FEDERAL CONSTITUTIONAL COURT

- 2 BvR 1368/16 -

- 2 BvR 1444/16 -

- 2 BvR 1482/16 -

- 2 BvE 3/16 -

Pronounced
on 13 October 2016
Fischböck
Amtsinspektorin
as Registrar
of the Court Registry

IN THE NAME OF THE PEOPLE

In the proceedings

I. on the constitutional complaint

of Prof. Dr. rer. nat. B(…),

– authorised representative: Prof. Dr. Karl Albrecht Schachtschneider,
Leibnizstraße 28, 13469 Berlin –

against 1. approval by the Federal Republic of Germany, by means of the competent member of its Government, of the free trade agreement between the European Union and Canada (Comprehensive Economic and Trade Agreement – CETA) and its approval of the provisional application of this Agreement in the Council of the European Union,

2. in case the Federal Constitutional Court holds that the decisions of the Council of the European Union do not require the approval of all Member States, and thus do not require the approval of Germany, against the Federal Government's failure to take the necessary measures to prevent the adoption of the Comprehensive Economic and Trade Agreement and the provisional application of the Agreement by means of a decision of the Council of the European Union, in particular to bring an action against the European Union before the Court of Justice of the European Union to clarify whether CETA, and also its provisional application, are in violation of the Treaties

here: application for a preliminary injunction

– 2 BvR 1368/16 –,

II. on the constitutional complaints

of Ms G(...),

and 68,015 other complainants,

– authorised representatives: 1. Prof. Dr. Andreas Fisahn,
Grüner Weg 83, 32130 Enger,

2. Prof. Dr. Martin Hochhuth,
Kaiser-Joseph-Straße 268, 79098 Freiburg –

against 1. the approval of CETA by the Federal Government in the Council of the European Union or the European Council,

2. alternatively, the approval of CETA by the European Union,

3. the approval of CETA by the *Bundestag*

here: application for a preliminary injunction

– 2 BvR 1444/16 –,

III. on the constitutional complaints

of Mr A(...),

and 62 other complainants,

– authorised representative: Prof. Dr. Andreas Fischer-Lescano, LL.M. –

against 1. the failure by the German representative in the Council of the EU to reject the adoption of CETA, which is being sought by the Commission, and to reject the authorisation of the President of the Council to conclude CETA on behalf of the EU, which is also being sought by the Commission,

2. the failure by the German representative in the Council of the EU to reject the provisional application of CETA, which is being sought by the Commission on behalf of the EU

here: application for a preliminary injunction

– 2 BvR 1482/16 –,

IV. on the constitutional complaints

1. of Mr H(…),

2. of Mr B(...),

3. of Dr. K(…),

and 125,009 other complainants,

– authorised representatives: 1. Prof. Dr. Bernhard Kempen,
Rheinblick 1, 53424 Oberwinter,

2. Prof. Dr. Wolfgang Weiß,
Sep-Ruf-Straße 33, 90480 Nürnberg

against the failure by the German
representative in the Council to reject these Council decisions

here: application for a preliminary injunction

– 2 BvR 1823/16 –,

and

V. on the application for a ruling in *Organstreit* proceedings to the effect that the respondent

1. violates the Basic Law and European law, and thus rights of the German *Bundestag*, through the failure by the German representative in the Council of the EU to reject the adoption of the Comprehensive Economic and Trade Agreement (CETA), which is being sought by the Commission, and through the authorisation of the President of the Council to conclude
CETA on behalf of the EU, which is also being sought by the Commission,

2. violates the Basic Law and European law, and thus rights of the German *Bundestag*, through the failure by the German representative in the Council of the EU to reject the provisional application of CETA, which is being sought by the Commission on behalf of the EU

Applicant: Parliamentary group DIE LINKE in the German *Bundestag*,
represented by chairpersons Dr. Dietmar Bartsch and Dr. Sahra Wagenknecht,
Platz der Republik 1, 11011 Berlin,

– authorised representative: Prof. Dr. Andreas Fischer-Lescano, LL.M. –

Respondent: The Federal Government,
represented by the Federal Chancellor Dr. Angela Merkel,
Bundeskanzleramt, 10557 Berlin,

– authorised representative: Prof. Dr. Franz Mayer, LL.M.,
Lettestraße 3, 10437 Berlin –

here: application for a preliminary injunction

– 2 BvE 3/16 –

the Federal Constitutional Court – Second Senate –

with the participation of Justices:

President Voßkuhle,

Huber,

Hermanns,

Müller,

Kessal-Wulf,

König,

Maidowski,

Langenfeld

held on the basis of the oral hearing of 12 October 2016:

Judgment

1. **The proceedings on the applications for a preliminary injunction are combined for joint decision.**
2. **The applications are rejected as set forth in the reasons.**

R e a s o n s:

A.

The constitutional complaint and the *Organstreit* proceedings (dispute between constitutional organs) are directed against the signing, the conclusion and the provisional application of the free trade agreement between the European Union and its Member States of the one part and Canada of the other part (CETA). 1

I.

[…] 2

[Excerpt from Press Release No. 71/2016 of 13 October 2016]

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(1) in conjunction with Art. 79(3) and Art. 20(1) and (2) of the Basic Law (*Grundgesetz* – GG). In the *Organstreit* proceedings, 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(1) second sentence in conjunction with Art. 59(2) GG. [end of excerpt]

1. […] 3

2. […] 4

3. The draft of the Agreement negotiated [between the Parties] (hereinafter: the CETA draft) consists of several parts. The main part consists of 30 chapters, some of which are divided into sections. In addition, Art. 30(1) of the CETA draft declares that all protocols, annexes, declarations, joint declarations, understandings and footnotes constitute integral parts of the Agreement. 5

Chapter 1 contains general definitions and initial provisions. Art. 1(1) of the CETA draft specifies: [translator's note: the Senate based its decision on a draft version of CETA in German. An English version of the text is available under http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf] 6

> For the purposes of this Agreement and unless otherwise specified
>
> Parties means, on the one hand, the European Union or its Member States or the European Union and its Member States within their respective areas of competence as derived from the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as the "EU Party"), and on the other hand, Canada;

(…).

