

**REFLECTIONS ON NIGERIA'S ENDORSEMENT OF THE AGREEMENT ESTABLISHING THE AFRICAN CONTINENTAL FREE TRADE AREA: QUANDARIES AND PROSPECTS\***

**Abstract**

*The Nigerian government took a significant step by signing the Agreement Establishing the African Continental Free Trade Area (AfCFTA). It is envisaged that Nigeria's commitment to the AfCFTA would engender a robust inter-African trade. This article seeks to examine salient features of the treaty and to ascertain the quandaries regarding its implementation in Nigeria. The article adopts the doctrinal research methodology for information. The article finds that the implementation of AfCFTA in Nigeria is patently attenuated by the fact that the country merely signed the treaty. It is yet to ratify same and the country is therefore not bound by its provisions under trite principles of international law. The article recommends that the country ought to ratify the treaty and domesticate it as required by the Constitution of the Federal Republic of Nigeria, 1999, as amended. The country is also implored to ram up critical infrastructure such as roads, bridges, and rail way across the country and beyond its borders to facilitate unfettered movement of goods and services. It is contended that the full implementation of this momentous treaty will galvanise the realization of Nigeria's quest for socio-economic development.*

**Keywords:** Agreement Establishing the African Continental Free Trade Area, International law, Quandaries, Prospects

**1. Introduction**

Nigeria is a major player in the African continent. The country has an estimated population of over 200 million people. It is endowed with immense natural resources and incontestably Africa's largest exporter of oil. However, Nigeria continues to face daunting socio-economic challenges<sup>1</sup> which have egregiously hampered its growth and development. This state of affairs is picturesquely exemplified by the World Bank as follows:

Oil price volatility continues to influence Nigeria's growth performance. Between 2000 and 2014, Nigeria's gross domestic product (GDP) grew at an average rate of 7% per year. Following the oil price collapse in 2014-2016, combined with negative production shocks, the gross domestic product (GDP) growth rate dropped to 2.7 % in 2015. In 2016, during its first recession in 25 years, the economy contracted by 1.6 %. Since 2015, economic growth remains muted. Growth averaged 1.9 % in 2018 and remained stable at 2% in the first half of 2019. Domestic demand remains constrained by stagnating private consumption in the context of high inflation (11% in the first half of 2019). On the production side, growth in 2019 was primarily driven by services, particularly telecoms. Agricultural growth remains below potential due to continued insurgency in the Northeast and ongoing farmer-herdsmen conflicts. Industrial performance is mixed. Oil GDP growth is stable, while manufacturing production is expected to slow down due to weaker power sector performance. Food and drink output are expected to increase, likely in response to import restrictions. Construction continues to perform positively, supported by ongoing mega projects, higher public investment in the first half of the year, and import restrictions. Growth is too low to lift the population out of poverty. The weakness of the agricultural sector weakens prospects for the rural poor, while high food inflation adversely impacts the livelihoods of the urban poor. Despite expansion in some sectors, employment creation remains weak and insufficient to absorb the fast growing labor force, resulting in high rate of unemployment (23% in 2018), with another 20% of labor force underemployed

Some of the socio-economic impediments besetting developing countries including Nigeria have been attributed to imbalances in international economic relations between developing countries and developed countries. This stand point is graphically depicted thus:

Many tensions in the world are the outcome of fundamental economic maladjustments and conditions of economic disequilibrium. The ever-widening gap between the few developed countries and the numerous developing countries constitute a major source of tension and insecurity. The present distribution of economic power in the world is imbalanced and unjust. More than two-thirds of the world's trade takes place among the developed countries

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<sup>1</sup> The World Bank, 'Nigeria Overview' <[www.worldbank.org/en/country/nigeria/overview](http://www.worldbank.org/en/country/nigeria/overview)> accessed on 2 November 2019

themselves. Moreover, three-fourths of the world's income is generated in developed countries.<sup>2</sup>The developing countries, therefore, want to change the traditional structure of international economic order. In July 1964 the Secretary-General of the United Nations declared "a change of political dimension in the awareness of the need for a more organized international cooperation in the economic and financial field."<sup>3</sup>This awareness finds itself manifested in putting forward the concepts of 'economic decolonization,' 'New International Economic Order,' 'Collective economic security,' 'Economic Rights and Duties,' 'Collective developing world,' 'Self-reliance,' etc.<sup>4</sup>

By and large, the quest for collective economic security and development in Africa led to the formation of a regional multilateral treaty entitled 'Agreement Establishing the African Continental Free Trade Area.' On the 7<sup>th</sup> day of July, 2019, Nigeria signed the Agreement Establishing the African Continental Free Trade Area.<sup>5</sup>It has been observed that Nigeria has a lot to benefit 'from increasing access to its goods and services to a wider African market.'<sup>6</sup>It is also envisaged that Nigeria's commitment to the Agreement Establishing the African Continental Free Trade Area (AfCTA), would engender a robust inter-African trade which is currently a far cry from the volume of trade the African continent carries out with Europe. Against this backdrop, this article seeks to examine the botched quest for a New International Economic Order (NIEO) and to undertake an overview of salient features of AfCTA. It also intends to analyse Nigeria's obligation under the treaty, ascertain the quandaries regarding its implementation, and enunciate the prospects and prescriptive implication of the treaty particularly in the Nigerian context.

