



“IN BETWEEN SEATS” ...
THE *CONSEIL CONSTITUTIONNEL* AND THE CETA

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ABSTRACT: On 26 July 2017, the *Conseil constitutionnel* ruled upon the compatibility of an EU (mixed) agreement with the French Constitution. Its decision, which concerned the EU-Canada Comprehensive Economic and Trade Agreement (CETA), clarifies, from a national constitutional law perspective, the room of manoeuvre of the national judge when controlling EU acts which also happen to be acts of the Member States. The necessity to combine EU law with French constitutional law when monitoring this specific category of international commitments of the French Republic results in a very narrow margin of manoeuvre for the judge. In the end, the *Conseil constitutionnel* considers CETA to be compatible with the Constitution of the French Republic.

KEYWORDS: constitutional courts – CETA – Canada – *Conseil constitutionnel* – mixed agreements – division of competence.

I. INTRODUCTION

The Comprehensive Economic and Trade Agreement (CETA) which was signed in October 2016 by Canada on the one hand, and the EU and its Member States on the other hand,¹ is undoubtedly a turning point in the development of the EU's trade action. However, along with the Transatlantic Trade and Investment Partnership (TTIP), it has been highly controversial from a material point of view. In this regard, Belgium recently activated the procedure enshrined in Art. 218, para. 11, TFEU so that the Court of Justice can decide whether the Investment Court System (ICS) is compatible with the Treaties or not.² The fierce criticisms against the CETA can moreover explain why this agreement

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¹ Comprehensive Economic and Trade Agreement (CETA) of 30 October 2016 between Canada, of the one part, and the European Union and its Member States, of the other part.

² Court of Justice, opinion 1/17, pending. Belgium committed to bring the CETA before the Court of Justice when the agreement was signed in October 2016. Cf. Comprehensive Economic and Trade Agreement between EU and Canada, Statements to be entered in the Council minutes, Statement 37 of the

has also crystallized core changes in the institutional functioning of the EU's external action. Not only has it revealed an unprecedented involvement of civil society,³ but it also showed the decisive role regional parliaments can endorse during the negotiating process.⁴ Moreover, the CETA is the first EU international agreement brought before national constitutional courts. After being referred to the German *Bundesverfassungsgericht*, whose monitoring procedure is still ongoing,⁵ CETA was brought before the French Constitutional Council (hereinafter also *Conseil constitutionnel*) in February 2017,⁶ pursuant to Art. 54 of the French Constitution (C).⁷

Art. 54 C is one of the three legal bases, beside Arts 61 and 61-1 C, provided in the French Constitution that can lead the *Conseil constitutionnel* to exercise a constitutionality review. Whereas Arts 61 C and 61-1 C concern the control of laws – before their promulgation in the first case,⁸ after their entry into force in the second⁹ – such as laws that transpose EU directives,¹⁰ Art. 54 C is specific to the monitoring of international undertakings.

Kingdom of Belgium on the conditions attached to full powers, on the part of the Federal State and the federal entities, for the signing of CETA, para. B.

³ EU citizens have used several tools, such as their right for petition before the European Parliament, the European citizen's initiative, referral before national courts, to express their scepticism towards CETA. Cf. C. RAPOPORT, *L'implication du citoyen dans l'élaboration du partenariat transatlantique*, in J. LEBULLENGER, C. DEBLOCK (eds), *Generation TAFTA. Les nouveaux partenariats de la mondialisation*, Rennes: Presses Universitaires de Rennes, 2018, forthcoming.

⁴ Cf. A. HERVÉ, *Les résistances des Etats membres dans le développement des relations conventionnelles de l'Union européenne: quels enseignements tirer de la conclusion de l'accord de libre-échange UE/Canada et de l'accord d'association UE/Ukraine?*, in *Revue Trimestrielle de Droit Européen*, 2017, p. 119 *et seq.*

⁵ German Federal Constitutional Court, judgment of 13 October 2016, 2 BvR 1368/16, 2 BvE 3/16, 2 BvR 1823/16, 2 BvR 1482/16, 2 BvR 1444/16. Cf. press release no. 71/2016 of 13 October 2016, *Applications for a preliminary injunction in the "CETA" proceedings unsuccessful*. It is likely that the German Federal Constitutional Court will wait for Court of Justice's opinion 1/17, for some of the questions asked are similar, even though both Courts rely on different legal texts for their control (one relies on the German Basic Law, the other on EU primary law).

⁶ French Constitutional Council, decision of 31 July 2017, Comprehensive Economic and Trade Agreement between Canada, on the one hand, and the European Union and its Member States, on the other (CETA), no. 2017-749 DC (CETA decision). The decision is available in English on the website of the Constitutional Council of the French Republic, www.conseil-constitutionnel.fr.

⁷ This provision came into force in 1958, along with the French Constitution of the Vth Republic.

⁸ According to Art. 61 C, "Institutional acts, before their promulgation, private members' bills mentioned in Article 11 before they are submitted to referendum, and the rules of procedure of the Houses of Parliament shall, before coming into force, be referred to the Constitutional Council, which shall rule on their conformity with the Constitution. To the same end, acts of Parliament may be referred to the Constitutional Council, before their promulgation, by the President of the Republic, the Prime Minister, the president of the National Assembly, the President of the Senate, sixty members of the National Assembly or sixty senators. In the cases provided for in the two foregoing paragraphs, the Constitutional Council must deliver its ruling within one month. However, at the request of the Government, in cases of urgency, this period shall be reduced to eight days. In these same cases, referral to the Constitutional Council shall suspend the time allotted for promulgation". Official translation of the French Constitution available on the website of the *Conseil constitutionnel*: www.conseil-constitutionnel.fr.

According to this latter provision, "if the Constitutional Council, on a referral from the President of the Republic, from the Prime Minister, from the President of one or the other Houses, or from sixty Members of the National Assembly or sixty Senators, has held that an international undertaking contains a clause contrary to the Constitution, authorization to ratify or approve the international undertaking involved may be given only after amending the Constitution".

It must be added here that the *Conseil constitutionnel* controls the compatibility of international agreements with all the legal sources that are part of the "*bloc de constitutionnalité*",¹¹ namely, those that have been attributed constitutional value.¹² This includes not only the 1958 Constitution itself, but also its preamble, the one to the Constitution of the IV Republic (1946) and, since the constitutional review of 2005, the Environment Charter. In the end, since the jurisdictional review procedure provided in Art. 54 C aims at determining whether the ratification of an international agreement by France can intervene without amending, first, the Constitution, it is beforehand very similar to the opinion procedure now enshrined in Art. 218, para. 11, TFEU.¹³

In practice though, Art. 54 C has rarely been activated,¹⁴ unlike Art. 61 C and Art. 61-1 C which are regularly used.¹⁵ Interestingly, it mostly concerned commitments France made in the framework of the European integration process (nine out of fourteen proceedings). Besides CETA, which is the first and only EU mixed agreement brought before the *Conseil constitutionnel*, five rulings dealt with the revision of the European treaties (Maastricht I & II,¹⁶ Amsterdam,¹⁷ the Treaty establishing a Constitution for Europe

⁹ According to Art. 61-1 C, "If, during proceedings in progress before a court of law, it is claimed that a legislative provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the *Conseil d'État* or by the *Cour de Cassation* to the *Conseil constitutionnel* which shall rule within a determined period. An Institutional Act shall determine the conditions for the application of the present article". Official translation of the French Constitution available on the website of the *Conseil constitutionnel*: www.conseil-constitutionnel.fr. The *question prioritaire de constitutionnalité* was introduced in the French Constitution in 2008. Cf. Constitutional Act no. 2008-724 of 23 July 2008, *Modernisation des institutions de la Vème République*,

¹⁰ French Constitutional Council, decision of 10 June 2004, no. 2004-496 DC; French Constitutional Council, decision of 30 November 2006, no. 2006-543 DC.