Chapter 2 contains the principle of “national treatment” and rules on market access for goods. Chapter 3 covers trade remedies. Chapter 4 addresses technical barriers to trade. Chapter 5 deals with sanitary and phytosanitary measures. Chapter 6 is about customs and trade facilitation and chapter 7 covers subsidies. 7

Chapter 8 concerns investment and specifies *inter alia*: 8

SECTION A

Definitions and scope

ARTICLE 8.1

Definitions

For the purposes of this Chapter:

investment means every kind of asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, which includes a certain duration and other characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

(a) an enterprise;

(b) shares, stocks and other forms of equity participation in an enterprise;

(c) bonds, debentures and other debt instruments of an enterprise;

(d) a loan to an enterprise;

(e) any other kind of interest in an enterprise;

(f) an interest arising from:

(i) a concession conferred pursuant to the law of a Party or under a contract, including to search for, cultivate, extract or exploit natural resources,

ii) a turnkey, construction, production or revenue-sharing contract; or

(iii) other similar contracts;

ARTICLE 8.2

Scope

4. Claims may be submitted by an investor under this Chapter only in accordance with Article 8.18, and in compliance with the proce-

dures set out in Section F. Claims in respect of an obligation set out in Section B are excluded from the scope of Section F. Claims under Section C with respect to the establishment or acquisition of a covered investment are excluded from the scope of Section F. Section D applies only to a covered investment and to investors in respect of their covered investment.

SECTION C

Non-discriminatory treatment

ARTICLE 8.6

National treatment

1. Each Party shall accord to an investor of the other Party and to a covered investment, treatment no less favourable than the treatment it accords, in like situations to its own investors and to their investments with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory.

ARTICLE 8.7

Most-favoured-nation treatment

1. Each Party shall accord to an investor of the other Party and to a covered investment, treatment no less favourable than the treatment it accords in like situations, to investors of a third country and to their investments with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory.

SECTION D

Investment protection

ARTICLE 8.9

Investment and regulatory measures

1. For the purpose of this Chapter, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.

ARTICLE 8.10

Treatment of investors and of covered investments

1. Each Party shall accord in its territory to covered investments of

the other Party and to investors with respect to their covered investments fair and equitable treatment and full protection and security in accordance with paragraphs 2 through 7.

2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 if a measure or series of measures constitutes:

(a) denial of justice in criminal, civil or administrative proceedings;

(b) fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;

(c) manifest arbitrariness;

(d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;

(e) abusive treatment of investors, such as coercion, duress and harassment; or

(f) a breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.

SECTION E

Reservations and exceptions

SECTION F

Resolution of investment disputes between investors and states

ARTICLE 8.18

Scope

1. Without prejudice to the rights and obligations of the Parties under Chapter Twenty-Nine (Dispute Settlement), an investor of a Party may submit to the Tribunal constituted under this Section a claim that the other Party has breached an obligation under:

(a) Section C, with respect to the expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of its covered investment, or

b) Section D, where the investor claims to have suffered loss or damage as a result of the alleged breach.

2. Claims under subparagraph 1(a) with respect to the expansion of a covered investment may be submitted only to the extent the measure relates to the existing business operations of a covered in-

vestment and the investor has, as a result, incurred loss or damage with respect to the covered investment.

ARTICLE 8.23

Submission of a claim to the Tribunal

1. If a dispute has not been resolved through consultations, a claim may be submitted under this Section by:

(a) an investor of a Party on its own behalf; or

(b) an investor of a Party, on behalf of a locally established enterprise which it owns or controls directly or indirectly.

2. A claim may be submitted under the following rules:

(a) the ICSID Convention and Rules of Procedure for Arbitration Proceedings;

(b) the ICSID Additional Facility Rules if the conditions for proceedings pursuant to paragraph (a) do not apply;

(c) the UNCITRAL Arbitration Rules; or

(d) any other rules on agreement of the disputing parties.

3. In the event that the investor proposes rules pursuant to subparagraph 2(d), the respondent shall reply to the investor's proposal within 20 days of receipt. If the disputing parties have not agreed on such rules within 30 days of receipt, the investor may submit a claim under the rules provided for in subparagraph 2(a), (b) or (c).

4. For greater certainty, a claim submitted under subparagraph 1(b) shall satisfy the requirements of Article 25(1) of the ICSID Convention.

5. The investor may, when submitting its claim, propose that a sole Member of the Tribunal should hear the claim. The respondent shall give sympathetic consideration to that request, in particular if the investor is a small or medium-sized enterprise or the compensation or damages claimed are relatively low.

ARTICLE 8.27

Constitution of the Tribunal

1. The Tribunal established under this Section shall decide claims submitted pursuant to Article 8.23.

2. The CETA Joint Committee shall, upon the entry into force of this Agreement, appoint fifteen Members of the Tribunal. Five of the

Members of the Tribunal shall be nationals of a Member State of the European Union, five shall be nationals of Canada and five shall be nationals of third countries.

Footnote 11 regarding Article 8.27(2) CETA draft specifies: 9

Either Party may instead propose to appoint up to five Members of the Tribunal of any nationality. In this case, such Members of the Tribunal shall be considered to be nationals of the Party that proposed his or her appointment for the purposes of this Article.

6. The Tribunal shall hear cases in divisions consisting of three Members of the Tribunal, of whom one shall be a national of a Member State of the European Union, one a national of Canada and one a national of a third country. The division shall be chaired by the Member of the Tribunal who is a national of a third country.

