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

By:

Ohio Omiunu

August 26, 2020

Introduction

The disruptions caused by the COVID-19 Pandemic are a stark reminder of inequalities in the institutional and governance framework of trade and investment regimes. Focusing on the role of sub-national governments in international trade and investment regimes, I argue that this level of

government has conventionally been a marginalised voice in the institutional setup. However, in the wake of the COVID-19 Pandemic, disruptions to international trade and investment regimes have had devastating impacts on these levels of government, due to the territorial dimension of the COVID-19 crisis. As a consequence, sub-national governments have been thrust into the limelight as 'global' actors responding to the global public health emergency. In fulfilling this 'global' role, I highlight a growing propensity of sub-national governments to challenge the status quo. More importantly, I argue that as 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.

Institutional asymmetries in trade and investment regimes: A history of marginalisation and resistance

Sub-national governments (i.e. non-central governments, cities, regions), especially federated entities, e.g., cantons, provinces, territories, regions, communities and *Laender* have traditionally been side-lined in the conventional protocols for participation in trade and investment regimes. When conceptualising the current framework for multilateral trade negotiations, States, and international organisations stand out as the 'traditional actors' in the sense that they are the central *loci* for the deliberations, which have framed international trade and investment rules over the years.

This is not to say that sub-national governments, primarily federated entities, have not featured prominently within the trade and investment regimes developed in the post-World War II era. However, sub-national governments have had their participation framed as disruptive of the status quo. This stems partly from the framing of their role under art XXIV: 12 of the GATT. As a consequence, sub-national governments have developed a notoriety for contravening measures (i.e. treaty violations) which lead to disputes between state parties to international and bilateral economic treaties. Notable examples include Metalclad v Mexico; Methanex v United States; AbitibiBowater Inc. v. Government of Canada; and Vattenfall v. Germany (1).

Sub-national government leadership in the Age of COVID-19

Sub-national governments around the world (i.e. non-central governments, cities, regions), have not been exempted from the impact of the Pandemic and, if anything, these local-level governance actors have been at the epi-centre of the territorial dimension of the COVID-19 crisis. Given this situation, in the past few months City Mayors, Governors and other regional leaders across the world have emerged in the spotlight of 'glocal' responses to the COVID-19 Pandemic. In fulfilling this critical role, sub-national governments have demonstrated resourcefulness, sometimes testing the boundaries of what is constitutionally acceptable nationally and internationally to deal with the current and unfolding realities of the Pandemic. For example, during the COVID-19 Pandemic, we have witnessed a sensational and radical measure taking by the US state of Missouri, which instigated a lawsuit against China. The Missouri Attorney General (AG) Eric Schmitt alleges that 'the Chinese Communist Party and a host of other Chinese entities behaved negligently and deceitfully, making them ultimately responsible for the outbreak of the pandemic, its rapid spread, and the lack of readily available personal protective equipment for medical workers. ' Relying on the case of Alfred v Puerto Rico, the AG justified Missouri's competence to sue a sovereign state arguing that Missouri has a 'quasi-sovereign interest in the health and well-being of its residents' (para 15). As improbable as the law suit's chances of success are before an international court or tribunal, the bold move by Missouri against a global superpower like China reminds us once again that the sub-national governments are becoming sites of resistance for institutional asymmetries in international law and relations.

The emergence of leaders of sub-national governments such as the Governor of New York, Maryland and Lagos, as 'glocal' actors responding to the COVID-19 Pandemic, goes beyond their jurisdictional competence for certain aspects relating to public health. Instead, the influence of sub-national governments exhibited during the management of the global public health crisis points to the growing prominence of these levels of governments as interlocutors for local communities, and sometimes sites of resistance where international rules are scrutinised. Evidence for this is seen in the ever-increasing agency of sub-national governments in international and transnational forums as they seek to influence the discourse on issues such as climate change action and the UN SDGs. In these spaces, sub-national governments are progressively gaining a

foothold as critical stakeholders who can challenge the status quo, and in certain instances, stand-up to the inaction of their national governments. Examples of this are seen in the stance of US Governors on climate change action.

Beyond the public health, sustainable development and climate governance spaces, sub-national governments have taken a similar activist stance in the governance space for trade and investment regimes; becoming a point of resistance against the negative impacts of economic integration. Challenges by Wallonia and Cyprus over the ratification process of the Canada-EU CETA, are recent examples of such activism against trade and investment regimes (Omiunu, 2017; Omiunu 2018; Melo Araujo, 2019). The chances of Wallonia succeeding when it brought the Canada-EU CETA ratification to a standstill was slim or next to nil. Instead, like the Missouri action against China, it was more of a political statement by Wallonia to amplify the marginalised voices of sub-national governments in the dynamics of trade and investment regimes. Cities, municipalities and regions are also passing resolutions to opt-out from international economic agreements (Omiunu, 2018: 201). The stance taken by the Scottish and Welsh devolved administrations to Brexit negotiations provides other interesting examples of how sub-national governments are taking different approaches to the national government on matters that pertain to international trade policy (Melo Araujo, 2019).