## **2. The Botched Quest for a New International Economic Order: Inflection towards an African Regional Strategy of Collective Prosperity?**

Sequel to the Second World War, developed countries of North America and Western Europe established an international economic system characterized by three major institutions, viz; International Monetary Fund (IMF), International Bank for Reconstruction and Development (IBRD), also referred to as World Bank, and the General Agreement on Tariffs and Trade (GATT). The World Trade Organisation (WTO) later replaced GATT upon its establishment in 1995. These institutions conferred on developed countries, political and economic hegemony over international economic order while developing countries of Africa, Asia, Latin America, and the Middle East remained subservient to them. The developed states established an international economic system which was immensely favourable to them but often at cross-purposes and less favourable to the interests of developing countries. This state of affairs engendered the agitation for a New International Economic Order (NIEO).<sup>7</sup> The NIEO includes a complex set of claims which involves the demand by developing countries for the control of multinational corporations, transfer of technology and information, and increase in the provision of financial resources to developing states to reduce global poverty and improve living standards.<sup>8</sup> The legal and regulatory framework aimed at establishing a NIEO include the UN General Assembly Declaration on a NIEO and the Charter of Economic Rights and Duties. These frameworks have been discussed briefly hereunder.

### **The United Nations Declaration on the Establishment of a New International Economic Order**

The quest for a NIEO is predicated on the huge disparity in the living standard between developed countries and developing countries and the demand of the latter for a just and equitable international economic relations aimed at addressing historically bifurcated imbalances.<sup>9</sup>The main purpose of the Declaration is restated thus:

...to work urgently for the establishment of a New International Economic Order based on equity, sovereign equality, interdependence, common interest and cooperation among all states, irrespective of their economic and social systems which shall correct inequalities and redress existing injustices, make it possible to eliminate the widening gap between the

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<sup>2</sup> P Chandrasekhar Rao, (1975) Charter of Economic Rights and Duties of States, *IJIL*, Vol.15, p.352 cited in S K Kapoor, *International Law and Human Rights* (7<sup>th</sup> Ed Central Law Agency, 2009) p.387

<sup>3</sup> United Nations Press Release S.G/I.S.M/110 July 16 1964, 2 cited in Kapoor(n2)

<sup>4</sup> Kapoor (n2).

<sup>5</sup> African Union, Agreement Establishing the African Continental Free Trade Area <au.int/en/treaties/continental-free-trade-area> accessed on 2 November 2019.

<sup>6</sup> M Jones, 'Nigeria Signs Africa Free Trade Area Agreement' British Broadcasting Corporation (BBC) <<https://www.bbc.com/news/world>> accessed on 2 November 2019

<sup>7</sup> A Akinsanya and A Davies, 'Third World Quest for a New International Economic Order: An Overview' (1984) *The International and Comparative Law Quarterly*, No. 33 Vol.1, 208

<sup>8</sup> P Malanczuk, *Akehurt's Modern Introduction to International Law* (17<sup>th</sup> Ed London: Routledge, 1997) p.233.

<sup>9</sup> Malanczuk (n8) P.233

developed and developing countries and ensure steadily accelerating economic and social development and peace and justice for present and future generations...<sup>10</sup>

The Declaration on the Establishment of a NIEO is to the effect that the gap between developed and developing states requires active and equal participation of developing nations in the formulation and implementation of resolutions that involves the international community.<sup>11</sup>The Declaration provides that socio-economic and political development of present and future generations is premised on cooperation between all members of the international community on the basis of sovereign equality and the elimination of disequilibrium that exists between them.<sup>12</sup>It emphasizes the significance of considering the imperative development needs of developing countries.<sup>13</sup>The UN is mandated to ensure the establishment of a NIEO.<sup>14</sup>The Declaration stipulates that the NIEO constitutes the most significant basis of international economic relations.<sup>15</sup>However, it is pertinent to note that the UN Declaration on the NIEO, being a resolution of the UN General Assembly, is not legally binding on member nations but generally recognized as having normative value in the international arena.<sup>16</sup>

### **Programme of Action on the Establishment of a New International Economic Order**

The Programme of Action on the Establishment of a New International Economic Order<sup>17</sup>stipulates the need for a more expeditious economic development of developing countries and enhancing their participation in international trade based on favourable terms. This is to be achieved by adopting a discriminatory approach in international economic relations in favour of developing states. It canvasses for the restructuring of the international monetary system and the flow of direct investment from rich to poor states. On the flip side, this strategy is often opposed by developed nations. It has been observed that 'no result oriented programme has been undertaken'<sup>18</sup>pursuant to the lofty objectives of the programme of action ordinarily aimed at the realization of a NIEO. This lackluster performance may be attributed to the ambivalence of some developed nations about the very ideology of a NIEO.