ARTICLE 8.28

Appellate Tribunal

1. An Appellate Tribunal is hereby established to review awards rendered under this Section.

2. The Appellate Tribunal may uphold, modify or reverse the Tribunal's award based on:

(a) errors in the application or interpretation of applicable law;

(b) manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law;

(c) the grounds set out in Article 52(1) (a) through (e) of the ICSID Convention, in so far as they are not covered by paragraphs (a) and (b).

ARTICLE 8.31

Applicable law and interpretation

1. When rendering its decision, the Tribunal established under this Section shall apply this Agreement as interpreted in accordance with the Vienna Convention on the Law of Treaties, and other rules and principles of international law applicable between the Parties.

2. The Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of a Party. For greater certainty, in determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpreta-

tion given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party.

3. Where serious concerns arise as regards matters of interpretation that may affect investment, the Committee on Services and Investment may, pursuant to Article 8.44(3)(a), recommend to the CETA Joint Committee the adoption of interpretations of this Agreement. An interpretation adopted by the CETA Joint Committee shall be binding on the Tribunal established under this Section. The CETA Joint Committee may decide that an interpretation shall have binding effect from a specific date.

Chapter 9 contains provisions on cross-border trade in services. Chapter 10 deals with the temporary entry and stay of natural persons for business purposes. Chapter 11 covers the mutual recognition of professional qualifications. Chapter 12 addresses domestic regulation of licensing and qualification requirements. Chapter 13 covers financial services. Chapter 14 regulates international maritime transport services. Chapter 15 deals with telecommunications, Chapter 16 regulates electronic commerce and Chapter 17 governs competition policy. Chapter 18 contains provisions regarding state enterprises, monopolies and enterprises granted special rights or privileges. Chapter 19 deals with government procurement and Chapter 20 is about intellectual property. Chapter 21 governs regulatory cooperation, Chapter 22 concerns trade and sustainable development, Chapter 23 deals with trade and labour. Chapter 24 addresses trade and environment, and Chapter 25 is about bilateral dialogues and cooperation. 10

Chapter 26 contains administrative and institutional provisions: 11

ARTICLE 26.1

CETA Joint Committee

1. The Parties hereby establish the CETA Joint Committee comprising representatives of the European Union and representatives of Canada. The CETA Joint Committee shall be co-chaired by the Minister for International Trade of Canada and the Member of the European Commission responsible for Trade, or their respective designees.

2. The CETA Joint Committee shall meet once a year or at the request of a Party. The CETA Joint Committee shall agree on its meeting schedule and its agenda.

3. The CETA Joint Committee is responsible for all questions concerning trade and investment between the Parties and the implementation and application of this Agreement. A Party may refer to

the CETA Joint Committee any issue relating to the implementation and interpretation of this Agreement, or any other issue concerning trade and investment between the Parties.

4. The CETA Joint Committee shall:

(a) supervise and facilitate the implementation and application of this Agreement and further its general aims;

(b) supervise the work of all specialised committees and other bodies established under this Agreement;

(c) without prejudice to Chapters Eight (Investment), Twenty-Two (Trade and Sustainable Development), Twenty-Three (Trade and Labour), Twenty-Four (Trade and Environment), and Twenty-Nine (Dispute Settlement), seek appropriate ways and methods of preventing problems that might arise in areas covered by this Agreement, or of resolving disputes that may arise regarding the interpretation or application of this Agreement;

(d) adopt its own rules of procedure;

(e) make decisions as set out in Article 26.3; and

(f) consider any matter of interest relating to an area covered by this Agreement.

5. The CETA Joint Committee may:

(a) delegate responsibilities to the specialised committees established pursuant to Article 26.2;

(b) communicate with all interested parties including private sector and civil society organisations;

(c) consider or agree on amendments as provided in this Agreement;

(d) study the development of trade between the Parties and consider ways to further enhance trade relations between the Parties;

(e) adopt interpretations of the provisions of this Agreement, which shall be binding on tribunals established under Section F of Chapter Eight (Resolution of investment disputes between investors and states) and Chapter Twenty-Nine (Dispute Settlement);

(f) make recommendations suitable for promoting the expansion of trade and investment as envisaged in this Agreement;

(g) change or undertake the tasks assigned to specialised committees established pursuant to Article 26.2 or dissolve any of these

specialised committees;

(h) establish specialised committees and bilateral dialogues in order to assist it in the performance of its tasks; and

(i) take such other action in the exercise of its functions as decided by the Parties.

ARTICLE 26.2

Specialised committees

1. The following specialised committees are hereby established, or in the case of the Joint Customs Cooperation Committee referred to in subparagraph (c), is granted authority to act under the auspices of the CETA Joint Committee:

ARTICLE 26.3

Decision making

1. The CETA Joint Committee shall, for the purpose of attaining the objectives of this Agreement, have the power to make decisions in respect of all matters when this Agreement so provides.

2. The decisions made by the CETA Joint Committee shall be binding on the Parties, subject to the completion of any necessary internal requirements and procedures, and the Parties shall implement them. The CETA Joint Committee may also make appropriate recommendations.

3. The CETA Joint Committee shall make its decisions and recommendations by mutual consent.

Chapter 27 contains provisions regarding transparency. Chapter 28 provides for exceptions. Chapter 29 concerns dispute settlement. Chapter 30 contains the final provisions and specifies *inter alia*: 12

ARTICLE 30.2

Amendments

1. The Parties may agree, in writing, to amend this Agreement. An amendment shall enter into force after the Parties exchange written notifications certifying that they have completed their respective applicable internal requirements and procedures necessary for the entry into force of the amendment, or on the date agreed by the Parties.