¹¹ French Constitutional Council, decision of 16 July 1971, no. 71-44 DC.

¹² *Ibid.*

¹³ Cf. on this issue S. ADAM, *La procédure d'avis devant la Cour de justice de l'Union européenne*, Bruxelles: Bruylant, 2011, p. 19 *et seq.*

¹⁴ It has been used only fourteen times since the entry into force of the Constitution of Vth Republic in 1958, which reckoned for the first time a constitutional review mechanism.

¹⁵ The cases are available on the website of the French Constitutional Council, www.conseil-constitutionnel.fr.

¹⁶ French Constitutional Council, decision of 9 April 1992, *Traité sur l'Union européenne (Maastricht I)*, no. 92-308 DC; French Constitutional Council, decision of 2 September 1992, *Traité sur l'Union européenne (Maastricht II)*, no. 92-312 DC.

(TECE)¹⁸ and Lisbon),¹⁹ and three concerned Member States commitments regarding respectively the Treaty on stability, coordination and governance in the economic and monetary union,²⁰ the 1976 Act dedicated to the election of the Assembly by direct universal suffrage²¹ and the Treaty of Luxembourg.²² Therefore, only five cases out of fourteen concerned commitments made by France outside the EU framework.²³ A revision of the Constitution was requested in seven cases²⁴ and was completed in six of them.²⁵

In view of these elements, when the procedure enshrined in Art. 54 C is initiated, it may directly affect the whole process of the conclusion of EU mixed agreements. If the *Conseil constitutionnel* declares the agreement incompatible with the French Constitution, the EU procedure will be delayed, until the Constitution is amended. Worse, if the constitutional amending process cannot be completed,²⁶ France is prevented from ratifying the EU agreement, causing the collapse of the conclusion procedure at the EU level. Even if the *Conseil constitutionnel* declares the agreement compatible with the French Constitution, the Members of Parliament who activated Art. 54 C will most likely

¹⁷ French Constitutional Council, decision of 31 December 1997, *Traité d'Amsterdam modifiant le Traité sur l'Union européenne, les Traités instituant les Communautés européennes et certains actes connexes*, no. 97-394 DC.

¹⁸ French Constitutional Council, decision of 19 November 2004, *Traité établissant une Constitution pour l'Europe*, no. 2004-505 DC.

¹⁹ French Constitutional Council, decision of 20 December 2007, *Traité de Lisbonne*, no. 2007-560 DC.

²⁰ French Constitutional Council, decision of 9 August 2012, *Traité sur la stabilité, la coordination et la gouvernance au sein de l'UEM*, no. 2012-653 DC.

²¹ French Constitutional Council, decision of 30 December 1976, *Décision du Conseil des Communautés européennes relative à l'élection de l'Assemblée des Communautés au suffrage universel direct*, no. 76-71 DC.

²² French Constitutional Council, decision of 19 June 1970, *Traité de Luxembourg*, no. 70-39 DC.

²³ French Constitutional Council: decision of 29 September 2006, *Accord sur l'application de l'article 65 de la convention sur la délivrance de brevets européens (Accord de Londres)*, no. 2006-541 DC; decision of 13 October 2005, *Engagements internationaux relatifs à l'abolition de la peine de mort*, no. 2005-524/525 DC; decision of 15 June 1999, *Charte européenne des langues régionales ou minoritaires*, no. 99-412 DC; decision of 22 January 1999, *Traité portant statut de la Cour pénale internationale*, no. 98-408 DC; decision of 22 May 1985, *Protocole n° 6 additionnel à la CESDHLF concernant l'abolition de la peine de mort, signé par la France le 28 avril 1983*, no. 85-188 DC.

²⁴ French Constitutional Council: *Traité de Lisbonne*, cit.; *Engagements internationaux relatifs à l'abolition de la peine de mort*, cit.; *Traité établissant une Constitution pour l'Europe*, cit.; *Charte européenne des langues régionales ou minoritaires*, cit.; *Traité portant statut de la Cour pénale internationale*, cit.; *Traité d'Amsterdam*, cit.; *Traité sur l'Union européenne (Maastricht I)*, cit.

²⁵ The only exception is the *Charte européenne des langues régionales ou minoritaires* decision, as the Charter was signed on May 1999 but never ratified.

²⁶ If the amendment is not approved by referendum or, in case the President of the Republic decides to submit a government bill to amend the Constitution to the Parliament convened in Congress, if the bill is not approved by a three-fifths majority of the votes cast (cf. Art. 89 C).

vote against the law authorizing its ratification.²⁷ This could, in the end, lead to the rejection of this law and, therefore, prevent France from ratifying the agreement.

In other words, cases brought before the *Conseil constitutionnel* pursuant to Art. 54 C may directly hinder the EU's capacity to assert itself on the international scene in compliance with Arts 3, para. 5, and 21 TEU.

That is why the CETA ruling was long-awaited, especially since this agreement has been feeding increasing national reluctances towards the EU's external action.²⁸ This stake can also explain why the *Conseil constitutionnel* rendered its decision more than five months after the one hundred and ten²⁹ Members of Parliament referred the CETA before it, although it was expected to deliver its ruling within a month.³⁰

Regarding the grievances, the applicant Members of Parliament claimed that CETA introduced binding rules that could affect the definition of national legal standards and, therefore, infringe the essential condition for exercising national sovereignty. They also contested the constitutionality of the stipulations dealing with investments in Section F of Chapter 8 of the agreement, and claimed that this agreement infringed the principle of precaution laid out in Art. 5 of the Environmental Charter.³¹ Finally, they also claimed that the stipulations related to the provisional application of the agreement and to the termination of this agreement were unconstitutional.

The *Conseil constitutionnel* entirely rejected these claims and declared that CETA does not contain unconstitutional clauses.

²⁷ This is what the Members of Parliament (MP) who brought CETA before the *Conseil constitutionnel* claimed. Cf. the press folder, www.pierrealainmuet.fr, p. 7.

²⁸ Cf. e.g. the 2016 Dutch referendum regarding the EU-Ukraine Association Agreement. Cf. A. HERVÉ, *Les résistances des Etats membres*, cit.

²⁹ 107 Members of Parliament seized the French Constitutional Council on 22 February 2017. They were joined by three more MPs on 20 March 2017.

³⁰ Art. 54 C does not mention any delay. Nevertheless, in practice, the *Conseil constitutionnel* often makes a reference in its rulings to the ordinance no. 58-1067 adopted on 7 November 1958 establishing the organic law regarding the *Conseil constitutionnel*, sometimes even to its Art. 19 which refers to the delay mentioned in Art. 61, para. 3, C, that is to say one month (eight days in case of emergency). It is true that, in practice, the *Conseil constitutionnel* has always delivered its ruling within a month, the only exception being the CETA case. Cf. P. JAN, *L'accès au juge constitutionnel: modalités et procédures*, Rapport pour le deuxième Congrès de l'A.C.C.P.U.F, 2000, p. 47, www.conseil-constitutionnel.fr. The former Secretary General of the *Conseil constitutionnel*, Schoettl, even considered this practice as a constitutional rule. See J.E. SCHOETTL, *Ma cinquantaine rue Montpensier*, in *Les Nouveaux Cahiers du Conseil constitutionnel*, 2008, p. 47 *et seq.* In the CETA case, the delay can also be explained by the fact that the *Conseil constitutionnel* was waiting for Opinion 2/15 which clarifies the division of competences between the EU and its Member States when it comes to the conclusion of Deep and Comprehensive Free Trade Agreements (DCFTAs). The *Conseil constitutionnel* indeed bases its solution on this opinion. See Court of Justice, opinion 2/15 of 16 May 2017. Cf. *infra*, Section III.1.

