

Democratic Legitimacy and the TTIP Agreement

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What does democratic legitimacy of TTIP require?

- ***Democracy*** is a ‘high-flown name for something that does not exist’; it lacks a ‘mainstream theory of democracy’ (Sartori, 1987), eg EU-USA
- **EU LAW** confirms that constitutional, parliamentary, deliberative and participatory democracy have become ‘multilevel’ (cf Arts 9-12 TEU) > they must complement each other in order to protect effectively the basic democratic values of individual + democratic autonomy and public goods demanded by citizens (eg human rights).
- **UN LAW** recognizes democracy > citizens and peoples as holders of ‘constituent powers’ delegating only limited ‘constituted powers’ subject to ‘inalienable’ rights of citizens, including democratic rights and ‘access to justice’ > ‘constitutional pluralism’ > Article 28 UDHR.
- **Governments resist ‘constitutionalization’** protecting rights of citizens in multilevel UN/WTO governance. Also **EU EXECUTIVES** fail to comply with Art 21 TEU in CCP and to protect economic freedoms and rule of law in conformity with WTO/FTA rules (Arts 16, 47 CFR).
- **METHODOLOGY:** Distinguish democratic legitimacy of (1) *negotiation*, (2) *conclusion* and (3) *implementation* of TTIP from (a) EU law perspective and (b) from different US constitutional perspective.

(1) Are TTIP/CETA *negotiations* democratically legitimate?

- **The EU treaty-making procedures (eg in Arts 207, 218 TFEU) reflect ‘representative democracy’ (Art.10 TEU). Yet, non-inclusive rule-making, broad regulatory scope + exclusion of citizen rights (Art.14.16 CETA) make FTAs more dangerous than other democratic legislation.**
- **FTA negotiations do not take ‘decisions as openly and as closely as possible to the citizen’ (Art. 10 TEU); citizens > ignorant, no rights.**
- **Are consultations among EU institutions (eg TPC),**
 - **reporting to TPC and EP/INTA,**
 - **‘stakeholder meetings’ with NGO representatives,**
 - **late publication of TTIP negotiation directives (Oct 2014), negotiation positions and of CETA text (Sept 2014) after 5 years of negotiations,**
 - **press conferences and selective EU website information democratically sufficient (eg in terms of Article 21 TEU)? No: ‘disfranchisement’ of citizens (eg Art. 14.16 CETA) runs counter to Art.21 TEU and CFR.**
- **EU EXECUTIVES prioritize rights of governments over rights of citizens (eg EU ‘freedom of manoeuvre’ to violate international law; no FTA rights of EU citizens pursuant to Arts 16 and 43 CFR). Is non-inclusive legislation without rights of citizens ‘democratic’?**

(2) Is TTIP/CETA *conclusion* democratically legitimate?

- **Consent by EP, conclusion by Council - approval also by 28 national parliaments as ‘mixed agreements’?**
- **Do complexity and non-inclusive negotiation of TTIP/CETA justify 2-3 years of delay in order to promote constitutional, ‘deliberative’ and ‘contestatory democracy’? Is Commission’s warning of parliaments not to request re-negotiation (eg of ISDS) democratic?**
- **Does content of TTIP/CETA ‘place the individual at the heart of its activities’ (Preamble CFR)? Why does CETA focus on rights of governments (cf Art 14.16 CETA) without protecting rights of citizens and legal/judicial accountability to citizens? Is such ‘re-feudalization of EU law’ in the interest of citizens and consistent with ‘democratic constitutionalism’ and democratic protection of public goods?**
- **UN and WTO governance failures confirm the historical experience that ‘intergovernmental feudalism’ cannot protect transnational ‘aggregate public goods’ without direct protection of individual rights in domestic legal systems. Will CETA/TTIP undermine individual rights (eg in domestic ISDS) and rule of law (eg ‘consistent interpretations’) to the detriment of constitutional democracy?**

(3) Democratic *implementation* of TTIP/CETA?

- **EU practice confirms that public goods (*res publica*) require republican constitutionalism. Prioritization of rights of governments over rights of citizens risks undermining public goods (eg Art 3 TEU: ‘strict observance of international law’ for the benefit of citizens rather than arbitrary EU violations of UN/WTO and EMU rules).**
- **‘Constitutionalism’ explains why *transnational* public goods (like a transatlantic common market) cannot be protected without cosmopolitan rights empowering citizens to challenge abuses of power (eg through antitrust law). ‘Cosmopolitan constitutionalism’ (eg as in EEA and required by Art 21 TEU) could render TTIP/CETA more effective, legitimate and accountable towards citizens; it could also promote**
- **‘cosmopolitan democracy’ holding UN/WTO power politics more accountable by protecting democratic governance of international public goods for the benefit of citizens and their constitutional rights.**
- **Constitutional problem: How can citizens protect themselves against ‘intergovernmental feudalism’ prioritizing the self-interests of governments (eg in limiting their democratic, legal and judicial accountability towards citizens) at the expense of rights of citizens?**

Two Conclusions (1): Time for citizens and parliaments to challenge intergovernmental power politics

- **The inadequate parliamentary control of intergovernmental treaty-making must be compensated by constitutional, participatory and ‘deliberative democracy’. Like other democratic legislation, FTAs must protect rights of citizens and transnational rule of law (eg based on ‘consistent interpretations’). ‘Democratic constitutionalism’ (= empowering citizens and holding governments accountable by constitutional rights) remains the most effective governance method for supplying public goods demanded by citizens > Art. 21 TEU requires promoting it also in citizen-oriented FTAs/CCP.**
- **As TTIP/CETA aim at replacing large parts of EU law, citizens and parliaments should challenge ‘un-democratic disfranchisement’ of rights of citizens as economic agents and ‘agents of justice’ (eg effective legal and judicial remedies pursuant to Article 47 EU CFR). The prioritization of rights of governments over equal rights of citizens in the EU’s CCP has failed to protect int’l public goods like ‘strict observance of international law’ (Art. 3 TEU) and constitutional rights of citizens. FTAs cannot protect transatlantic public goods without ‘cosmopolitan constitutionalism’ (eg in antitrust and social law).**

(2) Two propositions for renegotiating FTAs

- Replace the ‘anti-citizen clause’ (Article 14.16 CETA) by: ‘This Agreement aims at placing EU and Canadian (US) citizens at the heart of CETA (TTIP) by protecting and strengthening their rights and rule of law in transatlantic cooperation, including rights under the EU Charter of Fundamental Rights.’**
- Replace the ISDS provisions by the following: ‘In order to protect rule of law and strengthen equal rights of access to justice in conformity with their common constitutional traditions, the parties to this Agreement establish the Transatlantic Common Market Court, which shall provide effective legal remedies and rule on actions by a party to this Agreement, an institution, or a natural or legal person pursuant to the rules agreed upon in Annex ‘**
- Both provisions would demonstrate that the CETA *Preamble* reference to ‘human rights and the rule of law’ is not mere ‘lip-service’ and could be used by courts of justice for protecting individual rights. A ‘cosmopolitan TTIP’ could also help to transform WTO power politics by protecting rights of citizens.**