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Schill, S.W.B.

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Editorial: The Constitutional Frontiers of International Economic Law

The 2016 Roll of Honor

The End of Mega-Regionalism?

For the past few years, much attention in international economic law has focused on the negotiation of so-called ‘mega-regionals’ – agreements, often involving multiple parties with major economic and geopolitical importance – and the changes they would bring to global economic governance. The Trans-Pacific Partnership (TPP), the Transatlantic Trade and Investment Partnership (TTIP), the Trade in Services Agreement (TiSA), the Regional Comprehensive Economic Partnership (RCEP), perhaps even the Canada-EU Economic and Trade Agreement (CETA), are the prime examples of this type of agreement. Yet, with the US presidential elections, the announcement of Donald Trump to pull out of TPP as first order of business, and the likely halt of TTIP negotiations, the prospect of pushing global economic governance forward through mega-regionals has received a major jolt.

While the basis of Trump’s future economic policy is epitomized by his rhetoric of ‘Making America Great Again’ – which sounds populist, egocentric, perhaps even isolationist to non-Americans – the underlying principle to put national values first is not so much different from the political opposition to mega-regionals elsewhere, including in Europe. Unlike in the United States, however, opposition in Europe, just as in many quarters in Latin America, most vocally comes from the left, not from the right – and it is coined in quite different terms. Rather than speaking the language of nationalism, it comes in the vocabulary of constitutional values – namely democracy, the rule of law, and the protection of human or fundamental rights.

Even though the European Union (EU) may have a more cosmopolitan idea of what these constitutional principles mean than the United States – after all these values are the basis of cooperation of EU Member States and part of the foundational values of the EU itself,¹ reference to democracy, the rule of law,

1 See Article 2 of the Treaty on European Union (consolidated version) OJ C 202 (7 July 2016) 13.

and fundamental rights may be just a more indirect, politically correct, even euphemistic way of saying what Trump's more brutal rhetoric implies. In the end, both the new America and opponents to mega-regionals in Europe ultimately speak in favor of a disengagement from international economic governance through mega-regionals, replacing them with sovereign action at the level of the nation state (or that of the EU for that matter), and sticking with the existing international institutional infrastructure that is widely regarded as insufficient to effectively regulate globalization for the better. Whether the current political landscape will mean the definite end of mega-regionalism, or just reflect a temporary *baisse*, is probably too early to tell. What seems certain, by contrast, is that we will see a period of renewed patterns of unilateralism, perhaps even hegemony, which will continue to pose some of the challenges for international economic law that mega-regionals were sought to overcome.

Increasing Involvement of Constitutional Courts

Despite similarities in their effects, an important difference between the EU and the United States relates to the institutional implications of opposition to mega-regionals. In Europe – at least for now – this opposition does not come from an elected executive, but from large numbers of citizens and opposition parties, as well as a smaller number of Member States, or even sub-divisions of Member States – think of Wallonia – that leverage their constitutional rights against mega-regionals and the institutions they would give rise to, such as investor-state dispute settlement bodies and regulatory cooperation. And together with framing opposition to mega-regionals in constitutional language, actors whose purpose is precisely the protection of such constitutional rights and limits, namely constitutional courts, increasingly come into play.² Following earlier examples in Latin America,³ the 13 October 2016 ruling of the German Constitutional Court on a request for preliminary measures to stop

2 This notwithstanding, the impact of constitutional law on international economic agreements is also addressed by the political organs involved in the negotiation of such treaties. See, for example, the references to Article 21 TEU in European Commission, 'Towards a Comprehensive European International Investment Policy' (7 July 2010) COM(2010)343 final, 9.

3 See Juan Camilo Fandiño Bravo, 'The Role of Constitutional Courts in International Investment Law and Investment Treaty Arbitration: A Latin American Perspective' (2014) 18 *Max Planck Ybk UN Law* 667.

the signature of CETA made in the context of a constitutional complaint against that treaty by some 120,000 individuals⁴ is likely just the first in a number of constitutional court rulings in which international economic law encounters its constitutional frontiers head-on.

