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Free trade on fair terms.

Our positions on CETA

0. Summary
1. Introduction
2. Our stipulations regarding CETA
3. Investment protection (substantive provisions)
4. Dispute settlement mechanisms (procedural provisions)
5. Regulatory cooperation
6. Social standards, sustainable development and the precautionary principle
7. Services sector
8. Final remark

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Summary

Globalisation needs rules to ensure it does not lead to a race to the bottom in terms of standards. In principle, free-trade agreements can help to establish high standards in the conditions for competition and to advance fair and sustainable world trade. If TTIP and CETA are to become *fair free-trade agreements*, however, a number of changes are still required. This applies in particular to the draft text of the CETA free-trade agreement between the EU and Canada, which has already been made public. The Parliamentary Left in the SPD parliamentary group in the Bundestag is calling for changes in the following areas:

1. **Investment protection**
   Investments involve obligations as well as rights. Protecting businesses' profit expectations must not lead to national legislation being undermined. Financial market transactions are *not* regular investments – and that must be made clear in the agreement.

2. **Dispute settlement mechanisms**
   We oppose investor-to-state dispute settlement (ISDS) mechanisms. The investment protection provisions in CETA must be interpreted by public courts with a duty to consider the public interest. The public judicial monopoly must be preserved.

3. **Regulatory cooperation**
   The planned regulatory cooperation must not obstruct democratic legislative processes. Its aim must be to secure the highest standards in each case. There must be no retrograde steps with regard to regulation.

4. **Social standards and the precautionary principle**
   The agreement must enshrine a binding requirement for the parties to comply with and implement social and sustainable-development standards. This applies in particular to the ILO *core labour standards*, in order to prevent one-sided competitive advantages at the expense of good working conditions. In addition, European consumers must be able to rely on the tests which products undergo before they are authorised for sale (precautionary principle).

5. **Services sector**
   Only the services which are expressly specified may be liberalised (positive-list approach). This will ensure that it remains possible to decide not to liberalise certain areas in future. We oppose the negative-list approach provided for in the draft. Under no circumstances can the agreement be allowed to prevent parts of public services from being returned to public ownership.

The public's concerns about the issue of free trade must be taken seriously and taken into account in the negotiations. It is essential for the national parliaments to vote on the final text of CETA. In this context, our decision will be based on this paper and the decision taken by the SPD party convention.

Free trade on fair terms.

The European Union's planned free-trade agreements with Canada and the United States, CETA and TTIP, will, due to their scale, set standards worldwide and thus serve as a model for many future free-trade agreements negotiated and concluded by the EU – including with developing countries and emerging economies. The United States is working in parallel towards a trans-Pacific free-trade agreement, and so TTIP has an overarching strategic significance for Europe.

In principle, free-trade agreements can help to advance fair and sustainable trade rules around the world and to set good standards. The aim is to enable broad sections of the population to attain greater prosperity.

Currently, globalisation is not adequately regulated. However, unregulated globalisation means an uncontrolled "race to the bottom" in terms of standards. Simply abolishing customs duties and removing non-tariff and regulatory barriers to trade are steps in the wrong direction. Globalisation needs rules, and markets need a smart market design. Good trade agreements can offer a way of setting globalisation on the right track.

As the current coalition agreement between the SPD and the CDU/CSU states, the global trading system should be shaped by principles which apply equally to all participants. German policy is therefore focused in principle on strengthening the WTO and ensuring the completion of the current Doha Round of trade negotiations. Multilateral trade rules must apply in the intensification of international economic relations. To ensure that free trade does not become a gateway to wage and social dumping, the core labour standards of the International Labour Organization (ILO) must be taken into account.

The current discussion about the EU's bilateral free-trade agreements with Canada and the United States should therefore be taken as an opportunity to identify solutions to contentious issues which we can use in all future negotiations. TTIP and CETA must be *fair free-trade agreements*; in other words, they must prove their value by contributing to progress on the protection of workers' rights, consumer protection and sustainable economic activity on a global scale.

Changes are needed, above all, in the European Commission's approach to the conduct of the negotiations, for which its mandate came from the Council, in the investment protection chapter, in relation to the plan for a "Regulatory Cooperation Council" (with a view to preserving in full the democratically elected legislature's rights and options), and in relation to basic environmental, human-rights and social standards, such as the ILO core labour standards, as well as consumer protection.

