

Editorial EYIEL 7 (2016)

1 Critical Perspectives on International Economic Law

In October 2015, hundreds of thousands of protesters took to the streets of Berlin to voice their concerns about the proposed free trade agreements between the EU and Canada (CETA) and the EU and the United States (TTIP). It was not the first time that international economic agreements or institutions were at the centre of public protests. International economic law has always been a politically and legally contested field. Volume 7 of the European Yearbook of International Law addresses these contestations and focuses its main section on critical perspectives of international economic law.

The editors of the yearbook invited critical scholars to voice their concerns of the main features and principles of international economic law as it stands today and outline their critical analyses of the various subfields of the discipline. In order to stimulate debate and to challenge the contestations, we asked other colleagues to comment on these critical perspectives. In most cases, especially in the most fiercely debated areas, the commentators were critical of the critics. Some chose to directly react to the claims of the main chapters, others opted for a broader defence of the system and rejected the critics' assertions more generally. Yet, others added further—sometimes also critical—perspectives and dimensions without directly challenging the claims of the first author.

The result is a unique collection of critical essays accompanied by alternative and competing views on some of the most fundamental topics of international economic law. We hope that this collection will stimulate further debate and critical research and will serve as a first source of critical essays on international economic law for newcomers and old participants of the debates alike.

1.1 Foundations

Sol Picciotto's Distinguished Essay opens our collection of critical perspectives with a personal reflection on the relationship between academic research and engagement with policy and political practices, seen through the author's own experiences of working in the field of international economic law for more than half a century. He emphasises the need to maintain academic independence and a research perspective which is based on reflexive methodology and immanent critique. Picciotto sees an increased need for engagement by critical international economic law scholars with critical political practice to challenge the current system of global economic governance.

The next two essays address the much-debated concepts of constitutionalisation of international economic law. *David Schneiderman* rejects the idea of a single, unitary global economic constitution due to the hybrid and plural setting of global economic governance. He illustrates this analysis with the current state of international investment law. In this context, he explains that the jurisprudence of investment tribunals partly resembles the output of traditional domestic constitutional jurisprudence on property rights. The emergent economic constitutional order is in tension with fundamental functions of democratic decision-making about the proper role between the state and the market.

Ernst-Ulrich Petersmann rejects this critical reading and calls for a constitutionalisation of multilevel governance of international public goods. He points out that while European legal thinking accepted the constitutionalisation of European economic law and human rights law, the discourse about global constitutionalisation remains confusing due to inadequate clarification of legal terminologies, research methods and diverse conceptions of international law and multilevel governance of public goods.

1.2 World Trade Law

The following three pairs of essays focus on issues of world trade law. *Melaku Geboye Desta* critically assesses the reality of the WTO's Agreement on Agriculture (AoA), which he sees as only the first step in a long process aimed at establishing a 'fair and market-oriented agricultural trading system'. As the Doha negotiations become less and less relevant to agriculture, the AoA remains the only framework governing agricultural trade for the indefinite future. Desta demonstrates that the treatment of agriculture as an exception to the general rules of international trade has a long pedigree, both in economic theory and regulatory practice, often used by powerful economies against developing countries. However, bilateral and regional agreements cannot be a solution in the author's view. Instead, he argues that only a multi-sectoral and multilateral forum such as the WTO allows

all countries, whether they are for or against agricultural liberalisation, to make progress in this area.

Christian Häberli would not disagree. He therefore chose to describe a reform programme and shows where the development promises of the world trading system remain unfulfilled. He fears that even the completion of the Doha negotiations will fail to address specific concerns of net food-importing developing countries and resource-poor farmers. This is why additional specific commitments by developed and emerging economies are required.

From agriculture we move to trade liberalisation services. A critical academic and a politically engaged scholar at the same time, *Jane Kelsey*, challenges the dominant discourse and argues that trade in services agreements are creatures of neoliberalism. They have evolved over time as normative and disciplinary instruments and reach progressively deeper into the regulatory domain of states and limit the autonomy and authority of governments to regulate services in the national interest. A new generation free trade and investment agreements offered a way to redesign trade in services regime, align it to new technologies and corporate imperatives, and further circumscribe governments' regulatory options. Kelsey argues that new initiatives such as the plurilateral Trade in Services Agreement (TiSA) exacerbated long-standing tensions. These agreements continue to attempt to lock governments into a more extreme version of the neoliberal paradigm.

