FEDERAL CONSTITUTIONAL COURT

- 2 BvR 1368/16 -

- 2 BvR 1444/16 -

- 2 BvR 1482/16 -

- 2 BvR 1823/16 -

- 2 BvE 3/16 -

IN THE NAME OF THE PEOPLE

In the proceedings

I. on the constitutional complaint

of Prof. Dr. rer. nat. (…),

– authorised representative: (…) –

against 1. the Federal Republic of Germany's consent, as given by the competent member of its Government, to the free trade agreement between the European Union and Canada (Comprehensive Economic and Trade Agreement – CETA) and its consent to 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 consent of all Member States, and thus do not require Germany's consent, against the Federal Government's failure to take the necessary measures to prevent the adoption of the Comprehensive Economic and Trade Agreement (CETA) 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, including its provisional application, is in violation of the Treaties

- 2 BvR 1368/16 -,

II. on the constitutional complaints

of Ms (…),

and 68,015 other complainants

– authorised representatives: 1. (…), 2. (…) –

against 1. the Federal Government's consent to CETA in the Council of the European Union or the European Council,

2. by way of subsidiary application, the European Union's consent to CETA,

3. the *Bundestag*'s consent to CETA

- 2 BvR 1444/16 -,

III. on the constitutional complaints

of Mr (…),

and 62 other complainants

– authorised representative: (…) –

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

- 2 BvR 1482/16 -,

IV. on the constitutional complaints

of Mr (…),

and 125,011 other complainants

– authorised representatives: 1. (…), 2. (…) –

against the consent given by the German representative in the Council of the European Union to the signing, conclusion and provisional application of the Comprehensive Economic and Trade Agreement between Canada, of the one part, and the EU and its Member States, of the other part (CETA) or against the failure by the German representative in the Council to reject these Council decisions

- 2 BvR 1823/16 -,

V. on the application to declare in *Organstreit* proceedings 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) on behalf of the EU, 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 on behalf of the EU, which is being sought by the Commission,

Applicant: Parliamentary group in the German *Bundestag*
Die Linke,
represented by its chairpersons
Dr. Dietmar Bartsch and Amira Mohamed Ali,
Platz der Republik 1, 11011 Berlin,

– authorised representative: (…) –

Respondent: Federal Government,
represented by Federal Chancellor Olaf Scholz,
Bundeskanzleramt, Willy-Brandt-Straße 1, 10557 Berlin,

– authorised representative: (…) –

- 2 BvE 3/16 -

the Federal Constitutional Court – Second Senate –

with the participation of Justices

Vice-President König,

Huber,

Hermanns,

Müller,

Kessal-Wulf,

Maidowski,

Langenfeld,

Wallrabenstein

held on 9 February 2022, by order pursuant to § 24 of the Federal Constitutional Court Act:

1. **The proceedings are combined for joint decision.**
2. **The constitutional complaints and the application in *Organstreit* proceedings are rejected to the extent that they are directed against the participation of the German representative in the Council of the European Union in adopting the Council Decision on signing on behalf of the European Union the Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part (CETA) (Council Decision <EU> 2017/37 of 28 October 2016, OJ EU L 11 of 14 January 2017, p. 1 f.) and to the extent that they are directed against the proposed decision of the Council of the European Union on the conclusion of CETA, which the Council has yet to adopt (COM<2016> 443 final of 5 July 2016).**
3. **For the rest, the constitutional complaints and the application in *Organstreit* proceedings are dismissed [as inadmissible].**

R e a s o n s :

A.

The constitutional complaints and the application in *Organstreit* proceedings [dispute between constitutional organs] are directed against the conduct of German and European bodies with regard to the signing, provisional application and conclusion of the Comprehensive Economic and Trade Agreement between the European Union and its Member States, of the one part, and Canada, of the other part (CETA). 1

I.

1. […] 2

On 10 June 2009, the European Union and Canada started negotiations for an economic and trade agreement (cf. European Commission Press Release of 10 June 2009, IP/09/896). […] 3

According to the recitals of the Agreement, CETA aims to further strengthen the close economic relationship between the Parties (first recital) and to create an expanded and secure market for goods and services of the Parties through the reduction or elimination of barriers to trade and investment (second recital). At the same time, the Parties recognise that CETA preserves their flexibility to achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity and their right to regulate within their territories (sixth and eighth recital). 4

2. CETA is a “new generation” free trade agreement. Its main part consists of 30 chapters, some of which are divided into sections. Its Art. 30.1 states that any protocols, annexes, declarations, joint declarations, understandings and footnotes to the Agreement constitute integral parts thereof (cf. Official Journal of the EU – OJ EU L 11 of 14 January 2017, p. 23 ff.). 5

Chapter 1 contains general definitions and initial provisions. 6

[…] 7

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. 8

Chapter 8 concerns investment. It provides inter alia: 9

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 procedures 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 investment 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 (footnote: 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.) and five shall be nationals of third countries.

(…)

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 interpretation 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 mutual recognition of professional qualifications. Chapter 12 addresses domestic regulation. 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 or-

der 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 either 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. Notwithstanding paragraph 1, 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 terminated; and

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

(…)

3. On 5 July 2016, on the basis of Art. 91, Art. 100(2), Art. 207(4) subpara. (1) in conjunction with Art. 218(5) and (6)(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 on behalf of the European Union 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 (cf. COM<2016> 444 final of 5 July 2016, p. 13), and to declare that the Agreement will be applied “on a provisional basis by the Union as provided for in its Article 30.7(3)”, pending the completion of the procedures for its conclusion (cf. COM<2016> 470 final of 5 July 2016, p. 13), and to conclude said Agreement (COM<2016> 443 final of 5 July 2016). 13

[…] 14

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, and that it did not have shared competence in many areas governed by CETA either, the Commission had decided to propose the signature of the Agreement as a mixed agreement in order not to delay the signature of the Agreement. […] 15

[…] 16

Hence, certain reservations were set out in a draft decision of the Council of the European Union of 5 October 2016 on the provisional application of CETA (cf. Document of the Council of the European Union 10974/16 of 5 October 2016). 17

At the meeting of the Council of Trade Ministers on 18 October 2016, the envisaged decisions regarding the signing, provisional application and conclusion of CETA could not be adopted given that the Walloon Region had not authorised the Belgian Government to give its consent. Following further negotiations, the Walloon Region indicated its willingness to provide its authorisation on 27 October 2016. The General Secretariat of the Council thereupon initiated a written procedure on that same day in which the Member States of the European Union were to approve the Council's proposals for decision by 28 October 2016. 18

The Federal Government communicated its consent on 28 October 2016. On the same day, the Permanent Representative of the Federal Republic of Germany to the European Union made the following declaration in letters to the Secretary-General of the Council of the European Union and the Permanent Representative of Canada to the European Union: 19

> (…) The Federal Republic of Germany hereby declares that, as a Party to the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, it can exercise its rights deriving from Art. 30.7(3)(c) CETA. The necessary steps will be taken in accordance with EU procedures (…).

