

CETA violates the French Constitution – Detailed analysis

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foodwatch, the Veblen Institute and the Nicolas Hulot Foundation (FNH), sought the opinion of Dominique Rousseau, professor of constitutional law, and Évelyne Lagrange and Laurence Dubin, professors of public international law (1), about the question of the compatibility of CETA with the French Constitution.

According to their analysis, and despite the texts annexed *in extremis* to CETA for adoption by the European Union Council on October 30, 2016 (2), the Comprehensive Economic and Trade Agreement between the European Union and Canada (CETA) still contains provisions that violate the French Constitution. In this note, foodwatch, the Veblen Institute and the FNH point out three fundamental breaches of the Constitution that emerge from these analyses.

On the eve of its examination by the EU Council, CETA was the subject of intense discussions trying to overcome Austria's reticence, the Walloon "veto" and meet conditions imposed by the German Constitutional Court prior to signature of CETA. The Karlsruhe Court, summoned by foodwatch and more than 120,000 applicants, had in fact stated how CETA should be understood: a) the provisional application should only concern undisputed fields of competence within the EU, b) the German government should have a say in the CETA Joint Committee's work, and (c) the agreement's provisional application should be reversible for Member States (3).

All of these negotiations led to the last minute preparation of a joint interpretative instrument attached to CETA and 38 declarations annexed to the minutes of the EU Council's decision to obtain an agreement for signature. After the EU Council's vote and signature of the agreement, the text is now in the hands of the European Parliament. If approved on February 15, the agreement will enter into provisional application, before consulting national parliaments in preparation for ratification by Member States.

This complex ratification process is taking place at a time when, in line with internal negotiations with Wallonia, Belgium has announced its intention to bring the matter before the EU Court of Justice to verify the compatibility of CETA with European treaties.

A first question arises as to the status of these additional texts.

In that which concerns the common interpretive instrument, there is little doubt: the text was conjointly written by the European Union and Canada. The annex to the agreement is fully part of the agreement (see Article 30.1 of CETA) and its legal scope is binding. This means that CETA should be implemented and interpreted according to this text. However, according to the Commission's own submissions, its main purpose in this case is to specify the intention of the parties. Therefore, strictly speaking, it does not alter the content of CETA - it is not its purpose – but it will more or less guide the legal interpretation (by national or EU judges - which will be seized during the ratification phase, and by arbitrators seized after its entry into force).

The interpretive instrument also announces changes in the Investor / State (or the EU) Dispute settlement process (see analysis, point 1). In this instrument, the EU and Canada have made an additional commitment to work on a code of conduct to better ensure the impartiality of court members, including their remuneration and appointment, prior to enforcement of this process. While this commitment confirms that the CETA content can be improved, it also means that MEPs and national parliamentarians will have to decide on a text of which some crucial provisions have not been finalized.

Regarding the 38 annexed declarations, they were prepared by several European institutions as well as Member States (EU Council, European Commission, Germany, Austria, Belgium, Bulgaria, Greece, Hungary, Ireland, Poland, Portugal, Romania, the United Kingdom and Slovenia). They are annexed to the Council's minutes and shall only be binding for their authors. Therefore, they do not bind Canada and will not have a binding effect.

Therefore, in light of the legal status and the content of these additional instruments, it appears that several of CETA's provisions still infringe the Constitution, which could make it impossible for France to ratify the CETA agreement as it stands.

1) The principle of equality

The European Union and Investor-State Dispute Settlement (ISDS) mechanism allows foreign investors, and only them, to file complaints with an international court specially formed for the protection of investments. This court will be able to judge the compatibility of the measures taken by a Member State of the European Union or the European Union with the provisions of CETA and the numerous recognized rights of foreign investors so that they may obtain redress of prejudicial measures.

This mechanism introduces an inequality before the law between *domestic* and *foreign investors*. However, despite the elements added to the common interpretative instrument ("*CETA will not result in foreign investors being treated more favorably than domestic investors*"), procedural inequality of treatment remains. In the event of a dispute with a French public policy decision, foreign investors will benefit from a special legal remedy to protect their interests, unlike domestic investors. As foreign investors are not held to exhausting all domestic remedies, they could circumvent them and decide to refer directly to the parallel international court set up by CETA.

2) "The essential conditions for the exercise of national sovereignty"

CETA does and may continue to jeopardize the "essential conditions for the exercise of sovereignty" as understood by the Constitutional Council. On the one hand, it deprives national courts of their ordinary jurisdiction for the benefit of the international court at the discretion of foreign investors (see *equality principle* above), on the other hand, it alters the conditions for the exercise of the powers of parliament - the normative power and the power of control - as well as the powers of administrative authorities.

CETA establishes more than a dozen committees (the Joint Committee, specialized committees such as the Joint Management Committee for Sanitary and Phytosanitary Measures, the Committee for Services and

investments, etc.) some of which will be able to exercise their functions from the start of the provisional application. Among these committees, the Joint Committee plays a leading role. It brings together representatives from Canada and the European Union, but does not include any Member State representatives despite the considerable decision-making and interpretation powers that it has. Working in conjunction with specialized committees, the Joint Committee interferes with the exercise of the legislative and regulatory powers of Member States and the European Union.

The Council and Member States of the EU have made it clear in Declaration 19 that, in matters falling within the competence of Member States, European positions would be taken jointly with the Member States. However, for lack of clarity on the exact limits to respective powers and details on their effective implementation, this welcome commitment must be clarified. Although the question of the division of powers between the EU and Member States is a delicate issue. Thus, EU institutions have so far agreed to consider CETA as a joint agreement; although it seems that the provisions adopted by the EU for the provisional entry into force of CETA only cover the exclusive and undisputed powers of the Union.