2. Notwithstanding paragraph 1, the CETA Joint Committee may decide to amend the protocols and annexes of this Agreement. The

Parties may approve the CETA Joint Committee's decision in accordance with their respective internal requirements and procedures necessary for the entry into force of the amendment. The decision shall enter into force on a date agreed by the Parties. This procedure shall not apply to amendments to Annexes I, II and III and to amendments to the annexes of Chapters Eight (Investment), Nine (Cross-Border Trade in Services), Ten (Temporary Entry and Stay of Natural Persons for Business Purposes) and Thirteen (Financial Services), except for Annex 10-A (List of Contact Points of the Member States of the European Union).

ARTICLE 30.6

Private rights

1. Nothing in this Agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement to be directly invoked in the domestic legal systems of the Parties.

2. A Party shall not provide for a right of action under its domestic law against the other Party on the ground that a measure of the other Party is inconsistent with this Agreement.

ARTICLE 30.7

Entry into force and provisional application

1. The Parties shall approve this Agreement in accordance with their respective internal requirements and procedures.

2. This Agreement shall enter into force on the first day of the second month following the date the Parties exchange written notifications certifying that they have completed their respective internal requirements and procedures or on such other date as the Parties may agree.

3. (a) The Parties may provisionally apply this Agreement from the first day of the month following the date on which the Parties have notified each other that their respective internal requirements and procedures necessary for the provisional application of this Agreement have been completed or on such other date as the Parties may agree.

(b) If a Party intends not to provisionally apply a provision of this Agreement, it shall first notify the other Party of the provisions that it will not provisionally apply and shall offer to enter into consultations promptly. Within 30 days of the notification, the other Party may ei-

ther object, in which case this Agreement shall not be provisionally applied, or provide its own notification of equivalent provisions of this Agreement, if any, that it does not intend to provisionally apply. If within 30 days of the second notification, an objection is made by the other Party, this Agreement shall not be provisionally applied.

The provisions that are not subject to a notification by a Party shall be provisionally applied by that Party from the first day of the month following the later notification, or on such other date as the Parties may agree, provided the Parties have exchanged notifications under subparagraph (a).

(c) A Party may terminate the provisional application of this Agreement by written notice to the other Party. Such termination shall take effect on the first day of the second month following that notification.

(d) If this Agreement, or certain provisions of this Agreement, is provisionally applied, the Parties shall understand the term "entry into force of this Agreement" as meaning the date of provisional application. The CETA Joint Committee and other bodies established under this Agreement may exercise their functions during the provisional application of this Agreement. Any decisions adopted in the exercise of their functions will cease to be effective if the provisional application of this Agreement is terminated under subparagraph (c).

4. Canada shall submit notifications under this Article to the General Secretariat of the Council of the European Union or its successor. The European Union shall submit notifications under this Article to Canada's Department of Foreign Affairs, Trade and Development or its successor.

ARTICLE 30.8

Termination, suspension or incorporation of other existing agreements

1. The agreements listed in Annex 30-A shall cease to have effect, and shall be replaced and superseded by this Agreement. Termination of the agreements listed in Annex 30-A shall take effect from the date of entry into force of this Agreement.

2. In the event of the provisional application of Chapter Eight (Investment) in accordance with Article 30.7(3)(a), the agreements listed in Annex 30-A, as well as the rights and obligations derived therefrom shall be suspended as of the date of provisional application. In the event the provisional application is terminated, the sus-

pension of the agreements listed in Annex 30-A shall cease.

3. Notwithstanding paragraphs 1 and 2, a claim may be submitted under an agreement listed in Annex 30-A in accordance with the rules and procedures established in the agreement if:

(a) the treatment that is object of the claim was accorded when the agreement was not suspended or terminated; and

(b) no more than three years have elapsed since the date of suspension or termination of the agreement.

4. Notwithstanding paragraphs 1 and 2, if the provisional application of this Agreement is terminated and this Agreement does not enter into force, a claim may be submitted under Section F of Chapter Eight (Investment) within a period no longer than three years following the date of termination of the provisional application, regarding any matter arising during the provisional application of this Agreement, in accordance with the rules and procedures established in this Agreement.

ARTICLE 30.9

Termination

1. A Party may denounce this Agreement by giving written notice of termination to the General Secretariat of the Council of the European Union and the Department of Foreign Affairs, Trade and Development of Canada, or their respective successors. This Agreement shall be terminated 180 days after the date of that notice. The Party giving a notice of termination shall also provide the CETA Joint Committee with a copy of the notice.

2. Notwithstanding paragraph 1, in the event that this Agreement is terminated, the provisions of Chapter Eight (Investment) shall continue to be effective for a period of 20 years after the date of termination of this Agreement in respect of investments made before that date. This paragraph shall not apply in the case of provisional application of this Agreement.

4. On 5 July 2016, on the basis of Art. 91, Art. 100(2), Art. 207(4) subsection (1) in conjunction with Art. 218(5) and (6) letter a clause v and (7) of the Treaty on the Functioning of the European Union (TFEU), the European Commission proposed to the Council of the European Union to adopt a decision authorising the signing of the Comprehensive Economic and Trade Agreement between Canada of the one part and the European Union and its Member States of the other part pursuant to Art. 218(5) TFEU (COM <2016> 444 final), and to declare the agreement applicable “on a provisional basis by the Union as provided for in its Article 30.7(3)” pending the proce- 13

dures necessary for its conclusion (COM <2016> 470 final), and the conclusion of said agreement (COM <2016> 443 final).

