid 32 and 36.

95 ibid 36–40.

96 Convention for the Unification of Certain Rules for International Carriage by Air.

exemplary or non-compensatory damages cannot be recovered.[97] But the courts will also observe 'the duty in any given circumstance and avoid rendering a decision which enables a party to escape from his obligation under a contract by his own wrongful act or otherwise profit from his own wrongful act.'[98] To this extent therefore, treaties can positively influence legal jurisprudence. For example, in *Mekwunye*, the Supreme Court overturned the Court of Appeal decision because it would be 'unfair and unjust … to merely refund the flight ticket without compensatory or general damages'.[99]

The flexibility of Nigerian courts has favoured international treaties where there is contention about the effect of such treaties in Nigeria. Such judicial flexibility creates firm foundations for supporting principled flexibility in treaty domestication. In *Ibidapo*,[100] the main issue before the Supreme Court was whether the provisions of article 29(1) of the First Annex to the First Schedule to the Carriage by Air (Colonies, Protectorates, and Trust Territories) Order 1953 were still in force in Nigeria after its independence in 1960. This issue had to be first determined to enable a resolution of substantive issues concerning the duties of a bailee, and contractual and negligence grounds in the light of statute bar. The appellant's argument was that the 1953 Order had become spent upon independence. The appellant sought to strengthen that argument by observing that the Warsaw Convention was not included in a compilation of treaties by the Federal Ministry of Justice. The Supreme Court, in joining the Court of Appeal to reject these arguments, also observed that merely omitting the 1953 Order from the Revised Edition of the Laws of the Federation did not amount to a repeal of that Order or any enactment in a similar position. The treaty was subsumed under the category of 'existing law', having been duly accepted through the instrumentality of the British Crown during the colonial era.[101] Statutory repeal could not be implied.[102] Instructively, the nationalist

97 *Saudi Arabian Airlines v Saddaka* (2018) LPELR-46771 (CA) pp 30–31; *Cameroon Airlines v Otutuizu* (2011) 4NWLR (Pt 1238) 512; *Emirates Airlines v Mekwunye* (2014) LPELR-22685 (CA) 52–53; *Emirates Airlines v Aforka* (2014) LPELR-22686 (CA).

98 *Mekwunye v Emirate Airlines* (2019) LLJR-SC.

99 *Mekwunye* ibid para 16.

100 *Ibidapo v Lufthansa Airlines* (1997) LPELR (1397) (SC).

101 On the adaptation of 'existing law' (essentially in force immediately prior to the commencement of the Constitution), see s 156(1) of the 1963 Republican Constitution, s 274(1)(2) of the 1979 Constitution, s 315(1)(2) of the 1999 Constitution as amended.

102 Except perhaps 'two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time'. See *Ibidapo* (n 100) 114, 59; *Uwaifo v Attorney-General of Bendel State* (1982) 7 SC 124, 191; *Olu of Warri v Kperegbeyi* (1994) 4 NWLR (Pt 339) 416.

or protectionist approach that the appellant advanced was rejected from the High Court to the Supreme Court.

The scope for exercising judicial flexibility can be further demonstrated through the approach of judges to the Montreal Convention. The Montreal Convention Act provides in section 48(1) that 'The provisions contained in the Convention for the Unification of certain rules relating to International Carriage by Air signed at Montreal on 28th May, 1999 set out in the Second Schedule of this Act and as [a]mended from time to t[im]e, shall from the commencement of this Act have force of law' in Nigeria. This applies to 'international carriage by air to and from Nigeria.' In similar wording confirming its applicability to Nigeria, section 48(2) provides that the provisions of the Montreal Convention applies 'as has been modified and set out in the Third Schedule of this Act and as amended from time to time'. This applies to 'non-international carriage by air within Nigeria'. For full context, the Montreal Convention does not apply to purely domestic flights.[103] It is also critical to observe that the mechanism adopted by the legislature was deliberate as the 2006 Act repealed a previous Act on the same subject.[104]

In promoting flexibility to domestication in a way that favours international obligations, the only exception is that domestic legislation, especially the Constitution, remains supreme.[105] However, domestic law cannot be used to frustrate treaty obligations.[106] An exception is where there is a manifest violation of 'an internal law of fundamental importance',[107] and a manifest violation 'would be objectively evident to any State conducting itself in the matter in accordance with normal practice and good faith.'[108] The need to ensure that domestic laws and treaty obligations do not work at cross purposes is of such practical importance that countries should not exploit bilateral relations as an escape route for obligations except where a treaty allows that possibility. To illustrate, in arguing for the domestication of bilateral investment treaties (BITs), it was highlighted that BITs 'specifically refer to the fulfilment of constitutional requirements of state parties before they can come into force.'[109] This perspective is helpful but not for all BITs e.g., the 2001 China-Nigeria BIT

103 Montreal Convention art 1.

104 The Civil Aviation Act Cap. 51 Laws of the Federation of Nigeria, 1990 as amended.

105 See *Ibidapo* (n 100) 114; *Abacha* (n 25) para 15.

106 Vienna Convention art 27.

107 ibid art 46(1).

