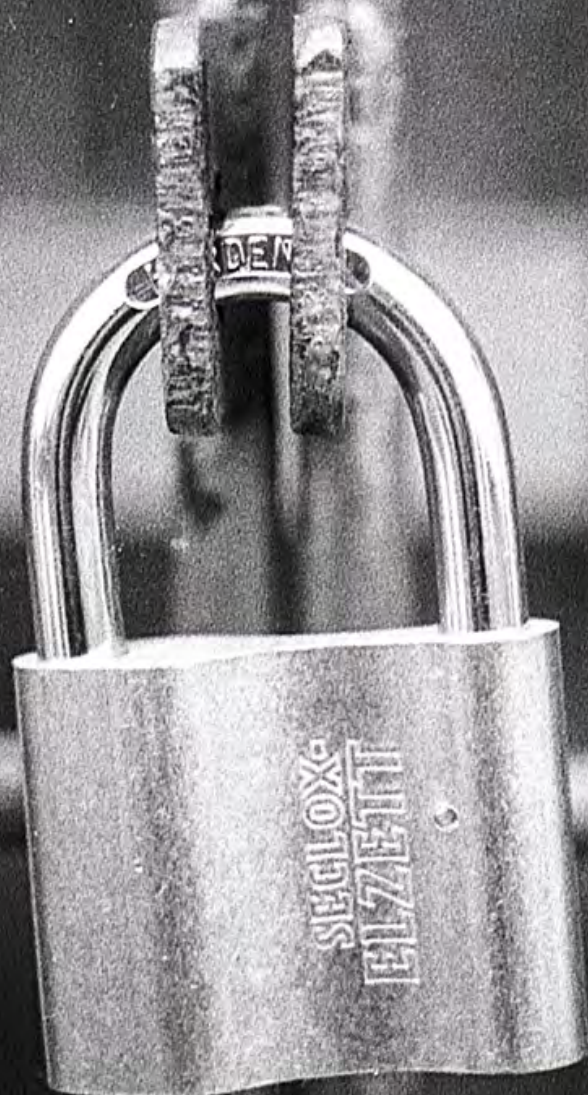


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**THE LEGALITY OF THE NIGERIAN
LAND BORDERS CLOSURE IN LIGHT OF
THE ECOWAS REVISED TREATY, THE WTO'S GATT
AND
THE AFCFTA AGREEMENT**

ARTICLE SERIES

The Nigerian government's decision to close its land borders[1] on 20 August 2019 has raised many questions regarding the legality of the government's action particularly in light of the recently signed Agreement to establish the African Continental Free Trade Area (AfCFTA). President Muhammadu Buhari, in a press statement released in August 2019, stated that the closure was necessary to allow Nigeria's security forces develop a strategy on how to curtail the incessant smuggling (of prohibited food items, arms and ammunition, other contraband goods), and its wider ramifications. He noted that in particular, the activities of the rice smugglers has threatened the self-sufficiency already attained under his administration's agricultural policies.



The legality of the closure has been widely debated. However, an analysis of the basis for the closure of the land borders in light of the Revised Treaty of the Economic Community of West African States, the World Trade Organisation's General Agreement on Tariffs and Trade, and the AfCFTA Agreement will clear some doubts as to the legality of the closure.

ECONOMIC COMMUNITY OF WEST AFRICAN STATES (ECOWAS)

The Revised Treaty of the ECOWAS, which came into effect on 24 July, 1993[2], governs trade relations among the ECOWAS Member States[3]. The Revised Treaty targets the promotion of trade[4] by providing for co-operation in trade, customs, taxation, statistics, money and payments. In essence, it requires Member States to liberalise trade, as part of the trade liberalisation scheme, by removing tariff and non-tariff barriers in order to establish a free trade area i.e. the Community. Article 3, Paragraph 2(d) of the Revised Treaty, which is geared towards the establishment of a common market, states that:

In order to achieve the aims set out in the paragraph above, and in accordance with the relevant provisions of this Treaty, the Community shall, by stages, ensure; d) the establishment of a common market through;

i) the liberalisation of trade by the abolition, among Member States, of customs duties levied on imports and exports, and the abolition, among Member States, of non-tariff barriers in order to establish a free trade area at the Community level;

ii) the adoption of a common external tariff and a common trade policy vis-a-vis third countries;

iii) the removal, between Member States, of obstacles to the free movement of persons, goods, services and capital, and to the right of residence and establishment;

[1] With the Republic of Benin in the west, Chad and Cameroon in the east, and Niger republic in the north.

