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Comprehensive Free Trade Agreements and German Constitutional Law

Expert Opinion, dated Sept. 26th, 2017[1]

Summary of the results

The Constitutional Law Challenge

1. For some years now, free trade agreements have been concluded in international economic relations with a view to achieving much deeper and closer integration of the markets of the contracting states than was the case with traditional trade agreements. These free trade agreements are not only aimed at eliminating the obstacles to the exchange of goods and services at the border. Rather, agreements of this type have a profound effect on the internal organization of the internal legal order ("behind the border"). They provide for guidelines in the areas of environment, social affairs, work, etc. They also contain extensive institutional and procedural guidelines - for example on how to carry out administrative procedures. They typically also provide for the establishment of treaty bodies empowered to take decisions on the further development of the agreement. They are thus creating a new form of international public authority. CETA is such a new kind of agreement.

2. Free trade agreements of this new type raise problems that are fundamentally different from the problems of traditional liberalisation of foreign trade policy. The basic goal of a liberal foreign trade policy is to reduce restrictions "at the border" and thus promote freedom and efficiency. However, their objective cannot be to persuade the contractual partners to dismantle their internal regulation completely or even extensively. The decision as to which level of regulation is appropriate is highly political. To determine the appropriate level must be left to the contractual

[1] The expert opinion will be published as a book by Duncker&Humblot, Berlin, in October 2017.

parties involved. If this decision is handed over to supranational executive contractual bodies, problems of legitimacy arise.

The basis of and prerequisite for democratic legitimacy: Clarity of the delimitation of competences and prevention of creeping shifts in competences

3. The political and legitimation-theoretical challenges associated with these new forms of free trade agreements have not yet been sufficiently recognised by the EU institutions. Agreements of this new type are being negotiated in the same way as traditional trade agreements. The fact that these agreements are also about liberalisation, harmonisation and re-regulation of the domestic conditions in the Member States is not sufficiently reflected in the negotiation process.

4. Precisely because free trade agreements of such a new type are not only aimed at eliminating the obstacles "at the border", but also have a profound impact on the internal conditions of the contracting states, it is necessary to clarify carefully whether the Member States, in addition to the European Union (EU), should also be involved in the treaty making process. Under German constitutional law, this is not just a question of political sensibility, but also of constitutional law quality. If the EU alone were to conclude an agreement containing provisions beyond its competence, it would be an "ultra vires" act. The excess of competence could be determined by the Federal Constitutional Court.

5. From the point of view of German constitutional law, it is the duty to clarify at the time of conclusion of the agreement which of the components of the agreement fall within the EU's sphere of competence and which fall within the sphere of competence of the EU Member States. Political practice has so far failed to comply with this constitutional requirement. Even if, as in the case of CETA, there is political agreement to treat the agreement as a mixed agreement between the EU and EU Member States, it is often not clear who is politically responsible for which components. The German legislator, acting in its capacity as treaty approving authority, deals with the agreement without being aware of what the legislator is politically responsible for. The requirements for the fulfillment of responsibility for integration (Article 38 of the Basic Law, Article 20 (2) of the Basic Law in conjunction with Article 79 (3) of the Basic Law) are violated as a result.

6. The EU now has (among other things) external competences within the field of external trade relations in the area of trade in goods and services and in the regulation of direct investments. Obviously, virtually every regulation in an EU Member State can have some sort of effect on cross-

border business transactions. Environmental law, social law, labour law, tax law, education law, professional licensing law, cultural law, etc.: Indirect repercussions on market access and the legal status of goods, services and investments are always present. There is a risk that the EU's external trade competences will be used as a lever through which internal conditions in the EU Member States will be comprehensively regulated and harmonised.

7. The ECJ argues that the EU's external trade powers may only be used to liberalise or harmonise Member States' rules which have a specific link to cross-border trade. In its Opinion 2/15 of 16 May 2017 (EU-Singapore Free Trade Agreement), however, this criterion is extended to such an extent that the ECJ concludes that the EU's exclusive competence also extends to regulations on the social protection of workers and environmental protection. The competence to regulate the recognition of professional qualifications should - according to the ECJ - also be an exclusive competence of the EU. The EU Member States will thus lose considerable parts of their competence to shape social, environmental and economic questions under international law.

8. This Opinion at 2/15 contains further attempts by the ECJ to extend the EU's foreign trade powers with regard to the situation "behind the border". The ECJ even argues that the EU can impose rules of an "extremely limited scope" even if it does not have the necessary explicit or implicit powers to do so. In this case, there are strong indications for the assumption that the ECJ is expanding its competence *ultra vires*, which the Federal Constitutional Court must oppose.

