Symposium Introduction: Vulnerabilities in the Trade and Investment Regimes in the Age of COVID-19

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This Symposium is one of the follow-up publications to the Afronomicslaw.org Webinar III on “Vulnerability in the Trade and Investment Regime in the Age of COVID-19”

‘Vulnerability’ in trade and investment regimes is not a new phenomenon. Nor, is the concept of ‘crisis’. While IEL scholarship has acknowledged some of the way(s) in which the formalisation of international legal rules in trade and investment can act like a ‘straightjacket’ on global south states, sustaining and creating forms of dependencies that are difficult to escape, there is a notable lack of meaningful engagement with the contours and manifestations of concepts like *precarities, inequalities,* and *crisis* that the narrative of

vulnerabilities encompasses. As Clair Gammage and Olabisi D. Akinkugbe argue in their forthcoming paper, “the analysis of the vulnerability status of the marginalized groups in international economic law is not a consequence of the COVID-19 pandemic. While those issues and the vocabulary of the vulnerable have been subjected to the periphery of IEL analysis, the pandemic has only brought to the fore and made more realistic, and quite unfortunately, the plight of the marginalized in our largely unequal multilateral trading regime.” We hope the essays in this symposium shed some light on the modest steps that could be taken to untangle the complexity that has come with this crisis.

The precarities that the COVID-19 pandemic has highlighted so far are many and complex. These precarities cut across the global south and global north countries alike and have led some to question whether the pandemic is “the great (Un)Equalizer.” On the one hand, the frailty of the trade and investment regimes of established hegemonies in the global north, have been pushed to their limits, and the fractured nature of global supply value chains, particularly in relation to the supply of COVID-19 related medical supplies has been revealed. On the other hand, the dependency of global south countries in Africa , Latin America, the South Pacific and the Caribbean on supplies from China and other parts of the global north have not only been revealed but also deepened. In this regard, there is a very real risk that the pandemic will accelerate a ‘race to the bottom’ and widen the gap between the rich and poor, both within and between countries.

In this symposium on *vulnerabilities* in international economic law (IEL), the contributors focus on the disruptive effects of the COVID-19 pandemic for trade and investment regimes in the global south. The contributors offer a diverse range of perspectives from the Caribbean, Latin America, the United States and Africa to demonstrate how the pandemic has intensified existing vulnerabilities and created new forms of inequalities in trade and investment. Each contribution offers a reflection on how the pandemic intersects with an aspect of IEL and presents concrete policy steps that have been, or could be, taken to redress the negative and harmful effects of the pandemic, be them intentional or unintended. Common to all contributions is the question of how we - an international community of scholars, activists and policymakers – can make trade and investment regimes more resilient, inclusive and sustainable.

These themes and ideas intersect with an important intervention offered by Vicente Paolo Yu III in a closed-workshop hosted by Donatella Alessandrini on global value chains in July 2020, attended by Clair and Bisi. In that session, Vicente argued that IEL scholars and policy-makers need new ways of thinking to respond to the narrative of the crisis - a 'new language game', and not just a new vocabulary, with its own narrative and internal logic to counter that of the logic of free trade. The following contributions implicitly and explicitly engage with this idea and collectively demonstrate that to truly engage with, challenge, and respond to vulnerabilities that are exacerbated by the existing logic of free trade underpinning the system of IEL, we need to identify new ways of thinking and doing IEL.

Following this introduction are two posts from authors that analyse vulnerabilities in trade and investment vulnerability in the Caribbean. First, Jan Yves Remy and Jason Cotton, in their contribution entitled "Our Trade Vulnerability Index Explained: Why, What, How and What's Next?" explain the rationale for, and future of their Trade Vulnerability Index (TVI). The creation of a TVI responds to growing concerns in the WTO about the process of self-designation: that a country can *choose* its own development classification in the multilateral trading system. An alleged benefit of classification as 'developing' is special and differential treatment (SDT); a system of rules and disciplines in the WTO agreements that enable developing countries and LDCs to benefit from more preferential terms of trade. Self-designation has been a controversial practice for some time and the United States of America called for the introduction of an "objective" and binary approach the eligibility criteria for special and differential treatment. Furthermore, it calls for countries with a certain level of income to lose their classification as developing countries. , The TVI was proposed to "… steer the discussion away from GNI- or GDP- per capita as a basis for differentiation…" which in their view, fails to capture the vulnerable position of the Caribbean and other small countries. Jan and Jason's essay explains the origins of the TVI, which builds on the Small Vulnerable Economies Proposal as well as the empirical work of the Caribbean Development Bank on a Multi-Dimensional Vulnerability Index, and illustrates the uniqueness of the TVI, which they argue "could be used to measure a country's or sector's vulnerability based on a methodology that uses select "trade proxy indicators" to develop a "scoring" or index that is linked to S&DT

