

Transatlantic trade agreements and adjudication without ‘protection of citizens’ and their fundamental rights?

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Executive Summary

> The EU Charter of Fundamental Rights (EUCFR) is an integral part of EU law constituting, limiting, regulating and justifying EU powers and their exercise, including trade policy powers and EU free trade agreements.

> The EUCFR protects fundamental rights, democracy, ‘public reason’, democratic support and legitimacy of the EU, the rule of law and other public goods also in the trade policy area.

> The EU-Canada Comprehensive Economic and Trade Agreement and the Transatlantic Trade and Investment Partnership risk dis-empowering citizens, undermining their fundamental rights and judicial remedies, and ‘re-fragmenting’ international investment law.

> EU citizens rightly challenge the disregard by EU institutions for the Lisbon Treaty’s ‘cosmopolitan foreign policy mandate’ for external EU trade and investment policies and EU trade agreements.

> Rather than exercising EU leadership for citizen-oriented reforms of trade and investment agreements, EU institutions emulate power-oriented foreign trade policies by excluding rights of citizens under free trade agreements so as to limit their own legal, democratic and judicial accountabilities vis-à-vis citizens.

> The potential welfare gains and ‘geopolitical importance’ of transatlantic free trade agreements justify civil society struggles against a ‘re-feudalization’ of EU powers.

The Brexit referendum of June 2016 and the persistent debt, economic, migration, refugee, rule-of-law crises and foreign policy challenges of the European Union (EU) entail increasing distrust of citizens in its problem-solving capacities and democratic legitimacy. The EU’s

disregard for the ‘protection of citizens’ (Article 3 TEU) and of their fundamental rights in the negotiations of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) and the Transatlantic Trade and Investment Partnership (TTIP) illustrates another failure to respect the EU’s constitutional mandate. In order to restore citizens’ trust in the EU and strengthen civil society support for welfare-enhancing trade regulation, the EU must keep its promise of concluding ‘transformative free trade agreements’ (FTA) that empower citizens in the collective supply of public goods in conformity with EU guarantees of fundamental rights, democratic governance, conferral of limited powers, subsidiarity, rule of law, and legal, democratic and judicial accountability of multilevel governance institutions. Judicial rights and remedies of citizens – as protected by the EUCFR – are a ‘republican strength’ of the EU, even if European courts impose legal limits on EU foreign policy discretion and force EU negotiators to insist on foreign policy reforms protecting rights of citizens by annulling EU foreign policy measures (for instance, on ‘smart sanctions’ against alleged terrorists, private data transfers violating Articles 7 and 8 EUCFR). This Policy Brief criticizes the EU negotiations of transatlantic FTAs for disregarding fundamental rights of citizens and provoking civil society opposition, which impedes the potential welfare gains of FTAs.

Transatlantic agreements without rights of citizens?

EU citizens criticize the EU negotiations of transatlantic FTAs for disregarding ‘constitutional principles’ of EU law:

First, EU law requires taking ‘decisions as openly as possible and as closely as possible to the citizen’ (Articles 1, 10 TEU). But the EU negotiates FTAs in non-transparent ways far away from citizens. In the EU’s

2014 ‘public consultation’ on transatlantic investment rules, the criticism by EU citizens illustrated how democratically inclusive treaty negotiations can prompt re-negotiations of intergovernmental treaty drafts so as to better protect ‘public interests’ (for instance in investment adjudication). Even though EU trade policies have recently become more transparent, EU citizens have reasons to reject the current CETA and TTIP texts on legal and democratic grounds.

Second, the Union ‘is founded on respect for human rights’ and requires ‘protection of its citizens’ and of their rights also in external relations (Articles 2, 3 TEU). Yet, in contrast to FTAs among European countries, CETA provisions cannot be invoked in the domestic legal systems. They do not confer rights on citizens (Article 30.6 CETA). This undermines the ‘right to an effective remedy’ for ‘everyone’ (Article 47 EUCFR) against harmful EU market regulations. The EU has failed to meet its legal duty (for instance pursuant to Article 52 EUCFR) to justify how such ‘anti-citizen clauses’ could be necessary for ‘protection of citizens’ (Article 3 TEU). As ‘the Union is founded on the rule of law’, ‘strict observance of international law’ and ‘consistency’ of internal and external market regulations are prescribed also for EU external relations, without conferring EU powers to violate international treaties approved by parliaments for the benefit of EU citizens (Articles 2, 3, 21 TEU). Yet, preventing citizens from invoking FTAs in domestic courts and offering foreign investors arbitration privileges (Articles 8.18, 30.6 CETA) distort and undermine citizen-driven rule-of-law based on equal access to justice.