³¹ The Environmental Charter was adopted by the Constitutional Law no. 2015-205 of 2 March 2005 (France). It is annexed to the French Constitution and all its provisions have a constitutional value.

If this solution is good news for the EU's external action, since it allows a swift ratification of CETA by France – nevertheless subjected to the approval of the French parliament –, the Constitutional Council decision raises, however, several questions which will necessarily come back to the point if another EU agreement is brought before it.

Indeed, some extracts are unclear, incomplete, if not questionable, and give the impression that the *Conseil constitutionnel* is not totally at ease with its ruling. Given the specificity of EU mixed agreements, its margin of manoeuvre is actually quite narrow. Indeed, the *Conseil constitutionnel* is always restricted by the Court of Justice's monopoly regarding the interpretation and the assessment of validity of EU law.

This can explain why the *Conseil constitutionnel* has to use a very specific and innovative reasoning in order to define its task (II). This can also justify the way the *Conseil constitutionnel* analyses the content of the CETA and declares, in the end, it is compatible with the French Constitution (III).

II. THE SPECIFIC NATURE OF EU MIXED AGREEMENTS: WHAT IMPACT ON THE NATIONAL CONSTITUTIONAL JUDGE?

In order to define the extent of its control, the *Conseil constitutionnel* had to take into account the specific nature of EU mixed agreements. This results in two essential consequences. On the one hand, since EU mixed agreements are at the same time international undertakings made by France and EU secondary legislation, the *Conseil constitutionnel* establishes a monitoring method based on both Art. 53 C and Art. 88-1 C (II.1.). On the other hand, since EU mixed agreements may contain provisions falling under both exclusive and shared competences, the *Conseil constitutionnel* defines a two-tiered constitutional review based on the division of competence between the EU and its Member States (II.2.).

II.1. A MONITORING METHOD BASED ON BOTH ART. 53 C AND ART. 88-1 C

In order to define its task, the *Conseil constitutionnel* starts by replicating the different steps it had already set when he examined, on the basis of Art. 54 C, previous international undertakings made by France. From this point of view, the reader understands from the beginning of the decision that the context is highly sensitive. Indeed, the first constitutional principle the *Conseil constitutionnel* invokes is the principle of national sovereignty which is proclaimed in different constitutional sources.³²

This can easily be explained. Through any international undertaking, France may consent to limitations upon its sovereignty. This is the spirit in which the *Conseil consti-*

³² French Constitutional Council, *CETA*, cit., paras 5-6, where the Preamble to the 1958 Constitution, Art. 3 of the 1789 Declaration of the Rights of Man and the Citizen and Art. 3 of the 1958 Constitution are referred to.

tutionnel invokes the Preamble to the 1946 Constitution, according to which "The French Republic [...] shall respect the rules of public international law" and, "subject to reciprocity [...], shall consent to the limitations upon its sovereignty necessary to the organisation and preservation of peace".

But the sovereignty issue is even more significant in the *CETA* case. As a matter of fact, CETA is not an usual international undertaking autonomously negotiated by the French Republic. It is an EU mixed agreement. Therefore, the French commitment under CETA directly derives from its EU membership.

Of course, even in this particular case, Art. 53 C applies.³³ Consequently, since CETA can be considered as a "trade agreement" or an agreement "relating to international organization", it "may be ratified or approved only by an Act of Parliament",³⁴ as the *Conseil constitutionnel* recalls.

Nevertheless, since an EU mixed agreement is also EU secondary legislation, Art. 53 C must be read together with Art. 88-1 C which acknowledges that France shall participate in the European Union "constituted by States which have freely chosen to exercise some of their powers in common by virtue of the [TEU] and of the [TFEU] [...]".³⁵

Consequently, as far as an EU agreement is concerned, the issue of the articulation between the French constitutional order and the EU legal order is raised. This means that the *Conseil constitutionnel* does not have a wide leeway when it controls the compatibility of EU agreements with the Constitution. It remains subject to EU law principles.

There comes a first "unease" in the ruling. On the one hand, the *Conseil constitutionnel* infers from Art. 88-1 C that France is "dedicated to the existence of a legal order of the European Union integrated within the national legal order and distinct from the international legal order". Here, it refers, implicitly at least, to the expression used by the Court of Justice in the seminal *Costa v. Enel* decision and, therefore, acknowledges the specificity of the EU legal order and its inherent principles, such as the principle of primacy.³⁶ But, as is well known, this latter principle, which is "absolute" according to

³³ According to this provision, "Peace Treaties, Trade agreements, treaties or agreements relating to international organization, those committing the finances of the State, those modifying provisions which are the preserve of statute law, those relating to the status of persons, and those involving the ceding, exchanging or acquiring of territory, may be ratified or approved only by an Act of Parliament. They shall not take effect until such ratification or approval has been secured".

³⁴ Surprisingly, the *Conseil constitutionnel* only refers to the "treaties or agreements relating to international organization", not to "trade agreements". Cf. French Constitutional Council, *CETA*, cit., para. 8.

³⁵ The *Conseil constitutionnel* also invoked Art. 88-1 C when it controlled the European treaties (Amsterdam, TECE, Lisbon).

³⁶ Court of Justice, judgment of 15 July 1964, case 6/64, *Costa v. ENEL*: "By contrast with ordinary international treaties, the EEC treaty has created its own legal system which, on the entry into force of the treaty, became an integral part of the legal systems of the Member States [...]".

the Court of Justice,³⁷ has always met reluctances in the EU Member States, – before the national constitutional courts in particular, especially when constitutional law is at stake.³⁸ That is why, in the CETA decision, the *Conseil constitutionnel* does not hesitate, on the other hand, to “confirm the place of the Constitution at the pinnacle of the national legal order”, following here its traditional approach of primacy.³⁹

In other words, the fact that France participates in the development of the European Union, which is “vested with legal personality and endowed with decision-making powers as a result of the transfer of competence consented to by the Member States”, does not put at risk the supreme value of the Constitution within the internal legal order.

This allows the *Conseil constitutionnel* to invoke the criteria it had progressively developed when it monitored, on the basis of Art. 54 C, international undertakings made by France in compliance with Art. 54 C, and to apply them to the specific case of an EU international agreements. Therefore, whenever a commitment signed by France, in order to participate in the development of the European Union, “contain[s] a clause that is unconstitutional,⁴⁰ call[s] into question the rights and freedoms guaranteed by the Constitution⁴¹ or run[s] contrary to the essential conditions for the exercise of national sovereignty”,⁴² its ratification may only be granted after the review of the Constitution.