In this position paper, the Parliamentary Left in the SPD parliamentary group in the Bundestag sets out its stipulations regarding the draft CETA trade agreement – together with its general position on investment protection and investor-to-state dispute settlement mechanisms in trade agreements. As negotiations on TTIP are still ongoing, we are adopting our position on transatlantic free trade on the basis of the CETA agreement, for which a concrete draft is already available – and in part because CETA will give US companies and investors with substantial activities in Canada the same bases for claims in the EU as Canadian companies.

Our stipulations regarding CETA

Since the 1960s, Germany has concluded 138 bilateral investment protection agreements, and the EU is in the process of negotiating further large trade agreements with chapters on investment protection. Thousands of agreements are in force worldwide. To date, these agreements have allowed investors to bring claims against states via private arbitration tribunals, and this is in urgent need of reform. Since 1999, there has been a sharp rise internationally in claims brought via private arbitration. These tribunals' interpretative approach has widened ever further, and entirely legitimate state regulation has been called into question or influenced in advance by the threat of legal action. Private arbitration has been characterised to date by a low level of transparency and a lack of appellate mechanisms.

Investment protection (substantive provisions)

The investment protection provisions in CETA must aim to ensure that domestic and foreign investors receive equal treatment. Foreign and domestic investors must enjoy the same protection and non-discriminatory access to domestic courts. However, investors have obligations as well as rights. This is especially true with regard to the effectiveness of the chapter on sustainable development.

The definition of "investment" must be worded in such a way as to allow a clear distinction to be made between trade-related investment measures, which fall within the regulatory competence of the EU, and other types of investment. We oppose a very broad definition of "investment" which would result in portfolio investments and all other foreign assets (asset-based definition) also being protected by the agreement. We are calling for a more precise definition which concentrates investment protection on direct investment and excludes portfolio investments – in other words, financial market transactions.

The reference to investors' "expectations" in the context of "fair and equitable treatment" is problematic. In essence, investors' expectations concern the profits they expect to make – and divergences from such expectations are part of the risk of investing. It is therefore necessary to clarify within what – very narrow – scope investors' expectations are actually legitimate and deserve protection. It must also be ensured that new legislation or the application of existing legislation cannot be regarded as an infringement of investors' expectations.

At the moment, the draft CETA text still contains a "most favoured nation" clause, which entitles investors under CETA to treatment which is at least equally favourable to that accorded under agreements with other countries. In view of the thousands of bilateral investment protection agreements in existence, a "most favoured nation" clause introduces a high level of legal uncertainty. This clause must therefore be removed.

There must be no basis for arbitration proceedings in the event of a government bond restructuring and the involvement of private-sector creditors. Bank resolution must also be excluded from investment protection, as must tax law.

The further development and interpretation of investment protection provisions must not be carried out solely by a Joint Committee of representatives of the European Commission and of the Canadian Minister of International Trade. Further development must take place with the agreement of all stakeholders – which, in the case of a mixed agreement, include the EU Member States.

Dispute settlement mechanisms (procedural provisions)

In addition to ensuring that the provisions on investment protection are clearly defined, it is also important to consider which institution is the forum for their enforcement. CETA permits state-to-state dispute settlement mechanisms in this context, but it provides above all for investor-to-state dispute settlement (ISDS). We oppose these ISDS mechanisms.

The EU Member States and Canada have highly developed legal systems in which redress can be obtained without resorting to extra-judicial solutions. CETA's investment protection provisions, which are broadly defined in some areas, must be interpreted by public courts whose approach is also guided by the public interest, social norms and values and fundamental rights, rather than by private arbitration tribunals. In practice, private tribunals are usually composed of international lawyers, whose decisions are often very investor-friendly, due to conflicts of interest and the fact that the agreements are weighted in favour of the interests of capital alone.

As a matter of principle, the law may only be interpreted by public courts. This follows from the judicial monopoly enshrined in the Basic Law (the German constitution) and, at EU level, the autonomy of EU law. Clarity on this issue could be provided by an ECJ Opinion pursuant to Article 218(11) TFEU, which allows the EU's external agreements to be examined in advance to determine their compatibility with the Treaties.

We oppose the ISDS mechanism as a matter of principle, including at global level, and are keen to engage in an open discussion to explore alternatives. Possibilities which already exist include recourse to national and European courts, state-to-state dispute settlement mechanisms, mediation, and private investment insurance. Future agreements should assign jurisdiction to an international court whose proceedings are public, the ECJ or the European Court of Human Rights if all domestic remedies have been exhausted.

International agreements must clearly enshrine the precedence of recourse to national courts and the requirement of exhaustion of domestic remedies, in order to avoid undermining the rule of law and to ensure broad equality of treatment with domestic investors. International dispute settlement mechanisms only make sense if domestic remedies fail or are completely unsuitable.