Third, the EU principles of constitutional, representative, participatory and deliberative democracy (Articles 9-12 TEU) protect the right of ‘every citizen to participate in the democratic life of the Union’. Yet, the fundamental rights of ‘everyone’ protected by the EUCFR – such as ‘freedom to conduct a business in accordance with Union law’ (Article 16), property rights (Article 17), access to justice (Article 47) and to ‘necessity’ and ‘proportionality’ of restrictions (Article 52) – are neither mentioned nor protected in transatlantic FTAs.

Fourth, EU law requires to ‘ensure consistency’ of internal and external market regulations as well as among the ‘different areas of external action’ (Article 21 TEU). The effectiveness of EU common market law was due to its citizen-driven, decentralized enforcement. Equally, FTAs with other European countries can be invoked and enforced by citizens in domestic courts. The

‘disempowerment’ and discrimination of EU citizens in transatlantic relations runs counter to the EU’s promise of ‘transformative transatlantic FTAs’ that can limit the long-standing market and governance failures in transatlantic markets, which gave rise to numerous transatlantic disputes over the past decades.

Contrary to claims by some EU trade politicians, the EU principles of conferral, subsidiarity and proportionality (Article 5 TEU) constitutionally constrain the exercise of all EU powers, including trade policy powers. From this constitutional perspective, EU citizens rightly criticize the disregard by EU institutions for the EU’s ‘cosmopolitan foreign policy constitution’. Utilitarian economic evaluations (for example the promotion of general consumer welfare through FTAs) remain uncertain. They justify neither EU power politics vis-à-vis citizens nor violations of EU law such as via discriminatory tax exemptions for US investors in Ireland. In order to realize the EU treaty mandates of ‘strict observance of international law’ and of legal, democratic and judicial protection of fundamental rights of citizens, the EU must insist that FTAs among transatlantic democracies – like FTAs among European states – protect fundamental rights to hold multilevel governance institutions legally, democratically and judicially accountable. Just as the EU has adjusted its FTAs to constitutional needs of European democracies (like the Swiss referendum against joining the EEA Agreement), the different constitutional traditions in North America may justify adjusting FTAs to different constitutional contexts. For instance, the lack of constitutional protection of private property in Canada may justify international investment protection.

Transatlantic investor-state arbitration risks undermining fundamental rights

Civil society opposition against transatlantic FTAs rightly criticizes interest-group politics as illustrated by legal and judicial privileges for foreign investors. The universal recognition of ‘inalienable’ human rights by all United Nations member states entails that state-centred conceptions of ‘international law among sovereign states’ must be limited by democratic and cosmopolitan conceptions of ‘international law among peoples’ and citizens insisting on legal obligations of multilevel governance institutions to respect, protect and fulfil fundamental rights in non-discriminatory ways. The more globalization transforms *national* into *transnational* ‘aggregate public goods’ (like human rights, rule of law, monetary, trading, investment,

environmental, communications and security systems) that no state can protect unilaterally without international law and multilateral institutions, the more human rights and foreign policy powers entail multilevel governance obligations to protect corresponding public goods (as specified in Articles 207 and 208 TFEU for the EU trade and development policies). The EU initially presented transatlantic FTAs as ‘transformative agreements’ aimed at limiting the persistent ‘market failures’, ‘governance failures’ and numerous transatlantic disputes in the context of the ‘Transatlantic Partnership’ since the 1990s. The civil society opposition against the proposed investment rules illustrates why citizens distrust interest-group politics disregarding rights and remedies of citizens. Three examples illustrate this:

First, just as the transnational rule of law and market integration inside Europe were promoted through citizen-driven, decentralized enforcement of common market rules and FTAs, so does non-discriminatory access of all affected citizens to domestic judicial remedies offer more effective enforcement mechanisms than transnational investor-state arbitration and related ‘negative discrimination’ of other citizens, which unnecessarily limit ‘participatory democracy’, rule of law and fundamental rights in violation of Articles 52, 54 EUCFR. The EU proposal for a new ‘investment court system’ envisages a few procedural improvements, for instance regarding the choice and composition of judges, public procedures, appellate review; but they offer no justification of why exclusion and ‘negative discrimination’ of EU citizens in international investment arbitration can be preferable over non-discriminatory access of all citizens and investors to domestic and EU courts, which are more independent and more constitutionally constrained and can offer more impartial and effective remedies.

