A Reflection on African Trade and Investment Wars in Context

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African trade and investment wars and their implication for the development of international economic law (IEL) in Africa are under-appreciated[1]. Except for a handful of literature in the last two decades, most of the scholarly work on economic integration in Africa has not focused on intra-African trade and investment wars. Yet, some of these trade wars have endured for many years. By trade wars, we mean the fracture of economic (trade and investment) relations between cooperating African States. We do not understand trade wars in the strict sense that trade economist or classic trade law do. These approaches understand trade wars as triggered when States decide to relate on the basis power-based tariff bargain as opposed to a rules-based regime. One narrative is that trade wars may be triggered as a consequence of governments' unilateral behaviour that ignores the 'impacts of their actions on political and economic agents in the opposite country.'

In our view, trade wars may also be triggered because of the escalation of small or medium scale economic and social conflicts that manifests in retaliatory actions between and among governments. To the extent that our understanding of trade wars is not simply about the classic tariff related or triggered aspects, our focus is not also on the judicialization of the trade and investment wars. On the contrary, the non-judicialization of these African trade and investment wars illustrate some of the innovative mechanisms through which African States address the issues at the heart of their 'wars'.

As intra-African trade and investment intensifies, and efforts are made to capture data on informal trade, trade wars are likely to also increase. It is therefore pertinent that African international economic law scholarship assess the effects of the emerging trend of intra-African trade and investment wars on the continent's over-arching economic integration goals as crystallized in the African Continental Free Trade Area Agreement (AfCFTA). In our view, the implications of these intra-African trade wars in context are murky. They engender both promises and perils for the single market economy of the AfCFTA.

In this essay, we center some of the intra-African trade wars in context. *First*, these trade and investment wars reveal the ways in which investors maneuver and respond to the hostile regulatory actions of a hegemon state by moving their investments to a friendlier economy. Our first example between Uganda and Kenya falls into this category. In response to the actions of the Kenyan government, the investor - Pearl Dairy Farms - secured market access in Zambia. Zambia thus became a beneficiary of the trade war between Uganda and Kenya. *Second*, the trade and investment wars bode well for the future of trade liberalization in Africa under the AfCFTA because this probably points to rising trade volumes between African states. *Third*, as we show in the context of the examples we discuss, the citizens of States that have taken the more hardline posture on the regulatory measure at the heart of the trade and investment war appear to be worse off in their capacity to generate sustained economic development. *Fourth*, in some cases, African trade and investment wars are caused by socio-economic conflicts. The xenophobic attacks in South-Africa are illustrative of this example. The xenophobic attacks often escalate to trade wars and retaliatory economic backlashes. Fifth and finally, we loop in the AfCFTA and arguethat the trade wars remain a threat to the realization of the

promise of the AfCFTA.

Trade Wars between Uganda and Kenya: Sugar, Milk and Poultry Products

Kenya and Uganda have deep historical trade relations. Both countries are members of the East African Community (EAC) and trade in various products, including but not limited to sugar, and milk. Kenya is Uganda's biggest trade partner with exports from Kenya to Uganda in 2020 standing at $673.66, while Uganda's exports to Kenya stood at $465.55 million for the same period.

Trade and investment wars between Uganda and Kenya is not a new phenomenon. The most recent trade wars between Uganda and Kenya dates back to December, 2019 when Kenya stopped the importation of Ugandan – Lato Brand – milk; and sugar in 2020. Kenya's claim, among others is that Lato milk was substandard, and that Pearl Dairy Farm, the manufacturer, was engaged in export counterfeit. On their part, Pearl Dairy denies this allegation and maintains that their facilities remain open for inspection. Pearl Dairy Farm is the largest processor of milk in Uganda. The brand is popular in Kenya and sells at a lower cost compared to locally produced ones. A planned trade mission by Kenya to Uganda aimed at resolving the standoff has been delayed. Since 2019 when the Lato milk was restricted in Kenya, Pearl Dairies secured market access in Zambia, a Southern African country. Zambia and Kenya are however both members of the Common Market for Eastern and Southern Africa (COMESA).

The bans and imminent retaliations are escalating the trade wars between the Uganda and Kenya as EAC countries. The restrictions between Kenya and Uganda has ongoing negative implications for their trade and investment relations. The impact on the socio-economic wellbeing and rights of the citizens could be worse. Even more critical, is the spill-over effect of the trade restrictions which runs contrary to the spirit and intent of the Customs Union Protocol under the EAC.