What we want to see in an international dispute settlement mechanism:

Transparency: It must be possible for investment law to be codified, in other words recorded and systematised, and developed further by precedent cases. The proceedings must be public and transparent, as is the case for domestic judicial proceedings in democratic states, and as is required by the UNCITRAL[1] standards.

Professionalisation: Decisions must be taken only by full-time judges who do not engage in ancillary activities.

[1] United Nations Commission on International Trade Law

Appellate mechanism:	The disputing parties must be able to appeal, to ensure that no one is bound by the judgment of a single court without any possibility of review.
Access restriction:	Only investors who verifiably comply with CSR[2] guidelines should have access to the dispute settlement mechanism.
Filter:	A state-to-state mechanism must allow claims to be excluded in sensitive areas (filter).
Commercial court:	Investment protection must be embedded in an overarching system of protection for human rights – including, of course, the protection of property – which is guided by the public interest. This should be carried out by an international public court.
Binding interpretation:	It must be possible for the parties to adopt binding interpretations of the agreement.

Regulatory cooperation

The provisions on regulatory cooperation are a first in a free-trade agreement. Their aim is to formally enshrine close cooperation between Canada and the EU even after the agreement has entered into force, in order to harmonise legislation on an ongoing basis, reduce unnecessary regulation, enhance transparency and efficiency, and prevent new barriers to trade. This continuous cooperation makes CETA a “living” agreement.

Regulatory cooperation must not hinder or impede in any way the ability of parliaments and governments to legislate and regulate for the protection of and in the interests of their citizens. The agreement needs a clause allowing undesirable developments to subsequently be dealt with rapidly and simply, and, if necessary, allowing individual sections or the entire agreement to be suspended.

With regard to the regulation of the financial markets, it must be noted that the existing process of negotiating multilateral regulation in the framework of the G20 always makes more sense than calling existing regulation into question in the context of bilateral free-trade agreements driven by the logic of liberalisation. There must be no retrograde steps when it comes to the regulation of the financial markets!

Regulatory cooperation must expressly aim to secure and align environmental, social, health and consumer-protection standards at the highest level in each case. The rather vague wording in this chapter is problematic, as it leaves a great deal of room for interpretation, which can result in unwelcome and negative consequences.

[2] Corporate Social Responsibility

This applies to the following issues, among others:

- *Exchanging information at the earliest stage possible:*
  While we consider it acceptable for bills or other regulatory measures to be passed on to the competent Canadian authorities, it is essential that the parliaments responsible are informed first, before information is shared with third parties. It must be ensured that the agreement does not result in Canadian stakeholders being given the opportunity to influence regulation before the parliaments responsible have had the chances to consider it.

- *The Regulatory Cooperation Forum (RCF):*
  The description of this new body's functions is, in our view, somewhat vague. A clearer explanation is needed as to why this forum is needed, what concrete functions it has, and what the forum is not permitted to do. It must be guaranteed that the RCF's proposals will not limit the legislative competences of the parliaments, especially when the RCF consults private stakeholders.

- *Cooperation underpinned by a common scientific basis:*
  The sharing of scientific findings with regard to product research or testing is desirable. It must be ensured, however, that a common scientific basis does not lead to the subsequent mutual recognition of certain products, which would undermine the precautionary principle in Europe. A clause to this effect must be included in the agreement.

- *The reduction of unnecessary differences in new regulation:*
  It is welcome that the reduction of unnecessary differences in regulation is also intended to enhance health, safety and environmental standards. We consider it important for consumer-protection standards, social standards and workers' rights to be added to this list, in order to rule out the possibility that regulatory cooperation could jeopardise them in any way. It must instead be possible to raise these standards.

Social standards, sustainable development and the precautionary principle

We are calling for the agreement to enshrine a binding requirement for the parties to comply with and implement social and sustainable-development standards. Appropriate monitoring, complaints and sanction mechanisms must be anchored in the dispute settlement mechanism. As Europeans, we have a special interest in not relinquishing the achievements of our welfare state. Rather, these achievements must be the starting point of our policies. A level playing field on the basis of high standards of protection, not competition via social dumping, is the foundation of our social market economy.

At the SPD's insistence, a clear commitment was incorporated in the coalition agreement to the effect that all EU trade agreements should contain a binding requirement for parties to comply with and implement the ILO core labour standards. We are calling for this to apply to the transatlantic trade agreements as well.

To date, Canada has only ratified 6 of the 8 ILO core labour standards. It has yet to ratify the *Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively* (C098 – Right to Organise and Collective Bargaining Convention) and the *Convention concerning Minimum Age for Admission to Employment* (C138 – Minimum Age Convention).