Besides, the specific nature of the CETA – international undertaking made by France and EU secondary legislation – leads the *Conseil constitutionnel* to clarify its mission and to strictly limit it to the control of compatibility of the CETA with the French Constitution.⁴³ Art. 88-1C, according to which France is bound by the TEU/TFEU, doesn't allow the *Conseil constitutionnel* to control the compatibility of the CETA with the TEU and

³⁷ Cf. e.g. *Costa v. ENEL*, cit.; Court of Justice, judgment of 17 December 1970, case 11-70, *Internationale Handelsgesellschaft*. Cf. also the corrections made by the Court of Justice in order to protect the national identity of EU Member States: Court of Justice, judgment of 14 October 2004, case C-36/02, *Omega*; Court of Justice, judgment of 12 September 2006, case C-145/07, *Spain v. United Kingdom*; Court of Justice, judgment of 12 September 2006, case C-300/04, *M.G. Eman, O.B. Sevinger v. College van burgemeester en wethouders van Den Haag*; Court of Justice, judgment of 16 December 2008, case C-213/07, *Michaniki AE v. Ethniko Symvoulío Radiotileorasis et Ypourgos Epikrateias*.

³⁸ Cf. e.g. German Federal Constitutional Court, decision of 29 May 1974, 2 BvL 52/71 (*Solange I*); German Federal Constitutional Court, decision of 22 October 1986, 2 BvR 197/83 (*Solange II*).

³⁹ Cf. e.g. French Constitutional Council, *Loi pour la confiance dans l'économie numérique*, cit, para. 7. The *Conseil constitutionnel* states that the transposition of a directive is a constitutional requirement that must be respected unless otherwise expressly stated in the Constitution. Cf. also the above-mentioned decisions concerning the Maastricht, Amsterdam, TECE and the Lisbon Treaty.

⁴⁰ This criterion was set in French Constitutional Council, *Traité sur l'Union européenne (Maastricht I)*, cit.

⁴¹ This criterion was set in French Constitutional Council, *Traité portant statut de la Cour pénale internationale*, cit.

⁴² This criterion was set in French Constitutional Council, *Traité sur l'Union européenne (Maastricht I)*, cit.

⁴³ French Constitutional Council, *CETA*, cit., para. 30. As underlined above, this includes all the sources that are part of the “*bloc de constitutionnalité*”.

TFEU.⁴⁴ Admittedly, this latter assertion is respectful of the monopoly of the Court of Justice in assessing the validity of EU Law,⁴⁵ as well as the compatibility of EU agreements with the treaties.⁴⁶

Nevertheless, the CETA case calls into question this same statement and raises a specific issue that will probably stand out again if another EU agreement is brought before the *Conseil constitutionnel*. This issue is directly linked to the fact that the constitutional principles to which the CETA is confronted have similar content to rules under EU law: the right to have an effective remedy and to a fair trial,⁴⁷ the principle of equality before the law,⁴⁸ and the principle of precaution⁴⁹ are indeed enshrined in the French Constitution (in the sense of "*bloc de constitutionnalité*") as well as in EU primary law. Therefore, monitoring the compatibility of CETA with these constitutional principles in some ways looks like confronting CETA with EU Law. Beyond that, if the *Conseil constitutionnel* had declared CETA to be incompatible with these constitutional principles, it would have, to some extent, cast a serious doubt on the compatibility of CETA with EU Law – and therefore on its validity.

The situation however differs from the control of EU acts which are already in force. In that case, as it is well known, national courts can declare that EU acts are valid but they must not claim that such acts are invalid.⁵⁰ The question is to know whether such reasoning also applies to the control of EU acts which haven't yet entered into force. Should it be considered, in the spirit of the *IATA* case,⁵¹ that where the *Conseil constitutionnel* regards one or more arguments in support of the incompatibility of an EU agreement with a "constitutional and EU principle" as well founded, it has to stay proceedings and make a reference to the Court of Justice in order to obtain a preliminary ruling on the agreement's va-

⁴⁴ Therefore, it considers in the CETA case that "it is not the responsibility of the Constitutional Council to assess the stipulations of Section F of Chapter 8 regarding the prescriptions of the European Union law that governs the competence of the European Union Court of Justice". *Ibid.*, para. 30.

⁴⁵ Art. 263 TFEU; Art. 267 TFEU; Court of Justice, judgment of 22 October 1987, case 314/85, *Foto Frost*.

⁴⁶ Art. 218, para. 11, TFEU.

⁴⁷ These rights derive from the 1789 Declaration of the Rights of Man and the Citizen (DRMC), Art. 16, and are also stated in the Charter of Fundamental Rights of the European Union, Art. 47. Cf. *ibidem*, paras 31-34.

⁴⁸ This principle is laid down in the same texts (Art. 6 of the 1789 DRMC and Art. 20 of the EU Charter). Cf. *ibidem*, paras 35-42.

⁴⁹ This principle is enshrined in the French Environmental Charter as well as in Art. 191 TFEU. Cf. *ibidem*, paras 54-61.

⁵⁰ *Foto Frost*, cit.; Court of Justice, judgment of 5 May 1982, case 15/81, *Gaston Schul*.

⁵¹ Court of Justice, judgment of 10 January 2006, case C-344/04, *IATA*, para. 32 : "[...] where a court against whose decisions there is a judicial remedy under national law considers that one or more arguments for invalidity of a Community act which have been put forward by the parties or, as the case may be, raised by it of its own motion are well founded, it must stay proceedings and make a reference to the Court for a preliminary ruling on the act's validity".

lidity?⁵² Probably not. The necessity to reach a common interpretation of a “constitutional principle/EU principle”, when it comes to an EU act which has already entered into force, derives from the fact that the contrary would affect the uniform application of EU law. This problem does not exist with an EU international agreement still waiting to be ratified. A preliminary ruling would not help the *Conseil constitutionnel* to decide whether the French Constitution has to be revised before the national ratification can occur. There is no necessity for the constitutional principle to be interpreted in the same way as the corresponding EU principle. Likewise, there is probably no necessity to verify whether the EU international agreement respects EU principles to establish, afterwards, its compatibility with the French Constitution.

Following this first step in defining the scope of its task, the *Conseil constitutionnel* then underlines the specificity of EU mixed agreements, which allows him to draw a two-tiered control.

II.2. A TWO-TIERED CONSTITUTIONAL REVIEW BASED ON THE DIVISION OF COMPETENCE BETWEEN THE EU AND ITS MEMBER STATES

Through its *CETA* ruling, the *Conseil constitutionnel* reveals that controlling the compatibility of an EU mixed agreement with the French Constitution slightly differs from controlling the compatibility of an amending Treaty with the French Constitution: the above-mentioned method that the *Conseil constitutionnel* had identified in its previous decisions does not apply to all the monitored provisions of an EU mixed agreement.⁵³ The *Conseil constitutionnel* considers that it must distinguish between, on the one hand, the provisions of the agreement that fall under the exclusive competence of the EU and, on the other hand, the provisions that fall under shared competences or competences retained by Member States. In other words, it adjusts the extent of its control according to the nature of the EU competence. The control is very limited when it comes to exclusive competences whereas it is much wider when it comes to shared and retained competences.

Concerning the provisions that fall under shared or retained competences, the *Conseil constitutionnel* applies the method attached to the monitoring of international undertakings. Consequently, it verifies whether the provisions “contain a clause that is unconstitutional, calls into question the rights and freedoms guaranteed by the Constitution or runs contrary to the essential conditions for the exercise of national sovereignty”.⁵⁴

⁵² If all the conditions required to introduce a preliminary ruling are met. In this regard, the Court of Justice would have to clarify if the activation of the procedure enshrined in Art. 54 C can be considered as a dispute before a national court.

⁵³ That is to say checking if the treaty contains a clause that is unconstitutional, calls into question the rights and freedoms guaranteed by the Constitution or runs contrary to the essential conditions for the exercise of national sovereignty.

⁵⁴ French Constitutional Council, *CETA*, cit., para. 13.