International economic law's constitutional frontiers will be further exposed in a host of upcoming decisions that all involve the relationship between constitutional law and international economic law. For one, the German Constitutional Court will have to decide on the merits of the constitutional challenge to CETA, and proceedings before other constitutional courts may follow. But also at the EU level, various proceedings before the Court of Justice of the European Union (CJEU) involve questions of EU constitutional law. Thus, the question of whether intra-EU investment treaties can be squared with principles of EU constitutional law is before the CJEU in a variety of different proceedings.⁵ But also the pending question before the CJEU of where the power to conclude EU trade and investment agreements resides, whether it is EU only or shared with Member States, involves a constitutional question on the distribution of competences in a quasi-federal system.⁶ Some, if not all, of these proceedings will see decisions in 2017. They will bring some clarity to where the constitutional frontiers of international economic law lie and show to which extent there is conflict or complementarity between the legal demands under constitutional law and the project to govern the global economy through mega-regionals.

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- 4 German Constitutional Court, App No 2 BvR 1368/16, 2 BvR 1444/16, 2 BvR 1823/16, 2 BvR 1482/16, 2 BvE 3/16, Judgment (13 October 2016) <www.bverfg.de/e/rs20161013_2bvr136816.html> accessed 20 December 2016. For an English summary, see German Constitutional Court, Press Release No 71/2016 (13 October 2016) <www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-071.html> accessed 20 December 2016.
- 5 CJEU will be faced with this question in at least three types of pending proceedings: one resulting from a request for a preliminary ruling by the German Supreme Court in the context of its review of the *Achmea* case (CJEU, Case C-284/16), one relating to the enforcement of the ICSID award in the *Micula* case, which the Commission has enjoined Romania from paying (CJEU, Cases T-624/15 and T-704/15), and finally likely also cases resulting from the infringement proceedings against various Member States for non-termination of intra-EU investment treaties (see European Commission, 'Commission Asks Member States to Terminate Their Intra-EU Bilateral Investment Treaties' Press Release, Brussels (18 June 2015) <http://europa.eu/rapid/press-release_IP-15-5198_en.htm?locale=en> accessed 20 December 2016).
- 6 CJEU, Opinion 2/15 (pending) (dealing with the competence of the EU to sign and conclude the Free Trade Agreement with Singapore).

Reasons for International Economic Law's Encounters with Constitutional Law

The encounters between international economic law and constitutional law may seem surprising, as both fields have so far kept in maximum distance to each other. The change in the relationship, however, is only logical considering that an increasing amount of constitutional questions, or questions with constitutional implications, will be dealt with by the courts and tribunals established under mega-regionals. The investment arbitrations brought by Vattenfall relating to Germany's nuclear power phase-out,⁷ or Philip Morris' challenges to tobacco regulations in Australia and Uruguay,⁸ are prominent examples of cases where questions dealt with by an investment tribunal are also questions of the respective countries' constitution; sometimes they are even litigated in parallel to each other. In these cases, investment arbitration is functionally equivalent to domestic constitutional litigation in reviewing a state measure under norms that are consubstantial with those in constitutional law.⁹ In some cases, investment tribunals may even review whether domestic constitutional law itself is in line with the state's obligations under international economic agreements.¹⁰ And in yet other cases, investment tribunals are called to apply domestic constitutional law directly as applicable law, as the counterclaim for environmental harm based on a breach of Ecuador's Constitution in the *Perenco* case illustrates.¹¹

Constitutional implications can not only result from the subject-matter of claims before international courts and tribunals established by mega-regionals.

7 *Vattenfall AB and others v Federal Republic of Germany*, ICSID Case No ARB/12/12 (registered 31 May 2012) (pending).

8 See *Philip Morris Asia Limited (Hong Kong) v The Commonwealth of Australia*, UNCITRAL, PCA Case No 2012–12, Award on Jurisdiction and Admissibility (17 December 2015) and *Philip Morris Brands SÀRL, Philip Morris Products SA and Abal Hermanos v Uruguay*, ICSID Case No ARB/10/7, Award (8 July 2016).

9 This becomes particularly clear in the context of Germany's nuclear power phase-out which was also litigated before the German Constitutional Court. See German Constitutional Court, 1 BvR 2821/11, 1 BvR 321/12, 1 BvR 1456/12, Judgment (6 December 2016) <www.bverfg.de/e/rs20161206_1bvr282111.html> accessed 20 December 2016.