108 ibid art 46(2).

109 Nriezedi-Anejionu also referred to art 13 of Nigeria–Spain BIT 2002 and art 15(1) of the Nigeria–Netherlands BIT 1992. See Nriezedi-Anejionu (n 71) 131.

does not contain such references.[110] In fact, by contrast, the China-BIT treaty ensures that the other party will enjoy changes in national 'legislation' which offer a more favourable treatment than set out in the treaty.[111]

As the next part of this article on legislative proactiveness will show, it is increasingly difficult for Nigeria reasonably to take refuge under domestic excuses that it foisted on itself. These include legislative inefficiency, internal mix-up between the executive and the legislature, and relevant constitutional evolution demonstrating the scope for flexibility regarding the application of treaties in Nigeria. Clearly, 'Nigeria, as part of the international community, for the sake of political and economic stability, cannot afford to live in isolation.'[112] Complementarily, Nigeria's attitude to engaging with treaties has evolved from the era when it appeared that the constitutional requirement for domestication seemed to suggest immutability. This evolution can be illustrated through constitutional amendment concerning international labour law.

5.2 *Legislative Proactiveness*

In a constitutional amendment in 2010, the National Industrial Court became vested with jurisdiction to deal with any matter concerning the application 'of any international convention, treaty or protocol of which Nigeria has ratified relating to labour, employment, workplace, industrial relations or matters connected therewith.'[113] This provision effectively circumvented the legislature in such a way that courts can apply ratified treaties even though they have not been domesticated in Nigeria.[114] There is an argument that Nigeria had to comply with the Core Labour Standards – a cardinal requirement for membership of the International Labour Organization (ILO) anyway.[115] While this is true,

110 Available at <https://www.italaw.com/sites/default/files/laws/italaw170107.pdf> accessed 7 July 2024.

111 ibid art 10(1).

112 *Ibidapo* (n 100) 31.

113 Constitution of Nigeria (Third Alteration) Act, 2010 s 254(c)(2). On how 'the trial Court is empowered to apply international conventions' in the light of s 254 (c) of the 1999 Constitution, see *Daapah v Odey* [2018] LPELR-46151 (CA) 31–32.

114 Ogunkorede Oluwayemi Oluwadunsin, 'National Industrial Court: Court with a Difference and the Need to Review its Legal Status' (2018) 9(1) Nnamdi Azikiwe University Journal of International Law and Jurisprudence 59, 67.

115 The Declaration on Fundamental Principles and Rights at Work, 1998 art 2 requires members to comply with certain obligations concerning human rights 'even if they have not ratified the Conventions in question'. See Peter Obi Okonkwo, 'Application of Treaties in Nigeria vis-à-vis the Instruments of the International Labour Organisation' (2018) Nnamdi Azikiwe University Journal of International Law and Jurisprudence 149, 155.

treaties do not take effect in that manner and the position in Nigeria effectively weakened legislative powers regarding treaty effectuation.

Some areas are more open to the influence of global developments than others. For example, it is rather difficult to insulate Nigeria from the universality of human rights.[116] Regarding such cases, it has been argued that 'the monism-dualism dichotomy will be a thing of the past [eventually]' even though Nigeria is a dualist state.[117] It is a matter for debate whether this prediction on the inevitable abolition of a strict dichotomy is overstated. The lesson here, however, is that constitutional evolution has already recharacterised the hitherto seemingly immutable dualist focus of domestication vis-à-vis section 12 of the Constitution.

The constitutional enablement regarding labour law was a safe step to take considering current realities and future possibilities. Current realities matter because the ILO framework would enhance Nigeria's legal framework to conform to human rights standards. It seems reasonable to expect that the development of labour rights will happen along a recognisable trajectory of human rights. The latter aspect may test the courts' resolve to avoid the National Assembly from the perspective of public policy. The courts are unlikely to interpret treaties or international instruments in any way that undermines public policy. An example is how the courts may deal with freedom from discrimination concerning same sex relationships and the Same Sex (Marriage) Prohibition Act 2013. Flexibility and evolution in attitude have implications for the treaty process.

Firstly, the Nigerian Constitution is an 'organic document' that should be adapted as may be necessary.[118] Secondly, the National Assembly adds a layer of complexity to the treaty process. Thirdly, there is arguably a gravitation towards international obligations in an efficient manner. The constitutional evolution regarding international labour law seems to have emboldened the view that domestication should not be required in some subjects.[119] Some scholars even

116 Christian N Okeke, 'The Use of International Law in the Domestic Courts of Ghana and Nigeria' (2015) 32(2) Arizona Journal of International & Comparative Law 371, 408.

117 ibid.

118 *Saraki v FRN* (2016) LPELR-40013 (SC) 131–132 (Nweze JSC).