In addition, CETA provides that parties establish regulatory cooperation mechanisms to reduce non-tariff barriers to trade through the harmonization or mutual recognition of their standards. These mechanisms, mentioned in the agreement and in particular in Chapter 21, create new constraints related to the function of "making the law". These constraints are likely to jeopardize the "essential conditions for the exercise of national sovereignty", as defined in the jurisprudence of the Constitutional Council. While it is explicitly stated in the common interpretative instrument that these mechanisms are voluntary, the risk of the State having to pay very large sums in the event of a complaint filed by private investors with the international court or, being involved in a lengthy and costly procedure is likely to dissuade national authorities from circumventing regulatory cooperation mechanisms.

Regardless of regulatory cooperation, the ability of foreign investors to file a complaint with the international court against a State could be a deterrent when adopting new legislation that might be deemed incompatible with CETA requirements. It is all the more true since the State is also exposed to other remedies, this time reserved to parties to the agreement (specifically: Canada), either before the Dispute Settlement Body for the WTO, or before CETA's State-State dispute settlement mechanism, SSDS (see article 29.3).

Therefore, CETA transfers powers to bodies (Joint Committees, Specialized Committees, the competent court for the settlement of disputes between public authorities and investors) which are not related to the legal order of the European Union or of its Member States but whose powers may directly or indirectly be forced upon them.

All the more reason to verify the compatibility of these transfers of normative or judicial powers (v. analysis under 1) with the Constitution that the conditions for denouncing such a binding agreement in areas where "essential conditions for the exercise of national sovereignty" are not clearly defined. In particular, the ability for a Member State to unilaterally denounce the agreement is not certain.

Some intra-European declarations purport to clarify the process for stopping the provisional application following a possible decision of unconstitutionality by a constitutional court or a final failure of a national ratification process. However, they do not precisely specify what the notion of final failure involves. After notification by the concerned Member State, it will be up to the European

Union to propose to the Council to vote to end the agreement's provisional application. This decision should probably be unanimous, which does not guarantee the concerned State the termination of the provisional application because it can not ratify the agreement.

Finally, the procedure for denunciation of the agreement by a Member State after its full and final entry into force has never been mentioned. While Article 30.9 of CETA on the termination of the agreement provides for the termination of the agreement by a party, it contains no clarification as to what exactly the term "party" means. Does it refer to the EU and/or the Member States (see art. 1.1 CETA)? Moreover, whatever the denunciation procedure, the agreement contains a survival clause according to which the entire chapter eight on investments and arbitration will remain in force for 20 years after a possible denunciation of CETA in order to protect investments made prior to that date. Here again, the "essential conditions for the exercise of national sovereignty" may be affected.

3) The precautionary principle

The precautionary principle makes it possible to take measures to protect citizens from potential risks, particularly in the health and food sectors.

The precautionary principle has been written into the French Constitution since 2005. Article 5 of the Charter for the Environment provides: "When the occurrence of any damage, albeit unpredictable in the current state of scientific knowledge, may seriously and irreversibly harm the environment, public authorities shall, with due respect for the principle of precaution and the areas within their jurisdiction, ensure the implementation of procedures for risk assessment and the adoption of temporary measures commensurate with the risk involved in order to preclude the occurrence of such damage." Article 10 of the Charter states that it shall inspire France's actions at both European and international levels.

In fact, article 191 of the TFUE obliges the EU to base its action on "Precautionary principles and preventive actions" in the field of environment - and in also in practice in the field of food, human, animal and plant health.

However, the CETA agreement, which covers a wide range of environmental issues, does not provide for any "measures to ensure compliance with the precautionary principle", as formulated by the Constitutional Council in 2008. In the common interpretative agreement, the EU, its members and Canada "reaffirm their commitments to precaution according to international agreements" However, the scope is limited in so far as only the word "precaution" is mentioned in the interpretative instrument - and not "precautionary principle". Whereas consistency and scope of the required precaution, if not the principle, are subject to variations depending on legal systems. For example, they differ according to WTO law, EU law and French constitutional law. Although some declarations, such as those written by the Commission, Slovenia and Belgium, are more precise, but in no way do they involve Canada.

The difficulties raised by CETA with regard to the precautionary principle and analyzed in the study published by foodwatch in June 2016 by four European lawyers, are therefore confirmed and still a current issue (4).

Ultimately, the common or individual interpretative instruments do not alter the need to submit CETA to both the CJEU and the Constitutional Council before ratification. (5)

Notes :

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Laurence Dubin is a professor of public law at the Université Paris 8 Saint-Denis and director of the legal research laboratory, Forces du droit. Her research includes international trade law .

(2) Joint interpretative instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union and its Member States :

<http://data.consilium.europa.eu/doc/document/ST-13541-2016-INIT/en/pdf>

Comprehensive economic and trade agreement (CETA) between Canada, on the one part and the European Union and its Member States on the other part- Statements to the Council minutes

<http://data.consilium.europa.eu/doc/document/ST-13463-2016-REV-1/en/pdf>

(3) Verdict October 13, 2016 CETA – Provisional Measures (Case reference 2 BvR 1368/16 et al.)

<https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-071.html>

(4) TAFTA and CETA: Europe ready to sell off the precautionary principle (28/06/2016): _

<http://bit.ly/2egdtUH> (summary of the legal opinion in four key points and five examples, and complete legal analysis)

(5) International trade and investment agreements: Let us not sacrifice human rights for commercial interests - The example of the EU-Canada Comprehensive Economic and Trade Agreement (CETA)

<http://www.cncdh.fr/fr/publications/opinion-ceta-and-human-rights-let-us-not-sacrifice-human-rights-commercial-interests>