As for the provisions that fall under an exclusive competence of the EU, the *Conseil constitutionnel* only checks that they "do not call into question a rule or a principle inherent to the constitutional identity of France".⁵⁵ The *Conseil constitutionnel* here invokes the standard it had laid down in its key 2006 Decision regarding the "constitutional requirement" to transpose EU directives.⁵⁶ Its control shall not go beyond this specific task.⁵⁷

The merit of this latter statement can be debated. Indeed, it is worth noting that this solution departs from the approach defended by the French government, which rightly argued that the CETA was brought before the *Conseil constitutionnel* only because of its mixed nature. In other words, according to the government, the CETA was submitted to the *Conseil constitutionnel* only because of the provisions falling under shared competences which need to be ratified by France. The government therefore suggested that the *Conseil constitutionnel* should not control the compatibility of provisions falling under the exclusive competence of the EU. It added that if the *Conseil constitutionnel* had doubted about the exact division of competences between the EU and its Member States, it would have had to refer to the Court of Justice for a preliminary ruling.⁵⁸

In response to the government's conclusion, one could note that Art. 4, para. 2, TEU, according to which "the Union shall respect [...] the national identities [of Member States], inherent in their fundamental structures, political and constitutional [...]", does not set a condition regarding the nature of the EU competence. Thus, it shall apply regardless of the (exclusive or shared) competence at stake. Therefore, couldn't we consider that, through the constitutional review of the provisions that fall under an exclusive competence of the EU, the *Conseil constitutionnel* exercises the Member States' fundamental right to preserve their national constitutional identity?

Therefore, the choice made by the *Conseil constitutionnel* to monitor the provisions falling under the exclusive competence of the EU leads to two main comments. Firstly, this choice can give the impression that the *Conseil constitutionnel* will accept to control the compatibility of future EU-only agreements with the French Constitution. Such a statement, however, would conflict with the systemic reading of the French Constitution that has prevailed so far. Indeed, it is long-standing that only agreements submitted to the ratification of the French parliament – a category which cannot include EU-only agreements – can be referred to the *Conseil constitutionnel* on the basis of Article 54 C.

⁵⁵ *Ibid.*, para. 14.

⁵⁶ French Constitutional Council, *Loi relative au secteur de l'énergie*, cit.

⁵⁷ It also recalls that "if this is not called into question, it is up to the judge of the European Union to oversee the compatibility of the agreement with European law". This turn of phrase is surprising since it is always up to the Court of Justice to oversee the compatibility of EU agreements with EU Law. But the *Conseil constitutionnel* may have meant that in case the agreement is compatible with a rule or a principle inherent to the constitutional identity of France, it is, *if appropriate*, up to the Court of Justice to oversee the compatibility of the agreement with EU Law.

⁵⁸ So that the Court of Justice can interpret the treaties and clarify the provisions falling under the exclusive or shared/retained competences.

Indeed, this latter provision makes reference to international undertakings whose ratification or approval *is to be authorized*.⁵⁹ This suggests that no constitutional review is possible when the ratification or approval of the undertaking is not submitted to the vote of a law, which is the case when EU-only agreements are concerned. In practice, this matches the international undertakings that “may be ratified or approved only by an Act of Parliament”, according to Art. 55 of the Constitution.

In reality, it looks like the *Conseil constitutionnel* does not intend to have potential jurisdiction on EU-only agreements. It carefully delineates its task “in the event that [it] is called to decide, on the basis of Art. 54 of the Constitution, on an agreement *that must be signed and entered into both by the European Union and by each of its Member States* [...]”.⁶⁰ If such a solution can be welcomed regarding the effectiveness of the EU’s action on the international scene, the *Conseil constitutionnel* nonetheless creates a paradoxical situation that could have been avoided if it had embraced the French government’s approach. Indeed, when confronted to a mixed agreement, the *Conseil constitutionnel* will be able to monitor provisions falling under EU exclusive competence while it won’t be able to do so if similar provisions are inserted into EU-only agreements.

Nevertheless – this is our second comment –, this needs to be put in perspective considering that the stakes are limited. In fact, by verifying that the provisions “do not call into question a rule or a principle inherent to the constitutional identity of France”, the *Conseil constitutionnel*’s task is in fact very narrow, if not ineffective. The “rule or principle inherent to the constitutional identity of France” concept, which was for the first time raised in the above-mentioned 2006 Decision, has actually never been clearly specified.⁶¹ The *CETA* decision appears to be another missed, but convenient, opportunity to define this concept. This can be understood as a means for the *Conseil constitutionnel* to reaffirm – in line with its traditional jurisprudence – the primacy of the French Constitution over EU law, while knowing that, in practice, the primacy of EU law will not be put into question.

⁵⁹ Cf. Art. 54 C which provides that: “If the Constitutional Council, on a referral from the President of the Republic, from the Prime Minister, from the President of one or the other Houses, or from sixty Members of the National Assembly or sixty Senators, has held that *an international undertaking* contains a clause contrary to the Constitution, *authorization to ratify or approve the international undertaking involved* may be given only after amending the Constitution” (emphasis added). Consequently, the *Conseil constitutionnel* has no jurisdiction on international commitments which are not submitted to parliamentary ratification – whether they don’t have to, whether the French government didn’t choose to or whether they are submitted to referendum instead.

⁶⁰ French Constitutional Council, *CETA*, cit., para. 12 (emphasis added).

⁶¹ On this issue, cf. E. DUBOUT, *Les règles ou principes inhérents à l’identité constitutionnelle de la France: une supra-constitutionnalité?*, in *Revue Française de Droit Constitutionnel*, 2010, p. 451 *et seq.*; B. MATHIEU, *Le droit communautaire fait son entrée au Conseil constitutionnel*, in *Les Petites Affiches*, 2006, p. 3 *et seq.*; M. VERPEAUX, *Rappel des normes de référence dans le contrôle effectué par le Conseil sur la loi Droit d’auteur*, in *La Semaine Juridique*, 2007, p. 34 *et seq.*; M. TROPER, *Identité constitutionnelle*, in B. MATHIEU (ed.), *1958-2008. Cinquantième anniversaire de la Constitution française*, Paris: Dalloz, 2008, p. 130 *et seq.*

The control exerted by the *Conseil constitutionnel* in the *CETA* case is totally in line with this idea. Indeed, the ruling only focuses on the provisions falling under shared competences between the EU and its Member States,⁶² as identified in Opinion 2/15 to which the *Conseil constitutionnel* explicitly refers.⁶³ These include the stipulations appearing in Chapter 8 as far as they concern non-direct investments and those that define (in Section F of the same Chapter) the procedure for the resolution of disputes related to investments between investors and States. It also includes the stipulations in Chapters 1, 21, 26, 27, 28, 29 and 30, insofar as they relate to shared competence between the European Union and its Member States. On this particular point, as will be further analyzed,⁶⁴ the ruling is more detailed.

On the contrary, when it comes to the other provisions of the CETA,⁶⁵ the ruling appears lapidary. Firstly, the analysis of these "other provisions" lies in two sentences only. Secondly, the *Conseil constitutionnel* does not bother identifying the relevant provisions. Thirdly, by stating that "the other stipulations of the Agreement do not contain any clauses that are unconstitutional, do not call into question constitutionally guaranteed rights and freedoms, do not infringe on the essential conditions for exercising national sovereignty, and moreover, do not call into question any rule or principle inherent to the constitutional identity of France",⁶⁶ the *Conseil constitutionnel* deals with the constitutionality of both provisions falling under the exclusive and shared competences in one sole and unsubstantiated statement.