119 Although they did not refer to the ILO constitutional amendment, Okika and Ezeanokwasa argued that all environmental treaties to which Nigeria is a state party should be 'enforceable within Nigeria without the need for domestication.' See EC Okika and JO Ezeanokwasa, 'Environmental Protection and the Imperative of Domesticating International Treaties in Nigeria' (2021) 17(1) UNIZIK Law Journal 55, 62.

suggested that section 12(1) of the Constitution should be repealed,[120] which is unnecessary considering the complementary value of the Treaties Act.

5.3 *Legislative Supremacy*

The Constitution has enabled Nigerian courts to occupy the space (not necessarily the role) of the legislator. Section 12 calls the executive to account regarding the application of treaties. However, the National Assembly is the catalyst for accountability. Section 12(1) is predicated on a treaty existing between Nigeria and another country, although it does not state how that treaty came about.[121] This underscores the relevance of the Treaties Act, an important deduction missed in the literature.

The Supreme Court's interpretation in *Abacha* regarding how treaties can be domesticated only wholly or not at all should now be filtered through the constitutional amendment. *Abacha* remains relevant in that regard because although the amendment does not concern domestication, a combined consideration of section 12 and *Abacha* vis-à-vis the constitutional amendment portrays the scope for flexibility. Furthermore, the constitutional amendment that promotes the role of the judiciary regarding labour law treaties does not include any amendment of section 12, proving that an absolute focus on that section is misplaced.

The precondition for a treaty to take effect also contemplates and accommodates the possibility that the legislature may enact parts of a treaty. A treaty could be signed and ratified on a wholesale basis (using the traditional mechanisms of reservations or declarations as may be necessary), but the National Assembly retains the prerogative to determine 'the extent' to which such a treaty should take effect. This is consistent with the traditional avenue to decide when a country will take refuge in a reservation or declaration if the treaty so allows. This piecemeal approach aligns with an in-text approach or incorporation by reference approach. Grafting of treaty provisions onto local laws in this manner means that the statute will be the primary reference or first port of call in relying on those provisions. Arguably, this approach resembles a normal local lawmaking process, except that the legislator has imported or benefitted from treaty provisions.[122] One weakness of such a piecemeal approach is

120 Okika and Ezeanokwasa ibid 62.

121 Cf the Constitution s 315.

122 An example is Part III of the English Arbitration Act 1996 (concerning the recognition and enforcement of New York Convention awards) that implements the New York Convention on Arbitration. See s 66 of the 1996 Act. The amended Act received Royal Assent in February 2025. See also Gardiner (n 11)126. Cf the Human Rights Act 1998 'An Act

its effect on legal certainty and predictability especially from the standpoint of international litigants, other countries, and international partners.[123] Such international stakeholders may be used to wholesale acceptance of treaties and therefore countries that take parts of treaties could be disadvantaged. This is particularly so if reciprocity is factored in. An ideal way forward would be to accept treaties wholesale or simply use reservations or declarations sparingly and clearly. Grafting should not be encouraged and may be left to model law circles, even though the model law approach also poses challenges.[124] There is an insightful argument that non-domestication of treaties should not pose a significant challenge if relevant provisions have already been reflected in local laws.[125] This approach may be appealing with respect to fundamental rights, but it is an insecure basis to engender sustainable development. Treaties are contracts and states need legal certainty according to treaty terms rather than mechanisms akin to functional equivalence.

The preceding arguments strengthen incorporation by reference, especially as the reference is to the *entire* treaty. 'The extent' approach to enacting a treaty into domestic law accommodates incorporation of that treaty by referring to the entire treaty, regardless of whether the treaty is annexed as a schedule to the statute. The issue of whether incorporation by reference suffices should not arise. In *Ibidapo*, there was no contention as to the fact that the Warsaw Convention contained in the First Schedule to the 1953 Order is treaty law. Iguh JSC observed: 'Being part of the First Schedule to the 1953 Order, it forms an integral part of the Order itself. This is so as a schedule in an Act of Parliament is as much an enactment as any other part of such an Act.'[126] This approach is analogous to incorporating any statute or treaty by referring to it. Indeed, there are many examples where statutes import the effect of other statutes merely by referring to them.[127]

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to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights" and annexed as Sched 1 to the Act.

123 For the argument that such an approach 'bears the risk of inadvertently departing from the rest of the law and legal system', see Gardiner (n 11) 126.

124 On the challenges of uncertainty relating to model laws, see Fernando Mantilla-Serrano and John Adam, 'UNCITRAL Model Law: Missed Opportunities for Enhanced Uniformity' (2008) 31(1) University of New South Wales Law Journal 307, 314.

125 Emmanuel E Okon, Laura Ani and Joke Adediran (n 60) 166, 219 in Ladan (n 7).

126 The *Ibidapo* opinion relied on the English cases of: *Attorney-General v Lamplough* (1878) 3 Ex. D. 214 at p 229; *Board of Customs and Excise v Barau* (1982) 10 SC 48 at pp 128 and 172. See *Ibidapo* (n 100) 55.