On 28 October 2016 (cf. Press Release of the Council of the European Union of 28 October 2016, 623/16), the Council of the European Union adopted a decision on the signing of CETA on behalf of the European Union pursuant to Art. 207(4) subpara. 1 in conjunction with Art. 218(5) TFEU (cf. Council Decision <EU> 2017/37 of 28 October 2016 on the signing on behalf of the European Union of the Comprehensive Economic and Trade Agreement <CETA> between Canada, of the one part, and the European Union and its Member States, of the other part, OJ EU L 11 of 14 January 2017, p. 1 f.). At the same time, a joint interpretative instrument was adopted (cf. Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement <CETA> between Canada and the European Union and its Member States, OJ EU L 11 of 14 January 2017, p. 3 ff.). 20

Moreover, the Commission, the Council and the Member States as well as the Council Legal Service issued 38 statements and declarations regarding the interpretation of CETA, which were entered in the Council minutes when the decision authorising the signature of CETA was adopted (cf. Statements to be entered in the Council minutes, OJ EU L 11 of 14 January 2017, p. 11 ff.). These statements and declarations included the following: 21

(…)

3. Statement from the Council relevant to the provisional application of transport and transport services:

The Council of the European Union declares that its decision, to the extent that it provides for provisional application by the EU of provisions in the field of transport services, falling within the scope of shared competences between the EU and the Member States, does not prejudge the allocation of competences between them in this field and does not prevent the Member States from exercising their competences with Canada for matters not covered by this Agreement, or with another third country in the field of transport services falling within the said scope.

4. Statement from the Council relevant to the provisional application of Chapters 22, 23 and 24:

The Council of the European Union declares that its decision, to the extent that it provides for provisional application by the EU of provisions in Chapters 22, 23 and 24, falling within the scope of shared competences between the EU and the Member States, does not prejudge the allocation of competences between them in this field and does not prevent the Member States from exercising their competences with Canada for matters not covered by this Agreement, or with another third country.

(…)

Regarding the scope of provisional application of CETA:

15. Statement from the Council:

The Council of the European Union confirms that only matters within the scope of EU competence will be subject to provisional application.

16. Statement from the Council relevant to the provisional application of mutual recognition of professional qualifications:

The Council of the European Union declares that its decision, to the extent that it provides for provisional application by the EU of provisions in the area of mutual recognition of professional qualifications and to the extent that this area falls within the scope of shared competences between the EU and the Member States, does not prejudge the allocation of competences between them in this area and does not prevent the Member States from exercising their competences with Canada or with another third country for matters that would not be covered by this Agreement.

17. Statement from the Council relevant to the provisional application of protection of workers:

The Council of the European Union declares that its decision, to the extent that it provides for provisional application by the EU of provisions in the area of protection of workers and to the extent that this area falls within the scope of shared competences between the EU and the Member States, does not prejudge the allocation of competences between them in this area and does not prevent the Member States from exercising their competences with Canada or with another third country for matters that would not be covered by this Agreement.

Regarding decisions of the CETA Joint Committee:

18. Commission declaration:

It is noted that it is unlikely that any decision amending CETA and any binding interpretation of CETA adopted by the CETA Joint Committee will be required in the near future. Therefore the Commission does not intend to make any proposal under Article 218(9) with a view to amending CETA or with a view to adopting a binding interpretation of CETA before completion of the main proceedings before the German Constitutional Court.

19. Statement from the Council and the Member States:

The Council and the Member States recall that where a decision of the CETA Joint Committee falls within the competence of the Member States the position to be taken by the Union and its Member States within the CETA Joint Committee shall be adopted by common accord.

Regarding the termination of provisional application of CETA:

20. Statement from the Council:

If the ratification of CETA fails permanently and definitively because of a ruling of a constitutional court, or following the completion of other constitutional processes and formal notification by the government of the concerned state, provisional application must be and will be terminated. The necessary steps will be taken in accordance with EU procedures.

21. Statement by Germany and Austria:

Germany and Austria declare that as Parties to CETA they can exercise their rights which derive from Article 30.7(3)(c) of CETA. The necessary steps will be taken in accordance with EU procedures.

(…)

36. Statement by the Commission and the Council on investment protection and the Investment Court System ('ICS'):

CETA aims at a major reform of investment dispute resolution, based on the principles common to the courts of the European Union and its Member States and of Canada, as well as to international courts recognised by the European Union and its Member States and Canada, such as the International Court of Justice and the European Court of Human Rights, as a step forward in reinforcing respect for the rule of law. The Commission and the Council consider that this mechanism revised on the basis of the terms of this statement constitutes a step towards the establishment of a multilateral investment court which will, in the long term, become the body responsible for resolving disputes between investors and States.

All of these provisions having been excluded from the scope of provisional application of CETA, the Commission and the Council confirm that they will not enter into force before the ratification of CETA by all Member States, each in accordance with its own constitutional procedures.

(…)

38. Statement by the Council Legal Service on the legal nature of the Joint Interpretative Instrument:

The Council Legal Service hereby confirms that, by virtue of Article 31(2)(b) of the Vienna Convention on the Law of Treaties, the Joint Interpretative Instrument to be adopted by the parties on the occasion of the signature of CETA, of which it forms the context, constitutes a document of reference that will have to be made use of if any issue arises in the implementation of CETA regarding the interpretation of its terms. To this effect, it has legal force and a binding character.

Moreover, the Council of the European Union adopted the decision to apply CETA on a provisional basis, subject to the following reservations (cf. Council Decision <EU> 2017/38 of 28 October 2016 on the provisional application of the Comprehensive Economic and Trade Agreement <CETA> between Canada, of the one part, and the European Union and its Member States, of the other part, OJ EU L 11 of 14 January 2017, p. 1080 f.): 22

Article 1

1. The Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its

Member States, of the other part (the ‘Agreement’) shall be applied on a provisional basis by the Union as provided for in Article 30.7(3) thereof, pending the completion of the procedures for its conclusion, and subject to the following points:

(a) only the following provisions of Chapter Eight of the Agreement (Investment) shall be provisionally applied, and only in so far as foreign direct investment is concerned:

- Article 8.1 to 8.8;

- Article 8.13;

- Article 8.15 with the exception of paragraph 3 thereof; and

- Article 8.16;

b) the following provisions of Chapter Thirteen of the Agreement (Financial Services) shall not be provisionally applied in so far as they concern portfolio investment, protection of investment or the resolution of investment disputes between investors and States:

- Article 13.2(3) and (4);

- Article 13.3 and Article 13.4;

- Article 13.9; and

- Article 13.21;

(c) the following provisions of the Agreement shall not be provisionally applied:

- Article 20.12;

- Article 27.3 and Article 27.4, to the extent that those Articles apply to administrative proceedings, review and appeal at Member State level;

- Article 28.7(7);

d) the provisional application of Chapters 22, 23 and 24 of the Agreement shall respect the allocation of competences between the Union and the Member States.

(…)

Finally, the Council decided to obtain the consent of the European Parliament regarding the conclusion of the Agreement (cf. Council of the European Union, Outcome of Proceedings of 28 October 2016, 13887/16; cf. also Press Release of the Council of the European Union of 28 October 2016, 623/16). 23

On 30 October 2016, representatives of Canada and the European Union signed 24

the Agreement (cf. Commission Press Release of 30 October 2016, IP/16/3581; Commission Announcement of 30 October 2016, AC/16/3890; Commission Daily News of 31 October 2016, MEX/16/3588).

[…] 25

On 21 September 2017, CETA provisionally entered into force (cf. OJ EU L 238 of 16 September 2017, p. 9; Commission Press Release of 20 September 2017, IP/17/3121). 26

Until now, 15 EU Member States have ratified the Agreement; ratification has yet to be completed in the other 12 Member States, including the Federal Republic of Germany. Similarly, both Canada and the EU have yet to ratify the Agreement. 27

II.