10 *Bernhard von Pezold and others v Republic of Zimbabwe*, ICSID Case No ARB/10/15, Award (28 July 2015) (dealing inter alia with the legality under an international investment treaty of a constitutional amendment that differentiated between nationals and foreigners in relation to land ownership).

11 See *Perenco Ecuador Ltd v The Republic of Ecuador*, ICSID Case No ARB/08/6, Interim Decision on the Environmental Counterclaim (11 August 2015) paras 319 ff.

They are also raised by the activities of these courts and tribunals themselves. Most prominently, the fact that international courts and tribunals do not only apply pre-existing international treaties, but to a considerable extent develop these standards through their jurisprudential activities, and thereby become important law-makers,¹² raises constitutional concerns. This is all the more true as international courts and tribunals regularly are not subject to the same type of constitutional controls as domestic courts that we are accustomed to under most domestic constitutional systems, notably the possibility of the legislator to react to jurisprudence it does not see fit.¹³

For all of these reasons, the domains of constitutional law and international economic law cannot anymore be clearly separated, but increasingly, and in important aspects, overlap.

Conceptualizing the Relationship: Conflict of Complementarity?

The increasing overlap between constitutional law and international economic law will unavoidable raise the question of which system has primacy over the other. The answer to this question is much less straightforward than one may at first think: all depends on perspective. From the perspective of a constitutional court, the applicable law and hence the order that determines the relationship between constitutional law and international economic law, is constitutional law. International economic law can thus only exist within the limits of constitutional law. This perspective becomes particularly clear, when constitutional courts block mega-regionals in case of their unconstitutionality before they come into force.

If, by contrast, international economic agreements have entered into force, and if the question about the relationship with constitutional law is asked by an international court or tribunal, the perspective is different. Here, domestic constitutional law, like any other domestic law, is not an excuse for compliance with international legal obligations.¹⁴ For an international court or tribunal, international economic law is supreme.

12 See generally Stephan W Schill, 'System-Building in Investment Treaty Arbitration and Lawmaking' (2011) 21 German LJ 1083.

13 For this argument from the perspective of the principle of democracy see Armin von Bogdandy and Ingo Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (OUP 2014).

14 See Article 27 of the Vienna Convention on the Law of Treaties (concluded 23 May 1969) 1155 UNTS 331 and Articles 3 and 32 of the Articles on State Responsibility <<http://legal>

Ultimately, such conflicts may lead to serious confrontations between constitutional courts and international courts and tribunals that can cast the effectiveness and legitimacy of both constitutional law and international economic law into doubt. The question that arises is therefore whether strategies exist for all actors involved to avoid conflicts and confrontation between international economic law and constitutional law, respectively international courts and tribunals and constitutional courts, while staying faithful to their respective missions to protect their constitutive legal order.

Drawing Inspiration from the Relationship Between Constitutional Courts and the CJEU

Comparative approaches prove immensely helpful in answering this question. In fact, the relationship between the CJEU and constitutional courts in EU Member States, as much as it is used as an example to illustrate confrontation, is also a great example for the various strategies of cooperation that exist between these courts in working together to ensure that public authority, whether exercised at the domestic or the supranational level, stays faithful to the common constitutional objectives shared by both EU law and its Member States to implement democracy, the rule of law, and the fulfillment of human and fundamental rights and freedoms, while pursuing increased economic and political integration.

In this common endeavor, which has been termed to form part of a ‘composite constitutional jurisdiction’,¹⁵ conflicts between the CJEU and constitutional courts in Member States are theoretically and conceptually unavoidable because courts at both levels proclaim the ultimate supremacy of their constitutional order.¹⁶ But in practice conflicts are limited. Thus, constitutional courts in Member States limit their control of the EU and the CJEU to ensuring that the domestic constitutional identity is not infringed and that acts of EU law, and the CJEU’s interpretations of it, are not manifestly *ultra vires*. The CJEU, in turn, leaves a significant margin to Member States and their constitutional courts to implement important domestic constitutional values. Hence,

un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf> accessed 20 December 2016.

15 Andreas Voßkuhle, ‘Multilevel Cooperation of the European Constitutional Courts—*Der Europäische Verfassungsgerichtsverbund*’ (2010) 6 *EuConst* 175.