9. The stealthy increase in competences ("competence creep") is democratically unacceptable. Decisions taken in an international negotiating area based on the EU's external competences are much less readily accessible to parliamentary democratic control and supervision than those taken in case of autonomous internal governance. The gubernatorial bias, which already characterizes the EU's decision-making process in general, will be further strengthened. The opportunities for co-determination of Member State parliaments are proving to be precarious. The Federal Constitutional Court is called upon to draw limits to the process of this creeping transfer of competences and thus protect the area of democratic parliamentary formation in the Federal Republic of Germany.

The creation of a mixed comprehensive free trade agreement: Federal law according to Art. 23 (1) S 2 GG with the consent of the Federal Council

10. In 1992, the German Basic Law was supplemented with a provision defining the principles and requirements on which German membership of

the EU is based (Article 23 GG). This provision contains substantive guidelines (Art. 23 para. 1 subpara. 1 sentence 1 of the Basic Law) and a special ratification procedure for treaty amendments (Art. 23 para. 1 sentence 2 - 3 of the Basic Law). The provision also assures the constitutional organs Bundestag and Bundesrat special rights of participation in the process of integration (Art. 23 para. 1a - 7 GG). Article 23 of the Basic Law superimposes and displaces the general regulation on the conclusion of international treaties (Art. 59 para. 2 of the Basic Law).

11. The Federal Constitutional Court has not yet clarified on which constitutional basis the German legislative must approve mixed free trade agreement of the new type. It is often suggested that the part of a mixed agreement, which falls within the competence of the Member States, should be subject to the procedure laid down in Art. 59 para. 2 of the Basic Law. Against this it can be argued that, in any case, mixed agreements have the effect of extending the EU's competences if they do not specify for which parts of the EU and which parts of the EU Member States are responsible for (for lack of a "separation clause"). The ECJ claims that it can also interpret those parts which fall within the competence of the Member States. Such an extension of competence is constitutionally permissible only if the German legislature is able to do so in accordance with Art. Article 23 para. 1 sentence 2 of the Basic Law, with the consent of the Bundesrat. The CETA Contract Act therefore requires the approval of the Bundesrat.

12. It is also unclear under German constitutional law whether the German legislature will have to provide renewed legitimacy in cases where the EU transfers the competences and powers, conferred on it by EU primary law, to international treaty bodies established by a free trade agreement of the new type. EU primary law empowers the EU institutions to transfer competences to international treaty bodies (Article 218 para. 7 TFEU). The extent to which this power of delegation is legally possible under EU law is unclear. Be that as it may, under German constitutional law, there must be limits to the freedom of the EU institutions to transfer *their* powers to external international treaty bodies. Under Article 23 para. 1 of the Basic Law the German legislator has legitimized the use of the powers, conferred to the EU, by the EU institutions within the setting of EU-Commission, EU Parliament and Council. Art. 23 of the Basic Law does not legitimize an extensive and substantive transfer of such powers onto other international bodies. The EU may only extend *essential powers* into the international arena on the basis of a new approval decision by the German legislator in accordance with Art. 23 para. 1 of the German Basic Law. The CETA treaty bodies are entrusted with such essential decision-making powers, such as the power to amend the appendices of CETA or to decide on the transfer to arbitration to a treaty based public international law scheme. The legislative act approving CETA must therefore also be

based on Art. 23 para. 1 sentence 2 of the Basis law, thus requiring the consent of both the Bundestag and the Bundesrat.

13. As a consequence, if the EU and the EU Member States wish to establish, in a mixed agreement, international treaty bodies to which essential decision-making powers are delegated, the transfer of competences falling within the competence of the German state must also be subject to Art. 23 para. 1 of the German Basic Law, if there is no separation clause in effect. A separation of the unified legislative act of parliament consent into one part which is dealt with according to Art. 23 para. 1 of the German Basic law (above thesis 12), and another part which is covered under Art. 59 para. 2 of the Basic Law, is unconstitutionally unwarranted.