### **The Charter of Economic Rights and Duties**

The Charter of Economic Rights and Duties of States<sup>19</sup>is essentially aimed at promoting a NIEO on the basis of 'sovereign equality, interdependence, common interest and co-operation among all states, irrespective of their economic and social systems.'<sup>20</sup>The Charter enunciates a plethora of socio-economic rights and duties of states. It stipulates that every state has the sovereign and inalienable right to adopt its economic system including political, social and cultural systems in line with the aspirations and desires of its citizens devoid of external interference.<sup>21</sup>States are entitled to exercise full and permanent sovereignty including possession, use and disposal, over its wealth, natural resources and economic activities.<sup>22</sup>States are vested with the right to engage in international trade and other forms of economic cooperation irrespective of any differences in political, economic and social systems free from discrimination on the basis of such differences.<sup>23</sup> Article 5 of the Charter stipulates that 'All states have the right to associate in organisations of primary commodity producers in order to develop their national economies...'. The states have a corresponding duty to respect that right by 'refraining from applying economic and political measures that would limit it.'<sup>24</sup>States are duty bound 'to contribute to the development of international trade in goods, particularly by means of arrangement and by conclusion of long

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<sup>10</sup> Preamble of the Declaration on the Establishment of a New International Economic Order Sixth Special Session, Agenda Item 7, Resolution adopted by the General Assembly of the UN 3201 (S-VI)

<sup>11</sup> *ibid* para 2.

<sup>12</sup> *ibid* para 3

<sup>13</sup> *ibid* para 5

<sup>14</sup> *ibid* para 6

<sup>15</sup> *ibid* para 7

<sup>16</sup> See Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons Case ILM 35 (1990) 809 at 826 para 70, where the ICJ observed, *inter alia*, that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an opinion *juris*.

<sup>17</sup> (adopted by the Sixth Special Session of the General Assembly via General Assembly Resolution 3202 (S-VI), 16 May 1974.

<sup>18</sup> S Chand, 'New International Economic Order: Objectives, Programme of Action'

<<http://www.yourarticlelibrary.com/trade-2/nieo-new-international-economic-order-objectives-programme-of-action/2627/>> accessed on 6 November 2019

<sup>19</sup> G A Res 3281 (XXIX), UN GAOR, 29 Sess, Supp. No. 31 (1994) 50

<sup>20</sup> Preamble of the Charter of Economic Rights and Duties of States

<sup>21</sup> Charter of Economic Rights and Duties, Art 1

<sup>22</sup> *Ibid*. Art 2

<sup>23</sup> *ibid* Art 4

<sup>24</sup> *ibid* Art 5

term multilateral commodity agreements, where appropriate, and taking into account the interest of producers and consumers. All states share the responsibility to promote the regular flow and access of all commercial goods traded at stable, remunerative and equitable prices, thus contributing to the equitable development of the world economy, taking into account, in particular, the interests of developing countries.<sup>25</sup> States have the primary responsibility to promote the socio-economic and cultural development of its citizens.<sup>26</sup> However, it is imperative to point out that most developed countries did not fully ratify the provisions of the Charter as some developed countries expressed reservations to certain fundamental provisions of the Charter. For instance, Article 2 paragraph 1 of the Charter is to the effect that all countries are obligated to ‘freely exercise full permanent sovereignty including possession, use and full disposal, over all its wealth, natural resources and economic activities’ Whilst recognizing the right of developing countries to full permanent sovereignty of natural resources, the United States of America, United Kingdom, France, Canada, Japan, and Germany rejected part of the provision on the ground if a developing state transferred a portion of wealth in a developed country, the foregoing principle could not be construed to imply that such developing state would still retain permanent sovereignty over the wealth in question.<sup>27</sup> It is contended that the Charter on the Economic Rights and Duties of States as well as the UN Declaration on a NIEO did not achieve the much cherished goal of a legally binding new international economic order. It would appear that the botched quest for a NIEO has given impetus to the desire of developing countries especially those situated in the African continent to explore and appropriate other avenues of international cooperation as exemplified by the establishment of the African Free Trade Area Agreement.

### 3. A Conspectus of the Agreement Establishing the African Continental Free Trade Area and its Protocols

The Agreement Establishing the African Continental Free Trade Area (AfCFTA)<sup>28</sup> is aimed at achieving the following general objectives:<sup>29</sup>

- (a) Create a single market for goods, services, facilitated by movement of persons in order to deepen the economic integration of the African continent and in accordance with the Pan African Vision of “An integrated, prosperous and peaceful Africa” enshrined in Agenda 2063;
- (b) Create a liberalized market for goods and services through successive rounds of negotiations;
- (c) Contribute to the movement of capital and natural persons and facilitate investments building on the initiatives and developments in the State Parties and RECs (Regional Economic Communities);
- (d) Lay the foundation for the establishment of a continental customs Union at a later stage;
- (e) Promote and attain sustainable and inclusive socio-economic development, gender equality and structural transformation of the State Parties;
- (f) Enhance the competitiveness of the economies of State Parties within the continent and global market;
- (g) Promote industrial development through diversification and regional value chain development, agricultural development and food security; and
- (h) Resolve the challenges of multiple and overlapping memberships and expedite the regional and continental integration processes.

