

Constitutional aspects of CETA: What role for parliament (and the courts)?

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CETA and its investor-state dispute settlement system:
blessing or threat to sustainable development?*

Jerfi Uzman
Professor of Constitutional Law,
Utrecht University

1

Today's Menu

- The Dutch Constitution: a political constitution moving fast...
- The Constitution & CETA
- Parliament's role
- A role for the courts?

2

Constitutional challenges to CETA

- Federal Constitutional Court Germany (2016)
- Conseil Constitutionnel France (2017)
- High Court Ireland (2021)
- The Netherlands...?

Irish Examiner
Green party TD: Legal opinion that Ceta deal is unconstitutional



The German Federal Constitutional Court confirms CETA
OCTOBER 18, 2016 • 2548 Author: Dr. Marc Oehm and Dr. Jan Vriesehoff



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3

Constitutional roadblocks?

Access to dutch courts? Self-executing?

Exclusive jurisdiction

Up to legislature

Do we really want a minimalist approach?

Article 112

1. The adjudication of disputes involving rights under civil law and debts shall be the responsibility of the judiciary.
2. Responsibility for the adjudication of disputes which do not arise from matters of civil law may be granted by Act of Parliament either to the judiciary or to courts that do not form part of the judiciary. The method of dealing with such cases and the consequences of decisions shall be regulated by Act of Parliament.

Asymmetry

Exhaustion of domestic remedies

Supreme Court Urgenda judgment 20-12-2019, para 8.2.1

Connection to 13 ECtHR: effective remedy

- Legislative primacy (art. 81 Const.)?
- Effective legal protection (art. 112 Constitution?)

4

Parliamentary approval

- Article 91 s. 3 Constitution
- Parliamentary Approval & Publication Act 1994

Article 6 Parliamentary Consent & Publication Act 1994 (Rgby):

1. Any treaty containing unconstitutional provisions or which necessitate a deviation of the Constitution shall be subjected to express consent.
2. The legislative proposal shall expressly declare that consent has been granted by application of article 91 s. 3 of the Constitution.

Article 91 Const.

1. The Kingdom shall not be bound by treaties, nor shall such treaties be denounced without the prior approval of the States General. The cases in which approval is not required shall be specified by Act of Parliament.
2. The manner in which approval shall be granted shall be laid down by Act of Parliament, which may provide for the possibility of tacit approval.
3. Any provisions of a treaty that conflict with the Constitution or which lead to conflicts requires a two-thirds majority in each of the Houses of the States General.

5

Parliamentary practice



- A very narrow approach to article 91 s. 3 Const.

Only the strict letter of a particular provision
No 2/3 majority 'to be sure'...

- Critique

'Treaties deviating from specific constitutional provisions or the principles underpinning them, require stronger democratic legitimacy. They should be approved by a two thirds majority'.



More broad interpretation required

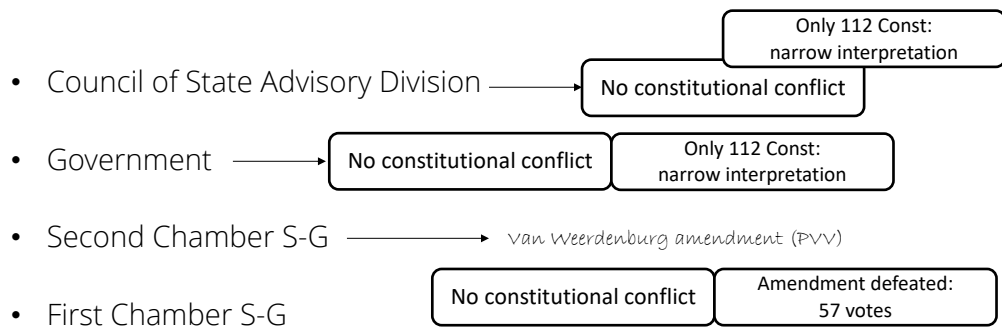
When in doubt, apply 91 s. 3

Constitutional patriotism...



6

CETA in the legislative process...



What if the First Chamber considers CETA a deviation from the Constitution?

- Option 1: pass with 2/3 majority (if at all feasible)
- Option 2: reject proposal *because* no provision as required by art. 6 Rgbv.

A constitutional challenge in the NL?

Declaratory side-note judgment possible?
 NL Supreme Court 14-04-1989
 (Harmonisation Act judgment)

- Challenging the State under the Civil Code?
- No challenge to the constitutionality of CETA as such possible
- Challenge to the consent (not applying Art. 91-3, 2/3 majority)

However...

'Constitution reserves the judgment whether the Constitution requires a specific procedure to the legislature, not the courts. No grounds to differentiate between the substance and the procedural requirements of the Constitution'
 NL Supreme Court 27-01-1963 (Van den Bergh/Staat)

The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts.
 (Art. 120 Const.)

So where does this leave us?

- Dutch Constitution is essentially a legal, but a politically enforced document.
- Special obligation on Parliament
- Political evaluation enables *and* requires a broad interpretation of constitutional values

NL:
 A politically enforced constitution moving fast...