In the *CETA* ruling, the *Conseil constitutionnel* had for the first time to define the scope of its control of EU mixed agreements. Given the specific nature of the latter – at the same time international undertakings made by France and EU secondary legislation –, the *Conseil constitutionnel* used the different methods it had previously identified and mixed them. If some aspects can be debated, the *Conseil constitutionnel* has the merit of establishing criteria which aim at preserving the status of the Constitution within the internal legal order while respecting EU law – especially the division of competences between the EU and its Member States, and the competence of the Court of Justice. The latter element can also explain why the *Conseil constitutionnel* had only a limited room of manoeuvre regarding the substance of the case and, eventually, had to conclude that CETA is compatible with the French Constitution.

⁶² French Constitutional Council, *CETA*, cit., paras 18 to 72.

⁶³ *Ibid.*, para. 17.

⁶⁴ Cf. *infra*, Section II.

⁶⁵ French Constitutional Council, *CETA*, cit., paras 73 and 74.

⁶⁶ *Ibid.*, para. 73.

III. THE COMPATIBILITY OF CETA WITH THE FRENCH CONSTITUTION

If the *Conseil constitutionnel* affirmed its jurisdiction over the provisions falling under the exclusive competence of the EU,⁶⁷ it gave no detail on how it came to the conclusion that these provisions did not violate any principle inherent to the constitutional identity of France. By contrast, it controlled CETA's controversial provisions falling under shared competences much more carefully, using the three cumulative criteria dedicated to the monitoring of international undertakings made by France. Yet, the *Conseil constitutionnel*'s room of manoeuvre appears to be narrow since it cannot interfere with the Court of Justice's competence in interpreting the CETA. Thus, it mostly quotes and describes the CETA provisions without departing from a literal reading. In the end, it appears that there is no need to amend the Constitution in order to ratify the CETA, for the latter respects "the essential conditions for exercising sovereignty" (III.1.), as well as the provisions of the French Constitution and the guaranteed rights and freedoms (III.2.).

III.1. NO VIOLATION OF "THE ESSENTIAL CONDITIONS FOR EXERCISING NATIONAL SOVEREIGNTY"

According to the applicants, several provisions of the CETA infringe "the essential conditions for exercising national sovereignty".

Firstly, the claimants argue that French normative activity will be affected by CETA's provisions on investment protection, especially those dealing with the Investor-State Dispute Settlement (ISDS). Indeed, the Canadian investors will be able to bring France before the investment Court created by the CETA. And, by doing so, choose to ignore the national or the European judicial system (depending on which is relevant). Therefore, the applicants worry that the Investment Court System might more easily condemn France on account of its laws and regulations than a national jurisdiction, bound by the principle of the separation of powers, would. In its answer, the *Conseil constitutionnel* focuses in the first place on the nature of the prerogatives granted to the Investment Court System.⁶⁸ It points out that the Court cannot interpret nor suspend or annul EU or national norms. It can only issue financial measures when a prejudice is established. In the second place, it underlines that France participates (at least through its membership in the EU Council) in appointing its members.⁶⁹ Finally, the *Conseil constitutionnel* stresses that the investment Court is bound by the interpretations delivered by the Joint Committee established by CETA,⁷⁰ within which the EU and its Member

⁶⁷ Cf. *supra*, Section II.2.

⁶⁸ Doing otherwise would have shed light on the compatibility with the Constitution of the numerous ISDS mechanism inserted in bilateral investment treaties (BIT) France has concluded up to now.

⁶⁹ French Constitutional Council, *CETA*, cit., para. 27.

⁷⁰ Cf. *ibid.* and Art. 8, para. 31, Section 3, Chapter 8, of the Comprehensive Economic and Trade Agreement between EU and Canada.

States have an equal say with Canada. Thus, regarding its powers, its composition as well as the scope of its jurisdiction, the *Conseil constitutionnel* naturally concludes the Investment Court System (established by CETA) does not affect the normative activity in a way which infringes the "essential conditions for exercising national sovereignty".⁷¹

Secondly, the applicants consider that CETA will weaken France's capacity to exercise its normative activity. They believe that the CETA "introduces binding rules in regard to setting national legal standards insofar as they affect the essential condition for exercising national sovereignty".⁷² They especially point out Art. 8, para. 4, (market access issues within the framework of investment protection) of the CETA, as well as the Chapters 21 (regulatory cooperation), 27 (transparency) and 29 (dispute settlement).

Before monitoring these provisions,⁷³ the *Conseil constitutionnel* emphasises that France will be bound by the CETA once it is ratified and has entered into force. This obligation, which results from Art. 55 C,⁷⁴ implies that international agreements prevail over acts of the French Parliament. This explains why an international agreement can affect the Parliament's ability to enact norms. It also explains why the *Conseil constitutionnel* can only make sure that the essential conditions for exercising national sovereignty are preserved by the international commitment for, by nature, an international commitment affects the making of laws. If such a statement is quite logical, it is however surprising that Art. 88-1 C is not mentioned.

This latter provision could have better justified the primacy of the CETA over national norms. Indeed, by referring to Art. 55 C – and not to Art. 88-1 C –, the *Conseil constitutionnel* seems to consider the CETA as a traditional agreement whereas it remains, despite its mixed nature, an EU norm.⁷⁵ Thus, the CETA produces the internal legal effects that Art. 88-1 C confers to EU law. Even if it has no impact on the present monitoring, it could affect the implementation of the CETA. Indeed, if the CETA is implemented as a classical international obligation, the reciprocity condition provided for in Art. 55 C nonetheless applies. That would allow France to verify that Canada properly implements the agreement. On the contrary, if the implementation of the CETA is considered as a constitutional obligation to respect EU law in compliance with Art. 88-1 C, i.e. the reciprocity condition, does not apply anymore.

⁷¹ French Constitutional Council, *CETA*, cit., para. 29.

⁷² *Ibid.*, para. 43.

⁷³ The *Conseil constitutionnel* does not bother answering on the transparency issue (Chapter 27, CETA) but it seems obvious that it has no effect on the ability to enact internal norms. However, the *Conseil constitutionnel* monitors the provisions of chapter 26 which concern the prerogative of the Joint Committee. Cf. *infra*, Section III.1.

⁷⁴ Art. 55 C: "Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party."

⁷⁵ This approach is all the more surprising because, apart from this, the *Conseil constitutionnel* does treat the CETA as EU law in the rest of its decision.

Actually, the *Conseil constitutionnel's* statement tends to reveal, if not a misunderstanding of the legal regime of EU mixed agreements, at least, that it has a different point of view from the Court of Justice. Even if the CETA encompasses provisions which fall under shared competences, it remains entirely an act of the EU.⁷⁶

There is not much to say about the reasoning of the *Conseil constitutionnel* that follows this first general statement. Indeed, the *Conseil constitutionnel* only quotes,⁷⁷ in response to each grievance, the appropriate provisions of the CETA. In this regard, it observes that the prohibition of different types of measures listed in Art. 8.4, is not absolute⁷⁸ and that regulatory cooperation – Chapter 21 – is conducted exclusively on a voluntary basis.⁷⁹ Then, it focuses on the different normative competences granted to the Joint Committee pursuant to Art. 26.1. In this regard, the *Conseil constitutionnel* notices that no decision can be taken without the mutual consent of both the EU and Canadian representatives. It also adds that the EU's position is adopted by the Council pursuant to Art. 218, para. 9, TFEU. The *Conseil constitutionnel* also refers to the Statement no. 19 of the Council of the EU and the Member States, according to which, when it comes to a decision falling under Member States competence, the “position of the EU and its Member States within the Joint Committee shall be adopted by common accord”.⁸⁰ Finally, the provisions of Chapter 29 regarding the settlement of disputes between the parties on the interpretation and application of the CETA are declared compatible with the French Constitution as they only intend to contribute to the good application of the Agreement and do not directly affect the making of norms within the internal legal orders.⁸¹

According to the claimants, the CETA also affects the essential conditions for exercising national sovereignty through its provisions on provisional application and denunciation. In this respect, they claim that those provisions do not allow France to escape provisional application nor to denunciate its participation to the agreement.