In order to engender the realization of the objectives specified in Article 3 of AfCFTA, State Parties are obligated to: ‘ progressively eliminate tariffs and non-tariff barriers to trade in goods; progressively liberalise trade in services, cooperate on investment, intellectual property rights and competition policy; cooperate on custom matters and the implementation of trade facilitation measures; establish a mechanism for the settlement of disputes concerning rights and obligations; and establish and maintain an institutional framework for the implementation and administration of the AfCFTA.’<sup>30</sup> The scope of the agreement extends to trade in goods, trade in services, investment, intellectual property rights and competition policy.<sup>31</sup> Member states are required to enter into negotiations in the area of intellectual property rights, competition policy and investment.<sup>32</sup> The institutional framework for the implementation, administration, facilitation, monitoring and evaluation of AfCFTA consists of the Assembly of heads and government of the African Union, the Council of Ministers, the

<sup>25</sup> *ibid* Art 6

<sup>26</sup> *ibid* Art 7

<sup>27</sup> Kapoor (n2)p.395

<sup>28</sup> (adopted 21 March 2018, entry into force 30 May 2019) The Agreement Establishing the African Continental Free Trade Area was adopted by the 10<sup>th</sup> Extraordinary Session of the Assembly in Kigali, Rwanda.

<sup>29</sup> Agreement Establishing the African Continental Free Trade Area, 2018, Art 3

<sup>30</sup> *Ibid.* Art4

<sup>31</sup> *ibid* Art 6

<sup>32</sup> *ibid* Art 7

Committee of Senior Trade Officials and the Secretariat.<sup>33</sup>When implementing AfCFTA, State Parties are required to accord each other, on a reciprocal basis, preferences that are no less favourable than those granted to third parties.<sup>34</sup> Unlike the Charter on Economic Rights and Duties of States, the AfCFTA clearly stipulates that no reservation shall be made to the treaty.<sup>35</sup> Thus all parties that ratify the AfCFTA are legally bound to comply with the entire provisions of the treaty. So far, a total of 58 African States including Nigeria have signed the AfCFTA. The countries that have ratified the treaty include Burkina Faso, Chad, Côte d'Ivoire, Congo, Djibouti, Egypt, Equatorial Guinea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Kenya, Mali, Mauritania, Mauritius, Namibia, Niger, Rwanda, South Africa, Sahrawi Arab Democratic Republic, Senegal, Sierra Leone, and Sao Tome and Principe. Other States include, Eswatini, Togo, Uganda, and Zimbabwe.<sup>36</sup>

### **Protocol on Trade in Goods**

The Protocol on Trade in Goods<sup>37</sup> is mainly aimed at creating a liberalized market for trade in goods.<sup>38</sup> The specific objectives of the Protocol on trade in goods is to boost intra-African trade in goods through progressive elimination of tariffs, progressive elimination of non-tariff barriers, enhanced efficiency of customs procedures, trade facilitation and transit, enhanced cooperation in the areas of technical barriers to trade and sanitary measures. Other objectives enunciated in the Protocol are the development and promotion of regional and continental value chains and enhanced socio-economic development diversification and industrialization across Africa.<sup>39</sup> The Protocol is primarily concerned with trade in goods between State Parties.<sup>40</sup> State Parties are required to accord 'most-favoured-nation treatment' to one another.<sup>41</sup> The 'most-favoured-nation treatment' is a method of establishing equal treatment opportunities, privileges, concessions, and immunities among states. It seeks to establish sovereign equality of states and equal benefits, such as lower tariffs, in the course of international economic relations.<sup>42</sup> Notwithstanding provision for equality of opportunity and equal treatment, the Protocol on Trade in Goods gives the latitude for differential treatment and flexibilities in the application of the treaty to State Parties at different levels of economic development or individual specificities or peculiarities as recognized by other States Parties. The differential treatment given includes special consideration and additional transition period in the implementation of the Protocol on a case by case basis.<sup>43</sup> State Parties are mandated to progressively eliminate import duties or charges having equivalent effect on goods originating from the territory of any other State Party.<sup>44</sup> Each State Party is required to apply preferential tariffs to imports from other State Parties.<sup>45</sup> State Parties have the discretion to regulate export duties or charges having equivalent on goods originating from their territories on a non-discriminatory basis.<sup>46</sup> The Protocol provides for the elimination of non-tariff barriers.<sup>47</sup> State Parties are required to take measures in respect of customs cooperation and mutual administrative assistance.<sup>48</sup> They are required to facilitate trade<sup>49</sup> and make necessary arrangements regarding transit.<sup>50</sup> State Parties are permitted to take anti-dumping and countervailing measures.<sup>51</sup> The Protocol gives State

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<sup>33</sup> *ibid* Art 9

<sup>34</sup> *ibid* Art 18

<sup>35</sup> *ibid* Art 25

<sup>36</sup> African Union, Agreement Establishing the African Continental Free Trade Area, <https://au.int/en/treaties/agreement-establishing-african-continental-free-trade-area> Retrieved November 9, 2019.