[2] <https://www.ecowas.int/ecowas-law/treaties/> [3] The 15 Member States include Benin, Burkina Faso, Cabo Verde, Cote d'Ivoire, The Gambia, Ghana, Guineas, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo. [4] Articles 33 to 53 of the ECOWAS Revised Treaty

Notwithstanding, Article 41 of the Revised Treaty makes allowances for quantitative restrictions on community goods by Member States as its paragraph 3 provides thus:

A Member State may, after having given notice to the Executive Secretary and the other Member States of its intention to do so, introduce or continue to execute restrictions or prohibitions affecting:

- (a) the application of security laws and regulations;*
- (b) the control of arms, ammunition and other war equipment and military items;*
- (c) the protection of human, animal or plant health or life, or the protection of public morality;*
- (d) the transfer of gold, silver and precious and semi-precious stones;*
- (e) the protection of national artistic and cultural property;*

Consequently, a Member State can validly introduce restrictions or prohibitions to trade with other Member States provided it is done for reasons or to achieve the results stated in sub-paragraphs (a) to (e). Nevertheless, a Member State cannot rely on the exceptions where its sole intent is to frustrate free movement of goods.[5]

THE WORLD TRADE ORGANISATION (WTO)

The World Trade Organisation (WTO) The WTO regulates international trade among nations. Its primary purpose is to open trade for the benefit of all its members[6] and the General Agreement on Trade and Tariffs (GATT) is its umbrella treaty for trade in goods. Article XXI of the GATT (reproduced below) permits its members to impose trade restrictions for protection of its essential security interests.

ARTICLE XXI SECURITY EXCEPTIONS

Nothing in this Agreement shall be construed:

(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived;



[5] Article 41, paragraph 5 of the Revised ECOWAS Treaty

[6] Nigeria, Benin, Chad, Cameroon, and Niger are members of the World Trade Organisation (WTO), see https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm#collapseN

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

[italics for emphasis]

As such, to the extent that the closure was for security purposes, the Nigerian government's action was permitted under the GATT of the WTO.

THE AFRICAN CONTINENTAL FREE TRADE AREA (AfCFTA)

The AfCFTA is intended to eliminate trade barriers among members of the African Union. The Agreement to create the AfCFTA is designed to progressively eliminate tariff and non-tariff barriers to trade, and establish co-operation on investment, intellectual property rights and competition regulations among the member countries. Currently, 54 countries have signed the Agreement while only 27 countries have ratified it.[7]

According to the African Union, the main objectives of the Agreement is to create a single continental market for goods and services and expand intra-African trade across the Regional Economic Communities (RECs)[8] and Africa in general.[9]

It is however clear that the Agreement's provisions are geared towards the promotion of intra-African trade, elimination of border barriers and the creation of the world's largest free trade area, but not at the expense of the interests of the State Parties. Article 26 of the Protocol on Rules and Procedures on the Settlement of Disputes (annexed to the Agreement) permits its State Parties to take certain restrictive measures to ensure compliance with their own local laws. Article 27 of the same Protocol allows restriction for security reasons:



"nothing in the Protocol shall be construed to prevent any State Party from taking any action which it considers necessary for the protection of its essential security interests." [10]

[7] These 27 countries have deposited their instrument of ratification as required under the Agreement. Nigeria, Benin and Cameroon have signed the AfCFTA but are yet to deposit their instrument of ratification. [8] There are 8 RECs in Africa, i.e. the Arab Maghreb Union (AMU/UMA); ECOWAS; the East African Community (EAC); Intergovernmental Authority on Development (IGAD); the Southern African Development Community (SADC); the Common Market for Eastern and Southern Africa (COMESA); the Economic Community of Central African States (ECCAS), and the Community of Sahel-Saharan States (CENSAD). [9] CFTA - Continental Free Trade Area available online at <https://au.int/en/ti/cfta/about> [10] Article 27,

Additionally, State Parties can apply preferential safeguards for the protection of their domestic markets. Article 19 of the Protocol on Trade in Goods (annexed to the Agreement) states that:



State Parties may apply safeguard measures to situations where there is a sudden surge of a product imported into a State Party, under conditions which cause or threaten to cause serious injury to domestic producers of like or directly competing products within the territory.[11]

A State Party which intends to take a restrictive action (such as closing its borders) is required to give a pre-closure notification to the AfCFTA Secretariat. In this regard, Article 17 paragraph 2 under part IV of the AfCFTA provides as follows:



Each State Party shall notify, through the Secretariat, in accordance with this Agreement, the other State Parties of any actual or proposed measure that the State Party considers might materially affect the operation of this Agreement or otherwise substantially affect the other State Party's interests under this Agreement.[15]

However, this requirement is not currently applicable to Nigeria as it is yet to submit its instrument of ratification of the AfCFTA Agreement.

OUR THOUGHTS

The land borders closure does not violate the foregoing provisions of the ECOWAS Revised Treaty, the WTO's GATT and the AfCFTA Agreement to the extent that the closure was made for security reasons and for the protection of the domestic markets, amongst other reasons. Nigeria's land borders are reported to have been used as thoroughfare for smugglers and the government has repeatedly noted that there is a need to checkmate illegal activities and importation of contraband goods. As such, the land borders had to be closed to develop a strategy on how to curtail same.

[1]Article 17, Part IV of the agreement establishing the AfCFTA.

These reasons are envisaged and provided for in these trade agreements.

States retain their sovereignty and are permitted to apply protective measures as it relates to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials taking place either directly or indirectly for the purpose of supplying a military establishment.

However, requisite notice must have been given to the relevant body and the affected states before the closure can be effected in accordance with the extant trade agreements.

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