provisions." Moving away from the purely economic assumptions underpinning the classification of countries toward a more inclusive process for evaluation could enable the vulnerabilities of countries to be better accounted for in the multilateral trading system. Jan and Jason plan to deepen the empirical basis of the TVI while simultaneously improving the possibilities of its practical application.

The second post by Alicia Nicholls, who co-authored the initial TVI essay, offers a Caribbean perspective on *vulnerability and resilience* in the context of international investment law. Alicia situates the twin issues of vulnerability and resilience in international investment law in the context of the Caribbean Community (CARICOM) and demonstrates how a trade vulnerability index, applied to an investment context, could enable better insights to be gained on the current problems facing the CARICOM states and to identify future proposals for reform to create more resilient economies. She extends the TVI to investment regimes in the CARICOM Community. Alicia acknowledges that while there are debates about the veracity of the claims that foreign direct investment (FDI) has a positive effect on the economic development of host states, in the context of the CARICOM Member States, FDIs remain a core component of the economic wellbeing of these Island states. To understand the vocabulary of vulnerability to the CARICOM Member States, Alicia argues that proxy indicators such as "small size", "concentration and lack of diversification", "dependence on external finance", "susceptibility to shocks" and, "legal exposure to investor state dispute settlement claims" which were used in their TVI index are applicable in the investment context. Alicia then discusses six steps that small Caribbean states can, and in some cases are already taking to build their resilience in the face of the COVID-19 pandemic induced investment shocks. In doing so, Alicia offers pragmatic steps that can be taken to identify and address existing and future vulnerabilities in the investment context.

The third post by Nicolás Perrone provides an intervention into the vulnerabilities debate and calls for IEL lawyers to 'find their own vocabulary of vulnerability' to better identify the costs of international trade for global south countries. Perrone questions the assumptions around the benefit and costs at the foundation of international economic law and offers a case for the consideration of *speed,* or *acceleration*, as a vocabulary of IEL. Through the lens

of global value chains (GVCs), he shows how the language of ‘speed’, ‘acceleration’ and ‘deceleration’ can import new ways of understanding the costs of trade. He argues that “… international economic law does not aspire to provide a different or less costly version of itself, let alone resolve the problems it creates, because the benefits of more trade and technology would be gone without the costs” and considers how the international trading system can become more equitable. In hisview, “…there is no reason for not having a specific vocabulary of vulnerability in international economic law.” This position is akin to the argument that Jan and Jason offer in relation to the Caribbean. Nicolás offers analytical examples based on global value chains and suggests that “the vocabulary of speed, acceleration (and deceleration) is just one example of the possible ways in which we can talk about the costs of international trade.” While other possibilities exists, he argues that such vocabulary should be ambitious, gather wide spread support and facilitate the coordination of both power and none powerful actors.

While the fourth post carries on the international investment theme, Magdalena Bas Vilizzio essay, written in Spanish focuses on investor-State dispute resolution in times of covid-19 based on the application of the vulnerability theory as developed by Martha Fineman. Magdalena argues that on the one hand, while the tension between investment protection and right to regulate persists, on the other hand, the danger is escalated when States take measures in order to target health, social and economic effects of the covid-19 pandemic. She argues that an approach from Martha Fineman’s vulnerability theory is imperative in the face of investor-State dispute resolution reform. In particular, “placing human being (vulnerable subject) as the center of the analysis, right to regulate protection should be a pre-stage for building resilience from social institutions.” By so doing, “States would not be at risk of compromising their budgets in international arbitration or experiencing “regulatory chill”.”