Second, in Opinions 1/2009 (European Patent Court) and 2/2013 (European Convention on Human Rights), the EU Court of Justice (CJEU) emphasized the constitutional prohibition of unnecessarily limiting the EU guarantees of interpreting and protecting fundamental rights within the particular structures and restraints of EU law. A 2016 opinion by the German Association of Judges inferred from this jurisprudence as well as from EU and German constitutional law that the CETA limitations of the jurisdiction of national and EU courts for investor-state disputes are neither necessary nor consistent with EU law in view of the alternative of more effective and comprehensive legal and judicial remedies in European courts. The legal

admissibility of ‘negative discrimination’ of EU investors inside the EU is likewise contested in a pending CJEU dispute.

Third, the broad definition of the ‘applicable law’ in Article 42 of the World Bank Convention on the Settlement of Investment Disputes between States and Nationals of other States illustrates that investor-state arbitration involves all three dimensions of international investment law: national laws, investor-state contracts, and international law rules applicable in the relations among the home and host states involved. The EU proposals for new FTA investment rules ‘re-fragment’ these complex interactions among the interdependent ‘three levels of investment regulation’ and related adjudication; they risk harming investors and the rule of law, for instance if EU investors cannot invoke FTA guarantees in domestic courts and fundamental rights cannot be invoked in investment courts (Article 8.18 CETA). CETA’s new investment court system is no model for reforming international law and protecting citizens.

Transatlantic adjudication: in whose name and for the protection of whose rights?

EU trade negotiators claim that – just as Canadian and US citizens cannot challenge violations of FTA rules in domestic courts – EU institutions should, likewise, not be held legally and judicially accountable in domestic courts for violating FTAs. Yet EU law does not authorize trade negotiators to use FTAs to curtail European constitutional law and judicial remedies of citizens in order to limit the judicial accountability of EU institutions. EU citizens and parliaments must challenge ‘Westphalian paradigms’ of ‘international law among states’ and related ‘intergovernmental power politics’ as being inconsistent with the fundamental rights of EU citizens as ‘constituent powers’ and ‘democratic principals’ of EU governance agents. The constitutional limits of EU powers require the EU to protect citizens and peoples as democratic ‘agents of justice’ responsible for holding multilevel governance institutions accountable for ‘strict observance of international law’ (Article 3 TEU) and of treaties approved by parliaments for protecting international public goods for the benefit of citizens. EU and North American power politics in transatlantic FTA negotiations are a missed opportunity for strategic leadership aimed at reforming the ‘disconnected UN/World Trade Organization governance’ through ‘cosmopolitan FTAs’ among transatlantic democracies.

Similar to the replacement of GATT by the 1995 WTO Agreement, there is a need for limiting the intergovernmental WTO power politics by a more citizen-oriented world trading system, possibly based on a future merger of mega-regional FTAs.

The universal recognition of human rights also calls for replacing the ‘Westphalian paradigm’ of justifying international adjudication through the consent of states by a ‘democratic paradigm’ of justifying international adjudication in the name of citizens and peoples. Among democracies, national treatment and impartial settlement of transnational economic disputes in domestic courts is more in conformity with the ‘principle of subsidiarity’ (Article 5 TEU) and equal remedies of all EU citizens affected by FTA rules than judicial privileges for foreign investors. The EUCFR requires the EU to ‘place the individual at the heart of its activities’ (Preamble). Why do transatlantic FTAs not confirm that their primary objective must be to strengthen the rights and general consumer welfare of all citizens through trade liberalization and regulation of

related market failures and governance failures that have distorted transatlantic trade for decades? Beyond the judicial settlement of disputes, (trans)national courts have additional legal functions, such as clarifying indeterminate treaty provisions, controlling abuses of power, and protecting rights of citizens to hold multilevel governance institutions accountable through constitutional, participatory and deliberative democracy, as prescribed in Articles 9-12 TEU. EU citizens rightly insist that outsourcing transatlantic disputes to ‘private’ or ‘diplomatic justice’ is not a legitimate policy option for the EU. Empowering EU citizens will not only strengthen the EU capacity of concluding FTAs that are then also democratically supported by those same citizens. ‘Cosmopolitan FTAs’ among democracies also meet the EU’s obligation under Article 21 TEU to ‘advance in the wider world’ the republican insight underlying European integration that multilevel governance of transnational public goods requires multilevel legal and judicial protection of equal rights of citizens.

Further Reading

Petersmann, E.-U., “The EU’s Cosmopolitan Foreign Policy Constitution and its Disregard in Transatlantic Free Trade Agreements”, *European Foreign Affairs Review* (forthcoming, December 2016).

Petersmann, E.-U., *Multilevel Constitutionalism for Multilevel Governance of Public Goods. Methodology Problems in International Law*, Oxford, Hart Publishing, 2016.

This Policy Brief emerged from a recent symposium on “The TTIP - Transatlantic Trade and Investment Partnership Issues & Perspectives for International Commercial Law?”, held on 15 April 2016 at the College of Europe in Bruges.

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