

Assessment of SPD Party Congress Decision and the Current Debates on Protocols in CETA from the Perspective of the DGB

I.) SPD Vote at Party Congress

On September 19, 2016, the Socialdemocratic Party (SPD) voted in favour of a compromise that has been interpreted in the public mainly as approval of the controversial CETA agreement.

It is true that the compromise praises many elements of the CETA and that this decision has paved the way for the parliamentary ratification process. The responsible minister for economic affairs gets the support of his party to agree to CETA in the upcoming Council Meeting of the European ministers for trade.

However, the compromise also determines concrete demands regarding the content that have to be met in order for German social democrats to eventually agree to CETA in the parliamentary process. That in turn means that the SPD thinks that CETA in its current form cannot be supported.

Demands:

“**In order to support CETA**”, according to the compromise it needs agreement on the following points – ideally before the decision in the Council is taken (see pages 9f. of the compromise):

- a. ***Investor protection*** has to be limited to the *non-discrimination of foreign investors compared to domestic investors*.

That means: Additional material rights that are granted to foreign investors in the current CETA text (e.g. fair and equitable treatment, compensation for expropriation (especially defined in the case of indirect expropriation) have to be rendered ineffective. This can be achieved through bilateral protocols that suspend at least articles 8.10 and 8.12 of the treaty.

- b. *There has to be a legally binding commitment that the EU does not deviate from the **precautionary principle***.

That means: The precautionary principle in Europe must not become under pressure through the promotion of the contradicting science-based approach in CETA.

This can also be achieved through a joint understanding between the EU and Canada that stipulates the protection of the precautionary principle by referring to existing international agreements (e.g. the Cartagena Protocol). At the same time, it has to make clear that regulatory decisions that are based on the precautionary principle cannot be subject to investor claims.

- c. *A **sanction mechanism** has to be developed that takes effect if breaches of labour, social and environmental standards occur. “The social dialogue has to be designed in an effective way in order for the procedures of implementing standards to be effectively enough and they have to be complemented by the possibility to impose sanctions.”*

In order to meet this demand, **comprehensive work on the CETA agreement is necessary**. This has to be sketched out in a protocol between the parties in a legally binding and concrete way.

- d. *“The CETA text has to make clear without doubt that existing and future **public services** are not covered by the agreement”.*
This needs a joint understanding that makes clear to exempt public services from all provisions of the agreement. In this case, public services have to be defined in a very broad way in order to cover the different systems of the EU member states with their differing forms of public services and their differing instruments of state regulation. A model clause can be found here (Point 3 on page 9): https://media.arbeiterkammer.at/wien/PDF/Publikationen/Model_clauses_for_the_exclusion_of_public_services.pdf
- e. *It has to be ensured and clarified that **all bodies** established by the CETA agreement will initially play a **consulting role** only with regard to the implementation of the agreement.*
That also means that CETA bodies will not be able to make decisions that are not democratically controlled and will not be able to change the treaty (in turn it can also not be changed for the worse).
- f. *It needs a clarification that the rules of CETA are respecting and realigned with the global **sustainable development goals** and the Paris **climate protection agreement**.*
In addition, the SPD-compromise determines further demands, e.g. a clarification that ensures the independence of members of the investment tribunal and the ratification of the eight core labour conventions of the ILO.

Indeed, the compromise says that these protocols and understandings have to be designed in a “legally binding” way and if possible brought forward before the decision in the Council **or the following parliamentary process**. In practice, these problems can most effectively be solved **before** the parliamentary ratification process.

Assessment

The demands mentioned above also reflect important demands of the trade unions. They could – if installed in a legally binding and effective way – help to solve significant problems of CETA.

Together with the Canadian Labour Council (CLC), the DGB drafted concrete proposals for such protocols and understandings between the CETA Parties (see Annex).

Debate on the necessary amendments has to take place already in the informal Council meeting on September 22 and 23.

On October 17, the Council has to give its final decision on CETA. This is when consensus on the necessary amendments needs to be found.

On October 27, at the EU-Canada-Summit, the respective protocols and understandings have to be signed by both Parties together with the core text.

In case this is not happening, amendments introduced during the parliamentary process will add further complexity and prolong the process, because in order to be effective, protocols and understandings have to be supported by both parties – Canada and the EU.

It has to be ensured that protocols and understandings are designed in a way that guarantees that above mentioned problems in CETA are solved effectively and in a legally binding way.

