statement

Statement of the Confederation of German Trade Unions (DGB):

Regarding the Updated Version of the EU Free Trade Agreement with Canada (Comprehensive Economic and Trade Agreement, CETA) After the Process of Legal Scrubbing

CETA: Despite Improvements Problems Remain

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Confederation of German Trade Unions

Department for Economic, Fiscal and Tax Policy

Florian Moritz & Nora Rohde
International and European Economic Policy Unit

florian.moritz@dgb.de

Tel.: +49 30 24060 247
Fax: +49 30 24060 218

Henriette-Herz-Platz 2
10178 Berlin

The trade agreement between the EU and Canada (CETA) is nearing the ratification process in the respective parliaments. By the end of 2014, the DGB had already adopted a negative position regarding the results of the CETA negotiations that were published, and thus called for a renegotiation.[1] The following in particular were criticised:

- the fact that CETA contained a problematic investment protection chapter and special rights of investors to sue states,
- the fact that CETA contained no effectively enforceable rules regarding the protection and improvement of workers' rights,
- the fact that, regarding the liberalisation of services, CETA follows a negative list approach and public services are not sufficiently protected.

Since then, and as a result of the pressure of public criticism, amendments have been made to the CETA text during the course of the "legal scrubbing", without actually reopening the negotiations. An analysis of these changes shows that the criticisms have been partially addressed and improvements have been made. However, numerous problems remain in the current CETA agreement that has been put forward for adoption.

The DGB does not oppose free trade in itself. Despite improvements, as a whole the CETA text does not yet meet the requirements for an agreement that is acceptable for the trade unions. Thus from the point of view of the DGB different aspects have to be renegotiated by the European Commission.

[1] See: http://www.dgb.de/themen/++co++0c8ffb4a-7eb9-11e4-854b-52540023ef1a/@@dossier.html

1.) Investment Protection

The European Commission has managed to incorporate large parts of its proposal for a reformed system of investment protection and according rights of investors vis-à-vis states (Proposal for an Investment Court System, ICS) into CETA. In particular, this has resulted in changes to the procedural configuration of the dispute settlement between investors and states (Investor - State Dispute Settlement, ISDS):

a) Dispute Settlement Procedure / ISDS

Previously, the CETA text stated that a list of at least 15 suitable arbitrators would be created, from which three arbitrators would be selected for the handling of each case. In this context, the defendant state would have designated one arbitrator, the plaintiff investor would have selected the second and the third would have been selected together. The investors would thus have had a direct influence on the composition of the arbitration body.

The revised CETA is now offering the establishment of a bilateral "Investment Tribunal", with its 15 members being appointed by the parties to the agreement (the EU and Canada). The respective cases will also be handled by three members of the tribunal (a Canadian, a European and a person from a third country). However, these will generally be named by the President of the tribunal in a random procedure. The plaintiff investors will thus no longer have any influence on the choice of arbitrator, which represents a significant improvement.

According to the revised CETA, the arbitrators ("Members of the Tribunal") shall be appointed for a period of five years (six years for seven of the initially appointed members)[2]. They shall receive a monthly allowance for this that is yet to be specified. This is on top of the usual daily fees for arbitration activities (currently USD 3000 per day), which are paid only in respect of actual proceedings taking place. The payment of members of the tribunal will thus probably continue to be made mainly in the context of actual cases. If the monthly standard fee for CETA is a similar level as in the ICS proposal (EUR 2000 per month), it is doubtful that real independence will be achieved in terms of the members of the tribunal.[3]

An improvement in terms of avoiding conflicts of interest of members of the tribunal is provided by the clarification in Article 8.30 paragraph 1 of CETA, which states that, following their appointment, members of the tribunal may not act as lawyers, counsels or experts in investment disputes. However, it appears that the performing of other legal work is still possible.

It is in principle welcomed that the requests of the DGB to establish a court of appeal with CETA that can review the procedures and change arbitration awards under certain conditions (Art. 8.28) have been included.

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[2] Here there is a difference between the new CETA and the ICS proposal from the European Commission; the latter provides for an appointment of judges for six years (nine years for seven of the first appointed judges).