[The complainants in proceedings I to IV assert a violation of their right derived from Art. 38(1) first sentence in conjunction with Art. 20(1) and (2) in conjunction with Art. 79(3) of the Basic Law (*Grundgesetz* – GG), a right that is equivalent to fundamental rights. The parliamentary group *DIE LINKE*, as applicant in proceedings V, invokes rights of the *Bundestag* by way of vicarious standing (i.e. standing to assert the rights of the *Bundestag* in its own name). It claims that the Federal Government's failure to reject the proposed Council decisions on CETA violates decision-making rights of the *Bundestag* under Art. 23(1) second sentence in conjunction with Art. 59(2) GG.]

[…] 28-84

III.

1. The Federal Government considers the constitutional complaints in proceedings I to IV and the application in *Organstreit* proceedings lodged by applicant V to be inadmissible from the outset and manifestly unfounded. 85

[…] 86-101

2. The German *Bundestag* likewise considers the constitutional complaints in proceedings I to IV and the application in *Organstreit* proceedings lodged by the applicant in proceedings V to be inadmissible and unfounded. 102

[…] 103-114

3. The *Bundestag* parliamentary group *BÜNDNIS 90/DIE GRÜNEN* submitted its own statement in addition to the statement submitted by the *Bundestag*. 115

[…] 116-120

IV.

1. By judgment of 13 October 2016, the Second Senate of the Federal Constitutional Court rejected applications for preliminary injunction lodged in the present consti- 121

tutional complaint and *Organstreit* proceedings, as set forth in the reasons to that judgment. The applicants had sought to prevent the German representative in the Council of the European Union from consenting to decisions authorising the signing, provisional application and conclusion of CETA (cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 143, 65 <66>).

To the extent that the applications for preliminary injunction were directed against the signing and conclusion of CETA, they were found to have no prospects of success because no direct legal effects for the applicants arose, neither from the signing of CETA nor from its conclusion, with the latter only possible once the European Parliament has given its consent and the Member States have ratified the Agreement (cf. BVerfGE 143, 65 <89 para. 42, 101 para. 73>). 122

To the extent that the applications were directed against the German representative's consent to provisional application, the Second Senate rejected the applications for preliminary injunction on the basis of a weighing of consequences. According to the Court, the disadvantages that would arise if the preliminary injunction were not issued but the Federal Government's participation in the adoption of the decision by the Council were later found to be impermissible are less severe than the disadvantages that would arise if the preliminary injunction were issued but the applications were later found to be unsuccessful in the principal proceedings. 123

a) On the one hand, the Court held that there was a possibility that the Council Decision on the provisional application of CETA would be found to amount to an *ultra vires* act and that the Federal Government's participation in adopting the decision would be found to violate the right of the complainants in proceedings I to IV derived from Art. 38(1) first sentence in conjunction with Art. 20(1) and (2) in conjunction with Art. 79(3) GG. The Court considered it likely that the European Union lacks, inter alia, treaty-making competence with regard to portfolio investment, investment protection, international maritime transport services, mutual recognition of professional qualifications and labour protection (cf. BVerfGE 143, 65 <93 ff. para. 51 ff.>). Furthermore, it could not be ruled out that the Council Decision on provisional application could also be qualified as an *ultra vires* act to the extent that CETA is designed to transfer sovereign powers to the system of tribunals and committees established under CETA (cf. BVerfGE 143, 65 <95 para. 58>). 124

Moreover, the Court did not completely rule out the possibility of an encroachment on Germany's constitutional identity protected by Art. 79(3) GG given that the design of the committee system established under CETA could violate the basic tenets of the principle of democracy, which forms part of the Basic Law's constitutional identity (cf. BVerfGE 143, 65 <95 ff. para. 59 ff.>). 125

b) On the other hand, however, the Court held that the risk of disadvantages in respect of the legal interests protected by Art. 38(1) and Art. 20(1) and (2) GG could be effectively avoided by way of various safeguards; as a consequence, it would ulti- 126

mately be possible to prevent any severe disadvantage for the common good within the meaning of § 32(1) of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG). The risk of an *ultra vires* act could be addressed by excluding from provisional application matters covered by CETA but not falling within the exclusive competence of the European Union (cf. BVerfGE 143, 65 <98 ff. para. 67 ff.>). The Court also pointed out that any encroachment on the constitutional identity (Art. 79(3) GG) resulting from the competences and procedures of the committee system could – at least during the stage of provisional application – be countered in various ways. For instance, an inter-institutional agreement might ensure that decisions taken pursuant to Art. 30.2(2) CETA may only be adopted on the basis of a common position unanimously adopted by the Council pursuant to Art. 218(9) TFEU, or other safeguards could be put in place (cf. BVerfGE 143, 65 <100 para. 71>). Moreover, it had to be ensured that Germany could unilaterally terminate the provisional application of CETA should the Federal Government 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 (cf. BVerfGE 143, 65 <100 f. para. 72>).

2. By order of 7 December 2016, the Second Senate rejected further applications for preliminary injunction in proceedings 2 BvR 1444/16, 2 BvR 1482/16, 2 BvR 1823/16 and 2 BvE 3/16 (cf. BVerfGE 144, 1 <2>). These applications were directed against what the applicants considered the Federal Government's failure to comply with the requirements set out in the judgment of 13 October 2016. The Court found that the Federal Government had satisfied the requirements set out in the judgment of 13 October 2016 before it gave its consent to the decisions on the signing and provisional application of CETA (cf. BVerfGE 144, 1 <12 para. 21>). In particular, the Federal Government had not given its consent to the provisional application of the Agreement for the matters specified in the judgment of 13 October 2016. The Court found that it was unlikely that the competences and procedures of the committee system would encroach on the constitutional identity given that statement no. 19 from the Council and the Member States must be interpreted in such a way that all Member-State concerns will be taken into consideration if decisions are taken in the CETA Joint Committee during the stage of the provisional application of CETA (cf. BVerfGE 144, 1 <16 f. para. 30>). In statement no. 21, Germany and Austria had declared that as Parties to CETA they may exercise their rights which derive from Article 30.7(3)(c) CETA. This meant that the right to unilaterally terminate provisional application was guaranteed (cf. BVerfGE 144, 1 <17 para. 31 f.>). 127

3. Following the decisions of the Federal Constitutional Court, the Court of Justice of the European Union issued two opinions: 128

a) In its opinion 2/15 of 16 May 2017 on the EU-Singapore Free Trade Agreement (cf. CJEU, Opinion 2/15 of 16 May 2017, Free Trade Agreement between the European Union and the Republic of Singapore, EU:C:2017:376), which had been requested by the Commission, the Court of Justice found that all matters to be governed by the prospective agreement fall within the exclusive competence of the EU, 129

with the exception of the provisions relating to non-direct investment and to investor-state dispute settlement in cases where claims are brought against Member States. According to the CJEU, these matters fall within competences shared between the European Union and the Member States. As a consequence, EUSFTA, in its original form, can only be concluded jointly by the European Union and the Member States.

b) In its opinion 1/17 of 30 April 2019 on investor protection under CETA (cf. CJEU, Opinion 1/17 of 30 April 2019, Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part, EU:C:2019:341), which had been requested by the Kingdom of Belgium, the Court of Justice found that Chapter 8 Section F of CETA is compatible with EU primary law. 130

B.