COMESA: Trade War Between Kenya and Zambia arising from fresh Milk Product

Within COMESA, Kenya and Zambia have their own trade war that predates the Kenya/Uganda example above. This trade war between Zambia and Kenya has dragged on for over 13 years. Zambia prevented the importation of milk from Kenya over health standards. The Zambia-Kenya milk ban is the subject of an ongoing mediation by the COMESA Council of Ministers since 2008. Despite the pending mediation before COMESA, Zambia continues to extend the ban on importation of Kenyan milk by Zambia. The COMESA approach for the non-litigious trade and investment wars and other innovations to the settlement of disputes remain one of the core areas that the AfCFTA can look to in re-engineering its dispute settlement regime. James Gathii's essay on this blog discusses this COMESA innovation and its lesson for the AfCFTA.

Trade wars between Nigerian and Ghana

The complex trade within some ECOWAS member states has a long history. See here and here) Within ECOWAS, the past decade has witnessed intensified trade related and retaliatory actions between Ghana and Nigeria. The background to the strained relationship between the two countries, i.e., Ghana and Nigeria can be traced to events arising from close to a decade ago, when Ghana sought to implement the provisions of the then Ghana Investment Promotion Centre Act, 1994. The Act required foreigners to employ a minimum of 10 Ghanaians and invest at least USD 300,000 in order to engage in retail trade. In June 2012, the government of Ghana began to enforce the law; closing down numerous foreign-owned retail businesses in major trading centers in the country. The situation has continued to persist over the years, with many more attempts to implement the law creating uproar in the Nigerian business community in Ghana. Prof. Kofi Oteng Kufuor's recent contribution on this blog centered his claim of supranationalism of ECOWAS in analyzing the retail trader retaliations. Unlike him, we do not see ECOWAS as a supranational community. These trade wars bring into sharp focus the realities of ECOWAS' trade liberalization objections on the ground.

A series of allegedly discriminatory actions are at the core of this this retail trade war. First, in 2019, the Ghana Union of Traders Association (GUTA) ordered the closing of some Nigerian owned shops, involved in retail trade on the grounds that their activities flouted the laws against foreigners engaging in retail trade. GUTA claimed that the Nigerian traders who were involved in retail

trade had not met the requirements of the Ghana Investment Promotion Centre Act. Second, in June 2020, Ghanaian retail traders once again clashed with their Nigerian counterparts over the Nigerian retailers' failure to heed to calls by GUTA to close their shops until they provide relevant legal documentation. This was after the Presidential Committee on Foreigners in Retail Trade had embarked on a 3-day exercise to inspect their documentation. The Committee was set up by the Ghana Ministry of Trade and Industry to vet the documentation held by foreign nationals involved in retail. Further, in May 2021, a branch of the Ghanaian trader's union in Kasoa threatened the closure of shops owned by foreign nationals, and which are engaged in retail business. To the Ghanaian traders, the invasion of the foreigners, contrary to law, was collapsing their businesses, especially as the foreigners have 'taken over their market', leading to very little returns for Ghanaian retailers. Ghana has committed to reviewing the GIPC Act which is at the core of the retaliatory and discriminatory actions against foreign traders in Ghana.

The Nigerian-Ghana trade wars reveal a deeper dimension of the challenges of economic integration in Africa – the limits of the freedom of movements and the fear that they create among citizens. The traders in Ghana view their Nigerian counterparts as a threat to their economic growth and prosperity. The example also points to the diverse ways in which trade and investment wars emerge in Africa. In our last example, we turn to the xenophobic contexts of trade wars in Africa.

Xenophobic Dimensions of Intra-African Trade and Investment Wars

Intra-African economic investment relations are steeped in a complex historical and contemporary socio-economic relations and social conflicts. Xenophobic attacks against non-South Africans characterize post-Apartheid South Africa. At the heart of the xenophobic attacks against non-citizens of South Africa are tensions attributable to loss of economic earnings, jobs, crimes among others that arise from petty retail businesses, semi and large-scale trade and investments by non-South Africans. The demography of the non-South African's who often bear the brunt are not limited to Africans and go beyond the citizens of Southern African Development Community. Unpacking the various complex dimensions at the root of xenophobic attacks in beyond the goal of the current essay.[2]

Xenophobic attacks are an important source of trade and investment wars between and among African countries. To the extent that what starts out as a domestic trade conflicts, aggravated attacks on non-South-Africans escalate quickly to State-relations and particularly economic investments, the AfCFTA Secretariat and indeed African governments must take this dimension of the manifestation of intra-African trade and investment wars seriously. These xenophobic attacks have been the basis of backlash by and against African governments and their investments in corresponding countries.