127 E.g., the Economic and Financial Crimes Commission (Establishment) 2004 s 42 refers to many statutes.

In the context of the executive taking obligations on behalf of the country, it has been argued that section 12(1) was 'intended to foster cooperation between the executive and the legislature, as the checks and balances envisaged would only be effective in an atmosphere of mutual trust and cooperation.'[128] However, the argument that the executive should inform the legislature before signing a treaty (to facilitate domestication) is probably unrealistic considering the partisan nature of legislators.[129] In any case, this will likely increase cost and bureaucracy.

Section 12 (1) is rigid as a prerequisite for legal effect of treaties in Nigeria, but it is also flexible in terms of the support that it can provide depending on the aims of the legislature. This complementarity is missed in the literature, which usually focuses on defining roles of the executive and legislature in the effectuation of treaties. An example is the fact that only the National Assembly can domesticate treaties regarding matters on the exclusive legislative list of the Constitution.[130] The absolute rigidity of section 12 has also been discounted from the perspective of *jus cogens* and it was argued that norms against crimes such as genocide would apply regardless of domestication.[131] Conversely, a treaty domesticated in breach of such norms would be invalid despite any domestication under section 12.[132]

In the context of domestication or ratification, legal certainty need not be achieved at the expense of flexibility. Legal certainty can be promoted if domestication is done expressly, rather than by inference.[133] But the question is whether express domestication is through the enactment implementing the legislation as was done for the African Charter.[134] Express domestication should be promoted if this means incorporation in statute through a dedicated statute, by reference or through a schedule. However, that approach should be rejected if it means that dedicating a statute to domestication is the only way forward. This latter approach would not only contradict Nigerian jurisprudence

128 Onomrerhinor (n 69) 22.

129 ibid 25.

130 The extent to which the State Houses of Assembly should be involved in the implementation of treaties (regarding matters on the concurrent or residual legislative lists) and the possible challenges resulting therefrom is beyond the scope of this paper. See Nwapi (n 19) 49.

131 Elijah Oluwatoyin Okebukola, 'The Application of International Law in Nigeria and The Façade of Dualism' (2020) 11(1) Nnamdi Azikiwe University Journal of International Law and Jurisprudence 15, 22. Cf s 53 of the Vienna Convention.

132 Okebukola ibid 22. Cf the Vienna Convention s 64.

133 Okeke (n 116) 121, 430.

134 Okeke ibid 406.

and practice but also impedes domestication. A rigid approach is also out of step with the challenges that legal uncertainty poses. There are scholarly opinions on legal uncertainty in Nigeria regarding international matters.[135] The question of flexibility is underscored by treaty enforcement, considering the difference between *lex lata* and legal or legislative experience.

Nigeria's legislators applied flexibility in incorporating the Singapore Convention by reference. The question is whether that approach was seamless and promotes the enforcement of treaty obligations under the Convention. The next section of this article provides an analysis of the legislative approach and how principled flexibility in treaty domestication would have prevented the legal uncertainty that ensued.

6 Enforcement of the Singapore Convention

The Singapore Convention defines mediation as 'a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ("the mediator") lacking the authority to impose a solution upon the parties to the dispute.'[136] The Convention was introduced to ensure the enforceability of cross-border settlement agreements on international commercial disputes in a fair and efficient manner.[137]

The potency of enforcement is a practical enquiry. International law should be effective if there are relevant statutory references facilitating clear obligations and a means for the enforcement of such obligations.[138] Furthermore, based on case law insights, there are parallels for the enforcement of obligations under the Singapore Convention.

135 Olusola Joshua Olujobi, 'Legal responses to energy security and sustainability in Nigeria's power sector amidst fossil fuel disruptions and low carbon energy transition' (2023) 9(7) *Heliyon* 8; Enabulele (n 28) 331.

136 Singapore Convention art 2(3).

137 Resolution adopted by the General Assembly on 20 December 2018 [on the report of the Sixth Committee (A/73/496)]. See Resolution A/RES/73198.

138 Edgar and Thwaites argued in the context of treaties and administrative law in Australia. See Andrew Edgar and Rayner Thwaites, 'Implementing Treaties in Domestic Law: Translation, Enforcement and Administrative Law' (2018) 19 Melbourne Journal of International Law 1, 9–10. See also James Crawford and WR Edeson, 'International Law and Australian law' in KW Ryan (ed) *International Law in Australia* (1984, 2nd edn, Law Book Company) 71, 118.

6.1 *Case Law and Practicality*

Case law on judicial flexibility with respect to promoting treaty obligations provides appropriate foundations for the analysis that is contained in subsequent subsections of this article. In *Abacha*, the Nigerian Supreme Court confirmed that there was no lacuna for the enforcement of relevant rights merely because neither the African Charter nor its Ratification and Enforcement Act made a special provision (such as section 42 of the Constitution) for the enforcement of peoples' rights.[139] Such rights could be enforced under relevant High Court rules, practice, and procedure 'since the Charter has become part of our domestic laws.'[140] This illustrates the scope for judicial flexibility and a focus on substantive legal obligations. If the National Assembly had immediately enacted a statute for enforcing mediation settlement agreements under the Singapore Convention, that would be valid as well, being similar to how the ICSID Convention was enacted in Nigeria.[141] Also, there would be no need for a separate Act to domesticate the Singapore Convention.