The constitutional complaints lodged in proceedings I to IV (see I. below) and the *Organstreit* application lodged in proceedings V (see II. below) are admissible in part. 131

I.

Based on a reasonable interpretation (see 1. below), the applications lodged in the constitutional complaint proceedings are admissible to the extent that they are directed against the participation of the German representative in the Council of the European Union in adopting the Council Decision on provisional application (see 2. below). For the rest, the constitutional complaints are inadmissible (see 3. below). 132

1. Based on a reasonable interpretation, the complainants in proceedings I to IV challenge the Federal Government's consent to the Council Decision, proposed by the European Commission, on the signing on behalf of the European Union 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 (Council Decision <EU> 2017/37 of 28 October 2016 on the signing on behalf of the European Union of the Comprehensive Economic and Trade Agreement <CETA> between Canada, of the one part, and the European Union and its Member States, of the other part, OJ EU L 11 of 14 January 2017, p. 1 f.). They also challenge the Federal Government's consent to the Council Decision on the provisional application 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 (Council Decision <EU> 2017/38 of 28 October 2016 on the provisional application of the Comprehensive Economic and Trade Agreement <CETA> between Canada, of the one part, and the European Union and its Member States, of the other part, OJ EU L 11 of 14 January 2017, p. 1080 f.). These decisions were adopted on 28 October 2016, with the Federal Government's consent communicated on the same day. 133

Moreover, the complainants in proceedings I to IV challenge the 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 134

part (COM <2016> 443 final of 5 July 2016). This decision has not yet been adopted.

The complainants in proceedings II further challenge a (potential future) act of approval by the *Bundestag* in relation to CETA. 135

2. The constitutional complaints are admissible to the extent that they are directed against the German representative's consent in the Council to the Council Decision on the provisional application of CETA. This is an admissible challenge in constitutional complaint proceedings (see a) below). The complainants in proceedings I to IV have standing (see b) below). [...] 136

a) The German representative's consent to the Council Decision of 28 October 2016 on the provisional application of CETA is an admissible subject matter for a challenge in constitutional complaint proceedings. Such consent is an act of German public authority within the meaning of Art. 93(1) no. 4a GG and § 90(1) BVerfGG (cf. BVerfGE 151, 202 <279 f. para. 100 ff.>). 137

The Federal Government's involvement in the Council Decision on the provisional application of CETA constitutes an act of participation that can be attributed to German state authority. Even though the Federal Republic of Germany could terminate provisional application pursuant to Art. 30.7(3)(c) CETA (cf. BVerfGE 143, 65 <100 f. para. 72>; 144, 1 <17 para. 31 f.>), the Council Decision entails obligations under international law for the European Union, and thus indirectly also for the Federal Republic of Germany. 138

If this Council Decision were to exceed the European integration agenda (*Integrationsprogramm*) or to encroach on the Basic Law's constitutional identity, lodging a constitutional complaint against the participation of the German representative in the Council would be the only possibility for citizens to invoke their right to democratic self-determination, derived from Art. 38(1) first sentence GG, before the Federal Constitutional Court. According to established case-law, the bearers of responsibility with regard to European integration (*Integrationsverantwortung*) must ensure that measures taken by institutions, bodies, offices and agencies of the European Union, including decisions by the Court of Justice of the European Union, do not exceed the limits of the European integration agenda in a manifest and structurally significant manner, thereby violating Art. 38(1) first sentence in conjunction with Art. 23(1) second sentence, Art. 20(2) first sentence and Art. 79(3) GG or encroaching on the Basic Law's constitutional identity protected by Art. 79(3) GG. In this respect, their actions are subject to constitutional review (cf. BVerfGE 142, 123 <204 f. para. 157>). 139

b) The complainants in proceedings I to IV have standing to the extent that they challenge a violation of Art. 38(1) first sentence GG. Based on their submissions, it appears at least possible that the German representative's consent to the provisional application of CETA violates their right derived from Art. 38(1) first sentence in conjunction with Art. 20(1) and (2) in conjunction with Art. 79(3) GG – a right that is equivalent to fundamental rights – given that the decision in question could amount to an 140

ultra vires act or encroach on the Basic Law's constitutional identity (§ 90(1) BVerfGG; see aa) below). However the complainants lack standing to the extent that they challenge a violation of the principle of the rule of law (Art. 20(3) GG). The complainants in proceedings II also lack standing to the extent that they challenge a violation of the protection of the natural foundations of life under Art. 20a GG; the complainants in proceedings II and III further lack standing to the extent that they challenge a violation of the principle of the social state (Art. 20(1) GG) and of the core of municipal self-government (Art. 28(2) GG), and the complainants in proceedings III moreover lack standing to the extent that they claim that provisional application constitutes an abuse of rights (see bb) below).

aa) The complainants sufficiently demonstrate and substantiate that the German representative's consent to the provisional application of CETA violates their right derived from Art. 38(1) first sentence in conjunction with Art. 20(1) and (2) in conjunction with Art. 79(3) GG (see (1) below) and that they are individually (see (2) below), presently (see (3) below) and directly (see (4) below) affected by this violation. 141

(1) As a right that is equivalent to fundamental rights, Art. 38(1) first sentence GG guarantees citizens the right to vote in elections to the German *Bundestag*, affording them a right to political self-determination and guaranteeing their free and equal participation in the process that provides legitimation to state authority exercised in Germany (cf. BVerfGE 123, 267 <340>; 132, 195 <238 para. 104>; 135, 317 <399 para. 159>; 142, 123 <173 para. 81, 190 para. 126>; 146, 216 <249 f. para. 46>; 151, 202 <274 f. para. 91>). The right to vote is not limited to the formal legitimation of (federal) state authority. Rather, it affords the individual the right to influence the formation of the political will through their vote, meaning that they can effect real change (cf. BVerfGE 151, 202 <274 f. para. 91>). Art. 38(1) first sentence GG does not, however, confer a right upon citizens to subject democratic majority decisions to a review of lawfulness that goes beyond what is necessary to safeguard the right to democratic self-determination protected by Art. 20(1) and (2) in conjunction with Art. 79(3) in conjunction with Art. 1(1) GG (cf. BVerfGE 129, 124 <168>; 134, 366 <396 f. para. 52>; 142, 123 <190 para. 126>; 151, 202 <286 para. 118>; 154, 17 <85 f. para. 100>). 142

Within the scope of Art. 23 GG, it protects citizens against a transfer of competences and powers from the German *Bundestag* to the European Union where such transfer would violate the principle of democracy; this would be the case if the transfer were to render meaningless the democratic legitimation of state power [at the domestic level] and the influence exerted by citizens on the exercise of this power – both of which stem from elections (cf. BVerfGE 89, 155 <172>; 123, 267 <330>; 134, 366 <396 para. 51>; 142, 123 <173 f. para. 81>; 146, 216 <249 para. 45>; 151, 202 <274 f. para. 91>; 153, 74 <152 para. 136>). 143

