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Position Paper of the German Trade Union Confederation (DGB) On the Free Trade Agreement between Canada and the EU (Comprehensive Economic and Trade Agreement, CETA)

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I) Introduction: as it stands, CETA is not consensual

The DGB last stated its position on EU Free Trade Agreements and on trade policy in general in a comprehensive resolution at the 20th Federal Congress. This puts forward the German trade unions views regarding the clear requirements which trade agreements should fulfil, including the need for transparent negotiations and effective prevention of any kind of pressure on either environmental standards or standards protecting employees. Sensible rules for protecting certain service areas should be kept in place, while pressure for more privatisation needs to be prevented. The unions believe it is vital not to grant investors specific rights to bring lawsuits against national states.

In recent months the DGB has repeatedly and publicly expressed these positions and made them clear to the German government, the EU Commission and the parliaments concerned – not just in the context of the ongoing negotiations on the EU Free trade Agreement with the USA (TTIP), but applying equally to the Free Trade Agreement between the EU and Canada (Comprehensive Economic and Trade Agreement, CETA).

CETA has now been concluded although it has not yet come into effect and changes can still be made. CETA is currently undergoing a process of legal scrubbing and translation, to be followed by a Council decision and the process of ratification in the individual parliaments. The text of the agreement has been published. This text does not meet trade union requirements and in our opinion it is not consensual. Negotiations should be resumed and in places the wording needs to be completely reworked.

Verantwortlich: Stefan Körzell, Mitglied des Geschäftsführenden Bundesvorstandes

In particular:

- CETA does not include effectively enforceable rules to protect and improve the rights of workers and employees,
- CETA contains a problematical chapter on investment protection as well as special rights for investors to sue states,
- In the liberalisation of services, CETA pursues a negative list approach and does not adequately protect public services.

A broadly-based public debate on the proposed Free Trade Agreement with the USA (TTIP) has now sprung up; there are different hearings with civil society, and several negotiating texts have been published, but this has hardly happened with the CETA negotiations. This reason alone means public debate is now a must. In particular, ratification by the EU member states' national parliaments as well as by the European Parliament, should be made mandatory.

CETA is also an important agreement because it serves as a blueprint for TTIP. One can assume that far-reaching liberalisation rules and investment protection clauses will also be demanded for TTIP, if introduced by way of CETA.

The German trade unions demand that the Council, the European Parliament and, eventually, the German Bundestag reject the adoption and ratification of CETA, should CETA not undergo substantial changes, thus leaving in place the existing weaknesses described in this position paper.

II) CETA text in detail

There are various places where the text of CETA falls short of trade union requirements. The most important of these are as follows:

1) CETA and Labour Rights

The DGB and its member organisations believe trade agreements need substantial and enforceable rules which firmly enshrine labour rights, as well as the protection of consumers and the environment. Since the basic purpose of a free trade agreement is to promote market access for foreign businesses and intensify competition, the care taken to ensure such competition is not detrimental to employees must be explicit.

Compliance with social and environmental standards, as well as the social and ecological impact of a given agreement must be monitored with the mandatory involvement of the social partners and civil society. A binding dispute settlement mechanism should be employed where social and ecological rules are violated, in the same way as the general complaint and dispute settlement mechanism applying to other parts of the agreement.

EU trade agreements frequently include labour rights provisions and rules on environmental protection inserted into a so-called sustainability chapter. CETA has a chapter on trade and sustainable development with a sub-heading on trade and labour ("Trade and Labour", chapter 24).

Many parts of the CETA chapter on labour and trade are phrased in a non-binding manner, but it does contain some welcome rules. For example, the agreement goes further than merely pointing out the obligations arising from ILO membership (for countries which belong to the International Labour Organisation) and from the 1988 ILO declaration on fundamental principles and basic labour rights. The contracting parties also explicitly commit to effective implementation of the ratified ILO core labour standards, and to increase efforts to ratify those core labour standards which have not been ratified. This has added relevance because Canada has not ratified ILO conventions 98 (Right to Organise and Collective Bargaining Convention), and 138 (Minimum Age Convention). However this clause does not so far constitute an obligation to actually ratify these core labour standards.

One should also welcome in principle the fact CETA is attempting to involve civil society representatives, including the trade unions, in the monitoring of the rules regarding the trade and labour chapter: as in the case of the EU-South Korea free trade agreement, domestic advisory groups are to be set up to look into complaints about violations of this chapter. However experience with the EU-South Korea agreement shows this is not enough to effectively promote and protect labour rights in trade agreements.