Section 12 of the Constitution should not impede treaty engagement and application. There was an argument that non-domesticated treaties are 'not legally binding on the Nigerian court system' considering section 12 of the Constitution.[142] Problematically, though, all the cases relied upon in this regard do not mention the Treaties Act.[143]

In interpreting section 12(1) of the Constitution, the Supreme Court decided that the ILO Convention did not apply. It observed that a valid and enforceable treaty 'must be supported by a law enacted by the National Assembly, not bits and pieces of provisions found here and there in the other laws of the land.'[144] However, as noted, the Constitution was later amended to effectively circumvent orthodox domestication of labour conventions. Principled flexibility in treaty domestication can thrive on the constitutional trajectory, which demonstrates considerable scope to promote the enforcement of treaty obligations. Crucially, however, principled flexibility in treaty domestication is also

139 The Supreme Court confirmed the position in *Ogugu v The State* (1994) 9 NWLR (Pt 366) 1, 26–27.

140 ibid.

141 See the International Centre for Settlement of Investments Disputes (Enforcement of Awards) Act 1967.

142 Nriezedi-Anejionu (n 71)76.

143 *Abacha* (n 25); *R.T.N.A v M.H.W.U.N* [2008] LPELR-3196SC; and *Fantaye* (n 57) 56. Understandably, the *Fantaye* Supreme Court decided the case in before the Treaties Act came into force.

144 *R.T.N.A v M.H.W.U.N* [2008] LPELR-3196SC 1, 53–54.

about preventing contradictions. This flexibility is, therefore, both proactive and responsive.

6.2 *Risks of Contradictions Concerning Incorporation by Reference*

Incorporation by reference, despite its suggested advantages, requires reflections on areas of potential incompatibility between the treaty incorporated by reference and the incorporating statute. As noted earlier, a scholar argued that section 54 of the ACA (through which the New York Convention – NYC – was domesticated),[145] breached treaty obligations because the section was restricted to contractual matters.[146] Nigeria's declaration states that the NYC would apply on a reciprocal basis with awards made in State parties 'and to differences arising out of legal relationships, whether contractual or not, which are considered as commercial'[147] under Nigerian law. Given the vast meaning attached to 'commercial' in art 57(1) of the ACA – now section 91(1) AMA – it may be thought that the courts are unlikely to adopt a restrictive approach, but the courts are likely to focus on the text of the statute itself. Furthermore, there are non-commercial contracts which foreign litigants would be used to.[148] But it seems dispositive that the NYC itself permits parties to issue declarations in the terms that Nigeria did,[149] and arguing that the declarations breach the NYC seems overstated.[150] A valuable lesson, however, is the risk of contradiction when a statute is incorporated by reference.

Section 54 of the repealed ACA, now section 60 of the AMA, contains similar provisions concerning the application of the NYC in Nigeria, although the latter AMA section adds 'whether contractual or not'. The ACA/AMA set out the NYC as a schedule, but it makes no substantive difference whether a treaty is annexed in this manner. Indeed, given that Nigerian statutes sometimes contain significant typos, it may be better for parties to directly access the treaties in question. Some provisions of the AMA offer considerable scope to assess the extent to which incompatibility between the AMA and the Convention requires some reflection if parties are to benefit from legal certainty. These provisions concern categories of settlement agreements, reciprocity and 'mediation seat'.

145 Although it was also reproduced in the second schedule to the AMA.

146 Nwakoby (n 16) 5.

147 Available at <https://www.newyorkconvention.org/contracting-states> accessed 7 July 2024.

148 Such as certain consumer contracts: <https://www.handbook.fca.org.uk/handbook/glossary/G3334.html> accessed 7 July 2024; the Singapore Convention does not apply to disputes arising from consumer contracts for personal, family or household issues. See the Singapore Convention art 1(2)(a).

149 NYC art 1(3).

150 Nwakoby (n 16) 5–6.

6.2.1 Categories of Settlement Agreements

The risk of contradictions may be illustrated through section 67 of the AMA under Part II.[151] The section provides that Part II applies to international commercial mediation, as well as written international settlement agreements that result from mediation.[152] However, Part II of the Act shall not apply to several situations – two of which apply to mediation. The first are 'cases that have been approved by a court or concluded in the course of proceedings before a court, unless parties agree otherwise'[153] or 'cases that are enforceable as a judgment of a Court in this Country, unless the parties agree otherwise.'[154] Both provisions contradict the Singapore Convention. The latter is clear that the Convention cannot apply to both categories of settlement agreements.[155] There are no exceptions in this regard and Nigeria did not make any reservations or declarations in adopting the Convention.[156] The legislature's inclusion of 'unless the parties agree otherwise' may sound pragmatic at first glance but this is not what the Convention provides. This discrepancy is significant because it causes legal uncertainty. In fact, such issues had been specifically considered without any resolution in favour of the legislative approach to the introduction of party autonomy. In considering an earlier draft of article 1(3), the Working Group made certain observations.