In order to safeguard the ability of citizens to exert a democratic influence on the process of European integration, Art. 38(1) first sentence GG generally affords them a right that sovereign powers be transferred only in the ways provided for in Art. 23(1) 144

second and third sentence in conjunction with Art. 79(2) GG (cf. BVerfGE 134, 366 <397 para. 53>; 142, 123 <193 para. 134>; 146, 216 <251 para. 50>; 151, 202 <297 f. para. 144>; 153, 74 <134 para. 98>). In addition, Art. 38(1) first sentence in conjunction with Art. 20(1) and (2) first sentence GG affords voters a right vis-à-vis the Federal Government, the *Bundestag* and, as the case may be, the *Bundesrat*, compelling these constitutional organs to exercise their responsibility with regard to European integration by monitoring whether institutions, bodies, offices and agencies of the European Union adhere to the European integration agenda, refraining from participating in the adoption and implementation of measures that exceed the limits of the integration agenda, and, where such measures constitute a manifest and structurally significant exceeding of EU competences, actively taking steps to ensure conformity with the integration agenda and respect for its limits (cf. BVerfGE 151, 202 <296 para. 140>; 153, 74 <133 para. 96>). Therefore, Art. 38(1) first sentence in conjunction with Art. 20(1) and (2) and Art. 79(3) GG also affords protection against a structurally significant exceeding of competences by institutions, bodies, offices and agencies of the European Union. The Federal Constitutional Court conducts an *ultra vires* review to determine whether this is the case (regarding *ultra vires* challenges, cf. BVerfGE 142, 123 <174 f. para. 83, 198 ff. para. 143 ff.>; 151, 202 <296 ff. para. 140 ff.>; 153, 74 <133 para. 96, 152 para. 136>; 154, 17 <90 para. 110>).

145 The democratic substance of the right to vote can furthermore be violated where the rights of the *Bundestag* are seriously curtailed, thereby encroaching on the *Bundestag*'s latitude to shape policy (cf. BVerfGE 123, 267 <341>; 142, 123 <190 para. 125>; 154, 17 <87 para. 103>). Where sovereign powers are transferred to the European Union, it is important to examine whether the sovereign powers exercised at European level are based on the necessary democratic legitimation; this must be assessed in light of the principle of democracy, which can be invoked as a public right of the individual on the basis of Art. 38(1) first sentence GG. Pursuant to Art. 23(1) first sentence GG, the Federal Republic of Germany may only participate in a European Union that is committed to democratic principles. This means that there must be a link of democratic legitimation between citizens entitled to vote and European public authority, with citizens having a right to be involved in some way in this legitimation; this right is based on the constitutional concept of Art. 38(1) first sentence in conjunction with Art. 20(1) and (2) GG. Therefore, citizens entitled to vote can also challenge deficits of democratic legitimation within the European Union that are relevant under constitutional law (cf. BVerfGE 123, 267 <331>).

146 The complainant in proceedings I asserts a violation of Art. 38(1) in conjunction with Art. 146, Art. 2(1) and Art. 14(1) GG, the complainants in proceedings II claim a violation of Art. 38(1), Art. 20, Art. 20a in conjunction with Art. 79(3) GG. The complainants in proceedings III, just as the complainants in proceedings IV, invoke Art. 38(1) first sentence in conjunction with Art. 20, Art. 23 and Art. 79(3) GG. With regard to the right of citizens to democratic self-determination enshrined in Art. 38(1) first sentence GG and covered by Art. 79(3) GG (cf. BVerfGE 89, 155 <187>; 123, 267

<340>; 129, 124 <169, 177>; 132, 195 <238 para. 104>; 135, 317 <386 para. 125>; 142, 123 <190 para. 126>; 146, 216 <249 f. para. 46>; 151, 202 <286 para. 118>; 153, 74 <153 para. 138>; 154, 17 <86 para. 101>), these challenges are sufficiently substantiated. The complainants make reference to the case-law of the Second Senate, addressing the constitutional standards developed by the Senate and their significance for the present case, and thereby satisfying the special requirements regarding the admissibility of *ultra vires* challenges (in this regard cf. BVerfGE 142, 123 <174 f. para. 83>; 151, 202 <274 ff. para. 90 ff.>; 154, 17 <82 para. 90>).

(2) The German representative's consent individually affects the right to democratic self-determination of the complainants in proceedings I to IV: they demonstrated in a plausible manner that the provisional application of CETA may violate their right to democratic self-determination, which is afforded to them as citizens entitled to vote and which is derived from Art. 38(1) first sentence in conjunction with Art. 79(3) GG, given the risks that provisional application poses with regard to adherence to the European integration agenda and to the protection of Germany's constitutional identity. 147

(3) The complainants in proceedings I to IV are presently affected by the effects of the challenged act of participation. The consent at issue here was given on 28 October 2016, the corresponding Council decision was adopted on the same day and has remained in force unchanged. CETA has been provisionally applied since 21 September 2017 (cf. OJ EU L 238 of 16 September 2017, p. 9; Commission Press Release of 20 September 2017, IP/17/3121). 148

(4) Moreover, the consent of the German representative in the Council to a measure of institutions, bodies, offices and agencies of the European Union that may constitute an *ultra vires* act or a violation of Germany's constitutional identity directly affects the complainants, as German citizens entitled to vote, with regard to their right to democratic self-determination. Neither an act of implementation nor prior review by the ordinary courts is required for the challenges to be admissible. 149

bb) […] 150

c) […] 151

d) […] 152

3. To the extent that the constitutional complaints of the complainants in proceedings I to IV are directed against the signing of CETA, they are inadmissible because the signing does not entail any direct legal effects for the complainants (cf. BVerfGE 143, 65 <89 para. 42>). 153

The constitutional complaints of the complainants in proceedings I to IV are also inadmissible to the extent that they are directed against the proposed decision on the conclusion of CETA, which the Council has yet to adopt. It is accepted that the Council will only adopt this decision once ratification has been completed in all Member States, which is why no direct legal effects arise from the prospective Council deci- 154

sion at this stage (cf. BVerfGE 143, 65 <101 para. 73>).

Lastly, the constitutional complaint lodged in proceedings II is inadmissible to the extent that it is directed against a future domestic act of approval since no such act of approval has been adopted yet. The constitutional complaint therefore lacks an admissible challenge. It is true that acts of approval in relation to international treaties can be challenged before the Federal Constitutional Court prior to their entry into force given that ratification makes them binding under international law. However, the challenged law must already have been enacted – even though it need not have entered into force (cf. BVerfGE 10, 20 <54>; 104, 23 <29>; 123, 267 <329>; 153, 74 <132 para. 94>). This means that *Bundestag* and *Bundesrat* must have concluded the legislative process, and the law only has to be certified and promulgated by the Federal President (cf. BVerfGE 1, 396 <413>; 153, 74 <132 para. 94>). An act of approval can thus only be challenged in constitutional complaint proceedings once it has been adopted (cf. BVerfGE 24, 33 <53 f.>; 123, 267 <329>; 153, 74 <132 para. 94>). 155

II.