Panagiotis Delimatsis firmly defends the general approach of trade in services liberalisation. He sees the GATS as a key achievement of the Uruguay Round. However, the relevance of the GATS for the global economy has suffered from the deficiencies of the GATS legal framework. Delimatsis critically reviews the inability of the GATS to take stock of the progress made in the last 15 years of multilateral trade negotiations. He recalls that regional service-related initiatives including TTIP and TiSA threaten the very existence of the GATS. Hence, Delimatsis calls for a 'GATS 2.0' focussing on non-discrimination and good governance.

The last two essays on trade issues focus on trade-related intellectual property rights. *Carlos M. Correa* recalls that a key argument of the proponents of the TRIPS agreement was that granting intellectual property rights would boost innovation globally. He shows, however, that R&D capabilities in developing countries have not improved in the last 20 years. Pharmaceutical innovation even declined. In Correa's view the proliferation of pharmaceutical patents reflects strategies aiming at blocking generic competition. Alternative models to generate new drugs, especially those needed to address diseases prevalent in developing countries, are needed.

In the view of *Nuno Pires de Carvalho*, Correa's arguments are based on widely spread misunderstandings about the international protection of intellectual property. He claims that the TRIPS agreement should not be blamed for failing to promote invention in developing countries because that is not its aim. Instead, TRIPS aims at promoting free trade of goods and services bearing or displaying intellectual property. Also, the patent system should not be blamed for its alleged inadequacy in fostering innovation because there is no empirical evidence of

whether the patent system works in one direction or the other. As a free market mechanism, the purpose of the patent system is to reduce costs.

1.3 International Investment Law and International Financial Law

The next section of our special focus addresses international investment law and international financial law, two areas which have recently been at the centre of many critical views on international economic law. The first two contributions address the relationship between investment law and development. *Muthucumaraswamy Sornarajah* who has been observing and criticising international investment law regime for decades calls it a ‘fraudulent system’. He claims that when development is made the focus of the system and it is not delivered by it, the use of such a strong term is justified. While investment agreements were signed upon the promise of supporting development, investment arbitrators have brought about a system of absolute investment protection far more extensive than that contemplated by the parties to the treaties and far removed from the original goal of economic development.

In his reaction to Sornarajah’s arguments, *Roberto Echandi* calls for a more balanced assessment. He agrees that the current international investment regime is not good as it is, but he claims that investment paradigms are radically shifting and development is starting to happen. However, just when developing countries are learning how to use international rule making to promote that process, many sectors in developed countries are harshly reacting against the very law they contributed to create. Echandi warns that calling a system of global governance just a manifestation of imperialism entails the risk of ‘saving developing countries from development’.

Investor-state investment arbitration is subject to the fiercest criticisms in recent years. *Kate Miles* reflects upon this criticism and considers the controversies, the responses and the current debates surrounding investor-state arbitration. In particular, she reviews the discourse on the right to regulate and the arguments that investment disputes have the potential to encroach into host state regulatory space. According to Miles there is an increased acknowledgement of the problematic nature of the ‘older-style’ bilateral investment treaties with a more nuanced approach to investment disputes emerging. Yet, Miles remains concerned that despite these developments, public welfare regulation continues to be at risk from investor challenges and that a lack of appreciation of non-investment issues persists in arbitral decision-making.

Stephan W. Schill shares several concerns of Miles and supports reform efforts to make the system more transparent, increase possibilities of involvement for third parties, and ensure policy space. However, he argues that the present system has to be seen as a mechanism to subject international investment relations to the

international rule of law, with investor-state arbitration providing a form of access to justice to foreign investors in cases where domestic courts do not sufficiently control government actions. Such a system, Schill claims, vindicates fundamental values of a just world order under law.