CETA's basic problem is that the rules in the chapter on trade and labour (and in the chapter on trade and the environment), are not formulated in such a way as to make them effective and enforceable. The mechanism for resolving disputes which the agreement generally applies (chapter 33), is replaced by a mechanism specific to this chapter; a case brought after complaints of violations against this chapter can be referred to a panel of experts which decides if violations have been committed. The contracting parties then have to discuss the situation and reach a solution

or decide on a plan of action to resolve the issue. However no financial or trade sanctions are foreseen in the case of violations. In this CETA falls short even of the North American Agreement on Labor Cooperation (NAALC), concluded 21 years ago as a side agreement to the North American Free Trade Agreement (NAFTA), between Canada, the USA and Mexico.
The DGB demands the chapter on labour rights, environmental protection and sustainable development be set up in such a way as to be just as enforceable as the rest of the agreement, i.e. the chapter should be subject to the general dispute settlement mechanism, enabling trade sanctions or compensation payments to be levied in case of violations.

Another problem in this context is the fact that, unlike many other EU trade agreements, CETA lacks an explicit human rights clause, allowing the agreement to be completely or partially suspended unilaterally if human rights or core labour standards are violated.

2.) CETA and investment protection

The wording of investment protection under CETA still has a potential for danger. By comparison with earlier investment protection agreements the CETA improvements are insufficient to effectively protect states from the high costs arising from illegitimate investor lawsuits, nor do they succeed in preventing negative consequences for parliaments and governments in their function of regulating in the public interest.

The chapter on investor protection in CETA gives investors the right to sue states at international arbitration panels (ISDS). As a matter of principle the DGB rejects ISDS.

There has been progress in making ISDS more transparent. The problem of a lack of transparency in arbitration under CETA is to be met by measures making these hearings public in principle. However even under CETA rules, it is up to the arbitrators to decide whether or not to hold their arbitration hearings either entirely or partially in camera.

CETA does not take sufficient measures to counteract the problem of arbitrators with a possible conflict of interest. It is unclear, for example, how one can make le-

gally ensure that a particular arbitrator will not act as legal counsel to the same investor in another time in another case. An additional code of conduct for arbitrators, is under consideration, but it remains to be seen what such a code is to determine and how binding it would be.

CETA does not envisage an appeals body able to review and amend arbitration rulings. So far, all that is planned is to consider establishing such a second body.

The scope of investor protection in CETA is wide-ranging, which significantly increases the number of potential ISDS cases since the chosen investment concept is "asset-based" rather than "enterprise-based". This means even portfolio investments, i.e. purely financial investments, rather than simply traditional direct investments, would be protected. The term "investor" is to be reserved for investors engaged in "substantial business activities", though the exact meaning of "substantial business activities" remains unclear.

CETA attempts to clarify the term "fair and equitable treatment" (FET), are both right and sensible, but the clarification alone is not enough. The term FET is still not limited to its narrow international customary law definition. Besides which, the EU proposal allows the contracting parties of an agreement leeway to modify the list of what constitutes a violation of the rule of fair and equitable treatment. This runs counter to a sensible, narrower limitation of the term. Another problem arises with the term referring to "Investor expectations". It lacks, at the very least, a clear definition of the - narrow! - context in which investor expectations are to be considered legitimate and deserving protection. In particular the DGB misses clarification that new, democratically decided laws or the application of existing laws could never be considered by an investor as a violation for which redress could be sought.

The term "expropriation" covering direct and indirect expropriation, is still not sufficiently narrowly defined in CETA. This remains true, even though it has been stated by way of clarification that non-discriminatory measures taken by the state in order to protect public welfare, i.e. concerning health, safety and the environment, should not normally be classified as indirect expropriation. However even the above clarification is the subject of ill-defined reservations (e.g. measures taken by the state must not appear "obviously excessive"…). From the point of view of the DGB, general regulations must never be definable as expropriation; this is to be excluded a priori. The term expropriation should be limited to such cases where the relevant host state concerned really does appropriate investments for its own use or for the benefits of third parties.

The CETA text also includes a most favoured nation clause which accords investors at least equal treatment available under agreements concluded with other countries. Given that there are thousands of bilateral investment protection agreements, any most favoured nation clause is accompanied by a high degree of legal uncertainty. However when comparing the text of CETA with the text which formed the basis for public consultations on investor protection in TTIP, there seems to be one improvement: an exception for the most favoured clause no longer applies only to procedural standards, but to substantive obligations as well.