a) On the basis of Art. 218(7) TFEU, the Commission also proposed to the Council that the Commission may approve amendments to Annex 20-A regarding geographical indications adopted by the CETA Joint Committee pursuant to Art. 20.22 of the CETA draft. 14

b) In its proposals for decision, the Commission stated that since many Member States had expressed the view that the European Union did not have the necessary competence to conclude CETA on its own, or that it did not have shared competence in the areas [in question] either, and in order not to delay the signature of the Agreement, the Commission decided to propose the signature of the Agreement as a mixed agreement. However, in July 2015 it requested an opinion of the Court of Justice of the European Union pursuant to Art. 218(11) TFEU with regard to the free trade agreement with Singapore (European Union-Singapore Free Trade Agreement – EUSFTA), the content of which is essentially the same as that of CETA (Case A-2/15). In these proceedings, the Commission takes the view that in the case of EUSFTA the European Union did have the competence to conclude the agreement by itself, or that, in the alternative, it at least had shared competence in those areas where the European Union's competence is not exclusive. It further posits that only once the Court of Justice has submitted its opinion on Case A-2/15, will it be necessary to draw the appropriate conclusions (cf. Proposal for a Council Decision on the conclusion of the Comprehensive Economic and Trade Agreement between Canada of the one part, and the European Union and its Member States, of the other part, COM <2016> 443 final). 15

The Commission also states that in order to ensure the implementation of the Agreement, a Commission Implementing Regulation is to be adopted pursuant to Article 58(1) of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 opening the tariff rate quotas provided for in the Agreement (cf. COM <2016> 443 final). 16

The Commission states that the decisions of the Council on the signing and the provisional application of CETA are to be taken on 18 October 2016. The European Commission plans to sign CETA at the next EU-Canada Summit on 27 October 2016. The Agreement is to apply provisionally only once the European Parliament has given its consent. 17

II.

1. a) Applicants nos. I to 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(1) in conjunction with Art. 79(3) and Art. 20(1) and (2) GG. […] 18

b) Applicant no. V states that it asserts rights of the *Bundestag* by way of vicarious standing (*Prozessstandschaft*). It claims that the respondent's failure to reject CETA violates decision-making rights of the *Bundestag* (Art. 23(1) second sentence in conjunction with Art. 59(2) GG), since the European Union does not have competences for many matters [covered by the Agreement]. Furthermore, it argues that the establishment of committees in CETA without Member State representation violates the decision-making rights of the *Bundestag*. […] 19

2. In addition, the applicants submit the following arguments: 20

a) The approval by the Council of the European Union of the signing, provisional application and conclusion of CETA exceeds the European Union's competences as set out in Arts. 207 and 218 TFEU. […] 21

b) The system of committees and tribunals proposed under CETA also affects the core of the principle of democracy and the rule of law, which is protected by Art. 79(3) GG. […] 22

c) Moreover, CETA violates the autonomy of European Union law, the principle of the social state (*Grundsatz der Sozialstaatlichkeit*, Art. 20(1) GG, Art. 2 of the Treaty on European Union – TEU), the precautionary principle (Art. 20a GG, Art. 191(2) TFEU) and the core of municipal self-government. 23

d) […] 24

III.

The Federal Government considers the applications for a preliminary injunction to be unfounded. 25

[…] 26-31

IV.

At the oral hearing of 12 October 2016, the parties reaffirmed and elaborated on their statements. 32

B.

The admissible applications are unfounded. 33

I.

1. Pursuant to § 32(1) of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG), 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. In assessing whether the requirements of § 32(1) BVerfGG are fulfilled, it must generally apply a strict standard, given the potentially far-reaching consequences of a preliminary injunction (cf. Decisions of the Federal Con- 34

stitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 55, 1 <3>; 82, 310 <312>; 94, 166 <216 and 217>; 104, 23 <27>; 106, 51 <58>). This standard is even stricter when the measures involved have implications for international law or for foreign policy (cf. BVerfGE 35, 193 <196 and 197>; 83, 162 <171 and 172>; 88, 173 <179>; 89, 38 <43>; 108, 34 <41>; 118, 111 <122>; 125, 385 <393>; 126, 158 <167>; 129, 284 <298>; 132, 195 <232 para. 86>).

When deciding in preliminary injunction proceedings, the reasons submitted for the unconstitutionality of the challenged measure 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 (cf. BVerfGE 89, 38 <44>; 103, 41 <42>; 118, 111 <122>; established case-law). In case the outcome of the principal proceedings cannot be foreseen, the Federal Constitutional Court must, in the context of a weighing of the consequences, in principle only weigh the disadvantages that would arise if the preliminary injunction were not issued but the constitutional complaint or the application in *Organstreit* proceedings were successful in the principal proceedings, against the disadvantages that would arise if the preliminary injunction sought were issued but the applications in the principal proceedings were unsuccessful (cf. BVerfGE 105, 365 <371>; 106, 351 <355>; 108, 238 <246>; 125, 385 <393>; 126, 158 <168>; 129, 284 <298>; 132, 195 <232 and 233 para. 87>; established case-law). 35

2. a) If an act of approval to an international treaty is challenged in the principal proceedings, it may be appropriate to not just weigh the consequences, but to already carry out a summary examination during the course of the [preliminary] proceedings pursuant to § 32(1) BVerfGG. It must then be established in the course of this examination whether, in view of the reasons submitted for the unconstitutionality of the challenged act of approval to the treaty, it is highly likely that the Federal Constitutional Court will declare the act of approval unconstitutional (cf. BVerfGE 35, 193 <196 and 197>; 132, 195 <233 para. 88>). On the one hand, this approach ensures that the Federal Republic of Germany does not take on obligations under international law that are incompatible with the Basic Law. On the other hand, it serves to prevent a situation where due to the denial of preliminary legal protection a potential violation of rights cannot be reversed, i.e. a situation where the decision in the principal proceedings would be too late (cf. BVerfGE 46, 160 <164>; 111, 147 <153>; 132, 195 <233 para. 88>), as is typically the case once an instrument of ratification of an international treaty has been deposited. 36

b) This is not the case here. 37

aa) As the Agreement has yet to be finally ratified and signed by all Member States of the European Union, it will not be final and binding under international law until further steps are taken. Member States may terminate the provisional application of the Agreement at any time by written notice of the Federal Government to the other Parties pursuant to Art. 30.7(3) letter c of the CETA draft (cf. para. 72 below). Therefore, 38

the decision to be rendered in the principal proceedings will not be too late.

bb) Furthermore, it must be considered that the Federal Constitutional Court can only carry out a summary examination if the draft acts or proposals for decision are sufficiently specific. This is also not the case here. […] 39

Ultimately, it has not yet been clarified which specific CETA provisions are exempt from provisional application and how the participation in the institutions to be established under CETA within the European Union will be designed in detail. 40

II.