The latest financial crisis, especially the global crisis of 2008 and 2009, brought the international financial system once more to the centre of public and academic debates. *Celine Tan* argues that the conscription of international public finance to crisis resolution and management in recurrent sovereign debt crises highlighted the centrality of international public finance and its institutions to global economic regulation. Tan analyses the role played by international financial aid in mitigating the distributive dislocations resulting from international law's allocation of the risks and benefits of a globalised economy and examines how the use of aid finance influenced the regulatory trajectories of international economic law. She argues that the emergence of development finance as a response to the regulatory crises of the global financial system has had an adverse effect on regulatory change and sustains existing asymmetries in international economic law, thereby exacerbating its negative distributive outcomes.

A common reaction to the financial crisis was the call for better and 'more' regulation on financial market instruments to prevent future crises. However, *Christian Tietje* claims that finding adequate regulatory instruments for financial markets is not as easy as it has often been suggested and that there is a danger of overregulation with negative economic consequences. Tietje also questions Tan's understanding of the Bretton Woods system. He argues that the system was never intended to provide for any financial market regulation. Furthermore, Tietje highlights the role of soft law and similar instruments in shaping the international financial architecture.

1.4 Multinational Enterprises and Human Rights

Until very recently, multinational enterprises (MNEs) were outside the realm of international economic law, but they have become more visible in the contemporary agenda of international economic law as shown in the chapter by *Peter Muchlinski*. Preferential trade and investment agreements of the new generation address the operations of MNEs. This created worries over the loss of sovereignty by States and prompted the rise of a critical alternative position that seeks to rebalance international economic law towards a re-assertion of state regulatory power and of values other than the purely economic values. However, Muchlinski argues that this remains problematic as long as states remain wedded to the core idea of market liberalisation and corporate freedom. He shows how this conundrum can be unravelled in the context of the development of trade and investment agreements and their impact on MNE regulation.

Ibrahim Kanalan approaches the notion of regulating MNEs from a human rights perspective. He discusses the horizontal effect of human rights and proposes a new and unconventional approach to the accountability of private actors for human rights violations. He proposes a new concept for the horizontal effect of fundamental human rights borrowing elements from systems theory, especially from the work of Gunther Teubner, and demonstrates the practicability of this concept.

Human rights are a relevant normative standard not only for the regulation of MNEs, but also for international economic law more broadly. In her article, *Sarah Joseph* begins with the observation that international human rights law and international economic law seem to seek similar outcomes, namely, the protection of certain rights so as to promote human flourishing. However, compatibility between international economic law and human rights law cannot be presumed, as Joseph claims. While restrictions on, for example, protectionism can undoubtedly have positive human rights effects, there are significant areas of divergence. Joseph shows that direct conflicts between the regimes may arise with regard to the implementation of the TRIPS agreement or arbitrations under bilateral investment treaties which have posed possible threats to a state's capacity to fulfil human rights. Joseph asserts that in the end international economic law focuses on the rights of a privileged few which may clash with the human rights of others.

Lorand Bartels accepts that a state's economic policies, including the protection of intellectual property and foreign investments, and trade liberalisation, can have an impact on the enjoyment of human rights. However, even if some of these policies may be encouraged by international treaties, they do not require any specific economic policy. Bartels argues that most treaties contain exception clauses that permit states to comply with both their economic and their human rights obligations. Even if international economic law would hinder the enjoyment of human rights, Bartels' preferred solution would be to ensure that those agreements contain exceptions that can permit states to comply with their human rights obligations.

2 Regional Developments: Focus on Megaregionals and Plurilaterals

The format of EYIEL's regular section on regional developments in this volume deviates from the formats of previous issues. Instead of adopting a more or less geographical perspective, we decided to focus on the current negotiations and adoption of megaregional and plurilateral agreements. In order to capture more than one perspective, we also invited different authors to contribute short and thought-provoking insights on various aspects of these negotiations.