These interventions by sub-national governments are a reminder that the encroachment of international trade/investment issues under the new models of deep integration PTAs into the sphere of sub-national jurisdictions necessitates a rethink of the parameters which inform the concept of 'involved actors' in the rule-based global economic system which is in a state of flux. In making this argument (which are developed further in the full-length paper) cognisance is taking of the logistical challenges that have informed the decision to restrict the formal participation of sub-national governments in deliberations on international trade and investment rules. However, one thing is clear; sub-national governments have a crucial stake in global economic governance due to the expanding scope of the system into areas of their competence, jurisdiction, and interests. My sense is that given the patterns of activism and resistance we have seen from sub-national governments during the COVID-19 Pandemic, and in other areas of international concern, these actors can serve

as a veritable platform for innovation, and contestation of the status quo. In challenging or scrutinising the status quo, their views may not always be adopted; however, this type of activism is welcomed anyway.

The African context: An absence of sub-national voices in the economic integration process?

Within the African continent, the situation is quite different from the scenario described in the previous section. As continental economic integration gathers pace with the entry into force of the AfCFTA, it will be useful for African sub-national governments to engage with the trade and investment discourse at REC or continental levels. Drawing parallels from the EU which has the Committee of Regions, the closest African Union Structure that can provide continental-level policy space for sub-national engagement with the economic integration process is the African Charter on Values and Principles of Decentralization, Local Governance and Local Development which was adopted in 2014 and entered into force in January 2019. Article 5 (4) of the Charter, in particular, is instructive because it has the potential to act as a platform for sub-national governments to push for consultation and dialogue on trade and investment negotiations that affect their local competencies. Sadly, although the Charter is in force, major federal and decentralised political systems such as Nigeria, Kenya, South Africa, and Ethiopia are yet to sign the agreement.

Another premise which could be leveraged to create a space for robust dialogue and engagement of sub-national governments with the economic integration process in Africa is the sustainable development goals framework, in particular SDG 16.7, which champions the push toward inclusive governance with multi-stakeholder representation and participation in governance processes.

Encouraging the activism of African sub-national governments on issues pertaining to continental trade and investment is important, given that the successful implementation of the AfCFTA requires a synergy between governance structures at all levels around the continent. The failure to adopt a synergies approach could sustain inequalities and create new vulnerabilities. For example, Signé and Van der Ven in a commentary on the unilateral border closures by Nigeria in recent months point out and rightly so that:

> *African leaders should embody the AfCFTA in their industrialisation and broader socio-economic development and governance, ensuring ownership at all the levels of governance, whether local, sub-national, national, sub-regional, or continental. Aligning with the AfCFTA, they should prioritise smart local and national strategies to enhance continental synergies and global competitiveness.*

The opinion by Signé and Van der Ven can only be actualised if sub-national governments see beyond their conventional roles as rule takers and implementing actors for trade and investment regimes signed by national governments. This is not impossible to envision as African sub-national governments have been active in the international sphere when it comes to environmental/climate change-related regimes. Several sub-national governments such as Lagos, and Cross Rivers, Johannesburg belong to multilateral city networks that advocate for climate change action over and beyond the commitments of national governments.

Conclusion

The vulnerabilities and fragilities in trade and investment regimes exposed by the COVID-19 disruptions are also an opportunity to address institutional and systemic asymmetries in the governance of trade and investment regimes across the world. In a pre-pandemic era, it was difficult to challenge long-established norms which have shaped the dynamics of trade and investment governance. However, the Pandemic has seen these established protocols challenged, as fault lines have become evident. It is too early to tell what conventional governance structures are no longer fit for purpose. However, what is apparent at this stage is that there are shifting power dynamics not just in the current pandemic crisis management, but in geopolitics and global economic governance generally. If sub-national governments have an essential role to play in the attainment of the UN SDGs,[i] the management of global public health emergencies and climate change action, why not in trade and investment regulation?

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* Senior Lecturer in Law, De Montfort University, Leicester. Email: ohio.omiunu@dmu.ac.uk

[i] According to the OECD, an *'estimated 65% of the 169 targets behind the 17 SDGs will not be reached without the engagement of local and regional governments.'*

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