Firstly, using reservations or declarations to give States flexibility to limit the scope of application may cause uncertainties. Secondly, an opt-in or opt-out approach could cause an imbalance between parties in different jurisdictions such that a settlement agreement may be enforceable in one country but not in another.[157] It would be a different debate altogether if the outcome of negotiations resulted in a model law rather than a treaty.[158] Any possibility of a solution that would result in flexibility did not find its way into the final draft of the Convention.[159] A reciprocal basis is also absent in the Singapore Convention.

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151 Part I applies to arbitration and Part III contains miscellaneous provisions.

152 AMA s 67(1) (a) and (d).

153 ibid s 67(2)(d).

154 ibid s 67(2)(e).

155 Art 1(3)(a)(i) and (ii) of the Singapore Convention contains both categories respectively.

156 The following countries have made reservations (or other notifications) and declarations: Belarus, Georgia, Iran, Japan, Kazakhstan, and Saudi Arabia available at <https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status> accessed 18 May 2024.

157 See the Report of Working Group II (Dispute Settlement) on the work of its sixty-sixth session (Vienna, 3–21 July 2017) (A/CN.9/901) paras 25–40.

158 See ibid paras 92–93.

159 See the Report of Working Group II (Dispute Settlement) on the work of its sixty-seventh session (Vienna, 2–6 October 2017) (A/CN.9/929) paras 17–29.

6.2.2 Reciprocity

Under the AMA, international settlement agreements emanating from outside Nigeria must meet two conditions. One, the State from which the settlement agreement emanates must be a Party to the Singapore Convention.[160] Two, the dispute must be one that is underpinned by a legal relationship that is considered commercial under Nigerian law.[161] The first condition is a reciprocity requirement not found in the Singapore Convention. This understanding has been aptly expressed in the United Kingdom, the European Union and South Africa.

In considering the possibility of becoming a party to the Singapore Convention, the UK Ministry of Justice sought expert opinions on whether the UK would be expected to enforce settlement agreements emanating from both contracting and non-contracting states. Most respondents did not envisage any difficulties with respect to enforcing settlement agreements against non-contracting states.[162] The UK became a signatory to the Singapore Convention shortly after the consultation.[163] Nigeria's inclusion of a reciprocity requirement, especially without any treaty reservation, causes significant legal uncertainty. It is possible that there was a default recourse to the reciprocity that traditionally underpins foreign awards[164] and even foreign judgments.[165] In any case, this legal uncertainty is compounded by Nigeria's attitude to the notion of a 'mediation seat'.

6.2.3 'Seat of Mediation'

The first condition for reciprocity in the preceding section is also relevant to the seat of mediation. Under section 87 of the AMA, a State from which

160 AMA art 87(a).

161 AMA art 87(b). The wording is rather unclear: 'difference arises out of a legal relationship, whether contractual or, it is not, considered commercial under the laws of Nigeria.' But this provision is not the focus of the analysis here.

162 Ministry of Justice, *The Singapore Convention on Mediation: Consultation Response* (March 2023) <https://assets.publishing.service.gov.uk/media/63ff482ee90e0740dd5ac0dc/the-singapore-convention-on-mediation-consultation-response.pdf> accessed 13 February 2025 paras 4.60–4.63 cf paras 4.64–4.66.

163 On 3 May 2023: <https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status> accessed 16 February 2025.

164 See the ACA s 54(1)(a). Cf art 1(3) of the New York Convention, second schedule to the AMA. Unlike the Singapore Convention, Nigeria clearly made a reciprocity declaration with respect the New York Convention <https://www.newyorkconvention.org/contracting-states> accessed 13 February 2025.

165 E.g., the Reciprocal Enforcement of Foreign Judgments Ordinance of 1922 and the Foreign Judgments (Reciprocal Enforcement) Act 1961. Cf *Grosvenor Casinos Ltd v Halaoui* [2009] 10 NWLR (Pt 1149) 309, 339 (SC).

an international settlement agreement emanates must be a party to the Convention. Using the analogy of arbitration, the seat of mediation usually is the place chosen for the mediation in the mediation agreement.[166] Generally, the law that governs the arbitration process (sometimes termed the 'curial law') is the law of the seat of arbitration.[167] This suffices to understand how the concept of seat works generally, as the analogy gets a bit complicated in a conflict of laws sense when parties did not choose the seat.[168]

However, the Singapore Convention does not provide any requirement for a mediation seat and this is arguably justifiable on the basis that mediation is essentially contractual (rather than judicial) and the mediator merely helps the parties to reach a settlement.[169] This means that there is no 'State of origin' per se.[170] It appears that the Nigerian legislator either did not fully appreciate such possibilities as contained in the Singapore Convention or rejected them as unsuitable regarding Nigerian interests. But any such speculation is rather irrelevant to international parties as the Convention is in force in Nigeria without any reservations or declarations. Whether the absence of a seat is regarded as positive (because 'only the place of enforceability matters' thereby promoting enforceability)[171] or negative (because it may lead to parallel proceedings),[172] it is difficult to appreciate why Parliament might unilaterally revise the wording of the Singapore Convention to suit perceived national interests. It seems self-evident that the courts will have to deal with these issues when they come up.