To illustrate our argument, we draw on the case on Nigerian-South African trade and investment relations. We use the cases of Shoprite Holdings Limited, a retail chain store, and MTN, a South African mobile telecommunications company both with significant investments in Nigeria. The investments by both companies in Nigeria are huge and with a significant implication on employment and economic growth of Nigeria and South Africa. Unfortunately, both Shoprite and MTN have been the subject on xenophobic backlash with implications for the trade and investment relations of both Nigeria and South Africa. The xenophobic attacks in South Africa have generated retaliatory attacks in other African states against South African owned investments and consequently led to a strain the relations of some African countries with South Africa.

In the context of MTN, the 2019 xenophobic attacks in South Africa and the retaliatory actions in Nigeria by Nigerians is relevant for our analysis. Narratives of the attacks on Nigerians and other migrants in South Africa can be read here, here, and here. On the heels on the 2019 attack, MTN Nigeria, the country's biggest mobile-phone company, closed many of its centers across different states in Nigeria due to the fear of retaliatory attacks by Nigerians. The closures had a direct impact on the share price of MTN. The threat and actual consequential attack on South African business in 2019 was also extended to Shoprite Nigeria.

In Lieu of Conclusion – Looping in the AfCFTA

It is troubling that the analysis of African trade and investment wars have not been centered enough in the scholarly analysis of the AfCFTA. These wars have important socio-economic and political aspects have implications for the flow of

capital and investments within Africa and by African entrepreneurs that are essential to the increase and density of formal intra-African economic relations. The dominant traditional narrative of failure and lack of intra-African trade and investment relations is evolving. Nuanced and progressive analysis of trade and investment flows between and among African states point to an emerging trend of more trade both with the formal and informal sectors.

Article 5 (Principles) of the AfCFTA Agreement provides that the AfCFTA shall be governed inter alia by regional economic communities' free trade areas as building blocs for the AfCFTA, variable geometry, preservation of the acquis and best practices in the regional economic communities (REC's), in the State Parties and International Conventions binding the African Union. The RECs have made progress and have challenges that they confront in the context of trade integration among their members States. The trade wars among and within African States and the deep-seated retaliatory actions have played out mostly in the context of REC's or intra-African investment. Since the REC's are the building blocks of the AfCFTA, regional trade wars among and between African states are a unique set of challenges that the AfCFTA trade liberalization agenda will confront. These issues are pertinent because they are at the intersection of national, regional, and sub-regional trade and investment policy spaces in Africa.

Intra-African trade and investment is growing. So, are the tensions that are associated with the density of such economic relations. Intra-African trade wars is good evidence that African states governments take intra-African trade policy seriously. There is a huge opportunity for the AfCFTA to leverage on the positive aspects of these and strategically confront challenges to harness for the AfCFTA. For the regional economic communities to be effective as building blocks for the AfCFTA, we need to learn from these trade and investment wars and not allow them go on unduly in a way that not only harms trade as well as the socio-economic activities and hence livelihoods of the ordinary peoples that depend on them.

A reader that is unfamiliar with the modus operandi of the settlement of disputes between African countries may wonder why these trade and investment wars have not been judicialized. The short answer to this is that African states have not always judicialized their economic integration disputes.

It is indeed a defining feature of trade relations in Africa that the reservation of jurisdiction to pursue trade disputes by states, has been utilized more outside of the formal realms of the regional courts. The COMESA example illustrates the non-judicial innovation that African regional courts have built into their design. However, there are many limits to soft diplomacy. The indeterminacy and protracted nature of soft diplomacy, as shown by the Uganda-Kenya milk trade war, erodes predictability in a rules-based regime. The negative impact on the economies concerned can be dire – especially for the weaker country. African states must step outside their comfort zone for the purpose of dispute settlement under the AfCFTA. Outside of the sub-regional economic integration context, the capital flow that underpins the trade and investment regimes of these countries will be critical to the future aspirations of the AfCFTA. Economic investments by African entrepreneurs in African countries have grown over the past three decades. As such, the tendency to prioritize foreign investments from Western or other Global South regions, such as from China and Japan in Asia, should be avoided.

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[1] For example, the Special Issue on “Trade Wars” which was published by the Journal of International Economic Law, which sought “to take stock of the current trade wars” in 2019 had no article on the trade wars in Africa. This is even though some of these trade wars have been on-going for over two decades. See, Anne van Aaken, Chad P. Brown and Andrew Lang, “Introduction to the Special Issue on ‘Trade Wars’, (2019) 22 Journal of International Economic Law, pp. 529-533.

[2] A symposium with stellar line up of authors that focuses on the complex linkage between international economic law and migration organized by Oreva Olakpe and Amaka Vanni is forthcoming on Afronomicslaw.org. See: https://www.afronomicslaw.org/symposia

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