I. The *Organstreit* application in proceedings V is admissible to the extent that it challenges the participation of the German representative in adopting the Council Decision of 28 October 2016 on the provisional application of CETA (see 1. below). The application is inadmissible for the rest (see 2. below). 156

1. The parties to the proceedings are constitutional organs or parts thereof (see a) below). The applicant in proceedings V challenges an action of the respondent (see b) below) and asserts, by way of vicarious standing and in a plausible manner, that this action violates the *Bundestag*'s constitutional rights (see c) below). […] 157

a) In its capacity as a *Bundestag* parliamentary group, the applicant in proceedings V can be a party to proceedings before the Federal Constitutional Court and assert rights of the *Bundestag* by way of vicarious standing pursuant to § 13 no. 5 and §§ 63 ff. BVerfGG (cf. BVerfGE 1, 351 <359>; 142, 123 <182 f. para. 106, 184 para. 111>; 152, 8 <18 f. para. 25>). According to § 63 BVerfGG, the Federal Government may be a respondent in *Organstreit* proceedings. 158

b) The applicant in proceedings V lodged an application to declare that the "failure to reject" the proposals for decision on the signing, conclusion and provisional application of CETA violates rights of the *Bundestag*. The applicant thus challenges the respondent's voting in the Council of the European Union. This is an admissible challenge in *Organstreit* proceedings (regarding a dispute between the Federation and the *Länder,* cf. BVerfGE 92, 203 <227>). 159

c) To the extent that the application in proceedings V is directed against the German representative's consent to the Council Decision on the provisional application of CETA, the applicant has standing pursuant to § 64 BVerfGG. 160

The applicant asserts that the respondent violated or directly threatened to violate rights of the *Bundestag* (cf. BVerfGE 60, 319 <324>; 70, 324 <350>; 137, 185 <224 para. 107>) by participating in an *ultra vires* act brought about by an EU institution and, additionally, by giving its consent to the provisional application of CETA, thereby participating in an encroachment on the constitutional identity protected by Art. 79(3) GG. In its case-law, the Federal Constitutional Court recognised that the responsibility with regard to European integration enshrined in Art. 23 GG confers upon the *Bundestag* the right and the duty to counter such encroachments and that this right can be invoked by the *Bundestag* parliamentary groups by way of vicarious standing (§ 64(1) BVerfGG; cf. BVerfGE 132, 195 <247 para. 125>; 134, 366 <397 para. 54>; 142, 123 <184 para. 111>; 157, 1 <18 ff. para. 56, 67 ff.>). 161

Substantively, the applicant in proceedings V challenges the fact that CETA comprises matters that fall within the Member States' competences, rather than being covered by the EU's common commercial policy within the meaning of Art. 207 TFEU. Moreover, the applicant claims a violation of rights of the *Bundestag* under Art. 23(1) second sentence GG on the grounds that overly far-reaching decision-making powers could be conferred on the committees envisaged under CETA during the stage of provisional application, without any Member State involvement, and that these powers might also concern matters that fall within the competences of the Member States. Thus, in substance the applicant in proceedings V challenges a further transfer of sovereign powers [to the system of tribunals and committees envisaged under CETA], which is impermissible under Art. 23(1) first and second sentence GG. 162

[…] 163

d) […] 164-166

2. However, the application in *Organstreit* proceedings is inadmissible to the extent that the applicant in proceedings V challenges the signing and conclusion of CETA, as presently no direct legal effects arise therefrom. This was already decided in the judgment of the Second Senate of 13 October 2016 concerning the applications for preliminary injunction (cf. BVerfGE 143, 65 <89 para. 42, 101 para. 73>). 167

The application is also inadmissible to the extent that the applicant asserts a violation of objective constitutional principles. An act or omission cannot be challenged in *Organstreit* proceedings solely on grounds of objective unconstitutionality (cf. BVerfGE 118, 277 <319>; 126, 55 <68>; 138, 256 <259 para. 5>; 140, 1 <21 f. para. 58>; 150, 194 <200 para. 18>; established case-law). The applicant in proceedings V asserts that CETA conflicts with the principle of the rule of law on the grounds that human rights are not sufficiently enshrined in the text of the Agreement and that the investment tribunal system violates the principle of autonomy of EU law. The applicant further claims that CETA conflicts with the principle of the social state on the grounds that social standards are not clearly set out in the Agreement. These challenges are inadmissible. 168

C.

To the extent that the constitutional complaints in proceedings I to IV are admissible, they are manifestly unfounded (see I. below). The same holds true for the application in *Organstreit* proceedings lodged by the applicant in proceedings V (see II. below). 169

I.

Measured against Art. 23(1) in conjunction with Art. 20(1) and (2) and Art. 79(3) GG and the European integration agenda set out in the German Act of Approval to the Treaty on European Union and the Treaty on the Functioning of the European Union (see 1. below), the Council Decision of 28 October 2016 on the provisional application of CETA neither qualifies as an *ultra vires* act, nor does it encroach on the basic tenets of the principle of democracy (see 2. below). There has been no violation of the complainants' right derived from Art. 38(1) first sentence GG, which is a right equivalent to fundamental rights. 170

1. According to Art. 23(1) first sentence GG, the Federal Republic of Germany participates in establishing and developing the European Union. Art. 23(1) GG sets out a commitment to recognise the legal effects of EU law and to enforce it (cf. BVerfGE 126, 286 <302>; 140, 317 <335 para. 37>; 142, 123 <186 f. para. 117>; Federal Constitutional Court, Order of the Second Senate of 23 June 2021 - 2 BvR 2216/20 inter alia -, para. 73). 171

a) However, the openness of the domestic legal order to EU law – an openness which has its basis in the design of the Basic Law and is given effect by the legislator deciding on European integration matters – is subject to limits that derive not only from the European integration agenda, for which the legislator bears responsibility, but also from Germany's constitutional identity enshrined in the Basic Law (Art. 23(1) third sentence in conjunction with Art. 79(3) GG), which is beyond the reach of both constitutional amendment and European integration. Measures taken by institutions, bodies, offices and agencies of the European Union are therefore only accorded precedence of application to the extent that the Basic Law and the domestic act of approval permit or provide for a transfer of sovereign powers (cf. BVerfGE 37, 271 <279 f.>; 58, 1 <30 f.>; 73, 339 <375 f.>; 75, 223 <242>; 89, 155 <190>; 123, 267 <348 ff., 402>; 126, 286 <302>; 129, 78 <99>; 134, 366 <384 para. 26>; 140, 317 <336 para. 40>; 142, 123 <187 f. para. 120>; 154, 17 <89 f. para. 109>). It is only within these limits that the application of EU law in Germany is based on the necessary democratic legitimation (cf. BVerfGE 142, 123 <187 f. para. 120>). It is incumbent upon the Federal Constitutional Court to uphold these constitutional limits, in particular when conducting a review on the basis of constitutional identity (identity review) or an *ultra vires* review. 172

These standards of the Basic Law, which bind all constitutional organs of the Federal Republic of Germany, may not be relativised or undermined (cf. Federal Consti- 173

tutional Court, Order of the Second Senate of 23 June 2021 - 2 BvR 2216/20 inter alia -, para. 75). German state organs may not participate in the adoption of EU measures that must be qualified as *ultra vires* acts or that encroach on the constitutional identity protected by Art. 79(3) GG in conjunction with the principles laid down in Art. 1 and Art. 20 GG, nor may they be involved in the implementation, execution or operationalisation of *ultra vires* acts (cf. BVerfGE 89, 155 <188>; 126, 286 <302 ff.>; 134, 366 <387 f. para. 30>; 140, 317 <336 para. 42>; 142, 123 <207 para. 162>; 154, 17 <151 para. 234>). In light of the responsibility with regard to European integration incumbent upon them (Art. 23 GG; cf. Federal Constitutional Court, Judgment of the Second Senate of 2 March 2021 - 2 BvE 4/16 -, para. 69 ff.), constitutional organs must use the means at their disposal to take steps seeking to ensure adherence to the European integration agenda (cf. BVerfGE 142, 123 <186 para. 115, 207 ff. para. 163 ff.>).