Firstly, the claimants argue that provisional application would exceed the provisions falling under the EU exclusive competence and suggest that it also covers provisions falling under shared competences. The *Conseil constitutionnel* rejects these arguments

⁷⁶ This comment would not be different, at least from an EU law perspective, if mixity was due to the presence, in the agreement, of provisions falling under exclusive competence of Member States.

⁷⁷ On one occasion, when monitoring Art. 8, para. 4, CETA, the *Conseil constitutionnel* added a comment. But it brought more confusion than clarification since the comment refers to the fact that Art. 8, para. 4, falls under exclusive competence of the EU. Thus, if it had followed the methodology announced from the beginning of the decision (para. 14), it should only have verified that this provision does not “call into question a rule or a principle inherent to the constitutional identity of France”.

⁷⁸ French Constitutional Council, *CETA*, cit., para. 46.

⁷⁹ *Ibid.*, para. 47.

⁸⁰ Statement from the Council and the Member States of 14 January 2017 regarding decisions of the CETA Joint Committee, Statements to be entered in the Council minutes.

⁸¹ *Ibidem*, para. 52.

by referring to Opinion 2/15 of the Court of Justice,⁸² which tends to confirm that the scope of provisional application established by the Council decision of 28 October 2016,⁸³ only covers provisions falling under exclusive competence of the EU. Since the *Conseil constitutionnel* confirms that the scope of provisional application does not affect the exercise of national sovereignty, it does not need to answer the criticism according to which a Member State cannot by itself put an end to provisional application. Indeed, allowing a Member State to end provisional application on matters falling under EU exclusive competence would be a violation of the division of competences established by the treaties. The solution might have been more complicated if the scope of provisional application had exceeded the provisions falling under EU exclusive competence. In this regard, Art. 30.7, para. 3, let. c), of the CETA arguably leaves the choice to terminate the provisional application to the EU only, since it states that "a Party may terminate the provisional application of this Agreement by written notice *to the other Party*". The notification to "the other Party" suggests that there are only two Parties: Canada on the one hand, the EU and its Member States on the other hand. Thus, the EU entity counts for one single party when it comes to provisional application. Henceforth, according to Art. 30.7, para. 3, let. c), France is unable to individually terminate the provisional application of CETA. If the *Conseil constitutionnel* had considered that provisional application also covers provisions falling under shared competences, its task would have been slightly more complicated. This is probably why the applicants tried to link their claim to the scope of provisional application. Some of them had previously asked the government to refuse provisional application.⁸⁴ Being unsuccessful through the political way, they tried the judicial path. They did not better succeed.

In the end, France can only indirectly put an end to the provisional application of the CETA, by notifying to the EU Council its refusal to ratify the agreement. Indeed, on 14 January 2017, the Council stated that the notification of the non-ratification of the CETA by a Member State, which would mean the agreement has no chance to ever enter into force, would imply the end of its provisional application.⁸⁵ Nevertheless, in any case, the end of provisional application has to be decided by the EU Council.⁸⁶

⁸² The way it refers to Opinion 2/15 is however rather curious since it does not refer expressly to the opinion of the Court but to the para. 17 of its own decision mentioning Opinion 2/15. Cf. *ibidem*, para. 64.

⁸³ Decision 2017/38/EU of the Council 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.

⁸⁴ The referral mentions a call to the government launched by 105 French MPs in September 2016 and a proposal for a European resolution of the National Assembly which was rejected on 13 October 2016. Cf. Proposal for a European resolution no. 722 of 23 June 2016, *Mixité de l'accord économique et commercial global entre l'Union européenne et le Canada*, modified on 29 September 2016 and rejected on 13 October 2016.

⁸⁵ Cf. Comprehensive Economic and Trade Agreement between EU and Canada, Statements to be entered in the Council minutes, Statement n° 20 from the Council regarding the termination of provision-

As far as the denunciation is concerned, the *Conseil constitutionnel* also considers that the CETA does not infringe the essential conditions for exercising national sovereignty. Such an infringement would suppose “an irrevocable participation to an international commitment relating to an inherent domain of national sovereignty”. The *Conseil constitutionnel* here implicitly applies the same cumulative criteria it had once used in its decision 2005-524/525 DC.⁸⁷ In this regard, it firstly observes that the French commitment is not irrevocable. It secondly notices that this same commitment does not concern an “inherent domain of national sovereignty”.

Regarding this latter criterion, even though the *Conseil constitutionnel* does not justify its position, it seems difficult to pretend – as the French government observed itself – that trade and investment issues constitute domains of national sovereignty.

As for the question of irrevocability, the *Conseil constitutionnel's* answer is also quite lapidary. If one could regret it, it can easily be justified by the fact that the *Conseil constitutionnel* cannot challenge the Court of Justice's monopoly of interpretation when it comes to EU law. Answering the applicants' question would indeed have implied to interpret the CETA.

In this regard, it cannot be denied that the CETA contains a denunciation clause which makes it revocable. Thus, the French commitment is, by nature, revocable. But this was not the real issue. The claimants actually wanted to know if the fact that France cannot denounce the CETA on its own could be considered as a form of irrevocability. Indeed, it is unclear whether the EU Member States, who are contracting parties, can unilaterally decide to terminate the agreement.⁸⁸ As a matter of fact, Art. 30.9, para. 1, of the CETA, states that “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 Canada, or their respective successors. This Agreement shall be terminated 180 days after the date of that notice”.

The fact that the notification is sufficient to terminate the CETA (after 180 days) and frees all the Parties from their commitment, suggests that, on the EU side, the termination has to be notified by the EU entity as a whole. Therefore, the fact that France cannot de-

al application of CETA, according to which: “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”.

⁸⁶ Since, according to Art. 218, para. 5, TFEU, the Council decides to initiate the provisional application, it also decides to put an end to it.

⁸⁷ In that decision, it had considered that the Second Optional Protocol to the International Covenant on Civil and Political Rights, which aims at abolishing the death penalty, was unconstitutional. This statement was based on the fact that it couldn't be denounced, since it did not contain any denunciation clause and that it dealt with a matter of national sovereignty (death penalty).

⁸⁸ The unilateral denunciation of a mixed agreement by a Member State would, regarding primary law, infringe the loyalty principle.

nunciate the CETA on its own is the most likely interpretation. For all that, such a conclusion does not make the international commitment of France irrevocable whatsoever.

It appears that the CETA does not infringe the essential condition for exercising national sovereignty. The *Conseil constitutionnel* does not find any violation of the provisions of the French Constitution or of constitutionally guaranteed rights and freedoms.

III.2. NO VIOLATION OF THE PROVISIONS OF THE FRENCH CONSTITUTION AS WELL AS CONSTITUTIONALLY GUARANTEED RIGHTS AND FREEDOMS

Apart from the impact of the CETA on the exercise of national sovereignty, the *Conseil constitutionnel* had to check whether the agreement respects both the provisions of the French Constitution – in particular Art. 88-1C – and the constitutionally guaranteed rights and freedoms – more specifically the principles of independence and impartiality, the principle of equality before the law and the principle of precaution. In the first case, the *Conseil constitutionnel* strongly refuses to interpret EU law, although verifying whether CETA respects Art. 88-1 C could theoretically serve as a roundabout mean to do so. In the second case, the control exerted by the *Conseil constitutionnel* appears more ambiguous. Although the *Conseil constitutionnel* sticks to a literal reading of the CETA, it cannot help interpreting principles which are similar within both national and EU legal orders in a way that could differ from the interpretation the Court of Justice will give in its Opinion 1/17.

