EU Constitutional Law as Restraint for EU Trade and Investment Agreements: The Example of CETA and Investor-State Dispute Settlement

Ernst-Ulrich Petersmann*

Abstract

The civil society protests against EU free trade agreements (FTAs) and investment arbitration reflect the failure of EU institutions to take “decisions as openly as possible and as closely as possible to the citizen” (Article 1 TEU) and to protect the rights of citizens also in external market regulations (Articles 3, 21 TEU). The less EU institutions comply with the legal requirements (e.g. in Articles 2, 9–12 TEU) of protecting constitutional, representative, participatory and deliberate democracy also in external market regulations, the less parliamentary approval of secretly negotiated FTAs guarantees democratic legitimacy and consistency of FTAs with EU constitutional law. Fundamental rights limit all EU governance powers, including trade and investment policy powers of the EU. The disregard for fundamental rights and judicial remedies of citizens in FTAs concluded by the EU with third countries is neither necessary nor justifiable in terms of Article 52 of the EU Charter of Fundamental Rights. Transatlantic FTAs on multilevel market regulation and protection of public goods should be designed as ‘democratic law’, which citizens are entitled to invoke and enforce in domestic jurisdictions as integral parts of EU law.

* Emeritus Professor of international and European law and former head of the Law Department of the European University Institute at Florence (Italy); ulrich.petersmann@eui.eu. This contribution summarizes my presentation in the conference convened by the European Society of International Law on The Role of the European Parliament in the Conclusion and Implementation of International Agreements on International Economic Law, held on 9 December 2016 in the European Parliament in Brussels.

Intergovernmental vs ‘Network Governance’ of Public Goods: Democratic Distrust of ‘Eurocracy’

Even more than before, globalisation transforms national public goods such as human rights, rule of law and democratic governance of mutually beneficial monetary, trading, environmental and security systems into transnational public goods (PGs). In response to the universal recognition of human rights and of global information and communication systems, the power-oriented, intergovernmental ‘chessboard governance’ (e.g. in UN/WTO institutions) and its ‘disconnect’ from citizens and democratic control are increasingly challenged, for instance by citizen-driven ‘network governance’. The latter can threaten international PGs (e.g. in case of security threats by networks of terrorists, criminal drug and migration cartels, cyber-criminals).

Yet, network governance offers efficient and legitimate ways of transforming power-oriented ‘international law among sovereign states’ into more inclusive, rules-based ‘democratic law’ empowering sub-state actors such as workers in international labour law, companies in international commercial and investment law, cities in climate change prevention agreements, individual victims in international criminal law, every human being in human rights law, and supranational actors such as EU membership in WTO agreements, parliamentary bodies in regional integration agreements, regional courts in human rights and economic agreements, to collectively protect transnational PGs.1

Empirical evidence confirms that – just as democracies tend to constrain (e.g. by civil and political rights and remedies of citizens) abuses of power in ‘political markets’ and related ‘governance failures’ more effectively than nondemocratic polities – also ‘economic markets’ are legal constructs; their undistorted functioning depends on equal rights and remedies of citizens, such as economic freedoms and property rights (e.g. as protected by Articles 15–17 EUCFR), equality and solidarity rights (cf. Articles 20–38 EUCFR), and other citizen rights and judicial remedies (cf. Articles 39–50 EUCFR) to challenge ‘market failures’ as well as ‘governance failures’ in multilevel supply of PGs like the rule of law protected by rights and remedies of citizens, open market competition protected by rights-based competition law, and public health protected by rights-based health regulations.