[3] The German Association of Judges emphasised in its opinion on the ICS proposal from the European Commission that "Neither the intended method of appointing judges for the ICS nor their position is sufficient to meet the international requirements for the independence of courts. [...] The term of office of six years with the possibility of a further term of office, a base salary ("retainer fee") of approximately EUR 2,000 per month for judges of the first instance [...] also cast doubt on whether the criteria for technical and financial independence of judges in an international court are met." See: http://www.drb.de/cms/fileadmin/docs/Stellungnahmen/2016/DRB_160201_Stn_Nr_04_Europaeisches_Investitionsgericht.pdf

The relationship with national legal protection continues to be problematic. The new CETA still does not stipulate that the national legal process must be exhausted before a lawsuit can be filed at the investment tribunal. A "No U-turn" clause is now included in the text. However, this merely states that all procedures on the national (and international) level must be terminated as soon as a lawsuit is filed at the investment tribunal.

In terms of transparency, the original CETA text already contained improvements compared to previous investment protection agreements. During the checking of the legal formal requirements, a welcome rule was also added stipulating that the funding of litigation by a third party must be explicitly stated and disclosed. The intervention rights of third parties though, as proposed in the Commission's ICS proposal, have not been included in the revised CETA.

The revised CETA contains some rules that could contribute to an alarming expansion of lawsuit cases on the part of small and medium-sized enterprises (SMEs). For example, Article 8.39, paragraph 6 states that additional rules will be created in order to reduce the "financial burden" (presumably legal costs etc.) for investors that are natural persons or SMEs.

b) Material Investment Protection Standards and Right to Regulate

There are no improvements over the original CETA text regarding the additional content rights and claims that foreign investors are granted. The statement regarding the entitlement to fair and equitable treatment (FET), and the rules on direct and indirect expropriation remain almost completely unchanged. As was previously the case with the ICS proposal, CETA therefore remains well behind proposals that have been developed on behalf of the German Federal Ministry of Economic Affairs.[4]

Regarding the rules for FET, Art. 8.10, paragraph 4, for example, continues to envisage the protection of "legitimate expectations" on the part of investors, which leaves considerable room for interpretation.

The concept of expropriation, which includes direct and "indirect" expropriation, is also still not defined stringently enough in CETA. This is the case despite the clarification in Annex 8-A that non-discriminatory government measures for protecting the public interest ("legitimate public welfare objectives"), for example in the areas of health, safety and the environment, are generally considered not to be "indirect expropriation", especially since this clarification is also subject to vaguely defined reservations (for example, the state measures may not appear to be "manifestly excessive"...). From the perspective of the trade unions, in this context it is especially valid to criticise the fact that the (non-exhaustive) list of legitimate state measures in the annex mentioned does not explicitly include occupational safety, co-determination and other workers' rights.[5]

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[4] See: https://www.bmwi.de/BMWi/Redaktion/PDF/M-O/modell-investitionsschutzvertrag-mit-investor-staat-schiedsverfahren-gutachten,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf

[5] In a recent study on the European Commission's ICS proposal, Krajewski and Hoffmann state that: "It also appears to be possible that, in order to achieve protection against legal requirements prescribed in labour and social legislation, investors try to rely on the institute of indirect expropriation and thereby trigger a compensation obligation on the part of the state. [...] Under German law, the implementation and expansion of co-determination is not compensable expropriation. Against this, it might be argued on the basis of the commission proposal that it amounts to a deprivation of the essential characteristics of the property if workers' representatives can block company decisions. In this context it should be noted that the concretisation of the concept of indirect expropriation in Annex I no. 3 does

The fact that CETA continues to define substantive additional claims against states for foreign investors, and the associated risks of lawsuits against legitimate state regulations, is counteracted in the revised CETA with an explicit reference to a right to regulate. The partners to the agreement “reaffirm” in Article 8.9 that they have the right to regulate to achieve legitimate policy objectives. For example, several measures regarded as legitimate are listed (such as protection of the health system, environment, consumers, social support etc.); but an explicit mention of measures relating to workers’ rights is not among them. It is admittedly the case that this is an open list, meaning that the protection of workers can still be considered legitimate. However, a specific mention of such measures would provide more legal clarity. The word 'legitimate' gives rise to further difficulty, as, when defining legitimacy, a significant margin of discretion arises with respect to the question of which measures are considered legitimate and which are not.

