Domestic Effects of International Law in Nigeria: The Case of Trade Agreements

By:

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1. Introduction

Nigeria is a bona fide state-actor within the international legal order. Yet, it is not only reluctant to negotiate and sign treaties, but also unwilling to ratify and implement the treaties it signed. This has, unfortunately, earned it a reputation for unreliability in the international legal system. But why does international law have little domestic effects in Nigeria? Why is Nigeria behaving in a non-cooperative or non-compliant manner?

In this piece, I argue that Nigeria's non-compliant behaviour is prevalent and entrenched in the field of international trade law, and that this behaviour is largely influenced by Nigeria's perception of its national economic interests, which are underpinned by the protectionist policy of import-substitution. But Nigeria's poor adherence to international trade rules should also be seen in the

context of its general lack of commitment to the rule of law.

The piece starts with an overview of the nature of treaty-making and treaty obligations. The next section discusses Nigeria's behaviour with respect to international trade law, drawing examples from a number of trade agreements. The article then attempts to explain Nigeria's behaviour. Finally, I conclude with thoughts on how Nigeria can reverse its poor international rule of law image.

1.1. Nature of Treaty-making and Treaty Obligation

Treaties are the main instruments for rules-based cooperation between or among countries. Their legal force is derived from the principles *pacta sunt servanda* and good faith fulfilment. These principles are set out in article 26 of the Vienna Convention on the Law of Treaties ("The Vienna Convention"). The first principle puts emphasis on observance of a treaty by the parties to it; the second requires a treaty to be implemented faithfully. Article 27 specifically prohibits states from invoking their national law or domestic circumstances as justification for failure to perform obligations imposed by a treaty.

That said, the principle of *rebus sic stantibus* provides for circumstances under which a party can depart from fulfilling a treaty obligation. Article 62 of the Vienna Convention tilted "Fundamental change in circumstances" states that a state can discharge or suspend its obligations under a treaty if circumstances unforeseen at the time the treaty was concluded subsequently happened. Trade agreements usually include escape and safeguard clauses aimed at such a "fundamental change in circumstances; for example, where goods are being dumped in the market of another state or an unexpected surge of imports causes or threatens to cause serious injuries to domestic industries. However, invoking these provisions requires adherence to due process.

In light of the foregoing, the next section considers Nigeria's behaviour with respect to its international trade law commitments, drawing evidence from a number of trade agreements, namely: the World Trade Organisation (WTO), the ECOWAS trade regime and the African Continental Free Trade Area (AfCFTA).

2. Nigeria's Approach to International Economic Law Treaty Obligations

The starting point in understanding Nigeria's approach to its international treaty obligations is to understand the status of treaties in its Constitution and, thus, in its domestic law. This is important because, broadly speaking, there is one of two approaches that states adopt with respect to treaties. These are monism and dualism.

A monist state regards international law and domestic law as one and the same, a single unity of legal rules. Thus, for a monist state, treaties, once signed, automatically become part of the domestic law without a legislative act to enact it into domestic law. By contrast, a dualist state treats international law and domestic law as two distinct legal systems, and, as such, treaties must be explicitly incorporated into domestic law through a legislative act before they can have legal effect domestically.

2.1. Monist or Dualist: The Status of Treaties in Nigerian Domestic Law

Section 12(1) of the Nigeria's 1999 Constitution (as amended), states thus: "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". This constitutional provision clearly shows that Nigeria is a dualist state as treaties have no legal effects in its domestic unless they are enacted into law by the National Assembly. Although section 19 (d) of the Constitution states that Nigeria's foreign policy objectives "shall be – (d) respect for international law and treaty obligations", that provision does not override the provision of section 12(1) regarding the legal force of unenacted treaties in Nigerian domestic law.

In the popular case of *Abacha v. Fawehinmi* ([2000] 6 NWLR 228, [2001]), relating to the unincorporated African Charter of Human and People's Rights, the Supreme Court held that, although an unincorporated treaty might give rise to a legitimate expectation by citizens that the government would observe the terms of the treaty, the African Charter, being unincorporated as required under section 12(1) of the Constitution, had no force of law in Nigeria.