<sup>37</sup> Article 23 (2) of the AfCFTA provides that the Protocols on investment, intellectual property rights, competition policy and any other instrument within the scope of AfCFTA as deemed necessary shall enter into force 30 days after the deposit of the 22<sup>nd</sup> instrument of ratification. On the 2<sup>nd</sup> April 2019, Gambia became the 22<sup>nd</sup> country to ratify the AfCFTA. See A Latif Dahi, 'Africa's Historic Free Trade Deal Now Has Enough Countries Signed Up to Go into Force' Quartz Africa (3 April 2019) cited in Wikipedia, 'African Continental Free Trade Area' <[en.m.wikipedia.org/wiki/African-continental-free-trade-area](https://en.m.wikipedia.org/wiki/African-continental-free-trade-area)> accessed on 9 November 2019 and on the 29 April 2019, Saharawi Republic made the 22<sup>nd</sup> deposit of instruments of ratification. See the African Union, AfCFTA Agreement Secures Minimum Threshold of 22 Ratifications as Sierra Leone and Saharawi Republic Deposit Instruments (29 April 2019) cited in Wikipedia (n37). Thus the Protocol of AfCFTA entered into force on the 30 May 2019 in accordance with the provisions of Article 23 (2) of AfCFTA.

<sup>38</sup> Agreement Establishing the African Continental Free Trade Area, 2018, Art 23 (2)

<sup>39</sup> *ibid* Art 2 (a)-(f).

<sup>40</sup> *ibid* Art 3(1).

<sup>41</sup> *ibid* Art 4.

<sup>42</sup> Britannica, 'Most-Favoured-Nation Treatment' <<https://www.britannica.com/topic/most-favoured-nation-treatment>> accessed on 8 November 2019

<sup>43</sup> Protocol on Trade in Goods, Art 6

<sup>44</sup> *ibid* Art 7 (1)

<sup>45</sup> *ibid* Art 8 (1)

<sup>46</sup> *ibid* Art 10 (1)

<sup>47</sup> *ibid* Art 12

<sup>48</sup> *ibid* Art 14

<sup>49</sup> *ibid* Art 15

<sup>50</sup> *ibid* Art 16

<sup>51</sup> *ibid* Art 17

Parties the latitude to support the establishment and operation of special economic arrangements or zones for the purpose of galvanizing development.<sup>52</sup> State Parties are allowed to undertake regulatory measures, on a non-discriminatory basis and for a specified period of time to protect infant industries.<sup>53</sup> State Parties are also allowed to adopt restrictive measures in accordance with international rights and obligations of the State Party concerned including those under WTO Agreement, the Articles of Agreement of the IMF or the African Development Bank where such a state is in critical balance of payment difficulties or under imminent threat thereof.<sup>54</sup> The Protocol on Trade in Goods therefore creates a legal and regulatory framework for the establishment of a regional economic order aimed at enhancing equitable trade relations in goods in the African region.

### Protocol on Trade in Services

The Protocol on Trade in Services<sup>55</sup> defines 'trade in services' as the supply of service:<sup>56</sup>

- (I) from the territory of one State Party into the territory of any other State Party;
- (II) in the territory of one State Party to the service consumer of another State Party;
- (III) by a service supplier of one State Party, through commercial presence in the territory of any other State Party;
- (IV) by a service supplier of one State Party in the territory of any other State Party.

The term 'services' refer to: 'any service, in any sector, services supplied in the exercise of governmental authority.'<sup>57</sup> 'A service supplied in the exercise of governmental authority' connotes 'any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.'<sup>58</sup> The specific objectives of the Protocol include:<sup>59</sup>

- (a) enhance competitiveness of services through: economies of scale, reduced business costs, enhanced continental market access, and an improved allocation of resources including the development of trade-related infrastructure;
- (b) promote sustainable development in accordance with the Sustainable Development Goals (SDGs);
- (c) foster domestic and foreign investment;
- (d) accelerate efforts on industrial development to promote the development of regional value chains;
- (e) progressively liberalise trade in services across the African continent on the basis of equity, balance and mutual benefit, by eliminating barriers to trade in services;
- (f) ensure consistency and complementarity between liberalization of trade in services and the various annexes in specific services sectors;
- (g) pursue services trade liberalization in line with Article V of the GATS by expanding the depth and scope of liberalization and increasing, improving and developing the export of services, while fully preserving the right to regulate and to introduce new regulations;
- (h) promote and enhance common understanding and cooperation in trade in services amongst State Parties in order to improve the capacity, efficiency and competitiveness of their services markets; and
- (i) promote research and technological advancement in the field of services to accelerate economic and social development.

Each State party has the discretion to regulate services and service suppliers within its territory in order to attain national policy objectives so long as such regulations do not undermine the rights and obligations enshrined in the Protocol.<sup>60</sup> State Parties are entitled to take measures to ensure domestic regulation of trade in services in a 'reasonable, objective, transparent and impartial manner.'<sup>61</sup> State Parties are given the latitude to adopt restrictions on trade in services in the event of serious balance of payments and external financial difficulties.<sup>62</sup> State Parties are expressly granted the discretion to use subsidies in relation to other development programmes or activities.<sup>63</sup> Each State Party is obligated to accord to services and service suppliers of any other State Party treatment no less favourable than what it accords its own similar domestic services or service

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<sup>52</sup> *ibid* Art 23 (1)

<sup>53</sup> *ibid* Art 24

<sup>54</sup> *ibid* Art 28 (1)

<sup>55</sup> (entered into force 30 May 2019 in accordance with the provisions of Article 23 of AfCFTA)

<sup>56</sup> Protocol on Trade in Service Art 1 (p)

<sup>57</sup> *ibid* Art 2(3)(b)

<sup>58</sup> *ibid* Art 2(3)(c)

<sup>59</sup> *ibid* Art 3(2)

<sup>60</sup> *ibid* Art 8

<sup>61</sup> *ibid* Art 9

<sup>62</sup> *ibid* Art 14

<sup>63</sup> *ibid* Art 17 (2)

suppliers, otherwise referred to as National Treatment.<sup>64</sup> State Parties are required, as much as possible, to mobilise resources by way of provision of technical assistance and cooperation in order to engender liberalization of services and strengthen their capacity in the supply of services.<sup>65</sup> These obligations are ultimately geared towards fostering national and regional socioeconomic advancement in the African continent.

