Applications for a Preliminary Injunction in the “CETA” Proceedings Unsuccessful

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Reference: 2 BvR 1368/16, 2 BvR 1444/16, 2 BvR 1823/16, 2 BvR 1482/16, 2 BvE 3/16

In its judgment pronounced today, the Second Senate of the Federal Constitutional Court rejected several applications for a preliminary injunction directed against the approval by the German representative in the Council of the European Union of the signing, the concluding and the provisional application of the Comprehensive Economic and Trade Agreement (CETA), which the Council of the European Union is expected to decide upon on 18 October 2016. The Federal Government must, however, ensure,

- that a Council decision on provisional application will only apply to those parts of CETA that lie indisputably within the scope of the competences of the European Union,

- that until the Federal Constitutional Court renders a decision in the principal proceedings, sufficient democratic legitimacy with regard to the decisions of the CETA Joint Committee is ensured, and

- that the interpretation of Art. 30.7 sec. 3 lit. c CETA allows Germany to unilaterally terminate the provisional application.

If these conditions are complied with, there are no significant disadvantages for the rights of the applicants, nor for the participation rights of the German *Bundestag*, that would make the issuance of a preliminary injunction necessary in the context of a weighing of consequences [comparing the consequences of the issuance of the preliminary injunction with those of non-issuance].

Facts of the Case:

In April 2009, the Council of the European Union authorised the European Commission to open negotiations with Canada on an economic and trade agreement. The Agreement was to further strengthen the common purpose of the mutual successive liberalisation of practically all areas of trade in goods and services, and of establishment, as well as to ensure and facilitate the compliance with international environmental and social agreements. Upon conclusion of the negotiations, the European Commission submitted a Proposal to the Council of the European Union in July 2016 to authorise the signing of CETA, to declare it provisionally applicable until the procedures required for its conclusion are completed, and to conclude the Agreement.

Applicants nos. I.- IV. essentially claim that a decision by the Council of the European Union authorising the signing of CETA, its provisional application, and the conclusion of the Agreement, violates their rights under Art. 38 sec. 1 in conjunction with Art. 79 sec. 3 and Art. 20 secs. 1 and 2 of the Basic Law (*Grundgesetz* – GG). In the *Organstreit* proceedings (dispute between constitutional organs), the parliamentary group DIE LINKE of the German *Bundestag* asserts, in a representative action on behalf of the German *Bundestag*, the latter’s right to legislative discretion under Art. 23 sec. 1 sentence 2 in conjunction with Art. 59 sec. 2 GG.

Key Considerations of the Senate:

The admissible applications are unfounded.

1. The Federal Constitutional Court may provisionally decide a matter by way of a preliminary injunction if this is urgently required to avert severe disadvantage, prevent imminent violence or for other important reasons in the interest of the common good (§ 32 sec. 1 Federal Constitutional Court Act – *Bundesverfassungsgerichtsgesetz* – BVerfGG). In assessing whether the requirements of § 32 sec. 1 BVerfGG are fulfilled, it must generally apply a strict standard. This standard is even stricter when the measures involved have implications for international law or for foreign policy. The prospects of success in the principal proceedings are not to be taken into account, unless the declaration sought, or the

application made, in the principal proceedings is inadmissible from the outset or clearly unfounded. In case the outcome of the principal proceedings cannot be foreseen, the Federal Constitutional Court must weigh the consequences.

2. Irrespective of the outstanding questions whether the constitutional complaints and the *Organstreit* proceedings are admissible and well-founded, the applications for a preliminary injunction are without success on the basis of the required weighing of the consequences.

3. If the preliminary injunction were issued yet the Federal Government's participation in passing the decision of the Council on the provisional application of CETA is later found to have been constitutionally permissible, the probability is high that the general public would suffer severe disadvantages.

a) In fact, the substantial consequences of even a preliminary, but certainly of an ultimate, failure of CETA would be more political than economic. A preliminary injunction preventing the Federal Government's approval of the provisional application of CETA would significantly interfere with the – generally broad – legislative discretion of the Federal Government in the fields of European, foreign and foreign economic policy. In a similar manner, this would also be true with regard to the European Union. The failure of CETA – even if only preliminary – would not only impair the external trade relations between the European Union and Canada, but also have far-reaching effects on the negotiation and conclusion of future external trade agreements. Thus, it seems evident that the issuance of a preliminary injunction would have a negative effect on European external trade policy and the international status of the European Union in general. The probability is high that the disadvantages stemming from the issuance of a preliminary injunction followed by a lack of success in the principal proceedings would be irreversible. The anticipated loss in reliability on the part of the Federal Republic of Germany – as the initiating force behind such a development – and on the part of the European Union overall could have lasting negative effects for the scope of action and decision-making of all European players in the shaping of global trade relations.

b) Compared with this, the disadvantages arising from the non-issuance of a preliminary injunction with the subsequent finding that the Federal Government's participation in the passing of the decision by the Council was impermissible are less severe. CETA does indeed contain provisions that could qualify the decision of the Council on the provisional application as an *ultra-vires* act in the principal proceedings. An encroachment on the constitutional identity protected under Art. 79 sec. 3 GG can also not be ruled out.

aa) However, the Federal Government has stated that by means of the final version of the Council decision in dispute and by means of its own corresponding declarations (Art. 30.7 sec. 3 lit. b CETA), exceptions to the provisional application can be made that at least result in ensuring that the upcoming Council decision on the provisional application of CETA should not qualify as an *ultra-vires* act. To the extent that these reservations suffice, any concerns regarding how the provision in question affects constitutional identity should be dispelled. Moreover, the Federal Government has made it clear that it will only lend approval in the Council to those parts of CETA that lie beyond doubt within the competences attributed to the European Union under primary law. According to its submission, it will not approve the provisional application for areas that remain subject to the competence of the Federal Republic of Germany. This affects, in particular, the provisions on investment protection, including the dispute settlement system (Chapters 8 and 13 CETA), on portfolio investments (Chapter 8 and 13 CETA), on international maritime transport (Chapter 14 CETA), on the mutual recognition of professional qualifications (Chapter 11 CETA) and on labour protection (Chapter 23 CETA).

bb) Any encroachment on the constitutional identity (Art. 79 sec. 3 GG) brought about by the system of committees' competences and procedures can – in the context of the provisional application at any rate – be countered in various ways. An inter-institutional agreement, for example, might ensure that decisions taken by the CETA Joint Committee pursuant to Art. 30.2 sec. 2 CETA may only be passed on the basis of a common position (Art. 218 sec. 9 TFEU) unanimously adopted by the Council.

cc) If, contrary to the assumption of the Senate, the Federal Government should not be able to, or foreseeably will not be able to, undertake the courses of action it had proposed in order to avoid a potential *ultra-vires* act or a violation of the constitutional identity of the Basic Law (Art. 79 sec. 3 GG), it has, as a final resort, the possibility of terminating the provisional application of the Agreement for the Federal Republic of Germany by means of written notification (Art. 30.7 sec. 3 lit. c CETA). This interpretation of the norm, however, does not appear to be authoritative. However, the Federal Government has stated that it is correct. It must therefore declare, in a manner that has bearing in international law, that this is its understanding and notify the other parties to the Agreement accordingly.