Thus, even the principle of legitimate expectation or that of consistent interpretation cannot save an unincorporated treaty in Nigeria's domestic law. This makes the domestication of international agreements crucial in Nigeria, but, as shown below, this rarely happens.

2.2. The Non-ratification and Non-implementation of Treaties in Nigeria

The basic argument of this piece is that Nigeria rarely ratifies, let alone implements, the treaties it signed. This proposition is widely supported by evidence. For instance, in 2020, the Chairman of the House Committee on Treaties, Protocols and Agreements, Ossai Ossai, disclosed that over 400 treaties, protocols and agreements signed by successive governments in Nigeria were yet to be ratified or domesticated. Several years ago, during a visit to the then Federal Ministry of Commerce, a director in the ministry showed me a large cupboard and said: “Nigeria has signed many bilateral trade agreements, most of them are simply not being implemented”. This non-ratification or non-implementation of trade agreements is a major source of frustration for Nigeria’s trading partners as shown in the specific examples below.

2.3. Nigeria’s Non-compliance with WTO Law

Nigeria participated, albeit not actively, in the Uruguay Round negotiations that created the WTO in 1994 as the successor organisation to the General Agreement on Tariffs and Trade (GATT) created in 1947. As a signatory to the WTO treaty, Nigeria has an obligation to comply faithfully with its rules. The overarching compliance obligation under WTO law is set out in article XVI:4 of the Marrakesh Agreement Establishing the World Trade Organisation, which states thus: “Each Member shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements”.

The above provision imposes a positive obligation on each WTO member to introduce relevant laws and regulations to implement the WTO Agreement at the national level. However, Nigeria has not introduced any WTO-compatible law to date.

After Nigeria’s fourth trade policy review (TPR) in 2017, the WTO said: “According to the authorities, the main challenge Nigeria faces in implementing WTO agreements is the difficulty in their domestication” More than 25 years after the WTO Agreement entered into force, the treaty has not been incorporated into Nigeria’s national law, and, thus, given the provision of

section 12(1) of the Constitution, has no force of law in Nigeria.

However, under article 27 of the Vienna Convention, Nigeria cannot invoke its national law as justification for failure to perform its treaty obligations. Specifically, with respect to the WTO, article XXIII of the GATT prohibits any WTO member from taking any measure that may “nullify or impair any benefit accruing directly or indirectly” to another member. In other words, whether or not Nigeria incorporates the WTO treaty into its domestic law, it should not introduce any measure that could nullify or impair any benefit accruing to another WTO member. But Nigeria is widely known for its entrenched protectionism.

The WTO has reviewed Nigeria’s trade policy four times to date, namely in 1998, 2005, 2011 and 2017. In each of these reviews, the WTO found evidence of increasingly entrenched protectionism. For instance, in the 2005 review, the WTO said: “Since its last TPR in 1998, Nigeria's trade regime has become generally more protectionist”, adding that “there has been a 10-fold increase in products covered by import bans” (paragraph 2.7 of the report) The 2011 review highlighted the fact that Nigeria maintained a number of import prohibitions and restrictions.

Ahead of its 2017 TPR, Nigeria received 270 advanced written questions from other WTO members complaining, and seeking clarifications, about its protectionist measures. The review itself highlighted the existence of “longstanding import prohibition lists”, in addition to the 43 categories of imports for which access to foreign exchange from Central Bank of Nigeria (CBN) is banned since 2016, a measure I criticised.

Legally, if dumped or subsidised imports were causing or threatening to cause injuries to Nigeria’s domestic industries, it could impose anti-dumping or subsidies countervailing measures after proper investigation and due process. Similarly, if Nigeria was experiencing an injurious surge of imports, it could introduce WTO-compatible safeguard measures. But Nigeria does not follow any of these legal routes; rather, it arbitrarily imposes protectionist measures, such as import bans. As the following section shows, this practice is not limited to WTO rules but also extends to the ECOWAS trade regime.

