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The Constitutional Frontiers of International Economic Law

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The End of Mega-Regionalism?

The future of 'mega-regionals', like the Trans-Pacific Partnership (TPP) or the Transatlantic Trade and Investment Partnership (TTIP), has become doubtful since President Trump took office. Through decisions, such as the withdrawal from TPP, he is putting his rhetoric to 'Make America Great Again' in action. Yet, the idea to put national values first is not, I argue in a recent issue of the Journal of World Investment and Trade, so different from opposition to mega-regionals elsewhere. Both the 'new America' and opponents to mega-regionals in Europe speak in favor of disengaging from mega-regionals and replacing them with action by the nation state. At the same time, rejecting mega-regionals will result in sticking with the existing international institutional infrastructure that is widely regarded as insufficient to effectively regulate globalization for the better.

Despite similarities in their effects, there are important differences across the Atlantic. In the European Union, opposition most vocally comes from the left, not from the right. It also 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. And it is couched in entirely different vocabulary: Rather than speaking the language of nationalism and protectionism, opposition in the EU invokes constitutional values and rights – namely democracy, the rule of law, and fundamental rights – which are leveraged against mega-regionals and the institutions they come with, notably investor-state dispute settlement (ISDS) and regulatory cooperation.

Increasing Involvement of Constitutional Courts

Couching opposition to mega-regionals in constitutional language has important consequences: It brings in a different set of actors, namely constitutional courts. Following earlier examples in Latin America, the 13 October 2016 ruling of the German Constitutional Court on an application for an injunction against the Canada-EU Comprehensive Economic and Trade Agreement (CETA) brought by some 120,000 individuals is likely just the first of many court rulings in which international economic law encounters its constitutional frontiers head-on.

These frontiers will be further exposed in many more upcoming decisions, both in Member States and at EU level. The German Constitutional Court will have to decide on the merits of the constitutional challenge to CETA. Similarly, France's Conseil

Constitutionnel has been seized to determine the constitutionality of CETA under the French Constitution. The Court of Justice of the European Union (CJEU) will rule on the compatibility of intra-EU investment treaties with EU constitutional law, decide on where the power to conclude EU trade and investment agreements resides (EU only or shared with Member States), and also assess the compatibility of CETA with EU constitutional law. These proceedings will bring some clarity to where some of the constitutional frontiers of international economic law lie. They will show whether there will be conflict or complementarity between the legal demands of constitutional legal orders and international economic agreements.

International Economic Law's Encounters with Constitutional Law: Conflict or Complementarity?

While international economic law and constitutional law have so far kept maximum distance from each other, this is changing fundamentally as international dispute settlement bodies increasingly touch on constitutional questions. Vattenfall's claim against Germany's nuclear power phase-out, and Philip Morris' arbitration against Australian and Uruguayan tobacco regulations, are just three prominent examples where the legal issues dealt with by investment tribunals also raise issues under the respective countries' constitution. Here, investment arbitration is functionally equivalent to domestic constitutional litigation – and may even run in parallel to constitutional court proceedings (as in Vattenfall).

In other cases, investment tribunals may even review whether constitutional law itself is in line with the state's obligations under international law (as in *Pezold v. Zimbabwe*). And in yet other cases, investment tribunals are called upon to apply domestic constitutional law directly as applicable law (as in the counterclaim in *Burlington Resources v. Ecuador*). Constitutional implications are also at stake as international courts and tribunals not only apply pre-existing international law, but to a considerable extent develop them. They thereby become important law-makers, but often lack equivalent mechanisms as those which control domestic courts. For all of these reasons, constitutional law and international economic law increasingly overlap, in important aspects.

This overlap will unavoidably prompt the question of which system has primacy. The answer, however, is less straightforward than one may at first think. All depends on perspective. For constitutional courts, the legal order that determines the relationship is constitutional law: International economic law only exists within the limits of constitutional law. This becomes particularly clear, when constitutional courts block mega-regionals as unconstitutional before they enter into force. By contrast, if one is asking an international court or tribunal, once its constituting agreement is in force, for its view on a State party's constitutional law, the perspective is different. Constitutional law, like any other domestic law, will not be accepted to justify non-compliance with international law. International economic law in that view is supreme.

Drawing Inspiration from the Relationship between Constitutional Courts and the CJEU

Such conflicts may lead to serious confrontations that can cast the effectiveness and legitimacy of both constitutional law and international economic law into doubt. What strategies then exist for all actors involved to avoid conflict, while staying faithful to their respective missions (that is, to protect constitutional or international economic law, respectively)?

Comparative approaches arguably prove incredibly helpful. In fact, the relationship between the CJEU and constitutional courts in EU Member States, as much as it is used to illustrate confrontation, is also a great example for mapping strategies of cooperation, in particular when putting emphasis on the common mission these courts share to ensure that public authority, whether exercised at the domestic or supranational level, stays faithful to shared constitutional values, such as democracy, the rule of law, and human rights. Certainly, in this endeavor, conflicts between the CJEU and Member States constitutional courts are conceptually unavoidable because both types of actors claim ultimate supremacy.

But in practice conflicts are rather limited (for more details see [here](#)): Constitutional courts limit their control to ensuring that 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 its jurisprudence, leaves Member States and their constitutional courts a significant margin to implement important domestic constitutional values. Despite claiming supremacy, courts at both levels therefore exercise considerable deference and engage in a 'judicial dialogue' to mitigate conflict.

International courts and tribunals established under international economic agreements, as well as constitutional courts, can draw inspiration from that relationship. To start with, international economic law, to a considerable extent, shares constitutional concerns for subjecting government action to the rule of law and to honoring basic economic rights, while ensuring government policy space to pursue competing public interests. It can thus help states successfully implement public policies, including for good governance and sustainable development (for detail see [here](#)). When called upon to ensure that core constitutional principles are respected, constitutional courts should not automatically tag international economic law with suspicion, but be aware of shared objectives.

Conversely, international courts and tribunals must exercise deference and permit States 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. In both respects, embedding an analysis of the boundaries of constitutional and international economic law in a comparative perspective to the relationship of constitutional courts in the EU may prove helpful to find solutions that are widely accepted.

Establishing Communication Channels and Interaction between Constitutional Judges and International Trade and Investment Adjudicators

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 reflect mutual respect and mutual control. To achieve this, mutual understanding and communication are key. This can be facilitated both through formal judicial interaction, for example the establishment of preliminary reference-type procedures, but also through informal means, such as joint conferences or regular personal meetings between constitutional judges and adjudicators in international trade and investment disputes. Such meetings have been central to fostering judicial interaction and mutual understanding of judges in European constitutional courts, the CJEU, and the European Court of Human Rights. Similar forms of interaction could and should also be developed in respect of international economic law and constitutional law, and their respective adjudication systems. In the end, this could enhance the potential of constitutional and international economic law jointly to contribute to the flourishing of democracy, the rule of law, and human rights.