#### **Protocol on Rules and Procedures on Settlement of Disputes**

The Protocol on Rules and Procedures on Settlement of Disputes<sup>66</sup> provides for the administration of dispute settlement arising out of regional economic relations amongst State Parties in a transparent, accountable and fair manner.<sup>67</sup> The Protocol provides for the establishment of a Dispute Settlement Body (DSB)<sup>68</sup> which is composed of representatives of State Parties to the Protocol on Rules and Procedures on Settlement of Disputes. The DSB is authorized to:<sup>69</sup>

- (a) Establish Dispute Settlement Panels and an Appellate body;
- (b) Adopt Panel and Appellate Body reports;
- (c) Maintain surveillance of implementation of rules and recommendations of the Panels and Appellate Body; and
- (d) Authorize the suspension of concessions and other obligations

State Parties to a dispute are given the latitude at any time to voluntarily undertake good offices, conciliation or mediation in order to resolve such disputes.<sup>70</sup> They are duty bound to fully implement the recommendations and rulings of the DSB in any given case. The Protocol on Rules and Procedures on Settlement of Disputes stipulates that compensation and the suspension of concessions or other obligations are temporary or interim measures available to an aggrieved party in the event of a dispute particularly where the accepted recommendations and rulings of the DSB are not complied with within a reasonable period of time.<sup>71</sup> Furthermore, parties to a dispute may resort to arbitration subject to their mutual agreement.<sup>72</sup> By and large, the Protocol on Rules and Procedures on Settlement of Disputes provides a regional framework for the resolution of conflicts that may arise in the course of international economic relations amongst State Parties to the AfCFTA and other relevant Protocols in the African Continent.

#### **4. Quandaries Militating Against the Implementation of the Agreement Establishing the African Continental Free Trade Area in Nigeria**

Recently, it was reported that three months after the signing of AfCFTA, Nigeria imposed a ban on all goods from neighbouring states such as Benin, Cameroon, and Niger. The ban includes international trade which involves import and export with the above mentioned countries. The primary aim of the ban is reportedly to curtail smuggling of food items such as poultry, rice and tomatoes in order to improve the country's agricultural economics.<sup>73</sup> The effect of the border closure is pointedly depicted as follows:<sup>74</sup>

The border closure has impacted Nigerian consumers and exporters with traders being refused entry of goods, even those for which they have already paid custom duties, and consumers facing inflated prices of imported food products-with some products having doubled in price. The biggest impact is felt by informal traders-most of them small and medium enterprises that operate along the Nigeria-Benin border. Nigeria's high level of protection on products like rice has made smuggling from neighbouring countries especially lucrative. The World Bank has estimated 80% of imports into Benin as destined for Nigeria.

It is noteworthy that AfCFTA has provisions which could be invoked to restrict border smuggling such as the requirement of State Parties to ensure international customs cooperation and trade facilitation.<sup>75</sup> It is contended

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<sup>64</sup> *ibid* Art 20 (1)

<sup>65</sup> *Ibid* Art 27

<sup>66</sup> (adopted 21 March 2018, entry into force 30 May 2019)

<sup>67</sup> Protocol on Rules and Procedures on Settlement of Disputes, Art 2 and 3

<sup>68</sup> *ibid* Art 5 (1)

<sup>69</sup> *ibid* Art 5 (3)

<sup>70</sup> *ibid* Art 8

<sup>71</sup> *ibid* Art 25

<sup>72</sup> *ibid* Art 27

<sup>73</sup> L. Signè, and C. Van der ven, <<https://qz.com/africa/1741064/nigerias-benin-border-closure-is-a-warning-for-afcfta-trade-deal>> accessed on 12 November 2019 ; Punch, Nigeria-Benin Border Closed to Curb Smuggling-Buhari <<https://www.google.com/amp/s/punch.com/nigeria-benin-border-closed-to-curb-smuggling-buhari/amp/>> accessed on 12 November 2019

<sup>74</sup> Signè and Van der ven (n73)