16 On this and the following see in depth Armin von Bogdandy and Stephan W Schill, ‘Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty’ (2011) 48 *CMLR* 1417.

while claiming supremacy over the respective other, courts at both levels also exercise considerable deference to each other and engage in a judicial dialogue about the proper implementation of the European project and the appropriate level of interaction this demands of domestic constitutional law and EU law.

Courts and tribunals established under international economic agreements, as well as constitutional courts, could, and arguably should, draw inspiration from the relationship between the CJEU and constitutional courts in EU Member States when approaching the constitutional frontier of international economic law from their respective vantage points. After all, international economic agreements, to a considerable extent, share constitutional concerns for subjecting government action to the rule of law and to honoring basic economic rights, while ensuring states' policy space to pursue competing public interests. For this reason, constitutional law and constitutional courts should not tag international economic law automatically with constitutional suspicion. On the contrary, international economic law can help states achieve constitutional objectives, including furthering the rule of law and implementing good governance and sustainable development.¹⁷ At the same time, constitutional courts should ensure that international economic law is implemented in conformity with constitutional standards of democracy, the rule of law, and fundamental and human rights.

Conversely, international courts and tribunals should exercise caution and deference in light of the constitutional values that may be at stake in certain disputes and permit the pursuance of constitutional values that do not frustrate the very objectives of international economic agreements. This also means, however, that international courts and tribunals should not grant *carte blanche* to all government action that comes under the cloud of constitutional law, just as constitutional courts should not uncritically sanction international economic law as beyond constitutional importance. In both respects, embedding an analysis of the boundaries of constitutional and international economic law in a comparative constitutional perspective may prove helpful to find solutions that are widely accepted.¹⁸

All in all, the relationship between constitutional law and international economic law, as well as that between constitutional courts and international economic courts and tribunals, should be one of mutual respect and mutual control. To achieve this purpose, mutual understanding and communication

17 See further Stephan W Schill and Vladislav Djanić, 'International Investment Law and Community Interests' (Society of International Economic Law (SIEL) Working Paper No 2016/01, 23 June 2016) <<https://ssrn.com/abstract=2799500>> accessed 20 December 2016.

18 See further the contributions in Schill W Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010).

are key. This can be facilitated both in the context of formal judicial interaction, for example, through the establishment of preliminary reference-type procedures that would allow international economic courts and tribunals to submit questions of constitutional law to constitutional courts or the CJEU, but also through informal interactions at conferences or regular personal meetings between constitutional judges and adjudicators in international trade and investment disputes. In fact, such interactions have been key in fostering judicial interaction and mutual understanding of judges in domestic constitutional courts in Europe, the CJEU, and the European Court of Human Rights.¹⁹ Similar forms of interaction should also be developed in respect of the increasing overlaps between international economic law and constitutional law, and their respective adjudication systems.

The 2016 Roll of Honor

2016 has been another successful year for JWIT, with a total of 1060 pages published. These included 25 articles (of which 8 formed part of a Special Issue on ‘The Latin American Challenge to the Current System of Investor-State Dispute Settlement’, and 6 of a Special on ‘Legal Problems of Intra-EU BITs’), 13 case comments, 3 book review essays, 11 book reviews, 1 editorial, 2 introductions to special issues, and, as a first, 1 letter to the (book review) editor. Our authors, again, were of great diversity in perspective, professional and geographical background, as well as gender and age. None of this would have been achievable without the unfailing help of JWIT’s editorial team. Thank you so much for this!

Of vital importance for a peer reviewed journal has been the honorary support of colleagues in reviewing submissions last year. Apart from members of the Editorial Board, among whose duties it is to peer-review submissions, the following have generously shared their time and expertise: Melaku Desta, Angelos Dimopoulos, Meng Fang, Paolo Farah, Mark Feldman, David Gantz, Makane Moïse Mbengue, Gracia Marin-Duran, Bryan Mercurio, Peter Muchlinski, Karl Sauvant, Michele Potestà, Harro Van Asselt, and Ingo Venzke. A big ‘thank you’ to everybody – JWIT would not be possible without your efforts!

Stephan W. Schill

19 See Laurent Scheeck. ‘The Relationship Between the European Courts and Integration Through Human Rights’ (2005) 65 *ZaöRV* 837, 873–875.