Announcements so far fall short of this:

The announcement of Canadian Minister for Trade Freeland and EU-Commissioner Malmström does not give much hope that there is political will for substantial and effective changes on the above mentioned points: [http://europa.eu/rapid/press-release STATEMENT-16-3101_en.htm](http://europa.eu/rapid/press-release_STATEMENT-16-3101_en.htm). Especially, material rights of investors are not mentioned in the release.

The declaration of Canadian Prime Minister Trudeau and Sigmar Gabriel who announced an assessment of further proposals and a legally binding declaration remains vague: <https://www.bmwi.de/DE/Presse/pressemitteilungen,did=780068.html>.

The detailed joint declaration of Freeland and Gabriel does not point to binding protocols the way we ask for: <https://www.bmwi.de/BMWi/Redaktion/PDF/G/gemeinsame-erklaerung-fortschrittliche-handelspolitik-ceta-und-darueber-hinaus,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf>. This has to be more precise:

II) Joint Declaration of Sigmar Gabriel and Chrystia Freeland (18.09.2016)

The joint declaration uses important keywords from the demands and proposals by DGB and CLC (and thus also from the SPD-compromise). However, some things are missing or remain too imprecise:

- a. **Investor Protection:** The announcement concerning additional procedures relates to the “procedural rules” that are supposed to clarify the independence of members of the investment tribunal. Apparently, no need for changes is seen on the important point of special material rights granted to foreign investors (FET and indirect expropriation) that are still loopholes for undermining regulations in the public interest. The statement that “the new system introduces more precise definitions” shows the lacking awareness of the problem. There is no reason for not touching the terms in the agreement, thus our demands for additional protocols remain important.
- b. **Sustainable Development Chapter/Labour Rights:** We want sanction mechanisms for the dispute settlement in the labour chapter (and a better participation of trade union et.al. in this process). The declaration between Freeland and Gabriel says in this regard: “We have agreed to support further investigation in order to find out whether further improvements are advisable.” That sound like a vague commitment and should be agreed upon in a binding way beforehand.
- c. **Public Services:** Clarifications of already existing rules and exemptions have been announced – e.g. with regard to remunicipalisation. However, for us it is important to have a comprehensive and effective exemption clause for public services from the whole agreement. This is necessary to somewhat limit the negative effects of the negative list approach.
- d. **Public Procurement:** The announcement in the declaration could go in the right direction, but it depends on the final wording.
- e. **Precautionary Principle:** It is questionable whether the wording of the declaration is more effective than what is already in the CETA text. It needs precision immediately.

III) Annex: Proposals of DGB and CLC for concrete Amendments to the CETA

Nr. 1

Understanding on the Provision of Public Services and Procurement

The following understanding was reached between the delegations of Canada and the European Union during the course of negotiations regarding specific commitments on public services and procurement in the Comprehensive Economic and Trade Agreement (CETA):

1. The Parties agree that nothing in this treaty shall be construed to restrict the provision, regulation or funding of public services by a Party or its subnational entities. Public services are activities which are subject to special regulatory regimes or special obligations imposed on services or service suppliers by the competent national, regional or local authority in the general interest.
Special regulatory regimes or special obligations include, but are not limited to, universal service or universal access obligations, mandatory contracting schemes, fixed prices or price caps, the limitation of the number of services or service suppliers through monopolies, exclusive service suppliers including concessions, quotas, economic needs tests or other quantitative or qualitative restrictions and regulations aiming at high levels of quality, safety and affordability as well as universal access and equal treatment of users.
2. The parties, the EU-Member States and the entities on the sub-national level reserve the right to adopt or maintain any measure with regard to the remunicipalisation of services regardless of whether the service concerned is mentioned in the Annex I or Annex II reservations or not.
3. No measure of a Party or its subnational entities may be considered to be in violation of the 'fair and equitable treatment' or the 'full protection and security' standards if it is covered by the right to regulate, by an exception, reservation or other derogation within this treaty.
4. Nothing in this Agreement shall be construed to prevent a Party or its subnational entities from adopting or maintaining a measure that prescribes formal or substantive requirements in connection with the supply of a service, provided that such requirements are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination.
5. With regards to public procurement, nothing in the agreement limits contracting authorities on central and sub-central level in laying down special conditions relating to the performance of a contract, provided the conditions are linked to the subject matter of the contract and indicated in the call for competition or in



the procurement documents. Those conditions may include economic, innovation-related, environmental, social or employment-related considerations and the obligation to comply with and adhere to collective agreements.

6. Nothing in this Agreement shall be construed to oblige non-profit, non-commercial, and charitable organisations and companies to act in accordance with commercial considerations as laid out in Article 18.5 (Commercial Considerations).

