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 populistic, 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,

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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. Following earlier examples in Latin America, the 13 October 2016 ruling of the German Constitutional Court on a request for preliminary measures to stop