The applications in the principal proceedings are neither inadmissible from the outset nor manifestly unfounded, at least in part. However, the applications for a preliminary injunction are without success on the basis of the required weighing of the consequences. 41

1. To the extent that the applications for a preliminary injunction are directed against the signing of CETA, they must be unsuccessful simply because the signing has no direct legal effects on the applicants. 42

2. To the extent that the applications are directed against the provisional application [of CETA], the disadvantages that would arise if a preliminary injunction were issued but the constitutional complaints or the application in the *Organstreit* proceedings were unsuccessful weigh more heavily than the disadvantages that would arise if the preliminary injunction sought were not issued but the applications were successful in the principal proceedings. 43

a) 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 (COM <2016> 470 final) is later found to have been constitutionally permissible, the probability is high that the general public would suffer severe disadvantages, as shown by the outcome of the oral hearing and the respondent's submissions, which were not substantially called into doubt by the applicants' submissions. These disadvantages may prove to be irreversible, and if not for legal reasons, then for political reasons at any rate. 44

aa) A preliminary injunction that would bar the German representative in the Council from lending his approval to the provisional application [of CETA] would result in the Council not being able to take the decision, planned for 18 October 2016, to authorise the provisional application of the Agreement. […] The consequence of issuing a preliminary injunction in accordance with the application would thus be the failure – at least preliminarily – of the entire treaty. A definitive failure could then only be averted provided that all Parties are willing to enter into renegotiations or new negotiations and that these lead to an outcome acceptable to all Parties. 45

bb) The disadvantages arising from such a decision are likely to be very severe. […] After all, the main implications of a preliminary, and even more of a final failure of 46

CETA would not be of an economic, but rather of a political nature.

(1) 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 (cf. in this respect BVerfGE 80, 74 <79 and 80>). This breadth of discretion in the field of foreign policy arises from the fact that the Federal Republic of Germany cannot unilaterally shape foreign relations and the relevant course of events; rather, numerous circumstances outside its control are at play in this regard. In order to enable the Federal Republic of Germany to implement its respective political objectives within the limits of permissibility set by international and constitutional law, the Basic Law grants organs vested with sovereign authority in foreign affairs wide discretion in assessing matters of foreign policy significance as well as the expediency of possible courses of action (cf. BVerfGE 40, 141 <178 and 179>; 55, 349 <365>; 137, 185 <235 para. 138>). This margin of discretion and of prognosis granted to the Federal Government with respect to the potential implications of a trade agreement between the European Union and its Members States and Canada on the basis of the negotiated CETA draft and its comparison to [the implications of] alternative scenarios predicting Canada's behaviour in case of the failure of CETA is only subject to a limited review by the Federal Constitutional Court. 47

(2) In a similar manner, this is also 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 negative effects on European external trade policy and the international status of the European Union in general. […] 48

cc) Moreover, the probability is high that the disadvantages arising from the issuance of a preliminary injunction followed by a lack of success in the principal proceedings would be irreversible. This holds true especially if [the finding of] the impermissibility of the provisional application [of CETA] were to result in the overall failure of the Agreement. But even if this were not the case, in particular if Canada were willing to completely forgo provisional application or even to conduct new negotiations and if these negotiations culminated in a new draft act, the failure of the draft negotiated in this instance would be final, insofar as all Parties assume that the provisional application of the Agreement will be possible (Art. 30.7(3)). In either case, the loss in reliability that is to be expected in respect of the Federal Republic of Germany – as the initiating force behind such a development – and in respect of the European Union overall would have lasting negative effects for the scope of action and decision-making of all European players in the shaping of global trade relations. This would seriously damage the Agreement's potential function as a model for shaping external trade relations with other partners, or would even eliminate it completely. 49

b) Compared with this, the disadvantages arising from the non-issuance of a preliminary injunction and the subsequent finding that the Federal Government's participation in the passing of the decision by the Council was impermissible are less severe. The decision of the Council on the provisional application could indeed qualify as an *ultra vires* act in the principal proceedings (aa). An encroachment on the constitutional identity protected under Art. 79(3) GG can also not be ruled out (bb). Yet such risks can effectively be avoided when suitable safeguards are provided for the period of provisional application (cc). 50

aa) Since CETA will be concluded as a mixed agreement (COM <2016> 470 final) that is not limited to matters that undisputedly fall within the competence of the European Union, it cannot be ruled out that the decision of the Council regarding the provisional application of CETA qualifies as an *ultra vires* act and that the Federal Government's participation in this decision violates the rights of applicants nos. I to IV under Art. 38(1) first sentence in conjunction with Art. 20(1) and (2) in conjunction with Art. 79(3) GG (cf. in this regard BVerfGE 123, 267 <353, 400>; 126, 286 <304>; 134, 366 <392 para. 37>; 142, 123 <200 para. 148>). 51

(1) It seems likely that the European Union lacks, *inter alia*, treaty-making competence with regard to portfolio investment, investment protection, international maritime transport, the mutual recognition of professional qualifications and labour protection. 52