7. This Understanding constitutes an integral part of the Agreement.

Nr. 2

Protocol on Investment Protection

1. The Parties agree that Articles 8.7 (Most-favoured-nation treatment); 8.10 (Treatment of investors and of covered investments); and 8.12 (Expropriation) of the treaty shall be suspended for 10 years after the signing of the Agreement.

2. Unless other agreements have been negotiated between the Parties, the suspension of above-mentioned articles remains in force after the expiry date determined in Article 1 of this Protocol.

3. The Parties agree that the dispute settlement procedure as laid out in Chapter 8 Section F (Resolution of investment disputes between investors and states) is foreseen as the last resort and can only be accessed after the full exhaustion of domestic legal action.

4. This Protocol constitutes an integral part of the Agreement.

Nr. 3

Understanding on the Precautionary Principle

1. The Parties come to the understanding that nothing in this Agreement shall be construed to undermine the precautionary principle prevailing as stated in Principle 15 of the Rio Declaration on Environment and Development and for Europe in particular in Article 191 AEUV. No part of the Agreement shall be interpreted as promoting the science-based approach over the precautionary principle in Europe. Specifically, measures and regulations based on the precautionary principle cannot be subject of disputes arising under Chapters 8 (Investment) and 29 (Dispute resolution).

2. This understanding constitutes an integral part of the Agreement.

Nr.4

Protocol on Dispute Settlement and Institutional Mechanisms for Chapter Twenty-Two (Trade and Sustainable Development) and Twenty-Three (Trade and Labour)

1. This Protocol constitutes an integral part of the Agreement.

Sub-Section A: Dispute Settlement

1. Article 23.11 (1b) (Dispute Resolution) shall be suspended.
2. The Parties agree that sanctions and remedies as laid out in Chapter 29 (Dispute Resolution) apply to disputes arising under Chapters 22 (Trade and Sustainable Development) and 23 (Trade and Labour) after the exhaustion of consultations and the examination of the dispute by a Panel of Experts.
3. Consultations shall also be undertaken at the request of the Labour Secretariat and the Committee on Trade and Sustainable Development.
4. All breaches of core standards - including in the public sector - should be interpreted as breaches of Chapter 23. Given the impact of systemic abuse of workers' rights on the ability of all other workers in an economy to make fair wages, the work of all workers in the economy shall be deemed trade-related and therefore be subject to the obligations of Chapter 23.

Sub-Section B: Committee on Trade and Sustainable Development

The Parties agree that the Committee on Trade and Sustainable Development has to follow a tripartite approach. Its constitution and agenda are determined as follows.

1. The Committee on Trade and Sustainable Development (hereafter referred to as “Committee”) shall be comprised of equal numbers of representatives, from the EU and Canada, of the Parties responsible for labour-related matters covered by this Agreement; of employers’ organisations; and of trade unions (together designated as the “component groups”).
2. The Committee shall oversee in particular the implementation of matters related to the ILO’s Decent Work Agenda throughout this Agreement, including cooperative activities and the review of the impact of this Agreement on sustainable development, and address in an integrated manner any matter of common interest to the Parties and to stakeholders in relation to the interface between economic and social development.
3. The Committee may hold special sessions dedicated to specific issues of interest to its components.
4. The ILO shall be invited to be represented as an observer at Committee meetings. Representatives of other international organisations such as the OECD may be invited as appropriate.
5. Each of the three component groups of the Committee may meet separately to prepare plenary meetings.
6. Adequate funding shall be provided by the Parties in the pursuance of the work of the Committee and related organs. The Committee shall meet within the first year of the entry into force of this Agreement, when it will agree its Rules of Procedure including the frequency of further meetings.
7. Each regular meeting or dedicated session of the Committee includes a session with the public to discuss matters relating to the implementation of the relevant Chapters, unless the Parties decide otherwise.
8. The Committee shall promote transparency and public participation. To this end:
 - (a) in conducting its activities, including meetings, the Committee shall provide a means for receiving and considering the views of interested persons on matters regarding this chapter.
 - (b) any decision or report of the Committee shall be made public. Extended minutes of meetings shall be made public unless it decides otherwise;
 - (c) the Parties shall present updates on any relevant matter pertaining to this Agreement as covered in Article 22.4.2, including its implementation, to the regular meetings of the Committee.
 - (d) the Committee shall report annually on any matter that it addresses. The Parties shall also report regularly to their Domestic Advisory Groups as established under Article 23.8.4.