The parties to the agreement must therefore agree on a timeframe within which the ratification, implementation and monitoring of the ILO core labour standards will be dealt with. Under no circumstances may the right to co-determination, staff representation and autonomy in collective bargaining, or other protection rights, be interpreted as "non-tariff barriers to trade".

In the harmonisation of product approval standards, the precautionary principle must apply. European consumers must be able to rely on the tests which products undergo before they receive marketing authorisation. Free trade must not jeopardise existing environmental and consumer-protection standards in agriculture, food production or the energy sector, or with regard to protection from hazardous chemicals.

Normally, the EU's trade agreements contain an "essential elements" clause, for example:

> *Respect for democratic principles and fundamental human rights, as laid down in the Universal Declaration of Human Rights, and for the principle of the rule of law, underpins the internal and international policies of the Parties. Respect for these principles constitutes an essential element of this Agreement.*

This clause is absent in CETA. It is insufficient for such a clause in the EU-Canada Strategic Partnership Agreement, which was negotiated in parallel, to refer to CETA. The clause has more power over the agreement's interpretation and the bases it offers for claims if it is included in the agreement itself. There must be no precedent for agreements which do not refer to the protection of fundamental rights.

Services sector

The liberalisation of services must permit an intelligent further development of public services, their extension and their support in the future. We stand by our position that only areas which are expressly selected and listed may be liberalised by free-trade agreements.

However, the EU has just taken the exact opposite approach – it has switched from the old (GATS[3]) positive-list approach to the more far-reaching negative-list approach. This puts the further development of public services at risk. We oppose the negative-list approach.

Nor is it acceptable for any standstill or ratchet clauses to be included in the agreement, as they can be used to thwart future political plans to return services, e.g. the water supply system, to public ownership.

The agreement's thresholds for public procurement are too low. We oppose the prohibition of "offsets", which allow public contracts to be linked to the regional economy. It must be possible to link procurement to social and environmental criteria (green procurement).

Local authorities and local public utilities must retain the option of awarding contracts directly and of cooperating across local authority boundaries. The right to local self-government must be recognised.

[3] General Agreement on Trade in Services

A clause should be added ruling out the application of trade agreements to those measures and services which, according to the jurisprudence of the relevant party or member, are taken or supplied in the exercise of governmental authority.

Calls addressed to the European Commission regarding the way ahead

It is essential, for both political and legal reasons, for the national parliaments to vote on the final text of CETA.

The German government takes the view that CETA is a mixed agreement, and thus requires the involvement of both the Bundestag and the Bundesrat in Germany. The agreement must therefore be ratified in all EU Member States in line with each country's constitutional provisions; otherwise, the agreement cannot enter into force at all. Since it is possible, under Article 218(5) TFEU, for agreements to be applied provisionally and with suitable grandfathering arrangements before their entry into force, it should be clear that any vote rejecting the agreement in the ratification process would have to have consequences.

The disagreement about the agreement's legal nature between the European Commission and the EU Member States in the Council must be resolved as rapidly as possible. The legal opinions of the German government, the other EU Member States and also the Council's Legal Service clearly indicate that CETA is a mixed agreement. The ongoing disagreement between the European Commission and the Council about the legal nature of CETA and TTIP makes clear that, for future trade agreements, greater clarity has to be achieved regarding the character of a mixed agreement.

A credible debate includes taking the public's concerns and fears seriously and taking them into consideration in the negotiations. The European Commission's rejection of the European Citizens' Initiative against TTIP and CETA is a political mistake.

Final remark

Our decisions on the planned free-trade agreements will be based on both the decision taken by the SPD convention and the calls and suggestions set out in this paper.

The Parliamentary Left in the SPD parliamentary group in the Bundestag

The Parliamentary Left (PL) is a network of Social Democratic Members of the Bundestag. Our goal is to initiate discussions, develop political ideas and drive forward their implementation – within the SPD parliamentary group and beyond. We are united by our affiliation with the left wing of the SPD and, consequently, our commitment to promoting freedom, equality and social progress. With almost 90 members, the Parliamentary Left is the largest network within the SPD parliamentary group in the Bundestag.

We want a society where an individual's background does not determine their life chances. We want prosperity to be distributed fairly. And we want a social and environmental transformation of our society which places people's working environment at the centre. We act on our convictions both in day-to-day politics and beyond, because we seek to consider the bigger picture. Together with our allies in academia and civil society, we are working to develop new ideas for a society based on solidarity.