b) Where Germany makes use of participation rights in institutions and bodies of the European Union, it exercises domestic public authority. When undertaking negotiations or voting in the Council, Germany's representative remains bound by the Basic Law (cf. BVerfGE 92, 203 <227 f., 230>; 135, 317 <429 para. 234>; 151, 202 <279 f. para. 101 f., 281 f. para. 105 f.>; 154, 17 <81 f. para. 89>). 174

c) The responsibility with regard to European integration is not just an objective duty incumbent upon constitutional organs. Rather, the right to democratic self-determination derived from Art. 38(1) first sentence in conjunction with Art. 20(1) and (2) and Art 79(3) GG gives rise to a right of citizens vis-à-vis *Bundestag*, *Bundesrat* and Federal Government to be protected against measures by which EU institutions, bodies, offices and agencies exceed their competences in a manifest and structurally significant manner and/or by which they encroach on the Basic Law's constitutional identity (cf. BVerfGE 142, 123 <174 f. para. 83, 188 para. 121, 198 ff. para. 143 ff.>; 151, 202 <296 ff. para. 140 ff.>; 153, 74 <133 para. 96, 152 para. 136>; 154, 17 <86 para. 101, 90 para. 110>). 175

In light of this, it constitutes a violation of the right of citizens derived from Art. 38(1) first sentence in conjunction with Art. 20(1) and (2) and Art. 79(3) GG if the German representative in the Council of the European Union gives consent to a measure that encroaches on Germany's constitutional identity or that amounts to an *ultra vires* act. 176

2. In the case at hand, the participation of the German representative in adopting the Council Decision of 28 October 2016 on the provisional application of CETA is not objectionable under constitutional law. Given the reservations regarding provisional application set out in the Council decision and the statements and declarations attached thereto, the Council decision neither amounts to an *ultra vires* act nor does it encroach on the basic tenets of the principle of democracy, which form part of the Basic Law's constitutional identity (see a) below). With regard to the assessment under constitutional law, the only relevant factor is the substantive meaning of the Council decision on the basis of a reasonable interpretation thereof. It is irrelevant in this 177

respect how CETA is provisionally applied in practice and that the findings by the Court of Justice of the European Union in its EUSFTA opinion of 16 May 2017 regarding the allocation of competences differ in some respects from the findings laid down in the judgment of the Second Senate of the Federal Constitutional Court of 13 October 2016 (see b) below).

a) The decision of the Council of the European Union on the provisional application of CETA neither amounts to an *ultra vires* act (see aa) below) nor does it encroach on the Basic Law's constitutional identity (see bb) below) since the original version of the draft decision of 5 July 2016 (COM<2016> 470 final) was amended and reservations were laid down regarding essential points before the German representative gave his consent. It can thus be ruled out that the consent given by the German representative in the Council violates the Federal Government's responsibility with regard to European integration and the right of the complainants in proceedings I to IV derived from Art. 38(1) first sentence GG (see cc) below). 178

aa) Taking into account the reservations laid down as to its scope, the Decision of the Council of the European Union of 28 October 2016 on the provisional application of CETA extends only to matters that undisputedly fall within the competences of the EU. As regards the contested treaty-making competence for portfolio investment, investment protection, international maritime transport services, mutual recognition of professional qualifications and labour protection (cf. BVerfGE 143, 65 <93 para. 52>), these matters are exempt from provisional application. 179

(1) The provisions concerning portfolio investment, whose main purpose is generating profit without direct influence of the investor on the company (cf. BVerfGE 143, 65 <93 f. para. 53>), are exempt from the provisional application of the Agreement (cf. also BVerfGE 144, 1 <14 para. 25>). In this respect, the Council Decision of 28 October 2016 provides that 180

- of Chapter 8 of the Agreement (Investment), only Arts. 8.1 to 8.8, 8.13 and 8.15, with the exception of paragraph 3 thereof, and Art. 8.16 will be provisionally applied, and only in so far as foreign direct investment is concerned;

- of Chapter 13 of the Agreement (Financial services), Art. 13.2(3) and (4), Arts. 13.3, 13.4, 13.9 and 13.21 will not be provisionally applied in so far as they concern portfolio investment, protection of investment or the resolution of investment disputes between investors and States (Art. 1(1)(b).

(2) The same applies to the provisions under the heading "Investment protection" in Chapter 8 Section D CETA that concern the treatment of investors and of covered investments (Art. 8.10 CETA) and expropriation (Art. 8.12 CETA) (cf. para. 180). 181

(3) With regard to provisions on feeder services (transport between ports and ships) and maritime auxiliary services, which are explicitly excluded from the scope of application of the common commercial policy pursuant to Art. 207(5) TFEU (cf. BVerfGE 143, 65 <94 para. 55>), no. 3 of the Council minutes contains a statement from the 182

Council relevant to the provisional application of transport and transport services. According to that statement, the Council decision – to the extent that it provides for provisional application by the EU of provisions in the field of transport services falling within the scope of shared competences between the EU and the Member States – does not prejudge the allocation of competences between them in this field and does not prevent the Member States from exercising their competences with Canada for matters not covered by CETA, or with another third country in the field of transport services falling within the said scope. As CETA does not include a general chapter on transport and transport services, it may be assumed that the Council statement on this matter covers all CETA provisions referring to any type of transport and transport services, in particular those concerning international maritime transport services within the meaning of Chapter 14 CETA (cf. BVerfGE 144, 1 <14 f. para. 26>).

(4) It is likewise doubtful whether the European integration agenda confers the necessary competence on the EU with regard to Chapter 11 CETA (mutual recognition of professional qualifications) (cf. BVerfGE 143, 65 <94 f. para. 56>). In this respect, statement no. 16 to the Council minutes (Statement from the Council relevant to the provisional application of mutual recognition of professional qualifications) provides that its decision – to the extent that it provides for provisional application by the EU of provisions in the area of mutual recognition of professional qualifications and to the extent that this area falls within the scope of shared competences between the EU and the Member States – does not prejudge the allocation of competences between them in this area and does not prevent the Member States from exercising their competences with Canada or with another third country for matters that would not be covered by this Agreement. 183

(5) Doubts as to the EU's competence for Chapter 23, which concerns trade and labour (cf. BVerfGE 143, 65 <95 para. 57>), are addressed by statement no. 4 to the Council minutes, which has almost exactly the same wording as the statement set out above (Statement from the Council relevant to the provisional application of Chapters 22, 23 and 24). The same applies to protection of workers, which is the subject matter of statement from the Council no. 17. 184

(6) It is submitted that the Council Decision on provisional application could be qualified as an *ultra vires* act on the grounds that CETA potentially allows a further transfer of sovereign powers to the system of tribunals and committees envisaged thereunder (Chapter 8 Section F and Chapter 26 CETA). In this respect, it appears doubtful whether affording the EU a comprehensive treaty-making competence in common commercial policy matters would be compatible with Art. 23(1) GG, as it seems at least possible that this would conversely diminish the powers of Member States and have far-reaching implications for their status as subjects of (international) law (cf. BVerfGE 143, 65 <95 para. 58>). However, these risks are sufficiently countered not only by the fact that Chapter 8 CETA (cf. para. 180) is exempted from provisional application, but also by statement no. 17 and declaration no. 18 to the Council minutes regarding the CETA Joint Committee. Most notably, statement no. 19 to 185

the Council minutes explicitly declares that positions taken within the CETA Joint Committee must be adopted by common accord, which makes such decisions contingent upon the consent of the German representative in the Council.