2.4. Nigeria’s Poor Commitment to ECOWAS Trade Rules

Nigeria was instrumental in the creation of the Economic Community of West African States (ECOWAS) and has contributed significantly to peace and security in the West African sub-region. But when it comes to the ECOWAS trade liberalisation agenda, Nigeria has shown little commitment. As Dr Ngozi Okonjo-Iweala, Nigeria's former finance minister and now Director-General of the WTO, noted in her book "Reforming the Unreformable: Lessons from Nigeria", Nigeria reluctantly signed up the ECOWAS Common External Tariffs (CET), but was equally reluctant to implement it. Okonjo-Iweala noted (see page 131 of the book): "Though Nigeria had signed the agreement, it was the last country to do so and had never implemented it".

This view is widely shared by many other commentators. For instance, as Merran Hulse notes, "Nigeria has displayed an absence of leadership in relation to the ECOWAS Trade Liberalisation Scheme and Common External Tariffs and has in the past behaved in an obstructionist fashion, delaying ECOWAS negotiations towards a free trade area and customs union". Similarly, Nigeria is the only ECOWAS member state that has not signed the Economic Partnership Agreement (EPA) with the European Union (EU), as a result of which the agreement could not enter into force.

Nigeria's arbitrary closure of its land borders in November 2019 was not only a breach of its WTO commitments but also of its obligations under the ECOWAS trade regime as I argued at the time. If the closure was motivated by the need to stop smuggling, then Nigeria could not ignore its failure to police its borders effectively or the corruption of its customs officers and disrupt the flow of legitimate trade. If it was due to dumped or subsidised imports or a surge of imports, that were harming domestic industries, then Nigeria should have invoked the escape and safeguard clauses in the various trade agreements. These legal routes were clearly not taken, which raises concerns about Nigeria's willingness to implement the AfCFTA Agreement that it reluctantly signed and ratified, as discussed below.

2.5. Nigeria and AfCFTA: Implementation Concerns

Nigeria was pivotal to the creation of the African Continental Free Trade Area (AfCFTA). First, AfCFTA owes its origins to the 1991 Abuja Treaty establishing the African Economic Community. Second, a Nigerian, the late Dr Chiedu

Osakwe, was the chairperson of AfCFTA's Negotiating Forum, who steered the technical aspects of the first phase of the negotiations to a successful conclusion. Third, it was the then Nigerian trade minister, Dr Okechukwu Enelamah, who, as chairperson of the African Union Ministers of Trade, led the AfCFTA negotiations at the ministerial level, and oversaw the signing of the agreement in Kigali, Rwanda, on March 21, 2018, when it was signed by 44 African heads of state.

However, despite Nigeria's technical and diplomatic inputs into the creation of AfCFTA, the Nigerian government refused to sign the agreement in Kigali and did not do so for well over a year later. Nigeria claimed it was consulting domestic stakeholders but should have done that before and during the negotiations, as often happens in trade negotiations where stakeholders are actively engaged before and during the negotiations before a deal is struck.

After a lot of domestic and international pressures, the Nigerian government eventually signed the AfCFTA agreement on July 7, 2019. Yet, Nigeria took an inordinate time to ratify the treaty. Nigeria was the 34th country to submit its instrument of ratification on December 5, 2020, a few weeks before the treaty entered into force on January 1, 2021.

Yet, the real challenge is actual implementation. Nigeria's readiness to implement the AfCFTA agreement is doubtful. First, as President Muhammadu Buhari's senior special assistance on media and publicity, Garba Shehu, said: "The implementation of the AfCFTA is going to be a long journey". Second, Nigeria is concerned about the impact of AfCFTA. As the Nigerian finance minister, Zainab Ahmed, said, "the AfCFTA could create a nightmare situation for Nigeria". Thirdly, regardless of AfCFTA, Nigeria will not stop its protectionist policies. The central bank governor, Godwin Emefiele, made this clear when he said: "AfCFTA won't stop us from adding more items to the forex restriction list" .

