Background

Constitutional Complaint against the Comprehensive Economic and Trade Agreement (CETA)

30 August 2016

1. The Constitutional Complaint

An alliance made up of *Mehr Demokratie*, *foodwatch* and *Campact* is submitting a constitutional complaint against the planned CETA free trade agreement between the European Union and Canada. In addition, an application has been made for a provisional order. This is supposed to prevent the CETA being provisionally applied – even in part – prior to ratification by the EU Member States.

125,047 persons have endorsed the constitutional complaint as plaintiffs. The counsel for the alliance is Prof. Dr. jur. Bernhard Kempen, Director of the Institute of International Law and Comparative Public Law (Institut für Völkerrecht und ausländisches öffentliches Recht) at the University of Cologne, who has drawn up the constitutional complaint in cooperation with other academics.

2. CETA and Democracy

Regardless of the outcome of the proceedings in Karlsruhe, CETA is a highly problematic agreement from a democratic point of view. It is part of a new generation of trade agreements that encroaches upon the socio-political process of legislation and regulation. The focal point of such new kinds of agreements, including the planned Transatlantic Trade and Investment Partnership (TTIP) agreement between the EU and the USA, is no longer to reduce tariffs, but rather to remove so-called non-tariff trade barriers. Regulations which regulate the "protection level" in important social areas – e.g. environment, health and consumer protection – are regarded as trade-restricting. This raises the question of whether democracy will be put at risk or whether constitutional law will be breached.

As an international agreement, CETA is intended to limit the scope of action of national states in favour of transnational objectives. Therefore, a restriction of the democratic principle, i.e. the right of citizens to determine their own political fate, is also consciously accepted. CETA will have a serious impact on the population. With such an agreement the further development of key socio-political regulations will depend on the approval of Canada, insofar as they relate to foreign trade. After conclusion it will not be possible to terminate the agreement in parts, in order to reclaim greater regulatory sovereignty. The whole agreement can be terminated unilaterally by the contracting partners; but, in the case of the EU, this would require the unanimity of all the Member States, which is therefore not very realistic.

At several points in the CETA agreement it is stated that the **"right to regulate"** of the contracting parties will be retained and that the EU and its Member States will therefore continue to be allowed to pass their own laws and regulatory measures independently. This

formal guarantee does not however provide any particular protection because if a contracting party terminates one of the regulations concluded within the framework of CETA or concludes a new regulation without the approval of the other contracting party, it must expect sanctions. Hence, it is true that the legislative powers will not be formally infringed by CETA, but, in practice, they will be restricted.

The **"regulatory cooperation"** in regard to CETA is also viewed critically, in that CETA is designed to be a "living agreement" that is constantly developing. This means that once the agreement has been ratified the contracting parties will permanently cooperate on regulatory issues. It is stipulated that under the executive bodies (regulatory authorities) of the contracting parties the continued development of the trade agreements will be agreed in advance. The influence of economic interests, and therefore the potential for shaping legislative initiatives, is especially powerful during this phase. Legislative bodies which are not included during this phase, i.e. the parliaments responsible for law-making, would be weakened. Consequently, the voice of the electorate would also have less value.

The restriction of the "right to regulate" and the "regulatory cooperation" should be criticised from the point of view of democratic policy. This does not however necessarily mean that it is unconstitutional. The German Federal Constitutional Court can only examine whether the parts of CETA that are questionable with regards to democratic policy also constitute a breach of the Basic Law (*Grundgesetz – GG*) using very strict standards. According to the assessment of the complainants, this is the case in four points, which are explained in more detail in 4.

3. Right to lodge a constitutional complaint

A constitutional complaint can be lodged if the right equivalent to fundamental rights of the complainants to effective democratic participation is breached (Art. 38 (1) sentence 1 GG). It follows from the case law of the German Federal Constitutional Court that this right is not exhausted by formal participation in the election to the German Bundestag. Rather Art. 38 (1) sentence 1 GG protects voters from having their right to vote coming to nothing, as in the Bundestag substantive powers must remain despite obligations under international law as would result from CETA.

4. Unconstitutional elements of the agreement

The complaining parties justify their constitutional complaint with four facts which are, in their opinion, unconstitutional:

a) Committees: CETA provides for the establishment of a committee structure. The central committee ("CETA Joint Committee") is authorised to unilaterally enact procedure provisions and even undertake contract modifications. The contracting states have to submit to these decisions. This power is assigned solely to the CETA Joint Committee, i.e. without a national procedure or the approval of the contract states being envisaged. The non-participation of German governmental representatives in the CETA Joint Committee is unconstitutional.

b) Investment courts: Canadian companies can invoke what is known as investment courts to sue the German state or Bundesländer and local authorities for damages if they consider the cost-effectiveness of their companies to be affected by state measures. This creates an inadmissible parallel justice and creates discrimination against German companies, as only foreign investors can claim damages from the state.

c) The "precautionary principle" as a core element of the European regulatory policy is legally not sufficiently safeguarded in CETA. In the past, improvements to health protection in environmental, consumer and food policy were in part successfully based on the precautionary principle. This applies, for instance, to the European Chemicals Regulation "REACH". Under the CETA agreement such a regulation would be practically excluded were one to follow the stipulations of the agreement.

d**) Provisional application:** CETA is what is known as a "mixed agreement" that affects not only EU competences, but also the competences of the national states and therefore makes ratification by the parliaments of the EU Member States necessary. The European Commission and the EU Member States have also declared that they want to "provisionally apply" CETA. The agreement is therefore already supposed to enter into force before the national parliaments have agreed on acceptance. The provisional application will continue to apply until ratification has been "finally" concluded. This could take years. The consequence is that citizens are exposed to the negative effects of the agreement without the agreement having been democratically adopted. It is irrelevant whether the whole agreement or only parts of it are provisionally applied. One discussed possibility is that only the parts of CETA that apply to EU competences alone will be provisionally applied. However, the trading policy that falls under EU competence can lead to irreversible negative consequences for people, e.g. as a result of a disregard for the precautionary principle. Therefore, provisional application is out of the question.

5. Provisional order against provisional application:

As the complainants also see the provisional application of the CETA agreement as unconstitutional, an application for a provisional order is made in addition to the constitutional complaint. If the German Federal Constitutional Court approved such an order, it would require the German representatives in the Council of Ministers to vote "no" on the provisional application of CETA. An explicit no vote is important insofar as an abstention from voting does not preclude a "unanimous" vote on provisional application and abstention therefore acts as a "yes".