As far as the rules on national treatment are concerned, CETA still has no specific approach on how to deal with measures which may not be discriminating in law, but which may well turn out to be so in fact. Accordingly, even generally applicable laws could be seen as discriminating against individual investors under certain circumstances. This must be rejected.

CETA contains general exception clauses for national treatment and most favoured nation taken from GATT and GATS. The problem is that it appears these exceptions are to apply selectively, and primarily to the area of non-discrimination, rather than the whole agreement. Consequently, measures rated as "indirect expropriation" cannot be justified with the general exception clauses. In addition, these exception clauses do not specifically refer to standards of social and labour protection, only to certain political objectives stated in GATT or GATS, such as "public order" or "safety and security". In any case, the DGB insists that exemption clauses must provide grounds for justifying social and labour protection standards as well as collective agreements.

The agreement must include a clause which effectively excludes public welfare measures, such as the protection of basic labour rights or social welfare legislation, from the scope of the investment protection chapter.

3.) Liberalisation in the Services Sector

The DGB is concerned that sensible protection rights involving specific services areas fall by the wayside – for example the training and quality requirements for providing certain services. Trade unions therefore feel the need for a close scrutiny of every single segment of the service sector before liberalisation is decided. A posi-

tive list should be drawn up together with trade unions and other stakeholders involved, which would indicate areas of service where there are no problems with liberalisation.

In addition, there has to be an effective way of excluding public services. Public services and some services of general interest must not become part of a trade agreement. Nor should any clauses be introduced which would prevent rescinding liberalisation (ratchet clause).
Questions concerning the cross-border posting of workers, or fixed-term labour migration, must not be regulated by trade agreements, which do not provide an appropriate framework.

CETA does not meet these requirements. The agreement has rules on fixed-term labour migration, a negative list approach, the ratchet clause and insufficient protection for public services which, in the opinion of the DGB, should be rejected.

Negative List Approach

CETA is the first agreement ever drawn up by the EU which follows the negative list approach. This means there is a commitment to liberalise all service areas not explicitly listed. So all the areas which are to be exempted are listed in annexes hundreds of pages long and virtually incomprehensible. It is extremely difficult to check whether important areas which should be protected, were overlooked when the list of exemptions was compiled. Naturally, sectors or segments of industry which may well only emerge in the future, cannot be put on a negative list now. There is also an appropriate degree of danger that certain areas will become liberated which employees or the general population do not wish to see liberalised. This issue assumes particular relevance given the dynamics of the CETA negotiations, because regulating in negotiations is generally seen as an obstacle to trade, a negative list approach invariably develops a dynamic in favour of more far-reaching liberalisation commitments. So keeping regulation in place must always require special justification.

The DGB demands a positive list approach for both CETA and other agreements along the lines of previous EU practice. In this context, liberalisation itself, rather than exceptions needs to be justified. According to the DGB, every sector must be assessed individually before any decision is taken, with the participation of the unions and civil society, as to whether the sector in question should indeed be largely liberalised as part of the free trade agreement. If so, this sector can be put on the positive list and will be subject to the agreement's liberalisation commitments.

Ratchet Clause

CETA has a so-called "ratchet clause" which determines the highest level of liberalisation achieved in each case: if areas which the agreement originally explicitly exempted from liberalisation are later opened to more competition, this level of liberalisation once granted can never be reversed. As a result, the clause will tend to increase liberalisation. The clause could for example prevent returning to municipalities the responsibility for areas of essential municipal services which were privatised earlier. In principle it would also diminish the room for manoeuvre future generations would enjoy in political decision-making. So such clauses must be rejected.

Public Services

The DGB considers the existing CETA exemptions for public services are insufficient. For example, CETA includes an exemption for services rendered as a sovereign function "in the exercise of governmental authority". This refers to the definition of GATT article I.3 (c), which stipulates that statutory tasks must not be employed for commercial purposes, or in competition with one or several service providers. What exactly constitutes services rendered as a sovereign function remains a matter of dispute. However a consensus emerging in the specialist media and in practice only includes activities performed by government which are at the core of the sovereign power of the state; such as the police, the judiciary and public administration. This means most public services, including social affairs and health, education and web-based services, public municipal transport and university services as well as postal and telecommunications services are not covered by the exemption clause. Even borderline areas where public and private services overlap and where a competitive situation exists are not protected by this clause.

Some other general, objective exceptions exist, such as the exception granted to audio-visual services in the EU. However, an exception for "cultural industries" applies exclusively to Canada.