Sub-Section C: CETA Labour Secretariat

The Parties agree to establish an independent Labour Secretariat. Its constitution and agenda are determined as follows:

1. There shall be established a CETA Labour Secretariat (hereafter referred to as “Secretariat”) to address transnational labour issues, to monitor and enforce this chapter, and to provide research on:
 - a. Best practices for any area covered by this agreement that affects the lives and livelihoods of working people.
 - b. The contribution of the CETA toward the creation and promotion of decent work.
 - c. Wage, job, union, community, and public welfare effects of the CETA. The Secretariat shall report biennially, at the request of the Working Group, or more frequently if circumstances warrant, on such issues as positive and negative impacts of the CETA on labour markets, including the transfer of production between nations and the effects on displaced workers; wage effects of the CETA, particularly in sectors and industries impacted by large transfers of production; community effects of CETA, including loss of tax revenues and community impoverishment. The Secretariat shall indicate when negative effects are sufficient to warrant policy intervention by the Parties and may recommend solutions.
 - d. The Secretariat will be responsible for providing regular, independent reports on compliance with this chapter of the CETA.
 - e. In addition to reports referenced in subsection (d), the Secretariat shall research and report on non-compliance alleged by any interested party in submissions made to the Secretariat.
 - f. Reports in response to submissions made under subsection (e) shall be completed within 180 days. The Secretariat may grant itself extensions on reports due if necessary. Each extension may consist of a maximum of 30 days and must be published, together with the reasons therefor.

2. When, pursuant to subsections (1) (c), (d), or (e) above, the Secretariat finds good cause to believe that a Party or EU member state government is not in compliance with the chapter, it shall create recommendations for improvement and shall provide technical assistance, where necessary or appropriate, to effectuate the recommendations and bring the Party or member state into compliance.

3. In order to perform its work monitoring, investigating, and providing technical assistance for any item described in subsection (1), Secretariat staff shall be free to visit and monitor workplaces within the Parties’

territory, to interview workers free from employer or government monitoring and interference, and to visit, observe, and assist relevant government offices tasked with securing the rights and freedoms protected under this chapter. Secretariat personnel shall be empowered to recommend to employers and labour officials “on the spot” changes to workplace conditions to bring employers into compliance with the provisions of this chapter, and to otherwise help effectuate the rights of workers and responsibilities of Parties under this chapter.

4. When the Secretariat determines that meaningful progress toward effective implementation of its recommendations has ceased, and if the Party or member state remains out of compliance with this chapter, the Secretariat shall begin dispute settlement procedures subject to Chapter 29 (Dispute Settlement) of this agreement.

5. Cases referred for dispute settlement shall proceed under the terms of that chapter, with no differences, including with respect to penalties, excepting that the arbitrators shall have expertise in international labour law, or human rights law, or both. The arbitrators shall base their decisions on ILO guidance, including Conventions, reports and recommendations, and may seek technical assistance or request expert reports from the ILO Committee of Experts at any time. The work of a dispute settlement panel may be delayed for a reasonable period of no more than 75 days while it seeks such expertise from the ILO. Should the ILO decline to provide such advice, dispute settlement processes shall resume immediately.

6. As with any other matter that proceeds to dispute settlement pursuant to the Dispute Settlement Chapter, a panel may authorize sanctions in the form of suspension of benefits. In such a case, the panel is directed to authorize such benefits to be suspended as to the specific workplaces identified as problematic in the case, and if that is not practicable, then in specific industries in which the lack of compliance subject to the dispute is concentrated, and if that is not practicable then in specific sectors in which the lack of compliance subject to the dispute is concentrated. The workplaces, industries and sectors will thereby be motivated to come into compliance. The amount of the suspension authorized shall be dissuasive enough to encourage resolution at the initial stages of the dispute and shall bear a relationship to the number of workers affected, the severity of the non-compliance, and the potential for such non-compliance to induce a race to the bottom by motivating other employers to reduce wages and standards. Further, dispute settlement panels are authorized to escalate the level and the breadth of the suspension, or both, if, year on year, the Party or member state has not come into compliance.

7. So long as the Secretariat continues to find good cause to believe that a Party or member state remains out of compliance with the terms of this Chapter, it shall proceed through the steps described in this Section (C) (Dispute settlement procedures and compliance) to achieve compliance.

8. Should investors retain the right to bring their own cases in this agreement pursuant to the investment chapter, the Secretariat shall likewise retain the right to pursue dispute settlement without seeking approval of any Party. Should investor-initiated cases be excluded from the CETA, the Secretariat shall refer cases to the Party that is not the subject of the dispute with a recommendation that dispute settlement be initiated. Parties receiving a referral but refusing to initiate a case shall publish in writing the reasons therefor.