166 Yun Zhao, 'The Singapore Mediation Convention: A Version of the New York Convention for Mediation?' (2021) 17(3) Journal of Private International Law 538, 559. Regarding English law, see *Enka Insaat ve Sanayi as v ooo Insurance Company Chubb* [2020] UKSC 38 para 1.

167 See the majority opinion of the UK Supreme Court's decision in *Enka v Chubb* ibid para 1.

168 *Enka v Chubb* ibid para 170.

169 Juan Pablo Hernández, 'Seat of Mediation under the Singapore Convention' (2020) 1 The Treaty Examiner <https://treatyexaminer.com/seat-of-mediation/> accessed 13 February 2025.

170 Kruger further noted that this reality 'makes understanding [the Convention] from a private international law standpoint challenging.' The Nigerian legislator may have found this relatable. See Thalia Kruger, 'The Private International Law of Mediated Settlement Agreements' in Justin Borg-Barthet et al (eds), *From Theory to Practice in Private International Law* (Hart Publishing 2024) 23, 30–31.

171 Itai Apter, 'The Singapore Convention on Mediation; The Right Instrument at the Right Time' (2021) 115 Proceedings of the ASIL Annual Meeting 120, 123.

172 Enforcing courts of signatory States may need to be careful regarding the applications of domestic or international public policy. See Anne Wang, 'Transplanting Public Policy: From Arbitration to Mediation' (2021) 24(1) IALR 1, 7.

6.2.4 Interpretation Challenges for the Courts

The courts will contend with legal uncertainty whilst international parties try to predict how relevant issues will be resolved. The AMA does not offer much comfort in its provision that in interpreting Part II, 'regard is to be had to the need to promote uniformity in its application and the observance of good faith.'[173] It will take an exceptionally progressive Nigerian court to strike an appropriate balance (which this article advocates) between treaty obligations emanating from the domestication of the Singapore Convention and contradictory statutory provisions. This balance should be in favour of the Convention.

The Convention's restrictive approach to settlement agreements involving the courts was in part 'to avoid possible overlap or gap with other existing or future international instruments.'[174] Even if there was not much reflection on the background debates that influenced specific provisions of the Convention, careful thought should have been given to the implications of expanding its scope. Such an expansion is an invitation to an asymmetry of obligations on the international and national planes. The exercise of party autonomy, the basis on which the Nigeria's qualification was introduced, is not a justification to depart from clear treaty provisions.

Nevertheless, such contradictions should not justify a departure from the domestication approach that Nigeria adopted for the Singapore Convention. The contradiction is squarely a matter of legislative drafting and not taking the full import of the Convention into account. Some permutations may be made as to why Parliament thought it would be wise to qualify the provisions of the Convention regarding cases approved by the court and those enforceable as judgments. For example, settlement agreements approved by the court during judicial proceedings are consent judgments essentially. As a matter of judicial policy, litigants are encouraged to reach amicable settlements even if they have initiated legal proceedings. Indeed, the Nigerian Court of Appeal observed that 'in deserving cases upon a successful mediation program, consent judgment can be entered by even this court.'[175] But neither the judicial policy in favour of amicable dispute resolution nor the prime importance of party autonomy is a licence to derogate from the treaty. Whether the Convention's attitude to settlement agreements that involve courts is appropriate is a different matter

173 Singapore Convention s 68(1).

174 See the Report of Working Group II (Dispute Settlement) on the work of its sixty-seventh session (Vienna, 2–6 October 2017) (A/CN.9/929) para 17.

175 *Ogbe v Arumemi-Ikhide* (2021) LPELR – 53507 (CA) 58. Traditionally, most efforts to settle out of court take place at the lower courts.

altogether,[176] but Nigeria cannot adopt the Convention without reservations and then qualify it regardless of the intentions that may drive such qualification. The Convention is not some type of model law where parts can be cherry-picked or qualified outside any reservation or declaration framework. The task of Parliament is to provide enforcement rules since 'each Party to the Convention shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in this Convention.'[177]

Even if, for the sake of argument, Nigeria adopted or adapted the UNCITRAL Model Law on mediation,[178] it would have needed to reflect on the implications of treaty obligations under the Convention.[179] All states with legislation based on or influenced by the Model Law enacted it before 2018 when the Singapore Convention was adopted.[180] A State that signs the Convention and adopts the Model Law concurrently may do so 'as a means of implementing their obligations under the Convention.'[181] From the analysis above, the drafting of the AMA does not promote implementation of treaty obligations under the Convention. Relevant national policy regarding how such terrain may be navigated is also rather unclear.