14. The new types of free trade agreements require the consent of the legislature, even if one is of the opinion that they are not covered by Art. 23 para. 1 sentence 2 of the Basic Law. Even if it were to be assumed that agreements such as CETA should be concluded under Art. 59 para. 2 of the Basic Law, insofar as German competences are affected, consent by a formal legislative act would be required - this is undisputed. Such agreements can not be concluded by the government alone. In the case of CETA, this legislative act can only be enacted with the approval of the Bundesrat. CETA concludes far-reaching requirements for the administrative processes within the competence of the German Länder, from which no derogations are allowed. Under German constitutional law, such agreements can only be concluded if the Bundesrat, as the representative of the German Länder on the federal level, consents (Art. 84 para. 1 sentence 6 of the German Basic Law). CETA also establishes a liability regime that assigns liability responsibility for illegal sovereign acts (e.g. in dealing with portfolio investments of Canadian investments) to the federal and state governments. Such a requirement can only be enacted by consent of the Bundesrat (Art. 74 para. 1 No. 25 in conjunction with. Art. 74 para. 2 of the Basic Law). If the German legislator were to enact the legislative act without approval by the Bundesrat, this would result in the invalidation of the act.

The need for sufficient democratic accountability of the decision-making activities of international treaty bodies.

15. One of the most important constitutional challenges is how to democratically reintegrate and legitimize the decision-making activities of international treaty bodies. Obviously, CETA's negotiating partners have not addressed this issue. In CETA, contractual bodies with considerable power of decision-making are established - even if this power of decision-making does not extend to the establishment of directly effective law. EU negotiators have not ensured that representatives of the Member States are represented in the treaty bodies when it comes to matters falling

within the competence of the Member States. They have addressed the question of whether a decision requires a Member State's consent in order to be valid only superficially and vaguely. CETA is based on trust in the technocratic rationality of decisions that are negotiated in small bodies by trade policy "experts". CETA thus falls well short of the legitimacy requirements that apply to the democratic and parliamentary legitimacy of supranational decision-making.

Requirement for the participation of German representatives in CETA treaty bodies

16. From the point of view of German constitutional law, the provisions within CETA aimed at the legitimization of the decision-making activities of the treaty bodies prove to be deficient. Adequate democratic legitimacy of the decision-making activities of these bodies can only be ensured if Member State representatives are involved in cases where CETA Treaty bodies take decisions within the competence of the EU Member States. This has not yet been ensured within the text of CETA.

17. The decision-making activities of the treaty making bodies of CETA therefore suffer potentially from a lack of democratic and personal legitimacy (Art. 20 para. 2 in conjunction with Art. 79 para. 3 of the Basic Law). The legislative act legitimizing the German ratification of CETA must ensure that the CETA treaty bodies may only make decisions, in cases where competences of the EU Member States are involved, solely with the participation of a German representative authorized to veto any proposal.

Necessity to enact a parliamentary act to control and monitor decision-making activities of the CETA treaty bodies (Begleitgesetzgebung)

18. The Federal Constitutional Court has long presumed that the German constitutional organs are obliged to politically supervise, control and legitimize the activities of supranational authorities which have a direct and tangible impact on the internal conditions in Germany ("Integrationsverantwortung"). When concluding an amendment to EU primary law, the German legislature must thus guarantee that the powers conferred upon the EU may only be used in a democratically legitimate manner, and that the German legislative bodies are in the position to overview and control the use of such powers. The German constitutional court and the political institutions use the term “Begleitgesetzgebung” ("accompanying legislation"). Such accompanying legislation has been adopted, for example, with regard to the European Union ("Integration Responsibility Act"), the European Financial Stabilization Facility (EFSF) and the European Stability Mechanism (ESM).

19. To date, the Federal Constitutional Court has not yet reached a decision on whether the German constitutional bodies have a corresponding "international treaty making responsibility" vis-à-vis the decision-making activities of treaty bodies in a free trade agreement. There is no valid reason to answer this question in the negative. The Federal Government and the Bundestag are obliged to exercise their treaty making responsibility to actively monitor the exercise of the decision-making powers conferred on international treaty bodies. In any case, substantial decisions may only be taken after they have received the approval of the German Bundestag. Therefore, an accompanying legislative act must be passed alongside the act consenting to the ratification of CETA, which determines in what cases the German representatives on the CETA treaty bodies may approve a decision only if they have been authorized by the plenary session or the competent committee of the German Bundestag.

20. In order to provide effective protection under international law for the provisions of the accompanying legislation, the Federal Republic of Germany must make a reservation under international law (Article 19 of the Vienna Convention on the Law of Treaties), in which it declares that decisions of the CETA Treaty bodies only claim validity for the Federal Republic of Germany if the requirements of the accompanying legislation - which are to be explained in detail - are met.