However, the fundamental problem regarding the article about the right to regulate is that its legal content remains unclear.[6] A real protection of the right to regulate must therefore in principle be ensured through effective delimitation of material protection standards.

c) Other Aspects

As the revisions in CETA focus, as mentioned, mainly on the procedural aspects of dispute resolution, other criticisms voiced in the DGB statement issued in 2014 remain, including:

- The area of applicability of investment protection is wide in CETA, which drastically increases the number of potential investment-related disputes. For example, not only classic direct investment but also portfolio investments, i.e. pure "financial investment", are protected.
- The definition of an investor is admittedly restricted to investors who display "substantial business activities". However, it remains unclear what is meant by "substantial business activities".
- The CETA text still contains a most-favoured nation clause, which gives investors at least the same treatment under CETA as in agreements that exist with other states.

In the opinion of the DGB, CETA basically does not need to grant any special rights or additional investment protection to foreign investors. Both Canada and the EU, and its member states, have well-developed legal systems that comprehensively protect property rights.[7]

2.) Workers’ Rights

The CETA chapter on trade and labour has remained largely unchanged following the legal scrubbing. The assessment contained in the DGB statement issued in 2014 thus remains relevant in this regard.

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not mention tariff provisions, occupational safety, etc." See: http://library.fes.de/pdf-files/wiso/12379.pdf

[6] With CETA, the right to regulate clause in fact appears to be weaker than in the original ICS proposal issued by the European Commission. The necessity test for this from the ICS proposal has been dropped from CETA.

[7] Regarding the DGB's general position on investor protection, see also: http://www.dgb.de/-/Yvr

At that time, the DGB was pleased that

- the parties to the agreement explicitly undertook the effective implementation of the ratified ILO core labour standards and pledged to "intensify efforts" to ratify the as yet non-ratified core labour standards;
- an attempt was being made to involve civil society stakeholders, including trade unions, in the monitoring of the rules defined in the chapter on trade and labour.

In particular the following were criticised:

- that the chapter about trade and labour is still formulated in a non-binding way in many parts;
- that no obligation to actually ratify all the core labour standards was included;
- that the rules in the chapter on trade and labour (and in the chapter on trade and environment) are not designed in such a way as to be implemented effectively (if necessary with financial or trade sanctions), because a chapter-specific dispute settlement mechanism applies, rather than the general dispute settlement mechanism defined in the agreement.

The DGB calls for the chapters on workers' rights, environmental protection and sustainable development to be designed as enforceable as the rest of the agreement, i.e. they at least fall under the general dispute settlement mechanism.

3.) Liberalisation in the Services Sector

There have also not been any major changes made to the rules regarding further liberalisation in the services sector in CETA. As was already emphasised in the DGB statement issued in 2014, in particular the following problems remain:

- CETA is the first ever EU agreement to follow a negative list approach. This means that liberalisation obligations will be entered into for all service sectors that are not explicitly listed. This approach leads to a situation where desired exemptions from liberalisation obligations are listed in long, almost impenetrable annexes running to hundreds of pages. Checking whether important areas that are worthy of protection have been forgotten in the lists of exceptions is therefore a difficult task. Furthermore, industry sectors or areas that may yet appear in the future are of course not included on the negative list.
- CETA contains a so-called "Ratchet Clause", which stipulates that the highest level of liberalisation that has been reached must always be observed: if areas that were explicitly excluded from the liberalisation obligations under Annex I of the agreement are subsequently opened to increased competition at a later time, the liberalisation that is thereby achieved cannot be reversed at any time.
- The exemptions for public services in CETA are still inadequate in the opinion of the DGB; the exclusion of "services carried out exclusively in the exercise of governmental authority", and the so-called public utility exception contain potential loopholes.[8]

[8] The comprehensive DGB statement from 2014 is available at:
http://www.dgb.de/themen/++co++0c8ffb4a-7eb9-11e4-854b-52540023ef1a/@@dossier.html

- The proposal of the DGB to insert a general factual justification in CETA, making it possible to also subsequently justify the protection of public services if it initially violates the agreement has, as is the case with some other recommendations, not been addressed in the legal scrubbing.
- CETA still envisages liberalisation obligations in the area of cross-border movement of workers for the provision of services. Issues of cross-border labour mobility should not be part of free trade agreements. In terms of compliance with labour law, social and collective agreements, the host country principle must in any case be stipulated and applied to all posted employees from the outset, if this is more favourable for them.