In 2024, Nigeria articulated a national policy on arbitration and alternative dispute resolution. Two prime purposes of the policy are to 'promote implementation of the UNCITRAL Arbitration Law on arbitration and UNCITRAL Model Law'[182] and 'provide a framework for the continuous review of arbitration legislation to ensure optimal conformity with the fundamental tenets

176 This is beyond the scope of this article.

177 Singapore Convention art 3(1).

178 UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018) (amending the Model Law on International Commercial Conciliation, 2002) <https://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation> accessed 13 February 2025.

179 According to the status list, Nigeria is not one of the 33 States (in a total of 46 jurisdictions) that have legislation based on or influenced by the Model Law. See <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_conciliation/status> accessed 13 February 2025.

180 Georgia (in the United States) is the only exception, and the introduction of legislation based on the text of the UNCITRAL Model Law was in 2021. See <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_conciliation/status> accessed 13 February 2025.

181 The other options are to 'adopt the Model Law 2018 as a first step to support domestic implementation of the Convention before later becoming a party to the Convention' or 'adopt the Convention as a standalone instrument.' See the Singapore Convention on Mediation website: <https://www.singaporeconvention.org/> accessed 13 February 2025.

182 National Policy on Arbitration and Alternative Dispute Resolution (ADR) (October 2024), 2024 para 3.0(c)

of international arbitration …'[183] These are the only parts where mediation is specifically mentioned, and the quote is the only part where the Singapore Convention is mentioned in the policy. However, the Convention does not reflect 'fundamental tenets of international arbitration'. As earlier noted, it does not apply to 'settlement agreements that have been recorded and are enforceable as an arbitral award.'[184] The only other reference to arbitration in the Convention concerns parallel applications or claims. Nevertheless, a clear policy is no substitute for the enforcement of treaty obligations under the Singapore Convention. Principled flexibility in treaty domestication should be anchored on the law.

7 Conclusion

Under the Vienna Convention, Nigeria is not immune to treaty obligations merely because a treaty was signed or ratified but not domesticated. Notably, there should be no conduct that will defeat the aims of a treaty. A proactive and flexible approach to domestication will help to strike an appropriate balance. This article has, therefore, developed and suggested principled flexibility in treaty domestication as a means of ensuring compliance with treaty obligations, legal certainty and an efficient domestic regime.

Whether Nigeria's Parliament should engage in treaty incorporation by reference should be answered in the affirmative as this *ipso facto* does not pose a problem. This approach even has the potential to promote efficiency in the treaty domestication process. The Nigerian Constitution, Treaties Act, and relevant case law contain foundations for effective incorporation by reference. Principled flexibility in treaty domestication is anchored on the requirement of good faith regarding treaties under the Vienna Convention, reducing delays and the cost of legislative processes. It is essential to have a cooperative relationship between the executive and the legislature within a clear legal framework. Also, a treaty is not some sort of model law. Therefore, the enforcement of treaty obligations should be paramount, subject to any treaty reservations or declarations as may be appropriate. This enforcement is further promoted through judicial regulation, especially if there is a proactive legislative support. The courts will not be unduly burdened with the need to clarify the law if the legislator plays an effective and proactive role. Nevertheless, in line with

183 ibid para 3.0(e)

184 Singapore Convention art 3(b).

principled flexibility in treaty domestication, the courts have enough flexibility to promote treaty obligations.

Domestication should be clearly done and incorporating a treaty by reference is one way of domesticating a treaty. However, there is a significant risk of legal uncertainty if the legislator includes statutory provisions that contradict the treaty in question. Nigeria's parliament has domesticated the Singapore Convention in a way that causes significant legal uncertainty not only for Nigerian and foreign disputants, but also for other parties to the Convention. This article has analysed these contradictions through the categories of enforceable settlement agreements, reciprocity, and the notion of 'mediation seat'. Applying its suggestion of principled flexibility in treaty domestication would prevent such challenges in the future.

If Nigeria wants to be more relevant on the global treaty stage, especially in a way that promotes purposive and effective engagement, there are further deductions from the analysis in this article that are foundational for development using the Singapore Convention as a paradigm. Firstly, the notion that the National Assembly should take on scrutiny of more treaties is either untenable or unsustainable. The holistic Nigerian regime on treaties is designed to prevent Parliament from being overwhelmed with relatively trivial issues. Secondly, it is necessary to build on the flexibility that the treaty regime offers to engage with treaties in a way beneficial to Nigerians. An excellent example is the Singapore Convention not because it is perfect but because it aligns with deeply engrained cultural values. Thirdly, principled flexibility in treaty domestication should prevent any abuse of statutory provisions to expedite treaty relations. Financial obligations, sovereignty implications for Nigeria, and national public policy should be carefully considered.

Principled flexibility in treaty domestication requires an acceptance and optimisation of both the Constitution and the Treaties Act. There is no need to repeal the latter, but even if repealed, it is critical to retain the value that the Act brings in terms of a layered approach to treaty making. Incorporation by reference, which suffices as a domestication mechanism, should be further explored to facilitate Nigerian treaty engagement and application. This approach would have saved legislative time over the years and helped to improve treaty engagement. It reconciles the Constitution and the Treaties Act and provides a layered approach to domestication that promotes legal certainty regarding international commercial transactions.