According to Art. 207(1) TFEU, the conclusion of tariff and trade agreements relating to foreign direct investment fall within the exclusive competence of the European Union. This includes investment that serves to obtain a controlling interest in an enterprise or to acquire real estate (cf. BVerfGE 123, 267 <421>; Cottier/Trinberg, in: von der Groeben/Schwarze/Hatje, Europäisches Unionsrecht, 7th ed. 2015, Art. 207 AEUV para. 54). However, it does not include portfolio investment that mainly serves to generate profits, without direct influence of the investor on the enterprise (cf. BVerfGE 123, 267 <421>; Mayr, EuR 2015, p. 575 <591>). 53

It seems likely that the European Union also lacks competence for the provisions contained in Section D of Chapter 8 of the CETA draft ("Investment Protection") regarding the treatment of investors and of covered investments (Art. 8.10 of the CETA draft) and expropriation (Art. 8.12 of the CETA draft). Such a competence ought not to follow from Art. 207(1) TFEU in particular, which does not cover the mere protection of foreign assets from expropriation (cf. Mayr, loc. cit., p. 597). This is supported by the fact that, according to Art. 345 TFEU, the Treaties shall not prejudice the system of property ownership of the individual Member States (cf. Wernicke, in: Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, vol. III, 48th supplement August 2012, Art. 345 AEUV para. 15). 54

Provisions on feeder services (transport between ports and ships) and maritime auxiliary services should not be considered a competence of the European Union, not least because the areas concerned are explicitly excluded from the scope of applica- 55

tion of the common commercial policy pursuant to Art. 207(5) TFEU. Thus, Chapter 14 of the CETA draft (International Maritime Transport Services) likely also concerns matters falling within the Member States' competence.

Likewise, the European Union probably does not have exclusive competence for Chapter 11 of the CETA draft (Mutual Recognition of Professional Qualifications). In this regard, a complete harmonisation has not yet occurred in internal European Union law (on the scope of the related provisions of European Union law see Forsthoff, in: Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, vol. I, 42nd supplement September 2010, Art. 45 AEUV para. 281; Kluth, in: Calliess/Ruffert, EUV/AEUV, 5th ed. 2016, Art. 59 AEUV para. 35). Moreover, European Union law only covers professional qualifications of EU citizens (Art. 20 TFEU), while the Member States remain competent for third country nationals, at least partially. However, this is not reflected in the Agreement. 56

The European Union likely also lacks the comprehensive exclusive competence regarding Chapter 23 (Trade and Labour). For instance, with regard to improving the working environment to protect workers' health and safety it only has competence to support and complement [measures taken by the Member States] (Art. 153(2) letter a TFEU). This view is supported by the fact that, according to Art. 153(4) TFEU, Member States are entitled to enact stricter rules with regard to their obligation to comply with standards of the International Labour Organisation (ILO) (Art. 23.3 of the CETA draft). 57

(2) Furthermore, it cannot be ruled out that the Council decision on the provisional application of CETA could also qualify as an *ultra vires* act to the extent that CETA is designed to transfer sovereign powers to the investment court and committee system. Accordingly, the provisions under Section F of Chapter 8 and Chapter 26 of the CETA draft may not be covered by Art. 207, Art. 216(1) and Art. 218 TFEU. Another question arising in this respect is whether this interpretation of the Articles would still be covered by Art. 23(1) GG. […] 58

bb) Moreover, it cannot be ruled out completely that the set-up of the committee system as provided for in CETA encroaches on the principle of democracy, which forms part of the constitutional identity of the Basic Law (cf. BVerfGE 140, 317 <334 para. 36>, BVerfGE 142, 123 <187 and 188, para. 120>). 59

(1) Art. 26.1 of the CETA draft provides for the establishment of a CETA Joint Committee responsible for all questions concerning trade and investment between the Parties and the implementation and application of CETA (cf. Art. 26.1(3) of the CETA draft). Its decisions are – subject to the completion of any necessary internal requirements and procedures – binding on the Parties, and must be implemented by them (Art. 26.3(2) of the CETA draft). The significant powers of the CETA Joint Committee include, insofar as provided in CETA, the power to decide on amendments to the Agreement (Art. 26.1(5) letter c of the CETA draft) and to amend its protocols and annexes (Art. 30.2(2) first sentence of the CETA draft). Yet in quantitative terms, proto- 60

cols and annexes make up the largest part of the Agreement in question. Moreover, the CETA Joint Committee may, by decision, add other categories of intellectual property to the definition of “intellectual property rights” (Art. 8.1 “intellectual property rights”, second sentence of the CETA draft).

Given the ambiguous provision of Art. 30.2(2) second and third sentences of the CETA draft, it cannot be ruled out that such decisions of the CETA Joint Committee do not require approval by the Parties. 61

(2) According to the wording of the Agreement and the arrangements provided for so far, it is not certain that the Federal Republic of Germany is guaranteed possibilities to influence the activities of the committee system. The composition of the committees and their decision-making procedures are only set out in the most basic terms. In particular, the Agreement does not provide for Member State participation in the committees by means of their own representatives with a seat and a vote, regardless of whether the committees address matters that fall within the competence of the European Union or of national governments. It is merely stated that the CETA Joint Committee shall comprise “representatives of the European Union and representatives of Canada” (Art. 26.1(1) first sentence of the CETA draft). It thus seems conceivable that German authorities will be completely excluded from exerting influence in this regard, rendering impossible both the legitimation of committee activities, in terms of participants and matters discussed and accountability with respect to citizens. This might concern trade remedies (Chapter 3), technical barriers to trade (Chapter 4), sanitary and phytosanitary measures (Chapter 5), customs and trade facilitation (Chapter 6), subsidies (Chapter 7), investment (Chapter 8), cross-border trade in services (Chapter 9), temporary entry and stay of natural persons for business purposes (Chapter 10), mutual recognition of professional qualifications (Chapter 11), licensing and qualification requirements and procedures (Chapter 12), financial services (Chapter 13), international maritime transport services (Chapter 14), telecommunications (Chapter 15), electronic commerce (Chapter 16), competition policy (Chapter 17), state enterprises, monopolies, and enterprises granted special rights or privileges (Chapter 18), government procurement (Chapter 19) and intellectual property (Chapter 20). 62