The fifth post by Kholofelo Kugler and Faith Pittet explores the linkages between international trade and public health, and critically assesses how COVID-19 can disrupt, reinforce, and create new dependencies. The focal point of their excellent contribution is centred on whether, and to what extent, compulsory licensing could be vital in unlocking access to COVID-19 vaccine for non-Least Developing Countries in Africa. They pose this question against the background of the significant costs associated with research and development

in their production. They argue that the pandemic has shown the interconnectedness of daily living in the Global North and the Global South. As such, measures to address the pandemic must centre the need for "every global citizen must be able to access relevant treatment and preventative medication." Kholofelo and Faith argue that in view of the "lack of domestic pharmaceutical research and development and manufacturing capacity in Africa, … access to the vaccines [developed by the Global North and China] could be threatened by trade restrictions." From this point of view, they opine that the pandemic exacerbates the vulnerability of African states, perhaps moreso than many other regions. They find a possible way out of this conundrum in the provisions Article 31, as modified by Article 31*bis* and the Annex of the WTO Agreement on Trade-Related Aspects of Intellectual Property. Kholofelo and Faith suggest a direct negotiation with manufacturers and countries involved for the non-LDC African countries that do not have "a compulsory licensing trump card in their hands."

The sixth post by Ohio Omiunu examines an often-overlooked aspect of the architecture of international economic law: sub-national governments. In his compelling piece, Ohio highlights the marginalisation of sub-national governments but the possibilities for them to serve as sites of resistance within the trade and investment governance regimes. Although sub-national governments are situated at the centre of the co-ordination of 'glocal' responses to the global health emergency, Ohio argues that they have been marginalized to the periphery of governance frameworks and their critical role in the management of the pandemic requires closer scholarly intervention. With the foregoing in mind, Ohio "… highlight[s] a growing propensity of sub-national governments to challenge the status quo, becoming sites of resistance and opposition to inequalities inherent in international regimes." He contends further that "…the *intermestic* nature of trade and investment norms are becoming more evident, the COVID-19 Pandemic offers us an opportunity to reflect on the changing role of sub-national governments as activists and sites of resistance against inequalities in international trade and investment rules." He decries the absence of sub-national voices in Africa's economic integration process and concludes that the COVID-19 pandemic offers a timely opportunity to "address the institutional and systemic asymmetries in the governance of trade and investment regimes [not only] across the world," but also a

reimagination of the role of sub-national governments in the process.

The final post of the symposium by Katrin Kuhlmann reflects on the need to take advantage of this crisis window to inject innovation and flexibility – drawing analytically on the African Continental Free Trade Area Agreement and the Special and differential treatment provisions in the WTO Agreements – in the regimes of international economic law (IEL). Her essay contribution which draws on three overlapping dimensions: "(1) flexibility and innovation in IEL agreement models, with a focus on trade agreements, that better integrate economic and social development goals and allow parties to adapt to new circumstances or phase in commitments on a more incremental basis; (2) flexibility in implementation of trade disciplines and agreements; and (3) legal and regulatory innovation that can both define and flow from IEL agreements." Katrin's analysis on these three dimensions of legal and regulatory innovation draws on her first-hand work and experience of over a decade in different parts of Africa. The essay is situated in the broader discussion on flexibility and innovation in African trade models and the corresponding lessons that the global economy can learn from these regimes. Katrin provides examples of both flexibility and regulatory innovation that exist across agreement models and critical legal issue areas, including agriculture and food security, IP, and digital regulation She demonstrates the delicate balance that must be achieved in order to address the internal contradictions of the system; to marry the need for certainty and predictability in rules with the need for flexibility and space to innovate for change.

Thank you and stay tuned for more on this series of symposia building on our Webinars.

Contributors

Jan Yves Remy and Jason Cotton: Our Trade Vulnerability Index Explained: Why, What, How and What's Next?

Alicia Nicholls: Vulnerability and Resilience in the Investment Context in the Age of COVID-19: A Caribbean Perspective

Nicolás M. Perrone: Vulnerability and the Speed of the Global Economy: Searching a new vocabulary for international economic law

Magdalena Bas Vilizzio: Solución de controversias inversor-Estado en tiempos de covid-19: un acercamiento desde la teoría de la vulnerabilidad

Kholofelo Kugler and Faith Pittet: Compulsory Licensing: The Key to Accessing the Future COVID-19 Vaccine?

Ohio Omiunu: Asymmetries in trade and investment regimes in the Age of COVID-19 and beyond: A reflection on subnational government marginalisation and resistance within the trade and investment governance structures

Katrin Kuhlmann: Flexibility and Innovation in International Economic Law: Enhancing Rule of Law, Inclusivity, and Resilience in the Time of COVID-19

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