9. Should the Secretariat bring a case which results in a dispute settlement panel authorizing a suspension of benefits and the Party that is not the subject of the dispute refuses to implement the suspension of benefits as authorized, the Party shall publish in writing the reasons therefor. Further, interested parties are authorized to use domestic procedures to seek compliance with the suspension of benefits authorized by the dispute settlement panel.

10. Experts in labour and human rights law, including former officers and staff of the ILO, shall staff the Secretariat. Ideally, the Secretariat shall be composed of approximately one-third Canadian nationals, one-third nationals of EU member states and one-third nationals of non-Canadian, non-EU member state countries. In no case shall more than 40% of the staff consist of one of the following three groups: Canadian nationals, nationals of an EU member state, or nationals of a non-Canadian, non-EU member state country.

11. Neither Party, nor any EU member state, shall have veto power over Secretariat activities, nor shall a Party or EU member state control, prevent or delay such activities or publication of Secretariat reports.

12. The Secretariat shall be funded by the Parties on a pro-rata basis, with each party contributing to the budget consistent with the size of its GDP compared to the size of the GDP of the entire CETA.

13. The Secretariat shall have at least one office in Canada and at least one office in an EU member state. Staff may rotate between the offices in a manner to be determined by the Secretariat. The Executive Director of the Secretariat shall not be a national of either Canada or an EU member state.

Sub-Section D: Wages and Standards Working Group

1. The Parties shall establish a CETA Wages and Standards Working Group from among its members, balanced among its components, all with voting power, that may consider issues upon its own accord or in response to reports produced by the Secretariat.
2. The Working Group shall be chaired by an independent eminent person with labour expertise, without voting power, who is not an EU or Canadian national and with an initial term of three years. The Working Group shall develop its own rules of procedure taking into account existing practice of social dialogue on national and regional levels and the practice of the ILO.
3. The Working Group shall study, review, and consider the impact of the CETA on wages, benefits, labour rights, labour standards, and the creation of decent work with the objective of creating a cycle of continuous improvement.
4. The Working Group shall also be tasked with investigating and reporting on any race to the bottom policies, including tax policies, that negatively affect the standard of living in any area within the CETA.
5. The Working Group shall recommend changes to CETA labour provisions or to national laws or both if it determines that there is evidence that wages, benefits, labour rights, labour standards, or the creation of decent work are stagnating or falling anywhere in the CETA zone as a result of, or potentially as a result of, the CETA; or that Parties (or political subdivisions thereof) are engaging in a harmful race to the bottom policies, including tax policies.
6. The Working Group may request information or reports from, or address recommendations to, the Secretariat at any time. The Secretariat shall respond promptly to information and report requests. The Secretariat shall act on recommendations or provide in writing the reasons for rejecting recommendations.
7. The Working Group shall monitor the work of the Secretariat. Two components of the Working Group, employers and labour, shall be able to launch an official complaint to the head of the Secretariat for the Secretariat's shortcomings and failures to deliver its mandate. Upon receipt of such a complaint, the Secretariat must reply within 30 days in writing with measures to be taken to correct the shortcoming or provide the

reasoning of rejecting the complaint.

8. The Parties and EU member states shall consider the recommendations of the Working Group, as applicable, and attempt to implement such recommendations when feasible. If a Party (or its applicable political subdivision) fails to attempt to implement such recommendations, it shall publish in writing the reasons therefor.

9. The Working Group, upon receiving the reasons for failure to attempt to implement a recommendation from a Party, may reissue its recommendation, together with a response and justification for continuing the recommendation in light of the objection received. The Parties shall reconsider all reissued recommendations of the Working Group. Upon reconsideration, the Parties shall either attempt to implement such recommendations or publish in writing the reasons for not doing so. When a Party has twice rejected a recommendation, the Working Group may call for a meeting of the Committee, or it may publish recommendations for renegotiation of the CETA, or both.

10. Each Party shall convene a new or consult its domestic labour or sustainable development advisory groups, to seek views and advice on issues relating to this Chapter. Those groups shall comprise a balanced representation of employers and unions, [as well as other relevant stakeholders as appropriate]. They may submit opinions and make recommendations on any matter related to this Chapter on their own initiative, including to the Committee.

11. Each Party shall be open to receive and shall give due consideration to submissions from the public on matters related to this Chapter, including communications on implementation concerns. Each Party shall inform its respective domestic labour or sustainable development advisory groups of those communications.

12. The Parties shall take into account the activities of the ILO so as to promote greater cooperation and coherence between the work of the Parties and the ILO.