<sup>75</sup> *ibid*; see also Protocol on Trade in Goods, Arts 14 and 15

that the application of AfCFTA rules to curtail smuggling is a more proactive measure than the unilateral closure of border and its attendant socio-economic implications especially amongst the affected countries. Signè and Van der ven<sup>76</sup> have pointedly asserted that the closure of the Nigerian border is at cross purposes with the spirit and letters of the AfCFTA and capable of scuttling the implementation of the treaty. On the flip side, allowing unfettered access to Nigeria without recourse to customs and immigration services would occasion huge loss of revenues that would otherwise have been generated through custom duties, tariffs and other fiscal benefits accruable to Nigeria. Furthermore, AfCFTA's objective which is essentially premised on importation of goods and services to State Parties including Nigeria at reduced prices would inexorably affect small scale businesses including manufacturers and producers in situations where the prices of goods and services imported from foreign countries are considerably cheaper than locally produced ones. Another quandary militating against the effective implementation of AfCFTA is the challenge of inadequate infrastructure such as railways, airports, and road networks across the African continent. Although the Protocol on Rules and Procedures on Settlement of Disputes, 2018, makes elaborate provisions for the resolution of disputes arising out of regional economic relations amongst State Parties, its efficacy is fundamentally attenuated by the quandary of enforcement particularly in highly contentious cases.

The implementation of AfCFTA in Nigeria is also palpably undermined by the fact that the country has merely signed the treaty, it is yet to ratify same and therefore not bound by its provisions. *Pacta sunt servanda*, the principle that treaties are binding and must be performed in good faith is a cardinal aspect of the law of treaties.<sup>77</sup> Article 26 of the Vienna Convention on the Law of Treaties 1969<sup>78</sup> provides that 'every treaty in force is binding upon the parties to it and must be performed in good faith'.<sup>79</sup> However, it is a well-known principle of international law that a State cannot be bound by any agreement to which it has not given its consent either by ratification or accession or any other means of expressing intention to be bound.<sup>80</sup> Although Nigeria has signed the AfCFTA, 2018, it has neither ratified nor domesticated the treaty and its protocols. To all intents and purposes these instruments cannot be enforced in Nigerian municipal law. Section 12 of the CFRN, 1999, as amended, provides that 'no treaty between the federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly'.<sup>81</sup>

State Parties to treaties are often instructed to institute measures that will engender the application of such treaties within their domestic legal framework.<sup>82</sup> By and large, State Parties to treaties are bound to observe the provisions of treaties already ratified or signed by them.<sup>83</sup> However, international instruments can only attain the force of law within Nigerian legal system to the extent to which any such instrument has been enacted by the National Assembly.<sup>84</sup> This is congruent with the dualist approach to the relationship between international law and municipal law.<sup>85</sup> Thus in the case of *Abacha v Fawehinmi*<sup>86</sup> the Supreme Court of Nigeria held that by virtue of Section 12(1) of the 1979 Constitution (which is coterminous with the provisions of Section 12 of the CFRN, 1999, as amended), an international treaty entered into by the government of Nigeria does not become binding until it is enacted into law by the National Assembly. The apex court further explained that before its enactment as such, an international treaty has no such force of law as to make its provisions actionable in Nigerian law courts.

### **5. Deconstructing the Prospects and Prescriptive Implication of the Agreement Establishing the African Continental Free Trade Area and its Protocols in the Nigerian Context**

A panoramic view of the AfCFTA and its Protocols unequivocally depicts that it provides a robust regional framework for a New Regional Economic Order aimed at galvanizing trade and socio-economic advancement in the African Continent. According to Signè and Van der ven, 'the AfCFTA is predicted to boost the combined consumer and business spending and increase intra-African trade by at least 53.2 %'.<sup>87</sup>In the light of the

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<sup>76</sup> Signè and Van der ven (n73)

<sup>77</sup> D. Harris (2010) Cases and Materials on International Law (7 Ed London: Thomson Reuters Legal Limited, 2010) p. 670

<sup>78</sup>[1980] UKTS 58 (Mnd7964; 115 UNTS 231; (1969) 811LM (679) 63 AJK 873 entered into force in 1980; Official Records U.N.DOCS.A/Conf.39/11.

<sup>79</sup> Vienna Convention on the Law of Treaties 1969, Article 26

<sup>80</sup> M O Gasiokwu, International Law and Diplomacy :Selected Essays ( Enugu: Chenglo Nigeria Ltd, 2004) p.332.

<sup>81</sup> Constitution of Federal Republic of Nigeria,1999, as amended, s12

<sup>82</sup> Gasiokwu (n80)P. 332

<sup>83</sup> Vienna Convention on the Law of Treaties 1969, Articles 26 and 27

<sup>84</sup> CFRN,1999, as amended, s 12.

<sup>85</sup> See Gasiokwu (n80)P. 337.

<sup>86</sup>(2000) 4 SCNJ 400 at 446; see also *Abacha v Fawehinmi* (2000) 13 NWLR (pt. 660) 228; see also Hon, S. T.(2004) Constitutional Law and Jurisprudence in Nigeria Pearl Publishers, Port Harcourt, Nigeria PP.57-59.