With regard to decision-making procedures, the Agreement provides that the CETA Joint Committee shall make its decisions by mutual consent (Art. 26.3(3) CETA draft). Even though the Committee thus cannot take decisions that go against the vote of the European Union, it is not guaranteed that the Federal Republic of Germany will have the possibility to influence the Committee’s activities. The situation is similar with regard to specialised committees (cf., e.g., Art. 26.2(4) third sentence, Art. 13.18, Art. 21.7(5) and (7) of the CETA draft). 63

Insofar as the Member States are not represented in the committees, they can only influence the committees’ procedures and decisions indirectly by agreeing on a common position in a Council decision under Art. 218(9) TFEU, which the representative 64

of the European Union must then defend in the CETA committees. Yet this influence is limited by the fact that the Council takes decisions by qualified majority – unless the Treaties provide otherwise (Art. 16(3) TEU, Art. 218(8) subsection 1 TFEU). In light of the foregoing, Art. 218(9) TFEU will likely be generally applicable where the CETA Joint Committee decides to amend the protocols and annexes of CETA (cf. Art. 30.2(2) first sentence of the CETA draft), or where it adopts binding interpretations of the Agreement (cf. Art. 8.31(3) second sentence, Art. 26.1(5) letter e of the CETA draft).

(3) In view of Art. 20(1) and (2) GG, democratic legitimation and oversight of such decisions appears uncertain and will likely only be guaranteed if decisions affecting the competences of the Member States or the scope of the European integration agenda are only taken with Germany's approval. It cannot be ruled out from the outset that this arrangement will not violate the *Bundestag*'s legislative powers and its responsibility with respect to European integration (cf. BVerfGE 142, 123 <183 and 184 para. 110 and 111>). 65

cc) However, the risk of the disadvantages discussed above in respect of the legal interests protected by Art. 38(1) and Art. 20(1) and (2) GG may be effectively avoided by way of various safeguards; as a consequence, a severe disadvantage for the common good within the meaning of § 32(1) BVerfGG (BVerfGE 111, 147 <153>; 132, 195 <233 para. 88>) can ultimately be averted. 66

(1) The Federal Government submitted in its brief and explicitly stated in the oral hearing that the Council decision (cf. Draft Council Decision 223/16 REV 1 of 25 September 2016) and corresponding declarations (Art. 30.7(3) letter b of the CETA draft) have the effect of making exceptions to the provisional application, which seem to ensure, at least as far as the result is concerned, that the upcoming Council decision on the provisional application of CETA (COM <2016> 470 final) should not qualify as an *ultra vires* act. As far as these reservations go, any concerns regarding the arrangement in question in respect of constitutional identity should also be dispelled. 67

Specifically, the Federal Government has stated that it will only lend its approval in the Council of the European Union to the provisional application of those parts of CETA that, without a doubt, lie within the specific powers conferred on the European Union. It has emphasised that the European Commission's proposal is not binding on the Council and that not only Germany, but also other Member States will not lend their approval to the provisional application of the entire Agreement. 68

[…] 69

As the Federal Government will also not approve the provisional application of CETA for areas that according to its view remain subject to the competence of the Member States, it can be assumed that it will voice such reservations in cases where exceptions to the provisional application have not been set out in a Council decision. Accordingly, the Senate assumes that, in particular, provisions on the following mat- 70

ters will not be subject to provisional application: investment protection, including the dispute settlement system (Chapters 8 and 13 of the CETA draft), portfolio investment (Chapter 8 and 13 of the CETA draft), international maritime transport (Chapter 14 of the CETA draft), the mutual recognition of professional qualifications (Chapter 11 of the CETA draft) and labour protection (Chapter 23 of the CETA).

(2) Any encroachment on the constitutional identity (Art. 79(3) GG) brought about by the competences and procedures of the committee system 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 pursuant to Art. 30.2(2) of the CETA draft may only be passed on the basis of a common position unanimously adopted by the Council pursuant to Art. 218(9) TFEU (see also BVerfGE 142, 123 <211 and 212 para. 171>). Such an approach would also correspond to state practice (cf. Art. 3(4) of the Decision of the Council and the representatives of the Governments of the Members States of the European Union, meeting within the Council, on the signature and provisional application of the Protocol to Amend the Air Transport Agreement between the United States of America, of the one part, and the European Community and its Member States, of the other part, Official Journal EU no. L p. 223/2). 71

(3) If, contrary to the assumption of the Senate, the Federal Government should not be able to undertake the courses of action it proposed for avoiding a potential *ultra vires* act or a violation of the constitutional identity, it has, as a final resort, the possibility of terminating the provisional application of the Agreement by means of written notification (Art. 30.7(3) letter c of the CETA draft). While this interpretation does not appear to be authoritative, the Federal Government has stated that it is correct. The Federal Government must declare, in a manner that has bearing in international law, that this is its understanding and notify the other Parties to the Agreement accordingly. 72

3. To the extent that the applications for a preliminary injunction are directed against the decision of the Council on the signing of CETA, they must be unsuccessful, since this decision will only be adopted once the consent of the European Parliament is obtained (Art. 218(6) TFEU) and it is ratified by the Member States, and the decision of the Council thus has no direct legal effects, at least not at this stage. 73

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