The applicants first claimed that section F of Chapter 8 of CETA infringed Art. 88-1 C according to which "The Republic shall participate in the European Union constituted by States which have freely chosen to exercise some of their powers in common by virtue of the Treaty on European Union and of the Treaty on the Functioning of the European Union, as they result from the treaty signed in Lisbon on 13 December, 2007".

In the present case, the applicants tried to argue that, since the section F of Chapter 8 illegally affected the Court of Justice's jurisdiction by allowing investor-State litigations to be brought before a specific Court, France could not apply these provisions without violating EU law and subsequently Art. 88-1 C out of which the *Conseil constitutionnel* has set out a constitutional obligation to respect EU law (see *supra*, Section II.1). The *Conseil constitutionnel* rejected this claim and affirmed that it has no jurisdiction under Art. 54 C (or any other constitutional provision) to "assess the compatibility of an international commitment with France's other international and European commitments".⁸⁹

The section F of Chapter 8 also needed to be confronted to several constitutional rights and freedoms. The *Conseil constitutionnel* was asked to verify whether the ISDS mechanism respects the principles of independence and impartiality of the judicial

⁸⁹ French Constitutional Council, *CETA*, cit., para. 30. Please note that the English version contains a translation mistake, as the French version is very clear on the fact that "it is not the responsibility [...]" of the *Conseil constitutionnel*.

power and the principle of equality before the law. All these principles have, within the French legal order, a constitutional value that the *Conseil constitutionnel* has identified in the past when it interpreted Arts 6 and 16 of the 1789 Declaration of Human and Civic Rights (DHCR).⁹⁰ Concerning the principles of independence and impartiality arising from Art. 16 of the DHCR, the *Conseil constitutionnel* quotes many abstracts of CETA's Chapter 8. Hence, it underlines that the members of the investment court are bound by ethical rules and that their nomination and revocation follow procedures that should guarantee their independence and impartiality.⁹¹ Henceforth, it concludes that the CETA provisions respect the above-mentioned principles. Concerning the principle of equality before the law arising from Art. 6 of the DHCR, the *Conseil constitutionnel* reaffirms its constant interpretation which is also admitted in EU law:⁹² "The principle of equality does not prevent the legislature from regulating different situations in different ways, nor does it depart from equality in the public interest, provided that in both cases the resulting difference in treatment is directly related to the subject matter of the law providing for such different treatment".⁹³

The reasoning developed in line with this interpretation is however a bit rapid. The *Conseil constitutionnel* first observes that, when it comes to the provisions dealing with the most favoured nation (MFN) treatment, national treatment or just and equitable treatment, the foreign investors are treated like national investors. The *Conseil constitutionnel* also refers to the interpretative instrument whose para. 6 reaffirms that foreign investors will not be treated better than national ones to establish that there is no violation of the principle of equality when it comes to substantial provisions of the CETA on investment.

If this observation is undisputable concerning the substantial provisions applying to investors, it can be discussed concerning the procedural provisions dealing with ISDS. Many detractors of ISDS consider that giving the foreign investors a choice of jurisdiction that local investors do not have favors the first ones. But the *Conseil constitutionnel* eludes that point. It focuses on the fact that there will be a differentiated treatment between Canadian investors and other foreign investors in France. This derogation to the principle of equality is however justified. According to the *Conseil constitutionnel*, it meets public interests since French investors will benefit from a reciprocal treatment in Canada and since it will contribute to attract Canadian investments in France. By refus-

⁹⁰ Pursuant to Art. 6 DHCR: "The Law is the expression of the general will. All citizens have the right to take part, personally or through their representatives, in its making. It must be the same for all, whether it protects or punishes. All citizens, being equal in its eyes, shall be equally eligible to all high offices, public positions and employments, according to their ability, and without other distinction than that of their virtues and talents". Pursuant to Art. 16, DHCR: "Any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution".

⁹¹ French Constitutional Council, *CETA*, cit., paras 32-33.

⁹² Cf. e.g. Court of Justice, judgment of 16 December 2008, case C-127/07, *Arcelor Atlantique et Lorraine et al.*

⁹³ French Constitutional Council, *CETA*, cit., para. 35.

ing to determine whether the existence of the Investment Court System constitutes a breach of equality between Canadian and European/French investors, the *Conseil constitutionnel* leaves conveniently the floor to the Court of Justice which will have to answer this question in its Opinion 1/17.

Finally, the *Conseil constitutionnel* considers that the CETA respects the principle of precaution guaranteed by Art. 5 of the Environmental Charter.⁹⁴ The monitoring is, here again, limited to the literal examination of the CETA and of the interpretative instrument which suffices to show that the principle of precaution is not affected by the CETA. The fact that there is no express reference to this principle in the agreement is not enough to establish its infringement, especially when several provisions within the CETA⁹⁵ and its interpretative instrument⁹⁶ tend to show, on the contrary, a willingness to respect such a principle. If the *Conseil constitutionnel* cannot go further than a literal reading of CETA, it recalls that the principle of precaution is also guaranteed by Art. 191 TFEU that the CETA must respect, just like any other primary law provision. Consequently, it will always be possible, once the CETA is applied, to use EU's legal remedies in order to make sure that its implementation respects EU primary law.

IV. CONCLUSION

Regardless of the nature of the competences at stake, the *Conseil constitutionnel's* room of manoeuvre appears to be quite narrow. On the one hand, its task cannot compete with the monopoly of the Court of Justice regarding the interpretation of EU law. On the other hand, the procedure enshrined in Art. 54 C being a preventive procedure, the *Conseil constitutionnel* cannot rely on the potential effects of the agreement to take a decision on its compatibility with the French Constitution. Therefore, the *Conseil constitutionnel* cannot do much more than quoting the agreement and interpreting its own constitutional standards. In the end, monitoring provisions falling under shared or exclusive competence might not be so different when it comes to the effective leeway of the *Conseil constitutionnel*.

Actually, such a conclusion should not surprise. If the three alternative criteria according to which the *Conseil constitutionnel* exerts its monitoring have in the past generated many revisions of the French Constitution, they were applied to international

⁹⁴ Pursuant to this provision: "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".

⁹⁵ Cf. Chapter 22 dedicated to Trade and Environment and Art. 24.8, para. 2, CETA.

⁹⁶ Cf. CETA, para. 9, let. a): "CETA commits the European Union and its Member States and Canada to provide for and encourage high levels of environmental protection, as well as to strive to continue to improve such laws and policies and their underlying levels of protection".

undertakings made by France as a fully sovereign State. In the same spirit, when those criteria were applied to the revision of the European treaties, i.e. the making of primary law, France wasn't bound by its Member State status. However, when it comes to EU secondary law, including EU mixed agreements, the *Conseil constitutionnel* deals with developments of the EU integrative project, which stay within the project defined as long as the agreement covers exclusive and shared competences, which both remain EU competences. There is no reason for its control to be more intense with such mixed agreement than with a directive adopted in a matter of shared competence. However, had CETA been mixed because of provisions falling under the Member State exclusive competence, the solution might have been different and the *Conseil constitutionnel* might have possessed full jurisdiction.