<sup>87</sup> Signè and Van der ven (n73)

foregoing, it is expedient for Nigeria to embark on pragmatic and proactive measures in order to take advantage of the stupendous socio-economic prospects accruable from the implementation of AfCFTA and its Protocols. Some strategies are enunciated as follows. First and foremost, having duly signed the AfCFTA, 2018, it is incumbent on Nigeria to ratify and domesticate the treaty and its Protocols so as to make the instruments enforceable in Nigerian domestic milieu. Although the Signing of the AfCFTA is commendable, the country needs to take a definitive surefooted step to be legally bound by the provisions of AfCFTA through the ratification and domestication of the treaty as required by section 12 of the CFRN, 1999, as amended. Secondly, it is imperative to safeguard Nigeria's borders. At the national level, this may be achieved through improving the capacity and funding of Nigerian Immigration and Customs service. This will go a long way in enabling the officials of these institutions to protect illegal entry into the country through its borders and prevent smuggling of goods into the country. At the regional level, the Nigerian government should collaborate with the custom service of other countries in order to bolster the protection of its borders from the unwholesome activities of smugglers and pirates. This measure is in consonance with the extant provisions of Article 14 of the Protocol on Trade in Goods, 2018. Thirdly, Nigeria is enjoined to take advantage of and invoke specific rules enshrined in AfCFTA to achieve national policy objectives and protect its economy and domestic investors in the course of international trade. For instance, under Article 8 of AfCFTA, Nigeria has the latitude to regulate or introduce new regulations on services and service suppliers within its territory to meet national policy objectives. In the event of serious balance of payments and external financial difficulties, Nigeria reserves the right to maintain restrictions on trade in services as stipulated under Article 14 of AfCFTA. State Parties are allowed to undertake regulatory measures, on a non-discriminatory basis and for a specified period of time to protect infant industries under Article 24 of AfCFTA. Furthermore, Nigeria is not precluded from introducing subsidies as a strategic protective measure and to galvanise its national development programmes in sync with the unequivocal provisions of Article 17 of AfCFTA. Fourthly, there is need for African States to shore up their national and regional means of transportation of goods and services. Efforts should be made to integrate road networks and rail lines across Africa. There is also need to scale up infrastructure and services provided by Airlines and the Shipping industry. The African Development Bank and other regional financial institutions may be consulted to provide funds for such projects. Private investors are implored to invest in the provision of transportation. Efforts should also be made through bilateral and multilateral agreements to enable landlocked states have unfettered access to maritime resources especial for purposes of international trade and transactions. Fifthly, Nigeria and other States parties of AfCFTA and the Protocol on Rules and Procedures on Settlement of Disputes are implored to ensure domestic enforcement of decisions made by the Dispute Settlement Body (DSB) and other depute resolution mechanisms employed by the disputing countries. In this regard, Nigeria should set up a national institution vested with the responsibility of ensuring compliance with the spirit and letters of the AfCFTA and its Protocols in trade and international economic relations.

The AfCFTA is a quintessential framework for the establishment of a unique regional economic order in the African Continent. It expressly provides a new vista of socio-economic opportunities and unprecedented prospects for Nigeria. It provides a vast and seismic international market to trade Nigerian goods and services and can boost the country's foreign exchange earnings and ultimately galvanise the realization of Nigeria's quest for socio-economic advancement.

## **6. Conclusion**

The Nigerian government took a bold and significant step by signing the AfCFTA in 2019. However, this potent commitment is egregiously benighted by challenges and fundamental glitches especially regarding the implementation of AfCFTA and its Protocols in Nigerian domestic milieu. It has been pointedly indicated that Nigeria is yet to ratify the AfCFTA. To all intents and purposes, the treaty is not legally binding on Nigeria. This quandary is exacerbated by the non-domestication of the treaty which practically renders AfCFTA unenforceable in Nigeria as required by section 12 of the CFRN, 1999, as amended. Other quandaries highlighted include: the unilateral closure of the country's borders with Benin Republic, Cameroon, and Chad, under the putative notion of preventing smuggling into Nigeria without recourse to the extant provisions of AfCFTA and its Protocols. Furthermore, they are inadequate infrastructure such as railway, road networks, maritime and air transportation required to carry out international trade of the magnitude envisaged by the treaty and the challenge of enforcing decisions made by the Dispute Settlement Body (DSB) and other conflict resolution mechanisms. Nonetheless, this article has espoused some measures aimed at ameliorating or eliminating the aforementioned problems. For instance, the country needs to take a definitive surefooted step to be legally bound by the provisions of AfCFTA through the ratification and domestication of the treaties as required by section 12 of the CFRN, 1999, as amended. Furthermore, it is imperative to safeguard Nigeria's borders. At the national level, this may be achieved through improving the capacity and funding of Nigerian Immigration and Customs service. At the regional level, the Nigerian government should collaborate with the custom service of other countries in order to bolster the protection of its borders from the unwholesome

activities of smugglers and pirates. Nigeria is enjoined to take advantage of and invoke specific rules enshrined in AfCFTA to achieve national policy objectives and protect its economy and domestic investors in the course of international trade. Nigeria and other States parties of AfCFTA and the Protocol on Rules and Procedures on Settlement of Disputes are implored to ensure domestic enforcement of decisions made by the Dispute Settlement Body (DSB) and other depute resolution mechanisms employed by the disputing countries. No doubt, the AfCFTA and its Protocols offers a new vista of socio-economic opportunities and unprecedented prospects for Nigeria. It provides a vast and seismic international market to trade Nigerian goods and services with the potential of boosting the country's foreign exchange earnings. The full implementation of this momentous treaty will ultimately galvanise the realization of Nigeria's quest for socio-economic development.