As in earlier agreements, the EU integrated the so-called Public Utility Exception into CETA. As a result, services regarded as "public utilities" at national or local level can be subject to state monopolies, or the exclusive rights of private operators, in all EU member countries. CETA adds a list of areas where such "public utilities" may be covered by this clarification. This list is not intended to be all-embracing, but it is striking that important areas like social services, cultural affairs, public-service broadcasters or education are not explicitly mentioned.

In CETA, telecommunications and computer-related services are fields which do not explicitly come under this exception. However telecommunications in particular is an area where, despite liberalisation, universal service obligations, which will have to be capable of further extension in the future (e.g. regarding broad band networks) still apply.

In addition, there are other problems associated with the public utility exception:

- It only refers to commitments to market access, not to national treatment
- It affects only two restrictions on market access, namely public monopolies and exclusive service providers. Other restrictions which may be used to safeguard public services, such as quotas or economic needs tests[1] do not, therefore, enjoy the protection of the Public Utility Clause.

The DGB believes CETA (and trade agreements in principle) should be reviewed to assess how public services and areas of general public interest can receive comprehensive and effective protection, while retaining sufficient flexibility to allow for them to be extended to these areas in the future.

Possible approaches[2]:
Instead of applying the GATS definition in connection with services rendered "in the exercise of governmental authority", trade agreements could be excluded from applying to activities and services regarded as services exercising sovereign functions by the laws of the parties and/or members concerned. Such a regulation would at least make clearer that the core government functions, as defined by each countries legal system, are exempted.

In addition, confusion associated with the term "public utilities" could be avoided by using the terms "public services" – defined as "services subject to specific regulations or distinguished by specific mandatory commitments for services providers at the national, regional or local level on the grounds of public interest".

Exceptions from the commitment to the principles of market access and national treatment should be made on this basis and as a horizontal restriction in the framework of a positive list approach.

[1] To prevent ruinous competition from possibly endangering the safety and quality of services, needs tests limit the number of service providers on the basis of need
[2] Cf. http://www.Boeckler.de/pdf_fof/S-2014-720-1-1.pdf

Another option for the protection of public services could be the introduction of general legal justification into CETA, which would allow retrospective protection of public services should such a service initially be in violation of the agreement.

4) Public Procurement

The DGB believes commitments on compliance with collective bargaining agreements, and social or ecological criteria, should be effectively supported in the regulations on public procurement laid down in trade agreements. The provisions of a trade agreement should never jeopardise the wording of socio-ecological award criteria.

CETA does not include any rules on the effective promotion of socio-ecological procurement criteria, only far-reaching rules on opening up procurement markets.

Thus CETA goes beyond the duty of non-discrimination for domestic and/or foreign bidders. For example, it bans so-called "offsets", i.e. linking award conditions with the promotion of local development, with current account improvements, the use of local precursor products or other similar steps. Against such a background one has to question the extent to which social criteria, such as compliance with collective bargaining criteria, can play a role in deciding public contract awards.

The general exceptions in article III of the public procurement chapter comprise measures to protect public morality, order and security, health, as well as measures relating to those goods and services produced by the disabled or by prison inmates. There are no measures to protect social and labour standards.

Article IX, par 6 of this chapter allows public purchasers to proscribe technical specifications intended to protect natural resources or the environment. Labour and social standards are not mentioned. Award criteria in CETA are either "the most advantageous bid", or, if the price is the only criterion, the lowest priced bid. Experts differ whether the most advantageous bid may or may not include social criteria.

5) Regulatory Cooperation

CETA includes a chapter on regulatory cooperation, intended to guarantee ongoing debate as well as harmonization of national regulatory measures of the contracting parties. In addition, it envisages a "Regulatory Cooperation Forum" (RCF) to discuss regulatory aspects. Administrative officers of both the EU and Canada are to

assess in advance the compatibility of proposed regulations or legislative procedures with the rules of the trade agreement. There are also provisions for interested parties to be invited to RCF meetings, thereby giving private interests and lobby groups additional, exclusive access at an early stage to legislative and governmental processes. The DGB rejects the establishment of bodies which restrict democratic rights. Regulatory cooperation must not be used to create a "regulatory council" to hamper the power of parliaments and governments to pass laws and regulations to safeguard their citizens and protect their interests.

6) Further Regulation

The DGB thinks trade agreements should include review clauses enabling unwanted developments to be corrected. CETA does not contain such a review clause.