The above case studies show that Nigeria lacks commitment to its obligations in international economic agreements, and, rightly so, earns the reputation for blatant violation of international rule of law and for acting with impunity in breach of its international legal commitments. The question is why? The next section briefly explains Nigeria's behaviour.

3. Explaining Nigeria's Non-compliant Behaviour

At the heart of Nigeria's poor commitment to its commitments in international trade agreements is the structure of its economy and external trade. As Helen Milner argues, there is a positive relationship between international cooperation and openness. Trade dependence and openness would positively influence better adherence to international trade rules. In its 2019 Nigeria Economic Update, the World Bank described Nigeria as "one of the most closed economies in Africa with a concentrated export-base". Both elements are interrelated. As Nigeria has little to export beyond crude oil, it always seeks to restrict imports to protect its import-competing industries and to conserve foreign exchange. But this goes against its international legal obligations.

Which leads to the second factor: Nigeria's general lack of commitment to the rule of law. Nigeria is not known for respect for the rule of law, and there is no great awareness of international law considerations among government officials. In other words, when Nigerian ministers and government officials take policy decisions, they do not consider whether such decisions are consistent with Nigeria's international legal obligations, as rule-of-law countries tend to do. In the United Kingdom, for instance, ministers receive legal advice about the international law implications of proposed measures and act on the advice. There is no evidence of international law awareness or consideration in policymaking in Nigeria.

The third factor is lack of institutional capacity. There is no doubt that Nigeria's bureaucratic, legislative and institutional capacities are weak. This inevitably affects Nigeria's ability to implement some of its international commitments. For instance, Nigeria once told the WTO that it did not "have the institutional and regulatory capacity to investigate anti-dumping issues". Yet, that capacity would address Nigeria's concerns about dumping as Temitope Adeyemi brilliantly argues in her article titled "Nigeria: Panaceas: Dumping And Trade Remedies In Nigeria".

4. Conclusion and the Way Forward

Drawing on evidence from Nigeria's approach to the implementation of, and compliance with, certain trade agreements, this piece confirms the widely held view that Nigeria has little regard for its commitments in international

economic and trade agreements. Ironically, a Nigerian, Dr Ngozi Okonjo-Iweala, is now the Director-General of the WTO. But that significant achievement is not matched by Nigeria's reputation for blatant violation of its international trade law commitment. So, what must Nigeria do to reverse this image? I suggest three solutions.

First is ideational or policy orientation. Adherence with international trade rules, which have distributional consequences, is, in part, a function of the economic ideology or worldview prevailing among the policymakers in a country. For instance, if policymakers believe that trade liberalisation or open trade is in the best interests of the country, they will negotiate, sign, ratify and implement trade agreements because that is the best way to secure market access for a country's exports. So, Nigeria must first decide whether it wants its economy to be based on import substitution or to be export led. The former requires protectionism and thus poor adherence to international rules; the latter requires trade openness and, thus, strong adherence to international trade rules.

Second, assuming Nigeria's policy orientation is in favour of export orientation and, thus, trade openness, then it must embed international trade law awareness in its policymaking process. This requires having trade lawyers in its core economic ministries to advise on policy proposals with trade and trade-related elements. This principle of international law awareness and consideration should, in fact, apply to all areas of international law since the doctrine of consistent interpretation requires Nigeria to interpret its laws and policies reasonably in a way consistent with international law.

Finally, Nigeria must build its regulatory, legislative and institutional capacities. There is no reason, for instance, why Nigeria has not ratified over 400 treaties it signed over the years. Similarly, there is no reason why Nigeria should not have a robust trade remedies regime to deal with unfair trade practices, such as dumping. Simply banning or restricting imports or closing borders harms Nigeria's reputation, whereas legally invoking and applying trade remedy rules will not. Nigeria thus urgently needs a strong trade remedy institution.

To conclude, I am a strong advocate of rules-based free and fair trade. This requires trade openness and adherence to international trade rules, as well as

resort to such rules to address unfair trade practices. Nigeria does not pass any of these tests, and, thus, harms its international rule of law reputation.

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