(7) Ultimately, it can be concluded that the Council Decision on the provisional application of CETA upholds the competences of the Member States. It is true that uncertainties may arise regarding the interpretation of statements and declarations in individual cases, insofar as these were not issued by individual Member States, but by the Council of the European Union. However, these uncertainties are reduced by the fact that the statements and declarations are clearly intended to respect the competences of the Member States as they were understood at the time of decision-making. Taking into account the reservations limiting the scope of the Council Decision of 28 October 2016 on provisional application, and the statements and declarations issued in this context, a manifest and structurally significant encroachment on the competences of the Member States can in any case be ruled out (cf. BVerfGE 144, 1 <15 para. 27 f.>). 186

bb) It is also not ascertainable that the Council Decision on the provisional application of CETA encroaches on the Basic Law's constitutional identity, in particular the principles of democracy and sovereignty of the people (Art. 20(1) and (2) GG) (cf. BVerfGE 143, 65 <95 para. 59>). 187

Art. 26.1 CETA 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 the Agreement (Art. 26.1(3) CETA). Its decisions – "subject to the completion of any necessary internal requirements and procedures" – are binding on the Parties and must be implemented by them (Art. 26.3(2) CETA). Significant powers of the CETA Joint Committee, as set out in the Agreement, include the power to decide on amendments to the Agreement (Art. 26.1(5)(c) CETA) and to amend its protocols and annexes (Art. 30.2(2) first sentence CETA). In quantitative terms, protocols 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 CETA; cf. BVerfGE 143, 65 <95 f. para. 60>). 188

Given the ambiguous nature of Art. 30.2(2) second and third sentence CETA, it appears possible that such decisions by the CETA Joint Committee do not require consent by the Parties (cf. BVerfGE 143, 65 <96 para. 61>). CETA does not provide for Member State participation in the committees through 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 comprises "representatives of the European Union and representatives of Canada" (Art. 26.1(1) first sentence CETA). Even though the Joint Committee can only make decisions by mutual consent (Art. 26.3(3) CETA), and it therefore cannot adopt decisions against the vote of the European 189

Union, it is not guaranteed that the Federal Republic of Germany will have the power to influence the Committee's decisions (cf. BVerfGE 143, 65 <97 para. 63>). It thus seems possible that German authorities will be excluded from exerting any kind of direct influence on decision-making taking place in the Committee. This in turn renders it impossible to ensure the personal and substantive democratic legitimation of committee activities through the participation of German state representatives and to thereby ensure accountability vis-à-vis citizens (cf. BVerfGE 143, 65 <96 f. para. 62>). This could 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) (cf. BVerfGE 143, 65 <96 f. para. 62>).

Insofar as the Member States are not represented in the committees, they can only influence the committees' procedures and decisions indirectly by adopting, on a proposal by the Commission, a common position in a Council decision pursuant to Art. 218(9) TFEU, which the representative of the European Union must then put forward 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) subpara. 1 TFEU). In general, Art. 218(9) TFEU will likely be applicable where the CETA Joint Committee decides to amend CETA's protocols and annexes (cf. Art. 30.2(2) first sentence CETA), or where it adopts binding interpretations of the Agreement (Art. 8.31(3) second sentence, Art. 26.1(5)(e) CETA; cf. BVerfGE 143, 65 <97 f. para. 64>). It appears doubtful whether decisions taken by the Committee would meet the level of democratic legitimation and oversight required under Art. 20(1) and (2) GG (cf. BVerfGE 143, 65 <98 para. 65>; 151, 202 <292 para. 131, 295 para. 138>). 190

Yet these concerns need ultimately not be resolved in the present case. The reservations laid down in declaration no. 18 and statement no. 19 to the Council minutes, which limit the scope of the Council Decision of 29 October 2016 on provisional application, rule out an encroachment on the principle of democracy. Firstly, in declaration no. 18 the European Commission provided assurances that the Commission does not intend to make any proposal under Article 218(9) TFEU with a view to amending CETA or with a view to adopting a binding interpretation of CETA during the period of provisional application, at least not before the Federal Constitutional Court has rendered a final decision in this regard. Secondly, it follows from the drafting history and context of statement no. 19 that any position to be taken by the Euro- 191

pean Union and its Member States within the Joint Committee regarding a decision of said Committee must be adopted by common accord. This means that the consent of the German representative in the Council is required, which rules out the risk that the competences of the CETA committee system or its procedures will encroach on the Basic Law's constitutional identity (Art. 79(3) GG) during the stage of provisional application (cf. BVerfGE 144, 1 <16 f. para. 30>).

cc) Given that the Council Decision of 28 October 2016 thus amounts neither to an *ultra vires* act nor to an encroachment on Germany's constitutional identity, it can also be ruled out that the consent given by the German representative in the Council violates the Federal Government's responsibility with regard to European integration and the right of the complainants in proceedings I to IV derived from Art. 38(1) first sentence GG. 192

b) The constitutional review of the German representative's participation in adopting the Council Decision of 28 October 2016 that is challenged in the present proceedings must be based on the substantive meaning of said decision as reasonably interpreted at the time that decision was adopted. The manner in which the decision was subsequently applied is irrelevant in this respect. 193

It thus has no bearing on the present case that the CETA committee system already became operational when CETA provisionally entered into force (cf. the overview of the European Commission announcing and documenting any CETA committees and other dialogues at https://trade.ec.europa.eu/doclib/press/index.cfm?id=1811&title=CETA - Meetings-and-documents <last accessed 26 January 2022>). According to the Federal Government, the committees will refrain, in accordance with statement no. 19 to the Council minutes of 28 October 2016, from making any decisions on matters falling within the competences of the Member States during the stage of provisional application (cf. *Bundestag* document, *Bundestagsdrucksache* – BTDrucks 19/6713, p. 6). 194

Similar considerations apply with regard to the opinion of 16 May 2017 on the EUSFTA, which was delivered by the CJEU after the Council Decision on provisional application had been adopted. The CJEU's conclusions in that opinion differ from the findings laid down in the judgment of the Second Senate of 13 October 2016 regarding the competences of the Member States for matters of international maritime transport services, mutual recognition of professional qualifications and labour protection (cf. para. 129). However, this has no bearing on the question whether the Federal Government, through the consent given by the German representative in the Council to the Council Decision on the provisional application of CETA, has violated its responsibility with regard to European integration. 195

This notwithstanding, German constitutional organs remain obliged to counter any measures taken during the stage of provisional application that amount to an *ultra vires* act or an encroachment on the Basic Law's constitutional identity. Where such action by the Federal Government is not successful, it still has the option, pursuant to 196

Art. 30.7(3)(c) CETA, to terminate the provisional application of CETA as a last resort (cf. BVerfGE 143, 65 <100 f. para. 72>; 144, 1 <17 para. 31 f.>).

II.

To the extent that the *Organstreit* application lodged in proceedings V is admissible, it is manifestly unfounded for the same reasons as the constitutional complaints lodged in proceedings I to IV. Since the Council Decision of 28 October 2016 on the provisional application of CETA does not amount to an *ultra vires* act and does not violate basic tenets of the principle of democracy, which form part of the Basic Law's constitutional identity, it has not violated rights of the German *Bundestag*. 197

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