The first three contributors address the Trans-Pacific Partnership (TPP) which has been finalised in October 2015. *Meredith Kolsky Lewis* clarifies the political economy dynamics in the United States with respect to the TPP, focusing on the

necessity of a Trade Promotion Authority (TPA) and internal political dynamics impacting support for, or opposition to, the TPP. *Henry Gao* discusses the TPP's potential implications for China arguing that the biggest challenge to China is the regulatory coherence issue. *Bryan Mercurio* broadens the perspective and highlights further potential effects of TPP on trade relations in East Asia, including the aim of the Association of Southeast Asian Nations (ASEAN) to reach deeper regional integration and Taiwan's status as an economic entity and participation in regional trade agreements.

From TPP we move to its transatlantic sister, the Transatlantic Trade and Investment Partnership (TTIP). *Jan Kleinheisterkamp* and *Lauge Poulsen* focus on investor-state dispute settlement in that agreement and argue that in order to avoid losing support for the agreement as a whole, the parties now need to think about alternatives. Observing the developments on the other side of the Atlantic, *Simon Lester* argues that TTIP could 'smooth out' regulatory differences between the United States and the European Union and move the parties towards a single market. In his view, this requires a careful balancing of economic efficiency and national autonomy. *Charlotte Sieber-Gasser* provides us with a Swiss and hence outsider perspective on TTIP. She shows that TTIP may have considerable economic implications for Switzerland which trigger a number of legal questions concerning the democratic legitimization of the foreign policy options of Switzerland. The reflections on TPP and TTIP are complemented with observations by *Azwimpheleli Langalanga* and *Peter Draper* on the impact of these agreements on economies in sub-Saharan Africa. They ask how African countries are responding to these megaregionals and discuss various potential strategies.

Even though TPP and TTIP are the most contentious megaregional negotiations, there are other initiatives in other parts of the world which also deserve close attention. *Vincent Angwenyi* highlights the largest free trade agreement in Africa, the Tripartite Free Trade Agreement which was signed on 10 June 2015. It combines three regional economic communities in Africa: the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and the Southern African Development Community (SADC). While the Tripartite FTA presents an opportunity to set in motion the establishment of a continental FTA and the eventual establishment of an African Economic Community, there are considerable challenges that need to be overcome before the Tripartite FTA can be actualised. *Emmanuel Opoku Awuku* offers a more general overview of the perspectives of developing and least-developed countries on megaregional agreements. Finally, *Billy A. Melo Araujo* provides us with an analysis of the state of play of the plurilateral negotiations on the Trade in Services Agreement (TiSA). In particular, he describes the extent to which TiSA can go beyond the current GATS framework and examines the compatibility of TiSA with WTO law.

3 Institutions and Book Reviews

This EYIEL volume is completed with our regular section on international economic institutions. *Jan Bohanes*, *Alejandro Sánchez* and *Alexandra Telychko* present an overview of WTO case law in the last year. *Catharine Titi* summarises recent developments in international investment law and investment arbitration case law. *Ludwig Gramlich* traces current activities of the International Monetary Fund (IMF) such as surveillance under Art. IV and various forms of financial and technical assistance. *Elisabeth Tuerk* and *Diana Rosert* outline UNCTAD's activities with regard to reforming the international investment agreement regime, in particular UNCTAD's action menu for reforming the international investment regime, as put forward in the World Investment Report 2015. *Carsten Weerth* looks at recent developments within the World Customs Organization (WCO).

Our book reviews cover *Culture and International Economic Law* (Valentina Vadi and Bruo de Witte, eds) reviewed by *Walther Michl*, *Rule of Law in International Monetary Law* (Thomas Cottier, Rosa M. Lastra and Christian Tietje, eds) reviewed by *Alexander Thiele*, *Improving the International Investment Law and Policy Regime: Options for the Future, Columbia 2013* (Karl P. Sauvant and Federico Ortino, eds) reviewed by *Julien Chaisse*, *Public Policy in International Economic Law: The ICESCR in Trade, Finance, and Investment* (Diane Desierto) reviewed by *Kholofelo Kugler* and *Investor-Staat-Schiedsverfahren nach Europäischen Unionsrecht, Zulässigkeit und Ausgestaltung in Investitionssabkommen der Europäischen Union* (Juliane Ahner) reviewed by *Till Patrik Holterhus*.

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